State–Federal Judicial Observer

NEWS AND COMMENTARY OF INTEREST TO THE STATE AND FEDERAL JUDICIARY

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Cold Spring Harbor Lab Hosts Judicial Seminar on Science

by James G. Apple,
Chief, Interjudicial Affairs Office,
Federal Judicial Center

Cold Spring Harbor Laboratory, near Huntington, Long Island, N.Y., is not only a world famous laboratory and location for high level scientific conferences that often include Nobel Prize winners, it also has, for the past three years, been the site for a seminar for state and federal judges on basic issues of science.

The 1998 seminar, held October 27–30 at the Laboratory's Conference Center, included presentations on "Cloning: the Biological and Social Implications of a New Science," by Professor Lee Silver of the Molecular Biology Department of Princeton University; "DNA and the Human Genome Project," by Dr. Jan A. Witkowski, Director of the Banbury Center; "Statistics and Probability in Science," by Professor Stephen Fienberg of the Department of Statistics, Carnegie Mellon University; "Social Implications of Genetic Research," by Dr. Philip Reilly, Executive Director of the Shriver Center for Mental Retardation; "Toxicology, the Environment and Risk Assessment," by Dr. Michael Gallo of the Robert Wood Johnson Medical School; and "Origins of Life," by Professor Robert Shapiro, Professor of Chemistry at New York University.

A special presentation at the 1998 seminar was made by John Horgan, science writer and author of *The End of Science*, who lectured to the judges about science in the next century.

Dr. Jan A. Witkowski, left, director of the Banbury Center of Cold Spring Harbor Laboratory, talks with Dr. James D. Watson, center, Nobel Prize-winning geneticist and director of the Laboratory, and Dr. Leon M. Lederman, right, who won the Nobel Prize in physics, during the seminar on Basic Issues of Science for State and Federal Judges in 1997. Dr. Watson, Dr. Lederman, and Dr. Witkowski made presentations to the judges at the 1997 seminar.

The seminar is sponsored jointly by the Federal Judicial Center, the Judiciary Leadership Development Council, a non-profit Washington, D.C.-based corporation dedicated to judicial education, and the Laboratory.

A total of 26 judges attended this year's seminar, 11 state judges and 15 federal judges.

The total number of judges who have attended the Banbury Seminar on basic issues of science over the three-year period is 78 judges: 38 state judges and 40 federal judges.

The Banbury Center each year hosts 15–20 seminars and conferences, mostly for scientists. Prior to 1996 the Center hosted occasional seminars for lay participants—Congressional staff persons, corporate officers, and journalists—but had never hosted a meeting only for judges.

The first Banbury Seminar for judges was held from October 10–15, 1996. It opened with a presentation by Dr. James D. Watson, Nobel Prize-winning geneticist who serves as director of the Laboratory. Dr. Watson won the Nobel Prize in 1962 for his description, in 1953 with Francis H. C. Crick, of the structure of the DNA molecule, a discovery that set off a revolution in molecular biology.

State and federal judges attending the 1998 seminar on Basic Issues of Science for Judges at the Banbury Center of Cold Spring Harbor Laboratory get a lesson in testing their own DNA at the Laboratory's DNA Learning Center.

The second seminar for judges, held October 14–17, 1997, concluded with a presentation by Dr. Leon M. Lederman of the Fermi Laboratory near Chicago. Dr. Lederman won the Nobel Prize in physics in 1988 for his discovery of the upsilon particle, or quark, a particle in the subatomic structure of the atom.

The focus of the seminars is not necessarily "science in the courtroom," although several presentations have dealt with various issues that might arise in the course of a case or trial. Rather, the main focus tends to be basic science, so that judges can acquire an understanding of fundamental scientific precepts and general issues in the different areas of science. It also aims to give judges a basic understanding of the scientific process—how scientific research is conducted and how scientists go about their work in their respective fields.

Because Cold Spring Harbor Laboratory is primarily a genetics laboratory, many of the presentations at the seminar deal with genetics and molecular biology. But other presentations focus on developments in physics, statistics, toxicology, cosmology, and viruses and plagues.

A feature of the seminars popular with the participating judges is a visit to the Laboratory's DNA Learning Center. The judges are given a lecture about DNA and then, using DNA samples, are shown how DNA testing is accomplished.

A presentation on the history of biology

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West Virginia Is Site of Pilot State–Federal Judicial Seminar

State and federal judges in West Virginia gathered on April 21, 1998, in Charleston, the state capital, to participate in a joint one-day educational seminar.

