ADDITIONAL DISTRICT AND CIRCUIT COURT JUDGES

HEARINGS

BEFORE THE

SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-FIFTH CONGRESS

FIRST SESSION

ON

ADDITIONAL DISTRICT AND CIRCUIT COURT JUDGES

MARCH 10, 23, AND 24, 1977

Serial No. 95–51

d for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1978

COMMITTEE ON THE JUDICIARY

PETER W. RODINO, Jr., New Jersey, *Chairman*

JACK BROOKS, Texas
ROBERT W. KASTENMEIER, Wisconsin
DON EDWARDS, California
JOHN CONYERS, Jr., Michigan
JOSHUA EILBERG, Pennsylvania
WALTER FLOWERS, Alabama
JAMES R. MANN, South Carolina
JOHN F. SEIBERLING, Ohio
GEORGE E. DANIELSON, California
ROBERT F. DRINAN, Massachusetts
BARBARA JORDAN, Texas
ELIZABETH HOLTZMAN, New York
ROMANO L. MAZZOLI, Kentucky
WILLIAM J. HUGHES, New Jersey
SAM B. HALL, Jr., Texas
LAMAR GUDGER, North Carolina
HAROLD L. VOLKMER, Missouri
HERBERT E. HARRIS II, Virginia
JIM SANTINI, Nevada
ALLEN E. ERTEL, Pennsylvania
BILLY LEE EVANS, Georgia
ANTHONY C. BEILENSON, California

ROBERT McCLORY, Illinois
TOM RAILSBACK, Illinois
CHARLES E. WIGGINS, California
HAMILTON FISH, Jr., New York
M. CALDWELL BUTLER, Virginia
WILLIAM S. COHEN, Maine
CARLOS J. MOORHEAD, California
JOHN M. ASHBROOK, Ohio
HENRY J. HYDE, Illinois
THOMAS N. KINDNESS, Ohio
HAROLD S. SAWYER, Michigan

ALAN A. PARKER, *General Counsel*
GARNER J. CLINE, *Staff Director*
FRANKLIN G. POLK, *Associate Counsel*

SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW

PETER W. RODINO, Jr., New Jersey, *Chairman*

JACK BROOKS, Texas
WALTER FLOWERS, Alabama
JOHN F. SEIBERLING, Ohio
BARBARA JORDAN, Texas
ROMANO L. MAZZOLI, Kentucky
WILLIAM J. HUGHES, New Jersey

ROBERT McCLORY, Illinois
CHARLES E. WIGGINS, California
WILLIAM S. COHEN, Maine

ALAN A. PARKER, *General Counsel*
DANIEL L. COHEN, *Counsel*
FRANKLIN G. POLK, *Associate Counsel*

CONTENTS

HEARINGS HELD

WITNESSES

ADDITIONAL DISTRICT AND CIRCUIT COURT JUDGES

THURSDAY, MARCH 10, 1977

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 10 a.m. in room 2141, Rayburn House Office Building, Hon. Peter W. Rodino, Jr. (chairman) presiding.

Present: Representatives Rodino, Brooks, Seiberling, Jordan, Mazzoli, Hughes, McClory, Wiggins, and Cohen.

Staff present: Alan A. Parker, general counsel; Daniel L. Cohen, counsel; and Franklin G. Polk, associate counsel.

Chairman RODINO. The committee will come to order. This morning the Judiciary Committee sets out to examine that matter which is at the very core of its jurisdiction, the quality of justice in our Federal court system. For too long now the twin problems of court congestion and delay have steadily eroded the effectiveness of the U.S. district and circuit courts.

It is imperative, therefore, that we in the Congress understand the real problems and it is imperative that we address the real needs. To some degree, at least, I believe these problems can be alleviated by the authorization of greater judicial manpower.

It is that relief we will be exploring in these hearings. But this committee must also set about the business of exploring alternative means of upgrading and modernizing our judicial machinery and simply adding more judges must not be viewed as a comprehensive or long-range or sole solution.

There are other valid proposals being studied, proposals such as increasing the jurisdiction of the U.S. magistrates and reducing the diversity of citizenship jurisdiction in the Federal courts.

In addition, the committee will also be exploring change in the en banc procedures of the circuit courts and proposals to make increased use of arbitration proceedings as alternatives to litigation.

Regardless of our plans to move in these other areas, however, it now seems clear that some manpower relief at this time, perhaps even omnibus relief of a significant nature is necessary. The situation in too many of our 49 districts is urgent. The need in too many of our 11 circuits is overwhelming.

Since 1950, for example, the volume of cases filed in the district courts has grown dramatically from 92,000 cases in 1950 to over 145,000 cases filed in 1972, to better than 171,000 cases filed last year.

Over that same period, the Congress responded by increasing the number of district court judgeships by 182; from 18 judges in 1950, to the present complement of 400. But critically no new omnibus legislation creating additional district court judges has been enacted in nearly 7 years.

Annual case filings have risen by more than 25 percent per judge since that time. Perhaps, however, to point out what is more serious are the problems facing our circuit courts for which no new judgeships have been authorized since 1968. The circuit court statistics paint an almost frantic picture of a desperate institution.

In 1953, 3,226 cases were filed in the circuit courts of appeal which then had authorized a complement of 57 circuit court judges. That represented an average of 56 cases per judge. By 1963, the caseload figures had risen to 5,039 and the level of authorized judgeships to 78, making an average of 64 cases per judge.

By 1975, however, the total filings in these courts had risen dramatically again from the annual figure of barely over 3,000 in 1953 to 16,658. For the 79 authorized circuit judgeships, that came to an average of 191 cases per judge, compared to the 56-case average of 25 years ago.

In the past 10 years alone, the total caseload of the circuit courts has more than tripled, a rise of better than 300 percent. The number of circuit judgeships, however, has been increased by only 24 percent.

The facts then clearly point to a critical need and it is the intent of this committee to assess that need and meet it as expeditiously as possible. No matter before this Committee of the Judiciary will enjoy a higher priority, but we will do our work carefully in the weeks ahead and rather than rush toward an immediate response, it is the intention of this committee to make a comprehensive inquiry.

When we legislate this time we want to be sure to do so with an understanding of the full picture and an awareness of the true interdependency of the district and circuit courts. There are several bills before the committee as we initiate our inquiry this morning. Not one of them has presumptive validity and each will be examined carefully.

It is the intention of this committee, however, to make H.R. 3685 the central focus of these hearings. That bill which I introduced last month as a vehicle only represents the current recommendation of the Judicial Conference of the United States. Two Federal judges will appear before the subcommittee next week to defend those recommendations. My own introduction of the bill, however—I want to make clear, and the decision to make it a central focus of these hearings—should not be viewed as any endorsement of the precise numbers of judges recommended by H.R. 3685. Nor should it be viewed as reflecting my belief that any one or another of the judgeships recommended by that bill is necessarily warranted.

Rather, it reflects a view that what is needed now is a comprehensive overall inquiry based on the freshest, most current statistics into the Federal court system as one interrelated entity. H.R. 3685 is the best vehicle for that examination.

Finally, let me say, as chairman, that the subcommittee is particularly delighted this morning to welcome as its first witness the new Attorney General of the United States, Griffin Bell. We are looking forward to many years of cooperation and productivity and joint achievement with the Department of Justice with which we cooperate in every instance in the area of our responsibility.

It is especially fitting, I think, that this Attorney General has made an appearance before the committee, relating to the matter of the Federal judiciary where Judge Bell himself, of course, has served for many years with distinction on the Federal bench and brings to us this morning a very deep personal as well as institutional interest and awareness of these problems.

Judge Bell, we look forward to your testimony and we welcome you to this committee this morning. I would now ask my ranking minority member, the gentleman from Illinois, if he has some remarks to make.

Mr. McCLORY. Thank you very much, Mr. Chairman. I certainly want to join in extending a warm welcome to the Attorney General at this first appearance of the Attorney General before our committee, and to give my assurance that I want to cooperate with him and to work along with him to improve the quality of justice and to improve the administration of justice in our country. I realize that this morning we are facing quite a challenge in this community, and I know that the reign of terror which has enmeshed our country and in many respects the entire world is going to be a major problem for us to contend with in the judicial and law enforcement area of our Government, and will affect greatly our responsibility.

Mr. Chairman, we begin here today, though, where we left off at the adjournment of the 94th Congress. At that time, we were attempting to bring to the floor Senate bill 287, a Senate-passed bill, providing for 45 new judgeships. We were willing to add as I recall four additional judgeships for the total of 49. But time elapsed before we were able to act.

I think we must assume part of the responsibility for not bringing this to a head at an earlier stage in the course of the last Congress. Now, we are confronted with legislation providing for 107 new district judges and 25 circuit judges. Although I support legislation to create the necessary additional judgeships, I am less than certain that all the judgeships provided in H.R. 3685 are necessary.

I am somewhat perplexed by the implication in the Attorney General's statement which addresses current needs whereas the committee's action of last year was based upon the needs as they once were. I should point out that the statistics available to the Judicial Conference last September were also available to us, that the committee was persuaded to add at least one judgeship on the basis of statistics for fiscal year 1976. The difference between S. 287 of last year and H.R. 3685 cannot be so easily dismissed as the difference between the old and the new. The Senate bill was passed on facts and figures, true, for fiscal year 1975, while some of our amendments were based upon fiscal year 1976 data.

The difference between the committee's action and H.R. 3685 cannot be ascribed to some sudden burst of litigation as it can to a disparity

of assessments between the congressional committees and the Judicial Conference.

Moreover, it should be noted that while the committee's purpose last year was to meet then current needs, the Judicial Conference's recommendations were made to meet anticipated or projected needs. Thus in a certain sense, the choice is not between current needs and antiquated needs, but between current needs and future needs. I am not persuaded that it would be prudent to take future needs into account at this time.

It seems quite clear that another subcommittee is seriously considering various bills that would decrease the workload of Federal judges. I was pleased to note in the Attorney General's statement that he will be forwarding to the Congress legislative proposals that may have a similar purpose and effect.

Since history has shown that the Judicial Conference's estimates of anticipated needs have often been wide of the mark, and since it is impossible to determine now what Congress will do to ease the workload, I think it would be unwise to act on anticipated needs, particularly in view of the fact that we are powerless to repeal our mistakes.

I hope that in the period for questioning which follows, the Attorney General might enlighten us as to what standard the Department of Justice employed in determining that additional judgeships were needed. I do not think it appropriate that Congress take the Judiciary's recommendations on faith. The Attorney General has undoubtedly observed that we failed to respond to the Executive recommendations last year any assistance we might receive in reviewing these recommendations will be greatly appreciated.

I thank you, and I am looking forward to the Attorney General's testimony.

Chairman RODINO. Thank you very much, and Mr. Attorney General, you may now proceed with your testimony.

TESTIMONY OF HON. GRIFFIN B. BELL, ATTORNEY GENERAL OF THE UNITED STATES, DEPARTMENT OF JUSTICE, ACCOMPANIED BY RAYMOND S. CALAMARO, ACTING DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGISLATIVE AFFAIRS, DEPARTMENT OF JUSTICE

Mr. BELL. Mr. Chairman, Mr. McClory, and other members of the committee, my prepared testimony is rather short and I will be [illegible] to answer questions. You will see that there will be a lot of roc[illegible] questions after I have finished with the prepared statement.

Thank you for providing me this opportunity to testify on a subject of profound importance to the Federal judiciary and to all Americans.

My message, and that of the Department of Justice, has three parts:

First, we need more Federal district judges. It is imperative that Congress act soon to create such additional judgeships and that the number of judgeships created realistically address the true present need, rather than what the need may have been several years ago. You will note I am not saying anything about numbers at this time.

Second, we need more circuit courts of appeals judges. Two of those circuits, the fifth and the ninth, have other urgent needs.

Third, necessary as such additional judicial manpower is, it is not a sufficient and complete response to the problem of our perpetually overburdened courts. Congress should now consider long-range solutions, solutions which prepare us better to handle the growing volume of legal disputes.

Nearly 7 years have passed since legislation was enacted to create additional district or circuit court judgeships. Yet, the workload of the courts has continued to increase by sizable proportions. To take only one statistical example, the number of new cases filed in the district courts has grown from 92,000 in 1950, to 145,000 in 1972, to over 160,000 in 1975, and an alltime high of nearly 172,000 last year.

It is necessary that we address the needs of the district courts as they are today, and not as they once were. In conducting its quarennial surveys, the Judicial Conference of the United States recognizes that new judgeships should be created at 4-year intervals. We have fallen behind and can no longer consider the judgeship bills of the past 2 years, but must revise the legislation to accommodate the increased demands.

A similar need exists for new circuit judgeships. Filings in the courts of appeals increased from 8,000 in 1967, to 15,600 in 1973 to 16,700 in 1975 and 18,400 last year. The numbers of filings and terminations per appeals court judge has about doubled in the past 10 years. Here, too, the need is for more judges, but the fifth and ninth circuits require additional considerations.

The fifth and ninth circuits already have 13 and 15 judges, respectively. The Commission on Revision of the Federal Court Appellate System, created by Congress by Public Law 92–439, made its report in December of 1973, considering the problems of these two circuits. Concluding that it would be undesirable further to augment the number of judges in those circuits, and recognizing the serious need for more manpower, the Commission recommended that each of those circuits be divided.

Congress is familiar with these proposals; and I, when sitting as judge in the court of appeals for the fifth circuit, testified before Congress in support of dividing that circuit; that is, the fifth circuit. I still believe this step is necessary and desirable.

The ninth circuit presents different problems. Proposals to realine it by putting portions of the State of California into two different circuits have generated great controversy. Congress needs to proceed with great caution here and should consider solutions which are not antagonistic to the will of the people of that State—that is, California—as transmitted by its elected and appointed representatives. The Department of Justice is presently studying this problem and hopes to offer some possible legislative solutions in the near future.

We now have 400 district judges. In its March 1971 midyear report, the Federal Judicial Center predicted that, at the then existing rate of growth, by 1990 we would need 1,129 district judges. Although the

growth rate had slowed for a few years, it seems to have risen again and that prediction may not be so far fetched.

Such inexorable expansion is having a profound effect on our judicial institutions and customs. Time for oral argument is being cut back or in some courts of appeals eliminated entirely. The custom and practice of delivering written opinions—long viewed as essential to an institution which depends on judges who are independent but do not act arbitrarily or capriciously—is in jeopardy. About a third of all courts of appeals decisions are handed down without such an opinion or explanation of the results.

Additional judges alone will not solve all problems. The courts of appeals have long benefited from a measure of collegiality. As benches grow to accommodate caseloads, this necessary element begins to disappear.

We must therefore meet the present and urgent demands for more judges while also beginning to take steps which anticipate and cope with growth.

Measures must be devised which will make better, more efficient use of existing judicial resources, including the new judgeships authorized by the pending bill and channel some of the business now coming to the courts through other dispute-settling mechanisms. We can achieve these objectives while preserving access to the courts for substantial and important controversies which only courts can appropriately decide.

To assist in developing such measures, I have recently created within the Department of Justice a new office, entitled Office for Improvements in the Administration of Justice. This office, along with the Office of Legislative Affairs, will work closely with the Congress, the Judicial Conference of the United States, and other groups in devising new structures and procedures for the courts and other dispute-settling bodies.

The Office for Improvement in the Administration of Justice is already at work on a number of proposals which, if implemented, should render the judicial system more efficient and should reduce its volume of business. I expect to recommend some of these measures to the Congress in the near future. For the moment, I will simply indicate their general nature. Some of these ideas are already familiar; others are more novel. I might say here that Prof. Dan Meador who occupied the James Monroe distinguished chair at the University of Virginia is the head of this Office. I was able to get him on a leave of absence from the university for 2 years. He can't ask for an extension as I understand the tenure rules of Virginia so we have got to get all the work we can out of him in the 2 years he's going to be here. He's working hard and he is available to the committee staff or to the committee if the committee wishes to get him to testify. I think you will be impressed with the fact that he is very knowledgeable in the field of judicial reform. He has studied the British system, he has been there and spent a year and written a book on a comparison between our court system and what they do there. He particularly knows a lot about the magistrate system as they use it in England.

The subjects under discussion include a proposal to enlarge the function of U.S. magistrates. I know Congress has considered this in

the past and I hope there can be fruitful interchange between the Department and Members of Congress or committees with an interest in the idea.

Work is also proceeding in the following areas: Reduced diversity of citizenship jurisdiction; increased use of arbitration; revised en banc procedures for courts of appeals; modifications in Supreme Court jurisdiction; "neighborhood justice centers" which make justice more accessible with less delay and expense.

Finally, another idea which is still quite tentative but worthy of exploration is that of creating "at large" circuit judgeships, not attached to a particular circuit but "floating," to address needs where the caseloads are greatest.

Collectively these proposals—and others which we will be developing later—hold promise not only of relieving the pressures of unprecedented volume on the Federal courts, thus relieving pressures for still more judges, but they also hold promise of benefiting American citizens by making justice more accessible, prompt, and inexpensive. The need to adopt these measures is as urgent as the need to create more judgeships.

Mr. Chairman, that completes my prepared statement.

