OPENING REMARKS

EVARTS ACT DAY

THE BIRTH OF THE U.S. CIRCUIT COURTS OF APPEALS

Ross E. Davies[†]

This installment of "Opening Remarks" is an odd example of the *Journal of Law*'s pursuit of its main mission – to be an incubator for "unconventional ideas."[1] Our publisher (the *Green Bag*) has stumbled upon an unconventional project of its own: printing legal scholarship on big pieces of paper. It is a convenient way to present some material – big maps, for example. But it is not so convenient for putting citeable scholarship on bookshelves (libraries, law offices, etc.) and in databases (Westlaw, HeinOnline, etc.). So, we are going to try to convert a "Single Sheet Classic" (that is what the *Green Bag* calls its big-sheet publications) into several smaller sheets, sequenced and bound in a law review. If this works well, the *Green Bag* might be able to attract "Single Sheet Classic" contributors other (and perhaps better) than its own staffers.

We have sliced the 18-by-25.5-inch Single Sheet Classic No. 4, *Evarts Act Day: The Birth of the U.S. Circuit Courts of Appeals*, into four parts:

First, on pages 252-253, an unreadably small reproduction of both sides of the original work, just to give you a sense of its shape and layout.

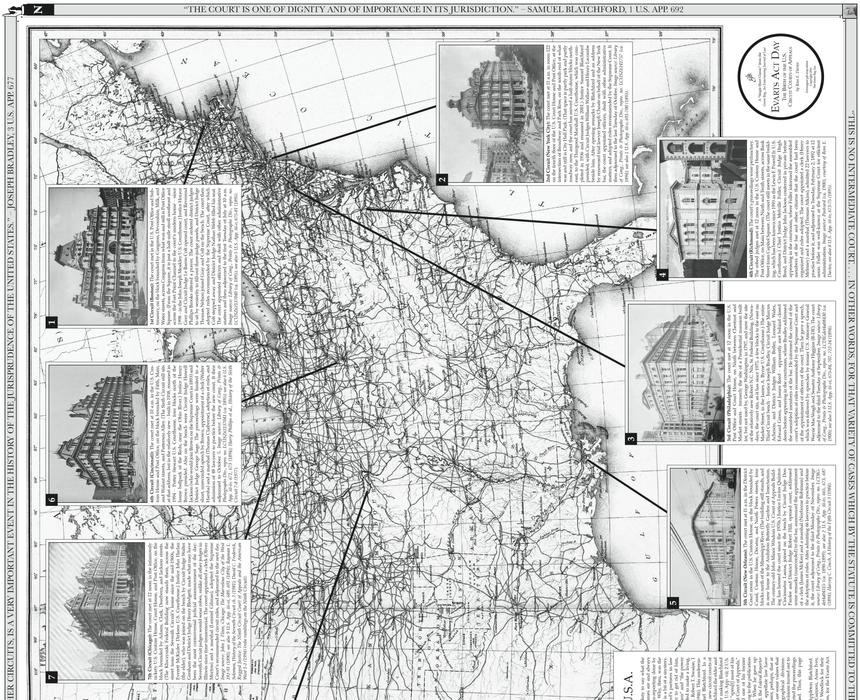
Second, on pages 254-256, the main block of text from the original, with slight revisions for easier reading in this regular law review format.

Third, on pages 257-266, the pictures (with captions) from the original, with slight revisions of the captions, again for easier reading in this format.

Fourth, on pages 267-273, the text on the back of the original: the complete Evarts Act of 1891, including the associated joint resolution.

[†] Professor of law, Antonin Scalia Law School at GMU; editor-in-chief, the *Green Bag*.

[1] Ross E. Davies, *Like Water for Law Reviews: An Introduction to the Journal of Law*, 1 J.L. 1, 1 (2011).


"THE COURT IS ONE OF DIGNITY AND OF IMPORTANCE IN ITS JURISDICTION." – SAMUEL BLATCHFORD, 1 U.S. APP. 692
"IT MUST BE CONCEDED THAT THE ORGANIZATION OF THIS COURT, AND SIMILAR COURTS IN THE OTHER CIRCUITS, IS A VERY IMPORTANT EVENT IN THE HISTORY OF THE JURISPRUDENCE OF THE UNITED STATES." – JOSEPH BRADLEY, 3 U.S. APP. 677
"THIS IS NO INTERMEDIATE COURT. . . IN OTHER WORDS, FOR THAT VARIETY OF CASES WHICH BY THE STATUTE IS COMMITTED TO THIS COURT THIS IS THE SUPREME COURT OF THE UNITED STATES." – DAVID BREWER, 4 U.S. APP. 699
"THUS WILL BE EFFECTED A GREAT IMPROVEMENT IN THE ADMINISTRATION OF JUSTICE." – STEPHEN FIELD, 7 U.S. APP 682
June 16, 1891: A Bright New Day for Appellate Litigation Across the U.S.A.
UNITED STATES NINTH CIRCUIT COURT OF APPEALS

