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Erwin C. Surrency

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A HISTORY OF FEDERAL COURTS

ERWIN C. SURRENCY*

Article III of the Constitution of the United States provided for a Supreme Court and such inferior courts as Congress should establish. Although the Constitutional Convention settled the issue that there would be federal courts separate from the existing state courts, it had given little consideration to the shape the system was to assume. The First Congress under the Constitution was thus faced with the duty of establishing the judicial system authorized by the Constitution. The opportunity was unique, for this was the first time in history that a new judicial system could be established without the heavy hand of tradition dictating the form of the structure. The state governments, established during the Revolution, were not faced with this problem, for they continued their existing judicial systems, merely changing the personnel, and in a few instances, the titles of the courts.

Since there were no previous federal courts, other than the Court of Appeals under the Confederation, the Congress had to create them, name them, and define their jurisdiction. How successful an experiment this was is a matter of dispute, but within the structure it has been possible to realize several important advancements in judicial administration in this century. Today, the federal judicial system is a model for all.

When considering the history of the federal judicial system, the reader should not forget that there was another group of federal courts in the territories governed by Congress.¹ These courts were very early designated by the Supreme Court of the United States as "legislative courts," to distinguish them from courts created under Article III of the Constitution.² This dichotomy has long been accepted in American Constitutional Law, and under this concept Congress has created several courts with limited jurisdiction. Recently, two legislative courts, the Court of Claims and the Court of Customs and Patent Appeals, have been declared by

*Professor and Law Librarian, Temple University; A.B. 1947, LL.B. 1948, M.A. 1949, University of Georgia; M.A. in Library Science, 1950, George Peabody College.

1. For a history of these courts, see Blume & Brown, *Territorial Courts and Law*, 61 MICH. L. REV. 39, 467 (1962).

2. *American Ins. Co. v. Canter*, 26 U.S. (1 Pet. 511) 388 (1828).

statute to be constitutional courts³ and have been accepted as such by the Supreme Court of the United States.⁴ The purpose of this paper is to deal with the history of the constitutional courts, leaving to another time the history of the legislative courts.

II. JUDICIARY ACT OF 1789

The original organization of the federal courts was provided for in the Judiciary Act of 1789.⁵ A system of three federal courts—the Supreme Court, the circuit courts, and the district courts—was established. The Supreme Court, which was specially required by the Constitution, was the appellate court in this new system. However, the Justices of this court would also assist in presiding in the chief trial courts of the system, the circuit courts. To effect this, the existing states were organized into three circuits, and two justices of the Supreme Court and the district court judges were to hold circuit court in each district within these circuits. Each state constituted a federal district, and in each district the federal courts were held in one or two cities at stated terms. The circuit courts of appeals of a later date are not to be confused with these circuit courts, since the latter, as we shall see, in addition to exercising some appellate functions were the chief trial courts of the federal system. It was this circuit organization which caused the greatest dissatisfaction with the federal courts from the beginning, and modification of this court was the subject of much controversy in the Nineteenth Century.

The jurisdiction of the circuit court extended to all matters triable under the federal statutes, not reserved exclusively to the district courts.⁶ In addition, the circuit court had exclusive original jurisdiction in diversity of citizenship cases where the amount exceeded \$500. It also had appellate jurisdiction from decisions of the district court. Upon occasion, the circuit courts were vested with the jurisdiction of the district court because of ill health or death of the district court judge, and the circuit

3. Act of July 28, 1953, § 1, 67 Stat. 226, 28 U.S.C. § 171 (1958), declaring the Court of Claims to be a constitutional court; Act of August 25, 1958, § 1, 72 Stat. 848, 28 U.S.C. § 211 (1958), declaring the Court of Customs and Patent Appeals to be a constitutional court.

4. *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962).

5. Act of September 24, 1780, 1 Stat. 73; Parker, *The Federal Judicial System*, 14 F.R.D. 361 (1954).

6. ROBINSON, *JUSTICE IN GREY, A HISTORY OF THE JUDICIAL SYSTEM OF THE CONFEDERATE STATES OF AMERICA* 420 (1941). The Congress of the Confederate States established district courts which had the jurisdiction of the federal circuit and district courts. The judges of the district courts were required to meet once as an appellate court, but this was never implemented.

court judge was forced to act as district court judge as well as a circuit judge.⁷

A district court was established in each state. The geographical jurisdiction of the district courts has, with a few exceptions,⁸ been coterminous with state boundaries since this date. The district courts were given jurisdiction over crimes where the punishment did not exceed thirty stripes, a fine of one hundred dollars, or a term of imprisonment of six months. This court had exclusive jurisdiction in admiralty, of seizures under the import, navigation and trade statutes, and seizures of land for the violation of the federal statutes. It had concurrent jurisdiction with the circuit court where an alien sued for a tort based upon a violation of the law of nations or a treaty, where the federal government itself sued and the amount equaled \$100 or less, and suits against consuls.⁹

From time to time Congress extended this jurisdiction, but at no time did it ever reach the importance of the circuit court's. In 1790, the district court was given jurisdiction over certain questions arising under patent law,¹⁰ and in 1800, a similar jurisdiction over bankruptcy cases.¹¹ The understanding of many lawyers that the district court was primarily a criminal court is true to the same extent as many other over-simplified statements. By an act of 1842, the district courts shared concurrent jurisdiction with the circuit courts over non-capital crimes.¹² A study of the dockets after the passage of this act will substantiate the general observation that the major portions of the district court's business were admiralty and criminal cases. The jurisdictional differences between the courts were to survive until 1911, when the circuit courts were abolished.

The beautiful symmetry of this system, whereby a district court was created in each state and assigned to a circuit, was never fully realized. The Judiciary Act of 1789 gave the district courts for Maine and Kentucky the jurisdiction of a circuit court, and in these states the district courts were the only federal courts.¹³ At no period during the history of the cir-

7. Act of September 24, 1789, § 11, 1 Stat. 79.

8. The District Courts for the Western District of Arkansas, for Kansas, and for the Northern District of Texas, all exercised criminal jurisdiction in certain parts of the Indian Territory beyond the boundaries of their states. Act of June 17, 1844, 5 Stat. 680; Act of January 6, 1883, 22 Stat. 400. The District Court for Wyoming exercises jurisdiction today over Yellowstone National Park, including those portions of the Park in Montana and Idaho. 28 U.S.C. § 131 (1958).

9. Act of September 24, 1789, § 9, 1 Stat. 77.

10. Act of April 10, 1790, § 5, 1 Stat. 111; Act of February 21, 1793, 1 Stat. 323.

11. Act of April 4, 1800, § 2, 2 Stat. 21.

12. Act of August 23, 1842, § 3, 5 Stat. 517.

13. Act of September 24, 1789, § 11, 1 Stat. 79.

cuit courts were all the districts included within a circuit. Neither should one assume that the internal organization of each district was uniform, for greater variations existed on this level than on the circuit level.

III. NEED FOR REFORM

From the very beginning, the organization of the federal courts did not meet with general approval. From 1789 until approximately 1850, there was constant agitation to modify the Judiciary Act. Its chief defect was the assignment of the Supreme Court Justices to hold the circuit courts. This placed upon the Justices the additional burden of being trial judges, handling the largest portion of the federal judicial business in the trial courts, and later exercising appellate jurisdiction as members of the Supreme Court. Traveling in these United States in the Nineteenth Century was not undertaken with a great amount of pleasure. For this reason, it was very often impossible for the Justices to hold the circuit courts at the appointed times, in which event the business of the circuit court was continued to the next scheduled term. This caused great discontent at the bar and among litigants when their suits were continued term after term because of the absence of the Justice.

Another source of dissatisfaction was the limited number of places where the federal courts were held (one city in all of Texas!). Even if the courts were held in a second or third city, the clerk was located in only one place and all process had to be filed there. These defects were remedied in a limited number of states by special acts authorizing sessions in different cities, often with provision for appointment of additional clerks and marshals.