Chief Justice Robin Jean Davis of the West Virginia Supreme Court of Appeals opened the seminar, noting that it was a pilot project to determine the benefit of conducting joint state–federal judicial seminars in other states.

The evaluations of the pilot seminar were almost universally positive. Ninety-five percent of the participants rated it either an "outstanding program" or a program "of substantial value."

Both state and federal judges especially appreciated the opportunity to meet and talk with their colleagues in the other system.

The seminar was jointly sponsored by the Federal Judicial Center and the West Virginia Supreme Court of Appeals.

Before the seminar, the Administrative Office of the West Virginia Supreme Court of Appeals sent out a survey to West Virginia judges to determine the most desirable topics to be included in the seminar.

The four topics chosen were:

• current issues in evidence law—the evaluation and admission of expert testimony;

• the intersection of bankruptcy law and the operation of state courts—issues in domestic relations;

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State, Federal Judges Meet for Mediation Training in Alaska

by James G. Apple,
Chief, Interjudicial Affairs Office,
Federal Judicial Center

The first joint state–federal judicial conference on alternative dispute resolution (ADR) was held in Anchorage, Alaska, on October 22–23, 1998. The conference was held during the annual state judicial conference of the Alaska court system.

The program had two purposes. The first was to train the judges in mediation techniques so that they could make better-informed decisions on referrals to ADR and learn how mediation skills might be used in judicial settlement conferences.

The second purpose was to introduce the judges to some of the issues that arise in managing cases that include or might include ADR. Topics ranged from selecting cases for ADR referral to handling ethical problems.

The program was especially timely because of the passage by Congress in October of the "Alternative Dispute Resolution Act of 1998."

The Act requires every federal district court to authorize the use of at least one form of ADR, and to implement an ADR program. Types of ADR authorized by the law are mediation, early neutral evaluation, minitrials, and voluntary arbitration.

The conference, consisting of seven sessions over a day and a half, covered the following subjects:

• introduction to ADR and demonstration of the mediation process;

• analyzing the underlying interests in the dispute;

• generating options and breaking impasses;

• mediating emotionally charged cases;

• managing cases in ADR; and

• ethical issues in ADR.

The participants also had an opportunity to "role play" in hypothetical situations, acting as mediators, attorneys, and clients.

J. Michael Keating, Jr., a lawyer/mediator from Providence, R.I., was the faculty coordinator for the part of the program dealing with mediation techniques. He was assisted by Jack Esher of Boston, Mass.; Sam Imperati of Portland, Ore.; Bob Niemic and Donna Stienstra of the Federal Judicial Center in Washington, D.C.; and Charles B. Wiggins of the University of San Diego School of Law.

For the managing cases portion of the program, Judge Wayne D. Brazil, U.S. Magistrate Judge from the Northern District of California, and Professor Stephanie E. Smith of Stanford Law School and Hastings College of Law discussed issues arising in cases considered for ADR.

Seventy-three judges attended, including 62 state judges and 11 federal judges.

The idea for the conference was developed in January 1998 by Jamilia A. George, Chief Deputy Bankruptcy Clerk for the U.S. District Court for the District of Alaska and by Justice Dana Fabe of the Alaska Supreme Court, who then called on other judges and court administrators to help in the planning process.

The conference was unique not only for the subject matter presented to the participants (the entire state and federal judiciary of Alaska), but also for the manner in which it was funded.

Part of the funds came from the Federal Judicial Center and the U.S. District Court in Alaska. The Alaska legislature matched a grant from the State Justice Institute, which provided the remaining funds for the conference.

The FJC funds covered faculty honoraria and certain travel expenses. The Alaska trial courts paid for conference space and lodging for the faculty. Legislative funds and the SJI grant covered participant expenses.

The program, which attending judges heralded as a great success, was the first of its kind to include nearly equal emphasis on mediation skills and the management of cases referred to ADR. ❑

Inside . . .

State and Federal Judges Attend Science and Humanities Seminars

Princeton University in New Jersey and Lewis & Clark College in Portland, Ore., were the sites of two state–federal judicial seminars on the humanities and sciences this past year.

The ninth annual Harold R. Medina Seminar for state and federal district and circuit judges was held at Princeton June 4–9, 1998.

A similar seminar for state judges and U.S. bankruptcy judges was held at Lewis & Clark College, October 1–6, 1998.

