SUPREME COURT FOR THE DISTRICT OF COLUMBIA

HEARINGS AND MARKUPS

BEFORE THE

SUBCOMMITTEE ON
JUDICIARY AND EDUCATION

AND THE

COMMITTEE ON
THE DISTRICT OF COLUMBIA
HOUSE OF REPRESENTATIVES
ONE HUNDRED FIRST CONGRESS

FIRST AND SECOND SESSIONS

ON

IMPROVING AND PERFECTING THE LOCAL COURT SYSTEM OF THE DISTRICT OF COLUMBIA

AND

H.R. 3470 AND NEW BILL H.R. 4257

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STAFF SUMMARY OF FINDINGS AND CONCLUSIONS

On November 2, 1989, the Subcommittee on Judiciary and Education held a legislative hearing to consider H.R. 3470, a bill to establish a Supreme Court of the District of Columbia, authorizes eight additional judges for the Superior Court of the District of Columbia, and to revise the present hearing commissioner system in the Superior Court of the District of Columbia.

BACKGROUND AND NEED FOR LEGISLATION

Following the passage and the signing into law of the bill, H.R. 1502, which authorizes funding for an additional 700 police officers for the D.C. Metropolitan Police Department, D.C. Delegate Walter E. Fauntroy introduced the bill H.R. 3470. The motivating force behind the bill was the overwhelming need to bring relief to the D.C. Superior Court system. According to the testimony of various witnesses and legal scholars, the D.C. Superior Court was in grave need of reorganization as well as needing a third tier or court of last resort in order to handle the increase in the arrest and prosecution of drug-related cases. At the time of the hearing, the court was 22 months behind in its trial schedule and was on the verge of falling even further behind in the face of the potential arrests to be made by the 700 police officers funded by H.R. 1502.

The subcommittee hearing on November 2, 1989, was a continuation of oversight and legislative hearings into questions surrounding the need for the creation of a supreme court. The result of which was H.R. 4257, the D.C. Judicial Reorganization and Supreme Court bill, which is presently awaiting Senate action. (For further details on H.R. 4257, refer to the summary of the legislative history of the bill, H.R. 4257.)

In addition, the bill called for the addition of eight judges to the D.C. Superior Court.

During the course of the debate, the question was raised concerning the need to amend the bill so as to allow for the authorization of the eight additional judges to be separate and apart from the authorization for the creation of a D.C. Supreme Court. An amendment to do this was offered and passed without objection. Subsequently, on November 16, 1989, Fiscal Affairs and Health Subcommittee Chairman Walter Fauntroy introduced the clean bill, H.R. 3670, a bill to authorize the appropriation of funds for an additional eight D.C. Superior Court judges.

On November 17, 1989, D.C. Committee Chairman Ronald V. Dellums, requested that the House discharge the Committee on the District of Columbia from its duties with regard to the bill H.R. 3670. The bill passed the House by voice vote and was sent to the Senate.

On November 20, 1989, the Senate passed, without amendment, by voice vote, the bill H.R. 3670.

On December 13, 1989, H.R. 3670 was signed into law by the President, becoming Public Law 101-232.

During the early days of the second session of the 101st Congress, the District of Columbia Committee completed its work on H.R. 4257, the D.C. Supreme Court bill.

In 1986, Chief Judge William Pryor of the District of Columbia Court of Appeals engaged Congressman Mervyn M. Dymally, chairman of the Subcommittee on Judiciary and Education, in considerable discussion about the creation of a local supreme court, noting a considerable backlog and delay in the appellate calendar. At that time, there was a 15-month delay from the point of the filing of an appeal. Today there is a 22-month delay, which is about four times longer than recommended by American Bar Association (ABA) standards. Chief Judge Pryor referred to the subcommittee chairman's attention, several different studies on the issue.

By the beginning of our hearings in 1988, there were three different studies regarding creation of a supreme court in the District of Columbia.

The first was the final report of the Subcommittee on the Workload of the D.C. Court of Appeals Judicial Planning Committee dated August 1979. In that report, the subcommittee cited a 15.5-month average delay from notice to appeal (three times longer than that contemplated by ABA standards) and concluded that an intermediate appellate court should be established in the District of Columbia.

The second report was a copy of a 1986 National Center for States Courts (Southeastern Region) Study on Appellate Delay in the D.C. Court of Appeals, which concluded that "serious consideration should be given to the creation of an intermediate appellate court" and a 1987 resolution of the board of directors of the Bar Association of the District of Columbia, which "urges the creation of an intermediate appellate court for the District of Columbia * * *".

The third was a September 1987 resolution of the board of directors of the Bar Association of the District of Columbia, which endorsed the idea of an intermediate court.

Each concluded that there was a need for a supreme court in the District of Columbia in order to alleviate its backlog and improve the quality of justice in the District of Columbia. Staff counsel was assigned to further explore the matter and to develop a bill to establish a three-tier court system.

Since 1980, several States have added intermediate appellate courts. According to studies of those courts, the addition of an intermediate court has resulted in a considerable increase in total appellate case dispositions. Those States include Idaho (1982), Minnesota (1983), South Carolina (1983), and Virginia (1983). For example, in Virginia total appellate dispositions in 1980-84 averaged 1,968 annually. Total appellate dispositions in 1986 were 2,479—a 26 percent increase.

It is important to note that the appellate and supreme courts have two distinct functions. The intermediate court generally has an error correcting function—correcting errors in the lower court's

application of law. The supreme court—as the highest State court—has a law stating (law development) function and a *final* error correcting function—resulting in final interpretation of the law. These functions are more logically performed by a court sitting en banc (as a whole) rather than by a subpanel of a larger court in the court of appeals.

Presently, in the D.C. Appellate Court, nine members sit most frequently in separate three-judge subpanels. Although authorized to meet en banc, it very rarely does. Thus, it is seldom that a legal opinion represents the full opinion of the majority of the appellate court. This shortcoming affects law development in the District of Columbia.

The proposed legislation revises the system to address the appellate backlog problem and the policy concern of having an appellate judicial system with both law stating and error correcting functions.

On October 2, 1990, the committee voted 11 to 1 to report to the House the bill H.R. 4257 as amended. Report No. 101-806.

On October 15, 1990, the bill H.R. 4257 was called up by the House under suspension of the rules where it passed by voice vote.

H.R. 4257 is presently under consideration by the Government Affairs Committee of the Senate. It is the intention of the committee to reintroduce H.R. 4257 in the first session of the 102d Congress where swift passage is expected.

H.R. 3470—DISTRICT OF COLUMBIA JUDICIAL REORGANIZATION ACT OF 1989

THURSDAY, OCTOBER 26, 1989

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON JUDICIARY AND EDUCATION,
COMMITTEE ON THE DISTRICT OF COLUMBIA,
Washington, DC.

The subcommittee met, pursuant to call, at 9:30 a.m., in room 1310A, Longworth House Office Building, Hon. Mervyn M. Dymally (chairman of the subcommittee) presiding.

Members present: Representatives Dymally, Fauntroy, and Rohrabacher.

Also present: Edward C. Sylvester, Jr., staff director; Johnny Barnes and Donald M. Temple, senior staff counsels; Donn G. Davis, senior legislative associate; Marvin R. Eason, staff assistant; Ronald C. Willis, senior staff associate; Howard Lee, minority assistant staff director.

[The text of H.R. 3470 follows:]

I

101ST CONGRESS
1ST SESSION

H. R. 3470

To establish a Supreme Court of the District of Columbia, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 16, 1989

Mr. FAUNTROY (for himself, Mr. DELLUMS, and Mr. DYMALLY) introduced the following bill; which was referred to the Committee on the District of Columbia

---

A BILL

To establish a Supreme Court of the District of Columbia, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "District of Columbia Judicial Reorganization Act of 1989".

TITLE I—SUPREME COURT OF THE DISTRICT OF COLUMBIA

SEC. 101. ESTABLISHMENT OF SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Title 11 of the District of Columbia Code is amended by adding after chapter 5 the following new chapter 6:

"Chapter 6. SUPREME COURT OF THE DISTRICT OF COLUMBIA

"SUBCHAPTER I. ESTABLISHMENT AND ORGANIZATION

"SUBCHAPTER II. JURISDICTION

"SUBCHAPTER III. MISCELLANEOUS PROVISIONS

"SUBCHAPTER I, ESTABLISHMENT AND ORGANIZATION

"§ 11–601. Establishment; court of record; seal.

"(a) The Supreme Court of the District of Columbia (hereafter in this chapter referred to as 'the court') is hereby established as a court of record in the District of Columbia.

"(b) The court shall have a seal.

"§ 11–602. Composition.

"The court shall consist of a chief justice and 6 associate justices.

"§ 11–603. Justices; service; compensation.

"(a) The chief justice and the justices of the court shall serve in accordance with chapter 15 of this title.

"(b) Justices of the court shall be compensated at 90 percent of the rate prescribed by law for justices of the United States Supreme Court. The chief justice shall receive $3,000 per year in addition to the salary of other justices of the court.

"§ 11–604. Oath of justices.

"Each justice, when appointed, shall take the oath prescribed for judges of courts of the United States.

"§ 11–605. Term; hearings; quorum.

"(a) The court shall sit in one term each year for such period as it may determine.

"(b) The court shall sit in banc to hear and determine cases and controversies, except that the court may sit in division of 3 justices to hear and determine cases and controversies certified for review under section 11–621 if the court determines that subsection (b)(2) of such section is the exclusive basis for such certification. The court in banc for a hearing shall consist of the justices of the court in regular active service.

"(c) A majority of the justices serving shall constitute a quorum.

"(d) A rehearing before the court may be ordered by a majority of the justices of the court in regular active service. The court in banc for a rehearing shall consist of the justices of the court in regular active service, except that a retired

justice may sit as a justice of the court in banc in the rehearing of a case or controversy if that justice was on the court at the initial hearing of that case or controversy.

"§ 11–606. Absence, disability, or disqualification of justices; vacancies.

"(a) When the chief justice of the court is absent or disabled, the duties of the chief justice shall devolve upon and be performed by such associate justice as the chief justice may designate in writing. In the event that the chief justice is (1) disqualified or suspended, or (2) unable or fails to make such a designation, such duties shall devolve upon and be performed by the associate justices of the court according to the seniority of their original commissions.

"(b) A chief justice whose term as chief justice has expired shall continue to serve until redesignated or until a successor has been designated. When there is a vacancy in the position of chief justice the position shall be filled temporarily as provided in the second sentence of subsection (a).

"§ 11–607. Assignment of justices to and from other courts of the District of Columbia.

"(a) The chief justice of the Supreme Court of the District of Columbia may designate and assign temporarily one or more judges of the District of Columbia Court of Appeals or the Superior Court of the District of Columbia to serve on the Supreme Court of the District of Columbia whenever the

business of the Supreme Court of the District of Columbia so requires. Such designations or assignments shall be in conformity with the rules or orders of the Supreme Court of the District of Columbia.

"(b) Upon presentation of a certificate of necessity by the chief judge of the District of Columbia Court of Appeals or the chief judge of the Superior Court of the District of Columbia, the chief justice of the Supreme Court of the District of Columbia may designate and assign temporarily one or more justices of the Supreme Court of the District of Columbia to serve as a judge of the District of Columbia Court of Appeals or the Superior Court of the District of Columbia.

"§ 11-608. Clerks and secretaries for justices.

"Each justice may appoint and remove a personal secretary. The chief justice may appoint and remove not more than three personal law clerks, and each associate justice may appoint and remove not more than two personal law clerks. In addition, the chief justice may appoint and remove law clerks for the court. The law clerks appointed for the court shall serve as directed by the chief justice.

"§ 11-609. Reports.

"Each justice shall submit to the chief justice such reports and data as the chief justice may request.

"SUBCHAPTER II. JURISDICTION

"§ 11–621. Certification to the Supreme Court of the District of Columbia.

"(a) In any case in which an appeal has been taken to or filed with the District of Columbia Court of Appeals, the Supreme Court of the District of Columbia, by order of the Supreme Court sua sponte, or, in its discretion, on motion of the District of Columbia Court of Appeals or of any party, may certify the case for review by the Supreme Court before it has been determined by the District of Columbia Court of Appeals. The effect of such certification sh' be to transfer jurisdiction over the case to the Supreme Court of the District of Columbia for all purposes.

"(b) Such certification may be made only when, in its discretion, the Supreme Court of the District of Columbia determines that—

"(1) the case is of such great and immediate public importance as to justify the deviation from normal appellate practice and to require prompt decision in the District of Columbia Supreme Court, or

"(2) the case was pending in the District of Columbia Court of Appeals on the effective date of this section and, because the justices of the Supreme Court of the District of Columbia were familiar with the case while serving as judges of the District of Columbia

Court of Appeals, the sound and efficient administration of justice dictates that the case be certified for review by the Supreme Court of the District of Columbia.

"§ 11-622. Review by the Supreme Court of the District of Columbia.

"(a) Any party aggrieved by a final decision of the District of Columbia Court of Appeals may petition the Supreme Court of the District of Columbia for an appeal. Such a petition may be granted and appeal be heard by the Supreme Court of the District of Columbia only upon the affirmative vote of not less than 3 of the justices that the matter involves a question that is novel or difficult, is the subject of conflicting authorities within the jurisdiction, or is of importance in the general public interest or the administration of justice. The granting of such petitions for appeal shall be in the discretion of the Supreme Court of the District of Columbia. The Supreme Court of the District of Columbia shall not be required to state reasons for denial of petitions for appeal.

"(b) On hearing an appeal in any case or controversy, the Supreme Court of the District of Columbia shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

"§ 11-623. Certification of questions of law.

"(a) The Supreme Court of the District of Columbia may answer a question of law of the District of Columbia certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, or the highest appellate court of any State, if—

"(1) such question of law may be determinative of the case pending in such a court; and

"(2) in the view of such court, there is no controlling precedent regarding such question of law in the decisions of the District of Columbia Court of Appeals or the Supreme Court of the District of Columbia.

"(b) This section may be invoked by an order of any of the courts referred to in subsection (a) upon such court's motion or upon the motion of any party to the case.

"(c) A certification order under this section shall—

"(1) describe the question of law to be answered;

"(2) contain a statement of all facts relevant to the question certified and the nature of the controversy in which the questions arose; and

"(3) upon the request of the Supreme Court of the District of Columbia contain the original or copies of the record of the case in question or of any portion of such record as the Supreme Court of the District of Columbia considers necessary to determine the questions of law which are the subject of the motion.

"(d) Fees and costs shall be the same as in appeals docketed before the Supreme Court of the District of Columbia and shall be equally divided between the parties unless precluded by statute or by order of the certifying court.

"(e) The written opinion of the Supreme Court of the District of Columbia stating the law governing any questions certified under subsection (a) shall be sent by the clerk to the certifying court and to the parties.

"(f) The Supreme Court of the District of Columbia, on its own motion, the motion of the District of Columbia Court of Appeals, or the motion of any party to a case pending in the Supreme Court of the District of Columbia or the District of Columbia Court of Appeals, may order certification of a question of law of another State to the highest court of such State if, in the view of the Supreme Court of the District of Columbia—

"(1) such question of law may be determinative of the case pending in the Supreme Court of the District of Columbia or the District of Columbia Court of Appeals; and

"(2) there is no controlling precedent regarding such question of law in the decisions of the District of Columbia Court of Appeals or the Supreme Court of the District of Columbia.

"(g) The Supreme Court of the District of Columbia may prescribe the rules of procedure concerning the answering and certification of questions of law under this section.

"SUBCHAPTER III, MISCELLANEOUS PROVISIONS

"§ 11–641. Contempt powers.

"In addition to the powers conferred by section 402 of title 18, United States Code, the Supreme Court of the District of Columbia, or a justice thereof, may punish for disobedience of an order or for contempt committed in the presence of the court.

"§ 11–642. Oaths, affirmations, and acknowledgments.

"Each justice of the Supreme Court of the District of Columbia and each employee of the court authorized by the chief justice may administer oaths and affirmations and take acknowledgments.

"§ 11–643. Rules of court.

"The Supreme Court of the District of Columbia shall conduct its business in accordance with such rules and procedures as the court shall adopt.

"§ 11–644. Judicial conference.

"The chief justice of the Supreme Court of the District of Columbia shall summon annually the justices and active judges of the District of Columbia courts to a conference at a time and place that the chief justice designates, for the purpose of advising as to means of improving the administration of justice within the District of Columbia. The chief justice

shall preside at such conference which shall be known as the Judicial Conference of the District of Columbia. Each justice and judge summoned, unless excused by the chief justice of the Supreme Court of the District of Columbia, shall attend throughout the conference. The Supreme Court of the District of Columbia shall provide by its rules for representation of and active participation by members of the unified District of Columbia Bar and other persons active in the legal profession at such conference.".

SEC. 102. TRANSITION PROVISIONS.

(a) ELEVATION OF JUDGES OF THE DISTRICT OF COLUMBIA COURT OF APPEALS AS JUSTICES OF THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.—

(1) Except as provided in paragraph (2), beginning on the effective date of this Act the chief judge of the District of Columbia Court of Appeals shall serve the remainder of the term to which he or she was appointed as the chief justice of the Supreme Court of the District of Columbia and the associate judges of the District of Columbia Court of Appeals shall serve the remainder of the respective terms to which they were appointed as associate justices of the Supreme Court of the District of Columbia. The Supreme Court of the District of Columbia shall conform to the numerical requirements of section 11–602 of the D.C. Code

through attrition. Vacancies in the offices of chief judge and associate judge of the District of Columbia Court of Appeals shall be filled in accordance with chapter 15 of title 11 of the D.C. Code.

(2) Any judge of the District of Columbia Court of Appeals may remain a judge of that court by written notification of such decision to the chief judge of the District of Columbia Court of Appeals not less than 30 days after the date of the enactment of this Act.

(b) TRANSITION PERIOD FOR THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.—

(1) The chief judge of the District of Columbia Court of Appeals shall be responsible for the administration of the period of transition prior to the establishment of the Supreme Court of the District of Columbia, including the hiring of necessary staff, the preparation of facilities, and the purchase of necessary equipment and supplies.

(2) Not more than 180 days after the date of the enactment of this Act, the chief judge of the District of Columbia Court of Appeals shall submit to the Subcommittee on Government Efficiency, Federalism, and the District of Columbia of the Committee on Governmental Affairs of the Senate and the Committee on the District of Columbia of the House of Representatives a

transition report, consistent with this Act, regarding the establishment of the Supreme Court of the District of Columbia.

(3) The provisions of this subsection shall take effect on the date of the enactment of this Act.

SEC. 103. CONFORMING AND OTHER AMENDMENTS.

(a) AMENDMENTS TO THE HOME RULE ACT.—

(1) Section 431(a) of the District of Columbia Self-Government and Governmental Reorganization Act is amended—

(A) in the first sentence by inserting "Supreme Court of the District of Columbia," after "vested in the"; and

(B) by adding after the third sentence "The Supreme Court of the District of Columbia has jurisdiction of appeals from the District of Columbia Court of Appeals.".

(2) Section 431 of such Act is further amended in subsections (b), (c), and (g)—

(A) by inserting "chief justice or" before "chief judge" each place it appears;

(B) by inserting "justice or" before "judge" each place it appears; and

(C) by inserting "justices and" before "judges" each place it appears.

(3) Section 432 of such Act is amended—

(A) by inserting "justice or" before "judge" each place it appears;

(B) by striking "District of Columbia Court of Appeals" each place it appears and inserting "Supreme Court of the District of Columbia"; and

(C) in subsection (a) by striking "law or which would be a felony in the District of Columbia" and inserting "law or the laws of the District of Columbia".

(4) Section 433 of such Act is amended—

(A) in the heading by inserting "JUSTICES AND" BEFORE "JUDGES";

(B) by inserting "justices and" before "judges"' each place it appears; and

(C) by inserting "justice or" before "judge" each place it appears.

(5) Section 434 of such Act is amended in subsections (b)(3) and (d)—

(A) by inserting "justice or" before "judge" each place it appears; and

(B) by inserting "justices or" before "judges" each place it appears.

(b) AMENDMENTS TO CHAPTER 1 of TITLE 11, D.C. CODE.—

(1) Section 11–101(2), D.C. Code, is amended by redesignating subparagraphs (A) and (B) as subparagraphs (B) and (C), respectively, and by adding before subparagraph (B) (as so redesignated) the following:

"(A) The Supreme Court of the District of Columbia.".

(2) Section 11–102 of the D.C. Code is amended to read as follows:

"§ 11–102. Status of Supreme Court of the District of Columbia.

"The highest court of the District of Columbia is the Supreme Court of the District of Columbia. Final judgments and decrees of the Supreme Court of the District of Columbia and of the District of Columbia Court of Appeals where review is denied by the Supreme Court of the District of Columbia are reviewable by the Supreme Court of the United States in accordance with section 1257 of title 28, United States Code.".

(3) The item relating to section 11–102 of the table of contents of chapter 1 of title 11, D.C. Code, is amended to read as follows:

"11–102. Status of Supreme Court of the District of Columbia.".

(c) AMENDMENTS TO CHAPTER 3 OF TITLE 11, D.C. CODE.—(1) Section 11–301, D.C. Code, is amended by striking "District of Columbia Court of appeals" each place it

appears, including the heading of such section and inserting "Supreme Court of the District of Columbia".

(2) The item relating to section 11–301 of the table of contents of chapter 3 of title 11, D.C. Code, is amended to read as follows:

"11—301. Jurisdiction of appeals from the Supreme Court of the District of Columbia.".

(d) AMENDMENTS TO CHAPTER 7 OF TITLE 11, D.C. CODE.—

(1) Chapter 7 of title 11, D.C. Code is amended by striking sections 11–723 and 11–744.

(2) Section 11–703(b), D.C. Code, is amended by striking "$500" and inserting "$2,500".

(3) Section 11–707 is amended by striking "chief judge of the District of Columbia Court of appeals" both places it appears and inserting "chief justice of the Supreme Court of the District of Columbia".

(4) Section 11–708, D.C. Code, is amended by striking "not more than three law clerks for the court." and inserting "law clerks for the court and law clerks and secretaries for the senior judges.".

(5) Section 11–722, D.C. Code, is amended by striking "Commissioner" and inserting "Mayor".

(6) Section 11–743 is amended by striking "according to" and all that follows and inserting "in accordance with such rules and procedures as it may

adopt. The Joint Committee on Judicial Administration in the District of Columbia shall review, and shall have the authority to approve or disapprove, all rules and procedures so adopted.".

(e) AMENDMENTS TO CHAPTER 9 OF TITLE 11, D.C. CODE.—

(1) Section 11–904(b), D.C. Code, is amended by striking "$500" and inserting "$2,500".

(2) Section 11–908, D.C. Code, is amended to read as follows:

"(b) When the business of the Superior Court requires, the chief judge may certify to the chief justice of the Supreme Court of the District of Columbia the need for an additional judge or judges as provided in section 11–607 and 11–707.".

(3) Section 11–910, D.C. Code, is amended by adding at the end the following new sentence: "In addition, the chief judge may appoint and remove law clerks for the court, who shall serve as directed by the chief judge.".

(4) Section 11–946, D.C. Code, is amended by striking "according to" and all that follows and inserting "in accordance with such rules and procedures as it may adopt. The Joint Committee on Judicial Administration shall review, and shall have authority to ap-

prove or disapprove, all rules and procedures so adopted.".

(f) AMENDMENTS TO CHAPTER 15 OF TITLE 11, D.C. CODE.—

(1) Chapter 15 of title 11, D.C. Code, is amended by striking section 11–1501 and inserting the following:

"§ 11–1500. Definitions.

"For purposes of this chapter—

"(1) the term 'judge' means any justice of the Supreme Court of the District of Columbia, or any judge of the District of Columbia Court of Appeals or the Superior Court.

"(2) the term 'chief judge' means the chief justice of the Supreme Court of the District of Columbia, or the chief judges of the District of Columbia Court of Appeals or the Superior Court, as appropriate.

"§ 11–1501. Appointment and qualifications of judges.

"(a) Except as provided in section 434(d)(1) of the District of Columbia Self-Government and Governmental Reorganization Act, the President shall nominate, from the list of persons recommended by the District of Columbia Judicial Nomination Commission established under section 434 of such Act, and, by and with the advice and consent of the Senate, appoint all justices and judges of the District of Columbia courts.

"(b) No person may be nominated or appointed a justice or judge of a District of Columbia court unless that person—

"(1) is a citizen of the United States;

"(2) is an active member of the unified District of Columbia Bar and has been engaged in the active practice of law in the District for the five years immediately preceding nomination or for such five years has served as a judge of the United States or the District of Columbia, has been on the faculty of a law school in the District, or has been employed as a lawyer by the United States or the District of Columbia government;

"(3) is a bona fide resident of the District of Columbia and has maintained an actual place of abode in the Districtf or at least 90 days immediately prior to nomination, and shall retain such residency as long as he or she serves as such judge, except judges appointed prior to December 23, 1973, who retain residency in Montgomery and Prince Georges Counties in Maryland, Arlington and Fairfax Counties (and any cities within the outer boundaries thereof) and the city of Alexandria in Virginia shall not be required to be residents of the District to be eligible for reappointment or to serve any term to which reappointed;

"(4) is recommend to the President, for such nomination and appointment, by the District of Columbia Judicial Nomination Commission; and

"(5) has not served, within a period of two years prior to nomination, as a member of the District of Columbia Commission on Judicial Disabilities and Tenure or of the District of Columbia Judicial Nomination Commission.".

(2) Section 11–1504(a)(1), D.C. Code, is amended by striking the period at the end of the first sentence and inserting the following: ", except that a retired judge may not serve or perform judicial duties on the Supreme Court of the District of Columbia.".

(3) Section 11–1505(a), D.C. Code, is amended in the second sentence by striking "District" and all that follows and inserting "of the court of the District of Columbia on which the judge serves.".

(4) Section 11–1526, D.C. Code, is amended—

(A) by striking "District of Columbia Court of Appeals" each place it appears and inserting "Supreme Court of the District of Columbia"; and

(B) in subsection (a) by striking "law or which would be a felony in the District of Columbia" and inserting "law or the laws of the District of Columbia".

(5) Section 11–1528, D.C. Code, is amended in subsection (a)(2)(C) by inserting "the Supreme Court of the District of Columbia or" after "elevation to".

(6) Section 11–1529, D.C. Code, is amended by striking "District of Columbia Court of Appeals" and inserting "Supreme Court of the District of Columbia".

(7) Section 11–1561, D.C. Code, is amended—

(A) in paragraph (1) by inserting "any justice of the Supreme Court of the District of Columbia," before "any judge"; and

(B) in paragraph (2) by inserting "a justice in the Supreme Court of the District of Columbia," before "a judge".

(8) The table of sections for subchapter I of chapter 15 of title 11, D.C. Code, is amended by inserting at the beginning the following:

"11–1500. Definitions.".

(g) AMENDMENTS TO CHAPTER 17 OF TITLE 11, D.C. CODE.—

(1) Section 11–1701, D.C. Code, is amended—

(A) by striking subsections (a) and (b) and inserting the following:

"(a) The chief justice of the Supreme Court of the District of Columbia shall be responsible for the administration of the District of Columbia courts. In carrying out responsibilities under this chapter, the chief justice shall consult with

the chief judge of the District of Columbia Court of Appeals and the chief judge of the Superior Court regarding matters affecting their respective courts, and shall be assisted by the Executive Officer of the District of Columbia Courts appointed pursuant to section 11–1703.

"(b) The responsibilities of the chief justice in the administration of the courts shall include the following:

"(1) General personnel policies, including those for recruitment, removal, compensation, and training.

"(2) Accounts and auditing.

"(3) Procurement and disbursement.

"(4) Submission of the annual budget requests of the courts as the integrated budget of the District of Columbia court system.

"(5) Approval of the bonds of fiduciary employees within the District of Columbia court system.

"(6) Formulation and enforcement of standards for outside activities of, and receipt of compensation by, the justices and judges of the District of Columbia courts.

"(7) Development and coordination of statistical and management information systems and reports supporting the annual report of the District of Columbia court system.

"(8) Liaison between the District of Columbia court system and the court systems of other jurisdictions, including the Judicial Conference of the United States, the Judicial Conference of the District of Columbia Circuit, and the Federal Judicial Center.

"(9) Other policies and practices of the District of Columbia court system and resolution of other matters which may be of mutual concern to the Supreme Court of the District of Columbia, the District of Columbia Court of Appeals, and the Superior Court of the District of Columbia.

"(c) There shall be a Joint Committee on Judicial Administration in the Distict of Columbia (hereinafter in this chapter referred to as the 'Joint Committee') consisting of (1) the chief justice of the Supreme Court of the District of Columbia, who shall serve as chairperson, and two associate Justices, (2) the chief judge of the District of Columbia Court of Appeals, and (3) the chief judge of the Superior Court of the District of Columbia."; and

(B) by redesignating subsections (c) and (d) as subsections (d) and (e), and inserting in (d) before "with" the following: "to assist the chief justice of the Supreme Court of the District of Columbia, and"; and inserting in (e) before "Joint

Committee" the words "chief justice of the Supreme Court of the District of Columbia".

(2) Section 11–1702 is amended—

(A) in the heading by inserting "the chief justice and the" after "of";

(B) by redesignating subsections (a) and (b) as subsections (b) and (c), respectively;

(C) by adding before subsection (b) the following new subsection (a):

"(a) The chief justice of the Supreme Court of the District of Columbia, in addition to the authority conferred by chapter 6 of this title, shall have the final responsibility for the internal administration of regular administrative matters of that court—

"(1) including all administrative matters other than those within the responsibility enumerated in section 11–1701(b), and

"(2) including the implementation in that court of the matters enumerated in section 11–1701(b).";

and

(D) in subsections (b) and (c) (as redesignated by subparagraph (B) above) by striking "Joint Committee" and inserting "chief justice of the Supreme Court of the District of Columbia".

(3) Section 11–1703, D.C. Code, is amended—

(A) in the second sentence of subsection (a) by striking "be responsible" and all that follows through "Joint Committee and" and inserting "assist the chief justice of the Supreme Court of the District of Columbia in the administration of the District of Columbia court system subject to the supervision of the chief justice";

(B) in the third sentence of subsection (a) by striking "Joint Committee" and inserting "chief justice of the Supreme Court of the District of Columbia"; and in the fourth sentence strike "Joint Committee" and insert "chief justice of the Supreme Court of the District of Columbia".

(C) in the first sentence of subsection (b) by striking "Joint Committee on Judicial Administration" and all that follows through "Courts" and inserting "chief justice of the Supreme Court of the District of Columbia in consultation with the chief judge of the District of Columbia Court of Appeals and the chief judge of the Superior Court";

(D) in the second sentence of subsection (b) by striking "Joint Committee" and inserting "chief justice"; and

(E) in subsection (d) by striking "the same compensation" and all that follows through "as" and inserting "a level of compensation, including retirement benefits, not to exceed the level of compensation provided for".

(F) This subsection is amended by inserting "or she" wherever there is a reference to "he".

(4) Section 11–1721, D.C. Code, is amended to read as follows:

"(a) The Supreme Court of the District of Columbia shall have a clerk appointed by the chief justice of that court who shall, under the direction of the chief justice, be responsible for the administration of that court and serve as the clerk of the District of Columbia Court of Appeals.

"(b) The Superior Court of the District of Columbia shall have a clerk appointed by the chief judge of that court who shall, under the direction of the chief judge, be responsible for the administration of that court.

"(c) Each such clerk appointed under this section shall receive a level of compensation, including retirement benefits, determined by the chief justice of the Supreme Court of the District of Columbia, except that such level may not exceed the level of compensation provided for the Executive Officer.".

(5) Section 11–1722, D.C. Code, is amended—

(A) in the first sentence of subsection (a) by striking "who shall have charge" and inserting "who shall be appointed by the chief judge of the Superior Court and who shall have charge"; and

(B) by striking "Executive Officer" each place it appears and inserting "chief judge".

(6) Section 11–1724, D.C. Code, is amended by striking "who shall" and inserting "who shall be appointed and supervised by the chief judge of the Superior Court and who shall".

(7) Section 11–1725, D.C. Code, is amended—

(A) in subsection (a) by striking "both" and inserting "all";

(B) in subsection (b) in the matter preceding paragraph (1) by striking "The Executive Officer" and all that follows through "judges)" and inserting "Except as otherwise provided in this title, the Executive Officer shall appoint, and may remove, other nonjudicial personnel for the courts"; and

(C) in subsection (b)(2) by inserting "chief justice or the" before "chief judge".

(8) Section 11–1726, D.C. Code, is amended to read as follows:

"In the case of nonjudicial employees of the District of Columbia courts whose compensation is not otherwise fixed by this title, the chief justice of the Supreme Court of the District of Columbia shall fix the rates of compensation of such employees without regard to chapter 51 and subchapter III of chapter 53 of title 5, United States Code. In fixing the rates of nonjudicial employees under this section, the chief justice shall be guided by the rates of compensation fixed for other employees in the executive and judicial branches of the Federal and District of Columbia Governments occupying the same or similar positions or occupying positions of similar responsibility, duty, and difficulty. The rate of compensation fixed for any employee under this section may not in any instance exceed the level of compensation, including retirement benefits, provided for the Executive Officer.".

(h) AMENDMENTS TO CHAPTER 25 OF TITLE 11, D.C. CODE.—

(1) Section 11–2501, D.C. Code, is amended—

(A) by striking "District of Columbia Court of Appeals" each place it appears and inserting "Supreme Court of the District of Columbia"; and

(B) by amending subsection (c) to read as follows:

"(c) Members of the bar of the District of Columbia Court of Appeals in good standing on the effective date of the

Supreme Court of the District of Columbia Establishment Act shall be automatically enrolled as members of the bar of the Supreme Court of the District of Columbia, and shall be subject to its disciplinary jurisdiction.".

(2) Section 11–2502, D.C. Code, is amended by striking "District of Columbia Court of Appeals" and inserting "Supreme Court of the District of Columbia".

(3) Section 11–2503, D.C. Code, is amended by striking "District of Columbia Court of Appeals" and inserting "Supreme Court of the District of Columbia".

(4) Section 11–2504, D.C. Code, is amended by striking "District of Columbia Court of Appeals" and inserting "other courts of the District of Columbia".

(i) AMENDMENTS TO CHAPTER 3 OF TITLE 13, D.C. CODE.—Section 13–302, D.C. Code, is amended by inserting "the Supreme Court of the District of Columbia," after "process of".

(j) AMENDMENTS TO CHAPTER 3 OF TITLE 17, D.C. CODE.—

(1) The chapter heading for chapter 3 of title 17, D.C. Code, is amended to read as follows: "SUPREME COURT OF THE DISTRICT OF COLUMBIA AND DISTRICT OF COLUMBIA COURT OF APPEALS.".

(2) Section 17–302, D.C. Code, is amended by striking "District of Columbia Court of Appeals" each

place it appears and inserting "Supreme Court of the District of Columbia".

(3) Section 17–305, D.C. Code, is amended by adding at the end the following new subsection:

"(c) The Supreme Court of the District of Columbia shall apply the same standards regarding the scope of review and the reversal of judgment as the District of Columbia Court of Appeals applies under subsections (a) and (b).".

(4) Section 17–306, D.C. Code, is amended by inserting "Supreme Court of the District of Columbia or the" before "District".

(k) AMENDMENTS TO TITLE 28, UNITED STATES CODE.—Section 1257 of title 28, United States Code, is amended by striking "District of Columbia Court of Appeals" and inserting "Supreme Court of the District of Columbia".

SEC. 104. AUTHORIZATION OF APPROPRIATIONS.

(a) IN GENERAL.—In addition to any other sums authorized to be appropriated to the District of Columbia, there are authorized to be appropriated to the District of Columbia for costs incurred by the District of Columbia in implementing the amendments made by sections 101 and 103 and in carrying out the provisions of section 102 the following amounts:

(1) $1,200,000, for fiscal year 1991.

(2) $5,000,000, for fiscal year 1992.

(3) $4,000,000, for fiscal year 1993.

(4) $3,000,000, for fiscal year 1994.

(5) $2,000,000, for fiscal year 1995.

(6) $1,000,000, for fiscal year 1996.

(b) AVAILABILITY OF FUNDS.—Funds appropriated pursuant to the authorization referred to in subsection (a) shall remain available to the District of Columbia until expended.

SEC. 105. EFFECTIVE DATE.

Except as otherwise provided, the provisions of this title shall take effect one year after the date of enactment of this Act.

TITLE II—JUDGES OF THE DISTRICT OF COLUMBIA COURTS

SEC. 201. TENURE OF JUDGES.

Section 11–1502, D.C. Code, is amended by striking "the date of enactment" and all that follows and inserting the following: "the date of enactment of the District of Columbia Judicial Reorganization Act of 1989 shall serve for a term of ten years, and upon completion of such term, such judge shall continue to serve until a successor is appointed and qualifies.".

SEC. 202. DESIGNATION OF CHIEF JUDGE.

Section 11–1503(a), D.C. Code, is amended to read as follows:

"(a)(1) Except as provided in paragraph (2), the chief judge of a District of Columbia court shall be designated by the District of Columbia Judicial Nomination Commission from among the judges of the court in regular active service. A chief judge shall serve for a term of four years or until a successor is designated, and shall be eligible for redesignation. A judge may relinquish the position of chief judge, after giving notice to the District of Columbia Judicial Nomination Commission.

"(2) Notwithstanding the first sentence of paragraph (1), the first chief justice of the Supreme Court of the District of Columbia shall be appointed in accordance with the provisions of section 102(a) of the District of Columbia Judicial Reorganization Act of 1989.".

SEC. 203. COMPOSITION OF SUPERIOR COURT OF THE DISTRICT OF COLUMBIA.

Section 11–903, D.C. Code, is amended by striking "shall consist of" and all that follows and inserting the following: "of the District of Columbia shall consist of a chief judge and 58 associate judges.".

SEC. 204. EFFECTIVE DATE.

Except as otherwise provided, the provisions of this title shall take effect on the date of the enactment of this Act.

TITLE III—JUDICIAL MAGISTRATES

SEC. 301. JUDICIAL MAGISTRATES.

(a) IN GENERAL.—

(1) REPLACEMENT OF HEARING COMMISSIONERS.—Section 11–1732, D.C. Code, is amended to read as follows:

"11–1732. Judicial Magistrates.

"(a) ESTABLISHMENT.—There are established not fewer than 22 judicial magistrates for 1990 and not fewer than 27 judicial magistrates for 1991, who shall serve in the Superior Court and perform the duties enumerated in subsection (f) of this section and such other functions incidental to such duties as are consistent with the rules of the Superior Court and the Constitution and laws of the United States and the District of Columbia.

"(b) APPOINTMENT AND TERMS OF SERVICE.—

"(1) IN GENERAL.—A judicial magistrate shall be appointed for a term of 4 years and may be reappointed for terms of 4 years.

"(2) JUDICIAL MAGISTRATE SELECTION COMMISSION.—Judicial magistrates shall be appointed by the Judicial Magistrate Selection Commission from among individuals recommended by the District of Columbia Judicial Nomination Commission. The Judicial Magistrate Selection Commission shall consist of (1) the

Chief Judge of the District of Columbia Superior Court; (2) the Mayor of the District of Columbia; and (3) the Chairman of the Council of the District of Columbia.

"(c) QUALIFICATIONS.—No individual shall be appointed as a judicial magistrate unless that individual—

"(1) is a citizen of the United States;

"(2) is an active member of the unified District of Columbia Bar and has been engaged in the active practice of law in the District for the five years immediately preceding the appointment or for such five years has been on the faculty of a law school in the District, or has been employed as a lawyer by the United States or District government; and

"(3) is a bona fide resident of the District of Columbia and has maintained an actual place of abode in the District for at least ninety days immediately prior to appointment, and retains such residency during service as a judicial magistrate.

"(d) SERVICE OF JUDICIAL MAGISTRATES.—

"(1) Judicial Magistrates shall be appointed for terms of four years and may be reappointed for terms of four years.

"(2) Upon the expiration of a judicial magistrate's term, a judicial magistrate may continue to perform the

duties of office until a successor is appointed, or for 90 days after the date of the expiration of the judicial magistrate's term, whichever is earlier.

"(3) No individual may serve as a judicial magistrate after having attained the age of seventy-four.

"(4) Judicial magistrates may not engage in the practice of law, or in any other business, occupation, or employment inconsistent with the expeditious, proper, and impartial performance of their duties as judicial magistrates.

"(5) Judicial magistrates shall abide by the same standards of conduct that apply to judges of the District of Columbia courts, and shall be subject to the jurisdiction of the Disability and Tenure Commission.

"(e) COMPENSATION.—Judicial magistrates shall be compensated at a rate established by the chief justice of the Supreme Court of the District of Columbia not to exceed the level of compensation received by the Executive Officer.

"(f) DUTIES OF JUDICIAL MAGISTRATES.—A judicial magistrate, when specifically designated by the chief judge of the Superior Court and subject to the rules of the Superior Court and the right of review under subsection (f), may make findings and enter final orders or judgments as provided by law, which judgment shall constitute a final order of the Superior Court, in proceedings in the Civil, Criminal, and

Family Divisions of the Superior Court, including the following:

"(1) landlord and tenant;

"(2) small claims;

"(3) civil nonjury proceedings when the amount in controversy does not exceed $50,000;

"(4) civil jury trials when the amount in controversy does not exceed $10,000;

"(5) criminal misdeameanors;

"(6) traffic offenses;

"(7) criminal pre-trial proceedings which do not involve questions of law under the Constitution of the United States;

"(8) civil pre-trial discovery proceedings;

"(9) uncontested probate proceedings; and

"(10) matters previously under the jurisdiction of the Hearing Commissioners.".

(2) CLERICAL AMENDMENT.—The item relating to section 11–1732 of the table of contents of chapter 17 of title 11, D.C. Code, is amended to read as follows:

"11–1732. Judicial magistrates.".

(b) REMOVAL FOR DISABILITY BY COMMISSION ON JUDICIAL DISABILITIES AND TENURE.—Section 11–1500(1) of title 11, D.C. Code, (as added by section 103(f)(1))

is amended by striking "any justice" and inserting "any judicial magistrate, justice.".

(c) CONFORMING AMENDMENTS.—(1) Section 431(g) of the District of Columbia Self-Government and Governmental Reorganization Act (as amended by section 103(a)(2)(B)) is further amended by striking "justice or" and inserting "judicial magistrate, justice, or".

(2) Section 432 of such Act (as amended by section 103(a)(3)(A)) is further amended by striking "justice or" each place it appears and inserting "judicial magistrate, justice, or".

