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Robert A. Ainsworth Jr.

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*Robert A. Ainsworth, Jr.**

I.

On October 14, 1980, Congress passed the Fifth Circuit Court of Appeals Reorganization Act of 1980.[1] Effective October 1, 1981, the Reorganization Act divides the Fifth Circuit, the nation's largest federal appellate court, into two new, autonomous circuits. This division comes with dramatic suddenness, ending a controversy over splitting the circuit which has simmered for almost two decades.

The Reorganization Act affects the six Deep South States which originally composed the Fifth Circuit: Texas, Louisiana, Mississippi, Alabama, Georgia, and Florida. Under the Act, the new Fifth Circuit is composed of Texas, Louisiana, and Mississippi, and the new Eleventh Circuit is composed of Alabama, Georgia, and Florida. The Fifth Circuit will have fourteen judges, with headquarters in New Orleans; the Eleventh Circuit will have twelve judges, with headquarters in Atlanta. It is thus apparent that each of the new circuits is large compared with other circuits.[2]

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* United States Circuit Judge, United States Court of Appeals, for the Fifth Circuit, New Orleans, Louisiana.

1. Pub. L. No. 96-452, 94 Stat. 1994 (1980).

2. The following table shows total filings of appeals in the top five circuits of the United States Court of Appeals for the twelve-month period ending September 30, 1980:

Circuit	Filings
Fifth	4,404
Ninth	3,712
Second	2,188
Fourth	2,132
Sixth	2,101

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS DURING THE TWELVE-MONTH PERIOD ENDED SEPTEMBER 30, 1980 at 25 (1980).

If the Fifth Circuit's 4,404 filings are allocated according to filings by states of the circuit, 53% would be in the new Fifth Circuit (Texas, Louisiana, and Mississippi), and 47% would be in the new Eleventh Circuit (Alabama, Georgia, and Florida). Filings for

This circuit division is the first to occur in the federal appellate court system in more than fifty years. Since the intermediate appellate courts were created by the Evarts Act in 1891,[3] the only other division has been the split of the Eighth Circuit in 1929,[4] at which time the Tenth Circuit was created.

The unanimity of support for the Fifth Circuit division is surprising in light of past opposition. All of the active judges of the court, twenty-five in number,[5] favored the split. By unanimous vote, the active judges of the Fifth Circuit petitioned Congress, by resolution dated May 5, 1980, to enact legislation providing for the split of the circuit.[6] Companion bills were introduced in both the Senate and House of Representatives to effect the division. Endorsement of the proposed circuit division came from many sources, including the United States Department of Justice, the American Bar Association, the Commission

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the new Fifth would be 2,334 and for the new Eleventh, 2,070—thus the two divided circuits would both be in the top six circuits. The percentage allocation was computed by Gilbert F. Ganucheau, Clerk of Court for the Fifth Circuit.

3. Ch. 517, 26 Stat. 826 (1891) (current version at 28 U.S.C. § 41 (1976)).

4. Ch. 363, 45 Stat. 1346 (1929). In 1922, the Court of Appeals for the District of Columbia was established.

5. Though the Fifth Circuit is authorized to have 26 judges, only 25 have been appointed thus far.

6. The May 5, 1980 Resolution of the Fifth Circuit reads, in pertinent part, as follows:

> BE IT RESOLVED by the Judicial Council of the United States Court of Appeals for the Fifth Circuit:
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> That we respectfully petition the Congress of the United States to enact legislation dividing the presently existing Fifth Circuit into two completely autonomous judicial circuits, one to be composed of the States of Louisiana, Mississippi, and Texas, with headquarters in New Orleans, to be known as the Fifth Circuit; the other to be composed of the States of Alabama, Florida, and Georgia, with headquarters in Atlanta, to be known as the Eleventh Circuit; and, pending the consideration of such legislation by the Congress, and to eliminate numerous administrative difficulties, and pursuant to the inherent and statutory authority vested in this court, two administrative units are established within the Fifth Circuit effective July 1, 1980, Unit A to be composed of the States of Louisiana, Mississippi, and Texas, with headquarters in New Orleans, and Unit B to be composed of the States of Alabama, Florida, and Georgia, with headquarters in Atlanta; and every case shall be filed, considered and decided in the unit in which it arose and for the decision of cases filed in Unit B the court ordinarily shall organize itself into panels of judges residing in Louisiana, Mississippi, and Texas (although the authority of judges to act as members of this court throughout this circuit shall in no wise be diminished or affected); and there shall be only one body of law, one judicial council and one judicial conference for the circuit.

