Federal Judicial Center

Research Report

The Geographical Division of the Eighth Circuit Court of Appeals

By

Denise Bonn

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F O R E W O R D

Ms. Denise Bonn came to the Federal Judicial Center in January 1974 as a student intern in the Washington Semester Program of the State University of New York.

During her five months at the Center, Ms. Bonn engaged in a number of research activities under the direction of the staff. Her study of the last geographical realignment of a circuit court of appeals in 1929 may provide added perspective on circuit realignment as it is contemplated today.

William B. Eldridge
Director of Research

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I. INTRODUCTION

The Commission on Revision of the Federal Court Appellate System has recommended to the Congress, the President and the Chief Justice of the United States that the geographical boundaries of the Fifth and Ninth Circuits be altered to create four circuits. If this proposal is adopted, it would be only the second time that geographical boundaries have been altered since the creation of the present federal circuit court system in 1891. The last such alteration occurred in 1929 when the Tenth Circuit was created from the (then) Eighth Circuit Court of Appeals.

This report describes the events surrounding the 1929 change and the issues motivating Congressional activity. These issues seem strikingly similar to issues now confronting the Congress as the House and Senate Judiciary Committees prepare to review the recommendations of the Commission. These recurring issues include:

-- the avoidance of single state circuits;

-- the hesitation to add states to existing circuits;

-- the desire to avoid a multitude of problems associated with total circuit court alteration;

-- the focus of attention on the circuits presenting the most glaring problems;

-- the confusion associated with the question, "What makes a court overworked?"

-- the optimum caseload for circuit judges;

-- the questionable use of district judges on the Court of Appeals;

-- the demand for court specialization in order to prevent the duplication of highly technical types of law between two circuits; and

-- the ever-present considerations of politics and artful compromise.

The following report will explain how these issues developed in the controversy over the division of the Eighth Circuit Court of Appeals.

II. INITIAL LEGISLATION

The initial legislation to divide the Eighth Circuit Court of Appeals was written not by a Congressional Subcommittee, nor a specially created Commission, but by a Subcommittee of the American Bar Association. The bill, H.R. 5690, was introduced by Maurice Thatcher of Kentucky on December 5, 1927. The A.B.A. Subcommittee prepared a bill to relieve the condition of congestion in the Circuit Courts, primarily that of the Second and Eighth Circuits. The A.B.A. had worked on the bill since 1925, attempting to adjust the circuits by the amount of litigation as the primary consideration, and secondly, by the population and wealth of the particular states. Merrill Moores, chairman of the subcommittee stated, however, that the committee could not come up with any division that was completely satisfactory.[1]

The bill, though drafted by an A.B.A. subcommittee, did not have the endorsement of the A.B.A. It appears that a resolution for the approval of the full membership of the A.B.A. was not taken prior to the Congressional hearings in February and March of 1928. This may have been a shortcoming in the manner of the bill's presentation to Congress; the views of the lawyers were not heard until after the bill was introduced, and they were almost totally negative. Had the A.B.A. tried to obtain the lawyers' views before introducing the bill, they would have seen its poor reception, and could have saved much time and effort in getting a bill passed.

The bill provided for a re-circuiting of the entire country, in an attempt to equalize litigation, population, and wealth, while also maintaining contiguity of the states and adequate transportation among them.[2] The bill provided for the following divisions of the states and American territories into circuits:

1) Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, Puerto Rico.
2) New York.
3) Pennsylvania, New Jersey, Delaware, and Virgin Islands.
4) Maryland, Virginia, West Virginia, North Carolina, South Carolina, Georgia.
5) Alabama, Arkansas, Florida, Louisiana, Mississippi, Texas, Canal Zone.
6) Kentucky, Tennessee, Ohio, Michigan.
7) Illinois, Indiana, Wisconsin.
8) Colorado, Kansas, Missouri, New Mexico, Oklahoma.
9) Iowa, Minnesota, Nebraska, North Dakota, South Dakota, Wyoming.
10) Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon, Utah, Washington, Hawaii, China.

(See Appendix Map, p. 4).

This revision created one additional circuit to the existing nine circuits, and provided for four circuit judges in the Second and the Seventh Circuits, and three judges in each of the other circuits. No

additional judgeships were created; the number of judges per circuit was achieved by grouping together states in which existing circuit judges were residing at the time. The proponents of the bill (Reeves T. Strickland and Moores of the A.B.A., and Rep. Thatcher) specifically stated in writing (Re: H.R. 5690 - A Bill to Amend Sections 116 and 118 of the Judicial Code - Brief for the Proponents) that the subcommittee desired to arrange the circuits in such a way that the number of judges in the circuits was relatively uniform.[3]

Hearings were held by the House Judiciary Committee on February 3 and March 2, 1928 to elicit the opinions of judges and members of the Bar. The bill received overwhelming condemnation by both groups.

The formation of a tenth circuit created controversy in its very break from tradition. Heretofore, there were only nine circuits, the number of circuits equalling the number of Supreme Court Justices. There was what can be termed a traditionalist outcry against increasing the number of circuits, because of the traditional tie between the number of Justices and Circuits. At one time there had been a procedural tie between the two, for each Justice attended meetings in one Circuit Court of Appeals, and had the power to sit on that Circuit's District Courts. Changes in the law and inability of the Justices to devote time to Circuit Court meetings, no longer made it necessary for there to be one Justice for each circuit. Chief Justice Taft held this opinion and he further stated, "There would be no practical difficulty in assigning, for miscellaneous business in two Circuits, the same Circuit Justice."[4]

The traditionalist argument had little weight and was easily countered with the above reasoning. It was not a major contention of the opponents to H.R.5690, but was merely stated by some.

The formation of a single state circuit was another issue in dispute. The creation of the Second Circuit containing only the state of New York was perceived as having a negative impact upon the Federal nature of Circuit Courts of Appeal. In a letter from Circuit Judge Thomas Swan to Senator Bingham, the idea of a "circuit to embrace a single state would be contrary to historical tradition and the underlying notion which led to the creation of Federal Circuits."[5] The desire for a Court to settle interstate conflicts and render a broad interpretation of an individual State's law in keeping with the best interests of the circuit, and the country as a whole was mentioned by Chief Justice Taft, by all the Second Circuit Judges, and members of the Bar from Connecticut and Vermont who did not want to be separated from New York. In a letter to the Attorney General, Washington, D.C., all four of the Second Circuit Judges denounced this provision of H.R.5690 as "unfortunate and very provincial."[7] They also pointed to the fact that New York relied upon the district judges of Connecticut and Vermont to help with New York's heavy caseload, and if these two states were separated from New York, New York could no longer make use of the judges from these two states.

