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The Level of Supreme Court Advocacy

Lewis F. Powell Jr.

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THE LEVEL OF SUPREME COURT ADVOCACY

I AM OFTEN ASKED BY JUDGES AND LAWYERS WHAT HAS SURPRISED ME MOST AS A NEWCOMER TO THE SUPREME COURT. AS YOU MAY RECALL FROM MY PREVIOUS REMARKS HERE AT THE FIFTH CIRCUIT, MY PRINCIPAL SOURCE OF DISQUIET WAS - AND STILL IS - THE CASELOAD OF THE COURT, A SITUATION NOT UNIQUE WITH US AND ONE PAINFULLY FAMILIAR TO ALL OF YOU HERE IN THE FIFTH.

I CONTINUE, ALSO, IN A STATE OF DISBELIEF AS TO THE INADEQUACY OF THE STAFF AND FACILITIES PROVIDED FOR THE HIGHEST COURT IN OUR COUNTRY. BUT I NEED NOT ELABORATE ON MY PREVIOUSLY EXPRESSED VIEWS.

RATHER, I TURN TO ANOTHER SURPRISE: MY DISAPPOINTMENT IN THE QUALITY OF BRIEFS AND ORAL ARGUMENTS. I AM GENERALIZING, OF COURSE, AND SHOULD NOT BE UNDERSTOOD AS SAYING THAT ALL OR

EVEN THE GREATER MAJORITY OF CASES BEFORE US ARE POORLY BRIEFED OR ARGUED. THE CHIEF JUSTICE HAS SPOKEN ON THIS SUBJECT WITH HIS USUAL PERCEPTION AND FORCE. AS HE HAS NOTED, AND AS WE ALL RECOGNIZE, THE QUALITY OF WRITTEN AND VERBAL ADVOCACY VARIES QUITE WIDELY.

MANY OF OUR CASES ARE SUPERBLY PRESENTED BY HIGHLY COMPETENT COUNSEL, AND THAT COMPETENCY IS NOT NECESSARILY RELATED TO AGE AND EXPERIENCE. SOME OF THE BEST ADVOCACY I HAVE WITNESSED HAS COME FROM FAIRLY YOUNG MEMBERS OF THE BAR, WHO TEND TO BE ESPECIALLY THOROUGH IN THEIR RESEARCH AND BRIEFING.

BUT THE DELIGHT OF THE OCCASIONAL HIGH LEVEL OF COUNSEL PERFORMANCE IS DILUTED BY THE MORE NUMEROUS PERFORMANCES THAT ONE MUST RATE AS "AVERAGE" OR "POOR". OF COURSE, NO ONE EXPECTS A JOHN W. DAVIS IN EVERY CASE, BUT I HAD HOPED FOR GREATER ASSISTANCE FROM BRIEFS AND ORAL ARGUMENTS THAN WE OFTEN RECEIVE.

I CERTAINLY HAD EXPECTED THAT THERE WOULD BE RELATIVELY FEW MEDIOCR PERFORMANCES BEFORE OUR COURT. I REGRET TO SAY THAT PERFORMANCE HAS NOT MEASURED UP TO MY EXPECTATIONS.

OF THE SOME 4,000 PETITIONS AND APPEALS THAT WILL BE FILED WITH US DURING THE CURRENT FISCAL YEAR, ABOUT 60% WILL BE CRIMINAL CASES. OF THE 168 CASES ARGUED THIS TERM, ABOUT 2.5% WERE CRIMINAL. A HIGH PERCENTAGE OF ALL OF THESE COME DIRECTLY OR BY HABEAS CORPUS FROM STATE COURTS.

AS A GENERAL OBSERVATION, IT IS SAFE TO SAY - ESPECIALLY WHERE IMPORTANT ISSUES OF CONSTITUTIONAL LAW OR CRIMINAL PROCEDURE ARE INVOLVED - THAT LAW ENFORCEMENT IS FREQUENTLY OUTGUNNED AND OVERMATCHED BY THE DEFENSE. TO BE SURE THIS IMBALANCE DOES NOT EXIST WHEN THE UNITED STATES IS A PARTY.

THE SOLICITOR GENERAL'S OFFICE, ALTHOUGH OVERWORKED TO THE POINT WHERE IT HAS DIFFICULTY IN KEEPING CURRENT, AFFORDS A HIGH LEVEL OF REPRESENTATION BOTH IN BRIEFING AND ARGUING CASES. BUT THE SITUATION IS FAR FROM UNIFORMLY GOOD WHERE A STATE IS BEFORE THE COURT.

IN A FEW STATES THE LOCAL PROSECUTOR REMAINS RESPONSIBLE FOR THE CASE ALL THE WAY TO THE SUPREME COURT. IN MOST CASES, HOWEVER, THE STATE WILL BE REPRESENTED BY AN ASSISTANT FROM ITS ATTORNEY GENERAL'S OFFICE. SOME OF THE WEAKEST BRIEFS AND ARGUMENTS COME FROM THESE REPRESENTATIVES OF THE PUBLIC INTEREST.

OFTEN THEY ARE OPPOSED BY EXCEPTIONALLY ABLE COUNSEL. THESE MAY BE APPOINTED, AS THE JUDICIARY USUALLY TAKES CARE TO SELECT COMPETENT COUNSEL.

IN THE "BIG" CASES, ESPECIALLY WHERE THE FRONTIERS OF CONSTITUTIONAL OR CRIMINAL LAW

ARE SOUGHT TO BE EXTENDED IN THE PROTECTION OF RIGHTS OF ACCUSED PERSONS, INTERESTED NATIONAL ORGANIZATIONS WILL PROVIDE FIRST RATE LAWYERS, OFTEN INCLUDING FACULTY MEMBERS WITH SPECIAL COMPETENCY IN THE PARTICULAR AREA INVOLVED.

THERE IS LITTLE DOUBT THAT THE MARKED TREND OF THE LAW TOWARD EXPANDED RIGHTS OF DEFENDANTS, A TREND SO NOTICEABLE OVER THE PAST TWO DECADES, HAS BEEN INFLUENCED IN PART BY THE IMBALANCE OF THE REPRESENTATION EQUATION BEFORE THE COURT.

I DO NOT IMPLY THAT THE CENTRAL CORE OF THIS TREND WOULD NOT HAVE BEEN PRETTY MUCH THE SAME. THERE WERE AREAS OF THE CRIMINAL LAW, IMPLICATING IMPORTANT CONSTITUTIONAL GUARANTEES, THAT URGENTLY NEEDED REEXAMINATION AND REFORM.

BUT THE FACT IS, AS EVERY JUDGE KNOWS, THAT THE QUALITY OF ADVOCACY - THE RESEARCH, BRIEFING AND ORAL ARGUMENT OF THE CLOSE AND DIFFICULT CASES - DOES CONTRIBUTE SIGNIFICANTLY TO THE DEVELOPMENT OF PRECEDENTS. THIS IS

A VITAL ROLE PERFORMED BY THE BAR, AND NO ONE WOULD WISH IT TO BE DIFFERENT. BUT THIS ROLE WOULD BE MORE EFFECTIVE, AND CERTAINLY THE PUBLIC INTEREST BETTER SERVED, IF THE CONTESTING SIDES IN THE GREAT CASES, AT LEAST, WERE MORE EVENLY MATCHED.

THIS IS NOT THE OCCASION TO DO MORE THAN SUGGEST ONE OF THE REASONS FOR THIS SITUATION. NO DOUBT THE OFFICES OF MOST ATTORNEYS GENERAL AND PROSECUTORS ARE UNDERFINANCED AND UNDERMANNED.

THE TYPICAL ATTORNEY GENERAL HAS A BROAD SPECTRUM OF RESPONSIBILITIES, BOTH POLITICAL AND LEGAL. HE MUST DEPEND IN LARGE PART ON THE NUMBER AND ABILITY OF HIS ASSISTANTS. HE MAY SIMPLY LACK THE REQUISITE BUDGET TO STAFF HIS OFFICE ADEQUATELY.

I WILL CITE ONE EXAMPLE. NEW YORK CITY, WITH SOME 600 ASSISTANT DISTRICT ATTORNEYS, WAS RECENTLY CONFRONTED WITH A SERIOUS PROPOSAL FOR UNIONIZATION. THE DISTRICT ATTORNEY OF

ONE OF THE BOROUGHES WAS QUOTED AS CONCEDED THAT THE ASSISTANTS "ARE GROSSLY UNDERPAID"; THAT THE LOW SALARIES HAVE HANDICAPPED RECRUITING AND CONTRIBUTED TO A "HIGH TURNOVER OF LAWYERS".

IN COMMENTING ON THE QUALITY FACTOR, HE SAID QUITE FRANKLY:

"I HAVE TO SEND BOY SCOUTS AGAINST HIGH POWERED DEFENSE ATTORNEYS IN A HOMICIDE CASE."

TURNING FROM THE REPRESENTATION OF CRIMINAL CASES, I ALSO FIND A NOTABLE UNEVENNESS IN THE ABILITY OF COUNSEL IN ALL TYPES OF CASES. THE DIFFERENCE IS THAT THE "MATCH UPS" IN THE CIVIL CASES ARE NOT AS FREQUENTLY OUT OF BALANCE.

THE SITUATION I HAVE DESCRIBED IN CRIMINAL CASES MAY OCCUR WHERE MAJOR SOCIAL LEGISLATION IS UNDER SCRUTINY OR OPPORTUNITY TO ACHIEVE SOCIAL REFORM THROUGH THE COURT IS PERCEIVED. IN MANY OF THESE CASES WE SEE ABLE

REPRESENTATIVES ON BOTH SIDES, BUT THIS IS BY NO MEANS UNIFORMLY TRUE. INTERESTED GROUPS AND ORGANIZATIONS OFTEN ARE CAREFUL IN THE SELECTION OF THE TEST CASE AND EQUALLY CAREFUL IN THE CHOICE OF COUNSEL.

THE FEDERAL GOVERNMENT IS WELL REPRESENTED BY THE SOLICITOR GENERAL IF IT IS A PARTY, BUT OFTEN THE IMPORT OF THESE CASES APPARENTLY IS NOT IDENTIFIED IN TIME OR POSSIBLY NOT EVEN COMPREHENDED BY STATE AUTHORITIES OR BY SOME OF THE PRIVATE INTERESTS AFFECTED.

I HAVE ONLY ADMIRATION FOR THOSE WHO RECOGNIZE THE POTENTIAL IMPORTANCE OF, AND WHO PREPARE CAREFULLY, FOR SUPREME COURT LITIGATION. I WISH THEIR EXAMPLE WERE MORE WIDELY FOLLOWED.

IN THE EARLY DECADES OF OUR COUNTRY, INDEED EXTENDING WELL INTO THIS CENTURY, THERE EXISTED WHAT WAS SOMETIMES CALLED THE SUPREME COURT BAR. THERE WERE A RELATIVELY SMALL NUMBER

OF LAWYERS WHO APPEARED BEFORE THE COURT WITH NOTABLE FREQUENCY. TODAY, APART FROM THE SOLICITOR GENERAL'S OFFICE, COUNSEL FOR A FEW NATIONAL ORGANIZATIONS AND ASSISTANT ATTORNEYS GENERAL FROM TWO OR THREE OF THE LARGER STATES, MOST OF THE LAWYERS WHO HAVE CASES BEFORE THE COURT ARE THERE ON A "ONE SHOT" BASIS.

ONLY A FEW LAWYERS IN THE PRIVATE PRACTICE HAVE A NATIONAL OR EVEN A REGIONAL REPUTATION AS SUPREME COURT ADVOCATES. NO DOUBT THIS RESULTS IN PART FROM THE VAST EXPANSION OF THE LEGAL PROFESSION, FROM THE SHEER SIZE OF OUR COUNTRY, AND FROM THE CONSEQUENT INABILITY OF CLIENTS TO IDENTIFY THE LAWYERS WITH THE REQUISITE SKILLS.

THE NUMBER OF LAWYERS BEING ADMITTED TO THE SUPREME COURT BAR IS INDICATIVE OF WHAT IS HAPPENING. DURING THE CURRENT TERM WE HAVE ADMITTED 4,074 LAWYERS. DURING MY THREE TERMS ON THE COURT, ADMISSIONS HAVE TOTALED 13,500.

BECAUSE OF NO SYSTEMATIC MEANS OF KNOWING ABOUT DEATHS AND RETIREMENTS, OUR CLERK'S OFFICE DOES NOT KNOW THE TOTAL NUMBER OF LAWYERS PRESENTLY ENTITLED TO PRACTICE BEFORE THE SUPREME COURT. IT IS EVIDENT FROM THE FIGURES CITED THAT THIS NUMBER RUNS WELL INTO THE TENS OF THOUSANDS.

THE ANSWERS TO THE NEED FOR HIGHER QUALITY ADVOCACY ARE BY NO MEANS SELF EVIDENT. ONE MAY ASSERT WITH SOME CONFIDENCE THAT THE STATES CAN AND SHOULD MOVE EFFECTIVELY TO IMPROVE THEIR REPRESENTATION OF THE PUBLIC INTEREST. BEYOND THIS IT IS DIFFICULT TO BE SPECIFIC. SUGGESTIONS HAVE BEEN MADE OVER THE YEARS FOR THE CERTIFICATION OF SPECIALISTS, WITH THE VIEW TO DEVELOPING A BRANCH OF THE PROFESSION SOMEWHAT ANALOGOUS TO THE BRITISH BARRISTERS.

BUT EVERY STUDY OF THIS PROPOSAL, MADE BY THE ABA AND OTHERS, HAS ENCOUNTERED SIGNIFICANT

PRACTICAL DIFFICULTIES. THERE ARE PROFESSIONAL ORGANIZATIONS, NOTABLY THE AMERICAN COLLEGE OF TRIAL LAWYERS AND ASSOCIATION OF TRIAL LAWYERS OF AMERICA, THAT DO CONCENTRATE ON THE IMPROVEMENT OF THE TRIAL BAR.

PERHAPS THE MOST HOPEFUL LONG-RANGE PROSPECT, ESPECIALLY IN THE PRIVATE SECTOR, IS THAT THE PUBLIC GRADUALLY WILL DEVELOP AN INCREASING AWARENESS OF THE IMPORTANCE OF SELECTING LAWYERS ACCORDING TO THE TASK AT HAND. A SIGNIFICANT DEGREE OF SPECIALIZATION IS AS NECESSARY TODAY IN MANY AREAS OF THE LAW AS IT IS IN MEDICINE.

