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A LEGISLATIVE HISTORY OF THE CREATION OF THE ELEVENTH CIRCUIT

Thomas E. Baker†

October 1, 1981, marked a milestone in the history of our federal courts. On that day the Fifth Circuit Court of Appeals Reorganization Act of 1980 (Reorganization Act)¹ divided the "former fifth circuit" into the "new fifth circuit," composed of the District of the Canal Zone, Louisiana, Mississippi, and Texas, and the new "eleventh circuit," composed of Alabama, Florida, and Georgia.² This article describes the legislative history of the Reorganization Act and summarizes the political and institutional forces that shaped the landmark statute creating the United States Court of Appeals for the Eleventh Circuit.³

The Reorganization Act is a prime example of the congressional historical preoccupation with altering the middle tier of the federal courts. Congress recently has been concerned specifically with the unique problems of the large circuits, those that have experienced such enormous docket growth that their effective functioning has been endangered.⁴ The legislative history of the division provides further background for understanding the first decade of the Eleventh Circuit.⁵


2. Id. § 10. The appellations used here are those of Congress.


5. The literature concerning the creation of the Eleventh Circuit is extensive. See The Hon. Robert A. Ainsworth, Jr., Fifth Circuit Court of Appeals Reorganization Act of 1980, 1981 B.Y.U. L. Rev. 523; Senator Howell Heflin, Fifth Circuit Court of
Furthermore, this look backward is relevant to the debate now before Congress over the fate of the largest surviving circuit, the Ninth Circuit.

For several decades, the Fifth Circuit's surfeited docket had been the subject of detailed study. During the decade of the 1950s and into the early 1960s, the six states of the Fifth Circuit experienced dramatic population growth, commercialization, industrialization, and urbanization; these changes transformed the work of the federal courts in the region. The South was changing and with these changes, new demands were made on the legal system. The Judicial Conference of the United States was informed in 1963 that its committees on court administration and judicial statistics had agreed on the need for additional judges in the Fifth Circuit, but had disagreed as to the best way in which to accomplish the increase in judgepower.

The Judicial Conference formed an ad hoc committee to study the geographical organization of the federal courts. In its 1964 report, the ad hoc committee recommended a division of the Fifth Circuit into a new fifth circuit composed of Alabama, Florida, Georgia, and Mississippi and a new eleventh circuit composed of Louisiana, Texas, and the Canal Zone. In that year the Judicial


7. See BARRON & WALKER, supra note 3, at 2-3.


9. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORTS OF THE PROCEEDINGS
Conference initiated a policy of making comprehensive surveys of
the business of the circuits and districts every four years. As a
result of the 1964 survey and the resulting recommendations,
Congress added four temporary judges to the Fifth Circuit in
1966, raising the total number of judges on the court to
thirteen.\textsuperscript{10} The temporary judgeships were made permanent and
two others were added in 1968\textsuperscript{11} to "alleviate . . . a crisis
situation"; Congress was convinced that the action was necessary
and could not await the scheduled 1968 survey.\textsuperscript{12}

As serious as the problem had been when originally noted, it
only worsened as study and debate lengthened. The parade of
horrible statistics lengthened with each new appraisal of the
situation.\textsuperscript{13} Between 1950 and the mid-1960s, appellate filings
in the Fifth Circuit had more than doubled.\textsuperscript{14} By the mid-1970s,
the total was roughly eight times the 1950 level.\textsuperscript{15}

\textsuperscript{10} The President was authorized to appoint four judges immediately with the
limitation that the next four vacancies on the court would go unfilled. Act of March
2d Sess., reprinted in 1968 U.S.C.C.A.N. 2086.} The previous increase had occurred in
between 1954 and 1961 clearly demonstrated that seven years was too long to wait


2087.} The court had been operating with the equivalent of 15 judges by arranging for
visiting judges to sit. Thus, the 1968 legislation did not decrease the Fifth Circuit's
caseload per judge, which was then the highest among the courts of appeals. \textit{Id. at}
2089.

\textsuperscript{13} Reports and statistical summaries were in abundance. Baker, \textit{supra} note 3, at
notes 77, 80, 84, 140.