There was antipathy to attaching to existing circuits any states taken from another circuit. For example, H.R.5690 took Utah from the

Eighth Circuit and added it to what had been the Ninth Circuit, and Georgia was removed from the Fifth and placed with the Fourth Circuit. Congressman Newton objected to this general practice at the House Hearings on H.R.5690, due to the differences in procedural and substantive law between the two circuits.

The clamor against the bill rose even higher on specific issues related to the bill. There was widespread opposition to the separation of Vermont and Connecticut from New York by judges, lawyers and Congressmen from all three states. Apart from the previously mentioned argument against the creation of a single state circuit, was the very practical argument made by the judges and lawyers concerning the inconvenience the recircuiting would cause. Connecticut lawyers explained that their state's economic ties with New York made it beneficial to have the two states in the same circuit because of the large amount of litigation arising between the two states as a result of business interactions of the two. Both Connecticut and Vermont lawyers also stated that it was closer and easier for them to come to New York for appeals litigation than to go to Boston, the Court seat of the First Circuit.

Congressman Newton also raised the point that the separation of Connecticut and Vermont from New York would not solve the problem it was supposed to, namely, reduce the Second Circuit's heavy caseload. The number of appeals from the former two states was so low that it would in no manner appreciably reduce the caseload. Furthermore, New

York would lose the services of one of its Circuit Judges, Judge Swan, for he lived in Connecticut and would thus become part of the newly created First Circuit.

The primary fight over the bill centered upon the division of the Eighth Circuit. Judge Kimbrough Stone, Senior Judge (at that time, "Senior Judge" had the same meaning as "Chief Judge" does today) of the Eighth Circuit, attacked the proponents of the bill whose alleged purpose (according to coverage by the press) was to alleviate the "'congestion' of the litigation in the Circuits and 'particularly in the Eighth Circuit' where, it is said, the court is 'from 200 to 300 cases behind its docket.'"[8] Stone stated emphatically that during the eleven years he served on the Court, it had "[n]ever been even one cas behind its docket and it is not now."[9] Stone objected to the statistics presented in the Brief for the Proponents of H.R.5690 which related to the Court's backlog. The chart in the Brief listed cases heard by the Court, and pending cases.[10] The figures were taken from The Report of the Attorney General - 1927. Stone felt that the writers of the Brief had construed pending cases as delayed cases. The report made it seem that the Circuit had 299 cases left over on its docket for the next year because of the Court's inability to dispose of them. Stone made it quite clear that this was not the case - a case was pending once the review papers were filed with the clerk, even though the litigant still had to prepare and file a brief and the transcript from the trial court had to be

prepared and filed. Also, since the Eighth Circuit was required by Congress to hold terms at different places throughout the Circuit, and to hear cases coming from certain areas at specific seats of the Courts,* a case might be filed after the deadline for that term, and thus be pending.[11] All of these cases, therefore, were not delayed by the Court, but had to be designated as pending because of particular Eighth Circuit Rules.

Stone therefore felt that the assertion that the Eighth Circuit was behind in its docket should not be a reason for altering the Circuit. He did say, however, "If there are other reasons why this Circuit should be reconstructed, of course, that isanother [sic] matter...,"[14] and he listed several things that should be included in a bill if the Circuit were to be divided that were not covered in H.R. 5690. He stated that legislation should provide that the present status (of seniority or Federal Service) of the Circuit Judges be maintained if they found themselves in new circuits.

Judge Stone also stated that the bill should provide for the time and places for holding court in each circuit. He specifically

*All Mountain State Cases from Wyoming, Colorado, New Mexico, and Utah were heard at Denver. They would only be heard at St. Louis or St. Paul by specific order of the Court or by motion.

For the rest of the Circuit, cases docketed by March 1 went to St. Paul and those docketed between March and December went to St. Louis. With the addition of the Oklahoma City sitting in 1928, the time for the St. Louis sittings was reduced and cases were heard in Oklahoma in late January.

mentioned that if the Eighth Circuit were to be divided, the Judges which would be sitting in each circuit should be consulted regarding this.

His final concern was that provision be made in the legislation indicating to which Court of Appeals would be assigned litigation presently in the Eighth Circuit and cases currently on their way up.

A large majority of the judges and lawyers of the Eighth Circuit were opposed to the specific division of the Circuit that the bill provided for. Their dislike of the addition of states from one circuit to existing circuits has already been mentioned.

The major controversy centered around the dislike of the division of the Eighth Circuit by an East-West line (see Appendix Map Page 4). Merrill Moores, defending this division, maintained that since the railroads ran primarily East to West and not North to South, it was the most practical division in terms of convenient travel for both judges and lawyers.[15] Moores further stated:

> The means of communication in the Western half of the district between the North and South ends of the Circuit simply do not exist. The railroad lines run East and West out there. They are trunk lines.
>
> They can not get North and South in the Western half of the Circuit.[16]

An examination of the existing rail lines in 1929 showed this to be primarily true. The major railroads, and the greatest number of lines, ran East and West. It was possible, however, to move North

and South in the Western part of the Circuit since some railroads did run North and South, although the railways were not extensive.[17]

A good many judges and lawyers, however, favored a North-South line of division for the Circuit. Several cited the fact that such a division would divide the states by litigation type; the eastern states would have primarily agricultural and manufacturing cases, the western states primarily matters concerning irrigation and mining. This would help the judges because they would not have to familiarize themselves with both types of law.*

Mr. Amasa C. Paul of the A.B.A. subcommittee concerned with the division of the Circuits favored a three-way division of the Eighth Circuit, with the addition of three judges, so that there would be three judges for each circuit. He proposed the division as follows: 1) Minnesota, Iowa, Nebraska, North Dakota, South Dakota (St. Paul Circuit); 2) Missouri, Kansas, Arkansas (St. Louis Circuit); 3) Colorado, Wyoming, Utah, New Mexico, Oklahoma (Denver Circuit). Each of the three circuits contained one of the three places of holding court where the Eighth Circuit sat at the time. (This was before Oklahoma City was added as a seat of court.)

*Irrigation law was considered extremely complicated and some of the Bar expressed the belief that the isolation of this type of litigation to one circuit would relieve the judges from the other circuit(s) from having to be strongly versed in it.[18]

Eighth Circuit Judges Booth, Van Valkenburgh, Kenyon, Stone, and Sanborn all would accept a tri-part division of the Circuit. Judge Booth favored such a division for he felt it would: 1)divide the court work into approximately equal parts, 2)interfere little with the three present seats of the Court, 3)group the states well by dominant litigation type (the irrigation, mining, agriculture, and manufacturing areas previously mentioned), and 4)be a long range proposal since the division would provide for future growth.[19]

Chief Justice Taft also took a position on the proposed division. He stated, "My own impression is that the best thing to do, if you want to do something that can be done at once and not involve conflicting considerations, is merely to divide the Eighth Circuit and let all the other circuits stand as they are."[22] This appeared to be good advice, because if H.R.5690 demonstrated anything, it was that attempting to change all the circuits at once was too much. The widespread opposition the bill received revealed that it was a poor political risk because it could never gain enough Congressional support to be passed. The bill had to be amenable to a majority in Congress. This became evident to others too, and attention shifted to how the Eighth Circuit, alone, should be divided.

