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## FIFTY YEARS OF THE UNITED STATES CIRCUIT COURT OF APPEALS†

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The Constitution of the United States vests the judicial power of the federal government in a Supreme Court and “. . . such inferior courts as congress shall ordain and establish,”<sup>1</sup> and provides that the judicial power shall extend to enumerated situations,<sup>2</sup> over some of which the

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†This article constitutes the first chapter of a projected volume on the work of the United States Circuit Courts of Appeal.

The author wishes to acknowledge his indebtedness to the writers who have preceded him in the field of the history of the federal judiciary, particularly Mr. Charles Warren, Mr. Justice Frankfurter, and Dean Landis. The influence of their research is evident in this article. Acknowledgment is also made of the kindness of Professor Henry Hart of the Harvard Law School, whose class in Federal Jurisdiction prepared term papers on the various topics embraced in the proposed book and which were made available to me. Finally the entire manuscript has been read and edited by Professor Orrin B. Evans of the Law School of the University of Missouri.

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1. U. S. Constitution, Article III, § 1.

2. U. S. Constitution, Article III, § 2 reads, “The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof, and foreign States, citizens or subjects.

“In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

“The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.”

Supreme Court shall have original jurisdiction and over others, appellate jurisdiction only.<sup>3</sup> Mr. Justice Story once plausibly argued<sup>4</sup> that a mandate was thus given to congress to establish a system of federal courts in which would be vested *nisi prius* jurisdiction over all the situations to which federal judicial power could extend (excepting those of which such jurisdiction was laid in the Supreme Court), so that the Supreme Court might exercise its constitutional appellate jurisdiction in every aspect. Although he spoke for the Court on that occasion, his thesis has had little influence in subsequent legislation or litigation concerning the federal judicial system, having been more disregarded than refuted. It is now well established that the creation of inferior federal courts is discretionary with congress, which may abolish them altogether or impose such limitations on their jurisdiction as it deems advisable, though as a result, the federal constitutional jurisdiction may not be fully exercised.<sup>5</sup> It is therefore the congressional statutes which must be searched for the organization and jurisdiction of the federal courts.

The famed Judiciary Act of September 24, 1789<sup>5a</sup> has been justly eulogized.<sup>6</sup> It is generally recognized today that the judicial branch of the national government has been largely responsible for the successful integration of dual sovereignties over the same territory. Oliver Ellsworth<sup>7</sup> had no precedent for such an institution in a federal system, and in the controversy over his bill, it was rightly asserted that it would preserve the Federalist

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3. The Supreme Court has original jurisdiction "...in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party. ... In all other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make." Art. III., § 2.

4. *Martin v. Hunter's Lessee*, 1 Wheat. 304 (U. S. 1816).

5. Among many, see *Sheldon v. Sill*, 8 How. 441 (U. S. 1849); *Kline v. Burke Construction Company*, 260 U. S. 226, 43 Sup. Ct. 79 (1922), 24 A. L. R. 1077, 1084 (1923). There are many illustrations of this principle. Perhaps the one most frequently encountered is the limitation of district court jurisdiction to cases where the matter in controversy exceeds the sum or value of \$3,000, if jurisdiction is otherwise based on diversity of citizenship or the presence of a "federal question." The Norris-LaGuardia Anti-Injunction Act, limiting federal jurisdiction over labor disputes, is another instance of the same doctrine, of great significance during the past decade. See *Lauf v. E. G. Shinner & Co.*, 303 U. S. 323 58 Sup. Ct. 578 (1938).

5a. 1 STAT. 73 (1789).

6. See 1 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* (1923) 11, 12; Trieber, *The New Federal Judicial Code* (1912) 46 AM. L. REV., 702, 703, 712. See also, note 10, *infra*.

7. The chief draftsman of the act, afterwards Chief Justice of the Supreme Court.

(and Hamiltonian) philosophy of a national union,<sup>8</sup> a prediction quickly realized in the opinion of Chief Justice Marshall in *Cohens v. Virginia*.<sup>9</sup> The Act of 1789 stood unchanged in its basic conception until 1891, and remains today the foundation of our federal judicial system.<sup>10</sup> The circuit courts of appeals represent the only major alteration in court organization.

The first federal court system was composed of a supreme court, consisting of a chief justice and five associate justices; three circuit courts, each composed of two justices of the Supreme Court and a district judge; and thirteen district courts, over each of which presided a single district judge. The original eleven states<sup>10a</sup> each constituted a federal judicial district, save that Massachusetts and Virginia were both divided into two districts.<sup>11</sup> The districts were in turn grouped into three circuits.

The very limited jurisdiction of the district courts was exclusively primary.<sup>12</sup> Review was exclusively by the circuit courts.<sup>13</sup> Jurisdiction of the

8. See 1 WARREN, *op. cit. supra* note 6 at 16, 18.

9. 6 Wheat. 264, (U. S. 1821).

10. It would be erroneous to suppose that because the original judiciary act proved itself a bold, ingenious and successful solution of the problem of the judiciary in a federal government dedicated both to a tri-partite division of powers within the national sovereignty and to the preservation of concurrent national and state sovereignties, it was a perfect statute. The administration of justice has seldom been more handicapped than by the awkwardness of procedures, uncertainties of controlling precedent, and arbitrary limitations of jurisdiction existing in certain periods of the history of the federal courts. It was nearly a hundred and fifty years before the separation of law and equity was overcome and the Conformity Act (usually referred to as of 1872 but in origin dating to 1791) effectually superseded. We are still struggling with the implications of the Rules of Decision Act of the same date. And as to certain aspects of the law of federal jurisdiction, a learned judge has remarked, "It would be euphemy to call it chaos."

10a. Rhode Island and North Carolina had not then ratified the Constitution.

11. With one negligible exception, federal judicial districts have never extended across state boundaries. See FRANKFURTER AND LANDIS, *THE WORK OF THE SUPREME COURT* (1928) 11, n. 25.

12. The United States Supreme Court is the only constitutional federal court. The other federal courts are denominated in the Constitution as "inferior" courts. They are, however, courts of general, rather than special, jurisdiction. In the absence of any particular restraint imposed by Congress, they may entertain any justiciable controversy within the broad jurisdiction conferred upon them as federal courts.

On the other hand, because of the dual character of our government it was thought desirable that national courts should duplicate the work of the state courts. The Constitution delimits the scope of federal judicial power and Congress has restricted it even further, roughly to situations where the right sought to be protected is derived from the national government or where the character of the parties suggests that a state court may not be in a position to render impartial or effective justice. The problems arising from the peculiar jurisdiction of federal courts—most acute in the district courts—have been the subject of numerous excellent treatises. *Inter alia*, see DOBIE, *FEDERAL JURISDICTION AND PROCEDURE* (1928); BUNN, *JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES* (4th ed. 1939). Legislation relative to these issues is omitted from the present work except as it directly affects the circuit courts of appeals.

13. 1 STAT. 83 (1789).

circuit courts was partially appellate, as just stated. It was also original in many situations, and for a considerable time by far the larger part of the *nisi prius* jurisdiction of the federal courts was exercised by the circuit courts, the district judges being chiefly occupied in preparing for trial the cases in which they would sit, with the two Supreme Court justices riding that circuit, as circuit judges. Of certain cases the *nisi prius* jurisdiction of the district and circuit courts was respectively exclusive, but in others it was concurrent.<sup>14</sup>

The Supreme Court was vested with limited original jurisdiction by the Constitution and statute.<sup>15</sup> It had appellate jurisdiction of two types:

14. The district courts had original criminal jurisdiction of offenses committed on the high seas or within the particular district, where the penalty did not exceed a fine of more than one hundred dollars, imprisonment of more than a year, or whipping of more than thirty stripes. (It will be recalled that as there are no common law offenses against the United States, criminal jurisdiction of all federal courts is limited to violation of express statute). *Act of Sept. 24, 1789, c. 20, § 9.* (1 STAT. 76). The circuit courts had concurrent jurisdiction of such crimes and exclusive jurisdiction of all other offenses cognizable under the laws of the United States. *Ibid.* at § 11 (1 STAT. 78). The state courts have no concurrent criminal jurisdiction.

The district courts had exclusive original jurisdiction of all causes in admiralty and maritime law, and "of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States." Concurrently with the circuit courts, the district courts had cognizance (1) of causes where an alien sues for tort based on violation of international law or United States treaty, (2) of suits by the United States where the matter in dispute amounted to \$100 exclusive of costs, and (3) of suits against consuls and vice-consuls. *Ibid.* at § 9 (1 STAT. 76). The state courts had concurrent jurisdiction of the first and second classes. The district courts of Maine and Kentucky had somewhat broader jurisdiction. *Ibid.* § 10 (1 STAT. 77).

The circuit courts had jurisdiction concurrent with the state courts, "of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State. *Ibid.* § 11 (1 STAT. § 78).

15. 1 STAT. 80 (1789). "*And be it further enacted,* That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction. (b.) And shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul, shall be a party. (a) And the trial of issues in fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury. The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states in the cases herein after specially provided for;

(a) from the circuit courts, whether the judgment to be reviewed was original or itself appellate; (b) from state courts of last resort.<sup>16</sup>

All the elements of the modern federal court organization were there.<sup>17</sup> Marked as may seem the changes, they are essentially matters of emphasis, dictated by a constant theme—relief of the Supreme Court—for the early court structure lacked the elasticity necessary for the demands on the judiciary arising from territorial expansion. The focal point of this deficiency was the fact that “. . . three tiers of courts were operated by two sets of judges. The whole system pivoted on circuit riding by the justices.”<sup>18</sup> As the country grew larger, more circuits were created.<sup>19</sup> This meant either more circuit riding by the justices, or an increased number of justices, or both. The last proved to be the case.<sup>20</sup>

Instead of appointing regular circuit judges to handle the work of the circuit court, congress met each emergency resulting from the increased tasks of the expanding federal judicial power with mere palliatives. In 1793 an

(b) and shall have power to issue writs of prohibition (c) to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of *mandamus*, (d) in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.”

16. Section 25 of this Act (1 STAT. 85 (1789)) provided, “That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity, (d) or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error....”

17. The constant characteristic of the three tiers of courts is easily discerned. The Supreme Court justices no longer ride the circuits, but on rare occasions do sit with the circuit courts of appeals and upon his retirement from active duty on the Supreme Court, Justice Van Devanter on one occasion sat in a federal district court in New York. In the heterogeneous “three judge” district courts, of which one judge is a circuit judge, and from which appeal lies directly to the Supreme Court, may be found the ghost of the *nisi prius* function of the old circuit courts.

18. FRANKFURTER AND LANDIS, *op. cit. supra* note 11 at 14.

19. 2 STAT. 90, divided the country into six circuits. In 1807 an additional circuit was created (2 STAT. 420) and in 1837 the number was increased to nine (5 STAT. 176). In 1929 (45 STAT. 1346) the tenth—and last—circuit was created.

20. As each new circuit was created an additional justice was appointed to the Supreme Court. See the statutes cited in footnote 19 *supra*.

amendment to the Judiciary Act provided that the circuit courts should consist of only one Supreme Court justice and one district judge;<sup>21</sup> and thereafter, the justices took the circuits in turn, instead of being confined to fixed circuits. The genuine remedy which the notorious "Midnight judges" Act of February 13, 1801<sup>22</sup> afforded in creating sixteen circuit judgeships, three judges for each of the first five circuits and one for the sixth circuit, was labeled a piece of "stupendous jobbery" and became "part and parcel of a fierce party strife."<sup>23</sup> There is no doubt but what it was the dying effort of the Federalists to prolong their domination of the government, but it would have entirely eliminated circuit riding by Supreme Court justices and would have answered the judicial needs of the time.

Following the sweeping victory of the Jeffersonian Party at the polls in 1801, came the inevitable repeal of this Act.<sup>24</sup> The courts returned to the old system of circuit riding<sup>25</sup> but congress did allow the circuit court to be held by a single judge. With the growth of the country, the latter provision became the custom rather than the exception, since it was "... impossible for the Justices to attend circuit in all the districts at all sessions, and the circuit courts devolved more and more into the hands of single district judges."<sup>26</sup>

As a new circuit was created, a new justice was added to the Supreme Court, the lack of correlation between the needs of the circuit courts and most efficient size of the Supreme Court notwithstanding. In 1807 an additional circuit was created and another justice appointed.<sup>27</sup> In 1837 the number of each was increased to nine.<sup>28</sup> But these measures were insufficient and in a few years the Supreme Court was seriously in arrears<sup>29</sup> and the

21. 1 STAT. 333 (1793).

22. 2 STAT. 89 (1801).

23. FRANKFURTER AND LANDIS, *op. cit. supra* note 11 at 21, *et seq.*

24. 2 STAT. 132 (1802).

25. 2 STAT. 156 (1802).

26. FRANKFURTER AND LANDIS, *op. cit. supra* note 11 at 32.

27. 2 STAT. 420 (1807).

28. 5 STAT. 176 (1837).

29. This growing arrearage is best illustrated by the figures contained in SEN. Doc. No. 91, 29th Cong., 1st Sess. 473:

<i>Term</i>	<i>Cases Pending</i>	<i>Cases Disposed of</i>
1841.....	106	42
1842.....	107	52
1843.....	118	36
1844.....	168	46
1845.....	173	64

chore of circuit riding became impossible.<sup>30</sup> By the Act of June 17, 1844,<sup>31</sup> a month was added to the Court's session and the Justices were relieved from attending "... more than one term of the circuit court within any district of said circuit in any one year. ..."<sup>32</sup>

The steady growth of business before the Supreme Court<sup>33</sup> forced it to adopt, for the first time, a rule limiting argument, to two hours a side.<sup>34</sup> These therapeutics were of scant aid. The impending struggle over the slavery question so engulfed congress that the already belated judicial reform was relegated to the shelf until after the Civil War. However, the Act of March 2, 1855,<sup>35</sup> enacted to meet the pressing needs of the newly created state of California,<sup>36</sup> by constituting it a circuit with a separate circuit judge, but leaving the general system untouched, presaged the ultimate divorce of the circuit courts from the Supreme Court.

