CIRCUIT REALIGNMENT

HEARINGS

BEFORE THE

SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-FOURTH CONGRESS

FIRST SESSION

ON

S. 729

THE REALIGNMENT OF THE FIFTH AND NINTH CIRCUIT COURTS OF APPEALS

PART 2

MARCH 18, 19; MAY 20 AND 21, 1975

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CIRCUIT REALIGNMENT

TUESDAY, MARCH 18, 1975

U.S. SENATE,
SUBCOMMITTEE ON IMPROVEMENTS
IN JUDICIARY MACHINERY,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:10 o'clock a.m., in room 6202, Dirksen Senate Office Building, Senator Quentin N. Burdick [chairman of the subcommittee] presiding.

Also present: William P. Westphal, chief counsel; William J. Weller, deputy counsel, and Kathryn Coulter, chief clerk.

The CHAIRMAN. The subcommittee has scheduled 3 days of hearings this week on S. 729, a bill to reorganize the fifth and ninth judicial circuits. Today's hearings will be devoted to witnesses from the fifth circuit.

Perhaps the dimension of the problem that this legislation is designed to solve can be demonstrated by a brief recitation of recent history. The subcommittee first held hearings on this problem in May of 1972 in connection with a resolution to create the Commission on Revision of the Federal Court Appellate System. The statistical data available at that time was for fiscal year 1971 and reflected the fact that in that year filings in the fifth circuit totaled 2,316 cases and in the ninth circuit totaled 1,936 cases. Legislation creating the commission was signed by the President on October 13, 1972, and the Commission began its official existence on June 21, 1973. After extensive hearings throughout the country, and particularly on the west coast and the gulf coast, the Commission issued its first report on December 18, 1973, in which it recommended that the fifth and ninth circuits be divided so as to create within the fifth circuit a new eleventh circuit and within the ninth circuit a new twelfth circuit. The report of the Commission was based on statistical data for fiscal year 1973, which disclosed that in that year filings in the fifth circuit totaled 2,964 and in the ninth circuit totaled 2,316.

Since the Commission's report, filings in the fifth circuit jumped another 11 percent to 3,294 cases and in the ninth circuit the increase was 16½ percent to 2,697 cases.

In the last Congress, this subcommittee held a total of 12 days of hearings on the problems of the circuit courts. In late Septem-

ber and early October of 1974, the subcommittee devoted 6 days of hearings to the problems of the fifth and ninth circuits. As a result of these hearings, the subcommittee on December 2, 1974, made wide distribution of a so-called clean bill in the form of a committee print revision of S. 2990. The concept set forth in that clean bill modified the recommendations of the Commission on Revision of the Federal Court Appellate System for the creation of a new eleventh and a new twelfth circuits and instead recommended that each of these circuits be reorganized into two divisions within the existing circuit. As a result of comments received and continuing discussions, additional changes were made in the so-called clean bill leading to the introduction of S. 729 in the form in which we are considering it today.

S. 729 proposes to reorganize the fifth circuit into a western division consisting of Texas and Louisiana and an eastern division consisting of Mississippi, Alabama, Georgia, Florida, and the Canal Zone. Also under the bill, the ninth circuit would be reorganized into a southern division, consisting of Arizona, Nevada, and the southern and central judicial districts of California, and a northern division, consisting of the States of Oregon, Washington, Idaho, Montana, Alaska, Hawaii, and the Territory of Guam.

With the circuits reorganized in this fashion, the bill proposes to create a total of 8 additional judgeships in the two divisions of the fifth circuit and 7 additional judgeships in the two divisions of the ninth circuit. Thus, the average caseload of 220 filings per judge in the fifth circuit and 207 filings per judge in the ninth circuit would be substantially reduced to a caseload of approximately 145 filings or less, per judge. According to the evidence received by the subcommittee during its lengthy consideration of this problem, the reorganized circuits, with the additional judge power provided in this bill, should be able to substantially reduce and eventually eliminate the intolerable congestion and delay which the rapidly increased caseload over the past years has forced upon litigants in these two circuits. Moreover, according to the evidence received by the subcommittee, the reorganization coupled with the increased judge power will greatly diminish the need for these circuits to rely upon various expedients as a means of coping with the huge caseload in these circuits.

We are pleased to have as our initial witness the senior Senator from Nebraska who is not only the ranking member of the Judiciary Committee and this subcommittee. but also the Chairman of the Commission on Revision of the Federal Court Appellate System. In this latter capacity, Senator Hruska has labored long and hard in an effort to solve the problems afflicting our Federal Courts of Appeals.

At this point, a copy of S. 729 will be incorporated in the record without objection. We will also receive a prepared statement from Senator Chiles who was unable to be here at this time.

[The documents referred to follow:]

94TH CONGRESS
1ST SESSION

S. 729

IN THE SENATE OF THE UNITED STATES

FEBRUARY 18, 1975

Mr. BURDICK (for himself, Mr. FONG, Mr. HRUSKA, and Mr. MCCLELLAN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To improve judicial machinery by reorganizing the fifth and ninth judicial circuits, by creating additional judgeships in those circuits, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 41 of title 28 of the United States Code is amended to read in part as follows:

"The eleven judicial circuits of the United States are constituted as follows:

"Circuits	Composition
* * * * * * *	
"Fifth:	
Eastern Division	Alabama, Florida, Georgia, Mississippi, Canal Zone.
* * * * * * *	
"Fifth:	
Western Division	Louisiana, Texas.
* * * * * * *	
"Ninth:	
Northern Division	Alaska, Eastern and Northern Judicial Districts of California, Hawaii, Idaho, Montana, Oregon, Washington, Guam.
* * * * * * *	
"Ninth:	
Southern Division	Arizona, Central and Southern Judicial Districts of California, Nevada.".

SEC. 2. A circuit judge in active service of either the fifth or ninth circuit as constituted the day prior to the effective date of this Act is assigned as a circuit judge of that division of either the fifth or the ninth circuit within which is located the State or judicial district within which he resided at the time of his original appointment to be a circuit judge of either the fifth or the ninth circuit and his seniority in service shall run from the date of his original appointment to be a judge of such circuit.

SEC. 3. A circuit judge in senior status of either the fifth or ninth circuit on the day of the effective date of this Act may elect to be assigned to either division of his particular circuit and he shall notify the Director of the Administrative

Office of the United States Courts of the election made by him.

SEC. 4. Where on the day prior to the effective date of this Act any appeal or other proceeding has been filed with the circuit court of appeals for either the fifth or the ninth circuit as constituted before the effective date of this Act—

(1) If any hearing before said court has been held in the case, or if the case has been submitted for decision, then further proceedings in respect of the case shall be had in the same manner and with the same effect as if this Act had not been enacted.

(2) If no hearing before said court has been held in the case, and the case has not been submitted for decision, then the appeal, or other proceeding, together with the original papers, printed records, and record entries duly certified, shall, by appropriate orders duly entered of record, be transferred to the division of the circuit court of appeals to which it would had gone had this Act been in full force and effect at the time such appeal was taken or other proceeding commenced, and further proceedings in respect of the case shall be had in the same manner and with the same effect as if the appeal or other proceeding had been filed in said court.

SEC. 5. The President shall appoint by and with the advice and consent of the Senate, three additional judges

for the Eastern Division of the Fifth Circuit, five additional judges for the Western Division of the Fifth Circuit, two additional judges for the Northern Division of the Ninth Circuit, and five additional judges for the Southern Division of the Ninth Circuit: *Provided*, That the appointments made under this section shall become effective on the date specified in section 26 of this Act: *And provided further*, That at the earliest practicable date after the date of enactment of this Act the President shall submit to the Senate of the United States his nominations for the additional judges authorized in this section and that after such submission the Senate shall proceed to consider such nominations at the earliest practicable date prior to the date specified in section 26 of this Act.

SEC. 6. Section 48 of title 28 of the United States Code is amended to read in part as follows:

"§ 48. Terms of court

"Terms or sessions of courts of appeals shall be held annually at the places listed below, and at such other places within the respective circuits as may be designated by rule

of court. Each court of appeals may hold special terms at any place within its circuit.

"Circuits		Places
"Fifth:		
	Eastern Division	Atlanta, Jacksonville, Miami and Montgomery.
"Fifth:		
	Western Division	New Orleans and Houston.
"Ninth:		
	Northern Division	San Francisco, Portland and Seattle.
"Ninth:		
	Southern Division	Los Angeles.

Provided, however, That the court of appeals of the Fifth Circuit-Eastern Division is authorized to hold terms or sessions of court at New Orleans until such time as adequate facilities for the court are provided at Atlanta."

SEC. 7. Section 42 of title 28, United States Code, is amended to read as follows:

"The Chief Justice of the United States and the Associate Justices of the Supreme Court shall from time to time be allotted as circuit justices among the circuits or divisions thereof by order of the Supreme Court. The Chief Justice may make such allotments in vacation.

"A justice may be assigned to more than one circuit or

division thereof, and two or more justices may be assigned to the same circuit or division thereof."

SEC. 8. Section 43 of title 28, United States Code, is amended to read as follows:

"§ 43. Creation and composition of courts

"(a) There shall be in each circuit, or division thereof, a court of appeals, which shall be a court of record known as the United States Court of Appeals for the circuit or division.

"(b) Each court of appeals shall consist of the circuit judges of the circuit or of the division in regular active service. The circuit justice and justices or judges designated shall be competent to sit as judges of the court."

SEC. 9. Section 44 (a) of title 28, United States Code, is amended to read in part as follows:

"(a) The President shall appoint, by and with the advice and consent of the Senate, circuit judges for the several circuits as follows:

"Circuits	Number of Judges
* * * * * * *	
"Fifth:	
Eastern Division	12
Western Division	11
* * * * * * *	
"Ninth:	
Northern Division	9
Southern Division	11".
* * * * * * *	

SEC. 10. Section 45 of title 28, United States Code, is amended in part as follows:

(a) At the end of the first sentence of subsection (a) delete the period and insert the words "or division."

(b) At the end of subsection (b) delete the period and insert the words "or division."

(c) In subsection (d) after the words "present in the circuit" insert the words "or division."

SEC. 11. Section 46 of title 28, United States Code, is amended to read as follows:

"§ 46. Assignment of judges; panels; hearings; quorum

"(a) Circuit judges shall sit on the court and its panels in such order and at such times as the court directs.

"(b) In each circuit or division the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges. Such panels shall sit at the times and places and hear the cases and controversies assigned as the court directs.

"(c) Cases and controversies shall be heard and determined by a court or panel of not more than three judges, unless a hearing or rehearing before the court en banc is ordered by a majority of the circuit judges of the circuit or division who are in regular active service. A court en banc shall consist of all circuit judges of the circuit or division in regular active service. A circuit judge of the circuit or division who has retired from regular active service shall also be competent to sit as a judge of the court en banc in the rehear-

ing of a case or controversy if he sat in the court or panel at the original hearing thereof.

"(d) (1) In any circuit consisting of two divisions, each of which has jurisdiction over cases arising from a United States district court sitting in a single State, the senior chief judge of the two divisions, upon certification or petition as hereinafter specified, shall convene a joint en banc panel consisting of the four most senior judges in regular active service in each division, excepting therefrom the senior chief judge who shall sit and preside ex officio on the joint en banc panel.

"(2) The joint en banc panel shall have only the jurisdiction specified in section 1291 (b) of this title. Such jurisdiction shall be invoked (1) upon certification by one of the divisions of that circuit that a conflict of opinion, as specified in section 1291 (b) of this title, exists between the divisions of that circuit or (2) upon a petition of a party, served upon all adverse parties within the time provided herein, suggesting the existence of a conflict of opinion as specified in section 1291 (b) of this title. The certification or the petition shall be filed with the designated clerk of the joint en banc panel within ten days after service of the notice of the entry of judgment by the division. The record before the joint en banc panel shall consist of the record and appendix to the briefs as submitted to the division together with such concise state-

ment of the case and issue presented for review as may be contained in the petition or in the supplemental briefs of the parties as may be authorized in special rules promulgated by the joint en banc panel governing the procedure for joint en banc review of cases specified in section 1291 (b) of this title. A majority of the judges serving on the joint en banc panel may order that the matter be heard and decided by the joint en banc panel, with or without oral argument. The designated clerk of the joint en banc panel shall perform all duties prescribed by law or rules of court as the same may be applicable to matters considered by the joint en banc panel.

"(e) A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum."

SEC. 12. Section 291 of title 28, United States Code, is amended to read in part as follows:

"(a) The Chief Justice of the United States may designate and assign temporarily any circuit judge to act as circuit judge in another circuit or division upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit or division where the need arises: *Provided, however,* That within a circuit consisting of two or more divisions the chief judge of the division who is senior in service may designate and assign temporarily any circuit

judge from one division to act as a circuit judge in the other division upon presentation of a certificate of availability by the chief judge of the division from which the circuit judge is assigned.

* * * * * * *

"(c) The chief judge of a circuit or division or the circuit justice may, in the public interest, designate and assign temporarily any circuit judge within the circuit or division, including a judge designated and assigned to temporary duty therein, to hold a district court in any district within the circuit or division."

SEC. 13. Section 292 of title 28, United States Code, is amended to read in part as follows:

"(a) The chief judge of a circuit or division may designate and assign one or more district judges within the circuit or division to sit upon the court of appeals or a panel thereof whenever the business of that court so requires. Such designations or assignments shall be in conformity with the rules or orders of the court of appeals of the circuit or division.

"(b) The chief judge of a circuit or division may, in the public interest, designate and assign temporarily any district judge of the circuit or division to hold a district court in any district within the circuit or division: *Provided, however*, That within a circuit consisting of two or more divisions the

chief judge of a division who is senior in service may designate and assign temporarily a district judge from one division to hold a district court in another division of the same circuit, upon presentation of a certificate of availability by the chief judge of the division from which the district judge is assigned."

* * * * * * *

SEC. 14. Section 293 of title 78, United States Code, is amended to read in part as follows:

"(a) The Chief Justice of the United States may designate and assign temporarily any judge of the Court of Claims or the Court of Customs and Patent Appeals to serve, respectively, as a judge of the Court of Customs and Patent Appeals or the Court of Claims upon presentation of a certificate of necessity by the chief judge of the court wherein the need arises, or to perform judicial duties in any circuit or division, either in a court of appeals or district court, upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit or division wherein the need arises.

"(b) The Chief Justice of the United States may designate and assign temporarily any judge of the Customs Court to perform judicial duties in a district court in any circuit or division upon presentation of a certificate of necessity by the

chief judge or circuit justice of the circuit or division wherein the need arises."

* * * * * * *

SEC. 15. Section 294 of title 28, United States Code, is amended to read in part as follows:

"(a) Any retired Chief Justice of the United States or Associate Justice of the Supreme Court may be designated and assigned by the Chief Justice of the United States to perform such judicial duties in any circuit or division including those of a circuit justice, as he is willing to undertake.

* * * * * * *

"(c) Any retired circuit or district judge may be designated and assigned by the chief judge or judicial council of his circuit to perform such judicial duties within the circuit or division as he is willing and able to undertake. Any other retired judge of the United States may be designated and assigned by the chief judge of his court to perform such judicial duties in such court as he is willing and able to undertake.

"(d) The Chief Justice of the United States shall maintain a roster of retired judges of the United States who are willing and able to undertake special judicial duties from time to time outside their own circuit or division, in the case of a retired circuit or district judge, or in a court other than

their own, in the case of other retired judges, which roster shall be known as the roster of senior judges. Any such retired judge of the United States may be designated and assigned by the Chief Justice to perform such judicial duties as he is willing and able to undertake in a court outside his own circuit or division, in the case of a retired circuit or district judge, or in a court other than his own, in the case of any other retired judge of the United States. Such designation and assignment to a court of appeals or district court shall be made upon the presentation of a certificate of necessity by the chief judge or circuit justice of the circuit or division wherein the need arises and to any other court of the United States upon the presentation of a certificate of necessity by the chief judge of such court. No such designation or assignment shall be made to the Supreme Court."

* * * * * * *

SEC. 16. Section 295 of title 28, United States Code, is amended to read in part as follows:

"No designation and assignment of a circuit or district judge in active service shall be made without the consent of the chief judge or judicial council of the circuit or division from which the judge is to be designated and assigned. No designation and assignment of a judge of any other court

of the United States in active service shall be made without the consent of the chief judge of such court."

* * * * * * *

SEC. 17. Section 296 of title 28, United States Code, is amended to read as follows:

"A justice or judge shall discharge, during the period of his designation and assignment, all judicial duties for which he is designated and assigned. He may be required to perform any duty which might be required of a judge of the court or district, circuit, or division to which he is designated and assigned.

"Such justice or judge shall have all the powers of a judge of the court, circuit, district, or division to which he is designated and assigned except the power to appoint any person to a statutory position or to designate permanently a depository of funds or a newspaper for publication of legal notices.

"A justice or judge who has sat by designation and assignment in another district, circuit, or division may, notwithstanding his absence from such district, circuit, or division or the expiration of the period of his designation and assignment, decide or join in the decision and final disposition of all matters submitted to him during such period and in the consideration and disposition of applications for rehearing or further proceedings in such matters."

SEC. 18. Section 331 of title 28, United States Code, is amended to read in part as follows:

"The Chief Justice of the United States shall summon annually the chief judge of each judicial circuit, or division, the chief judge of the Court of Claims, the chief judge of the Court of Customs and Patent Appeals, and a district judge from each judicial circuit or division to a conference at such time and place in the United States as he may designate. He shall preside at such conference which shall be known as the Judicial Conference of the United States. Special sessions of the conference may be called by the Chief Justice at such times and places as he may designate.

"The district judge to be summoned from each judicial circuit or division shall be chosen by the circuit and district judges of the circuit or division at the annual judicial conference of the circuit held pursuant to section 333 of this title and shall serve as a member of the conference for three successive years: *Provided, however,* That upon the effective date of this Act the district judge serving on the Judicial Conference from the fifth or ninth circuits shall continue to represent that division of his circuit wherein he resides until the next judicial conference of his circuit or division at which time each division of the circuit shall choose a district judge to serve on the Judicial Conference of the United States.

"If the chief judge of any circuit or division or the district judge chosen by the judges of the circuit or division is unable to attend, the Chief Justice may summon any other circuit or district judge from such circuit or division. If the chief judge of the Court of Claims and Patent Appeals is unable to attend, the Chief Justice may summon an associate judge of such court. Every judge summoned shall attend and, unless excused by the Chief Justice, shall remain throughout the sessions of the conference and advise as to the needs of his circuit or division or court and as to any matters in respect of which the administration of justice in the courts of the courts of the United States may be improved.

"The conference shall make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment of judges to or from circuits or divisions or districts where necessary, and shall submit suggestions to the various courts, in the interest of uniformity and expedition of business."

* * * * * * *

SEC. 19. Section 332 of title 28, United States Code, is amended to read in part as follows:

"(a) The chief judge of each circuit or division shall call, at least twice in each year and at such places as he may designate, a council of the circuit judges for the circuit or

division, in regular active service, at which he shall preside. Each circuit judge, unless excused by the chief judge, shall attend all sessions of the council.

"(b) The council shall be known as the judicial council of the circuit or division.

* * * * * * *

"(d) Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit or division. The district judges shall promptly carry into effect all orders of the judicial council. In any circuit consisting of two or more divisions each of which has jurisdiction over cases arising from a United States district court sitting in a single State, the senior chief judge, with the concurrence of the chief judge of the other division, shall select and appoint a joint committee on rules of procedure from among circuit and district judges of the divisions, together with representatives from among attorneys practicing in each division, for the purpose of achieving relative uniformity in the local rules of procedure adopted in each division: *Provided, however,* That the rulemaking authority shall be exercised by the judicial council of each division.

"(e) The judicial council of each circuit or division may appoint a circuit executive from among persons who shall be

certified by the Board of Certification. The circuit executive shall exercise such administrative powers and perform such duties as may be delegated to him by the circuit council. The duties delegated to the circuit executive of each circuit or division may include but need not be limited to:

"(1) Exercising administrative control of all nonjudicial activities of the court of appeals of the circuit or division in which he is appointed.

"(2) Administering the personnel system of the court of appeals of the circuit or division.

"(3) Administering the budget of the court of appeals of the circuit or division.

* * * * * * *

"(6) Conducting studies relating to the business and administration of the courts within the circuit or division and preparing appropriate recommendations and reports to the chief judge, the circuit council, and the Judicial Conference.

* * * * * * *

"(8) Representing the circuit or division as its liaison to the courts of the various States in which the circuit is located, the marshall's office, State and local bar associations, civic groups, news media, and other private and public

groups having a reasonable interest in the administration of the circuit or division.

"(9) Arranging and attending meetings of the judges of the circuit or division and of the circuit council, including preparing the agenda and serving as secretary in all such meetings.

"(10) Preparing an annual report to the circuit or division and to the Administrative Office of the United States Courts for the preceding calendar year, including recommendations for more expeditious disposition of the business of the circuit or division.

"All duties delegated to the circuit executive shall be subject to the general supervision of the chief judge of the circuit or division.

"(f) • • •

"The circuit executive shall serve at the pleasure of the judicial council of the circuit or division."

* * * * * * *

SEC. 20. Section 333 of title 28, United States Code, is amended to read as follows:

"§ 333. Judicial conferences of circuits

"The chief judge of each circuit or division shall summon annually the circuit and district judges of the circuit or

division, in active service to a conference at a time and place that he designates, for the purpose of considering the business of the courts and advising means of improving the administration of justice within such circuit or division. He shall preside at such conference, which shall be known as the Judicial Conference of the circuit or division. The judges of the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands shall also be summoned annually to the conferences of their respective circuits or divisions.

"Every judge summoned shall attend, and unless excused by the chief judge, shall remain throughout the conference.

"The court of appeals for each circuit or division shall provide by its rules for representation and active participation at such conference by members of the bar of such circuit or division.

"In circuits having two or more divisions an annual judicial conference may be held jointly by the divisions in which event it shall be summoned and presided over jointly by the chief judges of the several divisions."

SEC. 21. Section 334 of title 28, United States Code, is amended by inserting the words "or division" after the words

"the chief judge of each circuit" in the second sentence of subsection (a) and in subsection (b).

SEC. 22. Section 451 of title 28, United States Code, is amended by inserting the following new paragraph at the end of the section:

"The terms 'judicial circuit,' 'circuit court,' 'judicial council of the circuit,' and 'court of appeals of the appropriate circuit' as used in this title or other titles also mean and relate to a division of a circuit which has two or more divisions created pursuant to this Act unless the context in which said term is used necessarily excludes such meaning."

SEC. 23. Section 1297 of title 28, United States Code, is amended to read as follows:

"§ 1294. Circuits in which decisions reviewable

"Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

"(1) From a district court of the United States to the court of appeals from the circuit or division, embracing the district;

"(2) From the United States District Court for the District of the Canal Zone, to the Court of Appeals for the Fifth Circuit, Eastern Division;

"(3) From the District Court of the Virgin Islands, to the Court of Appeals for the Third Circuit; and

"(4) From the District Court of Guam, to the Court of Appeals for the Ninth Circuit, Northern Division."

SEC. 24. Section 1254 of title 28, United States Code, is amended in part by changing the first sentence of the section to read as follows:

"Cases in the courts of appeals, including cases before a joint en banc panel specified in section 46 of this title, may be reviewed by the Supreme Court by the following methods:".

* * * * * * *

SEC. 25. Section 1291 of title 28, United States Code, is amended to read as follows:

"§ 1291. Final decisions of district courts and of divisions of some circuit courts

"(a) The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

"(b) In any circuit consisting of two divisions each of which has jurisdiction over cases arising from a district court of the United States sitting in a single State, a joint en banc panel convened as provided in section 46 of this title, shall have jurisidiction over any decision by a division of that circuit which is in conflict with a decision by the other division of that circuit and affecting the validity, construction, or application of any statute or administrative order, rule, or regulation, State or Federal, which affects personal or property rights in the same State."

SEC. 26. The creation of courts of appeals for the eastern and western divisions of the fifth circuit and for the northern and southern divisions of the ninth circuit including the exercise of jurisdiction conferred by this Act upon those courts shall become effective on January 1, 1976.

PREPARED STATEMENT OF SENATOR LAWTON CHILES

Mr. Chairman, I appreciate the opportunity to file my statement with your Subcommittee today on behalf of S. 729, a bill to improve judicial machinery by reorganizing the fifth and ninth judicial circuits. Florida has a special interest in this legislation as we are part of the fifth circuit.

I understand that during recent years the workload has risen sharply in the ninth circuit. I know for a fact that it has risen in the fifth circuit, and we have been unable to keep current with the mounting caseload.

The Commission on Revision of the Federal Court Appellate System has recommended that both the 5th and the 9th circuits be divided so as to create a new 11th Circuit from the 5th, and a new 12th Circuit from the 9th.

When hearings were held last fall by your Subcommittee on a similar bill, a representative of the Florida Bar testified before you; and now the Florida Bar has recommended that S. 729 in its present form be given favorable consideration.

I hope your Subcommittee will be able to take early action on this measure so that early consideration can be given to it by the Senate and the House. The caseload is increasing daily and some relief is long overdue.

The CHAIRMAN. Senator Hruska, my colleague in arms, it is a pleasure to hear you first.

STATEMENT OF HON. ROMAN L. HRUSKA, A UNITED STATES SENATOR FROM THE STATE OF NEBRASKA, CHAIRMAN OF THE COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, ACCOMPANIED BY: PROFESSOR A. LEO LEVIN, EXECUTIVE DIRECTOR, COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM

Senator HRUSKA. Thank you very much, Mr. Chairman.

I appear here, as you have indicated, as Chairman of the Commission on Revision of the Federal Court Appellate System, and also as a cosponsor of the bill which was introduced by the Senator from North Dakota, S. 729, which is a bill which would reorganize the fifth and ninth circuits, and provide for additional judgeships in those circuits.

The members of the Commission, Mr. Chairman, again express their belief that "the situation in the fifth and ninth circuits should not be allowed to continue." We are persuaded that S. 729 satisfactorily achieves the objectives sought by the Commission in its report on realignment and we state unequivocally that it is far preferable to doing nothing.

S. 729 provides that both the fifth and ninth circuits shall be constituted of two divisions. Each division is to have its own chief judge, its own circuit executive, and its own judicial council. Nomenclature aside, in the fifth circuit the major difference between the Commission's recommendation and the present bill is that assignment of judges from one division to the other may be accomplished without seeking the approval of the Chief Justice of the United States. Instead, the chief judge who is senior in service is empowered to make interdivisional assignments, subject only to a certificate of availability by the chief judge of the division from which the judge is assigned. In addition, there is explicit

provision that the annual judicial conference may be held jointly by the divisions, in which event it shall be presided over jointly by the two chief judges.

The same distinguishing features are present in the proposal for the division of the ninth circuit. In addition, because two judicial districts of California are allocated to each of the new divisions, provision is made for a joint en banc in limited circumstances. The chief judge who is senior in service is authorized to convene a joint en banc when there is a decision by a division of that circuit which is in conflict with a decision by the other division of that circuit and affecting the validity, construction, or application of any statute or administrative order, rule, or regulation, State or Federal, which affects personal or property rights in the same State. (S. 729, sec. 5, amending 28 U.S.C. sec. 46.)

A further provision relevant to the ninth circuit may also be noted. It is designed to achieve relative uniformity in the local rules of procedure between divisions which hear appeals from district courts sitting within a single State. Specifically, the bill provides that the senior chief judge, with the concurrence of the chief judge of the other division, shall appoint a joint committee on rules of procedure. The rulemaking authority, however, is explicitly vested in the judicial counsel of each division.

The bill as introduced adopts the geographical division embodied in the Commission's Alternative Recommendation No. 2 concerning the fifth circuit, except for assignment of the Canal Zone to the Eastern rather than the Western division, a change designed to accommodate a more recently expressed preference by the bar of that territory. It adopts the geographical division for the ninth circuit, without change.

In making its recommendations, the Commission had before it statistical data for fiscal year 1973. The data for fiscal year 1974, set forth below, provide no basis whatever for concluding that the urgent need for Congressional action will go away.

I ask, Mr. Chairman, that these statistics be included at this point in the Record.

Senator BURDICK. Without objection.

[The material referred to follows:]

Fifth Circuit

Eastern Division:	
Florida	800
Georgia	469
Alabama	329
Mississippi	133
Total	1,731
Western Division:	
Texas	1,017
Louisiana	534
Canal Zone	7
Total	1,558

Ninth Circuit

Northern Division:	
California (Northern and Eastern)	584
Alaska	31
Washington	217
Oregon	144
Idaho	36
Montana	47
Hawaii	55
Guam	36
Total	1,150
Southern Division:	
California (Southern and Central)	1,153
Arizona	264
Nevada	128
Total	1,545

Senator HRUSKA. The Congress in creating the Commission recognized that however exigent the need for realignment, more was required. Accordingly, the governing statute directs the Commission, in the second phase of its work, to study the structure and internal procedures of the Federal Courts of Appeal sytem and to report its recommendations for such additional changes as may be appropriate. We are presently in the process of preparing that report. However, the members of the Commission wish to emphasize that after extensive study of proposals for change in structure and procedure, we have found nothing that would eliminate the need for the immediate relief which S. 729 would provide litigants in the Fifth and Ninth Circuits.

In making its realignment recommendations the Commission relied not merely on the caseload of each circuit and the undesirability of courts of 13 or 14 judges, but also upon the geographical size of the two circuits. The present ninth circuit covers an enormous territory; it ranges from the Artic Circle to the Mexican border, from the Sea of Japan to the Missouri River. Because of this great geographical span, judge time must inevitably be lost in travel; records and exhibits must be transported over long distances; conferences of the judges and en banc hearings are more difficult to arrange; and, in general, the centralized administration of a farflung circuit with an immense caseload results in delays and inefficiencies. The fifth circuit, too, extends over a vast area, stretching from the Florida Keys to the New Mexico border. Creation of two independent divisions within these two circuits would do much to solve the geographical problems faced by both judges and litigants. Even more important, it would make a major contribution by creating courts of appropriate size, yet with sufficient capacity to meet the demands of the heavy workload of the present fifth and ninth circuits.

In preparing its Phase II report, the Commission has studied the problems of managing a large circuit. In our view, it is highly undesirable at this time to create a court of as many as 15 judges in either the fifth or the ninth circuit. Moreover, even if it appears

that each division of the fifth and ninth circuits may eventually require more than what we would consider an optimal number of judgeships, it is our considered judgment that it is better to have two such divisions rather than one court of 20 or even 30.

In conclusion, the members of the Commission believe that those considerations which originally led us to recommend circuit realignment are still of sufficient force to make desirable the division of the fifth and ninth circuits, as contained in S. 729, and that the recommendations which result from the second phase of the Commission's work will not reduce the desirability of immediate action on that bill.

Mr. Chairman, I neglected to say at the opening of my remarks that I am accompanied here by our very highly respected Executive Director, Professor A. Leo Levin, for whom all of us have great affection and admiration. He sits here by my side to participate in any colloquy by the chairman or that the chief counsel may desire to have.

Senator BURDICK. The presiding chairman concurs in everything you said about the professor.

Mr. LEVIN. Thank you very much.

Senator BURDICK. Do you have something at this time?

Mr. LEVIN. No.

Senator BURDICK. Well, thank you very much. I think you have put the case solidly before us.

Senator HRUSKA. Thank you.

Senator BURDICK. Very well.

The committee would like to adopt this arrangement this morning if it suits the convenience of the judges. We would like to have the three judges of the fifth circuit appear together and each give their statement and then we can kind of talk about the subject together.

Judge Walter P. Gewin, Judge Bell and Judge Coleman; would you approach the witness table?

STATEMENT OF JUDGE WALTER P. GEWIN, FIFTH CIRCUIT COURT OF APPEALS, TUSCALOOSA, ALA., ACCOMPANIED BY JUDGE GRIFFIN B. BELL, FIFTH CIRCUIT COURT OF APPEALS, ATLANTA GA.; JUDGE JAMES P. COLEMAN, FIFTH CIRCUIT COURT OF APPEALS, ACKERMAN, MISS.

Judge GEWIN. Thank you, Mr. Chairman. The very first thought which I wish to express to this subcommittee, Mr. Chairman, is one of gratitude. The nine judges of the proposed eastern division are sincerely grateful to the subcommittee for its serious and enlightened consideration of the problems of the fifth circuit. We deeply appreciate, Mr. Chairman, your cooperation in arranging for Mr. Westphal, committee counsel, to attend a joint meeting of a committee of judges from the East, and a committee from the West in New Orleans on January 15, 1975. Mr. Westphal was thoroughly informed, fully cooperative and very helpful to both

committees. In addition, we also express our appreciation to the Commission on the Revision of the Federal Court Appellate System and its staff for their thorough and lengthy study of the appellate system of the Federal judiciary and particularly of the consideration given to the Fifth Circuit. Present here today and joining with me in these expressions are Judge Griffin B. Bell of Georgia and Judge James P. Coleman of Mississippi. They will also make statements.

It does not appear to be necessary to restate at this hearing the thoughts which have been fully and completely expressed to the Commission on Revision of the Federal Court Appellate System and to this subcommittee on former occasions by judges of the eastern division. We do here and now reaffirm those statements.

I am authorized to say to you that the nine judges of the eastern division are unanimous in their support of the proposed legislation, S. 729, which is a revision of S. 2990.

We are also pleased to advise the subcommittee that the State bar associations of the States of Georgia, Alabama, Florida, and Mississippi are unanimous in their support of the proposed legislation.

It is a singular and very significant fact, Mr. Chairman, that nine Federal appellate judges and the bar associations of four States are unanimous in their endorsement of the proposed legislation, S. 729. Statements of position by the bar associations of the four States mentioned have been filed or will soon be filed with the subcommittee. Embraced within those associations are persons of varying backgrounds, differing political affiliations, and divergent philosophical views. Notwithstanding these factors, their support is enthusiastic. These facts, in my opinion, support the conclusion that the proposed legislation is for the common good of all who are affected by it.

Within my own knowledge this subcommittee and the Commission on Revision of the Federal Court Appellate Court System have carefully considered the opinions and thoughts of experienced legal scholars throughout the country. The legislation under consideration was not drafted until mature thought and analysis had been given to the opinions of a vast number of people. We are indebted to the subcommittee for its incorporation into the proposed legislation of certain requests made by the judges of the eastern division. We would like to have the record show, Mr. Chairman, that for a substantial period of time prior to this date, the nine fifth circuit judges of the proposed eastern division have been unanimous and unreserved in their endorsement of S. 729, or its equivalent.

Accordingly, we urge early and favorable action on the proposed bill with that degree of speed which is compatible with mature and deliberate consideration of legislation of this importance.

Permit me to express one final thought, Mr. Chairman. From a sentimental and traditional point of view we regret that the cold facts demand a division of the fifth circuit. The 15 active

judges and the 4 senior judges who now serve the United States Court of Appeals for the fifth circuit represent many years of academic and legal training, long and varied experience in the practice of law and many difficult, though pleasant, years in the service of the Federal judicial system. During our period of service as judges we have developed a sincere and abiding friendship and affection for each other. We are determined to maintain those friendships even after the division.

However, the rules of logic, national policy, the high standards set for the Federal judicial system, and the desire to achieve judicial efficiency and to establish justice all demand the enactment of the proposed legislation.

Permit me to say further, Mr. Chairman, that I fully endorse the statement Senator Hruska just gave at this hearing this morning.

If there are any questions, Mr. Chairman, I will be pleased to attempt to answer whatever questions are asked.

Thank you very much.

Senator BURDICK. Thank you, Judge Gewin.

Judge Bell.

Judge BELL. Thank you.

I will follow with a statement, which I will now read.

Senator BURDICK. It will be received, without objection.

Judge BELL. I am a judge of the United States Court of Appeals for the fifth circuit appointed from the State of Georgia. I have been a United States circuit judge and a member of the fifth circuit since October 6, 1961.

I have some familiarity with appellate court administration. I served as chairman of the Committee on Innovation and Development at the Federal judicial center in 1968–1969. I am currently a member of the board of directors of the Federal Center. I am a member of the American Bar Association Commission on Standards of Judicial Administration. I am also a member of the Advisory Council for Appellate Justice, a study group sponsored by the Federal Judicial Center.

I am chairman-elect of the Division of Judicial Administration of the American Bar Association. Coming closer to home, I am and have been chairman of the rules committee of our court for several years and I am familiar with the local rules and particularly those which we have employed in recent years in bringing maximum efficiency to the court.

I testified at some length before the Commission on Revision of the Federal Court Appellate System on September 5, 1973, in Jacksonville, Fla., and that testimony is no doubt available to you. For that reason, I do not expect to testify in any detail today, but to make myself available for questions after a short statement.

During the period of my service on the Fifth Circuit, the court has increased from 9 to 13 and then to 15 judges. Filings have increased by geometric progression and to the point of near inundation—for example, an increase from 2,014 in 1970 to 3,294 in 1974.

The fact that S. 729 substitutes, through division of the circuit, 23 judges for the present 15 points up the problem. We need an additional eight judges in the present circuit. Either the eight will be added making a total of 23 active judges or the circuit must be divided along the line of what S. 729 proposes.

The massive problem of the fifth circuit will not be readily apparent from a comparison of the filings in the 11 circuits. For example, those filings for fiscal year 1974 would indicate that some of the other circuits have workloads approximating that of the fifth on the basis of filings per judgeship, but these are based on raw filings and not on case disposition actually requiring action on the part of the members of the court.

In this connection, I attach as exhibit 1, a table prepared by the chief deputy clerk of our court which adjusts administrative office statistics by what I term the "washout" rate for each circuit. By "washout" is meant those cases as shown on the table which are disposed of without judge activity. It will be noted that this rate runs from a low of 32.7 percent to a high of 57.5 percent and that the fifth circuit rate is 34.8 percent. The last column in that table demonstrates the actual caseload per judge. The load of 144 cases per judge in the fifth circuit is entirely too high, and, in fact, is unreasonable, oppressive, and not in the public interest.

We have used every known method to increase the efficiency of our court. We have developed methods heretofore unknown to the appellate process. Each judge's office is operated on a 12 months' basis. Each member of the court is assisted by more than the ordinary complement of law clerks. Oral argument is denied in more than half the cases which reach the judges for disposition. Orders are used in lieu of opinions in many cases. We receive help from senior judges and from visiting judges.

Despite these efforts which are unusual and perhaps unprecedented, and to some extent only warranted to prevent a crushing backlog, we are now facing a backlog of cases. We have reached and passed the capacity of the court. The longer the Congress delays in providing ample judge power, the greater will be the backlog.

In my judgment, it is imperative that more judges be allocated to the fifth circuit. It is equally imperative that the size of the circuit be reduced. I will not review the many problems involved in maintaining the law of the circuit, and even the court itself, as stable institutions, given the problems which inhere in the large en banc court. Nor will I review again the concept of small group dynamics which results in considerable difficulty in atttaining a majority opinion in a large court. A study of small group dynamics will indicate that there may be a group so small that there is not a proper atmosphere for a minority view but, on the other hand, there can be groups of such size that a phenomenon of fragmentation presents itself to the end that it is difficult to obtain a majority view. Absent a majority view, something akin to the legislative process sets in whereunder there is a casting about

amongst the fragmented groups to achieve a majority by compromise.

The only feasible method of reducing the size of the en banc court is to divide the Fifth Circuit.

A division of the circuit will lend itself to better administration of the court from an operational standpoint. In addition, the members of the court will be better able to keep abreast of the large volume of law being written by the court.

As regretttable as it may be, and I bow to none in my pride in the fifth circuit, the old order changeth. The combination of time, cases, and the vicissitudes of an expanding body of law dictates that we must now face circuit division.

I urge prompt action on S. 729 and will be glad to answer questions to the best of my ability.

Thank you, Mr. Chairman.

Senator BURDICK. Thank you, Judge Bell. The exhibit 1 which you referred to will now be placed in the record.

[Exhibit follows:]

EXHIBIT 1 TO JUDGE BELL'S STATEMENT

ADJUSTED FILINGS PER JUDGESHIP—FISCAL YEAR 1974

Circuit	Fiscal year 1974 filings	Adjustment for cases to be disposed of without hearing or submission on briefs [1]	Cases to be disposed after hearing or submission with briefs or merits
1st	129	38.6	80
2d	200	54.9	90
3d	135	42.2	78
4th	209	53.5	97
5th	220	34.8	144
6th	148	44.7	82
7th	136	32.7	92
8th	124	42.6	72
9th	207	41.8	120
10th	131	54.0	60
D.C.	138	57.5	59

[1] Includes cases disposed of: (1) By consolidation or cross appeals; (2) by dismissal by the parties under FRAP 42; (3) by the Clerk for want of prosecution under local rules; and (4) by the judges on such matters as motions of appellee to dismiss, petitions for mandamus, motions for summary affirmance or reversal, and other matters without briefs under FRAP 28.

Source: A.O. Management Statistics—1974.

Judge COLEMAN. Mr. Chairman, I had the privilege and pleasure last September of testifying at considerable length before you, and I have prepared a statement for today, which has been sent to committee counsel—it is in writing. It fairly well parallels what Judge Gewin and Judge Bell have already said.

Attached to it is a letter dated March 4, 1975, from the Mississippi State Bar reaffirming its position on that matter.

To satisfy you, Mr. Chairman, in the interest of time, I would simply like this statement filed and incorporated in the record at this point, or I would be happy to go ahead and state it orally. I do not know what the committee procedure is.

Senator BURDICK. This fits very well with procedure. The whole statement will be made a part of the record, and we are delighted.

[The prepared statement of Judge James P. Coleman follows:]

PREPARED STATEMENT OF JAMES P. COLEMAN, JUDGE OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Mr. Chairman, and members of the committee: I am here today for the purpose of again stating my support for Senate Bill 729, a bill to improve judicial machinery by reorganizing the Fifth Circuit.

I have read Senator Burdick's statement to the Senate when the bill was introduced on February 18, 1975. I think the statement correctly describes the situation which seriously threatens the effective exercise of the federal appellate process in the six states of the Fifth Circuit.

I have heretofore testified in Jackson, Mississippi, before the Commission on Revision of the Federal Court Appellate System.

On September 25, 1974, I testified here in Washington before the Subcommittee on Improvements in Judicial Machinery. This testimony went into considerable detail. I had the opportunity of answering many questions propounded both by the Committee and its Counsel.

Since my prior testimony is a matter of record, I do not think I should trespass on the time available to the Committee by repeating it a this time. I simply wish to say, and I appreciate the opportunity of saying, that I adhere, without reservation, to the testimony which I have already given.

I would like to emphasize one special point in particular. If we are to maintain appellate procedure in our Circuit as a meaningful process this proposed legislation is absolutely mandatory. By screening appeals, by denying oral argument in more than fifty per cent of our appeals, and by shouldering an almost intolerable workload, the Fifth Circuit has been able to stay abreast of its docket. Now, we find that on July 1, 1975, contrary to what happened last year, we shall have an unsubmitted backlog of about 275 cases. Because of the screening process these will necessarily be difficult cases, cases about which Judges may reasonably differ, and they will require far more than the usually expected time for their disposition. To be more specific, wherein we have heretofore been able to avoid the brink we are now about to be compelled to step off it. Every Judge on our Court has an extreme adversion to requiring litigants to wait indefinitely for the decision of their appeals, especially where they involve human freedom and the right to recover for serious personal injuries, as in the case of Seamen and Longshoremen.

If we could get the extra Judges provided by this legislation and if we could improve the logistics of the decision making process by cutting participation from fifteen Judges back to twelve, as this legislation provides for the Eastern Division of the Fifth Circuit, then we could both promptly and meaningfully dispose of appellate cases in Mississippi, Alabama, Georgia, Florida, and the Canal Zone.

Our Court is now well past "high noon," and I appreciate the efforts of the Congress to remedy the situation.

Mr. Chairman, on September 24, 1974, Mr. James Hugh Ray, President of the Mississippi State Bar, testified before you, here in Washington. At that time he stated the full support of the Mississippi State Bar for the proposed division of the Fifth Circuit. I have with me a letter from Mr. Ray, updating this testimony and indicating that the position of the Mississippi State Bar stands as it was in September. I would like to hand up his letter and ask that it be incorporated as a part of my statement.

Mr. Chairman, with this statement, I shall be delighted to try to answer any questions which the Committee or its Counsel may consider important.

Senator BURDICK. As you said, yourself, Judge Coleman, you all have almost spoken with one voice here this morning.

I have a few questions for all of you.

Gentlemen, at the conclusion of today's hearing I will include in the record of this proceeding various letters and resolutions

from the bar associations of the States of Florida, Georgia, Alabama, and Mississippi which disclose that the bar associations of these four States are unanimous in this legislation. From the testimony which each of you have given today it appears that the nine circuit court judges from these four States, including the three of you, are unanimous in support of this bill. In light of this unanimity, there is no reason for me to subject you gentlemen to additional questioning. However, there are a few questions I have.

According to these statistics, the proposed eastern division, consisting of 12 judges, would have an average caseload of 145 filings per judge. This would compare with the average filings of 220 per judge in fiscal year 1974. Do you feel this is a sufficient lightening of the caseload which is conducive to improving the appellate process in the four states?

Judge GEWIN. Unquestionably so.

Judge BELL. Yes.

Senator BURDICK. With this reduced caseload, do you think it would be possible for the eastern division to grant more oral argument than under existing procedures and manpower in the existing circuit?

Judge GEWIN. Yes, sir.

Senator BURDICK. I assume when one answers yes, and the others do not answer, you all agree?

Judge BELL. In our court, when there is no answer it means yes.

Judge COLEMAN. I think that is the chance to get back to more oral argument. That would save time. A lot of our time in the screening process could be used for more oral argument, if we were in a smaller court with a smaller number of judges operating.

Senator BURDICK. Under section 6, it is contemplated that Atlanta will be the headquarters for the court of appeals. However, because the new Federal Courthouse in Atlanta is in the process of construction, the bill authorizes the eastern division to sit at New Orleans until adequate facilities are available in Atlanta. Have any of you given any consideration as to the mechanics—as to how this housing problem will be solved or how long a time would be involved in using the facilities in New Orleans?

Judge GEWIN. You inquire about the use of the facility in New Orleans? Well, we have come through some pretty rough times, Senator, together. I believe we could live in the same house until we could get new quarters. I realize there would be some mechanical problems. We would have to confer and pick out times when the East would sit and the West would sit.

But on a temporary basis I do not think that would be a serious impediment to our operations.

Judge COLEMAN. I feel also, Mr. Chairman, that there would be no problem.

But there would be no problem in holding court in Montgomery, Jacksonville, Mississippi, and other places east of the river just as we do now.

I am here fresh from a week of court in Jacksonville.

Judge BELL. I might add, the post office is moving out of the Federal Building in Atlanta. Judge Gewin and Judge Morgan met with the spaceman over at the GAO office and we made a great deal of progress in obtaining space in the circuit court in Atlanta that would help within the year.

Judge GEWIN. I might state, Mr. Chairman, we have suggested to GSA that it would suit the eastern division quite well to let us remain in the present building, which is now being used by the district court and the post office, which, as Judge Bell said, will be moving out. We will be happy to remain there and refix that building, and we feel, and I think they feel that substantial savings would be accomplished by keeping us there rather than providing quarters in the new building, which would be certainly at the earliest, 4 or 5 years from now.

Senator BURDICK. As I understand it, there will be no problem about these temporary arrangements?

Judge BELL. Yes, sir.

Senator BURDICK. Do I detect nostalgia about staying around New Orleans?

Judge GEWIN. Yes.

Senator BURDICK. At a meeting on January 15, you and some of your fellow judges suggested to the subcommittee counsel that provisions should be made in the bill for the nomination, confirming, and appointment of new additional judgeships in advance of the effective date on which the two divisions would officially come into existence. My question to you is, have you studied the language to this effect and are you satisfied with that language?

Judge GEWIN. I think it is very good language, Mr. Chairman, but I must say we felt a little reluctance—for judicial officers to suggest what the executive and legislative branches should do and how quickly they should do it. We would be pleased to proceed as indicated in the bill, but we have not presumed to originate that idea because we thought it might be considered somewhat out of our field of activity.

Senator BURDICK. Well, gentlemen, there is such unanimity here I have no further questions, and I appreciate your appearance here this morning.

Excuse me. Staff has a question.

Mr. WESTPHAL. Looking ahead a few moments. I note that your colleague, Judge Wisdom, makes the prediction—well it seems to be a double prediction here—one is a statistical analysis that the caseload is kind of leveling off and there is a projection that the filings in 1975 may be down 2.8 percent from the filings of fiscal 1974. It may be true we will reach a plateau on this so-called law explosion we have had ever since World War II, it seems.

But there is also the prediction made that if the caseload does continue in the future as it has in the past, that the day is not far off when there may have to be 15 judges in each of the two divisions that would be created in the fifth circuit by this bill.

On the other hand, during the various hearings that we have had, there have been discussions of the fact that when a court oper-

ates over a more compact geographical area, that when we have the use of adequate supply of law clerks for the individual judges and have a better central staff operation, that the capacity of a court of given size can be increased.

The chairman has suggested by taking the caseload figures projected in this bill, that you start out with a low caseload of 145 filings per judge and taking into consideration this "washout" rate of some 34 percent, which Judge Bell mentioned, that you are left with a caseload of something like 97 cases per judge, that, through screenings and oral arguments and everything else, will be the effective workload per judge.

Now, can any of you hazard a guess as to what the capacity of your 12-judge court would be and its ability to assimilate a reasonable increase in the caseload that you would be starting out on?

Judge GEWIN. Well, certainly it is obvious that we could do much more about it with the 12 judges with a caseload of 97 than we can now with 15 judges with a caseload of 220.

I have never quite understood the argument, Mr. Chairman, that the problem is so large that to divide it will result in two problems equally as large. The sum of both is bound to demonstrate the fact that we are too large now. This decrease in filings may occur, but it is only a projection. But even so, the problem that will not go away is the backlog.

According to our Chief Deputy, who is considered to be quite a good statistician, in 1975 we will have a backlog of 177 cases; 1976, 288 cases; and 1977, 399 cases.

As to nonpreference cases, that has a significant meaning. For example, at the present time, by the end of this year, there may be in nonpreference cases a lapse of 11 months from the date of the filing of the last brief before hearing, but by January 1977 there will be a lapse of 17 months, and by April 1977 there will be a lapse of 20 months. So even if the filings should drop 2 percent the problem is not solved in any sense.

Judge BELL. I think I could add this, Mr. Westphal, that assuming a caseload of disposition by judges of 97, and I think we can say that over the years we could increase that 97 up to 115, so you are talking about an added capacity of about 200 cases, and at that point something would have to give. You would have to get more judges or divide again under this same concept of east and west. I suppose you would end up with 38 circuits. But you could at least take on 200 more cases, and of course, it is not what each one of those judges can do. That is some part of it, but of course, you have some senior judges and some visiting judges who help out some.

Mr. WESTPHAL. Of course, there is also operative in this situation we are talking about, as we talk about the future, the fact that Congress is considering legislation, for example, to reduce the number of three-judge courts, that efforts are being made to setup administrative procedures for handling complaints arising out of the prisons, so that you would have fewer 1983's. There are

some parts of the country that have already seen a decline in the number of habeas corpus cases.

Judge BELL. Right.

Mr. WESTPHAL. The proposals to limit diversity jurisdiction are still under consideration.

So that there may be things happening to caseloads which would offset what would otherwise be a normal projected input.

Judge GEWIN. One thing just happened, I think, that helps perhaps in a miniscule way, but there is a tendency—I believe legislation has now been adopted which eliminates three-judge courts to review an Interstate Commerce Commission ruling. The effective date does not eliminate two cases I now have. I wish it did, but in the future that will be some help.

I think what you say is important for the reason that not only is a division of the circuit a good remedy, but a limitation on jurisdiction in those areas you have mentioned, diversity, three-judge cases, et cetera—those remedies also are needed in this situation.

Judge BELL. Do not forget that historically when we have an omnibus judges bill, district judges—once those judges take office we have more appeals because each one creates some appeals, so that will add something to the caseload. These others may take it away. I think under S. 729, we can go for a good many years. I think that capacity is built into it so that it would suffice for a good while.

Mr. WESTPHAL. I have no further questions.

Senator BURDICK. Thank you, gentlemen.

Judge BELL. Thank you very kindly, Mr. Chairman.

Senator BURDICK. Our next witnesses will be the Chief Judge, John R. Brown, Judge John Minor Wisdom, and Judge Thomas G. Gee, of Houston, New Orleans, and Austin, respectively.

We would like to proceed with you gentlemen as we did with the previous witnesses.

STATEMENT OF CHIEF JUDGE JOHN R. BROWN, FIFTH CIRCUIT COURT OF APPEALS, HOUSTON, TEX., ACCOMPANIED BY JUDGE JOHN MINOR WISDOM, FIFTH CIRCUIT COURT OF APPEALS, NEW ORLEANS, LA., AND JUDGE THOMAS G. GEE, FIFTH CIRCUIT COURT OF APPEALS, AUSTIN, TEX.

Judge BROWN. Mr. Chairman, I express my appreciation as the other three judges did for the invitation this committee extends to us. This may be historic because it may be the last time I appear as the Chief Judge of the fifth circuit. There may not be the whole circuit, if this legislation passes.

I can not help but remark what Judge Goldberg has said, there has been more said on splitting the fifth than on splitting the atom, and we are adding to that today.

I want first to tell you that I feel an obligation to keep the committee and the Senate fully informed.

I have, working with the Chief Deputy Clerk, Mr. Ganucheau, some figures prepared. Filings have fallen off about 3 percent. At the same time we are developing a backlog now for the first time

in 10 years, and these sheets show the detail which I will not take time to explain.

Senator BURDICK. Without objection, they will be received.

[The material referred to follows:]

FIFTH CIRCUIT ANALYSIS OF FILINGS, TERMINATIONS, AND PROJECTED BACKLOG, ETC.—FISCAL YEAR 1975–77

I. FILINGS

The current projections would predict about 3,205 appeals (including cross-appeals), a decline of 89 cases (2.7%) from 3,294 in fiscal year 1974.

A. *Filings*	
1st half fiscal year 1975	1556
1st half fiscal year 1974	1540
Increase (1.0 percent)	+16
B. *Projected filings*	
1st half fiscal year 1975	1556
2d half fiscal year 1975	1556
Plus: Estimated 6 percent increase for 2d half of fiscal year over 1st half	93
Total	3205
C. *Projected change*	
Fiscal year 1975	3205
Fiscal year 1974	3294
Decrease (2.7 percent)	−89

D. *Filings needed to reach projection*	*Per month*
Average filings required January–June	275
Actual filings January and February 1975	275

The filings for the last three years and this year's projection are as follows:

Fiscal year:	*Filings*
1972	2864
1973	2964
1974	3294
1975 (Projected)	3205

3-year increase 1975 over 1972—341—11.9 percent.

II. TERMINATIONS

A. *All terminations*	
1st half fiscal year 1975	1593
1st half fiscal year 1974	1265
Increase (25.9 percent)	+328
B. *Opinion Output* (excludes cross-appeals)	
Fiscal Year (*8 mo only*):	
1975	1344
1974	1126
Increase (19.4 percent)	+218

III. PENDING CASES

Fiscal Year:	
1972	1636
1973	1729
1974	2310
1975 (1st half)	2258
Percentage change:	
1975 over 1974 (2.2 percent)	−52
1975 over 1972 (38.0 percent)	+622

IV. PROJECTION OF AVAILABLE CASES FOR SCREENING, CALENDARING, AND CUMULATIVE BACKLOG—ASSUMING NO INCREASE IN FILINGS

	Fiscal year 1975	Fiscal year 1976	Fiscal year 1977
a. Unassigned cases from preceding fiscal year	1,341	1,341	1,341
b. Estimated new filings	2,905	2,905	2,905
c. Total available cases	4,246	4,246	4,246
d. 44.6 percent of total available cases transmitted for screening	1,893	1,893	1,893
e. Cases available for screening	1,893	1,893	1,893
f. Less 53 percent summary III's	1,003	1,003	1,003
g. Balance for hearing calendar	890	890	890
h. Plus III's and IV's from prior fiscal year not heard	211	322	433
i. Less cases readied after cutoff date of May 1 (2/12th of Line (g))	1,101 145	1,212 145	1,323 145
j. Cases to be calendared to keep current	956	1,067	1,178
k. Less cases actually to be calendared (41 wks × 19 cases per week[1]	779	779	779
l. Backlog by cutoff date	177	288	399
m. Cases readied after cutoff date (Line (i))	145	145	145
n. Ready cases for oral argument carried forward to next fiscal year	322	433	544

[1] An average of one case per court week is continued for reassignment resulting in an average of 19 cases per week being heard.

V. IMPACT OF BACKLOG ON NONPREFERENCE CASES

	Fiscal year 1975		Fiscal year 1976		Fiscal year 1977	
Cases to be calendared to keep current (Line (j) table IV)		956		1067		1178
Less cases which can be heard:						
a. Preference cases[1]	397		397		397	
b. Nonpreference cases[2]	382	779	382	779	382	779
Backlog (nonpreference cases classified for argument not reached)		177		288		399

[1] 46.9 percent of cases available for screening.
[2] Difference between 397 perference cases and 779 maximum caseload on oral argument of 41 weeks at 19 cases per week.

VI. PROJECTED HEARING DATES FOR NONPREFERENCE CASES BRIEFED FROM DECEMBER 1974 THROUGH MAY 1, 1977, ASSUMING NO INCREASE IN FILINGS

Last brief filed in—	Case will be heard in—	Months from last brief to hearing
December 1974	October 1975	10
January 1975	November	10
February	December	10
March	January 1976	10
April	February	10
May	March	10
June	April	10
July	May	10
August	June	10
September	October	14
October	November	14
November	December	14
December	January 1977	14
January 1976	February	14
February	March	14
March	April	14
April	May	14
May	June	14
June	October	17
July	November	17
August	December	17
September	January 1978	17
October	February	17
November	March	17
December	April	17
January 1977	May	17
February	June	17
March	October	20
April (Cutoff date of May 1)	November	20

VII. FIFTH CIRCUIT CALENDARING PRIORITIES

Preference cases

Criminal Appeals (Rule 45(b) FRAP).
Appeals from orders refusing or imposing conditions of release.
Difficult or widely publicized trials.
Organized Crime Control Act.
Selective Service Criminal Cases.
Habeas Corpus and Section 2255 Appeals.
Interlocutory Appeals.
National Labor Relations Board.
Immigration & Naturalization Appeals.
Administrative Orders, Review Act of 1966.
Federal Trade Commission Act.
Mandamus, Prohibition, Etc.
Certain Federal Questions.
Social Security Appeals.
Railroad Unemployment Ins. Act.
Norris-LaGuardia Act.
Clayton Antitrust Act.

Nonpreference cases

United States Plaintiff: Negotiable Instruments; Other Contract Actions; Condemnation of Land; Other Real Property Actions; Personal Property Tort Actions; Civil Rights; Fair Labor Standards Act; Labor Management Relations Act; Securities, Commodities and Exchanges; and Tax Suits.

United States Defendant: Contract Actions; Real Property Actions; Tort Actions; Selective Service Act; and Tax Suits.

Federal Question: Marine Contract; Other Contract Actions; Employers Liability Act; Marine Injury; Other Tort Actions; Civil Rights; Labor Management Relations Act; Labor Management Reporting and Disclosure Act; Patent; and Securities, Commodities & Exch.

Diversity of Citizenship: Insurance; Other Contract Actions; Real Property Actions; Personal Injury—Motor Vehicle; Personal Injury—Other; and Other Tort Actions.

Judge BROWN. What is going to happen in terms of delay? We will be faced, perhaps, with a situation that has confronted the ninth circuit, where, when they hear the case orally, the briefs are 20 months old, and that is a deplorable condition.

I do not believe, and I am basing this on my experience, that this year we will have an increase. I think we will have leveled off this year. But I predict as I did before, there will be increases over the next two or three years. This exhibit is prepared on the assumption there will be no increase in filings. It still presents a problem.

Now, some mechanical things. On the use of the New Orleans Courthouse, we now pay rent to GSA. Maybe we can collect rent from the eastern division, to soften the blow to our own budget. I think we will have no real difficulty on that score. We will have some mechanical problems on where we can house the five new judges we will get in the western division, since we now have chambers for 15 plus 3 visiting judges.

Senator BURDICK. Well, Judge, if it will be helpful, I will offer my services as an arbitrator.

Judge BROWN. That will be fine, because we welcome an opportunity to appear before you. We regret you had to send only your counsel down to a meeting in New Orleans, since you were out in North Dakota, at the time we talked about it.

I think there are some technical problems here.

On the assumption the Congress passes the bill—a thing I earnestly hope never happens—in substantially this form, which is to say by creation of the divisions in the Fifth and Ninth Cir-

suit, there is a need for some corrective language in the bill. As it is now written and revised, it assures the cross-assignment of both active district judges to district court from one division to another, circuit judges from one Court of Appeals to another, and active circuit judges to districts in the divisions. That is taken care of by the bill.

Having worked with my circuit executive this past week, we prepared an analysis, and it is included in this memorandum of March 18, copies of which we sent to Mr. Westphal, and we talked to Mr. Weller on Thursday or Friday.

Left out inadvertently, because I remember at a meeting in New Orleans Mr. Westphal and I discovered after the meeting had broken up we had not adequately taken care of cross assignment to senior circuit judges or senior district judges, either to the district courts of the other divisions, or more importantly, to the circuit court, because we followed the policy the last four or five years of using only senior district judges on the Court of Appeals. Some of our most outstanding judges are in that category.

So we proposed on page 2 of this memoranda a new paragraph C to section 15.

I reread this thing, and this is a little technical, but the way it is now drafted, it calls for the senior of the two circuit chief judges to assign any retired circuit or district judge to either one of the two divisions. I think since the present statute is on this sort of a structure, namely, that the chief judge of the circuit from which the judge is coming has nothing at all to say about the assignment of a retired circuit or district judge from outside to another circuit, that this language ought to be changed so that it would provide that the chief judge of either of the divisions may assign a retired circuit or district judge to such duties as such senior judge is willing to undertake. You can see sort of a ludicrous situation. Suppose Judge Ingraham, who is a senior judge and lives in the Western division, and suppose he is to be assigned to the Eastern division Court of Appeals. I would have to assign a judge in the Eastern division Court of Appeals. It ought to be Judge Gewin who would be the chief judge of that circuit. So I could show Mr. Westphal some precise language when we adjourn that might well accomplish that.

Then we uncovered another thing that does pose a policy question, and on which our two Committees never had any discussion, and that is set forth on the bottom of that page, and that is with respect to en banc. At the present time, when a senior circuit judge of the circuit sits on a panel, he is automatically on the en banc court when it is reheard en banc. Now, it seems to me that the same thing should be true in the case of a cross assignment of a retired circuit judge from one division to the other division. Suppose Judge Tuttle in the Eastern division is assigned to a panel in the Western division, and the case goes en banc later, he would be automatically on the en banc court. This does pose some policy questions that the Congress may want to consider.

I cannot speak for anybody but myself on that particular affair.

But I do think it is important, and as you know, the Committee report on page 16 states the positive commitment of cross assignments without the necessity of going through the Chief Justice. My suggestions here are merely to bring the language of the bill into conformity with the policy which you have adopted.

Now, as far as the substance of the thing is concerned, I align myself with Judge Wisdom and Judge Gee, but I have a slight question with Judge Gee on en banc, but slight. I will not go through the things they have so ably stated before, and now state in their filed statements.

I do not believe this is a solution the Committee has found, because this is a split in everything but name. You have two independent courts, they are supposed to operate independently from a judicial and administrative standpoint, so that once you approach it that way it seems to me that you are just simply dividing another circuit when it gets to the point where that has to be divided——

Senator BURDICK. Judge, may I give you an analogy that you might think about?

Judge BROWN. All right.

Senator BURDICK. North Dakota for a number of years had two Congressmen at large, and they were pretty well devoted to the whole state of North Dakota, and then they split it into eastern and western districts and we still had the comradery and the interests of the State at heart, and unanimity.

Judge BROWN. I suspect there will be physiological or emotional values in this, but it does soften the blow a little bit that each of us can bear the name Fifth and we each would like to have it and understand why the others would, too.

But I really do not think from a substantive standpoint you are really solving anything, because if you apply this to the Third or Sixth Circuit you are doing what you have to do in the event of a split.

My own personal view is, and on this the judges from the West have not any firm unanimous policy at all, but my own view is it would be preferable if there were an outright split if this thing has to go through.