Taft suggested that the Eighth should be divided as follows: Eighth: Arkansas, Missouri, Iowa, Mannesota, North Dakota, South Dakota; Tenth: Oklahoma, Kansas, Nebraska, Colorado, New Mexico, Utah.

Taft expressed a preference that Nebraska should go with the Tenth Circuit because of its proximity to Kansas and Wyoming and because the railroad from Chicago to Colorado passed through Wyoming and Nebraska.[23] Taft was, however, open to the possibility of Nebraska included as a part of the Eighth Circuit. Since no Circuit Judge resided in Nebraska it did not matter if it were included in the Eighth or the Tenth Circuit, because its addition would not affect the number of judges in either circuit. The Circuit Judges in the Eighth Circuit, however, favored Nebraska remaining part of the Eighth.

By January of 1928, the A.B.A. changed its position of re-circuiting the whole country. A special subcommittee was convened that month to consider only the matter of dividing the Eighth Circuit, since the idea of changing all the circuit boundaries was abandoned. The Committee was composed solely of Eighth Circuit lawyers and was headed by A.C. Paul.

III. THE NEWTON BILL - H.R.13567 AND THE THATCHER BILL - H.R.13757

It was apparent to Mr. Thatcher and the other Congressmen that a new bill would have to be written which would get a more favorable response from the bench and the bar. Congressman Walter H. Newton from Minnesota submitted H.R.13567 on May 5, 1928. This bill divided only the Eighth Circuit, leaving the other circuits intact. The "Newton Bill", as it was called, provided for a North-South line of division: Minnesota, North Dakota, South Dakota, Iowa, Nebraska, Missouri, and Arkansas made up the new Eighth Circuit: Colorado, Wyoming, Utah, Kansas, Oklahoma, and New Mexico made up the new Tenth Circuit (see Appendix p.5, Upper Map). The bill provided for the creation of new judgeships: the Second, Sixth, Seventh and Tenth Circuits were to have four judges; the Eighth, five judges; and the other circuits all would have three judges. This was an increase of three judges for the area covered by the Old Eighth Circuit. The bill also stated that judges living in the Eighth Circuit would remain in the new Eighth, while those residing in the part of the old Eighth Circuit that would constitute the Tenth, would preside in the Tenth Circuit.

Sittings of the Court at St. Louis and St. Paul would continue in the Eighth Circuit; Denver was also to continue as a seat of the Court, but would now be a sitting of the new Tenth Circuit. Oklahoma City, which had been recently added as a court seat, would become a seat for the Tenth Circuit.

Mr. Thatcher also submitted a bill on May 14, 1928, H.R. 13757. This bill also left all the Circuits the same, except for a division of the Eighth. Thatcher's bill, however, maintained an East-West line of division: Iowa, Minnesota, Nebraska, North Dakota, South Dakota, and Wyoming constituted the new Eighth; Arkansas, Missouri, Oklahoma, Kansas, Colorado, New Mexico, and Utah to comprise the Tenth. (See Appendix, p.5 Lower Map). This division was patterned after a proposal made by Justice Willis Van Devanter who felt this division followed the "recognized routes of travel and commerce."[24] Van Devanter felt an East - West line of division would be better "because all trunk line railroads run East and West; and that if you had a North and South division you would have a great deal of confusion, especially in railroad litigation."[25]

Mr. Thatcher also provided for new judgeships in this bill. At that time, the Second and Seventh Circuits had four judges; the Eighth, six judges; and the others, three judges each. Thatcher's bill provided for four judges in the Second, Sixth, (the additional judge in the Sixth had been provided for by existing law and was added in Fiscal Year 1928), and Seventh Circuits, and three judges in all of the other circuits.

The seats of the Eighth Circuit were to be St. Paul and Cheyenne;* those of the Tenth were St. Louis, Denver, and Oklahoma City.

*Cheyenne had been listed as an alternative seat of court to Denver for the Eighth Circuit under Section 126 of the Judicial Code, but was rarely used.

IV. CONTROVERSY AND ISSUES

With the advent of these two bills, the controversy raged stronger. Hearings were held in the House on May 10, and December 4, 1928, and January 11, 1929, this time in reference to all three bills - Thatcher's two and the Newton Bill.

The A.B.A.'s special subcommittee came out unanimously for the Newton Bill,[26] and an A.B.A. resolution favoring the Newton Bill was passed on July 27, 1928.[27]

Widespread discussions of the bills led to questions of why there was even a need for a division of the Eighth Circuit. One point was the heavy caseload of the Eighth Circuit. The statistics most often mentioned in the Committee Hearings were those compiled in the Report of the Attorney General. The report listed cases pending at the beginning of the fiscal year, cases docketed during the year, and cases pending at the close of the fiscal year. It was first assumed that when the Committee's testifiers referred to the heavy case workload or case filings of the Courts, and primarily the Eighth and Second Circuits, a measure of cases docketed was used. (The number of authorized judgeships was divided into the cases docketed to give the results of Table 1 Appendix pp. 1-). It is apparent from these computations that no real case could be made that the "heavy caseload" of the Eighth Circuit justified a circuit division. A similar finding comes from the calculation of cases

pending at the close of the fiscal year divided by number of authorized judgeships. If one looks only at the total figures for cases docketed or cases pending without regard for the number of judges in each particular circuit, then one can definitely make a case for two overworked circuits. This is apparently what the proponents for division did.

Judge Van Valkenburgh, a circuit judge of the Eighth Circuit, pointed to a slightly different view of caseload. To him it is not only the fact that each circuit judge is expected to sit upon and decide a certain number of cases; the fact that these judges must utilize district judges to a large extent to dispense with all the cases is what he meant by court "congestion":

> Congestion is urged as the ground for division... I do not know what is meant by the term "congestion" in this connection unless it is that it is desired that fewer district judges, if any, should sit upon the Circuit Court of Appeals.[28]

Therefore, in Judge Van Valkenburgh's opinion, the overworked state of a court was being determined not just on the number of cases docketed or pending in a particular circuit, but by the extent to which it was necessary to call in district judges to assist the Circuit Judges in hearing all their cases.