\textsuperscript{14} The Hon. Thomas G. Gee, \textit{The Imminent Destruction of the Fifth Circuit; Or,

\textsuperscript{15} \textit{Id.} Then-Judge Gee is careful to point out, however, that the actual workload
simply could not add judges fast enough to keep the court afloat. With these developments, Congress crashed the “nine judge barrier,” which in judicial administration once had the same mystique as the sound barrier once had in aeronautics. Many judges and members of Congress almost mystically believed that the Supreme Court total of nine members was the absolute maximum number of judges that could operate efficiently and coherently as a single court.16

In 197017 Chief Justice Warren E. Burger urged that Congress create a commission to study and re-examine the structure of the federal court system.18 The Judicial Conference made a similar recommendation in the same year.19 Responding to the collective urging of the Judicial Conference, the Federal Judicial Center, the American Bar Association, and the chief judges of all eleven circuits, Congress created the Commission on Revision of the Federal Court Appellate System in 1972.20 The Commission was charged with conducting a broad study of the federal judicial system’s geographical divisions, structure, and

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16. See BARROW & WALKER, supra note 3, at 5; see also Gee, supra note 14, at 64.
17. During the five years between 1965 and 1970, the issue of dividing the Fifth Circuit was debated in the Congressional hallways and in judicial chambers. For a detailed account of this period of in-fighting, which for the most part was hidden from public view, see BARROW & WALKER, supra note 3, at 121-52.
internal procedures and with recommending such changes as would be "most appropriate for the expeditious and effective disposition of judicial business."\(^{21}\)

The Commission conducted extensive hearings\(^{22}\) and filed its report on the geographical realignment of the circuits in December 1973. Rather than suggesting a complete realignment of the circuits, the Commission recommended that the Fifth Circuit be divided so that Alabama, Florida, and Georgia would be grouped in one circuit and Mississippi, Louisiana, and Texas in another. This recommendation satisfied the Commission's self-imposed criteria: (1) circuits should be composed of at least three states; (2) no circuit should be created that would immediately require more than nine judges; (3) a circuit should contain states with a diversity of population, legal business, and socioeconomic interests; (4) realignment should avoid excessive interference in established circuit alignment; and (5) no circuit should contain noncontiguous states.\(^{23}\) The Commission also proposed two alternatives: an alignment of Alabama, Florida, Georgia, and Mississippi and a second alignment of Arkansas, Louisiana, and Texas; and an alignment of Alabama, Florida, Georgia, and Mississippi and a second alignment of Louisiana and Texas.\(^{24}\)
The Fifth Circuit was the obvious starting place for the proposed realignment and reform. Its problems with size and caseload were largest, and attempts to alleviate them by appointing more judges and instituting controversial procedural innovations already had been tried. Although its judges were unanimously opposed to adding more judgeships, they had voted overwhelmingly in favor of a split. The inevitability of a backlog was being suggested. The Senate reacted with the introduction of three bills, each tracking one of the three alternatives offered by the Commission. The Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary held hearings on the three bills and received the comments and criticisms of lawyers and judges. Instead of the circuit-splitting approach taken by the Commission and adopted in the three bills, the Subcommittee's 1974 draft report proposed an internal reorganization of the Fifth Circuit into two divisions.

25. The Commission "harbor[ed] no illusions that realignment [was] a sufficient remedy, adequate even for a generation, to deal with the fundamental problems now confronting the Courts of Appeals." Id. at 229. Realigning the Fifth and Ninth Circuits, however, was believed to be a necessary first effort to cope with their "pressing problems." Id.


27. See generally George K. Rahdert & Larry M. Roth, Inside the Fifth Circuit: Looking at Some of its Internal Procedures, 23 LOY. L. REV. 661 (1977); Philip Shuchman & Alan Gelfand, The Use of Local Rule 21 in the Fifth Circuit: Can Judges Select Cases of "No Precedential Value"?, 29 EMORY L.J. 195 (1980). By the mid-1970s, the Fifth Circuit was deciding approximately 55% of its cases without oral argument. See Rahdert & Roth, supra, at 668; see also Fifth Cir. R. 18 (1981). It also was disposing of approximately 35% of its cases without a written opinion. See Schuchman & Gelfand, at 220; see also Fifth Cir. R. 21 (1981); see also Thomas E. Baker, A Compendium of Proposals to Reform the United States Courts of Appeals, 37 U. FLA. L. REV. 225 (1985).


31. S. REP. NO. 117, supra note 19, at 40. Internal reorganization of the circuit into divisions arose as a response to objections to splitting the Fifth Circuit, including a concern over which new circuit would be called the Fifth. Splitting goes against the long-standing tradition of the circuit. See supra note 5. Confused resistance had been expressed for grouping Mississippi with the civil law state of Louisiana and with
This so-called internal division approach to the reorganization of the Fifth Circuit was translated into a Senate bill on which hearings were held in 1975. The substituted bill called for internally reorganizing the Fifth Circuit into two divisions: the Eastern Division, with twelve judges, would have included Alabama, Florida, Georgia, and the Canal Zone; the Western Division, with eleven judges, would have included Louisiana and Texas. The two divisions would have had similar caseloads. Each would have had its own chief judge, clerk, circuit executive, and judicial council. The substituted bill proposed some limited continuity for the new divisions, including a special joint en banc hearing before the most senior judges of the two divisions to settle interpretive conflicts in the decisions of the two divisions, a provision for a single judicial conference, and interdivision assignment of district and circuit judges to accommodate caseload demands.