(3) Section 434 of such Act (as amended by section 103(a)(5)) is further amended by adding at the end the following new subsection:

"(e)(1) In the event of a vacancy in any position of a judicial magistrate of the District of Columbia under section 11–1732 of the District of Columbia Code, the Commission shall, not later than 60 days following the occurrence of such vacancy, submit to the Judicial Magistrate Selection Commission a list of 3 persons for possible nomination and appointment for each vacancy. If more than one vacancy exists at one given time, the Commission must submit lists in which no person is named more than once and the Judicial Magistrate Selection Commission may select more than one nominee from one list. Whenever a vacancy will occur by reason

of the expiration of such a magistrate's term of office, the Commission's list of nominees shall be submitted to the Judicial Magistrate Selection Commission not less than 60 days prior to the occurrence of such vacancy.

"(2) In the event any person recommended by the Commission under paragraph (1) requests that his recommendation be withdrawn, dies, or in any other way becomes disqualified to serve as a judicial magistrate, the Commission shall promptly recommend to the Judicial Magistrate Selection Commission one person to replace the person originally recommended.

"(3) In no instance shall the Commission recommend any person who does not, upon the time of appointment to service as a judicial magistrate, meet the qualifications specified in section 11–1732(c) of the District of Columbia Code.

"(4) Upon submission to the Judicial Magistrate Selection Commission, the name of any individual recommended under this subsection shall be made public by the Judicial Nomination Commission.".

(d) TRANSITION PROVISION.—Any individual serving as a hearing commissioner under section 11–1732 of the District of Columbia Code as of the date of the enactment of this Act shall serve the remainder of such individual's term as a judicial magistrate.

TITLE IV—JUDICIAL NOMINATION COMMISSION AND COMMISSION ON JUDICIAL DISABILITIES AND TENURE

SEC. 401. DISTRICT OF COLUMBIA COMMISSION ON JUDICIAL DISABILITIES AND TENURE.

Subsection (a) of section 11–1522, D.C. Code is amended to read as follows:

"(a) The Commission shall consist of nine members appointed as follows:

"(1) The President of the United States shall appoint one member of the Commission.

"(2) Two members shall be appointed by the Board of Governors of the unified District of Columbia Bar—

"(A) both of whom shall have been members of the unified District of Columbia Bar and have been actively engaged in the practice of law in the District of Columbia for at least five of the ten years before such appointment; and

"(B) at least one of whom shall be a resident of the District of Columbia.

"(3) The Mayor of the District of Columbia shall appoint two members of the commission, one of whom shall not be a lawyer.

"(4) The Council of the District of Columbia shall appoint one member of the commission who shall not be a lawyer.

"(5) The Chief Judge of the United States District Court for the District of Columbia shall appoint one member of the Commission. The member appointed by the Chief Judge shall be an active or retired Federal judge serving in the District of Columbia.

"(6) The Delegate to the House of Representatives from the District of Columbia shall appoint one member of the Commission.

"(7) The Chairman of the Council of the District of Columbia shall appoint one member of the Commission.".

SEC. 402. DISTRICT OF COLUMBIA JUDICIDAL NOMINATION COMMISSION.

Section 434 of the District of Columbia Self-Government and Governmental Reorganization Act (as amended by sections 103(a)(5) and 301(c)(1)(B)) is futher amended—

(1) in subsection (a) in the second sentence by striking "seven" and inserting "nine;" and

(2) in subsection (b)(4) by inserting after paragraph (E) the following new paragraphs:

"(F) One member shall be appointed by the Delegate to the House of Representatives from the District of Columbia.

"(G) One member shall be appointed by the Chairman of the Council of the Distict of Columbia.".

SEC. 403. EFFECTIVE DATE.

The provisions of this title shall take effect on the date of the enactment of this Act.

TITLE V—CITIZENS ADVISORY COMMITTEE ON THE JUDICIAL SYSTEM OF THE DISTRICT OF COLUMBIA.

SEC. 501. CITIZENS ADVISORY COMMITTEE ON THE JUDICIAL SYSTEM OF THE DISTRICT OF COLUMBIA.

(a) ESTABLISHMENT.—There shall be a Citizens Advisory Committee on the Judicial System of the District of Columbia which shall advise the Congress, the Mayor, and the Council of the District of Columbia concerning the fairness and efficiency of the courts and judicial system of the District of Columbia.

(b) MEMBERSHIP.—The Advisory Committee shall consist of 15 members appointed as follows:

(1) 3 members appointed by the Chief Justice of the District of Columbia from among the judges of the District of Columbia courts.

(2) 1 member appointed by the Mayor of the District of Columbia.

(3) 1 member appointed by the Delegate to the House of Representatives from the District of Columbia.

(4) 1 member appointed by the President of the District of Columbia Bar.

(5) 1 member appointed by the Chairman of the Council of the District of Columbia.

(6) Eight members, one of whom shall be appointed by each member of the Council ofthe District of Columbia representing a ward of the District of Columbia.

(c) CHAIRPERSON.—The Advisory Committee shall elect a chairperson, who may not be a judge.

(d) MEETINGS.—The first meeting of the Advisory Committee shall be determined by the Delegate to the House of Representatives from the District of Columbia. The Advisory Committee shall meet at such times as may be determined by a majority of the members and at the call of the chairperson.

(e) REPORTS.—The Advisory Committee shall submit an annual report to appropriate committees of the Congress, the Mayor, the Joint Committee on Judicial Administration in the District of Columbia, and the Council of the District of

Columbia concerning the administration of the courts of the District of Columbia and the operation of the system of justice of the District of Columbia. The Advisory Committee may submit such other interim reports as are considered necessary and appropriate.

○

Mr. DYMALLY. Good morning. The Subcommittee on Judiciary and Education is called to order. The subcommittee does hereby convene our first in a series of hearings on H.R. 3470, a bill to address judicial reform in the District of Columbia courts.

H.R. 3470 evolves, in part, from several studies regarding an intermediate court for the District of Columbia and a subsequent review of the superior and appellate courts by Congressman Walter Fauntroy's Judicial Mission Team.

I would add that it was former Chief Judge William Pryor of the District of Columbia Court of Appeals who initially raised the issue of an intermediate court of appeals.

Shortly thereafter, in September 1987, the Bar Association of the District of Columbia adopted a resolution which urged the creation of an intermediate appellate court to alleviate appellate backlog and improve the administration of justice in the District of Columbia.

During the last Congress, in April 1988, this subcommittee held 2 days of hearings on H.R. 4366, a bill to establish a District of Columbia Supreme Court, and received testimony from numerous witnesses about the tremendous backlog in the court of appeals. After these hearings, Congressman Fauntroy organized the mission team of distinguished attorneys to review these hearings and other legal and administrative issues relative to the court system.

H.R. 3470 is representative of the constructive criticisms and suggestions which we received in the last Congress and the recommendations of the judicial mission team.

H.R. 3470 will establish a seven-member supreme court in the District of Columbia, authorize eight new judges, upgrade hearing commissioners to magistrates, modify the membership of the Judicial Nomination and Tenure Commissions, and create a citizens advisory committee for the District of Columbia court system.

It is significant that in 1970 this Congress passed the District of Columbia Court Reform and Criminal Procedure Act which created the local trial and appellate courts. In 1989, nearly 20 years later, it seems most appropriate with the twin urgency of trial and appellate backlog, that the committee takes this opportunity to consider steps to improve the administration of justice in the District of Columbia. H.R. 3470 seems to be a major step in this direction.

This bill is a very serious, significant and well thought out piece of legislation. It, however, may not be perfect, but can be perfected through these hearings. While comprehensive, H.R. 3470 is not complicated or legislatively burdensome.

We are looking forward to the testimony today. As a result, we have scheduled hearings on today and November 2, 1989 with hopes that we can move this legislation forward very quickly. I hope to add a final morning of hearings on the bill for markup on November 15. My statement states the 14th, but we've changed that to the 15th.

Today's witnesses include the District of Columbia Corporation Counsel, the Hon. Herbert Reid; Councilmember Ms. Wilhelmina Rolark; Chief Judge Fred Ugast of the District of Columbia Superior Court; and Chief Judge Judith Rogers of the District of Columbia Court of Appeals.

We look forward to the remarks of the witnesses and we thank them very much for taking time from their busy schedules to be with us.

Before we begin with our witnesses, we call upon the distinguished member from the District of Columbia, who is not here but who may very well have a statement later on. He'll be here shortly.

The first witness is Mr. Reid.

[The prepared opening statement of Mr. Dymally follows:]

OPENING STATEMENT
OF
THE HONORABLE MERVYN M. DYMALLY
CHAIRMAN, SUBCOMMITTEE ON JUDICIARY AND EDUCATION
COMMITTEE ON THE DISTRICT OF COLUMBIA
HEARING ON H.R. 3470
THURSDAY, OCTOBER 26, 1989

GOOD MORNING:

THIS HEARING IS NOW CALLED TO ORDER.

THE SUBCOMMITTEE ON JUDICIARY AND EDUCATION IS HEREBY CONVENING OUR FIRST IN A SERIES OF HEARINGS ON H.R. 3470, A BILL TO ADDRESS JUDICIAL REFORM IN THE DISTRICT OF COLUMBIA COURTS.

H.R. 3470 EVOLVES, IN PART, FROM SEVERAL STUDIES REGARDING AN INTERMEDIATE COURT FOR THE DISTRICT OF COLUMBIA AND A SUBSEQUENT REVIEW OF THE SUPERIOR AND APPELLATE COURTS BY CONGRESSMAN WALTER FAUNTROY'S JUDICIAL MISSION TEAM.

I WOULD ADD THAT IT WAS FORMER CHIEF JUDGE WILLIAM PRYOR OF THE DISTRICT OF COLUMBIA COURT OF APPEALS WHO INITIALLY RAISED THE ISSUE OF AN INTERMEDIATE COURT OF APPEALS.

SHORTLY THEREAFTER, IN SEPTEMBER 1987, THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA ADOPTED A RESOLUTION WHICH "URGED" THE CREATION OF AN INTERMEDIATE APPELLATE COURT TO ALLEVIATE APPELLATE BACKLOG AND IMPROVE THE ADMINISTRATION OF JUSTICE IN THE DISTRICT OF

COLUMBIA.

DURING THE LAST CONGRESS, IN APRIL 1988, THIS SUBCOMMITTEE HELD TWO (2) DAYS OF HEARINGS ON H.R. 4366, A BILL TO ESTABLISH A DISTRICT OF COLUMBIA SUPREME COURT, AND RECEIVED TESTIMONY FROM NUMEROUS WITNESSES ABOUT THE TREMENDOUS BACKLOG IN THE COURT OF APPEALS. AFTER THESE HEARINGS, CONGRESSMAN FAUNTROY ORGANIZED A MISSION TEAM OF DISTINGUISHED ATTORNEYS TO REVIEW THESE HEARINGS AND OTHER LEGAL AND ADMINISTRATIVE ISSUES RELATIVE TO THE COURT SYSTEM.

H.R. 3470 IS REPRESENTATIVE OF THE CONSTRUCTIVE CRITICISMS AND SUGGESTIONS WHICH WE RECEIVED IN THE LAST CONGRESS AND THE RECOMMENDATIONS OF THE JUDICIAL MISSION TEAM.

H.R. 3470 WOULD ESTABLISH A SEVEN (7) MEMBER SUPREME COURT IN THE DISTRICT OF COLUMBIA, AUTHORIZE EIGHT (8) NEW JUDGES, UPGRADE HEARING COMMISSIONERS TO MAGISTRATES, MODIFY THE MEMBERSHIP OF THE JUDICIAL NOMINATION AND TENURE COMMISSIONS, AND CREATE A CITIZENS ADVISORY COMMITTEE FOR THE DISTRICT OF COLUMBIA COURT SYSTEM.

IT IS SIGNIFICANT THAT IN 1970 THIS CONGRESS PASSED THE DISTRICT OF COLUMBIA COURT REFORM AND CRIMINAL PROCEDURE ACT, WHICH CREATED THE LOCAL TRIAL AND APPELLATE COURTS. IN 1989, NEARLY TWENTY (20) YEARS LATER, IT SEEMS MOST APPROPRIATE WITH THE <u>TWIN URGENCY OF TRIAL AND APPELLATE BACKLOG</u>, THAT THE COMMITTEE TAKES THIS OPPORTUNITY TO CONSIDER STEPS TO IMPROVE THE ADMINISTRATION OF JUSTICE IN THE DISTRICT OF COLUMBIA. H.R. 3470 SEEMS TO BE A MAJOR

STEP IN THIS DIRECTION.

THIS BILL IS A VERY SERIOUS, SIGNIFICANT AND WELL THOUGHT OUT PIECE OF LEGISLATION. IT, HOWEVER, MAY NOT BE PERFECT, BUT CAN BE PERFECTED THROUGH THESE HEARINGS. AND WHILE COMPREHENSIVE, H.R. 3470 IS NOT COMPLICATED OR LEGISLATIVELY BURDENSOME.

AS A RESULT, I HAVE SCHEDULED HEARINGS ON TODAY AND NOVEMBER 2, 1989, WITH HOPES THAT WE CAN MOVE THIS LEGISLATION FORWARD VERY QUICKLY. I HOPE TO HOLD A FINAL MORNING OF HEARINGS ON THE BILL ON NOVEMBER 14, 1989.

TODAY'S WITNESSES INCLUDE THE DISTRICT OF COLUMBIA CORPORATION COUNSEL HERBERT REID, COUNCILMEMBER WILHELMINA ROLARK, CHIEF JUDGE FRED UGAST OF THE DISTRICT OF COLUMBIA SUPERIOR COURT, AND CHIEF JUDGE JUDITH ROGERS OF THE DISTRICT OF COLUMBIA COURT OF APPEALS.

WE LOOK FORWARD TO YOUR REMARKS, AND THANK YOU VERY MUCH FOR TAKING TIME OUT OF YOUR BUSY SCHEDULES TO BE WITH US TODAY.

TESTIMONY OF HERBERT REID, ESQ., CORPORATION COUNSEL FOR THE DISTRICT OF COLUMBIA

Mr. REID. Mr. Chairman, I am pleased to be here today on behalf of Mayor Marion Barry to present testimony concerning H.R. 3470, a bill that would reorganize the District of Columbia court system and establish a supreme court in the District of Columbia.

I am Herbert O. Reid, acting corporation counsel, and with me is Claude Bailey from my office.

As acting chief legal officer of the District of Columbia, I'm always concerned about the administration of justice in this jurisdiction and any matter that involves the operations of our local courts. This bill is a laudable effort to address the continuing backlog of cases that confronts our local court system. I am also pleased to support other provisions of the bill which would also make the local court system more accountable to District residents, those people whom the local court system was designed to serve.

This is not the first time that this committee has considered establishing a supreme court for the District of Columbia. Last year, the committee considered H.R. 4366 which would have established a supreme court for the District of Columbia. My immediate predecessor, Frederick D. Cooke, testified at a hearing on H.R. 4366. Mr. Cooke, in his testimony, expressed the view that the bill to create a new supreme court may have been premature. He thought that the committee should give careful consideration to previous studies of the court of appeals that have been conducted prior to deciding whether a supreme court should be established.

I'm here today to give my unequivocal support to H.R. 3470 and its purpose.

H.R. 3470 would create a supreme court for the District of Columbia by elevating the judges who currently sit on the District of Columbia Court of Appeals to the new supreme court. These elevated judges would, in turn, be replaced by a new set of judges who will comprise the District of Columbia Court of Appeals, which will function as an intermediate appellate court.

The new supreme court would have discretionary jurisdiction to hear appeals from the District of Columbia Court of Appeals. Cases will be heard by the supreme court only when at least three justices vote affirmatively that the case involves a question that is novel or difficult, is the subject of conflicting authorities within the jurisdiction, or is important to the general public interest or the administration of justice.

I agree with and support their approach to the supreme court's jurisdiction. Conferring discretionary jurisdiction on the court will allow the supreme court to concentrate on its law—stating functions rather than its error—correcting function, which will be handled primarily by the intermediate court. Clarifying the state of the law of the District of Columbia should be the primary function of the proposed supreme court. This law—stating function is particularly important to the District of Columbia government since it is a party in much of the litigation that occurs in our local courts.

Another important provision of this bill would allow the supreme court to certify a case for review prior to a decision of the court of appeals where the case was pending before the court of appeals on

the effective date of this act and the justices of the supreme court are familiar with this case while serving as judges of the court of appeals. Older court of appeals cases still pending at the time this act becomes effective can be heard by the supreme court. This procedure would contribute significantly to the elimination of the backlog of the older cases.

I'm also encouraged by those provisions of the bill which would create a system of judicial magistrates. These proposed magistrates would have the authority to make findings and enter final orders or judgments in certain types of matters including landlord and tenant, small claim, criminal misdemeanors, traffic offenses and civil pretrial procedures.

Creation of this magistrate system would make a major contribution toward the elimination of the backlog of cases in the superior court. By allowing magistrates to hear certain limited minor matters, superior court judges should be free to concentrate their attention to the more serious cases on the court's docket. It is particularly crucial that superior court judges be available at this juncture when the District is experiencing an increase in drug-related crimes and arrest rate. Every superior court judge should be available to dispose of the increasing number of serious criminal matters coming before the superior court.

In sum, Mr. Chairman and members of the subcommittee, I support this legislative action that will allocate additional resources to our local court system. Our local court system, like the office of corporation counsel, is confronted with an increasing work load and decreasing resources. I think we are deeply indebted to the judges and their supporting personnel for the tremendous job they have done with the limited resources they have.

Creation of a supreme court and a magistrate system at the trial level would do much to eliminate much of the case backlog in our judicial system. Moreover, revising our current appellate court system from a one-tier system to a two-tier system would further assure that the quality of appellate justice is determined by the merits of each case and not the court's workload. Our appellate courts will have more time to give us well-reasoned decisions that are reflected in carefully considered and thoughtfully articulated opinions.

On behalf of Mayor Marion Barry and the District of Columbia, I would like to thank the subcommittee for allowing me to express the District government's view on this matter.

I am more than happy to answer any questions that you may care to put to me.

Mr. DYMALLY. Thank you, Mr. Reid.

[The prepared statement of Mr. Reid follows:]

TESTIMONY

OF

HERBERT O. REID, SR.

ACTING CORPORATION COUNSEL

OF THE

DISTRICT OF COLUMBIA

BEFORE THE

SUBCOMMITTEE ON JUDICIARY AND EDUCATION

COMMITTEE ON THE DISTRICT OF COLUMBIA

U.S. HOUSE OF REPRESENTATIVES

ON

H.R. 3470

"DISTRICT OF COLUMBIA JUDICIAL

REORGANIZATION ACT OF 1989"

OCTOBER 26, 1989

9:30 A.M.

MR. CHAIRMAN, AND MEMBERS OF THE SUBCOMMITTEE, I AM PLEASED TO BE HERE TODAY ON BEHALF OF MAYOR MARION BARRY, JR., TO PRESENT TESTIMONY CONCERNING H.R. 3470, A BILL THAT WOULD REORGANIZE THE DISTRICT OF COLUMBIA'S COURT SYSTEM AND ESTABLISH A SUPREME COURT OF THE DISTRICT OF COLUMBIA.

AS THE CHIEF LEGAL OFFICER OF THE DISTRICT OF COLUMBIA, I AM ALWAYS CONCERNED ABOUT THE ADMINISTRATION OF JUSTICE IN THIS JURISDICTION AND ANY MATTER THAT INVOLVES THE OPERATIONS OUR LOCAL COURTS. THIS BILL IS A LAUDABLE EFFORT TO ADDRESS THE CONTINUING BACKLOG OF CASES THAT CONFRONTS OUR LOCAL COURT SYSTEM. I AM ALSO PLEASED TO SUPPORT OTHER PROVISIONS OF THE BILL WHICH WOULD ALSO MAKE THE LOCAL COURT SYSTEM MORE ACCOUNTABLE TO DISTRICT RESIDENTS, THOSE PEOPLE WHOM THE LOCAL COURT SYSTEM WAS DESIGNED TO SERVE.

THIS IS NOT THE FIRST TIME THAT THIS COMMITTEE HAS CONSIDERED ESTABLISHING A SUPREME COURT FOR THE DISTRICT OF COLUMBIA. LAST YEAR, THE COMMITTEE CONSIDERED H.R. 4366 WHICH

WOULD HAVE ALSO ESTABLISHED A SUPREME COURT FOR THE DISTRICT OF COLUMBIA. MY IMMEDIATE PRECEDESSOR FREDERICK D. COOKE, JR., TESTIFIED AT A HEARING ON H.R. 4366. MR. COOKE, IN HIS TESTIMONY, EXPRESSED THE VIEW THAT THE BILL TO CREATE A NEW SUPREME COURT MAY HAVE BEEN PREMATURE. HE THOUGHT THAT THE COMMITTEE SHOULD GIVE CAREFUL CONSIDERATION TO PREVIOUS STUDIES ON THE COURT OF APPEALS THAT HAVE BEEN CONDUCTED PRIOR TO DECIDING WHETHER A SUPREME COURT SHOULD BE ESTABLISHED.

I AM HERE TODAY TO GIVE MY UNEQUIVOCAL SUPPORT TO H.R. 3470 AND ITS PURPOSE.

H.R. 3470 WOULD CREATE A SUPREME COURT FOR THE DISTRICT OF COLUMBIA BY ELEVATING THE JUDGES WHO CURRENTLY SIT ON THE DISTRICT OF COLUMBIA COURT OF APPEALS TO THE NEW SUPREME COURT. THESE ELEVATED JUDGES WOULD IN TURN BE REPLACED BY A NEW SET OF JUDGES WHO WILL COMPRISE THE DISTRICT OF COLUMBIA COURT OF APPEALS, WHICH WILL FUNCTION AS AN INTERMEDIATE APPELLATE COURT.

THE NEW SUPREME COURT WOULD HAVE DISCRETIONARY JURISDICTION TO HEAR APPEALS FROM THE DISTRICT OF COLUMBIA COURT OF APPEALS. CASES WILL BE HEARD BY THE SUPREME COURT ONLY WHEN AT LEAST THREE JUSTICES VOTE AFFIRMATIVELY THAT THE CASE INVOLVES A QUESTION THAT IS NOVEL OR DIFFICULT, IS THE SUBJECT OF CONFLICTING AUTHORITIES WITHIN THE JURISDICTION, OR IS IMPORTANT TO THE GENERAL PUBLIC INTEREST OR THE ADMINISTRATION OF JUSTICE.

I AGREE WITH AND SUPPORT THIS APPROACH TO THE SUPREME COURT'S JURISDICTION. CONFERRING DISCRETIONARY JURISDICTION ON THE COURT WILL ALLOW THE SUPREME COURT TO CONCENTRATE ON ITS LAW-STATING FUNCTION RATHER ITS ERROR-CORRECTION FUNCTION, WHICH WILL BE HANDLED PRIMARILY BY THE INTERMEDIATE COURT. CLARIFYING THE STATE OF THE LAW OF DISTRICT OF COLUMBIA SHOULD BE THE PRIMARY FUNCTION OF THE PROPOSED SUPREME COURT. THIS LAW-STATING FUNCTION IS PARTICULARLY IMPORTANT TO THE DISTRICT OF COLUMBIA GOVERNMENT SINCE IT IS A PARTY IN MUCH OF THE LITIGATION THAT OCCURS IN OUR LOCAL COURTS.

ANOTHER IMPORTANT PROVISION OF THIS BILL WOULD ALLOW THE SUPREME COURT TO CERTIFY A CASE FOR REVIEW PRIOR TO A DECISION OF THE COURT OF APPEALS WHERE THAT CASE WAS PENDING BEFORE THE COURT OF APPEALS ON THE EFFECTIVE DATE OF THIS ACT AND THE JUSTICES OF THE SUPREME COURT ARE FAMILIAR WITH THIS CASE WHILE SERVING AS JUDGES OF THE COURT OF APPEALS. OLDER COURT OF APPEALS CASES STILL PENDING AT THE TIME THIS ACT BECOMES EFFECTIVE CAN BE HEARD BY THE SUPREME COURT. THIS PROCEDURE WOULD CONTRIBUTE SIGNIFICANTLY TO THE ELIMINATION OF THE BACKLOG OF OLDER CASES.

I AM ALSO ENCOURAGED BY THOSE PROVISIONS OF THE BILL WHICH WOULD CREATE A SYSTEM OF JUDICIAL MAGISTRATES. THESE PROPOSED MAGISTRATES WOULD HAVE THE AUTHORITY TO MAKE FINDINGS AND ENTER FINAL ORDERS OR JUDGMENTS IN CERTAIN TYPES OF MATTERS INCLUDING LANDLORD AND TENANT, SMALL CLAIMS, CRIMINAL MISDEMEANORS, TRAFFIC OFFENSES, AND CIVIL PRE-TRIAL PROCEEDINGS.

CREATION OF THIS MAGISTRATE SYSTEM SHOULD MAKE A MAJOR CONTRIBUTION TOWARDS ELIMINATING THE BACKLOG OF CASES IN THE

SUPEROR COURT. BY ALLOWING MAGISTRATES TO HEAR CERTAIN LIMITED MINOR MATTERS, SUPERIOR COURT JUDGES SHOULD BE FREE TO CONCENTRATE THEIR ATTENTION TO THE MORE SERIOUS CASES ON THE COURT'S DOCKET. IT IS PARTICULARLY CRUCIAL THAT SUPERIOR COURT JUDGES BE AVAILABLE AT THIS JUNCTURE WHEN THE DISTRICT IS EXPERIENCING AN INCREASED DRUG - RELATED CRIME AND ARREST RATE. EVERY SUPERIOR COURT JUDGE SHOULD BE AVAILABLE TO DISPOSE OF THE INCREASING NUMBER OF SERIOUS CRIMINAL MATTERS COMING BEFORE THE SUPERIOR COURT.

IN SUM, MR. CHAIRMAN AND MEMBER OF THE SUBCOMMITTEE, I SUPPORT THIS LEGISLATIVE ACTION THAT WILL ALLOCATE ADDITIONAL RESOURCES TO OUR LOCAL COURT SYSTEM. OUR LOCAL COURT SYSTEM, LIKE THE OFFICE OF CORPORATION COUNSEL, IS CONFRONTED WITH AN INCREASING WORKLOAD AND DECREASING RESOURCES. I THINK WE ARE DEEPLY INDEBTED TO THE JUDGES AND THEIR SUPPORTING PERSONNEL FOR THE TREMENDOUS JOB THEY HAVE DONE WITH THE LIMITED RESOURCES THEY HAVE.

CREATION OF A SUPREME COURT AND A MAGISTRATE SYSTEM AT THE TRIAL LEVEL WOULD DO MUCH TO ELIMINATE MUCH OF THE CASE BACKLOG IN OUR JUDICIAL SYSTEM. MOREOVER, REVISING OUR CURRENT APPELLATE COURT SYSTEM FROM A ONE-TIER SYSTEM TO A TWO-TIER SYSTEM WOULD FURTHER ASSURE THAT THE QUALITY OF APPELLATE JUSTICE IS DETERMINED BY THE MERITS OF EACH CASE AND NOT THE COURT'S WORKLOAD. OUR APPELLATE COURTS WILL HAVE MORE TIME TO GIVE US WELL-REASONED DECISIONS THAT ARE REFLECTED IN CAREFULLY CONSIDERED AND THOUGHTFULLY ARTICULATED OPINIONS.

ON BEHALF OF MAYOR MARION BARRY, JR., AND THE DISTRICT OF COLUMBIA GOVERNMENT, I WOULD LIKE TO THANK THE SUBCOMMITTEE FOR ALLOWING ME TO EXPRESS THE DISTRICT GOVERNMENT'S VIEWS ON THIS MATTER.

I AM MORE THAN HAPPY TO ANSWER ANY QUESTIONS YOU MAY HAVE.

Mr. DYMALLY. We have just been joined by Mr. Rohrabacher of California.

Mr. Rohrabacher, do you wish to make a statement?

Mr. ROHRABACHER. Thank you very much, Mr. Chairman, and I'll be brief.

I am pleased to be here to participate in this first of what I expect to be several hearings on H.R. 3470, the District of Columbia Judicial Reorganization Act of 1989. Faced as we are with a proposal to revamp the entire judicial system of the District of Columbia, including creating an entirely new appellate level, I hope this subcommittee will be thoroughly investigating not only the many changes proposed by H.R. 3470, but also the many possible alternatives available to address the problems of the D.C. court system.

While I may have to leave early today, Mr. Chairman, which I apologize for, to attend to another committee assignment as well as to an issue on the House floor that specifically affects my district, I look forward to working with you and look forward to working with this committee and to benefiting from the analysis not only of our witnesses today but of the views of other knowledgeable witnesses of different points of view on important questions posed by H.R. 3470.

Thank you very much.

Mr. DYMALLY. Thank you indeed.

Mr. Reid, in your opinion, is a new supreme court the best remedy to existing backlog problems we have at the appellate level?

Mr. REID. I think so, Mr. Chairman. I think that it would significantly reduce the backlog and give us a better system in the District of Columbia, on that's faster and also one that is more adjusted.

I think the backlog in the appellate court affects the kind of cases and opinions, particularly opinions which come out. Not to be critical of the court in any way, but I think it would improve the system, yes.

Mr. DYMALLY. In your testimony you supported the concept of magistrates. How will upgrading of the commissioners increase the quality of justice in the District?

Mr. REID. Mr. Chairman, all over the country I have been teaching administrative law some 40 years. There is constantly a desire to get more matters out of the court system and into other systems of resolution and adjustment. I think that this is in line with that. The magistrate system would help to streamline a number of repetitious matters. I think it would—it's in that same spirit, but it is still in the court system. But I think it's an attempt in the court system to develop a more effective remedy.

Mr. DYMALLY. Do you see any constitutional problems with elevating judges from one court to another?

Mr. REID. No, sir, I do not.

Mr. DYMALLY. What about the problems of magistrates taking jurisdiction over civil cases with claims less than $50,000?

Mr. REID. I don't see any constitutional——

Mr. DYMALLY. Without consent of parties?

Mr. REID. Yes. I don't see any constitutional question involved, Mr. Chairman. As I said, this analogy to the administrative process more and more we move traffic or adjudication out of the court system into the administrative mode. More and more, procedures are being evolved and adopted to expedite the repetitious kind of cases.

Mr. DYMALLY. Finally, to what extent is the city prepared to take on some of the costs for this Herculean task and are you satisfied with the approach which we have taken in this bill?

Mr. REID. Yes, Your Honor—Mr. Chairman.

Mr. DYMALLY. Thank you, Congressman, for making me a judge. I've been trying all my life to be somebody important and finally made it this morning. Thank you.

Mr. REID. Please pardon me, but my history and background is in the judiciary. It's a mistake that I make on occasions, but I apologize.

Mr. DYMALLY. It's a good one.

Mr. REID. The answer I'd say was yes to the approach which is taken in the bill. I think the District government has pledged to do its share in supporting the new system, but with the transitional system that had been suggested.

Mr. DYMALLY. Finally, staff has informed me that this is your first appearance before this committee. Having elevated me to the bench, I was very light on you. I trust my colleague, Mr. Fauntroy, would be a little more drastic in his questions.

We are pleased to have Mr. Fauntroy here with us today.

Mr. REID. I'm pleased at the treatment I've received so far.

Mr. FAUNTROY. Mr. Chairman, let me first of all thank you for your initiative in calling a hearing on this bill and let me ask unanimous consent to enter my opening remarks in the record at this point.

Mr. DYMALLY. Without objection.

Mr. FAUNTROY. Yes. I do have a number of questions which I'd like to tender to Mr. Reid. But if you'd want to get in regular order, I'd——

Mr. DYMALLY. Yes. Mr. Reid, we would like to—Mr. Rohrabacher, and if you have any questions and you have to leave, we'd like to submit it to Mr. Reid with your permission, send some questions to you in the mail.

Mr. REID. Oh, I'd be happy to respond.

Mr. DYMALLY. Fine. Let's proceed.

Mr. FAUNTROY. I'd yield to Mr. Rohrabacher.

Mr. ROHRABACHER. I've been focusing on a matter in my district and I'm sorry that sometimes we have to—as you know, as Congressmen we have to focus on about three or four different things at one time and this happens to be one of those days.

Mr. Reid, maybe you could tell me right now what kind of backlog—and I'm sorry if I missed this in the beginning of your testimony—what kind of backlog we have in the court system in the District of Columbia at this moment and how this proposal specifically would deal with that?

Mr. REID. Well, I don't know the backlog figures. Both of the presiding judges of our courts are here and would be in a better position to tell you what they are currently. I know, and I've heard

that there is a backlog. This would fatten the backlog—the magistrate system would affect it by getting more cases in a routine mode and being handled faster and more expeditiously.

The two-tier court would bring relief to our present highest court by the intermediate court taking off matters and deciding matters at that particular level, leaving the highest court free to take those jurisdictional matters that effect policy and the development of the law. It's my considered opinion, sir, that both procedures would effect the backlog and would reduce the backlog.

Mr. ROHRABACHER. We're talking about establishing a new judicial level here and this would be the highest level in the District?

Mr. REID. No, what we're talking about is an intermediate level, putting in an intermediate court of appeals. So, we would have our trial court, the superior court, the intermediate court of appeals, and finally the—the procedures, sir, which are employed in your State and most of the States in the Union.

Mr. DYMALLY. Would the gentleman yield, please?

Mr. ROHRABACHER. Yes.

Mr. DYMALLY. In California we have another layer, the municipal court for traffic fines and petty misdemeanors.

Mr. REID. Oh, yes. You have more trial level courts than we have too.

Mr. DYMALLY. The superior court, which you have here, and the one you're proposing, we call it the DCA, district court of appeals. Then, on top of that, you'll have a supreme court——

Mr. REID. That's right.

Mr. DYMALLY [continuing]. Which is somewhat like the California one.

Mr. REID. Yes, sir. Yes, sir; and in most States.

Mr. DYMALLY. Thank you.

Mr. ROHRABACHER. Mr. Chairman, I appreciate this opportunity to get a better understanding of this piece of legislation. I guess that's what hearings are all about.

Is it possible that adding another level would basically add to the congestion of the court by adding another level?

Mr. REID. Well, that has not been the experience, sir, throughout the country where you've had intermediate courts of appeals.

Mr. ROHRABACHER. OK.

Mr. REID. I see no reason why it would happen. It has reduced the load elsewhere and been a——

Mr. ROHRABACHER. Are there other alternatives that you can see that might also lessen this backlog and that might be better than—well, I won't say better, but another alternative might as well achieve this cutting down of the backlog?

Mr. REID. Well, I imagine enlarging the court personnel, existing court personnel, would reduce the load, but we have been focused on this proposal and I think this proposal is a very good one. Obviously, there could be other arrangements you could make.

Mr. ROHRABACHER. All right. Thank you very much, sir.

Mr. DYMALLY. Mr. Fauntroy?

Mr. FAUNTROY. Thank you, Mr. Chairman.

I have, first of all, a couple of questions, Mr. Reid, that relate to things we had in an earlier draft which we did not include in this draft. One was a provision to allow attorneys employed by the

office of the corporation counsel, like attorneys in the Federal agencies, to be assigned a rotation in the office of the U.S. attorney. The goal of that practice would be to begin to prepare our local government lawyers for ultimate assumption of the role now filled by the U.S. attorney's office.

I wonder if you'd give your view on that proposal.

Mr. REID. Of course, you know I'm only acting. But I would be opposed to that because from what little I've seen in the office, our lawyers deal with many more matters than criminal prosecutions. All the U.S. attorney's office does is to deal with certain criminal prosecution. Our lawyers are defending the District in negligence actions, advising agencies and what have you. I don't see that beneficial to put them in a rotation system.

Now, if you need any experienced record in terms of our capacity and ability to prosecute, we do have a section that prosecutes and we prosecute a number of crimes in the District of Columbia and we do it very well and we are prepared to take on any additional responsibility that Congress might wish to give to us.

Mr. FAUNTROY. So that you could easily move over into the duties of the U.S. attorneys office were that judgment that the Congress reached?

Mr. REID. There would be no question whatsoever.

Mr. FAUNTROY. Also included in an earlier draft of the bill was——

Mr. REID. And the two offices work together very well. Their relationship with Mr. Stephens has been very good and very beneficial both ways.

Mr. FAUNTROY. That's very encouraging to hear.

I was about to say also included in an earlier draft was a provision to have criminal prosecutions undertaken in the name of the District of Columbia rather than in the name of the United States as is the current practice. Do you have any views on that proposal?

Mr. REID. No, not any extreme views. It might help with the distribution of the prisoners when the conviction is over, you know. We are having quite a problem with overcrowding of prisoners still at the Federal level. Everybody wants everybody apprehended, tried, punished and in prison somewhere else not near them.

Mr. FAUNTROY. Some have suggested that a preferred method of dealing with the appellate backlog would be to create an appellate division within the D.C. Superior Court. What is your view on that?

Mr. REID. That would be an approach. I should think that the independent or the separate or intermediate court as proposed here would be more efficient.

Mr. FAUNTROY. OK. Judge Ugast will testify later that the D.C. Superior Court needs 15 additional judges rather than the 8 provided by this bill. I'd like to know your view on use of judicial magistrates in lieu of adding more judges beyond the eight.

Mr. REID. Well, I would hope we could do both. What Judge Ugast thinks is necessary, I would support it because of his knowledge and efficiency in running that court. However, it appears to me that the magistrate system would help put some flexibility and speed in the system that is not there now. Speed, and I mean efficiency, not just merely speed. As I said, the trend has been to move

a number of things out of the judicial mode and into other modes of resolutions. I think this is in that direction.

Mr. FAUNTROY. Do you have any thoughts or comments on the issue of court administration? Specifically it is preferred that a joint committee administer the court system as is the case now. Or, in your view, is it best to leave the authority with the chief judge of the supreme court as we propose here, which is a practice, as I understand, in most States.

Mr. REID. I would support the practice as I understand it in most States, which is what we have.

Mr. FAUNTROY. Well, I was indicating that the practice of most States is that the administration be primarily in the hands of the chief judge of the supreme court as over against a joint committee. We in this bill——

Mr. REID. Oh, I would support a joint committee.

Mr. FAUNTROY. OK. In your testimony, I don't believe you addressed the notion of a citizens advisory committee for our local courts. What's your view on that proposal?

Mr. REID. Well, the input may be beneficial, but I think that public officials are elected to exercise their judgment and citizen input from time to time doesn't produce what we hope it would produce.

Mr. FAUNTROY. Thank you.

Mr. DYMALLY. One final question, Mr. Reid. Do you believe that the magistrates, commissioners, should continue to be under the supervision and control of the judges of the superior court?

Mr. REID. Oh, yes, yes.

Mr. DYMALLY. Finally, can you elaborate on the law—stating versus error—correcting function of a supreme court versus a court of appeals?

Mr. REID. Yes, sir. On appeal, obviously, whether or not error has been committed in the application of the law is a function of the court and what the court does. If the court is overloaded, it stops at that particular point and does not engage in another important function of stating what the law is and the development of the law in a particular area. In other words, it's one thing merely to rule on the matter, it's another to explain the law and to give guidance and leadership to the public and to the lower courts for the future.

Mr. DYMALLY. Good. Thank you very much.

Mr. REID. Thank you, sir.

Mr. DYMALLY. We'll now go to Hon. Fred Ugast, chief judge of the District of Columbia Superior Court.

TESTIMONY OF HON. FRED B. UGAST, CHIEF JUDGE, DISTRICT OF COLUMBIA SUPERIOR COURT

Judge UGAST. Good morning, Chairman Dymally and members of the subcommittee. I'm very pleased to be here this morning and I thank you for the opportunity to be allowed to appear to comment on H.R. 3470.

At the outset, I would like to emphasize, as I have many times recently and over the last 6 or 8 months, the need for additional trial judges for the superior court. On each occasion that I've testi-

fied before a congressional committee since last April, including the mission team of Congressman Fauntroy, I have tried to make it clear the situation existing in the trial court as a result of the drug epidemic we're suffering here in this city and that there is a need for eight or more judges right now. When I was talking last April, I was saying that, as well as additional judges for other parts of the court. Frankly, the situation has become more critical since my testimony last April before the mission team.

Let me just say, this isn't something that happened overnight and that we are just seeing. Part of our present drug efforts being made by the various law enforcement agencies our court had been experiencing for a number of years the results of drug-related crime and drug charges.

Just to give you an example, our drug testing program of adult arrestees started in 1984 and back then 51 percent of the adults arrested, going through our cellblock, tested positive for a drug; 73 percent of adults tested positive last year. Now, there's a little bit of improvement. I got the statistics yesterday for September; 66 percent of the adults going through the cellblock tested positive for drug use in September.

The adult drug of choice has changed here in the city, as it has across the country, from heroin to PCP to cocaine. Fourteen percent tested positive for cocaine back in the summer of 1984, 66 tested positive in 1988 for cocaine and the statistics for September are a little better, 63 percent tested positive for cocaine last month of the adults.

On the juvenile side, which I know is a concern of this subcommittee as it is of the court, 33 percent of the juveniles arrested in 1988 tested positive for a drug and the drug of choice has changed from marijuana to PCP to cocaine. Cocaine wasn't even found in juveniles tested in the earlier years. Now, 72 percent of the juveniles tested positive are positive for cocaine. Unfortunately, the statistics for September indicate 83 percent tested positive for cocaine.

As a result, what's happened is that felony indictments have more than tripled, from 3,100 in 1978 to 9,700 last year and we project over 10,000 this year of felony indictments. About 60 percent of those felony indictments involve drug charges. And you all, of course, are familiar with the terrible, terrible violence associated with this and the number of homicides.

Now, the juvenile petitions also have increased. It's not just on the adult side, from 4,082 to some 5,488 and we expect about 5,600 juvenile petitions this coming year.

You asked about backlog, I believe. We have 3,700 felonies pending at this time. We have 2,300 misdemeanors pending at this time and 1,200 of serious traffic—type offenses. It's important, I think, to understand that this is not just on the criminal side that's effected. The family division is effected in the number of neglect cases. The number of neglect cases have shot up of families where the children are either parents with drug problems, neglected children, nobody to take care of them, addicted babies. The family division is effected in that way. The civil division is effected by the number of cases involving asset forfeitures and that type of thing.

So, it's across the board. It's not just on the criminal side. These increased have occurred with only a small increase in the number

of authorized police officers. As I understand it, there is legislation pending that would increase the number of police officers in our city, I believe, to 1,000. At one point it was 700, 700 to 1,000 additional police officers. The addition of those officers certainly would make even more critical the need for resources in both the courts to meet this need.

I have tried to make it clear on every occasion I've appeared that the criminal justice system must be viewed as a unified entity. It's not just the police. It's not just the prosecutors. It's not just the court. It's not just the corrections. It's not just the defense bar and all the other related agencies. They all have to be viewed as a unified system interacting. When you do something with resources for one, particularly at the strategy and the law enforcement side, it goes down the line.

Our corrections, as you all know, is breaking and blowing apart in terms of the availability and capacity, and the same thing is happening throughout the entire criminal justice system and the courts, in order to carry out their responsibility, both at the trial and appellate level, need to be considered and examined in terms of the resources.

