CREATING *the* FEDERAL JUDICIAL SYSTEM

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ABOUT THIS PUBLICATION . . .

This publication was prepared as a reference work for the use of federal court personnel during the bicentennial year of the federal judicial system. Russell Wheeler is primarily responsible for the text. Cynthia Harrison, with the assistance of Deirdre Golash, is primarily responsible for the maps.

The authors thank Professor Kermit Hall of the University of Florida for his very helpful suggestions on an earlier draft.

The maps illustrate the changing configuration of the districts and circuits of the federal courts in the states over time. They do not address the development or relationship of the federal courts in the territories, nor the judicial authority over Indian lands. Information concerning the district lines came from the *United States Statutes at Large*, 1789 to 1989; Erwin C. Surrency, *History of the Federal Courts* (New York: Oceana Publications, 1987); a pamphlet by Erwin C. Surrency entitled *Federal District Court Judges and the History of Their Courts* (also published as 40 F.R.D. 139, 1966); and "History of Authorized Judgeships in the U.S. District Courts," prepared by the Statistical Analysis and Reports Division, Administrative Office of the U.S. Courts, October 1984. *Map Guide to the U.S. Federal Censuses, 1790-1920*, by William Thorndale and William Dollarhide (Baltimore: Genealogical Publishing Com., Inc., 1987) provided data about the county boundaries. For assistance on the maps, the authors would like to thank the Division of Archives and History, North Carolina Department of Cultural Resources. The authors invite comments for subsequent editions of these maps.

With the Judiciary Act of 1789,[1] Congress first implemented the constitutional provision that "The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish." The federal court system is still shaped by the basic concepts of that statute, although subsequent legislation has altered many of its specific provisions, and the 1891 Circuit Courts of Appeals Act effected a major change. But the basic design of the 1789 Act has endured.

The design endured because American judicial history has been dominated by the ideas that shaped the Act: a supreme appellate court to interpret the federal Constitution and laws; a system of lower federal courts, separated geographically by state boundaries and exercising basically the same jurisdiction from court to court; and reliance upon state courts to handle the bulk of adjudication in the nation. But Article III and its implementing legislation also reveal the clash of major disagreements over the optimal extent of federal jurisdiction and the optimal federal court structure to accommodate that jurisdiction. By studying the Judiciary Act of 1789 and the subsequent legislation, we learn why the federal judicial system is the way it is today.

Moreover, the history of the federal courts reminds us that some of the current provisions and proposed changes that seem so sensible to us today will appear as quaint and curious to our descendants as those proposed and adopted by our ancestors appear to us.

ESTABLISHING THE FEDERAL JUDICIAL SYSTEM

The Constitutional Convention's decisions about the national government's court system were few but important. The framers agreed that there would be a separate federal judicial power and that to exercise it there *would* be a Supreme Court and there *could* be other federal courts. They specified the jurisdiction those courts could exercise, subject to congressional exceptions. They prescribed the appointment procedure for Supreme Court judges, and they sought to protect the judges of all Article III courts from reprisals for unpopular decisions: Judges' compensation could not be reduced nor could they be removed from office other than by legislative impeachment and conviction.

How to put flesh on this skeleton was the First Congress's task. The same forces that contended over the writing of the Constitution and its ratification sparred in the First Congress over the nation's judicial system. Federalists generally supported the Constitution and the policies of President Washington's administration, and they generally favored a federal judiciary. Anti-Federalists opposed the Constitution—or at least favored significant changes in it—and favored at best only a very limited federal judiciary. After the Constitution went into effect, outright opposition to it diminished quickly. Democratic–Republicans, or "Jeffersonians," emerged as a counter to the Federalists in power.

The Judiciary Act and the Bill of Rights

In many states, supporters of the Constitution persuaded opponents to vote for its ratification by promising to seek amendments to the Constitution as soon as the government went into operation. The change most frequently sought was an itemization of rights that would be protected from intrusion by the new national government. But many Americans also voiced concern over the potential danger of the federal court system authorized by Article III. By one count, 19 of the 103 amendments proposed by the state ratifying conventions called for changes in Article III.[2] Indeed, Anti-Federalists sought limits on

Article III for much the same reason they sought a bill of rights (especially those Bill of Rights provisions relating to judicial procedures): They feared that courts—especially courts of the new and powerful national government—could become instruments of tyranny. Elbridge Gerry, who refused to sign the Constitution, said that his principal objection was "that the judicial department will be oppressive."[3] Excesses by the British criminal courts were fresh in many minds. More recent memories were of courts enforcing judgments against debtors during the economic turmoil under the Article of Confederation.[4] Charles Warren has identified the four main changes that opponents sought with respect to the Constitution's judiciary provisions: a guarantee of civil as well as criminal trial juries, restricting federal appellate jurisdiction to questions of law, eliminating or radically curtailing congressional authority to establish lower federal courts, and eliminating the authorization for federal diversity jurisdiction.[5]

Many who had supported the Constitution, however, believed a federal court system was necessary but doubted the need for a bill of rights. To them, the Constitution, in Hamilton's famous phrase, "is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS."[6] It contained specific limitations on the national government—e.g., Article III's provision for criminal jury trials—and, in a broader sense, it established an energetic national government, extending over a large republic, that would be capable of protecting people from the oppression of local factions. Courts would also protect rights. As Chief Justice Jay later told the grand juries of the eastern circuit, "nothing but a strong government of laws irresistibly bearing down [upon] arbitrary power and licentiousness can defend [liberty] against those two formidable enemies."[7] The performance of state courts under the Articles of Confederation convinced many Federalists that a separate set of federal courts was necessary to achieve "a strong government of laws."

Thus, among the many issues facing the First Congress were these inter-related questions: What provisions should a "bill of rights" contain? Should Article III's provisions governing federal judicial organization and jurisdiction be altered? How should Article III be implemented? Between April and September of 1789, the first Congress addressed them all.

Early in the first session of the House of Representatives, James Madison, the principal architect of the Constitution, put together a proposed bill of rights drawn from state proposals and constitutional provisions. Madison had opposed a bill of rights a year earlier—"parchment barriers" were no protection against "the encroaching spirit of power"[8]—but he knew the importance

of honoring commitments made in the ratification debates. Moreover, he told the House, if a bill of rights is incorporated into the Constitution, "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights."[9] Madison guided his proposed amendments through legislative revisions and around those who thought they were unnecessary or unwise, eluding still others who wanted to add provisions to curtail severely the contemplated federal judicial system.

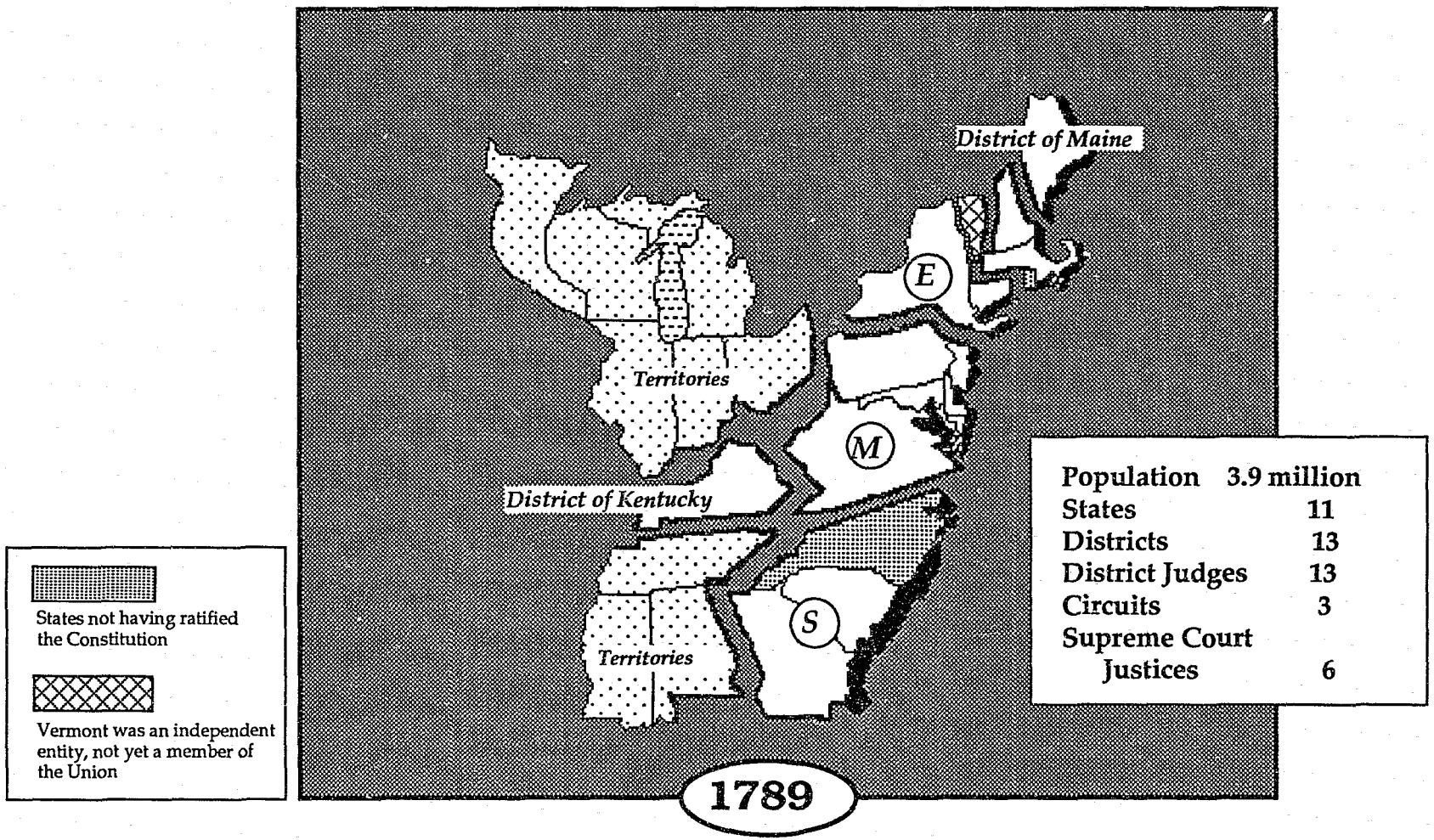
Meanwhile, the Senate quickly took up the organization and jurisdiction of the federal courts. The principal drafters of Senate Bill 1 were three lawyers: Oliver Ellsworth of Connecticut, William Paterson of New Jersey, and Caleb Strong of Massachusetts. Ellsworth and Paterson had served in the Constitutional Convention, and Ellsworth served on the committee of the Continental Congress that heard appeals in prize cases. He had a special appreciation of the role that a federal judiciary, properly constituted, might serve. (Ellsworth and Paterson went on to serve on the U.S. Supreme Court, Ellsworth as Chief Justice.)

On September 24, 1789, Washington signed "An Act to Establish the Federal Courts of the United States" and sent his nominations for the first federal judges to the Senate. On the same day, the House accepted the conference report on the proposed Bill of Rights. The Senate followed suit the next day and the amendments went to the states for ratification, becoming part of the Constitution in 1791.

The 1789 Judiciary Act: Its Provisions[10]

The Act's boldest stroke was simply to create a system of lower federal courts to exist alongside the courts already established by each state. There was considerable sentiment for leaving trial adjudication to the state courts, perhaps with a small corps of federal admiralty judges. (Indeed, 200 years later, few countries with federal forms of government have lower national courts to enforce the law of the national government.)