The new national consciousness engendered by the Civil War, plus an intense stimulation of economic and industrial activity tending toward nationwide corporate structures, necessitated the extension of federal activities, and, consequently, of the jurisdiction of the federal courts.<sup>37</sup> Moreover,

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30. See FRANKFURTER AND LANDIS, *op. cit. supra* note 11 at 49 *et seq.* for a summary of the miles travelled by the justices in riding circuit. In 1838, Justice McKinley reported that he covered 10,000 miles doing circuit duty in the ninth circuit, then composed of Alabama, Louisiana, Mississippi and Arkansas. SEN. Doc. No. 50, 25th Cong., 3rd Sess., 339. That the justices found the burden of riding the circuits most onerous from the very beginning of the court is evidenced by the representations of Chief Justice Jay and his associates to President Washington:

"We really, sir, find the burdens laid upon us so excessive that we cannot forbear representing them in strong and explicit terms. ... That the task of holding twenty-seven Circuit Courts a year, in the different States, from New Hampshire to Georgia, besides two sessions of the Supreme Court at Philadelphia, in the two most severe seasons of the year, is a task which, considering the extent of the United States and the small number of Judges is too burdensome." 1 AM. STATE PAPERS, MISC., 52.

31. 5 STAT. 676 (1844).

32. *Ibid.*

33. In 1840, 92 cases were docketed; in 1850 the number had increased to 253, and in 1860, to 310. See remarks of Senator Davis in the Senate on May 1 (1882) 13 CONG. REC. 3464.

34. Rule of Court No. 53, 7 How. (U. S. 1849), Wayne and Woodbury, JJ., dissenting.

35. 10 STAT. 631 (1855).

36. 9 STAT. 452 (1850).

37. See Trumbull, *The United States Circuit Court of Appeals* (1892) 16 ILL. S. B. A. REP. 64. Trumbull was a former member of the Illinois State Supreme Court and had been a leader in the senate during the period preceding the creation of the circuit court of appeals.



the courts, by liberal construction, were steadily assuming authority over cases theretofore left to the state courts.<sup>38</sup>

These factors, plus increased population, the settlement of western lands, and the chaotic events of the post-war era, pressed demands for substantial changes in the overburdened federal judicial system.<sup>39</sup> And they

38. "Till 1850, the calendar of the Supreme Court did not average 140 cases a term: for the last term it exceeded 1,500. This vast increase in the business of the Supreme Court is partly due to the growth of the population and business of the country, but chiefly to the legislation of Congress, conferring additional jurisdiction upon the District and Circuit Courts, and the disposition of the Federal Court by construction to amplify their powers. . . . Thus by legislation and judicial construction there have been drawn into the Federal Courts a class of cases between citizens of the same State never contemplated by the constitution (referring to the increased right of removal from state courts). It was originally held by the Supreme Court, that a corporation was not a citizen, and where the jurisdiction was founded only on the diverse citizenship of parties, the capacity of a corporation to sue or be sued in a Federal Court, depended upon the citizenship of its members. (*See Bank of the United States v. Deveaux*, 5 Cranch 61, (U. S. 1809)). This was the law in the days of Marshall. But by later decisions it has been held, that a corporation and its members are to be conclusively presumed to be citizens of the State by which the corporation is incorporated. (*See Louisville C. & C. R. R. v. Letson*, 2 How. 497, (U. S. 1844) and *Ohio & Miss. R. R. v. Wheeler*, 1 Black 286 (U. S. 1861)) and a large part of the time of the federal courts has, of late years, been taken up in considering cases to which corporations were parties, without regard to the citizenship of its members of the corporations, and of which they would have had no jurisdiction in Marshall's day.

"The business of the Federal Courts was also largely increased by cases growing out of the War of the Rebellion. Upon the abolition of slavery by the 13th Amendment to the Constitution, various Acts were passed by Congress to protect the freedmen in their civil rights, and the Federal Courts were given jurisdiction of cases arising under these acts. All of these causes combined, and particularly the act of 1875, so increased the business of the Federal Courts that the Supreme Court found itself unable during the term to dispose of the cases brought before it, and they continued to pile up, so that for the last half dozen years a case upon its calendar was seldom reached under three years from the time it was filed." *Id.* at 65, 66 (parenthetical matter supplied "By judicial decision is had been decided that all actions by or against corporations created by an act of Congress are actions which arise under the laws of the United States, and were therefore within the jurisdiction of the district court because of their subject-matter; this regardless of whether the case actually involved the construction or effect of an act of Congress. *See Osborn v. Bank of United States*, 9 Wheat. 738, (U. S. 1824); *Pacific Railroad Removal Cases*, 115 U. S. 1, 5 Sup. Ct. 1113 (1884). This jurisdiction was taken away as regards national banks by Section 4, Act of March 3, 1887, 24 STAT. 554; as regards railroad companies chartered by Congress by the Act of January 28, 1915, 38 STAT. 804, and the Act of Congress of February 13, 1925, 43 STAT. 941 28 U. S. C. § 42 (1940) stripped the federal courts of all jurisdiction based on federal incorporation save where the United States owns over one-half of the corporation's stock.

39. The underlying forces which demanded change in our judicial system are well summarized by Martin T. Manton, former senior judge of the United States Circuit Court of Appeals for the Second Circuit, in a paper on the organization of work of the courts of appeal.

were not long in coming. Had the old "Republicans" been present during this post-war era of reform they could have pointed to their prophetic remonstrances of 1801 and uttered a righteous "I told you so." A flood of litigation poured into the *nisi prius* courts,<sup>40</sup> and the Supreme Court's docket of cases pending soon reflected this ever-growing torrent. Where in 1850 only 253 cases were pending before the Supreme Court, and in 1860, only 310, the Court had 636 cases on its 1870 docket.<sup>41</sup> The record of the next twenty years was one of constant and intolerable increase.

Growing agitation against the absolute power of the single district judge who for all practical purposes was also a circuit judge,<sup>42</sup> coupled with the necessity of relieving the Supreme Court of its burden of circuit riding, resulted in the passage of the Act of April 10, 1869, which provided for the appointment of a circuit judge for each of the nine circuits.<sup>43</sup> This act

"The history of the national courts indicates that the Federal judiciary system has changed of necessity as its business has grown. . . . Many changes have been required with the growth of population and the progress of the country. As we have grown the public demand has been for a more centralized Federal control. That brought forth, as of necessity, Federal legislation to meet the requirements of the administration of justice after such control. New laws created new commissions and other agencies of the national government. Regulatory enactments to guide and control these new congressional creations were necessary. The regulation of interstate commerce, foodstuffs, railroads and other public utilities, foreign commerce, immigration and matters of maritime transportation has led to varied tribunals for solution." Manton, *Organization and Work of the U. S. Circuit Court of Appeals* (1926) 12 A. B. A. J. 41.

40. In 1873, the total number of cases pending in the district and circuits was 29,013, of which 5,108 were bankruptcy cases. By 1880, the repeal of the Bankruptcy Act notwithstanding, the number had increased to 38,045. A total of 54,194 was reached in 1890. (These figures are taken from the Reports of the Attorney-General for the years mentioned.)

41. Senator Davis in the Senate on May 1, 1882, 13 CONG. REC. 3464.

42. "The original distinction between the District and Circuit courts is now practically obsolete. In most of the federal districts nearly all of the work in the circuit courts is done by the district judges." Pierce, *Relief for the Federal Courts* (1881) 7 SO. L. REV. (N.S.) 884, 887. See also the *United States Courts and the New Court Bill* (1876) 10 AM. L. REV. 398, 406 *et seq.* Hill *The Federal Judicial System* (1889) 12 A. B. A. REP. 289, 304, and see McCrary, *Needs of the Federal Judiciary* (1881) 13 CENT. L. J. 167, pointing out that the district judges accumulated intense disfavor because over two-thirds of the circuit court work was handled by the single district judges whose decisions were final in many cases. This situation was particularly obnoxious in criminal cases because the Supreme Court had no jurisdiction of a writ of error from a circuit court in a criminal case. *United States v. More*, 3 Cranch 159 (U. S. 1805). It was not until 1889 that review was allowed in a capital case (Act of February 6, 1889, 25 STAT. 656) and not until 1891 was this review extended to "other infamous crimes." 26 STAT. 827 (1891).

43. 16 STAT. 44 (1869). These newly appointed circuit judges soon came in for their share of criticism and a writer, in *The Nation*, said that "the greatest despot of the land is the United States circuit judge." 32 NATION 9.

proved a temporary aid at best, however, since the performance of circuit duties by the Supreme Court justices had become more theory than fact and was no longer a very substantial portion of the judicial burden of the court, and any relief accorded by elimination of the *nisi prius* activities of its members was soon overbalanced by the sweeping provisions of the Act of March 3, 1875,<sup>44</sup> by which "... Congress gave the federal courts the vast range of power which had lain dormant in the Constitution since 1789."<sup>45</sup> In fact, the federal courts were given jurisdiction over all cases involving the constitution, a federal law, agency or treaty, and, by removal, over all such cases brought originally in a state court. The ever-increasing diversity of citizenship cases was multiplied by the developing doctrine of corporate citizenship.<sup>46</sup> Furthermore, the post-war amendments to the Constitution, notably the Fourteenth, added greatly to the work of the federal courts.<sup>47</sup>

Although proposals for an intermediate appellate court had emerged as early as 1848,<sup>48</sup> again in 1854,<sup>49</sup> and another in 1865,<sup>50</sup> they were admittedly premature. These early bills provided, basically, for either concurrent jurisdiction between the circuit and district courts or for the elimination of one or the other; and for intermediate tribunals composed of one Supreme Court justice and two or more district judges.<sup>51</sup> Instead of taking measures striking at the core of the problem, congress vacillated, and from time to time during the years between 1865 and 1891 added more judges<sup>52</sup>

44. 18 STAT. 470 (1875).

45. FRANKFURTER AND LANDIS, THE WORK OF THE SUPREME COURT (1928) 65.

46. See footnote 38, *supra*.

47. That the Supreme Court realized this fact is borne out in the following quotation from Davidson v. New Orleans, 96 U. S. 97, 104 (1877). "In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded." See also Missouri Pac. Ry. v. Humes, 115 U. S. 512, 520, 6 Sup. Ct. 110, 112 (1885).

48. 18 CONG. GLOBE 398-399.

49. 33 *id.* at 924, 1210.

50. CONG. GLOBE, 38th Cong., 2nd Sess. (1865) 292. See also *id.* at 275, 915, and 1338. Lyman Trumbull, in introducing his bill, stated: "I desire to say that I introduce it with the view of bringing the subject before the Senate and the country. ... The amount of business accumulating in the Supreme Court amounts almost to a denial of justice and some legislation is necessary, and will become more necessary as the business accumulates in that court, to relieve it."

51. It is to be remembered that no circuit judges, as such, existed prior to 1869.

52. Besides the addition of numerous district judges from time to time, the Act of April 10, 1869, 16 STAT. 44, created nine circuit judgeships.

to the outmoded system, limited review in admiralty and patent cases,<sup>53</sup> increased the money value requisite to appeals from \$2,000 to \$5,000,<sup>54</sup> debated bills devised to eliminate corporate citizenship as a means of access to the federal courts,<sup>55</sup> increased the jurisdictional amount from \$500 to \$2,000,<sup>56</sup> limited the right of an assignee of negotiable paper to sue to only those cases where the original holder could have sued,<sup>57</sup> subjected national banks to the jurisdiction of state courts,<sup>58</sup> and burdened the district and circuit courts with concurrent jurisdiction with the Court of Claims<sup>59</sup> in cases where the amount exceeded \$1,000 and did not exceed \$10,000.<sup>60</sup>

Reorganization of the federal judiciary had more at stake than mere administrative reform. There was involved the fundamental issue of the purpose which the federal courts should serve. Eastern capital was locked in fierce sectional strife with western and southern agrarianism. It was a new phase of the century-old struggle between the states and the federal government, and the record of the federal courts had demonstrated both their inevitable alignment with a nationalistic philosophy and their greater remoteness from popular sectional social movements. More than thirty bills were introduced in the House and/or Senate in the fifteen-year interim between 1875 and 1890 providing for some sort of an intermediate court of appeals.<sup>61</sup> Several bills sought a solution of the problem by creating additional Supreme Court justices;<sup>62</sup> one would have had an enlarged Supreme Court sitting in divisions;<sup>63</sup> some suggested relief by terminating the already theoretical circuit duties of the justices.<sup>64</sup> Not promoted by special interest

53. 18 STAT. 315 (1875), 28 U. S. C. 771 (1940).

54. *Id.* at 316.

55. These bills and the debates on them are fully covered in FRANKFURTER AND LANDIS, *THE WORK OF THE SUPREME COURT* (1928) 89, 90.

56. 24 STAT. 552 (1887).

57. *Id.* at 553.

58. *Id.* at 554 § 4, providing that national banks shall be "...deemed citizens of the States in which they are respectively located...."

59. See p. 213, *infra*, for a discussion of the Court of Claims.

60. 24 STAT. 505 (1887) (Commonly known as the Tucker Act) See footnote 56, *supra*.

61. See FRANKFURTER AND LANDIS, *THE WORK OF THE SUPREME COURT* (1928) 70-98. These bills were critically analyzed by a contemporary writer, Dickerman, *The Business of the Federal Courts, and the Salaries of the Judges*, (1890) AM. L. REV. 78. See also Raymond, *Relief of the Federal Courts' Docket* (1889) ILL. S. BAR ASS'N. REP. 65.

62. See FRANKFURTER AND LANDIS, *THE WORK OF THE SUPREME COURT* (1928) 74, 80. These proposals are critically discussed by Pierce, *Relief for the Federal Courts* (1881) 7 SO. L. REV. (N.S.) 884.