It was the contention of the first Justices of the Supreme Court that the Act of 1789 was temporary and that the Congress expected to make further provision for the courts within a short period. Little did these Justices realize how long the pattern of the federal judiciary would remain as created by this act.¹⁴

It is significant in support of this contention that the First Congress requested the Attorney General, Edmund Randolph, to report on proposals for the reform of the Federal Judicial System. Randolph made the report on December 27, 1790, discussing in some detail the jurisdiction of the federal courts, as well as the advantages and disadvantages of any changes. This report included many proposed changes which were later incorporated

14. Petition of the Justices, 1792, 1 Amer. State Papers, Misc. 52.

in the Judiciary Act of 1801. The first suggestion was that the Justices be removed from circuit court duty. The reasons assigned for this are interesting considering the date of the proposal. In Randolph's opinion, a Justice of the Supreme Court had to be more learned than any other member of the federal judiciary: the Supreme Court Justice "must be a master of the common law in all its divisions, a chancellor, a civilian, a federal jurist, and skilled in the laws of each state."¹⁵ By removing the burden of circuit duty, he would have time to develop his knowledge. Secondly, when the Justice, while on circuit, rendered a decision which was later appealed, he would be apt to be biased. And finally, as many of the cases coming before the Supreme Court were novel, the Justices were forced to rush off on circuit duty with little time for reflection and without libraries to which they could refer.

Randolph proposed that the district court judges form the circuit courts, three judges to constitute a quorum. Under his proposal, the division of states into circuits under the Judiciary Act of 1789 would remain the same, but the jurisdiction of the district court would be increased somewhat. The provision of the Judiciary Act of 1789 that the circuit court be an appellate court for the district court would be preserved.¹⁶ To overcome the problem of judges rendering appellate decisions in cases decided by themselves below, the judge from whose court the appeal was taken was not to have the right to vote on the appellate decision, although he could assign reasons for his decision below.

The jurisdiction of the federal courts in relation to the state courts was a problem which disturbed some leaders of this period. Within the first decade, decisions of the federal courts had antagonized two states, which immediately petitioned Congress for redress. In fact, the legislature of Pennsylvania authorized the Governor to use the militia to prevent the enforcement of a decision of the federal court.¹⁷ In speaking of relations between the federal and state courts, Randolph wrote: "It is an honorable evidence of candor explicitly to announce the rights of the federal judiciary," for it was the Attorney General's opinion that such an act should terminate any dissensions as to jurisdiction between the two court systems.¹⁸

Another significant recommendation of the Randolph report, in light of later history, was the suggestion that the Supreme Court prescribe the

15. 1 Amer. State Papers, Misc. 25.

16. See the discussion of the jurisdiction of these courts in the text accompanying notes 6 and 7 *supra*.

17. 2 Amer. State Papers, Misc. 2.

18. 1 Amer. State Papers, Misc. 26-29.

forms of all writs, summons and other processes for both the circuit and district courts. At this date the Supreme Court possessed the authority to prescribe only the forms and procedure in admiralty and equity actions.

Even the Justices of the Supreme Court complained about the system of federal courts. Although making no suggestions for change, they did observe that the requirement of sitting on circuit from New Hampshire to Georgia was a burdensome task with so few Justices. Since few of their number enjoyed robust health, to require them to be away from their families and upon the road a large part of their time was a sacrifice that they should not be called upon to make "unless in cases of necessity."¹⁹ Another defect, in the opinion of the Justices, was the requirement that a Justice on circuit, who rendered the original opinion, was called upon to correct his own error (the Judiciary Act of 1789 provided that the district judge rendering the original decision not take part in an appeal to the circuit court, but this did not apply to the Justices when the case came to the Supreme Court). The petition reiterated that this was "a distinction unfriendly to impartial justice, and to that confidence in the Supreme Court which it is so essential to the public interest should repose in it."²⁰

In 1793, Congress did seek to ameliorate the traveling burden of the Justices by providing that *one* Justice and the district court judge would be sufficient for the holding of the circuit court.²¹ Whether this act was necessary is doubtful, however, for the original act provided that any two of the three judges would constitute a quorum, and, at least in some circuits, it would have been rare to find two Justices of the Supreme Court in attendance.²²

IV. THE JUDICIARY ACT OF 1801 AND ITS REPEAL

The Judiciary Act of 1801, which resulted in much controversy, would have relieved the Justices of the Supreme Court from having to sit on circuit, special circuit judges being appointed for that purpose. The states were organized into six circuits, and in five of these circuits three judges were to be appointed for each circuit. In the Sixth Circuit, only one circuit judge was to be appointed, and with the aid of the district court judges

19. 1 Amer. State Papers, Misc. 28, Act of September 29, 1793, 1 Stat. 93.

20. *Supra* note 14.

21. Act of March 2, 1793, 1 Stat. 334.

22. Act of September 24, 1793, § 4, 1 Stat. 74.

was to hold the circuit court. Within this circuit, as the positions of the district court judges became vacant only circuit judges would be appointed. This in effect abolished the district courts in the states of Kentucky, Ohio and Tennessee.²³

A criticism made by the opponents of this act was the claim that it substantially increased the size of the federal judiciary. At that time, there were seventeen district court judges and six Justices of the Supreme Court—a total of twenty-three judges in the federal system. The Act of 1801 created sixteen new judgeships, but provided that when the district judgeships in the Sixth Circuit and one place on the Supreme Court became vacant, those positions would not be filled. Regardless of that fact, the act would have nearly doubled the number of judges in the trial courts of the federal system, and with the partisan politics of that date, the viewpoint of Jefferson and his followers may be appreciated. John Adams appointed judges to all of the sixteen new positions, but the individuals he appointed for the Fifth Circuit, consisting of Georgia, and North and South Carolina, refused to serve and appointments were made to these three judgeships by Thomas Jefferson.²⁴

Although some of the other states would have been divided into two districts, no provision was made for separate judges for each of these districts. The act would also have decreased the size of the Supreme Court to a membership of five. Perhaps the reforms which this act accomplished could have been saved had not Adams sought to appoint all the judges authorized by the act.²⁵

The controversy resulting in the repeal of this act is well known. As a result, the organization of the federal courts remained basically the same as created in 1789, until 1911 when the circuit courts were finally abolished. One of the unfortunate effects of the repeal was the creation of a precedent against a similar reform. Time and again, members of Congress used this as an argument against any change. In 1825, for instance, when Congress was again considering reform of the federal judicial system by abolishing the requirement that the Justices ride the circuit, one Senator described the Act of 1801 in the following terms:

[The Act of 1801 was] found so little adapted to the interest or sentiments of the American people, as to call from them at once,

23. Act of February 13, 1801, 2 Stat. 89.

24. Surrency, *The Judiciary Act of 1801*, 2 AMER. J. LEG. HIST. 53 (1958).

25. The controversy arising from some of these judges trying to obtain their commissions lead to the famous case of *Marbury v. Madison*, 5 U.S. (1 Cranch. 47) 137 (1803).

in terms too loud and strong to be resisted or denied, an imperious demand for its repeal. A repeal was promptly acceded to by the councils of the nation, and a newly created host of judges stripped of their salaries, their offices, and their honors, before time had been given them to enjoy, or even taste the delicious flavor of the dainties which had been placed before them—to warm the seats on which they had been placed, or to be warmed by the ermines with which they had been enshrouded.²⁶

V. CIRCUIT DUTY BY THE JUSTICES

After repeal of the Act of 1801, the courts returned to their organization under the Judiciary Act of 1789. The circuit court was held by a Justice of the Supreme Court and the district court judge of the district in which it was held. To hold these circuit courts required the Justices to travel many miles during the course of a year. In 1838, John Forsythe, the Secretary of State, made a report to the Senate in which he indicated the number of cases pending in the circuit courts and the number of miles traveled by the Justices during the course of the year. According to this report, Roger B. Taney, the Chief Justice, traveled a total of 458 miles in holding the terms of the courts in his circuit.²⁷ Most of the justices averaged a total of 2,000 miles during the year.

The record, however, must have been held by Justice John McKinley, who traveled a total of 10,000 miles during the course of a year.²⁸ Justice McKinley was assigned to the Ninth Circuit, which included Alabama, Mississippi, Louisiana and Arkansas. This circuit was established in 1837,²⁹ and the court was to be held in the following order: Little Rock, Arkansas, on the fourth Monday in March; Mobile, Alabama, on the second Monday of April; Jackson, Mississippi, on the first Monday in May; New Orleans on the third Monday in May; and Huntsville, Alabama, on the first Monday in June. In the fall, the terms of the circuit court were held in New Orleans, Jackson and Mobile.³⁰ Justice McKinley wrote that he must travel by boat from Little Rock through New Orleans to Mobile,

26. 8 BENTON, ABRIDGEMENT OF THE DEBATES OF CONGRESS 160-61.