The need to utilize district judges was controlled by the work capacity of Circuit judges. In a letter to A.C. Paul, Senior Judge Stone discusses this relationship:

> As this bill [The Thatcher Bill - H.R. 13757] provides for but three circuit judges in each of these two circuits (or groups), the inevitable result in the second group would be that two district judges would have to sit in every case, in order to keep up with the docket. This is so because the experience of this court has shown that 30 opinions is a good annual average for a judge working diligently, which means that each judge can sit in only 90 cases a year. As this group averages 270 or more cases annually, the above result is inevitable. This extensive use of district judges would seriously interfere with and delay trials in the district courts. Two-thirds of the opinions would be written by district judges and such opinions would often be delayed because of pressure of district court work on those judges.[29]

This practice of using district judges on the Circuit Court was criticized by Justices Taft and Van Devanter[30] and by some of the bar in the Eighth Circuit.[31] The following question and responses were given at the House Hearings:

> Mr. Summers: The practice is not a good one, is it, Mr. Chief Justice, to have district judges sitting in the circuit court of appeals?
>
> Mr. Chief Justice Taft: It is a good deal better to have the circuit judges confine their duties, so far as they can, to the circuit court of appeals work; and you get very much more continuity of opinion in that court by having it composed entirely of circuit court judges.
>
> Mr. Justice Van Devanter: A circuit court judge, being a continuing member of the court, has a larger degree of independence than a district judge who is invited to sit for one or only a few cases.[32]

One of the district judges, Judge Youmans, of Arkansas, also did not feel that district judges should serve on the Courts of Appeal:

> From my viewpoint as a district judge, the principal reason for a division of that circuit is the necessity under present conditions for the service of district judges in the circuit court of appeals. The district judge who performs that service must to some extent neglect the business of his district.[33]

A quite different view was presented by Van Valkenburgh who did not wish to eliminate entirely the use of district judges:

> By such assignments the appellate court is kept more closely in touch with the practical problems confronting the trial judges and the trial judges are enabled to get a more intimate understanding of the considerations which present themselves to the appellate court, which makes for better work in the districts.[34]

This question was of considerable importance in the light of the fact that 40% of the decisions in the Eighth Circuit were written by district judges.[35] The Newton Bill's provision for three additional judges for the two circuits was one attempt to alleviate the Circuit Judges' workload, and would, at the same time, decrease the use of district judges.

Together with the problem of "an overworked" court, was the problem of a court that was just getting too large. Chief Justice Taft stated:

> The six Circuit Judges in the Circuit, though necessary to keep up with the work, create another difficulty. They make up two Supreme Courts (for that is what they amount to) in the same 8th Circuit. And this prevents the uniformity of decision that is very necessary in one Circuit having theoretically only one Circuit Court of Appeals. Cases have been decided by the two different courts in the same 8th Circuit which have been thought not consistent.[36]

Justice Van Devanter also stated:

> There is another thing to which the Chief Justice has called attention: The court of appeals in that circuit is sitting, as he indicated, in two divisions. It really is sitting in three. It is sitting with two district judges at St. Paul, calling in a district judge; with two circuit judges at St. Louis, calling in a district judge; and likewise at Denver.
>
> It is impossible for each of these courts acting separately - although the same court - to have present knowledge of what the others are doing; and it unavoidably detracts from the continuity and harmony of their lines of decision.[37]

This problem created by the two panels also added to the burdens of the Supreme Court:

> MR. LA GUARDIA: Does that increase the work of the United States Supreme Court on appeal?
>
> MR. JUSTICE VAN DEVANTER: Yes, in two ways: In some cases it becomes apparent that there has not been that continuity and harmony of decisions - I am not talking about a personal want of harmony - that would be expected from a single circuit. And even where that is not apparent in particular cases, its existence in others is drawn in as a basis for seeking a review upon certiorari. Not unnaturally, defeated litigants think that the other judges, if sitting, might have decided differently.[38]

Furthermore, Justice Van Devanter agreed to the fact that the Circuit was just "so large that the addition of judges to the court does not relieve the situation."[39] The Circuit was too large geographically, which caused "too much scattering"[40] of judicial personnel.

In letters received by the House Judiciary Committee from judges, members of the bar, and bar associations, the Newton Bill was almost unanimously supported. One problem with this, though, is that it is questionable whether some of the judges and lawyers had copies of the Thatcher bills to comment upon. During the second set of hearings, the Committee had decided it wanted to get the views of the district judges in the Eighth Circuit concerning the proposed divisions. Congressman Newton suggested he would contact A.C. Paul and have him send to the Committee statements of those judges that Paul already had, and ask Paul to write to those judges whose opinions he did not have.[41] Congressman Thatcher, however, thought the Committee should do this.[42] At the January 11, 1929 hearings, Newton said that he had contacted Paul who wrote to the district judges and the State Bar Associations. "I did not say anything to Mr. Paul about presenting the Thatcher bill, because I did not understand that I was to do so."[43] Mr. Paul was not at the Committee hearing due to illness, and thus it is unclear what he did. Some of the judges do seem to make mention only of the Newton Bill, stating that they received "the bill" or the "Newton bill," while others specifically state they favor Newton over the Thatcher bill. This is a serious problem in assessing the actual feeling toward both bills by the district judges and the bar associations.

One judge who did favor the Thatcher Bill (the only one whose statement is included in the Hearings) was Judge Thomas Munger of Nebraska. This District Judge really wanted the Nebraska Bar Association's Bill to be passed, but he favored Thatcher's Bill to the Newton Bill. Most importantly of all, he wanted Omaha to be made a seat of the Circuit Court.[44]

The rest of the letters received by the Committee overwhelmingly supported the Newton Bill. Several common themes were mentioned by them. Many felt that Newton's provision for additional judges was a key point in the bill;[45] others went so far as to say that without additional judges, a division would be useless.[46] Senior Judge Kimbrough Stone was a strong proponent of this position. Stone felt that it would be "harmful"[47] to divide the Circuit if that would leave only three judges for each circuit. It would be better to have all six judges in the same circuit, over such a proposal, for then any of the judges could be utilized anywhere in the Circuit where there was a need for them. Also, if one of the judges could not sit because of illness or other reasons, court business would be seriously delayed. Furthermore, if there were an increase in cases, there would not be sufficient manpower to handle it.

