The Fifth Circuit: Expand or Divide?

By Honorable Lewis R. Morgan*†

The appellate courts of virtually all American court systems have experienced an enormous increase in their workloads, and the eleven circuit appeals courts in the federal system are no exception. The Fifth Circuit Court of Appeals' docketing problems surpass those of all other circuits.[1]

The causes of the increase are complex and cannot be isolated or even precisely identified. Criminal appeals from post-conviction rulings that originate from state as well as federal convictions have contributed to the increase. Also augmenting the case load has been the increasing involvement of the courts in law making, reviews of administrative agencies and the increasing transformation of social and economic problems into legal controversies. Another cause of caseload over-crowding in appellate courts is reflected by widely shared views concerning protection of legal rights afforded by appellate review. Increasingly, parties in criminal and civil cases, regardless of the merits, seem to insist on appeal. As a consequence, the appellate courts must employ procedures and methods of administration that permit performance of their functions in the face of caseloads that will in all probability remain very large.

The problem of the Fifth Circuit has been under study by the Judicial Conference of the United States for more than fifteen years and yet, as this paper is completed, the problem lingers on. In September, 1963, the Judicial Conference was informed that its committees on Court Administration and Judicial Statistics were in agreement on the need for additional judges in the Fifth Circuit, but were divided as to how the increase should be provided.[2] In October, 1964, the eminent Professor Charles Alan Wright

* Circuit Judge for the United States Fifth Circuit since 1968. United States District Judge for the Northern District of Georgia, 1961-1968. Chief Judge of that court, 1965-1968; member, General Assembly, 1937-39. University of Michigan, 1930-32; University of Georgia Law School (LL.B. 1935). Member of the American Bar Association, the American Judicature Society, the Georgia Bar, the Troup County Bar, and the Coweta Judicial Circuit Bar Association.

† The author is indebted to Kendall Coffey, his law clerk, for research and helpful suggestions in the preparation of this article.

1. In fiscal year 1976, participation in cases per active judge averaged 216 on the Ninth Circuit, 190 for the Second, and 130 for the District of Columbia Circuit. On the Fifth Circuit, each judge participated in, on the average, 365 cases.

2. *See* 1963 JUD. CONF. REP. 65. Subsequently, a Special Committee on the Geographical Organization of the Courts was formed. As a result of its studies, the Special Committee recommended a division of the Fifth Circuit, placing Alabama, Florida, Georgia and Mississippi in the new Fifth and creating a new Eleventh Circuit, to incude Louisiana, Texas and

wrote an article entitled, "The Overloaded Fifth Circuit, A Crisis in Judicial Administration."[3] More than fourteen years ago, he began with the statement, "The United States Court of Appeals for the Fifth Circuit is at a point of crisis."[4]

Addressing the American Law Institute at its annual meeting on May 20, 1964, the late Chief Justice Earl Warren stated:

> In the court of appeals there has been a major increase in filings with the resultant increase in the number of pending cases. In only two years the number of pending appeals increased from 2,900 to 3,900, a rise of more than 1/3 in the number.
>
> The increase in appeals has been much greater in the Fifth Circuit than in any other. The situation in that Circuit has been carefully examined and reviewed by the Judicial Conference. The volume, which includes cases of all kinds, presently pending in the Court of Appeals of the Fifth Circuit is so great that the Judicial Conference of the United States has concluded that that court, which already has nine judges, would need no less than six more judgeships to handle the volume, and this has led the Judicial Conference to recommend, with the utmost reluctance, a division of the Circuit.
>
> The recommended division would provide for a new Eleventh Circuit composed of the States of Texas and Louisiana and the Panama Canal Zone, with a Court of Appeals of seven judgeships and with provision for eight judgeships in the old Fifth Circuit. Legislation to carry out this recommendation will be submitted to the Congress in due course.

Since the late Chief Justice's recommendation in 1964, the Fifth Circuit's filings have climbed from a little over one thousand to more than 3,600 for the fiscal year 1976-77. With the addition of 35 new district judges proposed in S. 729,[5] the appeal filings in the Fifth Circuit will reach approximately 5,000 by 1978-79. I base this estimate on studies that reveal that each district judge generates 40 new appeals each year, so under the proposed legislation, these new district judges provided in the bill will generate 1,400 more appeals to the Fifth Circuit, which, added to the 3,600 appeals now being filed, will result in 5,000 appeals yearly in the Fifth Circuit.