Resolution of the Fifth Circuit (May 5, 1980) (on file with the Fifth Circuit Clerk of Court).

on Revision of the Federal Court Appellate System, the Federal Bar Association, the National Association of Attorneys General, the attorneys general of the six states of the circuit, the delegates from each of the six states to the Fifth Circuit Judicial Conference, the District Judges Association of the Fifth Circuit (consisting of 110 district judges), the United States magistrates and bankruptcy judges of the Fifth Circuit, and numerous local and state bar associations.[7] The circuit division was also endorsed by Justice Lewis F. Powell, Jr., the Supreme Court Justice designated to preside over the Fifth Circuit, and by Chief Justice Warren E. Burger.[8]

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7. Included in the endorsement was an editorial of the New York Times dated August 27, 1980, which reads as follows:

> Through the tumultuous civil rights struggles of the 1960's, the words "Fifth Circuit" meant judicial courage in the Deep South. The United States Court of Appeals for the Fifth Circuit ordered segregationist governors to obey the Constitution, redneck merchants to abide by public accommodations laws, registrars to allow blacks, finally, to vote. While those battles raged, the Court had to defend itself. There were subtle attempts to limit its power by gerrymandering its boundaries. Civil rights advocates rallied to overcome a proposal that would have peeled off Texas and Louisiana from Mississippi, Alabama, Georgia, and Florida leaving a more conservative eastern circuit.
>
> Now, finally, not racism but practicality dictates that the Fifth Circuit must be split after all.
>
> The national explosion in litigation has been dramatically evident in the Federal courts that stretch from Miami to El Paso. The Fifth Circuit has grown from 9 to 26 judges, making an orderly meeting of all members virtually impossible. A few weeks ago the vote in a major criminal case was 13 to 11.
>
> Mississippi's Congressional delegation and all the Fifth Circuit judges have asked for the shift. They now want Mississippi in a western circuit, based in New Orleans, with a new eastern circuit (to be denominated the Eleventh Circuit) based in Atlanta. The Senate has bowed to the inevitable by agreeing to the split. The House would be wise to follow suit promptly. The quality of President Carter's appointments, crowned by the elevation of Frank Johnson from an Alabama district court, offers assurance that both new courts can maintain the vigor and independence of their parent.

N.Y. Times, Aug. 27, 1980, § A, at 22, col. 1.

8. In a letter to Representative Peter Rodino, chairman of the Judiciary Committee of the House of Representatives, dated September 19, 1980, the Chief Justice said in part:

> I write you now to make it clear that I strongly support the enactment of the pending legislation to divide the Fifth Circuit into two separate Circuits. I do so notwithstanding the fact that since I originally made the proposal, division into two circuits has in reality become virtually obsolete. The Fifth Circuit at full strength will have 26 judges in active service. The Ninth will have 23. Neither in terms of general administration of such a circuit involving as it does a vast geographical area and the internal management, particularly in connection with en banc hearings, is this feasible. This was illustrated in the Fifth Circuit on the first case which was heard en banc. At that time there were only 24 judges qualifying and participating. I am informed that it took four and

When the Omnibus Judgeship Act of 1978[9] was passed authorizing twenty-six judges for the Fifth Circuit, few believed it would be possible to operate an appellate court efficiently with such a large number of judges. There is no other court of similar size in the United States, and perhaps in the world, with the possible exception of the World Court, at The Hague. The problem of size became apparent at once with the first en banc session of the court, in which twenty-four judges participated. Special physical arrangements were necessary; a two-tiered bench was prepared to accommodate the members of the court for en banc oral arguments. Later, in the conference of the judges, obtaining a consensus presented considerable difficulty. On cases under consideration, meetings in which the sitting judges expressed their views became long. The writing of the opinion was also a protracted process. The opinion was first assigned to a member of the court to be written and then slowly circulated among the judges for concurrences. Inevitably there were accompanying dissents and special concurrences. The time required to reach a result became excessive. It soon became obvious that a court the size of the Fifth Circuit was unworkable.

The House Judiciary Committee Report on the Fifth Circuit Reorganization Bill then pending in Congress summed up the court's predicament:

> The numerical size of the Court has the possibility of diminishing the quality of justice. Citizens residing in the states of the Fifth Circuit, and especially litigants and lawyers, are

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one-half hours for all of these judges to express their views on a single case. This harsh reality was not unanticipated, but I am informed that its actual realization brought about the support in the Fifth Circuit for the division. Inevitably, the whole matter will have to be considered within a relatively few years, but the division of the Fifth Circuit should not wait on that factor. It should be made at once. Ultimately, however, these Circuits must be divided into three units but we should not wait.