Still, the net effect of the substituted bill was to create two new circuit courts. The substituted bill thus departed from the Commission's recommended proposal in two significant

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Texas. Another fear was the creation of an oil and gas law circuit, with Louisiana and Texas dominating one circuit. See Gee, supra note 14, at 803-06. The splitting approach also involved the unique problems of the Ninth Circuit, and the problems of dividing one state, California, between two circuits. That proposal died quickly. See Charles R. Haworth, Circuit Splitting and the "New" National Court of Appeals: Can the Mouse Roar?, 30 Sw. L.J. 839 (1976). No bill was reported by the Judiciary Committee of either house in 1973 because the events of Watergate preempted committee activities. S. Rep. No. 117, supra note 19, at 8.

32. S. 729, 94th Cong., 1st Sess. (1975). See generally Haworth, supra note 6, at 843-54; Levin & Fickler, supra note 20. Because of strong resistance to dividing the Ninth Circuit and the State of California, the bill reported favorably by the Committee in December 1975 applied only to the Fifth Circuit. S. 2752, 94th Cong., 1st Sess. (1975); see S. Rep. No. 513, 94th Cong., 1st Sess. at 15 (1975); see also Barrow & Walker, supra note 3, at 171-81.

33. S. Rep. No. 117, supra note 19, at 41. The court had supported division into two autonomous circuits by a vote of ten to three. Two judgeships were vacant. The judges also requested that twelve additional judgeships be authorized and divided ratably between the two new circuits. Id.

34. The special en banc hearing was to be used in the event of a "conflict with a decision by the other division of that circuit and affecting the validity, construction, or application of any statute or administrative order, rule, or regulation, State or Federal, which affects personal or property rights in the same State." S. 729, 94th Cong., 1st Sess. (1975).

particulars. First, it adopted the Commission's second alternative grouping, with Mississippi aligned with Alabama, Florida, and Georgia. More importantly, the substituted bill created divisions within the Fifth Circuit in lieu of two new, completely autonomous circuits. Despite the pressing need for relief, political inaction in the 94th Congress brought the matter to an anticlimactic close. The Fifth Circuit enjoyed a well-deserved reputation as a bastion of civil rights in the South. The court's civil rights workload, however, pushed and pulled the debate over division. Civil rights suits swelled the docket numerically and "in ways that cannot be measured statistically; the time that appellate judges put into the supervision of these cases went far beyond the proportion that the cases represented of the old Fifth Circuit's total caseload." Thus, civil rights cases contributed to the workload pressure for division. At the same time, some concern was expressed that the Fifth Circuit's leadership role in civil rights could be compromised by division, and several organizations opposed division for that very reason.

36. The Commission had propounded even the alternatives as "a significant improvement over the current situation." Commission on Revision, supra note 23, at 233.

37. See supra text accompanying notes 22-24. While recommending legislation to divide the Fifth Circuit, the Department of Justice suggested that the divisions were really two autonomous circuits and should be designated as such so that all ties between the two would be broken. S. REP. NO. 117, supra 19, at 42. The Louisiana Bar Association also supported creation of two new circuits of three states each. Id.


40. Concern was raised that realignment might affect the conservative or liberal tendencies of the court generally. The Senate Judiciary Committee found no factual basis for such concerns. S. REP. NO. 117, supra note 19, at 46 (citing Haworth, supra note 5). See generally Haworth, supra note 6, at 847-54. Partisan politics may have played a role. Congress in 1975 was controlled by Democrats; the White House was Republican, and a presidential election was imminent. While legislation affecting the judicial structure is often nonpartisan, the prospect of wholesale judicial appointments generates intense political interest. F. FRANKFURTER & J. LANDIS, THE SUPREME COURT, A STUDY IN THE FEDERAL JUDICIAL SYSTEM 42 (1927); see also BARROW & WALKER, supra note 3, at 184-89.

After the 94th Congress adjourned, judicial statistics for 1975 became available and showed still another increase in case filings. In addition, the Judicial Conference made its quadrennial survey of judgeships and recommended that more be created. S. REP. NO. 117, supra note 19, at 8. Various other bills to add judges died during the same session. Id.
Both the House and the Senate in the 94th Congress took up bills realigning the Fifth Circuit. Because each chamber passed a different version, both of which substantially increased the number of district and circuit judgeships in the Fifth Circuit and throughout the country, the bills were forced to go to a conference committee. Under the Senate version, the Fifth Circuit would be divided into two separate circuits. The fourteen judges of the new fifth circuit would hold court for Alabama, Florida, Georgia, Mississippi, and the Canal Zone, and the twelve judges of the new eleventh circuit would do the same for Louisiana and Texas. The House bill would have increased the number of judges in the circuit, but did not provide for splitting the Fifth Circuit.