63. 10 CONG. REC. 528.

64. 11 *id.* at 810.

or by any particular politically influential group, all failed of passage by indecisive and inert congresses, the more incapable of creative legislation by reason of the lack of political unanimity among House of Representatives, Senate and presidency from 1875 to 1890.<sup>64a</sup>

While Congress "fiddled" the Supreme Court "burned."<sup>64b</sup> The October term of 1884 opened with 1315 cases; the following year brought the total to 1340; the 1886 term increased it to 1396; in 1887 there were 1427; in 1888, 1563; in 1889, 1635; and in 1890 the unbelievable total of 1816 was reached.<sup>65</sup> Finally, on April 7, 1890, the House Committee on Judiciary reported favorably upon a bill introduced by John H. Rogers.<sup>66</sup> It provided for one *nisi prius* court, abolishing the old circuit court. It created nine intermediate courts of appeal with final decision in cases arising solely through diversity of citizenship, reserving a right of certification; two addi-

64a. The animosity between President Andrew Johnson and Congress was undoubtedly a potent factor in postponing judicial reorganization immediately following the Civil War. This disagreement over patronage is said to be one of the reasons why Senator McCrary's bill of 1876 for the creation of an intermediate court of appeals did not provide for the appointment of any new judges (*See* (1876) 10 AM. L. REV. 398), the author noting that "There are worse evils in the administration of justice than delay." *See also* Hill, *The Federal Judicial System*, (1889) 12 A. B. A. REP. 289, 320, 321; Budd, *The United States Circuit Courts of Appeals* (1893) 9 L. Q. REV. 51, 56.

64b. The statement, obviously figurative, is descriptive in two senses. Not only was the court in danger of disintegration from the excessive burden, but also the justices were impatiently asking for legislative relief. Chief Justice Waite, a few months before his death in 1887, said in an address:

"The law which fixes at this time the appellate jurisdiction of the Supreme Court was enacted substantially in its present form at the first session of Congress, nearly 100 years ago. With few exceptions, and these for all practical purposes unimportant to the point I wish to make, the jurisdiction remains today as it was at first, and consequently with a population in the United States approaching 60,000,000 and a territory embracing nearly 3,000,000 square miles, the Supreme Court has appellate jurisdiction in all of the classes of cases it had when the population was less than 4,000,000 and the territory but little more than 800,000 square miles. Under such circumstances it is not to be wondered at that the annual docket of the court has increased from 100 cases or perhaps a little more, half a century ago, to nearly 1,400, and that its business is now more than three years and a half behind. . . . In the face of such facts it cannot admit of a doubt that something should be done, and that at once, for relief against this oppressive wrong."

*See also* Mr. Justice Miller's opinion on the need for reform, with suggested remedies, in the January, 1872, number of the UNITED STATES JURIST, quoted and discussed by a contemporary writer in Note (1872) 5 ALB. L. J. 22. *See also* the May, 1811, issue of the NORTH AMERICAN REVIEW for an article by Mr. Justice Strong; Mr. Justice Harlan, *The United States Supreme Court*, (1881) 20 CHI. LEG. NEWS 208 and Mr. Justice Field, *The Centenary of the Supreme Court of the United States* (1890) 24 AM. L. REV. 351.

65. These figures are obtained from the REP. ATT'Y. GEN., (1885 to 1891).

66. 21 CONG. REC. 3049, 3130.

tional circuit judges were to be appointed for each circuit, making a total of three for each circuit, thereby relieving the justices from circuit duty.<sup>67</sup>

After critics had argued that the circuit courts should not be disturbed and that nine separate appellate tribunals would bring uncertainty and chaos into the federal judicial system,<sup>68</sup> the bill passed the House by the decisive vote of 131 to 13.<sup>69</sup> The Senate Judiciary Committee, William M. Evarts, chairman, recommended a substitute for the House bill which made several important changes.<sup>70</sup> Evarts retained the central proposal of nine courts of appeal, but clung to the traditional district and circuit court system, abolishing only the appellate jurisdiction of the latter. His bill provided for a direct appeal from the district courts and the circuit courts to the Supreme Court in certain limited situations,<sup>71</sup> requiring that all other litigation be appealed to the new circuit courts of appeals. No jurisdictional amount was required. In diversity of citizenship cases, and in cases involving the patent, revenue, criminal and admiralty laws, the decisions of the latter

67. The bill is set forth in 21 CONG. REC. 3402.

68. *Id.* at 3043 to 3407.

69. *Id.* at 3410.

70. *Id.* at 10218. Senator Evart's bill, except for minor modifications in wording, an amendment allowing a direct appeal to the Supreme Court in the case of capital and "other infamous crimes," and a provision for appeals from the United States Court in the Indian Territory and from the courts of the other territories, became law in the Act of March 3, 1891, 26 STAT. 826 (1891).

71. Section 5 of the act as finally passed provided for direct appeal to the Supreme Court without limitation of jurisdiction amount,

(1) "In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision." [The appeal could not be taken prior to final judgment, nor could the same party appeal to the Supreme Court on the issue of jurisdiction and to the circuit court of appeals on the merits, *McLish v. Roff*, 141 U. S. 661, 12 Sup. Ct. 118 (1891); an appeal to the circuit court of appeals by one party was suspended during appeal to the Supreme Court on question of jurisdiction by his opponent, *Barling v. Bank of British North America*, 50 Fed. 260 (C. C. A. 9th, 1892); and, of course, though the appeal were made to the circuit court of appeals by either party on the merits of the case, it remained the duty of that court on its own initiative to consider the question of jurisdiction and to remand with directions to dismiss if jurisdiction did not appear on the record, *Mansfield, C. & L. M. Ry. v. Swan*, 111 U. S. 379, 4 Sup. Ct. 510 (1884); *Chicago, B. & Q. Ry. v. Willard*, 220 U. S. 413, 31 Sup. Ct. 460 (1911)].

(2) "From the final sentences and decrees in prize cases."

(3) "In cases of conviction of a capital or otherwise infamous crime."

(4) "In any case that involved the construction or application of the Constitution of the United States."

(5) "In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question."

(6) "In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States."

were to be final, subject to *certiorari*<sup>72</sup> or certification. In other cases a right of appeal from the circuit court of appeals to the Supreme Court lay where the matter in controversy exceeded one thousand dollars, if taken within one year from entry of the judgment or order sought to be reviewed. This bill added only one additional circuit judge to the one already provided for each circuit. The justices of the Supreme Court, the two circuit judges, and the judges of the district courts of the circuit were competent to sit upon the circuit court of appeals. While it was contemplated that it should be a three judge court, two judges would constitute a quorum.<sup>72a</sup>

72. Thus, in this numerically important portion of federal litigation, where national law is not intrinsically involved, the Supreme Court in its discretion could limit the number of cases to come before it. The device proved so efficacious and generally satisfactory that it formed the basis of most of the subsequent legislation affecting the jurisdiction of the Supreme Court, notably the Judges Bill of 1925 in connection with which the theory and practice is discussed, *infra*.

The right of the circuit courts of appeals to certify questions to the Supreme Court has also been preserved and is discussed *infra*. The attitude of the Supreme Court has not encouraged the use of this technique and, as will be seen, it is sparingly resorted to.

72a. Only the essential outline of the court organization is here depicted. The bill contained numerous other provisions necessary for the vitalization and functioning of the new courts. The then existing appellate practice governing appeals, writs of error, supersedeas and costs was made applicable to the new circuit courts of appeals. These courts were also granted the power to prescribe the form and style of their seals, writs and other process, to fix their terms of court, to issue extraordinary writs "... necessary for the exercise of their... jurisdiction, and agreeable to the usages and principles of law," and "to establish all necessary rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law." The act provided that both the Supreme Court and the circuit courts of appeals after reviewing a case on appeal, should remand the same to the district or circuit court, as the case might be "... for further proceedings to be there taken in pursuance of such determination."

The provisions of the act were expressly made applicable to appeals from the United States court in the Indian Territory, such appeals going to the Circuit Court of Appeals for the Eighth Circuit. Appeals from the territorial courts were to be reviewed by the respective circuit courts of appeals designated by order of the Supreme Court in cases in which the judgments of the circuit courts of appeals were made *final* by the act. All other territorial appeals went directly to the Supreme Court.

By virtue of piecemeal legislation too complicated to examine in detail in this work (for which reference may be made to FRANKFURTER AND LANDIS, *THE WORK OF THE SUPREME COURT* (1928) 267-270) at the present time the following circuit courts of appeals hear cases coming up from the following territories, respectively:

First Circuit—Supreme Court of Puerto Rico.<sup>1</sup>

Third Circuit—District Court of the Virgin Islands.

Fifth Circuit—U. S. District Court for the District of the Canal Zone.<sup>2</sup>  
Supreme Court of Hawaii.

District Court of the Territory of Alaska.<sup>1</sup>

1. Certain appeals from these courts go directly to the Supreme Court. See 50 STAT. 752, 753 (1937), 28 U. S. C. § 349a (1940).

These changes in the original bill presented by Rogers in the House were not wrought without extended consideration. They were formulated, in part, by an active and influential committee of the American Bar Association and drawn up in conference with the Senate Judiciary Committee.<sup>73</sup> Although several senators still clung to the belief that the circuit riding of pioneer days should be retained because of its "democratic" influences,<sup>74</sup> and others<sup>75</sup> favored a tripartite division of the Supreme Court, the Ewart's bill prevailed by a vote of 44 to 6 on September 24, 1890,<sup>76</sup> after a debate lasting six days.<sup>77</sup>

Final passage of the bill was delayed until the next session when, on February 21, 1891, the House voted not to concur in the Senate amendments.<sup>78</sup> However, the House conferees acceded to the Senate's changes,<sup>79</sup> the House voted approval on February 28, 1891<sup>80</sup> after strenuous opposition by Rogers because of the amendments to his original bill,<sup>81</sup> and on March 3, 1891, the act which created the circuit courts of appeal received the president's signature.<sup>82</sup>

The primary purpose of the Act was to expedite the administration of justice. A contemporary writer had described the existing condition in these words,

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2. For discussion of the creation of this court and its activities see note (1936) 49 HARV. L. REV. 793; Loring, *American Extraterritoriality in China* (1926), 10 MINN. L. REV. 407; Lobingier, *A Quarter Century of our Extraterritorial Court* (1932) 20 GEO. L. J. 427.

Review of decisions of the Supreme Court of the Philippine Islands can be had only in the Supreme Court of the United States, and there only by *certiorari* in cases "... wherein the Constitution, or any statute or treaty of the United States is involved, or wherein the value in controversy exceeds \$25,000, or wherein the title or possession of real estate exceeding in value the sum of \$25,000 is involved or brought in question...." 43 STAT. 940 (1925), 28 U. S. C. § 349 (1940) (Act of February 13, 1925). See the Historical Note, 28 U. S. C. § 349 for a judicial history of the Philippine Islands. See also Kingsbury, *Writs of Error and Appeals from the New Territorial Courts* (1907) 16 YALE L. J. 417.

73. See Dent, *Report of the Committee on Judicial Administration and Remedial Procedure*, (1894) 17 A. B. A. REP. 336, 337.

74. See 21 CONG. REC. 10223-10224, for remarks of Senator Vest of Missouri.

75. See *Id.* at 8307, for the minority report by Edmunds of the Judicial Committee favoring the divisional scheme for relieving the Supreme Court.

76. *Id.* at 10364.

77. *Id.* at 10193-10194, 10217-10232, 10278-10288, 10302-10318, 10335, 10363-10365.

78. 22 *id.* at 3087.

79. *Id.* at 3535, 3583.

80. *Id.* at 3587.

81. *Id.* at 3584-3588.

82. *Id.* at 3760; 26 STAT. 826 (1891), 28 U. S. C. §§ 212, 543, 544 (1940).



"... a defendant had only to carry his case to the Supreme Court to be assured of a respite of years before his case could be even heard, while to the plaintiff, successful in the lower court, the removal of his cause to the highest tribunal in the land meant a heart-sickening postponement of the time when he might reap the fruits of his victory."<sup>83</sup>

The record discloses that beyond argument the measures taken accomplished their purpose.<sup>84</sup> Appellate litigation which would previously have gone to the Supreme Court, to wait for years for final disposition, and which was by the Act diverted to the circuit courts of appeals, was promptly disposed of.<sup>85</sup> The immediate reduction in the number of new cases docketed in the Supreme Court<sup>86</sup> permitted that court to reduce its arrearage from a high of 1,190 cases at the end of the October term in 1890, to 714 cases at the same time in 1893, and to 313, in 1897.<sup>87</sup>

It should be noted that an intermediate appellate court can truly expedite the final disposition of litigation only where there does not exist appeal as of right from its judgments and where the relative jurisdiction of the several courts is well defined. Otherwise, the existence of intermediate review tends merely to interpose an additional stay in the course of the suit and much time, both of courts and litigants, may be consumed in determining the proper court of review.<sup>87a</sup> Undoubtedly a certain number

83. Budd, *The United States Circuit Court of Appeals* (1893) 9 L. Q. REV. 51.

84. "I think it is generally conceded that the court (C. C. A.) have justified their creation by accomplishing what was expected of them." REP. ATT'Y. GEN. (1897) XV.

85. Former Chief Justice Taft said:

"The Circuit Courts of Appeals worked well. Speaking generally, they were always abreast of their dockets, and their activity soon removed the 'hump' in the docket of the Supreme Court." *The Jurisdiction of the Supreme Court Under the Act of February 13, 1925* (1925) 35 YALE L. J. 1.

86. During the four years immediately preceding the creation of the circuit courts of appeals, the average number of new cases annually to come before the Supreme Court was 536, and in 1890 alone totalled 623. In 1891, during only part of which the Act was in operation, the number dropped to 379, and in 1892, to 275. See REP. ATT. GEN. for these years.