27. Senate Doc. No. 50, 25th Cong., 3d Sess., Vol. II, at 32. The mileage reported by each of the Justices is as follows: Roger B. Taney, 458; Henry Baldwin, 2,000; James M. Wayne, 2,370; Philip P. Barbour, 1,498; Joseph Story, 1,896; Smith Thompson, 2,590; John McLean, 2,500; John Catron, 3,464; John McKinley, 10,000.

28. Senate Doc. No. 50, 25th Cong., 3d Sess., Vol. II, at 39.

29. Act of March 3, 1837, 5 Stat. 176.

30. A year later, the term of the Circuit Court at Huntsville was abolished. Act of February 22, 1838, 5 Stat. 210.

Alabama, a distance of approximately 850 miles, for the purpose of holding the circuit court. To get to Jackson, Mississippi, he had to travel from Mobile back through New Orleans up to Vicksburg, Mississippi, by water, and finally by stage to Jackson, a distance of 800 miles. The next term of the circuit court was in New Orleans, a city through which he had already passed three times. It should be noted that the terms of the circuit courts were scheduled by Congress, generally at two-week intervals.

Justice McKinley's situation may have been extreme when compared with the other justices, but their difficulties were great although the distances which they had to travel were shorter. Justice McLean, traveling 2,500 miles by public conveyance, complained that in May, 1837,³¹ the mud was so deep in Indiana that it was impossible for a carriage of any description to pass and that the mail and passengers had to be conveyed in common wagons. Justice Barbour,³² traveling 1,498 miles to hold the circuit courts in North Carolina and Virginia, held the circuit court in Richmond as he returned to Washington for the term of the Supreme Court, which substantially reduced his amount of traveling.

In spite of the short period of time allowed the Justices of the Supreme Court to conduct the business of each circuit court and move on to the next place, a large amount of business was conducted by these judges. In the circuit court for Ohio, between 1827 and 1831, the court was in session for periods of from ten to nineteen days, during which time final disposition of the majority of cases was made. The docket of the circuit court for West Tennessee was the heaviest, and during the period from 1827 to 1831 the court was in session from sixteen to thirty-two days and disposed of from 58 to 153 cases each term.³³ It is not certain whether the Justice actually presided over these terms or not. In all likelihood, the Justice would try a few of the cases and then go on, leaving the district court judge to finish all other cases on the docket.

However, an 1823 petition from the Bar of the City of Nashville, Tennessee,³⁴ indicates that the circuit courts were not held as often as prescribed by statute. The petition states that only one half of the required number of courts had been held in the circuit court for the Western

31. Senate Doc. No. 50, 25th Cong., 3d Sess., Vol. II, at 36-37.

32. Senate Doc. No. 50, 25th Cong., 3d Sess., Vol. II, at 39.

33. Senate Doc. No. 229, 25th Cong., 3d Sess., Vol. III. A similar study of the dockets of the state courts would be interesting for a comparison of the amount of business conducted.

34. Ex. Doc. No. 29, 18th Cong., 2d Sess., Vol. II.

District of Tennessee since its establishment in 1807. In 1819, 170 suits were pending on the dockets of the courts; in 1820, 152; 1821, 202; 1822, 148; 1823, 185; and in 1824, 161. Some of these suits had been accumulating from time to time for lack of a qualified court.³⁵

In 1838, in an act establishing the terms of the newly reorganized Seventh Circuit,³⁶ Congress said:

It was the duty of the justice to attend at least one term annually in this circuit and in the absence of the circuit judge, the district judge may at his discretion . . . adjourn the cause to succeeding term of the circuit court.

This provision was generalized when, in 1844,³⁷ it was provided that the Justice of the Supreme Court would have to attend only one term annually in each of the circuit courts in his circuit. He was to designate the term he would attend, taking into consideration the nature and importance of the business pending therein, as well as public convenience. When the Justice attended the circuit court, the following types of cases were to be given priority on the docket: appeals and writs of error from the district court and those cases specially reserved by the district court judge which he felt were difficult or of peculiar interest. The final provision of the act was a declaration that the act did not prohibit the Justices from attending other terms whenever, in their opinion, public interest demanded their presence.

At what period the Supreme Court Justices ceased holding the circuit courts is not clear. During the first forty years of the federal judiciary, the Justices held the circuit courts regularly, although the district court judge must have assumed most of the administrative details.³⁸ Definitely, by 1860 it must have been the exception rather than the general rule for a Justice to preside at the circuit court, for after 1860 the acts designating the times for the terms of the federal court would provide for both the district and circuit courts simultaneously. Clearly, during the last half of the Nineteenth Century, the district court judge held the terms for both courts.³⁹

35. *Ibid.*

36. Act of March 10, 1838, 5 Stat. 215. For a discussion of the original organization of the circuit, see text accompanying note 44, *infra*.

37. Act of June 17, 1844, 5 Stat. 676.

38. Exec. Doc. No. 29, 18th Cong., 2d Sess., Vol. II. The petition from the Bar of Nashville, Tennessee, indicated that since the circuit court was established in 1807, the Justice assigned to the circuit had held the circuit court in Nashville one half of the number of times the court was required to be held.

39. Yet as late as 1869, Congress required the Justices to go on circuit once in every two years. For a discussion of the provisions of this 1869 act, see text accompanying notes 79-80 *infra*.

VI. ORGANIZATION OF THE CIRCUITS

For the purpose of holding the circuit courts, the country was divided into circuits by the various judiciary acts.

One of the chief criticisms of this organization was that not all the district courts were embraced in a circuit. This, the critics claimed, did not accord each state equal treatment as provided by the Constitution. Under the Judiciary Act of 1789, the country was divided into three circuits, designated the Southern, Middle, and Eastern Circuits. No specific provision was made for the assignment of Justices to the circuits, it being evident that Congress expected the members of the Supreme Court to settle this among themselves.⁴⁰

When the Act of 1801 was repealed, some reorganization of the circuits was necessary. In 1802,⁴¹ six circuits, the same number formed by the ill-fated Act of 1801, were created, embracing all the states then in the Union with the exception of Kentucky, Tennessee, Ohio, and Maine (which at this time was still a part of Massachusetts). Each of these circuits was designated by number. The act specially allotted the Supreme Court Justices to the various circuits, but provided that after the next appointment to the Bench, the Justices were to determine the assignment to the circuits among themselves and enter such allotment as an order of the court. However, in 1803,⁴² Congress provided that the circuit court for the Sixth Circuit should consist of the Justice residing in the Third Circuit and the local district judge where the court was held. The Third Circuit was to consist of the senior associate Justice residing within the Fifth Circuit, who was at that time Bushrod Washington. Again, in 1808,⁴³ Congress passed another act assigning the Justice living in the Second Circuit to hold the circuit court in that circuit. This was the last act in which Congress assigned a Justice to a particular circuit.

In 1807⁴⁴ Congress created the Seventh Circuit, to consist of the states of Tennessee, Kentucky and Ohio. A seventh Justice was added to the Supreme Court in order to preside in this circuit.⁴⁵ After the passage of

40. Act of September 24, 1789, § 4, 1 Stat. 74.

41. Act of April 29, 1802, § 4, 2 Stat. 157.

42. Act of March 3, 1803, 2 Stat. 244.

43. Act of March 9, 1808, 2 Stat. 471.

44. Act of February 24, 1807, 2 Stat. 420.

45. The sessions of this circuit court were to be held on the first Monday in May and November in Frankfort, Kentucky; in Nashville, Tennessee, on the first Monday in June; in Knoxville, Tennessee, on the third Monday in October; and in Chillicothe, Ohio, on the first Monday in January and September.

this act, all the states in the Union at that time were included in a circuit, although in those states which were divided into two districts only one of the districts was included in the circuit organization. The circuit court jurisdiction was removed from the district courts when they were included in a circuit.

Between 1807 and 1820, five new states were admitted to the Union; in each such state a district court was established and given circuit court jurisdiction. In 1820⁴⁶ Maine was admitted to the Union, but was added to the First Circuit. This state had always been a part of Massachusetts, and therefore was never a federal territory, which accounts for the fact that a district court with full federal jurisdiction had been established by the Judiciary Act of 1789, rather than territorial courts, as was customarily done in the federal territories.⁴⁷

No other changes were made in the organization of the circuits until 1837. By that date, nine new states had been admitted, and the district courts in eight of these states exercised circuit court jurisdiction. In 1837,⁴⁸ after a decade of debate, Congress finally passed an act creating two new circuits, the Eighth and Ninth Circuits, and all twenty-six states then members of the Union were assigned to a circuit. However, in Louisiana and Alabama, which were organized into two districts, one of the district courts in each state continued to exercise full federal jurisdiction as both a district and circuit court. In other states where two or more districts existed, the circuit court jurisdiction formerly exercised by one of the districts was abolished, and these districts were assigned to the same circuit as the other district in the state. At no time was a state which was organized into two or more districts divided between different circuits.