The Act provided for two trial courts—district courts and circuit courts—and gave the circuit courts a limited appellate jurisdiction. It made specific provision for the Supreme Court



The First Judiciary Act created 13 districts and placed 11 of them in 3 circuits: the Eastern, Middle, and Southern. Each district had a district court, a trial court with a single district judge and primarily admiralty jurisdiction. Each circuit had a circuit court, which met in each district of the circuit and was composed of the district judge and two Supreme Court justices. The circuit courts exercised primarily diversity and criminal jurisdiction and heard appeals from the district courts in some cases. The districts of Maine and Kentucky (parts of the states of Massachusetts and Virginia, respectively) were part of no circuit; their district courts exercised both district and circuit court jurisdiction.

created by the Constitution. It defined federal jurisdiction. It authorized the courts to appoint clerks[11] and to prescribe their procedural rules.[12] It authorized the President to appoint marshals,[13] U.S. attorneys, and an attorney general.[14]

The Act created 13 district courts, one for each of the 11 states that had ratified the Constitution, plus separate districts for Maine and Kentucky, which were then parts of Massachusetts and Virginia. Each district was authorized one district judge. Section 3 directed each court to hold four sessions each year, in either one or two specified cities in each district. The district courts served mainly as courts for admiralty, for forfeitures and penalties, for petty federal crimes, and for minor U.S. plaintiff cases. To reflect the wide variations in federal caseload from one state to another, Congress authorized different salaries for the district judges. The judge in Delaware received an annual salary of $800, but his counterpart in South Carolina, with its longer coastline and presumably greater admiralty caseload, received $1,800.[15]

The Act placed each district, except Kentucky and Maine, into one of three circuits: an eastern, a middle, and a southern circuit, following the administrative divisions used in the first year of the Revolutionary War.[16] Circuit courts were to sit twice each year in either one or two specified cities of each district of the circuit. For each circuit session, the judges were to be the two Supreme Court justices assigned to that circuit plus the respective district judge. These circuit courts were the nation's courts for diversity of citizenship cases (concurrent with state courts, but with a limited removal provision), major federal crimes, and larger U.S. plaintiff cases. (There was no provision for suits against the United States.) They were also intermediate courts of appeal for some of the larger civil and admiralty cases in the district courts.[17] The Kentucky and Maine district courts exercised circuit jurisdiction.

The Act established the size of the Supreme Court: a chief justice and five associate justices. Section 13 implemented the Court's original jurisdiction as delineated in the Constitution; it was a provision of § 13 that the Court declared unconstitutional in *Marbury v. Madison*.[18] The Act spelled out the Court's appellate jurisdiction: review of circuit court decisions in civil cases in matters over $2,000 (for some sense of perspective, in 1789 the salary of the Chief Justice was $4,000).[19] A general criminal appellate jurisdiction did not come to the Supreme Court until the 1890s.[20] The Act's famous § 25 authorized the Court to review state supreme court decisions that invalidated federal statutes or treaties or that declared state statutes constitutional in the face of a claim to the contrary.

The Judiciary Act of 1789: A Political Compromise

The Federalists made important concessions to get a federal judicial system. The Act bowed to the Anti-Federalists in two general ways: It restricted federal jurisdiction more narrowly than the Constitution required, and it tied the federal courts to the legal and political culture of the states.

Jurisdiction

The Act limited federal trial court jurisdiction mainly to admiralty, diversity, and U.S. plaintiff cases, and to federal criminal cases.

There was little dispute about the need to create national admiralty courts. Even opponents of the Constitution recognized the importance of maritime commerce and the inability of the government under the Articles of Confederation to provide an adequate judicial forum for resolving admiralty disputes. (Pursuant to an authorization in the Articles of Confederation, the Continental Congress in 1780 established a United States Court of Appeals in Cases of Capture, but that court had been undermined by widespread refusal to honor its mandates.) When proposals to abolish Congress's Article III authority to establish federal courts were made in the state ratifying conventions and in the first Congress, there was usually an exception for courts of admiralty.

A major concession to the Anti-Federalists concerned jurisdiction over cases arising under the federal Constitution or laws: For the most part, unless diversity were present, such cases could only be filed in state court. The Act made some specific grants to federal courts; the admiralty jurisdiction, for example, and jurisdiction over treaty rights cases.[21] Section 14 authorized federal judges to issue writs of habeas corpus concerning the legality of federal detentions. And Congress added incrementally to federal courts' federal question jurisdiction—starting in 1790 with certain patent cases[22]—but not until 1875 did it issue a general grant. The absence of such a grant meant less in 1789 than it would mean today or in 1875; federal statutory law was quite limited in the early years.

Other provisions of the Act reflected the same fear of overbearing judicial procedures that produced the Fourth through Eighth Amendments to the Constitution. For example, to alleviate fears that citizens would be dragged into court from

long distances, § 3 specified places and terms of holding court in each district, and § 11 provided that civil suits must be filed in the defendant's district of residence. Sections 9 and 12 protected the right to civil and criminal juries in the district and circuit courts, as the Sixth and Seventh Amendments would later do, and § 29 protected juror selection and qualifications from federal judicial control by directing courts to use the methods of their respective states. Sections 22 and 25 protected jury verdicts from appellate review. These sections responded to vigorous attacks on Article III's qualified grant to the Supreme Court of "appellate jurisdiction, both as to law and fact." And, as noted above, § 14 authorized federal judges to issue writs of habeas corpus to inquire into instances of federal detention.

A major nationalist victory in the Act was implementing the constitutional authorization of jurisdiction in cases "between citizens of different States" and cases involving aliens. Section 11 authorized the circuit courts, concurrently with the state courts, to hear suits when "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."[23]

Why did the Federalists want this federal diversity of citizenship jurisdiction? It was not simply—perhaps not even mainly—out of fear that state courts would be biased against out-of-state litigants. Rather, they worried about the potential for control over judges by state legislatures, which selected judges in most states and had the authority to remove them in over half the states. Given the influence of debtor interests in state legislatures, the Federalists worried that state judges might be reluctant to enforce unpopular contracts or generally foster the stable legal conditions necessary for commercial growth. Diversity jurisdiction was necessary to avoid a return to the conditions under the Articles of Confederation.[24] Anti-Federalists fought the diversity of citizenship jurisdiction: it "would involve the people of these States into the most ruinous and distressing law suits."[25] To quiet these fears, the Act established a jurisdictional minimum of $500, so that defendants would not have to travel long distances in relatively minor cases, and made state law the rules of decision in the absence of applicable federal law.[26]

The states as the organizational unit of federal courts

The Federalists achieved their goal of establishing a federal trial judiciary rather than leaving all trials in the state courts. But the federal courts that the Act created were not designed to be completely free of the influence of their states' politics and legal culture. The federal judiciary's fierce independence in protecting

national legal rights against occasional state encroachment has been sustained by factors other than the geographic structure of the national court system.

It seems axiomatic today that no district or circuit boundary should cross a state line because (with one minor exception[27]) none does. The 1789 Judiciary Act set this precedent, just as it required the district judges to reside in their districts.[28] These requirements create inevitable relationships between federal courts and the states in which they sit. But state boundaries are not the only way that federal court boundaries could be defined. The creators of the federal judiciary might have established separate judicial administrative divisions that would ensure roughly equal allocation of workload and would be subject to realignment to maintain the allocation. In 1800, a last-gasp Federalist bill to revamp the judicial system would have divided the United States into 9 circuits and 29 districts, each district with a distinctive name, and bearing no direct relation to state names or boundaries. For example, in the northern part of what is now the Second Circuit there would have been the district of Champlain, and in the western part of what is now the Fourth would have been the district of Cumberland.[29] Whatever administrative sense this arrangement might have made, it ran counter to the strong preference that federal courts have ties to the states in which they sit.

Circuit riding

To observers today, perhaps the most curious thing about the 1789 Judiciary Act was Congress's decision to create a major federal trial court but not to create any separate judgeships for it. Instead, the Act directed the two Supreme Court justices assigned to each circuit to travel to the designated places of holding circuit court, to be joined there by the district judge. This requirement, along with a sparse Supreme Court caseload in the early period, meant that the early Supreme Court justices spent most of their time serving as trial judges.

Circuit riding was common in the states. It was attractive to Congress for three reasons. First, it saved the money a separate corps of judges would require. In 1792, the Georgia district court judge reported that Congress declined to create separate circuit judgeships not only because "the public mind was not sufficiently impressed with the importance of a steady, uniform, and prompt administration of justice," but also because "money matters have so strong a hold on the thoughts and personal feelings of men, that everything else seems little in comparison."[30] Second, circuit riding exposed the justices to the state laws they would interpret on the Supreme Court, and to legal practices around the country—it let them "mingle in the strife of jury trials,"[31] as a defender of circuit riding said in 1864. Third, it

contributed to what today we call "nation building." It would, so went the argument, "impress the citizens of the United States favorably toward the general government, should the most distinguished judges visit every state."[32] (In fact, they did more than visit. The justices' grand jury charges explained the new regime to prominent citizens all over the country, winning praise from the Federalist press and, increasingly, barbs from the Jeffersonian press.)[33]

Whatever logic supported circuit riding, the justices themselves set about almost immediately to abolish it. They saw themselves as "travelling postboys."[34] They doubted, in the words of a Senate ally, "that riding rapidly from one end of this country to another is the best way to study law."[35] Furthermore, they warned President Washington, trial judges who serve also as appellate judges are sometimes required to "correct in one capacity the errors which they themselves may have committed in another . . . a distinction unfriendly to impartial justice."[36] The 1789 Act prohibited district judges from voting as circuit judges in appeals from their district court decisions[37] but placed no similar prohibition on Supreme Court justices. The justices themselves agreed to recuse themselves from appeals from their own decisions unless there was a split vote[38] (a rare occurrence). Congress's only response to their complaints was a 1793 statute reducing to one the number of justices necessary for a circuit court quorum.[39]

