MARY K. BONSTEEL TACHAU

Federal Courts in the Early Republic

Kentucky, 1789-1816

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To Eric

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Introduction

IN 1922, Charles Warren published *The Supreme Court in United States History*, a pioneering work concerned with the impact of the Supreme Court and the federal judiciary on American history from 1789 to 1918.[1] The book was immediately recognized as an important contribution toward understanding the third, and often neglected, branch of government. Among the complimentary letters Warren received was one from United States Supreme Court Justice Louis D. Brandeis. He wrote that Warren had "performed an important public service," because "a better understanding of the function of our Court is an essential of political and social health." Like many other readers, Justice Brandeis found that the book inspired ideas for further research. He suggested in the conclusion of his letter: "Much having makes me hunger more. Have you ever thought of writing on the lower Federal Courts? A consideration of their functioning in the past would be interesting."[2] But Warren's investigations led him in other directions, and Brandeis's casual remark lay forgotten among Warren's correspondence.

Six years later, the suggestion was repeated from another source. In response to the public interest generated by passage of the Judiciary Act of 1925, Felix Frankfurter and James M. Landis wrote *The Business of the Supreme Court.*[3] Their book was intended to explain "the surface technicalities governing the jurisdiction of the Federal Courts." It also evaluated the role played by the judiciary in the balances of power between the states and the national government, and between "growingly divergent economic interests."[4] In a passage describing the problems of the circuits and the caseload of the Supreme Court, the authors repeated the Brandeis suggestion, which was probably unknown to them:

> Our national history will not have been adequately written until the history of our judicial systems can be adequately told through monograph studies of individual courts. . . . Nor shall we be able to know

[1] Charles Warren, *The Supreme Court in United States History, 1789-1918* (Boston, 1922). References hereafter are to rev. ed. (Boston, 1926).

[2] Louis D. Brandeis to Charles Warren, June 23, 1922, Charles Warren Papers, Box 1, Manuscript Division, Library of Congress.

[3] Felix Frankfurter and James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* (New York, 1928).

[4] *Ibid.*, vi.

how our courts function until an effective system of judicial statistics becomes part of our tradition. . . . What is needed is an annual detailed analysis of litigation, the courts whence cases come, the dispositions made of them, the nature of the questions involved, etc., etc., etc.[5]

Although the suggestion was here made publicly rather than privately, it too has been largely overlooked.[6] Three recent books have examined different aspects of lower federal courts, but none has been as comprehensive or as methodically analytical as Frankfurter and Landis proposed.[7]

It is the purpose of the present study to pursue their suggestion by 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 juris-

[5] *Ibid.*, 52.

[6] Two recent exceptions are: R. Kent Newmyer, "Justice Joseph Story on Circuit and a Neglected Phase of American Legal History," *American Journal of Legal History*, XIV (1970), 112-135, and Bradley T. Johnson, *Reports of Cases Decided by Chief Justice Chase in the Circuit Court of the United States Fourth Circuit 1865-1869*, introd. Ferne B. Hyman and Harold M. Hyman (New York, 1972 [orig. publ. New York, 1876]), v-xxvii.

[7] Julius Goebel, Jr., *Antecedents and Beginnings to 1800*, in Paul A. Freund, ed., *The Oliver Wendell Holmes Devise History of the Supreme Court*, I (New York, 1971). (Hereafter cited as *Antecedents and Beginnings*.) However, Goebel was principally interested in the lower courts as they related to the United States Supreme Court, and his analyses of cases were directed toward illustrating questions of substantive law. A survey of the numbers and kinds of cases docketed in the federal district and circuit courts is included in Dwight F. Henderson's *Courts For a New Nation* (Washington, 1971). Henderson's purpose was to evaluate the need for those courts, and he did not systematically examine the disposition of the cases. Marvin Schick's *Learned Hand's Court* (Baltimore, 1970) is a study of the United States Court of Appeals for the Second Circuit from 1941 to 1951. As the author pointed out in his preface, the contextual limitation of a single decade distorts the work of the court because it overlooks the court's previous history and does not pursue the ultimate disposition of all the cases arising during that decade.

dictional questions may find some useful information, I wrote this study for historians and others without formal training in law.[8]

Source material for this subject is abundant. All the essential federal court records are still housed in the old Federal Building in Frankfort, Kentucky. The most important of these, the Order Books of the courts, have been made more accessible by a microfilming project conducted by the Church of Jesus Christ of Latter-Day Saints. They have also microfilmed the Complete Record of the Seventh Circuit Court, an incomplete collection of case papers containing illuminating material. (Copies of the microfilm are in the Special Collections Department of the Margaret I. King Library of the University of Kentucky, Lexington.) Other court records were made available by the clerk of the United States Court for the Eastern District of Kentucky at Lexington.

