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# COMMENT: ON THE ROAD: THE SUPREME COURT AND THE HISTORY OF CIRCUIT RIDING

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## Introduction

Circuit riding n1 - the system of sending Supreme Court Justices around the country to serve as judges of the various federal circuit courts - is not a topic that is given much direct attention in Supreme Court history, n2 constitutional law scholarship or in law school classes on constitutional law. Indeed, Chief Justice William H. Rehnquist, remarking that the practice of circuit riding is not often discussed said, "few lawyers and law students are aware that the Judiciary Act of 1789 created circuit courts but no circuit judges." n3

Nevertheless, circuit riding was officially part of the Supreme Court for the first 121 years of its history. n4 Throughout this time, the practice was reviled by most justices, who complained bitterly about having to travel and having less time to spend attending to their duties in the nation's capital. n5 In fact, the first Court even agreed to take a reduction in salary in exchange for Congress appointing a separate circuit judiciary. n6

Congress viewed the practice differently. For the majority, circuit riding transformed the justices into "republican schoolmasters" n7 who brought federal authority and national political views to the states. n8 Equally important, circuit riding enhanced the justices' ability to contribute to the formation of national law by exposing them to local political sentiments and legal practices. n9

For years, the many efforts to abolish the practice that came before Congress all failed. n10 Indeed, the history of circuit riding can just as easily be called the "history to abolish circuit riding." Throughout its existence, two main criticisms of the practice stand out. First, the justices disliked riding circuit because they loathed the traveling. The practice caused serious physical hardships during the burgeoning days of the Republic. n11 Second, the justices found it impossible to attend simultaneously to the ever-growing docket of the Supreme Court and to their circuit duties. This was especially true of the Court in the latter part of the nineteenth century. n12

For a long time Congress showed a complete unwillingness to come to the aid of the Court and abolish circuit riding. Most members of Congress held firm to the belief that circuit riding benefited the justices and the populous, and they turned a deaf ear to the corps of justices that desired to abolish the practice. Alone, the judicial branch lacked the influence to effectuate change.

Gradually, however, circuit riding lost support. The Court's increasing business in the nation's capital following the Civil War made the circuit riding seem anachronistic and impractical n13 and a slow shift away from the practice began. The Judiciary Act of 1869 n14 established a separate circuit court judiciary. The justices retained nominal circuit riding duties until 1891 when the Circuit Court of Appeals Act n15 was passed. With the Judicial Code of 1911, n16 Congress officially ended the practice. The struggle between the legislative and judicial branches over circuit riding was finally concluded.

In general, this struggle over circuit riding was fought on practical, not constitutional grounds. The two main criticisms of traveling and the ever-increasing docket formed the basis of most of the complaints that the justices laid before Congress. Indeed, the constitutionality of the practice was raised on rare occasion by several justices including Chief Justice John Jay and Chief Justice John Marshall, but when the question came before the Court in 1803 in the case of Stuart v. Laird, n17 the justices held the practice constitutional. They did so not by looking at the Constitution, but by

looking at the institutional practice of the Court since 1789. The Court, declared the justices, had acquiesced and ridden circuit for too many years for the practice to be deemed unconstitutional. n18

This Comment examines several different facets of circuit riding. Part I will describe the practice of circuit riding in general. Part II will provide an in-depth historical overview and analysis of circuit riding while focusing on attempts to abolish the practice. Part III will examine the constitutionality of the practice through a contemporary lens and conclude that, despite some objections, circuit riding is inherently constitutional.

## I. The Practice of Circuit Riding

Article III of the United States Constitution established the authority and scope of the federal judiciary, n19 but it was not a self-executing provision. n20 For the first eleven months of its existence, the federal government had no judiciary. n21 However, the Senate's first order of business was to enact the necessary legislation to formally establish a system of federal courts, n22 and Senate Bill Number One ultimately became the Judiciary Act of 1789. n23 The system created consisted of a Supreme Court comprised of five associate justices and one chief justice, as well as a two-tiered system of inferior courts comprised of three circuit courts, situated in the eastern, middle and southern portions of the country, and district courts, one located in each state. n24

The Judiciary Act of 1789 did not provide for separate circuit court judges. n25 Instead, it required that the justices of the Supreme Court also serve as judges of the circuit courts. n26 The Act required two Supreme Court Justices to "ride" twice each year to one of the three circuits where they would sit as a panel with the district judge from the state of original jurisdiction. n27

Circuit riding was established for several important reasons. n28 First were the cost factors: circuit riding saved money for both the federal government and for the litigants. n29 Only two sets of national judges were created and the first Congress felt that the early federal payroll could not accommodate a separate set of circuit judges. n30 Additionally, giving litigants two Supreme Court Justices at their trial heightened the finality of those trials, thereby lessening the litigants' need to take appeals to a distant Supreme Court, which would have been prohibitively expensive for most people. n31 In fact, the Act's principle drafters explained that the circuit riding provisions had been written to answer such concerns. n32

Second, since the early circuit courts were courts of original jurisdiction, circuit riding involved the Supreme Court Justices directly at the trial of most of the earliest federal cases. n33 It was important at the time that authorative and correct answers be given to the critical legal questions that were expected to come before the federal courts. n34 Having the justices ride circuit allowed cases to receive immediate attention from the nation's highest judges. n35 This was especially necessary for federal criminal trials n36 because the Judiciary Act of 1789 did not allow for appeals in criminal cases; it vested the circuit courts with exclusive jurisdiction in all criminal matters involving a violation of a federal statute. n37

Third, circuit riding "[kept] the Federal Judiciary in touch with the local communities," n38 and "brought home to the people of every state a sense of national judicial power through the presence of the Supreme Court Justices." n39 Through grand-jury charges n40 widely reprinted in the newspapers, n41 the justices could lecture the local citizens not only on the relevant law, but also on the nature of centralized government, the responsibility of the citizenry, and the ways in which the new government served their needs. n42 Favorable public opinion was necessary to ensure the survival of the young Republic n43 and the active and visible presence of the justices would help foster loyalty toward the new form of government n44 and somewhat weaken the people's previous allegiance to their state's government. n45

Fourth, circuit riding by the highest judges of the land enhanced the uniformity of federal law by having the justices review erroneous decisions of state courts that had denied federal rights asserted. n46 This was an end much desired by Federalists. n47 Furthermore, circuit riding allowed the justices to stay attuned to local law. The justices were assigned to the circuit where they lived and had practiced law in order to ensure that they were familiar with relevant state law. n48 This was necessary because much of the circuit court trial work was in diversity cases where state law was applicable. n49 Cases involving state law claims routinely came before the Supreme Court for appellate review. These cases required knowledge of the laws and cases of the various states on the part of all the members of the Court, especially the justice assigned to the particular circuit where the case originated. n50 Circuit riding allowed the justices to acquire this knowledge firsthand.

Lastly, circuit riding facilitated the development of a unified judicial branch. n51 The Framers were "troubled by the notion of a stationary, geographically-isolated Supreme Court exercising appellate review over a sprawling contingent of atomized judges scattered across the United States." n52 Circuit riding allowed the Supreme Court Justices to keep in touch with the dispersed district courts judges.

Nevertheless, circuit riding was not without its problems. For over 100 years, the Supreme Court had no power to pick and choose the cases that it wanted to adjudicate. n53 Instead, just as Congress decided which cases and controversies from the list contained in Article III, Section 2, would be decided by the lower federal courts, so too it decided which cases and controversies would be decided by the Supreme Court. n54 Cases came to the Supreme Court's docket from either the district or the circuit courts n55 for mandatory review on a writ of error, rather than a writ of certiorari. n56 This was problematic because the justices sitting together as the Supreme Court heard on appeal the same cases that they had heard on the circuit bench. n57 Although the first Judiciary Act entrusted some appellate jurisdiction to the circuit courts, n58 the circuit courts were primarily trial courts of original jurisdiction; n59 hence, the justices could be, in effect, trial and appellate judges in identical controversies. n60 While the Court had informally adopted a practice by which justices would not adjudicate cases in which they had been involved below, it was sometimes necessary for all available justices to participate in order to have a quorum. n61 Additionally, because the justices rode circuit in rotation beginning in 1792, different justices frequently heard the same cases in their various stages. This made uniformity of practice and decision difficult. n62

Another problem with circuit riding stemmed from the practice of assigning a justice to the circuit where he lived and practiced. By implication, a president was not free to choose anyone he wanted to fill a Court vacancy. n63 The nominee had to come from the circuit where the previous justice was assigned; otherwise the circuit would be deprived of someone knowledgeable of its state law. n64 Although a president could surely find supporters in all areas of the country, in some regions finding a man distinguished enough to be a justice who was also ideologically compatible with the administration was difficult. n65 Furthermore, unless the right circuit vacancy developed, the president could not select a particular nominee. n66

## II. The History of Circuit Riding

### A. The First Court's Struggle with Riding Circuit

The Supreme Court of the United States n67 met for the first time in the Royal Exchange Building in New York City n68 on Monday, February 1, 1790. n69 During that session and the following two terms, n70 there were no cases on the docket and the justices had little to do. n71 Nevertheless, the justices said of their appointment "The duty will be severe." n72 This was due to their circuit duties. n73

Circuit riding was an arduous task but, because of the landscape of the thirteen original states, it varied from circuit to circuit. Travel through the Eastern Circuit was fatiguing. n74 Travel through the large Middle Circuit was "strenuous but not as bad as it might have been, since judicial travel was entailed only from court city to nearby court city... ." n75 Reasonable travel accommodations were usually available in both of these circuits. n76 However, "the Southern Circuit required long trips through rough, unpopulated, and even unknown terrain" n77 at times in "unpredictably bad nasty weather" n78 with lodgings "uncertain and often unpleasant." n79 During their circuit riding journeys, the justices were often uncertain about how best to travel throughout different parts of the country. n80

Difficult for healthy men in the prime of life, circuit riding was even more difficult for several of the justices who were aging. n81 The physical hardships incurred during the early years of circuit riding caused numerous health problems. n82 Furthermore, because the justices had to spend almost six months a year n83 attending to their circuit duties, they were prevented from spending much time at home or engaging in other pursuits such as the study of law. n84

From the start of their circuit duties, the justices had a standing request from President Washington to provide him with information they obtained while riding circuit. n85 At the beginning of the first circuit assignments in 1790, Washington wrote:

As you are about to commence your first Circuit, and many things may occur in such an unexplored field, which it would be useful should be known; I think it proper to acquaint you, that it will be agreeable to me to receive such Information and Remarks on this Subject, as you shall from time to time Judge expedient to communicate. n86

Washington knew that circuit riding gave the justices immense contact with the national citizenry; n87 indeed, they were the only federal officials with such regular ongoing contact. n88

Starting in the first term of the Supreme Court, the justices complained bitterly about their circuit duties, and circuit riding became a matter of intense and continual preoccupation for them. n89 The justices of the 1790s were "seasoned politicians" n90 well connected to the political elite. They regularly exchanged correspondence with political figures in the hope of advancing the interests of the Court. n91 As expected, most of the justices' efforts were concentrated in one area: trying to persuade Congress to eliminate or overhaul the circuit riding system. n92

When the justices returned to New York from their first circuit riding assignments in August of 1790, the question of proposing changes to Congress was the focal point of their session. n93 The justices wanted to change the system before the process of "institutional ossification" set in. n94 They decided to respond to President Washington's request for information relating to their circuit duties and agreed on the general premise of a letter that Chief Justice John Jay wrote on their behalf to the President. n95 The letter bluntly stated that the circuit riding provision in the Judiciary Act of 1789 was unconstitutional. n96 Jay advanced three main objections. First, he argued that by instituting circuit riding, Congress had impermissibly extended the de facto original jurisdiction of the Supreme Court. n97 Second, Jay contended that the Supreme Court was created primarily to act as a court of last resort and should not normally sit in judgment of the work that its members had preformed as circuit riding justices of inferior tribunals. n98 Because the circuit courts were primarily trial courts, the justices were able to review their own decisions without any intervening appellate process. Finally, Jay objected to the legislature appointing judges to offices for which they were neither nominated nor confirmed for. n99 Jay wrote: "We, for our Parts, consider the Constitution as plainly opposed to the Appointment of the same Persons to hold both Offices, nor have we any Doubts of their legal Incompatibility." n100 Without mentioning any of the practical difficulties of circuit riding, Jay requested that Washington ask Congress to repeal the provision. n101 It is unclear whether the final version of this letter was sent to the president. n102 Nevertheless, Congress recognized right from the outset that the Judiciary Act was imperfect and that it would need to be revised. n103 During the session of the Court in which the justices agreed to write to Washington, Congress resolved to require the attorney general to report on whether the judicial system needed modification. n104

In his resulting report to Congress the following December, n105 Attorney General Edmund Randolph argued in favor of terminating the justices' circuit riding duties. n106 Randolph advocated that the district court judges be turned into circuit riders, rather than staff the circuit courts separately. n107 He criticized the "expediency" of circuit riding, with its attendant "fatigue" and "loss of leisure." n108 He also pointed out that it would be difficult for justices who had given an opinion on circuit to change it when they sat on the full court. n109

The Chief Justice and other justices were optimistic that Congress would consider the Attorney General's report and reform the judicial system. n110 In fact, even President Washington was convinced that the system would be modified. n111 Writing to Supreme Court nominee (and later Justice) Thomas Johnson, Washington wrote "that it is expected some alterations in the Judicial System will be brought forward at the next session of Congress, among which [the termination of circuit-riding] may be one." n112 Nevertheless, Congress surprised the justices and the President by not acting on the proposal. Randolph's report was buried in committee, where it died. n113 The justices suffered their first major disappointment at the hands of Congress.

By 1792, the justices were desperate to eliminate their circuit assignments. n114 On March 15, 1792, Justice James Iredell wrote to Chief Justice Jay to say that the justices should informally suggest to Congress that they each forfeit $ 500 of their salary in return for being relieved of their circuit riding duties. n115 Considering the Chief Justice earned $ 4,000 per year n116 and the Associate Justices $ 3,500 per year, n117 from which traveling expenses had to be deducted, n118 the proposal was not insignificant. n119 Justices James Wilson, John Blair, and Thomas Johnson immediately agreed to the plan, n120 but Justice William Cushing would not commit to it until he conferred with the Chief Justice. n121 Chief Justice Jay had reservations about the plan. n122 He wrote to Justice Iredell that if "our Brethren think it advisable to offer 500 of our Salaries for [the] object in Question, ... I will consent to that Deduction in case we are relieved entirely from the Circuits." n123 Having heard Jay's opinion, Cushing then agreed. n124 However, Jay and Cushing thought that the sentiments of Congress should be "pretty well ascertained" n125 before the proposal was made. They also thought that "it appeared doubtful whether it would be recd. [by Congress] with pleasure." n126 Legal historian Wythe Holt notes: "The interlocking nature of the provisions of the Judiciary Act, and resulting costs,

made such an alteration much less likely. There is no evidence that Iredell's salary reduction proposal was ever presented to Congress." n127 Iredell's biographer Willis Whichard speculates that Iredell's brother-in-law, Senator Samuel Johnston, dissuaded the Justice from pursing the proposal. n128

Iredell, however, did use his political connections to obtain some relief from Congress. The Judiciary Act was silent regarding assignments to the circuit courts n129 and, in its first meeting the Court adopted an informal rule permanently allocating the circuits according to the home states of the justices. n130 The reason for this rule was so that justices would be familiar with the state law they would have to apply and "could with most propriety determine on the applications for the admission of Lawyers in the Districts wherein they respectively lived." n131 Iredell, assigned to the arduous Southern circuit, had urged his brethren on several occasions that the circuits should be rotated among the justices; n132 however, the other justices were not receptive to changing the status quo. n133 Frustrated, he contacted his brother-in-law Senator Johnston. n134 At Johnston's behest, a bill was drafted by the Senate on March 22, 1792. n135 It was approved by the House on April 9, 1792, n136 and the Senate on the following day. n137 President Washington signed the bill into law on April 13, and the Judiciary Act of 1792 was enacted. n138 The first substantive alteration of the Judiciary Act of 1789, n139 the Act required that "no judge, unless by his own consent, shall have assigned to him any circuit which he hath already attended, until the same hath been afterwards attended by every other of the said judges." n140 If the system needed to be altered for any reason, four of the justices had to consent. n141 The change, though receptive to the needs of Justice Iredell, was able to pass Congress only because it was inherently uncontroversial; it did not fundamentally alter circuit riding's place within the federal judiciary. n142 On the subject of the Judiciary Act of 1792, Federalist Court n143 historian Julius Goebel writes "This statute was not calculated to bring happiness to the Justices who had not yet faced the insalubrious climate and the travel discomforts to and about the Southern Circuit, and consequently may have operated to induce concerted and more vigorous affirmative action for relief." n144

To make matters worse, a few weeks prior Congress had passed the Pension Act. n145 The Act, which granted pensions to disabled revolutionary soldiers, thrust upon the justices the new duty of deciding pension claims in the circuit courts and reporting those findings to Secretary of War. n146 Consequently, the justices would be required to increase the amount of time they would have to devote to their circuit duties. n147

While the justices decided many cases when riding circuit, "the vast majority were the kind of mundane contract and property squabbles that today would be relegated to small claims court." n148 However, the passage of the Pension Act spawned a case of constitutional proportions. Hayburn's Case n149 (and other like cases) was the first instance in which Supreme Court Justices expressed a view on the constitutionality of an act of Congress. n150 In fact, all six justices believed that Congress could not constitutionally use circuit courts to process the veterans' pension applications. n151

William Hayburn applied for a pension in Pennsylvania. n152 Justices Wilson and Blair, riding circuit, and District Judge Peters refused to consider his claim. n153 They did not file an opinion, but simply entered an order that stated: "The Petition of William Hayburn was read and after due Deliberation thereupon had, it is considered by the Court that the same not be proceeded upon." n154 The justices and district judge recognized that pension administration was an executive task that, delegated to the judiciary, violated the principles of separation of powers. n155 Following the decision, they wrote a letter to President Washington explaining that "it is a principle important to freedom, that, in Government, the judicial should be distinct from, and independent of the legislative department." n156 It is interesting to note that the justices seemed apologetic when writing to Washington. n157 They wrote: "Be assured, that, though it became necessary, [refusing to render a decision] was far from being pleasant. To be obliged to act contrary either to the obvious direction of Congress, or to a Constitutional principle, in our judgment equally obvious, excited feelings in us which we hope never to experience again." n158

Several months after the justices had rebuffed the pension law, n159 they made their first formal request to Congress to alter the circuit riding system. n160 Instead of writing directly to Congress, they collectively wrote to President Washington and asked him to place the matter before Congress. n161 The justices wrote:

We really, Sir find the burdens laid upon us so excessive that we cannot forbear representing them in strong and explicit terms. On extraordinary occasions, we shall always be ready, as good citizens, to make extraordinary exertions; but while our country enjoys prosperity, and nothing occurs to require or justify such severities, we cannot reconcile ourselves to the idea of existing in exile from our families, and of being subjected to a kind of life, on which we cannot reflect, without experiencing sensations and emotions, more easy to conceive than proper for us to express n162

They enclosed a separate letter addressed to Congress, which Washington ultimately delivered. n163 In their letter to Congress, the justices did not rely on the constitutional arguments they resorted to in their unsent letter of September 1790. n164 Instead, they noted that the Judiciary Act of 1789 was understood as a "temporary expedient" rather than "a permanent System," and mentioned that the task of holding the numerous circuit sessions was "too burthensome." n165 Although the justices did not directly suggest what changes they wanted made, it is clear that only a termination of their circuit duties would allow them to be "releived [sic] from their present painful and improper situation." n166 While Congress was considering this letter, Chief Justice Jay wrote to Justice Cushing, "I have heard that some Members of Congress doubt the Expediency of adopting our Plan... . I wish to see the Business fully discussed - hitherto but little attention appears to have been paid to it." n167

Justice Cushing thought that there was "a favorable prospect of a radical alteration of the present Itinerant System for the better." n168 However, his prediction did not come to fruition. While Congress did respond to the justices, they provided only partial relief. The Judiciary Act of 1793 n169 decreased the justices' circuit riding duties by requiring only one member of the Court to sit on each circuit n170 and decreasing the amount of circuits that each justice would have to ride from two to one per year. n171

The justices, realizing that Congress had recognized some of their concerns, later thanked Congress for the Act that "afforded them great relief, and enabled them to pass more time at home and in studies made necessary by their official duties." n172 However, they also noted that the Act presented some new problems. n173 If a justice was absent from a circuit, cases could not be decided because the 1793 Act required the presence of at least one Supreme Court Justice for any substantive decision to be made. n174 Additionally, the new Act created a system in which different judges in the same court could issue conflicting rulings in similar cases. n175 Congress responded to the former by empowering the district judge to adjourn the circuit court in any district if the Supreme Court Justice did not attend the court within four days after the time appointed by law for the opening of the session. n176 Additionally, a single justice was allowed to render a substantive decision on circuit in the absence or recusal of the district judge. n177

In 1794, the justices again wrote to Congress. n178 While they did not make any direct suggestions because any suggestions they made would be "be capable of being ascribed to personal Considerations," it was clear that they were requesting that circuit riding be abolished. n179 This time they added an argument that opposed the new rotation requirement: n180 the possibility that contradictory decisions on a given issue might be rendered by successive circuit judges that could not be appealed because of the Supreme Court's $ 2,000 minimum amount in controversy requirement. n181 Washington forwarded the letter to Congress but there was no response. n182

Upon receiving no assistance from Congress, the justices resulted to self-help in February of 1794. n183 They informally agreed to each pay the justice who rode the Southern Circuit $ 100 in order to ease his burden. n184 Not much evidence about the plan has been discovered, nor do Court historians know how long it may have operated, n185 but in a letter to Justice Wilson, Justice Iredell wrote: "I assented to the proposal immediately on its being mentioned, and was the first Judge who went the Southern Circuit afterwards, I considered myself entitled to receive the money agreed upon." n186

Nevertheless, the justices still continued to hope for legislative reform. In January of 1796, the Senate appointed a committee to consider alterations of the judicial system. n187 Samuel Johnston wrote to Justice Iredell that he "hoped[ed] they will at last see the necessity of having a separate set of Circuit Judges leaving the Judges of the Supreme Court to hold that Court only... ." n188 Johnson speculated that the only objection to the plan would be expense. n189 Again, the Justices hopes were dashed; the committee made no report. n190 Justice Iredell wrote to his wife Hannah, "We are still doomed, I fear, to be wretched Drudges." n191

In 1797 justices continued their perennial reform effort. Their letters suggest that they may have drafted the Circuit Court Act of 1797, n192 which revised and streamlined the order of circuit riding in the Eastern, Middle and Southern Circuits. n193 The provision most important to the justices concerned the date and place for holding the spring session of the Delaware Circuit Court. n194 The justices proposed to alter the Delaware Circuit, thereby changing the sequence of circuit riding in Middle Circuit in order to ease the burden of the justices who lived in the South. However, Congress rejected their proposal. While the Circuit Court Act of 1797 was an improvement over the old situation, n195 the justices were irritated that Congress did not alter the Middle Circuit. n196 They continued to try to affect the change by petitioning President Adams, n197 Congress, and the governor of Delaware; n198 predictably, all to no avail. n199

The next year Chief Justice Oliver Ellsworth was "optimistic about prospects for change." n200 The Senate considered a bill that would have relieved the justices of their circuit riding duties and provided five new districts and

two new district judges for the circuit courts. Ellsworth wrote to Justice Cushing that he thought the bill had "a prospect of ... making some progress this Session & being an early subject for the next." n201 His hopes proved to be false; five days after he wrote Cushing, the Senate voted to postpone further consideration of the bill. n202 It was never brought up again. n203 Not until the Judiciary Act of 1801 n204 did the justices get legislative relief, albeit temporary.

Between the years 1789 and 1799, ten federal judges resigned n205 and several prominent colonial men declined federal judgeships outright. n206 Four of those ten resignations were from Supreme Court Justices who, at least in part, were dissatisfied with their circuit riding responsibilities. n207 As Senator Gouverneur Morris would later remark, candidates for the bench required "less the learning of a judge than the agility of a post-boy." n208

Chief Justice Jay decided in 1792 that he would leave the Court if changes were not made to the circuit system; n209 purportedly he said that "almost any other Office of suitable Rank and Emolument was preferable" to continuing as Chief Justice. n210 After learning that Congress had failed to abolish circuit riding, Jay decided to make an ultimately unsuccessful bid for the New York governorship. n211 He then changed his mind and remained on the Court, concluding that remaining was tolerable enough because of the partial relief granted by Congress in 1793. n212 Nevertheless, he remained discontented enough n213 that in December 1793, he told political supporters in New York that he would "certainly acquiesce" to a second nomination, "and if elected would accept." n214

Ultimately, Jay was renominated and elected. n215 He resigned from the Court in 1795 n216 and was succeeded by John Rutledge, n217 who was in turn succeeded by Oliver Ellsworth. n218 In 1801, Jay was reappointed to the position of Chief Justice by President John Adams; but he declined the appointment. n219 In a letter to Adams, Jay remarked that given the circuit riding requirements of the office, "independent of other Considerations, the State of my Health removes every Doubt - it being clearly and decidedly incompetent to the fatigues incident to the office." n220 Jay's refusal to accept his commission led Adams to appoint John Marshall as Chief Justice. n221 Professor Emily Field Van Tassell writes:

Thus circuit riding, the aspect of Supreme Court service that generated the most dissatisfaction among justices over the first century of the federal judiciary, was indirectly responsible for the appointment of the man whose leadership of the Supreme Court would be among the most important factors in elevating the stature of the office from its unappealing status in the first decade of the republic. n222

With their immense dislike for circuit riding, the Federalist Court justices set the stage for a battle that would continue for another century. They devoted much time and energy lobbying Congress to abolish circuit riding, only to be rebuffed and even ignored. Congress, though it came to the aid of the Court with several small reforms, generally showed a complete disregard for the needs of the judicial branch by failing to relieve the justices of their circuit duties. While the justices may have felt vindicated by the Judiciary Act of 1801, it was not a triumph that endured as the Act was repealed and circuit riding was restored. Nevertheless, during the Marshall era, intense Congressional debates on the merits of circuit riding were held. For the first time, the size and growth of the Court's docket was an issue of concern.

### B. The Marshall Court and the Judiciary Act of 1801

In 1801, the outgoing Federalist Congress passed the Judiciary Act of February 19, 1801, n223 modifying the entire judicial system. The Act finally abolished circuit riding. n224 Furthermore, it reduced the number of justices on the Supreme Court from six to five, and established a new set of six circuit courts n225 staffed with sixteen new judges. n226 The Act also "eliminated the embarrassment and apparent impropriety of justices reviewing their own lower court decisions." n227 In creating the new courts, Congress made it more feasible for the Supreme Court to become an institution, regularly meeting in Washington, without being bogged down by the travel required to perform circuit duties. n228

The Republicans (or Democratic Republicans as they called themselves) quickly denounced the Act, n229 arguing that the docket's of the federal courts did not warrant such an increase in the number of judges; that the bill created new unwarranted federal jobs; and that the great increase of federal power was an infringement upon state's rights and a step toward the complete consolidation of government. n230

Above all else, the Republicans worst fear was that all of the newly created judgeships would be filled with Federalists appointed by the outgoing president, John Adams. n231 Their fears were realized; within thirteen days of the bill's enactment, President Adams sent to the Senate a complete list of nominations for the new judgeships. n232 By March 2, the Senate had confirmed all of the appointments. n233 Many of the commissions for these judges were finalized on the President's last day in office; hence they became known historically as the "midnight judges." n234

The Republicans were furious. n235 President-elect Thomas Jefferson and his party's leaders were determined to repeal the Judiciary Act when the new Congress convened. n236 However, they had more in mind than merely turning back the clock and ridding the judiciary of the new Federalists judges. n237 As Marshall Court historians George Lee Haskins and Herbert A. Johnson point out, "the attack on the Supreme Court was part of an identifiable policy on the part of the Republicans to reduce and confine the power of the federal courts generally." n238 After Congress convened, a long and heated debate ensued. n239 The Republicans had three contentions: first, the lack of necessity of any increase in the number of federal judges in view of an alleged decrease in the docket's of the federal courts; n240 second, the desirability of the performance of circuit duties by the Supreme Court Justices; n241 and third, the constitutionality of the proposed legislation. n242 Specifically, circuit riding was defended on the ground that the practice acquainted the justices with local law and custom. n243

The Federalists responded that the Act could not be repealed because of the constitutional provision that grants judges life tenure. n244 They argued that the independence of the judiciary would be destroyed, because if Congress had the power to wipe out a judge's position whenever it disagreed with its decision, the judiciary would become an unequal branch of government, acting under fear of legislative action. n245 Further, the Federalists claimed that the Act was needed to relieve the Supreme Court Justices of their arduous circuit riding duties. n246 They argued that they "were not convinced that the best way to study law was to ride rapidly from one end of the country to another." n247 It was also contended that most cases decided in the federal courts were predicated on common law, and therefore knowledge of local customs was not required to adjudicate cases. n248

Predictably, the Republicans (who controlled Congress) ultimately prevailed and the Repeal Act n249 passed the Senate on February 3, 1802, by a vote of sixteen to fifteen. n250 The House rejected two motions to postpone consideration of the bill and passed it by a vote of fifty-nine to thirty-two on March 3, 1802. n251 President Jefferson signed the bill into law on March 31, 1802. n252 The Act eliminated the sixteen newly created judgeships, transferred cases back to the courts where they otherwise would have been heard, n253 and restored the justices' circuit riding duties. n254 Seven weeks later, Congress passed the Judiciary Act of 1802, n255 which divided the country into six circuits. n256 This Act also altered the justices' circuit riding responsibilities by assigning each circuit a separate justice who, together with a district court judge, would compose a circuit court that would convene twice a year. n257

Despite the opinion of some Republicans that the attack on the judiciary had gone too far, n258 a more radical act of legislative power was about to be displayed. n259 Fearing that the question of the Repeal Act's constitutionality would immediately be questioned in the courts and presented to the Supreme Court for final decision, n260 the Republicans in Congress resolved to prevent or postpone any such decision until the time when the political power of the administration was stronger. n261 Immediately after the passage of the Repeal Act, yet another bill was introduced that proposed to abolish the new June and December terms of the Supreme Court (created by the Act of 1801), and restore the old February term (but not the old August term). n262

Representative James Bayard unsuccessfully introduced an amendment to postpone the operation of the bill until July 1, 1802. n263 In his floor speech advocating the amendment he asked: "Are the gentlemen afraid of the judges? Are they afraid that they will pronounce the repealing law void?" n264 On the other hand, Representative Joseph Nicholson asserted that the postponement did not have any ulterior motives; he was unconcerned whether or not the law would be declared void. n265 In response, Bayard contended, "It is to prevent that court from expressing their opinion upon the validity of the act lately passed ... until the act has gone into full execution, and the excitement of the public mind abated." n266 Nevertheless, the bill passed the Senate on April 8, n267 the House on April 23, n268 and became law on April 29. n269 With this "legislative maneuver," n270 an adjournment of the court was enforced for fourteen months (December, 1801 to February, 1803). n271

Writing about the Repeal Act and the surrounding events, Professors Larry Kramer and John Ferejohn remark: "Congress made clear its determination to put the federal bench in its place by abolishing a number of newly created judgeships and firing the judges, by delaying a Supreme Court sitting for over a year, and by restoring the despised ordeal of circuit riding." n272 The judicial branch seemed powerless and at the mercy of a truly vengeful Congress.