CHAP. 517. — An Act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there shall be appointed by the President of the United States, by and with the advice and consent of the Senate, in each circuit an additional circuit judge, who shall have the same qualifications, and shall have the same power and jurisdiction therein that the circuit judges of the United States, within their respective circuits, now have under existing laws, and who shall be entitled to the same compensation as the circuit judges of the United States in their respective circuits now have. Sec. 2. That there is hereby created in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, and which shall be a court of record with appellate jurisdiction, as is hereafter limited and established. Such court shall prescribe the form and style of its seal and the form of writs and other process and procedure as may be conformable to the exercise of its jurisdiction as shall be conferred by law. It shall have the appointment of the marshal of the court with the same duties and powers under the regulations of the court as are now provided for the marshal of the Supreme Court of the United States, so far as the same may be applicable. The court shall also appoint a clerk, who shall perform and exercise the same duties and powers in regard to all matters within its jurisdiction as are now exercised and performed by the clerk of the Supreme Court of the United States, so far as the same may be applicable. The salary of the marshal of the court shall be twenty-five hundred dollars a year, and the salary of the clerk of the court shall be three thousand dollars a year, to be paid in equal proportions quarterly. The costs and fees in the Supreme Court now provided for by law shall be costs and fees in the circuit courts of appeals; and the same shall be expended, accounted for, and paid for, and paid over to the Treasury Department of the United States in the same manner as is provided in respect of the costs and fees in the Supreme Court. The court shall have power to establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law. Sec. 3. That the Chief-Justice and the associate justices of the Supreme Court assigned to each circuit, and the circuit judges within each circuit, and the several district judges within each circuit, shall be competent to sit as judges of the circuit court of appeals within their respective circuits in the manner hereinafter provided. In case the Chief-Justice or an associate justice of the Supreme Court should attend at any session of the circuit court of appeals he shall preside, and the circuit judges in attendance upon the court in the absence of the Chief-Justice or associate justice of the Supreme Court shall preside in the order of the seniority of their respective commissions. In case the full court at any time shall not be made up by the attendance of the Chief-Justice or an associate justice of the Supreme Court and circuit judges, one or more district judges within the circuit shall be competent to sit in the court according to such order or provision among the district judges as either by general or particular assignment shall be designated by the court: Provided, That no justice or judge before whom a cause or question may have been tried or heard in a district court, or existing circuit court, shall sit on the trial or hearing of such cause or question in the circuit court of appeals. A term shall be held annually by the circuit court of appeals in the several judicial circuits at the following places: In the first circuit, in the city of Boston; in the second circuit, in the city of New York; in the third circuit, in the city of Philadelphia; in the fourth circuit, in the city of Richmond; in the fifth circuit, in the city of New Orleans; in the sixth circuit, in the city of Cincinnati; in the seventh circuit, in the city of Chicago; in the eighth circuit, in the city of St. Louis; in the ninth circuit, in the city of San Francisco; and in such other places in each of the above circuits as said court may from time to time designate. The first terms of said courts shall be held on the second Monday in January, eighteen hundred and ninety-one, and thereafter at such times as may be fixed by said courts[.] Sec. 4. That no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any district court to the existing circuit courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts, but all appeals by writ of error otherwise, from said district courts shall only be subject to review in the Supreme Court of the United States or in the circuit court of appeals hereby established, as is hereinafter provided, and the review, by appeal, by writ of error, or otherwise, from the existing circuit courts shall be had only in the Supreme Court of the United States or in the circuit courts of appeals hereby established according to the provisions of this act regulating the same. Sec. 5. That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision. From the final sentences and decrees in prize causes. In cases of conviction of a capital or otherwise infamous crime. In any case that involves the construction or application of the Constitution of the United States. In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question. In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States. Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a State, nor the construction of the statute providing for review of such cases. Sec. 6. That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States citizens or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under criminal laws as in admiralty cases, excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal. And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court. In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs. But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed. Sec. 7. That where, upon a hearing in equity in a district court, or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals: Provided, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court during the pendency of such appeal. Sec. 8. That any justice or judge, who, in pursuance of the provisions of this act, shall attend the circuit court of appeals held at any place other than where he resides shall, upon his written certificate, be paid by the marshal of the district in which the court shall be held his reasonable expenses for travel and attendance, not to exceed ten dollars per day, and such payments shall be allowed the marshal in the settlement of his accounts with the United States. Sec. 9. That the marshals of the several districts in which said circuit court of appeals may be held shall, under the direction of the Attorney-General of the United States, and with his approval, provide such rooms in the public buildings of the United States as may be necessary, and pay all incidental expenses of said court, including criers, bailiffs, and messengers: Provided, however, That in case proper rooms can not be provided in such buildings, then the said marshals, with the approval of the Attorney-General of the United States, may, from time to time, lease such rooms as may be necessary for such courts. That the marshals, criers, clerks, bailiffs, and messengers shall be allowed the same compensation for their respective services as are allowed for similar services in the existing circuit courts. Sec. 10. That whenever on appeal or writ of error or otherwise a case coming directly from the district court or existing circuit court shall be reviewed and determined in the Supreme Court the cause shall be remanded to the proper district or circuit court for further proceedings to be taken in pursuance of such determination. And whenever on appeal or writ of error or otherwise a case coming from a circuit court of appeals shall be reviewed and determined in the Supreme Court the cause shall be remanded by the Supreme Court to the proper district or circuit court for further proceedings in pursuance of such determination. Whenever on appeal or writ or error or otherwise a case coming from a district or circuit court shall be reviewed and determined in the circuit court of appeals in a case in which the decision in the circuit court of appeals is final such cause shall be remanded to the said district or circuit court for further proceedings to be there taken in pursuance of such determination. Sec. 11. That no appeal or writ of error by which any order, judgment, or decree may be reviewed in the circuit courts of appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order, judgment, or decree sought to be reviewed: Provided[,] however, That in all cases in which a lesser time is now by law limited for appeals or writs of error such limits of time shall apply to appeals or writs of error in such cases taken to or sued out from the circuit courts of appeals. And all provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the circuit courts of appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error, and any judge of the circuit courts of appeals, in respect of cases to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the conditions of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States respectively. Sec. 12. That the circuit court of appeals shall have the powers specified in section seven hundred and sixteen of the Revised Statutes of the United States. Sec. 13. Appeals and writs of error may be taken and prosecuted from the decisions of the United States court in the Indian Territory to the Supreme Court of the United States, or to the circuit court of appeals in the eighth circuit, in the same manner and under the same regulations as from the circuit or district courts of the United States, under this act. Sec. 14. That section six hundred and ninety-one of the Revised Statutes of the United States and section three of an act entitled "An act to facilitate the disposition of cases in the Supreme Court, and for other purposes," approved February sixteenth, eighteen hundred and seventy-five, be, and the same are hereby repealed. And all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this act are hereby repealed. Sec. 15. That the circuit court of appeal in cases in which the judgments of the circuit courts of appeal are made final by this act shall have the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders, and decrees of the supreme courts of the several Territories as by this act they may have to review judgments, orders, and decrees of the district court and circuit courts; and for that purpose the several Territories shall, by orders of the Supreme court, to be made from time to time, be assigned to particular circuits. Approved, March 3, 1891. Joint Resolution to provide for the organization of the circuit courts of appeals. Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the first meetings of the several circuit courts of appeals mentioned in the act of Congress passed at this present session, entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," shall be held on the third Tuesday in June, A. D. eighteen hundred and ninety-one; and if, from any casualty, the first meeting of any of said courts shall fail to be so held on that day, the first meeting of any such court so failing to be held, shall be held on such day subsequent thereto as the chief justice, or any justice of the Supreme Court of the United States assigned to such circuit, shall direct: And be it further resolved, That nothing in said act shall be held or construed in anywise to impair the jurisdiction of the Supreme Court or any circuit court of the United States in any case now pending before it, or in respect of any case wherein the writ of error or the appeal shall have been sued out or taken to any of said courts before the first day of July, anno Domini, eighteen hundred and ninety-one. Approved, March 3, 1891. [26 Statutes at Large 826-830 & 1115-1116]