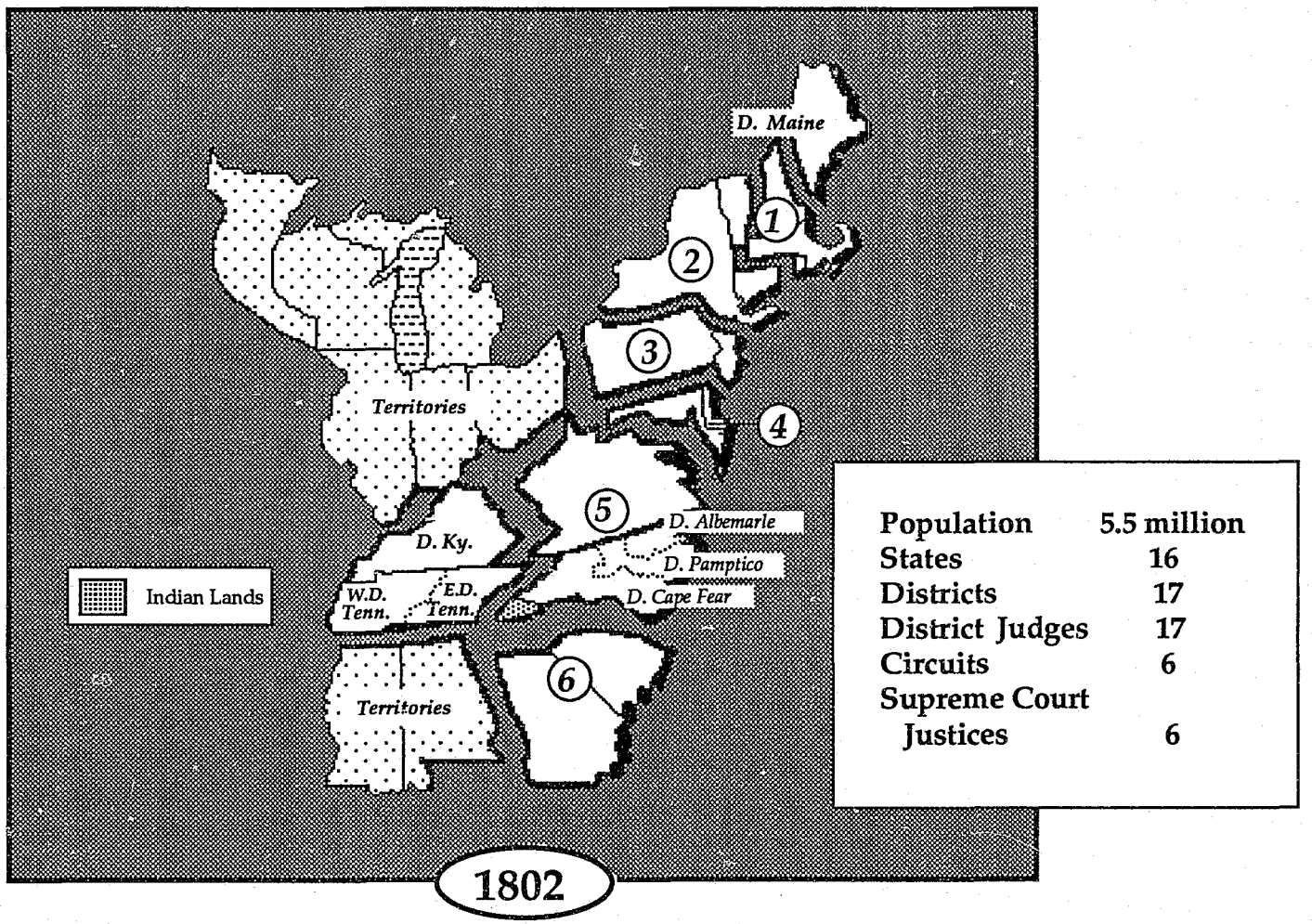
FROM THE FOUNDING TO THE EVARTS ACT

In 1801, as their era drew to a close, the Federalists brought to passage a bill that President Adams had proposed two years earlier. It established separate circuit court judgeships and expanded federal court jurisdiction to all categories of cases authorized by Article III.[40] The incoming Jeffersonians repealed the statute the next year,[41] abolished the judgeships it created, and then passed a new judiciary act.[42] It created six circuits where there had been three and re-established the justices' circuit-riding responsibilities—one justice per circuit, to hold one circuit court session each year in each district within the respective circuit. A quorum of one judge was sufficient to convene the circuit court.

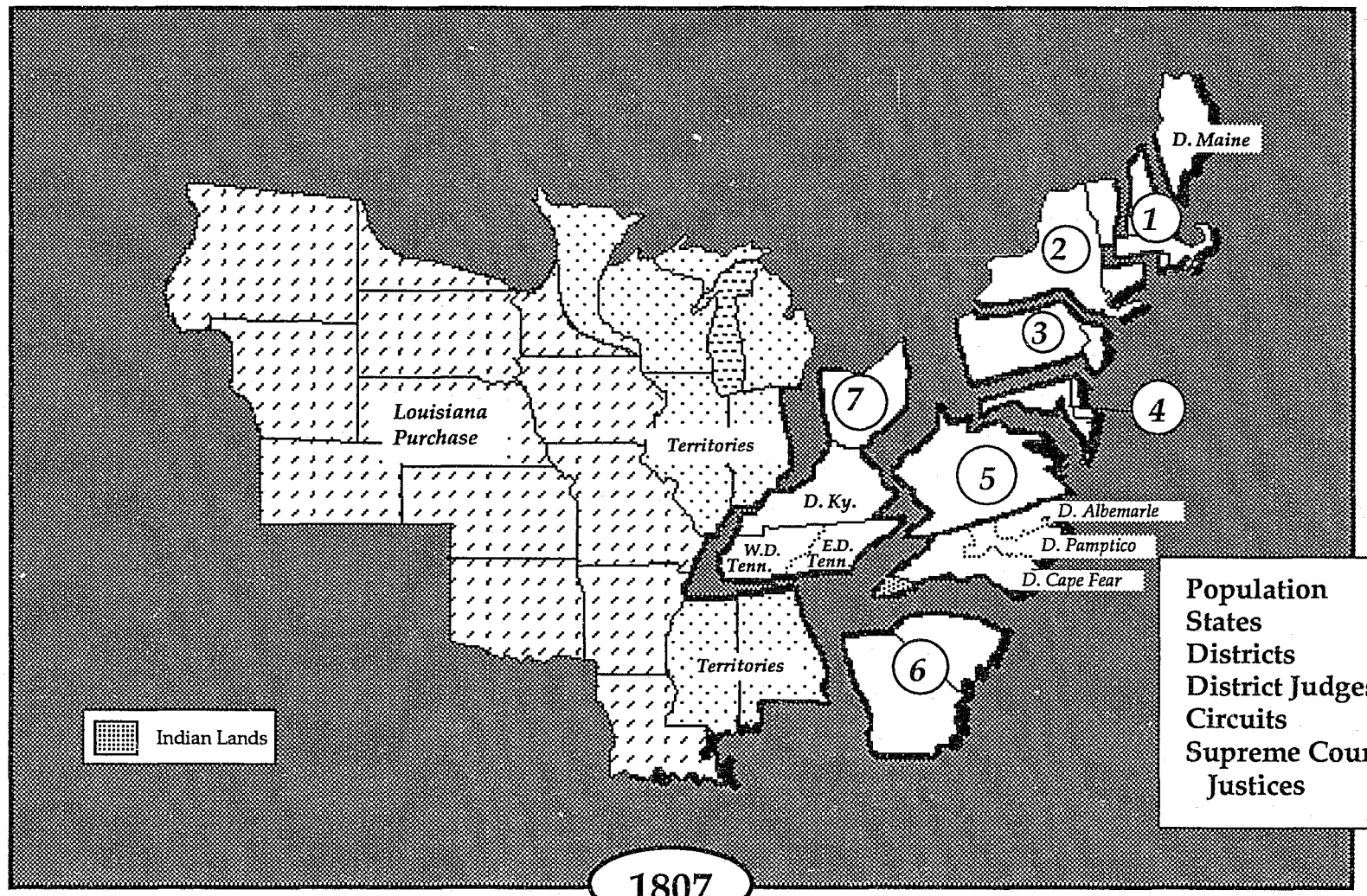
This slight restriction on circuit obligations brought only temporary relief. As time passed. the federal courts' condition deteriorated as case overload swelled. A political stalemate over the role the federal courts should play in national life made resolution impossible until 1891.

Westward Expansion

Between 1789 and 1855 the number of states increased to 31, and U.S. territorial possessions grew as well. The logic of the 1789 Judiciary Act dictated that new states and territories have their own district and circuit courts. The justices, however, found the travel burden of even the existing circuits to be too great. Congress thus created new circuits and gradually increased the size of the Supreme Court to provide justices for them. The expansion was not a smooth process. Creating a new seat on the Supreme Court became entwined with the politics of filling the seat. Thus, new states were often left in limbo, with the district courts exercising both district and circuit court jurisdiction. Not until the Civil War was every district within a



Upon taking control of the government, Jeffersonian Republicans repealed the 1801 Judiciary Act, a Federalist measure that had created six circuits and separate circuit judges. The 1802 Act, however, kept the enlarged number of circuits, and reduced the Supreme Court justices' circuit-riding obligations (as had earlier legislation).



Congress created the Seventh Circuit, which comprised Kentucky, Tennessee, and Ohio (admitted as a state in 1803). The number of justices on the Supreme Court was increased from six to seven, with the seventh assigned to this new circuit.

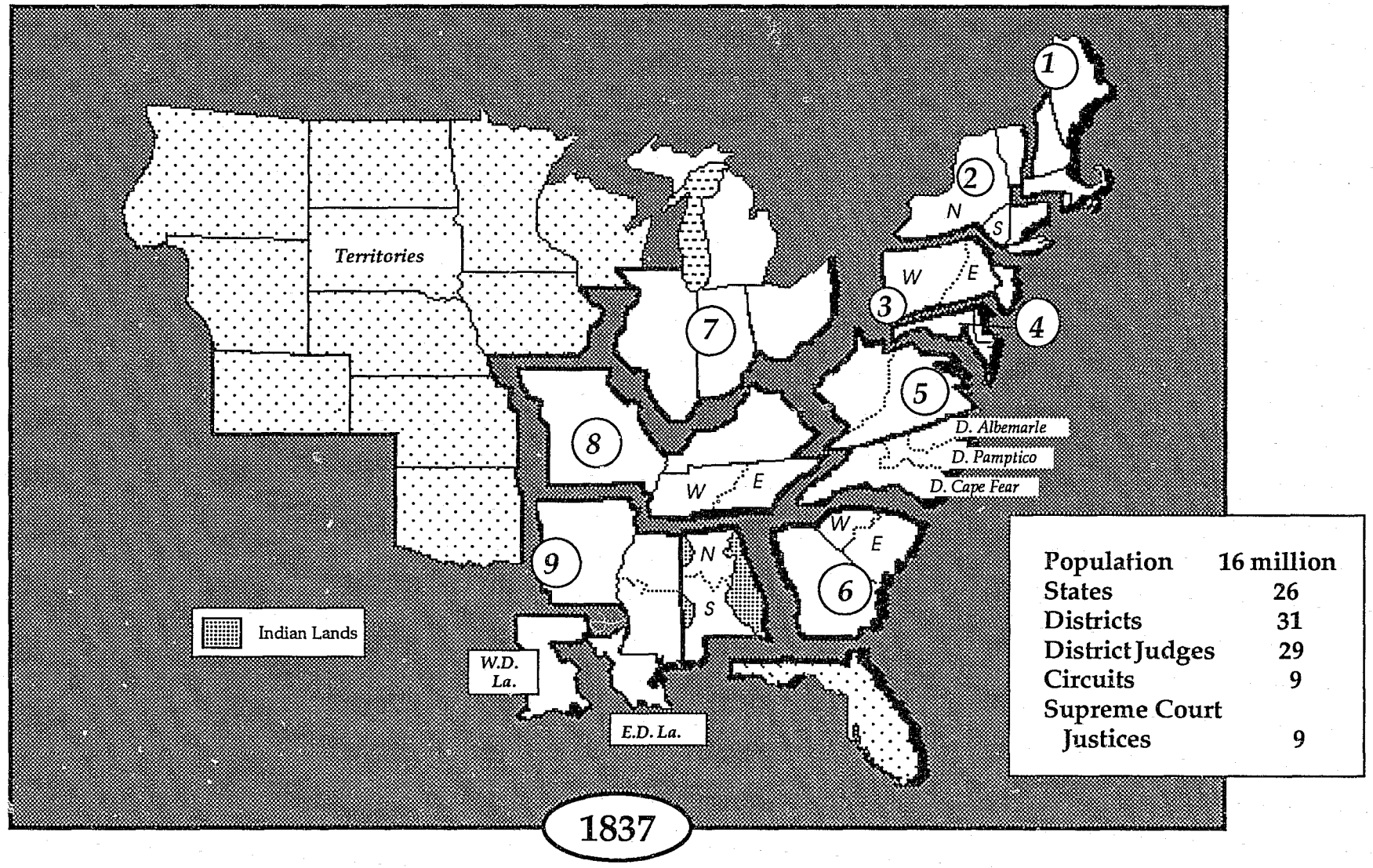
circuit served by Supreme Court justices. (The territories, moreover, were also served by separate territorial courts, established pursuant to Congress's power to provide rules for the government of the territories. Although beyond the scope of this monograph, the territorial courts were vital instruments of government during the nineteenth century.)