Once the conference committee began work on the House and Senate bills, profound disagreement immediately became apparent. The Senate plan would have violated the Commission's criteria by isolating two states in a single circuit and by creating two new circuits with more than nine judges. Civil rights proponents once again expressed their concern that the proposed new fifth circuit would be composed only of more conservative, deep south judges. Concern also was raised that the proposed new eleventh circuit would become an oil and gas circuit.

The conference committee labored long and hard over a compromise. A plan was offered to appoint the additional judges

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42. S. 11, 95th Cong., 2d Sess. (1977). For a dialogue by two Fifth Circuit judges on the merits of S. 11, see Gee, supra note 14, and Morgan, supra note 9. See also Barrow & Walker, supra note 3, at 189-95.
45. See supra text accompanying note 23.
47. See Reavley, supra note 44, at 3-4.
and wait one year after the appointment of the last judge for reports from the court and the Judicial Conference.48 Another compromise, offered to disarm the objection from the civil rights groups, was to create a special forum to decide conflicts between the two new circuits. The special forum was to be composed of the seventeen most senior active judges, nine from the present court, four from the proposed new fifth circuit, and four from the proposed new eleventh circuit.49 In the closing hours of the 95th Congress, Attorney General Griffin Bell, a former member of the Fifth Circuit, mediated a compromise that allowed both sides to claim victory.50 In addition to creating the new judgeships,51 section 6 of the statute provided:

Any court of appeals having more than 15 active judges may constitute itself into administrative units complete with such facilities and staff as may be prescribed by the Administrative Office of the United States Courts, and may perform its en banc function by such number of members of its en banc courts as may be prescribed by rule of the court of appeals.52

50. BARROW & WALKER, supra note 3, at 215-18. One Senate aide was quoted as saying, "It was a real cop-out by both the House and Senate conferees to get the judgeships and the political patronage . . . . They can interpret it to mean anything they want." 36 CONG. Q. WKLY. 2579 (Sept. 23, 1978) (omissions in original). Congressman McClory, a member of the conference committee, labeled § 6 "intentionally ambiguous language." 124 CONG. REC. H11, 471-72 (daily ed. Oct. 4, 1978). See CONG. REC. 32,339 (Sept. 28, 1978); CONG. REC. 33,507 (Oct. 4, 1978).
51. A total of 152 district and circuit judgeships were created, the largest number ever established by a single act of Congress. 36 CONG. Q. WKLY. 2961 (Oct. 14, 1978).
In essence, the committee thus had left initial resolution of the issue to the court itself.\textsuperscript{53}

The Fifth Circuit Judicial Council promptly appointed an ad hoc committee to consider this section of the Omnibus Judgeship Act of 1978 and the prospects of internal reorganization into administrative units and revision of the en banc procedure.\textsuperscript{54} The court's committee heard the views of each judge on both issues.\textsuperscript{55} In June 1979 the Fifth Circuit Judicial Council tabled the matter until more than sixteen active judges were in place, and it was set for consideration at the September 1979 session.\textsuperscript{56} At that session, twenty-two active judges debated the issues, and "it became obvious that there were many differences of opinion about what should be done."\textsuperscript{57} The majority agreed that the court could not split itself by rule after Congress had explicitly rejected the split legislation.\textsuperscript{58} Because Congress chose to maintain the Fifth Circuit as one court, it would be governed by one rule of law.\textsuperscript{60} As the judges themselves would soon conclude, the congressional decision to maintain one law of the circuit was sound in theory,\textsuperscript{60} but so burdensome as to be practically impossible without a division of the circuit.

Continuation of the en banc function after the internal reorganization of the circuit into administrative units threatened to endanger the notion of one law of the circuit. Several proposals were considered to alleviate the difficulties presented. One suggestion was that each administrative unit, east and west, have its own en banc court, but this approach raised the

\textsuperscript{53} The committee requested reports from the judicial council of the court and the Judicial Conference one year after the appointment of the last judge on "what rules have been implemented . . . how those rules are working, and recommendations for such additional legislation as may be necessary to provide for the effective and expeditious administration and disposition of the business of that court." H.R. CONF. REP. No. 1643, 95th Cong., 2d Sess. 9 (1978).

\textsuperscript{54} Reavley, supra note 44, at 4.

\textsuperscript{55} Id.

\textsuperscript{56} Id.

\textsuperscript{57} Id.

\textsuperscript{58} The Judicial Conference apparently drew support for this conclusion from Congress's use in § 6 of the term "administrative units" rather than "judicial units." Id.; see Omnibus Judgeship Act of 1978, 28 U.S.C. § 41 (Supp. II 1978).