87. REP. ATT'Y. GEN.

87a. To some degree this objection is inevitably present in any form of court organization in which some appeals must be taken to one court, others to another. The system contemplated by the Circuit Court of Appeals Act was not free from possibility of confusion, as witness the remarks of Chief Justice Taft in *McMilliam Contracting Company v. Abernethy*, 263 U. S. 438, 441, 44 Sup. Ct. 200 (1929), although never as unworkable as many forms of state court organization. By Act of Sept. 14, 1922, 42 STAT. 837 (1922), Congress provided for transfer to the proper court instead of dismissal of cases appealed to the wrong court. The legislation which minimized the appeals which could be taken directly to the Supreme Court and which routed more and more litigation through the circuit courts

of new cases coming to the Supreme Court, even before 1925, and a very substantial proportion since that date, were previously subjected to the delay of trial in the circuit courts of appeals, but so rigorously has the Supreme Court applied its rules of policy in granting *certiorari* that they constitute a very small percentage of the total number of cases appealed from the federal *nisi prius* courts (in this connection we may include, though with technical inaccuracy, many administrative agencies with the district courts as "courts" of first impression). This fact, taken in conjunction with the circumstance that both the Supreme Court and several circuit courts of appeals are currently abreast of their dockets, makes it apparent that the institution of the latter courts has served the intended purpose.

This is not to say that the work of the new courts was hailed by a unanimous chorus of hosannas. No one familiar with American political history would expect those who had viewed with distrust and alarm the expansion of federal governmental activity and had on that ground opposed an organization of the federal courts which would make possible the adjudication of the increasing litigation by federal sovereignty, to have changed their views immediately the courts were in operation.<sup>88</sup> And from the Act

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of appeals, such as Act of Sept. 6, 1916 (39 STAT. 726 (1916)), 28 U. S. C. § 344 (1940)) and especially the Judges' Bill of 1925, 43 STAT. 936 (1925), 28 U. S. C. §§ 225, 875, 227, 344, 48 U. S. C. §§ 645, 864 (1940): subject only to *certiorari* from the Supreme Court, reduced the number of cases which went astray.

88. "Whether the growing tendency of the Federal Courts to enlarge their powers may not in the end prove destructive of our system of government and the liberties of the people, is a question I do not propose to discuss; but it is not to be forgotten that to clothe any set of men with powers of whose extent they are to be the sole judges, is of the very essence of despotism. . . . The establishment of the Circuit Court of Appeals, enlarged jurisdiction conferred on Circuit Court by Acts of Congress, and their construction by the Federal Courts of late years, have tended to transfer to the Federal Courts much of the litigation formerly done by State tribunals. This, in my opinion, is to be regretted. I believe that State tribunals are the best administrators of domestic and local affairs. . . . The cases growing out . . . of the War of the Rebellion and the Constitutional Amendments have mostly been disposed of, and if the calendar of the Supreme Court had been free of continued cases at the time the act creating Circuit Courts of Appeals was passed, it is probable there would have been no occasion for such courts. Whether it would not have been better to have devised some scheme to dispose of pending cases, and left the Supreme Court to dispose of current cases as they arise, it is now too late to inquire. . . . The tendency of our time is to centralization in all directions, not only in politics, but of capital and in business of all kinds. The wealth of the country is rapidly passing from the hands of the many to great corporations and to the hands of a few individuals. While some measure was necessary to relieve the Supreme Court of its accumulated business, it is to be regretted that some other system could not have been devised to relieve it without creating nine new courts with all their paraphernalia and numerous officers scattered throughout the United States, which will necessarily tend to increase the

of 1789 to date, federal judges have suffered some enmity, in part earned by abuse of the security and independence given by their life tenure of office, but more arising from the discharge of their duties according to precedents established in Washington and with less response to popular pressure of the time and locality; in other words, from causes inherent in a judiciary whose jurisdiction was conceived primarily to override local convictions on matters of national concern and local passions and prejudices in suits affecting foreign parties.<sup>89</sup>

Furthermore, there was room for improvement in the law as it stood after the passage of the Act of 1891. In view of the many divergent schemes for court reorganization's being promulgated, each of which had its "last-ditch" adherents, it is doubtful if any complete reorganization could have been effected in a single bill, and the one actually to become law was not presented and passed under the most favorable circumstances for legislative consideration.<sup>90</sup> As described by former Chief Justice Taft,

"The parliamentary situation with respect to the bill had been such that if a measure of that kind was to pass in the last days of the 50th Congress, it had to pass exactly as it was reported by the

business of the Federal Courts, already, in my opinion, quite too expensive.

"What I have said is not intended as an attack upon the Court of Appeals, but to sound a note of alarm before it is too late against the tendency of the age to centralization which, if allowed to go on, must sooner or later destroy all local government, and with it the liberties of the people and the rights of man." Trumbull, *The United States Circuit Court of Appeals* (1892) ILL. S. BAR ASS'N. 64.

89. It is undoubtedly true that, as charged by the anti-Federalists of constitutional days and by the populist leaders ever since, the federal courts are less democratic than elective local courts. One is tempted to digress to principles of jurisprudence and political science. The American tradition could not tolerate the administration of justice completely divorced from popular will. On the other hand, we are equally committed to the proposition that "justice," whatever the word may mean, shall eschew *ex post facto* law making. The Greek assembly which condemned Socrates was a highly democratic court, whose jurisdiction and regularity of procedure he himself admitted. All successful government is a compromise of abstract theory, and several systems of court organization in the United States vary from each other but in degree in attempted reconciliation of conflicting ideologies.

The early decision of *Swift v. Tyson* and its recent repudiation in *Erie Ry. v. Tompkins* represent fluctuations in the policy of the Supreme Court on the necessary federal judicial attitude toward nationalizing the administration of justice. Although the great growth of interstate activity makes a uniform substantive law more desirable to-day than ever before, the country is more nationally minded and the position of the federal sovereignty less in need of assertion.

90. It must be remembered that this was long before the "lame duck" amendment, and that the 50th Congress ended at midnight on March 3, 1891. Thus the bill became law as the zero hour approached. See Walker, *Our National Judicial System* (1912) 75 CENT. L. J. 184, 190.

Senate Judiciary Committee. It was not, therefore, subjected to as full and free discussion as was desirable, and was not freed from gaps and obscurities which more careful consideration would have avoided. The Supreme Court in its interpretation has had difficulty in clarifying it."<sup>91</sup>

In the first place, the judicial machinery was still cumbersome. The act creating the circuit courts of appeals had not eliminated the ancient circuit courts, which in theory at least, continued to share *nisi prius* jurisdiction with the district courts although their limited appellate function was now completely gone. This resulted in a most confused situation. Not only were there two theoretically distinct courts serving identical functions, with unnecessary duplication of court machinery and possible jurisdictional snares for the unwary or inexperienced litigant who had to choose the correct forum, but the judicial personnel exercised such a variety of duties as to make even description of the system difficult.

The district judges held the district courts. The circuit courts could be held by either circuit judges, justices of the Supreme Court, or district judges, but in practice the latter presided almost exclusively.<sup>92</sup> The three classes of judges were also competent to sit on the circuit courts of appeals, but as only two circuit judges were provided for each circuit and a three judge court was contemplated and normally held, a district judge regularly

91. Taft, *The Jurisdiction of the Supreme Court Under the Act of February 13, 1925* (1925) 35 YALE L. J. 1.

92. "In the year 1908, out of a total of 18,000 days on which Circuit Courts were held throughout the United States, the Circuit judges sat in those courts only 2,000 days, or about 11% of the time, while for the remaining 16,000 days the court was presided over by the district judges. In twenty-two states the Circuit court was held exclusively by the district judge, and in at least six other states the total aggregate of days in which this court was held by the circuit judge would not exceed ten days for each state.

"The Circuit Courts of the United States, therefore, as they exist today, both in jurisdiction and in personnel of the judges, are wholly different from the courts created by the Judiciary Act of 1789. They have no appellate jurisdiction. They are presided over not by a Supreme Court justice, but by a district judge. The labor of the Circuit Court judges is confined almost exclusively to work in the Circuit Court of Appeals, and the rapid expansion of the work of that court will of necessity in the course of a few years eliminate him entirely as a factor in the performance of his duties as a judge of the Circuit Court.

"Yet, because under existing laws certain exclusive original jurisdiction is given to the Circuit Courts there is necessarily maintained in every district of the United States, and in every decision thereof, now seventy-eight in number, the complete machinery of a Circuit Court, consisting of court rooms, clerks, dockets, marshals, and all of the extensive and expensive features of a court organization." Note, (1911) 14 LAW NOTES 204.

sat upon it. The so-called "circuit judges"<sup>93</sup> devoted themselves virtually exclusively to the work of the circuit courts of appeals and the justices of the Supreme Court, though each was (and is) nominally assigned to a particular circuit, rarely, if ever took to the circuit.<sup>94</sup>

Almost immediately additional circuit judges were added to certain circuits<sup>95</sup> and this tendency continues (there are at least three circuit judges in every circuit today) as more and more litigation finds its way into the federal courts.<sup>96</sup> However, it was not until 1911 that the circuit courts were

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93. It is worthy of note that this nomenclature still exists. We have district judges, circuit judges, and justices of the Supreme Court, but not "circuit court of appeals judges." The shifting character of the personnel of the courts was frequently criticized, but this feature has been retained because of the flexibility by which greatly varying burdens of litigation may be met. By assignment by the presiding circuit judge, a circuit judge may sit in district court with same powers and limitations of powers as a district judge. He does not thereby become a district judge, however. So, by assignment by the presiding circuit judge, a district judge may sit in another district or upon the circuit court of appeals, with the powers of a circuit judge as to that litigation. The Chief Justice of the Supreme Court may assign district or circuit judges to temporary duty in the district or circuit courts of another circuit. A few years ago, because of a peculiar local situation, Judge Patrick Stone, a district judge in Wisconsin (in the seventh circuit) was assigned by the Chief Justice to sit in the district court in Michigan (in the sixth circuit) to hear the criminal prosecution of the officers of a number of large Detroit banks, *See* 28 U. S. C. § 17 *et seq.* (9 STAT. 442 (1850), 16 STAT. 44 (1869)).

These situations to-day represent the unusual, and except where a vacancy in office may exist—or temporary incapacity of the regular judge—the district courts are held by district judges and the circuit courts of appeals composed of circuit judges.

94. An exception is found in the case of *United States v. Motlow*, 10 F. (2d) 657, (C. C. A. 7th, 1926) in which Justice Butler sat in 1926 as a circuit justice in the Seventh Circuit Court of Appeals and entered an order enlarging the defendants on bail after two judges of the circuit court of appeals had refused a similar application. He sat as a circuit justice and made his order in a cause pending in the circuit court of appeals. The order which he entered was subject to vacation or modification by any member of said circuit court of appeals. In other words, the unique position of a justice of the Supreme Court sitting as a member of the circuit court of appeals is here illustrated. He is a justice of the Supreme Court, but eligible to sit as a member of the circuit court of appeals in the circuit to which he is assigned. When acting in the latter capacity, his authority is the same as any other member of that court and subject to vacation or modification to the same extent as the ruling of any other member of the court.

95. The second circuit had been the first to have a third circuit judge. In 1894 a third circuit judge was added to the eighth circuit (28 STAT. 115). The seventh (28 STAT. 643) and the ninth (28 STAT. 665) circuits each received a third circuit judge in 1895.

96. The circuit courts of appeals disposed of 403 cases in 1892, and 1388 in 1911. The average for the first decade of their existence was about 760, in the second decade 1150. The annual business now exceeds three thousand cases.

abolished<sup>96a</sup> and their *nisi prius* function turned over to the district courts, which became the exclusive federal court of general original jurisdiction.<sup>97</sup>

The Circuit Court of Appeals Act, by dealing only piecemeal with the federal judicial machinery, permitted a number of omissions in what should have been a coordinated code regulating appellate litigation, at least four of which were conspicuous enough to deserve special mention. The first of these concerned criminal cases. For the first hundred years of our national existence there could be no resort to the Supreme Court in these cases, a surprising circumstance which can be explained only by the fact that criminal jurisdiction has never occupied the same relative importance to civil jurisdiction in the federal courts as in the state courts, and by the original expectation that the bulk of the criminal cases would come before a three judge circuit court, presided over by a justice of the Supreme Court. As single district judges came to hold the circuit courts and to exercise final power in criminal cases, public remonstrance became felt and on February 6, 1889, the Supreme Court was given appellate jurisdiction in all capital criminal cases where the accused had been convicted.<sup>98</sup> By the Act of 1891 it was provided that such review might be had where the defendant was accused of a "capital or otherwise infamous crime," a clause which was interpreted to give the right of appeal to the Supreme Court in all cases in which "... the accused *might* be sentenced to imprisonment in a penitentiary, even if the punishment actually imposed (was) a fine only."<sup>99</sup> As the same statute had created intermediate appellate courts (the circuit courts of appeals) competent to review all convictions for violation of federal criminal law, it was anomalous so to extend the jurisdiction of the Supreme Court and to increase its burdens. After repeated recommenda-

96a. Agitation over the dual system of *nisi prius* courts was undoubtedly a prime factor in the movement for a "Judicial Code." See FRANKFURTER AND LANDIS, *THE BUSINESS OF THE SUPREME COURT* (1928) 128 *et seq.* Curiously enough, however, the commission appointed in 1899 to prepare the code recommended to the Attorney General in 1900 that the circuit courts of appeals be abolished and the circuit courts be made the intermediate courts of review. See REP. ATT'Y. GEN. (1900) 401.

97. 36 STAT. 1087 (1911), 28 U. S. C. (1940) Section 24 of the Judicial Code (36 STAT. 1091 (1911)) compiled the jurisdiction of the district courts. By its main provision in paragraph one, the code granted jurisdiction to the district courts over "all suits of a civil nature, at common law or in equity" where there was diversity of citizenship or a federal question. It also increased the matter in controversy from \$2000 to \$3000. Only after 1911 did the district courts become recognized as an important branch of the federal judicial system.