The number of circuits reached its nineteenth-century high point in 1855. To deal with a large number of land disputes in California, Congress created a separate, tenth, circuit for the state's two districts and, for the first time, authorized a separate circuit judge.[43] The Supreme Court reached its largest size in 1863, when Stephen Field of California took his seat on the Court, as the justice for the newly created Tenth Circuit.[44] (Although the Court had ten members, it appears that the ten never sat as a group because of the illnesses of Chief Justice Taney in 1863–1864 and of Justices Catron and Davis the next term.[45] An 1866 statute[46] sought to reduce the Court's size by forbidding replacement nominations until the Court consisted of seven members. Traditionally regarded as an effort to restrict President Johnson's power, the statute may well in fact have been aimed mainly at producing a Court of more manageable size, evidently with the justices' support.[47] The net effect was a nine-member Court after Justice Catron died in 1865, and an eight-member Court from Justice Wayne's death in 1867 until March 1870, when Justice Bradley was appointed pursuant to a statute raising the Court's authorized size back to nine.[48]

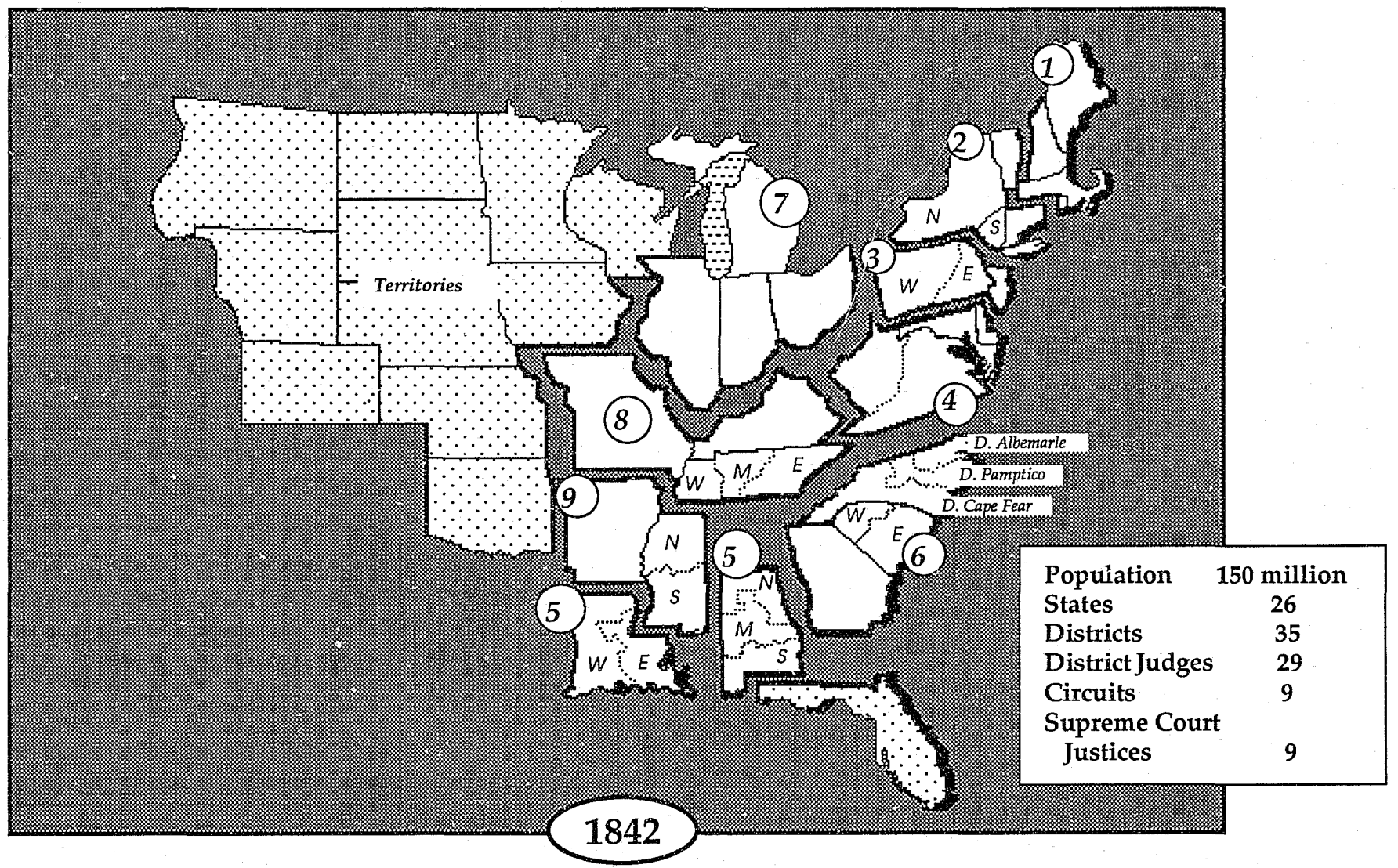
Reorganizing the Federal Courts

From the Civil War period until 1891, the nation engaged in an extended debate over how to reorganize the federal courts. The debate took place in the context of a broader argument over the proper role of the federal judiciary in national life.

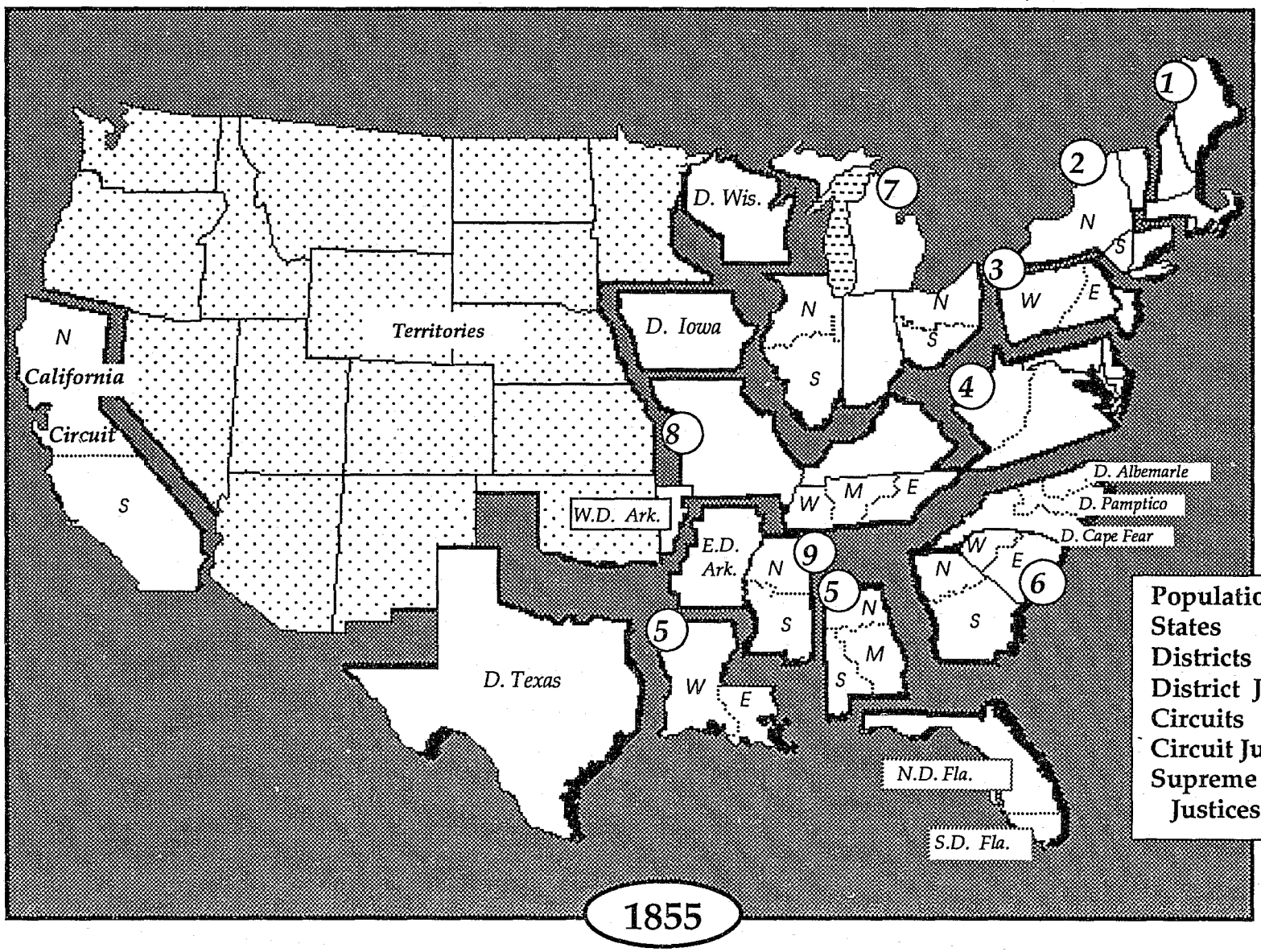
In 1861, in his first message to Congress on the state of the union, President Lincoln warned that "the country has outgrown our present judicial system."[49] The problem as he saw it was that the circuit system as established in 1789 could not accommodate the growth of the country. In 1861, eight recently admitted states had never had "circuit courts attended by supreme judges." Adding enough justices to the Supreme Court to accommodate all the circuit courts that were needed would make the Supreme



By 1837, nine new states had been admitted to the Union. Congress created two new circuits—the Eighth and the Ninth—and added two justices to the Supreme Court to preside in them. With this change, every state in the Union was part of a circuit, although Louisiana's Western District was not; its district court exercised both district and circuit court jurisdiction. Some district judges now served in more than one district.



Congress reorganized the circuits to relieve the workload of Justice John McKinley, who covered the four states of the former Ninth Circuit. Congress reduced that circuit to the two states of Arkansas and Mississippi and joined Alabama and Louisiana in the new Fifth Circuit, the only time continental states in a circuit were not contiguous.



Population	150 million
States	31
Districts	46
District Judges	39
Circuits	10
Circuit Judges	1
Supreme Court Justices	9

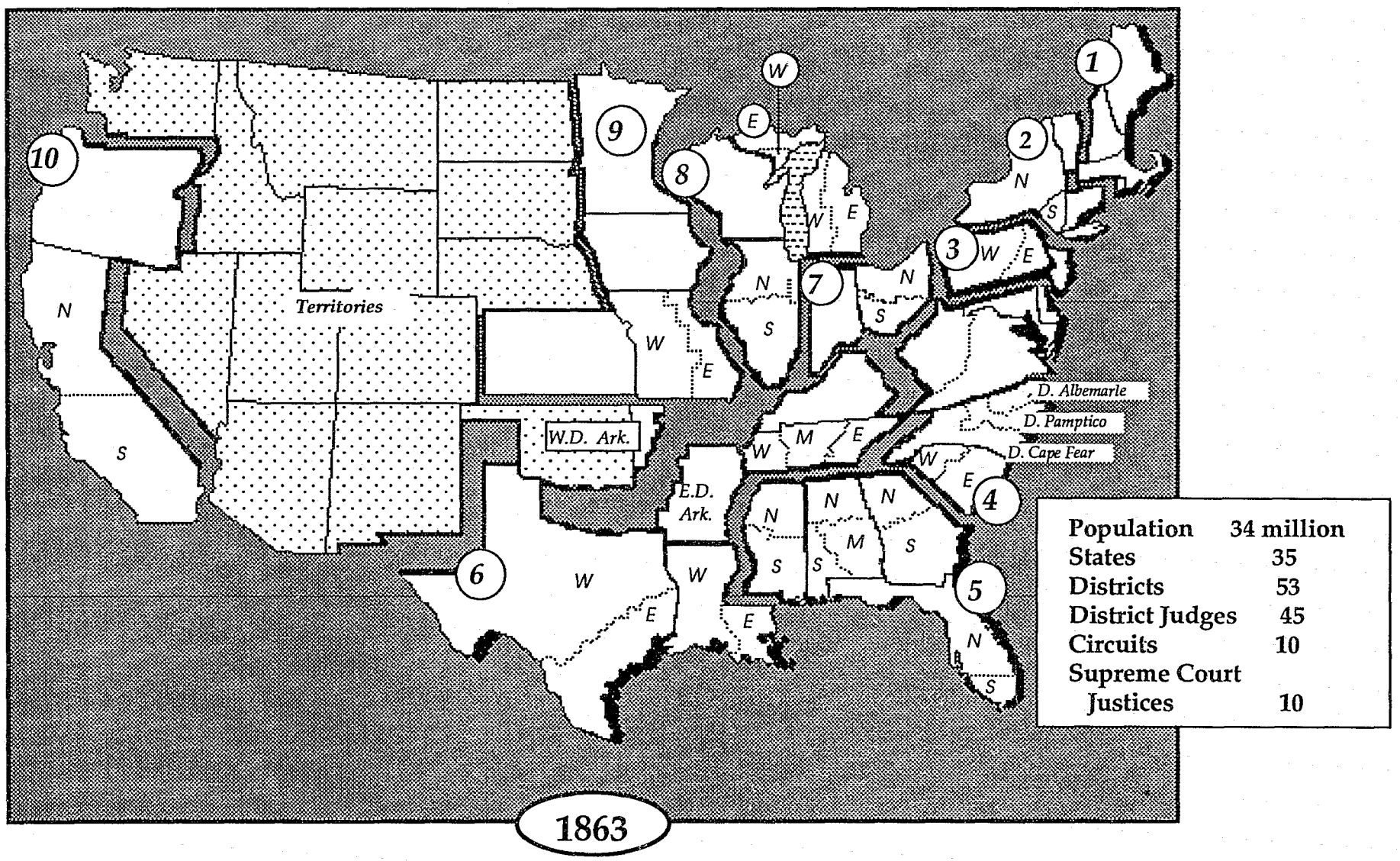
In 1855, Congress created a separate judicial circuit, "constituted in and for the state of California, to be known as the circuit court of the United States for the districts of California," with the same jurisdiction as the numbered circuits. Rather than increasing the number of Supreme Court justices, Congress authorized a circuit judgeship for the circuit.

