CIRCUIT REALIGNMENT

HEARINGS

BEFORE THE

SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-THIRD CONGRESS

SECOND SESSION

ON

S. 2988, S. 2989, and S. 2990

THE REALIGNMENT OF THE FIFTH AND NINTH CIRCUIT COURTS OF APPEALS

PART 1

SEPTEMBER 24, 25, 26; OCTOBER 1, 2, AND 3, 1974

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CIRCUIT REALIGNMENT

TUESDAY, SEPTEMBER 24, 1974

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

The subcommittee met, pursuant to notice, at 10 a.m., in room 457, Russell Senate Office Building, Senator Quentin N. Burdick (chairman of the subcommittee) presiding.

Present: Senators Burdick and Hruska.

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

Senator BURDICK. Today the subcommittee commences the third—and what is hoped will be the last—phase of hearings concerning the U.S. courts of appeals for several circuits.

In the 92d Congress the subcommittee was instrumental in the enactment of Public Law 92–489 which created the Commission on Revision of the Federal Court Appellate System. Pursuant to this law, that Commission, chaired by the senior Senator from Nebraska—and upon which the senior Senators from Arkansas, Florida, and I are privileged to serve—made its initial report on December 18, 1973, in which it recommended geographical realignment of the fifth and ninth judicial circuits. Thereafter, on behalf of the Senators serving on that Commission, I introduced S. 2988, S. 2989, and S. 2990. Those three bills embody the principal and alternative recommendations of that Commission with reference to dividing the fifth and ninth circuits. In March and April of this year, the subcommittee conducted a series of hearings on S. 2991 in order to investigate the needs of the several circuits other than the fifth and ninth for additional judgeships.

We are now commencing the final phase of these circuit hearings. At the conclusion of this opening statement, I will incorporate in the record the more comprehensive statement which I made when this series of bills to which I have referred was introduced on February 7, 1974. Without repeating what I then said, let me simply observe that in the interval since introduction of these bills, fiscal year 1974 has now been completed, and the preliminary judicial statistics available from that year indicate that the total appeals filed in the 11 courts of appeals has increased from 15,629 in the preceding year to 16,436 in 1974. This is an increase of more than 800 cases, and while the cases terminated by these courts increased approximately 300 cases, this meant that all of the circuits combined fell another 500 cases behind.

As presently constituted, the fifth and ninth circuits, with an expanding caseload, have encountered difficult problems, and each of

those circuits has been forced to resort to various expediencies to cope with the increased workload. The fifth circuit has adopted a practice of screening cases which has resulted in almost 60 percent of all the cases being decided without according to the parties the right of oral argument. During the hearings held by the Commission in the principal cities within the fifth circuit, members of the trial bar raised strenuous objections to this denial of oral argument in the fifth circuit.

In the ninth circuit expediency has taken a different approach. In that circuit, in order to avoid delays in the disposition of civil cases, which in many instances have run 2 years or more, the court has adopted the practice of assigning a district court judge as one member of the three-judge panels which hear and determine cases of that circuit. In the hearings held by the Commission on the west coast, many members of the trial bar objected to the frequency with which the cases were being considered by panels, not of circuit judges, but by panels including one or more district judges.

The Commission in its December report stated its belief that the problems presently existing in the fifth and ninth circuits are of such a dimension that some realignment of those two circuits is required in order to afford a measure of relief to litigants in those circuits without the necessity of resorting to unpopular expediencies as a means of coping with an excessive and ever-growing caseload.

For several years the fifth circuit has had 15 authorized judgeships and the ninth circuit has had 13 authorized judgeships. No other circuit has more than nine judges. Despite this large number of judges each of these circuits has had difficulty in handling its caseload. In the most recent year, the appeals filed in the fifth circuit increased by 330 cases and those in the ninth circuit by 381 cases. This increase in just the past fiscal year indicates that, at a minimum, at least two additional judgeships would be required in each of these circuits just to handle the increase.

During the course of these hearings the subcommittee will be examining the advantages and disadvantages of each of the principal recommendations and of each alternative made by the Commission, as well as the advantages and disadvantages of any alternative solutions which may be suggested by any of the interested parties.

It is not my expectation that the subcommittee will find unanimous support for any one proposal. On the contrary, it is more likely that the subcommittee will be searching for that alternative which appears to offer the greatest hope for a real and substantial improvement over the real and existing conditions and which results in little relative inconvenience to the fewest number of persons. As always, the important question is whether the interests of justice are served by a particular structure, composition or procedure which is now employed or which can be employed in the resolution of the judicial business of these courts.

At this time there will be inserted in the record copies of the introductory statement of February 7, 1974, S. 2988, S. 2989, and S. 2990, a copy of the report of the Commission entitled, "The Geographical Boundaries of the Several Circuits: Recommendations for Change," dated December 1973, and copies of committee exhibits A–2, B–2, C–2, D–2, E–5, E–12, and F, which contain statistical data relating to the fifth circuit court of appeals.

[The materials follow:]

[From the Congressional Record, Feb. 7, 1974]

STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

By Mr. BURDICK (for himself, Mr. Gurney, Mr. Hruska, and Mr. McClellan) (by request):

S. 2988. A bill to improve judicial machinery by designating Alabama, Florida, and Georgia as the 5th judicial circuit; by designating Louisiana, Mississippi, Texas, and the Canal Zone as the 11th judicial circuit; by dividing the 9th judicial circuit and creating a 12th judicial circuit, and for other purposes;

S. 2989. A bill to improve judicial machinery by designating Alabama, Florida, Georgia, and Mississippi as the 5th judicial circuit; by designating Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota as the 8th judicial circuit; by designating Arkansas, Louisiana, Texas, and the Canal Zone as the 11th judicial circuit; by dividing the 9th judicial circuit and creating a 12th judicial circuit, and for other purposes;

S. 2990. A bill to improve judicial machinery by designating Alabama, Florida, Georgia, and Mississippi as the 5th judicial circuit; by designating Louisiana, Texas, and the Canal Zone as the 11th judicial circuit; by dividing the 9th judicial circuit and creating a 12th judicial circuit, and for other purposes; and

S. 2991. A bill to authorize additional judgeships for the U.S. Courts of Appeals. Referred to the Committee on the Judiciary.

Mr. BURDICK. Mr. President, I am introducing, for appropriate reference, four bills, the consideration of which will permit the Congress to make a start on solving some of the most immediate problems of the U.S. courts of appeals.

In 1963, the courts of appeals for the 11 circuits in the Federal system were called upon to handle 5,400 cases with a complement of 69 authorized judgeships or an average of 78 cases per judge. Ten years later, in 1973, the number of appeals filed had soared to 15,629 which, with 97 authorized judgeships, resulted in an average 161 per judge. Thus, while judgeships increased by a little less than 50 percent, the cases filed increased by 300 percent. In 1971, the Judicial Conference of the United States recommended that the Congress authorize 11 additional circuit court judgeships in most but not all of the 11 circuits. In recognition of the fact that the caseload problems of our Federal courts are not amenable to solution solely by the increase in the number of judges, the 92d Congress responded by creating a Commission on Revision of the Federal Court Appellate System—Public Law 92–489. On December 18, 1973, this Commission, which was chaired by the senior Senator from Nebraska, and upon which the senior Senators from Arkansas, Florida and I were privileged to serve, filed its initial report in which it recognized that the appellate problems were particularly acute in the fifth and ninth judicial circuits. The Commission further recommended that immediate relief could be afforded to litigants in those circuits only by dividing each of those circuits into two new circuits. While the Commission is continuing the second phase of its studies in which it will study the structure and internal operating procedures of the courts of appeals, its further recommendation in this area will not obviate the necessity for realigning the States presently included in the fifth and ninth circuits in each of which the volume of litigation has far outstripped the capacity of the 28 judges currently assigned to those circuits.

Three of the bills which I am introducing today by request and on behalf of myself and my colleagues from Arkansas, Florida, and Nebraska, S. 2988, S. 2989, and S. 2990 are bills which would implement the alternative recommendations of the Commission on Revision of the Federal Court Appellate System. Each of these three bills would split the existing 5th circuit into two new circuits to be designated as the 5th and 11th circuits. Under one bill the new fifth circuit would consist of the States of Alabama, Florida, and Georgia. The new 11th circuit would consist of Louisiana, Mississippi, and Texas and would also include jurisdiction over appeals emanating from the District Court of the District of the Canal Zone.

The second bill incorporates the Commission's first alternative recommendation under which the new 5th circuit would consist of Florida, Georgia, Alabama, and Mississippi, and the 11th circuit would consist of Texas, Louisiana, Arkansas and the Canal Zone.

The third bill incorporates the second alternative recommendation of the Commission, under which the 5th circuit would consist of Florida, Georgia, Alabama, and Mississippi; and the new 11th circuit would consist of Texas, Louisiana, and the Canal Zone.

It will be perceived that the first two bills present alternatives under which at least three States would be included in each circuit, a factor deemed important by several authorities. The third alternative would provide for only two States in

one of the circuits. Obviously the Congress must make a choice between these alternatives.

All three of the bills would divide the existing 9th circuit by creating a new 12th circuit comprised of Arizona, the central and southern judicial districts of California and Nevada. A new 9th circuit comprising the balance of the present ninth circuit would consist of the eastern and northern judicial districts of California and the States of Alaska, Hawaii, Idaho, Montana, Oregon, Washington, and the District Court of the District of Guam. Since a simple division of the States comprising the present circuits would accomplish nothing, unless the judge power is also increased, these bills also contemplate creation of new judgeships within the new circuits sufficient to handle the workload which is being allocated to four circuits instead of the present two. The exact number of new circuit judgeships will be considered during the hearings and will require amendment of section 5 of these bills.

Because the State of California comprises 10 percent of the national population and because the State of California alone generates two-thirds of the judicial business of the present ninth circuit, the Commission concluded that the only feasible realignment of States within the ninth circuit must include a division of the four judicial districts in California between the two new circuits in the west. If the Commission's recommendation is accepted by the Congress, a possibility would exist that the two new circuits would reach conflicting results regarding the constitutionality of a California statute or an order of a California administrative agency having statewide application. A conflict of this nature must be resolved and the bills which I am introducing would require in section 7 of each bill, that such a conflict to be resolved by the Supreme Court of the United States.

As presently constituted, the fifth and ninth circuits, with an expanding caseload, have encountered difficult problems and each of those circuits have been forced to resort to various expediencies to cope with the increased workload. The fifth circuit has adopted a practice of screening cases which has resulted in almost 60 percent of all the cases being decided without according to the parties the right of oral arguments. During the hearings held by the Commission in the principal cities within the fifth circuit, members of the trial bar raised strenuous objections to this denial of oral argument in the fifth circuit.

In the ninth circuit expediency has taken a different approach. In that circuit, in order to avoid delays in the disposition of civil cases, which in many instances have run 2 years or more, the court has adopted the practice of assigning a district court judge as one member of the three-judge panels which hear and determine cases of that circuit. In the hearings held by the Commission on the west coast, many members of the trial bar objected to the frequency with which the cases were being considered by panels not of circuit judges but of a panel including one or more district judges.

The sponsors of these bills believe that the problems presently existing in the fifth and ninth circuits are of such a dimension that some realignment of the States in those circuits is required in order to eliminate the resort to unpopular expediencies as a means of coping with an excessive caseload. These bills will serve as vehicles to lay these problems before the appropriate committee for thorough study in the hearing process.

The fourth bill which I am introducing today (S. 2091) is a so-called omnibus circuit court judgeship bill which incorporates the recommendation of the Judicial Conference of the United States that the Congress create nine additional circuit judgeships as follows:

First Circuit: one judgeship.
Second Circuit: two judgeships.
Third Circuit: one judgeship.
Fourth Circuit: one judgeship.
Seventh Circuit: one judgeship.
Tenth Circuit: one judgeship.

As I previously stated the additional judgeships needed by the existing fifth and ninth circuits will be considered in connection with the bill realigning those circuits.

The increased case filings in the courts of appeals which has occurred since 1968, when an increase was last approved in the number of authorized circuit judgeships, requires that the Congress investigate the need for additional judges. In the hearings to be held on these four bills I propose that the need for additional judges be weighed in the light of the workload which the current level of case filings imposes upon the judges of our appellate courts in the 11 circuits. I hope that such hearings can be scheduled this spring.

Mr. President, I ask unanimous consent that all four bills be printed in the Record following these explanatory remarks.

There being no objection, the bills were ordered to be printed in the Record.

93D CONGRESS
2D SESSION

S. 2988

IN THE SENATE OF THE UNITED STATES

FEBRUARY 7, 1974

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

A BILL

To improve judicial machinery by designating Alabama, Florida, and Georgia as the fifth judicial circuit; by designating Louisiana, Mississippi, Texas, and the Canal Zone as the eleventh judicial circuit; by dividing the ninth judicial circuit and creating a twelfth judicial circuit, 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 thirteen judicial circuits of the United States are constituted as follows:

2

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

SEC. 2. Any circuit judge of the fifth circuit as constituted the day prior to the effective date of this Act, whose official station is within the fifth circuit as constituted by this Act, is assigned as a circuit judge to such part of the former fifth circuit as is constituted by this Act the fifth circuit, and shall be a circuit judge thereof; and any circuit judge of the fifth circuit as constituted the day prior to the effective date of this Act, whose official station is within the eleventh circuit as constituted by this Act, is assigned as a circuit judge of such part of the former fifth circuit as is constituted by this Act the eleventh circuit, and shall be a circuit judge thereof.

SEC. 3. Any circuit judge of the ninth circuit as constituted the day prior to the effective date of this Act, whose official station is within the ninth circuit as constituted by this Act, is assigned as a circuit judge to such part of the former ninth circuit as is constituted by this Act the ninth circuit, and shall be a circuit judge thereof; and any circuit judge of the ninth circuit as constituted the day prior to the effective date of this Act, whose official station is within the twelfth

circuit as constituted by this Act, is assigned as a circuit judge of such part of the former ninth circuit as is constituted by this Act the twelfth circuit, and shall be a circuit judge thereof.

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 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 consent of the Senate, such additional circuit judges for the fifth, ninth, eleventh, and twelfth circuits as the Congress may authorize by 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	Atlanta and Jacksonville.
* * *	* * * *
"Ninth	San Francisco, Portland, and Seattle.
* * *	* * * *
"Eleventh	New Orleans and Houston.
* * *	* * * *
"Twelfth	Los Angeles."

SEC. 7. Section 1254 of title 28 of the United States Code is amended by adding a new subsection (4) reading as follows:

"(4) By appeal, where is drawn in question, the validity of a State statute or of an administrative order of statewide application on the ground of its being repugnant to the Constitution, treaties, or laws of the United States: *Provided, however*, That this subsection shall apply only when the

court of appeals certifies that its decision is in conflict with the decision of another court of appeals with respect to the validity of the same statute or administrative order under the Constitution, treaties, or laws of the United States."

SEC. 8. This Act shall take effect on July 1, 1975.

93D CONGRESS
2D SESSION

S. 2989

IN THE SENATE OF THE UNITED STATES

FEBRUARY 7, 1974

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

A BILL

To improve judicial machinery by designating Alabama, Florida, Georgia, and Mississippi as the fifth judicial circuit; by designating Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota as the eighth judicial circuit; by designating Arkansas, Louisiana, Texas, and the Canal Zone as the eleventh judicial circuit; by dividing the ninth judicial circuit and creating a twelfth judicial circuit, 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 thirteen judicial circuits of the United States are constituted as follows:

"Circuits	Composition
* * *	* * * *
"Fifth	Alabama, Florida, Georgia, Mississippi.
* * *	* * * *
"Eighth	Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota.
* * *	* * * *
"Ninth	Alaska, Eastern and Northern Judicial Districts of California, Hawaii, Idaho, Montana, Oregon, Washington, Guam.
* * *	* * * *
"Eleventh	Arkansas, Louisiana, Texas, Canal Zone.
* * *	* * * *
"Twelfth	Arizona, Central and Southern Judicial Districts of California, Nevada."

SEC. 2. Any circuit judge of the fifth circuit as constituted the day prior to the effective date of this Act, whose official station is within the fifth circuit as constituted by this Act, is assigned as a circuit judge to such part of the former fifth circuit as is constituted by this Act the fifth circuit, and shall be a circuit judge thereof; and any circuit judge of the fifth circuit as constituted the day prior to the effective date of this Act, whose official station is within the eleventh circuit as constituted by this Act, is assigned as a circuit judge of such part of the former fifth circuit as is constituted by this Act the eleventh circuit, and shall be a circuit judge thereof.

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SEC. 3. Any circuit judge of the ninth circuit as constituted the day prior to the effective date of this Act, whose official station is within the ninth circuit as constituted by this Act, is assigned as a circuit judge to such part of the former ninth circuit as is constituted by this Act the ninth circuit, and shall be a circuit judge thereof; and any circuit judge of the ninth circuit as constituted the day prior to the effective date of this Act, whose official station is within the twelfth circuit as constituted by this Act, is assigned as a circuit judge of such part of the former ninth circuit as is constituted by this Act the twelth circuit, and shall be a circuit judge thereof.

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 circuit court of appeals to which it would have 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 consent of the Senate, such additional circuit judges for the fifth, ninth, eleventh, and twelfth circuits as the Congress may authorize by 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.

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"Fifth	Atlanta and Jacksonville.
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* * *	* * * *
"Eleventh	New Orleans and Houston.
* * *	* * * *
"Twelfth	Los Angeles."

SEC. 7. Section 1254 of title 28 of the United States Code is amended by adding a new subsection (4) reading as follows:

"(4) By appeal, where is drawn in question, the validity of a State statute or of an administrative order of a statewide application on the ground of its being repugnant to the Constitution, treaties or laws of the United States: *Provided, however,* That this subsection shall apply only when the court of appeals certifies that its decision is in conflict with the decision of another court of appeals with respect to the validity of the same statute or administrative order under the Constitution, treaties, or laws of the United States.".

SEC. 8. This Act shall take effect on July 1, 1975.

93D CONGRESS
2D SESSION

S. 2990

IN THE SENATE OF THE UNITED STATES

FEBRUARY 7, 1974

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

A BILL

To improve judicial machinery by designating Alabama, Florida, Georgia, and Mississippi and the fifth judicial circuit; by designating Louisiana, Texas, and the Canal Zone as the eleventh judicial circuit; by dividing the ninth judicial circuit and creating a twelfth judicial circuit, 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:

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"Eleventh	Louisiana, Texas, Canal Zone.
* * *	* * * *
"Twelfth	Arizona, Central and Southern Judicial Districts of California, Nevada."

SEC. 2. Any circuit judge of the fifth circuit as constituted the day prior to the effective date of this Act, whose official station is within the fifth circuit as constituted by this Act, is assigned as a circuit judge to such part of the former fifth circuit as is constituted by this Act the fifth circuit, and shall be a circuit judge thereof; and any circuit judge of the fifth circuit as constituted the day prior to the effective date of this Act, whose official station is within the eleventh circuit as constituted by this Act, is assigned as a circuit judge of such part of the former fifth circuit as is constituted by this Act the eleventh circuit, and shall be a circuit judge thereof.

SEC. 3. Any circuit judge of the ninth circuit as constituted the day prior to the effective date of this Act, whose official station is within the ninth circuit as constituted by this Act, is assigned as a circuit judge to such part of the former ninth circuit as is constituted by this Act the ninth circuit, and shall be a circuit judge thereof; and any circuit

judge of the ninth circuit as constituted the day prior to the effective date of this Act, whose official station is within the twelfth circuit as constituted by this Act, is assigned as a circuit judge of such part of the former ninth circuit as is constituted by this Act the twelfth circuit, and shall be a circuit judge thereof.

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 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

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court of appeals certifies that its decision is in conflict with the decision of another court of appeals with respect to the validity of the same statute or administrative order under the Constitution, treaties, or laws of the United States."

SEC. 8. This Act shall take effect on July 1, 1975.

COMMISSION ON REVISION OF THE
FEDERAL COURT APPELLATE SYSTEM

THE GEOGRAPHICAL BOUNDARIES OF THE SEVERAL JUDICIAL CIRCUITS: RECOMMENDATIONS FOR CHANGE

WASHINGTON, D. C.
December, 1973

COMMISSION ON REVISION OF THE
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December 18, 1973

Honorable Richard M. Nixon
President of the United States
Washington, D. C.

Honorable Gerald R. Ford
President of the Senate
Washington, D. C.

Honorable Carl B. Albert
Speaker of the House of
Representatives
Washington, D. C.

Honorable Warren E. Burger
Chief Justice of the United States
Washington, D. C.

Gentlemen:

In accordance with the provisions of section 6, paragraph (1), Public Law No. 489, Ninety-second Congress, the Commission on Revision of the Federal Court Appellate System herewith submits its report of recommendations for change in the geographical boundaries of the federal judicial circuits.

Respectfully yours,

Roman L. Hruska

Senator Roman L. Hruska
Chairman

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I. INTRODUCTION

For more than a decade the United States Courts of Appeals - courts of last resort for all but a handful of federal cases - have been a source of continuing concern. During this period they have experienced an increase in caseloads unprecedented in magnitude. In Fiscal Year 1960, a total of 3,899 appeals were filed in all eleven circuits; with 69 authorized judgeships, the average was 57 per judgeship. In 1973 the filings had soared to 15,629; with 97 authorized judgeships, the average per judgeship was 161, almost three times the figure for 1960. The filings themselves increased 301 per cent during the same period, compared with an increase of only 58 per cent in district court cases.

This flood-tide of appellate filings has given rise to changes in internal procedures. Opportunity for oral argument has been drastically curtailed in a number of circuits. At the same time, the use of judgment orders and per curiam opinions has increased dramatically. Many of these changes may be desirable, worthy of emulation in their present form. Some may contain the germ of good ideas which need refinement if they are to be retained. Others may be no more than responses of the moment, designed to avoid intolerable backlogs, but generating concern in their implementation. Without passing judgment on any of them, suffice it to say that they present questions which merit careful study.

An increase in the volume of judicial business typically spawns new judgeships. The Fifth Circuit has grown to a court of 15 active judges, each of whom shoulders a heavy workload despite the use of extraordinary measures to cope with the flood of cases. Serious problems of administration and of internal operation inevitably result with so large a court, particularly when the judges are as widely dispersed

geographically as they are in the Fifth Circuit. For example, it becomes more difficult to sit en banc despite the importance of maintaining the law of the circuit. Judges themselves have been among the first to recognize that there is a limit to the number of judgeships which a court can accommodate and still function effectively and efficiently. In 1971 the Judicial Conference of the United States endorsed the conclusion of its Committee on Court Administration that a court of more than 15 would be "unworkable". At the same time, the Conference took note of and quoted from a resolution of the judges of the Fifth Circuit that to increase the number of judges on that court "would diminish the quality of justice" and the effectiveness of the court as an institution.

In terms of geographical size, the Ninth Circuit prcsents an even more striking picture; it ranges from the Arctic Circle to the Mexican border, from Hawaii and Guam to Montana and Idaho. With thirteen judgeships, it is the second largest in the country, both in terms of size of court and of case filings, and has serious difficultites with backlog and delay.

In recognition of the problems faced by the Courts of Appeals, the Congress created the Commission on Revision of the Federal Court Appellate System (P.L. 92-489 (1972)), directing it, in the first instance, "to study the present division of the United States into the several judicial circuits and to report . . . its recommendations for changes in the geographical boundaries of the circuits as may be most appropriate for the expeditious and effective disposition of judicial business." Taking note of the urgency of the need for relief, Congress provided that the Commission report to the President, the Congress and the Chief Justice within 180 days of the appointment of its ninth member.

The Commission has held hearings in ten cities; a preliminary report was widely circulated. The Commission has

received ideas and opinions on the alignment of the circuits from the bench and bar in every section of the nation. We have concluded that the creation of two new circuits is essential to afford immediate relief to the Fifth and Ninth Circuits.

We have not recommended a general realignment of all the circuits. To be sure, the present boundaries are largely the result of historical accident and do not satisfy such criteria as parity of caseloads and geographical compactness. But these boundaries have stood since the nineteenth century, except for the creation of the Tenth Circuit in 1929, and whatever the actual extent of variation in the law from circuit to circuit, relocation would take from the bench and bar at least some of the law now familiar to them. Moreover, the Commission has heard eloquent testimony evidencing the sense of community shared by lawyers and judges within the present circuits. 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.

In making its recommendations the Commission has relied primarily on data from Fiscal Year 1973. We have heard testimony concerning what the future may hold, and we appreciate the need for anticipating it. Making projections of future caseloads, however, is at best a risky business, and as specificity increases, confidence decreases. For example, in Fiscal 1973 the number of filings in the United States district courts decreased for the first time in at least a decade; yet it would be folly to predict from this alone a continuing downturn which would obviate the necessity for the changes we recommend in the Fifth and the Ninth Circuits. Moreover, as we look to the future we find many variables which will surely have some impact on caseloads but are nonetheless in-

capable of being integrated meaningfully in a statistical analysis. The Congress has before it proposed legislation which, if enacted, may bring significant relief to both the appellate and the district courts. Other legislation may give rise to new federal causes of action; new judicial doctrines may expand or contract access of litigants to the courts; patterns of litigation may change. Furthermore, caseload is but one of a number of factors relevant to the question of circuit realignment. Procedures which enhance the ability of the Courts of Appeals to dispose justly and efficiently of the business before them may well be of greater significance. The past decade has witnessed dramatic achievements on the part of the courts in their effort to keep pace with rising caseloads; greater efficiencies and productivity may yet be possible.

We have considered these factors, so difficult to predict or to quantify, and find it impossible to conclude that solutions can soon be found which will obviate the need for circuit realignment. Accordingly, we remain persuaded that the creation of two additional circuits is imperative at this time.

The Commission harbors no illusions that realignment is a sufficient remedy, adequate even for a generation, to deal with the fundamental problems now confronting the Courts of Appeals. These problems are unlikely to be solved by realignment alone without destroying or impairing some of the most valuable qualities of the federal court appellate system. It is our opinion, however, that realignment is a necessary first step in the Fifth and Ninth Circuits, not only to afford relief to the pressing problems of the present, but also to provide a firm base on which to build more enduring reforms.

Our view that realignment of the Fifth and Ninth Circuits is a necessary initial measure is shared by the American Bar Association's Special Committee on Coordination of Judicial

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Improvements. The American Bar Association itself, acting upon the report of that committee, has expressed its recognition of the "urgent need" for realignment of the Fifth and Ninth Circuits and its support for such a change.

The Congress in creating the Commission has recognized that however exigent a report on realignment, more is 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 system," and to report its recommendations for such additional changes "as may be appropriate for the expeditious and effective disposition of the caseload of the Federal courts of appeal, consistent with fundamental concepts of due process and fairness."

In conformity with the mandate of the statute, the Commission herewith reports its recommendations for change in the boundaries of the several judicial circuits. We are not all of one mind on all issues, but we share the conviction that the situation in the Fifth and Ninth Circuits should not be allowed to continue. Work on the second phase of our assignment has already begun. We emphasize once again, however, that, whatever may emerge from that effort or from changes by the Congress or by the courts themselves which can now be envisioned, litigants in the Fifth and Ninth Circuits are entitled to that immediate and significant relief which our proposals would provide.

Creation of the new courts must be accompanied by authorization of judgeships sufficient to deal effectively with the volume of judicial business which litigants will bring before them. Accordingly, we recommend that the Congress, concurrently with realignment, create new judgeships adequate to man each of the courts affected by such legislation.

II. THE FIFTH CIRCUIT

The case for realignment of the geographical boundaries of the Fifth Circuit is clear and compelling. With 2,964 appeals filed in Fiscal Year 1973, this Circuit has by far the largest volume of judicial business of any of the Courts of Appeals -- almost one-fifth of the total filings in the 11 circuits. Although it is the largest federal appellate court in the country, with 15 active judges, it also has one of the highest caseloads per judge -- 198 filings in FY 1973, 23 per cent more than the national average. Geographically, too, the circuit is huge, extending from the Florida Keys to the New Mexico border.

Heavy caseloads in the Fifth Circuit are not a new problem. Proposals for dividing the circuit have been under serious consideration for some years, but instead additional judges were added. The caseload, however, has continued to grow and the active judges of the circuit, acting unanimously, have repeatedly rejected additional judgeships as a solution: to increase the number beyond 15 would, in their words, "diminish the quality of justice" and the effectiveness of the court as an institution.

To the credit of its judges and its leadership, the Court of Appeals for the Fifth Circuit has remained current in its work. It has been innovative and imaginative, avoiding what might have been a failure in judicial administration of disastrous proportions. The price has been high, however, both in the burdens imposed on the judges and in terms of the judicial process itself. This is the considered view of a majority of the active judges of the Court of Appeals for the Fifth Circuit who, joining in a statement which calls for prompt realignment, assert that "the public interest demands immediate relief" (emphasis in the original). Even 15, they emphasize, is too large a number of judges for maximum efficiency, particularly with respect to avoiding and resolving intra-

circuit conflicts. Pointing both to geographical area and to the number of judges, they conclude: "Jumboism has no place in the Federal Court Appellate System."

As a result of the pressure of a flood-tide of litigation, the court has instituted a procedure under which oral argument is denied in almost 60 per cent of all cases decided by it. The Commission has heard a great deal of testimony concerning this practice, but even among the strongest proponents of the Fifth Circuit's procedures there is the feeling that oral argument may have been eliminated in too many cases. Certainly this is the strongly held view of many attorneys who appeared before the Commission. The court has also decided an increasing proportion of cases without written opinions.

It is easier to perceive the problem than to propose a solution. At hearings in four cities in the Fifth Circuit, and in extensive correspondence with members of the bench and bar, we have heard opinions on a wide spectrum of possible realignments. The Commission considered numerous proposals before arriving at the conclusions presented in this report.

In considering the merits of the various proposals, we have given weight to several important criteria. First, where practicable, circuits should be composed of at least three states; in any event, no one-state circuits should be created. Second, no circuit should be created which would immediately require more than nine active judges. Third, the Courts of Appeals are national courts; to the extent practicable, the circuits should contain states with a diversity of population, legal business and socio-economic interests. Fourth is the principle of marginal interference: excessive interference with present patterns is undesirable; as a corollary, the greater the dislocation involved in any plan of realignment, the larger should be the countervailing benefit in terms of other criteria that justify the change. Fifth, no circuit should contain noncontiguous states.

On the basis of these criteria, we have rejected a number of proposals. For instance, to divide the Fifth into three circuits without affecting any adjacent states would require the creation of three two-state circuits, one of which would be too small to constitute a viable national circuit; moreover, as stated above, we think it undesirable to proliferate two-state circuits.

Once we begin to consider realignment plans affecting adjacent circuits, the principle of marginal interference comes into play. For instance, Georgia could be moved into the Fourth Circuit only if one of the Fourth Circuit states were moved into yet another circuit. Similarly, if Florida, Alabama and Mississippi were placed in one circuit, and Georgia, Tennessee (now in the Sixth Circuit), and South Carolina (now in the Fourth Circuit) in another, both would have manageable caseloads, but at the cost of interfering significantly with two adjacent circuits.

Similar considerations suggested the rejection of various proposed realignments for the western section of the Fifth Circuit. A circuit composed of Texas, Louisiana, Oklahoma and New Mexico, for example, would have a much higher workload than is desirable. In addition, it would leave the Tenth Circuit with only 527 filings, smaller than any existing circuit except the First.

In its Preliminary Report of November 1973 the Commission presented three possible plans for realignment of the Fifth Circuit. After careful consideration of the responses of the bench and bar, and further study of possible alternatives, a majority of the Commission now recommends that the present Fifth Circuit be divided into two new circuits: a new Fifth Circuit consisting of Florida, Georgia and Alabama; and an Eleventh Circuit consisting of Mississippi, Louisiana, Texas and the Canal Zone. Such a realignment

satisfies all five of the criteria deemed important by the Commission. In particular, no one- or two-state circuits would be created; no other circuit would be affected.

Commission Recommendation

	Filings FY '73 1/		Filings FY '73
Fifth Circuit		Eleventh Circuit	
Florida	800	Texas	838
Georgia	451	Louisiana	477
Alabama	249	Mississippi	143
	1,500	Canal Zone	6
			1,464

With nine judgeships for each of the new courts, the filings per judgeship in the new Fifth Circuit would be 167; in the Eleventh Circuit, 163. These figures may be compared with the national average in FY 1973 of 161. The circuits, it should be noted, are well balanced in terms of case filings.

1/ The Administrative Office of the United States Courts reports appeals from administrative agencies for each circuit, but not by state of origin. (The same is true with respect to original proceedings. These are relatively few in number and are here treated together with and considered as administrative appeals.) The figures in the text include, in addition to appeals from United States District Courts, an allocation to each state of administrative appeals in the same proportion to total administrative appeals in the circuit as the number of appeals from the District Courts within the state bears to the total number of District Court appeals within the circuit. In Fiscal Year 1973, the total number of administrative appeals and original proceedings in the Fifth Circuit was 218, which constituted 7 per cent of the circuit's total filings.

If for any reason the Congress should deem this proposal unacceptable, the Commission recommends enactment of one of the other two proposals presented in its Preliminary Report and set forth below. Either plan would represent a significant improvement over the current situation. The Commission expresses no preference between them.

Alternative No. 1

Eastern Circuit	Filings 2/ FY '73	Western Circuit	FY '73
Florida	800	Texas	838
Georgia	451	Louisiana	477
Alabama	249	Arkansas	93
Mississippi	143	Canal Zone	6
	1,643		1,414

This alternative affects only one circuit other than the Fifth: Arkansas is moved out of the present Eighth Circuit, which has one of the lowest caseloads in the country. The addition of Arkansas to Texas, Louisiana and the Canal Zone avoids the creation of a two-state circuit.

This plan, however, does create a relatively large eastern circuit -- 1,643 filings in FY 1973. With nine judges the circuit would have 183 filings per judgeship, well above the national average of 161. It would nonetheless effect an eight per cent reduction from the present Fifth Circuit figure. Further, a court of nine judges rather than 15 could be expected to achieve a greater measure of efficiency in holding en banc hearings and circulating panel opinions among all of the judges so as to minimize the possibility of conflicts within the circuit.

Alternative No. 2

Eastern Circuit	Filings 2/ FY '73	Western Circuit	Filings FY '73
Florida	800	Texas	838
Georgia	451	Louisiana	477
Alabama	249	Canal Zone	6
Mississippi	143		1,321
	1,643		

2/ See Footnote 1, page 9.

This alternative creates the same eastern circuit as Alternative No. 1, with the same disadvantages. It does create a two-state circuit in the west. It does not, however, alter any circuit other than the Fifth, and thus respects the principle of marginal interference.

III. THE NINTH CIRCUIT

The Ninth Circuit today handles more cases annually than any circuit other than the beleaguered Fifth. Since 1968 the number of appeals filed each year has consistently exceeded the number of terminations, resulting in a backlog of 170 cases per judgeship at the end of Fiscal Year 1973 -- enough to keep the court busy for a full year even if no new cases were filed. Delays in the disposition of civil cases, often of two years or more, have seriously concerned both judges and members of the bar. The size of the court (13 authorized judgeships since 1968) and the extensive reliance it has been required to place on the assistance of district and visiting judges have threatened its institutional unity. Attorneys and judges have been troubled by apparently inconsistent decisions by different panels of the large court; they are concerned that conflicts within the circuit may remain unresolved. Whatever the reason, for two successive fiscal years, 1971 and 1972, there were no en banc adjudications. More recently, the court has accepted a number of cases for en banc determinations and appears to be doing so with increasing frequency. It remains to be seen whether this will serve further to exacerbate the problems of delay.

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 re-live the history of the Fifth Circuit before its problems of caseload and geographical size are ameliorated.

Accordingly, the Commission recommends that the present Ninth Circuit be divided into two circuits: a Twelfth Circuit to consist of the Southern and Central Districts of California and the states of Arizona and Nevada; and a new Ninth Circuit to consist of Alaska, Washington, Oregon, Idaho, Montana, Hawaii, Guam and the Eastern and Northern Districts of California. Such a realignment will by no means solve all of the Ninth Circuit's problems for all time, but it will make them more manageable in the short run and establish a sound geographical base on which to build more fundamental reforms.

The Ninth Circuit's filings in Fiscal Year 1973 would have been allocated as follows if the division now recommended had been in effect:

Twelfth Circuit		New Ninth Circuit	
California - Southern	998	California - Northern	545
California - Central		California - Eastern	
Arizona	234	Alaska	26
Nevada	70	Washington	183
		Oregon	121
		Idaho	30
		Montana	36
		Hawaii	38
		Guam	35
TOTAL	1,302[3/]		1,014

3/ Adjusted to reflect appeals from administrative agencies and original proceedings. In the Ninth Circuit, these constituted 16 per cent of the total filings in FY 1973. See Footnote 1, page 9.

With nine judgeships in the proposed Twelfth Circuit the court would have had 145 filings per judgeship, virtually equal to the filings per judgeship (144) in all of the circuits in FY 1973 excluding the three busiest. That figure also represents a decrease of 19 per cent from the Ninth Circuit's current rate of 178 filings per judgeship. The states of the new Ninth Circuit, of course, had a lower caseload and, depending on the number of judgeships provided, would have had at least as much relief.

The Commission has received a number of other plans for realignment of the Ninth Circuit. Most strongly pressed is the suggestion that California, Nevada, Hawaii and Guam constitute one circuit, that Arizona be shifted to the Tenth Circuit, and that a separate circuit be created to consist of Alaska, Washington, Oregon, Idaho and Montana, the five northwestern states. After careful consideration we have concluded that, for reasons developed below, this plan, too, is so clearly inferior to the recommended realignment that we have no choice but to reject it. Nevertheless, and without minimizing the difference in relative merits of the plans, the Commission is of the view that adoption of this proposal -- joining California, Nevada, Hawaii and Guam, shifting Arizona to the Tenth, and creating a northwestern circuit of the remaining states -- is preferable to leaving the Ninth Circuit as it is now.

We find the plan just described to be inferior in several respects. First, it appears highly undesirable at this juncture to create a new circuit which in Fiscal 1973 would have had close to 1,700 filings, particularly when much of the area it would encompass is expected to experience substantial growth. The crucial fact is that California today already provides two-thirds of the judicial business of the Ninth Circuit. To keep it intact, and to join it in a circuit with other states,

would make it impossible to provide adequate relief for the problems of the circuit. Second, to shift Arizona into the Tenth Circuit would violate the principle of marginal interference. It would involve moving a state into a different, existing circuit in the face of vigorous, reasoned objections concerning the impact of such a move. Relocation would take from the bench and bar at least some of the law now familiar to them. We have also heard extensive testimony about the close economic, social and legal ties between Southern California and Arizona and the more limited nature of such ties between Arizona and the Tenth Circuit with its seat at Denver. Moreover, opposition to such a plan has come from California as well as Arizona. Finally, as we develop more fully below, a separate circuit for the five northwestern states does not appear justified or desirable at this time.

Although the underlying problems of caseload and size facing the Fifth and Ninth Circuits are similar, realignment of the Ninth poses difficulties not encountered or raised in deliberations concerning the Fifth. Some of these considerations are discussed immediately hereafter.

1. A single state -- in this instance California -- should not constitute a single federal circuit.

A one-state circuit would lack the diversity of background and attitude brought to a court by judges who have lived and practiced in different states. The Commission believes that such diversity is a highly desirable, and perhaps essential, condition in the constitution of the federal courts of appeals. Moreover, only two senators, both from a single state, would be consulted in the appointment process; a single senator of long tenure might be in a position to

mold the court for an entire generation. Finally, a circuit consisting of California alone would immediately require nine judges even to maintain the high caseload per judge that now obtains in the Ninth Circuit. In addition, it would do little to solve the existing problems of the Ninth Circuit because California now provides two-thirds of the caseload of the circuit as presently constituted.

2. Dividing the judicial districts of California between two circuits raises no insoluble or unmanageable problems.

The realignment plan we have recommended would divide the judicial districts of California between the new Ninth Circuit and the proposed Twelfth Circuit. The division of a state between two circuits would be an innovation in the history of the federal judicial system. The problems that may be anticipated fall into two broad classes: those involving actual or potential conflicting orders to a litigant, and those involving the promulgation of inconsistent rules of law in suits involving different litigants. Special concern has been voiced over the possibility of conflicting decisions as to the validity of state statutes or practices under federal law. However, after full consideration, we are convinced that any problems that might arise are of lesser magnitude and significance than those created by a single-state circuit, or any of the other proposals that have been suggested to us. In any event, they can be resolved by existing mechanisms and others that could readily be developed.

Conflicting judgments. Among the wide variety of mechanisms developed in the law to avoid repetitive litigation and conflicting judgments, at least half a dozen are explicitly designed or frequently used to deal with litigation arising

out of controversies crossing circuit boundaries. These include transfers between circuits, transfers of venue under 28 U.S.C. sec. 1404(a), consolidations by the Judicial Panel on Multidistrict Litigation, stays, injunctions, and statutory interpleader. Either in their present form or with modifications, these mechanisms would avoid many of the potential conflicts in the state divided between two circuits.

Conflicting legal rules -- issues of state law. The Commission has heard testimony to the effect that a division of California such as the one proposed will mean that two federal appellate courts rather than one would be interpreting California law. Of course, this may be true today. As the law governing choice of law has developed, every federal court may at some point be called upon to interpret California law. With litigation over mass torts such as airplane accidents and multi-state business transactions so common, we are neither surprised nor disturbed by a district court within one circuit applying the law of a state from another circuit. Moreover, even within California there are today four federal district courts which regularly interpret California law. Experience in the federal system shows that district courts within the same state may differ in their interpretation of state law. These differences may or may not be resolved by a Court of Appeals; if they are, the resolution may take years. Of central significance, on issues of state law both of the proposed circuits would be obliged to follow the well-developed jurisprudence of the California legislature and courts. This would be equally true in diversity cases and in cases involving federal claims which turn on points of state law.

Where unusual circumstances militate against federal decision of state-law issues, devices such as abstention and certification are available to delay or avoid federal adjudication (and thus the possibility of conflict) until resolution by the

California courts. Whether to provide for certification of doubtful state law issues, as some states have done, is of course for the California legislature to decide. Such legislation might be anticipated if it were thought that the federal courts were having undue difficulty in interpreting state law.

Forum shopping on issues of federal law. Witnesses at the Commission's hearings have expressed the fear that to divide California between two judicial circuits would foster forum-shopping by litigants whose cases turned on federal-law issues. We note, however, that opportunities for forum-shopping exist today in the federal courts, and that the decision to choose one court rather than another will depend on a variety of considerations. It is far from clear that forum shopping would increase if California were divided between circuits. It may be that litigants challenging laws of statewide application would have a greater incentive to forum-shop, but if this were felt to be a problem, Congress, using devices such as venue restrictions and transfer provisions, could restrict forum shopping (and avoid conflicts as well). Much the same may be said of litigation by state prisoners. In both contexts -- as in many others in our federal system -- a certain amount of forum shopping may be tolerable, especially if the alternatives are even less appealing.

Actions against state agencies. At the Commission's hearings in the Ninth Circuit several witnesses expressed concern that if the judicial districts of California were divided between two circuits, a state agency might be subject to conflicting orders of federal courts in the two circuits. The fear was also expressed that a state law or practice might be held valid in one of the circuits and invalid in the other.

When parallel lawsuits in the two circuits threaten either possibility, the mechanisms referred to above may be invoked to channel two actions into a single court. Even

if both lawsuits are permitted to proceed independently, they will often reach the same outcome, and unless the precedents are not clear, they may be expected to do so. If the two judgments are inconsistent, it will not necessarily follow that the state agency will have to violate one order to obey the other: for example, one court might require a change in procedures and the other approve the status quo, or one court might mandate broader relief than the other. Indeed, it is not easy to hypothesize cases in which the two courts' orders would be such as to make it impossible for the defendant to obey both. If such an impasse should occur, it would most likely result from so fundamental a clash of values that Supreme Court review would be appropriate; moreover, other procedures for the resolution of inter-circuit conflicts, either of broad applicability or specifically tailored to the Ninth and Twelfth Circuits, might be provided by the Congress. For example, in acting upon the realignment proposed by the Commission, Congress may wish to enact companion legislation providing for a single appellate resolution of multiple challenges to the federal validity of state laws. A model already exists for transfer and consolidation at the appellate level: 28 U.S.C. sec. 2112(a). That section provides that when proceedings have been instituted in two or more courts of appeals with respect to the same order of an administrative agency, the proceedings are to be consolidated in the court where the first appeal was filed. Further, authority is granted to that court to transfer the proceedings to any other court of appeals for the convenience of the parties in the interest of justice. We emphasize, however, that our recommendation is not dependent on the creation of new procedures; we regard existing mechanisms as adequate for the problems that are foreseeable.

Federal court review of state governmental actions is a delicate matter whether in two circuits or one. The reluctance

to have federal courts interfere with state institutions or procedures is reflected in the requirement of exhaustion of state remedies, the various abstention doctrines, and the Anti-Injuction Acts. These statutes and doctrines will prevent many conflicts that might otherwise arise in a state lying within two circuits. We note, too, that the judges of each of the new courts may be expected to reflect an appropriate sensitivity to the consequences of conflicting decisions and a willingness to invoke the principles of comity and deference to a recent decision by a court of equal stature.

In short, the Commission agrees with the conclusion of the Committee on Coordination of Judicial Improvements of the American Bar Association that "the principles of federalism and the advantages which flow from infusion of judges from several states into a circuit considerably outweigh any disadvantages which might be generated if part of a state were placed in two or more circuits."

3. Creating two "divisions" within the present Ninth Circuit is not likely to solve the circuit's problems.

At the Commission's hearings testimony was received suggesting that rather than recommend realignment, the Commission should urge a "restructuring" of the Ninth Circuit into two "divisions." A major advantage of this scheme, in the view of its proponents, is that it would preserve the availability of judges from the less busy northern districts of the circuit for assignment to the undermanned southern districts. The Commission has concluded, however, that the proposal would generate more problems than it would solve.

In our view, demonstrated needs for more district judges should be met by measures which are directly responsive to that problem. Adding new judgeships is, of course, the most direct response. The Judicial Conference of the United

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States has recommended added district judges for the Ninth Circuit, and the proposal is under active consideration in the Congress. Moreover, flexibility in the transfer of judges between circuits need not be limited to intra-circuit transfers. If necessary, the procedure could be modified, as, for example, by the promulgation of guidelines to assure adequate judicial manpower where needed and when needed. Special provisions might be made for transfers between circuits created from the present Ninth Circuit, until such time as the needs of the circuit were met on a permanent basis.

We note, too, that the Ninth Circuit today has 59 district judgeships. The recommendations of the Judicial Conference of the United States, if implemented, would bring the total to 70. These figures, of course, take no account of senior district judges. In a circuit stretching from the Arctic to the Mexican border, and including Hawaii and Guam, the administration of the work of such a large number of judges is bound to pose complex administrative problems. These problems have already come under the scrutiny of the Subcommittee on Judicial Machinery of the Senate Judiciary Committee. Whatever the difficulties in the past, it would be troubling to create an appellate structure designed to foster extensive use of intra-circuit district judge transfers as the solution of the manpower needs of the district courts.

The factual basis of the argument also deserves analysis. The three southern districts said to be dependent on the reserve judicial manpower from the northern districts are the districts of Central California (Los Angeles), Southern California (San Diego), and Arizona. In fact, however, the Central District in Fiscal Years 1972 and 1973 loaned considerably more judge days to the northern districts than it received from them. The District of Arizona has also given substantial help to the northern districts: in FY 1973 it received more than it gave, but in Fiscal 1972 the figures were reversed and it loaned more judge time to the northern

districts than it borrowed from them. The Southern District of California is indeed a borrowing court, but most of the visiting judges come from other southern districts or are senior judges from the northern districts. Senior judges have considerable discretion in deciding where they wish to sit, and under current practices may be assigned to districts outside their own more easily than active judges. Thus even with the recommended realignment they would be available to sit in the Southern District of California. To put the point more precisely, only one per cent of the total visiting judge-time received by the Southern District in Fiscal 1973 was from active judges of the northern districts.

Any scheme for restructuring the Ninth Circuit into divisions depends for its success on a mechanism for preserving a unified law within the circuit. The proposals we have received recognize this but defer the consideration of specific details on this crucial matter. Thus, it is difficult to predict how the divisions would operate. In all likelihood, however, the two divisions would soon act and be perceived as separate courts. As a result the circuit would be divided in fact though not in law. Enormous administrative difficulties might be created by the need to coordinate the activities of the two divisional headquarters and the directives of the two divisional chief judges. The present problems of avoiding intra-circuit conflicts would be exacerbated, inasmuch as only a proceeding that included judges from both divisions could speak with authoritative finality.

4. A separate circuit for the five northwestern states is not now warranted.

The appeals filed from the five northwestern states (Alaska, Washington, Oregon, Idaho, and Montana) in Fiscal Year 1973 accounted for only 17 per cent of the workload of

the circuit and totalled slightly less than the filings in the three-judge First Circuit, regarded as something of an anomaly within the overloaded federal appellate system. To create another small circuit would be undesirable. The Commission has heard testimony that the rapidly growing population and expanding business in the northwest will soon result in substantially increased litigation at the appellate as well as the trial level. Should these projections be borne out, a separate circuit for the four or five northwestern states may become appropriate.

IV. ASSIGNMENT OF JUDGES

If Congress enacts legislation to create new circuits, the Commission recommends that judges of affected existing circuits be assigned to the new circuit in which their official station is located. Choice as to their assignment is assured by the judges' ability to change their official station pursuant to 28 U.S.C. sec. 456. At some point before realignment becomes effective, however, the judges should be required to declare their intentions and to designate their desired official stations in accordance with the provisions of section 456. Their options will, of course, be limited by the number of judgeships authorized for each circuit by the Congress.

APPENDIX I

A. Data for Fiscal Year 1973

Circuit	Authorized Judgeships	Filings FY '73	Terminations FY '73	Terminations After Hearing or Submission FY '73	Pending End of FY '72	Pending End of FY '73
D. C.	9	1,360	1,288	601	1,220	1,292
First	3	401	370	223	166	197
Second	9	1,709	1,462	958	681	928
Third	9	1,197	1,281	723	839	755
Fourth	7	1,573	1,676	1,168	825	722
Fifth	15	2,964	2,871	2,092	1,636	1,729
Sixth	9	1,261	1,239	745	653	675
Seventh	8	1,117	1,088	630	892	921
Eighth	8	821	821	556	415	415
Ninth	13	2,316	2,140	1,347	2,033	2,209
Tenth	7	910	876	736	579	613
All Circuits	97	15,629	15,112	9,779	9,939	10,456

Source: AO Report

B. Data for Fiscal Year 1972

Circuit	Authorized Judgeships	Filings FY '72	Terminations FY '72	Terminations After Hearing or Submission FY '72	Pending End of FY '71	Pending End of FY '72
D. C.	9	1,168	1,001	466	1,053	1,220
First	3	421	385	253	130	166
Second	9	1,317	1,593	897	957	681
Third	9	1,179	1,201	675	861	839
Fourth	7	1,399	1,391	861	817	825
Fifth	15	2,864	2,662	1,877	1,434	1,636
Sixth	9	1,248	1,098	679	503	653
Seventh	8	999	882	443	775	892
Eighth	8	798	797	508	414	415
Ninth	13	2,258	1,968	1,221	1,743	2,033
Tenth	7	884	850	657	545	579
All Circuits	97	14,535	13,828	8,537	9,232	9,939

Source: AO Report

C. Data on Disposition Time

Circuit	Median Time in FY 1973 from Filing of Complete Record to Final Disposition (Civil)		Median Time in FY 1973 from Filing of Complete Record to Final Disposition (Criminal)	
	Cases	Interval (Months)	Cases	Interval (Months)
D. C.	237	14.5	282	10.2
First	138	4.5	60	6.4
Second	420	5.8	434	3.8
Third	415	10.6	220	6.1
Fourth	889	5.8	238	5.7
Fifth	1,445	5.2	484	4.3
Sixth	459	7.1	205	6.7
Seventh	354	12.0	207	9.6
Eighth	327	4.6	162	4.5
Ninth	536	13.8	646	4.9
Tenth	508	6.7	166	5.8
All Circuits	5,728	6.9	3,104	5.5

Source: AO Report

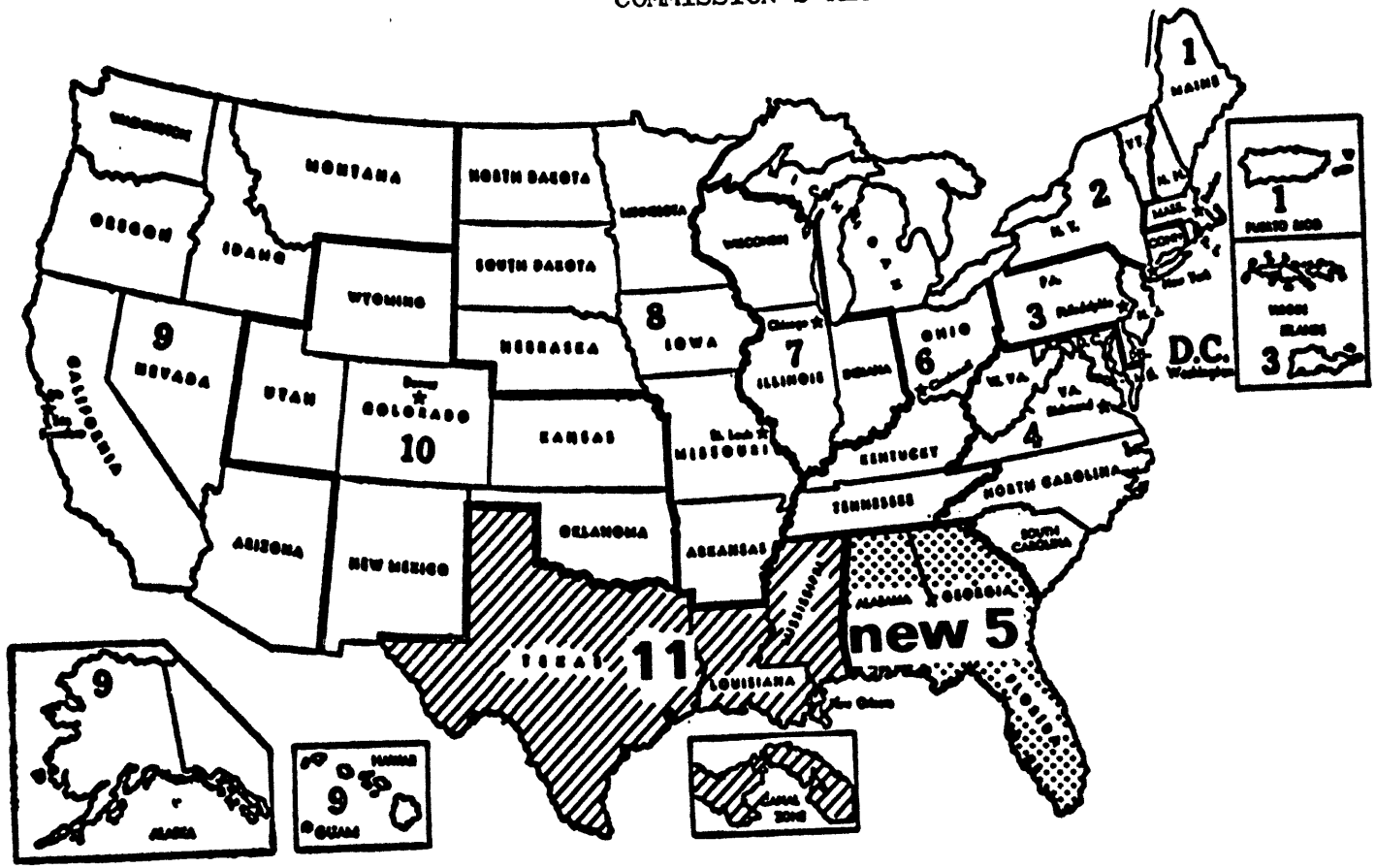
D. Appeals by State FY - 1973*/

		Appeals Filed FY 1973
I.	Fifth Circuit States	
	Alabama	249
	Florida	800
	Georgia	451
	Louisiana	477
	Mississippi	143
	Texas	838
	Canal Zone	6
II.	Eighth Circuit States	
	Arkansas	93
	Total of all other states	728
III.	Ninth Circuit States	
	Alaska	26
	Arizona	234
	California	1,543
	Northern & Eastern 545	
	Central & Southern 998	
	Hawaii	38
	Idaho	30
	Montana	36
	Nevada	70
	Oregon	121
	Washington	183
	Guam	35

*State figures adjusted to reflect appeals from administrative agencies and original proceedings. See Footnote 1, page 9.

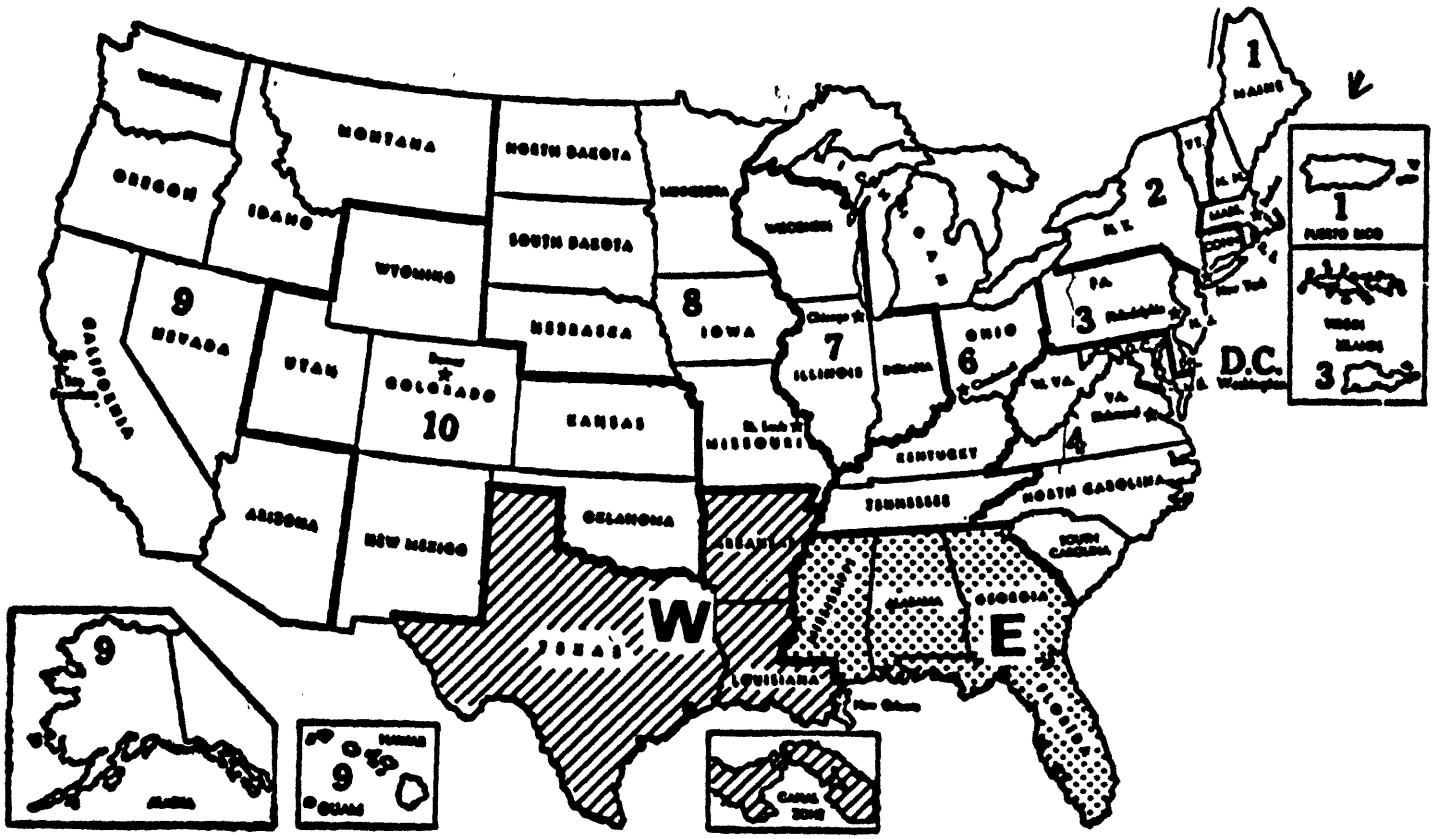
5th CIRCUIT

COMMISSION'S RECOMMENDATION



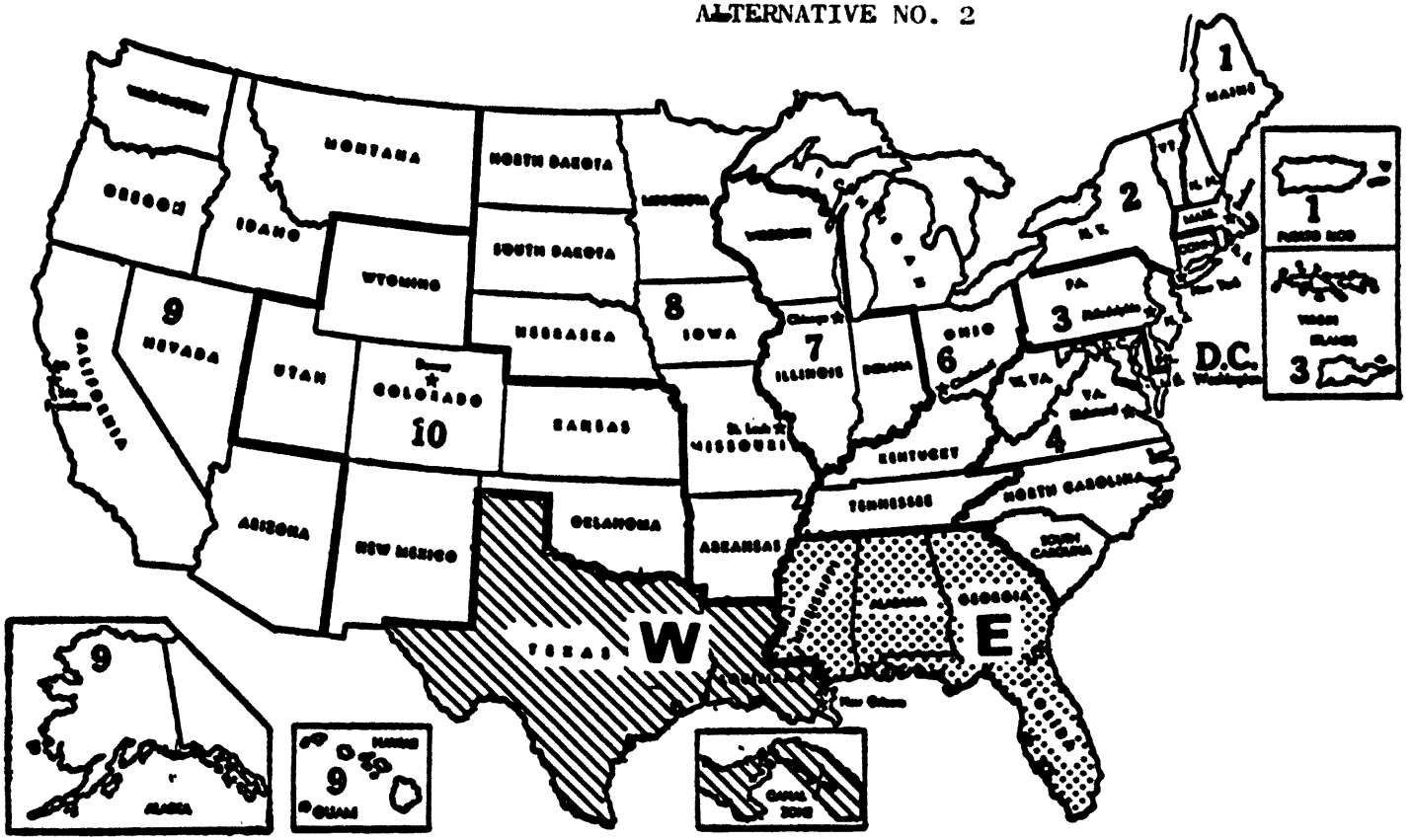
5th CIRCUIT

ALTERNATIVE NO. 1



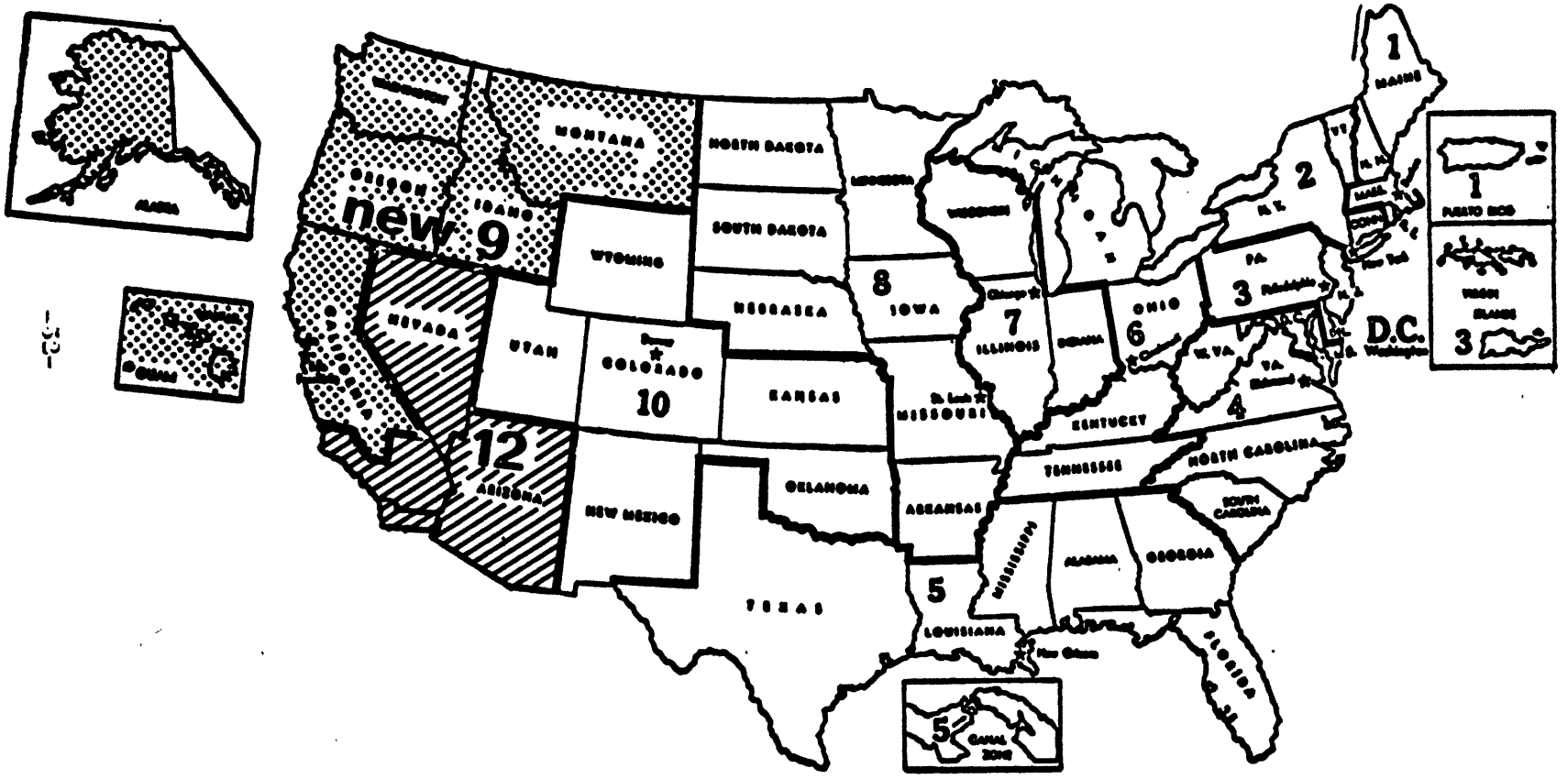
5th CIRCUIT

ALTERNATIVE NO. 2



9th CIRCUIT

COMMISSION'S RECOMMENDATION



Committee Exhibit A - 2

U.S. Courts of Appeals
Caseload
By Circuits and Fiscal Years

CIRCUIT	Fiscal Year	Auth. J/ships	Pending July 1	Com-menced	Termi-nated	Pending June 30	Increase or Decrease
District of Columbia	1971	9	1011	1055	1013	1053	+42
	1972	9	1053	1168	1001	1220	+167
	1973	9	1220	1360	1288	1292	+72
	1974	9	1292	1243	1310	1225	-67
First	1971	3	97	383	350	130	+33
	1972	3	130	421	385	166	+36
	1973	3	166	401	370	197	+31
	1974	3	197	387	420	164	-33
Second	1971	9	1105	1423	1571	957	-148
	1972	9	957	1317	1593	681	-276
	1973	9	681	1709	1462	928	247
	1974	9	928	1802	1819	911	-17
Third	1971	9	866	1100	1105	861	-5
	1972	9	861	1179	1201	839	-22
	1973	9	839	1197	1281	755	-84
	1974	9	755	1216	1216	755	0
Fourth	1971	7	656	1211	1050	817	+161
	1972	7	817	1399	1391	825	+8
	1973	7	825	1573	1676	722	-103
	1974	7	722	1462	1201	983	+261
Fifth	1971	15	1407	2316	2289	1434	+27
	1972	15	1434	2864	2662	1636	+202
	1973	15	1636	2964	2871	1729	+93
	1974	15	1729	3294	2713	2310	+581
Sixth	1971	9	489	1015	1001	503	+14
	1972	9	503	1248	1098	653	+150
	1973	9	653	1261	1239	675	+22
	1974	9	675	1335	1207	803	+128
Seventh	1971	8	665	902	792	775	+110
	1972	8	775	999	882	892	+117
	1973	8	892	1117	1088	921	+29
	1974	8	921	1086	1110	897	-24
Eighth	1971	8	404	713	703	414	+10
	1972	8	414	798	797	415	+1
	1973	8	415	821	821	415	0
	1974	8	415	995	918	492	+77
Ninth	1971	13	1532	1936	1725	1743	+211
	1972	13	1743	2258	1968	2033	+290
	1973	13	2033	2316	2140	2209	+176
	1974	13	2209	2697	2551	2355	+146
Tenth	1971	7	580	734	769	545	-35
	1972	7	545	884	850	579	+34
	1973	7	579	910	876	613	+34
	1974	7	613	919	957	575	-38
ALL CIRCUITS	1971	97	8812	12788	12368	9232	+420
	1972	97	9232	14535	13828	9939	+707
	1973	97	9939	15629	15112	10456	+517
	1974	97	10456	16436	15422	11470	+1014

Source: Annual Reports of the Director, Administrative Office of the U.S. Courts

Committee Exhibit B - 2

U.S. Courts of Appeals
Per-Judge Caseload
By Circuits and Fiscal Years

CIRCUIT	FISCAL YEAR	AUTH. J/SHIPS	FILINGS PER JUDGE	TERM. PER JUDGE	PENDING PER JUDGE
District of Columbia	1971	9	117	113	117
	1972	9	130	111	136
	1973	9	151	143	144
	1974	9	134	145	136
First	1971	3	128	117	43
	1972	3	140	128	55
	1973	3	134	123	66
	1974	3	129	140	54
Second	1971	9	158	175	106
	1972	9	146	177	76
	1973	9	190	162	103
	1974	9	200	202	101
Third	1971	9	122	123	96
	1972	9	131	133	93
	1973	9	133	142	84
	1974	9	135	135	83
Fourth	1971	7	173	150	117
	1972	7	200	199	118
	1973	7	225	239	103
	1974	7	208	171	140
Fifth	1971	15	154	153	96
	1972	15	191	177	109
	1973	15	198	191	115
	1974	15	219	180	154
Sixth	1971	9	113	111	56
	1972	9	139	122	73
	1973	9	140	138	75
	1974	9	148	134	89
Seventh	1971	8	113	99	97
	1972	8	125	110	112
	1973	8	140	136	115
	1974	8	135	138	112
Eighth	1971	8	89	88	52
	1972	8	100	100	52
	1973	8	103	103	52
	1974	8	124	114	61
Ninth	1971	13	149	133	134
	1972	13	174	151	156
	1973	13	178	165	170
	1974	13	207	196	181
Tenth	1971	7	105	110	78
	1972	7	126	121	83
	1973	7	130	125	88
	1974	7	131	136	82
ALL CIRCUITS	1971	97	132	128	95
	1972	97	150	143	102
	1973	97	161	156	108
	1974	97	169	158	118

Source: Annual Reports of the Director, Administrative Office of the U.S Courts

U.S. Courts of Appeals
Time Intervals
By Circuits and Fiscal Years

Circuit	Fiscal Year	Auth. Judgeships	Submitted over 3 months	Median Time A - R* Civil	Median Time A - R* Criminal	Median Time R - T** Civil & Criminal
District of Columbia	1971	9	41	1.2	4.1	11.2
	1972	9	45	1.3	4.2	11.4
	1973	9	56	1.2	1.8	11.7
	1974	9	58	1.3	2.4	12.3
First	1971	3	0	.7	.9	4.0
	1972	3	0	.4	.8	4.9
	1973	3	0	.4	.7	5.1
	1974	3	0	.5	.8	4.3
Second	1971	9	9	1.2	1.8	5.4
	1972	9	8	1.2	1.4	4.8
	1973	9	3	1.2	1.4	4.7
	1974	9	2	1.2	1.1	5.3
Third	1971	9	12	1.3	3.0	9.2
	1972	9	8	1.5	3.1	8.5
	1973	9	6	1.3	1.3	9.4
	1974	9	0	1.3	1.5	9.6
Fourth	1971	7	23	1.2	1.4	7.1
	1972	7	2	1.1	1.4	6.4
	1973	7	7	.9	1.4	6.6
	1974	7	7	1.4	1.7	7.0
Fifth	1971	15	40	1.5	1.9	6.4
	1972	15	45	1.4	1.8	6.4
	1973	15	43	1.3	1.5	6.4
	1974	15	74	1.3	1.5	6.5
Sixth	1971	9	2	1.2	2.0	7.2
	1972	9	4	1.3	2.0	7.4
	1973	9	5	1.3	2.2	7.0
	1974	9	22	1.6	2.8	7.2
Seventh	1971	8	13	1.3	2.3	10.7
	1972	8	22	1.4	2.4	11.4
	1973	8	35	1.4	2.1	11.1
	1974	8	57	1.3	1.7	10.3
Eighth	1971	8	15	2.6	3.0	5.0
	1972	8	7	2.7	2.5	5.3
	1973	8	1	2.5	2.5	4.5
	1974	8	6	2.1	2.3	4.1
Ninth	1971	13	12	1.6	3.0	10.6
	1972	13	44	1.9	2.9	8.4
	1973	13	65	2.0	2.3	7.1
	1974	13	62	2.1	1.8	7.2
Tenth	1971	7	23	1.6	2.9	7.8
	1972	7	16	1.5	2.1	7.0
	1973	7	19	1.4	2.1	6.3
	1974	7	3	1.6	2.0	6.9
ALL CIRCUITS	1971	97	220	1.3	2.5	7.6
	1972	97	188	1.4	2.3	6.6
	1973	97	232	1.3	1.7	6.4
	1974	97	291	1.4	1.7	6.8

* A reflection of median time in months from filing of notice of appeal to filing of the complete record (A = appeal; R = record).

** A reflection of median time in months from filing of complete record to final disposition (termination) (R = record; T = final disposition).

Source: Annual Reports of the Director, Administrative Office of the U.S. Courts

Committee Exhibit D - 2

U.S. Courts of Appeals
Written Opinions Per Judge
Averages - Fiscal Years 1967 - 1974

Signed Opinions Per Judge								
Circuit	1967	1968	1969	1970	1971	1972	1973	1974
D.C	18	17	27	19	21	20	19	19
First	26	29	31	33	38	39	42	61
Second	33	30	30	42	58	54	52	37
Third	24	20	18	21	23	38	27	24
Fourth	30	27	23	18	21	23	24	27
Fifth	34	32	41	49	45	40	45	41
Sixth	22	22	25	29	25	24	25	22
Seventh	35	30	36	40	41	39	38	34
Eighth	22	24	26	30	24	32	33	35
Ninth	41	25	30	34	29	35	38	34
Tenth	47	38	36	32	40	49	50	35
Nat'l Av.	30	27	30	33	34	36	36	33

Per Curiam Opinions Per Judge								
Circuit	1967	1968	1969	1970	1971	1972	1973	1974
D.C.	8	13	17	12	19	14	22	19
First	9	7	7	12	18	10	10	15
Second	13	11	10	14	18	17	10	11
Third	16	18	18	14	18	27	14	7
Fourth	18	21	20	28	40	65	63	52
Fifth	29	29	35	44	64	77	86	74
Sixth	13	11	12	25	32	44	54	49
Seventh	3	2	2	4	4	6	6	5
Eighth	4	4	5	8	15	23	21	19
Ninth	19	13	17	30	49	49	53	44
Tenth	14	29	19	31	37	35	45	14
Nat'l Av.	14	15	16	22	32	38	40	33

Committee Exhibit E - 5

Average Time for Stages of Appellate Review
Cases Terminated After Argument or Submission
By Type of Opinion and Type of Case - F.Y. 1973

Circuit: Fifth

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	119	65	89	93	109	371	
Per Curiam	109	50	74	105	24	266	
Memorandum	-	-	-	-	-	-	
No Opinion	5	59	37	47	12	166	
Private Civil - Signed Opinion	263	76	69	108	108	374	
Per Curiam	381	61	62	75	17	237	
Memorandum	-	-	-	-	-	-	
No Opinion	16	66	46	44	18	188	
Prisoner Pet. - Signed Opinion	66	71	70	89	67	316	
Per Curiam	322	51	77	56	7	197	
Memorandum	-	-	-	-	-	-	
No Opinion	2	58	47	18	0	139	
Criminal - Signed Opinion	150	80	73	71	65	301	
Per Curiam	316	68	70	48	8	209	
Memorandum	-	-	-	-	-	-	
No Opinion	1	52	38	54	0	150	
Admin. Agency - Signed Opinion	56	10	133	103	113	365	
Per Curiam	58	328	93	69	27	528	
Memorandum	-	-	-	-	-	-	
No Opinion	-	-	-	-	-	-	
Recapitulation							
All Signed Opinions	674	68	79	95	94	349	
All Per Curiam	1248	72	70	70	13	239	
All Memorandum	-	-	-	-	-	-	
All No Opinion	29	57	44	35	12	165	
Circuit Average	1951	70	73	78	41	276	

Committee Exhibit E - 12

Comparative Tables
Average Time For Stages of Appellate Review
Cases Terminated After Argument or Submission
By Circuit - Fiscal Year 1973

All Signed Opinions

Circuit	Number of Cases	Av. Time Appeal-Record (days) [FRAP-40 days]	Av. Time Record-LastBrief (days) [FRAP-84 days]	Av. Time Brief-Oral Argu. or Submission (days)	Av. Time A/S - Opinion (days)	Total Av. Time Appeal-Opinion (days)
D. C.	166	47	163	181	166	567
First Cir.	126	28	134	26	58	247
Second Cir.	367	48	113	29	57	249
Third Cir.	239	65	122	130	75	404
Fourth Cir.	160	52	122	53	98	323
Fifth Cir.	674	68	79	95	94	349
Sixth Cir.	226	58	101	64	95	321
Seventh Cir.	302	86	177	96	109	468
Eighth Cir.	264	102	61	52	75	294
Ninth Cir.	504	94	119	187	112	528
Tenth Cir.	347	73	109	66	92	342

All Per Curiam Opinions

Circuit	Number of Cases	Av. Time Appeal-Record (days) [FRAP - 40 days]	Av. Time Record-LastBrief (days) [FRAP - 84 days]	Av. Time Brief-Oral Argu. or Submission (days)	Av. Time A/S - Opinion (days)	Total Av. Time Appeal-Opinion (days)
D.C.	200	64	166	135	34	422
First Cir.	25	34	98	37	41	218
Second Cir.	80	49	112	39	21	225
Third Cir.	131	59	108	144	18	345
Fourth Cir.	327	57	111	47	32	263
Fifth Cir.	1248	72	70	70	13	239
Sixth Cir.	487	77	103	72	27	284
Seventh Cir.	51	60	153	120	76	420
Eighth Cir.	165	69	53	48	23	206
Ninth Cir.	697	87	100	134	30	365
Tenth Cir.	130	64	91	67	74	300

Circuit Averages - All Cases Argued or Submitted

Circuit	Number of Cases	Av. Time Appeal-Record (days) [FRAP - 40 days]	Av. Time Record-LastBrief (days) [FRAP - 84 days]	Av. Time Brief-Oral Argu. or Submission (days)	Av. Time A/S - Opinion (days)	Total Av. Time Appeal-Opinion (days)
D.C.	586	63	167	152	68	466
First Cir.	199	32	122	26	45	229
Second Cir.	781	51	107	31	30	220
Third Cir.	683	54	115	134	31	344
Fourth Cir.	496	55	114	49	54	284
Fifth Cir.	1951	70	73	78	41	276
Sixth Cir.	742	69	103	69	47	293
Seventh Cir.	631	82	162	104	86	433
Eighth Cir.	513	85	57	49	48	245
Ninth Cir.	1343	90	108	156	60	428
Tenth Cir.	492	70	103	65	85	327

Committee Exhibit F

COMPARISON OF CASES ARGUED OR SUBMITTED
PER
AUTHORIZED JUDGESHIPS AND ACTIVE JUDGESHIPS

- - - - - - - -

1st Circuit - (3 Judges):

Panel of Authorized Judges Averaged	211 Cases
Panel of Active Judges Averaged -	184 Cases
Active Judges Average Sittings -	6 Weeks + 1 Day
Average Argued or Submitted -	5.1 Cases Per Day

2nd Circuit - (9 Judges):

Panel of Authorized Judges Averaged -	264 Cases
Panel of Active Judges Averaged -	204 Cases
Active Judge Average Sittings -	10 Weeks + 1 Day
Average Argued or Submitted -	4 Cases Per Day

3rd Circuit - (9 Judges):

Panel of Authorized Judges Averaged -	233 Cases
Panel of Active Judges Averaged -	220 Cases
Active Judge Average Sittings -	8 Weeks
Average Argued or Submitted -	5.5 Cases Per Day

4th Circuit - (7 Judges):

Panel of Authorized Judges Averaged -	164 Cases
Panel of Active Judges Averaged -	125 Cases
Active Judge Average Sittings -	6 Weeks + 1 Day
Average Argued or Submitted -	4 Cases Per Day

5th Circuit - (15 Judges):

Panel of Authorized Judges Averaged - 145 Oral Arguments + 220 Summary =	365 Cases
Panel of Active Judges Averaged - 132 Oral Arguments + 220 Summary =	352 Cases
Active Judge Average Sittings -	5 Weeks + 3 Days + Summary Calendar
Average Argued or Submitted -	4.7 Cases Per Day

6th Circuit - (9 Judges):

Panel of Authorized Judges Averaged -	245 Cases
Panel of Active Judges Averaged -	209 Cases
Active Judges Average Sittings -	8 Weeks + 2 Days
Average Argued or Submitted -	4.9 Cases Per Day

7th Circuit - (8 Judges):

Panel of Authorized Judges Averaged -	252 Cases
Panel of Active Judges Averaged -	186 Cases
Active Judges Average Sittings -	6 Weeks + 1 Day
Average Argued or Submitted -	6 Cases Per Day

8th Circuit - (8 Judges):

Panel of Authorized Judges Averaged -	184 Cases
Panel of Active Judges Averaged -	180 Cases
Active Judges Average Sittings -	7 Weeks + 1 Day
Average Argued or Submitted -	5 Cases Per Day

9th Circuit - (13 Judges):

Panel of Authorized Judges Averaged -	256 Cases
Panel of Active Judges Averaged -	158 Cases
Active Judges Average Sittings -	9 Weeks + 3 Days
Average Argued or Submitted -	3.3 Cases Per Day

10th Circuit - (7 Judges):

Panel of Authorized Judges Averaged -	188 Cases
Panel of Active Judges Averaged -	141 Cases
Active Judge Average Sittings -	6 Weeks
Average Argued or Submitted -	4.7 Cases Per Day

D. C. Circuit - (9 Judges):

Panel of Authorized Judges Averaged -	199 Cases
Panel of Active Judges Averaged -	145 Cases
Active Judges Average Sittings -	5 Weeks
Average Argued or Submitted -	5.9 Cases Per Day

Senator BURDICK. We are privileged to have with us today the distinguished senior Senator from Nebraska, the ranking minority member of the subcommittee, and the Chairman of the Commission on Revision of the Federal Court Appellate System. He is accompanied by Prof. Leo Levin, the Executive Director of the Commission. Gentlemen, the formal report of the Commission has been received for the record and all of us are generally familiar with its contents. The subcommittee would be pleased to receive your views on the general nature of the problem which I have outlined in my opening statement.

Senator Hruska.

STATEMENT OF ROMAN L. HRUSKA, SENIOR SENATOR FROM THE STATE OF NEBRASKA

Senator HRUSKA. Thank you, Mr. Chairman.

You have made a fine statement on the subject at hand. It is in keeping with your regular and usual conduct on occasions of this kind.

I note that it is not your expectation that the subcommittee will find unanimous support for any proposal, and I would say you are understating the matter very mildly indeed. I want to join you in that lack of expectation for unanimous support. It is well that such situations transpire because we want disclosure of any differing views from those which the Commission adopted and which the subcommittee is now processing.

I should like to make this statement, Mr. Chairman, in a dual capacity, not only as a member of this subcommittee, but also as a member of the Commission on Revision. I am pleased to be here to participate in the hearings scheduled on these bills, 2988, 2989, and 2990.

As the distinguished chairman of this subcommittee has observed, these bills would implement the alternative recommendations of the Commission of Revision of the Federal Court Appellate System.

I am pleased to acknowledge the presence of the distinguished counsel of the subcommittee, William P. Westphal, who has been a constant source of study and reliable help to the Commission in all of its work, and, of course, his usefulness to this subcommittee is legend of the first quality.

Back in 1972, Mr. Chairman, you observed, "The Federal court of appeals are afflicted with an illness. While it is not malignant, there is a potential prognosis of chronic incapacity or partial paralysis." The Commission on Revision in the course of its intensive study which led to its recommendations concerning circuit realignment found that this was indeed the case. In fact, the situation in 1973 was more serious than when you wrote in 1972.

No less significant is the fact that the workload of the courts of appeals continues to grow. The Commission filed its report in December of 1973. The statistics for fiscal year 1974 have now been made available by the Director of the Administrative Office of the U.S. Courts. They show that the filings in the courts of appeals over the courts of the country have again increased, this time by 5 percent. More significant, for our purposes, is the fact that for the two circuits which would be divided under these bills, the rise has been little short of dramatic. Filings in the fifth circuit rose 11.1 percent and in the ninth circuit 16.5 percent over the preceding year.

We have heard much concerning the desirability of awaiting results of the Commission's study with respect to the structure and internal procedures of the Federal courts of appeals system.

The Commission has been actively at work on this, which is the second phase of its assignment. We have heard many suggestions for change, and a variety of proposals and ideas are under active consideration.

However, in my judgment, none of these proposals would diminish the urgency of the need for the realignment of the fifth and the ninth circuits. On the contrary, some which are pressed most vigorously would add to the workload of our present courts, because they seek to reduce the prevalence of truncated procedures under which so many cases are decided without oral argument or any statement of the reasoning behind the decision.

The Commission submitted its recommendations, aware that it was for Congress to review these recommendations and the data upon which they were based. This subcommittee has embarked upon that process, beginning with a full and open review of the problems relating to circuit realignment. I know that the inquiry is in good hands, and that all of us, whatever our views on the particular issues, have in common a deep concern for the Federal judicial system and its well being. We are, all of us, aware of, and concerned about, the rising demands on our judicial system and the need to fashion solutions and to implement them promptly. That common concern will stand us in good stead as we seek to help the Federal courts to continue to fulfill this ultimate function; namely, to administer justice.

Mr. Chairman, there has been the argument that we ought to await action on these bills and hold them in abeyance until the Commission completes the second part of its assignment. That decision, however, was made a long time ago. It was made when we determined the order of these assignments in the legislation creating the Commission. That decision is made, and I submit that we ought to go forward with this legislation, after processing duly and properly. I am sure that will be done so that we can then be ready to undertake the final conclusion of the second part of our assignment in the Commission which will later be considered in this subcommittee and Congress.

I thank you for this opportunity to express myself.

Senator BURDICK. Thank you, Senator Hruska. Before hearing from Mr. Levin, let me enter into the record a prepared statement from Senator McClellan, a member of the Commission on Revision of the Federal Court Appellate System and a distinguished member of this committee, along with a resolution from the House of Delegates of the Arkansas Bar Association.

PREPARED STATEMENT OF SENATOR JOHN L. MCCLELLAN, HEARINGS BEFORE THE SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY, SEPTEMBER 24, 1974

Mr. Chairman, as stated in the December 1973 report of the Commission on Revision of the Federal Court Appellate System, of which I am privileged to be a member, "the case for realignment of the geographical boundaries of the Fifth Circuit is clear and compelling." The Fifth Circuit has by far the largest volume of judicial business of any of the Courts of Appeals, approximately one-fifth of the total filings in the eleven Circuits. Although it has fifteen active judges and is the largest Federal appellate court in the country, it also has one of the highest caseloads per judge—198 filings per judge in Fiscal Year 1973. Geo-

graphically as well, the circuit is huge, extending from the Florida Keys to the New Mexico border.

Because of these facts, for several years now serious proposals have been put forward for dividing the circuit. Instead of adopting such a course of action, however, additional judges have been added to the court over the years to cope with its ever-increasing caseload. That caseload has now reached the point where this solution will no longer answer the problem. The members of the court have themselves recognized that the "public interest" demands geographical realignment.

In approaching the question of realignment of the Fifth Circuit, one of the most important considerations of the Subcommittee should be to adopt the solution that will be least disruptive of the existing system—the Commission's principle of marginal interference. One of the greatest benefits of any system of laws is the sense of stability that it provides. To cavalierly reorganize the Federal circuits would disrupt that stability. Except for the creation of the Tenth Circuit in 1929, the present circuit boundaries have stood since the nineteenth century. Modification of these boundaries would take from the bench and bar of the affected States at least some of the law familiar to them.

It is for this reason that I oppose bill S. 2989, to the extent that it would remove the State of Arkansas from the Eighth Circuit and place it in a new Eleventh Circuit with Texas, Louisiana, and the Canal Zone. Any benefits that might accrue from such a change would be outweighed by its adverse consequences. The Commission's principle of marginal interference would be violated not only by placing Arkansas in a new circuit but by joining it in a circuit with two States with completely different legal histories. The laws of Texas and Louisiana have their historical background in the Napoleonic Code; while Arkansas is a common law State. This difference in legal background would simply intensify the instability that the modification of the circuits would cause.

For the reasons above, while recognizing the need for some modification of the Fifth Circuit's boundaries, I would oppose any solution that would result in moving Arkansas out of the Eighth Circuit.

Mr. Chairman, I would like to submit for the record a copy of a resolution of the House of Delegates of the Arkansas Bar Association calling for retention of the State in the Eighth Circuit.

RESOLUTION

Be it resolved by the House of Delegates of the Arkansas Bar Association, being duly convened in regular session on January 11, 1974, that the Arkansas Bar Association approves the report of the Commission on Revision of the Federal Court Appellate System. Since Arkansas has been in the Eighth Circuit for many years and the law of Arkansas is more akin to the laws of the states in the Eighth Circuit than to the laws of Louisiana and Texas, the State of Arkansas should remain in the Eighth Circuit.

Be it further resolved that a copy of this Resolution shall be furnished to Senator John L. McClellan, the Senior Senator from Arkansas and a member of the Commission on Revision of the Federal Court Appellate System.

JAMES E. WEST,
President, Arkansas Bar Association.

STATEMENT OF A. LEO LEVIN, EXECUTIVE DIRECTOR, COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM

Mr. LEVIN. Mr. Chairman, I am deeply honored to be allowed the opportunity to appear at these hearings on Senate bills 2988, 2989, and 2990, introduced to implement the recommendations of the Commission on Revision of the Federal Court Appellate System concerning circuit realignment. The problems besetting the U.S. courts of appeals are certainly familiar to the members of this committee, and for that reason I need not elaborate upon them here. As Senator Hruska, the distinguished Chairman of the Commission, has already indicated, developments since the Commission filed its report a few months ago demonstrate clearly that we can expect no abatement of

the problems. On the contrary, there continues, in the country overall, a steady increase in the workload of these courts. Filings during fiscal year 1974 rose to the highest level in the history of the U.S. courts of appeals, 16,436, an increase of a little more than 5 percent over fiscal year 1973. Of greater significance to this subcommittee, however, is the fact that the two circuits which are our primary concern today were among those with the most dramatic increases. In the fifth circuit there were 11.1 percent more cases filed in fiscal year 1974 than in fiscal year 1973; in the ninth the increase was 16.5 percent.

I should like, if I may, to focus first on the fifth circuit. Despite an exceedingly heavy workload per judge, that court has prided itself over the past several years on its ability to remain current and to be free of backlog. The report of the clerk of the fifth circuit for fiscal year 1974 states, however, that as a result of increased filings and a lowered output per active judge, the fifth circuit experienced a substantial increase in cases ready for oral argument but not calendared as of their cutoff date—and I quote—"resulting in a backlog of 120 cases (6 weeks of court)."

Perhaps more significant than the backlog itself is the onerous workload already being shouldered by the active judges of the fifth circuit. The clerk's report, referred to above, shows an average of 717 decisions per active judge. These include 351 opinions and participations and, in addition, a substantial number of petitions for rehearing and administrative-interim matters. It would hardly do to suggest that the solution lies in increased judicial output, even on a temporary basis.

One must pay tribute to the creativity of the judges of that circuit for what they have accomplished in keeping current during the past few years, through fiscal 1973. Nevertheless, that success had not been without a price. It is by now a familiar tale that in well over 50 percent of all the cases in that court, the opportunity for oral argument is denied to the parties. Similarly, in more than one-third of the cases there is no opinion, or, stated more accurately, there is a Rule 21 opinion which ordinarily includes nothing beyond the fact of affirmance and a reference to the decision of the court explaining that procedure. Moreover, in 418 cases, 23 percent of the court's decisions, there was both a Rule 21 opinion and a denial of oral argument.

It may bear mention that Judge Griffin Bell, one of the leading proponents of the system of screening cases to reduce oral argument or deny it altogether, appeared at a hearing of the Commission held in 1973 and expressed his view that the court was denying oral argument in too many cases. He suggested that a reduction of some 10 percent would be appropriate. However, the court has not been able to achieve the reduction called for by Judge Bell. Thus we see that the fifth circuit presents a picture of a court whose judges are working exceedingly hard and who are handling a huge caseload; a court which is using truncated procedures in a large number of cases; and yet, despite these Herculean efforts, a court in which a backlog has developed and promises to increase.

Moreover, with a court of 15 judges it is not easy to maintain the law of the circuit—that is, to avoid intracircuit conflicts. The fifth circuit has taken its obligation to hold en banc hearings most seriously. Indeed, of a grand total of 70 cases determined en banc over the country, 33 were in the fifth circuit. One should certainly be appreciative of the willingness of that court to sit en banc when

necessary, despite the burden on the individual judges; and one should note further that in all but four of these 33 cases the court allowed oral argument en banc. Yet, perhaps, one may be permitted to speculate that the need for so many en banc determinations is, in part, a result of the fact that the court is so large; that there are so many panels sitting. Further, with 15 judges sitting on each en banc hearing, the time consumed, time which might otherwise be spent hearing and determining other cases, is, to put it mildly, substantial. If we were to compare the time spent hearing and conferring on these 29 en banc determinations in which oral argument was held with the judge time which would be required if the court were composed of only nine judges, it becomes apparent that the extra six judges alone could readily decide close to 100 cases, according oral argument to each.

As the Commission emphasized in its report, a majority of the active judges of the fifth circuit have called for realignment now as the first step in solving the problems of the circuit. This is understandable, for it must be remembered that not so very long ago the court formally and officially, and I should add, unanimously, expressed its opposition to the creation of additional judgeships for the circuit, being of the view that the quality of justice would thereby be impaired.

As you know, the Commission has recommended a plan for creating two new circuits out of the present fifth. Its report, which has been included in the record of this subcommittee, provides the data as of fiscal year 1973, with respect to the resulting caseload under such a division. If I may, I should like to submit for the record the caseloads which would have resulted in fiscal 1974, both from the recommended plan and from each of the two alternatives which the Commission outlined in its report. These data are computed in the same manner as those in the Commission's report, but on the basis of fiscal year 1974 filings.

Commission recommendation

TABLE I

Fifth circuit:	*Filings, fiscal year 1974*	Eleventh circuit:	*Filings, fiscal year 1974*
Florida	800	Texas	1,017
Georgia	469	Louisiana	534
Alabama	329	Mississippi	133
		Canal Zone	7
Total	1,598	Total	1,691

Alternative No. 1

Fifth circuit:		Eleventh circuit:	
Florida	800	Texas	1,017
Georgia	469	Louisiana	534
Alabama	329	Arkansas	154
Mississippi	133	Canal Zone	7
Total	1,731	Total	1,712

Alternative No. 2

Fifth circuit:		Eleventh circuit:	
Florida	800	Texas	1,017
Georgia	469	Louisiana	534
Alabama	329	Canal Zone	7
Mississippi	133		
Total	1,731	Total	1,558

It would appear clear that the need for circuit realignment of the present fifth circuit, with the creation of an additional circuit, is most compelling and, understandably, there is a sense of urgency with respect to the need for relief at the earliest possible moment.

I should like to turn now to the situation which the Commission found in the ninth circuit and to what has developed since the filing of the Commission's report recommending the division of that circuit and the creation of a twelfth circuit. Here, too, if I may, I should like to include in the record the 1974 caseloads for the two circuits recommended by the Commission.

TABLE II

Twelfth circuit:		New ninth circuit:	
California	1,153	California	584
Southern		Northern	
Central		Eastern	
Arizona	264	Alaska	31
Nevada	128	Washington	217
		Oregon	144
Total	1,545	Idaho	86
		Montana	47
		Hawaii	55
		Guam	86
		Total	1,150

In addition, I should like to provide similar data for a plan which the Commission described in detail and characterized as preferable to doing nothing, but which it found so clearly inferior to the recommended plan that it could not recommend it even as an alternative. These figures are as follows:

TABLE III[1]

Circuit X:		Circuit Y:	
California	1,737	Alaska	31
Nevada	128	Washington	217
Hawaii	55	Oregon	144
Guam	36	Idaho	36
		Montana	47
Total	1,956		
		Total	475

[1] N.B. Under this plan Arizona would be assigned to the tenth circuit.

It should be emphasized that the growth in filings in the ninth circuit has been one of the largest of any of the circuits. During fiscal 1974 there was an increase of 16.5 percent in the caseload as compared to the previous year. This is three times the rate of growth for the country as a whole.

The Commission recommended a plan under which two of the judicial districts in California would be assigned to the ninth circuit and two to a new twelfth circuit. It did this in large measure because of the large number of filings originating in the State of California. In fiscal 1974 there were almost 200 more filings attributable to California than there were in fiscal year 1973. Thus, that State alone, with appropriate adjustment for administrative appeals, generated 1,737 filings during that single fiscal year. If we put the fifth circuit to one side, this number of cases, attributable to the single State of California, was greater than that of any of the circuits except the second, and it approached the total filings in that circuit as well.

Much has been made of the fact that a great deal of the increase in the ninth circuit is attributable to litigation involving the Environmental Protection Agency. Certainly this should not be minimized; and yet it is relevant to note that in conferences with the staff of that agency, members of the Commission staff learned that no immediate diminution is in prospect. On the contrary, looking ahead, we can envision the EPA's generating a large volume of litigation in a variety of fields, and it is small consolation to private litigants who suffer from the resulting backlog to be able to point to the source of much of their trouble.

Perhaps it is desirable, at the risk of repeating a twice-told tale, to describe the impact of the situation in the ninth circuit on the individual civil litigant. As the chairman has pointed out, our search is for justice.

The Commission heard a great deal of testimony about civil cases which were delayed a year and a half and longer from the time of the filing of the last brief until the case was scheduled for oral argument. We have heard that it is the practice of certain Government agencies to file supplemental memorandums in ninth circuit civil cases precisely because of the long delays during which the law has changed. The median duration of cases tells some of the story, but it is also significant to study the Administrative Office report of cases under submission for more than 3 months as of June 30, 1974—cases already argued and heard or cases where briefs have been submitted to the panel. There were a total of 291 such cases in all of the courts of appeals of the country; more than 20 percent of them were in the ninth circuit. If we turn to cases that have been under submission for more than 9 months, then we find the ninth circuit responsible for 15 out of 36, or over 40 percent. These figures, it should be emphasized, represent the time that the litigants must wait for a decision after the case has been either argued or submitted. Clearly, another source of delay is in the period during which the litigants wait for oral argument or for submission.

No one would suggest that the judges of the ninth circuit are not burdened. As a result, that court has taken to assigning district court judges to the various panels of the courts of appeals, with serious negative reaction on the part of a number of members of the bar who testified at the Commission's hearings, as pointed out in the opening statement of the chairman.

A careful study of the practices in the ninth, compared with the other circuits, fully explains the source of the concern by the bar. Looking to the signed majority opinions handed down by the ninth circuit in fiscal year 1973, the latest year for which we have such data, we find that only 58 percent of them were written by active judges of that circuit, a little over half. This is the lowest percentage of any of the circuits. Another 15 percent were written by senior circuit judges, with 27 percent of the signed majority opinions written by other judges. Again, this figure of 27 percent is the highest in the country, and may be compared with a 6-percent figure for the second circuit, a 4-percent figure for the fifth, and 14 percent for the sixth. Most striking of all, however, is the fact that a total of 61 different judges wrote signed majority opinions of the court for the ninth circuit during that single fiscal year. This is more than twice the number of

judges writing opinions for the next ranking circuit and, for example, more than four times the number of judges who wrote signed majority opinions in the fourth circuit.

In these circumstances, maintaining the law of the circuit—avoiding intracircuit conflicts on doctrine or differing attitudes with respect to the application of accepted rules—becomes exceedingly difficult. To hold en banc hearings exacts a high price, although the ninth circuit did have five arguments en banc during fiscal 1974 and decided three other cases en banc without oral argument.

The conclusion seems inescapable that the ninth circuit has taken to reducing the number of oral arguments it will accord litigants. In fiscal year 1974 the total number of oral arguments—the absolute number—dropped by 21 percent as compared to fiscal 1973. What is important in the present context, however, is not that the court heard fewer cases as terminations increased, but rather that despite increased resort to truncated procedures, despite the use of so very many judges assigned to the panels from other duties, the court continued to fall behind in its work.

It appears clear at this juncture that the management of a circuit which extends from the Arctic Circle to the Mexican border, from Hawaii and Guam to Idaho and Montana, presents insurmountable problems. As already noted, the experience of the fifth persuaded the judges of that circuit unanimously to refuse to increase the number of active judgeships beyond 15. And it will be further recalled that the judges of the fifth, by an impressive majority, are seeking relief from their present situation. There is no need to have the ninth circuit relive the recent history of the fifth. The size of the ninth should be reduced, and it should be reduced now, before its caseload expands still further.

It is perhaps important to note that whereas we heard a great deal of sentiment for some structural change, serious concern was expressed—and has been expressed—about the proposal of the Commission to have two of the judicial districts of California assigned to one circuit and two to another. The Commission explored the problem and deliberated carefully concerning it. My colleague, Prof. Arthur Hellman, has written an article which appears in the May 1974 issue of the University of Pennsylvania Law Review entitled "Legal Problems of Dividing a State Between Federal Judicial Circuits." It canvasses all of the problems involved and analyzes each most carefully. The results of his study were available to the Commission, which numbers among its members such leading scholars in the field of Federal jurisdiction and Federal courts as Dean Roger Cramton of Cornell Law School and Prof. Herbert Weschler of Columbia Law School. They concluded, as did Judge Ben C. Duniway of the ninth circuit, that the problems were neither insoluble nor unmanageable.

Finally, it may be appropriate to say a few words concerning the process utilized by the Commission in arriving at its conclusions with respect to each of the circuits. Hearings were held during August and the beginning of September 1973, not only in Washington, but also in four cities of the fifth circuit and four cities of the ninth circuit. There was extensive newspaper publicity concerning the ninth circuit hearings in both San Francisco and Los Angeles. A large number of witnesses, representing both bench and bar, testified. The witness list in

California alone included the following (to name only the members of the practicing bar): Mayor Joseph L. Alioto of San Francisco; Moses Lasky, Esq.; John Bates, Esq.; Morris Doyle, Esq.; G. William Shea, Esq.; Lawrence Campell, Esq.; Marcus Mattson, Esq.; John Cleary, Esq., of the San Diego City Bar Association; and Leonard Sachs, Esq., on behalf of the Los Angeles Trial Lawyers Association. Of course, many who were invited to participate, both through a general invitation and as a result of specific inquiries, were not able to participate during that particular period of the summer.

Thereafter, a preliminary report was prepared and circulated widely. In addition, a copy of that report was published in the advance sheets of the West Publishing Co.'s Federal Reporter and Federal Supplement. The Commission received literally hundreds of communications expressing opinions concerning the preliminary report and the various proposals contained therein. The Commission also had before it a statement of the State Bar of California concerning the restructuring of the ninth circuit. In short, the Commission made every effort to gain the advantage of all ideas, comments, and reactions both with respect to these proposals and to a variety of other alternatives which were put forth during the course of its work.

As Senator Hruska noted, there are those who have suggested that circuit realignment should await completion of the Commission's report dealing with the structure and internal procedures of what the statute terms the Federal Courts of Appeals System. It is significant that in its report, the Commission noted that, in its view, realignment of the two largest circuits in the country is an essential preliminary step, as indeed the Congress had concluded, providing the basis on which to build firmly and soundly with respect to other changes which might develop. Some examples may prove helpful concerning this point. A proposal put forth by a special committee of the American Bar Association, presented to the Commission in great detail by Judge Shirley Hufstedler, provides for the creation of a new tribunal, but with the understanding that there would be no bypass of the present courts of appeal—that is, that cases would go to the new court only after they had already been decided by one of the regional courts of appeals. A large number of other suggestions, vigorously urged upon us, and referred to this morning, would augment the burdens of the present courts of appeals by increasing the proportion of cases in which oral argument is heard and discouraging the decision of cases without written opinions.

In short, what the Commission has recommended with respect to circuit realignment appeared to it then, and I am confident appears to it now, as an essential step regardless of what other recommendations may emerge from the work of the Commission in the course of the second phase of its assignment.

Thank you, Mr. Chairman.

Senator BURDICK. Thank you for a very fine statement, and we appreciate it.

I only have one or two questions.

I want you to understand that in these hearings this week we are dealing with the fifth circuit so that my questions won't be directed to the ninth circuit today. I presume you will be available later on with respect to the ninth circuit.

Mr. LEVIN. Yes indeed, Mr. Chairman. It would be my pleasure.

Senator BURDICK. In your statement, you say that the judges of the fifth circuit unanimously expressed their opposition to the creation of additional judgeships.

Mr. LEVIN. Yes, sir, Mr. Chairman.

Senator BURDICK. In other words, they take the position that, for the effective operation ot the court, it should not exceed 15 judges at any time?

Mr. LEVIN. Mr. Chairman, to be entirely fair, this is the last formal expression of the court as such that was transmitted to the Judicial Conference of the United States. Whether the present court would now be unanimous in that view, I would not be authorized to state, but that was the unanimously expressed view as of the last official statement of the judges, and it was formally communicated.

Senator BURDICK. When was that expressed?

Mr. LEVIN. I believe that was expressed in about 1970—perhaps Judge Brown would know—it was not that long ago. I should say, also, that it was a position taken at a considerable personal sacrifice to the judges, because this meant that they were going to individually bear a greater burden and they underscored the fact there was the risk of affecting the quality of the judicial product.

Senator BURDICK. I understand that the judges of the ninth circuit made the same statement with regard to the ninth?

Mr. LEVIN. This I have not seen in formal fashion. They have 13 judges in the ninth, but we could verify that for you, sir.

I can say that the decision of the judges in the fifth, when they took that action, has been referred to by judges of the ninth.

Senator BURDICK. We will check into the ninth.

Mr. LEVIN. I will look into the matter and provide the clarifying information for the record.

[Mr. Levin's correspondence on this matter follows:]

COMMISSION ON REVISION OF THE
FEDERAL COURT APPELLATE SYSTEM,
Washington, D.C., October 4, 1974.

Senator QUENTIN N. BURDICK,
Old Senate Office Building,
Washington, D.C.

DEAR SENATOR BURDICK: At the September 24 hearings of the Subcommittee on Improvements in Judicial Machinery a series of questions were posed concerning the experience of the Fifth Circuit with fifteen judgeships. These questions, put to several witnesses, focused both on when that Court reached its present size and, secondly, when the active judges of that Court resolved, unanimously, to oppose any increase in judgeships asserting that to have more than 15 judges "would diminish the quality of justice in the circuit." This resolution was adopted in October 1971 and is quoted in the published proceedings of the Judicial Conference of the United States, October 28–29, 1974. (A marked copy of the relevant pages is enclosed.)

It is noteworthy that the cited report includes language which makes it clear that the resolution of October 1971 was a reaffirmation of an earlier resolution. The Judicial Council of the Fifth Circuit, it recounts by way of preamble, "holds strongly to its prior formal determination," opposing an increase in size.

The Judicial Conference of the Fifth Circuit in October 1971 acted on the basis of substantial experience. The Court reached 13 judgeships in Fiscal Year 1967 (the legislation was enacted in March, 1966). It became a court of 15 during Fiscal Year 1969 (the legislation was enacted in June, 1968) and the Fifth Circuit had continued as a court of 15 through Fiscal Year 1969, Fiscal Year 1970 and Fiscal Year 1971 prior to the unanimous reaffirmation of opposition to a larger court referred to above.

Sincerely yours,

A. LEO LEVIN.

[The material referred to in Mr. Levin's letter of October 4, 1974, taken from pages 81–82 of the report of the proceedings of the Judicial Conference of the United States, October 28–29, 1971, follows:]

ADDITIONAL CIRCUIT JUDGESHIPS

After consideration of the recommendations of the Committee on Court Administration based on the quadrennial survey of the needs of the courts of appeals conducted by the Subcommittee on Judicial Statistics, the Conference agreed to recommend to the Congress the establishment of ten additional circuit judgeships, as follows:

Circuit:	Number	Circuit—Continued	Number
1st	1	8th	0
2d	[1]2	9th	2
3d	1	10th	1
4th	2	District of Columbia	0
5th	0		
6th	0	Total	10
7th	1		

[1] Conditional upon certification of need by the Judicial Conference.

In making this recommendation the Conference noted that based on statistics alone seven additional judgeships would be warranted in the Fifth Circuit over and above the 15 now authorized and five additional judgeships would be warranted in the Ninth Circuit rather than the two recommended. The Conference agreed further with its Committee on Court Administration that to increase the number of judges in a circuit beyond 15 would create an unworkable situation. In this connection the Conference noted a resolution unanimously adopted by the judges of the Fifth Circuit in October 1971 in which the judges state that the Judicial Council "holds strongly to its prior formal determination that to increase the number of judges beyond 15 would diminish the quality of justice in this circuit and the effectiveness of this court to function as an institutionalized federal appellate court." The Judicial Council of the Fifth Circuit went on to endorse H.R. 7378, a bill to establish a Commission on the Revision of the Judicial Circuits as previously proposed by the Judicial Conference "as an indispensable first step toward improvement in the federal circuit court system."

Senator BURDICK. You have spent considerable time on the fact that oral arguments were denied in many cases. Is that necessarily bad? There are some cases where it was clearly stated that oral argument may not add anything to the case; is that not true?

Mr. LEVIN. Yes, I think it is true, Mr. Chairman.

I think the crucial point about denial of oral argument is not that we are suggesting it should be allowed in every case. Phrased differently, I would not suggest that oral argument should never be denied. But one of the leading proponents of the screening procedure—referred to by the Chief Judge as the father of the proposal—says that oral argument is being denied in too many cases, that it should be reduced by at least 10 percent; that has been said by one of the leading proponents. I think we should take a look at the cumulative effect of a number of new procedures. When we combine no oral argument with no opinion and, in view of the exigencies in the decision of many of these cases, no conferences eyeball to eyeball, then we have problems of a different order of magnitude.

Senator BURDICK. You are not advocating oral argument in all cases?

Mr. LEVIN. No. it doesn't rest on the notion that we ought to make possible oral argument in all cases; no, sir.

Senator BURDICK. Mr. Westphal?

Mr. WESTPHAL. Professor Levin, on this last point the chairman was making inquiry about, you mentioned that, in connection with the Commission's study of the fifth circuit problem, you held public hearings in Houston, New Orleans, and Jackson, Miss., and, at those hearings did you hear testimony from many members of the trial bar as well as officials of State bar associations?

Mr. LEVIN. Yes; we did.

Mr. WESTPHAL. Can you tell us what the attitude was of those members of the bar who appeared before your Commission at these hearings concerning these procedures in the fifth circuit which have involved screening of cases and denial of oral argument to the extent that you have indicated in your statement? What has been the attitude of the bar?

Mr. LEVIN. Mr. Westphal, I think it is appropriate to answer that by making two points. One, they are not, as you would expect the case to be, unanimous. But by and large, I think, they were deeply concerned that things were going too far. I think this is a fair characterization of the attitudes expressed to us. It would be very difficult to say they wanted things returned to the situation as it existed several years ago. There was deep concern expressed to us in the hearings.

We are having conducted for us a scientific survey in which 3,000 lawyers who have had cases before three circuits are being circularized with a carefully pretested questionnaire. The results are coming in. There are thousands of lawyers in the fifth circuit, but the rate of return is exceedingly high—beyond 60 percent. I would say that the first returns I have seen, preliminarily, support—on the basis of this kind of sample—a deep concern about the extent to which these truncated procedures have affected the appellate practices.

Mr. WESTPHAL. Can you tell us when your Commission plans to complete the contemplation of these returns you have received from members of the practicing bar?

Mr. LEVIN. We would hope within 6 weeks. We are not doing it ourselves, but indeed we may have a report which would be citable at that time.

Mr. WESTPHAL. Now, is your Commission planning to print or publish in some form the transcripts of the hearings conducted at these cities I have mentioned in the fifth circuit as well as the cities on the west coast?

Mr. LEVIN. Yes, sir.

Mr. WESTPHAL. In what stage is the publication of those transcripts?

Mr. LEVIN. We have received page proof on approximately a little over half. The rest has been promised for this week. My guess is, in some form, it should be usable within a month or 6 weeks and in final form maybe a month thereafter. This is a rough estimate, and the reason for it is, they have not been complying with their prior promises.

Mr. WESTPHAL. I assume there will be no problem in your making copies of that printed transcript available to the subcommittee so it can take legislative notice of the information that you gathered at your hearings in these places?

Mr. LEVIN. That was a major purpose, sir, of making it available in that form.

Mr. WESTPHAL. You have, in the course of the second phase of the Commission's study, received testimony from various members of so-

called specialized bars—the tax bar and patent bar, among others—concerning the feasibility or the desirability of creating specialized courts to handle either tax cases or patent cases or even perhaps both types of cases within the jurisdiction of one court. Has your study of that possibility produced an evaluation of the number of such cases which are filed in the courts of appeals from the various circuits, so that you can express an opinion as to whether the creation of such specialized courts, were they legislatively authorized, would take away from the 11 courts of appeals a sufficient caseload—and more particularly, from the fifth and the ninth circuits—to obviate the necessity of some kind of geographical realignment of those circuits?

Mr. LEVIN. Yes, sir. There are perhaps four major proposals which should be mentioned here. First is patent litigation, where there is the strongest support, although, again, the bar is not unanimous. The total caseload is less than 150. It was about 122 a year ago. It is simply not of an order of magnitude, even considering the weighted caseload, that has any impact at all on these conclusions.

The next field is tax. But there we heard from the counsel of the tax section of the American bar. They are strongly opposed to a specialized tax court, and I think it fair to say that most witnesses have very little support for a tax court as such.

What there is—and this gets to the third thing that ought to be considered—is the possibility of creating some kind of a tribunal which would not drain off all tax litigation, but which might more rapidly resolve intercircuit conflicts in the tax area. The volume of cases which are being talked about for that purpose is relatively small. The total number which people are talking about for such a tribunal—part of which would be tax cases, part administrative decision cases, part other things—might be 1,500 cases a year. These might well include cases of a significance in other areas that would be referred to in different ways.

As a result, I think I can say with some confidence that none of the major proposals before us, which have wide support, envision that kind of a siphoning off of caseload from the present regional circuits which would affect these conclusions.

Mr. WESTPHAL. Do you know of any other proposals with reference to changes in structure or procedure which might be employed by courts of appeals which could so lighten the workload of the 15 judges in the fifth circuit and the 13 judges in the ninth circuit so that, again, the necessity, as you urge, of realigning these circuits geographically, could be obviated?

Mr. LEVIN. Mr. Westphal, let me, if I may, respond in some detail. There are proposals for total changes with respect to the handling of administrative appeals. I think I can fairly say that, of the alternatives likely to be presented to the Commission, none would so siphon off these cases. I mention the next point because one of the possibilities going directly to your point about changes of procedures involves the notion that you lose the right of appeal but you have something like a certiorari procedure, or what Judge Wisdom likes to refer to as a writ practice. People have suggested this procedure for appeals in diversity cases. These are the kinds of proposals which are getting some kind of support—that is, the opposition immediately engendered isn't tremendously strong for cogent reasons. I think this leave-to-appeal procedure would go against what some have assumed to be

virtually a major premise, that there is a right in our system to at least one appeal, and not simply to one judge. That might save some time, although I don't know that it would still be of an order of magnitude sufficient to avoid the real problem.

The use of central staff has been urged by many and will be seriously considered by the Commission. But again, if we have to leave judging to judges, then I do not envision—from what I have seen, and we have carefully gone over Professor Meador's seminar work—that proposals for use of central staff, where they are to aid the judges in doing judging, would so affect the cases that realignment would not be necessary.

In short, if I may elaborate, I am not speaking at the moment substantively against any of these procedures. I am saying that, in terms of the safeguards people will necessarily require, I don't envision a change which would avoid the necessity for the realignment of these two circuits.

Mr. WESTPHAL. Now, the Congress recently passed legislation which extends the life of your Commission to September 1975, is that correct?

Mr. LEVIN. Yes, with a report due in June 1975.

Mr. WESTPHAL. I take it the President has signed that bill?

Mr. LEVIN. Yes, he has signed that bill.

Mr. WESTPHAL. So that the final report of your Commission will not be forthcoming until June of 1975.

I believe that is all the questions I have.

Senator BURDICK. I have just one more question.

You have testified regarding the attitude of the judges of the fifth circuit about adding additional judges to the 15 already there, and you stated that the Commission held several hearings in the fifth circuit. Was there any substantial amount of expression from members of the bar indicating that they would like to increase the number of judges and avoid splitting?

Mr. LEVIN. No, I recall none. I think the bar is appreciative of the problems in the circuit, but they are also aware of the difficulties involved as you get more than 15 judges.

Senator BURDICK. Then there is no likelihood of increasing the number of judges?

Mr. LEVIN. We have not found that.

Senator BURDICK. Thank you, Mr. Levin. Our next witness is Chief Judge Brown.

Welcome to the committee, Judge Brown.

STATEMENT OF CHIEF JUDGE JOHN R. BROWN, FIFTH CIRCUIT, HOUSTON, TEX., ACCOMPANIED BY THOMAS REESE, CIRCUIT EXECUTIVE

Judge BROWN. Mr. Chairman, I am grateful of the opportunity of once again appearing before this committee.

I would like to introduce my circuit executive, Mr. Thomas H. Reese, who is going to sit on my right side, violating military protocol, because he can't hear with his right ear.

Senator BURDICK. That's not such an unusual circumstance.

Mr. WESTPHAL. Mr. Reese, between the two of us, we have two good ears.

Judge BROWN. The chairman will recall that last spring, when we were trying desperately to get you to come down to the Judicial Conference in New Orleans, I explained to you that, in this situation, I could not expect to represent the full court as I would ordinarily as chief judge in congressional matters, since we were sharply divided on some underlying serious policy. I urged the committee to allow several judges to appear. Not only have you done that, but the committee itself has solicited the presence of all of the judges. Judge Wisdom, I understand, will follow me. Our views are pretty well parallel. Judge Gewin will present what I refer to sometimes as "the manifesto from the East," signed by nine judges who happen to live east of the Mississippi River, all of whom want an immediate split of the circuit now, but some of them say "we could continue to use the courthouse in New Orleans."

The Book of Job says, "Oh, that my adversary had written a book." Well, I have written so many books I am fearful that what I say today may be contradicted by what I have sometime previously said.

In working with your counsel I suggested that we introduce into the record of this hearing, my statement on Senate Joint Resolution 122, submitted at the hearing before the Subcommittee on Improvements in Judicial Machinery when I appeared before the chairman in May of 1972. I will now offer that statement.

Senator BURDICK. It will be received without objection.

[See appendix's "A" of this hearing record for the full text of Judge Brown's prepared statement to the subcommittee on May 9, 1972, concerning S.J. Res. 122, 92d Cong., 2d sess., which created the Commission on the Revision of the Federal Court Appellate System.]

Judge BROWN. I also suggested that my statement and testimony before Congressman Celler's Subcommittee on H.R. 7378 be admitted.

Senator BURDICK. Received without objection.

[See appendix's "B" of this hearing record for the full text of Judge Brown's prepared statement and the record of his testimony before Subcommittee No. 5 of the Committee on the Judiciary of the U.S. House of Representatives on June 21, 1971 on H.R. 7873.]

Judge BROWN. You have already received copies of my yellow-backed statement before the Commission on Revision, which appears to be a prodigious thing with lots of exhibits, and I would like to introduce that, too.

Senator BURDICK. It will be received for the file without objection.

[This statement has been retained in committee files and does not appear as an appendix in this hearing record.]

Judge BROWN. Then I am going to have the circuit executive make available to counsel a copy of our annual report for the year just concluded. In the report there are some confidential tables which show the performance of individual judges, and we suggest that that not be printed. In my report to the Commission we scrambled this so no one could identify the judges by name. The difference is very slight between the man on top and the man on the bottom.

Senator BURDICK. That document will be received for the file and not for the record.

[The document has been retained in committee files.]

Judge BROWN. I will ask Mr. Reese to work that out with Mr. Westphal. As I said, I have written a book.

In both my statements before the House committee and before this committee I said that the fifth circuit was for a circuit split.

Senator BURDICK. Was what?

Judge BROWN. Was for a circuit split. We firmly resolved that we supported, in principle, H.R. 7378 [92d Cong., 2d sess.]. I said I was, too, but with other things that ought to be tried before this one takes place, because I don't think it is going to achieve what the Commission seeks to achieve or what the legislation undertakes for it to achieve.

I am sorry that Senator Hruska is not present because I am going to be just a little critical of the Commission's report.

I think there are two basic places where I differ with their approach. No. 1, was that they looked just at two troubled areas, the fifth and the ninth circuits. So far as I can see they made no effort to look at the revision of the circuits as a whole, when I think, clearly, the congressional view was that it was time for it to be looked at. I don't want to talk about other circuits because some people get very sensitive about this, but one illustration is the Circuit for the District of Columbia. There is hardly a place in the structure of an intermediate Federal Court of Appeals for a single State or single area court of appeals. To what should the District of Columbia area adhere, the fourth circuit or the third circuit or the second circuit? Apparently the Commission has as a principle a thing they called a doctrine of marginal interference. I interpret this, really, as just the view of the judges of each of the circuits that you should just leave us alone.

Now, I am not one of those. We recognize that somewhere down the line here there has to be some change. One of the difficulties which I think faces this committee and the Congress, as it did the Commission, is that nearly every argument you make comes back to meet you head on.

For example, I am going to tell you in a few minutes here about why I don't think this is going to achieve what they are after, and in doing so, we will also see that we are facing a very, very substantial increase in our own burden. What are we going to do with it? My answer is that the proposal here isn't going to accomplish anything, and if the circuit should be split, we would only have to have it resplit again within a period of 3 to 4 years.

Another criticism of the Commission's approach is that they adopted this magic formula of nine. You will hear from Judge Gewin on that because nine of my judges feel that way. That is an impossible thing to achieve unless we have a structure of 35 appellate courts, because the frightening thing is not what is taking place in the fifth and ninth circuits today, but what will take place across the Nation in 1980. On the conservative projections of statistically straight-line projections of a pattern followed by Mr. Shafroth, Deputy Director of the Administrative Office, we will have over 35,000 appeals in the courts in 1980.

Senator BURDICK. Judge, are you aware of the Administrative Office's reports of the last 2 years on the district court caseload? There has been a leveling off there.

Judge BROWN. We have seen no indication——

Senator BURDICK. The Administrative Office report shows graphically that the caseload is going down a bit.

Judge BROWN. Well, I don't get as enthused as the Chief Justice does. I think the business is still there and is growing. I don't know that you will find in California, for example, that there has been any significant dropoff in filings, either criminal or civil. I don't happen to have the figures readily available.

This year they went up 3.3 percent. You are dealing with 150,000 cases. That is a large number in fiscal year 1974 over fiscal year 1973. If you are going to have nine-judge courts to service that number of cases in 1980, you are going to have to have close to 30 courts of appeals. That will mean not only one State with two courts of appeals, but one court of appeals for lower Manhattan and for several of the States in the fifth circuit. I maintain that, from the standpoint of the opportunity and capacity for the Supreme Court to give some kind of national policy, that is not a happy prospect. You will have far more intercircuit conflicts.

This argument cuts in a lot of different directions. In the first place, it demonstrates that we have to find something other than this magic number nine. We have to recognize that there is a place for a court of appeals in excess of nine judges.

No. 2, it also demonstrates that we have got to find new methods of handling these cases that are safe and acceptable to the bar and litigants.

The chairman asked Mr. Levin whether the bar was heard from in the hearings. They certainly were in the fifth circuit, and they were there because of actions I took. I found that the bar knew nothing about the hearings that were scheduled. I don't mean to imply any criticism of the Commission staff. The Commission had a limited staff and limited time. I took it upon myself as chief judge to notify the executive officers of each of the six bar associations, and they were well represented. We had the president of the State Bar of Texas, who spoke very vigorously. Then at each of the places, there were outstanding members of the bar from every State. It doesn't surprise me at all that the reaction of most of these lawyers was that they would like oral argument and that they were disturbed because we had to abandon it and had to go to the screening system. But many of them also expressed the view that, as between a court that is 2 years behind in hearings—as I understand the court is in the ninth circuit—with another year until decision, that, rather than wait 3 years for a decision, they would rather have the decision now and no oral argument. Whether they would get a court opinion would depend upon the case, whether it would be a Rule 21, a per curiam, or a signed opinion. This question wasn't adequately asked in the questionnaire which was sent to the judges and lawyers; it was a pure oversight. We called the Judicial Center to suggest that they ought to have that question in there. Well, as usual, it was too late when we got it to them. They had already sent the questionnaire out to the printer, although we had acted very diligently. So the questionnaire itself never asked the real question.

Another problem, of course, as Mr. Levin's statement points out, was the dissatisfaction expressed on the west coast at the prospect of 80 percent of the panels having a visiting judge on them.