[The prepared statement of Hon. Griffin B. Bell follows:]

STATEMENT BY HON. GRIFFIN B. BELL, ATTORNEY GENERAL OF THE UNITED STATES

Mr. Chairman and Members of the Committee. Thank you for providing me this opportunity to testify on a subject of profound importance to the Federal judiciary and to all Americans.

My message, and that of the Department of Justice, has three parts:

First, we need more Federal district judges. It is imperative that Congress act soon to create such additional judgeships and that the number of judgeships created realistically address the true present need, rather than what the need may have been several years ago.

Second, we need more Circuit Courts of Appeals judges. Two of those circuits, the Fifth and the Ninth, have other urgent needs.

Third, necessary as such additional judicial manpower is, it is not a sufficient and complete response to the problem of our perpetually overburdened courts. Congress should now consider long-range solutions, solutions which prepare us better to handle the growing volume of legal disputes.

DISTRICT JUDGES

Nearly seven years have passed since legislation was enacted to create additional district or circuit court judgeships. Yet, the workload of the courts has continued to increase by sizeable proportions. To take one statistical example, the number of new cases filed in the district courts has grown from 92,000 in 1950, to 145,000 in 1972, to over 160,000 in 1975 and an all time high of nearly 172,000 last year.

It is necessary that we address the needs of the district courts as they are today, and not as they once were. In conducting its quadrennial surveys, the Judicial Conference of the United States recognizes that new judgeships should be created at four-year intervals. We have fallen behind and can no longer consider the judgeship bills of the past two years, but must revise the legislation to accommodate the increased demands.

CIRCUIT JUDGES

A similar need exists for new circuit judgeships. Filings in the courts of appeals increased from 8,000 in 1967, to 15.6 thousand in 1973 to 16.7 thousand in 1975 and 18.4 thousand last year. The numbers of filings and terminations per appeals court judge has about doubled in the past ten years. Here too, the need

is for more judges, but the Fifth and Ninth circuits require additional considerations.

The Fifth and Ninth circuits already have 13 and 15 judges respectively. The Commission on Revision of the Federal Court Appellate System, created by Congress by Public Law 92-489, made its report in December of 1973, considering the problems of these two circuits. Concluding that it would be undesirable further to augment the number of judges in those circuits, and recognizing the serious need for more manpower, the Commission recommended that each of those circuits be divided. Congress is familiar with these proposals and I, when sitting as judge in the Court of Appeals for the Fifth Circuit, testified before Congress in support of dividing that circuit. I still believe this step is necessary and desirable.

The Ninth circuit presents different problems. Proposals to realign it by putting portions of the state of California into two different circuits have generated great controversy. Congress needs to proceed with great caution here and should consider solutions which are not antagonistic to the will of the people of that state, as transmitted by its elected and appointed representatives. The Department of Justice is presently studying this problem and hopes to offer some possible legislative solutions in the near future.

LONG-RANGE APPROACHES

We now have 400 district judges. In its March 1971 mid-year report, the Federal Judicial Center predicted that, at the then-existing rate of growth, by 1990 we would need 1,120 district judges. Although the growth rate has slowed for a few years, it seems to have risen again and that prediction may not be so far-fetched.

Such inexorable expansion is having a profound effect on our judicial institutions and customs. Time for oral argument is being cut back or in some courts of appeals eliminated entirely. The custom and practice of delivering written opinions—long viewed as essential to an institution which depends on judges who are independent but do not act arbitrarily or capriciously—is in jeopardy. About a third of all courts of appeals decisions are handed down without such an opinion or explanation of the results.

Additional judges alone will not solve all problems. The courts of appeals have long benefited from a measure of collegiality. As benches grow to accommodate caseloads, this necessary element begins to disappear.

We must, therefore, meet the present and urgent demands for more judges while also beginning to take steps which anticipate and cope with growth.

Measures must be devised which will (1) make better, more efficient use of existing judicial resources, including the new judgeships authorized by the pending bill, and (2) channel some of the business now coming to the courts through other dispute-settling mechanisms. We can achieve these objectives while preserving access to the courts for substantial and important controversies which only courts can appropriately decide.

To assist in developing such measures, I have recently created within the Department of Justice a new office, entitled Office for Improvements in the Administration of Justice. This office, along with the Office of Legislative Affairs, will work closely with the Congress, the Judicial Conference of the United States, and other groups in devising new structures and procedures for the courts and other dispute settling bodies. The Office of Legislative Affairs is already at work on a number of proposals which, if implemented, should render the judicial system more efficient and should reduce its volume of business. I expect to recommend some of these measures to the Congress in the near future. For the moment, I will simply indicate their general nature. Some of these ideas are already familiar; others are more novel.

The subjects under discussion include a proposal to enlarge the function of United States Magistrates. I know Congress has considered this in the past and I hope there can be fruitful interchange between the Department and Members of Congress or committees with an interest in the idea.

Work is also proceeding in the following areas:

Reduced diversity of citizenship jurisdiction;

Increased use of arbitration;

Revised en banc procedures for courts of appeals;

Modifications in Supreme Court jurisdiction;

"Neighborhood Justice Centers" which make justice more accessible with less delay and expense.

Finally, another idea which is still quite tentative but worthy of exploration is that of creating "at large" circuit judgeships not attached to a particular circuit, but "floating" to address needs where the caseloads are greatest.

Collectively these proposals—and others which we will be developing later—hold promise not only of relieving the pressures of unprecedented volume on the federal courts, thus relieving pressures for still more judges, but they also hold promise of benefiting American citizens by making justice more accessible, prompt, and inexpensive. The need to adopt these measures is as urgent as the need to create more judgeships.

Chairman RODINO. Thank you. Thank you very much, Judge Bell.

Before proceding to the questioning, I would also like to welcome, I am sorry I overlooked him, your assistant, Mr. Ray Calamaro, who has been of invaluable assistance and has been in liaison with our committee. We recommend you for having appointed him.

Attorney General BELL. Thank you.

Chairman RODINO. Judge Bell, I first want to especially commend that portion of your statement which deals with the creation of the Office of Improvements in Administration of Justice and the proposals which that office presently has under consideration.

This is certainly a farsighted and necessary direction to take because unless we proceed down this road, I am afraid we are going to be thinking again 10 years from now of how many more judges we are going to need, and the problem is not going to be solved.

So, I think this action shows your ability to seek new, better solutions.

Judge Bell, there have been many who in setting up criteria for the creation of Federal judges have sometimes advanced the proposal that we have a set formula applied across the board. I am one of those who believes that a set formula would be a mistake, that I think we have got to have a flexible formula that takes into account all of the necessary criteria, that we consider the urban areas, the rural areas, and the various other aspects that come into the case process.

I am wondering what your views are on the question of applying a set formula in order to determine how many judges should be created and where to place them.

Attorney General BELL. I am not saying that I favor a set formula. In the district courts they have what they call the weighted caseload index. They do not have that for the courts of appeals. I think you have to study the kinds of cases they are handling.

You also have to get a feel of local conditions. If there is some unusual thing in a particular district that is causing an influx in the caseload—for example, if you see one district where they have an unusual number of truth-in-lending cases, completely out of proportion to what is going on in other districts—that would be an unusual fact, and you don't know how long that will keep going.

Or if you have a Federal penitentiary where they are having a lot of prisoner suits, you ought to know if that prison is going to be there 10 years from now, 5 years from now. Or you also ought to know what the trend is on using prison administrative procedure to cut down on the caseload.

There are a lot of things, facts that might indicate trends which would be something that wouldn't fit into a formula. So, I think you have to go beyond the weighted caseload index.

Chairman RODINO. In other words, just statistics alone aren't going to provide the answer to whether or not we have a number of judges for a number of cases.

Attorney General BELL. That is exactly so. Then in the case of a court like the ninth circuit where they are 2,000 cases behind, you probably have got to add enough judges to cut down the backlog unless a task force can be created some other way to go there and get rid of the backlog.

But once you got rid of the backlog you wouldn't need as many judges.

So, yes, you can't go strictly by a formula.

Chairman RODINO. Judge Bell, talking about the fifth and ninth circuits, I am a little unclear about your testimony.

Are you suggesting that Congress should not address these circuits in the omnibus bill unless and until it resolves the issue of whether they should be divided?

Attorney General BELL. I have an ambivalent feeling about that. I hate to see the courts not get the judges, although I think the fifth circuit has not asked for any judges and they have by far the heaviest caseload in the country. I think their position is they want to divide the circuit and get the judges at the same time.

Now, the ninth circuit wants to get the judges regardless. It is difficult for me to see how a court could function with 23 judges on it. A panel court. At the same time, they do need judges. That court is near breaking down, the ninth circuit. They have reached the point where, as I understand it, they are only handling cases with statutory priority, which leaves many important type of cases which can't be handled, including civil rights cases, tax cases, admiralty cases—just a run of important cases.

So, I am reluctant to say don't give them the judges now.

Chairman RODINO. I understand. I just wanted to get that clear.

Judge Bell, another point I'd like to nail down. Is it your view that we ought to proceed now on the basis of the new proposals, reflecting the new caseload statistics? As you know, the Senate passed a bill last Congress and this Committee reported a district court bill to the floor. We could reconsider those, but don't you feel it is best to start anew?

Attorney General BELL. That is correct.

I think the committee has made a wise decision to go to the new bill because as I understand it the statistics on which the old bill was based were old statistics, maybe back as far as 1972.

So, I think the committee has wisely gone to a new bill.

Chairman RODINO. Thank you.

Attorney General BELL. Based on more recent statistics.

Chairman RODINO. One final question, Judge Bell.

You make reference in your statement to the proposed modifications in Supreme Court jurisdiction. Will the Department be studying the commission recommendation to create a mid-level National Court of Appeals, and is that an approach worth pursuing?

Attorney General BELL. I don't think it is. The previous administration came out against National Court of Appeals as I understand it. I have always taken the position on a National Court of Appeals that it could only help the Supreme Court, and that would be on what we

call reference jurisdiction, that is, they would refer cases out to this court, some type case they thought ought to be handled and they couldn't reach it.

I have always opposed transfer jurisdiction, that is where a court of appeals could transfer its hard cases up to this other court.

I have seen a lot of times I would have enjoyed transferring some cases, but I had to decide them myself.

So, on reference jurisdiction I have taken the position if the Supreme Court wants it, I will support it. And during the Circuit Revision hearings I believe three Justices did write a letter saying they would like to have that. So, I would support it to that extent.

That means I am a little different from the Attorney General Levy. They wouldn't support it all all.

Chairman RODINO. Yes.

Attorney General BELL. But if the Supreme Court thinks it will help them to refer some cases out I would go along with that. But that will not help the Courts of Appeals at all.

Chairman RODINO. Well thank you very much, Judge Bell.

The gentleman from Illinois, Mr. McClory?

Mr. MCCLORY. Thank you, Mr. Chairman.

I might say, Judge Bell, that while you made reference to the old statistics that you say were used in the bill that was pending and considered in the 94th Congress, the statistics were old only as far as the judicial conference was concerned; the Senate did update those figures and did use more current figures and statistics with regard to their decision to recommend 45 judges. On the basis of the old figures, the Senate Committee had agreed to only 25.

Attorney General BELL. I didn't know that and I want to make it clear that I am not opting for any number of judges.

Mr. MCCLORY. No, I was wondering about that.

For instance, on page 2 of your statement you call attention to the fact that there were only 92,000 cases, new cases, filed in the district courts in 1950 and then you call attention to the fact that there were 172,000 filed last year.

Now 92,000 in 1950 were filed at a time when we had 218 Federal judges. There were 422 cases per judge whereas last year with 400 judges as I understand it, it only meant 430 new cases filed last year.

In other words, the number of new cases, if that is the criterion that we are using, was not very far off from the way it was in 1950,

Attorney General BELL. That is so.

Mr. MCCLORY. Do you feel that we should have some kind of an average new-case-filing standard upon which to base the number of judges that we designate?

Attorney General BELL. That would have a good deal to do with it. As I tried to make clear to the chairman, basically, that is a basic approach. But then you have got to consider other things.

Now the cases in 1950 that were tried in the Federal courts were simple compared to the cases today. We have created a Federal Rules of Civil Procedure, and with modern discovery techniques, and we have made every case into a big case.

I am working on a committee with American College of Trial Lawyers right now trying to make some improvements in procedures, be-

cause you can't imagine how complex cases, a little case can become very complex today in the Federal court.

Mr. McCLORY. Well, I don't want to interrupt, but of course in some districts, in some parts of the country, the Federal courts have a great volume of simple cases, and they have, in other parts they have large volumes——

Attorney General BELL. I was going to add that at the same time the cases have become more complex, Congress has given the courts a lot of small claims jurisdiction. Those are of course simple cases.

I don't know how it comes out on balance.

Mr. McCLORY. It is going to be your general attitude to try to hold down the number of, and kinds of cases that are newly assigned to the Federal courts; will it not?

Attorney General BELL. Right. Yes, sir.

Mr. McCLORY. Now in the last Congress we were recommending that there be an additional 50 judges, approximately, and I had the strong feeling as a Republican minority Member of the Congress and of the committee that the delays which prevented us from taking were political.

In other words, if the measure had been passed early in the year it would have meant that former President Ford would have had the opportunity to name the 50 judges.

Even in the final days I offered an amendment which would have provided that the effective date of the law be postponed until January 20, 1977, so that the judges would nevertheless be appointed by the next President, whoever he was.

Unfortunately, as we all know, the measure did get bogged down and didn't get passed.

Now, I have recently examined an Executive order of President Carter's, that he is going to have a panel of some kind in each of the different circuits, and that these panels, balanced between laymen and lawyers, will make recommendations to him, five recommendations as I recall from which he can select or nominate a judge.

What I want to know is that. One, has this been implemented in any way yet, and second, is it your expectation that this will result in a nonpartisan or a bipartisan judicial selection process?

Or are we going to have all Democratic nominees under the Carter administration?

Attorney General BELL. Well, the commissions only apply to courts of appeals judges. They have nothing to do with the district courts judges.

We are in the process of appointing the commissions now. In the circuits where there are vacancies, we will not activate a commission unless there is a vacancy.

There will be laymen and lawyers on the commissions. They will be representatives of the, generally the population mix. They will be nonpartisan.

And the person under me at the Justice Department who is in charge of setting up these commissions and making and handling this for me is a member of your party, and he was a Republican floor leader in the Georgia Legislature.

So I think if there is any way I could show nonpartisanship that would be it there. I have got him working on it.

Mr. McCLORY. That is encouraging.

Attorney General BELL. We are trying to find the best people available together on the Federal bench and we have asked in those commissions that they present only well qualified people.

Mr. McCLORY. I am particularly pleased that you are here this morning. I was concerned earlier that with the city government virtually under siege that your offices might be required.

You are involved, I judge, in assisting in trying to restore order out of the chaos that has developed here in Washington in the last 24 hours.

Attorney General BELL. Right. I am involved, but I got a report just before I came over here, it seems—seemed there wouldn't be any problem about coming over here for a couple of hours anyway.

Mr. McCLORY. You are utilizing the facilities of your office and the——

Attorney General BELL. And the FBI.

Mr. McCLORY. Operation of the Federal Bureau of Investigation?

Attorney General BELL. Yes, we are doing everything we can in the circumstances to help the city police department. We have—they are in charge and we are helping.

Chairman RODINO. The time of the gentleman from Illinois has expired.

The gentleman from Texas.

Mr. BROOKS. Mr. Attorney General, gentlemen, I am delighted to see you here and appreciate your coming down, and we look forward to your having an interesting tenure.

I appreciate particularly your earlier statements on reorganization made before you were Attorney General, I might add. But those I like better. I want to say that I appreciate your comments in your statement about the fifth circuit. Certainly if we are going to divide the circuit we ought to give them some more judges, there is no sense in that.

Otherwise they would be in the same shape they are, just each one of them would be just as bad off in two sets of difficult circumstances, though we have, I think, in that circuit one of the finest chief judges in the country, he handles those 13 judges very well and is a very, very able manager of people, a fine man, John R. Brown, that is right.

And he is a pistol. He is an able man and a hard working man.

I think if we can look and locate not only judges but chief judges of the caliber of that man, he is smart and he works hard and he works with people, with judges which are—which is a specialized requirement. And he handles them well.

I just think that that is the kind of man we need to locate to work in these circuit courts and to work as chief judges.

Now, I want to say one other thing in appreciation of your statement. And that is that we ought to continue to evaluate what we call workload for judges versus what they call caseload.

We use magistrates, there are many methods and ways to cut down on what they say is their work load. It would be to cut the cases maybe, it will be to expedite the method by which they handle them with no diminution of justice, but to use better management techniques in handling these problems.

Otherwise we are just going to be building buildings all over the United States with courtrooms that are this size, with bailiffs' rooms, attorneys' rooms, secretarys' rooms, judges' chambers, redo them all, build them new, every one of them has got to have his own establishment in full. And they are pretty expensive.

And I think that when we get that many the difficulty you pointed out of relations between them becomes more difficult. The give and take between judges in reaching decisions when you get tremendous numbers of Federal judges.

So I would say I commend your statement and particularly encourage every effort made to reduce the litigation and to expedite a full consideration of litigation rightfully and properly filed within the Federal courts.