Court "altogether too numerous for a judicial body of any sort." His solution: Fix the Supreme Court at a "convenient number," irrespective of the number of circuits. Then divide the country "into circuits of convenient size," to be served either by the Supreme Court justices and as many more separate circuit judges as might be necessary, or by separate circuit judges only. Or abolish the circuit courts.

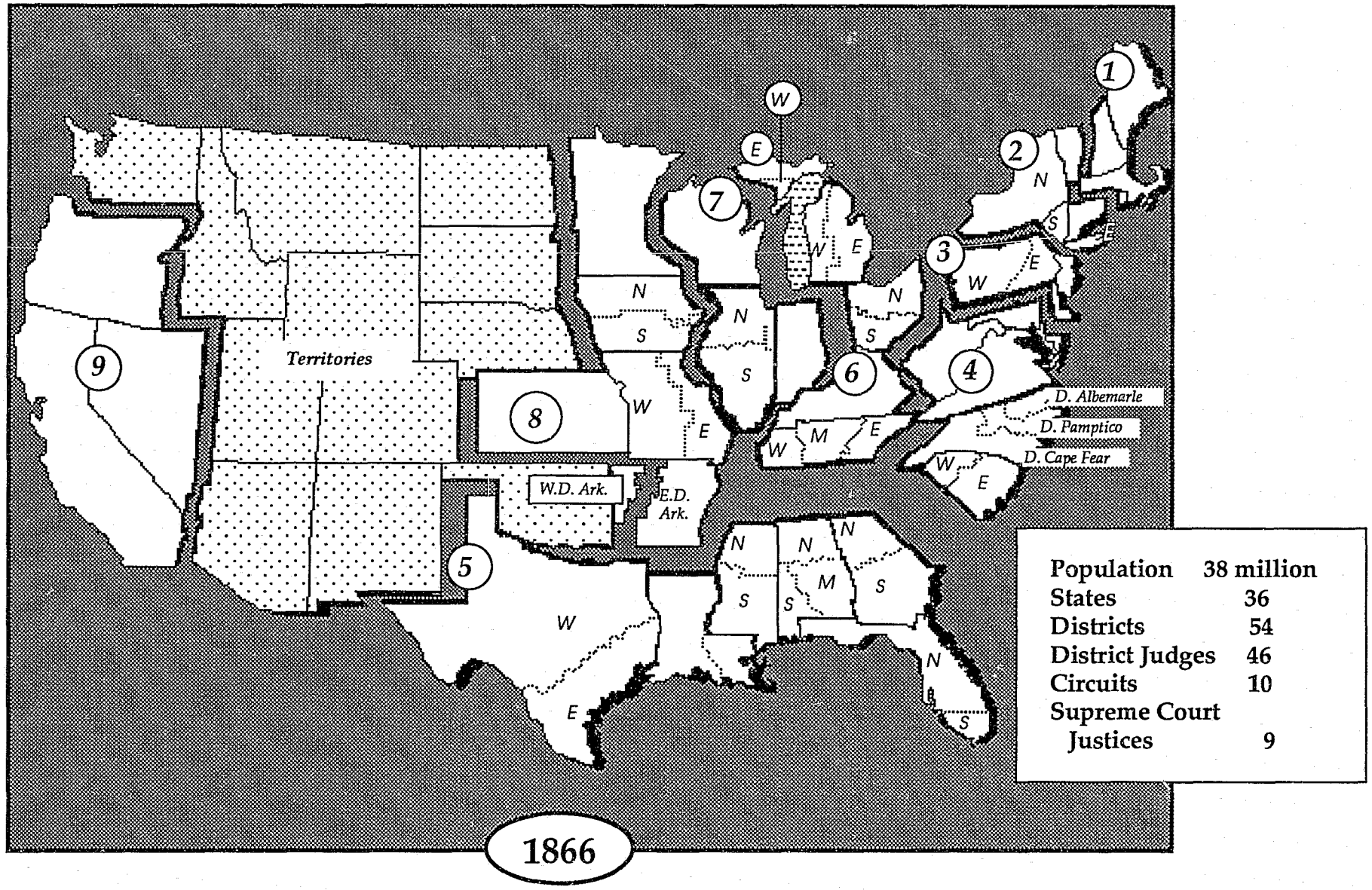
Adjusting the circuit system was not the only problem. Lincoln noted also that many federal statutes "have been drawn in haste and without sufficient caution . . . as to render it very difficult for even the best informed persons to ascertain precisely what the statute law really is." Furthermore, although Lincoln did not mention it, the Supreme Court and, apparently, the circuit and district courts were increasingly backlogged.

Before the Civil War, a growing economy, and the emergence of the business corporation, increased the federal courts' workload as their decisions created the legal conditions for commercial growth and expansion in maritime trade and in domestic commercial activity.[50] Congress steadily expanded the Supreme Court's jurisdiction.[51] After the Civil War came statutes to promote and regulate economic growth, the enforcement of which fell to federal courts through diversity or statutory grants of jurisdiction. Other laws expanded federal court jurisdiction to implement Reconstruction and to enforce the Reconstruction Amendments.[52] The budget offers one measure of the growth of federal court business. In 1850, the U.S. Treasury expended $500,000 on the federal courts, a figure that rose to $3,000,000 by 1875.[53]

Federal court business grew even more with the Judiciary Act of 1875,[54] doing essentially what the most ardent Federalists would have done in 1789: establish a general federal-question jurisdiction in the federal trial courts for cases involving $500 or more. It was adopted on the same day as the 1875 Civil Rights Act,[55] and, as one observer has said, the two statutes together "may be seen as an ultimate expression of Republican reconstruction policies. One recognized a national obligation to confer and guarantee first-class citizenship to the freedman. The other marked an expression of the party's nationalizing impulse and complementary concern for the national market."[56] Although the 1875 Civil Rights Act was invalidated by the Supreme Court eight years later,[57] the 1875 Judiciary Act made the federal trial courts, in Frankfurter and Landis's words, "the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States."[58]



In 1862, Congress added the states that had been admitted since 1842 to existing circuits. The following year, Congress abolished the Circuit Court for California and created the Tenth Circuit, consisting of California and Oregon. One justice was added to the Supreme Court for this circuit.



After the Civil War, Congress reduced the number of circuits to nine, adding Nevada to the new Ninth Circuit, formerly the Tenth. By law, Congress sought to limit the size of the Court by prohibiting appointments until the Court reached an authorized size of six associate justices, plus the Chief Justice. Congress restored the Supreme Court to nine justices in 1869, at the same time creating a circuit judge for each of the nine circuits "who shall reside in his circuit, and shall possess the same power and jurisdiction therein as the justice of the Supreme Court alloted to the circuit." Between 1867 and 1929, newly admitted states were added to either the Eight or the Ninth Circuit.

This vast expansion of federal court jurisdiction, especially the 1875 Judiciary Act, had two effects. In the long term, it established the federal courts' preeminent role as protectors of constitutional and statutory rights and liberties and as interpreters of the growing mass of federal statutes and administrative regulations. In the short term, by imposing significant jurisdictional increases on a court system conceived in 1789, it created serious delay in the administration of federal justice. In fact, Hart and Wechsler referred to the post-Civil War period as "the nadir of federal judicial administration,"[59] a condition which makes all the more remarkable what another scholar has called "the unifying function of the federal courts" in promoting commercial growth during the period.[60]

Numerous proposals to revamp the system led only to tinkering with the number, size, and terms of the federal courts. As a result, the nation lost much of its dwindling federal appellate capacity. Appellate review was statutorily foreclosed in many classes of cases. The decisions of the circuit courts were final in almost all criminal cases and in all civil cases involving less than $2,000 (after 1875, $5,000).[61] And even with this limitation, the Court's docket grew steeply. In 1860, the Court had 310 cases on its docket. By 1890, the 623 new cases filed that year brought the docket to 1,816 cases.[62] The Court was years behind in its work and, unlike today, was obliged to decide almost all the cases brought to it.

Consequently, decisions of federal trial courts were, for practical purposes, almost unreviewable. Those courts, moreover, had their own workload problems. Even with a partial restriction on diversity jurisdiction in 1887,[63] cases pending rose from 29,013 in 1873 to 54,194 in 1890,[64] or 86%. The number of district and circuit judges grew only by 11%, from 62 in 1873 to 69 in 1890.[65] Congress in 1869 had created nine circuit judgeships, realizing that the Supreme Court justices could attend but a fraction of the circuit court sessions. These nine judgeships were far too few to accommodate the increase in filings. In addition, the 1875 Act shifted some of the original jurisdiction of the circuit courts to the district courts and broadened the circuit courts' appellate jurisdiction. In the 1870s, single district judges handled about two thirds of the circuit court caseload. In the next decade, the figure was much closer to 90%—and often the district judges were sitting on appeals from their own decisions, thus making "the single district judges to a considerable extent ultimate courts of appeals."[66]

In one sense, the growing post-Civil War inability of the federal courts to accommodate this increased jurisdiction was caused by the inability of the bench and bar and legislators to