Even these daunting projections do not tell the full story. Appellate caseloads have not only increased in size, but have become more diverse in composition. Certainly this has been true of the cases on appeal in the Fifth Circuit. I refer particularly to some of the cases arising out of the energy shortage. Within the Fifth Circuit are many oil and gas producing

---

the Canal Zone. REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, March 16-17, 1964, 14-15. Except for the placement of the Canal Zone, this earlier recommendation mirrors the alignment contained in the current proposal, S. 11.

3. 42 TEX. L. REV. 949 (1974).

4. *Id.*

5. S. 729 94th Cong., 1st Sess. (1975).

areas, as well as corporate headquarters of many of the major oil corporations.[6] These industries generate litigation. Several of the parishes in southwest Louisiana produce more than 30% of the natural gas in the United States. Most of this gas production is subject to the jurisdiction of the Federal Power Commission.[7]

Since *Brown*[8] and *Baker*,[9] there is little doubt that the six states of the Fifth Circuit[10] have attracted most of the civil rights litigation. Initially, after 1954, the focus was on school desegregation cases, but before the school cases could be terminated, the Supreme Court rendered its decision in *Baker v. Carr*, which, by overruling *Colegrove v. Green*,[11] spawned litigation which affected the validity of the election processes of most of the municipalities, counties and states throughout the Fifth Circuit.[12] In Georgia, court challenges were directed to gubernatorial races,[13] and even to the apportionment of the United States House of Representatives.

How did this litigation affect the workload of the judges of the Fifth Circuit? These suits challenging the constitutionality of state laws required the impaneling of special three-judge courts. At least one judge of the Court of Appeals was assigned to each three-judge court, and the nature of the issues raised in three-judge cases[14] made them especially time consuming. Studies beginning with 1962 statistics which appear in the Annual Report of the Administrative Office indicate that about one-fourth of all three-judge cases heard in the United States were filed in the Fifth Circuit. In a great number of civil rights cases, the Chief Judge designated two circuit judges to serve on the three-judge panel. In the Northern District of Georgia, an area where many of the "bell wether" civil rights cases were filed, then Chief Judge of the Fifth Circuit Elbert Tuttle assigned Circuit Judge Griffin Bell and this writer to serve with him on most three-

6. The states of Texas, Louisiana, Mississippi, Alabama and Florida all have production. Only Georgia and the Canal Zone are without "black gold."

7. *See* Natural Gas Act, 15 U.S.C.A. §717 (1976). Environmental, economic and energy cases are among the most challenging matters that can come before a court. They are also among the most time consuming. Roughly one-fifth of all such appeals are heard in the Fifth Circuit.

8. Brown v. Board of Educ., 347 U.S. 483 (1954).

9. Baker v. Carr, 369 U.S. 186 (1962).

10. The present structure of the Fifth Circuit was first established in 1866, and it included Texas, Louisiana, Mississippi, Alabama, Georgia and Florida. The only change in the ensuing years has been the addition of the Canal Zone.

11. 328 U.S. 549 (1946).

12. *See* Wesberry v. Vandiver, 206 F. Supp. 276 (N.D. Ga. 1962), *rev'd sub nom*, Wesberry v. Sanders, 376 U.S. 1 (1962).

13. *See* Morris v. Fortson, 262 F. Supp. 93 (N.D. Ga. 1966), *rev'd*, 85 U.S. 231 (1966). In *Fortson*, our three-judge court found a denial of equal protection by Georgia's election scheme that called for the malapportioned General Assembly to choose the state's governor from among the top two popular vote getters where both failed to receive a majority. By a 5 to 4 vote, the Supreme Court reversed.