The only way that the Court could have stood up to Congress was by not performing its circuit duties. Indeed, since the repeal went into effect during the Court's congressionally-imposed adjournment, the question of performance was the immediate question facing Chief Justice John Marshall n273 and the Court in April 1802. n274 To ride circuit would be to concede the constitutionality of the Repeal Act. n275 On the other hand, choosing not to ride circuit would put the Court in direct opposition to President Jefferson and the Republican majority in Congress. n276 On April 19, 1802, Marshall asked the Associate Justices, via written communication, n277 whether they should comply with the new statute by performing their circuit duties. n278 It is interesting to note that in his letters Marshall focused on the validity of the justices acting as circuit court judges rather than on the validity of the termination of federal judges, n279 who under the Constitution, are to "hold their Offices during good Behaviour." n280

Marshall wrote to Justice William Paterson and Justice William Cushing (and probably to the other justices as well). He began by writing "It appears to me proper that the Judges should communicate their sentiments on this subject to each other that they may act understandingly and in the same manner." n281 Marshall had given the subject much thought and formed his own opinion. He wrote:

The result of this investigation has been an opinion which I cannot conquer, that the Constitution requires distinct appointments and commissions for the Judges of the inferior Courts from those of the Supreme Court. It is, however, my duty and my inclination, in this as in all other cases, to be bound by the opinion of the majority of the Judges, and I should therefore have proceeded to execute the law so far as that task may be assigned to me, had I not supposed it possible that the Judges might be inclined to distinguish between the original case of being appointed to duties marked out before their appointments, and of having the duties of administering justice in new courts imposed after their appointments. n282

Marshall doubted the validity of the Repeal Act and believed that the Constitution required distinct appointments and commissions for Supreme Court Justices and circuit court judges. n283 He wished that the Court would have an opportunity to hear a challenge to the legislation. n284 Nevertheless, as the leader of the Court he stated that he would be guided by the views of his Associates. n285 In light of the overall negative attitude that Congress had taken toward the judiciary in the repeal debates and its success in preventing the Court from meeting for fourteen months, n286 he emphasized the seriousness of the matter about to be decided:

This is a subject not to be lightly resolved on. The consequences of refusing to carry the law into effect may be very serious. For myself personally I disregard them, & so I am persuaded does every other Gentleman on the bench when put in competition with what he thinks his duty, but the conviction of duty ought to be very strong before the measure is resolved on. The law having been once executed will detract very much in the public estimation from the merit or opinion of the sincerity of a determination, not now to act under it. n287

Replying to Marshall's letters, Justices Paterson, Cushing and Washington all agreed that since the original justices had acquiesced to performing their circuit riding duties, the question of constitutionality should be regarded as settled. n288 Yet, if circuit riding had been a new provision in the Repeal Act, as opposed to a practice revived from the first Judiciary Act, a doubt might have been raised. n289

Justice Samuel Chase, on the other hand, viewed the Act as unconstitutional. n290 He urged the justices not to act as judges of the circuit courts. n291 He argued that the offices were occupied and that by acting as circuit judges, the Supreme Court Justices would "destroy the independence of the judiciary," n292 and be instrumental in carrying out an unconstitutional law. n293 Chase also argued that circuit riding represented an unconstitutional expansion of the Court's original jurisdiction:

I much doubt, whether the Supreme Court can be vested, by Law, with Original jurisdiction, in any other Cases, than the very few enumerated in the Constitution. In all other Cases ... the Supreme Court is vested with an appellate Jurisdiction; and if it can have Original Jurisdiction, in Other Cases, the Citizen would be deprived of the benefit of a hearing in the inferior Tribunals; and obliged to resort, in the Commencement of his suit, to the Supreme Court. n294

Chase expressed a resolute opinion in his lengthy letter, despite the fact that he was still open-minded about the issue. n295 He wrote: "If my Brethren should differ from me in opinion ... I will readily submit my Judgment to theirs; which I very highly respect." n296

Finding the majority of the justices in favor of complying with the statute, Marshall and Chase acquiesced. Marshall wrote to Paterson that he was "privately gratified," and should "with much pleasure acquiesce in it." n297 Marshall biographer R. Kent Newmyer writes:

And having taken a principled stand himself, he could then show his own willingness to set aside principle for the sake of the Court's survival as an institution - and invite his brethren to do the same. What the principled but practical-minded Chief Justice said without actually saying it was that legal reasoning had to be balanced by a consideration of the political impact which that reasoning might have - on Congress, on the people at large, and on the Court. n298

Although a decision had been reached, the justices continued to debate the merits of their conclusion; they even expressed some regret about the situation. n299 Nevertheless, the Chief Justice and his Associates proceeded to hold their circuit courts as usual in the autumn of 1802. n300 It was not until February of 1803 that the Court met again in Washington. n301

While riding circuit that fall the justices encountered Federalist lawyers who argued that the Repeal Act was unconstitutional. n302 In cases that had been continued from the preceding term when the circuit courts had been staffed by "midnight judges," it was contended that the new circuit court (consisting of a Supreme Court Justice and a district judge) lacked jurisdiction, having been commissioned by a law that unconstitutionally removed life-tenured judges. n303 In all cases but one, the result was the same. Upon hearing the jurisdiction claim and before it could be argued, the court adjourned overnight, the judges and the lawyers then conferred, and the next day the plea was withdrawn or passed over without comment. n304

The one exception to this pattern was the Fourth Circuit contract case of Laird v. Stuart. n305 Plaintiff Laird had obtained a judgment from one of the circuit courts created by the 1801 Act, and sought to enforce it in the court to which jurisdiction had been transferred by the 1802 Repeal Act. n306 The defendant Stuart argued that the court hearing the case following the Repeal Act had no jurisdiction because the statutes replacing the 1801 Act were unconstitutional. n307 Chief Justice Marshall, sitting alone on circuit, heard Stuart's plea to jurisdiction and ruled against him, n308 and in favor of constitutionality, without issuing an opinion. An appeal was taken to the Supreme Court and the constitutionality of the Repeal Act and the practice of circuit riding, ultimately came before the Court in Stuart v. Laird. n309 The case served as the engine for the Court to finally set to rest the bitter political struggle over the legislation and circuit riding. Marshall recused himself from reviewing his own decision and six days after Marbury v. Madison n310 was handed down, the Supreme Court, in a three-paragraph opinion by Justice Paterson, affirmed the circuit court decision. n311

Stuart presented two constitutional questions: whether Article III judges could be removed from office and whether the Supreme Court Justices could constitutionally sit on circuit courts. n312 Just as Marshall had done in his earlier correspondence, the Court avoided the first question, n313 but decided the second. Federalist Charles Lee, attorney for the defendant and former Attorney General, advanced three arguments as to why it was unconstitutional for the justices to sit on circuit courts. n314 The first argument he offered was that a litigant had the right to have his case determined by six unbiased Supreme Court Justices. n315 Second, he argued that the statute assigning circuit duties to the justices also appointed them as circuit judges and hence was in direct conflict with Appointments Clause, n316 which states that appointments are to be made by the President with advice and consent of the Senate. n317 His third argument stemmed from Marbury; the justices could not sit on circuit because the cases they would try there were outside the original jurisdiction of the Supreme Court, as defined by Article III. n318

The Court by a unanimous vote, upheld the Repeal Act, but did so without directly addressing the constitutional issues raised by Mr. Lee. Justice Paterson wrote:

Another reason for reversal is, that the judges of the Supreme Court have no right to sit as judges, not being appointed as such, or in other words, that they ought to have distinct commissions for that purpose. To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed. n319

Thus, the Court upheld circuit riding in the face of a constitutional challenge. In contrast to Marbury, the opinion was pragmatic and invoked the Court's own acquiesce in circuit riding since 1789. n320 The justices had rode circuit in the past, and therefore did not require specific commission to ride again. In upholding the Repeal Act, the Court avoided getting itself involved in a political battle with the Republican Congress and the President. n321 Legal historian William E. Nelson writes: "If the Court was to withdraw from politics, as Marshall had said in Marbury it would, it had to capitulate to legislative judgments upon such controversial issues as the constitutionality of the 1802 Act." n322 Despite the Court's on-going struggle with Congress over circuit riding, it showed deference to the legislature's interpretation of the Constitution and thereby failed to forever rid itself of the reviled practice. n323

Once the controversy subsided, the justices returned to their normal routines. The life of a Marshall Court justice was a strenuous one n324 and salary was relatively low for men of comparable education and prominence. n325 The justices only spent between six weeks and two months a year in Washington. n326 A much larger portion of their time was spent performing their circuit duties n327 where they were forced to be away from their families and homes for extended periods of time and travel through a largely undeveloped country. n328 Justice Joseph Story's travels on the First Circuit n329 provide an overview of circuit riding during the Marshall Court era. n330 Story's spring circuit duties began with the holding of court in Boston on or about May 1. n331 It ended in Providence or Newport, Rhode Island, on or about June 27. n332 Overall, Story had to travel about 2,000 miles to complete his circuit duties. n333 Other justices with less compact circuits needed to allocate much more time to travel. For instance, Justice John McKinley, assigned to the Ninth Circuit, had to allocate approximately six months out of the year to accomplish his judicial duties in Washington and on circuit. n334

Marshall Court historian G. Edward White points out: "The circuit riding-responsibilities of the justices were perennially criticized as wasteful, time-consuming and, debilitating." n335 During the latter part of Chief Justice Marshall's tenure, some members of Congress sympathized with the plight of the justices. Bills were introduced to relieve the justices of their circuit riding duties, appoint additional justices, and increase the number of circuits to provide for the growing judicial activity in the West and Southwest. n336

Many of the opponents of these judicial reform bills were opposed to the elimination of circuit riding. They feared, as Senator William Smith did, that the justices, once relieved of their circuit duties, would become "completely cloistered within the city of Washington, and their decisions, instead of emanating form enlarged and liberal minds, will assume a severe and local character." n337 Senator Abner Lacock warned that Washington lawyers would acquire undue influence and control over the Court, and the justices would be subjected to "dangerous influences and strong temptations that might bias their minds and pollute the streams of national justice." n338

In 1826, the Court's docket was so heavily congested that some form of legislative relief became imperative; the Court seemed unable to cope with the burden of its dual duties. n339 Indeed, in the previous year, the court disposed of only 38 out of 164 cases on its docket. n340 A relief bill, sponsored by Martin Van Buren, passed the House. n341 The bill would have increased the number of justices to ten, created three new circuits, and abolished circuit riding. n342 Supreme Court Historian Charles Grove Haines writes: "The primary purpose of the bill was to provide a more satisfactory system for the administration of federal justice in the states to which the circuit system of the Atlantic seaboard states had not been extended." n343

The debates for and against abolishing circuit riding were argued with vigor and with "considerable extravagance and often in picturesque language." n344 Representative James Buchanan spoke out against any bill that would confine the justices to Washington. n345 If the Supreme Court Justices should only serve on a court of last resort in Washington, he asked:

What will be the consequence when this tribunal shall be brought into collision with State laws and excited State authorities? Is there not great danger that it will become odious? ... Is this atmosphere so pure that there would be no danger from such a residence? A large portion of the People of this country hold a different opinion. They think that this atmosphere is more tainted than that of any other portion of the country. If the Supreme Court should even become a political tribunal, it will not be until the Judges shall be settled in Washington, far removed from the People, and within the immediate influence of the power and patronage of the Executive. n346

Underlying the position of Buchanan and like-minded Senators and Representatives, was the belief that without the benefit of circuit riding the decisions of the Supreme Court would more uniformly favor the federal government over the states. n347

In his argument in favor of abolishing circuit riding, Senator John M. Berrien eloquently responded to many of the opposition's arguments:

Sir, I have not myself been sensible of any peculiarly corrupting influence in the air of Washington. I do not believe that the integrity of a judge would be sacrificed by a residence here, and it does not seem to me that the confidence which that department of the Government justly enjoys, is to be ascribed to the semi-annual visits of its members to the People of their respective circuits. On the contrary, I believe that it is derived from their personal integrity, from the intelligence and fidelity with which they have discharged their duties, and from the general correctness which has marked their decisions. n348

Despite the prevailing sentiment favorable to judicial reform, nothing was accomplished by the debate of 1826; Congress was still not willing to abolish circuit riding n349 and the bill was defeated. n350 It is interesting to note that around the same time the bill was defeated the Supreme Court was subject to criticism regarding its decisions affecting the power of the states vis-a-vis the federal government and attempts were being made to contract the Court's jurisdiction. n351 Congress, clashing with the Court over its federalism jurisprudence was able to use its power to thwart a reformation of the system.

Congress, however, did not turn a blind eye to the Court's overcrowded docket. n352 In 1826, it passed a bill lengthening the Court's session by one month. n353 While this measure helped the Court deal with its backlog of cases, n354 it had an adverse impact on the justices' circuit duties because it further limited the amount of time that they had to tend to their circuits. n355

Following the controversy over the Repeal Act, the justices of the Marshall Court did not challenge Congress on the issue of circuit riding. They not only rode circuit as mandated but upheld the practice in the face of a constitutional challenge. While Congress paid attention to the plight of the judiciary, the period was ultimately one of inactivity during which no substantive reforms were enacted. As the Court entered its next era with unchanged obligations, the stage was set for more Congressional battles over circuit riding.

## C. The Middling Years

Roger B. Taney succeeded John Marshall as Chief Justice in 1836. n356 Members of the Taney Court, like those of earlier periods, spent more than half of their time traveling and attending to their circuit duties. n357 At the beginning of the Taney period there were seven circuits with one justice assigned to each. n358 District judges sat with the Supreme Court Justice to hold the circuit courts. n359

In March of 1837, n360 Congress turned its attention to the judiciary and divided the United States into nine circuits, n361 and added two members to the Supreme Court n362 to perform circuit duties for the new circuits and help the Court deal with its increasing workload. n363 This Act finally gave the West and Southwest two circuits, n364 and eight states were added to the circuit system. n365 It was the duty of every justice to ride circuit once each year for each district within his circuit. n366

As mentioned above, one of the primary purposes of circuit riding was to have the Supreme Court Justices act as "republican schoolmasters," expounding the Constitution and national rule of law. n367 Most of this was accomplished through the grand jury charge. On April 8, 1836, six days after he had taken the oath of office, Taney addressed his first grand jury in Baltimore. n368 In his charge, Taney did not explain the virtues of the Constitution; in fact, the essence of his charge was that the custom of charging grand juries was outdated and that in the future he would refrain from participating in the practice. n369 He admitted that in the early days of the Republic precise and detailed instructions were needed in order to assure justice. However, the present state of public enlightenment, he opined, rendered the practice no longer necessary. n370 He ended his charge with a "general request for diligence in inquiry in consideration of the right of the accused." n371

While Chief Justice Taney's decision not to offer eloquent grand jury charges did not signal the total demise of the practice, in general the charges came to attract less attention. They were only published when they dealt with issues of particular importance such as slavery n372 or the enforcement of the neutrality laws. n373 Taney Court historian Carl Swisher notes: "In general the educative and evangelistic functions of the Supreme Court Justices gradually declined with the passing years." n374

Meanwhile, in Washington, the justices were making sure that their dissatisfaction with circuit riding was known by Congress and the President. The 1830s, like the 1790s, was a period in which the justices complained about the travel and the extra work that came along with their circuit riding duties. n375 The most vocal complainers were Justices John Catron and John McKinley. These justices, assigned to the eighth and ninth circuits respectively, had the longest distances to travel and the worst travel conditions to endure. On February 13, 1838, Senator Clemant C. Clay (most probably at the request of Justice McKinley) made a motion that, "the Committee on the Judiciary be instructed to inquire into the expediency of making allowances for mileage to the judges of the circuit courts of the United States, in such manner as to equalize their compensation." n376 Members of Congress received travel allowances and therefore it was reasonable that justices should also be reimbursed for the expenses incurred while performing their circuit duties. n377 The Senate committee found that it needed more information, and secured the adoption of a resolution n378 asking Secretary of State John Forsyth to gather information on and report the miles traveled by the justices. n379 Although the report did not bring about any immediate changes, such as the abolition of circuit riding or the advent of a travel allowance, it does provide an interesting summary. The report can be summarized as follows: n380

[SEE TABLE IN ORIGINAL]

While the justices no longer traveled by horseback, their journeys were still hazardous. n381 In his report to the Senate, Justice John McLean added: "On no inconsiderable part of my route through Indiana in May last, the road was so deep as to be almost impassable to a carriage of any description. The mails and passengers had to be conveyed in common wagons." n382 Most justices traveled via stagecoach or steamboat, depending on the region and time of year. n383 They also took advantage of the railroad as it developed. n384

Concurrently, the rapid increase in the dockets of the Supreme Court and circuit courts proved extremely burdensome to the justices. n385 Although it did not produce any immediate responses, the infamous mileage summary and complaints from Justice McKinley n386 (and other justices who thought themselves over-worked), as well as from constituencies who felt that they were inadequately served, prompted another long discussion and attempts at legislation to amend or abolish the circuit system. n387

The Act of June 17, 1844 n388 relieved the justices from attending "more than one term of the circuit court within any district of such circuit in any one year." n389 While this provided some of the relief that Justice McKinley had hoped for, n390 the number of cases on the Court's docket continued to grow in number and importance. n391 The Court found itself unable to focus proper attention on its circuit duties; more drastic relief was necessary. n392

On January 28, 1846, Senator Henry Johnson introduced a resolution to modify the judicial system, by relieving the justices of circuit duty, and forming two new circuits. n393 Johnson stated that at the end of the 1845 term, the Court left an unprecedented 109 cases undecided. n394 He argued that increasing the number of justices on the Court would not solve the problem; the Court did not need to be enlarged to eleven justices, it could in fact be reduced to seven if the justices were relieved of circuit duty. n395 The bill was referred to the Judiciary Committee and was ultimately rejected. n396

In February 1848, it was proposed in the House that the justices be relieved of circuit duty for one year. n397 The Congressional battle over circuit riding of 1825-26 was refought. n398 The bill was contentiously opposed because some looked upon it as the first step in the permanent abolition of circuit riding. n399 Representative James B. Bowlin argued in the House: "Alienate the judges from the States, consolidate the Court in the metropolis, and the day is not far distant, when the sovereign rights of the free States of this Confederacy will be swallowed up in this mighty vortex of power." n400

The bill passed the House, n401 but was defeated in the Senate on April 18, 1848. n402 The Senators had their own notion of reform; they rejected the House measure and in its place passed a bill relieving the justices of their circuit duties for two years and compelling them to sit in Washington until the first Monday in July. n403 In the Senate debate, Senator George Badger spoke passionately for the opponents of the bill when he said:

We shall have these gentleman as judges of the Supreme Court of appeals, not mingling with the ordinary transactions of business-not accustomed to the "forensic strepitus" in the courts below-not seeing the rules of evidence practically applied to the cases before them-not enlightened upon the laws of the several States, which they have finally to administer here, by the discussion of able and learned counsel in the courts below-not seen by the people of the United States-not known and recognized by them-not touching them as it were in the administration of their high office-not felt,

and understood, and realized as part and parcel of this great popular Government; but sitting here alone- becoming philosophical and speculative in their inquiries as to law-becoming necessarily more and more dim as to the nature of the law of the various States, from want of familiar and daily connection with them-unseen, final arbiters of justice, issuing their decrees as it were from a secret chamber-moving invisibly amongst us, as far as the whole community is concerned; and, in my judgment, losing in fact the ability to discharge their duties as well as that responsive confidence of the people, which adds so essentially to the sanction of all acts of the officers of Government. n404

The House, in turn, rejected the Senate's version of the bill. n405 Despite the Court's inability to clear its docket, the justices' duties again remained unchanged.

The Court had to resort to self-help. n406 Up to this time there was no time limit on oral arguments before the Court. However, on December 1, 1849, the Court promulgated a rule that limited arguments to two hours per side. n407 Of this rule, Professors Felix Frankfurter and James Landis wrote, "[it] did something, but not much." n408

Justice Peter Daniel was aware of the necessity of eliminating circuit riding, an awareness heightened by his personal distaste and bitterness of his circuit assignment. n409 While on a one-month circuit assignment in Jackson, Mississippi, he wrote to Martin Van Buren:

I am here two thousand miles from home (calculating by the traveling route,) on the pilgrimage by an exposure to which, it was the calculation of federal malignity that I would be driven from the Bench. Justice to my friends, and a determination to defeat the machinations of mine and their enemies, have decided me to undergo the experiment, and I have done so at no small hazard, through yellow fever at Vicksburg and congestive and autumnal fevers in this place and vicinity... I trust to the overruling protection of a good providence to disappoint its purposes, and to the justice and independence of my friends, and the friends of honor, magnanimity and common fairness to give me redress. n410

Daniel's ideal vision was a Supreme Court that acted exclusively as an appellate tribunal and had long enough terms to be able to attend to its entire docket. n411 Daniel also thought that it was purposeless to have the justices hear appeals from themselves. n412 Redress never came for Justice Daniel, n413 and he never seemed to have stopped complaining about his circuit duties. n414 While in Arkansas, he wrote to his wife that he stayed in a hotel consisting of a beached and converted steamboat where he was housed in a room six feet by four feet and tormented by Buffalo gnats. n415 For the justices traveling thousands of miles, it may have been worth it in the end if the circuit cases they had to adjudicate were worthy of a Supreme Court Justice. However, as mentioned in Part II.A, and as confirmed by Daniel's experience, the cases heard on circuit were some of the "most miserably routine." n416 Of the eighteen cases that Daniel heard in Arkansas between 1844-45, six involved jurisdiction or matters of civil procedure; five were criminal; five involved real property; and two were contract disputes. n417

In 1853, the Baltimore and Ohio Railroad was completed, promising greater speed and comfort in circuit travel. n418 With a new mode of transportation expanding rapidly, there was a renewed attempt to reform the judicial system by adding additional circuits. The reform was deemed urgent because of the great expansion of the United States' territory, and the large increase in the Court's docket. In fact, President Franklin Pierce, in his messages to Congress in 1853 n419 and 1854, n420 criticized circuit riding and urged immediate legislation to address the problem. Pierce commissioned his Attorney General, Caleb Cushing, to report on the status of the circuit system. n421 The report called for the retention of circuit duties, but also the appointment of a separate set of circuit judges. n422 The Senate passed a resolution requesting a copy of the report; n423 however, it did not act on Cushing's ambitious proposal. In 1855, a bill was again introduced that would have added two new circuits and relieved the justices of circuit court duty. n424 The bill was met with the same opposition and arguments as previous bills dealing with the subject matter, but Supreme Court historian Charles Warren speculates that the bill probably would have passed had it not encountered another element of opposition. n425 This opposition came from the opponents of slavery, n426 who feared that if the Court was expanded, President Pierce would appoint two pro-slavery justices. n427

On the eve of the Civil War, President Abraham Lincoln was determined to improve the federal judicial system. n428 In his first annual message to Congress, he remarked that the federal judicial system had become outgrown and was in need of alternation. n429 He proposed to "let the supreme judges be relieved from circuit duties, and circuit judges be provided for all the circuits." n430 The following day, Senator John P. Hale criticized the Supreme Court, as well as the practice of circuit riding. n431 About the latter he remarked: "I think that the Supreme Court of the United States in its very organization has a radical and fatal error, one that we inherited from the British constitution." n432 That error was having justices first hear cases on circuit and then review their own decisions when the cases came up for

review before the full Supreme Court. Justices "look on those cases as their own children, that they are bound to take care of when they come up to be reviewed on the bench." n433 Despite the call of President Lincoln and like-minded Senators, circuit riding was not reformed during Lincoln's time in office.

However, during the War, Congress did realize that the judicial system was outgrown and in need of change. It passed the Act of March 3, 1863, n434 which officially established the tenth circuit comprising California and Oregon. Stephen Field was appointed to the Court, and assigned to the new tenth circuit. n435 During Justice Field's first years on the Court he traveled back and fourth from Washington to California via the same route he had taken as a gold hungry forty-niner. n436 He traveled by way of the Isthmus of Panama; with his route made a little easier because he could cross the isthmus via train instead of boat. n437 It was not until 1869 that the transcontinental railroad was launched and his journey was made less burdensome; yet, travel was still arduous for the justice because once he arrived in the West, he had to travel the entire length of the Pacific coast, from Los Angeles to Portland. n438

During the War Between the States, the justices did not hold circuit courts in the states that seceded from the Union. However, the justices continued to ride circuit within the Union and encountered cases involving mundane legal matters and war related issues. n439 In fact, war-related problems arose more often in circuit cases than they did in Supreme Court cases. n440 As a result, justices would first reveal their views on war-related issues on circuit. n441 For instance, Chief Justice Taney was averse to hearing circuit cases that involved arrest for treasonous pro-Southern activities, and deliberately took steps to postpone or delay the cases. n442

In January of 1865, Senator Lyman Trumbull introduced a plan to combine the district courts and circuit courts, and create an intermediate appellate court staffed by the circuit justice and district judges. n443 Given the Court's ever-increasing docket, this was an early attempt to prevent unimportant cases from reaching the high court. The bill passed the Senate, and went to the House where it was never taken up. n444 While it was clear that the circuit system needed reforming, "a nation in civil strife could hardly devote itself to the luxury of far-reaching change in the federal judiciary." n445

As previously mentioned, one of the problems of circuit riding was that Congress had not appointed funds for travel. n446 A circuit riding justice had to travel around the same territory consistently and do so at no expense, the justices (and other federal judges) accepted free passes from the railroads that they used for official and personal travel. n447 This was an improper practice - it made the justices beholden to the railroads when they were constantly deciding cases in which the railroads were a party. n448 In actuality, however, Congress provided the justices with little choice. The justices' low yearly salary, combined with their lack of travel allowance, made the free passes very inviting. Of course, it would have been preferable if the justices paid for their travel, but as Supreme Court historian Charles Fairman points out:

It is not supposed that the practice inclined any member of the federal judiciary in favor of the donor in the decision of cases: if a Judge was willing to be bought it would not have been for so small a price. However, it debased a Judge to be beholden to a railroad company and exposed him to misrepresentation. n449

As much as railroad travel made circuit riding an easier task, the judicial system was still in need of reform.

The Union's victory in the Civil War gave rise to new notions of nationalism and national organization. Coupled with an expanding population and industrialization these notions provided an impetus for judicial reform. n450 As the number of cases that came before the Court dramatically increased, n451 the need for an intermediate tier of courts with full appellate jurisdiction became apparent. Change, however, did not happen quickly.

On March 8, 1869, Senator Trumbull again introduced a bill to reform the judicial system. n452 Unlike his previous attempt, the bill did not called for the creation of intermediate appellate tribunals. n453 Instead, it called for the creation of a circuit judgeship for each circuit, thus providing some relief to the circuit riding justice. n454 The Supreme Court justice would be required to visit each district only once every two years. n455 Senator George Edmunds and others were still preoccupied with the retention of the circuit system and spoke out against the bill. Edwards still favored the concept of circuit riding, and wanted "the highest judges of the land to try causes at nisi prius, to mingle with the people, to hear witnesses, to see jurors, ... and to dignify and make holy ... justice at the very doors of the people; ..." n456 Nevertheless, the opponents of Trumbull's bill recognized that something had to be done to address the Court's docket. n457 Senator George Williams proposed a Supreme Court comprised of nineteen justices, nine of whom would stay in Washington and nine of whom would ride circuit, with three rotating every year. n458 This plan, he claimed, would keep the Supreme Court in touch with the circuits and prevent it from turning into a "fossilized institution." n459

Despite moderate opposition, Trumbull's bill passed the Senate on April 23, 1869. n460 After debate in the House, the bill was approved by a vote of ninety to fifty-three. n461 Upon the President's approval, the bill became the Act of April 10, 1869. n462 Congress had at last provided "a long-desired and long-contested judicial reform." n463 The Act established a separate circuit court judiciary. n464 The circuit courts remained the primary court of first instance, and nine new circuit judges were appointed. n465 They had the same powers and jurisdiction as a Supreme Court Justice sitting on circuit. A circuit court could be held by a Supreme Court Justice, the circuit judge, the district judge in his district, or by two sitting together. n466 Under the new system, it was the duty of each Supreme Court Justice to attend at least one term of the circuit court in each district of his circuit once every two years. n467

While the appointment of specific circuit judges provided the Supreme Court Justices some relief, they were not entirely relieved of their circuit riding duties. n468 After hours of Congressional debate, many legislators recognized the importance of helping the Court cope with its overflowing docket. However, Congress was still not ready to abandon circuit riding as an institution, especially since travel was becoming more convenient as a result of the proliferation of railroads. Thus, although the stage was being set for its complete abolition, circuit riding entered its final era with a still uncertain fate.

### D. The End of the Road

History demonstrates that as the years progressed, the Supreme Court was unable to deal with its ballooning docket. Unfortunately, in the years following the Civil War, the problem escalated. n469 The Court's docket became so overwhelming that on occasion the justices could not attend to their circuit duties. n470 When examining the period spanning from 1869 to 1911, the arguments for and against circuit riding and broader judicial reform reappear. Indeed, it can be said that since 1790, the same arguments had been advanced over and over. This time, however, the outcome was different. The Supreme Court finally got relief from the legislative branch.