That brings me, then, to the effective date of the bill. It is the view of many of us in the West, and I know I speak for Judge Goldberg very emphatically, but he thinks the effective date of the bill ought to be the date on which the new judges are in their seats. That poses some mechanical problems that are not easy, and I must say we are indebted to Mr. Westphal's presence in New Orleans and his working on the present section. I believe it is section 5, because if that is adopted I think the language is adequate to carry that out.

But let me point out why this does not really meet the problem. The moment the act becomes effective, now January 1, 1975, they have to use cross assignments. You have the gentlemen from the East; what will we do about oral argument? Until the new judges are appointed, neither of the two subdivisions can really effectively

change its operating rules. To be more specific, if they are going to help us on cross assignments, and they pledge to do it, and we honor that pledge, we cannot change their rules on screening. We will have to almost retain our present practices so that to that extent, at least, the courts are something less than independent.

So I think it would be a more positive thing to put the new concept into operation at the time when the resources are available and it ought not to be done prior to that time.

Senator BURDICK. You ought to understand we cannot control the President.

Judge BROWN. I do not think so, and the judges cannot control either the Congress or the President. We have enough trouble controlling the judges.

Whether this language that is in the revised bill will be effective, I do not know, but it is better than it was before.

Now, on the merits, I am sure Judge Wisdom will emphasize this a great deal—as we told you last year, we had instituted a new staff attorney setup in which we had five very fine lawyers with an adequate secretarial staff in addition to the pro se clerks in the clerk's office. That has been a very effective thing, just 9 months experience with it. We are 200 opinions ahead of last year, same time. That is pretty remarkable. We are turning out opinions at a faster rate than we did a year ago and nibbling always at that pending caseload. So this is another thing that ought to be given a real adequate trial experience before we cut this whole thing up.

Mr. WESTPHAL. Excuse me, Judge.

You say you were 200 opinions ahead or 200 dispositions?

Judge BROWN. These are 200 opinions ahead.

Now, you understand that this covers the rule 21's and the signed opinions. I can give you—as a matter of fact, I will leave with you the score sheet, which does not identify the judges by name, which shows an actual breakdown in contrast to last year. It is 200 cases. You can see that represents almost what—we have 32 percent washout, so we have done pretty well.

Now, I suppose we have enough problems in the fifth circuit without trying to offer any advice about the ninth circuit. But I have a role here as a member of the Judicial Conference of the United States, and I think you ought to take a close look at the way you worded arrangements for what I call the mini banc, that 4–1–4 court on California problems. Specifically where the judiciary will have troubles about it, is that it seems to me to require that the en banc court be convened on either one of two conditions: (1) By a certificate by a division; or (2) by petition of a party. That goes farther than rule 35, which allows the parties really to say nothing about it.

I know Mr. Westphal brought this up before the judges' meetings in New Orleans just for our reactions, and I hope you do not resent the fact that I am going to the west coast to tell them how to handle it.

That is all I have to say.

Once again, my thanks. Judge Wisdom will be next.

STATEMENT OF JOHN MINOR WISDOM, JUDGE, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

Judge WISDOM. Mr. Chairman, thank you for giving me the opportunity of expressing my disapproval of S. 729.

I have been on the fifth circuit for almost 18 years. I have testified before this committee and before the Hruska Commission and in each instance submitted prepared statements. I shall, therefore, not attempt to repeat specific recommendations I made or go into discussion of specific matters, such as the advantages of a central staff.

But I do feel it is appropriate and necessary for me to restate my basic position. My basic position is that this bill does not get to the roots of the problem. The roots are these: There are too many cases that should not be in the Federal courts. The input must be reduced.

Second: If the Federal appellate system creaks it must be restructured.

Third: Federal internal practices and procedures are in the grip of a dead hand and they must be reformed and made more efficient. I shall not go into specific suggestions as I did in my prepared statements.

Basically, I feel strongly that this bill may trigger a proliferation of circuits.

Here I repeat myself, but I think it is important enough to be repeated. This bill may trigger a proliferation of circuits that will dilute the role of Federal courts in our brand of American federalism.

What makes our system work is Federal legal supremacy, and this means the U.S. Court of Appeals has a federalizing function as well as a purely appellate function of reviewing errors.

We are exposed to areas of conflict of the most sensitive and difficult kind where there are local pressures and influences almost impossible to resist, especially on the part of some low courts. Certainly, the narrower the base, the less the incentive of inferior Federal courts to bring local policy in line with national policy.

I say the federalizing role of circuit courts should not be diluted by the creation of a circuit court so narrowly based that it would be difficult for that court to resist completely, as it must, the pressure of local interests. The best exercise of such a high role would call ideally for a court consisting of judges with widely different backgrounds who are familiar with regional or local thinking but insulated from the influences of the region and the community. A court of 15 judges, such as we have now, who reside in 13 different areas, large and small cities, from six States, is as well insulated from local pressures as any court of appeals could be. The fifth circuit is well suited as it is now constituted to serve our Federal system.

Now, my objection to your committee report is that it shows no awareness of the advantages to American federalism of having a court drawn from widely different areas. On the contrary, Texas and Louisiana are to be joined in one circuit. Why? I quote from

the committee print: "Because these two States have a civil law background springing from the Napoleonic code." This will come as a surprise to Texans. Texas has no civil code, and its law is not based on the Code Napoleon. Georgia, however, has a civil code, and has had it for over 100 years. The historical error is unimportant. What is important is the narrow view of the Federal system which the error exposes. Texas and Louisiana share common interests in oil and gas; Georgia has no oil and gas. In an oil and gas case, is it better to have the matter settled by a court composed entirely of Texas and Louisiana judges or to have on the court a judge from Georgia, and the court cross-pollinated with judges from six States?

That is why I oppose this bill on theory.

But I think the bill rests on internal inconsistencies The committee print recognizes, and I quote: "Creation of new circuits is not a solution," yet this bill would create two new circuits. I regard a division as set up in the bill as autonomous and in effect a new circuit, although I would rather have our court be called a western division of the fifth circuit than the twelfth circuit.

Now, the committee states in its report, and I quote, "The second, third, and sixth circuits could be prime candidates for division in the near future if their respective caseloads continue to increase. . . . Today we are asked to bring the number of circuits to 13, tomorrow it may be 15 or 16. By 1990 the Nation may well need 27 circuits if nine is the magic number of judges". I say it is regardless of whether it is 9 or 15.

You say, and I think it is true, that "it would be impossible to always have at least three States in a circuit." Yet your bill calls for a circuit of two States, though the Hruska Commission itself recognized that a circuit of two States was really unwise.

The committee demonstrates that it realizes the horrors of yielding to proliferation of circuits by pointing out that, in time, California might constitute one circuit which would present the same problem that the whole ninth circuit does now. The bill increases the opportunity for intercircuit conflicts by increasing the number of circuits to 13.

The committee concludes, that the "fundamental and basic solution to increased caseload continues to be increased judges". With deference, I suggest that this is no solution. The committee has already discovered in 1 year that the two nine-judge courts which the Hruska Commission recommended could not handle the caseload for the fifth circuit. The bill, therefore, recommends "23 judges at a minimum". I predict that by the time this bill becomes law and the additional judges take office, should that unhappy event occur, each of the two divisions will require a court of at least 15 judges. We will then be back to where we are now, so far as the argument of having a court of 15 is concerned.

It is true that our caseload is temporarily levelling off. That always takes place about 4 years after new district judges take office. The fifth circuit received 13 additional district judges in 1962, 14 in 1966, and 18 in 1970, or about a 25-percent increase every 4 years from 1962 to 1970. In 1974 the Judicial Conference of the United States recommended 22 additional district judges for the fifth

circuit. The Judiciary Committee cut that number down to 11. Those recommendations were based on fiscal year 1973 statistics and projections made in 1974. They do not take into account the compelling need for more district judges that the Speedy Trial Act will require. Right now, it is virtually impossible for trial judges in overcrowded districts to comply with the relatively easy time limits of the district court plans devised for expediting criminal trials. Literal compliance with the statutory plan when it becomes fully effective in 1979 will mean that no civil cases will be tried in many districts—unless the number of trial judges is substantially increased. My estimate is that this circuit will need not the 22 district judges recommended by the Conference, but at least 40 judges—before the act becomes fully effective. One can safely say that the Speedy Trial Act renders all existing statistical projections obsolete.

Let us assume, however, that only 22 additional district judges will be authorized for the fifth circuit. Each new judge will generate about 40 appeals. That means 920 new appeals. Forty new district judges will generate 1,600 appeals. These figures do not include an annual growth factor of 5 percent.

I say to you, therefore, that increasing the judicial manpower is not the problem. We have got to get to the roots of the problem. Proliferating circuits to add judges is not the solution to the problem.

What S. 729 does is to commit irreversible harm to the fifth circuit without providing even the breathing spell for a period of years that our judges need and ninth circuit judges need, and let us not forget civil litigants as well as criminal litigants.

Senator Burdick put his finger on the solution in 1971. In 1971 when you introduced Senate Joint Resolution 122 to create a commission on revision of the Federal appellate system this is what you said. "While it is apparent that a solution, other than pure manpower increases must be found, there is respectable opinion that realinement of the circuits, involving redistribution of the caseload to courts of appeals"—The benefits of such a realignment may last only until the caseload increases to a point beyond the capacity of the revised courts." I say to you that we will have that within a matter of a few years if the Speedy Trial Act is at work. "Legal scholars in recent years have suggested that a relatively permanent solution to the problems of increased appellate caseload can be found only if the appellate court system itself is redesigned or restructured."

I do not criticize the Congress for creating new causes of action. With all due deference, it seems to me that the report sets up a straw man when it talks about objections to Congress creating new causes of action.

Mr. Justice Frankfurter wrote in 1928:

> Whatever our (political) preferences, the complexities and interdependence of modern society are bound to throw upon the federal courts increasing burdens of litigation affecting federal rights . . . Whether national responsibility or state rights were the accent in speech, the administrations of Theodore Roosevelt, Taft, Wilson, and Coolidge alike have contributed heavily to the growth of federal authority. This has had its reflex in federal litigation. The process will not stop.

In the 47 years since 1928, expanding Federal legislation and the resulting expansion of Federal authority have accelerated at a pace that would have left Theodore Roosevelt, Taft, Wilson, and Coolidge panting for breath. This was in the cards when the U.S. Constitution replaced the Articles of Confederation. The accelerated increase in Federal question cases along with insubstantial appeals in criminal appeals and prisoner cases argue strongly for congressional reform of the Federal court system before the Congress dismembers the system by division, subdivision, and sub-subdivision of the circuits.

I have here a certified copy of a resolution of the Louisiana Bar Association. It "strongly urges that the said Commission revise such recommendation so that it finally reports that the geographical limits of the fifth circuit as presently constituted, and in the alternative, that Mississippi be included in a circuit with Louisiana and Texas."

Now, just a word more, and that is really in answer to something that has been said here today.

We have a small backlog—we are sitting only 7 weeks, and we sit 4 days a week. A week is 4 days, and we hear 20 cases. If we sat 8 weeks and sat 5 days and heard 25 cases we would not have a backlog, and I do not think we would be killing ourselves if we did that, either.

I think, too, that we have been resistant to using district judges and judges from other circuits because the lawyers have not liked it. Only 13 percent of our judges were senior judges or district judges or judges from out of the circuit. They used 41 percent in the second circuit. Perhaps there is a place there for us to look for further help.

Judge Brown does not mean to, but he seems to talk as if this bill is positively going to become law. I sincerely hope it will not become law, because I think it will do serious damage to our Federal system.

Thank you.

The CHAIRMAN. Thank you, Judge Wisdom.

Judge BROWN. Judge Gee of Austin, Tex.

The CHAIRMAN. Welcome to the committee.

Judge GEE. Thank you, Mr. Chairman. I am the one that the Secretary called the baby judge.

Judge Green said somewhere in one of his books even in the most perfect love one tries to love more than the other. It appears that the western division loves the eastern division more than the eastern division loves the western division, because most of the opposition seems to come from us.

I cannot add a great amount to what has been said. In fact, I probably cannot add anything except maybe something that comes from my particular situation.

I am just not quite 2 years on the bench, and I was an active practicing trial lawyer before I went on the bench.

I want to say that from the personal point of view of workload, our workload is heavy, but it is far from crushing. I was working harder in the practice in one sense, that is that I had far less control over my work than we have.

I could sum it all up in saying that judges do not have the emergency that lawyers have. You are seldom called at midnight by a client who is in jail and wants you to come down and get him out. Further, they never start court without you, you do not have to send bills and various other good things.

So although we do have a heavy workload, in my judgment there are lots of lawyers who are working just as hard as we are, probably most of the able and active lawyers.

Our present situation in the circuit, I say amen to what Judge Wisdom said. I realize I am one of the younger judges. I do not sit on as many committees and things like that as the more experienced judges do. About all I do is get ready to hear cases and write opinions. So perhaps the work seems to me a little bit lighter than it does to one of these men on the bench longer, and also I am younger and I suppose I have a little more endurance than some of the older people.

But we can sit another week in the year. We can sit another 2 weeks in the year. I would be willing to sit quite a bit more, and think I could if necessary in order to get rid of this backlog.

Presently, we have not really a backlog anyhow. It is sufficiently small that we could wipe it out by sitting once or twice more in the year. I do not think that is worthy of the legislation you are to notice. There are even some advantages to having a small backlog. It permits you to schedule similar cases for argument together, as long as the backlog does not get large enough so that the litigants are substantially delayed.

Well, it seems to me obvious that where you have a good functioning organization like the fifth circuit you ought not to disturb it unless it is necessary. That has weathered a lot of storms. Some of the storms that have beat on it in recent years have been storms indeed, probably more than any other circuit in the country. The fifth has been hammered but it has apparently withstood the hammering and come through with pride and respect. I think, of all the lawyers of the bars of which it is composed. I do not think we ought to tamper with it unless we have to.

If I could be persuaded, Mr. Chairman, that what is being proposed would be a solution, that it would solve our problems, even on a temporary basis, long-term, temporary basis, 15, 20 years, then I might be able to swallow hard and say well, if you have to do it, do it. But I think it is increasingly apparent that the tide of events has washed over the proposed solution. It was washed over even when the Speedy Trial Act was passed. With the passage of that, Mr. Chairman, this is a solution that has gone down the drain, I most respectfully submit.

Well, what else to do? If we embark on a splitting we are going to wind up with the circuit court for the southern district of Louisiana or for the western district of Texas. If that happens these are circuits courts in name only. They are no longer the thing that we have known as the Federal Circuit Court.

Well, what to do instead? Jurisdiction, the intake is where the attack has to be made, Mr. Chairman. Diversity of jurisdiction is an idea whose time has come and gone. It should be eliminated. At

the time of the Confederacy, some of the soldiers from some of the Southern States refused to swear allegiance to the Confederacy on the ground they had already sworn allegiance to their States. I do not think those views or passions are existent any more. A nonresident can get a fair trial in a State court where he sues a resident defendant these days, and the Federal courts do not need to be burdened with this. Admittedly, it is only about 10 percent or less or a little more of our docket, but it is a very troublesome 10 percent, Mr. Chairman. It requires us to attempt to stay reasonably current with the laws of numerous jurisdictions, which is interesting but burdensome. It is more trouble, in other words, than the mere 10 percent figure.

Next, we ought to abolish the three-judge court. It is a poor arrangement. It was a good idea, an excellent idea, but it has not worked out in practice, the reason being that the judges are taking time away from their regular work to do this, tremendous pressure is put on litigants to reduce things to affidavit form and stipulate and so forth. The three-judge courts often do not hear testimony in making their decisions.

So in fact, rather than having a better tribunal to hear these more important cases, you have a worse one. It would be far better to have these important cases heard in the regular way.

We ought to abolish rehearings and let the court initiate its own en banc. A rehearing accomplishes very little, very little. About all they are—they serve about the same function as saying "note our exception" used to—kind of gives the lawyer a chance to blow off sometimes and say something back to the court.

We ought to try to do something with the habeas corpus, the collateral attack. If I had my way I would attempt to limit these people, and I certainly would forget these multiple reviews on the same ground. Habeas corpus is becoming the legal hobby in prisons. It is 20 percent of our docket. I do not mean to sound flippant. If I were in prison I would be attempting to get out, too, and prisoners deserve a hearing of their claim, but I do not think they deserve hearings and rehearings and rehearings.

Next, I think we ought to recognize that screening, although the lawyers, many members of the bar, do not like it, has a valid place. We get many, many frivolous appeals, more and more. A public defender in a prominent Eastern State, I am told, stated in a public meeting, not long ago, that many of the appeals his office filed have no arguable merit. As lawsuits against lawyers for malpractice proliferate, lawyers become much more ginger about abandoning a meritless cause. So they tend to appeal when there is no reasonable grounds for appeal.

The furnishing of a gratis attorney to persons who otherwise would not have been able to afford one, is a great, great fine step, but that has produced a lot of appeals and collateral attacks which otherwise would not have been made.

We do get a lot of cases that do not require oral argument, and I do not think screening should be abolished. It was adopted in order to try to deal with the burgeoning workload, but I think we ought to be given discretionary review in some types of cases, perhaps tax

court appeals, NLRB cases, the kind in which we are essentially reviewing experts, the determinations of experts, that would form at least one class where certiorari would serve.

Mr. WESTPHAL. At that point, Judge, what would the difference be, in your opinion, between discretionary review of certain agency matters and the manner in which the fifth circuit under its existing rules handles those matters, many of which are handled, under rule 21? It seems to me that whether you have discretionary review or whether you consider it under rule 21, the court and its staff and its clerks would have to give almost as much consideration under one procedure as it would under the other.

Judge GEE. I think they would have to give—certainly they would have to give consideration to it, Mr. Westphal, but our rule 21's are decisions in every sense of the word. We are deciding that case. We are looking at it fully and passing on the merits. This is a different procedure from looking at something and saying well, maybe they are right for the wrong reason or this matter is not of any sufficient significance to require——

Mr. WESTPHAL. My point is this——

Judge GEE. But I would agree with you, we have come a long way toward that.

Mr. WESTPHAL. If you get agency review matters now, the principal point is whether there is sufficient evidence to sustain the findings and order of the agency. Now, under what you propose, you would get a petition for a writ of certiorari to review that particular agency order and they would say, as the basis for it, that there was not sufficient evidence to support the Commission's findings and the order which they issued. In either instance, you are going to have to search enough of that record to see whether there is, or there is not, enough evidence to support the Commission's findings. At the present time, if you come to that conclusion, using rule 21, you enter an order which says enforced or affirmed. Under the procedure you suggest you would enter an order denying the petition for writ of certiorari.

It seems to me the work within your court for the judges considering that matter would have to be almost the same in quantity and quality.

Judge GEE. My response is that this type of review is the type in which legal assistants can be of most value. They can read the record. They can say judge, if you will look at pages so and so and so you will find such and such. They can direct your attention where you are looking for evidentiary support. That is why I picked these out.

Let me say this, also, Mr. Chairman and Mr. Westphal, I am offering these as illustrations of mine which I think should be considered. I am not saying that they are all panaceas or that they necessarily all should be enacted. I am trying to show there are things which could be done short of cutting the circuit up.

I have one last thing to say and then I am done. I say I think it would be preferable to go on up in the number of judges of our court and limit those who sit en banc. If we had to operate with nine panels going at once, 27 judges, we could operate in that manner. I have no doubt of it. We can muster out of our judges and senior

judges, probably with some district judges, we could probably have seven panels sitting at one time now, maybe even possibly more. We would have to control the en bancs in some manner. I understand there are proposals now for limiting the en bancs, the number of judges. I am not familiar with all of them and have not studied them, but I am confident that something could be worked out in that line.

We need the flexibility, the broad base and the diversity that we have in our present circuit. We could not have done the job that we have done, and I can say it without immodesty, because I am new on the court and I have had fairly little to do with it, that this circuit could not have done the job that has been done, split into mini circuits. I think this is the wrong way to lower the level of the water in the bathtub. I think you are throwing out the baby.

Thank you.

[Prepared statement of Judge Gee follows:]

PREPARED STATEMENT OF THOMAS GIBBS GEE, JUDGE, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

Mr. Chairman, Members of the Committee.

I am Thomas Gibbs Gee. I have been a Circuit Judge on the United States Court of Appeals for the Fifth Circuit a few months less than two years. Thus in a sense I feel I am still close enough to the practice to perceive as a lawyer, but far enough into judging to know a modest amount about it—though a great deal less than my colleagues who appear with me today.

1. *Our Present Situation in the Fifth Circuit.*—Statistics are not my forte, and you will have heard and considered enough already that any I might quote would add little. Further, he that lives by the sword dies by it; were I to attempt any statistical tour de force, you could rightly expect me to be an expert and source in the field—whereas a few leading questions in awkward areas would speedily demonstrate that I am neither. I shall therefore note only a few general figures:

(a) It is true that over the last ten years or so our filings have increased mightly, but it is also true that we have coped and have no significant backlog—less than 180 cases. Each of us sits on a circuit panel seven times a year. By sitting one additional week in our five panels of three judges each, each hearing the customary twenty cases, we could reduce that backlog by more than half. One additional week would wipe it out. To do so would be a serious effort, but not a convulsive one; and when a court is no further than this from absolute currency, so far as I am concerned, it is current. Anyhow, a small backlog is not undesirable; for one thing, it facilitates the calendaring and arguing of similar cases together.

(b) New filings this year have leveled off and Gilbert Ganucheau, our Chief Deputy Clerk and a highly competent statistician, projects no increase for this year. I do not know what this means, but it is a fact and a new one, for this is the first time in a long while that our filings have dropped.

These statistics show that if matters have, per chance, stabilized, we can make it as we are and without tinkering with a proven system.

2. *Our Current Personal Work Load.*—By my experience, it is heavy, but far from crushing. For one thing, we are fortunate in having good help and good facilities. The Congress has, for the present at least, authorized us sufficient help and a budget which permits us to attract and fairly compensate top quality people. I am grateful for this and I want to say so right out and loudly. If you work, nothing except your religion and your family (if you have either or both) exceeds the importance of the people you work with, and the quality of mine is one of the joys of my life. Further, compared to the life of a practicing lawyer, our schedules are as long, doubtless, but less emergency-ridden and far, far more within our own control. Court never starts without us.

In my judgment, there is room in our days for intermittent increases in work—emergency loads—and perhaps for a small increase in regular load, but for no more. It must be remembered, however, that my judgment here may not be entirely reliable because of two factors: as judges go, I am a relatively young man (49), and a very junior judge, serving on few committees, etc. If I were older and wiser, I would have more to do than hear cases and write opinions, and I would tire faster to boot. All the same, I think I'm probably not far off in my judgments here.

3. *Splitting the Circuit as a Solution of Our Consumer's Problems.*—Let us at the outset admit that destroying such a seasoned and tested outfit, which has borne the heat of the day and functioned in difficult times, is a thing to be avoided if it can be. At present, with filings leveled off, it is not immediately necessary. But if, as is likely, the increase has merely paused and will shortly resume at its former (or an increased) rate, the split will do no good beyond perhaps the year 1977 or so, as Judge Wisdom's remarks demonstrate. About that time, we will have as many judges in each new circuit as we have in the present Fifth and with as heavy a load per judge. Thus it seems obvious that the presently-proposed split is either too much or too little—why not wait a year or so and see? For surely it will not be wished to continue splitting until we arrive at circuit courts of such a size and manning as to be devoid of any Federalizing influence whatever, such as would one composed, say, of a piece of Texas, or of Alabama alone, staffed by native judges. The strength of the circuits has been entirely otherwise, drawn from the diversity of the laws administered, of the lawyers arguing, and of the judges deciding our cases. Once we put our faith in splitting to solve our problems, I see no logical stopping place short of continued division until we arrive at dinky little mini-circuits, degraded into local rather than regional courts and having no more (and perhaps less) harmonizng effect than the state appellate systems. Such an arrangement would have served the nation poorly in many matters of recent memory, and cannot serve well in others which will surely arise in days to come.

If you doubt my gloomy predictions, you have only to observe what has already happened. Already the pressure of events has forced a compromise of the two guiding principles with which you set out: no courts of more than nine judges (one new court has 11 and the other 12) and no circuits of less than three states (Texas and Louisiana are sent off alone together).[1]

4. *What to do instead.*—The present bill represents one of those small reforms which are the enemy of large ones. While dismembering a time-tested, functioning and proud institution, it serves only to distract the attention from the real problem. This is that your Federal Courts are doing too many things they shouldn't be. I suggest the following steps as measures to cut down on our work load and increase our output:

(a) Eliminate diversity jurisdiction, an idea whose time has gone. Or at least deny it to resident defendants, in manufactured situations such as non-resident personal representatives, to corporations having local establishments in the state, etc.

(b) Abolish the three-judge court.

(c) Abolish rehearings and let the court initiate its own en bancs.

(d) Limit habeas (almost one-fifth of our case load and fast becoming a prison hobby) to persons asserting that they are not guilty and grounds directed to that end; forbid review of any ground (either on direct appeal or habeas) more than once.

(e) Recognize and support reasonable screening procedures, with adequate central staffs, etc. Screening has permanent value. Though it does more, ridding us of the mushrooming numbers of frivolous appeals alone would justify it.

(f) Give us discretionary review in some kinds of cases, N.L.R.B. and Tax Court appeals, for example.

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[1] On the erroneous suggestion, by the way, that both are civil-law backgrounded States. Texas is most emphatically not any such thing, having by statute adopted the common law as its rule of decision about as far back as the days of the Republic. Only our community property system comes from civil sources and these are Spanish, not French.

(g) Exercise restraint in the enactment of new programs. I realize this suggestion borders on the political and apologize for it, but truly it seems we hardly turn around anymore without stumbling over some vast new order, with appeal to us from the determinations of its administrators. I doubt many feel we are seriously undergoverned at present.

(h) Rather than cut up the Circuit, increase the number of judges further and limit those who vote on and sit en banc in some manner, requiring each sitting panel to contain at least one judge who sits en banc.

The above suggestions are offered mainly as concrete examples, to demonstrate that better measures than splitting the Fifth Circuit are available, measures which offer promise of permanent or at least long-term relief instead of lowering the water level in the bathtub by throwing out the baby.

Thank you.

The CHAIRMAN. The committee will be in recess for 5 minutes to give the reporter a little rest.

[Following a recess, the committee resumed.]

Senator BURDICK. I think I will take the witnesses in reverse order, taking the youngest first.

You gave a shopping list here of things that might be done——

Judge GEE. Yes, sir.

Senator BURDICK [continuing]. In lieu of making divisions in the circuit.

What State do you live in?

Judge GEE. I live in Austin, Tex.

Senator BURDICK. A practicing lawyer there?

Judge GEE. I was, yes sir.

Senator BURDICK. I wonder if you have known that for 3 years now, or maybe it is 4, that I have been the sponsor of provisions to do something about this diversity question.

Judge GEE. Yes, Mr. Chairman, I was speaking for posterity, and I know that you know.

Senator BURDICK. And do you know that as of this date that no bar association of a single State has endorsed the bill?

Judge GEE. They do not like our screening procedures either, Mr. Chairman.

Senator BURDICK. But I say you have to deal with the facts at hand. You cannot get this tool. Unless the bar association comes forward, because they have a strong influence on the gentlemen who vote with me, and so long as they take that adamant position I do not know what we will do about diversity. They will not move on it. They want the forum shopping provisions and so forth, so they will not come forward with approval. What do we do about that one?

Judge GEE. I will get to work on that as soon as I get home.

Senator BURDICK. I wish you had worked on it when you were a lawyer.

Judge GEE. That is a very good comment.

I can truthfully say that personally I have always been for it.

Senator BURDICK. What I am trying to point out to you, the tools you talk about are not within reach and yet you still have the problems, the backlog.

Let us take the three-judge court. As I know, you have been a strong supporter of that. We passed a bill for elimination of the

three-judge court in the Senate and sent it over to the House and there it lays. Again, these are the facts of life. It does not do any good unless it becomes the law of the land.

Judge GEE. I believe the bill that is now pending has been reintroduced again.

Senator BURDICK. Oh, yes, we will try it again, but I am saying these are the difficulties we are having. In the meantime the caseload builds. Nevertheless, if we have to wait for reduction of diversity jurisdiction, for example, we might get swamped.

Judge GEE. Let me say this, Mr. Chairman. We are not at the limit of our resources now, and our caseload, although it is increasing, we are coping with it. It is a fact. We are almost current. I do not mean to sound aggressive, but I am proud of our performance.

Senator BURDICK. Well, I have been in the forefront asking for greater efficiency, greater methods. I do not enjoy this idea of breaking up the circuits, either, but it comes to the point where you say you need more judges.

The testimony we have here to date indicates that you go past 9 or go past 12, or at least past 15 and your efficiency drops. That seems to be the general testimony.

Judge GEE. I wonder if anyone really knows, Mr. Chairman, because there is very little experience with larger courts.

Senator BURDICK. I do not have the record here before us, but as I recall it, that was almost the universal testimony, that when you get to a certain point you can operate efficiently and effectively, but beyond that it is like diminishing returns in the economic system.

Judge GEE. That may well be, sir. I cannot think of a court with more than 15 judges. Maybe there are some. If there are not any, then I do not know how anybody knows whether they can function or not.

Senator BURDICK. In your prepared statement you suggest that 15 judgeships in the present court could keep up with the work by sitting one additional week in the year. Of course, your statement presupposes that your existing procedures whereby oral argument is accorded to only about 36 percent of the cases would be the procedure you would have to follow in the future, is that true?

Judge GEE. That is true, yes sir.

Senator BURDICK. You could not increase the number of oral arguments under this theory?

Judge GEE. No, sir. I for one would not care to. We are set up now so that no cases are decided without oral argument unless three judges agree that oral argument would not help.

We have very diverse views of the law on our court. If you can get three of our judges to agree that oral argument would not help, and on one solution to a case, I do not think anyone is being prejudiced.

I do not like screening. I do not like the denial of oral argument, and when I was a lawyer I detested it, because I wanted to get up there and speak my piece. Maybe at an earlier time the Govern-

ment could afford to give me a forum to make a speech for a lost cause. But I do not think it can afford to do that any more.

Senator BURDICK. Do you think that is true of some cases?

Judge GEE. Yes sir.

Senator BURDICK. Judge Wisdom, I have a question or two for you.

Judge, in your prepared statement you expressed the fear that if S. 729 is passed it would trigger a prolification of circuits. Certainly if we were to believe that nine is the magic number, our growing caseload would require more and more circuit splitting and pose the threat of having 20 or more circuits at the same time in the future. However, at this particular time we are dealing with the two circuits that have the largest land mass. The thrust of this bill is to reorganize the land masses into more manageable entities and at the same time it gives us the opportunity to employ more judges. On this basis, do you not see this division concept as an opportunity to work out a more flexible structure within the court of appeals?

Judge WISDOM. I see nothing flexible about it. It sets up a division that is autonomous, that each division has its own chief judge, its own council to make its rules to run the circuit, and I think each division is a circuit, separate circuit, except in name. There may be some virtue in keeping the name because at least it prevents dispute as to which division would be the fifth circuit.

But I do not see anything flexible about it. I would be curious to see that developed.

Senator BURDICK. You also referred to the federalizing role of the circuit courts. While it is true they play an important part in developing national law, is it not true that it is the Supreme Court through its power to decide conflicts between the courts which is the ultimate federalizing court?

Judge WISDOM. Of course, but a very small percentage of cases reach the Supreme Court. That court comes down with a broad mandate, such as desegregate with due speed. We have to make that broad mandate work. We do not get the specified guidelines from the Supreme Court in many, many cases. We have now questions involving border searches, for example. We have to work our way through to a proper solution, case by case, until the Supreme Court gives us additional good answers. But we are the court of last resort in many cases.

Senator BURDICK. Do you feel that we have reached or will reach soon the point where the Supreme Court is going to have to have some help in performing this function?

Judge WISDOM. Yes, I do. I think that—I mention this in some of my other statements, but I think we may have to give thought to a court of national review, not the Fruend court. I think its recommendation has it backwards. I think that the Supreme Court should be able to refer to a national court case which may be not quite Supreme-Court-worthy, but should be settled by a national court. This would be particularly true in the tax field where it might be desirable to have a reasonably prompt construction of the tax law without waiting for intercircuit conflicts to develop.

I think it would be true in other fields.

I think somehow a national court of review might have a discretionary power to review habeas cases, prisoner cases, and 2255's that would bypass our courts which would help us, too.

I think there are many, many things that can be done and should be done. My own feeling is that, if this great body comes out in favor of S. 729, the general public will think that this is a solution, but I know and you know, as from your own statements on the floor of the Senate, that increasing judge power is not a solution.

Senator BURDICK. I agree with you.

Judge WISDOM. Now, you tell me that the tools—you do not have the tools. That is in effect saying that you may have something good to offer the Congress, but we do not think it can get by politically. I think that may well be, and this is no criticism of you or of the committee. Perhaps, however, your underestimate the weight of this committee with the American public.

I think that the committee, the Commission and the committee should come out strongly in favor of what is right, and if it does I think that is not politically unrealistic.

Senator BURDICK. I agree with you, but we still have to count votes.

No, I do not think judges alone are the solution. I have said that many, many times. I think there are many reforms and many things we can do here. I just heard this morning that the staff attorneys have helped a great deal.

Judge WISDOM. Yes, they have. We have 200 or more dispositions this year than last year, although we have lost two of our four central staff attorneys. We had some budget problems.

Senator BURDICK. But that may not be the total answer to the problem.

Judge WISDOM. No, I think there is no total answer. I think there has to be an attack on the broad front, but certainly the input has got to be reduced.

Now, the Commission's hands are tied to some extent, because it's enabling legislation does not allow it to explore how jurisdictions may be reduced. But certainly—you have given a lot of thought to this, and I am sure you have considered, too, that the major way of reducing the flow, the burden is by reducing the input at both levels, both the district court level and the appellate court level.

When one talks about 10 percent diversity cases at the present time you are talking about 330 cases in the fifth circuit, just diversity alone. I should think that that would have a political appeal on the ground that it is being in the interest of the States to have State judges interpret their own law, and the opposition, I believe, comes mostly from claims attorneys.

Senator BURDICK. Judge, the operation of the law has been a mystery to many of our average citizens. They do not follow this like lawyers do. They take the lawyer's word for positions. They do not have the insight that you and I might have.

Judge WISDOM. Would you not be disappointed, though, if you thought the public construed this bill as a solution?

Senator BURDICK. Certainly. I am not going to present it as a total solution. It is going to be a partial solution.

Judge WISDOM. Well, I feel strongly, however, on the other hand that a partial solution of this nature does more damage than good by diluting our Federal function.

Senator BURDICK. Judge, given the caseload in the fifth circuit, there seems to be no question but that the court has to have a minimum of 23 judges to do the work.

Judge WISDOM. Yes.

Senator BURDICK. Moreover, you predict that if the caseload expands rapidly that a total of 30 judges may be needed in the near future. Is there not the question of whether a court of 23 judges would be more or less efficient than two divisions of 11 and 12?

Judge WISDOM. I think the ninth circuit is a court now of about 79 judges. We do not have quite that many.

Now, the English Court of Criminal Appeals handles 10,000 filings. They have worked out a solution.

Senator BURDICK. You know, I heard that testimony given previously here.

Judge WISDOM. Yes sir.

Senator BURLICK. And if I can get the time, I am going to England to see how they do that. I am serious about it.

Judge WISDOM. I am serious about it, too. One thing, they make it difficult to appeal. The lawyers discuss the appeals with a judge or master. The sentence may be increased. I am not suggesting that we should do all of these things, but there are many things than we can do. They use a large central staff.

Senator BURDICK. Well, I do not know whether they go as far as we do in protecting constitutional rights and all those things.

Judge WISDOM. I do not think they do, and I would certainly feel that we would have to step very warily in any area affecting constitutional rights.

Senator BURDICK. I believe I am going to turn you, and Judge Brown, over to the staff. You have touched upon some technical things.

Mr. WESTPHAL. I think before I get to Judge Brown, if I could continue on with Judge Wisdom, Mr. Chairman.

On this last point that you and the chairman were talking about, it appears to me that we have spent 200 years in this country developing a judicial system in which we take pride in the fact that every man is entitled to relatively free access to our courts, he is entitled to his day in court, and like it or not, we have built up as part of that theory that each case is entitled to one review. Now, unless we scrap that theory, it seems to me it is difficult, extremely difficult to come up with a substitute system which would say that after the man has had one trial that then he is not entitled to have someone else make a judgment as to whether the result was or was

not right. If that is all he is entitled to, we can structure a completely different system whereby that result can be reached without briefs, it can be decided without briefs, it can be decided without oral argument. Maybe you can computerize whether the traffic light was green or red, and what the speed was, and maybe we can program out a means of passing onto that litigant a judgment of our system that the original result was right.

But after 200 years of the other system, it seems to me that our problem is one of structuring our system so that that individual litigant, whether he wins or loses, walks away from that experience with the feeling that he has received due process; that justice apart from the result has been brought about by the procedure and the attention that his case has been given. This is one of the fundamental factors that enters into our consideration of what is the best solution for a very difficult problem. Do you agree with that?

Judge WISDOM. I agree in part. First, I would distinguish between civil cases and criminal cases. I point out to you that for a long time, even in criminal cases there was no appeal except from capital cases.

Now, in civil cases I think that there are certain areas where one trial is enough. I see no reason, for example, why a personal injury suit, which is tried by the jury or tried by the court without a jury where the evidence is unquestioned and the case realy turns on substantial evidence, why that is not enough.

Take social security cases, which do not constitute a great number, but still take time and every little bit adds up. In social security cases, why not appeal the hearing in the district court? The same thing might be true in longshoremen and harbor worker cases.

I think there would be very few instances in which there would not be one review. But I think we could require a certificate of probable cause, for example. The trial judge would have to sign that as in certain cases now, a certificate of probable cause.

I think the shopping list that you have heard from Judge Gee and perhaps from others, I among them, the shopping list is one that is very long, indeed, and if it were presented as a full package with the weight of this committee behind it, I am not so sure that Congress would not say well, we have got to do something.

Mr. WESTPHAL. Judge, as the chairman of this subcommittee has pointed out, during the period of time that this subcommittee has taken the lead in looking at this shopping list of methods to reduce the input, that during that period of time in just some 3 or 4 years the caseload in the fifth circuit has grown from 2,300 cases to almost 3,300 cases. Now, if we cannot get more action on the shopping list than we have been able to get in the last 3 or 4 years, and in the face of a caseload which has increased almost 1,000 cases in that short interval, it seems to me that if we do not do something now to alleviate the problem that the fifth circuit and the ninth circuit will truly be swamped.

There are requests for creating a 10th judge in several of the other circuits, so that the rule of 9 is being breeched, but the ulti-

mate problem is that the appellate process has been so beset with congestion and delay, more so in the ninth circuit than in the fifth circuit, but that something has to be done now in order to give the Congress time to come to an ultimate solution on a whole list of items on the so-called shopping list.

Judge WISDOM. Well, I would agree with you if I thought that this bill would alleviate the situation, and I think you have already demonstrated that it is not going to alleviate the situation to the extent that the Hruska commission thought, because you have upped the number of judges from 18 to 23 in a year.

Mr. WESTPHAL. Well, the reason for that Judge, is this. I layed on the white table there, a copy of an updated version of committee exhibit E–5 that was used in our prior hearings last fall, and if you will look at exhibit E–5 you will see that for fiscal year 1974, the average length of time for U.S. civil cases in your circuit involving a case decided by a full-blown signed opinion, that the average time was 378 days. This is just about the same, although slightly larger, than it was in the preceding fiscal year, 1973, when the figure was 371. For all signed opinions in your circuit the average time is now 369 days, whereas a year previously it was 349 days.

In the comparable exhibit for the ninth circuit, you will find that in the ninth circuit their time factors are almost double yours. They have up to 749 days, where you are running 378 days, and in the ninth circuit this is a drastic increase above the prior year's figures.

[Compare Exhibit E–9 at page 61 with Exhibit E–5 at page 78.]

So the thrust of this bill is to try to respond to some of the testimony that we received from lawyers in these two circuits to the effect that when it takes that period of time in order to get a final resolution on appeal, when it takes, as it does in the ninth circuit some 22 months from the time you file your brief until you even get notice of argument, and when it gets to the point where you have to file supplemental briefs in order to get caught up with the intervening case law, that is a type of appellate process which lawyers do not like, and I am sure the judges do not like that type of delay.

Judge WISDOM. You will find that our median time is probably lower than almost any other circuit.

Mr. WESTPHAL. Considering the caseload you have, you have a much better record than the District of Columbia has, there is no doubt about it. But this is, I think, the real thrust of what the committee is trying to think of here in this legislation.

Judge WISDOM. Let me ask you a question, if a witness may ask you a question.

Do your projections take into consideration the appointment of new district judges?

Mr. WESTPHAL. This legislation is not based on projections.

Judge WISDOM. Well, I realize that, but unless you consider the projections which one should do because of the additional district judges, this will not give any relief.

Committee Exhibit E - 9

Circuit: Ninth

Average Time for Stages of Appellate Review
Cases Terminated After Argument or Submission
By Type of Opinion and Type of Case - F.Y. 1974

Circuit: Ninth

Type of Case and Opinion	Number of Cases	Av. Time Appeal-Record (days)	Av. Time Record-Last Brief (days)	Av. Time Brief-Oral Argu. or Submission (days)	Av. Time A/S - Opinion (days)	Total Average Time Appeal-Opinion (days)	Remarks
U.S. Civil - Signed Opinion	90	109	164	342	132	747	
Per Curiam	50	81	142	226	61	580	
Memorandum	26	85	109	281	30	505	
No Opinion	42	70	150	313	18	551	
Private Civil - Signed Opinion	119	106	174	322	137	739	
Per Curiam	116	96	142	354	68	660	
Memorandum	33	80	122	294	36	532	
No Opinion	40	97	142	288	50	577	
Prisoner Pet. - Signed Opinion	37	87	136	188	130	541	
Per Curiam	87	90	78	176	48	392	
Memorandum	21	78	87	205	34	403	
No Opinion	44	76	96	195	37	404	
Criminal - Signed Opinion	156	92	59	45	125	321	
Per Curiam	238	80	57	50	56	243	
Memorandum	92	72	51	87	85	295	
No Opinion	121	72	53	62	45	232	
Admin. Agency - Signed Opinion	25	13	166	220	97	496	
Per Curiam	56	14	141	207	59	411	
Memorandum	14	31	87	260	20	418	
No Opinion	21	4	108	232	28	372	
Recapitulation							
All Signed Opinions	444	94	128	214	129	565	
All Per Curiam	575	78	96	191	58	413	
All Memorandum	191	75	79	193	54	395	
All No Opinion	273	70	93	174	33	370	
Circuit Average	1483	81	103	140	75	449	

Mr. WESTPHAL. All right, Judge, let us consider that projection, then.

You have suggested in your testimony that by virtue of the Speedy Trial Act that there will be a need by 1979 for an additional 40 district judges within the 6 States that comprise the present fifth circuit.

Judge WISDOM. Right.

Mr. WESTPHAL. And you also suggested that from a statistical basis that each district judge seems to generate 40 appeals per year.

Judge WISDOM. This has been our experience, 38 to 41.

Mr. WESTPHAL. So that on that basis we can project an additional 1,600 appeals by 1979, added on to the 3,300 appeals that were filed in the fifth circuit in fiscal year 1974, so we would have——

Judge WISDOM. Plus normal growth.

Mr. WESTPHAL. So we would have a caseload of at least 4,900 or 5,000 cases in the existing fifth circuit. Now, you do not seriously contend that a court of 15 judges could handle that caseload, do you?

Judge WISDOM. No, I am not at all. I am saying, though, that dividing it into two will not handle it, either.

Mr. WESTPHAL. All right. So that we must necessarily find some means of employing more judicial manpower aided by a competent staff, whether individual law clerks or staff attorneys, performing a proper function so that that type of a caseload can be handled.

Now, one could project either the minimum of 23 judges, or perhaps 30 judges would be necessary to handle a caseload of 5,000 cases. Now, I think what it boils down to is this, Judge: Do you really believe that a single court, consisting of 30 judges where only 9 out of the 30 would constitute the en banc panel, do you feel that is more acceptable than this so-called division concept?

Judge WISDOM. It certainly is to me, because that would still be a court of judges selected from a broad base.

Mr. WESTPHAL. All right. Now then, what type of reaction do you think we will get if we select those nine judges for the en banc panel from the nine most senior judges? What kind of reaction do you think we will get from the other 21 judges on that court who will be bound by the law of the circuit as determined by those 9 men, and yet they will have had no input into what that law of the circuit should be?

Judge WISDOM. I think that it is possible that some of them will take it just as an attribute of seniority, inherent in the seniority that attaches to long tenure on the court, and I think others will resent it, but I think that resentment is minor, and not worthy of consideration compared with advantages of having a small en banc court instead of a full en banc court.

Mr. WESTPHAL. I would grant you that if what we are dealing with is just numbers, it is easier to work with 9 rather than 15 or 20 or with 25, but when you stop and think about that, would you not think that there would be more problems if you would suppose that the 21 judges who had no voice in the en banc decision were of the completely opposite view on that issue and yet here they were, they would be bound by the decision of the 9?

Judge WISDOM. Well, I have been on en banc courts where we divided 8 to 7. I was one of the seven. My point is, you do not mind so much being on the losing side if you are one of the seven——

Mr. WESTPHAL. You played the game, however?

Judge WISDOM. I understand, I understand. But my point is that what we want is certainty, uniformity, and that is important. I think every judge, whether he is in the 21 or whether he is in the 9, will feel that certainty is more important than his personal feelings.

Mr. WESTPHAL. Well, we want certainty and uniformity. People have suggested if we are going to have the en banc function performed by only nine out of a given larger number of judges, that rather than go by seniority there should be a system devised for rotating those nine judges.

Judge WISDOM. I have suggested this myself.

Mr. WESTPHAL. Now, if you do that then you run afoul of what Dean Griswold has always referred to as his principle of predictability. I think that we must necessarily give some consideration to Dean Griswold's point on predictability, because if I am practicing law in a circuit which has 30 judges and then at various times nine of them will be rotated to sit in an en banc function, I may well decide that, notwithstanding a prior precedent in that circuit, I will pursue an appeal in this case just in the hopes that on the luck of the draw I can get the nine that have to sit on my case to disagree with the prior nine.

Judge WISDOM. Well, let me answer it this way: I think from my experience that there are many cases which are put en banc because of their importance, and they should not be. That should not be one of the criteria. My experience suggests that putting the case en banc simply delays it reaching the Supreme Court, if the case really is important. So I think we must discipline ourselves and remove from the criteria for putting a case en banc the criteria of its importance. A case should go en banc only when there is a possibility of, or actual conflict within the circuit.

Second, I think that we are allowing a small point, the tail to wag the dog here. This is a small technical problem. Why should we not try out a court of 23 and have an en banc of nine and see if that works, and is it not better than dividing the fifth circuit? How do you know it will not work?

Judge GEE. If I might say so, Mr. Westphal, you could do that and then if it did not work you could split it and you would have all your judges ready to divide.

Mr. WESTPHAL. As I recall prior testimony which this subcommittee received in connection with S. J. Res. 122, the chief judge of the Fifth Circuit testified that back some years after the fifth circuit had reached 15 active judges that through the help of senior judges from the fifth circuit, from visiting judges from other circuits, and some district judges from within your own circuit, that the fifth circuit at times operated with an equivalent judgeship of 19, 20, and 21 for several terms, and that that had certain drawbacks. So that, as I understand that testimony, it was to the effect that a court of 19, 20, or 21 equivalent judges was not an effectively functioning court, and that that experience was one of the factors which led the fifth circuit as a body, meeting in judicial council, to advise the Judicial Conference of the United States that they did not want more than 15 judgeships created in the fifth circuit. So that is the basis upon which there has to be some discussion in the subcommit-

tee to the effect that we have tried a court of 20 or 21 judges and from experience it does not appear to work and therefore something else should be tried.

Judge WISDOM. There is a simple answer to that. Some of those judges came from other circuits, and lawyers generally do not like judges from another circuit serving in their circuit. Nor do they like district judges sitting on the panel.

But if you have a court of 23 judges all from the fifth circuit, you would have an entirely different kind of a court from the kind we have now, or from the ninth circuit where they, in effect, can draw on 79 judges.

Mr. WESTPHAL. Turning to what you say is your main point, Judge Wisdom, in your opposition to S. 792, and that is you suggest the passage of S. 792 would dilute the federalizing role of the circuit court, at least the circuit court of the fifth circuit, because under the proposal the 11 judges in the one division and the 12 in the other would be drawn from too small a base so that you would not have a proper cross section to exert this federalizing influence and to overcome local pressures in sensitive cases.

Judge WISDOM. Right.

Mr. WESTPHAL. All right. Now, then, of course we started out in our Federal system with probably the best cross section court you could ask for, and that is up until 1891, we had a Supreme Court of nine justices drawn from some 45 or 46 states. They represented the nation as a whole. That was the best cross section we could possibly have in order to exert a federalizing influence for uniformity in interpretation of Federal law, is that not true?

Judge WISDOM. Yes, that is true, but there is a big but there. Let me answer that question.

The reason that system was done away with was because the Supreme Court justices were put to such an onerous task in riding the circuits.

Mr. WESTPHAL. All right, and then——

Judge WISDOM. And it really caused more disruption in their other business and put a great deal of hardship——

Mr. WESTPHAL. So then in 1891, the Circuit Court of Appeals System was fashioned in order to relieve the pressure upon the Supreme Court, and indeed, those courts were deemed to be national courts, although sitting and organized on a regional basis. In 1927 or 1928, we had to do something about the problems in the old eighth circuit and the tenth circuit was spun off. And now for 20 years or more, there has been talk about what to do with both the fifth and ninth circuit.

Once again, it is a problem of trying to get sufficient manpower into the Federal Court system in order to perform both its appellate function and its federalizing function of applying uniform Federal law throughout the country. We have reached the point in two respects where something has to be done. We have these problems in the fifth and ninth circuits. We have the problem which leads to consideration of some sort of a national court of appeals. So these problems are there and decisions have to be made, and it may be necessary to break up these large land masses and narrow somewhat

the cross section from which you draw judges. That critism could be made in 1928, when the tenth circuit was spun off from the eighth circuit, that we were reducing the land mass and the cross section from which circuit court judges were to be drawn to handle that business in that large area.

Judge WISDOM. You refer to a large land mass, but they were broken up not because the circuit was too large a land mass, but because it was hoped that division of the circuit would provide the judicial manpower to handle it, and it did in that case. But it is not going to do it in the case of the fifth circuit, and therefore, I say to you let us try a lesser alternative before we take the irreversible step of dividing the fifth circuit.

Mr. WESTPHAL. And that lesser alternative would be to operate with the court of 23 to 30 judges as the caseload requires?

Judge WISDOM. That would be my feeling.

Mr. WESTPHAL. Judge, also in your testimony you suggested that rather than just concentrate on the fifth circuit and ninth circuit that the Commission, and in turn this subcommittee should have considered a real realignment by increasing the work load of the first circuit, which is a small three-judge court, and finding some additional work for the District of Columbia Court of Appeals, which, since the reorganization of the local courts here, has had decreasing caseload.

But I take it you are familiar with the fact that the Revision Commission in the very early stages of its studies gave great consideration——

Judge WISDOM. I know, computerized it.

Mr. WESTPHAL. Well, they did it on more than a computerized basis. The thought was, for example, that states could be attached from the fourth circuit and realigned with some of the Eastern states from the fifth circuit and we could have sort of a ripple effect. We could start out with the first circuit and work our way through the Federal system and wind up with maybe 15 circuits, which again would be a proliferation in your sense of the term, but also it would have the added disadvantage of dislocating a number of States from the circuit law that they had grown up with and had been accustomed to. So there seemed to the Commission, and to the subcommittee, to be certain drawbacks to a ripple effect realignment of every one of the circuits in the country.

Do you have any thoughts on that?

Judge WISDOM. Well, to some extent you have done that. You will have disrupted, if this bill passes, you will have disrupted the law in six states, the Federal law in six States of the fifth circuit and certainly disrupted the ninth circuit. It is not my duty to talk about the ninth circuit, but your proposal is especially disruptive because of the division of the State of California.

So the bill is going to have a disruptive effect in any way, and that is another reason why we ought to have something else.

Mr. WESTPHAL. Well, the western division of the fifth circuit will carry with it, on the day it starts, its prior precedents from the former undivided fifth circuit, will it not?

Judge WISDOM. It will, but it will be a question of applying those prior decisions, and that is where conflicts will arise.

Mr. WESTPHAL. They will be applied according to the law and facts found by both the trial court and the appellate court, and standing astride of either division will be the Supreme Court of the United States, to again enforce the rule of law. Is that not true?

Judge WISDOM. That is true, with some possibility of twice as many conflicts.

Judge BROWN. Let me raise a question, if I could, because in New Orleans, some of us suggested maybe the law ought to express what the rules should be, and we kind of backed away from it thinking that it was a judicial matter that Congress could not legislate on.

But suppose on the day when this act goes into effect a case comes up in the eastern division which is clearly controlled by a panel decision of the fifth circuit that happened to be made up of judges who came from the western division. Now, will it take a en banc decision of the eastern division to get rid of that prior precedent? That is another thing that is let loose.

Mr. WESTPHAL. To answer your question, if I could, Mr. Chairman, the answer would be yes, and that is simply because any court possesses the power to overrule its own prior precedent.

Judge WISDOM. Do you think there will be more prior precedents overruled when we have two new circuits?

Mr. WESTPHAL. I do not know. That would depend upon the perception of the judges before whom such questions are raised.

Judge GEE. Mr. Westphal, may I make a final observation, and I will not interupt again.

I think what Judge Wisdom and I are both saying is essentially something very simple. These are momentous matters. You know this as well as we, better. In momentous matters we are breaking new ground, and it seems to me it is always best to move as carefully as you can.

We do not have the problem in the fifth circuit that the ninth circuit has. The lawyers are not having to file supplemental briefs in cases that are 2 years old. We do not have any emergency. We are coping with our problem.

Mr. WESTPHAL. But we hear lawyers who object to the procedures you have used in order to cope with your problem. They object to being accorded the right of oral argument in only some 36 percent of the cases. They object to the fact that even when oral argument is granted, some of them get as little as 10 or 15 minutes of oral argument, having traveled some 700 or 800 miles to where the court is sitting. They object to some of the rule 21's in which they are told only "enforced" or "affirmed" and given no explanation at all. There are lawyers who will raise questions, and did before this committee, about the excessive use of or reliance upon staff attorneys in the preparation of proposed opinions which are then reviewed by the court to see whether the court wants to issue the work product of the staff attorney as the opinion of the court.

So that all I am suggesting is that the subcommittee has, along with the Commission on Revision in the Appellate System, the so-called Hruska Commission, has spent a long time wrestling with

these same problems we have discussed here this morning, and I am sure all of us think this is like playing back another record we have heard before. It is like reruns on television.

But when you get down to the final analysis, there is a proposal which has received the support of five of the six Bar Associations in the six States in the fifth circuit, which has received the support of a majority of the 15 judges, which has received support from quite a broad spectrum of the country.

It is true that the Louisiana Bar Association objects to it, but as an alternative, I might point out, they suggest that if the fifth circuit has to be split, that the four States of Texas, Louisiana, Mississippi, and Alabama, be aligned into a four-State-circuit which would have, according to the 1974 statistics, a total caseload of 2,013 cases, which would require 14 judges to handle. Then they suggest a two-state, not a three-state, but a two-State circuit of Georgia and Florida, which would have, along with the Canal Zone, total filings of 1,276 cases, which again——

Judge WISDOM. Which State is that?

Mr. WESTPHAL. Georgia and Florida.

Judge WISDOM. What State recommended that?

Mr. WESTPHAL. The Louisiana Bar Association.

Judge WISDOM. The Louisiana Bar Association resolution which I submitted to you this morning opposes the division of the circuit and suggests in the alternative that Mississippi be assigned to the circuit with Louisiana and Texas.

Mr. WESTPHAL. Well, I will read to you, judge, from the resolution that you handed to me.

> Be it further resolved that in the event the Commission does not adopt the view of this board above expressed, its proposed revision be altered to include the states of Texas, Louisiana, Mississippi, and Alabama in one circuit and the states of Georgia and Florida and the Canal Zone in another.

That is the alignment I was just suggesting, in which I indicated that if the subcommittee were to adopt the recommendation of the Louisiana Bar Association we would then have a four-State-circuit, one would require 14 judges, the other would require 9, again a total of 23, and it seems to me that one could draw a judgment there as to whether it is better to start out with circuits of 11 and 12 judges rather than judges of 9 and 14, because once you start with 14 there is little or no leeway in case you need an additional judge or two to meet an increasing caseload.

Judge WISDOM. I would like to make a comment on that.

The first resolution is an opposition to division of the circuit, and I think that probably Alabama was thrown in there for bargaining purposes in the hopes that perhaps Mississippi would be assigned.

Judge GEE. Mr. Westphal, if I could finish my little statement.

It was going to be that either way we are going to be doing something drastic. The fifth circuit is not in the situation in which the ninth is at present, and I know as well as you that if we stick on 15 judges and the filings go up, as they will, we lose. I am not advocating that. I would say go up on the judges and see if the court can function, and if it cannot, then divide it.

I have nothing to say about the ninth. It is in a much more serious situation than we—well, it is in a serious situation. We are not.

I recognize that the lawyers are not pleased with all of our procedures. When I was a lawyer I was not pleased with all of them, either. But they are necessary and there is no perfect way to handle this situation until jurisdiction is——

Mr. WESTPHAL. I would now like to address a few questions to Judge Brown.

Judge, you have suggested there may be some perfecting amendments left to be accomplished in this bill, one with reference to the power within the fifth circuit with two divisions to assign senior judges to serve in another division of that circuit, and another with respect to the problem of whether a senior judge who sits on the three-judge-panel should be a member of the en banc panel which might thereafter consider that case. I thought these problems would be taken care of by our prior perfecting amendments, and I will be glad to discuss those with you at the conclusion of the hearing. I do not think we need to take the time right now.

Judge BROWN. I have something scribbled out here, and I will read it to you when we have adjourned, that takes care of this.

Mr. WESTPHAL. You made a suggestion to the effect that the effective date of the legislation passed should be the date on which the new judges take their seats. It seems to me, that it would be pretty hard to make something of that kind a triggering event for the effective date, because if there are any uncertainties about the nomination, confirmation, or appointment process that should not be the triggering date, because then a litigant would really not know when the division took effect. There would have to be some additional promulgation of the fact that we now have seated the 23d member of the court, or the 11th member or the 12th member in either case.

Judge BROWN. What I envisage would be a sort of combination of your section 5 and then appropriate wording on the effective date so the President would have the power to go ahead and make the appointments.

Mr. WESTPHAL. I think about all the Congress can do, in any event, is to give the President the power to nominate, to urge that the Senate proceed with the confirmation process as rapidly as possible. There was legislation, for example, that required the President to appoint the members of a Presidential pay commission at a certain time, and I think that was fairly definite. Yet, the President did not appoint the members of a pay commission. It just seems to me we cannot start out legislating on the assumption that constitutional officers will not perform the duties that we place upon them by legislation.

Judge BROWN. Well, technically you are correct. There would be uncertainty, perhaps, as to when a particular new appeal becomes that of the western division or the eastern division. For all practical purposes, until these judges are nominated and seated the operation from the standpoint of the bar will be exactly as it is today. The eastern division has pledged they will help us bear the load. We have no doubt they will live up to that committment, which means we will have the panels looking just like they have been looking. They will

sit in New Orleans most of the time, and the bar—except that I do not know where we stand on who is going to be on the en banc court.

Mr. WESTPHAL. Well, there will undoubtedly have to be a transition period here in which some of these problems are worked out. I really do not see how this legislation can do more than provide for the appointment of the new judges prior to the effective date of the division.

Judge BROWN. Well, I remind you that when the Circuit Revision Commission was established the timetable on parts A and B were geared to the date on which the ninth members of a 16-man commission qualified. I was suggesting some sort of approach like that plus your language that would give the President the power to make the appointments, contemplating they would be effective when the last one of them is confirmed.

Mr. WESTPHAL. We found that even the method we used in creating the commission was not as definite as we would have liked, because there were some occasions to either hasten or delay the appointment of that ninth member.

But in any event, your suggestion will be given further consideration.

One last point, if I could. You made some reference to the provision about what triggers the convening of the joint en banc panel in the ninth circuit. While you concede that procedure is not applicable with the fifth circuit, you do raise some question about it. Of course, the language of the bill is that either the petition of a party or the certification by one of the divisions in effect triggers the joint en banc panel, but that is not to say that the joint en banc panel must sit and must grant a full blown rehearing with oral argument and additional briefs to everybody who petitions or in every case where there is a certification. It seems to me that that joint en banc under this statutory language will still have the discretion which any court sitting en banc has, and that is to decide whether they are going to grant or deny the petition for a rehearing en banc.

Judge BROWN. What concerns me is not the part that allows a division to certify it, but the language as I recall it in your revised bill says such a court will be convened on the filing of a certificate or the petition of a party.

The thing that bothers me is that you allow a petition by a party to set the en banc machinery in motion, which goes way beyond the present F.R.A.P. Rule 35, because there the parties merely suggest it and we have a duty to look at it and that is all. They cannot compel us to take a vote. En banc petitions are a real burdensome thing in the fifth circuit.

Mr. WESTPHAL. I think we will explore the point you raised more fully with the ninth circuit judges.

Judge BROWN. They will probably tell me to stay in Texas.

Now, can I say one thing? Do you have any further questions?

Mr. WESTPHAL. No.

Senator BURDICK. I have one.

On the assumption we have a 30-judge circuit, how many en banc judges would you recommend?

Judge BROWN. Well, it will be double tiered. I have just about changed my mind. I just about thought before that you had to have a whole group in there, but that will not work. You cannot have an en banc court that is meaningful with 30 judges. Our experience today is not at all satisfactory. We have six- or seven-to-eight decisions and in the last couple of experiences we were eight-to-eight where we have a senior judge, and when we come out, we cannot even generate any kind of a judgment on very troublesome, statutory or constitutional questions.

Senator BURDICK. Let us stop short of using computers.

Judge BROWN. If you have not seen lexis work you ought to, because it is amazing.

Senator BURDICK. Are you saying the larger the number of judges on a circuit, the more difficulty we are going to have with en bancs?

Judge BROWN. The en banc hearings will be much more difficult and I think it will probably pose some additional problems. Judge Wisdom is correct, we learn each day, but slowly. We need to discipline ourselves better. We realize some cases should never have been put en banc.

Now, I did want to say this. The suggestion is made we might sit another week. Well, I have been a man with a strong whip in his hand and the power of statistics to goad judges into working harder and harder. Each year we have done more, each year we turn out more cases than the year before. But the judges, I think, a majority of them have pretty well reached the conclusion that no matter how you do it, with 55 percent summary II's without oral argument, that they are just doing as much as they can. I was directed to appoint a committee to study some kind of a system by which we could put some kind of a ceiling on our output, recognizing we can only go just so far. I want you to look at that exhibit on backlogs closely, because the nonpreference cases are not frivolous. They include civil rights, tax, admirality, all those things.

Then I think we have to bear in mind always that we not only have 7 weeks of regular calendar, but 7 days of en banc so far, and we will have 2 to 3 days more in June. In addition to these cases, there are school cases which we have handled in a somewhat difficult way. Administrative orders are getting more and more complicated.

I am sure John Wisdom remembers what I call the tranquil days. I wrote 78 opinions in my first year. But I did not have to struggle. Then the ceiling started falling in and we have so many real difficult cases now. So I do think that while we can do more, there is not too much more, and I really do think there is a solid basis for seeing the growth of a backlog that in not too long a time is going to either keep many litigants from having their cases heard at all or heard on a stale brief.

That is it. Thank you again.

Senator BURDICK. If that is it, thank you.

At this time, without objection, there will be included in the hearing record copies of the following resolutions and letters received from various bar associations in the fifth circuit States:

One: Letter dated February 18, 1975, from Marshall R. Cassedy, executive director of the Florida Bar Association, together with a telegram dated March 17, 1975, from Mr. Cassidy.

Two: Letter dated January 20, 1975, from Cubbedge Snow, Jr., president of the State Bar of Georgia, together with the formal statement referred to in the letter. The Georgia Bar position is also reflected in the excerpt from the minutes of January 10, 1975, as certified by Mr. Omer W. Franklin, Jr., a copy of which is also included.

Three: Letter dated February 17, 1975, from Alto V. Lee III, president of the Alabama State Bar enclosing an official statement of that organization.