\textsuperscript{60} See infra note 71.
problems of whether one en banc court would bind the other and how to resolve conflicts between the two en banc courts. One solution would have created a "grande en banc" from the entire circuit to resolve such conflicts. This proposal ultimately was deemed unacceptable because it would have added another year to the appellate process and would have postponed, not solved, the original problems of a twenty-six member court.

Because an en banc court of twenty-six judges was deemed a problem in itself, several proposals suggested the creation of a permanent en banc court of a smaller number, selected either by lot or by seniority. This proposal was rejected because it would impair the court's collegiality by establishing classes of judges and would deny nonparticipating judges an important judicial function. Another proposal, which would have provided for random selection of the en banc court for each sitting, failed because a fortuitous selection process could reduce en banc precedent to the "luck of the draw." Such a result would have had serious consequences for the rule of one law for the circuit.

This commitment to maintaining one rule of law in the circuit left few alternatives, and no court consensus could be reached. The September 1979 Judicial Council decided to postpone action under section 6 for one year, but the court soon became impatient with its self-imposed moratorium and reconsidered section 6 at its May 1980 Judicial Council. Apparently, "the impetus for the split was ... the chaos of the en banc hearings and decisions in twelve cases presented in January 1980." A judge who participated described the first en banc session of the court, in which twenty-four judges participated.

Special physical arrangements were necessary; a two-tiered bench was prepared to accommodate the members of the

61. Reavley, supra note 44, at 5.
62. Id.
63. Id. at 5-6.
64. The suggestion was made that such a permanent solution would deprive the non-participating judges of their judicial office unconstitutionally without House impeachment and Senate removal. See id; see also U.S. Const. art. III, § 1.
65. Reavley, supra note 44, at 6.
66. Id. at 7.
67. Id.; see also Ainsworth, supra note 5, at 524 n.6; Judge Tjoflat: Sentencing Reform Bill Will Allow Appellate Review, Limit Parole, THE THIRD BRANCH, Apr. 1983, at 1, 3-4.
68. Marshall, supra note 39, at 1245.
69. Ainsworth, supra note 5, at 526.
court for en banc oral arguments. Later, in the conference of the judges, obtaining a consensus presented considerable difficulty. On cases under consideration, meetings in which the sitting judges expressed their views became long. The writing of the opinion was also a protracted process. The opinion was first assigned to a member of the court to be written and then slowly circulated among the judges for consensus. Inevitably there were accompanying dissents and special concurrences. The time required to reach a result became excessive.\textsuperscript{70}

For the first time, the Council voted unanimously to petition Congress and request the creation of two autonomous circuits.\textsuperscript{71} The Judicial Council also arranged the court into two administrative units: Unit A, composed of Louisiana, Mississippi, and Texas; and Unit B, composed of Alabama, Florida, and Georgia.\textsuperscript{72} The unity of the en banc court, the judicial conference, and the judicial council were maintained. This had something of a "localizing effect" on the court and "to some extent, the functioning of the separate units served as a rehearsal for the split of the circuit."\textsuperscript{73}

The unanimous May 5, 1980 petition from the Judicial Council triggered a quick congressional response.\textsuperscript{74} Senate Bill 2830, which would have split the Fifth Circuit, passed the Senate on June 18, 1980.\textsuperscript{75} House Bill 7665, which ultimately was enacted, created the new Fifth Circuit, composed of the Canal Zone, Louisiana, Mississippi, and Texas, and the new Eleventh Circuit, composed of Alabama, Florida, and Georgia.\textsuperscript{76} Testimony at the

\textsuperscript{70} Id. One case had a majority opinion, a two-judge concurring opinion, a second seven-judge concurring opinion, an opinion concurring in part and dissenting in part joined by eleven judges, and an eight-judge dissent. \textit{See generally} Barrow & Walker, \textit{supra} note 3, at 230-37.

\textsuperscript{71} The collective sense of the gathering was that this was the only solution. Telephone interview with Chief Judge J.P. Coleman, United States Court of Appeals, Fifth Circuit (May 14, 1980).

\textsuperscript{72} A committee was appointed to smooth the transition. \textit{Id.}; \textit{see} Fifth Cir. R. 1 (1981). Judges of each unit generally were to sit together in panels for that unit, "although the authority of judges to act as members of this Court throughout this circuit shall in no way be diminished." \textit{Id.}


\textsuperscript{74} \textit{See generally} Ainsworth, \textit{supra} note 5; Heflin, \textit{supra} note 5; Tate, \textit{supra} note 5.

\textsuperscript{75} S. 2830, 96 Cong., 2d Sess. (1980).