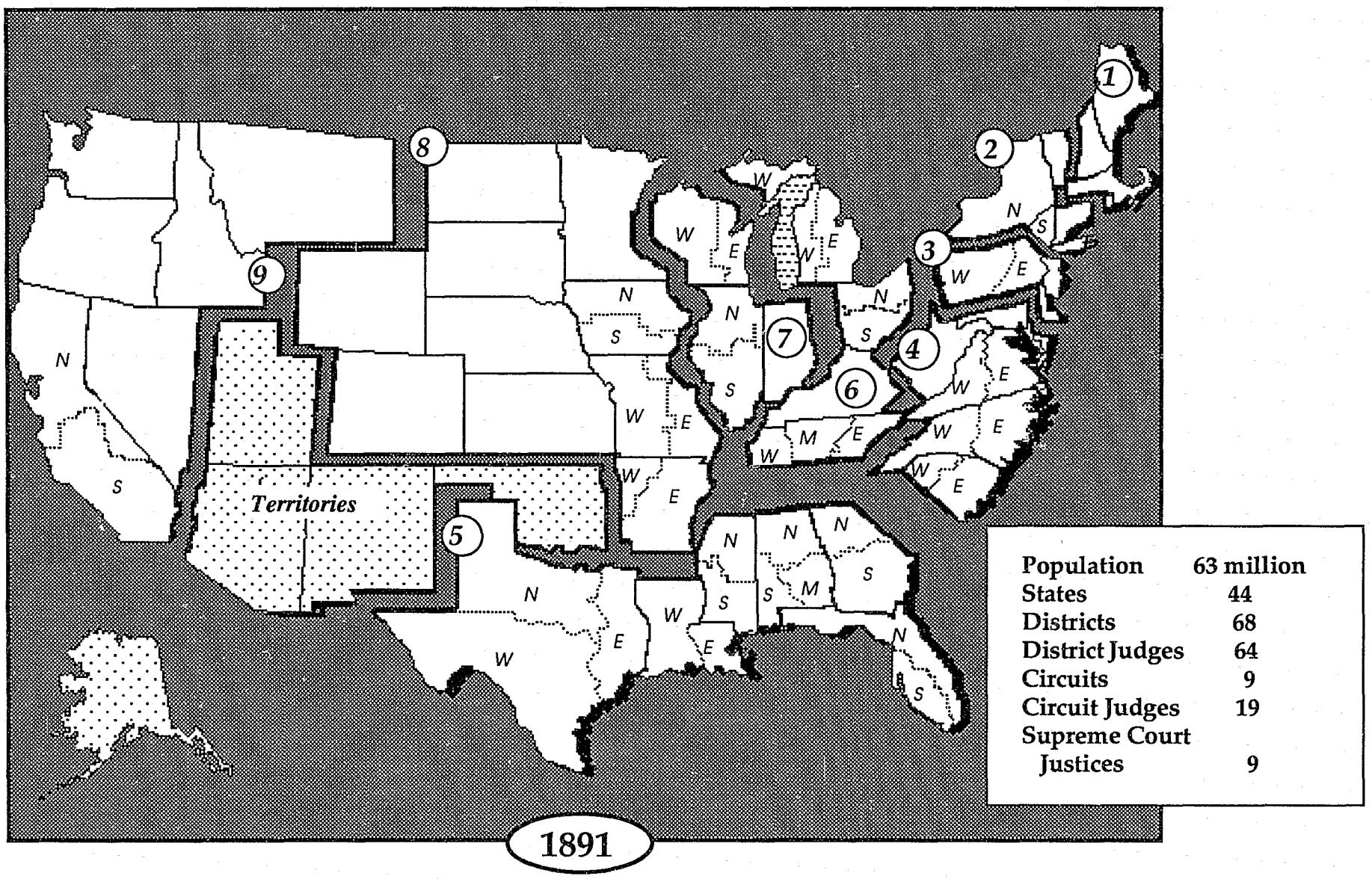
discover an effective scheme of judicial organization: one that could accommodate this new workload and still serve other values that some members of the bar and the legislature thought important, such as circuit riding. Numerous proposals were offered. Some were for an intermediate court of appeals, echoing bills introduced even before the Civil War and anticipating the reorganization of 1891. Others seem more curious today. Some proposed an 18-member Supreme Court, with nine serving on the circuits through a three-judge rotational scheme. Others suggested a Supreme Court divided into three panels to hear common-law, equity, and admiralty and revenue cases, with constitutional cases going to the Court en banc.[67]

But inability to agree on a new form for the courts reflected a more basic conflict. As Frankfurter and Landis put it:

> The reorganization of the federal judiciary did not involve merely technical questions of judicial organization, nor was it the concern only of lawyers. Beneath the surface of the controversy lay passionate issues of power as between the states and the Federal Government, involving sectional differences and sectional susceptibilities. . . . Stubborn political convictions and strong interests were at stake which made the process of accommodation long and precarious.[68]

The conflicts between Federalists and Anti-Federalists resurfaced a century later. One group, based mainly in the House of Representatives and drawing strength mainly from the South and the West, wanted to retain the traditional form of the federal courts but restrict their jurisdiction. They believed, not without some evidence, that federal courts were too sympathetic to commercial interests, too eager to frustrate state legislative efforts designed to help farmers and workers. An Illinois congressman argued that the post-Civil War "increase of . . . jurisdiction . . . grew out of the then anomalous conditions of the country and was largely influenced by the passions and prejudices of the times." To regard "Federal courts . . . as the safeguards of the rights of the people . . . is a great mistake and . . . lessens respect for State courts, State rights, and State protection."[69]

A separate coalition, with strength in the Senate and based in the East, wanted to broaden the federal courts' capacity to enable them to exercise the expanded jurisdiction created in the wave of nationalist sentiment after the Civil War. One proponent cited "prejudice" by state courts against corporation and "in the West . . . granger laws and granger excitements that have led people to commit enormities in legislation. . . . Capital . . . will not be risked in the perils of sectional bitterness, narrow prejudices, or local indifference to integrity and honor." The solution: "Let us stand by the national courts; let us preserve their power."[70]

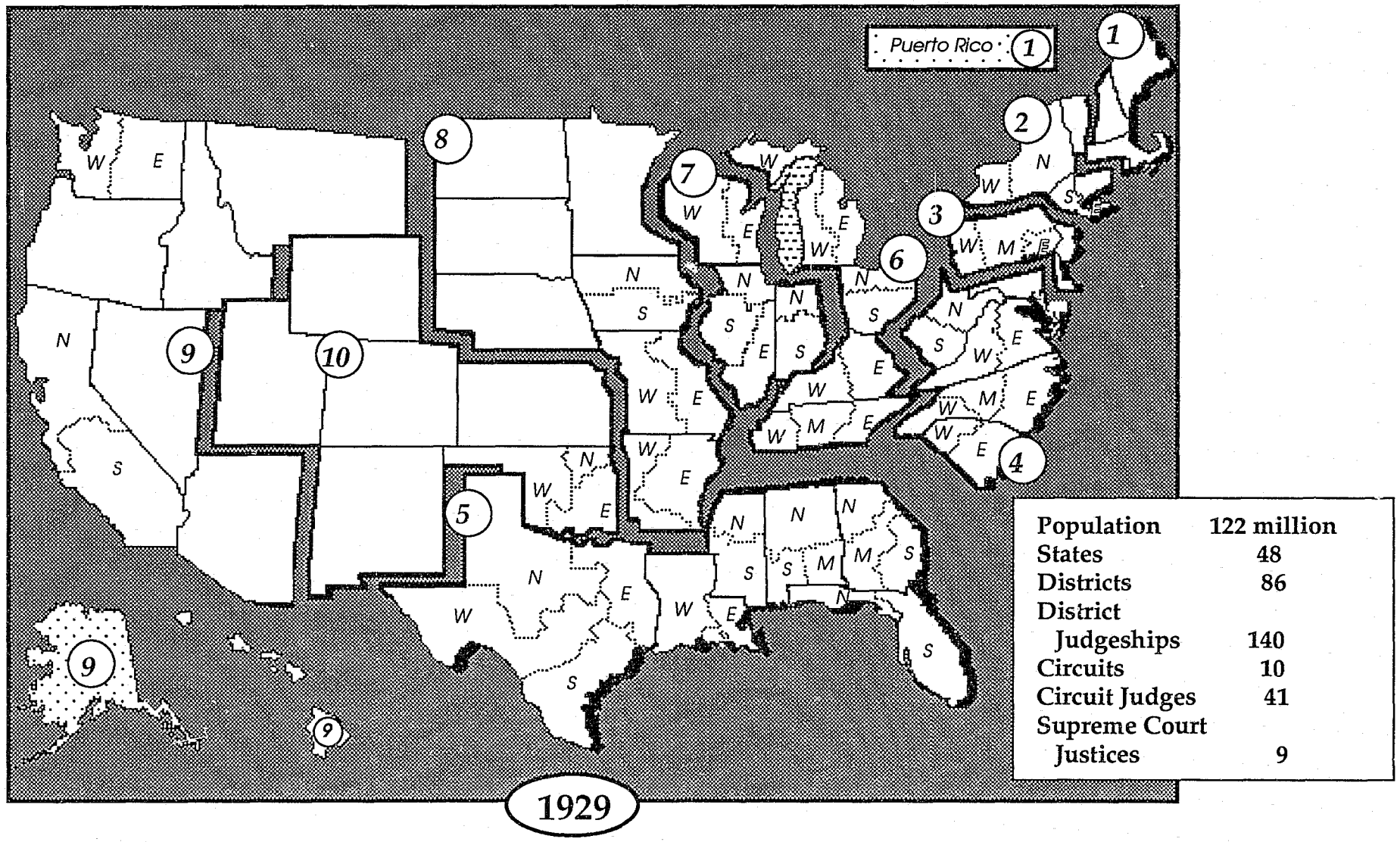


By the year in which Congress created the Circuit Courts of Appeals, the United States numbered 44. Utah, Oklahoma, Arizona, and New Mexico joined the Union within the next two decades, making the continental United States complete. Arizona was added to the Ninth Circuit; the other three states joined the Eighth. In 1911, Congress abolished the old circuit courts, which had exercised only trial jurisdiction since 1891.

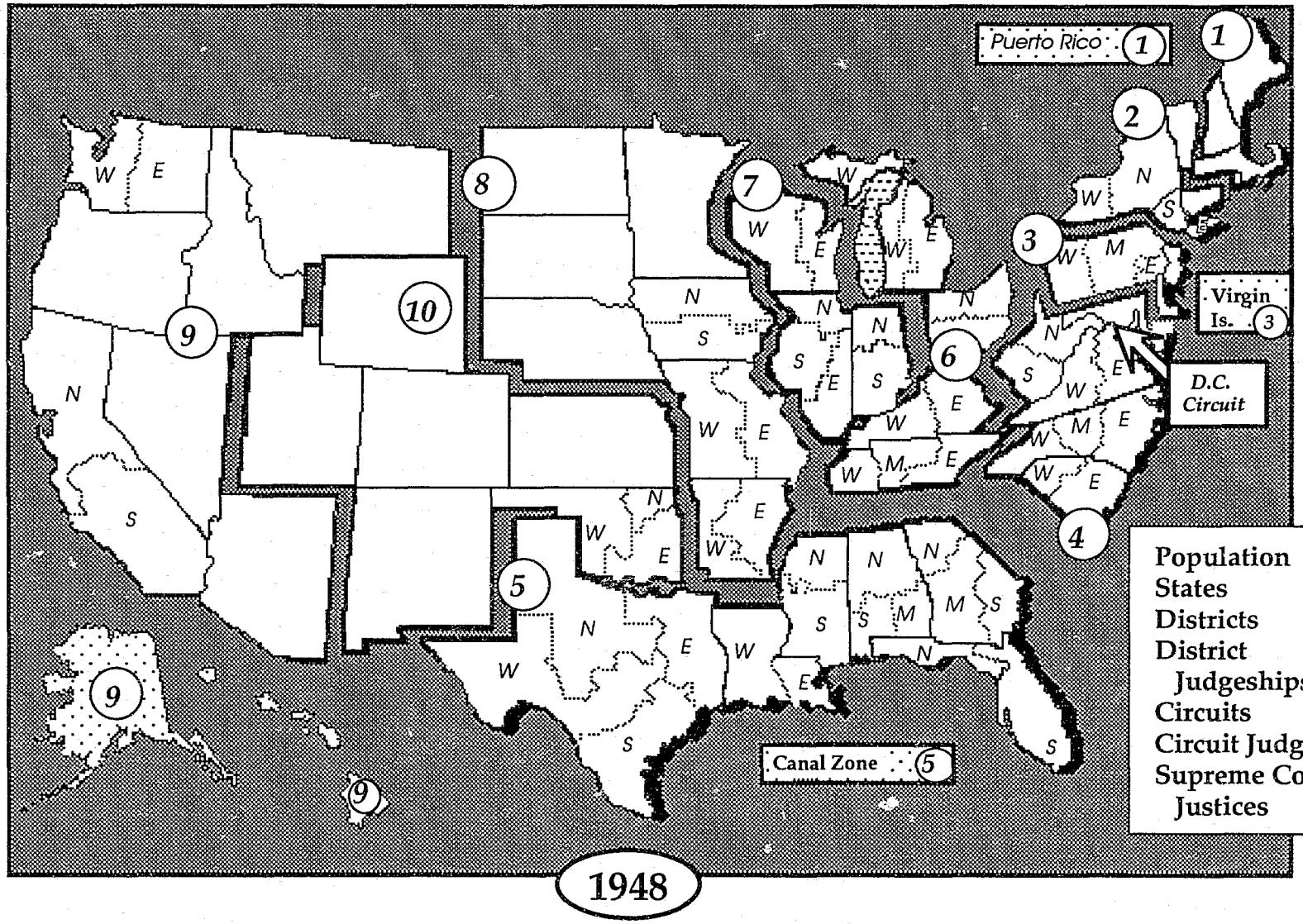
The culmination of this controversy was the Circuit Court of Appeals Act of 1891,[71] worked out by Senate Judiciary Committee Chairman William Evarts of New York. According to Henry Adams, Evarts prided himself on his ability to do the things he didn't like to do.[72] He had resisted the idea of separate courts of appeals for a long time. In accepting the concept, Evarts fashioned legislation that resolved the crisis in favor of the nationalists, although there were modest concessions to those who favored the old form.