A federal judge participating in one of the seminars commented that this type of program "gets judges out of the cocoon and in touch with the world of valuable ideas necessary to developing the broad view that judges must have in order to be effective."

Funds for the two seminars came from tuition payments by the judges themselves and other sources; no appropriated funds were used.

The Medina seminar at Princeton is cosponsored by the Judiciary Leadership Development Council, a Washington, D.C.-based nonprofit corporation dedicated to judicial education activities.

Each seminar featured lectures and discussions on subjects within the broad area of the humanities, as well as several lectures on scientific issues.

The Medina seminar was attended by 21 state judges and 27 federal judges.

The Lewis & Clark seminar included 6 state judges and 21 federal bankruptcy judges.

In addition to lectures in philosophy, architecture, history, literature, art, poetry, and international affairs, the judges participating in the Princeton seminar attended an organ recital in the university's gothic chapel and toured Princeton's art museum.

The judges at the Lewis & Clark seminar heard lectures in philosophy, literature, geology, history, theatre, comparative religion, economics, music, communications, and psychology. One day was devoted to a visit to the Columbia River Gorge, narrated by noted local historian Stephen Dow Beckham.

The seminars each covered a five-and-one-half day period. Usually three or four presentations were made during each of the full days. Sessions lasted one hour and fifteen minutes, and included a presentation by a lecturer and a period for discussion and questions.

The 1999 Medina Seminar at Princeton will be held June 10–15. No dates have yet been set for another seminar at Lewis & Clark College.

State judges interested in attending the Medina seminar should contact Judge John W. Kern III, Chairman, Judiciary Leadership Development Council, 2510 Virginia Ave., N.W., Watergate East 314-N, Washington, DC 20037, phone (202) 338-5513.

Federal judges interested in attending this type of seminar should contact John Cooke, Director, Judicial Education Division, Federal Judicial Center, Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Washington, DC 20002-8003, phone (202) 502-4060. ❑

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• alternative dispute resolution—mediation and other ADR techniques; and

• the judicial process—opinion writing and use of law clerks.

Senior Judge John P. Fullam of the U.S. District Court for the Eastern District of Pennsylvania addressed the first topic. Other speakers included U.S. Bankruptcy Judges George C. Paine II (M.D. Tenn.), L. Edward Friend II (N.D. W. Va.), and Ronald G. Pierson (S.D. W. Va.); West Virginia Circuit Judge Harry L. Kirkpatrick; Nancy Welsh of the Mediation Center in Minneapolis, Minn.; Prof. Barbara McAdoo of Hamline University School of Law; and Justice William A. Bablitch of the Supreme Court of Wisconsin.

Reading materials on each of the topics were furnished to the participants at the seminar.

The state judges were assembled in Charleston for the annual meeting of the West Virginia Judges Association, which provided the opportunity of the joint program.

The seminar was attended by 14 federal judges and over 65 state judges.

The judges also made suggestions for topics for future seminars. These included development of model jury instructions, the decision-making process, judicial reasoning, habeas corpus, technology and the courts, recent decisions of the U.S. Supreme Court, and criminal evidence. ❑

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A note to our readers

The *State–Federal Judicial Observer* welcomes comments on articles appearing in it and ideas for topics for future issues. The *Observer* will consider for publication short articles and manuscripts on subjects of interest to state and federal judges. Letters, comments, and articles should be submitted to Interjudicial Affairs Office, Federal Judicial Center, Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Washington, DC 20002-8003.

OBITER DICTUM

Criteria for Federal Jurisdiction Need to Be Preserved in Assessing Proposed Legislation

by Chief Justice William H. Rehnquist, U.S. Supreme Court

(Note: This essay is adapted from the remarks of the Chief Justice to the annual meeting of the American Law Institute in May 1998 in Washington, D.C.)

In my annual report for 1997, I criticized the Senate for moving too slowly in filling vacancies on the federal bench. This criticism received considerable public attention.

I also criticized Congress and the President for their propensity to enact more and more legislation which brings more and more cases into the federal court system. This criticism received virtually no public attention.

And yet the two are closely related: we need vacancies filled to deal with the cases arising under existing laws, but if Congress enacts, and the President signs, new laws allowing more cases to be brought into the federal courts, just filling the vacancies will not be enough. We will need additional judgeships.