The Appropriations Committees of both the Senate and the House, as you know, have supported immediately eight additional trial judges for the trial court and the necessary support staff.

So, with that, I just wanted to place again before you, as I know I don't need to, the tremendous need that we are facing right now and that it has gotten worse.

Let me just say this. When I talked and testified before the various congressional committees in April, the numbers of my regular felony two calendars, I have half the court almost assigned to the criminal division at this time, about 24 judges plus 5 hearing commissioners. The calendars were running around 200, a little bit over 200. They are up almost to an average of 300 cases of felony calendar and that is not manageable. We're doing the best we can, but I even assigned another judge to what we call the most serious felonies because of the number of homicides and I've added a third judge as of October 1, to handle the felonies.

So, I think it's important that I—I wouldn't want to appear here in connection with this legislation or any other legislation without trying to emphasize the need now for 8 judges as well as a greater need, as I testified previously, for some 15 judges taking into account the other parts of the court as well.

Let me just now turn briefly to some provisions to the bill and I will really just comment on those that I think directly affect the superior court and its operation. As I've indicated, the court of appeals, and Chief Judge Rogers I'm sure will amplify and has testified before about the needs of the court of appeals, which I support. Clearly the court of appeals, just as the trial court, must be looked at together and I defer to her and her colleagues on those matters.

Just a comment on the term of office that's proposed. I believe that there's nothing to be gained by reducing the term of the judges to 10 years from 15. Back in 1970, in court reform, the 10-year term for judges of the court of general sessions was changed to 15 years for judges of the superior court and the D.C. Court of Appeals. I've assumed that was done principally to strengthen the

independence of the judiciary. Frankly, to now reduce that term to 10 years seems to me to be a step backward. The Tenure Commission, which I think has to be considered in connection with that, has certainly performed ably in carrying out its responsibility to monitor the judges.

As to the administrative structure for the District of Columbia courts, I want to state at the outset that it should be recognized that the District of Columbia court system has a certain uniqueness about it that makes us stand apart. We are really the only truly one level and unified trial court in the Nation. I travel around the country a good deal to various types of conferences. I think we're envied for the uniqueness we have and what it lets us do in terms of efficiency and the interrelationships of the different responsibilities of the different divisions of the court, family, civil, criminal, probate, tax.

Unlike other States, we don't have county or district courts spread geographically throughout the State and there is only one trial court, it's located in a single set of buildings right here in Judiciary Square. I believe that the control required for the overall administration of the entire system all right here with the two courts, or three courts if it becomes that, has been and will continue to be adequately performed by a viable joint committee on judicial administration, which as a group shares the decisionmaking process required to act for the benefit of the entire system. Not just trial judges, not just appellate judges, judges who have as their goal the administration of the entire system.

I think the Court Reform Act of 1970 recognized this uniqueness of our system regardless of what has been the practice in various States throughout the country where the situation, I think, is just not comparable and that we have here this uniqueness where a five-member body, with at this time three representatives from the trial court and two from the court of appeals—the trial court handles some 200,000 filings a year, has some 1,200 people employed by the court. Representation on the court of appeals was limited to two of the makeup at that time, but recognizing, I think, that the court of appeals had a special role in terms of its administrative status and its responsibility.

The introduction of an intermediate court of appeals, if that is the decision of Congress, justifies obviously a need in the change of the structure of the joint committee on judicial administration, but not for its being abolished. The administrative firm work, I think, established by this bill and I don't know whether it was thought—but what it does, as I see it, it strips the authority from the joint committee and would result in the chief judge of the superior court and the chief judge of any new intermediate court having really no authoritative voice in decision on the court's personnel policies, budget, recruitment, accounting, dispersement of funds, space and things like that.

I'm not talking about control now, I'm talking about authoritative voice in which those voices would have the opportunity to make known and not only make know, but to have some real affirmative activity involved in those matters that affect very deeply the management of any of the courts.

Let me emphasize again, I don't take issue with the wisdom or the propriety of putting the overall administrative authority in the chief justice and that's recognized by the Chair of the joint committee as it has been over the past 20 years. But in my view, it should be subject to the policies and directives of the joint committee which is representative of all the courts that are involved with authority that's comparable to that of the existing joint committee with respect to matters that affect all the courts, personnel, budget, all of those matters.

So, I would recommend, as strongly as I can, that there continue to be a viable joint committee on judicial administration, that it be chaired by the chief justice, who would have responsibility for the overall operation of the court system, administrative responsibility, subject to the authority of the joint committee over court-wide matters. Then I've suggested the composition that it remain that there would be two on the supreme court, the chief justice and an additional justice, two representatives from the intermediate court of appeals, and that there remain three from the superior court.

Again, I'm not talking about control of the joint committee or anything like that. That's representative, it seems to me, of the three courts and the many issues that would arise.

You know, all I can say is that I've been on the court 16 years and I've served 3½ years on the joint committee. I believe the joint committee on judicial administration in our court has worked well and productively and effectively in the manner in which Congress envisioned it when it passed the Court Reform Act.

I have a comment, not on the structure—so basically, as I say, I think that my position is that whatever occurs in terms of change in the court system, it calls for change in the structure and I urge a viable and strong joint committee chaired by the chief justice.

The position of the executive officer would likewise, at least as I read the bill, be changed. I think what was envisioned is a somewhat independent administrator to handle matters of the two courts or three courts that would assist the chief judges. So, I think that the statute was written to ensure that the executive officer be responsible to each chief judge for those matters applicable to each court. The language seems to provide that the principal responsibility of the executive officer would be to assist the chief justice, which is fine and I have no problem with that. The chief justice, just as all the chief judges and the chief justice especially needs the assistance of a professional of that type. But I think it needs to be broader than that in that the executive officer should have an overall responsibility to all three courts and have a responsibility to assist and be subject to the chief judges of the various other courts with respect to matters involving their courts.

So, I guess what I'm talking about here is that language, to me, at least the way it's presently set up is too limited.

The relationship for that position to be able to have that executive officer work with all the courts, I think, would be too limited. I would suggest likewise that the selection of the executive officer, because of the joint responsibility to all courts, that there be the chief judges of the other courts, and I would think the joint committee, should be involved in the selection process.

Finally, and I'll try to be brief, the proposal establishing a specific number of judicial magistrates positions in lieu of our hearing commissioner system, I suggest that there really is no need for that specific statutory change. This committee and the full House District Committee in 1986, after hearings, permanently established the hearing commissioner position which we requested and authorized the court—the board of judges, not the chief judge, the board of judges, to determine the number of commissioners that were required to carry out the responsibility that the board of judges thought was appropriate and the extent of the authority that those judicial officers, not judges, should exercise.

It also required the authorization for the development of a merit selection system for the selection of hearing commissioners. The judges of our court worked several months. The committee I appointed, chaired by Judge Anise Wagner, developed a set of very stringent requirements for applicants for the position and a blue ribbon advisory merit selection committee was put in place by me, presently chaired by Mr. Fred Abramson who was Chair of the Judicial Nomination Commission a few years ago. That committee is charged with the screening of those applicants and making recommendations to the court. As a matter of fact, four commissioners were appointed at that time—it was not for 6 months later—were appointed under the new system. I've attached a copy of our process, the selection process as well as other aspects of the selection and the appointment and the removal of commissioners. I think it has worked well.

Now, I would also point out that the magistrates in the Federal system are selected by the trial court justice of that system in a similar fashion because they are not judges, they are judicial officers, and they are adjuncts to the court.

Now, let me just address also the expansion of the authority, and I understand this is an effort to help the court. But the hearing commissioners have made a very substantial contribution to the superior court, to the trial court, and will continue to do so. But rather than enact this legislation in its present form, I believe that whatever needed improvements that may exist in a few areas, they should be dealt with by specific legislation just directed to those issues. I expect to ask the joint committee to seek such legislation that might clarify some ambiguities that deal with the authority to act in certain proceedings without consent of the parties.

Basically what the court has done through its rules is to follow in many respects the magistrate statute and consent of the parties is required in a number of areas. There may be a few areas that I would suggest the authority be expanded that we are not using now, such as juvenile initial hearings and uncontested probate in fiduciary matters.

But the statute right now gives the court authority, broad authority, to delegate responsibility to the judicial officers. There clearly is a need to establish authority in the court, the board of judges or the joint committee, to provide uniform compensation, uniform retirement, uniform leave benefits for the commissioner magistrates, whatever nomenclature is used. The magistrate nomenclature proposed to conform with the nomenclature of the Federal magistrate statute is not objectionable.

What, I guess, I'm saying is—let me just return to, in closing, my original statement about an immediate need for 15 judges. That takes into account civil and family as well as additional criminal judges.

There's a critical need, as I say, for the eight trial judges as soon as possible. I think this bill—and as I say, I understand this bill recognizes the need, I think, for additional judicial resources, both at the trial court level and at the appellate court level, but appears to choose to meet that need at least in the trial court primarily by authorizing additional hearing commissioners or magistrates with expanded authority rather than providing a full complement of judges as is needed. We believe that what we need are judges, with the flexibility that judges have, to deal with serious litigation matters and to carry out the concept and the philosophy of court reform, of a single-tier unified trial court, not a two-tiered trial court with judges and then nonjudges in the same court to handle matters that have been always handled by judges.

So, I would hope then that this body would amend the proposed bill in a manner that would certainly assist all of the courts of the District of Columbia, bearing in mind all our needs, and help us to fulfill our responsibility to the city and to the community in this terrible and serious effort that we're waging against drugs. Thank you very much.

Mr. FAUNTROY. We thank you, Judge Ugast, not only for your testimony but also for your participation in the process by which this bill evolved.

[The prepared statement and attachments of Judge Ugast follow:]

TESTIMONY OF
CHIEF JUDGE FRED B. UGAST
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
BEFORE THE
SUBCOMMITTEE ON JUDICIARY AND EDUCATION OF THE
UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE DISTRICT OF COLUMBIA

OCTOBER 26, 1989

Chairman Dymally and members of the Judiciary and Education Subcommittee, it is my pleasure to appear before you today to comment on Bill HR 3470, the District of Columbia Judicial Reorganization Act of 1989.

Before commenting on the Bill itself however, I must impress upon the members of this committee the need, today, for additional judges for the Superior Court of the District of Columbia. In testimony provided before Congressman Fauntroy's Mission Team; Congressman Rangel's Select Committee on Narcotic Abuse and Control; Congressman Dixon's D.C. Appropriations Subcommittee; Senator Adams' D.C. Appropriations Subcommittee; and, Senator Bidens' Judiciary Committee, I have clearly indicated the desperate need for at least fifteen (15) judges for the Superior Court of the District of Columbia.

On each occasion, I have been very careful to make it clear that today there is a need for eight (8) or more judges just to handle the tremendous increase in the workload the Superior Court faces. Prior to any current drug enforcement programs, our Court had already been experiencing the results of drug-related crime for

a number of years.

For example, our program for drug testing of arrestees, in operation since 1984, reveals that, while 51% of adult arrestees tested positive in 1984, 73% of adults tested positive in 1988. The adult "drug of choice" has changed over these past five years from Heroin and PCP to Cocaine. (14% tested positive for Cocaine in the summer of 1984 - 66% tested Cocaine positive in 1988.)

In our Juvenile Drug Testing Program, 33% tested positive in 1988 and the drug of choice has changed from Marijuana and PCP to Cocaine. (Cocaine was not found in Juveniles tested in 1984; now, 72% of the juveniles testing positive are positive for Cocaine.)

As a result, felony indictments have more than tripled; from under 3,100 in 1978 to over 9,700 in 1988 and we expect over 10,700 felony indictments in 1989. Juvenile petitions have increased from 4,000 in 1982 to 5,400 in 1988 and 5,600 are projected for 1989. More importantly, the crimes committed by those juveniles have increased tragically in their severity.

Analysis of the filings of the past several years reveals that there has been a decided shift in the severity of cases brought before the Court. In 1985, 67% of the criminal cases formally charged were misdemeanors; felony cases now represent over 50% of the criminal filings. This phenomenal change can be attributed to

the influx of drugs and drug activity. It also vividly reflects, in 1987 and 1988, the impact of the District's "Operation Clean Sweep."

These increases have occurred with only a small increase in the number of authorized police officers. However, most recent reports indicate that over 1,000 additional officers will be appointed raising the D.C. Metropolitan Police complement to 5,100. An earlier projection of 700 additional police led us to attempt to calculate the significant number of additional arrests, including large numbers of users, which should be anticipated as a consequence. Comparison of the number of police officers to the number of arrests, over a period of years, shows that, on average, we can expect a little over seven court cases per officer per year. We estimated, therefore, that 700 additional officers would annually produce 4,900 additional arrest cases. In turn, this would, annually, result in an additional 1,600 misdemeanor filings and, after preliminary hearing and grand jury action, 2,000 more felony indictments per year. It is our belief that added emphasis on user arrests will substantially increase the number of misdemeanor arrests even further.

The combination of the already steady annual increase in the number and severity of juvenile filings, and the anticipated increase in arrests as a result of the addition of 700 police officers, leads us to expect approximately 900 additional juvenile

petitions each year.

The addition of 700 to 1,000 police officers to the District of Columbia Metropolitan Police Department exacerbates the existing need for at least eight (8) trial judges and leads us to believe that a minimum of fifteen (15) additional trial judges will be required to handle the workload occasioned by the authorized and funded law enforcement increase.

Senator Adams and Congressman Dixon have seen fit to provide FY 1990 appropriated funds to support eight (8) additional trial judges for the Superior Court of the District of Columbia and the necessary support staff. Although that money remains available until spent, our need is now. Any delay in the provision of those eight (8) judges exacerbates an existing problem and burdens the entire operation of the Superior Court. In short, the District of Columbia needs those eight (8) judges now and cannot wait for the legislative process to grind through another year or more of deliberation followed by six to nine months to recruit, nominate, appoint, and confirm them.

With respect to the provisions of Bill 3470, at this time I wish to confine my comments to those matters which directly affect the Superior Court and its operation. Discussion among the judges of our court has revealed a disparity of personal views with respect to the need for and desirability of an intermediate court

of appeals in the District of Columbia. However, the consensus among our judges is that the judges of the Court of Appeals and Chief Judge Rogers possess far more experience to comment knowledgeably on this matter. Consequently, I would defer to them.

As to the term of office for Superior Court judges, I must say that I do not believe there is anything to be gained by reducing the term from 15 to 10 years. You will recall that the 1970 Court Reform Act changed what was then a ten-year term for judges of the D.C. Court of General Sessions to a term of 15 years for judges of the Superior Court and the Court of Appeals. I have always assumed that was done with a view toward strengthening the independence of the judiciary. To now reduce the term to ten years seems to me to be a step backwards. As long as the Commission on Judicial Disabilities and Tenure continues, as it has, to monitor effectively the performance of judges during their term, the existing 15-year term presents no area of concern.

As to the administrative authority for the District of Columbia Courts, I must state for the record that the District of Columbia Court System is unique. We are the only truly one-level trial court in the nation and we are admired for this uniqueness and the quality of product and efficiency of operation that results. Furthermore, unlike the various states which have county and district courts spread geographically throughout their jurisdiction, there is only one trial court in the District of

Columbia and it is located in a single set of buildings in Judiciary Square. The control required for the overall operation of this Court System is well and adequately performed by a viable Joint Committee on Judicial Administration which, as a group, shares the decision-making process required to act for the benefit of the entire system. The 1970 Court Reform Act recognized this uniqueness by providing the Joint Committee as a five-member body, three of whom represented the trial court that handles 200,000 filings each year and employs, at the present time, 1,200 persons. Representation for the District of Columbia Court of Appeals on the Joint Committee was limited to two persons in recognition of its authoritative status, tempered by the fact that there are fewer than 85 persons, including judges, law clerks, and secretaries, employed by the District of Columbia Court of Appeals. The inclusion of an intermediate court of appeals justifies the need for a change in the structure of the Joint Committee on Judicial Administration, but not for its demise. The administrative framework established by Bill 3470, by stripping authority from the Joint Committee, would result in the Chief Judge of the Superior Court and the Chief Judge of the Court of Appeals having no authoritative voice in decisions on the court's:

1. personnel policies, including recruitment, removal, compensation and training of employees;
2. accounting and auditing;
3. disbursement of funds;
4. procurement of facilities and supplies for the court; and

5. submission of the court's budget requests.

Moreover, under the clause in the Bill that accords to the Chief Justice exclusive responsibility with respect to "other policies and practices of the District of Columbia court system in resolution of other matters which may be of mutual concern to the Supreme Court of the District of Columbia, the District of Columbia Court of Appeals, and the Superior Court of the District of Columbia", the Chief Justice is provided sole authority over virtually any matter relating to the management and administration of the other two courts.

Let me emphasize that I do not take issue with the wisdom or propriety of vesting overall administrative authority in the Chief Justice, however, it should be subject to the policies and directives of a Joint Committee with authority comparable to that of the existing Joint Committee. I would strongly recommend, therefore, that there continue to be a viable Joint Committee on Judicial Administration; that it be chaired by the Chief Justice of the District of Columbia who would have responsibility for the overall operation of the Court system subject, however, to the authority of the Joint Committee over court-wide matters; that there be one additional associate justice of the Supreme Court member; that the Chief Judge and one Associate Judge of the District of Columbia Court of Appeals be members of that Joint Committee; and that the Superior Court continue to have the Chief

Judge of the Superior Court and two associate judges of that Court provide its representation. I firmly believe that a committee of seven (7) judges, all of whom are selected for their administrative ability, represent the best possible approach for the continued successful cooperative and participatory management of this court system. From the vantage point of the 16 years I have served on the Superior Court and, more recently, the 3-1/2 years I have worked on our Joint Committee on Judicial Administration, I am unaware of any evidence that the administrative system currently in place has not operated as productively and effectively as was envisioned by the Congress when it passed the Court Reform Act. To the contrary, it is my impression that the Joint Committee and the Executive Officer of our courts have worked together productively and cooperatively to assure that the entire court system has operated as fairly and efficiently as possible.

Since the Joint Committee would include representation from the Superior Court, it would seem more appropriate for the Supreme Court, rather than the Joint Committee, to have responsibility for approval of substantive Superior Court rules. I would suggest, however, that procedural rules should be the responsibility of the Superior Court's Board of Judges.

The position of Executive Officer of the District of Columbia Courts was created by the Court Reform Act to provide a somewhat independent administrator to handle the logistics of our Court

System and to relieve the Chief Judges of the two Courts of many administrative matters. The existing statute provides for an experienced professional to handle those matters which are not normally the responsibility of a lawyer or a judge. Just as importantly, the statute was written to ensure that the Executive Officer would be responsible to each Chief Judge for those matters applicable to each court. The language in H.R. 3470 provides for an Executive Officer to assist the Chief Justice in the administration of the Courts. The relationship necessary for a person in that position to be effective is severely limited when the supervision of the Chief Judge of each Court, for matters applicable to that Court, is removed. Further, unless the selection of the individual for that important position remains the joint responsibility of the Chief Judges of each of the three Courts, the mutual trust necessary for effective management is lost.

Finally as to the proposal establishing a specific number of judicial magistrate positions, in lieu of the present hearing commissioner system, I suggest that there is no need for such a statutory change. This subcommittee and the full House District of Columbia Committee, in 1986, permanently established the Hearing Commissioner position and authorized the court to determine the number of commissioners required and the extent of their authority. Also required by the authorization was the development of a merit system for the selection of hearing commissioners. The judges of

the Superior Court of the District of Columbia developed a set of stringent requirements for applicants for the position and a blue-ribbon advisory committee, chaired presently by attorney Fred Abramson, was charged with the duty of screening those applicants and making recommendations to the Court. A copy of the procedure developed is attached and I would suggest that it provides a much-to-be admired process for the selection of hearing commissioners. I would also point out that magistrates in the federal system are selected by the trial court judges of that system in a similar fashion.

As to the expansion of their authority, let me state at the outset that the Hearing Commissioners have made a substantial contribution to our court and will continue to do so. However, rather than enact the proposed new legislation for magistrates, I believe that needed improvements in a few specific areas in the existing statute should be dealt with by specific legislation addressed to those issues. To this end, in the near future, I expect to ask the Joint Committee on Judicial Administration to seek legislation that would clarify some ambiguities in the current law relating to the authority of the commissioners to act in certain proceedings without consent of the parties, and if necessary, to expand their authority in certain limited areas, as for example, juvenile initial hearings and uncontested probate and fiduciary matters. There is also clearly a need to establish authority to provide uniform compensation, retirement and leave

benefits for the commissioners/magistrates.

In closing, I return to my opening comment that the trial court has an immediate need for fifteen (15) judges and a critically urgent need for eight (8) of those. It appears that this Bill recognizes the need for additional judicial resources, for both the trial court and the appellate court but chooses to meet that need in the trial court, primarily, by authorizing additional commissioners with expanded authority, rather than providing a full complement of judges as is needed. I would hope that this body would amend HR 3470 in a manner which would make it possible for the District of Columbia Courts to fulfill their responsibility to the citizens of the District of Columbia and to participate effectively in the District's war against drugs.

# # #

Appendix 2

STANDARDS AND PROCEDURES FOR THE SELECTION AND TENURE OF HEARING COMMISSIONERS

Chapter 1. Qualificiations of Hearing Commissioners

Section 1-1. Minimum Qualifications

(a) No person shall be appointed a hearing commissioner unless he or she -

(1) is a member in good standing of the unified District of Columbia Bar;

(2) for five years immediately preceding appointment, has been engaged in the active practice of law in the District of Columbia, or on the faculty of a law school in the District of Columbia or employed as a lawyer by the United States government or the District of Columbia government, or any combination of the foregoing;

(3) has been a bona fide resident of the District of Columbia and has maintained an actual place of abode therein for at least ninety days immediately preceding appointment and retains such residency during service in the position, except that hearing commissioners appointed before the effective date of the District of Columbia Judicial Efficiency and Improvement Act of 1986 shall not be subject to the residency requirement herein;

(4) is able by law to complete a full term;

(5) is competent to perform the duties of the office and of good moral character;

(6) has not served on the Advisory Merit Selection Panel within one year next preceding the filing of an application for appointment; and

(7) has made formal application to the Court for the position.

Section 1-2. Additional Qualifications

Consistent with applicable law, the Board of Judges may establish additional qualifications standards.

Chapter 2. Public Notice of Vacancy

Section 2-1. Publication and Posting of Notice

(a) Public notice of vacancies to be filled shall be published in the Daily Washington Law Reporter and one newspaper of general circulation in the District of Columbia.

(b) Copies of the public notice shall be filed and posted in the Office of the Executive Officer of the District of Columbia Courts.

(c) The Chief Judge of the Superior Court shall notify the Chairperson of the Advisory Merit Selection Panel in writing of any vacancies to be filled.

Section 2-2. Contents of Public Notice

(a) The public notice shall contain the following:

(1) the number of vacancies to be filled;

(2) the authorized salary;

(3) the duties of the position;

(4) the pertinent qualifications standards;

(5) the procedures for submitting applications, including the name and address of the person to whom applications should be submitted;

(6) the closing date for submission of applications; and,

(7) a statement that applications are to be submitted personally by the potential nominee with a statement indicating the person's willingness to serve if selected.

Chapter 3. Advisory Merit Selection Panel

Section 3-1. Establishment and Purposes of Panel

An Advisory Merit Selection Panel shall be established to assist the Chief Judge and Board of Judges in the appointment of commissioners by identifying and recommending persons whose character, experience, competence and commitment best qualify them to fill the positions.

Section 3-2. Composition of Panel and Term of Service of its Members

(a) The Panel shall be composed of seven members appointed by the Chief Judge of the Superior Court, who shall designate one of the members to serve as Chairperson during such member's term.

(b) The Panel shall consist of four lawyers and three non-lawyers. Each member shall be a bona fide resident of the District of Columbia and shall maintain an actual place of abode in the District during his or her tenure.

(c) Except as provided in paragraph (d), the term of each Panel member shall be three (3) years; provided, however, that a person appointed to fill an unexpired term shall be appointed for the remainder of that term.

(d) With respect to the membership of the first Panel appointed by the Chief Judge, the terms shall be as follows:

(1) one of the four members of the Panel who is a member of the bar and one of the other three members shall be appointed to serve a one year term;

(2) one of the four members of the Panel who is a member of the bar and one of the other three members shall be appointed to serve a two year term; and

(3) two of the four members of the Panel who are members of the bar and one of the other three members shall be appointed to serve a three year term.

(e) Members of the Panel shall be eligible for reappointment; provided however, that no member shall

serve more than one successive term, including any unexpired term.

(f) No employee of the District of Columbia Courts may serve as a member of the Panel.

Section 3-3. Panel Procedures

(a) The Panel shall establish procedures which are not inconsistent herewith by which it shall conduct its business as set forth in Section 3-1.

(b) The Panel shall select a Vice-Chairperson who shall act as Chairperson during any meeting at which the Chairperson is not present.

(c) The Panel shall act only at meetings held after notice of such meeting has been given to all panel members.

(d) Five members shall constitute a quorum for the purpose of conducting the business of the Panel. Decisions of the Panel shall be by majority vote of the members present; provided, however, that no person shall be identified and recommended by the Panel pursuant to D.C. Code §11-1732(b) without the approval of at least four members of the Panel who are present.

(e) The Panel shall make an affirmative effort to identify and give due consideration to qualified individuals including women and members of minority groups. In its consideration of persons to be recommended pursuant to D.C. Code §11-1732(b), the Panel may, in its discretion, personally interview individuals under consideration.

(f) Any information or comments received concerning persons under consideration by the Panel shall be maintained by the Panel in strict confidence.

(g) The Panel shall submit to the Chief Judge its recommendations for appointment to a vacancy and its statement in support thereof within sixty (60) days following notification by the Chief Judge of a vacancy for the position of hearing commissioner.

(h) In no instance shall the Panel recommend an individual who does not meet the qualifications standards specified in Section 1-1.

(i) The names of those persons recommended by the Panel to the Chief Judge for his consideration shall be disclosed by the Panel only to the Chief Judge; provided, however, that the Panel may, in its discretion, advise the person or persons it has recommended to the Chief Judge of such recommendation.

Chapter 4. Appointment of Hearing Commissioners

Section 4-1. Nomination and Appointment

The Chief Judge shall nominate and, with the approval of a majority of the judges of the Superior Court in active service, appoint all hearing commissioners. In making such nomination, the Chief Judge shall consider all persons recommended by the Advisory Merit Selection Panel and may consider other qualified applicants.

Section 4-2. Tenure

Hearing commissioners shall be appointed for terms of four years and may be reappointed for terms of four years. Upon expiration of a hearing commissioner's term, and upon designation by the Chief Judge, the hearing commissioner may continue to perform the duties of the office until a successor is appointed or for 90 days after the date of the expiration of the hearing commissioner's term, whichever is earlier.

Section 4-3. Oath of Office

Prior to entering on duty as a hearing commissioner, the appointee shall take the oath prescribed for judges of the Superior Court of the District of Columbia.

Chapter 5. Reappointment of Hearing Commissioners

Section 5-1. Qualifications

The provisions of Chapter 1 of these standards and procedures shall govern qualifications for reappointment of hearing commissioners.

Section 5-2. Declaration of Candidacy

(a) Not less than 90 days prior to the expiration of his or her term of office, a hearing commissioner seeking reappointment shall file with the Chief Judge in writing a declaration of candidacy for reappointment. The declaration shall include a statement in support of the commissioner's application for reappointment.

(b) If a declaration of candidacy for reappointment is not filed by a hearing commissioner as provided in Section 5-2(a), a vacancy shall result upon the expiration of the commissioner's term.

Section 5-3. Public Notice

(a) Public notice of a hearing commissioner's candidacy for reappointment shall be published in the Daily Washington Law Reporter and one local newspaper of general circulation. Copies of the public notice shall be filed and posted in the Office of the Executive Officer of the Courts.

(b) The notice shall state the date of expiration of the incumbent's current term of office, and it shall invite the submission of comments from members of the bench, bar and public within 30 days of the date of publication. The notice shall state the name and address of the person to whom comments shall be submitted.

Section 5-4. Evaluation of Candidates for Reappointment

(a) Upon the filing of a declaration of candidacy for reappointment, not less than 60 days prior to the expiration of the declaring candidate's term of office, the Chief Judge shall designate a committee of judges to review the incumbent's current service as a hearing commissioner and the comments from members of the bench, bar and public and to submit to the Chief Judge a written evaluation of the incumbent's performance.

(b) Any information or comments received by the committee of judges concerning candidates under consideration for reappointment shall be maintained in strict confidence.

Section 5-5. Reappointment

After due consideration of the report of the committee, the Chief Judge may nominate the incumbent and, with the approval of a majority of the judges of the Superior Court in active service, reappoint the incumbent to a new term. If the Chief Judge does not nominate the incumbent for reappointment or if an incumbent's nomination is not approved by a majority of the judges of the Superior Court in active service as required, the Chief Judge may fill the vacant position in accordance with the procedures set forth in Chapter 4.

Chapter 6. Duties and Functions of Hearing Commissioners

Subject to the rules of the Superior Court and when designated by the Chief Judge, a hearing commissioner shall perform those functions specified by the Chief Judge and authorized by D.C. Code §11-1732(j), including such functions as are incidental thereto.

Chapter 7. Training

The Chief Judge shall provide for training of all hearing commissioners to enable them to fulfill their duties.

Chapter 8. Conduct of Hearing Commissioners

In accordance with D.C. Code §11-1732(i)(1) and (2), hearing commissioners may not engage in the practice of law, or in any other business, occupation, or employment inconsistent with the expeditious, proper, and impartial performance of their duties as officers of the Court, and they shall abide by the Code of Judicial Conduct (formerly the Canons of Judicial Ethics).

Chapter 9. Suspension; Involuntary Retirement; Removal; and Discipline

Section 9-1. Suspension; Involuntary Retirement; Removal

A hearing commissioner may be suspended, involuntarily retired, or removed only for incompetency, misconduct,

neglect of duty, or physical or mental disability. An order of suspension, involuntary retirement, or removal shall be issued only upon the concurrence of a majority of the judges of the Superior Court in active service.

Section 9-2. Complaint

(a) Any complaint about the conduct or the physical or mental disability of a hearing commissioner shall be filed, in writing, with the Chief Judge and shall set forth the facts which form the basis of the complaint.

(b) Upon receipt of a complaint filed pursuant to subsection (a) of this section, the Chief Judge shall notify the complainant that the complaint has been received and will be processed in accordance with the provisions of this chapter.

Section 9-3. Preliminary Review of Complaint

(a) The Chief Judge shall designate a committee of judges to consider any complaint filed pursuant to section 9-2. The committee, after expeditiously reviewing the complaint and conducting any preliminary investigation deemed appropriate, shall submit in writing its recommendation to the Chief Judge:

(1) that the complaint be dismissed because it relates only to the merits of a decision or procedural ruling, or that the complaint is frivolous;

(2) that the complaint be dismissed because appropriate corrective action has been taken; or

(3) that a further investigation of the complaint is warranted.

Section 9-4. Further Investigation

(a) If the committee has recommended further investigation of a complaint, the Chief Judge shall promptly:

(1) appoint an ad hoc panel of three judges, who are not members of the committee of judges designated pursuant to section 9-3(a), to

conduct a further investigation of the allegations contained in the complaint; and

(2) provide written notice of the appointment of the ad hoc panel and a copy of the complaint to the hearing commissioner.

(b) After such investigation as it deems appropriate, the panel may terminate the investigation by filing written notice to that effect with the Chief Judge, which shall set forth the reasons the panel determines a hearing is not required, or the panel may order that a hearing be held before it concerning the complaint.

(c) The Chief Judge may appoint counsel to assist the panel in the investigation or presentation of evidence.

Section 9-5. Notice of Hearing; Answer

(a) The hearing commissioner shall be given written notice of such hearing not less than 30 days before the date on which the hearing is to be held. The notice shall specify the charges and the allegations upon which said charges are based and it shall advise the hearing commissioner of the hearing commissioner's right to counsel and right to file a written answer within 20 days after service of the notice.

(b) Within 20 days after service of a notice of hearing, or within such additional time as the panel may allow for good cause shown, the hearing commissioner may file an answer with the panel. The answer shall include all procedural and substantive defenses and challenges which the hearing commissioner desires the panel to consider.

Section 9-6. Hearing

(a) The hearing commissioner shall have the right to be present at any hearing held pursuant to section 9-5, to be represented by counsel, to offer evidence, and to confront and cross-examine witnesses. All proceedings shall be recorded.

(b) A hearing commissioner shall have the right to the issuance of subpoenas pursuant to section 9-11 of this chapter.

(c) Each witness who appears at a hearing before the panel shall swear or affirm to tell the truth.

Section 9-7. Confidentiality of Proceedings before the Panel

All pleadings and all evidence submitted to the panel shall be confidential, except that in the event of prosecution of a witness for perjury, the record of hearings before the panel and all papers filed in connection therewith shall be disclosed only to the extent required for the prosecution.

Section 9-8. Report and Recommendation of Panel

Within 60 days after the closing of the record, the panel shall submit to the Board of Judges a written report on its investigation. Such report shall present both the findings of the panel and its recommendation to the Board of Judges.

Section 9-9. Determination by Board of Judges

(a) Upon receipt of a report filed under section 9-8 of this chapter, the Board of Judges, by a concurrence of a majority of the judges in active service -

(1) may conduct any additional investigation which it considers to be necessary;

(2) shall take such action as is appropriate to assure the effective and expeditious administration of the business of the Superior Court, including, but not limited to, any of the following actions:

(A) dismissal of the complaint;

(B) censure or reprimand of such hearing commissioner by means of private communication;

(C) censure or reprimand of such hearing commissioner by means of public announcement;

(D) order that the hearing commissioner be suspended for a time certain with or without pay; or

(E) order such other action as it considers appropriate under the circumstances, including suspension, involuntary retirement, or removal.

(b) Following any action of the Board of Judges taken pursuant to subsection (a)(2) of this section, the Chief Judge shall immediately notify the commissioner of the action taken and shall notify the complainant that the complaint has been resolved pursuant to this chapter.

Section 9-10. Report and Decision

(a) In the event the Board of Judges takes action pursuant to sections 9-9(a)(2)(A) or (B), the decision of the Board and the report of the panel submitted to the Board pursuant to section 9-8 shall be published only at the request of or with the concurrence of the commissioner.

(b) In the event the Board of Judges takes action pursuant to sections 9-9(a)(2)(C),(D), or (E), the Board shall make its decision public and, by a concurrence of a majority of judges then in active service, may also make available to the public all or part of the report of the panel submitted to the Board pursuant to section 9-8 and any other portions of the record of the proceedings pertinent to its action.

Section 9-11. Subpoenas; Medical Examinations

(a) In the conduct of investigations and hearings under this chapter, any member of the panel may administer oaths, and, subject to Superior Court Rule of Civil Procedure 45, the panel may issue subpoenas for attendance of witnesses and the production of papers, books, accounts, documents, and testimony relevant to such investigation or hearing.

(b) If any person refuses to attend, testify, or produce any materials required by a subpoena issued by the panel, the panel may issue an order compelling him or her to attend and testify or produce the materials required by subpoena. Failure to obey the order shall be punishable as contempt of court.

(c) In pending investigations or proceedings before it, the panel may order the deposition of any person to be taken in such form and subject to such limitation as may be prescribed in the order. The deposition shall be taken and returned in the manner prescribed by law and the rules of the Court for civil actions.

(d) The panel may order a hearing commissioner whose health is the subject of investigation to submit to a medical examination by a duly licensed physician selected by the hearing commissioner from a list of three physicians designated by the panel. If the hearing commissioner fails to select a physician from the list, the panel shall make the selection.

Section 9-12. Compensation of Witnesses

(a) Each witness, other than an officer or employee of the United States or the District of Columbia, shall be entitled to receive for his or her attendance the same fees, and all witnesses shall receive the allowances, prescribed by D.C. Code §15-714 for witnesses in civil cases. Any person for whom a subpoena has been issued by the panel at the request of a hearing commissioner shall be paid the fees and allowances due them for such attendance by the hearing commissioner. Service of a subpoena issued by the panel at the request of a hearing commissioner shall be in accordance with Rule 45(c) of the Civil Rules of the Superior Court. Persons who are subpoenaed to appear at a hearing on the initiative of the panel shall be paid by the Court, but such persons need not be tendered either fees or allowances at the time the subpoena is served.

(b) Expert witnesses appointed by the panel are entitled to reasonable compensation, which shall be determined by the panel, and such compensation shall be paid by the Court.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

LAWYER AND NON-LAWYER MEMBERS OF
ADVISORY MERIT SELECTION PANEL

Frederick B. Abramson, Esquire (Chairperson) (Lawyer Member)
Sachs, Greenebaum & Tayler
1140 Connecticut Avenue, N.W., Suite 900
Washington, D.C. 20036
Phone: 828-8225 (3 year term - 1/31/87 - 1/31/90)

C. Francis Murphy, Esquire (Lawyer Member)
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Phone: 457-7821 (3 year term - 1/31/87 - 1/31/90)

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Washington, D.C. 20036
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20 F Street, N.W.
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Phone: 628-9600 (Reappt. 2 year term - 2/1/89 - 1/31/91)

Keith Winston Watters, Esquire (Lawyer Member)
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Washington, D.C. 20006
Phone: 887-5510 (3 year term - 4/1/89 - 3/31/92)

Mr. Angel L. Irene (Non-Lawyer Member)
4524 Alton Place, N.W.
Washington, D.C. 20016
Phone: 364-0347 (3 year term - 4/1/89 - 3/31/92)

Updated List as of 2/1/89

MEMORANDUM

TO : All Judges and Commissioners

FROM: Fred B. Ugast
Chief Judge

DATE: January 30, 1987

RE : Advisory Merit Selection Panel

I am pleased to advise you that, pursuant to D.C. Code §11-1732(b) and Chapter 3, Section 3.1 et seq. of the Standards and Procedures for the Selection of Hearing Commissioners adopted by the Board of Judges, I have appointed as members of the Advisory Merit Selection Panel the following individuals:

Frederick B. Abramson, Esquire
Term - 3 years (Chairperson)
Lawyer Member

C. Francis Murphy, Esquire
Term - 3 years
Lawyer Member

Raymond F. Patterson, M.D.
Term - 3 years
Non-Lawyer Member

Patricia Wynn, Esq.
Term - 2 years
Lawyer Member

Ms. Emily Gantz McKay
Term - 2 years
Non-Lawyer Member

Douglas B. Huron, Esquire
Term - 1 year
Lawyer Member

Ms. Flaxie Pinkett
Term - 1 year
Non-Lawyer Member

NOTICE

APPOINTMENT OF NEW HEARING COMMISSIONERS
FOR THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Four new Hearing Commissioners will be appointed to serve four year terms in the Superior Court of the District of Columbia. The duties of the position will include the following: (1) conduct of preliminary proceedings in criminal cases (e.g., bond hearings, initial probation revocation hearings and preliminary hearings); (2) conduct of hearings involving child support; and, (3) upon designation by the Chief Judge, conduct of other contested and uncontested proceedings pursuant to law and the rules of the Court.

The basic jurisdiction of Hearing Commissioners is specified in D.C. Code §11-1732 (Supp. 1986), as amended by District of Columbia Judicial Efficiency and Improvement Act of 1986, Pub. L. No. 99-573, §2, 100 Stat. 3228. To be qualified for appointment, an applicant must:

(1) be a member in good standing of the unified District of Columbia bar;
(2) for five years immediately preceding appointment, have been engaged in the active practice of law in the District of Columbia, or on the faculty of a law school in the District of Columbia or employed as a lawyer by the United States government or by the District of Columbia government, or any combination of the foregoing;
(3) be a bona fide resident of the District of Columbia and have maintained an actual place of abode therein for at least ninety days immediately preceding appointment;
(4) be competent to perform the duties of the office and of good moral character; and,
(5) make formal application to the Court for the position.

An Advisory Merit Selection Panel composed of lawyers and other members of the community has been established by the Court to assist the Board of Judges in identifying and recommending persons who are best qualified to fill the positions. The Chief Judge shall consider all persons recommended by the Panel and may consider other qualified applicants. After the closing date for submitting applications and completion of a background investigation, the Chief Judge shall nominate and, with the approval of a majority of the sitting judges of the Court, appoint the new Hearing Commissioners.

The current salary range for the position is $54,961-68,600 per annum. Application forms for the position may be obtained from the Executive Office of the District of Columbia Courts, Room 1500, Washington, D.C. 20001. A potential nominee must apply personally, and the application must be received in the Office of the Executive Officer of the Court no later than 5:00 p.m. on March 31, 1987. Any applicant who wishes to be considered for recommendation by the Advisory Merit Selection Panel should submit a copy of his or her application to the Panel also. The name and address of the chairperson of the Panel is:

Frederick Abramson, Esquire
1140 Connecticut Avenue, N.W.
Suite 900
Washington, D.C. 20036

Equal Opportunity Employer

Mr. FAUNTROY. Let me begin by just noting a few questions that both I and the chairman would like your response to.

First of all, in your testimony you indicated that within the community of judges there are diverse views regarding the provision of title I of the bill which establishes a supreme court for the District of Columbia. I wonder what your personal view about this is.

Judge UGAST. My personal view is that the court of appeals needs support in additional judicial resources, that it's a unified—just as the trial court, it's a unified system, and that it's very important that the court of appeals receives help and assistance by way of some change.

I have taken no view on the particular method, how it should be done, other than I do defer to Chief Judge Rogers and her colleagues on their determination and judgment as to what they think is best and the best way to do it.

Mr. FAUNTROY. But against the background of your frequent contact with systems around the country and with judges around the country, you have not reached a view as to whether or not we should have a supreme court here as a means of handling the appellate processes?

Judge UGAST. Other than that I defer to Chief Judge Rogers. If that's what she and her colleagues feel, I will accept that and that's where I stand.

Mr. FAUNTROY. I see. Some have suggested, as I indicated in my questioning of Corporation Counsel Reid, that one way to handle our backlog of appeals is to create an appellate division within the D.C. Superior Court. Since you head that court, what would be your view of that?

Judge UGAST. Well, I've never heard that discussed very much, although I know there are other jurisdictions where there is an appellate division of the trial court. I've never discussed it with Chief Judge Rogers or former Chief Judge Pryor. It's going to involve additional judicial resources and certainly we're not in a position to do something like that without additional resources since we already need them at the trial level. I don't know what the experience has been in other jurisdictions that have done it that way, vis-a-vis an intermediate court of appeals and then a supreme court. I just don't know. I haven't given it a lot of thought, but I have some misgivings about it unless there are additional judicial resources fully established.

It does put the judges themselves in the position as trial judges then having to review other trial judges' actions, which I suppose is done in places. But it may contribute to some tension in that regard.