Letter from Chief Justice Warren E. Burger to Representative Peter W. Rodino, Jr. (Sept. 19, 1980). In the Chief Justice's Year-End Report on the Judiciary, dated December 29, 1980, he further commented on the division of the Fifth Circuit as follows:

> The division of the Fifth Circuit represents an important, albeit long overdue, change to adopt [sic] the court's structure to current realities. The Fifth Circuit, dispersed as it is from Key West, Florida to the Western Border of Texas, has grown into an unwieldy and cumbersome judicial entity of 26 circuit judges and 125 district judges. An en banc hearing in the Fifth Circuit today is as large a body as the original U.S. Senate. A judicial body of that size is wholly unworkable.

Year-End Report on the Judiciary by Chief Justice Warren E. Burger (Dec. 29, 1980).

9. Pub. L. No. 95-486, 92 Stat. 1629 (1978).

> entitled to know with a maximum degree of reliability what the law of the Circuit is.
>
> Accordingly, there must be uniformity in the application of the law by the Court, especially since it does not generally sit as a body en banc but only in panels of three judges. As the Court now approaches 2,250 opinions per year, it becomes even more difficult to preserve uniformity in the law of the circuit. The possibility of intracircuit conflicts is extremely great and occurs with regularity. The only sanction for such conflicts is to resort to en banc consideration. With a twenty-six judge court this is a most cumbersome, time consuming and difficult means of resolving lawsuits.[10]

The Fifth Circuit's position was expressed by Chief Judge James P. Coleman in his statement to the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee:

> After operating together as the largest group of judges ever known on a court in the history of American Jurisprudence, we have unanimously come to the conclusion that our personal preferences must yield to the public good. We recognize that the resolution of the matter rests with the Congress, but we have come to the unanimous conviction that the effectiveness of the Court as a Judicial Institution requires the division proposed by the legislation which you now have under consideration. By formal resolution, again unanimously adopted, our Court has petitioned the Congress to divide the Circuit, three States to be included in each of the Circuits thus to be created. We express our deep appreciation to the Congress for its prompt response to our call for help, help that only the Congress can provide. We are here today to say, in utmost seriousness, that the sooner Congress grants this relief, the sooner we shall be able to accomplish the desired levels of efficiency and effectiveness.[11]

Judge Frank M. Johnson, Jr., also of the Fifth Circuit and a longtime veteran of important civil rights litigation dating back to when he was a federal district judge in Alabama, emphasized in his statement to the Subcommittee of the House Judiciary

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10. H.R. REP. No. 96-1390, 96th Cong., 2d Sess. 3, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 7680, 7682 (footnote omitted).

11. *Federal Court Organization and Fifth Circuit Division: Hearings on H.R. 6060, H.R. 7665 and Related Bills Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 21 (1980) (statement of Chief Judge James P. Coleman).

Committee the necessity for uniformity and predictability in the law of the circuit.[12] He also stated:

> We represent without reservation that as now constituted the Court can be divided into two three-state circuits without any significant philosophical consequences within either of the proposed circuits.[13]

In my own statement to the Subcommittee, I said that "[t]he geographical alinement [sic] of the Fifth Circuit is obsolete and must yield to the realities of great change."[14] When the federal appellate court system was created in 1891, approximately 8 million people resided in the six Deep South States of the Fifth Circuit, whereas now, eighty-nine years later, there are approximately five times as many, or 40 million people. I emphasized that for most litigants the federal court of appeals is the court of last resort because the Supreme Court reviews relatively few of the decisions of the federal circuit courts (about two or three percent).

Opposition to the bill initially came from civil rights groups, namely, the American Civil Liberties Union, the Lawyers Committee for Civil Rights Under Law, the Alabama Black Lawyers Association, and the NAACP Legal Defense Fund. Utimately, however, these organizations withdrew their opposition, the NAACP Legal Defense Fund being the last to do so. The NAACP opposition was expressed in a formal resolution which stated that "the Fifth Circuit has been the best Federal Court of Appeals on civil rights issues in the nation, not only from the standpoint of the NAACP, but on its records of being upheld by the Supreme Court."[15] Opposition to the split of the circuit was

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12. *Id.* at 32 (testimony of the Honorable Frank M. Johnson, Jr.).

13. *Id.* at 55.

14. *Id.* at 56 (testimony of the Honorable Robert A. Ainsworth, Jr.).