Night Watchman Theory

If we look at the way this sort of legislation has developed in the course of our history, we see that for the first century of our nation, the federal government epitomized what one of my college political science professors called the "night watchman" theory of the state. The government provided for the common defense in a rather halfhearted way, collected tariff revenues, delivered the mail, and left pretty much everything else to the states. So far as the lower federal courts were concerned, Congress did not even grant them federal question jurisdiction until 1875. Before that, these courts dealt only with cases based on diversity of citizenship or admiralty.

The Industrial Revolution changed all of this, and with the enactment of the Interstate Commerce Act in 1887 and the Sherman Act in 1890, Congress began regulating commercial activity. The sweep of congressional regulation has expanded ever since. Some of the laws were in aid of existing state regulation—the Lindbergh Act, for example, which established federal jurisdiction if a kidnapper crossed state lines. Some were federal grants and aid with strings attached; they had a regulatory effect, but they created no new business for the federal courts. But during the last half century, laws passed by Congress have created more and more claims that must be heard in federal courts. There was a time when the life of a federal judge was a rather leisurely one, and additions to the business of federal courts could engender no justifiable complaint. But those days are long gone.

Long-Range Plan

Several years ago, the Judicial Conference of the United States, after much study, adopted the *Long Range Plan for the Federal Courts* for the next century. Recommendation One of the *Plan* reads as follows: "Congress should commit itself to conserving the federal courts as a distinctive judicial forum of limited jurisdiction in our system of federalism. Civil and criminal jurisdiction should be assigned to the federal courts only to further clearly defined and justified national interests, leaving to the state courts the responsibility for adjudicating all other matters." In accordance with this principle, the *Long Range Plan* recommends that federal courts should only have criminal jurisdiction in five types of cases: "offenses against the federal government or its inherent interests; criminal activity with substantial multistate or international aspects; criminal activity involving complex commercial or institutional enterprises most effectively prosecuted using federal resources or expertise; serious, high level or widespread state or local government corruption; criminal cases raising highly sensitive local issues."

If we look at some recently passed federal legislation, and legislation that was introduced into and considered by the 105th Congress, we can see that they do not come close to meeting these criteria. There is no reason why Congress should slavishly follow the recommendations of the Judicial Conference. But the long range plan is based not simply on the preferences of federal judges, but on the traditional principle of federalism that has guided this country throughout its existence. It is a principle enunciated by Abraham Lincoln in the nineteenth century, and Dwight Eisenhower in the twentieth century—matters that can be adequately handled by states should be left to them; matters that cannot be so handled should be undertaken by the federal government. Reasonable minds will differ on how this very general maxim applies in a particular case, but the question that it implies should at least be asked.

Two Bills in 105th Congress

With this in mind, let us turn to the two juvenile crime bills that were pending before the House and Senate during the second session of the 105th Congress. These Senate and House bills raised the same concerns because they contained nearly identical provisions. First, both bills would have eliminated the traditional preference for state prosecutions of juvenile defendants, particularly if the juvenile is to be prosecuted as an adult. Current law favors state prosecution unless the government certifies to the district court that (1) the state cannot or will not take jurisdiction; (2) the state's juvenile programs are inadequate; or (3) the offense is a violent crime or drug-trafficking offense and there is a substantial federal interest involved in the case. Either of these juvenile crime bills would have eviscerated this traditional deference to state prosecutions, thereby increasing substantially the potential workload of the federal judiciary.

With regard to certain violent crimes or drug offenses, both bills authorized the prosecution of certain juveniles as adults. In addition, the House bill would have lowered the age at which the government could seek the death penalty from 18 to 16. Whether these policies are wise ones is fairly debatable, but what is not debatable is that, if they had been passed and implemented, they would have significantly added to the caseload burdens of the federal judiciary.

Filings Increase

In 1997, criminal case filings in federal courts reached 50,363—their highest level since 1933. Ending the preference for state prosecution and prosecuting juveniles as adults in federal courts would exacerbate the problem revealed by these numbers because adult criminal proceedings are far more time-consuming than their juvenile counterparts. Also, because of the more formalized structure of adult proceedings, convictions of adults may be much more likely to be appealed. Death penalty cases would obviously add additional burdens to both district and circuit courts.

The juvenile crime bills were especially troubling because of the surrounding context. These bills, if enacted, would have been the latest in a series of laws passed by Congress that have expanded the jurisdic-

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A Maine Journey in State–Federal Judicial Outreach

by Frank M. Coffin,
Senior Judge, U.S. Court of
Appeals (1st Cir.)