14. The Three Judge Court Act of 1910 ch. 309, §17, which has been subsequently revised, is found at 36 Stat. 557 (1971). For the act in its present form, see 28 U.S.C.A. §2284(1) (1978).

judge panels. As late as 1972, after many of the school cases and legislative malapportionment cases had been decided, the workloads of both the active and senior circuit judges on the designated three-judge court panels continued to be substantial.[15]

Many of the cases which the Fifth Circuit must decide have extremely complex factual issues, novel legal questions,[16] and policy considerations of far-reaching significance. On the other hand, many cases present questions scarcely warranting extended argument and some are on appeal only because the losing party wants to postpone a final judgment. To channel judicial resources more efficiently, this circuit has developed several time saving innovations.

In 1968, our court adopted a procedure called "screening," which has permitted our court to keep somewhat abreast of the caseload. Our screening process beings with the filing of the last brief by the parties in litigation. Immediately thereafter, the clerk's office in New Orleans forwards to

15. Pending three-judge courts by judges as of February 10, 1972:
Case load per circuit judge:

Alabama:	
Rives	16
Gewin	5
Godbold	7
Florida:	
Jones	1
Dyer	11
Simpson	19
Roney	13
Georgia:	
Tuttle	9
Bell	27
Morgan	28
Louisiana:	
Wisdom	36
Ainsworth	34
Mississippi:	
Coleman	13
Clark	14
Texas:	
Brown	8
Thornberry	14
Goldberg	19
Ingraham	20

16. *See, e.g.*, Occidental of Umm Al Quaywayn, Inc. v. Cities Serv. Oil Co., 396 F. Supp. 461 (W.D. La. 1975). The appeal is still pending in *Umm*. This case involves competing claims between oil companies for rights to recover oil from the seabed of the Persian Gulf. Both companies claim under grants given by different countries. When one company's tankers docked at a U.S. harbor, the other company filed an in rem action to confiscate the disputed oil.

a member of a panel of judges all the pleadings, including the record, as well as the briefs. Our court designates five three-judge panels that serve for a calendar year. Every fifteenth case filed is forwarded to a panel and each panel of three judges actually considers one out of every five appeals. The panel judge who first receives the appeal is designated the initiating judge, referred to as I.J., and after he studies the pleadings, the record, and the briefs, it is incumbent upon him to classify the case for either oral argument or summary disposition. If the initiating judge classifies the case for oral argument, the case is then automatically docketed for oral argument. However, if the initiating judge classifies the case for summary disposition, all pleadings and briefs are forwarded to the other two judges on the designated panel, each of whom must study the case and agree unanimously to the summary disposition. If either of the other panel members concludes that oral argument is needed, then the case is docketed for oral argument. Such cases are assigned to a different panel which will hear arguments and make the necessary determination. If, however, the panel unanimously agrees that the case should be classified for summary disposition, the initiating judge is responsible for preparing the opinion. In the last fiscal year, 1977-78, more than 53% of the cases filed were classified for summary disposition without oral argument.

Screening has generated a remarkable increase in the output of judges in this circuit. In 1968, active judges were averaging 61 opinions annually. The figures for fiscal year 1976 show an average opinion output of 123, approximately a 104% increase.[17] Indeed, our performance compares very favorably with that of other circuits. Despite our disproportionate share of complicated litigation such as class actions, oil and gas cases, and prisoner and civil rights matters,[18] we have remained well above the national average in case terminations per judgeship.[19]

The troublesome aspect of screening is its frequent foreclosure of the opportunity to present oral argument in an appeal. There is understandable disappointment for those parties who feel their case deserves more attention than it is seemingly given when not selected for oral argument.

17. For the statistics used in this article, we have relied on information furnished courtesy of Gilbert F. Ganucheau, Chief Deputy Clerk of the U.S. Fifth Circuit Court of Appeals.

18. Not only does our court bear a disproportionate share of such litigation, more often than not, these cases are filed as class actions, a dizzying problem for a court. The Fifth Circuit hears 28% of the class actions in the nation. Of these, nearly one-half address general civil rights, while 20% concern prisoner civil rights. In addition to posing difficult issues of substantive law, these cases present particularly demanding tasks in administration and providing remedies.

19. In fiscal year 1976, we averaged 210 terminations per active judgeship. Only the Second Circuit, which averaged 216, exceeded our total. Three federal courts of appeal averaged fewer than 125 terminations.