\textsuperscript{76} H.R. 7665, 96th Cong., 2d Sess. (1980), was introduced on June 25, 1980. The only difference between H.R. 7665 and S. 2830 was that the Senate version placed the Canal Zone in the new Eleventh Circuit. Both versions divided the states as
committee hearings, held in August 1980, unanimously favored the proposals.\textsuperscript{77} The earlier concerns for civil rights implications were allayed.\textsuperscript{78}

The House Report described several reasons for splitting the Fifth Circuit.\textsuperscript{79} The committee cited the court's enormity in geography, in population, in docket, and in judgeships as diseconomies of scale.\textsuperscript{80} Ironically, the congressional solution of

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\item The following organizations supported the judges' unanimous petition for splitting the court: U.S. Department of Justice; American Bar Association; Commission on Revision of the Federal Court Appellate System; Judicial Council of the Fifth Circuit; Federal Bar Association; National Association of Attorneys General; Attorneys General of the six states within the Fifth Circuit; Delegates from the State of Georgia to the Fifth Circuit Judicial Conference, 1980; Delegates from the State of Alabama to the Fifth Circuit Judicial Conference, 1980; Delegates from the State of Texas to the Fifth Circuit Judicial Conference, 1980; Delegates from the State of Florida to the Fifth Circuit Judicial Conference, 1980; Delegates from the State of Louisiana to the Fifth Circuit Judicial Conference, 1980; Delegates from the State of Mississippi to the Fifth Circuit Judicial Conference, 1980; United States Magistrates of the Fifth Circuit; District Judges' Association of the Fifth Circuit (consisting of 110 district judges); Bankruptcy Judges of the Fifth Circuit; Mississippi Bar Association; Florida Bar Board of Governors; State Bar of Georgia; Houston, Texas Bar Association; Mobile, Alabama Bar Association; New York Times; and Alabama Black Lawyers Association.
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\item Several influential groups withdrew their prior opposition: American Civil Liberties Union; Lawyers Committee for Civil Rights Under Law; Alabama Black Lawyers Association; and NAACP Legal Defense Fund. BARROW & WALKER, supra note 3, at 241. See generally id. at 230-45.
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\item The geographical size of the six states in the Fifth Circuit had not changed since 1891, when it became one of the original circuits. Act of March 3, 1891, ch. 517, 26 Stat. 826. Indeed, modern means of transportation have made riding circuit much less onerous than in the past, albeit more expensive. Total population in the area covered by the Fifth Circuit, at the time of the split, approached 40 million. The future docket predictions were staggering. H.R. REP. No. 1390, supra note 78, at 2. With the addition of 35 district court judges in the Omnibus Judgeship Bill of 1978, Fifth Circuit filings were to have reached 5,380 by 1982. Even with the split, the dockets of each of the two new circuits would be larger than any other circuit except the Ninth; in 1980 the states of the new Fifth Circuit had 2,301 filings and the states of the new Eleventh Circuit had 1,919. Fourteen judges would sit in the new Fifth Circuit; twelve judges would sit in the new Eleventh Circuit. Id. at 4 n.9. The committee's principal emphasis was the near
1978, adding judges, had become the precipitous problem in 1980. Emphasizing the need for "uniformity in the application of the law by the Court," the committee concluded that more intracircuit conflicts were inevitable with so many multiples of panels. The en banc process, which otherwise would remedy internal conflicts, had become so difficult, time consuming, and cumbersome that its effectiveness had suffered. Eleventh Circuit Chief Judge Tjoflat, a former district judge who had served on the former Fifth Circuit, later put it simply:

One of the biggest problems facing the federal judiciary is the instability of the rule of law that results when we create great numbers of additional judgeships. The more judges we create at the appellate level, the larger we make courts of appeals, the more unstable the law becomes. If you have three judges on a court of appeals, the law is stable. It is stable for litigants, lawyers, and district judges. The outcome of a suit, should one be filed, is predictable. When you add the fourth judge to that court, you add some instability to the rule of law in that circuit because another point of view is added to the decision making. When you add the fifth judge, the sixth judge, when you get as large as the old Fifth Circuit was, with twenty-six judges, the law becomes extremely unstable. One of several thousand different panel combinations will decide the case, will interpret the law. Even if the court has a rule, as we did in the old Fifth, that one panel cannot overrule another, a court of twenty-six will still produce irreconcilable statements of the law.

Thus, because Congress could not agree upon a solution to the circuit's problems, it had delegated the task of dealing with the problem to the court, which itself could not agree upon a unified approach; the resulting judicial impasse at last precipitated congressional action.

impossibility of so many judges functioning as an en banc court, maintaining uniformity in the law of the circuit, and coping effectively with the burgeoning output of so large a court. Id. at 3.