In May 1881, former Justice William Strong n471 published an article in the North American Review on The Needs of the Supreme Court. The article advocated the abolition of circuit riding duties and an overall reorganization of the federal judicial system. n472 Justice Strong bemoaned the increase in the number of cases on the Court's docket. n473 Indeed, for the October 1880 term, the Court had 1212 cases on its docket and because the court lacked discretion over its docket, it was obliged to decide all of the cases. n474 This was an unprecedented increase since in the five years ending in 1880 an average of 391 cases had come to the docket. n475 The justices, he wrote, spent eight to twelve hours a day hearing, conferring, and deciding cases from the opening of the term in October to its conclusion in May. n476 After that, each justice still had to attend to circuit duties. n477 To solve this problem, he wrote, "The only possible adequate remedy for the existing evil [is] ... the establishment of a court of appeals in each of the circuits into which the country is now divided - a court intermediate between the Supreme Court and the circuit courts." n478

Several years earlier, Justice Samuel Miller n479 had written that when the needs of the court are remedied, "it will probably compel the adoption of the plan which has always had my preference, an intermediate appellate court in each circuit, or such a number of intermediate courts of appeal as may be found useful." n480 In fact, in 1876 Representative George McCrary sponsored such a bill. n481 The bill would have created an intermediate court of appeals and ended compulsory attendance on circuit. n482 Three judges would sit on the new tribunal; they could be drawn from the ranks of the Supreme Court, the circuit court, or the district court. n483 Since the justices would be busy in Washington, it was assumed that they would elect not to attend. The bill passed the House, n484 but in the Senate it was referred to the Judiciary Committee, where it died. n485

In 1882, after a failed attempt by Senator Joseph McDonald to revise Section 610 of the Revised Statutes and thereby relieve the justices of their circuit duties, n486 a revised version of McCrary's bill was proposed in the Senate by former Justice David Davis. n487 The bill called for the creation of two additional circuit judgeships to staff each circuit's intermediate court of appeals. n488 Like the McCray bill, the justices were left free to determine their attendance on circuit based on the demands of the Supreme Court's docket. n489 The bill passed the Senate n490 but, despite the fact that the majority of the House Judiciary Committee was reported to be in favor of the bill, n491 it was ignored by the House. n492 While Congressional preoccupation with more important issues of the day and the inevitable delays in the legislative process contributed to the failure to provide relief to the judiciary, Professors Frankfurter and Landis caution the need to look deeper. n493 Indeed, as we have seen throughout circuit riding history, beneath the surface of the controversy we see what happens when Congress, the President, and the Judiciary "are

entangled in political passions and represent conflicting conceptions about the role of the federal courts in national policy." n494

Members of the Court decided to speak out in order to garner public support and secure Congressional action. n495 As the October 1887 term loomed, Chief Justice Morrison R. Waite made a public statement on the critical nature of the Court's docket. n496 The problem was that the appellate jurisdiction of the Supreme Court had remained essentially the same since 1789, but the national population had increased from less than four million to nearly sixty million, and the size of the country was almost four times greater. n497 Waite reiterated:

Under such circumstances it is not to but wonder that the annual appeal docket ... has increased from one hundred cases, or perhaps a little more, half a century ago, to nearly one thousand and four hundred, and that its business is now three years and a half behind, that is to say the cases entered now, when the term of 1887 is about to begin, are not likely to be reached in their regular order for hearing until late in the term of 1890. In the face of such facts it cannot admit of a doubt that something should be done, and that at once, for relief against this oppressive wrong. It is not for me to say what this relief shall be ... My present end will be accomplished if the attention of the public is called to the subject, and its importance urged in some appropriate way to Congress. n498

While he did not explicitly say it, it can be inferred that Chief Justice Waite favored the addition of a circuit court of appeals. n499

Not only was the Supreme Court's docket beyond control, but the lower courts were also overburdened. n500 It was virtually impossible for the circuit judges (created by the Act of 1869) to hold circuit courts in all of the districts assigned to them. n501 Since the circuit courts were trial and appellate courts, it was possible for a district judge sitting on the circuit court to sit in sole judgment of himself as judge of the district court. n502 Nevertheless, relief would not come until 1891. n503 Waite biographer C. Peter Magrath cites several factors that contributed to Congress' inability to pass a court relief bill. n504 These include: conflicts among sponsors of different plans; Southern hostility to an increase in the number of federal courts; and the fact that during the 1870s and 1880s, Congress and the Presidency were rarely controlled by the same political party, thereby making it difficult to agree on how the patronage jobs created by the new judgeships would be divided. n505

The case of Cunningham v. Neagle n506 is a late illustration of the hazards associated with riding circuit and may have, in fact, help hasten the practice's demise. Justice Field, en route by train from Los Angeles to San Francisco, was assaulted by a co-defendant in a suit that he had heard while sitting on the Circuit Court for the Northern District of California. n507 Field was hit twice in the face. n508 The deputy U.S. Marshall who accompanied Field eventually shot and killed the assailant. n509 The Justice and the deputy-Marshall were both arrested for murder. n510 Charges against Field were dropped, n511 but the deputy-Marshall was held under California law. n512 The deputy-Marshall's petition for a writ of habeas corpus was granted by the Circuit Court of the Northern District of California n513 and affirmed by a 6-2 vote n514 of the Supreme Court, because his conduct occurred while he was in the "discharge of his official duties." n515 The Court found that the deputy-Marshall should be discharged from state custody because his actions were authorized by federal law. He had done "no more than what was necessary and proper for him to do." n516

Despite the justices' disdain for the practice, the Court characterized circuit riding as a "matter of importance" and reiterated that while the Justices were riding circuit, they were carrying out their official duties:

The justices of this court have imposed upon them other duties, the most important of which arise out of the fact that they are also judges of the Circuit Courts of the United States ... and their attendance on the circuit and appearance at the places where the courts are held has always been thought to be a matter of importance. In order to enable him to perform this duty, Mr. Justice Field had to travel each year from Washington City, near the Atlantic coast, to San Francisco, on the Pacific coast. In doing this he was as much in the discharge of a duty imposed upon him by law as he was while sitting in the court and trying causes. n517

Melville Fuller was the Chief Justice when Cunningham v. Neagle n518 was handed down. Circuit riding and the structure of the federal judiciary, however, was something he thought about before he came to Washington, n519 and a task he contended with upon his arrival. When Fuller's first term as Chief Justice ended in May of 1889, he traveled to Charleston, South Carolina to conduct circuit court trials and hear appeals from the federal district court. n520 For the next several years, Fuller visited the circuit annually and held court in several districts. n521 However, given time

constraints and the vast size of the Fourth Circuit, it was difficult for him to visit all of the districts let alone handle any significant amount of circuit court business. n522 Fuller's early circuit riding decisions reinforce the contention that it was a waste of time to have Supreme Court Justices deciding routine matters in lower courts when the Supreme Court had a full docket to contend with. n523 Indeed, several of the justices in the 1880s neglected their circuit duties altogether. n524

Fuller realized that active circuit duty contributed to the problem of the ever-increasing Supreme Court docket. For more than ten years, various bills for the relief of the Supreme Court had been pending, but Congress had not taken action. n525 Fuller, encouraged by President Benjamin Harrison's first annual message to Congress in 1889, n526 was determined to change the system; three years after he became Chief Justice he succeeded in doing just that. n527

Fuller was aware that Senator William M. Evarts was the Senate's leading advocate for the creation of federal courts of appeal. n528 In January of 1890, Fuller gave a dinner at his home in honor of the recently appointed justice, David Brewer. The guests were the justices of the Court, as well as Senators William Evarts, George F. Edmunds and other members of the Senate Judiciary Committee. n529 With hopes of immediate reform, Fuller spoke to his guests about the backlog of cases that had accumulated on the Court's docket. His efforts soon paid off. A few weeks after the dinner, the Senate Judiciary Committee ordered that copies of all of the pending bills for the relief of the Supreme Court be sent to Fuller. n530 The Committee wrote that it would "be agreeable to the Committee to receive ... the views of the Justices." n531 Fuller asked Justice Horace Gray to prepare a report on the bills. n532 With the unanimous consent of the justices, Grey drafted a letter to the Senate Judiciary Committee dated March 12, 1890. n533 The letter recommended that intermediate circuit courts of appeal be established. n534 However, despite over 100 years of complaining about circuit riding, the Fuller Court justices did not seek to abolish the practice. Fuller biographer James W. Ely characterizes this a tactical decision on the part of the justices. n535 He writes: "The justices realized that many senators were attached to the traditional concept of circuit attendance and that to reopen this issue might well jeopardize any legislative relief." n536

In March of 1891, under a bill sponsored by Senator Evarts, Congress set up the circuit courts of appeal. The statute broke the stalemate that had thwarted efforts at judicial reform since the Civil War, granted substantial relief to the Supreme Court, and made a "lasting and important contribution to the federal judicial structure." n537 The Circuit Court of Appeals Act n538 expanded the federal court system from two to three tiers. The district courts retained their trial jurisdiction and the Act assigned the two appellate functions to two separate courts. n539 The new circuit courts of appeal played the error correction role and took appeals as of right from the district courts. n540 The Supreme Court would hear appeals from the circuit courts and was still responsible for the interpretation of the U.S. Constitution, the enunciation of national law, and the supervision of the lower federal courts; however, the Court "self-consciously ceased playing [the] role" of a court of error. n541

The Act introduced the concept of discretionary review by "writ of certiorari." n542 This allowed the Supreme Court to pick and choose the cases it wanted to hear. It was the direct opposite of the old "writ of error," which, since it provided for appellate review as a matter of right, was responsible for the exponential increase of the Court's docket. The framers of the Act thought that the writ of certiorari would be issued only for the purpose of resolving conflicts of judgments among the different courts of appeal in cases where the judgment of the court would be final. n543 The goal was to achieve nationwide uniformity of law. n544 However, in its first decision on the matter, Lau Ow Bew v. United States, n545 the Court gave a broad interpretation to its new-found power. In an opinion by Chief Justice Fuller, n546 the Court opined that in considering which cases it should grant review to, it was permitted to consider the "gravity and importance" n547 of the case.

On the topic of the creation of the circuit courts of appeal and the introduction of concept of certiorari, Chief Justice Rehnquist has written: "From this point on the Supreme Court was no longer at the disposal of every losing litigant in a federal court who had the time and money to take an appeal to the "highest court in the land.'" n548 The Court's case load was transformed. n549 Whereas in 1890, there were 623 new cases docketed, n550 in 1891 (with the new Act only a few months in operation) there were only 379, n551 and by 1892, just 275. n552

While earlier versions of the Act called for the complete abolition of the old circuit courts, n553 in order to satisfy the Congressional traditionalists, the Evarts Act did not abolish the courts. n554 Even though the circuit courts no longer had any appellate jurisdiction over the district courts, they retained original trial jurisdiction over capital cases, tax cases, and diversity cases where the amount in controversy exceeded the district court's limit. n555 Essentially, the circuit courts and district courts had concurrent jurisdiction; this resulted in much confusion for litigants and attorneys. n556

"As a gesture to tradition," the justices' circuit duties were not eliminated, but little was expected of them. n557 It was unclear, however, exactly what the circuit riding responsibilities of the justices were after the Evarts Act was passed. Under the Act, the justices of the Supreme Court were made "competent to sit as judges of the circuit court of appeals within their respective circuits;" n558 however, nothing mandated that they sit as judges on the old circuit courts or the new Circuit Courts of Appeals. n559 To the chagrin of those in Congress who still and believed in the virtues of circuit riding, after the new Act was passed, most justices ceased riding circuit. n560 Nevertheless, Chief Justice Fuller still took his circuit duty seriously. Between April 1892 and January 1909, he heard forty-two cases before the new Circuit Court of Appeals for the Fourth Circuit and wrote twelve opinions in his capacity as circuit justice. n561 Additionally, during his visits to Chicago, Fuller occasionally heard cases before the Court of Appeals for the Seventh Circuit. n562

Biographer James Ely cites Fuller's circuit attendance in order to dispel the "casual assumption" that circuit riding "abruptly disappeared" after the passage of the Evarts Act. n563 While he may be correct, it is clear that a majority of the justices gave up circuit riding after the passage of the Act. Congress was aware of the situation and the legislative branch, ironically not at the request of the justices, eventually became convinced that the old circuit courts and circuit riding were officially obsolete. n564 In the Judicial Code of 1911, n565 circuit riding died a quiet death. Congress officially abolished the circuit courts and made the district courts the exclusive federal trial courts. n566

### E. Circuit Riding Postscript

Much to the satisfaction of the Supreme Court, circuit riding was abolished in 1911; however, two remnants of the practice remain part of the institution. First, justices still act as Circuit Justices for each circuit. At the beginning of each term the Court assigns to each justice one or more of the thirteen federal circuits, n567 and applications in cases arising in such circuits are within the jurisdiction of the justice assigned thereto. n568 A justices' authority is limited to granting temporary relief, such as a temporary injunction, a stay of judgment or execution, and the granting of bail. n569

Second, retired justices can ride circuit pursuant to *28 U.S.C. 294*(a) which states: "Any retired Chief Justice of the United States or Associate Justice of the Supreme Court may be designated and assigned by the Chief Justice of the United States to perform such judicial duties in any circuit, including those of a circuit justice, as he is willing to undertake." Indeed, several justices have elected to continue their judicial service after retirement by sitting by designation on various Courts of Appeals. These justices include Byron White, n570 Lewis Powell, n571 Potter Stewart, n572 William Brennan, n573 Thurgood Marshall, n574 Stanley Reed, n575 and Harold Burton. n576 Justice Tom Clark, who retired from the Court in excellent health at the relatively young age of sixty-seven, spent the remaining ten years of his life riding circuit. n577 He remains the only retired justice to have sat by designation on all of the circuits. n578

## III. The Constitutionality of Circuit Riding

Supreme Court historians may on occasion recount the perils of early circuit riding, however, as mentioned in the Introduction, circuit riding is not a topic that is given much attention at the present time. n579 While the justices questioned the constitutionality of circuit riding during the first year of the judiciary's existence, n580 Constitutional Law scholars have largely ignored the issue. Nevertheless, Professor Akhil Amar has written: "Circuit riding raised important and difficult constitutional issues." n581 Looking at the practice through a contemporary Constitutional lens, this Part considers and ultimately rejects the Constitutional challenges to the circuit riding.

### A. Constitutional Authority

Circuit riding is an exercise of Congress's power to create lower federal courts. The grant of this power was debated at the Constitutional Convention. John Dickerson contended strongly that if there was a national legislature, there ought to be a national judiciary, and that the former should have the authority to create the later. n582 Edmund Randolph unsuccessfully suggested that inferior judicial tribunals should be established by the Constitution. n583 Ultimately,

James Madison and James Wilson supported Dickerson's idea, and moved "that the national legislature be empowered to institute tribunals." They observed that there was a distinction between "establishing such tribunals absolutely, and giving a discretion to the Legislature to establish or not establish them." n584 The Framers opted to give the legislature the power to create and regulate the lower federal courts' practice, procedure, and administration; essentially letting it determine how to devise a federal judicial system to best suit the country's ever changing needs. n585 Article III states that the judicial power shall be vested in one Supreme Court, and "in such inferior Courts as the Congress may from time to time ordain and establish." n586 Additionally, Article I states that Congress shall have the power "to constitute Tribunals inferior to the supreme Court" and "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers... ." n587 As the history of circuit riding demonstrates, Congress has exercised its power to determine the number of courts in the federal judicial system, the scope of their jurisdiction, n588 and who will staff these courts; in essence all things "necessary and proper" to carry out its authority to set up inferior judicial tribunals. n589 Assigning the justices circuit duties is an exercise of Congress's power under Articles I and III to set up inferior courts. For the reasons stated in Part I, Congress though that circuit riding would greatly benefit the judicial system. In its quest to set-up a workable judicial system, it used its power set up inferior courts to institute circuit riding and keep the practice alive for many years thereafter. In essence this was no different than Congress promulgating rules about jurisdiction and venue.

Indeed, the Senators of the first Congress understood the Constitution to give them wide latitude in establishing the national judiciary, and the text supports their claim of authority. n590 One-half of the Senators were also members of the Constitutional Convention. n591 In constructing the federal judiciary and instituting circuit riding their "interpretation of their authority is entitled to considerable respect." n592 In fact, in Martin v. Hunter's Lessee, n593 Justice Story made a particular point that weight should be given the judgment of the first Congress, because many of the members had been at the Constitutional Convention. n594

Nevertheless, Congress can only exercise its enumerated powers consistent with other Constitutional requirements. Plausible arguments can be made that circuit riding violates due process, the separation of powers, and is an expansion of the Supreme Court's original jurisdiction.

## B. Due Process

The first argument advanced against the constitutionality of circuit riding is that a litigant has a due process right to have his case determined by unbiased Supreme Court Justices. n595 A justice who had already heard a case on circuit would be biased toward the outcome already reached. As mentioned previously, this possibility concerned the drafters of the Judiciary Act of 1789. n596 While they prohibited a district judge from reviewing his own decision in a circuit court, n597 they did not include a similar provision for Supreme Court Justices. n598 Additionally, there was no mechanism to force a justice to recuse himself. Judge John Noonan writes that "the early Supreme Court did not believe that a judge was biased as a matter of law because he had previously ruled on the question being presented to him." n599

During the time of circuit riding, due process was defined as conformity with "those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors... ." n600 Indeed, in England, judges regularly sat in review of their own decisions, so circuit riding would not run afoul of the notion of due process at the time of its inception.

Standards, however, have changed, and more recent procedural due process decisions give more weight to the argument that circuit riding violates due process. n601 In Withrow v. Larkin n602 the Court, in dicta, speaking in the context of state administrative proceedings said, "when review of an initial decision is mandated, the decisionmaker must be other than the one who made the decision under review." n603 In fact, *28 U.S.C. 47,* first enacted in 1948, states: "No judge shall hear or determine an appeal from the decision of a case or issue tried by him." n604 In Rexford v. Brunswick-Balke-Collender Co. n605 it was recognized that the purpose of the statutory disqualification was to make certain that a Court of Appeals would be comprised of judges uncommitted and uninfluenced by having expressed or formed an opinion in the court of first instance. n606 Today, this statute is directed toward district court judges who sit by designation on a Court of Appeals. n607 The literal text of the provision, referring to "judges" suggests it does not apply to Supreme Court Justices. n608 However, in the modern era, justices appointed to the Supreme Court from lower federal courts appear to have refrained from hearing cases before the Court in which they participated as lower court judges. n609

Nevertheless, despite Section 47, there remain two instances in which a judge or justice can review his or her own decision. First, Section 47 does not disqualify a member of a three-judge Court of Appeals panel from later participating in the en banc reconsideration of the panel's decision. n610 This view is reflected in *28 U.S.C. 46*(c), which states: "A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court in banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof." n611 While the statute only expressly mentions retired judges, its premise is that a panel member still in active service sits en banc. An en banc review by a member of the three-judge panel is analogous to a justice reviewing a case at the Supreme Court he or she previously heard on circuit. When a case is heard en banc, it is adjudicated by all of the circuit judges in active service. n612 The en banc sitting is called a "rehearing," but in reality the reargument before the court is a fresh hearing. n613 There is a new oral argument and new briefs are often submitted. As mentioned above, "judges on the en banc panel who have heard the case the first time and decided it are not regarded as biased as a matter of law in sitting to judge this fresh appeal." n614 Similarly, when a justice heard a case on circuit and then participated in the case at the Supreme Court, it could be argued that they were hearing the case anew; with new oral arguments and briefs. In essence, they were "redoing" rather "reviewing." If a judge who hears a case in a three judge Court of Appeals panel can review the case when the Court of Appeals convenes en banc, then it stands to reason that a similarly situated Supreme Court Justice would not be regarded as biased as a matter of law in hearing a fresh appeal to the Court.

Second, under the current system of circuit assignments, justices can ultimately review their own decisions. Under the current practice, a party seeking to stay a lower court decision makes an application to the appropriate Circuit Justice. n615 If that justice denies the application, the party making the application may renew the application to "any other Justice." n616 The second justice customarily refers the matter to the entire court unless the matter is so urgent as to make that impractical. n617 If an application is referred to the entire court, it will not be granted unless a majority of the participating Justices affirm. n618 Hence, in this second round of review, the matter is before the original Circuit Justice for a second time. Like circuit riding, the justice is called to pass judgment on a matter that he or she has already passed judgment on.

The due process argument can be separated into statutory and constitutional concerns. While Congress has enacted a statutory scheme that indicates an overall concern with the effective administration of justice and judges reviewing their own decisions, it cannot be argued that circuit riding violates these statutes because circuit riding is congressionally authorized. Statutorily, circuit riding, a practice that has been in existence as long as the federal judicial system, can be considered an exception to the general prohibition.

Ultimately, the due process concern is a constitutional one. It can be argued that after adjudicating a case on circuit the justices are inherently biased and therefore due process forbids them from hearing the case on appeal at the Supreme Court. However, this proposition oversimplifies the meaning of "bias" in the judicial context. Indeed, there are several types of judicial bias including: (1) a personal stake in the outcome of a case; (2) a personal connection to the parties; (3) knowledge of the facts or circumstances that are not part of the case and; (4) a closed mind because the judge has previously heard the case. The first three categories of bias are codified in *28 U.S.C. 455,* which sets out the standard for the disqualification of a justice, judge or magistrate. However, it seems that circuit riding implicates the fourth kind of bias, a category which is fundamentally different from the first three. While it has been standard practice for a justice to disqualify or recuse himself when encountering a case he or she heard sitting on a lower court; it can be argued that this type of bias does not violate due process. In particular, the justice does not know anything he or she should not; he or she is not privy to any extrajudicial sources. n619 It is true that the judge is already familiar with the case, but only in the way that his or her colleagues will soon be. He may have "prejudged" the case (and literally, that is exactly what he did) but he or she is not "prejudiced" as to the outcome. n620

Needless to say, even if circuit riding violates due process, the problem is easily remediable. If a case comes before the Supreme Court that a justice happens to have heard on circuit, he or she should recuse him or herself from the case. Historically, many justices did just that.

### C. Separation of Powers

A second argument against the constitutionality of circuit riding conceptualizes the circuit riding justices as dual office holders. By assigning circuit duties to the justices, Congress had "appointed" them as circuit judges, in conflict with Article II's Appointments Clause, n621 the constitutional principle of separation of powers, and Article III. This argument can be traced back to Chief Justice Marshall, who, during the time of the Repeal Act wrote "The Constitution

requires distinct appointments and commissions for the Judges of the inferior Courts from those of the Supreme Court." n622 At the extreme, Congressional reassignment of the roles of presidential appointees impermissibly encroaches on the President's appointment power and overall authority and obligation to run the executive branch; however, circuit riding falls far short of that extreme.

First, circuit riding does not run afoul of the Appointments Clause. n623 The clause gives the President the power to appoint "Officers of the United States" with advice and consent of the Senate. n624 It can be argued that by having the justices ride circuit, Congress is appointing circuit court judges, and therefore violating the Appointments Clause. However, this is not the way to conceptualize circuit riding. Circuit riding was initiated for legitimate reasons n625 and while the justices hated the practice and yearned for Congress to suspend it for over 100 years, Congress did not did not usurp the Presidential power of appointment because the circuit courts were staffed exclusively with justices whom the President already appointed. n626 Congress did not appoint the justices; it just gave them extra responsibilities as part of the package of duties associated with the office of Justice. It had the constitutional authority to do so.

Additionally, it can be argued that circuit riding violates the separation of powers. In examining this argument, n627 Morrison v. Olson n628 instructs us to look at whether the issue at hand "unduly interferes with the role of the Executive Branch." n629 In the case of circuit riding, the alleged interference is that Congress has taken away the President's ability to appoint Court of Appeals judges. However, circuit riding did not interfere with the President's power to appoint judges and "simply does not pose a "danger of congressional usurpation of Executive Branch functions.'" n630 Under a judicial system that includes circuit riding, the President still has the power and authority to appoint all federal judges. While it is true that the President is not allowed to appoint the individual of his choice to staff the circuit courts, n631 Congress still does not usurp the Presidential power of appointment, because the circuit courts are staffed exclusively with Presidential appointees.

Lastly, and directly related to the two previous points, it can be argued that circuit riding "unconstitutionally conscripts" n632 justices into another job, therefore violating Article III. In Mistretta v. United States, n633 the Supreme Court held that nothing in the Constitution prohibits Article III judges from undertaking extrajudicial duties. n634 The Court opined: "Congress may delegate to the Judicial Branch non-adjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary." n635 If Congress can delegate to the judicial branch non-adjudicatory functions, then a fortiori it can delegate an adjudicatory function like riding circuit to members the judicial branch. Indeed, while riding circuit, the justices are exercising the "judicial power" that Article III gives them. Having Supreme Court Justices ride circuit fits within the central mission of the judiciary. The justices are in essence doing a job that they were appointed to do-decide cases. This does not interfere with prerogatives of another branch of government, and is again analogous to a District Court Judge sitting by designation on the Court of Appeals. n636 District Court Judges were appointed to adjudicate cases in the District Courts, not on the Court of Appeals. However, nothing in the Constitution prevents them from occasionally taking on an extra function that they weren't specifically appointed to do, and serving as Court of Appeals judges.

In sum, circuit riding does not "disrupts the proper balance between the coordinate branches ..." n637 and accordingly, it does not violate the separation of powers, Article III, or the Appointments Clause.

## D. Original Jurisdiction

A third argument against the constitutionality of circuit riding arises from the fact that the old circuit courts were trial courts. The argument is that a Supreme Court Justice trying circuit courts cases expands the original jurisdiction of the Supreme Court, as defined by Article III. Both Chief Justice Jay n638 and Justice Chase n639 made this argument, which, of course, is supported by Marbury v. Madison's n640 holding that Congress can not expand the Supreme Court's original jurisdiction.

Circuit riding, however, can be distinguished from the central issue in Marbury because the practice required individual justices, not the Supreme Court as an institution, to exercise original jurisdiction. n641 By the time the full court decides a case, it is exercising its appellate jurisdiction. It has the benefit of a circuit court decision and does not have to conduct a trial. n642 The diffyculty with this response is that it strengthens the Appointments Clause argument because it separates the justice from the court. n643 Professor David Currie writes: "To reject both contentions one must draw a delicate distinction: the new duties are a part of the existing office of Justice, but not a function of the Supreme Court as an institution." n644 This distinction can be drawn because at the time of appointment the performance of

circuit riding duties is included in the job description of a Supreme Court Justice and hence the new duties are part of the existing office and, the practice does not expand the original jurisdiction of the Supreme Court because circuit riding is performed by individual justices not the court as a whole and is hence not a function of the Supreme Court as an institution.

## Conclusion

An often-ignored part of the Supreme Court's history, circuit riding for most of its existence remained an unpopular hold-over from the early days of the Republic. As mentioned in the Introduction, the history of circuit riding can just as easily be called the "history to abolish circuit riding" and given circuit riding's severe practical shortcomings it is quite amazing that the practice lasted for as long as it did.

From the time of the establishment of the federal judicial system, the members of the Supreme Court complained about having to ride circuit. The justices had two main practical contentions: they hated to travel and they could not simultaneously attend to their circuit duties and keep up with their work in Washington because the Court's docket became unduly onerous. n645 Indeed, the constitutionality of the practice was rarely questioned.

For 121 years the justices, with the support of various members of Congress, fought to have circuit riding abolished. Time after time, they faced defeat. The majority of Congress firmly believed that the benefits of circuit riding outweighed the burdens. They were more interested in having members of the Court deliver justice to the vast citizenry residing outside the confines of Washington than they were in pleasing a dependent co-ordinate branch of government.

At last, however, with a backlog of cases on the Supreme Court's docket, the utter impracticality of circuit riding became apparent. In 1891, the justices finally succeeded in winning their on-going struggle with Congress and were relieved of their circuit duties. Twenty years later, circuit riding was officially abolished.

In 1987, one commentator referred to the "200-year war" that was on-going between the legislative and executive branches of government. n646 However, the history of circuit riding reminds us that the third branch of government, the judicial branch, had its own intra-governmental struggle. Indeed, the fight over circuit riding was a 121-year war that raged between the legislative and judicial branches. The judicial branch as represented by the corps of justices was not a powerful enough constituency, and for many years it lacked the political influence to persuade Congress to abolish circuit riding. The history of circuit riding truly personifies the never-ending separation of powers battle that is American government.

FOOTNOTES:

* Administrative Editor, Cardozo Law Review, J.D. Candidate (June 2003). B.S. Cornell University (May 2000). The author wishes to thank Professors Michael Herz of Cardozo Law School and Jefferson Cowie of Cornell University for their invaluable comments and guidance. The Author owes a huge debt of gratitude to the past and present members of the Cardozo Law Review, in particular Brian Kidd and Joshua Sussberg, who supported him in his endeavor to write about the little-mentioned topic of circuit riding. The author also wishes to thank his parents Susan and Sam Glick, his sisters Lauren, Rachel and Briana, his grandmother Edna Glick and his aunt Lynne Sherman for their constant love, support and, encouragement. Finally, the author dedicates this paper to his grandparents, Michael and Shirley Sherman, without whom this endeavor would not be possible.

n1. The author uses the terms "circuit riding," "riding circuit," and "circuit duties" interchangeably.

n2. While researching this topic, the author came across only four articles that focused exclusively on circuit riding. See Ralph Lerner, The Supreme Court as Republican Schoolmasters, *1967 Sup. Ct. Rev. 127;* Leonard Baker, The Circuit Riding Justices, 1977 Y.B. Sup. Ct. Hist. Soc'y 63; Wythe Holt, "The Federal Courts Have Enemies in All Who Fear Their Influence on State Objects": The Failure to Abolish Supreme Court Circuit-Riding in the Judiciary Acts of 1792 and 1793, *36 Buff. L. Rev. 301 (1987);* David J. Katz, Note, Grand Jury Charges Delivered by the Supreme Court Justices Riding Circuit During the 1790s, *14 Cardozo L. Rev. 1045 (1993).* Nevertheless, circuit riding is mentioned in all of the major Supreme Court encyclopedias. For very brief histories of circuit riding, see Kevin Eyster, Circuit Riding, in 1 Encyclopedia of the U.S. Supreme Court 163 (Thomas T. Lewis & Richard L. Wilson eds., 2001); Kermit L. Hall, Circuit Riding, in The Oxford Companion to the Supreme Court of the United States 145 (Kermit L. Hall ed.,

1992); Congressional Quarterly, Circuit Riding, in The Supreme Court A to Z: A Ready Reference Encyclopedia 72-74 (Elder Witt ed., 1993).

n3. 2 The Documentary History of the Supreme Court of the United States, 1789-1800: The Justices on Circuit: 1790-1794, at xxv (Maeva Marcus ed., 1988) [hereinafter 2 DHSC].

n4. See Holt, supra note 2, at 311 (the first justices rode circuit in March of 1790); Circuit Court of Appeals (Evarts) Act, ch. 517, 26 Stat. 826 (1891) (relieving the justices of their circuit duties); Judicial Code of 1911, ch. 231, 36 Stat. 1087 (officially abolishing circuit riding).

n5. See Eric. J. Gribbin, Note, California Split: A Plan to Divide the Ninth Circuit, *47 Duke L.J. 351, 359 (1997)* (remarking that "although each Congress was peppered with complaints from Justices about the time-consuming and exhausting travel schedules precipitated by the circuit-riding requirement, these duties remained (technically, at least) a part of the judicial system until 1891"). See also discussion infra Part II.

n6. See discussion infra notes 114-28 and accompanying text.

n7. Lerner, supra note 2.

n8. See discussion infra Part I.

n9. See discussion infra notes 46-50 and accompanying text.

n10. But see discussion infra Part II.B (noting that the Judiciary Act of 1801 is an exception to this statement; however there were many other concerns motivating this legislation). See generally discussion infra Part II.

n11. See discussion infra Part II.A.

n12. See discussion infra Part II.D.

n13. See Hall, supra note 2, at 145. See discussion infra Part II.C-D.

n14. Act of April 10, 1869, ch. 22, 16 Stat. 44.

n15. Circuit Court of Appeals (Evarts) Act, ch. 517, 26 Stat. 826 (1891).

n16. Judicial Code of 1911, ch. 231, 36 Stat. 1087.

n17. *5 U.S. (1 Cranch) 299 (1803).*

n18. See discussion infra notes 319-20 and accompanying text.

n19. See U.S. Const. art. III, 1 ("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.").

n20. "Self-executing" refers to provisions that are effective immediately and do not require ancillary legislation to implement their contents. A provision is self-executing when it supplies "sufficient rule by which [the] right given may be enjoyed or [the] duty imposed enforced." Black's Law Dictionary 1360 (6th ed. 1990). The Constitution gives Congress the authority to enact legislation to "execute" its non-self-executing provisions. U.S. Const. art. I, 8, cl. 18 ("The Congress shall have Power ... to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department ... thereof."). See Comm'n on the Bicentennial of the U.S. Constitution, The Supreme Court of the United States: Its Beginnings & Its Justices 1790-1991, at 10 (1992) [hereinafter Comm'n on the Bicentennial] (explaining that "most questions concerning the form and structure of the Judiciary were left for later resolution by Congress").

n21. See Charles Warren, The First Decade of the Supreme Court of the United States, *7 U. Chi. L. Rev. 631 (1940).*

n22. The Constitution made the existence of a federal judiciary dependant upon the actions of both the executive and legislative branches. See U.S. Const. art II, 2, cl. 2 ("[The President] shall nominate ... with the Advice and Consent of the Senate ... Judges of the supreme Court ... ."); id. art III, 1 ("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."); id. art I, 8, cl. 9 ("The Congress shall have Power ... to constitute Tribunals inferior to the supreme Court ... .").

n23. Judiciary Act of 1789, ch. 20, 1 Stat. 73. See generally Wilfred J. Ritz, Rewriting the History of the Judiciary Act of 1789 (1990) (discussing the history of the Judiciary Act of 1789).

n24. The three circuits consisted of Massachusetts, New Hampshire, Connecticut and New York in the Eastern Circuit; Pennsylvania, New Jersey, Delaware, Maryland and Virginia in the Middle Circuit; and South Carolina and Georgia in the Southern Circuit. Judiciary Act of 1789, ch. 20, 4, 1 Stat. 73. After the state constitutional conventions ratified the Constitution, Rhode Island and North Carolina were added to the Eastern and Southern Circuits respectively. See Act of June 4, 1790, ch. 17, 1 Stat. 126 (North Carolina); Act of June 23, 1790, ch. 21, 1 Stat. 128 (Rhode Island). Maine and Kentucky's district courts were not included in a circuit. Instead, the district court had both district court and circuit court jurisdiction and appeals could only be taken to the Supreme Court if the amount in controversy exceeded $ 2,000. Id. 10, 22. See Charles Gardner Geyth & Emily Field Van Tassel, The Independence of the Judicial Branch in the New Republic, *74 Chi.-Kent. L. Rev. 31, 57 (1998)* (remarking that "to overcome the concern that federal court litigation would force state citizens to litigate in distant and unfamiliar federal fora, Congress drew federal judicial district boundaries along state lines and located a federal district court in each state"). See generally Bernard Schwartz, A History of the Supreme Court 17 (1993) (describing the set-up of the early federal judicial system).

n25. Judiciary Act of 1789, ch. 20, 4, 1 Stat. 73.

n26. Id.

n27. The text of the Act provided:

That the before mentioned districts, except those of Maine and Kentucky, shall be divided into three circuits, and be called the eastern, the middle, and the southern circuit ... there shall be held annually in each district of said circuits, two courts, which shall be called Circuit Courts, and shall consist of any two justices of the Supreme Court, and the district judge, of such districts, any two of who shall constitute a quorum: Provided, That no district judge shall give a vote in any case of appeal or error from his own decision; but may assign the reasons of such his decision.