98. 25 STAT. 656 (1889).

99. Chief Justice Fuller, letter to Senator Hoar, 23 CONG. REC. 3285 (1892).

tions from the attorney general,<sup>100</sup> direct appeal to the Supreme Court by a defendant was limited to capital cases in 1897,<sup>101</sup> and completely abolished in 1911,<sup>102</sup> except in those situations (cases involving the jurisdiction of the district court, an interpretation of the Constitution, etc.) where direct appeal was also possible in civil cases.<sup>102a</sup> Thereafter, a defendant convicted in a criminal case could appeal to the appropriate circuit court of appeals, but could obtain further review only by *certiorari* (or certification).

It will be recalled that the Act of 1891—the Circuit Court of Appeals Act—still permitted direct appeal to the Supreme Court from the district or circuit court where the constitutionality of any law of the United States was in issue. However, the statute conferring a right of appeal to a defendant convicted in certain criminal cases was held<sup>103</sup> to deny to the government the right to appeal from an acquittal even though the decision of the single district judge was based on his conclusion of the invalidity of a federal statute. This holding was ultimately overturned by the Criminal Appeals Act in 1907<sup>104</sup> and the government may now appeal directly to the Supreme Court where the action of the district judge was founded upon his construction of, or the invalidity of, the statute, or his sustaining a special plea in bar where the defendant had not been put in jeopardy.

A second notable omission of the Act of 1891 was its failure to provide for litigation arising in the District of Columbia, which prior to that date had been considered a federal circuit for purpose of review of decisions of its supreme court. Even after the Court of Appeals for the District of Columbia was established in 1893,<sup>105</sup> review of its decisions was not limited to those situations in which review might be had of a decision of a circuit court of appeals, but rather appeal might be taken from the court of appeals to the Supreme Court under the same circumstances as they might formerly

100. REP. ATT'Y. GEN. (1893) XXV; *Ibid.* (1894) XXIV; *Ibid.* (1895) 12; *Ibid.* (1896) XVIII.

101. 29 STAT. 492 (1897).

102. JUDICIAL CODE § 238, 36 STAT. 1157 (1911), 28 U. S. C. 345 (1940).

102a. Curiously, the provisions of the Act of Feb. 6, 1889 (see footnote 98 *supra*) has never been repealed and still appears in the UNITED STATES CODE (Section 681 of Title 18), but must be deemed to have been overruled by the positive, inconsistent, and later enactment of the JUDICIAL CODE (See footnote 102 *supra*).

103. *United States v. Sanges*, 144 U. S. 310, 12 Sup. Ct. 609 (1892).

104. 34 STAT. 1246 (1907), 18 U. S. C. § 682 (1940) and see 28 U. S. C. § 345 (1940). The statute does not permit such appeal by the government as would place the acquitted defendant in "double jeopardy."

105. 27 STAT. 434 (1893).

have been taken<sup>106</sup> from the supreme court of the district. Thus was established an intermediate court which was but another stopping place in litigation inevitably bound for the highest court to which the litigants could take it, which could not relieve the burden of the Supreme Court nor expedite the ultimate conclusion of controversies arising in the District of Columbia, and which invited by its jurisdiction litigation of which Supreme Court review was desired but was unobtainable from any other federal court in the country.

This situation was also remedied in 1911 by the Judicial Code, which limited appeal from the Court of Appeals for the District of Columbia to cases in which "... the construction of any law of the United States" was invoked,<sup>107</sup> a phrase which was strictly construed to apply only to congressional acts of general application and not to purely local laws of the district.<sup>108</sup> Although this action effectively<sup>109</sup> controlled the volume of litigation appealed from the Court of Appeals for the District of Columbia, it preserved a distinction between that court and the several circuit courts of appeals which was not abolished until the "Judges' Bill" of 1925.<sup>110</sup> Since that time the Court of Appeals for the District of Columbia has occupied a position in the federal judicial machinery comparable to a Circuit Court of Appeals<sup>111</sup>

106. The scope of review in the Supreme Court of the United States of the cases from the Supreme Court of the District of Columbia was the same as that from the circuit courts of the United States. See REV. STAT. § 705 (1875); D. C. CODE (1875) § 846; D. C. Code (1894) § 43. With the further limitation by Act of Feb. 9, 1893, § 8, 27 STAT. 436, that an appeal or writ of error would lie if the amount in controversy exceeded \$5,000.

107. Section 250.

108. *American Security and Trust Company v. Commissioners of the District of Columbia*, 224 U. S. 491, 32 Sup. Ct. 553 (1912).

109. For the years 1907, 1908, and 1909, the appeals from the Court of Appeals of the District of Columbia alone to the Supreme Court averaged twenty-six cases a year. During the same years, the total appeals (as distinguished from cases taken on *certiorari*) from all nine circuit courts of appeals averaged but fifty-seven cases annually. During this time approximately ten per cent of the work of the Supreme Court originated in the District of Columbia.

From the enactment of the JUDICIAL CODE in 1911 until the Judges' Bill in 1925, the appeals from the Court of Appeals of the District of Columbia averaged about nine per term, being about one-eighth as many as from the combined circuit courts of appeals. See REP. ATT'Y. GEN. for the years named.

110. 43 STAT. 938 (1925). Section 1 of the bill amended Sections 239 and 240 (a) and (c) of the JUDICIAL CODE; Section 13 repealed §§ 250 and 251 of the CODE.

111. Its chief justice is a member of the Conference of Senior Circuit Judges (50 STAT. 473 (1937), 28 U. S. C. § 218 (1940), 50 STAT. 753 (1937), 28 U. S. C. § 17 (1940)) and the FEDERAL RULES OF CIVIL PROCEDURE are equally applicable to it. (See Rule 81 d).



except as the exclusive jurisdiction of the federal government over the District of Columbia necessitates a broader jurisdiction in the federal courts sitting there than is permitted the federal courts in the several states.

In the third place, the Circuit Court of Appeals Act, in providing for review of judgments and decrees of the district and circuit courts and for the first time permitting appeal from interlocutory orders, failed to contemplate in sufficient detail the peculiarities of equitable remedies, always an important branch of federal judicial activity. Appeal was permitted from final judgments and decrees, and also from interlocutory orders and decrees "granting or continuing" an injunction, but made no mention of appeal from interlocutory order or decree (a) "refusing or dissolving" an injunction or (b) appointing a receiver. The first omission was supplied in 1895<sup>112</sup> but even so, appeal might be thwarted by the appointment of a receiver without granting any injunctive relief. In 1900, Congress provided appeals from orders appointing or vacating receivers<sup>113</sup> only inadvertently to omit from the Act, which purported to amend the Act of 1891 and to re-enact the Act of 1895 just referred to, the words "refused or dissolved" of the latter statute, thus undoing the reform achieved in 1895. The matter was finally set to rights in the Judicial Code<sup>114</sup> which at the same time, abolishing the circuit courts whose receivers had had a useful geographically extensive jurisdiction, conferred upon receivers appointed by the district court jurisdiction throughout the entire circuit "subject, however, to the disapproval of such order, within thirty days there-

112. 28 STAT. 666 (1895).

113. 31 STAT. 660 (1900).

114. 36 STAT. 129 (1911), 28 U. S. C. § 227 (1940), JUDICIAL CODE § 129 reads:

"Where upon a hearing in equity in a district court, or by a judge thereof in vacation, an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall be refused, or an interlocutory order or decree shall be made appointing a receiver, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving, or refusing to dissolve, an injunction, or appointing a receiver, to the circuit courts of appeals notwithstanding an appeal in such case might upon final decree under the statutes regulating the same, be taken directly to the Supreme Court: *Provided*, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court, or the appellate court, or a judge thereof, during the pendency of such appeal: *Provided, however*, That the court below may, in its discretion, require as a condition of the appeal an additional bond."

after, by the circuit court of appeals for such circuit, or by a circuit judge thereof. . . ."<sup>115</sup>

Finally, we may note the failure of the Circuit Court of Appeals Act to deal with suits against the United States. Appeals from the Court of Claims lay as of right directly to the Supreme Court. The Tucker Act,<sup>116</sup> which gave to the circuit and district courts jurisdiction concurrent with the Court of Claims of claims of less than \$10,000 and \$1,000 respectively, provided that appeals and writs of error from the former courts should be taken under the provisions of the United States statutes then in force. As appeal from the district and circuit courts to the Supreme Court was generally possible prior to 1891, there was little substantial difference in the possibilities of review of the decisions of any of the courts in which a claim might have been brought. After the creation of the circuits courts of appeals, however, a literal application of the generalized wording of the Tucker Act would have resulted in bringing most appeals from judgments on claims brought before the district and circuit courts to the new courts, with only the possibility of reaching the Supreme Court by *certiorari*, whereas proceedings instituted in the Court of Claims could still be appealed directly to the Supreme Court. The Supreme Court at first sustained this interpretation of the law<sup>117</sup> and several unsuccessful efforts were made in Congress to effect a more uniform procedure.<sup>118</sup> Subsequently the Supreme Court squarely reversed itself<sup>119</sup> to hold that the provision for review set forth in the Tucker Act adopted the practice of that date, which was not affected by later changes in general appellate practice, and that appeal in these cases should still lie to the Supreme Court. The uniformity was bought at the price of increased work for the Supreme Court which could have been handled as competently and more expeditiously by the lower appellate courts. At the present time, owing to the provisions of the Act of 1925,<sup>120</sup>

115. 36 STAT. 1102 (1911), 28 U. S. C. § 117 (1940).

116. 24 STAT. 505 (1887).

117. *Ogden v. United States*, 148 U. S. 390 13 Sup. Ct. 602 (1893).

118. *See* REP. ATT'Y. GEN. (1898) 7; *Id.* (1899) 61.

119. The express self-reversal did not come until *J. Hamer Fritch, Inc. v. United States*, 248 U. S. 458, 39 Sup. Ct. 142 (1919) but as early as *Chase v. United States*, 155 U. S. 489, 15 Sup. Ct. 174 (1894), and again in *Reid v. United States*, 211 U. S. 529, 29 Sup. Ct. 181 (1909) the Supreme Court had assumed appellate jurisdiction without mention of the *Ogden* case. The *Ogden* decision had recurrent favor in 1914 when, in *United States v. Buffalo Pitts Company*, 234 U. S. 228, 34 Sup. Ct. 840 (1914) the jurisdiction of the circuit court of appeals to entertain an appeal was recognized.

120. 43 STAT. 939 (1925), 28 U. S. C. § 288 (1940).

the decisions of both the Court of Claims and the district courts are not appealable and may be reviewed by the Supreme Court only upon *certiorari*. (For exceptions see 28 U. S. C. §§ 288, 345 (1940)).

Despite these defects, the Circuit Court of Appeals Act was effective as to the great bulk of federal litigation. Twenty years later the Judicial Code,<sup>121</sup> the first attempt in the nation's history to "... revise and codify the laws concerning the jurisdiction and practice of the courts of the United States, including the Judiciary Act"<sup>122</sup> removed some of the imperfections inherent in the earlier measure. The "Code," however, was not a complete codification and in its own terms proposed a significant *caveat*.<sup>123</sup> Not infrequently a substantive law enacted by Congress contained provisions for its administration and enforcement affecting the jurisdiction and practice of the federal courts as to its subject, and these were generally not affected by the "Code," whose major innovations have been specifically touched upon in the preceding paragraphs.<sup>124</sup>

The outstanding example of distinctive jurisdictional and procedural regulations existing apart from the Judicial Code was to be found in the Bankruptcy Act, which has provided and controlled such a large part of the work of all the federal courts as to demand rather extended discussion. The Bankruptcy Act of 1898<sup>125</sup> was the fourth attempt by Congress to legislate in the bankruptcy field under the power conferred by Article I, Section 8 of the Constitution. Previous laws were passed on April 4, 1800, August 19, 1841, and March 2, 1867; but owing to serious inherent defects, the lives of these were limited to three, two and eleven years respectively.<sup>126</sup>

121. 36 STAT. 1087 (1911), 28 U. S. C. §§ 28 *et seq.*

122. 30 STAT. 1116 (1899).

123. Section 297 of the JUDICIAL CODE (36 STAT. 1169 (1911)) read in part: "Also all other Acts and parts of Acts, in so far as they are embraced within and superseded by this Act, are hereby repealed; *the remaining portions thereof to be and remain in force with the same effect and to the same extent as if this Act had not been passed.*" (Italics supplied.)

124. At this time the "jurisdictional amount" for cases brought in the district courts was increased from \$2000 to \$3000. This affected the circuit courts of appeals only in the volume of litigation permitted to enter the federal court system.

125. 30 STAT. 544 (1898), 11 U. S. C. § 1 *et seq.* (1940). In the REP. ATT'Y. GEN. (1899) 373 it was stated with reference to the total of over 22,000 voluntary and involuntary cases that were filed in the first year of the act's operation:

"The amount of business under this law may be best appreciated when it is remembered that the total number of civil suits in which the United States was not a party, brought during the past year in the circuit and district courts, is considerably less than one-half the number of bankruptcy cases."

126. REP. ATT'Y. GEN. (1899) 373.

Thus, during the twenty years preceding the passage of the 1898 Act, there had been no uniform bankruptcy law.

The review of interlocutory orders or decrees and final decisions in bankruptcy under Sections 24 and 25 of the Bankruptcy Act is peculiar in that only in bankruptcy cases, and then but in certain cases not appealable as of right, were the circuit courts of appeals given a discretionary review. In all other cases review of final decisions or interlocutory orders and decrees of a district court is mandatory.<sup>127</sup>

Section 24 of the Act of 1898, which supplied the jurisdiction of the appellate courts, reads:

“a. The Supreme Court of the United States, the circuit court of appeals of the United States, and the supreme courts of the Territories . . . are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from the courts of bankruptcy not within any organized circuit of the United States and from the Supreme Court of the District of Columbia.”<sup>128</sup>

“b. The several circuit courts of appeals shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. . . .”