The chronological limits of the study were determined by the tenure of the first judge of the United States Court for the District of Kentucky, Harry Innes. Innes kept an astonishing number and variety of his personal papers. His descendants deposited them in the Manuscript Division of the Library of Congress, where they fill twenty-eight volumes, capriciously numbered and arranged. Additional Innes papers are held by the Filson Club in Louisville, Kentucky, and by the Kentucky Historical Society in Frankfort. During the years while he sat alone on the Kentucky federal bench, Innes copied ninety-two of his opinions (which, according to custom, were not included in the court records) in a small leather-bound book that was found by chance in the office of the clerk of the United States Court for the Western District of Kentucky at Louisville. An important body of related government records is held by the National Archives in Washington. Supplemental material is in the manuscript collections of the Massachusetts Historical Society, Boston; the Connecticut Historical Society in Hartford; and in the Historical Society of Pennsylvania in Philadelphia.

In order to discover what happened in the federal courts in Kentucky, my fundamental research technique was to transpose these scattered sources into more manageable form by virtually reconstructing the cases in a card file. This involved copying the work of the courts recorded in the Order Books and then setting up a separate card for each case. All of the significant actions taken on a case were

[8] The distinction between institutional legal history and legal history emphasizing substantive law is described by Herbert Alan Johnson, "American Colonial Legal History: A Historiographical Interpretation," in Alden T. Vaughan and George Athan Billias, eds., *Perspectives on Early American History: Essays in Honor of Richard B. Morris* (New York, 1973), 262-269.

noted on each card. The technique thus invented produced a kind of evidence heretofore absent from legal history: the disposition of each case and, collectively, the day in, day out work of the courts. With eleven Order Books completed during the period under examination, containing 4,689 pages of notations on 2,290 cases, this system made possible quantitative as well as qualitative evaluation.

Because of the time limitations involved in working with microfilm borrowed through interlibrary loan, the collection of evidence was well under way before the background reading was completed. While this reversal of the usual procedure resulted in some initial disorientation, it had a fortuitous consequence. I had very few preconceived ideas about what conclusions to expect, and the evidence was gathered without commitment to a particular frame of reference. By the time I had fully assimilated the theses of other writers, I had compiled a large body of evidence against which their generalizations could be tested.

The unique opportunity provided by immediate and constant reference to the concrete evidence of the courts' own records led me, in many instances, to conclusions which differ from those of other students of American legal and constitutional history. The data, in fact, so frequently contradict so much of the conventional wisdom that a reexamination of many popular assumptions may be in order. It is, of course, possible that the Kentucky federal courts were atypical. Whether that proves to be the case can only be known after a research design similar to the one used in this study is applied to the records of other contemporaneous courts. With the growing availability and accessibility of early court records, one hopes that they will be used to seek comparisons with the findings presented here and to gain a more comprehensive understanding of this segment of the national past.[9]

Ever since the Works Progress Administration surveyed federal records in the states in the 1930s, it has been known that federal court records were available even where they were not easily accessible. It seems now somewhat surprising that they have not been used. Ap-

[9] A convenient listing of the location of many federal district and circuit court papers is in Goebel, *Antecedents and Beginnings*, 815. Some federal court records have been inventoried and microfilmed by the National Archives. An example of the potential for reevaluation may be seen in an article based upon the federal circuit court records for the District of Georgia, which presents a significant revision of the circumstances relating to the case that prompted the Eleventh Amendment. Doyle Mathis, "*Chisholm* v. *Georgia*: Background and Settlement," *Journal of American History*, LIV (1967), 19-29.

parently, most scholars, if they thought about the lower federal courts, assumed that they already knew in general terms what went on in them. If mentioned at all, they are described as inferior courts in every sense of that word. It was in the early federal circuit courts that the travesties of the Sedition Act of 1798 were carried out; it was in an early federal district court that Judge John Pickering so misbehaved that he was later impeached. Not until Robert Trimble of Kentucky was appointed to the Supreme Court in 1826 was any judge of a lower federal court elevated to the high court. This fact suggests that the lower federal courts were not seen as useful training grounds for judicial eminence.