Id. The system of circuit riding resembled the system of nisi prius courts in England, under which the judges of the courts of Westminster rode circuit throughout the realm to conduct jury trials of factual issues. James E. Pfander, Marbury, Original Jurisdiction, and the Supreme Court's Supervisory Powers, *101 Colum. L. Rev. 1515, 1564 (2001).*

n28. Holt, supra note 2, at 306-08. The author has drawn heavily from Professor Holt's excellent account of circuit riding during the early days of the Republic. See also William R. Casto, The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth 45 (1995). Casto writes:

The basic purpose of the circuit courts was to provide Supreme Court supervision of the federal trial courts without requiring expensive and inconvenient appeals from the local federal trial courts to the national capitol. Instead, circuit-riding Justices would in effect make Supreme Court decision making more accessible to litigants throughout the country.

Id.

n29. Holt, supra note 2, 306.

n30. See Letter from Henry Marchant to Theodore Foster, (Jan 1, 1793), reprinted in 2 DHSC, supra note 3, at 342. Rhode Island District Judge Marchant wrote to Senator Foster:

Altho' I have ever seen, as I think, some Impropriety in the Judges of the Supreme Court sitting as a Circuit Court with the Judges of the District Court, and an Indelicacy at least, in Appeals to themselves from their respective Decisions - Yet - There are some conveniences, and much Economy in the Mode - Very necessary in the first setting out - and until Our publick Debt is considerably lessened.

Id. See also Willis P. Whichard, The Life of James Iredell 174 (2000) (remarking that "by averting salary payments to a separate set of judges for the circuit court, the government conserved its meager resources"); Lerner, supra note 2, at 130 (stating that "it is plausible, even likely, that nothing more lies behind this feature of the judicial system than a close-fisted Connecticut concern to get value for money").

n31. Contra 1 Charles Warren, The Supreme Court in United States History 87 (1926) (remarking that even in the circuit courts, delays and postponements due to a Justice's illness or poor road conditions, caused great costs and hardships to litigants and injustice to persons held for trial). Cf. David N. Atkinson, Leaving the Bench: Supreme Court Justices at the End 45 (1999) (stating that "when justices failed to meet their statutory circuit responsibilities, the dockets became congested and the federal judicial system functioned inadequately").

n32. Holt, supra note 2, at 306 n.18. Senator William Paterson defended the circuit system at the time the Senate debated the proposed Judiciary Bill in June 1789, in part on the grounds that it would "meet every Citizen in his own State - not drag him 800 miles upon an appeal." William Paterson's Notes on the Judiciary Bill Debate and Notes for Remarks on Judiciary Bill (June 23, 1789), reprinted in 4 Documentary History of the Supreme Court of the United States, 1789-1800: Organizing the Federal Judiciary 410-13, 410 (Maeva Marcus ed., 1992) [hereinafter 4 DHSC]. Paterson thought that "not many appeals" to the Supreme Court would be taken, if citizens with federal issues had a trial in a federal court before Supreme Court judges. Id. at 412. The alternative, according to Paterson, allowing state courts to serve as the lower federal courts, would have been "monstrous" because it would be "expensive & oppressive." Id. The chief drafter of the Judiciary Act of 1789, Senator Oliver Ellsworth, shared Paterson's sentiments. Letter from Oliver Ellsworth to Richard Law (Aug. 4, 1789), reprinted in 4 DHSC, supra, at 495-96. He wrote that the proposed circuit courts, staffed with Supreme Court and district court judges "without creating any more, or much enhancing the expense," would "settle many cases in the States that would otherwise go to the Supreme Court." Id. Ellsworth "questioned much if any [alternative] will be found at once more economical, systematic & efficient than the one under consideration." Id.

n33. Holt, supra note 2, at 306-07. See Henry J. Bourguignon, The Key to the Judiciary Act of 1789, *46 S.C. L. Rev. 647, 669 (1995)* (explaining that "the Circuit Court would thus be effectively a traveling mini-Supreme Court, the court of last resort for most cases within its jurisdiction").

n34. Holt, supra note 2, at 306-07.

n35. Ritz, supra note 23, at 23.

n36. Casto, supra note 28, at 45.

n37. Judiciary Act of 1789, ch. 20, 11, 1 Stat. 73. See Casto, supra note 28, at 45 (stating "the district courts almost never tried criminal cases").

n38. 1 Warren, supra note 31, at 58. See John E. Semonche, Keeping the Faith: A Cultural History of the United States 41 (1998) (remarking that the reason for this "added burden" [circuit riding] was a belief that "justices should be brought in touch with common people at the trial level"); William Garrott Brown, The Life of Oliver Ellsworth 245 (Da Capo Press 1970) (1905) (stating that "perhaps no other officials of the new government had so good an opportunity as the justices to see the whole country and to become acquainted with the leading characters of all the sections"); *Baker, supra* note 2, at 67. Baker notes that "there developed between the Supreme Court justice and the local members of the bar a relationship of camaraderie and respect." Id. Baker goes on to recount and reproduce a description by Gustavas Schmidt, a lawyer, of Chief Justice Marshall presiding at the Circuit Court in Richmond. See id. Schmidt depicts a friendly man walking into the courtroom and stopping to speak to friends: "no attempt was ever made to claim superiority, either on account of his age or his great acquirements; neither was there any effort to acquire popularity." Id. Rather, in the few moments before he took his seat on the bench his conduct was "evidently dictated by a benevolent interest in the ordinary affairs of life, and a relish for social intercourse." Id. But the moment that Marshall took his seat on the bench, the Schmidt account continued:

his character assumed a striking change. He still continued the same kind and benevolent being as before; but instead of the gay and cheerful expression which distinguished the features while engaged in social conversation, his brow assumed a thoughtfulness and an air of gravity and reflection, which invested his whole appearance with a certain indefinable sternness.

Id. From this description Baker concludes "Marshall's appearance in the Richmond court supported the riding circuit rationale; the local people did receive a positive impression of the Supreme Court justices at work." Id.

n39. 15 Martin H. Redish et al., Moore's Federal Practice 100 app., at 12 (3d ed. 1997). As Senator Paterson explained, the circuit courts would "carry Law to [the People's] Homes, Courts to their Doors." William Paterson, Notes for Remarks on Judiciary Bill (June 23, 1789), reprinted in 4 DHSC, supra note 32, at 416. See Artemus Ward,

Deciding to Leave: The Politics of Retirement from the United States Supreme Court 29 (2003) (remarking that "Congress's ideal of using the members of the Court in an educative nationalizing function was plainly at odds with the harsh reality of the daily lives of the justices").

n40. See 2 DHSC, supra note 3, at 5 (stating that the "charge to the grand jury, was an important part of the court opening ritual"). Derived from the English practice, the charge had long been a part of the court proceedings in colonial America and was carried over into the new Republic. See id. James Iredell saw the ancient custom of the charge as providing "a few moments" for the jurors to "meditate" on the "high importance" of their duty. Grand Jury Charge (C.C.D. N.J. April 2, 1793) (Iredell, J.), reprinted in 2 DHSC, supra note 3, at 348.

n41. Holt, supra note 2, at 307.

n42. On June 17, 1799, a local New Hampshire newspaper wrote:

Among the more vigorous productions of the American pen, may be justly enumerated the various charges delivered by the Judges of the United States at the opening of their respective Courts. In these useful addresses to the jury, we not only discern sound legal information conveyed in a style at once popular and condensed, but much political and constitutional knowledge. The Chief Justice of the United States has the high power of giving men much and most essential information in a style the very model of clearness and dignity ... .

Farmer's Weekly Museum, June 17, 1799, reprinted in 3 The Documentary History of the Supreme Court of the United States, 1789-1800: The Justices on Circuit: 1795-1800, at 374 (Maeva Marcus ed., 1990) [hereinafter 3 DHSC]. See Kenneth B. Umbriet, Our Eleven Chief Justices: A History of the Supreme Court in Terms of Their Personalities 42 (1938) (explaining that "it was undoubtedly intended that the traveling judges, by means of charges to grand juries, should attempt to explain the nature of the new government throughout the land"). See generally Katz, supra note 2 (examining the grand-jury charges delivered by the Supreme Court Justices presiding over federal trial courts during the 1790s).

n43. Semonche, supra note 38, at 41.

n44. See, e.g., Grand Jury Charge (C.C.D.N.Y. Apr. 12, 1790) (Jay, J.), reprinted in 2 DHSC, supra note 3, at 25, 30 ("It cannot be too strongly impressed on the minds of all how greatly our individual prosperity depends on our National Prosperity, and how greatly our national prosperity depends on a well-organized, vigorous government, ruling by wise equal laws faithfully executed."); Grand Jury Charge (C.C.D. Ga. Apr. 17, 1791) (Iredell, J.), reprinted in 2 DHSC, supra note 3, at 216, 219 ("It is of great importance that the principles of this constitution should be clearly understood, and the more they are so the more highly in general, I am persuaded, it will be approved."); Grand Jury Charge (C.C.D.N.Y. Apr. 26, 1792) (Iredell, J.), reprinted in 2 DHSC, supra note 3, at 263, 271 ("It is pleasing to see the progress of reason & humanity that seems to be still daily increasing, and it must afford the highest gratification to every citizen of America to reflect that the noblest path to Liberty was first explored in the happy country that he lives in."). See also Jane Shaffer Elsmere, Justice Samuel Chase 72 (1980) (explaining that "the framers of the Judiciary Act of 1789 believed that sending distinguished jurists into the various states would help establish public confidence in the federal judiciary and in the federal government"); Umbriet, supra note 42, at 42 (noting that "it was thought that the constant visits of the judges of the Supreme Court to the various communities of the country would tend to break down the widespread feeling that the central government was something remote and foreign with which the average man had nothing to do"); Lerner, supra note 2, at 131 (noting that the justices "were quick to see and seize the chance to proselytize for the new government and to inculcate habits and teachings most necessary in their view for the maintenance of self-government").

n45. Holt, supra note 2, at 307. It is worth noting that in some states the Constitution was ratified by the slimmest of margins and also that during the Constitutional Convention, the state ratification conventions, and the passage of the Judiciary Act, delegates expressed hostility toward the creation of lower federal courts that would displace state courts. Katz, supra note 2, at 1053-54. Katz writes that the justices wanted to "strengthen the public's confidence in the federal government and, in particular, the federal judiciary." Id. at 1053.

n46. Bourguignon, supra note 33, at 679.

n47. Holt, supra note 2, at 308. See Robert J. Lukens, Note, Jared Ingersoll's Rejection of Appointment as one of the "Midnight Judges" of 1801: Foolhardy or Farsighted?, 70 Temp. L. Rev. 189, 196 (1997) (noting that the Federalists favored a more uniform and powerful central government).

n48. William H. Rehnquist, The Changing Role of the Supreme Court, *14 Fla. St. U. L. Rev. 1, 2 (1986)*.

n49. Id.

n50. Id.

n51. Geyth & Van Tassel, supra note 24, at 59.

n52. Id.

n53. Edward A. Hartnett, Questioning Certiorari: Some Reflections Seventy-five Years After the Judges' Bill, *100 Colum. L. Rev. 1643, 1649 (2000)*.

n54. Id.

n55. Schwartz, supra note 24, at 29.

n56. While the federal courts under the Judiciary Act of 1789 had the power to issue a writ of certiorari, they were not empowered to use certiorari to assert jurisdiction in a case. Judiciary Act of 1789, ch. 20, 14, 1 Stat. 73. Rather, they were to use certiorari "as an auxiliary process only, to supply imperfections in the record of a case already before it ... ." *Am. Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co., 148 U.S. 372, 380 (1893)*. This kind of certiorari did not provide the Supreme Court with discretionary control over its docket. Hartnett, supra note 53, at 1650. See James E. Pfander, Jurisdiction Stripping and the Supreme Court's Power to Supervise Inferior Courts, *78 Tex. L. Rev. 1433, 1510 (2000)* (noting that "Congress refrained from conferring any freestanding powers to issue writs of certiorari ... in the Judiciary Act of 1789").

n57. See Judiciary Act of 1789, ch. 20, 1 Stat. 73 (making no provision to address this concern). Contrary to this practice a district court judge when sitting on a circuit court could not vote on an appeal from his own decision. See id. 4. See also John P. Frank, Justice Daniel Dissenting: A Biography of Peter V. Daniel, 1784-1860, at 143 (1964) (remarking that circuit riding was an "odd system ... insofar as it permitted appeals from the circuit court to the Supreme Court, it permitted appeals from, among other, Barbour to Barbour"); David M. O'Brien, Storm Center: The Supreme Court in American Politics 138 (4th ed. 1990) (reflecting that circuit riding was "not merely burdensome; it also diminished the Court's prestige, for a decision by a justice on circuit [court] could afterward be reversed by the whole Court"). See generally Daniel J. Meltzer, The Judiciary's Bicentennial, *56 U. Chi. L. Rev. 423, 424 (1989)* (remarking that the structure of the original court system was flawed in conception).

n58. Section 11 of the first Judiciary Act authorized the circuit courts to have "appellate jurisdiction from the district courts," and provided for concurrent jurisdiction between the district courts and circuit courts in "all suits of a civil nature at common law or in equity... ." Judiciary Act of 1789, ch. 20, 11, 1 Stat. 73.

n59. See id. For a description of the jurisdiction of the circuit courts, see 2 DHSC, supra note 3, at 2. The Judiciary Act granted the circuit courts original jurisdiction, concurrent with the state courts, over all civil suits at law or equity in which the value of the matter in dispute exceeded five hundred dollars and one of the following conditions was met: the United States was a plaintiff or petitioner; one of the parties was an alien; or the suit was between citizens of different states. See id. The Act also conferred removal jurisdiction: an alien or non-citizen defendant sued in state court could remove the case to circuit court if the amount in controversy exceeded five hundred dollars. See id. A similar removal procedure applied to land disputes between citizens of the same state if one citizen claimed under a grant from a different state. See id. The circuit courts also had exclusive jurisdiction over major federal crimes and concurrent jurisdiction with the district courts over lesser federal crimes. See id. In addition, the circuit courts had jurisdiction over appeals from the district court in admiralty cases where the amount in controversy exceeded three hundred dollars and in civil actions where it exceeded fifty dollars. See id. See also G. Edward White, The Working Life of the Marshall Court, 1815-1835, *70 Va. L. Rev. 1, 7 (1984)* (describing the jurisdiction of the circuit courts and district courts).

n60. See Wythe Holt, "To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts, *1989 Duke L.J. 1421, 1505* (describing how this situation came about). When the original Act was being debated, "Senator McClay wrote in his diary that it "was agreed to' that "the Effect of this determination ... would prevent, the Circuit Judge, from sitting in the Supreme Court on an appeal When he had given original Judgt.'" Id. However this restriction does not appear in the final act. See id. See also Charles Warren, New Light on this History of the Federal Judiciary Act of 1789, *37 Harv. L. Rev. 49, 55 (1923)* (stating that the two written motions contained in the record to amend the act in this way were both marked failed).

n61. David P. Currie, The Constitution in the Supreme Court: The First Hundred Years, 1789-1888, at 76 n.88 (1985).

n62. 1 Albert J. Beveridge, The Life of John Marshall 55-57 (1916).

n63. Gerard N. Magliocca, Preemptive Opinions: The Secret History of Worcester v. Georgia and Dred Scott, *63 U. Pitt. L. Rev. 487, 554 (2002).*

n64. See Sandra Day O'Connor, The Majesty of the Law: Reflections of a Supreme Court Justice 18 (Craig Joyce ed., 2003) (remarking that "because of circuit riding, it was common in the past to appoint to the Court a person from the circuit in which the vacancy occurred").

n65. Magliocca, supra note 63, at 555.

n66. Id.

n67. The Court was comprised of *Chief Justice John Jay and Associate Justices John Blair Jr., William Cushing, John Rutledge, and James Wilson. Casto, supra* note 28, at 54. James Iredell was appointed a half a year later to take the place of Robert H. Harrison who had declined his appointment. Id. Upon the nomination of the first justices of the Court Senator Ralph Izard wrote that the proposed justices "are chosen from among the most eminent and distinguished characters in America, and I do not believe that any Judiciary in the world is better filled." Letter from Ralph Izard to Edward Rutledge (Sept. 26, 1789), reprinted in 1 The Documentary History of the Supreme Court, 1789-1800: Communications on Appointments and Proceeding 668-69 (Maeva Marcus & James R. Perry eds., 1985) [hereinafter 1 DHSC]. For an overview of the first justices of the Supreme Court, see generally Seriatim: The Supreme Court Before John Marshall (Scott Douglas Gerber ed., 1998).

n68. The inaugural session of the Court was held in New York, which was then the seat of the federal government. Robert L. Wagman, the Supreme Court: A Citizen's Guide 41 (1993).

n69. Only Chief Justice John Jay, Justices James Wilson and William Cushing were present at that first meeting. As a result, the Court adjourned until February 2, when Justice John Blair arrived. Comm'n on the Bicentennial, supra note 20, at 11.

n70. The court had two terms per year; one that began on the first Monday in February and one that began on the first Monday in August. Judiciary Act of 1789, ch. 20, 1, 1 Stat. 73.

n71. See Schwartz, supra note 24, at 18 (noting that the early Court had a "lack of business"). See also Letter from Abraham Baldwin to Joel Barlow (Apr. 7, 1790), reprinted in 1 DHSC, supra note 67, at 706 (Baldwin wrote of the Court "there is little business but to organize themselves and let folks look on and see they are ready to work at them ..."); Comm'n on the Bicentennial, supra note 20, at 11 (explaining that with no cases on the docket the Justices spent the first session attending to administrative duties such as the appointment of the Court Clerk, the adoption of Rules of Court, and the admission of attorneys to the Supreme Court Bar); Patricia C. Acheson, The Supreme Court: America's Judicial Heritage 33 (1966) (remarking that "when sitting on the Supreme Court, the Justices were not overly burdened by work ..."); Katz, supra note 2, at 1047 (noting that the Federalist Court decided less than a hundred cases during its tenure; it sat for no longer than thirty-seven days in its February Term and nineteen days in its August Term); William Rehnquist, Remarks of October 6, 2000, *43 Wm. & Mary L. Rev. 1549, 1550 (2000).* The current Chief Justice remarks:

During the first decade of the new republic, the Supreme Court got off to a very slow start. It decided a total of sixty cases in this ten-year year period - not sixty cases per year, but about six per year, because there was so little business to do. The Justices met in the national capital for only a few weeks each year. They spent the rest of their time riding circuit and sitting as trial judges in the respective circuits - from Portsmouth, New Hampshire to Savannah, Georgia.

Id.

n72. Letter from James Iredell to Thomas Iredell (March 8, 1790), reprinted in 1 DHSC, supra note 67, at 700. See Philip B. Kurland & Dennis J. Hutchinson, The Business of the Supreme Court, O.T. 1982, *50 U. Chi. L. Rev 628, 629 (1983)* (stating that "even when the Supreme Court dockets were sparse, circuit riding was a chore, a danger to life and limb if not a challenge to intellectual capacity").

n73. See Katz, supra note 2, at 1047 (noting that "the justices of the 1790s spent most of their time fulfilling their obligations by presiding over the federal circuit courts and comparatively little time sitting on the Supreme Court"). See also Comm'n on the Bicentennial, supra note 20, at 12 (remarking that "the Justices' circuit riding duties as federal trial and appellate judges were for many years more burdensome than their work on the Supreme Court"); Fred Rodell, Nine Men: A Political History of the Supreme Court from 1790 to 1955, at 52 (1955) (stating that most of the Supreme Court's work in the first decade "was performed by the Justices, not as a six-man team at the top of the judicial heap but in pairs or singly as they ran the show in a lower technical echelon of the federal judiciary").

n74. Holt, supra note 2, at 308.

n75. Id.

n76. Id.

n77. Id. See Letter from James Iredell to Hannah Iredell (May 10, 1790), reprinted in 2 DHSC, supra note 3, at 65. Justice Iredell complained to his wife on his first circuit tour of the Southern Circuit that "I scarcely thought there had been so much barren land in all America as I have passed through." Id.

n78. Holt, supra note 2, at 308. See Letter from James Iredell to Timothy Pickering (June 16, 1798), reprinted in 3 The Documentary History of the Supreme Court of the United States, 1789-1800: The Justices on Circuit: 1795-1700, at 278 (Maeva Marcus ed., 1990) [hereinafter 3 DHSC]. On a Southern Circuit assignment Iredell "unfortunately was prevented [from] reaching Savannah by one of the greatest floods of rain ever known in this State ... all the bridges almost being broke up in every direction ... I made every effort in my power, and I was nearly drowned in the attempt." Id. But see Whichard, supra note 30, at 215-23 (describing Iredell's positive circuit riding experiences).

n79. Holt, supra note 2, at 308. See 2 DHSC, supra note 3, at 3 (describing the justices' accommodations). During their travels the justices occasionally stayed with friends or individuals who had been recommended to them. See id. However, the justices sometimes felt compelled to decline private lodging because they did not want to raise questions about their impartiality. See Letter from John Jay to Edward Rutledge (Nov. 16, 1789), reprinted in 2 DHSC, supra note 3, at 10. Responding to Rutledge's invitation of October 31, 1789 to stay with him when in Charleston, Jay declined for reasons which "will occur to you without details." He continued, "I am inclined to think some general rule on this subject would be prudent - as yet I have not considered it maturely." Id. The Supreme Court never promulgated a rule on the subject. Commonly the justices stayed at a tavern or some other public accommodation where the crowded and uncomfortable conditions, coupled with the noise from the tavern below, did not allow them to relax after an exhausting journey. See 2 DHSC, supra note 3, at 3. See also letter of John Langdon to John Jay (Apr. 16, 1790), reprinted in 2 DHSC, supra note 3, at 47. After Jay declined to stay with Langdon in Portsmouth, Langdon wrote "but if you have absolutely determined to put up at a Publick house, give me leave to Recommend Co. William Brewster's of that Town as one of the Best." Id. It was neither unusual to share a room with strangers - Justice Cushing once slept with twelve fellow lodgers in a room - nor, as Justice Iredell discovered one night, to encounter unexpectedly "a bed fellow of the wrong sort." 2 DHSC, supra note 3, at 3.

n80. See Letter from Samuel Chase to James Iredell (Mar. 18, 1797), reprinted in 3 DHSC, supra note 78, at 154-55. Chase wrote:

I intend to embark from this City [Baltimore], about the first of next Month for Savannah, which will allow 20 days for the Passage; will this be time enough, or will less be sufficient? I have been advised to come from Savannah to Charles Town, by Water. What is your Opinion? I take a Carriage with Me to Savannah, and, as at present advised, I propose to bring it with Me, by Water, to Charles Town; if I come by land I must purchase Horses at Savannah, which would [you] advise? ... I fear the Journey, and am anxious for Information.

Id.

n81. Holt, supra note 2, at 309.

n82. See Atkinson, supra note 31, at 11. Several of the justices became ill before they reached age sixty-five. Id. Justice Iredell died at age forty-eight, exhausted from circuit riding. Additionally, Justice Blair resigned from the court at age sixty-four because he suffered from chronic headaches believed to have been brought on by circuit riding. Id. at 16-21.

n83. 2 DHSC, supra note 3, at 3.

n84. Holt, supra note 2, at 308-09.

n85. See Letter from George Washington to the Chief Justice and Associate Justices of the Supreme Court (Apr. 3, 1790), reprinted in 2 DHSC, supra note 3, at 21.

n86. Id.

n87. Neal Kumar Katyal, Judges as Advicegivers, *50 Stan. L. Rev. 1709, 1728 (1998).*

n88. Id.

n89. See Schwartz, supra note 24, at 30 (characterizing circuit riding duty as the "great albatross of the early Supreme Court"). See also Jane Shaffer Elsmere, Justice Samuel Chase 73 (1980) (noting that "it quickly became evident that serious flaws marred the effectiveness of the circuit court system, and the judges concluded that it was unsatisfactory from the standpoint of themselves, the litigants, and the public interest").

n90. John A. Ferejohn & Larry A. Kramer, Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint, *77 N.Y.U. L. Rev. 962, 1006 (2002).*

n91. Stewart Jay, Most Humble Servants: The Advisory Role of Early Judges 103 (1997).

n92. Id. at 161.

n93. Holt, supra note 2, at 311.

n94. 1 Julius Goebel, Jr., History of the Supreme Court of the United States: Antecedents and Beginnings to 1801, at 554 (Paul A. Freund gen. ed., 1971).

n95. Jay, supra note 91, at 104. Jay wrote a draft and circulated it among the justices. Id.

n96. See Letter (Draft) from the Justices of the Supreme Court to George Washington (c. Sept. 13, 1790), reprinted in 2 DHSC, supra note 3, at 89-91. See also Letter from John Blair to John Jay (Aug. 5, 1790), reprinted in 2 DHSC, supra note 3, at 83-84. Blair wrote that "the circuit system may not be perfectly consistent with the spirit of the Constitution... ." Id. at 84. The letter contains the first known expression of constitutional arguments against circuit riding. Geyth & Van Tassel, supra note 24, at 67. These arguments were adopted by Jay a month later in his letter to Congress. Id.

n97. Letter (Draft) from the Justices of the Supreme Court to George Washington (c. Sept. 13, 1790), reprinted in 2 DHSC, supra note 3, at 89-91. See Akhil Reed Amar, Marbury, Section 13 and the Original Jurisdiction of the Supreme Court, *56 U. Chi. L. Rev. 443, 469 (1989)* (stating that "after the Constitution's adoption, both Chief Justice Jay and Justice Chase premised their challenges to the constitutionality of circuit riding on the (to them) seemingly self-evident proposition that the original jurisdiction of the Supreme Court could not be expanded").

n98. Letter (Draft) from the Chief Justices and Associate Justices of the Supreme Court to George Washington (c. Sept. 13, 1790), reprinted in 2 DHSC, supra note 3, at 89-91.

n99. Id.

n100. Id. at 90.

n101. Id. at 89-91.

n102. Jay, supra note 91, at 104.

n103. Holt supra note 2, at 310. See, e.g., Letter from James Madison to Samuel Johnson (July 31, 1789), reprinted in 4 DHSC, supra note 32, at 491 (Referring to the Act, Representative Madison wrote: "It is pregnant with difficulties ..." and "the most that can be said in its favor is that it is the first essay, and in practice will be surely an experiment."); Elbridge Gerry, Debate in the House of Representatives, in Gazette of the United States (Sept. 17, 1789), reprinted in 4 DHSC, supra note 32, at 512 (Representative Gerry proposed an amendment in the House to limit the duration of the Act, "as it is acknowledged the bill is an experiment"); Letter from Pierce Butler to Archibald Maclaine (Mar. 3, 1790), quoted in Holt, supra note 2, at 310 n.33 (Senator Butler wrote that "it is generally agreed in Congress that the judiciary must undergo alterations").

n104. H.R. Res., 1st Cong., (Aug. 5, 1790), reprinted in 3 Documentary History of the First Federal Congress of the United states of America 1789-1791, at 550 (L. DePauw et al. eds., 1977).

n105. See Holt, supra note 2, at 316 (saying that it is unclear whether Randolph consulted the justices in preparing the report).

n106. See Edmund Randolph, Report of the Attorney-General to the House of Representatives (Dec. 31, 1790), reprinted in 4 DHSC, supra note 32, at 127-72. For commentary on the Attorney General's report, see Wythe Holt, "Federal Courts as the Asylum to Federal Interests": Randolph's Report, the Benson Amendment, and the "Original Understanding" of the Federal Judiciary, *36 Buff. L. Rev. 341 (1987).*

n107. Edmund Randolph, Report of the Attorney-General to the House of Representatives (Dec. 31, 1790), reprinted in 4 DHSC, supra note 32, at 127-72. In order to give them the time to do this, Randolph proposed to reduce the number of terms of district courts from four to two per year. However, the jurisdiction of the district courts was to be greatly increased. Id.

n108. Id. at 135. See also Charles Grove Haines, The Role of the Supreme Court in American Government and Politics 1789-1835, at 148 (1944) (stating Randolph "regarded the duties of a Supreme Court Justice so difficult and comprehensive that is was impossible to perform such dual functions").

n109. Edmund Randolph, Report of the Attorney-General to the House of Representatives (Dec. 31, 1790), reprinted in 4 DHSC, supra note 32, at 135.

n110. See Holt, supra note 2, at 319 (noting that "the loathesomeness of circuit riding made Jay and the other justices at times optimistically certain that the legislature would at last adopt a "radical' reform, the adjective used by some Federalists to describe the changes in the federal judiciary they desired").

n111. See Letter from George Washington to Thomas Johnson (Aug. 7, 1791), reprinted in 1 DHSC, supra note 67, at 76.

n112. Id. Federalist Congressman William Smith hoped that Congress would "in this Session abolish the system of making the Judges of the Supreme Court ride the Circuits throughout the Union... ." Letter from William Smith to Edward Rutledge (Feb. 13, 1792), reprinted in 1 DHSC, supra note 67, at 732.

n113. See Holt, supra note 2, at 316, 327 (describing the fate of Randolph's report); see also The National Gazette, Dec. 11, 1792, reprinted in 4 DHSC, supra note 32, at 587 (stating that "this elegant piece of refinement and obscurity, the report of the Secretary of Law, was immediately consigned to oblivion; and the great object of the administration of justice, and the reputation of the National Government were equally forgotten and neglected").

n114. This desperation is evidenced by the Justice Iredell's salary reduction proposal. See infra text accompanying notes 115-28.

n115. Letter from James Iredell to John Jay (Mar. 15, 1792). This letter has been lost. Goebel, supra note 94, at 559. What we know about the Proposal comes from Jay's reply of March 19, 1792. Letter from John Jay to James Iredell (Mar. 19, 1792), enclosed in Letter from John Jay to William Cushing (March 19, 1792), reprinted in 2 DHSC, supra note 3, 248-49.