82. H.R. REP. No. 1390, supra note 78, at 3.
83. Id.
Consistent with long tradition, traced above, the Congress continued its preoccupation with the middle tier of the federal judiciary with passage of the Fifth Circuit Reorganization Act of 1980, which became effective on October 1, 1981. After three decades of debate and study, the Fifth Circuit was finally divided, temporarily leaving three courts where there had been only one. Eventually, two courts survived: the new Fifth Circuit and the new Eleventh Circuit. According to the definitional section of the Reorganization Act, on the effective date of the Act, three courts coexisted within the confines of the former Fifth Circuit. First, the “former fifth circuit,” defined as “fifth judicial circuit of the United States as in existence on the day before the effective date,” continued to exist in two situations. If the matter was submitted for decision before the effective date of the Act, or if a petition was made for rehearing or for rehearing en banc in a matter decided or submitted before the effective date, the matter will be processed as if the Act had not been enacted. The “former fifth circuit” ceased to exist on July 1, 1984. Secondly, the Act created the “new fifth circuit,” defined as the fifth judicial circuit established by amending its composition to include the District of the Canal Zone, Louisiana, Mississippi, and Texas. Thirdly, the Act establishes the

86. For a codification of the current geographical division of the circuit courts of appeals, see 28 U.S.C. § 41 (1976). Since the courts of appeals were created in 1891, the Fifth Circuit had been comprised of the states of Alabama, Florida, Georgia, Louisiana, Mississippi and Texas. Act of March 3, 1892, ch. 517, 26 Stat. 826. These six states had been grouped together since 1866 when the circuit courts were reorganized. Act of July 23, 1866, ch. 210, 14 Stat. 209.
87. Reorganization Act, supra note 85, § 10(1).
88. Id. § 9(1). “Submitted” includes cases in which “oral argument has been heard or . . . the case has otherwise been submitted to a panel for decision.” H.R. REP. No. 1390, supra note 78, at 8.
89. Reorganization Act, supra note 85, § 9(3). This subsection preserved all rights to petitions for hearing in matters decided or submitted before the effective date. H.R. REP. No. 1390, supra note 78, at 8.
90. Reorganization Act, supra note 85, §§ 9(1), (3); H.R. REP. No. 1390, supra note 78, at 8.
91. Reorganization Act, supra note 85, § 11. The transition period also allows the former Fifth Circuit broad administrative discretion to resolve unforeseen developments. H.R. REP. No. 1390, supra note 78, at 9.
92. Reorganization Act, supra note 85, § 10(2). This is “the Fifth Circuit created” by the Act. H.R. REP. No. 1390, supra note 78, at 9 (emphasis added).
"eleventh circuit," defined as the "newly created" eleventh judicial circuit composed of Alabama, Florida, and Georgia. Thus, at least for a short time and for limited purposes, the former court continued to exist, to be joined and ultimately replaced by two new courts.

This legislative division raised no small question for stare decisis: what would be the precedential value of former Fifth Circuit case law in the new Eleventh Circuit? Court watchers did not have to wait long for an Eleventh Circuit answer to the question. A unanimous en banc court, in *Bonner v. City of Prichard*, ruled on the issue in the first appeal to be heard and the first opinion to be published by the new court. The Eleventh Circuit held:

> The decisions of the United States Court of Appeals for the Fifth Circuit (the "former Fifth" or the "old Fifth"), as that court existed on September 30, 1981, handed down by that court prior to the close of business on that date, shall be binding as precedent in the Eleventh Circuit, for this court, the district courts, and the bankruptcy courts in the circuit.

First, the en banc court committed the new Eleventh Circuit to the absolute rule of interpanel accord—by which one panel is obliged to follow the holdings of previous panels—a rule that had been followed in the former Fifth Circuit. Second, the court rejected the *tabula rasa* of beginning to judge in a new circuit without precedent. The judges concluded, "We choose instead to begin on a stable, fixed, and identifiable base while maintaining the capacity for change." Finally, the court

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93. Reorganization Act, supra note 85, § 10(2).
94. Id. § 10(3).
95. Additionally, the Reorganization Act (1) specified the number of active judges for each new circuit (14 for the new Fifth Circuit and 12 for the new Eleventh Circuit), id. § 4; (2) assigned the regular active judges to the respective new circuits, id. § 5; (3) provided senior judges with an option to be assigned to either new circuit, id. § 6; (4) specified the seniority of the judges within each new circuit, id. § 7; and (5) authorized the new Eleventh Circuit to hold court in the New Orleans courthouse until its own new quarters in Atlanta were complete, id. § 8. See generally H.R. REP. No. 1390, supra note 78, at 6-9.
96. See generally Baker, supra note 3.
97. 661 F.2d 1206 (11th Cir. 1981) (en banc).
98. Id. at 1207.
99. Id. at 1209.
100. Id. at 1211.
101. Id. Both appellant and appellees in *Bonner* urged the adoption of the former
selected the en banc decision in *Bonner* as a vehicle to transfer former Fifth Circuit precedent into the new court's jurisprudence as the foundation for building its own stare decisis.102 The new Eleventh Circuit likewise adopted new rules which were taken from the former Fifth Circuit and simplified and consolidated.103