In computing cases submitted for decision, the national average of 92 was reached by including the output of Senior and visiting judges. Our average of 146 cases per judgeship far and away surpassed any other circuit.

While sympathetic to such concerns, I want to emphasize that a case placed on the summary calendar still gets the full consideration of a court; the only difference is that the court as well as the parties to a dispute are spared the time and expense of unnecessary oral argument. And, because screening has promoted judicial efficiency, it benefits all litigants who appeal because they receive more prompt determinations of their cases than would otherwise be possible.

In addition to the screening procedure, we adopted local Rule 21 by which the court, in appropriate instances, can affirm without opinion the decision below.[20] Rule 21 affirmances have resolved over half the cases in which our screening has indicated no need for oral argument. Rule 21 has been used in 10% of our decisions warranting oral argument.

While screening and Rule 21 have been valuable, such measures have not been enough to contain the fast rising tide of appeals that is swamping our circuit. In 1973 we began to fall behind for the first time as cases commenced exceeded those terminated. This backlog has snowballed, standing currently at 534.[21] Intensifying this problem is the scheme of priorities for hearing cases that has resulted from congressional enactments which give particular laws swifter judicial determinations than other subjects of appeal.[22] Some 47% of our cases are accorded a preference while non-priority

20. Adopted on August 14, 1970, Local Rule 21 permits a simple order of affirmance in civil and criminal cases, and an order of enforcement in review of administrative determinations. No counterpart of Rule 21 exists for reversals of lower court or agency rulings. The operation and objectives of this procedure, also known as a Summary II affirmance, is explained in NLRB v. Amalgamated Clothing Workers of America, AFL-CIO, Local 990, 430 F.2d 966 (5th Cir. 1970). For a case explaining the policy and procedure of screening, *see* Isabell Enterprises, Inc. v. Citizens Cas. Co., 431 F.2d 409 (5th Cir. 1970). The factors considered in determining the need for oral argument are discussed in Hugh v. Southern Pacific Co., 417 F.2d 526, 530 (5th Cir. 1969).

21. Even if the proposed eleven judgeships are added to our court by Congress, our backlog would occupy their full attention for almost a year. Meanwhile the 35 new district judges would be generating some 1400 additional appeals annually. The following chart tells the story of our rapidly swelling backlog:

Civil Cases Commenced, Terminated, and Pending in the District Courts of the Fifth Circuit:

Year	Commenced	Terminated	Pending
1973	23,167	23,111	18,883
1974	24,215	22,418	20,680
1975	27,098	23,804	23,974
1976	30,542	25,388	29,128
1977	30,950	26,344	33,734
Increase '77	7,783	3,233	14,851
over '74	33.6%	14.0%	78.6%

22. As many as forty provisions in various congressional enactments require some sort of priority for cases arising under certain laws. Priority matters range from criminal cases,

cases include such matters as civil rights, tax, admiralty, diversity, and federal question cases. For non-preference cases, chances for prompt disposition are slim. As presently constituted, our court will be unable to hear most of the non-preference cases filed in fiscal year 1977 until 1979. Even worse prospects lie ahead. Projections indicate that hearings for non-preference appeals taken in 1979 will be delayed for six to nine years.[23]

review of assorted administrative determinations, and bankruptcy appeals, to such items as cases under the Sugar Act of 1948, the Packers and Stock-yards Act, and the Federal Seed Act. *See* Hearings on S. 11 Before the Senate Committee on the Judiciary, 95th Cong. 1st Sess 609 (1977) (testimony of Chief Judge John R. Brown).