Mr. FAUNTROY. I can imagine. I understand your view about making a statutory change for hearing commissioners—you know, from hearing commissioners to judicial magistrates. But can you comment on the use of more hearing commissioners or magistrates as opposed to more judges from the point of view of your——

Judge UGAST. I think that's critical, Congressman. I start with the proposition that under court reform the Congress intended us to have a unified, single-tier trial court. By that was intended that judges appointed under the process as Congress suggested with a nomination commission, screened in that fashion, with the full au-

thority of judges and the independence of judges, 15-year terms, would be those in whom responsibility for all of the kind of trial matters vested in the jurisdiction of our court, which was created as a general jurisdiction court, not a limited jurisdiction court, but responsible for all kinds of matters that in previous years had been in a court of limited jurisdiction, either municipal court or court of general sessions.

Under that concept and that philosophy, our judges have felt very strongly that we have a responsibility to Congress and to the community to try to ensure that all serious litigation or litigation that might not be viewed quite as serious but does represent a forum for the citizens, we should follow the concept of putting that responsibility in judges and not in people who, even though they may be well qualified, don't have the independence or the selection process of judges.

We have, if you will notice in our rules that I think have been made part of this, that may have been attached—if not, I'll make them available—the board of judges has tried to follow that concept in terms of the kinds of things we have placed responsibility in commissioners. The arraignments, the initial hearing with review by judges, the preliminary hearings in criminal matters, the traffic calendar control, limitation to taking pleas or trials in misdemeanors only up to where the sentence does not exceed 90 days. The statute gives us broader authority than that, but the board of judges feels that's to go beyond what we have, at least at this point, up to this point, would be contrary to the concept of a general jurisdiction court unified single-tier court.

Small claims matters are being handled by a commissioner and a judge. In family, the legislation that this committee helped us obtain in 1986 specifically permitted us to use hearing commissioners as the Federal statute provided for nonjudges in the child support area. They have done a fantastic job and we are trying to improve in that whole area. Seven commissioners are assigned to the family division and they do other things in the family division, certain things in mental retardation. They do certain type of reviews of plans. They do certain types of things in the—well, just to give you an example, they do consent decrees, mental retardation, paternity and support.

Last year, the commissioners in the family division handled some 38,000 matters. In the civil division they handled 3,100 matters. Well, no, 38,000 so far this year, excuse me. No, that's not right. They handled 22,000 in 1988 in the family division and they handled some 3,100 in the civil division. They've handled 45,000 matters in the criminal division so far this year.

So, I think that shows how we are trying to fully utilize—and I sometimes change. I may consolidate a particular court that a commissioner is handling. So, I guess what I come back to is as important as the commissioners are, as valuable as their contribution has been to the court, and I will continue to do so, I think to expand the authority very much further, except in maybe one or two areas as I have suggested, goes counter to the concept of a single-tiered trial court.

I don't think this committee is interested in creating a municipal court or in creating another limited court, so to speak, of nonjudges

in the superior court. That's why I feel strongly that we ought to basically stay with the statute we have and maybe make a few amendments. As I say, we need authority from you on compensation. The commissioners make different—right now they're paid at a grade 15, but they come in from different backgrounds and whether they've been in government or not. Some are at the bottom of the grade, some are at the top and I don't think that's appropriate. They all ought to be paid a uniform salary that should, I think, be set by the joint committee at a level, whatever the committee—or not to exceed a level and leave it to the joint committee to set it. Retirement ought to be uniform, the amount of leave ought to be uniform, but it isn't. I think those things are clearly important to the credibility and to the stature of the magistrates that we want them to have, recognizing still that their role is as judicial officers, not as judges.

I'm sorry to be so long, but that's an important issue, I think.

Mr. FAUNTROY. That's all right. I'm very happy you took the time to explain your position because I'm more clear on it now. I'm clear, one, that the adjustments which you've just mentioned have not deterred these commissioners from functioning in a fashion which, by your own admission, has improved not only the efficiency but they've provided a valuable service to us.

Judge UGAST. Absolutely.

Mr. FAUNTROY. I have before me your statement of back in March of the fact that between January 1987 and September 1987, they handled a grand total of 73,000 cases.

Judge UGAST. That was attached to the report we made?

Mr. FAUNTROY. Yes.

Judge UGAST. Yes, sir.

Mr. FAUNTROY. They have made a tremendous contribution, have they not?

Judge UGAST. Absolutely.

Mr. FAUNTROY. What troubles me is that with people having to wait 2 to 4 years to have cases handled in the civil court, civil cases handled, why we would not draw upon a mechanism and resources that have been as efficient and as able, given the handicaps you've just mentioned and yet handled 73,000 cases. I don't know the extent to which you have run into citizens in the District of Columbia who are furious about the fact they can't be heard in 2 or 3 or 4 years.

Judge UGAST. May I respond to that? I established in April a civil division task force headed up by Judge Paul Weber, who's now presiding judge of the civil division, to address the entire civil division issue. I have the responsibility in the community to keep the entire court running. I've got half the judges assigned to the criminal division. I can't assign any more judges and yet I'm faced with the problem of the people that are being arrested. I'm trying to keep some kind of a balance.

But again what you're saying is then I have a two-tiered court. I have judges and I have nonjudges handling people's civil division matters and they're concerned. I've been out in the community as well and I "rob Peter to pay Paul" when I take judges from one division to put them into the criminal division.

It has been recommended to me, and I've given the OK, to start hopefully October a year from now, individual civil calendars. The Bar of the District of Columbia are on this task force. There are a number of leaders of the bar, of various bar associations. They all support this as the best approach to the problem in the civil division. I've heard no indication of greater use of the magistrates in the individual calendar system which I hope we can initiate and make work if we can keep the resources and I don't have to take any more judges out of the civil division. I think that is the best approach to the issue in the civil division.

Mr. FAUNTROY. Is it true that the hearing commissioners and the judges have similar background? They're all lawyers, aren't they?

Judge UGAST. Yes, sir.

Mr. FAUNTROY. What is the significant difference between a commissioner and a judge?

Judge UGAST. Well, the manner of their selection and the——

Mr. FAUNTROY. I mean in terms of qualifications.

Judge UGAST. Well, we have tried to make the qualifications be of the highest type and have selected those that have experience that certainly would make them potentially individuals that would be considered by the nomination commission for the court. But they don't have the stature that's given to them or the independence that's given to them by the Congress of being judges.

Mr. FAUNTROY. I see.

Judge UGAST. So you've got two different types of positions.

Mr. FAUNTROY. Of qualified people.

Judge UGAST. Of positions. Many of them are very qualified. One of them has already come on the court. Judge Queen was a commissioner. Commissioner Christian was one of the three that were nominated this last time for the court and I anticipate that more of those people who are highly qualified may be selected to serve on the court; yes, sir.

Mr. FAUNTROY. You do understand that we do want to free as many of the more experienced lawyers who happen to be judges, having gone through the selection process, to handle the influx of criminal cases that you have so eloquently documented in your testimony and of which we are all keenly aware. You understand that our effort to provide relief through qualified lawyers as magistrates is an effort to address the problem that you quite properly identify as a very serious one.

Let me just move to another question. I was going to ask about the municipal court, lower level court that Chairman Dymally says functions in California. I take it from your comment that you would not favor a lower level court like a municipal court to handle this work to free the more experienced lawyers who happen to be judges to handle the serious cases that are of great moment for the people of the city?

Judge UGAST. Well, my comment is that of course in many jurisdictions and in most jurisdictions there is a court of limited jurisdiction. In Maryland it's the district court, in California the municipal court, which then handles a number of the matters that are not involved for the superior court, say, of Los Angeles, the court of general jurisdiction. But they're not unified. Some of them don't even handle certain types of family matters or other matters.

It seems to me that you've got to recognize and then either accept or reject that Congress 20 years ago felt that the importance of a single-tiered, unified trial court served the citizens of the city in our peculiar setup here in a narrow geographical area, in a manner that was highly preferable to a two-tiered trial court, one with limited jurisdiction on what the legislative body considers less serious matters, and one that handled more serious matters. It seems to me that's the philosophical or conceptual decision that has to be made. Is not the city here better served after 20 years by one single tier of general jurisdiction court rather than a court of limited jurisdiction and then another trial court of some other greater responsibility?

So, I think it's a conceptual aspect and my own view is that at this point, with the right amount of judicial resources, the original concept is preferable and probably better serves the city. As I say, we're envied, as I go around the country, because we're all one and the interrelationships between some of the less serious matters and handling those and the more serious matters are all under the umbrella of one single court.

But I leave to you, as I say, conceptually do you feel the time has come to reject that decision as having been made as far as the best and unique approach that most places don't enjoy. I think that's the issue, Congressman.

Mr. FAUNTROY. Yes, and it is the issue which we have resolutely attempted to resolve in the legislation.

Judge UGAST. I understand.

Mr. FAUNTROY. For while we may be the envy of the Nation in terms of a one-tiered system, we are the bane of the Nation in terms of what load we must now carry under the present circumstances. Quite frankly, while others may envy the system, they certainly don't envy the load that you must carry, particularly with the additional 1,000 police officers coming and you say a 2,000-a-year additional case load. So, we're simply trying to adjust to that.

Quite frankly, I see no substantive difference between magistrates and a municipal court in terms of somehow expanding the capacities that deal with some of at least the civil cases that are just so heavily backlogged.

I know I'm extending my time, but the other members of the committee were not here. I think I heard them yield to me, Mr. Chairman. I hear voices from time to time. But let me just ask one more question.

I wonder if you'd comment on title IV of the bill. What do you think about the changes in the composition of the Nominations and Tenure Commission?

Judge UGAST. I didn't comment on it because it seemed to me that's a legislative matter. My comment, I guess, would be that I believe it has certainly worked very, very well over the last 20 years. From where I sit as a chief judge and the kinds of people that are being appointed to our court, the caliber, their experience have been outstanding. It, to me, has worked well. Whether additional representation on the composition is a legislative decision, I think it's working very, very well over the years.

Mr. FAUNTROY. On title V, the advisory committee?

Judge UGAST. Again, I'm not sure how that will work. But again, I suppose that's a legislative decision involving the community. We have contact with the community, and try to continue to through our judges going to various parts of the city, as well as to representatives on our various committees of the court, to bring the community into that.

Mr. FAUNTROY. Would you object to changing the name of the hearing commissioners to magistrates?

Judge UGAST. I have no objection to that. But I've said on that again, I would favor and would ask under separate legislation or to this committee, I have no objection to the name change. Uniform the authority to either the joint committee or the board of judges to set the salary, say not to exceed 90 percent of the trial judges, something, leaving it to the joint committee to do so. To set uniform retirement provisions, to set uniform leave and any other benefits so that they are treated in an appropriate fashion as a single group.

I think statutorily, as far as authority, you can see what they're doing and we're using them very fully. As I say, I might ask for—the only expansion that I think I would ask for that we don't already have the authority to do, but the board of judges feels its inappropriate, would be in uncontested probate and fiduciary matters and the initial hearings in juvenile matters. We have broad authority under the existing statutes.

Mr. FAUNTROY. Thank you, Mr. Chairman.

Mr. DYMALLY. Judge, having paid my tickets with some regularity, what court system in the District of Columbia handles court cases?

Judge UGAST. Traffic?

Mr. DYMALLY. Yes. Do you have a separate traffic court?

Judge UGAST. I have a traffic branch that handles the serious traffic offenses. I might just go back to something that Doctor Reid was talking about. The less serious traffic offenses, not driving under the influence, reckless driving, leaving after the scene of an accident or driving under suspension, those we have retained and we still have, you might be interested to know, all traffic offenses ticketed by the Capitol Police. They are not decriminalized as the rest of the city. Everything else is in a traffic adjudication board and are decriminalized.

Mr. DYMALLY. But that's part of the superior court system?

Judge UGAST. No, sir; it is not. We have nothing to do with the traffic——

Mr. DYMALLY. Who handles that, the commissioners?

Judge UGAST. No, no, no. This is separate. It's in the executive branch, not in the court at all.

Mr. DYMALLY. I see. So, if I don't pay my traffic ticket, I don't have to come before you?

Judge UGAST. Unless it's down here at the Capitol.

Mr. DYMALLY. So, we are still behind times.

Judge UGAST. It might be in our court, I believe, on the traffic offenses by the Capitol Police.

Mr. DYMALLY. But I do want the record to show that I do pay my traffic tickets.

Judge UGAST. I'm sure you do, sir.

Mr. DYMALLY. Mr. Rohrabacher?

Mr. ROHRABACHER. Your Honor, I'm not a lawyer, so if you'll excuse some of my questions that may seem—that was one of my chief qualifications for running for this office. My constituents thought that not being a lawyer was a positive. But I find myself at a disadvantage today for some of these discussions.

Let me just ask you if I'm capturing the essence of what you're saying. You say the backlog which is being used as an excuse or a reason or justification, however you want to put it, for this reformation of the system actually could be taken care of by simply providing this system with more judges?

Judge UGAST. Well, I think we have to make the distinction between the trial court and the appellate court first. When I speak of backlog, for example, when I tell you that I have 3,700 felonies pending right now and that 12 of my felony regular calendars have about 300 cases, my concern backlogwise is how quickly can I get those cases disposed of and tried? I'd like to have those cases tried within 180 days. I'm not doing it in one-third of them. Two-thirds of them, we're making it; one-third we are not.

I consider that a backlog until I can get enough judges on those calendars to process those felonies, serious cases, within the 180 days. In California you have a Speedy Trial Act, as you may be familiar with.

Mr. ROHRABACHER. Right. In terms of what's been proposed, if we just gave you more judges to handle that as compared to what we have before us today, which do you think would be more effective?

Judge UGAST. The judges, because then I have the full flexibility and I'm also not telling the community, "Some of you are going to have judges and some of you are going to have judicial officers," notwithstanding the fact that they aren't well qualified.

Mr. ROHRABACHER. Let me think here. Listen, I have a few thoughts in mind, but as I say, you folks are more expert on this and you've been around and know the city's problems better than I do. That's why I was happy that you went on and asked as many questions as you did.

But it would seem to me, and this is just a layman's opinion, that what we have here is a serious attempt to deal with a problem. But sometimes when people—for example, if you need a few more drivers to drive the trucks in order to get the goods from here to there, sometimes you don't have to totally redo the whole transportation system. This may be what we're facing here. As these hearings go on, I'll be looking very closely at what people say and I want to thank you very much for your testimony.

Judge UGAST. Thank you.

Mr. DYMALLY. Judge, I do have some questions, but I don't want to keep Judge Rogers waiting any longer, so I plan to mail them to you. But I do have one.

Mr. Fauntroy made reference to your 1987 report. In your 1988 report to the Congress, I quote, "It is anticipated that greater utilization of hearing commissioners will enhance significantly the ability of the court to provide fair and prompt dispositions of the cases."

Based on the statistics and your comments, would you agree that upgrading of the commissioners to magistrates may help alleviate the court backlog?

Judge UGAST. What I have done since that report was written is expand the areas that the commissioners are handling. For example, I expanded calendars to have them handle the entire nonjury misdemeanor calendars. I expanded another calendar to have them handle the nonjury trials. It requires consent of the parties, but only up to 90 days. So, what I was talking about is within the framework that we now have and the various rules that the court adopted, I have expanded their area. Seven of them have gone into areas now in the family division that were just beginning back when that started.

So, what I have done is try to use them in other areas and other types of calendars within the framework to get even greater production and to handle more and more matters. So, I have done that.

Mr. DYMALLY. A court watcher has suggested that some of these commissioners are more qualified than some of the judges and some of the judges indeed so snicker and call them minijudges. Is this one of the reasons why there's opposition to this proposal to upgrade them?

Judge UGAST. No, sir; no. That's not true. I have been one of the real—at least I have insisted—what we want our commissioners to be accepted with credibility, their integrity, their standing, that they are acting as part of the court and as an adjunct to the court and they deserve the same respect in all facets, their ability to handle matters, their qualifications, et cetera.

Where the opposition comes, I think—back in 1986 there was opposition when I went up and urged the permanent establishment of hearing commissioners to help us do these things that we're doing, included the expanded family, child support matters. Some of the people in the city that appear opposed to even that concept, and I said, "Let us give it a chance and show you what these people can do, used with certain limitations in areas that we thought would be appropriate." So, I think that's the way I'd answer your question, sir.

Mr. DYMALLY. I shall yield to the gentleman from——

Mr. FAUNTROY. Mr. Chairman, may I just ask——

Judge Ugast, isn't one aspect of the problem the prestige attached to the position of commissioner, that they are not judged worthy of rendering independent judgments on some of these rather relatively mundane civil cases? Is it not true that this bill differs from the authority that you now have to assign them in that it does add to their prestige the ability to make final judgments without appeal to the appointing judges?

Judge UGAST. Well, it expands the authority. But what I'm concerned about and what the judges are concerned about is not the prestige, it's the perception of the community that you're giving us two different types of people titlewise who have been selected maybe in a different fashion who aren't considered judges. To you and me it may be that they have the same qualifications, they're selected——

Mr. DYMALLY. But, Judge, you do that now.

Judge UGAST. What?

Mr. DYMALLY. You have two types of people.

Judge UGAST. But they are in limited roles in areas that are basically initial type things with review by a judge at a later point. The rules all permit a review by a judge.

Mr. FAUNTROY. I guess my question is——

Judge UGAST. Required by the statute.

Mr. FAUNTROY. My question is of the 73,000 cases that these lawyers, absent the experience and good fortune of having been selected judges, have handled, do you have any indication that they handled them inadequately, that the judges were not satisfied with the extent to which they dispatched their responsibilities?

Judge UGAST. No, sir. I'm not saying that.

Mr. FAUNTROY. It's just hard for me to understand, therefore, why if just in the 73,000 cases digging into the backlog that has people showing up at my church saying, "You don't know me, but, I want to know why you can't do something about a court system—I've had a case before small claims and I can't get heard in 4 years, Reverend." So, I——

Judge UGAST. I wouldn't think that's in small claims or probate. There's some civil cases.

Mr. FAUNTROY. Yes, all right.

Judge UGAST. But I guess what I'm trying to say is that these commissioners—if you look at all these matters, it's a high volume type of matter that generally deals with matters that then proceed later on before a judge. All these criminal matters, except in the nonjury trials that they have and the pleas, are not finally determined. So, you're dealing with people's problems that they're litigating that are trying to have the commissioners do matters that are basically preliminary to the final decision that might involve a judge, so that people feel at least comfortable. They may not like the decision they get, but at least they feel comfortable, "I had a judge."

Now, that may be a wrong perception, Congressman.

Mr. FAUNTROY. It is. Excuse me.

Judge UGAST. But I'm telling you that's what's out there.

Mr. FAUNTROY. Yes. Well, let me tell you what's out there. They want the case handled. I have heard no one complain to me about a judgment that was recommended to a judge by a commissioner. If I thought that was a problem—that's why when I got that judgment I asked those lawyers around me was there a substantive difference between the qualifications of a judge and a commissioner and I learned that there's no substantive difference in terms of qualifications. I've learned from you that the difference, of course, is one of experience on the bench and the good fortune of having been selected through a process that is rather unique in the country.

Mr. DYMALLY. Thank you very much, Judge. We may very well have to invite you again to come back and share your views with us.

Judge UGAST. I'll be happy to.

Mr. DYMALLY. I promise this is the final question. Do I evidence some lukewarm or some reluctance about the whole system proposed in Mr. Fauntroy's legislation from you?

Judge UGAST. I've made myself very clear, I think, on the magistrates, that I feel that—while I understand what is attempting to be done, I've indicated my feeling that I think it's preferable that we do the things I've suggested rather than expand it with a set number of commissioners or magistrates and that kind of thing.

With respect to the supreme court, I support fully Judge Rogers in her request to you in terms of taking steps to assist the court of appeals to meet that need. I have no lukewarm feelings at all about that. I feel very strongly, as she does, that action is needed.

Mr. DYMALLY. If we revisit the whole issue of the magistrates versus the commissioners, do you think we can get your enthusiastic support for the bill?

Judge UGAST. Also with my very strong, strong recommendations on the structure of the administration of the court system. But I would like to push those eight judges as soon as you could.

Mr. DYMALLY. Thank you very much.

Judge UGAST. Thank you.

Mr. DYMALLY. I just want to say to you that I understand the California system as a nonlawyer and I like that model because it has been very efficient.

Judge UGAST. It has.

Mr. DYMALLY. Thank you very much.

Judge UGAST. Los Angeles Superior Court, I was with the chief judge, Judge Burn; 238 superior court judges in Los Angeles County and about 100 municipal court judges, I think, just in Los Angeles County when I was with him last weekend.

Mr. DYMALLY. I studied them. I try to stay away from them. Thank you.

Judge Rogers is no stranger to this committee, except she returns back in a very elevated position and we welcome her comments today on the legislation.

TESTIMONY OF HON. JUDITH ROGERS, CHIEF JUDGE, DISTRICT OF COLUMBIA COURT OF APPEALS

Judge ROGERS. Thank you, Mr. Chairman. I'm delighted to be here.

I'd like to introduce Richard B. Hoffman, who is the clerk of our court.

First, Mr. Chairman, I want to thank you for scheduling the hearings as promptly as you have and I want to express my deep appreciation to the Congressman representing the District of Columbia for the time and energy he has devoted to examining how the court system in the District of Columbia can better serve the community in which it is situated as well as all people who come into the courts.

I think it's important to recognize here that we're talking not only about the citizen who complains about their cases not being heard promptly, but we're talking about businessmen, we are talking about professionals, we are talking about regional operations and in some cases national operations because of the nature of the Nation's Capital.

Second, I would like to submit my statement for the record.

Mr. DYMALLY. Without objection, it is so ordered.

Judge ROGERS. Thank you, Mr. Chairman. I think I'd like to just highlight some points in light of the questioning that's gone on this morning and the statements I've heard.

First, I would like to make clear that what you are hearing and what has come before this committee is not something that the courts have initiated. The idea, and I think this is relevant to one of Congressman Rohrabacher's questions, it is the Bar of the District of Columbia, the organized and voluntary bar who had expressed concern about what is happening in our court system. While admiring the steps that Congress took in 1970 to create a State—like court system in the District of Columbia, the numbers and the complexity of cases have simply outstripped what was initially contemplated. Now the bar is saying, indeed said as long as 10 years ago, that in terms of the effectiveness and efficiency with which the court system handles the cases that are coming into it first, the courts have a responsibility to take those measures to improve their operations.

There was a comprehensive study of the court system in 1981 chaired by Charles Horsky that recommended a series of management improvements within the courts. At the same time, another bar study recommended, with respect to the court of appeals, that it was time to establish a intermediate court for two reasons. One, the amount of delay on appeal, at that time over 15 months, was simply intolerable. Second, that it was intolerable to have the highest court of a jurisdiction unable to perform its jurisprudential role. That is in addition to deciding error review, has the trial court properly applied existing law? Does the existing law need to be clarified? The highest court was unable, because of the pressures of workload, to deal with the law declaring functions in those areas that it is appropriate for a court to speak.

Since the establishment of the court system in 1970, 38 States have established intermediate courts of appeal and they have done so, I might add, in facing circumstances that are less troubling than those in the District of Columbia today. For example, in the District of Columbia today, the average time for a case to be handled on appeal is nearly 2 years. Most States move long before that to establish intermediate courts of appeal.

For example, in Minnesota, that court system, when delay on appeal was up to about 15 months, tried all types of different alternatives to resolve the problem of delay on appeal. For example, they added a couple of judges and they found out that did not solve the basic problem of delay and congestion on appeal.

We have tried that here in the District of Columbia. We have tried extra judges because we have our retired judges who sit and assist us on the court of appeals. Nevertheless, the delay problem has increased dramatically and I would hasten to add that the statistics will show that the judges are efficient, they are producing more opinions in less time, but the level in terms of the numbers of cases that are coming into the court, as well as the complexity of the questions that are coming into our court are such that relief is needed.

What you will see in my statement is an explanation of the background leading to court reform, the various studies done by the bar, and a study done by the National Center for State Courts

which proposed a model for the District of Columbia that is embodied in the bill introduced by Congressman Fauntroy in title I. The Bar Association of the District of Columbia estimated that were we to continue with the level of manpower we have now, it would take 14 years for the District of Columbia Court of Appeals to dispose of its backlog of nearly 2,400 cases. We now have 6 months of cases which are fully briefed and ready to be heard. Lawyers are filing motions to expedite their case simply on the grounds that they have filed their briefs as of January and still their case has not been put on a calendar.

I think we can capsulized what has happened if I could show you a couple of charts which are reproduced in my statement. The first chart, if I may, Mr. Chairman, shows where the District of Columbia court system was when court reform was created. At this time in 1971, when Congress created a D.C. Court of Appeals with nine judges, this is the level of work that those nine judges were being asked to address.

Ten years after court reform, this is what had happened to the workload coming into the court of appeals. Because the court of appeals adopted a number of management improvements, we were able to increase the level of productivity. The way we did that, so it's clear, is to make a judgment that because it was important to decide cases as promptly as possible, because it was important to decide as many cases as possible, we would emphasize deciding those cases which did not raise the more complex and difficult issues. We set up a summary calendar so those simple cases could be handled without oral arguments. We set up a process by which cases could be disposed of without full briefing. That's the way the court kept us with the volume of cases that were coming into it.

Now, look where we are today. The number of cases coming into the court of appeals has still increased and the court has tried to keep up with the number of cases that are coming into the court. To do that, once again we have spent more time on the simple cases. We have changed our rules, we have incorporated internal procedures so that cases when they are initially filed are screened and the case will be dismissed if the parties do not make certain representations to the court. We will set them on a schedule for prebriefing disposition. We will set them on a summary calendar and as a last resort, where it is impossible to divert those cases out of the system because they raise substantial and important legal questions, we will set them on the regular calendar for full briefing and oral arguments.

Nevertheless, having done all of these and adopted every single recommendation that has been made to the court to improve its efficiency and effectiveness, we have today a backlog of over 2,400 cases, appeals taking nearly 2 years and the level of cases being filed in our court continuing to increase.

I think that the picture here is not one of trying to revise a system merely for the purpose of revising a system. In order to increase the productivity of the court, we have had to sacrifice the jurisprudential role of the highest court of the District of Columbia and we have had to postpone decisions in cases which involve complex matters.

President Bush, in his message to the Nation, talked about the need to respond to the drug problem in our communities. You know better than I what is happening to this community that is plagued by drugs and drug-related violence. The President recognized, as did his drug czar, that what we need is sure and swift punishment. He recognized that we have to create additional courts. He recognized that this was a matter that the State legislatures would have to address. There is no way that you can have effective law enforcement in the District of Columbia without providing the resources to the trial courts and without providing the resources for the appellate courts.

It is important, if I may emphasize here, that we're dealing with a justice system and justice on appeal is part of that system. Where people cannot get their trials for 2 years or 4 years and then, even if they prevail in the trial court, they have to wait another 2 years for resolution on appeal, that is a system, it seems to me, which cries out for some type of resolution.

Now, the alternatives that have been suggested have been examined by my predecessors and by several committees of the bar, as well as the National Center for State Courts. As of October 23 of this year, 57 percent of the cases that are coming into the court of appeals are criminal cases. I know of no jurisdiction that is proposing to cut back on the right of first appeal in a criminal case.

As of that same date, approximately 10 percent of our cases are agency cases. Many of those cases involve pro se litigants. But as a practical matter, diverting agency cases out of the court is simply not going to solve the backlog and congestion problem the court faces.

The other alternative, appointing other judges, we've mentioned we have the assistance of the retired judges and nevertheless even with an increasing number of retired judges, the volume of cases coming in and the delay on appeal has increased.

So that we are clear as to what is happening, the courts are not sitting on their hands in this matter. In the fiscal year 1990 budget, we have requested for the court of appeals additional central court staff so that we can set up two case management teams. That would further enhance the ability of the court to move matters expeditiously on less than a full appellate track system. I hope the President signs that bill, but if not I hope the Congress is able to act promptly so that we can get that extra staff that will enable the clerk's office to become more involved in the screening and review of appeals with the idea of narrowing the issues, referring those cases that are appropriate for settlement.

Nevertheless, our most optimistic projections as to what those case management teams will do is somewhere around maybe 100 cases a year. We're talking about a backlog of almost 2,400 cases. That simply is not going to solve the problem.

Now, in one report of a bar committee dissenting view said, "Well, if the judges would just work during the month of August instead of taking a vacation, they could get that backlog taken care of." Well, I'm here to state that the judges did work in August and there is no way you can resolve 2,400 cases in 1 month and there is no way, with 1,700 matters coming into the court every year, that that backlog is going to disappear.

Furthermore, the court is at its maximum in terms of what type of pressures can be put on the court judges to do more work. Our court is fortunate in that we have industrious judges, but there is simply a limit as to what it is possible to do now. I think Dr. Reid was addressing that and I think you have to understand when you hear Chief Judge Ugast talk about the numbers of cases that are coming into the trial court, while obviously the number at the bottom of the pyramid is a lot larger than at the top, as his volume expands as we have 1,000 more police officers in the District of Columbia, as we have 50 new assistant U.S. attorneys, necessarily the number of appeals is going to increase.

I think I would like you to note in particular in my statement at pages 15 and 16 that the interesting thing about establishing intermediate courts is that we do nothing extraordinary, we simply do what every other jurisdiction facing less of a problem than is faced in the District of Columbia has done and has done successfully. This is not an experiment which has failed in the States, it is an experiment which has proven to resolve the problems that the States face.

For example, as the bar association committee report points out, when Minnesota established its intermediate court of appeals, the number of dispositions increased dramatically. In South Carolina it went up by 29 percent, in Virginia by 26 percent. In addition, the time of cases on appeal was reduced in Minnesota, for example, from 15 months to 6.6 months and the time for disposition in cases where there was no oral argument dropped from 8 months to approximately 5 months. That's proof, it seems to me, that interposing an intermediate appellate court that handles the volume of work in fact results in more cases being disposed of more quickly and maintaining the ability of the court system to perform what the ABA has pointed out are the two functions of the appellate court, the error review function as well as the jurisprudential function.

Additionally, I think it is important to point out that we are not proposing a system that would put in another tier of review. Rather, what this bill calls for is a system that the National Center for State Courts recommended and has been adopted by a number of courts around the country where all appeals would initially go to the immediate court of appeals. Pursuant to the statute and the rules of the highest court, cases that are identified by category would go initially to the highest court if the highest court was of the view that case would have to be decided ultimately by that court as well.

If you will note, on page 16 in footnote 26 of my statement, I have pointed out what the D.C. Bar report that you have has pointed out. For example the highest court in the State of Massachusetts only hears 5.7 percent of those cases heard by the intermediate court. In Minnesota, only 6 percent of the cases heard by the intermediate court were heard by the highest court, and in Maryland, the figure was 8 percent. In other words, throughout the country, the highest courts have been able to organize and discipline themselves so that it is only the important questions which are reaching the highest court.

I would also point out that we are not talking about creating a court system of high-paid judges who sit around and do nothing. In terms of what the ABA standards talk about, in terms of what is reasonable to anticipate that a judge can produce in a year, we're talking somewhere in the neighborhood of 75 to 100 matters a year. That is what is happening across the country in various forms. But in this jurisdiction, what is being forced on the judges is approximately twice that number.

Finally, I would like to emphasize that Congress has responded in the past to the needs of the trial court and I think as Congressman Fauntroy's comments make clear, this is what citizens bring to your attention. They want their trial. So, in terms of community awareness, there is so much focused on they want their appeal. However, if you talk to the lawyers in the community, they understand what we're saying when you have to have an entire system that is able to handle the volume of cases that come into it.

So, since court reform was established, Congress has added 7 additional trial judges and 14 hearing commissioners to the trial court. You heard Judge Ugast talk about the volume of matters being handled by the commissioners.

Let me say first, the Congress has also approved in the fiscal year 1990 budget funding for an additional 1,000 police officers and 8 additional trial judges. If you add this bill, you have another 13 magistrates. When you think of that additional person power coming into the trial court level, it seems clear to me that there has to be some attention to the appellate court as well.

Finally, I would simply point out that the statistics will show that between 1976 and 1986 when the National Center for State Courts performed its study of the volume of appeals in our court increased by 34 percent and yet there has been no change in the judge power that is available to that court. All we're talking about in title I of that bill is adding seven judges to the appellate structure in the District of Columbia. The court of appeals currently has all of the authority that is needed to decide these cases as we've described. The problem is we need seven more judges to do it.

Finally, if I may, I would turn briefly to the administrative issue. There is no court system in this Nation which administers itself from the bottom up. There is no court system in this country in which the chief justice of the highest court or the highest court is not in charge of the administration of the court system. So, when you describe the courts around the country, 20 States place the general administrative responsibility in the chief justice, 16 States in the chief justice acting on behalf of the highest court, 12 States with the highest court and by rule or State statute that is delegated to the chief justice, and only in 2 States do you have a committee system. You have it in California, but in California the chief justice of the Supreme Court of California appoints the overwhelming majority of people who serve on that council. That is not a system in which the chief justice is not in control and in charge of the system.

The only other jurisdiction, New York, the chief justice is assisted by administrative judges of the court system.

I suggest to you that to the extent you place responsibility for administration in either the highest court or the chief judge of the highest court, you cannot place responsibility without authority.

The important thing, it seems to me, to understand here is that if the District of Columbia court system is to be able to respond to the demands that are made on it, there has to be a mechanism that can address some of these problems and address them effectively. Collegiality goes so far. When everybody agrees to the solution of a problem, there is no problem. The problem is what do you do when everyone does not agree.

Now, the Bar of the District of Columbia, for example, in its most recent study, has pointed out the problem of court reporters in the District of Columbia and the delay in the preparation of transcripts. They have stated unequivocally that there is no excuse for the delay which occurs in the District of Columbia. But if you look throughout the country, transcript preparation delay is a problem. If you talk to any chief judge around the country of the highest court, you will find out that similar problems are being experienced.

How are these problems resolved? They are resolved, in part, by the highest court making some decisions in consultation with the other courts as to how to resolve these problems. Ultimately, someone has to make the decision. All of us can understand why a trial court does not wish to be in the business of disciplining court reporters. These are the people who supply the life blood for the trial judge on a day-to-day basis. On the other hand, we cannot have a system in the District of Columbia whereby the appellate process becomes so stymied as a result of the delay of transcript preparation. The technical capability exists to solve the problem. The question is, does the will?

The bar concluded that to make certain that we do not have transcript delay in this jurisdiction any longer than 60 days, it was necessary to place the responsibility for the administration of court reporters in the high court of the District of Columbia.

I think it is important to say that the experience around the country is relevant to the District of Columbia. In all jurisdictions, the number of judges, the number of court employees is greatest at the trial level. You will always have that pyramid with the bulk of matters occurring at the lower levels. Nevertheless, in terms of an administrative structure and rationale, there has to be authority placed with responsibility at the top. I've tried to review this in my statement.

Mr. DYMALLY. Judge Rogers?

Judge ROGERS. Yes, Mr. Chairman?

Mr. DYMALLY. May I interrupt you for a moment? Mr. Rohrabacher and I will have to leave to go vote. We'll ask Mr. Fauntroy to continue the hearing.

But before I leave, let me just ask you one quick question. What would be your response to an amendment for a speedy trial in the bill, such as we have in California?

Judge ROGERS. Well, speedy trial is a matter that has been considered by the Council of the District of Columbia, and I saw Councilmember Rolark here earlier and she may wish to address that. The only comment I will make, Mr. Chairman, is if you pass a

speedy trial act in the District of Columbia, then you will have to provide more resources, more judicial resources to the system. Otherwise, you will simply have cases dismissed and reindictments, representments and you will, in my view at any rate, exacerbate the problems of delay and congestion.

Thank you though for your attention while you were here. Thank you.

Mr. FAUNTROY. You may continue.

Judge ROGERS. Mr. Chairman, I'd be happy to respond to your questions. I've tried to set forth in my statement a lot of information that I hope will be of value to you and to the subcommittee. Of course, I'm available to provide any additional information I can.

Mr. FAUNTROY. I want to thank you both for your written testimony, which will be included in the record, and for your remarks here as a part of the hearing.

[The prepared statement of Judge Rogers, with attachments follows:]

STATEMENT OF THE HONORABLE JUDITH W. ROGERS
CHIEF JUDGE OF THE DISTRICT OF COLUMBIA COURT OF APPEALS
and CHAIR OF THE JOINT COMMITTEE ON JUDICIAL ADMINISTRATION
of the DISTRICT OF COLUMBIA COURTS
on
H.R. 3470 District of Columbia Judicial Reorganization Act of 1989
to the
SUBCOMMITTEE ON JUDICIARY AND EDUCATION
COMMITTEE ON THE DISTRICT OF COLUMBIA
UNITED STATES HOUSE OF REPRESENTATIVES

October 26, 1989

Thank you for the opportunity to submit this statement. I am heartened by the prompt scheduling of the hearings on H.R. 3470, the District of Columbia Judicial Reorganization Act of 1989. The legislation introduced by Congressman Fauntroy includes provisions that would address immediate and long standing needs of the District of Columbia courts for additional judicial resources. It comes at a particularly appropriate time in view of the added pressures on the District of Columbia courts arising from the scourge of illegal drug use and drug-related violence in our community. While the problems encountered by the District of Columbia courts are similar to those associated with overcrowded courts throughout the nation, they are complicated by the increasing number of prosecutions and other related matters that result from the widespread use of highly addictive drugs.

To assure that the courts of the District of Columbia can provide fair and impartial proceedings in a timely manner means that the resources of the courts must be increased. This was recognized by President Bush in his address to the Nation on September 5, 1989, when he called for the justice system to

assure the swift and certain punishment for activities associated with illegal drugs. The President recognized, as did the Chairman of the Senate Judiciary Committee in response to the President's speech, that the criminal justice system must be enlarged across the board and that more courts are required. See generally National Drug Control Strategy (The White House, September 1989).

The needs of the District of Columbia courts are well documented. In a variety of reports and studies by independent organizations, the unanimous conclusion is that additional judicial resources are required. As additional cases are brought to the courts there will be a need for more trial and appellate court resources. See id. at 19. Equally as important as the trial court's needs is the need to assure that the appellate court has the resources to provide justice on appeal, particularly when the cases overwhelm the trial court dockets. For virtually all of the cases that come into the District's courts, the District of Columbia Court of Appeals is the court of last resort.[1]

In jurisdictions with large appellate caseloads, the states have provided additional appellate court resources in the form of intermediate courts of appeal so that more cases can be decided more quickly and the jurisprudential role of the appellate court is not jeopardized. Thirty-eight states have created

[1] Since 1973, the United States Supreme Court has granted certiorari in only seven cases, all except one involving criminal appeals, and the single civil appeal was dismissed.

intermediate appellate courts in response to the delay and congestion on appeal that existed before the present surge in drug-related cases. Lesser measures, such as adding judges and staff to existing appellate courts, has proved inadequate to meet the task. No state without an intermediate court has a caseload that comes close to that of the District of Columbia Court of Appeals. Despite increased judicial productivity, the use of senior judges, and management improvements, as of September 1989 there were 2,398 cases pending in the Court and six months of fully briefed cases waiting to be heard.

In the District of Columbia, the organized and voluntary Bar as well as the National Center for State Courts, the Council for Court Excellence chaired by the Honorable Charles McC. Mathias, and other interested persons, including the chairperson of the Judiciary Committee of the Council of the District of Columbia, have recommended the establishment of an intermediate appellate court. The need, first documented ten years ago, and more recently redocumented in a study by the D.C. Bar, is now more pressing. In sum, it is long past time for Congress to act.

Titles I and II of H.R. 3470 would further the Congressional purpose in enacting the D.C. Court Reform and Criminal Procedure Act of 1970 to establish a state-type court system in the District of Columbia and thereby eliminate congestion and delay in the trial and appeal of local matters. The bill provides for an intermediate appellate court based on a model recommended in 1986 by the National Center for State Courts as part of its study

of delay in the D.C. Court of Appeals. It provides for a seven-member Supreme Court, a nine-member intermediate court, a single appellate clerk of court, and a pass-through provision to assure that matters ultimately to be heard by the Supreme Court sitting en banc may be heard initially without prior consideration by the intermediate court. Although the pass-through standard in the bill is far too narrow to achieve its purpose, this is remedied by a simple amendment, and it, along with the other appellate court provisions, warrant prompt enactment.

The bill also would clarify the administrative responsibility for the administration of the court system, providing for the chief justice of the highest court to administer the court system with the assistance of a court executive and advice from a reconstituted Joint Committee on Judicial Administration. The chief judge of each court would remain responsible for the daily administration of the respective courts. In carrying out those functions the chief judges would be assisted by the clerk of the respective court, and in matters concerning the court system, by the executive officer.

This streamlined organizational structure draws on the experience of the states[2] while taking cognizance of the

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[2] Forty-eight (48) state court systems place responsibility for the administration of the court system in the chief justice of the highest court or the highest court itself, generally to be exercised by the chief justice of that court. The two largest states -- New York and California -- use committees with the chief justice of the highest court having substantial authority to carry out the responsibility for administration. National Court Statistics Project, National Center for State Courts, State Court Organization, 1980, (1982), as updated by the Clerk of the

experience of the District of Columbia court system. It is consistent with the recommendations of the recent study of the court by a D.C. Bar Commitee.[3] It also assures that administrative matters affecting the court system will be addressed from the combined perspective of the court system while leaving the daily administrative tasks to the chief judges of the several courts.

In addition, the bill would provide eight additional judges for the Superior Court as well as thirteen additional hearing commissioners. The commisioners would be redesignated as magistrates and have greater authority than existing hearing commissioners and be subject to new selection and retention procedures. As the unified trial court has matured in the past eighteen years, additional judges have been added once before by Congress, and Congress authorized the appointment of hearing commissioners. Still, the volume of cases filed in the trial court makes the need for additional resources undeniably clear. The chief judge of the Superior Court sets forth those needs in a separate statement today.

Other amendments, Titles IV and V, relate to the membership of the Nomination and Tenure Commissions and an advisory committee on the judicial system.

To set these proposals in perspective, I review the reasons for the reorganization of the District of Columbia courts by

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Court, Richard B. Hoffman.

[3] See note 36, infra.

Congress in 1970 in Part I of this statement. In Part II I discuss the studies that examined the courts ten years after their creation in 1970, and in Part III the efforts by the courts to improve their efficiency and effectiveness. I conclude, in Part IV, with a discussion of appellate court restructuring and the provisions of H.R. 3470 that address the need for judicial resources.

I. Background

The present District of Columbia court system was created by Congress in the District of Columbia Court Reform and Criminal Procedure Act of 1970.[4] The Act transferred jurisdiction over criminal prosecutions and civil proceedings from the federal courts to a new District of Columbia Court system. Prior to the Court Reform Act the several District of Columbia courts had very limited jurisdiction. For example, the D.C. Court of General Sessions had jurisdiction over civil matters involving less than $10,000. Its criminal jurisidiction was limited to trials involving misdemeanors and to hearings on probable cause in felony cases. Domestic relations cases were handled by a separate branch of the court and proceedings involving juvenile

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[4] Pub. L. No. 91-358, 84 Stat. 473 (July 29, 1970). The enactment of the Court Reform Act came in response to the accumulated recommendations of a number of commissions and groups to upgrade the local courts in order to remedy shortcomings in the justice system in the District of Columbia. Mitchell, Introduction to Symposium on the Modernization of Justice in the District of Columbia, 20 Am.L.Rev. (Nos. 2 & 3, December 1970 - March 1971) xiv.

delinquency, neglected children and child support and paternity cases were handled by a separate juvenile court.