Appeals, as in equity cases, to the circuit courts of appeals were allowed, by Section 25, in bankruptcy proceedings in three cases only: “(1) from a judgment adjudging or refusing to adjudge a defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over,” if taken within ten days.

A final decision of a circuit court of appeals “allowing or rejecting a claim under this Act” could be appealed to the Supreme Court only: “1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal

127. Note the provisions giving to the circuit courts of appeals review over orders of administrative agencies in 43 STAT. 937 (1925) § 1, 28 U. S. C. §§ 227, 344 (1940).

128. This last sentence was no longer necessary because of the provisions of the Judges' Bill of 1925, Section 1, providing for review of decisions of various territorial courts in specified circuit courts of appeals. See note 72a *supra*. Thus it was repealed by 1926 amendment to the Bankruptcy Act, 44 STAT. 664, 665 (1926), 11 U. S. C. § 47 (1940).

or writ of error from the highest court of the state to the Supreme Court of the United States; or

"2. Where some Justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States." Direct review in the Supreme Court by *certiorari* was provided for "pursuant to the provisions of the United States laws now in force or such as may hereafter be enacted."

This act, and the above sections specifically, were frequently amended by later congresses as defects appeared in its operation. In the first place, the flood of bankruptcy litigation in the lower federal courts<sup>129</sup> was reflected in the appellate dockets of both the circuit courts of appeals and the Supreme Court. Under the review provisions of the act many matters in bankruptcy had, besides the hearing before the referee and the district court judge, a hearing before a circuit court of appeals and also before the Supreme Court.<sup>130</sup> It had long been argued, and was so provided by the Act of January 28, 1915,<sup>131</sup> and again by the Act of 1925,<sup>132</sup> that an appeal to a circuit court of appeals, with a right of review in the Supreme Court by a writ of *certiorari*, was sufficient. Thereafter certification and *certiorari* became the important means of obtaining a review in the Supreme Court of bankruptcy cases, and appeal the exception.<sup>133</sup>

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129. Out of 102,299 cases pending in the district court on July 1, 1913, 32,864 were bankruptcy cases, while in 1915 out of 120,208 pending, 37,949 were petitions in bankruptcy. REP. ART'Y. GEN. for named years.

130. H. R. Rep. No. 1182, 63rd Congress, 2d Sess.; reprinted in 52 CONG. REC. 435 (1914).

131. 38 STAT. 803 (1915). Section 4 providing: "That the judgments and decrees of the circuit courts of appeals in all proceedings and cases arising under the Bankruptcy Act and in all controversies arising in such proceedings and cases shall be final; save only that it shall be competent for the Supreme Court to require by *certiorari*, upon petition of any party thereto, that the proceeding, case or controversy be certified to it for review...."

132. Thus Section 25 (b) was impliedly repealed by the Act of Jan. 28, 1915, Section 4, 38 STAT. 803; and was expressly repealed by the Act of Feb. 13, 1925, 43 STAT. 942, Section 13 repealing "So much of Sections 24 and 25 of the Bankruptcy Act of July 1, 1898, as regulates the mode of review by the Supreme Court in the proceedings, controversies, and cases therein named." (11 U. S. C. §§ 47, 48 (1940)).

133. Section 1 of the Judges' Bill which gave the circuit courts of appeals "appellate and supervisory jurisdiction under Sections 24 and 25 of the Bankruptcy Act of July 1, 1898" and which relieved the Supreme Court of obligatory jurisdiction in bankruptcy cases, Section 240 (c), 43 STAT. 939. A litigant might have a direct right of appeal to the Supreme Court if his case came within Sections 237 (a), 238, or 240 (b) of the JUDICIAL CODE, as amended by the Judges' Bill.

The provisions of the Act of 1926,<sup>134</sup> in so far as they amended the appellate jurisdiction of the Supreme Court in bankruptcy litigation served only to confuse the litigant; and it was not until the Chandler Act of 1938,<sup>135</sup> that Sections 24 and 25 of the Bankruptcy Act were clarified. Section 24 of said act now reads:

“(a) The Circuit Courts of Appeals of the United States and the United States Court of Appeals for the District of Columbia . . . are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: *Provided, however,* That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury, shall extend to matters of law only: *Provided further,* That when any order, decree, or judgment involves less than \$500, an appeal therefrom may be taken only upon allowance of the appellate court.

“(b) Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal.

“(c) The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the Circuit Courts of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia in proceedings under this title in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted.”

The Chandler Act, in most cases, eliminated the distinction formerly taken between “proceedings in bankruptcy” and “controversies in bankruptcy proceedings,”<sup>136</sup> and gave the circuit courts of appeals a broader

134. 44 STAT. 664, 665 (1926). See also McLaughing, *Amendment of the Bankruptcy Act* (1927) 40 HARV. L. REV. 341, 343; Colin, *An Analysis of the 1926 Amendment to the Bankruptcy Act* (1926) 26 COL. L. REV. 789, 796 for the confusion resulting from the 1926 amendment.

135. 52 STAT. 854 (1938), 11 U. S. C. (1940) 47, 48.

136. Under former provisions the distinction was important.

“Controversies arising in bankruptcy proceedings” related to disputes between the trustee in bankruptcy and adverse claimants over the right and title of the bankrupt’s estate. “Proceedings” included matters in regard to the administration and distribution of the estate. The practical effect of this distinction in regard to the practice on appeal before the circuit courts of appeals is best summarized by MOORE, *BANKRUPTCY MANUAL* (1939) 89: “‘Controversies’ in bankruptcy proceedings, involving disputes which, but for the bankruptcy, would be the subject of ordinary litigation, could be reviewed by appeal under Section 24 (a) of the Bankruptcy Act, (1) as a matter of right, and (2) upon questions of both fact and law. Ordinary litigation would afford a right of appeal in such cases, and like relief could hardly be denied in bankruptcy. On the other hand, ‘proceedings’ in bankruptcy . . .

appellate jurisdiction by eliminating discretionary review except "where any order, decree, or judgment involves less than \$500," and perhaps in cases involving interlocutory appeals.<sup>137</sup>

Subdivision (c) of old Section 24 inserted by the 1926 amendment was rewritten as new Section 25 (a), and provided that appeal must be brought to the circuit courts of appeals and the United States Circuit Court of Appeals for the District of Columbia within thirty days. Despite this short appeal period the bankruptcy litigation has steadily increased, and during recent years it has amounted to between forty and fifty per cent of the entire business of the federal district courts.<sup>138</sup>

The circuit courts of appeals were fortuitously established. The volume of litigation in the federal courts which then necessitated a reorganization of judicial machinery was tremendously increased by two forces which first began to take effect almost at that date. One was the trend of philosophical thinking away from *laissez-faire* in government and toward increased regulation of all forms of personal endeavor. The other was the recognition that increased population integrated business, social and productive organizations, and improved methods of transportation and communication required federal rather than state regulation. Both trends, well established by 1916, received a tremendous impetus from our participation in the first World War which even the return to isolationist "normalcy" in post war years could not abate. The effect of the great depression of the early 1930's and the efforts of the Roosevelt administration to overcome it and prevent its recurrence are too recent to require discussion. The business of the federal courts has steadily grown, up and down the line, and the end is not in sight.

The Interstate Commerce Act<sup>139</sup> became law in 1887, the Sherman Anti-Trust Law<sup>140</sup> took effect in 1890, and the various pieces of Granger legislation marked the 1890's, as the circuit courts of appeals came into being.

fell within Section 24 (b) of the Bankruptcy Act, and were appealable (1) only if allowed in the discretion of the appellate court, and (2) only on questions of law. It was thought that it would be a source of intolerable delay if every dispute arising in the administration of a bankruptcy estate should be subject to review upon questions of fact. There were three exceptional classes of cases provided for in Section 24 (a) of the Bankruptcy Act, however, in which an appeal in 'proceedings' in bankruptcy could be had as a matter of right, and upon both the facts and law. . . ."

137. For an extended analysis of this latter problem, see MOORE, *BANKRUPTCY MANUAL* (1939) 96-97.

138. *REP. ATT'Y. GEN.* (1935-1941).

139. 24 *STAT.* 379 (1887), 49 *U. S. C.* §§ 1 *et seq.* (1940).

140. 26 *STAT.* 209 (1890), 15 *U. S. C.* §§ 1 *et seq.* (1940).

In the twenty-year period between the creation of the circuit court of appeals and the adoption of the Judicial Code were enacted the Safety Appliance Act,<sup>141</sup> the Lacey Game Act,<sup>142</sup> the Elkins Act,<sup>143</sup> the Animal Quarantine Law,<sup>144</sup> the Meat Inspection Law,<sup>145</sup> the Food and Drugs Act,<sup>146</sup> the Hours of Service Law,<sup>147</sup> the Federal Employers' Liability Act,<sup>148</sup> the Anti-Narcotic Act,<sup>149</sup> the Insecticide Act,<sup>150</sup> and the Mann Act.<sup>151</sup> The Bankruptcy Act, the most productive of litigation of all, also took effect during these years.

Not long after the Judicial Code came the Federal Reserve Act,<sup>152</sup> the Federal Trade Commission Act,<sup>153</sup> the Federal Water Power Act,<sup>154</sup> the Packers and Stockyards Act,<sup>155</sup> the Grain Futures Act,<sup>156</sup> the Adamson Act,<sup>157</sup> the Arbitration Act,<sup>158</sup> and the Clayton Anti-Trust Act.<sup>159</sup> These statutes created substantive rights or regulations which could be enforced in the federal courts. Many of them created administrative boards whose decisions were reviewable by the circuit courts of appeals, a phenomena of government which has assumed such proportions that it must be accorded special and detailed treatment in subsequent chapters. New and complicated tax laws, enacted to finance the cost of the war and retained to support the growing governmental overhead, required judicial interpretation

141. 27 STAT. 531 (1893), 45 U. S. C. §§ 1 *et seq.* (1940) as amended by Act of April 1, 1896, 29 STAT. 85 (1896), 45 U. S. C. § 6 (1940); 32 STAT. 943 (1903) 45 U. S. C. §§ 8, 9, 10 (1940); 36 STAT. 298 (1910), 45 STAT. §§ 16, 11, 12, 13, 14, and 15.

142. 31 STAT. 187 (1900), 16 U. S. C. §§ 701, 395 (1940).

143. 32 STAT. 847 (1903), 49 U. S. C. §§ 41, 42, 43 (1940).

144. 33 STAT. 1264 (1905), 21 U. S. C. §§ 123-126 (1940).

145. 34 STAT. 674 (1906), 21 U. S. C. §§ 71 *et seq.* (1940).

146. 34 STAT. 768 (1906), 21 U. S. C. §§ 1 *et seq.* (1940).

147. 34 STAT. 1415 (1907), 45 U. S. C. §§ 61-64 (1940).

148. 35 STAT. 65 (1908), 45 U. S. C. §§ 51-58, 28 U. S. C. § 71 (1940).

149. 35 STAT. 614 (1909), 21 U. S. C. §§ 171, 173, 174-177 (1940), as amended by Act of January 17, 1914, 38 STAT. 275, 21 U. S. C. §§ 171, 173, 174-184 (1940).

150. 36 STAT. 331 (1910), 7 U. S. C. §§ 125-129, 122, 130-134, 121 (1940).

See also Act of March 3, 1905, 33 STAT. 1269, 7 U. S. C. §§ 141-144 (1940) as amended by Act of August 20, 1912, 37 STAT. 314, 28 U. S. C. § 188 (1940).

151. 36 STAT. 825 (1910), 18 U. S. C. §§ 397-404 (1940).

152. 38 STAT. 251 (1913), 12 U. S. C., c. 3 (1940).

153. 38 STAT. 717 (1914), 15 U. S. C. §§ 441-51 (1940).

154. 41 STAT. 1063 (1920), 16 U. S. C. § 792 (1940).

155. 42 STAT. 159 (1921), 7 U. S. C., c. 9 (1940).

156. 42 STAT. 998 (1932), 7 U. S. C. §§ 1 *et seq.* (1940).

157. 39 STAT. 721 (1916), 45 U. S. C. §§ 65, 66 (1940).

158. 38 STAT. 103 (1913).

159. 38 STAT. 730 (1914), 15 U. S. C. §§ 12-27, 381-383, 387-390, 412 (1940).



and court enforcement.<sup>159a</sup> And in the meantime, interstate business, which means increased possibilities of controversy between citizens of different states, was growing by leaps and bounds.

The court records tell the story baldly. In the fiscal year 1892, the district and circuit courts disposed of 32,040 cases, with 56,782 pending trial. In 1912, 46,648 cases were disposed of, with 102,699 pending. By 1925, 159,812 cases were docketed in the district courts. Similar ratios obtained in the circuit courts of appeal. Eight hundred forty-one cases were docketed in 1892; in 1912, there were 1,241; in 1925, there were 2,156. In the Supreme Court, in 1892, but 275 new cases were docketed. (The influence of the circuit courts of appeals was being felt, though the Court was still in arrears with its work). By 1912, the number had risen to 509, and by 1925, there were 749—too many even for a valiant court which, despite an increase in the number of cases disposed of (from 576 in 1912 to 844 in 1925), was badly behind in its docket.<sup>160</sup>

In the glutted dockets of the district courts a prime source of indigestion was the Volstead Act,<sup>161</sup> an experiment which, noble or not in other aspects, was disastrous as a venture in law enforcement. Chief Justice Taft, in asserting that the prohibition laws had added at least ten per cent to the federal court docket, was greatly understating the situation. In 1921, of the 54,487 criminal cases instituted, 29,114, or well over fifty per cent arose under the national prohibition act. This figure constituted approximately twenty-eight per cent of the total district court litigation.<sup>162</sup> In succeeding years, the percentages remained fairly constant; only the actual figures increased.<sup>163</sup> Although the primary burden was on the district courts, which were reduced to the level of police courts in disposing of many of these cases, a substantial number of prohibition cases reached the circuit

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159a. According to the attorney-general, in 1921 taxation and prohibition were the leading factors in the post-war jump in federal litigation. *See* REP. ATT'Y. GEN. (1923) 85; *Id.* (1924) 79.