This operation costs probably $30–$35 million if they pass all this business, $35—maybe $50 million a year by the time they build the buildings, maybe more. But certainly it would cost $30 million a year for the foreseeable future.

So when we do that, if we can change the case load and the work load, in effect we can save millions of dollars and give people just as good or better justice. It is a pleasure to see you here, and I won't take any more of the committee's time.

Thank you Mr. Chairman.

Chairman RODINO. Thank you very much. Mr. Wiggins?

Mr. WIGGINS. Thank you, Mr. Chairman Judge Bell.

The principal legislative issue before us is H.R. 3685, which is Chairman Rodino's bill.

Are you generally familiar with the bill, Judge Bell?

Attorney General BELL. I am.

Mr. WIGGINS. Do you endorse the total number of judges recommended in that bill?

Attorney General BELL. I do not.

Mr. WIGGINS. What do you endorse in that connection?

Attorney General BELL. I haven't made a determination as to what I would endorse. I would have to take the figures and know about each district before I could say.

I was hoping to leave to the Congress and the Judicial Conference.

Mr. WIGGINS. I see.

Attorney General BELL. Without getting into it. I know places where judges are needed. But I don't know about the numbers.

Mr. WIGGINS. Whether you wish to get into it or not, I will leave to you, but if you voluntarily elect to share with us your views with respect to either total number or spread of the judges in the particular districts, if you would like to share that information with the committee by letter at a subsequent time I, for one would very much like to have the benefit of your views.

Attorney General BELL. I will be glad to do that. I didn't know if it was proper for the Attorney General to take a position on the number, because under our system of government, the courts have asked the Congress for it, and I am in the executive department and, in a sense, I am an intermeddler.

I don't want to get in that position, if I can avoid it.

Mr. WIGGINS. Anything further than you already are.

Attorney General BELL. Also I am the chief litigant in the Federal courts.

Mr. WIGGINS. I hope I haven't done anything to prejudice your standing before any court in the country.

Attorney General BELL. I don't think you have.

Mr. WIGGINS. You are already indeed in the business of judicial administration, even though you are in the executive branch. And I don't think you are going to sink any deeper in that morass, if you are inclined to do so.

Attorney General BELL. I will have somebody look into the number and check it myself.

Mr. WIGGINS. Fine. Second matter. I have before me a thick volume entitled "Management Statistics for the United States Courts," dated 1976. It is prepared by the Administrative Offices. The numbers, frankly, are, indeed, of analysis and evaluation.

I for one am somewhat reluctant to call upon the judges themselves to interpret the meaning of these numbers.

I am going to ask you again if you would wish to do so at a later time, particularly calling on your experience as a member of the circuit, to help this member understand what these numbers mean, particularly, which ones are significant.

For example, I don't know that the number of cases filed per judge is really a relevant number or not. Or whether it is the number of dispositions per judge. Whether we ought to crank in the availability of senior judges in these numbers or not. I know that you have lived with this problem in one of the circuits, and I think you are inclined to be a bit more objective than a representative of the Administrative Office.

Again, if you would wish to help by subsequent letter or meeting secretly on a park bench somewhere, I would be happy to hear your views.

Attorney General BELL. All right. Thank you.

Mr. WIGGINS. Finally, Judge Bell, I want to say a word without asking a question with respect to the ninth circuit and its problems.

At the earlier breakfast with this committee, I spoke in an offhand way to that problem. And I am delighted that you haven't repeated the error that I believe you made at the time of that offhand conversation in your prepared testimony. Yet I detect that you are at least mindful of the great political problems inherent in the consideration of that bill. I hope that if you are going to have a position, that you to the best of your ability forget all about the politics of that problem and give us your best shot on the administration of justice in the geographic area known now as the ninth circuit.

I am terribly fearful that this Congress is going to come up with a political decision which isn't going to make much sense in terms of the administration of justice. And you, if you agree, could help us from falling into that error by giving us some straight thinking on the subject, and I hope you will do so, when you do develop your position.

Attorney General BELL. I will do that. There are three different ways that can be handled. Anyone would avoid dividing California. One is the Chief Justice's plan that he spoke of in Seattle recently, divisions, administrative divisions. And another one is just a straight

division with California, Arizona, and maybe Nevada. And those are the two best ones.

Mr. WIGGINS. I am a Californian, but, frankly, I have little sympathy for those Californians, who can only make an argument that our State has to remain intact, because we are going to have 35 or 40 circuit judges just to serve California down the road, if we are not careful.

Attorney General BELL. That's what is happening.

Mr. WIGGINS. I am afraid so.

Attorney General BELL. You have to be careful to avoid something that is only a temporary solution.

We have somehow got to develop some plan that would serve for the long range. That is why, maybe there is some merit in the administrative divisions, with a small en banc court.

But eventually even under that system the small en banc court would grow to be a separate court, because they would spend so much time handling en bancs. We are developing something on that.

Mr. WIGGINS. Thank you very much, Judge. I appreciate your testimony.

Chairman RODINO. Mr. Seiberling.

Mr. SEIBERLING. Thank you.

Mr. Attorney General, it is a real pleasure to be able to see you.

I would just like to ask a couple of general questions. Of course, the Chief Justice has recommended an increase in both the district and circuit judgeships, and the bill that Chairman Rodino introduced reflects the Chief Justice's proposed increases.

Now, without indicating any specifics, is it your feeling that in general, some increase in the whole system on the order of that idea by the Chief Justice is certainly in order?

Attorney General BELL. I think that some increase is in order, but I don't know about on the order of, the number. I haven't studied the numbers.

For example, I noticed in Atlanta where they have six judges, they recommend getting five additional judges. They may need them, I don't know. I would have to look at that because that is almost doubling the number of judges. There are some other areas like that. I know the ninth circuit where they have got 13 judges and they ask for 10 more, that is in the bill.

I know they need 10 more to get rid of the backlog. I don't know how many they need just to sustain the workload, if their productivity was—is in line. I haven't studied their productivity.

Congressman Brooks said Judge Brown of the fifth circuit has got these systems in, and their productivity is far higher than that of any other court of appeals. I think you ought to allocate judges on the basis of some reasonable productivity standards.

That is another thing that ought to be fed into the system. So I would have to look at that. That may be a radical idea, you know, when you are talking about productivity standards in a court.

Mr. SEIBERLING. Well, your prepared statement, in your prepared statement you did say we need more Federal district judges and more circuit court judges. Are you undertaking any program to come up with any specific recommendations of the Justice Department as to numbers and places where increases are needed?

Attorney General BELL. I have not, but I, as I just said to Congressman Wiggins, I will be glad to do that. I know some places where they aren't trying any civil cases at all in the district courts, no civil cases are being tried.

It is quite obvious they need something, they need relief. It may be these numbers are fair, a fair assessment. But up to this moment I have not made an independent assessment.

Mr. SEIBERLING. Will your assessment also require resolving the impact of these other reforms that you are going to propose or will it be possible to give us your recommendations without waiting for all of those reforms to be proposed and implemented?

Attorney General BELL. What I had said before I will repeat, and that is, if we can put in these reforms, this will be the last time for a long time that we will be faced with creating a large number of Federal judgeships.

Certainly, if we can put in a magistrates' division, you will see a leveling off and a reconstitution of the court system in the—in something like a State court system, where you have a small claims division, as all State courts do have. But I have a sense of something, I guess, on the order of dead reckoning that this number is not too far off, because of the fact that this is an accumulation of 7 years, I believe, since they have had any new judgeships created. And the court system has changed drastically in that time, particularly in the area of criminal law.

Of the cases tried, there are a large number of appeals, nearly, there is almost an appeal in every case that is tried, every criminal case.

Mr. SEIBERLING. What I am working around to is asking whether you think this committee ought to wait until Justice makes its own evaluation of the need for additional judges, or whether the situation is urgent enough so that we ought to go ahead and do the best we can?

Attorney General BELL. Oh, I think you ought to go ahead. See, you know more, you have more expertise than we have in the Justice Department.

Mr. SEIBERLING. Well, I am not sure that I would go that far, but——

Attorney General BELL. I am willing to come up with something, with a recommendation. I will have to take the statistics and find out from our U.S. attorneys, people like that, what they think.

But I think that the staff of this committee already knows a lot more than I know about it, and I wish you would go ahead as fast as you can.

We need some judges. It takes a long time from the time your legislation is enacted before we will ever get judges.

It is a slow process. We sent a name in over to the White House earlier in the week on a district judge, that was the first one in the new administration.

We got a few others ready to go, but see, it's been 6 weeks, however long it's been in. It takes time to work it out.

We have to get so many checks made, IRS, FBI, then you make some independent check through lawyers.

It will be a good while before we get these judges, if you were to pass this legislation today.

Mr. SEIBERLING. Thank you very much.

Chairman RODINO. Mr. Cohen?

Mr. COHEN. Mr. Chairman, Judge Bell.

I would like to follow up just briefly on a couple of questions that were asked earlier by Mr. Wiggins. I gather from your testimony that statistics alone should not be determinative in assessing the need for a judge in a particular area.

And the Senate Judiciary Committee has suggested a four factor standard as I am sure you are aware: 400 cases filed per judge, whether they had a 358 terminations per judge in the course of a year, whether the bench time exceeded 110 days per judge and did a particular court make efficient use of its personnel and time?

I would assume, based upon your testimony, that those three other factors—namely, the terminations, the bench time, and the efficient use of personnel—would be of equal weight at least, perhaps even greater, than the artificial number of 400 cases filed per year, is that not true?

Does that not take into account this notion of productivity?

Attorney General BELL. It does, see, but first thing I need to know is what are the cases in a particular district?

Are they black lung cases in Kentucky? Are they social security cases, are they antitrust cases? I would have to know what the mix of case is.

Maybe they mean 400 on a weight case load index.

I don't know that from the question. That is why I am hesitant to say. I would want to look into it myself.

I think I know too much about it. That makes me apprehensive

Mr. COHEN. The only point I am trying to make is that the artificial figure of 400, whether actual cases filed or weighted cases, should not be the decisive factor in the need for judges.

Attorney General BELL. I agree with that.

Mr. COHEN. Mr. Brooks pointed out, for example, it is going to cost a lot of money; we need new buildings to house the judges and personnel.

I want to get a bit parochial for a moment and talk about Maine, because Maine has a situation where we have Judge Gignoux, and I think you have spoken quite highly of him in the past as being one of the finest trial judges in the country——

Attorney General BELL. True.

Mr. COHEN. Who has the burden of normally siting in the courtroom in Portland, Maine where they have all the personnel necessary to run a court. He then has to travel to Bangor over 100 miles away—my hometown—where they have another Federal building with all the necessary personnel, yet no judge. As a result of the caseload which he has, which last year was weighted about 367 cases, and as a result of a unique case of trial of four individuals carrying explosives interstate (they had three separate trials for four individuals which took up most of his time), we had a number of criminal cases that went beyond the time periods of the Speedy Trial Act of 1974. This committee was in part responsible for passing that legislation and I was one of the coauthors of the bill.

We have cases growing on the civil docket as a result of this time-consuming job by this one judge to serve the entire State, and we have the prospect, you talked about complexity, we have the Indian lawsuit against the State of Maine by the two tribes which the Justice

Department has said will be one of the most complex pieces of litigation to ever hit the Federal courts.

In view of that it seems to me that Maine would be in a unique position for the services of another judge. Last year this committee recommended the creation of a judge, but in this year's bill it was not included.

So when you do come to making any recommendation or personal assessment pursuant to Congressman Wiggins' suggestion, I would be interested in your focusing specifically upon the State of Maine.

Just to take up the notion of politics as you have stated before, the appointment is still going to be a matter for the Senate. We have two Democratic Senators who will be making a selection, if that should come about, and I simply want you to know that, from my perspective, there is nothing to be gained but an improvement in the administration of justice.

So I would take into account the State of Maine in particular when you review the cases for the judgeships.

Attorney General BELL. I will be glad to do that.

Chairman RODINO. Ms. Jordan.

Ms. JORDAN. Thank you, Mr. Chairman, and thank you, Mr. Attorney General for your testimony.

You have had called to your attention this book on management statistics for U.S. courts.

Are you familiar with this?

Attorney General BELL. I am.

Ms. JORDAN. Do you think that it is valuable for this committee to rely on anything in here, inasmuch as it is stated in the explanation of weighted filings that some of that data goes back and is based on 1969?

I mean do you feel that this is a valuable tool for us to use in a determination of how many additional Federal judges would be necessary?

Attorney General BELL. I think it is a tool, but they have got another book over there at the court administrative office they put out every year on the statistics.

And it goes—it will go back 5 years, something like that. They call it the annual report of the court administrative office. It is in more detail, I think, than you have there.

Ms. JORDAN. So you would recommend that?

Attorney General BELL. That is what I would use.

Ms. JORDAN. In preference to this, if we were going to look at statistics in any sense?

Attorney General BELL. That is what I am going to use myself, when I look at it. Somehow you have got to find what kind of cases these judges are trying, too, where they want more judges. I believe that annual report comes nearer showing that.

Ms. JORDAN. Judge Bell, I know you are interested in reducing caseloads, if possible; you have appointed a new officer and—to go into this matter, for novel ways to pursue, the ways of eliminating or reducing the burden.

I am just afraid, Judge Bell, that if we get so concerned with volume reductions, that we may sacrifice access to courts in some sense, and

I would just offer that world to you as you go through discussions and come to some conclusions as to how we can streamline the system.

I would hope that we would not sacrifice access to the stream of the administration of justice in the interests of trying to reduce the caseload of a judge.

Attorney General BELL. I am big on access; I like access. What I want is to figure out ways to handle the cases once they get there. It is very frustrating to the American people that they have access, but they never finish a case.

This is what the complaint is against our system of justice, that we have got an antiquated system where everybody can go to court, but then nothing happens once you get there. That is the problem.

Now, when I say streamline, for example, like using arbitration, that is a proven system.

They use it in Ohio. They have a 95-percent finality rate, when they send cases out to be arbitrated by three lawyers.

It is very inexpensive. It is quick. But if you don't like the decision, you can go right back to the courthouse and start right where you were.

You don't lose a thing. It shows that most people would like to get their dispute handled on one time. Those are some of the modern things that are going on in this country that we are not using in the Federal system.

Ms. JORDAN. What goes into your thinking when you say modifications of Supreme Court jurisdiction? What factors do you have in mind?

Attorney General BELL. They have got a very narrow jurisdiction left in the Supreme Court, where you get an appeal as of right instead of by certiorari.

The best thinking is they ought to be a certiorari court. In some instances the court of appeals ought to be made into certiorari courts.

For example, in a social security appeal after it's gone through the administrative process before an appeals board, it is then appealed to the district court. And it is then appealed to the circuit court of appeals, but I think that is too many appeals.

That would be the same type of thing with the Supreme Court. I think we ought to give everyone an appeal right.

But I don't think you ought to give them three appeals. We have got to—we have got a given resource, amount of resources.

We ought to accommodate the best system we can into the resources available without denying access.

I always like to tell the story that before the revolution, Sir Edmund Burke was speaking to Parliament and he said you better watch these Americans. He said they have bought more copies of Blackstone's Commentaries there in America than have been sold in the whole of England.

He said they are very litigious people. And we haven't changed. That's our heritage.

So I don't want to cut anybody out of court, but I want to be able to give them a hearing once they get to court and one appeal.

Ms. JORDAN. One appeal.

Attorney General BELL. Yes; and after that they can go by certiorari.

In cases where mistakes are made we will have to trust the courts up the line that they will pick up the mistake.

Ms. JORDAN. What goes into your thinking with the concept of neighborhood justice centers?

Attorney General BELL. The neighborhood justice center is something we developed in the conference followup task force. I was chairman of that, American Bar and Conference of State Chief Justices. I had that conference, then I was appointed chairman of a committee to make some recommendations on implementing the things that came up there.

The idea of the neighborhood justice center, I think, occurred to me, because we moved all the people to the cities, and we didn't bring the justices of the peace with them.

They have more disputes, because they are crowded together. And they have to go to one central courthouse.

So I would have, and I am going to try to get the LEAA to fund three or four of these on an experimental basis. I would have neighborhood courthouses called justice centers run by the clerk of the State courts.

And there in that center would be a clerk of the court, they would refer you to a mediator, factfinder, problemsolver, arbitrator, just have all sorts of people there who know how to do special things, and you would be referred to somebody.

If your problem couldn't be handled right there, then you would go ahead and have a lawsuit at the regular courthouse.

Ms. JORDAN. Would you anticipate that these people in the centers would be lawyers?

Attorney General BELL. No. No, they would be paralegals or trained people on processing, interviewing people.

Ms. JORDAN. Law students?

Attorney General BELL. Could be law students. Probably wouldn't be more than one lawyer there, if we needed a lawyer at all. Most people that have a reason to go to the courthouse need some advice.

Most of them would get the problem solved if somebody would sit down and talk to them, a lot of them would.

This would be what I call an alternative dispute-settling procedure, and it would be bringing justice to them, where now they have to go to a central courthouse to find out anything, and the courthouse is actually attuned to handling litigation.

It is not attuned to sitting, having somebody sitting down like a paralegal or ombudsman or something on that line, just to talk to people about their jobs.