What did the Act do? Essentially, it shifted the appellate caseload burden from the Supreme Court to new courts of appeals, and, in so doing, made the federal district courts the system's primary trial courts. It created a new court, the circuit court of appeals, with one for each of the nine circuits. Each court consisted, in effect, of two circuit judges and a district judge. It provided direct Supreme Court review of right from the district courts in some categories of cases and from circuit courts of appeal in others. It routed all other cases—notably criminal, diversity, admiralty, and revenue and patent cases—to the courts of appeals for final disposition. The appellate court could certify questions to the Supreme Court, or the Supreme Court could grant review by certiorari. The Act's effect on the Supreme Court was immediate—from 623 filings in 1890 to 379 in 1891 and 275 in 1892.[73]

Deference to tradition temporarily spared the old circuit courts, but the Act abolished their appellate jurisdiction. Until the courts themselves were abolished in 1911,[74] the nation still had two separate federal trial courts. Neither did the Act abolish the justices' circuit riding, but rather made it optional, thus quietly burying this anachronism in similar deference to tradition. The important legacy today of justices' circuit riding is 28 U.S.C. § 42, which directs the Court to allot its members "as circuit justices."



By 1929, the Eighth Circuit had grown to 13 states. Many plans had been proposed to address the growth of the western circuits; Congress finally chose simply to divide the Eighth into two, creating a Tenth Circuit. Hawaii, a territory acquired in 1898, was formally incorporated in the Ninth Circuit; Puerto Rico, a United States territory after 1899, was added to the First.



Population	150 million
States	48
Districts	87
District Judgeships	196
Circuits	11
Circuit Judges	58
Supreme Court Justices	9

The recodification of Title 28 regularized many features of the judicial system. The D.C. Circuit was formally specified; the U.S. Court of Appeals for the District of Columbia had been established in 1893. The territories of Alaska, the Virgin Islands, and the Canal Zone were officially added to specific circuits.

CONCLUSION

In their 200th year, the federal courts differ strikingly in size and structure from their forerunners in 1891, and even more from those of 1789. An expanding jurisdiction has generated a growing caseload, generating in turn a large increase in the size of the system. Since 1891, the number of authorized judgeships has grown almost nine-fold, from 84 to 739[75] (compared with a five-fold increase in the first century from the 19 judges originally authorized). In 1925, the federal judiciary employed 1,284 persons, of whom 179, or 13.9%, were Article III judges.[76] In 1988, it employed 20,743 persons, of whom 1,034, or 4.9%, were Article III judges.[77] Figures 1 and 2 give some idea of the change in workload of the federal circuit and district courts in the twentieth century.

The Supreme Court's limited certiorari jurisdiction in the 1891 Act has been broadened by successive legislation, the most noteworthy being the Judiciary Act of 1925, and the most recent being Pub. L. No. 100-352 in 1989, which eliminated most remaining categories of the Court's mandatory appellate jurisdiction. The number of courts of appeals has increased from 9 in 1891 to 13 in 1989. The number of district courts has increased from 68 in 1891 to 94 in 1989. The old system of bankruptcy referees was transformed in 1978 and 1984 into bankruptcy courts as units of the district courts.[78] Similarly, the system of U.S. commissioners—dating back to a 1793 statute authorizing circuit courts to appoint persons to take bail—was replaced in 1968 with the U.S. magistrate system.[79] A 1925 statute[80] created a probation system for the federal courts, and a 1982 statute created a permanent pretrial services system. And, in 1964, Congress authorized federal defenders' offices in the various judicial districts. Permanent staff attorneys and court executives have joined the personnel rosters.

Since 1891, the federal courts have achieved administrative autonomy from the executive branch. Legislation in 1939 shifted budgetary and personnel responsibility from the Department of Justice to the Judicial Conference of the United States and created the Administrative Office of the U.S. Courts as staff to the Conference. Circuit councils and conferences, also mandated in 1939, and the recognition of the office of chief district judge and chief circuit judge in 1948, have bolstered the concept of internal federal judicial administration. A separate federal court research and education agency was provided by a 1967 statute.

Figure 1

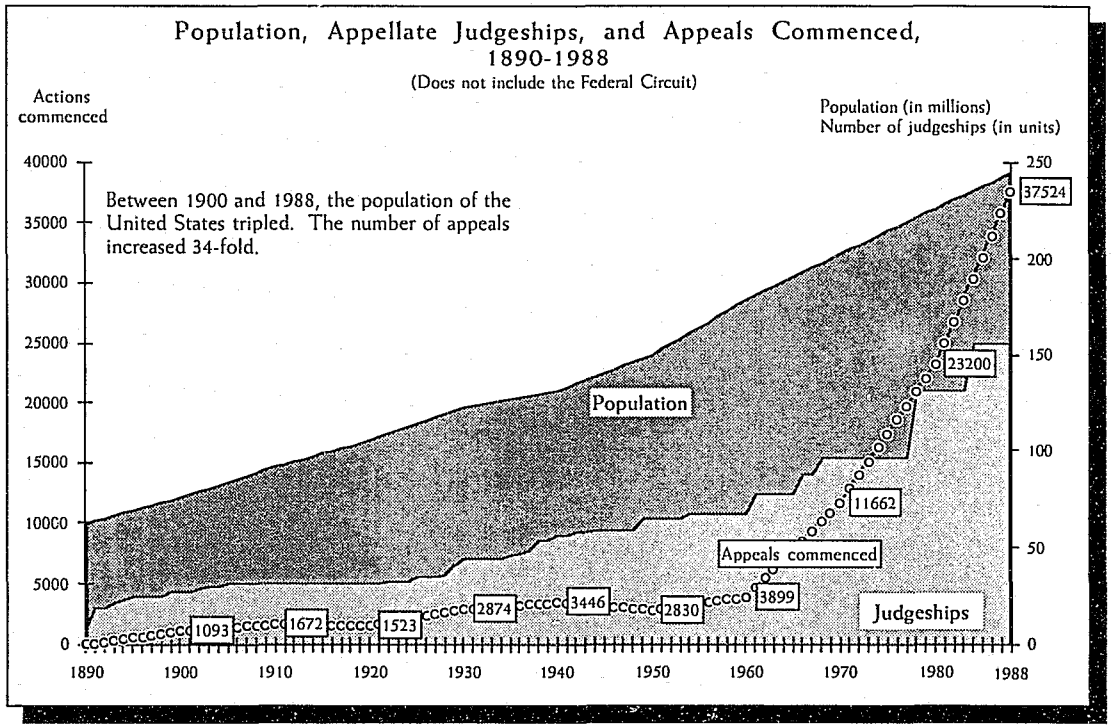
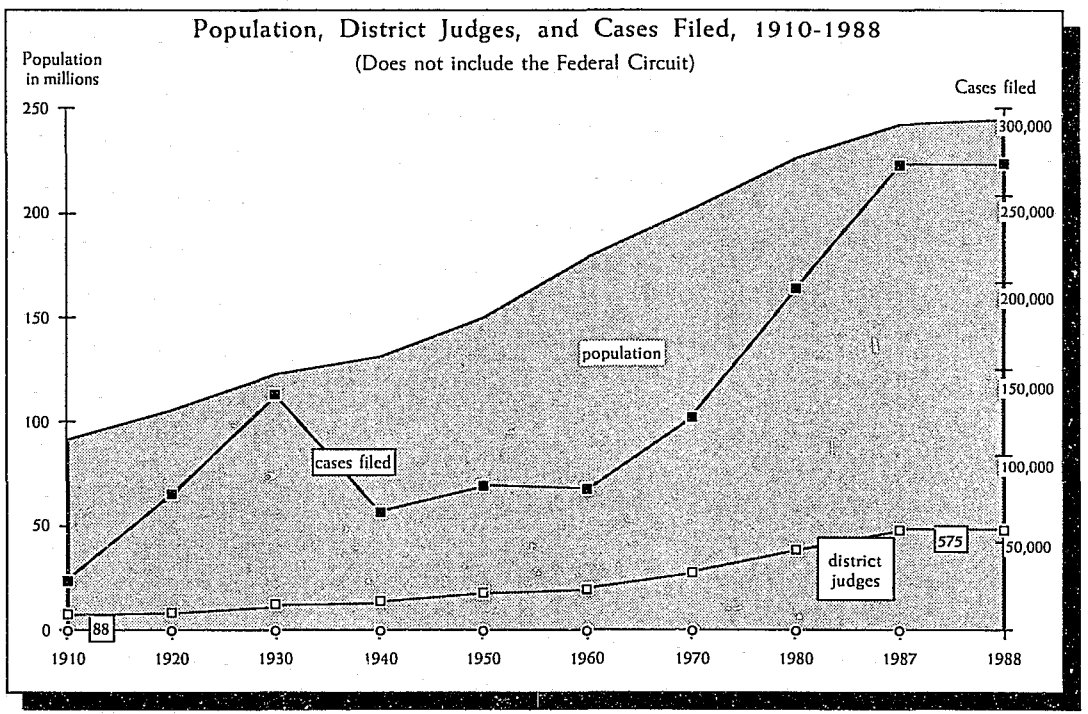
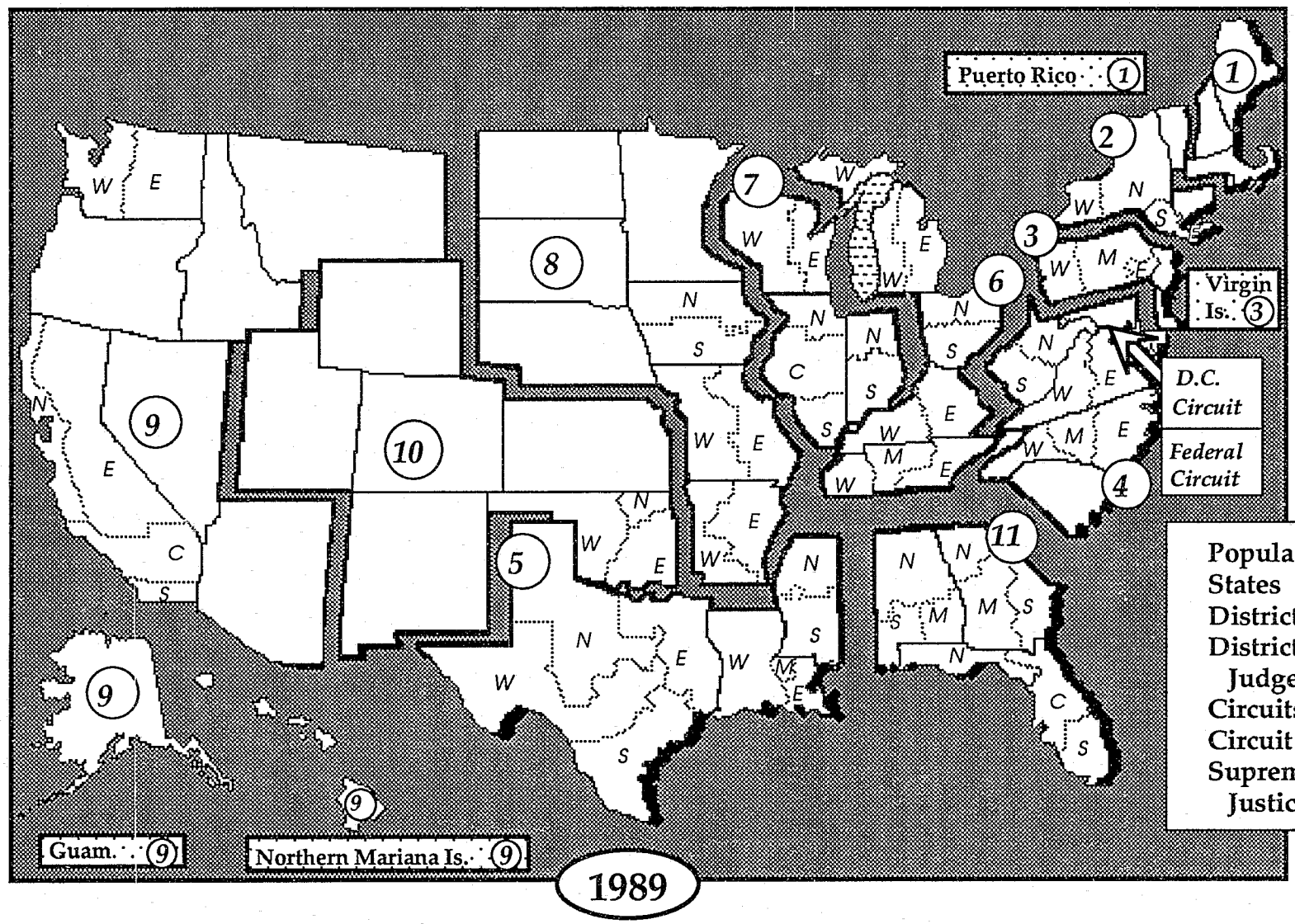