23. As presently structured, this court faces the dismal prospects spelled out in the following projections:

PROJECTION OF DATES OF HEARING OF NONPREFERENCE CASES—FISCAL YEARS 1975-79

(a)		(b)			(c)
		Year and percent nonpreference cases will be heard			Maximum nonpreference cases which can be heard
Nonpreference cases		Year	Percent	Number	
Backlog of nonpreference cases from fiscal year 1975	330	1976	100.0	330	
New nonpreference cases to be readied. Fiscal year 1976	485	1976	3.9	19	349
		1977	66.6	323	
		1978	29.5	143	
Total			100.0	485	
Fiscal year 1977	514	1977	0	0	323
		1978	29.8	153	
		1979	51.9	267	
		1980	18.3	94	
Total			100.0	514	
Fiscal year 1978	545	1978	0	0	296
		1979	0	0	
		1980	26.2	153	
		1981	40.2	219	
		1982	33.6	183	
Total			100.0	545	
Fiscal year 1979	578	1979	0	0	267
		1980	0	0	
		1981	0	0	
		1982	0	0	
		1983	25.6	148	
Balance		984-87		430	
Fiscal year 1980	613				237
Fiscal year 1981	650				219
Fiscal year 1982	689				185
Fiscal year 1983	730				148

Such delays are unacceptable in our system of justice. In the past, we have kept up by innovation and staff increases, but such measures are now outstripped by a mounting swarm of appeals. The mandate for major reform can follow at least two different paths for change. We can reduce the number of cases that may be heard, or we can dramatically expand our resources for meeting the spiralling demand. While there is no perfect solution, I opt for the latter approach and support the formulation adopted by the Senate.

The proposals for reducing our caseload frequently emphasize the elimination of diversity jurisdiction.[24] Not only would this decrease the number of cases on our docket, but it would also reduce our need to examine state law to resolve a controversy, which in this circuit requires familiarity with six different and widely varying state systems. There are some advantages in these proposals: state courts are well equipped to handle such cases and any reduction in our workload seems desirable. However, I do not believe that eliminating diversity jurisdiction will do much to solve our present dilemma. These cases occupy little more than 10% of our docket. The present workload, one that already stretches our capacity, faces a projected increase exceeding 38%.[25] Thus, we will be extended beyond current capac-

PROJECTED NEW APPEALS AND BACKLOG FROM IMPACT OF PROSPECTIVE 35 NEW DISTRICT JUDGES IN THE 5TH CIRCUIT, 1977-80

	1977	1978	1979	1980
New appeals (1)	3,600	3,960	4,680	5,040
Backlog of ready cases (2)	619	916	1,392	2,046

(1) Based on estimated 40 percent increase in appeals (10 percent in 1978, 20 percent in 1979 and 10 percent in 1980) generated by 35 new district judgeships with historical rate of appeals of 40 appeals per district judgeship.

(2) Backlog despite 54 percent summary calendar cases, continued use of visiting and senior judges on almost all panels and 7 weeks of oral argument cases per active judge.

Hearings on S. 11 Before the Senate Committee on the Judiciary, 95th Cong. 1st Sess. 609 (1977).

24. The arguments against dividing the Fifth Circuit are ably presented by Judge Thomas G. Gee in his fine article in the *Texas Tech Law Review.* Gee, *The Imminent Destruction of the Fifth Circuit: or, How to Deal With a Blossoming Docket,* 9 TEX. TECH L. REV. ___ (1978). Judge Gee's belief that diversity jurisdiction should be ended has support outside the debate over the realignment of our circuit.

Originally established by the Judiciary Act of 1789, diversity jurisdiction is currently under attack as a needless drain on federal judicial resources. On March 10, 1977, the Judicial Conference of the United States urged the elimination of diversity jurisdiction. Recently, the House Subcommittee on Courts, Civil Liberties and Administration of Justice reported out H.R. 9622, a bill that would eliminate diversity jurisdiction.

25. In the fiscal year ending on September 30, 1977, the 3,501 new appeals added in our circuit included 352 diversity cases. *See* FEDERAL JUDICIAL WORKLOAD STATISTICS, Oct., 1976-

ity irrespective of diversity jurisdiction. Furthermore, even without diversity jurisdiction, we would still need to be familiar with state laws within our circuit in order to assess pendent claims.