Almost all the courts of the new nation are believed to have been so anti-British that they ignored the proprieties of their English legal traditions. Lawyers are said to have been poorly trained and unpopular.[10] A recent study suggests that courts were governed more by politics than by law.[11] When, to these impressions, are added Charles Warren's assertions that the people of at least five states were at war with the federal judiciary during this time, it has seemed reasonable to conclude that the lower federal courts are best forgotten.[12] If the third branch of government made any contribution toward the permanence and stability of the new republic, it has seemed that only the court of John Marshall did so. American historians interested in the early federal judiciary have, therefore, tended to concentrate on the United States Supreme Court, its members, and its most significant cases.

In doing so, they have been aided by the Court itself, which recognized from the beginning that its decisions must be understandable if they were to be acceptable to the citizenry. Supreme Court opinions are written in terms that any interested literate person can comprehend, and sometimes are truly eloquent. That public interest of which the Court has always been mindful has been well served by historians who have expanded the language of the court to explain the policy issues and the public consequences of what were, at heart, legal questions.

But to move from the Supreme Court to the lower federal courts means to move from constitutional history to legal history, and that is another world altogether. It is a world into which a nonlawyer ven-

[10] Charles Warren, *A History of the American Bar* (Boston, 1911), 212-214. Maxwell Bloomfield, *American Lawyers in a Changing Society, 1776-1876* (Cambridge, Mass., 1976), 39-58.

[11] Richard E. Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic* (New York, 1971).

[12] Warren, *Supreme Court*, I, 366-400; 541-565; 633-652.

tures cautiously. Many historians have doubtless been chastened, at least vicariously, by the reprimands delivered by Julius Goebel, Jr. A lawyer-historian of stature and candor, Goebel scathingly denounced what he considered the presumptuousness of historians who attempted to deal with matters that he thought were better left to lawyers. So contemptuously did he dismiss several such pioneering efforts by people trained in history that his words have doubtless had a chilling effect on many others.[13]

Even historians who have never heard of Goebel are easily deterred from working in early lower court records. They are unlike any other official American documents. The law then had a language all its own, a highly stylized English interspersed with Latin. The English was not like spoken or literary English, and the Latin was not the Latin of Cicero or Caesar. Together they formed a strange tongue that had been brewed out of the melting pot of English history to mark the guideposts of English law as it was understood (and misunderstood) in these former English colonies. Until the reforms of the codification movement of the mid-nineteenth century, all court cases at the trial level were pursued in forms of action that have since been superseded and largely forgotten. Not only is the nature of a grievance obscured by language barriers, but also the methods of resolving it seem almost incomprehensibly ritualistic. There are no adequate guidebooks, ancient or modern, to help one through this most unfamiliar terrain. What was once so obvious and elementary that it did not seem worth writing down and explaining is now elusive and abstruse to a conventionally trained historian. Everyone confronting such obstacles understands and shares the lament of a law clerk of that era: "How many hours have I hunted, how many books turned up, for what three minutes of explanation from any tolerable lawyer would have made clear to me."[14]

But those who have some acquaintance with these archaic procedures and practices do not ask the questions for which historians need the answers. Lawyers with training in legal history are not particularly

[13] Julius Goebel, Jr. and T. Raymond Naughton, *Law Enforcement in Colonial New York: A Study in Criminal Procedure (1664-1776)* (Montclair, N.J., 1970), xxxii-xxxvi. See also, Goebel's review of Dorothy S. Towle, ed., *Records of the Vice-Admiralty Court of Rhode Island, 1716-1752*, in *American Historical Review*, XLIII (1938), 403-406.

[14] Henry C. Van Schaack, *Life of Peter Van Schaack, LL.D.* (New York, 1842), 9. The problems and significance of early court records are described by Elizabeth Gaspar Brown, "Frontier Justice: Wayne County 1796-1836," *Am. J. Legal Hist.*, XVI (1972), 126-153.

interested in how law affected the general population, or how the work of the courts interacted with other institutions. Legal training emphasizes precedent, the isolation of topical issues, and the development of legal doctrines. The analytic skills of lawyer-historians have therefore been principally devoted to discovering the history of American law rather than the legal history of the American people. For example, many lawyers have responded to the challenge of Chancellor James Kent's undocumented assertion that when he became a judge of the New York Supreme Court in 1798, "we had no law of our own, and nobody knew what it was."[15] One group of legal historians joined Dean Roscoe Pound in his belief that a rejection of English common law, the departure of leading Loyalist attorneys, and an undeveloped reporting system in the post-Revolutionary period, together led to a noticeable break from the past.[16] Another group has concentrated on the colonial period in order to discover whether the significant antecedents of American law derived from English local courts or from the central courts in London.[17] Both groups have been concerned with questions of substantive law and the development of legal principles rather than with the place of law in the lives of ordinary people.