Figure 2



Many things that the First Judiciary Act required have been swept aside. But many other things it provided are so intrinsic to our system of justice that we rarely give them a second thought: a separate set of courts for the national government, deciding matters of national interest, and arranged geographically according to state boundaries.

When that Act of 1789 was approaching, not its third century, but its third year, Chief Justice John Jay, sitting as a judge of the circuit court for the eastern circuit, undertook in his charge to the grand juries of that circuit to describe something of this new system of federal courts. Those who created the federal courts faced a formidable task, he observed, because "no tribunals of the like kind and extent had heretofore existed in this country." In that environment of experimentation, Jay reminded the grand juries—and his words could well be a charter for contemporary efforts—that "the expediency of carrying justice, as it were, to every man's door, was obvious; but how to do it in an expedient manner was far from being apparent."[81]



In 1981, the Fifth Circuit was divided into the Fifth and Eleventh Circuits, pursuant to a 1980 statute. In 1982, Congress created the Federal Circuit, a jurisdictional rather than a geographic circuit, out of the Court of Claims and the Court of Customs and Patent Appeals.

NOTES

1. Act of Sept. 24, 1789, 1 Stat. 73.

2. BATOR, MELTZER, MISHKIN & SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 20 (3d ed. 1988).

3. *Quoted in* Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 54 (1923).

4. Late eighteenth-century attitudes toward judges and lawyers ran a wide gamut, including strains of decided hostility. They are explored in R. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE NEW NATION ch. 8 (1971).

5. Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 56 (1923).

6. THE FEDERALIST, No. 84 (Modern Lib. ed. 1937).

7. *Charge to Grand Juries* in 3 THE PUBLIC PAPERS AND CORRESPONDENCE OF JOHN JAY 387, 395 (H. Johnston ed. 1891).

8. THE FEDERALIST, No. 48 (Modern Lib. ed. 1937).

9. *Quoted in* Warren, *New Light on the Judiciary Act of 1789*, 37 HARV. L. REV. 49, 115 (1923).

10. An excellent summary of the evolution of the Judiciary Act may be found in Eisenberg, Jordan, Marcus & van Tassel, *The Birth of the Federal Court System*, THIS CONSTITUTION No. 17, at 18 (Winter 1981).

11. Act of Sept. 24, 1789, § 7, 1 Stat. 73, 76.

12. Act of Sept. 24, 1789, § 17, 1 Stat. 83.

13. Act of Sept. 24, 1789, § 27, 1 Stat. 73, 87.

14. Act of Sept. 24, 1789, § 35, 1 Stat. 92–93.

15. Act of Sept. 23, 1789, § 1, 1 Stat. 72.

16. J. Goebel, Jr., *Antecedents and Beginnings to 1800*, vol. 1 of THE HISTORY OF THE SUPREME COURT 472 (Oliver Wendell Holmes Devise History of the Supreme Court of the United States 1971).

17. Act of Sept. 24, 1789, §§ 21, 22, 1 Stat. 83–84.

18. 1 Cranch 137 (1803).

19. Act of Sept. 23, 1789, § 1, 1 Stat. 72.

20. F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 109–13 (1928).

21. Act of Sept. 24, 1789, § 9, 1 Stat. 76–77.

22. Act of Apr. 10, 1790, § 5, 1 Stat. 109, 111.

23. Act of Sept. 24, 1789, § 11, 1 Stat. 73, 78.

24. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, esp. at 497–99 (1928). For a somewhat different analysis, see Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 25*ff* (1948).

25. *Quoted in* Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 52 (1923).

26. Act of Sept. 24, 1789, §§ 11, 34, 1 Stat. 73, 78–79, 92.

27. The District of Wyoming, in the Tenth Circuit, reaches into Montana and Idaho, in the Ninth Circuit, in order to keep Yellowstone National Park in one judicial district. 28 U.S.C. § 131.

28. Act of Sept. 24, 1789, § 3, 1 Stat. 73, 74. The successor provision is 28 U.S.C. § 134(b).

29. Turner, *Federalist Policy and the Judiciary Act of 1801*, 22 WM. & MARY Q. 3, 11 (1965).

30. Nathanial Pendleton to James Iredell, Mar. 19, 1792, in G. MCREE, II THE LIFE AND CORRESPONDENCE OF JAMES IREDELL 344–45 (1857).

31. Newspaper editorial quoted in Hall, *The Civil War Era as a Crucible for Nationalizing the Lower Federal Courts*, PROLOGUE, 177, 184 (Fall 1975).

32. This was Attorney General Randolph's characterization in his 1790 report on the judicial system; he went on to rebut the argument. *Quoted in* F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 19 (1928).

33. A helpful analysis of these charges is Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127.

34. Justice Iredell, *quoted in* C. WARREN, 1 THE SUPREME COURT IN UNITED STATES HISTORY 86 (rev. ed. 1926).

35. Gouverneur Morris, in 1802, *quoted in* F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 17 (1928).

36. Letter of Nov. 7, 1792, to Congress in 1 AMERICAN STATE PAPERS (CLASS X) MISCELLANEOUS 51–52.

37. Act of Sept. 24, 1789, § 4, 1 Stat. 74.

38. Justice Iredell explained the practice in Ware v. Hylton, 3 Dall. 199, 257 n.2 (1796).

39. Act of Mar. 2, 1793, 1 Stat. 333.

40. Act of Feb. 13, 1801, "To Provide for the More Convenient Organization of the Courts of the United States," 2 Stat. 89.

41. Act of Mar. 5, 1802, 2 Stat. 132.

42. Act of Apr. 29, 1802, "To Amend the Judicial System of the United States," 2 Stat. 118 (1802). The Supreme Court upheld this act in Stuart v. Laird, 1 Cranch 299 (1803).

43. Act of Mar. 2, 1855, "To Establish a Circuit Court in and for the State of California," 10 Stat. 631.

44. Act of July 15, 1862, "To Amend the Act of Third of March, 1837 . . . ," 12 Stat. 576 (1862).

45. This conclusion is based on the tables of justices and the reporter's prefatory notes in volumes 1 and 2 of Wallace's Supreme Court reports.

46. Act of July 23, 1866, "To Fix the Number of Justices of the Supreme Court of the United States, and to Change Certain Judicial Circuits," 14 Stat. 209.

47. S. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS 49–63 (1968).

48. Act of Apr. 10, 1869, 16 Stat. 44. See also the front pages of volumes 3 to 9 of Wallace's Supreme Court reports.

49. Message to Congress of Dec. 3, 1861, in 5 THE WORKS OF ABRAHAM LINCOLN 41–42 (R. Basler ed. 1953).

50. T. FREYER, FORUMS OF ORDER: THE FEDERAL COURTS AND BUSINESS IN AMERICAN HISTORY chs. 1–5 (1979); Hall, *Circuit Courts*, in ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 213–14.

51. Specific provisions are in BATOR, MELTZER, MISHKIN & SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 36–37 (3d ed. 1988).

52. *See generally* H. HYMAN & W. WIECEK, EQUAL JUSTICE UNDER LAW, CONSTITUTIONAL DEVELOPMENT, 1835-1875, chs. 8–11 (1982).

53. T. FREYER, FORUMS OF ORDER: THE FEDERAL COURTS AND BUSINESS IN AMERICAN HISTORY 125 (1979).

54. Act of Mar. 3, 1875, 18 Stat. 470.

55. 18 Stat. 335.

56. S. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS 159 (1968).

57. Civil Rights Cases, 109 U.S. 3 (1883).

58. F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 64–65 (1928).

59. BATOR, MELTZER, MISHKIN & SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 37 (3d ed. 1988).

60. T. FREYER, FORUMS OF ORDER: THE FEDERAL COURTS AND BUSINESS IN AMERICAN HISTORY 114 (1979).

61. Act of Feb. 16, 1875.

62. F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 101–02 (1928).

63. Act of Mar. 3, 1887.

64. F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 60 (1928).

65. Table B.3 in R. POSNER, THE FEDERAL COURTS, CRISIS AND REFORM 354–55 (1985).

66. F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 79 (1928).

67. *Id.* at 82.

68. *Id.* at 85.

69. Congressman Moulton of Illinois, *quoted in id.* at 85 n.135.

70. Congressman Robinson of Massachusetts, *quoted in id.* at 91–92.

71. Act of Mar. 3, 1891, 26 Stat. 826.

72. H. ADAMS, THE EDUCATION OF HENRY ADAMS 30 (1918).

73. F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 102 (1928).

74. Act of Mar. 3, 1911, § 301, 36 Stat. 1087, 1169.

75. R. POSNER, THE FEDERAL COURTS, CRISIS AND REFORM, Table B.3 at p. 355 (1985), and 28 U.S.C. §§ 1, 44, 133.

76. POSNER, THE FEDERAL COURTS, CRISIS AND REFORM 27 (1985).

77. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 1988 ANNUAL REPORT OF THE DIRECTOR, at 51.

78. *See* 28 U.S.C. §§ 151, 152.

79. McCabe, *The Federal Magistrate Act of 1979*, 16 HARV. J. ON LEGIS. 342 (1979).

80. Act of Mar. 5, 1925.

81. *Charge to Grand Juries* in 3 THE PUBLIC PAPERS AND CORRESPONDENCE OF JOHN JAY 387, 390–91 (H. Johnston ed. 1891).

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