This is a story of the efforts of two judges from Maine—one federal, one state—who, over the past three years, have tried to develop more effective state–federal cooperation, increase judicial outreach, and strengthen support for the courts.

Judge Frank M. Coffin

I am the federal judge, formerly chief judge of the First Circuit. My partner is the chief justice of Maine, Daniel E. Wathen.

Our experience provides an example of how state and federal judges, when working together and using a wide network of knowledgeable lawyers and laymen, can increase the opportunities for people in need of legal assistance to gain, and the ability of the judiciary to provide, access to the courts.

Funding Decline

In 1995 I had become concerned over what had happened to recent state appropriations for the Maine courts. The decline in funding for the courts had caused the National Center for State Courts to describe Maine as "the most hard-hit of any court system in the United States." Its caseload per judge was among the lowest; its expenditures per capita on courts about one-half the national average.

I had been a founding director of the Governance Institute, a Washington, D.C.-based organization devoted to research on and education about problems of governance. The Institute requested a two-year, $100,000 grant from a private foundation to explore "ways to increase communication between [the] courts and the public, the involvement of citizens in court-related activities, and public understanding of and support for courts, consistent with the dignity and independence of the judiciary." The grant was approved in December 1995. Chief Justice Wathen borrowed the state motto, a Latin word meaning "I lead," and baptized our enterprise "Dirigo."

In late 1995, Congress drastically cut the budget of the national Legal Services Corporation, the principal source of funds for Maine's major legal aid provider, Pine Tree Legal Assistance, Inc. Not only was Pine Tree's funding cut by a third, or over $1 million, but the kinds of cases it could handle were sharply curtailed. The Pine Tree Legal Assistance lawyers in the state had dwindled from over 30 to six or seven.

Facing this bleak prospect, the chief justice, together with the Maine Bar Foundation and the Maine State Bar Association, announced a "Fall Forum" to discuss ways and means of coping with the crisis and invited judges, lawyers and others connected with the organizations providing legal assistance to the poor and the elderly. The forum attracted approximately 65 people.

Assignments to Task Forces

Every participant in the forum signed up for, or was assigned to, a task force in such areas as legislation, pro bono bar efforts, revision of bar/court rules and administrative practices, fundraising (later, resource sharing), new organizational entities, volunteers, and technology.

Following the Fall Forum, a group that included Chief Justice Wathen and myself met for follow-up action. The group adopted the title Justice Action Group (JAG). I wound up as chair. We then created the Legal Services Response Team (LSRT), consisting of heads of provider agencies and lawyers. The LSRT would guide and coordinate specific task forces.

The Dirigo group in early 1996 spent several months in the familiar, time-consuming task of committee building. We obtained the services of a competent staff director. We were also fortunate to recruit as chair of a Dirigo state committee one of Maine's most valued citizens, Duane D. (Buzz) Fitzgerald, recently retired as C.E.O. of Maine's largest private employer, the historic ship-building company, Bath Iron Works. Around him we gathered a group of non-lawyers—a popular former governor, an admired philanthropist, and a mix of prestigious professionals and leaders of low-income groups.

Meeting every other month, we began by listening to court employees, outside experts, and heads of volunteer organizations, trying to learn what people needed from courts that they weren't getting. One new idea that was generated was sending volunteers to local district courts to be "friends in court," to answer questions on everything from what is expected of a witness or juror to the location of restrooms.

Questionnaire Distributed

We distributed a questionnaire to all district court judges and clerical employees, asking for their views of the courts' greatest needs. The clear answers were lay courthouse assistants and "lawyers for the day" at courthouses.

Dirigo then began helping existing organizations. For example, it supported a two-year old project of a legal secretaries' association that sent its members on rotation to district courts to help pro se divorce litigants, thus easing the burden on clerk and judge time.

The Dirigo committee also established an Information Technology Applications Subcommittee whose purpose was to create HelpNET, a computer-based guide to information about and resources of the courts. We made videos about court activities and issues, established a website, and produced several cable television programs.

A major achievement of the Justice Action Group in 1996 was the creation of two new allied organizations to do what Pine Tree Legal Assistance could no longer do under Congressional strictures. They were created to help advance legislation through consultation and lobbying, and to involve the private bar in a "virtual law firm" to pursue these actions.

Efforts of the judicial branch were directed towards simplifying procedures of and easing access to the courts. The Chief Justice appointed a committee to implement alternative dispute resolution and a pro se team to make more intelligible for lay persons the forms used in divorce and other court proceedings.