There also was a D.C. Court of Municipal Appeals consisting of six judges. Petitions for review of decisions of the Municipal Court of Appeals could be taken to the U.S. Court of Appeals for the District of Columbia Ciruit. From there appeals were to the United States Supreme Court on petition for certiorari.

The Attorney General of the United States in 1972 stated that the old system was

> unacceptable in principle and unworkable in practice. It was unacceptable in principle because a local judicial system deprived of all meaningful jurisdiction was inconsistent with developments toward self-government. It was unworkable in practice because the backlogs and delays which characterized the trial of felony cases in the U.S. District Court were rendering the system largely ineffectual.[5]

Viewing the system as one paralleling the judicial systems in the 50 states,[6] the Attorney General heralded the D.C. Court Reform Act as representing "a fundamental improvement in judicial administration," the inefficiencies and inadequacies of a multiplicity of local courts having been eliminated, and "[e]very attempt ha[ving] been made in this legislation to . . . . to give real power and stature to the local courts."[7] Strengthened further by Congress in the enactment of the D.C. Self-Government

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[5] Id. at xiv-xv.

[6] Id. at xv, xvii.

[7] Id. at xv.

and Governmental Reorganization Act,[8] the local court system's judges were to be selected by a Nomination Commission that included federal and local representation.

II. Studies of the D.C. Court System after ten years

Ten years after the enactment of the Court Reform Act, the District of Columbia Bar evaluated the District's court system. The report of the committee chaired by Charles A. Horsky placed particular emphasis on "[t]he efficiency and effectiveness with which the courts of the District of Columbia schedule and dispose of matters brought before them . . . ."[9] Its mission was also to recommend further improvements in the court system.[10] Running over 1,000 pages, the Horsky Report detailed a variety of internal improvements which the courts undertook to implement.

The Horsky Committee reached no conclusion on whether or not the 44 judges authorized for the trial court provided sufficient trial judicial manpower. In recognition of the substantial backlog of cases in the appellate court, see Chart I, however, the Committee recommended, based on assumptions that the appellate caseload would not increase in number and complexity,

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[8] Pub. L. No. 93-198, 87 Stat. 774 (December 24, 1973) (Home Rule Act).

[9] Horsky, Preface to Report of the District of Columbia Court System Study Committee of the District of Columbia Bar, March 1982, prepared for the Senate Subcommittee on Governmental Efficiency and the District of Columbia, 98th Cong.,1st Sess., S.Pnt. 98-34 (April 1983) vii (Horsky Report).

[10] Id. at vi.

that three additional appellate judges be appointed for a temporary period.[11] No judges were ever added to the court and the assumptions have proved incorrect.

A second Bar committee, chaired by John W. Douglas, specifically addressed the workload of the Court of Appeals. It recommended the establishment of an intermediate court of appeals.[12] The Douglas Committee concluded that "resolution of virtually all of its cases by majority vote of three-judge panels [is] an altogether unacceptable modus operandi for a jurisdiction's highest court."[13] The committee further concluded that "the Court's 15.5 months average delay from notice of appeal to decision is far too long, [being] roughly three times longer than that contemplated by the ABA Appellate Standards."[14]

To assess what has happened to the courts of the District of Columbia, it is important to recognize the impact of federal and local legislative initiatives. During the 1960's Congress enacted the legislative programs of the Great Society with the result that the states and the District of Columbia were required to conform to new federal laws and regulations and to promulgate local laws and regulations to carry out federal laws. These laws

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[11] Id. at vii-viii.

[12] District of Columbia Court of Appeals: Workload Problems and Possible Solutions, Final Report of the Subcommittee on the Workload of the District of Columbia Court of Appeals, District of Columbia Judicial Planning Committee, August 1979 (Douglas Report).

[13] Id. at 140.

[14] Id.

and local regulations created new rights and remedies, which, in turn, spawned new litigation in the local, and federal, courts. In addition, with the enactment of the Home Rule Act, the new local government, effective January 2, 1975, enacted many laws creating new rights and remedies which also affected the workload of the courts.

In addition, throughout this period, crime in the District of Columbia continued to rise, and criminal prosecutions became the major portion of the courts' workload. Of course, the recent surge in the number of drug cases and attendant violence has exacerbated the problems facing the courts.

III. Responses by Congress and the Courts

To respond to the increasing demands being placed on the District of Columbia courts, Congress, in 1986, authorized the appointment of seven additional trial judges for the Superior Court and the appointment of hearing commissioners. There are now 51 trial judges and 15 hearing commmissioners in the Superior Court. Additional support staff also was authorized for the trial court.

No such personnel increases occurred in the Court of Appeals, however. It has remained throughout its existence a court of nine judges. Faced with increasing appellate caseloads, the court has implemented management changes to improve the

effectiveness and efficiency of its operations.[15] Still the time a case is pending on appeal continue to rise dramatically. See Chart 2.

Nevertheless, despite these responses, the District of Columbia courts are able to function only at substantial costs to the justice system. For example, to respond to the rise in crime and the drug epidemic, the chief judge of the Superior Court has assigned 24 of the 51 judges to hear criminal cases. Consequently, civil matters and family proceedings face extended delays before coming to trial. Settlement and alternative dispute resolution mechanisms assist in disposing of some of these cases, but there remains a large number which require judicial attention. Maintaining the civil and family calendars even at this level is possible only by using retired judges more than they or the courts probably ever contemplated. These circumstances pertain notwithstanding the management improvements initiated by the trial court and in response to the 1986 study by the National Center for State Courts of delay in processing cases.

All of these trends are evident at the appellate level as

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[15] For instance, a summary calendar was established for cases which presented no new question of law and asserted errors that could be easily disposed of, oftentimes without oral argument, in a memorandum of opinion and judgment rather than a published opinion. In addition, a computer was installed in the clerk's office to expedite the handling of pleadings and to facilitate scheduling; word processors were installed in judges' chambers; court rules were revised and new procedures were instituted to enhance the courts' ability to handle more cases; settlement efforts were expanded. Various managment improvements continue to be implemented.

well. Statistics show that the number of appeals increased far beyond what had been anticipated at the time of the Horsky Report.[16] Between 1976 and 1986, appellate filings increased by approximately 34 percent. See Chart 3. Significant increases occurred in civil and agency cases.[17] The National Center for State Courts found that the caseload of the D.C. Court of Appeals, when compared to other state appellate courts is, based on 1986 statistics, "higher by far than any other court of last resort not having an intermediate appellate court."[18]

The inevitable result, efficiencies notwithstanding, was greater delay on appeal: the average time a case is pending on appeal is now 22 months even with the assistance of retired judges. This is almost double what it was when the Douglas Committee recommended 10 years ago that an intermediate appellate court be established.[19] See Chart 4. Yet, and this point must

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[16] Testimony of Charles A. Horsky, Esq., before this Subcommittee, April 28, 1988, on H.R. 4366.

[17] Appellate Delay in the D.C. Court of Appeals, District of Columbia Delay Reduction Project, Southeastern Regional Office, National Center for State Courts, Volume 1 (July 1986) 9. (NCSC).

[18] NCSC at 12.

[19] Section 3.52 (b) of the A.B.A. Standards Relating to Appellate Delay Reduction, Appellate Judges Conference, Lawyers Conference Task Force on the Reduction of Litigation Costs and Delay (approved by ABA House of Delegates, February 1988), provides in part:

> Compliance with the time standards enunciated for [administrative, lawyer and judicial functions] should allow intermediate appellate courts and the state's highest court to issue an opinion on an appeal within

be emphasized, while the judges continue to maintain high standards in resolving appeals, the statistics also show that the judges have become more efficient, disposing of more cases in less time.[20] See Chart 5.

This appellate efficiency has not been achieved without costs. Over the eighteen years of its existence, the Court of Appeals has disposed of an increasing number of summary calendar cases and a decreasing number of regular calendar cases; to keep the backlog from growing too big,[21] the court disposes of a large number of the less complex, single issue cases without oral argument or published opinion and fewer of the cases raising complex and diffcult legal issues. In addition, the court seldom sits en banc even though, for all practical purposes, its decision is the final decision in a case since the United States Supreme Court rarely grants certiorari review. Thus, the jurisprudential role is, as the Douglas Report decried, relegated to the majority view in three-judge panels rather than the full court.

IV. Appellate Restructuring

According to the American Bar Association Standards Relating to Court Organization, an appellate system should perform two basic functions:

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280 days of the filing of the notice of appeal.

[20] NCSC at 19 (Table 9).

[21] Despite these efforts, as of September 1, 1989, there were 2,398 cases pending in the D.C. Court of Appeals, an increase of 167 cases in two months.

1. To review trial court proceedings to determine whether they have been conducted according to the law and applicable procedure; and

2. To formulate and develop rules of law that are within the competence of the judicial branch to announce and interpret.[22]

When workload makes impossible the performance of both functions by the highest court in a jurisdiction, and improvements in efficiency in operations cannot be achieved without diluting the appellate functions, the ABA concludes that the appropriate solution is the formation of an intermediate appellate court.[23]

The vast majority of states have restructured their appellate courts accordingly. Thirty-eight (38) states have established intermediate courts of appeal. What this means is that the intermediate court handles the cases involving new facts applied to settled law, clarifying applications of law, the error review function of the appellate court; the state's highest court handles the cases that involve new or difficult questions of law, the jurisprudential function. Results in other jurisdictions demonstrate that where intermediate courts of appeals exist, more error review cases are decided without sacrificing the jurisprudential function of the highest appellate court. Overall more appellate cases are decided in less time than would be true

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[22] NCSC at 28 quoting ABA Standards Relating to Court Organization at pages 32-33.

[23] NCSC at 28-29 quoting ABA commentary on its Standards Relating to Court Organization.

without an intermediate appellate court.[24]

In 1986 the National Center for State Courts studied the District of Columbia Court of Appeals, and concluded that serious consideration should be given to the establishment of an intermediate appellate court.[25] The National Center for State Courts proposed a high court of seven judges who would always sit en banc and an intermediate court of appeals of nine judges who would sit in panels of three. Appeal to the highest court would be discretionary with that court. To avoid delay, a single clerk's office would serve both appellate courts, and as briefs were filed the clerk would route them to the appropriate court, thereby avoiding unnecesary delay when it is clear the highest court would want to hear a case. This "pass through" procedure allows the highest court to consider cases of substantial importance expeditiously and more judges to focus on initial

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[24] The report of the D.C. Court of Appeals Committee of the Bar Association of the District of Columbia, chaired by Sidney White Rhyne, gathered information on the experience in other jurisdictions. See Bar Association Committee Report on Intermediate Appellate Court, September 9, 1987, at 3 ff. The Committee reported that in Minnesota total appellate dispositions increased in 1984-86 by at least 61 percent; in South Carolina by 29 percent; in Virginia by 26 percent. Id. at 4. Also, for example, in Minnesota, after the first full year of operation of its intermediate appellate court, established in 1983, the time on appeal for cases in which there was oral argument dropped from 15 months to 6.6 months, while the time for disposition of cases without oral argument dropped from 8.5 months to 5.2 months. Id. (attachment: letter of January 31, 1985, from chief justice of the Minnesota Supreme Court to Governor Perpich and Senator Moe and Representative Jennings).

[25] NCSC at 3.

appeals.[26]

The Bar Association of the District of Columbia, after its own study, conducted by a committee chaired by Sidney White Rhyne, joined in the recommendation of the National Center for State Courts that an intermediate appellate court be established.[27] Most recently, the Board of Governors of the District of Columbia Bar endorsed the establishment of an intermediate appellate court based on the recommendation and comprehensive study of the D.C. Court of Appeals by a special committee chaired by James P. Schaller.[28]

Other suggestions for reducing appellate delay and congestion will not meet the need documented by the various studies of the D.C. Court of Appeals. The Schaller and Douglas Committees and the National Center for State Courts concluded that adding judges to the current court of appeals will only exacerbate the present congestion and delay without separating

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[26] The report of the Special Committee of the D.C. Bar to Study of the District of Columbia Court of Appeals, chaired by James P. Schaller, stated that in Massachusetts, only 5.7 percent of the cases heard by the Supreme Judicial Court were initially heard by the intermediate court; in Minnesota, in 1987, only 6 percent of the cases initially decided by the intermediate court were heard by the Supreme Court; and in Maryland, 8 percent of cases decided at the intermediate court level were reviewed by the Maryland Court of Appeals, the highest state court. Report of the Special Committee to Study the District of Columbia Court of Appeals, June 2, 1989, at 28, 32 (Schaller Report).

[27] Resolution of September 12, 1987, of the Board of Directors of the Bar Association of the District of Columbia.

[28] Letter of June 14, 1989, to Chief Judge Rogers from Philip A. Lacovara, President, D.C. Bar Board of Governors, on the Schaller Report.

the responsibility for jurisprudential and error review decision making. Experience in this jurisdiction, using retired judges, and experience in other jurisdictions confirms this conclusion.[29] The retired judges currently assist the court but cannot provide the needed judicial resources. Programs to reduce the amount of time required for the preparation of the record on appeal, including the time required for transcripts to be prepared, are under way,[30] but the effect of their success will be to increase the backlog of cases that are ready to be heard by the court.

Criminal cases involve 57 percent of our workload,[31] but eliminating the right to appeal in criminal cases is hardly a realistic solution to the problems of appellate delay and congestion. Eliminating appeals in agency cases would do little to solve the problem since these cases account for only 10

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[29] See Charts 2 and 4, showing increasing delay on appeal, and Hon. Peter S. Popovich, Beginning a Judicial Tradition: Formative Years of the Minnesota Court of Appeals, November, 1987, (Minn. State Court Administrator's Office) at 7-8.

[30] Additional staff was added to the appeals coordinator's office in the Superior Court. Also, in November, 1989, revised regulations for court reporters became effective that are designed to reduce to 60 days the time required for transcript preparation over a three-year period. Progress as of May, 1989, shows that the average time for transcript preparation of transcripts requested since January 1, 1989, is 64 days. In addition, the court is seeking authority to fund computer assisted transcription; this requires an amendment to D.C. Code § 11-1727 (b), and could be accomplished as part of H.R. 3470. Changes in court rules to permit audio recording and revised procedures for submission of agency records are under active consideration.

[31] This is based on the number of cases pending on October 23, 1989. In 1986, the National Center for States Courts found that on April 7, 1986, 65 percent of the cases pending in the D.C. Court of Appeals were criminal cases. NCSC at 24.

percent of the court's workload.[32] Moreover, a number of these appeals involve pro se litigants who have been denied unemployment compensation and want their day in court; even when the court affirms the agency's adverse decision, the litigants often are satisfied precisely because their grievance has been given serious consideration by the court.[33]

Nor, as the court of last resort, can the appellate court sacrifice basic collegial decision-making procedures. The Solicitor General of the United States, the Honorable Kenneth W. Starr, in recalling his eight years on the United States Court of Appeals for the District of Columbia Circuit, has observed that

> The deliberative process is what is to inform appellate adjudication. Spending time together, together in the courtroom, together in conference, is critical to the achievement of those values that provide the genius of multi-member courts.[34]

The 100th Congress

In April 1988, this Subcommittee held hearings on H.R. 4366, a bill to establish a Supreme Court of the District of Columbia, and for other purposes. Then Chief Judge William C. Pryor testified in favor of the establishment of an intermediate

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[32] This is based on the number of cases pending on October 23, 1989. On April 7, 1986, agency cases represented 8 percent of the court's caseload. NCSC at 24.

[33] Remarks of Michael Milwee, Esq., counsel for the D.C. Department of Employment Services, at D.C. Courts Judicial Training Conference in 1987.

[34] Kenneth W. Starr, "Returning to Learned Hand's Farm," presented to the 37th Annual Members Breakfast of the Institute of Judicial Administration, August 5, 1989, IJA Report, vol. 21, no. 4, at 2, 3.

appellate court, as did the Chairperson of the D.C. Council Committee on the Judiciary, the Honorable Wilhelmina Rolark. Also testifying in support of an intermediate appellate court was the Bar Association of the District of Columbia, the Washington Bar Association, and Charles A. Horsky, who had chaired the Bar Committee that evaluated Court Reform after ten years. Mr. Horksy concluded that, in view of the "intolerable" delay on appeal, to rectify "the fundamental problem of a highest court of a jurisdiction not sitting in banc, ... a Supreme Court of the District and an intermediate appellate court, with appropriate allocation of jurisdiction to each court, now appear to me to be the most satisfactory alternative to the present system."[35] A number of suggestions were offered to improve the pending bill.

The 101st Congress

Responding to a variety of suggestions to improve upon prior proposals, H.R. 3470 provides a vehicle to enable the District of Columbia court system to catch up with the improvements undertaken in the states. Because of my concern that the courts be promptly provided with the additional judicial resources, I respectfully recommend that the bill reported by the Subcommittee focus on those judicial recourses. Titles I and II of the bill will provide additional judges that the appellate and trial courts require now and improve the administrative structure for the court system by bringing it more in line with that in the

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[35] Horsky, supra note 16, at 3.

state court systems and as recommended by the D.C. Bar.[36] There are several amendments of importance that I will make available to the Subcommittee but none would alter the basic thrust of these titles. They relate to the pass-through provision for the Supreme Court, approval of court rules, the effective date of Title I, and judicial terms.[37]

Title III would create twenty-seven magistrates with authority comparable to thre judges of the D.C. Court of General Sessions, which was abolished in the 1970 Court Reform Act, in favor of a general court of trial jurisdiction. Experience has demonstrated, however, that the hearing commissioners provide valuable assistance to the trial court in managing its heavy caseload. While a change in name and numbers may well have a salutory effect, after conferring with the chief judge of the Superior Court, I conclude that the scope of a magistrate's authority requires further consideration. The chief judge of the Superior Court addresses this in his separate statement today.

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[36] To ensure that delays in transcript preparation beyond 60 days no longer occur, the Schaller Committee of the D.C. Bar called for administrative responsibility for the administration of the court reporters system to be placed in the highest court of the jurisdiction, noting that "in the vast majority of other jurisdictions, either the chief judge (or justice) of the jurisdiction's highest court, or the highest court, controls the administration of the court system." Schaller Report at 37-38. The Board of Governors of the D.C. Bar "unanimously endorsed the Committee's recommendations concerning internal administrative changes and goals." Letter of June 14, 1989, to Chief Judge Rogers from Philip A. Lacovara, President of the D.C. Bar.

[37] See attachment.

Therefore, in order to facilitate prompt Congressional passage of legislation to provide judicial resources that are needed now, I urge the Subcommittee to report favorably on the proposals in H.R. 3470 to establish a Supreme Court of the District of Columbia with attendant responsibility and authority for administration of the court system in the chief justice, aided by a reconstituted Joint Committee, and to authorize eight additional judges for the Superior Court. Favorable consideration also should be given to the recommendation of the chief judge of the Superior Court for additional judges. With appropriate modifications provision also could be made for the appointment of magistrates with expanded authority that is consistent with a trial court of general jurisdiction. These are the fundamental parts of a legislative package that is required to provide needed resources for the District of Columbia court system on which Congress should act promptly and favorably

Conclusion

The 101st Congress has recently approved legislation which would provide funds for 1,000 additional police officers and 8 additional trial court judges.[38] No action has been taken to provide the needed appellate judicial resources. From the perspective of the District of Columbia court system, therefore,

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[38] See S. Rpt. No. 101-124, Appropriations for the District of Columbia for Fiscal Year 1990, at 33.

there remain serious, long-unmet needs, which grow greater with the current drug problem.

The District's trial court must be afforded the judicial resources that it requires as set forth today by the chief judge of that court. The District's appellate court must also be afforded the judicial resources that it requires. To add again to the resources of the trial court without simultaneously addressing the needs of the appellate court is inconsistent with the basic purposes of establishing a state-type court system in the District of Columbia. It also will be counterproductive to the efforts to assure effective law enforcement in the Nation's capital.

The long-standing problems of appellate congestion and delay adversely affect individual citizens and professional and business enterprises seeking relief on appeal. Given the nature of activity in Washington, D.C., there is a regional and even national interest in assuring that there is an intermediate appellate court in the District of Columbia. For Congress to establish an intermediate appellate court in the District of Columbia is simply to update the state-type court system it created in 1970 in accordance with the restructuring of the state appellate systems in 38 states. It is basic to the principle of assuring justice on appeal; it is central to the success of the President's call for sure and certain punishment in the war on drugs.

Accordingly, I respectfully call upon Congress to act now to

assure that the District of Columbia court system is able to afford both timely trials and timely appeals.

Thank you.

A T T A C H M E N T

Proposed Amendments to H.R. 3470 as introduced October 16, 1989

TITLE I

Page 3 line 25: strike "retired" and insert "senior". Explanation: To conform to statutory designation of retired judges who are certified to hear cases as senior judges.

Page 6, lines 17-18: strike the words "great and immediate public" and insert "substantial". Explanation: The present language in the bill follows the ABA Standards on Appellate Courts, §3.10 (d). The "public urgency" standard underlying this language is overly narrow. There will be cases that the Supreme Court will determine are of sufficient importance that it should decide them initially and thereby eliminate unnecessary delay in the disposition that would occur were the appeal first to be heard by the intermediate court. The "sufficient importance" standard provides a standard consistent with the jurisprudential responsibilities of the jurisdiction's highest court. Although broader than the ABA language, it is far less expansive than that of the highest court in some states. See, e.g., Massachuetts General Laws, chapter 211A, §§ 10-11, quoted in the Schaller Report at A(III)-1 & 2. Enabling the highest court to reach down to hear cases initially is an important element of the effectiveness of the appellate system. See NCSC at 30 (in

addition to discretionary jurisdiction over all intermediate court decisions, as well as discretion to decide any case pending in that court, highest court should have authority to transfer cases from one court to another).

Page 12 line 19: strike "180" and insert "90". Explanation: To conform to the amendment proposed for the effective date of Title I. See comment for page 31 line 11.

Page 17, lines 1-4: strike the sentence beginning "The Joint" and insert before the period in line 12: "as are approved by the Supreme Court." Explanation: Approval of court rules is not an administrative function but a legal function. The highest court in the jurisdiction is responsible for approving rules of the lower courts in virtually all of the states. See Grau, Judicial Rulemaking: Administration, Access and Accountability, 18 & 75 (Amer. Judicature Society, 1978). The proposed amendment is consistent with provisions in the states placing authority in the highest state court to approve the rules of the other courts.

Page 17 lines 23-24 and page 18 lines 1-2: strike all that appears and insert after "unless it" and before "prescribes or adopts" the phrase "or the Supreme Court". Explanation: The amendment would maintain the current provisions that the Superior Court will follow the federal rules of civil and criminal procedure unless it changes them and clarifies that the Supreme Court can make changes so that the federal rules would not apply in the Superior Court.

Page 22, line 4: insert a new sentence: "In assisting the

chief justice, the executive officer shall provide appropriate assistance to the chief judges of the other courts in carrying out their administrative responsibilities." Explanation: To make explicit that the executive officer shall provide assistance to the chief judges in carrying out their administrative responsibilities in their courts.

Title II

Page 31 line 11: strike "one year" and insert "six months". Explanation: The six month period for the effective date of the 1970 Court Reform Act proved workable. That statute, like H.R. 3470, included the authorizations of appropriations for the new court system which is an important element of being able to act promptly.

Page 31 lines 15-22: strike these lines. Explanation: The term of tenure for judges should be the same. The 15-year term established in the 1970 Court Reform Act enhances judicial independence and the ability to attract persons of ability to the District of Columbia bench.

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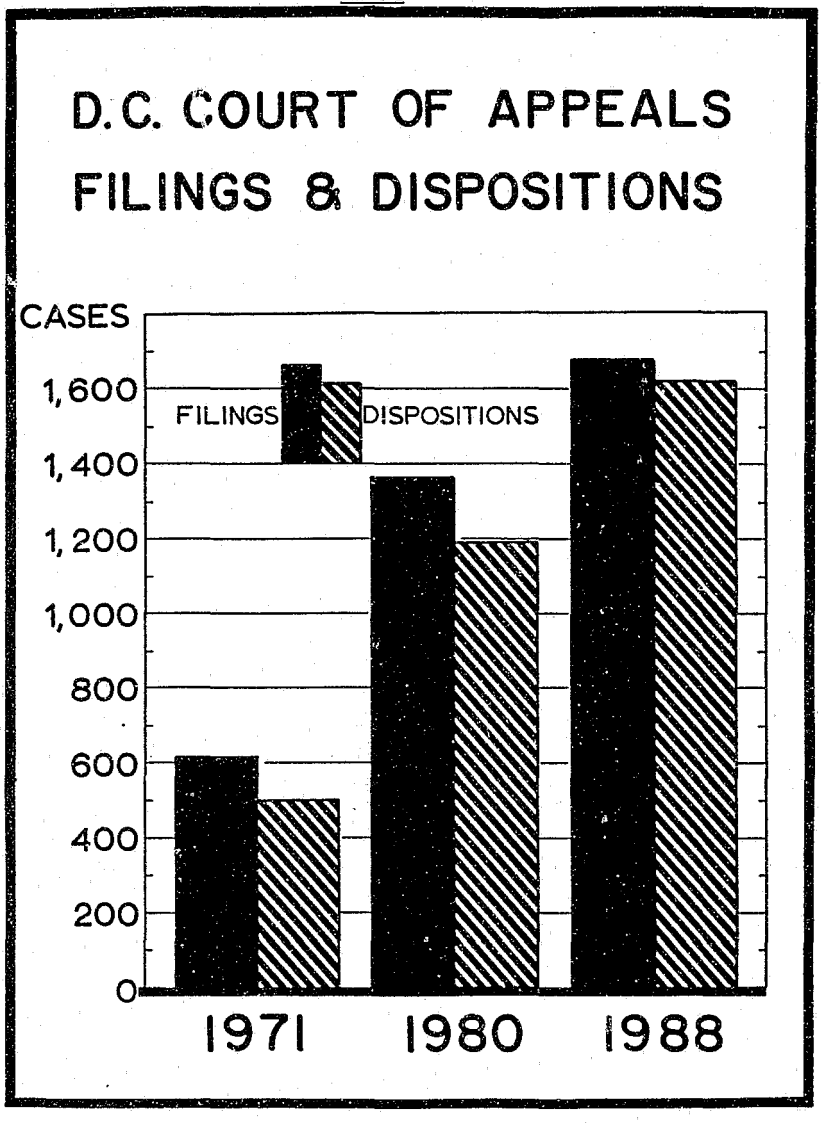
Chart 1


D.C. COURT OF APPEALS
FILINGS & DISPOSITIONS
CASES
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1,400
1,200
1,000
800
600
400
200
0
FILINGS
DISPOSITIONS
1971
1980
1988

Chart 2

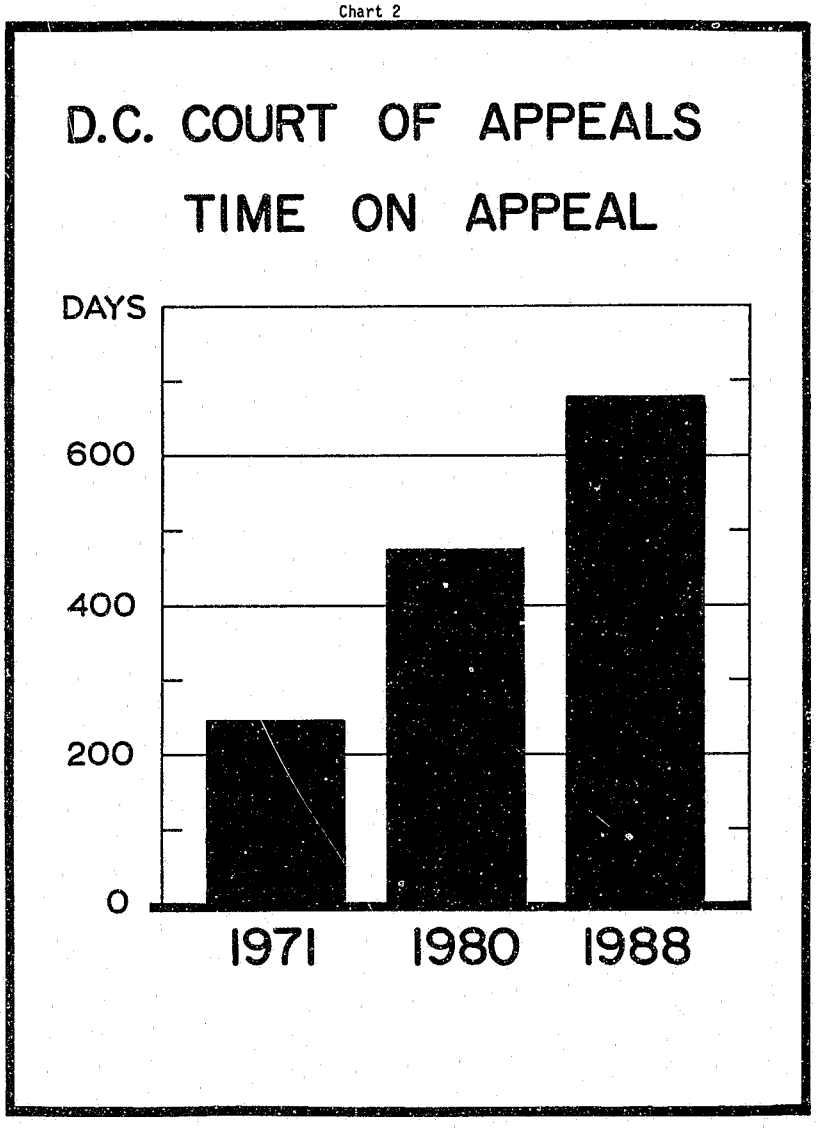
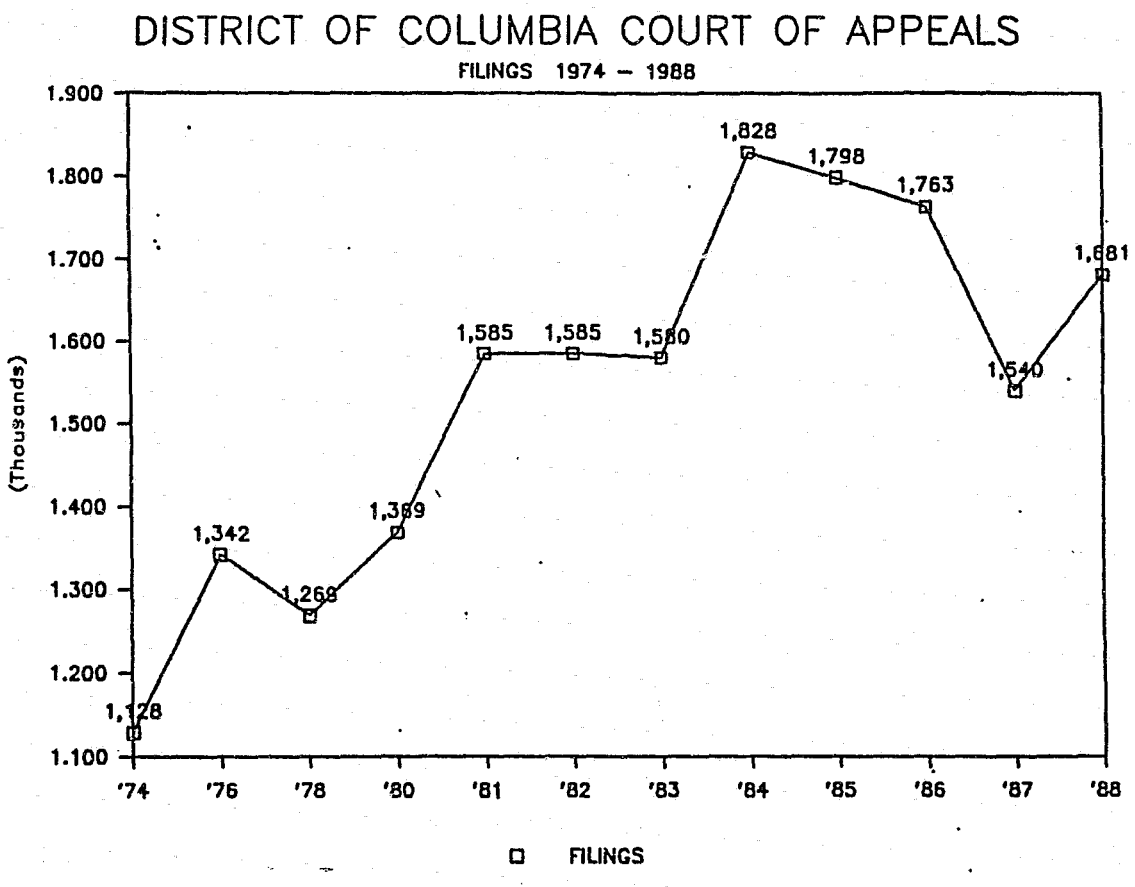

D.C. COURT OF APPEALS
TIME ON APPEAL
DAYS
600
400
200
0
1971
1980
1988

Chart 3


DISTRICT OF COLUMBIA COURT OF APPEALS
FILINGS 1974 – 1988
(Thousands)
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1.800
1.700
1.600
1.500
1.400
1.300
1.200
1.100
1,828
1,798
1,763
1,681
1,585
1,585
1,580
1,540
1,389
1,342
1,268
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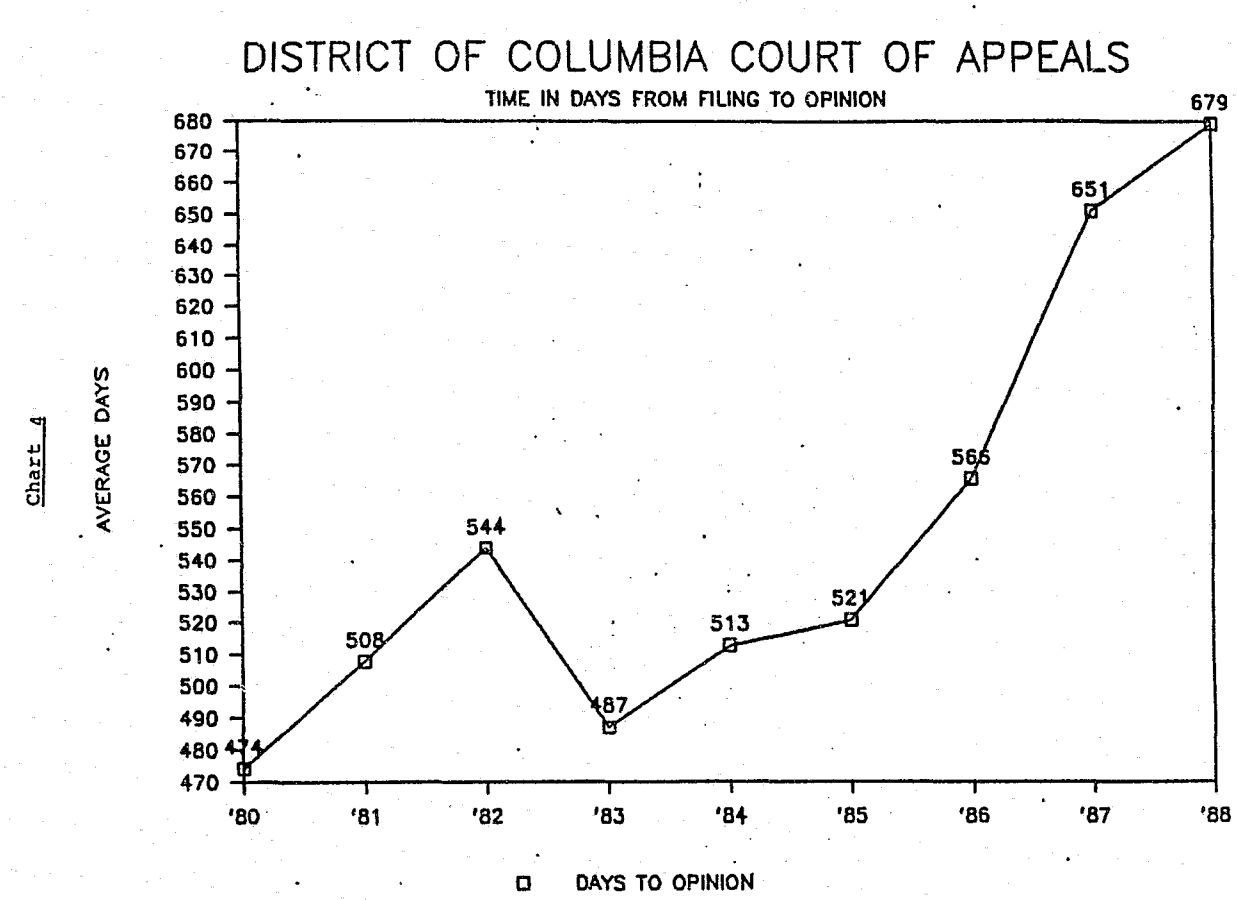
'85
'86
'87
'88
FILINGS

Chart 4


DISTRICT OF COLUMBIA COURT OF APPEALS
TIME IN DAYS FROM FILING TO OPINION
AVERAGE DAYS
680
670
660
650
640
630
620
610
600
590
580
570
560
550
540
530
520
510
500
490
480
470
474
508
544
487
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'80
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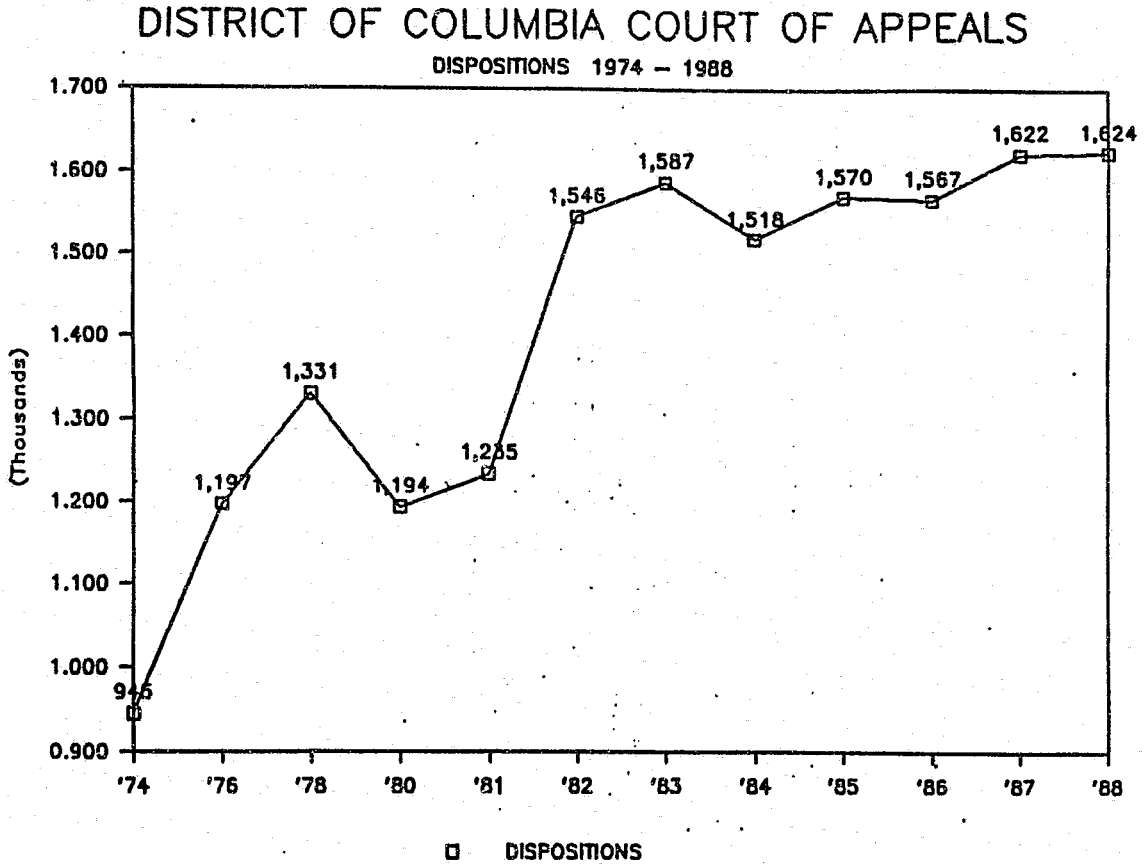
'84
'85
'86
'87
'88
DAYS TO OPINION

Chart 5


DISTRICT OF COLUMBIA COURT OF APPEALS
DISPOSITIONS 1974 – 1988
(Thousands)
1.700
1.600
1.500
1.400
1.300
1.200
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0.900
946
1,197
1,331
1,194
1,235
1,546
1,587
1,518
1,570
1,567
1,622
1,624
'74
'76
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DISPOSITIONS

Mr. FAUNTROY. I was encouraged by the 1972 quote in your testimony from the Attorney General of the United States, particular as related to the developments toward self-government. For that reason, it would be helpful if you would comment further on title III of the bill, particularly as relates to the inclusion of a local role in the appointment of judicial magistrates.

Judge ROGERS. Well, Mr. Chairman, I was interested to hear this morning the testimony of Dr. Reid because I think what I heard is something that represents, at least for me, a change in the position that I had previously heard coming from or on behalf of the elected officials of the District of Columbia.

As you know, 10 years ago a number of these proposals were discussed, both in terms of hearing commissioners, municipal courts, taking matters out of the courts and having administrative agencies handle a number of these matters. At that time there was a great uproar in opposition to that, saying that everybody should be entitled to have a decision by a judge. Nevertheless, some decisions were made such as Dr. Reid mentioned, by removing the nonmoving violations out of the court system and setting an administrative hearing process in the executive branch.

However, when proposals were made along the same line involving child support determinations there was great opposition. There was also opposition to having these matters involving landlord and tenant handled by any other than a judge.

What I heard this morning, what I've read since your bill has been introduced, it seems to me that the elected officials are suggesting there is a different view in the community, that there is an understanding of a need to free the judges for the more complex matters and to let these more simple matters be handled by nonjudge officials.

Judge Ugast has testified about the valuable role that the hearing commissioners have played in the District of Columbia Trial Court. You have commented on the problems where the hearing commissioner decisions are backlogged before the judges awaiting appeal. I think in my statement I emphasized my concern after discussions with Chief Judge Ugast about figuring out a way to preserve a single part of general trial jurisdiction. It may well be that what you are proposing can be consistent with that, with the provision for the direct right of appeal from a final decision by what is proposed as magistrates in your bill.