ONE IS NOT WELL ADVISED TO EMPLOY A SUCCESSFUL PERSONAL INJURY SPECIALIST IF THE PROBLEM INVOLVES A NOVEL ISSUE UNDER THE SECURITIES ACTS. SIMILARLY, THE CLIENT IS NOT WELL SERVED BY SELECTING HIS BEST FRIEND OR NEIGHBOR TO BRIEF AND ARGUE AN APPELLATE CASE IF HIS EXPERTISE HAS BEEN CONFINED, AS IS OFTEN THE CASE, EXCLUSIVELY TO AN OFFICE PRACTICE.

THE BAR ITSELF HAS A LARGE RESPONSIBILITY FOR EDUCATING THE PUBLIC AND FOR ENCOURAGING STANDARDS OF ETHICS AND RESPONSIBILITY THAT WILL PROMPT LAWYERS TO RECOGNIZE THEIR DUTY NOT TO TAKE EVERY REPRESENTATION THAT IS OFFERED THEM BUT RATHER TO SEE THAT THE PROSPECTIVE CLIENT IS PLACED IN TRULY COMPETENT HANDS. THE MEDICAL PROFESSION HAS BEEN AHEAD OF US IN THIS RESPECT.

I HAVE ONE FINAL THOUGHT THAT I MENTION WITH HESITATION, AS I DOUBT THAT MANY OF US ON THE BENCH WOULD BE WILLING TO IMPLEMENT IT: WHY SHOULDN'T JUDGES THEMSELVES, IN SITUATIONS WHERE AN EGREGIOUSLY BAD BRIEF HAS BEEN FILED, SIMPLY REJECT IT AS BEING INADEQUATE AND CALL FOR A REBRIEFING? IF ENOUGH OF US DID THIS IN CAREFULLY SELECTED CASES, AND AFTER GIVING DUE WARNING IN OUR RULES, THE BAR - AND PROSPECTIVE CLIENTS - PERHAPS WOULD GET THE MESSAGE.

MEMORANDUM

TO: Mr. Justice Powell
FR: Mark W. Cannon *M.W.C.*
RE: Statement by Roscoe Pound
DT: July 30, 1974

Regarding your recent speech on "Appellate
Advocacy," Russell Wheeler (Judicial Fellow) thought
you might be interested in the attached statement by
Roscoe Pound.

MWC:bb

Attachment: as noted

POUND ON APPELLATE ADVOCACY

FR: R. Pound, APPELLATE PROCEDURE IN CIVIL CASES (1941)

p. 381:

"Again, taking the country as a whole, there is need of better advocacy in appellate courts. Slovenly briefs and ill-prepared arguments, or slovenly briefs and submission on briefs, cannot lead to good work by a bench laboring with a heavy docket. It is the function of counsel to aid the court by presenting their clients' case so that the court may be assured it is missing nothing that it ought to consider and has before it for consideration all that can properly be urged. . . . [T]he waste of time in trying to dispose adequately of a case inadequately presented is no small item in apportioning the energies of almost any reviewing court. A great deal of what seems needless technicality in nineteenth-century appellate procedure grew up to meet such situations. After looking over volumes of briefs and records of the highest courts of most of our states and seeing the sort of case too often presented for review, I cannot but sympathize with the pronouncement of the Supreme Court of Oregon that it is not the office of that court 'to teach litigants how to appeal.'" [9 Oregon Comp. Laws Ann. 315 (1940)]

Sally -
attach to
File copy
of my Speech
to CA 5 on
May 29 1974

HP/SS 5/25/74

FIFTH CIRCUIT JUDICIAL CONFERENCE
New Orleans, Louisiana
May 27, 1974
Lewis F. Powell, Jr.

File Copy

THE LEVEL OF SUPREME COURT ADVOCACY

I am often asked by judges and lawyers what has surprised me most as a newcomer to the Supreme Court. As you may recall from my previous remarks here at the Fifth Circuit, my principal source of disquiet was - and still is - the caseload of the Court, a situation not unique with us and one painfully familiar to all of you here in the Fifth. I continue, also, in a state of disbelief as to the inadequacy of the staff and facilities provided for the highest court in our country. But I need not elaborate on my previously expressed views.

Rather, I turn to another surprise: My disappointment in the quality of briefs and oral arguments. I am generalizing, of course, and should not be understood as saying that all or even the great majority of cases before us are poorly briefed or argued. The Chief Justice has spoken on this subject with his usual perception and force. As he has noted, and as we all recognize, the quality of written and verbal advocacy varies quite widely. Many of our cases are superbly presented by highly competent counsel, and that competency is not necessarily

related to age and experience. Some of the best advocacy I have witnessed has come from fairly young members of the bar, who tend to be especially thorough in their research and briefing.

But the delight of the occasional high level of counsel performance is diluted by the more numerous performances that one must rate as "average" or "poor". Of course, no one expects a John W. Davis* in every case, but I had hoped for greater assistance from briefs and oral arguments than we often receive. I certainly had expected that there would be relatively few mediocre performances before our Court. I regret to say that performance has not measured up to my expectations.

Of the some 4,000 petitions and appeals that will be filed with us during the current fiscal year, about 60% will be criminal cases. Of the 168 cases argued this term, about ^{25%} 2.5% were criminal. A high percentage of all of these come directly

*John W. Davis argued a total of 140 cases during his long career as an advocate before the Court. During his term as Solicitor General (1913-1918), he argued 67 cases. After his retirement from that office, he appeared 73 times on behalf of private clients, the last time being Brown in 1954. Only two men have appeared more often. Walter Jones argued some 317 cases from 1801-1850, and Daniel Webster argued somewhere between 185 and 200. No one else in this century comes close to Davis' record.

or by habeas corpus from state courts. As a general observation, it is safe to say - especially where important issues of constitutional law or criminal procedure are involved - that law enforcement is frequently outgunned and overmatched by the defense. To be sure this imbalance does not exist when the United States is a party. The Solicitor General's Office, although overworked to the point where it has difficulty in keeping current, affords a high level of representation both in briefing and arguing cases. But the situation is far from uniformly good where a state is before the Court.

In a few states the local prosecutor remains responsible for the case all the way to the Supreme Court. In most cases, however, the state will be represented by an assistant from its attorney general's office. Some of the weakest briefs and arguments come from these representatives of the public interest. Often they are opposed by exceptionally able counsel. These may be appointed, as the judiciary usually takes care to select competent counsel.

In the "big" cases, especially where the frontiers of constitutional or criminal law are sought to be

extended in the protection of rights of accused persons, interested national organizations will provide first rate lawyers, often including faculty members with special competency in the particular area involved. There is little doubt that the marked trend of the law toward expanded rights of defendants, a trend so noticeable over the past two decades, has been influenced in part by the imbalance of the representation equation before the Court.

I do not imply that the central core of this trend would not have been pretty much the same. There were areas of the criminal law, implicating important constitutional guarantees, that urgently needed reexamination and reform. But the fact is, as every judge knows, that the quality of advocacy - the research, briefing and oral argument of the close and difficult cases - does contribute significantly to the development of precedents. This is a vital role performed by the bar, and no one would wish it to be different. But this role would be more effective, and certainly the public interest better served, if the contesting sides in the great cases, at least, were more evenly matched.

This is not the occasion to do more than suggest one of the reasons for this situation. No doubt the offices of most attorneys general and prosecutors are underfinanced and undermanned. The typical attorney general has a broad spectrum of responsibilities, both political and legal. He must depend in large part on the number and ability of his assistants. He may simply lack the requisite budget to staff his office adequately.

I will cite one example. New York City, with some 600 Assistant District Attorneys, was recently confronted with a serious proposal for unionization. The District Attorney of one of the Boroughs was quoted as conceding that the assistants "are grossly underpaid"; that the low salaries have handicapped recruiting and contributed to a "high turnover of lawyers". In commenting on the quality factor, he said quite frankly:

"I have to send boy scouts against high powered defense attorneys in a homicide case."*

Turning from the representation of criminal cases, I also find a notable unevenness in the ability of counsel in all types of cases. The difference is that the "match ups" in the civil cases are not as frequently out of balance.

*New York Times, Monday, April 8, 1974.

The situation I have described in criminal cases may occur where major social legislation is under scrutiny or opportunity to achieve social reform through the Court is perceived. In many of these cases we see able representation on both sides, but this is by no means uniformly true. Interested groups and organizations often are careful in the selection of the test case and equally careful in the choice of counsel. The federal government is well represented by the Solicitor General if it is a party, but often the import of these cases apparently is not identified in time or possibly not even comprehended by state authorities or by some of the private interests affected.

I have only admiration for those who recognize the potential importance of, and who prepare carefully, for Supreme Court litigation. I wish their example were more widely followed.

In the early decades of our country, indeed extending well into this century, there existed what was sometimes called the Supreme Court Bar. There were a relatively small number of lawyers who appeared before the Court with notable frequency. Today, apart from the Solicitor General's

office, counsel for a few national organizations and assistant attorneys general from two or three of the larger states, most of the lawyers who have cases before the Court are there on a "one shot" basis. Only a few lawyers in the private practice have a national or even a regional reputation as Supreme Court advocates. No doubt this results in part from the vast expansion of the legal profession, from the sheer size of our country, and from the consequent inability of clients to identify the lawyers with the requisite skills.

The number of lawyers being admitted to the Supreme Court bar is indicative of what is happening. During the current term we have admitted 4,074 lawyers. During my three terms on the Court, admissions have totaled 13,500. Because of no systematic means of knowing about deaths and retirements, our Clerk's Office does not know the total number of lawyers presently entitled to practice before the Supreme Court. It is evident from the figures cited that this number runs well into the tens of thousands.

The answers to the need for higher quality advocacy are by no means self evident. One may assert with some confidence that the states can and should move effectively

to improve their representation of the public interest. Beyond this it is difficult to be specific. Suggestions have been made over the years for the certification of specialists, with the view to developing a branch of the profession somewhat analogous to the British barristers. But every study of this proposal, made by the ABA and others, has encountered significant practical difficulties. There are professional organizations, notably the American College of Trial Lawyers and Association of Trial Lawyers of America, that do concentrate on the improvement of the trial bar.

Perhaps the most hopeful long-range prospect, especially in the private sector, is that the public gradually will develop an increasing awareness of the importance of selecting lawyers according to the task at hand. A significant degree of specialization is as necessary today in many areas of the law as it is in medicine. One is not well advised to employ a successful personal injury specialist if the problem involves a novel issue under the Securities Acts. Similarly, the client is not well served by selecting his best friend or neighbor to brief and argue an appellate case if his expertise has been

confined, as is often the case, exclusively to an office practice.

The Bar itself has a large responsibility for educating the public and for encouraging standards of ethics and responsibility that will prompt lawyers to recognize their duty not to take every representation that is offered them but rather to see that the prospective client is placed in truly competent hands. The medical profession has been ahead of us in this respect.

I have one final thought that I mention with hesitation, as I doubt that many of us on the bench would be willing to implement it: Why shouldn't judges themselves, in situations where an egregiously bad brief has been filed, simply reject it as being inadequate and call for a rebriefing? If enough of us did this in carefully selected cases, and after giving due warning in our Rules, the bar - and prospective clients - perhaps would get the message.

Trunk File B

November 19, 1973

Dear John:

It was good to visit with you on the telephone this morning. If we have any reoccurrence of the "Gellis case" problem, my secretary has been instructed to bring it to my personal attention.

I have talked to Bill Rehnquist about the possibility of his accepting an invitation to attend the CA5 Conference. Bill would like very much to visit our Circuit, especially as he knows so few of our Judges personally. He is a bit concerned (as was I) by the fact that the Conference is scheduled for the last week in May. I did not press Bill for even a tentative answer as to whether he thought he could accept an invitation. It was clear, however, that he is most appreciative of your interest and I think there is at least some chance of his accepting.

In view of my family obligation (and pleasure) to attend our son's graduation exercises at Washington and Lee University on May 29 and 30, it will be a bit difficult for me to include a trip to Florida in my schedule that week so near the end of our Term. But I have a strong desire not to miss a Circuit meeting.

It is good to know that you will be scheduling future meetings somewhat earlier. You mentioned the last two weeks in April. In checking (since our conversation) Court argument schedules here for the last two Terms, I find that we have had argument periods during the last two full weeks in April. If convenient for your Court, the first two weeks in May are almost always free of arguments before this Court.

It was good to talk to you.

Sincerely,

Hon. John R. Brown
Chief Judge
U. S. Court of Appeals for the
Fifth Circuit
Houston, Texas 77002

lfp/ss

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

JOHN R. BROWN
CHIEF JUDGE
HOUSTON, TEXAS 77002

January 22, 1974

Honorable Lewis F. Powell, Jr.
Associate Justice
United States Supreme Court
U. S. Supreme Court Building
Washington, D. C.

Fifth Circuit Judicial Conference
May 27-28, 1974

My dear Lewis:

After I brought to Director Kirks' attention the concern some of our Judges expressed about the President's policy on excess travel in the energy crisis and its impact upon Judicial Conferences, our Council has been biding its meeting of January 15 to determine its action. In our meeting this past week in New Orleans, the Judicial Council did two things: (1) It changed the format markedly from three 1/2-day work sessions to a single day of continuous work sessions with no organized recreational or social activity; and (2) with a reduced official guest list of those now eligible to attend, it obtained hotel reservations at the Royal Sonesta in New Orleans, a more central location than Hollywood, Florida. The meeting will, therefore, be held on Monday, May 28, to be attended by District Judges, Circuit Judges, official delegates, and representatives of the Administrative Office. The Council will meet on Tuesday morning and if we have any en banc matters, it is likely these will be handled on Wednesday. The District Judges will have their own Executive Session on Tuesday.

In a personal way I have a keen regret about all of this because I think we have found a good way to blend both the serious and recreational demands.

Hon. Lewis F. Powell, Jr.
January 22, 1974
Page 2

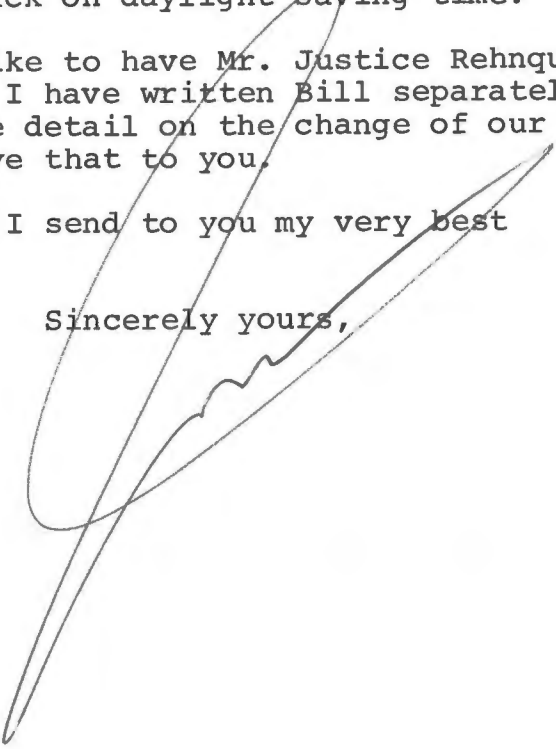
Of course, nothing is more a matter of business and judicial administration than the report or remarks of the Circuit Justice. Consequently, we are still very hopeful that you will be able to attend all or part of the Monday session and stay as long as possible on Tuesday. I recall, of course, your family problem and your concern about the timing of this meeting and its impact upon opinion-writing for the Supreme Court. Perhaps it makes it a little easier since New Orleans is so accessible to Washington, D. C. and vice versa.