In late 1996 "Fall Forum II" was held to recharge the batteries of all the participants in providing legal services to the poor, and to break new ground. This time, the emphasis was on the volunteer community. Nearly 30 court-related volunteer organizations, including Dirigo, presented accounts of what they were doing—to the surprise and edification of the participants, many of whom had no idea that the others existed.

Maine Chief Justice Daniel E. Wathen

In early 1997, the Maine legislature was in session. Our Legislative Task Force had introduced and supported a Civil Legal Services Funding bill—a proposal that filing fees for civil cases, the lowest in New England, be increased in the district, superior, and supreme courts, to be used to fund legal services to the needy.

At the same time, the Chief Justice had the even more difficult task of persuading the legislature to accept the concept of a Family Division of the District Court, in which a cadre of trained case manager officers would relieve overworked district judges by shepherding along without delay divorce and child custody matters. This legislation was aimed at making court processes more user friendly for the same low income or elderly people that our filing fee legislation was targeted to help.

Happily, with bipartisan backing and the support of the governor, both proposals became law.

Improve Legal Assistance

Other task forces were also active. An Access/Intake Committee was working with the private bar, legal service providers, and court personnel to simplify and improve access to legal assistance. The Volunteers Task Force and Bar Rules Task Force called for clarification of ethical standards governing volunteers and "lawyers for the day" and the contours of unauthorized practice of law.

The University of Maine Law School agreed to adopt a program, along with law firms, to allow third year students to intern under the tutelage of a law firm and also work part time with a legal services provider.

Managing partners of larger law firms met to explore ways in which more effective pro bono efforts could be made. All of Portland's twelve largest law firms responded with a program to fund two full-time lawyers in family law. This initiative may eventually spread to smaller firms and to other areas.

Coordinated Plan

The Information and Technology Task Force and the Shared Resources Task Force inventoried existing hardware and software used by legal service providers, developed a coordinated plan for improving access to legal information, and, through a Maine Bar Foundation grant, upgraded the providers' ability to intercommunicate.

The alchemy resulting from the 1996 Fall Forum led Dirigo to focus on building a cohesive, trained volunteer community. The key was "a coordinator of volunteers."

In due course, a private foundation made two successive one-year grants for a program enabling the state to advertise for and recruit an independent contractor to define the role and modus operandi of a coordinator of volunteers.

In December 1997 a coordinator was hired, just in time to attend a Dirigo-sponsored volunteers conference. We are planning an extension for a second year and, ultimately, legislative approval for a permanent office.

Dirigo Ends

Dirigo completed its two-year life at the end of 1997, but its seeds sprouted during and after its existence and should continue to flourish in the coming year.

One valuable lesson learned from these efforts and activities is that the concept of a unitary citizens' court support group is probably less realistic than that of building on the interest of volunteer-user groups already doing business with the courts.

At least as far as state courts are concerned, a great part of their activity at local or district court level is in the vast and vital area of domestic relations—the arena where many volunteer groups operate. However, such an approach should not rule out other approaches to other groups—the media, the business community, the schools, labor, and industry.

Another lesson is that, while in the long run increased federal funding for legal services is essential to provide the safest of safety nets for a large population of those in need of timely legal assistance, in the short run there exists a valuable reservoir of committed and knowledgeable people to be tapped to provide interim measures to assist these citizens. ❑

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tion of the federal courts. Some of the more notable examples of this trend are the Anti-Car Theft Act of 1992, the Violence Against Women Act of 1994, the Freedom of Access to Clinic Entrances Act of 1994, the Child Support Recovery Act of 1992, the Animal Enterprise Protection Act of 1992, and the recent arson provisions added to Title 18 in 1994.

I cannot say categorically that these laws do not pass the Lincoln-Eisenhower test, but one senses from the context in which they were enacted that the question of whether the states were doing an adequate job in this particular area was never seriously asked.

If the ill effects from these laws were confined to the increase of the workload of the federal judiciary, they would still be of concern to judges and to the legal profession. But there is a much broader question involved. How much of the complex system of legal relationships in this country should be decided in Washington, and how much by state and local governments? We cannot go back to the nineteenth century, but do we want to move forward into the twenty-first century with the prospect that our system will look more and more like the French government, where even the most minor details are ordained by the national government in Paris? This is a question that should at least be asked, even if all of us would not answer it in the same way. ❑

Lessons Learned Along the Way

by Maine Chief Justice Daniel E. Wathen

As a partner in the three-year journey described in this article, I offer a few observations:

1. It is part of every judge's and lawyer's job to keep the courthouse door wide open for all. Everyone's voice must be heard in court.