Legal research has ranged from bench to bar to legislative chambers. Scholars have collected, calendared, and edited the papers of prominent predecessors.[18] Even the notebooks of obscure attorneys practicing in a local court have been mined for clues.[19] Legislative debates have been examined to discover intention, statutes to determine implementation, and judges' opinions to find legal perception.[20] Members

[15] William Kent, *Memoirs and Letters of James Kent, LL.D.* (Boston, 1898), 117.

[16] Roscoe Pound, *The Formative Era of American Law* (Boston, 1938); Francis R. Aumann, "Some Problems of Growth and Development in the Formative Period of the American Legal System, 1775-1866," *University of Cincinnati Law Review*, XIII (1939), 382-445; Anton-Hermann Chroust, "The American Legal Profession: Its Agony and Ecstacy," *Notre Dame Lawyer*, XLVI (1971), 487-525.

[17] A particularly useful collection of these studies is David H. Flaherty, ed., *Essays in the History of Early American Law* (Chapel Hill, N.C., 1969).

[18] Julius Goebel, Jr., *et al.*, eds., *The Law Practice of Alexander Hamilton* (New York, 1964-1969); L. Kinvin Wroth and Hiller B. Zobel, eds., *Legal Papers of John Adams* (Cambridge, Mass., 1965); Irwin S. Rhodes, *The Papers of John Marshall: A Descriptive Calendar* (Norman, Okla., 1969); David John Mays, ed., *The Letters and Papers of Edmund Pendleton, 1734-1803* (Charlottesville, Va., 1967); Herbert A. Johnson, *et al.*, eds., *The Papers of John Marshall* (Chapel Hill, N.C., 1974-).

[19] Daniel J. Boorstin, ed., *Delaware Cases 1792-1830* (St. Paul, Minn., 1943).

[20] Morton J. Horwitz, "The Emergence of an Instrumental Conception of American Law, 1780-1820," in Donald Fleming and Bernard Bailyn, eds., *Law in American History*, Perspectives in American History, V (Cambridge, Mass., 1971), 287-326.

of the bar in at least two states have been scrutinized.[21] A variety of evidence has been gathered from widely scattered sources. As a result, the legal history of the young nation has been reconstructed from fragments of information and interpretation that are often unrelated to each other, and generalists have been forced to rely upon such disparate bits and pieces in the absence of more comprehensive knowledge.[22]

There have been few systematic studies of the total caseloads of any courts and fewer still that have analyzed the disposition of all the cases.[23] Sampling techniques have dominated research. Yet the comprehensive study of any court's records yields both a quantity and a quality of evidence not found elsewhere. While debates and statutes suggest possibilities, and private papers indicate probabilities, only court records provide certainties. And the court itself provides a focus for otherwise disconnected facts.

Court records, especially contemporaneous ones, also facilitate comparisons not otherwise feasible. It may prove to be impossible to develop a body of knowledge based upon state court records because they seem often to have been lost or destroyed. But the most essential records of the lower federal courts, the Order Books (or Minute Books) have been preserved for many if not all of the jurisdictions. Their records reveal actual legal practice. They show how national laws,

[21] Donald M. Roper, "The Elite of the New York Bar as Seen from the Bench; James Kent's Necrologies," *New-York Historical Society Quarterly*, LVI (1972), 199-237; Gerard W. Gawalt, "Massachusetts Lawyers: A Historical Analysis of the Process of Professionalization, 1760-1840" (Ph.D. diss., Clark University, 1969).

[22] The first general history of American law is Lawrence M. Friedman, *A History of American Law* (New York, 1973). The author describes the limitations of existing knowledge throughout his book. See, e.g., 9, 83, 110, 144, 596-601.