JUNE 16, 1891: A BRIGHT NEW DAY FOR APPELLATE LITIGATION ACROSS THE U.S.A.

The Evarts Act[2] altered the federal courts more extensively than any statute since the Judiciary Act of 1789,[3] which set up the Supreme Court and the subordinate federal courts. The new law created an intermediate federal appellate court system (the circuit courts of appeals profiled here) and rejiggered the relationships and jurisdictions of the various parts of the new system. For full details, see pages 267-273 below, where the entire Evarts Act is reproduced.

The new law was also amusingly defective – seemingly dead on arrival. Enacted on March 3, 1891, it declared: "The first terms of said [new] courts shall be held on the second Monday in January, eighteen hundred and ninety-one." The deadline for opening the new courts was in the past before the act creating them was passed. Congress's recovery from this stumble provides a nice example of how easy it is – as a technical matter, at least – for federal legislators to fix their own mistakes. Later in the day on March 3, it passed a joint resolution moving the circuit courts' opening day to

> the third Tuesday in June, A.D. eighteen hundred and ninety-one; and if, from any casualty, the first meeting of any of said courts shall fail to be so held on that day, the first meeting of any such court so failing to be held, shall be held on such day subsequent thereto as the chief justice, or any justice of the Supreme Court of the United States assigned to such circuit, shall direct.[4]

(You can find that gem on page 273 below as well.)

In truth, Congress probably could have ignored the dating defect and relied on the Supreme Court to interpret away the error. After all, the Justices serving in 1891 were the same crowd that would interpret the Alien Contract Labor Law[5] in Church of the *Holy Trinity v. United States*,[6] to comport with Congress's spirit, rather than its words. And if anyone

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[2] 26 Stat. 826.
[3] 1 Stat. 73.
[4] 26 Stat. 1115.
[5] 23 Stat. 332.
[6] 143 U.S. 457 (1892).

wanted the Evarts Act more than Congress did, it was the Supreme Court, for obvious reasons: it meant less work for the Justices and speedier justice for the citizenry.

During their first century as a nation, the people of the United States had multiplied, and so had their conflicts and transgressions, and therefore so had the dockets of their courts. Justice Stephen Field explained the Act crisply in his address to the crowd attending the opening of the U.S. Circuit Court of Appeals for the Ninth Circuit on June 16, 1891 (he and the other eight members of the Supreme Court did in fact manage to open all nine of the new courts on the third Tuesday in June):

> Its object is to relieve the Supreme Court of the United States from the vast accumulation of business which now crowds its docket, and at the same time to bring nearer to suitors the judicial force required for the disposition of a portion of such business. . . . The present increase of cases has arisen from the changed condition of the country, of its commerce, of its industries, and of the habits of its people. . . . So it has happened that the court has not been able to keep up with its constantly increasing business. The delays thus ensuing have often amounted to a denial of justice.[7]

Field's explanation for the Evarts Act also explains the choice of map for the backdrop of the original "Single Sheet Classic" version of this paper. (It is visible in miniature on page 252 above.) It is a map of "Railroad Systems of the United States: 1890," as reported in the Department of the Interior's *Statistical Analysis of the United States, Based Upon Results of the Eleventh Census*.[8] The density and reach of the rail networks in 1890 provide a nice visual metaphor for the density and pervasiveness of litigation in the United States in 1891. It is also a nice reminder of the logistics, and time and distance, involved in riding circuit by riding the rails in those days – a burden the Act lifted from the Justices.