2. Change in the legal community is most easily accomplished with the joint involvement of state and federal judges. Only this can command the attention of the entire spectrum of the bar.

3. Both judges and lawyers should speak plainly, truthfully, publicly, and often about the cost in human terms of inadequate court services and unmet legal needs.

4. People are open to change in tough times. Adversity really does equal opportunity.

5. Big problems lend themselves to small solutions. Know what you want and ask for it. Many pieces can solve the big puzzle.

6. Courts may have no natural political constituency, but effective communities of lawyers, court users, volunteers, and advocates develop quickly around unmet human needs.

7. Improvement often comes from unexpected sources. A little luck is needed, but luck is more likely to sprout from the seeds of patient effort. ❑

Chief Justice Theophilus Parsons: A Model of Judicial Statesmanship

by John Furniss,
Legal Intern,
Federal Judicial Center

Even U.S. Supreme Court Justice Joseph Story may have understated the accomplishments of Theophilus Parsons when, paying tribute in 1834 to the late Massachusetts Chief Justice, he asserted: "Parsons was a man who belonged *not* to a generation, but to a century. The class of men of which he was a member is an extremely small one."

Indeed, Chief Justice Parsons' extraordinary and varied achievements in the formation of the law of Massachusetts extend beyond a mere century's time and transcend state borders. His judicial statesmanship during the seven years (1806–1813) he served as chief justice of the Massachusetts Supreme Judicial Court has had both practical and profound effects on the law of the nation and has secured his place among the great jurist–judges of American legal history.

State of Chaos

The Massachusetts judiciary was in a state of relative chaos in the first decades following the American Revolution. Much of the problem surrounded the crowded docket of the Supreme Judicial Court, which suffered from a three-year backlog of cases. In many ways, the judicial system encouraged delays in litigation. For instance, it permitted the appeal of any civil action to the Supreme Judicial Court for a jury *trial de novo*. Further, the jurisdiction of the courts was for the most part undefined.

A dearth of good lawyers contributed to the docket's burden. Also, there was incentive to delay—the lawyers for the prevailing party were entitled to thirty-three cents for each day the case was pending, and continuances were routinely granted. The courtroom, undisciplined from a lack of enunciated court procedures, was in many ways dominated by these unprofessional, garrulous lawyers.

After the resignation of Chief Justice Francis Dana in 1806, certain members of the bar, bench, and legislature recognized the Court's need for a strong-minded and well-respected outsider.

Parsons, the most respected lawyer in New England, emerged as the obvious choice.

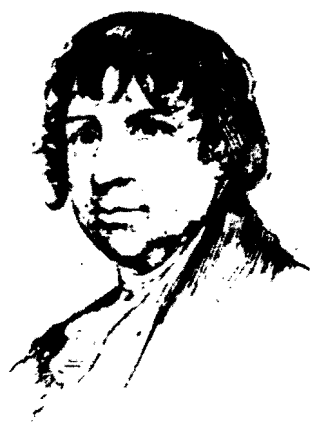
Taught by Trowbridge

Born in Byfield, Mass., in 1750, Parsons had begun his legal training in Falmouth, Mass., following his graduation from Harvard. The British destruction of Falmouth forced Parsons to return to his home in Byfield. This move proved fortuitous; he became friends with a leading New England lawyer, Edmund Trowbridge. Regarded as "the oracle of the common law of New England," Trowbridge provided Parsons with access to his library, considered the finest in New England at the time, and introduced him to the intricacies of law practice. Thus, Parsons received one of the finest legal educations New England could offer.

In the formative years of state and national government, Parsons emerged as one of New England's most renowned minds. He distinguished himself during the state constitutional convention, where his sophisticated work, *The Essex Result*, proved especially influential. His influence was again strong during the state convention to ratify the federal constitution, where his anonymous essay *Conciliatory Resolutions* was a key factor in the convention's ratifying the proposed constitution.

Legal Skills Superior

Meanwhile, his legal practice, which specialized in maritime law, thrived throughout New England. His legal skills were superior, and his practice earned him a handsome income. Nevertheless, when the lower-paying appointment to the Supreme Judicial Court presented itself in 1806, Parsons eventually agreed, viewing the reform of the judiciary not only as a pressing necessity but also his duty. In this pursuit Parsons would not disappoint—his impact was almost immediate.