Another major point cited in favor of the Newton Bill was that its division of the Circuit kept the Mountain States intact and the Agricultural States together. This divided the Circuit by type

of litigation - mining and irrigation in the Mountain States, and primarily agricultural interests in the others. This point was hailed by Stone[48] and other judges,[49] members of the bar,[50] and bar associations.[51] Kimbrough Stone stated that mining and irrigation cases involved "important property rights. Already, vital differences exist as to some of such law between this and the Ninth Circuit. There should be no opportunity for a third divergence through the further dividing of such states."[52]

Thus, the division would, in essence, continue the Eighth Circuit practice of keeping all mountain state litigation together; at the time, all mountain state cases were heard in Denver.[53]

Dividing the Circuit approximately equally in relation to the amount of business was also hailed as a good point of the Newton Bill.[54] Kimbrough Stone stated:

> On the basis of cases filed in 1927 there are 222 cases in the first group [Eighth Circuit] and 179 in the second [Tenth Circuit]; on the three year average there are 232 in the first and 174 in the second group. To take care of this difference, the Newton Bill provides for five judges in the first group and four judges in the second. By this increase from the present six judges to nine in both of the two new circuits, the bad effect of dividing the circuit is lessened.[55]

The Thatcher Bill, however, did not divide the work equally between the two circuits, nor did it provide for more judges in the circuit that had more cases filed.

> In the calendar year 1927, 130 cases were filed in the first group and 271 in the second. The average annual filing for the three calendar years 1925-7, was 132 for the first group and 273 for the second group - on either basis, more than twice the cases in the second group. In the second group is also much of the especially difficult litigation (Indian in Oklahoma and mining, irrigation, etc., in Colorado, New Mexico, and Utah).[56]

It is easy to see, therefore, why so many of the judges favored the Newton Bill over the Thatcher Bill, for the latter did not provide for sufficient judgepower to handle a greater caseload.

There was also a calling for the addition of Omaha and Witchita to be seats of court. This would make three places for holding court in each circuit, since the Newton Bill provided for the retention of the seats of court of the Old Eighth in the two new circuits.[57] Judge Munger has already been mentioned as favoring Omaha as a seat of the Court. The Nebraska State Bar Association had appointed a committee to push for Omaha as a court seat, and Senator George W. Norris of Nebraska was helping them achieve this.[58] It just so happened that Norris was Chairman of the Senate Judiciary Committee, and if politics then was anything like it is today, it is unlikely that the Chairman's views would be ignored.

Nelson Loomis, a member of the Omaha Bar, representing the Nebraska State Bar Association before the Committee, also favored the Omaha seat.[59] He said, "Omaha is a gateway. It is a great railroad

center."[60] Furthermore, there was a courthouse there already which could be used.[61]

Of greater interest is the fact that Omaha was a great railroad hub, and Mr. Loomis was employed at the Union Pacific Law Department, whose railroad emanated westward from Omaha. In a letter from James Kinsler, U.S. Attorney from Nebraska, to Senator Norris,certain allusions are made to Loomis' overattention to the Newton Bill:

> It is my understanding that Mr. N.H. Loomis of the Union Pacific Law Department is devoting an unusual amount of time and attention to the consideration of the Newton Bill and its progress in Congress, and I am at a loss to know just what his deep and particular interest in the Bill can be. We know, of course, that railroads are always deeply interested in the appointment of Federal Judges and I am wondering whether Mr. Loomis would be opposed either to you or me. It may be that he is only interested in having the court sit at Omaha on account of the probable increase in passenger traffic which might result.[62]

This gives the impression that the railroads may have had an interest in the division of the Circuit and the appointment of new judges, and in particular, the addition of Omaha as a seat of court. Both the Northern Pacific Railroad Company[63] and the Missouri-Kansas Texas Railroad Company[64] wrote letters to the Committee favoring the Newton Bill.

One can engage in speculation concerning the railroads' support for the Newton Bill. Did they feel a north-south line of

division would increase railroad traffic on the less numerous lines, or increase railroad traffic to particular points, like Omaha in the above example? Were they interested, as Kinsler maintains, in the appointment of more Federal Judges, and did they wish to influence the choice of those Judges? These questions remain unanswered and are just speculation, but they do raise interesting questions about the railroads' role in the division controversy.

The Committee desired to obtain the opinion of the judges concerning the addition of Omaha as a seat of court. Judge Booth, a Circuit Judge for the Eighth Circuit from Minneapolis, disapproved of the idea:

> There are arguments both for and against such an amendment. Against it is the matter of expense. Every additional place of holding court involves (laying aside temporary expedients) providing a permanent courtroom, chambers for the judges, rooms for their secretaries, and quarters for the clerk of court and his assistants. Adequate library facilities are also necessary. In addition to the item of expense may be mentioned the inconvenience to the judges and to the clerk in the way of increased travel and the carrying of records of the clerk's office from place to place.
>
> On the other hand an additional place of holding court would doubtless be a convenience to some of the lawyers in the circuit in the way of less travel; and an additional term of court at the new place would itself be a convenience to some of the attorneys.
>
> It has seemed to me that the arguments against an additional place of holding court outweigh those in its favor, and therefore personally I am opposed to the amendment.

> However, such an amendment, in my judgment, would not be a vital objection to the bill. With or without the amendment the bill is a pressing necessity. If it should develop that the amendment is indispensable to the passage of the bill, or that the amendment would insure the passage which might otherwise be even doubtful, I should be in favor of adding the amendment.[65]

It is possible, therefore, that the inclusion of Omaha as a seat of court was a political move. Booth seems to allude that it might have been necessary to insure passage of the bill. Was it to win over the railroads, to gain the support of Senator Norris, or to appease some other individual or group? Such is left to the obscurity of history.

There was also a call for Witchita to be made a seat of court. W.A. Ayres, Representative from Kansas, presented to the Committee a desire for the Witchita seat. He also stated that a Federal building was currently being built in Witchita, which could provide court facilities, and that the plans would be held up until they could see if judges were needed there.[66] The A.B.A. played an active role in this, for they passed a resolution on October 3, 1928 calling for a Witchita seat of court.

By the close of the January 11, 1929 hearings, the Newton Bill had been approved by all six Circuit Judges of the Eighth Circuit, 16 U.S. District Judges, the American Bar Association, the States Bar Associations of eight states of the Eighth Circuit, and 52 attorneys from the Eighth Circuit, among others.[67]

V. THE FINAL NEWTON BILL - H.R.16658 AND THE PASSAGE OF THE BILL

Congressman Newton rewrote parts of his bill in keeping with some of the sentiments expressed at the hearings, and he introduced H.R.16658 to the House Judiciary Committee on January 28, 1929. The bill was essentially H.R.13567, (the Newton Bill), with the following major changes and additions:

1) The Second Circuit was to have five circuit judges, instead of four. The other circuits were to have the number of judges specified in H.R.13567.

2) Omaha was added as a seat of court in the Eighth Circuit; Witchita was added as a seat in the Tenth. Specific reference to Cheyenne as a possible seat of court was eliminated. This caused no objection because court was rarely held there, and provision was still left in the bill, for court to be held when and where the court deemed necessary.

3) Provisions, in H.R.13567, which related to the disposition of the present judges of the Eighth Circuit and the cases before them, were taken out of the sections of the Judicial Code and made into separate sections of the bill.