n116. The Compensation Act, ch. 18, 1 Stat. 72 (1789).

n117. Id.

n118. See Goebel, supra note 94, at 559 n.29 (stating that the justices were not reimbursed for their travel).

n119. Id. at 559. Whether the monetary concession was meant to induce the appointment of Circuit judges or just for partial relief is not known. Id. Goebel assumes that the $ 500 figure represents the amount of money that the justices laid out in traveling expenses. Id. Any reduction in salary had to be voluntary because the Constitution prohibits Congress from reducing the salary of federal judges during their tenure. U.S. Const. art. III, 1.

n120. See Letter from Thomas Johnson to James Iredell (Mar. 9, 1792 ), quoted in Maeva Marcus & Emily Field Van Tassell, Judges and Legislators in the New Federal System, 1789-1800, in Judges and Legislators: Toward Institutional Comity 31, 48 (Robert A. Katzmann ed., 1988) (Justice Thomas, desperate to abolish circuit riding, urged that the Court present the plan to Congress without waiting for the views of Justices Cushing and Jay, observing that "if this Opportunity is lost we shall not have another soon so good").

n121. See Holt, supra note 2, at 329 (stating that "Cushing balked and equivocated until he could consult with Jay").

n122. See Letter from John Jay to James Iredell (Mar. 19, 1792) enclosed in Letter from John Jay to William Cushing (March 19, 1792), reprinted in 2 DHSC, supra note 3, 248-49.

n123. Id.

n124. See Letter from William Cushing to James Iredell (Mar. 26, 1792), reprinted in 2 DHSC, supra note 3, at 250 ("But if the thing can be fairly effected as the Ch. Justice has stated it, I have no objection.").

n125. Letter from John Jay to James Iredell (Mar. 19, 1792), enclosed in Letter from John Jay to William Cushing (Mar. 19, 1792), reprinted in 2 DHSC, supra note 3, at 248-49.

n126. Id. See id. (Jay wrote: "As a mere Matter of Bargain, I should think it an excellent one on our part, but not a very handsome one on theirs.").

n127. Holt, supra note 2, at 329.

n128. Whichard, supra note 30, at 180.

n129. See Judiciary Act of 1789, ch. 20, 1 Stat. 73.

n130. Jay and Cushing had been allocated the Eastern Circuit, Blair and Wilson the Middle Circuit, and Iredell and Rutledge that Southern Circuit. See Holt, supra note 2, at 311.

n131. Letter from James Iredell to John Jay, William Cushing, and James Wilson (Feb. 11, 1791), reprinted in 2 DHSC, supra note 3, at 131.

n132. In August of 1790, Iredell requested that circuit assignment be rotated amongst the justices, or if rotation was undesirable that any permanent assignment be accomplished by lot. Holt, supra note 2, at 311. In February of 1791, Iredell wrote a letter to Justices Jay, Cushing and Blair stating his arguments in favor of rotation. Letter from James Iredell to John Jay, William Cushing, and James Wilson (Feb. 11, 1791), reprinted in 2 DHSC, supra note 3, at 131. In February of 1792, meeting of the justices, Iredell again urged reform. See Holt, supra note 2, at 328.

n133. In February of 1791 Jay wrote to Iredell: "An adequate remedy can in my opinion be afforded only by legislative provisions." Letter from John Jay to James Iredell (Feb. 12, 1791), reprinted in 2 DHSC, supra note 3, at 135-36. Justice Cushing would not support Iredell's rotation proposal and wrote: "Whenever the majority shall determine on a rotation I shall endeavor to do my duty as well as I can. But I think the inconvenience to citizens by delay of causes likely to be occasioned by such a mode of procedure is not easily got over." Letter from William Cushing to James Iredell (Feb. 13, 1791), reprinted in 2 DHSC, supra note 3, at 137-38.

n134. Johnston was an influential Senator who was effective in congressional politicking, especially with regard to judicial matters. See Holt, supra note 2, at 330.

n135. See S. Journal, 413 (1792) (the Senate was to "bring in a clause to establish such rotation in the attendance of the judges at the circuit courts as may best apportion the burthen").

n136. 3 Annals of Cong. 549 (1792).

n137. 3 Annals of Cong. 120-21 (1792).

n138. Judiciary Act of 1792, ch. 21, 1 Stat. 252. See Jay, supra note 91, at 110 ("This measure might have been styled the "James Iredell Relief Act' in that it resulted from his indignant complaint over being assigned permanently the Southern Circuit.").

n139. Holt, supra note 2, at 330.

n140. Judiciary Act of 1792, ch. 21, 3, 1 Stat. 252. Iredell was riding the Southern Circuit for the third time when he learned that the law had been passed. Whichard, supra note 30, at 181. Delighted, he received letters of congratulations from his friends and family. Id. See, e.g., Letter from William R. Davie to James Iredell (Mar. 25, 1792), reprinted in 2 DHSC, supra note 3, at 278-80 ("I congratulate you on the interposition of Congress in your behalf against the tyranny and injustice of your brothers on the bench; but this will prevent your attending the S Circuit oftener than once in two years, and of course of seeing your Southern friends."); Letter from John Haywood to James Iredell

(June 18, 1792), reprinted in 2 DHSC, supra note 3, at 281 ("I am glad ... that Congress have at length provided, that the fatigue of attending the Courts most distant from the Seat of Government shall be shared by the Judges in rotation"); Letter from Arthur Iredell to James Iredell (July 31, 1792), reprinted in 2 DHSC, supra note 3, at 287-88 (The Justice's brother wrote: "How came the Justice of the Country to be so unequally distributed? - It seems strange that one Judge should be able to evade his Duty at the Expense of another Pains.").

n141. Judiciary Act of 1792, ch 21, 3, 1 Stat. 252.

n142. Holt, supra note 2, at 330.

n143. The term "Federalist Court" is used to refer the court before the appointment of John Marshall. This is unusual terminology considering that, starting with John Marshall in 1801 the court has always been identified by the name of the chief justice. Katz, supra note 2, at 1047 n.4.

n144. Goebel, supra note 94, at 560.

n145. The Pension Act, ch. 10, 1 Stat. 243 (1792).

n146. Id. The ruling could be reviewed by the secretary of war who could modify or deny any pension award. Id.

n147. Goebel, supra note 94, at 560. See Letter from James Iredell to Hannah Iredell (Oct. 4, 1792), reprinted in 2 DHSC, supra note 3, at 304 ("The Invalid-business has scarcely allowed me one moment's time, and now I am engaged in it by candle-light, though to go at three in the morning.").

n148. Peter Irons, A People's History of the Supreme Court 91 (1999). Contra 2 DHSC, supra note 3, at xxv (noting that the circuit judges heard "a number of significant cases").

n149. *2 U.S. (2 Dall.) 409 (1792)*. For a thorough analysis of Hayburn's Case, see generally Susan Low Bloch, The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There was Pragmatism, *1989 Duke L.J. 561, 590-619*.

n150. Irons, supra note 148, at 91.

n151. Bloch, supra note149, at 591. See Geyth & Van Tassel, supra note 24, at 71 (noting that "it seems, then, that the judges resisted the Invalid Act as a matter of constitutional principle, rather than self-interest").

n152. *2 Dall. 409 (1792)*.

n153. Id. (noting "the refusal of the judges to carry [the Pension Act] into effect"). In fact, the justices and district judge refused even after even after Attorney General Randolph urged them to take off their judicial robes and decide the claim as commissioners deputized by him. Irons, supra note 148, at 91.

n154. Ruling of the United States Circuit Court for the District of Pennsylvania (Apr. 11, 1792), reprinted in 6 The Documentary History of the Supreme Court, 1789-1800: Cases 1789-1795, at 49 (Maeva Marcus ed., 1998) [hereinafter 6 DHSC]. Additionally, claims were refused consideration in other circuits. See Extract from the Minutes of the United States Circuit Court for the District of South Carolina (Oct. 26, 1972), reprinted in 6 DHSC, supra note 154, at 70 (Justice Johnson and District Judge Bee wrote: "This court cannot constitutionally take Cognixance of and determine on the said Petitions and papers, they were ordered to be entered and filed with the Records of this court and no further proceeding be had thereon."); Extract from the Minutes of the United States Circuit Court for the District of New York (April 5, 1792), reprinted in 6 DHSC, supra note 154, at 370-72 (Chief Justice Jay, Justice Cushing and District Judge Duane wrote: That neither the Legislative nor the executive branch can constitutionally assign to the judicial any duties but such as are properly judicial, and to be performed in a judicial manner"). See generally Max Farrand, First Hayburn Case, 1792, 13 Am. Hist. Rev. 281 (1908).

n155. See Letter from Justices Wilson & Blair and District Judge Peters to George Washington (Apr. 18, 1792), reprinted in 6 DHSC, supra note 154, at 53-54.

n156. Id. They also wrote:

1. Because the business directed by this act is not of judicial nature: it forms no part of the power vested by the Constitution, in the Courts of the United States. The Circuit Court must, consequently have proceeded without constitutional authority. 2. Because, if, upon that business the Court had proceeded, its judgments - for its opinions are

its judgments - might, under the same Act, have been revised and controuled by the Legislature and by an Officer in the Executive Department. Such revision and controul we deemed radically inconsistent with the Independence of that judicial power, which is vested in the courts, and, consequently, with that important principle which is so strictly observed by the Constitution of the United States.

Id. See also Letter from James Iredell and John Sitgreaves to George Washington (June 8, 1792), reprinted in 6 DHSC, supra note 154, at 284-88 (Justice Iredell and District Judge Sitgreaves wrote that courts cannot exercise any "power not in its nature Judicial, or, if Judicial, not provided for upon the terms the Constitution requires"); Letter from John Jay, William Cushing, and James Duane to George Washington (Apr. 10, 1792), reprinted in 6 DHSC, supra note 154, at 371 (Chief Justice Jay, Justice Cushing and District Judge Duane wrote: "We could not, in our opinion, convey the enclosed extracts from the minutes of the Circuit Court ... to the Congress of the United States in so respectful and proper a manner as thro' the President, we ... request the favor of you to communicate them to that Honorable Body.").

n157. Letter from Justices Wilson, Blair and District Judge Peters to George Washington (Apr. 18, 1792), reprinted in 6 DHSC, supra note 154, at 53-54.

n158. Id. Hayburn's Case paved the way for the Court as an institution to exercise judicial review over acts of Congress. Irons, supra note 148, at 92. The following year, Congress changed the statute and eliminated the justices' pension duty. Semonche, supra note 38, at 46.

n159. See Geyth & Van Tassel, supra note 24, at 71 (stating that "in spite of the judges' efforts to be conciliatory and soften the blow of their decisions, their action was greeted with dismay by many, particularly Federalists").

n160. See Letter from the Chief Justice and the Associate Justices of the Supreme Court to George Washington (Aug. 9, 1792), reprinted in 2 DHSC, supra note 3, at 228.

n161. Id. The justices wrote to Washington because of his "connection with the Legislature, and the consideration that application from us to them, cannot be made in any manner so respectful to Government as through the President." Id. See Maeva Marcus, The Separation of Powers in the Early National Period, *30 Wm. & Mary L. Rev. 269, 274-75 (1989)* (noting that this routing of requests through the President was routine).

n162. Letter from the Chief Justice and the Associate Justices of the Supreme Court to George Washington (Aug. 9, 1792), reprinted in 2 DHSC, supra note 3, at 228-29.

n163. Letter from the Chief Justice and the Associate Justices of the Supreme Court to Congress of the United States (Aug. 8, 1792), reprinted in 2 DHSC, supra note 3, at 289-90. See Jay, supra note 91, at 104 (noting that Washington delivered the letter).

n164. See letter (Draft) from the Chief Justice and the Associate Justices of the Supreme Court to George Washington (c. Sept. 13, 1790), reprinted in 2 DHSC, supra note 3, at 89-91. See Geyth & Van Tassel, supra note 24, at 66-67. Professors Geyth and Van Tassell hypothesize that:

In spite of very real concerns about the circuit system on those [constitutional] grounds, the judges very soon ceased pressing such concerns with Congress, because of the fear that their position would be dismissed as stemming solely from interests of personal comfort and perhaps because their first experience with challenging congressional administration of the judiciary on constitutional grounds raised such ire in Congress.

Id.

n165. Letter from the Chief Justice and the Associate Justices of the Supreme Court to Congress of the United States (Aug. 8, 1792), reprinted in 2 DHSC, supra note 3, at 289-90.

n166. Id.

n167. Letter from John Jay to William Cushing (Jan. 9, 1793), reprinted in 2 DHSC, supra note 3, at 343-44.

n168. Letter from William Cushing to William Paterson (Mar. 5, 1793), reprinted in 2 DHSC, supra note 3, at 345.

n169. Judiciary Act of 1793, ch. 22, 1 Stat. 333. See Goebel, supra note 94, at 567 (calling the Judiciary Act of 1793 "but half loaf and a meager one at that"); Acheson, supra note 71, at 34 (saying that with the Judiciary Act of 1793

Congress "half-heartedly responded" to the justices' complaints); Gribbin, supra note 5, at 361 (characterizing the Judiciary Act as "more symbolic than effective").

n170. Judiciary Act of 1793, ch. 22, 1, 1 Stat. 333. However, the Supreme Court had discretion to assign two members when circumstances required the attendance of two justices. Id. 1.

n171. Id.

n172. Letter from Chief Justice Jay and Associate Justices Cushing, Wilson, Blair, and Paterson to Congress of the United States (Feb. 18, 1794), reprinted in 2 DHSC, supra note 3, at 443.

n173. Id. See Holt, supra note 2, at 337 (describing the problems of the Judiciary Act of 1793).

n174. Judiciary Act of 1793, ch. 22, 1, 1 Stat. 333.

n175. Goebel, supra note 94, at 567.

n176. Act of June 8, 1794, ch. 64, 1 Stat. at 369.

n177. Judiciary Act of 1793, ch. 22, 1, 1 Stat. 333. However, the same power was not given to a district court judge sitting alone on circuit. Id.

n178. Letter from Chief Justice Jay and Associate Justices Cushing, Wilson, Blair, and Paterson to Congress of the United States (Feb. 18, 1794), reprinted in 2 DHSC, supra note 3, at 443.

n179. Id. See Geyth & Van Tassel, supra note 24, at 76 (remarking that "it may be that the intensity of congressional reaction to the Invalid Pension decisions counseled prudence on the part of the Justices in overtly seeking radical change in the system, especially on constitutional grounds").

n180. Letter from Chief Justice Jay and Associate Justices Cushing, Wilson, Blair, & Paterson to Congress of the United States (Feb. 18, 1794), reprinted in 2 DHSC, supra note 3, at 443. This argument was in all likelihood raised because Justice Iredell was absent from the February 1794 session of the Supreme Court. See 1 DHSC, supra note 67, at 214, 219 n.4.

n181. Judiciary Act of 1789, ch. 20, 22, 1 Stat. 73.

n182. Jay, supra note 91, at 104. See Holt supra note 2, at 339 (stating that by 1794 the justices were "whistling in the wind").

n183. 2 DHSC, supra note 3, at 498 n.4. See Letter from James Iredell to James Wilson (Nov. 24, 1794), reprinted in 2 DHSC, supra note 3, at 497-98.

n184. 2 DHSC, supra note 3, at 498 n.4.

n185. Id.

n186. Letter from James Iredell to James Wilson (Nov. 24, 1794), reprinted in 2 DHSC, supra note 3, at 497-98.

n187. 3 DHSC, supra note 78, at 92 n.1.

n188. See Letter from Samuel Johnson to James Iredell (Feb. 27, 1796), reprinted in 3 DHSC, supra note 78, at 92. Iredell was so excited about the prospect for reform that he devised his own reform proposal entitled, "Alternations Proposed in the Judicial System." See James Iredell's "Alternations Proposed to the Judicial System," reprinted in 3 DHSC, supra note 78, at 97-99.

n189. See Letter from Samuel Johnson to James Iredell (Feb. 27, 1796), reprinted in 3 DHSC, supra note 78, at 92 (Johnston wrote: "The expense can be the only objection to the plan, which in so important a business should not be an object.").

n190. 3 DHSC, supra note 78, at 92 n.1.

n191. Letter from James Iredell to Hannah Iredell (Mar. 31, 1796), reprinted in 3 DHSC, supra note 78, at 101.

n192. Circuit Court Act of 1797, ch. 27, 1 Stat. 517.

n193. See Letter from Samuel Chase to James Iredell (Mar. 12, 1797), reprinted in 3 DHSC, supra note 78, at 156 (stating that Congress had altered the Southern and Eastern Circuits "as We proposed").

n194. The prior sequence of riding circuit was New Jersey, Pennsylvania, Maryland, Virginia, and Delaware. 3 DHSC, supra note 78, at 151. This was inconvenient to the justices who lived in the South because, after starting in the North and traveling south, they had to travel north again to cover the Delaware circuit. Id. Instead, the justices proposed changing the date of the Delaware circuit court from June (after Virginia) to April (after Pennsylvania). Id. They also wanted all of the circuit court session held in Wilmington, instead of alternately between New Castle and Dover. Id.

n195. Whichard, supra note 30, at 186.

n196. See Letter from Samuel Chase to James Iredell (Mar. 12, 1797), reprinted in 3 DHSC, supra note 78, at 154-55 (Chase wrote that the situation was "certainly objectionable, & very inconvenient to Me, and most Oppressive on You, without any possible benefit to the public.").

n197. See Letter from the Justices of the Supreme Court to John Adams (Aug. 15, 1797), reprinted in 3 DHSC, supra note 78, at 220-21.

n198. See Letter from the Justices of the Supreme Court to Gunning Bedford (Aug. 15, 1797), reprinted in 3 DHSC, supra note 78, at 221-22.

n199. 3 DHSC, supra note 78, at 151. The petition to change the date of the Delaware court session was killed by the Senate and the House refused to relocate the Delaware court from New Castle to Wilmington. Id.

n200. Whichard, supra note 30, at 187.

n201. Letter from the Oliver Ellsworth to William Cushing (Apr. 15, 1798), reprinted in 3 DHSC, supra note 78, at 251.

n202. See 7 Annals of Cong. 545 (1798).

n203. Id.

n204. Judiciary Act of 1801, ch. 4, 2 Stat. 89 (repealed 1802).

n205. Emily Field Van Tassel, Resignations and Removals: A History of Federal Judicial Service and Disservice - 1789-1992, *142 U. Pa. L. Rev. 333, 346 (1993).*

n206. See Letter from Robert H. Harrison to George Washington (Oct. 27, 1789), reprinted in 1 DHSC, supra note 67, at 36-37. After being confirmed by the Senate, Harrison declined his appointment. He wrote:

In the most favourable view of the Subject it appeared, that the duties required from a Judge of the Supreme Court would be extremely difficult & burthensome, even to a Man of the most active comprehensive mind; and vigorous frame. I conceived this would be the case, if he should reside at the Seat of Government; and, in any other view of my residence I apprehended, that as a Judge sollicitous to discharge my trust, I must hazard, in an eminent degree, the loss of my health, and sacrifice a very large portion of my private and domestic happiness.

Id. Harrison was aware that the Supreme Court Justices would have to ride circuit and was weary of the prospect. Washington replied:

I find that one of the reasons, which induced you to decline the appointment, rests on an idea that the Judicial Act will remain unaltered. But in respect to that circumstance, I may suggest to you, that such a change in the system is contemplated, and deemed expedient by many in, as well as out of Congress, as would permit you to pay as much attention to your private affairs as your present station does.

Letter from George Washington to Robert H. Harrison (Nov. 25, 1789), reprinted in 1 DHSC, supra note 67, at 40. However, Harrison still declined the appointment. Notwithstanding the Judiciary Act of 1793, the reform that Washington predicted never came.

n207. Justice John Rutledge resigned in 1791 without ever having sat on the court; although he did participate in circuit court duties, however, briefly. He went on to accept the chief justiceship of the South Carolina Supreme Court, a position he considered more prestigious. In 1795, President Washington, in a recess appointment, appointed Rutledge Chief Justice; however, the Senate ultimately rejected him. Atkinson, supra note 31, at 13. Justice Thomas Johnson resigned in 1793 because he was forced to ride the southern circuit. In a letter to George Washington Justice Johnson

said that riding circuit was "excessively fatiguing," and "I cannot resolve to spend six Months in the Year of the few I may have left from my Family, on Roads at Taverns chiefly and often in Situations where the most moderate Desires are disappointed: My Time of Life Temper and other Circumstances forbid it." Letter from Thomas Johnson to George Washington (Jan 16, 1793), reprinted in 1 DHSC, supra note 67, at 80. In 1795, Johnson declined Washington's offer to be Secretary of State; however, he did accept a presidential appointment to the commission charged with the planning of the new capital. Atkinson, supra note 31, at 15. True to his vow to refuse all public offices, he also refused President Adams's offer to be the first Chief Judge of the District of Columbia Circuit. Susan Low Bloch & Ruth Bader Ginsburg, Celebrating the 200th Anniversary of the Federal Courts of the District of Columbia, *204 Geo. L.J. 549 (2002)*. Chief Justice John Jay resigned in 1795 to become the Governor of New York and because of his lack of interest in the limited responsibilities of the Court. See Atkinson, supra note 31, at 12. Justice John Blair resigned in 1796 because of poor health brought about by circuit riding. Id. at 16. See Ward, supra note 39, at 25 (remarking that "rather than face hazardous, life-threatening journeys, the first Supreme Court justices chose to resign their seats and preserve their health").

n208. 11 Annals of Cong. 38 (1802).

n209. Letter from Egbert Benson to Rufus King (Dec. 18, 1793), reprinted in 1 DHSC, supra note 67, at 742 (reporting a conversation with Jay as to why the Chief Justice had agreed to compete in the New York gubernatorial election of 1792).

n210. Id.

n211. Jay, supra note 91, at 161.

n212. See Letter from Egbert Benson to Rufus King (Dec. 18, 1793), reprinted in 1 DHSC, supra note 67, at 742.

n213. See Letter from John Jay to Rufus King (Dec. 22, 1793), reprinted in 2 DHSC, supra note 3, at 434 (Jay wrote: "I can conceive of no Reason for continuing to send the Sup. Court Judges to preside in [the circuit courts], of equal weight with the Objections which oppose that measure... .").

n214. Letter from Egbert Benson to Rufus King (Dec. 18, 1793), reprinted in 1 DHSC, supra note 67, at 742.

n215. Atkinson, supra note 31, at 12.

n216. Kathleen Sullivan & Gerald Gunther, Constitutional Law B-1 (14th ed. 2001).

n217. Rutledge accepted a recess appointment, served on the Court during its August term, and rode his circuit. Acheson, supra note 71, at 35. However, when the Senate convened in December of 1795, his nomination was rejected. Id.

n218. Upon Rutledge's rejection, Ellsworth was appointed and confirmed. Poor health forced him to resign in 1800. Id. See Brown, supra note 38, at 244-47 (1970) (discussing Ellsworth on circuit and remarking, "from his training and temper, he found the duties of a nisi prius judge particularly congenial, and discharged them with distinguished success").

n219. Van Tassel, supra note 205, at 346.

n220. Letter from John Jay to John Adams (Jan. 2, 1801), reprinted in 1 DHSC, supra note 67, at 147. Jay also reminded the President that he had "left the bench perfectly convinced" that a judicial system "so defective" could never "obtain the Energy, weight and Dignity which are essential to its affording due support to the national Government, nor acquire the public Confidence and Respect, which, as the last Resort of the Justice of the nation, it should possess." Id.

n221. Van Tassel, supra note 205, at 346. See Acheson, supra note 71, at 34 (remarking that "it is interesting to note that Jay's resignation had an important indirect influence on United States' history").

n222. Van Tassel, supra note 205, at 347.

n223. Judiciary Act of 1801, ch. 4, 2 Stat. 89 (repealed 1802). See generally Thomas I. Vanaskie, The Independence and Responsibility of the Federal Judiciary, *46 Vill. L. Rev. 745, 754-56 (2001)* (giving a brief summary of the events surrounding the Judiciary Act of 1801 and its subsequent repeal).

n224. 1 Warren, supra note 31, at 185-93. The Act was not however simply a response to the justices' workload. It was a product of a long and bitter dispute between the Federalists, who had selected those who embraced the Federalists

constitutional and political ideals to be the first federal judges, and the Jeffersonian Republicans, who feared the Federalist judges would import into American courts English common law doctrine that was incompatible with republicanism. Id. at 185. See Elsmere, supra note 44, at 141 (remarking that "historians have termed it [the Judiciary Act of 1801] an admirable and justifiable reform").

n225. Judiciary Act of 1801, ch. 4, 6-7, 2 Stat. 89 (repealed 1802). See David P. Currie, The Constitution in Congress: The Most Endangered Branch, 1801-1805, *33 Wake Forest L. Rev. 219, 222 (1998)* (stating that the Judiciary Act of 1801 "also sensibly extended the jurisdiction of the circuit courts, as the Constitution permitted, to all cases arising under the Constitution, treaties, or federal law - thus affording for the first time a comprehensive federal forum in the first instance to ensure vindication of federal rights").

n226. Judiciary Act of 1801, ch. 4, 6-7, 2 Stat. 89 (repealed 1802). Three Circuit Judges were to sit together on each of the five Circuit Courts, and one for the Sixth Circuit (covering Tennessee, Kentucky, and Ohio) was to sit as the Circuit Court with the District Judges for Tennessee, Kentucky, and Ohio in turn. Id.

n227. Johnny C. Burris, Some Preliminary Thoughts on a Contextual Historical Theory for the Legitimacy of Judicial Review, *12 Okla. City U. L. Rev. 585, 661 (1987).*

n228. 2 George L. Haskins & Herbert A. Johnson, History of the Supreme Court of the United States: Foundations of Power: John Marshall 1801-1815, at 13 (Paul A. Freund gen. ed., 1981). The Act was also characterized as a blatant court-packing plan. See Geyth & Van Tassel, supra note 24, at 78 (noting that the Act "was the culmination of years of attempts to put the judiciary on a sounder footing within the constitutional structure, but it was also the first partisan court-packing plan ..."). See also James Leonard & Joanne C. Brant, The Half-Open Door: Article III, The Injury-In-Fact Rule, and The Framers' Plan For Federal Courts of Limited Jurisdiction, *54 Rutgers L. Rev. 1, 84 (2002)* (remarking that "although the Act had enlightened features, such as the abolition of circuit riding by Supreme Court Justices, its provisions for increasing the number of federal judges were clearly intended to permit Adams to stack the courts with Federalist judges who could obstruct Republican initiatives"); W.A. Sutherland, Politics and the Supreme Court, *48 Am. L. Rev. 394 (1914)* (describing the Judiciary Act of 1801 as a "pure case of political intrigue, of a defeated party striving to retain some semblance of power by interesting itself in the Judiciary"); Merrill D. Peterson, Thomas Jefferson and the New Nation: A Biography 631 (1970) (noting that Adams' last minute appointments demonstrated "a blatantly partisan measure, in part to make the judiciary a fortress against the rising Republicanism of the nation"). According to Peterson:

On March 3[, 1801] the Senate was in session late into the night confirming a last batch of nominations, and Adams spent his final hours in the executive chair hurriedly signing nocturnal commissions. The indecency of the proceeding capped two crowded months of Federalist office-packing. What was this for unless to stack the card against the new regime.

Id. at 668.

n229. The Republican newspaper The Aurora said of the Bill:

One of the most expensive and extravagant, the most insidious and unnecessary schemes that has been conceived by the Federal party is now before Congress under the name of the Judiciary Bill, but which might with greater propriety be called a bill for providing sinecure places and pensions for thoroughgoing Federal partisans.

1 Warren, supra note 31, at 187.

n230. Id. See Elsmere, supra note 44, at 141 (remarking that "one feature of the act which the Old Republicans found especially unacceptable was its strengthening of federal power at the expense of state sovereignty").

n231. See 1 Warren, supra note 31, at 188 (describing the anti-Federalist's reaction to the fact that before he left office, President Adams was able to nominate Federalists to fill the new judgeships).

n232. Id.

n233. Id. Of the sixteen Circuit Judges, six were promoted from the position of District Judge, and to the vacant District Judgeships thereby created; three Senators and one Representative were named. Two Representatives also were appointed as District Attorneys in place of two officials who were appointed as Judges. Id. at 188 n.1.

n234. Id. at 188. A common Republican comment at the time was that "Mr. Adams is laying the foundation of future faction and his own shame." Id.

n235. See id. at 189. The feature of the statute that reduced the number of justices on the Supreme Court from six to five thereby providing that when the next vacancy occurred it should not be filled - was regarded by President-elect Jefferson as a personal insult, an intentional diminution of his powers and an attempt to keep the Supreme Court wholly Federalist. Id. Justice Cushing was old and in extremely bad health, and he was expected to resign within a short time; yet, Jefferson would not be able to appoint his successor. Id. But see Haskins & Johnson, supra note 228, at 113 (stating that "the intemperate and misguided charges that the primary purpose of the Act of 1801 was to afford an opportunity to pack the judiciary with Federalists judges, as well as to increase their numbers, have one hopes been answered").

n236. They were convinced that since the Federalists lost the election they were making a last ditch effort to retain power over the judicial branch. For proof they could quote a Federalist authority as boasting "[The Circuit Court Act] is as good to the party as an election." 1 Warren, supra note 31, at 193. See Vanaskie, supra note 223, at 755 (noting the Republicans in Congress "asserted that it had the same right to repeal the law establishing inferior courts that it had to repeal the law establishing post offices or the levying of taxes").

n237. 1 Warren, supra note 31, at 193.

n238. Haskins & Johnson, supra note 228, at 162.

n239. 1 Warren, supra note 31, at 31.

n240. See Thomas Jefferson, First Annual Message - December 8, 1801, reprinted in The Life and Selected Writings of Thomas Jefferson 301, 305 (Adrienne Koch & William Peden eds., 1993). This message included data on the amount of judicial decision-making undertaken by the federal courts during the previous decade. Jefferson argued that there was no need to expand the federal judiciary because the state courts were dealing with most pending cases. See id. He said that he wanted Congress to "be able to judge of the proportion which the institution bears to the business it has to perform... ." See id. See also Peterson, supra note 228, at 696 (noting that Jefferson's data on the court business "showed clearly that the dockets were not so crowded as to warrant an expensive addition to the system"); Noble E. Cunningham, Jr., The Life of Thomas Jefferson 248-49 (1987) (contending that in "supplying information on the workload of the federal courts, showing that the expanded court system was unnecessary, [Jefferson] provided the most effective argument used to justify repeal of the measure, though the data were hastily prepared and inaccurate"). Cf. 33 Annals of Cong. 126-27 (1819) (statement of Sen. Smith), quoted in *Baker, supra* note 2, at 6. Years later, Senator William Smith of South Carolina turned one of John Marshall's own achievements against the notion that the justices should be relieved of their circuit riding duties. Smith said:

That there was no great pressure of business, given by the judges themselves. One of them had turned historian, and had written the history of his country in five large volumes, which would be redound to his imperishable honor, and the unspeakable advantage of his countrymen. It now adorned the library of every man of science ... surely then, the honorable judge could not have been oppressed by the duties of his office, or he could never have found the time to have written so elegant and voluminous a work.