Four: Letter dated March 4, 1975, from James Hugh Ray, president of the Mississippi State Bar.

Five: Letter dated March 10, 1975, from Kent Breard, president of the Louisiana State Bar Association, to Judge Wisdom enclosing a resolution of that association.

Six: Letter dated March 14, 1975, from Lloyd Lochridge, president of the State Bar of Texas.

Seven: Letter dated December 9, 1974, from John H. Hall of Dallas, Texas, a witness at our prior hearings.

Also exhibit E–5 showing the 1974 statistics will be received.

[The materials listed above follow:]

THE FLORIDA BAR,
Tallahassee, Fla., February 18, 1975.

Re S. 2990.

Hon. QUENTIN N. BURDICK,
Committee on the Judiciary, Subcommittee on Improvements in Judicial Machinery, Washington, D.C.

DEAR SENATOR BURDICK: In behalf of President Jim Urban, I am pleased to respond to your recent letters concerning the captioned legislation now pending before your subcommittee on Improvements in Judicial Machinery. We appreciate your courtesies in requesting the views of The Florida Bar on this most important legislation.

For more than two years the Board of Governors of The Florida Bar has given this subject careful study. A special committee of The Florida Bar was appointed and a representative of this committee appeared before your subcommittee last fall to offer testimony in behalf of The Florida Bar. Since that time, the committee has been contacted, and it is our recommendation that this legislation in its present form be given favorable consideration by the U.S. Congress.

It is our further belief that by establishing separate divisions of the 5th Judicial Circuit, adding several additional appellate judges, and affording the court an opportunity to sit in several additional locations within the division, the people of our four states will be better served and the administration of justice substantially enhanced.

In behalf of the 17,820 lawyers and judges of Florida, we wish to express to you and the members of the subcommittee our appreciation for a job well done.

Sincerely yours,

MARSHALL R. CASSEDY.

[Telegram]

THE FLORIDA BAR,
Tallahassee Fla., March 17, 1975.

Hon. QUENTIN N. BURDICK,
Committee on the Judiciary, Subcommittee on Improvements in Judicial Machinery, Washington, D.C.

Whereas the Florida Bar recognizes that action to relieve the appelate caseload in the Court of Appeals for the Fifth Circuit is urgently required and should be accomplished without further delay.

Be it resolved by the board of governors in regular meeting at Sarasota, on this the 14th day of March 1975, endorses and approves S. 729 as a practical and reasonable way to accomplish the necessary relief desired and is in the best interests of the bench, bar, and citizens of the States affected by the proposed division of the Fifth Judicial Circuit and the board of governors of the Florida Bar does hereby recommend favorable action on this legislation by the Congress of the United States.

MARSHALL R. CASSEDY,
Executive Director.

STATE BAR OF GEORGIA,
Macon, Ga., January 20, 1975.

Hon. QUENTIN N. BURDICK,
U.S. Senate,
Washington, D.C.

DEAR SENATOR BURDICK: Following up my letter of December 18, 1974, in which I expressed appreciation for forwarding me the copy of S. 2990, I am happy to report that the State Bar committee has met and recommended a statement in support of this bill. This position was then presented to the Executive Committee of the State Bar and unanimously approved. It, therefore, represents the position of the State Bar of Georgia in this regard.

We also recognize the urgency of this reform and revision of the Fifth Circuit Court of Appeals and urge favorable consideration of this legislation.

Respectfully submitted,

CUBBEDGE SNOW, Jr.

STATEMENT OF STATE BAR OF GEORGIA IN SUPPORT OF S. 2990

The State Bar of Georgia, acting by the Executive Committee of its Board of Governors and upon the unanimous recommendation of its Delegates to the Fifth Circuit Judicial Conference,

(a) Reiterates the opinion expressed in its statement filed last year with the Commission on Revision of the Federal Appellate Court System that action to relieve the appellate caseload in the Court of Appeals for the Fifth Circuit is urgently required and should be accomplished without further delay.

(b) Endorses and approves, as constituting appropriate, desirable and practical action toward the relief of such problem, the provisions of S. 2990, with amendments in the nature of a clean bill recently proposed by the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary of the United States Senate, which would divide the present Fifth Circuit into Eastern and Western Divisions and substantially increase the number of judges within each Division;

(c) Strongly urges prompt and favorable Committee consideration and the enactment into law of S. 2990 in the form of such clean bill; and

(d) Suggests, as a matter for consideration, the holding of a separate judicial conference within each Division of the Fifth Circuit, at least in alternate years, a procedure which would reduce the size of the Conference and the distance required to be traveled by many of the delegates, would permit more effective lawyer participation, and should result in a more effective conference.

STATE BAR OF GEORGIA,
Atlanta, Ga.

STATE OF GEORGIA,
Fulton County.

I, Omer W. Franklin, Jr., General Counsel of the State Bar of Georgia, and (in the absence of our Executive Secretary, Mrs. Grant Williams, who is presently hospitalized) custodian of the official records of the State Bar of Georgia, do hereby certify that the single sheet attached hereto, marked Exhibit "A" and, by this reference, made a part hereof, is a true and correct

Xerox reproduction of "Page Three" of the official minutes of a meeting of the Executive Committee of the State Bar of Georgia which was held on January 10, 1975, in the State Bar of Georgia headquarters, 1510 Fulton National Bank Building, 55 Marietta Street, Atlanta, Georgia, which page contains a Resolution regarding the division of the United States Court of Appeals for the Fifth Judicial Circuit, as formally adopted by the Executive Committee as aforesaid.

So certified on this the 4th day of March 1975.

OMER W. FRANKLIN, Jr.,
General Counsel.

EXHIBIT A

Now, therefore, be it resolved, That the State Bar of Georgia hereby approves and endorses the legislative proposal of the Commission on a National Institute of Justice that such a national institute be created and urges its creation by the United States Congress.

The president reported to the committee the unanimous recommendations of the State Bar delegates to the Fifth Circuit Judicial Conference with respect to the proposed reorganization of the Fifth Circuit as embodied in S.2990. Following discussion, motion was made and carried that the State Bar support and endorse S. 2990, and adopt the following statement to that effect:

The State Bar of Georgia, acting by the Executive Committee of its Board of Governors and upon the unanimous recommendation of its Delegates to the Fifth Circuit Judicial Conference,

(a) Reiterates the opinion expressed in its statement filed last year with the Commission on Revision of the Federal Appellate Court System that action to relieve the appellate caseload in the Court of Appeals for the Fifth Circuit is urgently required and should be accomplished without further delay;

(b) Endorses and approves, as constituting appropriate, desirable and practical action toward the relief of such problem, the provisions of S. 2990, with amendments in the nature of a clean bill recently proposed by the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary of the United States Senate, which would divide the present Fifth Circuit into Eastern and Western Divisions and substantially increase the number of judges within each Division;

(c) Strongly urges prompt and favorable Committee consideration and the enactment into law of S. 2990 in the form of such clean bill; and

(d) Suggests, as a matter for consideration, the holding of a separate judicial conference within each Division of the Fifth Circuit, at least in alternate years, a procedure which would reduce the size of the Conference and the distance required to be traveled by many of the delegates, would permit more effective lawyer participation, and should result in a more effective conference.

ALABAMA STATE BAR,
Dothan, Ala., February 17, 1975.

U.S. Senator, Chairman, Subcommittee on Improvements in Judicial Machinery, Washington, D.C.

DEAR SENATOR BURDICK: As President of the Alabama State Bar I am pleased to forward to you an official Statement of Position of the Alabama State Bar as adopted by its Board of Commissioners relating to a division of the United States Court of Appeals for the Fifth Judicial Circuit.

The Alabama State Bar appreciates this opportunity to convey to you and the Subcommittee on Improvements in Judicial Machinery its official position and the noted suggestions therein. We urge your favorable consideration of our suggestions in this matter.

Sincerely

ALTO V. LEE, III, *President.*

Enclosure.

POSITION STATEMENT OF THE BOARD OF COMMISSIONERS OF THE ALABAMA STATE BAR

IN RE THE DIVISION OF THE FIFTH CIRCUIT OF THE UNITED STATES

1. The Board of Commissioners of the Alabama State Bar Association are committed to the proposition that a division of the Fifth Circuit is necessary. The delegates of the Alabama State Bar to the Fifth Circuit Judicial Conference unanimously concur in that position.

2. We do hereby endorse proposed legislation S. 2990, with amendments in the nature of a clean bill, and respectfully urge early and favorable consideration of this bill.

3. The following amendments are respectfully requested:

a. Amend the proposed bill to provide for a Judicial Conference for each Division of the Fifth Circuit and make it discretionary by agreement of the Judicial Councils of the two Divisions to hold a joint Judicial Conference.

b. Amend the bill to eliminate the provision respecting a joint committee on rules in the Fifth Circuit.

c. The bill should be amended to make it clear that the two Divisions of the Fifth Circuit will have the full right to make cross-assignments of judges, senior and active, without the necessity of approval by the Chief Justice of the United States. Such amendment should apply to both Circuit and District Judges.

d. Montgomery, Alabama, should be designated as a place for holding court in the Eastern Division.

MISSISSIPPI STATE BAR,
Tupelo, Miss., March 4, 1975.

Hon. QUENTIN N. BURDICK,
Committee on the Judiciary, Subcommittee on Improvements in Judiciary Machinery, U.S. Senate, Washington, D.C.

DEAR SENATOR BURDICK: This will acknowledge and thank you for the materials you have supplied me relating to the proposed reorganization of the Fifth Judicial Circuit. I appreciate also this opportunity to submit comments on the legislation from the Mississippi State Bar.

The position of the Mississippi State Bar has not changed since my appearance before the Subcommittee when I gave testimony relating to this legislation during September of 1974. At that time I advised the Subcommittee that our Bar strongly favored a division of the Fifth Circuit and an alignment of Mississippi with the States of Alabama, Georgia and Florida as a separate Circuit.

Our Bar continues to support and endorse the proposed legislation to divide the Fifth Circuit and we are appreciative of the efforts of you and the other members of your Subcommittee and staff.

With kind regards, I am

Very truly yours,

JAMES HUGH RAY, *President.*

LOUISIANA STATE BAR ASSOCIATION,
New Orleans, La., March 10, 1975.

Re Realignment of the Fifth Circuit.
Hon. JOHN MINOR WISDOM,
Fifth Circuit Court of Appeals
New Orleans, La.

DEAR JUDGE WISDOM: Mr. M. Truman Woodward, Jr., advised me that you plan to go to Washington to testify before the Committee. Mr. Woodward suggested I forward a copy of the resolution adopted by our Board of Governors and respectfully ask that you be kind enough to reurge our position and file same with testimony.

With continued kindest regards, I am

Respectfully yours,

KENT BREARD, *President.*

Enclosure.

RESOLUTION

WHEREAS, the Commission on Revision of the Federal Court Appellate System has in its Preliminary Report of November 1973 invited comments and suggestions from all concerned with respect to said report, and

WHEREAS, the Board of Governors of the Louisiana State Bar Association is deeply concerned with the proposal contained in such Preliminary Report that the Fifth Circuit be divided into two circuits,

NOW, THEREFORE, BE IT RESOLVED by the Board of Governors of the Louisiana State Bar Association that it strongly urges that said Commission revise such recommendations so that it finally report that the geographical limits of the Fifth Circuit remain as presently constituted.

BE IT FURTHER RESOLVED that in the event that the Commission does not adopt the view of this Board, above expressed, its purposed revision be altered to include the States of Texas, Louisiana, Mississippi and Alabama in one circuit and the States of Georgia and Florida and the Canal Zone in another.

BE IT FURTHER RESOLVED that a copy of the resolution be duly forwarded to the Commission on Revision of the Federal Court Appellate System.

CERTIFICATE

I certify that the above and foregoing resolution was adopted by the Board of Governors of the Louisiana State Bar Association at its regular meeting held on Saturday, December 1, 1973.

DATE March 7th SIGNED Thomas O. Collins Jr.

Thomas O. Collins, Jr.
Executive Counsel and
Assistant Secretary
Louisiana State Bar Association

STATE BAR OF TEXAS,
Austin, Tex., March 14, 1975.

Hon. QUENTIN W. BURDICK,
Chairman, and to the members of the Subcommittee on Improvements in Judicial Machinery, being a subcommittee of the U.S. Senate Committee on the Judiciary, Washington, D.C.

GENTLEMEN: The State Bar of Texas would like to express its views about S. 729, insofar as it would reorganize the Fifth Circuit by dividing it into two divisions.

The State Bar of Texas previously expressed its support to the Commission on Revision of the Federal Court Appellate System for one of the Commission's alternatives, which would have created two circuits from the Fifth Circuit. Under that proposal, Texas would have been in a new Eleventh Circuit with Louisiana, Mississippi and the Canal Zone. The new Fifth Circuit would have consisted of Alabama, Georgia and Florida. The policy reasons for supporting that plan were stated in a letter from then President of the State Bar of Texas, Leroy Jeffers, as follows: (1) The two emerging circuits would have been fairly equal in caseload, based on 1973 filings, and would likely continue to be so, according to the most reasonable projections. (2) The two emerging circuits would have been cohesive geographically; would have consisted of contiguous states and transportation facilities between the states were good. (3) No other existing circuit would have been disturbed and continuity would have been maintained by preserving the present alignments. (4) Variations in economies and viewpoints would have been maintained.

After considering S. 729, the State Bar of Texas now states its position on this bill. While this State Bar's reasons for its support for the Commission's proposal can be restated in support of S. 729, though not to the same degree, this Bar feels there are additional considerations respecting S. 729. These considerations are as follows:

(1) By dividing the circuits into divisions rather than creating new circuits and providing for the adminstration of such divisions, the bill creates a statutory basis for flexibility in accommodating any increase in caseload in the foreseeable future. It allows for an increase in manpower without sacrificing the efficiency and collegiality needed to foster consistent rendition of opinions within the appellate divisions. As the number of judges within a circuit or division becomes unwieldly, new divisions can be created without a minor upheaval of our Federal judicial appellate system.

(2) The bill will promote administrative efficiency by providing each division with its own chief judge, circuit executive, judicial council and control over designation and assignment of both circuit and district judges. Further administrative efficiency is provided by allowing the senior chief judge of a divided circuit to assign district judges across division lines.

(3) The bill would maintain consistency in the interpretation of laws within a single state's jurisdiction, through its conflict-resolving mechanism in using joint en banc panels. While this mechanism would only be applicable to California as the bill reads now, it accommodates other states which may be under the jurisdiction of two or more circuit divisions in the future.

However, the State Bar of Texas feels very strongly that the value of this conflict-resolving mechanism is greatly diminished without some guarantee that there will be adequate opportunity for oral argument before such a joint en banc panel. Oral advocacy is a traditional, vital and important element in the adversary process. The steady erosion of advocacy in general, and oral argument in particular, by Fifth Circuit rules and procedures is a trend toward the weakening of the whole adversary system. The State Bar of Texas strongly expresses its feeling that the conflict-resolving mechanism is such a crucial arena in the adversary system that the panel could not fully serve its function without the opportunity of hearing oral argument.

Additionally, we observe that unless oral argument is assured before the joint en banc panel that at least one third of this panel will receive any case without having heard any oral argument on that particular case.

Respectfully submitted,

LLOYD LOCKRIDGE, *President.*

STRASBURGER, PRICE, KELTON, MARTIN & UNIS,
ATTORNEYS AND COUNSELORS,
Dallas, Tex., December 9, 1974.

Hon. QUENTIN N. BURDICK,
Subcommittee on Improvements in
Judicial Machinery, Washington, D.C.

DEAR SENATOR BURDICK: Thank you for the Committee Print of S. 2990 and the proposed Committee Report.

It is gratifying to see that additional circuit judges are contemplated. I have always felt that this was one of the prime needs and alluded to it before both the Commission on Revision of the Federal Court Appellate System and your subcommittee.

S. 2990 puts forth a workable plan to continue the judicial process rather than making it more than administrative process.

You and your subcommittee are to be commended.

Respectfully yours,

JOHN H. HALL.

Committee Exhibit E - 5

Circuit: Fifth

Average Time for Stages of Appellate Review
Cases Terminated After Argument or Submission
By Type of Opinion and Type of Case

Circuit: Fifth

Type of Case and Opinion	Number of Cases	Av. Time Appeal-Record (days)	Av. Time Record-Last Brief (days)	Av. Time Brief-Oral Argu. or Submission (days)	Av. Time A/S - Opinion (days)	Total Average Time Appeal-Opinion (days)	Remarks
U.S. Civil - Signed Opinion	74	59	74	120	125	378	
Per Curiam	87	60	75	52	74	261	
Memorandum	1	41	84	125	266	516	
No Opinion	5	75	100	93	15	283	
Private Civil - Signed Opinion	214	83	74	116	151	424	
Per Curiam	299	64	63	64	73	264	
Memorandum	1	81	54	133	121	389	
No Opinion	12	46	44	71	17	178	
Prisoner Pet. - Signed Opinion	71	69	84	83	115	351	
Per Curiam	349	48	68	47	41	204	
Memorandum	-	-	-	-	-	-	
No Opinion	10	74	72	37	17	200	
Criminal - Signed Opinion	201	85	71	78	105	339	
Per Curiam	313	64	65	33	45	207	
Memorandum	-	-	-	-	-	-	
No Opinion	3	59	50	94	17	220	
Admin. Agency - Signed Opinion	47	4	85	71	116	276	
Per Curiam	48	9	89	62	48	208	
Memorandum	-	-	-	-	-	-	
No Opinion	2	-	32	52	71	155	
Recapitulation							
All Signed Opinions	619	73	75	96	125	369	
All Per Curiam	1108	56	67	49	54	226	
All Memorandum	2	61	69	129	194	453	
All No Opinion	34	59	64	64	19	206	
Circuit Average	1763	62	70	66	78	276	

Senator BURDICK. With that, we will be in recess until tomorrow at 10 a.m.

[Whereupon, at 12:45 p.m., the subcommittee recessed to reconvene at 10 a.m. the next day.]

CIRCUIT REALIGNMENT

WEDNESDAY MARCH 19, 1975

U.S. SENATE,
SUBCOMMITTEE ON IMPROVEMENT IN JUDICIAL MACHINERY
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:05 a.m., in Room 6202, Dirksen Senate Office Building, Senator Quentin N. Burdick [chairman of the subcommittee] presiding.

Present: Senator Burdick (presiding).

Also present: William P. Westphal, chief counsel; William J. Weller, deputy counsel, and Kathryn Coulter, chief clerk.

Senator BURDICK. Today's hearing on S. 729 is the first of 2 days of hearings devoted to hearing the views of witnesses from the ninth judicial circuit concerning the provisions of this bill, which would divide the ninth circuit into a northern and a southern division. We will also consider printed amendment 132, which was introduced on March 17, and printed copies are not yet available.

When the subcommittee opened its hearings yesterday, I reviewed briefly some recent past history and referred to the fact that since the subcommittee first started studying the problem of the ninth circuit during the 92d Congress, the caseload in the ninth circuit has jumped from 1,936 cases to its present level of 2,697 cases. But more significant than this sharp increase in filings in the ninth circuit, and more significant than the fact that the ninth circuit court of appeals has employed the services of 60 or more visiting judges in order to cope with this workload, is the result of this great effort expended by all these judges.

The result to which I refer is the fact that despite the best efforts of those judges, the volume of litigation in the ninth circuit has produced unparalleled congestion and delay in the appellate process in that circuit.

When this subcommittee last held hearings on this problem in October of 1974, an exhibit prepared by the committee staff with the assistance of the Administrative Office of the U.S. Courts disclosed that the average time from notice of appeal to release of the opinion in the civil cases in which the United States was a party and where the case was decided by a full-blown signed opinion was 715 days. While that exhibit was prepared on the basis of 1973 data, we now have the benefit of data from fiscal year 1974 and as will be seen from the revised version of exhibit E–9 (see page 61, *supra.*), cases in the same category now require 747 days on the average from filing of the notice of appeal to release of the final opinion. The exhibit also shows

that private civil cases terminated by a signed opinion required an average of 739 days. Even criminal cases which are entitled to expedition required almost 11 months on the average where the case was decided by a signed opinion.

When the subcommittee last met on this proposal, it was considering the provisions of S. 2990 of the 93d Congress, which was a bill based upon the recommendation of the Commission on Revision of the Federal Court Appellate System that the ninth circuit be divided into two separate circuits, a new twelfth and a new, but smaller, ninth circuit. The proposal at that time provided that any conflict of decision between the new ninth circuit and the new twelfth circuit, each of which would have jurisdiction over appeals from two of the judicial districts in the State of California, would have to be resolved by the Supreme Court of the United States. At the hearings last October, representatives of the State Bar of California were most insistent that the proposal for conflict resolution by the Supreme Court of the United States would be inadequate to meet the need of California litigants. They expressed the desire to have, within the ninth circuit, a conflict resolving mechanism which would have the power to issue decisions which would have a binding precedent on all four of the judicial districts in California and upon the two divisions of the ninth circuit. After those hearings, the subcommittee's so-called clean bill was distributed which contained a provision for the convening of a joint en banc panel composed of judges from both of the divisions of the ninth circuit, which joint en banc panel would have authority to resolve conflicts which may develop for California litigants. Also the clean bill version contained a provision for a joint rules committee which would reduce the possibility of diverse procedural rules followed by the northern and southern divisions.

Thus, the proposal set forth in S. 729 is one which represents not only 3 years of work by this subcommittee but almost two years of study by the Commission of Revision of the Federal Court Appellate System. It also includes the joint en banc procedure and the joint rules committee provisions which were specifically designed to meet the objections made by the State Bar of California. In the next 2 days we will hear further testimony from and have the opportunity for further dialogue with judges and lawyers from the ninth circuit.

We have received a statement from Senator Howard Cannon of Nevada, which we will make a part of the record at this time.

[The material referred to follows:]

PREPARED STATEMENT OF SENATOR HOWARD W. CANNON

Mr. Chairman, thank you for this opportunity to present my views regarding S. 729, a bill proposing to reorganize the Fifth and Ninth Judicial Circuits. Since Nevada is now a member of the Ninth Circuit, and would remain so under Senator Burdick's proposal, I will confine my remarks to the Ninth Circuit.

S. 729 proposes to split the Ninth Circuit into two component sections; the Southern District which would operate primarily out of Los Angeles, and the Northern District which would be headquartered in San Francisco. While few will argue that reorganization of the Circuit is not long overdue, there does

seem to be much question regarding the location of the proper dividing line; whether Nevada should be included in the Southern or the Northern District, or for that matter; whether it should be split as is being proposed for California.

First, let me state that there will likely be short-term problems no matter what decision is made. However, I can foresee an even greater number of problems arising is Nevada is split such that half is in the Northern District and half is in the Southern. Administrative problems would no doubt arise. More cases would be dismissed due to errors in venue, breeding increased cost in terms of both time and money. Everything possible should be done to maintain the sanctity of each state as an entity. Based on this, the Committee can readily gather that I would be hard pressed to find justification for splitting Nevada internally between the Northern and Southern Divisions of the Ninth Circuit.

If my interpretation of S. 729 is correct, it appears to be more advantageous to the people of Nevada to associate entirely with the Southern Division. This would tie us in with Arizona and Southern and Central California. The 1975 Annual Report of the Administrative Office of the United States Court shows that our of 13,195 "civil" cases pending on June 30, 1974 in Ninth Circuit District Courts; 5,857 were in the jurisdictions proposed for the Southern District. The figures are somewhat reversed however when pending "criminal" cases are tallied. In that case the breakdown is 5,661 Circuit-wide, 3,898 of which can be attributed to the proposed constituents of the Southern District. Overall, a more even split could not be asked for at the District Court level.

While each and every District Court case has potential for appeal, a statistical analysis shows that proportionately only a very few cases are ever appealed to the Courts of Appeals. In the Ninth Circuit 2,697 cases were appealed in Fiscal Year 1974. Ninety-five of these appeals originated in Nevada. One thousand, one hundred and sixty-four originated in the proposed Southern District. This is 43% of the Ninth Circuit cases actually appealed.

Weighty consideration must also be given to other factors, such as that Nevada's population increase is percentagewise the second highest in the country behind only Florida. No doubt Arizona is not far behind. Evidence of the growth factor is found in many forms. The number of bankruptcy filings is, for example, up 33% nationwide this year. In Nevada it is up 66%. The number of appeals to Courts of Appeals in Nevada has steadily risen since 1971. Between Fiscal Year 1973 and Fiscal Year 1974 however, they rose by 61%. There is little hope for a drop-off when one accounts for the general population shift from East to West and, in particular, to my home state.

A letter from my State Bar indicates that Nevadans are fairly evenly divided on whether they wish to be included in the Southern or the Northern District, but are in full accord that the Circuit must be reorganized. Those in the Northern part of Nevada, the main population center being in the Reno area, favor affiliation with the Northern District due to Reno's proximity to San Francisco. Those in the Southern part of the state have similar feelings regarding Los Angeles. Convenience, cost, and the travel time are no doubt the prime considerations; however, they fail to account for the most important factor—service!

It is my understanding that S. 729 would create five new judgeships for the Southern District and two for the Northern District. This means that by associating with the Southern District, Nevada would be served by a total of eleven appellate judges, whereas, by associating with the Northern District the number would be nine.

A desire for the best appellate judicial service possible would thus seem to mandate that Nevada be included in the tri-state Southern District as opposed to the multi-stote Northern District.

For the record please note that Nevada's main population center is Clark County which is approximately 280 miles from Los Angeles; a 5½ hour drive at 55 m.p.h., or an hour's flight. It would be highly impractical for a Reno attorney and his client to drive the distance since another 400 miles would be tacked on, however the flight time would still be little more than an hour. Of course, the same considerations work in reverse. Clark County contains approximately 3/5 of the state's population and is the source of the greatest number of Ninth Circuit Nevada cases.

Mr. Chairman, I hope that this information assists you in achieving a functionable reorganization for the Ninth Circuit. I have attempted to present objective considerations in an effort to point out the unique situation of my home state, a state of divergent views, sparse population, and massive physical size. Thank you for this opportunity to address the Committee.

Senator BURDICK. Our first witness today will be Thomas G. Nelson, president of the Idaho Bar, Twin Falls, Idaho.

Mr. Nelson, a number of years ago I had the privilege of being in Twin Falls. It is a delightful city.

STATEMENT OF THOMAS G. NELSON, PRESIDENT OF THE IDAHO BAR ASSOCIATION

Mr. NELSON. It is not a place you get to by accident, Senator.

I am Thomas G. Nelson, president of the Idaho State Bar.

I have given the staff a written statement which I will ask be included in the record.

Senator BURDICK. It will be included in the record, without objection.

[The material referred to follows:]

PREPARED STATEMENT OF THOMAS G. NELSON

Mr. Chairman, members of the Committee. My name is Thomas G. Nelson. I am a lawyer in Twin Falls, Idaho, and am President of the Idaho State Bar. The Idaho State Bar is an integrated bar, so all lawyers practicing in Idaho are members. The bar is administered by a four-man Board of Commissioners elected by the members.

The Board of Commissioners supports the plan of reorganization of the Ninth Circuit Court of Appeals, as set out in S. 729. We understand that the bill also involves reorganization of the Fifth Circuit, but since Idaho is in the Ninth Circuit, I will limit my comments to that circuit. Before writing this statement, I contacted the presidents of each of the local bar associations and found them to be in support of the views I express herein.

There seems to be little question about the necessity of taking some action to provide relief to the Ninth Circuit from the large and increasing caseload in that circuit. The question revolves around the form the relief should take. Certainly more judicial manpower is required, and some administrative changes also seem indicated.

The two division concept embodied in S. 729 appears to offer the best solution for providing the extra judges, and also retaining the elements of strength in the Ninth Circuit which has been of great benefit to the states involved. As I understand it, the judges of the Ninth Circuit are in favor of this proposal, with only a few exceptions. Since this is a question of administration, I accept their view that this is the best administrative solution.

The other alternative which has been suggested, that of leaving northern California in the Ninth Circuit and splitting the northwest states off into a new Twelfth Circuit appears to be a poor choice. From the standpoint of the basic problem, the remaining Ninth Circuit would continue to be unwieldy, since 88% of the load of the present Ninth Circuit would remain there. The problems of a 19-judge circuit outlined by the Chairman in his statement introducing S. 729 would still be present, so the basic problem is not addressed by the Twelfth Circuit proposal.

From the standpoint of the State of Idaho, the Twelfth Circuit proposal is unpalatable. Idaho's basic law has been oriented toward California since the time of Idaho's territorial days. To split the federal courts in Idaho off from California law in Ninth Circuit decisions would not be consistent with Idaho's history nor be in its best interests.

Another, and perhaps more compelling argument, is that the proposed Twelfth Circuit would probably only require the services of three circuit judges. A three-judge panel simply does not offer the opportunity for the

interplay of personalities and ideas as does a larger number. The new Twelfth Circuit would not provide the number or quality of decisions as would the Ninth Circuit, and it would probably be many years before the caseload increased to the point of requiring more judges. The question of whether the Twelfth Circuit is an acceptable alternative for this reason should be of concern to the lawyers of all the states proposed for inclusion in that circuit. The Board of Commissioners of the Idaho State Bar rejects the Twelfth Circuit as an alternative to the concept embodied in S. 729.

The federal judges in the Ninth Circuit offer a pool of trained judicial officers who can be assigned any place within the circuit where their services are needed, including the Circuit Court itself. This flexibility and ability to respond to changing needs is an asset to the Ninth Circuit. The splitting off of the northwest states would reduce the number of district judges available, since inter-district use of federal judges is not automatic, as I understand it, and thus reduces the ability of the Ninth Circuit to respond to the changing needs of the federal courts in the circuit.

S. 729 will probably not satisfy everyone, but it appears to offer the best solution with the least violence to the traditions and quality of the Ninth Circuit. The two division concept offers an opportunity for all circuit judges to participate fully in the work of the circuit, while the inter-Division *en banc* proposal avoids the unacceptable situation of having two rules of decision in California.

This bill is a good and workable solution to the problem, and we support it. Our position has been communicated to Senator Church and Senator McClure, with the request that they support it.

Thank you for giving me this opportunity to appear before the Subcommittee.

Mr. NELSON. Rather than read it, I might simply summarize it.

Idaho is not one of the major problems of the ninth circuit in terms of caseload, but we are vitally concerned with where Idaho would fit and vitally concerned with what happens in the ninth circuit.

It is our feeling that the interests of Idaho are best served by the ninth circuit remaining essentially as it is with the two divisions. Idaho has copied its law from California since Idaho was a territory. As a matter of fact, our criminal code has been known for years as the "scissors code" because we cut up the California code in order to draft it back in 1864.

I do not know that that is a particularly heavy argument as to what happens to Idaho, since I think we contribute about 1 percent of the load of the ninth circuit.

I have been concerned somewhat about the proposals for a twelfth circuit. I do not think that that particular proposal is in the best interests of any of the States in the present ninth circuit. In my judgement, the ninth circuit which has created for itself a reputation of good opinions and their opinions are of considerable weight. I think the twelfth circuit would be years in reaching that particular pinnacle, and you would certainly restrict the ninth circuit from access to the pool of judicial manpower.

I think one of the great strengths is the large number of judges available for needed assignments as the case loads change in the Federal district.

My statement is in the record. I would not go on any further.

If the chairman or the staff have any questions about the position of the Idaho State Bar I would be happy to respond to them.

Senator BURDICK. Thank you very much for your contribution this morning.

I have just two questions.

I want to thank you, Mr. Nelson, not only for taking the time and trouble to appear before the committee, but I want to both thank and congratulate you on the clarity of your analysis of the issues which the subcommittee must decide.

In your statement you indicated that not only the board of commissioners of the Idaho State Bar, but also each of the local bar associations support the proposals set forth in S. 729. Did these local bar presidents authorize you to state that fact to the subcommittee?

Mr. NELSON. Yes; I did ask them if they had any objections to my stating that, and I heard from all but I think one at the time I left Washington, and there was no objection.

Senator BURDICK. Thank you.

We have also received a letter from Mr. Douglas Drysdale, president of the Montana Bar Association, indicating that the Montana bar generally supports the proposal to divide the ninth circuit and, in the event of such division, the State of Montana desires to be aligned with that portion of the circuit which would be headquartered at San Francisco and also sitting in Portland and Seattle. Have you had occasion to discuss this proposed legislation with either Mr. Drysdale or other members of the Montant bar?

Mr. NELSON. Yes; we did discuss it generally with Mr. Drysdale and other delegates from Montana. As I remember their position, even though they are not a community property State, their feelings are much the same as Idaho's, that they feel their best interests are with the ninth circuit with the division concept.

Senator BURDICK. I believe the staff has a question.

Mr. WESTPHAL. Mr. Nelson, as you attempted to summarize your prepared statement, you said that the interests of Idaho would be best served by having the ninth circuit remain as it is with two divisions. Now, could you clarify it?

Mr. NELSON. What I meant to say, and I probably said it very badly, was we would prefer to see the ninth circuit remain in the same geographic area so that we would remain a part of the ninth circuit as presently constituted, so that even though there would be two divisions we would have the benefit of what is frankly the California bias or leaning of many of the ninth circuit decisions.

Mr. WESTPHAL. And as you understand the provisions of this bill, S. 729, it would reorganize the ninth circuit into a northern and southern division rather than splitting it into a separate twelfth circuit and a separate new and reduced circuit?

Mr. NELSON. That is my understanding.

Mr. WESTPHAL. And in that alignment Idaho would be part of the proposed northern division and would therefore retain those ties to California which you have indicated were important to Idaho lawyers because of the fact that part of your civil code has been borrowed from the State of California; is that correct?

Mr. NELSON. That is correct.

Mr. WESTPHAL. You indicated that one of the factors that entered into the decision of your board of commissioners to support this bill was the fact that within the ninth circuit states, all nine in number, there is available what Judge Chambers always refers

to as the blood bank, and do you understand that under the provisions of S. 729, notwithstanding that the circuit is reorganized into two divisions, that the senior chief judge would still retain the power to assign judges from one division to another, both at the district level and or at the circuit level?

Mr. NELSON. That is my understanding. I think that is one of the real advantages to this concept.

Mr. WESTPHAL. Your statement indicates that your board of commissioners, before arriving at its position to support this bill, considered other alternatives, such as—well, you mentioned splitting the Northwest States off into a new twelfth circuit, which would not include any part of California, but you would leave northern California attached to southern California and the balance of the circuit. What were the reasons why your board of commissioners did not feel that that proposal was as acceptable as the first one set forth in this bill?

Mr. NELSON. First, of course, would be the strength of courts from California. Second, the twelfth circuit would be very small and probably would justify no more than three judges on the circuit panel. I do not think a three-judge circuit is big enough to get the entire play of mobility and personality. One strong judge would run that circuit very easily, and selfishly, I think. Idaho might have a circuit judge about every 100 years under that system, and would simply be overpowered by Washington and Oregon in terms of size. I think that would be true of Montana and Alaska, likewise.

I think the real disadvantage in splitting up the circuit is in eliminating the flexibility. You have eliminated that many district judges and that many circuit judges from the ninth circuit.

Mr. WESTPHAL. In discussing this matter with various Idaho lawyers and in the discussions within the board of commissioners, plus these conversations you had with the presidents of local bar associations within Idaho, did you glean any impression from talking to those lawyers as to whether they are disatisfied with the type of congestion and delay that exists in the ninth circuit today as described by the chairman in his opening statement?

Mr. NELSON. Well, I think it is a unanimous feeling of those lawyers who have business before the ninth circuit that something has to be done. If you have a nonpriority civil case in the ninth circuit—and I understand there are something like 100 different calendar priorities that the circuit has to face—you are looking at a delay much greater than the average that the chairman mentioned. You are looking at perhaps 3 years.

Some of these civil cases, even though nonpriority, are certainly of great significance, not only to the litigants, but to the other Western States.

There are a couple of water questions now pending in the ninth circuit which could have great impact on many of the states in the West. They have been sitting there for 18 and 24 months respectively, and I am not being critical of the ninth circuit, but that sort of delay when other rights and other cases are awaiting that decision simply does not do much for the problems that we face.

Mr. WESTPHAL. That is all the questions I have, Mr. Chairman.
Senator BURDICK. Thank you very much.
Mr. NELSON. Thank you.
Senator BURDICK. Our next witness is Judge Shirley M. Hufstedler, Ninth Circuit Court of Appeals, Los Angeles, Calif.
Welcome to the committee, Judge.

STATEMENT OF JUDGE SHIRLEY M. HUFSTEDLER, NINTH CIRCUIT COURT OF APPEALS, LOS ANGELES, CALIF.

Judge HUFSTEDLER. Good morning, Mr. Chairman, gentlemen.
You have heretofore been furnished copies of the prepared statement, and I would like to submit that for the record at this time.
[The material referred to follows:]

PREPARED STATEMENT OF SHIRLEY M. HUFSTEDLER, CIRCUIT JUDGE, U.S. COURT OF APPEALS, NINTH CIRCUIT

Mr. Chairman and Members of the Subcommittee: I fully support the premises of S. 729 that the Ninth Circuit is seriously overburdened, that the court presently needs 20 active judges to carry the load, and that existing en banc mechanisms are inadequate to maintain intracircuit decisional harmony. I nevertheless must oppose the bill because the division will (1) increase the appellate litigation in the circuit, (2) impose unjust and unreasonable burdens on the citizens of California, (3) increase the burdens of the Supreme Court, (4) escalate en banc proceedings, (5) generate serious problems for which the bill provides no answers, and (6) increase systemic and dollar costs without offsetting benefits.

The bill is built on the foundation of two unarticulated assumptions, both of which are wrong: (1) The only state adversely affected by the split is California which is cut in two, and (2) the problems created by splitting California can be resolved by the "joint en banc panel."

The fallaciousness of these assumptions can be demonstrated by a concise illustration: In a case arising in Oregon, the Northern Division holds that a federal tax statute as applied to taxpayer *A* is unconstitutional. Taxpayers identically situated to *A* are located in San Francisco, Los Angeles, and Arizona. Stare decisis will bind the San Francisco taxpayer to the Northern Division's decision. The taxpayers in Los Angeles and Arizona are not thereby bound. Taxpayer *B* in Phoenix makes the same constitutional challenge to the statute. The Southern Division holds that the statute is constitutional as applied to him.

1. Can Phoenix taxpayer *B* seek a resolution of the conflict by the joint en banc panel under section 1291(b) which limits joint en banc panel jurisdiction to "any decision by a division of that circuit which is in conflict with a decision by the other division of that circuit and affecting the validity, construction, or application of any statute or administrative order, rule, or regulation, state or federal, *which affects personal or property rights in the same state*"? (Emphasis added.) Or is taxpayer *B*'s sole remedy a certiorari petition to the Supreme Court?

2. Does the joint en banc panel have jurisdiction to resolve the conflict by sua sponte action, and, if it does have jurisdiction, does it have any obligation to exercise it?

3. Los Angeles taxpayer *C* appears to have no standing to seek any relief because he is not a party to either the Oregon or the Arizona action. How can he obtain a resolution of the conflict? Of course, he can relitigate the issue in the Tax Court (which may or may not be bound to follow one division's decision rather than the other), or in the district court within the Southern Division in which he must lose because the district court is bound by the decision in the Arizona case. He can then appeal to the Southern Division, which is likewise bound to its prior decision, unless it takes the case en banc. Suppose the Southern Division rejects his en banc suggestion. Does the joint en banc panel then have jurisdiction to entertain his petition to it to

hear the case en banc to resolve the interdivision split? Or is his sole recourse to petition the Supreme Court for certiorari?

Suppose that taxpayer *O* has conducted identical transactions in both San Francisco and Los Angeles—a very common phenomenon in respect of corporate taxpayers. During all the months and even years consumed by all of this litigation, what law must *O* follow in filing his tax returns?

4. Is the Government bound either by collateral estoppel or by stare decisis in the Southern Division by the adverse decision in the Northern Division?[1] Does it have any standing to seek joint en banc panel determination of the Northern Division's adverse decision? If it has standing and if the joint en banc panel has jurisdiction, does the Government have any obligation to suggest en banc hearing (a) before the Northern Division's internal en banc court, or (b) before the joint en banc panel, with or without prior en banc application to the Northern Division?

The questions raised by the illustration and its variants are serious and pervasive. The problems will recur constantly because decisions interpreting and applying the Federal Constitution, federal statutes, federal administrative orders, rules, and regulations constitute the bulk of the work of this circuit, and all of the federal law necessarily flows across the California fracture line and permeates every corner of the circuit. The bill confronts none of these problems and answers none of them.

Moreover, the bill fails to recognize that the division inherently generates litigation at both district and appellate levels for three reasons: (1) the split breeds conflict and uncertainty, and conflict and uncertainty always breed more litigation; (2) losers with the motivation and ability to relitigate an issue lost in one division will relitigate in another to work up a conflict for resolution by en banc proceedings, certiorari petitions, or both (litigants in this category abound in the circuit, *e.g.*, federal and state governments in all of their many capacities, big corporations, taxpayers, class litigants, conservationists); (3) the existing curb on conflict due to the obligation of all judges in the circuit to follow the prior law of the circuit unless it is overturned en banc[2] apparently is intended to be removed between divisions, with the exception of the decisions by the joint en banc panel. I say "apparently" because, while the bill does not directly address that question, the jurisdictional limitations on the joint en banc panel suggest that that is the intent, and commentary of the draftsmen to the effect that the division is expected to relieve non-joint en banc panel members of the burdens they now have in maintaining intracircuit harmony reinforces the suggestion.

The effect of the division and the fragmented en bancing procedure is to shift the burden of maintaining intracircuit harmony from the circuit court to the litigants and to the Supreme Court. The Supreme Court cannot absorb the added burdens. The litigants have little motivation and little or no means to maintain interdivisional harmony. Litigants are interested in winning lawsuits, not in maintaining institutional harmony. The burden falls especially unjustly and unreasonably on the people of California, who will be forced to file two or more appellate proceedings in every case in which a key federal law issue has been decided differently by the two divisions. Moreover, when the conflict has arisen in the circuit through cases originating in states other than California, they may have no jurisdictional access to the joint en banc panel, and they may be remitted solely to the Supreme Court of the United States. They are further unreasonably burdened when California law issues have been decided differently by the two divisions because they must both appeal to the division and suggest hearing by the joint en banc panel. If the joint panel rejects the suggestion, access to the Supreme Court is closed for want of a federal question, and they would then have to relitigate the issue through the state courts of California if they can avoid preclusion by res judicata. How can the citizens and governmental entities of California sensibly

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[1] The collateral estoppel issue is difficult in the intercircuit context (*e.g.*, Divine v. Commissioner of Internal Revenue (2d Cir. 1974) F. 2d [No. 73-1782] holding that the Government was not precluded from relitigating a tax question in one circuit that it had lost in another). It is even more difficult in the interdivisional setting because there is no guidance at all on the question.

[2] The nature and extent of the obligation of judges of the Ninth Circuit to maintain integrity of the law of the circuit by following prior decisions unless they are overruled en banc is accurately described by Alexander, "En Banc Hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities," 40 N.Y.U.L. Rev. 563 (1966).

plan and conduct their affairs in this situation? Why should they be forced to do so? Why should this jurisdictional and procedural morass be created?

The assumed justifications for creating all of these problems are: (1) the split will reduce circuit overburden, (2) it will permit the court to function in small units, and (3) a circuit with more than 10 and as many as 20 judges is inherently unmanageable, or is manageable only with untoward difficulty. The assumptions are demonstrably unsound.

The split will elevate the litigation burden for reasons heretofore mentioned. The small unit function is illusory, because the split will force continuous en bancing both within the divisions and across division lines. Finally, circuit courts of more than 10 and as many as 20 judges are not unmanageable.

The Ninth Circuit has operated effectively, although imperfectly, with more than 3 times 20 judges for several years. Last year our court used the services of 75 judges. In 1973 we used 66 judges. Our active judge complement is 13. In 1974 we had 13 active judges and 4 senior judges, until Judge Merrill took senior status last Fall. We had 59 different visiting judges, the great majority of whom are active district judges from our circuit, who left their own trial calendars to assist us by sitting with us one or two days during one or more of our monthly calendars during the year. The other visitors were senior district judges from our circuit and other circuits, and out-of-circuit senior circuit judges assigned to sit with us for five days on one or more of our monthly calendars. With occasional exceptions, one out of every three panel members has been and now is a visiting judge.

No one suggests that any court can operate with optimal efficiency with 18 full time judges, 4 part time judges, and 59 visitors whose regular duties are elsewhere and whose services turn over from week to week and even from day to day. We know that this is not a desirable way to run a court, any more than it would be a desirable way to run a congressional office. We have been driven to this system because our court is seriously and chronically understaffed. The key point is, however, that the court is being effectively managed in spite of the large number of judges and the turnover. The logistical and administrative problems involved in managing a 20-member full time judicial complement are very slight as compared with the present administration of a constantly shifting group of 75 judges from all over the nation.

A 20-judge court can be managed every bit as effectively and efficiently as a 10-judge court as long as management methods are adjusted to accommodate the larger size. Panel assignments, locations, and times of sitting can be adjusted to reach the results of division with no split of the circuit and with none of the added systemic and dollar costs.

I appreciate the affection for the small court concept, and I share the reluctance of judges to change the internal operating procedures of our courts with which each of us is comfortably familiar. The attachment, however, is a luxury that we can no longer afford because the demands on our circuit cannot be met while we cling to our old ways.

Our situation can be illustrated by an analogy to the development of law firms. A 9-lawyer firm is a pleasant working organization. Without much difficulty, every lawyer can keep himself informed of the work of every other lawyer in the firm. The firm does not need an administrative partner or an office manager. The 9-lawyer firm can occasionally accept a very large, complex lawsuit, but it cannot undertake several complicated lawsuits in a single year. If several complicated lawsuits are offered to the firm, it must either hire more lawyers or turn away the new clients. If it accepts the litigation, the firm must grow rapidly to 15, 20, or more lawyers. Law firms of 20 or more lawyers can and do operate very effectively; indeed their operations can be much more efficient than a small firm, but they do not manage themselves in the same way as do small firms. The analogy between the law firm and a circuit court holds true with one critical exception: Law firms can remain small by choosing to reject more litigation. Circuit courts do not have that choice.

During the last decade California has experienced explosive growth of law firms and of extremely complex litigation. Our court cannot process the resulting caseload with the judicial personnel and the internal operating procedures that sufficed in bygone days when caseloads were much lighter and simpler.

In briefest compass, here is a partial list of the systemic and dollar costs that circuit splitting engenders:

(1) Appellate litigation will increase in both divisions; unsettled law always promotes more appeals.

(2) Litigation in the district courts will increase by reason of forum shopping and relitigation of issues lost in the other division.

(3) En banc proceedings will multiply rapidly, both in suggestions for en banc hearings and in en banc hearings necessarily granted, within divisions and interdivision.

(4) The people of California will be in constant uncertainty about how to plan their actions because they will be unable to predict what law will be applied to them.

(5) Final decision of pending appeals will be further delayed while en banc petitions are filed and while awaiting the results of numerous en banc hearings granted.

(6) The additional legal work and the extended delay will escalate the costs to litigants; California litigants will be particularly oppressed.

(7) Burdens on the Supreme Court will be increased.

(8) A new circuit executive will be added and a new clerk's office will have to be created, staffed, and housed.

What are the benefits?

(1) A few of the judges who are not members of the en banc panel may save a little travel time.

(2) Meetings of the Circuit Council may be slightly shorter if 10, rather than the present 18 or the projected 20, attend.

I omit from the benefit column any saving of individual judge's time by reason of the participation of less than all judges in interdivision en bancs because any benefit that could flow from a new en banc mechanism is a function of that change and not a function of circuit division.

The cost-benefit ratio would be dramatically altered if the divisional concept of S. 729 were abandoned, the circuit was left intact, and its two highly meritorious features were retained: (1) the addition of 7 more active judgeships to the circuit and (2) the 9-member en banc mechanism was expanded to include all intracircuit conflicts.

Judge HUFSTEDLER. Because of the overall recognition that is contained in this bill, S. 729, of the serious problems of the Ninth Circuit, this is a matter of great importance, and I think essential to doing something about our problems. I am rather unhappy to have to say this, because it is true that we must have 20 active judges to carry the burdens of the Ninth Circuit.

Moreover, I think it is also true that the proposal for an en banc mechanism is a highly valuable one. I have some specific suggestions about the composition of that panel which I will address myself to a little later.

But it seems to me as a concept of judicial sitting, upon analysis of how it will function, I have come to the reluctant conclusion that it creates a great deal more problems than it resolves, and that the costs vastly exceed the benefits which can be thereby achieved.

The fundamental premises upon which this concept was erected, it seems to me, are that a circuit of more than 10 judges becomes inherently unmanageable, and that therefore there must be some means of division to keep a circuit down to this so-called optimum size.

Second, the problems generated by the split of the circuit into divisions can be successfully resolved by the joint en banc panel mechanism. I think both of these premises are wrong, and I think they can be demonstrated to be wrong.

As Senator Burdick has fully pointed out, last year our court used the services of 75 judges. That is an enormous load of judges,

and the difficulties of management of that mechanism with judges who are with us sometimes only for 1 day or 2 days, or 3 days, create management problems of extreme difficulty.

But if we had 20 active judges, to use the vernacular, management would come to a snap.

It is quite true you cannot manage your affairs identically when you have 20 judges as you can when you have nine. But that means really only an adjustment of the general operating procedures of the court. That means some difficulty, but it is by no means unseemingly difficult.

It seems to me that one of the difficult factors that was overlooked in the divisional concept is that the division, particularly of the State of California, will create continuing uncertainty and will generate litigation, both in the district courts and in the circuits.

Moreover, the proceeding contemplates having three different en banc mechanisms, one intradivisional en banc mechanism and then the joint en banc mechanism.

What this means, among other things, is that individual judges who are qualified to sit on the joint en banc panel, and of course were also qualified to sit on intradivisional en banc panels, can end up seeing the same case three times, first being on the panel itself, next on the en banc mechanism within the division, and third on the intercircuit or interdivisional en banc panel.

Frankly, I think that is a colossal waste of judicial time. At the present time, at maximum, a judge will sit twice and it is a relatively rare circumstance, because there is an obligation within the court that each member of the court must follow a decision within the circuit unless the matter is taken en banc. We regularly follow decisions with which we do not particularly agree, because we follow the discipline within the circuit.

But when you divide the circuit there is no need, nor is there any obligation, for the members of the southern division to follow the northern division, and if there were you are exactly where you started from in terms of the overall burden in keeping up with the court.

It seems, therefore, to me, that the problem should be faced more directly by keeping the circuit together and giving us the help we need without making any divisions or cuts. Indeed, the concept of the bill is contrary to the concept developed in judicial systems across the country, which is not to break up into more little pieces, but to put more little pieces together. That is true when you are talking about judicial systems. It is also true when you are talking about municipal governments.

Moreover, it was suggested, I think in the early days of this bill, that the only real problem created by dividing California would be difficulties probably in diversity cases in which you would have differing decisions of the two divisions about California law. That, again, in vernacular is a drop in the bucket. The real problem is that the law of the circuit, which is being made daily and which is the primary burden of the court, is the interpretation and application and construction of the Federal constitution, of Federal statutes, rules, and administrative orders. There is no possibility of pre-

venting decisions in cases of this kind from waffling from one side of the division line over into the other division.

It seems to me, in that particular that we would be faced with continuing and constant en banes, interdivisional, and across-division lines.

For example, a panel in the Northern division decides a case one way, a panel in the southern division decides it another. First, there would be an effort, I presume, to resolve the conflict by virtue of requiring an en banc intradivisional hearing. But suppose they adhere to the position that their prior panel determination made? Then you face the same problem in the southern division with another en banc proceeding before that division, and suppose there is still not a resolution. Then finally you must have a joint en banc panel undertake the problem, and I must say I think there is built into that a need that there will be a division within the joint en banc panel, because people do not yield to decisions they have taken once or twice or three times. It seems to aggravate the problems we presently have and creates problems within the divisions themselves of following a decision upon which a majority of the judges of the opposite division have reached a contrary conclusion. That in turn generates more problems, potentially resolvable only by the U.S. Supreme Court.

Rather than go into a recital of each and every one of these things, I would appreciate it if you would care to question me about any phase of this.

Senator BURDICK. Thank you very much for your testimony, and you will have some questions.

Judge, I have listened to your testimony with great interest. In your testimony, you have reiterated your opposition to the proposal to split the ninth circuit and more particularly to the so-called splitting of four judicial districts in California.

The reason I have listened with such interest is that the testimony which you have given here today seems to be at great variance with the testimony which you gave before the Commission on Revision of the Federal Court Appellate System on August 31, 1973, at a commission hearing in Los Angeles. I would like now to quote from your prior testimony on that occasion:

> In summary, I believe that circuit splitting makes bad problems worse without solving anything. If the Ninth Circuit is nevertheless to be split, we are obliged to try to find the least harmful way to do it. The less of a bad thing, the better. Therefore, I would divide the Ninth in twain and no more. The place to begin is California because California produces the intractable case load. Two proposals have been made: Create a circuit of California only or cut California in two. If the object of division is to distribute caseload and to keep a circuit close to the mystical 9, the latter is the only effective method, because the present California appellate litigation together with the anticipated increment will outstrip the capacity of 9 to handle the whole state. I would make the cut in the mid San Joaquin Valley. The Northern Ninth conveniently includes the Pacific Northwest, Alaska, Montana, and Idaho. The Southern Ninth annexes Nevada, Arizona, Hawaii, and Guam.

Judge, does your testimony today indicate that you have changed your mind from the position you took before the revision commission?

Judge HUFSTEDLER. No, it does not, Senator Burdick. The reason is, as I stated in that statement, and I elaborated on it earlier, I

disagree with the premise that we must keep a court to nine or close to nine. I disagree with that thought.

If, however, I am forced to accept the premise, whether I agree or not, that you should not have a court of more than 10, then it is not possible to handle the case load in California without dividing California. It is that simple.

But the premise is wrong. As usual, you know, if I give you the premise then you win the argument; if you give me mine, I feel I can win.

Senator BURDICK. While we are on that subject, do you not think there is a point beyond which a court begins to operate inefficiently with too many judges?

Judge HUFSTEDLER. Of course, but I do not think that point has been reached, and if and when it does then one must confront the much more serious and basic problem which is Congress' penchant for giving more business to the Federal courts and never taking any away.

Senator BURDICK. This committee has been trying to take some away. This committee has been very active in trying to get rid of three-judge courts.

Judge HUFSTEDLER. I thoroughly commend the subcommittee, and I was not pointing my finger at the subcommittee, but at Congress generally.

Senator BURDICK. Since the California bar has been opposing this bill, I do not see them coming in with a resolution to change diversity jurisdiction.

Judge HUFSTEDLER. Well, you are going to find a good deal of division within the State bar on questions of that kind, and I do not purport to speak for them, nor am I going to offer a defense for something I do not believe in, which is the maintenance of Federal diversity jurisdiction.

Senator BURDICK. The point is, if we do not change diversity jurisdiction, if we do not get rid of three judge court procedures, if we do not do these things, there is only one thing we can do—create more and more judges. Do we not reach a point that economists call diminishing returns?

Judge HUFSTEDLER. I think you will eventually, but I can not agree that a circuit court of 20 is too many or unmanageable. It is not any more unmanageable than the Senate when it used to have 40 Senators and now has 100 Senators.

But it is quite true that when you do business in the Senate today you do not do it identically to the course of conduct when we had a much fewer number of States. You have individual hearings, you do not sit on every single question. I think that is true in handling a court. There is nothing unreal or unmanageable about having a 20-judge court.

We need the manpower, and I think the proof of that pudding is that, even though we are not doing it perfectly, we are in fact managing 75, and a court of 75 in which your personnel turn over constantly creates extreme difficulties that are entirely avoided when you have a bench of 20 judges.

Senator BURDICK. There is some question in my mind at least about your operating efficiency with all those extra judges coming in for 1 day or 2 days and flying out again.

Judge HUFSTEDLER. Senator, it is not efficient, but at the same time we have to get our blood where we can create a transfusion, and when we are having to rely on the services of district judges because we do not have enough bodies otherwise, and I do not mean that in any derogatory sense at all, but we can not take them from their own calendars. It is a very bad system, but we must have the manpower, and since we have not had the manpower of our own we have had to do a cut-and-paste job to get the courts going. If we get the judges we can do a much more efficient job.

Senator BURDICK. Do you really think that 20 judges can turn out per judge the same as 11 or 15?

Judge HUFSTEDLER. Yes; I do.

Senator BURDICK. I think the record will dispute you.

Judge HUFSTEDLER. Everybody is not going to agree with the other person's statistics, but in terms of the experience we have right now, reminding you of 75 judges, it is my experience, and I think the statistics will bear me out, that each judge produces about the maximum of opinions he or she can produce, no matter how many judges you have on the court. A kind of par is the court's average on the California Court of Appeals of approximately 100 opinions or memorandums per judge per year. That really does not seem to change very much whether or not you add or substract judges.

Senator BURDICK. Do you not think it impairs the efficiency of the court when you have 20 judges rather than 11? Does every opinion not have to be floated and circulated around to 20 people as against 11?

Judge HUFSTEDLER. The opinions are not circulated prior to filing in the ninth circuit anyway. To the extent that is a problem, it is a problem that does not go away under S. 729, because each judge has some responsibility to keep up with the law in the other division. He must do so because it will be called to his attention regularly by way of petitions for internal en banc hearing when the other division has decided the particular issue.

Senator BURDICK. But you have a great bulk of your cases that are disposed of on law in which there is no dispute between the two circuits or the two divisions?

Judge HUFSTEDLER. That is entirely correct, Senator Burdick, but when you begin to create the conflicts which are intrinsic in this plan you are going to escalate the number of en banes very, very greatly, both internally and divisionally.

Senator BURDICK. Let's continue with these questions informally, Judge.

In any event, after you gave that testimony in Los Angeles you were asked these questions and gave these answers when Senator Hruska questioned you, and I quote:

Senator Hruska. Judge Hufstedler, I just listened with great interest to the idea that—one of the problems is to avoid conflicts on circuits.

Judge Hufstedler. Right.

Senator Hruska. And it is not a way to do it, by either adding more circuits or more judges.

Judge Hufstedler. That is right, because all you do is create more conflicts without, at the present time, any existing intracircuit mechanism other than the Supreme Court.

Now Judge Hufstedler, my question to you is this: Does S. 729 provide a mechanism for resolving intracircuit or interdivisional conflicts by other than the Supreme Court?

Judge HUFSTEDLER. It does in part, but it does not go the whole distance.

Rather, the interdivisional mechanism provides a mechanism short of the Supreme Court, but because of the problems I have already mentioned, I do not think it is going to spare the Supreme Court that much work, not only because of the conflict-generating problem I earlier mentioned, but because the bill as presently drafted simply provides no mechanisms for some of these, and I would ask you please to look at the provision of the bill which limits the en banc mechanism to resolving conflicts within a state. When the conflicts involve more than one state, which they necessarily will, the present draftsmanship does not even reach those conflicts.

Senator BURDICK. Thank you for calling it to our attention. We can make the correction.

Judge HUFSTEDLER. If you make that correction you can resolve them all and you are right back to square one, in that I think the most desirable feature of this bill, aside from the additional judges, is the creation of an en banc mechanism for less than the entire court. That is a highly valuable contribution. I think we could make a good thing there by altering the design very modestly, which is to say that the en banc panel for the entire circuit, your interdivisional panel, would consist of 9 judges, the number one judge always to be the chief judge of the circuit unless he is eligible to retire, and the next 8 to be initially all those who were senior in point of service not eligible to retire, but that every 6 months one judge would be rotated off the en banc panel. For the purpose of rotating off it does not make a great deal of difference whether you start it off at the number two judge or take it at the number nine judge.

The net product would be that each judge would serve approximately 4½ years on that panel, but you would have a rotation in such a way that the other members, junior and senior, would gradually be worked into the panel.

But I would cut off the rotation to the point that you would not dip in rotation below the point at which the active judge had less than 2 years of service on the court. It can be handled in a mechanical way rather simply, numerically, so that there is certainty that it will give the stability that is required to make the mechanism attractive and to work. It does not lock people into the situation of en bancing while depriving he juniormost in service of an opportunity to sit on the en banc panel.

But with that kind of addition I think it is a very effective means of resolving what is otherwise a very hard question.

Senator BURDICK. We will follow you and listen to your recommendations with great interest. We will give that consideration, you can be sure of that.

Well, let's go on with this little thing that I am reading to you. You were asked the following questions at the Los Angeles hearing: Judge Sulmonetti: "Judge Hufstedler, do you think that a judicial system can be so large that it finally reaches a point where it lacks the capacity to govern itself, and that you get more efficiency when you break the system down into more manageable units?" Judge Hufstedler: "I am not prepared to say that there is not a break-point on it, but nobody's proposals with respect to circuit splitting really meet that problem. It seems to me that the curse of excess is to feed less into the system. Granted, you finally reach a point, my illustration is the New York area, in which you have essentially an unmanageable city, but breaking up the city, unless you could move it physically apart, does not really resolve the problems." Judge Sulmonetti: "Can you produce greater efficiency by breaking a system into more manageable units? I think this has been demonstrated." Judge Hufstedler: "Well, in some respects you can, and in some respects you cannot."

I suppose your testimony today is that in this case, it is the respect in which you cannot?

Judge HUFSTEDLER. Well, that is right. I do not think there is any inconsistency at all between what I said then and what I am saying now.

Senator BURDICK. But you recognized there was a breaking point?

Judge HUFSTEDLER. That's right, but this is not it.

Senator BURDICK. Well, not too many years ago the eighth circuit got a little overburdened and we created a tenth circuit. Do you think that was a wise move by Congress?

Judge HUFSTEDLER. I think that old solutions to old problems sometimes work very well, but when the problems change you have to change your solutions.

Senator BURDICK. But sometimes the methods that have been used in the past and have proved successful might be a guide to the future, too.

Judge HUFSTEDLER. Indeed they may and can and are, Senator Burdick. We can put it the other way. If 13 circuits are good and 15 are better would not 25 even be better than that. You can overdo even a good thing, and sometimes it creates more problems than it resolves, which is true in this instance. Particularly indefensible to me is the splitting of California. There is no reason to impose the kinds of burdens that are placed upon California citizens and lawyers and judges by the split. It is a split I have never endorsed except from sort of a mathematical servitude that if you are going to divide a caseload evenly and you must have 10 judges then you must divide California.

What I was trying to argue: does that not mean you have to examine the original premise?

Senator BURDICK. I understand.

Well, you would like to add 20 judges to the circuit?

Judge HUFSTEDLER. I would not add 20, sir——

Senator BURDICK. I mean add until you get 20?

Judge HUFSTEDLER. Yes.

Senator BURDICK. What is your solution as to en banc number under those conditions?

Judge HUFSTEDLER. Precisely the one that has been outlined in S. 729 with modification I have heretofore suggested of having rotation of the en banc panel of one judge every 6 months.

Senator BURDICK. Judge, I will turn you over to the staff for a few extra questions.

Judge HUFSTEDLER. Thank you. I should have issued an instantaneous disclaimer. I think it is always built into these conversations.

I, of course, do not purport to speak for the ninth circuit. I speak for myself.

Mr. WESTPHAL. Judge, you and I have discussed this problem in the company of many others trying to come up with the answer to something which is a considerable problem. Is that not true?

Judge HUFSTEDLER. We have indeed, Mr. Westphal. You have been very generous in listening a lot.

Mr. WESTPHAL. Now, the dimension of that problem is that with a caseload of some 2,700 cases, approximately, in the ninth circuit, a caseload which just in 3 short years has grown by 700 cases, your court has indeed been overwhelmed, has it not?

Judge HUFSTEDLER. That is correct.

Mr. WESTPHAL. In an effort to meet that caseload you have resorted to the calling up of district court judges, both active and senior, to sit as a member of a three-judge panel. You have used all the services of visiting judges from other circuits that you could possibly obtain. Can you give us any estimate of what the equivalent judgeships would be for all these supernumeraries that you employ in the ninth circuit? What has been the equivalent judgeships from all these judge hours and judge days and judge sittings that you used?

Judge HUFSTEDLER. Mr. Westphal, if I had the power to program a computer and feed it data, I could probably give you the answer, but now I can not, because there are too many variables for me to compute at this time.

We lose a great deal of time in trying to deal with people whose primary job is not serving our court, so that you can not compute it simply on the basis of how many sittings per case or per day, because you lose so much in terms of trying to acquaint the visiting judge with the procedures of the court and all the negotiations that go on after or during an argument.