15. *Id.* at 14 (testimony of Althea T.L. Simmons). The NAACP Resolution was presented to the Subcommittee on Courts, Civil Liberties, and the Administration of Justice in the testimony of Althea T.L. Simmons. The resolution reads as follows:

> Whereas, in 1978 Senator Eastland proposed legislation to divide the Fifth Judicial Circuit in order to lessen the impact of the Court's decision [sic] in civil right litigation; and,
>
> Whereas, the Fifth Circuit has been the best Federal Court of Appeals on civil rights issues in the nation, not only from the standpoint of the NAACP, but on its records of being upheld by the Supreme Court; and
>
> Whereas, it is again proposed to divide the circuit, albeit along somewhat different lines;
>
> Now therefore be it resolved, that the NAACP opposes legislation dividing the circuit for the following reasons: (1) It is apprehensive about exchanging a

apparently based upon apprehension about exchanging "a court of known quality for two of unknown quality."[16]

In my testimony at the congressional subcommittee hearing on the bill, my final plea was as follows:

> [W]e would say to those who regard our court so highly that they should reciprocate by trusting us.
>
> Good relationships are built on trust. We urge that you trust our judgment that the quality of justice is now diminished in the present large court, that it is extremely difficult to carry on under present conditions, and that the people in the best position to know this are the judges of the court themselves.
>
> Our judgment should be trusted that the judicial philosophy of the two courts after the division will not differ from what it is today and that there will be no loss of sensitivity to constitutional rights. We think we have merited the trust of those who do business with the court and that trust can best be exemplified by supporting the [pending] legislation.[17]

In the face of the overwhelming support from many sources, including civil rights groups and leaders, the NAACP finally withdrew its opposition.

The bill to split the circuit passed the Senate without opposition. It was only when the proposed legislation reached the House that opposition developed from civil rights groups. Recognition of this circumstance is found in the report of the House Committee on the Judiciary:

> One of the principal bases of opposition to division of the circuit when it was first proposed was fear on the part of civil rights supporters that it would perpetuate the judiciary in the South as an all-white institution. Given the historical and political context in which the proposal arose, the committee cannot say that this fear was groundless. However, the affirmative

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court of known quality for two of unknown quality; (2) It believes the change is unwise in that the full membership of the court and the district courts under its jurisdiction has not as yet been determined; (3) It has not as yet had an opportunity to evaluate the performance of the newly appointed judges on the expanded court; (4) Since the same problems affecting the Fifth Circuit also exist elsewhere, it should not be considered in isolation but as part of comprehensive legislation.

Be it further resolved, that we urge the Congress to reject any proposal to divide the Fifth Circuit at this time.

Id. at 14.

16. *Id.*

17. *Id.* at 57 (testimony of the Honorable Robert A. Ainsworth, Jr.).

> action guidelines for judicial selections issued pursuant to Congressional directive and appointments made in the Fifth Circuit, both on the appellate and district court levels, indicate that any problem of this nature that may have existed is rapidly disappearing. Still, testimony before the subcommittee on Courts, Civil Liberties and the Administration of Justice indicates that some lingering doubts on this still remain. The committee took this into consideration in establishing the effective date of this legislation. It is the view of the committee that continued adherence to the affirmative action guidelines by the President, whoever he may be, in appointing, and the Senate, in confirming judicial nominations, will completely eliminate this matter from future consideration.[18]

Thus the House Committee unanimously agreed that the bill to split the Fifth Circuit into two separate and autonomous circuits should be passed. In doing so, the House Report referred to the favorable recommendation of the Commission on Revision of the Federal Court Appellate System, in which the Commission declared that "the case for realignment of the geographical boundaries of the Fifth Circuit is clear and compelling"[19] and recommended dividing the circuit into two circuits composed of the states with the same alignment as set forth in the House bill.

In consideration of the measure on the House floor, Congressman Robert Kastenmeier, chairman of the Subcommittee of the House Judiciary Committee which held the hearings on the bill, stated:

> The goal of the legislation is to meet societal change and constantly growing caseloads in the six States currently comprising the fifth circuit. It accomplishes this by providing residents, attorneys and litigants who reside or litigate within those States with a new judicial structure—two autonomous circuits—which is more capable of meeting the clear mandates of our judicial system: The rendering of consistent, expeditious, fair and inexpensive justice. It is my view that the two new circuits will preserve and promote the integrity and independence of the parent court.[20]

Finally, Representative Peter Rodino, chairman of the House Judiciary Committee, said in the floor discussion:

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18. H.R. REP. No. 96-1390, 96th Cong., 2d Sess. 5, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 7680, 7684 (footnote omitted).

19. *Id.* at 6, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 7680, 7685.

20. 126 CONG. REC. H1,0188 (daily ed. Oct. 1, 1980).