Theophilus Parsons

Image from Appleton's Cyclopaedia of American Biography, © 1887 D. Appleton & Co.

His first goal in the reform of the judiciary was the elimination of many of the delays in adjudication, especially when the Supreme Judicial Court was acting as a trial court. Through his firm control over the courtroom, he cleared the docket within his first three years on the bench. Parsons eliminated the routine granting of continuances and restricted witness testimony and counsel arguments.

He required that jury arguments in the trials *de novo* before the Court be based on evidence instead of serving as a mere exercise in oration, and would often demand summaries of the lawyers' arguments. Parsons' ready command of the legal and technical issues in his cases allowed him to make decisions without hesitation and most often without error.

One anecdote that illustrates Parsons' conception of the judge's relation to lawyers concerns a lawyer's complaining to the Chief Justice, "Your Honor did not argue your own case in the way you require us to." "Certainly not," Parsons replied, "but that was the judge's fault, not mine."

Reformist Behavior "Tyrannical"

While the bar viewed the Chief Justice's reformist behavior as tyrannical and overbearing, his effect on the profession was critical to his program of reform. The few lawyers who constituted the bar in the aftermath of the American Revolution were poorly trained, as they lacked access to law books and were unfamiliar with proper court procedures. Parsons helped remedy the problem by transforming his courtroom into a law school, patiently concerning himself with the education of individual members of the bar who appeared before him about both law and court procedures.

Parsons established procedures and created forms that promoted efficiency and fairness. He promoted the recording of judicial opinions in the *Massachusetts Reports*, using this publication as an opportunity to establish procedural rules and to define the jurisdiction of the courts.

Established Forms

He also established pleading forms that not only enabled lawyers to clarify the legal issues of a case but allowed for judicial determination of the scope of evidence that was appropriate for the case. These forms were subsequently published and served for many years as the standard for pleading in the Massachusetts courts.

One of Parsons' lasting contributions was his efforts at "Americanizing" the common law by merging the English version with colonial laws to meet the distinct needs of New England.

The common law occupied a precarious position in the American states following the Revolution. At that time there was a general hostility toward all things English, particularly in the realm of law. Not only had many lawyers been Tories, but lawyers were seen as instruments of an English system of law.

The ambiguities of the common law were considered a means of oppression and a threat to the order established through written constitutions and bills of rights. However, this misgiving was countered by the growing nation's need for a living legal order, and the English law emerged as the necessary device. Indeed, the English law was what had been taught, it was linguistically accessible, and it was widely known and understood.

Knowledge of Common Law

Nevertheless, the common law very much needed to adjust to the unique needs of the states, and Parsons was well suited to this end. Parsons had an unusual knowledge of the English common law as well as of colonial civil law, and he possessed a high degree of discipline, a partial result of his life-long pursuits of mathematics, astronomy, and Greek. His mind was uniquely capable of deriving order from chaos.

Moreover, Parsons had a broad and profound understanding of his community. He not only possessed insight into the political structure and ideals of the new government, but he also understood commercial usages and popular customs of New England. He therefore had a keen appreciation both of the law and of the community's needs.

Parsons was among that select group of jurists–judges who established the nature and character of the common law in America. That great achievement, together with his other contributions to court administration, the bar, and the substantive law, earn Parsons a prominent spot among the great jurists of the period, his legacy belonging not just to Massachusetts but more broadly to American law. ❑

BANBURY, from page 1

was included in the 1997 and 1998 seminars. The lecture, titled "From Darwin to Dolly," covered developments in the biological sciences, beginning with Charles Darwin and ending with the cloning of the sheep Dolly in 1997.

The seminars are held at the Laboratory's Banbury Center, a conference center five miles from the Laboratory and located on a tract of land overlooking Long Island Sound. The land and buildings were given to the Laboratory by the former owner, and a garage was converted into a modern technology-equipped classroom.

The fourth Banbury Seminar on basic issues of science for state and federal judges will be held October 26–29, 1999.

Interested federal judges should write to the Judicial Education Division, Federal Judicial Center, Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Washington, DC 20002-8003, phone (202) 502-4060, fax (202) 502-4299.

Interested state judges should write Senior Judge John W. Kern III, Judiciary Leadership Development Council, 2510 Virginia Ave., N.W., Watergate East 314-N, Washington, DC 20037, phone (202) 338-5513, fax (202) 333-9187. ❑

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