Finally, a word about citations. Why are the footnotes in this paper infested with references to "U.S. App."? Because they direct readers to the official (yes, official) volumes of reports of decisions of the federal courts of appeals: the *United States Courts of Appeals Reports*. Those books are unknown to many modern lawyers, maybe because (1) "U.S. App." is not

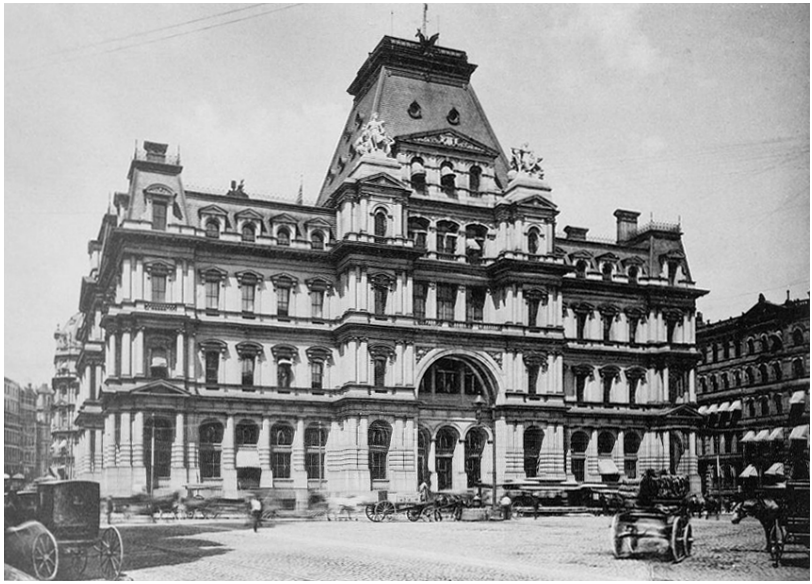
[7] 7 U.S. App. 679, 680, 681.
[8] 1898.

listed in *The Bluebook* – the citation tool on which future judges and their law clerks have long been trained – and therefore the set of reports to which "U.S. App." points does not exist in the consciousness of today's judiciary (have the courts inadvertently delegated to the editors of *The Bluebook* the duty to say what the citeable law is?); and (2) the "U.S. App." volumes are and always were unnecessary duplications of the decision-reporting done by West Publishing in its *Federal Reporter* series. Why, then, was the "U.S. App." series started in the first place?

It is a bit of a mystery. But consider this. Samuel Appleton Blatchford's partners in law practice dissolved their firm in 1885 in order to get rid of him, because he was short on both "business acumen" and "the power of cold legal analysis." Of course, he still needed to make a living, but he had only "modest" success on his own.[9] This underemployed lawyer was the son of Justice Samuel Blatchford. In a striking series of coincidences, each of the nine new circuit courts of appeals, operating under the leadership of Blatchford the elder and his Supreme Court colleagues, issued an order making Blatchford the younger its official reporter of decisions.[10] Thereafter, the junior Blatchford "spen[t] most of his time as a Reporter for the United States Circuit Court of Appeals," and apparently prospered. He even retained one of his former partners to represent him in negotiations relating to the publication of his "U.S. App." volumes.[11] When he gave up reporting in 1899, the "U.S. App." series ended, the *Federal Reporter* occupied the field, and lawyers and federal appellate law have gotten along just fine ever since. A nice indicator, perhaps, that at the highest levels of national leadership there are some values that transcend constitutional, political, and geographical divisions. Nevertheless, junior's work as a reporter of decisions turned out to be useful in one respect. He, unlike West, reported the proceedings at which the courts of appeals were launched. Thus, this paper could not have been produced without him.

So, thank you for your service, Samuel Appleton Blatchford. Thanks also to Cattleya Concepcion, Curtis Gannon, Anna Ivey, Robert A. James, Sarah Nash, and Douglas P. Woodlock for their judicious flyspecking. And thank you, Congress, for the Evarts Act.

[9] Robert T. Swaine, 1 The Cravath Firm and Its Predecessors 366-368 (1946).
[10] 1 U.S. App. vii; 2 U.S. App. viii; etc.
[11] Swaine at 368.



The U.S. Post Office and Sub-treasury, Boston, Massachusetts. Source: Library of Congress, Prints & Photographs Division, repro. no. LCUSZ62137040 (ca. 1895).

FIRST CIRCUIT (BOSTON)

The court met in the U.S. Post Office and Sub-treasury, on the block bounded by Congress, Devonshire, Milk, and Water streets, across Congress from what was and still is Post Office Square. (From the Square, it is just a half-mile stroll southeast and across the Fort Point Channel to the court's modern home – since 1998 – in the John Joseph Moakley U.S. Courthouse.)

Justice Horace Gray and Circuit Judge Le Baron Colt opened court, and Reverend Phillips Brooks offered a prayer. The court ordered district judges to sit by seniority to fill-out three-judge panels, and District Judge Thomas Nelson joined Gray and Colt on the bench. The court then adopted rules recommended by the Supreme Court, after which Colt stepped away and District Judge Nathan Webb filled his seat. The court appointed officers and dealt with other administrative matters and then adjourned to the first Tuesday of July at 10 a.m.[12]

[12] See 5 U.S. App. iii-v, 675-81 (1895).

The U.S. Court House and Post Office, New York, New York. Source: Library of Congress, Prints & Photographs Division, repro. no. LCUSZ6241757 (ca. 1894).

SECOND CIRCUIT (NEW YORK)

The court met at 11 a.m. in room 122 on the fourth floor of the U.S. Court House and Post Office, at the intersection of Broadway and Park Row, on the south end of what was and still is City Hall Park. (That space is partly park and partly roadway now, and the court has moved a half-dozen blocks northeast, to the Thurgood Marshall U.S. Courthouse, which was completed in 1936 and renamed in 2001.)

Justice Samuel Blatchford presided, with Circuit Judges William Wallace and Henry Lacombe beside him. After opening remarks by Blatchford and an address by renowned trial lawyer Joseph Choate on behalf of the New York bar, the court appointed officers, dealt with other administrative matters, and adopted rules recommended by the Supreme Court. It then adjourned to the last Tuesday of October.[13]

[13] See 1 U.S. App. iii-v, 691-700 (1893).

