

1979

# Federal Courts in the Early Republic: Kentucky 1789-1816 by Mary K. Bonsteel Tachau

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## Recommended Citation

Gardner, Woodford L. Jr. (1979) "Federal Courts in the Early Republic: Kentucky 1789-1816 by Mary K. Bonsteel Tachau," *Kentucky Law Journal*: Vol. 68 : Iss. 2 , Article 10.

Available at: <https://uknowledge.uky.edu/klj/vol68/iss2/10>

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## BOOK REVIEW

FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY 1789-1816.  
BY MARY K. BONSTEEL TACHAU. Princeton, New Jersey:  
Princeton University Press, 1978. Pp. 199, Appendix 29. Price:  
\$16.50

*Federal Courts in the Early Republic: Kentucky 1789-1816* was recognized in June, 1979, by the Kentucky Historical Society as the outstanding contribution in Kentucky history published during the past four years. With the proliferation of books and articles on Kentucky history during that period, it is no small achievement for Professor Tachau's work to have been so honored. The legal profession is the ultimate benefactor of a work concerning the early history of the federal courts in Kentucky, a work which necessarily deserves discussion in the legal journals of the state.

The author, Mary K. Bonsteel Tachau, a professor of history at the University of Louisville, is a non-lawyer who, much to her credit, tackled the cryptic codes of the early order books and the technical aspects of ancient common law writes to research and write this volume. Her lack of formal legal training permitted her to look at the resources and the topic in a fresh manner and to make conclusions that will generate re-evaluation of generally accepted theories of judicial history.

In the introduction to her scholarship, Professor Tachau defined the purposes of her study as developing

a systematic examination of the lower federal courts of one state during the first generation after the adoption of the Constitution. It is not an investigation to test any particular hypothesis, but an inquiry, as in the original etymological meaning of the word *history*. In the course of the research many tantalizing tangents have been explored, ranging from technical legal problems to the relationships between the court and its personnel and important events and persons in national history. But the findings that are reported are sharply limited to those which affected the federal courts in Kentucky. This is, therefore, an institutional history with an intentional focus upon the courts themselves. Although legal scholars interested in substantive and jurisdictional ques-

tions may find some useful information, I wrote this study for historians and others without formal training in law.<sup>1</sup>

The author achieved all the stated purposes of her study in a provocative and professional manner. The volume is presented in the form of an introduction, eight chapters, a conclusion and an extensive appendix. Chapters one through four concern the style, structure, jurisdiction, personnel and procedures of the court, while the emphasis of the remaining chapters shifts to a discussion of the types of cases decided by the court.

### JUDGE HARRY INNIS: FIRST UNITED STATES JUDGE

The time parameters for Tachau's study, 1789-1816, coincide with the term of service of Judge Harry Innis,<sup>2</sup> the first United States judge for Kentucky, who Tachau discusses in an early chapter concerning court personnel. Although Kentucky did not achieve statehood until 1792, there had been a United States district judge authorized, appointed and serving since passage of the Judiciary Act of 1789.<sup>3</sup> Professor Tachau reports

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<sup>1</sup> M. TACHAU, *FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY 1789-1816*, 4-5 (1978) [hereinafter cited as M. TACHAU].

<sup>2</sup> United States District Court Judge, Edward H. Johnstone, spoke to a session of the 1979 Annual Convention of the Kentucky Bar Association in Lexington, Kentucky, on May 24, 1979. During that speech, he commented that there had been twenty-five judges of the United States District Court in Kentucky. A list of those who have served as judges of the United States District Court in Kentucky and respective dates of their commission are as follows: Harry Innes, September 26, 1789; Robert R. Trimble, January 31, 1817; John Boyle, October 20, 1826; Thomas B. Monroe, March 8, 1834; Bland Ballard, October 16, 1861; William H. Hays, September 6, 1879; John Watson Barr, April 16, 1880; and, Walter Evans, March 3, 1899. *Eastern District*: Andrew H. J. Cochran, July 1, 1901; Hiram Church Ford, March 28, 1935; Bernard T. Moynahan, Jr., November 8, 1963; and, Howard David Hermansdorfer, March 7, 1972. *Western District*: Charles H. Moorman, January 8, 1924; Charles I. Dawson, January 13, 1925; Elwood Hamilton, June 20, 1935; Shackelford Miller, Jr., March 4, 1939; Roy M. Shelbourne, February 8, 1946; Henry L. Brooks, August 21, 1954; James F. Gordon, July 23, 1965; Rhodes Bratcher, October 16, 1970; Charles M. Allen, November 30, 1971; Edward H. Johnstone, October 13, 1977; and, Thomas A. Ballantine, Jr., November 7, 1977. *Eastern and Western Districts*: Mac Swinford, August 21, 1937; and, Eugene E. Siler, Jr., December 8, 1975.

For a partial list of the United States District Court Judges of Kentucky, see Erwin C. Surrency, *Federal District Court Judges and the History of Their Courts*, 40 F.D.R. 139, 208-210 (1967). Subsequent judges and the dates of their commission may be found in all Federal Reporters.