* I enclose copies of the revised Air Guide to and from New Orleans which I think will be rather firm since we have already gone back on daylight saving time.

We would still like to have Mr. Justice Rehnquist make some remarks, and I have written Bill separately. I am not going into the detail on the change of our format, and I will leave that to you.

In the meantime, I send to you my very best wishes.

Sincerely yours,



JRB:sb
* Encl.

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UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

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JAN 25 1974

File

JOHN R. BROWN
CHIEF JUDGE
HOUSTON, TEXAS 77002

January 22, 1974

Honorable William H. Rehnquist
Associate Justice
United States Supreme Court
U. S. Supreme Court Building
Washington, D. C.

Fifth Circuit Judicial Conference
May 27-28, 1974

My dear Bill:

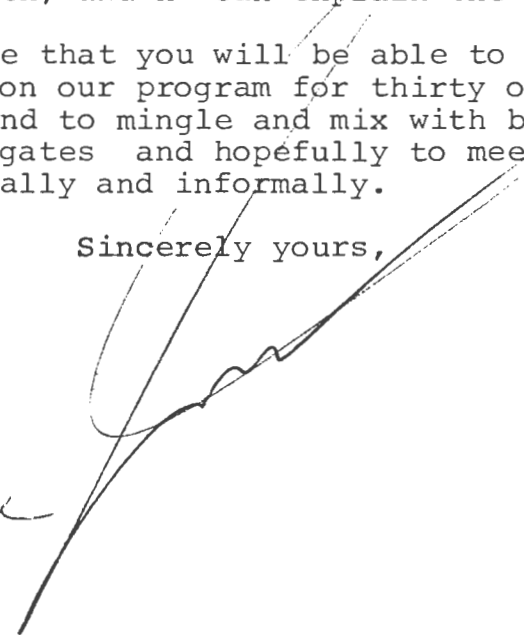
W
I have talked informally with your colleague and our Circuit Justice about your coming down to be on our program at the then planned Judicial Conference at Hollywood, Florida. I had put off direct communication with you pending our decision on whether to hold the Conference, or move it, or both. We have now moved it to New Orleans for a one-day business session. I have written Lewis at length, and he can explain the changes.

I certainly hope that you will be able to accept our invitation to be on our program for thirty or so minutes on that day and to mingle and mix with both the Judge and lawyer delegates and hopefully to meet with our Council both formally and informally.

Sincerely yours,

JRB: sb

cc: Justice Powell



CHAMBERS OF
JOHN R. BROWN
CHIEF JUDGE, U.S. COURT OF APPEALS
HOUSTON, TEXAS 77002

JAN 30 1974

January 28, 1974

Re: 1974 Fifth Circuit Judicial
Conference

Dear Lewis:

You don't have to read all of these, but
these are copies of letters divided
into three groups:

- (a) Withdrawal of invitation letter;
- (b) Letter to District Judge members; and
- (c) Letter to Bar Association officials.

We have uninvited a number of people. What
we are going to do is hold a bobtail confer-
ence.

Sincerely yours,

John R. Brown
by

Mr. Justice Lewis F. Powell, Jr.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Top (a)
Suspended

JOHN R. BROWN
CHIEF JUDGE
HOUSTON, TEXAS 77002

January 28, 1974

Mr. James E. Clark
Attorney at Law
1103 City Federal Building
Birmingham, Alabama

1974 Fifth Circuit Judicial Conference

Dear Mr. Clark:

It was our pleasure to invite you to attend the 1974 Judicial Conference of the Fifth Circuit then to be held May 27-29 at the Diplomat in Hollywood, Florida. I now regret exceedingly that we must withdraw the invitation because of circumstances quite beyond the control of any of us.

Responding to the President's plea for conservation of energy and the letter of the Director of the Administrative Office of the United States Courts suggesting that plans for Judicial Conferences should be reviewed in the light of fuel shortages caused by the energy crisis, the Fifth Circuit Judicial Council determined that three marked changes should be made: (1) Only a one-day joint working session without planned social or recreational activities; (2) reduction in the list of delegates and invitees and; (3) moving the conference to a more central location.

In effectuating this policy determination, the list of delegates was reduced to include only Circuit and District Judges, elected officers, the delegates (or alternates) of the six State Bar Associations, and official representatives from the Administrative Office and the Judicial Center.

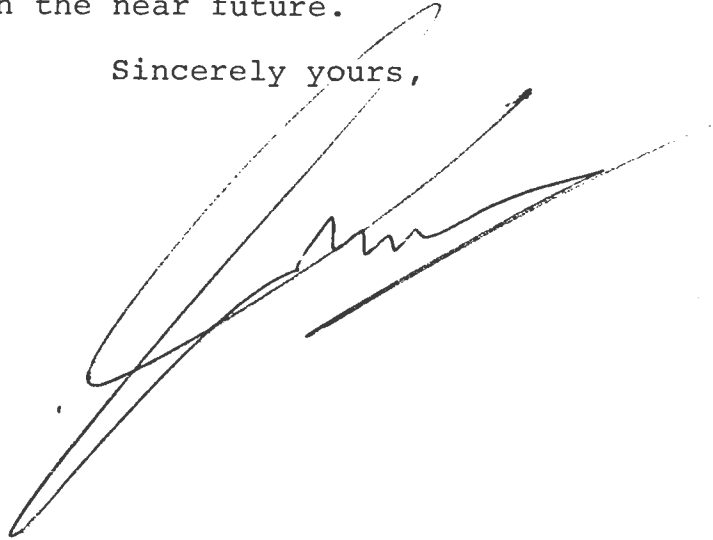
Page 2.
January 28, 1974

Although we cannot have the privilege of your company, you might wish to know that the Conference has been moved to New Orleans for a one-day joint work session with no planned recreational or social activities on Monday, May 27.

If you have made hotel reservations, I ask that you handle the cancellation of your reservation directly with the Diplomat.

We are checking our records to ascertain whether or not your \$50 registration fee has been received by the Secretary of the Conference. If it has, it will be refunded to you in the near future.

Sincerely yours,

A large, stylized handwritten signature in black ink, consisting of several sweeping, overlapping strokes that form a cursive name.

(b)

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

JOHN R. BROWN
CHIEF JUDGE
HOUSTON, TEXAS 77002

January 28, 1974

TO: ALL DISTRICT JUDGES OF THE FIFTH CIRCUIT

1974 Fifth Circuit Judicial Conference
May 27-28, 1974, Royal Sonesta Hotel
New Orleans, Louisiana

My dear Judges:

Responding to the President's plea for conservation of energy and the letter of the Director of the Administrative Office of the United States Courts suggesting that plans for Judicial Conferences should be reviewed in light of fuel shortages caused by the energy crisis, the Fifth Circuit Judicial Council determined that three marked changes should be made: (1) Only a one-day joint working session without planned social or recreational activities; (2) reduction in the list of delegates and invitees and; (3) moving the Conference to a more central location.

* A new call is enclosed going to those on the revised list only calling a meeting of the Judicial Conference of the Fifth Circuit in New Orleans, on May 27 and 28, 1974, at the Royal Sonesta Hotel.

The reduced list of delegates includes Circuit and District Judges, elected officers, the delegates (or alternates) of the six state bar associations and official representation from the Administrative Office and the Judicial Center.

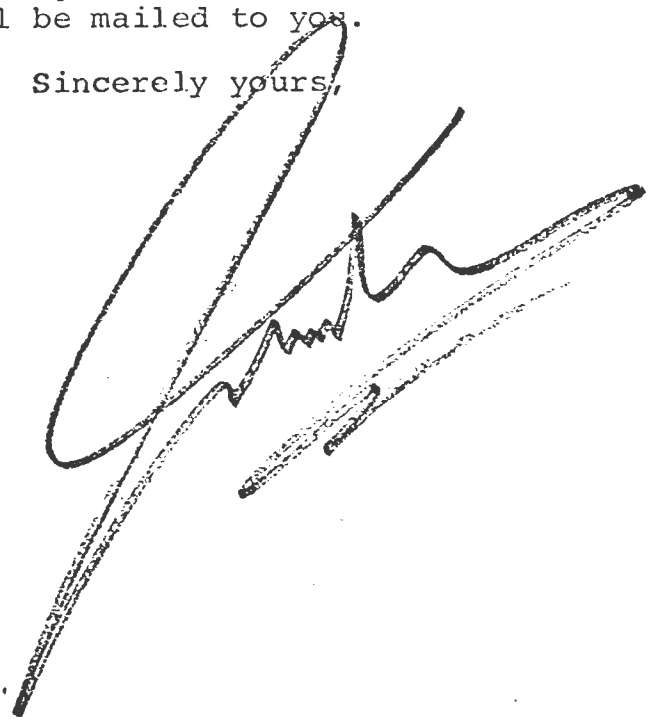
The Conference will consist of a full-day joint business meeting (Judges and delegates) on Monday, May 27, 1974, and an executive session for District Judge members only on Tuesday, May 28. There will be no organized social or recreational program. There might be an informal social reception Sunday or Monday evening on a self-sustaining basis.

-2-

If you have already made your hotel reservations at the Diplomat Hotel, I ask that you handle the cancellation of your reservation directly with that hotel.

Information regarding hotel accommodations at the Royal Sonesta Hotel will be mailed to you.

Sincerely yours,

A large, stylized handwritten signature in black ink, consisting of several loops and a long, sweeping underline.

JRB: sb
* Encl.

(e)

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

JOHN R. BROWN
CHIEF JUDGE
HOUSTON, TEXAS 77002

January 28, 1974

TO: PRESIDENTS, PRESIDENTS-ELECT, AND DELEGATES OR
ALTERNATE DELEGATES TO THE BAR ASSOCIATIONS
OF THE FOLLOWING STATES:

ALABAMA, FLORIDA, GEORGIA,
LOUISIANA, MISSISSIPPI and TEXAS

1974 Fifth Circuit Judicial Conference
May 27, 1974, Royal Sonesta Hotel,
New Orleans, Louisiana.

Gentlemen:

Responding to the President's plea for conservation of energy and the letter of the Director of the Administrative Office of the United States Courts suggesting that plans for Judicial Conferences should be reviewed in the light of fuel shortages caused by the energy crisis, the Fifth Circuit Judicial Council determined that three marked changes should be made:

(1) Only a one-day joint working session without planned social or recreational activities; (2) reduction in the list of delegates and invitees and; (3) moving the conference to a more central location.

Consequently, the Conference as previously scheduled at the Diplomat Hotel in Hollywood, Florida, May 27-29, 1974 has been cancelled.

The Conference has been re-scheduled in New Orleans, Louisiana, at the Royal Sonesta Hotel on May 27, 1974. The Conference will convene at 9:30 a.m. and will consist of a full-day business meeting on Monday, May 27, 1974. There will be no organized social or recreational program. There might be an informal social reception Sunday or Monday evening on a self-sustaining basis.

Page 2.
January 28, 1974

Besides Circuit and District Judges, the revised list includes from the Bar of each of your states only:

President
President-Elect
Delegates or Alternate Delegates.

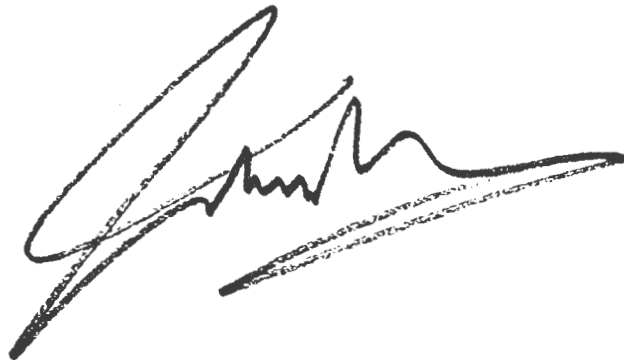
As the list is sharply curtailed, we urge that those specified as delegates/alternates coordinate their plans so that only a delegate or an alternate attends. In instances where more than the limited number have already registered, we request that you let the Secretary of the Conference (Mr. Thomas H. Reese, Circuit Executive, 504-527-2730) know of the person or persons finally selected. We regret exceedingly that these circumstances require us to withdraw any such previous invitations.

If you have already made your hotel reservation at the Diplomat Hotel, you should handle the cancellation of your reservation directly with the Diplomat.

Information regarding hotel accommodations at the Royal Sonesta Hotel will be mailed to you.

As there will be no organized social program and only a one-day business session, no registration fee is required from lawyer delegates. Therefore, if the Secretary of the Conference has received your registration fee, it will be refunded to you in the near future. If you plan to attend the conference, simply complete and return the registration form notice previously forwarded to you, but do not include the registration fee.

Sincerely yours,

A handwritten signature in black ink, appearing to be a stylized name, possibly "John" or "John H. Reese". The signature is written in a cursive, somewhat slanted style with a long horizontal stroke at the end.

*More May 27
Reception*

Trip File

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

JOHN R. BROWN
CHIEF JUDGE
HOUSTON, TEXAS 77002

March 1, 1974

MAR 4 1974

Honorable Lewis F. Powell, Jr.
Associate Justice
Supreme Court of the United States
Washington, D. C. 20543

Fifth Circuit Judicial Conference
New Orleans, Louisiana
May 27, 1974

My dear Lewis:

Judge Dyer, who is the program chairman, tells me that he wants you to be on the program for approximately thirty minutes to give us whatever observations you would like to pass on. I told David of our prior conversations and my hope that you would be able to make it especially since this will be a quick whirlwind one-day work session.

As he is trying to work out the details of the program and if it is not asking a Supreme Court Justice to do too much, would you mind calling David to work out these details. *U*

As I told you we are not having much social activity, but we will have at least one cocktail reception at which you and your lovely wife, we hope, will attend.

I am leaving on Sunday by train to come to the Conference. Of course, I will see you, but you know how little time we have there under the very strong gavel of the Chief. *U*

Sincerely yours,

JRB:sb
cc: Hon. David W. Dyer
(305-350-5297)

UNITED STATES COURT OF APPEALS
FIFTH JUDICIAL CIRCUIT

Trump file

MAR 15 1974

March 13, 1974

DAVID W. DYER
CIRCUIT JUDGE
MIAMI, FLORIDA 33101

Honorable Lewis F. Powell, Jr.
Associate Justice
United States Supreme Court
Washington, D.C. 20543

My dear Lewis:

I was so pleased to receive your telephone call yesterday in which you informed me that you and Mrs. Powell would attend the Fifth Circuit Judicial Conference and that you would appear on our program Monday morning for your remarks as our Circuit Justice.