So without being able to feed in these innumerable variables I do not think you can come out with a very sound figure. It can be done, but I cannot do it without somebody who is a statistician and with a computer handy.

Mr. WESTPHAL. The administrative office compiles what is known as visiting judge tables, you are familiar with those, are you not?

Judge HUFSTEDLER. Yes, indeed.

Mr. WESTPHAL. They show both the number of days of an assignment to your court, the number of sittings that judge participated in and a sitting, of course, is one case that he hears, so that if on a given day a panel heard three cases each judge on that panel would have three sittings to his credit. Is that not true?

Judge HUFSTEDLER. No; sittings are the days upon which the person sits on a particular panel, and the number of cases we calendar per day varies a great deal. We set very heavily our criminal calendars because by and large those cases do not involve as difficult sets of legal questions as the civil cases do. That does not mean they are less important, but the questions are less difficult. So we will sometimes set 10 or 14 cases before a single panel on a single day on the criminal side, for example.

Mr. WESTPHAL. All right. In any event, there are tables that are available prepared by the administrative office that will show how much judicial effort in the way of days and or sittings, whatever the sitting factor really means, there are tables from which this matter of equivalent judgeships can be computed. Is it not a safe estimate to say that the number of equivalent judgeships that you obtain out of all these visiting judge services which you receive will be the equivalent of anywhere from three to six additional judges in your circuit?

Judge HUFSTEDLER. I will have to say I can not deny it, neither can I affirm it, because I simply do not have enough information before me to make that estimate.

It sounds to me that that figure is certainly in the ballpark. But, again, it is very difficult for me to agree across the board, because there are variables in addition to simply the bare statistics of how many judges, which accounts for whether you get more or less from a visiting judge rather than an active judge.

Mr. WESTPHAL. Judge, whatever the actual figure is in the way of equivalent judgeships, and it will be something between an additional three or an additional six, whatever the figures show, the fact of the matter is that with a bench strength of somewhere between 16 and 19 judges, the ninth circuit has still been unable to cope with this huge caseload that has been thrust upon your circuit. Is that not true?

Judge HUFSTEDLER. Well, it is true that we cannot cope with the caseload we have now with the sporadic kind of help that we have. If you are asking me could we handle the caseload we have now if we had 20 judges, I say I think we can, and if I am wrong about that, S. 729 is also wrong about that.

Mr. WESTPHAL. Because S. 729 proposes to create in the circuit only 20 judges.

Judge HUFSTEDLER. That is true, so if it is my problem it is S. 729's problem as well.

Mr. WESTPHAL. We have received testimony in the course of the hearings on this problem indicating that with the exception of the last fiscal year, that is, 1974, in which the ninth circuit had five en banc hearings, that in the 3 years prior to that there had been only one, a total of one in 3 years in the ninth circuit.

Judge HUFSTEDLER. I think your figures are inaccurate, Mr. Westphal. That is not correct. We have had really a great many in the last 2 years.

Moreover, that does not show in the record as well, we have steadily a flow of en banc votes within the court. Some of these are lost by narrow margins and those who dissent from taking a case en banc have expressed their views in dissent.

Mr. WESTPHAL. What I was referring to, you are saying that in 1974 and 1975 you have held a number of en banc hearings.

Judge HUFSTEDLER. That is correct.

Mr. WESTPHAL. What I am saying is that in 1973—1972 and 1971 I think the records compiled by the administrative office showed that your court only had one.

Judge HUFSTEDLER. That is also correct, and I think that all of us realize that we had a far greater responsibility to maintain the law of the circuit, which burden we finally undertook within the last 2 years.

Mr. WESTPHAL. And the testimony the committee has received and this has been received from many of the lawyers in the ninth circuit, to the effect that there were too many conflicts either direct or so-called sideswipes within the ninth circuit, which the circuit sitting en banc was not resolving, and that there was a great deal of uncertainty about what was the law of the circuit in the ninth circuit on a particular question. You have heard complaints of that kind from lawyers, have you not?

Judge HUFSTEDLER. I think the complaint has foundation, Mr. Westphal, and I think that, again, that is one of the reasons why the use of the modified en banc, which is suggested in S. 729, is a very good idea.

Mr. WESTPHAL. All right. But the problem, then, with the subcommittee is that here are these complaints from lawyers in the ninth circuit about the lack of en bancs, which they feel creates uncertainty as to what is the law of the circuit, and the committee has to give consideration to that and at the same time to be thought you expressed this morning, or at least your fear, that under the proposal set forth in S. 729 there would also be some uncertainty as to what would be the law of the circuit. So it is a matter of balancing one type of uncertainty against the other type.

Judge HUFSTEDLER. I think it is a different dimensional problem, if I may say so, Mr. Westphal.

In short, here is another example of how the bill makes problems without solving anything. If we are having difficulty with en bancs now, if we are dealing with a situation in which we do not have conflict-generating mechanism of the kind created by the divisional circuit, certainly we end up having a great many more of those problems. We have not simply one en banc mechanism, we have three.

Mr. WESTPHAL. The committee has also received testimony indicating that part of the reason that the ninth circuit has not held more en banc hearings is the fact that your 13 judges are scattered over nine States that extend, as someone has said from virtually the Sea of Japan on the west to the Missouri River on the east and from Alaska to the Mexican border, and that the difficulty of getting 13 judges together in any one place from that vast geographical area has been a contributing factor to shortcomings of the existing en banc practices in the ninth circuit. Do you concede that is a contributing factor in the problem?

Judge HUFSTEDLER. No.

We have our court meetings early every month and all the judges of the circuit attend unless they are on vacation or excused.

We do not have that kind of trouble getting our judges together, but to the extent there is any such problem it does not go away for example by splitting San Francisco from Los Angeles. Moreover, it does not go away in any event because the judges who choose to maintain their residences at distances very substantially away from Los Angeles and San Francisco, if those judges choose to maintain their residences, for example one in Hawaii and two in the Pacific Northwest, will have to travel in any event, whether the circuit is divided or not.

Mr. WESTPHAL. Are you aware of an order or a decision of the court that someone called our attention to, which in effect, says that the petition for an en banc hearing was denied because it would be logistically impossible to convene the court?

Judge HUFSTEDLER. I am unaware of that decision and if it were made I disagree with it profoundly, because as I say, we get together every single solitary month without any great difficulty.

We have had a problem, it is true, in finding acceptable dates to have en banc hearings by reason of two practical difficulties. One is the need, in order to make the case en banc, to remove all other cases from the calendar that day and relieve the judges of rsponsibility for having the normal number of sittings every month, and because en banc hearings will only practically be held as long as they require a full judge complement in San Francisco, because we do not have the physical facilities in Los Angeles ot seat all those judges.

Mr. WESTPHAL. Now, as I would understand your testimony, you like that feature of S. 729 which could create an additional seven judgeships in the ninth circuit.

Judge HUFSTEDLER. Indeed, I do.

Mr. WESTPHAL. And you like that feature of S. 729 which would create a joint en banc panel as a mechanism for resolving conflicts insofar as California litigation is concerned?

Judge HUFSTEDLER. On that later point, I think I have been inarticulate, like the bill, in terms of having nine members of an undivided circuit to resolve intracircuit conflicts.

Mr. WESTPHAL. Your suggestion is that rather than have the creation of two divisions within the ninth circuit you would like to see the ninth circuit left as it is today with an increase in the number of judges from 13 to 20, and a provision that any litigant who feels adversely affected by the decision of a three-judge panel could then petition the 9–most senior members of that court for en banc consideration?

Judge HUFSTEDLER. Well, I would have a footnote that there is no reason to encourage en banc hearings simply because a disappointed litigant thinks the panel decision is wrong. But I know they will do that.

But of course the en banc mechanism primarily should be a device by which we keep the circuit law in order.

Mr. WESTPHAL. I should have modified my question by saying that a party who feels adversely affected by the decision of a three-judge panel can within the framework of rule 35 suggest to the court the propriety of an en banc consideration of that problem?

Judge HUFSTEDLER. Yes.

Mr. WESTPHAL. All right.

Judge HUFSTEDLER. And of course, I add, Mr. Westphal, and I am sure you intended to say so parenthetically, that any judge, as is true in the court at the present time, can ask for an en banc vote sua sponte, and that would be true with the diminished size of the en banc mechanism here proposed, that is any active judge could request an en banc vote but the vote itself would be confined to the nine-member panel of the court.

Mr. WESTPHAL. So that as I would understand the so-called perfecting amendment which you have suggested to the subcommittee, that given a court of 20 judges you would have an en banc function performed by 9 of those 20 judges?

Judge HUFSTEDLER. Correct.

Mr. WESTPHAL. And that the en banc panel would consider not only cases involving a conflict affecting California litigants, but cases arising from any of the judicial districts within the ninth circuit and having been decided by any of your three-judge panels where the case involves either a conflict or is of sufficient importance that it should be passed upon by the court sitting en banc?

Judge HUFSTEDLER. That is true.

Mr. WESTPHAL. All right. Are you at all troubled by the fact that in that kind of a setup, 11 judges of the court would have no voice in determining the law of the circuit which may be set by a decision of the 9-judge en banc court, and yet each of those 11 judges would be bound by principles of stare decisis to follow that decision in which they have no voice?

Judge HUFSTEDLER. Well, Mr. Westphal, I have two responses to that.

First: If that is a problem it is a problem that adheres in the present draft bill.

Second: I do not think it is a very big problem. The reason is, as I earlier mentioned, we already have an obligation within the circuit to follow prior law of the circuit, whether we agree with it or we do not. The only potentiality being to ask for an en banc hearing by the whole court.

The number of those en banc hearings which individual judges have requested, and have been denied that hearing, is very substantial, far and away the great majority of cases in which a judge asks to have the matter heard en banc which he does not agree with the decisions by another panel are rejected.

We all live with that all the time. He has, nevertheless, got to follow the law of the prior case even if he was turned down. The only possibility he or she has for expressing a contrary view is to file an opinion dissenting from the request for the en banc hearing, and that in and of itself is relatively rare.

Mr. WESTPHAL. You suggest that the problem that I point out, which is a majority of the members of the court being bound by a decision arrived at by a minority of the court would be the same under the provisions of S. 729?

Judge HUFSTEDLER. Yes.

Mr. WESTPHAL. I would call to your attention that under S. 729 judges in the northern division, when they considered that case en

banc each of the nine would have had some input into the decision that that division arrived at in that particular case. Also, if that decision conflicts with one from the southern division each of the 11 judges there would have had some voice into the decision which that court arrived at. So that in the procedure we set up under S. 729 each of the 20 judges at sometime gets some measure of input into the development of the legal issue and its ultimate resolution, and only in the event that there is a conflict between them would the 9 pass upon it on the joint en banc panel. Do you not recognize that is a difference between the procedure set forth in this bill and the procedure which you suggest to the committee?

Judge HUFSTEDLER. I think not, in the first instance suppose, to take a hypothetical case, 10 judges from the northern—I am not using hypothetical figures—but as opposed to 9 judges in the northern division all agree the case should go one way on that issue, and the 9 from the south have exactly the opposite view, and they have decided that at the division level individually en banc. They must, nevertheless, yield to whatever the decision is that is reached by the majority of the en banc panel. They will not be any happier or unhappier by reason of having decided it once.

To the extent they have input, they have input to the suggestion that I have already discussed, and that is any active judge on the court can request the en banc even though he does not vote on the en banc. If he feels particularly put out by the result he can always be permitted to file an opinion dissenting from the en banc panel decision to take the case.

Mr. WESTPHAL. Continuing along on this analysis of what difference there may or may not be between the en banc procedure which you suggest and that which was called for in this bill, under the procedure which you suggest, you would have the en banc panel consist of the nine most senior judges?

Judge HUFSTEDLER. Yes, unless the chief judge were eligible to retire in which event he would not be on the en banc panel anyway.

Mr. WESTPHAL. I understand that qualification also.

But your proposal is that among the 8 members, other than the chief judge, that 1 of those judges, by some system that could be devised, would be rotated off the en banc panel and his place would be filled by 1 of the other 11 judges who had more than 2 years' service on the court.

Judge HUFSTEDLER. Yes.

Mr. WESTPHAL. Now, in the period of 5½ years these other 11 judges would each get their turn to sit on the joint en banc panel under your system?

Judge HUFSTEDLER. That is correct.

Mr. WESTPHAL. Is your proposal to rotate 1 of the judges designed to overcome this possible objection that the 11 might have to the extent that they do not have any voice in determining the law of the circuit?

Judge HUFSTEDLER. Well, to the extent that there is substance to the assumed complaint, it would certainly go a substantial distance in alleviating that situation.

Mr. WESTPHAL. Is that the reason why you have suggested it to the committee?

Judge HUFSTEDLER. I have suggested it for two reasons. First, I believe there should be not only a high degree of stability in the en banc panel, but there also should be injection of some degree of fresh blood on a regular basis and also to give a greater amount of participation for the various members of the court.

But it is also to provide new blood that is not necessarily supplied on a sufficiently regular basis by virtue of retirements.

Mr. WESTPHAL. So that under your system you could have a decision setting the law of the circuit made by the nine-judge en banc panel in a 5–4 decision?

Judge HUFSTEDLER. That is right.

Mr. WESTPHAL. And the following month one of those five would be rotated off and his place would be filled by some fresh blood, and if in a companion case an identical question were raised you would then face the possibility that your joint en banc panel by a different 5-to-4 vote could reverse the prior decision?

Judge HUFSTEDLER. I could say it is possible. It is extremely unlikely, but after all, it is only a difference in degree and not in kind. In the present situation in which we have an en banc split 7–6, the six are obliged to follow the law made by the seven even though they do not agree.

Mr. WESTPHAL. But this likelihood that by rotating, either through your system or through a system where the 9 most senior members could be changed by 1 judge retiring or reaching retirement age and his place being taken by another judge from the circuit, under either of those systems there is a possibility when the en banc is limited to only 9 of the 20 of having the law of the circuit either be determined by a very small majority of the 20 judges or being subject to being reversed once you shift the 5 to 4 from one side of the question to the other?

Judge HUFSTEDLER. Well, that is true, but it is true right now by virtue of a senior status or vacancies which result in a change.

Mr. WESTPHAL. The other thing that enters into this, and it is somewhat related to this: in your testimony you suggest that the division system will produce a great deal of conflict and seem to suggest that the 9 judges in the north will arrive at an opposite legal conclusion on the same issue under the same facts as will the 11 judges from the south. But again, this, like my suggestion that the five to four would shift here to there, presupposes that judges serving on a court of appeals of the United States gets so polarized on legal issues that the second court, to pass upon a question, will willy-nilly say: "We would rather do it our way and we will not give any persuasive effect whatsoever to the decision of our brethren from the southern division who happened to pass in this question in the first place." In other words, what I am suggesting, Judge, is that in the instance where you have a legal issue which affects activities within the State of California that in actual practice there will not be a sort of a willy-nilly desire to create conflicts by deciding this case adversely to a reasoned opinion from the other division.

Judge HUFSTEDLER. Well, I certainly would agree with you that we do not decide cases willy-nilly and we would not under any system.

But, there is a great deal of difference in the obligation to follow the law of the circuit not as a matter of stare decisis, but to follow the law and to look to another opinion for whatever may be their persuasive effect.

Moreover, when we talk about what affects California, I revert to my earlier thought. The problem is that in dealing with the immense variety of Federal statutes, constitutional issues and the like, those are problems that do not just affect California. It does not matter how we decide in San Francisco or Los Angeles, they affect the whole circuit, as well as California. These are matters which judges have reasonable differences of view.

Indeed, in many instances on the difficult questions our court can already split five ways and they are not going to become more agreeable with one another simply because there is a division line placed between them. They are not fungible and they will agree to disagree a good deal, but the occasion for disagreement is substantially exacerbated when you relieve the judges of the obligations to follow the other decisions in other divisions. When you pull that stop, then you have created a situation in which a conflict will be endemic.

Mr. WESTPHAL. My time has expired, but thank you.

STATEMENT OF WARREN CHRISTOPHER, PRESIDENT OF THE LOS ANGELES COUNTY BAR ASSOCIATION

Mr. CHRISTOPHER. Mr. Chairman, before you close the record could I be heard for just a second or two for the purpose of filing a statement?

Senator BURDICK. Well, you are a noted jurist, lawyer, former Assistant Attorney General. The Senate has ordered us to quit. What shall we do about it?

Mr. CHRISTOPHER. I understand. I am fully sympathetic to that and intend to comply, Mr. Chairman. I simply wondered if I could file my statement with the committee because I am obligated to go back to California.

Senator BURDICK. Your full statement will be filed.

Mr. CHRISTOPHER. I am Warren Christopher, president of the Los Angeles Bar Association. I will file the statement I intended to make this morning.

[The material referred to follows:]

PREPARED STATEMENT OF WARREN CHRISTOPHER, PRESIDENT OF THE LOS ANGELES COUNTY BAR ASSOCIATION

Mr. Chairman and Members of the Subcommittee: May I begin by expressing my appreciation for this opportunity to appear before this Subcommittee and to present my views on the pending legislation, S. 729, which would reorganize the Fifth and Ninth Judicial Circuits. My comments today are directed primarily at issues that involve the Ninth Circuit and more particularly with regard to the State of California.

This statement will outline some very serious problems with S. 729 as it is currently drafted, but I would emphasize at the outset that the Subcommittee and its staff merit high praise and our deep appreciation for their constructive efforts to address the problems arising from a virtually geometric increase in cases filed in the Ninth Circuit over the last decade. The Board of Trustees of our Association has adopted a resolution opposing the current

version of the legislation for the Ninth Circuit, and endorsing an increase in the number of judges to 20, with an enbanc powers to be exercised by a panel of seven or nine circuit judges (copy attached). Our differences with the present bill, however, do not detract in any way from our sense of respect and gratitude for the expert work of the Subcommittee and its staff on an exceedingly difficult problem of judicial administration.

To conserve your time, I will go directly to problems and disadvantages which I perceive in S. 729.

1. *The "joint en banc panel" is an awkward device which would create many more problems than it would resolve.* It is important to recognize that S. 729 would create four layers of decision making for each case brought within the Ninth Circuit: (1) the District Court; (2) a panel of three circuit judges in a division; (3) an en banc panel consisting of all judges of the for certiorari in the Supreme Court, and they would tend to aggravate rather appropriate division; and (4) a joint en banc panel drawn from the two divisions. These four layers would precede the filing of an appeal or petition than diminish the caseload of the Supreme Court. In short, one could wonder how we will avoid drowning in our own complexity.

Confusion and uncertainty will abound from this four layered cake. Judge Hufstedler has analyzed in some detail before this Subcommittee the perplexing and often unanswerable questions that will arise from the proposal, and I will not repeat the analysis. It is important to emphasize, however, the fundamental flaw in the assumption of the bill that the unique problems pertaining to California can be solved by placing the judicial machinery of our state in a walled off water-tight compartment. S. 729 makes this assumption by providing that the only decisional conflicts within the jurisdiction of the joint en banc panel are those affecting "personal or property rights" in California (§ 1291(b)).

Quite the contrary is true. California citizens are today deeply affected by decisions originating from almost every state in either of the proposed divisions. For example, a Southern California litigant may be as much aggrieved by an appellate decision on a federal question in an Arizona case as he would be if the case came from Los Angeles. Yet, under S. 729 the Arizona litigant apparently would not have access to the joint en banc panel to seek resolution of a conflict between the decision in his case and a decision in the Northern Division. Thus a high potential exists that one rule might apply in Northern California in direct conflict with a rule pertaining to the exact same issue in Southern California.

In this situation, the Southern California litigant would, of course, have no standing to seek joint en banc review in the Arizona case. Moreover, a Southern California litigant commencing a new case in the same issue would probably find the Arizona case controlling against him in the first two of the four layers (district court and three judge panel). Finally, it might also be a barrier to his obtaining an en banc hearing in the Southern Division. Thus, in trying to remedy the split of California into different divisions, the en banc mechanism of S. 729 applies a cumbersome bandage that does not even cover the wound.

2. *The four decisional layers within the circuit will cause an increase in the delay and expense involved for California litigants.* Under the structure envisaged by S. 729, there will be enormous pressure on California litigants to seek a hearing before the joint en banc panel. However, the delay and expense involved will by no means be limited to the extra time and expense of one en banc panel—though that might be sufficient detriment without more. Rather, the California litigants might be impelled to seek an en banc hearing within their division in order to preserve their application for a joint en banc hearing.

Thus, in comparison to litigants who usually reach the Supreme Court after two hearings or decisions (one by the District Court and one by the Court of Appeals' regular panel), under S. 729 it is likely that four would be required. No one can be sure how long these four separate decision-making bodies might take, but it will inevitably entail a long and expensive process. Three judge panels in the Ninth Circuit now frequently take well over a year between the filing of a Notice of Appeal and decision. For example, in 1973, it took an average of 428 days from the filing of a Notice of Appeal until a decision was rendered in cases decided after oral argument or submission of briefs, and in

cases disposed of with a signed opinion, the average was 528 days. Moreover, historically it has taken a long time for en banc panels to assemble and decide the cases they hear, and there is no reason to think that separate hearings involving, first, the nine or eleven judge divisions en banc and, second, the nine judge joint en banc panel can be expected to act more swiftly. Indeed, greater delay is likely.

In summary, the four layer mechanism will make it difficult and perhaps unlikely for a case to be ready for the appeal or petition to the Supreme Court *until five years* after it is filed. As most practicing lawyers will attest, this delay can have a critical impact on the settlement posture of litigants and the very quality of federal adjudication. Thus, S. 729 runs directly counter to the urgent need to streamline and expedite federal litigation, which has become increasingly complex.

3. *The serious dangers of a divided California remain under the provisions of S. 729.* The earlier proposal of the Commission on Revision of the Federal Court Appellate System which would have divided the Ninth Circuit into two new circuits—and would have divided the State of California in the process—engendered strong opposition in California and elsewhere. While the Subcommittee's "two-division" approach is a well-intentioned effort to minimize the problems of a divided California, the solution does not come to grips with the fundamental problems.

Under S. 729, California would be united for purposes of appellate review in form only. In practical terms, it makes little difference whether California is split between two circuits (as it was under the earlier proposal of S. 2990) or between two divisions (as under S. 729), because the defects of the old proposal persist.

For example, one of the most serious problems created by a divided California is the potential for inconsistent judgments in cases involving the same parties and same issues but brought in different parts of the state. In California there are a tremendous number of statewide businesses, and many disputes are brought within the jurisdiction of District Courts in both the Northern and Southern part of the State. Inconsistent judgments in two branches of litigation could put a litigant in the intolerable situation in which he might not be able to avoid disobedience of one court.

Perhaps more serious than the possibility of inconsistent judgments is the problem of conflicts as to the legal rules applicable in a given situation. In California were bifurcated, there is a high risk that the Northern Division would interpret California or federal law in one way, while the Southern Division would interpret it in an opposite or significantly different way. This would lead to uncertainty, unequal treatment, and an unattractive inducement to forum shopping. The possibility of Supreme Court review in any case is highly uncertain in view of its own burdened docket.

In addition, if the two divisions in California should interpret state or federal law in different ways, there is the unpleasant prospect that California citizens would be held to markedly different standards of conduct simply by virtue of where their cases were brought or where they happened to be living or travelling in the state. It is hard to believe that the architects of our federal system intended that citizens of the same state should be governed in such a fortuitous and haphazard manner, and this seems particularly true in our highly mobile and interdependent society.

At the risk of some repetition I would summarize and re-emphasize that the joint en banc panel simply does not provide a satisfactory solution to the numerous problems created by a bifurcated California. As pointed out earlier, the mechanism is awkward and slow. At best, it would leave California citizens subject to the risk of inconsistent judgments and conflicts of interpretation of state and federal law for many years while cases move up and down through four layers of decision making. Moreover, there is no assurance that the joint en banc panel will agree to hear and resolve cases presenting these problems. Finally, as spelled out above, S. 729 does not permit a joint en banc review of a decision from a non-California district even though it may be in conflict with a decision of one of the California divisions and even though it may have the most serious ramifications for Californians.

Without going into great detail, it probably bears mention that there have been many efforts to split California for one purpose or another. Suffice it to say here that such efforts are as old as the State itself, going back to the

time of Admission in 1850 when it was proposed that California be divided between slave and free territory. Only a decade ago there was talk of a division of California in the wake of the reapportionment decisions by the Supreme Court. All of these attempts to split California, I am happy to say, have failed.

Against this background, bifurication would pose a more fundamental danger over and above these problems we have been discussing. It would breed a sense of separation in our state, exactly contrary to the direction in which we should be moving. After having resisted political division of the state for more than a century, it would seem most unfortunate to take a backward step in the judicial field.

4. *In spite of my grave doubts about the workability of the changes proposed by S. 729, I would also underscore two of the aspects of the proposal that have high promise.* First, it is unquestionably necessary to increase the number of judges in the circuit. It is time to end the very heavy reliance on visiting judges and district court judges to handle the work of the Ninth Circuit, with the inevitable delays and inefficiencies of that approach.

Second, there is much merit in the concept of a seven or nine member en banc panel to resolve conflicts among the panels of the circuit. The method of selection of the en banc panel is a thorny question. Personally, I would prefer random selection, with judges serving three year terms, and two or three going off each year, but this is only a suggested approach and it needs a good deal of study and careful thought.

Again, Mr. Chairman, may I express my appreciation for the opportunity to appear. We shall look forward to the further recommendations of the Subcommittee on the underlying problems of the appellate process as well as further consideration of the circuit realignment question.

LOS ANGELES COUNTY BAR ASSOCIATION

RESOLUTION

(Board of Trustees, Adopted January 8, 1975)

Whereas, United States Senate Bill, S. 2990 (committee print dated December 2, 1974) and an accompanying draft report of the United States Senate Committee on the Judiciary have been examined by the Federal Courts and Practices Committee of the Los Angeles County Bar Association, and the Committee having reported thereon with its recommendations: and

Whereas, the Board of Trustees of the Los Angeles County Bar Association, a voluntary bar association of 11,500 members, has considered the report and recommendations, and after full debate, the Board resolves as follows:

1. The Association opposes the basic proposal in said Bill to divide the Ninth Circuit into two divisions, which would split the State of California.

2. The concept that the en banc powers of the court be exercised by a panel of less than the whole number of circuit judges is a workable and useful concept.

3. This Association endorses the proposal of the Board of Governors of the State Bar of California that a simpler Bill be drafted to accomplish the following:

(a) Increase the number of circuit judges as proposed in the existing Bill;

(b) Provide for a selected or designated "en banc panel" of less than all the circuit judges, such as 7 or 9 circuit judges, to exercise all the en banc powers of the circuit;

(c) Select or designate the circuit judges to serve on the "en banc panel" in some appropriate manner.

Senator BURDICK. We might send you some interrogatories.

Mr. CHRISTOPHER. I will be very glad to respond and I will be here all day in case the decision is reversed.

Senator BURDICK. The committee stands in recess until the further call of the Chair.

[Whereupon the subcommittee recessed at 11:20 a.m.]

CIRCUIT REALIGNMENT

TUESDAY, MAY 20, 1975

U.S. SENATE,
SUBCOMMITTEE ON IMPROVEMENT IN JUDICIAL MACHINERY
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10 a.m., in room 457, Russell Senate Office Building, Senator Quentin N. Burdick (chairman of the subcommittee), presiding.

Present: Senator Burdick (presiding).

Also Present: William P. Westphal, chief counsel; William J. Weller, deputy counsel; and Kathryn M. Coulter, chief clerk.

Senator BURDICK. The subcommittee has scheduled today's and tomorrow's hearings to replace 2 days of hearings which we were forced to suspend and cancel last March 19 and 20.

In these 2 days of hearings, we will receive the testimony or prepared statements from witnesses and organizations who are interested in S. 729, and in the printed amendment to S. 729, offered by Senators Tunney and Cranston.

S. 729 represents a subcommittee modification to the recommendation of the Commission on Revision of the Federal Court Appellate System to the effect that the ninth circuit be divided so as to create a new and separate Twelfth circuit. The subcommittee modification would create within the ninth circuit two divisions.

The southern division would consist of the States of Arizona and Nevada, and the central and southern judicial districts of California.

The northern division would consist of the eastern and northern districts of California, Hawaii, and all other unnamed States in the ninth circuit.

The subcommittee modification resulted primarily from the fact that in hearings held last September and October, witnesses from the State of California objected to the Revision Commission's plan which would place part of the judicial business of the courts of California into each of two separate and distinct circuits.

As a result, the subcommittee modification creates separate divisions within the ninth circuit, and provides that any conflict between those two divisions with respect to the validity construction or application of any State or Federal statute affecting rights of litigants in California, would be resolved by a joint en banc panel consisting of the four most senior judges in point of service from each of the divisions, plus the senior chief judge of the two divisions.

On March 17, my colleagues, Senators Tunney and Cranston, introduced Printed Amendment No. 132, which would amend S. 729.

The basic thrust of the printed amendment, which I believe was suggested by the California State Bar Association, is to leave the ninth circuit intact from a geographic standpoint, to increase the number of judges from 13 to 20, and to provide that the en banc function for the entire circuit be handled by nine of the 20 judges.

Thus, the basic question would appear to be one of choosing between the suggestion of the printed amendment that Congress authorize a 20-judge circuit or as suggested by the Revision Commission that Congress authorize a large circuit of that size to function in two separate divisions, consisting of 9 and 11 judges respectively.

It seems to me that the basis for a choice must rest upon which alternative is most calculated to improve judicial efficiency and to promote administration of justice.

I think it would be well to point out what the Revision Commission has to say about the possibility of simply adding more judges to the ninth circuit without making some change in the structure of the circuit.

In its report of December 1973, the Commission stated:

> At the Commission's hearings, held in four cities of the ninth circuit the vast majority of the witnesses recognized that some change in the structure of the circuit is necessary.
>
> It was also generally recognized that the problems faced by the court could not be adequately resolved by simply increasing the number of judges. Adding judges without more is no solution. The fifth circuit judges, having lived with a court of 15, have repeatedly gone on record as opposing any increase beyond that number.
>
> Indeed, a majority of the active judges of the fifth find 15 too many. Some of the ninth circuit judges, too, have pointed to the difficulties encountered by their own court of 13, in maintaining institutional unity.
>
> Indeed, in more ways than one, the ninth circuit is close on the heels of the fifth, where a majority of judges, despite their remarkable efforts to cope with a burgeoning caseload and a vast geographical area, have requested immediate relief. It should not be necessary for the ninth circuit to relieve the history of the fifth circuit before its problems of caseload and geographical size are ameliorated.

I should also point out at this time that in October of 1971, the Federal Judicial Center submitted a questionnaire to all Federal judges in the United States. A total of 241 judges responded to the questionnaire.

Of special concern to us is the response of these Federal judges to the following two questions: "Assuming a circuit reorganization is undertaken, what, in your opinion, should be the optimum number of judges per circuit court?" And, "Since it will be difficult to create the required number of circuits so that each one has precisely the optimum number of judges, what should be the maximum and minimum number of judges per circuit court?"

Responses to these questions as to what is the optimum number of judges for an appellate court indicated a clear majority felt that a nine-judge court was preferred. When the response of only appellate judges was considered, almost two-thirds felt that nine was the preferred number of judges.

However, in response to the second question as to what is the maximum court size, the Federal Judicial Center reported responses as follows:

> While 41 percent favored nine as the maximum court size, sizable number of judges felt that a court could contain 11, 12, or even 15 judges, and still

function. It is perhaps significant that no judge thought that a court of more than 15 judges would be acceptable. On the other side of the coin, many judges felt that five was the minimum size for an appellate court. However, a significant number of judges suggested three, six, and seven, as the minimum size of a court.

In our prior hearing on March 19, we received the testimony of Mr. Thomas Nelson, president of the Idaho Bar Association, of Judge Shirley Hufstedler and of Mr. Warren Christopher, president of the Los Angeles County Bar Association. We have additional witnesses scheduled today and tomorrow.

Before calling our first witness, let me state that at the conclusion of today's hearing record, we will incorporate into the record copies of correspondence from the following individuals and organizations: A letter from Mr. Earl Hill, advising that the State Bar of Nevada supports the proposal to divide the ninth circuit into two parts and stating that a majority of the lawyers would favor Nevada being aligned with southern California.

A letter from Mr. Dick Wong, advising that the Hawaii State Bar Association supports S. 729;

A letter from Mr. Douglas Drysdale, advising that the Montana State Bar Association supports the proposal to divide the ninth circuit, and advising that Montana desires to remain attached to that part of the ninth circuit which would sit in San Francisco, Portland, and Seattle;

A letter from Mr. John Holloway, advising that the board of governors of the Oregon State Bar Association, by resolution, supports legislation to split the ninth circuit as recommended by the Revision Commission;

A letter from Mr. Eugene Thomas, of the Idaho State Bar Association, supporting the provisions embodied in S. 729, and recognizing that the possibility of a so-called "northwest circuit" must await future events; and, a letter from Mr. Edward Friar, advising that the Washington State Bar Association favors the creation of a northwest circuit, and opposes any division which would include the State of Washington with any part of California.

Because one of our witnesses today is Chief Judge Richard H. Chambers, of the ninth circuit, and because Judge Chambers urged us to consider the views of all 13 of the judges in his circuit, we will include in the hearing record correspondence from the following judges of the ninth circuit: Judge Herbert Choy; Judge Eugene Wright: Judge James Browning; Judge Alfred Goodwin; Judge John Kilkenny; and Judge Ozell Trask. While the majority of these judges support S. 729, the letters they have written will speak for themselves.

Also, I will include in the record a copy of a letter from Judge Russell Smith to Senator Mansfield, advising that the Montana district court judges support S. 729.

I will also include a letter from Chief Judge Harry Phillips of the sixth circuit and a letter from Professor Noel Keyes of Pepperdine University School of Law. There will also be included letters, dated February 14 and April 25, 1975, together with a prepared statement of Honorable Evelle Younger, the attorney general of California, who advised me that his office was unable to have a witness to attend our hearing today.

(The letters referred to are printed at the end of this day of hearings.)

I understand that my colleague, Senator Tunney of California, desires to submit a written statement because his commitments in connection with other hearings prevent his attendance here today.

(The prepared statement of Senator Tunney follows:)

PREPARED STATEMENT OF SENATOR JOHN V. TUNNEY

Mr. Chairman: Thank you for this opportunity to comment on S. 729, a bill to revise the Ninth and Fifth Circuits. I am pleased that this Subcommittee has undertaken the difficult task of providing relief for these two beleaguered circuits; such reform has long been needed. As a Senator from California, I am particularly concerned with those aspects of the bill dealing with the Ninth Circuit. Although its case load has increased substantially in recent years, the number of judges on the Circuit has not increased since 1968, so that by 1973 the court had a backload of 170 cases per judge. To deal with this situation, the court has had to make more use of district court judges and retired members on its three-person panels, but even these measures have not alleviated the problem. It is obvious that Congress should provide a remedy.

Unfortunately, I do not feel that the solutions offered by this bill are viable. S. 729 proposes an increase in the number of judges for the Ninth Circuit from 13 to 20 together with the creation of two "divisions" of the circuit of nearly equal coseload and population. This numerically balanced revision would cut California into halves, placing the northern part of the State in one division and the southern part in another. I fear that such a division would place intolerable burdens on California State government officials and litigants concerned with California law issues who would have to deal with both divisions of the Circuit between which there might be conflicts of interpretation. Moreover, this novel approach to judicial reform might cause more delays in the handling of complete cases and would certainly contribute further intricacies to an already complicated Federal appellate system.

In an effort to avoid these problems, Senator Cranston and I have introduced an amendment to S. 729, co-sponsored by Senator Laxalt of Nevada, which would increase the number of judgeships from 13 to 20, but which would keep the circuit and California intact. I, therefore, welcome this chance to explain both my objections to S. 729 and the reasons for my amendment.

S. 729 is a product of the Commission on Revision of the Federal Court Appellate System. The Commission Report suggested that the 9th Circuit be split into two separate circuits, and, because California contributes about 70 percent of the cases now handled by the Circuit, that the State be divided between the two new circuits. At the Hearings on this proposal, representatives from the California State Bar Association, local bars, and California State government pointed out that such a division of the state could create serious conflicts between the two new Circuits, each of which would be interpreting California law.

In response to these criticisms of the Commission's plans, S. 729 no longer envisions the creation of two separate circuits, but proposes splitting the Ninth Circuit into Northern and Southern divisions, with the State of California again divided in half. The bill would also establish a new judicial entity, entitled a "joint *en banc* panel." This panel would preside over both divisions of the circuit to resolve conflicts in cases arising from California. I appreciate the fact that the Subcommittee has drafted a bill designed to overcome the objections made to the Commission's original suggestion. By providing for the creation of a "joint *en banc* panel," it has acknowledged that the division of a state between two circuits or two divisions of the same circuit can create special jurisdictional and substantive legal problems. I am pleased that these problems have been recognized.

However, S. 729 redefines the word "circuit" in other statutes and provisions of the law so that each "division" is actually a judicial circuit with the power to sit *en banc*. Thus the same problems that would occur with two circuits interpreting California law will occur between two separate divisions of the

Ninth Circuit interpreting the same law. Conflicting judgments or orders between the two divisions arising from California cases remain a problem. Moreover, a statewide California agency under S. 729 might still be faced with the dilemma of following inconsistent rulings in the northern and southern parts of the state.

Nor are these objections to the division of the Ninth Circuit and California academic or limited to unusual situations. In his prepared statement to this Subcommittee on March 20, California State Attorney General Evelle J. Younger listed six areas in the field of criminal law alone where such conflicts could easily occur. In cases of statewide impact, such as those arising out of California's billion dollar water project which runs the length of the state, conflicting decisions are a very real possibility; challenges in Federal court are likely to be brough against such a project or state agency actions from both the north and south parts of the state, which, under S. 729, would place these cases in different divisions of the circuit. It is clear, then, that the bill invites forum shopping and conflicting interpretations. Indeed, it is because such conflicts will occur that the Subcommittee has provided for the creation of a "joint *en banc* panel" in S. 729.

Since most of the cases presently handled by the Ninth Circuit come from California, this special panel will probably have a heavy caseload. Yet, it may not be equal to its task. *En banc* panels are now rarely held in all the circuits because of the difficulty in getting a large number of judges together at one time. This is particularly true in the geographically large Ninth Circuit which held no *en banc* hearings in Fiscal Year 1971 or Fiscal Year 1972. Because of a similar difficulty in getting together the nine judges from both divisions who are to comprise this "joint *en banc* panel," there may well be a tendency for it to meet occasionally to resolve only the most obvious cases of conflict between the two divisions. Cases in which a potential conflict may exist or which are not seen to be of the utmost importance may not be heard by this "joint *en banc* panel." Yet, the failure to resolve such cases may create uncertainties in the law which will make planning difficult in both the public and private sectors. Even in cases which are scheduled to be heard, going through an additional tier of appeal will add to the delay of resolving them.

This joint *en banc* panel is also objectionable as a reform measure because it will add to the costs of litigating cases concerned with California law and will be a substantial burden to the Federal bar in California. Lawyers in my State who litigate in Federal Court will have to follow cases in both divisions and will be penalized by the added costs and delays if they unfortunately have to appeal a case on the grounds that a conflict exists between the divisions. This burden will be particularly great for the California State government which will have to monitor decisions in both divisions and appeal any conflicts which exist to insure that state agencies can apply uniform procedures and orders throughout the entire State.

The jurisdiction of this special panel may also be too circumscribed for it to deal with all the potential or actual conflicts that may exist between the divisions in the interpretation of California law. As Warren Christopher, President of the Los Angeles County Bar Association, pointed out in his testimony before this Subcommittee in March, an Arizona litigant will apparently not have standing before this "joint *en banc* panel" to resolve a conflict between his case, which arose in his own state, and a decision in the Northern Division. Thus different orders or rules of law could apply in the northern and southern parts of California which could not be resolved except by an appeal to the Supreme Court.

Because of the complexities, uncertainties and problems presented by S. 729, Senators Cranston, Laxalt and I have offered an amendment which would not alter the proposed increase in the number of judges in the Ninth Circuit from 13 to 20 but would keep the circuit and California intact. I believe that we are all in agreement that these additional judges are needed to help the court reduce its current backlog of cases. As S. 729 recognizes, though, a method must be found to provide for the manageability of such a large circuit: 20 judges would rarely be able to sit *en banc*. Therefore, this amendment authorizes the use of an "*en banc* panel" of nine judges selected by seniority or by any other method chosen by the Circuit. While it may be preferable, as the Commission Report found, to have circuits of nine members

each, in the Ninth Circuit this is not possible without the division of the State of California, which presents problems that outweigh the advantages of the 9 judge model.

Mr. Chairman, there has been some criticism of our amendment to the effect that limiting the *en banc* function in all cases to nine judges is not conductive to harmony in a court containing more than nine, and would have the effect of creating "first- and second-class" circuits judges. Such a division of authority, though, is found in every judicial system and in every form of governmental and private organization. Moreover, this same criticism can be made against S. 729 is creation of a special "joint *en banc* panel," for it too would be comprised of nine judges who would decide certain cases for all the circuit's 20 members. In short, I believe that nine circuit judges selected by an appropriate procedure similar to that proposed for the "joint *en banc* panel" is S. 729 would be a suitable tribunal to make and settle the law of the circuit. With such a review jurisdiction explicitly provided by statute, I do not believe that there would be any "disharmony" in the circuit.

Moreover, this amendment provides a method for insuring the managability of a 20 judge circuit without requiring any changes in the procedural or structural characteristics of the court. It requires neither drastic changes in court procedure nor the creation of new rules to be added to the sufficiently complicated nature of Federal appellate procedure. It is also consistent with the fourth criterion listed in the Commission report for the successful revision of the circuits which states that excessive changes from present patterns are undesirable. By providing for a nine-judge *en banc* panel, this amendment creates no other changes in current circuit practice—unlike S. 729 which would have to be implemented with many new rules and procedures.

In sum, this amendment represents a simpler method to revise the Ninth Circuit which will create fewer problems and avoid unnecessary changes. It accomplishes everything that S. 729 does in a more direct fashion and should not be thought of as a "stop gap" measure. Both our amendment and S. 729 increase the number of judges on the Circuit from 13 to 29; our amendment however, accomplishes this without dividing the Circuit and the State of California or creating a cumbersome additional level of appeal. The amendment has the support of the California State Bar Association and the California State Attorney General. Judge Shirley Hufstedler, a distinguished member of the Ninth Circuit, also supports the basic ideas embodied in the amendment. The Los Angeles Times, The Sacramento Bee and Riverside Press Enterprise have written editorials in support of the amendment, and have expressed their dismay at the possible adverse consequences of S. 729.

In light of this support and the problems which the bifurcation of California would create, I respectfully submit that the subcommittee consider favorably the amendment which Senators Cranston, Laxalt and I have offered. In the interests of simplicity, continuity and uniformity of decision within the Ninth Circuit, I believe that it should be adopted.

I would like to submit the editorials I have mentioned as attachments to this statement.

[From the Riverside Press Enterprise, March 21, 1975]

ONE APPELLATE COURTS INDIVISIBLE

A bill before the U.S. Senate would split California into two federal appellate court jurisdictions, which might not sound especially unworkable, but would probably produce confusion in determining the applicability of appeals court rulings.

The Ninth District Court of Appeals comprises the nine western states, including California. It has, as courts everywhere do, a growing caseload. More judges are needed, and a bill introduced by Sen. Quentin Burdick, D-N.D., would increase the number of Ninth District justices from 13 to 20.

Good enough. But the Burdick bill would also split the Ninth District into two subdivisions, one of which would include Northern California and the other of which would get Southern California. That is better, but not by much, than the recommendation of a federal commission in 1973, that the Ninth ought to be split, not into two subdivisions, but into two distinct appellate court districts, again, with part of California in each.

The problem posed by any such division of the state is that appellate court decisions are applicable only within the area of their jurisdiction, and it is

not hard to conjure a situation in which the controlling appellate court rulings on a particular issue would differ from Northern California to Southern California, and perhaps differ diametrically.

California's two Democratic senators, Alan Cranston and John Tunney, plan to introduce an amendment to the Burdick bill which would drop the subdivision proposal and substitute a special panel of nine justices to expedite appeals. That seems the better way, because where possible the federal courts (and federal jurisdictions of all kinds) ought to observe local and state government boundaries.

[From the Los Angeles Times, May 6, 1975]

THE BURDEN IN THE 9TH CIRCUIT

Federal appellate courts are burdened by an oppressive workload. The litigation is heavy in the huge 9th Circuit, which extends from the Arctic Circle to the Mexican border and from Montana to Guam. Roughly two-thirds of the workload of the U.S. Court of Appeals for the 9th Circuit is generated in California. Something should be done.

But legislation pending in Congress that would split the circuit into two divisions, with Northern California and Northwestern states in one division and Southern California and Southwestern states in the other, is certainly not the answer.

It would, as Judge Shirley Hufstedler of the 9th Circuit told a Senate judiciary subcommittee, create "a jurisdictional and procedural morass." The measure, said Warren Christopher, president of the Los Angeles County Bar Assn., runs directly counter to the urgent need to expedite and streamline federal litigation. And California Atty. Gen. Evelle J. Younger told the same subcommittee that there could be confusion and delay in obtaining clear and final decisions affecting state law and state programs.

Their concerns are thoroughly justified. The northern division of the court might interpret state or federal law in one way while the southern division might interpret it in an exactly opposite manner. The potential conflict is great. It embraces—to name but a few subjects—water law, welfare rights, public housing, educational aid, revenue sharing and the administration of criminal laws.

Hufstedler gave the committee a partial list of systemic and dollar costs that circuit splitting would engineer. It included increased appellate and district court litigation, further delay of decisions on pending appeals, escalated costs to litigants and increased burdens on the U.S. Supreme Court.

The solution lies, we think, in scrapping the two-division concept, increasing the 13-judge court to 20 members and providing a more expeditious procedure for the relatively infrequent en banc decisions that are necessary in cases of overriding importance or far-reaching effect.

Present law requires the participation of all 13 judges for en banc decisions. Sens. John V. Tunney and Alan Cranston of California plan to offer an amendment that would eliminate the two-division proviso and permit en banc decisions by 9 judges, rather than the hoped-for-20. The amendment has been drawn with the assistance of the State Bar of California. Although Hufstedler, Younger and Christopher have differing views as to how the en banc panel should be constituted, they all support the basic idea. We urge its adoption by Congress.

[From the Sacramento Bee, April 28, 1975]

THE HALVING OF CALIFORNIA

We are disturbed by proposals to divide California into two distinct legal sectors as the way to relieve the logjam of cases before the 9th Circuit Court of Appeals.

There is no denying arguments put forth by the Chief Justice of the United States, that federal appellate courts generally face an oppressive workload.

The 11 courts he spoke of experienced a 5 per cent increase in new cases filed last year, for an all-time high of 16,436. To get by, Burger said, they had to "resort to some draconian measures," such as curtailing oral arguments. The number of authorized circuit judges (97) has remained constant since 1968.

The 9th Circuit Court, in our own ballwick, is among those with a heavy backlog and it has a special problem in its far-reaching jurisdiction. But we

find no redeeming excuse for the severe surgery advocated in and out of Congress.

The 13-judge court covers an area stretching from the Arctic Circle to the Mexican border, from Montana to Guam. Its nine western states include California, the most populous in the nation.

A plan conceived by a special commission last year called for cutting the 9th Circuit in half—and in the process establishing two separate systems of federal law in California.

Lawyers protested the plan would lead to an intolerable situation if, as sometimes happens between various federal appellate courts, the northern and southern California courts disagreed on an all-California problem.

One example cited is not academic. It deals with current litigation over the California Water Project, which extends almost the entire length of the state. With two circuits, it is possible they would wind up issuing conflicting orders on water contracts—and then what? Stand in line before the U.S. Supreme Court?

The conflicts could affect prisons, welfare departments, cities trying to enforce statewide statutes and even private business—banks, especially. The state attorney general's office says the problems would be "horrendous."

Sen. Quentin Burdick, D-N.D., who failed to get the divided court bill through last year, has introduced a revised version which would create a special nine-judge panel to resolve conflicts between the two divisions of what would become a 20-judge 9th Circuit. The new approach makes the plan only slightly less objectionable.

It seems reasonable to expect that legal and academic circles can offer a solution without going to the extreme of partitioning California. Such a stringent step is totally unacceptable.

Senator BURDICK. Our first witness will be the Honorable Robert Duncan, the Congressman from Oregon.

Welcome to the committee, Congressman.

STATEMENT OF HON. ROBERT DUNCAN, A REPRESENTATIVE IN CONGRESS FROM THE THIRD CONGRESSIONAL DISTRICT OF THE STATE OF OREGON

Mr. DUNCAN. Senator, it is very kind of you to have me. I come here as a Member of Congress, and as one who practiced law for a number of years in the State of Oregon. I do not come before you as a regular practitioner in the court of appeals. I come as one of the great number of Orgeon lawyers, some of whom practice in the small towns, some in Portland, who from time to time come into contact with the Federal courts.

I might say the office I was with in Portland had a great volume of work in the Federal court, although I participated only spasmodically. I wrote a letter earlier this year to the committee, which I would like included in the record. I addressed myself to the problem of congestion in the ninth circuit.

Senator BURDICK. Without objection, that will be included.

[The letter referred to follows:]

MARCH 7, 1975.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: As one recently returned from the practice of law in Portland, Oregon, after eight years of absence from the Congress, I want to add my support to the efforts to solve the congestion and delay in the Ninth Circuit calendar. My last case ran 22 months from the final brief to notifica-

tion of argument and in that case the respondent had not even made an appearance.

While I individually lean toward a split of the Circuit, the consensus is apparently in favor of some additional judges and the retention of a single Circuit with two divisions. The mechanics are of less importance than is the solution of the problem.

I know there are many other important matters before your committee, but I hope you will be able to reach this matter within a reasonable time.

Sincerely,

ROBERT B. DUNCAN,
Member of Congress.

Mr. DUNCAN. I, individually, lean toward the creation of two circuits, but I understand the problems that are involved with respect to the origin of most of the cases, the difficulty of splitting the State of California, and I consider a solution to the problem of congestion to be much more important than the details thereof, and therefore without qualification, I would support the effort of this committee in the bill to create two divisions in the ninth circuit, to add some additional manpower, again, in an effort to solve this problem.

I appeared in front of the ninth circuit on several occasions when I practiced in Medford. Medford is a long way from the seat of the U.S. district court. At that time, most of the lawyers were literally terrified of the chief judge of that district, and our personal preferences were to take our cases into the Oregon courts, where we were familiar with the procedure and where we were in much less trepidation of the chief judge.

From time to time, however, we did go into Federal court. The more we went in the better we liked it.

On the rare occasions when I had an appeal in those days, I recall the time for its resolution was long but at that time also the time for resolution of cases in the State of Oregon was long, and so it did not appear to be particularly a problem.

The last case I took to the ninth circuit, Senator, was not a very complicated case. It was one in which rough justice had been accomplished in the District, but my client felt that his pleas had not been sufficiently considered. So we took an appeal from that case.

Now, on the day before we took the appeal, the respondent's attorney resigned. There was no further substitution of attorneys. Our briefs were filed. There was never any appearance on the part of the respondent.

As I recall now, it took approximately 22 months from the time that our last brief was filed until we were notified that the case was ripe, and had been set down for an original hearing.

Now, I do not blame all of these problems on the judges. I know that there are problems that are created by the lawyers themselves. I assume this committee is addressing itself to all of the problems of delay in the courts, and coming from Oregon where our trial courts will get to a case in 6 to 9 months, and where the appeals are handled with equal expedition, we have difficulty in understanding why the Federal appellate system should be so far behind.

As a matter of fact, if the chief judge who is in the chambers now will forgive me, I do not think I will ever forget in this particular appeal when the district court's opinion did not seem to be amply explanatory of the thought processes, he leaned over the bench and

said, Mr. Duncan, what would you think if we sent this case back, if we remanded it for additional explanation to the trial court's opinion?

And as a lawyer anxious to get an affirmative decision, I hesitated to respond quite as freely as I wanted to, and I finally decided I would anyway, and I said, your Honor, do you really want to know what I think, and he said yes; and I said, well, I do not think very much of it. I said I am from Oregon, and I said our courts are fairly current, and I said I have had a difficult enough time trying to explain to my client why we have had to spend 22 months getting this case to oral argument, during which period of time for all we know the respondent's assets have been dissipated, and our ability to collect on any judgments which might be entered accordingly impaired.

But I said I do not think it would be possible for me to explain a further delay, why this case went back on a remand, and fortunately the court decided the case promptly.

Now, as I say, Oregon, I think, has set a pretty good example to the rest of the States. We introduced an intermediate appellate court. We give that court the ability to make memorandom decisions. We give that court the power to actually make a decision on the bench, at the conclusion of oral arguments, and it has cut the backlog of cases down appreciably without any particular resentment, I think, on the part of either the litigants or the attorneys.

I would like to suggest also that we can, as a member of a legislative body, help the courts in cutting down the volume of cases. There are two situations that occur to me immediately.

One of them is on the question of victimless crimes, and having scanned through the chief judge's testimony, I note that he refers to that, too, and Oregon again took the lead with respect to victimless crime, particularly the crime of possession of marijuana. It now makes it a civil offense with a penalty, I think, of $100 to be caught in possession of one ounce or less of marijuana.

Now, I have introduced a similar bill into the Congress of the United States. I have reserved judgment with respect to the abolition or the treatment similarly of sales not for profit, because I do not think we ought to do anything to encourage the use of marijuana any more than I think we ought to encourage the use of alcohol, but our experience in Oregon thus far has been that the volume of cases has been cut down and we think there has been no appreciable increase in the use.

I would like to direct your attention to one more area where I think the Congress could help the courts with their appeals, and that is on the question of environmental law. It seems to me that Congress has imposed upon the courts a task for which they have really no particular expertise, and in many instances the decisions, the final decisions as to where bridges or highways are to be built, which logging areas are to be logged, and a whole panoply of environmental decisions are now being thrown into the hands of the courts, and they are lawyers and have no particular expertise in this field.

I think the great strides forward that we have made in the field of environmental law must be retained, and I have tried to search for a solution. I have introduced no legislation but I am thinking along the terms of perhaps an administrative court with an appeal

to the judiciary only on questions of constitutionality, or on questions of arbitrary and unreasonable action by the administrative agency that made the decision, or by the administrative courts that affirmed it, or changed it.

That is about all I can say. I endorse the proposal to split the circuit. I think that with your joint en banc hearings that you retain the concept which is undesirable of a, I suppose, a first and second class judge on the courts but I foresee that no solution that we reach is going to be completely satisfactory.

In my opinion, it is more important that we take a step forward, that we make a decision, than it is that that decision be in all respects absolutely the perfect decision, and I thank you, Senator, for letting me appear before you.

Senator BURDICK. I thank you for you contribution this morning.

Mr. DUNCAN. Thank you, sir.

Senator BURDICK. Judge Richard H. Chambers, chief judge of the ninth circuit. Welcome to the committee again, judge.

STATEMENT OF RICHARD H. CHAMBERS, CHIEF JUDGE OF THE NINTH CIRCUIT, SAN FRANCISCO, CALIF.

Judge CHAMBERS. Thank you.

I am Richard H. Chambers, chief judge of the ninth circuit.

I am sure he does not object to my saying so but Mr. Duncan assured me, as he went out the door, that it was someone else on our court that they had been scared of, and so far as I know, I had not been aware of anyone in Oregon being afraid of the current chief judge.

Mr. Chairman, I noted that you did not list any communication from the Arizona State Bar, to go into the record. I thought I forwarded the latest position on the stand of the State Bar to Mr. Westphal.

Mr. WESTPHAL. I do not recall it, judge. My recollection is that the last time we talked, you said that at a meeting in May, the Arizona State Bar had authorized you to—in your appearance here today—speak on their behalf also.

Now, if I have overlooked a piece of correspondence, of course, we will correct it.

You might summarize the position of the State Bar.

Judge CHAMBERS. Well, it does exist. It is not something that is going to be gotten up posthearing.

Senator BURDICK. When the statement arrives, it will be made a part of the record.

Judge CHAMBERS. Very well, if that may go in.

[Letter from Arizona State Bar:]

STATE BAR OF ARIZONA,
OFFICE OF THE PRESIDENT,
Phoenix, Ariz., April 15, 1975.

Re Proposed Reorganization of Ninth Circuit.

Hon. RICHARD H. CHAMBERS,
U.S. Court of Appeals,
Tucson, Ariz.

DEAR JUDGE CHAMBERS: At the meeting of April 11-12 the Board of Governors again discussed the proposed reorganization of the Ninth Circuit.

At that time I recommended that the Board take action in accord with my letter of March 27, a copy of which was forwarded to you.

The Board instructed me to request that when you appear before the Senate Committee considering the matter, you indicate to them that you are authorized to express the views of the State Bar of Arizona. The position of the State Bar of Arizona is as follows:

1. The best and most feasible solution to the problem is simply the appointment of enough additional judges to handle the work of the Ninth Circuit. The State Bar does not feel that there is an insurmountable administrative problem which would render this solution unacceptable.

2. If, however, the Committee feels that the administrative problems involved in simply appointing more judges would be too great, the only rational alternative acceptable to the State Bar of Arizona would be dividing the Circuit into a northern and southern division and appointing sufficient additional personnel to handle the case load. This, of course, would require some en banc procedure. The Board of Governors takes no position on what type en banc procedure would be best, since it feels you are much more knowledgeable about that than we are. However, in the event northern and southern divisions are established in the Ninth Circuit, the Board of Governors feels that Arizona should be part of the southern division, but provisions should be made for transfer or assignment of trial judges from either division to the other, as the need arises.

The Board does not consider that any of the other alternatives so far mentioned are viable. In the event neither of the suggestions mentioned above can be implemented we would appreciate your letting us know as soon as possible: we can then take a position on whatever other alternatives may then be proposed.

I am sending a copy of this letter to Judge Hufstedler to inform her that the Board has decided to request that you speak for the State Bar of Arizona and to thank her for her past efforts on our behalf. I am not sure that formal notice to the Committee is necessary since you were already scheduled to appear at the hearing. However, if formal notice is required, I would appreciate your informing the Committee that you speak for the State Bar of Arizona: if you prefer, please let me know and I will send them that notice.

Best personal regards.

Yours very truly,

STANLEY G. FELDMAN.

Judge CHAMBERS. The Arizona State Bar, which authorized me to present their position, I would say has first, last, and always been, and predictably, opposed to any proposition to annex Arizona to the tenth circuit.

Now, this is not because of any dislike of Arizonans or Coloradans or New Mexicans. But it is based on a number of things. I think you can find the key to it in this.

Our airlines will sell 10 times as many tickets from Arizona to California as they will sell from Arizona to Colorado. And the one ticket sold to Colorado, it is probably an even chance that someone is going out there hunting or fishing, or a student involved, or some family business.

But the only legal contact between Arizona and Colorado is that some of our municipal bonds in Arizona are marketed through Denver houses, Denver bond houses.

I practiced law 19 years, less the war years, and I never had occasion to go to Colorado on legal business. I had two occasions to go to Lordsburg, N.M., on a State court matter, just over the Arizona line, but after a few years I was going on business for clients several times a year to California.

Then, also, you see, while Oregon is not a community property State, virtually all of our States are community property States.

The great majority of states in the tenth circuit are not community property States. I believe Senator Fannin advised you of the position of the State Senate.

Now, what is the rest of the Arizona State Bar's position? First, as I understand it, they are willing to go along with the—with what have been characterized as the Tunney-Cranston amendments. They are willing to go along with that. Also, they are willing to go along, if the committee finds that infeasible, with S. 729, the two divisions, and I would say that they join me in my unhappiness about any proposed northwest division.

That solves nothing. I am sure, if we are all perfectly honest about it, that the northwest division, the way you read your statistics, has only 17 percent of the load.

If you are an enthusiast for it, you can figure around and come up with about 19 percent. But either way you cut it, its present load is a workload for 3½ judges, and that solves nothing.

The only reason, and I mean no offense when I say this, the only reason to create the Northwest circuit, that I can see, is just to be doing something, and, of course, I have a unique point of view from which to observe it. I say to you that this mobility of district judges that we have in the ninth circuit is the most wonderful aspect that any circuit has, and their availability to be moved around out of the Northwest where they have the time to do their work properly, and with some dispatch, is largely because they have few border problems.

If that mobility is destroyed. I just will be sick about it. In San Diego, where they have five Federal judges, by division of labor it takes 4½ judges down there to handle marijuana and heroin, speed and cocaine, amphetamine cases.

We have transferred down here from the east a security and exchange case that will take 3 months to try. We cannot spring a man for it.

All right. I call up Judge McNichols in Idaho. We have got this situation in San Diego. I cannot spring any man along the coast, or out of Arizona, can you take it? Well, he says, I do not want it, but I am part of the ninth circuit, and I will do it.

I can give you a dozen of those types of cases that the judges of the Northwest have taken on in the last 6 or 7 years.

So, let me give you the picture on our court, on the state of our business. Now, around 1966, Congress simultaneously passed the Bail Reform Act and the Criminal Justice Act, which gives every indigent or semi-indigent a free lawyer.

You cannot tell, the two of them being simultaneous, which brought us the most criminal business. I think actually the two of them put together resulted in giving us more than the sum total of the two if they had passed separately.

Anyway, the largest part of this criminal business we have is Southern California, Central California, Los Angeles, and Arizona.

Now, in California criminal appeals run about 11 months from sentence to issue. Now, that is in the State courts. Now, that does not result in as bad a situation as that much delay on the Federal side, because on the State side, the bail is not as freely given as on the Federal side.

Well, what does that mean? That means that you do not have the embarrassment of recidivism when the man is in the penitentiary or jail that you have with the Federal prisoner, if he is out a similar length of time, bringing in marijuana or heroin once or twice.

Well, what I am coming to is to this. With the permission of the court. I set out about 3 years ago to get our time on the criminal appeals down, and we have brought it down from approximately 9 months to a little over 5 months and we are going to get it below that.

Now, that has delayed the civil calendar, by my expediting of these criminal appeals. I do not expect to get it down much more than 1 more month—so that setback has been absorbed. The administrative office, I am sure, supplied the figures. But we are now taking in about 3,000 cases per year.

In the last 3 years we managed to dispose of the number of cases which we took in the year before. This year, indications are that filings have leveled off.

Well, what are we behind? We are behind approximately 650 cases.

Now, bear in mind, we take in over 3,000. And in those 600 cases, there are something like 138 environmental cases that have the same issue, and which by either formal stipulation, or by consent of the parties expressed by letters, been put on the back burner with the representation that they expect to be settled.

So I consider that we only have 400 cases, civil, waiting to be heard.

Now, you get into this problem. There must be a dozen types of cases by statute that are given priority and, for instance, by statute labor board cases are to have priority. Those are civil. Environmental cases, priority. Recalcitrant witnesses, priority. Some social security matters, priority. As a matter of fact, the priorities overlap, so we treat all the priorities essentially as equals.

Also we grant motions to expedite civil cases. An observation on that. I live in Tucson part of the year, have had informal, friendly relations with members of the local bar. They ask me when a civil case could be heard and I say, is there any reason it should be heard right away? Oh, yes, yes. Well, I tell them, make a motion to expedite it. That happens once a month, I suppose, and still in the last 4 or 5 years only one Tucson lawyer has made a motion to expedite.

In other words, if we had had the 15 judges the same as the fifth circuit, those two men would have made the difference between no backlog and what I consider that comparatively small backlog of 400 cases. Just two judges would have made the difference.

I thoroughly agree that, in the ideal, nine judges is big enough. I do say, though, that we bring in district judges for only short times because if we bring them in for a full week that breaks their stride at home.

A court of 20 circuit judges would be easier to handle assuming you have a limited number, less than all, to hold the en bancs. It would be easier to handle than bringing in 35 district judges for short periods. And so I do say this. If it is the wisdom of the committee to go the California way, then I think we can handle it. However, the en banc should be less than all and I think that the judicial council should be less than all.

I doubt that even 13 circuit judges should be assembled to pass judgment on the requests for 300 more square feet for the bankruptcy judge at Modesto, Calif. But I feel this. In my judgment with a court of 13 we have had less conflict between the panels than when I joined the court as a court of nine. The reason we had less conflict with 13 than 9, which on its face seems improbable, is a different set of judges, a younger set who are probably more flexible. I do have this terrible concern about the Revision Commission's hard line across California, complete surgery, almost complete surgery, two circuits, about the California plan and about S. 729 as written.