<sup>3</sup> M. TACHAU, *supra* note 1, at 14.

that Judge Innis was in a precarious position in establishing the authority and reputation of the United States Court in Kentucky. The country had just survived a revolution which was precipitated in part by dissatisfaction with foreign rule. The early settlers of Kentucky no more appreciated a whiskey tax imposed by their new government than the settlers of Massachusetts appreciated a tax imposed by Britain upon their imported tea.

Only a few years earlier, many of [the same settlers] had rebelled against England in part because they believed that its legislature had unfairly taxed one part of the population without its consent. Time had not dulled their convictions. Nor had it brought much experience of gracefully accepting the will of the majority, or of sacrificing self-interest to national needs.<sup>4</sup>

The author presents an exceptional biographic sketch of Judge Innis, around whom the history of the early federal courts in Kentucky revolved. His family connections are illustrated by the fact that Thomas Todd was reared in his home and became his protege. Todd was later appointed by Judge Innis to the position of first clerk of the Kentucky District Court, a position he held from 1789 to 1792, and some years later Todd was appointed to the United States Supreme Court by President Jefferson. Justice Todd's first child was named Harry Innis Todd, his son married Judge Innis' daughter, and John H. Hanna, the son-in-law of Justice Todd<sup>5</sup> was appointed by Judge Innis as the fourth clerk of the United States District Court in Kentucky, a position he held from 1807 to 1851.

The sharp division of national politics between the Federalist party and the followers of Thomas Jefferson, then known as Republicans, existed not only in the colonies but also in early Kentucky. Judge Innis was aligned politically with the Republicans and included as his allies John Brown, Thomas Todd, George Nicholas, John Breckinridge and Henry Clay.<sup>6</sup> This alliance secured the initial judicial appointment for Judge Innis, but secured few subsequent appointments for po-

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<sup>4</sup> *Id.* at 68.

<sup>5</sup> *Id.* at 57-60.

<sup>6</sup> *Id.* at 35.

sitions such as United States Attorney. This led to conflicts, charges and counter-charges among the officeholders and their supporters.

The opposing political structure in the early Commonwealth consisted of the Marshall family, headed by Colonel Thomas Marshall, who was directly related to Chief Justice John Marshall of the United States Supreme Court. Colonel Marshall's nephew, Humphrey Marshall, was the most "vocal and intemperate member of the family."<sup>7</sup> The Marshall family followed the Federalist party line and often looked to Alexander Hamilton for guidance. The Federalist influence on national politics made possible the appointment of William McClung on the short-lived Sixth Circuit Court of Appeals and his cousin, Samuel McDowell, Jr., as the first Marshall of the United States District Court in Kentucky. Other appointments were made by the Federalists and included the third United States Attorney, Joseph Hamilton Daveiss. Mr. Daveiss was such a strong Federalist and supporter of Alexander Hamilton that he voluntarily changed his name to include that of his mentor.<sup>8</sup> The intense interplay between the warring political parties climaxed with efforts to investigate and impeach Judge Innis, libel suits instituted by Judge Innis and Thomas Todd against the Federalist publisher Joseph Street, and a reported duel between Henry Clay and Humphrey Marshall.<sup>9</sup>

Tachau's thorough research leads her to disagree with two of the recognized giants of American legal history and jurisprudence. Charles Warren, who authored *The Supreme Court In United States History*, concluded that the citizens of early Kentucky were opposed to the federal court established in their state.<sup>10</sup> Tachau contradicts that conclusion, stating that in actuality the early citizens of Kentucky accepted the new federal court and made great use of its jurisdiction. Professor Tachau also disagrees with Roscoe Pound's conclusion that the early Kentucky courts did not follow the English tradi-

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 74.

<sup>9</sup> *Id.* at 43-53.

<sup>10</sup> *Id.* at 24 n.27.

tions of law and procedure.<sup>11</sup> Again, the author demonstrates that for the period under study, English traditions, writs and procedures in law and equity were indeed used extensively in the early Kentucky courts. Professor Tachau should be commended for her efforts in presenting these stimulating propositions.

#### CASES CONSIDERED BY THE EARLY COURT

As previously indicated, after presenting the history, style, structure, jurisdiction, personnel and procedures of the court, the author explores in the last half of the work the types of cases considered by the early court. These cases involved the internal revenue laws, criminal charges, private civil cases and land cases.