Now, I think what I am really trying to say here is that the Commission, setting out to get some relief to the fifth circuit judges,

thought a nine-judge court was the answer for administrative convenience and for the work of the judges. If I can elaborate on that a little bit, if I understand my friends who signed the manifesto—and I think Judge Clark will sound it very vigorously tomorrow, as he did in Jackson, Miss., before the Commission—one of our problems is just the sheer labor of keeping up with the output of all 15 judges, plus some senior judges. You have to read slip opinions for 15 judges, 2255's, and petitions for rehearing en banc. I will demonstrate by some exhibits that I will offer, in a minute, that this hope for surcease is an illusion, because the volume that is predicted by sound projections for the next 2 or 3 years, and certainly by 1980, will show that, under any one of these three realignments in your three bills, there is going to be a need for judges as high as 15 and the volume of work will be as great as it now is.

I would like to offer, first, table 28. The reason I designated this "table 28," Mr. Westphal, is that in my Commission statement, the tables were marked 1 through 27; I thought it would be a little simpler, if you were to refer to those, if you didn't have two tables with the same number. This is for the business of the fifth circuit as presently constituted from 1973 to 1977:

[The table follows:]

BROWN TABLE 28.—FISCAL YEAR PROJECTIONS 1973-77

	1973 (actual)	1974	1975	1976	1977
A.O. projections	2,964	3,308	3,652	3,996	4,340
Brown projections	2,964	3,388	3,812	4,236	4,660

The first line is the Administrative Office projections. These were the ones that were developed by the Administrative Office for the use of Judge Butzner's committee on the 1976 omnibus circuit judgeship bill and in response to a request from the fifth circuit. They comprise I think three different projections. The straight line method, showing the increase based upon the filings of the immediate past 5 years, was the one that we used. It shows that in 1975 we are going to have 3,652 cases in the fifth circuit and 4,340 in 1977. Our clerk estimates that if he waits a little bit this will rise to about 3,875, and to 4,660 in 1977.

I also have three different tables labled Brown tables 30, 31, and 32. Table 30 covers the Commission recommendation to split the circuit into Florida, Georgia, and Alabama in the East, and Texas, Louisiana, Mississippi, and the Canal Zone in the West. Table 31 covers Commission alternative No. 1, which places the four States east of the river together and Texas, Louisiana, Arkansas, and the Canal Zone together. Table 32 covers the second alternative, which places the four States east of the Mississippi River in one circuit, and Texas, Louisiana, and the Canal Zone in another circuit.

[Tables 30, 31, and 32 follow:]

BROWN TABLE 30.—COMMISSION RECOMMENDATION

	Filings for fiscal year—													
					1977								1977	
	1973[1]	1974[2]	1975	1976	5th circuit project	AO project		1973[1]	1974[2]	1975	1976	5th circuit project	AO projec
5th circuit:							11th circuit:						
Florida	800	801	976	1,117	1,258	1,166	Texas	838	1,018	1,023	1,171	1,319	1,238
Georgia	451	470	550	629	708	656	Louisiana	477	535	582	667	750	703
Alabama	249	330	304	347	391	362	Mississippi	143	133	174	199	224	206
Mississippi							Canal Zone	6	7	7	8	10	9
Total	1,500	1,601	1,830	2,093	2,357	2,184		1,464	1,693	1,786	2,045	2,303	2,156
Present authorized judgeships	7	7	7	7				8	8	8	8		
Caseload per judge without adding new judges	214	229	261	299	337	312		183	212	223	256	288	269
Caseload with maximum 9 judgeships for each new court	167	178	203	232	261	243		163	188	198	227	256	239
1973 5 circuit average caseload	198	198	198	198	198	198		198	198		198	198	198
1973 national average caseload	161	161	161	161	161	161		161	161	161	161	161	161
Judgeships needed in new circuits to maintain national average	9.3	9.9	11.4	13.0	14.6	13.6		9.1	10.5	11.1	12.7	14.3	13.4

[1] Based on Commission figures found on p. 9 of the Report of the Commission on Revision of the Federal Court Appellate System, December 1973.

[2] Computed as indicated in the Commission report referred to above. See footnote on p. 9.

BROWN TABLE 31.—COMMISSION ALTERNATIVE RECOMMENDATION NO. 1

	Filings for fiscal year—											
					1977						1977	
	[1] 1973	[2] 1974	1975	1976	5th circuit project	AO project		[1] 1973	[2] 1974	1975	1976	5th circuit project	AO project
Eastern circuit:							Western circuit:						
Florida	800	801	976	1,117	1,258	1,166	Texas	838	1,018	1,023	1,171	1,319	1,234
Georgia	45	470	550	629	708	656	Louisiana	477	535	582	667	750	703
Alabama	249	330	304	347	391	362	Arkansas	93	103	113	123	133	94
Mississippi	143	133	574	199	224	206	Canal Zone	6	7	7	8	10	9
Total	1,643	1,734	2,004	2,292	2,581	2,390		1,414	1,663	1,725	5,969	2,212	2,040
Present authorized judgeships	9	9	9	9				7	7	7	7		
Caseload per judge without adding new judges	182	193	223	254	287	265		202	237	246	281	316	291
Caseload with maximum 9 judgeships for each new court	182	193	223	254	287	265		157	185	192	219	246	226
1973 5 circuit average caseload	198	198	198	198	198	198		198	198	198	198	198	198
1973 national average caseload	161	161	161	161	161	161		161	161	161	161	161	161
Judgeships needed in new circuits to maintain national average	10.2	10.8	12.4	14.2	16.0	14.8		8.8	10.3	10.7	12.2	13.7	12.7

[1] Based on Commission figures found on p. 9 of the "Report of the Commission on Revision of the Federal Court Appellate System," December 1973.

[2] Computed as indicated in the Commission report referred to above. See footnote on p. 9.

BROWN TABLE 32.—COMMISSION ALTERNATIVE RECOMMENDATION NO. 2

	Filings for fiscal year—					
					1977	
	[1] 1973	[2] 1974	1975	1976	5th circuit project	AO project
Eastern circuit:						
Florida	800	801	976	1,117	1,258	1,166
Georgia	451	470	550	629	708	656
Alabama	249	330	304	347	391	362
Mississippi	143	133	174	199	224	206
Total	1,643	1,734	2,004	2,292	2,581	2,390
Present authorized judgeships	9	9	9	9		
Caseload per judge without adding new judges	182	193	223	254	287	265
Caseload with maximum 9 judgeships for each new court	182	193	223	254	287	265
1973 5 circuit average caseload	198	198	198	198	198	198
1973 national average caseload	161	161	161	161	161	161
Judgeships needed in new circuits to maintain national average	10.2	10.8	12.4	14.2	16.0	14.8
Western circuit:						
Texas	838	1,018	1,023	1,171	1,319	1,238
Louisiana	477	535	582	667	750	703
Canal Zone	6	7	7	8	10	9
	1,321	1,560	1,612	1,846	2,079	1,950
	6	6	6	6		
	220	260	268	307	346	325
	147	173	179	205	231	216
	198	198	198	198	198	198
	161	161	161	161	161	161
	8.2	9.7	10.0	11.5	12.9	12.1

[1] Based on Commission figures found on p. 9 of the "Report of the Commission on Revision of the Federal Court Appellate System," December 1973.

[2] Computed as indicated in the Commission report referred to above. See footnote on p. 9.

Now, I ask you to look at table 32, because—while this may be a political judgment on my part, for which I have no competence at all—I would say that if the circuit is split this is the one most likely to pass the Congress. Saying that, I am satisfied that every judge who appears from the fifth circuit will say that no one has any objection to having any State within the grouping. In any split, I welcome Mississippi or Alabama. I'm sure we welcome all of the States.

Now, you will notice that on these tables the figures, including those for fiscal 1974, are actual Administrative Office figures with the adjustment made in the Commission's report for administrative agency's cases. I was pleased with the results, because these statistics are so easy to fool with, yet these figures turn out to be within one or two of the totals in Mr. Levin's table in his prepared statement.

If you will notice, on the left-hand side of table 31, in the year 1975, there will be 2,004 cases in the eastern circuit. On the basis of the national average caseload of 161 cases per judge you will need 12.4 judges. In the year 1977, which is just the day after tomorrow, you will need 16 judges according to the fifth circuit projections, and 14.8 judges according to the Administrative Office projections. We don't have any 0.8 judges, so that means 15 judges.

In the western circuit you are going to have, as each of these years passes by: in 1975, 10 judges; in 1976, 12 judges; and in 1977, 13 judges.

I don't know where anybody is going to get any real relief out of this. Does it mean that we will go back to split that circuit again a third time to keep this number down to nine? What are my poor brothers in the eastern circuit going to do with our projection of 2,581 cases in 1977—or the Administrative Office Projection of 2,390 in 1977, which is about what we have now—as far as keeping up slip opinions, en banes and so on?

In table 29, there is a recap of this which sets it out very pointedly; it gives the gross figures for each of the three alternatives.

[The table follows:]

BROWN TABLE 29.—CIRCUIT JUDGESHIPS NEEDED NOW

	Current authorized judgeships	Needed for fiscal year 1973 caseload	Judgeships needed fiscal year 1977 in new circuits to maintain national average	
			Brown project	A.O. project
New 5th circuit	7	9.3	14.6	13.6
New 11th circuit	8	9.1	14.3	13.4
Alternate No. 1-East Circuit	9	10.2	16.0	14.8
Alternate No. 1-West Circuit	7	8.8	13.7	12.7
Alternate No. 2-East Circuit	9	10.2	16.0	14.8
Alternate No. 2-West Circuit	6	8.2	12.9	12.1

Now I've been thinking about the serious types of cases. You can take a look at page 5 of the clerk's report. I won't undertake to state the figures now, but they show the breakdown of criminal cases by States, both in 1973 and 1974. I added these up and out of 674 cases, over 350 will go to the eastern circuit and 324 will go to the western circuit. This is very significant because this is a big part of our business now. Habeas corpus is much the same, but mostly the work is in the direct criminal appeals. We have very substantial problems in criminal law: search and seizure, fourth amendment, fifth amendment,

and sixth amendment problems. These are some of the most vexing cases. So there is not going to be any real relief there.

Now, there are two or three other things. Since the prospect is that within the first year, certainly within the second year, and positively within the third year each of these two newly created courts will be a court way in excess of nine judges and will be at almost the same size that we are now, we ought to hesitate long and hard before we tear to pieces the great traditions of our court as it is now operating. We should experiment with every other kind of a solution before we make this useless split that has to be repeated almost immediately.

One of the things I hate to hear anybody talk about is truncated practices, as Mr. Levin did. As I demonstrated both before this committee and Mr. Celler's committee, had we not had screening we would have had a backlog of over 3,000 cases today of such a nature, with statutory priorities, that some cases literally never could have been heard. Now, I don't believe you are denying justice when three mature conscientious judges conclude that the case isn't going to be aided by oral arguments. I think, too, there is a myth about some of these oral arguments. I make no criticism of the second circuit. They have a practice and are very proud of either affirming or dismissing the cases from the bench, and Mr. Westphal can verify the figures. In my judgment that decision to affirm from the bench is not made as a result of that oral argument.

They must have thought about that before they ever went on the bench. It is a 35 cent subway ride, I guess, from Brooklyn over to Foley Square. It would hardly be fair if we asked a lawyer to come from El Paso to New Orleans and said, "all right, we don't need to hear from your opponent, we will just affirm this from the bench." I think too little has been said about our summary II practice. It requires unanimous decision by three judges to deprive the party of oral argument, and once it is written we can't have any dissents or special concurrences. The one thing I hope never happens at the hands of Congress is to put any kind of prohibition on experimentation. I would hate to see that, merely because in the past you had the luxury of an oral argument in every case, there is nothing in the system that recognizes that that must go on.

I have two or three other comments and then I will turn myself loose if I have any time.

One of the things we want desperately to try is an expanded group of professional staff attorneys. The Chairman will recall that when I appeared here in May of 1972, at page 60 of the S.J. Res. 122 record, I outlined the package (a) and (b) that the Judicial Conference of the United States had approved for the fifth circuit. This provided a third law clerk, a second secretary and a clerical assistant, and eight staff attorneys with a secretarial staff. Well, we have never yet been able to get the substantive legislation. That has finally been introduced. It is now 3 three years later. We managed, through the Appropriations Committee, to get an appropriation to set this thing up on a temporary basis just this past July. It is in its third month of operation, and already it is proving to be of great value to the judges in further increasing our output.

But this committee and the Congress has to take recognition of the fact that adequate steps have to be taken to assure a staff of permanent

professionals to help keep up with this certain prospect of great increases in business.

I think I should say something about the en bancs, because all of us recognize that they are a time-consuming thing in terms of judge power. We all leave here today or tomorrow to return to New Orleans next Monday night to begin en bancs in eight cases that will be heard orally and three cases on briefs, and with 15 judges plus three senior judges, that is a lot of judge time.

But one of the things that our experience demonstrates is that very few of these cases are the result of a conflict as such. Mr. Westphal has looked at my statement prepared for the Revision Commission and in exhibit "F" of my Jacksonville statement there is an analysis I had my law clerks make of all of some 75 cases that we heard en banc. I counted up three that were clear conflicts and five that were possible conflicts. What we have en bancs on are serious problems of the kind that come with the fifth circuit and call for this great intermixture of background, geography, and predilections. We see a slip opinion that arrives at a result that we don't like—or that we doubt that we like—but it is not because it is contrary to some prior decision. For example, I think next week there is only one case that involves a real conflict, a possible conflict. The rest of them are very serious, but new problems on which the Court has not really ruled. So I would predict that the prospect of the proportional number of en bancs is going to be as great in the new eastern circuit as it is in the total circuit.

I have two last little things. One is a kind of—well, I don't know how you will regard this, but I want to be perfectly fair to all my judges—I think we would all like to be known as the fifth circuit, and I think whatever split comes each of us would like to be part of the fifth circuit and let somebody else be a part of the eleventh circuit.

In the Commission's proposals they make the States east of the Mississippi River the fifth circuit, and make us on the western bank of the river, Texas and Louisiana, the eleventh circuit. Well, I would say for the sake of the building, which has chizzled into it the fifth circuit, that from the standpoint of economy, if not from tradition and history, we ought to be called the fifth circuit.

Senator BURDICK. Fifth circuit, west wing?

Judge BROWN. West wing? Well, we now have west, east, and en banc courtrooms.

I think, in the record—Mr. Westphal, if you will check with Mr. Levin, he can verify this—I believe the bar of the Canal Zone, which consists of about 20 lawyers, formally urged that they be attached to the eastern circuit rather than New Orleans. Historically they came to New Orleans because of ocean transportation. Now they have to fly to Miami anyway—to get to New Orleans, they fly to Miami. If that is all you had to decide I don't think we would be here.

I think that is just about all I have to say. As a matter of fact, I don't know whether I have said anything new. If I can offer any further help, I am here.

Senator BURDICK. Well, I want to thank you, Judge Brown. It is not only helpful to have your testimony, but you present it in such a unique way that we are always glad to hear from you.

You accented the need for new procedures, for speedy process, and for the deciding of cases without oral argument. Well, that is precisely

one of the questions I asked of the previous witness. Merely because you are screening them and denying them oral argument, that doesn't necessarily mean you are denying them justice, does it?

Judge BROWN. Not at all, not at all.

Senator BURDICK. I wonder, with all due respect to the members of the bar, if this doesn't, in some cases, have a tendency to reduce unnecessary argument.

Judge BROWN. I think that is a tendency, too. The system has been attacked only in about five or six cases. Denial of cert doesn't mean anything, they say. One of the interesting things is that people ask, "How many cases do you screen out?" We don't screen "out" anything. We screen every case. The figures show that since 1968 we have handled over 8,000 cases. We ask first, does it need oral argument, and, if it doesn't, what are the merits?

Senator BURDICK. If any one judge asks for oral argument, then it is granted?

Judge BROWN. That is right. This is where we are using these new staff attorneys, because they can make a preliminary determination. Then, before the calendar is made up, the decision is that of the presiding judge of the panel. If he differs, thinking this case doesn't deserve oral argument, he can take it off and it goes to a screening panel.

Senator BURDICK. Any other suggestions?

Judge BROWN. Of course, this Rule 21, which is a shortened opinion, and says "affirmed" or "enforced." But in the cases that it is used, I honestly believe that it meets the criteria that an opinion would serve no purpose.

Incidentally, in my statement before the Commission there is an exhibit "F" in which I had my law clerks make an analysis of signed opinions by me in summary calendar cases that are decided without oral argument, those of my fellow panel members, and then a random selection from other judges. You will see the serious character and nature of a lot of these cases. These are not frivolous cases. They may be tax cases. A great number of NLRB cases go off on summary docket. The figures show the wide spectrum of cases disposed of by Summary II's in which there is a denial of oral argument.

Now, one thing that surely the Congress ought to want to encourage is any system that assures a considered judicial judgment by responsible judges and at the same time hastens the day of finality in criminal matters. Criminal cases comprise about 44 percent of our docket which includes States prisoner cases, § 1983's, habeas corpus cases and direct criminal appeals. Approximately 60 percent of the direct criminal appeals go off without oral argument, 90 percent of the habeas corpus cases without oral argument, and 65 or 70 percent of the 2245's. We dispose of 63 percent of those in less than 40 days, and it isn't at all uncommon to get a brief on Monday, the case is sent to a screening judge, and within a period of 10 days' time a per curiam opinion or signed opinion is filed which disposes of the case. That is a desirable thing from the standpoint of justice. It meets society's needs for finality, and it helps the judges dispose of their cases, too.

Senator BURDICK. But there is still the one situation that splitting the circuit would aid, the en banc cases. You will have to concede that it will take less time with the 9 judges than with 15?

Judge BROWN. For the first year that is true. The second we will have about 11.

Senator BURDICK. We don't know that yet.

Judge BROWN. There is one thing certain about the fifth circuit—I have been making these calculations and in every year except 1973, our projections have been under the actual figures. In one of these exhibits that I have offered here and in my two statements to the Congress, I have shown how each year until this year we disposed of more cases than were filed the preceding year. We don't have any doubt—and I don't believe my brothers from east of the Mississippi have any doubt—that we are going to continue to have roughly a 10- to 12-percent increase annually.

Senator BURDICK. Do you have any suggestion about reducing the number of judges who sit en banc?

Judge BROWN. Well, I differ with Judge Wisdom on this. I expressed the view before, Mr. Chairman, that I don't see how you can have a court in which some of the judges don't have a right in making the policy decision on what the policy solution will be. I have difficulty with that concept that gives that role to the nine senior judges. I would oppose that.

Senator BURDICK. Well, it seems to me that when you get 15 judges appearing en banc, it is sort of a duplication of effort or a waste of judge power to tie them all up in one case. They have to come in from great distances. There must be some other alternative.

Judge BROWN. Well, it certainly is a thing that Congress ought to look at. It may be that there is a place for each panel going off on its own. In some circuits that is what used to take place. We try to respect a panel decision and not rule to the contrary. But the price is high in terms of judge time. Without a doubt, it is high.

Senator BURDICK. Mr. Westphal.

Mr. WESTPHAL. Judge, I know we have a serious matter under consideration today because you are wearing the most somber suit I have seen you in in the last seven times I have seen you.

I think you know, Judge, that during the time in which I have been privileged to work for this subcommittee, I have spent a great deal of time considering some of these problems that we have in the Federal judicial system, both at the trial level and at the appellate level. From my background as a trial lawyer for about 20 years, I have sat here and reflected for the past 4 years now on these problems. One thought which has occurred to me is that one of the real strengths of America and the system that we have here—a system which has endured for almost 200 years—has been the fact that the people of this country have always been willing to accept the resolution of disputes between citizen and citizen or between citizen and State when that resolution has been made by the courts of this land, whether State or Federal.

In that perspective, when we reach the day when the bar and the citizenry in this country will not accept as final the decisions made by our courts, then we are in a situation where we will greatly and seriously threaten the stability of the form of government we have had for 200 years. I am concerned about the attitude of the bar, because I do not think the bar adequately appreciates the problems we have. When they express concern about some of the expediencies which have been adopted in order to keep pace with the tremendous

increase in judicial business, I wonder how long it will be before their clients, and in turn many citizens, will share the same concern. I think that is one of the fundamental questions that this subcommittee, the full committee, and the Congress will have to concern themselves with when they go about the process of trying to make a decision on the problems that are involved in these hearings that we are starting today.

Let me ask you, Judge, when did your court receive its tenth and eleventh judges?

Judge BROWN. I wish I could tell you exactly.

Perhaps Judge Wisdom will recall.

Mr. WESTPHAL. Judge Wisdom, do you happen to recall the dates?

Judge WISDOM. I think it was around 1967. I may be wrong.

Mr. WESTPHAL. In any event, we can check.

Judge COLEMAN. In 1966 we went from 9 to 11, and then from 11 to 13 and then from 13 to 15.

Mr. WESTPHAL. In any event, it was some 8 or 9 years ago now?

Judge BROWN. Wait a minute. I can tell you exactly now. Table 1 in the annual clerk's report lists the number of judgeships. I can't be sure of whether these are fiscal years or calendar years, because we kept our records on a calendar year basis, but we had 9 judges in 1965–66, 11 judges in 1966–67, and 13 judges in 1967–68. Then we reached 15 in 1969 or 1970, but we didn't fill the positions until 1970–71.

Mr. WESTPHAL. In any event, since 1966, as far as the fifth circuit is concerned, there has been a departure from this magic number 9 for the number of judges?

Judge BROWN. Yes. Let me say something about that, too. There are many myths in the law, and judges perpetuate them. The District of Columbia Circuit has a number of visiting judges drummed up by Chief Judge Bazelon. He had 16 visiting judges in his court a year ago and I think he has about 25 lined up for this coming year. Our statistics show that, when you have a large number of visiting judges, you have the equivalent of a 12-, 13-, 14-, or 15-judge court. That applies to the second circuit, too.

Mr. WESTPHAL. The same thing has happened in your own circuit. Some years back, when you had visiting judges, these exhibits indicate that you operated with the equivalent of some 19 or 20 judges on your court.

Judge BROWN. Right.

Mr. WESTPHAL. In any event, for some 8 years now the answer to some of these growing caseload problems in the fifth circuit have been for Congress to increase the number of judgeships. As you have reviewed it, that occurred gradually, but finally, in 1971, the appointments were made, and ever since that time you have been accorded 15 judges. Also, in 1971, when you first became a court of 15, the total filings were 3,215. You are still accorded 15 and yet there has been a 1,000 case increase in your caseload. This in turn has reflected itself in the filings per judge figure which have grown from 1971, with 154 per judge, to 1974, when there were 219 per judge. During that same interval, your court, in order to try to keep abreast of this huge increase in business, has tried just about every—what I would term—expediency other

than oral decisions from the bench in order to keep your heads above water.

Judge BROWN. Right.

Mr. WESTPHAL. I agree with Professor Lævin and many members of the bar throughout the fifth circuit that you and the members of your court are entitled to a great deal of credit for making this effort; if you had not, things would be in pretty bad shape in your court.

The Chairman asked what methods should be tried, or could be tried, other than those with which we are all familiar, and you referred to Rule 21. You have had Rule 21 in your court ever since 1971. So that really isn't anything new.

Judge BROWN. Rule 21 came along a little later.

Mr. WESTPHAL. But it really isn't anything new and has already had an impact on this overall picture that we see. You also suggested that Congress could possibly authorize staff attorneys or, as you term them, legal assistants, who might have an impact. As we consider that question, we must consider some apprehension on the part of the bar. Some members of the bar feel that use of legal assistants or staff attorneys by a court that has 219 filings per judge is one thing; whereas the use of staff attorneys by a court that has only 124 filings per judge is quite different. Do you agree with that rather simplistic comparison between an overworked circuit and one with an average amount of work insofar as the use of staff?

Judge BROWN. Well, I suppose there is some basis for saying that the more overworked you are or the heavier the burden you face the greater is the hazard that a judge will take things at a slightly more leisurely pace. I want to make a footnote here that this is apowerful factor on a national basis to which, apparently, little attention is paid. With a caseload of 219 per judge for the fifth circuit this past year, many of the other circuits were down to 60, 70, and 80. If we can do this kind of work, why aren't other courts of appeals capable of doing the same sort of thing? And if so, shouldn't that manpower be manipulated physically in such a way that they attack this national burden?

Mr. WESTPHAL. Now, regarding your exhibits 28 through 32, I call your attention first to exhibit 28 which shows the Administrative Office projection and the Judge Brown projections for fiscal year 1974. The actual filings for your court in 1974 were 3,294, which is a little bit less than your projections and still a little bit less than the Administrative Office projections?

Judge BROWN. That is right.

Mr. WESTPHAL. Now, did I understand you to say in response to a question from Senator Burdick that the filings in the district courts had increased 3.3 percent?

Judge BROWN. I took that information from page I–2 of the just released annual report.

Mr. WESTPHAL. I haven't seen that yet. I am looking at a printout which we requested from the Administrative Office computers on caseloads in the district courts in fiscal year 1974, which shows that, in the Nation as a whole, the filings in the trial courts increased only 1.3 percent.

Judge BROWN. Well, on page I–2 the overall civil-criminal filings moved upward by 3.3 percent.

[Editorial note. In reviewing his testimony following the hearings, Judge Brown was able to determine the reasons for this confusion concerning the nationwide percentage increase in district court filings between fiscal year 1973 and fiscal year 1974. He therefore submitted the following supplemental statement for inclusion in this record:]

SUPPLEMENTAL STATEMENT OF JOHN R. BROWN, CHIEF JUDGE, FIFTH CIRCUIT

On editing the oral statement given by me to the Committee on September 24, 1974 for non-substantive corrections, I learned that I had made a substantive error on page 58–59 of the transcript. In response to an earlier question from the Chairman and again by Committee Counsel, I reiterated that, on the information received from my Circuit Executive (who was in attendance with me), nationwide filings in the District Courts had increased 3.3%. This was based on the summary sheet in the just recently published Annual Report of the Director of the Administrative Office. Subsequently, on checking I learned that the nationwide increase in filings was 1.6% and the 3.3% was on pending caseload.

The purpose of this supplemental statement is to supply to the Committee a formal statement which corrects this but at the same time gives significant pertinent information with respect to the Fifth Circuit.

As the possible realignment or split of the Fifth Circuit depends on our localized Fifth Circuit experience, the correction of this inadvertent error has led to a very significant statistic.

I have prepared Brown Table 33 (attached) which reflects that in the District Courts of the Fifth Circuit for the period FY 1970 through FY 1974 that except for Louisiana, all of the States of the Fifth Circuit have shown a substantial increase in business over the last four years. While the filings in the nation as a whole increased 12.5%, the States of the Fifth Circuit have shown a significant increase of 21.9% during the same time.

There is no drop off in the business of the District Courts (civil and criminal) of the Fifth Circuit. There is no likelihood that there will be any. And since the FY 1970–74 figures cover a period when there was no significant increase in District Judgeships, we have to bear in mind that the Judicial Conference of the United States has recommended the creation of 21 new District Judgeships and your Committee has approved creating 11 new Judgeships.

BROWN TABLE 33.—COMPARISON OF TOTAL CIVIL AND CRIMINAL DISTRICT COURT FILINGS BY STATES OF THE 4TH CIRCUIT

FISCAL YEAR 1970–74

	Fiscal year-		Increase or decrease
	1970 [1]	1974 [1]	
Alabama	2,516	3,125	24.2
Florida	5,240	6,272	19.7
Georgia	3,340	4,997	49.0
Louisiana	6,212	6,139	−1.2
Mississippi	1,249	1,561	25.0
Texas [2]	7,893	9,995	26.6
Canal Zone	471	759	47.6
Circuit total	26,921	32,818	21.9
National total	127,280	143,284	12.5

[1] Source: Annual Reports of the Director, Administrative Office of the United States Courts.
[2] Filings adjusted by reduction for criminal immigration cases due to change in docketing practice in fiscal year 1973.

[EDITORIAL NOTE: The record now resumes reporting actual testimony rendered during the hearings:]

Mr. WESTPHAL. In any event, the district courts are not experiencing the 7 percent annual increase that they were experiencing 3, 4, and 5 years ago?

Judge BROWN. Well, one factor which has been little recognized is that of the exponential rate of increase in appeals over the increase of trials in the trial court.

Mr. WESTPHAL. Of course, these projections on a straight line basis extend from a period of time when filings in the court were increasing at 7 and 8 percent per year and do not recognize, as the chairman has indicated, that for the last 3 years we had a decrease and then an actual leveling off.

Judge BROWN. Well, all I can say is that Judge Wisdom has the exact figures—but that we have had an increase of 10, 11, and 12 percent in district court judgeships in the last 7 or 8 years. Now, I know that there has been a substantial increase year-by-year in the total filings within the fifth circuit district courts.

[EDITORIAL NOTE: In support of Judge Brown's statement see Brown table 33, *supra*, submitted as part of Judge Brown's supplemental statement.]

Mr. WESTPHAL. And as you have indicated, there has been a resulting increase in the rate of appeals.

Judge BROWN. Right.

Mr. WESTPHAL. So, as shown on your Brown table 32, you have projected possible caseloads for the various States in the fifth circuit according to the Commission's second alternative recommendation. According to your exhibit 32, in fiscal year 1977, if there are 2,581 filings in the four eastern States, in order to maintain the 1973 national average of 161 filings per judge you would need 16 judges in the four eastern States?

Judge BROWN. Yes.

Mr. WESTPHAL. And similarly in the two western States plus the Canal Zone?

Judge BROWN. Thirteen judges.

Mr. WESTPHAL. So the fact of the matter is, Judge Brown, that, if no geographical realignment is made whatsoever, the fifth circuit as presently constituted would require by your own projections 29 judges instead of 15 in order to handle its workload in 1977?

Judge BROWN. That is what led me to say that every argument I make keeps coming back to hit me in the face.

Mr. WESTPHAL. This is just the problem that the Commission has had to deal with and that the Congress is now going to have to deal with. No matter how you look at this thing, in the future, instead of dealing with the work product of 15 judges, you are going to have to try to keep 29 judges familiar with what the other 28 are doing. It is going to take increasingly more of the judges' time to figure out what is going in their court and they will have less and less time in which to decide cases.

Judge BROWN. I don't believe anyone seriously feels that we ought to have 29 judges.

Mr. WESTPHAL. According to your exhibit, if the fifth circuit is not realigned, you will have a caseload in 1977 which—at a more manageable level of 161 cases per judge rather than the 219 cases per judge that you have right now—will require your court to have 29 judges to do it. Now, it seems to me that the question facing Congress is whether, in 1977, we want to have a court of 29 judges in the fifth circuit and a court of 22 judges in the ninth circuit or whether there is going to

be some geographical realignment. That is the ultimate question, it seems to me, which the subcommittee and the Congress must decide. There really isn't any other choice, is there?

Judge BROWN. No, there really isn't.

Mr. WESTPHAL. The theory of our system has always been that, through appellate review, the work of the trial courts will be guided by the decisions made by appellate judges.

Judge BROWN. I was pretty hasty in answering. Of course, I expressed a view when I appeared on S.J. Res. 122 that the Senate bill was preferable, but it didn't survive the conference. So that cart is before the horse, because there are a lot of matters that require legislation that could have a very direct bearing upon, not only the caseload as such in a number of appeals, but also in the manner in which they are to be handled. A good illustration is diversity cases, and Congress granting us a certiorari type power. About 12 percent of our cases are diversity cases. That is nearly 400 cases. We could knock those out on just a discretionary review There are also the social security cases and the like. But here we are about ready to split the circuit, knowing it is to be split again when these decisions have not even begun to be reported by the Commission.

Mr. WESTPHAL. This committee under Senator Burdick's chairmanship has spent some 3 years and some 15 or 16 days of hearings on a bill known as S. 1876 which embodies the proposals of the American Law Institute and which would make some slight change in diversity jurisdiction in the Federal courts. The bar in this country, particularly the ATLA, has proposed no changes whatsoever in diversity jurisdiction. I might note that many Southern lawyers in your own circuit—Lawrence Frank from Mississippi for one—realize that there is merit in some curtailment of diversity jurisdiction. Now, looking at the statistics in your court, in 1973, out of 2,840 terminations, 344 were in personal injury tort cases. I imagine a large number of those are diversity cases, and I imagine some of your contract cases, which numbered 271, may have diversity of citizenship as the basis for jurisdiction. But even if 50 or 60 percent of them could be eliminated were the Congress to pass some curtailment on diversity jurisdiction, you would still be left with some 2,500 cases which you would have had to terminate. Again I submit a caseload of 2,500 may in fact be too much.

With all due respect to those who say that jurisdiction should be curtailed first, before any attempt is made to solve the terrific workload that our system places upon the judges in our courts of appeal, I think we would have the wrong priority there. It will be 1977 before we see whether any of these possible changes have any effect whatsoever, and, as the right hand of Congress takes away some jurisdiction, the left hand of Congress can certainly create more jurisdiction. There is a bill pending right now regarding deep-water ports which would put in Federal courts any cases arising out of the use of those facilities. I am afraid the matter is in a push and shove stage regarding some of these issues we have to deal with.

Judge BROWN. I would say this is the general sort of reaction to that. There could be a more eloquent argument made for the critical necessity of having the Congress look at the need for new methods and new requirements. I just hope nobody freezes out the opportunity

to improvise and experiment. As I told you, our experimentation has been both positive and negative. I told you about our "standing panel" experience that turned out to be wrong and we abandoned it. As you know, in just 4 years of screening we increased the judge output by 104% and simultaneously reduced the median time from notice of appeal to final disposition to make us the third ranking circuit in the Nation. If, on the basis of the experience in 3 months operation of the staff attorneys' office, we can achieve a like increase, we may well show that no split of the circuit is necessary.

Mr. WESTPHAL. Judge, you mentioned earlier in your testimony that one slight criticism of the Hruska Commission's work which you have is that they concentrated on the fifth and ninth circuits only when they should have looked at the country as a whole. I think you will recall that, prior to the hearings at Houston, there were distributed for consideration by all the people interested in this subject some computer printouts, made by either the Federal Judicial Center or the Administrative Office, using variable factors which explored different possibilities of carrying out a realignment from Maine to southern California and from Washington to the tip of Florida. It is my recollection that the Commission did consider that before they concentrated their attention on the three circuits that seemed to have the largest problem in terms of caseload, namely, the second, fifth and the ninth. Do you happen to recall that?

Judge BROWN. Yes, there were, and I made them available to all lawyers before their appearances, so they had some understanding.

Mr. WESTPHAL. Judge, I think your statement here has contributed to the information that the subcommittee will need and will consider.

Mr. Chairman, that is all.

Judge BROWN. Thank you very much. I enjoyed, as always, being here.

Senator BURDICK. We have two judges left, Judge Wisdom and Judge Gewin. Do either of you have a travel problem?

Judge WISDOM. No problem, Senator.

Senator BURDICK. Fine. I will then now enter your prepared statement into this record, Judge Wisdom, and you may proceed to direct whatever summary remarks you may have to the committee.

[Judge Wisdom's prepared statement follows:]

PREPARED STATEMENT OF JUDGE JOHN MINOR WISDOM

Thank you for the opportunity of appearing before this Committee.

I have served on the Court of Appeals for the Fifth Circuit since June 1957, seventeen years. I have no intention of taking senior status.

I am a member of the Council of the American Law Institute, and I served as one of the advisors on the ALI Federal Jurisdiction Study. I mention this, because you should know that I now favor doing away with diversity jurisdiction. It has outlived its usefulness. Elimination of diversity jurisdiction will relieve the Fifth Circuit of about 12 percent of its caseload, or almost 400 filings. In the alternative, I favor the ALI proposals now before Congress limiting diversity jurisdiction. Adoption of these proposals will reduce diversity filings by about 50 percent.

I am a member of the Advisory Council on Appellate Justice (ACAJ), of which Professor Maurice Rosenberg is Chairman. As you know, the Council has developed, with Judge Shirley Hufstedler and Professor Paul Carrington, an ambitious plan for restructuring the federal appellate system, based on a national division of the federal courts of appeals. I mention my membership on this council, because you should know that I oppose its plan to restructure the appel-

late system and I oppose any other radical revision of the federal courts system *until* we put the horse in front of the cart. The federal judicial system needs restructuring and it may need realignment of geographical boundaries—I would enlarge some circuits, for example. But first things first. Before any radical change, such as splitting the Fifth and Ninth Circuits, Congress should deal with the roots of the evil.

The evils are naked to the eye. First, we have too many cases which should not be in the federal courts; jurisdiction must be reduced at both the district and appellate levels. Second, the federal machinery of justice must be improved; the internal practices and procedures of federal courts are inefficient and in the grip of a dead hand. Using a simple screening process to eliminate oral arguments and to shorten opinions, and employing a small central staff, the Fifth Circuit has kept up with its work. In Fiscal Year 1973 we had no backlog. If Congress will furnish funds for an adequate staff, there will be no need to divide the Fifth Circuit—even if, Heaven forbid—the iuput of cases to federal courts is not curtailed.

The Committee has before it a recommendation far more radical than the ACAJ's proposals. This is the recommendation of the Commission for Revision of the Federal Court Appellate System that the Fifth and Ninth Circuit Courts be divided. This is a dangerous step toward proliferation of circuits that may not destroy but will certainly weaken the historic role of the federal courts in American Federalism.

A federal circuit court has a federalizing function as well as a purely appellate function of reviewing errors. Federal courts are more than courts which settle private disputes over contracts and torts. The federal courts' destined role is to bring local policy in line with the Constitution and national 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." A court composed of judges chosen from six states is better insulated from parochial prides and prejudices than a court composed of judges from a small number of states. The Court of Appeals for the Fifth Circuit is truly a federal court. I question whether a court composed of judges from only Louisiana and Texas would be able to perform its federalizing function as well as the Fifth Circuit.

The Commission's basic assumption is that a court should not have more than nine members. Accepting that assumption and pursuing its consequences to their logical conclusion, the country is in for a rude shock. Manhattan and Southern California should each have its own circuit, as soon as the additional needed district judges are appointed and start generating appeals.

My esteemed colleagues who want to see the Fifth Circuit divided are in for a ruder shock. Before the Commission, they agreed that: "It should be emphasized that any circuit realignment should result in a Federal Appellate System which will suffice without further realignment for *a period in excess of 25 years.*"

In fiscal year 1973 the Fifth Circuit had 15 active judges handling a total of 2964 filings, 198 filings a judge, as compared with the national average caseload of 161. (Without the Fifth and Ninth Circuits the national average would be 141). If the Commission's plan were in effect in *this fiscal year*, 1974, there would be two courts of nine judges each, handling a total caseload for both courts of 3294 filings or 183 filings per judge. These are hard figures from the Administrative Office. Accepting the Administrative Office's projects, as early as fiscal year 1977, we would have total filings of 4340 (our clerks estimates 4660); 2184 for a circuit composed of Florida, Georgia, and Alabama, or 243 filings per judge; 2156 for a circuit of Texas, Louisiana, and Mississippi, or 239 filings per judge.

In other words, the assumed relief afforded by having three additional judges (for the proposed two courts), a 20 percent increase in judgepower, will have disappeared before the two courts can come into being, because the filings will increase by more than 20 percent.

Consider the pressing need for additional district judges in our circuit. The Fifth Circuit received 13 additional district judges in 1962, 14 in 1966, and 18 in 1970, or about a 25 percent increase every four years, from 1962 to 1970. The Judicial Conference of the United States recently approved 20 additional judges

for the Fifth Circuit. The Judiciary Committee of the Senate cut down this number to 11 additional district judges. Accepting this latter figure, the 11 newly appointed judges will generate appeals about equal in number to 15 percent of the appeals now generated by our 74 district judges. To the overall estimate of district court filings must be added an historic growth factor of 7 percent. The appeals generated just by the 11 new district judges to be appointed, plus the 7 percent normal growth factor, will further increase the workload by 22 percent, producing 750 more cases by fiscal years 1975–76.

I am well aware that, under Public Law 92–489 (1972), the Commission's first duty was to study and report its recommendations for changes in the geographical boundaries of the circuits. But that direction is qualified in the statute by the requirement that the changes be "appropriate for the expeditious and effective disposition of judicial business". If I may say so, without being presumptuous, I suggest that this Sub-Committee on Improvements in Judicial Machinery could take the position that its studies demonstrate that the temporary relief afforded by the division of the Fifth and Ninth Circuits is either non-existent or so insubstantial as not to justify the radical measure the Commission recommends.

Senator Burdick put his finger on the problem on June 21, 1971, when he introduced Senate Joint Resolution 122: "A joint resolution to create a Commission on Revision of the Federal Court Appellate System of the United States." On the floor of the Senate, he delivered a clear warning of the inadequacies of realignment:

> *While it is apparent that a solution, other than pure manpower increases must be found,* there is respectable opinion that realignment of the circuits, involving redistribution of the caseload to courts of appeals having new delineations of territorial jurisdiction would be only a temporary solution. *The benefits of such a realignment may last only until the caseload increases to a point beyond the capacity of the revised courts.* 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.*

Since appeals caused by normal growth and appeals generated by newly appointed district judges exceed the new capacity provided by three additional judges to the proposed new circuits, in the language of Senator Burdick, there will be no benefits of realignment; the caseload is beyond the capacity of the revised courts.

There is no time to waste.

First, the flow of cases to the federal courts must be reduced.

I agree almost completely with Judge Friendly's recommendations. On the subject of federal courts, and a lot of other subjects, for that matter, there is no better informed person in the country than Henry Friendly. I shall not try to improve on what he has well said in his book and in his statements to the Commission and to this Committee.

The Freund Committee, Federal Judicial Center Study Group on Caseload of the Supreme Court has come up with an imaginative, innovative suggestion that has a great potential for reducing the caseload of "criminal cases". I include in the term, collateral attacks on convictions and prisoners' complaints of mistreatment in prison. The Committee has suggested "The establishment by statute of a non-judicial body whose members would investigate and report on complaints of prisoners, both collateral attacks on convictions and complaints of mistreatment in prison. Recourse to this procedure would be available to prisoners before filing a petition in a federal court, and to the federal judges with whom petitions were filed".

Habeas, 2255 cases and prisoners' complaints constituted 22.9 percent of appeals docketed in fiscal year 1973. With the direct criminal appeals (24.4), they are—to put it mildly—the most insubstantial appeals before our Court and all federal courts. Yet a few have merit and are of great constitutional importance. And in every case the prisoner should have the belief that his rights and his wants are not neglected in our system of justice. The Freund Committee's suggestion for an ombudsman approach for dealing with groups of appeals, many meritless and vexatious, would be in the interest of society as well as in the interest of conserving judge-time. I would hope that the Commission would explore this subject, propose legislation to Congress, and urge prison authorities not to wait for legislative approval but to act now by establishing grievance procedures. (I understand that in some prisons this has been done.)

Our federal judicial system creaks. Thought should be given to establishing writ (discretionary) jurisdiction in the courts of appeals in certain categories of cases—in diversity cases, for example, if diversity jurisdiction is not abandoned.

Applications for rehearing should be severely restricted, if not done away with.

En banc proceedings need reexamination. The importance of a case should not be one of the criteria for granting an en banc hearing. If the case is really of great public importance, an en banc hearing simply delays final action by the Supreme Court. If all that is needed is a resolution of a conflict between two panels, there is no good reason why that act of resolution should not be performed by a third panel or a panel of five judges.

One of the most significant contributions this Committee or the Commission could make would be to endorse screening as a necessary and proper business practice to improve the efficient operation of the courts. If we had had no screening, we would today have a backlog of 3000 cases. On Administrative Office figures, we would need a complement of 31 judges. An appeal would take three-and-a-half years to be heard; but no civil cases could be heard, because the criminal cases would occupy the full Hearing Calendar. It is significant that only 40 per cent of the civil cases are classified as Summary II's. It is also significant that we have reduced the use of visiting judges and senior judges by 60 per cent. I have found that Fifth Circuit lawyers are unhappy when a visiting judge or even a district judge from this circuit is a member of the panel; we are proud of our senior judges and so are the lawyers in this circuit.

The essential ingredient of effective screening is a central staff supervised by a permanent, well-paid, competent lawyer, working with adequately trained junior lawyers or good law clerks. Such a staff would be institutional in character as distinguished from a judge's own individual law clerks. These soon take on the coloration of "their" judge. Professor Dan Meador has made detailed studies showing the benefits of a central staff.

Assume (1) even a modest growth in population, commerce, and industry, (2) even a conservative estimate of an increase in federal question cases, and (3) even the appointment of only eleven district judges to the area now comprising the Fifth Circuit. *In one tenth of a generation* the relief will have vanished and, on the basis of the Commission's rationale for dividing the Fifth Circuit, the new Fifth Circuit and the proposed Eleventh Circuit should be partitioned, further proliferating the circuits. Judge Thomas Gibbs Gee's remarks in his letter to Professor Levin of December 20, 1973, are worth repeating:

> I submit that to dismember a proud and effective institution such as the Fifth Circuit as a preliminary measure and in pursuit of benefits which can only be short-haul, when it is obvious that other and far-reaching changes of a basic nature are going to be necessary, would be unwise. Who knows that the necessary long-range changes which plainly must come might not render such an action even unnecessary?
>
> If I may employ a homely metaphor, you have a good horse that is getting the wagon up the hill now. I do not think we should exchange him for two ponies, when it is plain that, by the time we have them in harness, we may be dealing with different wagons and different hills.

I respectfully suggest that division of the Fifth Circuit will create a dangerous illusion of temporary relief that will delay effective reformation of the federal courts system.

As Madison clearly foresaw, the central principle that makes the American system workable is federal legal supremacy. This principle preserves national policy against conflicting local policy, protects the individual's constitutional rights against governmental abuses of both the nation and the states, and safeguards basic political principles of American federalism. As federal question litigation has increased, the circuit courts have become more and more important. Their relative insulation against local prides and prejudices, as compared with district judges and state courts closer to the fire, has enabled them to fulfill their destined, if friction-making, exacerbating role. In recent years the federal circuit system has proved workable in trying situations. I hope, indeed, I know, that this Committee will think long and hard and exhaust all reasonable alternatives before it takes a step that may lead to such proliferation of the circuits as to undermine the principle of federal legal supremacy.

STATEMENT OF JUDGE JOHN MINOR WISDOM, FIFTH CIRCUIT, NEW ORLEANS, LA.

Judge WISDOM. Thank you for the opportunity of appearing before this committee. My name is John Wisdom. I have been on the Court of Appeals for the Fifth Circuit for 17 years. I have served on the multidistrict litigation panel since its inception in 1968, so I am not unacquainted with innovative judicial efficiencies. I am a member of the council of the American Law Institute and was one of the advisers on the advisory committee on the American Law Institute jurisdiction study. I mention that fact because I am in favor now of doing away with diversity jurisdiction; in the alternative, I favor adoption of the American Law Institute proposals now before Congress.

I have previously submitted a statement to the committee; so I shall try to be brief.

I have three points. The first is one that has guided me in my previous statements to the Hruska Commission, and in all matters affecting the circuit: That is the necessity for preserving the federalizing function of Federal courts. I am in deathly fear that division of the fifth circuit will dilute the federalizing function, because it will reduce the number of States which furnish the base for selection of circuit judges. The figures that Mr. Westphal alluded to a moment ago, which are figures that I have used myself, are figures that show we are in grave danger of having our federal system diluted, if not destroyed, by proliferation of the circuits. We require 29 judges only if there are no changes in either jurisdiction or court management. Without these changes, even if you divide the circuit into 2 courts of 9 judges each, in no time at all this area will require 29 judges. I am not ashamed to be in the minority of our court on this point, because I have got James Madison sitting with me and he is worth a legion of judges.

My second point is that division of the circuit will not accomplish the objective of reducing our caseload. Judge Brown has talked at some length on this point and each of us has submitted a statement. I have a few figures which he has not used but which bring this out clearly. That is the caseload per judge.

If we use the 1973 figures—those were the figures that the Hruska Commission used for its study—the national average caseload per judge at that time was 161, but that 161 average included figures from the ninth and the fifth circuits. If you exclude the ninth and the fifth, the national average was 111. Now, in 1974 the caseload per judge, which is the year just past, was 198. Assuming that we do not divide the fifth, the caseload per judge will be 222 in fiscal year 1975. If we divide the fifth circuit, by 1977 the caseload per judge of each new court of nine will be approximately 240 per judge. Now, this indicates that you can not go by the numbers here.

But we are not as overworked as it would appear.

The English Court of Appeals, Criminal Division, which is a court of last resort—except for the few cases that manage to go to the House of Lords—in 1969 to 1970 handled a caseload of almost 10,000 criminal appeals. They used what we would call screening. They screened out of the appellate process 73 percent of those cases with-

out oral argument or briefs. We can do the same thing with the proper management of our court.

My second point is that the Hruska Commission has really performed no service in recommending division of the fifth circuit. I say this with great respect for the Commission. Division will not accomplish the objective of bringing even temporary relief, because the year after next or the year after that each judge will have the same caseload then as now and in the meantime we will have taken the irreversible step of dividing the fifth circuit leading perhaps to further proliferation of circuits.

My third point is that, before we commit such an irreversible step, feasible alternatives should be taken. We have not reached the root of the evil and we will never get there until we curtail the input. I realize the difficulties there. I can see what has happened to the three-judge court bill, although everyone familiar with the situation knows that three-judge courts have outlived their usefulness. More importantly, diversity jurisdiction has outlived its usefulness.

Not only should we curtail jurisdiction, we should improve court management. Improving management requires that we dispense with oral argument in a large number of cases. We had no oral argument in 55 percent of our cases last year. Efficient court management also means a central staff. This we are just now instituting, although we tried to have it instituted some years ago. That is the way the British take care of their large caseload. Michigan and California take care of their large caseloads with an efficient central staff supervised by an experienced lawyer with junior lawyers and supervised law clerks.

I have developed these points at greater length in my written statements to this committee and to the Commission.

We must at all costs avoid diluting the federalizing function of the Federal courts.

The pursuit of temporary relief will not succeed, next year or the year after next, certainly not by 1977. In this connection I should like to call to your attention that one reason there is some leveling off, at least in appeals, is because there have been no district judgeships created. But the Judicial Conference recommended 20 district judges for our circuit. This was cut down by the Judiciary Committee to 11. We estimate that each new district judge will generate 40 appeals. If you take the 440 appeals that will be generated by the absolutely needed district judges and add those to the appeals attributable to normal growth plus the increase in Federal question cases that we are bound to have, you will unquestionably see that all of this time spent in realigning the circuits is wasted time until we get to the roots of the evil. The roots of the evil are (1) the input of cases in Federal courts which don't belong there and (2) inefficient management of the appellate process.

Of course, a great deal of thought has gone into plans of one kind or another. I am also a member of the Advisory Council on Appellate Justice. I oppose restructuring of our appellate courts—you are familiar with the various proposals, I know—until we attempt the lesser alternatives: reduction of input and improvement in court management.

I should like to call to your attention that, until this last year, the fifth circuit has never had a backlog. We have been able to handle our

work through screening and with a small staff of pro se clerks. No one can tell just how effective a full central staff, well organized, would be in reducing our burdens. I believe that we are not being overworked, that we can handle our workload without dividing the circuit, and that we can at the same time preseve the federalizing function of the Federal court system.

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 en 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.

I am picking up points that came out in the previous testimony because you have, for what it is worth, a statement I prepared.

Let's talk a little about oral argument. The Louisiana Bar Association has adopted a resolution asking that the fifth circuit not be divided. So we do have a statement of one State bar association in our circuit asking that the circuit not be divided.

I, too, favor realignment of the circuits, however, in spite of all I have said, because I think that some circuits have too small a caseload or cover too small an area. A thorough study should be made of the feasibility of a complete realignment of the circuits rather than selecting the fifth circuit and the ninth circuit for division.

I have so much material here I hardly know where to start. Just ask me questions, if you wish.

Senator BURDICK. Well, Judge, that has been a very good statement, a great contribution. I can't find much fault in finding procedures that will take care of many of these chores. That is the reason we passed the magistrates bill, to help the districts. If we give you more help, then you can turn out more work. That is fine with this chairman.

Judge WISDOM. I think we can do our work, and we don't need to have the circuit divided. That is my view.

Senator BURDICK. But we have a different opinion.

Judge WISDOM. I know, but I have James Madison on my side.

Senator BURDICK. I would be interested in having you give us the mechanics on how your en banc panel of five should be selected.

Judge WISDOM. It should be selected at random from the judges who are not on either of the two panels which were in conflict, or you

can have just another panel decide. As Judge Brown pointed out, we have only 3 of the 28 en banc cases which will be heard to resolve conflicts. He analyzed those cases and there are only three cases involving internal conflicts. The other cases, therefore, involve issues which are of such importance that in accordance with present criteria they should be decided en banc. If they are of such importance, let's not delay their progress to the Supreme Court.

Senator BURDICK. Even 3 cases, when you draw upon 29——

Judge WISDOM. I want another panel to decide the conflicts or a court of five.

Senator BURDICK. Are you recommending that we supply some more clerks here and defer this for awhile?

Judge WISDOM. Yes, I am. Some years ago I proposed a central staff to our court, and the court thought well of it. We had an interview—we tried to get an interview with the Chief Justice, but some conflict came up and we spoke with Mr. Rowland Kirks. Now, however, we are well on the way to a central staff, but not the kind of central staff that I think we should provide, not the kind that Michigan and California have or that the English have. We need a well-paid person, a job paying enough to attract a good man, an experienced lawyer, with a permanent staff. There are reasons for that. Then, we'll have more of an institutional staff. A judge's personal law clerk tends to take on the judge's own coloration; the clerk has learned your legal philosophy and predilections, and his point of view may be quite different from that of an institutionalized staff.

We now have two law clerks, with the option of having a second secretary or a third law clerk at a second secretary's salary. And we have begun to set up a central staff.

Senator BURDICK. Is there danger of one of these more qualified clerks with the good salary becoming a circuit judge himself?

Judge WISDOM. This is the argument that is always used against it, as you know. The answer to the argument is that the determination of every case is always in court. This is where our own law clerks can help us, to insure that the central law staff is not arrogating to itself judicial responsibilities. Every decision we make now is by a full panel of the court.

That brings up another question—I hope you will excuse me if I seem to go off on a tangent in answer to your question.

Not enough has been made of the fact that by using the screening process, and by using a central staff to help us screen, we can devote more time to the really meritorious cases. We are getting extremely difficult cases in new fields: consumer protection and environmental protection, for example. We will have with us, always, civil rights, only now they are in a different form. Now it is a question of women's rights or employment discrimination. We have more time for these cases—well, just looking around, I can see judges who have been writing longer opinions than they used to write—and it is good because they explain their decisions better and they have more time to devote to these difficult cases.

Senator BURDICK. I think you have another argument going for your point of view in that you are now feeling the experiences of the district courts 2 or 3 years ago. If the Administrative Office knows what it is

talking about, this thing has leveled off in the district courts and it might level off in your court, too. There is always a timelag.

Judge WISDOM. That is right.

One thing that you could do—and here we have to give credit to the Freund committee for this—I think the Freund committee came up with a great, great idea, and that was the idea of an administrative agency in the prison, accessible to prisoners. Such an agency would investigate habeas cases, 2255's, and prisoners' complaints before the filing stage. Then we wouldn't have cases involving some warden or guard taking seven cigarettes from a prisoner and the case going up to the court of appeals twice. We wouldn't have those cases. That kind of administrative agency would greatly help us. Forty-five percent of our appeals are criminal in nature (due-at appeals, habeas cases, 2255's). An ombudsman type of agency could make an enormous contribution. Not enough attention has been paid to this. I am very hopeful, because the Commission is loaded with brains. I am very hopeful that the Commission will go into these things and come up with constructive suggestions for improvements in procedures and operations. The notion of geographical realignment is like following a will o' the wisp, it leads you nowhere except into a morass.

Senator BURDICK. You don't think that the circuits, as they are presently constituted, are created by divine wish?

Judge WISDOM. Oh, I certainly don't. That is why I would favor a thorough study and a realignment that would provide better balanced circuits. If it were possible, of course it isn't possible, but if we could combine Maine and California that might be a good thing, too.

Senator BURDICK. Pretty bad in en banc, though.

Judge WISDOM. I guess so: I guess it is.

Senator BURDICK. Staff would like to ask a question.

Mr. WESTPAHL. Judge, I thought that the main objective of the so-called Hruska Commission was to try to figure out how we could employ more manpower to handle the judicial business of the courts of appeals. Now, that manpower can be judge power, or it can be staff attorney power, or it can be law clerk power. As you explore just what kind of a mix of these three types of power you are going to concentrate on a given load in judicial business, you get into certain practical problems and certain philosophical problems that I know perplexed the Commission, judges, and members of the trial bar.

The chairman of this committee—being aware of the fact that a number of the circuits were experimenting in one way or another with the use of staff attorneys—really law clerks—was, along with other Senators, instrumental in getting authorization for one law clerk to be paid up to $[illegible] in each circuit. I think that this experimentation is going to result in different constructive uses of staff attorneys in many of the circuits. Judge Kaufman has an interesting innovation he has told us about on settlement procedures—and all of us will thereby learn what is good and what is bad about the staff-attorney or legal-assistant concept as it is applied by the circuit courts.

Now, as a staff attorney to this subcommittee, I certainly cannot quarrel very much with the argument that men such as judges and Senators, who have difficult decisions to make, are entitled to an adequate and competent staff to assist them. But, as staff attorney for this subcommittee, I have no power—and I never exercise any—to make

decisions on policy. I have no vote, and it takes a majority of votes to make decisions on this subcommittee, but I do have adequate access to the time of the chairman of this subcommittee—and to the time of the other Senators who are on this subcommittee—so that they can closely guide and supervise whatever work I do on behalf of this subcommittee.

Using that as a point of reference, and considering the fact that each circuit judge has three law clerks—you do have three, do you not?

Judge WISDOM. Well, on the fifth circuit we were offered the option of a second secretary or a third law clerk at a secretary's salary. That means I have two law clerks at a law clerk's salary and a third boy willing to work for me at grade 7 instead of grade 11.

Mr. WESTPHAL. The fact of the matter is you do have three law clerks?

Judge WISDOM. The fact of the matter is that I have three clerks, but I would like to have the third one upgraded, and so would everyone who is in my fix.

Mr. WESTPHAL. Let's assume, whatever the appropriation or the authorization problems are, that you are of the opinion that each judge on your circuit should have three law clerks?

Judge WISDOM. That is my opinion.

Mr. WESTPHAL. Now, this legal-assistant theory—the staff-attorney theory—espoused by yourself and Judge Brown——

Judge WISDOM. May I interrupt you to suggest that Prof. Dan Meador has written a book on that which has just been published, and he has cogent arguments in favor of a central staff.

Mr. WESTPHAL. Now, then, as I recall the concept Judge Brown explained to us in connection with the hearings on Senate Joint Resolution 122, the concept was to have a "senior" staff attorney at a salary of about $25,000 per year——

Judge WISDOM. Thirty.

Mr. WESTPHAL. I think the Senate recently authorized $30,000 a year, which is a little more consistent with inflation.

Judge WISDOM. My figure was $30,000. He may have had $25,000.

Mr. WESTPHAL. But the concept was to have some four or five attorneys at salaries of $15,000 a year—and I suppose that figure has to be adjusted—but to have a staff of about six attorneys, structured somewhere along the lines that I just suggested to you, and have them perform work along the lines suggested by Professor Meador as a result of the experiments which he has been conducting in Virginia, Illinois, Michigan, and one other State that escapes me——

Judge WISDOM. I think California, but in addition there is the Court of Military Appeals.

Mr. WESTPHAL. Right, but the question that comes to my mind is this: Who among your 15 judges is going to be able to give to those staff attorneys the amount of time that my chairman is able to give to me, in order to guide my efforts, so that we are assured that the decisions that are being made are being made by appellate judges who have considered the facts and studied the legal issues and have, most importantly, put their judgment, experience, wisdom, and commonsense to work on the resolution of a legal problem? That is what troubles me, because—I will just make one more statement and then

you can respond—what I have suggested in my prior question to Judge Brown is this: If a court has to deal with the number of filings that we have been looking at here—and incidentally, if nothing is done in the fifth circuit, and we reach a level of 4,660 filings in 1977, and still have only 15 judges, we will then have a caseload of over 310 filings per judge, which, in my humble opinion, is about double what we should expect a judge to handle—but even if a judge only has to handle a caseload of 219, he can only do it with the help he gets from staff attorneys. Now, as I understand the Meador experiment and the system employed in California, the staff attorneys write a legal memorandum analyzing the law involved as applied to the facts involved and attach to it a proposed memorandum decision of the court. What concerns me is: Do we run the risk that when that system is employed in a court with a heavy caseload, we are virtually inviting the judges of that court to just rubberstamp the opinions or the work product of the staff attorneys? How are we going to get the mature judgments and reflections of the appellate judges if they are just passing on the staff work?

Judge WISDOM. I think I can answer that question in this way, and I quote Ehrlich on this: "In the final analysis, justice depends on the personality of the judge." If you get a high enough caliber of judges, the judges can control the staff and there will be no rubberstamping. But it depends on the judge; he must recognize his responsibilities and live up to them. This may seem to be a loose generalization, but it is true. That is one reason why we desperately need pay raises for judges, too. I want to bring that into the discussion here—and I am not now thinking of myself, because I am too old. I really ought to retire. I am not going to, but I ought to. But I do want to bring that in here because we are not going to attract judges who will live up to Ehrlich's concept of the personality of the judge being the final residual guarantee of justice, if their salaries are based on a 1968 price level. Ultimately that is how this must be done. The way we are now functioning now is to lay out policies and procedures along the lines you have described. We do not have a highly paid supervisor. We have a former law clerk to Judge Ainsworth who is supervising new law clerks. But I believe if we had a man, say, like the Registrar of the British Court of Appeal or like the top man in California—if we had a competent man, he himself would see that the procedures are followed. He will not be able to go around our circuit and spend time with each judge, I admit that. There is that danger, but there is a risk attached to everything. There is a risk in the second circuit that they are not paying enough attention to the briefs. There are risks in almost every form of procedure that is used by the courts.

There is a risk that the district court doesn't decide the case properly. It took Gideon 90 applications for writs.

Mr. WESTPHAL. Under the current classification procedures and screening procedures in the fifth circuit, where you have classes I, II, III, and IV, that screening and classification is made by a screening committee of judges, is that right?

Judge WISDOM. The central staff is helping us there, and it can and is, I think, giving us a good deal of help in that it furnishes a memorandum and recommendation. Sometimes we follow the recommenda-

tions, sometimes not, but the control never leaves the panel to which the case is assigned.

Mr. WESTPHAL. In fiscal year 1973 there were almost 1,100 cases that were classified as "summary II's"?

Judge WISDOM. Yes.

Mr. WESTPHAL. And virtually no class I's, so-called frivolous cases, lacking completely in merit?

Judge WISDOM. There were a few.

Mr. WESTPHAL. So what we are talking about is the staff assisting the judges in your court in handling these class II cases?

Judge WISDOM. Right.

Mr. WESTPHAL. Now, in fiscal year 1973 the 15 judges of your court considered those 1,100 cases, which means that each judge participated on an average, in one way or another, in 219 such cases?

Judge WISDOM. Right.

Senator BURDICK. Well, you certainly can't give that entire workload of 1,100 cases to 5 or 6 staff attorneys, can you?

Judge WISDOM. No, you cannot, that is why we need a larger staff. We have, right now, however, a staff of three handling pro se matters and four handling other matters.

Senator BURDICK. Judge, I have to go to the Chamber and vote in about 3 minutes. Unless you object, I will step down from the bench right now, but let staff continue.

Judge WISDOM. No objection, Senator.

Senator BURDICK. After which we will be in recess until 1:30.

Judge WISDOM. Very good, fine.

I just want to thank you again for the opportunity to testify.

Senator BURDICK. Thank you, Judge.

Mr. WESTPHAL. Now, if you had 11 staff attorneys, and if they processed all class II's, they would have about 100 class II cases for each staff attorney, and I suppose, in order to handle a load of, on the average, 100 cases each, they in turn would be wanting some law clerks?

Judge WISDOM. Well, they are, of course, law clerks.

They are all lawyers. I would add a parenthesis here to throw some light on it. They do not have the job of working on the III's and IV's, and there is quite a difference between writing a memorandum on a simple II and working on a III or a IV.

Mr. WESTPHAL. Some of the members of the bar are of the opinion that some of the cases put into the class II category are not really so-called simple cases, but that they are cases that should have been accorded oral argument under a class III or IV designation. How do we satisfy the members of the bar on this point if you have a staff of 7 or 8 or 11 of these experienced staff attorneys who are handling class II's?

Judge WISDOM. Only by satisfying the bar that the ultimate responsibility lies in the panel to which the case is assigned. I think we should be able to satisfy the lawyers. We satisfied the Louisiana State Bar Association. Also, I don't find that there is nearly as much criticism as some proponents of division say that there is—at least that has not been my experience. Most of the criticism comes from plaintiffs' attorneys, some of whom, of course, are very fine lawyers; but a good many are not fine lawyers. There are some plaintiffs' attorneys who are looking for a fee for the oral argument. I think we should consider the liti-

gants in this matter. It is greatly to the advantage of a litigant not to have to pay travelling expenses for an attorney to argue a hopeless case and not to have to pay his fees for arguing such a case.

Mr. WESTPHAL. Well, if the decision that the case is so hopeless that it cannot be aided by oral argument is made by three judges sitting on a panel, that is one thing; but if that decision is made by some of these staff attorneys, that is altogether another thing.

Judge WISDOM. I believe that every class II case is decided by the panel. We do not rubberstamp them.

Mr. WESTPHAL. Now, on this matter of the assistance of so-called "central staff" in handling these cases, under the Meador experiment and the system as employed in California, the staff attorney, in addition to preparing this rather comprehensive memorandum on the facts and legal issues involved, also prepares a proposed, or a tentative, memorandum or per curiam opinion of some kind?

Judge WISDOM. Right.

Mr. WESTPHAL. Now, I can appreciate the fact that, if we are going to have a well-paid and knowledgeable lawyer go to the trouble of studying the briefs and records in that case and preparing such a memorandum, then it would take just a little bit more of his time to have him draft a proposed memorandum or per curiam decision. But in doing so we encourage the judges to—I don't want to use the word "rubberstamp"—but we encourage the judge to accept his end work-product without spending too much time in the deliberating process which he would have to go through if the staff attorney hadn't already prepared a proposed memorandum order that disposes of the case. You or I, as a judge sitting on the same panel, might say, "Gentlemen, that looks pretty good to me; it reads pretty good." But if we do that without taking the time to get back in there and think about it—and particularly if we do that under a procedure where we do not sit down at a conference table to argue our different points of view—do you think the bar would accept it?

Judge WISDOM. I think you are positing a case that isn't happening now and I hope would not happen. I think that each of our judges is responsible. They look into the class II's, and they don't simply accept memorandums from the staff attorneys. That is a benefit, too, of having individual law clerks that can help with the necessary research.

But we will have difficulties, no matter how the circuit should be realigned or what reforms should be instituted, because of judges living in different cities. With the possible exception of the judges in the Second Circuit who live in New York City, after the first conference you have to confer again by telephone or by letter. That is going to take place in every circuit, with the possible exception of the second, and it takes place in the second, too, with respect to those judges who are not from New York.

Mr. WESTPHAL. Well, in the sixth circuit they employ a procedure on some of their screening panels whereby members of a panel physically meet and confer on all the matters that have been scheduled for their determination on that day; they physically sit around the conference table and discuss it, whereas in the eighth circuit it is all done by mail.

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Judge WISDOM. The trouble with the sixth circuit method is that the cases are actually calendared, and then half of them go off the calendar as a result of their meeting in conference. The same purpose could be accomplished without their meeting—unless you attach undue value to the conference, which I think is an overvalue in the class II cases. In the class II cases it is not necessary to have an eyeball conference, in my opinion, in most cases.

Mr. WESTPHAL. Judge, in your opinion, can improvement or relief be obtained from the employment of staff attorneys alone, considering the projected increase in business for the fifth circuit, without some curtailment of the input as you have suggested, or must both of those things occur in order to give that relief which would permit the fifth circuit, with 15 judges, to handle the caseload of the next 5 years?

Judge WISDOM. Well, I would hope that both would go on simultaneously. But we don't know what our experience will show as to the benefits of a central staff. We won't know that until the end of fiscal year 1975. But certainly the circuit should not be divided before fiscal year 1975. I don't think there is any possibility of that, either. So we will be in a better position to testify as to the advantages of a central staff, say, in June or July of 1975. But certainly there are some reductions on the input that can be made at this time. I recommend very highly the idea of an administrative agency within the prisons. It seems to me that Congress should—and I don't mean to be presumptuous—but I would hope differences would be resolved on the abolition of three-judge courts. They are certainly wasteful, and there are other reforms that could be made.

Mr. WESTPHAL. I think that completes my questions. Unless you have something more to offer, Judge Wisdom, pursuant to the previous order of the chairman we will stand in recess until 1:30.

Judge WISDOM. I just wanted to say I would like to be able to submit a supplemental statement if that is within the rules.

Mr. WESTPHAL. That will be fine. We will keep the record open and permit you to do that.

[Judge Wisdom's supplemental statement follows:]

SUPPLEMENTAL STATEMENT OF JUDGE JOHN MINOR WISDOM, FIFTH CIRCUIT

With deference to the Hruska Commission, I take exception to its bestowing upon Circuit X of Plan A the title, "Fifth Circuit". Circuit X includes Alabama, Florida, and Georgia.

I am proud of the history of the Court of Appeals for the Fifth Circuit and the body of law our Court has developed. I am sure that all my brothers take equal pride in our Court; each of us regards with repugnance the thought of changing the name of the court on which he serves from the "Fifth Circuit" to the "Eleventh Circuit".

The Commission apparently assumes that starting with the First Circuit and continuing down the eastern seaboard, it would be logical for a Fifth Circuit of Alabama, Florida, and Georgia to be adjacent to the Fourth and Sixth Circuits. The proximity of these states to the Fourth and Fifth Circuits is an inconsequential irrelevance. The Sixth Circuit is adjacent to the Third Circuit. The Ninth Circuit is not adjacent to the Eighth Circuit and is west of the Tenth Circuit.

The significant historical fact which the Commission overlooked or ignored is that from the time when the memory of man runneth not to the contrary New Orleans has been the headquarters of the Fifth Circuit. The present Circuit was constituted by the Act of July 23, 1866 (ch. CCX, 14 Stat. 209). The office of the Clerk of the Court of Appeals for the Fifth Circuit and the circuit library

have always been in New Orleans. The Act of March 3, 1891 (ch. 517, 26 Stat. 837) provided that "A term shall be held annually . . . in the fifth circuit, in the City of New Orleans". No other city was mentioned, although the statute authorized the circuit courts to designate other places where the court may sit. It was not until the Act of March 3, 1911 (ch. 231, 36 Stat. 1131) that Congress specifically referred to any other cities (Atlanta, Fort Worth, and Montgomery) as places where the Fifth Circuit might sit. By that time, however, the Clerk's Office and the Circuit Library were firmly entrenched in New Orleans. I submit that if the circuit is to be divided, Louisiana, Texas, and Mississippi should constitute the Fifth Circuit.

Please do not conclude from these observations that I am reconciled to what I regard as the ill-considered, pointless, irreversible partition of the Fifth Circuit. I am hopeful that Congress will not tolerate the Circuit's being ripped in two when the statistics for fiscal years 1974 and 1975 and the projections for 1976 and 1977 confirm my contention that the bisection will not bring even temporary relief: appeals are multiplying faster than appellate judges can be appointed to handle them. This is manifestly true, if one considers the annual appeals (40 to 45 a judge) that will be generated by newly appointed district judges who are an absolute necessity if the federal courts system is not to break down.

Assume (1) even a modest growth in population, commerce, and industry, (2) even a conservative estimate of an increase in federal question cases, and (3) even the appointment of only eleven district judges to the area now comprising the Fifth Circuit. By 1977 any relief will have vanished and, on the basis of the Commission's rationale for dividing the Fifth Circuit, both the new Fifth Circuit and the proposed Eleventh Circuit should then be partitioned further proliferating the circuits.

The evils in the federal courts system are naked to the eye. We have too many cases which should not be in the federal district courts; jurisdiction must be reduced. The federal appellate system creaks: it must be restructured. Federal internal practices and procedures are in the grip of a dead hand; they must be reformed.

I respectfully suggest that division of the Fifth Circuit will create a dangerous illusion of temporary relief that will delay effective reformation of the federal courts system.

Mr. WESTPHAL. Pursuant to the previous order of the chairman, this subcommittee will now stand in recess until 1:30 p.m.

[Whereupon, at 12:45 p.m., the subcommittee was recessed until 1:30 p.m., the same day.]

AFTERNOON SESSION

Senator BURDICK. Judge Gewin is the next witness.

STATEMENT OF JUDGE WALTER P. GEWIN, FIFTH CIRCUIT, TUSCALOOSA, ALA.

Judge GEWIN. Mr. Chairman, I would like to say that I am very grateful to be here for two reasons. First, I am happy to have the opportunity to make this statement. But about this time yesterday I got in a jet and started over the hillsides of Alabama, and in about 10 minutes they turned on the red lights and announced that one of the engines had gone out and we would have to turn around and make an emergency landing. My faith got a little weak, but when we got on the ground it was restored pretty well and I am happy to be here with you.

I would like to say, with all due respect and deference to my brothers Brown and Wisdom, that I must disagree with some of the conclusions they have reached. One of the main reasons given by them for not realigning is that the problem before us is so large and difficult that a solution of it will only create greater problems. It seems to me

to be untenable to say that, simply because the fifth circuit is so large, that if it is divided the two components will also be too large and will be difficult to handle. I also disagree with the statement about en banc consideration of cases being created by very few intracircuit conflicts. I think of the en banc cases we now have under consideration, at least three cases were placed en banc because of an obvious developing conflict in an area of the law in which the Supreme Court has very recently spoken concerning the 11th amendment in *Edelman* v. *Jordan*, which is a very difficult area. So it seems to me that en banc sessions are not limited to a simple conflict within the circuit but may relate in many instances to conflicts that are developing among panels because three different panels may have 11th amendment issues which bear vitally on what course the court should take.

In addition, I do not believe that you can furnish enough staff help to take care of the burden. A judge, sooner or later, will have to do the judging. Even with three brilliant young law clerks in my office, and with a staff memorandum, I think every judge feels in his own conscience that he must reexamine suggested conclusions and that he must look at the record and the briefs to be certain that the suggested conclusion or the suggested analysis is correct.

Assuming that a judge on the fifth circuit arrives at his office, we will say, at 8:15 or 8:30 in the morning, given the workload these days, on the average he is lucky if he gets to what I call his own work, his opinion writing duties before 11 o'clock. Very often that judge is unable to consider the cases assigned to him until 2 o'clock in the afternoon because of the flow of paper and other matters he must consider. These assertions are made only to emphasize the position of the eight judges whose statement I will file with the subcommittee. This statement was made before the Commission in Jackson, Miss., on August the 23d, I believe, of last year. I have letters from all of the judges reaffirming the position they took in the statement and asserting that they are more convinced now, having experienced the excess load for another full year, of the correctness of the statement than they were when it was initially made.

Shall I just read the statement, Mr. Chairman?

Senator BURDICK. If you wish.

Judge GEWIN. The undersigned judges of the U.S. Court of Appeals, Fifth Circuit, submit the following statement with respect to circuit realignment. The judges present will be pleased to respond to any questions which the Commission may wish to direct to them. We are grateful to you for the opportunity to make this statement.

We do not feel sufficiently informed to make specific suggestions with respect to circuit realignment on a national basis. Based upon our experience and service in the fifth circuit over a number of years, we do feel, however, that our recommendations for solutions that can ameliorate the problems encountered in the fifth circuit may be of value to the Commission.

It is our considered conclusion that the fifth circuit is geographically too large and that 15 judges is definitely 6 too many. It is extremely difficult for an appellate court composed of 15 judges to function with maximum efficiency. The sheer weight of administrative problems and

the necessity of one judge having to deal with 14 others impairs the judicial process. It is very burdensome for each judge to read and carefully analyze all of the opinions of the other 14 judges. Moreover, it is only natural that intracircuit conflicts multiply when there are 15 active judges.

Senator BURDICK. Excuse me, Judge, would you suspend for a minute? We are having a busy time on the floor; we're voting a lot. I'll stay for the five bells, which is the last call. If you would like to continue, you will have another 6 minutes left. As soon as the five bells ring, I'll have to leave the bench here, but if you don't mind completing after I leave, you might try to finish your statement in 6 minutes.

Judge GEWIN. I might be able to. All right, sir, I'll resume reading where I just left off.

It is to be noted that intracircuit conflicts between panels give rise to en banc proceedings. This problem would be avoided in large measure by prerelease circulation of at least all signed opinions. The adoption of such a sound judicial standard is hardly feasible, however, in a court rendering an inordinate number of opinions.

Intracircuit conflicts require the convening of en banc courts. At the present time there are 11 en banc cases to be heard. By the time the court convenes en banc, there will probably be at least 15 cases requiring disposition. It is not infrequent that one or two senior circuit judges are involved in en banc cases. However, assuming only 15 active judges are present and allowing at a minimum 10 minutes for each judge to express his views in conference, the deliberations in each case will consume $2\frac{1}{2}$ hours. The 10-minute allotment may itself be unrealistic. In some instances a single judge has consumed substantially over an hour to present his views. But even assuming that only the active judges participate and take the minimal time allotment, 15 cases will require $37\frac{1}{2}$ hours of conference time. Eliminating time for lunch and a short recess during the morning and the afternoon, and permitting 9 solid hours of uninterrupted conference per day, 15 cases will require more than 4 days of conference time. In addition, substantial time must be spent in preparation. While all en banc cases are not orally argued, the tendency is toward more oral argument, which adds to the workload. It often happens that a substantial number of judges will agree on one issue, but will be sharply divided on other issues. Since many en banc cases present multiple issues, it is virtually impossible to obtain a unanimous decision by 15 judges. Some of our en banc decisions require careful mathematical analysis to simply aline the positions of the judges according to the issues decided.

It is the considered opinion of the judges who join this statement that the public interest demands immediate relief for the fifth circuit. Jumboism has no place in the Federal court appellate system. This statement applies both to geographical area and the number of judges serving the court. In spite of innovative procedures, long hours of work, and the decision of over 125 cases per judge per year, on the average, it is apparent that the fifth circuit cannot keep abreast of its mounting caseload. The populations of both Texas and Florida are expanding very rapidly. Much of the litigation in the fifth circuit

originates in these two States. It appears to be almost impossible for one circuit to accommodate two States which are growing at such a rapid rate which results in ever-increasing litigation.

Some have expressed the fear that any remedy is objectionable. This fear seems to be based upon the concept that any remedy which may be adopted will result in parochialism, provincialism, and a lack of cross-pollination amongst judges of different backgrounds which will seriously interfere with the court's traditional role as a national court. The undersigned judges reject out of hand this expression of fear.

The undisputed record demonstrates that the fifth circuit hears as wide a variety of cases as any circuit in the Nation. In addition it is recognized that the fifth circuit has been the active battleground of school integration cases, suits involving the integration of public accommodations, attacks on jury discrimination and other civil rights litigation. By innovative procedures we shortened the time for perfecting appeals, filing briefs and reaching decisions in school integration cases. *Singleton* v. *Jackson Municipal Separate School District*, 5 Cir., 1970, 419 F. 2d 1211. For example, in the fifth circuit we heard 166 appeals in school integration cases alone between December 2, 1969 and September 24, 1970—a period of slightly over 9 months. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, n. 5 (p. 13).

We believe it is fair to say that the six States which (in addition to the Canal Zone) comprise the fifth circuit are far more integrated on all levels than any other six States in the Nation. We have rendered more integration decisions than all of the other appellate courts of the Nation combined. A very high percentage of these decisions were unanimous. Admittedly, most of the decisions were rendered by three-judge panels, but during the critical period mentioned, all opinions were circulated to the entire court for possible objections prior to release. This practice is still followed.

We do not approve the classification of judges by the elusive concepts of "liberal" or "conservative," but if the judges of this court were so classified, it is obvious that neither a conservative group nor a liberal group could have dominated the court during the time mentioned. We believe the same statement could be made with respect to any 9 of the 15 judges who presently are in active service.

It is important to note that it is virtually impossible to mold the thinking of a particular court to make that court fit into a specific classification. History is replete with examples of the independence of judges who have disappointed the President who elevated them to office. Such is a historical fact. This historical fact has been true even in fortuitous circumstances which permitted a single President to appoint a majority of this court. For example, when there were only seven members of the Fifth Circuit Court of Appeals, President Eisenhower appointed five members in the court. The other two were appointed by Presidents Hoover and Truman.

It is interesting to analyze the retirement eligibility dates of the present active circuit judges of the Fifth circuit. This information is afforded by the following table:

Active judges:	*Retirement eligibility date*
John R. Brown	1975—3 years.
John Minor Wisdom	1972—Now.
Walter Pettus Gewin	1976—3 years.
Griffin B. Bell	1983.
Homer Thornberry	1978—5 years.
James P. Coleman	1981.
Irving L. Goldberg	1976—3 years.
Robert A. Ainsworth, Jr	1976—3 years.
John C. Godbold	1985.
David W. Dyer	1976—3 years.
Bryan Simpson	1968—Now.
Lewis R. Morgan	1978—5 years.
Charles Clark	1990.
Paul H. Roney	1986.
Thomas Gee	1990.

From the foregoing table it may be observed that two active members of the court are now eligible to retire. Within 3 years an additional 5 members of the court may retire. In 5 years an additional 2 members may retire. Thus, within the short span of 5 years, 9 of the 15 members of the court now in active service may exercise the privilege of retirement. One member of the court has retired this year.

In should be emphasized that any circuit realignment should result in a Federal appellate system which will suffice without further realignment for a period in excess of 25 years. In formulating a plan of realignment it would be a mistake to try to classify the philosophical attitudes of judges of this circuit and perhaps of other circuits. This fact is emphasized by the changes in personnel which will take place within the next 3 to 5 years in the fifth circuit, assuming there are no vacancies created by death.

The 15 active judges of this court have averaged writing 39 (plus) *signed* opinions per year. In addition each active judge has averaged disposing of an *additional* 86.6 cases by means of short per curiam or summary opinions. This is an average of 125 cases *per judge per year*. Assuming that 5 weeks are eliminated by holidays (Christmas, Thanksgiving, Fourth of July, et cetera) and vacations, 7 weeks for actual sittings, 1 week for attending the Judicial Conference, 1 week for en banc court, 1 week for three-judge cases and 1 week for special assignments (committees on judicial administration, the jury system, probation system, budget, et cetera), only 38 weeks remain for attention to the routine caseload of the court. Based upon the record of the average judge in active service in the Fifth Circuit, these figures demonstrate that each judge has averaged passing upon 3¼ (plus) cases each week during the time he was not sitting on the bench or away from his office on other important judicial matters.

The foregoing figures are astounding. They clearly demonstrate that the judges of the fifth circuit need additional time for contemplation, study, and for the preparation, revision, and refinement of opinions and decisions in order to maintain the high level of performance demanded of Federal judges. We would note also that not included in the figures outlined are concurring and dissenting opinions and numerous emergency motions for stays, writs of mandamus, pro-

hibition, and extraordinary relief which occupy much of each judge's time in a large and overbusy circuit.

Please understand that this statement is not intended as self-praise or as a complaint. Considering the problems involved, it is intended as a short delineation of unquestioned facts. This court needs your help. There is no hope of improvement short of legislative relief. The six States involved are growing and developing rapidly. Litigation of all types is increasing at an explosive rate. Some relief may be afforded by curtailing diversity jurisdiction, habeas corpus petitions by State prisoners, three-judge cases and civil rights suits by prisoners. However, it appears that even if substantial curtailment is accomplished in the areas mentioned, that factor will be nullified by the continuous enactment of legislation expanding the jurisdiction of Federal courts without a profound study of the impact of such legislation on this over-burdened circuit.

Judge GEWIN. I would like to point out that the legislation referred to in the last sentence of the statement encompasses such matters as environmental protection, equal employment opportunity, the omnibus crime bill involving wiretapping, and other subjects unknown to the law a short time ago.

Thank you for your time and attention.

Mr. WESTPHAL. Do you have an extra copy of your statement?

Judge GEWIN. Yes sir, I have two or three copies.

I would also like to say, if I may, that Judge Roney from Florida who did not join in the statement at the time, told me Friday that he was writing a letter to the chairman of this subcommittee asserting that he has now concluded that it is inevitable that the fifth circuit should be divided.

Mr. WESTPHAL. Your statement contains the names of the seven judges, in addition to yourself, who subscribe to the statement that you have just made to the committee?

Judge GEWIN. Yes, sir, their signatures are on it.

Mr. WESTPHAL. And you have just said that Judge Roney does not subscribe to that statement, but that he will write the chairman a letter indicating his own views?

Judge GEWIN. Right, sir.

Mr. WESTPHAL. I think the record at this time might well indicate that the committee has also received correspondence from other members of the Court of Appeals of the Fifth Circuit.

Because they include observations other than the fact that they do or do not agree with Judge Wisdom's position, I think the record should reflect those observations as they have been expressed to the chairman and the committee.

So, Mr. Chairman, unless there is some objection, at this time, I would offer for the record Judge Ainsworth's letter of September 19, and Judge Gee's letter of September 19, addressed to Judge Wisdom, in which he indicates that Judge Wisdom is authorized to speak on behalf of Judge Gee.

[The above mentioned materials follow:]

[Editor's Note. In addition to those letters, mentioned *supra*, there are also included here the text of the letter sent to all fifth circuit judges, other than Judges Wisdom and Gewin and Chief Judge Brown, and the replies received by the committee from those judges. Judge Gewin's testimony is resumed following the last of these letters.]

SEPTEMBER 13, 1974.

Hon. ——— ———,
U.S. Court of Appeals.

DEAR JUDGE ———: The subcommittee has scheduled hearings on S. 2988–2990 which are the bills embodying the recommendations of the Commission on Revision of the Federal Court Appellate System for geographical realignment of the Fifth Circuit. On September 24th, the first day of the hearings, I have arranged for the appearance of Chief Judge Brown and Judges Wisdom and Gewin. As a member of the above-mentioned commission, I am aware of the fact that in the testimony of these three judges the subcommittee will hear two different points of view on this issue.

My purpose in writing to you is to invite you to appear at hearings on either the 25th or 26th of September if you desire to express to this subcommittee your own views on the proposals to split the Fifth Circuit insofar as they may differ from such views as may be expressed by your three colleagues mentioned above. In the event you do not desire, or are unable, to appear on either of those days, the subcommittee would be pleased to receive in letter or statement form such views as you care to express involving the three alternative recommendations made by the commission.

The hearings on September 25th and 26th will be held in Room 457 of the Old Senate Office Building commencing at 10:00 a.m. each day. If you wish to appear on either of these days, I would request you call the subcommittee's Chief Counsel, Mr. Bill Westphal (202/225-3618) and make the necessary arrangements. I would also add that the subcommittee will make every endeavor to receive testimony or the written views of state bar associations and individual members of the trial and appellate bar.

With kindest regards, I am

Sincerely,

QUENTIN N. BURDICK, *Chairman.*

U.S. COURT OF APPEALS,
FIFTH CIRCUIT.
New Orleans, La., September 16, 1974.

Hon. QUENTIN N. BURDICK,
Chairman, Subcommittee on Improvements in Judicial Machinery, U.S. Senate, Washington, D.C.

DEAR SENATOR BURDICK: Thank you very much for your kind letter of September 13 relative to the forthcoming hearings before your subcommittee to begin on September 24.

I am content with the arrangements for the appearances of Chief Judge Brown and Judges Wisdom and Gewin. Therefore, I will not attend.

If realignment is to become a reality, the best, fairest and most appropriate division would be a circuit of Texas, Louisiana, Mississippi and Canal Zone, and one of Alabama, Georgia and Florida. This is the prime recommendation of the Commission on Revision of the Federal Court Appellate System. Simultaneously with passage of any realignment should be a companion measure to authorize the creation of such additional judgeships as will be needed. There is no doubt that additional judgeships are required.

I send to you and your able Chief Counsel, Mr. Westphal, my best personal regards.

Sincerely,

ROBERT A. AINSWORTH,
U.S. Circuit Judge.

U.S. COURT OF APPEALS
FOR THE FIFTH CIRCUIT.
Austin, Tex., September 19, 1974.

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

DEAR MR. CHAIRMAN: I am grateful to you for your thoughtfulness in inviting me to appear before your subcommittee on proposals to realign the Fifth Circuit. While I would be happy to renew our personal friendship, I do not deem it necessary to appear and present any views which I may have on the proposals.

At the same time, I do express my urgent concern that if realignment of the Fifth Circuit is proposed, adequate additional judgeships should be provided in the same legislation proposing realignment. For instance, should the Congress in its wisdom propose realignment as recommended in its plan styled "Alternative No. 2," the "Western Circuit," composed of Louisiana, Canal Zone and Texas, would have over 49% of the present docket and only six judges. Should this particular realignment be proposed, I strongly urge that Congress must in the same legislation provide the additional judgeships needed to handle this docket.

I send you my warm personal regards and ask to be remembered to Mr. Westphal.

Sincerely,

HOMER THORNBERRY.

U.S. COURT OF APPEALS
FOR THE FIFTH CIRCUIT,
Austin, Tex., September 19, 1974.

Re Circuit Realignment.

WILLIAM WESTPHAL, Esq.,
Chief Counsel, Subcommittee on Improvements in Judicial Machinery, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. WESTPHAL: I have learned indirectly that your Subcommittee will be hearing testimony on the above matter within a few days. So that my position may be clear, I enclose a copy of my letter of this date to Judge John Minor Wisdom authorizing him to speak on my behalf and epitomizing my views. I would appreciate it if this might be made a part of the Subcommittee's record.

Yours very truly,

THOMAS GIBBS GEE.

U.S. COURT OF APPEALS
FOR THE FIFTH CIRCUIT,
Austin, Tex., September 19, 1974.

Re Circuit Realignment.

Hon JOHN MINOR WISDOM,
U.S. Circuit Judge,
New Orleans, La.

DEAR JUDGE WISDOM: I am advised that you will appear before the Subcommittee of the Senate Judiciary Committee (or the whole Committee, as the case may be), on September 24, 1974, for purposes of testifying on the desirability of splitting our Circuit. My views continue to be the same as yours in this connection, and you are entirely authorized to speak for me. As we have discussed, I think the cart is before the horse. Jurisdiction should first be examined. Commencing upon a program of circuit splitting without a searching re-examination of jurisdiction can only, if pursued to its logical consequences, eventuate into a system of mini-circuits comprising, in some instances, less than one state. Texas may well be one of those instances.

For those and other reasons, all of which you know and can express better than I, I think this road is a wrong turning.

Sincerely,

THOMAS GIBBS GEE.

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY,
Washington, D.C., September 23, 1974.

Judge THOMAS GIBBS GEE,
U.S. Court of Appeals, U.S. Courthouse, Austin, Tex.

DEAR JUDGE GEE: Upon receipt of your letter of September 19th, I became acutely aware of the fact that I owe you an apology. We intended to extend to you an invitation to appear before this subcommittee at the hearings on circuit realignment or to otherwise make known your views on this issue to the subcommittee. Apparently, our letters went out according to an outdated list of circuit judges which list obviously was composed prior to the time that you succeeded Judge Ingraham. I apologize for the oversight. However, it appears from your letter that in your infinite wisdom you have divined our unexpressed and uncommunicated intent.

We will certainly make your letter of February 19th to Judge Wisdom a part of our hearing record.

Sincerely,

WILLIAM P. WESTPHAL, *Chief Counsel.*

U.S. COURT OF APPEALS,
FIFTH JUDICIAL CIRCUIT,
Austin, Tex., October 7, 1974.

WILLIAM P. WESTPHAL, Esq.,
Chief Counsel, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. WESTPHAL: Thank you for your kind letter of September 23 which arrived while I was leaving for an en banc in New Orleans so that I was unable to reply until now. I entirely understand why I was not asked to the hearing and feel that John Wisdom could say what I had to say better than I could, anyhow. I am afraid that preserving the circuit is a lost cause, but I very much believe that Judge Wisdom is right and that we are selling our birthright for a mess of potage. I won't play the cracked record any more for you, however.

May I say that from the comments of the participants at the en banc which I mentioned, I can tell you that your knowledge of the subject and the penetrating questions which you asked at the hearing were remarked on very favorably. I am sorry that I did not get to meet you.

With best regards, I am,

Yours sincerely,

THOMAS GIBBS GEE.

U.S. COURT OF APPEALS,
FIFTH JUDICIAL CIRCUIT,
Newnan, Ga., September 16, 1974.

Hon. QUENTIN N. BURDICK,
Chairman, Subcommittee on Improvements in Judicial Machinery, Senate Office Building, Washington, D.C.

DEAR SENATOR BURDICK: In 1973, I joined with Judges Walter P. Gewin, Griffin B. Bell, James P. Coleman, David W. Dyer, Bryan Simpson and Charles Clark in a written statement concerning the desirability of the division of the Fifth Circuit Court of Appeals into two circuits.

It is my understanding that Judge Gewin will appear before your subcommittee on September 24th to testify concerning the proposed legislation. Since Judge Gewin will present a joint statement which will adhere to the views expressed by the above-named judges, I will not personally appear at the subcommittee hearings.

I wish to thank you and the subcommittee for this invitation.

With best regards, I am

Sincerely,

LEWIS R. MORGAN.

U.S. COURT OF APPEALS,
FIFTH JUDICIAL CIRCUIT,
Atlanta, Ga., September 16, 1974.

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

DEAR SENATOR BURDICK: Thank you for the invitation to appear before your Subcommittee regarding geographical realignment of the Fifth Circuit. My colleague, Honorable Walter P. Gewin, will appear on September 24 and his views on the subject coincide with mine.

In addition, I testified before the Commission on Revision of the Circuits last September in Jacksonville at some length and also presented a statement from the State Bar of Georgia.

I do not think that any further testimony on my part will be helpful to the Senate but I stand ready to assist your Subcommittee in any way possible.

Yours sincerely,

GRIFFIN B. BELL.

U.S. COURT OF APPEALS,
FIFTH JUDICIAL CIRCUIT.
September 16, 1974.

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

DEAR SENATOR BURDICK: Thank you so much for your kind letter of September 13, 1974, inviting me to appear before your Subcommittee on September 24, 1974, when it will hold hearings on S. 2988-2990.

I will forego the pleasure of appearing, since my views are entirely in accord with Judge Gewin's views and I am sure he will ably present our position.

With warm regards, I am

Sincerely yours,

DAVID W. DYER, *Circuit Judge.*

U.S. COURT OF APPEALS,
FIFTH JUDICIAL CIRCUIT.
September 16, 1974.

Mr. BILL WESTPHAL,
Chief Counsel, U.S. Senate, Committee on the Judiciary, Subcommittee on Improvements in Judicial Machinery, Washington, D.C.

DEAR MR. WESTPHAL: I have received Senator Burdick's letter of September 13 inviting my appearance at the hearing on September 25 or 26 if I care to express my views on pending proposals to split the Fifth Circuit insofar as they may differ from the views of Chief Judge Brown and Judges Wisdom and Gewin.

I have written Judge Gewin, copy attached, asking that he express my views.

Sincerely yours,

BRYAN SIMPSON, *Circuit Judge.*

SEPTEMBER 12, 1974.

Hon. WALTER P. GEWIN,
U.S. Circuit Judge,
P.O. Box 2729,
Tuscaloosa, Ala.

DEAR JUDGE GEWIN: In connection with your prospective appearance to testify before the Subcommittee of the Senate Judiciary Committee (or the whole Committee as the case may be) on or about September 23, 1974, please be advised that I adhere to the views expressed in the statement prepared by you, Judge Bell and Judge Morgan, and circulated to and signed by Judges Coleman, Godbold, Dyer, Clark and me in addition to the three of you in August 1973.

I also adhere to the statement expressed in a letter I wrote to Chief Judge Brown on this subject, copy to all Active Judges, on April 10, 1974: "If it can be arranged for Judges Gewin and Bell, either or both, to appear before Senator Burdick's sub-committee, I will be content to let them speak for me."

I am confident that any views you advance at the upcoming Committee hearing in Washington will coincide with mine. Please feel free to express this view to the members of the Senate Judiciary Committee.

Sincerely yours,

BRYAN SIMPSON, *Circuit Judge.*

U.S. COURT OF APPEALS,
FIFTH JUDICIAL CIRCUIT.
September 17, 1974.

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

DEAR SENATOR BURDICK: Thank you for inviting me to appear before the Subcommittee. Judge Walter P. Gewin is authorized to state my views. Since anything I might say would tend to be merely cumulative I do not plan to appear.

Sincerely,

JOHN C. GODBOLD, *Circuit Judge.*

U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT,
Dallas, Tex., September 23, 1974.

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

DEAR MR. CHAIRMAN: Without any reservation whatsoever I wish to associate myself with Judge Thornberry's letter of September 19, 1974.

In my opinion it would be nothing short of catastrophic to saddle the six "Western Circuit" judges with the caseload that would be cast upon them if Alternative No. 2 were adopted.

Sincerely and respectfully yours,

IRVING L. GOLDBERG, *Circuit Judge.*

U.S. COURT OF APPEALS, FIFTH CIRCUIT,
St. Petersburg, Fla., September 23, 1974.

Hon. QUENTIN N. BURDICK,
U.S. Senator, Old Senate Office Building,
Washington, D.C.

DEAR SENATOR BURDICK: Thank you for the invitation to appear before the Subcommittee on Improvements in Judicial Machinery in connection with S. 2988–2990.

Although I can see no useful purpose in my appearing before the committee, I would like to express this view:

Regardless of what is done in order to afford the Federal Court Appellate System a full opportunity to discharge its responsibilities, and regardless of the salutary effect that any proposal which I have heard to date might have in relieving the current overload in the Fifth Circuit, our Circuit will have to be divided in the foreseeable future if the number of judges on the court is not to exceed 15, and if the court is not to fall hopelessly behind. Since a split of the Fifth Circuit, together with the addition of three judges to make a total of 18, will offer some immediate relief and is inevitable in any event, I am in favor of dividing the Circuit now.

Essentially, I am in accord with the conclusions of Judge Walter P. Gewin, who will be testifying before the Subcommittee tomorrow.

Best regards,

PAUL H. RONEY, *Circuit Judge.*

U.S. COURT OF APPEALS, FIFTH JUDICIAL CIRCUIT,
Ackerman, Miss., September 17, 1974.

Hon. QUENTIN N. BURDICK,
Chairman,
Committee on the Judiciary,
U.S. Senate,
Washington, D.C.

DEAR SENATOR BURDICK: I sincerely welcome your letter of September 13 with reference to the possibility of my appearing at hearings before your Committee on either September 25 or 26.

I would be pleased to take advantage of this opportunity, and would hope that it would be convenient for me to be heard on the morning of September 25, as I have no problem with hotel reservations at that particular time.

While I have not talked with Mr. Westphal, I have talked with Mr. Stockett, and I understand that they are making the appropriate arrangements.

With best wishes, I am

Sincerely yours,

JAMES P. COLEMAN, *Circuit Judge.*

U.S. COURT OF APPEALS, FIFTH CIRCUIT,
Jackson, Miss., September 23, 1974.

Hon. WALTER P. GEWIN,
U.S. Circuit Judge,
P.O. Box 2729,
Tuscaloosa, Ala.

DEAR JUDGE GEWIN: I continue to adhere to the views expressed in the statement which you submitted to the Commission on Revision of the Federal Court Appellate System at its hearing in Jackson, Mississippi on August 23, 1973.

Respectfully,

CHARLES CLARK, *Circuit Judge.*

U.S. COURT OF APPEALS, FIFTH CIRCUIT,
Houston, Tex., September 18, 1974.

Hon. QUENTIN N. BURDICK,
Chairman, Subcommittee on Improvements in Judicial Machinery, U.S. Senate, Washington, D.C.

DEAR SENATOR BURDICK: I have your letter of September 13th in which you extend an invitation for me to appear and testify before your committee on September 25th and 26th.

It will not be convenient for me to appear in Washington at that time and I therefore express to you and the members of the committee regrets that I will be unable to appear. However I believe I can here briefly state my views on the subject. I am firmly of the view that the Fifth Circuit is too large and unwieldy and that it should be divided. I have heard that Senator Eastland has said that the Fifth Circuit is not a court but a convention.

One of the proposals to split the Fifth Circuit would place Texas and Louisiana in the western part, and another would place Texas, Louisiana and Mississippi in the western part. I believe the plan that would place only Texas and Louisiana in the western portion would probably be a more equal distribution. Then I understand that there is a question whether the Canal Zone should be attached to the eastern or western portions. My view on that subject is that the Canal Zone, being as far east as Florida and Georgia and having direct airline connections with Florida, would properly be more appropriately placed with the eastern portion.

With kindest regards, I am

Sincerely yours,

JOE INGRAHAM, *Circuit Judge.*

[Judge Gewin's interrupted testimony resumes.]

Mr. WESTPHAL. According to the Administrative Office figures, the four States of Florida, Georgia, Alabama, and Mississippi, plus the Canal Zone, had a total of 1,738 filings in fiscal year 1974. Now, that caseload, distributed over a nine-judge court, would result in appeals commenced at a rate of 193 appeals per judge. By splitting those four States off from the present fifth circuit and putting them into a separate circuit, there would not be much relief from the caseload that the judges of the fifth circuit are presently carrying. Since in 1974 the filings in the fifth circuit averaged 219 for each of the 15 judges. Do you follow my mathematics on that?

Judge GEWIN. I think so.

Mr. WESTPHAL. Unless more than the nine judges who are presently located in those four States are employed upon the work of those four States, there would be no appreciable relief in workload simply by splitting those four States off from Texas and Louisiana. Isn't that true?

Judge GEWIN. I think, mathematically, you have correctly stated it, but when you are sitting on a 9-judge court, as distinguished from a 15-judge court, at least you don't have to deal with 6 more judges on every case. While we love each other and have no feelings of

animosity, dealing with 14 other judges is a great deal more difficult and time consuming than dealing with 8 more; to have to read what each says and reconcile his position with yours and deal with all the administrative matters makes the caseload and administrative problems even greater.

I think, while the caseload might be equal, the problem of dealing with vast numbers of judges would reduce the time you have to spend in such endeavors.

Mr. WESTPHAL. If only nine judges were employed on the work of those four States, those nine judges would still have to employ a screening technique, would they not?

Judge GEWIN. Well, sir, I suspect, whether we like it or not, to meet the demand of present day litigation screening is inevitable.

Mr. WESTPHAL. That would mean that there would be some percentage of cases that would still be decided on the briefs, without the benefit of oral argument?

Judge GEWIN. That is correct, sir, but I would like to say this with respect to screening.

We have been very much occupied with solutions to the problem—and I have consulted no one about this—but I think before we actually implemented screening to its present state of perfection—if I may use that expression—it might have been better if we had had members of the bar come and hear what we were doing. We might have put to them this simple question: "Would you rather have some of your business-type cases involving securities, liability of one kind or another, and contract arrangements postponed for 3 years, or would you rather have a decision without oral argument in some cases?" That is the stark fact that faces this court and the bar, whether we like it or not.

Mr. WESTPHAL. I think you have made the point. If the Congress should fashion those 4 States and the Canal Zone into one nine-judge court, and if that nine-judge court should have the caseload as evidenced by the 1974 figure of 193 per judge, that nine-judge court would have to screen cases; it would have to deny oral argument in a certain number of cases; it would have to use a Rule 21, in one form or another; and it would have to have the services of staff attorneys in order to keep up with a caseload of 193 per judge, would it not?

Judge GEWIN. Yes sir, I think it would, but I would like, if we could, to reduce the percentage of screening from 50 percent to a lower level, and I don't see at this point how we can do it.

Mr. WESTPHAL. If your caseload for 9 judges in this four-State circuit were 193 per judge, compared to the existing caseload of 219 cases per judge for 15 judges, which is only a difference of 26 cases per judge, it seems very likely that the four-State circuit would have to face, with or without the consultation of the bar, the same hard choice: That is, you either adopt these expediencies in order to keep your heard above water, or you ask the lawyers to wait up to 3 years in order to have their cases decided by that nine-judge court sitting in that 4-State circuit. Do you follow me on that?

Judge GEWIN. Yes, sir. May I make a statement on this point? I do not disagree with Judge Wisdom and Judge Brown regarding their suggested jurisdictional solutions. I think that Congress upon consideration, may well see the wisdom of reducing jurisdiction in whatever area it may choose here. But I speak about this division as some-

thing that will help now, not as the exclusive remedy for all time, because Congress must decide whether they wish to continue to enlarge our jurisdiction and keep us overloaded or whether they wish to curtail jurisdiction in some areas. Environmental law is new to most judges, and it takes a lot of study. Discrimination in employment presents difficult problems of back pay. As I say, it will take, perhaps, both remedies from a long-range point of view.

Mr. WESTPHAL. Of course, along the same line, the statistics which we have reviewed also mean that the chances of this new four-State circuit court hearing oral argument in more cases and having more time for deliberate consideration of the issues in all important cases would be enhanced if, instead of 9 judges you had the 11 judges needed to reduce the caseload per judge to about the 1973 national average of 161. Isn't that true?

Judge GEWIN. While I don't call nine a magic number, I will call it a traditional number. I think that almost 200 years of history have demonstrated that there is some wisdom in the number "9." But if you get into an emergency situation where the Congress wants to expand the jurisdiction of Federal courts and the courts expand their own jurisdiction, then maybe you will have to take more than the nine. Every time you go up beyond that traditional number, however, the best solution to the problem may not be presented. Other remedies would probably be better.

Mr. WESTPHAL. What I am suggesting, Judge, is that, unless that four-State circuit has a bench of 11, the benefits to be achieved by splitting those four States off into a new circuit would not be reflected in a lower caseload per judge or in less of a need for a resort to some of these expediencies we talked about. The benefit would solely be that, instead of having to review the work of five panels, you would only have to review three panels.

Judge GEWIN. That is correct.

Mr. WESTPHAL. Instead of contacting 15 judges on an en banc matter, or Judicial Conference matter, you would only have to consult nine judges. That would be the only benefit derived by splitting off four States from Texas and Louisiana, unless you started out with a complement of 11 judges.

Judge GEWIN. I would hate to say it is the only benefit.

I don't know what others to mention at this moment, but when you say "only," that should not minimize the substantial benefit——

Mr. WESTPHAL. I appreciate that fact. My point is this: If Congress is concerned about the attitude expressed by members of the bar—that they are dissatisfied with a denial of oral argument in too many cases, being dealt with under Rule 21, that they are dissatisfied with some of these other expediencies—then the only way to try to alleviate their dissatisfaction is to employ more and more judges so that there will not be so great a need to resort to so many expediencies.

Judge GEWIN. Inevitably true, sir.

Senator BURDICK. Looking at the two States of Texas and Louisiana, that, under one proposal would constitute a separate circuit, those two States would have a caseload of 250 on a per judge basis for the judges that are from those two States. They would have a caseload of 258 per judge, which is 39 more than the caseload per judge in the existing fifth circuit. Again there can be no relief from all of these things

unless the judge complement in that two-State circuit is increased beyond the number 6, at least up to 9. Isn't that true?

Judge GEWIN. I should think it would have to go beyond 9, if you give them the same number that the eastern side would have, 11 for the number of cases you mentioned, they would get more than 9: would they not?

Mr. WESTPHAL. Nine judges employed on a caseload of 1,558 would give you a figure of 172 per judge, which is 11 cases more than the national average was in 1973, so that, again, in the case of that two-State circuit it would not take much of an increase beyond their 1974 caseload before you reached the necessity of having to create 11 judgeships.

Judge GEWIN. Yes, sir, but may I make one observation. You must look at the viability of the alternatives. Suppose you divide the circuit and have two circuits with 11 judges. That means, if you don't divide it, we would have one circuit with 22 judges, and I don't know how to say just "good morning" to 22 judges over the telephone and have time to do anything else that day.

Mr. WESTPHAL. As I suggested to your Chief Judge Brown, that gets right the heart of the question. If we must have more judges to handle this expanded caseload, the question seems to me to be whether we employ 22 judges on one bench or 11 on each of two benches.

Judge GEWIN. I think that is inherent in the problem. You have to realize that, if you have 22 judges on one bench, 1 judge has to keep up with 21 others. There is just a limit to the mind of a man like me. I will have to conclude that it is difficult to keep up with 14 others now, and I don't believe, under the facts of life, that I could conscientiously keep up with 21.

Mr. WESTPHAL. The only thing that I know of that has been advanced as a scenario, by which you could have a 21- or 22-judge court and avoid the problems you have just mentioned, is a suggestion that emanated from a 1968 study, made by the American Bar Foundation, of the problems of increased workload upon the people in the courts. There was a suggestion, which was put forward in a Law Review article by Prof. Paul Carrington, who was executive director of the study. You will recall that his suggestion was that, if you have to go to the 21-judge court, you organize the court in 7-judge divisions and assign a certain subject matter jurisdiction to each one of those divisions, giving them—not a centralized docket—but as general a docket as you can, while, at least for the law of the circuit and en banc proceedings, they are combined to constitute one body composed of the three 7-judge divisions. That would be a variation on the theme which would mean that, for the period of time you were assigned with 7-judge divisions, you would really have to concern yourself primarily with the work product of that division and not so much with that of all 21 judges. Now, that is the only plan I know of that would have some feasibility insofar as a system having 21 or 29 judges on a given court. Do you know of any other system that would be feasible when you reach a number of judges which exceeds 20 on a given court?

Judge GEWIN. I don't know of any number that would be feasible, but that is not to say I think that number would be feasible.

I don't know whether you would call a court that large a thing or a "thing-a-ma-jig" or what. It still has to be some kind of unit.

The same people will be living in the fifth circuit, if we use that as an example, but some will be in division (a), some in (b), and some in (c). I can't conceive of such a functioning group achieving uniformity of decision or equality of treatment in every area of the law, especially, as he suggests, if assignments are made as general as possible. Well, how general is that? It seems to me you must go from criminal to antitrust. I don't want to be only a prisoner's judge or only an antitrust judge. I think we should take the cases as they come. I do not think we should say, if you are from division (a), you will go to this fine group, but if you are from (b) you must go over here and then possibly to division (c). It is difficult for me to see an operation of that kind.

Mr. WESTPHAL. In other words, you feel that the Carrington proposal would present some of the same difficulties, in an institutional involvement, as a court of 15 presents in the terms we have been using?

Judge GEWIN. This may be a self-serving declaration, but it doesn't apply to me only. I believe the 15 judges I have known have operated as well as any 15 could operate. We are congenial and effective.

With reference to one of the suggestions that was made by my brother Wisdom, who decried so vociferous a parochial system, to pick 5 judges out of 15 and say they will be the ultimate decisional group of this body and will decide the conflicting cases and the other 10 shall not have a voice in a given case seems to me to be self-defeating. I believe that, if we are going to have a national court, it may be more important to have it on the eleventh amendment cases than it would be some other less important cases.

Mr. WESTPHAL. There is also another disadvantage to a court that is as large as 15 or 20 judges. The projections from the Administrative Office, and the projections of Chief Judge Brown's exhibit No. 32, indicate that by the year 1977 the four States that we have talked about will have a caseload which, in order to maintain a level of 161 cases per judge, will require us to go right back up to 15 judges in those four eastern States by the year 1977. So, instead of having 25 years of relief, we may in fact find we have only 3 or 4 years of relief, or less than that. How can the Congress avoid the pitfalls of what is going to happen as this caseload continues to grow?

Judge GEWIN. I would make one respectful suggestion. It is really no solution to say—I don't mean to be facetious—it is really not a solution to say that the problem is getting so big that to divide it you will have two other courts that will be getting too big. You must consider the fact that, if the two new circuits become overlarge, the one that was divided would have been far too overlarge.

But it would be my hope and my sincere plea to the Congress that during whatever interim there might be, 2 years or 3, that they might come to such considerations as curtailing diversity, or curtailing jurisdiction over many of the cases we now have. I think it will take both solutions to ultimately get the problem solved. It is just too broad to run down this little alley here and stop. I think we must look at the overall problem.

As to those ideas about having some kind of tribunal to pass upon prison cases, we have been through various phases of that before. A man in the penitentiary will never be satisfied until he is out, and he

will never quit hounding the court as long as he thinks he has a chance. That is illustrated by the fact that he is never satisfied with the process. He has had all of the administrative procedures. We say we won't review your case until you have exhausted all those procedures. As the chairman pointed out this morning, it doesn't take long for them to go through that, and although we wait, the big load comes anyway.

Mr. WESTPHAL. I don't think I can fully summarize or equate your position and, for example, Judge Wisdom's, but it seems to me that I hear Judge Wisdom saying to us, "Don't split the fifth circuit now; let's try these other things, and, if we cannot get sufficient relief from them, then it may be necessary to split the fifth circuit in some way." By the same token, I understand you to say, "Split the fifth circuit now because we, meaning the litigants in that circuit, need immediate relief. If, as others fear, the caseload continues to expand to the point where we once again achieve a court of up to 15 in number, maybe by that time Congress will have had the opportunity to curtail the caseload input into the Federal courts in those areas where it may be proper to curtail it, and we may be able to devise some administrative way of handling at least the 1983's that come out of the institutions. There may be some relief in that way that would make it unnecessary for circuits to be split any further as the caseload grows." But then that caseload grows and proliferates. So it is just a question of where you put the emphasis. In the final analysis we all recognize that we are dealing with the same problem, is that not so?

Judge GEWIN. Yes, sir, we are dealing with diagnosis and prognosis essentially. I diagnose the patient as being rather ill today and needing some emergency relief. We may get into a prognosis that will show that he will be that ill again a little while later, but at least that will give us an opportunity to administer other remedies.

Mr. WESTPHAL. Thank you, Mr. Chairman.

Senator BURDICK. I will read carefully the questions I was unable to ask you when I was voting.

As you practice the screening process in the fifth circuit, it gives to any one of the three judges assigned to the case the right to ask for an oral argument. Do you think there has been any denial of justice under that procedure?

Judge GEWIN. No, sir. I don't think there has been. Every week, sometimes every day for a time, we write to our panel members and say, "please reclassify this case as a No. III." I had to do that Friday on the simple question of whether a jury, in a case involving a man charged in a six-count indictment with the sale of narcotics, could find that man not guilty under the first two counts because of entrapment, but could find him guilty under two other counts. In that kind of case, we put it on the oral calendar.

I would have to say this, Senator Burdick: I personally am deeply conscious of the very real fact that courts live upon confidence and respect. That is the reason why I adhere very avidly to some of the rules, for instance, disqualification because of ownership of one share of stock where there are 5 million outstanding. I embrace the idea because I want the man on the street to think that judges are honest and sincere and doing the best thing possible for the country as a whole. When the bar, and through the bar, the clients, think, whether with justifiable cause or not, that we are denying oral argument in

too many cases, that does worry me. As Mr. Westphal said this morning, for nearly 200 years people, with great respect, have said "The judges have ruled and we will follow the rule of law," and therefore they do. But I would hate to engage in any process, however justified, which would destroy that confidence and that respect. That is why I do sometimes become a little shaken about the number of cases we place on the summary calendar.

Senator BURDICK. We are mindful of the fact that there are some appeals which are taken entirely without merit and that granting oral argument in those cases would be just obliging the lawyer.

Judge GEWIN. There is a vast number of cases that should never go up on the oral argument docket. I would say, however, that it might be better, from a public confidence standpoint, to reduce somewhat the number of cases not accorded oral argument right now——

Senator BURDICK. None of those lawyers I just referred to are from North Dakota, of course.

Judge GEWIN. I say that as one who has been in the courtroom for 26 years and sometimes left elated and sometimes very depressed.

Chief Judge BROWN. Mr. Lævin, Mr. Chairman, may I say one thing? I hope that you have sensed from what you have heard today, and from what you will hear tomorrow, that, even with our differences of views, there is no acrimony or bitterness on the fifth circuit. You can split us, and somehow we will survive, but when I come back 2 years from now, I don't know whether I will be representing the 5th or 11th circuit.

Senator BURDICK. I underscore your statement; you will survive.

Judge GEWIN. If there is a judge who could preside over 25 judges, I would nominate Chief Judge Brown.

Senator BURDICK. We will now stand recessed until tomorrow morning at 10 o'clock.

[Whereupon, at 3:35 p.m., the subcommittee was recessed until 10 o'clock, Wednesday, September 25, 1974.]

CIRCUIT REALIGNMENT

WEDNESDAY, SEPTEMBER 25, 1974

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

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 457, Russell Senate Office Building, Senator Quentin N. Burdick (chairman of the subcommittee) presiding.

Present: Senators Burdick (presiding) and Hruska.

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

Senator BURDICK. This is the second day of hearings on the realignment of the fifth and ninth circuits.

Our first witness this morning will be Hon. James P. Coleman of the fifth circuit.

Mr. Coleman, welcome to the committee.

STATEMENT OF JUDGE JAMES P. COLEMAN, FIFTH CIRCUIT, ACKERMAN, MISS.

Judge COLEMAN. Thank you, Mr. Chairman.

Senator HRUSKA. Mr. Chairman, may I extend a word of welcome to Judge Coleman and Judge Clark?

Last summer when we went to Mississippi with the Commission, they were present and—I believe you, Judge Coleman, were present in New Orleans.

Judge COLEMAN. Senator, I was just in Jackson, not in New Orleans.

Senator HRUSKA. We not only had a well-arranged session for testimony and a very informative session, but they extended the traditional hospitality of Mississippi to us at noontime, just before we boarded our plane. We had a nice social time as well as a useful professional and business session.

Mr. Westphal was there and he can confirm my judgment of the proceedings.

Mr. WESTPHAL. I say amen.

Judge COLEMAN. I hope that you can come back and that Senator Burdick can come the next time.

Mr. Chairman and members of the committee, with your permission I would like to make a brief statement in organized form, after which I shall be happy to try to answer questions if there are any to be propounded.

I am one of the circuit judges of the fifth circuit.

You have heard Judge Gewin's presentation so I shall not address myself to that subject.

I am here to discuss where the State of Mississippi is to be assigned, if such a division is made. I recognize that this decision rests solely with the Congress, with the approval of the President.

My purpose is to present considerations which I hope will be of assistance in reaching the most nearly correct answer to the question.

I understand as a judge, and in private life, that there are many questions to which there are no perfect answers. We just have to look for the best available answer.

In making my presentation today, I speak as one who for 9 years has served on the fifth circuit bench. Before beginning that tour of duty, it had been my privilege to serve a composite period of 16 years as a State district attorney, a State circuit judge, on the State supreme court and as the Attorney General of Mississippi.

Additionally, I spent 4 years as a member of the State legislature and 4 years as Governor. So I have had experience from the executive and legislative, as well as from the judicial, standpoint.

Of considerable importance, I think, is the fact that, from 1935 to 1939 I worked here on Capitol Hill as an administrative assistant to a Member of Congress. I started when I was 21 years of age. At that early time I learned to look at matters from a national standpoint, and not from a purely local or provincial approach.

I might say that those 4 years here in Washington were a great bank of experience upon which I have drawn in all of the nearly 40 years since.

From the official report of the Commission, it is seen that, if the badly needed division—and I say that deliberately—if the badly needed division occurs, Florida, Georgia, and Alabama will most certainly be in one circuit. It is equally obvious that Texas and Louisiana will be in another. So the sole remaining question is, "Where should Mississippi go?" We are right in the middle.

I sincerely hope that Mississippi will be aligned with its sister States east of the Mississippi. It is an honor to serve the great States of Louisiana and Texas—and they are great—and my views here today indicate no lack of love or respect or affection for those States—but we are looking now not to personal wishes or desires, but to the future welfare and operation of this fifth circuit court.

I simply believe that, if a separation is to occur, then Mississippi should not be aligned across the river.

As we all know, the Mississippi River is the dividing line between the sixth and eighth circuits, and it is also the dividing line between the seventh and the eighth. The only circuit in the United States bisected by the Mississippi River today is the fifth circuit as presently constituted. This bisection occurred in 1891, 83 years ago, the year that my mother was born. It must be remembered that 83 years ago our six States were almost altogether agricultural.

Until 1929, one Federal trial judge took care of all the Federal court business in Mississippi. Since 1891—and for nearly 50 years after 1891, to be conservative about it—there was very little for the Federal courts to do in the South, because we were a nonindustrial section of the United States.

When the circuit was set up, the automobile was nonexistent, oil had not been discovered in Texas or in Louisiana, and the Houston Ship Canal had not been built. Today, the situation is altogether different.

In area, population, industry and financial activity Texas would suffer no distortion at all if it were in fact four States. Some would like to approach it as just one State, but as Judge Clark will later point out in some of his remarks, it is the equivalent—on almost any yardstick—of at least three of our States east of the Mississippi River rolled into one.

Now, oil, gas, admiralty litigation, offshore drilling litigation, and cases of that type in Texas and Louisiana set those States apart as unique judicial territory. They require highly specialized legal training as well as judicial experience in the fields not so familiar to the lawyers east of the Mississippi. Moreover, Texas and Louisiana are the only community property States in the circuit. They distinctly operate from civil law beginnings, whereas the legal systems of the other four States of our circuit are grounded solely on the common law.

Back when I was practicing law, if I happened to be fortunate enough to get a case in Louisiana, the first thing I did was to hire a Louisiana lawyer, because I knew I was totally lost in the Louisiana civil law system which has come down from the Code Napoleon.

As presently constituted, Florida, Georgia, Alabama, and Mississippi already have nine circuit judges. East of the river, we have our nine.

Therefore, it would not be necessary to appoint any additional judges for this region. Texas and Louisiana presently have six circuit judges, and—considering that nine is the ideal number—we had a good deal of talk about that yesterday and you may question me about it later, but I still say nine is the ideal number, and I say that from experience—but considering that nine is the ideal number of judges for an appellate court, three additional judges would be appointed from Louisiana and Texas for that new circuit, and this would present the opportunity to name men who are highly experienced in the particular fields which I have mentioned, and others, which presently consume so much of the time of the court as it is now constituted. This one consideration alone would prompt me, if I had a vote in the matter—which, of course, I do not—to let the four States east of the Mississippi remain together while combining Texas and Louisiana.

Now, there are a few other points which I would like to make very quickly, because I do not wish to consume your time with a lengthy statement. I found out yesterday that this committee already knows all about this. I doubt that you have heard a thing that you did not already know, but we appreciate the opportunity to talk to you about it.

As the circuit is presently constituted, with six States, it covers half a million square miles, 531,000 square miles. It includes nearly 32 million people, 31,880,000. The land area of the four States east of the Mississippi is 216,794 square miles. The land area of Louisiana and Texas is 314,402 square miles, 50 percent larger than the area east of the Mississippi. In 1970 the population of the four States east of the Mississippi was 17 million. The population of the two States west of the river was 14 million.

Now, that brings us to the matter of caseloads. I hope, possibly, Mr. Westphal in the very comprehensive way he has of going into this, when he comes to questions may talk about this some more; statistics can be very misleading about the status and the activities of the court. But at this point I want to say that during the year ending June 30, 1974, 2,572 appeals were docketed in the fifth circuit. Those figures do not tell you what you get from the Administrative Court, which includes all kinds of petitions, motions, and things. But these are the figures I got directly from our clerk about a month or so ago. As of June 30, 1974, we had 2,582 appeals docketed in that fiscal year—1,368 of these appeals were from east of the river; 1,197 were from Louisiana and Texas, plus 7 from the Canal Zone.

Now, of the 2,572 docketed cases, only 128 were from Mississippi, which clearly shows that the addition of this caseload to the west or to the east will really make no difference in the overall burden of the judges, whether they are serving east of the river or west—only 128 out of a total of 2,572.

Many cases require very little judicial effort. Members of this committee and counsel, of course, are lawyers and they know about those things. A case is a case is a case. We have cases that you can do your duty by in 15 minutes, as Senator Burdick was pointing out yesterday in connection with oral arguments.

I recently worked for 3 weeks on one Federal Power Commission case, and, after we had finally reduced it to writing on a very serious question of jurisdiction, and the other three judges agreed on what I had written, the parties notified us they had settled the case. That is one thing you run into when you start dealing with statistics. Many cases are so novel or extensive that, really, weeks are required for analysis and decision. But Mississippi generates very few cases of this kind, as an examination of our docket will show.

There is one other factor which, on the surface may be rather intangible, but nevertheless has its impact from my experience, and that is that both Mississippi and Alabama were originally a part of the State of Georgia. We were formed from the State of Georgia. It is our mother State. With our legal systems going back to the same common source in Mississippi, Alabama, and Georgia, I am quite certain that the business and the efforts of the judges on our court would be greatly expedited and justice certainly could not be harmed if we were put together and allowed to work together.

Now, I have heard fears expressed that a divided circuit might lapse into provinciality or into parochialism. I want to say that I have no fear of this. The Supreme Court is always there, and if provinciality and parochialism were to rear their heads east of the river it would not take the Supreme Court long to put them down, and, of course, no judge—I have been both a trial judge and appellate judge—but no judge with just pride in the exercise of his duties either desires or intends that his decision shall invoke the reversal of a higher tribunal.

Again, in closing, let me emphasize that, by grouping Florida, Georgia, Alabama, and Mississippi you will have a ready-made court of nine judges all set to go without further ado, and to me of equal importance, the opportunity will arise for the appointment of three additional judges from Texas and Louisiana from a pool of legal talent better fitted to handle litigation centered in that area than would

be judges appointed from east of the river with no special experience in each of those States. I sincerely hope, when all the factors are evaluated, that the Congress in its wisdom will see fit to leave Mississippi where it geographically belongs, and that is east of the Mississippi River, along with its sister States of Alabama, Georgia, and Florida.

Thank you very much, Mr. Chairman.

Senator BURDICK. Thank you, Judge.

Senator Hruska?

Senator HRUSKA. Judge Coleman, when we had the hearing last summer in Jackson, Miss., we were informed that a majority of the judges in the fifth circuit favored a division of the fifth circuit, so that it would become a manageable circuit and one more conventional to the circuits generally throughout the United States. Has any change of opinion occurred since that testimony was given?

Judge COLEMAN. Not any that I know of, except that, after another year, Senator Hruska, those of us who believe in the necessity for a division have occasion to believe it more strongly, and Judge Gewin, in his remarks yesterday—which probably have not been transcribed yet for you to read—emphasized that point.

We think the time has come that, if we are to maintain the right of appeal, if appeals are to be meaningful rather than just a form, or going through the motions, there just has to be a division.

Now, it has been suggested that, even if a division is made, in a year or two you are going to be right back in the same situation. Well, I do not know whether that is the case or not, but I never have thought that, when you have something that stands badly in need of remedy, you should withhold the remedy out of fear that the future might necessitate something else.

The whole thing is, as I said, that this circuit was set up in 1891 under different circumstances and conditions. I am satisfied that if the Congress today were setting out to organize courts of appeals, as it did in 1891, you would never for a minute think of making a circuit out of all this vast territory from Savannah on the Atlantic to El Paso way out on the Rio Grande.

Senator HRUSKA. But it made sense at that time?

Judge COLEMAN. Absolutely. Up until about 1965 is worked fine. I was appointed to the court—both Senators now on the bench remember when I was appointed, I am sure. We were getting 800 cases a year. We had only nine judges. We were getting along fine. Everybody was receiving oral argument. But then, of course, under the impact of circumstances well known to the Senate and the House of Representatives, the caseload escalated to 2,500, 2,800, or 3,000, depending on who is counting and how they are counting.

Although it made absolutely perfect sense in 1891, I think it is contrary to all good judgment to suggest it be left to that, although two of our brothers testified here yesterday that they wanted it left that way.