In 1959 the Congress passed a bill to provide that the chief judge should be the senior in service, under 70. Now, gentlemen, I appeared before the Revision Commission in open hearings here the other day. I went away particularly saddened that the oldest member of the Commission, a former Congressman, thought that I was making an attack on people over 70 years of age. Nothing could be further from the truth. I think it is better that people over 70 be relieved of the administrative duties, generally so. What is unique almost in the Federal judiciary, you can always find something dignified and honorable for a retired judge to do, even though he does not have the physical strength to handle large or heavy cases, and those retired men are the jewels in our crown. We have 13 or 14 of them in our district.

Every one of the district judges eligible to retire has retired with two exceptions. One has been eligible for 2 weeks and the other one who is still only 67 or 68, has been eligible for 2 years. No reason why they should retire at all except to give us another new judge.

I apprehend that unless your bill, whichever alternative it adopts —if you do not exclude those who are eligible to retire from the limited en banc court, you are going to be right back where we were one the ninth circuit when I joined the court in 1954, with judges of the average age about 70 years. Because those people that are on the en banc will feel it their duty to stay on and supervise their younger brothers and keep their thinking straight. As a matter of fact, some of that impetus is kind of surging in me now, that I might have a duty to stay on and help them with their thinking if I had some special position. That would be tragic, of course.

If you will bear with me, the legend is, and I am sure it is true, that the reason we got this statute about under 70 years of age, was that newly appointed, newly confirmed Chief Justice Earl Warren went up to a judges' dinner, a bar meeting, in Manhattan and an 87- or 88-year-old chief judge of the district was seated next to the new Chief Justice and the new Chief Justice said, I am Earl Warren and the chief judge of the district said I am so and so. What did you say your name was? I believe that history to be correct.—

This graduated step retirement should also be enacted.—It really would be tragic if we about-face and discourage our men from retirement.

Let me say that no living human being has expressed a contrary opinion to this one that the less-than-all en banc court should be constituted by judges ineligible to retire, and no one has expressed any opposition whatever to this graduated retirement.

We can live with the California plan. We can live with S. 729 quite peacefully. For my own part, because of the loss of the northern blood bank, the outright split of the ninth circuit would be something very undersirable, terribly undesirable from the standpoint of getting our work done in the southern part of the circuit.

As a matter of fact, diversity litigation is such a small part of it that I am not troubled in that field about northern California and southern California going two ways. I have some trouble in this perennial business that we are into now which is not a matter of our creation, regulating State agencies. I recall one case we had involving welfare where we ordered Governor Reagan to find $200 or $300 million right now. I cannot help but wonder about the race to the courthouse that we might have had on that thing.

I fear I have not been very helpful and, of course, it is not my circuit. It belongs to the people, the lawyers, and I may not attribute anything. Anyway, I hope you will pardon me for saying that if the Congress decides to cut off my right arm, I want to be around when it is done and I hope you will forgive me for all the time I have taken, Senator.

Senator BURDICK. Thank you very much, Judge. Your testimony has been very helpful.

We just have a few questions. This question of not designating a judge to serve en banc, who is eligible for retirement, I think has a lot of merit and some language we have worked out along those lines reads as follows: "A judge who is eligible to retire under section 371 of this tile is disqualified from serving on a joint en banc panel."

Now, the only question I have then is should that apply to the chief judge of each division?

Judge CHAMBERS. As a chief judge eligible to retire, being the one circuit judge eligible to retire who has not done so, my answer is yes. He obviously is not going to be there very long.

Now, I think one associate is good enough to replace the chief judge; but I say by all means count him out of the en banc.

Senator BURDICK. Well, Judge, here is what bothers me. Suppose that both the senior judges in the two divisions are eligible to retire. What do we do about that ninth man? And they are both under 70 and both over 65.

Judge CHAMBERS. I would say that the senior of the two in service would preside. I think so.

Senator BURDICK. Under our format we have a ninth man. If we disqualify the two chief judges I presume we can take the next in line who was not eligible to retire who is senior and have him serve as the ninth man.

Judge CHAMBERS. Yes.

Senator BURDICK. How would that work?

Judge CHAMBERS. It would work. As of the moment I think it is all right.

Senator BURDICK. But the other two would still be chief judges as long as they were there.

Judge CHAMBERS. I beg your pardon?

Senator BURDICK. The chief judges would still be chief judges but they would not be sitting on the en banc panel.

Judge CHAMBERS. Yes, that is right. No chief judge is going to run out of work even though he is not sitting on those en banc panels.

Senator BURDICK. Judge, the attorney general of California, in a prepared statement he has submitted for the record, criticizes S. 729 because a joint en banc panel would not have jurisdiction of a case until an actual conflict exists between the two divisions. Do you think that the joint en banc panel also should have the discretion to accept the case which is of such importance that the issue should be decided by the joint en banc panel at the earliest opportunity?

Judge CHAMBERS. I would not know how to say it just offhand. There ought to be a provision that, oh, where it is public law, at least where public law is involved, that it could promptly go en banc. Now, I am sure that Mr. Westphal could come up with something on that.

Senator BURDICK. Did he give you the language of the proposed amendment?

Judge CHAMBERS. He handed it to me.

Senator BURDICK. See if that would take care of the situation in your opinion.

(Proposed Amendment follows)

PROPOSED AMENDMENT TO JURISDICTION OF JOINT EN BANC PANEL

In line 5, page 23, of the bill after the phrase "have jurisdiction over" insert "(1)."

In line 10, page 23, delete the period and quotation mark after the word "State" and insert the following: "and (2) any devision, or a panel thereof, involving, as a question of first impression or of primary importance, a determination of the validity, construction, or application of any statute or administrative order, rule or regulation, where it is shown to the joint en banc panel that a prompt review of such decision by the joint en banc panel is necessary to avoid uncertainty and to promote uniform application of the law within a single state or within the several states of such circuit."

Judge CHAMBERS. It seems to me to be very well drawn. I am inclined to think so. And I would say that if you go the California route, something similar should be put in, but it—well, I dare say that somebody might have some little suggestion but as I read it now, I like it. I think it is excellent.

Senator BURDICK. Judge, I think staff has one or two questions for you and that will be it for this morning.

Mr. WESTPHAL. Judge, under date of March 17, you submitted a prepared statement to the subcommittee and I take it that you desire that that statement be included in the hearing record.

Judge CHAMBERS. That is correct.

Senator BURDICK. Without objection, so ordered.

(The prepared statement of Judge Richard H. Chambers follows:)

PREPARED STATEMENT OF RICHARD H. CHAMBERS, CHIEF JUDGE, NINTH CIRCUIT COURT OF APPEALS

Mr. Chairman and Members of the Subcommittee on Improvements of Judicial Machinery: Perhaps I should first comment on S. 729, 94th Congress, introduced on February 18, 1975.

This bill would create two large divisions of the Ninth Circuit. The Northern Division would be Alaska, Hawaii, Idaho, Montana, Oregon, Washington, Northern California and Eastern California. The Southern Division would consist of Arizona, Nevada, Central California and Southern California.

Speaking as one-thirteenth of the active court, I do not oppose this concept. It is far superior to the proposal to create two circuits with the same geographical boundaries, which was embodied in the Realignment Commission's report of December 18, 1973. It would preserve our blood bank of easily borrowable district judges from the five Northwest states. And, there is no factor more important in this realignment business. As to the Ninth Circuit, I say it is the most important factor.

Our southern districts are always short on judges. I anticipate it will continue. Practically, we cannot pick up the telephone, dial Congress and get another judge for a district. Practically, we have to wait until the wagon comes by. Sometimes we have to wait as long as seven years to get an authorization for more judges. This is not likely to change.

So what do we do meanwhile? We make do with what we have. There are always in our southern districts some that are in trouble. Today it is Arizona. A few years ago, it was the Southern District of California at San Diego. Earlier it was Los Angeles. Always our Court of Appeals needs help. Where do we get it? We get it mostly out of the Northwest and from a few senior judges from outside the circuit. The chief judge has the responsibility of shifting these judges around. I appeal and I beg the Congress not to leave the southern districts to just stew in their own juice.

As to details of the intra-court reorganization, I would ask leave of the committee to permit the judges of the Ninth Circuit to submit written suggestions on the subject—if the committee decides the basic idea of S. 729 is what it wants.

There is one thing in S. 729 that alarms me and will continue to do so unless changed. It provides for an en banc panel of less than all circuit judges. It envisions the more senior active judges to sit. This en banc panel ought to be composed of judges not eligible to retire. If it is not so composed, you will have judges staying on beyond time they would normally take senior status. It is too easy to feel you are needed to straighten out the thinking of your brothers if you have the upper hand. Let the bill stand without a qualification on the age of members of an en banc court of less than all the judges and you will quickly get an over-aged court.

Other points where consideration should be given to modifying S. 729 are minor in comparison.

Other proposals should be discussed. We understand that the California State Bar has come out against S. 729. They, we believe, think the Ninth Circuit is not bad as it is now constituted. They believe in the regional concept (that is, a large region) and there is a lot to be said for it. They would add more circuit judges, but put in a fairly small en banc court of less than all to resolve conflicts between panels. If the California Bar would add the limitation of prohibiting judges eligible to retire from sitting on the limited en banc court, it would be, in my view, quite workable. Of course, if the committee accepts the California Bar's concept, we would like to be consulted as to details.

The Revision Commission wisely rejected the proposal for a Northwest circuit of Alaska, Idaho, Montana, Oregon and Washington. Their load is only about 20 percent of our total. From the standpoint of the Court of Appeals, it just cuts off the dog's tail. From the standpoint of our southern districts with their ever present need to borrow, it chops off the dog's back legs.

Now there is a recent movement to make a circuit out of California and Arizona. This is no better than the Northwest circuit idea. Adding Nevada and Hawaii to the Northwest circuit would leave the Arizona-California circuit with about 75 percent of its present business. This idea of California-Arizona as one circuit would soon shift to making California-Arizona, Hawaii and Nevada (plus Guam) into a circuit, which is now the other side of the Northwest circuit's present coin.

Why would it so shift? Heretofore, there has been in the past an effort to tie Hawaii into a Northwest circuit. Hawaii's ties are to California. I know Nevadans have nothing per se against Oregonians. But they will say, "No, thank you" to being joined to Washington-Oregon.

Will the two states be shuffled into a circuit to which they do not want to belong? Won't their representatives in the Congress be responsive to the wishes of their virtually unanimous views at home? And, will not this committee respect their wishes?

Practically, there are other problems in creating this Northwest circuit. The Bar of Idaho is against it. I have found no sentiment in Montana for it. At best, there is badly divided opinion for it in Alaska, Oregon and Washington.

There the argument for it is "prompt service." Give us some more judges (or take away our marijuana business) and we will give them prompt service. The Northwest is not complaining about conflicts between panels or the luck of the draw.

In fiscal year 1974 we took in 2,316 cases. By source, our circuit executive allots the percentages as follows:

	Percent
Alaska	1.2
Arizona	9.7
California	64.2
Hawaii	2.0
Idaho	1.4
Montana	1.7
Nevada	4.7
Oregon	5.4
Washington	8.1
Guam	1.6
Total	100.0

Thus in fiscal 1974, a circuit of Arizona and California would have produced 73.9% of the business that came in. If Hawaii, Nevada and Guam were added to California, the percentage would have been 82.2%. Thus, the five Northwest states of Alaska, Idaho, Montana, Oregon, and Washington were the source of only 17.8%. Parenthetically it should be noted that the districts of California divided up as follows:

	Percent
Central	28.3
Northern	17.5
Southern	14.4
Eastern	4.0
Total	64.2

There has been a notion that a court of nine should be the optimum. It is a good theory, but right now California alone needs 14 judges. Add Arizona, and 16 are needed. Add Nevada, Hawaii and Guam and 17 are needed. And one needs at most only 4 for the five Northwest states.

Any solution will be imperfect. S. 729 is feasible. The California State Bar's proposals are feasible. Both bills need minor tinkering.

Mr. WESTPHAL. In that statement you furnished to the committee a breakdown of the number of appeals which originate from each of the States in the ninth circuit and your statement indicates that 64.2 percent or 1,487 of those cases come from the State of California.

Now, that statistic alone is the nub of the particular problem that this legislation is directed at is it not?

Judge CHAMBERS. Sure is.

Mr. WESTPHAL. All right. Now, then, you also state that to handle the California caseload of 1,487 cases would require 14 judges just to handle that caseload which originates in California. Do you agree with that?

Judge CHAMBERS. Right.

Mr. WESTPHAL. So that the problem is trying to get the proper number of judges into a court to handle that particular caseload.

Now, if one were to stick to some magic number of judges, and if that magic number of judges should be 14 or 15, that would mean that California would have to be a circuit all by itself, would it not?

Judge CHAMBERS. Yes.

Mr. WESTPHAL. Well, then, let me ask you this, Judge——

Judge CHAMBERS. It would be over nine anyway.

Mr. WESTPHAL. Do you favor a concept whereby a Federal Court of Appeals, a circuit court, whether that court should be a one-State court or whether it should be a several-State court?

In other words, do you see any advantages to having that court as sort of a regional court composed of three or more States?

Judge CHAMBERS. There are advantages to a regional court. I do not mean to be smart aleck about it but I have no objection to California being in the circuit as long as I do not have to be part of it. Then there has been talk that the Congress is going to do something. We can count on that.

All right. I agree to that premise. So let us have a circuit consisting of Arizona, California, and Nevada or Hawaii.

Now, that proposal is in my view—there has been also talk of Arizona and California. I cannot believe that this committee or the U.S. Senate are going to kidnap Nevada or Hawaii up with the northwest circuit.

Mr. WESTPHAL. Judge, you put your finger right on the very problem that the Congress and this committee face and that is this, that if you start out with California having 64 percent of the caseload of the ninth circuit and if you start out on the premise advanced by the California Bar Association that in no way should California be split, divided, or otherwise gerrymandered, that then you have the problem of Arizona, as you have stated, wanting to retain judicial ties at the Federal appellate level with California because that is where all its economic and social ties lie. Nevada takes the same position as you have just stated. That is, they want to be tied with California. Las Vegas is very close to Los Angeles and that is where their ties run. Their biggest city is Las Vegas. And their next biggest city, Reno, is closely tied to San Francisco. That is where all their interests run. And the Nevada Bar Association has advised us that because the population, a majority is down in the southern part of the State, it is very likely, on just a simple poll, that Nevada would prefer to retain alinement to the Los Angeles area.

Now, then, you have Hawaii. They do not want to be kidnapped either. They want to retain ties to California, preferably to the San Francisco area, and that is the testimony they have given to the revision commission. That is the thrust of the statements they have submitted to this committee.

Last March the President of the Idaho State Bar Association said that Idaho wanted to retain ties to California because that is where they got their code in the first instance and there is a great comfort for them to be able to rely on judicial interpretations coming out of California State courts as well as Federal courts. So that the problem for the Congress, in that posture of events, is that it is virtually impossible to give to each of those States 100 percent of their desires without having the same situation you have now or without creating the northeast circuit. It that not true?

Judge CHAMBERS. Well, I think my statement says that in my opinion the division principle that your subcommittee has worked out I think is sound. I also say we could live with the California plan and try it out and if that had the faults that some people

think it will, then you can go to the two divisions, but similarly if you divide the circuit, make two circuits, it is hard to retreat to the two divisions. If you create the two divisions it is hard to retreat to, impossible to retreat to the California plan. Now, what is the bill number?

Mr. WESTPHAL. S. 729.

Judge CHAMBERS. When S. 729 came out I was happy. I thought that somebody did realize that I was not talking through my hat when I talked about the necessity of retaining that northwest blood bank in the district court and the proposition that that district thing is more important than the court of appeals.

Mr. WESTPHAL. All right, Judge. So you recognize that in S. 729, provision is made so that the ninth circuit, composed of two divisions, will still have what you refer to as the blood bank.

Judge CHAMBERS. Yes; and I am very happy with it.

Mr. WESTPHAL. So that satisfies you.

Judge CHAMBERS. Yes.

Mr. WESTPHAL. Also am I correct in recalling that you yourself have been an advocate of having the ninth circuit organized into administrative divisions? I believe this was a suggestion of yours before S. 729 or the revision commission or anything else was ever thought of. Is that not true?

Judge CHAMBERS. Oh, I think that you could say yes. But keep in mind that I would do anything to keep that northeast blood bank.

Mr. WESTPHAL. Under S. 729 you have got your blood bank.

Judge CHAMBERS. Yes.

Mr. WESTPHAL. Now, as far as whether the ninth circuit is organized into these two divisions as provided in S. 729 or it is not, let me ask you this. Under the rules of the ninth circuit as they exist today, do those rules provide that appeals from Arizona and Nevada will normally be heard in Los Angeles unless the court orders otherwise? Is that not true?

Judge CHAMBERS. I would not say that.

Mr. WESTPHAL. Well, let us take a look at the rules.

Just let me find the rule so we can keep the testimony straight on the point that I have raised here. It may not be in your rules. It may be in one of your general orders.

Judge CHAMBERS. I think that is where it is.

Mr. WESTPHAL. Do you recall what general order it is, Judge?

Judge CHAMBERS. No, I do not know the number.

Mr. WESTPHAL. I am starting out with general order No. 2 and there is also general order No. 15 and quite a few general orders.

Judge CHAMBERS. Well——

Mr. WESTPHAL. Well, in any event, you do recall, do you not, that which says that cases being appealed from the district courts of Arizona and of Nevada will normally be scheduled for hearing by the court at Los Angeles. Do you recall that in your general orders?

Judge CHAMBERS. I believe there is something to that effect in the general orders but I am so full of the subject of expediting criminal appeals where I was given almost carte blanche authority that in most of the load out of southern Nevada and Arizona that is criminal, the clerk is now under instructions from me to put those on where

he can get them heard first. And so that is the preponderance of the thing. Normally, Reno civil cases will be heard in San Francisco and I think the clerk has it in his discretion as to whether he puts Arizona on Los Angeles or San Francisco.

Mr. WESTPHAL. All right. And then under the general orders of the court the clerk is also instructed that appeals which originate in Idaho, Montana, Oregon, Washington, Alaska, and Hawaii, will normally be set for hearing in San Francisco unless they are put on the Portland or Seattle calendar or the occasional calendars which you have in Honolulu and/or Alaska, is that not true?

Judge CHAMBERS. Yes, that is right.

Mr. WESTPHAL. All right. So that under the ninth circuit procedures today there is, as a practical matter, a division, a geographic division, of the places where your appeals will be heard and that division is roughly the same as the division suggested by the revision commission and the geographic alignments laid out in S. 729. Is that not true?

Judge CHAMBERS. I think the answer to that is yes.

Mr. WESTPHAL. All right.

Judge CHAMBERS. If you had the people in the Northwest, that southern border of Oregon would be a splendid place to divide it.

Mr. WESTPHAL. Now, in the composition of your panels for sitting, the general orders of your court also have a provision to the effect that if, and I quote now from section 4(e) of general order No. 2 which was revised as of April 1, 1974, under that general order there is a provision that says: "If possible, a rotation system shall be followed so that active judges of the court will sit with every other active and senior judge approximately the same number of times each year."

Now, you recall that part of your general order?

Judge CHAMBERS. Oh, yes.

Mr. WESTPHAL. And the purpose of that, Judge, I assume, is so that your 13 judges have an opportunity to work with each other frequently enough on three-judge panels so that it preserves some sense of institutional unity among your 13 judges, develops a little collegiality and develops a little esprit de corps, that is correct?

Judge CHAMBERS. That is correct.

Mr. WESTPHAL. All right. Now then, if the California plan were accepted, whereby you would have 20 judges under the same geographic setup that exists now in the ninth circuit, it would still be a good policy to do that in order to promote esprit de corps and collegiality in the sense of unity but your problem of arranging that schedule is complicated by the fact that instead of trying to fit 13 judges into relative equality of sitting with their colleagues you then have to work 20 judges into this relative equality of sitting with their colleages, is that not true?

Judge CHAMBERS. Let me say that it works out very well and as a matter of fact, it could all be done by computer. But I hope to be gone by the time we have a computer arrangement.

Mr. WESTPHAL. Judge, you told us a couple of interesting anecdotes here that you gleaned along the line. I assume you also heard about the anecdote which runs to this effect, that when the fifth circuit reached the number of 15 judges and having a few senior judges also

available from within their own circuit, that in the fifth circuit where they had this same policy of having judges sit in equal number of sittings with each of their colleagues so they could promote collegiality, Judge Brown found it in fact necessary to use a computer in order to solve that problem because the number of different panels you can compose out of 15 or 18 judges is almost infinite and it overwhelms the simple mathematical ability shared by either judges, chief judges, or lawyers. You have heard that anecdote, have you not?

Judge CHAMBERS. Yes.

Mr. WESTPHAL. So is not that going to be part of the problem of trying to run the circuit with 20 judges which is even 5 more than what their experience has been now in the fifth circuit.

Judge CHAMBERS. Well, let me explain first how Judge Hufstedler, who makes them up for us, works. She—well, I guess you would call it country grocery store style. She makes out the panels. But then the clerk is constantly every month, publishing a table for the past 12 months of who sat with whom. As she goes along, she compensates for Judge Kelch sitting too much with Judge Chambers, for Judge Wright not sitting enough with Judge Chambers, and at the end of 12 months, by constantly compensating, it works out.

Mr. WESTPHAL. Before you leave that point, Judge, my point is simply this. The work involved in trying to compensate, as you say, for this inequality that sometimes occurs, it takes much more compensating when you are dealing with a group of 20 judges than it takes is you are dealing with a group of 13 judges, is that not true?

Judge CHAMBERS. Oh, obviously, but it does not take as much as we have got now dealing with 13 active, 4 retired, and 25 district judges.

Mr. WESTPHAL. All right. Now then, let us talk a little bit about that. You make the suggestion that if the ninth circuit had had 15 judges for as long as the fifth circuit had had 15 judges, that the ninth circuit would not have this backlog of 600 civil cases. According to what you told us, according to the records, over the past 4 or 5 or 6 years the ninth circuit has had the equivalent bench strength of approximately 19 or 20 judges through its use of a district judge serving as the third member of each or your three-judge panels.

Now, in 1972, for example, 53 percent of the opinions of your court were written by the active judges of your court, 24 percent were written by the senior judges in your court, and 23 percent were written by either district judges or visiting judges, from within the circuit, or from visiting judges from without the circuit. So in the year 1972, there were some 66 different judges employed in the opinion writing efforts of your court.

The figures for the year 1973 are somewhat comparable except that the effort by seniors went down a little bit and the effort by district judges amounted to 27 percent.

So, as a matter of fact, by this use of district judges, which you were just simply forced to do in order to keep up with your backlog—we understand that—the fact of the matter is that the equivalent judge-power in the Ninth Circuit has been much larger than the number of 13 over the last 5 or 6 years. Is that not true?

Judge CHAMBERS. Yes.

Mr. WESTPHAL. All right. Now then, under either S. 729 or under the California Bar proposal, there would be 20 judges in the Ninth Circuit. Under S. 729 nine of them would be in one division and 11 of them would be in the other division which would be operational entities bridged by the joint en banc panel.

Under the California Bar plan, we would take your court as it now exists and simply increase the number of active judges from 13 to 20.

Now, as I recall your testimony, you said that you could live with that, especially if the less-than-all or the nine judge en banc were written into that proposal. Is that not true?

Judge CHAMBERS. Yes.

Mr. WESTPHAL. Are you at all troubled by the fact that under the California Bar proopsal 11 of the judges would be excluded from en banc participation, that they would have no input into the en banc function of making the ultimate determination of what is to be a law of the circuit?

Judge CHAMBERS. Not particularly, but, Mr. Westphal, that all comes back to my concern over the tragedy of creating the so-called northwest circuit. Anything is better than-that.

Mr. WESTPHAL. There is no proposal at this time, under existing caseloads, for creating a northwest circuit. What the attitude of the members of the bench and the bar and of the Congress would be some years hence when caseload patterns and litigation patterns in the so-called northwest circuit are different than they are now is another question. It is not for us to decide. But the point of it is this:

As the chairman stated in his opening statement, the choice for the committee here and the choice for Congress is one of whether you employ 20 judges in one circuit and the only change you make is to have the less-than-all en banc which is the California Bar proposal, or wether you have those 20 judges organized in the two divisions, one consisting of nine and one consisting of 11.

You have stated that with less than all in the en banc, en banc of nine, that would be feasible. My question to you, judge, is that if those other 11 judges had no input into en banc proceedings, no input into determining the law of the circuit, they are then in a position where they must, on the principle of stare decisis, follow and be bound by the decision made by the nine even though they have had no voice into it.

Now, my question to you is does this not tend to destroy a sense of institutional unity, of collegiality or camaraderie, esprit de corps, all of which are I think you will recognize as vital characteristics of a good efficient appellate court?

Judge CHAMBERS. Well, it sure would if you do not put in the clause about those eligible to retire cannot sit on it.

Mr. WESTPHAL. Well, we can out the judges who are eligible to retire but have not yet retired. We can bar them from the en banc function. But if there are two of those who have not retired you would still be left with nine judges plus those two that we have excluded because they are eligible for retirement. In either event you have still got 11 judges left who have had no input in determining the law of the circuit, who are nevertheless bound by it, and all I can suggest, judge, is that that is almost self-defeating in a sense in that

we are posing the possibility of those 11 judges feeling that they are not first class judges, that they have no voice in determining the law that they are expected to follow.

Judge CHAMBERS. Mr. Westphal, you have got a good point there. I do not think it is quite that serious and I have the feeling in my bones that if you follow the California plan, it would eventually work out something like S. 729.

Mr. WESTPHAL. Let me expand my point a little bit. Also in your testimony you indicated that if the California plan were going to be followed with a decision to having a less-than-all en banc, you also suggested that the judicial council should consist of less than all. I do not know what your suggestion is as to how many of those 20 judges should assume the responsibilities of carrying out the function of the judicial council of the ninth circuit, but again if it is conceived that only nine of the 20 should carry out the judicial council function, again you would be excluding 11 judges from participation in what I would think is a vital part of running a circuit court. It is not that important as to whether a magistrate or a referee gets $300 additional salary but there are a lot of things done by a judicial council which are vital to the functioning of that circuit and if we exclude 11 of them from that function as well as excluding 11 of them from an en banc function, I greatly fear that the point is a little bit better, and a little bit more serious, because again we have taken another step towards creating second class judges.

I would suggest that the second class under this scheme, if the nine judges who sit en banc are the same as the nine judges who sit on the judicial council, that then you are going to have 11 judges whose only purpose is to be one of three warm bodies on a panel who have to go through the nitty-gritty of hearing arguments, and writing up cases, and participating in screening. You are inevitably going to have some divisive effect upon this sense of collegiality that each appellate court has.

Do you have any reaction to that?

Judge CHAMBERS. Well, Mr. Westphal, I do not know how it has come about, but we have had so many junky duties imposed on the council that most of us would be glad to be rid of them. For instance, all our senior judges are invited to attend our council meetings. They all reply, what do you think I retired for, and do not come, unless we especially request.

If I may double back just a moment, one thing I did want to get into the record. If we had had 15 judges we would still have used the district judges but we would be up-to-date. Now here is one thing that I can only prove by going back to 1954. At that time the ordinary civil case, no priority, backlog, was about 600 cases when the court was increased from seven to nine. That increase enabled us, with the use of district judges, to get caught up so that when the last brief was in, counsel in civil cases got notice that his argument was immediately set.

Well, when we got caught up, the number of appeals dipped a little and did not increase for 4 or 5 years or 6 years, and what I am saying is that it is hard to prove that delay feeds on.

Mr. WESTPHAL. Judge, please do not misunderstand me. By my questioning I do not imply any criticism whatsover of the ninth cir-

cuit today or the ninth circuit in the past. I am sure the committee does not intend that. I am sure the Congress does not intend that.

The point of the matter is that almost everybody, yourself, all the judges on your court, virtually all of the lawyers in the ninth circuit who have any Federal practice at all, recognize that despite your best efforts there are problems in not only the ninth circuit but the fifth circuit and Lord knows they have all got them. But the reason I refer back to past records and past experiences is to see whether we can learn from that something that helps the Congress make the decision which it has to make on these competing plans.

Now, just if I might, in order to further delineate what we are talking about here, and set some parameters on what we are talking about, insofar as the concept where less than all of the judges of a court participate in the en banc and the judicial council functions of the court, I would like to call your attention to the fact that under general order 15 in your court, under the revisions dated April 1, 1974, that being the general order which deals with en banc hearings, petitions for rehearing an amendment of opinions, and so forth, that those rules go on at great length in order to make sure that every active judge of the 13 active judges in the ninth circuit today gets a voice into the en banc function of that court.

I would ask, Mr. Chairman, that that general order 15 be included in the record.

Senator BURDICK. Without objection, so ordered.

[The material referred to follows:]

EN BANC HEARINGS; PETITIONS FOR REHEARING; AMENDMENT OF OPINIONS

General Order No. 15 (Rev. 4/1/74)

1. DEFINITIONS

"Hearing" means the initial hearing in this Court, whether by a panel or by the Court en banc.

"Rehearing" means any subsequent hearing by the panel or by the Court en banc, whether or not an opinion has been issued and whether or not the initial hearing was by a panel or by the Court en banc.

"En banc coordinator" is a member of the Court appointed by the Chief Judge, with duties set forth herein.

2 SUGGESTIONS AND REQUESTS FOR INITIAL HEARING EN BANC

(a) *Suggestion by a party.*—Upon receipt of a suggestion of a party for an initial hearing en banc, made pursuant to Rule 35(b), Federal Rules of Appellate Procedure, the members of the Court ordinarily will withold action thereon unless and until advised by one or more members of the panel on the calendar to which the case is ultimately assigned whether an initial hearing en banc is deemed advisable.

Unless a member of the Court requests en banc consideration, the Clerk shall calendar the case in due course for a panel hearing pursuant to General Order No. 2. When the case is calendared, the Clerk shall call to the attention of all active judges the suggestion for an initial en banc hearing. If, after the judges of the panel have read the briefs in ordinary course, in preparation for oral argument, one or more of them conclude that the suggestion should be adopted, he or they shall so advise the Court as provided in subsection (b) of this section. If no request is received, it will be assumed that no member of the panel believes an initial hearing en banc advisable. Any judge in active service may, without awaiting consideration of the suggestion by the panel, request the en banc coordinator to take a vote thereon.

(b) *Form of request.*—A request by a member of the Court for an initial hearing en banc shall be addressed to all members of the Court in active serv-

ice, with information copies to senior judges, and the en banc coordinator shall call for a vote thereon.

(c) *Removal from calendar.*—If a suggestion or request for initial en banc consideration under subsections (a) or (b) of this section is communicated so near the time of the scheduled hearing that the vote cannot be taken before the time of the scheduled hearing, the Clerk may be requested by the en banc coordinator to remove the case from the calendar of the panel and postpone the scheduled hearing.

3. RESPONSE TO PETITION FOR REHEARING

When a petition for rehearing has been filed the Court, or a panel thereof, shall ordinarily call for a response thereto before granting a petition for rehearing, or amending its opinion, by substitution of opinions or otherwise, in such manner as to affect the result. If the panel grants a panel rehearing on a petition which included a suggestion for rehearing en banc, it shall so advise the other members of the Court.

4. PROPOSAL OF JUDGE THAT PANEL WITHDRAW AND AMEND ITS OPINION OR FILE A SUBSTITUTE OPINION

In lieu of requesting a rehearing en banc as provided in section 5 of this General Order, an active or senior judge of this Court may propose to the panel, with or without copies to the other members of the Court in active service, that the panel withdraw and amend its opinion or file a substitute opinion. Upon receipt of such a proposal either the author of the opinion, if a circuit judge of this Circuit, or the senior member of the Court on the panel if the author of the opinion is not a member of the Court, shall notify the Clerk that a proposal to withdraw the opinion is under consideration and that the mandate should not issue until the Clerk receives further advice from the panel.

If the panel accedes, in substance, to the proposal that the opinion be amended or replaced, it shall proceed accordingly; however, if a petition for rehearing has been filed it shall call for a response before taking the proposed action if the action would affect the result. If the panel declines to accept the proposal, it shall notify the judge who made the proposal and such judge shall have ten days thereafter to request a rehearing en banc, as provided in subsection 5(b).

If the judge making such a proposal expects to be absent from the circuit or otherwise unavailable to act in the matter at the time the panel acts upon the proposal, such judge shall advise the panel. If the panel, following receipt of notice of the judge's absence, determines not to accept the proposal, it shall withhold action to that effect until the judge making the proposal is available, unless urgent circumstances require prompt disposition of the case. Similarly, where a panel has not received notice of the unavailability of a judge making such a proposal, if it has actual knowledge that such judge is unavailable to act in the matter, it shall give consideration to withholding adverse action on the proposal until the judge making the proposal is available.[1]

5. INITIATIVE BY JUDGE FOR A REHEARING EN BANC

(a) *Proposal to panel.*—(1) Procedure: A member of the Court, or of the panel to which a case has been assigned, may, on his own motion, propose to a panel the appropriateness of en banc consideration, in which event the judge initiating the proposal shall notify the Clerk and the en banc coordinator that he is making such a proposal. Any such proposal shall be made prior to the expiration of the fourteen-day period allowed for the filing of a petition for rehearing, and shall have the effect of staying the issuance of the mandate until further notice from the Chief Judge or the en banc coordinator.

(2) Action: No action shall be taken upon such a proposal until at least five days after expiration of the time for filing a petition for rehearing. If no petition for rehearing is filed, the panel shall then make its recommendation upon the proposal and follow the same procedures as it would upon a petition of a party for rehearing with a suggestion for en banc consideration; if a petition for rehearing is filed, copies thereof shall be distributed to the members of the Court in active service and to any other judge who may have proposed a rehearing en banc.

[1] The provisions of the above paragraph are effective also as to each section of this General Order wherein they appear applicable.

(b) *Request for vote of the Court.*—A member of the Court may, by following the procedure outlined in section 7 of this General Order, request consideration by the Court of the appropriateness of en banc consideration: (1) on his own motion, provided such request is made within the time period specified in section 5; or (2) in response to a panel recommendation rejecting a suggestion or proposal for panel action to initiate rehearing en banc.

6. PANEL RECOMMENDATION

(a) *For rehearing en banc.*—Should the panel to which a case has been assigned determine, sua sponte or upon consideration of a suggestion of a party or a proposal of a member of the Court or of the panel, that the case should be reheard en banc, it shall follow the procedure outlined in section 7.

(b) *Against rehearing en banc.*—Should the panel to which a case has been assigned determine, upon consideration of a suggestion of a party, or of a proposal of a member of the Court or of the panel, that the case should not be reheard en banc, it shall, without taking any other action, so advise the other associates.

A member of the Court in active service, receiving advice from a panel that it does not favor a rehearing en banc, is not required to take any action thereon, in which event it will be assumed that such judge defers to the view of the panel. Any member of the Court in active service, upon receiving such advice, who desires to request en banc consideration may do so within fourteen days from the date of the advice from the panel by following the procedure outlined in section 7 of this General Order.

If no judge requests or gives notice of intention to request en banc consideration within fourteen days of the panel's advice to associates, the panel may then present to the Clerk for filing its order denying the petition and rejecting the suggestion for rehearing en banc.

7. EN BANC CONSIDERATION BY COURT—PROCEDURE

(a) *Recommendation of panel or request of judge.*—(1) Preliminary notice: If a judge wishes to request en banc consideration and cannot prepare his supporting memorandum within the fourteen-day period following a panel memorandum rejecting en banc consideration, or a panel wishes to avoid delay when preparing a recommendation for en banc consideration, the judge or panel shall circulate to associates and to the Clerk the following preliminary notice of intention to seek en banc consideration:

To All Associates and Clerk: Date: _____

PRELIMINARY NOTICE OF INTENTION TO SEEK EN BANC CONSIDERATION

In _____

(Name and Number of Case) (Identification of Panel)

It is (the inention of the panel in the case, my intention) within fourteen days from the above date, to present a (recommendation, request) for en banc consideration in the above entitled case.

_____

Note to Clerk:

Upon receipt of this Notice you will not issue the Court's judgment until notice from the Chief Judge or the en banc coordinator.

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(2) Formal request or recommendation: Circulate memorandum, to reach associates within fourteen days after date of panel memorandum rejecting rehearing, or after preliminary notice, if any, stating that the memorandum constitutes a request or recommendation for en banc consideration under General Order No. 15, indicating the reason for the request or recommendation, and specifying the

question or questions with which the court, en banc, will be particularly concerned. If the Clerk has not been notified by copy of a preliminary notice, the requesting judge or the presiding judge on the panel shall request that the mandate be held until further notice from the Chief Judge or the en banc coordinator.

A panel should not ordinarily make a recommendation to take a case en banc unless and until the members of the panel have first expressed their views in the form of a proposed opinion or opinions which can be circulated with the recommendation.

A judge requesting en banc consideration may express his views in his initial memorandum, or in the form of a dissent or a proposed opinion, or may indicate that a memorandum or opinion will follow within a specified time.

(3) Response: If the request challenges a previously published or circulated opinion, the judge making the request shall invite the author of the challenged opinion to respond within fourteen days so that the members of the Court will have the benefit of an appropriate exposition of conflicting views before proceeding further.

(4) Failure to circulate memorandum: If the requesting judge does not follow through with the memorandum contemplated in 7(a)(2) within thirty days from the date of his formal request, the en banc coordinator shall inquire of the requesting judge concerning his wishes, and if the requesting judge does not desire to circulate a memorandum the en banc coordinator shall place the matter upon the agenda of the Court and Council for resolution at the next available meeting.

(b) *Action upon recommendation or request.*—(1) Time for response: Any member of the Court or panel shall have fourteen days in which to circulate a memorandum in response or to notify the associates of an intent to circulate such a memorandum.

(2) Initiation of voting procedure: Not less than fourteen days after receipt of a memorandum of the kind described in subsection 7(a)(2), and 7(a)(3), if any, and at such time as the record is complete, the en banc coordinator shall call for a vote, by written memorandum addressed to all judges entitled to vote thereon, with information copies to senior judges and members of the panel, or at a Court meeting.

(3) Voting procedure: All available active judges shall vote upon the recommendation or request by sending their votes to the en banc coordinator, with copies to all associates and other panel members. Votes cast before the vote is called for shall be considered tentative only, so that any judge who wishes to do so (including a nonvoting judge) may express his views by a timely memorandum.

(4) Majority vote: The en banc coordinator shall report to the Court when votes reach a majority; if a majority is not reached within fourteen days from the date of the call, the coordinator will request a vote from any judge who has not voted.

(5) Agreement for en banc hearing: If a majority of the members of the Court in active service agree that the case should be heard en banc, an order shall be prepared by the requesting judge or the judge designated by the presiding judge of the recommending panel and forwarded to the Chief Judge for signature and filing with the Clerk, authorizing the withdrawal of the assignment of the case from the panel, providing for a rehearing en banc on a day to be fixed or stating that there shall be no further oral argument, stating whether additional briefs will be accepted or required, and specifying the question or questions with which the court, en banc, will be concerned. A copy of the order shall be supplied to all associates and panel members. The substance of the order, but not the vote upon en banc consideration, shall be communicated to the parties. After the opinion or opinions have been circulated, the en banc coordinator may assist in tallying the votes.

(6) Rejection of en banc hearing: If a majority of the members of the Court in active service vote not to hear the matter en banc, the en banc coordinator shall so advise the panel, which shall then determine what alternative course it shall follow and manifest the same by memorandum, opinion, or entry of an appropriate panel order. A panel order granting or denying a petition for rehearing which incorporated a suggestion for rehearing en banc rejected by the Court shall indicate the rejection, but not the vote thereon. The en banc coordinator shall notify the Clerk that the case has been returned to the panel, which panel shall thereafter be responsible for instructing the Clerk concerning the mandate.

(7) Judge voting in the minority: Whether a majority of the members of the judges of the Court in active service votes either to hear a case en banc or not to so hear the case, a judge voting with the minority shall have the right to request that the dispositive order concerning the en banc vote shall include the recitation of his minority vote. Moreover he shall have the right to file his dissenting views to the majority's action in either voting to take a case en banc or voting not to so take the case.

8. EN BANC COORDINATOR'S DUTIES WITH REFERENCE TO IRREGULAR PROCEEDINGS

(a) *Premature order denying and rejecting.*—When a panel presents to the Clerk for filing an order denying the petition for rehearing and rejecting the suggestion for rehearing en banc, the Clerk shall notify the en banc coordinator. If a panel by inadvertence presents such an order to the Clerk for filing during the running of the time (fourteen days) in which a member of the Court has the right to request a vote, the en banc coordinator shall inform the Clerk that the order is premature and shall instruct the Clerk to hold the order without filing it for twenty-four hours or such other time as the en banc coordinator may designate, but not to exceed the remaining time within which a member of the Court might request a vote.

(b) *Delay of a panel's order.*—Whenever the en banc coordinator causes the Clerk to delay the regular processing of any order presented by a panel, the coordinator shall immediately notify the author of the panel opinion and the senior member of the Court on the panel if the author is not a member of the Court. If no member of the Court calls for a vote within the time prescribed in this General Order, the author of the panel opinion or the presiding judge of the panel shall promptly instruct the Clerk to file the order denying and rejecting the petition for rehearing and the suggestion for rehearing en banc.

(c) *Filing of an untimely petition.*—If a panel allows the late filing of an untimely petition for rehearing with a suggestion for rehearing en banc, and the Clerk does not receive the order allowing the late filing in sufficient time to place copies of the untimely papers in the hands of the members of the Court who were not on the panel which decided the case until after the panel has already decided to deny the petition and reject the suggestion, the time in which a member of the Court may call for a vote does not begin to run until the late petition has been filed by the Clerk.

9. GALLEY PROOF

Whenever there is a request or suggestion for en banc reconsideration the author of the challenged opinion will not correct and return the galley proof to West Publishing Company until the en banc procedure has terminated. If the author of the original opinion is not a judge of this Court, then the presiding judge of the panel issuing the original opinion has the responsibility of assuring that the galley proof shall not be prematurely returned to West Publishing Company.

Mr. WESTPHAL. For example, in paragraph 2(a) of that general order it says: "Any judge in active services may, without awaiting consideration of the suggestion by the panel, request that the en banc coordinator take a vote thereon". And 2(b) provides: "A request by a member of a court for an initial hearing en banc shall be addressed ~~to all~~ members of the court in active service with information copies to senior judges and the en banc coordinator shall call for a vote thereon". And I could go on and recite things from all of these rules contained in your general order number 15 but the thrust of them is that when there has been a suggestion of the necessity for an en banc hearing, either rehearing or initially, that every member of your court in active service is to be notified by the court or by the en banc coordinator of such requests. If it is a rehearing, some initial responsibility is given to the original three-judge panel, that heard it, but in any event, either before the recommendation of that panel, if it is a rehearing, on after the recommendation of that panel, if it

is a rehearing, any active judge on your court may take the position that that matter is important enough so it should be heard en banc and if a majority of the judges on your court agree with him, then that matter is heard en banc.

Is that basically what your procedure is?

Judge CHAMBERS. Yes, sir.

Mr. WESTPHAL. All right. Is it not drawn that way in order to promote this collegiality, this sense of participation which leads then to a willingness to be bound by whatever the law of the circuit is because each and every one of those active judges has had a voice in it? Is that not the purpose for it?

Judge CHAMBERS. Well, you cannot answer that without going into the history of it. Mr. Westphal, I forget the date of these Federal rules of appellate procedure, which forced it on us, the rule that every petition for rehearing should be considered by every member of the court. Prior to that, our rule was that a petition for an en banc was never considered by the whole court unless two members of the panel voted for en banc. Actually it was a very good rule.

Now, today we get about the same number of percentage of cases going en banc as we used to get under the old rule. But here is a terrible burden under this Federal appellate rule that those must be considered by every judge. We spend so much time in meetings arguing over whether we take the case en banc. It is not a loss of time on the cases that we decide to take en banc. It is a tremendous waste of time arguing about the cases we resolve not to take en banc.

Mr. WESTPHAL. Well, I think that gets down to this point, Judge. If what we are looking at, if all we are looking at, is efficiency, we could have the most efficient method by simply saying that any petition for en banc will be submitted to the chief judge of the court and he will rule as to whether it will or will not be heard en banc and you would not waste all that time in the discussion and depending upon the attitude of the chief judge of that court, you may have a lot of en bancs or you may have virtually no en bancs.

Now, it seems to me that the theory of the appellate rules which ordain that every judge of the court shall give consideration to a petition for an en banc hearing, and that whether it is granted or not will be decided by a majority of them, that the theory of that is that each judge should have a voice in it. The common law of this country, and the interpretation given the statutory law of this country, is such that its development and its pursuit in the interests of justice is enhanced on a multi-judge court by this kind of dialogue that goes on and the discussions and the arguments, even though they are heated, that go on when you are considering whether you should even hear it at all and particularly in the discussions you have after you have decided to hear it in conference after you have heard the argument.

Now, that to me, Judge, seems to be fundamental to the Anglo-American system of common law that we have and I think that the committee bill, S. 729, tends to preserve that, whereas I have the impression that the California plan which would exclude 11 judges from any kind of participation in that whatsoever, tends to defeat what has been for 200 years in this country and for many hundred years in England the basic philosophy.

Judge CHAMBERS. That may be so. It would be my guess that the California plan would eventually evolve in a few years into S. 729.

I think, Mr. Westphal, and this is our basic problem, you are assuming that that northwest circuit is dead.

Mr. WESTPHAL. I am not assuming it is dead, Judge. All I am assuming is that it will be some period of time before there will be an actual need for it and a justification for it.

Now, you have told us that you suspect that the California plan, if adopted, would in time develop into a division concept like S. 729. May I ask you this, Judge. Under the California plan you are starting out with the same number of judges provided in S. 729, that is, 20 judges.

Now, if the caseload continues to grow in California and in Arizona and in Nevada and in all other states in your circuit as it has in the past, we will in short order reach the point where 20 judges are insufficient and you are going to need 23 or 25 or 27, and when you reach a court of that size, it would be a situation where again only 9 out of 29 would be participating, 20 would be excluded, whereas under a division concept you would still probably not be exceeding 13 or 14 or 15 judges.

Judge CHAMBERS. Mr. Westphal, I would assume that that is when it would happen, when it had to go above 23.

Mr. WESTPHAL. Do you not think that there may be some advantage in a plan whereby you would start out with a division of 9 and a division of 11 which are relatively compact, where it is very easy to maintain an institutional unity in the sense of collegiality, and then as the caseload grows, you add a tenth judge to one and a twelfth judge to the other and you perfect it and work the kinks out of a new structure and new machinery, so when the day arrives that you are overwhelmed with caseload you are not going to have to suddenly go into a division concept with 14 or 15 judges in each division. Do you see any advantage to that?

Judge CHAMBERS. I see the arguments against the California plan. I simply say that with a court of 25 active circuit judges, we would have had more collegiality than we have had with the way we made up our teams. Today it is just a bailing wire court with the use of district judges. Do not think I am ridiculing any district judge. It is purely an accident that I do not work for them. It was not any selection made on merit. Of course, there are arguments against the California plan but I have no objection to trying it out. But, it is just my opinion, the two things on which I have a dedication are, first, the Commission's hardline across California making it two circuits, and the second, this northwest circuit.

Mr. WESTPHAL. If those are your two main points, Judge, you are going to be satisfied because there is no proposal before the subcommittee that will do that.

Senator BURDICK. Neither one.

Mr. WESTPHAL. I might say this, Judge, that I personally do not want to see you continue with a bailing wire operation. I would just as soon see you get a nice new, brand new combine. Of course, the combine consisting of two divisions.

I have no further questions.

Judge CHAMBERS. Well, thank you. May I comment that I think it is wonderful that through this hearing, or whatever you want to call

it, the last 18 months or 2 years, that we have been able to get through it without any of the bitterness that has accompanied every previous effort to reorganize the ninth circuit. I think it is remarkable that we have had very few sour notes on the thing, and we have tried to keep it on a high level. The commission has and this committee has. And I know the former Solicitor General expressed some unhappiness with us. I might add that we apparently seem to have good rapport with the present Solicitor General. And so I thank you for listening to me.

Mr. WESTPHAL. Mr. Chairman, before the hearing record is concluded, may I just insert this. I found the rule which specified where appeals will be heard, that is, in Los Angeles and San Francisco as the judge and I previously discussed and it is rule 3(c), and I would ask that the rule be inserted in the record.

Senator BURDICK. Without objection it will be received.

[The material referred to follows:]

RULES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Effective July 1, 1968

(Revised as of January 22, 1974)

* * * * * * *

Rule 3

TIME AND PLACE OF HEARINGS

* * * * * * *

(c) Place of Hearings. Appeals and original writ proceedings arising in the Central and Southern Districts of California will normally be heard in Los Angeles. Appeals and original writ proceedings arising in the District of Arizona will normally be heard in Los Angeles or San Francisco. Appeals and original writ proceedings arising in the Northern and Eastern Districts of California and the District of Nevada will normally be heard in San Francisco. Appeals and original writ proceedings arising in the Districts of Alaska, Hawaii, Idaho, Montana, Oregon, Western Washington, Eastern Washington and the Territory of Guam will normally be heard in San Francisco, provided that, upon the written request of any litigant therein filed with the clerk on or before the filing of the first brief therein, that any such appeal or original writ proceeding be heard elsewhere than in San Francisco, the court, or a judge thereof, may order that an appeal or original writ proceeding, if arising in the Districts of Idaho, Montana, Oregon, Western Washington and Eastern Washington shall be heard in Seattle or Portland; if arising in the District of Alaska, shall be heard in a city of the State of Alaska or in Seattle or Portland; and if arising in the District of Hawaii or the Territory of Guam, shall be heard in Honolulu.

The court, upon its own motion, or upon the written request of a party filed with the clerk on or before the filing of the first brief therein, may designate a place of hearing other than as provided in the first paragraph of this rule.

* * * * * * *

Senator BURDICK. We will be in adjournment until 10 a.m. tomorrow morning. The letters and other material that I referred to in my opening statement will now be inserted in the hearing record.

[Whereupon at 12:10 p.m., the subcommittee recessed until 10 a.m. on Wednesday, May 21.]

STATE BAR OF NEVADA,
Reno, Nev., February 12, 1975.

Re Reorganization of Ninth Circuit.

Hon. QUENTIN N. BURDICK,
Chairman, Subcommittee on Improvements in Judicial Machinery, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR BURDICK: I recently succeeded Mr. Thomas A. Cooke as Chairman of the Committee on Judicial Administration of the State Bar of Nevada; and have now acquired his file pertaining to the matter in caption.

The members of the Federal Judiciary in Nevada, as well as membership of the Nevada Bar acknowledge the need to divide the Ninth Circuit into two parts. They would not favor having Nevada transferred into the Tenth Circuit.

The members of the Federal Judiciary in Nevada have both expressed a preference that, if the State of California is divided, Nevada be placed with Northern California rather than Southern California. Predictably, Nevada lawyers are divided on this point—those practicing in Reno and Northern Nevada would like to continue with Northern California; our Las Vegas and Southern Nevada brethren favor association with Southern California. I am informed that a majority of the Nevada-generated caseload in the Ninth Circuit originates in Southern Nevada; and lawyers are more numerous there than in Northern Nevada. These statistics may tilt the balance toward Nevada's being attached to Southern California.

To the best of my knowledge and information, and my ability to express it, the foregoing represents the consensus of Federal judges and lawyers in Nevada. If we may provide any specific information, or otherwise be of assistance in this matter, please feel free to call upon us.

Yours sincerely,

EARL M. HILL,
Chairman, Committee on Judicial Administration.

HAWAII STATE BAR ASSOCIATION,
Honolulu, Hawaii, March 7, 1975.

Reference: S. 720 (94th Congress).

Hon. QUENTIN N. BURDICK,
Chairman, Subcommittee on Improvements in Judicial Machinery, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SIR: The Hawaii State Bar Association supports the objectives sought to be accomplished by this bill and favors the concept for accomplishing those objectives that are stated in the provisions of the bill. We have long recognized that the judges, and the administrative machinery, of the Ninth Judicial Circuit have been badly overworked and unable to keep pace with the ever-increasing caseload. We believe the Committee's bill to alleviate these problems is well designed to accomplish that purpose. We favor its enactment with such amendments as, in the legislative process, may be found to be appropriate.

Yours very truly,

DICK YIN WONG, *President.*

THE MONTANA BAR ASSOCIATION,
Helena, Mont., February 13, 1975.

Senator QUENTIN N. BURDICK,
Committee on the Judiciary
Washington, D.C.

DEAR SENATOR BURDICK: The Montana Bar Association has reviewed copies of the bill and committee report setting forth the proposal to reorganize the 5th and 9th Circuits.

Bearing in mind that Montana constitutes a minor portion of the problem, we make the following comments.

First, we would think a division of the 9th Circuit would be advisable and beneficial to Montana. It would speed appellate procedures.

Secondly, Montana would desire to remain in the 9th Circuit, with access to the Circuit Court of Appeals sitting in San Francisco and Washington and Oregon on Order of the Court.

Montana is in no position to advance any particular plan or idea as to the division other than as set forth.

Obviously, Montana is not in a position to comment on, or indeed, make any determination as to, the advisability of the solution as it relates to California and Arizona.

We conclude briefly, that Montana favors a division of the 9th Circuit, that it remain in the 9th Circuit, with the Court sitting in San Francisco.

Sincerely,

DOUGLAS R. DRYSDALE, *President.*

OREGON STATE BAR,
Portland, Oreg., February 14, 1975.

Hon. QUENTIN N. BURDICK,
Committee on Judiciary, Subcommittee on Improvements in Judicial Machinery, U.S. Senate, Washington, D.C.

DEAR SENATOR BURDICK: Appended hereto are copies of letter writen by us to Oregon senators and representatives. This is in response to your letter of February 6, 1975 addressed to Lynn W. McNutt, Esq., Past Vice President of the Oregon State Bar.

The Board of Governors favors a split in the 9th circuit in the manner set forth in the enclosures.

Very truly yours,

JOHN H. HOLLOWAY,
Executive Director.

Enclosures.

OREGON STATE BAR,
Portland Oreg., February, 11 1975.

Hon. MARK O. HATFIELD,
Senate Office Building,
Washington, D.C.

DEAR SENATOR HATFIELD: Set forth below is an excerpt from the minutes of a regular meeting of the Board of Governors held on January 24, 1975:

"*Division of Ninth Court of Appeals.*—Motion was made, seconded and carried (a) that the Board of Governors reaffirm its support of congressional legislation to split the 9th circuit into two circuits in accordance with the report and recommendation of the Commission to the Congress, the split, in the understanding of the Board of Governors, to result in the creation of two circuits, one to include Arizona and southern California and the other to include northern California and all other states now included in the 9th circuit; and (b) that the Secretary notify the ABA and all Oregon Congressional Senators and Representatives accordingly."

I think that the excerpt from the minutes is self-explanatory. The Board of Governors is the governing body of the Oregon State Bar. No action of the kind taken by the Board of Governors has been taken by the membership of the Oregon State Bar at an annual meeting, but I believe that the consensus of the Board of Governors is the same as that of a great majority of the membership of the Oregon State Bar.

If you have any questions, please let me know.

Very truly yours,

JOHN H. HOLLOWAY,
Executive Director.

Editors note: Other identical letters are omitted.

MOFFATT, THOMAS, BARRETT & BLANTON,
Boise, Idaho, December 17, 1974.

Hon. QUENTIN N. BURDICK,
U.S. Senator, Subcommittee on Improvements in Judicial Machinery,
Washington, D.C.

DEAR SENATOR BURDICK: Your letter of December 2, 1974, to Thomas G. Nelson, President of the Idaho State Bar, together with a copy of a Committee Print of S. 2990, has been forwarded for comment.

I was designated by the Idaho State Bar to participate in the review of this matter at the time the Commission conducted hearings and took testimony concerning the Ninth Circuit.

In my opinion, the needs of the people of Idaho afford judicial services from the federal system would be adequately provided by this legislation. Several well considered proposals have been presented and S. 2990 seems to me to be yet one more. It has the advantage of keeping Idaho grouped with states familiar with the community property laws. The commerce of this area flows heavily toward our neighbors to the west and southwest, making it particularly convenient and reasonable that our judicial affiliations should be with the states of the Ninth Circuit, and, in particular, of what now is suggested to constitute the Northern Division of the Ninth Circuit.

With time and when the controlling considerations permit it, there may be further need for consideration of a new circuit servicing the states of the Pacific Northwest with chambers in Seattle, Washington or Portland, Oregon. At this time, however, the legal history of Idaho and California has so much in common and our ties with San Francisco are so strong that I am sure the proposal you have under consideration will prove convenient and reasonable for Idaho litigants concerned with the federal system. In particular, we see the proposal strengthening the judiciary with additional financial support and, therefore, applaud it as a progressive and worthy proposal.

If there is any thing in addition to this letter, Senator, that I or that the Idaho State Bar can provide to be of assistance in the presentation of the legislation, kindly advise.

Very truly yours,

EUGENE C. THOMAS.

WASHINGTON STATE BAR ASSOCIATION,
Seattle, Wash., February 20, 1975.

Senator QUENTIN N. BURDICK,
Senate Office Building
Washington, D.C.

DEAR SENATOR BURDICK: On February 6th, 1975, in your capacity of Chairman of the Subcommittee on Improvements in Judicial Machinery, you wrote to Kenneth P. Short, the President of the Washington State Bar Association. Mr. Short had a heart attack at about that same time and so has not had an opportunity to reply to your letter.

Just for the record, I wanted to write you to advise you that the Washington State Bar Association favors the creation of a Northwest Circuit and there is considerable material in your file outlining the details of this proposal and supportive material in connection with it. The Washington State Bar Association opposes any division of the current Ninth Circuit which includes us with any part of California.

Our President last year, Cleary Cone, testified in Washington, D.C. in connection with this matter and in the event there if further opportunity for us to be heard, we would appreciate that chance.

With best wishes to you, I am

Sincerely yours,

G. EDWARD FRIAR,
Executive Director.

U.S. COURT OF APPEALS,
NINTH CIRCUIT,
Honolulu, Hawaii, March 24, 1975.

Hon. QUENTIN N. BURDICK,
U.S. Senator,
Washington, D.C.

DEAR SENATOR BURDICK: I have studied the statement of Judge Ben. C. Duniway which was filed with your Subcommittee On Improvements of Judicial Machinery of The Judiciary Committee of The Senate. It pertains to S. 720, 94th Congress, introduced February 18, 1975, to create two divisions of the United States Court of Appeals, Ninth Circuit.

I am in favor of the bill with the modifications suggested by Judge Duniway in his statement, which statement I heartily endorse.

Sincerely yours,

HERBERT Y. C. CHOY.

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT,
Seattle, Wash., March 24, 1975.

Re S. 720.

Hon. QUENTIN N. BURDICK,
U.S. Senate, Senate Office Building,
Washington, D.C.

DEAR SENATOR BURDICK: Thank you for giving us the opportunity to comment on the new subcommittee bill, providing for the reorganization of the

Fifth and Ninth Circuits. I am grateful for the serious attention that you, your colleagues, and your Chief Counsel have given to our problems.

You have already had extended comments by some members of the court. Judge Duniway's memerandum indicates in its final paragraph that I was one of the Ninth Circuit judges who was generally in favor of the bill. He is correct, and I am pleased to endorse it in principle.

Judge Duniway has noted a problem with reference to Section 2 which would require a judge of this circuit to remain with the division which includes the state from which he was appointed. I agree with Judge Duniway that this would be a mistake.

I understand that your subcommittee needs to have a cutoff date which would serve to fix the number of active judges available to staff each of the two divisions, so that you would know how many vacancies would have to be filled. Perhaps, as an alternative to your Section 2, you might provide that each active circuit judge would have to make an election six months prior to the effective date of the act. A new judge who had just taken office would have to make his election at once.

Section 11(d)(1) causes me some trouble in its provision for the convening of a "joint en banc panel consisting of the four most senior judges in regular active service in each division." I agree with Judge Goodwin's comment on this plan. It would be far better, I suggest, to provide either selection of the panel by lot or by a system of rotation. I see no advantages to the seniority system and many disadvantages.

Sincerely yours,

EUGENE A. WRIGHT.

U.S. COURT OF APPEALS,
FOR THE NINTH CIRCUIT.
San Francisco, Calif., March 21, 1975.

Re S. 729—Reorganization of Circuits.

WILLIAM P. WESTPHAL,
Chief Counsel, Subcommittee on Improvements in Judicial Machinery,
Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR BILL: I have examined with care the statement submitted to you by Judge Duniway on March 20, and I wish to confirm personally that I fully agree with all that Judge Duniway has to say.

Sincerely,

JAMES R. BROWNING.

U.S. COURT OF APPEALS,
FOR THE NINTH CIRCUIT,
Portland Oreg., March 4, 1975.

Re S. 729—Reorganization of Circuits.

Hon. QUENTIN N. BURDICK,
U.S. Senator, Washington, D.C.

DEAR SENATOR BURDICK: I agree generally that the draft of S. 729 dated February 18, 1975, presents the best solution proposed so far to the administrative problems of the two largest circuits.

However, if the joint en banc panel in the Ninth should function to keep the two divisions of the circuit pulling in the same direction on California cases, why should it not work the same way on all intracircuit conflicts? Whether or not a decision in one division which is in conflict with a decision by the other division affects "* * * personal or property rights in the same state," a circuit with twenty or more judges ought to have this convenient method available for solving all its intracircuit conflicts. I should think this would also reduce pressure on the Supreme Court.

I would suggest that whenever a majority of the judges eligible to sit on the joint en banc panel are of the opinion that a conflict has occurred within the circuit (and the existence of a conflict is not always free from doubt), the joint en banc panel should have jurisdiction to resolve the conflict.

Under S. 729, we could have a situation in which a panel in the Southern Division decides a case affecting rights in Arizona. The case will, however, establish the law of that division in such a way as to bind the division a week later in a case arising out of the Southern District of California. The following week a Northern Division panel, sitting in San Francisco, could decide

differently an Idaho case which, a week later, would bind the Northern Division in a matter from Northern California. I see no virtue in waiting for the collision to occur within California when it becomes obvious that the two divisions are on a collision course.

Your committee might also want to consider whether the likelihood of purely local-law questions arising from the various California districts is as great as some of the California lawyers are predicting. In the past four years I can think of very few close questions that turned on state law, and none that approached en banc importance. During the same time, however, we have seen different panels create a number of intracircuit conflicts on federal questions affecting rights of individuals all over the circuit. Most of these questions have been resolved by taking one or more cases en banc. Frequently, the question whether or not to take a case en banc is more controversial within the court than the ultimate disposition of it after it has been taken en banc.

I mention these points only to suggest that the bill might be simplified and more useful if it would provide a uniform method for taking en banc all intracircuit conflicts, rather than just the very rare ones that are presently contemplated.

Finally, on the en banc business, I would much prefer that the joint panel members be drawn by lot from time to time as needed. The proposed plan, limiting en banc participation to judges of the top half in seniority, while commendable in terms of experience, could produce unfortunate stratifications on the types of cases most likely to involve policy, and hence most likely to be taken en banc. With the various executives exercising appointive power as they historically have exercised it, one could visualize a joint en-banc panel consisting of appointees of a single administration, systematically overruling inconvenient cases decided by appointees of a different persuasion. Random selection not only would minimize this hazard, but would also minimize perhaps undue speculation by the bar and the press about the degree of the hazard even if in reality it should prove to be largely an illusory one.

Apart from en banc matters, which have been my principal concern because I am presently the en banc coordinator for our court, I have one other suggestion. I wonder if it is necessary or advisable to lock circuit judges into the states from which they were originally appointed. If, prior to the enactment of S. 729, a circuit judge from Tucson or San Diego moved his residence to San Francisco, he shouldn't be compelled to move to Los Angeles merely because his original appointment has marked him as Southern Californian or an Arizonan. I have no present plans to move to Los Angeles, and, indeed, were I living today in Los Angeles I might be sorely tempted to move to Portland, but I would prefer not to have my option foreclosed by act of Congress.

I appreciate your thoughtfullness in keeping us informed.

Yours very truly,

ALFRED T. GOODWIN,
U.S. Circuit Judge.

U.S. COURT OF APPEALS,
NINTH CIRCUIT,
Portland, Oreg., December 10, 1974.

Re Reorganization of Fifth and Ninth Circuits.

Hon. QUENTIN N. BURDICK,
Chairman, Subcommittee on Improvements in Judicial Machinery, Committee on the Judiciary, Dirksen Office Building, Washington, D.C.