And so judicial history was made. The House Report summarized the Congressional hope for the new Fifth Circuit and the new Eleventh Circuit:

> The goal of the legislation is to meet societal change and growing caseloads in the six States presently comprising the Fifth Circuit. It accomplishes this by providing the residents, attorneys and litigants who reside or litigate within those States with a new Federal judicial structure which is capable of meeting the clear mandates of our judicial system—the rendering of consistent, expeditious, fair and inexpensive justice. The two new circuits will preserve and promote the vigor, integrity and independence of the illustrious parent court.104

Congress divided the former Fifth Circuit essentially because of its size in geography, population, docket, and judgeships. And the creation of the new Eleventh Circuit arguably allowed for a “more stable circuit law, a better functioning en banc court, . . . improved collegiality, less travel, more efficient administration, and improved [capability] of the judges to keep up with the law of the circuit.”105 Redrawing the circuit boundaries, however, did absolutely nothing to relieve the press of the caseload. The new Fifth Circuit reached the predivision crisis level of filings in less than five years.106 Before the two new courts were ten years old, Chief Judge Charles Clark of the Fifth Circuit chronicled the region's relentless docket growth:

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102. *Id.* at 1211.
103. *Id.* at 1211.
105. BARROW & WALKER, *supra* note 3, at 246-47.
Since this is a joint conference [of the Fifth and Eleventh Circuits], I thought it may be interesting to compare where the circuits began in 1981 and where they are now. In the district courts, pending civil cases in the 5th Circuit increased 60% since 1981. They presently total 36,871. In the 11th Circuit, the increase has been 48% and the present total is 19,530. Criminal cases in the district courts in the Fifth Circuit have increased by an astounding 280% to the present total of 4,343. The 11th Circuit criminal case increase has been almost as dramatic: 188%. Pending criminal cases now total 3,539 pending cases. Pending bankruptcy cases in the 5th Circuit increased 108% to their present level of just over 100,000 while the 11th Circuit's pending bankruptcy cases increased 79% to the present-day total of 93,514. In the Courts of Appeals, pending cases in the Fifth rose by 35% to the present total of 2,955, while the 11th Circuit experienced a 44% increase in pending cases to a total of 3,171.107

Before the end of the Eleventh Circuit's first decade, the Eleventh Circuit Judicial Council reached the point of passing a formal and unanimous resolution in March 1989 asking Congress not to add any more circuit judgeships, despite statistical caseload justifications, because that court of appeals simply would grow too large.108

The division of the Fifth Circuit thus did not perform any lasting miracle. At least some members of Congress have come to recognize that the technique of splitting circuits has an inevitable downside. It irreversibly lessens the "federalizing function of courts of appeals."109 Subdividing courts of appeals is a limited strategy and a reform that simply does not work.110 The largest courts of appeals today with the largest problems—the District of Columbia, the Second, and the Ninth Circuits—practically resist

109. Wisdom, supra note 21, at 788; Wright, supra note 6, at 974.
110. Gee, supra note 14, at 806 ("[A]re we to continue the splitting process until it becomes mincing, with a United States Court of Appeals for the Houston Metropolitan Area?").
111. See Carrington, supra note 6, at 587 (1969); Hellman, supra note 23, at 1192-1237.
any feasible division. This is the larger lesson to learn from the Reorganization Act of 1980.

In the abstract, dividing circuits might be more feasible if the entire national geographical scheme could be redrawn, the approach always rejected as too unsettling. This would permit an initial levelling of caseload and judgeships. We might have twenty circuits of nine judges organized with roughly equal caseloads under a completely redrawn system of boundary lines. This symmetry would be gained, however, at a high cost in disruption. Much federalizing influence of the courts of appeals would be lost. The balkanized precedent of the law of the circuits would be worsened without any compensating improvements. More circuits multiply intercircuit conflicts, and the resulting hegemony of national law is one of the principle banes of the federal appellate court system. If circuit-splitting is a bad idea, circuit-mincing is even worse. The cure is worse than the disease, for circuit-splitting does not solve the problems of one circuit and merely postpones solution of the problems of two. Former Chief Judge Goodwin of the Ninth Circuit summed up the lesson learned from the division of the Fifth Circuit, during the recent debate over whether to divide his own court:

Splitting the Ninth Circuit, or other circuits, would not address the real problem facing the Federal Courts of Appeals. The problem is not structure, but workload. Creating more regional circuits would not diminish the work, but merely divide it. The number of cases that must be heard by three-judge panels nationwide would remain the same and continue to grow no matter how many new circuits are formed.

This is why circuit-splitting has fallen into disrepute with would-be reformers. This is why the Eleventh Circuit, which owes

115. See generally REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (April 2,
its origin to the problems of bigness, likely will continue to grow bigger in caseload and eventually in judgeships for some time to come.