In 1842,⁴⁹ Alabama and Louisiana were detached from the Ninth Circuit and were designated as the Fifth Circuit. The states comprising the former Fifth Circuit were assigned either to the Fourth or the Sixth Circuits.

In 1861 came the Civil War, and the Justices suspended holding the circuit courts in the Southern states. However, in 1862,⁵⁰ the states which had been admitted since the last arrangement of the circuits were assigned to the circuits, and circuit court jurisdiction of the district courts in Texas, Florida, Wisconsin, Minnesota, Iowa and Kansas was abolished.

46. Act of March 30, 1820, 3 Stat. 554.

47. For a discussion of territorial courts see text accompanying notes 1-4 *supra*.

48. Act of March 3, 1837, 5 Stat. 176.

49. Act of August 16, 1842, 5 Stat. 507.

50. Act of July 15, 1862, 12 Stat. 576.

The number of Supreme Court Justices was not increased; only the circuits were enlarged. Actually, there were ten circuits, and the circuit embracing California, Nevada and Oregon was designated as the Tenth Circuit.⁵¹ The next year, Indiana was detached from the Seventh Circuit and assigned to the Eighth Circuit.⁵²

By the Act of July 23, 1866⁵³ the Tenth Circuit was abolished, and all the states were allotted among nine circuits. From 1866 until 1929, new states when admitted to the Union were assigned to either the Eighth or Ninth Circuits. Finally, a Tenth Circuit was created from the Eighth Circuit in 1929.⁵⁴ Proposals have been made to create an Eleventh Circuit, but no action has been taken by Congress.⁵⁵

VII. APPEALS FROM THE DISTRICT COURT TO THE CIRCUIT COURT

Generally, an appeal could be taken to the circuit court from the district court where the amount exceeded \$50 in civil suits or \$300 in admiralty suits. However, a different method was applied to those courts exercising circuit court jurisdiction.

The district courts of Kentucky and Maine were given circuit court jurisdiction by the Judiciary Act of 1789. An appeal could be taken from the district court of Kentucky to the Supreme Court under the same regulations as from other circuit courts (when the amounts in controversy exceeded \$2,000). An appeal from the district court of Maine was taken to the circuit court in Massachusetts,⁵⁶ under the same regulations as appeals from other district courts;⁵⁷ subsequent appeal could be taken to the Supreme Court of the United States.

This method of appeal was also used in New York. The District Court for the Northern District of New York, which was created in 1814, was given circuit court jurisdiction and appeals from this court were taken to the Circuit Court in the Southern District of New York.⁵⁸ This provision was abolished in 1826, and thereafter appeals from the Northern District

51. Act of March 3, 1863, 12 Stat. 794.

52. Act of January 28, 1863, 12 Stat. 637.

53. Act of July 23, 1866, 14 Stat. 209.

54. Act of February 28, 1929, 45 Stat. 1346, at 134.

55. Report of the Judicial Conference, House Doc. No. 475, 83d Cong., 2d Sess. 3.

56. Remember that Maine was a part of Massachusetts until admitted separately in 1820.

57. Act of September 24, 1789, §§ 21, 22, 1 Stat. 83.

58. Act of April 29, 1814, 3 Stat. 120.

of New York were taken directly to the Supreme Court, as from other circuit courts.⁵⁹

In the Northern District of Alabama, which was created in 1824,⁶⁰ appeal was to be taken to the Circuit Court for the Southern District of Alabama held at Mobile. In 1842, appeals from the Northern District Court to the Circuit Court in the Southern District were abolished and provision was made for a district appeal to the Supreme Court.⁶¹ Since the same judge presided over both districts, one finds the incongruous situation that the district judge when sitting in the Northern District exercised circuit court jurisdiction, yet while in the Southern District he exercised such jurisdiction only in the absence of the Justice assigned to that circuit. From all decisions rendered in the Northern District appeals were taken to the Supreme Court, but from his decisions as a District Judge in the Southern District appeals were made to the circuit court sitting in that district.

If the pattern in Alabama sounds absurd, the situation in the Western District of Pennsylvania, when this disparity arose within a single district, was even moreso. In 1837,⁶² the circuit court jurisdiction of the Western District when held in Pittsburgh was abolished, but when the district court was held in Williamsport, Pennsylvania, the district judge exercised circuit court jurisdiction and appeals were taken directly to the Supreme Court.

This pattern of appeals from the district court with circuit court jurisdiction to the circuit court sitting in the other district within the state was not used again after 1842.

It was the contention of some that the organization of a district court with full federal jurisdiction did not accord the new states equal treatment under the Constitution, as some states had a Justice of the Supreme Court to hold the circuit court, while in the newer states a district judge held the circuit court. This meant that when a district court exercised the jurisdiction of a circuit court, there could be no appeal from the decision of the district court judge unless the amount involved exceeded \$2,000, whereas in districts where the Justice held the circuit court, an appeal could be

59. Act of May 22, 1826, 4 Stat. 192.

60. Act of February 22, 1838, 5 Stat. 210.

61. Act of August 4, 1842, 5 Stat. 504.

62. Act of March 3, 1837, 5 Stat. 176.

taken from a decision of the district judge where the amount was more than fifty dollars.⁶³

VIII. EFFORTS AT REFORM

After the repeal of the Act of 1801, several attempts were made to reform the federal judicial system.⁶⁴ Congressional committees studied the problem, and made recommendations which were almost always rejected. A few members of Congress spoke against the existing system, centering their criticism on the requirements that the Justices were required to attend the circuit courts. Nevertheless, a majority of the members of Congress defended the system with glowing eloquence and, doubtless, many members of the Bar supported them.

Between 1800 and 1850, Congress received several petitions concerning the organization of the federal courts. In the main, these petitions complained of the organization of the federal judiciary and especially of the circuit courts. In 1823, for example, a petition from the Bar of Nashville, Tennessee, was received.⁶⁵ It complained of the lack of appeal from the district court sitting with circuit court power where the amount was less than \$2,000. The petition further indicated the belief that none of the members of the Supreme Court were capable of exercising the great power and trust imposed upon them. According to the petition, it was impossible for the Justices to have intimate knowledge of the laws of the twenty-four states.⁶⁶ It was suggested that Congress authorize three additional Supreme Court Justices and provide for one term of the circuit court per year. The petition completed its attack by pointing out that the circuit court in Nashville was not being held as often as required by statute.⁶⁷

In the same year, the Senate Judiciary Committee rendered a report which emphasized that, in its opinion, "some changes would be necessary in the organization of the federal courts." Obviously, the Committee felt,

63. Act of September 24, 1789, § 22, 1 Stat. 84. The Act of May 31, 1844, 5 Stat. 658, provided that the Supreme Court could review civil decisions of the circuit courts when the United States was bringing an action under any revenue law.

64. For a complete discussion of all efforts made in Congress from 1798 to 1891, see FRANKFURTER & LANDIS, *THE BUSINESS OF THE SUPREME COURT, A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 4-102 (1928).

65. Ex. Doc. No. 29, 18 Cong., 2d Sess., Vol. II.

66. "To acquire knowledge of state laws, a judge must devote time to study, to acquaint himself with the citizens, the situation of land title, and legal principles peculiar to that system of jurisprudence." *Ibid.*

67. *Supra* note 65.

it was impossible for the seven Justices of the Supreme Court to hold circuit court in many distant places.⁶⁸ The report offered two solutions: increase the number of Justices on the Court and include the new western states in new circuits; or readopt the system used in the ill-fated Act of 1801. The Committee felt that the latter proposal should not be adopted until the first had been given an opportunity.⁶⁹