The House Judiciary Committee met in executive session on January 1, 1929, and the Committee reported the bill out favorably to the House. As it appeared that no action would be taken on the

bill that session,[68] a resolution was introduced on February 11, 1929 by Mr. Graham, Chairman of the House Judiciary Committee, for the House to consider the bill. The resolution passed and so did the bill, unanimously, on February 18, 1929. In a letter to Taft, Newton tries to explain the unanimity with which it was passed. "Possibly the fact that no speeches were indulged in may account for the unanimity with which it was passed. In any event that is what some of my colleagues have suggested."[69]

The bill then went to the Senate Judiciary Committee. The Committee reported the bill out favorably with one amendment - the addition of Kansas City as a seat of court in the Eighth Circuit. The bill was amended and passed the Senate on February 23rd, and the House agreed to the Senate amendment on February 25th. President Coolidge signed the bill into law February 28, 1929 which became Public Law 840.

VI. CONCLUSION

An analysis of the division of the Eighth Circuit in 1929 can illustrate the problems and pitfalls incurred in dividing a judicial circuit. The first bill proposed, H.R. 5690, revealed the folly of attempting to re-circuit the entire country, especially without first obtaining the widespread support of judges, lawyers, state bar associations, and the American Bar Association. The proponents of division moderated their proposals and solicited the views of Supreme Court Justices, circuit judges directly affected, district judges, and bar associations in support of the Newton Bill. With their support behind him, Representative Newton was able to gain the support of his colleagues, and press for passage of the bill. Thatcher's flaw, in my opinion, was his continued insistence on an east-west line of division, in spite of overwhelming opposition to that by the judges and the bar. Whether his proposal was the better plan or not, it just was not politically expedient - Congressmen in the Eighth Circuit could not vote for that bill in the face of the opposition it engendered.

H.R. 5690 also raised the issue of creating a single state circuit, which was greatly opposed by judges and lawyers of New York, Connecticut, and Vermont, the three states affected by the provision. The opponents called the single state circuit provincial, and contrary to the nature of Federal Courts.

Greeted with equal ire, was the idea of adding states to existing circuits. It was believed that this would create an undesirable situation because of the differences between the substantive and procedural law between the two circuits.

With the introduction of H.R. 13567 and H.R. 13757 more discussion ensued. The exact manner in which the Circuit was to be divided became extremely important to judges and lawyers in the Eighth Circuit. There was overwhelming support for a north-south line of division. This would divide the states by litigation type - irrigation and mining in one circuit, agricultural states in the other. This appears to have been a call for some specialization within the Federal Courts.

Judges Stone and Youmans believed that the division of the Circuit without the addition of new Circuit Judges would not solve the problem of an "overworked court" that had to rely extensively upon the use of district judges. This employment of district judges on the Circuit Court was particularly decried by Justices Taft and Van Devanter, who hoped the addition of new Circuit Judges would decrease this practice.

Another issue was the very size of the original circuit. Chief Justice Taft disapproved of the two "Supreme Courts" and Eighth Circuit formed - this led to inconsistent decisions and thus more work for the Supreme Court. Furthermore, the Circuit was just too large an area to merely increase the number of judges as a solution to the Circuit's problems.

The seats of court also were an important issue - possibly even political moves to placate certain forces or win them over.

Political forces and lobbyists were other factors that had to be dealt with. The fact that one of the Senators from Nebraska was Chairman of the Senate Judiciary Committee emphasized Nebraska's position and increased the importance of demands from that state.

The obscure position of the railroads, representing what may have been a lobbying interest, was another force that had to be dealt with.

Chief Justice Taft's analysis of the enactment of P.L. 840 is an apt conclusion:

> It has been a work of long effort to secure acquiescence in the present proposed division, because of the many varied objections that have been presented to a different arrangement. The people of that region, the Judges, the lawyers and the litigants have finally come to this arrangement as a compromise. If the step is taken, and any defect appears, it will be much easier to have a State transferred from one Circuit to another than to agree upon another compromise. I don't urge the change on the ground that it is a perfect change, but I urge it that we may make progress.[70]

FOOTNOTES

[1]Testimony of Merrill Moores in Hearings on H.R. 5690 Before the House Committee on the Judiciary, 70th Congress, 1st Session, pt. 1, at 9. (1928) [Hereinafter cited as Hearings, Part 1]

[2]M. Thatcher, R. Strickland, M. Moores, RE: H.R. 5690, A Bill to Amend Sections 116 and 118 of the Judicial Code - Brief for the Proponents, 7.

[3]Id., at 4.

[4]Letter from W.H. Taft to Senator Norris, 2/21/29, on file in the National Archives, House Judiciary Committee Files. [Hereinafter cited as Taft Letter]

[5]Judge Swan quoted in etter from Senator Bingham to I.G. Hersey, 3/1/28 in Hearings, Part 1, supra, note 1.

[6]Testimony of W.H. Taft in Hearings on H.R. 5690, H.R. 13567, and H.R. 13757 Before the House Committee on the Judiciary, 70th Congress, 1st and 2nd Session, pt. 2, at 66. 1928-1929) [Hereinafter cited as Hearings, Part 2]

[7]Testimony of Judges Martin Manton, Learned Hand, Thomas Swan, Augustus H. Hand, in Hearings, Part 1, supra, note 1, at 5.

[8]Letter from K. Stone to I.G. Hersey, 2/20/28, on file in the National Archives, House Judiciary Committee Files, [Hereinafter cited as Stone Letter 2/20/28]

[9]Id.

[10]Brief in Support of H.R. 5690 - Report of the Committee on Jurisprudence & Law Reform to 1926 Meeting of the ABA in Hearings Part 1, supra, note 1, at 41.

[11]Letter from K. Stone to I.G. Hersey, 3/6/28, in Hearings, Part 1, supra, note 1, at 57-58,

[12]Testimony of A.C. Paul in Hearings, Part 1, supra, note 1, at 35.

[13]Stone Letter, 2/20/28, supra, note 8.

[14]Id.

[15]Testimony of M. Moores in Hearings, Part 1, supra. note 1, at 42.

[16]Id., at 42-43.

[17]POORS RAILROADS, BANKS, INSURANCE, Vols. 1928 & 1929.

[18]Letter from G.B. Rose to L.C. Dyer, 2/17/28, on file in National Archives, House Judiciary Committee Files. [Hereinafter cited as Rose Letter].

[19]Testimony of W. Booth in Hearings, Part 1, supra. note 1, at 52.

[20]Rose Letter, supra. note 18.

[21]Id.

[22]Testimony of W.H. Taft in Hearings, Part 2, supra. note 6, at 66.

[23]Id., at 67.

[24]Testimony of Justice Van Devanter in Hearings, Part 2, supra. note 6, at 72.

[25]Id.,at 82.