When it is convenient for your secretary to do so, I will appreciate it if she will let me know your arrival time in New Orleans on Sunday, May 26th, and I shall arrange to meet you. I hope that you and Mrs. Powell will join some of us for dinner that evening and, if it is possible for you to stay over Monday night, I know that we are planning to have an informal reception which I am sure you will enjoy.

Accommodations have been arranged for you at the Royal Sonesta Hotel, and if there is anything else that I can do for you please drop me a note.

We all realize how tremendously heavy your schedule is, especially at this time of the year, and we very much appreciate your willingness to attend the Conference and thus give our judges the opportunity of meeting with you.

Warm regards.

Sincerely yours,

Dar

*7. Feb level
by*

UNITED STATES COURT OF APPEALS
FIFTH JUDICIAL CIRCUIT

THOMAS H. REESE
CIRCUIT EXECUTIVE
NEW ORLEANS, LOUISIANA 70130

April 16, 1974

APR 18 1974

Honorable Lewis F. Powell, Jr.
Associate Justice
United States Supreme Court
Washington, D.C. 20543

1974 Fifth Circuit Judicial Conference
May 27, 1974 - Royal Sonesta Hotel -
New Orleans, Louisiana

Dear Mr. Justice Powell:

A reservation for a complimentary suite at the Royal Sonesta Hotel has been made for you and Mrs. Powell, with arrival date of May 26, 1974, and departure date of May 27, 1974. You should receive a confirmation of this reservation from the hotel.

→ As you are a scheduled speaker for the Fifth Circuit Judicial Conference on May 27, 1974, you are authorized to be reimbursed fully for your travel and subsistence expenses, and expenses of your wife, with the exception of her travel fare.

→ As attendance and participation in judicial conferences is official government business, you are entitled to claim government reimbursement for your portion of this function. However, the additional expenses not normally authorized will be refunded to you out of conference funds (excluding such items as non-related long distance personal telephone charges, valet service, and charges for merchandise). If you do have such additional expenses, it is requested that you, as soon as possible after the conference, submit to me a brief statement of such expenses that are not recoverable from the government, and a check in payment therefore will be issued to you.

*Sally
- Check
Manhall
office
on the*

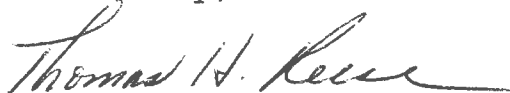
There will be a packet containing conference material for you at the registration desk, which you should pick up either Sunday afternoon, May 26, or

Page 2.
April 16, 1974
Hon. Lewis F. Powell, Jr.

during the day on Monday.

If I can assist in any way in making your visit to New Orleans more enjoyable, please do not hesitate to call upon me.

Sincerely,

A handwritten signature in cursive script that reads "Thomas H. Reese". The signature is written in dark ink and is positioned above the typed name and title.

Thomas H. Reese
Secretary of the Conference

/lgc

cc: Hon. John R. Brown
Hon. David W. Dyer
Hon. Paul H. Roney
Mrs. Lydia G. Comberrel

Fifths Circuit

April 18, 1974

Dear Tom:

Thank you for yours of April 16, advising that there will be a suite for Mrs. Powell and me.

Our tentative flight schedule is to arrive in New Orleans on Delta 623 at 3:17 p.m. on May 26. We depart for Washington on Monday afternoon, May 27 on Delta 1226 at 5:00 p.m., as I must be here at the Court on Tuesday morning. If there are any changes in my flight schedule, I will let you know.

I understand from Judge Dyer that he will put me on the program for a brief talk during the morning of the 27th.

I look forward to being with my friends in the 5th Circuit and to seeing you again.

Sincerely,

Thomas H. Reese, Esquire
Circuit Executive
United States Court of Appeals
Fifth Judicial Circuit
New Orleans, Louisiana 70130

lfp/ss

cc: Hon. John R. Brown
Hon. David W. Dyer

Truck File

4/18/74

I have changed your reservations to New Orleans going down to tourist and you are wait listed for tourist coming back.

The governments pays for your air fare and gives you a per diem of \$25.00. The Marshal's office thinks this may have been increased. They will check and let us know.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Trish Jell

MAY 13 1974

JOHN R. BROWN
CHIEF JUDGE
HOUSTON, TEXAS 77002

May 8, 1974

Honorable Lewis F. Powell, Jr.
Associate Justice
Supreme Court of the United States
U.S. Supreme Court Building
Washington, D. C.

My dear Lewis:

Since we would like to be able to share you amongst all of us for the short period of time you can be with us, I am hoping that you and your sweet wife can join us for cocktails with all of the other Circuit Judges in my suite about 6:00 P.M. Sunday evening to be followed by a dinner in a private dining room in the hotel about 8:00 P.M. with all our Circuit Judges and their wives.

On Monday noon during the luncheon recess, we will have a light snack in my suite where, hopefully, you can informally talk with us as you did in El Paso.

We look forward to seeing you.

Sincerely yours,

John R. Brown
JR

JRB:sm

*File
Wahl*

WALTON LANTAFF SCHROEDER CARSON & WAHL

ATTORNEYS AT LAW
900 ALFRED I. DUPONT BUILDING
MIAMI, FLORIDA 33131
TELEPHONE: (305) 379-6411

AREA CODE 305
CABLE ADDRESS
"WALHUB"

WILLIAM C. LANTAFF (1913-1970)

MILLER WALTON
LAURENCE A. SCHROEDER
SAMUEL O. CARSON
JOHN H. WAHL, JR.
ROBERT L. CASEY
RICHARD J. THORNTON
JAMES KNIGHT
EDWARD J. ATKINS
CHALMERS R. WILSON
OSCAR J. KEEP
JOSEPH P. METZGER
CAREY A. RANDALL
RALPH B. PAXTON
CARL E. JENKINS
DAVID K. THARP
CHARLES P. SACHER
CALVIN F. DAVID

FRANK G. CIBULA, JR.
WILLIAM J. GRAY
WILLIAM S. GARDELLA
MICHAEL B. DAVIS
ROY B. GONAS
PETER L. WECHSLER
MICHAEL R. JENKS
JOHN R. PECK
HERMAN I. EISENBERG
JOHN M. MURRAY
DANIEL M. HOLLAND
WAYNE T. GILL
RICHARD A. HENRY
MALCOLM S. STEINBERG

MAY 15 1974

OFFICES IN
FORT LAUDERDALE, FLORIDA 33301
WEST PALM BEACH, FLORIDA 33401

May 13, 1974

Dear Judge Powell:

The Florida Bar's Delegation to the Fifth Circuit Judicial Conference cordially invites you and Mrs. Powell for a preconference social gathering in the Florida Hospitality Room at the Royal Sonesta Hotel on Sunday, May 26, 1974, from 4:00 o'clock in the afternoon until 7:00 o'clock in the evening.

The Hospitality Room will be registered in my name.

The Delegation will be happy to have you and Mrs. Powell invite other guests.

Sincerely,

Miller Walton

MW:rc

Honorable Lewis F. Powell, Jr.
Supreme Court of the United States
Washington, D. C. 20543

Fifth Circuit

May 14, 1974

Dear John:

Thank you for yours of May 8.

I will be happy to join you and the other Circuit Judges for the Sunday evening festivities, and also to meet informally with you and your colleagues during the Monday recess.

Sincerely,

Hon. John R. Brown
11501 United States Courthouse
Houston, Texas 77002

lfp/ss

cc: Hon. John Minor Wisdom
Hon. David W. Dyer

UNITED STATES COURT OF APPEALS
FIFTH JUDICIAL CIRCUIT

May 16, 1974

DAVID W. DYER
CIRCUIT JUDGE
MIAMI, FLORIDA 33101

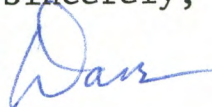
Honorable Lewis F. Powell, Jr.
Justice, Supreme Court of the United States
Washington, D. C. 20543

Dear Lewis:

I will meet you and Jo at 3:17 P.M. Sunday
afternoon in New Orleans.

Looking forward to seeing you.

Sincerely,



DWD/b1

cc: Honorable John R. Brown
Honorable John Minor Wisdom

May 20, 1974

Dear Dave:

I write to say that my wife, Jo, will not be with me on my brief trip to New Orleans.

Her mother, age 89, has not been well and Jo thinks it best for her to spend a few days in Richmond with her. She regrets missing any CA 5 meeting, as she has enjoyed getting to know the fine people and their wives who attend your meetings and parties. She vividly remembers the hospitality and sightseeing at Savannah and El Paso, and New Orleans - though far briefer - would certainly be no exception. But I am inclined to think her decision is right under the circumstances.

My own plans remain unchanged, and I look forward - as always - to being with you.

Sincerely,

Hon. David W. Dyer
U.S. Court of Appeals
Fifth Judicial Circuit
Miami, Florida 33101

lfp/ss

cc: Hon. John R. Brown
Thomas H. Reese, Esquire

KING & SPALDING

2500 TRUST COMPANY OF GEORGIA BUILDING

ATLANTA, GEORGIA 30303

404/658-1350

May 17, 1974

MAY 20 1974

The Honorable Lewis Powell
Justice, United States Supreme Court
Supreme Court Building
Washington, D. C.

Dear Justice Powell:

The Georgia delegates to the Fifth Circuit Judicial Conference would like you and your wife to join the Georgia group for cocktails on Sunday evening, May 26th, from 6:00 to 8:00 p.m. in the Grisgris Room (second floor), Royal Sonesta Hotel.

We hope that we will have the pleasure of seeing you at this time.

With kindest personal regards.

Cordially,



Kirk McAlpin, Chairman
Harry S. Baxter
Oscar M. Smith

Delegates to the
Fifth Circuit Judicial Conference

KMcA:pl

cc: Mr. F. Jack Adams, President
State Bar of Georgia

Mr. Cubbedge Snow, Jr., President-Elect
State Bar of Georgia

May 20, 1974

Dear Kirk:

Thank you and your partners for your generous invitation to cocktails on Sunday evening, May 26.

As I will not arrive until that afternoon and must return to the Court late Monday afternoon, I am devoting this brief time to whatever the Judges have planned. They have invited me to a function Sunday evening. Jo will not accompany me in view of the hurried nature of my trip.

I nevertheless look forward to seeing you.

With appreciation and best wishes.

Sincerely,

Kirk McAlpin, Esquire
King & Spalding
2500 Trust Company of Georgia Building
Atlanta, Georgia 30303

lfp/ss

cc: Cubbedge Snow, Jr., Esquire

May 21, 1974

Dear Chief:

Here is a rough draft of what I propose to say at the Fifth Circuit Conference.

As I know you anticipate a full dress treatment of this subject (with appropriate documentation) at some time in the future, I thought it might be helpful to start some ferment and thinking in the area.

I will welcome your comments.

Sincerely,

The Chief Justice

lfp/ss

Self Center

May 21, 1974

Dear Mike:

If you can readily provide answers to the following questions, I would be grateful:

1. What percentage of the approximately 4,000 petitions and appeals this year will be from criminal cases?
2. How many cases were argued (separate docket numbers not opinions) during the 1973 Term?
3. Of the argued cases, approximately what percentage were criminal?
4. Of the criminal cases, what percentage comes from state courts, either by habeas corpus or directly?

I believe you will have the answers to the first three questions almost at your fingertips. The answer to the fourth question may not be available without some research, which I do not want.

Many thanks for your help.

Sincerely,

Mr. Michael Rodak, Jr.

lfp/ss

*File
account*

May 24, 1974

Dear Mr. Walton:

Thank you for your letter of May 13, inviting Mrs. Powell and me to your Florida Hospitality Suite Sunday afternoon.

Mrs. Powell will not be with me, and I am not scheduled to arrive in the city until late in the afternoon. If I have the opportunity, I will certainly come by to visit with the Florida delegation.

Sincerely,

Miller Walton, Esquire
Royal Sonesta Hotel
New Orleans, Louisiana

lfp/ss

*files
Counsel*

May 24, 1974

Dear Mr. McGurn:

In response to your request of May 23, I enclose copy of my informal remarks which I plan to make at the Fifth Circuit Judicial Conference on Monday, May 27, at 10:30 a.m.

Sincerely,

Mr. Barrett McGurn

lfp/ss
Enc.

L.F.P., Jr.

In view of the "selective" coverage in the press about my remarks to the Fifth Circuit Conference, and at the request of two of you, I have enclosed a copy of what I said.

MEMORANDUM TO THE CONFERENCE

May 29, 1974

J. McLean

Sam Houston State University

GEORGE G. KILLINGER
Director

Institute Of Contemporary Corrections
And The Behavioral Sciences
HUNTSVILLE, TEXAS 77340

ANN P. BAKER
JAMES A. BARRUM
GEORGE BETO
BILLY W. BRAMLETT
HAROLD D. CALDWELL
JOHN A. COCOROS
GARY D. COPUS
JERRY L. DOWLING
ERWIN GOREE ERNST
CHARLES M. FRIEL
EDWIN D. HEATH
GLEN A. KERCHER
HAZEL B. KERPER
RICHARD G. KIEKBUSCH
DON E. KIRKPATRICK
LEO A. McCANDLISH
JOHN P. MATTHEWS
MERLYN D. MOORE
WAYLAND D. PILCHER
JIMMY D. SHADDOCK
ROBERT A. SHEARER
LINDA J. SNYDER
HASSIM M. SOLOMON
S. SOURYAL
ROBERT N. WALKER
DONALD J. WEISENHORN
MILTON O. WOMACK
JEANNE P. YOUNG

May 29, 1974

The Honorable Lewis F. Powell, Jr.
Associate Justice
Supreme Court of the United States
Washington, D.C. 20534

Dear Judge Powell:

Your statement, as indicated in the enclosure, has my complete concurrence.

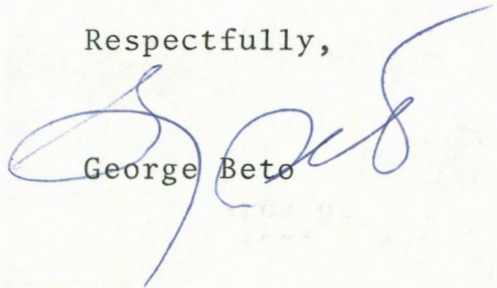
Frequently, I have been a defendant. Too, I have served as an expert witness in six states on occasions when former colleagues of mine were defendants. In all instances save one, they were represented by a lawyer from the office of the Attorney General.