In February 1825, the Senate debated a bill to create two new circuits in the western states.⁷⁰ Amendments were offered which would have provided that the circuit judges created under this act would not be members of the Supreme Court, but this proposal was defeated. The benefits of the organization of the judicial system of that period were described in glowing terms by the Senator from Kentucky, Mr. Talbot. He spoke of how the present system, organized in 1789, was "framed in so much wisdom and experience—sanctioned by such names as the Congress in the United States of that period enrolled in the catalogue of its members." He praised the fact that the system was modeled after the English system, where the justices of Westminster Hall had original and appellate jurisdiction and sat in all parts of the kingdom to hold the courts of *Nisi Prius*—a system which "has never yet been held as a blemish, much less of fatal error in the organization of the British Courts."⁷¹ Talbot thought it an advantage to have the Justices ride the circuits, as they would visit the states and preserve "sentiments and feelings connected, in some degree with the just pride, the sovereignty, the constitutional independence (of the states)." If relieved of circuit duty, the Justices would become national in their attitude, a thing which some of the states had reason to dread in view of then recent decisions of the Supreme Court.⁷² Certain states had been severely attacked "and, after a feeble and ineffectual struggle, had been successively vanquished in the contest; have contended without aid or cooperation from their sister states." The contention of the speaker was that the proposed amendment would deny these states equal rights under the Constitution. He described the system in the following terms:

The present system of organization of the courts of the United States, founded in much wisdom, framed by many of the sages to whom we are indebted for the great charter of our liberties, sanc-

68. At this time there were 27 district courts, one in each state and two in New York, Pennsylvania and Virginia.

69. Reports of Committees, No. 105, 17th Cong., 2d Sess., Vol. II.

70. For the debates on this bill, see 8 BENTON, *op. cit. supra* note 26, at 160.

71. *Ibid.*

72. This is interesting in view of the feeling exactly opposite today.

tioned by a happy experience of thirty-five years; adapted to the administration of justice by the same impartial means; and well adapted to the number and extent of the States which at that time composed our Union: the benefits of which, by a simple extension of the system and application of its principles to the nine Western States, which have swelled the number and added to the wealth, power and resources of the Union, is all we ask; is all the bill on your table contemplates, and is that to which no honorable member of this body has denied our unquestioned right.⁷³

In 1829 the Senate Judiciary Committee rendered another report on the judicial system as it then existed, with ideas for certain reforms.⁷⁴ The report began with the observation that, after a casual survey of the system, the committee could find no reason for continuing the present system. The report observed that since 1807⁷⁵ seven new states had been admitted, and that in all but one of these states (Maine was attached to the First Circuit) the district court had been given circuit court jurisdiction. One of the serious defects of such a system was that an appeal from these courts could be taken to the Supreme Court only where the amount in controversy exceeded two thousand dollars, which the committee felt created an injustice in that it left many decisions to the fiat of one man from whose decisions there was no appeal.

The committee suggested that Congress could reorganize the judicial system by adopting one of the following five proposals: First, the present system could be continued with additional Justices appointed to preside over the new circuits embracing the new states. Second, new circuit judgeships could be created for the new areas, but these judges would not be members of the Supreme Court. However, as vacancies should occur on the Court, these judges would be elevated to the Court. This, in effect, would have resulted in creating a training ground for Justices of the Supreme Court. Third, the system of 1801 could be revived. Fourth, three district judges could be allowed to hold the circuit courts and thus relieve the Supreme Court Justices of this duty. The fifth proposal was a variation of several of the above proposals. Under this plan, the states which were not then included in a circuit would be organized within new circuits with

73. 8 BENTON, *op. cit. supra* note 26, at 165.

74. Sen. Doc. No. 50, 29th Cong., 2d Sess., Vol. I.

75. At that time the Seventh Circuit had been created to embrace Kentucky, Ohio, and Tennessee. An additional Justice for this circuit was added to the Supreme Court. In the original organization in 1789, the two existing states had been excluded from the circuit system.

judges appointed to preside over these new circuits who would not be members of the Supreme Court. The Supreme Court Justices would continue to hold the circuit courts in the existing circuits but these circuits would not be extended. The committee made no recommendations.

Even some individuals petitioned Congress for a reorganization of the courts. In 1849, one John Henderson, a member of the Mississippi bar, presented such a petition, in which he observed that since the Act of 1789, "patchwork expedients have continued to mar and deform the structure, till the whole machine has become rickety, disjointed, and impractical."⁷⁶ His petition continued with statistics on the crowded condition of the dockets of the Supreme Court and the lower federal courts. His chief reforms would have been the appointment of circuit judges and the division of all circuit courts into three departments. The Supreme Court would have appellate jurisdiction from the circuit courts where the amount in controversy was in excess of thirty thousand dollars and from the departments when there was a conflict between the decisions of the departments—an interesting proposal in light of Supreme Court practice today.

In 1853, Congress by resolution requested the Attorney General, Caleb Cushing, to furnish an opinion suggesting a reorganization of the federal judicial system.⁷⁷ Cushing reviewed the proposals suggested by others previously, but recommended the organization of the country into nine circuits and assignment to these circuit courts of the jurisdiction assigned to the original circuit courts. These courts would be held by a Justice of the Supreme Court and an assistant circuit judge, or either of them. The Attorney General thought such an organization would work the least change in the system and add the least additional personnel. He concluded his opinion with the observation that the "existing judicial organization is altogether insufficient for the obvious necessities of the people even of the present United States."⁷⁸

76. House Misc. Doc. No. 17, 31st Cong., 1st Sess., Vol. I.

77. 6 OPS. ATT'Y. GEN. U.S. 271, Sen. Ex. Doc. No. 41, 33d Cong., 1st Sess., Vol. VIII.

78. *Supra* note 77, at 284. We are informed by the editors of the *American Law Review* that a bill to reorganize the circuit courts failed of passage in 1866. The bill provided that the district judges were to perform all duties of a circuit judge at *nisi prius*, and circuit justices with the district judge were to hear appeals and exceptions. The editorial argues that the direct and indirect benefits derived from them infinitely outweigh any real objections which can be urged against the practice. . . . The discipline, even if each judge try but half a dozen criminal and patent cases a year, more than repays him for the trouble and inconvenience; and the con-

IX. CIRCUIT COURT JUDGES

Cushing's suggestion was apparently of some effect, for in 1869⁷⁹ the office of circuit judge was created. A circuit judge was to be appointed for each of the nine existing circuits, possessing the same power as an associate Justice sitting as a circuit court judge; in addition the circuit court judge would have the power to appoint the clerk. The circuit court could then be held by either the Justice, the circuit judge, or the local district judge, or any combination of the three. The arrangement allowed the circuit court to be held in different districts in the same circuit at the same time. The Supreme Court Justice was required to go on circuit once in every two years. Congress was not yet willing to relieve the Justices of circuit duty, although by this date it was evident that some relief was necessary if the federal courts were to perform their business with dispatch.

This was not, however, the first time that Congress had created a circuit court with a separate circuit judge who was to exercise essentially the same power as a Justice of the Supreme Court.⁸⁰ When California was admitted to the Union, Congress recognized that it would be impossible for a Justice of the Supreme Court to travel such a great distance to hold the circuit court and then return to Washington for the sessions of the Supreme Court. Thus, in 1856,⁸¹ the Circuit Court of California was created with the same jurisdiction as the other circuit courts, but the President was authorized to appoint a circuit judge to preside in this circuit. Matthew Hall McAllister was appointed to the position. When he resigned in 1862,⁸² the court was abolished, possibly as the result of strong feeling that this plan discriminated against California. To meet this objection, California, with Oregon, was organized into a Tenth Circuit, and a tenth Justice was added to the Supreme Court.⁸³ It is obvious that the Congress did not expect this Justice to be in Washington very often for it authorized payment of an additional traveling allotment "for each year in which he may actually attend a session of the Supreme Court of the United States."

sequent mingling and association with the bar all over the circuit keeps up an acquaintance and understanding between it and the bench which we should be sorry to see lessen.

1 *AM. L. REV.* 207 (1866).

79. Act of April 10, 1869, 16 Stat. 44.

80. See text accompanying notes 23-26 *supra* for a discussion of the circuit judges under the ill-fated Judiciary Act of 1801.

81. Act of March 2, 1855, 10 Stat. 631; Act of April 30, 1856, 11 Stat. 6.

82. Act of March 3, 1863, 12 Stat. 794.

83. *Ibid.*

Four years later⁸⁴ the number of Justices was reduced to seven, and so ended the apparent attempt to have a Justice of the Supreme Court who was not expected to be a part of that court.

Historians have acknowledged that the Civil War affected the growth of the nation in many ways. With this growth came a parallel increase in the business of the federal courts. Federal statutes enforcing federal policies flooded the courts with cases.⁸⁵ To compound all this, in 1875 Congress extended the jurisdiction of the federal courts,⁸⁶ giving them full jurisdiction of all problems arising under the Constitution. These factors, plus the unrealistic attitude of Congress toward the need for a reorganization of the federal courts and an increase in personnel, caused the courts to be inundated with a case load they were ill-equipped to handle.⁸⁷ Even the appointment of circuit judges failed to relieve the courts.