Id. Smith was referring to the biography of George Washington that John Marshall had written. *Baker, supra* note 2, at 6. The biography upset the Republicans because it presented a Federalist view of America's development. Id.

n241. See, e.g., 11 Annals of Cong. 63 (1802). Senator Stevens Mason of Virginia argued that the Supreme Court Justices, with only ten suits on their docket, would have little to occupy their time without circuit riding duties. See id. He cautioned that if the justices were permanently relieved of their circuit riding duties, they might engage in mischief in areas in which they should not be engaged. See id.

n242. See Burris, supra note 227, at 621. The Republicans contended that the abolition of inferior federal courts was within the powers granted to Congress because it had the power to create inferior federal courts. See id. They read the Constitution as placing no limitation on the exercise of the power of Congress to create or abolish federal courts. See id.

n243. Haines, supra note 108, at 237.

n244. U.S. Const. art. III, 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

n245. Currie, supra note 225, at 225.

n246. Haskins & Johnson, supra note 228, at 163-64.

n247. Haines, supra note 108, at 237.

n248. Id.

n249. The Repeal Act, ch. 8, 2 Stat. 132 (1802) (repealed 1911).

n250. See 11 Annals of Cong. 183 (1802).

n251. See id. at 982 (1802).

n252. The Repeal Act, ch. 8, 2 Stat. 132 (1802) (repealed 1911). The Republicans were exalted, and exclaimed in the National Intelligencer: "Judges created for political purposes, and for the worst of purposes under a republican government, for the purposes of opposing the National will, from this day cease to exist." 1 Warren, supra note 31, at 209-10. On the other hand the Federalists were extremely pessimistic: "By this vote the Constitution has received a wound it cannot long survive. The Jacobins exult; the Federalists mourn; our country will weap, perhaps bleed." Id. Founding father and Federalist Alexander Hamilton wrote to Charles Pinckney that the repeal was a "vital blow to the Constitution." Letter from Alexander Hamilton to Charles Pinckney (Mar. 15, 1802), quoted in Haskins & Johnson, supra note 228, at 166. Pinckney responded that the Repeal was to be expected from "persons who have always been hostile to the Constitution ... a work whose adoption they opposed, and whose execution they have constantly counteracted." Letter from Charles Pinckney to Alexander Hamilton (May 5, 1802), quoted in Haskins & Johnson, supra note 228, at 166.

n253. The Repeal Act, ch. 8, 4, 2 Stat. 132 (1802) (repealed 1911). See Currie, supra note 225, at 235 (stating that "whatever the rights of the judges, nothing in Article III precluded Congress from transferring a case from one tribunal to another").

n254. The Repeal Act, ch. 8, 1, 2 Stat. 132 (1802) (repealed 1911). Supporters of the Repeal Act tried to refute the charges that the judges would be overworked. A contemporary pamphleteer wrote:

To decide upon the ability of the judges to perform the service, let us consider the labours of one judge - judge Cushing for instance. The law requires of him to hold annually, in conjunction with the district judges, two sessions of a circuit court in each of the states of N. Hampshire, Massachusetts and Rhode Island. Ten Days may fairly be computed the full length of a session. The courts will then require sixty days. His travel in going to and returning from those courts cannot exceed 480 miles, which allowing one day for each 20 miles amounts to 24 days more. A session of the supreme court will not require more than 21 days. His residence does not exceed 480 miles distance from the seat of government. At the above moderate rate of traveling, there must be added 48 days more, making the whole time while on expense and in public service, 153 days, or a little over five months, for which he receives $ 3,500 in each year.

Plain Truth, psued., and Algernon Sidney, A View and Vindication of the Measures of the Present Administration 11-2 (1802), quoted in Elsmere, supra note 44, at 144-45. See Elsmere, supra note 44, at 145 (remarking that "to the men who did hard manual labor all year long for a fraction of the amount received by the judges, the latters' working conditions and salaries must have seemed quite satisfactory").

n255. Judiciary Act of 1802, ch.31, 2 Stat. 156.

n256. Id. 4. The six circuits consisted of: First Circuit - Massachusetts, New Hampshire, and Rhode Island; Second Circuit - New York, Vermont, and Connecticut; Third Circuit - New Jersey and Pennsylvania; Fourth Circuit - Maryland and Delaware; Fifth Circuit - Virginia and North Carolina; Six Circuit - South Carolina and Georgia. Id. The districts of Maine, Kentucky, and Tennessee were excluded from the circuit system. Id.

n257. Id. See Jean E. Smith, John Marshall: Definer of a Nation 306 (1996) (noting that years later, speaking for the Court in U.S. v. Daniel, Marshall stated explicitly that the Act of 1802 was a "great improvement of the pre-existing system," *19 U.S. (6 Wheat.) 542, 547 (1821)).*

n258. See Letter from James Bayard to Richard Bassett (Mar. 8, 1801), quoted in Haskins & Johnson, supra note 228, at 165. Bayard wrote:

Notwithstanding the Party adhered together they were much shaken. They openly cursed the measure, if it had been possible for them to recede, they would have joyfully relinquished the project. But they had gone too far, & were obliged to go through. I have no doubt it was the most ruinous step they could have taken and such are the accounts we have from the Southard.

Id.

n259. See Haskins & Johnson, supra note 228, at 167 (noting that "there was still more to come, for the Republicans were not yet finished with the judiciary").

n260. 1 Warren, supra note 31, at 222.

n261. Id. See Haskins & Johnson, supra note 228, at 168 (nothing another equally important reason for keeping the court adjourned: the legislation also postponed the Court's decision in Marbury v. Madison, which was likely to be decided in the June term if the court was in session).

n262. 1 Warren, supra note 31, at 222. Republican James Monroe thought that this postponement was a bad idea. Letter from James Monroe to Thomas Jefferson (1802), quoted in Dumas Malone, Jefferson the President: First Term, 1801-1805, at 132 (1970). Monroe wrote to President Jefferson, "If the repeal was right, we should not shrink from the discussion in any course which the Constitution authorizes, or take any step which argues a distrust of what is done or apprehension of the consequences." Id. He added that the Act may be "considered an unconstitutional oppression of the Judiciary by the Legislature, adopted to carry a proceeding measure which was also unconstitutional." Id.

As expected, Federalist leaders were in an uproar. One asked, "may it not lead to the virtual abolition of a Court, the existence of which is required by the Constitution? If the functions of the Court can be extended by law for fourteen months, what time will arrest us before we arrive at ten or twenty years?" 1 Warren, supra note 31, at 223. The Federalist press agreed and circulated reports that the "abolition of the Supreme Court [would] soon follow." Donald O. Dewey, Marshall versus Jefferson: The Political Background of Marbury v. Madison 69 (1970).

For a positive aspect of the plan, see *Smith, supra* note 257, at 306 (noting that the Court would convene every February for four weeks rather than hold two separate two week terms and this would in turn minimize the travel requirements of the justices, especially for Justice William Cushing who came from New England and Justice Alfred Moore who traveled from lower North Carolina).

n263. 11 Annals of Cong. 1229 (1802). Before the bill had passed the House, Bayard wrote to Alexander Hamilton:

You have seen the patchwork offered to us as a new judicial system. The whole is destined to cover one object, which the party consider it necessary to accomplish - the postponement of the next session of the Supreme Court to Feby following. They mean to give to the repealing act its full effect, before the Judges of the Supreme Court are allowed to assemble. Have you thought of the steps which our Party ought to pursue on this subject. There will be a meeting to concert a uniform plan of acting or acquiescing before Congress adjourns, to be recommended in the matter which shall be thought advisable.

Letter from James Bayard to Alexander Hamilton (Apr. 12, 1802), quoted in Haskins & Johnson, supra note 228, at 168-69.

n264. 11 Annals of Cong. 1229 (1802).

n265. See id. 1229 (1802). Representative Nicholson said:

My being, therefore, in favor of postponing the session until February, does not arise from any design which I entertain to prevent the exercise of power by the judges. But we have as good a right to suppose gentlemen on the other side are as anxious for a session in June, that this power may be exercised, as they have to suppose we wish to avoid it, to prevent the exercise.

Id.

n266. Id. at 1235.

n267. Id. at 257.

n268. Id. at 1236.

n269. See Act of April 29, 1802, ch. 31, 2 Stat. 156 (repealing the December/June schedule predicated on the Judiciary Act of 1801).

n270. 1 Warren, supra note 3, at 222. See William H. Rehnquist, The Supreme Court 28 (2001) (describing the Act of April 29, 1802 as being "enacted with ill-disguised hostility toward the Supreme Court"); Jed Handelsman Shugerman, Marbury and Judicial Deference: The Shadow of Whittington v. Polk and the Maryland Judiciary Battle, *5 U. Pa. J. Const. L. 58, 64 (2002)* (remarking that the Republicans "rammed" the Act of April 29, 1802 through Congress).

n271. See Currie, supra note 225, at 234 (stating of the postponement that "within broad bounds of reason, setting judicial terms, like setting the number of Justices, is necessary and proper to the operation of the courts, and thus within congressional power").

n272. Ferejohn & Kramer, supra note 90, at 996.

n273. See *Smith, supra* note 257, at 305 (saying that "Marshall took the repeal calmly and he appears to have considered Congress's actions inevitable").

n274. See Haskins & Johnson, supra note 228, at 169 (explaining that the "primary question" was whether "so long as doubts existed as to the constitutionality of the Acts and before they had been passed upon" the justices should perform their circuit duties). See also R. Kent Newmyer, John Marshall as an American Original: Some Thoughts on Personality and Judicial Statesmanship, *71 U. Colo. L. Rev. 1365, 1379 (2000)* (discussing Marshall's dilemma).

n275. Newmyer, supra note 274, at 1380.

n276. Id.

n277. Since the June session of the Court had been abolished, Marshall was prevented from considering the question en banc so he resulted to written communication.

n278. See, e.g., Letter from John Marshall to William Paterson (Apr. 19, 1802), reprinted in 6 The Papers of John Marshall 108 (Charles E. Hobson ed., 1990) [hereinafter 6 John Marshall Papers].

n279. Dean Alfange, Jr., Marbury v. Madison and Original Understanding of Judicial Review: In Defense of Traditional Wisdom, *1993 Sup. Ct. Rev. 329, 361.*

n280. U.S. Const. art. III, 1.

n281. Letter from John Marshall to William Paterson (Apr. 19, 1802), reprinted in 6 *John Marshall Papers, supra* note 278, at 108. Marshall reflected, "I hope I need not say that no man in existence respects more than I do those who passed the original law concerning the Court of the United States, and those who first acted under it." Id.

n282. Id.

n283. See Letter from John Marshall to William Cushing (Apr. 19, 1802), reprinted in 6 *John Marshall Papers, supra* note 278, at 108 (Marshall wrote: "For myself I more than doubt the constitutionality of this measure and of performing circuit duty without a commission as a circuit Judge."). Of this letter, Haskins and Johnson wrote:

In other words, under the 1801 Act, circuit commissions were expressly authorized for the new circuit judges, but neither of the two 1802 Acts had expressly authorized the Supreme Court judges to resume riding circuit: if they had

such authority it must be under the March Act, which nullified the 1801 Acts and therefore, by implication, reauthorized the judges to ride circuit.

Haskins & Johnson, supra note 228, at 170.

n284. See Letter from John Marshall to William Paterson (Apr. 5, 1802), reprinted in 6 *John Marshall Papers, supra* note 278, at 106 (Marshall remarked: "I cannot however regret the loss of the next June term. I could have wished the Judges had convened before they proceeded to execute the new system."). It seems as though Marshall had shared his opinion with Federalist leaders in late March 1802. One Congressman who visited Marshall reported "that the firmness of the Supreme Court may be depended upon should the business be brought before 'em." Letter from John Rutledge to James A. Bayard (Mar. 26, 1802), quoted in Shugerman, supra note 270, at 77.

n285. See David. E. Engdahl, John Marshall's "Jeffersonian" Concept of Judicial Review, *42 Duke L.J. 279, 329 n.167 (1992)* (remarking that Marshall's letters were deferential in tone, and after reflection he readily acquiesced in the majority's opinion - which differed from his own). Cf. Charles F. Hobson, Editing Marshall, *33 J. Marshall L. Rev. 823, 847 (2000)* (stating that "in this first test of his Chief Justiceship, [Marshall] revealed at the outset those qualities of leadership that characterized his judicial tenure: his openness to argument and persuasion and his willingness to subordinate his own views of necessary to obtain a single opinion of the Court - characteristics that were no less essential to effective leadership than was his formidable intellect"); Newmyer, supra note 274, at 1380 (saying of Marshall's leadership: "Here is subtle leadership at its most subtle. Indeed, Marshall put into play all of those personal qualities of patience, sensitivity, and humility which contemporaries attributed to him.").

n286. Geyth & Van Tassel, supra note 24, at 81.

n287. Letter from John Marshall to William Paterson (Apr. 19, 1802), reprinted in 6 *John Marshall Papers, supra* note 278, at 108, 109.

n288. For Washington's views, see Letter from John Marshall to William Paterson (May 3, 1802), reprinted in 6 *John Marshall Papers, supra* note 278, at 117-18. For Paterson's views, see Letter from Hannah Cushing to Abigail Adams (June 25, 1802), reprinted in 6 *John Marshall Papers, supra* note 278, at 118 n.6, in which Hannah Cushing incorporates a portion of Paterson's letter to John Marshall, a copy of which was sent to Justice Cushing (the original letter to Marshall has not been found). For Cushing's views, see Letter from William Paterson to John Marshall (June 11 & 18, 1802), cited in 6 *John Marshall Papers, supra* note 278, at 118 n.6. Cf. Jack Knight & Lee Epstein, On the Struggle for Judicial Supremacy, *30 Law & Soc'y Rev. 87, 97 (1996)* (stating that "the associate justices (except Chase) thought the consequence too grave if they did not sit").

n289. See Letter from Hannah Cushing to Abigail Adams (June 25, 1802), reprinted in 6 *John Marshall Papers, supra* note 278, at 118 n.6, in which Hannah Cushing incorporates a portion of Paterson's letter to John Marshall, a copy of which was sent to Justice Cushing (the original letter to Marshall has not been found) (Justice Paterson said "if open for discussion, it would merit serious consideration; but the practical exposition is too old and strong & obstinate to be shaken or controlled"). See also Letter from William Cushing to William Paterson (May 29, 1802), quoted in Haskins & Johnson, supra note 228, at 177 (Justice Cushing wrote "as the case is - to be consistent, I think with you, we must abide by the old practice").

n290. See Letter from Samuel Chase to John Marshall (Apr. 24, 1802), reprinted in 6 *John Marshall Papers, supra* note 278, at 109-13.

n291. Id.

n292. Letter from Samuel Chase to William Paterson (Apr. 6, 1802), in William Paterson Papers (on file in the MSS Room (Lenox), New York Public Library). Chase wrote: "I will only say, if the office of the Circuit Judge is full, and it is so if not taken away by the repealing act, We are to be made the instruments to destroy the independence of the Judiciary." Id.

n293. See Letter from Samuel Chase to John Marshall (Apr. 24, 1802), reprinted in 6 *John Marshall Papers, supra* note 278, at 109-13, 110 (Chase wrote: "I have no doubt, that the Circuit Judges cannot, directly, or indirectly, be deprived of their Offices, or Commissions, or Salaries, during their lives; unless only on impeachment for, and conviction of, high crimes and Misdemeanors, as prescribed by the Constitution."). Joseph Story, although not yet a member of the court, was of the same opinion. See 3 Joseph Story, Commentaries on the Constitution of the United

States 494-95 (1833) (arguing that the repeal "prostrates in the dust the independence of all inferior judges ... and leaves the constitution a miserable and vain delusion").

n294. Letter from Samuel Chase to John Marshall (Apr. 24, 1802), reprinted in 6 *John Marshall Papers, supra* note 278, at 109-13, 110-11. See Amar, supra note 97, at 468 (stating that Justice Chase [and Chief Justice Jay] premised his challenge to the constitutionality of circuit riding "on the (to them) seemingly self-evident proposition that the original jurisdiction of the Supreme Court could not be expanded"). See also Pfander, supra note 27, at 1576 (viewing Chase's letter as an account of the Court's "limited original jurisdiction that emphasized the importance of providing convenient alternative tribunals for the benefit of the citizen").

n295. Letter from Samuel Chase to John Marshall (April 24, 1802), reprinted in 6 *John Marshall Papers, supra* note 278, at 109-13, 110.

n296. Id.

n297. Letter from John Marshall to William Paterson (May 3, 1802), reprinted in 6 *John Marshall Papers, supra* note 278, at 117.

n298. Newmyer, supra note 274, at 1382. But see Wythe Holt, "If the Courts have firmness enough to render the decision:" Egbert Benson and the Protest of the "Midnight Judges" Against the Repeal of the Judiciary Act of 1801, in Wythe Holt & David A. Nourse, Egbert Benson: The First Chief Judge of the Second Circuit (1801-1802), at 9, 16-17 (2d Cir. Bicentennial Comm., 1987) (Holt contends that "Marshall, Paterson, and the others acted not primarily out of loyalty to their institution ... but out of fear for their own reputations, and fear of the ravages of open warfare, perhaps entailing bloodletting").

n299. Shugerman, supra note 270, at 79.

n300. Meanwhile, eleven of the displaced circuit judges submitted a petition to Congress pointing out their Constitutional entitlement to serve during good behavior and asking for continued compensation and the assignment of appropriate duties. See 12 Annals of Cong. 30-32 (1803). Having already repealed the law the Republicans in Congress stated that the Article III entitled judges to salary only during their "continuance in office," U.S. Const. Art. III, 1. See 12 Annals of Cong. 432 (1803) (statement of Rep. Randolph); id. at 438 (statement of Rep. Eustis). The petitions were denied. See 12 Annals of Cong. 78 (1803) (vote of the Senate); id. at 440 (vote of the House). See generally Haskins & Johnson, supra note 228, at 177-80 (describing the judges' petition).

n301. Haskins & Johnson, supra note 228, at 177.

n302. Holt, supra note 298, at 16-17. Arguments were presented at the fall meetings of the First Circuit in Massachusetts, the Second Circuit in Connecticut, the Third Circuit in New Jersey, and the Fourth Circuit in Maryland and Virginia. Id.

n303. Id. at 17.

n304. Id. Jeffersonian newspapers noticed the Federalist's lack of success and argued that the appearance of a Supreme Court Justice and a district judge in a circuit court confirmed the constitutionality of the Repeal Act. Id.

n305. Id.

n306. *Stuart v. Laird, 5 U.S. (1 Cranch) 299, 300 (1803).*

n307. *Id. at 303.*

n308. *Id. at 308.*

n309. *Id. at 299.*

n310. *5 U.S. (1 Cranch) 137 (1803).*

n311. *Stuart, 5 U.S. (1 Cranch) at 308-09 (1803).* See 1 Warren, supra note 31, at 272. Warren wrote:

No more striking example of the non-partisanship of the American Judiciary can be found than this decision by a Court composed wholly of Federalists, upholding, contrary to its own personal and political views, a detested Republican

measure; and the case well justified the comment made by William Rawle in his View of the Constitution in 1825, that it illustrated the fortunate truth that in this Republic "party taint seldom contaminated judicial functions."

Id. But see Alfange, supra note 279, at 363-64. Reflecting on Warren's analysis Alfange wrote:

No more striking example of silliness can be found in commentary on the American judiciary than this statement. Stuart v. Laird was manifestly not an example of nonpartisan fairness, but of a craven unwillingness on the part of the Court even to admit the existence of the principle constitutional issue in the case [the summary removal of Article III judges]... . The Court acted out of a fully justified fear of the political consequences of doing otherwise, not out of an overriding compulsion to reach the correct legal result whatever sacrifice of their own political preferences."

Id.

n312. David P. Currie, The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1835, *49 U. Chi. L. Rev. 646, 662-63 (1982)*. See Shugerman, supra note 270, at 59-60 n.5 (characterizing Stuart v. Laird as "of greater political significance than Marbury" because "control over life-tenured federal courts was far more important than a few minor offices as justice of the peace").

n313. See Alfange, supra note 279, at 363-64 (explaining that the Court "refused to deviate from its insistence upon dealing with the question of the constitutionality of repeal only in terms of whether the Supreme Court Justices could be assigned duties as circuit judges ... even though the author of its opinion had earlier categorically written that he believed that law to be invalid for precisely the reasons that he here chose not even to mention"). Later justices were to assume that Article III judges could not be discharged by abolishing their courts. Currie, supra note 312, at 662 n.108.

n314. These arguments are clearly laid out in Currie, supra note 312, at 662-66. The author relies on this summary to present them here.

n315. *Stuart, 5 U.S. (1 Cranch) at 305-06* (Mr. Lee).

n316. U.S. Const. art. II, 2.

n317. *Stuart, 5 U.S. (1 Cranch) at 305* (Mr. Lee).

n318. *Id. at 305* (Mr. Lee).

n319. *Id. at 309*. Justice Chase did not file a dissent. See Letter from Hannah Cushing to Abigail Adams (June 25, 1802), reprinted in 6 *John Marshall Papers, supra* note 278, at 118 n.6, in which Hannah Cushing incorporates a portion of Paterson's letter to John Marshall, a copy of which was sent to Justice Cushing (the original letter to Marshall has not been found). This letter foreshadows Paterson's opinion in Stuart v. Laird. See id. Paterson wrote: "On the Constitutional right of the Judges of the Supreme Court to sit as circuit judges ... Practice has fixed construction, which is too late to disturb." Id. See also Geyth & Van Tassel, supra note 24, at 84 ("Paterson's views on the constitutional question may well have been foreordained; he was, after all, on the Senate committee that drafted the Judiciary Act of 1789; and indeed, the first nine articles of the original draft of that Act were in his handwriting, including section 4 that created the circuit system.").

n320. See Pfander, supra note 27, at 1591 (saying that the court in Stuart accepted imposition of circuit riding because it had been a previously accepted practice). However, Currie also comments that the Court's acquiescence had been less than absolute because the justices had repeatedly asked Congress and the President for relief from circuit duty. Currie, supra note 312, at 665. See also Semonche, supra note 38, at 62 ("Paterson certainly could not have been unaware that from the very beginning the justices had questioned the constitutionality of their being both circuit and Supreme Court judges."); Geyth & Van Tassel, supra note 24, at 70 (remarking that "Justice Paterson rewrote the history of the first decade of the judicial branch and elevated the politically expedient acquiescence in circuit riding to the level of constitutional construction").

n321. Michael J. Klarman, How Great were the "Great" Marshall Court Decisions?, *87 Va. L. Rev. 1111 (2001)*. See Alfange, supra note 279, at 364 (saying that the Court "acted out of a fully justified fear of the political consequences of doing otherwise"); Semonche, supra note 38, at 62 (remarking that the "decision the Court reached avoided another political battle that the Court could not win").

n322. William E. Nelson, The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence, *76 Mich. L. Rev. 893, 942 (1976).*

n323. See Ferejohn & Kramer, supra note 90, at 996 (characterizing Stuart v. Laird as a "meek submission to this congressional mugging"); Shugerman, supra note 270, at 59-60 n.5 (remarking that Stuart v. Laird "established a stronger text and context of judicial weakness"). However, Justice Chase and other justices had said that legislation was not to be declared unconstitutional except in "clear" cases. See *Calder v. Bull, 3 U.S. (3 Dall.) 386, 395 (1798)* (Chase, J.); *id. at 399* (Iredell, J.).

n324. White, supra note 59, at 9. See *Baker supra* note 2, at 63. Baker recounts a story in which John Marshall was traveling from his home in Richmond to the Circuit Court in Raleigh, North Carolina. Id. He traveled by stick gig - a wooden chair supported on two wheels and two shafts and pulled by a single horse. Id. Marshall was an elderly man at this time and he often napped as the horse pulled him along. Id. On one occasion the gig ran over a sapling and tilted. Id. Marshall was wakened by the jolt and himself sitting at a strange angle, unable to move either to the left or right. Id. He was rescued by an elderly black man who came along and suggested the obvious: that the Chief Justice stop trying to move either to the left or right, but instead, back up the gig. Id. As Marshall rode away, the rescuer is supposed to have described him as "a nice old gentleman who wasn't not too bright." Id.

n325. From 1780 until 1819, the salary of the Chief Justice was $ 4000 and the other justices were paid $ 3500. Act of Sept. 23, 1789, ch. 18, 1 Stat. 72. After 1819, Chief Justice Marshall received $ 5000 in salary, and the other justices earned $ 4500. Act of Feb. 20, 1819, ch. 27, 3 Stat. 484. By comparison, prominent lawyers such as Daniel Webster earned as much as $ 17,000-$ 20,000 a year during the same time period. See White, supra note 59, at 9 n.33.

n326. See White, supra note 59, at 6.

n327. There were six circuit courts before 1807 and seven thereafter to the end of Marshall's tenure. Id. at 7.

n328. White, supra note 59, at 9. See Haskins & Johnson, supra note 228, at 114 (noting "the almost unbearable hardships of circuit riding, which were caused in part by the scarce and primitive transportation facilities in underdeveloped portions of the country, continued to result in accidents, delays, and fatigue").

n329. See R. Kent Newmyer, Supreme Court Justice Joseph Story 317-18 (1985) (characterizing the First Circuit as "the most pleasant in the U. States" and one of the "richest in lawmaking potential").

n330. White, supra note 59, at 8.

n331. Id. He then traveled to Portland or Wiscasset, Maine; then to Portsmouth or Exeter, New Hampshire. Id.

n332. Id. Even when they were not holding court the justices could not completely "relinquish their judicial burdens." Id. at 9. Justice Story mentioned in an 1823 letter that there were "many important cases ... upon which I am obliged to spend a great deal of time in vacation." Letter from Joseph Story to John Bailey (Dec. 8, 1823), quoted in White, supra note 59, at 9.

n333. White, supra note 59, at 9. Justice Story was able to periodically return home to Salem, Massachusetts, where he lived until September 1829, when he moved to Cambridge to assume the Dane Professorship at Harvard Law School. Id. The very fact that Story accepted the Dane Professorship suggests that he anticipated being able to be in Cambridge for a good portion of the academic year, notwithstanding his circuit duties. Id. See generally R. Kent Newmyer, Justice Joseph Story on Circuit and a Neglected Phase of American Legal History, *14 Am. J. Legal Hist. 112 (1970)* (giving a detailed discussion of Justice Story's circuit riding experiences).

n334. See Frank Otto Gatell, John McKinley, in 1 Justices of the United States Supreme Court 1789-1969, at 773 (L. Friedman & F. Israel eds., 1969) (recounting that before he began his service on the court, McKinley stated his new position was going to be "certainly the most onerous and laborious of any in the United States"). See also Atkinson, supra note 31, at 35-36. Riding the exhausting southern circuit occupied most of Justice McKinley's time. See id. at 35. Indeed, during his time on the court (1837-1852), he wrote only nineteen majority opinions, four dissents, and two concurrences. See id. at 36. Riding circuit also took a toll on McKinley's health, and in 1842 he moved to Louisville, Kentucky, a city located on the Ohio River. James L. Noles, Jr., Alabama's Forgotten Justices: John McKinley and John A. Campbell, *63 Ala. Law. 236 (2002).* Living by a river, McKinley was in a better position to take advantage of the city's water transportation as he traveled between Washington, D.C. and the court cities of his circuit. Id. Fifteen years of circuit riding contributed to his death at the age of 72. Id.

n335. 3-4 G. Edward White, History of the Supreme Court of the United States: The Marshall Court and Cultural Change, 1815-35, at 949 (Paul A. Freund & Stanley N. Katz gen. eds., 1988). Justice Thomas Todd rode the 2600 mile circuit between Ohio, Kentucky, Tennessee and Washington D.C. See Ward, supra note 39, at 50. His circuit trips made him physically exhausted and forced him to miss five Supreme Court terms during his nineteen years on the bench. Id.

n336. See 1 Warren, supra note 31, at 672 (the Western States had a population equal to that of the entire Union in 1798, but only had one Supreme Court Justice assigned to them).

n337. 33 Annuals of Cong. 126 (1819).

n338. Id. at 130. Senator Lacock used the age of many of the justices to his advantage. He said:

The judges are to be old men when appointed, and the infirmities of old age will every day increase, and as the useful and vigorous faculties of their minds diminish, in the same proportion will their obstinacy and vanity increase. Old men are often impatient of contradiction, frequently vain and susceptible of flattery. There weaknesses incident to old age will be discovered and practiced upon by the lawyer willing to make the most of his profession, and located in the same city, holding daily and familiar intercourse with the judge. And thus ... your court becomes subservient to the Washington Bar. The judges, bowed down by the weight of years, will be willing to find a staff to lean upon; and thus the opinion of the Washington Bar is make the law of the land.

Id. at 131-32.

n339. 1 Warren, supra note 31, at 676.

n340. Id.

n341. White, supra note 335, at 949.

n342. Id.

n343. Haines, supra note 108, at 504.

n344. 1 Warren, supra note 31, at 677. See 1 Joseph Story, Commentaries on the Constitution of the United States 493 (1883) (writing that the bill "gave rise to one of the most vigorous and protracted debates which we have had this winter").

n345. Buchanan said: "Next to doing justice, it is important to satisfy the People that justice has been done. This confidence on their part, in the Judiciary of their country, produces that contentment and tranquility which is the best security against sudden and dangerous political excitements." 2 Reg. Deb. 931 (1826).

n346. Id. at 931-32.

n347. Haines, supra note 108, at 506.

n348. 2 Reg. Deb. 533 (1826).

n349. See White, supra note 335, at 949 (stating that "the failure of the bill left circuit-riding intact").

n350. Not only was the majority of Congress still in favor of circuit riding, but there was also a concern amongst the opponents of President John Quincy Adams that he would be able to appoint the three new justices. Id. Additionally, a controversial amendment was added to the bill that would have required seven justices to agree on any decision invalidating a state statute or an act of Congress; this amendment hurt the bill's chance for success. Id.

n351. Haines, supra note 108, at 512-13.

n352. It was noted in Niles' Register that the Court had enough cases on its docket to occupy all the spare time of the justices for five years and that "it appears absolutely necessary that a remedy should be applied to relieve the judges of this court of some part of their present duties, else justice must be, in effect, refused by delay." 28 Niles' Register 49 (1825).

n353. Act of May 4, 1826, ch. 37, 4 Stat. 160.

n354. See letter of Joseph Story to Jeremiah Mason (Feb. 27, 1828), quoted in White, supra note 335, at 949 ("We have done a good deal of business, and shall not probably leave sixty cases behind us. This is a great victory over the old docket, and encourages me to hope much for the future course of the Court.").

n355. F. Frankfurter & J. Landis, The Business of the Supreme Court 44 (1927).

n356. Sullivan & Gunther, supra note 216, at B-2.

n357. 5 Carl B. Swisher, History of the Supreme Court of the United States: The Taney Period 1836-64, at 248 (Paul A. Freund gen. ed., 1974) [hereinafter Swisher]. See Carl B. Swisher, Roger B. Taney 353-54 (1961) [hereinafter Taney]. Swisher noted:

The judges and their friends claimed that it was unreasonable to require elderly men, after serving in the Supreme Court, to ride hundreds of miles over rough roads and through rough country to preside over local courts when they ought to be in Washington or elsewhere adding to their knowledge of law.

Id.

n358. Swisher, supra note 357, at 248.

n359. When a justice was unable to attend a circuit court, the district judge could hold a session of the court sitting alone. In 1852, a journal described the interrelations between the two sets of courts and the two sets of judges:

In each of the districts into which the United States are divided, there is a District Judge, who presides singly in the District Court, and who is associated with one of the Supreme Court Judges in holding within his district the term of the Circuit Court, which is a court of higher grade then the District Court. It often happens that the Circuit Judge is unable to hold the required terms, in which case the District Judge holds the Circuit term himself, precisely as he holds his District term. The two are distinct courts, with different calendars jury panels, &c, though it very commonly happens that the same District Judge presides singly in both, and often within five minutes is sitting, now in the one capacity and now in the other, adjourning the District and opening the Circuit Court, or vice versa, according to convenience.