> The Federal courts in these six States have been in the forefront of our Nation's civil rights efforts in the last two decades. Black Americans and other minorities who have been the victims of discrimination in schools, in housing, in employment and in many other aspects of their lives, have made the fifth circuit a crucial battleground in the fight for human rights for all Americans.
>
> In 1978 I was deeply concerned that the splitting of the fifth circuit would create an imbalance in the make up of the court which would prevent the continuation of civil rights advancement through our judicial system. It is my judgment that dividing the fifth circuit at this time will not create such an imbalance in the court and that its effect will be to advance the cause of equal justice in the six States.[21]

The bill passed the House of Representatives without opposition and was signed by President Carter on October 14, 1980.

II.

As early as March 1964 the Judicial Conference of the United States had adopted a resolution that the Fifth Circuit be split into two autonomous circuits.[22] Later, in October 1972, Congress established the sixteen-member commission known as the Commission on Revision of the Federal Court Appellate System. The prime recommendation made in its report published in December 1972 was that the Fifth Circuit be divided into two circuits: one composed of Florida, Georgia, and Alabama, the other composed of Texas, Louisiana, Mississippi, and the Canal Zone.[23] The Commission report also recommended division of

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21. 126 CONG. REC. H1,0193 (daily ed. Oct. 1, 1980).

22. The Judicial Conference accepted the recommendation of the Special Committee on the Geographical Organization of the Courts, which had been authorized by the Conference in its September 1963 session. The Committee submitted a "comprehensive report" on the judicial business of the Fifth Circuit, recommended additional circuit judgeships for the circuit and recommended that the circuit be divided into two circuits, one with the States of Alabama, Florida, Georgia, and Mississippi, and the other with the States of Louisiana and Texas and the Canal Zone. *See* DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 14 (1964).

23. In its report dated December 1973, the Revision Commission said:

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

the Ninth Circuit. Some observers were surprised at the Commission's recommendation that all of the circuits be left intact with the exception of the Fifth and Ninth; Professor Charles R. Haworth of the University of Texas commented that "[t]he Commission labored mightily, but produced only a mouse."[24]

There were numerous hearings before congressional committees following the report of the Commission. But not until the Omnibus Judgeship Bill of 1978 was introduced in Congress was the split of the Fifth Circuit given serious consideration. The Senate version of the bill, as it passed that body, provided for a division of the Fifth Circuit into two circuits with the creation of the new Eleventh Circuit. While the measure was pending in the House, opposition arose to the division of the states on a two-four basis as provided in the Senate bill, that is, Texas-Louisiana to compose one circuit and Mississippi-Alabama-Georgia-Florida to compose the other circuit. A stalemate ensued, and the Fifth Circuit split was ultimately deleted from the bill.

A so-called compromise, or substitute, for the split was provided in the Act in the following language:

> Sec. 6. Any court of appeals having more than 15 active judges may constitute itself into administrative units complete with such facilities and staff as may be prescribed by the Administrative Office of the United States Courts, and may perform its en banc function by such number of members of its en banc courts as may be prescribed by rule of the court of appeals.[25]

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

COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, THE GEOGRAPHICAL BOUNDARIES OF THE SEVERAL JUDICIAL CIRCUITS: RECOMMENDATIONS FOR CHANGE (1973), *reprinted in* 62 F.R.D. 223, 227-28 (1973).

24. Haworth, *Circuit Splitting and the "New" National Court of Appeals: Can the Mouse Roar?*, 30 SW. L.J. 839, 839 (1976) (quoting Miller, *Supreme Court: Time for Reforms*, Washington Post, Jan. 11, 1976, § F, at 1, col. 4).

25. Onmibus Judgeship Act, Pub. L. No. 95-486, § 6, 92 Stat. 1629 (1978).

However, the Fifth Circuit was not able to agree on the establishment of more than one en banc court, and the en banc function continued to be composed of all of the active judges of the court.

III.

Judicial history has now been made. What many believed was a practical impossibility, on account of the long-standing opposition to the circuit division, has become a reality. Those of us who have served as judges of the Fifth Circuit may be saddened by the change in a great institution. But change is inevitable when circumstances overwhelmingly demand it. There has been little doubt on the merits of the questions whether the circuit split was imperatively necessary. Twenty-six judges on one appellate court was on its face an absurdity. The Fifth Circuit has had a long and proud record. However, the two new courts which came in existence on October 1, 1981, the Fifth and the Eleventh Circuits, will carry on that tradition equally well.[26]

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26. The House Report said in this regard:

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

H. R. REP. No. 96-1390, 96th Cong., 2d Sess. 1, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 7680, 7680.