The Attorney General of the United States urged reform and bar associations joined in this plea. Finally, by a narrow margin, Congress created the intermediate appellate courts called the Circuit Courts of Appeals⁸⁸ to relieve the Supreme Court.

X. CIRCUIT COURT OF APPEALS

By the Act of 1891,⁸⁹ in each existing circuit an additional circuit judge was appointed, who, together with the other circuit judge appointed under the terms of the act of 1869 and the associate Justice of the Supreme Court assigned to that circuit, would hold the circuit court of appeals. The purpose of this court was to hear appeals from the district and circuit courts. The appellate jurisdiction of the latter court was abolished. In certain specified areas, an appeal could be taken directly from the district

84. Act of July 23, 1866, 14 Stat. 209.

85. For a list of acts extending the jurisdiction of the federal courts, see FRANKFURTER & LANDIS, *op. cit. supra* note 64, at 61 nn.20-22.

86. Act of March 3, 1875, 18 Stat. 470.

87. The following is a list of the number of cases at the beginning of each term of the Supreme Court of the United States:

Oct. T. 1884—1315 cases

Oct. T. 1885—1340 cases

Oct. T. 1886—1396 cases

Oct. T. 1887—1427 cases

Oct. T. 1888—1536 cases

Oct. T. 1889—1635 cases

Oct. T. 1890—1800 cases

See ANNUAL REPORTS OF THE ATTORNEY GENERAL for the years mentioned, and 140 U.S. 707 (1890).

88. Act of March 2, 1891, 26 Stat. 827.

89. *Ibid.*

court to the Supreme Court, but in all other cases the appeal was to be taken to the circuit court of appeals. The act provided that the first session of each of these courts was to be held on the Second Monday in January, 1891, and thereafter as fixed by the courts.⁹⁰ Since the act was not finally passed and approved until March, an amendment was made to the effect that the first session of these courts was to be held on the Third Tuesday in June, 1891.⁹¹

It is apparent that many facets of the past judicial organization were preserved—the circuit courts, circuit duty for the Justices, and the existing circuits, to mention a few. The circuit duty of the Justices was destined to be abolished not by statute but by custom.

The effect of these new courts was immediately felt by the Supreme Court, and its docket soon returned to manageable proportions. It was also soon apparent, however, that the Justices could not sit with the circuit courts of appeals, and within four years additional judges were added to the Seventh, Eighth, and Ninth Circuits, bringing the total in each circuit to three. The Court of Appeals for the Second Circuit already had two circuit judges⁹² at the time that court was organized, one of whom had been authorized by the Circuit Court Judge Act of 1869, the other authorized later;⁹³ with the extra judge authorized by the Act of 1891, its membership was also three.

The act creating the circuit courts of appeals provided for a term of the court in one location in each circuit. Beginning in 1902, a series of acts required that the Court of Appeals for the Fifth Circuit meet in other cities. The first act required the court to sit in Atlanta, where the court would hear appeals from the courts in Georgia.⁹⁴ This act gave the court the authority to hold sessions in other cities within the Fifth Circuit, but apparently the court did not take advantage of this authority for by an act of the same year the court was required to hold sessions in Fort Worth, Texas.⁹⁵ Later acts required sessions to be held in Montgomery⁹⁶ and Jack-

90. In the Judicial Code of 1911, the terms of the circuit court were set by statute, but the Judicial Code of 1948 returned to the court of appeals the authority to establish these dates by rule of court.

91. Resolution No. 17 of March 3, 1891, 26 Stat. 1115. Just how many of these courts met this date will not be clear without an extensive study of the minutes of all the circuits.

92. The Second Circuit judgeship was created by the Act of March 3, 1887, 24 Stat. 492.

93. Act of March 3, 1887, 24 Stat. 492.

94. Act of June 30, 1902, 32 Stat. 548.

95. Act of December 18, 1902, 32 Stat. 756.

96. Act of January 30, 1903, 32 Stat. 784.

sonville.⁹⁷ Similar acts were passed for other circuits, and today the Courts of Appeals for the Fourth, Fifth, Eighth, Ninth and Tenth Circuits hold sessions of the court in several cities within their circuits.

The terms of the Circuit Court of Appeals for the Fifth Circuit, which were to be held in Atlanta, Georgia, Montgomery, Alabama, New Orleans, Louisiana and Fort Worth, Texas, were for the purpose of hearing appeals from the federal courts in those states, a unique provision applicable to that circuit only. An exception to this method of appeal was made by the Act of 1905.⁹⁸ This act authorized appeals from the District Court at Beaumont, Texas to be taken to New Orleans rather than Fort Worth. Texas is such a large state that it was more convenient for the parties from Beaumont to go to New Orleans than to Fort Worth. This provision was carried into the Code of 1911 and was unique for that time. The general practice of the court of appeals today is to hear a case in the most convenient city, not simply the city where the clerk has his office. In the Ninth Circuit, the attorney must file a request for such a hearing; upon this request the court will assign the hearing to a place where the court would not generally sit.⁹⁹

In addition to the original nine circuit courts of appeal created by the Act of 1891, a Tenth Circuit was established in 1929 by detaching certain states then included in the Eighth Circuit. The terms of this court were to be held in Denver, Wichita and Oklahoma City, provided suitable accommodations were furnished in Oklahoma City free of expense to the government. The act further stipulated that if there had been no hearing in cases which after the passage of this act would have gone to the Tenth Circuit, those cases were to be transferred to the new court.¹⁰⁰

Whether the states will be regrouped again in the future remains to be seen. Although proposals have been made to divide the Ninth Circuit, thereby creating an Eleventh Circuit, nothing has yet resulted.¹⁰¹

XI. DIVISION OF A STATE INTO SEVERAL DISTRICTS

One of the innovations of the Judiciary Act of 1801¹⁰² had been the division of New Jersey, Virginia, Maryland and North Carolina into dis-

97. 28 U.S.C. § 48 (1948); Senate Rep. No. 1559, 80th Cong., 2d Sess.

98. Act of March 4, 1904, 33 Stat. 59.

99. RULES, COURT OF APPEALS, 9th Circuit, Rule 4 (3).

100. Act of February 28, 1929, § 5, 45 Stat. 1348.

101. See *supra* note 55 and accompanying text.

102. Act of February 13, 1801, § 21, 2 Stat. 96.

tricts, but without additional district judges. Although, as previously mentioned, that act was later repealed, a new act provided for the division of North Carolina¹⁰³ into three districts for the purposes of holding the district court, and of Tennessee¹⁰⁴ into two districts for the same purpose. The new districts in these cases did not mean additional judges, for the new districts were created only to provide additional cities in which the court would meet. South Carolina¹⁰⁵ was unique among all the states in that it was divided into two districts for the purpose of holding district court, while the entire state constituted one district for the purpose of holding the circuit court.

The first division of a state into two districts with a separate judge for each was made in New York in 1814,¹⁰⁶ and after that Pennsylvania in 1818¹⁰⁷ and Virginia in 1819.¹⁰⁸ These divisions were made because of the long distances the litigants had to travel to attend the sessions of the federal courts. The business of each district was thought to be enough to keep one judge occupied.

Several of the state legislatures petitioned Congress for the division of their state into two or more districts.¹⁰⁹ The legislature of Texas gave as its reason the inconvenience and the expense of attending the district court, which was held at Galveston for the entire state of Texas. They desired an additional district and provision for holding the court in at least two places in each of these districts.¹¹⁰ Congress acted upon this request in 1857 by creating the Eastern and Western Districts of Texas, with provision for holding the courts in two places in each district.¹¹¹

Congress has since accepted the idea of appointing several judges in one district and has become reluctant to divide the states into further districts, although bills have been introduced for that purpose. Indiana, in 1928, was the last state to be divided into districts,¹¹² until 1962, when

103. Act of April 29, 1802, § 7, 2 Stat. 162.

104. Act of April 29, 1802, § 16, 2 Stat. 165.

105. Act of February 21, 1823, 3 Stat. 726. The Act of March 3, 1911, § 105, 36 Stat. 1123, authorized an additional judge in the state.

106. Act of April 9, 1814, 3 Stat. 120.

107. Act of April 20, 1818, 3 Stat. 462.

108. Act of February 4, 1819, 3 Stat. 478.

109. Petition of Legislature of Georgia, 1845, House Doc. No. 121, 29th Cong., 1st Sess., Vol. IV; Petition of Legislature of Texas, 1850, Senate Misc. Doc. No. 102, 31st Cong., 1st Sess., Vol. I.