I hasten to add, Mr. Chairman, as you know, if you provide a right of direct appeal, you have to add some numbers to the figures that I've already given you because those are high-volume cases. While the number of appeals in terms of percentages may not be high, nevertheless those are appeals that often involve serious matters.

For example, our products liability law in the District of Columbia arose out of a small claims court case. Civil cases involving up to $50,000 often involve difficult and serious issues. So, there is a balance, it seems to me, between trying to have some sort of official that is available with the prestige and with the screening process for selection so that there is a competent body of officials who can dispose of what you have described as some of the lesser matters

that come before the courts so that more prompt resolution of matters is possible.

Mr. FAUNTROY. Again, in title IV we talk about changes in the judicial nomination and tenure commissions giving a greater role to local community persons and thus advancing self-government. What's your view on that?

Judge ROGERS. Mr. Chairman, one reason I included the quote from the Attorney General was to make it clear that the administration had long been on record as saying that court reform is a step toward self-government. I agree with Chief Judge Ugast's comments earlier this morning that I think the nomination and tenure commissions have worked well in the District of Columbia. Certainly you know, as well as I do, in terms of the people who have been appointed to the courts, that our court systems have, I think, been very fortunate in that we have not had judges involved in the types of problems that have existed around the country.

So, my main emphasis would be that it is important that the procedure for nomination and the procedure for retention be designed in a manner that preserves the independence and the integrity of those processes.

Mr. FAUNTROY. On the advisory committee in title V, any comments?

Judge ROGERS. No, Mr. Chairman. I would only suggest to you that the court currently, as you know, has a lot of advisory groups that come to it. It's not only through the advisory neighborhood commissions, but of course it is through the multiple organized, as well as voluntary, bar associations in the District of Columbia as well as some of the civic organizations.

What you are proposing, as I understand it, is a group that would annually report to the Congress, and I hope you would amend your bill so they could report to the chief judge of the highest court as well, on what their concerns are and feelings are about what is happening in our court system.

Again, I think it is important that in defining the mission of any such group that it be clear that its focus would be on the broader pictures and not individual case determinations because I do think that the integrity and independence of the judicial system is something that must be preserved.

Mr. FAUNTROY. You've heard our discussion about the appellate backlog and the suggestion by some that an appellate division within the D.C. Superior Court might be appropriate. What's your view on that?

Judge ROGERS. Mr. Chairman, so far as I know, there's only one jurisdiction that has that and that's New York. The way it actually works is the Governor selects from members of the trial court and I'm advised that people who are appointed there stay there. So, in effect, you have an intermediate court of appeals that functions independently. I don't see that as an advantage to what you have proposed.

I think the point Chief Judge Ugast makes is a good one. We have experienced in a local court system where in the past, before these great volumes of cases were coming into the court, where a newly appointed judge to the trial court was invited to sit as a member of a panel on the court of appeals, both so that that judge

could get a sense of what we do and also understand how we do it, but see the perception of a case from a different angle. What we found is not only are there some of the tensions where one trial judge is ruling on another trial judge's opinion, but also the problem of workload. The trial judges were very conscientious in assisting, but because of the demands from their own caseloads, they were simply unable to get to their work in preparing the appeal opinion.

So, that system has not worked well in the District of Columbia and indeed has been suspended simply because Chief Judge Ugast has needed every judge available and indeed has had to call back retired judges to assist in handling the volume of cases.

Mr. FAUNTROY. I think you did indicate that simply adding more judges to the D.C. Court of Appeals is not a solution given the experience in Minnesota, did you mention?

Judge ROGERS. In Minnesota, for example, and in our own court system because it doesn't solve the basic problem of freeing up judges to handle the jurisprudential questions.

What the system that you propose does is to establish a level whereby the volume of cases can move out and move out quickly and the appellate system as a whole is able to perform both of its functions. Simply adding judges to our court will exacerbate the problems we now have of jurisprudential inconsistencies, where one panel of judges rules one way and the next panel of judges tries to figure out a way to distinguish or basically ignore the opinion of the other panel. Because of the pressures on time, even though our rules provide for a mechanism whereby the court can hear a matter on bank where there is a difference of opinion between panel opinions, that rarely happens simply because of the pressures of time. We do not have the type of consistent oversight of those jurisprudential questions.

I think it's important to understand that adding judges to our court does not do anything to resolve the problem of the jurisprudential questions being resolved by three judge panels. Basically that is one judge who has to find another judge who either doesn't object too strongly to the view being presented or is willing to join it. That is how the important legal questions are being decided. That is not the system that Congress contemplated. It is not the system that the States have and it is not the system that the ABA standards call for.

Mr. FAUNTROY. You, in your testimony, also indicated the average time for a case pending on appeal is 22 months.

Judge ROGERS. Yes, Mr. Chairman.

Mr. FAUNTROY. I just have two questions about that. One, what's the average time in the other States? Two, what do you think would be an ideal time a case should be pending on appeal?

Judge ROGERS. Well, the ABA standards say that the appellate process should be completed in 280 days. As I mentioned to you, in Minnesota for example, when they created their intermediate court, the bar association report points out that the delay there was approximately 15 months.

I hasten to add that a large part of that delay is not only the time it takes to get a case on the calendar and to be decided by a judge, but it is also the delay attendant to the preparation of the

record and the transcript on appeal. So, the things that I've been describing to you that we're doing to try to address that problem—for instance, we have hired additional staff for the appeals coordinators office. We are actively considering rules, changes for the preparation of agency appeals in excess of 500 pages. We have revised the court reporter regulations over a 3-year period to bring the transcript time down to 60 days. But the point I wish to emphasize here is that when we achieve what I will call the efficiencies of record preparation and transcript preparation, what that simply does is move the delay out of the clerk's office and into the judges chambers. So we will have instead of 6 months of fully briefed cases ready to be argued and decided, you will have many, many more cases fully briefed, ready to be decided.

I would hasten also to point out that there are those who suggest that we should do things like have mediators, we should have settlement conferences. So, last fall, we had one of our retired judges assigned to our conference procedure. He was a great advocate of that thinking that it would dispose of a number of cases. He sat on approximately 81 cases and less than 10 percent of those could be resolved.

The problem is the trial courts now have systems that are set up to divert cases out of the courts which can be settled either through mediation or arbitration. In addition, the pressures of time sometimes cause parties to reach agreement without waiting for further litigation in the courts. By the time the case comes up to appeal, parties have waited so long that the notion of waiting longer has already been accepted if it were and the incentive to settle has long since passed.

That is what we found last fall. It was easy to see as a result of that experience that it was not a cost-efficient way to use judge time. Nevertheless, we maintain the availability of the settlement conference procedure and from time to time parties will request it. But my experience, both before I came on the court and since I've come on the court, is that unless it is a case, say, involving a zoning matter where delay is literally costing hundreds of thousands of dollars a day, it is unlikely that the settlement conference procedure is going to dispose of many cases. I think our experience last fall makes that abundantly clear.

Mr. FAUNTROY. I must, as well, ask you a question about the creation of a municipal court or lower level court that would—with of course review to the D.C. Superior Court, but with the hope that it eliminate some of the cases that might be appealed because of this trial level review process.

Judge ROGERS. Well, Mr. Chairman, it's interesting, I think, that what you're trying to accomplish in your bill is somewhat comparable to what we're trying to accomplish in the court of appeals in this sense. The bill you have introduced would, as the National Center for State Courts recommended, have a single clerk's office to handle the work of both of the appellate courts. In a manner of speaking, the provision that you have established for the magistrates would have that magistrate function serviced by the same clerk of the court that now serves the trial court, and in that sense achieve the economies and efficiencies that other jurisdictions have found to be beneficial.

I think when the court reform legislation was being discussed and had been studied by previous bar committees, one of the concerns was by having independent courts it did not allow the flexibility of assignment of judges. It created additional costs and inefficiencies by having separate bureaucracies serving the different courts and that there were efficiencies and economies to be achieved through a unified court system. It seems to me that is consistent with what title III of your bill is proposing.

Mr. FAUNTROY. You would agree that it would probably not be most efficient to have a three-tier court system with a clerk for each court and an executive officer who is responsible to each judge?

Judge ROGERS. Well, let me say that there was a case management study done prior to court reform which pointed out the need for administrative capability in courts and there had been a Federal study as well talking about the need to bring in administrative and management expertise to the courts through an official—whether it's called a circuit executive or executive officer or court administration. It was in testimony and reports filed with the Congress at that time predicted that the volume of work in the trial court would be in effect that the court executive would be working on trial court matters.

That is what's happened in the District of Columbia. The court executive serves as a staff assistant to the chief judge of the trial court.

What I think the most recent studies done by Duke Cameron and Isaiah Zimmerman and one other person, and I've cited it in my testimony, has pointed out, that experience in the State court systems has demonstrated two things.

Number one, judges have become better administrators. That may simply be a factor of people being selected as judges who have some administrative responsibility or those judges simply learning—going back to school, taking the courses that are necessary to understand and be able to implement administration and management decisions of their courts. That judges, no matter where they are located, are going to give up certain responsibilities. They are going to keep the responsibilities for calendaring. They are going to keep the responsibilities for assigning judges.

So, when you look at the statute that's been passed in the District of Columbia back in 1970 by Congress, what was created was a very different animal than what, in fact, has happened in the District of Columbia. I think your bill is trying to take acknowledgment of that fact, that the court reform legislation created a court executive that literally would administer all of the courts. He would make calendar assignments, he or she would assign judges, and do all of the ministerial matters associated with the two-court systems.

That has proven not to be satisfactory to the chief judges or to the court administrators around the country and there has been over the last 10 years an evolving relationship. So, it is generally the consensus that has been reached that the court administrator for a system should look at court-wide matters, whether it be management, personnel, fiscal matters, training, research and development. Those are the types of matters that the court system as a

whole has to address; the court reporters, as I've mentioned before. Each chief judge should for his or her court run the day-to-day operations of that court. Let me the chief judge, with the clerk of that court and with such other assistance that the chief judge needs, run the day-to-day operations of that court.

That is what your bill provides. It would say very clearly that the chief judge of each court runs the day-to-day court, working with the clerk of the court. It would say also that the court administrator, as is true around the country, is to report to the highest court or to the chief judge of the highest court to deal with these court system problems.

For example, in our court system we now have computer systems where you can't talk between the two courts in terms of exchange of records. Both Chief Judge Ugast and I are of the view that when the computer systems are to be examined, we need to have someone who looks at them from the point of view of how can the two courts meet their own needs but also meet the needs of each other. There's that type of system-wide focus where at least the experience has been that the management expertise can be very valuable and useful.

B: in terms of running the day-to-day operations of the courts, those have to be the chief judges, with such assistance as they need.

Mr. FAUNTROY. Thank you. That's very illuminating.

Given the uniqueness of the D.C. court system and its history and tradition, as Judge Ugast has pointed out, what about a joint committee for the administration of the courts?

Judge ROGERS. You provide for that, Mr. Chairman. You have a joint committee that provides for the advice and consultation and assistance. I think it is important to understand what happens in fact. In talking with chief judges around the country, there is no way that the chief judge of the highest court can become a dictator, can direct that things happen. These things have to be worked out in a collegial and cooperative manner or they don't happen.

The process not only in this jurisdiction but in every jurisdiction, is a very public process. Not only do you have to go before State legislatures in this community, but we appear before Congress. During budget reviews as well as during legislative reviews, issues come out as to what are the needs of the various courts, what is happening.

In addition, in this jurisdiction, we have a system by which the chief judges are selected by the nomination commission and in the process of that selection these qualities are examined by the commission in terms of who would be a chief judge, who would be effective, who could not only provide the leadership and collegiality necessary within that court but throughout the court system and work together effectively. I think that it draws on the valuable experience in this jurisdiction that making certain all voices are heard and that there is a process by which that can be heard, and yet providing, as do all the other court systems throughout the country, responsibility that also has some authority to address the administrative needs of the court system.

Mr. FAUNTROY. Thank you.

Mr. Chairman, may I just ask your indulgence for just one question and then I'll be through.

What about a joint committee composed differently, say with the three judges with a tie-breaking vote available to the chief judge of the supreme court?

Judge ROGERS. Mr. Chairman, I don't know how you run an operation effectively unless you have the authority to do so. If you look around the country, if you're going to have some mechanism whereby there's a committee structure, the chief justice has the appointment power with more than a majority on that committee.

I think it's important to understand all that we're trying to achieve here is a system whereby there is a court system-wide perspective and not only a perspective from, "Well, I'm chief judge of the appeals court, so that's all I'm concerned about," or, "I'm chief judge of the trial court and that's all I'm concerned about." Someone looking at that system has to keep systems need in mind. Getting the advice, getting the consultation, getting whatever expertise is available, whether it comes through the bar or through the court organizations itself and then being able to make decisions—and inevitably, Mr. Chairman, as you know, there are no decisions that are going to be made that are not going to be fully reviewed either by the Appropriations Committees of the Congress or the Council of the District of Columbia.

Mr. DYMALLY. Judge?

Judge ROGERS. Yes, Mr. Chairman.

Mr. DYMALLY. Under the provisions of the act, the Congress will, in effect, elevate the court of appeals judges to the supreme court. Do you see us taking away the Presidential appointed powers and do you see any subsequent constitutional problems with that?

Judge ROGERS. Mr. Chairman, the judges on the court of appeals now have all of the authority and power that the highest court would have if this bill were to be passed. All we are talking about is adding seven judges and those seven judges, at least under current law, would be nominated through the nominating commission process and three names would go over for each vacancy to the President and the nominate and the Senate would confirm the judges of those courts.

Mr. DYMALLY. But would the bill not automatically elevate the court of appeals judges to the supreme court?

Judge ROGERS. Mr. Chairman, it's sort of what are you looking at, the doughnut or the hole? You could say that the bill would change the name of the court, but you could also say that some of the authority of the current court is being put in another court. Namely we now have both the error review and the jurisprudential functions. Under Congressman Fauntroy's proposal, the jurisprudential functions would stay with the highest court of the District of Columbia. The error review functions would be removed and placed in an intermediate court.

Mr. DYMALLY. But you see no legal problems with that?

Judge ROGERS. No, because the President has appointed all of these judges to the court that exist now and he or she would make any future appointment.

Mr. DYMALLY. 3,470 provides for a 1-year transition period. You are advocating 6 months. Do you see any problems?

Judge ROGERS. Well, Mr. Chairman, it's interesting. I was speaking with judges who were involved in the transition that was required under court reform in 1970 and it was pointed out to me that when all of the jurisdiction that was transferred from the Federal courts was being transferred to this new court system, the effective date was a 6-month period. While it took a lot of work to do it, it was done effectively and there was simply no reason given the fact that what we are doing in this proposal is a lot less complex. All we are doing is literally talking about adding some staff to the clerk's office and adding seven judges, that there was no need for a full year to pass. So that is why I recommended the 6-month period.

As you notice, there is still the provision for a report to the appropriate committees of Congress during the transition.

Mr. DYMALLY. Judge, the Congressman from the District and the chief judge of the appeals court have come to the Congress and said, "We have a log jam here. We want you to help us. We want you to reorganize the system, create some new positions." Then one member from California says, "Give me a certificate of guarantee that you're going to perform in an expeditious manner in the form of a speedy trial act." The judge responded, "Well, you exacerbate the problem."

What guarantee does the public have? Where is the certificate of guarantee?

Judge ROGERS. Guarantee, Mr. Chairman, is in the work that has been done since court reform was established and the guarantee is that when it's been done in 38 States throughout the country it has worked. You have conscientious people who are appointed to these positions who take their oath of office seriously.

As I pointed out to you, the statistics in this jurisdiction show that the judges have become more efficient and expeditious in their work assignments, handling many more cases. That is the guarantee. It is the guarantee of public trust. As I emphasized to you, Mr. Chairman, that is why I think it so important that the integrity and independence of the judiciary be maintained. These are conscientious people.

All I can do is point to the experience in the States and suggest to you that I see no reason why the same experience would not occur here. The way the bill is styled, it forces that type of discipline on the system.

Mr. DYMALLY. If your product is so good, why don't you give me a certificate of guarantee in the form of a speedy trial amendment?

Judge ROGERS. Mr. Chairman, the speedy trial amendment isn't going to—I'm not sure what you mean by the speedy trial amendment, but the amendments I am familiar with talk about a case must be brought to trial within, for example, 60 days. What we are talking about is how do we handle all the cases that have gone to trial and are disposed of. Saying that we have to dispose of them within 60 days in effect does nothing, and I mean that very seriously.

What is happening, Mr. Chairman, is each piece of legislation that is passed by Congress and the Council of the District of Columbia, because of the outcry that Congressman Fauntroy mentioned from the community, and that is the community of trial lawyers,

the community of the business professionals, it's the community of the average citizen. Every bill is saying to the court of appeals, "You must decide this appeal on an expedited basis." We now have about 20 different statutes that say this particular type of appeal must be decided within 60 days.

As a practical matter, that means that those cases that involve, for example, prisoners who are locked up, where ultimately their conviction might be reversed or citizens who have medical malpractice judgments, those have to wait in line while these other cases are given priority. I don't think your speedy trial act solves the problem on the court of appeals.

Mr. DYMALLY. I think you addressed this issue, but I want to raise it once more. You mentioned there were two States which had some help in the administration of the system. I agree with you, even though California has a judicial council, the supreme court justice, the chief supreme court justice has a lot of power still in that council. Not only in the appointive process, but in the administration of their decisions.

Judge ROGERS. That's correct, Mr. Chairman, and that's correct in New York as well.

Mr. DYMALLY. Yes. But the judges here are saying, "Look, you're taking away the power we have. You're taking away all the administrative power from us."

Judge ROGERS. That is simply inaccurate. As I pointed out, the chief judge of the individual court, for example the chief judge of the trial court, remains in charge of the day-to-day administration of that court system. The notion that anybody is taking away any power is simply incorrect.

What we are talking about now is a system, Mr. Chairman, where you have a committee of five people, a majority of whom are trial judges. That is a system that allows administrative matters simply to be ignored.

The proof of the pudding is in the D.C. Bar report which was unanimously endorsed by the board of governors of the bar, saying that to solve some of these difficult administrative problems there has to be a system where the highest court has the authority and responsibility to resolve them.

Being chairman of a committee is a wonderful honor, but if you don't have the votes to move something, things simply don't get done.

Mr. DYMALLY. Judge, one final question. Do you have any reservations about any sections of the bill that you'd like to see changed or strengthened?

Judge ROGERS. I have included in my statement some amendments, Mr. Chairman. I think it's very important in order for the highest court to function as I believe the Congressman intends and as the national center intends and as the State court systems around the country intend, that there not be a standard limiting the highest court to taking cases of immediate public urgency. But rather, cases as well which are of substantial importance that the highest court determines it will want to hear in any event.

That amendment is designed to eliminate unnecessary delay on appeal. There is no reason, in other words, for the intermediate court to hear the matter if the highest court has already deter-

mined that it will hear the matter. So, I have made that amendment.

In addition, I have proposed an amendment that would clarify that the rule approval authority is in the highest court. That is a legal decision, Mr. Chairman, it is not a policy decision and the bill places that now in a policy body. If you look at what is true around the country, the rule approval authority is placed in the highest court.

I have also suggested a couple of other amendments, but they are attached to my statement. As I've said, none of them would alter the basic thrust of the bill introduced by Congressman Fauntroy.

Mr. DYMALLY. Judge, we thank you for appearing and thank all the witnesses for appearing.

Judge ROGERS. Thank you very much.

[Whereupon, at 12:05 p.m., the subcommittee was adjourned.]

[The following additional prepared statements were received for the record:]

STATEMENT OF CONGRESSMAN WALTER E. FAUNTROY
BEFORE THE SUBCOMMITTEE ON JUDICIARY AND EDUCATION
COMMITTEE ON THE DISTRICT OF COLUMBIA
HEARING ON H.R. 3470
THE DISTRICT OF COLUMBIA JUDICIAL REORGANIZATION ACT OF 1989
1310 LONGWORTH HOUSE OFFICE BUILDING
WASHINGTON, D.C.
OCTOBER 26, 1989

MR. CHAIRMAN, I WANT TO THANK YOU FOR AGREEING TO HOLD THESE SERIES OF HEARINGS SO THAT WE MIGHT MOVE EXPEDITIOUSLY TO ADDRESS THE NEED FOR EXPANDED RESOURCES WITHIN OUR LOCAL JUDICIAL SYSTEM.

THE DRUG DRIVEN VIOLENCE WHICH HAS ENGULFED OUR COMMUNITY HAS CAUSED MANY OF US TO SEARCH FOR SOLUTIONS.

AS YOU NOTED IN YOUR OPENING REMARKS, ONE SOLUTION THAT I HAVE PURSUED FOR MANY MONTHS IS TO INVOLVE THE RESOURCES OF THE FEDERAL GOVERNMENT IN THE TASK OF CONTAINING THE PROLIFERATION OF DRUGS AND THE SPREAD OF VIOLENCE SO THAT NEIGHBORHOODS THROUGHOUT OUR COMMUNITY CAN BE RETURNED TO THE RESIDENTS.

I AM PLEASED THAT THE EFFORT TO INVOLVE THE FEDERAL GOVERNMENT HAS BORNE SOME FRUIT. NEXT WEEK, THE HOUSE AND SENATE WILL VOTE ON THE CONFERENCE REPORT TO H.R. 1502, A BILL I INTRODUCED TO PROVIDE 700 ADDITIONAL POLICE OFFICERS TO THE METROPOLITAN POLICE DEPARTMENT. THE FUNDS FOR THE FIRST YEAR OF THE FIVE-YEAR AUTHORIZATION PROVIDED FOR IN H.R. 1502 HAVE ALREADY BEEN APPROPRIATED BY THE HOUSE AND SENATE IN THE D.C.

APPROPRIATIONS BILL FOR THIS FISCAL YEAR. IN ADDITION, THE D.C. GOVERNMENT HAS PROVIDED FOR 300 MORE POLICE OFFICERS IN ITS BUDGET, BRINGING THE TOTAL NUMBER OF NEW OFFICERS THAT WILL BE AVAILABLE TO 1000. FUNDS HAVE ALSO BEEN APPROPRIATED FOR EIGHT ADDITIONAL JUDGES TO BE ADDED TO THE D.C. SUPERIOR COURT. WHILE I SUPPORT EXPANSION OF THE NUMBER OF JUDGES FOR OUR LOCAL TRIAL COURT, WE MUST ALSO CONSIDER THE IMPACT THIS MAJOR INFUSION OF LAW ENFORCEMENT PERSONNEL WILL HAVE ON OUR ENTIRE JUDICIAL SYSTEM.

THAT IS WHY, MR. CHAIRMAN, IN MY SEARCH FOR SOLUTIONS TO THE DRUG CRISIS, A REVIEW WAS UNDERTAKEN OF EARLIER HEARINGS THIS SUBCOMMITTEE HAD HELD AND PRIOR STUDIES THAT WERE MADE ON THE COURT SYSTEM IN THE DISTRICT OF COLUMBIA. AS A RESULT OF THAT REVIEW, SERIOUS PROBLEMS IN AVAILABLE RESOURCES FOR THE D.C. COURT SYSTEM WERE DISCOVERED. AMONG THOSE PROBLEMS ARE AN INTOLERABLE BACKLOG IN APPELLATE CASES, BOTH CRIMINAL AND CIVIL; AND ONEROUS DELAYS IN THE PROCESSING OF CIVIL CASES, BOTH TRIAL AND PRE-TRIAL. AS YOU POINT OUT, THERE HAS BEEN NO SIGNIFICANT OVERHAUL IN OUR COURT SYSTEM SINCE THE 1970 COURT REFORM ACT, SOME TWENTY YEARS AGO. THE DRUG CRISIS HAS CLOGGED EVERY LEVEL OF THE COURT SYSTEM, AND NEW APPROACHES ARE NECESSARY.

CONSEQUENTLY, FOR THE PAST 10 MONTHS, I HAVE CONSULTED WITH MANY EXPERT AND INTERESTED PERSONS IN SHAPING AND RESHAPING A COMPREHENSIVE PROPOSAL NOT ONLY TO ADDRESS THE ADDED BURDEN THE COURT HAS BEEN AND WILL BE EXPERIENCING ON ITS CRIMINAL DOCKET, BUT TO ALSO ADDRESS THE DELAYS IN THE PROCESSING OF CIVIL CASES WHICH AFFECTS THE QUALITY OF JUSTICE FOR ALL D.C. CITIZENS.

THE PRIMARY VEHICLE FOR CONSULTATION AND INPUT HAS BEEN THE JUDICIAL

MISSION TEAM THAT I ASSEMBLED AT THE START OF THIS CONGRESS TO ASSIST ME IN THIS IMPORTANT EFFORT. THE MISSION TEAM IS CHAIRED BY ATTORNEY HARLEY DANIELS, A PARTNER IN THE LAW FIRM OF DANIELS AND DANIELS. OTHER MEMBERS INCLUDE ATTORNEY THOMAS DUCKENFIELD, PRESIDENT OF THE NATIONAL BAR ASSOCIATION AND FORMER CLERK OF THE D.C. SUPERIOR COURT; ATTORNEY JACK SCHEUERMANN, A PARTNER IN THE LAW FIRM OF SMINK AND SCHEUERMANN; ATTORNEY JULIA WILLIAMS, SOLO PRACTITIONER; ATTORNEY FRANK CARTER, FORMER DIRECTOR OF THE D.C. PUBLIC DEFENDER SERVICE; ATTORNEY ANTHONY RACHAL, A SOLO PRACTITIONER; ATTORNEY MARIALICE DANIELS, A PARTNER WITH DANIELS AND DANIELS; MR. RON LINTON, ONE OF THE LAYPERSON MEMBERS OF THE TEAM; MR. EDWARD SYLVESTER, STAFF DIRECTOR OF THE HOUSE DISTRICT OF COLUMBIA COMMITTEE; ATTORNEY NATE SPEIGHTS, FORMER PRESIDENT OF THE WASHINGTON BAR ASSOCIATION; ATTORNEY LEE SATTERFIELD OF THE C&P TELEPHONE COMPANY; PROFESSOR CHARLES OGLETREE OF HARVARD LAW SCHOOL; AND MR. FRANK PENDLETON FROM COUNCILMEMBER WILHELMINA ROLARK'S OFFICE.

SINCE DECEMBER OF LAST YEAR, THE MISSION TEAM HAS HELD MEETINGS AND CONDUCTED HEARINGS AND WORKSHOPS, CONSULTING WITH THE CHIEF JUDGES OF OUR COURTS, THE U.S. ATTORNEY FOR THE DISTRICT OF COLUMBIA, MEMBERS OF THE BAR, AREA LAW SCHOOL DEANS AND PROFESSORS AND INTERESTED CITIZENS. OUT OF THAT PROCESS HAS COME A PROPOSAL FOR WHAT I BELIEVE WILL BE A GENUINE "PEOPLE'S COURT" IN THE DISTRICT OF COLUMBIA --- A COURT THAT FUNCTIONS EFFECTIVELY AND EFFICIENTLY WHILE GIVING THE CITIZENS OF THE DISTRICT A TRUE SENSE OF SATISFACTION WITH OUR LOCAL COURT SYSTEM.

I AM PLEASED THEREFORE THAT YOU AND THE CHAIRMAN OF THE FULL COMMITTEE, MR. DELLUMS JOINED ME IN INTRODUCING THIS BILL, H.R. 3470, THE DISTRICT OF COLUMBIA JUDICIAL REORGANIZATION ACT OF 1989. THE BILL HAS MANY IMPORTANT FEATURES:

* TITLE ONE ESTABLISHES A SEVEN (7) MEMBER DISTRICT OF COLUMBIA SUPREME COURT AS THE LOCAL COURT OF LAST RESORT. THE EXISTING MEMBERS OF THE D.C. COURT OF APPEALS WILL BE ELEVATED TO THIS NEW COURT, AND THE PRESIDENT WILL APPOINT NINE (9) NEW MEMBERS TO THE D.C. COURT OF APPEALS. UNDER CURRENT PROVISIONS OF THE BILL, THE CHIEF JUSTICE IS GIVEN BROAD, NEW AUTHORITY TO ADMINISTER THE ENTIRE COURT SYSTEM.

* TITLE TWO ADDS EIGHT (8) NEW JUDGES TO THE DISTRICT OF COLUMBIA SUPERIOR COURT. THE TERMS OF THE NEWLY APPOINTED JUDGES ARE PROPOSED AT TEN (10) YEARS RATHER THAN FIFTEEN (15) UNDER CURRENT LAW.

* TITLE THREE CREATES THE NEW POSITION OF JUDICIAL MAGISTRATE, REPLACING THE POSITION OF HEARING COMMISSIONER. THE BILL ADDS ELEVEN (11) NEW JUDICIAL MAGISTRATES BY 1991 TO ASSIST THE COURT IN BOTH CIVIL AND CRIMINAL DOCKETS. THE JUDICIAL MAGISTRATES WILL HAVE GREATLY EXPANDED AUTHORITY, AND D.C. SUPERIOR COURT JUDGES WILL NO LONGER BE REQUIRED TO REVIEW THEIR ACTIONS. MOST IMPORTANTLY, MR. CHAIRMAN, THE JUDICIAL MAGISTRATE POSITIONS WILL BE FILLED BY A LOCAL SELECTION COMMISSION, COMPOSED OF THE CHIEF JUDGE OF THE D.C. SUPERIOR COURT, THE MAYOR AND CHAIRMAN OF THE D.C. COUNCIL, WHO ACT BASED UPON RECOMMENDATIONS MADE BY THE JUDICIAL NOMINATIONS COMMISSION.

* TITLE FOUR PROVIDES FOR GREATER LOCAL REPRESENTATION IN THE SELECTION AND RETENTION OF JUDGES BY CHANGING THE MEMBERSHIP OF THE JUDICIAL NOMINATIONS AND TENURE COMMISSIONS.

* AND TITLE FIVE CREATES A CITIZEN ADVISORY COMMISSION FOR THE JUDICIAL SYSTEM OF THE DISTRICT OF COLUMBIA.

I AGREE WITH YOU MR. CHAIRMAN, THAT THIS BILL MAY NOT BE THE PERFECT SOLUTION TO OUR JUDICIAL PROBLEMS. IT IS ONE ANSWER. THERE ARE OTHERS. I JOIN YOU IN LOOKING FORWARD TO THESE SERIES OF HEARINGS SO THAT AT THE CLOSE OF THEM, WE WILL EMERGE WITH MUCH NEEDED JUDICIAL REFORM LEGISLATION.

I AM CERTAIN THAT YOU ARE DETERMINED AS I AM THAT THE MONEY ALREADY APPROPRIATED FOR THE EIGHT (8) ADDITIONAL D.C. SUPERIOR COURT JUDGES WILL NOT BE LOST IN THIS PROCESS. AT THE SAME TIME, I KNOW THAT YOU AGREE THAT A COSMETIC, BAND-AID APPROACH TO THIS PROBLEM COULD DO MORE HARM THAN GOOD. THANK YOU.

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STATEMENT OF
WILHELMINA J. ROLARK
CHAIRPERSON, COMMITTEE ON THE JUDICIARY
BEFORE THE SUBCOMMITTEE ON
JUDICIARY AND EDUCATION,
UNITED STATES HOUSE OF REPRESENTATIVES

THURSDAY, OCTOBER 26, 1989

CHAIRMAN DYMALLY AND DISTINGUISHED MEMBERS OF THE SUBCOMMITTEE, I AM PLEASED TO APPEAR BEFORE YOU THIS MORNING IN SUPPORT H.R. 3470, INTRODUCED BY MR. FAUNTROY, A BILL TO ESTABLISH A SUPREME COURT OF THE DISTRICT OF COLUMBIA.

AS CHAIRPERSON OF THE COMMITTEE ON THE JUDICIARY, THE PROBLEM OF APPELLATE REVIEW IN THE DISTRICT OF COLUMBIA COURTS IS OF PRIMARY CONCERN TO ME. RESTRUCTURING THE COURTS HAS BEEN A SUBJECT UNDER STUDY AND ANALYSIS CONTINUOUSLY FOR THE PAST ELEVEN YEARS. THE INCREASED NUMBER OF CASES AND APPEALS FILED IN THE DISTRICT, PROCESSING TIME, AS WELL AS THE PERSISTENT BACKLOG OF CASES HAVE BEEN IDENTIFIED AS KEY FACTORS CALLING FOR REVISIONS IN THE COURT SYSTEM. IN FACT, A 1986 STUDY BY THE NATIONAL CENTER FOR STATE COURTS REVEALED THAT THE CASELOAD OF THE D.C. COURT APPEALS WAS "HIGHER BY FAR THAN ANY OTHER COURT OF LAST RESORT NOT HAVING AN INTERMEDIATE APPELLATE COURT." SINCE 1986, I DOUBT THERE HAVE BEEN ANY APPRECIABLE DIFFERENCES. THUS, IT SEEMS IMPERATIVE THAT MEASURES MUST BE TAKEN TO REVISE THE STRUCTURE OF THE DISTRICT'S COURT SYSTEM.

THE ESTABLISHMENT OF A TWO-TIER APPELLATE COURT SYSTEM IN THE DISTRICT OF COLUMBIA WILL NOT ONLY HELP TO RELIEVE THE CURRENT BACKLOG OF CASES, BUT ALSO HELP TO EXPEDITE APPEALS OF ADMINISTRATIVE DECISIONS BY THE DISTRICT

GOVERNMENT. MOREOVER, A TWO-TIER SYSTEM WOULD ALLOW THE INTERMEDIATE APPELLATE COURT TO FOCUS ITS REVIEW ON INDIVIDUAL CASES TO ASSURE THAT SUBSTANTIAL JUSTICE HAS BEEN RENDERED, AND CORRECTING ANY ERRORS. ON THE OTHER HAND, THE HIGHEST COURT WOULD DECIDE THOSE CASES THAT SHAPE THE DECISIONAL LAW OF THIS JURISDICTION IN A MORE COLLEGIAL FASHION AND WITH GREATER ASSURANCE OF UNIFORMITY. CURRENTLY, THE D.C. COURT OF APPEALS PERFORMS BOTH FUNCTIONS. WHILE ENHANCING OUR JUDICIAL SYSTEM, THE PROPOSED TWO-TIER SYSTEM WOULD BRING THE DISTRICT IN CONFORMITY WITH THE PRACTICE IN MOST STATES.

WHILE I LEND MY OVERALL SUPPORT TO THIS PROPOSAL, THE CURRENT BUDGET CONSTRAINTS FACED BY THE DISTRICT LEAD ME TO REQUEST THAT CONGRESS, IN ESTABLISHING THIS NEW COURT, PROVIDE THE FUNDING WHICH WILL BE REQUIRED FOR ITS IMPLEMENTATION.

BILL H.R. 3470 WOULD ALSO ALLOW FOR MORE LOCAL INPUT IN OUR JUDICIAL SYSTEM BY CHANGING THE MEMBERSHIP OF THE JUDICIAL NOMINATION AND TENURE COMMISSIONS. IN ADDITION, THE BILL WOULD ESTABLISH A CITIZENS ADVISORY COMMITTEE CONSISTING OF 15 MEMBERS, 8 OF WHOM WOULD BE APPOINTED BY EACH COUNCILMEMBER REPRESENTING EACH WARD OF THE CITY. LOCAL INPUT INTO THE SELECTION AND ASSESSMENT OF THE JUDGES AND COURTS WILL IMPROVE THE PROVISION OF SERVICES TO RESIDENTS OF THE DISTRICT.

AT THE SUGGESTION OF COUNCIL CHAIRMAN DAVID CLARKE, I PLAN TO INTRODUCE A RESOLUTION WHICH RECOMMENDS A COUNCIL POSITION ON THE BILL.

MR. CHAIRMAN AND SUBCOMMITTEE MEMBERS, IN CLOSING, I WOULD LIKE TO REITERATE MY SUPPORT OF H.R. 3470, AND I HOPE THE SUBCOMMITTEE MOVES WITH ALL DUE HASTE TO ESTABLISH THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

H.R. 3470—DISTRICT OF COLUMBIA JUDICIAL REORGANIZATION ACT OF 1989

THURSDAY, NOVEMBER 2, 1989

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON JUDICIARY AND EDUCATION,
COMMITTEE ON THE DISTRICT OF COLUMBIA,
Washington, DC.

The subcommittee met, pursuant to call, at 9:07 a.m., in room 1310–A, Longworth House Office Building, Hon. Mervyn M. Dymally (chairman of the subcommittee) presiding.

Members present: Representatives Dymally, Fauntroy, and Rohrabacher.

Also present: Edward C. Sylvester, Jr., staff director; Johnny Barnes, senior staff counsel; Donn G. Davis, senior legislative associate; Donald M. Temple, senior staff counsel; Ronald C. Willis, senior staff associate; Marvin R. Eason, and Nelson F. Rimensnyder, staff assistants; Mark J. Robertson, minority staff director; Howard Lee, minority assistant staff director; and Rick Dykema, minority staff assistant.

Mr. DYMALLY: Good morning.

The Subcommittee on Judiciary and Education is called to order for our second day of hearings on H.R. 3470 by Mr. Fauntroy. This legislation provides for reorganization of the District of Columbia court system.

At our last hearing on October 26, 1989, the chief judges of the District of Columbia Superior Court and the D.C. Court of Appeals and the corporation counsel for the District of Columbia presented their testimony to the subcommittee on H.R. 3470. We learned a great deal about the need to make the local court system more efficient and effective at both the trial and appellate levels. Many of the changes which were recommended are long overdue since the creation of the local court system by Congress almost 20 years ago.

I note that H.R. 3470 is an evolving document. It is reflective of the various criticisms and recommendations which I have received since our very first subcommittee hearing on the issue of an intermediate court of appeals in the last Congress.

I expect that there will be several amendments to this bill in markup which will further improve our work product and greatly enhance the likelihood of its passage. To this end, I appreciate the comments and suggestions which we have received and look forward to the testimony which will be presented today.

We have scheduled a third and final day of hearings on Wednesday, November 15. It is my expectation that the full committee will

probably report this or a similar bill to the full House—at first, I thought early December, but I understand we may get home for Thanksgiving turkey, and that will change our scheduling.

I extend my appreciation to each of the witnesses for taking the time out of their busy schedules to present testimony today.

Our first witness is Mr. Schaller, chairman of the District Bar Special Committee to Study the Court of Appeals, and then Mr. Sidney White Rhyne. But before we do that, let's hear from the member from the District of Columbia, my friend, Mr. Fauntroy.

[The prepared opening statement of Mr. Dymally follows:]

OPENING STATEMENT
OF
THE HONORABLE MERVYN M. DYMALLY
CHAIRMAN, SUBCOMMITTEE ON JUDICIARY AND EDUCATION
COMMITTEE ON THE DISTRICT OF COLUMBIA
HEARING ON H.R. 3470
THURSDAY, NOVEMBER 2, 1989

GOOD MORNING.

THE SUBCOMMITTEE ON JUDICIARY AND EDUCATION IS HEREBY CALLED TO ORDER FOR OUR SECOND DAY OF HEARINGS ON H.R. 3470, LEGISLATION WHICH PROVIDES FOR REORGANIZATION OF THE DISTRICT OF COLUMBIA COURT SYSTEM.

AT OUR LAST HEARING ON OCTOBER 26, 1989, THE CHIEF JUDGES OF THE DISTRICT OF COLUMBIA SUPERIOR COURT AND COURT OF APPEALS, AND THE CORPORATION COUNSEL FOR THE DISTRICT OF COLUMBIA PRESENTED TESTIMONY TO THE SUBCOMMITTEE ON H.R. 3470. WE LEARNED A GREAT DEAL ABOUT THE NEED TO MAKE THE LOCAL COURT SYSTEM MORE EFFICIENT AND EFFECTIVE, AT BOTH THE TRIAL AND APPELLATE LEVELS. MANY OF THE CHANGES WHICH WERE RECOMMENDED ARE LONG OVERDUE SINCE THE CREATION OF THE LOCAL COURT SYSTEM BY CONGRESS ALMOST TWENTY (20) YEARS AGO.

I NOTE THAT H.R. 3470 IS AN EVOLVING DOCUMENT. IT IS REFLECTIVE OF THE VARIOUS CRITICISMS AND RECOMMENDATIONS WHICH I HAVE RECEIVED SINCE OUR VERY FIRST SUBCOMMITTEE HEARING ON THE ISSUE

OF AN INTERMEDIATE COURT OF APPEALS IN THE LAST CONGRESS.

I EXPECT THAT THERE WILL BE SEVERAL AMENDMENTS TO THIS BILL IN MARK-UP, WHICH WILL FURTHER IMPROVE OUR WORK PRODUCT AND GREATLY ENHANCE THE LIKELIHOOD OF ITS PASSAGE. TO THIS END, I APPRECIATE THE COMMENTS AND SUGGESTIONS WHICH WE HAVE RECEIVED AND LOOK FORWARD TO THE TESTIMONY WHICH WILL BE PRESENTED TODAY.

WE HAVE SCHEDULED A THIRD AND FINAL DAY OF HEARINGS ON WEDNESDAY, NOVEMBER 15, 1989. IT IS MY EXPECTATION THAT THE FULL COMMITTEE WILL PROBABLY REPORT THIS OR A SIMILAR BILL TO THE FULL HOUSE IN EARLY DECEMBER.

I EXTEND MY APPRECIATION TO EACH OF OUR WITNESSES FOR TAKING TIME OUT OF THEIR BUSY SCHEDULES TO PRESENT TESTIMONY TODAY.

OUR FIRST WITNESSES ARE MR. JAMES SCHALLER, CHAIRMAN OF THE D.C. BAR SPECIAL COMMITTEE TO STUDY THE D.C. COURT OF APPEALS AND MR. SIDNEY WHITE RHYNE, CHAIRMAN OF THE BAR ASSOCIATION OF D.C. STUDY COMMITTEE ON THE D.C. INTERMEDIATE APPELLATE COURT. THEY WILL BE FOLLOWED BY FORMER SENATOR CHARLES MCC. MATHIAS AND MR. CHARLES HORSKY, REPRESENTING THE COUNCIL FOR COURT EXCELLENCE.

Mr. FAUNTROY. Thank you, Mr. Chairman.

I want to again thank you for taking the time from your schedule to continue the hearings on this most important matter. Last week, we received valuable testimony from our witnesses, and I look forward to listening to the statements we will hear today and to engaging in a dialogue with the witnesses appearing before us.

I would, however, be remiss, Mr. Chairman, if I did not comment that at a time when we in the Congress have agreed to some solutions to the problem of drug-driven violence that has so deeply penetrated our local community, the President of the United States seems to have declared a cease-fire in our war against drugs.

I am, of course, referring to the recent veto by President Bush of H.R. 3026, the D.C. appropriations bill for fiscal year 1990. The President's veto places a cloud of doubt over our efforts on this bill. That is because the funds for the eight additional superior court judges authorized by H.R. 3470 are contained in the D.C. appropriations bill.