My experience with this quality of representation moved me to make a statement before the annual meeting of the Alabama Bar two months ago in which I opined that prison administrators are losing cases very frequently in federal courts for one or both of two reasons: first, they frequently go into court without -- to use a convict expression -- "having their business straight;" secondly, their representation too frequently is either mediocre or inferior.

I can only hope that your observation will contribute toward the improvement of the quality of the attorneys serving the "public interest."

I continue to recall with pleasant memory your address in El Paso at the annual meeting of the judges of the Fifth Circuit.

Respectfully,


George Beto

GB:msd

Encl: 1

Fupll am

June 3, 1974

PERSONAL

Dear Ed:

My thanks to you and your colleagues for the editorial recently on the talk which I made in New Orleans to the Fifth Circuit Judicial Conference about the unevenness of the briefs and oral arguments before the Supreme Court.

This has indeed been one of my disappointments, as the quality and thoroughness of research and advocacy inevitably have some effect on the course of judicial precedents. Also, in a personal sense, the better the briefing and arguments the less of a burden on members of the Court.

I enclose a copy of the full text of my brief remarks.

As you can surmise from the recent news, I will not be returning to Richmond to occupy my "summer office" at the federal court there quite as early as had been anticipated. In any event, I look forward to seeing you, Overton Jones and other old friends at the TD.

Sincerely,

Mr. Ed Grimsley
Editor
Richmond Times-Dispatch
333 East Grace Street
Richmond, Virginia 23219

lfp/ss
Enc.

Fyall

June 7, 1974

Dear Prof. Beto:

Thank you for your gracious letter of May 29.

In view of your interest, I enclose the full text of what I said to the Fifth Circuit Judicial Conference.

I recall you most pleasantly from last year's meeting in El Paso.

Sincerely,

Prof. George Beto
Institute of Contemporary Corrections
And The Behavioral Sciences
Sam Houston State University
Huntsville, Texas 77340

lfp/ss

bc: The Chief Justice

Enclosing a copy of Prof. Beto's letter - which is confirmatory of the views which you and I share.

L.F.P., Jr.

*File
Court ✓*

Richmond Times-Dispatch

JUN 13 1974

Edward Grimsley
Editor of the Editorial Page

June 11, 1974

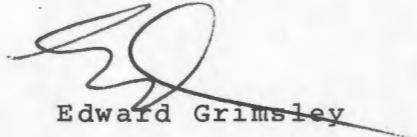
The Honorable Lewis F. Powell, Jr.
Supreme Court of the United States
Washington, D. C. 20543

Dear Mr. Justice Powell:

Thank you very much for the text of your New Orleans speech and for your gracious remarks concerning our editorial, which Overton Jones wrote. Whenever it is proper and convenient for you to send them, we should appreciate receiving texts of all your speeches, for news stories, as you know, can be most sketchy.

You do indeed face a busy and challenging summer. My best wishes will be with you as you and your colleagues consider the difficult questions presented for your consideration.

Sincerely,



Edward Grimsley

*Media
General*

UNITED STATES COURT OF APPEALS
FIFTH JUDICIAL CIRCUIT

June 14, 1974

DAVID W. DYER
CIRCUIT JUDGE
MIAMI, FLORIDA 33101

JUN 17 1974

Honorable Lewis F. Powell, Jr.
Associate Justice
United States Supreme Court
Washington, D.C. 20543

Dear Lewis:

I hope you will forgive me for being so tardy in expressing my deep appreciation to you for attending our Conference and making such a fine presentation on Monday. I am sorry that you were unable to stay for the festivities that evening.

As you requested, I am enclosing a list of calendaring priorities required by statute, rule or court decision.

Warm regards.

Sincerely,



June 24, 1974

Dear Dave:

Thank you for yours of June 17th, and for your thoughtfulness in remembering to send me the list of calendar priorities required by statute, rule or court decision. This does not leave you much time for other cases, and at least defers consideration of them.

I have wanted since returning from New Orleans to thank you for your courtesies there, particularly meeting me at the airport.

I thought we had an interesting meeting. It is always a pleasure to have this opportunity to see the Judges in the Fifth Circuit.

Sincerely,

Honorable David W. Dyer
Circuit Judge
United States Court of Appeals
Fifth Judicial Circuit
Miami, Florida 33101

LFP/gg

June 24, 1974

Dear John:

I have wanted, since returning from New Orleans, to thank you for your many courtesies during my brief visit with the Fifth Circuit.

Although the meeting was truncated, I thought you preserved the essence of a very fine program. As always, the social occasions were delightful.

It was especially good to see you and Mary Lou.

Sincerely,

Honorable John R. Brown
Chief Judge
United States Court of Appeals
Fifth Circuit
Houston, Texas 77002

LFP/gg

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Feb
JUL 1 1974

JOHN R. BROWN
CHIEF JUDGE
HOUSTON, TEXAS 77002

June 26, 1974

My dear Lewis:

I have written you a more austere letter to thank you on behalf of the whole Conference. This is in a more personal vein which begins as that one did with a regret that I have taken so long to send this note on.

I appreciated so much your nice words after your return to Washington. Somehow, things have kept me occupied or preoccupied (I have thirty-three opinions to write plus new ones coming in on Summary II's each week).

As you recall you told me about your personal family plans for the week of our Conference and then the Court Conference itself gave you only a few hours to be with us, but we are so grateful that you would submit to this inconvenience so that we could have you for a few hours on Sunday evening and some time on Monday at the Conference and again at lunch.

Give my best to Jo and tell her that I have written what I said to you in person, that we missed her very much, understand fully why she did not feel she could be with us, but look forward to next year for more time together.

Sincerely yours,



Hon. Lewis F. Powell, Jr.
Washington, D. C.

P.S.: The 1975 Fifth Circuit Judicial Conference is scheduled for the week of April 28, 1975 at Orlando, Florida.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Fifth Cir
JUL 1 1974



JOHN R. BROWN
CHIEF JUDGE
HOUSTON, TEXAS 77002

June 26, 1974

My dear Mr. Justice Powell:

Although this is late in coming I want you to know on behalf of the whole Judicial Conference of the Fifth Circuit and all of the Judges of the Circuit, both District and Circuit, how much we appreciated your being with us at our recent one-day Conference in New Orleans.

Knowing as I do the pressing personal schedule that faced you for that week plus your duties on the Court, your presence even for the brief period of time represented a great inconvenience and burden to you. We appreciate so much your being there so we can have an opportunity of knowing you better and to listen to you as you share the observations that your experience reflects.

Both in a personal and an official way, we were disappointed in only one thing, that your lovely wife could not be with us.

We hope that next year you can spend more time with us, but we are grateful for these few hours.

Sincerely yours,

Hon. Lewis F. Powell, Jr.
Washington, D. C.

M E M O R A N D U M

TO: Mr. Justice Powell
FROM: Mark W. Cannon *M.W.C.*
RE: Fifth Circuit Statistics
DATE: May 17, 1974

I am enclosing the memo on the Fifth Circuit which you requested. It was prepared by Howard R. Whitcomb. If you have further questions, please advise.

For your information, I have also attached a xerox of those portions of the Hruska Commission's report which pertain specifically to the recommended realignment of the Fifth Circuit.

enclosures

II. THE FIFTH CIRCUIT

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

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

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

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

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

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

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

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

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

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

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

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

		<u>Commission Recommendation</u>		
		<u>Filings^{1/}</u>	<u>Filings</u>	
		<u>FY '73</u>	<u>FY '73</u>	
Fifth Circuit			Eleventh Circuit	
Florida	800		Texas	838
Georgia	451		Louisiana	477
Alabama	249		Mississippi	143
	<u>1,500</u>		Canal Zone	6
				<u>1,464</u>

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

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

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

Alternative No. 1

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

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

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

Alternative No. 2

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

^{2/} See Footnote 1, page 9.

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

This memo responds to your telephone request of 14 May for information on the Fifth Circuit as to caseload disposition, oral argument, and petitions for writs of certiorari to the Supreme Court.

The following data provide an overview of the filings, terminations, and pending caseload of the 5th Circuit for FY 1973:

Circuit	Authorized Judgeships	Filings FY '73	Terminations FY '73	Terminations After Hearing or Submission	Pending	
				FY '73	End of FY '72	End of FY '73
Fifth	15	2,964	2,871	2,092	1,636	1,729

This memo will analyze these data along with a consideration of a) opinion writing practices, b) trends in oral argument, and c) petitions for writs of certiorari. It will conclude with estimates for FY 1974 that were obtained from Mr. Tom Reece, Circuit Executive. The primary source for this memo, save the explicit references to the conversation with Mr. Reece, are from the 1972 and 1973 A.O. Reports.

greatest w. appeals in any circuit. 1/5 of all in the 1 circuit.

① The 2,964 appeals filed in FY 1973 in the 5th were the greatest of any circuit--almost 1/5th of the total filings in the 11 circuits. ② The FY 1973 filings and terminations per judgeship placed the 5th second only to the 4th. The FY 1973 filings and terminations per judgeship were 198 and 191, respectively, compared with the national averages of 161 and 156, respectively. The FY 1973 filings in the 5th were 3.5% higher than they had been the previous year, and the FY 1973 terminations were 7.9% higher than they had been in FY 1972. Pending cases at the end of FY 1973 were 5.7% higher than they had been at the end of the previous FY, but only .5% above the average for all of the circuits.

a). Opinion Writing--The 5th Circuit data for "terminations after hearing or submission" need further clarification. First, the total number of cases terminated less consolidations was 2,522. Of these 2,522 430 (or 17%) were disposed of without oral hearing or submission on briefs, and without either a written opinion or memorandum filed. For the 2,092 cases disposed of after oral argument or submission there were 674 signed opinions, 1,292 per curiam opinions, and 126 with no written opinions.

to decrease in CAS since '66

b). Oral Argument--The A.O. Reports give information on the trends in oral argument since 1966. Since 1966 the total number of hearings in the Circuits have increased by 55.3%; however, the 5th in FY 1973 held 1% fewer hearings than it had in 1966. This decline contrasts with the increases of more than 100% in four of the circuits.

c). Certiorari Petitions--In FY 1973 approximately 1/5th (511) of the 2,527 petitions for writs of certiorari filed from the 11 circuits were from the 5th; however, only 10% (or 14) of the 135 granted were from that circuit. The 511 petitions from the 5th represented almost exactly 20% of the 2,522 cases terminated less consolidations in the circuit. The 14 petitions eventually granted by the Supreme Court in FY 1973 represented only 2.7% of the 509 5th Circuit petitions disposed of by the Supreme Court. In FY 1972 the percentage of 5th Circuit petitions granted was 5.5%.

Conversation with Mr. Tom Reece, Circuit Executive--Although the final figures for FY 1974 will not be available until July, Mr. Reece indicated that filings were up 11% in FY 1974 and that there is currently a backlog of 120 cases. In fiscal years 1972 and 1973 the 5th had been current. N

He also provided more explicit information regarding the proportion of cases in which oral argument is not granted. He estimated that 54% of the cases during FY 1974 were being disposed of on the summary calendar--the comparable figures for the two preceding years, FY 1973 and FY 1972, had been 57% and 59%, respectively.

In Summary--1). The 5th Circuit currently has a backlog of 120 cases in contrast to the two previous years in which it had been current. 2). Approximately 20% of the 5th Circuit cases terminated less consolidations are appealed to the Supreme Court. 3). Only 2.7% of the 5th Circuit petitions for writs of certiorari were granted in FY 1973 (5.5% in FY 1972). 4). During the last three fiscal years the percentage of cases in which oral argument has been denied has ranged between 54% and 59%.

PROGRAM



31st ANNUAL JUDICIAL CONFERENCE
of the
UNITED STATES COURTS
of the
FIFTH JUDICIAL CIRCUIT

MAY 27, 1974

ROYAL SONESTA HOTEL

NEW ORLEANS, LOUISIANA

NEW ORLEANS

New Orleans is one of the world's unique cities . . . a storied blend of proud tradition and elegant serenity, progressive bustle and joie de vivre. It has taken more than 250 years to mold her highly individualized personality, and the process continues today. New Orleans history is as fascinating as the city itself.

Founded in 1718 by Jean Baptiste Le Moyne, Sieur de Bienville New Orleans became the capital of French Louisiana in 1723. The Spanish succeeded the French some forty years later, and New Orleans became an American city with the Louisiana Purchase in 1803. (You can still see the building where the historic transfer took place—the Cabildo, erected in 1795, now a state museum.)

The city has not forgotten her European heritage, nor has she abandoned the flavor of the Old South. The French Quarter retains its old world charm, while ante bellum splendor lingers on in the Garden District. New Orleans' "international" atmosphere coexists in perfect harmony with boomtown excitement: horsedrawn carriages and fast-paced expressways, leafy courtyards and a soaring skyline.

Architecturally, New Orleans is a city of extreme contrasts. Looking out over the rooftops of the old city, one can see in the distance the towering spires of the new. Her streets, ordinarily bustling with the traffic of a growing city, also know the gentle clippity clop of mule-drawn vegetable wagons.

On intricately woven wrought-iron balconies and in the quiet seclusion of brick-walled patios, visitors can imagine themselves at another time in history. A time marked by elegant customs and gracious living. A time almost forgotten in the hustle of today's busy world, but carefully preserved in the romantic atmosphere of old New Orleans.

The splendor of New Orleans' rich history is remembered in its many ante bellum homes, forts and monuments, such as the site where Andrew Jackson defeated the redcoats in the War of 1812. The "Crescent City" also remembers its tradition of superb gourmet dining. Visitors always remember the splendid Creole and French dishes that delight the most critical palates in hundreds of fine restaurants throughout the area.

It's no wonder New Orleans is noted for its food. From the bayous surrounding it come an abundance of fresh seafood and shell fish in a variety of delectable forms. And from the neighboring countryside to the old French Market comes a plentitude of plump, ripe fruits and vegetables—products of the rich Louisiana soil.

New Orleans offers a glittering array of scenic moods to the visitor. From the world-famed antique shops on Royal Street to places once host to the mysterious rites of voodoo. Along the Mighty Mississippi from the bustling commerce of the nation's second-largest port, to the city's many formal gardens.

New Orleans is also a party town, and just so happens to be the scene of the "ultimate" party—the greatest free show on earth—Mardi Gras.

Mardi Gras means "Fat Tuesday". A day when an entire city frolics in the streets with a drink in her hand and laughter in her heart. It's a day of madness and merriment—a time to mask and become your alter ego. Mardi Gras is just part of the fun that is New Orleans.

No matter what facet of the city you choose to explore, you'll love New Orleans. And she'll love you right back.