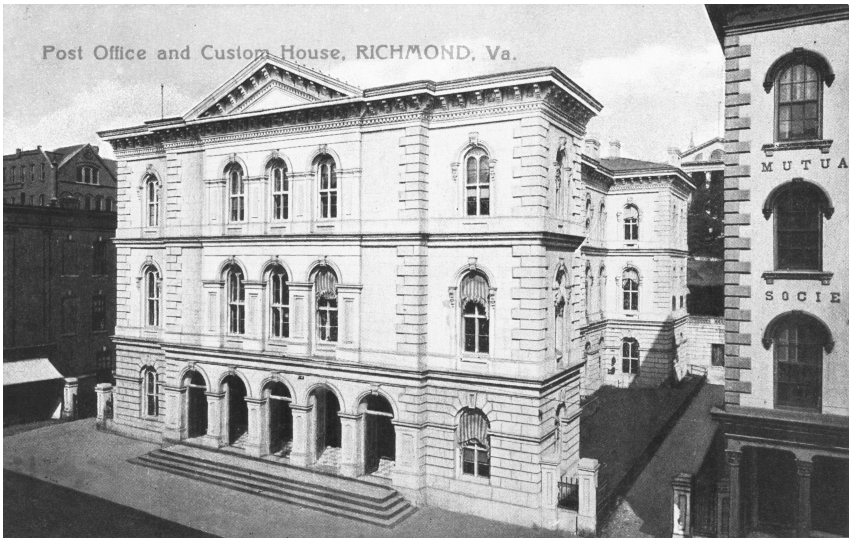
U.S. Post Office and Court House, Philadelphia, Pennsylvania. Source: Library of Congress, Prints & Photographs Division, repro. no. LCDIGdet4a08430 (ca. 1900).

THIRD CIRCUIT (PHILADELPHIA)

The court met at 12 noon in the U.S. Post Office and Court House, on Ninth between Chestnut and Market streets – formerly the site of a Presidential mansion built for, but not used by, George Washington in 1797, and now the site of the relatively new Robert N.C. Nix, Sr. Federal Building. (Nowadays, the court sits, as it has since 1975, a few blocks to the east on Market Street, in the James A. Byrne U.S. Courthouse.)

The entire Third Circuit bench – Justice Joseph Bradley, Circuit Judge Marcus Acheson, and District Judges William Butler, Leonard Wales, Edward Green, and James Reed – apparently met behind closed doors before appearing in the courtroom, where Bradley addressed the assembled members of the bar. He informed the crowd of the court's adoption of rules recommended by the Supreme Court and of the appointment of officers of the court. Then he gave a speech, which was followed by speeches by former U.S. Attorney General Wayne MacVeagh and Senator Anthony Higgins (R-DE). The court adjourned to the third Tuesday of September.[14]

[14] See 3 U.S. App. iii-vi, 675-84, 707, 722-24 (1894).



The U.S. Custom House and Post Office, Richmond, Virginia. Source: Postcard (ca. 1900), courtesy of Ross E. Davies.

FOURTH CIRCUIT (RICHMOND)

The court's proceedings were perfunctory. The robed judges met at 12 noon in the U.S. Custom House and Post Office, on Main between Ninth and Tenth streets, across Bank Street from Capitol Square. (The court still meets in the same building, which has been known since 1993 as the Lewis F. Powell Jr. U.S. Courthouse.)

Chief Justice Melville Fuller, Circuit Judge Hugh Bond, and District Judge John Jackson conferred in private before appearing in the courtroom, where Fuller informed the assembled members of the bar and other citizens that the court had been organized and rules adopted. The court appointed a clerk (Henry Meloney) and a marshal (Thomas Atkins), admitted 22 lawyers to practice before it, and adjourned to Tuesday, February 2, 1892 at 12 noon.[15] Fuller was well-known at the Supreme Court for efficient administration.

[15] See 8 U.S. App. iii-iv, 673-75 (1895).

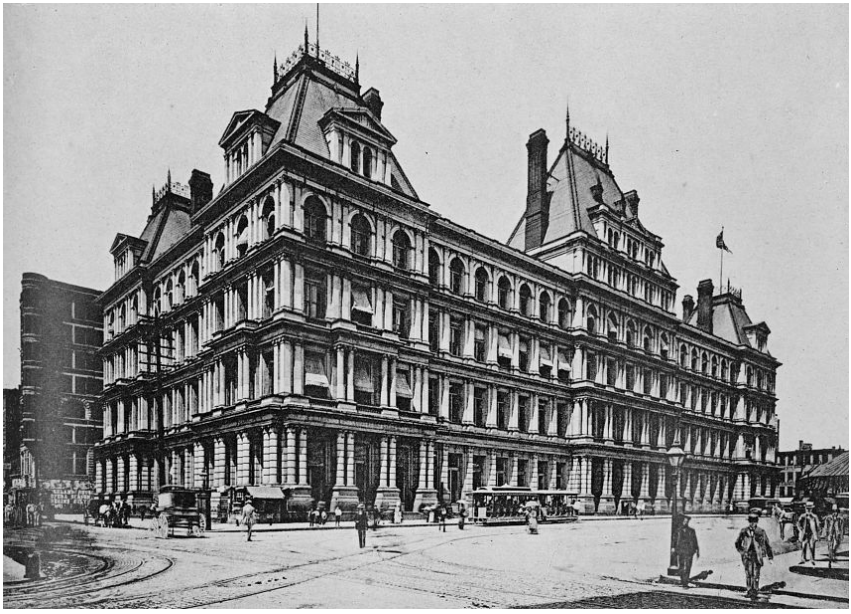
The U.S. Custom House, New Orleans, Louisiana. Source: Library of Congress, Prints & Photographs Division, repro. no. LCDIGdet4a04315 (ca. 1890-1899).