When you consider that the Federal courts today completely reorganize the State—they act in regard to the election of its legislatures under the one man, one vote rule; they realign congressional districts under the one man, one vote rule; they take over the operation of penitentiaries and mental hospitals—I do not know why we

should not be subject to the same changes when they are necessary. We give it to others. We ought to be prepared to take our own medicine if it is indicated to be the thing that ought to be done.

Senator HRUSKA. I followed your statement here in the testimony with a great deal of interest, Judge, and I want to make one observation, Mr. Chairman. I think it does recite in a concise and understandable form the essence of the arguments and the basis for a division and also the character of the division of the States. I want to thank you very much for appearing here for this purpose, Judge.

Judge COLEMAN. Thank you, Senator.

Senator BURDICK. Judge Coleman, you have a very good background with your experience in the legislative branch and now the judicial branch. You have been around.

Judge COLEMAN. I have been the beneficiary of the kindness of some mighty good people.

Senator BURDICK. That is why I want to throw you a curve.

Judge COLEMAN. All right, sir.

Senator BURDICK. Which of the two new districts would carry the name "Fifth"?

Judge COLEMAN. That was brought up here yesterday, Senator Burdick. I think the Commission recommended that the fifth—or that the designation "Fifth"—remain with the group east of the river, but by whatever name it is called, it would be all the same to me, just so we get into shape where we can attend to our business. I do not care whether we are called the eleventh or the one-hundred eleventh as far as the name is concerned.

Of course, there is great pride, of course, in the name "Fifth."

Senator BURDICK. I asked that question with a certain degree of levity, but there is still a question. Is there any merit in the "Fifth east" and the "Fifth west?"

Judge COLEMAN. Well, if they are going to be separate and independent circuits, then it should be just that way.

We come to these things. When I was Governor of Mississippi, for example, I tried my best to get the legislature to reapportion itself, and it would not do it. The time came when the Federal courts were to do it under the one man, one vote rule. I live in a small county where my people have lived since 1835. At one time in the past it had three Members of the House of Representatives. It got down to one. Sitting on that three-judge court, I had to combine Choctaw with Webster. Now we share one Representative with Webster. These changes just have to be made, and they do come about. So, whatever number the Congress assigns to us, I would be happy.

Senator BURDICK. Well, that leads to the next question. It was suggested yesterday—mildly at least—that perhaps the fifth remain the fifth and have its headquarters in New Orleans across the river; would that work out very well?

Judge COLEMAN. You mean let both circuits have their headquarters in New Orleans?

Senator BURDICK. Yes.

Judge COLEMAN. No, sir, I do not think it would work. That would be very much like having two families in the same house. I do not think so.

I suppose—although again I am sure the Senators and Congressmen would have a great deal to say about this—but logically, I suppose the circuit east of the river would have its headquarters in Atlanta because they have a new building under construction there now which would furnish housing and all. But regardless of what room we meet in or what house or what city we meet in, we need to get some room in which to really operate.

Senator BURDICK. I understand that this is just a side issue. But I think we need a little guidance from our judges.

Judge COLEMAN. If I had anything to do with it, I would not suggest that both circuits be housed in New Orleans.

Senator BURDICK. Yesterday we heard a considerable amount of testimony from the other judges that there are some innovations that we could adopt—some procedures we could adopt—that would save us time. We heard about the screening process, the limiting of oral arguments and so forth. Do you think there is considerable amount of judge time to be gained by such procedures in the future?

Judge COLEMAN. Senator Burdick, when screening first came up and was presented to our court, there were only two judges on the court who voted against adopting the procedure, Judge Wisdom and myself. I voted against adopting screening to start with because I am just a great believer in oral argument. I came up in a country where oral argument is a strong tradition.

I have seen cases, sir, since I have been on the fifth circuit, where we have read the briefs, you know, in advance and tried to familiarize ourselves with the cases, in which I have had my preliminary opinions changed completely by what I heard at oral argument. There are many cases of such complexity and intricacy that you need it. But I also agree with your remark yesterday that there are many, many cases where oral argument is just not going to help anything at all, particularly in criminal cases.

We have appeal after appeal now under the Criminal Justice Act. All the lawyers appeal because they do not want to be charged with incompetency of representation or inadequate representation. A man files a post conviction motion alleging that, "my lawyer did not even go down and argue my case on my behalf, and if he had done so the result might be otherwise." If you have oral argument as a right to everybody, they are certainly going to use it. If you allot one hour to each case that will give you an idea of the time to be consumed. So there are cases that can be disposed of with perfect justice without hearing any argument.

I always liked to rest my case on a brief when I was practicing law. If I could not put it down on paper in plain, concise language sufficient to impress the judge, I knew I was not going to impress him when I got up there to talk face to face. I remember one landmark case that I happened to be counsel on in about 1961 or 1962 where we completely changed the law of the United States on contingent fees for informers. I was representing the defendant. The fifth circuit reversed the conviction. I filed a brief. I did not go to oral argument at all.

But I do think maybe after sitting here and listening yesterday—and from what I have heard here—maybe we could use procedures where oral argument is denied by giving reasons why it is denied and

that would let the people know why we had not taken their time or expense to come to court to make an oral presentation.

Now, so far as the Rule 21 cases are concerned, where we say affirmed without further comment, that has been the practice in the Supreme Court of Mississippi for over 50 years. I have taken appeals to the Supreme Court of Mississippi—of course, we have always had oral argument and still do, but when they came down with an opinion "per curiam affirmed," no comment, I knew the judges thought I had not brought a very good appeal. I did not need any further elaboration.

Actually, when a lawyer gets an opinion from the fifth circuit, maybe 50 pages long, all he looks at first is to see how it came out, what are the results, what happened to me. If he lost, why, the reasons do not really make any difference, you know. But the reasons do make a lot of difference when you are setting precedents, laying out guidance for future cases, and there are many cases in which there should be written opinions.

I believe last year we produced over 100 opinions per judge, per curiam or signed, and I think the closest thing to it anywhere in the United States was maybe 60 in some other circuit. Writing for the sake of writing is not helping anything. I am appalled by the fact, really, that when I got on the fifth circuit in 1965 we were at only about volume 350 Federal 2d in the Federal reporter system, and now, in that 9 years, we are up past volume 500. In 9 years we have produced over 150 volumes of Federal reports, just from the courts of appeal.

Senator BURDICK. Not only that, but the size of the books is increasing, and the cost is getting more and more expensive.

Judge COLEMAN. Not only that, but when you try to study something to find out what has to be done with it, you have a haystack to work yourself through, and much of it is repetitive.

So, I think judging is an art instead of a science, and if a man puts himself in a lawyer's shoes—and all judges have been lawyers—we can take care of those problems all right.

Senator BURDICK. You have put your finger on one very important facet here. You say that a lawyer for a criminal, just to protect himself, has to appeal, regardless of merit as to his client, and if he goes through with an appeal without merit, there has to be some way to dispose of that.

Judge COLEMAN. Well, sir, it worries me that a lawyer is expected to file an appeal that he knows has no merit. That leaves me with a feeling that the profession is being prostituted, for lack of a better word. A lawyer is supposed to be specially trained, and he is supposed to know what is best for his client. Presumably, that is what the Constitution guarantees in the right to counsel. I have sat down with many a man and said, "Now, we could appeal. We can delay matters with many appeals, as you well know. We can do this, we can do that." But I never did think it helped my professional reputation to file appeals only to lose them. It certainly does not help a man who is faced with serving a term in prison to let him think he might get out when you know good and well he is not going to get out, for one day down comes the decision, and he is no better off than he would have been without an appeal. I think the law has slipped into a status where, if the fifth circuit affirms a man's conviction, then he has to be informed, and, if

he wants it done, the lawyer has to file a petition for certiorari for him. That is the law, and I am going to follow the law as far as I know how, but it seems to me that is "using a lawyer," I guess, for lack of a better term.

Senator BURDICK. Well, now, you said a moment ago that you oppose the elimination of these oral arguments to the extent they are now eliminated. Have you come to the point where you believe they have merit, providing, of course, one judge out of the three assigned to the case has a right to demand oral argument?

Judge COLEMAN. Well, I would hope, Senator Burdick, if Congress allowed these circuits to be realigned, we could then take a fresh look at the whole thing. I know there are cases that ought not to be argued under any circumstances, and I would adhere to that view. On the other hand, our present system is that these cases come down by numerical rote. No judge knows what he is going to get. Nobody else knows what he is going to get. We have a calendar judge who sets up a calendar without knowing who is going to sit, and the chief judge constitutes a calendar. That is to preserve impartiality and all that.

Take the screening procedure. I do my own screening. I do not leave it up to my law clerks. Law clerks are very helpful people, and it would be very hard to get along without them, but I also think it is useless to expect a man fresh out of law school to do with these things what a judge would do with the appropriate experience under his belt. Therefore, I do my own screening. I look at it and I see very quickly, sometimes, that a case deserves an hour's argument. All I do is check the folder and send it back to the clerk and it goes to the oral argument calendar. In other cases, they do not merit oral argument. At the present time, I am on the screening panel of Judges Dyer and Roney. We change panels every year, or thereabouts. I send a case to Judge Dyer, and if he agrees, it goes to Judge Roney. Then it comes back to me and I prepare the per curiam or whatever. We do not decide anything on a summary calendar unless it is just so open and shut that there is no room for argument about it.

Well, with all of that, in the time we spend doing those things I think we could hear a lot of argument. Say you allow a man 20 minutes to argue, you will spend that much on the screening. So, I would hope, if we get the circuits divided, we would not be standing under a mountain all the time and we could go back and largely reinvigorate oral argument, or at least grant oral argument in all of the cases where, if I were the lawyer, I would say, "I sure would like to talk to the judge for 15 minutes about this one."

Senator BURDICK. Yesterday we heard testimony from Judges Brown and Wisdom that we would have to split the circuits again in the future, and this could go on and on and on. My question is: As long as one member of the panel to which the case has been assigned, after he has read the briefs, asks for an oral argument, is that not sufficient?

Judge COLEMAN. That is the present situation, Senator Burdick. Any one of the three can put it on the oral argument calendar, and we do. If we agree it does not deserve it, we still have to agree on what is done with it. Sometimes at that point we disagree. Then it goes to the oral argument calendar. So that is a safeguard, I think.

I must say that, in all candor, I do not know of any injustices that have been caused by the summary calendar procedure.

By the same token, of course, the lawyers now who appeared before Senator Hruska and Mr. Westphal and others in Jackson, complained about limiting oral argument. My own propensity, as I have just indicated, would be to give them all we can, as far as we can without just wasting judicial time. It costs the United States a lot of money to have these cases decided. When you think about the judicial salaries and the cost of supporting personnel and travel and all that, there is no telling what each case costs.

Senator BURDICK. Well, I can give you one experience. I'll just take another minute or two here. In the first case I had as a young lawyer, I did it in a hurry; I proved it up in about 5 or 10 minutes and went to the back of the courtroom. Just as I was leaving the courtroom, one of the older lawyers tapped me on the shoulder and said, "Not a very good job, young man." And I said, "What is the matter; didn't I do it right?" He said, "Yes, sir, but take more time, take more time."

Judge COLEMAN. "Do not make it look too simple."

Senator BURDICK. I am just wondering if all these appeals are not for that same purpose.

Judge COLEMAN. Well, I just wish it were possible for all of the Senators and Congressmen—it is not possible under the separation of powers—but I wish it were possible for them to sit with us and see these problems for themselves. We can find out what you are doing. We can read the Congressional Record, keep up with every word that is said, keep up with the committee reports, and read the papers, but I wish it were possible for the lawmakers of this country to be able to sit with the court just for 2 or 3 days—especially the lawyer members; it may not be of much interest to those who are not lawyers—and I am sure it would be as revealing to them as it was to me when I first got to the court, even though I had had other judicial experience.

Senator BURDICK. Are there other procedures that you would recommend that might prevent what Judge Wisdom and Judge Brown fear might happen in a few years? Do you have any other suggestions for saving the judges' time?

Judge COLEMAN. Well, predictions are a very, very dangerous exercise. It is not given to anybody to foretell the future. But on the other hand, I have every confidence, based upon my past 9 years on the court—I was there when we had 9; I was there when they brought in 13; I was there when they brought in 15—I have every conviction that 9 men on a court can keep it going and can do a good job, and I just do not see this proliferation that they see.

Now, the point was made yesterday by Mr. Westphal that maybe we need 11. I would not quarrel too much with that, but I would like to see us start off with 9 and, if it does not get the job done in an appropriate judicial manner, we can always come back to you and say we need two more.

Our present court of 15 members formally passed a resolution. The Administrative Office was circulating the news that we needed 22 judges on the fifth circuit and we all knew we had reached the point of no return when it comes to running a court instead of a convention. We passed this resolution unanimously. We do not need any more

judges. We do not need more than 15. I think that after you pass the number 11 the more you go up, the more you slow down. You have more people involved. You have more people you have to pass by. Our en banc conferences, for example—you heard a great deal about that yesterday. There is a rule, of course, that when you are in conference you start at the end of the table and go all the way around. No judge can be stopped. There is no way you can shut a judge off when he is stating his views on a case. With 15 we can just barely get it done. Then you have to vote back up the line.

I think that after we passed 11, Senator, we slowed things down instead of speeding them up.

Senator BURDICK. That seems to be the impression that I get from the testimony. You soon reach the point of diminishing returns.

Judge COLEMAN. Yes, sir.

Senator BURDICK. Any questions?

Mr. WESTPHAL. I have a few, Mr. Chairman.

Judge, you commented that, when a lawyer gets the opinion from the Appellate Court, the first thing he looks at is that last page, to see whether it is affirmed or reversed. You indicated that it usually does not make much difference what the court said.

Judge COLEMAN. Not to him.

Mr. WESTPHAL. Well, I think if he loses, it makes a great deal of difference. If he wins, it does not make much difference; but if he loses that judgment, he has to explain to his client.

Judge COLEMAN. I have opened those envelopes many times with my heart in my throat.

Mr. WESTPHAL. You mentioned, Judge, that, if there is to be an eastern four-State circuit, it should be headquartered at Atlanta?

Judge COLEMAN. I say that is a possibility, of course.

Mr. WESTPHAL. Of course, Atlanta would be approximately at the center geographically. Are there any other places where you think that court should be authorized to sit—not simply to satisfy local pride—but to lend some efficiency to court operations, in the sense that you could calendar a group of cases from a certain part of the circuit in one place and a panel could go there, instead of having all counsel come to panels in Atlanta? What are your views on that?

Judge COLEMAN. That is a very important question and there are many facets to it. Unfortunately, under our present setup, I have seen lawyers, because that is the way the calendar fell, travel from El Paso to Atlanta or Jacksonville to argue a case, while at the same time somebody in Atlanta was going to New Orleans. I remember one time in Atlanta the Assistant Attorney General of Georgia had a case on our calendar. We called the calendar and she did not respond, and we found out she had gone to New Orleans. She had gone to the wrong place.

Of course, you have the expense item involved, too. It is all a matter of good sound judgment and good practical administration.

Now, I myself would like to see the court sit in every State.

If I am not trespassing too much on your time, I want to give a very impressive example. The fifth circuit had never sat in Jackson, Miss., when I was appointed to the court. We had plenty of business from Mississippi, but the judges were not sitting in Mississippi. I asked the judges, "why do you sit in all of the other five States, but not in

Mississippi?" They said, "Well, we have never been asked to sit in Jackson, Miss." I said, "Well, I am asking you now. I think it would be good for the public upon whose lives you have such a heavy impact, to see you and hear you." They said, "We will do it." They came. We went up and called upon the Supreme Court of Mississippi in a body. They came down the next day and called upon us. There was some State-Federal cooperation and community of spirit there that, in my opinion, did a lot of good for the cause of justice.

So I would say that where we sit should be left to the judicial council once we are organized. We should leave it to the members of the judicial council to determine that based on all they know. Although I mentioned Atlanta a while ago, I personally do not care where you put the headquarters. What I want is a court where we can get out from under some of this terrific caseload and have a little time to reflect, think, study, and maybe take a second look at cases we do not have time to take second looks at now.

Mr. WESTPHAL. You have suggested that Atlanta would be the principal headquarters of that new court, but you think the other places where they sit should be left to the discretion of the council. I think it is customary for the Congress to write into the creating legislation the places in which the court is authorized to sit, always giving the court discretionary power to sit wherever the exigencies of a particular situation may from time to time require. I take it, your feeling is that a court should sit in practically every State in a circuit?

Judge COLEMAN. The statute under which we operate says we shall hold one term in Montgomery, Ala., one in Fort Worth, Tex., and one in New Orleans. We have not been holding those terms in Fort Worth and Montgomery. There has not been a necessity for it. The chief judge knows some procedure through which he can eliminate such sittings.

We have sat frequently and regularly in Houston, Tex., ever since I have been on this court. Until the last year or so there was not anything in the statute about doing that. I think the statute as presently drawn, says, "and such other places as the council may direct." I am not, however, certain of that.

Mr. WESTPHAL. Has the existing circuit ever sat in Florida?

Judge COLEMAN. Yes, sir, we have, at Jacksonville. We sit there regularly. I am going to be sitting in Jacksonville in about the third sitting from now.

Mr. WESTPHAL. If the new circuit is formed, should Jacksonville be an authorized place?

Judge COLEMAN. I would rather see what the circuit judges from Florida say about that. They know more about the facilities and so forth and so on.

Mr. WESTPHAL. Florida generated, last year, 600 appeals which would be by far the largest volume of appeals originating from any of the four States.

Judge COLEMAN. Yes, sir.

Mr. WESTPHAL. I assume that a good share of those appeals come from the southern or middle districts of Florida?

Judge COLEMAN. I believe you only have about—you have the figures before you, I am sure—but you only have a very small number from the northern district of Florida—from Pensacola and Tallahassee—and then a pretty good bunch from the middle district—Jack-

sonville, Orlando, or Tampa—and a great many from the southern district. That is why I thought, if the committee is interested, I am sure Judges Dyer, Simpson, and Roney would be willing to state their views. I just do not feel qualified to say what ought to be done about Florida.

Mr. WESTPHAL. On the other hand, it has been suggested that there is a great deal more efficiency in a court of appeals—that is, efficiency insofar as conservation of judge time—if the judges of that court are all headquartered at the principal place where the circuit holds court. The second circuit, because of its favorable geography, in fact operates that way. The seventh circuit is now at the point where all of its judges live in Chicago and its suburbs. But in most of the other circuits, even though the court may sit in one principal place, such as the eighth circuit sitting in St. Louis, nevertheless, once they get through with sittings the judges scatter back to their own home States. Now, do you have any particular views on the possibility of having all hearings held only at the headquarters of the court? I understand the fifth circuit in the last two calendar years, I believe, has tried having all panels sit in New Orleans at substantially the same period of time. What views do you have on that issue?

Judge COLEMAN. We have been trying to sit in New Orleans most of the time deliberately because the building has been refurbished and redone, and all the judges have individual chambers there where they can work and so on.

Generally, we start a session on Monday morning. I drive down on Sunday afternoon. The court adjourns on Friday, say at 2 o'clock, and I am home by dark. I do not think that presents any real problem.

Mr. WESTPHAL. If the judges live further from New Orleans it is a different matter.

Judge COLEMAN. Well, those who live farthest away, of course, will probably get on a plane and be there more quickly than I can get to Ackerman in an automobile. You can fly to New Orleans pretty quickly in the fifth circuit.

Mr. WESTPHAL. You say that there is a new Federal courthouse—or at least a new Federal building with facilities in it for the courts—being built in Atlanta. Do you, or Mr. Reese, the circuit executive who is present in the hearing room, happen to know how far along that construction is? Have they actually started construction of the building?

Judge COLEMAN. No, sir, Judge Griffin Bell would know about that, of course, because he lives in Atlanta. I understand that the Congress has authorized it and funded it. Now, how far along it is I do not know, but it is being built where the old Union Station used to be.

Mr. Reese informs me that construction has not started on it yet.

Mr. WESTPHAL. Well, it would help if we knew just what stage we are at. If a circuit court is going to be headquartered in that facility, and if that facility is still on the drawing board, so to speak, there may be the opportunity for GSA to make some changes in the plan, so that the facilities that are erected will be appropriate for use by the circuit court, especially one which would have nine judges, and especially if those nine judges were ultimately to have their official chambers in Atlanta. I think my question is, "how far along is that Atlanta

building?" On the drawing—do you have any information on that?

Judge COLEMAN. Perhaps Mr. Reese can answer that.

Mr. REESE. Mr. Westphal, as I understand it, the plans have been completed for a new Federal building. Those plans, architectural drawings, are in the hands of the General Services Administration. The plans provide for courtrooms for a circuit court of appeals and for chambers for the judges of such a court.

Mr. WESTPHAL. How many courtrooms and how many chambers? Do you have an idea?

Mr. REESE. No, I could only estimate. I can provide that information later.

Mr. WESTPHAL. Could you provide that in letter form, addressed to the committee? We will need to know how many courtrooms are provided, whether any of the courtrooms are of such size that they would be used for en banc purposes by a bench of 9 or 11, and how many chambers are contemplated in that structure. We would also be interested in knowing whether they have put the contract out for bids, and whether they have accepted any bids—in other words, at just what stage is GSA now and what is their timetable for putting it out on bids, if they have not already done so. This all becomes of some concern, because if the circuit court does not have proper facilities it labors under a handicap that we certainly would not want to impose on anybody.

Judge COLEMAN. I think, from what I have heard, that I would like to suggest, if it is agreeable to you, that Mr. Reese be asked to confer with Judge Griffin Bell about this, because he is the resident circuit judge in active service at Atlanta. I think I have heard Judge Bell say that this is to be a 33-story building at the site of the old Union Station, which has since been abandoned, that it would have more adequate space for the court of appeals, if there were to be a new circuit. But if you wish, I am sure Judge Bell would be glad to write you about that.

Mr. WESTPHAL. It would perhaps be more convenient if Mr. Reese could act as the intermediary and furnish that information. The reason I am making that request, rather than having the subcommittee staff try to get that information directly from GSA, is that I understand it is customary for GSA to consult the local representatives of the judicial branch if they are planning any judicial facilities.

Mr. REESE. I will be happy to do so, Mr. Westphal.

Mr. WESTPHAL. Thank you.

[The requested information is contained in the letter of November 5, 1974, which follows:]

U.S. COURT OF APPEALS,
FIFTH JUDICIAL CIRCUIT,
New Orleans, La., November 5, 1974.

Mr. WILLIAM P. WESTPHAL,
Chief Counsel, Subcommittee on Improvements in Judicial Machinery, Dirksen Office Building, Washington, D.C.

DEAR MR. WESTPHAL: When the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary of the United States Senate was hearing testimony, from several of the active judges of this Circuit, on the problem of circuit realignment, I was present in the hearing room and was requested to furnish the Subcommittee a current status report on the court of appeals facilities now available and those planned for the new U.S. Courthouse in Atlanta, Georgia. There follows the information you requested.

FACILITIES NOW AVAILABLE

One courtroom with a three-judge bench (also used by the district court),
Two resident judges' suites, and
Two non-resident judges' suites.

FACILITIES PLANNED

One large courtroom with a 15-judge bench.
Two regular courtrooms, each with three-judge bench.
Two resident judges' suites,
Eight non-resident judges' suites,
A central library,
Two judges' conference rooms,
Court clerk's space,
Expansion space for five non-resident judges' suites, and
Expansion space for the court clerk.

STATUS OF FACILITIES PLANNED

Plans and specifications were completed in July 1974. Construction bids can be solicited by the General Services Administration (GSA) as soon as current funding problems are resolved. As originally approved by Congress, GSA was authorized to spend about 27 million dollars. It is now estimated that the cost will be in excess of 60 million dollars and it will be necessary for Congress to authorize a higher cost limitation before a construction contract may be awarded.

The site has been selected and GSA has an option to purchase it.

SUMMARY

In summary, adequate facilities for a court of appeals headquarters are planned in the new building in Atlanta. If Atlanta is established as a headquarters point before the new building is completed, sufficient space is available in the current building to satisfy an interim operation.

Hopefully, this gives you the desired information; if not, however, please let me know what else you wish to have.

With kind regards, I am

Sincerely,

THOMAS H. REESE.

Mr. WESTPHAL. Judge Coleman, I have no desire to run through the complete questioning that I posed to Judge Gewin yesterday—I believe you were present in the hearing room and heard that—but I am just a little bit troubled by your assertion, early in your testimony, that it would not be necessary to appoint more judges, because those four States would already have their nine. You later modified that to say that you really do not have any objection to 10 or 11, but you thought you would like to start with 9 because you could always ask Congress to authorize more if 9 could not handle it. I believe that is a fair summary of what you said, isn't it?

Judge COLEMAN. Yes, sir, that is right.

Mr. WESTPHAL. Now, this is a matter of some concern in the subcommittee's consideration of this problem concerning the fifth circuit, because, as of June 30, 1974, the fifth circuit had pending 2,310 cases, which is almost a full year's filings. Other studies indicate that, on the average, for a case which receives the full-blown treatment of oral argument and a full signed opinion, it takes an average of 349 days from the date the notice of appeal is filed until the opinion is released.

Judge COLEMAN. What are the statistics between the time the case is ready for our consideration and the time it is decided?

Mr. WESTPHAL. 189 days.

Judge COLEMAN. Between the time it is ready and decided?

Mr. WESTPHAL. Yes; between the time the last brief is filed and the case is decided by the court. I am talking now about a case that is decided by a full-blown signed opinion after oral argument. From the time counsel have completed their work—getting that last brief and everything filed—to the day an opinion emanates from the fifth circuit court takes an average of 189 days, which is a considerable period of time, on the average, when we compare it to some circuits that do not have the problems of such overwhelming caseloads. I mean this as no criticism of the effort made by your 15 judges.

Judge COLEMAN. I understand.

Mr. WESTPHAL. I am just mentioning that as a circumstance. But the subcommittee would like to see you have sufficient manpower and resources so that these time factors can be shortened somewhat.

Judge COLEMAN. I strongly suspect that if a real study were made it would be found out that a great many of these 189 days are due to the extremely large number of judges who have to participate in what finally becomes a final judgment, because you nearly always get a petition for rehearing en banc. Then that has to be circulated and all that.

Mr. WESTPHAL. This would not include any time consumed——

Judge COLEMAN. This is just from the time the first opinion comes down.

Mr. WESTPHAL. In any event, the point of my question is this. The fifth circuit now has a pending caseload of 2,300 cases. Were we to come up with a new circuit, that new circuit for four States would have 53 percent of the new filings, so, I am just assuming that they would also get 53 percent of the pending cases. You would then have a considerable number of pending cases, not all of which can be regarded as a backlog, of course. So I just have some doubt in my mind—as we get into a refined statistical analysis related to the workload of the nine judges in a four-State circuit, whether we may not come to the conclusion that, in order to give that new circuit, not only a fighting chance to keep up with the current incoming cases, but also a chance to whittle down their so-called backlog and eventually achieve some better timeframe on this overall time from notice of appeal to when the opinion comes out, or from last brief to when the opinion comes out—I am just wondering whether you may not have to start out with 10 or 11 judges in order to have that opportunity.

Judge COLEMAN. Well, I should think we ought to start with an uneven number, either 9 or 11. I am not here to oppose the number 11. If you have 10, you are likely to wind up with a lot of district judges being affirmed by an evenly divided court, which does not even write an opinion and, therefore, the whole thing remains a mystery.

Not being a chief judge of the court, I am not too much involved in these various and sundry statistical mechanics and operations. I have been trying to get my opinions written. I will say that, at this time, I have no opinions assigned to me that have not been written and filed; I am ready to start a new court year with a clean desk. I go to my office every Saturday all day, most of the time on Sunday afternoons, and also at night after supper. That does not bother me. I grew up on the farm. I am just foolish enough to like work, and being a judge is just like being anything else; it has its difficulties and you have to meet them.

But there is one matter which is something of a mystery to me. We have the States of West Virginia, Maryland, Virginia, North Carolina, and South Carolina—pretty good States, I would think—which are operating in the fourth circuit with only seven judges. Now, how many States is that?

Senator BURDICK. I would like to verify, at this point, your opinion. Based upon the caseload that you have now, if we split the fifth circuit to the east and west of the river, you believe that you are going to handle that with nine judges?

Judge COLEMAN. I believe that, sir. I would not be at all opposed to putting 11 judges on if the committee, in its wisdom, sees fit to do that.

Senator BURDICK. This is your opinion?

Judge COLEMAN. Yes; my opinion is that nine can do it. I also have the opinion, based on past experience, that if you start off with 11, it will be just that much sooner that you are met with the argument that you should have 13. If 9 horses will pull the wagon easily, 13 will pull it more easily.

Mr. WESTPHAL. I have no more questions.

Judge COLEMAN. Thank you very much.

Senator BURDICK. Thank you very much, Judge.

Judge COLEMAN. Thank you.

Senator BURDICK. Our next witness is Judge Clark.

STATEMENT OF JUDGE CHARLES CLARK, FIFTH CIRCUIT, JACKSON, MISS.

Judge CLARK. Thank you, sir.

Senator BURDICK. I just want to let you know that Senator Hruska had an engagement with the Appropriations Committee. He wanted me to express to you that he is sorry that he could not be here to hear your testimony, but he will read the printed transcript.

Judge CLARK. Thank you, sir.

Mr. Chairman, I, as Judge Coleman, have a prepared statement and then I will be glad to answer any questions that are generated by that or that may be directed to me.

Others have spoken to the do-or-do-not-divide issue. My remarks are limited to the placement of the State of Mississippi if this committee decides that this circuit should be divided. I favor a location of Mississippi into a circuit with Alabama, Georgia, and Florida. The report of the Commission on Revision of the Federal Court Appellate System in December 1973 defined several important criteria. My prepared remarks are really directed totally to that report.

The first of the five criteria that your Commission thought should be controlling was that, where practical, circuits should be composed of at least three States, but in no event just one. Since Texas is geographically a single State, the Commission recommended that Mississippi and Louisiana be joined with it into a western circuit; however, Texas cannot properly be regarded as a single State in any real judicial or political sense. Its area is greater than the rest of the States of the fifth circuit combined. Its population approximates that of four of the other five States in its total number, and the population mix contains Indian, Negro, and Mexican-American ethnic groups, all of

significant size. It encompasses vast agricultural and industrial enterprises, and has seaports and an international border. It generates today more cases than Alabama, Georgia, and Mississippi combined. Only in the sense of its constitutionally limited representation in the U.S. Senate can it be said to be on a par with the other States in the fifth circuit.

The second criterion which the Commission weighed was that circuits should not immediately require more than nine active judges, but since the time of the Commission's recommendations, filings in the fifth circuit have increased 11 percent. Thus, if the maximum new judge power of nine per court were assigned to both sections of a divided fifth circuit, the average caseload of the two divisions already would be well above the national average which the Commission's report thought was a goal that should be sought to be achieved.

However, if five new judgeships, to make a total of 11 judges, were assigned to a circuit comprised of Texas, Louisiana, and the Canal Zone, today's caseload would be safely below the figure that the Commission thought was desirable, and if two additional judgeships for a total of 11 were assigned to the other side of the division the caseload there would also be below the national average.

The third consideration that your Commission advanced was the national character of the resulting circuits. It was recommended that, to the extent practicable, the circuits contain States with a diversity of population, legal, and socioeconomic interests. It is in this area that the placement of Mississippi with the States to the east shows most favorably. Mississippi shares the mighty river, from which it takes its name, with Louisiana. Only if Mississippi is included in an eastern circuit could the river's regular generation of its unique admiralty litigation be added to the eastern circuit.

Mississippi is also fortunate enough to enjoy a very substantial oil and gas production and a refining industry within its borders. While both Texas and Louisiana lead Mississippi in the size of these industries, the assignment of Mississippi to the eastern circuit would be necessary to bring any significant amount of oil and gas related litigation to that circuit. On the other hand, the placement of Mississippi into a western circuit with Texas and Louisiana could add no significant dimension that the Commission sought to obtain. It would only add volume.

The fourth and fifth considerations of the Commission, which were marginal interference and the inclusion of noncontiguous States, are not pertinent to any proposed division that would be made of the fifth circuit within itself.

Because past experience has shown it to be a far more accurate barometer of judicial forecasts than the Administrative Office figures used by the Commission, our clerk maintains his record of filings, which does not separately count cross appeals and which includes the actual number of agency review cases assigned to the States where the cases originate, rather than projecting the estimate of such cases based on an overall percentage. When the current, more accurate figures of the fifth circuit are used, they show that dividing the present circuit between Mississippi and Louisiana would result in the best possible balance for now and also for the future. The difference in appellate filings today would be less than 2 percent, and the faster

growing western side of the division would eliminate this difference in the immediate future.

As Judge Coleman has so aptly put it, Mississippi has a historical kinship with Alabama, Georgia, and Florida. It has a particularly close affinity with Alabama, its mirror-image twin, which not only is rooted in the past, but is also cemented into the foreseeable future. The U.S. Corps of Engineers is presently constructing a gigantic water highway which angles across the border between Alabama and Mississippi. The tremendous volume of commerce which will continuously flow up and down this important artery should not be served by two separate circuits.

A division of States within its existing boundaries is the most plausible means of relieving the debilitating workload of the fifth circuit. Mississippi, the pivotal State in any circuit split, desires to be placed with those States from which it was created. Happily a line drawn at the river between Mississippi and Louisiana is the most equitable means of equalizing the judicial workload between the two resulting divisions.

I would add this. I share Judge Coleman's views that the nine men who currently occupy the judgeships that are already authorized for the States of Alabama, Mississippi, Georgia, and Florida, could, in my opinion, very adequately handle the present caseload that originates in those States. Also, like Judge Coleman, I have no objection whatsoever to an increase in the court's size to 11 judges. There does come a point in working with a large number of other judges on en banc court matters, and other general court matters, when the number ceases to give the court the efficiency and ability to dispose of extra appeals. We think we have reached that point of saturation—or perhaps even supersaturation—at 15 in the fifth circuit, but I see no reason why 11 judges would not give us added judge power and not be so burdensome in total number that they would cut down on the efficiency of the court.

In short, I am of the opinion that 9 could handle the workload to begin with, but I do not object to 11.

Senator BURDICK. Do you think 9 could do it presently?

Judge CLARK. Yes, sir.

Senator BURDICK. Judge, do you have any suggestions for different procedures that might be adopted by the courts that would ease the burden somewhat? We have had reference here in testimony in the last few days to screening processes, the limitation of oral arguments and things of that nature, so that more cases could be handled by the judges.

Judge CLARK. Senator, I know of nothing that can be done that is not presently being done in the fifth circuit. I am sure the committee knows what our procedures are now, the use of opinions that contain no reasoning, but which are definitive and known to the bar to be assigned to a category of cases controlled by existing precedent and in which an opinion would be of no value other than to the party's litigant to explain the court's reasoning.

We also eliminate oral argument in about—well, more than 55 percent of the cases presently filed with us. But this must be a completely unanimous procedure by the panel of judges assigned to hear that case.

I know of nothing else significant that could be done.

Senator BURDICK. What about law clerks?

Judge CLARK. Personally, we are at the saturation point in my office. We have three law clerks because I have opted for that procedure over two clerks and two secretaries. We are having some difficulty in the stenographic department, and I am very seriously considering going back to the opposite balance which is not good, either. I tried two secretaries and two law clerks for a while, and it is heavy on the secretarial side. But these clerks have a maximum potential for input to a single brain. It may be the size of my brain that is the problem in my office, but I do not believe I could keep more than three clerks productively occupied.

Now, our central staff is something that we hope will offer us some new potential. We cannot realize the full value of that office yet because we do not have a staff director that we think is of the caliber to supervise the work of those people. We have just been unable to hire a person at the level authorized by the Congress to date. We are hoping that Congress will see fit to appropriate a sufficient amount for that chief staff law clerk's position to enable us to have an attorney widely experienced and well versed in the law, who can manage that office to make it more productive. This could then give us input that could possibly help with the workload.

Senator BURDICK. It seems generally agreed that, once you pass nine judges, you are getting to an efficiency impasse; is that correct?

Judge CLARK. I agree with that, sir.

Senator BURDICK. Staff may have some questions.

Mr. WESTPHAL. Thank you, Mr. Chairman.

Judge Clark, Judge Wisdom appeared here yesterday, and I am sure you know, basically, what views he expressed to this committee on this issue. One of the things that he put rather heavy emphasis on was the fact that he implored the Congress to do something about curtailing the input into the Federal court system. Various people will have various reactions to such a suggestion, but inevitably, involved with such a consideration, is the question of whether, in attempting to do so, you are curtailing the legal rights of anybody whose case is thereby denied Federal court jurisdiction. It seems to me, from the statistics that have been presented for the subcommittee's consideration, which document the growth in judicial business ever since the end of World War II, that—whether Congress splits the fifth circuit or does not split the fifth circuit, whether it splits the ninth circuit or does not split the ninth circuit—eventually it is going to have to give some consideration to the feasibility of at least a moderate curtailment of input, simply because these courts, no matter how reorganized or reshuffled, will eventually again become swamped. Do you have any particular views on that point as it relates to what the caseload will be for a four-State circuit and how nine judges—or whatever number of judges—can possibly handle that incoming caseload plus reduce the backlog, as I discussed with Judge Coleman? I would be interested in whatever views you have on that.

Judge CLARK. Let me compose my thoughts just a little bit into categories. In the first place, I agree entirely with the thesis that Judge Wisdom advances. The splitting of the fifth circuit is to my mind an expedient, albeit a necessary expedient. I do not share his views in opposition to the splitting of the fifth circuit.

If I may use an analogy that perhaps is not too good, if a man gets the terrible news that he is diagnosed to have cancer, he can curse the surgeon or submit to the surgery in the hopes that it will correct the condition. I do not think that division of circuits, proliferation of circuits, is the answer to the Federal judicial problem. I do believe curtailment of jurisdiction is essential for the long-range solution. I am convinced that, if you do not divide the fifth circuit right now, justice will suffer. Now, where the suffering will come all depends on whose case does not get heard or whose case does not get sufficient attention. I do not think there is a judge in our circuit that lets a case go out of his office that he believes is unjustly decided or does not receive enough attention. But this is always an individual matter, and somewhere along the line, with the press of business, we will either be unable to reach a case in time to do justice or we are going to let cases out of the chute that really are not ready to be released for their precedential value or their effect on the litigants.

Furthermore, and maybe more fundamentally, I believe that the continued proliferation of Federal jurisdiction is harmful to our federalism. The States have, in every case in the fifth circuit, splendid court systems. I do not mention Mississippi as an outstanding example, but I do not say that Mississippi is anything less than a State whose courts accord justice to the litigants before them in every case. I think that the States would respond magnificently to additional challenges, to support the load of deciding cases, deciding controversies between people, in a peaceful way.

I personally agree with Judge Wisdom that diversity jurisdiction has served its purpose. In the days when the entire country was provincial, diversity jurisdiction allowed people to see the bigger picture, to keep pettiness from deciding cases with out-of-State persons and with large corporations. But that day is gone now. People in even the most rural sections of my State, and of other States in my circuit, understand that fairness is the guide for court systems, not whether the plaintiff is your neighbor or whether the defendant is your neighbor. I think that the Congress should be very careful in adding new areas of jurisdiction to the Federal courts, and I think that it should look carefully at areas where it can curtail already existing jurisdiction if it wants to solve the ongoing problem of the management of a court system.

Senator BURDICK. Judge, I would like to respond to what you have said about diversity jurisdiction.

I have been for some time now the author of a bill, which was sponsored principally by the American Law Institute, and do you know that I have not received an endorsement from a single bar association in the country?

Judge CLARK. Senator, I did not know that——

Senator BURDICK. The lawyers thought it was useless for some reason.

Judge CLARK. I will say this. I came to Washington with the president of our State bar association, who will be before you in a minute, and I am sure that he will advise you that that is not the widely held opinion of the Mississippi bar, either.

Senator BURDICK. I would be just delighted to have a resolution from you. It is a modest proposal at best, too.

Judge CLARK. Yes, sir. It is not a full abolishment. I just say that I entertain that opinion myself. Of course, the abolishment of diversity jurisdiction in the fifth circuit's case would probably only save us about 10 percent of our workload. It is not going to be the complete answer. But I think that we have got to look for ways to curtail the jurisdiction of the Federal courts in many areas.

Senator BURDICK. I think one of the reasons that the statistics in the Administrative Office show a leveling off in the district courts is that there has been some relief in sight. For example: Selective Service cases are no longer coming in; we passed a bill that would eliminate or reduce the number of lawsuits in cases involving vessels on the high seas; and no-fault insurance may be on the horizon, which would eliminate a lot of personal injury cases. So there is a little help coming over the hill, perhaps.

Judge CLARK. Yes, sir. We welcome it. At the same time, we get the Occupational Safety and Health Act bringing us new cases every day and NEPA, the National Environmental Protection Agency, generates environmental protection cases. These are both very difficult areas because they are precedential and they have to be very carefully structured.

Senator BURDICK. After some case law and after precedents are established, they will not be as great a problem.

Judge CLARK. Yes, sir.

Mr. WESTPHAL. In addition to curtailing input by changing existing jurisdiction, there is the matter of, as you pointed out, seeing that not too much additional workload is imposed on the Federal system. I am referring to the so-called impact theory the Chief Justice of the U.S. Supreme Court is quite interested in. As long as the subject has come up, I thought I would mention, for the sake of the record, that the chairman of this subcommittee has been particularly instrumental in trying to watch for those things in this past Congress. Efforts were made to throw some 26,000 National Labor Relations Board "unfair labor practice" cases into the district courts, taking them completely out of the hands of the General Counsel of the Labor Relations Board. Had that legislation passed, the district courts would be inundated with cases of that kind. There are various examples that I could cite, but the point is, whether circuits are split or not, there must be some further effort to try to curtail Federal jurisdiction that is not necessary for the resolution of individual rights. Do you agree?

Judge CLARK. Yes: I do agree.

May I note one thing here? This was not commented on earlier because it slipped my mind. The insertion of agency review at the appellate level has advantages because it tends to bring it to a close more quickly, but that has a number of disadvantages as far as the court of appeals is concerned. We get reviews from the NLRB directly into our court. It never goes to a district court, and the number of cases that would naturally fall out there are not saved to us at the appellate level. Certainly it would be a shifting of burdens, because the district courts would have to move in and pick these up, but we would get a lot fewer labor cases appealed if that were not so. The same is true of Federal power reviews and other reviews. They are in-

serted into the system at the appellate level, which is an unusual procedure.

Mr. WESTPHAL. There is one more point here that I would like to make. You will recall that at the public hearing held by the Commission on the Revision of the Federal Court Appellate System, the so-called Hruska Commission, you brought a bit of demonstrative evidence into the hearing room. I suggested that you do not go to the trouble of bringing that demonstrative evidence here to Washington, but I have just now been reviewing the record of the hearing there at Jackson. If your memory can supply the exact figures and statistics I will be happy to have you do so, otherwise, I will refresh your recollection from what I have gleaned from the transcript of that hearing.

You will recall that you brought into the hearing room at Jackson the printed slip opinions which came from the 15 judges of the Fifth Circuit Court of Appeals during a particular fiscal year, and you piled those slip opinions one on top of the other on the hearing table. They measured 51½ inches high, which is not quite as high as Dr. Elliot's shelf of books, but it nevertheless is 4 feet 3½ inches of slip opinions. Do you recall that one demonstrative bit of evidence that you produced at that hearing?

Judge CLARK. Yes, sir.

Mr. WESTPHAL. I think in producing that you made the comment that, on a bench of 15 judges, if you want them to be well informed on the work that was being done by all judges of that court, you are compelled either to read—or at least to review—material contained in that 51½ inches of slip opinions sometime during the course of the year.

Your second bit of demonstrative evidence was the assembly of a stack of printed slip opinions that represented the end work product of just those cases in which you participated as one of the judges of the three-judge panel. They included, also, those cases in which you were acting as a judge sitting en banc. That pile of slip opinions came to 1 foot in height. I mention that because I think that that is a pretty good capsule indication of the problems that are brought about by a court having the volume of business that the present fifth circuit does have and the problems which individual judges on a 15-judge court do have.

Now, if the fifth circuit is split and if the four States to the east have just nine judges, the number of incoming cases would be 193 per judge, only slightly less than the 219 per judge in fiscal year 1974 in the fifth circuit with a bench of 15 judges.

Now, with 53 percent of the 2,310 cases pending on June 30, it is likely that your wonderful stack of slip opinions in which you participated would probably not be reduced in size by the fact that the fifth circuit is split?

Judge CLARK. That is true.

Mr. WESTPHAL. But the 51½ inches of slip opinions would be considerably reduced; would they not?

Judge CLARK. Yes. There might also be some slight reduction in the number of en banc opinions that I would participate in, too, Mr. Westphal.

Mr. WESTPHAL. Well, that depends upon what type of internal procedures the new court develops one way or another to deal with that.

Judge CLARK. The problem gets to be one that progresses geometrically when you increase the number of judges on a court. This is significant to me in going from 9 to 11, even. It is not just 2/11th's more difficult.

Mr. WESTPHAL. I understand that.

The other thing the committee has been quite interested in is the fact that the number of cases in which oral argument has been denied in recent years—reaching up to 57 and 60 percent, depending on how you look at the statistics—the resort to other innovations such as Rule 21, and some of these other procedures followed in the circuit are not very satisfying to members of the trial bar throughout the present fifth circuit. Therefore I think there are two objects to be sought as one considers splitting the circuit. One is to try to give the judges of an appellate court a more manageable workload by reducing the per-judge statistics: the second is that by reducing the workload we may obviate the need for a court to resort to various expediencies in order to handle an overwhelming caseload and give that court an opportunity both to accord oral argument in more cases, and to write opinions in more cases, rather than relying upon Rule 21 excessively. I think that that is important, because then the members of the bar, and their clients at large, feel that whatever issues they raise, whatever varying degree of merit they had, were, in fact, deliberately considered by that court. Would you agree that those are two of the objectives that are desired?

Judge CLARK. Absolutely. I wholeheatedly agree.

May I make one comment? I think—and this is a personal opinion which I have discussed with no other judge—I think it would be unrealistic for the Fifth Circuit to be divided on the prospect that the resulting divisions would go back to a regular oral argument calendar. I do think that one important difference would be made and should be made in the approach taken to screening cases without oral argument, and that is that the standard would move from one where the judge asks himself, after reading the briefs, "Would oral argument help me to be surer of my decision in this case?" You see, that gap will let you decide some cases involving very important legal principles where the resolution of the legal principle depends solely on an issue of law. I normally do not get that much out of a lawyer arguing to me that the case of "Jones v. Brown" means thus and thus. Eventually I have to get that case out and read what the Supreme Court meant to say or what another member of my panel meant to say. The lawyer's urging is of very little help, but when he starts to explain to me how the facts played in it, it gets to be very important to listen to him and consider what he has to say.

But that standard could move from "would oral argument be helpful" to "is this a frivolous case" or "is this a case that is really of very light weight in which the answer is very apparent?" That would still enable us to dispose of a number of cases without oral argument, but a lesser number.

Senator BURDICK. I would like to interrupt at this point.

What is accomplished by granting oral argument when, on the face of the briefs, the case flies in the face of well-established precedent and law?

Judge CLARK. Nothing at all, Senator.

Senator BURDICK. Except maybe making the lawyer feel better.

Judge CLARK. He has gotten a trip, in my opinion. The client is not well served because that expense money has to come from somewhere. The lawyer's time is taken and the court's time is used. We have had lawyers request that cases be placed on the summary calendar because that procedure is now available to them. Previously they would have had to routinely come and appear in New Orleans and so forth. Now we have them ask, with permission of the court, that the case be decided on the briefs.

Mr. WESTPHAL. I think we all recognize that there are certain types of cases in which oral argument is not necessary for a mature and deliberate resolution of an issue, either because there is so little merit that the case is virtually frivolous or, as you stated it, there is only the question of whether a certain case falls within the four corners of a previously decided legal issue. But what you are saying is that, with a smaller court, a more manageable workload, and more manageable procedures in the screening process, there will be room to adopt a different standard, and that, in a case which may not be of earthshaking precedential value, but which nevertheless contains a complication in the facts, oral argument which would be helpful to the court, a decision which would be more satisfying to the lawyers on both sides, and a result which would be more readily accepted by litigants and by the public at large would all be possible under that new standard whereas it is not now possible in such a case.

Judge CLARK. That is very close to my view, Mr. Westphal.

Mr. WESTPHAL. In other words, instead of denying oral argument in 60 percent of the cases, the court would only be denying it in 30 to 40 percent?

Senator BURDICK. It might go to 70, depending on how many frivolous cases you have. How do you get a percentage?

Judge CLARK. I would just give you this example—and I am sure this is not confidential. In my own experience on the court, the number of summary cases in which I am the judge with the initiating responsibility—in other words, where the case comes to me first for review—has varied each year depending upon the panelists I am with. With the case mix that comes to me, I think that it has varied from 45 percent to 70 percent in certain months because we get our statistics by the month. So it is going to move some, you are correct about that. I do hope and I would expect that a higher level of oral arguments would be reached, that a lower threshold would be established for throwing the case over to the oral argument docket, if we had the time to do it.

Mr. WESTPHAL. No further questions.

Senator BURDICK. Thank you, Judge Clark.

Judge CLARK. Could I impose on you for one comment, because it related so specifically to a matter I had brought up in Jackson?

Senator BURDICK. Certainly.

Judge CLARK. You asked Judge Coleman about the establishment of a headquarters in New Orleans for both circuits. I made the suggestion in Jackson as a matter of expediency. I continue to believe that, at least for a temporary time, it would be completely suitable to headquarter both courts, if you do choose to divide the circuits, in the same building in New Orleans where we now have chambers. I know there

are more than 18 sets of chambers in that building for judges and their staffs. I know there is such room and sufficient mechanical ability for a clerical staff to process the number of papers that move in and through our court in total in that building. I suggest to you that it would be a perfectly suitable means of operating both courts if it was on a temporary basis. I did not mean that the facility should serve permanently for that purpose.

Thank you so much. I appreciate having had this opportunity.

Senator BURDICK. Thank you very much. Our next witness is James Hugh Ray of the Mississippi Bar Association.

Welcome to the committee, Mr. Ray.

STATEMENT OF JAMES HUGH RAY, PRESIDENT, MISSISSIPPI STATE BAR ASSOCIATION, TUPELO, MISS.

Mr. RAY. Mr. Chairman and Mr. Westphal, following the basic format of Judges Coleman and Clark, although not in printed form, I should like to make a preliminary formal statement and then attempt to answer any questions you might have.

As president of the Mississippi State Bar, it is my privilege to relate the position of that organization of lawyers on this question of realignment of the Fifth Circuit Court of Appeals. I do so with the approval and at the urging of the Board of Bar Commissioners which is our governing body. I think it will interest this subcommittee to know there are approximately 3,400 lawyers who are members of the Mississippi State Bar and that our bar is what we call an integrated bar, and by that I mean by statute lawyers who are licensed to practice in our State are required to be members of the association.

The Mississippi State Bar strongly favors a division of the Fifth Circuit and an alignment of Mississippi with the States of Alabama, Georgia, and Florida as a separate circuit. The geographic location of our State, its history, as has been so eloquently referred to by Judge Coleman, and its economic ties, the economic ties of its citizens, all reflect a long and continuous bond or a community of interests with our sister States to the east. Historically, as has been pointed out, Mississippi was originally a part of the State of Georgia, as was Alabama. As a consequence of that, our entire body of law, decisional and statutory law, has necessarily been shaped and significantly influenced by that historical fact.

The growth over more than a century of the socioeconomic ties between citizens of the four States mentioned is recognized by the fact that more than 20 departments, agencies, and commissions of the U.S. Government serve at least 3 of these 4 States—at least Georgia, Alabama, and Mississippi—and I am not sure whether these departments and agencies serve Florida. They may.

They serve these States through regional offices that are located in Atlanta, Ga. These agencies and departments include the Departments of Agriculture; Commerce; Defense; Health, Education, and Welfare; Housing and Urban Development; Interior; Labor; the LEAA of the Department of Justice; Department of Transportation. Many other agencies and commissions, of which I have a partial list, have their regional offices in Atlanta and serve Mississippi, Alabama, and Georgia and, as I say, I am not sure, they may serve Florida as well.

[Mr. Ray's complete list appears at the conclusion of his testimony.]

As further evidence of the close interrelationship between these States, Judge Clark alluded to the Tombigbee Waterway in his remarks. This body of water will extend from the Tennessee River through the States of Mississippi and Alabama along the Tombigbee River, the waterway is now under construction and, when completed, it is expected to develop into one of the major arteries of commerce in our section of the United States.

In addition to that project, for some time now, studies have been underway for a proposed highway corridor system which would extend from just north of the State of Florida to Kansas City, Mo., and would serve to further solidly link by this transportation system and communication system the four States to which I have referred.

I might add that representatives from all of these States are working together in a strong spirit of cooperation in an effort to see that this vast corridor system would hopefully become a reality in years to come and serve the Southern part of the United States.

If Mississippi should be severed from its sister States to the East in the realignment of the fifth circuit, it would apparently then be placed with the States of Louisiana and Texas, and the Canal Zone, to the West and perhaps others. In so doing, the value of the judicial history which stems from Mississippi's origin as a part of the State of Georgia would largely be lost insofar as the circuit court of appeals would be concerned.

Louisiana, as you know, has a system of laws based upon the Napoleonic Code, and both Louisiana and Texas, as Judge Coleman has mentioned, are what we know as community property States, as contrasted to the common law system known in Mississippi and the States to the East. Thus, from the standpoint of the value of the judicial history of the decisional law as well as the statutory law, I suggest to you that the judges of a court of appeals would not receive the assistance that they would otherwise receive if Mississippi were placed in a circuit with the States to the West.

The Mississippi State Bar Association strongly urges that our State be aligned with Alabama, Georgia, and Florida in any division that the Congress may make of the existing fifth circuit. We appreciate the opportunity of making this position known to you. We offer to be of any service we can in your considerations and deliberations, and if there should be questions that I can answer as a representative of the Mississippi State Bar, I shall be more than pleased to attempt to do so.

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

Whenever we have a problem in this country based upon caseload, we try to meet the problem and give justice at the same time. A few judges appeared here yesterday from your circuit and indicated that splitting the circuit would provide relief for only a short time and then we would need to split again.

How do your lawyers feel about the procedures which have been adopted to enable the judges to turn out more work and relieve themselves of a lot of unnecessary work? Specifically, how do they feel about the screening process?

Mr. RAY. Mr. Chairman, I think it would be fair to state that the practicing lawyers of Mississippi generally feel that they would like an opportunity for more oral argument in their cases on appeal. We recognize, of course, that the court must, in its wisdom, exercise control over its docket and that there are obviously cases which reach the appellate court which do not perhaps merit oral argument, merit taking the time, the valuable time of the judges in order to present oral argument.

However, it is the feeling of the lawyers who practice in Mississippi with whom I have discussed this subject that, under the present workload of the fifth circuit, litigants are being denied the right to have their cases argued orally before that court, in some instances, not because of lack of merit of the points involved, but rather, in some instances, because, as a matter of expediency in handling and controlling its docket, the court has formulated its rules and has imposed them, and we think this is a rather artificial basis of limiting oral argument. I think—to make one further comment—Judge Clark's reference to perhaps lowering the threshold by which a case might be argued orally would be consistent with the position I am stating.

Senator BURDICK. Well, certainly, if you are right, we will find ourselves splitting the split circuit again. Now, you present a very cogent and very sound argument for keeping the four States together based upon the historical premise that they were once a part of the same area and therefore it is just good to have them together. I think that is a very fine argument. But, if you had to split it a second time you would have to do something about that history, would you not? Suppose we do establish a fifth circuit in the four States east of the Mississippi River, and suppose Judge Wisdom and Brown are right, and in about 4 or 5 years we have to split it again. Where do you split it then? Do you see now why we are thinking of procedures, too?

Mr. RAY. I understand. Obviously, the court has to have procedures which enable it to handle and manage its docket and its caseload. It seems to me that, with the benefit of the history we now have of the 15-judge court of appeals, it is fairly well evidenced, I think convincingly so, that adding judges is not the answer.

Senator BURDICK. That is right.

Mr. RAY. I personally favor, and I can say I speak for the Mississippi State bar in making this statement, a court no larger than nine judges, an appellate court no larger than nine judges. As we know, that is the composition of the U.S. Supreme Court. That happens to be also the composition of the Mississippi Supreme Court, which has problems, as do appellate courts all over the country.

I think that there are many ways by which a court may undertake to manage, and maybe more efficiently manage, its crowded docket problems and growing backlog of cases. Obviously in the Federal appellate system, as has been mentioned by you in your questioning this morning, some consideration must be given to the question of whether the jurisdiction of the appellate courts is going to be limited or restricted in any way or enlarged by future legislation, and I would not attempt to project into the future and hazard a guess at what the situation might be a few years from now. I do not think anybody can rightfully say.

Senator BURDICK. As the fellow says, I am glad you raised that question. What would the Mississippi Bar do with regard to the present legislation that has been——

Mr. RAY. What would it do?

Senator BURDICK. Yes; how would it resolve it?

Mr. RAY. I think I can say without polling the bar that—I think I know the bar well enough to say that—we would like to see diversity left.

Senator BURDICK. This is an example of what happens. All the studies advise that we give less jurisdiction to the Federal courts, but when we get down to the practical issue of doing something about it, we do not do it.

Where would you reduce jurisdiction?

Mr. RAY. Where would you reduce it?

Senator BURDICK. Yes.

Mr. RAY. I think I may not be qualified to offer testimony on that point. I think obviously that diversity is one area where it could be reduced. If I understood Judge Clark, about 10 percent of the caseload in the fifth circuit results from diversity cases now. That would reduce it some.

Senator BURDICK. Do you know what would happen if we reported that diversity legislation out of the committee to the Senate floor? We would have a flurry of opposition from lawyers from Mississippi and everywhere else. Until the bars themselves take a responsible position here and do something about reducing jurisdiction, relief will not be achieved. This may not be the way, but I think we have a problem with the practicing bar.

Mr. RAY. That is right.

Senator BURDICK. Well, staff has a question.

Mr. WESTPHAL. I was just going to suggest, Mr. Ray, do you know Larry Franck from Jackson?

Mr. RAY. Yes, sir.

Mr. WESTPHAL. Larry Franck, when addressing himself to the Commission, in response to a question the chairman just asked you, gave this testimony, and I quote:

> Accordingly, I believe the time has come for serious consideration to be given to sharp restrictions upon the district court's original—or removal—diversity jurisdiction. Specifically, it seems to me that a substantial case can be made for limiting that jurisdiction to instances in which an actual showing of probably local prejudice can be demonstrated.

Now, the bill which Senator Burdick has sponsored and which contains a recommendation emanating from the American Law Institute is a bill which would not abolish diversity jurisdiction completely. What it would do is say that a Mississippi litigant, or a litigant in any other State, should not be allowed to bring an action in Federal court just because by accident the defendant he is suing happens to have citizenship in another State, because to allow jurisdiction under those circumstances is to have the Mississippi litigant say, "I, as a Mississippian, cannot get a fair trial in the State courts in my own State." Now, if a Mississippian happens to be sued by a resident of Louisiana in a Louisiana court, then it is entirely proper for the Mississippi man to allege that he cannot get a fair trial in a Louisiana State court and, therefore, the law should allow him to remove that action to the Fed-

eral district court in Mississippi. Now, this is a very modest curtailment of diversity jurisdiction of Federal courts. It would have an impact numerically which would probably not be too great. But it seems that it would be a little bit more logical a rule than the rule which prevails at the present time which permits a citizen of a State to say that he cannot get a fair trial in the courts of his own State.

Now, if that is the case, then that litigant and the lawyer who represents him should get to work within their own legislature and within their own bar association to see to it that changes are made in the State court system which will allow him to get a fair trial and a prompt trial under the best procedures that that State has.

Now, when viewed in that light, do you adhere to your position, or do you think that the majority of the members of the Mississippi State Bar would oppose any curtailment in diversity jurisdiction, or do you think that the majority of them might agree with Larry Franck that some modest inroads along this line have to be considered by Congress?

Mr. RAY. Mr. Westphal, I will be glad to respond to that, and you understand that I am giving you my personal views, just——

Mr. WESTPHAL. I understand that, sir.

Mr. RAY [continuing]. As I was giving the chairman a moment ago. I think that the majority of the practicing lawyers in Mississippi would not like to see curtailment made on the diversity jurisdiction question. I think, obviously, that there is some developing sentiment that would agree with Larry Franck in his statement.

From my personal experience in practicing law, largely in the northeastern sector of Mississippi, I can tell you that in the cases we have been involved with where our client has had the privilege of removal or remaining in the State court where the action was initiated, I do not recall us making that decision on the basis of whether we thought our client would be getting a fair trial in the State court, but rather largely because of the advantage we thought the discovery rules in the Federal system offered compared to our State discovery rules.

Mr. WESTPHAL. What happens if the Mississippi State Bar Association tries to get the Federal Rules of Civil Procedure adopted within the Mississippi State practice?

Mr. RAY. Well, over a long period of years some effort has been made to accomplish that. We are still working on it.

I might, as a personal note, say that in the mid-1950's I happened to be chairman of a code study committee in our "young lawyer's section" and recommended that we enact substantially the Federal Rules of Civil Procedure in our State courts.

We have presently, and have had in the last year at least, very serious efforts being made to make substantial improvements in the administration of justice in our State courts. I refer particularly to a bill which passed one house of our legislature earlier this year, and which wound up in conference between the two houses, that would have recognized the authority of our Supreme Court to make its own rules of practice and procedure that would apply to our judicial system.

Many of us who participated in that effort were heartened considerably. We think the time is nearing when we may see successful results made.

Now, in the context of that, we also are working on the adoption of rules which hopefully would be substantially patterned after the Federal rules and thereby take advantage of an already well-developed body of law.

So I think we are making progress and the Mississippi judiciary, in my view, is sound and healthy, but like that of many other States and of the federal system, it is overworked at the present time.

Mr. WESTPHAL. I might make two observations. First, if you do succeed in having Mississippi adopt the essence of the Federal Rules of Civil Procedure, then your decision on removal, when you have to make that decision, will not be prompted solely by whether or not you can get into Federal court or can use Federal Rules of Civil Procedure?

Mr. RAY. Yes.

Mr. WESTPHAL. The other observation I would like to make is this, that several years ago the subcommittee sent every bar association in the Nation copies of the bill encompassing this ALI proposal along with some additional material that tries to explain it and invited each bar association to give some consideration to it. A number of bar associations appointed committees for that express purpose and we have heard from them. That has taken some time, because these things do not move fast. But now, gradually, a number of State bar associations have supported this modest inroad in diversity jurisdiction——

Senator BURDICK. Just a minute. Let me correct my own staff member. That has not come from the State conventions: that has only come from the committees.

Mr. WESTPHAL. Correct, that has not come from the ABA.

Senator BURDICK. No, from the State bars.

Mr. WESTPHAL. In any event, Mr. Chairman, would you agree if I were to invite Mr. Ray to see what he can do to have his own bar association look into this?

Senator BURDICK. I do not like to disagree with my own staff, but if the executive committee could agree—you have not yet had a full State bar session?

Mr. RAY. Yes.

I can say this. I was not aware of the point you just made that, at some earlier time this information had been submitted to the State bars. I have served on the Board of Bar Commissioners and then as president-elect, and this year as president. I presume this must have occurred at an earlier time, but I would be more than happy to present this matter to our board of commissioners for their consideration, and beyond that, I, of course, do not know what the result of their deliberations would be, but I would be very pleased to do that.

Mr. WESTPHAL. Thank you, Mr. Chairman, I have no further questions.

Senator BURDICK. Thank you very much.

This completes the second day of our hearings on the fifth circuit.

We will hear several other witnesses tomorrow. The committee will be in recess until 10 o'clock tomorrow.

Mr. WESTPHAL. Mr. Ray, could I get from you the list of those agencies which you mentioned earlier in your testimony?

Mr. RAY. Yes.

[The requested material follows:]

ATLANTA REGIONAL OFFICES

Department of Agriculture

Consumer and Marketing Service.—Meat and Poultry Inspection Office, Southeastern Region; Information Division, Southeast Region; Plentiful Foods Program, Southeastern Regional Office; Poultry Division (Market News Branch), Poultry and Poultry Products Office.

Food and Nutrition Service.—Southeast Area Office.

Forest Service.—Regional Office, Region 8; State and Private Forestry Areas, Southeastern Area Office.

Department of Commerce

Bureau of the Census.—Regional Office.

Department of Defense

Office of Civil Defense.—Regional Office (Thomasville, Ga.), Region 3.

Department of Health, Education, and Welfare

Regional Offices.—Regional Office, Region 4.

Food and Drug Administration.—District Office.

Department of Housing and Urban Development

Region 4.—Regional Office.

Department of the Interior

Bureau of Outdoor Recreation.—Southeast Regional Office.

Bureau of Sport Fisheries and Wildlife.—Regional Office, Region 4.

Department of Justice

Law Enforcement Assistance Administration.—Regional Office, Region 3.

Naturalization Information Field Office.

Department of Labor

Bureau of Labor Statistics.—Regional Office, Region 4.

Manpower Administration.—Regional Office, Region 4.

Workplace Standards Administration.—Regional Office.

Bureau of Labor Standards.—Regional Office.

Women's Bureau.—Regional Office.

Office of Federal Contract Compliance.—Regional Office.

Department of Transportation

Federal Highway Administration.—Regional Office, Region 3.

National Highway Traffic Safety Administration.—Regional Office, Region 4.

Urban Mass Transit Administration.—Regional Office.

Civil Service Commission

Regional Office.—Atlanta Region.

Commission on Civil Rights

Field Office.—Southern Region.

Environmental Protection Agency

Interim Regional Coordinators.—Region 4.

Equal Employment Opportunity Commission

Field Office.—Atlanta.

Federal Communications Commission

District Office.—District 6.

Federal Mediation and Conciliation Service

Regional Office.—Region 3.

Federal Power Commission

Regional Office.—Atlanta.

Federal Trade Commission

Field Office.—Atlanta.

General Services Administration
Regional Office.—Region 4.
National Archives and Records Centers.—Federal Records Center, Atlanta.
Business Service Centers.—Service Areas, Region 4.
Federal Information Centers.—Atlanta.

Interstate Commerce Commission
Regional Office.—Atlanta (Region 3).

Office of Economic Opportunity
Regional Office.—Region 4.

Office of Emergency Preparedness
Regional Office.—Region 3.

Railroad Retirement Board
Regional Office.—Atlanta.

Securities and Exchange Commission
Regional Office.—Atlanta.

[EDITOR'S NOTE.—The following information is presented as a supplement to Mr. Ray's list in accordance with Judge Charles Clark's request:]

U.S. COURT OF APPEALS,
FIFTH CIRCUIT,
Jackson, Miss., November 4, 1974.

WILLIAM P. WESTPHAL, Esq.,
Chief Counsel, Subcommittee on Improvements in Judicial Machinery, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. WESTPHAL: At the time of my testimony I was not aware that the Federal Prison System (which is involved with more than 33⅓% of the cases before our court) places Texas and Louisiana in its South Central Region with headquarters in Dallas and places Mississippi, Alabama, Georgia and Florida in its Southeast Region with headquarters in Atlanta. If it was contained in the listing of information submitted by Honorable James Hugh Ray, it escaped my attention. If the record is still open and this very significant fact is not a part of it, I request that it be placed before the subcommittee.

Please give my regards to Senators Burdick and Hruska and thank them again for their cordiality and attentiveness at the hearing.

Respectfully,

CHARLES CLARK, *Circuit Judge.*

[Whereupon, at 12:20 p.m., the subcommittee was recessed, to reconvene at 10 a.m., Thursday, September 26, 1974.]

CIRCUIT REALIGNMENT

THURSDAY, SEPTEMBER 26, 1974

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

The subcommittee met, pursuant to recess, at 10 o'clock a.m., in room 2228, Dirksen Senate Office Building, Senator Quentin N. Burdick (chairman of the subcommittee) presiding.

Present: Senators Burdick and Hruska.

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

Senator BURDICK. This is the third day of hearings on the question of realigning the fifth and ninth circuits. Our first witness this morning will be John H. Hall, attorney at law, Dallas.

Welcome to the committee, Mr. Hall.

STATEMENT OF JOHN H. HALL, ATTORNEY AT LAW, DALLAS, TEX.

Mr. HALL. Thank you, sir.

I might say, by way of preface, that my brief remarks are not those of an appellate lawyer because I seldom appear in an appellate court. My views are those of one whose appearances are in the trial courts.

In August of 1973, in Houston, when the Commission on Revision of the Federal Court Appellate System held hearings, the Commission was told in substance that it was a misconception that the fifth circuit was in trouble. It was told that it was absolutely current, thus apparently indicating that the fifth circuit's yardstick for being in or out of trouble would be whether the caseload is being handled, not how it is handled.

It seems to me that being current and being in trouble is mixing apples and oranges. If expediencies are keeping the circuit current, it results in dispensing with justice, not in the dispensing of justice; it results in doing away with the Anglo-American adversary case and controversy system.

I use that phrase because that is the phrase used by the fifth circuit in *Huff* v. *Southern Pacific Railroad*, in the course of its opinion describing the manner in which the circuit is handling its expanded caseload.

But this case and controversy system is being sacrificed by expediency in order to keep current. Figures were presented to the committee in Houston in August 1973 showing that the fifth circuit caseload increase was some 90 percent from 1968 to 1973. Figures

were also presented there showing that the opinions of the judges during the same period of time increased 124 percent. This increase has been handled through what the Court described in its opinion in *Murphy* v. *Holman* as "judicial inventiveness" to increase productivity and expedite disposition.

I do not see how we can properly keep current through expediency any more than a surgeon can perform a 2-hour operation in 30 minutes.

When there is an increase in the caseload of some 90 percent, something has to give way if the court is to continue current. The hours in the day do not increase, the days in the week do not increase, and the judges do not increase. Many of the lawyers are concerned about what is the result of this.

I think most believe that the adversary case and controversy system has suffered because of the manner in which the caseload is handled. When you screen cases to either curtail or eliminate oral argument, or put cases on the summary calendar, that tends to do away with the adversary case and controversy system.

Oral appellate argument has never been said to be unnecessary. Has any lawyer or judge ever read a brief without there being some question raised which could be answered in oral argument? Doing away with oral arguments speeds us toward an administrative system as distinguished from a judicial system.

None of the fifth circuit opinions explaining the expediencies used to handle the caseload give any indication of the manner in which the law clerks are used. There is wonderment as to whether perhaps the clerks are being used for work that is better done by judges. How is the influx being handled when there is no increase in judges or hours in the day?

I do not know how it is handled and cannot tell you, but I think there is apprehension among the lawyers that the law clerks may have much to do with the judicial process as distinguished from the administrative process. That may be unwarranted. I hope it is, and I hope that, either this subcommittee will determine, or the Commission on Revision of the Federal Court Appellate System has determined, that the internal procedures are such that the law clerks are doing only the work of law clerks.

If law clerks are involved in duties better handled by a judge, it is submitted that a law clerk cannot do what a judge should do any more than a competent nurse in an operating room can perform surgery for a surgeon.

We seem to be caught in a wave of expediencies to keep current. There was an article in the August 1974 American Bar Association Journal, speaking on why we should retain the jury system in trials, which stated:

"Just as justice delayed is justice denied, assembly line justice is no justice at all."

I think the fifth circuit is to be commended for initiating various procedures to keep current, but I feel that this should continue, and should have and does have its origination, only as a stop-gap situation.

I have never heard anyone say that the expediencies presently used are better than what was used before the influx of the caseload.

Chief Justice Warren Burger alluded to the effect of a heavy caseload upon the U.S. Supreme Court in an article written by him which appeared in the American Bar Association Journal in July 1973. He recognized that the caseload ultimately affects the quality of the product of the U.S. Supreme Court. This would be just as true as it relates to the courts of appeal.

In reality, the court of appeals is the Supreme Court to most litigants, for seldom do their cases ever go to the Supreme Court.

Any expediency used which decreases the right of oral argument or affects quality of the product or results in assembly line justice is a tragedy. It is a tragedy not only to the litigant in particular, but it is a tragedy to the people in general. Their basic rights are just gradually eroding away and they are not even aware of what is happening to them.

I think the problem is a very difficult one, but if we are to keep the adversary case and controversy system, something must be done. The caseload continues to increase; it is not decreasing. Just as the population increases, and just as the population increase results in building more hospitals and schools, it is submitted that the caseload increase should result in more judges.

We need increased judicial manpower for the increased caseload. Even now the fifth circuit uses more judges than it has. Some of the district court judges and some of the judges from the other circuits come in and sit from time to time on the panels hearing the cases in the fifth circuit.

In solving the problem, it seems to me that not only could the circuit be split geographically, but that the number of judges should be increased to be commensurate with the need.

The fact that, historically, there have been 15 judges for the fifth circuit consisting of the six States in it and the Panama Canal does not seem to me to be a reason to continue that number when more are needed.

Thank you.

Senator BURDICK. I just have one or two questions, Mr. Hall.

Testimony received in the last 2 days indicates that, under the screening process practiced in the fifth circuit, after a case has been assigned to the panel, panel members read the briefs and then determine whether or not an oral argument is necessary, and if any one of the three thinks an oral argument is to be had, it is granted. Is that not a pretty good safeguard?

Mr. HALL. I feel that, when they are confronted with the caseload that they have, it tends to at that point cause expediences to take over, because, if there is a benefit of the doubt, I imagine they give the benefit of the doubt to not having the argument.

Senator BURDICK. The evidence does not show that; they just say, "If one man alone for any reason asks for an oral argument, it is granted."

Mr. HALL. Yes.

Senator BURDICK. You will have to concede there are cases that have less than real merit when they come up.

Mr. HALL. I will agree with that.

Senator BURDICK. We heard a statement from Judge Wisdom which said that the British judges handle several—how many did he say?

Mr. WESTPHAL. Their Court of Criminal Appeals handles about 10,000 cases a year as compared to the 3,000 that the fifth circuit has.

Senator BURDICK. I guess there are other facts to be weighed, but our American system of law springs from the common law system which we took from England. Do you think they are moving away from that old common law system and not giving justice to litigants?

Mr. HALL. I think, in the manner it is handled, they are doing that. I do not profess to be an expert on the British system, although I have heard some of their barristers and even the Lord Chief Justice speak. They do have a system whereby their judges, as I understand it, come from the pick of the trial bar, and, as I understand it, they seem to be very knowledgeable and up to date in the law. I think their system of selecting judges is entirely different from ours, and I think that has an effect on this, when trying to compare the two.

Senator BURDICK. Well, before I get along too far in years in this committee, I am going to take one more trip, and I am going to look at that British system and see what they are doing that we do not do and see just what is happening over there. I was intrigued by Judge Wisdom's statement. I could not believe it for a while, but he seemed to be rather convincing.

Well, we get your point. We do not want a denial of justice, and you are afraid if we do not get more judge power we will not have justice and that the center of justice will deteriorate. Is that your point?

Mr. HALL. Yes, sir.

Mr. WESTPHAL. I have just a few questions, Mr. Hall.

In your remarks you mentioned that you had some question in your mind, as a lawyer, as to the extent to which the law clerks employed by the judges may, under this pressure of a large volume of cases, be doing work in the appellate process that is probably beyond the capacity of a law clerk to do; you are apprehensive that, because of this heavy volume of work, the judges are probably forced to rely on some extra help from law clerks beyond their competency, which they would not do if they did not have such a heavy caseload to cope with. Do you recall that?

Mr. HALL. Yes, sir.

Mr. WESTPHAL. Of course, I think this has been the suspicion of trial lawyers for several years. That is, we have always suspected that the law clerk wrote the opinion and had a great deal of input into the decision; everybody has always been a little bit suspicious of that.

I think that in actuality what happens is that if you have a good conscientious judge—as I would estimate 99 of every 100 of our judges are, by and large—then they will not suffer any law clerk to make a decision for them. They do get help from the law clerk in the initial drafting of an opinion or the initial research on a legal issue. I think that that fact may vary; as the caseload of a court gets too heavy for the judge to bear you get more and more reliance on a law clerk.

There have been proposals made that the Congress should authorize, in addition to the two or three law clerks that work for each appellate judge, a corps of five or six staff attorneys for each circuit court of appeals. They would be headed by a man who has had considerable trial experience, to whom we would pay a commensurate salary, and these staff attorneys would work for the court as a whole in the appel-

late process. They would assist in the screening in this way. After the judges have made the initial determination that a case, for example, would not be accorded oral argument but would be decided on the briefs, then the staff attorneys would try to analyze the issues, the evidence and the law in the case and lay it before the judges. The judges would then make a tentative decision, and they would then get some help from either their individual law clerks or these staff attorneys in the drafting of an opinion.

Now, what reaction do you have as a trial attorney in the State of Texas to that concept of "staff attorneys?"

Mr. HALL. Well, I gather that you are creating sort of an administrative mini-judge, and to me, rather than doing that, I would rather see more judges.

I think, certainly, that if there is anything to this apprehension that the lawyers have concerning law clerks, that that system would be better than the present one, but I do not think it would be as good as having more judges.

Mr. WESTPHAL. Of course, in the best of all worlds, we would like to have our judges have a caseload that they could handle personally, that they could handle without need of law clerks, and we would be sure that we would have each judge making his own mature, deliberate decision on the facts in the case. That is the best of all worlds. But I am sure you realize that, as this volume of legal business grows; we are never going to be able to go back to that so-called best of all worlds, that we do have to make some changes in our method of handling an ever-increasing volume of cases. Is that not true?

Mr. HALL. I do not look at it that way if you proceed from the premise that our system is the best system. That is why I alluded to the idea of using a nurse in an operating room to try to cut down on time. I do not see how you can change the system, if you believe in the basic system.

We have increased other things because of population increases, and I do not see why we should not increase judge power because of the same thing.

Mr. WESTPHAL. Let me draw an analogy to what examples you have given here.

I am sure that in the field of surgery there used to be the day that the surgeon did everything in connection with the surgery, including stitching up the incision. He did everything. Now the practice is that a good competent surgical nurse in there will sometimes herself stitch up the wound, as long as she does it under the supervision of the surgeon, who is still there and is concerned about other things such as watching the vital signs of the patient. Now, the surgeon needs her help in order to perform his skill well.

I do not know what the size of your law firm is, but when I was practicing law and was the main trial attorney in the firm, I had the help of younger lawyers in my office. They either rendered assistance on a case while I was in trial on that case, or they were preparing other cases for me. Would you not concede that, drawing that analogy, judges do have to have the help of law clerks and do have to have the help of staff attorneys, and that the main thing that keeps the system working properly is that the judge who has this assistance of staff is not so overworked that he cannot still give his own close personal supervision and

have his own imprint on the end product? Do you think those are the proper guidelines?

Mr. HALL. I think they are. I think that, if there is a hole in that, so to speak, it is to make sure that it does not proceed to the point where in fact the law clerk or staff attorneys are in reality doing what the judge should be doing. To me the issue is how that line is determined and who makes sure it is not crossed.

Mr. WESTPHAL. That is absolutely correct. You put your finger on it. If I come in to your firm and retain you as a lawyer at whatever hourly rate we agree on to handle a case, the only way I know that you are going to do the work on my case rather than have some young lawyer in you firm who is just one year out of law school doing that work, is to have confidence in you and in your integrity and ability as a lawyer. Then I, as your client, would be satisfied. It is the same way with us as lawyers as we view our appellate judges. We have to have confidence in their integrity, in their conscientiousness about their work. We have to trust that they will not suffer any law clerk to be making any active decisions for them. Isn't that about what it boils down to?

Mr. HALL. Yes.

Mr. WESTPHAL. Do you have any feelings about one of the proposals ultimately recommended by the Commission which would divide the six States of the fifth circuit by putting the four eastern States in one circuit and Texas and Louisiana into a second circuit? Do you have any feelings about a circuit composed of only the States of Texas and Louisiana?

Mr. HALL. No. I think that if they are going to be split, No. 1, it is better to use States within the circuit rather than bring in other States; plus the fact that to have adjoining States together would make the most sense.

As I recall the figures, if Texas, Louisiana, and Mississippi were together with the Panama Canal Zone and if the other three to the East were together, then I believe the caseload is substantially the same for each.

Mr. WESTPHAL. Well, I think that was true for the 1973 statistics. I think as the filing picture has changed a little bit in 1974, and we get very close to equality in caseload under a 4 to 2 split. I will supply you with the figures here in a moment.

Mr. HALL. That would seem to be the situation under the latest figures. I would see no objection to that. I do not know what or how to project what it might be in the future. If we split it that way, and then find that the whole situation changes so that perhaps it doubles in the east or perhaps it doubles in the west, I do not know what we would do to settle that problem.

Senator BURDICK. The record shows that you people in Texas are big litigators. The biggest increase is generated right there in Texas.

Mr. WESTPHAL. In any event, as a lawyer you have no strong feeling that a circuit should consist of more than two States?

Mr. HALL. No.

Mr. WESTPHAL. I believe that is all the questions I have, Mr. Chairman.

Just one thing. Do you have an extra copy of your prepared remarks with you, or if not, may we borrow your copy and Xerox it?

Mr. HALL. Certainly.

Senator BURDICK. Any questions, Senator?
Senator HRUSKA. I have no questions.
Thank you for appearing here, Mr. Hall.

[EDITOR'S NOTE.—In preparation for these hearings, the subcommittee sought the views of the State Bar of Texas. The subcommittee unfortunately did not receive a response from the State Bar of Texas until after completion of the hearings. There follows a complete record of all the pertinent correspondence between the subcommittee and the State Bar of Texas.]

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY,
Washington, D.C., September 9, 1974.

MR. LEROY JEFFERS,
Attorney-at-Law, Vinson, Elkins, Searls, Connally and Smith, First City National Bank Building, Houston, Tex.

DEAR MR. JEFFERS: In preparation for this subcommittee's consideration of recommendations by the Commission on Revision of the Federal Court Appellate System with reference to the division of the Fifth Circuit, I have just finished reading your interesting testimony given approximately one year ago when the commission met in Houston.

In addition to sponsoring the legislation which created that commission, this subcommittee under the chairmanship of Senator Burdick has also been handling S. 1876 which contains the proposals to make a limited restriction upon the diversity jurisdiction of the district courts in addition to other revisions and improvements in federal jurisdiction. In your testimony you mentioned that the Texas State Bar Association, at its July 1973 meeting, created a special committee to study the matter of federal court jurisdiction, including S. 1876. I would appreciate it if you could now advise whether the special committee of the bar association has completed its study and particularly whether it has taken a position with reference to S. 1876.

I would also like to inquire whether the bar association has now taken any official position with reference to proposals to divide the Fifth Circuit as a means of coping with the ever increasing appellate caseload in that circuit. Whether or not an official position has been taken, am I correct in assuming that either you or your successor as the president of the bar association would be interested in presenting either a written statement or oral testimony when this subcommittee considers the various proposals made by the commission with reference to the Fifth Circuit? I would appreciate hearing from you on this latter point at your earliest convenience.

Sincerely,

WILLIAM P. WESTPHAL, *Chief Counsel.*

STATE BAR OF TEXAS,
Houston, Tex., October 29, 1974.

MR. WILLIAM P. WESTPHAL,
Chief Counsel, Subcommittee on Improvements in Judicial Machinery, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. WESTPHAL: Your September 9 letter inquires as to whether the State Bar of Texas has taken any official position with reference to proposals to divide the Fifth Circuit, on S. 1876 or other proposals to limit diversity jurisdiction of the district courts, or with reference to other revisions and improvements in federal jurisdiction. During my Presidency of the State Bar of Texas, the Board of Directors on its behalf did take official action with reference to these proposals. The action taken was reported by me to the Commission on Revision of the Federal Court Appellate System for incorporation in its record and in the official report to be made by it. I am enclosing copies of my letters making these reports.

The State Bar of Texas, of course, continues to be very much interested in all proposals and legislative developments concerning the Fifth Circuit and concerning revisions in federal appellate court jurisdiction and procedures. I am confident that the State Bar of Texas would want to be represented by oral testimony and written statement at any Subcommittee hearing conducted on the subject. I am sending a copy of your letter and of this letter to Honorable Lloyd

Lochridge, the current President of the State Bar of Texas, for his information and for his confirmation of my view that the State Bar of Texas would like the opportunity of presenting its official position to the Subcommittee at any hearings conducted by it on these subjects.

Sincerely yours,

LEROY JEFFERS.

[EDITOR'S NOTE.—The enclosures in Mr. Jeffers' October 20th letter follow:]

STATE BAR OF TEXAS,
Houston, Tex., December 3, 1973.

Hon. A. LEO LEVIN,
Executive Director, Commission on Revision of the Federal Court Appellate System, Court of Claims Building, Washington, D.C.

DEAR PROFESSOR LEVIN: I am enclosing 20 copies of the Statement of Position of the State Bar of Texas concerning the three alternative realignments to which the consideration of the Commission has been narrowed according to its preliminary report. You will note that this Statement of Position of the State Bar of Texas favors the first alternative described in the preliminary report and recommends its adoption.

Sufficient copies are enclosed for distribution to all members of the Commission.

Sincerely yours,

LEROY JEFFERS, *President.*

STATE BAR OF TEXAS,
Houston, Tex., December 3, 1973.

COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM,
Court of Claims Building,
Washington, D.C.

TO THE HONORABLE MEMBERS OF THE COMMISSION: The State Bar of Texas has now given careful consideration to the preliminary report of the Commission enumerating three alternative proposals for the realignment of the United States Court of Appeals for the Fifth Circuit which are stated "to remain under active consideration." Appropriate Committees of the State Bar of Texas have deliberated upon the preliminary report and the three alternative realignments pursuant to the Commission's invitation to the Bar for "reasoned comments and advice." The result is that the Board of Directors has voted overwhelmingly to recommend to the Commission that it adopt the first alternative described in its preliminary report under which there would be a realignment of the Fifth Circuit into two Circuits composed of Florida, Georgia and Alabama in one and composed of Texas, Louisiana, Mississippi and the Canal Zone in the other. The policy reasons behind the recommendation that the first alternative be adopted as the most desirable of the three still under active consideration are as follows:

(1) This alternative would make the two emerging Circuits more equal in caseload than either of the other two alternatives based on 1973 filings as described in the preliminary report. This most even case division of the three alternatives is stated to be 1,500 cases in the Florida, Georgia and Alabama Circuit and 1,464 cases in the Texas, Louisiana, Mississippi and Canal Zone Circuit. Based on the most reasonable projections, the caseload between the two emerging Circuits under the first alternative is likely to continue to be more evenly divided than would be the case under either of the other two stated alternatives.

(2) The first alternative results in the two emerging Circuits which would be most cohesive geographically. Contiguous states would be present in both Circuits. Transportation facilities between points in Texas, Louisiana and Mississippi and New Orleans are quite good. Transportation facilities are further very good between points in the cohesive states of Florida, Georgia and Alabama, particularly with Atlanta, Miami, Jacksonville and Birmingham.

(3) The first alternative does not disturb any other existing Circuit and maintains continuity by preserving present alignments among the two groups of continguous states into which the Fifth Circuit would be divided.

(4) Alternative 1 would maintain a higher degree of desirable variations in economy and viewpoints than would either the second or third alternatives and in the judgment of the State Bar of Texas would result in the best balanced realignments of any of the three proposed.

Respectfully submitted.

LEROY JEFFERS, *President.*

STATE BAR OF TEXAS,
Houston, Tex., June 27, 1974.

Hon. A. LEO LEVIN,
Executive Director, Commission on Revision of the Federal Court Appellate System, Court of Claims Building, Washington, D.C.

DEAR PROFESSOR LEVIN: The Board of Directors of the State Bar of Texas, which is composed of thirty members elected by printed mail ballot by the lawyers in the various geographic Bar Districts, has unanimously adopted three recommendations to the Commission on Revision of the Federal Court Appellate System relating to issues which you now have under consideration. The State Bar of Texas is a statutory agency of which all of the approximately 24,000 licensed lawyers in Texas are members. It is declared by the statute to be a part of the Judicial Branch of the government of the State of Texas.

We will greatly appreciate your informing the members of the Commission and entering into the records of the Commission the following recommendations:

(1) It is recommended that the right to oral argument of all cases in the United States Courts of Appeals be preserved and strengthened. In the numerous instances where it has been eliminated or severely curtailed, it is recommended that it be restored. It is deemed that oral advocacy is a traditional, vital and important part of the adversary process and that its erosion constitutes a weakening of the adversary system of justice and the acceleration of a trend toward the administrative rather than the adjudicative disposition of appeals.

(2) It is recommended that the statutory provision for the convening of three-judge federal courts be repealed. Such action would conserve judicial time both at the trial and appellate court levels without adverse effects on the adversary process or the proper adjudication of constitutional issues.

(3) It is recommended that the jurisdiction of United States District Courts and United States Courts of Appeals to review final judgments of state courts in criminal cases be either abolished or severely curtailed by statute. The recommendation is that, in any event, the grounds upon which judicial review is sought in the federal courts must have been first raised and fully developed in the state court in which the judgment in the criminal case was entered and the remedy in the state court thereafter completely exhausted by appeal to the highest appellate court in the state having jurisdiction of the case and thereafter by appeal or petition for *writ of certiorari* to the United States Supreme Court. This recommendation is addressed to the problem of numbers of cases in the federal courts which can never be dealt with by changes in structures or procedures except by way of stop-gap measures until this source of federal cases is eliminated or severely curtailed.

Respectfully yours,

LEROY JEFFERS, *President.*

STATE BAR OF TEXAS,
Austin, Tex., November 4, 1974.

Re Position of the State Bar of Texas with reference to Proposals to Divide the Fifth Circuit, on S. 1876 or Other Proposals to Limit Diversity Jurisdiction of the District Courts or with reference to Other Revisions and Improvements in Federal Jurisdictions

Mr. WILLIAM T. WESTPHAL,
Chief Counsel, Subcommittee on Improvements in Judicial Machinery, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. WESTPHAL: I have received a copy of a letter dated October 29, 1974 addressed to you by my distinguished predecessor, Leroy Jeffers, respecting the above mentioned subject.

He has, of course, accurately stated the official action taken by the State Bar of Texas through its Board of Directors during his Presidency and reflected by the letters which he wrote under date of December 3, 1973 and June 27, 1974 to the Honorable A. Leo Levin, Executive Director of the Commission on Revision of the Federal Court Appellate System there.

The State Bar of Texas would indeed like an opportunity to present its official position to the Subcommittee at any hearings conducted by it on the subject and to supply a written statement at such hearings.

I would be most appreciative if you could have me notified when there may be held any such hearings and when our position may be presented.

Sincerely yours,

LLOYD LOCHRIDGE.

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY,
Washington, D.C., November 7, 1974.

Mr. LLOYD LOCHRIDGE,
President, State Bar of Texas,
Austin, Tex.

DEAR MR. LOCHRIDGE: This will acknowledge receipt of your letter of November 4th, referring to the exchange of correspondence between Mr. Jeffers and me relative to the position of the State Bar of Texas on proposals to divide the Fifth Circuit.

After my letter of September 9th to Mr. Jeffers, I had a telephone conversation with him on September 16, 1974, in which I advised that the subcommittee had scheduled hearings on this legislation on September 24th, 25th and 26th and indicated our desire to have a representative of the State Bar of Texas appear at the hearings. It is my recollection that Mr. Jeffers informed me of the fact that you had succeeded him and I understood that he would refer my request on to you. Thereafter, I was not advised that your association would be able to send a representative to the hearings on any of these dates and therefore I arranged to incorporate in the hearing record the Statement of Position contained in Mr. Jeffer's letter of December 3, 1973, to the Commission on Revision of the Federal Court Appellate System.

Thus, at the present time, there are no further hearings contemplated by the subcommittee. However, it is always possible that Senator Burdick, as chairman of the subcommittee, may schedule some additional hearings and if so we would at that time be happy to receive the testimony which you might deem necessary as a supplement to the position statement of December 3, 1973. I am sending a copy of this letter to Mr. Jeffers by way of acknowledging his letter of October 29, 1974.

Sincerely,

WILLIAM P. WESTPHAL, *Chief Counsel.*

STATE BAR OF TEXAS,
Austin, Tex., November 15, 1974.

Re: Position of the State Bar of Texas with reference to proposals to divide the Fifth Circuit, on S–1876 or other proposals to limit diversity jurisdiction of the District Court or with reference to other revisions and improvements in Federal jurisdiction

Mr. WILLIAM T. WESTPHAL,
Chief Counsel, Subcommittee on Improvements in Judicial Machinery, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. WESTPHAL: Thank you for your letter of November 7th pointing out that the Subcommittee has already had its hearings on this particular legislation on September 24–26 and that you will let me know should any further hearings be scheduled by the Chairman, Senator Burdick.

Good wishes,
Sincerely,

LLOYD LOCHRIDGE.

Senator BURDICK. Mr. Joe J. Harrell, attorney at law, Pensacola, Fla., is our next witness. I assume you are here to let the record also show that we have some litigators down there in Florida, too.

STATEMENT OF JOE J. HARRELL, ATTORNEY AT LAW, PENSACOLA, FLA.

Mr. HARRELL. Good morning.

Senator BURDICK. Welcome to the committee, Mr. Harrell.

Mr. HARRELL. I am Joe J. Harrell from Pensacola, Fla. I have been a member of the Florida Bar since 1948, and have practiced in Pensacola continually since that time. I have been a member of the Board

of Governors of the Florida Bar, a member of the Florida delegation to the Fifth Circuit Conference since 1970, and a member of the committee that was appointed by the president of the Florida Bar to study the problem of restructuring the fifth circuit, which, I believe, was activated in September 1973.

A report was made to the Florida Bar by the chairman of that committee, Thomas C. McDonald, Jr., and with your indulgence I would like to read the minutes reflecting that report. It is very short.

This is an excerpt from the minutes of the regular meeting of the Florida Bar held September 20, 21, and 22, 1973, relating to item 17, the Commission on Revision of the Federal Court Appellate System. Chairman Thomas C. McDonald, Jr., reported, in behalf of the ad hoc committee appointed by President Hadlow, as a representative on the board which attended a hearing on the restructuring of the Fifth Judicial Circuit held September 5, 1973, as follows:

Upon motion made, seconded and carried, the Board endorsed the recommendation by several members of the judiciary who have appeared before the Commission to the effect that a division should be effected within the fifth circuit; recommended that Florida be joined with as few States as is feasible in the judgment of the Commission and that Florida be joined only with States presently in the fifth circuit; and approved the continuance of the ad hoc committee and empowered it to express the Board's views and to assist the work of the Commission in any way possible?

I think that statement of the position of the Board of Governors of the Florida Bar is clearly set forth. The committee felt, and it was the feeling of the Florida Bar, that the fifth circuit should be divided and that Florida should in fact be aligned with one or more States in the new alignment of the fifth circuit.

It was the feeling that Florida should be aligned certainly, with Georgia and possibly with Alabama and Mississippi. From here on I will be giving you essentially my own views, and I would not want them to intrude on the official position of the Florida Bar which I have just set forth.

I have been a practicing attorney engaged in general trial practice in Pensacola. I am a member of a firm that has nine men in it. We practice in Pensacola, which is a little unusual geographically in that we are only 13 miles from the Alabama state line and some 700 miles from Miami. We are closely aligned in many respects with Alabama insofar as our basic location is concerned.

Mr. WESTPHAL. How far are you from Atlanta?

Mr. HARRELL. Do not hold me to this exactly, but I will say something like 450 miles. While we are on that, I can tell you with more assurance we are 1 hour by plane from Atlanta.

I might digress right now to state that it was the feeling of the committee that insofar as oral arguments were concerned, it would be well if oral arguments could be held in perhaps Atlanta, Jacksonville, and Miami. Although I am from Pensacola, I recognize that the bulk of the work of the Florida caseload comes out of Miami. It would be unrealistic for me, even though I am far away, to think that it would not be more feasible for the court to sit in Miami than for it to sit elsewhere. As far as a practicing attorney in Pensacola is concerned, for the convenience of himself and his client, either New Orleans or Atlanta, just an hour, give or take a few minutes, away is best. Oftentimes we have had oral arguments in Jacksonville and, with the present

strike of National Airlines, and even routinely, it is difficult to get from Pensacola to Jacksonville, much more difficult than it is to go to Atlanta or New Orleans.

It is my view that the fifth circuit should be divided, and it would seem logical, certainly, in keeping with the recommendations of the Commission, that Florida be joined with Georgia, Alabama and perhaps Mississippi in a realignment of a new circuit. This would make sense to me geographically.

It would also, I think, facilitate the handling of business because Miami, as I said, has by far the greater caseload in Florida. If we had such an alignment I do not think perhaps—at least in my personal judgment—we would have the problem, suggested by Judge Wisdom, of the proliferation of the circuits which would impair the court structure and lead to provincialism. We, in Pensacola, are as different from Miami, almost, as daylight from dark. We have a different view. We have some alignments which, it seems to me, would lead to a caseload that would give a broad spectrum insofar as the work of the court was concerned, bearing in mind of course, that Atlanta and Georgia are growing, and Atlanta is becoming a business center and sophisticated insofar as business transactions and work are concerned.

It is our feeling that Texas, being, other than Florida, the fastest growing State, logically should be in a separate circuit, partly in order to help meet the problem that you are confronted with.

I am mindful of Judge Wisdom's feeling that there should be no restructuring of the fifth circuit. I have read a copy of his report, which I believe was given on September 24. I can only say that, although I have a great respect for Judge Wisdom, I feel personally that he is too apprehensive in his remarks insofar as his feeling that the whole idea of a strong Federal system of courts would be impaired by the division of the fifth circuit into two circuits.

Last year, I have been given to understand, was the first recent year in which the fifth circuit was behind in its caseload, having some 300 cases to carry over. The court screened 50 to 60 percent of the cases without oral argument. In other cases, the time for oral argument was cut down. As a practicing attorney, a trial lawyer, I personally feel that it would be wiser to screen cases if there is not enough time, and, on the cases which warrant it, give the lawyers a little more time, rather than the 15 minutes, for example, that might be allotted for oral argument.

That is just a personal view. I am mindful of the fact that something has to be given up in the balance, and I only suggest that to you as my personal opinion.

Insofar as the number of judges on the court, 15 judges, it would seem, certainly is stretching the number insofar as the viability of the court is concerned. It would seem that a smaller court, perhaps with 7 judges, 9 judges or 11 judges—something in that area—would be far more workable than with 15 judges, as we now have it.

Also, it has been my experience that, when I appear over there, there is often a district judge, a visiting district judge, who is sitting, which of course increases the number of working judges that they presently have.

I have attended the fifth circuit judges conferences, and I believe that, during the last 4 or 5 years, this particular matter has been a subject that has been alive in a number of sessions during that time.

Everybody recognizes the problem; the larger the court becomes, the more difficulty you have with conflicts among the panels of the court, leading to more en banc arguments, leading to more time-consuming sessions, which are perhaps not the optimum utilization of the judges' time.

The Commission and this committee have heard all of these observations before and I will not intrude on your time further other than just to point out the fact that we have been conscious of this particular problem for some time.

As far as screening is concerned, as a trial lawyer, I would be less than candid if I did not say that, as you look at it, perhaps it may seem all right if John Doe's case is screened out, but when your case is screened out with no oral argument you feel that perhaps your client certainly might well have not had his full day in court as far as the appellate process is concerned. I might add that clients have difficulty in understanding this, too.

Just as an aside, lawyers have to discuss fees with clients. You tell a client that "maybe" you will have to take a trip to Jacksonville, New Orleans, or Atlanta or "maybe" you will not have to. If you have to take the trip, that is another day out of the office, with the attendant expenses, but then you may not go. Of course your client is left with the idea that perhaps his lawyer does not know as much about this appellate process as he should, even though you have explained to him that you have no control over whether or not his particular case will be screened or scheduled for oral argument. That is just one of the practical problems, but it is a real problem to a practicing attorney.

We in Pensacola have, as I have said, some natural affinity with Alabama because of the nearness; geographically we are 60 miles from Mobile. On a number of cases that are handled in the Federal court—admiralty cases in particular—a number of Mobile lawyers practice in Pensacola and a number of Pensacola lawyers practice in Mobile. We work together, and therefore, there is something of a natural affinity.

The same holds true, I am told, with attorneys who are practicing along the border between Alabama and Georgia and, of course, in that section where Florida is contiguous to the Georgia State line. There is something of a natural affinity there geographically.

Our committee felt strongly that certainly, if possible, it would be wiser to make up the new circuit from the States that comprise the present fifth circuit rather than go outside and restructure with States, that, in a sense, were foreign to our present fifth circuit.

Perhaps I have spoken at too much length on all this, so I will not say anything further, but, of course, I would be glad to have you pose any questions that I might answer.

Senator BURDICK. Thank you, Mr. Harrell, for your very useful contribution this morning.

I have just one or two questions. My first one is directed to the resolution that was adopted. All it contained was your bar's wish to keep the new circuit within the States now contained in the fifth circuit. You did not say, however, exactly where the line should be drawn, did you?

Mr. HARRELL. Well, I think that our bar, in all fairness, wanted to leave that to the judgment of you gentlemen and of the Commission,

with the strong feeling that it would be unrealistic for Georgia and Florida to be separated. The two of them would certainly go together. Alabama would naturally fall into that group, and then, of course, we have Mississippi, and Mississippi has, I believe, the smallest number of filings of those four States; certainly Mississippi could fall in with those four States without doing violence to the restructuring, it would seem to me.

My personal feeling would be that that would be a good balance. If you ask what is the next position, well, the next position would, of course, be, as has been indicated in the Commission report, that the three eastern-most States, that is, Florida and Georgia and Alabama be joined.

Senator BURDICK. Well, Mr. Harrell, I raised this because the resolution did not draw the line. But you have been in various judicial conferences and have talked to your fellow lawyers throughout these States. Have you picked up a consensus? Do they favor division at the river, or would they favor placing Mississippi to the west? What kind of consensus is there?

Mr. HARRELL. Well, sir, we have discussed it considerably. Perhaps I am giving you something of a biased view in that I am the western-most member of our committee, the nearest to Mississippi. I married a girl from Mississippi, and I have some natural affinity to Mississippi myself, but there really was no strong feeling about including Mississippi. Perhaps there was some feeling that, as far as the caseload was concerned, if it would create an imbalance in the other direction, Mississippi could well be included.

I'm not sure I have given you much help.

Senator BURDICK. If the lawyers had their choice, as near as you can judge their wishes and desires, would they like to have the four States together?

Mr. HARRELL. I think Florida lawyers, if they had to make the choice, would like to have the three States together; that is, Florida, Georgia and Alabama.

Perhaps that shows some selfishness, because that would be something of a smaller circuit and I think the attorneys on the east coast of Florida feel that they, frankly, have the bulk of the caseload. They would vote for anything that would help them arrange to have more of the courts' work conducted in the south Florida area. Well, perhaps I shouldn't say "vote for anything;" perhaps I should only say they would prefer that.

Senator BURDICK. There has not been any official expression of this preference? It is just your feeling about the subject?

Mr. HARRELL. No, sir, there has been no official expression other than this: In our minutes, they wanted Florida to be joined only with States now in the fifth circuit and with as few States as feasible in the judgment of the Commission.

I think some of the committee members—and perhaps some of the members of the board of governors of the Florida bar—felt that, insofar as Florida was concerned, the fewer States it is aligned with, the better it would be. But I do not suggest that as being a criteria at all.

Senator BURDICK. We heard some argument yesterday about the historical background of the fifth circuit, to the effect that Mississippi, Alabama, and Georgia were once part of one territory.

Mr. HARRELL. Yes.

Senator BURDICK. And that there was a natural feeling that the group ought to stay together, so to speak.

Mr. HARRELL. There is a feeling in our particular area—and I want you to remember that I am speaking about Pensacola, which is the westernmost part of Florida—there is a feeling, shared by some Miami people, that they should have given us over to Alabama and that it was a mistake when we were ever made a part of Florida. We, of course, smile at that, but I want to lay it out for you so you can understand it thoroughly.

We do, perhaps, have a closer affinity with Alabama and Mississippi in Pensacola than we do with Miami or with south Florida or south central Florida—or perhaps even Florida south of Jacksonville and Tallahassee. On the other hand, as a lawyer I recognize that as far as the administration of the court in the future is concerned, it may be more desirable to have the court structured with the three easternmost States. But Mississippi could just as well go with this particular group as could Alabama.

Senator BURDICK. Well, that resolution impresses me; they could not have been too sure where they wanted the line drawn, or they would have said so.

Mr. HARRELL. No, sir.

Well, in fairness, the one thing that I think was the sense of the board of governors of the Florida bar was that they felt the circuit should be restructured, that definitely the fifth circuit should not remain intact with just more and more additional judges being added. In other words, that was the violent consensus. If I did not make that clear to you, sir, I failed. The one thing they felt must be done was that the circuit must be restructured and that the fifth circuit not remain intact, as suggested by Judge Wisdom.

Senator BURDICK. Senator Hruska, any questions?

Senator HRUSKA. I have no questions, but I think we get the thrust of the position of you folks there, and it is helpful to get that.

Mr. WESTPHAL. Just one question, Mr. Harrell.

I am not sure whether the Commission's report reflects it or not, but the Commission did, during its deliberations, as I recall, spend some time toying with the possibility that in the restructuring of the circuits they might restructure every circuit in the country. They gave some thought, for example, to having South Carolina adhere to a circuit with Georgia and Florida. I take it from the resolution of the Florida State bar that it is their sense that they would not favor any such structuring which would bring about an alignment of States from various circuits.

Mr. HARRELL. That is correct.

Mr. WESTPHAL. All right. I think that is all I have.

Mr. Chairman, if the record at this time could include a letter from Judge Paul Roney, dated September 23, and a letter from Judge Goldberg dated September 23, reflecting their views on this issue——

Senator BURDICK. Without objection, they will be received.

[The letters follow:]

U.S. COURT OF APPEALS, FIFTH CIRCUIT,
Petersburg, Fla., September 23, 1974.

Hon. QUENTIN N. BURDICK,
U.S. Senator, Old Senate Office Building, Washington, D.C.

DEAR SENATOR BURDICK: Thank you for the invitation to appear before the Subcommittee on Improvements in Judicial Machinery in connection with S. 2988–2990.

Although I can see no useful purpose in my appearing before the committee, I would like to express this view:

Regardless of what is done in order to afford the Federal Court Appellate System a full opportunity to discharge its responsibilities, and regardless of the salutary effect that any proposal which I have heard to date might have in relieving the current overload in the Fifth Circuit, our Circuit will have to be divided in the foreseeable future if the number of judges on the court is not to exceed 15, and if the court is not to fall hopelessly behind. Since a split of the Fifth Circuit, together with the addition of three judges to make a total of 18, will offer some immediate relief and is inevitable in any event, I am in favor of dividing the Circuit now.

Essentially, I am in accord with the conclusions of Judge Walter P. Gewin, who will be testifying before the Subcommittee tomorrow.

Best regards,

PAUL H. RONEY, *Circuit Judge.*

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT,
Dallas, Tex., September 23, 1974.

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

DEAR MR. CHAIRMAN: Without any reservation whatsoever I wish to associate myself with Judge Thornberry's letter of September 19, 1974.

In my opinion it would be nothing short of catastrophic to saddle the six "Western Circuit" judges with the caseload that would be cast upon them if Alternative No. 2 were adopted.

Sincerely and respectfully yours,

IRVING L. GOLDBERG, *Circuit Judge.*

Senator HRUSKA. I presume, Mr. Chairman, that our witness will supply us with a copy of that resolution for insertion in the record.

Mr. HARRELL. Yes, sir, I will be glad to do that.

[The material follows:]

MINUTES OF REGULAR MINUTES OF THE SEPTEMBER 20, 21, 22, 1973, MEETING OF THE BOARD OF GOVERNORS OF THE FLORIDA BAR

ITEM 17: COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM

Chairman Thomas C. McDonald, Jr. reported in behalf of the ad hoc committee appointed by President Hadlow to represent the Board at a hearing on the restructuring of the Fifth Judicial Circuit held September 5, 1973. Mr. McDonald reported that the commission was activated in June and is to submit its report in December 1973.

Upon motion made, seconded and carried the Board endorsed the recommendation of the several members of the judiciary who have appeared before the commission to the effect that a division should be effected within the Fifth Circuit; recommended that Florida be joined with as few states as is feasible in the judgment of the commission and that Florida be joined only with states presently in the Fifth Circuit; and approved the continuance of the ad hoc committee and empowered it to express the Board's views and to assist the work of the commission in any way possible.

Mr. Clayton asked that the special ad hoc committee investigate the possibility of establishing a Federal Criminal Court in Gainesville. President Hadlow directed him to prepare the facts and submit them back to the Board for further consideration.

Senator BURDICK. Thank you very much, Mr. Harrell.

Mr. HARRELL. Thank you.

Senator BURDICK. The committee will be in recess until next Tuesday at 10 o'clock.

[Whereupon, at 10:50 a.m., the committee recessed, to reconvene Tuesday, October 1, at 10 a.m.]

CIRCUIT REALIGNMENT

TUESDAY, OCTOBER 1, 1974

U.S. SENATE,
SUBCOMMITTEE ON IMPROVEMENTS 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.

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

Senator BURDICK. Today we commence the second week of hearings on S. 2988, S. 2989 and S. 2990, which embody the recommendations of the Commission on Revision of the Federal Court Appellate System to the effect that both the fifth and ninth circuits be geographically realigned as a means of improving the administration of justice in those two circuits. Our hearings this week will concentrate on the conditions existing in the ninth circuit and on the various propoals which have been advanced as potential solutions to the problems in the ninth circuit.

During the past 4 fiscal years the number of appeals filed in the ninth circuit has increased from 1,936 cases in 1971 to 2,697 cases in 1974. Of this increase of 761 cases, 381 occurred in fiscal year 1974. During this period of time the filings per judge for a court of 13 judges have increased from 149 cases per judge in 1971 to 207 cases per judge in 1974. While it is true that the terminations have also increased, from 133 per judge in 1971 to 196 per judge in 1974, nevertheless this court has steadily built up an ever-increasing backlog of cases pending.

Last week we studied the situation in the fifth circuit, a circuit which has employed virtually every expediency conceivable, *except* a resort to oral decisions from the bench and the regular employment of an active district judge or a visiting judge in the composition of each three-judge panel.

In contrast, the ninth circuit appears to be a circuit which has attempted to afford as much oral argument as possible to the litigants in as many cases as possible but has been able to do so only by employing 40 active district judges from within the ninth circuit together with 10 senior district judges from within the ninth circuit as the

third members of three-judge panels. In fiscal year 1973 these 50 district court judges furnished 198 days of judge time sitting on panels of the Ninth Circuit Court of Appeals. While the 12 active judges of this court averaged 48 days per judge of panel sittings, a figure second only to the second circuit, the calendar of the court scheduled an average of only 3.3 cases per day for hearing or consideration by each panel, which is the lowest number of cases heard per day by any of the 11 circuits.

As previously stated, by use of active district judges plus the services furnished by other assigned and visiting judges this circuit received 336 days of judge time during fiscal year 1973. This is the equivalent of seven full-time judges, so that in fiscal year 1973, even with one vacancy in its authorized complement of 13 judges, this court operated with the equivalent judge power of 19 full time judges. Nevertheless, in fiscal year 1973, it terminated 176 cases less than were filed, and in 1974 it terminated 146 cases less than were filed. While this court has endeavored to keep up with its criminal caseload, it is reputedly 2 years behind in its civil caseload.

As shown by committee exhibit E–12, in fiscal year 1973 the average time from notice of appeal to release of the court's opinion in cases which were determined by a signed opinion after oral argument, the average time was 528 days, a figure which was exceeded only by the District of Columbia Circuit.

The purpose of this factual summary is neither intended, nor should it be construed, as any criticism of the effort made by the 13 judges of this court to solve the host of problems which arise from the large number of appeals generated from the nine States and one territory encompassed by this circuit over a large land mass. It may be that the caseload problems of the ninth circuit as presently composed may be beyond the capacity of any given number of judges to administer in an efficient manner. Whether or not there would be a significant increase in efficiency as a result of geographical realignment is a question which the Congress shall have to determine. The ninth circuit problems, in all their dimensions, are the subject of our hearings this week.

Before calling our first witness I will include in the record, without objection, committee exhibits A–2, B–2, C–2, D–2, E–5, E–9, E–12 and F. There will also be included in the record a copy of remarks of Mr. Warren Christopher, president of the Los Angeles Bar Association and former Deputy Attorney General of the United States, two letters from Judge Alfred T. Goodwin of Portland, Oreg., dated September 25, and 27, 1974, and a letter from Judge Eugene A. Wright of Seattle, Wash., dated September 23, 1974.

[Editor's NOTE. Committee exhibits A–2, B–2, C–2, D–2, E–5, E–12, and F are hereby incorporated by reference from that section of this record which reports the proceedings held on September 24, 1974. Committee exhibit E–9, the remarks of Mr. Warren Christopher, and the letters from Judges Goodwin and Wright follow:]

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. 1973

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	62	95	155	327	131	715	
Per Curiam	53	107	146	216	25	506	
Memorandum	-	-	-	-	-	-	
No Opinion	12	114	165	410	24	733	
Private Civil - Signed Opinion	107	105	169	329	148	757	
Per Curiam	111	93	165	344	55	664	
Memorandum	1	61	39	89	-	213	
No Opinion	28	113	126	246	14	504	
Prisoner Pet. - Signed Opinion	37	52	119	139	84	440	
Per Curiam	89	87	97	78	15	319	
Memorandum	-	-	-	-	-	-	
No Opinion	13	90	151	57	2	311	
Criminal - Signed Opinion	231	118	72	56	98	358	
Per Curiam	365	93	69	46	26	243	
Memorandum	-	-	-	-	-	-	
No Opinion	57	117	57	39	24	247	
Admin. Agency - Signed Opinion	53	16	170	291	86	597	
Per Curiam	53	20	121	260	23	444	
Memorandum	-	-	-	-	-	-	
No Opinion	24	15	117	208	27	389	
Recapitulation							
All Signed Opinions	504	94	119	187	112	528	
All Per Curiam	697	87	100	134	30	365	
All Memorandum	1	61	39	89	-	213	
All No Opinion	141	94	103	159	19	387	
Circuit Average	1343	90	108	156	60	428	

ROOM 3600, 611 WEST SIXTH STREET,
Los Angeles, September 23, 1974.

WILLIAM P. WESTPHAL, Esq.,
Chief Counsel, Subcommittee on Improvement in Judicial Machinery, New Senate Office Building, Washington, D.C.

DEAR BILL: On checking my calendar for October 1, I find that I am scheduled to be in an important series of meetings here with the Chief of Police, the Superintendent of Schools, and other local officials on juvenile justice problems which have been plaguing our community.

Thus, with great regret I must decline to accept your invitation to appear at the hearings on circuit revision. Fortunately, State Bar President Brent Abel will be appearing and will express views which I believe are largely consistent with mine.

For your information and file, I am enclosing a copy of a speech on the circuit issues, which I delivered to the Chancery Club of Los Angeles entitled "Don't Divide California".

With regards.

Sincerely,

WARREN CHRISTOPHER.

REMARKS OF WARREN CHRISTOPHER DELIVERED IN A SPEECH TO THE CHANCERY CLUB OF LOS ANGELES, MARCH 1974

[Mr. Christopher is a member of the law firm of O'Melveny and Myers, 611 West 6th Street, Los Angeles, California. Currently he is President of the Los Angeles Bar Association. Formerly he was Deputy Attorney General of the U.S. (1967–1969) and has held a variety of other government offices, both State and Federal.]

DON'T DIVIDE CALIFORNIA

There is more mischief than merit in the recent proposal that would divide California in the process of dividing the Ninth Appellate Circuit into two separate circuits.

The plan, being advanced by a Federal Commission, would place the Northern section of California in a new Twelfth Circuit, while the Southern portion would remain in a realigned Ninth Circuit. While the arguments for realignment of circuit boundaries are strong, on balance I think the proposal that would divide our state entails serious disadvantages that far outweigh the benefits. The circuit, in my view, can be divided without dividing California.

I. PREVIOUS ATTEMPTS TO DIVIDE THE STATE.

The idea of dividing California, politically or otherwise, is not new. Attempts to split California are as old as the state itself. These efforts, which have always failed, provide some historical perspective for the current proposal.

As early as 1850, when California was admitted to the Union there was a threat of division. Southern senators sought to preserve the balance between slave and free states by demanding that the Missouri Compromise line be extended to the Pacific. That proposal would have severed California just south of Monterey. But a "great compromise" was worked out and California was admitted in its entirety as a free state. In the bargain, Utah and New Mexico were organized as territories without a ban against slavery.

This was only the beginning in a series of attempts to divide the state. Shortly after Admission, there was a strong movement for separation that arose in the southern counties—then called the "Cow Counties". This time the motivation was different—too much taxation and too little representation. In those years, the six southern counties with a population of 6,000 paid twice as much in property taxes as the six northern counties with a population of 120,000.

So in 1851, a "Convention to Divide the State of California" was convened in Los Angeles. Pronouncing the state government a "spendid failure", the Convention resolved that the political connection of the North and South is "beneficial to neither and prejudicial to both".

Another effort to carve away part of the state came closer to success in 1859. Andres Pico obtained approval from the legislature to incorporate the counties from San Luis Obispo south as the "Territory of Colorado". However, the Civil War broke out before congressional approval could be obtained, and the project was blocked.

As a footnote, I might mention that another of the early proposals for division would have formed a state south of the Tehachapis with the name "South Cafeteria".

In the 20th Century, Southern California continued to chafe over the distribution of power as well as uneven taxation, and proposals for division continued to be heard. The most serious recent proposal for bifurcation came in 1964 in the wake of a series of Supreme Court one person-one vote cases. Faced with the prospect of reapportionment, northern senators proposed a division of the state at the Tehachapis. However, polls showed that more than two-thirds of the voters even in the North were opposed to division, so the proposal never got off first base.

While one can understand the motivation of those who sought the division at various times in our state's history, I think we would all agree that the right result obtained. Providence seems to have intended that California should be a great state with a great people and a great destiny.

II. COMMISSION'S PROPOSAL TO DIVIDE THE NINTH CIRCUIT.

The latest proposal for a division of California comes neither from Southern or Northern California but from the Commission on Revision of the Federal Court Appellate System. The Commission was created in 1972 (P.L. 92–489) in response to near unanimous observation by scholars, lawyers and judges that the Court of Appeals, as a national institution, is suffering from overload.

Consider these hard statics: In 1960 there were 57 appellate filings per existing judgeship, while in 1973 the number had tripled to 161 per judgeship, in spite of the creation of 28 additional judgeships. The Fifth Circuit has expanded to 15 judges and the Ninth to 13. Case loads are heavy, and backlogs have become intolerable.

In the first phase of its work, the Commission was directed by Congress to recommend changes in the geographical borders of the circuits. Specifically, the Commission was given 180 days, ending December 18, 1973, to make proposals.

In the second phase of its work the Commission is continuing to study the structure and internal procedures of the Court of Appeals with recommendations due at the end of 1974.

Some perceptive observers, such as Judge John Minor Wisdom of the Fifth Circuit, think that Congress may have put the cart before the horse by seeking to redraw Circuit Court boundaries without first considering the more fundamental questions of internal structures and procedures. This observation has a good deal of force to it, but the exhaustive study of the Commission on the first phase has been completed and we have before us its recommendations.

In summary, the Commission has concluded that, for now, only the Fifth and Ninth Circuits require major surgery. While the problems of the realignment of the Fifth Circuit are distinct and interesting, I am sure you will not be surprised to hear that it is our own Ninth Circuit upon which I intend to focus today.

The Ninth Circuit is massive, extending from the Arctic Circle to the Mexican Border, and from Montana to Guam. At the end of fiscal 1973 there was a backlog of 170 cases per judge, enough to keep the court busy for a year if no new cases were filed. Even with the steady stream of visiting judges from other Circuits and District Judges sitting by designation, the thirteen currently-authorized judges have simply been overwhelmed by the increase in appellate filings. Thus, the backlog continues to grow. Indeed, in the first six months of fiscal 1974 the backlog rose to 194 per judge.

The foregoing raw statistics, which amount to over a fourfold increase in appellate filings in ten years within our own Circuit, translate into some very significant practical changes in appellate practice. Oral argument is cut down, sometimes cut out. The time gap between District Court decision and Court of Appeals argument grows. In the Ninth Circuit, as Judge Duniway observed, the gap may be as much as two years in civil cases.

In addition, unsigned or per curiam opinions have become the rule rather than the exception. While some might argue that this terseness is a welcome sign of judicial economy at the appellate level, it is, quite to the contrary, evidence of an overburdening of the appellate courts that threatens the quality of appellate review.

It is in the context of this urgent need for relief that the Commission has made the basic recommendation that the Ninth Circuit should be reconstituted into two new circuits:

(1) A new Twelfth Circuit to consist of the Southern and Central Districts of California, the states of Arizona and Nevada, and

(2) A new Ninth Circuit to consist of Alaska, Washington, Oregon, Idaho, Montana, Hawaii, Guam and the Eastern and Northern Districts of California.

Some criticize the plan as a palliative, suggesting stronger medicine as the only hope; some say the division of the Circuit will impede further substantive reform; and others suggest that the situation, while critical, simply should be left alone. For my purposes, I am willing to regard some division of our present Ninth Circuit as inevitable—"a given"—and a prudent one, too.

III. THE DANGERS OF DIVISION

The problem, as I see it, is not with the concept of a new circuit, but with the method of achieving it. We urgently need to redistribute the case load of the Ninth Circuit, but not at the expense of other important values—not at the cost of making California half Ninth and half Twelfth. I believe that the bifurcation of California would create some very substantial problems, though in saying so I recognize I am differing with some eminent Court of Appeals judges who have both my friendship and respect.

A. The Potential for Inconsistent Judgments

One of the most serious problems created by dividing California into separate circuits involves the potential for inconsistent judgments in cases involving the same parties and the same issues, but brought in different parts of the State. I am sure that each of you can easily call to mind what are essentially single disputes but where the parties have invoked the jurisdiction of the federal courts in both San Francisco and Los Angeles.

In a divided California, such situations would almost inevitably result in the waste of judicial time in litigating separate appeals in separate circuits. More important, one or more parties might be subjected to confusing or altogether inconsistent obligations, imposed by inconsistent judgments in the two branches of the litigation. A litigant may find himself in the intolerable situation where he cannot avoid disobeying one judgment or the other.

It can be no answer that the United States Supreme Court is available to resolve disparate judgments, for the High Court itself is struggling with the sharp increase in its own case load. Civil cases that are not of national concern, in spite of the amount in controversy or the importance of the litigants, are seldom regarded as worthy of hearing in the Supreme Court. With no procedural device similar to a rehearing *en banc*, the parties would be left to try to cope with directly conflicting or at least confusing judgments.

B. Conflict of Decisional Law—Diversity Litigation

In addition to the possibility of inconsistent judgments against a party, there is the more pervasive and equally serious problem of conflicts as to the legal rules applicable in a given situation. Perhaps this can be most easily seen in connection with the application or interpretation of state law in the federal courts. If California were bifurcated, it is entirely conceivable that the Northern Circuit would interpret California law in one way, whereas the Southern Circuit would interpret it in an opposite or significantly different way.

Again, the availability of the Supreme Court is not a sufficient protective device. The Supreme Court's custom, in diversity cases, is to accept a Court of Appeal interpretation of the law of any state within the circuit. Thus, litigants in different federal courts in California could be subject to different rules, and there is no guarantee that either would conform even to state interpretations. All this would lead to much uncertainty, unequal treatment, and a particularly unattractive inducement to forum shopping.

It has been suggested that since it is state law that is involved, the difficulty to which I have referred could be resolved by a liberal dose of abstention on the part of the federal courts. Abstention certainly has its place, particularly with respect to novel state constitutional questions and cases removed to federal court with only a tenuous federal jurisdictional base. But this doctrine has limited application to diversity cases where litigants have a federally-created right to the availability of a federal forum

In diversity litigation, state law seldom seems to fit exactly the facts of a new case. So many new cases seem to involve previously unlitigated issues stemming from our complex, interdependent, and technologically advanced society. Thus,

the federal courts are required to exercise their judgment and wisdom, rather than simply applying state law by rote. This, in my view, is the way it should be, and I think it would be as unwise as it is unattractive for the federal courts to have to shrink from a duty imposed by Congress and recognized by the Supreme Court since 1938.

I doubt there is any constitutional infirmity in the proposed plan to split California. But I cannot help wondering whether the Framers of the Constitution intended the federal system to be so fragmented that citizens of the same state would be bound by differing federal court interpretations of their own law.

C. Conflict of Decisional Law—Federal Question Jurisdiction

The conflict of legal rules, of course, applies to federal as well as to state law. If the two circuits in California should interpret federal law in different ways, there would be the prospect that California citizens would be treated differently depending upon where their cases were brought. Arguably, this is no worse than conflict among circuits which are located at opposite ends of the country, but I am not at all sure that this is so.

Indeed, when we picture the many federal laws which may be peculiarly applicable to a single state, it seems inadvisable to encourage a situation in which persons are subject to different rules of law simply by virtue of where they live or happen to be travelling in their home state.

The potential for diverse interpretation is not imaginary. For example, both federal and state welfare laws are subject to much litigation these days and it is easy to conceive of the southern circuit in California reaching a result in direct conflict with that of the northern circuit on an important legal issue of statewide importance.

To give another example, there is increasing litigation involving the rights of prisoners in our state institutions. Once again, it is not at all difficult to envision a situation in which the southern circuit in California would uphold certain prisoner rights in an action against the State Director of Corrections, while the northern circuit was denying the same or comparable rights. Who would argue that this would be a desirable situation?

Corporations, both public and private, operating on a statewide basis would face the same dilemma. Take one of our statewide banks for example. An action brought against a bank in the northern circuit might establish a certain right for depositors which could be denied in a comparable case in the southern circuit. Yet, neither case might be worthy of certiorari, and the bank would be left to face the inconsistent decisional rules.

I have only suggested some of the areas in which inconsistent decisions between the newly-created circuits would cause a serious disruptive effect. Federal labor, tax, antitrust, and environmental laws might also be interpreted with varying degrees of inconsistency. So the present task of advising a client on a complex legal matter involving its operations in this state would be greatly complicated by the division of the state into two circuits.

D. Techniques To Minimize Conflict

I recognize, of course, in addition to abstention and remand, there are a number of techniques which might be used to help prevent such inconsistent judgments or a conflict of legal rules. These include transfer of venue under 28 U.S.C. § 1404 (a), multidistrict handling under § 1407, injunctions against litigation in another district, and stay of proceedings. These techniques would be helpful in lessening potential problems if California had to be divided. But they were designed for a different purpose, and very often they seem to result in delay and expense which is justified only in the most complex cases. By my lights, these techniques at best would be a cumbersome and expensive way of dealing with a problem which never need arise.

The staff of the Commission on Revision has also suggested that if Congress decides to bifurcate California, "it might be well advised" to set up a special procedure for resolving certain issues. The suggestion is that litigation involving a particular state statute or rule should be channelled to a single District Judge drawn from either circuit, who would handle the case through both discovery and trial. That is only the beginning of the problem, however, for then Congress would have to provide a special appellate panel to hear the appeal, perhaps chosen by the Chief Justice from the two circuits in the state. In effect, we might end up having three new circuits, the third being a tie-breaker for California cases. I doubt the advisability of such a procedure, but by advancing it, the staff of the Commission does seem to confirm my estimate of the gravity of the problem of splitting California.