MONDAY, MAY 27, 1974
(South Ballroom, Lobby Floor)

MORNING SESSION:

PRESIDING Judge Paul H. Roney

9:00 - 9:15

INTRODUCTORY REMARKS . . . Chief Judge John R. Brown

9:15 - 9:30

WELCOME Governor Edwin Edwards

9:30 - 9:45

GREETINGS FROM THE AMERICAN BAR ASSOCIATION

Chesterfield Smith

9:45 - 10:00

REMARKS OF THE CIRCUIT JUSTICE

Mr. Justice Lewis F. Powell, Jr.

10:00 - 10:15

PRESENT AND FUTURE PROGRAMMING OF THE FEDERAL
JUDICIAL CENTER

Richard A. Green

10:15 - 10:30

Coffee Break

JUDGE PAUL H. RONEY — United States Circuit Judge for the Fifth Circuit, St. Petersburg, Florida.

JUDGE JOHN R. BROWN — Chief Judge, United States Court of Appeals for the Fifth Circuit, Houston, Texas.

GOVERNOR EDWIN EDWARDS — Governor of the State of Louisiana, Baton Rouge, Louisiana.

CHESTERFIELD SMITH — President of the American Bar Association, Chicago, Illinois.

JUSTICE LEWIS F. POWELL, JR. — Associate Justice of the Supreme Court of the United States, Washington, D.C.

RICHARD A. GREEN — Deputy Director of the Federal Judicial Center, Washington, D.C.

SOCIAL PROGRAM

MONDAY, MAY 27, 1974

9:00 A.M. - 5:00 P.M.

Ladies Hospitality Room, Teche-Belle Grove Rooms.

7:00 P.M. - 9:00 P.M.

Cocktail Reception, Evangeline Suite & Foyer, Royal Sonesta Hotel.

TUESDAY, MAY 28, 1974

9:00 A.M. - 5:00 P.M.

Ladies Hospitality Room, Teche-Belle Grove Rooms.

Speech & Trip file
CAS - may 2/8

The Third Branch

Dolley Madison House, 1520 H Street, N.W., Washington, D.C. 20005

Bulletin of the Federal Courts

VOL. 5 NO. 12

Published by the Administrative Office of the U.S. Courts and the Federal Judicial Center

DECEMBER, 1973

LAWYERS ON TRIAL

Thanks to the Louis Nizers in real life and the Perry Masons in fiction, the American trial lawyer enjoys a certain mystique. The art of the surprise witness, the withering cross-examination, the sudden objection phrased in arcane formulas—all seem to bespeak a profession based on elaborate training and requiring consummate skill. And, in fact, the best American trial lawyers are very good indeed. But the blunt truth is, as Chief Justice Warren E. Burger maintained last week, that out of the 375,000 lawyers in the U.S., as many as half may be incompetent to try a case in court.

The problem of the competence of American trial lawyers has long been recognized, but the legal profession has rarely discussed it in public. Burger's attack delivered a resounding blow to that gentlemen's agreement. "We are more casual about qualifying the people we allow to act as advocates in the courtroom than we are about licensing electricians," declared the Chief Justice in a scathing lecture at New York's Fordham Law School. "No other profession is as casual or heedless of reality as ours."

THIS ARTICLE HAS BEEN REPRINTED, WITH PERMISSION, FROM THE FROM THE DECEMBER 10 ISSUE OF NEWSWEEK.

Cuckoo: Burger's denunciation of the state of trial practice evoked instant and near-total agreement from top lawyers and judges. "I used to go into the courtroom in the morning with an empty feeling in my stomach that here comes a couple more cuckoo lawyers," says retired New York Judge Samuel Leibowitz, himself a prominent advocate before moving to the bench. Adds Houston's blunt-spoken Percy Foreman, "There aren't two lawyers out of a hundred who can hold their own in court."

Every trial lawyer or judge has a catalog of horror stories about courtroom blunders. Burger recalled that he once walked into court and observed a half-empty whiskey bottle, which was to be used in

evidence, on the counsel table. "The young prosecutor did not know," said Burger, "the simple rule that an 'inflammatory' exhibit, such as a weapon, or a bloody shirt, or even a whisky bottle, is to be kept out of sight until it is ready to be introduced." And it is usually the client who suffers at the hands of a lazy or incompetent lawyer. Houston attorney Joseph Jamail, who has won four negligence-suit verdicts of more than a million dollars each, recently was called for advice by a Florida man who had lost a leg in an accident; because the victim's lawyer had not bothered to check an elementary theory of proof, the man collected nothing. "The way the lawyer tried the case was just less [See **LAWYERS**, pg. 3, col. 1]



ERWIN N. GRISWOLD

PROPOSAL: THE CREATION OF A NATIONAL PANEL OF THE U.S. COURT OF APPEALS

An Interview with former Solicitor General of the United States, Erwin N. Griswold

There are few members of the bar who are more well known than former Solicitor General Erwin N. Griswold. A former Dean of the Harvard Law School and until recently, the Solicitor General of the United States, Mr. Griswold is in a key position to analyze the nation's judiciary and more specifically, the problems of the Supreme Court's mounting caseload.

As a member of the Advisory Council for Appellate Justice, he recently proposed that a National Panel of the U.S. Court of Appeals be created not only to relieve the Supreme Court of some of its caseload problems but provide a forum for establishing additional [See **GRISWOLD**, pg. 2, col. 1]

[GRISWOLD, from page 1] nationally accepted law which would be binding on all other federal courts, and on state courts as to federal questions, subject only to review by, or later decision of, the Supreme Court.

In the following interview, Mr. Griswold discusses this proposal and also comments on other problems facing the federal judiciary today.

What is the major problem facing the federal judiciary today?

There is one massive problem which is overcrowding--too big a caseload to be handled by the present manpower and facilities.

What is generating this caseload especially at the federal Court of Appeals level?

Well, the Supreme Court is generating a great deal of it--much of this, I think, is highly desirable--but the Supreme Court, through its decisions has let down all the old barriers with respect to standing and mootness. As a result of decisions by the Court, the whole frame of mind and atmosphere of the public and many lawyers is that whenever there is anything they don't like about the government, go to court, go to court, go to court, let the courts decide everything, and that, I think, is a great mistake. That doesn't mean that the court can't change its approaches, but if these changes are desirable, they are a considerable part of the reason why we have an increased caseload. Two thirds of the cases decided on the merits by the Supreme Court last year were civil liberties cases. I don't say that was bad. It's a major trend, but it also means that the ordinary commercial case has little prospect of being heard by the Supreme Court, where in 1890, 80% of the cases were commercial cases or interstate commerce controversies, or things of that kind.

What solution do you suggest to alleviate this problem?

I have proposed one which I call a National Panel of a single United States Court of Appeals. There

would be many regional panels which would hear the run-of-the-mill cases, but they might also hear cases which are surely going to go to the Supreme Court anyhow. However, it seems to me that if we had a National Panel with authority to speak for the whole country, its decisions would be binding on all Courts of Appeals just as the Supreme Court's are; that it could decide a great many cases which are not worthy of the time and attention of the Supreme Court. For example, the **Cartwright** case was decided by the Supreme Court last year which involved the world-shaking question whether mutual fund shares in the estate of a decedent should be valued at the higher price or the lower price. It was simply a question that had to be decided. It comes up ten, if not hundreds of thousands of times a year, and lawyers and revenue agents just ought to know what they should do. As long as it's uncertain, they have to squabble about it, have to litigate, settle or negotiate, and this takes a great deal of time. In fact, I would say that one of my criticisms of the Supreme Court over a long period of years is that it seems to have no feel for and no sensitivity to, the administrative problems which its decisions create.

For example, last spring we filed a petition for certiorari in cases involving the question whether an intern in a hospital is an employee and taxable, or whether he is receiving a scholarship, a large part of which is not taxable. The Court denied certiorari, making it plain that it regards that as a jury question. Well, the result is that nobody can advise any intern; nobody can ever know what the rule applied is; no revenue agent can administer the law; no lawyer can tell the intern that you are or are not taxable until this has been taken and tried before some trier of the facts. Well, it seems to me that this simply ought to be a rule one way or another about interns who are doing the work of the hospital. My view would be that they are employees and are taxable, but I

don't much care.

Then this National Panel could conceivably handle this kind of dispute?

The National Panel could handle this kind of thing which is not worthy of the time and attention of the Supreme Court.

Would this idea of a National Panel be politically feasible? There was major criticism of one of the major proposals of the Freund Committee. Would your proposal have more political feasibility?

I don't see why there should be any political opposition to this. Incidentally, in my view, this should not be done by simply assigning judges from the Courts of Appeals to come in and have a pleasant three months in Washington. There should be a permanent National Panel, permanent in the sense that the Supreme Court is permanent, that is, that people should be appointed to either the regional panels or to the National Panel.

Similar to the Court of Claims?

Like the Court of Claims, yes. I would like to see 5 judges, not 3. Some people have said there should be 15, and they should sit in panels of 5, but I don't think so because I want to get some certainty from the National Panel on relatively unimportant questions that ought to be decided on a nationwide basis as you get from the Supreme Court. Everybody knows that over a period of a generation the Supreme Court moves various ways, but from year to year, you can rely pretty well on recent decisions of the Supreme Court.

Do you see any other possibilities of alleviating this problem? For example, what other proposals did you consider before coming up with this proposal for the National Panel? Did you have any alternatives?

No, I didn't. The National Panel will not help with the *informa pauperis* question. A great deal of the opposition to the Freund Report came because the intermediate court could stop all access to the
[See GRISWOLD, pg. 4, col. 1]

[LAWYERS, from page 1] strenuous for him," says Jamail in disgust.

Any lawyer is presumed to be as qualified to try a case in court as to undertake any other professional task, such as drafting a will or negotiating a contract. But the special skills of courtroom practice are largely ignored by many law schools, and no apprenticeship program after graduation is required. "The difference between an office lawyer and a trial lawyer is as great as between an internist and a surgeon," says New York attorney Nizer. "Both require high talents, but the specialized skills and tools are so different that they may as well be in different professions." Any doctor can, in fact, perform surgery; but fewer than 12 per cent of the nation's 350,000 physicians have been certified by the surgical specialty boards. No equivalent certification exists for trial lawyers.

One reason for the low quality of some trial lawyers is that, with rare exceptions, money and prestige in the legal profession seldom come from trying cases. The richest lawyers are the ones who save millions of dollars in taxes for corporations or manipulate intricate real-estate developments.

In Great Britain, which Chief Justice Burger pointed to as a possible model for reform of the American system, a sharp distinction is drawn between trial lawyers and other attorneys. There, a "solicitor" handles all forms of legal affairs except trials; only a robed, bewigged "barrister" can argue a major case in court. A barrister does not even meet his client until he is called in by the solicitor on the eve of trial.

Medicine: A British law graduate must be apprenticed to a barrister for a year before being called to the bar. Burger believes that aspiring U.S. trial lawyers should spend much of their third year of law school and a period after graduation studying with expert advocates before being approved for trial work. Foreman recommends that the legal profes-

sion should follow medicine's lead by requiring a residency and internship process before admission to the bar.

Many American lawyers would disagree; they have long prided themselves as generalists, able to perform any legal task. But change may be under way. "The problems are there, and we ought to attack them any way we can," says American Bar Association president Chesterfield Smith. He plans a national conference on trial practice next year.

NOTE

Many readers of The Third Branch are probably aware of the talk the Chief Justice delivered on November 26 at Fordham University Law Center. The article reprinted above is typical of the extensive press coverage the Chief Justice's remarks received.

Because a printed copy of the Chief Justice's lecture was not immediately available, there were some inevitable inaccuracies in the coverage. Most notable is the misconception that the Chief Justice suggested using the British "Barrister-Solicitor" system as a "Model" for the American legal profession. In fact the Chief Justice merely urged the American legal profession to recognize some assumptions of the English system that "are sound and sensible whether applied to the English system or to our own." Noting in the printed version of his talk that "we cannot have, and most emphatically do not want a small elite, barrister-like class of lawyers" in this country, the Chief Justice called instead for apprentice programs for aspiring advocates, and the establishment of minimum standards that a lawyer would have to meet before being certified as an advocate in trials of serious consequence.

\$550,000 SAVED

JUROR UTILIZATION FIGURES RELEASED

Federal Judges and Clerks of Court are soon to receive the 1973 **Juror Utilization in the United States Courts** report which is prepared by Operations Branch, Division of Information Systems of the A.O.

In the preface, A.O. Director Rowland Kirks states, "Besides providing these reports on juror utilization, the federal judiciary is taking a hard look at ways to continue the improvement of jury service."

The report provides a ten-step checklist of factors which can effect a high or low juror usage index.

Drawing on statistics furnished by the various Court Clerks, the report, in each of its four parts, shows the efficiency of the courts in using jurors and the progress that has been made in juror utilization over the past three years.

The pull-out back cover allows a district to compare itself with pertinent national averages. Through better juror utilization methods, the courts were able to save taxpayers an estimated \$550,000. The national average juror cost per day for jury trials has fallen from \$514 in 1972 to \$498 this year.

A significant factor in this saving was a continued drop in "unused jurors" from 32.8% in 1971 to 28.4% this year.

The report anticipates that, "Further reduction should continue with the implementation of Multidistrict Juror Utilization Seminars sponsored by the Federal Judicial Center, together with the availability of Staff from the Administrative Office to provide guidance in the use of jury pool formulas and jury trial scheduling." ¶¶

The Third Branch is *your* publication. Please send articles or story ideas to the editor for publication consideration. Also, editorials from local newspapers are requested.

Bulletin

THE JUDICIAL FELLOWS PROGRAM, 1974-75

The Judicial Fellows Program, entering its second year, invites applications from highly talented young professionals with multi-disciplinary skills and at least two years of professional activity who wish to spend a year gaining broad first-hand experience in Federal judicial administration. Application materials should be mailed by February 15, 1974. Further information can be obtained from Mark W. Cannon, Executive Director, Judicial Fellows Commission, Supreme Court of the United States, Washington, D.C. 20543.

ATTENTION CHIEF PROBATION OFFICERS:

There will be an Orientation Course for Newly Appointed Probation Officers the last week in January. Please alert your officers who entered on duty in January to attend on short notice. Invitations are being sent.

[GRISWOLD, from page 2]

Supreme Court. So you will find in this proposal that I favor allowing people to file in the Supreme Court, but building up their staff there, headed by people with judicial status, either retired judges, or assigned judges, or judges appointed for that purpose who would examine these, review them, report to the Supreme Court, subject to the direction and control of the Supreme Court in all respects, but with the hope that the individual justices might not have to look at more than a hundred of them rather than over 2,000 which are now filed.

Turning to another subject, what are your views on the proposal put forth by the Chief Justice and echoed by Judge Irving Kaufman to increase

the courtroom abilities of a great portion of the bar which both the Chief Justice and Judge Kaufman believe is a major problem today. First, do you believe there is a major problem?