But that is not all, Mr. Chairman. The President also left a cloud of doubt over the remainder of the $3.18 million in drug emergency funds, money that would have gone to hire 700 additional police officers, as provided by H.R. 1502, a bill I introduced and on which the House and Senate this morning will vote on the conference report, money that would have gone for drug education in our schools and drug treatment of addicted pregnant women.

The President's veto also leaves in doubt the funds provided by the District government to fund an additional 300 police officers. In doubt also are the funds for construction of a new 800-bed correctional facility, the funds needed to beef up the resources of the D.C. Court of Appeals, and funds for additional attorneys and staff in the office of the corporation counsel.

This hearing today, Mr. Chairman, states to the President that his veto has not dampened our resolve to do something about the drug problem which plagues our Nation's Capital. It also states that we are grimly determined to overhaul a judicial system that has not been reformed in two decades.

The citizens of Washington, DC, like citizens throughout the Nation, are entitled to a judicial system that responds to their legitimate needs, and I know you join me, Mr. Chairman, in a commitment to achieve that end. We have made a good start with this bill, H.R. 3470, and these hearings are helping us reshape our thinking and ultimately reshape the bill into legislation that will pass the Congress and benefit the District of Columbia, and for all of those reasons I again thank you for your leadership and for taking the time to continue this hearing process.

Mr. DYMALLY. Thank you.

We are pleased to have Mr. James Schaller and Mr. Sidney White Rhyne as our first witnesses. Would both witnesses come and begin their testimony.

Mr. White Rhyne, would you kick off the testimony.

STATEMENTS OF SIDNEY WHITE RHYNE, CHAIRMAN, BAR ASSOCIATION OF D.C. STUDY COMMITTEE ON THE D.C. INTERMEDIATE APPELLATE COURT; AND JAMES P. SCHALLER, CHAIRMAN, D.C. BAR SPECIAL COMMITTEE TO STUDY THE D.C. COURT OF APPEALS

STATEMENT OF SIDNEY WHITE RHYNE

Mr. RHYNE. Mr. Chairman and members of the subcommittee, my name is White Rhyne. I appear today as Chair of the D.C. Court of Appeals Committee of the Bar Association of the District of Columbia.

I have submitted a written statement that I ask be made a part of the official report in its proceeding. I will try to summarize the major points of my statement in the testimony this morning, and of course I shall be available to answer any questions you may have.

I do want to note that paragraph numbered 3 on page 9 of my statement should be stricken as inaccurate, and there are several minor errors, such as page cross-references, that I shall correct by letter to the subcommittee.

We are proud of the hard working judges on our local courts, at both the trial and appellate levels, but there are simply not enough of them to keep up with rising case loads. The result has been backed up dockets and delays that have stretched into years and have turned due process of law in the District of Columbia into what might best be characterized as the overdue process of law.

H.R. 3470 would create seven new appellate judgeships and eight new trial judgeships. They are badly needed. We strongly endorse both provisions.

It is much simpler to expand a trial court than an appellate court, at least where the appellate court is the final authority on law in a jurisdiction and has reached the size of our nine-judge D.C. Court of Appeals.

On a trial court, you add more judges and you get more cases decided, but when you expand an appellate court beyond nine judges, in order to get more cases decided in panels you impair the ability of the court to sit en banc on the really important cases that make new law or resolve conflicts and apparent conflicts in panel decisions.

The Bar Association decided more than 2 years ago that the solution was to restructure the appellate system in the District of Columbia into two courts along the lines recommended by the American Bar Association and already in effect in 38 States. An intermediate appellate court would exercise mandatory jurisdiction and sit in panels. The highest court would exercise discretionary jurisdiction and sit en banc.

We are pleased to have had the opportunity to work with you in commenting on two bills prior to this one that would have created such a two-tier appellate system for the District of Columbia. With each successive bill, there have been improvements. The appellate sections of the bill that is now under consideration show what members of the bench, bar, and legislature can accomplish when working together. But the people whom we all serve will realize no benefit in terms of timely justice, unless the provisions of the bill that have had so much work can now be moved forward into law.

We have made only two suggestions for further substantive change in the bill. These appear at pages 4 and 5 of my written statement. First, we believe that the provision for temporary assignment of judges from the lower courts to sit on the D.C. Supreme Court should be deleted. The justices of the highest court will have been chosen by the executive and confirmed by the legislature to be the final arbiters of important questions of local law in this jurisdiction. The collective wisdom of a majority of the judges so chosen should not be subject to change in close cases by the addition of judges from other courts who were not chosen for that special role.

We have no problem with the provision for temporary assignment of justices from the supreme court to sit on lower courts when they are needed and can be spared or for cross-assignment of judges between the intermediate court and the trial court. Those provisions give the system needed flexibility, but it is not common for a court of last resort to receive judges from lower courts by assignment. Witness the U.S. Supreme Court on which Federal judges from lower courts never sit by designation even when there are vacancies.

Second, the bill makes it harder for the highest court to grant review of a case before it has been heard by the intermediate appellate court then after an intermediate appellate court decision. We believe that should be changed. We would establish the same standard for review at both stages, thereby encouraging the highest court to identify early those cases that present questions worthy of its consideration and to avoid successive appeals of the same case with attendant delay in ultimate disposition. Other States, notably Massachusetts, have followed this first procedure with commendable results in avoiding double appellate decisions in most cases.

The written statement that I submitted for the Bar Association contains five pages of suggestions for other textual changes in the portion of the bill on the appellate courts, but they are largely technical, not substantive, and require no extended comment at this point.

I do want to urge on behalf of the Bar Association that the much worked over provisions to give us seven new appellate judges and a two-tier appellate system and the rather simple provision for the addition of eight judges to the trial court be uncoupled from the six tangential provisions identified on pages 9 and 10 of my statement. These have not had nearly the same degree of legislative work and have already engendered some controversy. I call them tangential because the provisions for new appellate and trial judges could stand whichever way they are resolved. We take no position for or against any of those provisions, but we do see them as a threat to the speedy creation of new judgeships that we think are vital if timely justice is to be reclaimed for the citizens of the District of Columbia.

[The prepared statement of Mr. Rhyne follows:]

THE BAR ASSOCIATION
OF THE
DISTRICT OF COLUMBIA
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WASHINGTON, D.C. 20006-3690
(202) 223-6600 (FAX: 293-3388)

Comments of the

BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA */

on

H.R. 3470, 101st Congress, 1st Session

(To establish a Supreme Court of the District of Columbia, and for other purposes)

November 2, 1989

I appreciate the opportunity to appear before the Subcommittee this morning to comment on H.R. 3470 on behalf of the Bar Association of the District of Columbia. The Association is a 118-year-old organization of lawyers practicing in this jurisdiction. Its voluntary, dues-paying membership is approximately 5,000. It was chartered in 1874 to enable the profession, among other stated purposes, to "increase its usefulness in promoting the due administration of justice." The Association has always been interested and involved in efforts to improve the administration of justice in the local courts.

What we have now in the courts of the District of Columbia, through no fault of our hard-working judges, might best be characterized as the "overdue administration of justice." The effort to

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*/ The Bar Association of the District of Columbia, founded in 1371 and chartered in 1874, is a voluntary organization of lawyers who practice in the District of Columbia. The Association functions through an elected Board of Directors and appointed commmittees in areas of special interest. These comments were prepared for the Association by its District of Columbia Court of Appeals Committee, Sidney White Rhyne, Chair. The comments have been reviewed and its substantive suggestions approved by the Association's Board of Directors.

address that problem in this Subcommittee, through the bill now pending and predecessor bills, have involved the bench, the bar, and the elected representatives of the people of this community, in a genuine cooperative effort.

We are grateful for the legislative initiatives of the Subcommittee, and particularly of the Chairman and the Congressman from the District of Columbia. We note that the need for new judges in both the trial and appellate courts of this jurisdiction is critical. We urge that you keep that need central in your deliberations.

Bar Association Interest in the
Subject Matter of This Bill

The interest of the Association in the possibility of a two-tier appellate system for the District of Columbia dates back to early 1987, when its D.C. Court of Appeals Committee, which I chair, undertook a study of the problem of docket overload and delay in the Court. That study was begun in response to an invitation by the then-Chief Judge of the Court who, in a luncheon address to the Association, asked for help in devising a solution to a problem that the Chief Judge felt was no longer susceptible to solution through internal remedies at the Court.

My committee discovered that the average delay at that time in the disposition of cases in our Court of Appeals, from notice of appeal to decision, was 18 months. That was three times the period recommended in the standards for appellate courts published by the American Bar Association.

Moreover, we found that the problem was likely to get worse, because annual filings in all but two years of the last ten had exceeded dispositions. The fact is that, in the two years since we undertook that study, the average time on appeal in our Court has increased from 18 months to 22 months.

We also found, from data supplied by the National Center for State Courts, that our Court was already producing more dispositions per judge than courts of last resort in virtually all states. And we found that the pressure of the docket was preventing our Court from sitting en banc to decide important cases of precedential value except on rare occasions.

Our conclusion was that more judges were needed, but that simply adding more judges to the existing court would be unwise. The difficulty of sitting en banc and of maintaining uniformity in panel decisions increases when a court of last resort is composed of more than nine judges. The ABA Standards say that the optimum number of judges is seven, with a manageable range of from five

to nine. They also say that, "when improvements in efficiency of operation of the highest court cannot be achieved without dilution of the appellate function, the appropriate solution is the creation of an intermediate appellate court." ABA Standards Relating to Court Organization, p. 35 (1974). That, we found, was the course that had been followed, with successful results, in states whose appellate caseload volume had begun to approach the volume we already had in the District of Columbia.

We concluded that the appropriate solution for the case overload in the District was to expand the number of appellate judges, but to restructure them in two tiers, with an intermediate court exercising mandatory appellate jurisdiction and the highest court exercising discretionary jurisdiction over those cases it decided were of greatest importance in the development of the law. The intermediate court would be the high-volume court and would sit in panels. The highest court would be the law-making court and would sit principally or solely en banc.

All but thirteen states already have intermediate appellate courts. And no state without such a court has anywhere near the annual volume of appeals that we have in the District of Columbia.

We presented our recommendations to the Board of Directors of the Bar Association, in two reports in May and September 1987. Both those reports were submitted to this Subcommittee. The Board of Directors of the Bar Association adopted a resolution in September 1987, urging the creation of an intermediate appellate court for the District of Columbia, with mandatory jurisdiction, and with the jurisdiction of the highest court to be converted from mandatory to discretionary. A copy of that resolution was likewise supplied to this Subcommittee.

Bar Association Participation in Legislative Effort

The Bar Association resolution also offered, through my committee, to assist the legislative bodies in the process of drafting appropriate legislation to implement its recommendation. In April 1988, in response to an invitation from this Subcommittee, I appeared to comment for the Bar Association on H.R. 4366 in the Second Session of 100th Congress. That was the second of what have become five successive legislative proposals for a two-tier appellate system. The first, H.R. 152 in the First Session of the 100th Congress, was introduced prior to the Bar Association resolution and had proposed two appellate courts with mandatory review at each level.

My 17-page statement on H.R. 4366 is part of the official record. I presented the policy position of the Bar Association

on an intermediate appellate court and offered a number of suggestions for textual changes in the bill. Most of those changes were subsegently incorporated in H.R. 5541, a revised version of the bill introduced later in that same session of Congress.

In February 1989, working with staff counsel, I sent the Subcommittee an 18-page statement of Comments for the Bar Association on H.R. 5541. It contained further suggestions for textual change and additions to that bill, with reasons for incorporating them. Most of them have been incorporated in the bill that is presently under consideration. Because hearings were never held on H.R. 5541 and consequently there was no official record of comments on that bill, I have attached to this statement a copy of the Comments of the Bar Association dated February 3, 1989.

In all, more than forty suggestions by the Bar Association for change in and additions to the text of the bills to restructure the appellate system of the District of Columbia appear in the bill that is now before you. These include five out of the six principal substantive suggestions identified in our most recent comments. I believe those various changes have strengthened and improved the legislation. We are pleased to have had that opportunity, and to have this further opportunity, to participate in the legislative process.

Additional Substantive Suggestions

We have only two new substantive suggestions for change in a bill that has already undergone a great deal of substantive revision. These suggestions are as follows:

1. Removal of Provision for Temporary Assignment of Judges to Supreme Court

We question the desirability of ¶(a) of §11-607, at line 21 on page 4 of the bill, which permits assignment by the Chief Judge of the new Supreme Court of the District of Columbia of judges of the new intermediate appellate court and the trial court to sit temporarily on the highest court. The bill would be improved if that section were deleted and ¶(b) became the sole paragraph under §11-607, without the (b) designation.

The judges of the highest court will have been nominated and confirmed to be the final arbiters of the most important legal issues in the District of Columbia, to sit almost exclusively en banc in order to assure uniformity of decision in the fashioning of new legal precedents. The introduction on that court of judges

from other courts could, in close cases, produce decisions not subscribed to by a majority of judges chosen by the executive and legislature to be the final arbiters, and could impair uniformity of decision. */

With a Supreme Court of seven justices, as recommended in the bill, it seems unnecessary to bring up temporary judges from lower courts. Even with vacancies, there would most likely always be at least five justices to render a decision reflecting the collective will of the Court. Moreover, the executive and legislature control a vacancy. They can permit it to continue or can fill it. They would not control any change in the will of the majority that might result from introduction of the opinions of judges from other courts.

We have no problem with ¶(b) of §11-607, which properly provides for the Chief Justice of the Supreme Court to assign justices from that Court to sit temporarily on lower courts when they can be spared and are needed on the lower courts. A parallel can be found in the federal system, where judges and retired judges and justices are often assigned to sit temporarily on courts other than their own. But no such justice or judge is ever assigned to sit on the federal court of last resort, the United States Supreme Court. See 28 U.S.C. §291-96. In fact, the statute specifically prohibits such assignment. 28 U.S.C. §224(d).

2. Relaxation of Standard for Review by Supreme Court Prior to Review by Court of Appeals

The bill provides two standards for application by the Supreme Court in determining to review a case. In §11-622(a) on page 7, the Court is permitted to hear any case already decided by the Court of Appeals upon a finding by at least three justices that "the matter involves a question that is novel or difficult, is the subject of conflicting authorities within the jurisdiction, or is of importance in the general public interest or the administration of justice." In §11-621(b)(1) on page 6, the Court is permitted to hear cases not yet decided by the Court of Appeals upon a certification that "the case is of such great and immedi-

*/ See also the apparent inconsistency between ¶¶(b) and (d) of §11-605(b) on page 3 of the bill, and ¶(a) of §11-607, which is discussed on pages 10-11 of these comments. And see the proposed addition to §11-1504(a)(1) of the Code on page 20 of the bill, discussed on page 14 of these comments.

ate public importance as to justify the deviation from normal appellate practice and to require prompt decision in the District of Columbia Supreme Court."

Section 11-621(b)(1) establishes a higher standard for review in the Supreme Court prior to Court of Appeals review than for review after a Court of Appeals decision. It unnecessarily weighs the bill in favor of successive reviews in the two appellate courts, and even describes that as the "normal appellate practice," a deviation from which must be justified.

While provision for two layers of appellate review is necessary in order to allow the Supreme Court to undertake consideration of cases whose importance was not apparent until the Court of Appeals issued its opinion, the system should be structured so as to discourage rather than encourage successive reviews. Such successive reviews waste judicial resources and exacerbate rather than help relieve the problem of appellate delay. Every effort should be made to assist the highest court to identify early those cases worthy of its attention and decide them without the necessity for an intermediate court decision.

Massachusetts is an example of a state that encourages early identification of cases warranting review by the highest court and thereby minimizes successive reviews of the same case. There is an opportunity for the parties to request review by the highest court at the outset of an appeal. In addition, staff counsel of the highest court routinely review briefs filed in cases in the intermediate court and make recommendations as to cases that should be decided without intermediate review. While the high court has power to grant further review on application of a party after an intermediate court decision, review at that stage requires three votes of the justices rather than two. The number of cases that receive successive appellate reviews is thereby limited. In the most recent court year in Massachusetts, less than 7% of the cases heard by its highest court had been decided first by the intermediate appellate court.

Maryland furnishes another example of a state with an intermediate appellate court where staff counsel from the highest court regularly reviews briefs filed in the intermediate court and recommend cases that should be taken up without an intermediate court decision. Although the highest court in Maryland has not been as successful as that in Massachusetts in avoiding double dispositions on the merits, still only about 8% of all cases decided by the intermediate court in Maryland are also heard by the highest court. And for the intermediate court, which makes the only appellate decision in 92% of the cases, the average time from docketing to decision during fiscal year 1988 was a little over five months.

While the manner in which the Supreme Court of the Distict of Columbia achieves the objective of limiting double review may properly be left to court rule, the task of early selection of important cases for Supreme Court review should not be made difficult by imposing a standard for such selection that is higher than the standard for selection after intermediate review. Thus, the same standard should appear in §11-621(b)(1) as in §11-622(a), perhaps with an additional requirement in §11-622(a) that a party moving for Supreme Court review after an adverse Court of Appeals decision make a special showing of justification for review at that stage.

This could be accomplished, for example, by revising §§11-621(b) and 11-622(a) to read as follows:

"(b) Such certification may be made only when not less than three [or perhaps two, following the Massachusetts model] justices of the Supreme Court of the District of Columbia determine that--

"(1) the case involves a question that is novel or difficult, is the subject of conflicting authorities within the jurisdiction, or is of importance in the general public interest or the administration of justice, or

"(2) the case was pending in the District of Columbia Court of Appeals on the effective date of this section and, because the justices of the Supreme Court of the District of Columbia were familiar with the case while serving as judges on the District of Columbia Court of Appeals, the sound and efficient administration of justice dictates that the case be certified for review by the Supreme Court of the District of Columbia.

"§11-622. Further Review by the Supreme Court of the District of Columbia after Review by the District of Columbia Court of Appeals.

"(a) Any party aggrieved by a final decision of the District of Columbia Court of Appeals may petition the Supreme Court of the District of Columbia for further review. If no petition for review in the Supreme Court was filed by the party prior to consideration of the case by the Court of Appeals, the petition for further review shall make a showing of why it was not possible to assert at the earlier stage the reasons for Supreme Court review on which it relies. If a petition was filed prior to

consideration of the case by the Court of Appeals but was denied, the petition for further review shall make a showing of why the case involves considerations warranting review that were not present at the time of filing of the earlier petition for review.

"(b) A petition for further review filed under this section may be granted if not less than three justices of the Supreme Court determine that the standards for Supreme Court review stated in §11-621(b) are met and, if applicable, that the case merits consideration notwithstanding denial by the court of review at an earlier stage of the proceedings or failure of the petitioner to seek review at an earlier stage of the proceedings."

Since the rest of §11-622 ought to apply to Supreme Court review whether under §11-621 or §11-622, it should be put into a separate section of the statute, which might read as follows:

"11-623. Standards for Review by Supreme Court of the District of Columbia.

"(a) The granting of petitions for review or further review by the Supreme Court of the District of Columbia shall be in the discretion of that Court or of the justices considering the matter. The Supreme Court shall not be required to state reasons for grant or denial of such petitions.

"(b) On reviewing the decision in any case or controversy, the Supreme Court of the District of Columbia shall give judgment after an examination of the record without regard to errors or defects that do not affect the substantial rights of the parties."

Succeeding sections of Chapter 6 would, of course, have to be renumbered to accommodate this new §11-623.

Provisions of the Bill That Are Tangential Creation of a New Two Tier Appellate System Should Be Separately Considered

The Bar Association notes with regret that the much-needed provisions for enlarging the number of judges available to decide appeals in the District of Columbia and dividing them into two courts, taken from prior bills and improved by substantial revision, have now been combined with other legislative proposals of a tangential and potentially controversial nature. Those proposals are described as "tangential" because the provisions for creation

of a new appellate court structure, at pages 1-21 and 28-30 of the bill, could stand on their own regardless of whether or not the new proposals are enacted.

Those tangential provisions of the new bill are as follows:

1. Responsibility for Judicial Administration: The bill, at pages 21-27, would amend Chapter 17 of Title 11 of the Code to transfer most responsibility for administration of the District of Columbia courts from the presently-constituted Joint Committee on Judicial Administration to the Chief Justice of the new Supreme Court of the District of Columbia. The five-member Joint Committee, retained but with a reconstituted membership in which the trial court would be reduced from three representatives to its Chief Judge only, would become principally an advisory body. The Executive Officer of the courts would be appointed by and report to the Chief Justice of the Supreme Court instead of to the Joint Committee on Judicial Administration.

2. Tenure of Judges: The bill, at page 31, reduces the term of appointment of judges of the District of Columbia courts appointed after its enactment from fifteen years to ten years.

3. Appointment of Chief Judges: The bill, at pages 31-32, shifts the power to appoint chief judges of District of Columbia courts from the President to the District of Columbia Judicial Nomination Commission.

4. Judicial Magistrates: The bill, at pages 33-37, substitutes for Hearing Commissioners in the Superior Court new officials known as Judicial Magistrates, with greatly expanded powers. Unlike the Hearing Commissioners, who are appointed by the Court itself, the Judicial Magistrates would be appointed by a new Judicial Magistrate Selection Commission, from among nominees of the District of Columbia Judicial Nomination Commission. The Judicial Magistrate Selection Commission would consist of the Chief Judge of the Superior Court, the Mayor, and the Chairman of the Council of the District of Columbia.

5. Judicial Tenure Commission: The bill, at pages 39-40, enlarges the District of Columbia Commission on Judicial Disabilities and Tenure and reconstitutes it so as to reduce the appointment power of the President, enlarge the appointment power of the Mayor, and give new appointment powers to the unified District of Columbia Bar, the Council of the District of Columbia and its Chairman, and the Delegate to the House of Representatives from the District of Columbia.

6. Judicial Nomination Commission: The bill, at pages 40-41, enlarges the District of Columbia Judicial [misspelled "Judicidal" in the section heading on page 40] Nomination Commis-

sion by two members and provides that they shall be appointed by the Delegate to the House of Representatives and the Chairman of the Council of the District of Columbia.

7. Citizens Advisory Committee: The bill, at pages 41-43, creates a new 15-member body consisting of three judges of local courts appointed by the Chief Justice of the District of Columbia Supreme Court, and twelve members appointed by local elected officials. The committee is to advise elected officials on the fairness and efficiency of the judicial system and submit reports at least annually to Congress and other designated organizations and officials.

The Bar Association takes no position for or against any of these provisions. It notes, however, that they have not benefitted from the detailed study, analysis and successive revisions that have shaped the provisions for restructuring the appellate system into an intermediate appellate court and a court of last resort. */

Moreover, many of these proposals are highly controversial. Earnestly-held views can be expected to be expressed on both sides of the issues raised. Opposition to these provisions should not be permitted to sidetrack the badly-needed and much-studied restructuring of the appellate court system. That reform should not have to face the opposition of determined opponents of the manner in which the other issues are resolved, whichever way that may be. Instead, the tangential provisions of the bill should be uncoupled and the provisions for the two new appellate courts, which constitute the principal portion of the bill, should be considered on their own merits.

The Size of the Superior Court Should Be Increased

On one tangential issue introduced in the new bill, the Bar Association does express a strong opinion. That is the provision, found on page 32 of the bill, to increase by eight the number of

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*/ In addition to its own reports and legislative comments referred to on pp. 3-4 of this statement, and the rest of the hearing record on H.R. 4366, the Bar Association commends to the Subcommittee a detailed report of a committee of the mandatory District of Columbia Bar in June of this year, with attached graphs and statistical analyses, that recommended the establishment of an intermediate appellate court for the District of Columbia. That recommendation was endorsed by the Board of Governors of the Bar on June 13, 1989.

judges on the Superior Court. The Bar Association believes that §203 of the bill, amending §11-903 of the D.C. Code to increase the number of associate judges on the Superior Court from 50 to 58, should likewise be made the subject of a separate bill and should be promptly adopted.

The problems of delay and backlog in the trial court are well recognized. See "Backlog Haunts Superior Court," page 1 of Legal Times, March 14, 1988 ("The typical wait from the time a case is filed in Superior Court until the scheduled trial date is between two and three years"). At least on the civil side, they are even worse than in the appellate court. Many cases, resolved only after years of litigation in the trial court, are then moved into the appellate court where they commence another long wait for the judicial system to produce an ultimate determination.

Unlike on the appellate side, no elaborate restructuring of the court system is necessary in order to provide the additional judicial manpower required to address the problems of delay and backlog in the trial court. The judges of Superior Court do not sit en banc and, by and large, render their decisions individually rather than collegially. Moreover, they do not have the ultimate responsibility for fashioning case law for the District of Columbia that is uniform and predictable to those who must look to the law for guidance in structuring their business dealings, or in resolving civil disputes, or criminal charges, without lengthy and expensive litigation. The capacity of the trial court to decide more cases can be increased by simply adding more judges.

That should be done, and it should be done as promptly as possible. Though this step is outside the area of responsibility of my particular committee, when I met with the Board of Directors of the Bar Association to review the provisions of the new bill, I was instructed to include a strong endorsement for the new Superior Court judges in the statement that I prepared for the Association.

Enlargement of the size of the Superior Court will, of course, further aggravate the problems of case overload and docket delay in the Court of Appeals. It will create more trial court dispositions, and presumably more appeals, for a Court of Appeals that is striving mightily but is unable to keep up with even its current caseload.

But that is no reason not to do what is right by the trial court, and by the citizens whose disputes are submitted to that court and all too often find that they must wait years for a resolution. Both the provisions of the bill to restructure and enlarge the appellate court system, and the provision to enlarge the trial court, should be uncoupled from H.R. 3470 and should be considered as separate legislative proposals, on their merits, independent of the rest of the bill and even of each other.

Line-by-Line Comment on the Bill

Page 3, Lines 17-19

No change in §11-605(b) is necessary if our suggestion on page 4 of these comments, that ¶(a) of §11-607 be deleted, is accepted. But if it is not, then the provision that the court en banc for a hearing shall consist of "the justices of the court in regular active service" seems inconsistent with §11-607(a), which permits assigning lower court judges to sit temporarily on the Supreme Court of the District of Columbia.

Because the Supreme Court will sit en banc exclusively except for cases that it reviews in panels pursuant to §§11-605(b) and 11-621(b)(2) in the first few months after the effective date of the new legislation, lines 17-19 on page 3 would seem to preclude any judge assigned to the Court from another court from having a role on the Supreme Court. The lower court judge would not be able to sit on a case because not a "justice of the court in regular active service."

Page 3, Lines 22-25

Unless ¶(a) of §11-607 is deleted, as suggested on page 4 of these comments, the provision in §11-605(d) that the court en banc for a rehearing shall consist of "the justices of the court in regular active service" would seem further to negate the use of judges from lower courts sitting by designation under §11-607 (a). They would be precluded from participating in rehearings as well as hearings.

Page 5, Lines 18-19

While §11-708 on page 16 of the bill is amended to permit the Chief Judge of the Court of Appeals to appoint and remove law clerks and secretaries for senior judges of that court, there is no comparable provision in §11-608 on page 5 for the Chief Justice of the Supreme Court to appoint and remove law clerks and secretaries for senior judges of that court. The two sections should be parallel, which presumably indicates revising §11-608.

Page 9, Lines 21-24

Paragraph (2) of §11-623(f) should be reworded to read:

"(2) there is no controlling precedent regarding such question of law in the decisions of the appel-

late courts of the State to which the order of certification is directed."

Page 13, Lines 14-17

The sentence added by ¶(B) of §103(a) should be inserted after the fourth sentence of §431(a) of the District of Columbia Self-Government and Governmental Reorganization Act rather than after the third sentence, and should read as follows:

> "The Supreme Court of the District of Columbia has jurisdiction to review cases in which an appeal has been taken to or filed with the District of Columbia Court of Appeals, where it certifies the case for review, and to review appeals from decisions of the District of Columbia Court of Appeals."

Page 13, Lines 24-25

The phrase inserted in subsections (b), (c), and (g) of §431 of the Self-Government Act by ¶(C) of §103(a)(2) should read "justices or" rather than "justices and."

Page 14, Lines 2-3

The following paragraph should be inserted to amend the heading of §432 of the Self-Government Act to make it parallel with the heading of §433 of the Act, as amended in lines 12-13 on page 14 of the bill:

> "(A) in the heading by inserting "JUSTICES AND" before "JUDGES";

Existing ¶¶(A), (B), and (C) of §103(a)(3), at lines 2-10 of the bill, should then be relettered as ¶¶(B), (C), and (D), respectively.

Page 14, Lines 8-9

The words "of Columbia' should be deleted from §103(a)(3) since they do not appear after "District" in §432(a)(1) of the Self-Government Act.

Page 15, Line 24

The word "appeals" in line 3 of §103(c) should read "Appeals," as it does in §11-301 of the Code.

Page 15, Line 22, through
Page 16, Line 5

As §11-301 of the Code is reworded by ¶¶(1) and (2) of §103(c), ¶(2) of §11-301 states that the Supreme Court of the District of Columbia has jurisdiction of appeals from judgments of that Court entered before the effective date of the 1970 Court Reorganization Act. But the Supreme Court of the District of Columbia was not in existence before the 1970 Act, so ¶(2) makes no sense. Moreover, it is not needed eighteen years later. A new ¶(3) of §103(c) should be added at line 6 on page 16 to read:

> "(3) The numerical designation of ¶(1) of Section 11-301, D.C. Code, is deleted, the paragraph is merged with the preceding paragraph without the dash after the name of the court, and ¶(2) of Section 11-301 is deleted."

Page 16, Line 15

In order to make §11-707 of the Code consistent with §11-607(b) as provided at lines 5-12 on page 5 of the bill, §103(d)(3) of the conforming amendments should be expanded, at line 15 on page 16, to read as follows:

> "... the Supreme Court of the District of Columbia,' and by inserting in subparagraph (b) thereof after the word "more" the words "justices of the Supreme Court of the District of Columbia or".

Page 16, Lines 16-19

See comment on page 11 regarding page 5, lines 18-19, of the bill.

Page 16, Line 22, through
Page 17, Line 4

This revision of §11-743 of the Code makes sense only if coupled with a reconstitution of the membership of the Joint Committee on Judicial Administration so as to draw a majority of its members from the justices of the Supreme Court of the District of

Columbia. That reconstitution is provided for on page 23 of the bill, but is tangential to the restructuring of the appellate court system and the Bar Association has recommended that it be made the subject of separate legislative consideration. See ¶1 on page 8 of these comments.

If that restructuring of the Joint Committee is not a part of this bill, then it would be better to make leave the basic wording of §11-743 as it is but with the substitution, as was provided on page 18 of H.R. 5541, of "Supreme Court of the District of Columbia" for "court" where that word appears in the statute.

Page 17, Line 20, through
Page 18, Line 2

See comments on previous page regarding the revision of §11-743 of the Code. The same reasoning applies to the revision of §11-946. It would be better to leave the basic wording of §11-946 as it is but with the substitution, as was provided on pages 18-19 of H.R. 5541, of "Supreme Court of the District of Columbia" for "District of Columbia Court of Appeals" both places that it appears in the statute.

Page 19, Line 10

It is unclear whether a substantive change in the present requirements as to qualification of government attorneys for judicial posts was intended, but in order to avoid such change the words "in the District" would have to be inserted in the next-to-last line of revised ¶(2) of §11-1501(b) of the Code as proposed in the bill, after either the word "employed" or the word "lawyer."

Page 19, Line 14

There is a typographical error in the word "District" in the third line of ¶(3) of §11-1501(b).

Page 20, Lines 9-13

This addition to §11-1504(a)(1) is consistent with the philosophy of the substantive revision to §11-607 suggested on page 4 of these comments. It seems to recognize that judges other than active justices of the Supreme Court of the District of Columbia should not sit on that Court.

Page 20, Line 16

In order to prevent a redundancy in the revised §11-1505 (a), the words "of the" in the fourth line of ¶(3) of the §103(f) conforming amendments should be deleted.

* * *

These comments do not contain a line-by-line analysis of the sections of the bill that they recommend on pages 8-10 be made the subject of separate legislative proposals.

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Comments of the

BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA */

on

H.R. 5541, 100th Congress, 2d Session
(To Establish a Supreme Court of the District of Columbia, and for other purposes)

February 3, 1989

In September 1987, the Board of Directors of the Bar Association adopted a resolution endorsing (a) the creation in the District of Columbia of an intermediate appellate court with mandatory jurisdiction over appeals, and (b) conversion of the jurisdiction of the highest appellate court from mandatory to discretionary. Copies of that resolution, and of the two memoranda to the Board from the Association's D.C. Court of Appeals Committee that formed the factual basis for the resolution, have previously been supplied to the House of Representatives Committee on the District of Columbia.

On April 19, 1988, the Chair of the D.C. Court of Appeals Committee submitted a statement to the Judiciary Subcommittee on H.R. 4366, which proposed to create a two-tier appellate structure of the type suggested by the Bar Association.

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*/ The Bar Association of the District of Columbia, founded in 1871, is a voluntary organization of more than 5,500 lawyers who practice in the District of Columbia. The Association functions through an elected Board of Directors and appointed commmittees in areas of special interest. These comments were prepared for the Association by its District of Columbia Court of Appeals Committee, Sidney White Rhyne, Chair. The comments have been reviewed and its substantive suggestions approved by the Association's Board of Directors.

He summarized the reasons for the Association's position on the need for such a structure and suggested various textual changes in the then-pending bill. Most of those changes were incorporated in H.R. 5541, introduced on October 19, 1988. The Association endorses those changes.

These further comments are directed to H.R. 5541 rather than to H.R. 167, introduced last month in the current Congress, which is in form identical to H.R. 4366. This is based on information from House District Committee Senior Staff Counsel Donald Temple, Esq., who has advised that a new bill along the lines of H.R. 5541 is contemplated and accordingly that comments would be most helpful if directed to the text of that bill.

These comments will make suggestions for further textual changes in H.R. 5541, some of which changes are substantive and some technical. The substantive changes are identified by asterisks next to the headings within the comments that denote the pages and items to which they relate.

The Bar Association believes that its proposed changes would further improve the bill. It will look forward to the appearance of the text of the revised bill and to the opportunity to express its views on that bill when it is in print.

The subject matter of the bill is important because the highest court of the District of Columbia is simply overloaded with cases and therefore unable to dispose of appellate matters in a timely fashion. Notwithstanding diligent efforts by the court and a high rate of case dispositions, more than 1,600 dispositions last year, the accrued case backlog from many years in which new case filings have exceeded dispositions now stands at more than 2,300 cases. During calendar year 1988, new case filings again exceeded case dispositions.

New appellate case filings during the decade of the 1980's have run almost 70% higher than in the early 1970's when the D.C. Court of Appeals was established. Yet the number of appellate judges has remained the same. The result of this swell in cases with no increase in judicial capacity was that, by the time the Bar Association passed its 1987 resolution urging an intermediate appellate court, the average time from filing to disposition had climbed to 18 months. This was more than three times the American Bar Association standard for appellate courts. Statistics from the Court for 1988 show that the figure in D.C. is now 22 months.

This bill would go a long way toward addressing the problem of case overload and delay by enlarging the number of appellate judges in a way that other jurisdictions with high caseloads have successfully employed to deal with similar

problems. The bill would organize the appellate judges in two tiers, with those in the intermediate court handling in panels the bulk of routine error-correcting cases. The judges of a reduced-size highest court, sitting principally in banc, would decide cases that define new law for the District. This would not only enlarge judicial capacity but would provide greater assurance of uniformity of decision in cases of precedential importance to the District.

The principal substantive changes urged in these comments are:

1. Size of Supreme Court: The comments recommend, for the reasons stated in the discussion of this recommendation on the next page, that the size of the highest court be increased from five to seven members.

2. Deletion of Collateral Changes: They recommend, on pages 5-6, 11, 13, 14, 16 and 18, separation from this bill of certain potentially controversial changes that are collateral to the main purpose of the bill to create a two-tier appellate court system, and consideration of those changes in a separate legislative proposal.

3. Transition Cases: They recommend, on pages 6-7, that the Supreme Court be given power to certify to itself from the Court of Appeals all cases pending in that court on the transition date on which the justices of the Supreme Court have already invested significant judicial time while serving as judges of the Court of Appeals.

4. Dual Service of Judges: They recommend, on pages 8-9, deleting a confusing provision of the bill that would provide for all appellate judges to be assigned to both appeals courts for one year after the effective date of the Act.

5. Chief Judge Compensation: They recommend, on page 12, that the extra stipends of the chief judges of the D.C. Court of Appeals and the Superior Court be raised from $500 to $2,500 to make them more in line with the stipend set in the bill for the Chief Justice of the Supreme Court of D.C., which is $3,000.

6. Enrollment of Attorneys: They recommend, on page 17, that all attorneys who are members of the bar of the D.C. Court of Appeals be automatically enrolled in the bar of the new Supreme Court, because of its primary responsibility for supervision of the bar.

Proposed changes in H.R. 5541, whether substantive (*) or technical, will be addressed in the order in which they ap-

pear in the bill, with citations to the pages and lines where those changes might be made:

*Page 2, Line 10

Consideration should be given to substituting the word "six" for "four" in §11-602, thus enlarging the court from five to seven justices. Seven is the number of judges found by the American Bar Association to be "most common and generally satisfactory" for a court of last resort. See ABA Standards Relating to Court Organization, p. 34.

A highest court of only five judges will be severely impacted by vacancies. During 44% of the time over the past eight years, there has been a vacancy on the present Court of Appeals. The Federal Communications Commission, for which the statute provides five commissioners, has been functioning at a strength of only three commissioners for more than a year.

Recusals may also require an appellate court to function at less than full strength. Such recusals often result from the appointment of new judges, particularly those coming from institutional litigants before the court such as the United States Attorney's Office and Corporation Counsel's Office, or from the trial court. Four of the last five appointments to the D.C. Court of Appeals have come from one of these institutional litigants or from the trial court, and an appointment from the U.S. Attorney's Office is now pending.

Vacancies can also have an effect outside the period of the actual vacancy in forms other than recusal. Periods preceding termination of the service of retiring judges may be marked by reduced case intake to avoid unfinished casework at retirement. Periods following the appointment of new judges may be marked by a "start-up period" of non-participation in cases already well along in processing.

Page 3, Line 6

The word "judges" should read "justices" and the word "Courts" should read "Court."

*Page 3, Lines 9-12

Paragraph (2) of §11-603(b) would, after three years, turn over to the Council of the District of Columbia authority to establish salaries for justices of the Supreme Court of D.C.

Heretofore the salaries of all D.C. judges have been set by Congress (i.e., when they set federal judicial salaries).

Paragraph (2) did not appear in H.R. 4366. It introduces a potentially controversial issue that is collateral to the principal purpose of the bill. Without at this time taking any position on whether the authority to set salaries for D.C. judges should be transferred from Congress to the D.C. Council, the Association recommends that such a transfer be made the subject of a separate legislative proposal rather than being incorporated in this bill.

Moreover, the bill transfers salary-setting power to the D.C. Council only for justices of the Supreme Court of D.C. and not for judges of the D.C. Court of Appeals (D.C. Code §11-703) and Superior Court (§11-904). There would seem to be no reason to differentiate among the three D.C. courts. Any separate legislative proposal should relate to all three.

*Page 3, Lines 21-22

In order to coordinate with a change suggested at line 2 of page 7, which would add a new subsection (b)(3) to §11-621, the phrase "subsection (b)(2) of such section constitutes the exclusive" should be changed to read "subsection (b)(2) or (3) and not subsection (b)(1) of such section constitutes the".

Page 5, Line 5

The word "justices" should be "judges" because it relates to the D.C. Court of Appeals and Superior Court, not the Supreme Court.

Page 5, Line 6

For clarity, after the word "Columbia" there should be inserted the phrase "to serve on the Supreme Court of the District of Columbia or a division thereof". A similar phrase appears in D.C. Code §11-707(a), the statute now permitting assignment of judges of the Superior Court to serve on the D.C. Court of Appeals.

Page 5, Line 14

The word "Judge" should be "justice" because it relates to the Supreme Court of the District of Columbia.

*Page 5, Lines 19-26

Proposed §11-608 follows the form of present §11-708 (pertaining to appointment of clerks by the D.C. Court of Appeals), except that (1) it inserts the phrase "not less than" in front of the number of personal law clerks for the chief justice and associate justices, (2) it deletes the phrase "not more than three," removing the limitation on the number of law clerks that the chief justice may appoint for the court, and (3) it refers to the latter simply as "clerks" rather than as "law clerks".

The reasons for these changes are unclear. The insertion of the two phrases "not less than" introduces an element of uncertainty as to how many personal law clerks the chief justice and justices will have, indeed placing no limit on the number. Deletion of that phrase at both places would seem desirable.

For the same reasons of clarity and certainty, insertion of the phrase "not more than" to modify the number of law clerks for the court to be appointed by the chief justice, following the form of present §11-708, would seem desirable. The same phrase, inserted in lines 21 and 23 to modify the number of personal law clerks that may be appointed by the chief justice and associate justices, would make clear that they may appoint less than the allotted number if they choose to operate with less.

Conformance of §11-608 to the style of §11-708 in line 24, permitting the chief justice to appoint and remove "not more than three law clerks for the court", also seems desirable. It would provide greater clarity, not only as to how many such clerks there will be but also as to what kind of training they would be expected to have and what kind of functions they would be expected to perform.

In any event, the form of §11-608 related to clerical personnel for the new Supreme Court, and §11-708 related to clerical personnel for the D.C. Court of Appeals, should be parallel. Lines 19-26 on page 5 of H.R. 5541 and lines 9-10 on page 18 do not make them so.

*Page 7, Line 2

On the effective day of the new Act, all cases previously pending in the D.C. Court of Appeals will still be pending in that court, even though it may have all new judges. The new D.C. Supreme Court will have no cases, and will have to create its initial case load almost entirely by reaching down into the Court of Appeals for cases via the process of certification.

One type of case that the Court will certainly want to bring up in order to avoid wasteful duplication of judicial resources is the case on which its justices have already expended significant time while serving as judges of the D.C. Court of Appeals. Most such cases will not be certifiable under ¶(1) of §11-621(b) as of "great and immediate public importance". Presumably they could be certified under ¶(2), based on the crowded docket of the Court of Appeals, but the real reason the Supreme Court would wish to certify them is simply that its justices are already familiar with them. That could be addressed by changing the period in line 2 on page 7 to a comma, followed by the word "*or*", and then adding a third basis for certification in substantially the following form:

> "(3) the case was pending in the District of Columbia Court of Appeals on the effective date of this Act and, because of familiarity of justices of the Supreme Court of the District of Columbia with the case acquired while serving as judges of the District of Columbia Court of Appeals, the sound and efficient administration of justice dictates that the case be decided by the Supreme Court of the District of Columbia."