DEAR SENATOR BURDICK: I am fascinated with the Committee Print of S. 2990, dated December 2, 1974, and the Report of the Subcommittee.

It seems to me that the proposed legislation retains all, or practically all, of the worthwhile proposals of Chief Judge Chambers and the Oregon judges. The fact that the present proposal does not include certain administrative features suggested in the Oregon plan is of no major consequence. Needless to say, I have not had an opportunity to study the Subcommittee's proposal in detail. Thus far, it seems quite acceptable.

I note the proposal uses "en banc", rather than "en banc." Inasmuch as "in banc" is presently used in both 28 U.S.C. § 46 and Rule 35, Federal Rules of Appellate Procedure, I suggest that "in banc" should be carried forward in the present proposal.

The proposed legislation might be more acceptable to some of the circuit judges if it contained a grandfather clause under which circuit judges in of-

fice, on the effective date of the legislation might move from division to division on the consent of the division chiefs.

My congratulations to you and Mr. Westphal on what I believe to be a significant move in the right direction.

Sincerely,

JOHN F. KILKENNY.

U.S. COURT OF APPEALS,
NINTH CIRCUIT,
Portland, Oreg., March 6, 1975.

Re S. 729, Reorganization of Circuits.

Hon. QUENTIN N. BURDICK,
Chairman, Subcommittee on Improvements in Judicial Machinery,
Committee on the Judiciary,
Dirksen Office Building, Washington, D.C.

MY DEAR SENATOR: In general, I agree with everything that is said in Judge Goodwin's letter to you dated March 4th.

However, I hold firmly to the view that what the Ninth Circuit needs, more than anything else, is the creation of a substantial number of new circuit judgeships. The need is now.

Sincerely,

JOHN F. KILKENNY.

U.S. COURT OF APPEALS,
NINTH CIRCUIT,
Phoenix, Ariz., March 24, 1975.

Re S. 729—Reorganization of Circuits

Hon. QUENTIN N. BURDICK,
U.S. Senator,
Washington, D.C.

DEAR SENATOR BURDICK: I had not thought it necessary to burden your subcommittee with my views on S. 729 since others have heretofore expressed my concerns with its technical problems. However, the views of judges are now being offered by name and it is thus fitting that I briefly add mine to the collection.

At the present time I am an active judge of the United States Court of Appeals for the Ninth Circuit. It has been my privilege to serve in that position for five and one-half years.

I have from the beginning felt that given more judges and adequate supporting staff, the Ninth Circuit could satisfactorily handle its work load without any deterioration in quality or loss of expedition. During a period of several years in the 1960s when the volume of cases was increaing at a near explosive rate the court did not have the judges or the staff support to handle the filings, and the increase of filings over dispositions created a backlog that required emergency action. The court was thereafter increased in numbers, and in recent years we have obtained more staff assistance. We have developed procedures to expedite dispositions. Our criminal case backlog has disappeared and if we are given more judge and adequate staff and the court is promptly maintained at full strength, in my opinion we can continue the Ninth Circuit intact and at the same time avoid the problems known and unknown that are involved in a split or in two divisions.

With respect to the number of additional judges, I would like to see the court have four to six additional active judges immediately and an evaluation made of the needs of the clerk's office and legal staff.

I do not believe a court of seventeen or even nineteen (an odd number suits us best for en banc situations) would be an impractical number for purposes of panel consideration and occasional en banc sitting. The en banc situations could be worked out on a lesser number that the full court, perhaps with a rotating membership.

In my consideration of the bill I have not addressed the technical problems of dividing California either by splitting the circuit or by creating two divisions. The latter alternative appears to me to contain all of the problems of the first. These difficulties have been analyzed by Judge Hufstedler and by representatives of the California bar. I would subscribe to those same concerns and urge the subcommittee to adopt a plan along the lines of the less radical surgery that I have outlined.

I also note with concern the fact that in the first draft of the bill judges were given a deadline for making a choice of residence and circuit. In later drafts that choice has been omitted. The right of a judge to select his residence at any location within the circuit has been his throughout the history of the court. Whatever my personal choice may be, I would like to see that opportunity restored.

Yours sincerely,

OZELL M. TRASK.

U.S. DISTRICT COURT,
DISTRICT OF MONTANA,
Missoula, Mont., March 24, 1975.

Re S. 729; Division of the Ninth Circuit.

Hon. MIKE MANSFIELD,
U.S. Senate,
Washington, D.C.

DEAR MIKE: I am writing with respect to S. 729 which divides the Ninth Circuit into two divisions. I have talked with Judges Jameson and Battin (Judge Murray is ill and I could not reach him) and they agree with me that S. 729 is a competent solution for a difficult problem. We all think that if the Circuit were increased in size to 20 judges, which is about what is needed, it would be completely unmanageable. We all think that any division of the Circuit which leaves California (which produces 64.2% of the business) intact would not solve anything. The division of the district into divisions will speed up the disposition of appeals from Montana and has no disadvantages so far as Montana is concerned.

With kindest personal regards,

Sincerely,

RUSSELL E. SMITH.

U.S. COURT OF APPEALS,
FOR THE SIXTH CIRCUIT,
Cincinnati, Ohio, December 11, 1974.

Re S. 2990.

Hon. QUENTIN N. BURDICK,
Chairman, Subcommittee on Improvement in Judicial Machinery,
U.S. Senate, Washington, D.C.

DEAR SENATOR BURDICK: In response to your letter of December 2, 1 have examined your proposed revision of the Bill for the reorganization of the Fifth and Ninth Circuits.

I consider your amendment to be a masterpiece in the art of compromise of a question which appeared to be beyond solution. I think your proposal for an en banc solution of conflicts between the two divisions of the Ninth Circuit with respect to California cases is a stroke of genius.

I am happy that the House Judiciary Committee yesterday approved S. 663, which you sponsored in the Senate. I am sure that every federal Circuit and District Judge in the United States and every Justice of the Supreme Court join me in the hope that the House will pass this Bill and send it to the President before the adjournment of the present Congress.

I had an interesting visit with Mr. Westphal while I was in Washington. The good work of your Subcommittee is appreciated by the federal judiciary.

Sincerely,

HARRY PHILLIPS,
Chief Judge.

PEPPERDINE UNIVERSITY,
SCHOOL OF LAW,
Anaheim, Calif., March 14, 1975.

Re Reorganization of Ninth Circuit.

Hon. QUENTIN N. BURDICK,
Judiciary Committee,
Old Senate Office Building,
Washington, D.C.

DEAR SENATOR BURDICK: I am writing to express concurrence with the reorganization and the compelling need to divide the State of California where

in excess of two-thirds of the caseload now originates. The current practice (called "expediency" in the Senate Report) of assigning district court judges to sit on panels of the circuit courts in order to handle their caseload (a) is not consistent with the concept of having appellate judges handling appeals, and (b) has not resulted in avoiding the excessive delay extant today.

Accordingly, I wish to express disagreement with the apparent view of the San Francisco Bar Association Special Committee calling for a "crash program of special panels to reduce the large backlog" and the concept of simply adding many more judges to an already unmanageable circuit. This "fire-fighting" approach can be disastrous if followed by your Committee solely to appease those who recommend "that the State of California be kept intact."

There exists no "fundamental" reason for preserving the unity of California as an "institution" in the Federal Court System. In fact, the greatest advance in this system since the previous century will be the division of the circuit recommended by the Commission on Revision of the Federal Court Appellate System—at least insofar as diversity cases are concerned. In my view, the mere existence of two divisions or circuits in this state may force each of them to thoroughly consider judgments of its counterpart (to North or the South as the case may be) because the divergence itself may constitute the necessary element to achieve review by the U.S. Supreme Court or, if not, the State of California through its courts or its legislature may then choose to resolve any such divergence—which itself is a healthy process in these increasing instances where the circuit courts have taken over the legislative process and done so in different ways. Judge Duniway of the Ninth Circuit has testified that in 13 years of the federal bench he has never heard of conflict of opinions among the three-judge courts; however, assuming some conflicts do arise between two circuit courts in interpreting California law, this is not a fundamental reason against "splitting" a state under our federal system.

Sincerely,

W. NOEL KEYES,
Associate Professor of Law,
Director of Clinical Law.

OFFICE OF THE ATTORNEY GENERAL,
DEPARTMENT OF JUSTICE,
Sacramento, Calif., February 14, 1975.

Re S. 2990, Committee print December 2, 1974: Realignment of 9th Judicial Circuit.

Hon. QUENTIN BURDICK,
Chairman, Subcommittee on Improvements in Judicial Machinery, U. S. Senate Judiciary Committee, Washington, D.C.

DEAR SENATOR BURDICK: We appreciate receiving the revised Committee print of S. 2990 with the Committee's proposed report of same date.

This revision represents a substantial improvement over the original proposal of the Commission on Revision of the Federal Court Appellate System on Revision of the Federal Court Appellate System. We are grateful for the patience and thoughtfulness which the Subcommittee has given us, and for the thoughtful manner in which the objections of this office and others have been noted in the course of hearings on that proposal.

As revised, S. 2990 does not split the State of California into two separate judicial circuits. Instead, however, it creates two divisions within the existing Ninth Circuit; a northern diivsion composed of nine judges and consisting of Alaska, the eastern and northern districts of California, Hawaii, Idaho, Montana, Oregon, Washington, and Guam; and a southern division staffed by eleven judges and composed of Arizona, the central and southern districts of California, and Nevada.

Cases and controversies in the two divisions are to be heard and determined by a panel of not more than three judges, unless a hearing or rehearing before the court en banc is ordered by a majority of the judges of the circuit or division who are in regular active service (Section 46c).

Thus, for all practical purposes the creation of two divisions, each with its own provision for separate en banc hearings, could result in the same conflicts in the interpretation of laws applicable to the entire State of California as those which we had anticipated in our previous testimony before the Subcom-

mittee. In earlier testimony we had indicated several possible problems which could be caused by the creation of two separate circuits in the State of California.

1. Actual conflict between decisions of the two courts of appeal.

2. The uncertainty resulting from potential conflict from the decisions of two state courts of appeal.

The amended S. 2990 proposes to meet the problem of actual conflicts by providing for a joint "en banc" panel, consisting of the four most senior judges in regular active service in each division, which would be convened by the senior chief judges of the two divisions in either of two instances:

1. Upon certification of a conflict between any decision by a division and that of the other division and affecting the validity, construction, or application of any statute or administrative order, rule, or regulation, state or federal, which affects personal or property rights in the same state; or

2. Upon petition of a party filed within ten days of a decision by the division which is in conflict with the decision of the other division. Sec. 46(d), Sec. 1291.

This proposal, while representing an improvement over the one previously made, presents several serious problems:

1. It fails to deal with the possibility of conflict which must necessarily give uncertainty to state programs of statewide application, as well as to the enterprises of private business.

2. It creates the possibility of four separate layers of judicial decision-making before certainty may be reached:

a. The decision of the federal district court.

b. The decision of a panel of the court of appeal of one division.

c. The decision en banc on petition for rehearing of the same division.

d. The decision of the joint en banc tribunal.

Thus, the proposal would cause additional time and duplication rather than streamlining the judicial process. As an alternative, we propose augmentation of the existing court by seven judges, retention of the present administrative structure, and utilization of a reduced en banc panel for all en banc proceedings of the court. Such an en banc court of nine judges should be able to reconcile both potential as well as actual conflicts.

The manner of selection of the joint en banc panel would necessarily be controversial. However, such controversy cannot be avoided and would exist in any event in the creation of the joint en banc panel contemplated by S. 2990 in its amended form. Seniority as one possible basis—as contemplated in the revised bill—would be acceptable. However, the Subcommittee should consider the possible need for added flexibility. One solution might be the delegation to the court of the authority to provide for other selection procedures by rule.

Additionally, the Subcommittee should consider the desirability of establishing criteria by which the en banc hearing would be granted. And, as we expressed in previous testimony, more thought should be given to the initial question of federal jurisdiction, which has expanded so widely over past years. We hope to have the opportunity of commenting in more detail on these matters in the near future.

We appreciate the courtesy and consideration of the Subcommittee in providing us with this revised bill and soliciting our comments. Senate Bill 2990 has been substantially improved over previous versions. However, it remains a measure that could cause serious problems for this State. We respectfully urge the Subcommittee to adopt the additional modifications set forth above. The addition of needed judges and adoption of a smaller, more workable en banc panel would, we believe, meet the demonstrated needs of the Ninth Circuit and at the same time avoid possibly serious impediments to the effective administration of state programs.

Your Subcommittee Counsel has advised us that a new bill will be introduced in the near future. We respectfully request an opportunity to analyze it, to provide written comments, and to testify at any further hearings the Subcommittee may hold on this subject.

Very truly yours,

EVELLE J. YOUNGER, *Attorney General.*

OFFICE OF THE ATTORNEY GENERAL,
DEPARTMENT OF JUSTICE,
Sacramento, Calif., April 25, 1975.

Re S. 729: Reorganization of the Ninth Circuit.

Hon. QUENTIN BURDICK,
Chairman, Subcommittee on Improvements in Judicial Machinery, U.S. Senate Judiciary Committee, Washington, D.C.

DEAR SENATOR BURDICK: This is with reference to the rescheduled hearings on S. 729 now set for May 20 and May 21 before your Subcommittee on Improvements in Judicial Machinery. I regret that we will be unable to appear at these continued hearings. We respectfully request that the statement heretofore filed with the Subcommittee be made part of its record.

We wish to reiterate our appreciation of the willingness of the Subcommittee and its staff to discuss constructive approaches to the problems of the workload in the Ninth Circuit. At the same time, we must re-express our strong concern over a proposed reorganization which would, in effect, split the circuit into two separate parts and cause unnecessary delay in the resolution of important questions affecting the State as a whole. We respectfully suggest that the best solution is that proposed by the State Bar and discussed by Justice Hufstedler in her testimony at the March hearings.

We recommend that the Ninth Circuit immediately be increased to 20 judges, and that a nine-judge "en banc" panel be established, based initially on seniority as Justice Hufstedler suggested.

Please feel free to contact us should additional questions or issues arise in the course of your consideration of this legislation.

Very truly yours,

EVELLE J. YOUNGER, *Attorney General.*

STATEMENT OF CALIFORNIA ATTORNEY GENERAL EVELLE J. YOUNGER

We join with this Subcommittee in recognizing that efforts are needed to deal with the growing workload and administrative problems of the Ninth Circuit. Senate Bill 729 represents an imaginative and improved vehicle for dealing with these serious problems. It provides for a thoughtful and needed procedure, for imposing relative uniformity on local rules of procedure. It would give the Ninth Circuit a badly needed increase in judicial manpower by increasing the total number of judges from 13 to 20. We join the Subcommittee and its Chairman in urging that these actions be taken to solve the Ninth Circuit's pressing workload problem.

However, we suggest that Senate Bill 729, in its present form, creates serious possibilities of confusion and delay in obtaining needed finality in federal decisions affecting state law and the implementation of state programs. Senate Bill 729 would, in effect, divide the State of California and provide additional delay in the finality of federal decisional law. In its 1973 report, the Commission on Revision of the Federal Court Appellate System stated: "Except for the most compelling reasons, we are reluctant to disturb institutions which have acquired not only the respect but also the loyalty of their constituents." Report, Commission on Revision of the Federal Court Appellate System (December, 1973). Clearly, this bill would have that effect.

Senate Bill 729 creates two divisions within the existing Ninth Circuit: divisions which in effect would divide the eastern and northern districts of California from the central and southern districts. Cases in the two divisions would be heard and determined by three-judge panels unless a hearing or rehearing before the court en banc were ordered. Sec. 46c. Thus, for all practical purposes, the creation of two divisions, each with its own provision for separate en banc hearings, could result in the same conflicts in the interpretation of laws applicable to the entire State of California as those which we had anticipated in our previous testimony before the Subcommittee with respect to S. 2988–2990 last year. In this earlier testimony we had indicated

several possible problems which could be caused by the creation of two separate circuits in the State of California:

1. *Actual conflicts* between decisions of the two courts of appeal.

2. The uncertainty resulting from *potential conflicts* between the decisions of two courts of appeal not yet handed down.

Senate Bill 729 proposes to meet these problems by providing for a joint en banc panel consisting of the four most senior judges in regular active service in each division, which would be convened by the senior chief judges of the two divisions. The joint en banc panel would have jurisdiction only over decisions of one division which (1) conflict with a decision of the other division, and (2) affect "the validity, construction, or application of any statute or administrative order, rule, or regulation, State or Federal, which affects personal or property rights in the same state." Sec. 129(b).

This proposal presents several problems:

1. It creates the possibility of five separate layers of judicial decision-making before certainty may be reached:

a. The decision of the federal district court.

b. The decision of a panel of the court of appeal of one division.

c. The decision en banc on petition for rehearing in the same division.

d. The decision of the joint en banc tribunal.

e. An ultimate review by the U.S. Supreme Court.

And, of course, prior or concurrent state court proceedings could and often do occur.

2. By requiring an *actual* conflict between divisions of the circuit, this provision fails to deal with the *possibility* of conflict which must necessarily give uncertainty to state programs of statewide application, as well as to the enterprises of private business. This possibility cannot be taken lightly. In our previous statement to the Subcommittee we pointed out, for instance, that there is an urgent necessity for finality now with respect to such important rules of statewide applicability as:

a. The ownership of geothermal resources in lands patented by the federal government and subject for reservation of minerals, *U.S.* v. *Union Oil Co. et al*, 369 Fed. Supp. 1249.

b. Interpretation of the various federal statutes involving the welfare program, e.g., *Bryant* v. *Carleson*, 444 Fed. 2d 353; 465 Fed. 2d 111 (9th Cir. 1972); and *Homemakers Inc.* v. *Div. of Industrial Welfare*, 356 Fed. Supp. 1111 (N.D. Calif., appeal pending); and

c. California's billion dollar water project, which runs the length of the state with projected deliveries to 30 water distribution agencies, and is presently challenged on multiple grounds in the Northern District of California in *Sierra Club* v. *Morton et al*, No. C–71–CBR.

We further pointed out the existence of at least 23 federal statutes granting direct state appeal to the Ninth Circuit from federal actions in such diverse programs affecting this state as educational aid, student incentive grants, tax revenue sharing, EPA water quality actions, and state community grants for the aging, as well as LEAA grants.

3. Proposed section 1291(b) requires a decision affecting a statute or administrative order, rule, or regulation of the State or Federal government. In so doing, it ignores the real possibility for uncertainty in the administration of criminal law raised by the invalidation of a city or county ordinance. Identical or similar ordinances may be and are adopted by various local governments, and their constitutionality may be differently interpreted. For instance, the California Supreme Court has upheld the validity of certain topless ordinances of both Sacramento and Orange Counties, and certiorari has been denied by the U.S. Supreme Court, *Reynolds* v. *City of Sacramento*, *Crownover* v. *Musick*, 9 Cal. 3d. 405, cert. denied 415 U.S. 931 (1974). However, in a similar case in the Second Circuit, a contrary decision was reached and probable jurisdiction noted by the U.S. Supreme Court, *Salem Inn Inc.* v. *Frank*, 501 Fed. 2d 18, probable jurisdiction noted, No. 74–337. Last fall, we pointed out to the Subcommittee a number of fields in the criminal law in which diversity of decision would have adverse effects on the uniform administration of justice. These decisions have proliferated even since our last statement. They include:

a. *Prison regulations.* We pointed out last year that the Department of Corrections maintains institutions throughout the state. Different rules from dif-

ferent circuits or divisions of the same circuit could raise insurmountable administrative problems in such areas as prison management and control, i.e., *Procunier* v. *Martinez*, 416 U.S. 396 (mail regulation and access to media); *Pell* v. *Procunier*, 417 U.S. 817.

b. *State habeas corpus.* The applicability of review to state habeas corpus is in doubt. Contrary to the state's interpretation, the Ninth Circuit has held that denials without opinion in state habeas corpus cases are to be considered as rulings on the merits, *Harris* v. *California*, 500 Fed. 2d 1124 (petition for cert. pending).

c. *Probation revocation.* The revocation of probation cases is still in considerable confusion. Since the decisions of the U.S. Supreme Court in *Morrissey* v. *Brewer*, 408 U.S. 417 and *Gagnon* v. *Scarpelli*, 411 U.S. 778, numerous cases have arisen and are pending relative to the law concerning state prisoners. Diverse decisions are a possibility until resolved by the U.S. Supreme Court, cf. *McDonnell* v. *Wolff*, 418 U.S. 539 (1974).

d. *Post conviction remedies.* In this field, federal courts have deviated from state interpretations and contrary results have been reached. In *Michigan* v. *Tucker*, 94 Sup. Ct. 2357, the circuit court was reversed. The Supreme Court has currently granted certiorari in two other cases involving the same problems, *Brown* v. *Illinois*, 73-6650 and *Oregon* v. *Haas*, 73-1452.

e. *Federal procedural rules.* As we pointed out previously, in the Central District of California local rules were adopted permitting magistrates to hold evidentiary hearings in habeas proceedings involving state prisoners. However, in *Wingo* v. *Wedding*, 418 U.S. 461 (1974), a similar rule, adopted by the District Court of the District of Kentucky, was held invalid.

f. *Pornography law.* State law enforcement was presented with conflicting decisions in the field of pornography. For instance, in *People* v. *DeRenzy*, 275 Cal. App. 2d 380, the State Court of Appeal held that a prior adversary hearing was not required, whereas a contrary result was reached by the Ninth Circuit in the same case, *Demich* v. *Ferdon*, 426 Fed. 2d 643 (1970). As a result of a decision in *Heller* v. *New York*, 413 U.S. 483 (1973), the result of the *Demich* case was overturned. However, in the meantime state law enforcement was presented with conflicting decisions.

We should not have to wait for the decision of yet another en banc court if indeed such a hearing is granted to resolve such questions.

AN IMMEDIATE REMEDY IS AVAILABLE

We suggest that there is considerable merit in Senate Bill 729, and that if the objectionable added layer of review in the form of a federal joint en banc proceeding is eliminated, the bill should be adopted. In this respect we concur with the recommendations of the State Bar of California, which has filed thoughtful suggestions. We propose, therefore, that the Subcommittee take prompt action to recommend legislation which does the following things:

1. Adds 7 judges to the Ninth Circuit. The need for such additional manpower is beyond doubt.

2. Retains provision for the review and implementation, to the extent practicable, of uniformity of rules throughout the Circuit.

We are mindful of the administrative difficulties inherent in providing en banc hearings by a 20-judge court. We suggest that a constructive alternative is provided by the State Bar proposal for en banc hearings by a nine-judge court to be selected on the basis of precedence. A joint en banc court for all purposes would be able to reconcile both potential as well as actual conflicts. Initially it should utilize criteria set forth in Federal Rules of Appellate Procedure, 35a, i.e., hearings should be granted:

a. When consideration by the court en banc is necessary to secure or maintain uniformity of its decisions; or

b. When the proceeding involves a question of exceptional importance.

However, in light of the increasing need for uniformity of decision, we suggest an additional criterion be adopted and incorporated in the Subcommittee's bill if the joint en banc panel is established. As the Subcommittee's 1974 report points out, en banc decisions have been rare during past years in the Ninth Circuit. We suggest that a third criteria be included for en banc jurisdiction; i.e., on certification of the U.S. or State Attorney General that an

actual or potential conflict of significance exists between the decisions of the two panels of the court. Such a criterion would ensure prompt resolution of those questions of statewide importance which should be resolved promptly if the state is to conduct its business and adequate certainty is to be provided. At the same time, by limiting such certification to the U.S. or California Attorney General, there is some assurance that the en banc court will not be swamped with work.

The federal judiciary is inextricably enmeshed with the laws and programs of the State of California. To the extent that simplicity and finality can be given to its decisions, the people of California will benefit. We stand ready to work with the Subcommittee toward achieving such laudable goals.

CIRCUIT REALIGNMENT

WEDNESDAY, MAY 21, 1975

U.S. SENATE,
SUBCOMMITTEE ON IMPROVEMENT IN JUDICIAL MACHINERY,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:10 a.m., in room 2228, Dirksen Senate Office Building, Senator Quentin N. Burdick (chairman of the subcommittee) presiding.

Present: Senators Burdick (presiding, and Scott of Virginia).

Also present: William P. Westphal, chief council; William J. Weller, deputy counsel, and Kathryn Coulter, chief clerk.

Senator BURDICK. In the last Congress, the subcommittee held 6 days of hearings on legislation proposing to reorganize the fifth and ninth circuits as recommended by the Commission on Revision of the Federal Court Appellate System. Today is our fourth day of hearings on the same subject matter in the 94th Congress. Hopefully, it will be our last day of hearings.

Today we have scheduled two witnesses representing the Bar Association of the State of California, who are here to support the Tunney-Cranston printed amendment to S. 729. As I stated yesterday, the printed amendment was suggested by the California Bar Association. It proposes an alternative solution to the problems of the ninth circuit. While S. 729 proposes two divisions, one a nine-judge division and the other an 11-judge division, the proposal of the California State Bar Association, which Judge Chambers refers to as the "California Plan", would have all 20 judges appointed to one court, with only nine of the judges serving as the en banc court.

Before calling our first witness, let me say that the subcommittee will now receive the prepared statement of Judge Ben C. Duniway of the ninth circuit. Judge Duniway had intended to be present today, but I am advised that, unfortunately, he has injured his back and upon medical advice, he could not travel cross country to our hearing. I might say that I regret Judge Duniway's inability to be here. His statement addresses itself to several important points and he makes several suggestions for perfecting amendments. I urge all to read his statement.

[The prepared statement of Judge Duniway follows:]

STATEMENT OF BEN. C. DUNIWAY, U.S. CIRCUIT JUDGE, NINTH CIRCUIT

Mr. Chairman and Members of the Subcommittee: My name is Ben. C. Duniway and I am a United States Circuit Judge, an active member of the United States Court of Appeals for the Ninth Circuit. I have been a member of the

56-832—75——11

court for thirteen years, and before that, I was a Justice of the District Court of Appeal, First District, Division One, of the state of California at San Francisco. I began the practice of law in San Francisco in 1933, and practiced there until 1959, except for a five and one-half year interval, 1942 to 1947, as a government attorney and administrator during World War II.

Last fall I appeared before you in support of the recommendation of the Commission on Revision of the Federal Court Appellate System that the Ninth Circuit be divided into two circuits: a new Twelfth Circuit embracing the Central and Southern Districts of California and the states of Arizona and Nevada, and a new Ninth Circuit embracing Alaska, Washington, Oregon, Idaho, Montana, Hawaii, Guam and the Eastern and Northern Districts of California. I also filed a statement in which I set out in detail my reasons for favoring the Commission's recommendation.

I now appear before you in support of S.729, which accomplishes most of the things that would have been accomplished by the recommendation of the Commission, but, instead of dividing the Ninth Circuit into two new circuits, creates within the Ninth Circuit two divisions—a Northern and a Southern Division, each of which would have the same territorial jurisdiction as the two new circuits that the Commission proposed.

In the statement that I filed with the Committee last fall, I gave reasons why I opposed a suggestion that had been made by some of my colleagues on the Court of Appeals for the creation of two new divisions within the circuit. In my opinion, S.729 answers practically all of those objections. As I stated in a letter that I wrote to the Chairman of your Committee under date of December 19, 1974, to me the most important features of S.729 are first, that it creates two substantially independent courts small enough to function efficiently as collegiate bodies, and second, that it provides sufficient judicial manpower to enable each of those courts to catch up its backlog and to keep current with its work. I do not intend to repeat the testimony that I gave before your Committee last fall nor the arguments that I set out in the statement that I then filed. My purpose in appearing before you now is to indicate why I support S. 729, and to answer as best I can some of the objections that have been made to S. 729.

The workload situation of the Court of Appeals for the Ninth Circuit as I described in my statement has not changed materially. During the first half of fiscal 1975 (July through December, 1974), the number of appeals filed was 162 less than were filed during the corresponding period in fiscal 1974 (the months of July through December, 1973). It appears, however, that this drop is temporary. During the first two months of 1975, 527 appeals were filed as compared with only 443 in the first two months of 1974. This is the highest number of cases filed in January and February in any year. On March 11, 1975, there were 601 civil cases fully briefed but not calendared. Some are two years or more old. The figure is the same as it was last September. We have not fallen further behind, but neither have we gained. Thus the caseload problem which I described in my previous statement still exists without any substantial relief. Moreover, the problems arising from the extended geography of the circuit are still with us and they are still contributing to our problems of internal administration and to our problem of maintaining the collegiality of the Court of Appeals for the Ninth Circuit. Thus all of the reasons for dividing the circuit that then existed are extant today.

I favor S. 729, in spite of the fact that it creates two new divisions rather than two new circuits, for two reasons. First, as I read the bill, each division will for nearly all purposes be a separate court functioning as such, and independent of the other division. Each division will be of such a size that it can function as a collegiate court ought to function. The amount of travel required will be reduced. (The reduction will be greater in the Southern Division, which will have the larger caseload, than in the Northern Division.) Moreover, the volume of paper flowing through the Clerk's office in each division will be far less than the volume of paper now flowing through our Clerk's office. That office is swamped and is not able to render efficient service either to us or to the Bar. In addition, with the additional manpower to be provided for each division, there will be enough active judges so that they should be able to handle the entire caseload without the necessity of bringing large numbers of visiting judges to sit with the court as we have been doing during the past several years. For example, in 1974, we had 59 different visiting judges who sat with us. This has produced a reaction from members of the Bar which is

epitomized in a statement made by one of them—that as it now functions the Ninth Circuit is not a court but a judicial slot machine.

Second, the bill provides what seems to me to be a reasonable answer to the fears of members of the Bar and others in California that somehow there will be numerous conflicts between the two divisions about what the law of California is, and about the application of federal law within California. This is accomplished through the creation of a special en banc panel (the joint en banc panel), which is provided for in Section 11 of the bill, adding subdivision (d) to 28 U.S.C. § 46. The jurisdiction of that panel is defined in Section 25 of the bill by amendment to Title 28 U.S.C. §1291, subsection (b).

The principal objections to the bill appear to be of two sorts. One comes primarily from the California Bar which is opposed to any action which appears to divide the state of California. A part of this opposition, I am sure, is sentiment, and, as a Californian, I share the sentiment, but I am not willing to see sentiment defeat what appears to me to be a valid and sensible solution to a most serious problem. The major objection stems from a fear that there will be conflicts between the two divisions as to what the law of California is, or as to what the federal law as applied in California is, or both.

In the statement that I filed last fall, I stated at some length the reasons why I believe that these fears are largely unjustified. My view was based, and is now based, on more than thirteen years of experience as a member of this court. In my statement I pointed out that under the present division of responsibility between district courts in California, including the three-judge district courts, such conflicts have not been a problem. So far as I know, the Supreme Court has never had to exercise its direct appellate jurisdiction over decisions of the three-judge courts sitting in the various California districts for the purpose of reconciling conflicts between them. Similarly, so far as I know, this court has never had to exercise its appellate jurisdiction for the purpose of reconciling conflicts between single district judges sitting within California as to California law or the application of federal law in California. I recognize that there is a possibility that such conflicts can arise between two autonomous divisions, each having jurisdiction over a part of California, but I see no reason to believe that such conflicts would be any more likely between those two courts than they have been between three-judge district courts or single-judge district courts in the past.

I think, too, that the method of settling those conflicts, which is provided for by means of the joint en banc panel established in the bill, is a sensible and simple method of solving those conflicts. I find it impossible to believe that the members of the joint en banc panel, knowing their responsibility to the law and to the Bench and Bar and people of California, would decline to settle such conflicts if any should actually arise.

The other principal objection to the bill is based upon what I believe to be a misconception of what the bill does. It is stated at length in the statement of my colleague, Judge Hufstedler, which she has filed with you. I am convinced that her objections, and similar objections coming from the Bar of California, are based upon a misconception about the bill.

As I understand the bill, each division will be, in fact, a separate court of record just like any other circuit court. It can settle conflicts of the type that arise within its jurisdiction, that is, conflicts between its own panels, by sitting en banc in the same manner in which all other circuit courts sit. If there were a conflict between the Northern and Southern Divisions, of a sort that does not fall within 28 U.S.C. § 1291(b), as it would be amended by Section 25 of the bill, that conflict will be settled in the same manner as that in which conflicts between circuit courts are now settled, namely, by the Supreme Court of the United States. Thus there will be no more layers of courts to go through in relation to such questions than there now are. The only difference will be that there will be thirteen courts, conflicts between which must be resolved by the Supreme Court, rather than eleven. This will undoubtedly add something to the workload of the Supreme Court, but I do not think that it will add enough to make an appreciable difference in that workload. Moreover, there are now pending before the Commission on Revision of the Federal Court Appellate System proposals for the creation of some kind of national court which will help to relieve the Supreme Court of some of its burdens, and specifically the burden imposed by inter-circuit conflicts. I suggest that this is the best manner in which to solve the problem of conflicts between circuits and divisions.

Again, as I understand the bill, there will be no overall en banc court of the entire circuit which will undertake to dispose of conflicts between the two divisions that do not fall within the special jurisdiction of the new joint en banc panel.

The joint en banc panel provides a different level of review, but I feel confident that in operation it will not be an additional level of review. Under the rules of the courts as they now stand, a party seeking a hearing en banc must seek it within the time within which he can petition for a rehearing by the panel. Our experience has been that a high proportion of petitions for a rehearing carry with them a suggestion for a rehearing en banc. I would expect this practice to continue. If a petition for a rehearing en banc is based upon a claimed conflict between divisions falling within the new jurisdiction of the joint en banc panel created by § 1291(b), that petition would be considered by the joint en banc panel rather than by the judges of the division involved. Thus there would be but one hearing en banc for such a case. The difference would be that the hearing would be before the joint en banc panel rather than by the division sitting en banc.

It is conceivable that in a particular case a division would have heard the case en banc and thereafter the joint en banc panel, feeling that there was a conflict affecting California between the decision of that division and a decision of the other division, would then take the case to be heard before the joint en banc panel. To that extent there might be an additional level of review. In my judgment, however, because I have great faith in the integrity, ability and sense of obligation of my colleagues, I think that this would be a most unlikely occurrence. In other words, the normal course of review would be what it is now—an appeal to the appropriate division, a decision by that division and, only if either the division or the joint en banc panel concluded that a hearing en banc was required, a hearing en banc before either the division, or the joint en banc panel, but not both. Consequently, there would still be only two opportunities for hearing before the court first by a panel and second, but seldom, en banc. I would expect that en banc hearings would be as rare as they are now. Thus I believe that the "parade of horribles" which are set forth in Judge Hufstedler's statement is largely imaginary. Certainly the problems that she imagines are not, in my opinion, either serious or pervasive, as she claims that they are.

The State Bar of California bases its objections in part on a contention that the only administrative problem with which the Ninth Circuit is now confronted has to do with hearings en banc. It refers to the en banc problem as the primary argument for dividing the circuit in the first place. This, with respect, I can only characterize as nonsense. It is easy for those who are not on the inside of the court and do not have to live with the many difficult administrative problems that are created by its size and the extent of the territory over which it has jurisdiction to make such a statement. I will not repeat here what I said in the statement that I filed with your Committee last fall. It fully outlines what those problems are and I think that it makes it clear that the en banc problem is in many ways the least of them, not the greatest.

If my understanding of what the bill would do is correct, then, as I have indicated, I am strongly in favor of it. There are, however, a few small matters to which I would like to call your attention.

First, Section 5 of the bill provides for the appointment of two additional judges for the Northern Division of the Ninth Circuit and five additional judges for the Southern Division of the Ninth Circuit. These figures are not correct. To fill the present vacancy on the court, the President has just nominated a California lawyer who resides in Sacramento to fill the vacancy created by the fact that Judge Merrill has taken senior status. I would assume that that vacancy will soon be filled by that appointment. This would mean that there would then be eight, not seven, judges of this court whose residences at the time of their appointment were within states or districts falling within the jurisdiction of the Northern Division and only one appointment would be necessary to bring the Northern Division up to nine judges. On the other hand, Judge Merrill having taken senior status, and his successor not being from Nevada, there would only be five of the present active judges who would become judges of the Southern Division and it would be necessary to appoint six additional judges to bring that division to its full strength of eleven active judges.

Section 2 of the bill deprives the present members of the court of any right to choose whether they will become members of a particular division. I know of at least one member of our court who objects to the bill solely on the ground that if the court is divided into divisions as the bill contemplates, he would prefer to change his residence so as to be in the division of his choice. I presume that the restriction of Section 2 of the bill is designed to see to it that a reasonable number of the present active judges will become a member of each division, but I find it hard to justify the restriction since it has always been the law that a circuit judge can change his residence within the circuit to any city where the court sits,

I suggest that the ten-day time for certification or petitions for rehearing before the joint en banc panel, which is prescribed in Section 40 of the bill (page 8, line 22), is too short. The mail service being what it is, I would think that the time should be closer to thirty days rather than ten days. I have known it to take a week for mail from San Francisco to reach Los Angeles. Sometimse it takes several days for mail from Arizona to reach Los Angeles. Similarly, it takes a long time for mail from Alaska or Hawaii or Guam to reach San Francisco. Thus counsel may not learn of the decision of the court for several days. Having learned, counsel will need time to prepare a petition and time to submit it to the court.

I suggest that in Section 19 of the bill, at line 3 on page 18, the words "or division" should be inserted after the word "circuit" and, similarly, that at page 19, line 14, the words "or division" should be inserted after the word "circuit."

I suggest that the jurisdiction of the joint en banc panel, as prescribed in Section 25 of the bill, might be redefined. Much of the law of California and much federal law is strictly judge-made. The jurisdiction of the panel is restricted to decisions affecting "the validity, construction, or application of any statute or administrative order, rule, or regulation, state or federal, which affects personal or property rights in the same state." Perhaps this could be revised to read "the validity, construction, or application of any statute, rule of law as announced by the courts, or administrative order, rule, or regulation, state or federal, which affects rights or duties in the same state." I would not limit the jurisdiction to such matters which affect only personal or property rights. Much litigation now affects the actions of administrative bodies within the state of California and some of them at least may not fit neatly in the category of actions affecting personal or property rights.

Finally, I do not favor a suggestion that has been made by some of my colleagues, and that I at one time thought that I favored, as is indicated in the letter that I wrote to your Chairman under date of December 19, 1974. That suggestion is that the jurisdiction of the joint en banc panel should be enlarged to include all alleged conflicts between the two divisions. This would indeed create an additional level of review and would lend support to the "parade of horribles" advanced by Judge Hufstedler, to which I have heretofore referred. I think it would be a mistake to create this additional level of review within the circuit.

I end where I began. I strongly favor the bill. I think that it is of the utmost importance, first, that there be adequate judicial manpower to handle the business of the circuit. We need twenty judges whether the circuit is divided or not. Second, I think it equally important that the circuit be divided. A court of twenty judges will not be a court in the sense in which we have long used that term. It will simply be a collection of judges. A court of nine or a court of eleven, with a lower workload and a smaller geographical jurisdiction, can function in the manner in which a collegiate court is supposed to function. This I regard as of the utmost importance to the administration of justice in the Ninth Circuit.

Two of my colleagues, Judges Koelsch and Browning, have reviewed the foregoing statement and I am authorized by them to state that they are in general agreement with it. Time has prevented my submitting the statement to other members of the court. I do know, however, that the following members of the court are generally in favor of the bill: Judges Ely, Wright, Choy and Goodwin. I understand that Judges Hufstedler, Wallace and Sneed are opposed to the bill. Judge Chambers will speak for himself. I know that two senior judges, Judges Merrill and Kilkenny, also favor the bill.

Senator BURDICK. Senator Cranston is unable to be present, but desires to submit a prepared statement to be made a part of the record at this time.

[The statement of Senator Cranston follows:]

PREPARED STATEMENT OF SENATOR ALAN CRANSTON

Mr. Chairman: Thank you for this opportunity to present to the Subcommittee on Improvements in Judicial Machinery my views on S. 729, a bill to reorganize the fifth and ninth circuits, and amendment no. 132 to that bill.

I endorse without reservation Senator John Tunney's excellent statement on S. 729. Senator Tunney and I have joined to introduce an amendment to the bill changing its treatment of the Ninth Circuit in certain respects.

The Ninth Circuit, which serves nine states, is over-burdened. As a result, federal justice on the appellate level is delayed excessively, and in many instances, effectively denied to parties. Reform is mandatory.

The Subcommittee proposes in S. 729 to redistribute the workload of the Ninth Circuit by splitting California between two independent divisions of the Circuit. In effect, this plan calls for dividing California between two separate and independent federal courts of appeal—California would be the only state so divided.

The major obstacle to reorganizing the Ninth Circuit has been the fact that California accounts for more than two-thirds of all cases filed in the circuit. Our state generates sufficient court business to support a Circuit Court consisting solely of California. Such a circuit would be the third or fourth busiest in the nation!

Proposals to establish California as an independent circuit have not gone far. The multi-state, regional nature of federal judicial circuits, is considered by many to be an overriding consideration in organizing a federal judicial circuit.

But if California is to be part of a multi-state circuit, the problems of over load remain.

The Subcommittee on Improvements in Judicial Machinery has hit upon the expedient of dividing the state in half, much as Solomon proposed for the child claimed by two women.

Dividing the state and its 20 million people will create more conflicts than it will solve. California State Attorney General Evelle Younger has listed six areas in the field of criminal law alone where such conflicts could easily occur. These include prison regulations, state habeas corpus proceedings, probation revocation, post-conviction remedies, federal procedural rules and laws controlling pornography.

It is possible that the State could find itself freeing a prisoner in the North, while the same facts and issues in the South would result in a denial of release. State law enforcement officers could stop the spread of smut in one area of the state, but would be powerless to act in another. State fraud investigators could halt schemes to bilk people in San Francisco, but not in San Diego. These results, I believe, would be intolerable to Californians.

In cases of statewide impact, Mr. Younger points out, such as those arising out of California's billion dollar water project which runs the length of the state, conflicting decisions are a very real possibility. Challenges in Federal Court are likely to be brought against the project or against state agency actions from both the north and south parts of the State, which under the Subcommittee bill, would place these cases in different divisions of the Circuit.

To resolve these conflicts the Subcommittee has proposed a joint en banc panel consisting of four judges from each division and the chief judge. This adds an additional level of review which would exist only for California and the Ninth Circuit—no other state and circuit would be subjected to this extra layer of judicial review. This burden will be particularly great for the California State government which will have to monitor decisions in both divisions and appeal any conflicts which exist to insure that state agencies can apply uniform procedures and orders throughout the entire state.

These are just a few of the obvious inequities that arise from asking California to carry the burden of accommodating the needs of the Ninth Circuit. I don't think that within our federal system it is fair or right to require one state to carry a burden not shared by others.

The problems of the Ninth Circuit can be solved without subjecting any State to unwarranted burdens on its government, people and organized bar.

Senator Tunney and I have sponsored such a solution: one developed by the California State Bar Association and which has come to be called, "The California Plan."

The California Plan for Revision of the Ninth Circuit proposes to keep California intact, joined with her neighbors, and solves the administrative problems of the Circuit by means of a special nine-judge panel which would coordinate and resolve conflicts in decisions within the court. I am convinced that this solution will work and will allow for the growth of our region—*if* modern methods of court administration also are instituted promptly.

Our federal courts are being run in a manner reminescent of the Eighteenth and Nineteenth Centuries. Times have changed and the courts must change, too.

The adavntages and advances of modern technology and administrative methods—such as computers, instantaneous transmission of judicial decisions via electronic media, and other techniques—have not been utilized as fully as they could be in the Ninth Circuit—and for that matter in courts throughout the land.

The caseload in the Circuit can be reduced by cutting down on the number of cases entering federal courts at the trial level. For example, I have cosponsored legislation decriminalizing marijuana offenses. I am told marijuana and other drug related offenses account for the total time of more than four judges in the District Courts of the Ninth Circuit. Immigration proceedings, which could be handled through administrative processes, account for a large percentage of the business of federal court in San Diego. These reforms also would cut down on the case load of the Ninth Circuit.

Until these remedies have been tried and it is proven that they will not improve administration of justice in the Ninth Circuit—and I doubt this will be the result—I will oppose cutting California in half. If the failures in administration of our court system have brought the Ninth Circuit to the point of collapse, then those faults are in need of correction, not the size of the circuit. Chopping the circuit into smaller pieces won't solve those problems, it merely is an easy way to avoid dealing with modern court reform.

I appreciate the desire of the Subcommittee to achieve a lasting solution to the problem of administration of justice in the Ninth Circuit in a way that will accommodate the potential future growth of our region. Any observer of the work of the Subcommittee and of the Commission on Revision of the Federal Appellate Court System, so ably chaired by Senator Hruska of Nebraska, quickly learns that the answers are not easy and that not all of the cherished customs, old ways of doing business and the finer jurisprudential considerations of federal appellate courts will survive the revision needed for the Ninth Circuit. Some things will have to give way. The question is which ones?

I disagree with the judgment reached in S. 729. It is my view that it is not necessary to divide California to solve the problems of the Ninth Circuit. My view is shared by my colleague, Senator Tunney, by the Attorney General of California and by the California State Bar Association.

The amendment I have cosponsored offers a constructive solution, one which keeps stability and certainty in the law as its main operating features. It is supported by the organized bar of the state and distinguished judges.

I urge the Subcommittee to give careful consideration to the opinion and views of Californians who must live under the results of whatever decision you reach. These concerns cannot be lightly set aside or dismissed as imaginary. They are very real. Those who have had the actual experience of administering and governing in California—a vast and diverse state—conclude that bifurcating California will cause great difficulties in governing the state. As a former State officer, I respect their concerns and share them.

Senator BURDICK. Today, the proponents of the "California Plan" are our principal witnesses. I will now call Mr. Brent Abel, president of the State Bar of California, who is accompanied by Mr. Jordan Dreifus, attorney of Los Angeles.

Gentlemen, you may each proceed to make such initial statements to the subcommittee as you desire. And we welcome you to the committee.

STATEMENT OF BRENT M. ABEL, PRESIDENT, STATE BAR OF CALIFORNIA, ACCOMPANIED BY JORDAN A. DREIFUS, CALIFORNIA STATE BAR COMMITTEE, LOS ANGELES, CALIF.

Mr. ABEL. Thank you, Senator. I am Brent Abel, and Mr. Dreifus is on my left.

[The prepared statement of the State Bar of California follows:]

STATEMENT ON BEHALF OF THE STATE BAR OF CALIFORNIA

In summary, the State Bar of California:

1. opposes S. 729 insofar as it affects the Ninth Circuit; and
2. supports Amendment No. 132 introduced March 17, 1975, by Senators Alan Cranston and John Tunney.

A. HISTORY OF S. 729

Proposals to reorganize the Fifth and the Ninth Circuits originated with the Commission on Revision of the Federal Court Appellate System in recommendations made by the Commission in its report of December 1973. That Commission recommended a plan of dividing the Ninth Circuit into two new circuits by cutting the existing circuit roughly into halves of nearly equal population and caseload. And in doing so, is would cut the State of California similarly into halves, placing the northern half of the State in one new circuit and the southern half in another new circuit.

Early last session bills were introduced (S. 2988–2990, 93rd Congress) to carry out that plan. Hearings were held on them last fall by this Subcommittee. In testimony received at those hearings and in formal statements submitted prior to and subsequent to the testimony, the State Bar of California, local bar associations in California, the California Attorney General and others stated their firm opposition to any realignment of the Ninth Circuit which would effectively divide California into two appellate jurisdictions for purposes of federal intermediate appellate court review.

We assume this Subcommittee will take notice of such testimony and statements which were received during the 93rd Congress. Therefore, we do not repeat here all that was at that time said and furnished to this Subcommittee on this subject. What was said then, nevertheless, bears re-emphasis. The structure of the federal courts and the federal court appellate system are an integral part of a complex web of federal-state interrelationships which have come into existence to a degree hardly conceived as recently as fifty years ago and which continue to grow. The State of California, as a government, administrative, political and economic entity, has become a close participant with the federal government in all of these areas. The decisions of the Court of Appeals of the Ninth Circuit, and the decisions of the U.S. district courts and various administrative agencies under the precedents made by the Circuit, have a direct operational impact on all sorts of activities, programs, and relationships, governmental and non-governmental, throughout the State of California. The Court of Appeals is effectively the federal appellate court of last resort in many of these cases, for lack of review by the Supreme Court. It would be detrimental to all aspects of government, and to the conduct of ordinary affairs by the people of California, to restructure the appellate system of the Ninth Circuit in a manner which ignored the need to preserve unity of judicial decision and judicial precedent co-extensive with the territory and governmental organization of the State whose people the judicial system is intended to serve.

In December 1974, Senator Burdick circulated a committee print amendment of S. 2990, 93rd Congress, which contained substantial changes with respect to the Ninth Circuit, in an attempt to overcome the serious deficiencies of the original plan respecting California. S. 729, now pending, is substantially the same as that committee print.

We examined that committee print, as did the California Attorney General and others. We concluded that its provisions respecting the Ninth Circuit (which are repeated in S. 729) were undesirable and probably unworkable. In lieu thereof, the California State Bar suggested a simpler solution for the Ninth Circuit, making use of and building upon one of the substantial innovations introduced by Senator Burdick in his committee print.

The Ninth Circuit provisions of S. 729, like those of the preceding committee print, appear to be self-contradictory. On the one hand, S. 729 includes a new provision to recognize (as it must in view of the evidence and comments received last year from California witnesses) the necessity that there be a single tribunal at the Court of Appeals level to decide conflicts of decision respecting the law applied by the federal courts in all of California. On the other hand, S. 729 would divide California into what are virtually two separate circuits, in the same configuration as in the original plan of the Commission on Revision, except for the semantic of naming each fragment a "division" instead of a "circuit". In attempting to achieve these incompatible objectives, S. 729 would create court arrangements in the Nitnth Circuit which would be unduly complex but which also would only operate to preserve uniformity of law applied in California at the price of administrative inefficiency, uncertainty and delay for litigants, attorneys and the judicial system itself.

Essentially, S. 729 would divide the Ninth Circuit and California into a "northern division" and a "southern division". It would redefine "circuit" in other statutes and provisions of law so that each such "division" would be substantially a judicial circuit in all respects, including, for example, the power of each "division" to sit in-banc, the same as any other court of appeals in-banc. The bill increases the total number of judges in the Ninth Circuit so that the new northern division would have nine judges and the new southern division, eleven, for a total of twenty. In the effort to meet the needs of California, the bill would superimpose over the two divisions a third entity, a special tribunal known as the "joint in-banc panel". This joint in-banc panel would be composed of the nine most senior judges, drawn five from one division and four from the other. The joint in-banc panel would have jurisdiction over the two divisions in cases arising in California and requiring resolution of a conflict of law applied in the federal courts in California. The joint in-banc panel would no doubt have a substantial work load because California comprises about two-thirds of the population of the Ninth Circuit and the California caseload comprises about two-thirds of the caseload of the Ninth Circuit. The jurisdiction of the joint in-banc panel, of course, would not be limited to rarely arising constitutional issues, but must include the resolution of all conflicts of decision arising in federal courts in California in order to meet the need for which it is intended.

B. WHY WE OPPOSE S. 729 IN ITS PRESENT FORM

As we see it, some of the problems that would ensue in the Ninth Circuit under S. 729 are these:

1. The joint in-banc panel (in Section 11 of S. 729, pages 7–9 of the Bill) has review jurisdiction over each division of conflicts of decision in cases arising in or involving law applied in Calfornia, which are two-thirds of all the cases in the circuit. This must mean that after judgment in the district court (or administrative agency action reviewable in a court of appeals), there will be review first by a three-judge panel of the court of appeals; next, if granted, by a hearing or rehearing in-banc by the division; and next, if granted, a hearing by the joint in-banc panel; then (if the litigants and lawyers are not exhausted) review by the U.S. Supreme Court. This multiplication of appellate hearings into three separate stages at the intermediate appellate level cannot but result in additional delay and expense to litigants and a duplication of workload for those judges who are members of the joint in-banc panel who would have considered the case at the division in-banc stage and again as a member of the joint in-banc panel. Also, there would be cases in which a petition or suggestion for hearing in-banc is refused by the division in-banc but in which a hearing is thereafter granted by the joint in-banc panel, which is composed of a different membership and may feel a responsibility for a different view of the law. Litigants, and particularly the lawyers advising them, will naturally feel obliged to exhaust all three tiers of the appellate structure. Additional delay and expense in appellate litigation would appear to be the result.

2. The consequence of the appellate structure just described is that litigants, lawyers and judges in the Ninth Circuit would be subject to two possibly diverging bodies of jurisprudence, namely, the law of the southern division and the law of the northern division.

Furthermore, a litigant in Arizona, or in any state of the Circuit other than California, might face the added complication of possible conflict between his or her division (in a case not subject to joint in-banc panel revision) and a joint in-banc panel decision. This apparently can occur under S. 729 because

the divisional decision is not subject to joint in-banc review if the case is from a state other than California and does not involve any law applied in California.

3. The splitting of California into divisions, which are virtually separate circuits except for the review by the joint in-banc panel, is likely to produce confusion, delay, and procedural disagreements in resolving sensitive types of litigation in which the State of California or its agencies are parties or in which their programs are directly in issue. There are numerous statutes (many of them listed in the statement of the California Attorney General submitted last fall to this Subcommittee) which provide for court of appeals review of federal administrative action concerning a state or state agency in carrying out federal programs or regulated or subsidized activities. These statutes typically provide that jurisdiction and venue for review shall be in that circuit which "embraces" the state concerned or in which the state is "located", or in the "appropriate" circuit, etc. More of these statutes are enacted all the time. Typical is the recent enactment of Section 17 of the Deepwater Port Act, P.L. 93-627, January 3, 1975, which provides for review in the circuit within which the nearest "adjacent coastal state" is located. In which "division" is the State of California located for such purposes? S. 729 does not say, presumably leaving it to be settled by litigation. If the answer is that the proceeding can be brought in *either* division, it would be an invitation to duplicate litigation and forum shopping, at the division level, in a kind of litigation that is particularly susceptible to that problem and in which even temporary conflict of decision would be injurious to the public interest. If S. 729 were enacted, the probable tendency in this type of litigation would be to bypass the divisional in-banc stage and immediately seek review by the joint in-banc panel, to avoid the time and efforts of litigants and judges at the division in-banc stage when only the joint in-banc panel could speak with an authoritative voice.

4. As already noted, the Ninth Circuit will have not two, but effectively three, federal courts of last resort subject to review by the Supreme Court under S. 729, namely, the joint in-banc panel in cases arising in California and each division in other cases. With effectively three new "circuits" in place of the present one, each would have the power to disagree with the others, subject only to resolution by the Supreme Court. This would aggravate further the Supreme Court's already heavy caseload.

5. We also question some of the technical provisions of S. 729 respecting the jurisdiction and procedure of the proposed joint in-banc panel. These appear to restrict access to that panel unduly. The panel might be prevented from fulfilling the basic purposes it is intended to serve. Unnecessary technical threshhold controversies are likely as to the extent of the jurisdiction of the joint in-banc panel. The jurisdiction of the joint panel under S. 729 is defined in a proposed amendment of 28 U.S.C. §12091 (page 23 of the Bill), which provides that the joint panel would have jurisdiction to hear a case in which there is a conflict between the division—

". . . affecting the validity, construction, or application of any statute or administrative order, rule, or regulation, State or Federal, which affects personal or property rights in the same state."

This is broader than the analogous provision of S. 2990, 93rd Congress, which was limited to cases of claimed invalidity (unconstitutionality) of laws, rules, etc.

But even the proposed Section 1291 language is not sufficiently broad. It would in practice lead to unnecessary litigation over what are "personal or property rights" and whether "rule" includes case law. A proper description of what must be covered would simply say that the joint panel must hear and decide conflicts of decision respecting the law applied in the divided state, with "law" defined to include case law, constitutions, statutes, regulations, rules and orders of any kinds, state or federal.

6. The jurisdiction of the joint in-banc panel seems (proposed U.S.C. §46(d)(2), at pages 8-9 of the Bill) to depend on the filing of a certification or a petition ". . . within ten days after service of the notice of entry of judgment by the division." First, having a jurisdictional period begin from the date or time of *service* of a notice, rather than the date of judgment or of entry of judgment (regardless of when service is made) is a concept foreign to federal trial, as well as appellate, procedure. It would be bound to breed threshhold jurisdictional litigation. Second, ten days' time is totally inadequate, given the current realities of U.S. mail service and the geographical size of and dis-

tances in the distances in the Ninth Circuit (and in each division). Under Federal Rules of Appellate Procedure, Rules 25 and 40, a petition for or suggestion of a hearing or rehearing in-banc must be filed within fourteen days after entry of judgment. Even this provision has been severely criticized by attorneys in California as too short to permit proper consideration of and preparation and filing of such papers. This is so, particularly for attorneys who are at a distance from the clerk's office or in other states. Even in the same city, substantial delays in delivery by mail are commonplace. The comparable provision in Rule 58 of the U.S. Supreme Court Rules provides twenty-five days in which to file a petition for rehearing. Under the former Ninth Circuit Rule 23 (1964 ed., prior to the adoption of the Federal Rules of Appellate Procedure) the time so to petition was thirty days. When too short time limits are imposed, litigants are forced to incur the extraordinary expense of accelerated legal work and of such measures as employing commercial air express or courier service to deliver papers which should otherwise go as ordinary mail. The extremely short ten-day period may discourage meritorious petitions which might otherwise be filed, and may likewise encourage the filing of unnecessary petitions simply to protect the time pending an opportunity for mature consideration.

7. S. 729 provides that the joint in-banc panel would be selected by straight seniority from among the twenty circuit judges of both divisions of the Ninth Circuit. As is well known, this is a highly controversial issue among both lawyers and judges. Many attorneys have expressed opposition to seniority as the basis of composition of the joint in-banc panel under this or any other proposal for any form of in-banc panel. Chief Judge Chambers of the Ninth Circuit has stated the opinion that under any form of in-banc panel arrangement, judges eligible for retirement should not be eligible for the in-banc panel. The provision in S. 729 for selection and tenure (at least as to eight members other than the Chief Judge) on the basis of seniority without modification or provision for alternative options is undesirable. It should not be adopted without further study of alternatives.

8. We doubt that S. 729 will lead to economies in operations of the courts and their offices, staffs, facilities, etc. Two divisions, with two Clerk's offices, will almost certainly result in greater expenditures for more personnel, space and facilities, than the maintenance of a single office. What is more, the joint in-banc panel apparently would have its own Clerk under proposed 28 U.S.C. §46(d)(2) of the Bill.

C. DESIRABLE FEATURES OF S. 729

Notwithstanding what we conceive to be the defects in S. 729, it contains two innovations which we believe are desirable.

First, it recognizes the concept that an in-banc panel of judges, of less than the whole number of circuit judges, can be empowered to act as the court in-banc and thereby establish the law of the circuit. Recognition of this concept provides the mechanism, further discussed below, for solving the problems of the Ninth Circuit.

Second, S. 729 contains a provision which would facilitate achieving uniformity of local practice and procedure in a multi-district state such as California. We think such a provision has merit independent of the other provisions of S. 729.

D. HISTORY OF AMENDMENT NO. 132

In December 1974, and January 1975, the State Bar of California, on the recommendation of its Committee on Federal Courts, considered and rejected the Ninth Circuit provisions now contained in S. 729 and proposed instead a much simpler arrangement based on maintaining the present structure and alignment of the Circuit, but providing that in-banc functions should be fulfilled by an in-banc panel similar to the joint in-banc panel proposed in S. 729. Indeed, the only significant difference between the joint in-banc panel in S. 729 and the in-banc panel in the California proposal would be that under the California proposal, the Ninth Circuit in-banc panel would have jurisdiction of *all* cases. Under S. 729, the joint in-banc panel would have jurisdiction *only* of the two-thirds of the cases which arise in California. Thus, the California proposal builds upon and makes use of the very useful and innovative provision which, as mentioned above, originated in Senator Burdick's committee print and which is in S. 729.

The California State Bar drafted a bill along these lines. Between December 1974, and February 1975, the California State Bar, the California Attorney General, and others made their positions and their proposal known in detail to Senators Cranston and Tunney and to Senator Burdick and his staff.

On February 4, 1975, Senator Cranston and Senator Tunney stated their views in a letter to Senator Burdick, which concurred with our position.

We, therefore, strongly support Amendment No. 132, which embodies the proposal of the State Bar of California, as introduced by Senator Cranston and Senator Tunney, in lieu of the Ninth Circuit provisions of S. 729.

The Amendment would replace the parts of S. 729 which affect the Ninth Circuit but leave unaffected the parts which affect the Fifth Circuit. In place of the Ninth Circuit provisions of S. 729, the Amendment would provide (as would S. 729) twenty judges for the Ninth Circuit and would provide for the performance of all in-banc functions of the circuit by an in-banc panel of nine circuit judges. The Amendment contains conforming amendments to the Federal Rules of Appellate Procedure which are necessary to accommodate the Ninth Circuit in-banc procedure and to avoid inconsistency between those Rules and the Amendment as to matters which properly belong in those Rules rather than in a statute. The Amendment also makes language changes in the portion of S. 729 relating to uniformity of local practice and procedure. Finally, the Amendment contains appropriate transition and effective date provisions respecting the Ninth Circuit.

Further details of the Amendment are as follows:

1. Sections 1, 2, 3, 4 and 6 of S. 729 would be amended to eliminate references to the Ninth Circuit, but would remain unaffected concerning the Fifth Circuit. Sections 5 and 9 of S. 729 would be amended to provide for the additional seven judgeships in the Ninth Circuit and the appointment of the additional judges, but eliminating references to divisions.

2. Section 11 of S. 729, which would amend 28 U.S.C. §46, would be amended to delete the proposed §46(d) and in lieu thereof substitute a new subsection (d). The substituted subsection would provide that in the Ninth Circuit there shall be a nine-judge in-banc panel which shall exercise the in-banc powers of the court and would provide other details as to method of selection of the in-banc panel, its composition, procedure, etc. Subsections (a), (b), (c) and (e) of 28 U.S.C. §46, as they would be amended by Section 11 of the Bill, would be further amended to add exceptive cross-references to the new proposed subsection (d).

3. Section 19 of S. 729, insofar as it would amend 28 U.S.C. §332(d) by adding a new third sentence to that subsection, would be amended to delete the references to divisions and otherwise modify the provisions relating to uniformity of local rules.

4. Section 23 of S. 729, insofar as it would amend 28 U.S.C. §1294, would be amended to delete the reference to "Northern Division" from §1294(4).

5. Section 24 of S. 729 which would amend 28 U.S.C. §1254 and Section 25 which would amend 28 U.S.C. §1291 would be deleted as unnecessary.

6. In conjunction with the in-banc panel procedure, the Amendment would amend Federal Rules of Appellate Procedure, Rule 35, which governs Court of Appeals in-banc procedure. This is necessary in order to carry out the intent of the Amendment and in order to avoid any inconsistency between the provisions of the Rule and the new statutory provisions for the Ninth Circuit in-banc panel. The amendment of the Appellate Rules is made subject hereafter to the powers of the regular rule-making procedure under 28 U.S.C. §2072 for any further amendment or modification deemed advisable.

The Amendment also contains certain transition and effective date provisions respecting only the Ninth Circuit, which generally make the amendments effective January 1, 1976, the same date as is provided for the Fifth Circuit provisions of S. 729. The transition provisions provided for the Ninth Circuit have been arranged to determine with as much clarity as possible the applicability of the new provisions in different situations in order to avoid uncertainty, ambiguity and litigation over the technicalities of the transition.

The Amendment provides that a quorum is to be seven of the nine judges on the in-banc panel. This is a relatively high number, compared, for example, with six out of nine for the Supreme Court, 28 U.S.C. §1, and compared with only a simple majority required under present Court of Appeals in-banc procedure. The relatively high quorum number is intended to assure stability in the composition of the panel.

The Amendment also provides that a majority of the membership of the in-banc panel may decide to hear or rehear a case in-banc (see the proposed amendment of FRAP Rule 35(a)).

The Amendment retains the provision of S. 729 for improvement of local practice and procedure but with some modifications. Such a provision is necessary and salutary whether or not the State of California is divided into separate divisions. It was pointed out in the State Bar of California statement submitted last year that division of California into separate circuits would have destroyed any hope of obtaining relative uniformity of local practice and procedure in district courts. At present, there is a high degree of uniformity of practice and procedure among the various superior courts of the counties of the State, possibly more so than between and among the four federal districts in the State. S. 729 includes an amendment of 28 U.S.C. §332(d) which would create a joint committee of circuit and district judges for the purpose of recommending improvement and uniformity in local rules. The Amendment modifies this provision to make it more flexible and permissive rather than mandatory and to make it clear that cooperation with bar associations and others is authorized and encouraged.