Other possibilities exist for diminishing our intake. For example, if orders of the National Labor Relations Board were self-enforcing, aggrieved parties would obtain faster relief, and petitions to enforce the orders would be lifted from circuit court dockets.[26] A very different suggestion calls for the repeal of certain federal criminal statutes that address crimes adequately covered by state laws and authorities.[27] Yet, even when aggregated, these measures offer no more than a bucket to bail out an ocean. And assuming Congress could be persuaded to contract the reach of federal authority, I suspect that it will continue to pass other laws which will continue to extend federal remedies. The upshot of this is that more appeals will find their way to our docket. Often I have hoped that Congress would issue a Judicial Impact Statement, accompanying major enactments, to consider increments to judicial congestion that often follow the enactment of new laws. Perhaps a hard look at increased expense to our court system, and at the burdens of litigation thrust upon private parties, would focus attention on costs to society that may be frequently overlooked.

Realistically, the future promises an unrelenting flood of appeals in the Fifth Circuit. The Congress, the Attorney General and the Chief Justice all agree that eleven new appellate judges must be added.[28] The contro-

---

Sept., 1977, at 24-26. The creation of new district court judgeships is projected to add 1,400 cases to our docket.

26. Our court considered 94 appeals from Board decisions in the fiscal year ending on September 30, 1977. While petitions for enforcement would be unneeded, circuit courts would still be hearing some appeals from Board orders.

A proposal currently before Congress would expedite appeals in labor cases. Section 8 of H.R. 8410 would provide that if a party failed to appeal within 30 days of the issuance of an order, the Board could pursue routine procedures for enforcement.

27. There are various means, both large and small, to be explored for reducing the federal caseload. A separate provision of S. 11 would require a $10,000 jurisdictional amount for claims for freight damage or delay brought under the Interstate Commerce Act, 49 U.S.C.A. §20(11) (1951).

Several jurists, including Judge Gee, have suggested that we replace appeal as-of-right with discretionary review of appeals in order to control our docket loads. Certainly the chances for passing any such measures are speculative. And, I suspect that a review to determine which appeals warrant docketing would not save much time. Resources must still be extended to assess the merits of a petition seeking leave to appeal. Indeed, the entire process would resemble the screening process which we presently undertake.

28. *See, e.g.*, Letter from Warren E. Burger, Chief Justice of the United States to James O. Eastland, Chairman, Committee on the Judiciary (March 11, 1977). While urging twelve additional judgeships for the Fifth Circuit, the Chief Justice expressed a conviction that no court can be effectively administered with more than twelve judges. In fact, the Chief Justice said that a division into two separate circuits would no longer be enough. Instead, he suggested the creation of three divisions within both the Ninth and Fifth Circuits.

Judges of this circuit, in resolutions adopted at a March 4, 1977, meeting in New Orleans,

versy arises as to whether our circuit, as presently structured, can operate with 25 circuit judges. I submit that it cannot and that the best solution lies in the Senate bill S. 11 that would divide the Fifth into two separate circuits.

In 1973, a sixteen member Commission on the Revision of the Federal Court System recommended that the Fifth Circuit be split in two and suggested several possible schemes for division.[29] Alternative one of this report, the division propounded in S. 11, places Alabama, Florida, Georgia, Mississippi and the Canal Zone in a remodeled Fifth Circuit. Texas and Louisiana would comprise a wholly new Eleventh Circuit. Under the Senate bill, five additional judgeships would be allocated to the revised Fifth, reaching a total of fourteen. The new Eleventh would gain six new judgeships creating a total complement of twelve judges.

The proposed establishment of a circuit containing only two states is the feature of this plan drawing the most criticism. Some feel that a broader range of influences is needed than can be found in two states. This concern is understandable, and yet it seemingly overlooks the fact that several other circuits encompassing just three states are operating without difficulty. Surely Texas, with boundaries that could contain the entire First or Third Circuits, offers enough variation in geography, economics, and politics to count as two states. Placing common-law Texas in a circuit with the unique civil law system of Louisiana offers ample room for the interplay of diverse thoughts and influences.[30]

Without a split of the Fifth, we would crowd 26 judges into a circuit that already exceeds the recommended limit of twelve judgeships.[31] At least two major difficulties surround an expansion to 26 judges. First of all, judges have a duty to remain current as to the opinions of all other judges within their circuit. Presently, I must read some 6,500 pages of opinion output

---

demonstrated overwhelming support for the proposed new judgeships. Seven judges, including the author, opposed adding judges without a circuit realignment due to the formidable administrative obstacles involved. Assuming a realignment, only three members of the court were against the proposed additions.

