

Peter G. Fish, *Federal Justice in the Mid-Atlantic South: United States Courts from Maryland to the Carolinas, 1789-1835* (2002)

Foreword

Of all the Circuit histories, that of the Fourth Circuit is one of the richest in detail. This magnificent history by Professor Peter G. Fish will trace the origins of the circuit from the early days of the republic through the middle of the twentieth century. *Federal Justice in the Mid-Atlantic South: United States Courts from Maryland to the Carolinas* is multi-dimensional—documentary, statistical, biographical, and analytical. The principal time frame for the history is 1789-1958 (170 years).

Part One, "The Early Republic's Third Branch," traces the development of national courts and national law through the founding decade of our republic to 1801. It focuses on the important role played by federal judges in the mid-Atlantic South in building a new nation. As Professor Fish recounts in his absorbing study, these judges gave life to an untested national judicial system. They labored initially under the provisions of the Judiciary Act of 1789. Circuit courts staffed by Supreme Court Justices and district judges heard great and small cases arising out of the lives of the people of the region from the Tidewater eventually to the spine of the Appalachian mountains.

Part Two, "Courts, Law and Jeffersonian Ascendancy," traces the development of regionalized national courts and national law from 1801 to approximately 1819. It focuses on the important role played by federal judges in the mid-Atlantic South in defining national power during a tumultuously partisan era in American politics. Professor Fish skillfully relates how these judges served a national judicial system in the throes of politically sensitive changes. They had worked at first under the provisions of the Judiciary Act of 1789, then under the Federalist-inspired Judiciary Act of 1801 and finally under the Act of 1802 promoted by the triumphant Republicans. Circuit courts staffed by Supreme Court Justices and district judges, and briefly by separate circuit judges, rarely heard cases of enduring importance. Some, however, remain judicial landmarks. Among them is the great treason trial of Aaron Burr. Its vital story is recounted here as well as in a videotape cassette produced as part of the "Equal Justice Under Law" series sponsored by the Committee on the Bicentennial of Independence and the Constitution of the Judicial Conference of the United States. The late Clement F. Haynsworth, Jr., Chief Judge of the United States Court of Appeals for the Fourth Circuit from 1964 to 1981, chaired the Committee which brought this effective dramatization into the nation's classrooms.

Part Three, "National Unity, Seeds of Discord in the Age of Marshall," traces the development of regionalized national courts and national law from approximately 1819 to 1835. Considered within it is the role played by federal judges in the mid-Atlantic South in defining the scope of national power as against sovereignty claims advanced by the states, pre-eminently by South Carolina. Professor Fish masterfully sketches the varied responses of these judges to incipient sectional strife driven by controversy over the institution of slavery. Laboring within the organizational and jurisdictional context provided by the Judiciary Act of 1789 as amended by the Acts of 1802 and 1819 were Supreme Court Associate Justices Gabriel Duvall and William Johnson, and Chief Justice John Marshall together with district judges in the several

states comprising three separate circuits, later combined to form the modern Fourth Circuit. The cases they heard arose out of the lives of the people of the regions from the Atlantic coast across the Appalachian mountains to the Ohio River and from the Susquehanna basin to the Savannah River.

Few of the cases discussed by Professor Fish are familiar landmarks in the law. Noteworthy, however, is his linking of circuit court decisions authored by Circuit Justices Marshall and Johnson to subsequently written Supreme Court opinions by the same Justices. Having previously spoken on circuit to the question of national commerce power and its scope, both Justices' opinions in the great case of *Gibbons v. Ogden* (1824) take on aspects of the opening night performance of a well-rehearsed play. Noteworthy, too, is Professor Fish's attention to a Cherokee land case arising in North Carolina and to his treatment of the harmonizing role played by United States courts in the protection of private property and private credit arrangements. In this manner are different contributions to American legal development set out in his rich history of national courts as they then existed in today's Fourth Circuit.

The Civil War would have a dramatic impact on the South and on its links with the national judicial system. In the war's wake came new demands on that restored system. Circuits were realigned in 1866 at which time the Fourth Circuit assumed its present five-state composition. Three years later, Congress established a separate office of Circuit Judge for each of the nine existing circuits. Further increases in regional judicial business and in the docket of the Supreme Court led to establishment in 1891 of the circuit courts of appeals. Among them was the United States Court of Appeals for the Fourth Circuit encompassing the states of Maryland, Virginia, West Virginia, North Carolina, and South Carolina.

The ceremonial opening of this historic regional court took place before a packed courtroom at 12:05 p.m. on Tuesday, June 16, 1891. The large crowd included nearly every lawyer of prominence in the new court's seat of Richmond, Virginia. The Chief Justice of the United States presided. He, like every one of his predecessors beginning with John Marshall, had been allotted to the circuit that included the venerable Commonwealth of Virginia. Chief Justice Melville Weston Fuller explained that the tribunal would provide "a court of extended jurisdiction and great importance, through whose creation it is believed suitors will obtain more speedy justice, and the pressure on the Supreme Court of the United States will be relieved."

The site of the new intermediate appellate court in Virginia's capital was the Customs House, completed in 1858. Three stories high, the building originally housed the Post Office on the first floor, the Customs Office on the second, and the U.S. District Court on the third level. It is described by William B. O'Neal in his *Architecture in Virginia* (1968) as a "superb granite building [that] has miraculously retained its original character [and]...its strong Victorianism [that made it] a happy focal point in the city's business district."

The old Customs House has grown into today's courthouse named after native Virginian Lewis F. Powell, Jr., Associate Justice of the United States Supreme Court from 1971 to 1987. Within the walls of that courthouse is centered the modern Fourth Circuit. It is one that values still its traditions, its civility, its continuity, and its commitment to equal justice under law. Its judges continue the long practice of descending from the bench after every oral argument to

shake the hands of the lawyers in the case. From Richmond, the Court's judges have reached out through the Fourth Circuit Judicial Conference to far-flung district, bankruptcy and magistrate judges as well as to the various state benches and bars within the circuit. The conference owes its genesis to Chief Judge John J. Parker (1925-1958) who in 1931 organized the nation's first circuit conference which was held at the Grove Park Inn in Asheville, North Carolina.

Many fine people have assisted in the development of this extensive project. Former Chief Judge Clement F. Haynsworth, who died in 1989 after thirty-two years of distinguished service on the Fourth Circuit Court of Appeals and sixteen years on the Judicial Conference of the United States enthusiastically promoted the production of a Fourth Circuit history. He worked to ensure that its contents would be accurate and presented with appropriate dignity. We are much indebted to him for all of his encouragement and labors.

Much gratitude is due the Fourth Circuit History Committee composed of Honorables John D. Butzner, Jr., Sam J. Ervin, III, the late Donald S. Russell, and H. Emory Widener who have worked from the inception of this history to ensure a scholarly publication that would reflect this court's contribution to the law of our region and our nation. Our circuit executive, Samuel W. Phillips, has worked steadily and effectively in support of this important project.

I would also be remiss if I did not mention Professor William F. Swindler of the Marshall-Wythe School of Law, College of William and Mary, who began this history and assembled substantial quantities of information for it before he died.

The true creator of our history though is Peter G. Fish, Professor of Political Science and Law, Duke University. Volume 1 is the first in a series which will encompass the subjects of judicial organization, selection of judges and, of course, the effect of judicial decisions on legal, political and social issues in the Fourth Circuit. The outstanding quality of this volume and its importance to the Fourth Circuit are beyond question. This history is a tribute to the talents and energies of Professor Fish, and a source of pride for all who value the special place of the Fourth Circuit in our system of justice.

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