110. Petition of Legislature of Texas, 1850, *supra* note 109.

111. Act of February 21, 1857, 11 Stat. 164.

112. Act of April 21, 1928, 45 Stat. 437.

Florida was divided into three districts.¹¹³ Districts usually have been named with reference to their location within the state, with the exception of a few states where a third district was created between two existing districts and became known as the "Middle District."

When Congress provided for the holding of the district or circuit courts in two or more locations within a district, many problems of administration were presented. Was the jury to be selected from the entire district or from an area close to the place where the term of court was to be held? In which city would the cause be tried? To solve some of these problems, in 1838 the Northern District of New York was divided into divisions for the trial of "all issues, triable by a jury."¹¹⁴ This act grouped the counties into divisions designated as the Northern, Eastern and Western Divisions of the Northern District. This was the first organization of a district into divisions. A cause of action which arose in the Northern or Eastern divisions was triable in the Circuit Court held in Albany; the causes of actions arising in the Western division were triable in Canandaigua. This did not, however, regulate the venue of transitory actions or the "changing of the same for good cause." Four places were prescribed for the purpose of holding the district court and each of these locations was assigned to a division. The divisions in the Northern District of New York were later abolished and this pattern was not used again until after 1859,¹¹⁵ when Iowa was separated into divisions. Since that time, such a procedure has been commonplace.

Not all states have been partitioned into divisions, and in some the parties have their choice of cities in which to try their cases. The lawyer has often made his choice, not on the basis of convenience, but on other intangible factors—whether the verdicts of juries in certain cities tend to be higher than in others, or whether juries are more reluctant to convict for certain crimes.

Generally, divisions have been known by the name of the city in which the court for that division is held, although some are named for points of the compass. In only two states have the divisions been numbered.¹¹⁶

113. Act of April 30, 1962, 76 Stat. 247.

114. Act of July 7, 1838, 5 Stat. 295.

115. Act of March 3, 1859, 11 Stat. 437.

116. Kansas, Act of June 9, 1890, 26 Stat. 129, all divisions abolished by Act of August 27, 1949, 63 Stat. 666; Minnesota, Act of April 26, 1890, 26 Stat. 72.

XII. APPOINTMENT OF JUDGES

The appointment of judges has long been considered a matter of political patronage, and if Jefferson had been successful in his impeachment of the federal judges,¹¹⁷ even the provision of the Constitution providing life tenure for judges would have been thwarted. Rarely has any President appointed anyone to the bench from other than his own party. However, at least one significant change in the appointing process has been that the selection has passed from the hands of the President. Today, selections are made by the Attorney General in consultation with Senators from the state concerned. Furthermore, while during the Nineteenth Century the only qualification was loyalty to the party in power, beginning with Theodore Roosevelt the general trend has been to give some consideration to the candidates' qualifications. Increasingly the American Bar Association is consulted.¹¹⁸

The Judiciary Act of 1789 provided for a single district court judge in each state—a total of thirteen district judges. When Rhode Island and North Carolina accepted the Constitution, these states were similarly organized, which established the pattern followed after that date. New states, as admitted to the Union, were organized into single districts with a single judge, regardless of the size of the district. Looking back, one cannot but conclude that Congress was completely unaware of the size of these states—how can one otherwise account for the organization of Texas into a single district?¹¹⁹ Only once was a state admitted and at the time of its admission organized into two districts. This was the state of Oklahoma.¹²⁰

The only experiment during the Nineteenth Century regarding two judges in a single district was made in New York in 1812.¹²¹ A second judge was appointed and the senior judge was required to sit on the circuit court with the Supreme Court Justice. In his absence, the junior judge could sit. This experiment continued for two years, at the end of which New York was divided into two districts with a single judge in each district.¹²² After this date, when the business of the court made the services of a second

117. See 3 BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 50-223 (1919).

118. For political implications in the appointment of federal judges, see Evans, *Political Influences in the Selection of Federal Judges*, 1948 WIS. L. REV. 330; Major, *Federal Judges as Political Patronage*, 38 CHI. BAR RECORD 7 (1956).

119. Act of December 29, 1845, 9 Stat. 1.

120. Act of June 16, 1906, § 13, 34 Stat. 275.

121. Act of April 29, 1812, 2 Stat. 719.

122. Act of April 9, 1814, 3 Stat. 120.

judge necessary, states were divided into two or more districts. One should realize, however, that the division of a state into a second district did not invariably indicate the appointment of an additional judge, for some states were subdivided simply to provide additional locations for holding the federal courts.¹²³ Alabama, for instance, was divided into two districts in 1824,¹²⁴ and into a third district in 1839,¹²⁵ but no additional judge was authorized for the state until 1886,¹²⁶ when a judge was authorized in the Southern District, leaving the incumbent judge to preside over the Northern and Middle Districts.

The business of the federal courts grew during the last part of the nineteenth century,¹²⁷ and the addition of an increasing number of cities in which the courts were required to meet placed a severe burden on the district court judges. Since Congress primarily concerned itself with the organization of the circuit courts and the supplying of the necessary judges for these courts, the needs of the district courts received little attention. In 1903,¹²⁸ Congress authorized an additional district judge for the state of Minnesota and in the same year an additional district judge for the Southern District of New York; this was the first time a second judge had been authorized for a district in nearly a century. Thereafter, each Congress passed several acts increasing the number of judges in individual districts, until 1922,¹²⁹ when Congress passed an omnibus act authorizing additional judges in several districts. Since 1954,¹³⁰ additional judges have been authorized by omnibus bills, although individual bills authorizing additional judges in single districts have also been introduced.

Another innovation following the turn of the century was the appointment of a judge to assist in two or more districts. In 1911,¹³¹ there were four states in which the same judge presided over two districts, but generally judges were authorized for each district. South Carolina, for instance, had

123. See the text accompanying notes 103-05 *supra*, for additional discussion of this point.

124. Act of March 10, 1824, 4 Stat. 9. See also Surrency, *The Appointment of Federal Judges in Alabama*, 1 AM. J. LEG. HIST. 148 (1957).

125. Act of February 6, 1839, 5 Stat. 315.

126. Act of August 2, 1886, 24 Stat. 213.

127. See statistics for the Supreme Court in 1890, 140 U.S. 707 (1890).

128. Act of February 4, 1903, 32 Stat. 795; Act of February 9, 1903, 32 Stat. 805.

129. Act of September 14, 1922, 42 Stat. 837.

130. Act of February 10, 1954, 68 Stat. 8. The Omnibus Judgeships Bills since 1922 are as follows: Act of August 19, 1935, 49 Stat. 659; Act of May 31, 1938, 52 Stat. 584; Act of May 24, 1940, 54 Stat. 219.

131. Act of March 3, 1911, § 1, 36 Stat. 1087.

only one judge in both districts until 1911,¹³² when a second judge was authorized. In 1929,¹³³ a third judge was created to preside in both districts. Since that date,¹³⁴ similar positions have been created in other states.

Generally, in the case of multiple-judge courts, Congress has not attempted to prescribe the cities in which any judge shall preside, but has left this to the senior circuit judge. However, when appointing a judge to sit in both the Northern and Southern Districts of West Virginia, Congress specified the cities in which each judge was to sit.¹³⁵ Today, where a judge is to preside is left to the court to determine.

Congress has experimented with several alternatives to the increase in the number of permanent judges in a district. In 1910,¹³⁶ an additional judge was authorized in the district of Maryland but with the proviso that the next vacancy was not to be filled. This type of appointment was used in 1922,¹³⁷ when twenty-three temporary judgeships were created. But, one by one, in separate acts, these positions have been made permanent. In 1948,¹³⁸ only nine temporary judgeships existed in the federal judicial system, although five additional temporary judges were authorized in 1954.¹³⁹ Since then all of these positions have been made permanent. In 1961,¹⁴⁰ temporary judgeships were authorized in Ohio, and are currently the only such positions. A temporary judgeship does not violate the Constitution, for all the individuals appointed have life tenure, and the district has the services of another judge for an indefinite period.

XIII. TERMS OF COURT

From the Judiciary Act of 1789 to the Judiciary Act of 1948, Congress regulated the terms of all federal courts, prescribing both the times and

132. Act of March 3, 1911, § 105, 36 Stat. 1123.

133. Act of February 26, 1929, 45 Stat. 1319.

134. Missouri and Oklahoma, Act of June 22, 1936, 49 Stat. 1804; Kentucky, Act of June 22, 1936, 49 Stat. 1806; Washington, Act of May 31, 1938, 52 Stat. 584; West Virginia, Act of June 22, 1936, 49 Stat. 1805.