Local practice and procedures cover mundane and routine matters. But these are matters which substantially affect the every-day conduct of practice and indirectly the economics of the practice and the cost to litigants.

We think it appropriate to respond to certain criticisms that have been directed against the principle of committing in-banc powers to less than all of the judges of the circuit. That criticism (see Congressional Record of February 18, 1975, at page 8—1968) is to the effect that "limiting the in-banc function in all cases to but nine judges" is not conducive to harmony in a court containing more than nine, and would have the effect of creating "first and second class" circuit judges.

The criticism stated is inconsistent with the terms of S. 729 itself. The function envisaged for the joint in-banc panel under S. 729 would be identical to that of the in-banc panel under the Tunney-Cranston Amendment except for the fact that the Amendment would apply the in-banc panel jurisdiction to *all* Ninth Circuit cases instead of only to a portion of them. The joint in-banc panel under S. 729 composed of nine judges could decide, in a five to four decision, to overrule or reverse a decision of, for example, the proposed southern division of the Ninth Circuit, which would have eleven judges sitting in-banc. Moreover, we are informed that the Commission on Revision of the Federal Court Appellate System now has under consideration and may issue a report in favor of a new proposal which would provide for similar in-banc panel-type jurisdiction and procedure in any circuit when the number of circuit judges in the circuit exceeds nine.

Empowering an in-banc panel to make the law for the whole membership of the circuit is no different from the function exercised by any appellate tribunal over any group of lower tribunals. Such a division of authority and function is found in most judicial systems and in most forms of governmental and private organization. Of necessity, this division of functions means that some small body of judges must be the ultimate arbiters of the law at the head of the structure and that the lower judges and courts are bound to follow the rules thus made. We know of no judicial system or system of government in which every judge or officer has absolute equality of power with every other.

The principle which appears to have been assumed previously by the Commission on Revision of the Federal Court Appellate System seems to have been that every circuit judge should participate in every in-banc decision, no matter how large any circuit might become. This principle could be carried to an absurd extreme. No one would suggest, for example, that the one hundred or so circuit judges of all the circuits ought to get together and by majority vote of their whole membership decide conflicts of law between the several circuits. Absurd as that may sound, there is no logical difference between such a hypothetical case and the proposition that no matter how large a circuit becomes, only the total membership can sit and act in-banc.

In short, we believe that nine circuit judges selected by an appropriate process with relative stability and permanence of position and similar in functions to the joint in-banc panel proposed in S. 729 would be a suitable tribunal to make and settle the law of the circuit. With such a review jurisdiction explicitly provided by statute, we do not believe that there would result the "disharmony" feared by critics.

A question of particular importance is the method of selecting the judges who are to sit with in-banc powers. The Amendment provides that the membership of the in-banc panel is to be determined according to seniority but empowers the judicial council of the circuit (composed of all the circuit judges) by a majority to adopt an alternative method of its choice. In considering the provisions proposed, seniority versus other methods of selection was a predominant subject of discussion. Strict seniority as a basis was generally considered undesirable. The provision of seniority together with power in the judicial council of the circuit to choose another system is intended to give flexibility and to avoid the collateral issues and complexities involved in attempting to detail in a statute some method of selection other than seniority.

We wish to make clear that we do not oppose any feasible and generally acceptable alternative to seniority as a method of selection or tenure for the membership of an in-banc panel. Enacting the Amendment in its present form would permit on-going study of the subject, with seniority to prevail in the meantime. The subject might, for example, have the attention of the Commission on Revision of the Federal Court Appellate System. We suggest exploration and evaluation of a number of possible alternative methods, such as the following, most of which could be combined with others:

(a) Selection by seniority, but for a limited tenure on the panel for a stated term of years. The terms could be staggered so as to provide a continuity of membership on the panel; replacements by other circuit judges could either be on the further basis of seniority or by random selection from the remaining circuit judges, etc.

(b) Staggered seniority, that is, selection of every other judge in order of precedence.

(c) Selection by some other method, such as a random method, but for stated terms of years, with replacement at the end of terms limited to the pool of circuit judges who have not served, etc.

(d) Appointment by higher authority (for example, by the Chief Justice of the United States), either for indefinite tenure or for terms of years.

(e) An age limit, or retirement eligibility limit (as suggested by Chief Judge Chambers) might be a feature of one or more of the foregoing.

A Los Angeles County Bar Association subcommittee has suggested a method of random selection of the initial panel membership for staggered terms of years, with replacement of members upon the expiration of terms, also at random but drawn only from the remaining number of judges who have not served on the panel at all or for a stated period of time.

We believe the fundamental concern of many is that an in-banc panel should have a stable membership, but that the membership should not be exclusively judges who are the oldest in seniority.

The most important feature of the Tunney-Cranston Amendment is that it would in no way change any of the procedural or structural characteristics of the court with which all lawyers in the entire circuit are now familiar. It requires no drastic change of procedure or the addition of a whole new set of rules and concepts to be added to the sufficiently complicated nature of existing appellate procedure.

In conclusion, the State Bar of California urges this Subcommittee to reject the Ninth Circuit provisions contained in S. 729, and in lieu thereof, substitute the provisions contained in the Amendment introduced by Senator Cranston and Senator Tunney.

Dated: May 16, 1975.

Respectfully submitted,

BRENT M. ABEL,
President, State Bar of California.

Mr. ABEL. Let me open by stressing my appreciation to the chairman and to Mr. Westphal, counsel, for the opportunity for a very thorough exchange of views and for the constructive approach which the committee has taken and the receptivity to our correspondence, if not to our ideas.

I have asked Mr. Dreifus to be with me on the premise that there may be aspects of the matter where his expertise will provide better answers than mine. But let me begin by adding to the record an

editorial from the Los Angeles Times of May 6, and an editorial from thte Sacramento Bee of April 28, both of which generally support our position.

Senator BURDICK. Without objection, they will be received.

[NOTE.—The editorials mentioned appear as appendixes to Senator Tunney's prepared statement, supra.]

Mr. ABEL. I think just briefly to review where we stand, I would start by pointing out that all agree that the ninth circuit needs 20 judges. And the question is, having arrived at that conclusion, which I think is indisputable, where do we go from there?

S. 729 would follow the route of creating two divisions within the circuit, the ninth circuit. The Tunney-Cranston amendment, which I will call the California amendment, would deal with what seemed to us to be the principal problem with considerably greater simplicity.

Now, essentially the problem is one of managing a 20-judge circuit, and those who think that a 20-judge circuit is unmanageable, I think, place an excessive importance on what has come to be called collegiality of the court.

I think in point of fact what we must consider in looking at this whole subject is the public interest, the desirability of certainty in the law, of a minimum of procedural problems and see how each of these two plans—that is, S. 729 on the one hand and the Tunney-Cranston amendment on the other—stand up against that very paramount consideration of what is in the public interest.

The California proposal, the California amendment would simply allow the en banc functions of the court and powers of the court in the ninth circuit to be discharged by a panel of nine judges. There are a number of different ways in which that panel could be selected. I think we get to that at the second stage of the discussion rather than at the first.

The text of S. 729 on the other hand would create two divisions within the circuit, and there we see a great many difficulties from a practical standpoint, as well as difficulties from the standpoint of certainty in the law and the public interest to which I have referred.

Now, essentially the basic objection to the text of S. 729 is the creation of what seems to us to be a four-level decisionmaking process within the circuit. First at the district court, then to a three-judge panel of the court of appeals, then to an en banc panel or an en banc treatment within the division, and finally the joint en banc panel overreaching at part of, but not all of, the decisions of the en banc panels of the two divisions.

Now, we think that, that is, for a number of reasons, a cumbersome and unnecessary resolution of the main problem. The conclusion essentially is forced on us by the nature and the extent to which Federal law and State law have become interrelated in the last 35 years, and the pattern and the direction which legislation is taking today in the Congress indicates that that interrelation will become greater rather than less.

One threshold question has to do with where the caseload in the ninth circuit is headed. I think in our view one has difficulty in foreseeing what the direction of the caseload will be. We know approximately what it is today. Whether the disappearance of certain kinds

of cases from the calendar in the ninth circuit, particularly cases involving Selective Service violations, will be offset completely or not by other kinds of litigation, which increase the number of filings; these are things which we cannot accurately foresee. Nor can we accurately foresee the trend of population growth in the ninth circuit, except to observe that the curve has been flattening out. And to the extent that population growth affects caseload, one must conclude that the caseload will be flattening out.

So that bearing in mind the uncertainties in the caseload picture, we think one should approach the problem of the California and ninth circuit situation on the assumption that the caseload will not increase as dramatically in the future as it has in the recent past, and that one may prudently plan on an arrangement for the ninth circuit which contemplates a rather limited growth in caseload in the early future.

Now, I say that because if one designs a plan in which two divisions are created on the assumption that the caseload will increase dramatically in the future, and it does not, in fact, do so, we then will have created a set of machinery which is unnecessarily cumbersome in the interest of planning for something that does not occur. On the other hand, if we follow the route of the Tunney-Cranston, the California amendment, and if the caseload does increase dramatically a second step could always be taken later on to go to a two-division concept.

I take it that at this point the only two alternatives the subcommittee is considering are the two which I have described; that is, the route of S. 729 and the route of the California amendment. That is, I take it that the original proposal which came out of the Commission for splitting the ninth circuit is not one of the alternatives which the subcommittee is now considering. Am I correct in that, Senator?

Senator BURDICK. That is correct. Well, we are considering everything, but our principal approach now is S. 729.

Mr. ABEL. Yes. Now, those are the general observations. There are a number of specifics. I think, though, we would only get to those if we cross the bridge of determining which of these routes are going to be followed.

Now, if S. 729 is the route, then we have some mechanical questions within the text created by the numerous statutes referred to, not listed but referred to in my statement wherein the jurisdiction of the court of appeals is laid in the circuit which "embraces" the State concerned. And if you have two divisions, some kind of further statutory amendment would be necessary in order to bring those within, to clarify the matter within that framework.

There are others. There are other points of clarification. But I would prefer not to get into those until the questions are asked about them, because our main point, on which we, after very thorough consideration by our committee and our board of Governors, our main point on which we are quite firm is that the main problems of this 20-judge court can be most desirably and most simply dealt with by the procedure of allowing an en banc treatment by a panel of nine judges to be selected in ways which are still open, in our view, rather than by going to a two-division arrangement with two en banc panels

and a joint en banc panel, and the consequent proliferation of bureaucracy inherent in establishing instead of the present single clerk's office, at least two and perhaps three clerk's offices. One for each division and one for the joint en banc panel.

I think as far as I am concerned I am more interested in pausing there to hear what questions there may be in the minds of the chairman and/or counsel in order to focus on those issues which are of the greatest interest to the subcommittee. So, I would rest at that point. I would think what I would suggest to the subcommittee is that initially we talk about this threshold question of which fork in the road is now to be taken. And having discussed the merits, pro and con of that, that then we focus on the details of each. I wonder if that would be an acceptable way to proceed?

Senator BURDICK. Mr. Dreifus, do you have anything to add before we open this to questions?

Mr. DREIFUS. Senator, I would believe that I could best serve the subcommittee by responding to questions. I believe Mr. Abel has adequately stated our case.

Senator BURDICK. Very fine. I have a few questions and I believe the staff has a few questions.

Mr. ABEL. Yes.

Senator BURDICK. Mr. Abel, you mention the fact that you want the court to be more efficient, and you think that the plan of the Tunney and Cranston amendment would bring you up to more efficiency. If you have 20 judges and keep the same circuit, the same geographical boundaries and the same everything except you change the en banc from 20 to 9, that is the essence of your proposal, is it not?

Mr. ABEL. That is right.

Senator BURDICK. In 1971, before this situation really became boiling and we had all of the controversy, the Federal Judicial Center sent a questionnaire to all of the Federal judges of the United States. Of the judges 241 responded to the questionnaire, and two of the questions that were asked were as follows:

> Assuming a circuit reorganization is undertaken, what, in your opinion, should be the optimum number of judges per circuit court?

And the next question that was asked:

> Since it would be difficult to create the required number of circuits so that each one has precisely the optimum number of judges, what would be the maximum and the minimum number of judges per circuit?

As I say, 241 judges responded to the questionnaire. They show that when the appellate judges were considered, almost two-thirds felt that nine was the preferred number of judges. However, in response to the second question as to what is the maximum court size, the Federal Judicial Center reported responses as follows: While 41 percent favored 9 as a maximum court size, a sizable number of judges felt that the court could contain 11, 12, or even 15 judges and still function. It is perhaps significant that no judge thought a court of more than 15 judges would be acceptable.

On the other side of the coin, many judges felt that five was the minimum size for an appellate court. However, a significant number of judges suggested three, six, and seven as the minimum size of the court.

Now, Mr. Abel, that is the unanimous opinion of the 241 judges that responded, that there should not be an appellate court of over 15. Do you not think that the judges' opinions on the efficiency of the court and how it was run would have some weight?

Mr. ABEL. Some weight, I would say, though, Senator, that, as in every other form of human endeavor these days, a degree of flexibility and adjustability and adaptability has to be found. I think what is in the opinion of the judges the optimum method of operating the court is only one part of the mix that goes into determining what is best from the standpoint of the public interest. I think judges, and I say this with all due courtesy to my many friends on the bench, tend to see things as they are, to like things as they are, to be reluctant to change their method. And I can perfectly well see as a personal matter it is nicer to work with a group of nine people than it is with a group of 20.

But I do not think that answers the basic question, the basic question being how do we establish a method which has the greatest likelihood of producing certainty in the law. I do not want to overuse the word efficiency, because justice is not always efficient. But, it strikes a reasonable balance between efficiency and the kind of justice to which this country is entitled. So I say that what the judges think about the internal management of their court is only one part of the answer to this question, and not the final one by a long shot.

Senator BURDICK. No; of course it is not the final answer. But it seems to me the men who work in the shop, and are the judges, know when they can do the best job and are most efficient. As I say, the estimates ranged from 3 to 15. None were over 15, and that was the unanimous feeling of the entire response.

Mr. ABEL. Well, let me point out I think within that questionnaire there was no alternate proposed of how they would feel if, having expressed that opinion on the management of the courts as they then existed, whether the answer would be different if the en banc procedures of the court were entrusted to less than the whole number of judges on the circuit. I think that answer might have been different had they been asked if the en banc functions of the court are entrusted to less than all of the judges, would your answer be the same.

Senator BURDICK. I think you are absolutely right, and I think if that en banc situation were presented to them your case would be even weaker yet, because you are having an en banc with 9 judges, which is a minority of 20, and you do not even have a majority input in a 9-member en banc.

Mr. ABEL. Well, of course, there are still many contacts between judges, and I think we must look plainly at the fact that in the Ninth Circuit, as I assume in other circuits, the present makeup of the circuit judges is only a small number of those judges within the circuit who take part in the appellate process because of the calling in of district court judges from all over the circuit.

Also, of course, you get to a balancing of interests here on the question of what further step you have to take if you are going to make a division, go into a division of judges into nine-judge groups, that question being one of whether dividing a State into two divisions, for example, is too heavy a price to pay for that higher degree of cooperation and personal contact that you get from the

nine-judge circuit. There is a balancing of interests throughout this course.

Senator BURDICK. Now, as I say, the optimum number the judges recommended on this question was 15, and you say you can run California with 20. And assuming that business does increase, population increases, would you say then that you could run the ninth circuit with 25, with 27, with 29? Do you have any limit? Do you have any limit at which the court can operate efficiently?

Mr. ABEL. I think there is a limit. I would hate to suggest an arbitrary one. I think it is a number larger than 20. I think the public interest is what prevails here. That is, judges I think are able, should be willing and probably in due course will be willing, and are willing now, to adjust their personal preferences as to the size of the group in order to achieve what seems to me the more important objective, which is certainly in the law, a minimum proliferation of appellate stages in order to arrive at the final decision, and uniformity in the law.

Now, I think one must shape the optimum size to conform to that more important objective.

Senator BURDICK. Well, we have reached one happy accommodation. There is a limit?

Mr. ABEL. Yes; there is a limit. Mr. Dreifus has a response.

Mr. DREIFUS. If I may add to Mr. Abel's comments, the crucial question is that of the institutional unity of the law applied in a States versus the institutional unity of what the judges themselves would feel would be their optimum size.

And I would like to also point out that in California we have an intermediate appellate court system divided into I believe five districts in the State. The second district, District Court of Appeals, has 20 judges who sit in 3 judge panels, and they operate with efficiency and without any difficulty.

There is one thing they do not do, they do not sit en banc.

Senator BURDICK. Would you repeat that, would you read that back to me? I missed that.

[Whereupon, reporter read back the witness' prior response.]

Mr. DREIFUS. If I may clarify the answer, Senator, I was referring to the California Court of Appeals for the second district based in Los Angeles.

Senator BURDICK. Well, I can see a possibility, gentlemen, when you have an en banc of 9, which is a minority of 20, I can see the possibility of having only one point of view presented en banc. It might not be the agreement of the other 11, and what are you going to do about that one?

Mr. ABEL. I think that one can be dealt with by the method of selecting the judges en banc, and I personally would favor some form of rotation that takes the assignment to sit en banc out of seniority as the sole measure, something of the sort that is suggested, was suggested by Judge Hufstedler in rotating the membership on 6-month intervals, something of that sort.

Senator BURDICK. I understand that. But the point is how do you rotate points of view and philosophy, and in this rotation and complication you could very well have the 9 having one point of view

and the 11 having another, which the 9 would have the minority point of view.

Mr. ABEL. But I think actually that makes a point for uniformity, Senator, in the sense that with the change in makeup of the panel I think you would find that the institutional unity of the court is likely to be greater rather than less, because in due course everyone on the circuit would have been within a relatively short period sitting in the en banc role.

Senator BURDICK. But my point still is that on one drawing, whether it is the Hufstedler plan or whatever plan it is, on the one drawing you could have a minority point of view in those judges.

Mr. ABEL. Yes; this is possible. But how serious a vice is that? I think that is my next question. I am not sure it is.

Senator BURDICK. You do not have the feeling and the expression of the circuit because you do not have the input from all 20. You cannot. Can you say that that is the law of the circuit because nine of them decide on a minority view?

Mr. ABEL. If the nine happens to be a minority view at the time, 1 year later, or 2 years later, it will no longer be.

Senator BURDICK. And then where is the stability?

Mr. ABEL. I think the stability comes from the fact that over time that process simply compels every judge in the circuit to reexamine his viewpoint, and his or her viewpoint, and come to a greater degree of intellectual consanguinity, if you will, than exists today where essentially the en banc procedure does not really give an opportunity for full, equal participation by all of the judges in the circuit anyway.

Senator BURDICK. I do not understand that. They are all invited. What do you mean? They are all a part of the en banc, and what do you mean do not have any input?

Mr. ABEL. They sit too rarely en banc to have that sort of input. And furthermore, I am not sure that each judge has an equal voice today.

Senator BURDICK. Do you know that as a fact?

Mr. ABEL. No; I do not think I can prove it as a fact.

Mr. DREIFUS. Senator, I would like to add to Mr. Abel's thoughts on this. Stability in the composition of a court goes hand in hand with the Anglo-American jurisprudence principle that courts should follow their prior precedents for stability in the law.

Now, any institution, no matter how you organize it is going to be relatively stable or relatively unstable. One could have ultimate stability if one could have a court of unchanging composition forever, which is absolutely bound to follow its prior precedent.

We have relative instability even in the U.S. Supreme Court because over time its members retire or are replaced, or the court simply changes its mind and decides that it has reason enough to overrule or depart from a prior decision. So we have relative values of stability and instability.

The law has got to have some instability. Otherwise it would never change, and a nine-judge en banc panel in one circuit is a sufficient membership to assure a relative degree of stability that a circuit or a State can get along with.

Senator BURDICK. Are you trying to tell me that a nine-judge en banc will give you more stability than a 20 court en banc? Are you telling me that, really?

Mr. DREIFUS. Senator, yes. If you had no means of sitting en banc at all, if you had 20 judges that sat in three-judge panels with solely the obligation of attempting to follow what other panels are reported to have done in cases you will get relative stability. There are a lot of court systems with—in fact, this is one of the problems in our Federal court system now, the inability of the Supreme Court to adequately assure unity. But, every three-judge panel would attempt to follow its obligation of what a prior panel has done—observing what a prior panel has done, following the rules thereby made. But, you must have somebody at the head of the organization to make the law and resolve the conflicts where they do arise.

And a nine-judge panel that has a rotating membership admittedly is less stable than a nine-judge panel appointed for life to serve as the judges who will have the final decisionmaking power. But various other values are at stake. Members of the bar are universally opposed to such a permanency and the problems that it would give rise to, and would prefer rotating membership in some form.

Senator BURDICK. Judge Brown of the fifth circuit has described several other problems to us, and he and other judges mentioned the great difficulty that each judge had in trying to read and keep abreast of all of the opinions written by every one of the other 14 judges. Under your California plan, it is not true that each of the judges would have to keep abreast of each opinion written by 19 other judges?

Mr. ABEL. The answer to that is yes. And I think the further answer is that this is not an extraordinary or an unbearable or an intolerable burden.

Senator BURDICK. Another problem mentioned by Judge Brown was the logistical problem of communicating with 15 judges scattered over a 6-State area extending from Texas to Florida. In addition to communications was the problem involved in assembling 15 judges at the headquarters of the court in order to form an en banc court or perform judicial council functions. He also testified that despite such difficulties, it is desirable that all of the judges of the circuit be in the same city at the same time and at the same place, and this helped to promote collegiality and the feeling of unity among the members of the court. Do you have any feeling about how the ninth circuit is going to accomplish this same purpose if it has 20 judges scattered over a nine-State area extending from the mid-Pacific to the Mississippi River?

Mr. ABEL. Well, the law calls for an annual judicial conference of all of the judges in the circuit, and would continue to call for that.

In addition, of course, those judges who are sitting together geographically will have ample opportunity for contact with each other.

Again, I come to the point of the balance of interests here, which it seems to me has to be continually reemphasized, and that is what price do we pay in terms of the quality of justice, and in uniformity of it, for this greater opportunity of judges to be with each other and exchange views on an informal basis? If that price becomes too

high, or if the importance of the other aspects of this outweigh the so-called collegiality issue, then I think the collegiality issue must yield, and that essentially is where we come out.

We think, at least I think, that the difficulties of contact are more imagined than real, and that in point of fact the normal rotation of panels, three-judge panels within the circuit is likely to expose most of the judges to each other over a relatively short period of time.

Mr. DREIFUS. May I add to that answer? With regard to the expense of travel, even under the division plan or the plan originally proposed to divide the ninth circuit, there will not be very much savings in travel. Looking at the proposed northern division shows the large travel distances are roughly the same, and the only travel saving would be between Los Angeles and San Francisco really, and that has probably the cheapest and the most efficient means of travel that I am aware of in the United States.

Second, with regard to the obligation of every one of the judges and of the lawyers in the circuit being obliged to read and understand and be aware of the law made in the other divisions, that I believe would continue to be necessary under the committee bill, under S. 729, because of the operation and effect of the joint en banc panel. So I do not believe there is any real difference between our amendment and the subcommittee's bill in that regard.

Third, with regard to the reference to the Fifth Circuit, I would say there is a cardinal difference between the two situations. In the ninth circuit we are faced with a proposal to divide a State in half. Nowhere have I seen in any of the proposals relating to the fifth circuit any proposal that the State of Texas be divided in half, or the State of Louisiana, or the State of Mississippi, or the State of Alabama, or Georgia or Florida.

Senator BURDICK. Well, they do not have a caseload comparable at all to California's, and you know that.

Mr. DREIFUS. Sir, that may be true now, but if the State of Texas grows like the people in Texas believe it is going to grow, there will be a proposal sooner or later to divide Texas, if such a proposal should go through for California.

Senator SCOTT. Would the chairman yield just briefly?

Senator BURDICK. Yes.

Senator SCOTT. I notice in the prepared remarks by the California Bar Association that the objection to the division of the State, and the witness just referred to concern the division of California. But if the court, in fact, has the stability to which you alluded a few minutes ago, what difference does it make? The decisions would be the same, relatively the same. I do not see the objection with this stable circuit that we have, the objection to having the State divided in two, so that one is one judicial circuit, and another is in another judicial circuit. What is your principal objection if it is not in regard to having the same law in both circuits? You have been making an argument to the effect that you are going to have relative stability in decisions, and comparable law, and what difference does it make if part of California is in one circuit and the other part is in another circuit?

What is your real objection to this? Is it parochial?

Mr. ABEL. Let me take a run at that, Senator.

Senator SCOTT. All right.

Mr. ABEL. As you know, there are a great many areas where California law and Federal law interrelate, and the fact is that inevitably, given two different divisions passing on cases coming up from lower courts in California, there are likely to be different results, different appellate judges see things differently, as Senator Burdick was pointing out. So that if you come to a situation in which the Court of Appeals for the Northern Division, sitting in the northern part of California, and the Court of Appeals for the Southern Division, sitting in the southern part reach different results on the same question of law, you have the necessity of resolving that difference.

You also encourage litigants and lawyers, both of whom are traditionally, and naturally optimistic about results, to go to the division where they are most likely to get the result they are seeking. Forum shopping. Consequently, there is an added factor of uncertainty introduced into the structure of the law where two different courts are going to be deciding the same general issues. I think that essentially is the danger.

Senator SCOTT. Well then, what you are saying now, Mr. Abel, is that the law is not as stable as the other gentleman was saying a while ago, or we are not as bound by precedent then, and it is not really as reliable and dependable as the witness was saying a few minutes ago? You are saying that it does vary between the circuits, and between different panels. Is this correct?

Mr. ABEL. It does. But, of course, our objective should be to minimize those differences and seek greater uniformity.

Senator SCOTT. That is the major reason you have the Supreme Court, is it not, to stabilize the law between the circuits?

Mr. ABEL. Certainly that is a major reason.

Senator SCOTT. That is one of the reasons they grant certiorari?

Mr. ABEL. Exactly. Of course, however, we want to do what we can to avoid adding to the burdens of the Supreme Court.

Senator SCOTT. Mr. Chairman, thank you for letting me intercede here. But it just seemed to be a little conflict, and you sort of wanted the best of both worlds. Maybe I misinterpreted. One, the law is stable, but do not divide California, and there seemed to be a little inconsistency. That is why I asked the Chair to let me intercede.

Mr. ABEL. I think essentially we want to avoid dividing California so as to minimize the opportunity for divergent developments.

Senator SCOTT. Thank you, Mr. Chairman.

Mr. DREIFUS. May I add to that answer?

Senator BURDICK. I want to follow up that answer for Senator Scott's benefit. Under the bill there is a joint en banc panel that represents both divisions of the circuit to resolve the problems that you referred to.

Mr. ABEL. Well, that is true. But, of course, our objection is you never get to having that additional joint en banc panel if you simply have an en banc procedure for the circuit where the en banc functions are discharged by less than all of the judges in the circuit.

Senator BURDICK. Well, let us make the comparison. Under your system you want to add judges, keep adding judges, and you did not give me the ultimate limit where you wanted to stop. But, let

us take it for the moment at 20 judges. Under our proposal we keep your circuit, we make it two divisions, and then one will have 9 judges and one will have 11, which is manageable. All 9 will operate en banc in the one division, and all 11 will operate en banc in the other division, and if there is any dispute between the two divisions, they will get together on the joint en banc. Is that not a simple operation?

Mr. ABEL. It is simple to describe it that way, Senator. Of course, in point of fact what you get at each of those levels is some procedural hassling at times, clerk's records, motions for further hearings en banc within the division, and then, further, a motion to hear en banc by the joint panel. And our point simply is why go to that difficulty if you can have substantial uniformity within the whole circuit by the very much simpler method of committing to a lesser number than the full number of judges in the circuit these en banc functions?

Senator BURDICK. The only problem is that you would not be assured of a majority point of view. That is the trouble with it.

Mr. ABEL. Over time you will, as I see it, because of the changing nature of the panel, the en banc panel.

Senator BURDICK. Well, I have found out where a matter was settled in the circuit that it takes a long, long time before it is unsettled again. It takes years and years, and almost generations on something that is settled, unless it is a 5 to 4 decision or something. It is really settled.

Mr. ABEL. Well, this, of course, I think is true. However, I think the development by this process of changing the en banc panel is likely to produce a greater uniformity of decision, and a more valid series of precedents which are more acceptable to later generations of en banc panels than the method of having simply a resolution at the joint en banc level of two en banc panel decisions coming up from below.

Senator BURDICK. Well, it seems to me that you have two divisions, a manageable court in each division, one has 9 judges, one has 11, and it seems to me your planning, and your travel, and everything else is made much simpler. The amount of disagreement for en banc is not great. I believe in California—how many en bancs did they have last year?

Mr. WESTPHAL. They had 174 petitions for, or suggestion of, an en banc hearing in the ninth circuit, and the ninth circuit only granted 8 of them. They denied 166.

Now, that is the greatest activity they have had in the last 4 or 5 years, because in the preceding year they only granted one en banc, and in the 2 years before that they did not grant any. And I think this is the objection you made a while ago, Mr. Abel, and that is that in the ninth circuit today, with only 13 judges, that until the congressional committees started, and the Hruska Commission started putting a little heat on the ninth circuit, they only granted one en banc hearing over a 3-year period. The Hruska Commission received testimony from lawyers in four different cities on the west coast where they held hearings that one of the principal objections was the amount of intracircuit conflict between various three-judge panels

where you would have two circuit judges sitting on each panel and one district judge, or a senior judge, or a visiting judge from someplace else. And you had all kinds of intracircuit conflicts. And nonwithstanding that, the ninth circuit would not grant an en banc hearing for 2 years. They only granted one in the next year, and until heat was put on they did not grant any substantial number.

Mr. ABEL. Well, of course, one reason may be that to have an en banc hearing with the full number of judges on the circuit bench is a difficult thing to be arranged. It would be, I think, more practicable to have the smaller en banc arrangement in which it is easier, mechanically, for the judges to hear the en banc proceeding.

Let me make one point right here, because I think it is germane. Suppose our point is mistaken; that, that this would not work as well as we think it would. You could always switch later to a two-division concept, but you cannot go the other way. If you create this two-division thing now, and it proves unworkable, and the practical difficulties that we envision appear there, the difficulties of the three appeal levels, four total decisionmaking processes in the circuit, then you cannot go back. So I think it is worth pointing that out.

Senator BURDICK. The first thing that I wanted to say to you is that getting a law passed to make districts, or rearrange circuits or anything like that is not something like changing an electric light-bulb around here. We have been at it for 4 years to try to make this correction, and it is a long process.

Mr. ABEL. I understand that.

Senator BURDICK. I want to know under your theory that you simply add judges, to what point do you think that you can add judges until you really get inefficiency? Now, let us get a number from you. Is it 21, is it 23, is it 25? Where do you stop?

Mr. ABEL. I hate to be pinned down on that one, Senator.

Senator BURDICK. Well, this is what we are facing.

Mr. ABEL. I think 20 is not too large for a circuit, given the mechanics that the California amendment proposes for dealing with the en banc function provides.

Now, I think since there has never been a court with as many as 20, and certainly none with more than 20, it would be very hard for me to testify except as pure speculation as to where that maximum number comes in.

Senator BURDICK. We know that it is going to exceed 20. We know that from the projections.

Mr. ABEL. That the demands for the circuit——

Senator BURDICK. Yes. Where do wo stop, then? If we take your proposition, where do we stop?

Mr. ABEL. I think as long as you have a procedure for dealing with the en banc function, and even that, we admit we do not know exactly how that is going to turn out, but we think it will work, and if it does work, then the limit on the number of judges within a circuit may be very substantially affected by how this en banc arrangement actually works in practice. That is, committing the en banc functions to less than the whole number of judges.

Senator BURDICK. Well, your bar association has done some study on this. Can you not give me a number where you thing that we will really run out of efficiency?

Mr. ABEL. I will ask Mr. Dreifus if he has an answer. For me it would be speculation, Senator, and I say that with all sincerity.

Senator BURDICK. Well, I can say to you that based upon the population growth in this country, and the population growth in California, and based upon the caseload and everything, we are convinced that it is going to go beyond 20. Now, how far beyond would you go before you would make it into two divisions?

Mr. DREIFUS. Senator, as Judge Chambers said yesterday, the mechanics of organizing the court, and assigning the judges is a mathematical problem. It is as easy to assign 20, 25, 30, or any number. That is no problem. The problem comes in only with regard to the ability of the individual judges and the lawyers and the jurisdiction to follow the law, to follow the output of 20 judges.

Now, I think that it can be done easily, because as I said, we have a California Court of Appeals right now that has 20 judges, and they are grinding out opinions as fast as any other 20 appellate judges.

The entire California Court of Appeals for all of the districts has I think around 35 or 40 judges, and all of the California lawyers seem to be able to read their opinions. And the judges read each other's opinions.

If I may add one further remark, the division of the circuit, and dividing the State into two divisions or circuits, whether they are called divisions or circuits, would have this effect: To the extent that such a division would obey the rules of stare decisis of all of the decisions, you would very soon get a tendency that those judges and lawyers of the one division feel that they are a separate circuit and they would stop paying attention to the other division's decisions.

One of the reasons why there are relatively few en banc decisions, or en banc petitions now granted is the fact that even with 13 active duty judges, and what I think Mr. Westphal said, some 50 or 60 visiting judges sitting in the ninth circuit, the simple obligation to follow prior precedent has effectively held down the number of conflicts. But when you split a circuit into two divisions or circuits where each division no longer has the duty of following precedent other than its own, you will very soon get a parting of the ways in the jurisprudence generally, and this brings up the point that Senator Scott made in his question.

There is relative unity and stability of law within circuits. Regrettably there is a less degree of unity and stability between circuits because the Supreme Court does not have time to take all of the cases that it must.

Senator BURDICK. And that is why we have got the joint en banc panel, to take care of it.

Mr. DREIFUS. Yes, sir. But that is not the whole story. So long as the State remains within a whole circuit, the problem does not arise because the circuit court of appeals up to the present time has been able to take care of its intracircuit problems. But under S. 729, the joint en banc panel possibly could take care of the whole story if it could take a lot more cases than I presently understand it is supposed to take the way it is drafted. But it still would not be the whole story insofar as you set up a divisional structure where the lawyers

and judges in each division will not feel the full degree of obligation that they now feel to be aware of and to follow the precedents made in the other division.

Now, you have two conflicting tendencies there. If the lawyers and judges of each division are to have an obligation to look at, to follow the decisions of the comparable courts in the other divisions, and of your joint en banc panel, then what you have got in essence is something very close to what we have proposed in our amendment.

Senator BURDICK. Well, do I understand your answer to my original question to be that you see no limit in the size of a circuit? Is that your answer?

Mr. DREIFUS. No, sir. It is not.

Senator BURDICK. What is your answer?

Mr. DREIFUS. It has a limit which is more than 20, but the figure I do not know, Senator.

Senator BURDICK. Less than 100?

Mr. DREIFUS. Oh, yes.

Senator BURDICK. Where would you put the limit?

Mr. DREIFUS. Senator——

Senator BURDICK. That is what we are facing. Let us not beat around the bush, because that is what we are facing, and where do we divide it?

Mr. DREIFUS. Senator, I do not know. All I can say is based upon whatever projections might be applicable I feel the the total number of judges is within the ball park of 20, and I think that is the practical question we have.

Senator BURDICK. That is not the practical question because we have to look ahead. We cannot decide on these things in a day. We are not going to make these divisions every year. We cannot rely on 20 judges taking care of that circuit, we just cannot for the years ahead. So we have to decide how far do we have to go before we make a decision about dividing north and south. That is my question.

Mr. DREIFUS. Senator, all I can say is, if and when we have 20 judges on the circuit, which I believe will be practical based upon actual experience, and some of the opinions of some of the judges whose opinions I respect, I believe that we will be better able to know what the limit is.

Senator BURDICK. And that will be 5 or 10 years down the road?

Mr. ABEL. Yes. I think that is right.

Senator BURDICK. Notwithstanding the fact that the survey by the Judicial Center runs unanimously that no judge felt you should have more than 15 in one circuit.

Mr. DREIFUS. Senator, I think as Mr. Abel stated there are other values at stake than the purely procedural values. And I would say this: I have not read the questionnaire, but I would ask did the questionnaire differentiate between the questions asked on the assumption that a circuit would not be so realigned as to divide a State between two circuits? Also, did the questionnaire pose the question: suppose the en banc problem was solved in some manner as we now suggest?

Senator BURDICK. But that could lead to a minority position, and that is not solving it, in my opinion. You are going to have nine judges decide for 20.

Mr. DREIFUS. Senator, as I say, and I do not think this point can be overemphasized, the division of State between two circuits where in effect the circuit court of appeals rules as the court of last resort, is a very serious matter. There has literally been an explosion of Federal jurisdiction over the last 30 or 40 years, not just in the traditional areas of patent law, and antitrust law, and copyright law and things like that, but in things like prisoners' rights, civil rights, environmental regulations.

We have a very recent case which we cited in our statement where a panel of the ninth circuit decided extremely important issues concerning the rights of prisoners in custodial treatment in the State correctional institutions. It would create a positive mess if we had two divisions coming even temporarily to opposing decisions on matters that sensitive.

Judge Chambers in his testimony yesterday mentioned a welfare rights case in which he said the ninth circuit told the Governor of California that he had better find $200 million or $300 million pretty quick, and I think Judge Chambers mentioned what a problem that would be if you had forum shopping in a case like that.

Senator BURDICK. But Judge Chambers did not accept either plan, if you will recall in his testimony, he did not accept our plan or your plan. He did not take either one of them.

Mr. DREIFUS. Well, he said I believe that either one of them were acceptable.

In this regard, Senator, we mentioned in our statement, we referred to the statement of the attorney general of California which is now in the printed hearings of last October. The California attorney general referred to I guess perhaps 20 or 25 statutes, more of which are being passed all of the time. We pose one example, the Deep Water Ports Act where the Congress, on some regulatory or subsidy program, has stated that review shall be in the court of appeals of the circuit embracing the State, or in which the State is located.

Mr. WESTPHAL. No; it said to the nearest adjacent circuit. You have a deep water port off of some continental shelf on the northern half of California, and under that Deep Water Ports Act your appeal would be the northern division of the ninth circuit. If that happens to be down in Santa Barbara Channel, then your appeal would be to the southern district. There is no ambiguity under that particular act.

Mr. DREIFUS. Well, I believe it says to the nearest adjacent coastal State.

Mr. WESTPHAL. All right.

Mr. DREIFUS. The court which embraces the nearest adjacent coastal State.

Mr. WESTPHAL. You tell me where your deep water port facility is located, and I will tell you where is the nearest adjacent State for the appellate review purposes of that act.

Mr. DREIFUS. Well, Mr. Westphal, in that particular statute what you state is a possible interpretation of the statute, but one which I am sure would be litigated for several years unless we provided for those cases.

Mr. WESTPHAL. We can either have a perfecting amendment to take care of some of those problems if the existing statute is not sufficient, and when we get the time we will get to the specifics of what the existing statutes provide. But, it would only take, even if Congress does not come up with a perfecting amendment that would solve that rather incidental problem, it would only take one decision and you would have it decided.

Mr. DREIFUS. We also have the problem, for example, of those numerous other statutes that the Attorney General cited. For example, the city of Sacramento, which in the State of California is the State capital, is located or would be in the northern division, and I do not think that it is appropriate to say that the northern division thereby has Federal jurisdiction over all of those matters.

Mr. WESTPHAL. If I may, Mr. Chairman?

Senator BURDICK. Surely.

Mr. WESTPHAL. In response to the point raised by the attorney general of California, who as Judge Duniway says sees a lot of parades of horribles, which Judge Duniway in his statement says he just does not think are going to exist, but you take a situation where an action is brought against an agency of the State of California to prevent that agency from doing something which is prohibited by Federal law. The relief granted by that court is going to enjoin that State official from carrying out that policy, not only in the one facility that may be located in the northern division, or the one facility that may be located in the southern division, but the court will enjoin that procedure from being followed throughout the State of California in any facility under the jurisdiction of that official. So that you are not going to have, in that instance, any problem by reason of the fact that the litigation is carried on in the northern division, or the northern district of California at Sacramento, and then the appeal is taken to the northern division of the ninth circuit, because the relief that will be granted will define what is proper activity for that part of the State's function throughout the State of California. Is that not true?

Mr. DREIFUS. Mr. Westphal, that might be true. You would simply be having the vagaries of venue determine which of your devisions is truly the Federal court of intermediate review in California. You would have a situation somewhat similar to one you had in Federal habeas corpus cases where the mere fact that a prisoner happened to be incarcerated in some district other than the district in which the State court was located where he was convicted meant that some Federal judge at a great distance away was reviewing the State judge's decision. That, of course, has been overcome by a transfer provision in the habeas corpus statute.

Mr. WESTPHAL. That got taken care of by a transfer provision, and one or two judicial decisions. But, Mr. Dreifus, what I have difficulty in seeing is this: At one time California only had two district courts, Federal district courts. It was not too long ago, about 1965 or 1966, or so, that two others were created. So all of a sudden you have four different Federal district courts, each of which can have jurisdiction over some State activity. And I assume that all of the actions that have been brought, and that have been mentioned by Attorney General Younger in his statement were brought in one of those district

courts under proper venue statutes. Now, had there been a choice of forum, I suppose if the Federal Government initiated that action they might have made some choice of forum, but that is allowed them under the law. If there is a conflict of opinion between those four district courts in California, that conflict was decided by the Ninth Circuit Court of Appeals. And the system is going to be substantially the same under S. 729 with this additional half step, and that is that if the two divisions are in conflict on law applicable in California, which is more than just California cases, by the way, that then it will be resolved by the joint en banc panel. So I do not see where you find a basis for your fears that to create two divisions will cause some instability in the law.

Mr. ABEL. I am not satisfied, Mr. Westphal, that that additional half step, as you call it, which is really a full step as I see it, is necessary in order to make that resolution.

Mr. WESTPHAL. It is necessary in order to resolve the conflict if you are going to have two divisions. The two divisions are necessary because you need 20 judges, and all of the testimony shows, and the experience shows, that a court beyond 15 is terribly inefficient. We know they are going not only beyond 15, because this bill would give you 20 judges, which is even 2 more than the Judicial Conference recommended, and the committee wants to see that you have enough manpower out there so that your civil litigants do not have to wait 3 years to get their case decided.

Now then, if you take that one step, you then get to the point that the chairman raised, which is that if it takes 20 judges today to handle that caseload in the ninth circuit, and we know that the caseload is going to increase; why wait to make a decision that you have to divide the circuit in some way because 20, or 21, or 23, or 27, or 40, or 50 judges is an inefficient organization? If the California plan were adopted, and the only response that Congress could make in the future was to give you the extra 5 judges, the extra 8 judges, the extra 10 judges to bring you up to 25, 28, or 30, under your proposal you would have what, a 30-judge court, and you would have 9 judges deciding what the law of the circuit is, and you would have 21 judges excluded from any input into what is that law of the circuit, except as they may be rotated every 6 months under the Hufstedler proposal, or except as you might have a random selection.

And so the perception, if I may just finish my rather long statement, the perception has been that a system under which you exclude 11 judges from any input in determining the law of the circuit, but yet say to them you must under the principles of stare decisis follow that law that is determined for you by the other 9 judges, or God forbid by a 5-to-4 decision of those other 9 judges, that that really is not too acceptable under the system that we are familiar with in this country. It would be even worse if you get to the point where those 9 judges decide the law of the circuit that would bind 21 other judges who have absolutely no input on it.

Mr. ABEL. Let me take that last point first, because I think there is built into it an assumption that I for one am not really prepared to accept. Our law is full of situations where one group decides something that binds another.

Now, of course, historically, it is true that all circuit judges are equal. But I do not think that that means that we put that principle on an altar where in the public interest it can never be changed.

Now furthermore, if you rotate the panel, then the 11 judges who are making, or the 9 judges who are making the decision now will not be the same 6 months from now. So I do not think any judge who feels prejudiced by the fact that others within the circuit are making decisions which bind him need say anything further to himself than wait until I am on the panel; I have my equal access to the panel; my role as a circuit court judge is substantially on equal footing with that of the others; and you go from there.

Now, you asked me for examples, and one example, of course, is the Supreme Court, and another is in our State where there are intermediate appeals.

Mr. WESTPHAL. But Mr. Abel——

Mr. ABEL. But I want to take one more point first, if I may, and that is how do you know the caseload in the ninth circuit is going to multiply as you have described? How do you know that it is going to be necessary to have 30 judges in the circuit? I do not know that. If you take a look at some of the legislation that is pending in California and elsewhere, no fault, for example, what is that going to do? Arbitration, all of the various systems that are being devised to take cases out of the courts. And any change that might occur that would diminish the Federal court jurisdiction—I do not foresee those, but my point is why build the structure designed on the assumption that there is going to be a tremendous caseload growth in the ninth circuit if it may never occur?

Mr. WESTPHAL. Let me try to answer your last point. The Congress has watched the caseload in the fifth circuit. Once those States there changed, from what had basically been agricultural economy in Georgia and some of those other States, changed into an industrial economy, then that caseload within a 6-State area just exploded, and increased to the point where the Congress increased from 7 up to 15 in the number of judge required. We have seen that similar explosion in California, and those who advocate a northwest circuit to be carved out of the ninth circuit, they base the claim on the fact that they anticipate a huge increase in social and economic activity, and in population and everything else in Oregon, in Washington, in Alaska. And this is their basis for claiming that we should now create a northwest circuit, which if we create it now, would not have enough caseload to even keep three judges busy.

The other reason we feel that that caseload is going to increase is because as the Congress has tried to cut down the amount of jurisdiction placed in the Federal courts, it has been opposed by practically every bar association in 50 States. Senator Burdick was the author 4 years ago of a bill entitled S. 1876 that was recommended by the American Law Institute, and that bill would have made a very modest restriction on diversity jurisdiction. And there are those who will argue that diversity cases should not even be in the Federal system, they should be completely abolished. But the ALI proposal was that diversity jurisdiction should be modified so an in-State plaintiff could not invoke it; he could not come in and say that I as a

California resident and citizen cannot get a fair trial in my own State court; and, therefore, I want to invoke diversity jurisdiction of the Federal courts. And in 4 years—in the first year—this same subcommittee held about 15 or 16 days of hearings on that proposal, and there have been countless mailings and communications with State bar associations, and not one State bar association has supported that limited attempt by Congress to decrease the jurisdiction of Federal courts, as you have suggested. As a matter of fact yesterday your colleague, Mr. Dreifus, told me that his efforts to try to get the California State Bar Association to support that principle are not going anyplace because the trial bar of this country refuses to recognize some of these tough problems that the Congress is asked to deal with.

Now, Mr. Abel, I apologize for a rather long statement. But that is the reason why I can sit here and feel fairly confident that the problem that the chairman of this committee suggested to you, and that is that you are going to have to eventually create more judges because that caseload is going to grow, is a very valid premise upon which he asks you to commit yourself as to what is the highest number that you would tolerate on the court of appeals.

Mr. ABEL. Mr. Dreifus.

Mr. DREIFUS. I would like to make some comments.

First of all, Mr. Westphal did correctly relate the fact that we are having difficulty arriving at a conclusion concerning the proposal in S. 1876, but I hope to have the committee of the State bar make a report on it as soon as practicable.

But, to go to the issue before us with regard to Senator Burdick's question, what is the ultimate limit on the size of a circuit, I believe that question has to apply not just to the amendment we propose, but also to S. 729. If the ultimate size of the circuit is going to be a problem, it is a problem for both bills. And here I would like to add that when you stand back and look at our amendment, and look at S. 729, including some possible revisions of S. 729, and I hope I will not be out of order in referring to some discussions that I have had with Mr. Westphal in which he presented me with some possible draft amendments, there is not that much difference between the basic concepts of both bills. Both of them have what is in essence an en banc panel of nine judges taken from the whole number. There may be different methods of selection, there may be different ways of what the whole number of judges do with regard to how they sit in individual three-judge panels. But basically the structure is the same.

And I would like to state here on the record, even though it is in our printed statement, give credit where credit is due, the California amendment, the concept for an en banc panel of nine, less than the whole number of circuit judges in the circuit came directly from the committee print issued by Senator Burdick in December, which is the same as S. 729. We felt we were merely taking that basic concept and carrying it to its logical conclusion.

Senator BURDICK. Yes; but that is an entirely different en banc. Those four are from each division and represent the whole. They are bringing the point of view of the one division against the point of view of the other. But 11 have participated in the en banc in one division and the 9 fully participated in the other one, so they are just

representatives of the 9 and the 11, and that is the only difference there.

Mr. DREIFUS. Yes, Senator, but let us assume the circuit does grow so that you wind up with 30 circuit judges, 15 in one division and 15 in the other. You would still have a nine-judge joint en banc panel and, of course, for example, if they were picked by straight seniority, to which there has been a lot of criticism, you might have the southern division being divided on something by a heavy majority, and the only dissenters on the southern division would happen to be members of the en banc panel. You could have that situation. So in both S. 729, as in the amendment, you are faced with the same possible criticism, and I say possible with emphasis, because I believe in either case it is criticism that we can live with.

I think as in the case of S. 729, the four members who would be on the joint en banc panel, selected from the 9 of the 11 of each division, would bring to the joint en banc panel the feeling that they represent the entire circuit to the extent that they have had a feeling, to the extent that they have contact with their colleagues, and maintain a feeling of collegiality, and they would make a decision in a representative spirit, and in the same spirit that any appellate tribunal does in which they are deciding cases, in which the decision will govern lower tribunals. The Supreme Court does the same thing.

Senator BURDICK. I am afraid for you that your argument is leading right down to separate circuits as the Hruska commission found, because then you have no problem. If you got a different feeling in each circuit, you go to the Supreme Court and get it resolved. Is that the way you want to do it?

Mr. DREIFUS. No, Senator.

Senator BURDICK. We thought we would do you a favor when we had this division apparatus.

Mr. DREIFUS. Senator, the Supreme Court cannot devote itself to being the highest Federal court for the State of California. It simply cannot, and that would be a distortion of its functions.

Senator BURDICK. That is what the Hruska commission recommended.

Mr. DREIFUS. But it does not have the time to do it. It cannot spend 90 percent of its time on southern California cases.

Senator BURDICK. That is why we have this division concept. We can refer back to the Hruska commission findings very simply, and then you have no problem at all about the differences between the northern and the southern divisions. That is all gone then.

Mr. DREIFUS. Senator, I merely repeat what I said, that I do not believe the ultimate size of the circuit is a practical problem with regard to the proposal, either for S. 729 or for our amendment. And as I again said, we felt that in proposing what we in the State bar proposed that we were following a basic pattern, a basic kind of structure which originated with the subcommittee.

Senator SCOTT. Mr. Chairman?

Senator BURDICK. Yes.

Senator SCOTT. Gentlemen, being a new member of this subcommittee I do not have the same depth of information as the chairman or counsel has, but in listening to the comments that are being made, about the possibility of a 20–30-judge bench in the ninth circuit, and

being aware of some comment to the effect that perhaps we need another court in between the circuit and the Supreme Court, the question which occurs to me, and runs through my mind is this: With all of the new law that the Congress is writing, and the regulations of our administrative agencies, that maybe there are too many appeals being taken, and maybe the answer might be to assure every American the right to a fair and impartial trial, but put some limitation on the right to more than one trial. It seems to me after listening to the exchange going on here today that maybe there is no end to all of this as we get more and more people, and as our litigation becomes more complex, and there are more reasons to take a case to a Federal court. And I am sure there are similar problems in our State courts also.

But, it is not often that I get an opportunity to talk with California lawyers, being from Virginia. I would just like to get your views, if the Chair will indulge me, because this may be a little bit off the immediate question before this subcommittee. But, is part of the answer to this influex of appellate cases, further limitation on the right to go above the district court level, and to put some further limitation on the right to get into the circuit, or the Supreme Court? From time to time you hear that they do not have adequate time to consider all of the matters that come before them, and the suggestion of still another level of Federal courts is made.

Now, are we having too many appeals? And I know gentlemen, being lawyers, this is your livelihood, and yet if a person is afforded one good trial, is that due process, or should we put any limitation on appeals? Would that be a part of the answer to the problem that is confronting us here, this multiplicity of appeals?

Mr. ABEL. Senator you have raised an interesting question. I do not know of any move to reduce the number of appeals to the court of appeals level.

Of course, the trend of society in this country today is to exhaust a person's individual rights; that is, to push appeal and protect the right to appeal as a matter of right.

Senator SCOTT. I am all for protecting the rights of society or the individual. But I am just asking if his rights have to be protected by taking every case to the court of appeals, or by petitioning for certiorari and considering the possibility of consideration at still another level of Federal courts? Are we going too far here when we talk about the backlog in our courts, and the discussions were with the chairman asking what number of judges we would have within one circuit, and the answer being 20 at one place, 30 possibly at another place, no limit at another place. It may be that this panel or others have considered this from time to time, but still you are here, and I just wonder if you have an opinion? Are we going too far? Should we put some limitation, further limitation on the right to get into an appellate court? We would all agree that everybody is entitled to his day in court, but I am just wondering are they entitled to appeal in every instance, and then should the Congress consider some further limitation on the right of appeal?

Mr. DREIFUS. Senator, if I may, in clarification of an earlier answer, my own personal view is that ultimate size of the circuit we do

not know. But my guess is that in the foreseeable future it would be in the ball park of 20. My mention of the higher figure earlier was in a more or less hypothetical discussion.

But with regard to the other problem you mentioned, this is a fundamental problem. It is more fundamental than problems of courts and procedure. I noted in the editorial page this morning of the Washington Post a column which reported a very recent speech of Attorney General Levi in which he pointed out that there seems to be an expectation of society that laws and court decisions can solve all of the problems of society. And there is a tendency to try to bring every conceivable human problem into court, to put it into court pleadings and this just simply cannot be. It cannot be done.

Frankly, Senator, I do not know what the answer is. All we can do as lawyers is to observe what appears to have happened. I would agree with you that we face a fundamental problem.

Senator SCOTT. Well, you talked about some of these habeas corpus cases a few minutes ago, and we know that sometimes the inmates bring some of these suits, and I think we do have some cases that are brought that perhaps we could put some limits on the rights of appeals, further limits.

But frankly, Mr. Chairman, it is just something that flashed through my mind, and I thought perhaps you two gentlemen might have some views on it. Mr. Abel, you are president of the California bar. Do you have any thoughts that you could share with us on this?

Mr. ABEL. My view on that, Senator would be that the best hope is in reducing the number of cases entering the trial court channel. That is, I think there are many possibilities there. Arbitration is one. We have going in California now, for example, an experiment in which a plaintiff in a tort case, if he agrees to accept a judgment of under $7,500, he may compel the defendant to arbitrate, and the defendant is bound by a law to do that.

Now, no fault, of course, is another thing. I think the way to reduce court congestion at the appellate level is to cut off the incoming stream farther up the river before it gets into the appellate court.

Senator SCOTT. If you deny a person the right to go to court, this could be a denial of due process, could it not?

Mr. ABEL. It could, of course, so that any legislation dealing with the subject has to have due regard for constitutional rights. But given that regard, I think that the hopeful avenue to follow on this is at the trial level rather than at the appellate level. That is not to close the door on the possibility, since you asked the question and I have been sitting here thinking and trying to think of some types of cases where you could say that a trial court is the last court, or it is the last court on certain issues, and at the moment I do not come up with anything that might be of great value. But I think the idea is worth exploring.

Senator SCOTT. For example, in your district court if people are not satisfied with the decision of a specific trial judge, let them perhaps have a three-man panel at the district court level rather than even get into the circuit court. Is there some machinery that would keep these cases out of the circuit courts? Mr. Chairman, I am not going to indulge further. I know this is speculation, and it is not

directly involved, but yet the thought comes to my mind that rather than creating additional judgships perhaps we could find a way that an individual could have his day in court, but have his day, and not have his year, or 2, or 3, or 4, or 5 years in court, and still it does seem that the process is too long and too drawn out and unnecessarily so. I am not sure that due process includes the right in every situation to go to the circuit court or to petition for certiorari.

Perhaps through a study we might limit further the appellate process, and I was just seeking your opinion on something not directly related to this matter.

Mr. DREIFUS. Senator, if I may further respond, I would say that the bar association diligently is looking at things like that.

But to get back to your original question concerning habeas corpus cases, we do not know what the solution is. Some have criticized the great expansion of habeas corpus jurisdiction over State convictions, but without getting into the merits of that, so long as we have to have that large review jurisdiction by the Federal courts, that relates to what we have here, and a State can live with that Federal habeas corpus jurisdiction if it knows that the court of appeals in a unified way is going to make rules applicable to the States. But, you would be creating a very bad situation if you had a State divided between two divisions or circuits as that you would have habeas corpus law in one circuit or division applicable to State prisoners and reviewing State convictions where the judges do not feel a complete obligation to follow the same law throughout the whole State.

Senator SCOTT. Mr. Chairman, I appreciate your indulgence, and I am sure you have got this matter under control.

Senator BURDICK. I quite agree with Mr. Abel that if we are going to stop the chain operation we have to stop it at the district court, and that is why we have the ALI proposal, and are exploring no fault and things of that nature, because this is where the chain starts. It would be quite a problem for us to deny review and still maintain our constitutional safeguards.

Well, I just looked at the facts here, and in 1967 the ninth circuit went from 9 judges to 13, and now we are going to 20. Is it not a reasonable assumption that we will go much higher?

Mr. ABEL. I would say in answer to that the probabilities are that we will. There are uncertainties to it, but I think that is true, more likely to be true than not.

However, I am still of the view that we can move in that direction later. We cannot move back if we build a structure that is intended to cope with a caseload that somehow does not materialize.

There are a few items of evidence in terms of population growth, of course, and in the ninth circuit, particularly in California that population growth has been levelling off. On the other hand, the fact is that, as has been pointed out, society expects the courts to resolve more and more questions, and attorneys particularly I think are becoming aware that their duty to their client requires them to take an appeal under certain circumstances where there is any question about whether the outcome below has been in the client's best interest and represents full treatment of the case by the attorney.

So one can see arrows pointing both ways on caseload, and given that fact I would be very reluctant to go a route which assumes some-

thing which may never occur. I can perfectly well see your point, Senator, in that making a further change is not going to be a matter of changing a light bulb. This experience we have had with this proposal demonstrates that. And I do not know what your decision will be as to the fifth circuit. If you go the dividing of the circuit route into divisions there, and if you leave the ninth circuit as it is, dealing with it only as proposed in the California amendment, you will, of course, in time have an index of which of these two systems works better. If it turns out that the division of the fifth circuit is something that is workable and desirable, that could be the next step down the road in the ninth.

Perhaps that is an advocacy of a gradualist approach, but I think it is realistic.

Senator BURDICK. We think you are over the limit now.

Mr. DREIFUS. Senator, if I may add a comment concerning population, I do not have authoritative figures, but my recollection of the population growth of California is that it roughly doubled from 10 million to over 20 million from 1950 to 1970. But the current projections are that it is to level off through the seventies and eighties at somewhere around 22 or 23 million.

I do not know what the projections are for the Northwest States. I think their percentages are somewhat higher, particularly the State of Alaska, and perhaps also Oregon. But they have rather small populations to start with.

Senator BURDICK. They have small populations, but they are expecting big business.

Mr. DREIFUS. Especially in Alaska.

Senator BURDICK. Which brings litigation.

The staff has some technical amendments that they want to discuss with you for a minute.

Mr. WESTPHAL. Thank you, Mr. Chairman.

Before I get to some specific amendments that the committee is giving consideration to, and which I would like to give you an opportunity to comment on, let me mention this. Under the proposal contained in S. 729, when the two divisions, or if the two divisions are created they will each be a division of the ninth circuit, so that starting out they will each have as judicial precedents the existing case law of the ninth circuit. Those judicial precedents, they will be bound to follow, because they are each part of the ninth circuit, so that we will have that degree of stability to begin with. You recognize that, do you not, Mr. Abel?

Mr. ABEL. Yes.

Mr. WESTPHAL. All right. Now then, each of these divisions would have the same freedom that the ninth circuit today has, and that is to change their own precedents, and you recognize that? They could by case decision decide that they are going to overrule one of their prior precedents and establish a new law?

Mr. ABEL. Yes. As to a point of first impression that it was not already governed by an existing law.

Mr. WESTPHAL. Now, before we get to the point of first impression, let us just talk about the existing judicial precedents of the ninth circuit. Each of these two divisions would start out with judicial precedents which they would be bound to follow. What I am suggest-

ing to you is that starting from that point, each division would retain the same right, which the ninth circuit has today to override one of its prior judicial precedents, and to create a new rule of law.

Mr. ABEL. All right.

Mr. WESTPHAL. You now understand what I am talking about?

Mr. ABEL. Yes.

Mr. WESTPHAL. Now, if we assume that the northern division for some reason should decide to override a prior precedent, right at that first decision you would then have, if this was a precedent that applied to law applicable in California, you would have an existing conflict between the northern division which has decided to make a new precedent and the southern division which theoretically is bound by principles of stare decisis to follow the old precedent, so you would then at that instance have a basis for the exercise of jurisdiction by your joint en banc panel in order to clear that up.

I think the record might show that you did agree by nodding your head to the statement that I just made?

Mr. ABEL. Yes. I am not sure where you are leading me, but so far I am being led.

Mr. WESTPHAL. I do not want to lead you down the primrose path. But let me mention this. Then we get to the point, assuming Congress passes some law, and it is litigated in one division or the other and it is a case of first impression, and again it is a law which would be applicable in the entire State of California, and the original case testing that law, let's say originates in the southern district at San Diego, and it would be passed upon let us say by the southern division sitting en banc, but because this is a matter of first impression it has been suggested that the joint en banc panel should have jurisdiction, have the discretionary authority to take that decision from the en banc panel of the southern division and to pass upon that question, because it is one of first impression and/or of primary importance. Do you think that that type of jurisdiction should be given to the joint en banc panel if there is going to be a joint en banc panel sitting astride these two divisions?

Mr. ABEL. Definitely.

Mr. WESTPHAL. All right.

Mr. ABEL. My answer to that is quite clear, that if you are going to have a joint en banc panel, and if you have a question of primary importance or first impression, or whatever other definition you want to attach that signifies a case of special significance, it would be a desirable feature to be able to bypass the en banc procedure within the division and go directly to the joint en banc panel.

Mr. WESTPHAL. All right now, that is a third possibility.

Mr. ABEL. Do you have any different views, Mr. Dreifus?

Mr. WESTPHAL. Well, let me just continue this, so that we can try to get it out. Under S. 729 the joint en banc panel would have jurisdiction to resolve any conflict of opinion or of decision between the two divisions regarding the validity or application or construction of any statute or Federal or State regulation or administrative rule that affects rights in California. Now, that is one head of jurisdiction that that joint en banc panel would have.

What I just finished talking about was the possibility that there could be created a second head of jurisdiction for that joint en banc

panel, and that is a head of jurisdiction to pass upon cases of first impression and/or of great importance in order to head off any possible action conflict between the two divisions. This would be in response to, I think, a criticism advanced by the attorney general of California that in the printed form of S. 729 there is no jurisdiction in the joint en banc panel to ward off the possibility of a conflict.

Now, do you understand the point that I am talking about on this second head of jurisdiction?

Mr. ABEL. Yes.

Mr. WESTPHAL. And I think you have just indicated you agree that that would be desirable to give that joint en banc panel a second head of jurisdiction in that way?

Mr. ABEL. Yes. If you are going to have this joint en benc panel. But now let me point out that at each of these junctures you have got procedural hassling, differences of opinion on whether the case is or is not a question of first impression, is or is not a question of great importance at each of these junctures between going from the district court to the three-judge panel on the one hand, or the district court to the en banc panel of the division, or from the district court to the joint en banc panel. You have procedural problems, uncertainties, delay at each turning point in the road.

And so while in theory it seems to me very desirable to be able to bypass the division en banc step and go directly to the joint en banc step. I only say that in the light of the very real objections it seems to me that by simplistically stating things alternatives are overlooked, There are too many little roadblocks that would cause a delay, some intermediate decisionmaking process to determine whether this is a case that should go to the joint en banc panel directly from the district court, time requirements, all kinds of bureaucratic steps that it seems to me merely serve to underscore the difficulties about having this two division setup.

Mr. WESTPHAL. Well, Mr. Abel, on that point, let me ask you how that would vary from your own State court system whereby you have your court of general jurisdiction, what is it, circuit court?