The Late Cuba State Trials, 30 Democratic Rev. 307, n.1 (1852).

n360. Act of Mar. 3, 1837, ch. 34, 5 Stat. 176.

n361. Id. 1.

n362. Id.

n363. See Congressional Quarterly, Circuit Riding, in The Supreme Court A to Z: A Ready Reference Encyclopedia, supra note 2, at 73 (stating that "Congress increased the number of justices from six to nine ... largely because the circuit courts - and the justices - were overloaded").

n364. See 2 Charles Warren, The Supreme Court in United States History 40 (1926) (stating that "the crowded conditions of the inferior Federal Courts in the States of the West and Southwest had become such as to make relief absolutely necessary, and its refusal a scandalous denial of justice to those parts of the country").

n365. Alabama, Arkansas, Illinois, Indiana, Louisiana, Michigan, Mississippi, and Missouri were added to the circuit system. Act of Mar. 3, 1837, ch. 34, 1, 5 Stat. 176.

n366. Id. 4.

n367. See discussion infra Part I.

n368. *Charge to Grand Jury, 30 F. Cas. 998 (C.C.D. Md. 1836) (No.18257).* Taney's circuit duties required him to hold two terms of the circuit court in Baltimore each year, and one each in New Castle and Dover, Delaware. Taney, supra note 357, at 354. To hold court in Delaware Taney had to travel over 300 miles via stagecoach. Id. Swisher categorizes most of the cases Taney heard while riding circuit as "unimportant." Id. at 357. But see Bernard C. Steiner, Life of Roger Brooke Taney: Chief Justice of the United States Court 453 (Gaunt, Inc. 1997) (1922) (noting that the very first case which Taney heard on circuit was one in which he held constitutional the provision in the Judiciary Act

of 1789, giving the United States District Court jurisdiction over counsuls in civil cases). See generally id. at 451-87, 512-14 (describing Taney's Circuit Court decisions).

n369. See *Charge to Grand Jury, 30 F. Cas. 998 (C.C.D. Md. 1836) (No.18257).* Taney said:

It has been usual for this court, at the opening of the term, to deliver a charge to the grand jury; and you will probably expect one from me, in conformity with this practice. As I doubt much the necessity of continuing the custom, and may not hereafter adhere to it, my address to you will be brief one, and its chief object to explain why I am disposed to depart from the former practice.

Id. See Steiner, supra note 368, at 453 (mentioning that Taney's first grand jury charge was also his last).

n370. See *Charge to Grand Jury, 30 F. Cas. 998 (C.C.D. Md. 1836) (No.18257).*

n371. Id. Of Taney's change in practice, Swisher writes:

Taney was in a sense acting politically in the abnegation of a privilege which had become a tradition with his predecessors. Since it had been exercised largely by Federalists for Federalists purposes, their enemies were on record as opposing it. Taney's gesture of self-restraint was hailed as a Democratic gesture by the spokesmen of the Jackson party.

Taney, supra note 357, at 356-57. Indeed, Taney's charge met with scorn from Sen. Charles Sumner, a close friend and former law student of Justice Story. Letter from Charles Sumner to Richard Peters (Nov. 23, 1836), construed in Swisher, supra note 357, at 61. Sumner called it a "Jacobin speech." Id. He considered Taney's proclamation that the people were so well informed that they no longer needed the instruction of charges to be a demagogic proclamation. Id.

n372. See *Charge to Grand Jury, 30 F. Cas. 1026 (C.C.D. Ga. 1859)* (No. 18269a) (Justice Wayne's memorable charge dealing with the outlawing of the slave trade). See also Henry G. Connor, John Archibald Campbell: Associate Justice of the United States Supreme Court 1853-1861, at 102 (Da Capo Press 1971) (1920). In the Circuit Court of Mobile in November 1858, Justice Campbell delivered a charge to the grand jury which denounced the slave trade as piracy and urged the grand jurors to indict those who aided and abetted, directly or indirectly, those violating the anti-slave trade laws. Id. As expected, Campbell was subject to harsh criticism from citizens engaged in attempts to revive the salve trade. Id. Additionally, in 1858 in the Circuit Court of New Orleans, Campbell delivered an "elaborate charge" to the grand jury regarding the slave trade. Id. at 103. The Savannah Republican referred to the charge as "one of the ablest and most decided" and went on to herald that Campbell "has shown himself the incorruptible and fearless Judge who plainly lays down the law and calls upon his sworn co-associates to perform their whole duty in executing them to their fullest extent." Id. at 104.

n373. See Charge to Grand Jury - *Neutrality Laws, 30 F. Cas. 1018, 1020 (C.C.D. Ohio 1839) (No. 18265).* Justice McKinley favored the old practice of sermonizing and urged vigilant enforcement of the neutrality laws. See id. He charged the Grand Jury in Ohio:

I invoke, in behalf of the tribunals of justice, the moral power of society. I ask it to aid them in suppressing a combination of deluded or abandoned citizens, which imminently threatens the peace and prosperity of the country. And I have no fears, that when public attention shall be roused on this deeply important subject; when the laws are understood, and the duties of the government; and when the danger is seen, and properly appreciated, there will be an expression so potent, from an enlightened and patriotic people, as to suppress all combinations in violation of the laws, and which threaten the peace of this country.

Id. See also Connor, supra note 372, at 91 (remarking in the spring term of the Circuit Court of New Orleans, Justice Campbell charged the grand jury "at length" about the neutrality laws).

n374. Swisher, supra note 357, at 262. However, the federal courts still attracted much public attention. Id. With not much in the way of entertainment in many towns, it was a big event when a Supreme Court Justice and the district judge came to town to hold court. Id. Local citizens crowded into the court room to hear the trials of important cases. Id. See Connor, supra note 372, at 89. A member of the New Orleans Bar remarked of Justice Campbell: ""His presence [in circuit in New Orleans] attracted the attention of the public and his way of controlling and dispatching business justly

brought him the reputation of being a great judge.'" Id. The holdings of court also lead to social gatherings. Id. The judges were entertained by distinguished members of the bar and by other social and civic leaders in the community. Id. They relayed political and social news from Washington and other parts of the circuits. See Swisher, supra note 357, at 263-65 (discussing the social habits of the justices of the Taney Court). See also Francis P. Weisenburger, The Life of John McLean 185 (Da Capo Press 1970) (1937) (remarking that "in the midst of his circuit duties, [Justice] McLean was not averse to some social diversion").

n375. Swisher, supra note 357, at 249.

n376. Cong. Globe, 25th Congress., 2nd Sess. 179 (1838).

n377. Swisher, supra note 357, at 250.

n378. S. Journal, 288 (1838).

n379. Id. They also asked the Secretary to report on the "number of suits on the trial docket of each of the circuit courts of the United States, and the district courts while exercising circuit court powers, at each term thereof within the last two years next preceding the date of the information communicated to him." Id.

n380. S. Rep. No. 50 (1839), reprinted in Frankfurter & Landis, supra note 355, at 49 (formatting altered by author). See Swisher, supra note 357, at 250 (describing the justices' method of calculation). Each justice calculated their total mileage differently. See id. Chief Justice Taney got his mileage figures from the post office. See id. He gave the shortest route possible for public transportation and said that he had once traveled by a longer route. See id. Justice Story estimated his figures, and suggested that any error could be corrected by referencing the Post Office's figures. See id. Justice Wayne based his figures "upon that of the General Post Office, and upon the present stage, steamboat, and railroad route from Savannah to Washington which is the shortest." S. Rep No. 50, at 35 (1839). Justice McKinley got his large total from a very loose estimate. Swisher, supra note 357, at 251. He added to his report:

The shortest practicable route by which traveling can be performed, according to the best information I can obtain, is about six thousand five hundred miles. But upon some of the roads there are no public conveyances, and the time allowed for holding the courts would render it impossible to perform the traveling by any private mode. I have never yet been at Little Rock, the place of holding that court in Arkansas; but from the best information I can obtain, it could not be conveniently approached in the spring of the year, except by water, and by that route the distance would be greatly increased. If the courts of this circuit were properly arranged, the traveling would be diminished considerably.

S. Rep No. 50, at 39 (1839). See also White, supra note 59, at 7 n.24 (stating that the purpose of the inquiry makes the justices' estimates as to mileage somewhat suspect, especially Justice Baldwin's estimate of 2000 miles for the third circuit, which included only Pennsylvania and New Jersey and Justice McKinley's estimate of 10,000 for the ninth circuit which included Alabama, Louisiana, Mississippi, and Arkansas). An interesting comparison is afforded by the distances traveled by the justices prior to the increase from seven to nine circuits:

[SEE TABLE IN ORIGINAL]

These figures are taken from the speech of Rep. Wright in the House on January 19, 1826. 2 Reg. Deb. 1047 (1826).

n381. See Letter from Fletcher Webster to Daniel Webster (Mar. 10, 1836), quoted in Swisher, supra note 357, at 251. Daniel Webster's son reported to his father that while riding circuit Justice Story had "met with various disasters, upsets and breakdowns; but came at last in safely." Id.

n382. S. Rep No. 50, at 35 (1839), quoted in Swisher, supra note 357, at 250. See Weisenburger, supra note 374, at 180-87 (describing Justice McLean's circuit riding experiences and noting several of the more interesting cases that he heard as a circuit judge, including cases argued by Abraham Lincoln).

n383. Swisher, supra note 357, at 250.

n384. See discussion infra notes 447-49 and accompanying text.

n385. Frankfurter & Landis, supra note 355, at 27.

n386. See letter of John McKinley to Martin Van Buren (Nov. 9, 1839), quoted in Swisher, supra note 357, at 251. Justice McKinley sent President Van Buren a complaint letter emphasizing the information contained in the Senate report. See id. He said that, even if he had no other duties, a judge could not attend to the entire ninth circuit docket. See id. He questioned how he could perform his duties when New Orleans and Mobile, where two of the most important courts were held, were subject to yellow fever from late fall until the winter every year. See id. He added, "by the peculiar mode of proceeding under the laws of Louisiana it takes double the time to try a case that it would to try one, of like character, by the rules, of the common law." Id. at 253.

More than two years later, Congress had still not reformed the system. Swisher, supra note 357, at 256. Justice McKinley took the unusual step of writing a petition to the two houses of Congress setting fourth and explaining his grievances. Petition of John McKinley, Praying an alteration in the Judicial circuits of the United States, S. Doc. No. 99 (1842), quoted in Swisher, supra note 357, at 256. In the petition Justice McKinley stated that nearly two-thirds of the pending cases were in the Ninth, that almost one-third of the total necessary travel by the Justices was required there, and that this arrangement was also financially inequitable. Id. He wrote:

Is it proper that a judge should have no time allowed him for attending to his private concerns? no time of relaxation? no time for reading and study? Is it just to suitors in the ninth circuit to deprive them of the services of the judge, by requiring more of him than he can possibly perform? Is it just to the judge to require as much service of him as of four or five other of the judges? Your petitioner believes that all the other judges are convinced that it is impossible for him to perform the duties required of him; but they have not the power to relieve him, nor can they agree upon a plan for doing it.

He believes, however, that they are all of the opinion that the judges of the Supreme Court ought not to be required to hold more than one term of the circuit courts a year in each district... .

Id.

n387. Frankfurter & Landis, supra note 355, at 50.

n388. Act of June 17, 1844, ch. 96, 5 Stat. 676.

n389. Id. 2.

n390. See discussion supra note 386.

n391. 2 Warren, supra note 364, at 195.

n392. Frankfurter & Landis, supra note 355, at 51.

n393. Cong. Globe, 29th Cong., 1st Sess. 261-62 (1846). One circuit would consist of Louisiana and Texas and the other of Wisconsin and Iowa. Id.

n394. Id. See S. Doc. No. 91 (1845). Within a five year period, the Court never disposed of more than 48.5 percent of its docket. Id. The following figures are contained in the document. The author calculated the percentages.

[SEE TABLE IN ORIGINAL]

See also Frank, supra note 57, at 260 (noting that there could be no long range cure for the Court's docket ills until the Justices were relieved of their circuit duties).

n395. Cong. Globe, 29th Cong., 1st Sess. 261-62 (1846).

n396. 2 Warren, supra note 364, at 195 n.3.

n397. On Feb 29, 1848, Rep. Ingersoll from the House Judiciary Committee reported a bill relieving the Supreme Court Justices of circuit duty for two years. Rep. Bowlin moved a substitute bill that gave the district judges in the first instance the same jurisdiction as the circuit courts, and contemplated an intermediate court of appeals consisting of the district judge and one member of the Supreme Court. Cong. Globe, 30th Cong., 1st Sess. 398-99 (1848). On March 6, the House debated the measure at length. Id. at 432-33. Rep. Thompson moved to amend to cut down the relief from

two years to one, and the amendment was adopted. Id. Bowlin's substitute bill was rejected, and the original bill as amended was passed. Id.

n398. 2 Warren, supra note 364, at 195-96.

n399. Id.

n400. Cong. Globe Appendix, 30th Cong., 1st Sess. 355 (1848).

n401. See discussion supra note 397.

n402. Cong. Globe, 30th Cong., 1st Sess. 642-43 (1848).

n403. On April 20, 1848, Badger in the Senate reported a bill for relieving the Supreme Court of circuit riding duty for two terms and repealing the second section of the Act of June 17, 1844. Cong. Globe, 30th Cong., 1st Sess. 656 (1848). On April 28 it was reported back from the Judiciary Committee without Amendment. Id. at 700. On June 24, "after a brief explanation," the Senate passed the bill. Id. at 872.

n404. Cong. Globe, 30th Cong., 1st Sess. 596 (1848). See also Cong. Globe, 30th Cong., 1st Sess. 594-95 (1848). Senator William Allen remarked:

I would admonish those gentleman, who do not think as I do on these points, but wish to maintain this Judiciary in its present features, that if they do not wish to sound the tocsin, they had better not separate the judges for an hour from circuit duties, and direct intercourse with the people of the States. That is the only feature in the system which connects them with the nation; and if that be struck out, the striking out of the court will follow as naturally as the snuffing of a candle issues in darkness.

Id.

n405. The House referred it to the Judiciary Committee and reported back with an amendment on August 8, 1848, when it was finally rejected by a vote of 98 to 61. Cong. Globe, 30th Cong., 1st Sess. 882, 1049 (1848).

n406. Frankfurter & Landis, supra note 355, at 51-52.

n407. 7 How. (U.S.) v (1849).

n408. Frankfurter & Landis, supra note 355, at 52.

n409. Frank, supra note 57, at 260. Daniel was assigned to the Ninth Circuit, which at that time consisted of Arkansas and Mississippi. Id. at 275. In performing his circuit duties, he spent more time traveling than judging. Id. at 280.

n410. Letter from Peter Daniel to Martin Van Buren (Nov. 9, 1843), quoted in Swisher, supra note 357, at 258.

n411. Frank, supra note 57, at 260.

n412. Id.

n413. See id. (remarking that as time went by Daniel became aware that "although there was always talk about correcting the circuit system, nothing was likely to be done about it").

n414. See id. at 276-81 (recounting some of Justice Daniel's circuit riding escapades). To Justice Daniel's credit, his biographer remarks that "the Court to which Daniel came was an institution whose members worked immensely hard. In his respect a more radical switch from the leisurely life of a Virginia district judge would be impossible to imagine." Id. at 173.

n415. See Letter from Peter Daniel to Elizabeth Daniel (Apr. 17, 1851), cited in Swisher, supra note 357, at 259.

n416. Frank, supra note 57, at 281.

n417. See id. at 282-84 (describing the cases as well as several other Circuit Court cases Daniel heard).

n418. Swisher, supra note 357, at 259.

n419. Message from Franklin Pierce to Congress (Dec. 5, 1853), reprinted in 5 Messages and Papers of the Presidents 1789-1897, at 217-18 (James D. Richardson comp., 1896-1899).

n420. Message from Franklin Pierce to Congress (December 4, 1854), reprinted in 5 Messages and Papers of the Presidents 1789-1897, at 292 (James D. Richardson comp., 1896-1899).

n421. Ex. Doc. No. 41, 33rd Cong. 1st Sess., Ser. No. 689 (1853), cited in Frankfurter & Landis, supra note 355, at 53 n.177.

n422. Id.

n423. See Cong. Globe, 33rd Cong., 1st Sess. 14 (1853).

n424. Cong. Globe, 33rd Cong., 2nd Sess. 191 (1855).

n425. See 2 Warren, supra note 364, at 266. Warren cites the New York Evening Post of January 12, 1855 as saying that the relief of the Supreme Court Judges from circuit duty and their reduction in number from nine to six was generally favored. Id. The paper wrote: "There are, however, a few Senators who oppose any change in the present system until a more thorough reform can be effected - to secure, for instance, the substitution of a term of years for that of good behavior. They think that the decisions infringing the inherent personal and political rights of the people would not come from a Bench, liable to a rejection every eight years." Id.

n426. 2 Warren, supra note 364, at 266. The slavery debate was also responsible for the defeat of a 1855 bill that would have increased the Justices' salary. See Cong. Globe, 33rd Cong., 2nd Sess. (1855). Senator Badger, the proponent of the bill, said that the bill was defeated because the Justices had enforced the Fugitive Slave Law, a law Badger characterized as "obnoxious to public opinion." Cong. Globe, 33rd Cong., 2nd Sess. 238 (1855) (remarks of Sen. Badger).

n427. 2 Warren, supra note 364, at 266.

n428. David M. Silver, Lincoln's Supreme Court 39-40 (1956).

n429. 5 Roy. P. Basler, The Collected Works of Abraham Lincoln 35-43 (1953).

N430. Id.

n431. See Cong. Globe, 37th Congress., 2nd Sess. 26-28 (1861).

n432. Id. at 28.

n433. Id. Senator Hale called upon the Judiciary Committee to examine the defects of the Judicial System in light of other country's experiences. He said:

I want the enlarged wisdom of the Judiciary Committee to look over the history of the world, see what our own experience has developed, see the progress of improvement that has been made in the judicial system of France, see the judicial progress that some of the best minds of England have been laboring for a long while to accomplish, without effectuating a great deal, through they have done something, and see if it is not possible that we, in the year of grace 1861, by the experience of the past century, are qualified to improve somewhat upon the wisdom of 1789.

Id.

n434. Act of Mar. 3, 1863, ch. 100, 12 Stat. 794.

n435. Rehnquist, supra note 270, at 72.

n436. Paul Kens, Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age 97 (1997)

n437. Id. at 97-98. This trip took six weeks to complete. See Rehnquist, supra note 270, at 72.

n438. Kens, supra note 436, at 98.

n439. Silver, supra note 428, at 168.

n440. Id. See, e.g., *United States v. Baker, 24 Fed. Cas. 962, 966 (C.C.S.D.N.Y 1861) (No. 14501)* (Defendant, master of a private armed schooner commissioned by Jefferson Davis, was charged with piracy. Justice Nelson

instructed the jury that "until ... this recognition of the new government, the courts are obliged to regard the ancient state of things as remaining unchanged. This has been the uniform course of decision and practice of the courts of the United States."); *United States v. Smith, 27 Fed. Cas. 1134, 1135 (C.C.E.D. Pa. 1861) (No. 16318)* (in a trial for piracy, Justice Grier rebuked the notion that the Confederacy was an independent entity by declaring "[a] successful rebellion may be termed a revolution; but until it becomes such it has no claim to be recognized as a member of the family, or exercise the rights or enjoy the privileges consequent on sovereignty"); *United States v. Republican Banner Officers, 27 Fed. Cas. 781, 782* (C.C.D. Tenn. 863) (No. 16148) (when upholding the Confiscation Act, Justice Canton wrote "there being then a formidable rebellion in progress, the intention of Congress, in enacting this law, must have been to deter persons from so using and employing their property as to aid and promote the insurrection ..."); *United States v. Greathouse, 26 Fed. Cas. 18, 22 (C.C.N.D. Cal. 1863) (No. 15254)* (leaders of a ship were arrested in San Francisco harbor on the charge of aiding the Confederacy, Justice Field instructed the jury, "war has been levied against the United States... . all who aid ... are equally guilty of treason within the constitutional provision").

n441. Silver, supra note 428, at 168.

n442. Id. at 169. In the spring of 1864 Taney wrote to Justice Samuel Nelson:

I have made up my mind to continue the indictments for treason whether I go to Baltimore or not... . It is not in the power of the Court under such circumstances [martial law in Maryland] to give ... [an] impartial trial - or to protect ... [those who] should be found not guilty to by the Jury... . I will not place the judicial power in this humiliating position - nor consent thus to degrade and disgrace it - and if the District Attorney presses the prosecutions I shall refuse to take them up[.] I shall order the cases to be continued - and shall in a written opinion place my decision upon the grounds above stated. - What do you think of it?"

Letter from Roger Taney to Samuel Nelson (May 8, 1864), quoted in Silver, supra note 428, at 170-71.

n443. Cong. Globe, 38th Cong., 2d Sess. 292 (1865). Trumbull said "the amount of business accumulating in the Supreme Court amounts almost to a denial of justice, and some legislation is necessary, and will become more necessary as the business accumulates in that court, to relieve it." Id.

n444. Charles Fairman, Mr. Justice Miller and the Supreme Court: 1862-1890, at 401-02 (1939) [hereinafter Justice Miller]

n445. Silver, supra note 428, at 168. See Frankfurter & Landis, supra note 355, at 55 (noting that "the Civil War put out of men's minds such placid concerns as judicial organization, but the Civil War is also a turning-point in the history of the federal judiciary").

n446. See supra notes 376-77 and accompanying text.

n447. On January 7, 1876 the managing director of the Lake Shore and Michigan Southern Railway sent Chief Justice Morrison Waite and his wife free annual passes. Letter from Lake Shore and Michigan Southern Railway to Morrison Waite (Jan. 7, 1876), reprinted in 6 Charles Fairman, History of the Supreme Court of the United States: Reconstruction and Reunion 1864-88, Part One 543 (Paul A. Freund gen. ed., 1971) [hereinafter 6 Fairman, Part One]. While the letter stresses the personal nature of the pass, the railroad knew that the Chief Justice would be using it for official travel. Id. The letter states:

We send this as an entirely personal matter feeling that you will so regard and accept it. We would be glad to extend the courtesy to your associates, but do not know whether it would be acceptable to them. As you are on the ground we would be glad to rely upon your consideration and wishes in this matter.

Id. See Weisenburger, supra note 374, at 182 (noting that by 1856 "at least one [railroad] was giving McLean an annual pass").

n448. See generally 6 Fairman, Part One, supra note 447, at 541-48 (describing the relationship between the railroad and members of the Court).

n449. Id. at 544-45.

n450. Gribbin, supra note 5, at 364.

n451. In fact between the years of 1860 and 1870 the number of cases pending before the Supreme Court more than doubled. Frankfurter & Landis, supra note 355, at 60. See Hartnett, supra note 53, at 1650 (noting that "the number of cases that the Court was obligated to decide grew dramatically after the Civil War").

n452. See Cong. Globe, 41st Cong., 1st Sess. 29 (1869).

n453. Frankfurter & Landis, supra note 355, at 73 (remarking that Trumbull thought that "the creation of intermediate courts of appeal was still too sudden a wrench from the past").

n454. Cong. Globe, 41st Cong., 1st Sess. 192 (1869).

n455. Id.

n456. Id. at 214. See Summary of Events: United States - Congress, *1 Am. L. Rev. 206, 207* (1866-1867). This article demonstrates that as late as 1866 there was still organized opposition to relieving the Justices from their circuit duties. Id. The editors eloquently expounded the classic arguments in favor or circuit riding. Id. They wrote:

We trust that so mischievous a measure will never receive the assent of Congress. Mr. Webster more than once defeated similar propositions, including one which had the honor of being drawn up by Mr. Justice Story ... [a] more crude and ill-devised plan was never propounded in the shape of a bill. It has been well designated as a bill to prevent the justices of the Supreme Court from ever learning any law. The great objection to it is that it relieves the supreme judges of all nisi pruis duties... . Small as are these duties now, we firmly believe the direct and indirect benefits derived from them infinitely outweigh any real objections which can be urged against the practice. It must keep each judge's knowledge of practice and evidence much more fresh and serviceable than it could be, were he never to preside at a jury trial. The discipline, even if each judge try but half a dozen criminal and patent cases a year, more than repays him for the trouble and inconvenience; and the consequent mingling and association with the bar all over the circuit keeps up an acquaintance and understanding between it and the bench which we should be sorry to see at all lessened. We are so strongly of this opinion, that we should regard a Supreme Court of eleven judges going the regular circuits preferable to one of six or seven sitting only in banc.

Id.

n457. See Cong. Globe, 41st Cong., 1st Sess. 208 (1869). Senator Williams remarked:

I agree that it is necessary that the Supreme Court should have some relief or that the country should have relief in some way by a law that will expedite the transaction of business before that tribunal; but I do not find in this bill any assurance that the business of the Supreme Court will be dispatched with more rapidity than it is at the present time.

Id.

n458. *Id. at 208-09.*

n459. *Id. at 209.*

n460. *Id. at 219.*

n461. Id. at 345.

n462. Act of Apr. 10, 1869, ch. 22, 16 Stat. 44.

n463. 2 Warren, supra note 364, at 501.

n464. See Frankfurter & Landis, supra note 355, at 128 (noting that the Judiciary Act of 1869 "hoped to save the circuit court system by providing circuit judges").

n465. Act of Apr. 10, 1869, ch. 22, 2, 16 Stat. 44.

n466. Id.

n467. Id. See Arthur J. Jacobson, The Ghostwriters, in The Longest Night: Polemics and Perspectives on Election 2000, at 193 (Arthur J. Jacobson & Michel Rosenfeld eds., 2002) (stating that one result of the Act of 1869 was that the "Supreme Court justices became less coworkers and more supervisors of judicial business on the appellate level").

n468. See 6 Fairman, Part One, supra note 447, at 560. Even though, in theory, the justices only had to attend a circuit court in each district once every two years, in practice, pending important litigation would still require the justice to visit some circuit courts once a year. Id.

n469. See discussion infra note 474.

n470. See Rehnquist, supra note 48, at 9 (noting that "during the latter half of the nineteenth century the appellate business of the Supreme Court picked up so much that it became a full-time job for the Justices of the Court; their circuit-riding duties were secondary at best and often fell into desuetude").

n471. Justice Strong retired from the Court in 1880 after ten years of service. Atkinson, supra note 31, at 57. He was seventy-three years old and was "still recognized as one of the ablest men on the Court. He obviously hoped to set an example. The Court at the time included several people who were clearly unable to do the work but who were still reluctant to leave." Id.

n472. See William Strong, The Needs of the Supreme Court, 132 N. Am. Rev. 437 (1881).

n473. Id. at 437-38.

n474. 1881 Att'y. Gen. Ann. Rep. 5. In that term the Court docketed 417 new cases, heard 184 oral arguments and was able to dispose of 369 cases in total, leaving 843 cases on the docket. Id. These numbers are staggering, especially given the statistics from the previous decades. However, it was only to get worse.

[SEE TABLE IN ORIGINAL]

By 1888 the court was more than three years behind in its work. Hartnett, supra note 53, at 1650.

n475. 6 Charles Fairman, History of the Supreme Court of the United States: Reconstruction and Reunion 1864-88, Part Two 468 (Paul A. Freund gen. ed., 1971) [hereinafter 6 Fairman, Part Two]. See C. Peter Magrath, Morrison R. Waite: The Triumph of Character 266 (1963) (explaining that "this steep rise in litigation was in large measure a consequence of the expansion of federal activities in the wake of the Civil War's nationalizing influence and of the vigorous economic life of the postwar period which spurned bankruptcy, patent, and admiralty cases - in short, because of the country's growth").

n476. Strong, supra note 472, at 439.

n477. Strong wrote: "No one has ever complained that the judges are idlers." Id. at 440.

n478. Id. at 445. Strong wrote:

The details of the scheme may not have been sufficiently digested, but its outlines are enough to enable those who are acquainted with the embarrassments of the Supreme Court, and with the inadequate provision now existing for the administration of justice in the circuits, to form some rational estimate of its value. It is quite certain that, if adopted, it could bring speedy and permanent relief to the Supreme Court without detracting from its power to perform all the functions for which it was created.

Id. at 446. Other plans considered and rejected included increasing the number of justices on the court to twenty-one and dividing the Court into three sections to decide particular classes of cases, except that the entire Court would hear cases in the construction of the Constitution, or an Act of Congress, or a treaty. 6 Fairman, Part Two, supra note 475, at 769-70. Justice Field supported this approach, and he wrote to District Judge Deady in Oregon on February 18, 1885:

The Court of Appeals bill is not likely to pass the House. There is too much uncertainty as to the appointment of Judges for either party to be very anxious that eighteen new offices of so high a grade should be filled. I am inclined to think that eventually the plan, of which I have so often spoken to you and which I have favored, of increasing the Supreme Court of the United States to twenty one Judges and dividing it into sections will be adopted ... I may be that an amendment to the Constitution will be necessary to carry the plan into effect, but it grows more and more every day into favor.

Letter from Stephen Field to Deady (Feb. 18, 1885), quoted in 6 Fairman, Part Two, supra note 475, at 770.

n479. See Justice Miller, supra note 444, at 411 (describing Justice Miller on circuit and remarking that, "the quality of Judge Miller's work at nisi prius is particularly to be noted"). See also *23 Am. L. Rev. 426 (1889)* (noting that Miller's "nisi prius work is distinguished by a most animated sense of justice ...").

n480. Letter of Samuel Miller to William P. Ballinger (Mar. 9, 1872), quoted in Justice Miller, supra note 444, at 404. While Justice Miller favored the creation of intermediate courts of appeal, he realized that they were only going to be considered "when the evil [overcrowded docket] becomes of such a magnitude as to demand instant and efficient remedy." Id. In the short term, in an article on "Judicial Reforms" published in January 1872, he noted that a filed case took three years before it was argued and decided. See Samuel Miller, Judicial Reforms, 2 U.S. Jurist 1 (Jan. 1872). He advocated an increase in the amount in controversy from $ 2,000 to $ 5000. Id. He also advocated that the same amount in controversy rule be applied to the District of Columbia court and a Territory court; previously cases could be appealed with an even smaller amount in controversy. Id. Additionally, he advanced the propositions that there should be no appeals of admiralty cases to the Supreme Court unless a judge or judges in the circuit court certified to its importance, and that only questions of law should be reviewed in chancery cases. Id.