160. The statistics are gathered from the reports of the attorneys-general for the years cited.

161. 41 STAT. 305 (1919), enacted to effectuate the provisions of the U. S. CONST. AMEND. XVIII.

162. REP. ATT'Y. GEN. (1921) 101, 150, 151.

163. In 1922, there were docketed 130,632 cases, 60,722 on the criminal calendar. Of these, 34,984 arose under the prohibition laws, being our 50% of the criminal cases and 28% of the total litigation.

In 1923, 159,812 cases were docketed, with 76,137 on the criminal calendar. Of these 49,021 arose under the prohibition laws, being 64% of the criminal cases, and 33% of the total litigation. Figures are from REP. ATT'Y. GEN. for those years.

courts of appeals.<sup>164</sup> An indirect effect upon that court was the frequent assignment of circuit judges to sit in the district courts in an unsuccessful effort to keep the trial courts abreast of their dockets.

Already piecemeal efforts had been made to relieve the Supreme Court, again falling behind its docket and its time and energies diverted from exclusive consideration of issues of national policy and uniform law administration which, as the single highest court, it is peculiarly equipped to handle. The Circuit Court of Appeals Act had partially breached the principle of universal right of appeal to the highest court, but Congress would not trust the untried courts with final jurisdiction in all cases. As experience proved their reliability, appeal from additional types of litigation was prohibited, and review by *certiorari* only was substituted. In 1915 Congress removed the mandatory appellate jurisdiction of the Supreme Court in bankruptcy cases<sup>165</sup> and trademark<sup>166</sup> litigation, at the same time providing that appeals from the District Court of Puerto Rico should go to the Circuit Court of Appeals for the First Circuit. In 1916 cases arising under the Federal Employer's Liability Act, the Hours of Service Act, and the Safety Appliance Act were terminated in the circuit courts of appeals, subject to review by *certiorari*. The time limit for application for all forms of review by the Supreme Court was reduced to three months and the length of the Supreme Court term was extended.<sup>167</sup>

The measures taken were inadequate and the Supreme Court was a year behind its docket in 1924.<sup>168</sup> No one was more aware of the situation than the justices of that Court. Chief Justice Taft tells us:

"The members of the Court, afraid that the docket might become more congested, brought the matter to the attention of the Judiciary Committees of both Houses of Congress, and it was there suggested that the Court prepare a bill to help matters. A committee of the Court was appointed, of which Mr. Justice Day was Chairman, Mr. Justice Van Devanter and Mr. Justice McReynolds

164. See *The Relief of the Federal Courts and the Pay of Federal Judges* (1921) 93 CENT. L. J. 255; See also Shelton, *Congested Federal Court Dockets* (1922) 94 CENT. L. J. 127.

165. 38 S9(9. 803 (1915), 28 U. S. C. §§ 211, 225 (1940).

166. 38 STAT. 804 (1915), 28 U. S. C. § 345 (1940).

167. 39 STAT. 726 (1916), 28 U. S. C. §§ 338, 344, 308, 350 (1940). Six months was permitted for cases coming from the Philippine Islands.

168. "After thirty-five years (from the creation of the circuit courts of appeals), however, that Court's business had again grown beyond its capacity, and a hearing could not be had for cases not advanced out of their order until more than a year after their filing." Taft, *The Jurisdiction of the Supreme Court Under the Act of February 13, 1925* (1925) 35 YALE L. J. 1, 2.

were members, and the Chief Justice acted *ex officio*. Upon the retirement of Mr. Justice Day, Mr. Justice Van DeVanter became the Chairman of the Committee. In the pressure of the regular judicial work, the bill was not fully and satisfactorily formulated until the last session of the first Congress in the Harding administration: Its legislative consideration was delayed by measures regarded as more pressing until the last session of the last Congress.<sup>169</sup>

There was more at stake than the relief of an overworked judiciary. A function of government is to provide prompt and competent adjudication of civil disputes and criminal prosecutions. If litigation overwhelms a court system, the remedy is not to reduce the jurisdiction of the courts where that would deprive the citizens of the country of a proper tribunal. The close relationship of two distinct problems has sometimes caused their confusion. Whether there is virtue in having a law suit between citizens of different states tried in a federal court today, is disputed, but the merits of that political controversy should be settled independently of the effect of the policy adopted upon the court system. If it is advisable, as we have thought, to permit such suits in the federal courts, and it develops that the judges are thereby overworked and the dockets so crowded as to delay the disposition of cases or affect proper consideration of their merits, the remedy is a change in substantive law (to eliminate disputes) if possible, improvement in adjective law (to expedite trial), more judges or more courts. Increasing the jurisdictional amount is an appropriate solution only if it can be shown that controversies involving more than \$3,000 require a federal forum more than cases involving a lesser amount.

The significance of the state of the Supreme Court docket in the early 1920's was that litigants were delayed in the final adjudication of bitterly fought law suits and the Supreme Court was prevented from concentrating on the cases most important from a national standpoint. Justice demands an impartial trial, good government, a competent one. There is no inherent requirement of either justice or government for a single review of trial court decisions, let alone a double review, except as concentration of disputes over interpretation of law in one court—and it is patently impossible for one court to handle all the *nisi prius* litigation of the United States—tends toward national uniformity of decision.

Upon these considerations was based the philosophy of the bill drafted

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169. *Id.* at 2.

by the justices<sup>170</sup> and, with but one significant congressional amendment, enacted into law.<sup>171</sup> The bill contemplated a complete codification of federal appellate jurisdiction.<sup>172</sup> In this it was only partly successful,<sup>172a</sup> but in the main it did set up the scheme of organization under which the federal courts now operate, and a descriptive approach may now be substituted for the historical report in these pages.

The district courts hold exclusive<sup>173</sup> general *nisi prius* jurisdiction.<sup>173a</sup>

170. Mr. Justice Van Devanter, testifying before the Judiciary Committee of the House, reported,

"... more than two thirds of the cases which come to us under an obligatory jurisdiction—from state courts, Circuit Courts of Appeals, district courts and the Court of Claims—result in judgments of affirmance by our court, and also a goodly number are ultimately dismissed for want of prosecution. This, we think, illustrates that the present statutes are too liberal—that they permit cases to come to us as of right with no benefit to the litigants or the public. What we learn of the cases in examining them confirms or emphasizes this conclusion. Of course in proportion as our attention is engaged with cases of that character it is taken away from others which present grave questions and need careful consideration." Hearings before the Judiciary Committee, H. R. REP. No. 8206, 68th CONG., 2nd. Sess. (1934) 113.

The Chief Justice added his word:

"The Supreme Court's function is for the purpose of expounding and stabilizing principles of law for the benefit of the people of the country, passing upon constitutional questions and other important questions of law for the public benefit. It is to preserve uniformity of decisions among the intermediate courts of appeals." Chief Justice Taft in Hearing before the Committee of the Judiciary H. R. REP. No. 10479, 67th Cong. 2d Sess. (1922).

171. 43 STAT. 936 (1925), 11 U. S. C. §§ 47, 448, 28 U. S. C. 225 *etc.*

172. Mr. Justice Van Devanter stated:

"What it (the act) does is to take up all the various statutes dealing with the appellate jurisdiction of the circuit courts of appeals and the appellate jurisdiction of the Supreme Court, to bring them together and restate the law on the subject, to make the various provisions harmonious, and to eliminate some of the obligatory jurisdiction now existing in the Supreme Court, to transfer some that now exist to the circuit courts of appeals, and to enlarge the discretionary jurisdiction which the Supreme Court now exercises in petitions for certiorari." Procedure on Federal Courts. Hearing before Sub-Committee of Committee on Judiciary, SEN. REP. 68th Cong., 1st Sess. (1929).

172a. Even at the time of its enactment, it was said,

"The petitioner today must travel outside the Act of 1925 to ascertain the full measure of review allotted to these... courts." Blair, *Federal Appellate Procedure as Affected by the Act of February 13, 1925* (1925) 25 COL. L. REV. 393.

The observation is even more true today and the litigant uncertain of his procedure would be well advised to examine not only the 28th Title in the United States Code, but also any federal statute which might affect his substantive rights, for procedural and jurisdictional provisions. The National Labor Relations Commission Act and other relatively unrelated pieces of legislation of the depression era exemplify the point.

173. Numerous special tribunals, primarily of an administrative character, have been created, and over the subjects with which they are concerned the jurisdiction of the district courts has been sharply limited. Decisions of these administrative agencies may be "reviewed" by the circuit courts of appeals. In one sense, as to such matters the circuit court of appeals is exercising original jurisdiction, since published by the first circuit. Miscellaneous Reports of the Department of Justice, 1914, in examining the record for errors of law.

173a. Its appellate jurisdiction is insignificant. See 28 U. S. C. § 49 (1940).

The court is held by a single judge except in (1) suits brought by the United States under the Anti-trust or interstate commerce laws;<sup>174</sup> (2) suits to enjoin the enforcement of a state statute or order of a state administrative board or commission;<sup>175</sup> (3) suits to enjoin the enforcement of an act of congress;<sup>176</sup> (4) suits to review judgments or decrees in action to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money;<sup>177</sup> and (5) cases arising under the Packers and Stockyards Act,<sup>178</sup> the Shipping Act,<sup>179</sup> the Federal Communications Act,<sup>180</sup> and the Tennessee Valley Authority Act.<sup>181</sup> In those situations a three judge court is held, presided over by a circuit judge or a justice of the Supreme Court (in practice, exclusively by a circuit judge).

Of the cases heard by a three judge district court, appeal lies directly to the Supreme Court in the first four classes, and in cases under the Packers and Stockyards Act in the fifth class. It is apparently thought that the three judge court, presided over by a circuit judge, offers an opportunity for deliberate judgment comparable to a circuit court of appeals and at least in the second and third classes of cases, the public interest makes ultimate review by the Supreme Court so certain and desirable that the delay and

174. The "three judge district court" was instituted by Act of Feb. 11, 1903, 32 STAT. 823 (1903), 15 U. S. C. §§ 28, 29, subsequently amended, authorizing the attorney-general in any equity suit in which the United States is complainant, brought under the anti-trust or interstate commerce acts to state that the case was one of public importance in which case it was to be heard before a three judge court. As the circuit courts were not then abolished, the citation was more confused than ever.

175. 36 STAT. 557 (1910), now Section 266 of the Judicial Code 28 U. S. C. § 266 (1940) originally applied to injunctions "...restraining the enforcement... of any statute of a State by restraining the action of any officer of such state in the enforcement... of such statute..." This was amended by the Act of March 4, 1913, 37 STAT. 1013 (1913), to apply to injunctions to restrain the enforcement of orders "made by the Administrative board or commission, acting under and pursuant to the statutes of such state,..." In 1925 the Section was again amended, extending the requirement of three judges allowing a direct appeal to the Supreme Court on the *final* hearing on the permanent injunction. 28 U. S. C. § 380 (1940).

176. This class was not contained in the Act of 1925, but was added, with the right of direct appeal to the Supreme Court, by 50 STAT. 748 (1937), 28 U. S. C. § 421 (1940).

177. By the Act of Oct. 22, 1913, 38 STAT. 220, 28 U. S. C. §§ 44, 45a, 47 (1940) which abolished the short lived Commerce Court, it was provided that there could be a direct appeal from a three judge court granting an interlocutory injunction restraining the enforcement of an order of the Interstate Commerce Commission.

178. 42 STAT. 159 (1921), 7 U. S. C. §§ 181 et seq. (1940).

179. 39 STAT. 738 (1916) 46 U. S. C. § 830 (1940).

180. 48 STAT. 1093 (1934) 47 U. S. C. §§ 401 (d) and 402 (a) (1940).

181. 48 STAT. 70 (1933), 16 U. S. C. § 831 x (1940).

expense of an intermediate trial would be wasteful.<sup>182</sup> If it is wondered why actions under certain acts are entitled to trial by a three judge court, and not those under equally significant regulatory statutes, bewilderment must be more pronounced at the arbitrary selection of statutes, suits under which are directly appealable to the Supreme Court. It would seem that a more consistent philosophy would be to provide for immediate review by the circuit courts of appeals of the orders of the administrative commissions created by the several statutes and a review by the Supreme Court through writ of *certiorari* or by certification only.<sup>183</sup>

In addition, direct appeal to the Supreme Court from the judgment of a single district judge is permitted as under the Criminal Appeals Act of 1907,<sup>184</sup> and in any suit to which the United States is a party and the decision is rested upon the unconstitutionality of a federal statute (the appeal may be taken by any party).<sup>185</sup>

However uncertainly the line may be drawn, the underlying principle is clear. Direct appeal may be had to the Supreme Court only where public interest, independent of, though perhaps incidentally concurring with a litigant's interest, is affected. This procedure is but briefly outlined here, for it is concerned with omitting the circuit courts of appeals, of which we are writing. Every other final judgment (since the Rules of Civil Procedure for the federal district courts have been promulgated by the Supreme Court, "judgment" includes "decree,") and certain interlocutory orders and judgments<sup>186</sup> are appealable as of right within three months to, and only to,

182. Taft, *The Jurisdiction of the Supreme Court Under the Act of February 3, 1925* (1925) 35 YALE L. J. 1, 6.

183. See Note (1937) 51 HARV. L. REV. 148; Comment (1929) 38 YALE L. J. 955.

184. See note 104, *supra*, Chief Justice Taft wrote:

"The only writ of error permitted from the Supreme Court to a District Court is in criminal cases in which the United States has been defeated by a ruling of the District Court and where the defendant has not been exposed to jeopardy or acquitted by a verdict of the jury. The reason for this exception is doubtless in the need for expedition in securing a final construction of new criminal statutes by the court of last resort so that the Government and those charged with violating the new law may have the earliest possible final interpretation of what the law means and long trials and convictions, which might subsequently be set aside because of a faulty interpretation of the statute, may be avoided. Expedition and uniformity in construction are thus the controlling considerations." Taft, *supra* note 182 at 6.