I think it is well worth trying, and I think we can find somebody that will do it.

I think we might get one in Atlanta.

Ms. JORDAN. Would you draw a distinction between the kinds of centers you are talking about, and the legal aid centers?

Attorney General BELL. Oh, yes. At legal aid centers the legal aid intake clerks do something of the same thing, because they are trained and they have paralegals and that sort of personnel, and they are able to resolve some of the problems the people have, in the same way. But they are an independent group, and my center would be something run by the courts.

The clerk of the court would be in charge of it. So it would have more official status.

Ms. JORDAN. Thank you, Mr. Chairman.

Mr. SEIBERLING. Would the gentlewoman yield?

Ms. JORDAN. Yes; I will yield to the gentlemen from Ohio.

Mr. SEIBERLING. The neighborhood legal centers, it sounds to me like a very creative idea and also might take some of the caseload pressure off the congressman's district offices.

Attorney General BELL. I hadn't thought about that. That is a side benefit.

Ms. JORDAN. Thank you, Mr. Chairman.

Chairman RODINO. Thank you, Mr. Mazzoli.

Mr. MAZZOLI. Thank you, Mr. Chairman, and thank you, Mr. Attorney General for joining us today and for being as available as you have been.

Let me ask in connection with what the gentle lady from Texas has been inquiring about, ask whether or not this idea of neighborhood justice centers would be helpful in reducing Federal case loads.

Attorney General BELL. I think not. This is mainly state but there could be some slight reduction. This is mainly people who have small disputes that would normally go to the state courts.

Mr. MAZZOLI. So, it would generally clean up the bench load across the country but mostly in local States and municipal courts primarily?

Attorney General BELL. I am trying to operate on what I call the Justice Department's developing a policy on the delivery of justice on a national basis which would include State and Federal courts. Of course, we have the LEAA under our jurisdiction and this idea could be developed to help the State courts and help the people.

Mr. MAZZOLI. That is very commendable.

Let me ask you, sir, when you think your assistant, Mr. Meador, will be able to produce a report. Do you have any time frame for these recommendations?

Attorney General BELL. He is working now. I would say in 2 weeks he probably could have a good deal ready. And he's available to talk to you on an individual basis.

Mr. MAZZOLI. Good.

Let me also mention that I intend to support your view that Federal judges and the Federal court productivity ought to figure into our determinations as to the numbers of judges. In that connection and just surveying these figures, while there are not ones you say would be necessarily your benchmarks, using the statistics which are in the quadrennial survey, I note with respect to the eastern district of Kentucky, which you mention in your testimony because of black lung cases and other social security-related cases, that we have a higher case load pending than any area in the circuit.

At the same time we are clearing more cases than any district in the circuit and we rank very high in the Nation, so that apparently on the basis of productivity, it seems like Kentucky from that standpoint would be generally entitled to an addition to its Federal bench.

Let me ask you, sir—

Attorney General BELL. Now, a lot of those cases under my idea would go to magistrates.

Mr. MAZZOLI. You have read my mind because my question now is I would like to ask you just your ideas on the use of magistrates in this whole idea of reducing the caseload at the circuit level or at the

district route level and circuit level and the Supreme Court. What are your thoughts on that, sir?

Attorney General BELL. I would constitute the magistrates into some separate court called a magistrates division. It would be up to Congress to decide what jurisdiction to move from the district judges to the magistrates. It would not be a dangerous thing to do that because you would still appeal to the district judge if you were dissatisfied with the magistrate's decision, just as is done now in the bankruptcy law. Same system exactly.

Then, you would, instead of appealing on up to the court of appeals, you would go by certiorari.

I don't know just what to say to give the magistrates but we will make some recommendations on that.

You want to be careful that you don't single out some kind of jurisdiction that might appear discriminatory.

Now, I have said that I would give the magistrates all trials through misdemeanors.

Now, if a felony would have the same sentence of misdemeanor or we would end up with something under the recodification bill, they could try those, too. It is just a matter of allocating resources, and I know that there are some civil jurisdiction matters that we could transfer to the magistrates. There is a pattern you will find in truth-in-lending cases now being handled for the district judges by the bankruptcy judges, as they call special masters. All those cases fit a pattern, and you just get a run of them, and they are not hard cases in that sense. Most of them involve just small recoveries, and with most of them, the recovery's a foregone conclusion.

Mr. MAZZOLI. I have had some few conversations with some of the Federal judges in our State and they seem very high on the idea of the further and increased use of magistrates, enhancement of their jurisdiction and powers to—not to provide any barrier to the access that you have talked about which, I think, is perfectly necessary.

But simply to cut down on some of the unnecessary appeals.

Mr. Attorney General, the fact that on page 5 of your statement recommendations regarding magistrates do not appear with regard to the total change. That magistrate idea will be a main aspect of Mr. Meador's work?

Attorney General BELL. Yes; it is on page 5 at the beginning of the paragraph at the bottom of the page.

Mr. MAZZOLI. I am sorry.

Attorney General BELL. I didn't list it below there. That will be one of the main things he'll be working on.

Mr. MAZZOLI. Thank you very much, Mr. Chairman.

Chairman RODINO. Thank you very much, Judge Bell. We appreciate your taking time especially knowing that you have a busy schedule, and I would like to state that the subcommittee will now stand adjourned until Wednesday of next week, March 16.

At that time, we will have before us two Federal judges to discuss the Judicial Conference recommendations.

The subcommittee stands adjourned.

[Whereupon, at 11:20 a.m., the hearing was adjourned, to reconvene on Wednesday, March 16, 1977.]

ADDITIONAL DISTRICT CIRCUIT COURT JUDGES

WEDNESDAY, MARCH 23, 1977

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 10:15 a.m. in room 2141, Rayburn House Office Building, the Honorable Peter Rodino, Jr. (chairman) presiding.

Present: Representatives Rodino, Flowers, Jordan, McClory, and Cohen.

Also present: Daniel L. Cohen, counsel, and Franklin G. Polk, associate counsel.

Chairman RODINO. The committee will come to order.

And this morning the subcommittee will continue its hearings on H.R. 3685 to authorize the creation of additional Federal judgeships for the U.S. district courts and the U.S. circuit courts of appeal.

As a reminder, the subcommittee will be meeting again tomorrow at which time we will hear testimony from Chief Judge Browning of the ninth circuit, and from Judge Butzner of the fourth circuit, formerly of the District Court for the Eastern District of Virginia. Both gentlemen will be appearing on behalf of the Judicial Conference whose recommendations form the basis of the bill we are examing this morning. Judge Butzner of the ninth circuit served as chairman of the Statistics Subcommittee of the Conference's Committee on Court Administration.

This morning we are especially pleased to welcome the very distinguished president of the American Bar Association, Mr. Justin Stanley of Chicago. Mr. Stanley is a senior partner in the firm of Mayer, Brown and Platt and has served as president of the association since August of last year. And I'm sure he brings to us the kind of testimony which is going to be very helpful to us, for he has served in many capacities. He has long experience as a practicing attorney, as a professor of law, as a college administrator and as a civic and community leader. He is also a past president of the Chicago Bar Association, a member of the Illinois bar and a member of the American College of Trial Lawyers.

Mr. Stanley, we are pleased to welcome you here, and I'm sure that your good friend and fellow Chicagoan would like to make some remarks beforehand.

Mr. STANLEY. Thank you.

Mr. MCCLORY. Thank you, Mr. Chairman.

I am pleased to welcome a fellow Illinoian and a fellow alumnus from Dartmouth College here today. I spent most of my professional

life as a practicing lawyer in the city of Chicago and before the Illinois Bar.

So it's with a great sense of pride that we have before us today my good and long-time friend, Justin Stanley, who has risen to the top of the legal profession, and honors us today, and honors his colleges and honors his State and community by being elected as the president of the American Bar Association, the highest office in our profession to which a person can aspire.

And I'm particularly happy to welcome him today on this very important subject of the additional judgeships for the Federal courts. And so I join you, Mr. Chairman, in extending a warm welcome to Justin Stanley. Thank you.

Chairman RODINO. We're also pleased to welcome here with Mr. Stanley the director of the Washington office of the American Bar Association, Mr. Hoffman.

You may now proceed, Mr. Stanley.

TESTIMONY OF JUSTIN A. STANLEY, PRESIDENT, AMERICAN BAR ASSOCIATION, ACCOMPANIED BY HERBERT E. HOFFMAN, DIRECTOR, WASHINGTON, D.C. OFFICE

Mr. STANLEY. Thank you, Mr. Chairman.

And thank you, Mr. McClory.

In view of the fact that my prepared statement is quite short, Mr. Chairman, and since I was unable to get it to you in advance, it occurs to me that I might simply read that statement, and then respond to whatever questions the committee has.

My name is Justin A. Stanley. I am a practicing lawyer in Chicago and I am the current president of the American Bar Association.

I am pleased to appear before you today to record the strong support of the American Bar Association for a prompt increase in the number of district and court of appeals judges in the Federal system.

This support, of course, is not new. Last year, for example, Judge Walsh, our then president, testified at length before you and discussed many aspects of our dispute resolution process and the steps which we are taking or advocating to improve it.

Unfortunately, efforts to do this, and there are many, have not eliminated the need for an increase in the number of judges required to handle the mounting case loads before our courts.

We supported, for example, the Federal Magistrates Act which enables magistrates to perform many tasks which formerly took judge time. We urged the elimination of the three-judge court because, in our view, it unnecessarily required services of two extra judges. We backed the Circuit Executives Act which relieved judges of certain administrative chores.

Further, we are advocating the creation of a National Institute of Justice which will, on a continuing basis, study means of improving our entire system of justice.

The courts themselves are working on matters which would tend to expedite their work—and some of these are not popular with lawyers—such as limiting or eliminating oral argument, restricting the issuance of formal opinions, and the like.

The danger of too much so-called efficiency on the one hand or too burdensome judicial caseloads on the other, is that we risk losing the reflective, deliberative process that we have deemed so important to the judicial resolution of our disputes.

Justice Frankfurter once put it this way:

> The judgments of this Court are collective judgment. Such judgments presuppose ample time and freshness of mind for private study and reflection in preparation for discussions in conference. Without adequate study there cannot be adequate reflection; without adequate reflection there cannot be adequate discussion; without adequate discussion there cannot be that mature and fruitful interchange of minds which is indispensable to wise decisions and luminous opinions.

Of course, he was talking about an appellate court, but the same consideration applies, really, to decisions which the district courts must make.

When Judge Walsh testified before you, the need for additional judges was demonstrably great. This year that need is even greater.

You will be, I know, furnished with an abundance of statistical evidence showing filings, dispositions and like matters and there will be substantially testimony showing what steps the judges are taking to improve their efficiency in handling matters before them. It would, therefore, serve no useful purpose for me to discuss those statistics or even to refer to them on a selective basis.

I can only say that I think the need for additional judges has been fully demonstrated before the Senate Judiciary Committee and that it will be fully demonstrated before this committee.

That need, in my opinion, calls for prompt action on the part of Congress and a determination to pursue a periodic reappraisal of the need, so that whenever action is needed it can be promptly taken.

[The prepared statement of Justin A. Stanley follows:]

STATEMENT OF JUSTIN A. STANLEY, PRESIDENT, AMERICAN BAR ASSOCIATION

Mr. Chairman and Members of the Subcommittee: My name is Justice A. Stanley. I am a practicing lawyer in Chicago and I am the current President of the American Bar Association.

I am pleased to appear before you today to record the strong support of the American Bar Association for a prompt increase in the number of District and Court of Appeals judges in the federal system.

This support, of course, is not new. Last year, for example, Judge Walsh, our then President, testified at length before you and discussed many aspects of our dispute resolution process and the steps which we are taking or advocating to improve it.

Unfortunately, efforts to do this, and there are many, have not eliminated the need for an increase in the number of judges required to handle the mounting case loads before our courts.

We supported, for example, the Federal Magistrates Act which enables Magistrates to perform many tasks which formerly took judge time. We urged the elimination of the three-judge court because, in our view, it unnecessarily required services of two extra judges. We backed the Circuit Executives Act which relieved judges of certain administrative chores.

Further, we are advocating the creation of a National Institute of Justice which will, on a continuing basis, study means of improving our entire system of justice.

The Courts themselves are working on matters which would tend to expedite their work—and some of these are not popular with lawyers—such as limiting or eliminating oral argument, restricting the issuance of formal opinions and the like.

The danger of too much so-called efficiency on the one hand or too burdensome judicial caseloads on the other, is that we risk losing the reflective, deliberative process that we have deemed so important to the judicial resolution of our disputes.

Justice Frankfurter once put it this way:

"The judgments of this Court are collective judgments. Such judgments presuppose ample time and freshness of mind for private study and reflection in preparation for discussions in Conference. Without adequate study there cannot be adequate reflection; without adequate reflection there cannot be adequate discussion; without adequate discussion there cannot be that mature and fruitful interchange of minds which is indispensable to wise decisions and luminous opinions."

When Judge Walsh testified before you, the need for additional judges was demonstrably great. This year that need is even greater.

You will be, I know, furnished with an abundance of statistical evidence showing filings, dispositions and like matters and there will be substantial testimony showing what steps the judges are taking to improve their efficiency in handling matters before them. It would, therefore, serve no useful purpose for me to discuss those statistics or even to refer to them on a selective basis.

I can only say that I think the need for additional judges has been fully demonstrated before the Senate Judiciary Committee and that it will be fully demonstrated before this Committee.

That need, in my opinion, calls for prompt action on the part of Congress and a determination by Congress to pursue a periodic reappraisal of the need, so that whenever action is needed it can be promptly taken.

Chairman RODINO. Thank you very much, Mr. Stanley.

I have some general questions, Mr. Stanley, and my first question is really very general, and I haven't completely thought it out. Nevertheless. I'd like your comments on it.

Should the Congress, or maybe this committee, begin thinking of ways to make a more regular, meaningful review of the Federal caseload situation for the purpose of better evaluating what the real judgeship needs are? Currently, the Congress is simply in a position of just awaiting surveys which are submitted to it by the courts themselves.

Has the bar association, maybe, given any thought as to how the Congress might itself get more actively involved in this area?

And one of the problems as I see it, of course, in any regular, periodic oversight, is the application of standards and criteria. As you know, standards and criteria can sometimes be so inflexible, and they can be so confusing that, frankly, they don't offer that much help in trying to determine what the real needs are.

And I'm wondering whether or not the bar association has thought about this so that rather than coming here and saying, "Well, we've seen what the caseload is, and we've seen what the filings are, and we're going to say to you at this time that there is a need for judges, and they need it bad," there can be additional dialog.

Is there something else that the association has considered by way of making some determination which would be helpful to us in at least trying to establish the kind of criteria needed to make a meaningful resolution of this problem?

Mr. STANLEY. I suppose the direct answer to that is that we have not, at this stage, done so. It seems to me that maybe for the first time we're beginning to recognize the need for guidelines or standards in the matter of judicial appointments.

I know of nothing in the history of this that suggests that any have been developed, that is to say by a congressional body or by our association. Studies have been made. For example, a few years ago

Prof. Charles Alan Wright of the University of Texas Law School made a study of the workload in the fifth circuit. My recollection is that, as a result of his study, he concluded the maximum caseload per judge in the fifth circuit should be 80.

Wel, we're way beyond that now, but he assumed, in making his study, that each case would be fully argued, fully briefed, and be blessed with full opinion.

But courts are moving—the fifth circuit among others—courts are moving away from that. They are limiting oral argument, they are limiting the number of written opinions they produce.

Even assuming Professor Wright was correct 5 or 6 years ago, I think he would concede that the figures should be higher, so that I think you're dealing, Mr. Chairman, not only with something relatively new, but in an area where you can expect shifting standards, depending on how the courts treat their cases and the appellate court backlog.

And there is serious backlog, as the judges themselves will testify. A lot of that backlog, it seems to me, might be reduced, if not eliminated, by providing that reviews should be discretionary with the appellate court.

You may find, if you interrogate the judges, that they believe a substantial number of the cases that come before them really don't merit full argument, full briefing, and full opinions.

The function of an appellate court, it seems to me, should be to consider fully those matters which could be of precedential value, which involve important constitutional rights, which deal with statutory interpretations which affect a large number of people, or which might resolve conflicting decisions below.

I'm not at all sure that an appellate court should—I'll take a hypothetical—review a case between Mr. Hoffman and me, which is of importance only to Mr. Hoffman and me and nobody else, and which does not involve the considerations which I've recited.

But that isn't the way the system has worked up to the present time. There is no Federal constitutional right of appeal; yet, statutes generally provide for appeal as a matter of right.

Now, this puts a burden on the courts with which they have to deal. It seems to me in most States—it's certainly true in Illinois—there is, under our own constitution, an absolute right to appeal from the decision of a lower court.

Now, it seems to me that, as our population increases, and if we, as a nation, continue to become more rather than less litigious, we may have to give serious consideration to the matter of whether every case should be appealable as of right.

There are some that should; for example, in the criminal area. In my mind there's no question constitutional rights are involved, and so on.

I may have moved off your question a little bit.

Chairman RODINO. No. I appreciate your comments.