FIFTH CIRCUIT (NEW ORLEANS)

The court met at 11 a.m. in the District Court room in the U.S. Custom House, on the block bounded by Canal, Custom House, Decatur, and North Peters streets, four blocks north of the Mississippi River. (The building still stands, and is now home to the Audubon Butterfly Garden and Insectarium. The century-old John Minor Wisdom U.S. Court of Appeals Building has housed the court since the 1970s.)

Justice Lucius Quintus Cincinnatus Lamar, joined on the bench by Circuit Judge Don Pardee and District Judge Robert Hill, opened court, addressed some remarks (unrecorded) to the bar, announced the appointment of a clerk (James McKee) and a marshal (Norborne Robinson) and the adoption of rules. After admitting 66 lawyers to practice before it, the court adjourned to the third Monday of November.[16]

[16] See 2 U.S. App. iii-iv, 665, 673, 687 (1894); Harvey C. Couch, A History of the Fifth Circuit 3 (1984).



The U.S. Custom House and Post Office, Cincinnati, Ohio. Source: Library of Congress, Prints & Photographs Division, repro. no. LCUSZ62137041 (ca. 1895).

SIXTH CIRCUIT (CINCINNATI)

The court met at 10 a.m. in the U.S. Custom House and Post Office, on the block bounded by Fifth, Main, and Walnut streets, and Patterson Alley. (The Sixth Circuit still sits at that address, but in the relatively new – built in 1938, renamed in 1994 – Potter Stewart U.S. Courthouse, four blocks north of the home ballpark of the Reds, near the Ohio River.)

Justice Henry Brown presided. Also on the bench were Circuit Judge Howell Jackson (who would join Brown on the Supreme Court in 1893) and District Judge George Sage. The proceedings were limited to a short, unrecorded speech by Brown, appointment of a clerk (Walter Harsha) and a marshal (Thomas Claiborne), adoption of rules, and admission of 48 lawyers to practice before the new court. It then adjourned to October 5.[17]

[17] See 6 U.S. App. iii-iv, 671, 673 (1894); Harry Phillips et al., History of the Sixth Circuit 7-8 (1977).

The U.S. Custom House, Court House, and Post Office, Chicago, Illinois. Source: John J. Flinn, Chicago: The Marvelous City of the West 292-93 (1890).

SEVENTH CIRCUIT (CHICAGO)

The court met at 12 noon in the infamously rickety U.S. Custom House, Court House, and Post Office, on the block bounded by Adams, Clark, Dearborn, and Jackson streets. (The Kluczynski Federal Building now stands there, across the street from the Seventh Circuit's home since the mid-1960s, the Everett McKinley Dirksen U.S. Courthouse.)

Justice John Harlan (the elder), who was joined on the bench by Circuit Judge Walter Gresham and District Judge Henry Blodgett, made what may have been the most controversial judicial announcement of the day: Seventh Circuit judges would wear robes, unlike all other judges in Illinois since time immemorial. The court appointed a clerk (Oliver Morton) and a marshal (Lemuel Gilman), adopted the Supreme Court's recommended circuit rules, and adjourned to the next day.[18]

[18] See 9 U.S. App. iii-vi, 689, 691 (1894); Rayman L. Solomon, History of the Seventh Circuit ch. 2 (1981); David C. Frederick, Rugged Justice: The Ninth Circuit Court of Appeals and the American West 1-2 (1994) (robe rumblings on the Ninth Circuit).

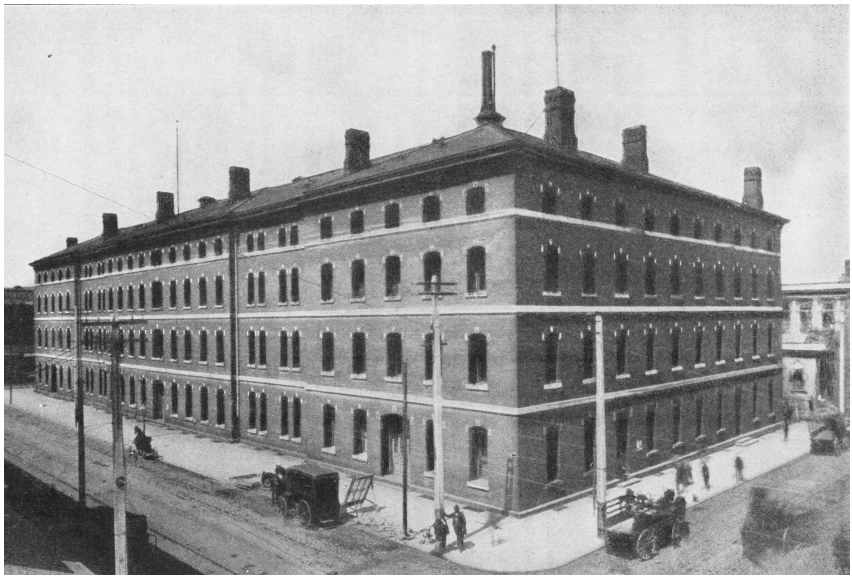
The U.S. Custom House and Post Office, St. Louis, Missouri. Source: A History of Public Buildings Under the Control of the Treasury Department 346-47 (1901).

EIGHTH CIRCUIT (ST. LOUIS)

The court met at 11 a.m. in the Custom House and Post Office, on the block bounded by Eighth, Ninth, Locust, and Olive streets, eight blocks east of the Mississippi River. (The building, which is now in private hands, counts the Missouri Court of Appeals, Eastern District, among its tenants. The Eighth Circuit now sits five blocks to the south, in the Thomas F. Eagleton U.S. Courthouse, as it has since 2000.)