Three years later, two of Miller's points would be taken up by Congress in an effort to lighten the Court's work load. The Act of February 16, 1875, ch. 77, 18 Stat. 315 increased the amount in controversy requirement to $ 5000 and limited appeals in admiralty cases. 6 Fairman, Part Two, supra note 475, at 420-21, 424.

n481. 4 Cong. Rec. 1125 (1876).

n482. Id.

n483. Id.

n484. Id. at 1206.

n485. Id. at 1249.

n486. 11 Cong. Rec. 819 (1881).

n487. 13 Cong. Rec. 3464-66 (1882). Justice Davis resigned his Supreme Court seat on March 4, 1877, after fifteen years on the bench, to accept a seat in the Senate. See Atkinson, supra note 31, at 55. He was actually elected to the Senate by the Illinois state legislature while still on the Court. Id. Judicial work had become too burdensome for him, particularly as the docket increased. Id.

n488. 13 Cong. Rec. 3464-66 (1882).

n489. Id.

n490. Id. at 3876.

n491. 14 Cong. Rec. 1245 (1883).

n492. See 6 Fairman Part Two, supra note 475, at 768 (describing the fate of the bill).

n493. Frankfurter & Landis, supra note 355, at 85.

n494. Id. See Justice Miller, supra note 444, at 406. Fairman speculates that the Democrats, who controlled the house, were not inclined to reform the judiciary by creating judgeships. Id. Instead, they favored a reduction in the jurisdiction of the federal courts. Id. This way President Rutherford Hayes, a Republican, would not have any new judgeships to fill. Id.

n495. See, e.g., Address of Chief Justice Morrison R. Waite, reprinted in *22 Am. L. Rev. 292 (1888);* Stephen Field, The Centenary of the Supreme Court of the United States, *24 Am. L. Rev. 351 (1890).*

n496. *Address of Chief Justice Morrison R. Waite, supra* note 495.

n497. Id. Waite also faced another problem; several of the justices were in ill health and refused to retire. Magrath, supra note 475, at 268. Justice Ward Hunt suffered a stroke and was incapacitated. Id. Hunt was assigned to the second circuit where a large number of admiralty and patent cases were pending in the Circuit Court. Id. In the summer of 1878 and 1879 Waite traveled to New York after the completion of his own circuit work, and held court in place of Hunt. Id. at 269. He wrote to his wife: "You don't know how I am bored here in court, but I must stand it... ." Id.

n498. *Address of Chief Justice Morrison R. Waite, supra* note 495, at 292. Following the text of the speech the editors of the journal made the following comment: "The subject is one about which Congress has long been shamefully lethargic. Much could be done to relieve this court by changes in the modes of legal procedure... ." Id. at 293.

n499. See 6 Fairman, Part Two, supra note 475, at 771 (saying of Waite "doubtless he shared the view of his brethren, other than Field, in favor of a layer of circuit courts of appeals").

n500. Frankfurter & Landis, supra note 355, at 85.

n501. Id. at 87.

n502. Of this situation a paper before the American Bar Association wrote: "Such an appeal is not from Philip drunk to Philip sober, but from Philip sober to Philip intoxicated with the vanity of a matured opinion and doubtless also a published decision." Walter B. Hill, The Federal Judicial System, *12 A.B.A. Rep. 289, 307 (1887),* quoted in Frankfurter & Landis, supra note 355, at 87.

n503. By that time both Chief Justice Waite and Justice Miller had collapsed from over work and died. Id. See Magrath, supra note 475, at 267 (stating that: "Not until 1891 ... did Congress finally pass a comprehensive measure, the Circuit Court of Appeals Act, which freed the justices from the archaic necessity of going on circuit, and established an intermediate layer of courts to siphon off cases otherwise destined for the Supreme Court").

n504. Id.

n505. Id. But see Frankfurter & Landis, supra note 355, at 91 (remarking that while "traditional southern sentiment in favor of state institutions and against extension of federal power was undoubtedly alive ... the effort to curb the federal courts was not a distinctly southern measure" because "[a] contest between eastern capital and western and southern agrarianism was at stake").

n506. *135 U.S. 1 (1890).*

n507. *Id. at 52.*

n508. *Id. at 53.*

n509. Id.

n510. *Id. at 4.* Upon his arrest, Field submitted. He said to the sheriff, "You are doing your plain duty, and I mine in submitting to arrest." Kens, supra note 436, at 281-83.

n511. *Cunningham, 135 U.S. at 4.* Upon learning that a warrant had been issued for the arrest of Justice Field, the Governor of California wrote to the Attorney General of the state, urging, him to instruct the District Attorney of San Joaquin County to dismiss the unwarranted proceeding against Justice Field as his arrest "would be a burning disgrace to the State unless disavowed." The Attorney General "advised the District Attorney that there was ""no evidence to implicate Justice Field in said shooting" and that "public justice demands that the charges against him be dismissed, ..." which was accordingly done." *Id. at 4 n.1.*

n512. *Id. at 4.*

n513. *In re Neagle, 39 F. 833* (C.C. N.D. Cal., 1889). Neagle was immediately released. In the judges chambers, Field gave Neagle a gold watch and chain. It was inscribed, "Stephen J. Field to David Neagle, as a token of appreciation of his courage and fidelity to duty under the circumstances of great peril at Lathrop, Cal., on the fourteenth day of August, 1889." Carl Swisher, Stephen J. Field: Craftsman of the Law 359 (1963).

n514. Chief Justice Fuller and Justice Lamar dissented on the grounds that Neagle's appointment as deputy marshal was informal and therefore he was not carrying out a duty explicitly created by federal law. *Cunningham, 135 U.S. at 76-99.* Justice Field recused himself. *Id. at 76.*

n515. *Id. at 75.*

n516. Id.

n517. *Id. at 54-55.*

n518. *Id. at 1.*

n519. See Willard L. King, Melville Weston Fuller 148 (1950). Indeed, one year before his appointment, Fuller, as President of the Illinois Bar Association, bemoaned the number of cases encumbering the docket of the Supreme Court and recommended that the Bar support legislation to create an intermediate appellate court. Id. The Court was more than three years behind in its work and the number of cases was consistently increasing. Id. There were thousands of cases pending. Id. The Court was obligated to decide all of these cases, however, they could not dispose of more than 450 cases in any given year. Id.

n520. James W. Ely, The Chief Justiceship of Melville W. Fuller, 1888-1910, at 41 (1995). Fuller's first circuit court opinion, *Lee v. Simpson, 39 F. 235 (C.C.D.S.C. 1889),* concerned the execution of a testamentary power of appointment, by Anna Clemson in favor of her husband, who in turn devised the land at issue to the state. Id. Fuller upheld the exercise of the power, thereby fostering the creation of Clemson University. Id.

n521. Id.

n522. Id.

n523. Id. In 1889 Fuller considered a motion to enjoin a public works project and the removability to federal court of an action in state court alleging that corporate directors were defrauding stockholders. Id.

n524. Ward, supra note 39, at 89. See John C. Rose, Jurisdiction and Procedure of the Federal Courts 94 (4th ed. 1931) (noting that during circuit riding's later years the duties were "little regarded").

n525. King, supra note 519, at 149.

n526. See Message from Benjamin Harrison to Congress (Dec. 3, 1889), reprinted in 9 Messages and Papers of the Presidents 1789-1897, at 42-43 (James D. Richardson comp., 1896-1899). Harrison, a former lawyer, encouraged Congress to create intermediate federal courts of appeal. Id. He wrote:

The necessity of providing some more speedy method for disposing of cases which now come for final adjudication to the Supreme Court becomes every year more apparent and urgent. The plan of providing some intermediate courts having final appellate jurisdiction of certain classes of questions and cases has, I think, received a more general approval from the bench and bar of the country than any other. Without attempting to discuss details, I recommend that provision be made for the establishment of such courts.

Id.

n527. King, supra note 519, at 97.

n528. Ely, supra note 520, at 42.

n529. The other members of the Judiciary Committee included Senators George, Ingalls, Hoar, Vest and Pugh. King, supra note 519, at 150.

n530. Id.

n531. Id.

n532. Id.

n533. Id.

n534. Id. The justices also called for the creation of a court of patent appeals and the transfer of current cases on the Supreme Court docket to new tribunals. Ely, supra note 520, at 42-43.

n535. Ely, supra note 520, at 43.

n536. Id.

n537. 8 Owen M. Fiss, History of the Supreme Court of the United States: Troubled Beginnings of the Modern State, 1888-1910, at 24 (Stanley N. Katz gen. ed., 1993).

n538. Circuit Court of Appeals (Evarts) Act, ch. 517, 26 Stat. 826 (1891).

n539. Id.

n540. Martha J. Dragich, Once a Century: Time for a Structural Overhaul of the Federal Courts, *1996 Wis. L. Rev. 11, 21.*

n541. Id. (quoting Samuel Estreicher & John Sexton, Redefining the Supreme Court's Role: A Theory of Managing the Federal Judicial Process 1 (1986)).

n542. Section 6 of the Act provided: "And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court." Circuit Court of Appeals (Evarts) Act, ch. 517, 6, 26 Stat. 826 (1891).

n543. Fiss, supra note 537, at 25. These include cases "in which the jurisdiction is dependant entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases ... ." Circuit Court of Appeals (Evarts) Act, ch. 517, 6, 26 Stat. 826 (1891).

n544. Fiss, supra note 537, at 25.

n545. *141 U.S. 583 (1891).*

n546. See Fiss, supra note 537, at 25 (stating that "because of his involvement in the formulation and enactment of the statute, or because he believed it was his principal duty as chief justice to ensure the smooth and continuous flow of work, Fuller took it upon himself to write most of the opinions that construed the 1891 Act").

n547. *Lau Ow Bew, 141 U.S. at 587.* See *In re Woods, 143 U.S. 202 (1892)* (stating that the Court should grant certiorari when presented with questions of "gravity and general importance" in order to guarantee sound jurisprudence and uniformity of decision).

n548. Rehnquist, supra note 48, at 6.

n549. See Frankfurter & Landis, supra note 355, at 101 (saying of the result of the Evarts Act, "[a] flood of litigation had indeed been shut off").

n550. 1891 Att'y. Gen. Ann. Rep. iv.

n551. 1892 Att'y. Gen. Ann. Rep. iv.

n552. 1983 Att'y. Gen. Ann. Rep. iv. See Charles Evans Hughes, The Supreme Court of the United States 56 (1936) (stating that ""the establishment of the Circuit Court of Appeals under the act of 1891 greatly relieved the Supreme Court ..."").

n553. Frankfurter & Landis, supra note 355, at 129.

n554. See Gribbin, supra note 5, at 368 (commenting that: "indeed, the retention of some vestiges of the 1789 system (although the old circuit courts quickly became virtually powerless) probably helped to sell the new legislation to some of the conservative senators who had blocked change for so many years").

n555. Hall, supra note 2, at 145.

n556. The situation was summarized by Rep. Reuben O. Moon, Chairman of the House Committee on the Revision of the Laws:

The jurisdiction conferred by act of Congress upon these courts is, in a large majority of cases, concurrent, and in a comparatively few cases is exclusive jurisdiction conferred upon them. This jurisdiction differs very little in character and is distinguished by no controlling principle. They both have jurisdiction of civil and criminal cases, the only distinction being that the circuit court has exclusive jurisdiction in capital cases. In some cases the line of demarcation is simply the amount involved in the litigation; in some cases there exists a mere arbitrary division, giving the admiralty and maritime jurisdiction exclusively to the district courts, and matters relating to revenue to the circuit courts; and during the past 25 years few, if any, acts of Congress have been passed that conferred jurisdiction upon the courts in which the same jurisdiction has not been conferred upon both the circuit and the district courts.

46 Cong. Rec. 88 (1911).

n557. C. Herman Pritchett, The American Constitution 104 (1959). See Frankfurter & Landis, supra note 355, at 101 (noting that "while Evarts hardly expected any more circuit attendance by the Justices in the future than in the past, he did not disturb the deep sentiment behind the old tradition by explicitly eliminating them, ... from the composition of the circuit courts of appeals")

n558. Circuit Court of Appeals (Evarts) Act, ch. 517, 3, 26 Stat. 826 (1891).

n559. Ely, supra note 520, at 42-43.

n560. See Felix Frankfurter, The Supreme Court in the Mirror of Justices, *105 U. Pa. L. Rev. 781, 790 (1957)* (remarking that "Circuit-riding ceased long before members of the Court were statutorily relieved of it ... .").

n561. Ely, supra note 520, at 44. It is worth noting that the majority of Fuller's circuit duty was concentrated in the years before 1898. Id. Other commitments must have kept him for visiting the Fourth Circuit regularly in the years following 1898. Between 1902 and 1907 Fuller made only one Fourth Circuit appearance. Id. In 1908, he heard 4 appeals and in 1909 he wrote his last circuit opinion. Id.

n562. Id. Fuller heard at least five appeals before the Seventh Circuit in 1893 and 1894, writing two opinions. Id.

n563. Id. See, e.g., *Johnson v. United States, 163 F. 30* (1st Cir., 1908) (Holmes, Circuit Justice).

n564. An editorial from 1910 summarizes the situation: "The surprising thing is that the Circuit Court of the United States has not long ago been abolished." 41 Nat. Corp. Reg. 626 (1910), quoted in Frankfurter & Landis, supra note 355, at 134 n.137.

n565. Judicial Code of 1911, ch. 231, 36 Stat. 1087. See Frankfurter & Landis, supra note 355, at 143 (noting that "in piloting the Judicial Code through the House and Senate everything was subordinated to the attainment of its pivotal reform - the abolition of the circuit courts").

n566. See Robert B. Highsaw, Edward Douglass White: Defender of the Conservative Faith 184 (1981).

n567. See *28 U.S.C. 42* (1994). The following is the current allotment of the Chief Justice and Associate Justices among the circuits:

For the District of Columbia Circuit, William H. Rehnquist, Chief Justice.

For the First Circuit, David H. Souter, Associate Justice.

For the Second Circuit, Ruth Bader Ginsburg, Associate Justice.

For the Third Circuit, David H. Souter, Associate Justice.

For the Fourth Circuit, William H. Rehnquist, Chief Justice.

For the Fifth Circuit, Antonin Scalia, Associate Justice.

For the Sixth Circuit, John Paul Stevens, Associate Justice.

For the Seventh Circuit, John Paul Stevens, Associate Justice.

For the Eighth Circuit, Clarence Thomas, Associate Justice.

For the Ninth Circuit, Sandra Day O'Connor, Associate Justice.

For the Tenth Circuit, Stephen Breyer, Associate Justice.

For the Eleventh Circuit, Anthony M. Kennedy, Associate Justice.

For the Federal Circuit, William H. Rehnquist, Chief Justice.

n568. Robert L. Stern et al., Supreme Court Practice 745 (8th ed. 2002).

n569. Congressional Quarterly, Circuit Riding, in The Supreme Court A to Z: A Ready Reference Encyclopedia, supra note 2, at 74.

n570. See, e.g., *U.S. v. Stone Container Corp., 196 F.3d 1066 (9th Cir. 1999); Legal Aid Soc. of Hawaii v. Legal Servs. Corp., 145 F.3d 1017 (9th Cir. 1998); Chief Probation Officers of California v. Shalala, 118 F.3d 1327 (9th Cir. 1997); Toney v. WCCO Television, Midwest Cable and Satellite, Inc., 85 F.3d 383 (8th Cir. 1996); Conoco, Inc. v. C.I.R., 42 F.3d 972 (5th Cir. 1995); Rubio-Rubio v. I.N.S., 23 F.3d 273 (10th Cir. 1994).*

n571. See, e.g., *U.S. v. Adam, 70 F.3d 776 (4th Cir. 1995); Rowland v. Perry, 41 F.3d 167 (4th Cir. 1994); U.S. v. Jones, 13 F.3d 100 (4th Cir. 1993); Miller v. U.S., 949 F.2d 708 (4th Cir. 1991); Nat'l Envtl. Found. v. ABC Rail Corp., 926 F.2d 1096 (11th Cir. 1991); U.S. v. Gordon, 895 F.2d 932 (4th Cir. 1991); Picou v. Gillum, 874 F.2d 1519 (11th Cir. 1989); U.S. v. Velazquez, 847 F.2d 140 (4th Cir. 1988); Lane v. Griffin, 834 F.2d 403 (4th Cir. 1987).*

n572. See, e.g., *N.L.R.B. v. Norbar, Inc., 752 F.2d 235 (6th Cir. 1985); Brine v. Paine, Webber, Jackson & Curtis, Inc., 745 F.2d 100 (1st Cir. 1984); People of Three Mile Island v. Nuclear Regualtory Comm'r, 747 F.2d 139 (3d Cir. 1984); Stewart v. C.I.R., 714 F.2d 977 (9th Cir. 1983); Neubauer v. Owens-Corning Fiberglas Corp., 686 F.2d 570 (7th Cir. 1982).* Referring to this part-time work on the lower courts Justice Stewart is said to have remarked that it "was no fun to play in the minors after a career in the major leagues." John C. Jeffries, Jr., Justice Lewis F. Powell Jr.: A Biography 542 (1994).

n573. See, e.g., *Tenngasco Exch. Corp. v. F.E.R.C., 952 F.2d 535 (D.C. Cir. 1992); Kanuth v. Prescott, Ball & Turben, Inc., 949 F.2d 1175 (D.C. Cir. 1991).*

n574. See, e.g., *Morgan v. U.S., 968 F.2d 200 (2d. Cir. 1992); Doko Farms v. U.S., 956 F.2d 1136* (Fed. Cir, 1992).

n575. See, e.g., *Cornman v. U. S., 409 F.2d 230 (Ct. Cl. 1969); DeLano v. U. S., 393 F.2d 517 (Ct. Cl. 1968); John Wanamaker Phil., Inc. v. U.S., 359 F.2d 437 (Ct. Cl. 1966); Wilson v. U.S., 369 F.2d 198 (D.C. Cir. 1966); Brandenfels v. Day, 316 F.2d 375 (D.C. Cir. 1963); Rogers v. Hodges, 297 F.2d 435 (D.C. Cir. 1961).*

n576. See, e.g., *Thompson v. Gleason, 317 F.2d 901 (D.C. Cir. 1962); Hepner v. Chozick, 296 F.2d 595 (D.C. Cir. 1961); Springfield Airport Auth. v. C. A. B., 285 F.2d 277 (D.C. Cir. 1960); Spann v. Richmond, F. & P.R. Co., 273 F.2d 827 (D.C. Cir. 1959).*

n577. Atkinson, supra note 31, at 136.

n578. See, e.g., *Lussier v. Gunter, 552 F.2d 385 (1st Cir. 1977); Shepard v. Taylor, 556 F.2d 648 (2d Cir. 1977); Rodgers v. U.S. Steel Corp., 541 F.2d 365 (3d Cir. 1976); Hopkins v. Collins, 548 F.2d 503 (4th Cir 1977); U.S. v. Kaiser, 545 F.2d 467 (5th Cir. 1977); Spence v. Bailey, 465 F.2d 797* (6th Cir, 1972); *Carothers v. W. Transp. Co., 554 F.2d 799 (7th Cir. 1977); Kropp v. Ziebarth, 557 F.2d 142 (8th Cir. 1977); U.S. v. Duffy, 550 F.2d 533 (9th Cir. 1977); Matter of Mullendore, 527 F.2d 1031 (10th Cir. 1975); Missouri Edison Co. v. Fed. Power Commission, 479 F.2d 1185 (D.C. Cir. 1973); Trans-Atlantic Co. v. U. S., 471 F.2d 1397 (C.C.P.A. 1973).*

n579. But see Federalist Society Symposium, Panel Four Relimiting Federal Judicial Power: Should Congress Play a Role?, *13 J.L. & Pol. 627, 643-44 (1997)*. At the symposium, Professor Akhil Amar of Yale Law School discussed the merits of circuit riding and advocated that it should be revived - albeit in a more limited form. Amar said:

[I]'m not sure we're going back to the old-style circuit-riding, but I do think it would not be a bad thing to get the justices outside the Beltway from time to time to sit with fellow federal judges elsewhere in the country in order to make them more attentive to state law and different perspectives in this vast country of ours. It would be great if they could sit in on some trials. Because I actually think they've been over-exuberant in criminal procedure, I would like them to actually see crime up close, in trials, not just federal trials for white-collar crimes but murder, rape, and robbery cases as well.

... They could preside at trials in D.C. I pick D.C. because it is the place where the federal courts are doing murder, rape and robbery, and other real crime, and so, they could see the effects of their over-exuberant exclusionary rules and all the rest. This is sort of a modification of the circuit-riding idea, to do trials, to get outside the Beltway, to see state law, to mix with other judges so you're not just always with eight fellow justices.

Id.

n580. See discussion supra notes 96-101 and accompanying text.

n581. Amar, supra note 97, at 475 n.151.

n582. 1 James Madison, Debates in the Federal Convention of 1789, at 61 (1987).

n583. Jane Butzner, Constitutional Chaff: Rejected Suggestions of the Constitutional Convention of 1787, at 115 (1941).

n584. *Madison, supra* note 582, at 61.

n585. See Ritz, supra note 23, at 15 (remarking of Article III, "the most important details were left to the discretion of the Congress"). See also Bourguignon, supra note 33, at 686 (commenting that "nearly all the participants in the debate over the judiciary bill [of 1789] believed Congress could choose whether to create lower federal courts, and they believed Congress could give them a little, a lot, or all the powers enumerated in Article III").

n586. U.S. Const. art. III, 1.

n587. U.S. Const. art. I, 8.

n588. See *Kline v. Burke Constr. Co., 260 U.S. 226, 234 (1992)* (noting that "the Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it"). This topic has generated much controversy in the academy. See, e.g., Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, *66 Harv. L. Rev. 1362 (1953)* (analyzing the limits of congressional power over the jurisdiction of the federal courts).

n589. See *Willy v. Coastal Corp., 503 U.S. 131, 136 (1992)* ("Article I, 8, cl. 9, authorizes Congress to establish the lower federal courts. From almost the founding days of this country, it has been firmly established that Congress, acting pursuant to its authority to make all laws "necessary and proper" to their establishment... .) (footnotes omitted).

n590. Ritz, supra note 23, at 15.

n591. Goebel, supra note 94, at 459 n.8.

n592. Ritz, supra note 23, at 15. See *Marsh v. Chambers, 463 U.S. 783, 790 (1983)* (remarking that a "Decision of 1789" provides "contemporaneous and weighty evidence" of the Constitution's meaning since many of the Members of the First Congress "had taken part in framing that instrument").

n593. *14 U.S. (1 Wheat) 304, 351 (1816)* (Story remarked that the First Congress contained "men who had acted a principal part in framing, supporting, or opposing that constitution").

n594. It is interesting to note that at the time of the framing of the Judiciary Act of 1789 a state high court had already declared a statute imposing circuit riding duties on state court judges to be unconstitutional. In 1788, the

Virginia legislature enacted a statute that established district courts and imposed on "the judges of the high court of appeals" the duty to "attend the [district] courts, allotting among themselves the districts they shall respectively attend." *Cases of the Judges of the Court of Appeals, 8 Va. (4 Call) 135, 138 (1788).* The merits of the statute were frequently debated. See *id. at 139.* The opponents of the statute contended that: "It was contrary to the constitution to impose new duties to be performed out of the courts to which the judges respectively belonged; but clearly so, if no additional compensation was made them for it." Id. The proponents countered that: "The tenure of office, which was all that the constitution meant to preserve, was not assailed by the assignment of new duties: which might be imposed whenever the legislature thought proper." *Id. at 140.*

In April 1788, the Virginia Court of Appeals declared the law unconstitutional because it violated the principles of judicial independence and separation of powers imbedded in Virginia's 1776 Constitution. Id. at 140. They opined that the Act, by assigning duties to judges, "which, though not changed as to their subjects, are yet more than doubled, without any increase of salary" was an "attack upon the independency of the judges." *Id. at 145.*

Despite this opinion, the framers of the Judiciary Act still required the justices to ride circuit; they did not find circuit riding contrary to the Constitution. Professors Charles Gardner Geyth and Emily Field Van Tassell speculate as to the reasons why. First, the Framers viewed circuit riding as having less to do with deciding additional cases and more to do with the travel associated with getting there to decide the cases. Geyth & Van Tassell, supra note 24, at 59 n. 115. Since there was already English precedent for making judges travel to hold court, imposing a comparable burden on the Justices of the Supreme Court may have seemed commonplace from a constitutional standpoint. Id. Second, the Virginia legislature imposed additional district court duties on the sitting court of appeals judges without any additional compensation (a fact central to the Court's reasoning). The framers of the Judiciary Act, on the other hand, imposed circuit riding duties on Supreme Court Justices, not as an uncompensated extra job, but as "a fully compensated part of the original package of duties associated with the office." Id.

n595. In Stuart v. Laird, Charles Lee specifically argued that his client had the right to have his case heard by six unbiased justices however, this argument is without Constitutional merit because, the number of justices on the court is determined by Congress, not the Constitution. As we have seen, Congress has since increased the number of justices on the Court. See *Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 432 (1793)* (Iredell, J., dissenting).

n596. See supra note 60.

n597. See Judiciary Act of 1789, ch. 20, 4, 1 Stat. 73.

n598. See supra note 27.

n599. *Partington v. Gedan, 880 F.2d 116, 133 (9th Cir. 1989)* (Noonan, J., concurring). Cf. *Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)* (Chief Justice Marshall did not recuse himself from hearing the case despite the fact that he was President Adams' Secretary of State).

n600. *Murray's Lessee v. Hoboken Land & Improv. Co., 59 U.S. (18 How.) 272, 277 (1856).*

n601. Currie, supra note 312, at 663.

n602. *421 U.S. 35 (1975).*

n603. *Id. at 58 n.25* (dictum) (citing *Gagnon v. Scarpelli, 411 U.S. 778, 785-86 (1973),* and *Morrissey v. Brewer, 408 U.S. 471, 485-86 (1972)).*

n604. See *U. S. v. Garramone, 374 F. Supp. 256 (E.D. Pa.1974)* (stating that that the phrase "case or issue," as used in this section, refers to a final order of the lower court which may be appealed to a higher court).

n605. *228 U.S. 339 (1913).*

n606. See also *Delaney v. United States, 263 U.S. 586 (1924); United States ex rel. Fink v. Tod, 1 F.2d 246 (2d Cir. 1924),* rev'd on other grounds *267 U.S. 571 (1925); Lee v. United States, 91 F.2d 326 (5th Cir. 1937); Swann v. Charlotte-Mecklenburg Bd. of Educ., 431 F.2d 135 (4th Cir. 1970).*

n607. See *28 U.S.C. 292*(a) (2003) The statute states:

The chief judge of a circuit may designate and assign one or more district judges within the circuit to sit upon the court of appeals or a division thereof whenever the business of that court so requires. Such designations or assignments shall be in conformity with the rules or orders of the court of appeals of the circuit.

Id. See generally Richard B. Saphire & Michael E. Solimine, Diluting Justice on Appeal ?: Examination of the Use of District Court Judges Sitting by Designation on the United States Courts of Appeals, 28 Mich. J. L. Ref. 351 (1995).

n608. *28 U.S.C. 47.* Cf. *28 U.S.C. 455* (1974) (specifically stating that a "justice" is subject to its provisions).

n609. Jeffrey W. Stempel, Rehnquist, Recusal, and Reform, *53 Brook. L. Rev. 589, 609 (1987).*

n610. See *Edwards v United States, 334 F.2d 360 (5th Cir. 1964)* (Section 47 did not appear to have any application to a situation, in which a judge had previously been a member of a three-judge Court of Appeals panel and was then part of the Court of Appeals en banc on the petition for rehearing).

n611. See Chief Circuit Judge (Fourth Circuit): Order Regarding Performance of Judicial Duties (Mar. 31, 1983), reprinted in *28 U.S.C.A. 46* (Judge Ervin ordered that "any senior circuit judge who undertakes the performance of any official duties pursuant to this designation consents to participate (except upon absence from duty station or the like) in the consideration of the same until terminated, including, but not exclusively, participation in in banc consideration of the matter").

n612. See *28 U.S.C. 46*(c) (2003). The statute states:

A court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with *section 6 of Public Law* 95-486 (92 Stat. 1633), except that any senior circuit judge of the circuit shall be eligible (1) to participate, at his election and upon designation and assignment pursuant to section 294(c) of this title and the rules of the circuit, as a member of an in banc court reviewing a decision of a panel of which such judge was a member, or (2) to continue to participate in the decision of a case or controversy that was heard or reheard by the court in banc at a time when such judge was in regular active service.

Id.

n613. *Partington v. Gedan, 880 F.2d 116, 133 (9th Cir. 1989)* (Noonan, J., concurring).

n614. Id.

n615. Sup. Ct. R. 22.3.

n616. Sup. Ct. R. 22.4. These applications are "not favored" except when the denial is without prejudice. Id.

n617. Stern, supra note 568, at 749. Because of this, Rule 22.4 provides that "renewed application is made by letter to the Clerk, designating the Justice to whom the application is to be directed and accompanied by 10 copies of the original application and proof of service as required by Rule 29." Sup. Ct. R. 22.4.

n618. Stern, supra note 568, at 781.

n619. See Blank v. Sullivan & Cromwell, 418 F. Supp.1 (S.D.N.Y 1975) (noting that "in order to remove a judge, the bias shown must be a "personal' prejudice, from an extrajudicial source and resulting in an opinion on the merits not warranted by the facts or issues presented in the case").

n620. The roots of "prejudged" and "prejudice" are the same despite their different meaning. John P. Dawson, The Oracles of the Law, at xv (1968).

n621. U.S. Const. art. II, 2. See Currie, supra note 312, at 663-64 (remarking that "this contention was not at all frivolous. Although not every addition to a court's jurisdiction should be held to require a new appointment, some limit on congressional reassignment of the functions of incumbent officers seems implicit if the President's authority is not to be circumvented").

n622. Letter from John Marshall to William Paterson (Apr. 19, 1802), reprinted in 6 *John Marshall Papers, supra* note 278, at 108. See also Letter from John Marshall to William Paterson (Apr. 5, 1802), reprinted in 6 *John Marshall Papers, supra* note 278, at 106 (Marshall wrote: "I cannot well perceive how the performance of circuit duty by the

Judges of the supreme court can be supported"). Cf. letter (Draft) from the Justices of the Supreme Court to George Washington (c. Sept. 13, 1790), reprinted in 2 DHSC, supra note 3, at 89-91. Chief Justice Jay wrote:

The Constitution not have otherwise provided for the Appointment of the Judges of the Inferior Courts, we conceive that the Appointment of some of them, viz of the Circuit Courts, by an Act of the Legislature, is a Departure from the Constitution, and an Exercise of Powers, which, constitutionally and exclusively belong to the President and Senate.

Id.

n623. See *Buckley v. Valeo, 424 U.S. 1 (1976).*

n624. U.S. Const. art. II, 2.

n625. See supra notes 28-52 and accompanying text.

n626. See The Federalist No. 47, at 325-26 (J. Cooke ed., 1961). James Madison wrote that separation of powers "does not mean that these [three] departments ought to have no partial agency in, or no control over the acts of each other," but rather "that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution, are subverted." Id.

n627. In the often quoted words of Justice Jackson:

While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

*Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952)* (Jackson, J., concurring).

n628. *487 U.S. 654, 693-97 (1988).*

n629. *Id. at 693.*

n630. *Id. at 727* (quoting *Bowsher v. Synar, 478 U.S. 714, 727 (1986)).*

n631. Id. at 695.

n632. *Mistretta v. United States, 488 U.S. 361, 397 (1989).*

n633. Id.

n634. *Id. at 398* (The court noted that "our early history indicates that the Framers themselves did not read the Constitution as forbidding extrajudicial service by federal judges").

n635. *Id. at 388.*

n636. See supra note 607 and accompanying text.

n637. *Nixon v. Adm'r. of Gen. Servs., 433 U.S. 425, 443 (1977).*

n638. Letter (Draft) from the Justices of the Supreme Court to George Washington (c. Sept. 13, 1790), reprinted in 2 DHSC, supra note 3, at 89-91. This letter was drafted by Chief Justice Jay.

n639. Letter from Samuel Chase to John Marshall (Apr. 24, 1802), reprinted in 6 *John Marshall Papers, supra* note 278, at 109-13, 110-11.

n640. *5 U.S. (1 Cranch) 137 (1803).*

n641. Nelson, supra note 322, at 941.

n642. Currie, supra note 312, at 664.

n643. Id.

n644. Id.

n645. Swisher, supra note 357, at 275.

n646. Stanley M. Brand, Battle Among the Branches: The Two Hundred Year War, *65 N.C. L. Rev. 901 (1987).*