I think my question was motivated by a bit of frustration with the process in general. Every few years people come before us and merely show us numbers and say its time for more judges. I think we are going to need to have a closer look at this process in the future.

Mr. STANLEY. Well, I think it's appropriate for the judges to come to you with their statistics. I don't know where else they would go. And I don't know who else can or has produced statistics.

I think you're just going to have to do the best you can with what you have.

Chairman RODINO. Well, right now that's right.

Mr. STANLEY. However, I think it's fair to question where you're going and to try to be sure that the statistics that are submitted to you have validity.

Now, with respect to the question of where you're going, I do not believe we can continue right down the path of having unlimited increases in the numbers of judges.

Chairman RODINO. Well, that's what I think we ought to be dealing with.

I think we need some hope that we can deal with the problem in the future. We ought to be thinking about it in that light now, and I think your association, and other interested groups, ought to be doing that.

Mr. STANLEY. I couldn't agree more. And incidentally, one of the things which we're proposing, to which I've referred in my testimony, is the creation of a National Institute of Justice.

I don't like the idea of creating any more agencies or entities than we need, but we have never had, Mr. Chairman, in the history of our country, so far as I know, an entity—independent group—devoting its entire attention to research on the question of the proper administration of justice and how that can be improved.

And I would hope that we can make a concrete suggestion to Congress shortly in this regard, one which will be tremendously helpful to us as a Nation, because this is a terribly serious problem.

Chairman RODINO. Let me ask this so that I have it on the record.

Mr. Stanley, has the bar association itself made any kind of comprehensive examination of overall Federal court statistics? Have they looked at any specific circumstances in the individual districts or circuits; or, is the association, in making its recommendation, its endorsement of legislation, depending largely on the fact that new judgeships have been recommended by the Judicial Conference?

Mr. STANLEY. We have not proceeded independently. I think it is fair to say that we have relied largely on the statistics developed by the Judicial Conference, or information which has come to us through discussions with judges, and our own observation of the case loads—how long it's taking, for example, in a given circuit to get a matter disposed of.

For example, there was a period of time, I believe, recently, when the fifth circuit just was not reaching several types of appeals because of their backlog and the need to dispose of matters in the criminal field. And, as you know, there are any number of statutes which assign priority to certain matters on appeal.

So, although I must tell you that we have not compiled any independent statistics, we don't come here without some experience in making our recommendation.

Chairman RODINO. Mr. Stanley, you mentioned the fifth circuit a number of times. Do you, or does the association, take a position regarding the proposals to divide the fifth and ninth circuits, assuming

there is shown a real need for new judgships, particularly in the ninth circuit?

Would it be responsible for us to postpone providing the new judges until we resolve the question of circuit revision, or does the fact that we've got to provide new judges take precedence?

Mr. STANLEY. We have—by we I mean the association—taken the position that either new circuits should be created, both in the fifth and the ninth, or that there be divisions within the circuits.

And in a rather ambiguous resolution adopted by our house of delegates, in February of this year, we seemed to urge that the additional judgeships go along with these changes in the circuit structure.

If it came to a question of whether you should provide additional judges only if there were a division, my personal view is you should not condition the judges that way. Provide the judges and then take care of the division or breaking up of the circuits.

That also, I think, is the position of the Chief Justice of the United States. I understand that this would be acceptable in the ninth circuit; but I also understand that in the fifth by a very close division, the judges said unless you can split us in two or give us some divisions, we don't want any additional appellate judges.

I cannot explain that position. I guess I don't have to. You probably had better ask somebody from the fifth circuit.

Chairman RODINO. Thank you very much.

Mr. STANLEY. Yes, sir. Thank you, Mr. Chairman.

Chairman RODINO. Mr. McClory.

Mr. MCCLORY. Thank you, Mr. Chairman.

There are two principal areas that I would like to explore briefly with you. The first one is this: The Judicial Conference concluded its 2-day semiannual meeting just about a week ago, and they made the recommendation with regard to revising the jurisdiction of the Federal courts by recommending that diversity of citizenship no longer be a basis for jurisdiction.

They also recommended legislation to enhance the jurisdiction of Federal magistrates, and I believe they made a recommendation to limit voir dire examination by attorneys, so that this might be conducted by the court, thus cutting down the time that it takes to impanel a jury in a Federal court.

The question that I have, first of all, is this: Since here is legislation relating to these subjects pending at the present time, and, I believe, some interest in effecting these changes, would it not be reasonable and prudent—since the result of those changes would be to greatly reduce the load on the Federal district judges—to await action in this Congress on those subjects before increasing the number of Federal judges?

Mr. STANLEY. I would suppose that there would always be some reason for delaying and not acting. The question of eliminating diversity jurisdiction probably has been before Congress on a number of occasions. I know the Chief Justice of the United States has been advocating that for a long time.

My memory is that if it were eliminated completely, it would cause a reduction in the district court caseload of perhaps 19 percent.

If that could be done very promptly, then you might, understandably, say, "Let's wait and see the effect of this before we create more judgeships."

But it's a dangerous game to play, it seems to me, because we have no assurance that such a change in the law could be enacted promptly.

The need, on the other hand, for additional judgeships, by whatever test you apply, is great, and immediate. My memory is that not since 1968 has there been an increase in court of appeals judges, and not since 1970 has there been an increase in the number of district judges.

In the mean time, our population has grown. And as population grows, the number of interpersonal relationships among people grows, not at the same arithmetic rate, but at a geometric rate.

And the more interpersonal relationships you have, the more chances you have of dispute, and so on. I would have to come down, Mr. McClory, in favor of passage of this bill.

Mr. McCLORY. You would favor acting on the Federal judgeships, having no special confidence that the Congress, this year or soon, might be taking these very useful steps, which, as you say, have been recommended before but appear to be getting more active consideration at the present time.

Well, let me start my second question by saying that, in the last Congress, we had legislation which was recommended by this committee to add, I believe, 49 additional district judges. A comparable bill was passed in the Senate. And we just never got together.

One of the reasons for the delay, I believe, was a purely political reason. If that legislation had been passed and signed before the Congress adjourned—well before the Congress adjourned—the former President, the Republican President, then would have had the authority to name these additional judges. And so the legislation was delayed.

In view of these political factors, I offered an amendment that the right to name the judges would be deferred until after the inauguration of the new President, hoping that we'd get support for this and get the subject of additional judges, at least to the extent of 49 judges, behind us.

Now, as we begin a new Congress, the new President has already issued, I believe, an Executive order to establish a Commission for the purpose of selecting combined lawyers and nonlawyers to recommend candidates for circuit judges.

Would you favor extending this procedure that the new President has—that President Carter has set up with regard to court of appeals judges—for district court judges—so that we'd get some balance and get the partisan politics out of the selection of Federal, district and court of appeals judges?

Mr. STANLEY. I'm sure you're not asking me a political question, Mr. McClory.

Mr. McCLORY. I'm asking you an objective, bipartisan question.

Mr. STANLEY. The association has favored and still favors merit selection of judges. To my way of thinking, having the best possible judiciary that we can is of vital importance to the functioning of our system. I don't care whether a judge is a Democrat or a Republican

or independent or what. I want, and the association wants, good judges.

Under the President's proposal, would the committees make their recommendations to the Senators from the States involved, or to the President?

Mr. McCLORY. No; they recommend to him. I think they recommend to him, and then he selects. I think they recommend five.

Mr. STANLEY. Yes.

Mr. McCLORY. And then he selects.

Mr. STANLEY. The reason I ask that question is because in 1972 our house of delegates adopted a resolution which recommended that commissions be set up to recommend to—this is for district judges, for example—recommend to the senate potential moneys from which the senators might choose.

I'm not sure, at this stage, Mr. McClory, how this system recommended by the President will work. I don't know that anyone does. It might work very well, and I hope that it does.

I would not be inclined, at this stage, to move directly from that to an identical application to the district courts. I would be in favor of all the help we can get to the end that the people nominated are the best-qualified people we can get, and I think it ought to be nonpartisan. I'm fully in favor of that.

And, as you know, in Illinois in recent years, the nominations to the courts, district and circuit courts of appeals, have been from both parties. And I would hope that would continue in Illinois with Senator Stevenson taking the lead.

I'm in favor of an extension of this, but let's don't lock ourselves in too completely until wek now how a given proposal is going to work.

Mr. McCLORY. Well, while not supporting the precise technique that President Carter has recommended with regard to the court of appeals judges, you would, nevertheless, support some mechanism which would enable us to have a bipartisan or nonpartisan selection of district court judges on the basis of merit.

Mr. STANLEY. Yes; that's correct.

Mr. HOFFMAN. Mr. McClory, I'm sure you know, in recent months a number of the Senators, a number of the States, have adopted commission plans. It seems to be snowballing. It's almost as if the Senators are finding out that this patronage, which they have jealously guarded these many years, is a negative rather than a plus factor. For each vacancy, they can see 10 people interested. Nine end up disappointed and unhappy with the Senator, and one, as somebody said, becomes an ingrate.

We have been gathering plans of various States, including the States where the Senators are of two different parties. And more and more seem to be developing, in not only for judicial appointments, but for U.S. attorney appointments as well.

Mr. McCLORY. I think it would be helpful if you—if the American Bar Association could come up with something specific. That would be encouraging to me. But thank you.

Mr. STANLEY. We may be able to do that. These things are just beginning to move, Mr. Congressman.

Chairman RODINO. Ms. Jordan.

Ms. JORDAN. Thank you, Mr. Chairman.

And Mr. Stanley, if we could get back to the subject matter of H.R. 3685——

Mr. STANLEY. I didn't hear that.

Ms. JORDAN. That was not a question. I said we're returning to the legislation before us, which is H.R. 3685. I want the judges, too. It's like wanting a good apple pie and ice cream.

The question of whether we need additional judges is one which, by everyone's admission, has been before us for quite some time. Given population growth will continue, given the American people's penchant for litigation will probably continue, given we cannot continue to pile on additional numbers of judges in an effort to relieve the judicial congestion which results from population growth and the penchant for litigation: now, given these things, what do we do is the question. What do we do next?

I would like to know whether the American Bar Association has any input into what the Attorney General is doing by way of study for alternatives to court matters.

Are you familiar with what the Attorney General is doing? He appeared before us and told us about neighborhood paralegal kinds of centers, and the various other recommendations. Does the American Bar Association have any input into that?

Mr. STANLEY. Well, gracious yes; indeed, we do. We've been working very hard on the development of alternatives to dispute resolutions.

Ms. JORDAN. And what are some of the alternatives that you would suggest?

Mr. STANLEY. Well, let me give you first a recitation of the direction in which we are moving.

We worked with the Conference of State Chief Justices and with the Chief Justice of the United States in putting on the Pound Conference last spring. The Pound Conference was held in Minneapolis-St. Paul, and it dealt with the popular dissatisfaction with the administration of justice.

That conference considered many subjects. We then—by we I mean the American Bar Association—having gone through that, established a special committee to see how we could implement some of the recommendations. As a matter of fact, Judge Bell was chairman of that committee.

As president, I have attempted to take steps to implement every one of the recommendations, at least, to study them further. One of the matters of primary importance to me has been the resolution of so-called minor disputes. That would be a dispute between Mr. Hoffman and me, which wasn't of any importance to anybody but us, and which involves some money, which puts it in a category where, under our present system, society simply cannot afford, economically, to have a large courtroom and a judge and a clerk and a bailiff, and all of that, with each side having a lawyer arguing the case.

So, I started on this program about 2 years ago. We have a committee which connected all of the information on small claims courts—things of that sort—arbitration, mediation; and we're going to a major conference in May, where we'll bring the leaders in the field together.

I hope we can make some recommendations which can then be implemented to provide a means of resolving disputes which today simply cannot be resolved because of economic consideration.

Now, that sort of thing won't directly affect the Federal court burden directly, but it will indirectly because if tribunals of that sort can be created, can be set up, for example, in neighborhoods where people live so that it doesn't take an inordinate amount of time and money to resolve a dispute that fact would tend to minimize the terrible propensity that we have today to take things to court which shouldn't be there at all. Now, that's one thing that we're doing.

We are also working on this appellate backlog matter, which I mentioned before. Again, the only way I can function, Ms. Jordan, is through a committee. I can't do these things myself. We have a top-grade committee studying this matter of appellate backlog to see what we can do to maybe convert to a discretionary review system. That would make a tremendous difference.

We also have another group working in an area which causes a tremendous court burden and tremendous expense in the litigation process. And that's what I call the abuse of the deposition process.

We try our cases twice now. When depositions were first put forward—I believe in the 1930's—they were put forward with the notion that they would eliminate the game of chance from the trying of cases. But in fact, now we depose, and depose, and depose, and then we go through the whole process again when we get into court.

Now, this adds to time, it adds to court burden, it adds to administrative burden, it adds tremendously to cost.

But there is a fundamental question that I cannot answer, and I was discussing this the other day with a very thoughtful television reporter from Miami who has studied our system, and the English system, and the French system to get at the question of why in the world we are so litigious in this country—why we tend to take everything to court.

I think it's wonderful for us to have faith in our courts, and believe, as I think we must, that they will provide a fair answer to problems. But our fundamental purpose in democracy ought to be to get along with each other. The end of democracy is not litigation.

But this reporter was saying to me that, being troubled by the same thing, he has examined these other systems. And he said, "It's not so much that the systems are different, it's that the people are different. We're different here."

And I cannot answer that question. I don't know who can.

Ms. JORDAN. Well, I don't know either, Mr. Stanley. It may be that there is no answer to that question, and maybe we proceed with these alternatives that you have told us the American Bar Association through the committee is pursuing, and perhaps we give the resolution of disputes another outlet other than the courtroom. That's about all that we can do.

The danger, I feel, Mr. Stanley—if we get too exotic in our efforts to provide a new and different ways to resolve disputes, and see that justice is administered—the danger of that, I feel, is that we are going to, somehow, limit the access the average citizen has to court, and, perhaps, have a disincentive effect or impact on the pursuit of justice

if we become so overcautious and overly concerned with how much work is getting into the courtroom.

I would hope that that is a caution that would be exercised by anyone developing alternatives to the settlement of disputes.

Mr. STANLEY. I'm sure it will be, but the fact of the matter is that today a lot of the disputes that I first discussed aren't being resolved any way. And this builds up, I think, a tremendous and understandable sense of frustration among people.

Ms. JORDAN. One final question, Mr. Stanley: We in the Congress have been accused of enacting legislation which added to the workload and the burden of the Federal court.

Do you think there would be any merit in a committee of the Congress, once it enacts legislation which may give rise to litigation, including in that a sort of judicial impact statement before we made the decision as to whether to move ahead with that particular piece of legislation?

Mr. STANLEY. I do.

Ms. JORDAN. Nor further questions, Mr. Chairman.

Chairman RODINO. Thank you.

Mr. COHEN. Thank you, Mr. Chairman.

Mr. Stanley, I think you've indicated we have a need for judges, and that need is great and immediate. The problem is this committee has to decide how many judges and where those judges ought to be located. And in order to do that, we have to have some sort of standard.

Now, the Judicial Conference has recommended that we apply a standard of some 400 case filings per judgeship. Your emphasis seems to be on the need for reflection. In determining whether we have reflection versus efficiency, you have to come down on the side of reflection.

And I think I'd have to agree with you that we can have justice administered effectively, efficiently, but not necessarily justly, if our emphasis is upon speed and efficiency.

Now, by the same token, it seems to me that we do have to take into account the need for efficiency and efficient disposition of cases.

And this committee last year—I'd like to quote from the report on page 4—said:

> While not endorsing the formula of the Senate as the ultimate yardstick, the House Committee believes that the formula serves the very necessary purpose of foreclosing additional judgeships in Districts where judges have not been appropriately productive. None of the forty-nine new judges recommended by the purported bill are provided for districts where existing judges are not bearing the full loads.

Would you agree with that conclusion arrived at by this committee?

Mr. STANLEY. Well, I cannot agree with the specifics, because I don't know about them.

Mr. COHEN. Without the specifics.

Mr. STANLEY. I do agree with the proposition that if judges are inefficient, you shouldn't try to correct that simply by adding more judges.

And that gets back, really, to the question that the chairman asked as to the validity of statistics that are being presented. And this, again, is a newly developing field. Clearly, you have to balance these things. I do agree with that.

Mr. COHEN. But the Judicial Conference only used the one test of 400 case filings, and I take it by your testimony that, in your opinion, that is not necessarily the most accurate one.

Mr. STANLEY. Well, if you have some other information which indicates that the judges in particular districts or circuits are not functioning effectively, that must be taken into account.

Mr. COHEN. There's no way of really determining that if we're just talking about the number of cases filed in a court. Their standard doesn't talk about terminations, it doesn't talk about workdays on the bench, it does not talk about efficiency of procedures maintained by the court itself.

For example, in your statement you indicated that the ABA has backed the Circuit Executives Act which would relieve judges of certain chores. And yet in the report last year, they pointed out that all circuits except the first and seventh have appointed circuit executives which has substantially reduced the administrative workload.

Mr. STANLEY. That's right.

Mr. COHEN. And yet the first and seventh circuits now are requesting additional judges, even though they haven't employed the tools that we've provided.