[26]Testimony of A.C. Paul in Hearings, Part 2, supra. note 6, at 80.

[27]Letter from ABA, 10/3/38 in Hearings, Part 2, supra. note 6, at 125.

[28]Letter from Judge Van Valkenburgh to A.C. Paul, 3/5/28 in Hearings, Part 2, supra. note 6, at 56.

[29]Letter from K. Stone to A.C. Paul, 6/30/28, on file in Library of Congress. [Hereinafter cited as Stone-Paul Letter]

[30]Testimony of Justices Taft and Van Devanter in Hearings, Part 2, supra. note 6, at 73.

[31]Rose Letter, supra. note 18.

[32]Testimony of Justice Van Devanter in Hearings, Part 2, supra. note 6, at 73.

[33]Letter from Judge Youmans to I.G. Hersey, 12/19/28, in Hearings, Part 2, supra. note 6, at 127.

[34]Letter from Judge Van Valkenburgh to A.C. Paul, 3/5/28, in Hearings, Part 1, supra. note 1, at 51.

[35]Testimony of Justice Van Devanter in Hearings, Part 2, supra. note 6, at 72.

[36]Taft Letter, supra. note 4.

[37]Testimony of Justice Van Devanter in Hearings, Part 2, supra. note 6, at 72.

[38]Testimony of Mr. La Guardia and Justice Van Devanter in Hearings, Part 2, supra. note 6, at 73-74.

[39]Testimony of Mr. Sumners in Hearings, Part 2, supra.note 6, at 73.

[40]Testimony of Justice Van Devanter in Hearings, Part 2, supra. note 6, at 73.

[41]Testimony of W.H. Newton in Hearings, Part 2, supra. note 6, at 86.

[42]Testimony of M. Thatcher in Hearings, Part 2, supra. note 6, at 86.

[43]Testimony of W. H. Newton in Hearings, Part 2, supra. note 6, at 90.

[44]Letter from Judge Munger to I.G. Hersey, 1/8/29 in Hearings, Part 2, supra. note 6, at 117.

[45]Letter from W. E. Anchor, Esq., to I.G. Hersey, 1/4/28, in Hearings, Part 2, supra. note 6, at 134.

[46]Letter from G.E. Badger, Esq. to I.G. Hersey, 1/1/29 in Hearings, Part 2, supra. note 6, at 135.

[47]Stone-Paul Letter, supra. note 29.

[48]Id.

[49]Testimony of District Judges Kennedy, Farris, Reese in Hearings, Part 2, supra. note 6, at 113-114.

50Letter from Finley, Allen, & Dunham to I.G. Hersey, 1/2/29 in Hearings, Part 2, supra. note 6, at 134.

[51]Letter from Utah Bar Association to I.G. Hersey, 1/8/29 in Hearings, Part 2, supra. note 6, at 130-131.

[52]Stone-Paul Letter, supra. note 29.

[53]Testimony of A.C. Paul in Hearings, Part 1, supra. note 1, at 26.

[54]Letter from Campbell, Glen & Campbell to I.G. Hersey, 1/9/29, in Hearings, Part 2, supra. note 6, at 138-139.

[55]Stone-Paul Letter, supra.note 29.

[56]Id.

[57]Letter from Judge Booth to I.G. Hersey, 12/31/28 in Hearings, Part 2, supra. note 6, at 94.

[58]Letter from G.W. Norris to E.B. Ferry, 1/31/29, on file in the Library of Congress, Norris Papers.

[59]Testimony of N. Loomis in Hearings, Part 2, supra. note 6, at 96.

[60]Id., at 97.

[61]Id., at 101.

[62]Letter from J.C. Kinsler to G.W. Norris, 2/23/29, on file in the Library of Congress, Norris Papers.

[63]Letter from D.F. Lyons to W.H. Newton, 12/18/28, in Hearings, Part 2, supra. note 6.

[64]Letter from W.W. Brown, 1/7/29. in Hearings, Part 2, supra. note 6, at 147.

[65]Letter from Judge Booth to A.C. Paul, 1/19/29, on file in the National Archives, House Judiciary Committee Files.

[66]Testimony of W.A. Ayres, in Hearings, Part 2, supra. note 6, at 85.

[67]Sheet from House Judiciary Committee Files, 70th Congress, RE: HR 16658, on file in the National Archives.

[68]Letter from John Robertson(Secretary to Senator Norris) to Paul Martin, 2/2/29, on file in the Library of Congress, Norris Papers.

[69]Letter from W.H. Newton to W.H. Taft, 2/19/29, on file in the Library of Congress, Taft Papers.

[70]Taft Letter, supra. note 4.

TABLE 1

1926

Circuit	# Judges Authorized	Cases Docketed	C.D. / # Judges	Cases Disposed	C. Dis. / # Judges	Cases Pending	C.P. / # Judges
1	3	162	54	132	44	121	40
2	4	464	116	435	109	157	39
3	3	136	45	141	47	89	30
4	3	127	42	122	41	55	18
5	3	238	79	250	83	93	31
6	3	257	86	276	92	111	37
7	4*	181	45	191	48	99	25
8	6	446	74	378	63	390	65
9	3*	267	89	283	94	120	40

* - Plus one temporary Judge

TABLE 1 - (CONT'D)

Circuit	# Judges (Authorized)	Cases Docketed	C.D. # Judges	Cases Disposed	C. Dis. # Judges	Cases Pending	C.P. # Judges
1927							
1	3	108	36	181	60	48	16
2	4	413	103	428	107	142	36
3	3	150	50	162	54	77	26
4	3	108	36	120	40	43	14
5	3	291	97	230	77	154	51
6	3	291	97	240	80	162	54
7	4*	144	38	141	35	102	26
8	6	401	67	492	82	299	50
9	3*	306	102	299	100	127	42
1928							
1	3	123	41	104	35	66	22
2	4	405	101	417	104	130	33
3	3	251	84	163	54	165	55
4	3	126	42	118	39	51	17
5	3	242	81	271	90	125	42
6	4	229	57	209	52	182	46
7	4*	122	31	149	37	75	19
8	6	377	63	401	67	275	46
9	3	329	110	326	109	130	43

* - Plus one temporary Judge

TABLE 1 - (CONT'D)