Justice David Brewer presided, with Circuit Judge Henry Caldwell beside him. Arthur Selby, clerk of the Circuit Court of the U.S. for the Eastern Division of the Eastern District of Missouri, served as crier pro tem: "The Honorable Circuit Court of Appeals of the Eighth United States Judicial Circuit has now convened for the purpose of organization." The court

appointed a clerk (John Jordan), a marshal (William Hodges), and three bailiffs (John Bertram, Walter Atkinson, and George Hazlett), and designated District Judge Amos Thayer to join the panel (which he did). Brewer then delivered a long speech to a crowd consisting of "a large number of prominent members of the St. Louis bar, and other well known men, together with a number of ladies." After a recess, the court heard argument on a motion for leave to file a transcript of record. Brewer announced the decision to grant the motion. The court then adjourned until the next day.[19]



The U.S. Appraisers' Stores building, San Francisco, California. Source: A History of Public Buildings Under the Control of the Treasury Department 38-39 (1901).

NINTH CIRCUIT (SAN FRANCISCO)

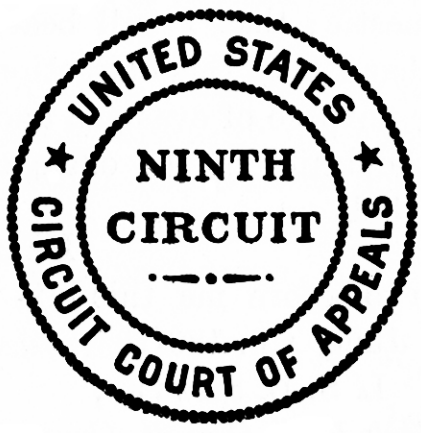
The court met in the Northern District of California's courtroom in the Appraisers' Stores building, on Sansome Street between Jackson and Washington streets. (A newer building for Appraisers, and Immigration officials, now stands there, about 1.5 miles northwest of the impressively

[19] See 4 U.S. App. iii-v, 697-708 (1893); Atchison, Topeka & Santa Fé Railroad Company v. Wilson, 4 U.S. App. 703 (1891).

durable James R. Browning U.S. Court of Appeals Building – completed in 1905, renamed in 2005 – where the Ninth Circuit now sits.)

Justice Stephen Field presided, with Circuit Judge Lorenzo Sawyer also on the bench. Field opened the proceedings with a short speech to a crowd that included many prominent members of the bar. The court appointed a clerk (Frank Monckton), adopted a seal, and postponed other business pending the arrival of District Judge Matthew Deady to fill (by designation) the third seat on the bench. (The seal, which is reproduced elsewhere on this page, was just like the seals adopted by the other circuit courts, except that each featured a different ordinal number, of course.)

Notably – given his historical identity as a domineering, even arbitrary, judge – Field proceeded to solicit advice: he "stated that the court would be glad to hear any suggestions from members of the bar respecting the rules which the Justices of the Supreme Court had recommended should be adopted by the various Circuit Courts of Appeals." Edward Taylor, a leading local lawyer and future mayor of San Francisco, delivered some friendly remarks about the court, after which it adjourned to June 22 at 11 a.m.[20]



Seal of the U.S. Court of Appeals for the Ninth Circuit.
Source: 7 U.S. Courts of Appeals Reports 716 (1894).

[20] See 7 U.S. App. iii-v, 679-83, 713-16 (1894).

THE EVARTS ACT

26 Statutes at Large 826-830 & 1115-1116
(March 3, 1891)

CHAP. 517. – An Act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there shall be appointed by the President of the United States, by and with the advice and consent of the Senate, in each circuit an additional circuit judge, who shall have the same qualifications, and shall have the same power and jurisdiction therein that the circuit judges of the United States, within their respective circuits, now have under existing laws, and who shall be entitled to the same compensation as the circuit judges of the United States in their respective circuits now have.

SEC. 2. That there is hereby created in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, and which shall be a court of record with appellate jurisdiction, as is hereafter limited and established. Such court shall prescribe the form and style of its seal and the form of writs and other process and procedure as may be conformable to the exercise of its jurisdiction as shall be conferred by law. It shall have the appointment of the marshal of the court with the same duties and powers under the regulations of the court as are now provided for the marshal of the Supreme Court of the United States, so far as the same may be applicable. The court shall also appoint a clerk, who shall perform and exercise the same duties and powers in regard to all matters within its jurisdiction as are now exercised and performed by the clerk of the Supreme Court of the United States, so far as the same may be applicable. The salary of the marshal of the court shall be twenty-five hundred dollars a year, and the salary of the clerk of the court shall be three thousand dollars a year, to be paid in equal proportions quarterly. The costs and fees in the Supreme Court now provided for by law shall be costs and fees in the circuit courts of appeals; and the same shall be expended, accounted for, and paid for, and paid over to the Treasury Department of the United States in the same manner as is provided in respect of the costs and fees in the Supreme Court.

The court shall have power to establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law.

SEC. 3. That the Chief-Justice and the associate justices of the Supreme Court assigned to each circuit, and the circuit judges within each circuit, and the several district judges within each circuit, shall be competent to sit as judges of the circuit court of appeals within their respective circuits in the manner hereinafter provided. In case the Chief-Justice or an associate justice of the Supreme Court should attend at any session of the circuit court of appeals he shall preside, and the circuit judges in attendance upon the court in the absence of the Chief-Justice or associate justice of the Supreme Court shall preside in the order of the seniority of their respective commissions.