E. A Fundamental Danger

In addition to the somewhat technical problems I have discussed, bifurcation would have a more fundamental danger. It would breed a sense of separation in our state, exactly contrary to the direction in which we should be moving. It would encourage Northern California to a new isolation and thus a new insularity. After having resisted political division of the State for more than a century, wouldn't it be most unfortunate to take this backward step in the judicial field.

IV. ALTERNATIVE PROPOSALS

A. California as a Separate Circuit?

I have spent a good deal of time explaining why I think the division of the state between two circuits is an idea that bears a heavy burden. No other state in the United States is divided between two circuits. With this in mind I would like to discuss for a moment an alternative—also unique and untried—that would solve many of the problems of case overload. The idea, which was considered and rejected by the Commission, would create a separate Circuit Court of Appeals composed only of the State of California.

The Commission apparently believes that if California were a one-state circuit, it would lack the diversity of background and attitude brought to court by judges who have lived and practiced in different states. On this score, the Commission just may not know California and its federal judiciary.

Consider a few of the judges from California on the Ninth Circuit. There is Walter Ely who lived and grew up in Texas and would bring quite a lot of diversity to any group! Then, there is Shirley Hufstedler who grew up in New Mexico and who would bring both distinction and distinctiveness to any group of judges. And who would say that Judge Wallace and Judge Duniway are two peas in a pod? In almost every repsect, California is as diverse as the nation, and I am confident it would produce plenty of diversity in its judges.

Moreover, California as a separate circuit would fare well in comparison to circuits such as the Second, which is made up of only Connecticut, New York, and Vermont. In the Second Circuit, 8 of the 9 authorized judges either practiced law or was a Federal District Judge in New York before appointment. Moreover, cases from New York District Courts made up 75% of the appellate filings in 1972.

The Commission also argues that if California constituted a single federal circuit, only two senators from a single state would be consulted in the appointment process, and a single senator of long tenure might have a great deal of influence. This brings to mind some valid questions about senatorial influence on appointments which have been raised by Elliot Richardson. His views no doubt deserve a hearing and they may lead at some future date to overall reform of the selection process. Yet if we retain the senatorial system—and it seems likely we will—my experience leads me to question whether there is any great danger in seniority, or any inherent safety in numbers in connection with judicial appointments.

As a very broad generality, the more senior a senator is, the better his suggestions for appointment tend to be. Perhaps this is because a senator, re-elected over a period of time, develops more independence from his political obligations.

As to the Commission's suggestion that there is safety in numbers, I may observe that the high quality the California state judiciary owes a good deal to the fact that it reflected for a relatively long period of time the appointments of a single man, Governor Earl Warren. Moreover, the relatively long influence of Governors Brown and Reagan has, on the whole, been healthy. So, I am inclined to think that, as usual, it is quality, not quantity that counts.

Another reason advanced against having California as a single circuit is that 60% of the Ninth Circuit case load comes from California, and so it is argued that it is essential to divide the state in order to spread the case load between two circuits. This point has weight, but it is also worth remembering that the birthrate has dropped remarkably in California in recent years, and there are other indications that the population influx from outside the state has leveled off.

Moreover, California's case load can be spread among more than nine judges. A nine judge maximum may have symmetry about it, but there is no magic in that number. California as a circuit should probably have more than nine judges, but this is not reason enough to split the state.

Finally, it seems likely to me—and this is perhaps mainly intuition—that if California were a circuit, the cohesiveness of the Court and the proximity of the judges would result in marked efficiencies in handling the case load.

B. California Grouped With Other States

If there is any great problem about a circuit consisting of a single state, the matter can be at least partially corrected. Nevada could be added to California without any substantial increase in the case load of the circuit. Under such a plan, Arizona might be transferred to the Tenth Circuit, so as to assure that the circuits are made up of contiguous states. I would not recommend this, but if there is a fixation that a single state not be a circuit, it would still not justify splitting California.

V. CONCLUSION

One is always hesitant—and rightly so—to challenge the recommendations of a Commission, which is made up of a distinguished and able group of judges, lawyers, scholars, and elected officials. As you probably know, the Commission consists of four members appointed from the Senate (Senators Burdick, Gurney, Hruska, and McClellan), four members appointed from the House (Congressmen Brooks, Flowers, Hutchinson, and Wiggins), four appointed by the President (Emanuel Celler, Dean Cramton, Francis Kirkham of San Francisco, and Judge Sulmonetti), and four appointed by the Chief Justice (Judge Lumbard, Judge Robb, Bernard Segal, and Professor Wechsler). In addition to this outstanding lineup, it needs to be added that the Executive Director of the Commission is Professor Leo Levin of the University of Pennsylvania Law School, the co-author of a leading case book on federal civil procedure.

With all respect to this outstanding Commission, I beg to differ on the division of California. The problems arising from bifurcation—problems such as inconsistent judgments and conflicting versions of state and federal law—are, in my view, real and substantial. They outweigh the difficulties—minor difficulties in my view—of having a circuit consisting solely of California. I hope Congress will see it as I do and, once again, keep California together.

U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT,
CHAMBERS OF ALFRED T. GOODWIN, U.S. CIRCUIT JUDGE,
Portland, Oreg., September 25, 1974.

Mr. WILLIAM P. WESTPHAL, *Chief Counsel,*
Subcommittee on Improvements In Judicial Machinery,
Dirksen Office Building, Washington, D.C.

DEAR MR. WESTPHAL: I am sorry that I was out of the office when you called and I am even more sorry that I cannot come to Washington the week of October 1st to appear before the subcommittee. We have set a full calendar of oral arguments in Los Angeles for that entire week, and I am scheduled to sit on four of the five days beginning September 30.

As you know, the problem of the Ninth Circuit, is essentially a problem of what to do about California. California by itself produces more than two-thirds of the work of the circuit, and the projected future case-load coming out of California will be greater than it is today, both in gross figures and in proportion to the rest of the Ninth Circuit. I think S. 2988, 2989, and 2990 deal realistically with the Ninth Circuit. The distinguished commission gave a lot of thought to the problem of California, and the commission's proposed solution makes good sense. Whether it will be well received by the people who make political decisions affecting California is another matter.

Maybe what we need is fewer circuits rather than more circuits, or the abandonment of the circuit structure and development of a new administrative technique for putting the necessary judges where the cases are to be heard.

I would not be alarmed at the prospect of one national court of appeals under centralized administration, so long as the administration remains responsive to the needs of the various districts. Because the Ninth Circuit has been a borrowing circuit and has had the benefit of assistance from senior judges from other circuits. I have personally sat on panels with judges from the First, Second, Third and Fifth Circuits within the last three years. In most of the cases, the questions were federal questions, and the regional origins of the judges were wholly irrelevant. As far as travel is concerned, we can probably forget some of the folklore that we learned during the days of horse and railroad. It is as

easy to go from Portland to New York, or from Philadelphia to Los Angeles, as it is to go from Portland to Billings or Spokane. And the cost of moving judges around is probably a relatively minor cost in the total budget for civilian government.

In conclusion, I support S. 2988 as a temporary measure and suggest further study be given the need for the separate circuits.

Sincerely,

ALFRED T. GOODWIN,
U.S. Circuit Judge.

U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT,
Chambers of Alfred T. Goodwin, U.S. Circuit Judge,
Portland, Oreg., September 27, 1974.

Hon. QUENTIN N. BURDICK,
Chairman, Subcommittee on Improvements in Judicial Machinery, Dirksen Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: While I am on record in support of the report of the Commission on Revision of the Federal Appellate Court System (as the lesser of several evils), I want to make it clear that I favor fewer, rather than more circuits.

Judge John Kilkenny of the Ninth Circuit, convinced that the splitting of California into two circuits is politically unlikely as well as undesirable, has suggested a relatively minor administrative change that would save the Ninth Circuit, and at the same time create an experimental laboratory for observing an alternative administrative model. The northern and southern division scheme, however, has not commended itself to the Commission, at least in part because of its lack of nationwide application. I have been advised that it is a lost cause, but I still think the Kilkenny plan is superior to the creation of more circuits.

In any event, the geographical area now served by the Ninth Circuit needs at least eighteen judges to hear and decide the cases presently being produced in the region, and any solution which fails to provide sufficient manpower, in my judgment, would fail of its purpose.

Sincerely,

ALFRED T. GOODWIN,
U.S. Circuit Judge.

U.S. COURT OF APPEALS, NINTH CIRCUIT,
EUGENE A. WRIGHT, JUDGE,
Seattle, Wash., September 23, 1974.

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

DEAR SENATOR BURDICK: Because of a conflicting court calendar in Los Angeles early next month, I shall be unable to attend the hearings to be conducted by your committee on circuit revision. At Mr. Westfall's suggestion, I would like to present my views.

I testified in Seattle before the Commission on Revision of the Federal Court Appellate System in August 1973. I said at that time that:

(*a*) There was an immediate and urgent need to divide the Ninth Circuit.

(*b*) That the Commission and the Congress should be planning ahead for at least 20 years.

(*c*) That there was justification for the creation of a new circuit in the Pacific Northwest.

Those are still my views and they have been reinforced by some recent events.

A year ago some of us reported that the judges of the Ninth Circuit sat en banc rarely because of the difficulty of gathering all 13 active judges in one courtroom at a specific time. Members of the bar had charged the court with having released a number of conflicting opinions which needed to be reconciled by rehearings en banc.

Since that time we have taken many cases en banc, some for the reasons suggested by the bar. In one situation, conflicting and totally irreconcilable opinions had been filed within one week, each by a three-judge panel which was unaware of the case under consideration by the other. But, the en banc process consumed many more months and the en banc opinions in the two cases have not yet been filed.

There have been other examples which make the same point. The fault is not with any judge or with the administration of the court. The circuit is just too large and there are too many judges to administer and too many opportunities for errors. Simultaneously the court can be sitting in three cities, often with district judges filling out the panels. One panel has no way of knowing the nature of the cases being heard by the others. The district judges who assist us are unaware of most correspondence and intra-court memoranda on general subjects.

So, my conclusion from all of this is that the court is unwieldy, that it must be broken up in some way, that a court of nine judges in active service is the absolute maximum that can be organized and administered efficiently, and that courts of five, six or seven judges would be more desirable.

The bar has quite properly charged us with delay, and the results of accumulating backlogs of civil cases which have been briefed and ready for argument 12 to 18 months before we have reached them. Such delay has been costly to the public, litigants, lawyers, as well as to us on the court. When we prepare for oral argument and read briefs which are 18 months old, we can assume that the law has changed, that the lawyers have long since forgotten the case and will not argue before us with clear and present memories of the trial scene, and that the extended delay may have even caused the appeal to abort.

Again, the fault is not with the court. New appeals have engulfed us. Our production has increased, but not fast enough. It is obvious to me that adding more judges to a circuit already too large is not an answer.

A year ago I suggested to the Commission that we can expect an increase in judicial business and in appealed cases in the Pacific Northwest. I believe that I am correct, but I must depend upon others to supply the figures. Here in Seattle it is clear to us that federal litigation in Alaska will increase tremendously within five years. Seattle's harbor is filled with ships and barges heading north. Commercial airlines bound for Alaska cities are traveling full. Soon we shall see floods of cases in such fields as environmental law, civil rights, the problems of the Alaska natives, and the inevitable load of criminal prosecutions.

It makes sense to me to have argued in the Pacific Northwest the cases coming up on appeal from those states. Travel time for lawyers can be saved. With lawyers' hourly rates for appellate work now at $100 per hour or more, it is unfair to counsel and their clients to require more travel time than necessary. It is unfair to the lawyers and citizens of the less populous states to deny them speedy administration of justice by making them wait in line behind appeals coming up from the nation's most populous state.

Thank you for giving me the opportunity to present my views.

Sincerely yours,

EUGENE A. WRIGHT.

Senator BURDICK. We will now call as our first witness the Honorable Ben Duniway of San Francisco, a Judge of the Ninth Circuit Court of Appeals.

STATEMENT OF BEN CUSHING DUNIWAY, JUDGE, NINTH CIRCUIT, SAN FRANCISCO, CALIF.

Judge DUNIWAY. Thank you, Mr. Chairman. I am pleased to be able to be here to discuss the ninth circuit.

You have summarized a good many of our problems. We are well aware of them, and have been working very hard to increase the disposition of our cases.

I have prepared and handed to Mr. Westphal a written statement of my position. I don't intend to repeat all that is contained in that statement unless you desire that I do so, but there are some rather distinguishing aspects of this matter which I think are unique to the ninth circuit, and I would like to address my remarks to those aspects.

Senator BURDICK. Judge, your prepared statement will now be incorporated into the record in full and you may proceed to present your views in any manner you wish.

[The full text of Judge Duniway's prepared statement follows:]

PREPARED 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 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, except for a five and one-half year interval as a government attorney and administrator during World War II, until 1959.

I appear 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 am in hearty agreement with the Commission's statement that:

> Such a realignment will by no means solve all of the Ninth Circuit's problems for all time, but it will make them more manageable in the short run and establish a sound geographical base on which to build more fundamental reforms.

I am convinced, after serving on the Court of Appeals for the Ninth Circuit for thirteen years, that the Circuit must be divided, regardless of anything else that may be done to reduce the workload of the United States Courts of Appeals. Anything that can sensibly and reasonably be done to reduce our workload, such as limiting the jurisdiction of the Federal Courts in ways that will not deprive persons who ought to have a Federal forum of that forum, or such as devising better methods of considering and deciding the cases that come before us, will be welcome. We are ourselves already hard at work on the latter job. But I personally am convinced that the Ninth Circuit's caseload is now so large that we can no longer function as a Court of Appeals ought to function. I am also convinced that one of the factors that makes our job so hard to do properly is the very large area from which our cases come. In short, I believe that two factors—geography and caseload—have combined in the Ninth Circuit in such a way as to make it well nigh impossible for us as judges to do the kind of job of considering and deciding cases that the litigants, the bar, and the public generally are entitled to expect of us. While the two factors interact, I believe that it will be helpful to consider them separately.

1. GEOGRAPHY

a. Size

We are by far the largest Circuit geographically. We extend from the eastern border of Montana to Guam, and from the Mexican border to Point Barrow, Alaska, north of the Arctic Circle. California is the nation's largest state in population, and the third largest geographically. It produces over 65% of our cases, and it has six of the Census Bureau's 50 major metropolitan areas of the nation, including Los Angeles, the second largest, and San Francisco, the sixth largest. Other major areas are San Diego, California, Phoenix, Arizona, Portland, Oregon, Seattle-Tacoma, Washington, and Honolulu, Hawaii.

b. Travel

Distances from San Francisco, our headquarters, are great. This means that the court travels extensively. We believe that litigants in distant places ought not to have to bear the heavy expense of travel to San Francisco. We sit regularly in San Francisco (12 months), Los Angeles (11 months), Portland-Seattle (3 months), Alaska and Hawaii (1 month each). In Los Angeles two panels sit each day for a week. In San Francisco three panels sit each day for a week. In the Northwest, Alaska, and Hawaii a single three-judge panel sits each day for a week. All of this means extensive travel for all of us, and travel uses valuable

time. We do not believe in "local" panels; so all of us travel. Each active judge is expected to sit about the same number of times as each other active judge, in each place where we sit.

Every time the court sits away from San Francisco, someone from the clerk's office (usually two) must travel. So must the briefs and records in all of the cases to be heard. This greatly reduces the efficiency of the clerk's office.

Because we only sit for a week each month in each city, most of us do not take our secretaries or law clerks with us when we travel; they have plenty to do at home, and travel reduces their hours of actual work. Moreover, both we and they are more efficient at home. That is where we have our personal libraries, our files, and our equipment. So we are less effective when away from home.

c. Scatteration of judges

As of October 8, we will have twelve active and five senior judges and one vacancy. Here is where they have their headquarters:

	Active	Senior
Seattle	1	
Portland	1	1
Honolulu	1	
San Francisco	1 4/6	2
Los Angeles	2	1
San Diego	1	1
Phoenix	3/6 [1]	
Tucson	1/2 [1]	

[1] Our Phoenix judge spends 3 months in San Francisco: our Tucson judge spends 6 months in San Francisco.

d. Massive paperwork

Normally, a judge who travels to a city to hear cases is there only long enough to hear the cases, confer about them, receive his assignment, and go home. This means that the circulation of opinions, comments and discussion about cases, and almost everything else about our business, goes on paper and through the mails, although we do make extensive use of the telephone. This method of doing business is not efficient, it takes time, and is far less satisfying than face to face discussion. Thus, with our judges so scattered, and with the number of us that there now is, the sheer volume of paper work, both in the Clerk's office and between the offices of the various judges, increases by geometric progression. This could be materially cut down if all of us maintained our offices in any one place. This, however, the law does not require, and although I would like it, I am not sure that it should be required. When a man has been practicing law or been a judge in a given community for many years, it is asking a great deal of him to pull up his roots and move himself and his wife, and his children if they are not grown up, to another city where they may not have any personal friends or ties. If it were required that every judge move to the headquarters of the court, it could well be that some highly qualified persons would decline appointments to the court. Fortunately for me, I need not personally face this problem.

2. CASELOAD

I joined the court in the fall of 1961. This is the record for the previous fiscal year, 1961:

Fiscal year 1961 appeals	Filed	Terminated	Pending
Total	443	470	372
Per judgeship (9)	49	52	41

Fifty-two was also the national average number of terminations per judgeship that year for all of the Courts of Appeals. Our experience has been that about one-third of our cases are disposed of without decision on the merits--dismissed, transferred, settled, withdrawn, etc. So each of us had to write about

35 opinions per year. We had *no* backlog. We were hearing every appeal as soon as all briefs were in. It was a great time to join the court. That happy condition continued for two or three years. Then the avalanche began, and it has continued ever since.

Since 1961, our filings are up sixfold. Our dispositions are up well over fivefold. Our "backlog" is up more than sixfold (this refers to cases pending at year's end). Here is the record for fiscal 1974, with thirteen judgeships:[1]

	Appeals filed	Terminated	Pending
Total	2,697	2,464	2,467
Per judgeship (13)	207	190	190
In fiscal 1973, the figures were:			
Total	2,349	2,148	2,234
Per judgeship (13)	181	165	173

For fiscal 1973, the last figure available to me, the national average of terminations per judgeship was 150, and of pending cases per judgeship was 108.

It took us longer than we should have taken to realize what was happening to us. But when we did, we began various efforts to stem the tide.

1. We asked for and finally got four more judges.
2. In common with the other circuits, we got two law clerks per judge.
3. We made massive use of visiting judges and senior judges.
4. More cases were heard by each active judge.
5. We made extensive use of per curia and brief orders.
6. We undertook screening of cases, beginning September 14, 1970.

By screening, we have increased our dispositions considerably. From September, 1970, through August, 1974, a total of 1324 cases were screened and considered by panels of the court. This was done without reducing the regular calendar workload; it was in addition to that load, which had also increased.

Since September, 1970, we have made a massive effort to get current on criminal cases. We have the largest load of criminal cases of any circuit. We now have an expediting law clerk. Each appeal, when filed, gets a fixed calendar date. The clerk "rides herd" on each case until it is ready to be heard. Each month each of us sits in one or more hearings at which seven or more criminal cases are heard on one day. Today, criminal cases are current.

In contrast, we have a horrendous problem with civil cases. On the average, these are the harder cases to decide. Litigants do not spend money on civil appeals unless they believe that the appeals are meritorious. As of September 24, 1974, there were 601 cases fully briefed but not calendared. Cases not entitled to preference are now between one and two years old. This does a grave injustice to the litigants involved.

We are also making massive use of visiting judges. Nearly every panel has one visiting judge. Most are district judges. Some are senior judges from other circuits. We also get a lot of help from our own senior judges. They like to take tough cases. All of this means that our per judgeship figures for dispositions look better than they are.

The more cases we have to decide, the more judges we have, and the more scattered they are, the harder it is to keep us functioning as one court—to keep our decisions fully consistent. By the same token, in banc hearings are very burdensome, and we try to avoid them. An in banc hearing means assembling 13 judges from all over the circuit. This is equivalent to four plus panels, and means the use of all that manpower to hear one or two cases instead of at least twelve cases. The paperwork in circulating an in banc opinion or opinions, getting comments, revising and recirculating, is enormous. Let me give you an example. Last December, two panels of the court, one sitting in Seattle, the other in Los Angeles, filed two opinions, almost simultaneously, deciding an important question of Federal law differently. The two panels attempted to agree between themselves on a proper solution, but were unable to do so. They then recommended that the court hear both cases in banc. The two cases were heard together by 12[2] judges in June. Following a lengthy conference, the cases were assigned to me. Opinions

[1] These figures include administrative review cases and original proceedings, just over 24% of all filings in fiscal 1974.

[2] It was stipulated that the 13th judge, who was unavoidably absent, could participate in the decision.

were circulated in July. Following circulation of memoranda and phone conferences with various judges, the opinions were revised. More memoranda and phone conferences ensued. In September, the cases were again discussed at a meeting of the full court. The opinions were filed on September 27. In one case there are a principal opinion, a concurring opinion, and three concurring and dissenting opinions. In the other, there are a principal opinion, concurring opinion, and a dissenting opinion. My files of drafts and memoranda are more than two inches thick! This year we have taken almost a dozen cases in banc.

The use of visiting judges also makes it more difficult to maintain institutional unity. They are not members of the court, they are with us only for short periods, and many do not feel the need for such unity as keenly as we do. If and when we can get current, we hope to reduce the use of visiting judges very drastically. The workloads of our district judges are constantly growing, so that it becomes more and more of a burden for them to assist us.

We have not been shy about asking for more help. We have asked for five more judges. We have obtained seven more law clerks and six more secretaries, and we are asking for more. We are constantly striving to increase our efficiency.

I am convinced, however, that none of these things will solve our problems. Without extra help and extra effort, we would never have been able to increase our dispositions from 52 per judgeship to 193 per judgeship. We might be able to increase them further with the help of more law clerks, secretaries, and other assistants. But we are now up to an average of about 110 opinions per judgeship per year.

My experience on this court leads me to conclude that a judge has about 189 regular working days per year in which to read briefs and records, examine authorities, and formulate and write opinions, as well as to consider the approximately 240 other opinions that will come to him from his colleagues who have sat with him. I reach that figure this way.

Days per year	365
Days vacation	—30
Total	335
Days (98 weekends)	—96
Total	239
Days for committees, administration, etc	—10
Total	229
Days hearing argument (10 mo. 4 days each)	—40
Total working days	189

In fact, most of us also work on those 96 weekend days. Thus, we have about 285 days, or less than three days per case! Yet we frequently have cases that require weeks, not days of work. If present trends continue, we will not really be judges at all.

Yet the bar and the people expect, and are entitled to expect, that their appeals will be decided by judges, not by law clerks. The more law clerks a judge has to work on the cases the judge has to decide, the more the judge is going to have to rely upon his law clerks in deciding the cases. He will do less and less of his own research and less and less of his own writing. He may even get to the point where the only persons in his office who even read the briefs are his law clerks. We are not there yet, but we are approaching that situation. This is not my idea of what a judge is appointed to do, and I do not believe that it is the lawyers' or the public's idea of what a judge is appointed to do. He is appointed to be a judge, and that means that it should be he, and not someone else, who does the deciding. He cannot do his job properly unless he has a reasonable amount of time within which to do it. Judging, among other things, is supposed to take thought, and a judge who is immersed in paper work, in bench memoranda from his law clerks, and in draft opinions from his law clerks, is not going to be able to take the time to do what he is supposed to be doing.

Thus, I think it imperative, rather than to increase the workload of judges by further administrative devices, to reduce it, and I do not think it proper to reduce it by creating a system under which somebody other than the judge is really doing the judging.

I have no pat formula for deciding how big a Circuit should be in terms of area, caseload, and number of Circuit Judges. But I am sure that the Ninth Circuit is *too large* in all of these categories. A smaller area would mean less travel, less scatteration of judges, less paper work, fewer administrative problems; a smaller caseload per judge would enable us to perform far better as judges. We make the law of the Circuit; frequently we make the law of the nation. We ought to have time to do those jobs properly. A smaller area and a smaller caseload will mean a smaller court. Nine judges, all located in or near one place and thus in daily contact with each other, and with a manageable caseload, are judges enough. Seven would be better. Such a court, I believe, could do a good job with a caseload of about 100 filings per judgeship per year. Much beyond that I do not think that we should have to do.

3. DIVIDING THE NINTH CIRCUIT

The following table shows the source, by state and district, of all appeals, including agency appeals and original proceedings, filed with us in fiscal 1974:

Alaska	32
Arizona	260
California	1,731
Northern	473
Eastern	108
Central	765
Southern	388
Hawaii	55
Idaho	38
Montana	45
Nevada	125
Oregon	147
Washington	218
Eastern	49
Western	169
Guam	43
Total	2,697

As will be at once apparent, the single most important figure is 1731 cases from California. If California alone became a separate circuit, with 9 judges, there would be 192 filings per judgeship—a figure far too large, in my opinion. To get the figure down to approximately 100 per judgeship, there would have to be 17 judges—again far too many, in my opinion. It seems to me inevitable, therefore, that California must be divided between two new circuits.

This is not something that I would like to see done, but it does seem to me essential that it be done.

The Commission would create two new Circuits with filings (fiscal 1974) as follows:

1. New Ninth:

California:	*Filings*
Northern	473
Eastern	108
Alaska	32
Washington	218
Oregon	147
Idaho	38
Montana	45
Hawaii	55
Guam	43
Total	1,159

2. New Twelfth:

	Filings
California:	
Southern	388
Central	765
Arizona	260
Nevada	125
Total	1,538

Nine judges in the new Ninth would face 129 filings per judge. Nine judges in the New Twelfth would face 171 filings per judge. The 129 is a reasonable number, in my opinion. The 171 is high, but much better than the 207 we faced in fiscal 1974, or than the 192 that a circuit of California alone would face. In the proposed new Twelfth, the judges would be in a reasonably compact circuit geographically, and could function much better as a unit than we now can.

If a new circuit composed of California plus one or more other states were created, the result would be even less helpful than to create a circuit covering only California, because such a circuit would inevitably have more filings than would a circuit covering only California. For example, in a letter to the Commission last December, Acting Attorney General Bork suggests that it would not be a mistake to create a circuit composed, for example, of California, Alaska, Hawaii and Guam, thus avoiding the problems which he thinks might arise from dividing the state of California between two circuits. He points out that in fiscal 1973, a total of 1642 appeals were filed in the proposed circuit, i.e., California, Alaska, Hawaii and Guam, which is fewer [by 67] than the number filed in the Second Circuit during that period. I add parenthetically that in fiscal 1974, the total filings for these states was 1861—more than 206 per judge for a nine-judge court.

The suggestion seems to me to miss the whole point of dividing a circuit. Next to the Fifth and Ninth, the Second Circuit is the most overloaded in the United States. It is also one of the most efficient, but I suspect that the time is coming when its workload will demand that it, too, be split. In fiscal 1973, the Second Circuit terminated only 1462 cases, carrying over 247 cases. This raised its pending cases from 681 to 928. There is no use going through the difficult process of dividing a circuit in order to achieve two circuits, each of which will have a workload that is manageable by a court of not more than nine judges, if one of the two is to have a caseload at the start which is or very soon will be too much for such a court. That is what the caseload of Mr. Bork's suggested circuit would be.

I am aware that many persons and organizations, including the State Bar of California and some leading local bar associations in California, are opposed to dividing the state between two circuits. Some of the objections are sentimental, and I share the sentiment, but not at the expense of the ability of our court to do its job properly.

The major objections are based on fears that the two new circuits will come down with conflicting decisions about California law, or about federal law as it affects California. These objections are considered, and I believe satisfactorily answered, in the Commission's Report. I add a few comments of my own.

The objections fall generally into two categories. One is a divergence of view between the two circuits when actions of state agencies or the validity of state laws may be challenged in two circuits, with the possibility of conflicting results.

With the greatest respect for the objectors, the fears expressed remind me of the ancient Scottish prayer which goes: "From ghoulies and ghosties and long-leggity beasties and things that go bump in the night, Good Lord deliver us." Based upon my experience of thirteen years as a member of the Court of Appeals for the Ninth Circuit, I think that the problems that the objectors foresee are in the category of "things that go bump in the night." They are not real.

Most often mentioned is possible conflict if actions of state agencies or the validity of state laws are challenged in two circuits. This is not a new problem. Challenges to the actions of state agencies or to the validity of state laws now arise most often in three-judge district courts whose judgments are not appealable to the Court of Appeals but to the United States Supreme Court. There are four districts in California. Thus it has long been possible for similar actions to be filed in two different districts and to have three-judge courts in those districts come out with conflicting decisions. So far as I know, since 1961, when I became

a member of this court, *this has never happened*. There is no reason why it should happen if the state of California were divided between two circuits. Unless and until three-judge courts are abolished, the same possibility of conflict, *which has never occurred*, will continue to exist.

If, on the other hand, three-judge courts were abolished so that decisions would be made by a single district judge, and would be appealable to the appropriate court of appeals, I think the possibility of conflict is still imaginary rather than real. The natural tendency of one circuit or one district court to follow rather than to disagree with the decision of another circuit or district court should eliminate, and I think would eliminate, the possibility of conflict.

Moreover, if it is believed that these fears are justified, it should be possible to provide by law for the transfer of actions filed in different districts to a single district, thus eliminating the possibility of conflicts between districts and between circuits. The Multidistrict Litigation statute, 28 U.S.C. § 1407, provides an analogy.

The second category of cases that worries objectors is those that might produce conflict as to interpretations of state law between two circuits. Here, too, because there are four district courts sitting in California, this possibility has always existed. The difference of course is that with one circuit court, this court is in a position to reconcile those conflicts, while if there were two, there would be the possibility that the two circuit courts, like the district courts, would disagree. Here again, however, I have never known of a case in which two district courts in California have disagreed about what the law of California is, so that this court has had to reconcile the difference.

I can see no reason why there would be any more likelihood of such conflict when the district courts are in two circuits rather than in one. District court judges are independent minded people but they will not become more so merely because they are in different circuits. If there should be such a conflict between district courts, it seems to me almost inconceivable that the two circuits which deal with the laws of California would continue such a conflict. If one of them first decided the question, the other would almost surely follow its lead. This is partly because decisions by circuit courts on matters of state laws are not authoritative precedents on the question of what the law is. They are like Mr. Justice Roberts' famous excursion ticket which is good for this day and this trip only. I used to sit on the California District Court of Appeal and I well remember the reaction of that court when a decision of the Ninth Circuit was cited to us on a question of California law. Our reaction was, what does that federal court know about our law? In short, I think that the last thing that two circuits dealing with the law of California would want to do would be to create or preserve a conflict between them as to what the law of California is.

Moreover, if that should ever occur, it would always be open to the legislature or the courts of California to settle the question. In addition, I would guess that if California were divided between two circuits there would be little difficulty in persuading the California legislature to adopt the Florida procedure which permits a federal court having before it a question of Florida law about which it is in doubt to certify the question to the Florida Supreme Court for an authoritative pronouncement. This is only one of the many ways in which the problem envisaged, if it should arise, could be taken care of.

I urge that action to divide the Circuit, whether California is placed in two circuits or in one, not be delayed while the Commission and the Congress are studying other ways to revise the Federal Appellate System. We need help now, not in some distant future. If the Circuits are ultimately to be abolished, which seems to be most unlikely, it will not at that time matter whether there are then eleven or thirteen of them. If a national court of some sort is created, as many suggest, it will make no substantial difference to it whether there are eleven or thirteen circuits. Moreover, the national court, as presently proposed, is designed to relieve the burden of the Supreme Court. If it will substantially relieve the Courts of Appeals of their burdens, I have not been told how that is to occur. But if it does, it will be as welcome to thirteen circuits as it will be to eleven.

Finally, I comment upon an alternative to dividing the Circuit that has been suggested by some of my colleagues. That would be, instead of creating two circuits, to divide the Circuit into Northern and Southern divisions, under one chief judge. The "Divisions" would correspond to the new Ninth and Twelfth Circuits that the Commission recommends. Each would have nine judges. Headquarters for the Northern Division would be at San Francisco; headquarters for the Southern Division would be at Los Angeles. It has not been made clear

whether the Chief Judge would be a part of one of the Divisions, or would be separate from both, thus giving us 19 judges. The suggestion is thought to have several advantages. One is that it avoids the sticky problem of dividing California between Circuits. Another is possible greater flexibility in assigning judges to sit in one division or the other, as need arises. Another is that there would be more flexibility in assigning District Judges to other Districts as they are needed. It is thought that in the smaller districts, where per judge workload is less, judges can be available to help in the larger districts, where workloads are higher and where complex cases, involving lengthy trials, and sometimes disqualification of local judges, are most often found.

In spite of these claimed advantages, I strongly oppose the "Division" suggestion. If it were adopted, we would still have nearly all of the problems that we now have, and, as to some, we would have them "in spades." Trying to maintain the unity of a 13-judge court is bad enough; I shudder to think of trying to do it with 18 or 19 judges. The only way in which the "Division" suggestion could be made to work would be to have each "Division" function as if it were a separate court. Under such a system, we would soon have a Circuit divided in fact, but not in name—with most of our present problems plus a new one. I refer to maintaining unified law for the Circuit as a whole. Who would do it? The two "Divisions," 18 or 19 judges sitting in banc? If not, would a smaller group be selected to perform that function? If so, how? And how would the cases be selected for it to hear? By vote of the whole court? By vote of the "Division" concerned? By vote of the other "Division"? By the selected group that is to decide? Would not this in substance interpose between the "Divisions" and the Supreme Court another level of review? Would the Supreme Court require exhaustion of remedy at that level before it would entertain certiorarj? If not, might not the Supreme Court find itself having to settle intra-"Division" conflicts? In short, I consider the suggestion of "Divisons" to be the suggestion of an administrative monstrosity, offering few advantages but preserving and to some extent making more severe nearly all of our present problems.

I realize, of course, that it is not desirable to have a large number of Circuit Courts. Too many can create an intolerable burden on the Supreme Court. But I doubt if serious consideration need be given to splitting any Circuits except the Ninth and Fifth. I omit the Second, because if anything were split off from that Circuit, it could readily be added to the First. No other Circuit appears to be—or needs to be—in real trouble. Thus I doubt that geographic reorganization would produce more than 13 or 14 Circuits. I think that the country—and the Supreme Court—could live very well with that number for a long time.

Judge DUNIWAY. There are some features of the ninth circuit which I think make our problems different from those of any other circuit. I think it is fair to say that our problem is complicated by our geography: we are much larger than any other circuit. We therefore feel that we owe it to the litigants to go to them—at least in part—rather than making them come to use in San Francisco. So we have monthly sittings in Los Angeles 11 months of the year. I believe this past year we had 12. We have monthly sittings in San Francisco 12 months of the year. We go to Portland and Seattle 3 months of the year. We send a panel to Alaska and one to Hawaii once a year. We have our judges scattered. One lives in Seattle, one in Portland, one in Honolulu, and there are 4¾ of us in San Francisco. By that I mean one of our judges spends half the year in San Francisco and half in Tucson and another judge spends a quarter of the year in San Francisco and three-quarters of the year in Phoenix. We have another judge in San Diego and two in Los Angeles. We also try to avoid having "local" panels, thus the local judges are expected to sit just as much in the other cities as they do in their own. We don't want to have the court divided up into separate panels with the consequent possibility of conflicting decisions that sometimes arise from that. We don't think that the lawyers ought to be able to pick their panel. So all of us travel.

Now, in my experience in 13 years on the court, this has caused a considerable degree of inefficiency in the disposition of our business. When I go to another city to sit I am just not as effective in doing the work—other than in listening to oral arguments—as I am at home, where I have my own library, files, law clerks, secretary, and so on. I think every one of us runs into that.

In addition when we sit en banc, and we have done so on about 12 cases this year, this means that we have to assemble the 13 of us from every part of the circuit to hear one or two cases. That is the equivalent of more than four panels of the court. We then have to confer about the case, and an opinion has to be drafted and circulated. It takes an enormous amount of time.

I have given an example of what happens in one of those cases in the prepared statement which I filed here this morning.

I think the distance, the amount of traveling that we have to do, and the fact that we are so far apart that a great deal of our business has to be done by mail or on the telephone has had a serious effect on the efficiency of the court. I can see it myself as a result of having been on the court since 1961. We then had nine judges on the court, seven of whom had their headquarters in San Francisco, one in Los Angeles, and one in Fresno, and we saw those two judges every month. The seven of us who were there frequently had lunch together and discussed our cases. It was much easier to maintain the court as a single court applying the same principles panel by panel than it is now when we are scattered all over the place. This is one of the things that has, I think, made it difficult for us to manage the enormous increase in caseload that we have had.

You mentioned some figures, Mr. Chairman, about this past year and I have some figures in this prepared statement. I just want to contrast them with the figures we had 13 years ago when I came on the court. In fiscal year 1961, 443 appeals were filed in our court, and 470 were terminated. That is 49 filings and 52 terminations per judgeship, contrasted with the figures that you read into the record a few moments ago of 2,697 filings and 2,464 terminations or, for 13 judgeships, 207 filings and 190 terminations per judge. Our dispositions per judgeship have been going up every year.

You mentioned the fact we have been using a large number of district judges and senior judges to assist us. We have, but we are now hearing a larger number of cases per active circuit judge actually participating than the approximately three cases that I think you mentioned. Last month, for example, I sat for 2 days during which I heard eight criminal cases each day, and 2 days during which we heard six civil cases. This month I have a similar situation, and most of us are doing that. We have gradually gotten current in our criminal cases in two ways. One of them is by riding herd on the appeals when they are filed—by seeing that they get to us promptly. We have a clerk who does nothing but ride herd on counsel to get their papers in. Then we regularly calendar them on these longer calendars. In a substantial number of them we hear no arguments. Most of them we dispose of with a very brief opinion—just a few lines up to one page—unless we think the case is one that has value as a precedent.

Civil cases have caused us a great deal more difficulty. As you know, in the criminal field, particularly with the Criminal Justice Act, the convicted defendant has little to lose by filing an appeal. The consequence of that is that there are a good many appeals filed that don't have much merit. In the civil litigation, on the other hand, parties seldom will take an appeal which is going to cost them substantial money unless they think they have a chance to win the case. I have no doubt there are a few civil cases taken purely for delay, but seldom is a civil case disposed of as readily as a criminal case on the average. Some civil cases are very difficult and some are very easy, but, on the average, the civil cases take much more time. The briefs tend to be longer and much more complex, and the amount of work is greater. Consequently, we don't calendar as many civil cases as criminal cases. Keeping current on criminal cases reduces the time we have for our civil cases. But again, because of the distance we have to travel, I suspect we are somewhat less efficient than I know we were when the whole court, or practically the whole court, was all together 13 years ago and for 2 or 3 years after that.

I strongly support the recommendations of the Commission for the division of the circuit. I don't think it will solve all our problems, but I think it will enable two courts adequately manned to do a far more efficient job than we are now doing. I know that I have the very strong feeling—based on my own experience—that, because of the pressure and volume of business, the quality of the work that I am doing and the amount of consideration that the litigants get from me in the cases that I am required to hear and help to decide, is not what it used to be. In order to dispose of the number of cases that I have to dispose of, I am now writing better than 100 opinions and memorandums deciding cases each year, and that means that I have better than 200 that I have to take a look at from my colleagues before I decide whether to concur in them or not. I know perfectly well that, under those circumstances, those cases do not get the kind of attention that they used to get when I had more time. Most of my research has to be done by someone other than myself. I review that, and I read the briefs in every case, but how much longer I will be able to do so I don't know. The burden of the caseload is very heavy.

Whether the circuit is split or not, I am very sure of one thing, and that is that we need more judge power. I am also confident, however, that if that judge power comes in the form of two adequately staffed courts, then between them they would do a better job than one court with more judges. I think that is true simply because, among other things, the distance, the travel, and the "scatteration" of the judges around the circuit makes it so difficult to maintain what I call "institutional unity" within the circuit. The more panels we have, and the more separated they are, the more danger there is of our going off in different directions. That has happened and that is why we are having some of our en banc cases.

Now, the Commission's recommendation includes the recommendation for the division of the State of California between the two new circuits. As a Californian, for sentimental reasons, I would expect myself to oppose it, but because I have lived with this problem now for about 13 years, I am convinced that if the circuit is to be divided it is important that the State of California be divided between the two new

circuits. This would be the first time this has ever been done, and naturally the bar and some of the judges object—as one of our San Francisco supervisors put it, "the most unheard of thing I have ever heard of"—but that is not a very good reason to object, and I think many of the objections are of that kind.

The State of California, in which I have lived, practiced, and been on the bench now for about 40 years, is a very interesting State, as you know. There is a certain natural geographical difference between the two portions of the State. The State has lived with this for a long time. The Governor has an office in Sacramento but he also has one in San Francisco and one in Los Angeles. The attorney general has three offices. The State Bar of California has always divided its major committees into two sections, north and south. I was chairman, for example, of the State Bar Committee on the Administration of Justice, and the northern section used to meet very frequently, especially during the sessions of the legislature because the bar had an active legislative program. There was a corresponding section in the south. Once in awhile the two committees would get together and hash out differences, but the rest of the time we functioned separately.

On the other hand, there are a great many unifying factors in the State.

But I am convinced that the problems I have heard raised about the division of the state are pretty much what lawyers call a "parade of horribles." They are mostly imaginary and, to the extent they exist, they are, I think, readily solved.

Preliminary let me say this: If the State of California alone were made into a single circuit, on the basis of the filings in 1974 that circuit would have had 1,731 filings last year. That's just the State of California. With a court of nine judges that is almost 200 filings per judge. If you add any other State to it, you quickly get above 200 filings per judge, and you are right back, I think, to some of the major problems you are going to have to solve if the judges are going to be able to function as I believe judges ought to function. They must have time to study their cases, time to think about them, and time to write decent opinions. You are either going to have to have more than nine judges immediately, or soon thereafter have a circuit composed solely of the State of California. If you add any other State to it you are getting back to a point where the exercise of dividing a circuit for the purpose of increasing the efficiency will be essential, and the institutional unity of each of the new courts would be pretty well gone as far as any "California circuit" is concerned. This is why I think that this problem is unique to the ninth circuit, and I think that something that a lot of us don't feel very pleased about from a sentimental point of view has to be done.

Now, among the principal objections raised there are two which are related directly to California. One is the contention that there would be a danger that there could be an attack on the validity of a State law or statewide agency decision in the Federal courts in each of the two new circuits with conflicting decisions from the circuits as to what the authorities in California can do or as to whether a California law is valid. This is not a new possibility. We now have four district courts in California, and we have had four for some time. It used to be just two, but even then there were two. Most of these questions involving

attacks on the constitutionality of a State law or statewide action by administrative bodies of the State come up in three-judge district courts in which one circuit judge sits and from which the appeal is not to the court of appeals but directly to the Supreme Court. So all the time there is the possibility of conflict, just the kind of possibility I am talking about, between two three-judge district courts in the State of California. It may be that somebody has found one someplace, but in the 13 years I have been a Federal judge in California I have never heard of this happening. I think this is the kind of thing people like to think of—when they don't want something done—as a good reason for not doing it, but the fact is it hasn't happened.

If three-judge courts are abolished, there will then be a possibility that, on appeals from these two district courts within the two circuits, the two circuit courts might disagree. I think there are ways of solving that. One, as an example, is the multiple litigation statute under which, if there were cases attacking the validity of a statewide agency, one in the north and one in the south, one could be transferred to another court so you could have them all heard in one district court with one circuit giving the result.

There are other things that could take care of the problem if it should ever arise.

The other principal objection relating directly to California is the possibility of conflicting decisions between the two circuits as to what the law of California is. That kind of question can come up in at least two different ways. One is in a diversity action based upon the difference of citizenship where the Federal court is bound to apply the State law. The other could be in a Federal suit—there are many—where the question will turn in part on the State law, as for example, the validity of a lien in a bankruptcy, certain tax matters where a Federal tax law applies but where the State law governs the property transfer, or things of that kind. There are many cases of this kind. Where you have a conflict of laws case, you may find that the second circuit in New York City is deciding what the law of California is.

This again is a problem which I think is more imaginary than real so far as conflicts within the State are concerned. There are several reasons why I believe this is so. First of all, we have had for some years now four districts in California, each of which is obliged to apply the law of California. If there has been an instance in the last 13 years in which two district courts in California have disagreed about what the law of California is, it has never come to my attention and it has never been necessary for our court to straighten out that kind of conflict. Theoretically it could happen. If there were two circuits there should be some way of straightening out that conflict.

The State of Florida has a statute under which, if the Federal court has a doubt, if you will, about a State law properly before the court, it can certify that question to the supreme court in Florida and have it decided. I think something similar could be done in California if it were felt necessary to do so. In addition, of course, a Federal court decision as to what the law of California is is not authoritative in the courts of California. When I sat on the California District Court of Appeals in San Francisco and a decision of the court on which I now sit was cited as to what the law of California

was, our reaction was, "what does that Federal court know about the law of California?" If we agreed with it, we followed it; but if we did not, we just disregarded it. At the most it was persuasive authority, not controlling authority, on what the law of California was.

Now, the other objections that have been raised are of a different character, and these, I think, are purely delaying tactics. One that has been heard is that a decision on whether to split the circuit should be deferred while the Commission considers other ways of improving the workload or reorganizing the Federal appellate courts. If there is any proposal of that kind which both has the promise of a substantial effect in solving the problems of the ninth circuit and has been so far developed as to have any kind of general support, I don't know about it. I have heard about the proposed national court and, each time I read somebody's statement about what the national court is to be, it is different from the last one. The last concept is so nebulous I suppose it will be a long time before anything of that kind would be adopted. Moreover, from what I understand, the people who are talking about the national court, it seems apparent, are seeking to relieve the workload of the Supreme Court of the United States; if there is any way in which that national court is going to assist the circuits with their problems, I have not been told what it is. Now, it may be that, eventually, legislation will be adopted which will reduce the jurisdiction of the Federal courts. That, of course, should have the effect of reducing our workload, but I think that that is not very likely. Indeed, my experience over the past 13 years is that, by and large, the legislative actions of Congress have increased rather than diminished the jurisdiction of the Federal courts. As you know, it was suggested to Congress that we ought to have a weighing of the increased business that will come to the courts every time there is a new bill. I do think it is true that, by and large, the jurisdiction of the Federal courts has been increased, not decreased.

I don't know of any proposal, in short, for improving or reforming the Federal appellate system which offers any immediate relief from what the judges now face. Therefore, I think, there is no reason to delay action on a division of the circuit in hopes that something like that will turn up. If there were 13 circuts instead of the 11 we have now, any reform of that sort would be just as helpful to all 13 as it would be to all 11. If it were decided to abolish the circuits and establish something on the order of the model of the tax court, I don't see how it would be any more difficult to abolish 13 than 11. In the meantime, I think, realignment would enable use to do a much better job, and it ought not be delayed in hopes that some of these other things, or one of them, may materialize.

There has been a suggestion that we might operate in two divisions, a southern and a northern division under a single chief judge, with the same number of judges we would have had if we had two new circuits. My belief about that is that one of two things will happen: Either we will continue to have all the internal adminstrative problems from which we now suffer or we will very rapidly find out that what we really have is two circuit courts sitting separately. Then we would have the additional problem of trying to maintain the notion that the precedents of each of them were precedents for the other, and we would be having en banc hearings with 18 or 19 judges, which, although possible, is not something I contemplate with pleasure.

That about covers my general views on the matter, Mr. Chairman. I will be glad to answer questions, if I can.

Senator BURDICK. Judge, that was a very excellent statement. You presented your case very well.

We have had testimony before the committee indicating that the ideal number of judges for a circuit was 9, that we might possibly stretch it to 11, but that 9 would be an ideal number, giving a more efficient operation. You mentioned the en banc problem and others. Do you agree that you can get the greatest efficiency out of a lower number?

Judge DUNIWAY. I thoroughly believe, Mr. Chairman, you get more efficiency out of a lower number, but I am not sure I would say nine is the ideal. I had the happy experience of sitting for 2 years on a three-judge court in California which was highly efficient, and I think more efficient than the nine-judge court that I moved to down the street when I became a Federal judge. So that the smaller the better for efficiency.

On the other hand, it seems to me pretty apparent, that, while I think the Supreme Court could live just about as well with 13 circuit courts as 11, considering certiorari and possible conflicts between them, if you would make nothing but three-judge circuits in the United States, you would have a system where the Supreme Court would be overwhelmed with petitions for certiorari from those courts.

I am convinced that the efficiency of the court starts to go down somewhere between seven and nine judges and it goes down very fast as the number increases.

Senator BURDICK. The old theory about diminishing return sets in?

Judge DUNIWAY. Yes.

You talk about the economics of scale, you know; well, you go up the scale a little bit, but then it goes down very fast as the number of judges increases.

Senator BURDICK. That light up there signals a vote that is coming up on the floor, but we have a period of grace. When five bells ring I will have to leave, but if you don't mind staff will ask you questions in my absence and I will be right back.

Judge DUNIWAY. Surely; be glad to.

Senator BURDICK. Do you think you have adopted all the timesaving procedures that can be adopted?

Judge DUNIWAY. I don't honestly think I can say yes to that question, partly because I am not sure I know what all the possible judge timesaving procedures are. We don't decide cases from the bench like the second circuit. We do, very often, decide them within a day afterwards by a very brief memorandum. There are some other devices of that kind that we might use.

Do you have any specific ones in mind?

Senator BURDICK. Yes, I do, Judge. Last week, we heard 3 days of testimony from witnesses from the fifth circuit, and there they practice the so-called screening process. They screen these cases, given the right of one judge on the panel to ask for an oral argument, and, if the case is so clear and well defined that it isn't necessary to have an oral argument, they don't grant it.

Judge DUNIWAY. We have been doing this for quite some time but not in exactly the same way.

Let me tell you how it is going with us. In 1970 we instituted screening, but we had the cases examined by law clerks who came up with a recommendation as to whether the case should or should not have oral argument. If the recommendation was no, then the briefs with their memoranda went to a weekly screening panel which had those cases in addition to whatever cases the members were hearing during the month. In other words, this was extra caseload for them. Each judge examined the cases. They didn't have to get together to do it. Unless one of them asked to have oral argument there was no oral argument. The senior judge on the panel assigned the cases by mail to other members and they would be disposed of without getting the court together except by mail, unless, of course, it happened that the three members rotating on those panels were in the same place. We have disposed of about 1,500 cases since that time.

Now, we have changed our procedure in two ways thereafter. One factor was that we were very anxious to get current on the criminal cases. We felt an obligation that that had to be done. We dropped the screening of criminal cases. We are now doing it on civil cases alone. We substituted this process of calendaring every criminal case as soon as it is ready and hearing as many as eight or nine a day. There the judges do screening. For instance, I have been looking at the briefs for next week's criminal calendar which I will sit on, and I expect within a day or two to be on the telephone to the other judges as to which ones we can decide without oral argument. That is really an informal method of screening, there. Now, on the civil cases, instead of having a separate screening panel, each month our staff attorneys, who examine these cases to determine whether they are heavy or light cases, will recommend that a certain number be considered as what we call light cases. Those cases will not normally receive an oral argument. They are simply added to the court calendar that month. So, instead of my hearing three cases, I will have three regular civil cases requiring oral argument plus three more of the light cases. That is, in effect, screening. We have been doing that, but not in quite the same way that the fifth circuit has done it.

Senator BURDICK. In 2 years we will be celebrating the Nation's 200th anniversary. We should have a pretty solid background of cases by then at this rate.

Judge DUNIWAY. It always amazes me when somebody can find something that precisely fits. We write a memorandum in those cases which is simply an informal way of telling counsel why we did what we did. They have no precedential value and they can't be cited. I think about 50 percent of our cases are decided that way. We may get it higher.

Senator BURDICK. If this circuit were split, you would certainly reduce travel time. You mentioned the problems of bringing judges together. I see more problems with more judges.

Judge DUNIWAY. That is right.

Senator BURDICK. If we split circuits, we could reduce that considerably, I presume. Apparently the opposition comes from those who would like to be a unit consisting of one State. Isn't the Chamber of Commerce thinking they might be a little crowded with two circuits in their State?

Judge DUNIWAY. I would like to persuade them on that.

Incidentally, the proposed new 13th circuit would be a much more compact circuit than the other which would have the rest of the States in the circuit in it. It would also have a somewhat heavier caseload. I would think, probably, we should have about the same number of judges, nine, for each of those circuits to start with. The southern circuit, which would be more compact, requiring less travel, would probably have most of its judges right in Los Angeles and could operate somewhat more efficiently. The northern circuit, which would go all the way to Alaska and Montana, unless some of the States were transferred to a different circuit, and I don't think either the eighth or tenth would like those States added to them.

Senator BURDICK. I can't help but think that the savings, just in travel time and in en banc matters, would be tremendous.

Judge DUNIWAY. I believe that very firmly.

Mr. WESTPHAL. Judge, I don't find anywhere in the rules of the ninth circuit any rule which covers the amount of time prescribed for oral argument, either by types of cases or all cases. How is the time for oral argument allocated?

Judge DUNIWAY. There is a provision in the Federal Rules of Appellate Procedure and the normal time is a half hour to each side. Each time a calendar is heard the presiding judge informs counsel in all cases that the members of the court, all of them, have read the briefs and are familiar with the issues and that they can take that into account in framing their argument. The next question is, "How much of your allotted time do you think you have to use?" This cuts it down very substantially.

Mr. WESTPHAL. You do this every morning at 9:30.

Judge DUNIWAY. Every session when we come in to hear the calendar.

Mr. WESTPHAL. So you call the calendar and you allocate time then?

Judge DUNIWAY. That is right.

Mr. WESTPHAL. As the Chairman indicated in his opening statement, the subcommittee staff has done a study of the calendars of each of the 11 circuits for fiscal year 1973. In the ninth circuit, in 1973, a three-judge panel of the court, sitting for the purpose of hearing oral argument heard, on the average, 3.3 cases per day. In the seventh circuit, for example, they set six cases per day. A number of circuits sat five cases a day, and I think a number of them sat four a day, but they sat some 10-plus weeks per judge on the average as compared, for example, 9 full weeks and 3 days in the ninth circuit. In 1973 the 12 active judges on your court averaged 48 days per judge of sitting on three-judge panels. This is exclusive of any en banc matters and exclusive of anything that was peculiarly a motion calendar.

Now, I take it that as you call the calendar you find a number of cases where parties do not use up the full hour.

Judge DUNIWAY. Particularly in criminal cases.

Mr. WESTPHAL. And a number of them probably say well, instead of 30 minutes for each side, Judge, we can get by with 15 minutes per side?

Judge DUNIWAY. That is right, sometimes 5 minutes, sometimes 15, sometimes 20, and so on.

Mr. WESTPHAL. Of course there is nothing in the Federal Rules of Appellate Procedure which would prevent the court from, instead of following the normal procedure of 30 minutes per side in every case, by rule or by decision in each individual case, just simply saying, "the court has allocated 20 minutes per side" in this case, or 15 minutes per side, or if you want to get down to what they do in the second circuit, 10 minutes per side?

Judge DUNIWAY. Yes; that could be done.

Mr. WESTPHAL. Of course, if you do not do that, and if you have three cases set and each case takes their full half hour the court has sat from 9:30 to 12:30 in order to hear argument in just three cases.

Judge DUNIWAY. Right.

Mr. WESTPHAL. You have indicated that on some days you will sit for as many as six or seven or, occasionally, more than eight cases per day if they are believed to be of lesser significance——

Judge DUNIWAY. It is not quite like that, Mr. Westphal. We have to divide our current practice between criminal and civil cases. I sit 10 months a year, during 1 week in each month. In that week I will normally hear two calendars of criminal cases, with an average number of 8 cases on each one. Now, among those there will be a certain number in which we will advise counsel in advance that we aren't going to hear oral argument. There will be others where we can get them to materially reduce the time that they will use. During the other two days I will be sitting on three civil cases, each of which will normally take an hour. With our current screening practice there will be anywhere from two to four additional cases either with no oral argument or, if we chose to, we can say half the normal amount or any figure we chose. I say up to four. This new system of dropping these cases in on the calendar rather than having a separate screening panel has only been in effect about 8 weeks. We haven't quite gotten up to the four, but it has to be a maximum of four which would make eight cases on the civil calendar as well.

Mr. WESTPHAL. As I understand it, for the past 8 weeks your printed daily calendars have included both cases set for oral argument and cases in which no oral argument will be accorded.

Judge DUNIWAY. Not in criminal cases. They are all just put on the calendar. The judges who are on the calendar get the briefs and the records about 3 weeks in advance. They look them over and decide which ones we will not have oral argument in.

Mr. WESTPHAL. That is criminal.

Judge DUNIWAY. That is criminal.

On the civil calendar there will be three regular civil cases set on the hearing day and then the screening staff of law clerks will have examined the cases and come up with some of what we call "light" cases, which will require no oral argument or brief argument, and those are added to that calendar, up to four. In those cases counsel are notified when they go on the calendar and, unless the court has asked for it, there will not be oral argument.

Mr. WESTPHAL. This practice with respect to both civil cases and criminal cases was not employed by the court in calendar year 1973; is that true?

Judge DUNIWAY. In 1973 we were using the same practice, as I recall, beginning in September of 1973. We were using the same practice we now use on criminal cases, but in the latter part of 1973, and up until about May or June of this year, we had our screening panels for the cases that the staff lawyers thought were "light" cases in civil cases. Now we calendar them as we do the others, but usually without oral argument.

Mr. WESTPHAL. Just so I understand it, in 1973, with respect to civil cases, if the screening panel had determined that the civil case did not deserve oral argument for whatever reason——

Judge DUNIWAY. It did not go on that calendar at all.

Mr. WESTPHAL. It did not go on the printed daily calendar of that particular panel.

Judge DUNIWAY. That is right. There was a separate calendar for a weekly screening panel and it could have up to 10 cases. It averaged about six.

Mr. WESTPAHL. Now, in 1973, with respect to the calendaring of criminal cases, you would calendar up to eight and——

Judge DUNIWAY. Beginning in September of 1973.

Mr. WESTPAHL. And we noticed on one or two occasions there would be possibly up to 10 cases calendared. I suppose they had a combination or something.

Judge DUNIWAY. Usually that would be a case in which there was one trial and two appellants or three, something like that.

Mr. WESTPHAL. But in any event, where you had up to eight criminal cases calendared, the panel to which those eight cases were referred would determine which of the eight cases would be accorded oral argument and which would not be?

Judge DUNIWAY. That is right.

Mr. WESTPHAL. And counsel would be notified in advance?

Judge DUNIWAY. Counsel would be notified if there was to be no oral argument. When they went on the calendar, counsel got notice that their cases were set for such and such a day. They got notice before the hearing if there was to be no oral argument.

Mr. WESTPAHL. Now, in reviewing the calendars for fiscal year 1973, we noted that there were a number of days in which only two cases or one case were set on the calendar. Were all of these situations situations where the magnitude of the issues involved in that case were such that more than a half an hour per side was being allotted?

Judge DUNIWAY. I would say generally not, Mr. Westphal. They could fall in two categories. We get a certain number of what we call expedited appeals, for example, where a witness is held in contempt for refusing to answer to a grand jury. The appeal has to be decided within 30 days. A panel will be drawn to hear it, and it will be set down one day to be heard without regard to the calendar. We get a certain number of others where it seems very important that the case be decided immediately, and they will be set down that way.

I would guess in the other cases where it turns out there are only one or two on the calendar that a couple got settled and it was too late to put another one on.

Mr. WESTPHAL. I am just looking, for example, at April 30, 1973. Several panels sat in Portland. On Monday there were three cases calendared for one panel, on Tuesday one case, on Wednesday one case, and on Thursday one case. So that——

Judge DUNIWAY. I can tell you what that was. That was something very special. That was the opening of the new Pioneer Courthouse in Portland. We had a whole bunch of our judges up there, and part of the time was taken on the celebration. As I recall, just to give everybody a chance to sit once in the Pioneer Courthouse, they scattered the small calendar around. I think that was the one. As I recall, the opening of that courthouse was in the spring of that year.

Mr. WESTPAHL. Well, then, during the week of February 12, and I am not sure where the panel sat, on Monday there were five cases calendared, on Tuesday one, on Wednesday one, on Thursday three, and on Friday five.

Judge DUNIWAY. I couldn't tell you what that was.

Mr. WESTPAHL. Absent ceremonial occasions, like the Pioneer Courthouse in Portland, and assuming that an advance allocation of time was made according to the complexity of the issues presented in the case, don't you think it is conceivable that the average number of cases calendared per day could be increased from 3.3 up to at least four cases per day?

Judge DUNIWAY. We think we will get it higher than that with the current program we have of adding cases to the civil calendar. Our objective would be to get that up to eight, like the criminal calendar.

Mr. WESTPAHL. This would include both orally argued and non-argued cases submitted on briefs?

Judge DUNIWAY. On that day.

Mr. WESTPAHL. Is this part of the program that your senior law clerk will be working on?

Judge DUNIWAY. That is exactly the program. We hope to get it operating in such a way that there will be a bench memorandum even in the complex cases.

Mr. WESTPHAL. Now, along this same line, I recall in your prepared statement that you said that, when, for example, a panel sits in Portland and the three members of that panel are not from San Francisco, say, a judge from Los Angeles——

Judge DUNIWAY. Well, say one from Honolulu, to give it a nice variety.

Mr. WESTPHAL. You intimated basically that what that accomplishes is that the three judges hear the argument, you draw the assignments and go back to your homes and work on the opinions which have to be circulated by mail?

Judge DUNIWAY. That is right.

Mr. WESTPHAL. On such occasions, assuming you heard the 3.3 cases on Monday, when you are through by 12:30 or 1 o'clock, do those three judges confer on those three cases?

Judge DUNIWAY. Certainly. Every day we confer on the cases we heard that day.

Mr. WESTPHAL. And at that conference, if possible, a tentative disposition is agreed upon and assignment of the opinion-writing chore is made?

Judge DUNIWAY. That is exactly what we do.

Mr. WESTPHAL. Of course, I assume it is the practice in the ninth circuit for most of the judges to either read the briefs or at least the law clerks' bench memorandum so they have a familiarity with the issues?

Judge DUNIWAY. I would say it is the practice without exception for the judges to read the briefs before they hear the cases. We tell counsel we have read them before we hear the argument.

Mr. WESTPHAL. And that shortens argument considerably? For example, appellant's counsel doesn't have to devote so much of his time explaining the facts?

Judge DUNIWAY. That is right. If he starts with a set speech he gets interrupted very quickly.

Mr. WESTPHAL. So that really the point you make in your statement is that, because of this scatteration syndrome in the ninth circuit, the real inefficiency comes from the fact that in polishing that tentative draft of the opinion, in circulating it, it all has to be done by mail and can't be done by the judges walking down the hall to a different chamber and sitting down and talking out a point face to face?

Judge DUNIWAY. That is right.

Mr. WESTPHAL. I think you said that, when you come on the bench in 1961, there were only nine judges, and that seven of them resided and had their principal chambers in San Francisco and there was therefore greater efficiency?

Judge DUNIWAY. That is right. My frequent practice in those days was simply to walk down the hall to one of my colleagues on the panel, or to get both of them together, and talk it over. That was a very helpful thing to be able to do. We do this by telephone, conference call, now, but for some reason, and I am not able to explain this, you don't really get down to the nitty-gritty of a question in a telephone conference the way you can when you have three people face to face. I have no way of telling you why that is so, but I know it is so from experience.

Mr. WESTPHAL. Judge, in your present internal procedures in the ninth circuit, as the record indicates, there has been an extensive use of active district court judges and senior district court judges from within the ninth circuit, employing them as a third member of a panel or division of the court constituted for the purpose of hearing argument. Apart from the fact that the district court judges themselves seem to have enough work to do if they stayed home, what problems, if any, does that present in your opinion insofar as the operation of the appellate court is concerned?

Judge DUNIWAY. It presents two problems. One of them you put your finger on. These judges, most of them, have a workload of their own. They don't get credit for the time they put in with us. I haven't any statistics to back up this statement, but I am sure this is so. By and large, where the district judge sitting with us gets a difficult case in which to write the opinion, it is longer before we get that draft than it is from one of us, because his first duty is to the litigation in his district.

The other problem it creates is this: The district judges, I think, are, on the whole, I guess, because they aren't regular members of the court, less conscious of the importance that we attach to trying to see to it that the decisions of all our panels are consistent with each other so that we have just one law in the circuit. We tend, therefore, to have district judges—well, they are likely to come up with an opinion which the circuit judges think has to be modified, or it is not

going to fit in with certain other of our decisions. They either stand by their position, in which case we may have them dissenting, or one of us dissenting, or there is the time involved in persuading them to change their minds. I think that it tends to increase the problem of maintaining what I call our institutional unity.

Mr. WESTPHAL. Another term sometimes referred to is "collegiality."

Judge DUNIWAY. Right.

Mr. WESTPHAL. We hear a lot of talk about how great collegiality is if you don't go beyond the number 9, but what you are pointing out is that, as you employ some 50 or 60 different judges in a mix with your regular 13, you also destroy collegiality.

Judge DUNIWAY. That is a very serious effect. Most of the judges that sit with us don't sit for a full week. They sit for one or two calendar days and then somebody else comes in.

Mr. WESTPHAL. You mentioned that you first adopted the screening practice in September of 1970 and that you disposed of some 1,500 cases by that method. Now, that is 1,500 cases over a period of approximately 4 years?

Judge DUNIWAY. That is right, those are in addition to the cases on the regular calendar.

Mr. WESTPHAL. Yes; I understand.

Now, Judge, how long were you on the State bench?

Judge DUNIWAY. Two years.

Mr. WESTPHAL. You have been on the ninth circuit bench for 13 years?

Judge DUNIWAY. Thirteen years last month.

Mr. WESTPHAL. Before that you were practicing law in the city of San Francisco?

Judge DUNIWAY. That is right.

Mr. WESTPHAL. You told us that you strongly or heartily endorse the recommendation made by the Commission to the effect that the ninth circuit should not only be divided, but that, in that division, the four judicial districts of the Federal district court should be allocated two to each division of the ninth circuit. I take it the main reason you support that is that, if the State of California alone were to constitute a single circuit, it would have a caseload to start out with of some 1,731 or 1,737 filings, and, if the number of judges were kept to nine, those judges would be starting out with a caseload of almost 200 filings per judge. I assume they would get their portion of the so-called backlog or pending cases and that they would have a caseload that would be very difficult for just nine judges to handle, just on the incoming caseload, let alone with the backlog?

Judge DUNIWAY. That is right.

Mr. WESTPHAL. Certainly if you were to keep the State of California intact with the 1,737 filings and then add to it, for example, Arizona and Nevada—Arizona having over 200 filings and Nevada having some 70 filings as I recall—that caseload, for a circuit composed of California, Arizona and Nevada, would be well over 2,000 cases.

Judge DUNIWAY. That is right.

Mr. WESTPHAL. That, for a bench of nine judges, would be even a higher caseload per judge than the present——

Judge DUNIWAY. They would be worse off than we are now.

Mr. WESTPHAL. So that, really, if any proposal other than splitting the State of California into two circuits is considered, one must also consider just how closely we can stick to the magic number "nine." We would have to give consideration to increasing the number of judges to possibly 11 or 12 to start with, simply to give the judges a more manageable caseload to work with. Is that correct?

Judge DUNIWAY. Yes, that is correct. As a matter of fact, I would add this: even if it were decided not to split the State of California, I would still divide the circuit. I would add not more than one State to California if it were felt necessary to preserve the interstate character of the circuit—probably Arizona—and I would add enough judges to handle the load. I would put the headquarters of the court in the most central place in that area, and, if I could, I would make every judge on the court have his office there and provide him with as much help otherwise as possible. I think they could function more efficiently than we do now. But, if they did that in that other circuit they would have to have a higher caseload per judge ratio because there would still be the problem of geography. If you divided the State of California, the northern circuit—the New Ninth as the Commission calls it—probably should have a smaller number of filings per judge than the New Twelfth, because, again, it would retain, still, a very large and scattered geography, whereas the New Twelfth would be more concentrated, and, I think, could function somewhat more efficiently, so that the judges in that circuit, I think, could handle a somewhat higher per-judge caseload.

Mr. WESTPHAL. Judge, in your statement you seem to indicate that a filing figure of 100 per judge, in the best of all worlds, is the optimum that you would like to see.

Judge DUNIWAY. I would be very happy to see that. I wouldn't say it was the optimum. The optimum was when I came on the court; we then had 52 per judge.

Mr. WESTPHAL. But like the nickel cigar and the nickel beer, those days are gone forever.

Judge DUNIWAY. That is right.

Mr. WESTPHAL. But, when you are talking about 100 per judge, what you are saying is that that would really be 300, assuming the same panel sat and heard all cases. That panel would be hearing 300 cases, one judge would have to write 100 opinions, and participate in two hundred others; isn't that what we are talking about?

Judge DUNIWAY. Not quite, Mr. Westphal, because as I pointed out in the statement, the filings figure is deceptive. There is an attrition of about 35 percent, so that means each judge would have to write about 65 opinions and pass on 130 others to his colleagues. That is less than I am trying to do now.

Mr. WESTPHAL. Now, then, in your statement you point out that, under the Commission's proposal, the northern circuit, or the New Ninth, would have a caseload of 1,159 filings, which for nine judges would give a caseload of 129 per judge. You seem to imply that 129 per judge is acceptable and is a manageable figure, especially in the light of an attrition rate of approximately 35 percent.

Judge DUNIWAY. That is right. I think we could do a good job with that.

Mr. WESTPHAL. Now, you also point out that the New Twelfth, with the southern and central districts of California, plus Arizona and Nevada, with nine judges, would have a caseload of 171 per judge, which you state is too high.

Judge DUNIWAY. I do.

Mr. WESTPHAL. Even considering a 35-percent attrition rate? If you just play a numbers game here, in order to get the caseload in the New Twelfth with 1,538 filings down to this level of 129 per judge, which would be the level of filings in the northern circuit, you would have to employ some 11 or 12 judges——

Judge DUNIWAY. I would say 11.

Mr. WESTPHAL. All right. But you have also suggested that, you think that new southern circuit, if it were to be created, should start out with nine judges. You believe that, because it is a more compact circuit, it would be less crowded and that, even with 170 filings per judge and an attrition rate that may get up as high as 35 percent in some years, nine judges could conceivably cope with that caseload?

Judge DUNIWAY. I think so. I think they could do a better job than we are doing right now.

Mr. WESTPHAL. Do you think they could, with a caseload of 171 per judge, also have room to work on that so-called backlog of pending cases, which in the instance of at least some civil cases, is running some 8 to 24 months behind?

Judge DUNIWAY. Well, that is a harder question to answer, but in this last year—the 1974 year—we disposed of a total of 190 cases per judge. That would be a lower figure than we dispose of this year. If they could keep up the 190 rate, they could begin to reduce the backlog. While some of our cases are old in our civil backlog, I would say it is only about 600 cases approximately. They would have—I don't know the figure, the breakdown of the course of these cases—but they would have, I guess, better than half of those 600.

Mr. WESTPHAL. They would have better than half of the total caseload and about all they can do is assume a pro rata disposition.

Judge DUNIWAY. I couldn't be specific about it.

Mr. WESTPHAL. I think in your statement you demonstrate the extent of the so-called backlog we are talking about in the existing ninth circuit by reporting that, as of the time when the court quit hearing arguments in one particular year, there were some 601 cases in which the record had been filed and all the parties had filed their briefs, so that those cases were then ready for calendaring and decision by the court, but still the court didn't reach them and had to carry them over into the next year.

Judge DUNIWAY. Yes—well, it really isn't a matter of carrying them over into the next year, because we don't really operate on a term, but as of any given month, that is about the figure that we have that we haven't been able to get to that month.

Mr. WESTPHAL. The figures indicate, in some of these exhibits that have been included in the record here——

Judge DUNIWAY. I think, by the way, that 601 cases is the September 24, 1974, figure. I got it just before I came back.

Senator BURDICK. Are those cases in which there hasn't been any oral argument?

Judge DUNIWAY. That is right, civil cases, fully briefed, but not yet calendared for argument. They will vary in age from 90 days perhaps, on some expedited preferred types of cases, to as much as 2 years on civil cases with no preference. As you know, Senator, there are about 30 Federal statutes that give various types of cases preference on the calendar. We find it very hard to be sure that every one of those gets some kind of a preference.

Senator BURDICK. Judge, we are trying to help you. We have passed a no-fault insurance bill, and taken care of some cases occurring on the high seas. We have done a little to help, too.

Judge DUNIWAY. Sure.

Mr. WESTPHAL. Just to complete the point I was pursuing a moment ago, Judge——

Judge DUNIWAY. I didn't mean to interrupt you.

Mr. WESTPHAL. There is no interruption at all when the chairman speaks, Judge. But I would like to direct your attention to committee exhibit E–12. It covers cases terminated in 1973 after oral argument or submission on briefs. In the ninth circuit, there were some 1,343 cases included in that study. The study indicates that the average time for all cases—and this would be criminal, civil, cases with priority, cases without priority—the average time that elapsed from the time when counsel had filed their last brief until the case was orally argued was 156 days, which was the highest of any of the circuits in the country. That means that over 5 months pass before the court can get around to hearing cases that have been fully ready for the court to hear.

Judge DUNIWAY. That is right. You see, that means with the nonpreferred type of civil case it is much worse, because with our criminal cases now, we are hearing them much faster than that.

Mr. WESTPHAL. Judge, you mentioned that you don't see many problems with two districts of California in one circuit and two districts in another circuit. You suggested that, to the extent that that may present a problem, there is a possibility that, if there is pending for trial, let's say, at the same time, a case in the southern district of California and a case in the northern district of California, each of which involves the question of the propriety or legality of some action taken by a State agency, it would be possible to use a procedure analagous to a multi-district panel in order to have those two cases involving that same issue effectively consolidated for trial and so on. Is that your suggestion?

Judge DUNIWAY. That is right. There is another possibility there, also. There are some statutes dealing with our review of Federal administrative agency decisions which provide that if attacks on the decision of the administrative agency are filed in two circuits, the circuit in which the first case is filed gets them all and they are transferred. We frequently will transfer a case of that type to another circuit court, because there is already one pending there raising issues out of the same proceeding or something of that type.

Mr. WESTPHAL. Any such transfer should not be a transfer just for pretrial handling, but also a transfer for trial?

Judge DUNIWAY. Sure, full disposition.

Mr. WESTPHAL. All right.

Do you think it is feasible, within the structure of our judicial system, to create a court of a multidistrict panel of that type, one which would operate only insofar as the ninth and the twelfth circuits are concerned, having the power to transfer only those cases which have an effect on the operation of either the California State government or of some other——

Judge DUNIWAY. Constitutionality of the California statute.

Mr. WESTPHAL. Yes.

Judge DUNIWAY. I don't know why that couldn't be done, Mr. Westphal. I don't see any real obstacle.

Mr. WESTPHAL. It could be a separate panel from the national multidistrict panel which the Federal court system has?

Judge DUNIWAY. Oh, yes. I would think it could be created solely for this purpose and operate much more simply, because it would be dealing only with the possibility of cases in four districts.

Mr. WESTPHAL. You suggest to this subcommittee that you perceive of nothing that could be recommended by the so-called Hruska Commission in the second phase of its study of our appellate court system which, in your opinion, would obviate the necessity of making some kind of realignment of the second circuit?

Judge DUNIWAY. That is my belief.

Mr. WESTPHAL. One of the things considered in phase two of that Commission's deliberations is the possibility of a separate, or specialized, court that could handle tax cases and possibly also patent cases, either combining them in one court or separate courts and changing some of our present jurisdictional statutes as they apply to tax and patent law.

Is the volume of either of these types of litigation in the ninth circuit sufficient enough so that the removal of tax and/or patent cases, singularly or in combination, would reduce the caseload of the ninth circuit sufficiently below this 2,700-case figure that it now has?

Judge DUNIWAY. I can't answer that question with specific figures, but I know that if I am a typical member of the court, the number of tax cases and patent cases that I get in proportion to the total workload is so small that it would make, in my opinion, very little difference. I think the buildup of the caseload in 1 year would take care of the difference, but I don't have any figures. Anything which would reduce our caseload obviously would be helpful to us.

Mr. WESTPHAL. Judge, you and I have referred to an attrition rate of approximately 35 percent.

Judge DUNIWAY. That has been our experience.

Mr. WESTPHAL. I am just looking at this special study which the Administrative Office did for the courts of appeals for calendar years 1972 and 1973. This is an exhibit included in the hearings which this subcommittee had in connection with S. 2991, the so-called omnibus circuit court judgeship bill, so we can take cognizance of it.

In 1973, out of a total of 2,109 terminations, this report indicates there were 116 that were terminated principally by consolidation of cross appeals, and also 131 dismissals, for a total of 247. Out of the total, that would be approximately 11 percent. I think this is, at least, in the prior hearings the subcommittee has held, the recognized so-called attrition rate. Consolidations, cross appeals, and dismissals as a result of settlement or want of jurisdiction or something of that

kind have been our focus point. There has also been made a suggestion that, in lieu of a geographical realignment or a split, that the ninth circuit should be divided into two divisions or sections for administrative purposes. This is what we call the so-called chambers or divisions theory. As I recall your testimony, you stated that, unless it were compartmentalized in some way, you would still have the scatterization effect and the loss of time through travel, and inefficiency resulting from having to circulate an opinion that you have now; is that correct?

Judge DUNIWAY. That is right.

Mr. WESTPHAL. On the other hand, another thing you point out is that with this so-called division for administrative purposes, if the Congress were to create the five additional judgeships that the ninth circuit has asked for and which the Judicial Conference has approved, you would then have a total bench of 18, and the en banc process would be one of 18 judges, unless Congress were to stipulate some lesser number which would constitute an en banc panel. You would then probably be adding to the difficulty that you have now in the ninth circuit of one three-judge panel not knowing what another three-judge panel may be in the process of deciding with reference to substantially the same legal question.

Judge DUNIWAY. I think that is correct. It seems to me that, if the division were to mean anything, it would have to mean that you would have one group of judges primarily hearing appeals in the proposed new twelfth circuit and the other group continually engaged in appeals from the proposed new ninth circuit, and pretty soon you would be having two separate courts in both effect and substance. I think this would make it more likely, rather than less likely, that the 18, or some substitute number, would have to from time to time get together to see to it that the law of those courts, which are really functioning as separate courts, was a unified law.

Mr. WESTPHAL. Judge, one final question. By whatever size, shape or description a change is made in the ninth circuit, in your opinion, must it be such a change that it results in the employment of more than 13 circuit court judges toward the judicial business of the present ninth circuit?

Judge DUNIWAY. Unless the number of judges were increased to 18, at least, there would be no use in doing it, in my opinion.

Mr. WESTPHAL. Thank you, Judge.

I have no further questions, Mr. Chairman.

Senator BURDICK. Thank you, Judge. You have been very helpful.

Judge DUNIWAY. I appreciate having had the opportunity to appear and testify.

Senator BURDICK. I have another vote coming up, but if Mr. Abel would like to start, we will continue, while I am voting, with the staff.

STATEMENT OF BRENT ABEL, PRESIDENT, CALIFORNIA STATE BAR ASSOCIATION, ACCOMPANIED BY JORDAN A. DREIFUS, CHAIRMAN, CALIFORNIA STATE BAR COMMITTEE ON FEDERAL COURTS

Mr. ABEL. Thank you, Mr. Chairman.

My name is Brent Abel, president of the State Bar of California, and I have with me Mr. Jordan A. Dreifus, who is chairman of our State bar committee on Federal courts. If the chairman please, I would like to ask Mr. Dreifus to sit with me and supplement my remarks and assist in the answering of questions from his standpoint, which is that of superior wisdom to mine.

Senator BURDICK. Very well.

Mr. ABEL. I want first to address the general question of what is in the public interest here. Before doing so, let me point out that we have filed a written position paper about this matter, reacting to the proposal of the Commission for the Realignment of the Ninth Circuit. The board of governors of the State bar has adopted that report as our position.

Senator BURDICK. Your entire statement will be made a part of the record at this point.

Mr. ABEL. Thank you.

STATEMENT OF THE STATE BAR OF CALIFORNIA.—OPPOSING THE PROPOSAL TO DIVIDE THE STATE OF CALIFORNIA INTO TWO FEDERAL JUDICIAL CIRCUITS, AS PROPOSED BY THE COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM

A. INTRODUCTION

In late November, 1973, the Commission on Revision of the Federal Court Appellate System (hereafter "Commission") made public and distributed its draft of a report entitled, "The Geographical Boundaries of the Several Judicial Circuits: Alternative Proposals". This draft report was published in West's *Federal Reporter* pamphlet, 484 F.2d No. 3, and first came to the attention of interested members of The State Bar, particularly the Federal Courts Committee of The State Bar, in early December, 1973. On December 18, 1973, the Commission formally adopted the draft as its report, with a change in the title and some textual changes, but with no change in its basic recommendation. The report, as adopted, has been published in West's *Federal Reporter* pamphlet, 487 F.2d No. 4, February 4, 1974. The governing statute which created the Commission, 28 USC § 41, required the Commission to act within very short time limits.

Regarding the Ninth Circuit and particularly the State of California, the Commission's recommendation is that this state be divided into two separate judicial circuits by dividing the Ninth Circuit and placing roughly one half of the state into a newly created federal judicial circuit, leaving the remainder in a smaller Ninth Circuit.

We of The State Bar of California are strongly opposed to the Commission's proposal to divide the state. Our opposition stems from a careful consideration of the proposal, the facts and realities of the case load of the Ninth Circuit, the alternatives available, and important historical, political, social and economic facts and circumstances which the Commission may have overlooked.

Having considered all of these matters, it is the firm conclusion of The State Bar of California that:

(1) The entire State of California should remain in one judicial circuit, regardless of how the circuit may be realigned.

(2) Regardless of any realignment of the judicial circuit or the creation of any new circuits, the number of circuit judges in the circuits covering the states now included in the Ninth Circuit must be substantially increased, and other measures must be taken to hear and decide the back-log of cases in the Ninth Circuit Court of Apeals. These cases will confront any successor court or courts embracing the territory of the Ninth Circuit.

B. Existing Institutions and Practices

In order to make it clear why we are so firmly opposed to the Commission's plan, we recite some of the basic principles and practices under the present court structure.

(1) *Maintenance of stability of the law within California under the existing Ninth Circuit practice (Stare decisis)*

Ever since the first creation of the circuit courts of appeals by act of Congress in 1891, those courts, the Ninth Circuit included, have maintained certain jurisprudential principles and practices which are of fundamental importance and which are pertinent to the matters here under consideration.

The sole purpose of the Congress in 1891 when it created the circuit courts of appeals (as they were then known) was to take from the Supreme Court the great burden of direct appellate review of federal trial court cases, a burden which had become impossible for the Supreme Court to carry by 1891. It was thought that by delegating this major burden of federal appellate work to a new level of intermediate appellate courts, the Supreme Court could devote itself to ". . . cases of public concern . . ." and still have ample time to "supervise" the circuit courts of appeals, ". . . to avert diversity of judgments and guard against inadvertance of conclusion . . ." at the new intermediate appellate level. *In re Woods* (1891) 143 U.S. 202, 12 S. Ct. 417, 418. It was anticipated that there might be temporary conflicts in decisions between the circuit courts of appeals, but it was also anticipated that the Supreme Court would resolve any such conflicts.

The circuit courts of appeals functioned with only three judges each for a number of years after 1891. Due to continually increasing case loads, the number of circuit judges in most of the circuits was increased so that today most of the circuits have many more than the original three judges. The purpose of increasing the number of judges was to increase the number of three-judge panels to dispose of the burgeoning case loads. It was and is the intent of the law and the routine practice, codified in 28 USC § 46(c) that the courts of appeals sit and function in panels of three judges.

Notwithstanding the existence of a multiple number of circuits, and the growth of multiple numbers of three-judge panels deciding cases in each circuit, the whole system has worked because of adherence within each circuit to the rules of *stare decisis*, to the end that there is stability of law in each circuit, subject to review by the Supreme Court. The applicable rules and their corollaries operate as follows:

(a) As between circuits, it is the duty of the Supreme Court to ". . . avert diversity of judgements . . .". *In re Woods*, *supra*; see also: Supreme Court Rule 19(1)(b).

(b) As between circuits, the decisions of a court of appeals of one circuit are not binding upon and need not be followed by the court of appeals or the district courts of another circuit. *Allstate Insurance Co.* v. *Stevens* (9th Cir., 1971) 445 F.2d 845; *Waters* v. *American Auto Insur. Co.* (D.C. Cir., 1966) 363 F.2d 684; *Jaben* v. *U.S.* (8th Cir., 1964) 333 F.2d 535, *affd.* 381 U.S. 214.

(c) Within a circuit, each three-judge panel of the court of appeals is bound by prior circuit decisions (rendered by three-judge panels) which are held to establish the law of the circuit. In other words, if a point has been once decided by a three-judge panel in a circuit, later cases decided by the same or any other panel of the same circuit, under principles of *stare decisis*, must follow the first decision as the binding precedent within the circuit, regardless how persuasive may appear to be the views of cases decided in other circuits. *Oliver* v. *U.S.* (9th Cir., 1968) 396 F.2d 434; *U.S.* v. *Cooper* (5th Cir., 1972) 462 F.2d 1343; *Powell* v. *U.S.* (7th Cir., 1964) 338 F.2d 556; *Ashe* v. *C.I.R.* (6th Cir., 1961) 288 F.2d 345. A corollary to this rule is that a three-judge panel of the court of appeals cannot presume to overrule an earlier precedent by the same or any other three-judge panel of the same circuit no matter how much the later panel may disagree with the earlier decision. *Charleston* v. *U.S.* (9th Cir., 1971) 444 F.2d 504, *cert. den.* 404 U.S. 916.

(d) The court of appeals has the power, recognized only in relatively recent years, if it chooses, to sit *en banc* and decide a case or rehear a case previously heard by a three-judge panel, by all of the circuit judges in regular active service acting as a single panel. By *en banc* action, the court may overrule prior circuit decisions, establishing the law of the circuit and resolving apparent conflicts between panels which have arisen in spite of the *stare decisis* principle mentioned above.

The most frequently applied and important of these rules is the rule that decisions must follow prior decisions within the same circuit. This rule is routinely applied by the district courts and the court of appeals, and makes it possible for a multiple panel court of appeals to meet one of the basic objectives of American law, that the decisional law be stable, predictable and ascertainable.

Next in importance, in our judgment, is the availability of the Supreme Court as the means, not only of preventing the development of conflicting doctrines between and among the several circuits, but also of correcting erroneous decisional rules of the courts of appeals.

Lesser used is the power of the court of appeals to convene itself *en banc* and hear or rehear a case in that manner. It is established that *en banc* procedure is employed only in the court's own discretion and is not available as a matter of right. *En banc* procedure is used with comparative infrequency. A decision of the circuit *en banc* can only affect the decisional law *within* the circuit.

(2) Uniformity of practice and procedure in California

California has achieved a high degree of uniformity and standardization of practice and procedure in all its aspects, especially in the state court system throughout the large territory of the state. In the state courts we now have a complex and sophisticated system of statutes, rules and forms which are accomplishing the efficiencies to be expected from the uniformity and standardization of many of the details of practice. Traditionally, Californians in general, and the lawyers of this state in particular, have always treated the state as a single community. It is common for attorneys from one part of the state to practice in another part. This is particularly true in that attorneys from one large metropolitan area, such as Los Angeles, do not hesitate to conduct litigation in other metropolitan areas, such as San Francisco, and vice versa. This is facilitated by the degree of uniformity and standardization of state practice that has been achieved.

The federal trial courts in California are divided into four federal judicial districts. For those California attorneys who tend to specialize in those areas of the law in which there is frequent resort to the federal courts, it is routine and common practice to appear in and conduct litigation in any of these four districts, regardless of the district in which they reside. In short, California is a single territorial entity for the purpose of trial practice, especially in the federal courts.

Uniformity, standardization and consistentency of local rules, practices and procedures is certainly necessary and desirable as an objective in the federal courts in California as it is in the state court system. The principal method of achieving and maintaining uniformity of federal court practice has been through cooperative effort, comity and agreement among the district judges of the several federal districts, but always under the potential paramount authority of the Judicial Council of the Ninth Circuit to impose uniformity of local practice under its statutory authority to make local practice rules (28 USC § 332). The State Bar and its appropriate committees, such as its Committee on Federal Courts, as well as the federal courts committees of the larger county bar associations in the state, are actively interested in and are doing all they can to encourage and assist the achievement of uniformity, standardization and consistency of practice and of local practice rules among the several federal districts in California.

The importance of this matter of uniformity of local practice rules in the federal courts is illustrated by a problem which arose several years ago concerning requirements imposed on the admission of non-resident attorneys. It developed that one or more of the federal districts were following practices and imposing requirements as to admission of non-resident attorneys at variance with those of the other districts and with those of The State Bar itself for practice in the state courts. After efforts by the organized bar, local federal court rules were promulgated on the subject of admission to practice. These rules in the several federal districts are substantially uniform with each other and with the state court practice on this important subject. The fact that all four of the districts were in one circuit certainly aided achievement of uniformity of practice in this instance.

(3) Maintenance of institutional unity of the law applied by the Federal courts within the State of California and the need to maintain "institutional unity" of applicable law for the State as a whole

This state comprises nearly one-tenth of the population of the United States and nearly one-twentieth of the total land area. It is, in population, the largest

state in the union. Because of its size (five times that of the average state) and resources, the state has developed into a highly integrated political, social, economic and legal entity. We are proud to say that in matters of state law, state legislation and governmental administration, California and its institutions have developed a degree of competence and sophistication at the state level which we believe is not exceeded by any other state. The Commission itself refers (Report, Part III, § 2) to the "well-developed jurisprudence of the California legislature and courts."

But the matter is not so simple. Whether fortunate or unfortunate, and whether we like it or not, in the last thirty or forty years there has been an accelerating and pervasive application of federal law, and of the federal constitution, statutes, regulations, decisional law, regulatory, operational and administrative programs, and financial involvement of the federal government in many activities and functions of state and local governments and of individuals, entities, and organizations throughout the state. In many areas and as to many functions in law, administration and regulation, we seem to have a body of law applied in the State of California which is really composed of various mixtures of rules of the state law and the federal law. Examples include the following:

(a) California has an elaborate and comprehensive body of law, statutory and decisional, covering criminal law and procedure and custodial treatment of persons and penalties, punishments and forfeitures. But it is part "federal" law, because there has been a tremendous "federalization" of criminal law and procedure and of the rights of persons in custody, and a coextensive expansion of federal court jurisdiction for review of these "federal" matters. Included in this, for example, is federal *habeas corpus* review of state criminal convictions or the treatment of prisoners held under state convictions.

(b) The same kind of "federalization" has occurred in numerous areas of law and public administration, and federal law is held also to govern the relations and transactions of private parties insofar as they may be "state action" and may involve civil rights, equal protection, due process, etc. Here, the litigated issues are always a mixture of the state law, subjected to a paramount federal standard; and most, if not all, of the litigation is in the federal district courts, subject to review in the court of appeals.

(c) In many new areas, the Congress is enacting laws which provide an overlay of federal standards or paramount rules over state law. Consider, for example, "truth in lending" and pollution and environmental standards.

(d) The State is, in reality, a "partner" or "subsidiary" (really the territorial delegate) of the federal government in many operational programs which are financed in whole or in part by the federal government and subject in a greater or lesser degree to requirements of federal law or regulation. Such a program is, in name, the operation of a statewide agency. But, in litigation, usually in the federal courts, it develops that there are complex and delicate interrelationships of state and federal law, and regulation subjected to the interpretation of the federal courts. Consider, for example, the welfare and similar aid programs, and functions and projects subject to federal environmental and similar regulatory requirements.

(e) In a number of well-known and traditional areas, the federal statutes, systems or programs adopt as their content the law of the state. But the nature of the statute, program or system is such that all or the major part of the court litigation must be in the federal courts and not the state courts. Here, the "tail wags the dog", where the federal courts are the courts which make most of the "state" law. Examples of this are actions under the Federal Tort Claims Act, tax cases, bankruptcy cases and others where the federal law has expressly adopted areas of state law as the content of the federal law. Aviation accident cases are an example, especially in cases involving large aircraft. Most of the decisional law in these cases is in the federal courts, even between private parties, because the United States itself is almost always involved in some operational manner, and the government can only be joined as a party in the federal courts. (A perusal of the supplement of West's *California Digest*, "Aviation", §§ 141–191, shows that most of the decisional law digested in recent years is that of the federal district courts and the Ninth Circuit.)

It is not the purpose here to theorize or to evaluate whether this great and pervasive involvement of federal law into the smallest details of the legal, political, social and economic life of the state is good or bad, but merely to describe it as it is. We think this has an important bearing on the organization of the federal courts to deal with the legal situation as it, in fact, has developed. We

believe a fair characterization of the matter is that there is a large body of interstitial federal law applicable to the State of California and the systems, institutions and programs of the state as a whole, and that the state represents a territorially differentiated subdivision in many matters of federal law, as well as retaining its identity in terms of state law.

To the extent that the United States Supreme Court itself has not made the federal decisional law absolutely uniform respecting all of these matters, the federal courts in this state, including the Ninth Circuit, make the "federal law of California". On some subjects, as pointed out above, the federal courts really decide most of the cases, albeit under "state" law. In the past five or ten years, federal court intervention has grown enormously in the areas of applying federal standards of constitution, law or regulation, to the supervision of all kinds of "state action" and state programs which have any kind of involvement with federal money or other federal control.

We suspect that the accelerated growth of federal court litigation in some of the areas just mentioned might be, in large part, responsible for the great case load increases experienced in recent years. Also, cases in these areas may present more difficult issues of federal law and policy, and of state laws measured against paramount federal law and policy, taking more time of the courts than the more familiar type of diversity of citizenship litigation between private parties governed by state law.

Any current volume of the *Federal Supplement* or the *Federal Reporter* reveals a high proportion of decisions in federal cases of this character. These decisions frequently require long and complex opinions. They are to be compared with the types and kinds of federal cases and decisions reported forty, thirty or even twenty years ago. In the office of the Attorney General of this state, and in counsel's offices of various state and local government agencies and entities, whose activities are affected by overriding federal constitutional, statutory or regulatory requirements, constant and routine reference to federal cases, federal statues and federal regulations and frequent participation in federal court litigation now has become necessary in the representation of their respective agencies and entities.

The office of the Attorney General of this state has furnished us with statistics of federal cases to which the State, its offices and agencies have been made parties, as follows:

Civil Law: Over the past three years civil cases have been filed involving the State as follows:

Northern district	94
Central district	171
Eastern district	66
Southern district	18
Total	349

Criminal Law: As of January 1, 1974, the State was represented by that office in pending civil rights and *habeas corpus* actions in the Federal District Courts as follows:

Northern district	348
Central district	399
Eastern district	224
Southern district	50
Total	1021

The burden of cases involving the State as a party has been equally significant at the circuit court level. In the last three years 58 civil cases have been docketted in which the State is a party. During the same period 179 criminal cases have been docketted in which the State is a party. The statistics confirm what is said above about the interrelationship of federal and state law which has now developed.

Stare decisis, and stability and predictability of the law in decisions on federal law affecting the state as whole are therefore of great importance. This means maintaining the "unity" of federal decisional law in this state. In theory, total unity of federal decisional law for the whole country is to be maintained by the United States Supreme Court, but this is certainly not the situation in fact. In practice, the Supreme Court in recent years has not had the time to do other

than accept a few cases and establish broad general rules in various areas of the law. As a practical matter, absent Supreme Court action, unity of federal decisional law applicable to federal court cases arising in one state, such as in California, has been left to the court of appeals of the circuit embracing that state.

In our judgment, the role of the court of appeals of this circuit of supervising and unifying the law applied by the four federal district courts of this state respecting matters of statewide interest, which are subject to federal law or in which law of the state really furnishes the content of the federal law applied, is that court's most important role; and the objective of that role is to assure and maintain "institutional unity" of all the law applied throughout the State of California.

The "institutional unity" of the whole state and of the law applied throughout the state must be a fundamental objective. Such unity of applied law is consistent with the strong feeling of the people of the state in general, that the state is and always has been a single community in all respects. It is worth noting, in this connection, that on a number of occasions, since 1850 when California was admitted to the Union, there have been abortive attempts or suggestions for one purpose or another to divide this state, usually into a "north" half and a "south" half. All such attempts have been resoundingly rebuffed by the people and their elected representatives, and all such concepts are discredited by history. The people of this state and their elected representatives are cognizant of these historical facts. Any proposition for the territorial division of a statewide institution which bears a resemblance to such past proposals no doubt would arouse the resentment and opposition of the great majority of the people of this state.

C. Criticism of the Commission Recommendation to Divide California

(1) *The Commission's proposal to divide the State of California is wrong*

First, we emphatically make clear that we agree with the Commission that more circuit judges must be appointed to the Ninth Circuit, or to any successor court or courts embracing the same territorial jurisdiction, in order not only to stay abreast of the growing case load, but also to dispose of the backlog of appeals, and bring the court (or successor courts) as current as practicable in its disposition of cases.

The Commission's Report is concerned about certain practices now employed in the various circuits, such as elimination or reduction of oral argument, use of unpublished memoranda and orders in lieu of published opinions, the greater delegation of work to law clerks, etc., and to this extent we share the concern of the Commission. But all of these practices are attributable to the failure to appoint a sufficient number of judges to accommodate the accelerated growth of the case load. This problem is present regardless of how the circuit as a whole is organized or aligned.

We emphatically disagree with the method proposed by the Commission insofar as it involves the division of the State of California between two circuits.

The proposal of the Commission to divide California must be evaluated in light of the premises which have already been set forth at length. Such an evaluation demonstrates the proposal of the Commission, in this respect, is unwise and erroneous.

A careful reading of the report shows that the Commission focused its attention on certain difficulties which the Commission felt would be intolerably aggravated if more and more circuit judges were added to the existing circuits as the simple solution to the case load.

But the only really specific reason given by the Commission for the conclusion that no circuit should be permitted to have more than a certain number of circuit judges is that doing that would impair the ability of the court in "avoiding or resolving intra-circuit conflicts" (Report, Part II, respecting the Fifth Circuit), and would impair the court's own "institutional unity". The Report states that "attorneys and judges have been troubled by apparently inconsistent decisions by different panels of the large court; they are concerned that conflicts within the circuit may remain unresolved" (Report, Part III, respecting the Ninth Circuit). In a number of other places the Report contains generalities about the "serious problems," etc., to be encountered by a much enlarged circuit court. But the only "serious problem" which is specifically identified is the problem of intra-circuit conflicting decisions already mentioned.

It is difficult to guess what other substantial reasons the Commission has in mind. For example, the travel distances covered in the Ninth Circuit are nothing new. The Ninth Circuit has been the same size for many years, from a time before the age of the airplane and many other modern innovations. In the operation of clerk's offices, we know of no obvious economies in, for example, operating two clerk's offices, each for nine judges, instead of one office for eighteen judges. If there is some great economy in such a division, we assume the Commission would have said so. We, therefore, must conclude that the real concern of the Commission is its fear that such an enlarged court of fifteen or twenty more judges would be unable to maintain the "institutional unity" of the court, apparently because it is also thought that a court or such size cannot deliberate and make decisions *en banc*.

By its focus on this specific reason for the recommendations it has made, the Commission recognizes the importance of maintaining the "law of the circuit" and enforcement of the rule of *stare decisis* (although the Commission seems to prefer the term "institutional unity" to embrace these objects).

The Commission thus starts out by demonstrating the central importance of "institutional unity" as a thing to be nurtured and preserved. It then makes its recommendation to create new courts, with territorial boundaries which do do not presently exist, but of a size which the Commission believes will have "institutional unity" within themselves. The fallacy of the Commission's recommendation is that it ignores the "institutional unity" of law applied in the State of California and the application to the whole state of the law of the Circuit. The Commission would sacrifice and dispense with the institutional unity of the law applied in the state for the sake of its own conceptions of court structure.

The same historical principles which made essential a single Supreme Court at the head of our whole federal system now should apply on a lesser scale, to assure unity of decisional law applied throughout the whole territory of this state. The axiom stated by Alexander Hamilton in the *Federalist*, No. 80, is as applicable now, to the federal courts in California, as it was to the entire nation when it was written:

> If there are such things as political axioms, the propriety of the judicial power of a government being co-extensive with its legislative, may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed.

The proposal advanced by the Commission would divide California between two circuits, contrary to this basic and practical principle; it would leave review of federal court cases to "two heads", absent intervention by the Supreme Court.

We believe the Commission has misjudged the values at stake. We believe the courts exist to well serve all other institutions of society and not the reverse. The Commission's proposal to divide California into two circuits would be a disservice to this state and its institutions far exceeding any advantages of court efficency, real or imagined, to be gained by such a division.

(2) *The premises of the Commission are doubtful*

We do not think the Commission has made out a case for any absolute limit of the size of a court of appeals, based upon any inherent limitation on the number of judges who should sit *en banc*. In other words, we do not understand why there should be a specific threshold or ceiling of nine circuit judges per circuit. Any time that a court of appeals acts *en banc* with more judges than the panel of three originally contemplated by Congress it is less efficient in the use of judicial manpower than the same number of judges acting in three-judge panels. The reason for acting *en banc* is to obtain the deliberation and wisdom of all of the judges instead of only three in the panel. It follows that nine judges acting as one nine-judge panel can only dispose of one-third the number of the cases the same nine judges could in three-judge panels. A court acting *en banc* with twelve judges or fifteen judges would be proportionately that much less efficient than a nine-judge court, and a five or seven judge court would be proportionately that much more efficient in its use of judicial manpower.

It is problematical whether a decision by nine judges will be wiser or more correct than one made by only three. In any event an *en banc* decision is no more binding outside the circuit than any other decision of the same court. No matter how many respected circuit judges agree *en banc* on a decision, it

is still subject to reversal by the Supreme Court. See, for example, *United States* v. *F & M Schaefer Brewing Co.* (1958) 356 U.S. 227, 78 S. Ct. 674, in which a divided Supreme Court reversed an *en banc* decision of the Second Circuit. Very recently, there have been cases with eight judges acting, *Laundry, Dry Cleaning, etc. Workers* v. *Mahoney* (8th Cir., 1974) 491 F. 2d 1029; twelve judges, *United States* v. *Sacco* (9th Cir., 1974) 491 F.2d 995; and fifteen judges, *Morrow* v. *Crisler* (5th Cir., 1974) 491 F. 2d 1053.

We do not suggest here that it is desirable that any court should act with 15 or 20 judges as one panel. But if a court does so, the difficulties and efficiency lost are only relative compared, for example, with a court acting with nine judges. Actually, there are a number of devices described below which might be enacted to provide for the effect of *en banc* adjudication to establish or change the decisional law of the circuit without requiring all the judges to act.

The State of California has nearly ten percent of the nation's population and generates about the same percentage of court appeals cases (1,543 out of the national total of 15,629 for Fiscal 1973, according to the Report, Part III, App. I). By prudent standards the case load arising in California alone should require eleven circuit judges, the national average of all the circuits being 144 cases per judgeship (Report, Part III). This would justify California alone to be made into a judicial circuit.

While we do not necessarily suggest it as the only possible solution, we believe the views of the Commission, critical of the idea of a circuit composed only of this state, are wrong. We find astonishing the Commission's inference that there would be a "lack of diversity of background and attitude" in a court of judges chosen from this state. On the basis of our knowledge of the size, history, economics, society and politics of this state and the diversity of its people, we firmly disagree. It may be that the assumption that one state should not make up one circuit has some validity when applied to the average state of four million people. But the conclusions and value judgments that flow from such an assumption should not be applied to the consideration of a state that is typical of five average states.

The Commission also fears one senator might dominate the court because of traditional senatorial power over appointments. For similar reasons we think there is no basis for such concern. The political history of the state and foreseeable future political conditions demonstrate that any senator from California who would hope for tenure in office would have to represent, and be representative of, the diverse elements of the state in a way which is inconsistent with the kind of provinciality feared by the Commission. In any event, a circuit composed of California and one or two neighboring states would be dominated by California judges anyway, in the same manner New York dominates the Second Circuit. That a senator of long seniority can "mold" the federal courts of his state is a novel criticism. Every district court is subject to senatorial control of appointments in the same manner. But we have not heard such criticism of the district courts. Certainly no one familiar with the district courts in this state would even consider it.

The Commission also seems to believe that unless at least two or more states are included in one circuit, the result is automatically antiethical to "principles of federalism," and that in the creation of new circuits, at least two or more states or parts of states must be included in a circuit, out-weighing other considerations. We do not understand the basis for this "two-or-more-states" concept to be such an essential condition for maintaining "principles of federalism" without regard to the circumstances of the particular situation of California. With all respect to the esteemed Committee of the American Bar Association whose conclusion is quoted by the Commission's Report, we do not believe that the conclusion stated should be applicable in the case of this state. We again note the example of the Second Circuit, which is fairly dominated by the State of New York, with six out of eight of its judges from New York. See 486 F.2d viii. We have never heard anyone say that the Circuit Judges of the Second Circuit suffer from parochialism, provincialism or any lack of devotion to "principles of federalism".

(3) *Procedural devices and arrangements cannot avoid or minimize the basic problem created by dividing this state into two circuits*

The Commission's Report begins with the basic premise of "institutional unity" of the courts. After stating the recommendation that California be divided, the Report discusses (in Part III, § 2) the conflicts and other problems

that must arise by so dividing the state. Curiously, the Report is ambiguous. It states two alternatives: (1) the conflicts will not be a large or serious problem after all; and, (2) it proposes a whole catalog of suggestions, some more specific than others, as to how various problems created by the division may be dealt with by various procedural devices.

In attempting to minimize the effects of dividing the state, the Report is inherently inconsistent. On the one hand its basic premise is the importance of "institutional unity". On the other hand it seeks to minimize the effect of dividing the state by discounting the effect such a division will have on the "institutional unity" of the law applied over the whole state. Furthermore, the space and attention the Report gives to this point and its elaboration of various sorts of special procedures and devices to avoid or overcome conflicts betrays a defensiveness which only emphasizes that the problem really is fundamental and important.

Two circuits in one state will no doubt create new opportunities for forum shopping. The Commission passes this off, merely noting that forum shopping exists today. But one cannot justify making a virtue of it. Forum shopping among the judicial circuits is a well-known problem in federal subject matters, such as in patent cases, and on the part of the government in tax cases. (See dissenting opinion of Justice Douglas in *U.S.* v. *Skelly Oil Co.* (1969) 394 U.S. 678, 691-692, 89 S. Ct. 1379, 1386-1387). It is easy to visualize what a field day litigants, especially state and federal government litigants, or interests adverse to such governmental litigants, will have with two circuits available in which to try for conflicting results in a second case if not satisfied with the result of the first case.

The Report (Part III, § 2) is vague on what devices might be needed in order to avoid or resolve the problems division of the state would create. It mentions that there are "at least half a dozen" mechanisms already available, such as transfers of venue, pretrial consolidation of actions by order of the Judicial Panel on Multi-District Litigation (under 28 USC § 1407), stays, injunctions, interpleader, etc. The trouble with most of these is that they are not really intended for intrastate use, and each of them involves a complex and expensive kind of threshold litigation and a burden upon the court and the parties which should not have to be undertaken unless necessary. For example, it is difficult to demonstrate the balance of "convenience" necessary to invoke 28 USC § 1404(a) if the transfer sought is from one California district to another. When an impasse occurs with conflicting rulings between courts in different circuits as to transfers or stays, etc., of the same subject matter, the Supreme Court must step in and decide the forum. See *Hoffman* v. *Blaski* (1960) 363 U.S. 335, 80 S. Ct. 1084. What would be needed to make the thing operate would be something equivalent to, but with substantially greater powers than, the Judicial Panel on Multi-District Litigation. The panel, under 28 USC § 1407, is able to order the transfer of multi-district litigation and consolidate the same, but only for pretrial discovery purposes. To accomplish what the Report has in mind would require a "California Panel on Multi-District Litigation" empowered to transfer and consolidate cases, not only for discovery, but for all purposes, or a grant of such added powers to the national Multi-District Panel for that purpose. But the suggestion of such provisions reveals their undesirable and unwieldy character. Why should litigants be saddled with such complicated preliminary procedures and transfer of cases, otherwise presumably unnecessary, but for the effects of division of the state?

The Commission's Report, in the next to last paragraph in Part III, § 2, comes down to an exhortation that the two new circuit courts of a divided California should show "sensitivity" and "comity and deference" to each other's prior decisions. With great respect to the Commission, such a pious hope does not change the rule that one circuit is not bound to follow the decisions of another, in spite of the "comity and deference" which must be assumed to exist between the existing circuits.

To sum up, we believe that the palliatives and ameliorating devices and mechanisms suggested by the Commission's Report cannot undo the fundamental damage that would be done by its proposed division of this state, and the Commission's Report itself reveals this.

D. Alternatives

(1) *Supreme Court functions*

If the Supreme Court had time, it would be the Supreme Court's function and duty to review and resolve not only conflicts between circuits, but also any conflicting decisions that arise between different three-judge panels in the same circuit. (See, for example, *C. I. R.* v. *Estate of Bosch* (1967) 387 U.S. 456, 87 S. Ct. 1776.)

In short, if the Supreme Court had the time to completely fulfill its functions, it would take care of the problem which has stimulated the Commission's recommendation to divide the circuit.

But it is stated by many that the Supreme Court is unable at this time to cope with the case load thrust upon it. In 1891 the federal subject matter was slight compared to the great federalization of many areas of the law which has now taken place. In 1891 there were but ten three-judge panels consisting of the then existing ten judicial circuits themselves (nine plus the District of Columbia). Now there are approximately one-hundred circuit judges, and a proportionate increase in three-judge panels turning out decisions from which review may be sought in the Supreme Court. It is not surprising that the Supreme Court can review only a few of these cases.

The real solution of the problem is, therefore, to provide for the performance of the review and conflict-resolution function which, under our federal system, was intended to be performed by the Supreme Court, but which that court is no longer able to perform.

This indicates to us that, with all due respect to the Commission and to the Congress in creating the Commission, the work which the Commission has been charged with doing cannot be done independently of or in advance of more fundamental actions which must be taken to alleviate or provide those review and conflict-resolution functions which are otherwise to be performed by the Supreme Court.

A great deal of work has been done by several groups who have made studies and recommendations concerning the creation of new tribunals to assist the Supreme Court or to take a delegated portion of the Supreme Court's jurisdiction. We offer no opinion on the merits or demerits of any of those proposals. The study group under the chairmanship of Professor Paul Freund made an extensive study and report which is found in 57 FRD 573. That report stated in two different places (57 FRD at 589 and at 593) that one of the primary functions needed to be performed by any such new tribunal would be the resolution of conflicts between the circuits (whether or not the case otherwise merited the attention of the Supreme Court itself).

This would also be a primary function of the "National Division" of the U.S. Court of Appeals proposed in the recent resolution of the ABA Special Committee on Coordination of Judicial Improvements (See ABA Journal, April, 1974, p. 453. 60 ABAJ 453).

It is our conclusion that a realignment of this judicial circuit and any realignment which would result in an increase in the number of judicial circuits must be accomplished only concurrently with and after or as a part of an overall resolution of the functions of the Supreme Court.

Review by a superior tribunal such as the Supreme Court (or some successor tribunal) is more efficient and more productive than the mode of "horizontal" review represented by *en banc* procedure in the courts of appeals. It was no doubt the growing case load of the Supreme Court over the years which encouraged the use of this horizontal method of review within the courts of appeals themselves. But for various reasons, some of which have already been mentioned, review by a court of appeals *en banc* of the court's own prior decisions is in some respects not very efficient or productive. A court of appeals acting *en banc* is still only a court of appeals, whether it has five judges or eighteen judges. Its decision is not binding outside the circuit any more than the decision of a three-judge panel. In the same circuit, three-judge panels in future cases are bound to adhere to the rule of decision created by the court acting *en banc*, but such adherence is required only by the principle of *stare decisis*. Adherence to principle is not quite the same as being bound to obey the decision of a higher tribunal.

The state court system in California is an excellent example of how a court system should properly operate without the necessity of *en banc* action on the part of lower or intermediate appellate courts. In California the state is divided into several appellate districts, in each of which sits a court of appeal,

as the intermediate appellate court of the state. Appeals are taken, as of right, from the trial courts to that intermediate appellate court. From that court there is a discretionary *certiorari*-like review available in the California Supreme Court. The Court of Appeal of the Second District, which embraces Los Angeles County, has twenty Justices, but the court acts only in panels of three. The court never sits *en banc*. It need never do so because any conflicts of decision between any panel and any other panel of any of the courts of appeal are promptly subject to resolution by the California Supreme Court.

The history of our California court system is worth noting in this regard. The intermediate appellate courts of the state were created in 1904. Prior to that time the California Supreme Court had direct review jurisdiction over all of the trial courts in the state, and found it necessary to sit in panels in order to handle its business. The procedure of sitting in panels and convening from time to time *en banc* was found to be unsatisfactory, and this led to the creation of the intermediate appellate court system, patterned directly after the circuit courts of appeals which had been created earlier in the federal system.

Perhaps it might be desirable and more efficient if the *en banc* procedure could be dispensed with entirely. This would only be considered, of course, if some tribunal or tribunals were created to assist in the performance of the functions of the Supreme Court in order to completely displace any need for *en banc* action in the courts of appeals.

(2) *Devices are available to avoid the need of an excessively large number of judges participating in en banc proceedings*

As pointed out above, it may be relatively less efficient for twelve, fifteen or twenty judges to participate in the decision of a single case, although it is by no means impossible or impractical for them to do so, as illustrated by some recent cases cited above. Nevertheless, measures could be enacted which could provide for a limited number of judges to be empowered to act for the circuit "*en banc*" and whose decision would be given the respect and adherence of an *en banc* decision for the purpose of resolving conflicts and establishing the law of the circuit.

In a way this is already done by the limitation of 28 USC § 46(c), in that the court "*en banc*" must consist only of the circuit judges who are in "regular active service." By liberal use of visiting judges, senior judges and district judges in its panels, a court of appeals is effectively operating with a larger number of judges than those eligible to sit *en banc*. Assume, for example, the court is operating with an average of six three-judge panels, each of which consists, on the average, of two circuit judges plus one "other" judge. The court is then operating as if it had the strength of eighteen judges deciding cases in panels. But for the purpose of acting *en banc*, the court consists only of the twelve circuit judges in regular active service. To carry the example further, suppose the court of appeals consisted of only seven circuit judges in regular active service, but that it made use of sufficient "other" judges to make up an average of six three-judge panels in operation. In that situation the court would be acting effectively with the strength of eighteen judges, but for the purpose of acting *en banc*, it would consist of only the seven circuit judges.

Thus has the statute, 28 USC § 46(c), effectually created two classes of judges, one class of whom is denied the power to sit *en banc*.

Some administrative agencies in the federal government appear to have adopted a similar type of organization. Thus a tribunal consisting of a large number of administrative law judges may have its judges divided into two categories, one being a "senior" category consisting of those who are given a special power to act "*en banc*" for purposes similar to which *en banc* procedure is employed in the courts of appeals. (See, for example, the Armed Services Board of Contract Appeals, which has thirty-five administrative law judges out of which there is chosen a "senior deciding group", CCH Contract Appeal Decisions, paragraphs 105 *et seq.*, 201 *et seq.*; 32 CFR § 30.1).

Aside from the permanent establishment of a specially empowered class of judges by means similar to that of 28 USC § 46(c), other methods are readily available by which a special group of less than all of the circuit judges of the circuit could be chosen equitably to perform the function of acting *en banc*. The group could be chosen at random from among the circuit judge membership (for example, seven could be chosen out of a total of fifteen or twenty circuit judges); or they could be chosen from time to time to serve for terms in a manner similar to that suggested by the Freund study group for the "National Court of Appeals" proposed in that study. (See 57 FRD, at 591.)

In any event, there are various methods for choosing an *en banc* group of circuit judges empowered so to act, but consisting of substantially less than all of the circuit judges of the circuit.

In addition, there might be other measures taken internally within the court of appeals which might tend to avoid conflicting adjudications where the same issue is pending at the same time before different panels of the same court. For example, perhaps identity of issues can be ascertained so that all pending cases with the same issue can be transferred to the panel which has the case with the lowest docket number. This "low number" principle is routinely followed in district courts which follow a random individual assignment system. At least this would avoid different panels of the same court announcing conflicting decisions in cases which were simultaneously pending.

E. Drastic Measures Would be Needed to Attempt to Deal With the Problems Created if the Division of the State Were Carried Out

If the Commission recommendation were to be followed and the state divided into two circuits as proposed, certain drastic and novel provisions would be required to be enacted in order truly to solve the schism that would be created.

(1) *Joint powers over practice and procedure will be required*

We have already noted the importance of avoiding variations of practice and procedure among the several district courts in California if the state were to be divided into two circuits, this might end any hope of achieving further progress toward a desirable uniformity of local practice. There would be no one circuit judicial council to exercise the potentially broad rule-making powers provided under 28 USC § 332. (See *In re Imperial "400", etc.* (3d Cir., 1973) 481 F.2d 41.) Notwithstanding the closely integrated statewide character of The State Bar, it would be obliged to attempt to work with and give its attention to two completely separate circuit judicial councils and two completely separate circuit judicial conferences.

In order to avoid all the destructive effects of such a division of functions between two circuits, it would be necessary to amend 28 USC § 332 to provide, in California, for some sort of inter-circuit council and other inter-circuit activity and organization so that the functions of 28 USC § 332 can be carried out with respect to the State of California. We do not know exactly what form this might take, but in whatever form, it would be absolutely essential.

(2) *Access to the Supreme Court would have to be provided*

If this division of the state is to be enacted before there is any provision for some new or additional tribunals to perform or assist in the performance of the Supreme Court functions of resolving conflicts between the circuits, then we think the State of California has a right to insist upon the enactment of provisions which would demand special attention from the Supreme Court in the resolving of conflicts created by the division of the state into two circuits.

This would require an amendment to 28 USC § 1254, imposing on the U.S. Supreme Court mandatory, non-discretionary appellate jurisdiction of any court of appeals decision, in a case which originally arose in a district court of a state divided between two circuits, in which it is claimed that the decision is in conflict with a decision of the other circuit respecting the law (state or federal) applied in the divided state. Such a provision, of course, would be in the teeth of all present observations of and criticism of the case load situation of the Supreme Court and a contradiction of the discretionary jurisdiction policy enacted for the Supreme Court in the Judiciary Act of 1925. But we believe the State of California, if it is to endure such a division of itself into two circuits, has a right to such special consideration.

Such a provision for special treatment by the Supreme Court of cases arising from California would be especially necessary in view of another change in federal court jurisdiction which is proposed to be enacted. We refer to the proposal to dispense with the requirement that a district court act with three judges (under 28 USC §§ 2281–2284) when it entertains a case to enjoin the constitutionality of a state statute, and like matters. The three-judge district court provision is due to be abolished because it is said to be a burden on the lower courts and upon the Supreme Court because of the direct access to the Supreme Court by the right of appeal provided for in such three-judge district court

cases. The abolition of the three-judge district court procedure at the same time would take away such relatively direct access to the Supreme Court on important matters affecting state governmental administration. If the division of the state into two circuits were to be carried out, The State Bar would find it necessary to oppose any abolition or restriction of the jurisdiction of three-judge district courts and the direct appeal to the Supreme Court unless some clear right of appeal is created for the purpose above stated of assuring resolution of conflicting decisions of the two circuits which would embrace California.

(3) Special provision for coordination of multidistrict litigation within California would be required

As already mentioned, it will be necessary to provide for coordination and consolidation for all purposes of multi-district litigation between and among the four federal districts in California. At present this can only be done for pretrial purposes under 28 USC § 1407. The California state court system already has provision for similar coordination and consolidation for all purposes. See California C.C.P. §§ 404–404.8. It will be necessary either to require that the judicial panel now existing under 28 USC § 1407 devote special attention to California to do this, or to provide for a special "California" panel, either as an independent entity, or as a delegate of the existing 28 USC § 1407 panel to carry out these functions.

F. Conclusion

In conclusion, The State Bar of California reaffirms its opposition to the proposal of the Commission that this state be divided into two federal judicial circuits, and with equal firmness recommends that if the Ninth Circuit must be realigned or new circuits created, the whole State of California be included within any division in a circuit, if necessary creating a separate judicial circuit out of the state itself.

At the same time, The State Bar strongly recommends a substantial and immediate increase in the number of judges available to sit on the court of appeals.

Finally, we believe a comment is in order concerning the fact that this statement is submitted several months after the Commission performed its statutory duty of rendering its report on December 18, 1973. The statute which created the Commission, 28 USC § 41, note, imposed a stringent 180-day time limit in which its report had to be rendered to the Congress. That time limit expired on December 18, 1973. Unfortunately, the Commission did not publish its preliminary report until mid-November, 1973. That preliminary report first became generally available to us through the courtesy of unofficial publication in West's *Federal Reporter* pamphlet dated November 19, 1973. It, thus, did not become generally available to members of the Bar until about November 25, 1973 or later, when the *Federal Reporter* was normally received in the course of the mail. Yet, the notice accompanying the preliminary report states:

> . . . we invite comments and suggestions from all concerned and ask that they be placed in the hands of the Commission as soon as convenient and in any event *no later than December 5, 1973*, so that they may be considered in the preparation of our final report . . . [emphasis added].

By the terms of that notice, not only The State Bar of this state, but the entire nation, were expected to comprehensively consider the Commission's proposals and prepare and send to the Commission their thoughtful and considered views on the same, within the space of about one week. We cannot blame the Commission for this unfortunate procedure; its hands were tied by the statute, and it was all the Commission could do, within the 180 days allotted to it, to assimilate the materials it obtained and formulate its own views. In addition, it should be pointed out that the staff of the Commission did what they could to cooperate with The State Bar of California and its Federal Courts Committee within the stringent time limitations described above. By the same token, the Congress must recognize that the Report of the Commission, dated December 18, 1973, could not and did not take into account the views of The State Bar of California, which are contained in this Statement, and that the submission of this Statement is the first reasonable opportunity for The State Bar of California to make its views known concerning the Commission's recommendations.

Mr. Abel. The principal point I want to make this morning is that the State Bar of California is opposed to the division of California into two circuits. In approaching that question I do so initially from

the standpoint of what is in the public interest. It seems to me of vital importance that whatever we can do in the institutions related to justice these days to introduce certainty into the decisionmaking process, or to reduce uncertainty is worth doing. We should shape our institutions to meet that end rather than shape the public need to fit our institutions.

More specifically, let me suggest this, and I don't think that this is a chamber of horrors, as my old and good friend, Judge Duniway has said. There are, in our Federal courts these days, an increasing number of types of cases where there is an overlay of Federal aspects, whether statutory or constitutional, in the interpretation and enforcement of State laws. Mr. Dreifus can amplify that with a number of examples. The kind that occur to me immediately relate, for example, to our California Coastal Commission which was created within the last couple of years. In the carrying out of its duties a number of constitutional issues are presented.

Now, if California is divided into two circuits, I am not saying that one circuit would differ with the other as to the result. I *am* saying that the creation of two circuits would be an invitation to every client and every attorney to seek a different result in one circuit from that which has been determined in the other. I don't see how you can escape that likelihood. That has two effects: First, it seems to me that it reduces the confidence of the public in the certainty of the law when, in all good conscience, an attorney may say to his client, "the twelfth circuit has decided this point in this way, but I think we could get the ninth circuit to go the other way." An attorney can give that advice in good conscience. But this is not in the interest of justice. Whether the twelfth circuit ultimately agrees with the ninth is not the point. The point is that the existence of the two circuits is an invitation to a greater caseload, and I think an introduction of a further uncertainty in the law as it is applied within California.

Therefore, it seems to me there is a strong affirmative thrust for keeping California within one circuit.

Now, let me answer some of the questions that have been raised about that and some of the objections.

It is said that California naturally falls into two parts. I think that, in a geographical sense, that is so. Of course, there is a good deal of chauvinism between north and south in California, but it is largely in a jocular vein, I think. The State is an integral unit. It is tied together, if by nothing else, by the transportation of the surplus water from northern California to southern California. It is tied tight together by its university system, by a number of institutions within the State and, of course, by the institutions of government.

Of course, in the past when the suggestion has been made that the State be divided in two there has been a substantial public outcry against it. So I don't think it is accurate to say that California naturally falls into two parts.

Next it is said that the caseload in California, if California were a single circuit of its own, would be so heavy that a nine-judge court would not be able to serve the need; and therefore, that California should not be a single circuit, let alone combining it with another State or States to make a new circuit. That answer, of course, is irrelevant unless one accepts the premise that a nine-judge court is "the optimum

maximum," if you will excuse that phrase. One can see that, on the general principle that a small group can get more accomplished in a decisionmaking role than a large group, a nine person court, I should say, is more efficient or could be more efficient. But I think to say that that decides that California should not be a circuit of its own, or that California should be divided, places too much emphasis on the internal management of the judicial group in the circuit.

It is said also that a court meeting en banc is too large if the size exceeds nine. I think that argument falls on two grounds: One, that as has been held, I understand, in the second circuit, it is not necessary that all judges sitting en banc hear oral argument, but only that all consider the written briefs and record. Therefore the spectre of more than nine judges sitting in a single room is not necessarily a part of the notion that too large a number would be sitting en banc.

Second, I think that, if the en banc situation is something that is important from the standpoint of being a part of the judicial process of each circuit, the way to cure that is to adopt some procedure by which less than all of the active circuit court judges must necessarily participate.

Mr. WESTPHAL. If I may interrupt, what alternative or method would you suggest, assuming for example a bench of just 15, as to a method by which you could constitute a lesser number than the en banc court for——

Mr. ABEL. Here let me say I am reacting only to that as an individual and not on behalf of the State bar, but it would seem quite appropriate to me to say that the seven senior judges within the circuit would be those who would sit en banc and their opinion would have the same effect as an en banc decision.

Mr. WESTPHAL. Don't you think the junior judges would have rather strong feelings about that? They would be bound by an en banc decision, which sets the law of the circuit, and yet they would have no input into making that law?

Mr. ABEL. Well, I think that——

Mr. WESTPHAL. That seven-judge panel could in fact represent a minority of the 15-judge court.

Mr. ABEL. That argument is one, of course, that can be made. I think, of course, it is only one possibility. It could be that the entire panel of judges in the circuit, instead of picking the seniors, would elect their own judges to sit en banc.

My point is simply that it doesn't seem to me a final answer to say that 15 judges are too many to sit en banc. I think that can be wrestled with. Then, of course, it is also true, I think, that if you make the en banc picture a vital turning point in the determination of how you divide the circuit, you allow the tail to wag the dog.

Mr. WESTPHAL. Well, I think that is a very serious matter of concern. As I understand some of the testimony given before the so-called Hruska Commission at the hearings that were held along the west coast—as well as conversations I have had at several Ninth Circuit conferences—there has been a feeling that the Ninth Circuit, for whatever reasons, has not held enough en banc hearings in order to resolve what counsel are contending are intracircuit conflicts in decisions between several three-judge panels. Are you aware of this criticism that members of the trial bar have been making?

Mr. DREIFUS. May I comment on that?

Mr. WESTPHAL. Please do.

Mr. DREIFUS. After that comment was heard, a number of en banc hearings were scheduled and held. I know personally of several held in the past few months. I know Judge Duniway mentioned that a number were held this past year.