29. As discussed earlier, *see supra* note 2, considerable attention has been directed toward the possibility of dividing our circuit since the 1960's. Pursuant to a 1971 recommendation by the Judicial Conference of the United States, Congress in 1973 appointed a commission to examine the present structure of several circuits and to recommend necessary changes. This commission, headed by Senator Roman Hruska, urged the division of both the Fifth and Ninth Circuits. Legislation to effectuate this recommendation was introduced in 1974 before the 93d Congress, and also before the 94th. *See* S. 2988-2990, 93rd Cong., 2d Sess. (1974).

With the Ninth Circuit proposal, the placement of California posed a bewildering problem. Alternatives presented to Congress required California itself to be divided, with different halves going to different circuits. Under the proposal presently before Congress, the Ninth Circuit would remain intact.

30. For the fiscal year concluded in June 1977, Texas accounted for 927 appeals. The entire First Circuit drew 547, the Eighth Circuit 1,074, the Tenth, 1,146, and in the D.C. Circuit, 1,175 appeals were commenced.

31. *See, e.g.*, Letter from Chief Justice Burger, *supra* note 25.

yearly. An annual reading of over 10,000 pages would be required in a 26-judge circuit. This would impose an enormous drain on energies that would include screening, hearing and deciding cases, and writing opinions.

The second area of difficulty lies in *en banc* rehearings. Panel determinations that seem to stray from the law in this circuit can be reconsidered by a court consisting of every judge in the circuit. No one pretends that this is easy with fifteen judges hearing oral arguments and conferring afterward. Additionally, the logistics of circulating a proposed majority opinion, revised drafts, and concurrences or dissents imposes significant delays before the final collective opinion can be announced. These already substantial difficulties would reach unacceptable proportions without a split of the circuit. With 26 judges at a sitting, we would appear more like a convention than a court. Further, the increased number of judgeships would enhance prospects for conflict among the three-judge panels, thereby argumenting the need for congestive *en banc* reconciliations.

Some have suggested that we minimize problems in a 26-judge court by authorizing just nine judges for a particular *en banc* sitting.[32] These nine would be selected at random or based upon seniority. This suggestion has the obvious defect of setting up *en banc* determinations made by less than a majority of the circuit judges.[33] That seems to defeat the entire purpose of *en banc* rehearings which are intended to gain a circuit-wide viewpoint on difficult issues of law.

While a circuit realignment is not free from objections, it seems the best course for meeting the caseload explosion. Bar associations from all concerned states save Louisiana support the proposed realignment.[34] So do

32. In his article in the *Texas Tech Law Review*, Judge Gee suggests as one of several alternatives to circuit splitting that we hold *en banc* rehearings with less than the entire complement of judges. A similar view has been expressed by the Fifth Circuit's Chief Judge John R. Brown. Attorney General Griffin Bell has urged that the Ninth Circuit, which under present proposals will remain intact, hold *en banc* rehearings attended by the nine most senior judges who are below the age for optional retirement. Letter from Griffin B. Bell to James O. Eastland (March 23, 1977). On the other hand, others have sharply criticized a plan which calls for the creation of a special group of "super judges" whose votes would carry greater weight than other judges holding the same office and title.

33. Quite conceivably, a nine-member *en banc* court would permit a five-judge majority to represent a supposed collective viewpoint of 26 judges. Because *en banc* cases usually involve difficult points of law, close votes are common. *See, e.g.*, Brown v. Dade Christian Schools, Inc., 556 F.2d 310 (5th Cir. 1977) (the court held that a private sectarian school could not deny admission on account of race, a 7 to 6 decision).

34. During 1975 hearings on realignment proposals before the 94th Congress, resolutions and letters of support were received from the Bar Associations of Florida, Georgia, Alabama, Mississippi, and Texas. The Louisiana Bar Association opposed that bill. Hearings of S. 729 Before the Senate Committee on the Judiciary, 94th Cong., 1st Sess. 71-75 (1975) (Resolutions of the State Bars of Florida, Georgia, Alabama, Mississippi, Texas and Louisiana).