In case the full court at any time shall not be made up by the attendance of the Chief-Justice or an associate justice of the Supreme Court and circuit judges, one or more district judges within the circuit shall be competent to sit in the court according to such order or provision among the district judges as either by general or particular assignment shall be designated by the court: *Provided*, That no justice or judge before whom a cause or question may have been tried or heard in a district court, or existing circuit court, shall sit on the trial or hearing of such cause or question in the circuit court of appeals. A term shall be held annually by the circuit court of appeals in the several judicial circuits at the following places: In the first circuit, in the city of Boston; in the second circuit, in the city of New York; in the third circuit, in the city of Philadelphia; in the fourth circuit, in the city of Richmond; in the fifth circuit, in the city of New Orleans; in the sixth circuit, in the city of Cincinnati; in the seventh circuit, in the city of Chicago; in the eighth circuit, in the city of St. Louis; in the ninth circuit, in the city of San Francisco; and in such other places in each of the above circuits as said court may from time to time designate. The first terms of said courts shall be held on the second Monday in January, eighteen hundred and ninety-one, and thereafter at such times as may be fixed by said courts[.]

SEC. 4. That no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any district court to the existing circuit courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts, but all appeals by writ of error otherwise,

from said district courts shall only be subject to review in the Supreme Court of the United States or in the circuit court of appeals hereby established, as is hereinafter provided, and the review, by appeal, by writ of error, or otherwise, from the existing circuit courts shall be had only in the Supreme Court of the United States or in the circuit courts of appeals hereby established according to the provisions of this act regulating the same.

SEC. 5. That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:

In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.

From the final sentences and decrees in prize causes.

In cases of conviction of a capital or otherwise infamous crime.

In any case that involves the construction or application of the Constitution of the United States.

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

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

Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a State, nor the construction of the statute providing for review of such cases.

SEC. 6. That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States citizens or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under criminal laws as in admiralty cases, excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that

court for its proper decision. And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs. But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed.

SEC. 7. That where, upon a hearing in equity in a district court, or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals: *Provided*, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court during the pendency of such appeal.

SEC. 8. That any justice or judge, who, in pursuance of the provisions of this act, shall attend the circuit court of appeals held at any place other than where he resides shall, upon his written certificate, be paid by the marshal of the district in which the court shall be held his reasonable expenses for travel and attendance, not to exceed ten dollars per day, and such payments shall be allowed the marshal in the settlement of his accounts with the United States.

SEC. 9. That the marshals of the several districts in which said circuit court of appeals may be held shall, under the direction of the Attorney-General of the United States, and with his approval, provide such rooms in the public buildings of the United States as may be necessary, and pay all incidental expenses of said court, including criers, bailiffs, and messengers: *Provided, however*, That in case proper rooms can not be provided in such buildings, then the said marshals, with the approval of the Attorney-General of the United States, may, from time to time, lease such rooms as may be necessary for such courts. That the marshals, criers, clerks, bailiffs, and messengers shall be allowed the same compensation for their respective services as are allowed for similar services in the existing circuit courts.

SEC. 10. That whenever on appeal or writ of error or otherwise a case coming directly from the district court or existing circuit court shall be reviewed and determined in the Supreme Court the cause shall be remanded to the proper district or circuit court for further proceedings to be taken in pursuance of such determination. And whenever on appeal or writ of error or otherwise a case coming from a circuit court of appeals shall be reviewed and determined in the Supreme Court the cause shall be remanded by the Supreme Court to the proper district or circuit court for further proceedings in pursuance of such determination. Whenever on appeal or writ or error or otherwise a case coming from a district or circuit court shall be reviewed and determined in the circuit court of appeals in a case in which the decision in the circuit court of appeals is final such cause shall be remanded to the said district or circuit court for further proceedings to be there taken in pursuance of such determination.

SEC. 11. That no appeal or writ of error by which any order, judgment, or decree may be reviewed in the circuit courts of appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order, judgment, or decree sought to be reviewed: *Provided[,] however*, That in all cases in which a lesser time is now by law limited for appeals or writs of error such limits of time shall apply to appeals or writs of error in such cases taken to or sued out from the circuit courts of appeals. And all provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the circuit courts of appeals, including all provisions for bonds or other securities to be required and taken on such ap-

peals and writs of error, and any judge of the circuit courts of appeals, in respect of cases to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the conditions of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States respectively.

SEC. 12. That the circuit court of appeals shall have the powers specified in section seven hundred and sixteen of the Revised Statutes of the United States.

SEC. 13. Appeals and writs of error may be taken and prosecuted from the decisions of the United States court in the Indian Territory to the Supreme Court of the United States, or to the circuit court of appeals in the eighth circuit, in the same manner and under the same regulations as from the circuit or district courts of the United States, under this act.

SEC. 14. That section six hundred and ninety-one of the Revised Statutes of the United States and section three of an act entitled "An act to facilitate the disposition of cases in the Supreme Court, and for other purposes," approved February sixteenth, eighteen hundred and seventy-five, be, and the same are hereby repealed. And all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this act are hereby repealed.

SEC. 15. That the circuit court of appeal in cases in which the judgments of the circuit courts of appeal are made final by this act shall have the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders, and decrees of the supreme courts of the several Territories as by this act they may have to review judgments, orders, and decrees of the district court and circuit courts; and for that purpose the several Territories shall, by orders of the Supreme court, to be made from time to time, be assigned to particular circuits.

Approved, March 3, 1891.

[No. 17] Joint Resolution to provide for the organization of the circuit courts of appeals.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the first meetings of the several circuit courts of appeals mentioned in the act of Congress passed at this present

session, entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," shall be held on the third Tuesday in June, A. D. eighteen hundred and ninety-one; and if, from any casualty, the first meeting of any of said courts shall fail to be so held on that day, the first meeting of any such court so failing to be held, shall be held on such day subsequent thereto as the chief justice, or any justice of the Supreme Court of the United States assigned to such circuit, shall direct: *And be it further resolved*, That nothing in said act shall be held or construed in anywise to impair the jurisdiction of the Supreme Court or any circuit court of the United States in any case now pending before it, or in respect of any case wherein the writ of error or the appeal shall have been sued out or taken to any of said courts before the first day of July, anno Domini, eighteen hundred and ninety-one.

Approved, March 3, 1891.