Mr. STANLEY. Well, I can't tell you what to do, but I think I'd like a harder look at those circuits.

Mr. COHEN. One final question that I would have: In other words, you think we should also be looking into how efficient these courts are.

Mr. STANLEY. Of course.

Mr. COHEN. What about the policy of having a single judge district? Do you find that that is a good policy in terms of the administration of justice?

I'm talking about getting parochial, about my State. We have just one judge to cover the entire State. He is considered overworked at this point.

But I'm raising a policy question that the judge himself has raised to me in the past, whether or not it's a good policy to have only one judge available to cover the entire State—or district if you're talking about a more populated State—with attorneys, over the years, being forced to deal with only one judge.

From your own practice of law and your experience in the history of the bar association, do you think that's a good policy?

Mr. STANLEY. I would think ideally there should be more than one.

Mr. COHEN. That's all I have.

Chairman RODINO. Mr. Flowers.

Mr. FLOWERS. Mr. Chairman, I don't really have any questions. I enjoyed the colloquy with others and the gentleman here with us.

I think that our duties as a committee are to take all of the recommendations and make up our own minds, and that, I think, is what you are saying.

Mr. STANLEY. Yes, sir.

Mr. FLOWERS. I'd be inclined to look very hard at the request by the Judicial Conference for the 25 additional circuit judges which doesn't even contemplate any in the fifth circuit, which is the most overworked circuit of in terms of the appeals circuit. Because, at least at this point, there's an attempt to divide that circuit, which I happen to think would be a good idea.

And the 107, I believe, additional district judges, I don't know how we decide these issues of how much is enough, and how much is not enough, and who puts in a good day's work, and who doesn't. I guess just kind of flip a coin in some respects and do that.

And, of course, argument can be made that—was it Parkinson's law—that workload will expand to meet the needs of those who are there to do it. We probably create 500 additional judgeships, and 5 years from now they'll come back and want some more. It's sort of like putting a fox in charge of the hen house, I think, when you let the judges recommend how many new judges they need.

Do you think there's any of that in these recommendations by the Judicial Conference?

Mr. STANLEY. Perhaps so, and yet I think you do have to assume some degree of objectivity on the part of those who are responsible for seeing that the judicial system functions. I can't believe that they would be making recommendations if they didn't firmly believe that they were proper. I'm sure they're interested in seeing that the system functions.

And I suppose, in a way, they're the best qualified to tell you what they're doing, and what their workload is.

Mr. FLOWERS. Well, now, an indicator to me that their workload is too great, would be if there were some judges who were retiring because they're working too hard.

Do we see any indication of that?

Mr. STANLEY. Not that I know of.

There have been a number of retirements because of the——

Mr. FLOWERS. Salary.

Mr. STANLEY. Salary level.

But let me point out one aspect of this that has not been touched on, and that is the so-called use of the senior judges who, under the law, are permitted to retire and receive their full compensation. Most of those judges are continuing to work.

And again relying on memory, my memory is that in the second circuit the senior judges account for about 30 percent of the work that's done in that circuit. Now, supposing, which I hope will not happen, that all the senior judges did no more work. We'd have a much more serious problem than we do right now.

Mr. FLOWERS. Well, I think it's very commendable that they do continue, but I don't think we can assume that, in one fell swoop, they're going to all quit.

Mr. STANLEY. Oh, I don't either.

Mr. FLOWERS. I mean we're going to continue to have senior judges because the law allows for that, and I think we've also got to make some assumptions that at least some number of them will continue to make themselves available.

Mr. STANLEY. I think most of them will.

Mr. FLOWERS. And I think they provide a very, very useful function. In fact, one, a dear friend of mine who was on the fifth circuit has retired, and he's working almost as hard as he was when he was a practicing judge.

But I hope we can come up with some objectivity here, too. And I appreciate very much your testimony, sir.

Mr. STANLEY. Thank you, sir.

Chairman RODINO. Further questions?

Mr. COHEN. I have, Mr. Chairman.

To add to what the gentleman from Alabama was saying, apparently Senator Burdick found out that a 40-percent increase in the number of judges resulted in only a 9-percent increase in the number of cases terminated between 1959 and 1969, so the theory about Parkinson's law applying proves true.

Chairman RODINO. Thank you very much, Mr. Stanley.

This concludes our morning's deliberation, and the committee will adjourn to meet at 10 o'clock tomorrow morning here in this room.

Mr. STANLEY. Thank you.

Chairman RODINO. Thank you very much.

[Whereupon, at 11:40 a.m., the hearing was adjourned, to reconvene at 10 a.m., on Thursday, March 24, 1977.]

ADDITIONAL DISTRICT CIRCUIT COURT JUDGES

THURSDAY, MARCH 24, 1977

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 10 a.m. in room 2141 of the Rayburn House Office Building; the Honorable Peter W. Rodino, Jr. (chairman) presiding.

Present: Representatives Rodino, Brooks, Jordan, Mazzoli, and McClory.

Also present: Daniel L. Cohen, counsel, and Franklin G. Polk, associate counsel.

Chairman RODINO. The subcommittee this morning continues its hearings on H.R. 3685 to provide additional Federal judgeships for the U.S. district courts and the U.S. circuit courts of appeal.

Our witnesses this morning—and we are pleased to welcome them both before the committee—are two distinguished members of the Federal bench: Chief Judge James R. Browning of the U.S. Court of Appeals for the Ninth Circuit, and Judge John Butzner of the Court of Appeals for the Fourth Circuit.

Judge Butzner is also a distinguished former U.S. district court judge for the eastern district of Virginia, and he appears before us this morning as the chairman of the Judicial Statistics Subcommittee of the Judicial Conference's Committee on Court Administration.

Judge Browning is here to discuss with us the critical situation in the ninth circuit for which the Conference has recommended 10 new appellate judgeships.

I also wish to announce that I am placing in the subcommittee's hearing record a copy of a lengthy statement and some accompanying exhibits submitted by Chief Judge John R. Brown of the fifth circuit. Judge Brown could not be with us today and he has asked that his statement nonetheless be included. We are happy to accommodate that request.

Gentlemen, we are delighted to have you with us. You may proceed as you wish. Either of you may decide to go first.

Judge Butzner, will you please identify the gentleman alongside of you?

Judge BUTZNER. Yes, sir, Mr. Chairman. Judge Browning has very graciously suggested that I go first. I am delighted to accept that invitation.

Seated to my left is David Cook, assistant chief of the Statistical Analysis and Reports Office of the Administrative Office of the United States.

Chairman RODINO. Thank you very much. You may proceed.

TESTIMONY OF JOHN D. BUTZNER, JR., JUDGE, U.S. COURT OF APPEALS, FOURTH CIRCUIT, AND CHAIRMAN, JUDICIAL CONFERENCE SUBCOMMITTEE ON JUDICIAL STATISTICS

Judge BUTZNER. Mr. Chairman, I am John D. Butzner, Jr., a judge of the U.S. Court of Appeals for the Fourth Circuit, and chairman of the Judicial Conference's Subcommittee on Judicial Statistics. I am here today as a representative of the Judicial Conference to speak in support of the 107 additional district court judgeships and the 25 additional court of appeals judgeships recommended by the Conference and proposed in H.R. 3685.

As you are probably aware, the Judicial Conference usually recommends additional judgeships to the Congress only once every 4 years. These recommendations are made on the basis of a comprehensive survey conducted by the Subcommittee on Judicial Statistics of the Committee on Court Administration. Without going into great detail, I will explain the five-step procedure which is used to provide recommendations to Congress.

First, each of the courts assesses its own additional judgeship requirements. After reviewing this assessment, the circuit council forwards its recommendations to the Subcommittee on Judicial Statistics. The subcommittee undertakes a detailed study using the supporting material provided by the circuit councils and statistical data and analyses supplied by the administrative Office. When the subcommittee completes its study, the Committee on Court Administration reviews the recommendations and presents them, with any necessary changes, to the Judicial Conference.

The conference follows the same procedure before making its final recommendations to the Congress. Therefore, a judgeship request is not made to the Congress until it has been reviewed by four judicial panels.

This quadrennial survey procedure was followed in 1976 in developing the Judicial Conference recommendations for 107 additional district judgeships. However, the procedure varied slightly in developing the request for 25 additional judgeships for the courts of appeals. I will explain this difference later in my statement, but first I would like to address the judgeship recommendations for the district courts.

The last quadrennial survey of the judgeship needs of the district courts was concluded in September 1976. Although this survey is termed quadrennial, it addresses an accumulating need for additional judges. The last omnibus judgeship bill, which increased the district court bench from 340 to 401 judgeships, was passed in 1970 on the basis of the 1968 Judicial Conference recommendations.

Since that time, the Judicial Conference has completed two surveys. Because the 1972 survey did not result in legislation creating additional judgeships, the 1976 survey, which is under consideration here today, deals with judgeship needs which have existed in some district courts for as many as 7 years.

During the course of that recent survey, the Subcommittee on Judicial Statistics received requests for 136 additional judgeships,

131 of which were approved by the circuit councils. In conducting the survey, the subcommittee considered these recommendations along with a compilation of six years of statistical data and a workload projection for each district.

In general, the subcommittee recommended additional judgeships when a district's annual rate of filings was in excess of 400 cases per judgeship, although this standard was not applied inflexibly. All other pertinent information provided by either the districts or the administrative office also taken into consideration.

An excerpt from the report of the Committee on Court Administration which contains the survey sheets used in making the judgeships recommendations is attached as exhibit A. These pages include the data used in making the current recommendations as well as the rationale for each judgeship recommended.

I understand, Mr. Chairman, exhibit A has been furnished the committee in a black binder.

Chairman RODINO. Yes.

Judge BUTZNER. That gives the detailed statistics on each district.

Chairman RODINO. Thank you, very much.

Judge BUTZNER. Along with a summary of the recommendations.

You will notice from exhibit A that a bench-time factor, which had previously been employed by the Senate was not considered by the Subcommittee on Judicial Statistics in formulating its recommendations. The subcommittee concluded that the number of days a district judge spends in open court is not a reliable indicator of the need for additional judges. Many judges find it more effective to hear motions and to work toward the settlement of cases through informal chambers proceedings rather than formal courtroom proceedings. Those who find the chambers proceedings more effective should not be penalized in any evaluation of judgeship needs.

In addition, the subcommittee was not satisfied that the present method of collecting bench-time information is accurate or consistent enough to provide a reliable measure. The use of such a factor is misleading and detrimental to the effective and efficient use of judgepower.

As I mentioned earlier, workload projections were once again employed in the quadrennial survey for two reasons. First, the elapsed time between the completion of a quadrennial survey and the passage of an omnibus judgeship bill demonstrates that a survey which is conducted only once every 4 years should not be based on current data alone.

Second, due to the ever-increasing workload of the district courts, some attempt should be made to plan for the future, rather than find the courts 4 years from now in the exact predicament which exists today. Nevertheless, we have separated the 88 recommendations based on current workload from the 19 based strictly on projections. A copy of the table showing this breakdown is included in exhibit A.

A review of the statistics of the district courts since 1970 indicates a clear need for additional judges. Since 1970, total civil and criminal filings in these courts have increased by 35 percent without an increase in the number of judgeships. In 1976, cases were filed at a rate of 430 per judgeship compared to a rate of 317 in 1970.

During this same period, the termination rate of the district judges has grown from 345 per judgeship to 386. However, even with this

rise, the courts have been unable to keep pace with the incoming work. As a result, the pending backlog has grown from 285 cases per judgeship at the end of 1970, to 401 at the end of 1976, an increase of nearly 41 percent.

The district courts cannot be expected to continue increasing their rate of terminations. The present rate already reflects the assistance of magistrates and the use of more efficient procedures. There is a possibility that, with the time limits imposed by the Speedy Trial Act, and without the needed judgepower, the speedy disposition of civil cases will become a thing of the past.

Therefore, it is essential that the Congress act swiftly to create additional judgeships for the district courts to enable them to maintain the high quality expected of the Federal judicial system.

I would now like to address my remarks to the judgeship needs of the courts of appeals. Nearly 9 years have passed since the Congress last enacted legislation to create additional judgeships for these courts. That legislation was enacted on June 18, 1968, and was based on a comprehensive study conducted by the Judicial Conference of the United States in 1966 and early 1967.

Since 1968, the Judicial Conference has conducted two quadrennial surveys of the judgeship needs of the 11 courts of appeals, one in 1970 and the other in 1974. Despite your committee's efforts in September 1976, when you sent S. 286, 94th Congress, to the House floor, neither of these surveys has resulted in the enactment of legislation to create additional judgeships.

In September 1976, the Judicial Conference recommended that 16 additional judgeships be created for the courts of appeals. This figure included the 13 previously recommended in 1974, plus three additional judgeships for the Court of Appeals for the District of Columbia.

In January of this year, the Committee on Court Administration conducted a complete review of the workload in all courts of appeals. This review is the basis for the current Judicial Conference recommendation of the 25 additional judgeships which is under consideration here today. A table listing these judgeships is appended as exhibit B.

Updating the Judicial Conference recommendations at this time represents a slight departure from the quadrennial survey for the courts of appeals. However, the Committee on Court Administration felt that Congress should be provided with the most current assessment of the judgeship needs of the U.S. courts of appeals. Should the Congress act on legislation without the most current assessment, it would be basing its actions on recommendations which, for some courts, were initially made as early as 1971.

In conducting the review in January of this year, the Committee on Court Administration did not rely on a specific statistical standard. A statistical standard which can be applied uniformly to all courts of appeals has yet to be developed by either the judiciary or the Congress. Therefore, the committee developed its recommendations by interpreting and updating with 1976 data the analysis contained in the Senate's report on S–286 in the 94th Congress.

Just during the short period of time since the Senate filed its report on S–286, the workload of the courts of appeals has grown by more than 10 percent.

Since the courts of appeals bench was last increased in 1968, the case filings in these courts have more than doubled. During this 9-year period, a number of measures have increased the productivity of the judges of these courts. A review of the statistics shows that these efforts have been successful. Since 1968, the termination rate has increased by nearly 100 percent. However, this increased termination rate has not prevented a serious increase in the backlog. The number of pending appeals has grown from 6,615 to 14,110—an increase of 113 percent.

The courts of appeals have implemented more effective and efficient procedures to aid in the disposition of appeals, and they are constantly seeking improvement. In order to handle the tremendous caseload, most of the courts have found it necessary to limit the number of cases which can be permitted oral argument. The time limits for argument in these selected cases have also been shortened.

In addition, the courts have adopted opinion publication plans which reduce the percentage of cases which will be decided by time-consuming signed opinions. All of these procedures have been adopted in an effort to handle a caseload which is double that of an appellate judge in 1968.

We of the appellate bench realize that many of the changes which have been made over the last 9 years have been beneficial. We also realize that the courts must continue to be open to new procedures. However, there is a limit to the amount of change which can be absorbed by the system. We cannot further curtail oral argument nor can we continue to increase the number of cases which are decided without a reasonably full explanation of the court's decision. Therefore, immediate provision for additional judges is essential to maintain an effective judicial system.

This concludes my statement, and I will be happy to answer any questions that the committee may have.

Chairman RODINO. Judge, would you like to proceed and then we will direct questions to both of you?

Judge BROWNING. Thank you, Mr. Chairman. I would be very happy to do that.

I would like to thank this committee and particularly the chairman, for recognizing the urgency and the need to meet that urgency as soon as we possibly can. I believe the Nation is indebted to you for that.

I am here as the chairman has indicated, on behalf of a request for 10 additional judgeships for the ninth circuit.

I have a written statement which has been submitted to the committee, Mr. Chairman, and I would appreciate it if it could be included in the record.

Chairman RODINO. Without objection it will be so included.

[The prepared statement of Judge Browning follows:]

STATEMENT OF JAMES R. BROWNING, CHIEF JUDGE, U.S. COURT OF APPEALS, NINTH CIRCUIT

THE NINTH CIRCUIT'S NEED FOR TEN ADDITIONAL JUDGESHIPS

SUMMARY

The Court of Appeals for the Ninth Circuit is now unable to perform its minimum function of affording review within a reasonable time to civil litigants. The

situation will continue to deteriorate until the number of judges is increased substantially.

In the last 15 years (Fiscal Years 1961–1976) the number of appeals in the Ninth Circuit increased more than 650 percent (443 to 2,907). During the same period the number of authorized judgeships increased only 44 percent (9 to 13). The court nearly quadrupled the number of cases terminated per judgeship (from 52 in 1961 to 198 in 1976), but the workload per judgeship increased four-and-one-half times. In no recent year has the number of terminations exceeded the number of filings.

Both the backlog and the time taken to dispose of cases have increased alarmingly. More than 3,080 appeals are now backlogged. It would require the work of 22 judges for at least one year, or five judges for at least four-and-one-half years, to decide only the backlogged appeals. The average civil appeal now takes approximately two years to reach and decide. In the foreseeable future, civil appeals that do not have a statutory priority will not be reached at all.

On the basis of current figures, at least nine additional judgeships are required to keep abreast of current filings. A tenth additional judgeship is urgently needed to begin reducing the backlog, with the aid of senior Ninth Circuit judges and judges borrowed from other circuits.