[23] Francis W. Laurent's study of the circuit court of Chippewa County, Wisconsin, from 1855 to 1954, *The Business of a Trial Court: 100 Years of Cases* (Madison, 1959) received only one thoughtful review, by Lawrence M. Friedman in *St. Louis Law Review*, V (1959), 454-466. One of the rare examples of published court records for this period is William Wirt Blume, ed., *Transactions of the Supreme Court of the Territory of Michigan 1805-1814* (Ann Arbor, 1935). Even colonial court records, which have received greater attention, are seldom published in their entirety. A convenient guide to these is Michael G. Kammen, "Colonial Court Records and the Study of Early American History: A Bibliographic Review," *American Historical Review*, LXX (1965), 732-739. Analyses of post-Revolutionary legal history based upon court records are: William Wirt Blume, "Civil Procedure on the American Frontier: A Study of the Records of a Court of Common Pleas of the Northwest and Indiana Territories (1796-1805)," *Michigan Law Review*, LVI (1957), 161-224; M. Leigh Harrison, "A Study of the Earliest Reported Decisions of the South Carolina Courts of Law," *Am. J. Legal Hist.*, XVI (1972), 51-70; Brown, "Frontier Justice," *ibid.*, 126-153.

constitutional interpretations, and federal authority were, in fact, applied to the citizens and the circumstances of the nation.

It is important to remember that the federal judiciary encompasses much more than the United States Supreme Court. Certainly the appellate function of that court gives it a unique status. But the presumption that a court of last resort is the most (or only) important court in the legal system should be qualified, especially for the early national period. Most cases originate and terminate in the trial courts; it is there that most people have their only contact with the judicial system. The traditional emphasis upon the Supreme Court may have distorted our understanding of the importance of the federal judiciary. Systematic investigations into the work of the early inferior courts may show that their impact was much greater than has been assumed.

In the beginning of the national experience, it was generally thought that state courts could handle most of the cases that would be docketed in the federal district and circuit courts. These lower courts were believed to be needed, not to share the burden of volume (which was expected to be slight), but to protect nonresidents from possible local prejudices, and to assure uniformity where a single national practice was considered necessary, as in admiralty and maritime law.[24] Local variations in legal practice were expected and accepted as long as the right of appeal to the Supreme Court was preserved. The original district and circuit courts were considered useful more for political purposes than because they were needed for the administration of private or public law.

From the passage of the Judiciary Act of 1789 to the present, no evidence has been presented to challenge these assumptions. But an examination of the records of the federal courts in Kentucky suggests that they may need reevaluation. The most striking discovery is the number of cases. During a period when the United States Supreme Court handed down 457 decisions, the federal courts in Kentucky acted on 2,290 causes. Constitutional and legal questions were decided much more frequently by these inferior courts than by the Supreme Court, and for 98 percent of the litigants, those decisions were final.

Only forty-nine cases were carried to the Supreme Court, where they appear in the early Reports (although the case files are incomplete in the Supreme Court's records).[25] The remaining 2,241 cases have been

[24] Charles Warren, "New Light on the History of the Federal Judiciary Act of 1789," *Harvard Law Review*, XXXVII (1923), 49-132.

[25] Appellate Case Files of the Supreme Court of the United States, 1792-1831, M-214, Records of the Supreme Court of the United States, Record Group 267, National Archives.

completely overlooked by the compilers of federal and state digests and do not appear in any published records. Only two Kentucky cases from this period have ever received any public attention at all, and even that has been limited to specialists.[26]

This hitherto hidden litigation provides a wealth of illuminating material. Its usefulness for legal history is obvious. Some of the information yields insights into social and economic history. Other data are important in political history. For example, one-third of the cases were brought by officers of the government. Most of this litigation came about because of the internal revenue laws and it illustrates the difficulties of enforcing unpopular statutes among a population determined to resist them. The remaining cases were private civil suits between individuals. The volume alone indicates that in Kentucky the federal courts were perceived as essential in the adjudication of private controversies.

Thousands of people were directly affected by the proceedings in these courts. And because the influence of a lawsuit may extend beyond the nominal litigants, it is likely that thousands more were affected indirectly. It seems clear that the federal courts in Kentucky must have been much more important than has been assumed, and in a different way from that described by Charles Warren. It is doubtful whether any other branch of the federal government acted so directly upon so many people in Kentucky as did this segment of the federal judiciary. Probably only the government's policies on the Indians and on navigation of the Mississippi River were of greater significance to these citizens in the interior. During a period when the executive and legislative branches so often seemed "at a distance and out of sight," and the United States Supreme Court was available only to a tiny, privileged minority, the courts of Harry Innes were accessible, visible, and deeply involved in the concerns of the population.[27]

Because contact with the federal courts was so extensive, these institutions may well have exercised considerable influence on the attitudes of Kentuckians toward their central government. It has, therefore, seemed important to evaluate the kind of law practiced in the

[26] The better known is the charge of treason unsuccessfully brought against Aaron Burr, described in Chapter Six. *Green* v. *Biddle* was discovered in the Supreme Court Reports by Paul W. Gates, who described its progress there in "Tenants of the Log Cabin," *Mississippi Valley Historical Review*, XLIX (1962), 3-31.