Yes, I think there is a substantial problem. I think a great many people who undertake to appear in court do not do it very well. I'm not sure that it is a question of training or if they would do it any better if they had more training. I think it very well may be in part that they are not very well qualified for it and ought not to undertake court work. I think that the development of some kind of an appellate bar in the country would be desirable.

However, I would disagree that this should be done at the expense of basic education. I am strongly opposed to cutting down legal education from three years to two years or to diverting the whole third year to so-called clinical work. I have the quaint view that a lawyer's work is never done. Of course, there are a lot of practical things he must learn after he leaves law school, and I'm entirely willing to organize and regularize that.

If we could take steps to develop a tradition that court work is rather specialized, and not everybody should undertake it, I would think that was highly desirable. But I'm particularly opposed to focusing the whole third year on so-called clinical legal education because my best guess is 80% of all lawyers never appear in court at all, and the elaborate courtroom training is not only wasted, but most of them aren't very well qualified to take it.

You had a unique opportunity as Solicitor General to observe the Supreme Court. What other changes did you observe other than the dramatic shift, you might say, in the kind of cases the court has been accepting?

Well, there are some things that I don't like--the multiplication of law clerks making it a bureaucratic job rather than an individual job. As a result, there is a great increase in the

length of opinions which I think is undesirable, and I feel that it is a consequence because I think there are more people around to do more research. I'm not suggesting that the law clerks are writing opinions. I don't think that at all. But more material is coming to the justice, and this may be, in part, a consequence of what the court feels to be the failure of counsel, and more and more justices are relying more on their law clerks to dig out information that counsel might well have provided. I happen to feel that because of the pressure of cases, the reduction of argument time to a half an hour for each side is unfortunate, at least when applied as sweepingly as it is now.

Did you feel that was greatly inhibiting?

Yes. I found that it was very difficult to make an adequate presentation of a complicated case. Most of the cases I had--not all, but most of them--had either numerous points in them or were complicated in one way or another. Now, it is true that the court will quite freely give ten or fifteen extra minutes if you ask for them; nevertheless, you hate to ask.

Did you find the job running the solicitor general's office constantly changing while you were in that position?

No. Except that I do think that the existing pressures are such that a good many cases are not taken to the court that might well be; cases that fully merit the attention of a court like the Supreme Court if the Supreme Court had more time.

For example?

The Alaska pipe line case. I think that was a case of national importance that a Supreme Court ought to have decided. They probably ought to have affirmed it. But it ought to have been decided, it seems to me, on a national basis.

One other problem of the Solicitor General is that he is constantly saying no to agencies of the government--not so much the Justice Department--but the National Labor

Relations Board, and the Federal Trade Commission and Securities and Exchange Commission because he feels that the agency's petition will probably be denied. If he gets the reputation among the court of filing petitions that aren't absolutely clear grants, that will impair his standing when he has a clear case. I think that in twenty percent of the cases where I said no, I think that the system should have enabled me to say yes. Incidentally, this is leading to repercussions. There is great pressure in Congress to give all agencies authority to file their own petitions. I testified against this during my last Congressional appearance. They put a rider on the Alaskan Pipe Line Act which, in effect, allows the Federal Trade Commission to go before the Supreme Court. I wouldn't be surprised that as a result of this, the Supreme Court is going to get forty or fifty more petitions a year from these agencies because the Solicitor General won't be able to control them.

The Solicitor General then won't be able to act, in effect, as a traffic policeman?

They, in effect, have forced him to be too strict so that his position is becoming untenable and is subject to criticism and complaint. I don't want to put it in the past tense because I hope that in the long run the Solicitor General's office may be able to hold its basic control over these things, but it's not easy because the Court has such a strict standard that the Solicitor General's position is very difficult.

Part of the backlog in the Federal system has been attributed to the great number of diversity cases. Do you think it might be wise to cut back on some of this federal jurisdiction?

We ought to eliminate diversity jurisdiction. I'm not sure how important that actually is. Of course, another way to deal with it is to promote the whole no-fault concept which ought to reduce the amount of litigation generally and, therefore, the amount of diversity litigation.

Take most of the automobile

litigation out of the courts?

Yes. Well, suppose we handled the workmen's compensation cases in the courts. There must be a hundred thousand cases a year of one kind or another which are now handled administratively. I don't know any reason in the world why we can't get most of the automobile cases out of court.

Do you think there is enough support among the judiciary and the bar for a major overhaul of the federal appellate system?

I think there's very little support. The bar generally opposes any change of any kind no matter how good it is, and it's usually only because of special circumstances of some kind or another that it is finally put across and more often because some person, sometimes a Congressman, just decides this is what he wants to do, and he sticks with it until he gets it through.

Do you feel it's necessary to revise the federal circuits geographically which is now being done by the Commission on Revision of the Federal Court Appellate System?

Well, I think that fifteen judges in the Fifth Circuit doesn't make any particular sense, and I don't know how many there are in the Ninth but I also know that the Ninth seems to have no feeling for intra-circuit harmony. Now, if you end up with twenty-seven circuits and don't have some kind of a National Panel you just multiply the conflicts and the chaos. I don't think that dividing the circuits is a panacea, by any means, and I'm sure that it may help in some respects. But it will bring in new problems particularly for the Supreme Court.

Would the National Panel that you propose actually be another tier in the appellate system?

No. The case would not go from a regional panel to a National Panel. There would have to be some kind of selection under rules made by the Supreme Court or made by the national panel under which a case when it came from the District Court would either go to a regional panel or

would go to the National Panel and, in either event, review would only be by the Supreme Court.

You've eliminated the criticism of cutting off access to the Supreme Court?

Yes, everybody would have access to the Supreme Court just as much as ever except that I would venture the thought that the Supreme Court would almost never grant a petition from the National Panel.

[See GRISWOLD, pg. 7, col. 1]

PERS_{ON}NEL

Nominations

Albert J. Engel, U.S. Circuit Judge, 6th Cir., Dec. 5

Russell James Harvey, U.S. District Judge, E.D. Mich., Dec. 5

Herbert J. Stern, U.S. District Judge, D.N.J., Dec. 7

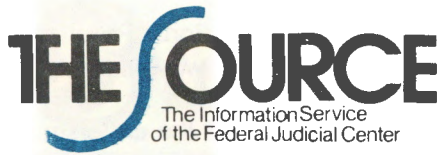
LOW CONVICTION RATE NOTED IN DRAFT LAW CASES

Recent figures released by the Administrative Office of the U.S. Courts for fiscal 1973 show a marked decrease in the conviction rate of defendants charged with Selective Service Act violations.

Of 3,496 defendants charged only 977 were convicted and sentenced. The various District Courts dismissed 2,338 of the cases brought and another 180 defendants were acquitted by either judge or jury.

Of the 977 defendants convicted and sentenced, 631 had entered pleas of guilty or nolo contendere, leaving 253 convicted by the Court and 93 convicted by jury. 707 of those defendants convicted were placed on probation and 7 received only a fine.

The average sentence for those 260 defendants who were imprisoned was 17.5 months. ■■■



- ABA minimum standards for criminal justice - a student symposium. 33 La L Rev 541, Summer 1973.

- The anarchy of sentencing in the federal courts. William James Zumwalt. 57 Judicature 96, Oct. 1973.

- Changing times. T.C. Clark. 1 Hofstra L Rev 1, Spring 1973.

- Computerized legal research: one law firm's user experience. Richard M. McGonigal. 46 Ohio Bar 1615, Nov. 26, 1973.

- Computers and the legal profession. J.L. Garland. 1 Hofstra L Rev 43, Spring 1973.

- The education of judges. Hugh Jones. 4 ALI-ABA CLE Rev., Nov. 2., 1973.

- Eighth Circuit: 1971-1972. 57 Minn L Rev 1105, June 1973. (Collection of Comments on 8th Circuit Decisions)

- Federal magistrates - relief for the federal courts. Lawrence S. Margolis. 12 Judges' J 85, Oct. 1973.

- Judicial reform: solid progress but a long road ahead. 31 Cong. Q 3025, Nov. 17, 1973.

- The nondangerous offender should not be imprisoned; a policy statement. Board of Directors, Nat'l Council on Crime and Delinquency. 19 Crime & Delinq. 449, Oct. 1973.

- Pretrial disclosure of federal grand jury testimony. William J. Knudsen, Jr. 60 FRD 237, 1973.

- "The problem child" -- whose problem? David L. Bazelon. (Address before American Academy of Child Psychiatry, Oct. 20, 1973)

- The special skills of advocacy; are specialized training and certification of advocates essential to our system of justice? Warren E. Burger. (Fourth John F. Sonnett Memorial Lecture, Fordham U. School of Law, Nov. 26, 1973).

- Technology and the court. Thomas J. Moran. 12 Judges' J 98, Oct. 1973.

- Toward better court organization. Carl McGowan. 59 ABA J 1267, Nov. 1973.

- Tribute to Chief Justice (N.J.) Arthur T. Vanderbilt. VI IJA Report 6, Oct. 1973. ¶¶

EDUCATION AND TRAINING DIVISION ROUNDUP

In an effort to improve the interviewing techniques of newly appointed probation officers, the Education and Training Division has devised a new method of training. Using the Center's videotape and playback equipment, the new approach is what educators call role playing. In a workshop setting two men are selected, one to play the part of the probationer and the other, the probation officer. A general scenario is described by the instructor but the main portion of the skit is improvised by the officers themselves. After a period of about five minutes the skit, which had been videotaped, is played back for the group. With the use of stop action on the recorder, the instructor and group critique the methods of the officers. This effective teaching technique illustrates good and bad interviewing methods. It is also useful to show how psychological ruses and expressions can have a profound effect on the interview. ¶¶

BEN MEEKER JOINS CRIMINAL JUSTICE CENTER

Ben Meeker, who retired last June from his position as head of the Federal Probation Office of the U.S. District Court, Chicago, Illinois, has accepted a part-time position as Research Associate and Administrator of the Center for Studies in Criminal Justice at the University of Chicago Law School. The Center was founded in 1965. It is funded by the Ford Foundation and other grants and is co-directed by Law School professors Norval Morris and Frank Zimring. Research projects

sponsored by the Center have included a survey of capital punishment; an analysis of the Illinois jail system; half-way houses for adults and juveniles; juror aid services; the relation between guns, knives and homicide in Chicago and more recently, a comprehensive research and demonstration project on the use of Probation Officer Aides, including some ex-offenders employed by the Federal Probation Office of the Northern District of Illinois. ¶¶

A MESSAGE FROM

THE CHIEF JUSTICE

It is a pleasure to extend Holiday greetings to everyone in the Federal judiciary.

The Holiday season is traditionally one of thanksgiving, of introspection, and of resolution. We can fairly look with satisfaction and pride on significant progress during the past year in handling the many new and enlarged challenges and responsibilities.

In 1972 and 1973, the Federal courts disposed of more cases than at any other time in history. We extend our thanks to the judges and courts staffs whose dedication and effort produced these results, often at the expense of longer hours and reduced vacations.

I hope we can continue to build on the efforts of this past year and continue to provide equal justice for all, to the end that all Americans will accept the rule of law as the indispensable basis for a civilized social order. This will assure open opportunity for each person to develop his or her native talents by individual work and a sense of personal responsibility.

Mrs. Burger joins me in wishing each of you a Merry Christmas and all the best for the New Year. ¶¶

[GRISWOLD, from page 5]

We should still have three tiers of federal courts. But the intermediate tier should be a single United States Court of Appeals. This court will have many panels, and most of the panels would be regional panels, essentially indistinguishable from the present United States Courts of Appeals. Presumably, there would be more than ten such panels, in accordance with the proposals which may be made by the presently existing Commission on the Organization of the Appellate Courts. Judges would be appointed to the United States Court of Appeals, but most of them would be designated, on appointment, to the regional panel where they reside, and they would not sit on any other panel, except on special designation by the Chief Justice to meet emergency situations. It is important, I think, to have reasonably well established panels, so as to develop some stability and continuity of decision in the various regional panels.

Most cases would go to the regional panels, with three judges sitting, as now. This would include nearly all criminal cases on direct review, nearly all diversity cases, and other types of cases turning largely on their facts, or without any general or national significance.

In addition, however, there would be a National Panel of the United States Court of Appeals. This would not be a fourth tier, as it would be wholly correlative with the regional panels, and cases would be assigned either to the regional panel, or to the National Panel, according to the nature of the case. The method of assignment presents some difficulty. My suggestion would be that the assignment should be made by the Chief Judge of the United States Court of Appeals, pursuant to rules established by the National Panel, or perhaps by the Supreme Court. The objective would be to assign to the National Panel--which might consist of five judges, sitting together--cases where a nationally applicable decision is desirable. The decision of

the National Panel would be subject to review by the Supreme Court on certiorari, just as would be the decisions of any other panel of the United States Court of Appeals. But, unless so reviewed, the decision of the National Panel **would be binding throughout the United States**, and would establish the law of the United States, binding on all other federal courts, and on state courts as to federal questions, subject only to review by, or later decisions of, the Supreme Court. III

LEGISLATION

On November 27, the President signed the fiscal 1974 Appropriations Act for the Judiciary, Public Law 93-162.

The bill which extends for an additional six months, the life of the June 5, 1972 grand jury of the United States District Court for the District of Columbia (the so-called Watergate grand jury) was signed on November 30, 1973, Public Law 93-172.

CONGRESSIONAL ACTION

The Senate has passed with amendments, H.R. 9256, which will increase the government's contribution to the cost of health benefits for federal employees. The present contribution is 40 percent which would be increased to 55% under the Senate version and 75% under the House version. The bill is now in conference.

THREE-JUDGE COURT BILLS: S. 271, "to improve judicial machinery by amending the requirement for a three-judge court in certain cases, and for other purposes" has passed the Senate and is pending before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee. Hearings were held October 10.

S. 663, "to improve judicial machinery by amending title 28 U.S.C., with respect to judicial review of decisions of the Interstate Commerce Commission, and for other purposes" passed the Senate November 16 and has been referred to the House Judiciary Committee.

STATUS OF PENDING LEGISLATION:

H.R. 10539 will increase from \$25 to \$35 the maximum per diem allowance for government employees travelling on official business and will increase from \$40 to \$50 the amount

necessary in unusual circumstances. The bill was introduced September 26 and is pending before the Committee on Government Operations.

S. 597, "to provide for the appointment of additional district judges, and for other purposes," is pending before the full Senate Judiciary Committee.

H.R. 2055, to amend Title 5, U.S.C., to authorize the payment of increased annuities to secretaries of justices and judges of the United States is pending before the House Post Office and Civil Service Committee, Subcommittee on Retirement and Employee Benefits. The bill would place secretaries to justices and judges on the same basis as congressional secretaries.