135. Act of August 23, 1937, 50 Stat. 744. Several of the acts passed between 1903 and 1911 authorized the circuit judge to divide the work among the several judges in a single district, but these provisions were incorporated into the general duties of a senior judge of the circuit court of appeals in 1911. Act of March 3, 1911, § 23, 36 Stat. 1090. See also the Act of February 4, 1903, § 2, 32 Stat. 795, authorizing an additional judge in Minnesota, which provided that the senior judge of the Eighth Circuit should make all necessary orders for the division of business and the assignment of cases for trial in said district.

136. Act of February 24, 1910, 36 Stat. 202.

137. Act of September 14, 1922, 42 Stat. 837.

138. H.R. Rept. 308, 80 Cong., 1st Sess., notes under § 133.

139. Act of February 10, 1954, 68 Stat. 8.

140. Act of May 19, 1961, § 2 (2), 2 (e) (1), 75 Stat. 83.

places where such terms were to be held. Between 1789 and 1845, ten acts were passed regulating the circuit courts of New York, nine acts regulating the terms of the circuit courts in Massachusetts, and four acts regulating the circuit court in Delaware, which is but an indication of the number of such acts regulating the terms in each district. From 1789 to 1948 each session of Congress passed at least five acts regulating the terms of courts, a burdensome task for Congress.¹⁴¹

A few exceptions were made, and some courts were allowed to prescribe their own terms. In 1851,¹⁴² Congress gave the judge of the District Court of Illinois the power to make the necessary rules and "regulations for the regulation of the terms of said court, and the process thereof, and the business, and the fees and costs to be taxed therein, as he shall deem expedient, and revise and alter the same when necessary." In 1857, similar power was given to the Circuit Court of the District of Columbia.¹⁴³ These acts were repealed within a few years, and at the time of the *Revised Statutes of 1874*, Congress was again regulating the terms of all the circuit and district courts. After that date, however, this power was relinquished through favorable legislation in a few situations. In 1911, Montana became unique among all the district courts in possessing the power to prescribe by rule of court the dates for holding its terms, though the places where the court was held were still prescribed by Congress.¹⁴⁴ After 1930, Congress, with increased regularity, granted permission for other courts to exercise this privilege, although at least one of these acts authorized the judge to regulate the time of the court only in one locality within the district.¹⁴⁵ By the Judiciary Code of 1948, each court is free to prescribe its terms by rule of court.¹⁴⁶

141. An exhaustive study of these statutes indicates that there were situations where Congress provided for terms of the circuit courts in the different districts, but within the same circuit on precisely the same date. See Ex. Doc. No. 29, 18th Cong., 2d Sess., Vol. II. This was a petition from the members of the Bar of Nashville, Tennessee. The petition indicates that by an Act of 1824, the dates for holding the circuit court in the District of Ohio and in Nashville for the District of West Tennessee were the same. One should remember that this was prior to the Act of 1869, which was the first act making it physically possible to hold the circuit court in two places at once. See text accompanying note 79 *supra*.

142. Act of March 3, 1851, 9 Stat. 636.

143. Act of February 7, 1857, 11 Stat. 158.

144. Judicial Code of 1911, 36 Stat. 1087, § 92, at 1118.

145. Act of June 29, 1938, 52 Stat. 1245.

146. Act of June 25, 1948, 28 U.S.C. § 138 (1958).

XIV. THE FEDERAL COURTS SINCE THE JUDICIAL CODE OF 1911¹⁴⁷

No major change has been made in the organization of the federal courts since the abolishment of the circuit courts in 1911, although Congress has passed numerous acts creating divisions, providing for courts to be held in various cities, and authorizing additional judges for the courts. But, while no changes have been made in the judicial structure, the administration of the federal judicial system has been greatly strengthened through a series of far-reaching acts. In 1922, the Chief Justice of the United States was authorized to summon to Washington the senior circuit judge of each circuit, to "make a comprehensive survey of the condition of the business of the courts, prepare plans for the temporary transfer of the judges to districts in which they are needed, and to make suggestions to the various courts as may seem in the interest of uniformity and expedition of business."¹⁴⁸ This conference has taken many steps to improve the functioning of the courts and to bring about necessary changes in substantive and procedural laws.

Originally, only the chief judges of the circuits attended the Judicial Conference, but in 1956 the act was amended to authorize the attendance of the Chief Judge of the Court of Claims and one district court judge from each circuit, chosen by election by the judges at the judicial conference of the circuit.¹⁴⁹ A later amendment authorized representation of the Court of Customs and Patent Appeals when it was declared a constitutional court by Congress.¹⁵⁰ The Conference has been charged with carrying on a continuous study of the operation and effect of the general rules of practice and procedure, in addition to those rules which the circuits seek to adopt.¹⁵¹

In each of the circuits, the chief judge of the court of appeals calls all the judges in the circuit to an annual judicial conference to discuss the business of the courts in that circuit.¹⁵²

Until 1939 the budget of the federal courts was a part of the budget of the Justice Department.¹⁵³ In that year, the Administrative Office of the Courts was created to supervise administration of the courts. This office

147. See Chandler, *Some Major Advances in the Federal Judicial System*, 31 F.R.D. 309 (1963).

148. Act of September 14, 1922, § 2, 42 Stat. 838.

149. Act of July 9, 1956, § 1 (d), 70 Stat. 497.

150. Act of September 19, 1961, 75 Stat. 521.

151. Act of July 11, 1958, 72 Stat. 356.

152. Act of August 7, 1939, § 306, 53 Stat. 1224.

153. Act of August 7, 1939, 53 Stat. 1223.

furnishes the courts with necessary supplies, and aids in the central control of the courts through the preparation of statistics as to the status of dockets. The office has also been a strong influence in attaining a more efficient administration within the courts.

Another significant advancement was made in 1958 when sentencing institutes in each circuit were authorized under the auspices of the Judicial Conference of the United States.¹⁵⁴ The purpose of these conferences is to study and formulate objectives, standards and policies for sentencing those convicted under the federal laws. The chief judge of each circuit is authorized to invite the judges of the district courts to attend under such conditions as will not delay the work of the courts. Several of these institutes have been held and their proceedings published.¹⁵⁵ It is felt that these conferences have contributed immeasurably to the better administration of the courts, acquainting the judges with the problems of parole, probation and penology—subjects with which few judges are thoroughly familiar.

XV. CONCLUSION

The purpose of this article has been to trace the history of the organization of the federal courts through the statutes, an area which is within the sole discretion of the Congress. Only rarely have the courts been called to pass upon questions arising under these acts. Strange to say, there are many historical problems to which we have no definitive answers, because the materials from which conclusions could be drawn are not available. One of the most interesting of these questions concerns the effectiveness of the circuit court system with the Justices riding the circuits. When did the Justices cease this practice? The statutes do not tell us. Was justice more expeditiously administered in those districts in which the district court judge had full jurisdiction, as contrasted to those districts where the Justice attended the circuit court? These questions can be answered only by an examination of the records of the individual courts.

Another purpose of this paper has been to explain the disparity in the organization of the federal courts from district to district. Today, internally, not all are similarly organized, as an examination of the appropriate sections of the United States Code will show. Some are divided into divisions, while others are not. Litigants have the power to shop for a forum in some dis-

154. Joint Resolution of August 25, 1958, 72 Stat. 845.

155. See 27 F.R.D. 287 (1961); 30 F.R.D. 185 (1962).

tricts where cities are not assigned to divisions. However, these differences are not as great today as they once were, and, hopefully, will become even less so in the future.

If a history of the federal judicial system contains any lesson, it is in recognizing the glaring failure of Congress to give any mature deliberation to the needs and proper organization of the courts. It is not unfair to say that the federal courts have developed through piecemeal legislation rather than through comprehensive reorganizations.

The motive for some statutes is hard to ascribe, but is safe to say, upon examination, that the welfare of the courts was not one of the considerations. Acts providing that the court be held in a second city within a district, without any consideration as to whether it was practical or desirable from the point of view of proper judicial administration, or acts designating a city as a site of the court for prestige of the local community, are but a few examples. Happily, with establishment of the Administrative Office of the Courts and the Judicial Conferences as bodies to speak for the courts, this has changed to an extent. The future promises further changes in the court structure, and a strengthening of its function in assuring justice.