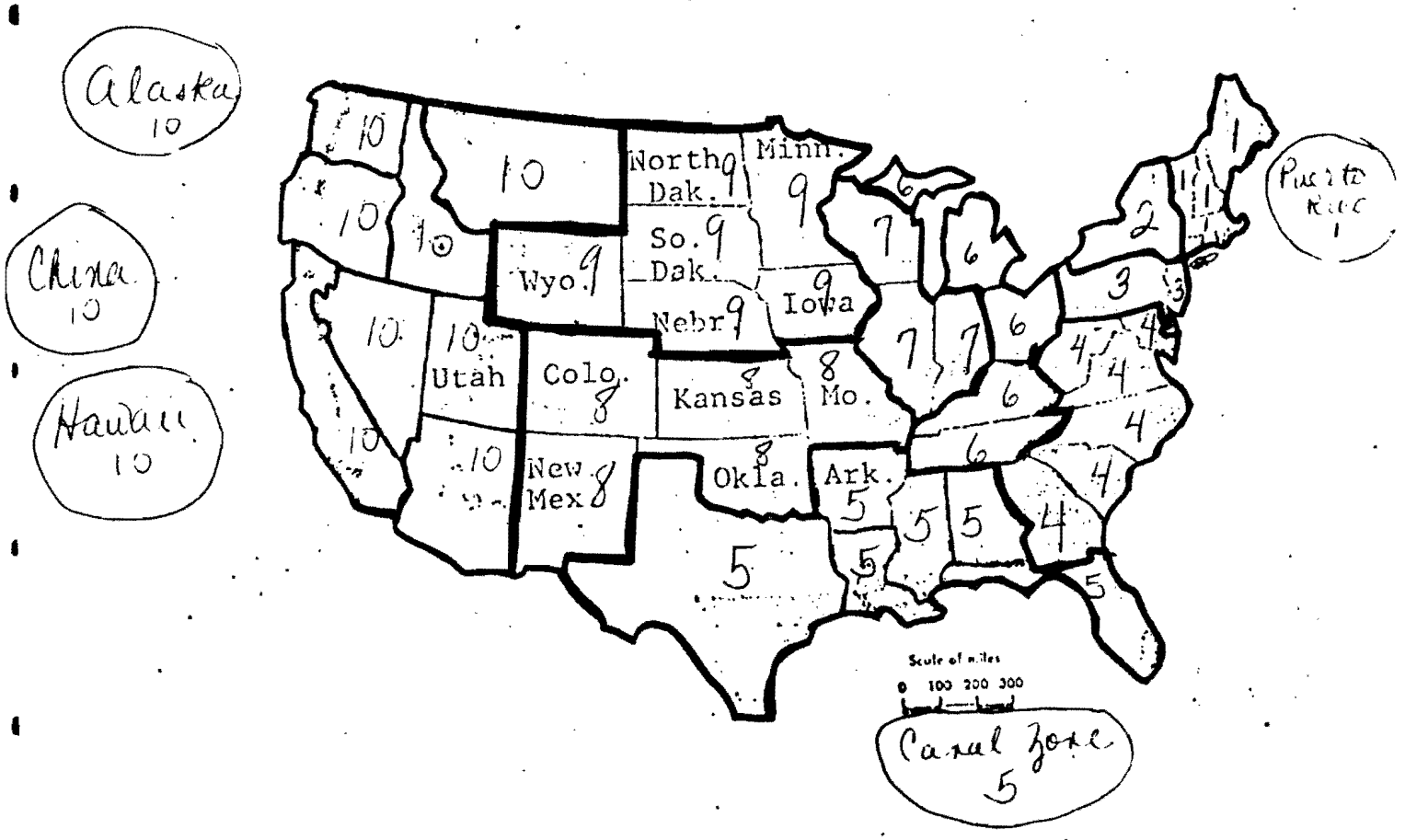
THREE YEAR AVERAGES

1926, 1927, 1928

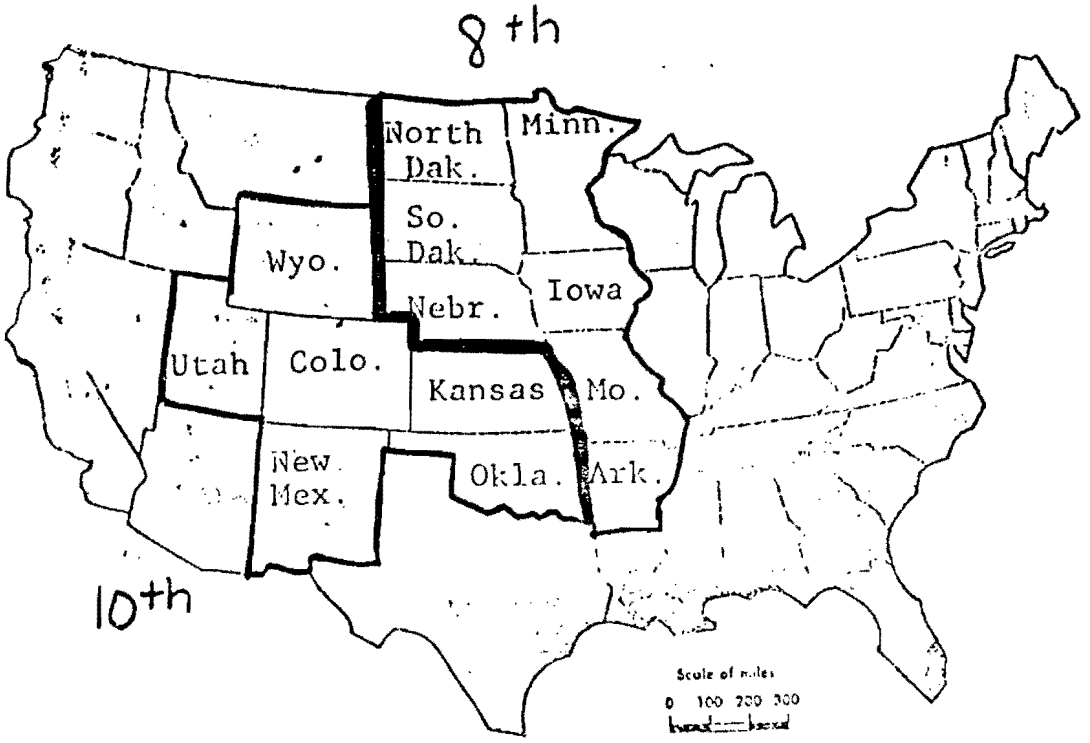
Circuit	# Judges Authorized	Cases Docketed	C.D. / # Judges	Cases Disposed	C. Dis. / # Judges	Cases Pending	C.P. / # Judges
1	3	131	44	139	46	78	26
2	4	427	107	427	107	143	36
3	3	179	60	155	52	110	49
4	3	120	40	120	40	50	16
5	3	257	86	250	83	124	41
6	3	259	80	242	75	152	46
7	4*	149	38	160	40	92	23
8	6	408	68	424	71	321	54
9	3*	301	100	303	101	126	42

* - Plus one temporary Judge

INITIAL LEGISLATION - THE A.B.A. BILL
(H.R. 5690)



THE NEWTON BILL - H.R. 13567.



THE THATCHER BILL - H.R. 13757