185. This was added by 50 STAT. 751 (1937), 28 U. S. C. §§ 401, 349a, 380a, 17 (1940).

186. (1) From interlocutory orders of the district court, or a judge thereof in vacation, granting, continuing, modifying, refusing, or dissolving an injunction (see p. 212 and footnote 114); (2) from certain interlocutory orders creating

the circuit court of appeals in which the district court sat. This obviously embraces the great bulk of federal litigation.<sup>187</sup> There is no special jurisdictional limitation, though the court must always be alert to error in the form of lack of jurisdiction in the court below. To illustrate, if a citizen of Illinois sues a citizen of Wisconsin for \$5,000, which may be recoverable as a legal possibility, a federal district court in Illinois or Wisconsin has jurisdiction if the defendant is properly served. From a judgment for \$2,500 either party may appeal to the Circuit Court of Appeals for the Seventh Circuit though an action could not have been brought in the district court for that amount, and the appellate court has jurisdiction. However, if the action had been one in which only \$2,500 had been claimed and judgment for that amount rendered, it would be the duty of the circuit court of appeals to remand the case, with direction to dismiss for lack of the district court's jurisdiction, whether or not the point was raised by one of the litigants (it is assumed that the jurisdictional defect is apparent in the record) as federal district courts have jurisdiction on "diversity of citizenship" grounds only where the matter in controversy exceeds the sum or value of \$3000. Even in this situation, the circuit court of appeals has jurisdiction to correct the error of the district court, but the case must be disposed of on the jurisdictional error below, not on any possible errors of trial.

From judgments of the circuit courts of appeal, appeal may be taken to the Supreme Court in but one situation.<sup>188</sup> The Act of 1925 contains a provision granting a litigant a right of review by writ of error where a circuit court of appeals invalidated a state statute as contrary to a federal

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or terminating receiverships; (3) from an interlocutory decree in admiralty proceedings, 44 STAT. 233 (1926), 28 U. S. C. § 227 (1940); and (4) from a decree in a suit for the infringement of letters patent where the decree is final except for the accounting, 44 STAT. 1261 (1927), 28 U. S. C. § 227a (1940). The review of these circuit court orders and decrees is only by permission of the Supreme Court.

187. To quote Professor (now Judge) Dobie,

"Thus this jurisdiction covers all cases in which diversity of citizenship is the sole ground of the district courts' jurisdiction; all criminal cases, save in a few exceptional cases in which writ of error is given to the United States; cases in which the United States is a party, including claims against the United States brought in the district court under the Tucker Act with the exception of certain suits brought by the United States under the anti trust and interstate commerce laws; habeas corpus; an overwhelming majority of cases involving a Federal question; admiralty cases; and cases in Bankruptcy." DOBIE, FEDERAL JURISDICTION AND PROCEDURE (1928) 789.

188. Prior to the Act of 1925, according to Chief Justice Taft, there were fourteen.—See FRANKFURTER AND LANDIS, THE WORK OF THE SUPREME COURT (1928) 261-262.

right.<sup>189</sup> The justices in their draft had proposed that the circuit courts should be final arbiters, subject only to review by *certiorari* in the ultimate tribunal, in all cases and had eliminated all review as of right of their decisions. The Senate, however, with the belief that the federal courts might be prejudiced in favor of constitutional claims as against state and local rights provided for appeal where the constitutional claim had been sustained.

The Senate, thus, intended to put on perfect parity discretionary review of the decision of the highest state courts and of the circuit courts of appeals.<sup>190</sup> A writ of error was allowed from a state decision where a federal claim had been denied or a state right upheld although attacked on constitutional grounds, and where a circuit court of appeals had denied a state claim as being contrary to the Constitution. In all other cases review was by *certiorari*. The anomaly in this parity is in limiting review to writ of *certiorari* from decisions of a *court of appeals* holding *acts of congress* unconstitutional. Surely, if any decision is of nation-wide import and deserving of review by the Supreme Court, this is it. Perhaps the fact that the Supreme Court will not often deny a petition for *certiorari* in such a case will allay any fears derived from the logical inconsistency contained therein.<sup>191</sup>

This right of appeal is of very narrow scope and the Supreme Court is limited to examination of the ruling on the validity of the state statute. "Should the defeated party desire to have the whole case examined on its merits, he can only secure this by abandoning his right to an appeal or writ of error and by invoking the discretion of the Supreme Court by applying for a writ of *certiorari*."<sup>192</sup>

In other situations review may be had by certification of specific questions by the circuit court of appeals.<sup>192a</sup> Exercise of this prerogative rests

189. 43 STAT. 936, 28 U. S. C. § 347 (1940).

190. Senator Walsh said that Congress thereby "intended to put the two on a perfect parity, allowing a writ of error from the circuit court of appeals under conditions exactly the same, except reversed, and allowing a writ of *certiorari* in one case as in the other case, so that the two would be entirely harmonious." 66 CONG. REC. (1925) 2923.

191. JUDICIAL CODE §§ 237 (a) and (b) and 240 (b). Also FRANKFURTER AND LANDIS, *THE BUSINESS OF THE SUPREME COURT* (1927) 286 and footnote 118 *supra*.

192. Taft, *supra* note 182 at 5.

192a. The Supreme Court usually on certification answers only the question presented to it, but it can require, upon application of any party or upon its own motion (See Revised Rules of the Supreme Court of the United States, adopted Feb. 13, 1939) that the entire record be sent up for its determination as though the case had come up on appeal. DOBIE, *FEDERAL JURISDICTION AND PROCEDURE* (1928) 853.



in the sound discretion of that court, and it is not a matter of right to the litigant. As might be expected, it has not been extensively used, and the more important possibility of review lies in application by the aggrieved litigant to the Supreme Court for writ of *certiorari* directed to the Circuit Court of Appeals whose decision is sought to be examined. Unlike writ of error, the writ of *certiorari* is granted only in the discretion of the court by whom it is issued, and the Supreme Court has governed the exercise of its discretion by the principles already discussed.<sup>192b</sup> Court statistics indicate that less than 3.4% of the decisions of the circuit courts of appeals are actually reviewed by the Supreme Court on *certiorari* and of these, about one-half are affirmed. It seems very clear that the circuit courts of appeals are essentially courts of last resort. *Certiorari* may issue "either before or after a judgment or decree" by a circuit court of appeals or the Circuit Court of Appeals for the District of Columbia,<sup>193</sup> although in practice it is rarely issued before final judgment or decree.

While the jurisdiction of the circuit courts of appeals is termed exclusively appellate,<sup>194</sup> those courts have an original jurisdiction to issue writs of *mandamus*, prohibition, or *certiorari* to aid, protect, or enforce their appellate powers.<sup>195</sup> A circuit judge may also issue a writ of *habeas corpus* as an original process, but his order must be entered in the records of the district court wherein the restraint of liberty complained of is had.<sup>196</sup> Otherwise, however, the courts of appeals can exercise no control, except that within their appellate power, over district court orders aside from the power to "revise" in bankruptcy proceedings.<sup>197</sup>

Formerly the appellate jurisdiction of federal courts might be invoked either by writ of error or by appeal, where the litigant did not have to rely upon the court's discretion in issuing writ of *certiorari*. By statute in 1928<sup>198</sup>

192b. See Rules of Supreme Court, Rule 38 (5), 306 U. S. 716. (1939).

193. JUDICIAL CODE, § 240 (2), 43 STAT. 936, 28 U. S. C. § 347 (1940).

194. JUDICIAL CODE § 117, 36 STAT. 1191, 28 U. S. C. § 212 (1940).

195. 28 U. S. C. 377 (1940). See also *Chamber of Commerce v. Federal Trade Commission*, 280 Fed. 45 (1922); *United States v. Severens*, 71 Fed. 768 (1896); *Zell v. Judges of Circuit Court*, 149 Fed. 86 (1906), *aff'd* 203 U. S. 577 (1906).

196. 43 STAT. 940 § 6 (1925) amended by 52 STAT. 1232 (1938), 28 U. S. C. § 463 (1940).

197. See p. 215 *supra*.

198. 45 STAT. 54 (1928), as amended by 45 STAT. 466 (1928), 28 U. S. C. §§ 861a, 861b (1940), providing:

"Section 1. That the writ of error in cases, civil and criminal, is abolished. All

the form of writ of error was abolished and one who seeks review as of right must do so by appeal.<sup>199</sup> In substance, however, much of the distinction between the two is still preserved. At common law, writ of error brought up for review only the "record proper," and any possibility of re-appraisal of the evidence for re-determination of the facts was precluded. By the Seventh Amendment to the United States Constitution, re-examination of facts found by a jury upon conflicting evidence is prohibited,<sup>200</sup> so though review may be in the form of appeal bringing to the appellate court a more complete record of the proceedings below, in jury cases the court is almost as limited as if writ of error had been employed.

There are now ten circuits. In general, the numbering runs from East to West,<sup>201</sup> but the Tenth Circuit embraces the Rocky Mountain area and the Ninth, the Pacific coast, for the reason that after the entire country had been divided into nine circuits, it was found that the eighth circuit was over-large, and the Tenth Circuit was carved out of it.<sup>202</sup> The Court of Appeals of the District of Columbia occupies a position analogous to the circuit courts of appeals, and within its limited jurisdiction, so far as review of its decisions by the Supreme Court is concerned, so also does the Court of Claims. The review of decisions of the insular courts has already been noted.<sup>203</sup>

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relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal.

"Section 2. That statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

199. Fed. Rules Civ. Proc. (1938) Rules 72 and 73.

200. "In suit at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact shall be otherwise reexamined in any court of the United States, than according to the rules of the common law." U. S. CONST. AMEND. VII.

201. The several circuits are composed as follows:

First: Me., N. H., Mass., R. I.

Second: N. Y., Conn., Vt.

Third: Pa., Del., N. J.

Fourth: Md., Va., W. Va., N. C., S. C.

Fifth: Tex., La., Miss., Ala., Ga., Fla.

Sixth: Mich., Ohio, Ky., Tenn.

Seventh: Wis., Ill., Ind.

Eighth: Minn., Iowa, Mo., Ark., N. D., S. D., Neb.

Ninth: Wash., Ore., Idaho, Mont., Nev., Cal., Arizona.

Tenth: Wyo., Utah, Colo., Kan., Okla., N. M.

202. 45 STAT. 1346 (1929).

203. See note 72a *supra*.

RESUME

(1) The historical review of the scheme of the federal courts adopted in 1789, and its growth is set forth to show that the pattern of the United States circuit court of appeals was determined long before its creation and long postponed its coming.

(2) The United States circuit court of appeals was created solely to relieve the Supreme Court, and yet not to modify the central idea of an integrated judicial system, with the Supreme Court, the only constitutional court, as its head and all inferior courts created by congress, with the idea of maintaining this general scheme. The Supreme Court was to maintain its preeminent position and retain the power which made the Judiciary the third independent branch of Federal Government.

(3) The United States circuit courts of appeals, created to relieve the Supreme Court, rather promptly produced radical changes in the entire judicial system. These changes were (a) the elimination of the U. S. Circuit Court; (b) a great increase in the jurisdiction and importance of the United States district court; (c) the displacement in actuality of the Supreme Court as the court of last resort in the federal judicial system. In over 95% of the cases originating in or removed to the federal court, the circuit court of appeals has become the court of last resort. The Supreme Court, disposing of less than 5%, limits its intake largely to Government cases and to cases where validity or constitutionality of federal statutes, and the application of provisions of the Federal Constitution, are involved. In civil suits between citizens, the Supreme Court has become the court of last resort in actual practice in less than 2% of the cases begun in the federal courts.

(4) The unexpected and extraordinary growth of quasi-judicial boards, called administrative boards, has increased the importance and the work of the circuit courts of appeals as appeals from the rulings of many of these boards,—the Tax Court, the Labor Board, and the Federal Trade Commission—by pass the United States district court and go directly to the United States circuit courts of appeals.

(5) The volume of cases heard by the United States circuit courts of appeals has grown until it annually hears ten times as many cases as are heard by the Supreme Court. Of necessity, the number of circuit courts of appeals increased from nine to ten and the total number of circuit judges has increased from nine (one for each circuit) to fifty-two. The volumes of its decisions now outnumber those reported by the Supreme Court and

is increasing in relative numbers at the rate of ten to one. One of its misfortunes has been the failure to provide a way for the elimination of the unessential and unimportant opinions from the published volumes containing its decisions.

(6) The United States district court, with its increase in jurisdiction, has increased in number of United States district judges from thirteen to 183 (including the District of Columbia). Its heaviest and greatest time-consuming labor is still over the criminal calendars.

(7) The circuit court of appeals was the child of necessity—not desired, but born to relieve the Supreme Court of its over-crowded calendars. To accomplish this, and yet to permit the Supreme Court to sit as the final federal court of review, the circuit court of appeals became the seven day a week working court performing the inconspicuous but heavy spade work for the Supreme Court which, in turn, became,—especially after review by *certiorari* instead of appeal relieved it of much of its labor,—a court of lessened activity but of greater importance, as compared to the seven day circuit court of appeals court. It is a Sunday court, so to speak, busy, with the graver and weightier questions, but questions of interest to the public rather than to the private litigants. Finality of the circuit court of appeals decisions is in the field of private as distinguished from public litigation.