Mr. ABEL. Superior court.

Mr. WESTPHAL. Superior court. And how many different superior courts do you have in the State of California?

Mr. ABEL. One in every county.

Mr. WESTPHAL. All right. How many counties?

Mr. ABEL. Sixty-eight as I recall. Do you remember?

Mr. WESTPHAL. Sixty-eight counties?

Mr. ABEL. I have forgotten how many.

Mr. WESTPHAL. So you start in the California State court system with 68 superior courts which are the trial courts, and then is it five or is it six intermediate courts of appeal?

Mr. ABEL. There are five.

Mr. WESTPHAL. All right. So you have five intermediate courts of appeal. One has as many as 20 judges, and the others, the others have how many judges?

Mr. ABEL. As few as three.

Mr. WESTPHAL. All right. Now, beyond that court you have the California Supreme Court, so that at each one of those steps you have

the same kind of a delay and confusion, and procedural steps and bureaucracy that you fear under the S.729 proposal, is that not true?

Mr. ABEL. Well, not quite, because the only discretionary aspects in the whole appellate chain within the State courts is at the level of the supreme court.

Mr. WESTPHAL. Now then, under the California State court system, the California Supreme Court has, I take it, discretionary power to take a case of great importance, and it can bypass your intermediate courts?

Mr. ABEL. Yes. That is rarely done, but that is possible.

Mr. WESTPHAL. And I take it that the California Supreme Court has the discretionary power as to whether they will or will not entertain an appeal from the intermediate appellate court?

Mr. ABEL. Yes.

Mr. WESTPHAL. So that basically——

Mr. ABEL. There are certain classes of cases where there is an automatic appeal.

Mr. WESTPHAL. Yes, there are certain classes of cases where there is an automatic appeal as a right. Now, under the provisions of S. 729 there is an appeal as a right to the division where it would be heard by the three-judge panel, the same as it would be heard in one of your intermediate courts in the State system where you have some three-judge courts and even with 20-judge court operating in three-judge panels, does it not?

Mr. ABEL. Yes.

Mr. WESTPHAL. Whether or not the division will entertain the case in an en banc proceeding is discretionary, just as it is discretionary whether the California Supreme Court will hear a case, and they also sit en banc, do they not?

Mr. ABEL. Yes.

Mr. WESTPHAL. It is discretionary whether the California Supreme Court will hear en banc a decision made by three judges from any one of your five intermediate courts of appeal, so that this system that is proposed in S. 729 does not vary that greatly from the system you have in your own State court system, and you have managed to live with your own State court system, have you not?

Mr. ABEL. Well, I differ, and Mr. Dreifus may want to answer that question. I will listen to him and supplement it.

Mr. DREIFUS. If I may comment on your several questions, first of all, the difference in the analogy to the California State court system, rather the differences in this, the California District Court of Appeals does not sit en banc. It sits only in three-judge panels.

Mr. WESTPHAL. I understand that.

Mr. DREIFUS. Unlike S. 729 where you would have a division sitting en banc as well as divisional panels apparently before getting to the joint en banc panel.

Mr. WESTPHAL. But they would sit en banc only if in their discretion they decided the case was worthy of sitting en banc, and in the entire ninth circuit in the year 1974 there were only 174 such cases where counsel ever suggested that the cast was of such importance that it ought to be considered en banc. Now, that is 174 out of 2,551 cases terminated in the ninth circuit in the year 1974.

Mr. DREIFUS. Yes. But if you recall Judge Chambers' testimony, he related that the consideration of en banc petitions takes a very large amount of a judge's time, because they all must, in the divisional case, all of the active judges of the division would have to sit and consider the en banc petition under the original draft of S. 729.

Mr. WESTPHAL. All right.

Mr. DREIFUS. Now, let me come to the amendment that appears to be suggested. May I say that I appreciate the courtesy of counsel for the committee in furnishing me a copy of a proposed amendment yesterday. But, as is so often the case in these extremely complex problems of court procedure and jurisdiction, it is very difficult to come to a final finished piece of work overnight. And while I have looked at it, and I can comment on it generally, these are not things that can be done overnight.

I would say this: as I understand the amendment and the comments of counsel here today, it represents a significant broadening of the jurisdiction of the joint en banc panel from that which appeared in the original draft of S. 729 as introduced. To that extent we certainly agree with it, because it goes in the direction, we think, of what such a joint panel has to do. As I say, I do not know whether I could completely agree with the language without making particular comments on it. But the direction of it is, functionally at least, in the direction of what the California amendment would do, because as I understand the amendment, it would give the joint en banc panel the power to, by its own decision, take a case. The power to bypass the division en banc.

Mr. WESTPHAL. In a case where it involves a question of first impression, or of primary importance.

Mr. DREIFUS. Yes. Well, as I say, I would have to take a look at those criteria to see whether they were actually broad enough. And I am only speaking about the general direction in which the amendment goes. It gives the joint en banc panel the power by its own order to bypass the division en banc and take a case directly, take a case directly from a three-judge panel. If that is the case, then that represents a significant improvement over what we thought was the intent of S. 729.

Now, our principal procedural objections to the structure of S. 729 was that it represented three separate en banc entities, and that the division en banc had to be exhausted before a petition could be considered by joint en banc panel.

Mr. WESTPHAL. I think, may I say, because I think this is an interesting and an important dialog, I think this perception of the language contained in S. 729, which is in section 25 of the bill, which would amend section 1291 of title 28, and the language you have in mind appears on page 23 of the bill, which says that the joint en banc panel shall have jurisdiction over any decision by a division which is in conflict with the decision of the other division, and affecting the validity, construction and so forth of any statute, et cetera, which affects personal rights in the same State, I think your perception of what that language is, is correct. It would require an actual conflict between the division, not necessarily sitting en banc. If you had, for example, if you had a three-judge panel decide a

question, and the division decided that it would not hear it en banc, then the decision of that three-judge panel would be a final decision of that division, and if it were in conflict with a decision of the other division, that then the joint en banc panel would have jurisdiction.

So that head of the jurisdiction which is contained in the printed bill is what I have been referring to as first head of jurisdiction, for the joint en banc panel, that is, the resolution of an actual conflict. So you and I are in agreement as to what that language was intended to cover, is that not true?

Mr. DREIFUS. Yes. And that is the reason why, and again repeating, giving credit where credit is due, while we agreed with the basic function, and considered the functional idea of a joint en banc panel and innovative concept, the State bar disagreed with the very limited jurisdiction that was set forth in S. 729. We felt that it could not do, perform the function that it was intended to perform.

Mr. WESTPHAL. All right. Now let us talk about this jurisdiction so that it will not be limited in your perception, and let us see if we can reach some agreement as to how broad it should be. Now, we are in agreement that we should have jurisdiction to resolve actual conflicts between the two divisions, is that not true?

Mr. DREIFUS. Yes.

Mr. WESTPHAL. All right.

Mr. ABEL. At that point, Mr. Westphal, may I interject? The bill, on page 23, line 7, has the words "and affecting the validity, construction or application," and so on. Now, the amendment which as I understand it was put in the record yesterday, which includes the provision for bypassing the division court, and going directly to the joint en banc panel, had somewhat broader language which read substantially this way: a determination of the validity, construction or application of any statute or administrative order, rule or regulation where it is shown to the joint en banc panel that a prompt review of such decision by the joint en banc panel is necessary, et cetera. My point is that that language I think should be in the language relating to the conflict of decision portion.

Mr. WESTPHAL. Well, I cannot agree with you, Mr. Abel.

Mr. ABEL. As well, in both places.

Mr. WESTPHAL. This is the purpose of my trying to lead this questioning here, so that we are all talking about the same thing, because I think that if the bill were to pass, and if it were to be amended, our hearing record should be somewhat clear as to just exactly what it is we are talking about in our efforts to broaden the jurisdiction of the joint en banc panel.

Now, the existing language is the printed bill as we have it here today on page 23, lines 1 through 10, that is one head of jurisdiction for this joint en banc panel, and that is based upon the existence of an actual conflict between the two divisions. And I think we all understand each other, that that is what is intended. Is that true?

Mr. ABEL. That is true. My point simply is——

Mr. WESTPHAL. I will get to your point.

Mr. ABEL. All right.

Mr. WESTPHAL. A second head of jurisdiction is that which is proposed in the amendment proposed by the chairman, and discussed

with Judge Chambers at the hearing yesterday, and which I furnished copies of to Mr. Dreifus, and I assume that you have seen that copy?

Mr. ABEL. I have it here.

Mr. WESTPHAL. All right. Now, if you will notice, that proposed amendment, what it would do, it would, beginning at line 10, after the existing language on line 10 of the bill, it would insert as a new numbered subparagraph a second head of jurisdiction for the joint en banc panel, and that would be jurisdiction to entertain a review of any decision, either by a division or by a panel thereof, involving a question of first impression or of primary importance where it is shown to the joint en banc panel that a prompt review of such decision by the joint en banc panel is necessary to avoid uncertainty and to promote uniform application of the law, either within a single State, which in this instance would be California, or within the several States of such circuit.

Now, in other words, what is intended there, as I would understand it, and as I would read that language, Mr. Abel, is that this joint en banc panel would have the power which the California Supreme Court has, which the U.S. Supreme Court has, and that is to take these cases of great importance, or of first impression, where you know that if we do not resolve that law right now, or resolve that question about the interpretation of the statute, or a new statute right now, that subsequent litigation will certainly produce a conflict. And rather than allow that thing to percolate, as the expression is, that the court feels that it is important to resolve it right now, and that is what is intended by the amendment proposed by the chairman. And I would here, in our discussion, call that the second head of jurisdiction.

Now, so my question to you is whether you agree that this second head of jurisdiction is appropriate, if there is going to be a joint en banc panel sitting astride the two divisions?

Mr. ABEL. I agree.

Mr. WESTPHAL. All right.

Mr. ABEL. But reiterating my prior observations about the difficulty in establishing whether or not at each of these turning points it is an appropriate case for a joint en banc panel.

Mr. WESTPHAL. But that is no different than the decision that has to be made by the California Supreme Court when it decides to exercise its authority to entertain an appeal from a superior court without waiting for a decision by one of your intermediate courts of appeal?

Mr. ABEL. Well, I do not recall the exact language that governs that step, but in any event, it is a point where discretion is required to be exercised by the court. And, of course, that is one of the aspects of this procedure that I am concerned about, because every time you have a court exercising discretion as to whether or not a case falls within a particular division, you have a procedural step, a delay, an argument, and we think it is important to avoid that wherever possible.

Mr. WESTPHAL. Really, Mr. Abel, there is no way that we can get around that, there is no way that the Congress can get around it

under the existing system. In every circuit, except the first where they only have three judges, you always have this threshold discretionary decision as to whether a court sitting en banc is going to rehear or to hear initially, because of its primary importance, one of the appeals filed in its court. So I do not see how we can avoid that. We have to rely on this discretionary power of the judges. I would hope that that discretion would be exercised in the better fashion than it apparently was exercised in the ninth circuit over a 3-year period in which they only held an en banc hearing on one case.

Mr. ABEL. If you have the joint en banc panel, you are stuck with that step.

Mr. WESTPHAL. But we have got that step throughout our system. And as our prior questioning here and discussion here today indicates, if we look at the 1974 record in the ninth circuit, there were only 174 cases out of 2,551 in which, because of a perceived conflict, or a perceived erroneous decision by a three-judge panel, or a perceived case of great importance that counsel ever suggested to the court that there should be an en banc panel. So that in looking at it that way, there should not be a large volume, as your statement indicates, "two-thirds of a caseload that would wind up in the joint en banc panel." What would wind up in the joint en banc panel is some part of 174 cases, because I assume that among those 174 suggestions for an en banc hearing which were filed in the ninth circuit last year, that a number of them were filed by counsel who felt that the three-judge panel had simply decided the case wrong, and they wanted the court en banc to correct what they felt was an error by the decision of the three-judge panel. So that this correction for rightness or wrongness under S. 729 is going to be exercised by the division sitting en banc, by 9 judges, or by 11 judges. But the function of the joint en banc panel is to give you this degree of unity, of judicial decision within the limits of the State of California.

Do we understand each other a little bit better on the theory of S. 729?

Mr. ABEL. Oh, yes. I understand the theory, Mr. Westphal. There is no problem of not understanding.

Mr. WESTPHAL. I thought it important to establish that.

Mr. ABEL. Oh, yes.

Mr. WESTPHAL. Because I appreciate there may be some difference——

Mr. ABEL. No.

Mr. WESTPHAL. As between us as to whether it should be a split circuit by having two divisions or whether it should be but one circuit with 20 judges and only nine of them sitting en banc, and we have got that basic difference.

Mr. ABEL. Well, we have got that basic difference, and then each step, as we described, of the features embodies in 729. I keep being struck again by what seems to me to be the practical difficulties in dealing with them.

Now, Mr. Dreifus I think has some comment about the number of instances where if California is not all in one division you will have a

greater caseload then is suggested by simply extrapolating the statistics on what the application for hearing en banc has been in the past.

Mr. WESTPHAL. What comment do you want to make on that, Mr. Dreifus?

Mr. DREIFUS. As I said before, the moment you divide a territory such as a State into what are functionally two circuits, if they are really going to be functionally that, then you will have lawyers and judges inclined to think of themselves in a separate manner, and you will have divergences grow. At the present time, the lawyers and judges throughout California and throughout the ninth circuit feel a duty to obey prior precedent made by the three-judge panels of the circuit in the past. And I would say that 174 petitions for hearing en banc out of 2,500 appeals is a substantial number.

Judge Chambers yesterday adverted to the amount of time that all of the judges must spend in considering these petitions, and they have to spend the time even though they deny the petitions.

Now, to come to the basic thrust of your amendment, I would say that we are in favor of any sort of an amendment of S. 729, as a hypothetical matter, if I may say this without saying that I endorse 729, we are in favor of any amendment which broadens the discretionary jurisdiction of your en banc panel to take a case, and completely bypass the need of the division en banc to even concern itself with the petition. To the extent that you do that, you eliminate one of the most serious sources of inefficiency and delay.

Mr. WESTPHAL. But then what you are suggesting is that you want, really what you want is the California plan, which is a court of 20 with only nine of them serving the en banc function. But what you give up under that plan is a great deal of collegiality in a court. You create a second-class judge whose only function is going to be to sit on a three-judge panel and grind out the first level of decision. He will have no voice in determining what is the law of the circuit. And as the discussion went with Judge Chambers yesterday when he was present, Mr. Dreifus, this is perceived to be quite a problem.

Mr. DREIFUS. Mr. Westphal, I would have to say that with regard to the first- and second-class judge comment, if that would be applicable to the California plan, I am afraid it would also be applicable to S. 729. I believe the joint en banc panel under S. 729 has functions similar to those, although not as extensive as under the California law.

Mr. WESTPHAL. But what you do not concede, Mr. Dreifus, is that to the extent that the nine judges in the northern division would sit in an en banc capacity, they would have input into determining what is going to be the law of the circuit, unless that law is overruled by the joint en banc panel. The same is true of the 11 judges in the southern division that are going to have input at that division en banc level into determining the law of the circuit.

Now, in those rare cases where the joint en banc panel is going to have to resolve a conflict, or set a rule of law in a case of first impression, or great importance, then you are going to have a decision out of a joint en banc panel which will be binding upon both divisions, which will be a judicial precedent in both divisions. It will be

added to this body of judicial precedent that each of these divisions will start out with.

But, what you have done under S. 729 is that you have organized a 20-judge court into two relatively efficient, 9 and 11 judge divisions, and you have greatly increased the flow of justice in the ninth circuit beyond that which exists today.

Mr. DREIFUS. Mr. Westphal, I believe the basic flow of justice depends upon the handling of cases by the three-judge panels. Most court of appeal decisions are those of the three-judge panels, and en banc decisions and the appeals to the Supreme Court are relatively rare in comparison.

The problem you have is this: If the divisions are each going to sit en banc, then one trades off the inefficiency and delay of having that divisional en banc step in there, with whatever it educationally adds, whatever it adds by way of contacts between judges which they do not otherwise have from the simple fact they all sit in rotation on three-judge panels, and presumably they all have personal contact with each other. As a strictly procedural step, we think that the joint en banc panel, assuming such a panel is to be constituted, should have the discretion in a broad class of cases to bypass the division en banc so that wholly unnecessary imposition on the time of the judges of the division can be avoided by the joint panel.

Mr. WESTPHAL. I would agree with you if the cases we are talking about are the cases of great importance, or of first impression. But to have a bypass for every case creates inefficiencies and defeats a lot of the principles that we have had in our circuit courts.

Now, we are running out of time, and I have a number of other specific things that I want to give each of you gentlemen a chance to comment on, before we run out of time here. Mr. Abel, you are familiar with the suggestion of Judge Chambers that judges who are eligible for a senior status, but who have not taken senior status, should be barred from serving on the joint en banc panel, under either plan?

Mr. ABEL. I am familiar with that.

Mr. WESTPHAL. Do you agree with that?

Mr. ABEL. To the extent I have any standing or authority to agree with it, I agree with it. I think that is a matter that is particularly within the province of the judges of the court. However, let me observe very firmly that I am in favor of broadening the participation in the en banc process as much as possible, and therefore, on that principal I would support what Judge Chambers has said.

Mr. WESTPHAL. All right now, let us get to the question, whether there is going to be a joint en banc panel, or whether there is going to be a panel of only nine or your California plan, the question of how you select those nine judges. Now, the alternatives or the choices available to the Congress are No. 1, to select those nine judges on a strict basis of seniority, which is the basis provided in S. 729, and it is the basis from which your California plan starts, subject to whatever other system the judges of the ninth circuit might decide to rule.

OK, now we both start with seniority, strict seniority. The other choice is to have a random selection whereby out of a hat containing 20 names you draw out 9.

A third possibility would be to start with seniority, but to provide for rotation, which is what we might refer to here as the Hufstedler proposal.

Now, are there any other alternatives other than those three that are available?

Mr. ABEL. I know of none, and I think you could probably think of some.

Mr. WESTPHAL. The only other thing would be to come up with some system whereby you would number each judge from 1 to 20 and say the first panel will be composed of judges 1, 3, 5, 7, and 9, and so forth, but that becomes unduly complicated to write, either into the statute or into a rule. Would you agree with that?

Mr. ABEL. Yes. You asked if there are any other possible methods. I suppose another one might be to have the Chief Justice of the United States make the appointments. But I would be, I think, opposed to that, simply on the ground that the Chief Justice is already overburdened, and a more prudent selection method can be left, it seems to me, to the judges of the circuit.

Mr. WESTPHAL. Well, let me comment on that, and I will not say whether I think the Chief Justice should have additional duties or not, but at one time there was a proposal that all circuit lines be abolished, that all 97 judges be put into a huge pool, and that they would have some administrator perform the function of composing three-judge panels out of that 97. And this was a proposal for overcoming some of these problems in the circuits, and when that proposal was advanced, I said that if they are going to have that, then I want to apply for the job of selecting those three-judge panels, because once you have the power to select what particular judges are going to preside at a particular term of court, or to hear a particular case, that almost carries with it the power to decide that case. Would you not agree with that.

Mr. ABEL. Do I have to?

Mr. WESTPHAL. So that if we had these three choices available that is, strict seniority, random selection, or seniority modified by rotation, then we can narrow our consideration down to these three?

Mr. ABEL. Yes.

Mr. WESTPHAL. Now, if you have strict seniority, I suppose the disadvantage to that is that it might be perceived that it is too inflexible in the sense that if your nine most senior judges were all conservative, you are going to make unhappy those who have a more liberal point of view. On the other hand, if all nine should happen to be too liberal, you are going to make somebody of conservative persuasion a little bit unhappy, and that is the basic objection to strict seniority, is it not?

Mr. ABEL. Yes.

Mr. WESTPHAL. All right. The advantage of strict seniority is that it gives you a relatively simple way of stating who the nine judges shall be. Do you agree with that?

Mr. ABEL. That is certainly true.

Mr. WESTPHAL. All right. Now then, on random selection whereby you would just pick the names out of a hat, I take it that that would be a selection of nine judges that would serve for a specific period of

time, 6 months or 1 year, and then you would make another random selection and compose another nine-judge panel. That is basically what you are talking about, is it not?

Mr. ABEL. Yes; of course, there are some modifications of that. That is, if on the first go around you have selected nine judges, you would want on the second I think to exclude those nine on the random selection, although that, of course, immediately poses the question of continuity, because if you have a complete turnover all at one time, the continuity objective becomes less attainable.

Mr. WESTPHAL. Another problem with random selection is—and I think Dean Griswold is the greatest opponent of that—he says that this reduces the system of justice down to the luck of the draw. And what it does is that it promotes and ferments litigation, because there is no stability, there is no element of predictability that enters into the law, and Dean Griswold argues that one of the greatest features of our Anglo-American system is that there is a degree of predictability, and that lawyers can use that as a tool when they advise a client whether they should or should not invest the time and effort into an appeal to a higher court. The lawyers can look at the people on that court and come fairly close to predicting whether the court will or will not entertain that kind of a question and what the outcome of that question might be.

So, would you agree with Dean Griswold that a random selection system is not desirable because it removes this element of predictability from the judicial process?

Mr. ABEL. Yes, I definitely would.

Mr. WESTPHAL. All right. So then the third possibility is to have a seniority system modified by a rotation. Now, Judge Hufstedler has suggested that there be a rotation of one judge every 6 months. If you just applied the mathematics of that, it would take 5½ years for that system to work before you would have brought the 11th judge onto the court: It would take 5 years before you would have brought the 10th judge onto the court, and 4½ for the 9th judge and so forth.

Now, this is some modification of seniority, but it really does not overcome a basic objection to the California plan, which is if you exclude 11 judges from your en banc function at any given point in time, even if you have rotation you will still have 11 judges excluded. It would take 5 or 5½ years before you have every judge participatingin an en banc function in some way.

Mr. ABEL. That is with a panel of 20 judges?

Mr. WESTPHAL. That is with a panel of 20 judges under the California plan.

Mr. ABEL. Mr. Dreifus wants to comment. But let me say this: I think this matter of how you choose the judges to sit en banc, or how the judges themselves choose is a very important and sensitive matter. I think we all recognize that judges, being people, are not all alike: they are not fungible. Some judges have a particular ability or proclivity for dealing with highly sensitive matters and, of course, by hypothesis the matters coming before the joint en banc panel, or the en banc panel, whichever system you use, are going to be the tough cases. So the mechanics should recognize that.

On the other hand, they should also recognize the very definite possibility that sitting on the en banc panel may tend to create two

classes of judges, and that would be true to some extent or another under both the bill and the California amendment.

Mr. WESTPHAL. Let me make this further observation. A fourth possibility here is the one which you have in your California plan as a means of avoiding the tough decision as to just how you are going to select these nine judges, and that is to just let the judges themselves determine how they will select their nine. Now, if you stop and think about that for a moment, I am just wondering how satisfied the bar would be and the entire ninth circuit if the legislation were to leave to those judges the choice. Those judges would have no greater choice than what we have discussed here. They would either go by strict seniority, in which even you are going to make certain elements of the bar unhappy. Or they could go and select by the random system, where you would have lawyers feeling unhappy because of the so-called luck of the draw. Or they could have the seniority system with rotation, which in turn has advantages and disadvantages to it. How serious are you about legislation which would say let the judges themselves decide it by whatever they want to do by rule?

Mr. ABEL. Bear in mind our statement does not take a firm position on that.

Mr. WESTPHAL. Yes; but legislation that this committee passes will have to take a firm position, and we want your views.

Mr. ABEL. That is what I am about to give you, for what it's worth. But it is my personal view, and not the view represented by the written testimony. I think you have the balancing of concerns here, some of which we have mentioned. First, the need to reduce the possibility that somehow there will be an in-group and an out-group of judges. That is the possibility that two classes of judges will be created.

Second, you have the objective of retaining to the degree you can the feature of collegiality which the judges have emphasized. That feature I think favors a rotation method, because if everybody has a chance to serve on the en banc panel in the course of time, the statute of each judge will be like that of every other judge.

The third point is that some judges are more competent at dealing with highly sensitive cases of the type that come before the en banc panel, and one needs to consider at least, perhaps not yield to, but at least consider how important it is to have the highest quality of decision on the en banc panel.

Balancing those three features, there may be others that one could think of, but balancing those three, I think that I would come down on the side of a rotation at some interval like 6 months, starting perhaps with an initial panel picked on the basis of seniority so that you would have, initially, on the panel the judges who have served the longest and were, therefore, in theory in least, more familiar with the history of decisions in that circuit.

Mr. WESTPHAL. I think you have made a good suggestion, Mr. Abel, and the committee will give consideration to it.

I might mention in passing that I have had long discussions with your predecessor, Seth Hufstedler, about this particular problem, and it gets to be very difficult to write a statute, although not impossible. It just takes a lot of words to write a statute providing for a rotation.

There may be an advantage for Congress to write such a statute if it is able to do so, because then it is set by Congress and it is not left open to the complete discretion of the judges as to how they are going to compose what is a specific entity for a specific purpose under the congressional legislation.

Let me move on to another point if I can.

Mr. DREIFUS. May I add one comment, Mr. Westphal? I believe that the mathematics of it under Judge Hufstedler's plan, in 5½ years all 20 judges would have served, or would have begun to serve.

Mr. WESTPHAL. Right.

Mr. DREIFUS. I would also like to add that no one subject caused as much discussion and difficulty for our State bar committee as the provision for selection or appointment of the judges, and since we submitted our amendment I personally have my doubts about the method of leaving it to the circuit itself, unless some very strict guidelines were added, because I have been told by a number of people that even if anything otherwise would not create first, second, third, fourth, or fifth class judges, by the time you got over the fight that might take place within the circuit over this, you would have considerable dissension and abrasion between the judges.

Mr. WESTPHAL. Now then, in your statement on page 7 you mention the problem that might occur under certain statutes setting up administrative agencies, or under specific legislation such as the Deep Water Ports Act, of determining which of the two divisions would have jurisdiction over a certain type of administrative agency review. And of course, when the administrative agency review is in the district court in the first instance, there is no problem. Do you agree to that?

Mr. DREIFUS. Well, there is no problem except that there is a larger distance to get to the joint en banc panel.

Mr. WESTPHAL. I suggest you did not listen to my question, Mr. Dreifus. The question is if the administrative review under the law is put in the district court in the first instance, then there is no problem of determining which of the two divisions would have the authority to review the decision of the district court, if there is further review allowed?

Mr. DREIFUS. That is correct.

Mr. WESTPHAL. The problem comes in where the administrative review goes to the court of appeals level in the first instance, is that not true?

Mr. DREIFUS. That is true. But I have to add a comment. If you have a venue choice between the district in the two different divisions, you might have an incentive to shop which you would not have now.

Mr. WESTPHAL. Title 28, section 2343, which pertains to review of orders of Federal agencies states as follows:

> The venue of a proceeding under this chapter is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit.

Now, under that statute there will be no problem in determining which of the two divisions has jurisdiction to review this administrative agency, because I take it that the petitioner resides or has his principal place, or his principal office in only one of those two divisions, is that not true?

Mr. DREIFUS. That is true. But I believe that chapter applies only to the special statutory review of what are called the big four or the big six administrative agencies. It does not apply to all of these others matters applicable to the States.

Mr. WESTPHAL. You are right, and you have just anticipated my next question to you, which is that the area where we would have the problem is under those statutes which State that the review shall be in the circuit which embraces the State involved, or something of that kind, and there you will have a problem?

Mr. DREIFUS. Yes. You have a problem in any statute where the venue section is premised on what had heretofore been the universal assumption that a whole State is located within a circuit.

Mr. WESTPHAL. Now then, section 22 of S. 729 was an attempt to partly anticipate some of these problems, and we may not have anticipated it completely. But section 22 of the bill provides:

> The terms judicial circuit, circuit court, judicial council of the circuit and court of appeals of the appropriate circuit as used in this title or other titles also mean and relate to a division of a circuit which has two or more divisions created pursuant to this act, unless the context in which that term is used necessarily excludes such meaning.

Now, in the light of the comments that you have in your prepared statement here today, I think that it would be wise for the subcommittee to give some further thought to what additional language would be needed in order to avoid there being any problem in determining which of the two divisions has jurisdiction to entertain administrative review in the cases not covered by big four statute. Do you agree with that?

Mr. DREIFUS. Yes. And I sympathize with the subcommittee's problem in that other subcommittees and committees of Congress are constantly adding statutes, and adding jurisdiction and venue provisions in many different ways, and I think the only solution is to go through the individual statutes, and cross-reference them, or make appropriate amendments.

Mr. WESTPHAL. One other point your statement makes is that in the provision which would allow 10 days within which to apply to the joint en banc panel, or to certify that the joint en banc panel was necessary for the consideration of a case, you suggest that the 10 days is too short. And you point out that under rule 40 of the Federal Rules of Procedure it provides a 14-day period. I might say that I am inclined to agree with you that we should have the same period of time, and 10 days probably is too short, but the least that we should do is have 14 days which will make it the same time factor as there is for an appeal in the first instance.

Mr. DREIFUS. May I make a comment on that, Mr. Westphal?

Mr. WESTPHAL. Yes.

Mr. DREIFUS. And I would note that Judge Duniway thoroughly agrees with us, and he recommends 30 days.

Mr. WESTPHAL. I understand that. The problem that I perceive is that if you start having different time factors in the ninth circuit than you do in other circuits, you have added some problems for lawyers who are not too familiar with the procedural steps in the ninth circuit.

Mr. DREIFUS. Yes. And I should add that the State bar in California, at the urging of many attorneys, has under consideration a

recommendation to the Rules Advisory Committee to change that 14-day period.

Mr. WESTPHAL. Do you not think that the resolution of that question should be made in that fashion by the Rules Advisory Committee rather than by this committee in this legislation trying to come up with a different time factor? In other words, if 14 days is too short a period of time, within which to give counsel an opportunity to decide whether to appeal or not, should there not be a decision which affects the appellate procedures throughout the country rather than this limited phase of this particular procedure in the ninth circuit?

Mr. DREIFUS. Yes, with one problem. The ninth circuit used to have 30 days before we had the Federal Rules of Appellate Procedure. It got reduced down to 14 days, and as a result of some urging, I attempted to do some research on where the 14 days came from. And I could not find anything over at the judicial center. I did observe that the second circuit and some of the eastern circuits had 14 days, and apparently that is where they got it from.

There is a big difference in sending a petition for a hearing or rehearing in Washington, Alaska, Hawaii, Seattle, Portland, or Las Vegas to San Francisco than it is to send it from Brooklyn to Foley Square in New York. And I believe the geographical differences in the circuits calls for differentiation, or at least if there should not be a differentiation there should be a substantially longer period. The Supreme Court allows 25 days.

Now, this brings up another drafting problem. With our amendment as drafted in such a way that procedural matters germane to the rules are placed directly in the appellate rules, I believe the subcommittee might wish to consider that in any bill that it recommends, procedural matters are separated out from the statutory matters and put directly in the rules, and we would be in favor of that, whatever bill is reported.

Mr. WESTPHAL. In any event, we thank you for having called that problem to our attention, and also the problem about whether the time should run from service of the notice of entry of judgment, or from the entry of judgment. And I might explain that the draftsmanship having it run from the service of the notice rather than from the entry was based upon the rule which requires the clerk to immediately serve notice of the entry of judgment upon the entry of judgment. So, it might be a little bit longer time in running it from the service than from the entry of judgment, but I agree that it should run from the entry of judgment, and the period of time is a matter that the subcommittee will have to consider in the light of this discussion we have just had.

I think that is all the questions I have.

Senator BURDICK. I have no further questions. Before we adjourn the hearing we will receive for the record a letter dated March 17, 1975, together with a mailogram dated May 23, 1975 from the Bar Association of San Francisco, and a letter dated February 20, 1975, from Mr. Luck, the ninth circuit executive, to Mr. Westphal, the subcommittee counsel. There will also be received letters from certain senior judges from the fifth circuit; namely, Judge Elbert Tuttle, Judge Warren Jones, and Judge Richard Reeves.

The record will remain open to receive a statement to be submitted on behalf of the Lawyers Committee on Civil Rights Under Law.

Subject to the foregoing, the meeting is adjourned.

THE BAR ASSOCIATION OF SAN FRANCISCO,
San Francisco, Calif., March 17, 1975.

Re: Ninth Circuit Reorganization.

Senator QUENTIN N. BURDICK,
U.S. Senate,
Washington, D.C.

DEAR SENATOR BURDICK: Thank you for your earlier letters, furnishing copies of S. 729 and S. 2990 (93rd Congress). The Bar Association of San Francisco appreciates the continuing careful consideration given by you to the needs of the Ninth Circuit.

We favor devisions so long as California remains intact

Congress should pass legislation to create divisions within the Ninth Circuit provided that a split of California is avoided. The divisional concept seems to be a worthwhile innovation to assist larger circuits to handle increasing case loads. Also the use of an executive committee of judges for en banc hearings is desirable for the larger circuits.

Therefore, the Bar Association of San Francisco opposes S. 729 (as well as S. 2990) only because it would split California between two divisions. We recognize that California continues to contribute a large percentage of the appeals to the Ninth Circuit. At the same time we foresee a potential for confusion and conflict and divisiveness, if parts of California are placed in different divisions. On the other hand, placing California entirely within one division would promote harmony of panel decisions affecting California. Any conflicts should be resolved at the divisional level.

The concept of dividing the jurisdiction of one court (the Ninth Circuit) into branches (divisions) has been utilized successfully in several state systems. Nevertheless, such division in itself entails some potential problems and risks. We believe that a split of California greatly would compound the problems and risks attendant upon the experiment of dividing the circuit.

Divisional lines may become new circuit boundaries

There is a further consideration. Although the divisional concept is promising, it represents something of an experiment. In the future the Congress may determine to create two new circuits in place of the Ninth Circuit. There would be a natural tendency to create those circuits along divisional lines earlier established. Any such solution, if California already had been severed into two divisions, would not be palatable and would be vigorously opposed for the reasons expressed by us last fall.

We reluctantly accept another litigation tier

We do have some misgivings about the creation of another tier for litigants and lawyers in the setting up of divisional review en banc between the panels and circuit review. But, the potential advantages to us outweigh this drawback. Larger and larger circuits of twenty and then twenty-five or thirty judges should be able to work more cohesively in two (or more) groups. If so, this will mean better unity within each division with clearer guidelines for the trial judges. Use of an executive committee for circuit en banc hearings should facilitate resolution of any inter-divisional conflict.

Endorsement of additional judges

We do favor the proposed addition of seven judges in the Ninth Circuit. More judges definitely have been needed for some time. But we cannot be sanguine that twenty judges will be able to work more cohesively together than two groups of judges of a lesser number. California alone or California with one or more states (e.g. Arizona or Hawaii and Guam) should constitute on division. The thirteen judges or so required for such a division should be able to work together more cohesively than the same number that have had to cover the entire area of the Ninth Circuit.

Endorsement of a joint en banc panel

We believe that an executive committee for en banc hearings is a workable idea worth trying. Gathering nine judges would be much easier than gathering

twenty. It is doubtful that argument to twenty judges is really feasible. Certainly decision by nine can be accomplished more swiftly and certainly than decision by twenty.

The scope of the panel should extend to all inter-divisional conflicts.

Opposition to selection of the panel by seniority alone

We oppose selection of the joint en banc panel on the basis of seniority alone. The panel should be more representative. All judges in the circuit should have more of a sense of participation or of a chance to participate.

We prefer selection of the executive committee or joint en banc panel on a basis of qualified seniority. Perhaps, the initial terms for the senior judges could be for 1, 2, 3 and 4 years with vacancies filled from the rest of the judges by random selection.

Please be assured of our keen and continuing interest in this matter. We appreciated your invitation to send a spokesman to testify at the hearings this week, but we believed that this letter could present the Association's views adequately. We ask that our letter be made part of the record. We are sending copies of this letter to other interested associations and persons.

Respectfully yours,

E. ROBERT WALLACH,
President.
BERNARD PETRIE,
Chairman, 9th Circuit Committee.

[Mailgram]

SAN FRANCISCO BAR ASSOCIATION,
San Francisco, Calif., May 23, 1975.

Sen. QUENTIN N. BURDICK,
Washington, D.C.

DEAR SENATOR BURDICK: The San Francisco Bar Association respectfully calls your attention again to its letter of March 17 on the two-division proposal for the ninth circuit. We endorse the position of the California State Bar, seeking seven additional judges for the circuit and supporting the executive committee en banc concept. Also we continue to support the concept of division, so long as California is kept intact.

ROBERT WALLACH,
President.

OFFICE OF THE CIRCUIT EXECUTIVE,
U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT,
San Francisco, Calif., February 20, 1975.

WILLIAM P. WESTPHAL, Esq.,
Chief Counsel, U.S. Senate, Committee on the Judiciary, Subcommittee on Improvements in Judicial Machinery, Dirksen Office Building, Washington, D.C.

DEAR BILL: I enjoyed talking with you at the National Conference on Appellate Justice. I thought it was a very interesting and informative assemblage.

Otherwise, I am answering your letter of January 2, 1975, about the number of suggestions for rehearing en banc filed in this court in Fiscal 1974.

In that year 174 such suggestions were filed. Of these, 166 were denied. Of the remaining eight, the court held hearings en banc in five, and the other three were submitted to the court en banc without argument.

Best regards.

Sincerely,

WILLIAM B. LUCK.

U.S. COURT OF APPEALS,
FIFTH JUDICIAL CIRCUIT,
Atlanta, Ga.

HON. WILLIAM J. WELLER,
Deputy Counsel,
Subcommittee on Improvements in Judicial Machinery

DEAR MR. WELLER: Your courteous letter addressed to me as a senior judge of the Court of Appeals of the Fifth Circuit was forwarded to me here where I am sitting with the Ninth Circuit but without a secretary's assistance.

I have not heretofore made a statement concerning the current proposed legislation to realign the Fifth and Ninth Circuits because I feel that the Active Judges would express adequately any arguments pro or con.

However, I do find myself in liaison with the minority of our judges. I deeply regret the circumstances which seem to dictate a split of the Fifth Circuit, I can best express my reason by aligning myself completely with Judge Wisdom in his several statements. Our court would lose much of its characteristics of a truly National Court, if it were to be divided.

Sincerely yours,

ELBERT P. TUTTLE.

U.S. COURT OF APPEALS,
FIFTH JUDICIAL CIRCUIT,
Jacksonville, Fla., May 2, 1975.

WILLIAM J. WELLER,
Deputy Counsel, Subcommittee on Improvements in Judicial Machinery, Washington, D.C.

DEAR MR. WELLER: Your letter of April 28, 1975 is acknowledged. I am not among those who think that you can improve a court by adding additional judges, hiring additional law clerks and disposing of appellate cases in a summary manner.

As you know, there are a considerable number of lawyers who feel that the constitutional right to be heard should include a right to have someone with an ear to listen which would permit oral argument wherever desired. There are some who feel that there may be too much adjudication by court personnel other than judges.

I think it is most desirable that the Fifth Circuit be divided. If it is to be divided, I see no reason why it should not be into two circuits rather than two divisions even though there may be some basis for this fictional procedure in splitting the Ninth Circuit.

I do not think the ends of justice will be served by being able to boast of the largest constitutional court in history.

Yours truly,

WARREN L. JONES,
U.S. Circuit Judge.

U.S. COURT OF APPEALS,
FIFTH JUDICIAL CIRCUIT,
Montgomery, Ala., May 6, 1975.

WILLIAM J. WELLER, Esq.,
Deputy Counsel, Subcommittee on Improvements in Judicial Machinery, U.S. Senate, Washington, D.C.

DEAR MR. WELLER: Your letter of April 28th inviting me to send to the subcommittee staff my views concerning circuit realignment is heartily appreciated. Being invited, I must in good conscience respond, despite my deference to my Brothers who are in regular active service and my reluctance to raise the ugly subject of racial prejudice on which my views may be considered extreme. I am happy that on some fronts the war against racial discrimination appears to have been won. However, the victory is far from complete, and it is too early for us to rest assured that the present advances are safely permanent. It may be significant that while the Fifth Circuit contains a larger percentage of Blacks than any other circuit, no Black has been or in the foreseeable future will be appointed in this Circuit as either a circuit judge or a district judge.

These views have troubled me from almost the beginning of the legal and social revolution which still affects our Nation as a whole, and is most acute in the six deep South states of the Fifth Circuit.

On May 19, 1964, I wrote to The Honorable Robert F. Kennedy a letter some parts of which I may reveal without breach of confidence or unpleasant reference to individuals. Because my views on the subject remain the same as those expressed in that letter, I quote at some length:

"My dear Mister Attorney General:

"I plan to be in Washington on June 16 and 17 and hope that it may be convenient for you to discuss with me at that time the proposed split of our Fifth Circuit. In my opinion, that proposal, if enacted into law, will probably delay for many more weary years the dream of our Negro citizens for equality before the law.

"I cannot reasonably ask you to spare me the length of time needed to tell you my views on this subject, and even if you could do so, my granddaughters would probably be tugging at my coattail to guide them around Washington as I have promised. I hope, therefore, that you may find time to read and consider this necessarily long letter. The carbons enclosed are for your convenience in the event you care to discuss its contents with Mr. Burke Marshall, Mr. John Doar or other members of your staff. While your opposition to this proposal might be decisive, I do not ask that you become involved unless you see fit, but do ask your views as to whether I am unduly alarmed and, if not, as to the course I should follow to prevent the proposed split.

"You or some of your staff may have attended the meetings of the last Judicial Conference of the United States. The Chief Justice has not yet, so far as I am aware, made its proceedings public. However, a news story out of Washington on about April 21st showed that 'the proposed split would reduce the circuit to four states—Alabama, Florida, Georgia and Mississippi—by creating an eleventh circuit composed of Louisiana, Texas and the Canal Zone,' that 'a resolution calling for the rearrangement has been approved by the judicial conference,' and that 'details of the plan came from Hubert H. Finzel, chief counsel of the Senate subcommittee on improvements in judicial machinery, who is helping to draft the bill.' Since that news story, two proposed drafts of legislation that would have the effect of dividing the Circuit have been submitted to the Circuit Judges of the Fifth Circuit for their views as to technical draftsmanship.

* * * * * * *

"The proposed split having been approved by the Judicial Conference, it may seem presumptuous for me to further resist it. In my opinion, however, the probable effects of this proposed split go beyond questions of judicial administration and the business of the courts to which the functions of the Judicial Conference are limited. See section 331 of Title 28, United States Code. While the President and you are preoccupied in securing passage of the 1964 Civil Rights Bill, this proposed split, if enacted into law, might constitute a second line of defense having the potential of delaying for the foreseeable future any enforcement of present or future civil rights. I have in mind more particularly the hard-core states of Alabama and Mississippi.

"I have the utmost respect for the integrity and ability of every Circuit Judge on the Fifth Circuit as now constituted. I would deplore, however, the loss by the Fifth Circuit of the services of such judges as Judge Wisdom and Judge Brown. I do not mention Judge Hutcheson, for on account of his advanced age we cannot hope to have the benefit of his services much longer. * * * Thus you can understand my concern, and even alarm, over the probability that if Louisiana and Texas are excluded from the Fifth Circuit a majority of the judges of the Court of Appeals for the reduced Fifth Circuit will not favor a policy of vigorous and effective enforcement of civil rights. If my pessimistic apprehensions should prove true, the probable effect upon the district courts within the Circuit can be accurately foretold by considering their recent past history as contained in a carefully documented Comment, *Judicial Performance in the Fifth Circuit*, 73 Yale Law Journal 90 (1963). In the absence of a strong Court of Appeals, the Supreme Court is too remote to have an effective control over the conduct of the district courts.

"If the civil rights issue could be avoided—and it cannot—I would still be opposed to the legislation as uneconomical, unnecessary and unwise. To elaborate upon such views, however, would unduly prolong this letter. * * *

"My duty, it seems to me is to do whatever a judge can with honor and dignity do to prevent this proposed split of the Fifth Circuit, and I earnestly seek your advice to that end."

Parentheticaly, I would repeat as of the present time a sentiment expressed in the foregoing letter and emphasize that I have the utmost respect for the integrity and ability of every circuit judge now on the Fifth Circuit but, because of differences in viewpoints among the various judges, I would deplore the loss by the Fifth Circuit of the services of those judges who reside either in Louisiana or in Texas.

My apprehensions were accentuated by the pressure for my retirement brought about by a provision of the Omnibus Judgeship Bill, as I explained in a letter to Mr. Justice Hugo L. Black on February 15, 1966:

"My dear Mr. Justice Black:

"I am sending to you as our Fifth Circuit Justice a copy of my letter of retirement forwarded this day to the President. As indicated, I hope to continue to perform the duties to which I may be designated and assigned either by the Chief Justice or by the Chief Judge or Judicial Council of the Fifth Circuit. Indeed, my retirement is more in name than in fact. The timing of it is occasioned by the Omnibus Judgeship Bill, which I am informed will probably be enacted into law within the next two weeks and which includes the following provision: '(c) The President shall appoint, by and with the advice and consent of the Senate, four additional circuit judges for the Fifth Circuit. The first four vacancies occurring in the office of circuit judge in said circuit shall not be filled.' The Administrative Office advises me the Department of Justice construes that provision to mean that the first four vacancies occurring after the bill has been enacted into law shall not be filled.

"In closing, may I again advise you that I am going to keep on working as long as I am physically and mentally capable, and I feel no evidence of failure at this time. It has been one of my highest privileges to work under you as our Circuit Justice."

My general views on circuit realignment remain the same as expressed in a letter which I wrote to Chief Judge Brown on May 29, 1973, and a part of which I quote:

"Dear Judge Brown:

"I thank you for your letter of May 24 and for requesting the views of the Senior Judges.

"It seems to me that the first and most important question to be answered is whether a geographical realignment of the circuits is necessary or even advisable to relieve overburdened Courts of Appals. I think not for many reasons.

"No judge familiar with the enormity of a court of appeals' work would minimize the seriousness of the problem, but is geographical realignment the answer? For the first time since the creation of the Courts of Appeals in 1891, we face the problem on a national scale. Solving the problem by merely creating new circuits has many disadvantages, among others the following:

"1. For some circuits, as of today it may offer a possible, but temporary, solution. For others, such as the District of Columbia Circuit, geographical realignment appears already to be impossible. For such populous states as New York and California, geographical realignment would require in the near future placing parts of the same state in different circuits.

"2. The boundaries of the circuits should aid the Courts of Appeals in performing their functions as national courts. Courts composed of judges from states with diverse interests and traditions can be expected to maintain a broad and nationally comprehensive outlook, while courts composed of judges from a single state or from two or three states might tend to become provincial. Extending this thought into the foreseeable future, geographical realignment may increasingly tend to lower the efficiency and prestige of Courts of Appeals as truly national courts.

"3. Each of the present circuits has a well-deserved pride in its traditions, methods, and decisions, which it follows in preference to those of other circuits, but with due respect to the other circuits. Such balance of values with which the several circuits are now familiar will be disrupted by any comprehensive geographical realignment.

"4. Creation of additional circuits may result in more inter-circuit conflicts, which would either add to the burdens of an even more overburdened Supreme Court or require the creation of some new tribunal, such as the presently proposed National Court of Appeals. As between the alternatives, it is far better to keep the conflicts intra-circuit and settle them by en banc Courts of Appeals, than to add to the burdens of the Supreme Court."

In addition to the views expressed in the foregoing letter, and in lieu of a geographic split, I suggest that the core of the boil be removed by developing a less burdensome method of settling intra-circuit conflicts. I agree with the following suggestions made by Judge Wisdom:

"I should like to say a word on en banes. There is no reason in the world why we should have an en banc court of 15. If the cause for putting a case en banc is a conflict within the circuit, that can be disposed of by another panel that is not composed of members who sat on the conflicting panels, or it could be disposed of by an en banc court of five. Of course, that would take legislation. The British use a court en banc of 5 and they, too, have a full court of 15, plus trial judges to draw on, in their court of appeals, criminal division.

"One of the criteria we have been using for putting a case en banc is the importance of the case. I believe that this is a serious mistake. If the case is very important, by putting it en banc we simply delay its getting to the Supreme Court, possibly by as much as 8 months to a year. The importance of a case should no longer be used as a criterion for hearing cases en banc.

"I feel that the burdens of en banc hearings are greatly exaggerated. Certainly the fifth circuit should not be divided because of 10 or 15 extra cases that are heard en banc. If we must have an banc hearings to settle intracircuit conflicts, I would suggest legislation allowing three judges, neutral judges, or a panel of five chosen at random, to settle intracircuit conflicts."

(Hearings, Part 1 Circuit Realignment, p. 101.)

As to the Fifth Circuit I would make a substitute suggestion, that is to create by legislation an en banc panel of seven judges to consist of the Chief Judge of the Circuit and the senior judge in regular active service from each of the circuit's six states. I would suggest leaving to that panel also the question of which hearings or rehearings should be considered en banc. If and when the en banc problem is solved, the number of three-judge panels can be increased as needed, and creation of new circuits and geographical realignment will be unnecessary. Our circuits as now constituted can then be permitted without disruption to continue their steady improvement of the administration of justice.

Again thanking you for the privilege of submitting my views, I remain,

Sincerely,

RICHARD T. RIVES,
U.S. Circuit Judge.

STATEMENT OF NEAL P. RUTLEDGE AND TERRENCE ROCHE MURPHY ON BEHALF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

Mr. Chairman: We are Neal P. Rutledge and Terrence Roche Murphy, members of the Washington law firm of Wald, Harkrader & Ross. We submit this statement on behalf of the Lawyers' Committee for Civil Rights Under Law. The Lawyers' Committee was organized in 1963 at the express request of the President of the United States to mobilize the energies and resources of the private Bar in support of the movement to remove racial discrimination from American life through legal process. Each succeeding President expressed renewed support for the Committee and its objective. The Committee has a national Executive Board comprised of lawyers practicing in most major cities and a national office and staff in Washington, D.C. It also operates a Field Office in Jackson, Mississippi, staffed by four attorneys. Associated committees operate in Washington, Chicago, Philadelphia, Boston, and San Francisco. Affiliated offices are in Los Angeles, Cleveland, Kansas City, Indianapolis, New Orleans, Birmingham, and Atlanta.

Mr. Murphy is a member of the Executive Board of the Washington Lawyers' Committee and had handled litigation for that office and for the national Lawyers' Committee and its Mississippi Field Office at various levels in the federal judicial system, including the United States Supreme Court; he has also acted as trial counsel to plaintiffs in school desegregation litigation in the United States courts in Louisiana. Mr. Rutledge is a former Professor of Law at the Duke University Law School, practiced for many years in Miami, Florida, and has appeared on numerous occasions before the United States Court of Appeals for the Fifth Circuit.

Through its Mississippi Field Office and otherwise, the Lawyers' Committee has been active before the Fifth Circuit. In one example, the leading recent case of *Morrow* v. *Crisler*, 491 F.2d 1053 (5th Cir. 1974), the Circuit (acting *en banc* upon the application of Lawyers' Committee counsel) modified and strengthened its panel's previous order and directed the District Court to require the Mississippi Highway Patrol to undertake an affirmative action hiring program to offset the effects of past job discrimination. Against this background, the Committee has reviewed the legislative proceedings concerning S. 729 and its predecessor bills. The Bill's impact upon the Fifth Circuit requires us respectfully to oppose its passage.

1. In our judgment, the Bill should be seen for what it is, a program for the permanent and almost total split of the Circuit into two new federal courts

of appeals.[1] Both new courts—apparently for nostalgic or historical reasons—are to bear the title "Fifth Circuit."[2] Thus, the legislation would divide the Fifth Circuit into an Eastern and a Western "Division," including Louisiana and Texas in the Western Division and Alabama, Georgia, Florida, Mississippi and the Canal Zone in the Eastern Division.

A similar divided system would be established in the Ninth Circuit, but unlike the Ninth, the "Fifth Circuit" under S. 729 would not enjoy any provision for the resolution of the intra-circuit or inter-divisional conflicts or for considerations of major issues at the circuit-wide level. Thus, S. 729 provides for a "joint *en banc* panel" with membership consisting of the "four most senior judges in regular active service in each division, excepting therefrom the senior chief judge who shall sit and preside ex officio on the "joint *en banc* panel." But that provision applies *only* to "any circuit consisting of two divisions, each of which has jurisdiction over cases arising from a United States district court sitting in a single state . . ." Clearly, this would apply only to the Ninth Circuit and appears intended to deal with the need for a uniform body of federal appellate law applied to California, which contributes the great bulk of the case load of that Circuit.

The Lawyers' Committee has no unique expertise in California or before the Ninth Circuit, but we point out that in specifically providing joint *en banc* panels in the Ninth Circuit-California context, the legislation makes clear by omission (and Senator Hruska's March 1975 statement makes explicit) that no such coordination techniques is to be followed with respect to the proposed "Fifth Circuit." Rather, the two "Divisions" are to go their own way, with the Western Division centered in New Orleans as the Circuit is now, and the new Eastern Division to be based in Atlanta in a new federal court house that even before this Bill clears the Subcommittee already has been designed to include the new "Division" with provisions for courtrooms, chambers for the full court, a Circuit or "Division" library, and substantial facilities for support staff. Thus, it is well to recognize that S. 729 irrevocably would divide the Fifth Circuit; the fact that each "Division" would bear the original name appears to be of only cosmetic significance.

2. The Lawyer's Committee recognizes that some method of accommodating the increased load of the Fifth Circuit should be found. But we point out that this problem is not unique to the Fifth, or even to the Fifth and Ninth Circuits. Thus, while the Fifth Circuit's pending case load at the end of Fiscal Year 1974 was 477.5% over that pending at the end of Fiscal Year 1961, the Fourth Circuit's was 883.0% over Fiscal Year 1961, the Seventh Circuit's was 506.1%, the District of Columbia Circuit's 367.6%, and the Eighth Circuit's case load was 278.5% over Fiscal Year 1961. Eeven the First Circuit, traditionally enjoying a relatively light case load, showed a 221.6% change over the end of Fiscal Year 1961. (1974 Annual Report of the Director of the Administrative Office of the United States Courts, p. 183).

In addition, while the Fifth Circuit's pending case load per judgeship went from 44 in Fiscal Year 1961 to 154 in Fiscal Year 1974 (a 250.0% change), the Fourth Circuit's pending case load per judgeship increased from 20 in Fiscal Year 1961 to 140 in Fiscal Year 1974 (a 600.0% change). The D.C. Circuit's per judgeship case load rose from 36 to 136 (a 396.0% change), the Seventh Circuit's from 21 to 112 (a 433.3% change), and the Eighth Circuit's from 19 to 62 (a 226.3% change). All other circuits have experienced comparable growth. The First Circuit increased its per judgeship pending case load from 17 at the end of Fiscal Year 1961 to 55 per judgeship (223.5% of the base period) at the close of Fiscal Year 1974, and the Second Circuit—which has experienced the smallest percentage change (136.0%) in pending cases during that period—more than doubled the case load per judgeship from 43 to 101. (*Id.* at pp. 186–187).

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[1] As noted by Senator Hruska in his March 1975 statement on behalf of the Commission on Revision of the Federal Court Appellate System, the Bill would delegate to the senior of the two divisional chief judges the power (now held by the Chief Justice) to make interdivisional assignments, and would permit, *but not mandate*, a joint annual judicial conference. (Statement, p. 2). Since each division would have "its own chief judge, its own circuit executive, and its own judicial council" (*ID.*), it is not difficult to envision the early development of two circuits fully independent in spirit, in administration and in fact even while linked by a common name.

[2] In their submissions to the Subcommittee concerning predecessors of S. 729, several judges expressed the desire to continue in srvic on th "Fifth" Circuit after any split.

Clearly, the case load burden is not limited to the Fifth and Ninth Circuits. In our view, the Congress would do well to avoid the piecemeal approach represented by S. 729 and rather should focus on broader structural reorganization of the appellate system if relief is deemed necessary. The December 1973 Report of the Commission on Revision of the Federal Court Appellate System is only interim in nature; in his March 1975 statement submitted to this Committee, Senator Hruska, the Commission Chairman, stated that there is in preparation a more comprehensive report to contain the Commission's "recommendations for such additional changes as may be appropriate." (Statement, at p. 5).

We note that in numbers of cases filed, two of the adjoining circuits (the Fourth and the Eighth) are much smaller than the Fifth, with the Fourth Circuit receiving 1,462 filings in Fiscal Year 1974 and the Eighth Circuit receiving only 995 during that period. While those filings represent significant increases over 1961 and subsequent years in each instance, the combined fillings of the two circuits is only 2,457, far less than the 3,294 filings in the Fifth Circuit. We do not pretend to omniscience, but a possible circuit reorganization that added Georgia to the Fourth Circuit and/or Alabama and Mississippi to the Eighth[3] or a realignment that added Georgia and Florida (as seaboard states) and the Canal Zone to the Fourth Circuit and kept the rest of the Fifth Circuit as it is, might more appropriately equalize the case loads in the region than an artificial split of the current Fifth Circuit into nominal "Divisions." Indeed, the Hruska Commission itself has recommended that if the Circuit should be split, the preferred alignment would be Texas-Louisiana-Mississippi in the West with the Canal Zone and the other states in the East. (1973 Report, at p. 9). That recommendation has not been followed in S. 729.

3. Short of a broad-gauge realignment of the appelate court system, it appears to as most unfair to provide a reorganized Ninth Circuit with a joint *en banc* panel for the resolution of major circuit-wide matters, while denying the same to a bifurcated Fifth Circuit. Such a joint panel would not be a perfect solution, but it would permit the Fifth Circuit to continue in the great function it has performed as a *national* court of appeals—not merely as a regional body resolving local disputes—while still avoiding some of the burdens and inefficiencies criticized by witnesses testifying before this Subcommittee.

We have prepared, and have attached hereto, a list of most recent *en banc* actions by the Fifth Circuit. Many actions setting cases for *en banc* review were taken *sua sponte;* often the court directed that there be no oral argument. In several others, the opinions ranged from two paragraphs to two pages in length. Thus, the logistical and administrative burdens of a joint *en banc* panel technique should not in fact be large. The Lawyers' Committee sees no considerations of efficiency that serve to reduce the critical national interest in the maintenance without dilution of the federalizing function of a major judicial circuit that has played such a vital role in our constitutional history. We concur fully in Judge John Minor Wisdom's view, already presented to this Subcommittee, of the issues at stake:

"A United States Court of Appeals has a federalizing function as well as a purely appellate function of reviewing errors. We do not just settle disputes between litigants. The federal courts' destined role is to bring local policy in line with the Constitution and congressional policy. Within the framework of 'cases and controversies' and subject to all the appropriate judicial disciplines, federal courts adjust the body politic to stresses and strains produced by conflicts (1) between the nation and the states and (2) between the states and private citizens asserting federally-created or federally-protected rights. The United States Supreme Court cannot do it all. When the Supreme Court acts, inferior courts must carry out the Court's decision. It is up to us to put flesh on the bare bones of such broad mandates as the requirement that schools desegregate with 'all deliberate speed.'

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[3] In this possible solution, which we cite merely as an example and neither approve nor disapprove, the resulting Fifth Circuit would contain non-contiguous states. But the present Third Circuit includes the offshore Virgin Islands, and the Second Circuit—primarily based in urban New York and Connecticut—includes rural Vermont, which might more appropriately have been linked with other New England states served by the First Circuit (which itself encompasses the Commonwealth of Puerto Rico). We are not aware that these anomalies have excited particular pressures for revision.

"For the most part, the friction-making cases in the federal courts are not those involving the allocation of power between the states and the nation. They are the cases between the states and its citizens involving civil rights and fair criminal procedures. These contests arise from state courts' employing different constitutional standards in their criminal procedures from those federal courts employ, or from a state's failure to give effect to constitutionally created or federally guaranteed rights, when these rights conflict with state laws and customs. Civil rights cases reflect the customs and mores of the community as well as the legal philosophy of the individual judges called upon to adjudicate the controversies. This area of conflict therefore is the most sensitive and difficult one in which federal courts must perform their nationalizing function. This is where localism tends to create wide differences among our courts. Parochial prides and prejudices and built-in attachments to local customs must be expected to reduce the incentive of inferior federal courts to bring local policy in line with national policy.

"The federalizing role of circuit courts should not be diluted by the creation of a circuit court so narrowly based that it will be difficult for that court to overcome the influence of local prides and prejudices.

"The best exercise of this role would call ideally for a court consisting of judges with widely disparate backgrounds who are familiar with regional and local thinking but insulated from the pressures and influences of the region and the community."

The Fifth Circuit should not be split into two separate courts heavily dominated by the regional or local interests—economic or otherwise—of one or two states.

CONCLUSION

For the above reasons, the Lawyers' Committee for Civil Rights Under Law recommends that the Congress reject the proposals in S. 729 to divide the Fifth Circuit into two nominal "Divisions," and further recommends that circuit realignment be considered only in the context of an overall appellate court reorganization plan. If Congress decides that some interim action should be taken, we believe that a better solution would follow the plan of Amendment No. 132 to S. 729, which has been introduced by Senators Cranston and Tunney. That amendment would preserve the Ninth Circuit in its present form and expand the number of authorized judges while permitting the chief judge to create a panel of not more than nine judges to sit *en banc*. We think this proposal has merit and if adopted for the Ninth Circuit should be applied to the Fifth Circuit as well. As an alternative less desirable from the Committee's point of view, a joint *en banc* panel technique should be considered.

RECENT FIFTH CIRCUIT EN BANC ACTIONS REPORTED IN THE FEDERAL REPORTER, 2ND SERIES

Plotner v. *Resor*, 463 F.2d 422 (5th Cir. 1972)
Hilliard v. *Beto*, 465 F.2d 829 (5th Cir. 1972)
Winters v. *Cook*, 466 F.2d 1393 (5th Cir. 1972)
Cisneros v. *Corpus Christi Independent School District*, 467 F.2d 142 (5th Cir. 1972)
United States v. *Bailey*, 468 F.2d 652 (5th Cir. 1972)
Purett v. *Texas*, 470 F.2d 1182 (5th Cir. 1973)
Perkins v. *Mississippi*, 470 F.2d 1371 (5th Cir. 1972)
United States v. *Robinson*, 472 F.2d 973 (5th Cir. 1973)
Kessler v. *EEOC*, 472 F.2d 1147 (5th Cir. 1973)
United States v. *Colbert*, 474 F.2d 174 (5th Cir. 1973)
Baker v. *Beto*, 476 F.2d 1281 (5th Cir. 1973)
Gallegos v. *United States*, 476 F.2d 1281 (5th Cir. 1973)
Scarpa v. *United States Board of Parole*, 477 F.2d 278 (5th Cir. 1973)
Johnson v. *Penrod Co.*, 478 F.2d 1208 (5th Cir. 1973)
Fitzgerald v. *Beto*, 479 F.2d 420 (5th Cir. 1973)
United States v. *Groner*, 479 F.2d 577 (5th Cir. 1973)
Jones v. *Wade*, 479 F.2d 1176 (5th Cir. 1973)
Bryan v. *United States*, 481 F.2d 272 (5th Cir. 1973)
United States v. *Soriano*, 482 F.2d 469 (5th Cir. 1973)
Willingham v. *Macon Telegraph*, 482 F.2d 535 (5th Cir. 1973)
United States v. *Caraway*, 483 F.2d 215 (5th Cir. 1973)

Mobil Oil Corporation v. *Oil Chemical Union*, 483 F.2d 603 (5th Cir. 1973)
Littlejohn v. *Shell Oil Co.*, 483 F.2d 1140 (5th Cir. 1973)
United States v. *Mississippi*, 484 F.2d 956 (5th Cir. 1973)
United States v. *Sepe*, 486 F.2d 1044 (5th Cir. 1973)
United States v. *Castallana* 488 F.2d 65 (5th Cir. 1974)
Toney v. *White*, 488 F.2d 310 (5th Cir. 1973)
United States v. *Farias*, 488 F.2d 852 (5th Cir. 1974)
Bazaar v. *Fortune*, 489 F.2d 225 (5th Cir. 1973)
Van Blaricom v. *Forscht*, 489 F.2d 1034 (5th Cir. 1974)
Morrow v. *Crisler*, 491 F.2d 1053 (5th Cir. 1974)
United States v. *Dinitz*, 492 F.2d 53 (5th Cir. 1974)
Sims v. *Fox*, 492 F.2d 1088 (5th Cir. 1974)
Park v. *Huff*, 492 F.2d 1088 (5th Cir. 1974)
Penn v. *Schlesinger*, 497 F.2d 970 (5th Cir. 1974)

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