May I also address a remark to this question of less than the whole number of active circuit members being designated by statute to be the en banc court for purposes of making decisions which have en banc effect as precedents. The fact that one small group of judges out of a larger number are designated by statute in any judicial system to make a decision binding upon a much larger number is a fact that we live with every day. In one sense, for example, the Supreme Court, when it overrules the settled decisions of the circuits, is in effect overruling decisions by over 100 judges. So you have a superior body empowered to make the law for the inferior body. The one trouble is probably the tradition that circuit judges have always been at one level; we have never had a situation where, in our circuit courts of appeals, a judge has been both sitting at one level and also had the power to sit at another. We did have that, traditionally, at one time, when a Supreme Court Justice could sit in the circuit court of appeals. I believe that was true when they were first created.

This is not an insurmountable theoretical problem. It is more a human type of problem.

Mr. WESTPHAL. I will accept, Mr. Dreifus, your argument that the Supreme Court in its wisdom may overrule a legal decision that has, in fact, been held by perhaps 10 circuits. When the Supreme Court decides in favor of the 11th circuit which has expressed a contrary opinion, however, it does so by virtue of its constitutional authority to do so. It is "supreme." But when you are dealing, for example, with a bench of 15 circuit judges, those 15 are equals, and, as you have suggested, you can easily run into legal, theoretical, philosophical, and personal problems. I think they are problems that the Congress is necessarily going to have to consider as it evaluates the en banc function of a court of appeals as part of this overall problem that we are discussing in this series of hearings.

Mr. DREIFUS. Yes, I would like to point out that, in a de facto sense, this type of institution already exists in the way in which section 46 of title 28 operates. There, a circuit court sits with its panels filled with quite a number of visiting judges and district judges; thus its strength in total is greater than its strength in circuit judges. The circuit en banc consists only of certain judges.

Mr. WESTPHAL. Isn't this, in turn, one of the things that many members of the California bar have objected to, this practice of having at least one district judge on every three-judge panel in the ninth circuit?

Mr. DREIFUS. I believe the objection of the bar is more to the lack of certainty and stability, to the extent which that has on getting a precedent that can be followed. I think the example we gave in our statement of the California Supreme Court is apt. There you have a seven-judge court which has the time to control any possible conflicts among the many California lower courts. The way the circuits operate, and the way the Supreme Court is now organized, unfortunately, the Supreme Court does not have the time to do that with regard to panels of the circuits.

Mr. WESTPHAL. I think we have both interrupted Mr. Abel.

Mr. ABEL. I didn't feel that I had been interrupted, but I do have a few additional comments.

I think the arguments that Judge Duniway refers to about the burdens of travel are very understandable, and I think they undoubtedly do make the performance of a court of appeals judge much more difficult than if the circuits were less widely dispersed. But let me point out that the Commission proposal puts Alaska, Hawaii, and Guam in the new ninth circuit and that travel, therefore, is just as Guam, and the twelfth circuit consisted of Washington, Oregon, great within the new ninth circuit as it is with the old. If, however, the new ninth circuit consisted of California, Arizona, Hawaii, and Idaho, Montana, Nevada, and Alaska, at least the burdens of travel would be spread between the two circuits.

Now, we have not felt it would be appropriate for the California State Bar to suggest a circuit. Our main point is that we see serious defects, not in the public interest, involved in dividing California between two circuits. However, simply looking at the filings, and assuming that you are not limited to nine judges per circuit, a circuit consisting of California, Arizona, Hawaii, and Guam could be served by a panel of perhaps 12 judges. Now, as I say, the State bar has not taken a position on that, but only that California should not be divided. But a mere look at the filings tells that such a circuit would not be of unmanageable size.

I think that concludes my direct statement. Mr. Dreifus may have some additional comments.

Mr. DREIFUS. Yes, I do. I believe the central and important concern we have is the great change in the nature of the case law which is now preoccupying the courts—the Federal courts particularly. It is not just a case of the Federal courts deciding Federal cases and then, in diversity of citizenship cases, deciding matters of State law.

A look at the Federal Supplement and the Federal Reporter in the last couple of years—comparing just in pages of opinions and numbers of headnotes, the kind of decisions and the kinds of cases that are occupying the courts now as compared with 20, 30, or 40 years ago—reveals that there has been a tremendous expansion, in many areas of governmental administration and everyday transactions of every kind. It is this situation to which we address ourselves. I wish to make it very clear that neither I, nor the State bar, are commenting one way or another on whether this is a good or bad development. The State and the State institutions really have become a partner, if you will, of the Federal Government in carrying out combined State and Federal programs.

It tends to emasculate the State of California as a viable entity to say that the judicial structure shall not be coincident with the State itself. That is very important, because I believe we have to face the fact that the Court of Appeals in many aspects of Federal law—and strict questions of unconstitutionality are not the whole story—in many aspects of the kinds of cases which now seem to be routine, the Court of Appeals is really the court of last resort. The Supreme Court, with the tremendous area of jurisdiction that it has over all of the 50 State courts, the case law of the circuits and other courts, simply takes very few cases. As I say, these are not just constitutional cases, cases chal-

lenging the constitutionality of statutes; they are simply mundane interpretations of regulations that fill up volumes of the Federal Register, some of which are an inch thick. I don't know exactly how many cases have recently gone up on the subject of interpretation of welfare regulations, but there have been a great many of them.

Mr. WESTPHAL. Will you yield for a question at that point, Mr. Dreifus?

Mr. DREIFUS. Yes.

Mr. WESTPHAL. Let's assume you represent among your clientele a corporation engaged in the manufacturing business and it has one plant in San Diego and another plant in Fresno. That manufacturer is subject to the OSHA regulations on occupational health and safety. Today it would be possible to have a decision in the Federal court in San Diego applying those OHSA regulations to the operation of your client in San Diego and to have a different interpretation or decision in the Federal court in Fresno, applying to the same manufacturer, and to substantially the same type of a physical plant and piece of machinery. You do concede that is possible, do you not?

Mr. DREIFUS. Yes.

Mr. WESTPHAL. Now, today, you would resolve that conflict by appealing both of those decisions to the Ninth Circuit Court of Appeals, would you not?

Mr. DREIFUS. That is true.

Mr. WESTPHAL. Under the recommendation of the Hruska Commission for the creation of a new twelfth circuit and realignment of what is left into the ninth circuit, those two decisions would be in different circuits, would they not?

Mr. DREIFUS. That is true.

Mr. WESTPHAL. Assuming the same kind of conflict in the decisions, in the interpretation and application of an OHSA regulation, you would appeal the southern district decision to the new twelfth circuit and the decision from the eastern division, Fresno, to the new ninth circuit, would you not?

Mr. DREIFUS. That is true.

Mr. WESTPHAL. Conceivably each of those two circuits could affirm, and you would have a conflict, not only between the two circuits, but a conflict for your client who is manufacturing and engaging in business for both of the circuits.

Mr. DREIFUS. Yes, sir, that is true.

Mr. WESTPHAL. Under the existing procedure your only recourse would be to appeal those decisions to the U.S. Supreme Court, and you would have to proceed by certiorari, claiming a conflict of opinion between the several circuits, would you not?

Mr. DREIFUS. That is right.

Mr. WESTPHAL. So that really, in this hypothetical situation that I have just created, what becomes important for your client, the manufacturer, and important to you as his attorney is that you have a means of resolving the conflict, not so much between the two circuits, but between the southern district and the eastern district where that conflict originated. Isn't that true?

Mr. DREIFUS. Yes; that is true.

Mr. WESTPHAL. So that fundamental to a question of realignment, as it affects the practice of law and the doing of business in the State of California, is the idea that the Congress provide a mechanism through which such a conflict can be resolved, preferably at the first appellate level beyond the southern and eastern districts, rather than at the highest level here in Washington in the Supreme Court, where you can only be heard if that court grants a writ of certiorari. Isn't that what we are really talking about?

Mr. DREIFUS. Yes, sir.

Mr. WESTPHAL. That is the real concern of the practicing lawyers in California if the State of California were split between two different circuits, isn't it?

Mr. DREIFUS. Sir, there is a little more to it than that. I don't practice in the OSHA area, but my understanding is that in California OSHA is administered by a statewide organization. Even if you had the jurisdictional and procedural machinery that you have described, you would still be faced with this result: You would have a decision which is precedent in one circuit in California but not necessarily precedent in the other circuit.

Mr. WESTPHAL. All right.

Mr. DREIFUS. Then, while one client may be bound as a matter of estoppel or res judicata on this issue, you would have confusion because you would have a rule applicable in two districts of the State which is not necessarily applicable to other employers and not necessarily going to be carried out by the administrative people who have carried it out in the other two districts.

Mr. WESTPHAL. What you are suggesting is that, in addition to having a mechanism for the resolution of a conflict, that mechanism must also include a precedent setting procedure so that the conflict which is resolved will be a precedent that any one of the four district courts in the State of California will have to follow?

Mr. DREIFUS. Yes, sir.

Mr. ABEL. If I may interject here, just in that context, you could carry that scenario one step further. Assume that there is this OSHA decision in the southern district. Let's assume now that the State has been divided into two circuits and the same question arises in the northern district. The question is: Does the litigant appeal in the northern district, knowing that the appeal that has come out of the southern district to the new twelfth circuit has come out in a certain way? The answer is, I think, that almost inevitably the party affected in the northern district, even knowing that the appeal coming up in the twelfth circuit from the southern district has gone one way, may have the hope and the expectation that he can somehow persuade the court of appeals in the new ninth circuit to go the other way. In other words—and I want to make this point again—dividing the State for this purpose is very likely to increase the caseload as well as the uncertainty in the minds of the public as to what the law is.

Mr. WESTPHAL. If Mr. Dreifus, I were not only able to resolve the conflict in the first two cases, but also able to make that resolution of the conflict a binding precedent on all four of the California district courts, then your problem would not exist?

Mr. ABEL. That is true.

Mr. WESTPHAL. This statement which has been received in the record, reflecting the official views of the organized State Bar of California, was a statement that was developed by that bar in May 1974. I take it that this was during the period of time that your predecessor, Mr. Seth Hufstedler was president of the State bar?

Mr. ABEL. That is correct. I was a member of the board at that time.

Mr. WESTPHAL. Now, I had the opportunity to read that statement shortly after it was first issued and to discuss it with Mr. Hufstedler, and I recall at that time that I was kind of chiding Mr. Hufstedler that, while the State bar had done an excellent job of stating its opposition to the recommendations of the Hruska Commission, it had really not come forward with any viable alternative which it would have the Congress consider.

Now, in your testimony here today—and I take it you offer it only as your personal suggestion and not as an official suggestion of the State bar—you have stated that you feel that a circuit composed of California as an entity, Arizona, Hawaii, and Guam, with approximately 12 judges is a viable alternative to that suggested by the Hruska Commission?

Mr. ABEL. That is correct.

Mr. WESTPHAL. What reaction do you think such a change would draw from members of the Nevada Bar, who would then be in the other circuit? The principal place for holding court, I assume would either be Portland or Seattle. I wonder what reaction we'd draw if a Las Vegas lawyer or a Reno lawyer had to travel to Portland or Seattle rather than San Francisco? Is your suggestion a viable one taking into account that problem?

Mr. ABEL. Of course, that would be a negative to that possibility. However, without knowing the number of filings out of Las Vegas, I would be loath to say that that would be a crucial factor. Someone's ox has to be gored by any change of circumstances.

Mr. WESTPHAL. I think that is a pretty good way of characterizing the problem that both the Hruska Commission and Congress is going to have to face here. It will be a question of selecting the ox and determining just how badly you are going to gore it.

In 1974, 125 appeals to the ninth circuit originated from the State of Nevada. If we are looking for a small level of appeals as the critical factor in determining which ox we are going to select, then we would have to look at Hawaii, Montana, Idaho, and Alaska and say, "since their ox is smaller than any other ox, we will select them for the goring." That doesn't seem to be a particularly satisfying way of arriving at a solution to a real tough problem.

Mr. ABEL. Of course, I personally tend to sympathize with the underdog. That may sound a little odd coming from a Californian, but the fact is that I think some attention should be given to the needs of States with the smaller number of filings, perhaps by making it easier for them to enable litigants to travel to court at Government expense. Now, Judge Duniway has mentioned that the ninth circuit court considers it important to take the court where the litigants are. I think that is essentially a good idea, but I don't think it is the only solution, and perhaps some attention by Congress to the possibility of bringing the litigants to the court of appeals would be appropriate. That would involve machinery, of course, but again it would be a matter of weigh-

ing in the balance on the one hand the efficiency of the operation of the court and on the other the advantage to the litigants to have the court come to them.

Senator BURDICK. What do you think the State Bar of Montana would say about taking all their cases to California?

Mr. ABEL. Well, I have never known of anyone who didn't like to come to San Francisco, Mr. Chairman.

Senator BURDICK. I think you would have some real opposition to that.

Mr. WESTPHAL. Let me pose another question, Mr. Abel.

If one were to look at a map—and if one were given a free license to do whatever type of gerrymandering he might want to do—looking at the statistics that are involved, one could come up with the possibility of taking the State of Arizona with its 260 filings and aligning it into the tenth circuit in which it would have more geographical congruity with its new States than it now has under some of the suggested gerrymandered alternatives for the ninth circuit.

What views do you have about the possibility of Arizona being detached from the ninth circuit and aligned with the tenth circuit?

Mr. ABEL. Well, I speak very hesitantly about Arizona. I suppose one problem would be the question of what, then, would be the law of the circuit as applied to Arizona after it became a part of the tenth circuit. That is to say, would decisions of the ninth circuit, antedating the date of the transfer, be binding on the district courts of Arizona, or would decisions of the tenth circuit, antedating the transfer, be binding? I don't know what the resolution of that is. Perhaps Mr. Dreifus has a comment on that.

Mr. WESTPHAL. Assuming that to the extent that those two circuits are applying Federal law, they apply that Federal law differently, and assuming that the U.S. Supreme Court has not attempted to resolve that intercircuit conflict where does that leave an Arizona lawyer and his client? Of course, without making a study, one would not know how many instances there would be in which an Arizona lawyer would be confronted with the possibility that the law of the tenth circuit is different from the law of the ninth circuit with respect to any one single issue of Federal law. But the advantage of moving Arizona is that then, if California is to be kept in part as an entity, one could adhere Nevada to it and you wouldn't have this problem that I posed briefly with respect to the Nevada people. One could align, for example, a State like Hawaii with 55 appeals to California and that might well be better statistically than aligning a State like Arizona with some 260 appeals. It may well be true that we are really talking about oxen being gored, but there are an infinite number of factors Congress will have to consider in trying to resolve the problems that are presented to it.

Mr. ABEL. Of course, the fact is that looking at it from the standpoint of total number of filings in the circuit, the number would be less in the new ninth circuit, and therefore, more manageable, if Arizona were allocated to the tenth circuit and Nevada retained in the ninth, simply because the Arizona filings have historically been much greater in number than those of Nevada.

I am not used to dealing in sweeping geographical alignments of this sort. You will have to excuse me if I have only the most tentative views about such matters.

Mr. WESTPHAL. I don't think the Congress is used to it either. It hasn't been done since 1927.

Senator BURDICK. I was talking to some railroad people about freight rates. They said that once you change the rate in one particular area it is like a tablecloth when you pull one corner; you wrinkle the whole tablecloth.

Mr. DREIFUS. I don't know about the other States, but I have recently had some contact with a lawyer in Guam. They have a commendable court system, and I have discovered that they have copied it from California. Such a similarity of State law might also be a factor that would be taken into account, as well as travel arrangements and other things of that nature.

Mr. WESTPHAL. I believe that is all the questions I have, Mr. Chairman.

Senator BURDICK. Thank you.

We will be in recess until 10 o'clock tomorrow morning.

[Whereupon, at 12:25 p.m., the subcommittee was adjourned, to reconvene on Wednesday, October 2, 1974, at 10 a.m.]

43-476—75——16

CIRCUIT REALIGNMENT

WEDNESDAY, OCTOBER 2, 1974

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

The subcommittee met, pursuant to recess, at 10:05 o'clock 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 Coulter, chief clerk.

Senator BURDICK. This is the fifth day of hearings on geographical realignments. We are dealing this week with the ninth circuit.

Our first witness this morning will be my colleague, the Honorable Paul Fannin.

STATEMENT OF HON. PAUL J. FANNIN, A UNITED STATES SENATOR FROM THE STATE OF ARIZONA

Senator FANNIN. Thank you, Mr. Chairman, for this opportunity of appearing before the subcommittee this morning on behalf of my State of Arizona. I asked to appear before you because of various proposals relating to the realignment of the ninth circuit as it affects Arizona. Mr. Stanley G. Feldman, President of the State Bar of Arizona, submitted a letter resolution to me which I would like to place in the record.

Senator BURDICK. It will be received, without objection.

[Copy of letter referred to follows:]

STATE BAR OF ARIZONA,
OFFICE OF THE PRESIDENT, STANLEY G. FELDMAN,
Phoenix, Ariz., September 13, 1974.

Hon. PAUL FANNIN,
U.S. Senate,
Washington, D.C.

DEAR SIR: I understand that a Senate subcommittee will soon hold hearings regarding the various proposals to divide the Ninth Circuit.

The Board of Governors of the State Bar of Arizona has discussed these proposals and has asked me to convey to you the opposition of the Arizona Bar to any proposal which would have the effect of putting Arizona and California in different circuits.

Our opposition is based upon legal tradition and history and, more importantly, upon present day facts and circumstances. For instance, the great majority of Arizona commercial and legal business is transacted with California. Recent surveys have shown that traffic between Arizona and California exceeds that between Arizona and any other state. In short, Arizona's legal, commercial and social ties are closer to California than to any other state. Lawyers and judges in both Arizona and California are used to considering these factors.

To put Arizona in a circuit with other states would be to put our people, our business community and our legal community in a position where they would have to deal with judges familiar with neither Arizona law nor with the commercial, legal and historical background of this region. The Board of Governors feels that this would be most disadvantageous, not only to the bar but to the entire commercial community.

I would appreciate your doing whatever you think appropriate to convey our position to the appropriate Senate subcommittees, and thank you in advance for any help which you can give us.

Yours truly,

STANLEY G. FELDMAN.

Senator FANNIN. In essence, the State Bar of Arizona is totally opposed to any proposal which would have the effect of putting Arizona and California in different circuits.

It is my understanding that there is a serious problem facing the ninth circuit. This circuit now handles more cases than any other except the fifth. On December 18, 1973, the Commission on Revision of the Federal Court Appellate System submitted its report. The Commission considered a number of proposals regarding the ninth circuit, with which you are familiar. The Commission recommended that the circuit be divided into two separate circuits, the ninth and a newly created twelfth. California would be divided in half with the southern and central districts being joined with Arizona and Nevada to constitute the new twelfth, and the northern and eastern districts of California would be incorporated with Alaska, Washington, Oregon, Idaho, Montana, Hawaii and Guam into a new ninth.

Chairman Burdick, on February 7, 1974, introduced Senate Bills 2988, 2989, and 2990 which contained the recommendation and alternatives offered by the Commission with respect to the ninth circuit.

The Commission also considered other proposals. One sponsored by Judge Kilkenny would have the effect of dividing the present ninth circuit into two divisions, northern and southern. The southern division would consist of the central and southern districts of California and Arizona. The northern division would contain the remainder of the present ninth circuit. Another proposal would leave the ninth circuit as is and merely increase the number of authorized judges.

Each of these three proposals has its adherents and I suppose Arizona could live with any one of them. However, a fourth proposal considered by the Commission would realign the ninth circuit as follows: California, Nevada, Hawaii, and Guam would constitute one circuit; Arizona would be shifted to the tenth; and a separate circuit would be created consisting of Alaska, Washington, Oregon, Idaho, and Montana. The Commission rejected this plan as totally unworkable.

The Commission reported that California by itself generates two-thirds of the caseload of the present ninth circuit. Of 2,316 filings in the ninth circuit in fiscal 1973, California accounted for 1,543. On the other hand, Arizona filings in the ninth circuit in 1973 constituted 234 cases, or approximately 10 percent of the total. Splitting Arizona off from California would not resolve the problem. The Commission in rejecting the proposal to place Arizona in the tenth circuit states as follows, and I quote:

. . . To shift Arizona into the Tenth Circuit would violate the principle of marginal interference. It would involve moving a state into a different, existing circuit in the face of vigorous, reasoned objections concerning the impact of such a move. Relocation would take from the bench and bar at least some of the law now familiar to them. We have also heard extensively testimony about

the close economic, social and legal ties between Southern California and Arizona and the more limited nature of such ties between Arizona and the Tenth Circuit with its seat at Denver. Moreover, opposition to such a plan has come from California as well as Arizona. Finally, as we develop more fully below, a separate circuit for the five northwestern states does not appear justified or desirable at this time. . . .

Mr. Chairman, I am sure this subcommittee is aware that Arizona is both geographically and commercially bound to California. Many of our State statutes were adopted from California. Both logic and statistics should preclude Arizona from insertion into the tenth circuit.

Mr. Chairman, I appreciate very much this opportunity to present my views.

Senator BURDICK. Could I ask one or two questions?

Senator FANNIN. Yes, sir.

Senator BURDICK. In other words, Arizona would like to remain there?

Senator FANNIN. Yes.

Senator BURDICK. Do you realize what the workload is with all of California and Arizona—that we would have to have between 20 and 30 judges?

Senator FANNIN. Mr. Chairman, approximately 10 percent of the total caseload is from Arizona. So this, I don't think, would——

Senator BURDICK. I wonder why people from Arizona would oppose a union with southern California?

Senator FANNIN. Well, I don't think there would be the opposition to southern California that there would be to taking us out of the ninth circuit.

Senator BURDICK. Do you believe the bar would have less objection to a unit consisting of southern California and Arizona?

Senator FANNIN. My personal opinion would be that that would be less objectionable. Would that be another circuit?

Senator BURDICK. We would give one new circuit the "ninth circuit" name, but both new circuits together would be the old ninth circuit.

Senator FANNIN. Of course, I do feel, Mr. Chairman, that there would be less objection to that than to breaking Arizona away from California completely.

Senator BURDICK. There has been some testimony, which has suggested that you get your maximum from the judges at the number nine. As you increase judges from number nine on up you get less efficiency.

Senator FANNIN. I understand, Mr. Chairman, but the total caseload would just be increased by 10 percent if Arizona stays within the ninth circuit, and, of course, we are just across the border from California. The borders are together for many, many miles, and you do have both economically and otherwise a very close connection between Arizona and southern California.

Senator BURDICK. What you are trying to convey this morning is that your bar has indicated its belief that this is no way to improve the tenth circuit.

Senator FANNIN. That is correct, Mr. Chairman.

Senator BURDICK. I have read the letter from the State bar's president, Stanley Feldman. He says the board of governors had studied the proposals and so forth. Do you know if that has ever been ratified by a meeting of the State bar, or is this just the view of the board of governors?

Senator FANNIN. The board of governors, as I understand. I do know from my own personal observation that there seems to be agreement, and I have never known it to be expressed otherwise than with the position that the State bar takes.

Senator BURDICK. In other words, it doesn't mean that has been approved by the State bar itself?

Senator FANNIN. I do know from the information I have received that there is a consensus, I would say, for this.

Senator BURDICK. I see.

Thank you, Senator, very much.

Senator FANNIN. Thank you, Mr. Chairman.

Senator BURDICK. The next witness is Mr. Francis Kirkham, an attorney at law from San Francisco and a member of the Revision Commission. Mr. Kirkham, we are pleased to have you with us this morning. Please proceed to present your case in any manner you wish.

STATEMENT OF FRANCIS R. KIRKHAM, ATTORNEY AT LAW, SAN FRANCISCO, CALIF.

Mr. KIRKHAM. Thank you, Mr. Chairman. I am pleased to have the opportunity to appear at these hearings. While I cannot entirely divorce my comments from my experience for 40 years as a practioner in the ninth circuit, I do feel that I should try to speak today as a member of the Commission, drawing upon the evidence which has been submitted to us.

As you know, Mr. Chairman, the Commission's recommendations were preceded by hearings held in four cities of the ninth circuit: Seattle, Portland, San Francisco, and Los Angeles. The most striking aspect of these hearings was the virtual unanimity of the witnesses in expressing serious dissatisfaction with the situation in the ninth circuit; others proposed circuit realignment; and the proponents of new are needed to solve the problems faced by the court. They disagreed, to be sure, on the nature of the most desirable structural changes. Some preferred creation of geographical divisions within the existing circuit; others proposed circuit realignment; and the proponents of new circuits differed as to where best to mark their boundaries. Since the publication of our report, the Board of Governors of the State Bar of California has adopted a report opposing new circuits which would divide California. It is unlikely that unanimity of views as to the best solution will ever be reached among the bench and bar of an area as vast and varied as that comprising the ninth circuit: from Alaska to Arizona, and from the islands of the Pacific to the Dakotas. But above all, it seems to me, the evidence before us demonstrates that we must not let a lack of unanimity as to the preferred solution result in a continuation of the status quo. Two local bar associations in California have already suggested that any change be postponed pending further study. This is a familiar gambit and, I submit, an intolerable suggestion in the light of the testimony received by the Commission. Let me, therefore, emphasize at the outset the need for a change before discussing the proposed solution.

The first hard unalterable fact is the caseload with which the circuit must deal. In fiscal 1973, 2,316 cases were filed. In fiscal 1974, as our executive director told this committee last week, this number increased to 2,695—an increase of more than 16 percent; three times the rate of growth for the country as a whole.

The most serious consequence of the present situation in the ninth circuit is delay in the disposition of cases, especially civil cases. In the summer of 1973 the Judicial Conference of the Ninth Circuit passed a resolution:

Resolved, That the Judicial Conference of the Ninth Circuit expresses its concern over the delay in disposition of civil appeals in the Circuit and urges the Commission for reform of the Federal Appellate Court system to complete its studies and recommendations with respect to the Ninth Circuit under the provisions of Public Law 92-489 at the earliest possible date.

At the Commission's hearings, witness after witness expressed concern over delays in the disposition of civil cases—delays often approaching or exceeding 2 years at the appellate level.

The Administrative Office reported that, as of June 30, 1974, there was a total of 291 cases under submission for more than 3 months in the country as a whole. More than 20 percent of these were in the ninth circuit. Further, of the total cases under submission for more than 9 months, over 40 percent were in the ninth circuit. These figures, of course, represent only the time litigants must wait for a decision after a case has been argued or submitted. The additional delay in the ninth circuit in civil cases between the filing of briefs and the calendaring of a case for argument or submission is also a matter or serious concern. One witness before the Commission pointed out that he had to wait a year and a half after the last brief was filed before his case was called for argument; that he virtually had to relearn the case because of the lapse of time. Indeed, the ninth circuit now sends out a form letter at the time counsel are advised that a case has been calendared for oral argument, inviting the parties to submit any "relevant decisions rendered since the filing of a party's last brief." It is not a happy circumstance that a case may have to be researched anew because of delays between briefing and argument.

Another problem related to the inordinate caseload, and also to the vast geographic extent, of the ninth circuit is the problem the court has had in trying—rather unsuccessfully according to the testimony before the Commission—to maintain a consistent law within the circuit. Only the other day I learned that two decisions by different panels of the court, one in Los Angeles and one in San Francisco, had come down within a matter of hours of each other, each in direct conflict with the other on the construction of an important Federal statute. Not one of the judges in either panel knew that a like case to the one he was considering had been briefed and argued and was under submission to another panel of the court. Needless to say, in these two cases the ninth circuit has granted one of its relatively rare en banc hearings.

Judge Duniway expressed yesterday before the subcommittee, far better than can I, how such a thing could happen—the pressures on the court and the resulting lack of any opportunity for the collegial consultation between members of the court which is essential to institutional unity and, indeed, to the very functioning of the judicial process itself.

I should add that members of the California bar, at our hearings, expressed concern at the "great variance" in the decisions of different panels, and the assistant U.S. attorney for the central district of California gave specific examples of apparently inconsistent decisions by different panels of the court, and expressed apprehension that cases were being decided "by the luck of the panel."

The Commission also learned that for two successive fiscal years, 1971 and 1972, there were no en banc adjudications in the ninth circuit. More recently, the court has accepted a number of cases for en banc determinations—these facts were brought out at our hearings—and appears to be doing so with increasing frequency. In fiscal 1974, for instance, the court gave en banc consideration to eight cases. In only five of these cases, however, did the en banc court hear oral argument. Attorneys have indicated dissatisfaction with a procedure under which en banc cases—usually matters of great importance or controversy—are decided without an opportunity for counsel to personally engage the attention of all the judges who will be deciding the case. Indeed, the distinguished chief judge of our circuit has expressed the view that "every en banc should have an en banc argument in open court. I think it really expedites things because it brings them to a focus."

It is, I believe, somewhat questionable whether eight en bancs are sufficient to avoid the inconsistencies of decisions which have disturbed the bar. In the fifth circuit, where enbancs require the gathering of 15 judges, 33 en bancs were held in fiscal 1974, all but 4 of them with oral argument. It also remains to be seen whether the increased use of en bancs in our circuit further exacerbates the problems of delay to which I have referred.

The difficulties which the ninth circuit has had in maintaining a consistent law within the circuit undoubtedly stem in part from the extensive reliance which the court has been forced to place on the assistance of district and visiting judges. Unbelievable as it may sound, a total of 71 different judges sat on ninth circuit panels during fiscal 1973, the most recent period for which figures are available. During that year only 58 percent of the signed majority opinions issued by the ninth circuit were written by the active circuit judges: 27 percent, nearly a third, were written by district judges and judges visiting from other courts. No other circuit comes even close to that proportion—the next highest being 18 percent—while for the country as a whole the figure is only 12 percent. Even more striking, the signed majority opinions in the ninth circuit were written by a total of 61 different judges. This is twice the number of judges writing signed opinions of the court in any other circuit. With so many judges taking part in the decisionmaking processes—and so many judges writing opinions—it is hardly to be wondered that the court has had problems in keeping its decisions consistent. I recall to you Mr. Chairman, the statements of Judge Duniway about the difficulty these 61 judges who wrote opinions had in arranging for consultation with each other because of the geographic distance between their home stations.

To summarize, Mr. Chairman, no one disputes that the caseload now borne by the ninth circuit imposes a completely impossible burden on the 13 active circuit judges now provided for the circuit. No one disputes that 15 or more active judges are required to carry the caseload of the circuit. Actually, the number should be greater. If the number of judges were 18 today, each would have a caseload of 150 cases per year, which would be greater than the filings per judgeship in seven of the present circuits, and would approximate the national average of terminations per judgeship. No one disputes that, at the very least, difficult problems arise in maintaining institutional unity

on such a large court, extending over such a vast territory: in fact, the testimony before the Commission shows that serious problems do exist which can be solved only be creating smaller, more manageable circuits.

I want to emphasize, Mr. Chairman, that these delays and other problems are not the fault of our judges. The judges of the ninth circuit could not be more conscientious or hard working. The simple truth of the matter is that they have been put in an impossible bind by the failure of all of us to recognize the situation and do something about it: to provide them with a structure under which they can perform their duties as judges with a current docket. Instead, they find themselves in a situation where, without their fault, they are falling further and further behind as they try to deal with an impossible workload by borrowing excessively from overworked district judges, by reducing and eliminating oral argument, by deciding cases without written opinions, by delegating, as a practical matter, the screening of cases for summary treatment to nonjudicial personnel, and by relying more and more—of necessity—upon such personnel for the analysis of cases and the preparation of written opinions. In other words, Mr. Chairman, we are looking at a threatened breakdown in the judicial process itself. And I may add that we are doing this at a time in our country's history when, it seems to me, perhaps above every other public trust, the integrity of the judicial process in our national courts must be preserved.

What, then, is the solution?

There is little, if any, dissent from the view that the circuit must be divided, except for those who have suggested the alternative of two divisions. I cannot add to what Judge Duniway told the committee yesterday about the proposal for two divisions. As he pointed out, it would create what in effect would be two separate courts, but with the serious drawback of administrative problems enhanced by the dichotomy itself. To try to maintain institutional unity in a single large circuit is difficult enough, as is demonstrated by the experience of the ninth circuit and the fifth circuit with its 33 en banc hearings in 1 year, each calling for the convocation of 15 judges from 6 States. To maintain such unity in a circuit as large and dispersed as the ninth, with two divisions geographically separated and under semi-autonomous leadership would, as Judge Duniway put it, be an "administrative monstrosity."

If, then, the circuit must be divided, the only question is how?

A circuit composed of California alone would, for the first time, abandon the principle that circuit courts should be national in their composition. As the Report of the Special Committee on Coordination of Judicial Improvements of the American Bar Association put it:

> After careful consideration, the committee believes that the principles of federalism and the advantages which flow from infusion of judges from several States into a circuit court considerably outweigh any disadvantages which might be generated if part of a State were placed in two or more circuits.

The Commission agrees with this statement.

But beyond this, such a circuit would immediately face the stark and inescapable fact that a court with the appellate caseload originating in California would start with an overloaded docket and soon find itself entangled in the same difficulties as now beset the

fifth and ninth circuits. After all, California is an empire of 21 million people—larger than any other State, and considerably larger than most of the countries in the world. Guam, Hawaii, Alaska, Washington, Oregon, Montana, Nevada, and Arizona contribute little more than one-third of the caseload of the ninth circuit. Notwithstanding their vast geographical expanse, stripped of California, they would constitute one of the smallest circuits in the country in volume of work.

Commonsense dictates the creation of two circuits which would divide the caseloads—and this is what the Commission recommends. The only significant opposition to this recommendation is from those persons who oppose "splitting" or "dividing" California.

In the first place, I believe the words "splitting" and "dividing" are misnomers. California already has four judicial districts, in each of which a single judge decides the law. No one has ever found anything in this situation which threatens the unity of the State, nor has anyone read into it any political overtones. To include the whole sovereign State of California in two Federal judicial circuits has no more of a divisive effect. The courts of appeals declare national law. Each at any time may have to discern in particular cases the law of any State. But the decision of the Federal court on that law is in no way binding upon the State courts. California is a sophisticated State with a fully developed jurisprudence. And, as Judge Duniway pointed out, in his long experience on the bench, both State and Federal, he has never seen an occasion when the several Federal courts in California have disagreed on the meaning of State law. Here again, without needless repetition, I can do no better than to endorse Judge Duniway's analysis of the problems from the vantage point of his many years of distinguished service on both the court of appeals and the appellate courts of the State of California. That testimony appears in his statement that was submitted to the committee yesterday. I might, however, add two thoughts:

In the first place, I find it disturbing to have the State Bar of California concerned that litigants will shop in two circuits to obtain conflicting judgments on the application of the national law to State activities. The problem here, of course, Mr. Chairman, is not the existence of two circuits in California, but the possibility of a conflict between circuits which will impose different rules of national law upon citizens of the United States who happen to live in different parts of California. In my judgment, a conflict in national law is equally intolerable, whether it be between two circuits in one State or two circuits in distant States.

There is no doubt that conflicts do exist. There is no doubt—any more—that the Supreme Court tolerates these conflicts, sometimes for long periods of time. As one member of this Commission, I am firmly of the view that a means of resolving such conflicts must be devised. Statutes imposing different obligations or creating different rights for particular citizens or communities would suffer a quick death under the equal protection clause. Any rational system of jurisprudence must provide the same result with respect to the adjudication of courts. I have never been persuaded by the view expressed by some writers and held, I fear, by some members of the Supreme Court, that conflicts should be allowed to "simmer" in the circuits until the experience of those who suffer under discriminatory rules of law "illumines" for

the Supreme Court the path it should take. Our duty is to recommend a way to eliminate, promptly and forthwith, all conflicts in the national law. This, I think, would resolve any substantial problem that is presented to us by the State bar.

In the second place, I feel it only fair to point out that while the Board of Governors of the State Bar of California properly speaks for the integrated bar, no plebiscite was conducted, and there are, of course, many who do not share the views stated in the board's report. For example, the American College of Trial Lawyers surveyed its members in California and of those who responded, a majority favored the Commission's recommendation. The sample was not large enough to be used as representative of any universe, but it does disclose the views of a group of lawyers particularly experienced in litigation.

I cannot close without saying that I, too, have had the same qualms as others at the thought of what may be called "dividing" California. But reason tells me that these qualms, like the feelings of my good friends on the board of governors of the State bar, are more emotional than substantive.

I believe there is no reasonable alternative to the division recommended by the Commission. If you will forgive me, Mr. Chairman, I would like to interpolate to recall to you one of the most impressive experiences I have had. About 10 years ago, I sat at Lakeside, Bohemian Grove, north of San Francisco, and heard Mr. Wernher von Braun tell us how President Kennedy's promise to put a rocket on the moon by 1970 was going to be accomplished. He said we would take a rocket and put some men in it and shoot it up to the moon and orbit the moon, and then another smaller rocket attached to that mother ship would disengage itself and float down to the surface of the moon, the men would get out and explore the surface, get back in, blast off from the moon, reunite with the mother rocket and they would all come safely back to earth.

So prestigious was Mr. von Braun—as the chairman well knows—and so impressive in his knowledge and so articulate in what he said that we nearly believed him.

But the interesting thing he said at the end of his talk was this. He said many people are complaining about expenses and why do we go to all this trouble to make all of these changes. He said it reminded him of the little old lady who said, "Why do we go to all this trouble, why don't we just stay home and look at television as the good Lord intended."

There are times when inaction is a course which bears greater risk than action. At some point it becomes essential for the bar, for informed citizens and for the Congress to examine the implications of allowing the present situation to continue without the relief which circuit realignment, coupled with new judgeships, can afford. It is not hard to find objections to any proposal which may emerge; but such an attitude little serves the needs of a judicial system already beset with grave difficulties—a system which, in the interest of the country, must operate with efficiency, yet without sacrificing either fairness or the essential characteristics of the courts of appeals as national institutions.

Senator BURDICK. Thank you very much for your very excellent statement. You have been very helpful to the committee.

I am impressed with that one sentence on the last page of your prepared statement: "There is, I submit, no reasonable alternative to the division recommended by the Commission." When it comes to providing a viable alternative to the new circuits, I have yet to hear one suggested by those who oppose new circuits. The only alternative I have heard is, "create more judges." Right now the circuit needs 20 new judges. When you consider en banc hearings using 20 judges—counting up the traveltime and the days required to sit and hear these arguments—why you have used up much of your new judge time right there.

The testimony has been quite clear up to this date that when you get past nine you are getting diminishing returns. I am impressed with your statement because I haven't heard a viable alternative yet, have you?

Mr. KIRKHAM. No: I have not. I approached the division of California with just as much instinctive feeling as I am sure every member of the Board of Governors did, but when you look at the matter there is no other way, and when you examine the supposed problems raised by our suggestions, those problems really disappear as far as any substance is concerned.

Senator BURDICK. I can understand California not wanting to give up the one-State approach. I understand that from an emotional point of view. But the alternative, as you point out, is bigger caseloads and bigger backlogs than we have now, and the more judges we appoint the less work we will turn out per judge.

Mr. KIRKHAM. Actually, there is no division of California. To place parts of California in separate judicial circuits is really no more divisive than to place them in separate judicial districts. The solution is a means for resolving any conflict just as you have a means for resolving conflicts if they occur by appeal from the district court decisions. It is quite possible, for instance, even in such a social matter as the annual meetings of the judicial conference, to have a joint meeting, as the eighth and tenth have now.

Senator BURDICK. Do you see any conflict between these two new circuits and any other circuits?

Mr. KIRKHAM. No, I don't.

Senator BURDICK. The Supreme Court must resolve such conflicts?

Mr. KIRKHAM. A conflict between judicial districts in California is no more disturbing than a conflict between a citizen of California and a citizen of Utah. It must be taken care of if a rational system of justice is to be applied.

Senator BURDICK. Does staff have any questions?

Mr. WESTPHAL. Yes, Mr. Chairman. Mr. Kirkham, in your response to one of Senator Burdick's questions, I believe you referred to the fact that each of these bills now before the subcommittee would add an express provision to section 1254 of title 28, which stipulates the methods by which cases in the courts of appeals may be reviewed by the U.S. Supreme Court. That provision, which is set forth in section 7 of each of these bills, reads as follows:

(4) By appeal, where is drawn in question, the validity of a State statute or of an administrative order of statewide application on the ground of its being repugnant to the Constitution, treaties, or laws of the United States: *Provided, however*, That this subsection shall apply only when the court of appeals certifies that its decision is in conflict with the decision of another court of appeals with respect to the validity of the same statute or administrative order under the Constitution, treaties, or laws of the United States.

Now, you have studied that language, haven't you, Mr. Kirkham?

Mr. KIRKHAM. I have read it, yes.

Mr. WESTPHAL. Do you think that language, creating an appeal in an instance where there would be a conflict between the proposed new ninth circuit and the proposed new twelfth circuit concerning the validity of an order of the State of California, would be sufficient to insure that the Supreme Court would resolve the conflict by taking jurisdiction of the case? The Congress really forces it to take jurisdiction, doesn't it?

Mr. KIRKHAM. Yes; I am satisfied that that is so.

Mr. WESTPHAL. Of course, apart from putting that burden on the Supreme Court, I suppose there are other ways in which that specific problem—which Judge Duniway has never seen in his years of experience and suggests would only occur rarely—could be resolved?

Mr. KIRKHAM. I was about to say that I don't consider it a burden, because I don't anticipate it will happen. If it does, it will be so rare it will be no real burden to the court. This is not just a problem for two parts of California; it is a problem for the whole Federal system of jurisprudence.

As far as the broader problem is concerned, there are—and perhaps there must be as a matter of sheer necessity, because of the Supreme Court's docket—some other methods devised for resolving conflicts. Those conflicts are not conflicts that should concern the Supreme Court. I can give you an example. In one of our cases in the ninth circuit, the court recently held that where a district court enters judgment against a defendant for attorney's fees, as in the *Perkins* case, and that is appealed and the court of appeals holds the judgment excessive and fixes a lower amount, then the defendant must pay interest on the lower amount from the date the district judge entered his order. The third district, I think—I have given a citation to Mr. Lævin—has held exactly the opposite. In one circuit, parties are paying interest on a judgment, and in another circuit parties are not paying interest. This is not a problem that should concern the Supreme Court of the United States. Those justices shouldn't have to get together and concern themselves with that, but it is important that that conflict of law be resolved so that every citizen in the United States will be operating under the same law. It involves a construction of the antitrust laws.

Mr. WESTPHAL. On that point, let me just mention, that, under Senator Burdick's chairmanship, this subcommittee has, over the last 4 years, followed a course, chartered by the chairman of the subcommittee, of reviewing the structure, procedures and operation of the Federal judicial system. We started with the magistrate system, trying to make that as effective as it could be under the Magistrates Act. We then moved on to extensive oversight hearings in connection with the requests for more district judgeships. The subcommittee examined, in hearings and in staff studies, the operations of approximately 62 of the 94 judicial districts, and, earlier this year, held 4 days of hearings on the judgeship needs of, and the operating procedures employed in, the First, Second, Third, Fourth, Sixth, Seventh, Eighth, and Tenth Circuit Courts of Appeals. In this series of hearings now being held the subcommittee has been looking into the Fifth and the Ninth Circuit Courts of Appeals. The logical progression, we hope, is that

once decisions have been made concerning the lower Federal courts—the district and circuit courts—then perhaps that would be the best time for Congress to look into the reports and recommendations that have been made by the Freund Committee, the Advisory Council on Appellate Justice, the American Bar Association, and other groups with reference to how the Supreme Court is to be given help—if indeed it needs help—in resolving conflicts with reference to the national law.

Do you find any objection to that timetable?

Mr. KIRKHAM. No; none whatsoever. It is a serious problem and deserves very careful study. The reaction to the Freund Committee report is an example. Here are very distinguished scholars. We all know how distinguished, and how thoroughly familiar with the workings of the Supreme Court and the Federal courts, they are, but without background study and without enough of a realization of a rather fundamental flaw in the recommendation, they made their recommendation. Now, much of what they say is, of course, obviously true, and much of what they say must be remedied; that is certain. But they haven't given much consideration, I think, to the full ramifications, and I hope the reaction to one aspect of that report—namely, depriving the Supreme Court of the right to review every case—doesn't bear upon the merit of the whole report.

Mr. WESTPHAL. Mr. Kirkham, I assume that, out of a sense of modesty, you have omitted from your testimony before this committee any personal background other than the fact that you have been a practitioner for some 40 years. I think you may have mentioned in an aside earlier this morning the fact that you had the opportunity of clerking for one of the justices of the Supreme Court, but I think it would add to our record this morning if you would tell us something more about your personal background and experiences in the field of law. Would you do that, please?

Mr. KIRKHAM. Well, I did serve as law clerk to Chief Justice Hughes, and thereafter—partly during that time and thereafter, Mr. Robertson and I wrote a book on the jurisdiction of the Supreme Court of the United States, which is in its second edition and which, I am told, is still the authoritative text on that subject. Since that time I have practiced law as an active practitioner, spending much of my time in the courts; served for 10 years as general counsel for Standard Oil of California; served on numerous committees of the State bar, including the Committee on the Administration of State Justice that Judge Duniway referred to yesterday; served on the Research Committee of the American Bar Foundation; been the chairman of the Anti-Trust Section of the American Bar Association; and have tried to, in the course of my practice, accept such public positions in connection with the problems of the judiciary and of the law as have come to me. I think that about states it.

Mr. WESTPHAL. I would be interested in knowing in how many of those approximately 40 years you have been engaged in trial work at the district court level?

Mr. KIRKHAM. Well, it is hard to say how many years. I tried quite a number of cases, mostly in the antitrust field—large cases—and some cases involving—well, the case involving the Standard Oil trademark. I have had perhaps even more experience in the appellate courts, arguing cases in the U.S. Supreme Court and in the circuit courts—not only the ninth circuit, but the tenth, fifth, eighth, and others.

Mr. WESTPHAL. Could you give us a rough estimate of the number of cases in which you have appeared and argued in the courts of appeals for the various Federal circuits?

Mr. KIRKHAM. Well, it would be hard to do that. The first one was in the 1930's and the last one was a few months ago. There have been dozens, I am sure, dozens.

Mr. WESTPHAL. You are a senior partner in the firm of Pillsbury, Madison in San Francisco?

Mr. KIRKHAM. Pillsbury, Madison and Sutro.

Mr. WESTPHAL. To what extent have you had practice in the Supreme Court of the United States?

Mr. KIRKHAM. I think I have practiced more in the Supreme Court of the United States than in the State of California. I have only argued about eight cases in the Supreme Court, but I have participated in many, many others. I suppose I have been on 50 or more briefs to the Supreme Court.

Mr. WESTPHAL. So I take it that the views that you have presented to the subcommittee this morning are based, not only on your study of the report of the Commission on the Revision of the Federal Court Appellate System, but are also influenced by your own experience over a long number of years in practicing before many of these courts of appeals?

Mr. KIRKHAM. That inevitably is true, Mr. Westphal.

Mr. WESTPHAL. If you can mention the 1930's, then your experience began in the courts of appeals when they had no caseload problems and were able to give oral argument to every case and render their opinions with reasonable dispatch and has continued to the present day, when they are operating under vastly expanded workloads with an ever-increasing number of judges?

Mr. KIRKHAM. That is true. It so happens that in cases I personally have had in recent years in the courts of appeals I have not had the experience of having oral argument curtailed. In fact, it has been expanded. But I am very much disturbed by the tendency that has grown up, particularly in the Fifth and Ninth Circuit Courts of Appeals. It is correlated, absolutely, to the workload, and the often too ready-answer to the problem is the reduction of oral argument. I don't think an oral argument is necessary in every case. We do have those cases—and I can go through the thousands of records of the Supreme Court and find numerous cases, particularly prisoner appeals—that are frivolous. But I do not think oral argument should be denied in any case were it is requested, because it can be curtailed the moment the lawyer stands before the court. I think that no matter what the case, the court should give an option to counsel to argue the case.

Senator BURDICK. Judge Duniway testified yesterday that these frivolous cases generally are in the criminal field, where there is an automatic appeal. I believe it is the practice in the fifth circuit that, where even one judge thinks oral argument is necessary, they grant it. Now, if you have a case where oral argument is not necessary, would you grant oral argument?

Mr. KIRKHAM. Yes, I would, because it is not going to take that much time of the court. Those cases can be docketed. There are notices sent out. There are many of these cases where argument won't be requested—because counsel won't go the distance to appear before the

court—but if they request oral argument, I think oral argument should be permitted. Judge Lombard, in the second circuit, has told us it takes no time—and this is true, it takes no time—for a judge to discern if there is anything of merit there. I believe that type of case should be dismissed, decided immediately from the bench, but I don't think any case should be denied oral argument where it is requested, and I don't think that any case, no matter how frivolous, should be decided without an opinion. Now, an opinion can mean two things. It can mean a written opinion prepared as a precedent and it can mean one sentence from the bench that tells why the court is summarily disposing of the case. I do not think it is an appropriate judicial process for a case to be set before the court and then to get a notice that there will be no oral argument and then a notice which says "affirmed" or "reversed". I don't think the right of an appeal in that situation—not as a matter of due process, perhaps, but as a matter of our best practice—has been accorded to every person from the first judgment. This doesn't mean that you have to have long opinions. Above everything, it doesn't mean every opinion must be printed by the West Publishing Co. to burden our shelves; it means there should be a statement, no matter how informal, as to the reasons why the case is disposed.

I have been distressed, for instance, to see the Supreme Court go back to the old practice it had before Chief Justice Hughes. Before that time, when an appeal was dismissed, they had a formal per curiam that said, "dismissed for lack of a substantial question," citing only cases that held that when a question was not substantial it went to the jurisdiction of the Court and it could be dismissed for want of a substantial Federal question. Under Chief Justice Hughes, those cases which had decided that matter prior to that time were cited in the per curiam so that the lawyer knew why his case was not substantial. All the Court does now is say "dismissed for lack of a substantial Federal question." I have seen cases in which, with all of my experience, I couldn't see why there was a lack of a substantial Federal question: it wouldn't have hurt the court to have cited the cases to tell me why.

Senator BURDICK. The question I am going to ask now is beyond the scope of this discussion, but you have prompted me to ask it.

One of the judges from the fifth circuit came before us the other day and referred to the English system. As you know, our common law is based upon the English system as it has been modified here, but it is still the common law.

Mr. KIRKHAM. That is right.

Senator BURDICK. I presume their present system is still based on their old common law, yet this fifth circuit judge testified that those judges over there handle 5 and 10 times the caseload that we do. How do they do it?

Mr. KIRKHAM. Well, I can't answer that. I wish my partner, Mr. Bates, were here. He just returned as one of the lawyers representing the American Bar on the study of the English courts. But I do know one thing they do not do: they don't brief cases there. They appear before the court with their cases. They argue those cases before the court. The court looks at those cases at that time. The assistants brings them in and stack them on the table. They go into the case and then the case is decided from the bench. It is decided with a statement of

the reasons why, and that is it. They don't go through the long folderol of printed briefs, submissions, and so on. The case is taken directly in and argued as the pleadings come before the court—as the case is before the court. They consult at the very time the case is before the courts. Maybe that is a better way—I don't know, but it performs the functions of the court.

Mr. WESTPHAL. I assume the English bar accepts it because that is the tradition and the procedure they have had for hundreds and hundreds of years.

Mr. KIRKHAM. That is right.

Mr. WESTPHAL. On the other hand, in the United States, the procedure has been one which fully employs the adversary proceeding both at the trial level and at the appellate level, by calling for the preparation of briefs by the appellant and by the respondent, and the matter is considered by the court on the printed record. That has been our custom. So it is a question of what the jurisprudence of the country has grown used to.

Mr. KIRKHAM. Has been accustomed to.

I favor the American system of filing briefs. I think they are helpful to both the court and counsel. I think it helps direct the lawyer better. One thing we must remember, of course, is that the English people are not as litigious as we are. Why California should be such a litigious state, I don't know. There are only half as many appeals in Texas as in California. In England they are not litigious. They say "*de minimis non curat lex.*" The law won't concern itself with trifles. In this country we pass rules that provide for class actions so that everybody who has a dollar claim will appear in court. In England, too, you have a trained barrister. There is that screen between the solicitor and the court. So there are many fewer cases, and many fewer cases come to litigation. Also the court can award costs. The plaintiff goes on his appeal at his peril. When costs can be awarded against you, why——

Senator BURDICK. Even if there are fewer cases, it is a fact that the judges handle more cases.

Mr. KIRKHAM. That is right. They are presented with more ability. I am sure that is so, Senator.

Senator BURDICK. Well, I may take another trip to England and take a look at this system. I may just do that.

Mr. KIRKHAM. I wish you would. In your position, I can't think of anything that would be more helpful than for you to have the most complete knowledge concerning the judicial systems there and here. As Mr. Westphal says, they are the historical base of our judicial system, and a part of it.

Mr. WESTPHAL. Mr. Kirkham, along this same line, I take it that you do not dispute the fact that the so-called "law explosion" which set in following World War II has reached a point where the courts of this country, both State and Federal, have been forced to deal with a much larger caseload than we all knew back in the 1930's and early 1940's. For example, as Judge Duniway testified yesterday, when he first went on that bench as late as 1961, their filings per judge were only 49 and their terminations per judge were only 25. We are now talking in terms of 100 filings per judge being utopia, and we don't see how we can create enough judges on a court in order to get their

filings down to a figure of 100—let alone back to a caseload of 50 per judge. In those days, they wound up writing probably a total of 35 opinions a year, both full-blown signed opinions and per curiam opinions.

Mr. KIRKHAM. That is correct.

Mr. WESTPHAL. We will never see those days again.

Mr. KIRKHAM. No, we will not.

Mr. WESTPHAL. So the problem for Congress is really to see how it can so structure our appellate courts so that we will not expect our judges to deal with caseloads of 209, 189, or 169 per judge. We need to get down to the most manageable figure that we can.

Mr. KIRKHAM. That is correct.

Mr. WESTPHAL. Still, we have to reserve the opportunity for every litigant to have his rights determined in a court of law and to have at least one right of review by an appellate court. Is that basically the dimension of this problem?

Mr. KIRKHAM. That seems to me to be it exactly.

Mr. WESTPHAL. All right. Now, in that context, I would like to look at the recommendation of the Commission with reference to the proposed creation of a new twelfth circuit and the realignment of the other States into a new ninth circuit. The figures given by Professor Levin in his testimony a week ago showed that, with reference to the 12th circuit, one consisting of the southern half of California plus Arizona and Nevada, that court would have a total of some 1,545 filings. I think you were present in the hearing room yesterday when I asked Judge Duniway about this point. The testimony indicated that, if that new twelfth circuit had only nine judges, the caseload would be approximately 171 per judge. In order to get that caseload down below that figure that circuit would very likely need 10 or 11 judges. In order to get it as low as 129 you would need 12. Do you realize that?

Mr. KIRKHAM. I do.

Mr. WESTPHAL. Of course, all we are talking about there are the new filings coming into that court from those States each year. We have not asked how that court, with whatever number of judges, is going to whittle away on the backlog which it will inherit of some 2,300 cases. The committee exhibits show that that many cases were pending as of June 30, 1974, when the 1974 fiscal year terminated.

In your statement you have mentioned the percentage of cases that have been pending for decision for longer than 3 months and for longer than 9 months in the ninth circuit. Judge Duniway told us yesterday that as of, I believe, September 30 in the ninth circuit there were some 601 cases which had been fully briefed—where counsel had done all their work—which were just waiting for a time when the court could schedule them for oral argument.

Mr. KIRKHAM. And then they will be waiting for a decision after that.

Mr. WESTPHAL. And then you have to wait for a decision after that.

Now, then, the point of my question is, if this circuit is to be realigned—and also if the fifth circuit is going to be realigned, because they have somewhat the same problem, although they do not have as much of a backlog as the ninth circuit because of this extensive screening technique they have employed—how are we going to go about getting enough judge power, not only to handle the incoming caseload, but also to whittle away at this backlog?

Mr. KIRKHAM. Well, it seems to me, Mr. Westphal, that certain ideals have to be compromised as a practical matter. We have heard much testimony—and it is almost unanimous as far as the judges are concerned—that a court of nine is about as large as a court should be if it is to have the ideal collegial atmosphere which a court should have. I think that in this situation it is necessary to compromise that ideal to the extent of appointing enough judges to take care of the backlog and to take care of the workload. If this takes two more judges or three more judges, then it just has to be.

Now, the compromise can be lessened, in my opinion, if you take care of the geographical problem that is presented in the ninth circuit. The biggest problem will be in the southern division, and there is no reason, in my opinion, why every judge cannot live at the place where court is held. If they are in Los Angeles, if they are available to each other, if their chambers adjoin each other, if their law clerks have communication among themselves, then they are not going to have a situation where one panel of the court hands down a decision that is contrary to another panel of the court. The collegiality that is essential to the operation of the judicial process, even if it is necessary to appoint more than an ideal number of judges, could be accomplished in that way, I think.

Mr. WESTPHAL. Mr. Kirkham, it seems to me, then, that really the problem facing Congress is twofold: First, to come up with a realignment for a restructuring which, coupled together with adequate facilities and so forth, permits a system under which a judge of a court of appeals would be expected to deal only with a manageable caseload, assuming that a caseload of 209 is manageable. The reason we want to achieve a lower workload per judge is to give these judges a fighting chance to keep up with the caseload and, hopefully, reduce this backlog. The ultimate goal is to furnish as expeditious a review on appeal as the system can possibly offer. Don't you think that is part of the question?

Mr. KIRKHAM. That is exactly true; yes.

Mr. WESTPHAL. Now, even if we are able to bring the caseload per judge in the ninth circuit down to what the national average was in 1973—about 161 filings—it would seem to me readily apparent that judges, even with that type of a caseload, are going to have to work pretty hard to handle it.

Mr. KIRKHAM. That is true. That is too large a caseload.

Mr. WESTPHAL. Now, in our study of the seventh circuit in Chicago we found that until just a few years ago that circuit was customarily setting three cases for argument every day. It was granting counsel on each side a full half hour. They found, however, that they could not keep up with their calendar. Their backlog was building up. So about 3 years ago they decided to start calendaring six cases per day. Probably four of them would be cases in which oral argument was granted and one or two of them would be a case that was ordered to be submitted on the briefs. In any event, they in effect almost doubled the number of cases that they were calendaring for oral argument.

You were present in the hearing room yesterday when Judge Duniway testified that statistically for the year 1973 each panel of the ninth circuit had 3.3 cases per day on the calendar for argument before the court. The study that the subcommittee made of the 1973 calendars

of the ninth circuit indicates that they had a panel sitting on 333 different occasions during the year. On a given day they might have three or four different panels sitting in the various locations throughout the circuit. Now, out of that 333 days, there were 45 days in which only one case was calendared for oral argument; there were some 46 days where only two cases were calendared for oral argument; and there were 143 days where only three cases were calendared for oral argument. That, then, would leave a total of 99 days out of 333 on which the court calendared four or more cases for oral argument.

Now, I can understand that, if the court has a case which is multiparty or in which it has to accord oral argument to five or six different lawyers who are representing various parties, that that is the type of case which perhaps should be given just 1 day for oral argument.

Mr. KIRKHAM. An unusual case, yes.

Mr. WESTPHAL. But it seems hard for me to accept the fact that there can be 45 occasions during the course of the year where cases of that magnitude would come up in the ninth circuit or 46 occasions on which you would have 2 cases of such magnitude that you would only set 2 cases for argument.

Now, as a result of your extensive experience before the Ninth Circuit Court of Appeals, do you have any opinion as to whether that circuit gets such a large number of complicated cases that only one case should be set for argument?

Mr. KIRKHAM. No. I don't think so at all. You will recall that Judge Duniway did say that, particularly recently, in some of these cases where one, two, or three cases were set for oral argument, there were also on the calendar other cases which were being submitted on the briefs which the judges of that panel would be required to decide at the conference that would follow that session. So perhaps the three cases for oral argument doesn't quite state the full workload of the judges on those panels, particularly recently.

I think that time is wasted in oral argument. I have sat in court rooms—and I am sure you have—where I have listened to lawyers who just have nothing to say. They are taking the time of the court, and it is perfectly obvious that that is so. Now, a strong judge should be able, it seems to me, to control that type of situation. There are cases where argument should be stopped at the end of 5 minutes, where counsel should be told, "This is the only thing that this court is concerned with. Address yourself to that point." When that point has been made, the court should say, "thank you, counsel, now the case is submitted" or "the case is decided." You can turn from one judge to the other and, if they are in accordance with that, the reason should be stated.

I don't think that low a number of cases for argument really represents a full workload, if you take the cases as they come.

Mr. WESTPHAL. Well, the report of the Judicial Conference, which is part of our hearing record in connection with S. 2991, indicates that in the same fiscal year, 1973, there were some 414 cases decided by the ninth circuit on the briefs and without oral argument. That would certainly be more than one for each day of this 333 days on the average. But it seems to me that this analysis of the court's calendar would indicate that there probably would be room for a court—if it were more compact, did not have the prevalent problems and communications problems that that court has—there would be opportunities for that court to calendar more cases per day for oral argument, certainly more than one or two.

Mr. KIRKHAM. I am sure that some more could be calendared, and I am sure more effective judicial consideration could be given to the case. You may recall the testimony you have heard to the effect that judges will sit on the panel, will hear the argument and then, after they have had their short conference, leave. Then they are available only by telephone to write the opinions.

Now, I may say, Senator Burdick, in furtherance of what I earlier said about their oral argument, that I can only think of these 500 cases that you talk about. If the court had sent a letter to counsel and said that in the opinion of the court this case can be decided on the briefs without oral argument unless you request it, there wouldn't be a request. There would be a very small percentage of lawyers that would request an oral argument contrary to the expression of the court.

Mr. WESTPHAL. That is in effect the practice of the eighth circuit?

Mr. KIRKHAM. Yes. So, I don't think you will be burdened with that. I don't think it will make a great difference, but I think the opportunity should be present.

Senator BURDICK. Rather than to let a man proceed, stop him. What do you gain by giving the lawyer an argument when on the face of the briefs he has no case?

Mr. KIRKHAM. You don't gain a thing in that case, Senator, but there is a case where the court suddenly says, "gentlemen, we didn't realize this." If oral argument has any advantage—and it does have, in my opinion, great advantage—it furnishes an opportunity to bring out to the court facts that may not be apparent.

Senator BURDICK. I agree with you, but I am trying to find out how to handle an avalanche of litigation when a lot of it is frivolous.

Mr. KIRKHAM. It is frivolous, I think, in those criminal appeals, if the public defenders and the court says, "We are prepared to decide this case without oral argument," we'll benefit. So many of those appeals are taken for purposes of delay, for keeping the prisoner out of jail, and the government pays the cost of appeal.

Senator BURDICK. That only encourages the complaint?

Mr. KIRKHAM. Or complicates the complaint. I don't think it will make a great deal of difference, but it will be of some help.

Mr. WESTPHAL. One more question, Mr. Kirkham, and then I will be through.

As a member of the Commission on the Revision of the Federal Court Appellate System, you have met with the Commission during its several hearings and meetings after the report of December 1973 was filed, in other words, during the phase II part of that Commission's work?

Mr. KIRKHAM. That is right.

Mr. WESTPHAL. As a member of the Commission have you become aware of any change in procedure, or change in structure, being considered by the Commission during phase II of its deliberations which would obviate the necessity of realigning either the fifth circuit or the ninth circuit?

Mr. KIRKHAM. No, and I wish very much to emphasize that, Mr. Westphal. There are many matters that we are considering. There are problems that relate to criminal appeals. There is the problem of appointing an ombudsman. There may be ways that we can help in eliminating the caseload in criminal cases. There are, of course, other

proposals before the courts. What certainly should be done away with is the three-judge courts. All of those things will effect in part, and hopefully affirmatively, the problems in the Federal courts. But there is not one thing that we can foresee, or that has been brought before us, that could affect the judgment the Commission has made that it is imperative in the interest of justice that these two circuits be divided.

Mr. WESTPHAL. Thank you. I have no further questions.

Senator BURDICK. Thank you very much for your contribution.

Our next witness is Mr. Jan Stevens, an Assistant Attorney General for the State of California.

Mr. Stevens.

STATEMENT OF JAN STEVENS, ASSISTANT ATTORNEY GENERAL, STATE OF CALIFORNIA, SACRAMENTO, CALIF.

Mr. STEVENS. Thank you.

Senator BURDICK. Do you have a prepared statement?

Mr. STEVENS. I apologize for not having a prepared statement at this time. I request the indulgence of the committee and request permission to file a statement, which could certainly be ready within a week. At this time, however, we do not have a prepared formal statement. I appreciate your courtesy.

A second matter will soon be presented to the committee in the form of a letter from the Governor of California, Governor Reagan. I understand the letter was mailed to the chairman yesterday, expressing the views of the governor with regard to the proposed realignment of the ninth circuit. I would request, preliminarily, that this letter expressing his position be made part of the record.

Senator BURDICK. It will be so received.

Mr. STEVENS. Thank you, Mr. Chairman.

[Governor Reagan's letter to the Chairman follows:]

STATE OF CALIFORNIA,
GOVERNOR'S OFFICE,
Sacramento, September 27, 1974.

Hon. QUENTIN BURDICK,
Chairman, Senate Subcommittee on the Improvement of the Judicial Machinery, Senate Office Building, Washington, D.C.

DEAR CHAIRMAN BURDICK: My attention has been drawn to the recommendation by the Commission on Revision of the Federal Appellate Court System regarding the fate of the State of California in the realigned 9th Circuit. The Commission forwarded to former President Nixon several months ago its recommendations, and they are now embodied in legislation pending before the Congress.

I am taking this opportunity to acquaint you with my strong opposition to the Commission's proposal concerning California. In a radical departure from precedent, the Commission proposes the splitting of California between two Federal appellate court circuits. Currently, California is included in the 9th Circuit, together with Alaska, Arizona, Hawaii, Idaho, Montana, Nevada, Oregon, Washington and Guam. The Commission recommends carving the present 9th Circuit into two circuits: a new 12th Circuit to include Arizona and Nevada and the nine southernmost counties of California; and a realigned 9th Circuit to include Alaska, Hawaii, Idaho, Montana, Oregon, Washington, Guam and the other 49 counties of California.

The organized Bar in California will make its position known from the standpoint of practicing lawyers. But I must speak out on behalf of the government of the State of California. That my concern is real is evidenced by the fact that over the past three years, the State has been a party (usually defendant) to 349 civil cases in the U.S. District Courts in California, and to 1,021 criminal cases (usually of the prisoner rights, habeas corpus, variety).

Frankly, I see confusion and chaos in attempts to administer statewide programs if we are subjected to the potential of conflicting court orders issued out of the two different circuits in California. Our Corrections, Welfare and Medical Assistance programs are continually challenged in the Federal courts and if the State is split into two circuits, conflicting orders are almost a certainty.

I have reviewed the basis for the Commission's recommendation and believe this proposal is founded on faulty premises. One premise is the arbitrary assertion that no circuit should encompass only a single state. The arbitrariness of that conclusion becomes impossible to defend when it is recognized that there has long functioned a circuit which encompasses only the District of Columbia. Another premise is that the nine southernmost counties of California have a greater affinity for the State of Arizona than they do toward the other 49 California counties. That simply is not so.

I urge you to use your best efforts to oppose this proposal in the Congress. I have instructed my staff to develop alternative plans that will relieve the present overburdened condition of the 9th Circuit without doing violence to the State of California or any other component of that circuit. I will be pleased to share such plans with you or whomever you may designate.

Sincerely,

RONALD REAGAN, *Governor.*

Mr. Chairman, we appreciate the opportunity to appear here today. We are in the position of apologizing to some degree for both the growth of the State of California and its litigiousness. However, we don't feel we are wholly responsible for the latter, and we hope both are leveling off somewhat.

Senator BURDICK. I am sure the other 49 States have experienced your problem at one time or another.

Mr. STEVENS. They have, Mr. Chairman. We have hopes of improvement, however, and would also note that some of the litigiousness is not entirely our fault. Congress has conferred jurisdiction in the past few years that did not exist previously and the courts have themselves assumed some jurisdiction, too.

We appreciate the intense and serious consideration which this subcommittee is giving to what is obviously a very serious problem for the State of California.

The Commission on Revision of the Federal Court Appellate System has acted within necessarily short time limits on a serious question, and of course, has recommended that the geographical boundaries of the ninth circuit be changed to diminish the heavy workload problems.

Of most concern to us, of course, is the proposal that the state be split between two Federal circuits. The Commission, in its report, has properly observed, we feel, that procedures to enhance the abilities of the courts of appeals to dispose of the business before them do deserve greater study. Certainly such study is in order. We hope that it can be achieved to a greater degree before Congress should launch upon the serious step of changing what is a political, legal, and social entity, the State of California. Senator Fannin has referred to the ties that bind Arizona and California. We would respectfully submit that these ties are even closer between the northern and southern halves of the State.

In its report the Commission has pointed out its reluctance to disturb institutions which have acquired, not only the respect, but also the loyalty of their constituents. Furthermore, the report notes that Congress has before it proposed legislation, which, if enacted, may bring significant relief to both the appellate and the district courts. Caseload, the Commission itself notes, is but one of a number of factors relative to circuit realignment, and the procedures which enhance the ability of the courts of appeals to dispose efficiently of the business before them may well be of greater significance.

We believe that procedural reforms in the long run will provide the only real answer to the problems of Federal judicial workloads. We believe the answer lies somewhere between the surgery proposed by the Commission and the mere mechanical addition of judges to an already overburdened circuit.

As the ABA's Special Committee on Coordination of Judicial Improvements has observed, there is a clear need for structural and procedural changes in the courts of appeals. Although that committee has endorsed the report of the Commission, in doing so it has expressly stated that such a proposal should not be interpreted as an expression of confidence; it has stated that realignment will provide mere temporary relief.

The State Bar of California in its presentation has noted the large number of civil and criminal cases filed involving the State of California directly. In the past 3 years the Federal district courts have had 349 such filings in the civil field and 1,012 in the criminal field. During the past 3 years the courts of appeals have entertained appeals in 58 civil cases and in 179 criminal cases in which the Attorney General represented the State of California or one of its agencies. This does not represent the total number of cases in which the State of California is involved, because there are some agencies in which the State is represented by counsel other than the Attorney General, and there are some cases in which special counsel have been appointed. However, it does represent, I think, a fair example of the significance of this problem to the State.

There are a number of programs reaching the ninth circuit which are of substantial importance to the entire State. For instance, of course, the field of prison regulation is subject to increasing Federal judicial review. Our department of corrections maintains institutions throughout the State. Different rules from different circuits could raise insurmountable administrative problems. In this respect, the ninth circuit as a practical matter is the court of final review when the Federal law is applied to California procedures.

Since the Federal courts are entertaining cases involving extensive questions of prison management and control—such as mail regulations, access to media and access to visitors—judicially enunciated rules could be different, depending on the location of the prison, and their eventual resolution—in the form of U.S. Supreme Court review or consolidation—could be extremely difficult.

If in fact there were a period in which differing rules were applicable, claims of denials of equal protection might possibly be raised.

The substantive criminal law is also subject to different interpretations. The entire criminal law could be effected by a proposed division. The opportunities now for diverse judicial division are ripe, and we hope they will not be multiplied. For example, in the field of obscenity the State law has been held by a Federal district court to be unconstitutionally vague. Previously, the California Supreme Court had upheld that statute. If two circuits reached a different conclusion, State authorities would hesitate to enforce State statutes uniformly. There is sufficient confusion now, we submit, and we hope there is not the opportunity for additional confusion in the future.

In the same field, a State court held that no prior adversary hearings are required, and the ninth circuit reached a contrary decision.

Until that decision reached the U.S. Supreme Court, serious problems of uniform law enforcement were presented. The existence of two circuits within the same State would, we feel, accentuate such problems.

In the juvenile field there are similar problems. The ninth circuit held that State procedures for transferring juveniles to a court for handling resulted in the violation of the double jeopardy provisions, whereas the fifth circuit had ruled that no such jeopardy occurred. At least the ninth circuit was a court of last resort for the State of California—the *entire* State and the *entire* juvenile justice system. Precedents from two circuits would have accentuated and greatly prolonged the confusion existing already. In addition, we do believe that with the possibility of two different rules of law, and two different courts, forum shopping would be a temptation and a danger.

Problems also exist in the civil field, because here the development of State resources and the implementation of State programs would be involved. The ninth circuit has presently before it a case involving ownership in geothermal resources patented by the Federal Government and subject to a reservation of minerals. These resources exist in both the northern and southern parts of the State. Presently, in Northern California such plants provide 500,000 kilowatts of electricity. Until an answer is supplied as to the issue of surface ownership and mineral ownership, the further development of this important resource will be delayed and inhibited. Confusion over the issue, if it arises between two circuits, could result in two different Federal rulings concerning the nature and ownership of geothermal resources in California. It is unlikely further development will proceed as long as confusion exists. Hopefully the ninth circuit will resolve what two circuits may fail to resolve.

In the welfare field we have had numerous cases. Recently the ninth circuit has had occasion to rule on many such cases, including questions concerning the necessity to make retroactive payments and the need for payment of overtime pay for women under California law. Ninth circuit rulings on such questions have decided the questions for the State of California and for the State welfare program.

California has, of course, a multi-billion dollar project involving the movement of water from the north to the south. This project is currently in the process of implementation. The source of water developed is, of course, in the northern part of the State. There are projected deliveries to 31 water distribution agencies, beginning in the San Joaquin Valley and the northern part of the projected new ninth circuit and extending into southern California as far south as San Diego. Litigation challenging the present project is currently in trial in the U.S. District Court for the Northern District of California. Should that district court decision be appealed under the existing organization of the ninth circuit, a ruling from that circuit court will have statewide application. If two appellate decisions were issued, however, the water plant could be indefinitely delayed pending final decision by the U.S. Supreme Court. The problem is far from theoretical, inasmuch as the Federal circuit courts are now divided on a number of important questions which are involved in such litigation, such as the application of the National Environmental Policy Act, the Rivers and Harbors Act of 1899, and other Federal statutes which are applicable in the inextricable relationship we have with the Federal Government in such programs.

We hesitate to state that the satisfactory answer can be to resolve such problems at the U.S. Supreme Court level in every case. On the contrary, the overwhelming caseload of the U.S. Supreme Court has been the subject of even more intensive controversy than the one presently before this subcommittee. Recently Chief Justice Burger has emphasized the necessity for *procedural* reforms rather than the mechanical addition of new judges, whether through the creation of new courts or through additions to existing ones.

To utilize, as the Commission's report suggests, such devices as motions for stay, injunctions, and multicourt consolidations would not only require additional legislation; it could impose additional—and time consuming—delays in the form of threshold litigation. Such devices were not designed for such purpose and are, we feel, at best makeshift remedies for the problems caused by splitting the State.

We earnestly suggest that other remedies are available and reiterate our desire to work with the committee, the Commission and others in helping to achieve them. Obviously, there is a need for relief. Pending the Commission's study of procedural alternatives, other solutions are possible. As Justice Friendly stated, "If a stream is a mounting flood, commonsense would dictate consideration of measures to divert a portion of the flow." Alternatives are presently available which could provide some immediate assistance to the ninth circuit. The obvious one, of course, is the creation of new judgeships, which is also, as I understand, before this body and Congress. The Judicial Conference, in 1971, concluded that a court of more than 15 would be unworkable. The ninth circuit now has 13 judgeships, which is admittedly a large number. However, the proposed addition of at least two judgeships at this time could be achieved without reaching the Conference's maximum limit.

Secondly, the subcommittee has considered the establishment of two divisions within the ninth circuit. We will not belabor this problem. We know now, however, that presently the overwhelming bulk of litigation being decided before the ninth circuit is being decided by panels. The panel precedent could be effectively utilized in such a system. A thoughtful study, which was prepared for the Federal Courts Committee of the State Bar, shows that the panel system has widespread use and relative efficiency. As I understand, the original Federal court of appeals was a three-judge court. It has been suggested that the three-judge panel provides the most efficient hearing tribunal, because of the facility by which informal conferences can be held and the minimum delay in assembling judges. One study has indicated that the average elapsed time from oral argument to judgment rose from 2½ months to 4½ months if the court en banc, rather than a panel, heard the case in a particular circuit.

In addition, we would suggest that the increased dismissal of frivolous appeals on motion could be utilized. An analogy is now being attempted with some success in the State of California, in which appeals are increasingly being made the subject of motion by this office rather than undergoing the full-scale hearing procedure. An appeal which is obviously frivolous or lacks merit on its face, we believe, should be effectively disposed of by motion rather than a full hearing.

Then diversity jurisdiction, we feel, deserves reexamination. The screening of cases has been utilized with varying degrees of success. Once again, as Justice Burger noted:

. . . [I]t is not surprising with criminal appeals available at public expense to every convicted indigent defendant, most take appeal. . . . It may be that the time has come to consider whether some other alternative is available. . . .

Twenty years ago, complaints filed in the Federal courts by prisoners in state prisons were hardly enough to give any concern. . . . In fiscal 1972 there were more than 16,000 petitions of various kinds challenging the validity of the conviction, even after full review by other courts.

I would also point out that within recent years more than 4,000 additional cases have been filed under the Civil Rights Act claiming mistreatment or denial of rights. The Justice points out one case—admittedly an extreme one—in which a prisoner in a State penitentiary filed a complaint under the Civil Rights Act claiming a prison guard had arbitrarily taken cigarettes from him. The complaint was dismissed, and the prisoner then took an appeal to a three-judge circuit court, where three judges, after reading briefs and considering his arguments, wrote an opinion remanding the case with instructions to conduct a trial on the merits.

Alternatives can be and should be considered. Justice Burger has aptly pointed out that all these matters are within the jurisdiction of the Commission on the Revision of the Federal Court Appellate System. He has suggested that such things as a statutory procedure for administrative review of prisoner complaints, both State and Federal, might be established, and that informal grievance procedures could be established in the State prison, to hear prisoner complaints subjectively and to deal with them.

The experiences of the attorney generals of all our States indicate that there is a need for relief in this area. A special committee of the National Association of Attorneys General found that the Federal habeas corpus filings alone had increased from 1,020 in 1961 to 9,063 in 1970 nationally. The percentage of such filings has increased from 4 to 18 percent of the total Federal district court workload. The association has requested legislation imposing reasonable limits on collateral attack in the Federal courts, providing an adequate opportunity for review and for hearing on the merits has been provided.

Of course, other proposals, such as Judge Ainsworth's proposal for a special court to entertain questions of Federal criminal appeals and State criminal appeals in which a Federal question has been raised, as well as those complaints with regard to prison conditions, merit some consideration.

In addition, we believe that other procedural alternatives deserve serious considerations. We know we are receiving this consideration here.

The Commission has adopted a number of special criteria in making its recommendations. First of all, they said, where practicable, a circuit should be composed of at least three States, and in no event should a one-State circuit be created. Second, no circuit should be created which would immediately require more than nine active judges.

Third, to the extent practicable, the Commission contended that a circuit should contain States with a diversity of population.

Fourth, of course, the Commission raised the issue of excessive interference with present patterns. The greater dislocation involved in any plan of realignment, the larger the countervailing benefit should be to justify the claim.

Fifth, they recommended that no circuit contain noncontiguous States. Alternatives compatible with the Commission's criteria are available for the realignment and handling of the ninth circuit workload pending more procedural review, and such alternatives can be worked out without interference with present patterns. These alternatives have been discussed at length already before the subcommittee and we know the subcommittee is thoroughly familiar with them.

We commend careful consideration by the subcommittee of them, and we note that there are several notes of optimism in the present sad picture with regard to the circuit workload. A member of the special committee of the San Francisco Bar Association, who will, I understand, appear before this subcommittee, has found that the ninth circuit filings in the first 5 months of 1975 were only slightly more than the same period in 1973, 1,046 as against 1,037, while disposition increased, suggesting a possible leveling off of case load. The Administrative Office of the U.S. Courts is not yet programed to identify the circuit court appeals by district of origin, but other distinctions exist. For instance, criminal matters take about half the time civil matters do. There is at least a temporary pause in the ninth circuit's caseload to permit, we hope, further analysis before a final geographical decision.

The Commission specifically objected to reorganization plans retaining the State of California as a geographical unit on several grounds: first, that it would lack diversity of background caused by judges from different States. We would submit that few geographical areas have the diversity of California in its present form, since it is one of the most metropolitan and most rural of states.

The fact that only two Senators would be consulted in the appointment process was criticized by the Commission. It seems irrelevant to us. As a matter of fact, we feel that a single Senator of long tenure may be more immune from the considerations which disturb the Commission than a number lacking sufficient tenure.

Basically, we fear the proposed appellate review devices would have the effect of increasing rather than diminishing workloads. The Commission contended that, for the five Northwestern States, they would not be warranted, inasmuch as the appeals from such States were such a small part of the circuit. Time did not permit the Commission to make any population projections. We submit the solution would be to have the subcommittee make such studies, utilizing new data from the State courts and demographic data from the States involved. The State of Oregon has reported to us steadily increasing immigration from California, representing a note of hope at least that the Northwest will some day in the near future reach a substantially higher population than it has now.

To conclude, the ninth circuit now has 13 authorized judgeships and an admittedly heavy workload. Faced with the pressures of the deadlines before it, the Commission has made a proposal, receiving relatively little hearing, which would have far reaching effect on California. Such a proposal should not be adopted without further serious study. More consideration must be given, we submit, to the burden of litigation which the various Western States, in addition to California, will enjoy in the future—to changing growth patterns, to the nature

of the judicial workload of the Federal courts, and to procedures to impose reasonable limitations on the explosion of litigation which has arisen during the past few years.

The ninth circuit has an extremely heavy workload which must be alleviated. However, we cannot agree with the specific recommendation that has been made. In the meantime, we would hope that Congress could act to increase the judges available for work in the ninth circuit and to adopt interim relief.

Senator BURDICK. Thank you very much for your contribution.

Mr. STEVENS. Thank you, Mr. Chairman.

Senator BURDICK. Your thoughts seem to be that we should do more studying before we make this decision. In the meantime what happens to the caseload? What happens to the backlog while we are studying?

Mr. STEVENS. We appreciate this concern, and I think it is very appropriate. We hope that there are several devices available which can assist the ninth circuit in dealing with its caseload.

First of all, we would be more than happy to cooperate with the increased utilization of motions for the dismissal of appeals which lack merit on their face.

Senator BURDICK. I am sure any judge will tell you that it often takes as much time to consider a motion as it does a case.

Mr. STEVENS. That may be, Mr. Chairman. It is an experiment that we are attempting in the California appellate courts in the hopes that it will save time rather than utilize just as much. We are getting some experience with that, and I hope it will prove favorable.

Senator BURDICK. You mentioned procedural reforms, and suggested that there might be something done about diversity jurisdiction. This subcommittee has been trying to do that for several years, but the lawyers are fighting any diversity change like tigers.

Mr. STEVENS. I can understand your problem, Mr. Chairman.

Senator BURDICK. We have to deal with things as they are. Now how do you suggest we change diversity?

Mr. STEVENS. I can understand the problem and the reason that it hasn't been solved as yet. We hope that some progress can be made if the alternatives seem obvious enough.

Senator BURDICK. When the Board of Governors of the A.B.A. sends a resolution in a letter to the committee and says nothing about diversity, I wonder if that really is an alternative.

Mr. STEVENS. I admit, nothing could be easier than coming in and attacking proposals before you, and that finding reasonable alternatives is harder.

Senator BURDICK. Well, given the size of these caseloads we are talking about, I wonder if changes in diversity jurisdiction, even if accomplished, will provide very much relief. We are still looking at very heavy caseloads.

Mr. STEVENS. That is right. It is by no means a final solution. Mr. Chairman.

There are a number of things we hoped would assist, but obviously no one of them is going to solve our problem.

Senator BURDICK. You mentioned prisoner cases and diversity. What other things might we do to save judge power?

Mr. STEVENS. Basically, these are the immediate ones which have come to mind.

Habeas in Federal court actions, Federal civil rights actions which we discussed, the question of diversity jurisdiction which must be considered——

Senator BURDICK. What do we do about habeas?

Mr. STEVENS. Well, we have a proposal which is presently pending before both houses. That has been, in successive years, to limit the utilization of habeas in the form of review of State court judgments which have already been considered, and an adequate opportunity given to defend at the State court level.

Senator BURDICK. You still have the problem of that big workload. We have asked witness after witness if he had any alternative but to go by the suggestions of the Commission. None have yet come forward with specificity.

Mr. STEVENS. Yes, Mr. Chairman. Of course, the subcommittee has had before it the proposal with regard to division, and the proposals with regard to California as a single circuit or one which is aligned with perhaps Nevada or one other additional State. These admittedly would not have the same symmetry of figures that would be the case if the Commission's proposal were adopted. But nevertheless, it would avoid some of the problems which we think are so severe in dividing the State in two.

Senator BURDICK. Are you aware of the testimony before this committee that it is the consensus of the judges, at least, that once you pass the figure "nine" for the number of circuit judges, you then get into the area of diminishing returns? That opinion is upheld by statistics, too. When you pass nine, your workload per judge is reduced because of administrative travel and other problems. Do you agree with that?

Mr. STEVENS. I have heard such testimony, Mr. Chairman. I am sure that a nine-judge court would be the best possible solution. I believe that much of this testimony has been based on the belief that there is a necessity to have more en banc hearings. I am not sure this has been conclusively established, or that the use of the present panel system is not perhaps just as efficient, considering the relative disuse of en banc hearings even in smaller circuits.

Senator BURDICK. I believe that you have recently had 33 en banc's in the ninth circuit. How else can you handle them but by calling in everybody from all parts of the district? How else can you handle an en banc hearing?

Mr. STEVENS. That is a tremendous problem in court administration, Mr. Chairman. If a split is made at the level of the Northwest States, however, I would suggest that much of the travel will be eliminated. It isn't half as hard to get from Los Angeles to Seattle.

Senator BURDICK. That is one problem we have when we start increasing judges. The en banc problem gets greater and greater.

Mr. STEVENS. There is no question of that.

Senator BURDICK. I have a very important engagement. If you have no objection, technical questions by the staff will now be asked. Do you mind if I am absent?

Mr. STEVENS. No.

Senator BURDICK. Thank you, again.

Mr. WESTPHAL. Mr. Stevens, in your testimony you made reference to Judge Friendly's proposals about how you handle the problems of a stream of cases when the floodgates have overflowed. Of course, there

are a couple of ways to take care of that stream. Out in the midwestern part of the country, which has a very flat terrain, they have built what they call "judicial ditches." They are drainage ditches, but they are called "judicial ditches," because usually the water course extends beyond county lines and, rather than let the county board take jurisdiction over it, they refer it to the district court. The district court then decides how this stream that has overflowed is going to be properly drained so that all the land around it will not be flooded. Basically, you can help prevent flooding by cleaning out the deadwood, silt, and everything else so that the stream can carry the capacity it was intended to carry.

I take it your suggestion about resolving frivolous and unmeritorious appeals by motion practice is in that vain. It is an attempt to get some of the deadwood out of the stream of judicial business that comes into the courts of appeals. Do you think that is a fair analogy?

Mr. STEVENS. That is correct.

Mr. WESTPHAL. The problem is that someone has to make the determination whether the matter is frivolous or unmeritorious. If that determination is made by a judge, as the chairman indicated, it still takes time for the judge to review the case, read the record, read the briefs and come to this conclusion. There are appellate judges who have told us that it is much easier to schedule the thing for oral argument, because then you can dispose of it faster, giving greater satisfaction to counsel, than if you determine it after the so-called screening process.

The other way that you can remove deadwood from the stream of judicial business is to have the determination that the case is frivolous or unmeritorious made by a core of law clerks or "staff attorneys," without the intervention of the judge. How long do you think that the Bar of California, or of any other State, would tolerate a procedure under which that decision was made by a staff attorney without the intervention of a judge? How long do you think the bar of any State would be satisfied with that type of decision?

Mr. STEVENS. That determination must be judicially made.

Mr. WESTPHAL. Suggestions have been made that there is so great a volume of this so-called deadwood, consisting of frivolous and unmeritorious claims, and that the judges are so overworked, that there is a tendency to accept the decision of the clerk or "staff attorney." You then run the risk, in the eyes of some lawyers, that you are forcing that judge to simply rubberstamp whatever his law clerk recommends to him, simply because he is so busy trying to keep up with the opinions he has to write, briefs he has to read in preparation for oral argument, and listening to oral argument that he doesn't have time to pause and reflect upon the recommendations given by his staff. You do recognize that there are these pros and cons to this possibility of clearing the deadwood from the stream of judicial business, don't you?

Mr. STEVENS. Of course. This has to be viewed with respect to the entire workload problem, with determination of appeals on the merits as well as determinations of motions.

Mr. WESTPHAL. Now, the Commission, in phase II of its work, has in fact received testimony from one intermediate courts of appeals in which it explained the procedure by which it employed staff attorneys to go through this culling procedure and recommend a rather summary

termination of cases lacking in substance. The very question that I just posed was raised by the commission. While much had been said for it in terms of expediency and efficiency, something can be said against it because of the risk that you may create a rubberstamp procedure which will satisfy neither the litigant nor the attorney. There are real problems with that type of an attempt to avoid the flow.

Now, there is another way that you can avoid the flow of judicial business. You can make some major changes in the channel of the stream. You can impound some waters at the head of the stream and impound others at various intervals along the stream. This is an approach that some of these circuits have employed quite unconsciously, probably without any volition on their part. We have heard testimony that 601 cases ready for argument have been impounded and they have been held "impounded" for some 5 or 6 months waiting for the judges of that court to have sufficient time to hear the oral arguments in them. We have heard about impounding cases at a later stage in the stream where there are a large number of cases that are held awaiting decision for a period of 3 months, and some for a period of 9 months. That type of impounding, it seems to me, is not acceptable in our concept of due process. Would you agree with that analysis?

Mr. STEVENS. Obviously any solution that is suggested is going to have problems, and I think your analyses are good ones.

Mr. WESTPHAL. There is another way of changing the structure of the stream that has overflooded, and that is to have two channels for that stream where you previously have had one. If you can put half of the floodwater in a new channel that is just as big as the old channel was, then you perhaps can avoid the flood that way. It seems to me that this is, basically, the recommendation of the Commission on Revision of the Appellate Court System: to give two channels to handle a flood of 2,700 cases which the present channel of 13 judges is physically incapable of handling with a degree of relative dispatch.

Mr. STEVENS. The general present Federal policy as I understand it, if it engages in creating two channels where one existed before, is to prepare a fairly exhaustive environmental impact report. Such projects in the past have given rise to considerable controversy, and litigation as to the adequacy of such an impact report. I think one of our points here is that all of the impacts to California must be given more consideration. We are afraid that the impact will be more adverse than it is advantageous, considering all the other factors involved.

Mr. WESTPHAL. All right. The Congress asked the Commission on Revision of the Federal Appellate Court System to study the environment of our appellate courts, to give us some kind of an impact statement, and some recommendations as to a solution for the problems which arise when a particular appellate environment is somewhat polluted. The Congress itself has been subjected to criticism because it does not give enough consideration to that. However, in fact, the record will show that in this current Congress, the chairman of this subcommittee has been instrumental in preventing some 26,000 unfair labor practice cases from being thrown into the Federal district courts in lieu of having them handled by the General Counsel of the National Labor Relations Board. It will also show that, when there was a bill approved to correct abuses i nreal estate closing procedures, where the

buyer was being allegedly overcharged on some real estate closing expenses, and the proposed legislation would have given a $500 award of damages to anybody who was not given notice of the amount of closing, that bill was changed so that it would not come under the jurisdiction of the Federal district courts but would only come under the jurisdiction of the State court in the State in which that particular piece of property was located. I could cite other examples of efforts to prevent new jurisdiction. Now there may indeed be some criticism due to the Congress for creating new causes of action, but what is Congress to do? We had a witness here yesterday, Mr. Jordan Dreifus, who appeared with Mr. Abel of the California State bar. Mr. Dreifus, I believe, is interested in some jurisdiction in the area of air crash litigation. Now if the Congessmen who study the problem of aircraft crash litigation determine that there can be no other remedy for that serious problem than to create Federal jurisdiction, then I think the Congress must create Federal jurisdiction. These matters are not easily resolved and they directly influence this matter of controlling the input into the Federal courts. That input has increased and probably will always increase until we find better ways of solving disputes in our country than by bringing them into courts.

Mr. STEVENS. No question about it.

I believe the chairman has made some extremely valuable observations in his efforts to act upon legislation or to stop legislation which unnecessarily creates a new Federal cause of action immediately. Perhaps the Environmental Policy Act was another example, where an expert administrative review of Federal decisions could be made without the need to immediately resort to the Federal courts in every case in which Federal action is questioned.

Mr. WESTPHAL. You made a good point that various areas of law are under consideration, but the problem is that the resolution of those particular problems is something that takes time, and in the meantime, as the chairman said, what are we to do with the 2,700 cases filed in the ninth circuit, the 2,400 in the fifth circuit, and the ever-increasing backlog?

There are only a couple of other matters I would like to mention.

You suggested that there is hope ahead because the statistics for the first 5 months of calendar year 1974 were somewhat less than for the first 5 months of calendar year 1973. The problem with that statistic is that those first 5 months of calendar year 1974 were 5 of the last 6 months of fiscal 1974, which was concluded on June 30, 1974, and the Administrative Office reports that, in fiscal year 1974, the total filings in the ninth circuit increased by some 16 percent. So instead of leveling off, I think we have to be able to recognize that you have a 16-percent increase over 1973 in the workload of the ninth circuit, and the number of current final determinations don't come anywhere near meeting that kind of an incoming caseload.

I have a couple questions that I would like to ask you about the work of the Attorney General of California as far as management of the litigation of the State is concerned. You now have four Federal trial courts in the State of California?

Mr. STEVENS. That is right.

Mr. WESTPHAL. To what extent does the State get involved in litigation in those Federal courts—whether in the area of welfare

cases or juvenile cases or geothermal cases or whatever—where the same legal issue is involved in a case brought by someone in the eastern district in California and in a case brought by someone else in the central or southern district of California? How often has that occurred during the period of time you have been in the Attorney General's office?

Mr. STEVENS. I can't give you an exact figure, but I think that has happened fairly frequently with regard to criminal cases.

Mr. WESTPHAL. In what way does the Attorney General handle that problem when it does arise? What steps do you take in that situation?

Mr. STEVENS. In the criminal area particularly, we insure that the Federal district court involved is familiar with the fact that the same issue has arisen elsewhere. Very often consultation is impossible or impractical, and therefore we at least appraise the court of this fact and hope for, if not coordination immediately, ultimate coordination at the ninth circuit level.

Mr. WESTPHAL. Where I practiced law, and I think under the common law at least, a lawyer in that situation could also make a plea of abatement in the second action and ask that court to hold action on the issue until it was decided in a court which already had the matter under consideration. Is that in effect what you attempt to do in that situation in so far as the four district courts in California goes?

Mr. STEVENS. Particularly where a trial is at issue. Very often matters can be disposed of by motion, but where a trial is available, we certainly make that effort.

Mr. WESTPHAL. So in as far as this problem of having two courts in different jurisdictions dealing with the same issue of law as it affects a State agency in the State of California, that is a problem that you have to deal with now even though California is in its entirety within the ninth circuit, isn't that true?

Mr. STEVENS. We do, suggest, of course, that all of the districts of the ninth circuit are subject to the decisions of that circuit.

Mr. WESTPHAL. Alright. So really what you are saying is that the problem with the possible splitting, to use that term, of the State of California into two different appellate circuits is that you fear that, by that split, you would lose the umbrella effect of the Ninth Circuit Court of Appeals as presently constituted sitting in judgment on the work product of the different Federal district courts in California. That is what you fear, is it not?

Mr. STEVENS. That is correct.

Mr. WESTPHAL. All three of these bills that are before the committee contain, as mentioned here earlier this morning, a provision whereby the Supreme Court of the United States is required to take jurisdiction, to grant an appeal as of right, in any case in which you would have a conflict between an appellate decision from the new ninth circuit and an appellate decision from the new twelfth. Do you feel that that would be adequate to resolve the conflict that you fear would arise?

Mr. STEVENS. No, we don't, Mr. Westphal, for several reasons. First of all, as I read the provision in the pending legislation, it applies only to those instances in which the validity of a State statute or administrative regulation is being challenged. It would not apply to cases

where the courts of California are construing California law, and it could very arguably not be applied to cases where the conformity of a State program—such as the water plan—to applicable Federal laws and regulations is being challenged. Those are both important fields.

Last of all, I think, the chairman pointed out that such a procedure, if broadened, as it would have to be to solve all our problems, would add once again to the workload of the Supreme Court, perhaps moving us from the frying pan into the fire.

Mr. WESTPHAL. Well then, if you do have a possible conflict—and we have had testimony to suggest that it has never occurred in the last 13 years in as far as California is concerned—but if you can get a conflict resolution mechanism that doesn't require you to overload the Supreme Court of the United States and doesn't require you to come to Washington for a resolution of the conflict, then that would eliminate much of your objection to the recommendation of the commission, wouldn't it?

Mr. STEVENS. First, the testimony that you referred to is that there has not been a conflict between *three-judge* courts, which I believe is accurate. There have been, on a number of occasions, conflicts between decisions of *individual Federal district courts* within the State of California which have been resolved at the ninth circuit level.

Secondly, we think perhaps the very best mechanism for resolving potential conflicts between the Federal courts is one court of appeals. Of course, this is our purpose in being here—to urge that one court be retained.

Mr. WESTPHAL. In the existing ninth circuit, with conditions as they exist today, you can have the northern district of California in conflict with the southern district of California or the eastern district in conflict with the central district of California on the same point of law as it affects the operation of the State government in California. You can have that?

Mr. STEVENS. That is right.

Mr. WESTPHAL. Under the commission's proposal, that condition isn't going to be changed whatsoever at the trial level.

Mr. STEVENS. Except for the fact that the Federal district courts in the north and those in the south would be guided by different circuit courts.

Mr. WESTPHAL. I am talking about the trial level; that isn't going to be changed at all under the commission's proposal.

Mr. STEVENS. The district courts will remain the same but they will be guided by different appellate courts.

Mr. WESTPHAL. Different appellate courts, but we cannot assume that those different appellate courts would take different views, one from the other, of the same legal issue.

Mr. STEVENS. I would hope you are correct.

Mr. WESTPHAL. But if they should take different views on the same legal issue arising from different district courts and affecting the California State government, then what you would want to see is a means of resolving that conflict in such a fashion that the resolution of it would be binding upon all four of those Federal district courts, no matter what circuit they may be in, whether in the same circuit or in different circuits. Isn't that what you desire?

Mr. STEVENS. That would be essential.

Mr. WESTPHAL. Then the essential point is achieved—and really it should make no difference whether those four districts courts are under one umbrella or under two different umbrellas—as long as, when it comes to the precedential effect of the conflict resolving opinion, that opinion is binding upon all four of those courts, no matter what name we give to them or how we place them in the structure. Isn't that true?

Mr. STEVENS. I agree that a mechanism could be fashioned. I think it would be extremely hard to fashion one which would make the decisions of one circuit binding on the future decision of another circuit. In order to have some certainty in advising the State regarding its statewide actions, that is really just about what we would have to have.

Mr. WESTPHAL. But if that could be achieved you will be satisfied?

Mr. STEVENS. In effect we would really have a single circuit, which is what we are arguing for.

Mr. WESTPHAL. Then what we are talking about, Mr. Stevens, is not nomenclature. We are not talking about the configuration on a map or anything of that kind. We are talking about trying to preserve some judicial unit as far as the State of California is concerned; isn't that true?

Mr. STEVENS. Absolutely.

Mr. WESTPHAL. Just one last thing. You indicated earlier that you would prepare from the notes that you used in your presentation here this morning a typewritten statement that you could then send the committee. I would appreciate it if you would do so.

Mr. STEVENS. I would appreciate the opportunity to do so.

Mr. WESTPHAL. Thank you, Mr. Stevens.

Mr. STEVENS. Thank you.

[The prepared statement discussed above follows:]

STATEMENT OF CALIFORNIA ATTORNEY GENERAL EVELLE J. YOUNGER

Acting within the necessarily short time limits imposed upon them by Congress, the Commission on Revision of the Federal Court Appellate System has recommended that the geographical boundaries of the Fifth and Ninth Appellate Circuits be changed in order to diminish heavy workload problems of those courts. Specifically, and of most concern to us, the Commission has recommended that the State of California be split between two federal circuits.

The Commission has properly observed that procedures to enhance the ability of the courts of appeal to dispose of the business before them deserve greater study. Certainly such study is in order before Congress should launch upon the serious and detrimental step of splitting the legal, political, and social entity of California into two circuits. We believe that such a measure would result in immeasurably more harm to the rule of law in California, and to the proper administration of California's government, than the short term convenience it might provide for the federal appellate workload.

In its report, the Commission commendably points out its reluctance "to disturb institutions which have acquired not only the respect but also the loyalty of their constituents," and notes that in fiscal 1973 the number of filings in the U.S. District Courts decreased for the first time in at least a decade. Report of the Commission on the Revision of the Federal Court Appellate System 3 (December 1973). Furthermore, the Commission's report notes that Congress has before it proposed legislation "which, if enacted, may bring significant relief to both the appellate and the district courts." *Id.* at 4. The report states that "caseload is but one of a number of factors relevant to the question of circuit realignment," and "[P]rocedures which enhance the ability of the Courts of Appeal to dispose justly and efficiently of the business before them may well be of greater significance." *Ibid.* Nevertheless, the Commission has recommended the realignment of the Ninth Circuit to split California in two, and legislation has been introduced to implement its recommendations.

We believe that procedural reforms will, in the long run, provide the only real answers to the problems of federal judicial workload. Somewhere between the drastic surgery proposed here and the mechanical addition of judges to an overburdened circuit, we believe, lies the solution. As the Special Committee on Coordination of Judicial Improvements of the American Bar Association has observed, there is a "clear need for structural and procedural changes" in the federal Courts of Appeal, and "*real* relief for the federal appellate courts" must come from such proposals (emphasis added). Although that Committee endorses realignment of the Fifth and Ninth Circuits, it expressly states that such a proposal "should not be interpreted as an expression of confidence that realignment will provide much more than temporary relief." Report, Special Committee on Coordination of Judicial Improvements, American Bar Association (October 1973). We understand that Congress has provided the Commission a more extensive opportunity to examine other means of facilitating the federal appellate process in H.R. 3052, and we stand ready to work with the Commission in its study.

To split the State of California would cause immeasurable problems in the administration of justice and the government of the State. California is economically sixth among the nations of the western world (or would be if it were a nation). It is the largest state in the Union. It is essential that the Federal appellate decisions which govern California programs and California law be uniform. Litigation involving the State of California alone, in which this office usually represents state agencies and programs, illustrates the problems that can result from two separate rules of law.

Civil Law

Over the past three years civil cases have been filed involving the State as follows:

Northern District	94
Central District	171
Eastern District	60
Southern District	18
Total	349

Criminal Law

As of January 1, 1974 the State was represented by this office in pending civil rights and habeas corpus actions in the federal district courts as follows:

Northern District	348
Central District	399
Eastern District	224
Southern District	50
Total	1,021

In the past three years, 58 civil cases and 179 criminal cases in which the Attorney General represented the State of one of its agencies reached the Court of Appeals. Those cases which reach the Ninth Circuit involve programs of substantial importance to the entire State of California. For instance:

1. Prison regulations are increasingly subject to federal judicial review.

The Department of Corrections maintains institutions throughout the State. Different rules from different circuits could raise insurmountable administrative problems. Since the federal courts are entertaining cases involving extensive questions of prison management and control ,such as mail regulation and access to media *Procunier* v. *Martinez*, —— U.S. ——, 40 L. Ed 2d 224; *Pell* v. *Procunier*, —— U.S. ——, 41 L. Ed. 2d 295), judicially-enunciated rules could be different depending on the location of the prison, and could even result in claims of denial of equal protection.

2. Substantive criminal law could be interpreted differently.

The entire field of criminal law in California could be affected by the proposed division. The opportunities for diverse judicial decision are rife now and should not be multiplied. For example, in the field of obscenity, a three-judge district court in the Central District of California has held the state obscenity statutes unconstitutionally vague. *Miranda* v. *Hicks*, Civil 73-2775 F (appeal now pending to the U.S. Supreme Court, 42 L.W. 3122). Previously, the state courts had upheld these statutes. *People* v. *Enskat*, 20 Cal. App. 3d Supp. 1, 98 Cal. Rptr.

640, 33 Cal. App. 3d 900, 109 Cal. Rptr. 443, (pet. for cert. denied 94 S. Ct. 3225). When state and federal courts reach different conclusions, state authorities may hesitate to enforce state statutes uniformly. In the same field, state courts have held that no prior adversary hearings are required in obscenity cases under California law, *People* v. *DeRenzy*, 275 Cal. App. 2d 380, 79 Cal. Rptr. 777; whereas a contrary decision was reached in the same case by the Ninth Circuit. *Demich, Inc.* v. *Ferdon*, 426 F. 2d 643, judgment vacated 401 U.S. 990. Until the U.S. Supreme Court decided *Heller* v. *New York*, 413 U.S. 43, serious problems of uniform law enforcement were presented. The presence of two circuits within the same state would exacerbate these problems.

Similarly, in the juvenile field, the Ninth Circuit recently held California's procedure for transferring juveniles to adult courts for handling resulted in violation of the double jeopardy provision of the Fifth Amendment, *Jones* v. *Breed*, 497 F. 2d 1160, pet. for cert. pending, 43 L.W. 1995; whereas the state courts had previously ruled that no such jeopardy had occurred, *In re Gary Steven J.*, 17 Cal. App. 3d 704, 95 Cal. Rptr. 185.

With such possibilities, forum-shopping would be more than a temptation.

3. The development of State resources and implementation of State programs would be imperilled.

The Ninth Circuit presently has before it a case involving the ownership of geothermal resources in lands patented by the federal government, subject to a reservation of minerals. *U.S.* v. *Union Oil Co., et al.*, 369 Fed. Supp. 1249. Geothermal resources exist in both the northern and southern parts of California. Presently combined power plants in operation at the Geysers in Northern California produce approximately 500,000 kilowatts of electricity. The lack of a clear answer to the question of ownership between surface owners and mineral owners has inhibited further development of this increasingly important resource. Confusion over the issue between two circuits could result in different federal opinions concerning the nature and ownership of geothermal resources within California. It is unlikely that further development will proceed as long as such confusion exists.

In the welfare field over the past several years California has been involved in litigation involving many cases and a total potential liability of some 12 billion dollars. Recent Ninth Circuit rulings have involved such questions as the necessity to make retroactive AFDC payments, *Bryant* v. *Carleson*, 444 Fed. 2d 353; 465 Fed. 2d 111 (9th Circuit) and the necessity for payment of overtime pay for women under California law, *Homemakers Inc.* v. *Div. of Industrial Welfare*, 356 Fed. Supp. 1111, Northern District of California (Appeal pending) (1973).

California's billion-dollar project to move water from the north to the south is currently being implemented. The source of water developed by this project is in the northern part of the state. Projected deliveries to 31 water distribution agencies extend through the San Joaquin Valley and into southern California as far south as San Diego. Litigation challenging present project operations and future development is currently in trial in the U.S. District Court, Northern District of California, *Sierra Club* v. *Morton et al.*, No. C-71-500 CBR. Under the existing organization of the Ninth Circuit, an appellate ruling would have statewide application. If two circuits existed, however, the water plan could be indefinitely delayed pending resolution by the U.S. Supreme Court. The problem is far from theoretical. Federal circuit court decisions are now divided as to the application of the National Environmental Policy Act (one of the statutes at issue in the *Sierra Club* case) and the Rivers and Harbors Act of 1899.

Indeed, the availability of direct state appeals to the Court of Appeals arising from federal actions or inactions with regard to specific state programs is impressive. There is a direct appeal provided the State of California and, in some cases, its local governments, to the Ninth Circuit from the following federal actions:

Educational aid programs (20 USCA 241(h)).
State public library service plans (20 USCA 351(d)).
Federal revocation of aid for state education programs (20 USCA 641).
Federal action on state library grants (20 USCA 827).
Grants for educational planning (20 USCA 869(a)).
Student incentive grants (20 USCA 1070(c)-3).
Educational professions development grants (20 USCA 1110(c)).
Federal facility construction grants (20 USCA 1132(a)-7).
Federal community colleges grants (20 USCA 1135(b)-7).

Basic education for adults (20 USCA 1207).
Education of handicapped children (20 USCA 1413).
Federal unemployment tax credit allowances (26 USCA 3310).
Federal collection of state income taxes (26 USCA 6303).
Review of federal action on revenue sharing (31 USCA 1263).
Review of EPA water quality actions in promulgating standards, passing on state standards, promulgating effective standards, etc. and passing on state permit programs (33 USCA 1369b(1)).
Review of federal hospital construction grants (42 USCA 291).
Unemployment Administration grants (42 USCA 504).
Public assistance determination (42 USCA 1316).
Review of EPA actions in approving or promulgating state air quality implementation plans (42 USCA 1857h-5).
Mental retardation project grants (42 USCA 2694).
State community grants for the aging (42 USCA 3025).
Older Americans volunteer program grants for nutritional programs (42 USCA 3045(d)).
LEAA grants (42 USCA 3759).

We appreciate the recognition of this problem set forth in section 7 of Senate Bills 2988-2990. That section provides for a direct appeal to the U.S. Supreme Court

"[W]here is drawn in question, the validity of a State statute or of an administrative order of statewide application on the ground of its being repugnent to the Constitution, treaties, or laws of the United States: Provided, however, That this subsection shall apply only when the court of appeals certifies that its decision is in conflict with the decision of another court of appeals with respect to the validity of the same statute or administrative order under the Constitution, treaties, or laws of the United States."

However, as we indicated in our testimony before the Subcommittee on October 2, 1974, this provision fails to meet the problems before us in several significant ways:

1. It fails to meet the problems created by *federal* actions affecting statewide programs. We have cited above 23 federal statutes giving the states direct access to the Courts of Appeal over contested federal actions. The specter of two rules of law looms unaffected by section 7.

2. Section 7 requires that the decision complained of be in actual conflict with the decision of another court of appeals. *Potential* conflict remains a problem. The development, for instance, of geothermal resources, will still be clouded where the potential for conflict exists between circuits.

3. Section 7 is limited to cases in which the validity of a "state statute or administrative order" is questioned. State programs or practices falling short of being statutes or administrative orders would not be covered. Nor would cases involving questions of the application of a state or federal statute. Litigation over such significant issues as the California Water Plan and ownership of geothermal resources falls into this latter category.

4. Section 7 requires the court of appeals to certify that its decision is actually in conflict with that of another court of appeals. Such conflicts are to be avoided in the first place, rather than kicked upstairs to an already overworked Supreme Court for resolution. Once the conflict exists, the damage is done in terms of confusion, impairment of state programs, and possible unequal application of laws.

It is not a satisfactory answer to suggest that problems of such magnitude can be adequately determined by the U.S. Supreme Court. To the contrary, the overwhelming caseload of that Court has been the subject of much more intensive controversy than the one before you. In a recent article, Chief Justice Burger has emphasized the necessity for procedural reforms rather than the mechanical addition of new judges, whether through the creation of new courts or through additions to existing ones. Burger, "Report on the Federal Judicial Branch—1972," 59 A.B.A.J. 1125, 1126 (1973).

To utilize, as the Commission's report suggests, such devices as motions for stay, injunction, and multi-court consolidations would impose costly and time-consuming delays. Such devices were not designed for such a purpose, and would be at best makeshift remedies.

OTHER REMEDIES ARE AVAILABLE

We are mindful of the need for relief, and suggest that, pending the Commission's study of procedural alternatives, other solutions are possible. As Justice Friendly has stated, "If a stream is in mounting flood, common sense would dictate consideration of measures to divert a portion of the flow." Friendly, "Averting the Flood By Lessening the Flow," 59 Cornell L. Rev. (1974).

1. *Create more judgeships.* A U.S. Judicial Conference in 1971 concluded that a court of more than 15 would be "unworkable." While the Ninth Circuit now has thirteen judgeships, an additional two positions could be created without reaching that maximum limit established by the Judicial Conference. *See, e.g.*, H.R. 14024 (93d Congress, 2d Session).

2. *Establish two divisions.* Serious consideration should be given, in the interest of effective administration, to the creation of two divisions within the circuit. The overwhelming bulk of litigation now is being decided by panels, and the panel procedure could be effectively utilized in such a system. A thoughtful study prepared for the Federal Courts Committee of the State Bar of California shows the great age, widespread use, and relative efficiency of the panel system. The conclusion that three-judge panels provide the most efficient hearing tribunals is widely accepted, because of the facility by which informal conferences can be held and minimum delay in assembling judges. See Pound, Appellate Procedure in Civil Cases 384 (1941); A.B.A., Report on the Internal Operating Procedures of Appellate Courts 52-59 (1961). Indeed, one study showed that the average elapsed time from oral argument to judgment rose from two and a half to four and a half months if the en banc court rather than a panel heard the case. Note, En Banc Hearings in the Federal Courts: Accommodating Institutional Responsibilities, 40 NYU L. Rev. 563, 577 (1965).

3. *The courts should consider increased dismissal of frivolous appeals on motion, and issuance of brief per curiam opinions.* An analogy now being attempted with some success in the state courts of California is the procedure by which opinions of the Courts of Appeal must be certified for publication—to avoid the flood of largely repetitious published opinions.

4. *Diversity jurisdiction should be re-examined.* Implicit in the Commission's recommendations is the assumption that the present limits of federal jurisdictional are sacrosanct. Yet, Chief Justice Burger points out, "Today there is no rational basis to put an auto accident case in a federal court merely because the litigants reside in different states." Burger, *supra*, at 1126. See, also, Friendly, "Averting the Flood By Lessening the Flow," 59 Cornell L. Rev. 634 (1974).

5. *Greater attention should be paid to the screening of cases.* "It is not surprising that with criminal appeals available at public expense to every convicted indigent defendant, most take appeal. . . . It may be that the time has come to consider whether some other alternative is available as, for example, a procedure requiring a litigant to secure leave to appeal." Burger, *supra*, at 1127.

6. *Prisoner petitions should be re-examined.* Justice Burger has pointed out the increasing problem caused by prisoner petitions. "Twenty years ago complaints filed in federal courts by prisoners in state prisons were hardly enough to give any concern. In fiscal 1972 there were more than 16,000 petitions of various kinds filed challenging the validity of the conviction, even after full review by other courts. In addition, prisoners have filed more than 4,000 cases under the Civil Rights Act claiming mistreatment or denial of rights."

In one case, Justice Burger writes, "A prisoner in a state penitentiary filed a complaint in a federal district court under the Civil Rights Act claiming that a prison guard had arbitrarily taken seven packages of cigarettes from him without justification. The district judge dismissed the complaint. The prisoner then took an appeal to the Court of Appeals for the Third Circuit, where three circuit judges after reading briefs and considering his arguments wrote the opinion remanding the case to the district court with directions to conduct a trial on the merits. *Russell* v. *Bodner*, No. 72-1788 (May 29, 1973). Under established procedures, the three circuit judges first had to submit their proposed opinion and the concurring opinion of one of the three to the other six members of the Court of Appeals who were not assigned to the case."

Justice Burger aptly points out that "All these matters are within the jurisdiction of the Commission on Revision of the Federal Court Appellate System." Burger, *supra* at 1128, and suggests that alternatives be considered, specifically, including:

1. Creation of a statutory administrative procedure to provide for hearing prisoner complaints administratively within the prison, and requiring these procedures be exhausted before any proceedings could be filed in federal court.

2. Establishment of informal grievance procedures in the state prisons to hear prisoner complaints. *Id* at 1125.

The experience of state attorneys general compels similar calls for relief. A special committee of the National Association of Attorneys General found that federal habeas corpus filings alone had increased from 1,020 in 1961 to 9,093 in 1970; or from four to eighteen percent of the total federal district court caseload. For the past ten years, the Association has requested legislation imposing reasonable limits on collateral attack upon state court judgments. E.g., S. 567, 93d Cong. 1st Sess. (1973). The Judicial Conference of the United States now has this subject under study, and we are optimistic of a constructive consensus.

And Judge Haynsworth's proposal for a National Court of Criminals Appeals, to entertain questions of federal criminal appeals, state criminal appeals raising a federal question, and claims of state and federal prisoners attacking prison conditions, merits consideration. Haynsworth, "A New Court to Improve the Administration of Justice," 59 A.B.A.J. 841 (1973).

The National Association of Attorneys General has asked that Congress consider proposals for review of sentencing contended by defendant to be excessive, limitation of the time for petitioning for removal of a criminal prosecution from a state court, a prohibition upon unnecessarily delayed or successive petitions attacking state court judgments, and legislation to curb abuse of the federal writ of habeas corpus by state prisoners. Report of the Committee on Habeas Corpus, National Association of Attorneys General (1973). Any attempt to detail these proposals would be unnecessarily lengthy at this time. However, we would be happy to outline them or any one of them should the committee so desire.

More Study Should Be Given to Other Organizational Alternatives

In making its recommendations, the Commission has adopted express criteria:

1. Where practicable circuits should be composed of at least three states; in any event, no one state circuit should be created.

2. No circuit should be created which would immediately require more than nine active judges.

3. To the extent practicable, the circuits should contain states with the diversity of population, legal business, and socio-economic interests.

4. Excessive interference with present patterns is undesirable . . . the greater the dislocation involved in any plan of realignment, the larger should be the countervailing benefit in terms of other criteria that justify the change.

5. No circuit should contain non-contiguous states. Report, *supra*, at 7.

Except for the Commission's determination that no one state circuit should be created, alternatives available for realignment and handling Ninth Circuit workload pending more intensive procedural reviews are available and can assist the Circuit in handling its work without "excessive interference with present patterns." For example, if physical reorganization should be deemed essential, several viable alternatives exist:

1. Create a new circuit of California, Nevada, Hawaii, and Guam, shift Arizona into the Tenth Circuit, and establish a separate circuit composed of Alaska, Washington, Oregon, Idaho, and Montana. Such a proposal would clearly avoid the dislocations inherent in splitting California.

The Commission rejected this proposal on the grounds that the new circuit would have had "close to 1,700 filings in fiscal 1973" and that much of the area was expected to experience "substantial growth." However, California's substantial growth of the last twenty years appears to be leveling off. Data suggests the existence of at least a temporary pause in the rate of growth of California, sufficient to permit further analysis before a final decision.

2. Establish a new circuit composed only of California, splitting the existing circuit into two divisions.

The Commission's objections to alternative reorganization plans are as follows:

1. A one state circuit would lack sufficient diversity of background added to or brought to a court by judges who have lived and practiced in different states . . . moreover only two senators, both from a single state, would be consulted in the appointment process; a single senator of long tenure might be in a position to mold the court for an entire generation. Finally, a circuit consisting of California alone would immediately require nine judges even to maintain the high caseload per judge that it now obtains . . . ."

We respectfully submit that few geographical areas have the diversity enjoyed by California, which at once is the most metropolitan and the most rural of states. Its position in this respect can be favorably compared with the Second Circuit (composed of New York, Vermont, and Connecticut, staffed eight to one by New York judges, and with 75 per cent of its workload from New York). The fact that only two senators would be consulted in the appointment process seems irrelevent. As a matter of fact a single senator of long tenure might be more immune from political considerations than several without such stature.

2. The Commission suggests that such procedural devices as transfers between circuits, transfers of venue, consolidation, stays, injunctions, and statutory interpleador could be used to avoid potential conflicts between the circuits. However, such procedures would have the effect of increasing rather than diminishing judicial workload. In addition, they would impose unnecessary and unwarranted costs upon the parties than by way of preliminary proceedings.

3. The Commission contends that a separate circuit for the five northwestern states is not now warranted. The Commission staff points out that appeals filed from the five northwestern states (Alaska, Washington, Oregon, Idaho, and Montana) in fiscal year 1973 accounted for only 17 per cent of the workload of the circuit, and totaled slightly less than the filings in the three-judge First Circuit. However, population projections for the northwest states are much greater than those for the southern states and California. Obviously, time did not permit the Commission to make any definitive population and workload projections, nor is such effort made here. However, it is respectfully suggested that a most realistic solution to the immediate problem would be to permit the Commission to make such studies, utilizing new data from the Administrative Office of the Courts, and from the demographic units of the various state governments involved.

Conclusion

The Ninth Circuit now has 13 authorized judgeships and an admittedly heavy workload. Faced with the pressures of immediate deadlines, the Commission on Revision of the Federal Appellate Court System made a proposal which received relatively little hearing and which would have far-reaching and irreversible effects on the legal and political structure of California. Such a proposal should not be adopted without further serious study. More consideration must be given to the burden of litigation which the various western states will enjoy in the future, to changing growth patterns, to the nature of the judicial workload of the federal courts, and to procedures which will impose reasonable limitations on the explosion of federal litigation which has arisen during the past few years. In the meantime, we recommend that Congress act to increase the judges available for work in the Ninth Circuit and to adopt interim relief in the form of realistic limitations on federal jurisdiction.

Senator Burdick. The committee stands in recess until 10 o'clock tomorrow morning.

[Whereupon, at 12:35 p.m., the committee recessed to reconvene at 10 a.m. the next day.]

CIRCUIT REALIGNMENT

THURSDAY, OCTOBER 3, 1974

U.S. SENATE,
SUBCOMMITTEE ON IMPROVEMENTS 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, Brian C. Southwell, deputy counsel, and Kathryn Coulter, chief clerk.

Senator BURDICK. This is the third day of hearings on the geographical realignment of the ninth judicial circuit.

Our first witness this morning will be the Honorable John F. Kilkenny, U.S. Court of Appeals, Ninth Circuit.

Judge Kilkenny, welcome.

STATEMENT OF HON. JOHN F. KILKENNY, U.S. COURT OF APPEALS, NINTH CIRCUIT, PORTLAND, OREG.

Judge KILKENNY. Good morning, Mr. Chairman.

Senator BURDICK. You may proceed in any manner you wish.

Judge KILKENNY. I have some notes, Mr. Chairman, upon which I will probably improvise from time to time.

I would like to proceed in that manner, and then, of course, I would be happy to answer any questions you may have.

Senator BURDICK. Very well. Your prepared statement will be entered in the record in full at this point and you may proceed in the manner you have just described to us.

[Judge Kilkenny's prepared statement follows:]

PREPARED STATEMENT OF JUDGE JOHN F. KILKENNY [NINTH CIRCUIT COURT OF APPEALS]

Mr. Chairman and other members of the Subcommittee:

I start with a quotation from the 1968 Report of the American Bar Foundation Advisory Committee on the workload of the U.S. Court of Appeals: "On balance, it is more desirable to add judges, above the number of nine, than it is to create more circuits." One reason is obvious, the greater the number of circuits, the greater the caseload on the Supreme Court.

First of all, permit me to emphasize my belief that what we need in the Ninth Circuit are five new judgeships, rather than the creation of a new circuit. As early as 1971, five new positions were recommended. As yet, we have none. It is obvious that without additional judgeships, the splitting of the circuit will accomplish nothing. Needless to say, I am not one of those who believes that a

circuit of 18 or even 21 judges is unmanageable. In support of this thinking, I need only point to the superb performance of the 15 judges in the Fifth Circuit where the calendar is up to date and to a lesser extent to the performance of the 13 judges in the Ninth Circuit, where with district judge and other help, the criminal calendar is up to date, but the civil calendar is lagging. I say, with firm conviction, that if we had had five additional circuit judges on, and since the time of the 1971 recommendation, our calendar, both criminal and civil, would be current and I doubt if we would be here arguing over whether the circuit should be split.

In my opinion, a panel of three active judges working for ten months in the ensuing calendar year, would competely eliminate the Ninth Circuit's civil backlog. Already, we are utilizing the equivalent of two additional circuit judges by the use of district judges. This means that the chief judge is already administering a 15-man court and with the use of three rather active senior judges and a few outside judges, in reality, is sitting on top of a 17- or 18-man court. Of course, I do not argue that the use of district judges at the circuit judge level is a wholly efficient operation. But the present utilization of that many bodies clearly demonstrates that there is little, if any, validity to the argument that the efficiency level of a circuit stops at the magic number of *nine*. Give us an adequate number of judges and you can forget the splitting of the circuit.

For that matter, it is the founded opinion of more than one of our circuit judges that if we had the two additional judgeships which were recently recommended by the Judicial Conference on an emergency basis, and had the additional legal staff, the proposal for which has been approved by the Judicial Conference and is now before the Congress, we would be current on both our civil and criminal calendars within 15 to 18 months.

Next, I speak on what might be termed an alternative to splitting the circuit. Here, I would emphasize that the studies outlined in subsections (a) and (b) of Sec. 1 of Public Law 92–489 should be concurrent and that the subject matter of (a) cannot be intelligently studied without a companion analysis of (b). In my opinion, we should not divide or restructure the circuits without first considering what, if any, jurisdiction should be removed from the district and circuit courts, such as agency decision reviews, three-judge courts, diversity jurisdiction and some type of a limitation on appeals in 2254 and 2255 proceedings. I say this well knowing that the Commission was under a mandate to first submit a report on the study directed in subdivision (a).

In any event, an outright cleavage of the Ninth Circuit is neither necessary nor desirable. As an alternative, it is suggested that the circuit be restructured into two divisions: (1) a Southern Division to consist of the Central and Southern Districts of California and the District of Arizona. This alignment would account for approximatley one-half of the present appeals, and (2) a Northern Division to consist of the Northern and Eastern Districts of California, Oregon, Idaho, Nevada, Washington, Alaska, Hawaii and Guam. This group is presently responsible for approximately one-half of the appeals.

One Circuit Chief would preside over both divisions, with a Division Chief to preside in each division. The first Chief to be appointed would carry over from the present circuit, with tenure as provided by law, his successor to be selected by the Chief Justice from the active judges of both divisions, the vacancy to be filled by the President. The Division Chiefs would be selected in a manner provided by rule of court in each division.

The principal office of the circuit to remain in San Francisco. The principal office of the Northern Division to be San Francisco and the Southern Division, Los Angeles. Places of holding court in the Southern Division, Los Angeles and Phoenix, and in the Northern Division, Portland, Seattle, Anchorage, Honolulu and San Francisco.

Each division to have nine active judges. *In banc* proceedings in each division would be heard by nine judges. In case of conflict in opinions between the two divisions, the Chief Circuit Judge would call a circuit *in banc* proceeding, in which four judges from each division, and the Chief Judge would participate. In-division selection of the four judges to be by rule.

The restructuring of the circuit into divisions, rather than a split into separate circuits, would permit a free flow of judge power, both circuit and district, between the divisions and would eliminate what appears to be the political nightmare of attempting to divide California into two circuits.

Beyond that, I think it is relevant to consider the historical background and physical aspects of the circuit. The circuit was created in 1860 consisting of the states of Oregon, California and Nevada. Strangely enough, it was then known

as the Tenth. We were first designated the Ninth by the legislation of 1866. Thus, it would appear that we have had a uniform body of law, insofar as it can be uniform, in the circuit for well over 100 years. We have had and certainly now have the longest coastline of any circuit in the United States. Armed with the great ports of San Diego, Los Angeles, San Francisco, Portland, Seattle, Anchorage and Honolulu, we have created an immense body of maritime law which is followed from Point Barrow, on the northern tip of Alaska, to the Mexican Border and west to Honolulu and Guam. Many of the great admiralty cases which reached the United States Supreme Court originated in our circuit. Surely, we would be flying in the face of the tides of reason to split the circuit and set up two courts which might go in opposite directions on this fundamental body of jurisprudence.

Moreover, this plan would have the built-in advantage of utilizing the existing court facilities in San Francisco and Los Angeles, which are now sufficient to accommodate the administrative functions of each division and of the circuit as a whole. The plan would no doubt save the expenditure of a vast sum of money in the creation of a new facility in the Northwest. Only in Portland, has the Circuit a building of sufficient capacity to accommodate the personnel of a new Circuit.