SUPPORTING DETAIL

The number of filing in the court increased from 443 in 1961 to 2,907 in 1976.[1] The number of authorized judgeships grew from nine to 13 during the same period. As a result, the caseload per judgeship increased from 49 in 1961 to 224 in 1976, or more than four-and-one-half times. At the same time, issues being appealed have become more diverse and complex.[2]

The Ninth Circuit has attempted to deal with the increased workload in various ways.

Abbreviated appellate procedures have been instituted.

Nonjudicial court personnel are increasingly involved in preliminary processing of motions and screening of appeals before oral argument. The court now employs 12 permanent staff attorneys and eight court law clerks (in one-year positions) to help process cases and motions, In addition, each active judge has two regular law clerks (one for each senior judge), and many of the judges have obtained the assistance of one or more "externs" from local law schools.

Judges from other circuits and district judges from this circuit have been used, increasingly, to decide Ninth Circuit appeals. In 1976, a total of 69 judges sat on the court: 13 active Ninth Circuit judges, four senior Ninth Circuit judges, 43 district judges from the Ninth Circuit, and nine judges from other circuits. The visiting judges participated in 25 percent of the appeals submitted on the briefs or in which oral argument was heard. The Ninth Circuit utilized the services of visiting judges more than any other circuit.

As a result of these efforts, the number of cases terminated per judgeship increased from 52 in 1961 to 198 in 1976, or nearly four times. As noted above, during the same period the workload increased four-and-one-half times. The court is unable to cope with its increasing workload. In on recent year has the number of terminations exceeded the number of filings. The backlog has grown increasingly worse.

The court had 237 appeals pending per judgeship as of September 30, 1976. This is an increase of over 575 percent since 1961 (from 42 to 237), when the

[1] See the following table:

TABLE 1.—*Cases commenced in 9th circuit*

	1961	1966	1971	1976
Number of cases commenced	443	877	1,936	2,907
Number of cases commenced per judgeship	49	97	149	224

NOTE.—References throughout the text and notes are to fiscal rather than calendar years.

Source: The tables in this report are taken from the "Annual Reports of the Director of the Administrative Office of the United States Courts."

[2] *See, e.g.*, Rosenberg, Planned Flexibility to Meet Changing Needs of the Federal Appellate System, 59 Cornell L. Rev. 576, 582 (1974); S. Hufstedler, Statement in Hearings on S. 729 Before Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess., Pt. 2, at 90 (1975).

court was current in its work. More cases are now pending than were terminated in 1976. Because of the nature of the cases in the backlog, it is estimated that more than two full years' caseload is pending.[3] The court's backlog is the largest among the circuits, both in terms of the total number of cases pending and the number of cases pending per judgeship.[4]

The increased workload has adversely affected the time taken to dispose of an appeal. In 1976, the median time from filing of the record to final disposition of an appeal in this circuit was 11 months (about 16 months for civil cases and six months for criminal cases).[5] The average time is greater; two years or more is commonly required to dispose of civil appeals.[6] The time required to reach and dispose of an appeal is longer than in any other circuit except the District of of Columbia.[7]

[3] The Ninth Circuit recently completed the first qualitative analysis of its backlog. 3,081 cases were pending on September 31, 1976, which exceeded by about 500 the number of appeals terminated during the preceding year. As of November 30, 1976, in addition to the cases not yet fully briefed, 1,313 appeals were fully briefed and awaiting final disposition: 755 awaiting calendaring, 230 calendared and awaiting oral argument or submission, and 328 under submission. A case-by-case analysis of the appeals awaiting calendaring has revealed a very large proportion of very difficult cases. On the basis of this new data, it is conservatively estimated that the existing backlog equals more than two years' workload.

[4] See the following table:

TABLE 2.—*Number of cases pending (July 1, 1976)*

Circuit	Total	Per judgeship
District of Columbia	1,351	150
1st	307	102
2d	793	33
3d	1,033	115
4th	1,178	168
5th	2,885	192
6th	1,145	127
7th	895	122
8th	592	74
9th	2,968	228
10th	903	138

[5] Additional time is required between filing the notice of appeal and filing the record: In 1976, the median duration of this period was about two months (2.2 months for civil cases and 1.5 months for criminal cases).

[6] *See* Sen. Comm. on the Judiciary, Reorganization of the Ninth Judicial Circuit, S. Rep. No. 94–1227, 94th Cong., 2d Sess., at 14 (1976).

[7] See the following table:

TABLE 3.—*Median time for disposition, from filing complete record to final disposition*

[In months, fiscal year 1976]

Circuit	Civil	Criminal	All cases
District of Columbia	13.5	8.7	11.9
1st	5.2	5.5	5.3
2d	5.9	3.4	5.2
3d	6.8	4.9	6.4
4th	9.5	7.3	9.0
5th	6.2	5.8	6.0
6th	7.6	6.2	7.2
7th	8.0	5.0	7.0
8th	5.1	3.7	4.7
9th	15.9	6.0	11.1
10th	10.0	8.2	9.4

The adverse effect of the workload is further evidenced by the number of appeals under submission for more than three months. The Ninth Circuit has more such appeals in each of the reporting categories than any other circuit.[8] Twenty-six percent of all appeals under submission in federal circuit courts for more than three months were pending in the Ninth Circuit. Moreover, the number of such Ninth Circuit appeals increased in each reporting category from 1975 to 1976.

The lengthy time required to dispose of appeals impairs appellate justice. It undermines the right to appeal; it encourages meritless appeals; it adversely affects the quality of the court's work.

The Ninth Circuit's workload will continue to increase as the population and economy of the circuit grow and the scope of federal legislation expands.[9] The Judicial Conference of the United States will soon recommend to Congress the creation of 15 additional district judgeships in the circuit. Although these additional trial judges are badly needed, their added production will increase the number of appeals to the Ninth Circuit.

There are three possible approaches to the problem. The inflow of cases into the appeal process could be reduced;[10] but as a practical matter the potential for such reductions is small.[11] Increased efficiency in the use of court resources, and greater use of nonjudicial personnel, may help. The court has taken steps in these directions and others will be taken. However, there is a limit to the use of such procedures. They exact a toll.[12]

The remaining alternative is to increase the number of judgeships. This also involves risks and costs. The present members of the court are satisfied, however, that the problems involved in increasing the number of authorized judgeships to the point necessary to handle the work can be managed. But if the needed judgeships are not provided, the court will be unable adequately to perform its minimum functions; delays will become intolerable. It is entirely conceivable that within the foreseeable future, non-priority civil appeals will never be reached.

[8] See the following table:

TABLE 4.—*Cases under submission more than 3 mo as of June 30, 1976*

Circuit	Total	More than 3 but less than 6 mo	More than 6 but less than 9 mo	More than 9 mo but less than 1 yr	More than 1 yr
Total	470	283	118	32	37
District of Columbia	55	31	17	6	1
1st	9	9	----	----	----
2d	10	6	4	----	----
3d	6	6	----	----	----
4th	32	18	14	----	----
5th	82	50	23	2	7
6th	34	19	13	----	2
7th	67	40	12	5	10
8th	12	11	----	----	1
9th	124	65	28	15	16
10th	39	28	7	4	----
9th circuit cases under submission as of June 30, 1975	79	40	15	11	13

[9] *See* Sen. Comm. on the Judiciary, Reorganization of the Ninth Judicial Circuit, S. Rep. No. 94–1227, 94th Cong., 2d sess., at 19–21 (1976).

[10] *See, e.g.*, H. Friendly, Federal Jurisdiction: A General View (1973); P. Carrington, D. Meador & M. Rosenberg, Justice on Appeal 188–96 (1976).

[11] P. Carrington, D. Meador & M. Rosenberg, Justice on Appeal 195 (1976).

[12] The bar strongly opposes further reduction or elimination of oral argument, contending that oral argument permits attorneys to clear up bothersome points and add perspective to the written record, that a hearing in open court is associated in the client's mind with impartial decision making, and that deciding cases without oral argument and written opinion increases the risk of unprincipled decision making. Greater use of nonjudicial personnel will increase the risk that decisions will be made by judges who are less-than-adequately informed. Utilizing visiting judges decreases the stability of the circuit's law, increases the risk of justice according to "luck of the draw," takes district judges away from their primary task, and increases administrative, travel, and communication costs.

The circuit needs at least ten additional circuit judgeships—a court of 23.

Using 1974 figures, the Senate Committee on the Judiciary concluded that "[t]he Ninth Circuit needs 20 judges at a minimum," and recommended seven additional judgeships. Sen. Comm. on the Judiciary, Reorganization of the Ninth Judicial Circuit, S. Rep. No. 94-1227, 94th Cong., 2d Sess., at 22 (1976). In the most recent available study, Professors Carrington, Meador and Rosenberg, utilizing 1974 figures but a different statistical analysis, also concluded that the Ninth Circuit needed seven additional judgeships. P. Carrington, D. Meador & M. Rosenberg, Justice on Appeal 197 (1976).

Between 1974 and 1976, filings in the Ninth Circuit grew from 2,697 to 2,907, and the backlog increased from 2,355 to 2,968. The backlog is now over 3,080. There is every reason to believe the increase will continue.

The Senate Judiciary Committee's recommendation of seven additional judgeships was based on a ratio of 135 filings per judgeship, in terms of 1974 figures. *See* S. Rep. No. 94-1227, *supra*, at 22. Using 1976 data, the same ratio of 135 filings per judgeship will require nine additional judgeships.[13] An extension of the analysis of Professors Carrington, Meador and Rosenberg to current data also indicates a need for nine additional judgeships in order to cope with current filings.[14]

As noted above, the Ninth Circuit has made heavy use of visiting judges. In 1976 senior and visiting judges supplied judge-power equivalent to seven additional active judges. Even then, the court was unable to keep pace with current filings. Filings exceeded terminations by 332, or the equivalent of about 2.5 additional judgeships on the basis of either the Senate Committee or Carrington standards. This experience confirms the need for at least nine additional judgeships to keep abreast of current filings.

Nine additional judgeships would permit the court to do little more than cope with current filings, even assuming the new judgeships were authorized and filled immediately. A great deal of additional judge-power will be required to dispose of the backlog. If the 3,081 appeals pending as of September 30, 1976, were no more difficult than a cross-section of newly filed appeals, the efforts of nearly 23 judges would be required for a full year to decide them, or five judges for four-and-one-half years, on the basis of either the Senate Committee or Carrington standards. As noted below, we know the backlogged cases are in fact much more difficult than a crosssection of current filings. It is apparent from these facts that a tenth additional judgeship is urgently needed to begin a reduction of the backlog.

The court's backlog is the heaviest of all the circuits (both in overall terms and per judgeship) and now constitutes more than two years' workload. In quantitative terms, 3,081 cases were pending on September 1, 1976, which exceeded by approximately 500 the number of appeals terminated in the preceding year. As of November 30, 1976, 985 appeals were fully briefed and awaiting calendaring (755) or calendared and awaiting oral argument or submission (230).

The court recently completed a qualitative analysis of the 755 cases fully briefed and awaiting calendaring. Each case was classified according to its apparent difficulty. A startlingly large proportion of the cases was found to fall in the category of very difficult appeals. This situation has developed as a result of a program inaugurated some years ago to screen out of the backlog simple appeals that could be disposed of quickly.

The court does not request the creation of the number of additional judgeships that would be required to dispose of the backlog within a reasonable number of years. An effort will first be made to accomplish this objective with the assistance of judges borrowed from the district courts and the courts of appeals of other circuits. If this effort fails, the court will be compelled to request the creation of a substantial number of temporary judgeship to deal with the problem.

---

[13] The Ninth Circuit had 2,907 filings in 1976. Dividing this figure by 135 filings per judgeship, the court needs 21.56 judgeships, which is rounded to 22.

[14] The three professors conclude that an appellate judgeship is required for every 75 decisions a court must make after oral argument or submission on briefs. P. Carrington, D. Meador & M. Rosenberg, Justice on Appeal 196-97 (1976).

In 1976, 2,907 appeals were filed in the Ninth Circuit. In recent years, more than 57 percent of the appeals filed have been decided after oral argument or submission on the briefs (the others were consolidated, settled, etc.). Of the 2,907 filings, therefore, the court will have to decide more than 1,657 cases after oral argument or submission on briefs. At a rate of 75 such decisions per judgeship, the court needs slightly more than 22 judgeships. Even this calculation does not provide the judge-power required to dispose of the court's backlog.

It is also the court's view, however, that one authorized judgeship in addition to those required to meet current filings should be committed now to the effort to reduce the backlog. This is appropriate because of the importance of reducing the backlog and because filings will increase enough to require an additional authorized judgeship to keep abreast of current filings long before the backlog can be eliminated. Filings have increased about eight percent per year for the past five years. Over the past two years, the annual increase has been at the rate of four percent. On the basis of the latter rate of increase and using either the Senate Committee or Carrington standards, the workload will reach a level justifying the tenth judgeship merely to handle current filings in less than 18 months.

In conclusion, the court's determination that at least ten additional judgeships are needed is based on an extrapolation of the Senate Committee and Carrington analyses, the court's experience utilizing the services of visiting judges, and a case-by-case evaluation of the appeals now backlogged. If ten new judgeships are authorized, the court can keep abreast of current filings and begin to reduce the backlog. If the court receives any less than ten new judgeships, by the time the new judgeships are authorized and filled the court will be unable to keep abreast of then current filings.

Judge BROWNING. In view of that written statement, I believe my oral presentation can be very brief.

The need in the ninth circuit, as the chairman has stated, is critical. Most civil litigants in our court now must wait 2 years to get a resolution of their appeal.

In nonpriority civil cases, in the reasonably foreseeable future, we will not be able to decide them at all, because priority appeals would come in above them. The reason is clear enough. In the last 15 years the filings in our courts have increased by 650 percent, and the number of judges have increased by only 44 percent.

I think there is a general recognition of the critical nature of the situation in the ninth circuit. The question s not whether we need more judges, but truly how many more we need. It s our judgment that we need nine additional judgeships in order maintain a current situation with respect to the filings as they come in.

We base this conclusion upon three facts; two studies and our experience in fiscal 1976. The two studies are, first, the one that was made by the Senate Judiciary Committee that Judge Butzner has referred to. That study arrived at the conclusion that our circuit required a judgeship for each 135 filings.

On that basis they recommended seven additional judgeships on fiscal 1974 figures. The increase is such that on fiscal 1976 figures the requirement would be for 8.6 judgeships.

Professors Carrington, Meador and Rosenberg have made a careful study and they base their estimate on dispositions not on filings. On that basis they come up with the same figure, that the ninth circuit would require 9.1 additional judges based on 1976 figures. That was the second study.

In fiscal 1976, our court went through an experience which we think proves what is needed just to keep up with current filings. In 1976 we actually used 96 people as judges on our court. Fifty-two of them were borrowed. Forty-three district court judges were drawn away from their trial schedules to come into our court. Nine judges were called in from other circuits.

Those 52 borrowed judges performed the equivalent of the service of 7 active judges. So, in effect, we sat at fiscal 1976 with a court of 20, 7 borrowed judges plus our regular 13. Yet, that year we fell

behind by 332 cases. We disposed of 332 fewer cases than were filed during that year.

That deficit represented a need for 2.5 additional judges, again indicating a need in our court between nine and 10 judgeships. These figures do not consider the backlog and they do not include increases in filings. It is on that basis that we ask the committee to approve the 10 additional judgeships. Our backlog now numbers 3,081 cases. If these were just normal current filings—and they are not—but if they were simply normal current filings, it would take 22 judges a year, and five judges 4½ years, to dispose of that backlog while doing no other work. The fact of the matter is, those cases are so difficult that we compute that, in effect, they represent the equivalent of twice those which have just been filed.

In addition to that, of course, our filings are continuing to increase year by year. Over the last 5-year period there was an average increase of 8 percent per year, and in the last 2 years, it was an average increase of 4 percent per year. If you take that against our roughly 3,000 filings, it indicates an increase of about 120 per year, which clearly indicates the need for additional judgeships.

If we were able to get nine judgeships established today, by the time the judges were appointed—which I suppose realistically would have to be in about a year—those 9 additional judges, plus the 13 we now have would not be able to dispose of current filings. We would be exactly where we are today. It is on that basis that we ask you to provide us with 10 additional judgeships. I believe the need is urgent. I think, as a matter of fact, if we get those 10 additional judgeships we may or may not be able, with the use of our senior judges, to dispose of our backlog and try to keep current, but we would like to get the opportunity to try.

Thank you, Mr. Chairman.

Chairman RODINO. Thank you very much, Judge Browning.

Judge Butzner, I have question for you, and I am really trying to search out in my mind how I can, based solely on these statistics that are presented, really justify the needs. I know that there are numbers of case filings, and you come before us with these statistics, as do all of the others who have appeared before us, and based on these numbers purport to show a need.

Now, I would like in my own mind to be able to understand these statistics, and know how to analyze them because I wonder whether they indicate that there is, one, either a genuinely overburdened caseload, or two, they merely may indicate there is low productivity.