Professor Tachau reports that enforcement of the internal revenue laws affected the appointment of a United States Attorney for the Kentucky District and resulted in almost no convictions for criminal charges under the act. The office of the United States Attorney remained vacant for many years because no one would accept the responsibility of prosecuting friends and neighbors for violation of the internal revenue laws, which in that day consisted primarily of a tax on whiskey—a tax which was anathema to the citizens of the Commonwealth and was largely ignored. Some distinguished citizens were brought before the court and charged with violations of the whiskey tax but were seldom convicted. For example, William Trimble, the father of United States Supreme Court Justice Robert Trimble, was tried by a jury for violation of the internal revenue laws and was acquitted. Professor Tachau reports that five jurors sitting on that jury had similar charges pending against them.<sup>12</sup> The only progress in achieving compliance with the internal revenue laws occurred when supervisor James Morrison decided to file civil suits for debts rather than criminal charges. There was no toleration, however, for collectors of funds under the internal revenue laws who did not deliver those funds to the proper governmental authority.

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<sup>11</sup> *Id.* at 9.

<sup>12</sup> *Id.* at 112.

Of fifteen former collectors charged with delinquent accounts, fourteen were convicted by juries and one died before his case could be tried.<sup>13</sup> The author emphasizes that the internal revenue cases possibly justified the existence of the United States courts in Kentucky.

Civil litigation in the United States District Court in Kentucky substantiates the confidence of the citizens in the federal court. Although the federal court had concurrent jurisdiction with the state court, 699 private suits, excluding injunctions and land cases, were brought in the federal court.<sup>14</sup> Of these, 510 were actions for debt, amounting to 22 percent of the total of 2,290 cases docketed in the court during the period under study. The plaintiffs were successful in 96.7 percent of the civil cases<sup>15</sup> which went to the jury—a remarkable disclosure considering that many of these plaintiffs were English merchants.

Kentucky attorneys are aware that citizens of the Commonwealth become extremely aggravated and will become quickly involved in protracted litigation over a line fence, right of way or a gate on a lane. Professor Tachau demonstrates that this tendency has been noticeable from the beginnings of Kentucky jurisprudence. She reports that of 1,550 private cases docketed, 712 involved land cases.<sup>16</sup> The veritable maze of claims made this area of the law difficult to handle. From 1801 to 1822 the United States Supreme Court decided thirty-three cases involving Kentucky land litigation, seven of which were certified in questions of law, fifteen of which were reversed, and eleven of which were affirmed.<sup>17</sup> Professor Tachau discloses that five of the fifteen land cases reversed by the United States Supreme Court involved relatives or political allies of John Marshall, Chief Justice of the United States.<sup>18</sup> The author notes that the Chief Justice did not dis-

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<sup>13</sup> *Id.* at 121.

<sup>14</sup> *Id.* at 150.

<sup>15</sup> *Id.* at 165.

<sup>16</sup> *Id.* at 167.

<sup>17</sup> *Id.* at 185.

<sup>18</sup> *Id.* at 186. The following digest of a case heard and decided by the United States Supreme Court while John Marshall served as Chief Justice of the United States appears as follows:

qualify himself in these cases, and, in fact, wrote three of the opinions. "The tendency of Kentuckians to litigate made land ownership virtually impossible for anyone without a good lawyer, and it appears that sometimes it was important to choose counsel on the basis of their connections on the Supreme Court, as well as their skill."<sup>19</sup>

In conclusion, Professor Tachau has written an excellent study. Her research of primary source material is obviously exhaustive; she assimilates the information into manageable proportions, entertainingly writes her volume, provocatively states her opinions, and leaves the reader with a sense of satisfaction of time well spent after reading her work. This book is mandatory reading for anyone interested in the early history of the courts of Kentucky.

*Woodford L. Gardner, Jr.\**

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*Humphrey Marshall and wife v. James Currie*, 4 Cranch 172.

Error to U.S. District Court, Kentucky, J. for defendant in error, defendant below, reversed. Opinion by Justice Johnson.

The case involved the validity of entry made by Thomas Marshall, J.M.'s father, claimed by Humphrey, J.M.'s brother-in-law and cousin, and his wife, J.M.'s sister. Action against older patentee claiming under prior entry. The entry based on marked trees was held sufficiently definite because of courses and distances making it only location.

It appears that J.M. sat at the argument of the cause. U.S. Supreme Court, Minute Book B, 44 (Feb. 27, 1807).

I. RHODES, *THE PAPERS OF JOHN MARSHALL: A DESCRIPTIVE CALENDAR*, V. I, 556 (1969).

<sup>19</sup> M. TACHAU, *supra* note 1, at 190. Differing conclusions concerning the propriety of Chief Justice John Marshall's hearing certain cases is shown by the following statement:

The lower courts ruled in Mason's favor, and Wilson then appealed to the Supreme Court. His case was argued by Joe H. Daviess, who two years after appearing as Wilson's counsel before Marshall married Marshall's sister, Nancy—a point that critics of Marshall's ultimate decision have made much of.

L. BAKER, *JOHN MARSHALL: A LIFE IN LAW* 367 (1974).

Professor Tachau stated in her volume that the correct spelling of the surname is Daveiss, rather than Daviess. Mr. Baker made the common mistake in his volume. It is further noted by Professor Tachau that even the Kentucky county named in honor of the early Kentuckian reversed the surname letters in the spelling of Daviess County. M. TACHAU, *supra* note 1, at 1975.

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