From a practical viewpoint, this plan is workable and, with the shedding of certain types of jurisdiction, would be adequate for the foreseeable future. The creation of a separate Northwest Circuit consisting of Alaska, Idaho, Montana, Oregon and Washington would accomplish nothing. Those districts are responsible for only about 15% of the appeals. The combined appeals of those states would not justify over a three or four judge court. This would be true even if Nevada, Hawaii and Guam were included. The suggestion that California might be a separate circuit is illogical. The state now provides 67% of the appeals and it is predicted that the case growth in that state will be far greater than in any other section of the circuit. The present appellate load created by California federal litigation would require the services of all, or practically all, of the present complement of judges. Placing California in a separate circuit would truly be an exercise in futility.

Of the 64 district judges who returned ballots on an appropriate questionnaire, 38 voted in favor of a division, rather than a split of the circuit. Only 14 favored a split. The remainder expressed no opinion.

This division plan could well be a pilot experiment in connection with the expanding suggestion that what we may need is one single national circuit court, operating in separate or distinct districts or divisions under the administration of a national chief judge who would utilize the judges where the services were most needed and who would present legislation sufficiently in advance to avoid this constantly recurring crises created by lack of judge power.

The national court here mentioned bears no relationship to the intermediate appellate court suggested and sponsored by Judge Shirley M. Hufstedler. However, I would go on record in favor of the Hufstedler proposal. It would eliminate *in banc* problems and, without going into detail, would otherwise lessen circuit court burdens.

An Advisory Committee of the American Bar Foundation as early as 1968 advanced a somewhat similar plan as a solution and was of the view that such a system, by creating additional divisions, could employ up to thirty judges in a circuit.

A substantial number of our recent *in banc* cases grew out of Supreme Court decisions on obscenity law and drug traffic checkpoints along the Mexican border. Others out of construction and interpretation of recent environmental and other controversial legislation. This type of case would probably go *in banc* no matter what the size of the circuit.

Statistical information submitted by the Commission on the interchange between the northern and southern district judges is subject to challenge. In substantial part, the flow of southern judges to the north, is occasioned by the judges normal vacation months, and if the flow were stopped neither the northern nor the southern districts would benefit. The argument that most of the northern help is from senior judges and would be available even on a split is faulty. If the circuit were split, this judge power would not be then available except through the Committee on Intercircuit Assignments. The Arizona district judges quite consistently move to the north or to the coast during the torrid heat of the Arizona summers. In place of twiddling their thumbs in Arizona or vacationing elsewhere, they are working in the northern or coastal districts. To the contrary, the north-

ern judges are directed to the distressed areas in both working and vacation periods.

I am authorized to say that the Oregon Circuit and District Judges are in complete agreement in favoring divisions, over an actual split in the circuit.

Finally, and only, if in your wisdom you conclude that the circuit must be split, then I would reluctantly favor the recommendation of the Commission that California be split along the lines suggested in its report.

On the humorous side, one of the judges who has been on the Court of Appeals for five years expressed the view that the only thing wrong with a large court is that the judges cannot get together for a group picture. A major point, I concede. Nonetheless, he is hopeful of a picture in the near future and would rather bypass that addition to judicial history, than see a split in the circuit.

In closing, I repeat that what we presently need more than anything else is immediate legislation creating four additional circuit judgeships in the Ninth Circuit. This need is desperate. No one argues that we will need less than that number even if the circuit is realigned or restructured into separate divisions or circuits. The need is now. I will not repeat that we may split, divide or restructure the circuit, but we will not bring the calendar up to date until we receive more judgeships.

Needless to say, Mr. Chairman, we are most grateful to the members of the Committee and Counsel for affording us this opportunity to present these views on this most important subject.

Judge KILKENNY. I am here primarily at the suggestion of Judge Chambers. I do not mean that we agree in the entirety; we do not. But it seems that some of my thinking is in line with the thinking of the Chief Judge of the Ninth Circuit Court of Appeals.

We have problems in the ninth. Of course, that has been recognized, but we have some serious problems. The most recent statistics would indicate that the problems are beyond those which were considered by the Commission, Senator Burdick, in that there were 2,694 filings in 1974. Probably Judge Duniway has already mentioned that fact.

Now, I want to point this up. I think it is important to look at what has happened in the ninth circuit. When the additional four judges were authorized following the 1966 quadrennial survey, there were 9 judges, and they terminated approximately 800 and some odd cases. Nevertheless, at that time, under different circumstances, it was felt that there was a need for four additional judges. They terminated approximately 100 cases per judge.

Now, in fiscal 1974, with 13 active judges, the ninth circuit terminated over 2,500 cases, or approximately 200 cases per judge. True enough, the 13 judges were assisted by what you might call a massive infusion of district judges, and, to some extent, by outside judges and senior judges. So that during the past 2 or 3 years the ninth circuit has not been operating a 13-judge court, but in fact has been operating with a 17- or 18-judge court under very, very difficult circumstances.

I assure you it is not easy to go from week to week, day after day searching for district judges to sit on a panel.

First of all 13 judges was an unfortunate number. It left one judge up in the air on a three-judge panel system. That extra judge made it necessary to call in district judges or outside judges or senior judges in order to complete a panel.

If the same standard were—and I am not saying that it should be—but if the 1968 standard were applied today, the ninth circuit would be entitled to 25 judges rather than the 13 which it has.

Now, of course, I am not asking for an application of the 1968 standard to the problems of today. Through the employment of various

devices, often times challenged by both the bench and the bar—and in particular by the bar—such as screening the present congestion of cases, the elimination of oral argument, a tight reign on criminal appeals, and the utilization of district judges and outside and senior judges, we have made our criminal calendar current. It has been current for approximately a year.

Regrettably, I cannot say the same thing about the civil calendar. But while I am on the subject, and in explanation of what has happened to our civil calendar, first of all we must give precedence to the criminal calendar. Next, we must give precedence to the habeas corpus cases, the 2255's, and literally dozens of other kinds of priority cases which have been dictated by the Congress.

When the four judges were authorized in 1968, it seemed that the positions might be filled within a reasonable period of time. Judge Hufstedler was appointed, I think, within 6 or 7 months, and then the administration—the Johnson administration—was faced with what we might call the Justice Fortas problem, so that there wasn't another appointment to fill the remaining three positions during the Johnson administration. They went over into the first Nixon administration. Those positions were not filled until approximately October 1, 1969. So, in effect, we did not have a 13-man court until 1970.

In January, 1970, Judge Barnes took senior status. That vacancy went unfilled, I think, for approximately 9 months. Shortly thereafter Judge Hamley—this was in 1971—took senior status, and his position was not filled for well over 2 years. It wasn't filled until August of 1973. In the meantime, Judge Carter retired, and there were some problems on that, and his vacancy wasn't filled for approximately 8 or 9 months, or possibly longer.

This, of course, is not in criticism of the Congress. I have no intention of doing that.

Senator BURDICK. These senior judges continued to work, though, didn't they?

Judge KILKENNY. Yes. I have mentioned that, Senator Burdick. I have mentioned that they did continue to work, and that makes up some of the 18-man force that I mentioned at the opening of my statement. There is no question about it. Most of them still continue to work far above and beyond duty, I would say. They do a substantial amount of work, and they are to be given credit for that. But nevertheless, we didn't have the active judges, and the senior judges do not work on the committees and do not take full calendars. After all, the committee work in itself in the ninth circuit, on motions to dismiss and other serious motions that are presented on appeal, requires a substantial amount of time. When those judges took senior status, they no longer served on those committees. In any event this backlog occurred, you might say, starting with fiscal year 1971. I think, if you will check back, you will find that at that time we had a backlog of around 10 months. That includes both criminal and civil cases. The majority there, again, was made up of the civil caseload, and this civil caseload has not substantially increased since the time when we fell behind for failure to get our vacancies filled on the 1968 authorization.

There is another point I want to mention. It relates to the statistics which were furnished by Mr. Westphal. I know that if there was an error, it was an unintentional error. But at page 81 of the Hearing

record on S. 2991, he points to the performance of the second circuit in turning out 499 signed opinions, while the ninth circuit, in utilizing many more judges, filed only 471 full blown opinions. I think in checking the statistical information you will find that in fiscal 1973, which is what we are talking about, the second circuit filed 365 rather than 499 signed opinions and 78 per curiams. Now, compare that to the performance of the ninth. The ninth had 1,347 cases submitted, argued and submitted, of which 498 were signed opinions, 498 as against 365, and 692 were per curiam opinions.

When we are talking of a per curiam in the ninth, we are talking about a normal reasoned opinion. It is an opinion—I have examples here which I can file with the clerk—it is an opinion participated in by all of the judges, and probably the only reason it is not an "authored" opinion, or "full-blown," is that more than one judge has actually participated in the language, the body, of that opinion.

So as against the second circuit's 78 per curiams, we have 692. Compare the figures for 1974; the second disposed of 819 cases after hearing or submission, 336 signed opinions, 97 per curiams and 386 without written opinions.

I might interrupt here to say that I have served on the second circuit. I do know of the method used in the disposal of cases. I am not speaking against it. I just happen to be one that does not believe—nor do the other members of our court—in disposing of cases from the bench after an oral argument, and probably a vast majority of the 386 disposals of the second circuit were from the bench. In the ninth circuit, there is either a written order, a written memorandum, a written per curiam, or a written opinion.

Now, in that same year the ninth disposed of 1,483 cases after hearing or submission, 444 signed opinions, 375 per curiams—correction—575 per curiams, against 97 in the second and 464 disposed of by either order or memorandum.

Now, to mention, and it seems to me to detract from the performance of the ninth, that 61 different judges served in fiscal 1973. We don't dispute the figure, but I would like to point out that of the 61, approximately 25 percent, possibly one-third, were district judges from the north or other districts already sitting in Los Angeles or San Francisco and they were called up for 1 or 2 days. They were not there for a week, not sitting for a week. They were called up there for 1 day. So when you speak of 61 judges, why, you are not speaking of 61 circuit judges that have been assigned for a week. You are probably speaking of around 25 percent of the district judges called up for a very short period of time, sometimes 2 days, sometime 1 day, and they are doing that in connection with a regular district court assignment to either San Francisco, or Los Angeles. It also happens in Seattle and Portland.

I don't believe that the "full-blown" or the signed opinion is a measuring standard of the judges' work. I think you do have to work to do the per curiams. You have to look to the other work of the court. Some of our memoranda are truly "full-blown" opinions, but since they just answer counsel's arguments and have nothing to do with new law in the circuit or otherwise, we feel that we shouldn't create a burden on the lawyers or other courts by sending that material on to West Publishing Co. for publication.

Mr. Chairman, I hope that it is appropriate to refer to your remarks in the Kentucky Law Journal as set forth in the transcript of the

hearings on S. 2991. I am in complete agreement that the collegial nature of the court should be maintained in the interest of efficiency, harmony, and quality, but nonetheless—and I quote from your remarks—"While these are vital characteristics of an appellate court, it is submitted that an increase in judges beyond the supposed maximum will neither destroy nor seriously impair the effective work by the court."

I further agree with your comment that, "The necessary interchanging of views between judges would still be possible were the number of judges to exceed 15 or even 20." In any event, we should be given the oportunity to try out an 18-man court, or now, it would seem from the 1974 statistics, maybe we must have a 21-man court. I don't know.

I additionally agree with your remarks that the present inadequacies in our system cannot be relieved by a resort to any short term expediency, but rather that "It can be achieved only by shaping a long-range plan which will meet the needs of our appellate system not only in 1975, but also in 1990."

The split of the ninth circuit in the present proposal will not even meet the needs of today in the ninth circuit.

Now, with reference to my proposal for divisions, to try out divisions in the circuit rather than to split it, I know I am arguing against the recommendation of the Commission. A broad outline of the proposal is in the report of the Commission and in the material which I filed with the Commission at the time of the hearing in Portland. I am authorized to say that approximately 60 percent of the district judges in the ninth circuit favor this division plan. Only 20 percent oppose it. The remaining 20 percent didn't express a view. The voto was approximately 3 to 1 in favor of division rather than a split. All of the judges in Oregon, and I am speaking of circuit and district, favored a division system rather than a split. At this moment I would mention the letter of Judge Goodwin, I believe, to counsel. Then there is a more recent letter that Judge Goodwin wrote to you, Mr. Chairman, which I believe may be in the files. If not I have copies which can be filed.

[EDITOR'S NOTE.—The letters from Judge Goodwin to Mr. Westphal, dated September 25, 1974, and to Senator Burdick, dated September 27, 1974, referred to by this witness were both incorporated into this hearing record during the session held on October 1, 1974. Pages at which the letters may be found are listed in the index to this volume.]

The CHAIRMAN. In any event, he favors the division viewpoint rather than a split, if a division would be possible. All of the judges in Oregon and Arizona and, I believe, all the district judges in Idaho and Montana, are in favor of divisions. So is the State Bar of Arizona and the bar of the city of San Francisco. In my file I have a letter from Seth Hufstedler in which he says that the State Bar of California had not actually passed on this proposal as yet, but that they were giving consideration to it. I don't know whether they have passed on it at this time.

Now, in commenting on the division plan, the bar of San Francisco—I was going to note what they said, but I note that Mr. Petrie is here this morning, so I will leave it to him.

We feel the advantage of divisions over a split are: first and foremost, less work on the Supreme Court. No matter how you look at it, once there is a split, why additional work is presented to the Supreme Court. Next, the keeping of a uniform body of maritime law from the Arctic Circle to the Gulf of California and westward through Honolulu and Guam. Also, fewer problems with California State law, and I believe, of significant importance—despite what is said in the report of the Commission—the free-flow of circuit and district judges from Alaska to California and vice versa. Now, I am firmly convinced that the division proposal is worthy of a try and better than anything else that has as yet been proposed.

Now, the division proposal is not really new thinking. In 1968, a report of the special committee of the American Bar Foundation recommended, "When the judges exceed 15, a division system should be adopted where judges are assigned on a routine basis, with each division having support for specific substantive subject matter. Up to 30 judges could be accommodated within a given circuit under this substantive division concept."

Now, I do not go so far as suggesting a *substantive* division concept. I believe that would be more complicated than the division which I have suggested, although I believe there is considerable merit in that concept.

We might think of this: Isn't it obvious that, if in 1968 this circuit had actually been split, with six judges in one circuit and seven judges in another, and with the tremendous influx of filings since that time, would we not be faced with precisely the same problem with which we are now faced?

Now, finally, and this is only if the subcommittee concludes that the circuit must be split, then, and only then, would I reluctantly join in the recommendation that California be split along the suggested lines. If there is to be a split, I think that that is the only way of doing it. Although I do not think it wise; it is probably a political nightmare to contemplate. Nevertheless, I can't honestly say that I find anything insurmountable in the plan.

However, on the basis of fiscal 1974 statistics, the legislation should provide for 11 judges in the twelfth circuit and 9 judges in the ninth circuit. If the plan is adopted, the California Legislature, and this might require some doing, could outline a procedure similar to the Florida legislation under which either circuit could seek the advice of the California Supreme Court on any troublesome questions of State law. By the same token, I see nothing judicially sinful in creating a one-State circuit in California. To me there is nothing sacred in the number "nine." Presently the appeals in California would require the services of the entire complement of the court of 13 judges. What would remain is what has been referred to as a "horse shoe circuit," commencing in Arizona, extending north through Nevada, Idaho, Washington on to Alaska and then southwest to Hawaii and Guam. On creation of such a circuit I venture to say there would be considerable infighting over the location of the headquarters of the circuit, and being somewhat of a gambler, I would bet on Reno.

Mr. Chairman, the foregoing is a capsulized version of my views. Again, I say that the answer to the immediate problem is the creation of a substantial number of additional circuit judgeships, the cleavage of the circuit or the divisions within can await further study. The

creation of additional judgeships just cannot wait. Otherwise, in keeping our heads above water, there is no alternative to the continued use of district and outside judges, in which case we will in effect be operating an 18- or 19-man circuit court. Hopefully this testimony will be of some help in solving this exceptionally acute and very difficult problem for your committee, Mr. Chairman.

Now, if it is your wish, why I would be open to questions. I hope I can answer them. I don't claim to be an expert on the entire system.

Senator BURDICK. Thank you, Judge, for your contribution this morning.

You didn't detail your differences between the division and a split.

Judge KILKENNY. I didn't want to go into that detail, Mr. Chairman, and take the time here. That is in substance set forth in the showing which I made before the Commission.

Senator BURDICK. Now, one of the problems that we face in not splitting the circuit is the loss of judge time and the loss of judge power that attends en banc hearings. The testimony from many witnesses indicated that, while there is no magic in the number nine, once we get beyond nine in the number of judges, we see diminishing returns. That seems to be the testimony of Judge Duniway and the testimony of many other judges. Do you want to speak to that?

Judge KILKENNY. Yes, I would. First of all I would point out, Mr. Chairman, that the statistical evidence from both the fifth and the ninth circuits absolutely disproves that you lose something in the decisional procedures when you increase the number above 9 and even above 13, up to 15. What is the experience in the fifth? They are up to date. They have been using 15 judges. Now, true enough, the bar is not satisfied with what is going on, and I think that I personally might be critical of some of the methods. But nevertheless, that court is operating.

What about in the ninth circuit, where at least for the past 3 or 4 years we have been operating all the way a 16- to an 18-man court through the use of district judges? What did we do last year? We terminated approximately 200 cases per active judge. I don't care what is said on the outside; I think that statistics prove that it can operate and that it does operate.

Now, with reference to this loss of time in a large court, I happen to have my station in Portland. I have never utilized the government's time in going to court. I have traveled on Sunday every time I have ever attended court in Seattle, Anchorage, Los Angeles or San Francisco. No time is lost there. My briefs are with me and I am reading all the time. Now, if you want to say that I am losing time on my return flight, I concede that is possible. Nonetheless, I try to utilize that time in reviewing the arguments, and, on occasion, writing rough drafts of opinions. We outside judges, who can reach our chambers in 5 or 10 minutes each morning, do not waste nearly as much time as the San Francisco and Los Angeles judges who spend up to an hour or more each day in reaching their chambers.

In a year I devote at least two-thirds of the Saturdays to working on the cases that are before me. I know that is true of Judge Goodwin, possibly not as much as I do, but most of the outside judges work on Saturday, and I don't think that you would ever find many San Francisco judges down in the courthouse on Saturday. They, of course, might take their briefs home with them, it is true.

So I think it is wrong to say that you lose, actually lose any available time in the trip between your station and headquarters. In any event, the only way to stop it would be by legislation under which the judge would have to declare his station at the headquarters, and that could be done, of course. I think that those appointed would accept it or they wouldn't be judges.

Now, there was a third part to your question, Mr. Chairman, and I think that I have lost it someplace in my response.

Senator BURDICK. I think the third part concerned en banes.

Judge KILKENNY. Yes. Well, on the divisional end of it, I thought that we would have two nine-man courts. Frankly, I now think we must have more, but if we had two nine-man divisions the overall chief of the two divisions would select four judges from each by lot, and he would preside. I see nothing wrong, Mr. Chairman, in an en banc court of nine judges. Whatever they decided would be the law of that particular circuit until the Supreme Court overturned it. There is nothing wrong with that.

Senator BURDICK. When you select four judges in a nine-man court you really do not have a majority.

Judge KILKENNY. Well, that is very true, but you have a majority of the entire circuit when you have nine.

Senator BURDICK. You have testified in terms of having 21 judges.

Judge KILKENNY. I think you may have to have 21 judges, Mr. Chairman. I am now speaking of the nine. If you have 21, I don't think that presents insurmountable problems. While on the question of an en banc, I think the Congress should give the courts authority to settle what number of judges will sit. A simple majority should be sufficient.

Senator BURDICK. Do you have any mechanics for how you pick the four?

Judge KILKENNY. Oh, yes, by lot. We do it all the time on our panels, Mr. Chairman. Every one of our panels is picked by lot, so there is no problem on that. I don't think any judge in the ninth circuit will say that there has ever been a problem in connection with selection of panels.

Senator BURDICK. And you think that procedure is satisfactory for the total representation on the en banc?

Judge KILKENNY. Well, Mr. Chairman, I have sat on a 13-man en banc, and frankly, I would much rather sit on a 9-man en banc. Now, what really happens is you have seven in the front row and six in the back row. We all have a bit of ham in us, and we all want to ask a question here and there, and by the time we get around to the ninth judge, the attorney who is presenting his argument is just willing to quit anyway. So I don't think it makes much difference whether it is a 9-or 13-man court, but certainly a 13-man court is not a satisfactory en banc court.

Senator BURDICK. If 13 isn't satisfactory, certainly 20 wouldn't be.

Judge KILKENNY. If we get up in that field we should have a different method, Mr. Chairman, of selecting the judges, or the type of panel, that is going to sit en banc.

Senator BURDICK. What do you think about the screening process? Do you favor it?

Judge KILKENNY. Yes. I must modify that. You asked me a general question.

I do believe that possibly in 50 percent of the 2255's and the 2254's, the State habeas, that come before us, that they probably should be screened or, as we are now calling it, predigested. These cases are not worthy of oral argument. I feel that the attorneys in most of these cases, who think that they may be faced with a law suit if they don't appeal, take the appeal for the very purpose of getting it out of the way on appeal. I know you are familiar with some of the types of briefs with which we are faced. Most of the questions have been decided so many times that it would be a futile thing to grant arguments in those cases, or even take the time generally of the judges in reading the briefs before the arguments. I certainly favor screening to a certain extent. There is no alternative when you have an excessive amount of work. It is a method that was worked out in the fifth and I just say thank God for the work in the fifth. If we hadn't utilized screening in the past couple of years, a kind of a semiscreening and a hitching post, as Judge Chambers calls it, to bring the criminal appeals up to us right now, why, in place of being say 16 or 18 months behind in the civil field alone, we would possibly be a year behind in the criminal field and 2½ years behind in the civil field. It is something that should be considered by the committee, that if Judge Chambers, having the personality which he has, hadn't been able to bring in this high volume of district judge power from all over the circuit, what would be the present condition of the calendar in the ninth?

We have, as you are probably familiar with, a bill before the Congress which would kind of bring us up to the fifth in manpower. They have three law clerks per active judge and we only have two. There is one-third extra power there.

This bill, although the clerks would be handled in a different manner, and it may never get through the Congress, is good legislation and I favor it. If this bill passes, and if we could get even two more active judges, we could turn this thing around in about 18 months. If we get this extra help that is in the legislation which is now before the Congress, it would be a great help.

Senator BURDICK. With all this talk about screening, it seems to me that, in terms of the Supreme Court, the certiorari process could be described as a screening process.

Judge KILKENNY. There is no question about it. I have never been on the Supreme Court, of course. I have never worked as a law clerk on the Supreme Court or had that type of contact. But it is known that the Court cannot dispose of all its cases without going through some type of process similar to screening.

Senator BURDICK. I just give that as an example, and in most cases we have already had appellate review.

Judge KILKENNY. Yes.

Senator BURDICK. Staff has a few questions.

Mr. WESTPHAL. Judge, first let me say this: with reference to the figures I was using on page 81 of the hearing record of the omnibus circuit court bill—which you took some exceptions to and corrected this morning—I checked back against the record and some of the exhibits. I think what happened there is that I spoke with reference to 1973 figures, as the hearing record shows, and I must have been looking at the 1972 figures from this special judicial Administrative Office exhibit which we received in evidence in connection with that.

Judge KILKENNY. Well, needless to say, I knew it was an inadvertence.

Mr. WESTPHAL. There was also a copy of the Administrative Office exhibit, which I think is a part of their regular annual report, an exhibit prepared by the Administrative Office in which they show how many judges wrote what types of opinions and how many opinions in particular circuits. Their figures in that special exhibit may have been a case or two off from the figures that they showed in this report. But in any event, whatever the true figures are, the record will prove either that I was wrong and you were right, or vice versa.

Judge KILKENNY. Well, I thought since it put the ninth in a rather bad light, I thought I should mention it.

Mr. WESTPHAL. To compare the second circuit and the ninth circuit, you can't just look at the raw statistics and divide them by the number of authorized judges, because we all recognize that the second circuit is blessed with a great supply of senior judge power. As the second circuit says, for example, they do not want a 10th or 11th judgeship created for their court as the judicial conference would like to recommend. We have to recognize that the second circuit position is influenced by the fact that they have some six or seven active senior judges, if I may use that phrase, who are probably putting in 80 percent as much time as they did before they took senior status.

Also, in the ninth circuit, as you have pointed out, you can't really regard that as being just a 13-man court, because, if you make allowance for the 50 active district court judges that were pulled in on assignment from district courts throughout the ninth circuit, plus the 10 senior district court judges that were pulled in to sit on panels, plus your other visiting judges and your own senior judges within the ninth, the manpower of the ninth circuit is obviously more than the 13 authorized judges. Isn't that true?

Judge KILKENNY. Oh, no doubt. As I said, I believe it might add up to 18 if it was ever figured out.

Mr. WESTPHAL. The other day, when Judge Duniway was here, he made reference to the fact that, in fiscal year 1973, the active judges—and you only had 12 active judges at that time—that was before Judge Sneed was appointed—in fiscal year 1973 there were a total of 911 judge days devoted to sitting on panels, exclusive of en banc hearings; 575 of those days were furnished by the 12 active judges. Now that averages out to 48 days per active circuit court judge. Subtracting that 575 days from the total of 911, you then have 336 judge-sitting days that were furnished by these active district court judges, senior district court judges, senior circuit court judges, and visiting judges from outside the ninth circuit. If one were to divide that 336 days by the 48 days of average sittings by an active judge you would then have exactly the equivalent of seven full-time judges. So that in the year 1973 the ninth circuit operated with 12 active judges, plus that equivalent help. In effect, it operated as a 19-judge court.

Judge KILKENNY. No question about it.

Mr. WESTPHAL. Now, then, exactly when did Judge Sneed come on board?

Judge KILKENNY. In August 1973.

Mr. WESTPHAL. He has been through his shakedown cruise and has been of active help to you for a full year?

Judge KILKENNY. That is right.

Mr. WESTPHAL. Of course, with Judge Sneed in there, and assuming you are calling in the same number of district judges that you did before, the equivalent judgship strength would be up to a total bench of approximately 20?

Judge KILKENNY. Correct.

Mr. WESTPHAL. So that for some years now the ninth circuit has, by extensive use—I think you used the word massive use—of district court judges, been operating with an equivalent bench strength of some 18, 19, or 20 judges?

Judge KILKENNY. Well, I would say "Yes," but I would want to modify that, if I might, right at this moment. When you are operating with district judges and with outside judges, you are not operating with full efficiency.

Mr. WESTPHAL. As a matter of fact, none of those visiting judges participate in other functions of the court. They do not participate in any en banc proceedings; they do not participate in any council matters; they do not participate or serve on any internal committees. In short, they do not participate as a full-time circuit judge?

Judge KILKENNY. That is correct.

Mr. WESTPHAL. In any event, during the last several years, when the court has had an equivalent bench strength of some 18 to 20 judges, we come down to 1974, and we find that, even though that court has had this equivalent bench strength of up to 20 judges, that court of 20 judges is just not able to keep up with the filings, which in 1974 increased some 16 percent above 1973. As a result, Judge Duniway, in his testimony the other day, told us that, as of September 24, 1974, there were 601 cases that had been fully briefed but had not been placed upon any argument calendar of the court. Also as of June 30, 1974, the end of fiscal year 1974, in the Nation as a whole, from all the circuits, there were 291 cases which had been under consideration for over 3 months. Of that 291, 62 of them were in the ninth circuit. Included in that group of 291 cases there were some 80 cases in the Nation as a whole in consideration for over 6 months, and 19 of that 80 were in the ninth circuit. Also in the Nation as a whole there were 22 cases that had been under consideration by the various circuit courts for over 9 months, and of that 22, 9 of those cases were in the ninth circuit. Similarly, according to this Administrative Office exhibit which is published, I take it, in their annual report, in the Nation as a whole there were 14 cases pending before circuit courts for over 1 year, and 6 of those were in the ninth circuit.

Now, would you agree that those figures paint a picture of the result of the difficulties with which your court has been struggling over the past several years in trying to meet this virtually overwhelming influx of cases?

Judge KILKENNY. I believe the figures are deceptive. Once we fell behind, as I say, in 1970 I believe it was—I do have the figures some place, but I don't have them right before me—once we fell substantially behind, when we should have had 13 judges and didn't have those 13 judges, and fell substantially behind, why, the caseload each year has been increasing without additional judges, and we just haven't been able to catch up on the cases.

If you would take—I think there was some figure of 543, I believe, which is used in some of your statistics—if you would take a year and a half that we are behind, and have been behind ever since the four judges were authorized, and then subtract a year and a half's caseload from the 543, you would come up with just about what is the average caseload in the United States.

Now, with reference to the cases that are a year old, and the substantial number which are almost a year old, I think that might happen through one or two judges out of an entire group. Even one judge could be the main factor in that delinquency. One judge can get involved and get behind where he has two or three very difficult cases. The same thing can happen to another judge. I think possibly that the Administrative Office has better information than I have on the 12-month-old cases. We know all judges are not capable of the same amount of work. I say this—and I certainly don't say it in an immodest manner—I have been on the court of appeals for over 5 years, sometimes in senior status, and I have never had a case that hasn't been disposed of in less than 3 months. The work habits of a judge have so much to do with this. Moreover we might be unfortunate in the selection of some of our district judges who have visited or possibly one or more of our active judges, but I don't think the court as a whole should be condemned for the delinquency.

Mr. WESTPHAL. There is no intent by anyone to condemn the 13 judges and all the senior judges of the ninth circuit, or any of the judges. Nobody is attempting to condemn them. They have tried their very best during this period of time to keep up with this ever-increasing caseload.

You have suggested that these figures that I mention may be deceptive. You have suggested that the backlog has a direct correlation to being a year and a half behind which occurred before you got these positions filled. You told us that Judge Hufstedler was appointed pretty promptly but that it was 1970 before all four of those judges came on board.

I would just call your attention to this: according to committee exhibit A-2, a copy of which is on the table in front of you, as of 1971, on June 30, the end of the fiscal year, there were 1,743 cases pending, and in this intervening 4 years, during which time you had all 13 judges——

Judge KILKENNY. No we didn't, counsel. I have spoken of the vacancies. Judge Hamley was out for 2 years, and he was ill.

Mr. WESTPHAL. Those vacancies were more than replaced by the visiting judges or assigned judges that you have called in.

Judge KILKENNY. I would agree with that.

Mr. WESTPHAL. In exhibit A-2, running from 1971 to 1974, the backlog of the cases pending has increased from 1,743 to 2,355, an additional 823 cases. So I would suggest——

Judge KILKENNY. Of cases pending, backlog?

Mr. WESTPHAL. Yes.

Judge KILKENNY. Backlog? 2,300 backlog?

Mr. WESTPHAL. The committee exhibit shows the total number of cases pending as of June 30, 1974.

Judge KILKENNY. Pending, yes, correct, right.

Mr. WESTPHAL. Now, of course, the point you are making is that not all of those can be classified as backlog, because any time you stop something in midstream there are a certain number of cases that are in various stages of the appellate process. But nevertheless, the figures show that for each and every one of the last 4 years this court, whether it be 18 or 19 or 20 equivalent judgeships, has been unable to come any closer than an average of terminating about 200 cases less than those which are on file each and every year.

Judge KILKENNY. If you would take hold of the additional filings during that period of time I still think my statistical statement is correct. It would more than match the increase in the pending cases.

Mr. WESTPHAL. Judge, I have the feeling that as I ask these questions, not only have you, but Judge Duniway and others, have seemed to feel that we are trying to make an attack upon the judges' industry and their efforts to keep up with the caseload. That isn't it at all, Judge.

Judge KILKENNY. I hope that I am not giving that impression. The mere fact that there might be a bit of Irish blood in my veins may cause me to raise up here and there, but I have no intention of giving that impression at all.

Mr. WESTPHAL. I understand that this so-called delay in the civil cases, to which you yourself referred, runs about a year and a half. The fact that there are some 601 cases that haven't been calendared for oral argument causes the court itself, when it finally does schedule a case for oral argument, to encourage counsel to submit to the court any additional precedents or controlling cases which may have been handed down in the interval between the time counsel filed their last briefs and the time they appear for oral agument. Isn't that evidence that the court itself recognizes the delay?

Judge KILKENNY. That didn't apply to just civil cases. That was a general order in the run-of-the-mill criminal cases, too. The court didn't do that for the purpose of bringing an 18-month delay up to date. It was a fine thing to do, but the general order was for the criminal and the civil calendar both.

Mr. WESTPHAL. I am not implying it was civil only, although I said that. Even if it applies to all of them, this more or less confirms that testimony, which was given by civil lawyers during the hearings held by the Hruska commission on the west coast, to the effect that there is so much delay between the time they file their last brief and the time they finally appear for oral argument that they virtually have to rebrief their case.

Judge KILKENNY. Of course, I don't think there is any validity to that case, counsel. Even if it were normally a 6-month delay, counsel is not doing his job if he doesn't rebrief and bring it up to date.

Mr. WESTPHAL. There is another facet of the present procedures in the ninth circuit under which you are forced to operate in order to keep up with this caseload and that is this massive use of district court judges. It has been suggested to the subcommittee that this is not a practice that you should be encouraged to exercise for too long for two reasons: First, many of the district courts in the ninth circuit have caseload problems of their own, and their judges' time could be better spent working at home to reduce their own caseloads rather than spent furnishing time on assignment to sit on panels in the ninth circuit.

And the second point that is involved is that the bar itself seems to have some feelings against having a district court judge sit on virtually every panel. There is also that fact—that has been described to us by Judge Duniway—that when a district court judge is a member of the panel, whether he draws that opinion on assignment or not, that district court judge is not quite up to date on what the case law of the ninth circuit is and that frequently results in some 2 to 1 decisions. Frequently it results in the necessity of en banc cases, because a panel has gone off in different directions than some other panel has. Have you any observations to make on that?

Judge KILKENNY. I have.

With reference to your first statement, I have no quarrel with that. District judges should not be sitting on the circuit except once in a while to acquaint themselves with what goes on on the circuit court. I know, Mr. Chairman and counsel, that if we had enough circuit judges there would be no district judges sitting on the ninth circuit, and that is the answer. It is just the complete answer to it.

On the second point, I in part at least agree with Judge Duniway. I think that is the reason why district judges shouldn't sit with regularity. If the other two members of the panel are in favor of reversing a district judge, there may be a reticence on the part of the sitting district judge to go along.

Mr. WESTPHAL. They are only human like the rest of us.

Judge KILKENNY. Well, after all, they have their district judges association, and have many other contacts. A visiting judge on a case wouldn't be from the same court, because we try to avoid that. We do avoid that. Still, he certainly is acquainted with his fellow judges. He is acquainted with them. He is acquainted with the district court problems. That does happen, but I don't think that it happens too often, because generally there is agreement on the panel. Once in a while, however, a district judge has been quite reluctant to go along with the majority.

I am not recommending against the occasional use of district judges at the circuit court level. I am just saying it is an emergency measure. If we hadn't used them, I think you can imagine what condition the ninth circuit would be in at the present time.

Mr. WESTPHAL. So I take it we are in substantial agreement that the problem—whatever dimensions you place upon that problem—can be solved only by finding a way to employ more circuit judge power to the caseload of the ninth circuit?

Judge KILKENNY. I would put it this way: the simple way of stating it is that we need more judges, period. Now, the question is can we properly employ the power of the judges on an 18- or 21-man court? I guess that that is what the committee must decide. Personally, I believe we can do it.

Mr. WESTPHAL. Very good.

So now what we are down to is the fact that, as a means of employing a sufficient amount of judge power to the resolution of this problem, we have before us two principle proposals. I understand that when Mr. Petrie testifies we may have many more proposals, but as of this time we have two principle proposed solutions. One is a solution, proposed by the so-called Hruska commission, which would place the southern and central districts of California, Arizona, and Nevada into a new

12th circuit, and the balance of the present ninth circuit would retain the designation ninth circuit but in effect it would be a new ninth circuit.

The other alternative is one that you suggested to the committee here in your statement, which is that the existing ninth circuit be divided into two divisions, a southern division and a northern division. The southern division you propose would be one which would consist of the southern and central districts of California and the State of Arizona. Your northern division would have the State of Nevada included in it plus all the other remaining districts of the present ninth circuit.

Judge KILKENNY. Yes.

Mr. WESTPHAL. So that basically, as far as geography is concerned, the only difference in your alignment and the recommendation of the Hruska commission is with respect to where the State of Nevada would be placed?

Judge KILKENNY. That is correct.

Mr. WESTPHAL. All right.

Now, under the Hruska commission proposal this twelfth circuit would have, according to 1974 filings, a total incoming caseload of 1,545 cases. Under your proposal it would have a caseload of 1,417. Again, according to the 1974 filings, the balance of the circuit, or what you refer to as a northern division—and what the Hruska commission refers to as a new ninth circuit—would have total filing of 1,150 and yours would have 1,278. Your suggested alignment comes closer, by virtue of changing Nevada's 128 filings, to some numerical equality than does the Hruska commission proposal?

Judge KILKENNY. Yes.

Mr. WESTPHAL. Speaking again in that frame of reference, which is geographic, and attempting to equalize the caseload, your suggestion would more closely equalize the caseload by making a different placement of Nevada in the scheme of things?

Judge KILKENNY. That is correct.

Mr. WESTPHAL. One of the things that you also suggest is that this northern division would sit in Portland, Seattle, Honolulu, and San Francisco. As far as the northern Nevada litigants and lawyers, who are in an area adjacent to the northern part of the State of California, are concerned, they would be arguing their appeals in the same place they always had argued them?

Judge KILKENNY. That is right.

Mr. WESTPHAL. But lawyers from the southern part of Nevada would then go to San Francisco rather than Los Angeles, under your proposal?

Judge KILKENNY. Right.

Mr. WESTPHAL. Unless their case was calendared to be heard by a panel which was sitting at Portland or Seattle?

Judge KILKENNY. Which seldom would happen.

Mr. WESTPHAL. All right.

Moving on now to other areas of difference between your suggestion and the Hruska commission proposal, your suggestion is that the two divisions, the northern and southern divisions of the ninth circuit, would continue to have a chief judge presiding as the only chief judge over both the northern and southern divisions.

Judge KILKENNY. Correct.

Mr. WESTPHAL. Whereas, the Hruska proposal would have a chief judge for the twelfth circuit and a chief judge for the new ninth circuit?

Judge KILKENNY. That is correct.

Mr. WESTPHAL. I assume that the incumbent chief judge of the ninth circuit, by virtue of his seniority, would be the chief judge of what the Hruska commission calls the twelfth circuit, as well as by virtue of his being a resident of the twelfth circuit?

Judge KILKENNY. Frankly, I just wouldn't hazard a guess on that, counsel.

Mr. WESTPHAL. What you are saying is that, in the event you regard him as a resident of the South, he might be chief judge of the new twelfth circuit?

Judge KILKENNY. He may be.

Mr. WESTPHAL. You would also have a division chief judge, who would really not be a "chief judge" within the contemplation of the Federal statutes assigning duties and authority to a chief judge, but this division chief judge would be more or less an effective presiding judge or administrative chief judge?

Judge KILKENNY. I would say that is correct. Of course, the Congress would probably——I haven't reached that point in the proposed legislation—but the Congress would probably leave it to the circuit to set that up by rule, or the Congress itself could pass the legislation which would define the duties of the chiefs within the divisions.

Mr. WESTPHAL. Really, then, on that particular point, the difference between what you suggest to the subcommittee and what Senator Hruska's commission has suggested and recommended is only a difference of how the chief judge authority specified by the Federal statute should be exercised over these two geographical groups?

Judge KILKENNY. Essentially, I think that is correct, counsel. Without giving deep thought to it, I would say that is correct.

Mr. WESTPHAL. Now, the Hruska Commission's proposal is a little bit different geographically from yours and a little bit different from yours as far as this chief judge question is concerned. Where you have two separate circuits, if there should be a conflict between a decision in the ninth circuit and one in the twelfth circuit on a point of federal law, that conflict would be resolved by the Supreme Court of the United States, just as they would resolve a conflict between the ninth circuit and the sixth circuit if they recognized it as a conflict which needed resolving today?

Judge KILKENNY. That is right.

Mr. WESTPHAL. But under your proposal, where you would not denominate them as circuits but would denominate them as separate divisions with essentially the same geographical lines, you would resolve any conflict between the divisions by a special en banc procedure of having four judges from the northern division sit with four judges of the southern division, and this chief judge would join them to be a ninth member of this en banc panel?

Judge KILKENNY. That is correct.

Mr. WESTPHAL. So that in effect your suggestion is that we use this four plus four plus one en banc procedure as a means of reconciling any intracircuit conflicts that might arise.

Judge KILKENNY. Correct.

Mr. WESTPHAL. But at the present time, and for the last several years, the ninth circuit has had this same number of judges, about 19 or 20. They have also developed intracircuit conflicts between three judge panels, and we have received testimony, Judge, that there has been some difficulty in composing an en banc panel of 13 judges in order to resolve those intracircuit conflicts. Why is it that you think your new concept of northern and southern divisions, employing a four plus four plus one formula, could more readily resolve these intracircuit conflicts than the existing circuit has over the last 3 or 4 years?

Judge KILKENNY. Well, for one thing, you only have the 9 judges with whom you must deal, rather than the 13 active judges. I might say there have only been 13 active judges for a few months during 1970 and since Judge Sneed was appointed in 1973. But, in any event, there has been difficulty finding space for 13 judges at times. The chief generally places en banc hearings for the court and council meetings on the calendar for San Francisco on the Wednesday of the week in which the court meets there. Sometimes a judge who is not sitting during that particular week may have to make a special trip. They have had some problems getting all 13 judges together, but with nine judges you wouldn't have that problem. At least you would have no more problem there than you would with nine judges on any other circuit similar to the ninth circuit where they are located in various quarters.

Mr. WESTPHAL. I have one other point that I would like to clear up, Judge.

In your prepared statement, regarding your proposed realignment into northern and southern divisions you state that the first chief judge could be appointed by carryover from the present circuit, with tenure as provided by law, "his successor to be selected by the Chief Justice from the active judges of both divisions, the vacancy to be filled by the President." I take it you refer to the Chief Justice of the United States.

For what reason do you suggest that a chief judge be designated by the Chief Justice of the United States and appointed by the President, rather than having the chief judge position filled as it normally is now?

Judge KILKENNY. Well, it is a personal viewpoint, counsel. I would prefer to see the Chief Justice of the United States appoint, from the members of the circuit, the chief judge who would preside over both divisions. My reason for it, and I think that it is a good reason, is that some judges in that circuit would be much better qualified to serve as a chief than an at-large appointment by the President of the United States where the chief judge wouldn't necessarily have to be from the ninth circuit at all.

Mr. WESTPHAL. I see.

Under the existing system the chief judge goes by appointment of seniority among the active judges.

Judge KILKENNY. Correct.

Mr. WESTPHAL. There have been people, in years past, who have suggested that that should not be the fact, because, in truth and in fact, there are some judges on any circuit who are better qualified to be the administrative and operating head and chief judge of a circuit

rather than he who just happens to come along by the process of seniority. So what your suggestion does is, in effect, recognize what some people have said for a number of years?

Judge KILKENNY. There would be something to that, yes.

Mr. WESTPHAL. I thank you, Judge. I think that this dialog has helped us to sharpen the difference that may exist between the Hruska Commission and your position.

I have one further question.

You said at the outset that you and Chief Judge Chambers don't necessarily agree on everything that you are presenting to the subcommittee today, but it has been my understanding that what you have presented as a geographical plan and division nomenclature is basically something that Judge Chambers adheres to.

Judge KILKENNY. I believe you can say that, although I would prefer to use Judge Chamber's language, which he employed in his letter to you, Mr. Westphal. I believe that I reflect some of his views, and I would prefer to leave it that way.

Mr. WESTPHAL. All right. Thank you, Judge Kilkenny.

Mr. Chairman, that is all.

Senator BURDICK. You recommendation is to set up divisions instead of circuits?

Judge KILKENNY. Well, all I can say, I had suggested divisions in the circuit long before the Hruska Commission started splitting the circuit.

Senator BURDICK. It seems to me your divisions may be more clumsy in one respect: in the circuit system you have one chief judge, but in your division system you have two chief judges, two straw bosses.

Judge KILKENNY. You could describe it that way. You could use that nomenclature. If you have divisions, I believe that you must have an overall chief. When you create divisions along lines as suggested by the American Bar Foundation, where they may be on different types of law, such as criminal law, handled by one division or the other, I think you must have someone that you will call chief of that division. I think it would be a necessary thing on this divisional set up that has been proposed, too. I believe it is certainly worthy of consideration, gentlemen.

Senator BURDICK. Judge Kilkenny, let me thank you once again for coming to Washington today and for your very helpful contribution.

Judge KILKENNY. Thank you for giving me the privilege of appearing before you.

[EDITOR'S NOTE: Following his testimony, Judge Kilkenny sent the following letter and supplement to his testimony to the subcommittee:]

JOHN F. KILKENNY, SENIOR CIRCUIT JUDGE,
U.S. COURT OF APPEALS, NINTH CIRCUIT,
Portland, Oreg., October 7, 1971.

Mr. WILLIAM H. WESTPHAL,
Chief Counsel, Subcommittee on Improvements in Judicial Machinery, Dirksen Office Building, Washington, D.C.

DEAR MR. WESTPHAL: I attach original and necessary copies of a Supplement to my Oral Testimony. Hopefully, there will be no objection to the filing of this material.

Sincerely,

JOHN F. KILKENNY.

SUPPLEMENT TO ORAL TESTIMONY OF JUDGE JOHN F. KILKENNY.

I neglected to mention that when we fell behind in the critical years of fiscal '71, '72 and '73, that the Ninth Circuit Senior Judges were doing substantial out-of-circuit work in exchange for the sittings in the Ninth by outside circuit judges. These assignments, of course, are directed by the Chief Justice. For example, since taking Senior Status, I have served in the First, the Second, the Seventh and the Tenth Circuits, and will again serve in the Seventh the latter part of this month. Likewise, Senior Judges Barnes and Hamley have occasionally sat in outside circuits. Considerable of Senior Judge Carter's time is consumed with his work on the Emergency Court of Appeals.

Although the termination of 2,500 cases in fiscal '74 might indicate to the contrary, I have no doubt that the substantial use of District Judges cuts down on the overall efficiency of the court. Given the same number of circuit judges in the critical years that we had of district judges, I am convinced that the civil backlog would now be close to normal. This again points to the appalling need for five or more additional circuit judgeships in the Ninth.

I failed to mention that the brilliant showing of the Fifth in keeping its calendar current might well be due, at least in substantial part, to the 15 additional law clerks and the substantial secretarial assistance received by reason of the special Congressional legislation some two or three years ago. Needless to say, I am not condemning, but, on the other hand, commending the Fifth for its "know-how" in securing this financial grant. We did not put it all together until this year and now have legislation pending, with Judicial Conference approval, which would place us on an almost equal footing with the Fifth.

The fact that a majority of the judges in the Fifth may have voted to limit to 15 the judgeships in their circuit is beside the point. Opposing that is the action of the Ninth in voting for five additional judges some two or three years ago. The only available proof is that a court in excess of 15 judges is a manageable court. We need only take a look at the performance of the Fifth with its outside and senior judges and the performance of the Ninth with its outside, senior and district judges during the past two or three fiscal years. These performances demonstrate that courts of 18 to 21 judges are manageable, even under adverse circumstances.

Another advantage of the division proposal over an outright split is the former's political feasibility. With the outright opposition of the California State Bar, and the Bars of the Cities of San Diego, Los Angeles and San Francisco, I would predict that the proposed split of California is a dream for the distant future.

On the question of a "collegial court", at the October 2nd hearing it was again suggested that the outside judges wasted considerable time in going to and from San Francisco, Los Angeles, Portland or Seattle. I neglected to say that while working in San Francisco or Los Angeles, the outside judges have the services of staff secretaries and, time after time, dictate orders, memoranda, or oft times opinions in disposition of the cases they have under consideration. Beyond that, the judges are in constant contact with their home secretaries and each day respond to all incoming mail, in addition to dictating memoranda, transmitting finalized opinions, letters and other materials which the home secretary has prepared during the judge's absence. I repeat, the time lost in air flight and in reaching or returning from the judge's destination is minimal.

Additionally, I have known of ill feeling developing between judges serving under the same roof, but I have not heard of animosity between judges who only see each other one week out of each month. Indeed, for the non-resident judge the monthly return to San Francisco or Los Angeles is in the nature of a dignified homecoming. Everyone seems delighted and the daily luncheons are truly "collegial" affairs, while the dinners with visiting judges are sources of conviviality and, at times, intellectual triumph. "Fragmentation" is a bad, bad word when used as descriptive of the activities, or judicial performance, of the judges of the Ninth.

Dated: October 7, 1974.

Senator BURDICK. Our next witness is Mr. Bernard Petrie, of the San Francisco Bar Association, San Francisco.

Welcome to the committee, Mr. Petrie. You may proceed in any manner you wish.

STATEMENT OF BERNARD PETRIE, SAN FRANCISCO BAR ASSOCIATION, SAN FRANCISCO, CALIF.

Mr. PETRIE. Mr. Chairman, Mr. Westphal, my name is Bernard Petrie. I am a San Francisco lawyer and spokesman for the Bar Association of San Francisco.

We appreciate very much, Mr. Chairman, this chance to present our views.

The Bar Association of San Francisco has about 4,400 members and is 102 years old. I served as chairman of a special committee of the association to review the report of the Commission on Revision of the Federal Court Appellate System. Our committee has 10 members with diverse and substantial Federal trial and appellate experience. With your permission, Mr. Chairman, I would like to file a copy of our report. I have supplied several copies to the committee.

Senator BURDICK. It will be received.

[Committee insert.]

REPORT

of the

SPECIAL COMMITTEE OF THE BAR ASSOCIATION OF SAN FRANCISCO

TO REVIEW REPORT OF THE COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM

July 15, 1974

Approved by the Board of Directors

of the

BAR ASSOCIATION OF SAN FRANCISCO

July 24, 1974

Committee Members

Bernard Petrie, Chairman
Jerome I. Braun
Frederick P. Furth
John T. Hansen
James F. Hewitt
Charles A. Legge
Matthew P. Mitchell
David C. Moon
Cecil F. Poole
Noble K. Gregory

Dissenting

Noble K. Gregory

43-476 O - 75 - 20

7/15/74

Report to the Board of Directors of The Bar Association of San Francisco by its Special Committee to Study the Recommendation of the Commission on Revision of the Federal Court Appellate System for a Change in the Boundaries of the Ninth Judicial Circuit.

BACKGROUND

In 1972 the Ninety-Second Congress by Public Law No. 489 created the Commission on Revision of the Federal Court Appellate System (the Commission). The Congress directed the Commission to study first "the present division of the United States into the several judicial circuits" and to recommend "changes in the geographical boundaries of the circuits as may be most appropriate for the expeditious and effective disposition of judicial business". Sixteen members* formed the Commission, appointed four each by the President, Chief Justice, Senate and House of Representatives. The Commission held hearings in many cities and submitted its report on December 18, 1973.

The increasing caseload in the circuit courts of appeal prompted the study. The Commission focused on the circuits with the greatest caseloads and the most judges, the Fifth and the Ninth. The report recommends a division of each of these circuits into two new circuits. The present Ninth Circuit would be divided into a new Ninth Circuit consisting of the Northern and Eastern Districts of California and the states of Alaska, Washington, Oregon, Idaho, Montana and Hawaii, and Guam, and a new Twelfth Circuit consisting of the Southern and Central Districts of California and Arizona and Nevada.

Senator Burdick, a member of the Commission, introduced bills on February 7, 1974 (S.2988-91) to carry out the Commission's recommendations. The bills were referred to the Committee on the Judiciary. It is expected that hearings will be held in the late summer or fall. Subcommittees on Improvements of Judicial Machinery (chaired by Senator Burdick) and Representation of Citizens Interests (chaired by Senator Tunney) as well as the Executive Director of the Commission, Professor A. Leo Levin, have asked for the views of The Bar Association of the City of San Francisco.

This Special Committee (the Committee) was appointed on February 13, 1974, and has had several meetings. It has reviewed the statements filed with the Commission and digests of testimony before the Commission by judges and lawyers from the Ninth Circuit as well as other materials, including certain statistical material on filings in the Ninth Circuit and its districts courts and a Statement of the State Bar of California to the Commission dated December 5, 1973.

The Committee deems the recommended division of the Ninth Circuit to be premature and, in any event, a partial solution. If the Ninth Circuit is divided, California need not and should not be split.

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* Senators: Quentin N. Burdick, Edward J. Gurney, Roman L. Hruska, John L. McClellan; Congressmen: Jack Brooks, Walter Flowers, Edward Hutchinson, Charles E. Wiggins; Honorable Emanuel Celler; Dean Roger C. Cramton; Francis R. Kirkham, Esq.; Judge Alfred T. Sulmonetti, Judge J. Edward Lumbard; Judge Roger Robb; Bernard G. Segal, Esq.; Professor Herbert Wechsler.

DISCUSSION

This is a time of ferment of ideas to grapple with increasing federal appellate caseloads.* Proposals such as that for a National Court of Appeals with divisions are being studied. The Committee notes that the Commission itself is engaged now in the second phase of its work to study the structure and internal procedures of the federal appeal system and to recommend such changes "as may be appropriate for the expeditious and effective disposition of the caseload of the Federal Courts of Appeal consistent with fundamental concepts of due process and fairness". The Committee feels that there are numerous ways to tackle the problem now faced by the larger circuits. Appended hereto is a list of some of the matters we believe the Commission could consider profitably. The Ninth Circuit already is being innovative in some of these areas.

The Committee is mindful that the increasing filings in the Ninth Circuit have resulted in insufficient time for judicial reflection and consistency, a much longer wait than desirable in civil cases, more per curiam orders, fewer en banc hearings, elimination of oral argument in some cases and a large backlog. The Committee unhesitatingly and unanimously joins with the Commission in finding that the need for reform is pressing. What concerns the Committee is that circuit division very well may turn out to be a fleeting solution that will divert efforts away from the real task of overhauling and honing the federal appellate system. Also, with circuit division a desirable regionalism will suffer. Some tradition will be lost. Some confusion will ensue as a new circuit strikes out on its own. The Supreme Court will be burdened further. All of these drawbacks become more serious if circuit division entails splitting California, and that act involves its own disadvantages, which are noted below.

An analysis of case filings in the Ninth Circuit to which we turn in the next section indicates that the proposed division would be premature now and probably would create a workload imbalance.

The Committee views the present large backlog in the Ninth Circuit as an urgent problem, but regards it as separate from the problem of heavy, current filings, and believes it could be reduced promptly by ad hoc panels of additional judges.

The Committee endorses the request for at least two more judges at once. Additional appellate judges will be needed whether or not the circuit is split. The Committee also endorses Judge John F. Kilkenny's plan to utilize two divisions within the present Ninth Circuit as preferable to splitting the Circuit now.

The Committee prefers that "enbanc executive committees" (envisaged by such plan to consist of several fewer judges than the entire court) be selected by rotation rather than seniority. An opportunity to test out this promising plan of Judge John Kilkenny may be lost if the circuit is to become two circuits.

THE SIZE, SHAPE, AND RATE OF GROWTH OF THE NINTH CIRCUIT CASELOAD.

Underlying all of the suggestions for the division of the Ninth Circuit (or for its reorganization into two divisions) are general conceptions of the unwieldiness of the Ninth Circuit and assumptions about the rates of growth of the Ninth Circuit's business. Those assumptions and conceptions can be summarized as follows:

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* It is also a time to grapple with the appellate caseload in California, where a division of the State into two court systems is not even theoretically possible. In consequence of this limitation, the recent study of the National Center for State Courts (to be published in early fall) focuses exclusively on administrative reforms, an alternative the Committee believes should be exhausted in the case of the Ninth Circuit. See text below.

1. The Ninth Circuit caseload is large in absolute terms and on a per-judge basis;

2. The caseload of the Ninth Circuit is growing rapidly;

3. The Ninth Circuit's performance has deteriorated under the weight of its caseload.

and

4. The distribution of the caseload throughout the Ninth Circuit can be determined on the basis of statistics on numbers of appeals filed from the various districts within the Ninth Circuit.

In an attempt to examine some of these assumptions (and particularly assumptions 2-4) the Committee commissioned one of its members, Matthew P. Mitchell, to examine available published statistics in an attempt to determine whether the assumptions are valid, and if not, the nature and consequences of modified assumptions supported by the statistical material examined.

Mr. Mitchell's report is attached to the original hereof as appendix. It consists of a number of tables, together with separate text material describing and analyzing those tables.

The conclusion of Mr. Mitchell's study can be summarized as follows:

A. GROWTH OF CASELOAD

The large absolute number of cases which the Ninth Circuit has handled in recent years, and the large number of cases per judge, cannot be doubted. However, at least three factors which have contributed to a very rapid growth of caseload in the '60's suggest that, while the growth has been real, the apparent rate of growth of the Ninth Circuit's caseload has greatly exceeded its long term trend. Very recent statistics for early 1974 show that the Ninth Circuit's new caseload may actually be leveling. Filings for the first five months of 1974 totaled 1,046 as against 1,037 for the comparable period of 1973. The Court terminated 1,091 cases for the first five months of 1974 compared with 965 terminations for the same period in 1973. While this phenomenon is likely to be temporary, there are reasons to believe that a "plateau" in new case filings has been reached and that it will slope gently upward for the foreseeable future.

The factors supporting this hypothesis include a very noticeable slackening in the rate of growth of the population at large in the geographic area comprising the Ninth Circuit. While the Ninth Circuit has not yet achieved zero population growth, its population is now growing at a rate of less than 1-1/2% per year - far less rapidly than it grew in the '40's, '50's and '60's.

Two changes in procedural rules occurred during the '60's which may have substantially increased the propensity for losing litigants to appeal. First of these was the passage of the Criminal Justice Act of 1964 providing for the compensation of attorneys appointed to represent indigent defendants. The statistics strongly suggest that this change in the law has substantially increased both the number of criminal cases tried at the district court level and the number of criminal cases appealed to circuit courts in the United States. This phenomenon is nationwide.

In addition, "barriers to entry" have been reduced by changes in the Ninth Circuit rules (in part through the Federal Rules of Appellate Procedure) eliminating the requirement of printed briefs and a printed record and otherwise reducing the cost of an appeal to all litigants. No statistics have been found to verify this phenomenon, but to the extent that it has increased the rate of appeal during the '60's, the impact of this change has probably already been felt.

Finally, there is some statistical support for the proposition that high interest rates in the economy at large are reflected in an increased propensity for civil damage judgment debtors to appeal

the adverse judgments upon pain of payment or relatively modest statutory rates of interest if their judgments are affirmed on appeal. Whether or not this is a significant factor is hard to determine. Perhaps a desire to postpone payment of utilizable capital funds at a relatively light interest is at work. Again, this phenomenon (to the extent that it is suggested by the numbers) is nationwide.

The Ninth Circuit's share of the work done by the circuits has been increasing in recent years. However, this trend may also be leveling off. In 1960-1961, the Ninth Circuit received about 11% of the new filings in all circuits. That figure grew to something over 15% in the years 1971-73, but fell off slightly (to 14.8%) in fiscal 1973.

A significant amount of the growth in filings which the Ninth Circuit has experienced over about the last decade has been in the area of selective service appeals and appeals in narcotics cases. However, the trend has already reversed itself insofar as the selective service appeals are concerned. Those appeals apparently peaked at 152 filings in fiscal 1972. They peaked in fiscal 1970 when considered as a percentage of criminal appeals (they amounted to 22.8% of the criminal appeals filed in that fiscal year). The selective service cases amounted to 8.9% of all appeals filed in both fiscal 1970 and fiscal 1971 and lower percentages in later years. In fiscal 1973 the selective service appeals dropped off by any measure - absolute number of filings, as a percentage of criminal appeals filed, and as a percentage of all appeals filed. It may be confidently predicted that the selective service appeals caseload will rapidly dwindle to insignificance.

By contrast, the narcotics appeals caseload is large, and has been growing especially rapidly since fiscal 1970. This growth has been apparent in terms of absolute numbers of narcotics appeals taken, narcotics appeals as a percentage of all criminal appeals, and narcotics appeals as a percentage of all appeals in general.

In fiscal 1973, narcotics appeals comprised 28.5% of criminal appeals taken to all circuits and 9.5% of all appeals of every kind. In the Ninth Circuit, by contrast, narcotics appeals have risen, in fiscal 1973, to 46.2% of the criminal appeals caseload and an even 20% of all appeals taken to the Ninth Circuit in that fiscal year.

Narcotics appeals are, in other words, a large and rapidly growing portion of the Ninth Circuit caseload by any measure. An accurate prediction of the future growth or shrinkage in the narcotics caseload would help considerably in predicting the future rate or growth of the Ninth Circuit caseload.

B. THE NINTH CIRCUIT'S PERFORMANCE

The Administrative Office of the United States Courts has maintained rather complete records on the time taken by circuit courts to dispose of cases. The most recent full year's statistics available show that the Ninth Circuit is slightly faster than all circuits collectively in disposing of criminal cases but significantly slower in disposing of civil cases.

In each instance, however, the Ninth Circuit did significantly better in the fiscal years ended on June 30, 1971, 1972 and 1973 than it did in the years ending June 30, 1961, 1962, and 1963. Indeed, the Ninth Circuit's performance in fiscal 1973 in disposing of its criminal caseload was better than in the year 1961 or any year since. The Ninth Circuit's performance in disposing of civil cases in fiscal 1973 was better than 1961 and eight intervening years, but worse than its performance in 1965, 1966, 1967 and 1970.

In other words, the available statistics do not support any assertion that the Ninth Circuit's performance in disposing of its cases has deteriorated during a decade or so of rapid growth.

C. DISTRIBUTION OF THE NINTH CIRCUIT'S CASELOAD

One would expect to find that cases of various types are not uniformly distributed throughout the district courts within the Ninth Circuit. One would also anticipate that the percentages of cases appealed from district courts vary somewhat by type of case. The statistics bear this out.

Uneven dispersion of various types of cases among the districts within the Ninth Circuit creates several problems which must be solved in connection with any planned reorganization of the circuit. Prediction of rates of growth of caseload depends upon the types of cases included in that caseload. For example, a caseload consisting mainly of criminal selective service cases is likely to decline rapidly in the foreseeable future. Conversely, if present trends continue, a caseload consisting largely of criminal narcotics cases will continue to grow explosively. Reasonably accurate growth predictions are necessary if new circuits are to be properly staffed.

The type of caseload handled by a circuit court may even influence the willingness of prospective judges to accept appointment to the bench - few lawyers are likely to be "turned on" by the prospect of reviewing an endless array of search and seizure cases involving narcotics.

Available statistics suggest substantial problems inherent in the present proposal for division of the Ninth Circuit as a result of uneven distribution of the sources of that caseload among the district courts of the present Ninth Circuit. The statistics available on this subject are imperfect because no published statistics showing appeals by type of case by district are presently available.*

Considering district court statistics on cases commenced, it appears that the proposed new Twelfth Circuit would carry a far heavier burden in narcotics cases than would the proposed New Ninth Circuit. While the proportion of narcotics cases to all criminal cases in district courts is substantially above the national norm in the present Ninth Circuit, the district courts of the proposed New Ninth Circuit are well below the national norm and the district courts of the Proposed New Twelfth Circuit substantially above. Thus, if narcotics cases are appealed with about the same frequency in all districts, a disproportionate share of this important part of the caseload will go to the New Twelfth Circuit.

With selective service cases, the pattern is reversed. That is, the district courts in the Ninth Circuit have consistently handled an unusually high proportion of selective service cases in their criminal caseload. This imbalance is due, however, almost entirely to the district courts within the area of the proposed New Ninth Circuit; the district courts of the New Twelfth Circuit have handled a selective service caseload only slightly above the national average.

However, district courts of the proposed New Ninth Circuit have handled a high percentage of selective service cases. In fiscal 1971, selective service cases comprised 23.1% of their criminal caseload versus a national average of 11%. In 1972, the percentage was even higher, with selective service cases comprising 27.2% of the criminal caseload in district courts within the proposed New Ninth Circuit as against a national average of 10.9% in that year.

Any division of the present Ninth Circuit into two new circuits, staffed in proportion to raw appellate filings of the last few years, will likely produce substantial imbalance in the workload of

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* The Administrative Office of the United States Courts has the necessary information in its data bank, but has not as yet programmed its computer to identify Ninth Circuit appeals by type of case, by district from which they have risen. The Administrative Office should be encouraged to do the necessary statistical work to determine accurately the sources of cases of various types which the proposed new circuits will be expected to handle.

judges in those circuits as the large bulge of selective service cases lightens the load of the proposed New Ninth Circuit and the disproportionate increase in narcotics cases increases the load upon the proposed New Twelfth Circuit.

D. "WEIGHTING" OF THE APPELLATE CASELOAD BY TYPE OF CASE

No statistical information has been developed for the Committee on the relative difficulty of various types of cases once they reach the circuit court level. Built-in limitations on the length of briefs, length of oral argument, and the limited objectives sought by the appellant (i.e. one reversible error is enough) tend to reduce all appellate cases to a common denominator.

However, intuition suggests that appellate courts do consistently find some cases more difficult than others.

The only empirical study on this subject, as far as we know, is a self-imposed time and motion study done by some of the judges and law clerks of the Third Circuit. It is not sufficiently detailed to provide much help except that it does indicate that civil cases take twice as much judicial time as criminal cases.

In order to fairly assess the relative difficulty of the "average" case expected to arise in a proposed circuit, better information on the relative difficulty of handling cases at the appellate level would be required. In the absence of such information, one type of case nevertheless bears mention in connection with the Ninth Circuit: The private civil antitrust action, of which the Ninth Circuit handles a disproportionate number of appeals. In fiscal 1973, 9.7% of all private civil cases appealed to the Ninth Circuit were antitrust actions. That amounted to 3.5% of total appeals to the Ninth Circuit. In the same year, private antitrust appeals amounted only to 3% of the private cases in all circuits and only 1.4% of total appeals.

Even at 3.5% of the total appeals, antitrust cases do not bulk numerically large in the Ninth Circuit's appellate caseload. Assuming, however, that they represent an uncommonly difficult type of case for the Circuit to review, it is important to know how these cases would be distributed following a division of the present Ninth Circuit into the proposed New Ninth and Twelfth Circuits.

For the fiscal year ended June 30, 1972, 201 private antitrust cases arose in the districts within the proposed new Ninth Circuit as against only 126 in the larger proposed New Twelfth Circuit, or about 61.5% in the area of the proposed New Ninth Circuit and 38.5% in the area of the proposed new Twelfth Circuit. Based upon all filings, the proposed new Twelfth Circuit should take over about 55% of the business of the present Ninth Circuit, leaving 45% for the proposed New Ninth Circuit. Private antitrust cases are thus disproportionately concentrated in the proposed New Ninth Circuit.

E. CONCLUSIONS

The statistics in Mr. Mitchell's report support two conclusions. First, present trends of growth in the Ninth Circuit's caseload suggest the existence of at least a temporary pause in the rate of growth sufficient to permit a careful analysis of caseload sources and trends before a final decision is reached. Second, a detailed analysis of the present Ninth Circuit's caseload should be undertaken before any final decision on how to divide the Ninth Circuit is made.

Presently available information suggests that the Administrative Office of the United States Court, could develop extremely useful information from unpublished sources available to it. This Committee recommends that the development of such statistical information by the Administrative Office of the United States Court be encouraged.

The Proposed Split of California.

If and when it is determined that the Circuit should be divided, the Committee recommends that every effort be made to keep California intact.

The main reason advanced to require placing the districts of California in different circuits is the fact that California contributes about two thirds of the filings. (In Fiscal 1973, 1,543 filings out of 2,316.) Articulate spokesmen favoring the division of California argue that California's filings alone would require more than nine judges at the start and that the caseload soon would be unmanageable. The Committee has given, it believes, due weight to these numbers, i.e., the assumed optimal number of nine judges per circuit and a desirable number of average filings per judge. However, it is concerned that the solution offered has too many drawbacks.

There are several serious objections to dividing California: (1) the potential of conflicting judgments or orders; (2) the potential of inconsistent rulings on California law; (3) resultant increased forum shopping; (4) added burden on the Bar of California to master a second body of appellate decisions and a second set of appellate rules, with increased expense to clients as well as increased uncertainty for them; (5) psychological basis for an unproductive north-south polarization; and (6) anticipated adverse reaction and resistance from the bulk of the bar of California.

We have considered carefully the study of the Commission's staff entitled Legal Problems of Dividing A State Between Two Federal Judicial Circuits (October, 1973), which deals especially with objections (1) through (3). The view of the staff, adopted by the Commission in its report, is that existing and possible devices would go far towards alleviating, if not eliminating, any such problems. These mechanisms are: (a) transfer of cases between courts of appeal; (b) transfer of venue between district courts; (c) consolidation of multi-district litigation for trial as well as pre-trial; (d) injunction; (e) stay; (f) service outside district; (g) interpleader; and (h) certification to the California Supreme Court. The Committee remains unconvinced that these existing mechanisms, which were designed for different purposes (e.g. transfer under 28 U.S.C. 1404(a) for the convenience of parties and witnesses), would work well enough. What is proposed is moving litigants or at least preventing them from proceeding in courts chosen by them, never a happy task even in the situations for which they were enacted. A lot of judicial time would be used to try to anticipate and obviate conflicts and contradictions at the trial and appellate level. Even one or a few glaring instances of contradictory orders (e.g. in the welfare or prison field) might bring the judicial system into disrepute.

Contradictory rulings and inconsistent interpretations of state law may pose real dilemmas for officers of business and government in California. There is the recent example of inconsistent rulings between district courts in San Diego and San Francisco regarding the availability and legality of repossession by self-help. If such opposing rulings were handed down by two circuits within the State of California it would be more difficult for banks and other businesses to operate. Such inconsistent rulings might amount to a denial of equal protection of the laws. To obviate or minimize inconsistent interpretations of California law the Commission has suggested a certification to the California Supreme Court under legislation similar to that adopted in Florida and other states. The Committee has some concern that a California constitutional amendment might be required to validate any such law because the California Supreme Court is prohibited from rendering advisory opinions.

The bills introduced by Senator Burdick provide (Section 7) for appeal to the Supreme Court of the United States of a case invalidating a state law or administrative order under the Constitution, treaties or laws of the United States whenever a court of appeals certifies that its decision conflicts with that of another court of appeals with respect to the same statute or administrative order. The provision is designed, of course, to resolve conflicts between the new ninth and twelfth circuits arising from the bifurcation of California. Resolution of conflict, of course, is imperative. In this case, however, it would add to the burdens of the Supreme Court, which is striving to cope with its increasing caseload. Moreover, until that Court acted, California officials would be in a quandary.

The larger question of the future of the federal appellate system should be faced first. Federal governmental units should be designed to embrace and not to split states. The numbers argument for splitting California works almost as well to split the state of New York (and, indeed, the City of New York) in a division of the Second Circuit. If 1,700 filings are too many for a circuit court to handle, (i.e., 150 in excess of California's 1550) the Second Circuit (and New York City) should be divided. And soon also the Fourth. Fragmentation of circuits, of course, would mean additional burdens for the Supreme Court of the United States and dilute regionalism. These splits might be obviated or alleviated, if the proposed national court of appeals or similar body were created. Our point is that a conscious choice should be made overall and for the long term, between fragmenting circuits on the one hand, and alternatives on the other, such as more judges per circuit, the creation of divisions within circuits, and administrative and jurisdictional reforms. This choice should be made deliberately before the division of California is even considered. A division of California prejudges important questions that should be faced and answered.

In this connection, we note that the Commission considered and rejected a revision of the boundaries of the Second Circuit after hearing the vigorous opposition of the Committee on Federal Courts of the Association of the Bar of the City of New York. (See the statement of that committee by its chairman appended hereto.) The only division of the Second Circuit, it was argued, that would have made sense statistically would have resulted in putting the Southern (Manhattan) and Eastern (Brooklyn) Districts into different circuits. Thus, it can be seen that numbers and statistics can almost be made to prevail over common sense.

Many, if not most, California lawyers would be hostile to division of the state. While a subcommittee of three of the Federal Courts and Practice Committee of the Los Angeles County Bar Association felt a division of California was feasible, the committee as a whole was overwhelmingly against such a division. And the chairman of the subcommittee, anticipating such resistance, wrote a concurring report which presented several alternative proposals for keeping California intact and contributed to our thinking. While there may be more sentiment in Southern California to keep the state intact, probably a majority of the lawyers in Northern California would also oppose dividing the state. This attitude of the Bar, reinforced as it is by conscientious study of the issues by some of its experienced representatives, might be important to the successful functioning of the new circuits. If California is kept intact, maximum cooperation from the Bar could be expected.

The Committee has serious concern that a division of California would interfere with the present, effective cooperation among private and governmental legal officers in California. For example, the United States Attorneys from the various districts of California now attend circuit conferences, which facilitates liaison among them. Also, organizations offering legal assistance to low income groups have offices both in Los Angeles and in San Francisco, operating as statewide law firms. A division of the state, we believe, would disrupt this cooperation at a time when a great increase in the use of the legal profession by the lower middle class is foreseen.

Resistance from the Bar is grounded in part on the added burden of a second group of appellate decisions and rules. There are relatively few California lawyers who practice in several circuits. Relatively few also are able to or need to follow the law of several circuits. It would be burdensome in time and energy for the rest of the California lawyers were the state to be split, and the burdens would probably result in additional expense for clients.

Feasible Alternatives with California Intact

The Committee desires to present five plans which it deems are feasible alternatives to the recommendations of the Commission:

	*Appeals Filed FY 1973
Plan A	
Ninth Circuit: California and Arizona	1777
Twelfth Circuit: Alaska, Washington, Oregon, Idaho, Montana, Nevada, Hawaii and Guam	539
Plan B	
Ninth Circuit: California and Nevada	1613
Twelfth Circuit: Alaska, Washington, Oregon, Idaho, Montana, Hawaii and Guam	439
Tenth Circuit: Add Arizona	244
Plan C	
Ninth Circuit: California, Hawaii and Guam	1616
Twelfth Circuit: Alaska, Washington, Oregon, Idaho, Montana, Nevada and Arizona	700
Plan D	
Ninth Circuit: California	1543
Twelfth Circuit: Alaska, Washington, Oregon, Idaho, Montana, Nevada, Arizona, Hawaii and Guam	773
Plan E	
Ninth Circuit: California, Hawaii, Nevada and Guam	1689
Twelfth Circuit: Alaska, Washington, Oregon, Idaho, Montana, Arizona	627

* Includes appeals from administrative agencies and original proceedings

These plans inevitably will be measured against the criteria of the Commission, five in number: "First, where practicable, circuits should be composed of at least three states; in any event, no one-state circuits should be created. Second, no circuit should be created which would immediately require more than nine active judges. Third, the Courts of Appeals are national courts; to the extent practicable, the circuits should contain states with a diversity of population, legal business and socio-economic interests. Fourth is the principle of marginal interference: excessive interference with present patterns is undesirable; as a corollary, the greater the dislocation involved in any plan of realignment, the larger should be the countervailing benefit in terms of other criteria that justify the change. Fifth, no circuit should contain non-contiguous states."

Preliminarily, we observe that these criteria represent a priori assumptions. They may (or may not) be ideal in the abstract. But, we deal with difficult choices in an imperfect world. Some flexibility is needed, and the Committee submits that the alternatives to a division of California pretty well satisfy the principles behind the Commission's criteria and offer a reasonable balancing of the various interests involved.

The Committee would like to treat briefly the two main objections that have been raised to a circuit consisting of the State of California alone. First, the fear of influence by a single, senior senator, and second, inadequate diversity. The following observations, we believe, meet both points. The Commission's concern that more than two senators are needed to maintain the qualifications of a circuit bench are of questionable significance in the case of California, at least. California is the largest state in the nation. Its geography, economy and society reflect greatly diverse interests and influences. Its elected representatives must be responsive to this diversity of opinion and values, as must the President himself in considering appointments to seats in California. This same pattern of California politics applies to the Commission's fear that a single senator of long tenure could "mold the court for an entire generation". Furthermore, it must be pointed out that even though not applicable to the same degree in the federal system as in the state system, the present trend of the judicial selection process is to de-emphasize political considerations and to apply relatively objective standards related to judicial aptitudes.

Plans A and B above contemplate circuits of two states. While the Commission expresses a preference for circuits of at least three states, the Commission itself was obliged to propose a circuit of two states (plus the Canal Zone with only six filings) as its alternative Plan No. 2 for the division of the Fifth Circuit. This illustrates that the Commission's criteria are not self-executing and inflexible principles. What is involved is an accomodation of interests.

The second criterion of the Commission represents a laudable aim, but at the same time it opts for even more circuits in the future. The Committee agrees that circuits of nine or fewer judges seem to possess advantages like greater institutional unity and greater feasibility of en banc hearings. Yet, if federal appellate business does continue to grow, a decision will have to be made whether to divide a number of circuits (possibly making a fourth tier of courts desirable to relieve partially the Supreme Court) or to add judges above nine to several circuits and utilize divisions within circuits or other solutions. This dilemma should be faced directly. If the choice will be to avoid an increase in the number of circuits, then the present caseload moving to the Ninth Circuit from California is not nearly as persuasive in favor of splitting California.

Plan A, grouping Arizona and California, makes for the largest number of filings currently. Still, with 11 or 13 judges the average number of filings per judge would be 162 and 137 respectively. These would compare, not too unfavorably, with 145 filings per judge for the nine judge circuit envisaged by the Commission to cover Arizona, Nevada, and the southern and central districts of California.

The fourth principle of "marginal interference" permits the transfer of a state to another circuit if there is "countervailing benefit". The Commission's alternative Plan Number 1 for the division of the Fifth Circuit moves Arkansas from the present Eighth Circuit to a new western circuit. Similar considerations might be applied to the transfer to Arizona to the Tenth Circuit, contemplated in Plan B above. The caseload of the Tenth Circuit can absorb the filings of Arizona (234 in FY 1973). Detachment of Arizona from the new Ninth Circuit would cut away appreciable filings. Not adding Arizona to the new Twelfth Circuit would

decrease the distance problem. The principal objection to moving Arizona seems to be trade ties that Arizona has with Southern California. It is believed that there is significant commerce also between Phoenix and both Albuquerque and Denver. The Committee has not tried to determine the extent to which Arizona jurisprudence is derived from California or from the states that might comprise the new Twelfth Circuit. However, the Committee does note that Arizona historically was part of the territory of New Mexico.

In presenting this suggestion as one of the alternatives, the Committee recognizes that Arizona's assignment to the Tenth Circuit might or might not result in some interim uncertainty. If there are significant differences in law between the Ninth and Tenth Circuits, should any different rule in the Twelfth Circuit be applied retroactively to transactions in Arizona prior to the transfer or not? The Committee assumes that fair solutions to this and other questions exist, but has not itself had an opportunity to pursue them.

The fifth criterion is satisfied by all plans, except plan E. The first and third criteria seem to be based in part upon the same underlying consideration, namely the desirability of diversity. The Committee does not prefer a one-state circuit, but it believes that California alone would generate a diverse caseload. Probably, it is desirable to group three states or at least two states in a circuit. However, a one state circuit of California may be indicated, if spokesmen for Hawaii or Nevada oppose being attached to California alone or together out of a genuine concern of being "dwarfed". We in California would welcome them but would want them to be willing participants. If they felt more comfortable with states generating caseloads more like their own, that should be considered.

The Commission felt that a new northwestern circuit excluding any portion of California would not have enough of a caseload to be viable. The Committee respectfully disagrees. The new circuit under Plans C and D above would have a caseload slightly less than that of the Eighth Circuit. The new circuit under Plans A, B and E above would have a caseload equal to or in excess of the First Circuit. Concededly, the size of the First Circuit is too small to be ideal. But, with three to five judges there is economy of judicial manpower. The population and caseload of the proposed new Twelfth Circuit can be expected to grow at a more rapid rate than that of the First Circuit. Also, lawyers from the Northwest, particularly those from Seattle, indicated before the Commission a strong preference for their own circuit, not attached to California or even to a part of California. Lastly, the Commission's report indicates that a separate circuit for the Northwest states may become appropriate, if population growth materializes.

CONCLUSION

The Committee as a result of its independent analysis is in accord with the position of the State Bar of California that every effort should be made to keep the Ninth Circuit intact. The Committee recommends a crash program with special panels to reduce the large backlog. We recommend opposition to the Commission's proposal and to pending legislation, which we have concluded are objectionable and do not tackle the basic problems. We endorse the request that has been pending for some time before the Congress for at least two more judges for the Ninth Circuit. Had these judges been added earlier, the backlog today would not be the serious problem that it is. With the backlog eliminated or greatly reduced and with the additional judges the caseload of the Ninth Circuit can be managed, by two divisions, if necessary, while structural and procedural forms are studied and implemented. If the Ninth Circuit is to be divided, the Committee strongly recommends that the State of California be kept intact under one of the five feasible alternatives presented in this report.

(Signed) Jerome I. Braun

(Signed) Frederick P. Furth

Continuation of signatures to Special Committee Report dated June 15, 1974 on Ninth Circuit Revision.

(Signed) John T. Hansen

(Signed) James F. Hewatt

(Signed) Charles A. Legge

(Signed) *Matthew P. Mitchell

(Signed) David C. Moon

(Signed) Bernard Petrie (Chairman)

(Signed) Cecil F. Poole

* Mr. Mitchell declines to endorse Judge Kilkenny's plan.

DISSENTING.

(Signed) Noble K. Gregory
(Dissent attached)

APPENDIX TO REPORT OF SPECIAL COMMITTEE

List of Possible Reforms in Structure and Procedure in the Federal Appellate System

1. Creation of circuit public solicitors and defenders to represent the government and indigent defendants.

2. Requirement that circuit judges reside at headquarters.

3. Pre-screening of cases to segregate those probably not benefiting from oral argument or raising issues of general importance.

4. Restriction of district judges and possibly visiting and senior judges to certain categories of cases.

5. Requirement of summaries from counsel of issues and positions and consolidation of like issue type cases.

6. A floating interest rate on money judgements tied to the prime rate.

7. Periodical published analyses of judicial output, both circuit and individual.

8. Use of two judge panels with tie breaker judge, if necessary.

9. Elimination of diversity jurisdiction or modification of it, for example, by raising minimum monetary level and ALI recommendation that in-state plaintiff cannot bring a diversity suit.

10. Increased decision from bench without opinion and with or without oral explanation, especially for affirmance.

11. Abolish three judge courts.

12. Retention of appeal in criminal cases with certiorari in some civil cases, for example, diversity cases or cases involving review of evidence to support jury verdict.

13. Increases of professional staff to screen and do other tasks.

14. Award of attorney's fees as well as costs against losing party.

15. Creation of non judicial body to investigate prisoner complaints.

16. Consider functional division of circuit (separate criminal and civil).

17. Revert to pre-1968 Rule 23 for en banc hearings.

18. While giving due recognition to importance of oral argument, discretion to eliminate or limit oral argument, with possible request to counsel to state in advance the thrust of oral argument, and encouraging judges to focus counsel before or at argument on troublesome issues.

Statement of the Committee on Federal Courts of the Association of the Bar of the City of New York. Opposing Revision of the Boundaries of the Second Circuit

I am Alvin K. Hellerstein and with me are Irving Younger and Bernard W. Nussbaum. I am a member of Stroock & Stroock & Lavan and I am Chairman of the Committee of Federal Courts of the Association of the Bar of the City of New York. Judge Younger, who is on the bench of the Civil Court of the City of New York, and Mr. Nussbaum, who is a member of Wachtell, Lipton, Rosen & Katz, are members of that Committee. In addition, Judge Younger and Mr. Nussbaum are both former Assistant United States Attorneys for the Southern District of New York and each is presently a member of the adjunct faculty of the Columbia University School of Law.

The Committee on Federal Courts is a standing Committee of the Association of the Bar of the city of New York. The Committee has 19 members, appointed to staggered three year terms by the President of the Association upon the recommendation of the Chairman. The membership of the Committee is intended to reflect different philosophies and specialties in order to bring together as wide and representative a set of perspectives as possible. What we all have in common is that each of us has practiced or is practicing law in the federal courts of our Circuit and we have gained a deep and abiding respect for those courts.

We appreciate the opportunity to appear before this Commission and give our views with respect to the proposed realignment of the geographical boundaries of the Second Circuit. While no one committee — or one Bar Association for that matter — can be said to represent an entire bar, we believe that the views we express are widely shared by the Second Circuit bar. In this connection, we hope that the members of this Commission will agree with us that before any recommendation is made to realign the present boundaries of the Second Circuit, it must first be determined whether there is a felt need among the members of the bar — the lawyers who day in and day out practice before that Court — for such a change. We respectfully submit there is no such felt need. Thus, we strongly oppose any recommendation to alter the present geographical boundaries of the Second Circuit.

It is not our purpose here to offer to this Commission massive statistics respecting judicial business in this Circuit and others — although we must necessarily touch on some — for we are aware that you and your able staff are in the process of collecting and analyzing such figures. What we are here to do is to offer the experience with the court of the bar practicing before it. And it is our experience that the Second Circuit yields to none in maintaining its tradition of judicial excellence. It is respected for its opinions and current in its business. No litigant in the Second Circuit, whether in a civil or a criminal case, need suffer delay in having his case heard or decided. Nor does he have to forego oral argument.

During the fiscal year ending June 30, 1973 — in which period the Second Circuit decided more criminal cases than all but two of the other circuits — it took only 3.8 median months from the filing of the complete record in a criminal case to final disposition. In this, the Second Circuit stood first among all the circuits. With respect to all cases, civil and criminal, the median time interval in the Second Circuit from filing of the complete record to final disposition of the appeal was 1.8 months. In this, the Second Circuit was surpassed only by the Eighth, and then only by .3 10 of a month and in the context of a considerably smaller caseload.

What do these statistics mean to lawyers and litigants in the Second Circuit? Using median time periods: in a criminal case, the argument follows the last brief by but six days; in a civil case by but 27 days. The comparable median time periods for all federal Courts of Appeals are 39 days for criminal cases and 6[illegible] days for civil cases. A lawyer or litigant could ask for little more.

Our experience with the speedy and efficient manner in which the Second Circuit hears and disposes of its cases causes us to place less weight than do others on such statistics as the number of cases pending at the end of a fiscal year, or the total number of cases filed during any fiscal year, or the filings per judge. These figures often include cases which for one reason or another may never be carried to conclusion. Moreover, it is often misleading to speak of cases which are pending as a "backlog", as if somehow these cases are interfering with the disposition of other cases which are being docketed and briefed. A large circuit must have cases pending at the end of any fiscal year if the Court is to be occupied. Moreover, many cases, listed as pending for the Second Circuit in fiscal 1973, were filed late in the year, and for that reason could not be disposed in the short time remaining before the end of the year. As indicated, the important question is whether all cases which have been docketed and briefed – regardless of whether or not they have been characterized as "pending" at the end of a fiscal year – are being speedily and efficiently disposed of. In the Second Circuit, the answer is that they have.

This record is all the more impressive because it has been accomplished without limiting oral argument, a practice which we understand has been adopted in other circuits. Oral argument is the means by which lawyers can occasionally touch the hearts and minds of judges, and by which judges can probe attorneys about the issues that trouble them. To deprive lawyers of this contact with the Court, and to deprive the Court of this contact with attorneys, in our opinion, seriously interferes with the quality of justice. We note with pride that the Second Circuit has refused to abandon the tradition of oral advocacy.

The Second Circuit is current even though for approximately two years it has been one active judge short of its full complement of nine. In addition, the Second Circuit has kept current with its calendar without adopting extensive screening procedures or creating a separate staff of professional law assistants employed by the Court as a whole. Should there be a substantial increase in judicial business, there is thus much that can be done even within the confines of a nine-man bench. And, if it comes to be necessary at some future time, the Court could in our opinion be increased by one or two judges (which would still keep it significantly smaller in number than the present Fifth and Ninth Circuits) without severely affecting its collegial atmosphere. By these means, the Court should remain current in handling its calendars for the foreseeable future.

Thus, neither the volume of its work nor the quality of its performance presently justifies any revision of the boundaries of the Second Circuit. But even assuming that such revision were attempted, there are additional compelling arguments against it. As the Commission is aware, during the fiscal year ending June 30, 1973, over 75% of the Second Circuit's caseload – and undoubtedly a higher percentage of the difficult and complex cases – came from just two districts, the Southern District of New York and the Eastern District of New York. From the Southern District alone came 56%. It appears, in consequence, that there are only two ways to reorganize the Second Circuit so as to achieve a substantial diminution in its volume. One way would be to allocate the New York districts to different circuits; it has been said, with respect to the Southern and Eastern Districts, that "the computer found such a separation attractive." The other way would be to constitute the four districts of New York a single circuit. We believe that each of these proposals would generate intractable problems of doctrine, administration and policy, and therefore oppose both.

Were the New York districts to be divided between two circuits:

(1) Which precedents would govern in the realigned districts, the decisions of the old circuit or of the new?

(2) Suppose one circuit declared a New York statute unconstitutional. What would be the effect of the decision in the other circuit? The result, and we need hardly say that we find it unseemly, might be that the statute was invalid in the courts of one part of the state and valid in another.

(3) Apart from decisional asymmetry, a practical consequence of this would be

forum-shopping. Long disapproved as between state and federal courts, surely it should not be encouraged as between the federal courts of the state.

(4) Questions of state law must of course be decided by federal courts in diversity cases. Were the New York districts split between two circuits, there would inevitably be conflicting decisions on identical questions of state law. The result would be a lessening of public and professional confidence in the coherence of the administration of justice in the federal courts.

(5) And since questions of state law are frequently presented in specifically "federal" actions -- e.g., bankruptcy matters, civil rights actions, federal tax cases, suits under the Federal Tort Claims Act -- there would be more instances of conflict between the circuits. Because these conflicts would arise in "federal" actions, it is natural that litigants would look for their resolution to the Supreme Court, thus adding to that Court's already heavy burden of petitions for certiorari.

Were the four districts of New York to be constituted a single circuit, eliminating Vermont and Connecticut:

(1) When all the judges of a circuit come from one state, they may lack something of the collective breadth, roundedness, and acuity engendered by a mixture of outlooks and experiences.

(2) The risk of political parochialism would be substantially increased. One party may retain the Presidency and both Senators from a given state for a long time. With three states as diverse as New York, Connecticut and Vermont, that risk is less likely.

(3) The impalpable but nonetheless important quality of prestige would be affected for the worse were the Court of Appeals to lose its broad geographic base. We do not believe that the Second Circuit should be simply a New York court.

The Second Circuit for over 170 years has had a great and distinguished history. Today it continues to act in the highest traditions of judicial craftsmanship. In so doing it has not fallen behind in its business; it acts speedily and efficiently with respect to the cases that come before it; lawyers and litigants are assured of a prompt hearing and disposition of their appeals and the Court enjoys wide respect and esteem. We are strongly of the opinion that not only does the bar of the Circuit feel no need for a reduction of the geographical boundaries of the Second Circuit, but, for the reasons we have given, is unalterably opposed to any such proposal. Speaking on behalf of many members of that bar, we respectfully request this Commission to let the Second Circuit be.

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DISSENT

The majority report provides no answer to the carefully considered and unanimous recommendation of the Commission on Revision of the Federal Court Appellate System, that the Court of Appeals for the Ninth Circuit presently be divided.

The basic shortcoming of the majority report is that it ignores the present realities which contribute the basis for the recommendation that the Ninth Circuit be divided, while concentrating its attention on highly speculative and largely irrelevant possibilities. The central reality, which cannot be ignored, is that the present workload for the Ninth Circuit is too large for a court already consisting of thirteen judges. As the Commission has pointed out, there were 138 filings per judgeship in the Circuit in fiscal year 1973. This was second highest in the nation, and represents over a three-fold increase since 1961. The majority does not contend that this caseload will suddenly disappear. To the contrary, even under their speculative assumptions, they predict that the caseload will increase "for the foreseeable future" and they join in requesting immediate provision of "at least two more" judges for the Circuit. Thus, the majority acknowledge that the present and minimum foreseeable caseload for the Circuit will require, at the very least, a court of 15 active circuit judges. And even more will be required if the circuit's caseload continues to increase at anything like the rate that has been regularly experienced since 1961.

There is no need to repeat here all of the reasons underlying the Commission's conclusion that a court of 15 active circuit judges is entirely too large to permit the fair and efficient administration of justice. As the Commission summarized its position with particular reference to the Fifth Circuit, which is presently composed of 15 judges:

> "The Fifth Circuit has grown to a court of 15 active judges, each of whom shoulders a heavy workload despite the use of extraordinary measures to cope with the flood of cases. Serious problems of administration and of internal operation inevitably result with so large a court, particularly when the judges are as widely dispersed geographically as they are in the Fifth Circuit. For example, it becomes more difficult to sit en banc despite the importance of maintaining the law of the circuit. Judges themselves have been among the first to recognize that there is a limit to the number of judgeships which a court can accommodate and still function effectively and efficiently. In 1971 the Judicial Conference of the United States endorsed the conclusion of its Committee on Court Administration that a court of more than 15 would be 'unworkable'. At the same time, the Conference took note of and quoted from a resolution of the judges of the Fifth Circuit that to increase the number of judges on that court 'would diminish the quality of justice' and the effectiveness of the court as an institution."

In view of the general consensus that a court of 15 judges is undesirable and indeed, unworkable, and in view of the majority's position that a court of at least 15 judges is already required in the Ninth Circuit, it is difficult to understand the majority's conclusion that any present division of the Ninth Circuit would be "premature."

There was, moreover, substantial evidence before the Commission that the problems of administration and institutional unity inherent in a court of 15 judges have already manifested themselves in the Ninth Circuit. The Commission summarized the evidence before it as follows:

> "Delays in the disposition of civil cases, often of two years or more, have seriously concerned both judges and members of the bar. The size of the court (13 authorized judgeships since 1968) and the extensive reliance it has been required to place on the assistance of district and visiting judges have threatened its institutional unity. Attorneys and judges have been troubled by apparently

> inconsistent decisions by different panels of the large court, they are concerned that conflicts within the circuit may remain unresolved. Whatever the reason, for two successive fiscal years, 1971 and 1972, there were no en banc adjudications. More recently, the court has accepted a number of cases for en banc determinations and appears to be doing so with increasing frequency. It remains to be seen whether this will serve further to exacerbate the problems of delay."

The majority rests in part on the possibility of adopting procedural reforms in lieu of a division of the circuit. However, these reforms could obviate the current need for 15 or more active circuit judges only if they could be expected to produce a large increase in the already existing workload of 405 annual dispositions per judgeship. This result is unlikely. As Circuit Judge Browning pointed out in his persuasive testimony before the Commission, the court has already adopted numerous procedural devices in an effort to increase its efficiency, resulting in a per judge increase in dispositions from 52 per judgeship in fiscal 1961 to 165 per judgeship in fiscal 1971, including approximately 110 opinions per judgeship per year. It is unrealistic and highly speculative to assume that procedural reforms alone can result in a significant increase in judicial output beyond that already existing. This conclusion is reinforced by the fact that the two procedural reforms which offer the clearest potential for increasing per judge output, screening and limitation or elimination of oral argument, are already heavily employed in the Ninth Circuit under Circuit Rule 4(a). (See Judge Hufstedler's address of June 27, 1971, to the Los Angeles County Bar Association, reprinted in the Los Angeles Metropolitan News, June 28, 1971.)

The majority also opposes the presently needed division of the circuit on the ground that it may "divert efforts" from the need for a general "overhaul" of the federal appellate system, and suggests that the choice must now be made between splitting circuits on the one hand, and procedural and other reforms on the other. There is, however, no warrant for such an "either or" approach, as the Commission specifically pointed out:

> "The Commission harbors no illusions that realignment is a sufficient remedy, adequate even for a generation, to deal with the fundamental problems now confronting the Courts of Appeals. These problems are unlikely to be solved by realignment alone without destroying or impairing some of the most valuable qualities of the federal court appellate system. It is our opinion, however, that realignment is a necessary first step in the Fifth and Ninth Circuits, not only to afford relief to the pressing problems of the present, but also to provide a firm base on which to build more enduring reforms."

A large portion of the majority's report is devoted to the exposition of certain statistics which purport to show that if the Ninth Circuit is divided along the lines indicated, the current diminishing workload in selective service cases may be unduly concentrated in the new Ninth Circuit, whereas the current increasing workload in narcotics cases may be unduly concentrated in the new Twelfth Circuit. Thus, concludes the report, further study is needed in order to assure that the caseload in each new circuit will grow at the same rate. Even if these statistics be accepted at face value, they are essentially irrelevant. The fact that one circuit's caseload may grow slightly faster than that of another in the future does nothing to obviate the present need for division created by the existing caseload. Further, the majority have made no effort to quantify the purported difference in growth rates arising from the alleged imbalance in relation to the overall caseload of the proposed new circuits. Nor do they suggest that the historical overall rate of growth of appellate caseloads in the proposed circuits is significantly different. Indeed, to the extent there is any "imbalance" created by the distribution of narcotics and selective service cases, it seems probable that it is cancelled out by "imbalances" in other types of cases not identified by the majority.* Moreover, the majority report makes no effort to take

* Thus, the majority themselves suggest that potentially more difficult private antitrust appeals may be more heavily concentrated in the proposed Ninth Circuit. This would tend to offset any possible "imbalance" created by the allegedly uneven distribution of narcotics and selective service cases.

account of the extent to which the workload significance of criminal narcotics and selective service cases has already been reduced by screening under Circuit Rule 3(a).

The majority offer several proposed alternatives designed to avoid the necessity for dividing the judicial districts of California among two circuits. However, as the Commission has pointed out

> "a circuit consisting of California alone would immediately require nine judges even to maintain the high caseload per judge that now obtains in the Ninth Circuit. In addition, it would do little to solve the existing problems of the Ninth Circuit because California now provides two-thirds of the caseload of the circuit as presently constituted."

This conclusion is strikingly demonstrated by the extreme imbalances in the caseloads of the proposed circuits under each of the five alternatives advanced by the Committee. Plan "D" in which California alone would constitute the new Ninth Circuit, involves the least imbalance. But even under that plan nine judgeships would be required to maintain the current unacceptably high per judge caseload in the "California" circuit, which only five judges would be sufficient to handle the caseload in the other new circuit. Thus, even the least distorted division proposed by the majority would simultaneously create a one-state circuit and yet another unduly small circuit without achieving the substantial benefits that may be realized under the Commission's proposal.

The majority's fears respecting potential conflict in matters of interpretation and validity of California state laws are likewise speculative and are fully dealt with in the report of the Commission. As Circuit Judge Dunway pointed out in his testimony before the Commission, the jurisprudence of California is highly developed thus minimizing the potential for conflict in matters of interpretation. Further, there is no substantial reason to doubt that such devices as abstention and certification, if proved necessary, will be appropriately authorized (in the case of certification) and utilized by federal judges sensitive to the need to avoid such conflict. Even without utilization of such devices, decisions of the state courts on matters of state law control those of the federal courts, and any conflicts on significant points of state law that may develop are unlikely to endure. As to possible conflicts regarding the validity of state law under the Federal Constitution and Statutes, the express conflict resolution provision of the proposed implementing legislation provides an adequate remedy should any significant conflicts develop.*

A more important "conflicts" problem than that hypothesized by the majority for the future is reflected in the substantial evidence received by the Commission that "attorneys and judges have been troubled by apparently inconsistent decisions by different panels of the large court; they are concerned that conflicts within the circuit may remain unresolved." This very real and existing problem is an outgrowth of the problems of "institutional unity," discussed by the Commission, resulting from the court's large size and caseload.

The Commission likewise fully dealt with the majority's preference for "divisions" within the circuit. As the Commission correctly concluded:

> "Any scheme for restructuring the Ninth Circuit into divisions depends for its success on a mechanism for preserving a unified law within the circuit. The proposals we have received recognize this but defer the consideration of specific details on this crucial matter. Thus, it is difficult to predict how the divisions would operate. In all likelihood, however, the two divisions would soon act

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* As the majority recognize such conflicts are possible even today among the decision of the four Federal district courts located within California.

and be perceived as separate courts. As a result the circuit would be divided in fact though not in law. Enormous administrative difficulties might be created by the need to coordinate the activities of the two divisional headquarters and the directives of the two divisional chief judges. The present problems of avoiding intra-circuit conflicts would be exacerbated, inasmuch as only a proceeding that included judges from both divisions could speak with authoritative finality."

Noble K. Gregory

Mr. PETRIE. Our report is dated July 15, 1974, and has been approved by the board of directors of the Bar Association of San Francisco on July 24, 1974.

A majority of nine, including myself, opposed the Revision Commission's report, and the pending proposal to realign the ninth circuit, principally because it would entail a division of California, Mr. Chairman. One member, Mr. Gregory, dissented and his dissent is a part of that report. We hesitated before challenging the proposal of the distinguished Commission and its able and courteous director, Professor Levin, but, with respect, we cannot agree that the pending bill strikes the best balance.

Probably you have heard almost as many views on realignment as have been expressed recently on inflation. Mindful of that and of your time, I will not repeat in any detail what is contained in our report.

Mr. Chairman, I understand that you and Mr. Levin are familiar generally with that report. You are aware that the Bar Association of San Francisco urged that the ninth circuit be kept intact, at least for the time being, that more judges be added, that the Administrative Office of the U.S. Courts be asked to analyze the kind of caseload coming from the various districts to the ninth circuit and then, on any eventual realignment, the State of California be kept intact.

We were and are concerned about the potential for conflicting or confusing judgments or interpretations of California law if California were divided between two circuits. We were concerned also that a split of California would tend to polarize the northern and southern parts of the State. Parenthetically, may I say that nothing seems to have united southern and northern California more in recent times than the Commission's recommendation and this pending legislation. The two parts of the State of California are quite different in many ways, yet the Federal Courts Committee of the Los Angeles County Bar Association was also almost unanimously against any division of California, as we, of course, were.

In a moment I would appreciate the opportunity to deal with some of the numbers as to filings and numbers of judges and consider with you what we deem to be feasible alternatives to severing California.

But first, we of the San Francisco Bar Association would like to pose what seemed to us to be some of the basic questions and then go on to suggest some tentative answers.

The first question we would like to raise, Mr. Chairman, is: Does the proposed realignment best promote a desired regionalism? Our second question would be: Does the proposed realignment furnish a basis upon which to build in the next 25 years or even the next 10 or 15 years?

The third question: Is it worthwhile to sever California in order not to exceed the number of nine judges?

Now, Mr. Chairman, I would like to speak first as to the first question. All of us want to pay more than lipservice to regionalism. The question that troubles me is how can regionalism be served by cutting

California and by putting one-half of it in the twelfth circuit and the other half in a new ninth circuit. While the analogy is not exact, Senator Cranston does not represent one-half of California, and Senator Tunney does not represent the other; they both represent all of California.

The Federal circuit courts have a different role of course, but isn't there some parallel? We have asked ourselves what is meant by regionalism or federalism, particularly with respect to the Federal circuit courts. I suppose that regionalism connotes drawing upon the diverse elements from several States, not only to avoid provincialism, but also to gain insight and strength. To what end? We submit so that the Federal circuit court can serve as a beacon and a unifying factor, so that all the Federal courts can strengthen all the States of the Union. Doubtelessly, Mr. Chairman, others can articulate better the moving spirit behind regionalism and its aim. It seems to us there are two concepts, drawing strength from the various States and then unifying and strengthening them all together.

What we hope to do is to focus this subcommittee on what seems to us should be of paramount concern, and we of the San Francisco Bar Association cannot see that regionalism is best served by severing California. The Federal Government would be a devisive, not a unifying factor, and all in the name of judicial efficiency.

Now, to turn, Mr. Chairman, to our proposed answer to the second question. The question differently stated is will the proposed realignment, in the words of the Commission's report, "provide a firm base on which to build more enduring reforms?" We believe we can all agree that the solution should be a long range solution. Yet, regretfully, we cannot see that the proposed grouping of the twelfth circuit would last even for 5, let alone 25 years, if the Commission's criteria leading to the spit of California are to continue to apply; that is, the desirability of nine judges and so many filings per judge. Already the figures for fiscal year 1974 render the twelfth circuit too large to meet the criteria for the optimum of judges and filings. Based upon figures secured from Mr. Luck, our circuit executive, I calculated a figure of 1,552 filings, and 172 filings per judge, for a nine-judge court for the proposed twelfth circuit. Now, this is an immaterial difference of 1 from the figure of 171 filings per judge which I understand Judge Duniway presented a couple of days ago.

But the important thing to us is that the filings have increased in the proposed twelfth circuit from 1,302 in fiscal year 1973—I refer to the Commission's report at page 13—to 1,538—that is Judge Duniway's figure—to 1,552—that is my calculation. I believe, Mr. Westphal, you earlier this morning referred to a figure of 1,545. But the difference in those seems to me to be immaterial.

This is an increase of somewhere between 236 and 250 filings during the 1 year and boosts the present judge filings from 145 filings per judge—I refer again to the report of the commission at page 14—to 171 or 172 filings per judge.

Now, this increase, it seems to us, illustrates that the use of statistics to construct a position at any given point in time will rest on shifting sands, and this is illustrated, we believe, by how Judge Duniway has had to shift his position and his emphasis just a little bit from the time that he filed a statement with the Commission to the time that he filed his statement with this subcommittee just 2 days ago.

Now, we of the San Francisco Bar, Mr. Chairman, and lawyers throughout the ninth circuit have the highest respect for Judge Duniway, and I am referring to this merely to indicate that to us even these figures that are taken at any point in time must be viewed as relative figures. Now, in the statement that Judge Duniway filed with the Commission—I refer to page 14 of that statement, Mr. Chairman—Judge Duniway was arguing against the proposition of California alone becoming a separate circuit with nine judges, and he said, "As will at once be apparent, the single most important figure is 1,550 cases from California. If California alone became a separate circuit with nine judges, there would be 172 filings per judgeship, a figure far too large, in my opinion."

Yet, when Judge Duniway is confronted with the figure of 171 filings or 172 filings per judge for the proposed new twelfth circuit, according to the fiscal year 1974 figures, he is obliged to change emphasis somewhat, and I now refer to page 15 of the statement that he filed with the subcommittee just a couple of days ago: "Nine judges in the new ninth would face 129 filings per judge. Nine judges in the new twelfth would face 171 filings per judge. The 129 is a reasonable number, in my opinion. The 171 is high, but much better than the 207 we faced in fiscal 1974 or than the 192 that a circuit of California alone would face. In the proposed new twelfth, the judges would be in a reasonably compact circuit geographically and could function much better as a unit than we now can."

Mr. WESTPHAL. Mr. Petrie, if I may interrupt at this point.

Mr. PETRIE. Yes.

Mr. WESTPHAL. You were not here on Tuesday when Judge Duniway testified, and I think you should know that in subsequent testimony, with reference to that particular language on page 15 which you have read, he conceded yesterday that 171 per judge was higher than he would like to see and that that figure could be reduced by adding a 10th or 11th judge, for example, to get it closer to the figure of 129 which he feels is a very manageable figure. I think the comparison you make is a valid one, but Judge Duniway's subsequent oral explanation should be taken into consideration.

Mr. PETRIE. I very much appreciate, Mr. Westphal, your pointing that out and bringing me up-to-date. So that, if I understood what you say, Judge Duniway, in his oral testimony, was willing to accept a 10- or 11-judge court?

Mr. WESTPHAL. He said he thought that it could start out with nine judges and we could see if it increases in efficiency. The nonscatteration of judges could help them to keep up with a caseload as high as 171. He thought that that new circuit should have an opportunity, if created, to try that before they would come to the Congress and ask for a 10th or 11th judge.

Mr. PETRIE. We feel this increase, just in the one fiscal year, is an indication that the caseload in the proposed twelfth circuit probably would continue to grow, especially from southern California and Arizona, so that nine judges very soon will not be enough to handle that caseload. Let us grant that nine is the optimal number, furnishing enough diversity and yet still being cohesive enough. Still, we note that many notable courts have more than nine judges; the World Court, the Tax Court, the English Court of Appeal, the English criminal Court of Appeal. With that consideration, we have suggested that

more judges be added right away to the present ninth circuit, and that Judge Merrill's vacancy be promptly filled. We have suggested, as I believe you are aware, in our report, that it would be useful to secure from the Administrative Office of the U.S. Courts an analysis of the kinds of cases that are going up to the ninth circuit from the various districts, information that we don't yet have but which we are told is readily available in the computer bank. This might assist your subcommittee in determining the best grouping or a realignment of the circuit. It might not add much, but the information seems to be readily at hand. Meanwhile, you would have an opportunity to see how well a court with 15 or 18 more circuit judges might work.

Now, the third question that we posed: Would it be worth severing California to start out with courts of nine judges or less? We believe the answer to that is found in this brief discussion and the answers that we have suggested to the two prior questions. We believe that there is a potential conflict if you set two circuits over the two halves of California; that there will be contradictory judgments and orders; that there will be conflicting interpretations of State law; and that there will also be conflicting interpretations of Federal law. I understand that other witnesses who have preceded me have tried to address themselves both to the possibility of conflicting interpretations of Federal law, as it pervades many areas now and many areas to come, and State law.

We, at the San Francisco Bar Association, considered as carefully as we could the staff report assembled under Professor Levin's able direction, and the idea that many devices that presently exist and other devices that could be constructed might obviate these conflicts. But we are dubious that they would work well enough. What these devices seem to involve is preventing litigants from proceeding, or moving them from Los Angeles or San Francisco to Sacramento, to obviate these conflicts, and the utilization of the devices would in themselves involve judicial time and judicial manpower. So we have our misgivings about the avoidance of conflicts.

Now, Mr. Chairman, I would like to talk briefly about various alternatives that seem to us to be feasible alternatives to the pending legislation. In our report, and I believe you and Mr. Westphal are generally familiar with the report of our Special Committee that has been adopted by the Board of Directors, we set forth five different plans, including the plan of California as a single State circuit. We contend that California would be diverse enough by itself.

These prepared remarks, Mr. Chairman, are not going to last much longer, and then I would welcome any questions that you and Mr. Westphal might have. They are not really prepared remarks, Mr. Chairman. As these hearings have proceeded, we have been trying to revise our remarks so that we might be able to make some fresh contribution to these hearings, although one always despairs of being able to really do that with the learned witnesses that precede one.

As I say, one of our plans is for California as a single State circuit, but we recognize that two States are better than one and three States are better than two. It is a matter of balancing the factor. Our thought was that if it was extremely important to keep down the number of filings per judge and the number of judges on the court, then very serious consideration should be given to California as a one-State circuit. If you're content to give a little leeway, we would then like to

talk about first, perhaps adding Hawaii and Guam to California as a circuit. Immediately you double the number of Senators, although as our report indicates, we believe that the two California Senators alone would have to be responsive to the diverse interests of the State, and we would hope that out of that would come a diverse judiciary, even for a one-State circuit. But we grant that four Senators would be better than two in that regard, perhaps, and that Hawaii and Guam would add some diversity—though that State and Guam would, of course, add the fewest filings to the new circuit. Nevada would add somewhat more filings. I have figures here. Perhaps you also, Mr. Westphal, have added them up. I come out, for a circuit with California, Hawaii, and Guam, based on the figures for fiscal year 1974, with 1,832 filings, and, with an 11-judge circuit, that is 167 filings per judge. It seems to us to be in the ball park. If you add Nevada, instead of Hawaii and Guam, and join Hawaii and Guam to a northwestern circuit, you would add a few more filings. A figure of 1,832 would give you about 300 more filings, a little less, than the filings for the new twelfth circuit based on the fiscal year 1974 figures. Arizona in place of Nevada, of course, would mean more filings.

Now, if this number of filings is too much for a circuit, Mr. Chairman, then we at the San Francisco Bar Association would be bound to ask this subcommittee if you would be turning next to the second circuit, because that is roughly its number of filings. I was struck with what you said this morning, Mr. Westphal, about the second circuit having more senior judges and other assistance, but I still think the situations are roughly comparable. So, if that number of filings that we propose for a new circuit is too much, then the next step would seem to be to form a circuit out of the Southern District of New York and Vermont or Connecticut, with added burdens for the Supreme Court.

So the question that we see arising here concerns the future. Is the future solution going to be to fragment circuits or to add judges to present circuits? As the Commission is now studying the possibility of structural revision and procedural reform, we hope that it will look at the appendix of suggestions that we have attached to our report—some 18 suggestions in number—which are worthy of consideration, we feel, and, if adopted, could enable a larger court to work well. For example, we suggest circuit solicitors on both sides, circuit appellate lawyers for the Government and public defenders at the appellate level. We wonder, Mr. Chairman, if it might not be a good idea for the circuit court to be able to award attorney's fees to winning parties on appeal. We have the feeling that in many instances today losing parties appeal, especially money judgments, so that they need not pay out on the judgments for a while.

Now, there are some things that we would like to call to your attention very briefly about these fiscal year 1974 figures. I have secured some of these from our circuit executive. The ninth circuit, Mr. Chairman, seems to be holding as many, if not more hearings than are being held around all the circuits. We offer this to indicate that we don't think that circuit has to be realigned tomorrow. I certainly want to argue my cases orally, and I believe most lawyers do, but according to these figures that Mr. Luke has given me, the ninth circuit in fiscal 1974 held 16.8 percent of all hearings. Now, that is to be compared to, I think, its percentage of the cases in the country that are terminated

after hearings or after submission, and that is only 14 percent. So the ninth circuit seems to be doing a little better than the national average on that.

There is one other recent statistic I would like to call to your attention. It is a calendar year statistic. In the first 8 months of this calendar year, the ninth circuit has made a net gain on its backlog of pending cases of 245. The filings for the first 8 calendar months of this year were just a little less, I believe 23 less, than the first 8 months of calendar year 1973. That is a little updating of the 5-month calendar figures that we had in our report.

Mr. WESTPHAL. Mr. Petrie, on that statistic, if you're considering the first 8 months of the calendar year, you have in operation two phenomena. That 8 months includes June, July, and August, and a lot of attorneys in the ninth circuit have some kind of vacation. Perhaps they don't file as many cases in July and August as in other months. There is also the fact that in May, June, and July the court has reached the end of the period of time when it normally hears oral arguments, and the judges, then, are turning out opinions that accummulate in various sessions. So you have a larger number of terminations during that particular period of time.

Mr. PETRIE. Well, I appreciate that, but we are comparing the first 8 calendar months of 1974 with the first 8 calendar months of 1973 when the same factors should seem to be at work.

Now, I can't draw any great hope from this that there is a real leveling off and that a plateau has been reached, but I think it may give a little less sense of urgency to your considerations, and we thought it was a significant statistic. I expect that the caseload is going to continue to increase more gradually as a federal consumer protection agency bill, and other legislation, is passed.

We would like to call your attention, if you haven't already noted it, to a study of the National Center for State Courts on the California Courts of Appeal. Perhaps you have already noted it. It seems to us that it contains some suggestions that are worthy of consideration here and before the Hruska Commission.

So the Bar Association of San Francisco, Mr. Chairman, respectfully urges this subcommittee not to sever California, diluting regionalism and raising problems. We believe that neat, nine, judge compartments are perhaps like the will-of-the-wisp. Sections of the country embracing large caseloads call for somewhat larger courts. All courts, but especially the larger ones, can be aided greatly by structural innovation, the subject of the Commission's second study.

We, the San Francisco Bar Association, Mr. Chairman, thank you for listening to these remarks, and I would be very pleased to try to answer any questions that you, Mr. Chairman, or Mr. Westphal might have.

Senator BURDICK. Thank you very much for your contribution. It has been very helpful.

In your presentation you talk about regionalism. How do you square regionalism with your recommended plan of keeping California alone in the circuit?

Mr. PETRIE. To us it is not the happiest solution, Mr. Chairman.

Senator BURDICK. How can you possibly——

Mr. PETRIE. We feel it doesn't dilute regionalism too much for this reason: the diversity of California. I mean, that is what we must come back to. One of the goals of regionalism that we apprehend is to draw diverse elements from various States of the Union.

Senator BURDICK. Texas could make the same argument. They are regional. They have everything from cattle to oil.

Mr. PETRIE. In California, Mr. Chairman, we would respond by claiming to be more regional and more diverse than Texas. That is all I can say. We have the cities of Los Angeles and San Francisco, as well as the farming country and the oil. It is a matter of degree, Mr. Chairman, I grant you, but that is the response that we would make. We do not prefer California as a one State circuit, but we say that that is a feasible alternative and a better alternative than splitting California.

Senator BURDICK. You have in your report a list of possible reforms of structure and procedure in the Federal appellate system. I would especially like to refer to item nine: Eliminate diversity of jurisdiction or modify it, for example, by raising the monetary level.

Well, I happen to be the author of a bill that will do just that. In fact, I have been an author of such a bill for the past 3 years, and you know, counsel, I haven't received encouragement from a single State bar association, including California's.

Mr. PETRIE. We will try to rectify that, Mr. Chairman.

Senator BURDICK. Well, you see, this is a long way off.

Mr. PETRIE. Well, it may or may not be, Mr. Chairman. But we hope that you're closer than you think to that.

Senator BURDICK. You haven't read my mail. The bar starts writing letters and that has quite an effect upon this Congress. You've come here with a recommendation from the bar association; do you have a recommendation on diversity?

Mr. PETRIE. Not a specific one, Mr. Chairman, because our special committee was formed mainly to study the report of the Commission, and that is all the authority that we have. But when I get back to San Francisco I will relay your remarks, and I will talk to the president of the bar association.

Senator BURDICK. Is Frederick Furth a member of your bar association?

Mr. PETRIE. He is a member of our bar association and a member of our special committee.

Senator BURDICK. He testified violently before this committee.

Mr. PETRIE. Well, he signed the report, Mr. Chairman.

Senator BURDICK. Well, you say they aren't following the recommendations, though.

No PETRIE. No, the appendix, this is a list of suggested structural reforms or innovations.

Senator BURDICK. You mentioned the conflicts that might arise in the State of California if we had two circuits. Judge Duniway testified here that in his 13 years on the bench, he has run across no problems like that at all, although you have four district courts in the State of California.

Mr. PETRIE. As I read his prepared remarks, he was talking about two things. One, he was talking about the three judge court situation, which involves the invalidity of a statute, and two, he was talking about conflicting interpretations of California law.

Now, as to the first point, Mr. Chairman, the invalidity situation, that does not seem to us to be the main problem. The main problem, or the potential for the most conflict, seems to us to inhere in the area of interpreting Federal laws as they apply to State or Federal constitutional requirements, as they apply to practices such as prison practices, questions in the environmental impact area, for example, or in the area of consumer protection, or in the welfare area or other areas that Judge Duniway was *not* talking about.

Senator BURDICK. You can imagine a lot of things. I can imagine all sorts of things, but are these more imaginary than real?

Mr. PETRIE. We have already had concrete examples, Mr. Chairman, of differing interpretations. For example, in the environmental impact area we have conflicts as to what constitutes an adequate environmental impact statement. There have been differing interpretations.

Senator BURDICK. This is rather a new law and when we finally get it shaped down by decisions, you will have to go to the Supreme Court on intercircuit disputes, that is true. But these things get settled.

Mr. PETRIE. They get settled, Mr. Chairman, but new laws seem to come along and new cases seem to raise new issues, so it seems to be a real problem to us.

Senator BURDICK. We are trying to help you. We are trying to get no-fault insurance. How do you stand on that?

Mr. PETRIE. I am all in favor of it, Mr. Chairman, because I don't handle personal injury matters.

I am also, Mr. Chairman, if I may add, personally in favor of reducing diversity jurisdiction, if not eliminating it. Yet I recognize that diversity jurisdiction constitutes only about 10 percent of the Federal caseload, more or less.

Senator BURDICK. Well, 10 percent is helpful.

Mr. PETRIE. It would be helpful.

Mr. WESTPHAL. It represents 3 percent of the cases tried by a jury.

Mr. PETRIE. That is interesting.

Senator BURDICK. So it is more than 10 percent in a way.

I have some floor business and I may have to leave before your interrogation ends. I hope not, but if I do, you will understand?

Mr. PETRIE. I will, Mr. Chairman.

Senator BURDICK. In which case we will adjourn until 2 o'clock this afternoon, when we will hear the remaining witness.

You may proceed.

Mr. WESTPHAL. Mr. Petrie, let me say this at the outset and reaffirm what I said in my letter. I want to compliment your committee and the San Francisco Bar in presenting to both the Hruska Commission and to this subcommittee an excellent statement. Not that we don't like what the Hruska Commission has recommended, but you did offer some analysis to the problem and some alternatives that could be placed alongside what the Hruska Commission has recommended.

Now, there are just a few points that I would like to explore. In your committee, and in your bar association's consideration of this problem, was their any discussion about this extensive use of district court judges as a third member of an appellate panel?

Mr. PETRIE. Mr. Westphal, not extensive discussion, but there was some discussion.

Mr. WESTPHAL. What generally is the attitude of the bar that you represent? Do they like that practice or don't they? Do they think it is one which should continue or don't they?

Mr. PETRIE. We do not like it, Mr. Westphal.

Mr. WESTPHAL. There has been some indication that, while the ninth circuit is reasonably current on criminal cases, they are 1½ to 2 years behind on civil appeals. What is the attitude of your bar group on that facet of this problem?

Mr. PETRIE. Well, we feel that that is a very unfortunate situation. Any delay in the trial courts, or in the appellate courts, of that magnitude sits very hard with the litigants. Cases should be tried and disposed of and should be appealed and disposed of faster than that. But I do concur with what Judge Kilkenny said earlier, if the vacancies had been filled faster and if the requests for additional judgeships had been met in the ninth circuit, the situation in the view of the bar would not be nearly as bad as it is now.

Mr. WESTPHAL. As you look back at the history of the country this matter of the speed with which vacancies are filled, is very much like the problems we've faced regarding declarations of war. I don't know how that time problem can be solved within the limits of the Constitution. I don't know how you can fill vacancies any faster when the process specified in the Constitution seems to entail as much time as it does.

Mr. PETRIE. We appreciate that it takes significant time and should take significant time.

Senator BURDICK. As the process of selecting a new judge goes on, your senior judge is there; in most cases, he is still operating.

Mr. PETRIE. Yes, but if the new judge were there, there would be two judges, Mr. Chairman.

Senator BURDICK. That is right, but the fact that you are waiting for an appointment doesn't mean you don't have a single judge in the meantime.

Mr. WESTPHAL. Then there will be an interval between the creation of the judgeship and the time it is filled by appointment. Again, this is in the same catagory as declarations of war.

Mr. PETRIE. Pardon me. You know, we in San Francisco believe that there must be senior judges or inactive judges around the country who can be brought into the ninth circuit, at least more of them than have been, on a kind of crash program to whittle away at the backlog.

Mr. WESTPHAL. The subcommittee has studied every one of the circuits in the country. We find that every circuit, in order to meet its increasing caseload is making virtually a full use of its own judges, both circuit and district. This flexibility that is extended into the system, by virtue of the assignment powers of the chief judges and the Chief Justice, is being utilized, and there is very little unused and untapped judge power going to waste. At least that is what we have found in our studies as we have reviewed not only the circuits but the districts.

Mr. PETRIE. You, of course, have a much broader perspective than we have.

Mr. WESTPHAL. We have had testimony concerning the experiences of a 15-man court which has also employed, at various times, visiting judges and assigned judges, giving it the equivalent of 19, 20, or 21 judges, in order to handle a caseload even larger than that of the ninth circuit. They devised a system which has in effect resulted in the elimination of oral argument in about 50 percent of their cases. Is that a

trend that you and your committee or bar group would like to see continue and spread from the fifth circuit into other circuits?

Mr. PETRIE. No, we don't welcome that in the sense that we believe in oral argument, but I do appreciate Judge Kilkenny's point that there are many cases that go to the circuit courts of appeal that can be decided wisely and correctly without oral argument.

Mr. WESTPHAL. Well, as a trial lawyer, I worked in the appellate courts for 20 years and I agree with you, but those are always the other lawyers' cases.

Mr. PETRIE. I certainly also want to orally argue my own cases, Mr. Westphal.

Mr. WESTPHAL. Mr. Petrie, I am curious as to what your reaction is as to the Kilkenny proposal as presented to the subcommittee this morning.

Mr. PETRIE. Well, we would like you to give it a chance to see how it works, and we think that that chance would be lost if you realigned the circuits. We saw enough promise in it that we were able to endorse it in our report. We did lose one of the nine-man majority. Mr. Mitchell felt that he could not endorse Judge Kilkenny's proposal. I have not discussed it with him at any length. We think, all in all, that it is a feasible proposal and that it offers a way to make larger circuits with more judges work.

Mr. WESTPHAL. What do you perceive to be the essential difference between the Kilkenny proposal and the Hruska Commission proposal?

Mr. PETRIE. Intracircuit conflicts rather than intercircuit conflicts, trying to resolve those conflicts at the circuit court level instead of further burdening the Supreme Court.

Mr. WESTPHAL. In other words, you are most concerned about the Hruska proposal focusing upon this problem of how you resolve conflicts of opinion between the new ninth circuit and the new twelfth circuit. You perceive that the Kilkenny proposal for division keeps substantially the same geographical realignment, but also keeps your conflict-resolving power out on the west coast instead of a block and a half down the street here in Washington. Isn't that what the problem is?

Mr. PETRIE. That is basically what I commented on. I wanted to refrain from repeating what I commented on earlier, but our principal objection to the recommendation of the commission is that it would entail a division of California—that it is divisive. Maybe this is imponderable, but we are concerned about it. We think that it would lead to a north-south polarization in California. There is that problem in addition to the mechanics of the thing.

Mr. WESTPHAL. Doesn't the Kilkenny proposal divide California by putting the northern and eastern districts in the northern division and the southern and central districts in the southern division?

Mr. PETRIE. Yes, but we don't think that is going to be nearly as divisive, because there will still be one circuit covering the State and other States.

Mr. WESTPHAL. Well, that gets down to the conflict resolving mechanism. In other words, divisiveness, splitting, polarization, whatever we want to call it, is a problem because of what one finally comes up with as a conflict resolving mechanism. It doesn't have anything to do with geographical realignment or nomenclature or any-

thing of that kind. It is solely a matter of what is to be the conflict resolving mechanism.

Mr. PETRIE. Well, with all respect, Mr. Westphal, that analysis should lead this subcommittee to a realignment proposal that does not sever California. You are asking me to compare Judge Kilkenny's proposal to the basic proposal of the Hruska commission.

Mr. WESTPHAL. I understand what you are saying, but what I am suggesting to you is that I don't think the word is sever. What you are suggesting to us is that we should not come up with a proposal which would allow conflicts of opinion between your four district courts to result in conflicts of opinion at the circuit level which cannot be readily resolved in one fashion or another, I assume, preferably without the insertion of a fourth-tier court and without the need of relying on review here in Washington every time you get a case which you feel presents a conflict. As we all know, the Supreme Court of the United States doesn't always agree with the lawyers when they analyze a situation and proceed. Isn't that basically what it boils down to?

Mr. PETRIE. Well, it is one way to look at it, Mr. Westphal.

Mr. WESTPHAL. Well, yesterday Jordon Dreifus agreed that that final analysis was the real concern, and suggested that we not get carried away by names and some of these other things. He suggested that we should concentrate on the central function of the judicial system at the appellate level, which is that of reviewing actions taken in the trial courts. If that review results in conflicts, whether intercircuit or intracircuit, there must be a mechanism for readily and speedily resolving those conflicts. Isn't that the real problem we face as we try to develop structures that can employ more than 9 judges or no more than 13, 15, 18, 19, or 20, in order to handle what we all recognize as a vast caseload?