I have got to try to make an assessment here in order to determine, at least based on the presentation that you have made, the need for 107 judges. And the reason I am curious is that the district court judges themselves, from the way that I see the requests that are made to the Conference, seem to perceive their own needs so differently one from another. There doesn't seem to be, at least in my analysis of the statistics presented, any kind of uniform perception by them of what their needs are. I am not speaking about your recommendations. I am referring to what the districts themselves have asked for.

Now, for example, I am choosing these districts and examples at random and going through them as illustrations only and not because

I have concluded they are or aren't doing the job, but let's take the western district of Michigan. There were 514 case filings per judge in 1976, and 511 per judge in 1975. That district requested of the Conference two new judges. You gave them, in fact, the request for two new judges.

In Arizona, the 1976 case filings per judgeship figure for 1975 was 493 and last year it was 494.

Maryland, with seven judges, in 1975 was below the national average of 400 filings per judge. They were at a figure of 361.

And the eastern district of Arkansas, on the other hand, with only two judges, has one of the highest per judge case filings in the Nation, 668. Yet the judges in Maryland submitted a request for three new judgeships, and Arkansas, eastern district, asked for just one.

Now, I don't know just how I can reconcile in my mind how these variations occur. Judges are asking for a different amount of judges when their caseloads seem to be almost the same. I am wondering, are the judges perceiving their work and their needs differently despite the fact that they are providing you with the same statistics? And I am wondering just what the criteria are. Are there any standards set; are there any guidelines for them? Do they just, in presenting their petitions for new judges, see their responsibilities wholly separately from a national norm?

What does the Conference do about this? Does the Conference attempt to analyze this?

Judge BUTZNER. Yes; it does. In the first place, I believe that the judges do not see their responsibilities differently from other districts; but the workload, the character of the workload in districts does differ. We have found that in the metropolitan areas, such as Maryland, New Jersey, and the eastern district of New York, there is a different type of litigation that requires a great deal more judge time per case than in some other districts.

Those districts have very complicated criminal cases. There are many motions. They have cases with many defendants. They have difficult cases. They are cases that can't be moved along and decided in a day. The northern district of California is another example. That district has a great number of cases that take a great number of days per case to try.

Chairman RODINO. With the same number of filings, would those judges be making the same requests for additional judges?

Judge BUTZNER. They would be asking for more judges, I am sure, than they do. What we try to do in getting up this statistical study and making these recommendations, is to get, first, the assessment of the judges in the field. Those go through the circuit councils and then we try to get—and do get in most instances—a fairly uniform basis for recommending judgeships on the basis of 400 filings per judgeship.

The seventh circuit sent us a long memorandum arguing that was too high, that we should drop it back to 350, and they cited many reasons in the Chicago area why that is true. But we stuck to the 400 as a fairly rough indicator, a good indicator of need.

Now, one way of looking at it, and I think this will illustrate what I have been discussing, is to consider the weighted filings——

Chairman RODINO. Does the Conference, Judge Butzner, suggest some kind of guideline, some kind of guidelines for the judges to follow?

Judge BUTZNER. In working this out we went the opposite way. We did not want the tail of the subcommittee wagging the dog of the entire judiciary. First we started out by asking the judges and the circuit councils. There are 11 of them. They are charged by law with supervising the work in their circuits on these recommendations. For the past two quadrennial surveys, taking into consideration the experience of all these judges who have sent in information, we have come to the conclusion that about 400 cases per judgeship is a realistic figure.

Now, the national terminations aren't that great, although some courts terminate a greater number of cases.

We also have a system of weighted filings, and that is an attempt to determine statistically whether an antitrust case is a more lengthy case than a Dyre Act case of a stolen motor vehicle.

Chairman RODINO. Judge, let me stop you there.

If a district were to recommend to you that they could do with less judges, are there situations where you feel that you should still recommend that there ought to be more?

Judge BUTZNER. No, sir.

Chairman RODINO. Have there been situations where you have recommended more?

Judge BUTZNER. No, sir. I believe no.

Then the circuit councils have recommended——

Chairman RODINO. I believe that if you will review the recommendations, Judge Butzner, you will find that there are some areas where you have recommended more than have been requested.

Judge BUTZNER. There were some judgeships—

Chairman RODINO. At least in three areas.

Judge BUTZNER. There were some judgeships that were in the last Senate bill which we did remove, which were placed in after the recommendations went in, and we didn't feel free to remove them. But I will be glad to address any specific ones.

Chairman RODINO. No.

Judge BUTZNER. Our general rule has been not to recommend judgeships unless they were asked and approved by the circuit council.

Chairman RODINO. But there have been cases, too, where even if they recommended more you recommended less.

Judge BUTZNER. Oh, yes, sir. No problem there. A great many less. We haven't accepted all the recommendations. We pared them down not quite a third, from 136 to 107. Maryland had 361 cases per judge in 1975, but they had weighted filings of 377, which bears out that their cases are harder than the raw indicate, and in Maryland, I think we followed some projections and recommended one on the basis of their current and one on the basis of their projected caseload.

Chairman RODINO. Judge, my reason for asking is not so much to try to engage in some argument as to the fact that you have in some instances recommended more than have been asked, because I know that in many cases you have recommended less than has been requested.

I guess my question really goes to whether or not the Conference—which seems to be the recommending body that most people would

rely on—is going to take a look at its own statistics, its own methods of making requests for judgeships. Much of the methodology now being used is too confusing, too haphazard it seems. And are we going to reach the point where because of the situation we are just going to be finding that we are going to be asking continually for more judges, and more judges, and more judges, and not be dealing with the problem that exists right in the system?

And apparently there have got to be some problems. How do we deal with that? I am wondering if the Conference is addressing itself to this, so when it comes before us again at some time it will have other kinds of recommendations to make based on something we can understand. That is a tough question.

Judge BUTZNER. That is a tough question.

Chairman RODINO. And of course, I don't expect you to answer all of it now.

Judge BUTZNER. Let me try to answer it by describing very briefly what we have done and some of the things we are considering doing.

The quadrennial survey is one of the problems in itself. It is every 4 years. There was a reason for that. The quadrennial survey of the bulk of these judgeships—the district judgeships—is completed early to keep it out of the political process altogether. It is completed before the Presidential election in a Presidential year. It is just as simple as that. Actually, the preliminary work on this 1976 survey, which firmed it up within 10 or 15 judgeships nationwide, was completed in May of 1976, and the Conference acted on it with finality in September of 1976.

We have also found that there has been a considerable delay, even under the best of circumstances in creating judgeships. So we tried using projections as to what the needs would be 4 years hence. Frankly the projections work out sometimes and sometimes they don't. They are not absolutely accurate in every instance.

One of the things we are considering is going to a 2-year survey and coming before you every 2 years to try and present current needs in a more graphic way, relying less on projections.

In addition, the judicial center is constantly studying and conducting seminars on better ways to conduct the business of the courts. That is an ongoing subject. Judges are brought into a week-long seminar with other judges, men with experience, and they discuss what has worked in one district and new ways of trying to move things along.

The districts are working very, very hard with the magistrates to turn over as much as can reasonably be turned over to the magistrates without lowering the system of justice in this country. The magistrates are doing a good job, and I am sure they will be able to do more. In essence, we are attacking this on every front.

The fact remains that the case filings are increasing. The sheer numbers keep coming in. Terminations have gone up. Judges are increasing their work, and where we thought that there could be any possibility that they weren't in actual need in that district, we cut their requests, because we knew we were coming here with a great number of judgeship requests, and we did not want to be vulnerable in any one district and have a question raised which would reflect on the whole thing.

So we did try and work it out. But there are some districts, like Maryland, that showed, not only through statistics, but also through the letters that they wrote, and the memorandum that we worked up that a number of cases took a long period of time. A 6-week case throws a district into a very bad situation, and when you get several 6-week cases, removing a judge from other work, it does a great deal of damage to his overall productivity. He is working hard, but he is not turning out those 400 cases a year. That is where we are and where we hope to go.

Chairman RODINO. Thank you, Judge.

I wanted to ask Judge Browning a question.

I am bothered by the controversial question of revising the circuit lines, and the issue surrounding the ninth circuit, of course, is one that has become almost emotional. I wonder if you could share your views with us concerning proposals to divide the ninth circuit, and explain the nature of some of the opposition that has arisen. And then I would like to ask you whether or not you think that the question is something that we ought to deal with immediately, or whether we should deal with the question of adding judges first and leave the circuit split to be decided later?

Judge BROWNING. With your permission I would like to answer the second part of your question first.

Chairman RODINO. Please do.

Judge BROWNING. We had a meeting of our 28 judges, 13 active and 15 senior, and we discussed the issues to which you are referring. We were divided among our group as to whether or not or what kind of reorganization of the circuit, if any, was necessary to accommodate this enormous increase, necessary increase in judgeships.

There was a little emotion there with the question, but we were unanimous on the proposition that we could deal with almost any kind of reshaping, administrative reshaping, of the circuit in one way or another.

Aas a matter of good will, imagination and energy, we can handle the problems associated with that. We could not possibly handle the problem of trying to dispose of a workload that required 23 judges with just 13, so we unanimously concluded that we would ask the Judicial Conference and the Congress, first, to provide us with the additional judges, which would be needed in any event. No matter how the circuit is reorganized, the case filings are still going to be there. We decided to put behind us, for the time being, the emotional question of how the circuit should be reorganized.

Chairman RODINO. I appreciate that.

Judge BROWNING. Let me say in response to the first part of your question, naturally I speak only for myself, but I have long thought along the lines of the Chief Justice, who recently stated in his address in Seattle that our circuit ought to have some kind of reorganization. Despite my own feeling on that subject, I concur entirely in the conclusion that that question should await the creation of additional judgeships, because our real fear is, if the two questions become intermixed, then the additional judgeships are going to be delayed, and that I truly believe would be a tragedy.

Chairman RODINO. Thank you very much. Mr. McClory.

Mr. McCLORY. Thank you, Mr. Chairman. I want to express my appreciation to our distinguished witnesses for appearing here today, and helping us in this very difficult problem with which the Congress is faced.

I might say that I am convinced that a major part of the fight against crime in America is contingent upon having adequate judicial talent to handle the criminal cases.

I might say further that the point that Judge Butzner made about trying to get the subject of additional judgeships disposed of before a Presidential-election year is a very laudable objective. We did run into this problem last year, notwithstanding the fact that I offered an amendment which was accepted, that if we got the additional 49 judgeships that we voted on in this committee, the appointment of judges would be deferred until the inauguration of the new President. Unfortunately, we didn't get the bill passed.

Now, the thing that occurs to me is that we would have had 49 additional judgeships if we had acted last year. Today, we are talking about 88 judges which are needed, plus 19 additional judges that are requested on the basis of projected needs.

We are also working in the Congress at this session on the subject of trying to change the jurisdiction of the Federal courts, to limit the jurisdiction with regard to diversity cases.

We are endeavoring to delegate magistrates more jurisdiction with regard to Federal cases. We are hoping that some changes can be made to have judges handle the voir dire examination of juries and not have the long delays that are involved when counsel engage in this process. And there are other changes that are occurring.

There is no practical way that I know of that we can eliminate judges once we have created them. I am wondering, then, whether it would be prudent to create so many judgeships, particularly those justified by projections, when we are also contemplating jurisdictional changes and other measures that would reduce the work load of the Federal judges. Judge Butzner, would you want to comment along that line?

Judge BUTZNER. I want to say that we appreciate very much your examination of these factors which do make up the work load of a district judge or court of appeals judge. One means of cutting down the number of cases that are filed is a change in diversity jurisdiction. Elimination of diversity would do that. It would cut down quite a few cases. It would not cut down the very difficult Federal question cases which are on the increase. It would, of course, relieve time for that.

I believe, though, that even if those reforms are made, there will still be the need for these additional judgeships. Certainly with no immediate prospect of those changes, there is a complete need, a great need right now.

The projections that we made for 19 judgeships indicate that those courts are having over a period of years an increased case load. It probably will be 1 year to 2 years before the judgeships are created, the actual places filled, and we think that there will then be a need, and that these judges will be working.

Mr. McCLORY. As I understand it, I believe we have 4 districts in which we have 398 district judges, and in only 61 of those districts do we utilize even today a Federal magistrate. Is there just no need for

magistrates there, or if there is a need, what if anything is the judicial conference doing to encourage the utilization of magistrates in those other districts?

Judge BUTZNER. In the districts where we recommended judgeships, we did take into consideration work that magistrate were doing. The magistrate system is fairly new. Some districts are adapting to it much faster than others.

In some districts, the magistrate is a part-time man who is taking the place of the former U.S. Commissioner. He is more like a justice of the peace. He may be many, many miles away from the judge's chambers.

Mr. MCCLORY. Could I just refer you to this?

Judge BUTZNER. Yes, sir.

Mr. MCCLORY. It is shown to us that in only 61 districts are magistrates conducting pretrial conferences, and in only 57 districts are the magistrates reviewing motions. Moreover, magistrates handle social security cases in only 52 districts, yet these were the kinds of cases that we thought that a magistrate would be able to handle in order to relieve the district judge of the more routine or more administrative type actions. Are we doing anything to try to that?

Judge BUTZNER. Yes, sir. The Judicial Conference and the Judicial Center are placing an emphasis on the more efficient use of magistrates.

Mr. MCCLORY. That would really in turn relieve the district judges of some of the work load, would it not?

Judge BUTZNER. It will, but these matters are really not fungible. In some districts all of the judges are in a single building and the magistrates are there. They can handle things efficiently. In others, the magistrate may be 100 miles from the judge and, although he is doing important work, he can't do the same type of work that a full-time magistrate does. My own feeling is that we should move from the part-time magistrate as rapidly as possible to the full-time magistrate.

Mr. MCCLORY. I would like to ask one more question: Are we utilizing those district judges who are on senior status to augment the number of judges we are able to use? Has any thought been given to establishing a pool of district judges to handle district court cases so that we could move them freely from one district to another instead of this complicated statistical business, district by district, that plagues us all the time and gets us in tremendous controversy as far as different districts?

I think frequently you mentioned trying to get politics out of this subject. Yet we have Members of the Senate and of the House that want an additional judge in their district, or don't want an additional judge there because of some hostility against the bench that seems to raise its head every once in awhile.

What, if anything, has been considered in this area?

Judge BUTZNER. The Judicial Conference has had, for a number of years, a committee on intercircuit assignments. While there is no formal pool, judges can be assigned across the country from one circuit to another.

That is expensive, and the committee tries to keep those assignments to a minimum. They put certain restrictions on them. A judge must go for a certain length of time and take so many cases, and so on, within the circuit.

There is a great deal more assignment activity when there is a need in one district. That is up to the circuit council, but, again, there is not a formal pool of active judges who are assigned to any specific district and who can be sent all over the United States. Nor do I believe there has been any consideration of creating such a pool of active judges.

Mr. McCLORY. I don't know whether we will have any further hearings on this legislation. Mr. Chairman, I wonder if I would be permitted to address a few written questions to Judge Butzner, for instance, who is representing the Judicial Conference, and whether he would respond to my written questions?

Judge BUTZNER. I would be very glad to, sir.

Chairman RODINO. I would like to ask Judge Butzner and Judge Browning—we are in the midst of a rollcall. However, the committee would like to furnish you with some specific questions, written questions which we would like your responses within due time and we would get them in the record.

I would hope that you would be able to supply us with that information.

Judge BUTZNER. Yes.

Judge BROWNING. We would be happy to.

Judge BUTZNER. May I say, Mr. Chairman, we appreciate very much your interest and the committee's interest in determining what the need is, and in filling that need. We are very glad that you have taken such prompt action.

Chairman RODINO. We certainly want to move along. We recognize that there is a need. We are really searching for some ways of being able to respond to the needs of the future without being confronted with requests for astronomical numbers of judges, and it seems that we have got to do some thinking.

The Congress, the Judicial Conference, the ABA and all others who are interested in preserving justice and according each and every individual his right to be heard, and to have a fair hearing before some proper tribunal, but at the same time, remembering that we are getting to such a stage that it may be impossible to some day even meet the needs if we go on in this manner of providing judges and judges and judges. This is, I think, some of the things that we have got to be thinking about down the line.

Mr. Mazzoli.

Mr. MAZZOLI. Thank you very much, Mr. Chairman. I would just like to welcome the judges and thank them for their testimony. I am sure they understand the dilemma we are in. There is certainly no intent here to indicate a displeasure, but just simply the fact that we have to justify, does anyone know how much it costs to put a judge together per year for courtrooms, bailiffs, and the works?

Mr. COHEN. The Congressional Budget Office estimates it is approximately $239,000 per judge for the first year of operation. It goes down slightly after that. But as a general matter, providing 107 new judges would cost $30 million to $40 million, approximately, for the first year.

Mr. MAZZOLI. These, of course, are lifetime appointments and would go on and on. I think Mr. McClory said once you create a judge you never disband, you add more.

So the problem we have is one of primarily delivering justice to the people for whom justice is intended, but second, of course, we have to have something that flies around here, too, and that is the problem we are in.

We thank you for your help and certainly Chairman Rodino has shown a lot of leadership in this area and we intend to get the work done in our committee very soon.

Chairman RODINO. Thank you very much, Judge Butzner and Judge Browning for coming here this morning. The committee stands adjourned.

[Whereupon, the hearing was adjourned.]

○