On February 15, 1977, the American Bar Association passed a resolution which stated that it is imperative that the Fifth Circuit be realigned.

most of the judges in this circuit.[35] The split has been approved in the judgeship bill passed by the Senate, while the House version rejected a circuit division. Thus, for now, the fate of the split rests with the Conference Committee. My guess is that the realignment will be effectuated, if not this session then soon afterwards, due to the pressure of caseloads[36] and the widespread support for the plan.

If adopted, the plan for splitting the circuit calls for the new Eleventh to be headquartered in New Orleans, the center of operations for the present Fifth Circuit. In addition to New Orleans, the Eleventh Circuit would be authorized to sit in Houston, Texas. The remodeled Fifth would continue to use the logistical apparatus in New Orleans until July, 1978, at which time new facilities should be ready in the permanent headquarters city of Atlanta. In addition to Atlanta, the new Fifth Circuit would sit in Jacksonville, Miami, Birmingham and Montgomery.

The effective date for the creation of two new circuits was originally set for October 1, 1977 and will, therefore, have to be reset allowing at least 120 days from the time of passage to the new effective date. Pending cases already heard or submitted for a decision as of the specified effective date will be determined by the judges that heard the case as members of the old Fifth. All other pending as well as future cases will be transferred either to the new Fifth or Eleventh Circuit depending upon where the case arose.[37]

While the proposed law makes no provision for the judicial precedent to be followed in the Eleventh Circuit, it seems probable that the influence of the old Fifth will be substantial, at least initially. This seems likely not only because sister circuits are ordinarily accorded a high measure of deference, but also because six of the twelve judges launching the new court would be former Fifth Circuit judges.[38]

Little case law exists to delineate the role of precedence within a divided circuit. One case on point stems from the 1929 splitting of the old Eighth Circuit to create a new Tenth Circuit as well as a reduced Eighth. In 1934, a district court in the new Tenth found that a decision of the old Eighth

35. The judges of our court have enjoyed a lively debate over the merits of dividing the circuit. A resolution approving the realignment was passed on March 4, 1977, by a vote of 10 to 3.

36. As disconcerting as our projections for the future may seem, experience tells us, if anything, that our predicted increases are likely to be understated. In a footnote in a 1970 Fifth Circuit case, the court discussed predicted increases through 1975. *See* Isbell Enterprises, Inc. v. Citizens Cas. Co., 431 F.2d 409, 413 n.15 (5th Cir. 1970). At that time, when appeals for fiscal year 1969 stood at 1,763, a figure of 2,464 was expected for 1975. More frightening was the study of one doomsayer that projected a 2,609 total for fiscal year 1975. As things turned out, the gloomier forecast proved to be unduly optimistic. In fiscal year 1975 we had 3,292 appeals.

37. *See* S. REP. No. 95-117, 95th Cong., 1st Sess. 44-48 (1977).

38. Four active judges in Texas and two in Louisiana would be part of the new Eleventh. These judges include Chief Judge Brown and Judges Thornberry, Goldberg, Ainsworth, Gee and Rubin.

controlled over the law of an unrelated circuit.[39] I suspect that in close cases the decisions of the old Fifth will provide highly persuasive if not controlling authority for both offspring circuits.

On the whole, the realignment plan contained in S. 11 seems the most workable approach to our accelerating caseload requirements. The other realistic alternatives have been explored and exhausted, yet, the spiral continues. We should continue to investigate ways to reduce our intake and streamline our processes as long as such objectives can be achieved without compromising the quality of justice we dispense. Still, small reforms are not enough. Only by adding sufficient judgeships and dividing our region into administratively viable units can we redouble our capacity to handle the caseload timebomb about to explode in the Fifth Circuit.

39. *See* Thompson v. St. Louis-San Francisco Ry., 5 F. Supp. 785 (N.D. Okla. 1934). In *Thompson*, the court observed: "This court was formerly a part of the Eighth Judicial Circuit, having become disengaged therefrom upon the creation of the Tenth Judicial Circuit. The decisions of the Eighth Judicial Circuit are binding upon this court in the absence of decisions of the Tenth Circuit." *Id.* at 789.