Mr. PETRIE. Certainly we should provide for the resolution of conflicts. It is a hard choice, I agree, but the real question is, how are you going to do it?

Mr. WESTPHAL. Well, that has to be done in some fashion. That conflict has to be resolved, whether it is intracircuit or intercircuit.

Just a couple of things here to kind of clean up the left side of my yellow pad.

On page 3 of your report, as well as page 6, there is reference to the 5-month figures from calendar year 1974, which we had talked about in relation to the 8-month figures earlier. I would just like to point out, for the sake of clarifying the record, that the first 5 months which you referred to on page 3 and on page 6 were in fact the last 6 months of fiscal 1974, and the Administrative Office figures that the caseload in that fiscal year in fact increased by 16 percent.

Mr. PETRIE. I am aware of that.

I wonder if I might give you the figures, Mr. Westphal, for these 8 calendar months of 1974.

Mr. WESTPHAL. These are the figures furnished you by Mr. Luck?

Mr. PETRIE. Yes.

Judge KILKENNY. Mr. Westphal, I am going to have to catch my plane. Would you mind if I left now?

Mr. WESTPHAL. Not at all, Judge. Thank you for coming.

Mr. PETRIE. In the first 8 calendar months of 1974 there were 1,723 filings as against 1,746 filings in the first 8 calendar months of 1973, so that is a little less, 23 less. There were 1,765 terminations in the first

8 calendar months of 1974 as against 1,543 or 222 more terminations in the first 8 calendar months in 1974, and that gave me the net gain on the backlog of 245. I thought, if you didn't get them from any other source, you might like to get them from me.

Also, according to the fiscal year 1974 figures, California is now contributing not quite two-thirds of the filings, but 64.2 percent of the filings in the ninth circuit.

Mr. WESTPHAL. Then one last thing, and that is that I couldn't quite let go your remark that the report of the Hruska Commission has done more to unify the State of California than anything in recent years. The reason I can't let that go by is that it reminds me of my experience in the Marine Corps some 30 years ago. On the weekends when we hit a liberty port we could go into a bar, and, if there were two marines and only two marines standing alongside that bar, they could get into a pretty good argument about the merits of the Marine Corps or of their respective outfits, but never let a soldier or sailor come along and agree with one or the other because then the two marines would jump on the soldier or sailor and all hell would break loose. This is reasonably analogous to the way in which you are suggesting the organized bar is reacting in California, isn't it?

Mr. PETRIE. Well, it is somewhat analogous, but——

Mr. WESTPHAL. You also spoke of the diversity within the State of California, and I think we all realize it is based in part upon the diversity between the north and south. Historically that has been true of California, politically, economically, with respect to water and oil.

I think your committee has done an excellent job and has recognized the seriousness of the problem. You have done your best to offer an analysis of it and to offer alternatives, and I think that fact demonstrates the difficulty of the ultimate choice Congress will have to make; do you agree with that?

Mr. PETRIE. Yes; we think it is a hard choice.

Mr. WESTPHAL. But no matter how hard the choice, there is a real, urgent need for additional judge power to be applied to the caseload in the ninth circuit and that need must be met, as you suggest, in a fashion which meets three criteria. No. 1, we must realign on a basis that will promote the desired regionalism in the Federal court; No. 2, we must come up with a base upon which we can build a system of Federal appellate review that might last for some 15 or 25 years; and No. 3, our decision should be one that is not locked in by any concept that there is some magic in the number nine. Is that a fair summary?

Mr. PETRIE. Yes; those seem to us to be the principal considerations, Mr. Westphal. If we can offer any further input to the subcommittee's consideration, I hope we will be able to do that. Can we do so by directing a letter to you?

Mr. WESTPHAL. I think if there are any points we have not covered you can direct that letter to the chairman of the committee, with perhaps a copy to me. We usually make it known to all members of the subcommittee.

I want to thank you, Mr. Petrie.

Mr. Chairman, I think, then, we are ready to stand in adjournment until 2 o'clock.

Mr. PETRIE. We of the San Francisco Bar Association appreciate very much this opportunity to exchange views with you, Mr. Westphal, Mr. Chairman.

[Whereupon, at 12:35 p.m. the subcommittee recessed to reconvene at 2 p.m. the same day.]

AFTERNOON SESSION

Senator BURDICK. Our next witness will be Mr. Cleary S. Cone, past president of the Washington State Bar Association.

Welcome to the committee, Mr. Cone.

STATEMENT OF CLEARY S. CONE, PAST PRESIDENT, WASHINGTON STATE BAR ASSOCIATION, ELLENSBURG, WASH.

Mr. CONE. Thank you, Mr. Chairman.

I appreciate very much the opportunity to appear before the subcommittee.

I, as you just stated, am the past president of the Washington State Bar Association, a unified bar association of approximately 6,000 members.

The Washington State Bar Association appeared through a number of witnesses before the Commission at its hearing in Seattle, and we spoke at substantial length at that time with respect to the grave problems stemming from the difficulties of the present ninth circuit.

I would like to make it clear at the outset that we have the greatest respect for the individuals on the Commission. We have the greatest respect for the quality of their deliberations, and we agree wholeheartedly with their basic conclusion, that is that the ninth circuit must be divided and a new circuit must be created, and not on the basis of some sort of a divisioning of an existing and continuing ninth circuit.

I think it would serve no purpose to reiterate the reasons for that position, because the Commission has itself covered that well in its report and had heard broad testimony with respect to it.

The question I think is not whether the circuit should be divided or whether a new circuit should be created, but *how* the circuit should be divided and *what kind* of a new circuit should be created.

We recognize, Mr. Chairman, that there isn't any solution to this problem, no matter how Solomon-like it might be, that would be satisfactory to everyone. I think this has elements similar to the budget battle connected with it. Everyone is anxious to see something done but not to them.

At the same time there is a different aspect here. That aspect is that the objections that you are hearing are coming from bar associations. They are objections coming from professionals, and I think, Mr. Chairman, we must recognize these objections are very highly principled objections, based not simply upon provincialism or upon some effort to maintain a status quo with respect to stature, but are highly principled objections based upon serious concerns about the effects of the method of division of the circuit that has been recommended by the Commission.

I think that because of the obvious quality of those objections they should not be taken lightly, and I don't mean to suggest they are being taken lightly. But I think that the gravity of the problem is such that arithmetical niceties are a secondary consideration and the best solution is that which best accommodates the conflicting interests of the jurisdictions which will be affected by division of ninth circuit.

The Commission has concluded that no circuit should consist of less than three jurisdictions, and that under no circumstances should California comprise an entire circuit. The Commission, unfortunately then went on, from a preponderance of filings in California, to conclude that it was necessary to divide California between two circuits, and really all else, I think, in the Commission's report flowed from that conclusion. Because of the number of filings in California, you had to divide it: Arizona and Nevada being added to the southern portion of California was just incidental, and, similarly, all the rest of the jurisdictions fell into line because of that basic conclusion.

With respect to the Commission's conclusion that California should be divided, the subcommittee, I am sure has hard substantial objections. I do want to add the objections of the State of Washington to that list. I think that while the State Bar of California, in connection with their objections to the Commission's report, and some of the local bar associations of California, in varying degrees, suggest that the circuit ought to be retained as it is, or that some try should be given to this divisioning process, I think it is fair to say, and I don't mean to speak for them, but I think it is fair to say their objection is basically to the division of California between two circuits. There are obviously unsatisfactory aspects to this divisioning with respect to a chief judge and two assistant chief judges, but they regard anything as being preferable to a division of the State between two circuits.

Washington's State Bar Association, and the State Bar Associations of Idaho and Alaska have for some time strongly favored the creation of a new circuit which would ~~not include any~~ part of California. The Oregon State Bar Association and the Montana State Bar Association have both stated they would have no objection at all to inclusion in such a circuit. There is a rather overwhelming preponderance of objection from the professionals, and from the bar associations, which I think fairly can be said to reflect concerns not merely from the standpoint of their interests but from the standpoint of their clients, in overwhelming opposition to the Commission's report.

The Washington State Bar has consistently favored the creation of a new circuit which would consist of the five Northwestern States of Alaska, Washington, Oregon, Nevada, and Montana, together with such other jurisdictions as would make the division more feasible. We now specifically recommend to the subcommittee that a new circuit be created consisting of those five Northwestern States together with Nevada and Guam. Mr. Chairman, a very good case can also be made for substituting Hawaii for Nevada. The creation of such a new circuit would not achieve mathematical parity.

It would, however, answer, first, the problem and the serious objections of California to a splitting of that State. In addition, the retention in the present ninth circuit of California, along with the two other jurisdictions of Arizona and Hawaii would answer the objection of the Commission that no circuit should consist of less than three jurisdictions. The representatives of the California bar have stated their objections to the splitting of the State, and representatives from Arizona and Hawaii would be more competent than I to comment with respect to their inclusion in the three-State circuit with California but I think it very unlikely there would be serious objection to that inclusion. I have no way of knowing, with respect to that three-State

circuit—which would be handling a caseload roughly three times the size of the new circuit that we recommend be created—I have no idea what the attitude of that three-State circuit might be with respect to experimenting with some sort of a divisioning process, although one would hope it would have a more solid foundation than some of the suggestions I have heard with respect to it.

I must, I think, obviously, Mr. Chairman, address myself to the Commission's attitude toward the creation of a northwest circuit. The proposal that I am making has, I think, clearly the advantages of meeting the desires of the great majority of the jurisdictions involved, particularly it is consistent with the overriding concern of the State of California and its various bar associations that it not be divided.

The Commission, as you are of course aware, recommended against a creation of a northwest circuit at this time, based upon the fact that it did not have a sufficient caseload. I would point out that the circuit that we are recommending at this time consist of two additional jurisdictions beyond that which was considered by the Commission in its report. I point out further that the Commission, in its report, was referring to the creation of a northwest circuit that had a caseload of 17 percent of the circuit and had, based upon the last statistics available to them at that time—the 1973 fiscal year statistics—only 382 filings. I think their conclusion about the creation of a circuit with only 382 filings was quite understandable. They did, however, in answer to the vast amount of testimony they had heard with respect to developing activity, indicate that, should the projections be borne out, a separate circuit for the four or five Northwestern States might become appropriate. I am puzzled how one gets only four Northwestern States, but I am assuming that that was just not a matter of significance.

Now, what we are talking about is not four States or five States but six States plus the territory of Guam. I must point out, Mr. Chairman, that the filings in fiscal 1974 in those seven jursidictions were not the 382 that were considered by the Commission when recommending negatively on such a circuit, but filings which amounted to 639. Incidentally, when I refer to the figure 382, that is the 1973 statistic which carried into effect the change in statistical method to include administrative appeals and original proceedings. In 1961 the entire ninth circuit had only 443 filings. In fiscal 1974, the proposed new northwestern circuit had 639 and, even after taking into account the adjustment for statistical changes, the filings in this new circuit would exceed by about 40 percent the filings in the entire ninth circuit only 13 years ago when it functioned as a seven-judge circuit court.

In addition, Mr. Chairman, the lawyer population, the population in general and the economic activity of the jurisdictions that would comprise the new circuit are growing much, much faster than the national average. There is every reason to anticipate that not only will there be an increase in filings, but that there will also be a sharply accelerated rate of increase in filings.

I think it is also significant to note that, within the framework of that increase, it should be borne in mind that the jurisdictions involved in such a seven-jurisdiction new circuit are uniquely involved in what I guess one could call the environmental battle, the strife between development of energy, increased economic activity, and a desire to maintain a particular form of life. And that desire to maintain a life-

style, to maintain the ecological balances, has certainly been reinforced by Federal legislation. I think it is inevitable that this is going to provide the Federal court system in such a new circuit with a substantial number of intricate and difficult cases.

It is, I think, not an accident that between 1972 and 1974, there was a 40.7 percent increase in filings in this proposed new circuit, as compared with an increase in filings in the three States which would be left in the ninth circuit under our proposal of only 13.7 percent. I have made some inquiries to try to determine whether there was some sort of statistical anomaly involved there. I have not been able to elicit any response that would indicate that there is any anomaly. It is simply that the filings are growing much faster in those jurisdictions.

We, therefore, must respectfully disagree with the recommendation of the Commission and with its conclusion. The creation of a new northwest circuit, with the addition of the two jurisdictions I have indicated, would, in our judgment, at this point, have an ample workload to support at least a five-judge appellate circuit.

I must say that one of the things that struck me, Mr. Chairman, as I reviewed this matter and went through a vast volume of material, is the fact that, while the Commission's basic undertaking here is to try to arrive at a solution which will be a long-range solution, the statistical matters that appear and what I know of the area that is involved are simply inconsistent with what they have recommended being a long-range solution. There has been a good deal of talk in the course of the presentation, and in the questions, about an ideal ninth circuit, or a circuit that ideally would not exceed nine judges, about an effort being made to try to retain some degree of collegiality in connection with this. I think it is very significant that, if one looks at the Commission's proposal, looks at the increase in filings, considers the developments that are going on now in connection with products liability, environmental protection, consumer protection, and more refined concepts of due process, one inevitably has to come to the conclusion that before any legislation is passed to remedy this problem—even if it were passed precisely as the Commission has recommended—neither of those circuits would be able to function as collegial courts. We are starting out with a number of filings, with normal increases, that will provide a caseload that will be too heavy for a nine-judge court.

Now, my proposal on behalf of the Washington State Bar Association for creation of the seven-jurisdiction circuit allows for a degree of expansion, starting with a five-judge circuit court, up to that optimum of nine. I think it is a proposal which can stand on its own. I think it is a tenable proposal, and I think that, considering the lapse of time that is involved in getting the matter adjusted once a problem becomes a problem, the time to do it is now, before it achieves crisis proportions.

Now, I will anticipate a question. I cannot give you a perfect answer to it. That is part of the Solomon-like problem that the Commission has and that the subcommittee has. The pertinent question, obviously, is that, assuming, as I think you can fairly assume, that the creation of such a circuit as I have suggested—the seven-jurisdiction circuit—is warranted, what does that do for the three-State circuit that is left which would have, based on fiscal 1974, 2,000 filings? How about that? Well, my answer I think has to be the kind of answer I dislike, essenti-

ally a negative type of answer. I think that the subcommittee and the Congress is beaten before it starts, on the concept of trying to create two circuits with a maximum number of nine judges. I just think the statistics and the direction in which things are going makes that impossible. This I guess means either a fragmentation of the circuit into more than two divisions—and I don't like to keep confusing the issues by referring to divisions, but a splitting of the circuit into more segments than two—or it means setting up a northwestern circuit with the two additional jurisdictions and supplementing the other circuit with this divisioning process that has been suggested with refinements as can be brought to it.

But I do feel that the Commission's suggestion will be obsolete before it ever becomes law and ever is implemented, just as the 1968 statistical study became obsolete years before the time covered by it.

I think I have said all I can say about it, Mr. Chairman. I don't believe any purpose could be served by my reading my statement. You have it in front of you.

Senator BURDICK. Thank you very much, Mr. Cone, we will place your prepared statement in the record at the conclusion of your testimony.

Your business comes from—I am talking about the circuit court—is fed by the business in the district courts, and we have been hearing from the district courts in dealing with various procedures that might ease the burden down there. The Administrative Office reveals that the caseload in the district courts for the past 2 years has actually gone down and maintained kind of a plateau for these 2 years. What makes you think there is going to be a rapid increase in the business of the circuit, then?

Mr. COXE. There just apparently has been. If filings in those jurisdictions, if appellate filings have increased 40.7 percent in that 2-year period——

Senator BURDICK. But you haven't yet felt the impact of the plateau having been established in the district courts

Mr. COXE. Well, I don't have the statistics on the number of trials or the number of filings on proceedings in the district court level, so I am not in a position to challenge you or that. I would be most surprised——

Senator BURDICK. This is nationwide. I don't know to what extent your State has experienced this. This is a generalization of the country as a whole.

Mr. COXE. Oh, well, the country as a whole. I found it incredible with respect to the jurisdictions I am talking about.

There is a quickening of activity. There is more population growth in those jurisdictions than is true nationwide. The lawyer growth has an impact. It may seem strange that it does, but the growth in the number of lawyers does have an impact on the amount of litigation that goes on.

The bars in the area that we are talking about are growing at a 10-percent compounded rate, far greater than anywhere else, and the economic growth rate is tremendous. When one considers the commerce between Oregon, Washington, and Alaska and when one considers the impact of the pipeline, it is very significant.

Very recently there was another district judgeship authorized for the western district of Washington. I do know that as late as 1973 the

State of Oregon's district court judges on a trial basis were the most overworked of any in the United States, so I think the nationwide statistics are not applicable to the area.

Senator BURDICK. Well, we'll let this pass for a while.

You say that if we just divide the circuit the way the Commission recommended, we are lost from the start?

Mr. COXE. I think so.

Senator BURDICK. Then you are recommending three circuits?

Mr. COXE. Well, the position that I am specifically authorized on behalf of my bar association to recommend in the creation of the seven-jurisdiction circuit that I have recommended to you. On a purely personal basis, I am concerned in general with where we are headed in the Federal appellate system, and I think it involves a basic expansion of both what are considered to be rights and the ability of people to pursue those rights. This reflects itself in a variety of things that I have just mentioned, environmental protection, consumer protection, more refined concepts of due process. In addition to this, the law schools are crammed with people who want to be lawyers. The number of young people coming into the profession is unprecedented. Furthermore, I think we can say that these young lawyers are coming into the profession with a zeal to litigate, and to litigate on many of the social and environmental issues that legislation is now providing new avenues for litigating.

Senator BURDICK. We understand all that. I understand the problem.

The question is, if we give you your northwest circuit, that will solve your problem for a while, but what about the problem of the California area, which is a real problem?

Mr. COXE. It isn't any more real than ours, Mr. Chairman, because we are suffering from the delay and the inefficiency of that area just as much as anyone else.

Now, with respect to California, I don't know whether—this is a threshold proposition, and I don't feel I want to speak to California. By threshold proposition I mean the concept of taking a State and dividing it between two circuits. The California people who object to that being done see some merit in considering this divisioning thing. I would rather they would speak to that.

I would say, clearly, from the standpoint of the Washington State Bar Association, talking in terms of setting up a divisioning of the entire circuit, we think it is a bad idea. But what is right for that three-State circuit that I am recommending be left, I would much rather have them respond to.

The point I am trying to make with this is that——

Senator BURDICK. The point is you have your problem solved but you have left us with another problem.

Mr. COXE. No, because I think the solution recommended by the Commission, that is taking this circuit and dividing it virtually in two, I don't think that is a solution. I don't think that solves it either for California or for the Northwestern States, because I think that within a matter of 3 or 4 years both of those new circuits would find it impossible to function without an excessive number of judges.

Senator BURDICK. Well, if we don't divide it, the problem will be even worse, won't it?

Mr. COXE. I agree. If you are looking for a personal opinion I guess ultimately we are looking at more than two circuits, covering 30 million people.

Senator BURDICK. Counsel, do you have some questions?

Mr. WESTPHAL. Yes, Mr. Chairman.

Mr. Coxe, your recommendation on behalf of the State Bar of Washington is for the creation of a separate circuit, with the five so-called Northwest States plus Nevada and Guam. You indicated that that circuit could be altered by substituting Hawaii for Nevada, which wouldn't make much difference. Basically your proposal is to have the five Northwest States, plus Nevada and Guam, a six-state and one-territory circuit, so to speak. The figures indicate that that alignment would have had total filings in 1974 of 639 cases. That would mean, then, under your recommendation, that a three-State circuit consisting of California, Arizona and Hawaii would have 2,056 filings. So that that three-State circuit under your recommendation would have 228 filings per judge, which is larger than now. And of course, there is no arguing with the figures that I have available and which all the exhibits show.

Mr. COXE. So that we don't misunderstand, I am not concurring that that circuit should attempt to operate with that number of judges.

Mr. WESTPHAL. I understand, because I take it you recognize that 228 incoming filings per judge is an unbearable load for any appellate court to have.

We have had a suggestion—I believe it was last week when Chief Judge Brown of the fifth circuit testified—that we might use a common factor in analyzing these caseload filings. He suggested that the 1973 average filings per judge for the Nation as a whole be used as a factor in dealing with these statistics. That figure was 161 cases per judge.

Now, then, under your recommendation, if we wanted to have that three-state circuit with 2,056 filings operate at a load of 161 filings per judge, that would require 13 judges. In your six-State-plus-one-territory circuit would you recommend, with 639 filings divided by the same standard of 161 filings per judge, a bench of four judges?

Mr. COXE. If you stopped tomorrow.

Mr. WESTPHAL. All right, if you stopped tomorrow. You indicated there is some apprehension that the load may increase. But if it increases for your northwest circuit it will also most likely increase for this three-state circuit and eventually, in order to sustain the same level of filings of 161 per judge, those three States would have to go above the number of 13 judges.

Mr. COXE. I think it is likely it would increase. Statistically, it would appear it would increase in the new circuit at a much higher rate.

Mr. WESTPHAL. So that, basically, what confronts the subcommittee as we look at this suggestion is that we have heard, in 3 days of testimony, that the ninth circuit, which has had 19 judges for the last 3 or 4 years, not only has not been able to keep pace with its caseload, but the mere fact that they have had to operate with the equivalent manpower of 19 judges has given rise to delay and intracircuit conflicts which members of the bar and the judges alike seem to object to.

My question to you is, do you really seriously suggest to the subcommittee that in adopting your recommendation—which would be to create a three-State circuit of California, Arizona and Hawaii on the

one hand and the Northwest States on the other hand—we should go ahead and authorize 13 judges to handle the caseload on that three-State circuit?

Mr. CONE. Well, you are incorporating several things in your question that I am not willing to buy as part of a whole.

First, I don't necessarily agree at all with Judge Brown's assertion about 161 cases per judge being an appropriate level. I am not so sure that people in general are that happy with the performance of the Federal appellate system, and I suspect a primary reason for it is because of the excessively heavy caseload. So starting right off the bat, I don't accept that.

Secondly, taking your 13 and 4 proposition, which is structured obviously to that assumption of Judge Brown's figure of 161 as being an optimum figure, obviously, if the caseload is lower, then we are talking about more than 13 and more than 4, and I think we ought to be talking about more than 13 and more than 4.

But the point I am trying to make here is that, when I said we were licked on this proposition before we started, I mean that if we use this thing—that nobody likes except the Commission—of dividing California in two and tacking these other States on, we are still dealing with the same kind of caseload and the same number of judges. Taking your figures, you need 17 judges for this circuit to handle its caseload now. Cut it in two the way the Commission is talking about and you are starting out with two new circuits of 8 and 11 judges respectively, and before you get the job done it will be 13 and 15 respectively. My point is that this thing isn't going to happen this year. These case filings are going to continue to go up. That is the problem.

The chairman's question is, what do I think should be done about the three-State circuit which you labeled a 13-judge circuit? I think something further has to be done with it, but I would like to hear that question answered by others, not by me speaking from the standpoint of a Washington lawyer. I would like to hear that question answered by the California people, the Arizona people and so forth.

Mr. WESTPHAL. Well, of course, we have heard from the California people and the Arizona people.

I will just pursue this line a little bit further.

You have suggested that we are licked before we start because we inevitably get into a large number of judges and a large caseload which may be as unmanageable with any number of judges as the number we started out with before we even start to realign. You suggest then, perhaps, that what the subcommittee will have to think about, instead of having two segments to solve the problem in the ninth circuit, is having three segments. Let me just suggest to you that, if we have one segment consisting of the five Northwestern States we would then have a caseload of 475 for those five Northwestern States. If a second segment consisted of all other States except your five Northwestern States, and except California, you would then have a circuit of Arizona, Nevada, Hawaii, and Guam, a three-State circuit with total filings of 483 just about what you will have with the five Northwest States. But your third segment, then, still consists of California with 1,737 filings which again, if we only had nine judges, would result in almost 200 filings per judge. That is quite a change from the existing situation, and can only be brought down to a figure of 161 filings per

judge—which as a factor used by way of example—by the employment of more than nine judges to work on that caseload generated just in California alone. So that, viewed from that suggestion of three segments, again, it boils down to what can you do to handle the caseload that comes out of California alone?

Mr. COXE. I don't know what you can do about the caseload that comes out of California. What I am saying is, I think to adopt the Commission's recommendation to split the circuit into two segments at this time simply does not really address the problem, because you will then have two circuits both of which start out overloaded.

Obviously the question of what to do about California, either now or at some time in the future, is a critical question. Frankly, I don't know what to do about California.

Mr. WESTPHAL. I hope the subcommittee and Congress in turn can figure out what the solution is. But let me clarify one last point as to what the real position is of the Washington State Bar and these other several States that you have told us are in substantial agreement with you.

Mr. COXE. Pardon me. So there will be no misunderstanding, I have not solicited an opinion from any other than the five States that I have mentioned.

Mr. WESTPHAL. In response to one of the Chairman's questions you stated that your constituency does not like the Hruska Commission recommendation, which would align you with part of California, because you are afraid that, if you are aligned in any way with part of California, you will continue to suffer from the delay and inefficiency which you are currently suffering under in the existing ninth circuit. Is that basically what you said?

Mr. COXE. I don't think that is what I said.

At least—if I understand the Chairman's question—it had to do with our being part of a division of the ninth circuit and had something to do with the use of our district court judges as a blood bank for the California situation. "Bloodbank" is a term I have heard. In any event, I may simply have not understood the question.

Mr. WESTPHAL. What I am trying to get down to is this: I take it that your basic recommendation is that you would like to see a northwest circuit. Whether it is composed of five or seven States doesn't make much difference, but you would like to see that northwest circuit.

Mr. COXE. That is correct.

Mr. WESTPHAL. And the reason for that, I assume, is not local or regional pride, but rather a desire to gain something that you would not have by reason of either the Hruska proposal or the Kilkenny proposal, which would both have your five States assigned with all or part of California?

Mr. COXE. Yes, that is correct, and—to clarify my problem a moment ago in responding—it isn't having part of California—I think to a degree you did misdirect me—it is not having part of California involved in that circuit at all. It is starting out as part of a new circuit that has the number of filings that that new circuit would have in it by the time it ever came into being. Before we even got off the ground we would be an overloaded circuit for the number of judges that would be afforded us, and we would be essentially in the same boat that we are in now. But this is not a matter of resentment or concern that somehow California would dominate or that California, part

of California, would be draining off the judicial resources. It is simply that I think there would be too many filings with the kind of growth that is going to occur in the north.

Mr. WESTPHAL. In other words, you like California, but you just don't like the caseload that goes with it?

Mr. CONE. No; not the caseload that goes with California itself, the caseload that goes with a circuit that is that big.

Mr. WESTPHAL. Judge Duniway's figures, and the Hruska Commission's figures, indicate that the Northwest States, plus Hawaii and Guam and the two northern districts in California, would have a caseload of 1,159 filings, according to the 1974 figures. That is a beginning caseload, and eventually the nine judges would have 129 filings. Now, certainly 129 is an acceptable and manageable caseload, is it not?

Mr. CONE. It is as long as it stays 129; yes.

Mr. WESTPHAL. So that really, again, it isn't out of any idea of provincialism or local pride that you urge that the five Northwest States be consolidated into one circuit; rather, it is your concern that whatever assignment is made results in a structure where the appellate judges employed on that work have a manageable caseload that they can deal with with relative efficiency and dispatch, rather than the relative delay and inefficiency which has been a characteristic of the ninth circuit for the last several years. Is that a fair statement?

Mr. CONE. Yes; that is a fair statement to make, assuming that that caseload can be achieved in a new district without an excessive number of judges.

Mr. WESTPHAL. Do you have any extra copies of your prepared statement or remarks that you can leave?

Mr. CONE. I delivered 20 to the staff.

Mr. WESTPHAL. Thank you. It will be made a part of this record. That is all the questions I have, Mr. Chairman.

Senator BURDICK. Thank you, Mr. Cone, for coming today.

Mr. CONE. Thank you very much for the opportunity to appear.

If I might make one more comment, perhaps I touched upon this in the statement. Maybe I seem preoccupied with the consequence of the lapse of time that is involved, but it is significant, I think, that there was real attention turned to this in about 1970. Between 1970 when that occurred and 1974, the filings in these seven jurisdictions that I am talking about doubled, and we haven't arrived at a solution yet.

It seems to me that my preoccupation with the belief that delay will occur in the future is not unrealistic.

Senator BURDICK. We will check the Hruska Commission proposal very carefully, and we will try to act quickly.

This meeting will now be adjourned subject to the receipt of those various documents authorized to be received at a later date.

[EDITOR'S NOTE.—Mr. Cone's prepared statement, mentioned during his testimony supra, follows:]

PREPARED STATEMENT OF CLEARY S. CONE ON BEHALF OF THE WASHINGTON STATE BAR ASSOCIATION

My name is Cleary S. Cone and I am the immediate past president of the Washington State Bar Association. I am appearing before you at the request of Mr. Kenneth P. Short, the incumbent president of the Washington State Bar Association, to express the position of that Bar on the recommendations of the Commission on Revision of the Federal Court Appellate System as they pertain to the Ninth Circuit.

At the hearing conducted by it in Seattle, Washington, the Commission received detailed testimony from numerous representatives of the Washington State Bar Association with respect to the unwieldiness of the Ninth Circuit as presently constituted, and the severe problems resulting therefrom. We wish to commend the distinguished members of the Commission for their patient and painstaking approach to the difficult task assigned to them. Although the Washington State Bar Association advocates a different solution to the problem of the Ninth Circuit than the solution recommended by the Commission, I want it to be clear that we have the greatest admiration and respect for the members of the Commission and the quality of their deliberations.

We wholeheartedly agree with the conclusion of the Commission that the problems stemming from the present composition of the Ninth Circuit into two that the only solution lies in dividing the present Ninth Circuit into two circuits. Because the record upon which the Commission made its findings is so broad and so complete, and because, in my opinion, the Commission's basic conclusion cannot be validly challenged, I will not restate the arguments, concerns and complaints which led the Commission to its conclusion. Instead, with complete acceptance of the Commission's conclusion that the Ninth Circuit must be divided, I will address myself entirely to the question of how it should be divided.

At the outset, it must be recognized that there is no solution, however Solomon-like, that will not be objectionable to some individuals and some organizations. It is important to bear in mind that the positions of the various state and local bar associations in opposition to the Commission's recommendation are highly principled objections based upon basic concerns about adverse effects which would flow from the division of the Circuit as recommended by the Commission. We believe that because of the quality of the objections, they should not be taken lightly. We further believe that the best solution to the problem is that solution which best accommodates the conflicting interests of those jurisdictions which will be affected by a division of the Ninth Circuit.

The Commission has conducted that no circuit should consist of less than three states, and that under no circumstances should California comprise an entire circuit. The Commission has further concluded, because of the preponderance of filings from the State of California, that in order to split the Ninth Circuit it is necessary to divide California between two circuits. The retention of Arizona and Nevada with the southern portion of California in one circuit flows almost incidentally from the conclusion of the Commission that the State of California must be split, and the addition of all of the rest of the present Ninth Circuit to the northern portion of California is similarly incidental to the conclusion that California must be split.

The State Bar of California and local bar associations in California are flatly opposed to the division of California between two circuits and have fully and persuasively stated their reasons for opposition. In some instances, it has been recommended that the circuit be retained as it is presently constituted, and in other instances it has been recommended that there be administrative divisions within the circuit. It is clear, however, that the opposition of the California state and local bars is to the division of California between two circuits and not to the creation of a new circuit consisting of states other than California.

The State Bar Associations of Washington, Idaho and Alaska all strongly favor the creation of a new circuit, which would not include any part of California, and the State Bar Associations of Oregon and Montana have both stated that they have no objection to the creation of such a circuit.

In short, it would appear that there is a great preponderance of opposition to splitting the circuit by dividing California and by adding various states to each of the two segments of California.

The Washington State Bar Association has consistently favored the creation of a new circuit which would consist of the five northwestern states of Alaska, Washington, Oregon, Montana and Idaho, together with such additional entire jurisdictions as would add to the feasibility of such a circuit. We now specifically recommend to this subcommittee that a new circuit be created consisting of the five northwestern states above mentioned, together with Nevada and Guam.

The creation of such a new circuit would leave a Ninth Circuit consisting of California, Arizona and Hawaii which would meet the three-state criterion established by the Commission. It is true that the filings in the reduced Ninth Circuit would be, at least for a time about three times as high as in the new circuit which we are recommending. While relative rates of growth and the degree to which that balance would be maintained are somewhat uncertain, there is no reason, in the face of the differing interests and concerns of the jurisdic-

tions affected, why the division of the circuit must be dictated by arithmetical equality. Representatives of the California Bar have stated, or will persuasively state, their objections to the splitting of their state between circuits. Representatives of the Arizona and Hawaii Bars are patently far more competent than I to state their position on inclusion in a three-state circuit with California. It may well be that the creation of administrative divisions in that three-state circuit will be looked upon with favor by the bars affected, and it may be that such a device might be helpful and far less disruptive in the unique situation of California than would be a parceling out of that state between circuits.

The recommendation of the Washington State Bar Association that a new circuit be created consisting of the five northwestern states together with Nevada and Guam is consistent with the overriding interests of California in being left intact within a single circuit. More basically however, it is a proposal which is desiral le on its own merits.

The Commission expressed the conclusion that a separate circuit for the five northwestern states is not now warranted because of the relatively small number of filings, which the Commission computed as 17% of the work load of the circuit. The addition of Nevada and Guam, of course, increases both the number and the percentage of filings.

However, there are two far more basic responses which must be made to any contention that such a new circuit would not have a sufficient work load.

First, it should be noted that in 1961 the entire Ninth Circuit had only 443 filings. In fiscal 1974 the proposed new circuit had 639 filings. Even after taking into account the adjustment in statistics to reflect original proceedings and appeals from administrative agencies, the filings in the new circuit would exceed by about 40% the filings in the *entire* Ninth Circuit only 13 years ago.

Second, the lawyer population, the population in general, and the economic activity of the jurisdictions which would comprise the new circuit are growing far faster than the national average, and there is every reason to anticipate not only an increase in filings, but an accelerating rate of increase in filings. Within the framework of that increase, it should be borne in mind that the conflicts between the burgeoning development of natural resources and the reinforced desire to protect the ecology will be uniquely productive of intricate and important litigation. It is no accident that between 1972 and 1974 there was a 41.7% increase in filings in the proposed new circuit, while the increase in filings in the same period in the three states which would be left in the Ninth Circuit was only 13.7%.

We must therefore, respectfully but forcefully disagree with the Commission's conclusion that the creation of such a new circuit is not now warranted. The work load is now sufficient and it is only realistic to anticipate a continuation of the accelerating rate of growth in that work load.

The lapse of time between the emergence of a serious problem of judicial overload and the time of its cure is so long that the problem attains crisis proportions to the detriment of all interests affected by it. Between 1970, when attention became focused on the problem, and now, when legislation to cure the problem is still at least a year away, the filings in the proposed new circuit have approximately doubled. For that reason, if for no other, it would seem apparent that the time for the creation of a new circuit consisting of the five northwestern states together with Nevada and Guam is now.

[EDITOR'S NOTE: Following these hearings, Judge Shirley M. Hufstedler of the Ninth Circuit Court of Appeals asked that the following prepared statement be made a part of this record:]

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

Mr. Chairman and Members of the Subcommittee, I appreciate the opportunity to express my views opposing the Recommendation of the Commission on Revision of the Federal Court Appellate System that the Ninth Circuit should be split and that the split should be made by dividing the Circuit into a new Twelfth Circuit encompassing the Central and Southern Districts of California and the States of Arizona and Nevada, and a new Ninth Circuit consisting of the Northern Districts of California, and Alaska, Washington, Oregon, Idaho, Montana, Hawaii, and Guam.

I agree with the Commission that the Ninth Circuit is seriously overburdened. Judge Duniway of our Circuit has accurately described the impact on our Court

of the appellate litigation explosion during the last decade. I also agree that we need five more judges. I strongly disagree that circuit division will resolve or ameliorate our problems; rather, I believe that splitting our Circuit will create more difficulties than it solves.

A limited number of options are available to relieve any overloaded intermediate appellate court: (1) horizontal expansion—that is adding judges to the existing court; (2) vertical extension—that is elongating the appellate ladder by adding a new tier of appellate courts at any level below the apex of the judicial system; (3) reduction of the intake of litigation at the trial level or at the appellate level; (4) increase in nonjudicial personnel to take on functions formerly handled by judges; (5) increase per-judge output by altering internal procedures, such as caseflow management, calendaring adjustments, adding supporting hardware (*e.g.*, dictating equipment, typewriters, telex, computers,) and by changing the traditional appellate process (e.g., decreasing opinions, reducing or eliminating oral argument, and unifying reviewing procedures.)

Circuit splitting does nothing to decrease the flow of appellate litigation; indeed, the tendency of circuit splitting is to increase litigation. Dividing the same litigation burden into two stacks obviously does not decrease the total. Less obviously, multiplication of circuits generates intercircuit disharmony and conflict. Lack of certitude about the law breeds more appellate litigation. It is no secret that litigants having the power and the means to relitigate an issue that has been lost in one Circuit will raise the same issue in other Circuits seeking to generate a conflict. Not only do large corporations engage in this tactic, the United States regularly does so as well.

Circuit division has no beneficial impact on reforming internal management procedures, or increasing nonjudicial personnel to take on functions that have been (but need not be) performed by judges, or altering traditional appellate process. To the extent that geographical splits are not wholly neutral, divisions may delay needed reforms because they may reinforce the illusion that nothing need to be done.

What is there about geographical division that produces any benefits? Supporters of circuit division say that it will permit the addition of more judges and that it will increase the per-judge output.

The former argument has two premises. The unarticulated premise is that Congress will be more amenable to the creation of the necessary judgeships if there are two circuits growing in the place of one. No one has explained why this is or should be true. I am unable to do so.

The second premise is that no more than "X" judges can function effectively and efficiently on a single circuit. "X" is usually nine. I quite agree that a nine-member court is pleasant, and, in the best of all appellate worlds, it may even be ideal. Unfortunately, we do not live in an ideal appellate world, and we cannot expect to do so because the amount of appellate litigation now before us and the increased burden on the horizon forbids that result. Unless the Circuit is fragmented, rather than bisected, we cannot realistically anticipate that the California load alone can be carried by nine judges.

A much more serious charge is that expanding the court beyond nine renders the court unmanageable because the multiplication of three-judge panels generates more intracircuit conflicts than can be satisfactorily resolved by current *en banc* mechanisms. There is some truth in this charge. But dividing the Circuit simply transforms intracircuit conflicts into intercircuit conflicts that can be resolved, if ever, only by the United States Supreme Court. That Court does not have the decisional capacity to resolve the existing intercircuit conflicts. The creation of the new circuits, therefore, increases these conflicts with no mechanism for their resolution. The solution to intracircuit disarray and the overconsumption of judicial time in *en banc* matters is not a revision of circuit lines, but a revision of *en banc* mechanisms.[1]

Our Circuit is currently operating with thirteen active judgeships,[2] but we have part time services from our five senior judges, visiting senior circuit judges from other circuits, and senior and active district judges. The reality is, therefore, that we are now trying to accommodate the views of about thirty judges.

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[1] The revision is not simple, but it is not impossible. A number of plans have been suggested whereby a majority of the Court, but not less than nine members, would perform the *en banc* function.

[2] We have 12 active judges and one vacancy.

Although no one suggests that this situation is ideal, it is strong evidence that a circuit court with a judicial complement of more than three times the mystical nine can and does operate effectively.[3]

The second prong of the argument in support of the circuit splitting is that the judges in the new circuits will be able to increase their individual output. The increased work product is purported to flow from several sources: (1) reduction of traveltime, (2) reduction of paper work, and (3) geographical concentration of the judges of the divided court.

Some travel time is inevitable no matter how the court would be divided. Guam, Hawaii, Alaska and the Pacific Northwest are thousands of miles apart from each other and exceedingly distant from Los Angeles and San Francisco. The Commission's recommendations do not move them an inch closer to each other. Of course, we could save all of the judge's travel time if we compelled all of them to maintain their residences at the same place, and we also compelled all of the litigants to present their cases at that place. The difficulties with those notions are sufficiently evident that no one has proposed them.

The circuit division, as recommended by the Commission, save an insignificant amount of travel time. The travel saved by the San Francisco based judges no longer sitting in Los Angeles is more than offset by their necessarily increased sittings in Alaska, Hawaii, and the Pacific Northwest. The Pacific Northwest judges save an extra two hours an average of one calendar per month by sitting in San Francisco, rather than Los Angeles. The Los Angeles based judges save two travel hours plus the airport commute to San Francisco, one trip per year to the Pacific Northwest, and one trip every third year to Alaska and Hawaii. These savings are truly negligible because travel is rarely arranged during hours that would be spent in chambers and almost all, if not all of us, use the travel time reading briefs and advance sheets.

A decrease in paper work is highly unlikely unless the judges changed their present methods of working. Of course, if the judges heard fewer cases and wrote fewer opinions than they do today, everyone would have less paper work. That thought cannot be squared with increased production. If we had a smaller court, there would be a lesser number of views to be exchanged, but the volume of paper would not be significantly reduced. The records and briefs must still be read in every case. The three judges must exchange views on each panel. Unless they abandon their present practice of exchanges in writing, the paper volume will be the same for all panel opinions. (They now can and do talk to each other orally as well.) If there were fewer members of the court or different *en banc* mechanisms, some savings would be achieved on *en banc* hearings. Note, however, that any and all of these savings do *not* come from circuit realignment, but from changes in the internal operating procedures of the court.

Geographical concentration of the judges does not depend on circuit realignment. Instead, it depends on the inclinations of the individual judge to maintain his residence at the place of his own choosing.

Finally, neither logic nor intuition supports an assumption that circuit division will have any impact on the amount of work that any judge produces. My experience on several appellate courts, including this one, tells me that a judge's work product, like a lawyer's, largely depends upon his or her own capacity and personality. A slow and methodical workman does not accelerate, nor does a hard driving, quick workman slow down when he or she is exposed to different judicial geography. As far as I am aware, every judge on this Court is producing the maximum work that that judge can do. Circuit splitting will not increase anyone's maximum.

In summary, an analysis of the assumed benefits of circuit splitting reveals that they are at best minimal. However, the costs are substantial. The dollar costs of creating a new Clerk, new Circuit Executive, and new offices for the Clerk are obvious. Of much greater moment, however, are the less visible costs to the federal judicial system as a whole. The critical item on this list is the

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[3] An active and senior in-circuit judge complement of 30 judges would be far easier to manage because all of them would have the continuing responsibility for maintaining the institutional unity of our court and they would not be distracted by the duties of their own separate courts to which their primary allegiance is owed. (In making this point, I do not suggest that 30 judgeships are needed for our Circuit.)

inevitable increase in intercircuit disharmony.[4] Although added intercircuit conflicts cannot be readily qualified, they will occur and they will swell the Supreme Court's certiorari overburden. The inability of the Court to hear more than a few of these cases will further Balkanize federal law and will generate more litigation.

Circuit splitting makes bad problems worse without solving anything. If the circuit is nevertheless going to be divided, the division should be made without cutting California in two.[5] The severe difficulties engendered by splitting California between two circuits have been cogently stated by the State Bar of California and by the Special Committee of the Bar Association of San Francisco.[6] I adopt their reasoning opposing the division of California.

None of the proposals for a division is satisfactory. The least unsatisfactory division, in my view, is a new Ninth Circuit composed of California, Arizona, Hawaii, and Guam, and a new Twelfth Circuit composed of Alaska, Washington, Oregon, Idaho, Montana, and Nevada. This division leaves about three-quarters of the caseload in the Ninth Circuit. Hawaii and Guam together account for a miniscule portion of the burden; Arizona has a significant volume of business, but the depth and duration of her economic and legal ties to California makes impracticable her annexation to the Tenth or Twelfth Circuit. This split substantially reduces the geographic reach of the present Ninth Circuit, but it relieves the Circuit of no more than a quarter of the caseload. A heavy caseload is unavoidable if California remains whole because it supplies almost two-thirds of the litigation.

Scrutiny of this division and any other suggested plan again raises the pivotal question: In view of the serious problems engendered by division, is any truly useful purpose served by drawing new lines on the map of the Ninth Circuit?

[Whereupon, at 2:45 p.m., the subcommittee adjourned, subject to the call of the Chair.]

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[4] Proponents of circuit splitting have implied that this increase is not a concomitant of division. They would be on sound ground if a majority of the judges in both new circuits shared a common legal and social philosophy, but they do not. The judges of this Circuit do not have homogenized views. Their opinions are going to differ sharply no matter how the Circuit would be divided. The sharp differences of views that characterize our *en banc* hearings, in my view, will inevitably carry across new circuit lines. We have no reason to believe that new judges will be any the less individualistic than the present ones.

[5] Slicing California in twain is essential if Congress is determined to adhere to the mystique of nine or almost nine judges per circuit. A court of less than nine cannot handle the California load. Indeed, nine judges would be hard pressed to undertake the burden at its present level.

[6] "Statement of the State Bar of California Opposing the Proposal to Divide the State of California into Two Federal Judicial Circuits, as Proposed by the Commission on Revision of the Federal Court Appellate System" (May 1974). "Report of the Special Committee of the Bar Association of San Francisco to Review Report of the Commission on Revision of the Federal Court Appellate System" (July 1974).

APPENDIX "A"

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PREPARED STATEMENT OF JOHN R. BROWN, CHIEF JUDGE U.S. COURT OF APPEALS FIFTH CIRCUIT HOUSTON, TEXAS

[Submitted to the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary of the United States Senate, in Hearings held on May 9, 1972 on the Revision of the Appellate Court System (S. J. Res. 122, 92d Cong., 2d Sess.).]

STRUCTURE OF THIS STATEMENT

This statement is structured in two main divisions:

Part One: This covers comments, views, recommendations, and suggestions on S.J. Res. 122 on the Commission for Realigning Circuits (and related legislative proposals).

Part Two: As requested by the Chairman (letter March 17, 1972) this covers comments, recommendations and data in support of the Judicial Conference approved request for substantive legislation providing for Legal Assistants to the Fifth Circuit.

SOURCE AND RELIABILITY OF STATISTICS

Except where specific identification is made to tables, etc. in the Administrative Office reports (e.g., AO Table 6) or to the Shafroth Report, all of the statistics are those kept by the Fifth Circuit. Except for updating them in terms of actual input and output, and revising projected future estimates in the light of intervening actual experience, these Fifth Circuit statistics are essentially those submitted formally to the Chief Justice (and later to the Federal Judi-

cial Center) in connection with the "Fifth Circuit Crisis Project". Before submission to the Chief Justice and the Judicial Center these statistics were submitted to the Administrative Office and found to be reliable and acceptable (we were informed a few inconsequential arithmetical errors were found). The most significant thing is that the Fifth Circuit figures are *hard figures*. Unlike the statistical reporting standards followed by some of the Courts of Appeals and the input AO tables, we have eliminated entirely cross-appeals and multiple appellants. (See e.g., AO Table 4—1971 report, page II-9 and Table B 1, page A 2, total filings FY '71 2,316 as compared with actual filings Fifth Circuit figures 2,077). Our projections for FY '73–'75 (as was true with the Shafroth surveys) are based on these actual hard figures.

Supporting detail for the statistics emphasized herein can be found in our Clerk's Annual Report (Clk. Ann. Rept.), his report "Miscellaneous Statistics on Standing Panels, Screening, Caseload, Workload, etc. for FY 1972," October 19, 1971, which will be furnished to the committee if desired.

Part One

EXPERIENCE OF THE FIFTH CIRCUIT WITH PROBLEMS OF COURTS OF APPEALS

As you know, I am John R. Brown of Houston, Texas. I have been on the Fifth Circuit Court of Appeals since September of 1955. I am Chief Judge and have been since July 17, 1967. But as I previously stated to various Committees of the Congress, before becoming Chief Judge I had a great deal of experience in Court administration because of the work delegated to me by my predecessors Chief Judges Hutcheson, Rives and Tuttle. As all know, the Fifth Circuit with fifteen authorized active Judges is the largest constitutional Court in the United States. It is largest also in terms of population of its constituent states (Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas), in the number of cases filed, the number of cases disposed of, and the number of opinions published. Consequently, the Circuit has every kind of problem in double measure that Federal Appellate Courts could have. But the Court has not allowed these staggering burdens to overwhelm it. Through the diligent, resourceful, imaginative efforts of conscientious Judges—who know no limitations on energy—we have adopted innovative systems that have increased our output enabling us so far to keep abreast of this load. But even with these new practices we have to recognize with the Court at its present size (fifteen active and three energetic Senior Judges) that something has to happen now, and certainly long before FY 1975.

This sense of great urgency was sounded by the Judicial Council to the Judicial Conference of the United States, in the formal resolution of October 1971 (App. A). The Judicial Conference by formal action took note of this and the necessity of transmitting this urgency to the Congress.

FIFTEEN JUDGESHIP MAXIMUM

Although there are some internal differences, the Judicial Council of the Fifth Circuit after careful consideration concluded unanimously that the Court should have not more than fifteen active Judges.

Inevitably, this means that on current exponential projections for FY 1972–1980 somehow the Circuit has to be split.

FIFTH CIRCUIT COMMITTED TO NATIONWIDE CIRCUIT REALIGNMENT

The Council by formal resolution in October 1971 endorsed without reservation the principle of national Circuit realignment "as an indispensable first step toward improvement in the federal circuit court system". See the Resolution App. A.

The Judicial Conference of the United States, in its October 1971 meeting in its report on "Additional Circuit Judgeships" (see p. 81, 82, Report of the Proceedings of the Judicial Conference of the United States, October 28–29, 1971), in which ten additional Circuit judgeships were recommended, took note of the situation in the Fifth Circuit and the recommendation of the Judicial Council concerning nationwide circuit realignment:

In making this recommendation the Conference noted that based on statistics alone seven additional judgeships would be warranted in the Fifth Circuit over and above the 15 now authorized and five additional judgeships would be warranted in the Ninth Circuit rather than the two recommended. The Conference agreed further with its Committee on Court Administration that to increase the number of judges in a circuit beyond 15 would create an unworkable situation. In this connection the Conference noted a resolution unanimously adopted by the judges of the Fifth Circuit in October 1971 in which the judges state that the Judicial Council "holds strongly to its prior formal determination that to increase the number of judges beyond 15 would diminish the quality of justice in this circuit and the effectiveness of this court to function as an institutionalized federal appellate court." The Judicial Council of the Fifth Circuit went on to endorse H.R. 7378, a bill to establish a Commission on the Revision of the Judicial Circuits as previously proposed by the Judicial Conference "as an indispensable first step toward improvement in the federal circuit court system."

NEED FOR THE COMMISSION

Although, as orginally conceived by the Judicial Conference, the Commission's recommendation, at least with regard to geographical circuit lines, was to be self-executing unless expressly disapproved by the Congress within the stated time prescribed in S.J. Res. 122 (or in the revision of HR 7378 reported out March 7, 1972 by the House Judiciary Committee), I unhesitatingly endorse S.J. Res. 122. The important thing now is that there be a national circuit realignment and the Commission concept seems to be the one most likely to succeed if relief is to be obtained before conditions become simply impossible. I am confident that this is the sentiment of the Judicial Council of the Fifth Circuit.

STRONG POINTS OF S.J. RES. 122

In my judgment, the strength of S.J. Res. 122 is in the broad "commission" given to the Commission. Unlike some earlier versions in which the commission's work, findings, and recommendations were largely geared to drawing geographical lines for the recommended revised or new Circuits, this Resolution charges the Commission to make comprehensive penetrating studies. The problems of the Courts of Appeals, the possible solutions, and the nature and character of the decisive decisions which have to be made for any long range solution are capsulated in §§ 1(a)–(f) describing the function of the Commission to be:

(*a*) to study the present division of the United States into the several judicial circuits;

(*b*) to study the problems attendant upon prehearing screening of appeals, en banc hearings, intracircuit and intercircuit disparity in interpretation of Federal law, and other appellate procedures and problems;

(*c*) to study the present and anticipated caseloads of these circuits, the workloads of the judges, the time required for appellate review, and the alleviation of the problems arising therefrom by redividing the United States into several judicial circuits or by restructuring the appellate court system, or by other feasible court reforms;

(*d*) to study the problems arising from present and anticipated caseload of the Supreme Court and the possible alleviation of these problems;

(*e*) to study other areas of court reform related to the problems specified herein; and

(*f*) to recommend to the President, the Chief Justice of the United States, and the Congress such alternative changes in the appellate court system of the United States as may be most appropriate for the expeditious and effective disposition of the present and anticipated caseload of Federal appellate courts, consistent with fundamental concepts of fairness and due process.

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CIRCUIT LINE DRAWING ALONE IS SUPERFICIAL

If we are to find really permanent solutions—instead of stop gaps that will be outdated within five years—it is important, in my judgment, that these broad and specific mandates be retained. A bill which merely charges the Commission to recommend new geographic Circuit lines is no solution at all.

More important, the lines can hardly be drawn as an effective solution for the short range future (10–20 years) without the consideration of several decisive factors. First, no rearrangement or realignment of the Circuits can avoid the need for judgepower, since the needed judgepower depends on the business, not artificial state or Circuit lines. Second, lines cannot be drawn that will adequately care for the short range future without careful analysis of the role of the intermediate Courts of Appeals in the federal system. In the light of frightening projections, this must reckon with such problems as (i) the appeal as a matter of right in every civil and criminal case no matter how meritorious and (ii) the reduction in diversity and other jurisdiction and the like. Once the role or mission of the intermediate appellate federal court system is determined, the Circuit lines cannot intelligently be drawn apart from some understanding of just what it is Circuit Judges, singly and collectively as a Court, can reasonably be expected to perform. This brings into the inquiry the extent to which the problem is too much the product of traditional practices and, on the other hand, the extent to which much can be alleviated and often overcome by imaginative innovations. This borders on the earlier problem of the role of the Court of Appeals and the extent to which we can continue the luxury of the traditional oral argument in nearly every case.

Based to a great extent on the vast experience of the Fifth Circuit, I undertake in the following to demonstrate in more detail the basis for these concerns.

BUSINESS—NOT CIRCUIT LINES—DETERMINES JUDGESHIPS

The superficiality of Circuit line-drawing as a solution is illustrated by the predicament of the Fifth Circuit. Based upon experience-proved projections, the work ahead for the Fifth Circuit on an annual basis FY 1971–75 with a forecast for 1980 is as follows:

TABLE 1.—PROJECTION OF FILINGS FISCAL YEAR 1972-75 PER SHAFROTH 1970 SURVEY AND FIFTH CIRCUIT REVISION

Fiscal year	1970 Shafroth Survey [1]	September 1971 upward revision Fifth Circuit [2]	Upward revision percentage increase
1971	1,852	[3] 2,077	[3] 15.8
1972	2,006	2,596	[3] 25.0
1973	2,159	2,794	[3] 7.6
1974	2,311	2,990	[3] 7.0
1975	2,464	3,188	[3] 6.6
Cumulative increase, fiscal year 1971-75			53.5
1981 [4]		6,750	[5] 38,875

[1] The first survey was in 1967, Survey of U.S. Courts of Appeals, 1967, 42 FRD 243 et seq. Within a year the projections through 1975 had to be revised and within just two more years, the 1970 survey again revises them substantially upward.

[2] Upward revision of Shafroth based on projected 29.4 percent estimated deficiency in Shafroth's projection for fiscal year 1972. Cross appeals and multiple parties eliminated. The forecasts for fiscal year 1972-75 are undoubtedly on the low side since the annual increase for each of these years is calculated on the deficiency of Shafroth projections for fiscal year 1971 (12.1 percent). The Court's actual experience showed yearly gains—1968-71 of 13.2, 10.6, 20.5 and 15.8 percent respectively. These average out to approximately 15.0 percent.

[3] Actual filings.

[4] Fiscal year 1981 projections based on 225 percent increase (267 percent with cross appeals) in 5th Circuit fiscal year 1961-71 and 204 percent national increase as reflected by table 2 A.O. 1971 report (cross appeals and multiple parties excluded).

[5] National (all circuits).

Incidentally, demonstrating the exponential increases in filings the above table was markedly revised upward over our January 1971 projection. On the basis of the first three quarters of FY 1972 the projections for FY 1972 still hold true as do those for FY 1973–1975.

Thus, for example, on the September 1971 projections in FY 1972 we will have 2,304 cases (revised in Table 1). If the six states (see map) were divided

8 and 8, 8 of the Judges would end up with 144 filings per Judge and the other 7 with 164 per Judge.[1] This is in contrast to the national average of FY 1970 of 120 cases per Judge.[2] And in FY 1974 with 2,655 filings the division would be 166 and 189 cases per Judge.

TABLE 2.—STATISTICS COMMITTEE JUDGESHIP PROJECTIONS

Circuit	Present number	New judgeships statistically justified per circuit	New total
First	3	1	4
Second	9	5	14
Third	9	1	10
Fourth	7	1	8
Fifth	15	7	22
Sixth	9	1	10
Seventh	8	1	9
Eight	8	0	8
Ninth	13	5	18
10th	7	1	8
Total	88	23	111

As the detailed charts show, on eight different statistical projections the Fifth Circuit's needs average 8 and run from a low of 5 to a high of 10 more judgeships.

As pointed out above (page 6) the Fifth Circuit declined to ask for any judgeships in excess of 15.

Now would a series of splits within the Fifth Circuit be of any real help. The problem is posed, of course, because of the East and West anchor states, Florida and Texas, which have 53.7% of our business plus the adjacent states of Georgia and Louisiana making up another 30.4%.[3] Based on FY 1970 figures combining Florida (443) with its 3 Judges and Georgia (264) with its 2 Judges for a total of 707 case filings and 5 Judges to produce a caseload of 140 would help none. On the other end, combining Texas (492) with its 4 Judges and Louisiana (264) with its 2 Judges for a total of 756 and 6 Judges would momentarily reduce the caseload only slightly.

TABLE 3.—ORIGIN OF FILINGS BY STATE

State	1967-68	1698-69	1969-70	1970-71	Percent increase fiscal year 1971 over 1968
Texas	354	412	492	596	68.3
Florida	343	390	443	502	46.3
Georgia	215	194	264	316	46.9
Louisiana	165	213	264	300	81.8
Alabama	139	128	162	181	30.2
Mississippi	82	111	114	135	64.6
Overall					55.6

[1] Recognizing the sometime unreliability of case filings per judgeship these illustrative projections for FY 1973 and 1974 are more than borne out by the recommendations of the Subcommittee on Judicial Statistics of the Court Administration Committee of the Judicial Conference. See page 4 of Judge Dunaway's report of March 19, 1971 and the table, page 2 of the A.O.'s Statistical Study "Judgeship Needs in the United States Court of Appeals" February 1971 in which seven additional judgeships are recommended for the Fifth Circuit between now and FY 1975.

[2] See the very recent well constructed Administrative Office "Management Statistics" February 1972. With no downward adjustments to eliminate multiple parties and cross-appeals, the Fifth Circuit filings for FY 1971 were 154 in contrast to national average of 132.

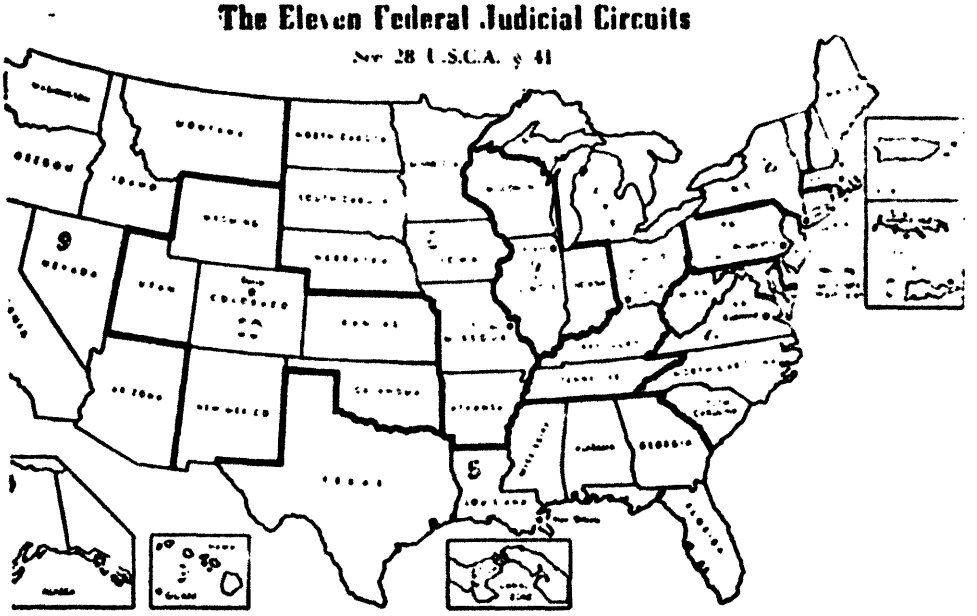
Since our projections (Table 1) exclude these, the figure of 120 must be correspondingly reduced.

[3] The origin of the Fifth Circuit business is shown by the filings by states for the last three years.

A Circuit split, therefore, within the states of the Fifth Circuit will offer no help. The business is still there. It takes added judgeships to handle or it requires extraordinary innovation with some, but not as many, added judgeships.

Nor is it going to be any help to the Fifth Circuit or its Judges to rearrange the Circuit by adding one or more states of the Fifth Circuit to one or more of the present adjacent Circuits—the Fourth, the Sixth, the Eighth, or the Tenth.

The problem is readily seen from the map of the present Circuit lines using the figures of FY 1971 as a matter of convenience:



For example, if Georgia were added to the Fourth Circuit this would bring 316 more cases to the 1,211 filed in FY 1971 in the Fourth Circuit of seven Judges. The result would be a caseload of 169. With but two active Judges in Georgia, they would get no help from the Fourth Circuit's redistribution of its load and, conversely, the Fourth Circuit would statistically get no help from the Georgia Judges. It gets no better if one things of lumping Georgia (316) and Florida (502) with its three Judges into the Fourth Circuit (1,211). With a result of 169 there would be no gain either way except, of course, the Fourth Circuit would then become a Court of 12 Judges and much added territory.

On the same analysis adding Georgia (316) to the Sixth Circuit (1,015) would bring that Court's load to 1,331. There would be but a very slight gain for the Georgia Judges which would soon be wiped out as business increases. The same would be true if Mississippi and Alabama with their 316 cases were added to the Sixth.

To tie Texas (596) and Louisiana (300) onto the Eighth Circuit (713) would give slight, temporary relief. And the slight gain would be even less in tying Texas (596) and Louisiana (300) onto the Tenth Circuit (734).

Thus on the figures of a year ago (FY 1971) there would be no gain in the most probable of intra-Circuit splits and only slight if any gains by partial adhesions to existing adjacent Circuits.

But that is not all. For on the projections (see Table 1) there is a marked increase each year over the preceding year in percentage and the resulting case filing per fifteen active judgeships.

INCREASED WORKLOAD PER JUDGE

Based on the September 1971 upward revisions, the impact per active Judge (15 in number) will be:

TABLE 4.—PROJECTED FILINGS AND CASELOAD INCREASE

Fiscal year	Annual percentage increase	Caseload per judge
1971	15.8	138
1972	25.0	173
1973	7.6	186
1974	7.0	199
1975	6.6	212
Cumulative 1975 over 1971	53.5	

These caseload increases from 173 this year (FY 1972) to 212 in FY 1975 wipe out any possible gains by conceivable practical adhesions.

This analysis shows that drawing Circuit lines is not a solution at all. No matter how drawn, no matter how we are paired or aggregated, no matter what adhesions are made to existing or newly created Circuits, the judicial business in the states now comprising the Fifth Circuit is and will be such that the existing judgepower cannot possibly handle it. We must therefore find some other solutions.

IS SOLUTION IN A 9-JUDGE COURT? IS THERE MAGIC IN THE NUMBER 9?

One quick simple solution is, of course, to forecast the growth in judicial business against the estimated acceptable output per judgeship and then aggregate contiguous states to form a Court having not more than 9 Judges. This would be on the assumption that there is validity to the oft repeated statement that a Court of more than 9 Judges cannot work efficiently.

Among my own colleagues on the Fifth Circuit there are some that feel this way. Despite the added problems from size, experience of the Fifth Circuit demonstrates that we are and have been a Court of remarkable productivity. We are now officially a Court of fifteen active Judges, but we have long been a Court exceeding 9 judgeships. Beginning with the very capable leadership of our then Chief Judge Elbert P. Tuttle, we followed the practice of using visiting Judges—both District and out-of-Circuit Judges plus our own energetic Senior Circuit Judges. This produced a Court of equivalent judgeships as follows:

TABLE 5.—EQUIVALENT JUDGESHIPS FROM VISITING JUDGES

Fiscal year	Total court weeks	Available active 5th Circuit judges	Judge weeks from visiting judges	Equivalent judgeships
1965	30	7	25	10
1966	39	9	33	13
1967	45	12	33	16
1968	48	13	35	17
1969	46	12	50	19

If there ever was a case in which the pudding's proof is in the eating, then our output demonstrates that we did make it work and work effectively. Later I discuss this further in connection with the development of output standards of productivity by new procedures and innovations. It is sufficient there to say that in every year since 1966 the output has exceeded the total input for the previous year, and in the short course of the last three years active Judges have increased their opinion output by 75.4% and the Court as a whole increased by 74.3%.

Of course, I do not minimize the problems, including the burden that rests upon each of the Judges not only in case participation and opinion-writing but in keeping abreast of the flood of opinions that the Court is handing down (over 1,661 FY 1971). All would like a Court of 9 as an ideal size. But the simple fact is that for the federal system this is a goal that can hardly be attained. And if it is attained there will be such a proliferation of Circuits that

an even more impossible burden will be placed upon the Supreme Court of the United States in its very important role of "policing" the cases of great importance coming from the Circuits.

More important, even in using the 1970 revised Shafroth projections (which are already on the low side), it is certain that by FY 1975 at least 5 of the Circuits will require judgeships in excess of 9. (See App. C). This schedule measures output in terms of average caseload per judgeship which at the time the table was prepared (1970) was approximately 96. On that basis a nine-man Court would handle 864 cases. The projections for added Judges needed in FY 1972 over 1970 is shown in column (e). For FY 1975 the projections are in columns (f) through (j). As shown in column (j) there will then be five Circuits requiring more than 9 Judges: Second, fourth, fifth, seventh, and ninth.

While the total new judgeships forecast in the statistical study by the Conference Committee is 23, rather than 42 as in my table for FY 1975, it is interesting to see that this much more elaborate analysis on variable factors covers several of the same Circuits (see Table 2):

TABLE 6.—*Recommendation excess of nine judges statistics committee*

Circuit:	*Required total judgeships 1975*
Second	14
Third	10
Fifth	22
Sixth	10
Ninth	18
Total	74

With 74 judgeships needed for these 5 Courts, this means that restructuring down to 9 judgeships per Court would call for at least 3 new Circuits to bring the total up to 14. With 13,801 cases predicted for FY 1975 for all Circuits in Shafroth (1970 Rev.), and the FY 1980 projection for all Circuits of 34,881 cases (see Table 1), this means that unless there is a radical revision in the role of the Courts of Appeals within the short five-year period from 1975–80 the 120 recommended judgeships (see Table 2) will have to increase to 320. Applying the ideal goal of a nine-man Court we would have 35 Circuits. The prospect of 35 Courts of Appeals in terms of the capacity of the Supreme Court effectively to give consistency to the body of controlling federal law is staggering. Worse, the staggering burden is augmented by the fact that the great majority of such new Courts would be Federal Courts of Appeals for a single state with all of the parochialism that would bring. The federalizing influence, so essential to the political and social structure of the United States, would be severely undermined.

Of course, I am not arguing here that Courts should expand to the sizes indicated even in 1975 (see App. C) and the statistical studies of the Administrative Office (see Table 2). We will reach a working limit. Rather the importance of this is to demonstrate again that it is the judicial business flowing into the judicial system which determines the need, not the geographical or the momentary arrangement of those judgeships in one or the other Circuit.

It is positive proof that those who are charged with the responsibility of recommending Circuit lines must not approach it on any supposed idyllic nine-man Court. That means, therefore in the most direct way, this Commission ought to try to ascertain what is the maximum size of a Court of Appeals that is manageable. It has a rich reservoir of material in the Ninth Circuit and the Fifth Circuit on which to make objective judgments. And once the effective use of visiting Judges, as employed in the Second Circuit, is analyzed in terms of the real total judgepower of such Court for a given year, further helpful data will result. Perhaps more important, this quest for the magic nine compels us to recognize that we must stop, look and listen to determine how long we can go on with the Courts of Appeals having their present role.

THE ORIGIN OF THE BUSINESS

Up to now—including the very penetrating Statistical Study made by the Conference Committee on Judicial Statistics (see Table 2)—projections for

judgeship needs for Courts of Appeals are always in terms of the business of those Courts. Every projection is based upon the input. Never has there been any inquiry in terms of the real source of the input—the District Courts from which the great bulk of appeals come. As the 1971 Report of the Director pointed out "the United States District Courts must go on struggling with mounting work. Filings are at a new high: so are terminations. But number of terminations for the most part has not kept up with filings so, inevitably, the record for fiscal year 1971 will also show a new high of pending cases. The 124,525 civil and criminal cases pending on June 30, 1971 is nine percent higher than a year ago and almost 81 percent above the 1960 level.

With continuing increase in population and general business, the Fifth Circuit has to reckon with the fact that its six states, comprising 12% of the states, in FY 1971 produced 21,657 of the civil cases filed or 23.2% out of the Nation's total of 93,396 and 10,727 criminal cases of 24.9% out of the Nation's total of 43,157 (see Table C 1 and D 1, 1971 A.O. Rep.). The growth in judicial business within the states of the Fifth Circuit is reflected by the recent addition of 16 district judgeships under the last omnibus District Judgeship Bill.

Undoubtedly the Commission would—and under the structure of the Bill as presently drafted could—investigate and analyze carefully this origin of business factor. But once again, any such study and the projections which are bound to come from it—especially in the light of current experience in the disproportionate increase in the number of appeals—brings the Commission back again to the basic question of the role which should be committed to the Federal intermediate courts of appeals. That could manifest itself in many ways, two of which are discussed in greater detail—(i) reducing federal jurisdiction in certain areas (ii) abandoning appeal as a matter of right with discretionary certiorari-type review in a significant number and type of cases.

DISPROPORTIONATE INCREASE IN APPEALS TO TRIALS

One of the significant factors bearing directly upon the exponential increase in caseloads of the Courts of Appeals is the disproportionate increase in the number of appeals over the increase in the number of trials, both civil and criminal, in the District Courts.

This was analyzed in the Shafroth (1970 Rev. Report), and for the Fifth Circuit is shown on App. D. As reflected, in FY 1961–1969 civil trials increased 94.7%, but at the same time civil appeals increased 157.1%. More startling, however, is that of criminal cases. Somewhat surprisingly, criminal trials increased but 48.1%, but criminal appeals jumped an amazing 210.6%, and against an appeal in approximately 1 out of every 6 criminal cases in FY 1961, in FY 1968 and 1969 every third case was appealed. Undoubtedly much of this is due to the Criminal Justice Act which, with its essential and commendable objective of affording counsel to all defendants, encourages appeals some of which have little merit. But there is no indication that this will subside and from the standpoint of the professional interest of court-appointed counsel, it is increasingly evident that the appeals are taken to eliminate the possibility that in a post-conviction remedy the defendant would accuse his counsel of inadequate representation for failure to take the appeal. Of course, this tendency, already quite evident in post-conviction cases, will likewise increase now that under Amendments to the Criminal Justice Act court-appointed counsel in both the Trial and Appellate Court on a selective basis can be given limited compensation.

Once again this brings the focus back to whether a system can be tolerated which continually increases the percentage of appeals over trials.

REDUCTION OF CASELOAD STATUTORY CHANGES

If the Commission were statutorily charged with the duty of analyzing the role of the intermediate federal appellate courts in the light of factors including those I have discussed, it is inescapable that it would be faced with the necessity of determining what sort of statutory changes could and ought to be made. This would take two main forms. The first is the reduction in federal jurisdiction in terms of the District Courts. Perhaps most significant as current illustrations of that approach on diversity jurisdiction and two American Law Institute suggestions which commend themselves, (a) denying a citizen of

the state in which the District Court is held the right to invoke diversity jurisdiction in that district, and (b) treating a foreign corporation with a permanent establishment in a state the same as a local citizen, thus denying it the right to invoke diversity jurisdiction, either originally or on removal.

Certainly this explosive growth in federal court litigation calls for a critical examination of the place for diversity jurisdiction and the limitations to be placed on its exercise. There are undoubtedly a number of other areas representing a substantial portion of a District Court's docket which should be scrutinized carefully. One must recognize, of course, that against the hope that some jurisdiction would be reduced, it is a certainty with the continuing enactment of more and more federal regulatory legislation that the federal question jurisdiction inescapably will increase markedly.

The other principal form of statutory change would be with respect to the jurisdiction and function of the Court of Appeals. Now except for a rare bankruptcy case, a criminal case which the Court under stringent standards declares to be frivolous, and habeas cases in which certificate of probable cause is denied, the statutory structure of the United States Courts of Appeals is to afford an appeal as a matter of right in every case. That policy must be seriously questioned now in the face of the projections for FY 1975 and 1980. Probably the most useful thing would be to establish a discretionary review of a certiorari-type in significant types of cases. This may take many different forms. The diversity cases once again afford a ready example. To the diversity cases should also be added post-conviction cases under habeas corpus or §2255 or the like. Others might include review of social security cases—almost invariably presenting nothing but a factual controversy which has already been through a review by the District Court. Much the same could be said about cases from the National Labor Relations Board, especially that great bulk of them presenting nothing but a factual controversy with no significant legal principles presented.

No Commission can realistically draw Circuit lines against the prospect of FY 1975–1980 caseloads without seriously questioning whether any such system can be tolerated, or for that matter even survive. Unless another tier of an intermediate appellate court is to be created, serious concern must be given to those areas in which the work of the Court of Appeals would be reduced by restricting its role in a number of significant areas or types of cases. Any such ultimate decision would be fraught with a good deal of controversy. The Commission, composed of distinguished people from all walks of life, with its wide resources and inquiry from all elements of the community, including the organized Bar and individual or groups of lawyers with partisan views, could undoubtedly come forward with well-founded conclusions and recommendations which would be of great assistance to the Congress in the process of enacting some or all of the recommended legislative changes.

WHAT SHOULD APPELLATE JUDGES DO? WHAT CAN APPELLATE JUDGES DO? WHAT SHOULD A COURT OF APPEALS DO?

Finally, in drawing Circuit lines, there has to be some sort of qualitative standard by which the Commission determines just what reasonably can be expected of a single Circuit Court. Inevitably this means examining into what Judges can and ought to do. Of course, this involves many subjective factors which are beyond measure and would be fruitless to examine. But there is sufficient experience now in a number of Appellate Courts, state and federal, by which the size and location and the geographical area of a proposed Circuit would be determined in a significant degree by the extent to which the use of new and unusual procedures would significantly increase output. These present matters can be measured on an objective basis. They also bear directly on the underlying question of the basic role or mission of the appellate court, or, perhaps more accurately, just what kind and character of an appeal can we now tolerate for just the 10 years (to 1980) ahead in the face of this explosive expansion. First, to pinpoint one or two things. Is an appeal of right too much of an ideal? Where do we cut it off? How is it cut off? By express exclusion from appellate jurisdiction? Or by a discretionary review? If appealable, is it either necessary, wise or desirable to structure it on the supposition that oral argument is available in every case? To what extent should oral argument hearings be reduced or eliminated? What safeguards are necessary to assure serious review of appeals authorized by statute if handled summarily without

oral argument? To what extent can Courts improve productive output by the use of standing panels? What safeguards are needed? How much rotation of panels and constituent Judges is necessary or desirable?

It seems to me that unless the Commission is simply going to confine itself to demographic data and that coming from the source of business (the District Courts), it cannot possibly set up a reasonably ideal Circuit geographic structure without it having some notion of what Judges can and ought to be able to do. Surely the inquiry leading to Circuit lines ought to start on the assumption that much has to change. And certainly it has to change in the appellate system.

OUTPUT CAPACITY REQUIRES ASSESSMENT OF NEW METHODS

Our own experience in the Fifth Circuit has made us conscious of how important *methods* are. Had we not adopted new and untried practices, we would have long ago collapsed, and instead of a Court that is virtually up-to-date, we would have had a backlog of scandalous proportions. But as our new practices pose many of the queries briefly listed above, there is certainly a place for a study in depth by the Commission on the extent to which these and other practices are significant in affecting the productive output and are worthy of nationwide use or adaption.

Our own experience in the Fifth Circuit shows why this is vital. Our case filings started to climb from 876 in 1962 to 1,347 in 1967. One of our principal weapons in keeping abreast of this increase was the use of visiting Judges and an increase in the number of courtweeks shown below:

TABLE 7.—FIFTH CIRCUIT COMPARISON VISITING JUDGES 1965-1971

	1965-66	1966-67	1967-68	1968-69	1969-70	1970-71	
Visiting Judges		33	21	27	41	1	11
Court weeks		38	45	48	46	38	43

In the fall of 1968 with the prospect (later made good) of 1,489 filings that year, we recognized that we could not possibly keep abreast of this inflow unless we found some new ways. We knew we could not get enough visiting Judges. For that input (after proved reductions for cases terminated without significant judicial activity) we would have required 64 courtweeks. With but 12 active Judges this would have required (after full use of the three Senior Judges) 60 visiting Judges. We know we could not possibly obtain this number, and our experience with the use of 45 (in 1966–67) proved that it was impossible to effectively assimilate that many visiting Judges. This led us to adopt the Fifth Circuit screening procedure. This is explained fully in *Isbell Enterprises, Inc.* v. *Citizens Casualty Company of New York*, 5 Cir., 1970, 431 F.2d 409, Part I, and the cited *Huth* and *Murphy* earlier opinions. By an elaborate, but still very simple system, we set up a program under which every case was judicially screened by Judges, not Law Clerks. The Court was divided into standing panels with cases assigned in strict routine rotation by the Clerk to the initiating Judges on each panel. We established four classes of cases. Class I covers cases so lacking in merit as to be frivolous and subject to dismissal or affirmance without more. Class II comprises cases in which oral argument is not required and which then go on the Summary Calendar for disposition on briefs and records without oral argument. For that classification we had a double unanimity rule requiring unanimity by the standing panel on classification and also on the final opinion. This leaves those cases in which oral argument is deemed required or helpful. Class III group covering those in which limited (15 minutes) argument is thought adequate, and Class IV covering those meriting up to the full time (30 minutes) allowed by FRAP 34. The success of this is little short of miraculous. For a better understanding of the operation and impact of screening, it is helpful to have the composition of our docket in the three principal categories (direct criminal, habeas—Section 2255, civil) as follows:

TABLE 8.—*Fiscal year 1971 appeals docketed by major subdivisions*

	Percent
Direct criminal	22.1
Habeas	16.0
Section 2255	5.1
Subtotal	21.1
Total	43.2
Civil	56.8
Total	100.0

COURTS INCREASED OUTPUT DUE TO NEW PROCEDURES—JUDICIAL SCREENING AND DISPOSITION WITHOUT ORAL ARGUMENT

Without a doubt it is the Court's screening procedure and the large percentage of Summary II's (cases without oral argument) that has enabled it constantly to increase its output both in terminations and in opinions by Judges.

As the Court and the Judges gained experience in this new and untried procedure there was an increase in the number of Summary II's and, so important, a *decrease* in the number of cases for oral argument as shown below:

TABLE 9.—SCREENING CLASSIFICATION BREAKDOWN TO NUMBERS AND PERCENTAGES

Class	Fiscal year 1969		Fiscal year 1970		Fiscal year 1971	
	Number	Percent	Number	Percent	Number	Percen
I and II	218	32.7	452	38.1	6 2	4.7
III	265	39.7	506	42.7	511	46.3
IV	184	27.6	229	19.2	154	10.8
Total	667	100.0	1,187	100.0	1,428	100.0

Although FY 1971 II's were 45.7% for the whole year, it is significant that there was a substantial increase in the last half (to 51.6%) over the first half of FY 1971.

TABLE 10.—SCREENING REPORT, JULY 1, 1970 THROUGH JUNE 30, 1971

	July 1, 1970–December 29, 1970		December 30, 1970–June 30, 1971		Overall	
	Number	Percent	Number	Percent	Number	Percent
Class I and II	306	40.4	346	51.6	652	45.7
Class III	356	47.0	266	39.6	622	43.5
Class IV	95	12.6	59	8.8	154	10.8
Total	757	100.0	671	100.0	1,428	100.0

Although under an experimental Standing Panel project (which the Court had to abandon because of adverse, substantive side effects, especially a lack of adequate personnel) the Summary II's for a short period (July–September 1971) reached 69.7%, the overall percentage has now settled down to about 55%.

That Summary II's run the gamut of the Court's whole docket and do not—in any sense—as too often supposed by some Judges, scholars and critics who are uninformed—represent so-called "trash" or frivolous, worthless, wasteful cases is shown by the following subject matter breakdown for FY 1971.

TABLE II.—CLASSIFICATION AND SUBJECT MATTER OF CASES SCREENED JULY 1, 1970 TO JUNE 30, 1971

Subject matter	Class I	Class II	Class III	Class IV	Total
Direct criminal	2	177	138	28	345
Habeas corpus:					
With counsel		39	43	4	86
Without counsel		128	10		138
Section 2255:					
With counsel		21	7	1	29
Without counsel	1	42	3		46
Civil:					
Private civil		126	222	75	423
U.S. civil		40	56	14	110
Tax		17	53	10	80
Bankruptcy		7	13	2	22
NLRB		20	24	6	50
Other agency		4	7	2	13
Civil rights	1	21	42	10	74
Admiralty		6	4	2	12
Total	4	648	622	154	1,428

Of extraordinary significance is what screening and Summary II's produce in the field of direct criminal appeals and post-conviction remedies (habeas and §2255). Delay in total time from conviction to final affirmance and termination of post-conviction remedies is a matter of great public concern, if not a near scandal. Experience has demonstrated that the use of Summary II's sharply reduces this time since this eliminates all calendaring delay:

TABLE 12.—FISCAL YEAR 1971 PERCENTAGE OF SUMMARY II's TO TOTAL CRIMINAL-RELATED CASES

	Summary II	Total	Percent of summary II to total cases
Criminal	179	345	51.8
Section 2255	64	75	85.3
Habeas	167	224	74.6

This means that out of this whole criminal area which comprises 41.5% of our docket in FY 1972 (see App. F attached) a good portion goes off without oral argument. Of direct criminal appeals (comprising 20.7% of the docket in FY 1972) 51.8% of those go off as Summary II's. It is even higher for habeas (74.6%) and 2255's (85.3%) which jointly comprise 20.8% of our docket.

This is of particular significance in relation to the time it takes as we discuss later under expediting criminal appeals and the median time study.

Another significant result of Summary II's in direct criminal appeals is to markedly reduce the median time from the date of filing of the record until date of final disposition in the Court of Appeals. In the study leading to the formal Plan for Expediting Criminal Appeals adopted by the Fifth Circuit Judicial Council in January 1972 (copies of which are being furnished to the Committee) a median time study showed that in cases disposed of after oral argument, the median time was 12 months. In contrast, for those disposed of as Summary II's without oral argument, the median time was 8 months. With tightened procedures concerning the preparation and filing of the record in the trial court, shortening briefing schedules in the Court of Appeals, and eliminating all causes for delay in filing briefs in the Court of Appeals, Summary II's will be even more significant. The case goes to the screening panel immediately on the filing of the last brief thus eliminating all delay for routine calendaring, the time between the issuance of the calendar and the date set for argument, etc.

THE FIFTH CIRCUIT INNOVATES AGAIN—RULE 21

As though screening were not enough, experience of about two years with the system revealed that in this great volume of appeals—many of which were

on the oral argument calendar as III's and IV's—judicial consideration of them by the panel, either on the summary or regular calendar, demonstrated that no good would be served by an opinion. Consequently, on August 14, 1970, the Court adopted what it calls Rule 21 which permits a simple order of affirmance for civil and criminal cases (not reversal) and enforcement in an administrative agency case. This rule, in its operation and the necessity for it, is detailed in *NLRB vs. Amalgamated Clothing Workers of America*, 5 Cir., 1970, 430 F.2d 966.

Of course, such a device must be, and is, carefully used. Scattered as we are geographically, it works well for us. At least in effect it closely parallels the practice frequently used in the second Circuit of dismissal from the Bench. In reaching our output of 1,661 opinions this has been significant since Rule 21 opinions comprised 28% of the total per curiams for FY 1971. In contrast and to illustrate the progress and effectiveness of this device, of the 1,914 opinions projected for FY 1972, we project that Rule 21 opinions will comprise 40% of the total unsigned opinions. The following table covering the first eight months of FY 1972 is a further illustration:

TABLE 13.—SIGNED, PER CURIAMS AND PERCENTAGE OF RULE 21 OPINIONS FIRST 8 MONTHS FISCAL YEAR 1972

	Total opinions	Percentage rule 21
Signed	390	33.7
Per curiam	459	39.7
Rule 21	307	26.6
Totals	1,156	100.0

PROOF OF THE PUDDING—INNOVATIONS WORK—FIFTH CIRCUIT OUTPUT SHARPLY INCREASED

Despite spectacular annual increases in both the percentage and numerical rate of new filings the Court through these innovative practices has managed each year to turn out more cases than were filed the year before and in FY1971, for the first time at least since 1960, the Court turned out more cases than were filed in the current year, as this table shows:

TABLE 14.—FILING, DISPOSITIONS AND CARRY-OVER IN FIFTH CIRCUIT FISCAL YEAR 1960-1971

Fiscal year	Number cases filed	Number cases disposed of [1]	Carried forward to succeeding year
1960	584	554	278
1961	639	514	403
1962	717	598	522
1963	876	765	633
1964	1,033	931	735
1965	1,073	878	930
1966	1,099	1,028	1,001
1967	1,189	1,171	1,019
1968	1,347	1,290	1,076
1969	1,489	1,496	1,069
1970	1,794	1,682	1,101
1971	2,077	2,079	1,179
1972	2,596 (est.)		

[1] In but 5 years our volume has increased by 978 cases (89 percent) from 1,099 in fiscal year 1966 to 2,077 actual cases in fiscal year 1971 (all consolidations and cross appeals eliminated), and a 225 percent increase in the last 10 years.

The 2 year increase fiscal years 1969–1971 totaled 588 cases. For this current fiscal year 1972 alone we expect a further increase of 519 cases for a total increase in 3 years of 1,107 cases (74.3 percent increase).

While there has been an exponential increase in the number of cases filed, since 1967 the Court has disposed of more cases than filed in each preceding year, with 1971 showng more closed (2,079) than filed (2,077), and the carry over to the succeeding year has been disproportionately smaller. At the same time there has been a marked reduction from 12.5 months to 6.5 months in fiscal year 1971 of the median time from the filing of the complete record to the final disposition of the appeal, while the national average is 7.6. See table B-4 A.O. 1971 report.

For an appellate Court, termination largely depends upon the number of cases the Judge can hear and dispose of by a written opinion. The following Table 15 shows the numerical and percentage increase from FY 1968 to FY

1971 in output by the Court and the opinions per active Judge. As the Court has been increased by additional judgeships to its current maximum statutory complement of 15, the analysis was made on the basis of individual Judges, not just an average. In this relatively short period of time the Court's disposition by opinion has increased 74.3%, its total dispositions by 61.2%. The reason for this is the spectacular increase of 75.4% in the opinion output per active Judge as shown by the following table:

TABLE 15.—NUMERICAL AND PERCENTAGE INCREASE IN OUTPUT

	Fiscal year				Percent increase 1968-71
	1968	1969	1970	1971	
(a) Output by opinions	953	1,129	1,271	1,661	74.3
(b) Output other than by opinions	337	367	411	418	24.0
(c) Total closed cases	1,290	1,496	1,682	2,079	61.2
(d) Opinions per active judge	61	72	82	107	75.4

TABLE 16.—*Opinion output comparison fiscal year 1971–70*

Fiscal year 1971:	
Signed	676
Rule 21 [1]	210
Per curiams	775
Total	1,661
Fiscal year 1970:	
Signed	638
Per curiams	633
Total	1,271

[1] Since August 14, 1970 rule 21 summary affirmance opinions have comprised 30.8 percent of per curiams, but in current fiscal year 1972 they run 40 percent. (See table 13.)

The median number of opinions per active Judge increased from 87 in FY 1970 to 108 in FY 1971, a numerical increase of 21 and a percentage increase of 24.

All this shows why the Fifth Circuit ranks No. 1 in the total number of judicial terminations after hearing or submission on briefs. Our total is 117 against a national average of 78. Our 117 total was an increase from 72 in 1968. (See A.O. "Management Statistics", statistical profile.)

INNOVATIONS HAVE AVOIDED SCANDALOUS BACKLOG

Not only have these innovated procedures enabled the Court continuously to increase its output, but a direct consequence of this is that the Court has been able thus far to avoid backlogs which would otherwise have been of scandalous proportions. It is necessary, however, at this point, to sound the specific caveat that we have reached the maximum of our productive output unless as discussed in Part Two, the Congress effectively gives us much needed help both to the Judges' staff and to the Court as an institution for the performance of judicial functions.

There are many who deplore the high percentage of Summary II decisions without oral argument, but to these criticisms, the answer is a simple one.

Were we not to use the methods we have employed and the new ones being initiated we would be in an absolute state of chaos with scandalous cumulative backlogs. This is because in order to dispose of all of these cases on oral argument, we would have to have a startling number of court weeks way beyond the capacity of our own Judges which in turn would require an impossible number of visiting Judges. This is illustrated by the following on the assumption of 30 visiting Judges with the annual and cumulative backlog resulting.

TABLE 17.—CUMULATIVE BACKLOG UNLESS HELP COMES

	Fiscal year 1972	Fiscal year 1973	Fiscal year 1974	Fiscal year 1975
Cases for judicial disposition	1,764	1,904	2,043	2,234
Backlog from preceding year	20	280	780	1,440
Total cases for oral argument	1,784	2,184	2,823	3,674
Court weeks required (20 per week)	84	109	142	184
Court weeks serviced by active Fifth Circuit judges	60	60	60	60
Total visiting judges required	72	147	246	372
Backlog (assuming 30 visiting judges available)	280	780	1,440	2,280

NOTE: These impossibilities highlight why our success for fiscal year 1971 is due to our new procedures. Without screening and on oral argument only, on the same basis as this table, we would have required 76 court weeks with 48 visiting Judges, an impossible attainment

This material is put forward not to show that we do better than anyone else or that others could or should adopt our systems. Every Circuit, whether on present or future alignments, will have unique problems. I offer it in this detail to demonstrate that there is a tremendous, untapped capacity for output that Judges and Courts are not aware of until they experiment. It is of importance here because the Commission cannot really determine how many Judges and therefore how many Circuits are needed until it first ascertains what it is Judges or groups of Judges in a collective Court can do.

SIGNIFICANCE OF PART TWO OF THIS STATEMENT

Although Part Two is submitted in response to the request of the chairman that we discuss the proposal made by the Fifth Circuit and approved by the Judicial Conference to establish a staff of Legal Assistants to the Court of Appeals, the comments made and the data supplied have a direct bearing upon all of these matters concerning Circuit realignment. They demonstrate the urgency in point of time as almost a last ditch means of avoiding scandalous backlogs and a near breakdown. They demonstrate as well the significance of the problems which must be studied by a Commission and on which it must make deliberative decisions if its work is to be anything more than a momentary stop gap. Consequently, Part Two is an essential consideration for Part One.

CONCLUSION OF PART ONE

I end as I began: I am wholeheartedly in favor of the establishment of this Commission. This analysis demonstrates, I believe, that the Commission cannot intelligently draw those lines without first making an in-depth study of what the role of the Court of Appeals ought to be, what we can tolerate, what we can survive under, what statutory changes should be wrought to bring the workload within reasonable capabilities, and an objective determination of what Judges and Courts reasonably ought to be expected to do and accomplish by the imaginative use of new methods and procedures.

Part Two

ESTABLISHMENT OF LEGAL ASSISTANTS TO THE FIFTH CIRCUIT

After submission to the Subcommittee on Supporting Personnel with data substantially that reflected in Parts One and Two of this statement, that Subcommittee recommended to the Committee on Court Administration that significant additional personnel be made available to the Fifth Circuit because of the urgency of the problems facing it. This request did not ignore the possibility or likelihood of circuit realignment. To the contrary, the Fifth Circuit urged these proposals as one of the ways by which a productive output could be increased with no sacrifice to the quality of justice both as a long range proposition and the short range emergency. By the October, 1971 resolution (App. A) the Judicial Council recognized that even with the enactment of some sort of legislation creating a commission or otherwise to recommend circuit realignment, there was no likelihood that effective relief could be afforded within two to three years at the minimum. In the meantime, the Court is facing further explosive increases in filings so that unless something drastic is

done without delay, disturbing backlogs will occur and, at least for many litigants, there may be almost an exclusion from *any* appellate review in the Fifth Circuit.

The Judicial Conference of the United States approved the recommendations of the Committee on Court Administration as shown by the minutes of the October, 1971 meeting.

To fund these approved positions, the Budget Committee recommended, and the Judicial Conference approved the request for funds covering (a) Judges' Staff (1)(2)(3)(4)(5), but deferred action pending substantive legislation on Part (b) for Serving the Whole Court(1)(2)(3) as follows.

Estimates for 1973

The estimates approved for fiscal year 1973 for the judiciary, exclusive of the Supreme Court, the Customs Court and the Federal Judicial Center, aggregate $180,428,000, an increase of $19,234,000 over the amounts appropriated for 1972. The increase includes all funds requested for personnel approved by the Conference (see Report of Committee on Court Administration) but does not include the Fifth Circuit request for $208,000 to establish a staff law office, for which the Budget Committee believed substantive legislation would be required.

PROPOSED SUBSTANTIVE LEGISLATION

Pursuant to the direction of the Judicial Conference, the Director of the Administrative Office sent to the President of the Senate and to the Speaker of the House his letter of February 7, 1972 (App. G) together with a proposed substantive bill (App. H) to authorize the creation of the positions in Part (b)(1)(2)(3) for Serving the Whole Court.

On receipt of copies of these I wrote to the distinguished Chairman of this subcommittee on February 29, 1972 to which the Chairman on March 17, 1972 responded stating that he would like to know what cost is involved for this legal assistance concept, salaries contemplated, and the secretarial or additional law clerk help envisaged.

As this ties directly into the problems discussed in Part One relating specifically to S. J. Res. 122, it is appropriate to attempt to furnish this data and further supporting material through this statement which, hopefully, will result in the early introduction and enactment of substantive legislation of the kind proposed (App. H) or any other suitable type.

WE CANNOT WAIT UNTIL CIRCUIT REALIGNMENT

As Part One makes emphatic, the Fifth Circuit is all for national circuit realignment. It is all for the Commission form of approach. It reiterates its unqualified endorsement for early enactment of such a structure, but the Court must face reality. Already a year has gone by since the first Commission-type legislation was introduced (H.R. 7378, April 7, 1971) and only now has this progressed to a revised bill reported out of Committee (March 7, 1972). Similarly, the present hearings are the first under S.J. Res. 122. No criticism of either the Senate or the House is even remotely suggested. We accept this as an inevitable part of the legislative process in a body that literally has the cares of the world upon its shoulder. Indeed it is this unavoidable delay which leads us to sound this strong note of urgency. We have to be realists. Considering the pressures upon the Congress it would be optimistic to anticipate enactment of circuit realignment legislation earlier than a year from now. By that time the current FY 1972 will have been history, and FY 1973 will have run three quarters of its course. Even assuming enactment within a year, there is little reason to believe that the Commission would be appointed and at work in less than 6 months thereafter. That is well into FY 1974. Considering the nature of the problems which must be investigated (as we have outlined in Part One) and as S. J. Res. 122 prescribes (see page 10) it would be a year before the Commission could complete its investigation and arrive at its recommendations.[4] That day is on the eve of FY 1975. Since the Commission concept in S. J. Res. 122 (and revised H. R. 7378) now calls for a recommendation and report to the Congress, there can be no effective change until the Congress enacts

[4] Of course, S. J. Res. 122 allows two years. In the revised bill reported to the House, H. R. 7378 reduces the time to "one hundred and eighty days [from] the date on which [the] ninth member [of the commission] is appointed". See Sec. 6.

legislation approving or disapproving the Commission's recommendations or otherwise determining the basic problems of the system of Federal Courts of Appeals and, specifically, the geographic realignment of the Circuits. By this time FY 1975 has gone. Additionally, as our analysis in Part One demonstrates, redrawing Circuit lines is no solution at all. The business is still there. This means in many realigned Circuits there is still need for additional judgeships. This in turn calls for substantive legislation of a kind which traditionally takes not less than a year. As a certainty, we are speaking then of FY 1976.

In the meantime business goes on in the six states of the Fifth Circuit. Business means marked increase in District Court filings. This means increased appeals and with no added judgeships beyond 15 something must give. So alarming is our situation that it bears repeating the January 1972 FY 1972–75 projections (set out in more detail in Table 1, page 14).

TABLE 18.—PROJECTION OF FILINGS, FISCAL YEARS 1972-75

Fiscal year	1970 Shafroth Survey	September 1971 upward revision, Fifth Circuit	Upward revision percentage increase
1971	1,852	2,077	15.8
1972	2,008	2,596	25.0
1973	2,159	2,784	7.6
1974	2,311	2,980	7.0
1975	2,464	3,188	6.6
Cumulative increase fiscal years 1971-75			53.5
1981 [1]		6,750	[2] 38.875

[1] Fiscal year 1981 projections based on 225 percent increase (267 percent with cross appeals) in Fifth Circuit fiscal years 1961-71 and 204 percent national increase as reflected by table 2 A.O. 1971 report (cross appeals and multiple parties excluded).
[2] National (all circuits).

Experience, including the certainty of meeting the projection of nearly 2600 for the current FY 1972, demonstrates that these upward revisions over the 1970 Shafroth Survey will prove true. This produces an increase of the caseload per Judge from 173 in FY 1972 to 212 in FY 1975, and an accumulative percentage increase, 1975 over 1971 of 53.5%

This becomes aggravated by the nature of the cases, especially those commanding the highest priority such as direct criminal appeals and post conviction cases.

CRIMINAL CASES AGGRAVATE THE PROBLEM

From 1965 criminal appeals increased from 180 to 439 (FY 1971)—a 144% increase in contrast to civil cases which increased from 874 in 1965 to 1,598 (FY 1971) for an 83% increase. Significantly, during the last of FY 1971 the percentage of criminal and post-conviction cases increased over FY 1970 from 38.6% to 43.2% with a consequent decline in civil cases from 61.4% to 56.8%.[3]

On the indicated projections and the percentage composition of docket filings (see Table 8), the workload for criminal (and related) cases will be not less than the figures shown on the following Table:

TABLE 19.—PROJECTED DIRECT CRIMINAL, HABEAS AND SECTION 2255 FISCAL YEAR 1972-75

Subject matter	Fiscal year 1972	Fiscal year 1973	Fiscal year 1974	Fiscal year 1975
Criminal (20.7 percent)	537	578	618	660
Habeas (16.0 percent)	415	447	478	510
Section 2255 (4.8 percent)	124	134	143	153
Total (41.5 percent of docket)	1,076	1,159	1,239	1,323

[3] See App. D in the Shafroth 1970 survey showing disparity between increase in trials and appeals as between civil and criminal cases.

INCREASED JUDGE OUTPUT THE ONLY ALTERNATIVE TO SCANDALOUS BACKLOGS

Despite what the Court has done through the full exploitation of innovative methods and the spectacular results which have so far enabled it to keep abreast of the constantly increasing input, it is now certain that *unless* very significant increases in Judge output can be attained, the Court will have backlogs which approach dangerous if not scandalous proportions. On the most optimistic basis of assuming each active Judge can write opinions in 110 cases (not counting school cases and administrative matters which are in addition to this caseload) FY 1972 will end with a backlog of 114 cases. On the usual basis of 20 cases per week this is close to six weeks of Court. This at first seems small but it goes over to the next year and adds to the backlog of that year and so on through FY 1975 as reflected by the next table:

TABLE 20.—PROJECTED BACKLOG ON BASIS OF 110 OPINIONS PER ACTIVE JUDGE

[Excluding school cases or opinions in administrative matters]

	Fiscal year			
	1972	1973	1974	1975
On basis of 110 opinions per active judge:				
(a) Ready cases remaining for hearing or submission	1,764	2,064	2,525	3,171
(b) Less: Maximum 110 cases (opinions) per 15 active judges	1,650	1,650	1,650	1,650
(c) Backlog of ready cases	114	414	875	1,521

The backlog for FY 1973 (414) will actually exceed the entire input in FY 1971 for the First Circuit (383 cases). The cumulative backlog for FY '74 (875) will exceed the current filings in FY 1971 of the Tenth Circuit (734), the Eighth Circuit (713), the First Circuit (383) and will nearly equal that of the Seventh Circuit (902). And in FY 1975 the cumulative backlog (1521) will exceed the whole year's input for FY 1971 of every Circuit except the Ninth (1936) and the Fifth (2316). (See AO Table 4, page II-9). Just the backlog alone would exceed our own total filings for FY '68 (1489). At 20 cases per week the backlog alone would be the equivalent of 76 courtweeks. On an experience-demonstrated capacity of a maximum of 10 weeks of actual Court sittings these 76 weeks would require 228 judge weeks or a total demand for 78 visiting Judges. These are simply unobtainable and a number of weeks would have to be manned by panels made up of a majority of non-Circuit Judges of the Fifth Circuit—a condition we found out by actual experience to be very unsatisfactory to the Bar, to the Court as an institution, and to the sound development of the law. But of course one cannot consider just the backlog (1,521) and for the Court to dispose of current FY 1975 cases ready for submission (1,793), there would be a total of 3,314 cases or the equivalent of 166 court weeks requiring 348 visiting Judges!

We must again sound the caveat: we know we simply cannot keep abreast of this increased business in FY 1973–75. Some backlogs will develop. Indeed, unless some help is forthcoming without delay, we cannot even keep up the pace we have set for ourselves during FY 1968–71 and which will increase in the current FY 1972. On the other hand, most of us feel that with substantial help made available *now* we can—with safety to our own health and the quality of justice—increase our output.

ADDITIONAL AGGRAVATING ADVERSE FACTORS

Approaching it purely from a question of the whole docket composition, the outlook is bleak with huge backlogs inevitable. To the statistical averages must be added other adverse factors which makes it even worse.

EXPEDITING CRIMINAL APPEALS

On its own and after much study the Judicial Council of the Fifth Circuit in its January 1972 meeting adopted a formal plan for expediting criminal appeals.

Under the Plan the Court has now adopted a stringent schedule under which the most significant and immediate impact is on the Judges themselves. The Court has fixed a period of 6 months as the maximum time for disposing of criminal case. To accomplish this, internal procedures are set up which are streamlined to assure that no time is lost and no cases get in default for failure of counsel or court reporters to comply strictly with the rules. Most significant, the Judges have pledged to dispose of every criminal case within half the time ordinarily considered to be prompt disposition. With the large number of direct criminal appeals plus the post-conviction cases projected for FY 1973–75 (see Table 19), the Judges cannot meet this rigid time schedule and keep up with the balance of the cases (approximately 58–60% civil). Thus, by the Court's self-imposed and Judicial Conference-imposed expediting mandates the general backlog at least of civil cases will be more than that projected above (see Table 20).

THREE-JUDGE COURT CASES

In addition to the growing increase in the caseload of the Court of Appeals itself, three-judge court cases are a substantial part of the activities of Active Circuit Judges. The extent to which this is such a burden is shown below which reflects the number of three-judge courts constituted by me in the short period that I have been Chief Judge (since July 17, 1967). They total 512 and as of February 16, 1971 294 were pending. The breakdown is shown by districts and states.

TABLE 21.—TOTAL DESIGNATED 3-JUDGE CASES SINCE JULY 17, 1967 TO FEBRUARY 16, 1972

State	Districts					Total
	Northern	Middle	Southern	Eastern	Western	
Alabama	16	30	9			55
Florida	29	39	50			118
Georgia	78	5	8			91
Louisiana				67	23	90
Mississippi	22		36			58
Texas	41		27	2	30	100
Total designated since July 17, 1967						512

TABLE 22.—PENDING 3-JUDGE CASES

State	Districts					Total
	Northern	Middle	Southern	Eastern	Western	
Alabama	5	16	7			28
Florida	11	15	18			44
Georgia	53	2	9			64
Louisiana				52	18	70
Mississippi	11		16			27
Texas	24		18	2	17	61
Total pending as of February 16, 1972						294

The workload on Active Judges (Senior Judges are available for only a few of these cases) is shown by Table 23 which has been updated to February 10, 1972. This shows the pending cases which each of the Judges listed now has responsibility for as the presiding member of the three-judge panel.

TABLE 23.—*Pending three-judge courts by judges as of February 10, 1972*

Case load per circuit judge:

Alabama:		Louisiana:	
Rives	16	Wisdom	36
Gewin	5	Ainsworth	34
Godbold	7	Mississippi:	
Florida:		Coleman	13
Jones	1	Clark	14
Dyer	11	Texas:	
Simpson	19	Brown	8
Roney	13	Thornberry	14
Georgia:		Goldberg	19
Tuttle	9	Ingraham	20
Bell	27		
Morgan	28		

IMPACT OF PRIORITIES ON BACKLOG

Priorities have been fixed by the Court (many controlled by statutes) covering 24 identifiable categories, the bottom one of which is "regular non-preference civil appeals" which are processed for decision or hearing in accordance with the "first-in—first-out rule". An actual analysis of the docket for FY 1971 (Table 24) shows the total number of preference cases. These comprise 51.8% of the entire actual docket.

TABLE 24.—*Fiscal year 1971 filings by established priorities*

Criminal appeals	544
1. Criminal Appeals (Rule 45(b) FRAP)	
2. Appeals from orders refusing or imposing conditions of release	
3. Difficult or widely publicized trials	
5. Organized Crime Control Act	
6. Selective Service Criminal Cases	
Habeas corpus and section 2255 appeals (Item 4)	411
Interlocutory appeals (Item 9)	11
National Labor Relations Board (Item 10)	106
Other agency review	30
12. Immigration & Naturalization Appeals	
15. Administrative Orders, Review Act of 1966	
17. Federal Trade Commission Act	
Mandamus, prohibition, etc. (Item 7)	32
Certain Federal questions	66
11. Social Security Appeals, 25	
13. Railroad Unemployment Ins. Act, 7	
14. Norris-LaGuardia Act, 21	
16. Clayton Antitrust Act, 13	
Total preference cases	1,200
Total filings fiscal year 1971	2,316
Percentage of docket requiring preference	51.8

The disturbing thing is how important the so-called non-preference cases are or can be. These would include on a first-in—first-out basis: Civil Rights, U.S. Civil not include in priority list, Federal Questions not included in priority list, Tax Cases, Bankruptcy, Admiralty, and Diversity.

When backlogs develop, priorities can mean almost a complete exclusion of a case or cases. On the expectation that 110 opinions per Active Judge is the maximum output (unless significant help is afforded immediately), the projected backlog on the projected input will be:

TABLE 25.—PROJECTED BACKLOG WITH OR WITHOUT SCREENING ON BASIS OF 110 OPINIONS PER ACTIVE JUDGE

[Excluding school cases or opinions in administrative matters]

	Fiscal year			
	1972	1973	1974	1975
On basis of 110 opinions per active judge:				
(a) Ready cases remaining for hearing or submission	1,764	2,064	2,525	3,171
(b) Less: Maximum 110 cases (opinions) per 15 active judges	1,650	1,650	1,650	1,650
(c) Backlog of ready cases	114	414	875	1,521

The following table[6] illustrates how priorities work to cut off cases entirely once the maximum output of the Judges is reached.

TABLE 26.—FISCAL YEAR IMPACT OF PRIORITIES ON BACKLOG

	1972		1973		1974		1975	
	Cases	Cumulative total	Cases	Cumulative total	Cases	Cumulative total	Cases	Cumulative total
Direct criminal	429		474		513		558	
Habeas corpus	277	706	306	780	332	845	360	918
2255	91	797	101	881	109	954	120	1,038
Social Security	14	811	16	897	17	971	18	1,056
Civil rights	92	903	101	998	109	1,080	119	1,175
U.S. civil	122	1,025	134	1,132	146	1,226	158	1,333
Other agency	16	1,041	19	1,151	20	1,246	22	1,355
Federal question	309	1,350	341	1,492	370	1,616	403	1,758
Tax	99	1,449	109	1,601	118	1,734	129	1,887
Bankruptcy	26	1,475	29	1,630	32	1,766	34	1,921
National Labor Relations Board	62	1,537	68	1,698	74	1,840	78	1,999
Admiralty	14	1,551	16	1,714	17	1,857	18	2,017
Diversity	213	1,764	236	1,950	255	2,111	279	2,296

Opinions per active judge:	*Maximum cases which can be calendared for screening or oral argument*
100×15	1,500
105×15	1,575
110×15	1,650
115×15	1,725

Thus, on the illustrative listing of priorities (see Note 6) the line drawn across the columns shows that in FY 1973 all NLRB, Admiralty and Diversity cases will be excluded. In FY 1974, priorities will exclude all Tax, Bankruptcy, NLRB, Admiralty and Diversity cases. And in FY 1975 it will exclude a major portion of non-priority federal question cases and all Tax, Bankruptcy, NLRB, Admiralty and Diversity cases. What is worse, with the operation of the priorities, some or all of these cases may *never* be reached, because while they would go over to the succeeding year to be calendared on the first come, first out basis, some or all could be "frozen out" in the succeeding year as the 51.4% of priority cases in themselves exceed the total maximum Judge output (1650 cases).

THE WORKLOAD AHEAD DEMANDS IMMEDIATE RELIEF

Although we again emphasize that we cannot hope to cope completely with these projected explosive increases, the magnitude of the problem is well illustrated by App. J which shows the projected workload per Active Judge (on the basis of 60% Summary II's) in terms of opinion writing and participation as a panel member in Summary II cases, those orally argued and Administra-

[6] Special Note: The table was worked up for the Court's use as an illustration and does not list the categories in the correct order of priority.

tive and School Cases. Assuming no backlog the workload pe rJudge runs from 477, FY 1972 to 653, FY 1975. Acknowledging that we cannot hope to cope with all of the increase year by year the Court does wish to increase its output to the maximum extent of human physical resources and the creditable performance of just and fair dispositions.

TO MINIMIZE BACKLOGS HELP IS NEEDED NOW

We must find ways by which, without sacrifice of quality and no possible abdication of independent, judicial responsibility, the Judges' output can be markedly increased. Our own experience indicates that the most likely source of expansion of increased productivity will come through intensified screening, and increased effectiveness of Summary II's without oral argument. This can only happen by the availability and full utilization of adequate supporting staffs, both legal and secretarial, to the Judges and to the Court as a whole in the performance of judicial responsibilities.

PERSONNEL REQUESTED FOR JUDGE'S STAFF

As shown in the excerpt from the Judicial Conference Report (see page 88) Part (a) covers increase in the Judge's staff to provide an additional secretary, law clerk and clerical assistant for each active Circuit Judge (with some additions for the Chief Judge). Although these approved positions depend only on funding and no substantive legislation is required or proposed we mention these because of the responsibility which the Senate Committee on the Judiciary has in assuring that there is not a near breakdown in the Fifth Circuit. All recognize the working necessity of the Congress acting through its committees. But the urgent seriousness of our plight transcends the technical confines of committee structures. No committee is in a better position, nor it seems to us has a greater obligation, to sound this sense of urgency to the Senate Committee on Appropriations, to the Senate and the Congress than this distinguished Subcommittee dedicated to improvement in judicial machinery. Certainly "improvement" encompasses action to prevent a breakdown or failure in the machinery.

PERSONNEL FOR SERVING THE WHOLE COURT

This is covered in Part (b) and calls for the following:

	Total
(1) Chief staff attorney	1
(2) Additional staff attorneys (5)	8
(3) Secretaries for staff law clerk's office (3)	4

(1) *Chief Staff Attorney.*

(2) *Five additional Staff Attorneys:*[1] This project contemplates the establishment within the Court's structure of a Staff Attorney's office. It is essential, we think, to get away from the concept of either *pro se* clerks or law clerks to the Court. The prestige of these people needs to be enhanced. Each of the Staff Attorneys should be a mature person compensated in the range of $15,000. The Chief Staff Attorney should have maturity, exceptional managerial professional attainments and supervisory ability. Compensation should be in the range of $25,000–$30,000.

In our screening procedure we have used the present 3 *pro se* clerks (attached to the Clerk's office) very effectively in the handling of pro se matters, certificates of probable cause and in forma pauperis applications, habeas, §2255 cases, and in direct criminal appeals. This has demonstrated that staff clerks are a most effective tool. They should be assigned to the Court as an institution where they can work closely together under competent supervision. But they need to be adequate in number and receive compensation which will attract the persons having the required professional resources.

The pressure for expediting criminal appeals discussed above offers both the most immediate need and opportunity to exploit fully the professional talents of such a group. Under the Court's commitment to dispose of these cases

[1] To meet the ever-growing docket we have been afforded three so-called *pro se* clerks who are lawyers attached to the Clerk's office. The five requested in this project are in addition so that as the table shows, there would be a total of 8 Staff Attorneys.

within 6 months (not an average, but in fact in 6 months) and a pledge by the Judges to dispose of the opinions within one-half the ordinary time, it will be essential that every criminal case (direct and post-conviction) be carefully analyzed in advance of submission to the Judge and his staff by the Staff Attorneys. This would most often take the form of legal research leading to a memorandum for use by the Judges in drafting opinions. In the screening process the Judge would then be able to determine readily whether it should be classed for oral argument (Class III or IV) or disposed of as Summary II. On studying the record and briefs, the Judge would have the Staff Attorney for ready consultation. In the meantime, this would free the Judges' own staff of law clerks (presently 2 and 3 as now requested in the pending budget) for memoranda in advance of oral argument in the cases classed III and IV and the preparation of drafts in the cases heard on oral argument and assigned to that Judge for opinion-writing.

It is certain as anything can be that unless the nation is prepared to accept the prospect of scandalous backlogs under the present system of appeal as a matter of right in every federal case the system is going to break down. The hope is to learn how to employ and effectively use paralegals under competent direct supervision which does not infringe upon the Judges' inescapable sole responsibility and judicial independence. Staff Attorneys of a high professional order are an answer, an answer which needs to be fully exploited.

The Fifth Circuit has a need for this help that is critical. The Fifth Circuit has proved that it can innovate and make new ideas work. The Court is confident that it can make this idea work, and without such assistance we are certainly headed for serious trouble.

(3) *Secretaries for Staff Law Clerk's Office:* This is a perfectly obvious request to enable these professionals to perform professional duties without subjecting them to the tedious and wasteful operations of being their own typists. As described above it is essential that the flow of the cases move without delay and in a way by which the preliminary analysis, recommendation, proposed drafts, etc. of the Staff Attorneys can be effectively employed by the Judge. This means a tremendous amount of stenography. But stenography is cheaper than backlogs.

We, therefore, earnestly assert that each of the positions in Subpart (b) are needed and can be effectively employed, and will enable the Court to continue increased output.

Of course, there would be added costs for such things as furniture, fixtures, supplies. Undoubtedly the Administrative Office is in the best position to give estimates on this.

But on the estimate of the new added costs of $129,000 above and adding a liberal 25% overhead the aggregate of the estimated $161,000 is small indeed. It is small in terms of what can be accomplished, more so, in what can be avoided—backlogs and breakdowns, complete or partial—and small in contrast to costs incurred for additional judgeships.

PROBABLE COSTS FOR LEGAL ASSISTANTS TO COURT

Although the Judicial Conference Budget Report states the estimated cost at $208,000, the direct costs stated in round numbers would appear to be as follows:

	Present clerk's payroll	New commitment
Chief Staff Attorney		$30,000
Staff Attorneys:		
Five additional		75,000
Three present pro se	$39,000	
Secretaries:		
Three additional		24,000
One clerk's office	8,700	
Subtotal	47,700	129,000
Total present and new		176,700

The Congress is fully informed as to the initial costs of each new Judgeship. High as are these initial costs there is a recurring annual expense for the support of the Judge, his office and his staff. On the conservative estimate that 3 additional judgeships would be needed to handle these projected increases the annual cost would be not less than:

Three judges	$127,500
Six law clerks	78,000
Three secretaries	36,000
Total	241,500
If additional personnel part (a) is funded:	
Three law clerks	40,000
Three secretaries	33,000
Subtotal	73,000
Total	314,500

PROPOSED STAFF LEGAL ASSISTANTS TO COURT OF APPEALS FURNISHES EXPERIENCE FOR NATIONWIDE ADAPTATION

Although as approved by the Judicial Conference and as covered in the proposed substantive legislation this is for the Fifth Circuit alone, the Fifth Circuit will not be the lone gainer. Circuit realignments are bound to come. The simple statistics, Circuit and nationwide, show that unless the system is to break down of its sheer weight in the proliferation of new Circuits some very drastic and novel changes must be made. The most likely solution is bound to be in the form of additional supporting personnel composed of highly trained, adequately compensated professionals with sufficient administrative and secretarial support.

What the Fifth Circuit will learn in the use of this organized staff of Legal Assistants to the Court will be of great value to other Circuits, no matter how realigned. The characteristic of the handling of the juducial machinery is that we always wait until the crisis is at hand and chaos is approching. Facing the staggering prospect of 38,875 appeals in all the Courts of Appeals in FY 1981 (see Tables 1 and 18) and the equally staggering prospect of 35 additional Courts of Appeals if the structure is to be simply the traditional one of a 9-Judge Court (see page 28), it is the pr * of good sense and good management to explore for new methods and then exploit them fully in practice to determine their strength and weaknesses for use or adaptation by others. No longer is the Fifth Circuit the sole source of concern. Now there are a number of Courts of Appeals facing problems equally acute and nearly all of them translate in terms of increased input and the need for increased output.

CIRCUIT REALIGNMENTS MUST COME

Unless they are to be repeated every five or ten years Circuit realignment must be done after an intelligent inquiry in depth. The Commission charged with the responsibilities under S. J. Res. 122 can supply that intelligent direction and recommendation for subsequent congressional action. In the meantime, the Fifth Circuit, restricted as it is under the statute to a Court of fifteen active Judges, but still, with the sole responsibility for the whole of the Circuit, faces demonstrable burdens which it cannot meet in full. Until Circuit realignment is an accomplished fact and necessary judgepower is afforded and deployed by Congressional action the Court is faced for FY 1973-75 with a real emergency. It must have help. It must have help now.

STATEMENT AND RESOLUTION, JUDICIAL COUNCIL, FIFTH CIRCUIT

The Fifth Circuit along with other circuits is faced with awesome prospects. In 1960 the case filings were 584. In FY 1971, the year just closed, they were

2077. In the first quarter of the current year 1972 filings have gone up another 25% for a projected numerical increase of 519 to make a total of 2596.

The situation is grave. By separate resolution we have endorsed without reservation HR 7378 for circuit realignment. But even with early enactment of the bill, the appointment of the Commission, the comprehensive investigation contemplated, the making of its report and action thereon by the Congress, the time would, in our opinion, run a minimum of two years. Considering that almost every conceivable realignment of the states comprising the Fifth Circuit will call for added Judgeships, the time would in all likelihood stretch into at least a third year through FY 1975.

In that interim things would become critical, for on the most conservative projections in the next three years, filings will increase to 2704, 2990, and 3188 (FY 1973-75) to produce cumulative backlogs of 714 in FY 1973, 1325 in FY 1974, and 2121 in FY 1975. As a result, this Circuit will be virtually unable to handle any cases other than those falling within categories of cases which Congress has invested with a priority status.

The Council therefore directs the Chief Judge to bring this to the attention of the Judicial Conference of the United States at the October 1971 meeting with the request that the Conference and its Committees communicate the Fifth Circuit's sense of the urgency of the situation to all those in a position of responsibility in the Executive and Legislative Branches.

Attest:

EDWARD W. WADSWORTH,
Clerk, U.S. Court of Appeals for the Fifth Circuit.

The following motion was moved by Judge Wisdom, seconded by Judge Ainsworth, and unanimously adopted:

The number of appeals in federal courts have increased to the point where under the existing circuit system the federal administration of justice is in danger of breaking down from the overload. All filings increased from 3,889 in F.Y. 1960 to 10,748 in F.Y. 1970, and for 1980 filings of 34,881 are projected. In the Fifth Circuit, appeals increased from 577 in 1960 to 2,077 in 1971 to 2596 (projected) for this year. The most conservative arithemetic projections disclose that by F.Y. 1973 this Circuit will be virtually unable to handle any cases other than those falling within categories of cases which Congress has invested with a priority status.

Despite this imbalance in the system, there has been no realignment of the circuits in over eighty years except for the establishment of the Tenth Circuit.

The Administrative Office, after a careful survey of all the circuits, concluded that for this court to continue functioning effectively seven judges should be added to the court.

This Judicial Council holds strongly to its prior formal determination that to increase the number of its judges beyond fifteen would diminish the quality of justice in this Circuit and the effectiveness of this Court to function as an institutionalized federal appellate court.

The Congress now has before it H.R. 7378 to establish a Commission on Revision of the Judicial Circuits of the United States.

Be it resolved therefore, That the Judicial Council of the Court of Appeals for the Fifth Circuit, without any reservations, endorses H.R. 7378 as an indispensable first step toward improvement in the federal circuit court system. To remove any doubt as to the Commission's authority, the Council recommends that the bill be amended so that it will state explicitly that the Commission may recommend, where needed, the appointment of additional judges along with the geographical reorganization of the circuits.

Attest:

EDWARD W. WADSWORTH,
Clerk.

ADDITIONAL CIRCUIT JUDGESHIPS NEEDED 1972 AND 1975; SHAFROTH ON PROJECTIONS (UPDATED TO 1970)

96 case load average

(a)	1972 (b)	1972 (c)	1972 (d)	1972 (e)	1975 (f)	1975 (g)	1975 (h)	1975 (j)
Circuit	Present number judgeships (1970)	Shafroth projection (1970)	Exceed 864 by	Added judges needed 1972, compared 1970	Shafroth projection (1970)	Exceed 864 by	Added judges needed 1975, compared 1970	Judgeships per circuit; 9 or more
Second	9	983	119	1	1,177	313	3	12
Third	8	749			874	10		
Fourth	[1] 8	1,426	562	7	1,820	956	11	19
Fifth	15	2,006	1,142	6	2,464	1,600	10	25
Sixth	8	867			981	117	1	9
Seventh	8	809			968	104	2	10
Ninth	13	1,719	855	5	2,166	1,302	10	23
Tenth	7	713			824			
District of Columbia	9	1,025	161	2	1,478	614	6	15
Total				21			42	

[1] Note.—One added as recommended by 1970 Shafroth report.

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PERCENTAGE INCREASE IN CIVIL AND CRIMINAL TRIALS AND INCREASE IN APPEALS—FIFTH CIRCUIT FISCAL YEAR 1961-69

Fiscal year	Number of judgeships		Total trials	Total civil and criminal appeals filed	Civil trials	Civil appeals	Criminal trials	Criminal appeals
	Circuit	District						
1961	7	33	1,770	512	1,159	408	611	104
1962	9	45	1,975	529	1,328	422	647	107
1963	9	45	2,227	678	1,463	528	764	151
1964	9	45	2,154	818	1,418	687	736	131
1965	9	45	2,292	879	1,596	702	696	177
1966	9	45	2,478	873	1,669	664	809	209
1967	13	58	2,703	949	1,869	703	834	246
1968	13	58	2,960	1,159	2,034	R20	926	339
1969	15	58	3,162	1,372	2,257	1,049	905	323
Percent change 1969 over 1961	114.3	75.8	78.6	168.0	94.7	157.1	48.1	210.6

Note.—Beginning with 1962 the number of appeals in each year under each category have been reduced by the number disposed of by consolidation.

Source: 1970 Shafroth Survey.

CLERK'S WEEKLY SCREENING REPORT[1]

Week	Substitute	Retired	Outstanding	Reclassified	Classification (after adjustments) I	II	III	IV	Total	Weekly percentage: Excluding without council	Weekly percentage: All cases	Overall percentage: Excluding without council	Overall percentage: All cases
Outstanding from report of:													
Dec. 31, 1971	74												
Jan. 7, 1972	28	47	55		32	13	2	47	63.4	68.1	63.4	68.1
Jan. 14, 1972	42	19	78	3	5	13	1	19	12.5	26.3	49.1	56.1
Jan. 21, 1972	43	64	57	4	35	22	7	64	50.0	54.7	49.6	55.4
Jan. 28, 1972	22	34	45	1	19	12	3	34	51.6	55.9	50.0	55.5
Feb. 4, 1972	39	28	56	1	11	13	4	28	29.2	39.3	47.1	53.1
Feb. 11, 1972	36	28	64	3	19	7	2	28	59.1	67.9	48.4	55.0
Feb. 18, 1972	35	24	75	1	12	7	5	24	42.9	50.0	47.9	54.5
Feb. 25, 1972	36	49	62		27	14	8	49	51.1	55.1	48.4	54.6
Mar. 3, 1972	38	41	59	3	22	15	4	41	47.2	53.7	48.3	54.5
Mar. 10, 1972	42	42	59	4	26	14	2	42	55.6	61.9	49.1	55.3
Mar. 17, 1972	30	29	60	2	21	8	0	29	68.0	72.4	50.4	56.5
Mar. 24, 1972	38	28	68	2	10	16	2	28	28.0	35.7	48.9	55.2
Total	501	433	68	24	239	154	40	433				

[1] Calendaring requirements: Weeks required, 4; period, May; cases required, 80; unassigned III and IV, 48; deficiency, 32; and needed by, April 3, 1972.