[27] The quotation from *The Federalist*, No. 27, by Alexander Hamilton, illustrates James Sterling Young's description of the alienation of citizens from their government in *The Washington Community 1800-1828* (New York, 1966), 13-37.

courts to determine what kind of image they projected to the people. Did these courts aspire to that equal justice which is consonant with political equality? Were the procedures of the courts new ones that were devised in response to the requirements of the frontier, or were they the familiar English procedures as they had been modified by the colonial experience? What kind of men were identified with the courts? Did they enhance the prestige of the judiciary, or did they dissipate its potential authority? What was the range of power available to the lower courts?

This study attempts to answer these questions. Whether the experience of Kentucky was unique or was typical will not be known until similar studies are made of other federal and state courts of this period. The difficulties of transportation and communication may have superseded a common tradition, the perceptions and convictions of certain key individuals may have been uncommon, and the expense of carrying cases to the Supreme Court may have prevented challenges to the practices of the Kentucky courts and inhibited the development of a uniform federal practice. But what happened in the Kentucky federal courts from 1789 until 1816 is revealed in an unusually rich combination of records. They provide the evidence for this examination of the jurisdiction of those courts, the judges and other personnel who served in them, the procedures followed, and the disposition of cases according to categories. Taken together, these findings illustrate one segment of our judicial history—and raise questions about the remainder.

CHAPTER ONE

The Style, Structure, and Jurisdiction of the Courts

KENTUCKY acquired a federal court in 1789, two and one-half years before it achieved statehood. What was then the western district of Virginia was a wilderness, only recently vacated by Indians who frequently recrossed the Ohio River to attack the Anglo-Americans who had taken their hunting and farming lands.[1] It was a forested and fertile land which promised great productivity and wealth to those who could hold and exploit it, but it was a land that could be reached only after hazardous journeys along primitive trails or along the rivers. No stagecoaches penetrated the region, and the unimproved Wilderness Road, recently carved through the mountains, was too rugged for wagons.[2] There was no mail service: even letters from President Washington and his secretary of war were carried in the packs and saddlebags of private citizens.[3] Communications within and away from the area were exceedingly irregular.

Yet despite the primitive environment, the federal court in Kentucky soon became very busy, in part because the law practiced there did not yield the crude justice generally associated with the frontier.[4] This

[1] Harry Innes to John Brown, Dec. 7, 1787, Harry Innes File, Manuscript Collection, Kentucky Historical Society, Frankfort, Ky.; William Elsey Connelley and E[llis] M[erton] Coulter, *History of Kentucky*, ed. Charles Kerr, I (Chicago, 1922), 239-307, *passim*.

[2] Thomas Todd to Charles S. Todd, Aug. 23, 1808, Todd Family Papers, Manuscript Dept., Filson Club, Louisville, Ky.; Thomas Speed, *The Wilderness Road* (Louisville, 1886), 30; Robert L. Kincaid, *The Wilderness Road* (Harrogate, Tenn., 1955), 184.

[3] George Washington (by Tobias Lear) to John Brown, Oct. 2, 1789, Miscellaneous Letters of the Department of State, 1789-1906, M-179, roll 2, General Records of the Department of State, Record Group 59, National Archives. (Hereafter cited as Misc. Letters, Dept. of State, M-179); Henry Knox to Beverly Randolph, Dec. 17, 1789, W. P. Palmer *et al.*, eds., *Calendar of Virginia State Papers and Other Manuscripts . . . Preserved . . . at Richmond (1652-1869)*, V (Richmond, Va., 1875-1893), 82.

[4] Writers who accept the thesis that English common law was rejected during this period often conclude that English procedures also were proscribed, and that frontier courts were crude and undignified. E.g., Charles Warren, *A History of the American Bar* (Boston, 1911), 212-214; Roscoe Pound, "The Pioneers and the Common Law," *West Virginia Law Quarterly*, XXVII (1920), 1; Richard E. Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic* (New York, 1971), 115-117; Anton-Hermann Chroust, "The American Legal Profession: Its Agony and Ecstasy," *Notre Dame Lawyer*, XLVI (1971), 487-525; Charles