Six-Member Jury Legislation:

S. 288, which would reduce both criminal and civil juries to six members, and S. 2057, to reduce jury to six in **civil** cases only and (1) reduce peremptories from three or two; (2) give judge discretion in multi-party cases in respect to the number of peremptories; and (3) affirmatively require unanimity of verdicts. These bills are pending in the Senate Judiciary Committee Subcommittee on Improvements in Judicial Machinery.

H.R. 8285 which would reduce the jury to six in **civil** cases only and would reduce peremptories from three to two, was the subject of a hearing in the House Judiciary Committee on October 10.

H.R. 7723, to provide for a within-grade salary increase plan for secretaries to circuit and district judges of the courts of the U.S. and for other purposes. Hearings were completed September 14 before the Subcommittee on Monopolies and Commercial Law of the House Judiciary Committee.

S. 2455, to amend Title 28, U.S.C., to change the age and service requirements with respect to the retirement of justices and judges of the United States. This bill provides for retirement eligibility at 70 with 10 years service, 69 with 11 years, age 68 with 12, age 67 with 13, age 66 with 14, and age 65 with 15 years service. It is pending before the Senate Judiciary Committee, Subcommittee on Judicial Machinery.

H.R. 3324, the companion bill in the House is pending before the House Judiciary Committee, Subcommittee on Monopolies and Commercial Law.

S. 2014, to improve judicial machinery by providing improved benefits to survivors of federal judges comparable to benefits received by survivors of Members of Congress, and for other purposes, is pending before the Senate Judiciary Committee. The Judicial Conference has recommended certain technical changes in the text. This is the bill which will merge the Judicial Survivors' Annuity System into the Civil Service Retirement System and would bring judges under the same annuity program as is now available to Senators and Representatives. III

aoos fjc calendar

- January 7-8 Judicial Conference Ad Hoc Committee on Habeas Corpus, San Francisco, Ca.
- January 7-10 Seminar for Courtroom Deputy Clerks, Phoenix, Ariz.
- January 10-11 Judicial Conference Subcommittee of Judicial Improvements, Laredo, Tex.
- January 9-11 Judicial Conference Committee on Administration of Criminal Law, San Francisco, Ca.
- January 14-16 Seminar for Chief Deputy District Court Clerks Phoenix, Ariz.
- January 17-19 Third Seminar for Chief Clerks in U.S. Bankruptcy Judges' offices, Phoenix, Ariz.
- January 21-24 Seminar for Federal Public Defenders, Phoenix, Ariz.
- January 25 Judicial Conference Probation Committee, Washington, D.C.
- January 21-25 Orientation Seminar; Probation Officers, Washington, D.C.
- January 24-25 Judicial Conference Committee to Implement the Criminal Justice Act Phoenix, Ariz.
- January 28-29 Judicial Conference Committee on Court Administration, Scottsdale, Ariz.
- January 28-29 Committee on the Operation of the Jury System, San Antonio, Texas.
- January 28-30 Seminar for Circuit Court Clerks.
- January 28-29 Judicial Conference Magistrates Committee, Phoenix, Ariz.
- February 2-3 Judicial Conference Advisory Committee on Judicial Activities, Houston, Texas.
- February 4-6 Judicial Conference Review Committee, Houston, Texas.
- February 11-14 Conference for District Judges, Washington, D.C.
- February 11-15 Refresher Seminar for Probation Officers, Dallas, Texas.
- February 15 Judicial Conference Committee on Bankruptcy Administration, Washington, D.C.
- February 20-23 Judicial Conference Advisory Committee on Bankruptcy Rules, Washington, D.C.
- February 25-Mar. 1. Orientation Seminar for Probation Officers, Washington, D.C.

THE THIRD BRANCH

VOL. 5 NO. 12 DECEMBER, 1973

THE FEDERAL JUDICIAL CENTER

DOLLEY MADISON HOUSE
1520 H STREET, N.W.
WASHINGTON, D.C. 20005

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POSTAGE AND FEES PAID
UNITED STATES COURTS

Assistant Prosecutors to Vote On Union Representation Here

By TOM GOLDSTEIN

The city's 600 assistant district attorneys, who have been pushing for higher wages, are to decide next month whether they want to be represented by a union in contract negotiations with the city.

Officials of the New York State District Attorneys Association and of the National District Attorneys Association said last week that if the assistants in the five boroughs voted for a union at a meeting planned for May 7, it would mark the first time in the state and one of the first instances in the country where a group of prosecutors became members of a union.

"Our salaries are too low," said Arthur Friedman, an assistant district attorney in Brooklyn. "We're professionals, and we should be paid like professionals."

Mr. Friedman is acting as president of the Association of the New York City Assistant District Attorneys, the group that would represent the assistants throughout the city.

The starting salary for assistants in New York City is \$13,000 a year in Los Angeles, where assistants are members of the civil service and are represented by a labor group; the starting salary is \$14,430. Large corporate law firms pay law-school graduates a beginning wage of \$18,000.

The path for next month's union vote was cleared at the end of February when a three-member board of certification of the city's Office of Collective Bargaining determined after 13 months of taking testimony that assistant district attorneys could not be barred from collective bargaining under existing state law.

During the hearings, the city and the district attorneys argued unsuccessfully that assistants were managers and therefore forbidden from forming a union because they played a substantial role in the formulation of office policy.

D.A.'s Sympathize

In the last few weeks, legislation has been introduced in Albany that would classify assistant prosecutors as "managers." If passed, the legislation, which is supported by the city, would nullify the ruling of the Office of Collective Bargaining and would postpone indefinitely the assistants' attempts to form a labor organization.

Although faced with the possibility that they will soon be presiding over union shops, the district attorneys have expressed sympathy for their assistants.

It's most unfortunate that a professional group has to resort to the threat of unionization to receive a living wage," said District Attorney Mario Merola of the Bronx. "They are grossly underpaid."

Mr. Merola said the low salaries hindered his recruiting efforts and contributed to a high turnover of lawyers in his office.

"I have to send boy scouts against high-powered defense attorneys in a homicide case," he said.

District Attorney Eugene Gold of Brooklyn, noting that assistants do not receive overtime pay or night-time or weekend differentials, said he would not oppose "any legal means for assistant district attorneys to be paid consistently with their responsibilities."

Post 4/24

Public Interest Law Firms

ONE OF THE better recognized efforts in recent years at providing citizens access to the law has been the federal legal services program. Less noticed, however, but with major significance also, has been the emergence of a number of public interest law firms. Many of them have established impressive records of achievement, having impact not only on the lives of people who seldom, or never, had access to lawyers before, but also effecting changes in the law itself.

Four of these public interest law firms were in the news recently when the Ford Foundation announced it would continue offering them financial support—a total of \$2.3 million to be shared by the Center for Law and Social Policy, the Natural Resources Defense Council, the Citizens Communications Center and the Sierra Club Legal Defense Fund. In associating itself with these law firms, the foundation has guaranteed that the skills of many lawyers will continue to be felt in such crucial areas as poverty law and environmental law, and in the fields of civil rights, women's rights and consumer rights.

One of the landmark cases involving one of the firms came when the Center for Law and Social Policy helped win an Alabama court case with a ruling that a constitu-

tional right to adequate treatment must be extended to patients who are involuntarily committed to a mental hospital. At the time of this victory, the rights of the mentally ill and mentally retarded were a much neglected field; but the success in Alabama has led to efforts at reform in other states, and the issue is now an important one.

Much of the firms' activities involves representing environmental interests before federal and state agencies. Rather than being the champions of the law as they should be, many of these agencies actually block or ignore the law. It has yet to dawn on some of them, for example, that the National Environmental Policy act is meant to be obeyed; this specifically includes its requirement calling for environmental impact statements. Without doubt, if such groups as the Natural Resources Defense Council or the Sierra Club Legal Defense Fund did not exist, some government agencies would be ignoring this law with considerably greater impunity.

Whether or not one agrees with the philosophies of these public interest law firms, there is no arguing that they are using the legal system in ways which can only bring credit to the ideals of justice. Had the firms not been at work these past few years, large numbers of citizens would have their rights either ignored or abused.

21 May 1974

Rider A
(add on a note)
H

Mr. Justice:

* John W. Davies argued a total of 140 cases during his long career as an advocate before ^{the} this Court. During his term as Solicitor General (1913-1918), he argued 67 cases. After his retirement from that office, he appeared 73 times on behalf of private clients (~~at least he represented them in a private capacity~~), the last time being Brown in 1954. Only two men have appeared more often. Walter Jones argued some 317 cases from 1801-1850, and Daniel Webster argued somewhere between 185 and 200, No one else in this century comes close to Davies' record.

JCJjr

4/22/74

CA5 Speech

Refer to the brief on behalf of Kentucky in No. 73-846 Wingo v. Wedding, including my notes on the back of Kentucky's brief.

L.F.P., Jr.

SS

April 30, 1974

Fifth Circuit

Among the things I might mention as having impressed me during my first two-and-a-half years on the Court are as follows:

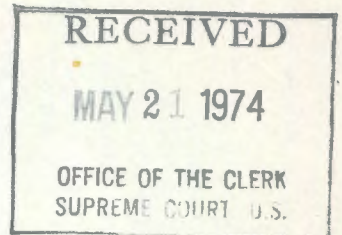
1. The extent to which the Court itself is responsible for the vast expansion of its caseload. Quote Erwin Griswold's recent article as to what has happened, for example, with respect to standing and mootness.
2. Talk about the role of law clerks.

L.F.P., Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 21, 1974



Dear Mike:

If you can readily provide answers to the following questions, I would be grateful:

1. What percentage of the approximately 4,000 petitions and appeals this year will be from criminal cases?

168 2. How many cases were argued (separate docket numbers not opinions) during the 1973 Term?

25% 3. Of the argued cases, approximately what percentage were criminal?

4. Of the criminal cases, what percentage comes from state courts, either by habeas corpus or directly?

I believe you will have the answers to the first three questions almost at your fingertips. The answer to the fourth question may not be available without some research, which I do not want.

Many thanks for your help.

Sincerely,

Lewis Powell

Mr. Michael Rodak, Jr.

lfp/ss

	OFF-MERITS CASES (Decided) (Includes all appeals, per curiams, without argument and all argued cases)	THREE JUDGE CASES (Decided)	TOTAL CASES (Decided)
1967	458	77	2973
1968	360	81	3151
1969	239	93	3409
1970	340	143	3422
1971	453	109	3645
1972	442	173	3748
1973*	326	90	3283

* Through May 20, 1974.

260 admissions today

May 9, 1974

OCTOBER TERM 1973
STATISTICAL SHEET NO. 21

	CURRENT	TERM LAST	O.T. 71
<u>PAID CASES</u>			
1 Cases from prior terms	412	442	362
2 Cases docketed during term	1673	1514	1471
3 Cases on docket	2085	1956	1833
4 Cases granted review and carried over	63	84	73
5 Cases denied, dismissed or withdrawn	1267	1196	1107
6 Cases summarily decided	96	120	74
7 Cases granted review this term	129	114	101
8 Cases acted upon	1555	1514	1355
9 Cases not acted upon	530	442	478
<u>IN FORMA PAUPERIS CASES</u>			
10 Cases from prior terms	467	436	515
11 Cases docketed during term	1682	1713	1650
12 Cases on docket	2149	2149	2165
13 Cases granted review and carried over	13	14	31
14 Cases denied, dismissed or withdrawn	1603	1637	1336
15 Cases summarily decided	37	32	42
16 Cases granted review this term	14	17	20
17 Cases acted upon	1667	1700	1429
18 Cases not acted upon	482	449	736
<u>ORIGINAL CASES</u>			
19 Cases from prior terms	13	13	13
20 Cases docketed during term	0	6	3
21 Cases on docket	13	19	16
22 Cases disposed of during term	3	6	6
23 Cases remaining	10	13	10
24 Total cases on docket	4247	4124	4014
<u>ARGUMENT CALENDAR</u>			
25 Cases available at beginning of term	76	99	107
26 Cases made available during term	143	131	123
27 Cases reset for argument	1	0	4
28 Original cases set for argument	1	3	1
29 Total cases available for argument	221	233	235
30 Cases argued	168	177	176
31 Dismissed or remanded without argument	2	3	5
32 Total cases disposed of	170	180	181
33 Total cases available (43½ hrs.)	51 (50½)	53 (49)	54
<u>DECISION CALENDAR</u>			
34 Cases argued and submitted	168	177	177
35 Disposed of by signed opinion	81	77	72
36 Disposed of by per curiam opinion	5	12	15
37 Set for reargument	1	0	4
38 Total cases decided	87	89	91
39 Cases awaiting decision	81	88	86
40 Number of signed opinions	71	73	66
41 Admissions to the Bar - On Written Motions	3274	3493	4211
- In Court	336	403	303
	3610	3896	4514

126, 010
Since 1790

3406 with
668 in court
4074

~~3668
336
332~~

4074
1973

4210
1972

5223
1471

(13,500)

ROOM NO.	POWELL, JR., Judge/Mrs. L.			5/26		
ARRIV DATE	5/26/74	LAST NAME OF GUEST	FIRST	MIDDLE	IN	RATE
ARRIV DATE		Justice Lewis F. Powell, Jr.				5/27
CLERK		Supreme Court of the U.S.				DEPARTURE DATE
CLERK		Supreme Court Bldg.				
DEPOSIT		Washington, D. C. 20543				
DEPOSIT						1/Br. Su.
NO. & TYPE ACCOMMODATIONS		U. S. COURT				
DATE REC'D		COMP per REC				form gs
DATE CONF'D						4/26
SPECIAL INSTRUCTIONS						



ROYAL SONESTA
HOTEL

A SONESTA HOTEL
300 Bourbon Street
New Orleans, La. 70140
(504) 586-0300

RESERVATIONS ARE HELD UNTIL 6:00 P.M. ONLY. IF RESERVATION IS TO BE HELD FOR LATER ARRIVAL, A ONE NIGHT'S DEPOSIT IS REQUESTED. THIS DEPOSIT REFLECTS THE RATE OF THE ROOM TO BE OCCUPIED. PLEASE ADD CITY AND STATE TAX OF 6½%.

Thank you very much for your reservation. We're looking forward to having you with us at the Royal Sonesta, by location FUN, by design LUXURIOUS. Check-out time is 1:00 P.M., our guaranteed Check-in time is 3:30 P.M., and your room will be assigned as quickly as possible. If further correspondence is necessary, KINDLY MENTION ARRIVAL DATE INDICATED ABOVE. While in the Royal Sonesta you'll enjoy Begue's for French Cuisine and New Orleans' specialties, and you will want to visit Historic ECONOMY HALL, the key address to entertainment in New Orleans.

Reservations Manager

A SONESTA HOTEL