TABLE OF NEW APPEALS DOCKETED BY SUBJECT MATTER—FISCAL YEAR 1971

Subject matter	Cumulative percent prior period	Current monthly filing percent	Current overall percent	Total	July	August	September	October	November	December	January	February	March	April	May	June
Direct criminal	21.9	24.2	22.1	459	37	25	30	41	42	45	30	41	37	43	36	52
Habeas corpus:																
with counsel	5.0	4.6	5.0	104	7	9	6	5	12	9	8	7	14	10	7	10
without counsel	11.1	10.2	11.0	229	9	16	20	19	20	17	19	11	26	30	20	22
2255:																
with counsel	1.2	0.5	1.2	24	1	1	5	6	0	1	2	2	4	1	0	1
without counsel	4.1	2.8	3.9	82	12	6	3	9	6	7	2	10	7	7	7	6
Subtotal	43.3	42.3	43.2	898	66	57	64	80	80	79	61	71	88	91	70	91
CIVIL:																
Private Civil	27.7	31.2	28.1	583	48	46	48	42	28	47	53	34	58	52	60	67
Diversity		(13.5)	(11.5)	(239)	(20)	(18)	(23)	(19)	(13)	(25)	(25)	(15)	(15)	(11)	(26)	(29)
Federal question		(17.7)	(16.6)	(344)	(28)	(28)	(25)	(23)	(15)	(22)	(28)	(19)	(43)	(41)	(34)	(38)
U.S. Civil	7.9	10.2	8.1	170	16	16	7	15	23	5	12	7	17	14	16	22
Tax	4.8	5.6	4.9	102	11	10	5	6	8	11	7	10	8	6	8	12
Bankruptcy	1.8	0.9	1.8	36	2	0	4	3	5	3	3	3	1	4	6	2
N.L.R.B.	4.3	3.2	4.2	86	12	5	5	1	4	8	13	3	13	10	5	7
Other agency	1.4	0.0	1.3	25	5	1		1	3	0	0	2	2	3	8	0
Civil rights	4.9	3.7	4.5	99	9	9	8	7	6	7	0	4	17	12	12	8
Admiralty	0.7	0.5	0.7	14	3	2	1	0	0	0	1	0	0	4	2	1
School	3.2	2.4	3.2	64	15	17	9	5	2	2	4	2	2	1	0	5
Subtotal	56.7	57.7	56.8	1,179	121	106	87	80	79	83	93	65	118	106	117	124
Grand total	100.0	100.0	100.0	2,077	187	163	151	160	159	162	154	136	206	197	187	215

TABLE OF NEW APPEALS DOCKETED BY SUBJECT MATTER—FISCAL YEAR 1972

Subject matter	Monthly percent 1972 (a)	Overall percent 1971 (b)	Overall percent 1972	1971 cumulative average (c)	1972 cumulative total (d)	July	August	September	October	November	December	January	February	March	April	May	June
Direct criminal	13.3	22.1	20.7	268	305	49	40	37	41	61	49	28					
Habeas corpus:																	
With counsel	6.2	5.0	6.0	61	89	8	10	10	14	17	17	13					
Without counsel	11.9	11.0	10.0	133	147	25	26	20	17	16	18	25					
2255:																	
With counsel	0.5	1.2	1.0	14	14	1	4	1	3	2	2	1					
Without counsel	2.4	3.9	3.8	48	56	12	18	5	2	6	8	5					
Subtotal	34.3	43.2	41.5	524	611	95	98	73	77	102	94	72					
Civil:																	
Private Civil	26.7	28.1	23.6	340	347	49	53	53	53	41	42	56					
Diversity	(16.7)	(11.5)	(11.8)	(139)	(174)	(19)	(23)	(23)	(27)	(27)	(20)	(35)					
Federal question	(10.0)	(16.6)	(11.8)	(201)	(173)	(30)	(30)	(30)	(26)	(14)	(22)	(21)					
U.S. Civil	9.0	8.1	7.2	99	106	19	10	24	13	5	16	19					
Tax	4.8	4.9	5.4	60	79	4	16	15	10	11	13	10					
Bankruptcy	1.9	1.8	1.4	21	20	1	4	1	4	3	3	4					
N.L.R.B.	6.7	4.2	3.9	50	58	3	10	7	8	13	3	14					
Other agency	3.3	1.3	2.0	14	29	0	5	4	6	3	4	7					
Civil rights	7.1	4.5	7.3	58	108	12	22	14	10	19	16	15					
Admiralty	3.3	0.7	2.3	8	34	5	1	5	4	8	4	7					
School	2.4	3.2	4.7	37	69	11	15	15	13	7	3	5					
Social security	0.5	.....	0.7	.....	11	0	1	4	0	3	2	1					
Subtotal	65.7	56.8	58.5	687	861	104	137	142	121	113	106	138					
Grand total	100.0	100.0	100.0	1211	1472	199	235	215	198	215	200	210					

Legend.—Column (a) Monthly percentage Makeup of the new filings.
(b) The overall percentage in fiscal year 1971 compared with current overall percentage in fiscal year 1972.
(c) The numerical cumulative average in fiscal year 1971 for comparison with (d).
(d) The cumulative total for fiscal year 1972.

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ADMINISTRATIVE OFFICE OF THE U.S. COURTS,
Washington, D.C., February 7, 1972.

Hon. SPIRO T. AGNEW,
President, U.S. Senate,
Washington, D.C.

DEAR MR. PRESIDENT: Pursuant to an action of the Judicial Conference of the United States, taken at its meeting on October 28 and 29, 1971, authorizing its Committee on the Budget to suggest appropriate legislation on the subject of providing for legal assistants in the Courts of Appeals of the United States, the attached draft bill as approved by that Committee is transmitted herewith for appropriate referral and the consideration of the 92nd Congress.

The purpose of the draft bill is to enable the Judicial Conference to authorize Courts of Appeals to appoint legal assistants to the court who would have sufficient professional experience and legal background to qualify such attorneys to perform the function of making the preliminary examination of all matters filed with the court; identify the issues raised; distinguish these substantial issues requiring more extended review by the court from insubstantial cases requiring less deliberation; settling preliminary procedural matters incident to appeals which now divert the time of judges away from their substantial tasks; and otherwise performing screening procedures necessary to expedite the task of the judges in reaching the substance of the matters presented to the court.

It is anticipated that such legal assistants would receive salaries commensurate with the high demands of their legal duties and with the experience and scholastic qualifications which would be imposed. Such officers would perform these screening services for the entire court and are to be distinguished from law clerks who are on the personal staff of individual judges. The latter are usually newly graduated law students without prior experience in law practice who spend a brief tenure, usually a year, with the individual judge to perform research. Legal assistants, on the other hand, would be permanent staff attorneys to the entire court with higher qualification standards necessary to the duties which they would perform.

The necessity of appointing staff attorneys as legal assistants to the court is evidence in large measure by the magnitude of judicial business faced by the courts of appeals, especially those with the highest volume of filings. Overall since 1961, the appeal filings in the eleven judicial circuits have increased by 204%. The volume since 1968 alone has increased 51%. Though the dispositional rate of the courts has been constant, the overall increase in the *pending* caseload is 289% greater than fiscal year 1961.

The request for the assistance of staff attorneys to perform the function of preliminary processing of matters filed with the court originated with the Chief Judge of the Court of Appeals for the Fifth Circuit. That court has ranked first in filings among the eleven judicial circuits and covers a vast geographical territory from Texas to Florida. The Fifth Circuit first demonstrated to the Conference an urgent need for legal assistants to this court who could handle the preliminary processing of matters submitted to the court and reduce the valuable time of its 15 active and 4 senior judges which can be more wisely deployed in deciding the merits of the litigation before them.

It might be noted that under the provisions of this draft bill, prior approval of the Judicial Conference is required before any such position of judicial assistant is established. (We would anticipate their limited use at this time only in courts of appeals having the greatest case volume.) The legal assistants will be appointed by and be removable by the court itself. Under the provisions of Section 604(a)(5), the Director of the Administrative Office would set the salaries and qualifications of these employees with the approval of the Judicial Conference. The exact range of salaries would presumably be a subject of a reference in the Judicial Appropriation Act.

It seems clear without express mention that these new officers could be subject to the usual benefits of federal employment such as retirement, health and life insurance benefits, and the like as well as specific provisions dealing with salaries administratively fixed (see 5 U.S.C. 5307).

Representatives of this office will be pleased to provide additional information that is necessary.

Sincerely,

ROWLAND F. KIRKS, *Director.*

A BILL To provide for the appointment of legal assistants in the Courts of Appeals of the United States

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Chapter 47 of title 28, United States Code, is amended by adding the following new section:

"§714. Legal assistants.

"(a) A court of appeals may appoint necessary legal assistants to positions authorized by the Judicial Conference of the United States who shall be subject to removal by the court. Such legal assistants shall perform such duties as the court shall determine involving the preliminary processing of matters filed in such court.

"(b) The compensation of legal assistants shall be fixed pursuant to section 604(a)(5) of this title, and the approval of the Judicial Conference of the United States shall be required prior to the establishment of each such position."

SEC. 2. The analysis of Chapter 47 is amended by adding immediately following, "713. Criers, bailiffs and messengers." the following new material:

"714. Legal assistants."

PROJECTED WORKLOAD PER ACTIVE JUDGE ON BASIS OF 60 PERCENT SUMMARY II's, FISCAL YEAR 1972-75

	1972	1973	1749	1975
I. Summary calendared cases:				
(a) Opinions or dispositions as initiating judge	71	78	84	92
(b) Participations in opinions or dispositions of other panel members	142	156	168	184
(c) Subtotal summary calendared cases	213	234	252	276
II. Orally argued cases:				
(a) Opinion or disposition as writing judge	47	52	53	61
(b) Participations in opinions or dispositions of other panel members	94	104	112	122
(c) Subtotal oral argument cases	141	156	168	183
III. School cases:				
(a) Opinion or disposition as writing judge	10	11	12	13
(b) Participations in opinions or dispositions of other panel members	20	22	24	26
(c) Subtotal school cases	30	33	36	39
IV. Total opinions	128	141	152	166
V. Total participations	256	282	304	332
VI. Total opinions or participations	384	423	456	498
VII. Administrtive-interim matters	93	110	130	155
VIII. Total matters participated in per judge	477	533	586	653
IX. Weeks of court at 20 cases per week	7	8	8	9

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SUPPLEMENT STATEMENT OF JOHN R. BROWN, CHIEF JUDGE, U.S. COURT OF APPEALS, FIFTH CIRCUIT, HOUSTON, TEX.

Significant figures (based on three-fourths of fiscal year 1972)

(1) New filings (percent)	+19.7
(2) Summary II's:	
Cases	+1,029
Percent	+57.8
Equivalent (86 weeks)	[1] 17
(3) 1972 performance (cases):	
Standing panel	241
Regular calendar	447
Summary II's	1,029
Total	1,717
Equivalent:	
86 at 20	[1] 17
68 at 25	[1] 14
Cases closed:	
First three-fourths	2,007
Percent	+30.6
(4) Opinions (cases):	
Fiscal year 1971	1,661
Fiscal year 1972	1,922
Percent	15.7

[1] Per active judge.

	Rule 21	Per curiam (percent)	Signed
Summary II	35.4	45.1	19.3
Regular	15.4	32.5	52.0
Total	27.1	39.9	33.0

(5) PROJECTIONS FISCAL YEAR 1973-75 REVISED DOWNWARD (APPROXIMATELY 100) FROM TABLE 1 (PAGE 14)

Fiscal year	Table 1	Mar. 31, 1972
1972	2,596	2,486
1973	2,794	2,675
1974	2,990	2,863
1975	3,188	3,052

(6) PROJECTIONS ADDITIONAL DISTRICT JUDGESHIPS

	By 1975	By 1980
Fifth Circuit	+28	
Nation [1]	+50	+130

[1] Administrative Office estimate.

NUMERICAL AND PERCENTAGE MAKEUP OF DOCKET BY STATES, FISCAL YEAR 1970 AND 1971, AND PROJECTION FOR FISCAL YEAR 1972

	Fiscal year 1970		Fiscal year 1971		Fiscal year 1972 [1]	
	Number	Percent	Number	Percent	Number	Percent
Texas	492	28.1	596	29.2	726	29.2
Florida	443	25.4	502	24.6	612	24.6
Georgia	264	15.1	316	15.6	388	15.6
Louisiana	264	15.1	300	14.8	368	14.8
Alabama	162	9.3	181	8.9	221	8.9
Mississippi	114	6.5	135	6.6	164	6.6
Canal Zone and Federal Power Commission	9	0.5	7	0.3	7	0.3
Total	1,748	100.0	2,037	100.0	2,486	100.0

[1] Projected on fiscal year 1971 percentage basis and estimated 2,486 appeals in fiscal year 1972.

SECTION I—CLASSIFICATION BREAKDOWN IN NUMBERS AND PERCENTAGES

	Fiscal year 1969		Fiscal year 1970		Fiscal year 1971		Fiscal year 1972 (9 mos.)	
Class	Number	Percent	Number	Percent	Number	Percent	Number	Percent
I and II	218	32.7	452	38.1	652	45.7	795	60.3
III	265	39.7	506	42.7	622	43.5	397	30.1
IV	184	27.6	229	19.2	154	10.8	127	9.6
Total	667	100.0	1,187	100.0	1,428	100.0	1,319	100.0

SECTION II—FISCAL YEAR 1972 ONLY

	First half		Last half (3 months)		Overall	
Class	Number	Percent	Number	Percent	Number	Percent
I and II	540	63.5	255	54.5	795	60.3
III	229	26.9	168	35.9	397	30.1
IV	82	9.6	45	9.6	127	9.6
Total	851	100.0	468	100.0	1,319	100.0

SUMMARY OF CLASSIFICATION AND SUBJECT MATTER OF CASES SCREENED, JULY 1, 1970 TO JUNE 30, 1971

Subject matter	I	II	III	IV	Total	Percent of II's to total cases
Direct criminal	2	177	138	28	345	51.9
Habeas corpus		167	53	4	224	74.5
Section 2255	1	63	10	1	75	85.3
Civil:						
Private civil		126	222	75	423	29.8
U.S. civil		40	56	14	110	36.4
Tax		17	53	10	80	21.3
Bankruptcy		7	13	2	22	31.8
NLRB		20	24	6	50	40.0
Other agency		4	7	2	13	30.8
Civil rights	1	21	42	10	74	29.7
Admiralty		6	4	2	12	50.0
Total	4	648	622	154	1,428	45.4

SUMMARY OF CLASSIFICATION AND SUBJECT MATTER OF CASES SCREENED, JULY 1, 1971 TO MARCH 31, 1972 (9 MONTHS)

Subject matter	I	II	III	IV	Total	Percent of II's to total cases
Direct criminal		216	92	14	322	67.1
Habeas corpus		190	32	4	226	84.0
Section 2255		71	3	1	75	94.6
Civil:						
Private civil (division)		77	66	23	166	46.4
Private civil (Federal)		82	63	36	181	45.3
U.S. civil		32	32	15	79	40.5
Tax		31	28	7	66	47.0
Bankruptcy		12	5	1	18	66.7
NLRB		23	20	4	47	48.9
Social security		10	2	0	12	83.3
Other agency		6	4	7	17	35.3
Civil rights		32	44	13	89	36.0
Admiralty		13	6	2	21	61.9
Total		795	397	127	1,319	60.3

COMPARISON OF NUMBER AND PERCENTAGE MAKEUP OF SUMMARY II'S FISCAL YEAR 1971 AND FISCAL YEAR 1972 (9 MONTHS)

Subject matter	Fiscal year 1971		Fiscal year 1972 (9 months)	
	Class II's	Percent	Percent	Class II's
Direct criminal	179	27.5	27.2	211
Habeas corpus	167	25.6	23.9	190
Section 2255	64	9.8	8.9	76
Civil:				
Private civil (Division)	(126)	(19.3)	9.7	77
Private civil (Federal)	(126)	(19.3)	10.3	82
U.S. Civil	40	6.1	4.0	32
Tax	17	2.6	3.9	31
Bankruptcy	7	1.1	1.5	12
NLRB	20	3.1	2.9	23
Social security	(1)	0.0	1.3	10
Other agency	4	0.6	0.8	6
Civil rights	22	3.4	4.0	32
Admiralty	6	0.9	1.6	13
Total	652	100.0	100.0	795

[1] No records maintained.

SUMMARY OF WORKLOAD IN FISCAL YEAR 1973–1975 ON VARYING MAXIMUM NUMBER OF OPINIONS

					To keep current		
					1973	1974	1975
(a) Opinions per judge	100	105	110	115	130	140	150
(b) Total cases to be disposed of	1,500	1,575	1,650	1,725	1,947	2,099	2,244
(c) Summary II (55 percent)	825	866	907	949	1,070	1,154	1,234
(d) Cases for oral argument	675	709	743	776	877	945	1,010
(e) Backlog[1]:							
Fiscal year 1973	447	372	297	222	.....	.....	.....
Fiscal year 1974 (cumulative)	1,046	896	746	596	.....	.....	.....
Fiscal year 1975 (cumulative)	1,790	1,565	1,340	1,115	.....	.....	.....
(f) Weeks of court (with screening—55 percent II's)	34	35	37	39	44	47	51
(g) Weeks of court (no screening—20 cases)	75	79	83	86	97	105	112
(h) Weeks of court (no screening—25 cases)	60	63	66	69	78	84	90
(j) Weeks per active judge (with screening—55 percent II's)	6.8	7.0	7.4	7.8	8.8	9.4	10.2
(k) Weeks per active judge (no screening—20 cases)	15.0	15.7	16.5	17.2	19.4	21.0	22.4
(m) Weeks per active judge (no screening—25 cases)	12.0	12.6	13.2	13.8	15.6	16.8	18.0
(n) Preference cases under council priority schedule—51.8 percent of the docket					1,008	1,087	1,162

[1] For each sitting by a senior or visiting judge the backlog would be reduced by approximately seven cases.

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TABLE OF NEW APPEALS DOCKETED BY SUBJECT MATTER—FISCAL YEAR 1972

Subject matter	Monthly percent 1972 (a)	Overall percent 1971 (b)	Overall percent 1972	1971 cumulative average (c)	1972 cumulative total (d)	July	August	September	October	November	December	January	February	March	April	May	June
Direct criminal		22.1				49	40	37	41	61	49	28	47	38			
Habeas corpus:																	
With counsel		5.0				8	10	10	14	17	17	13	9	26			
Without counsel		11.0				25	26	20	17	16	18	25	15	17			
Section 2255:																	
With counsel		1.2				1	4	1	3	2	2	1	1	2			
Without counsel		3.9				12	18	5	2	6	8	5	5	7			
Subtotal		43.2				95	98	73	77	102	94	72	77	90			
Civil:																	
Private civil		28.1				49	53	53	53	41	42	56	45	39			
Diversity		(11.5)				(19)	(23)	(23)	(27)	(27)	(20)	(35)	(25)	(24)			
Federal question		(16.6)				(30)	(30)	(30)	(26)	(14)	(22)	(21)	(20)	(15)			
U.S. civil		8.1				19	10	24	13	5	16	19	16	13			
Tax		4.9				4	16	15	10	11	13	10	10	5			
Bankruptcy		1.8				1	4	1	4	5	3	4	5	5			
NLRB		4.2				3	10	7	8	13	3	14	12	5			
Other agency		1.3				0	5	4	6	3	4	7	6	4			
Civil rights		4.5				12	22	14	10	19	16	15	14	20			
Admiralty		0.7				5	1	5	4	8	4	7	10	6			
School		3.2				11	15	15	13	7	3	5	1	3			
Social security						0	1	4	0	3	2	1	2	5			
Subtotal		56.8				104	137	142	121	113	106	138	121	105			
Grand total		100.0				199	235	215	198	215	200	210	198	195			

Legend.—Column:
(a) Monthly percentage makeup of the new filings.
(b) The overall percentage in fiscal year 1971 compared with current overall percentage in fiscal year 1972.
(c) The numerical cumulative average in fiscal year 1971 for comparison with (d).
(d) The cumulative total for fiscal year 1972.

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MARCH 2, 1972, OMNIBUS 4-YEAR DISTRICT JUDGESHIP BILL—FIFTH CIRCUIT

District	Alabama	Florida	Georgia	Louisiana	Mississippi	Texas
Northern	1	0	3		1	3
Southern	1	2	1		0	4
Eastern				2		3
Western				2		3
Middle	1	3	(1)			
Totals	3	5	4	4	1	11
Grand total						28

EN BANCS

The following table shows the number of petitions for hearing and rehearing en banc filed during the first nine months of this fiscal year, the number denied and granted, with and without a poll:

	(Fiscal year 1972—9 months) July 1, 1971–Mar. 31, 1972
Pending as of July 1, 1971	18
Total petitions for rehearing en banc filed	132
Total suggestions for hearing en banc filed	8
On court's own motion	3
Total	143
Total petitions and suggestions	161
Denied:	
With poll vote	—18
Without poll vote	—120
Total	—138
Granted:[1]	
On motion of parties	—3
On court's own motion	—3
Total	—6
	—144
Total pending as of Mar. 31, 1972	17

[1] Of the 6 en bancs granted, 1 was granted with oral argument and 5 granted without oral argument.

	Projected workload based on 9 month figures	Projected workload to keep current based on April 1972, revised figures and on 55 percent II's		
	1972	1973	1974	1975
I. Summary calendared cases:				
(a) Opinions or dispositions as initiating judge	68	71	77	82
(b) Participations in opinions or dispositions of other panel members	136	142	154	164
(c) Subtotal summary calendared cases	204	213	231	246
II. Orally argued cases:				
(a) Opinion or disposition as writing judge	47	59	63	68
(b) Participations in opinions or dispositions of other panel members	94	118	126	136
(c) Subtotal oral argument cases	141	177	189	204
III. School cases:				
(a) Opinion or disposition as writing judge	5	6	7	8
(b) Participations in opinions or dispositions of other panel members	10	12	14	16
(c) Subtotal school cases	15	18	21	24
IV. Total opinions	120	136	147	158
V. Total participations	240	272	294	316
VI. Total opinions or participations	360	408	446	474
VII. Administrative-interim matters	93	110	130	155
VIII. Total matters participated in per judge	453	518	571	629
IX. Weeks of court at 20 cases per week	7	8.8	9.4	10.2

APPENDIX "B"

TESTIMONY AND PREPARED STATEMENT OF JOHN R. BROWN, CHIEF JUDGE U.S. COURT OF APPEALS FIFTH CIRCUIT HOUSTON, TEXAS

[Given to Subcommittee No. 5 of the Committee on the Judiciary of the United States House of Representatives, in Hearings held on June 21, 1971 on the Commission on the Revision of the Judicial Circuits.]

COMMISSION ON REVISION OF JUDICIAL CIRCUITS

THURSDAY, JUNE 24, 1971

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE NO. 5 OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10 a.m., in room 2141, Rayburn House Office Building, Hon. Emanuel Celler (chairman) presiding.

Present: Representatives Celler, Brooks, Hungate, Mikva, Poff, Hutchinson, and McClory.

Also Present: Benjamin L. Zelenko, general counsel; and Thomas E. Mooney, associate counsel.

The CHAIRMAN. The hearing will come to order.

I recognize the gentleman from Texas, Mr. Brooks.

Mr. BROOKS. Mr. Chairman, it is my particular pleasure to introduce Hon. John R. Brown, the chief judge of the Fifth Circuit, U.S. Court of Appeals.

Judge Brown has had a long and distinguished career as a practicing attorney and as a jurist. He was appointed to the Fifth Circuit Court of Appeals in September 1955 and became chief judge in July 1967.

Judge Brown enjoys one of the finest reputations among his fellow colleagues on the bench and the practicing bar as a jurist who maintains a continuing interest in assuring that decisions emanating from the Federal courts are prompt, just, and responsive to the needs of our times. As chief judge of the largest constitutional court in the United States, Judge Brown has an obvious interest in improving court procedures and court administration. I think we are most fortunate to have him here as a witness today.

The CHAIRMAN. Judge Brown, you have been here before. You have made a very profound impression upon the members. We are very happy to have you here again to give us your views on this very important piece of legislation. We will be glad to hear from you.

STATEMENT OF HON. JOHN R. BROWN, CHIEF JUDGE, U.S. COURT OF APPEALS, FIFTH JUDICIAL CIRCUIT

Judge BROWN. Thank you, Mr. Chairman. I appreciate very much the courtesy that you have shown to me and the privilege of appearing once again before this committee. I must thank my friend, Congressman Brooks, for that nice introduction. He is now about to be something more than a friend. It appears that he is about to become my Congressman, as well.

The CHAIRMAN. Good.

Judge BROWN. So we hope he will do as well for us as a Congressman as he has done as a friend, and as a friend of the judiciary.

Mr. Chairman, as you know, I have prepared a rather detailed statement. I will say again if I had more staff and more time perhaps it would be half as long or maybe a third as long, but when you have to work under my pressures it just gets to be pretty long. I don't think there is any point at all in my reading it or trying to restate it. It is all there. I have tried to document it. I have a few comments I would like to make which I think summarize my views.

The CHAIRMAN. We will be very glad to place your complete statement in the record and you may make any comments you wish.

(Judge Brown's prepared statement follows:)

STATEMENT OF JOHN R. BROWN, CHIEF JUDGE, U.S. COURT OF APPEALS, FIFTH CIRCUIT

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I am John R. Brown of Houston, Texas. I have been on the Fifth Circuit Court of Appeals since September of 1955. I am Chief Judge and have been since July 17, 1967. But as I previously stated to various committees of the Congress before becoming Chief Judge I had a great deal of experience in Court administration because of the work delegated to me by my predecessors Chief Judges Tuttle, Rives and Hutcheson. The Fifth Circuit, as all know with fifteen authorized active Judges, is the largest constitutional Court in the United States. It is largest also in terms of population of its constituent states (Alabama,

Florida, Georgia, Louisiana, Mississippi, and Texas), in the number of cases filed, the number of cases disposed of, and the number of opinions published. Consequently, the Circuit has every kind of problem in double measure that Federal Appellate Courts could have. But the Court has not allowed these staggering burdens to overwhelm it. Through the diligent, resourceful, imaginative efforts of conscientious Judges—who know no limitations on energy—we have adopted innovative systems that have increased our output enabling us so far to keep abreast of this load. But even with these new practices—which will be further extended by our experimental standing panel procedure—we have to recognize with the Court at its present size (fifteen active and three energetic Senior Judges) that something has to happen by FY 1975.

FIFTEEN JUDGESHIPS MAXIMUM

Although there are some internal differences, the Judicial Council of the Fifth Circuit after careful consideration concluded unanimously that the Court should not have more than fifteen active Judges.

Inevitably, this means that on current exponential projections for FY 1972–1980 somehow the Circuit has to be split.

NEED FOR THE COMMISSION

Although, for reasons which I later discuss, I think H.R. 7378 is too narrowly constructed, the policy behind this proposed method is sound, and I unhesitatingly endorse it. As a member of the Judicial Conference, I voted for this proposal although specific legislation was not before us. I am confident that is the sentiment of the Judicial Council of the Fifth Circuit.

I am also of the clear view that to achieve the objective of a reasonably early determination on Circuit lines, it is essential that in the Commission's report to the Congress, the definitive part of the report should be confined to the proposed Circuit lines as recommended by the Commission. This will enable the recommendations to be carried into effect within the times prescribed unless, as is provided, there is rejection or disapproval. But the Commission's report should, in my judgment, have a separate section dealing with the investigation and conclusions of the Commission on those factors which inescapably have a significant, if not decisive, bearing on Circuit line-drawing.

DEFICIENCIES IN H.R. 7378

My criticism of the proposal is based on (i) the mission assigned and (ii) the scope of the Commission's recommendation.

The bill ordains that the function of the Commission:

"Shall be to study the present division of the United States into the several judicial circuits, and to recommend * * * such changes as may be most appropriate for the expeditious and effective disposition of judicial business." (Page 1, L. 4–9).

The scope of its recommendations is likewise restricted in a linear geographical way:

"The recommendations of the Commission with respect to the geographical reorganization of the Circuits or such parts thereof not specifically disapproved * * * shall take effect * * * at the stated times." (Page 4, L. 17–21)

Although the Bill (§ 5, Page 4, L.4–11) authorizes the Commission to obtain information from other departments and agencies, everything within the ordination of the Commission's role and the scope of its recommendations points in the single direction of Circuit lines. Obviously, the Bill recognizes that some data is needed—perhaps largely demographic or Court docket-filing and disposition statistics—but the whole emphasis is on the restrictive, linear problem of drawing lines.

It is here that I am of the strong view that simply splitting Circuits, redrafting Circuit lines, is no solution at all. And if it is a solution, it is but a momentary one in terms of a year or two. Worse, the problem, unsolved, will recur as population and the resulting judicial business increases. A new Commission will be needed in 1975, another in 1980.

CIRCUIT LINE DRAWING ALONE IS SUPERFICIAL

To me the shortcoming of this bill is that merely redrawing Circuit lines is no solution at all. More important, the lines can hardly be drawn as an effective

solution for the short range future (10 20 years) without the consideration of several decisive factors. First, no rearrangement or realignment of the Circuits can avoid the need for judgepower, since the needed judgepower depends on the business, not artificial state or Circuit lines. Second, lines cannot be drawn that will adequately care for the short range future without a careful analysis of the role of the intermediate courts of appeals in the federal system. In the light of frightening projections that must reckon with such problems as (i) the appeal as a matter of right in every civil and criminal case no matter how meritorious and (ii) the reduction in diversity and other jurisdiction and the like. Once the role or mission of the intermediate appellate federal court system is determined, the Circuit lines cannot intelligently be drawn apart from some understanding of just what it is Circuit Judges, singly and collectively as a Court, can reasonably be expected to perform. This brings into the inquiry the extent to which the problem is too much the product of traditional practices and, on the other hand, the extent to which much can be alleviated and often overcome by imaginative innovations. This borders on the earlier problem of the role of the Court of Appeals and the extent to which we can continue the luxury of the traditional oral argument in nearly every case.

Based to a great extent on the vast experience of the Fifth Circuit, I undertake in the following to demonstrate in more detail the basis for these concerns.

BUSINESS NOT CIRCUIT LINES DETERMINES JUDGESHIPS

The superficiality of Circuit line-drawing as a solution is illustrated by the predicament of the Fifth Circuit. Based upon experience-proved projections, the work ahead for the Fifth Circuit on an annual basis FY 1971-1975 with a forecast for 1980 is as follows:

TABLE 1.—PROJECTION OF FILINGS, FISCAL YEAR 1971-75 PER SHAFROTH 1970 SURVEY AND 5TH CIRCUIT REVISION

	1970 Shafroth survey[1]	January 1971 upward revision 5th circuit[2]	Upward revision percentage increase
Fiscal year:			
1971	1,852	2,129	[2] 19.2
1972	2,006	2,304	[2] 8.2
1973	2,159	2,483	[2] 7.6
1974	2,311	2,655	[2] 7.0
1975	2,464	2,831	[2] 6.6
Cumulative increase, fiscal year 1970-75			57.9
			National (all circuits)
1980[3]		4,513	34,881

[1] The 1st survey was in 1967, survey of U.S. Courts of Appeals, 1967, 42 FRD 243 et seq. Within a year the projections through 1975 had to be revised and within just 2 more years, the 1970 survey again revises them substantially upward.

[2] Upward revision of Shafroth based on actual experience of Shafroth deficiency. Cross appeals and multiple parties eliminated. The forecasts for fiscal year 1972-75 are undoubtedly on the low side since the annual increase for each of these years is calculated on the deficiency of Shafroth projections for fiscal year 1971 (14.9 percent). The court's actual experience showed yearly gains 1968-71 of 13 percent, 11 percent, 20 percent, and 19.2 percent respectfully. These average out to approximately 15.5 percent.

[3] Fiscal year 1980 projections based on 250 percent increase in 5th circuit fiscal year 1950-70 and 199 percent national increase as reflected by table 2 A.O. 1970 report (cross appeals and multiple parties excluded).

Thus, for example, in FY 1972 we will have 2,304 cases (see Table 1). If the six states (see map page 12) were divided 3 and 3, 8 of the Judges would end up with 144 filings per Judge and the other 7 with 164 per Judge.[1] This is in

[1] Recognizing the sometime unreliability of case filings per judgeship these illustrative projections for FY 1973 and 1974 are more than borne out by the recommendations of the Subcommittee on Judicial Statistics of the Court Administration Committee of the Judicial Conference which either has been or shortly will be brought to this Committee's attention through other witnesses. See page 4 of Judge Dunaway's report of March 19, 1971 and the table, page 2 of the A.O.'s Statistical Study "Judgeship Needs in the United States Court of Appeals" February 1971 in which seven additional judgeships are recommended for the Fifth Circuit between now and FY 1975:

contrast to the national average of FY 1970 of 120 cases per Judge.[2] And in FY 1974 with 2,655 filings the division would be 186 and 180 cases per Judge.

TABLE 2

Circuit	Present number	New judgeships statistically justified per circuit	New total
1st	3	1	4
2d	9	5	14
3d	9	1	10
4th	7	1	8
5th	15	7	22
6th	9	1	10
7th	8	1	9
8th	8	0	8
9th	13	5	18
10th	7	1	8
Total		23	111

Nor would a series of splits within the Fifth Circuit be of any real help. The problem is posed, of course, because of the East and West anchor states, Florida and Texas, which have 53.7% of our business plus the adjacent states of Georgia and Louisiana making up another 30.4%.[3] Based on FY 1970 figures combining Florida (443) with its 3 Judges and Georgia (264) with its 2 Judges for a total of 707 case filings and 5 Judges to produce a caseload of 140 would help none. On the other end, combining Texas (492) with its 4 Judges and Louisiana (264) with its 2 Judges for a total of 756 and 6 Judges would momentarily reduce the caseload only slightly.

TABLE 3.--ORIGIN OF FILINGS BY STATE

State	1967-68	1968-69	1969-70	Percent increase, fiscal year 1970
Texas	354	412	492	39
Florida	343	350	443	29
Georgia	215	194	264	23
Louisiana	165	213	264	60
Alabama	139	178	162	17
Mississippi	82	111	114	39

NOTES

Fiscal year 1971 will shortly close. We are positive that the ratios run the same, but we are not able to extrapolate the figures because much of the data source was destroyed in the fire in our clerk's office in January 1971, and the reconstruction by other means is arduous.

As the detailed charts show, on 8 different statistical projections the 5th circuit's needs average 8 and run from a low of 5 to a high of 10 more judgeships. See table 2, p. 9.

A Circuit split, therefore, within the states of the Fifth Circuit will offer no help. The business is still there. It takes added judgeships to handle or it requires extraordinary innovation with some, but not as many, added judgeships.

Nor is it going to be any help to the Fifth Circuit or its Judges to rearrange the Circuit by adding one or more states of the Fifth Circuit to one or more of the present adjacent Circuits--the Fourth, the Sixth, the Eighth, or the Tenth.

The problem is readily seen from the map of the present Circuit lines:

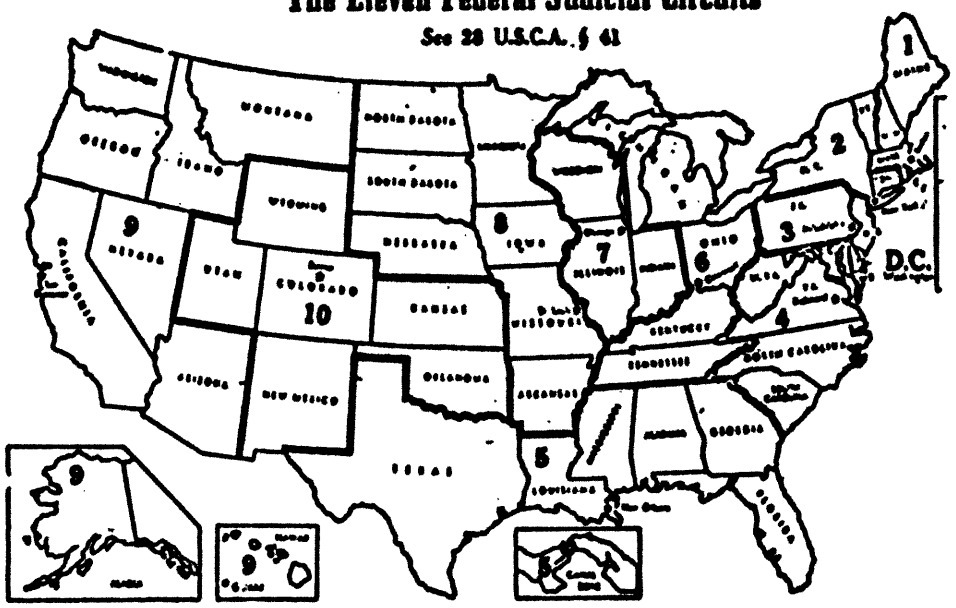
[3] The origin of the Fifth Circuit business is shown by the filings by states for the last three years.

[2] See Table 2, Sheet II-4 and Table 3, Sheet II-13, Report of the Director, Administrative Office 1970.

Since the Fifth Circuit figures in Table 1, page 8 above exclude multiple and cross appeals which are included in the Administrative Office tables cited, the 120 figure should be reduced.

The Eleven Federal Judicial Circuits

See 28 U.S.C.A. § 41



AMENDED TABLE 3

ORIGIN OF FILINGS BY STATE

State	Fiscal year 1968	Fiscal year 1969	Fiscal year 1970	Percent increase, Fiscal year 1970 over 1968
Texas	354	412	492	39
Florida	343	390	443	29
Georgia	215	194	264	23
Louisiana	165	213	264	70
Alabama	139	128	162	17
Mississippi	82	111	114	39

PROJECTIONS, 1971-75 ON BASIS OF ANNUAL INCREASE OF 15.0 PERCENT

State	Fiscal year --				
	1971 [1]	1972	1973	1974	1975
Texas	565	650	748	860	989
Florida	510	587	674	775	891
Georgia	304	350	402	463	532
Louisiana	304	350	402	463	532
Alabama	186	214	246	284	327
Mississippi	131	151	174	200	230

[1] Actual figures unavailable due to fire in clerk's office January 1971.

For example, if Georgia were added to the Fourth Circuit this would bring 264 more cases to the 1,166 filed in FY 1970 in the Fourth Circuit of seven Judges. The result would be a caseload of 158. With but two active Judges in Georgia, they would get no help from the Fourth Circuit's redistribution of its load and, conversely, the Fourth Circuit would statistically get no help from the Georgia Judges. It gets no better if one thinks of lumping Georgia (264) and Florida (443) with its three Judges into the Fourth Circuit (1,166). With a result of 156 there would be no gain either way except, of course, the Fourth Circuit would then become a Court of 12 Judges and much added territory.

On the same analysis adding Georgia (264) to the Sixth Circuit (911) would bring that Court's load to 1,175. There would be but a very slight gain for the Georgia Judges which would soon be wiped out as business increases. The same

would be true if Mississippi and Alabama with their 276 cases were added to the Sixth.

To tie Texas (492) and Louisiana (264) onto the Eighth Circuit (589) would give slight, temporary relief. And the slight gain would be even less in tying Texas (492) and Louisiana (264) onto the Tenth Circuit (748).

Thus on the figures of a year ago (FY 1970) there would be no gain in the most probable of intra-Circuit splits and only slight if any gains by partial adhesions to existing adjacent Circuits.

But that is not all. For on the projections (see Table 1) there is a marked increase each year over the preceding year in percentage and the resulting case filing per fifteen active judgeships:

TABLE 4

	Annual percentage increase	Caseload per judge
Fiscal year:		
1971	19.2	142
1972	8.2	153
1973	7.6	165
1974	7.0	171
1975	6.6	189
Cumulative, 1975 over 1970	57.9	

These caseload increases from 153 next year (FY 1972) to 189 in FY 1975 wipe out any possible gains by conceivable practical adhesions.

Most important, this analysis shows that drawing Circuit lines is not a solution at all. No matter how drawn, no matter how we are paired or aggregated, no matter what adhesions are made to existing or newly created Circuits, the judicial business in the states now comprising the Fifth Circuit is and will be such that the existing judgepower cannot possibly handle it. We must therefore find some other solutions.

WHERE IS THE MAGIC IN THE NUMBER 9?

One quick simple solution is, of course, to forecast the growth in judicial business against the estimated acceptable output per judgeship and then aggregate contiguous states to form a Court having not more than 9 Judges. This would be on the assumption that there is a validity to the oft repeated statement that a Court of more than 9 Judges cannot work efficiently.

Among my own colleagues on the Fifth Circuit there are some that feel this way. Despite the added problems from size, experience of the Fifth Circuit demonstrates that we are and have been a Court of remarkable productivity. We are now officially a Court of fifteen active Judges, but we have long been a Court exceeding 9 judgeships. Beginning with the very capable leadership of our then Chief Judge Elbert P. Tuttle we followed the practice of using visiting Judges—both District and out-of-Circuit Judges plus our own energetic Senior Circuit Judges. This produced a Court of equivalent judgeships as follows:

TABLE 5

	Total court weeks	Available active 5th circuit judges	Judge, weeks from visiting Judges	Equivalent judgeships
Fiscal year:				
1965	30	7	25	10
1966	39	9	33	13
1967	45	12	33	16
1968	48	13	35	17
1969	46	12	50	19

If there ever was a case in which the pudding's proof is in the eating, then our output demonstrates that we did make it work and work effectively. Later I discuss this further in connection with the development of output standards of productivity by new procedures and innovations. It is sufficient here to say that in every year since 1966 the output has exceeded the total input for the

previous year, and in the short course of the last three years active Judges have increased their output by 38% and the Court as a whole increased by 32% in a year and a half, and for the past year over the previous one by 25%.

Of course, I do not minimize the problems, including the burden that rests upon each of the Judges not only in case participation and opinion-writing but in keeping abreast of the flood of opinions that the Court is handing down (over 1,600 this year). All would like a Court of 9 as an ideal size. But the simple fact is that for the federal system this is a goal that can hardly be attained. And if it is attained there will be such a proliferation of Circuits that an even more impossible burden will be placed upon the Supreme Court of the United States in its very important role of "policing" the cases of great importance coming from the Circuits.

More important, even in using the 1970 revised Shafroth projections (which are already on the low side), it is certain that by FY 1975 at least 5 of the Circuits will require judgeships in excess of 9. I attach Appendix 1. This schedule measures output in terms of average caseload per judgeship which at the time the table was prepared (1970) was approximately 96. On that basis a nine-man Court would handle 864 cases. The projections for added Judges needed in FY 1972 over 1970 is shown in column (e). For FY 1975 the projections are in columns (f) through (j). As shown in column (j) there will then be five Circuits requiring more than 9 Judges: Second, Fourth, Fifth, Seventh, Ninth.

While the total new judgeships forecast in the statistical study by the Conference Committee is 23, rather than 42 as in my table for FY 1975, it is interesting to see that this much more elaborate analysis on variable factors covers several of the same Circuits (see Table 2):

TABLE 6.—*Required total judgeships, 1975*

Circuit:	
Second	14
Third	10
Fifth	22
Sixth	10
Ninth	18
Total	74

With 74 judgeships needed for these 5 Courts, this means that restructuring down to 9 judgeships per Court would call for at least 3 new Circuits to bring the total up to 14. With 13,801 cases predicted for FY 1975 for all Circuits in Shafroth (1970 Rev.), and the FY 1980 projection for all Circuits of 34,881 cases (see Table 1), this means that unless there is a radical revision in the role of the Courts of Appeals within the short five-year period from 1975–80 the 120 recommended judgeships will have to increase to 320. Applying the ideal goal of a nine-man Court we would have 35 Circuits. The prospect of 35 Courts of Appeals in terms of the capacity of the Supreme Court effectively to give consistency to the body of controlling federal law is staggering. Worse, the staggering burden is augmented by the fact that the great majority of such new Courts would be Federal Courts of Appeals for a single state with all of the parochialism that would bring. The federalizing influence, so essential to the political and social structure of the United States, would be severely undermined.

Of course, I am not arguing here that Courts should expand to the sizes indicated even in 1975 by Apendix 1 and the statistical studies of the Administrative Office (see Table 2). We will reach a working limit. Rather the importance of this is to demonstrate again that it is the judicial business flowing into the judicial system which determines the need, not the geographical or the momentary arrangement of those judgeships in one or the other Circuit.

It is positive proof that those who are charged with the responsibility of recommending Circuit lines must not approach it on any supposed idyllic nine-man Court. That means, therefore in the most direct way, this Commission ought to try to ascertain what is the maximum size of a Court of Appeals that is manageable. It has a rich reservoir of material in the Ninth Circuit and the Fifth Circuit on which to make objective judgments. And once the effective use of visiting Judges, as employed in the Second Circuit, is analyzed in terms of the real total judgepower of such Court for a given year, further helpful data will result. Perhaps more important, this quest for the magic nine compels us to recognize that we must stop, look and listen to determine how long we can go on with the Courts of Appeals having their present role.

THE ORIGIN OF THE BUSINESS

Up to now—including the very penetrating Statistical Study made by the Conference Committee on Judicial Statistics (see Table 2 above)—projections for judgeship needs for Court of Appeals are always in terms of the business of those Courts. Every projection is based upon the input. Never has there been any inquiry in terms of the real source of the input—the District Courts from which the great bulk of appeals come. As the 1970 Report of the Director pointed out "the 1970 increase in case filings [in the District Courts] was the steepest caseload jump for any year of the last decade. A total of 127,280 civil and criminal actions were commenced, 13% more than fiscal year 1969." With continuing increase in population and general business, the Fifth Circuit has to reckon with the fact that its six states, comprising 12% of the states, in FY 1970 produced 19,536 of the civil cases filed or 22% out of the Nation's total of 87,321 and 10,212 criminal cases or 26% out of the Nation's total of 39,959 (see Table C 1 and D 1, A.O. Rep.). The growth in judicial business within the states of the Fifth Circuit is reflected by the recent addition of 16 district judgeships under the Omnibus Judgeship Bill.

Undoubtedly the Commission would—and under the structure of the Bill as presently drafted could—investigate and analyze carefully this origin of business factor. But once again, any such study and the projections which are bound to come from it—especially in the light of current experience in the disproportionate increase in the number of appeals—brings the Commission back again to the basic question of the role which should be committed to the Federal intermediate court of appeals. That could manifest itself in many ways, two of which are discussed in greater detail—(i) reducing federal jurisdiction in certain areas (ii) abandoning appeal as a matter of right with discretionary certiorari-type review in a significant number and type of cases.

DISPROPORTIONATE INCREASE IN APPEALS TO TRIALS

One of the significant factors bearing directly upon the exponential increase in caseloads of the Courts of Appeals is the disproportionate increase in the number of appeals over the increase in the number of trials, both civil and criminal, in the District Courts.

This was analyzed in the Shafroth (1970 Rev. Report), and for the Fifth Circuit is shown on Appendix 2 attached. As reflected, in FY 1961-1969 civil trials increased 94.7% but at the same time civil appeals increased 157.1%. More startling, however, is that of criminal cases. Somewhat surprisingly, criminal trials increased but 48.1%, but criminal appeals jumped an amazing 210.6%, and against an appeal in approximately 1 out of every 6 criminal cases in FY 1961, in FY 1968 and 1969 every third case was appealed. Undoubtedly much of this is due to the Criminal Justice Act which, with its essential and commendable objective of affording counsel to all defendants, encourages appeals some of which have little merit. But there is no indication that this will subside and from the standpoint of the professional interest of court-appointed counsel, it is increasingly evident that the appeals are taken to eliminate the possibility that in a post-conviction remedy the defendant would accuse his counsel of inadequate representation for failure to take the appeal. Of course, this tendency, already quite evident in post-conviction cases, will likewise increase now that under Amendments to the Criminal Justice Act court-appointed counsel in both the Trial and Appellate Court on a selective basis can be given limited compensation.

Once again this brings the focus back to whether a system can be tolerated which continually increases the percentage of appeals over trials.

REDUCTIONS OF CASELOAD STATUTORY CHANGES

If the Commission were statutorily charged with the duty of analyzing the role of the intermediate federal appellate courts in the light of factors including those I have discussed, it is inescapable that it would be faced with the necessity of determining what sort of statutory changes could and ought to be made. This would take two main forms. The first is the reduction in federal jurisdiction in terms of the District Courts. Perhaps most significant as current illustrations of that approach on diversity jurisdiction and two American Law Institute suggestions which commend themselves, (a) denying a citizen of the state in which the District Court is held the right to invoke diversity jurisdiction in that district, and (b) treating a foreign corporation with a permanent establishment in

a state the same as a local citizen, thus denying it the right to invoke diversity jurisdiction, either originally or on removal.

Certainly this explosive growth in federal court litigation calls for a critical examination of the place for diversity jurisdiction and the limitations to be placed on its exercise. There are undoubtedly a number of other areas representing a substantial portion of a District Court's docket which should be scrutinized carefully. One must recognize, of course, that against the hope that some jurisdiction would be reduced, it is a certainty with the continuing enactment of more and more federal regulatory legislation that the federal question jurisdiction inescapably will increase markedly.

The other principal form of statutory change would be with respect to the jurisdiction and function of the Court of Appeals. Now except for a rare bankruptcy case, a criminal case which the Court under stringent standards declares to be frivolous, and habeas cases in which certificate of probable cause is denied, the statutory structure of the United States Courts of Appeals is to afford an appeal as a matter of right in every case. That policy must be seriously questioned now in the fact of the projections for FY 1975 and 1980. Probably the most useful thing would be to establish a discretionary review of a certiorari-type in significant types of cases. This may take many different forms. The diversity cases once again afford a ready example. To the diversity cases should also be added post-conviction cases under habeas corpus or § 2255 or the like. Others might include review of social security cases—almost invariably presenting nothing but a factual controversy which has already been through a review by the District Court. Much the same could be said about cases from the National Labor Relations Board, especially that great bulk of them presenting nothing but a factual controversy with no significant legal principles presented.

No Commission can realistically draw Circuit lines against the prospect of FY 1975–1980 caseloads without seriously questioning whether any such system can be tolerated, or for that matter even survive. Unless another tier of an intermediate appellate court is to be created, serious concern must be given to those areas in which the work of the Court of Appeals would be reduced by restricting its role in a number of significant areas or types of cases. Any such ultimate decision would be fraught with a good deal of controversy. The Commission, composed of distinguished people from all walks of life, with its wide resources and inquiry from all elements of the community, including the organized Bar and individual or groups of lawyers with partisan views, could undoubtedly come forward with well-founded conclusions and recommendations which would be of great assistance to the Congress in the process of enacting some or all of the recommended legislative changes.

WHAT SHOULD APPELLATE JUDGES DO?

WHAT CAN APPELLATE JUDGES DO?

WHAT SHOULD A COURT OF APPEALS DO?

Finally, in drawing Circuit lines, there has to be some sort of qualitative standard by which the Commission determines just what reasonably can be expected of a single Circuit Court. Inevitably this means examining into what Judges can and ought to do. Of course, this involves many subjective factors which are beyond measure and would be fruitless to examine. But there is sufficient experience now in a number of Appellate Courts, state and federal, by which the size and location and the geographical area of a proposed Circuit would be determined in a significant degree by the extent to which the use of new and unusual procedures would significantly increase output. These present matters can be measured on an objective basis. They also bear directly on the underlying question of the basic role or mission of the appellate court or, perhaps more accurately, just what kind and character of an appeal can we now tolerate for just the 10 years (to 1980) ahead in the face of this explosive expansion. First, to pinpoint one or two things. Is an appeal of right too much of an ideal? Where do we cut it off? How is it cut off? By express exclusion from appellate jurisdiction? Or by a discretionary review? If appealable, is it either necessary, wise or desirable to structure it on the supposition that oral argument is available in very case? To what extent should oral argument hearings be reduced or eliminated? What safeguards are necessary to assure serious review of appeals authorized by statute if handled summarily without oral argument? To what extent can Courts improve productive output by the use of standing panels? What safeguards are needed? How much rotation of panels and constituent Judges is necessary or desirable?

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It seems to me that unless the Commission is simply going to confine itself to demographic data and that coming from the source of business (the District Courts), it cannot possibly set up a reasonably ideal Circuit geographic structure without it having some notion of what Judges can and ought to be able to do. Surely the inquiry leading to Circuit lines ought to start on the assumption that much has to change. And certainly it has to change in the appellate system.

OUTPUT CAPACITY REQUIRES ASSESSMENT OF NEW METHODS

Our own experience in the Fifth Circuit has made us conscious of how important *methods* are. Had we not adopted new and untried practices, we would have long ago collapsed, and instead of a Court that is virtually up-to-date, we would have had a backlog of scandalous proportions. But as our new practices pose many of the queries briefly listed above, there is certainly a place for a study in depth by the Commission on the extent to which these and other practices are significant in affecting the productive output and are worthy of nationwide use or adaption.

Our own experience in the Fifth Circuit shows why this is vital. Our case filings started to climb from 870 in 1962 to 1,347 in 1967 (see Appendix 3 attached). One of our principal weapons in keeping abreast of this increase was the use of visiting Judges and an increase in the number of courtweeks shown below:

TABLE 7

	1965-66	1966-67	1967-68	1968-69	1969-70	1970-71
Visiting judges	33	21	27	41	1	11
Courtweeks	38	45	48	46	38	43

In the fall of 1968 with the prospect (later made good) of 1,489 filings that year, we recognized that we could not possibly keep abreast of this inflow unless we found some new ways. We knew we could not get enough visiting Judges. For that input (after proved reductions for cases terminated without significant judicial activity) we would have required 64 courtweeks. With but 12 active Judges this would have required (after full use of the three Senior Judges) 60 visiting Judges. We know we could not possibly obtain this number, and our experience with the use of 45 (in 1966–67) proved that it was impossible to effectively assimilate that many visiting Judges. This led us to adopt the Fifth Circuit screening procedure. This is explained fully in *Isbell Enterprises, Inc. vs. Citizens Casualty Company of New York*, 5 Cir., 1970, 431 F.2d 409, Part I, and the cited *Huth* and *Murphy* earlier opinions. By an elaborate, but still very simple system, we set up a program under which every case was judicially screened by Judges, not Law Clerks. The Court was divided into standing panels with cases assigned in strict routine rotation by the Clerk to the initiating Judges on each panel. We established three principal classes of cases, Class II being a Summary Calendar case disposed of without oral argument. For that classification we had a double unanimity rule requiring unanimity by the standing panel on classification and also on the final opinion. Those cases for oral argument were Class III (limited to 15 minutes) and Class IV (full 30 minutes). The success of this is little short of miraculous. Beginning in December of 1968 and down through the first 9 months of FY 1971, out of a total of 2,958 cases screened, 1,131 were disposed of as Summary II's without oral argument. That this covers the whole gamet of the docket is shown on Appendix 4 which breaks the figures and percentages down annually in the three categories of (1) habeas—§ 2255, (b) direct criminal appeals and (3) civil appeals.

TABLE 8.—TYPE OF CASE, NUMBER AND PERCENTAGE OF SUMMARY II CASES

	Fiscal Year 1969		Fiscal Year 1970		Fiscal Year 1971 (9 months)		Overall	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Habeas and 2255	56	25.7	141	31.2	163	35.3	360	31.8
Direct criminal	58	26.6	131	29.0	130	28.2	319	28.2
Civil	104	47.5	180	39.8	168	36.5	452	40.0
Total of summary II	218		452		461		1,131	

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RECAP

	Number, summary II	Total cases screened
Fiscal Year:		
1969	218	667
1970	452	1,187
1971 (9 months)	461	1,104
Total	1,131	2,958

Several things are noteworthy. First, the number of Summary II's steadily increase as we gain confidence and experience. In the first six months they ran 32.7% and at the end of nine months in FY 1971 they were running 41.8%. The current weekly report shows that from January 1, 1971 to June 15, 1971, the overall percentage of Summary II's is 40.5%. Even more remarkable is the output by particular types of cases of great public importance. Our docket is made up of the four principal types of cases:

TABLE 9

	Percent
Habeas	15.8
§ 2255	5.7
Subtotal	21.5
Direct criminal	22.2
Subtotal	43.7
Civil	56.3
Total	100.0

Criminal cases, either direct appeal or post-conviction, comprise 43.7% of our docket. More significant, 45.4% of all direct criminal appeals, 81.7% of § 2255 and 66.9% of habeas appeals go off as Summary II's. This does not mean they are treated as frivolous or as light or flimsy cases. All are disposed of with an opinion and many are signed opinions of some complexity. But this illustrates what innovation can do. In an area now a matter of great concern in the public's demand for more and earlier finality in criminal cases, the use of this procedure eliminates all of the delay since a case goes to the panel immediately after the last brief is filed and it is not at all uncommon for an opinion affirming a conviction to be out within 30 days. This has markedly reduced the median time from the filing of the record to its ultimate disposition.

But what this system has enabled the Court to do covering the whole range of its docket is even more spectacular. In the first 18 months a case-by-case analysis proved that it increased the Court's output 32%. And in the present, single year of FY 1971 (the last month being projected) against an increase of 18% in appeals filed over FY 1970 the number of opinions has increased 25% and the closed cases 15%. This has been brought about in no small degree by the fact that in that year the number of Summary II's increased by 48%. The cases considered and determined by both regular and summary calendar increased 29% (see Appendix 5). Another analysis of the output of each active Judge over the last three years shows to a certainty that by the use of these new methods each active Judge has increased his output by 38%.

THE FIFTH CIRCUIT INNOVATES AGAIN RULE 21

As though screening were not enough, experience of about two years with the system revealed that in this great volume of appeals—many of which were on the oral argument calendar as III's and IV's—judicial consideration of them by the panel, either on the summary or regular calendar, demonstrated that no good would be served by an opinion. Consequently, on August 14, 1970, the Court adopted what it calls Rule 21 which permits a simple order of affirmance for civil and criminal cases (not reversal) and enforcement in an administrative agency case. This rule, in its operation and the necessity for it, is detailed in *NLRB vs. Amalgamated Clothing Workers of America*, 5 Cir., 1970, 430 F. 2d 966.

Of course, such a device must be, and is, carefully used. Scattered as we are geographically, it works well for us. At least in effect it closely parallels the practice frequently used in the Second Circuit of dismissal from the Bench.

In reaching our output of 1,000 opinions this has been significant since Rule 21 opinions for the first nine months of FY 1971 comprised 23% of the per curiams.

An appellate Court's work is principally that of deciding cases by delivering opinions. The current year will see almost 1,000 opinions published. Of these 886 (55%) are curiams (see Appendix 6). In terms of output since 1967 the Fifth Circuit has disposed of more cases in the current year than were filed in the previous year (see Appendix 7). All the while there has been a disproportionate increase in the so-called carryover of cases in the course of getting ready for calendaring (376 over 1967 in contrast to case filing increase of 1,027).

THE FIFTH'S NEWEST EXPERIMENT
STANDING PANELS

Not content with these spectacular results the Fifth Circuit has again entered on an even more unique experiment. Faced with the certain projections of work which exceeded the capacity of 15 active Judges and the determination not to increase beyond 15 judgeships, the Court recognized that it was faced with a real crisis. It proposed to the Chief Justice and to the Judicial Center what it has called the Crisis Project. This we are hopeful will be supported by the appropriate agencies. To increase output in the interim the Court has just adopted a new procedure on an experimental basis (up through December 31, 1971) by which all judicial matters are assigned in strict rotation to five standing panels with that panel having complete responsibility from the beginning to the end of that case. The panel will determine whether it is to be disposed of as a Summary II without oral argument, and if argument is needed that panel will hear the case at the time and place fixed by the panel. Under this system we anticipate that in contrast to the current figure of nearly 50% Summary II's, dispositions without oral argument will run as high as 75% of the entire docket. Although this will call in FY 1972 for a substantial increase in the personal productive output of each Judge, we think we will be able to do it if we get the supporting staff help we need. We are hopeful that we will be, as we now are, substantially current with no real backlog. Each year thereafter poses new burdens, but we are hoping that it will work through FY 1973–74. For those who deplore this high percentage of Summary II decisions without oral argument, the answer is a simple one. Were we not to use the methods we have employed and the new ones being initiated we would be in an absolute state of chaos with scandalous cumulative backlogs. This is because in order to dispose of all of these cases on oral argument, we would have to have a startling number of court-weeks way beyond the capacity of our own Judges which in turn would require an impossible number of visiting Judges. This is illustrated by the following on the assumption of 30 visiting Judges with the annual and cumulative backlog resulting.

TABLE 10

	Fiscal year—			
	1972	1973	1974	1975
Cases for judicial disposition	1,764	1,904	2,043	2,234
Backlog from preceding year	20	280	780	1,440
Total cases for oral argument	1,784	2,184	2,823	3,674
Court weeks required (20 per week)	84	109	142	184
Court weeks serviced by active 5th circuit judges	60	60	60	60
Total visiting judges required	72	147	246	372
Backlog (assuming 30 visiting judges available)	280	780	1,440	2,280

Note: These impossibilities highlight why our success for fiscal year 1971 is due to our new procedures. Without screening and on oral argument only, on the same basis as this table, we would have required 76 court weeks with 48 visiting judges, an impossible attainment.

This material is put forward not to show that we do better than anyone else or that others could or should adopt our systems. Every Circuit, whether on present or future alignments, will have unique problems. I offer it in this detail to demonstrate that there is a tremendous, untapped capacity for output that Judges and Courts are not aware of until they experiment. It is of importance here because the Commission cannot really determine how many Judges and therefore how many Circuits are needed until it first ascertains what it is Judges or groups of Judges in a collective Court can do.

That my concern upon goals and methods is not simply the parochial view of a single Chief Judge from a single Circuit is proved by the comprehensive program set up by the American Bar Foundation for an in-depth analysis of the appellate process. This is done under the guidance of the Appellate Judges Conference of the Section of Judicial Administration by a Committee of which Judge James D. Hopkins of the New York Supreme Court is chairman and Professor Prentis Marshall is the project director. Operating in probably parallel concern is the Commission on Judicial Administration of which Judge Carl McGowan of the D.C. Circuit is chairman operating under the supervision of the American Bar Association with a Ford Foundation grant (see 30 Law Week 2090).

CONCLUSION

I end as I began: I am wholeheartedly in favor of the establishment of this Commission. I agree also that in its definitive recommendations on Circuit realignments and Circuit lines this must be positive and direct for submission to this Congress. But this analysis demonstrates, I believe, that the Commission cannot intelligently draw those lines without first making an in-depth study of what the role of the Court of Appeals ought to be, what we can tolerate, what we can survive under, what statutory changes should be wrought to bring the workload within reasonable capabilities, and an objective determination of what Judges and Courts reasonably ought to be expected to do and accomplish by the imaginative use of new methods and procedures.

ADDITIONAL CIRCUIT JUDGESHIPS NEEDED, 1972 AND 1975 SHAFROHT ON PROJECTIONS (UPDATED TO 1970)

	96 caseload average							
	1972				1975			
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)
	Present number judgeships (1970)	Shafroth projection (1970)	Exceed 864 by—	Added judges needed, 1972 compared 1970	Shafroth projection (1970)	Exceed 864 by—	Added judges needed, 1975 compared 1970	Judgeships per circuit 9 or more
Circuit:								
2d	9	983	119	1	1,177	313	3	12
3d	8	749			874	10		
4th	1 8	1,426	562	7	1,820	956	11	19
5th	15	2,006	1,142	6	2,464	1,600	10	25
6th	8	867			981	117	1	9
7th	8	809			968	104	2	10
9th	13	1,719	855	5	2,166	1,302	10	23
10th	7	713			824			
District of Columbia	9	1,025	161	2	1,478	614	6	15
Total				21			42	

1 1 added as recommended by 1970 Shafroth report.

APPENDIX 2

PERCENTAGE INCREASE IN CIVIL AND CRIMINAL TRIALS AND INCREASE IN APPEALS, 5TH CIRCUIT, FISCAL YEARS 1961–69

	Number of judgeships							
Fiscal year	Circuit	District	Total trials	Total civil and criminal appeals filed	Civil trials	Civil appeals	Criminal trials	Criminal appeals
1961	7	33	1,770	512	1,159	408	611	104
1962	9	45	1,975	529	1,328	422	647	107
1963	9	45	2,227	679	1,463	528	764	151
1964	9	45	2,154	818	1,418	687	736	131
1965	9	45	2,292	879	1,596	702	696	177
1966	9	45	2,478	873	1,669	664	809	209
1967	13	58	2,703	949	1,868	703	834	246
1968	13	58	2,960	1,159	2,034	820	926	339
1969	15	58	3,162	1,372	2,257	1,049	905	323
Percent change, 1969 over 1961	114.3	75.8	78.6	168.0	94.7	157.1	48.1	-210.6

Note: Beginning with 1962 the number of appeals in each year under each category have been reduced by the number disposed of by consolidation.

Source: 1970 Shafroth survey.

SUMMARY OF COURT BUSINESS (5TH CIRCUIT)

Item	Fiscal year— 1959-60	1960-61	1961-62	1962-63	1963-64	1964-65	1965-66	1966-67	1967-68	1968-69	1969-70	[1] 1970-71
(1) Unassigned carryover from preceding year	192	207	263	329	420	588	825	816	762	754	754	875
(2) Carryover of cases argued but not decided	56	71	140	193	213	147	105	185	257	322	315	306
(3) New filings	584	639	717	876	1,033	1,073	1,099	1,188	1,347	1,489	1,794	2,055
Total to be disposed of during fiscal year	832	917	1,120	1,398	1,666	1,808	2,029	2,190	2,366	2,565	2,863	3,236
(4) Less cases closed	554	514	598	765	931	878	1,028	1,171	1,290	1,496	1,682	1,932
(5) Undisposed of cases	278	403	522	633	735	930	1,001	1,019	1,076	1,069	1,181	1,304
(6) Breakdown of undisposed of cases:												
(a) Pending under submission	71	140	193	213	147	105	185	257	322	315	306	382
(b) Unassigned carryover	207	263	329	420	588	825	816	762	754	754	875	922
(7) Percent of new filings over preceding year	4.7	9.4	12.1	21.5	17.6	3.2	2.4	7.5	13.2	10.6	20.5	14.7
(8) Number of weeks of court (5-day basis)	24	25	26	31	33	30	39	45	48	46	38	43
(9) Percent carryover increase of unassigned cases to preceding carryover (item 6(b))	7.8	27.0	25.0	27.6	40.0	40.3	−1.1	−6.7	−0.2	0	16.0	5.4
(10) Percent carryover increase of submitted cases to preceding carryover (item 6(a))	26.8	97.2	37.9	10.4	−31.0	−21.9	76.2	38.9	25.3	−0.2	−0.3	24.9
(11) Percent carryover of unassigned case to total annual filings (item 3)	35.6	41.1	46.1	48.4	57.6	76.9	74.1	65.7	56.0	50.6	48.7	44.8
(12) Average monthly filings	49	53	60	72	85	87	89	98	112	124	150	171
(13) Number of judges (active)	7	7	9	9	7	7	9	12	13	12	14	15

[1] Projected as of May 4, 1971.

APPENDIX 4

TYPE OF CASE—NUMBER AND PERCENTAGE OF SUMMARY II CASES

	Fiscal year 1969		Fiscal year 1970		Fiscal year 1971 (9 months)		Overall	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Habeas and 2255	56	25.7	141	31.2	163	35.3	360	31.8
Direct criminal	58	26.6	131	29.0	130	28.2	319	28.2
Civil	104	47.5	180	39.8	168	36.5	452	40.0
Total of summary II	218		452		461		1,131	

RECAP

Fiscal year	Number summary II	Total cases screened
1969	218	667
1970	452	1,187
1971 (9 months)	461	1,104
Total	1,131	2,958

GENERAL BUSINESS OF THE 5TH CIRCUIT (FISCAL YEARS 1970-71)

	Fiscal year 1971	Fiscal year 1970	Percent increase
New appeals	2,127	1,794	18
Opinions	1,584	1,271	25
Closed cases	1,932	1,682	15
Hearing calendared cases	860	740	16
Summary cases	669	452	48
Regular and summary calendar	1,530	1,192	29
Unready cases carried over	922	862	7
Percentage of new cases carried over	44.8	48.7	[1] −3.9
En banc petitions filed	99	77	29
Miscellaneous prisoner petitions	502	438	15

[1] Decrease.

DISPOSITIONS BY PRINTED OPINIONS, FISCAL YEARS 1965-71

	Signed opinions	Per curiam opinions	Total opinions
Fiscal year:			
1965	322	304	626
1966	355	317	672
1967	450	370	820
1968	500	353	853
1969	604	525	1,129
1970	638	633	1,271
1971	708	886	1,594

SUMMARY II OPINIONS

	Fiscal year—		
	1969	1970	[1] 1971
Per curiam	109	326	493
Signed	41	100	101
Total	150	426	594

[1] 9 months actual and projected. Since Aug. 14, 1970 rule 21 summary affirmance opinions have comprised 23 percent of per curiams (103 out of 446).

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FILINGS, DISPOSITIONS AND CARRYOVER IN 5TH CIRCUIT, FISCAL YEAR 1960-71

	Number of cases filed	Number of cases disposed of	Carried forward to succeeding year
Fiscal year:			
1960	584	554	278
1961	639	514	403
1962	717	598	522
1963	876	765	633
1964	1,033	931	735
1965	1,073	878	930
1966	1,089	1,028	1,091
1967	1,189	1,171	1,019
1968	1,347	1,290	1,076
1969	1,488	1,496	1,068
1970	1,794	1,682	1,181
1971	2,127	1,932	1,376

[1] 9 months actual and projected.

SUPPLEMENTAL STATEMENT OF JOHN R. BROWN, CHIEF JUDGE, U.S. COURT OF APPEALS, FIFTH CIRCUIT

I am filing this supplemental statement to my original statement and testimony of June 24, 1971, in order to supply data not then readily available on (i) the composition of the docket by categories of cases and particularly diversity, (ii) the extent to which en bancs are requested or passed upon, and (iii) to give emphasis to a factor which ought to be self-evident but which is the very life blood of our continued use of innovated procedures which have brought about such increases in productive output.

Composition of the Docket: In connection with the proposal that diversity jurisdiction be sharply curtailed, the question was asked as to the percentage of diversity cases in the filings of the Fifth Circuit. I stated approximately 10%. This turns out to be almost on the head. Until August 1970, diversity cases were lumped in with private civil cases generally. Since that date we have separate figures. I attach as Appendix 8 the Table of New Appeals Docketed by Subject Matter FY 1971 down through May 31, 1971. From this the Committee can also see the other main categories. These figures are currently kept so that we can intelligently plan our activities and can anticipate marked changes in the character, kind or volume of particular type of cases (e.g. school pupil assignment cases).

En banes: An en banc is an essential, but sometimes awkward mechanism, for maintenance of institutional uniformity and stability in multi-judge Courts. I attach as Appendix 9 a recap showing the totals in annual periods up through January 31, 1971 and the two-month period Febuary 1, 1971 through March 31, 1971. The reporting period begins February 1 because that is the time we instituted the practice later formalized in Federal Rules of Appellate Procedures 35. For the most recent full twelve-month reporting period (2/1/70—1/31/71) and the period February 1, 1971 to June 30, 1971 the following extract indicates the volume of these petitions, each of which has to be considered by every active member of the Court even though few of them result in a request for or the conducting of a poll and even fewer are granted:

TABLE II

	Feb. 1, 1970 to Jan. 31, 1971	Feb. 1, 1971 to June 30, 1971
Petitions for rehearing en banc filed	138	80
Polls conducted	26	6
Denied by panel without poll	79	51
Rehearing en bancs granted	11	5

In addition to these petitions by parties, the Court has an internal procedure in which a non-panel member can request the panel to reconsider some or all of

the decisions. This goes to the entire Court for consideration, but seldom results in a poll and most often terminates with modifications eliminating the cause of concern.

Success Means People: People Mean Money: Although in my statement I stressed that the screening procedure and the standing panel procedure just adopted require substantial additional supporting personnel, this deserves further emphasis. We know that we are at the end of our rope now. And while over the last three years we have consistently improved our output, we know we will soon reach the point of maximum output *unless* we get substantial added staff. This includes extra secretaries, a third law clerk for each Judge, a well organized group of staff attorneys (paralegals) under competent supervision and with adequate secretarial and clerical assistance. All of this means money. But unless the money is forthcoming to acquire this personnel, the chaos revealed in the Tables will occur. And in terms of sheer money—to solve the problem to avoid the chaos—the cost is much less than that of installing and maintaining eight additional tenured Judges with their regular staffs. The cost of this increased productive capacity is not cheap. But if this help is not forthcoming, there is no hope that either the current pace can continue or that the new methods can be employed or such efforts would keep up with the flood.

The extent to which our innovative systems impose substantial burdens beyond that borne when matters are handled traditionally by oral argument is shown by Appendix 10A–10D. This shows for each of the Judges of the standing panels the burden of participation and opinion load based upon the filing projections for FY 1972–1975 and on the alternative hypothesis that the Summary II's will amount to 60%, 65%, 70%, and 75% of the total filings. The Judges simply cannot handle 117 opinions as projected for FY 1972 unless we get help over and above that of our existing staff and that of the Court as a whole. And FY 1973, 1974, 1975 is simply out of the question.

TABLE OF NEW APPEALS DOCKETED BY SUBJECT MATTER, FISCAL YEAR 1971

Subject matter	Cumulative percent prior period	Current monthly filing, percent	Current overall, percent	Total	Jul.	Aug.	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	Apr.	May	Jun.
Direct criminal	22.1	19.3	21.9	407	37	25	30	41	42	45	30	41	37	43	36	.....
Habeas corpus:																
With counsel	5.2	3.7	5.0	94	7	9	6	5	12	9	8	7	14	10	7	.....
Without counsel	11.2	10.7	11.1	207	9	16	20	19	20	17	19	11	26	30	20	.....
2255:																
With counsel	1.4	0.0	1.2	23	1	1	5	6	0	1	2	2	4	1	0	.....
Without counsel	4.1	3.7	4.1	76	12	6	3	9	6	7	2	10	7	7	7	.....
Subtotal	44.0	37.4	43.3	807	66	57	64	80	80	79	61	71	88	91	70	.....
Civil:																
Private civil	27.3	32.1	27.7	516	48	46	48	42	28	47	53	34	58	52	60	.....
Diversity						(18)	(23)	(19)	(13)	(25)	(25)	(15)	(15)	(11)	(26)	.....
Federal quest.						(28)	(25)	(23)	(15)	(22)	(28)	(19)	(43)	(41)	(34)	.....
U.S. Civil	7.9	8.6	7.9	148	16	16	7	15	22	5	12	7	17	14	16	.....
Tax	4.9	4.3	4.8	90	11	10	5	6	8	11	7	10	8	6	8	.....
Bankruptcy	1.7	3.2	1.8	34	2	0	4	3	5	3	3	3	1	4	6	.....
N.L.R.B.	4.4	2.6	4.3	79	12	5	5	1	4	8	13	3	13	10	5	.....
Other agency	1.0	4.3	1.4	25	5	1	.....	1	3	0	0	2	2	3	8	.....
Civil rights	4.8	6.4	4.9	91	9	9	8	7	6	7	0	4	17	12	12	.....
Admiralty	0.7	1.1	0.7	13	3	2	1	0	0	0	1	0	0	4	2	.....
School	3.3	0.0	3.2	59	15	17	9	5	2	2	4	2	2	1	0	.....
Subtotal	56.0	62.6	56.7	1,055	121	106	87	80	79	83	93	65	118	106	117	.....
Grand total	100.0	100.0	100.0	1,862	187	163	151	160	159	162	154	136	206	197	187	.....

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	Feb. 1, 1967, to Jan. 31, 1968	Feb. 1, 1968, to Jan. 31, 1969	Feb. 1, 1969, to Jan. 31, 1970	Feb. 1, 1970, to Jan. 31, 1971	Feb. 1, 1971, to Mar. 31, 1971	Total
(1) Disposition of petitions for rehearing en banc:						
Denied:						
With poll vote	5	7	8	15	0	35
Without poll vote	42	64	66	79	16	267
Granted:						
With argument	2	0	0	0	0	2
Without argument	3	3	3	5	0	14
Total	52	74	77	99	16	318
Pending	2	4	15	50	30	30
Total	54	78	92	149	46	348
(2) Less: Carryover of pending petitions from prior period	0	2	4	15	16	16
(3) Total petitions for rehearing en banc filed	54	76	88	134	30	332
(4) Total petitions for hearing en banc	0	0	4	4	0	16
(5) Total all en banc petitions	54	82	92	138	30	348
(6) En banc on court's own motion:						
With argument	4	2	13	0	0	19
Without argument	0	2	5	6	0	13
(7) Total, all petitions for rehearing and/or rehearing en banc	227	284	335	399	88	1,333

PROJECTED WORKLOAD PER ACTIVE JUDGE UNDER STANDING PANEL ASSIGNMENT SYSTEM ON SUMMARY II's[1] FISCAL YEARS 1972–75

	Basis of 60 percent				Basis of 65 percent				Basis of 70 percent				Basis of 75 percent			
	1972	1973	1974	1975	1972	1973	1974	1975	1972	1973	1974	1975	1972	1973	1974	1975
I. Summary calendared cases:																
(a) Opinions or dispositions as initiating judge	70	76	82	89	76	83	88	97	83	89	95	105	88	95	102	112
(b) Participations in opinions or dispositions of other panel members	140	152	164	178	152	166	176	194	166	178	190	210	176	190	204	224
(c) Subtotal summary calendared cases	210	228	246	267	228	249	264	291	249	267	285	315	264	285	306	336
II. Orally argued cases:																
(a) Opinion or disposition as writing judge	47	51	54	60	41	44	48	52	34	38	41	44	29	32	34	37
(b) Participations in opinions or dispositions of other panel members	94	102	108	120	82	88	96	104	68	76	82	88	58	64	68	74
(c) Subtotal oral argument cases[2]	141	153	162	180	123	132	144	156	102	114	123	132	87	96	102	111
III. Total opinions	117	127	136	149	117	127	136	149	117	127	136	149	117	127	136	149
IV. Total participations	234	254	272	298	243	254	272	298	234	254	272	298	234	254	272	298
V. Total opinions or participations	351	381	408	447	351	381	408	447	351	381	408	447	351	381	408	447
VI. Administrative-interim matters	93	110	130	155	93	110	130	155	93	110	130	155	93	110	130	150
VII. Total matters participated in per judge	444	481	538	602	444	481	538	602	444	481	538	602	444	481	538	606
VIII. Weeks of court at 20 cases per week	7	8	8	9	6	7	7	8	5	6	6	7	4	5	5	5

[1] Total caseload from January 1971 5th circuit updated Shafroth projection.

[2] Each substitution of a senior judge for an active judge on a standing panel for 1 week of 20 cases per week reduces the judge's opinion writing by 7 and participations by 13.

Judge BROWN. Thank you, sir. I am in favor of this legislation. As a member of the Conference, I voted for it in principle. We did not have any specific proposed legislation before us.

I think that there is great value in a commission-type of procedure. We are told that there has been only one circuit realinement, really, in modern times and that was when the Tenth Circuit was created and it was the slow product of much hauling and tugging.

We are told—we don't know directly about these things, of course—that this is so wrapped up with political considerations, Senators envious of what circuit they are going to be in, and so on, that it might be a very difficult thing if the Congress itself undertook to try to redraw these circuit lines. So I am enthusiastic about the commission method. I also recognize that if the so-called reorganization plan type of structure is to be followed, where a report is made and the Congress either accepts it or rejects it within a stated time, that their recommendations on circuit lines would have to be very definitive.

My criticism of the bill is that it is too narrowly structured. It just assumes that you can draw lines and solve problems. I think this Commission has to be charged not only with sort of a professional concern but with an official responsibility to look at some of the deep questions that are wrapped up in this problem of caseloads and the work of the courts of appeals and that is the tenor and that is the burden of my approach here. I maintain, first, that there is really no solution at all in just a circuit split. Second, you cannot really decide what ought to be done without looking at the probable load on the court of appeals systems in terms of the next 7 or 8 years, with a view of seeing whether we can tolerate or even survive any longer under this system. That brings us to the role of the court of appeals, what should its mission be. Then next, how can anybody intelligently determine where circuit lines should be drawn unless he first knows what is it you can expect a court to do, a good court. I mean, a hardworking court. I believe I speak for everyone. We are all working hard. You cannot decide what a court can do without knowing what is it you can expect a judge to do, what is a reasonable standard. I don't mean that you should try to find in a subjective way if Judge X doesn't work as hard as he should and Judge X does better, but there are some objective ways.

Then, third and finally, you cannot possibly determine what it is a court should do or what a judge should do without knowing what it is that judges are doing now that is unusual and that has brought about a great increase in productivity.

I am going to talk about the Fifth Circuit because we are a guinea pig. There isn't a problem in the judiciary we don't have. We have it in a double dose. We could have collapsed 3 or 4 years ago. But in fact we are up to date. It is a remarkable record. We face a prospect that is staggering. We have taken some new steps I am going to tell you about that we hope will keep us abreast for a couple or three more years. Then something is going to have to give. So this is the kind of a theme I have here.

I still believe the bill is a good one, but I think any such commission must look into these basic things.

Now, let me remind you first that the Court of Appeals for the Fifth Circuit is the largest, as Mr. Brooks pointed out, with 15 active judges. Next is the Ninth Circuit with 13 judges. Our council has gone on rec-

ord formally, unanimously, against more than 15 active judges. I will say some of us were not quite as enthusiastic about it but we have a united front. We have actually been running a court of more than 19 judges when you figure the equivalent of visiting judges. When somebody says a 15-man court can't work I just say, as some of our political friends have said, "Just look at the record." What we are doing is nothing short of an amazing thing, and I am not too boastful, I hope, in saying it.

So we are a court that recognizes, first, that something is going to have to be done and, second, maybe a court realinement seems to be more or less inevitable. But it ought to be done in a way that solves the problems in some kind of a sensible way.

Why do I say a circuit split or just circuit lines is a superficial nonsolution? The Fifth Circuit again is a good illustration. We have six States: Florida, Georgia, Alabama, Mississippi, Louisiana, and Texas. Fifty percent of our business comes from Texas on the west and Florida on the east, and the next adjacent States, Georgia and Louisiana, supply another 30 percent. As to Mississippi and Alabama, we have no real problem since these can be shifted to adjacent circuits to probably get a little help but not much.

First, let's talk about splitting the Fifth Circuit. We can cut it in two or in thirds. With 15 judges we would still end up with a caseload that is 35 percent more than the average for the whole Nation last year of about 120. We would have approximately 150 to 160 cases. If Georgia and Florida were cut off and made a new circuit their caseload would be higher than it now is and within a couple of years it would even be worse. Texas and Louisiana would gain a little bit for the first year. I gave to Mr. Zelenko a new amended table 3 which is found on page 11 which gives the filings from each of the States of the Fifth Circuit with projections to fiscal year 1975. I used the 1970 figures because that was the only way I could get a comparison with the other adjacent circuits. You can see for fiscal year 1971 we have a little difficulty on statistics because of the fire in the clerk's office which destroyed these records so that we are going to have to reconstruct them for 1971. We will do it. However, the projections are very, very conservative (an annual increase of 15.5 percent) with respect to 1972 through 1975 and you will see how much they go up. Texas and Florida will increase 150 each just for this coming year, and the moment you apply that to any of these cross-pollinations, say, to the Fourth Circuit or the Sixth Circuit or the Eighth Circuit or the Tenth Circuit it is already out of balance. So you can see that drawing of lines is no answer.

Why is that? Well, the reason is that the business is there, not only business business, but judicial business that comes from business.

The States of the Fifth Circuit comprise 12 percent of the States. We have about 15 percent of the population. We have 22 percent of the civil business of the whole country and, not to our great credit, we have 25 percent of the criminal business. So we know that as long as the business is there it is going to take judgepower.

Here, of course, you get face to face with what is it you ought to expect of a court of appeals system and of judges. Our projections are set forth in the statement. Incidentally, we have our own figures and they are hard figures. They exclude all of the water. We take out all the multiple parties. We cannot work just on the Administrative Office

records; they are a year and a half old when they get to us so they are not very useful to us for planning purposes. But we have proved year after year that our projections are right on the nose.

This year we will have 2,100 cases against a projection of 2,127 and they tell me that is pretty good. Next year we know it is going to be not less than 2,300 cases. In preparing this statement I learned that we used an additional approach which I would regard as doubtful since we just used the adjustment factor on the 1971 figures for 1972 through 1975. If experience teaches us anything, it is that in the last 4 years we have averaged each year an annual increase of 15 percent, so instead of 2,300 next year we are apt to have 2,500, and when we get to 1975—that is just the day after tomorrow—we are going to have not less than 2,800 cases and we will undoubtedly end up with about 3,000.

Incidentally, all of these projections have been reviewed by the statistical people in the Administrative Office. We have submitted them directly to the Chief Justice so that he knows of our plight. They have been found trustworthy both in the calculations and in the statistical methods used.

In 1980—and that is just a couple of weeks off, so to speak—we anticipate we will have over 4,800 cases. But the shocking thing that should bring this committee really to a point of great excitement is that for the court of appeals system as a whole there will be 34,000 cases. Now, that is against a total last year of 11,000 and it is against a total of about 13,000 on the Shafroth projections for fiscal year 1975. I am sure you have heard about the Shafroth projections. He is a tremendously able man.

Now, when you think about that you can see why I say somebody has to start looking at the problem of what do you expect of the court of appeals, not just good judgments, but can they do it.

Now, one of the things that I regard as somewhat of a myth is that no court should ever be larger than nine. I have some judges on my court who feel that way. Judge Coleman, a great friend of Senator Eastland, has said, "It is too much like a convention. It is not a court." But again we have made it work.

The CHAIRMAN. It would be like a House of Lords.

Judge BROWN. House of Lords, that is right. But now we are going to divide ourselves up into standing panels. I am going to tell you about that. We are going to divide ourselves up to see if we can't improve output even more. Any kind of a consideration of this problem, I think, will lead you to the certainty that you cannot demand the luxury of a nine-man maximum court. Again the Fifth Circuit is a good illustration of this.

I made a projection here a couple of years ago which you will find in the table in appendix 1. It shows on these projections the number of courts of appeals in 1975 that will have to have more than nine judges. I have also set forth as a table the extract from the statistical study made by and for Judge Butzner's committee (and report by Judge Duniway). That is the Subcommittee on Statistics and Procedures of the Judicial Conference which is making a study on the omnibus judgeship bill for the courts of appeals. As you remember, each 4 years the Congress and the Conference try to handle district judgeships in one omnibus bill, and then in another year following that the court of appeals. We reported that we don't want more active judges.

We are going to have to have more help. But this committee went ahead and made eight different projections to try to eliminate these aberrations that come from some of the reporting methods used, especially on habeas corpus and postconviction cases, to get the water out and to get common denominators.

On eight different projections they show that the Fifth Circuit needs seven more judges—that is 22—by 1975. Worse, it shows for the Second, Third, Sixth, and Ninth Circuits they will need more than nine judges and it runs up to 19 in the ninth circuit. If you divide the additional judges up and get an ideal of nine, you will see that even on that projection you are going to have to create three more courts of appeals. But the startling thing is if you apply these same statistical methods to the projection for 1980 you will see that we will need 320 circuit judges, and if you then want nine-judge courts you are going to have 35 courts of appeals. That means, for example, there will be a court of appeals for Texas. That is a terrible thing, not so much just for Texas but it is for the Nation because the great strength of the court of appeals system is its federalizing influence that comes from the cross-pollination of views and judges of different backgrounds and laws of different backgrounds that have this influence on a healthy, growing body of law.

California, with its 19 million or 20 million people, is going to have to have a Federal court of appeals for California pretty soon. That is another instance that makes the job so urgent that you look to see what it is you can expect of the Federal intermediate appellate system.

Change can take several forms. One is statutory relief in terms of, say, jurisdiction in the Federal district court because that is where our business comes from.

Mr. Poff. Would you care to give some examples at that point, judge?

Judge Brown. Yes: I am going to do it right now. There are two branches of legislation involved. One would be those that go to jurisdiction of the district courts and the second group would be those that go to the nature of the review permitted in the court of appeals or otherwise in the appellate system. The first is the basic jurisdiction. We are strong for the ALI standards on diversity jurisdiction that will whittle this thing way down.

The Chairman. Might I ask at that point what is the percentage of appeals in that classification? Roughly how many appeals involve diversity cases?

Judge Brown. Diversity runs about 10 percent in our circuit. I will have the exact figure here in a little bit when I lay my hands on it. It is about 10 percent. The civil business is approximately 60 percent of our docket but that covers U.S. civil, Government civil cases, private civil cases under Federal questions, civil rights, admiralty, tax, NLRB, administrative agencies. We keep exact figures and I am going to give to Mr. Zelenko a table that will show the breakdown month by month of the exact type of case we have so we know exactly what we are dealing with. I think we should take a lot of diversity away from the district courts.

The ALI standards really propose that you can't create false citizenship status by corporate origin, and second, that a person in the State ought not to be able to sue somebody else in the Federal court. He ought

to sue in the State court. However, you must recognize that this is not going to be too productive, too helpful, because for every one of those diversity cases we are going to lose we are going to get another dozen Federal question cases as a result of the Congress grinding out new legislation every day. A little boy says, "Why make a Federal case out of it, pops?" Well, that is all it is today. Everything is a Federal case. I don't see much escape from it because every time you declare a congressional policy, if the act doesn't provide for some kind of judicial relief, a group of judges who claim to be overworked will work real hard to find that again they have the keys to the kingdom as the savior of the country and will afford judicial relief by implication.

I think the basic place where you have to look at this thing is in terms of the authorized review, the kinds of cases that ought to be reviewed. There is a great place, and I think it is essential, for a certiorari type of review. Now, this is where diversity cases would come right in.

The CHAIRMAN. That is, the courts of appeals should have the right of certiorari?

Judge BROWN. That is right: Does this case deserve a review? Has it had a fair crack? There are a lot of cases on which this method would be good. For example, there are 35,000 social security cases a year that are handled. The Supreme Court wrote about it in the *Perales* case. Appeals go now to the district judge. It is really absurd. Of course, to the person the case is a great, great thing. They are disabled and most of the cases arise from an adverse award.

The CHAIRMAN. It is not a question of law but a question of fact?

Judge BROWN. It is a question of fact. You will get a question of law about once every 4 or 5 years. I don't think we can tolerate that kind of review.

Another illustration is postconviction cases. They represent in our court about 25 percent of our docket—that is 2255's and habeas corpus. In habeas the case has gone through the State system and once you have had a Federal district judge look at it in the light of 1970 standards that now apply to assure a real review, I think there is a place for certiorari.

Now, we have it in a way when a judge denies a certificate of probable cause or a leave to appeal in forma pauperis, but that is too infrequent. There we apply this kind of a standard: Should it have review?

Mr. MIKVA. Could you accomplish the same result with some kind of division into a summary jurisdiction where either with argument or minimal argument you furnish per curiam decisions rather than detailed decisions? There is a significant difference between total denial of the right of review and limitation on the right of review. We are all deeply aware of the overburdening of the circuits, but couldn't you accomplish the same result or close to the same result?

Mr. POFF. Mr. Chairman, before the witness answers, will my colleague yield?

Mr. MIKVA. Of course.

Mr. POFF. I may be anticipating what you may be about to say. I believe the Fifth Circuit about 2 or 3 years ago installed an innovative system of dividing the court into five panels with somewhat the same thing you are suggesting. Am I correct?

Judge BROWN. That is precisely so, and you have asked a good question. Why I am so disturbed and why we are concerned is that we have proved now that we increased our productivity the first year we put in screening. We call it screening, and I will explain it to you in just a minute. We increased the court's output 32 percent. This last year—you will see from the tables—with a caseload that went up to 2,100 cases and 1,600 opinions published—imagine that—we increased the number of opinions in a single year by 25 percent and the court's output by 15 percent. Now, this is all due to this screening. But, unfortunately, we now see that unless we can carry it a couple of steps further—and that means we have to have many of the so-called paralegals. Sometimes I wonder what they are, as I have never seen one yet. I recently told the Chief Justice, "Send me one. I want to look at him to just see what he looks like." For this, we are going to have to come back to the Congress and its other committees, I suppose. But I want to stress, we are going to have to have help, supporting personnel, law clerks, additional secretaries, clerks of that kind. But with screening, we have been able to do all these things. To do more, we need more help.

For the last 6 years, every year we have turned out more business than was filed the year before. There is a built-in carryover, as you know, those of you who are lawyers, in the filing of the briefs, and so on; but as against an increase of 1,000 in filings from 1967 to 1971, the carryover has only increased about 300, so we are at the most current stage we have ever been. We have reduced the median time. The trouble is, and one of the tables here will show you, that if we just go on as we are, the workload begins to get so big that the judges simply won't have the capacity to turn out that additional kind of work. This means that we know—having determined that 15 judges is the maximum—we are going to have to have some kind of help in two or three directions.

One is some sort of circuit realinement which is intelligently done. Second is a determination of what the role of the court ought to be, the character of appeals and the character of appeals to be allowed, and maybe some reduction in original jurisdiction in the district court.

Let me tell you a little bit about the Fifth Circuit screening. It seems to me that no commission can really intelligently determine where lines ought to be drawn unless they know what it is they can expect.

The CHAIRMAN. Let me ask you this, Judge.

Judge BROWN. Yes, sir.

The CHAIRMAN. If we cut down the rise of cases that go to the court of appeals, by putting some brakes on postconviction appeals, diversity cases, and social security cases, and develop some sort of system of certiorari, would there be a need for changing the geographic lines, for example, of the Fifth Circuit? You would still have 15 judges. You would want to make some changes there, wouldn't you?

Judge BROWN. I think it would be difficult to say. Let me say this: None of us want to see the circuit split. We like the circuit as it is. It has a great diversity of viewpoint. I often say that from Texas I can play havoc with Florida law, and my brothers do the same for Texas law. It does all some good. But I don't think that you could really

determine finally until you could analyze the probable effect of such changes or the appellate structure.

The CHAIRMAN. Well, in your experience in the Fifth Circuit, you did cut down the cases and the caseload, did you not, with these changes?

Judge BROWN. No. We don't cut down the cases, and we don't cut down the caseload. To the contrary, the cases have gone up, and the caseload per judge has gone up.

The CHAIRMAN. At least, you handle the cases more expeditiously.

Judge BROWN. Yes, sir.

The CHAIRMAN. Let's assume that is the case. Would you still want the Fifth Circuit divided?

Judge BROWN. Well, the projections here for 1975—found on table 10—are a pretty good indication that there comes a time when we cannot do more. In response to the question about the effect of screening, we have done three things. Screening worked so well—I have previously given you the percentage increase. In addition, we made a body count study of what active judges were doing. It showed head by head that from 1969 to 1971, each individual active judge increased his output by 38 percent. We have proved to ourselves what we wouldn't believe, that we could do more and better work. I think this proves to others that they should look at new systems, not necessarily ours, but some new systems.

We got this screening as a little germ from Mr. Justice Clark. Screening started in a modest way in the Sixth Circuit. Its function there is essentially a means to indicate how much time should be given to oral argument. The Fifth Circuit has taken ours almost word for word. The Ninth Circuit has adapted in part our system but has not gone quite as far with it.

We found that we had to deal with two things, perhaps ideas. This is an interesting thing. Everybody had this reluctance: Are you cutting somebody off from an appeal? The other idea was that this would all be trash, frivolous.

We have different classes. Class I is frivolous. Class II is a summary disposition without oral argument. Class III is a 15-minute oral argument case. Class IV is a 30-minute oral argument case. Our experience proved that the longer we are in screening, the more confidence we have that these people are getting a look-see at their case as good, if not better than those that are orally argued. We have a rule that before you deny oral argument, the three members of the panel have to agree (1) on that classification and (2) when the opinion comes out it has to be unanimous—it cannot have a dissent or special concurrence. It has to be a full 100-percent agreement.

We found, though, in this experience—and this proves the desirability of the certiorari type of review—that there were too many cases, including those on an oral argument calendar as a 15-minute or 30-minute argument, that ought never to have really taken that much limited judicial energy. Consequently, we adopted what is called rule 21 in which we outlined reasons why we can just say "affirm" or in NLRB or an agency case "enforce" the order. This is probably not a very welcome thing to the loser. All it says is enforced, rule 21; or affirmed, rule 21. We don't reverse by this rule.

We started that in last August and in that length of time with over 55 percent of our cases now going off as per curiams (those are un-

signed opinions that you like to keep short but sometimes they get long, too), 23 percent of these per curiams are rule 21 cases.

We have one judge on the court who just can't write a per curiam. He either has to write a law review article or rule 21. He has found it a helpful thing. The operation of rule 21 is explained in detail in the opinion referred to in my statement.

But we now find this isn't enough. Now we just adopted a new experiment that we are going to try from now until December 31, 1971. We have divided the court up into five standing panels. For this period we are going to use the same panels that we have used on screening. The case routinely comes to them on a roster so we avoid any kind of panel picking. We have too many sensitive cases to ever get close to that. That standing panel has the full responsibility from beginning to end of that case.

The CHAIRMAN. How do you divide the cases in proportion to the panels?

Judge BROWN. The Clerk gives them to the next initiating judge on the roster just as his name comes up without any regard to the kind of case or where it came from, so that every panel and every judge gets the same number of cases, and on the roll of the dice they will get their same ratio of types of cases.

The CHAIRMAN. You don't do it by subject classification, like anti-trust or criminal cases?

Judge BROWN. No, sir. It goes right across the board. If they decide it can be disposed of without oral argument—that is the summary II—the panel does it. We call the Initiating Judge the judge to whom the case is sent on that panel. In this way the administrative burdens are also equalized and not put on the seniormost judge of that panel. If classed as a summary II, he writes the opinion. If the panel decides that it needs oral argument they have to hear the case.

Now, there is a little therapy in that, too, because it was easy before for a judge seeing a difficult case on classification to say, "Well, let's put this down for oral argument, knowing that he might never get it."

The CHAIRMAN. Who initiates the "no soap," as it were? One of the judges of the panel, or what?

Judge BROWN. Yes, sir; it is done by the panel. One judge as the Initiating Judge gets it on a rotating basis.

The CHAIRMAN. One judge initiates it and then it goes to the panel and they vote on it?

Judge BROWN. They vote on the classification and if they decide it ought to be orally argued they have to hear it. Right now our cases disposed of as summary II's—that is, without oral argument—are running close to 50 percent. It is an interesting thing what experience will produce. We have seen the percentage of summary II go way up. Since January 1, 1971, it has been a remarkable thing. It was about 40 percent but each succeeding week it is more and more, all of which means that the judges have gained confidence in the reliability of a previously untried system.

The CHAIRMAN. Judge, by virtue of certiorari the Supreme Court only hears about 1 percent, we are told, of all cases that are decided in the U.S. Court of Appeals. That is rather an interesting item. Now, where you have these panels is there a tendency to discourage appeals? Is there any injustice done because judges may be impatient with the vast number of cases that come before the panel and may reject appeal?

Judge BROWN. I think there is always a hazard, and the farther you remove it from the nice idyllic sort of thing of a full oral argument those hazards increase. But I think you have to accept it on what we demonstrate or what other courts can demonstrate that they are capable of doing.

The CHAIRMAN. What I am trying to say is that justice is more important than the convenience of judges and more important than frugality in Congress when appropriating for improvements in the courts. Is there any diminution of the quality of justice in the method you have described?

Judge BROWN. I don't think so, but you have put your finger really on what this problem is all about. It isn't a question of convenience of judges and it isn't an effort to just get relief from burdens because I think the prospect of a Federal judge on a court of appeals of a busy area is going to be hard work no matter how it is sliced, and I don't mind it nor do our judges.

The CHAIRMAN. I don't mean to imply that the judges are in any way derelict or anything like that. I have the greatest respect for the Federal judiciary.

Judge BROWN. We know that, and I don't want to be arguing with the timekeeper, but what I am trying to say is this: that this puts the focus right on the problem. You talk about justice. Now, can you have justice if you are going to have 34,000 appeals to be handled by a single structure? What are you going to do? Are you going to have another tier of intermediate appellate courts—a kind of junior grade Supreme Court, or a senior grade court of appeals?

You can see that on the growth of population, business, and sound projections, that within the brief period of 8 years (to 1980) this country is going to be faced with a caseload that would be beyond any kind of present physical capacity. Keep in mind also that the more you proliferate these circuits in numbers, the more you add to the burden of the Supreme Court whose work right now, I think, challength their physical capacity in a policing sort of sense to assure some uniformity in the Federal jurisprudence. So I think that justice is the factor that makes you look carefully. It is precisely why I think this commission with a wide-ranging authority, charged with specific responsibility, should and could collect a lot of very sensible views from various elements of the bar and the social and political community across the Nation to see what ought to be done.

Another factor that is very significant is the increase in appeals in contrast to the increase in trials. I have attached as an exhibit an extract from the Shafroth 1970 revision. For the Fifth Circuit it shows that while civil trials went up 97 percent, civil appeals went up 157 percent. But here is the alarming figure: Criminal trials went up 48 percent but criminal appeals went up 210 percent. Every sixth case was appealed in 1960. Now every third case is appealed and the chances are this is going to get worse with the increased payments to counsel under the amended Criminal Justice Act. Add to this the allowance of fees in habeas and 2255 cases.

Mr. POFF. Mr. Chairman, I hope it doesn't interrupt the train of thought here but it is important to me to understand a little more about the functional method involved. As I understand, you have four categories of cases with five panels.

Judge BROWN. We have five panels.

Mr. POFF. Four categories of cases?

Judge BROWN. Well, our docket divides itself up into habeas corpus, 2255's, direct criminal appeals, and then civil cases. That is all thrown into the hopper and, mind you, when we talk about habeas corpus and 2255's it means that case has survived the certificate of probable cause. This is not the letter from the prisoner, "Please give me some relief." This is where we have a difference in our statistical methods with some one or two other circuits since they treat every letter, and so on, as a case. Only after a certificate is granted does the case go on the docket. Under screening, when the time expires for the last brief under the rules—this is about 65 or 70 days from the filing of the record—the clerk simply looks at this roster to see who in turn is the next initiating judge, and what is the next panel (A, B, C, D, E). If it is panel B he gives it to the next initiating judge on panel B. The clerk doesn't know, himself, what kind of a case it is. He doesn't pick it or choose it, and every panel gets its ratable share of every kind of business.

Through a project that we hoped the Chief Justice could get the Judicial Center to support financially we were going to divide the cases into two main categories: (1) 60 percent of them would comprise diversity, habeas corpus, 2255's, social security, labor cases, and direct criminal appeals because we thought the percentage of summary II's going off on oral argument would be higher in that category; (2) the remaining 40 percent would comprise the balance of docket by types. In the early days of the screening some of the judges said, "Patent cases are always difficult. We ought not to screen them. We should put them down for oral argument," or tax cases. But we determined that is when you run risks of injustice and unequal treatment because the prisoner ought to at least have as good a chance as somebody who has a million dollars to finance a patent case. So we have, and have had, no categories of cases that are automatically given a particular type of treatment.

Mr. POFF. I see in cases out of the Fifth Circuit references to what are called summary II's and I assume you have a summary I category, and that you have a category III and category IV. Summary II, as I understand it, is a case that is decided on the brief without oral argument, and category III is the case that is decided with 15 minutes' oral argument, and category IV the case decided after 30 minutes. but what is category I in that complex?

Judge BROWN. That is a frivolous case. In the beginning we thought we were going to have a lot of frivolous cases. just judicial trash. It didn't turn out that way and so most go off as II's.

You will see on page 32, table 8—this includes the first 9 months of 1971—that since 1969, out of 2,958 cases that we had briefed and screened—that is across the board—1,131 were these summary II's. They break down for that period 31 percent for habeas, 28 percent were direct criminal appeals, and 40 percent were civil appeals.

Mr. POFF. I am interested in the process by which the determination is made into which category each case will be placed.

Judge BROWN. Well, it is a judicial judgment. It is not made by law clerks. Law clerks are essential in this process but the judges have assumed the direct immediate, personal responsibility. We outline some

of the factors in the opinions I have written for the court at its request, some of which are cited in my statement. I think that the most important factor is: Do you think oral argument is going to be of any real help?

Mr. POFF. Well, now, does a lawyer for the litigant have any input into that decisionmaking process?

Judge BROWN. Only by the quality of his brief. In fact, we put a star on the calendar which would indicate it is a 15-minute case and my comment on the call of an oral calendar always is that:

You have gotten this star. It either is an indication that your case has little or no merit or that you have done such a wonderful job that you don't need argument or more time.

Well, a tax case is not a very sexy thing, say, an estate tax case. You can't even state the problem when you put the papers down. It is that complicated. Likewise with a Fair Labor Standards Act case with an exemption for overtime rather than a rate of pay. Those congressional standards are inevitably so complicated that all the oral argument in the world is not going to help the judges in an understanding of the case.

On the other hand, there are certain kinds of cases that you just know ought to be orally argued because of their public importance.

We have, for example, the *Town of Shaw* case that made quite a sensation where a panel of our court ordered that the town of Shaw, Miss., do a lot of sewer digging and telephone and electric light power installing because of racial grounds

We have a kind of instinctive feeling about this. But we have tried to be fair with the bar. I have three opinions (referred to in my statement) that collect both the statistics on why we had to do it and what our methods are. The remarkable thing is that we have had but three challenges to this system and each one has survived certiorari—two criminal cases and one civil case. We all know that doesn't mean anything finally, but the Solicitor General each time filed a formal memorandum in support of our practice. Apparently, the Justices of the Supreme Court were not disturbed by our new methods.

Mr. POFF. Do I understand that each of these panels has the power to make a dispositive decision? Does the full court hear the case after the panel has concluded hearing?

Judge BROWN. No. Only if a majority of the active judges votes for en banc is the panel decision reviewed by the full court. Then we have the responsibility under the statute to hear a case en banc.

The CHAIRMAN. How often do you hear cases en banc?

Judge BROWN. We have had approximately 35 in the last 2 years but we have not had any orally argued cases en banc for 2 years. There is a trend in the court now, I think, that with this standing panel device we are going to have more and more oral arguments in en banc.

The CHAIRMAN. Let me ask this question, Judge. It is more or less a philosophical question. Do you think appeal in a Federal forum is a matter of right? If it is a matter of right does the discretionary power that you describe—whether to hear or not to hear the appeal—undermine that right?

Judge BROWN. I think that is one of the basic problems—to what extent should the system now tolerate, allow, or require or permit an appeal as a matter of right. That is what we have in nearly every case now. You can rack off habeas by denial of CPC. But in direct criminal

appeal, this would be the rare case where appeal is frivolous. Add a few bankruptcy cases, and that is just about it. The rest of them are entitled to a review as of right and I don't know how long the system itself—not the judges but the system—can stand that.

Mr. ZELENKO. The Fifth Circuit I believe, with the panels as you describe, is really using a kind of certiorari procedure now, isn't it?

Judge BROWN. No, I don't think so, although we are a firm believer in the need for statutory power for certiorari action. What we do as a summary II is dispose of that case on its merits. This is borne out by the fact that the figures will show that of the opinions written in the summary II cases approximately a third of them are signed opinions.

I saw one recently by Judge Thornberry, one of your former colleagues, who has made a wonderful judge, I will tell you that. His opinion as a summary II was a signed opinion and it was 20 pages long. It had every kind of serious question. I forget the area of law but it was Federal legislation. We dispose of the case on its merits and by summary II we do not undertake to say, "Well, this is just not worthy of review."

Rule 21 is also a decision on the merits. It is a judicial determination. One of the factors for rule 21 is that precedential value is afforded by an opinion in the case, either per curiam or a signed opinion. When you start talking about 1,600 opinions we are publishing each year—of 14 volumes that West Publishing Co. publishes each year for the court of appeals, the Fifth Circuit has five of those volumes—it is almost impossible for us to keep up with them ourselves.

Mr. BROOKS. This is an outstanding record, I think, and a good innovation. Have any of the other circuit courts adopted this procedure to expedite their consideration on the merits of the cases submitted to them?

Judge BROWN. The Eighth Circuit has come as close as any to the system we are following. They have one difference, the cases are put on a calendar which, so far as we see it, accomplishes little and, on the converse, loses much of the time in disposition which we save.

One of the things gained by our screening is not only increased output but increased speed of output. This is important since one of the scandals today is this terribly long time between conviction to affirmance in criminal cases.

For example, on a direct criminal appeal the last brief is due, say, on October 1. It gets to an initiating judge (both under the new standing panel system or under our former screening system) within 2 or 3 days. It takes about a week for the thing to go through the mill, just by sending it to Austin or to Florida, wherever the three members of the panel are. Suppose they agree on a summary II as a case to be disposed of without oral argument. It comes back to that initiating judge. He writes an opinion right then. It is not at all uncommon for an opinion to be published within 30 to 45 days of the time of the last brief. That has decreased our median time way down on disposition generally, and on criminal cases and postconviction cases we are down to a record that I don't know whether it can be improved.

Mr. BROOKS. I would say of the lawyers in my district that I have never heard a complaint about the appeals procedures that exist in the Fifth Circuit court. They don't feel that they are getting a bad shake. They feel that they get fair and prompt treatment. I think that

it is an indication that the innovations developed by Judge Brown in that court and utilized by his 15 judges do work and meet the need. I think that we may really be talking about the wrong thing when we talk about changing the circuit lines. The facts are, how can we make it possible for these judges who are willing to work to do their job. The Fifth Circuit is a good example. There may be some others. I agree with the chairman in that I have some doubts, if I understand you correctly, Mr. Celler, as to whether or not we can have enough circuit court judges scattered throughout the United States to give everybody a full oral hearing. We don't have that many judges that we can appoint.

Mr. Poff. My colleague, in his usual fashion, goes to the heart of things and it prompts me to suggest that it would be helpful if the record at this point could show the ratio of applications for certiorari arising out of the Fifth Circuit as compared with the national average.

Judge Brown. I don't know what it is. There are figures in the Directors report at the Administrative Office on that which I think would be quite complete and accurate as they deal with cases actually disposed of.

Mr. Poff. But if the ratio were low it would speak well for the innovation the judge has made, and I would rather expect that the percentage ratio would be low.

Judge Brown. Let me give you another illustration of the use of our new methods. In the Chief Justice's opinion in this recent school desegregation case, the *Swann* case, I transmitted this information while the case was pending, without, of course, going to the merits at all. We used this standing panel, that is, this screening panel system for school cases, as well. This was in December of 1969. We had just then been chastised by the Supreme Court and reversed summarily for a little extension of time I granted to the Secretary of Health, Education, and Welfare whose emissary made a call to my house at 10 o'clock at night—the first time I had ever seen a safe-hand courier since I was a second lieutenant—and the Supreme Court, in effect, told us to get on with the business. We had a council meeting and we decided that the moment an appeal came up, the panel assigned by roster with no chance of panel picking would have that case from then on.

Some of these in a course of 6 months were appealed three different times from about December 3, 1969, until September 12 last year, 1970, at which time we decided that we would wait for the Supreme Court to speak and say no more until they did. This we announced to the bar. In that short 9-month period we had disposed of 193 school cases, some of which were appealed as many as three different times.

We cut down the time for notice of appeal. We cut down the time for filing of the record. We cut down the time for filing of briefs. Remarkably, we only heard three of those 193 orally. Well, there were a lot of people who didn't like that method but in only one of them was certiorari granted, and this was on the merits, not method.

Mr. Hutchinson. Mr. Chairman, may I make an inquiry at this point?

The Chairman. Yes.

Mr. Hutchinson. Judge, in order to clear up some present confusion in my mind, when a case is assigned to a panel and it decides that, let's say, it is worthy of class IV consideration and now under your present arrangement that same panel hears the case, hears the oral

argument, and so on, then that same panel or one of the judges on that panel then prepares an opinion?

Judge BROWN. Right.

Mr. HUTCHINSON. Then does the full court, 15 judges, sit in conference on that case?

Judge BROWN. No; this was never followed in the good old days when we had plenty of time. Each panel is the court of appeals. The statute says it sits in panels of three judges or the full court. You can't have it in between. Here is where the full court comes in. First, sensitive to our responsibility as a court for everything that goes out from each of the panels, we have now come up with a couple of other methods since we have mechanical problems of people scattered so far. We call them pinkies and prepinkies. That is one of my innovations. This is simply a cover sheet to alert the judge with this mass of material to the need for action and the deadline.

The pink cover sheet instructions advise each active judge that here is a request—either by a party or by one of the judges—for reconsideration by the full court. In others it is a letter expressing from a judge some concern about the panel's opinion. So that we are well disciplined toward reading this mass of opinions, 1,600. That means close to 150 a month and they will come out in slugs like that. If a judge sees a decision of a panel that he is disturbed about he writes that panel. We have a detailed systematic system. Copies go to all the other active members of the court. Hopefully, the panel can work out the cause of disturbance. We are concerned at that stage primarily with the opinion as a precedent, what is it going to do in terms of a precedent. This is so because we do try to follow the practice of not overruling another panel and most of the time when we do it it is inadvertent. We are pretty well disciplined.

Now, the parties under the statute are not entitled to an en banc nor can they demand a vote. All they can do is request it and the Supreme Court ruled that they were entitled to a vote by the judges, if, but the "if" is a big one, a member of the court requests a poll.

Now, we have had approximately 300 applications or petitions for rehearing en banc over the last 4 years. Of those, in 267 the judges have declined to ask for a poll. They just automatically go off and then the panel has the full responsibility. Of that 300, only 35 mustered enough concern to have a poll. Of course, without problems, in order to expedite action, I devised a form letter for the poll and I have a ballot that is as good as any political party ever devised. On a single ballot we were voting "Grant" or "Deny" petition for rehearing, and with or without oral argument.

Now we have decided that we are going to try two ballots. We vote first on en banc. If it is granted, then I submit another ballot to the judges as to oral argument. This makes it a little bit easier because sometimes the temptation is great to look at the physical, logistical problems of assembling.

For example, the only place we can have an en banc argument is in Houston.

We have a removable, retrievable, collapsible double-tiered bench. Some counsel addressing us in a school case once said he hoped that the judges on the lower tier would not feel that in addressing the senior members he was speaking over their heads. But those are some of the problems.

The CHAIRMAN. Judge, I gather from reading your statement that you suggest that the revision of the Fifth Circuit boundaries will not ease the caseload per judgeship in the fifth circuit; am I correct?

Judge BROWN. That is correct.

The CHAIRMAN. I take it that you mean additional judges would be required in addition to the circuit revision?

Judge BROWN. That is the only way we would get any relief there. You could split it up into, say, three circuits but for this business you are going to have to have *x* judgepower and that will mean, say, 22 or 25 total and that comes back again to illustrate this basic question of what is it you expect.

The CHAIRMAN. If we authorize additional judges we will go beyond the nine judge limit suggested by some.

Judge BROWN. Well, my feeling is that there should be no limit to nine and that you can make a 15-judge court work, and work well. There is a feeling expressed by some very distinguished people, Judge Lumbard, for example, who just recently stepped down as chief judge of the Second Circuit, who firmly believe that nine is all you can really handle.

The CHAIRMAN. That is what he told us the other day.

Judge BROWN. There are problems. We have problems growing out of size, but I just think if you look at this realistically, a nine-man court is a dream. Mr. Hutchinson, did I answer your question?

Mr. HUTCHINSON. Yes; Judge, you did.

Mr. MCCLORY. Would the Chairman yield for a question?

The CHAIRMAN. In a minute. Beyond provision for additional judges you would recommend that we address ourselves to legislation concerning post-conviction remedies, diversity of citizenship jurisdiction, the uses of certiorari by courts of appeals, social security cases, revision of the courts into panels, the use of oral arguments, and so forth. Is there anything else that should be done besides these reforms?

Judge BROWN. Well, that covers pretty much everything, I think. I think this inquiry is long overdue. I have been sounding this everywhere to the point where I am almost becoming an irritant, I guess.

The CHAIRMAN. What kind of guidelines should the bill contain to assist the Commission in developing new circuit boundaries? Have you any suggestion for guidelines? You wouldn't want one State to constitute a single circuit.

Judge BROWN. As to how to state it, I am a little uncertain. My observation is that judges do fairly well, maybe, in interpreting law, but they are poor draftsmen. Every time there has been a bill drafted by judges and submitted to the Congress by the Judicial Conference, we have had to amend it later on because it didn't say what we intended it to say. I would leave that to the skilled people in the Congress. You are capable of doing it. In the Transportation Act, you have the transportation policy of the United States. In the crime on the streets bill, you have what the policy of the United States is; and this Commission should be charged, however you articulate it, with the responsibility of looking into this problem of the intermediate appellate system of the United States, the Federal judiciary, what it can do. what is needed, what kind of reductions or increases are advisable and then charge the Commission also with exploring fully the innovative methods of courts, not only the Fifth Circuit but the Ninth Circuit

the Sixth Circuit, the Eighth Circuit, in trying to solve some of these problems.

I think there is a place for the Commission to do that, because we hope that it would have fine people on it that would have a great interest. One of the problems that just came to mind by the remark the Chairman made, is this one about oral argument. Now, that is a pretty serious question. The tradition has been that you are entitled to be heard orally. We have had to abandon that in over 50 percent of our cases.

Now, I think the Nation needs to decide: Is that a sound thing? The Congress may have doubts about the system we are following. They may say, "What would you be faced with; well, what is the prospect?" The answer is revealing. I can show you on these tables in my statement that, for example, next year we will have 1,720 cases as a minimum to hear; that is, dispose of. If we heard those on oral argument at 20 cases a week—and that is all we have ever been able to handle—we would have 85 court weeks. Now, with just 15 active judges, and assuming they sit 15 weeks which is twice what they are able to do now with screening, we would still need 75 visiting judges. You can't get them. You just can't get them. And even if you got 30—that is perhaps attainable—there are still some difficulties.

These tables show the cumulative backlog, and it runs from 280 the first year—next year, fiscal year 1972—up to nearly 2,200 in 1975, just 3 years from now. No matter how distressing, that is the answer to people who deplore the absence of oral argument; with case filings of the kind we now have and which the Nation will soon experience, the system will collapse. We would be in a state of chaos with backlogs of scandalous proportions that, on oral argument alone, would take as much as 3 years to wipe out.

The CHAIRMAN. You just think that Congress should take an adjournment for 3 years, and with less burdens you will have less cases?

Judge BROWN. That would make this job the sinecure which people told me I was getting when I got appointed.

The CHAIRMAN. Any other questions?

Mr. HUTCHINSON. Mr. Chairman, may I inquire further? Judge, I understand you are a strong proponent of the commission approach to this whole problem, not only in determining the territorial bounds of circuits, but in tightening all of these procedural changes and limitations upon the appellate power and what not.

Judge BROWN. Yes, sir.

Mr. HUTCHINSON. This disturbs me a little bit. For the sake of argument at the moment, maybe Congress might get wrapped up in politics in trying to define exactly where a circuit boundary should be, but if we turn over to a Commission this whole task of limiting the appellate power and so on, it seems to me, Judge, as though what we are doing is turning over to the Commission a job that Congress under the Constitution is expected to perform. I don't want to quarrel about it, but I just want to state that. I take it you would disagree with me.

Judge BROWN. Well, I don't think I really do disagree with you. I think that in part this is inevitable with a commission, but I think it is still good if for no other reason than this: For them to simply draw

circuit lines is no solution at all. It is just no solution at all. So you don't want to charge them with a job that is both superficial and absolutely of no real meaningful effect. What do you want them to do? You want them to recommend circuit lines in the light of policies which would be good but which admittedly Congress would have to determine. And I am quite careful here to say that obviously they cannot make policy determinations and submit that as a kind of reorganization plan structure for the Russian type of veto; circuit lines, yes, that are based on that. When the Congress examines these underlying inquiries and policy determinations that the Commission recommends as the basis for their circuit line drawing, the Congress will have to say whether these are good or bad. You might conclude: "We can't take their lines because they are based on some policies we find unacceptable." So I think there would still be a big job for Congress, a big job for Congress. But from the standpoint of the Fifth Circuit, which has nearly 25 percent of the whole business of the courts of appeals in the United States, I can't imagine if they drew some circuit lines, how we would get one dime's worth of relief out of it. Do I answer your question now, Mr. Hutchinson?

Mr. HUTCHINSON. Yes, Judge, you have. Thank you.

The CHAIRMAN. Mr. McClory.

Mr. MCCLORY. Thank you, Mr. Chairman. I want to say, Judge, that you have provided a very illuminating and very helpful statement here in your testimony before the committee and I want to express my appreciation. Also, I would like to ask a couple of questions.

One is don't you feel that it would be a preferable approach to have a commission which would make recommendations with the Congress undertaking to review those recommendations rather than for Congress to originate legislation?

Judge BROWN. I am not sure that I understand, Mr. McClory.

Mr. MCCLORY. Well, the commission form which is embodied in the bill before us would provide that the recommendations of the commission would automatically become a law unless the Congress undertook to veto those recommendations and that then in effect it would become law without the President receiving a piece of legislation and approving or disapproving it. I am just wondering if you don't feel that it would be a preferable procedure for the commission to recommend to the Congress new geographical lines, recommendations with regard to a change in procedures or change in the types of cases that are to be heard on appeal, and then the Congress to act on the basis of those recommendations in a direct manner as we do act on most legislative proposals?

Judge BROWN. I go so far with you that I really hesitate to disagree at all. I think the virtue of the commission recommendation of the circuit lines after the commission has been charged with responsibility to determine these and recommend underlying policies is that if the Congress accepts the underlying policies upon which the recommended lines are drawn to effectuate this, a lot of such policies would have to be expressed in terms of active legislation. In that way the circuit lines could be accepted without what we are told are the political problems when you start pushing States from one circuit to another. This is to say that I think there is a great value in the commission-type of structure and the report on circuit lines has to be definitive, that is,

definitive in the sense that it is, for example, to be drawn between the States of Michigan and Ohio, or here or there.

For example, suppose the Commission decides, "Well, we ought to have a certiorari type of case" and in these categories, diversity, 2255's, post-conviction. That would take affirmative legislation. You could adopt the circuit lines and you would know we would not get any workload relief out of it, even though we could still be restructured geographically. However, before the help would come the Congress itself would have to review that policy and then write a statute because right today the Judicial Code commands us with the duty to take every case except—and you can put about 1 percent in the exception. Congress and the President can alone bring these changes about. Did I answer you? Does that help you any?

Mr. McCLORY. Yes.

Mr. POFF. If my colleague would yield, if I interpret my colleague's concern, actually it is that if we pursue the procedure sketched in the bill and the Commission makes its report and the Congress fails to veto it and it theoretically becomes valid automatically, and then subsequent to that point in time someone challenges the constitutionality of that legislative process and if the court should find that the process was unconstitutional, what a shambles the system would be faced with. Do I correctly interpret that?

Mr. McCLORY. That is implicit in the question, although I gather that the judge finds no constitutional obstacle.

Judge BROWN. I don't suppose you could ever say that about anything, but I am sure the conception of this is that you have a rich history now and the Congress has apparently found it to its satisfaction in reorganization plans. For example, the Federal Torts Claims Act came through a reorganization plan. All of a sudden I had a good claim against a steamship for a dock damage. I didn't have it the day before. It was in the form of a reorganization plan. You have often done that. And we all benefit from the salary revision bill. Now, I guess nobody has been greedy enough to challenge that. I suppose somebody could challenge it.

Mr. POFF. Would my colleague yield?

Mr. McCLORY. Yes.

Mr. POFF. That is hardly on all fours with the procedure——

Judge BROWN. That is right.

Mr. POFF (continuing). Because involved in this case and not in the one you put is the question of the prerogative of the Chief Executive to sign legislation passed by the Congress, and this procedure makes no provision for the Chief Executive.

Judge BROWN. I guess the theory is when he signs this bill with whatever modifications he has in effect agreed——

Mr. POFF. He would be estopped? He would waive his constitutional powers? I wonder if a President can waive his constitutional powers.

Judge BROWN. We would give you at least a class III on that contention, I tell you that.

The CHAIRMAN. I don't know whether this question is appropriate or not, but if the matter came before you at some future time would you care to indicate what the decision would be?

Mr. POFF. I hope the Chairman doesn't mean to put that question in quite that form.

The CHAIRMAN. I will put it in judicial form. The questions and answers seem to have the same import. You seem to imply that you do approve of the bill; that is, a commission could draw these lines.

Judge BROWN. I think it is worth running the risk. There may be constitutional problems but I think it is worth running the risk and I can speak with some freedom because the prospect of my going farther north than the northern border of Texas is pretty remote at this stage. I have a good deal of latitude, I think. I believe that there is a pretty good chance that the system would be sustained.

The CHAIRMAN. Judge Friendly, in his statement, stated the following:

> Another possibility would be to create the Commission, instruct it to report on Circuit realignment in a short period, say six months, with the legal effect provided in Section 6(b) of the bill, and then go on to make further recommendations, with respect to which affirmative Congressional action would be required. Perhaps that would be the best solution of all.

Do you agree with that?

Judge BROWN. I don't disagree with it in the policy expressed. He said so briefly and so well what I took 40 pages to say and he is not known either for being short in his opinions. We both suffer from somewhat the same problem only he is more scholarly. My criticism of that is, and I think I know something about this, I defy anybody to come up with an intelligent realinement of these circuits in 6 months to give any kind of real relief. I just don't see it. You can play with these figures any way you wish. I even gave you a map so you can look at it. It is right there. But as far as the other policies, I think there is a need and he seems to recognize that we have to look into this thing to see what ought to be done. So, on the disturbing problems we are together.

Mr. POFF. Do you think that a geographical realinement of the circuits might necessarily entail geographical realinement of the districts within the circuit?

Judge BROWN. Not the district boundaries, I wouldn't think so.

Mr. POFF. Not necessarily, but might possibly?

Judge BROWN. Yes. I will make this point here: that you have a look at the business. Where does the business come from? Ninety percent of ours comes from the district courts and that is where you have to look to see what is going to happen. To just say there are so many district judgeships, and there are so many States, and even so much population, you end up with a very unrealistic sort of determination. I think the Second Circuit would be a good illustration. I am sure a disproportionate part of their business populationwise comes from the Southern District and the Eastern District of New York.

The CHAIRMAN. Mr. Zelenko.

Mr. ZELENKO. Judge, do you envision this Commission as authorized to create additional circuits as well as to revise existing lines and to keep the number at 11?

Judge BROWN. You know, I never thought about that, and perhaps that proves that the bill is inadequately structured. I am not sure but what it does permit that but it is pretty vague. It says, and you know it better than I:

> * * * the present division of the United States into the several judicial circuits, and to recommend to the President, the Congress, and the Chief Justice such changes as may be most appropriate for the expeditious and effective disposition of judicial business.

If they aren't charged with the duty of recommending the creation of some new courts of appeals I don't see how they can do anything worthwhile since once again the Fifth Circuit is itself the finest example.

Mr. ZELENKO. In that connection, then, Judge, would it be helpful to the Commission to have some guidelines in the legislation? For example, should there be a maximum number of circuits that should be authorized?

Judge BROWN. I think that is a question that has to be decided. I gave you the illustration that on these 1980 projections you are going to have 35 circuits. Obviously, that system is going to be entirely different from what we have today and I think the Congress would have to recognize it. I think, first, you would have a series of parochial courts and you would have an impossible burden on the Supreme Court for an intelligent sort of national consistency. So the Congress would have to decide how many courts of appeals can the Nation really tolerate, and that brings you right down to these very basic questions.

Mr. ZELENKO. The Judicial Conference apparently doesn't recommend any specific criteria or standards to guide the Commission in considering the creation of new circuits or revised circuits. For example, a minimum number of district judgeships, a minimum number of districts, a maximum number of circuits, a maximum number of circuit judges, a minimum number of circuit judges, a prohibition against a circuit containing only one State, a prohibition against a State being divided between or among circuits, and so forth. These are matters I gather from your testimony which also should be considered.

Judge BROWN. I think so.

Mr. ZELENKO. Thank you, Judge, very much.

The CHAIRMAN. Judge, this is a very knotty and intricate problem and you have certainly been helpful in untying some of the knots and your statement has been very illuminating. We always welcome your presence here and we especially welcome you at this point.

Judge BROWN. I hope you will let me come back.

The CHAIRMAN. We are very grateful to you.

Judge BROWN. May I take this opportunity to present to the other members of the Committee my secretary, Mrs. Blackstock, whom I introduced to several of the members earlier. She is my right hand on these matters.

The CHAIRMAN. Yes, indeed.

Judge BROWN. I don't know why she didn't have a few more facts and figures in my statement but I have given you enough.

It is a pleasure to be here and we are confident that we have an understanding heart in the Congress. Thank you very much.

The CHAIRMAN. We have received the statement of Judge Alfred P. Murrah, Director of the Federal Judicial Center. It is clear that the Judicial Center has given some attention to the subject of revision of circuit court boundaries. We shall hold Judge Murrah's statement until we are able to reschedule his appearance.

I believe it is very important to have Judge Murrah testify on this subject. The hearing will adjourn until we can arrange for the presence not only of Judge Murrah but of Judge Friendly, who is the chief judge of the Second Circuit.

(Whereupon, at 11:30 a.m., the subcommittee adjourned, subject to the call of the Chair.)

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