A slight revision in §11-605 (lines 21-22 on page 3 of the bill), as suggested in these comments, would permit such cases to be heard by the Supreme Court in panels rather than in banc.

Page 7, Lines 5-6

The introductory clause of §11-622 refers to a §11-745 which is not in the bill. The clause should be deleted and the section begun with the last word on line 6, "any", which should be capitalized.

The reference to §11-745 is a carry-over from H.R. 4366, which contained such a section making the decisions of the Court of Appeals final in certain types of cases. Section 11-745 was deleted in H.R. 5541, presumably as a result of ABA Standard §3.00(a)(1) and prior comments submitted for this Bar Association.

Page 10, Line 6

Subsection (a) of §11-625 is a provision that was moved out of §11-623, where it appeared in H.R. 4366, and has been reworded to track some of the language of ABA Standard 3.11

("Scope of Appellate Review"). Both the move and the rewording were suggested in prior comments submitted for this Bar Association.

However, the subsection was recast in a way that in one respect leaves its meaning unclear. Clarity would be improved if, in line 6, the words "give judgment" were deleted and replaced by the words "disturb a trial court judgment", thus tracking exactly the ABA Standard.

Since the Supreme Court may also be reviewing administrative orders and decisions that have been appealed to the D.C. Court of Appeals under D.C. Code §11-722, and then certified or appealed to the Supreme Court, it would be even better if the replacement words in line 6 were to read "disturb a trial court judgment or an administrative decision".

Page 10, Line 14

Subsection (b) of §11-625 is capable of being read to allow sixty days for transmittal of records and transcripts to the Supreme Court in every case. Since some cases coming to the Supreme Court will have undergone prior review by the Court of Appeals, a record and transcript will already have been prepared at the time review is granted. Sixty days will not be necessary. Insertion in line 14, after the word "court", of the words "within such time as it shall designate" would make clear that the court may require transmittal of the record and transcript in less than sixty days in appropriate cases.

Page 11, Lines 16-19

The third sentence of §11-644 retains awkward phrasing from the same sentence of present §11-744 of the Code. Read literally, it would make the power to excuse judges from attendance at the Judicial Conference applicable only to the requirement that they "remain throughout the conference", not to their attendance at all. This could be corrected by rewording the sentence as follows: "Unless excused by the chief justice, each justice and judge summoned shall attend and remain throughout the conference.".

*Page 13, Lines 1-12

Subsection (b) of §3 of the Transition Provisions creates a potentially confusing situation where for one year all justices of the Supreme Court and judges of the Court of Appeals are "assigned to serve on both of the appellate courts". This

could impair the control of the chief justice or chief judge of each court over his or her own court and could raise unnecessary legal questions as to the status of the judges serving in such long term dual capacities. The subsection is unnecessary to address the backlog problem, by reason of the following provisions of the bill which permit ready transfer of cases and jurists as needed between the two courts:

1. Section 11-605(a), allowing the Supreme Court to take routine error-correcting cases from the Court of Appeals and hear them in the Supreme Court in three-justice panels.

2. Section 11-607(b), allowing the chief justice of the Supreme Court on request of the chief judge of the Court of Appeals to assign justices of the higher court to sit on the intermediate court.

3. Section 11-607(a), allowing the chief justice to assign judges of the Court of Appeals to sit when needed on the Supreme Court.

If subsection (b) of §3 is deleted, subsection (c) should of course be redesignated as (b).

Page 15, Line 2

Since §11-622 on page 7 of the bill limits the term "appeal" to cases coming to the Supreme Court from the Court of Appeals, and uses the term "review" for cases coming directly from Superior Court, it would maintain consistency to use the same terminology in §431(a) of the D.C. Self-Government Act. This could be done by deleting the word "from" in line 2 on page 15 and substituting therefor the words "to review judgments of".

Alternatively, §431(a) could be left as is and §11-622 could be modified to make the term "appeal" apply to cases coming from both the Court of Appeals and the Superior Court. This could be done by substituting the word "appeal" for "review" in line 16 on page 7 of the bill and deleting the words "or review" in lines 18 and 19.

Page 14, Line 15

The awkward additions throughout the text of §§431-434 of the Self-Government Act could be avoided by adding to the Act after line 15 on page 14 a new §430 entitled Definitions, along the lines of new §11-1500 which the bill adds (at page 19) to Chapter 15 of Title 11, D.C. Code. The new section of the Self-Government Act would read:

"§430. Definitions.

"For purposes of this Act--

"(1) the term 'judge' means any justice of the Supreme Court of the District of Columbia, or any judge of the District of Columbia Court of Appeals or the Superior Court.

"(2) the term 'chief judge' means the chief justice of the Supreme Court of the District of Columbia, or the chief judges of the District of Columbia Court of Appeals or the Superior Court, as appropriate.".

Page 15, Line 4

If the change suggested for line 15 on page 14 is not made, then subsections "(a)," and "(d)," should be deleted from line 4 on page 15 of the bill because they do not contain the words "chief judge", "judge" or "judges".

Page 15, Lines 14-17

If a new §430 entitled Definitions were added to the Self-Government Act as suggested, then ¶¶(B) and (C) of §432 could be deleted and ¶¶(D) and (E) should be redesignated as ¶¶(B) and (C).

Page 16, Lines 1-5

The bill provides for insertion of the words "JUSTICES AND" before "JUDGES" in the heading to §432 of the Self-Government Act (see page 15, lines 12-13), but not for insertion of the same words in the heading to §433 where they are similarly needed. The language of ¶(A) in lines 12-13 on page 15 should be repeated ahead of the text now appearing at line 1 on page 16.

See the comment for Page 14, Line 15, as to the possiblity of avoiding awkward additions throughout the text of §433 of the Self-Government Act. If these additions are retained, however, then ¶¶(A) and (B) of §433 at lines 1 and 4 on page 15 of the bill should be redesignated as ¶¶(B) and (C).

Page 16, Lines 6-11

See the comments under Page 14, Line 15, as to the possibility of avoiding additions throughout the text of §434 of the Self-Government Act. If these additions are retained, then line 7 on page 16 should be changed to read "(A) in subsection (b)(3) and(4) and (d)(1) and (2)--" because the words "judge" and "judges" do not appear in subsections (a) and (c) of §434. If ¶(A) is deleted, then "(B)" could be deleted in line 12 and lines 12 and 13 could be merged with line 5, without the dash after "amended".

*Page 16, Lines 14-17

Subsection (b)(4)(E) of §434 of the Self-Government Act is amended in the bill to remove the appointing power for the judicial member of the Judicial Nomination Commission from the chief judge of the U.S. District Court and to give it instead to the chief justice of the D.C. Supreme Court, and also to provide that the member appointed will be a District rather than a Federal judge.

This change introduces a potentially controversial issue that is collateral to the principal purpose of the bill. Without taking any position on whether such a change is desirable or not, the Association recommends that it be made the subject of a separate legislative proposal rather than being incorporated in this bill. It could perhaps be joined with the proposal to transfer authority to set salaries for D.C. judges from Congress to the D.C. Council, in lines 9-12 on page 3, likewise suggested for separate legislative treatment.

The same considerations relevant to the proposal to shift from Federal to District appointing power and judicial representation on the Judicial Nomination Commission would seem to apply to the judicial representation on the Judicial Disabilities and Tenure Commission, yet the bill in its treatment of the Self-Government Act leaves that appointive power and judicial representation in Federal hands. See §431(e)(3)(E) of the Self-Government Act, for which no change is proposed at lines 3-10 on page 15 of the bill [but see also the change proposed in §11-1522(a)(5) of the D.C. Code at Page 22, Lines 10-13].

Section 431(e)(3)(E) and §434(b)(4)(E) of the Self-Government Act and §1522(a)(5) of the D.C. Code could all be included in the same separate bill, perhaps with §11-603(b) of the Code, but they should not be part of this bill.

Page 17, Lines 11-12

The bill would amend §11-102 of the D.C. Code to make final judgments of the Supreme Court of D.C., as well as the D.C. Court of Appeals where review is denied by the Supreme Court of D.C., reviewable by the Supreme Court of the U.S. under 28 U.S.C. §1257. The bill should also amend 28 U.S.C. §1257, the basic Supreme Court jurisdictional statute, to add a reference to the Supreme Court of the District of Columbia as within the phrase "highest court of a State". The statute now refers only to the District of Columbia Court of Appeals.

Page 17, Lines 15-16

Since the correct name of the new court established in §11-601(a) of the Code (see line 5 on page 2 of the bill) is the "Supreme Court of the District of Columbia", that name should be substituted in lines 15 and 16 on page 17 of the bill for "District of Columbia Supreme Court" as the entry in the table of contents of chapter 1, title 11, D.C. Code.

*Page 18, Line 4

Though the bill (see line 7 on page 3) establishes in §11-603(b)(1) of the D.C. Code an annual stipend of $3,000 for the chief justice of the Supreme Court of D.C., in addition to his or her compensation as a justice of the court, it leaves untouched the $500 extra stipend presently provided in the Code for the chief judges of the D.C. Court of Appeals and the Superior Court. If the $3,000 stipend for the highest court is retained, the stipends for the other two courts should be raised to at or near that amount, perhaps to $2,500. That would require, for the Court of Appeals, a proposal to substitute the figure "$2,500" for "$500" in the second sentence of §11-703(b) of the Code. Such a change should appear immediately after line 4 on page 18 of the bill.

*Page 18, Line 17

See the suggestion above for raising stipends for the chief judges of the D.C. Court of Appeals and Superior Court to something comparable to that provided in the bill for the chief justice of the Supreme Court of D.C. That would require, for the Superior Court, a proposal to substitute a new figure, perhaps "$2,500", for "$500" in the second sentence of §11-904(b) of the Code. The change should appear immediately after line 17 on page 18 of the bill.

*Page 20, Line 2

By inadvertence or for a reason that is not apparent, the bill deletes from §11-1501(a) of the D.C. Code the power of the President to make recess appointments to fill vacancies in the D.C. courts. If the deletion was inadvertent, the second sentence of the section relating to such appointments should be restored. If the deletion was purposeful, it should be included in a separate legislative proposal as collateral to the purpose of this bill. See similar suggestions as to lines 9-12 on page 3 and lines 14-17 on page 16.

Page 20, Lines 2-4

The words "justice or" in lines 3-4 are unnecessary by reason of the definition of "judge" in §11-1500(a) as broad enough to include any justice of the Supreme Court of D.C. (see line 10 on page 19). If, however, those words are retained in lines 3-4, then they should be added in line 2 before the word "judge" so that the terminology in subsections (a) and (b) of §11-1501 is parallel.

Page 20, Line 20

The words "or judge" should be inserted in §11-1501(b)(2) after the word "lawyer" in order to retain the present provision in the Code for elevation of judges from one court to another.

Page 20, Line 17

The words "or she" should be added after the word "he" in §11-1501(b)(3) in order to make the section gender-neutral.

*Page 22, Lines 10-13

See comments under Page 16, Lines 14-17, as to provisions of the bill that would shift appointive power and judicial membership on the Judicial Nomination Commission and Tenure Commission from the Federal to the District courts. These changes, as to which the Association takes no present position, are collateral to the purpose of the bill and should be separately considered.

*Page 22, Lines 14-15

The bill proposes that the Mayor appoint the Chair of the Tenure Commission. This represents a potentially controversial change in §11-1522(a) of the Code, which presently provides that

the President shall appoint the Chair of the Commission. The change is collateral to the purpose of the bill to create a two-tier appellate court system for the District of Columbia. Without taking any present position on who should have the appointive power, the Association suggests that the question be part of a separate legislative proposal, perhaps along with questions of power to set salaries of judges of D.C. courts and power to appoint judicial members of the Judicial Nominating and Tenure Commissions. See comments on the text of the bill at lines 9-12 of page 3, lines 14-17 of page 16, and lines 10-13 of page 22.

If, however, the sentence at lines 14-15 on page 22 giving the Mayor the right to designate the Chair of the Tenure Commission is retained in the bill, it should be noted that the bill provides for the designation to be made by the Mayor from among the appointees to the Commission of the Unified Bar Board of Governors. It is unclear whether this was conscious or whether the intent was to allow the Mayor to designate the Chair from among his own appointees. In the latter event, "paragraph (2)" in line 15 should be changed to "paragraph (3)". Section 11-1522(a) now allows the President to designate one of his own appointees.

Page 23, Line 3

If the amendments to §11-1522 proposed at lines 7 and 9 on page 22 of the bill are retained, then the word "attorney" on line 3 of page 23 should probably be changed to "lawyer" in order to make the language parallel.

*Page 23, Lines 4-7

The same comments that appear under Page 16, Lines 14-17, and Page 22, Lines 10-13, with regard to the appointive power and judicial membership on the Tenure Commission apply also to §11-1522(b)(3), which changes from federal to local the power to appoint an alternate member of the Commission and the courts from which that alternate member is drawn. This potentially controversial change is collateral to the purpose of the bill and should be made part of a separate legislative proposal.

Page 23, Lines 20-21

The words "each place it appears" in ¶(6) of the amendments proposed by the bill to Chapter 15 of Title 11, D.C. Code, should probably be stricken since they seem to imply, erroneously, that "District of Columbia Court of Appeals" appears more than once in §11-1529 of the D.C. Code.

Page 24, Lines 1-6

The order of ¶¶(A) and (B) should probably be reversed and the paragraphs relettered to make them conform to the order of the two paragraphs of §11-1561 of the Code that they amend.

Page 24, Line 8

The additions of language throughout Chapter 17, resulting in sometimes-awkward phrasing, could be eliminated by adding a new §11-1700 entitled Definitions similar to §11-1500 on page 19 of the bill. See also the suggestion for a similar Definitions section in the Self-Government Act, on page 15 of the bill. Such a Definitions section for Chapter 17 would eliminate the need for lines 3-4 and 9-10 on page 25 of the bill, lines 2-3, 16-17, 19-30 and 23-24 on page 26 of the bill, and lines 20-22 and 23-25 on page 27 of the bill. Succeeding sections would have to be redesignated after some of those deletions.

Page 24, Line 24

A comma should be inserted at the end of the line before the quotation mark in order to make ¶(4) of §11-1701(b) of the Code parallel in form to ¶(9). See line 6 on page 25 of the bill, amending ¶(9).

*Page 25, Lines 1-2

This change, in the number of members of the Joint Committee on Judicial Administration whose concurrence is required for modification of budget requests, seems superficially sensible in view of the increase in the size of the Committee. However, consideration should be given to the fact that for the first time it would allow modification of budget requests of appellate courts without the concurrence of at least one member of the committee from the court whose budget is affected. If that is regarded as a problem by the present appellate members of the Joint Committee, then "five of the seven" in line 25 should be changed to "six of the seven".

*Page 25, Line 8

Legislative status could be accorded a practice that is already followed if the following new text were inserted in the bill at line 8 on page 25:

"(C) by adding the following new subsection (e)--

"(e) The Executive Officer selected by the Joint Committee pursuant to §11-1703(b) shall serve as staff to and secretary of the Committee."

*Page 26, Lines 4-6

Paragraph (B) of Section 4(g)(3) of the bill would amend §11-1703(d) of the D.C. Code to raise the salary of the Executive Officer of the D.C. Courts from the compensation of an associate judge of the Superior Court to that of an associate judge of the D.C. Court of Appeals. This change is collateral to the purpose of the bill to establish a two-tier appellate structure in the District of Columbia. Without taking any position in favor of or opposed to the increase in compensation, the Association suggests that it be made the subject of a separate legislative proposal.

Page 26, Line 11

In the interest of clarity, the word "clerk" should be changed to "Clerk of Court" both times that it appears on this line.

Page 27, Line 1

The word "judges" in ¶(A) of Section 4(g)(6) of the bill, line 1 on page 27, should be changed to "judge" to conform to the way it appears in §11-1731 of the D.C. Code.

*Page 27, Lines 10-16

The amendment to §11-1732 of the Code, changing the title of "Hearing Commissioner" to "Magistrate", is collateral to the purpose of the bill and should be made the subject of a separate legislative proposal. Without at this time taking any position on the merits of the change, the Association notes that there are distinctions between the duties of Hearing Commissioners of the Superior Court and Magistrates of the Federal Courts.

The change in subsection (n) of §11-1732 should be retained in the bill. If lines 10-16 on page 27 are deleted,

as suggested, the dash at the end of line 9 and the "(D) at the beginning of line 17 should likewise be deleted and the two paragraphs merged.

Page 27, Line 22

If ¶(8) of §4(g) of the bill on page 27 is retained [see comments at Page 24, Line 8], the words "except in subsection (8)" should be inserted on line 22 after the word "appears" and before the period. Subsection (8) deals with the chief judge of the Superior Court.

*Page 28, Lines 3-6

Section 11-2501 of the Code is properly amended to transfer authority over the admission and discipline of attorneys from the D.C. Court of Apeals to the Supreme Court of D.C. However, provision needs to be made for attorneys who are now members of the bar of the Court of Appeals to become automatically members of the bar of the Supreme Court, in the same way that members of the bar of the U.S. District Court for D.C. became automatically members of the D.C. Court of Appeals when primary admission and disciplinary authority was shifted between those two courts in 1972.

This could be done by inserting a dash on line 3 of page 28 after the word "amended", making the rest of that paragraph a new paragraph preceded by "(A)", changing the period at the end of the paragraph to a semi-colon followed by the word "and", and adding before ¶(2) that now starts on line 7 the following new text:

> "(B) by striking subsection (c) and inserting in its place--
>
> "(c) Members of the bar of the District of Columbia Court of Appeals on the effective date of this Act shall automatically be enrolled as members of the bar of the Supreme Court of the District of Columbia and shall be subject to its disciplinary jurisdiction."

Page 29, Line 2

The word "the" before "Supreme" should be deleted from the language within the quotation marks that is to be added to D.C. Code §17-306.

*Page 29, Lines 4-18

The bill would amend §23-101 of the D.C. Code so as to make changes in governmental entity (i.e., the United States of the District of Columbia) in whose name criminal prosecutions are brought in the District of Columbia. This change is unrelated to the purpose of the bill, to create a two-tier appellate structure in the District of Columbia. Without presently taking any position on whether the change is desirable or not, the Association recommends that it be deleted from the bill and made the subject of a separate legislative proposal.

*Page 29, Lines 19-23

The bill would amend §23-311 of the D.C. Code so as to change a provision of law on joinder of offenses in violation of laws of the United States and the District of Columbia. The change is unrelated to the purpose of the bill, to create a twotier appellate structure in the District of Columbia. Without presently taking any position on whether the change is desirable or not, the Association recommends that it be deleted from the bill and made the subject of a separate legislative proposal.

*Page 29, Lines 23-25, and Page 30, Lines 1-6

Subsection (m) of Section 3 of the bill (Transition Provisions) would be unnecessary if subsections (k) and (l) were deleted, as recommended above under Page 29, Lines 4-18 and 19-23.

Conclusion

The Bar Association of the District of Columbia appreciates the opportunity afforded by the House District Committee to share in the process of drafting appropriate legislation for the creation of a new intermediate appellate court in this jurisdiction, and the establishment of a court of last resort that acts primarily in banc with discretionary review authority. If enacted, the change will significantly enhance the administration of justice in the Nation's Capital. Please feel free to call on the Bar Association for any further assistance it can provide.

Mr. DYMALLY. Thank you very much, indeed.

Mr. Schaller, and then we will come back to Mr. Rhyne for questions.

STATEMENT OF JAMES P. SCHALLER

Mr. SCHALLER. Thank you, Mr. Chairman.

As the committee knows, I have submitted most of my testimony by way of my letter of October 31, and the item to which I particularly wanted to direct the attention of the chairman and the members of the committee was the report of the Special Committee to Study the District of Columbia Court of Appeals of the D.C. Bar.

Let me state here so I don't have to keep on repeating it, the constraint under which I operate and the D.C. Bar operates as the bar which is composed of all 50,000-plus admitted members of the District of Columbia Bar, that committee study does not purport to represent anything but the views of the committee itself. It does not purport and is not being offered here as the views of the bar or its board of governors.

Nevertheless, that committee worked for 18 months, after having been established by the board of governors of the D.C. Bar. It presented its report to the bar board of governors, which received it in June of this year, and it represents an undertaking and an investment of time which I think has investigated this problem for approximately the fourth or fifth time in 10 or 15 years and has come to the same conclusion, again, I think, exhaustively and finally that people have been urging all during that course of time, with the exception of the Horsky committee report, and, of course, as pointed out in my letter, Mr. Horsky himself, when he thought that perhaps the problem of backlog and appellate delay could be solved by some measure short of creation of an intermediate court of appeals, was relying on a couple of assumptions, and those assumptions did not come to pass.

The most notable of those assumptions, of course, was that the case load, the new filings level, would plateau at around 1,200 per year. That had been exceeded by almost a quarter, or 25 percent, by the year after the report was issued, 1981. It has reached a high of 1,800. Those assumptions are no longer valid, and Mr. Horsky himself has stated so to this committee and numerous other people interested in this problem since the time that report was issued.

Every other report and basically the premises of Mr. Horsky's report indicate that while there are short-term measures, half-measures, as I have referred to them from time to time, which can ease somewhat the problems faced by the District of Columbia Court of Appeals, nothing short, it would appear, of creation of an intermediate court, will do away with or successfully handle the problems of appellate delay and backlog, and that is why our committee recommended that an intermediate court of appeals for the District of Columbia be created and recommended, second, that the court reporting system currently utilized by the Superior Court of the District of Columbia and its court of appeals be reformed (a) by concentrating the administrative authority for the D.C. courts in the chief justice of the highest court, which would be the supreme court under the bill which this committee is currently discussing,

and (b) by requiring that the court reporter division go to mandatory computer-assisted transcript technology as quickly as possible, and that should really be today, because that is a technology whose time has come and long since.

We have made those recommendations, Mr. Chairman, because we feel that by implementing those recommendations the delay in appellate review will be reduced to the extent that it can be reduced, bearing in mind that this is a deliberative collegial process, and, second, that the backlog will be reduced to manageable numbers and provide a measure of real justice and speedy justice to the extent it can be provided at the appellate level for the citizens of the District of Columbia who come before this court.

As important as those two aims and objectives, however, was the need to reduce the risk which all of the judges of the current court of appeals and all of the former judges and all of the experts on that appellate court to whom we spoke—and they were numerous—have testified of decisional inconsistency between different panels of this nine-member court, and, second, to increase the number of en banc sittings in the law-declaring cases where there are extremely important questions for the citizenry of the District of Columbia to increase the opportunities for the appellate court to sit en banc and have the full court's deliberation and input into these very important questions. Those are all, also, very important reasons for the adoption of the recommendations which our committee made.

Now the questions, I suppose, are: Will these recommendations shorten delay, will they reduce backlog, or will they, instead, produce another area of delay at perhaps a different point in the system? We have answered the first two questions yes, and as far as producing another source of delay, Mr. Rhyne has referred to the so-called "cert. first" system which is part of the bill that this committee is discussing. It is the kind of certification process that has been utilized very successfully, as Mr. Rhyne pointed out, in Massachusetts, and it includes or contemplates that cases which go to the appellate level are screened initially to see which of those cases will be handled in the first instance by the intermediate court and which will go directly to the supreme court.

There will be some cases—it is about 5 percent, the experience has been in Massachusetts—of cases that go through the intermediate court, and there is then found to be a very important question, perhaps of constitutional dimensions, requiring review by the supreme court. Those cases will be very few in number, and, for the most part, those cases which require only error correction will go to the intermediate court in the first instance, and they will end there because that court will be able to handle them, and those cases that do have issues of constitutional or large dimension will go in the first instance to the supreme court and will not need to go through the intermediate level.

So if those cases which require en banc sitting can get them quickly and the court that is put in place to hear those cases hears nothing else, and if those cases that require only error correction are heard by a new intermediate court which is not also burdened with the necessity of en banc sittings, it seemed to us that the

delay in both classes of cases will be dramatically reduced, and that is why we made the recommendations we did.

The report that we have put before the committee—and I would ask, Mr. Chairman, that report be made a part of the record of this committee's deliberations——

Mr. DYMALLY. Without objection.

Mr. SCHALLER [continuing]. Is lengthy, it is exhaustive, it covers any number of points. I don't purport, unless the chairman or some member of the committee would like me to, to rehash it even in summary beyond what I have already done, and I am certainly prepared to answer questions, as is Mr. Rhyne.

[The report and letter of October 31, 1989, follow:]

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DIRECT DIAL NUMBER

457-1630

October 31, 1989

The Honorable Mervyn M. Dymally
Chairman, Subcommittee on Judiciary and Education
U.S. House of Representatives
Committee on the District of Columbia
Longworth House Office Building
(Room 1310)
Washington, D.C. 20515

Re: District of Columbia Judicial Reorganization Act of 1989; H.R. 3470

Dear Congressman Dymally:

Thank you for your kind letter of October 23, inviting my testimony and expression of views regarding the captioned legislation.

As you may know, I served as Chairman of the Special Committee to Study the District of Columbia Court of Appeals, created by Resolution of the D.C. Bar Board of Governors on July 14, 1987. The Committee submitted its Report and Recommendations, together with dissenting views, on June 1, 1989. As the footnote indicates, my testimony is that of a Committee Chairman and is not intended to state the views of the D.C. Bar.*

The mandate of that Committee was by no means limited to an evaluation of the wisdom -- or lack of it -- of an Intermediate Court of Appeals for the District of Columbia.

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* The views expressed herein represent only those of the D.C. Court of Appeals Study Committee of the D.C. Bar and not those of the District of Columbia Bar or its Board of Governors.

However, as I observed at the time the Committee presented its work product, we came, inexorably, to focus our attention more and more upon that subject:

> * * * The D.C. Court of Appeals has already progressed through several stages of appellate delay and backlog-reduction efforts: increased computerization; centralization of and greater reliance upon professional support staff; court reorganization and expansion; employment of summary disposition mechanisms. Significantly, the most authoritative critics, the judges themselves, felt that the problems remained and that an intermediate court was the best and perhaps the only realistic way of dealing with them.

Far and away the most persistent and daunting difficulty in working to correct the problems under which the Court of Appeals has been laboring heroically for at least the last several years, is that of persuading people and institutions of unquestionable good will that the problem is not a temporary one and that it is not one which minor expedients can be expected to cure. Numerous observers and commentators have reviewed all of the various half-measures that have been proposed from time-to-time and have virtually all concluded that they won't work. Indeed, most such measures have already been tried and manifestly haven't worked. I submit that they cannot work because more fundamental changes are needed. In my judgment, the signal contribution of the D.C. Bar Committee's efforts lies precisely in its exhaustive review of all such half-measures and the showing it made of why they do not meet the need.

I am forwarding to you copies of the Committee's Report and Recommendations, including the spirited and articulate dissents. I hope that you and your Subcommittee will find this study interesting and useful. You are no doubt aware of the fact that the Committee on which I served was not writing on a blank slate. We had a number of distinguished predecessors; all were thoughtful and insightful studies of the Court of Appeals over a period of a dozen years. They include the reports of the so-called "von Kann Committee", the "Douglas Committee" and the "Horsky Committee" of the D.C. Unified Bar; that of the National Center for State Courts; and that of the "Rhyne Committee" of the Bar Association of the District of Columbia. All support the conclusion that creation of an Intermediate Court of Appeals is an idea whose time has come, even those which, like the Horsky Committee study, did not recommend creating one.

The Horsky Committee recognized that the Court needed considerable relief at the time it issued its Report, but suggested a less sweeping measure as a perhaps viable alternative solution. That suggestion was based upon some assumptions that Mr. Horsky has since acknowledged (to this Subcommittee among other individuals and institutions) did not come to pass. The most notable assumption upon which the Horsky Committee was willing to base its conclusion that the problem might be handled short of creating an intermediate court was that new filings would plateau at 1,200 or so per year. Instead, as we know, they have continued to climb. As early as 1981, they had topped the 1,500 level. And they have remained well over that level for the rest of the decade, reaching a high of over 1,800! Hence, Mr. Horsky has himself long since taken the position that an intermediate court is the only answer to the Court's delay and backlog problems which makes sense.

There is much in H.R. 3470 which I have not looked into either in the course of my participation in the Committee's study or on my own. As to those elements of the Bill, I am somewhat loathe to express any opinions. Certainly, however, insofar as the Bill provides for creation of an Intermediate Court of Appeals and a Supreme Court for the District of Columbia, characterized by "cert. first" review (whereby the highest court determines which cases will be heard in the first instance by the intermediate court and which will go directly to the Supreme Court) and also vests administrative authority in the Chief Justice of the highest court, I heartily endorse those provisions.

No one can seriously question the need for additional judges at the trial court level, and while that is not a need that I have studied in any depth, I am entirely supportive of that portion of the current legislation as well. But it must not be lost sight of that, if the system provides additional law enforcement personnel and prosecutorial resources and this Bill supplies additional trial level judges, the problem of a workload that is already over-taxing the resources of the Court of Appeals will only be exacerbated. That is certainly not any kind of solution to the problem to which I am primarily interested in directing your Subcommittee's attention and concern.

I would deem it a great honor to share my views and the conclusions of the D.C. Court of Appeals Study Committee with the Subcommittee on November 2 and I ask that you accept this letter as my testimony. I will content myself with undertaking to answer such questions as Members may have and perhaps making a few very brief opening remarks on November 2.

I am grateful to you and the Subcommittee for affording me this opportunity to express my views on what I conceive to be a subject of surpassing importance to the administration of justice in the District of Columbia.

Respectfully submitted,

James P. Schaller

Encl: Report and Recommendations,
Special Committee to Study
the D.C. Court of Appeals

cc: Members of the Special Committee

THE VIEWS EXPRESSED HEREIN
REPRESENT ONLY THOSE OF THE
SPECIAL D.C. COURT OF APPEALS
STUDY COMMITTEE OF THE D.C. BAR
AND NOT THOSE OF THE D.C. BAR
OR ITS BOARD OF GOVERNORS

REPORT AND RECOMMENDATIONS

to the

BOARD OF GOVERNORS OF THE DISTRICT OF COLUMBIA BAR

of the

SPECIAL COMMITTEE TO STUDY
THE DISTRICT OF COLUMBIA COURT OF APPEALS

An In-Depth Study of the
Intermediate Court of Appeals Issue
and Other Proposals for Dealing With
the Workload and Reducing the Backlog
of the D.C. Court of Appeals

With Dissenting Views

James P. Schaller, Chair
Constance L. Belfiore
Earl C. Dudley, Jr.
Michael W. Farrell
Cornish F. Hitchcock
Catherine B. Kelly
James Klein
William I. Martin
Frank Q. Nebeker
John Payton
Charles L. Reischel
Sidney White Rhyne
Alexander L. Stevas
Robert L. Weinberg
Charles R. Work

D.C. COURT OF APPEALS STUDY COMMITTEE

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Member, Board of Governors,
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Robert L. Weinberg
Williams & Connolly

Charles R. Work
McDermott, Will & Emery

1/ Effective June 1, 1989, Mr. Dudley resigned from the private practice of law to accept a faculty appointment as Associate Professor at the University of Virginia School of Law.

2/ On June 8, 1989, Michael W. Farrell was confirmed Associate Judge, D.C. Court of Appeals and was invested on June 27, 1989.

3/ On April 4, 1989, Judge Nebeker was nominated for the Chief Judgeship of the newly-created United States Court for Veterans Appeals; he was confirmed in that appointment by the Senate on May 17, 1989.

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FORWARD

When, in November of 1987, then-D.C. Bar President Bob Jordan asked if I would chair a committee to study methods to reduce delay and backlog in the D.C. Court of Appeals, I will confess to harboring some misgivings as to whether the subject had not already been studied nearly to death. Nor were they eased upon receipt of copies of the von Kann Report, the Douglas Report, the Horsky Report, the Bar Association Report and the Report of the National Center for State Courts, all of which became required reading for members of the Committee in preparation for our first meeting in January of 1988.

This Committee has struggled assiduously not to view itself simply as one to evaluate the wisdom or lack of it of an intermediate appellate court for the District of Columbia but, ineluctably, we began more and more to focus upon that proposal. The D.C. Court of Appeals has already progressed through several stages of appellate delay and backlog-reduction efforts: increased computerization; centralization of and greater reliance upon professional support staff; court reorganization and expansion; employment of summary disposition mechanisms. Significantly, the most authoritative critics, the judges themselves, felt that the problems remained and that an intermediate court was the best and perhaps the only realistic way of dealing with them.

On a committee which combined the views of lawyers involved in the private bar, from solo practitioners to members of mega-firms; of two former members (and, as it turned out, one future member) of the court under study and a distinguished former Chief Clerk of that court; of experienced leaders in the appellate sections of the United States Attorneys Office, the Public Defender Service, and the Corporation Counsel's Office; of Neighborhood Legal Services and the Public Citizen Litigation Group, there were certainly great disparities in philosophy. The same kinds of disparities can be found to exist among appellate judges themselves.

> Despite . . . consensus on the characteristics of an ideal system, a wide variation exists in the actual operations of appellate courts. In part, the divergence may arise from disagreement over the role judges play in dispensing appellate justice. Some judges view themselves as result announcers; they see opinion writing as a largely delegable adjunct to the decision-making process. Others treat writing and deciding as inseparable; they believe the quality of the decision depends upon the discipline of a judge's personal involvement in writing a reasoned analysis of the case. Some judges consider participation in oral argument to be a luxury that a busy system can seldom afford. Others think oral argument is an essential means of assuring judge-made, collegial decisions. * * *

Remand, News of the Appellate Judges' Conference, ABA, Vol. 3 No. 2 (Spring, 1987).

So, too, the members of the Committee came at the problem from a variety of backgrounds and viewpoints. Patiently and with

never-failing courtesy and civility, they hammered out such difference as could be reconciled and championed their respective views eloquently and energetically in those areas where consensus could not be forged.

In the end, the Committee voted to recommend creation of an intermediate court of appeals. While the vote was not close, the positions and the rationales in support of those positions were very close indeed, tempting me to think that perhaps this report might consist of a single statement in which the concerns of the minority were accommodated. That has not proven possible and, consequently, we are presenting two principal statements, that of the majority, to which, indeed, all members of the Committee have made valuable contributions with special efforts from Chuck Reischel, White Rhyne, and Con Hitchcock, and a statement of the minority in which Connie Belfiore, Frank Nebeker, and Al Stevas have set forth their concerns in opposition to the recommendations of the majority. In addition, Frank Nebeker has written a separate Statement in dissent from his unique perspective as a former associate judge of the D.C. Court of Appeals.

In retrospect, this undertaking appears daunting indeed. Now, as at the outset, I am overwhelmed by the distinguished company in which I have found myself for the past year and a half. I seriously doubt that any group could be found with a superior combination of appellate experience and know-how, standing at the Bar, and industry for the task at hand. I hope

that this study will make a meaningful contribution to the efforts to reduce delay and backlog in the D.C. Court of Appeals while maintaining and, where possible, improving the quality of justice dispensed by that body.

James P. Schaller,
Chairman
June 1, 1989

REPORT: COURT STUDY COMMITTEE

I. Introduction.

The Court of Appeals Study Committee was created by Resolution of the Board of Governors of the D.C. Bar, acting at the suggestion of then-Chief Judge William C. Pryor. The Resolution "approve[d] the concept and creation of a special committee to look at the Intermediate Court of Appeals issue as well as alternative methods of dealing with the workload problems of the courts."1/ That Resolution was translated into a directive to the Committee "to study the Court and make recommendations as to its future evolution in terms of structure, staffing and mission." To that end, the Committee determined to undertake the following activities:

(1) To study the structure, workload and internal operating procedures of the District of Columbia Court of Appeals;

(2) To assess the substance and seriousness of the Court's current backlog and determine its causes and contributing factors;

(3) To review previous studies of this and other similar Courts;

(4) To consult with present and former judges, staff and support personnel, agencies and attorneys frequently appearing before the Court, and leaders of the Bench and Bar; and

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1/ See Minutes of the July 14, 1987 meeting of the Board of Governors of the District of Columbia Bar at 3-4.

(5) To formulate recommendations to achieve an orderly reduction of the Court's present backlog in the shortest feasible time and to prevent its recurrence.

The Committee has made a concentrated effort to explore all reasonable proposals for dealing with the problems of workload, decisional delay and backlog, including, but by no means limited to, the advisability of creating an intermediate appellate court.

In our judgment, an intermediate appellate court should be established for the District of Columbia. The present workload of the Court of Appeals appears to be such that no reasonable alternative means are available which would allow the Court to dispose of cases brought to it in a timely fashion without unacceptable sacrifices in the quality of the Court's work, increased risk of decisional inconsistency, and continued inability to hear more than an insignificant number of cases en banc. It is, moreover, the Committee's view that a mere increase in the number of full-time judges devoted to appeals would not allow the Court both to deal with its workload problems, on the one hand, and to assure the quality of the process, on the other.

The experience of other jurisdictions with the problem of structuring their appellate judiciary to accommodate growing caseloads demonstrates that the best and most efficient way of organizing that judiciary is in two tiers, with most cases being decided by three-judge panels in an "intermediate" appellate court and cases that are of greatest significance to the law of

the jurisdiction being decided by a highest court that sits en banc.

The Committee has reviewed, and is deeply indebted to, the considerable efforts others have previously made to study and assess the appellate process in the District. These include the 1977 "von Kann Report" examining the extent of the Court's compliance with the ABA Standards of Judicial Administration Relating to Appellate Courts;[2/] the "Douglas Report" recommending that an intermediate appellate court be established;[3/] the 1980 "Horsky Report" which recommended that alternatives to an intermediate court be attempted over a five-year period, including adding three judges to the Court of Appeals in an effort to ascertain whether its backlog could be eliminated;[4/] and the 1986 National

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2/ Report to the District of Columbia Judicial Planning Committee from the Subcommittee to study the extent to which practice and procedure of the D.C. Court of Appeals conforms to the Standards. The District of Columbia Court of Appeals and the A.B.A. Standards of Judicial Administration (1977) (hereinafter, "von Kann Report," after the Subcommittee Chairman Curtis E. von Kann).

3/ Subcommittee on the Workload of the District of Columbia Court of Appeals, District of Columbia Judicial Planning Committee. District of Columbia Court of Appeals: Workload Problems and Possible Solutions (1979) (hereinafter, "Douglas Report," after the subcommittee chairman John W. Douglas).

4/ District of Columbia Court System Study Committee of the District of Columbia Bar, Appeals Court Report (1980) reprinted for use of the Senate Committee on Government Affairs, 98th Cong., 1st. Sess. (S. Prt. 98-34) (U.S.G.P.O., 1983) (hereinafter "Horsky Report" after the Committee's Chairman, Charles A. Horsky).

Center for State Courts Report, recommending that serious consideration be given to creating an intermediate court.5/

In addition, the Committee has had the benefit of the recent efforts of the Bar Association of the District of Columbia. In 1987, the Board of Directors of the Association, acting on written reports and recommendations from its D.C. Court of Appeals Committee, chaired by S. White Rhyne, a member of this Committee, adopted a resolution urging establishment of an intermediate court with mandatory appellate jurisdiction, and conversion of the jurisdiction of the highest court from mandatory to discretionary. This Committee reviewed the material developed by the Bar Association, considered the views it expressed, and is indebted to it for its efforts in studying the problem.

The Committee has also reviewed what has taken place in Congress. Four bills to create a two-tier appellate system in the District of Columbia have been introduced in Congress in the last few years.6/ Hearings have been held on one of them.7/

After reviewing the studies, the congressional hearings, and other materials concerning the D.C. Court of Appeals, the Commit-

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5/ Southeastern Regional Office, National Center for State Courts, Appellate Delay in the D.C. Court of Appeals, (1986) (hereinafter referred to as the "National Center for State Courts Report", or "NCSC Report").

6/ H.R. 152, 100th Congress, 1st Session (1987): H.R. 4366 and 5541, 100th Congress, 2nd Session (1988); and H.R. 167, 101st Congress, 1st Session (1989).

7/ Hearings on H.R. 4366 before the Judiciary Subcommittee of the House of Representatives Committee on the District of Columbia, held April 19 and 28, 1988.

tee interviewed eacn of the judges and senior judges of the Court of Appeals, the clerks of the Court of Appeals and the Superior Court, judges of other courts, and numerous counsel possessing special interest and expertise in the Court of Appeals' functioning.8/ Finally, the Committee examined closely statistical measures of the Court's work.9/

In testing the conclusion that the best way to ensure adequate and timely disposition of appeals is to establish an intermediate appellate court, we considered very seriously the objection that such a court might only produce another, different source of delay: that it would become "just another step" in litigation.

To avoid that result, we are recommending that the highest court of the jurisdiction be empowered to determine in the first instance what cases should be heard by the intermediate court, and what cases the highest court should hear directly. We believe that this mechanism will minimize duplication of effort.

The Committee also took very seriously the expense involved in creating another court. The ultimate question, however, is whether that expense should be borne to provide those who depend on the District of Columbia Courts with the same quality of justice afforded elsewhere, or whether they will be relegated to a system of appellate justice which cannot, in the long run, assure

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8/ Those interviewed are listed in Appendix A.

9/ See the workload Statistics in Appendix B.

timely justice of that high quality. Should the expense of creating an intermediate court prove to be too high, means for mitigating that expense could be explored.

We also recommend that forceful steps be taken to ensure that transcripts are timely produced. First, the highest court of the jurisdiction should be charged with administering the court system. Second, reporters should be directed to use computer-assisted transcription (C.A.T.).

II. The Problem.

The workload problem of the Court can be measured in several ways, but under any criterion, the Court cannot keep up with its docket. Over the past decade, two unmistakable trends have emerged: first, the Court is being asked to hear more cases; and second, despite Herculean efforts by the judges, the time required from filing of a notice of appeal to decision is increasing inexorably.

-- Over the last decade, the number of cases filed has risen from approximately 1300 to 1700 cases per year. More cases are now pending in the Court than ever before (2347 pending cases in 1988, versus 1109 in 1978), and there have been only two years since 1980 in which the Court disposed of more cases than were filed (in 1983 and in 1987).

-- The Court is also finding it harder to dispose of cases in a timely manner, and it now takes nearly two years on average for a case to move from notice of appeal to final decision. In

1988, an average of 679 days (or 22.6 months) elapsed between filing a notice of appeal and the issuance of a final decision; in 1978, the average elapsed time was 472 days (15.6 months).

Throughout this time, the productivity of the Court, as measured in case dispositions, has actually improved. During the late 1970s, the Court was issuing between 600 and 700 opinions, both published and unpublished, each year. During virtually every year since 1982, the Court has handed down approximately 800 published and unpublished decisions annually.

This increased productivity largely reflects an increase in the use of unpublished opinions. Since 1976, the Court's published opinions have fluctuated within a rather constant range, at approximately 300 opinions each year, averaging between eight and eleven pages each. By contrast, the number of unpublished opinions has increased dramatically. Unpublished decisions (Memorandum Opinions and Judgments or "MOJs") rarely reached 400 a year prior to 1980. Since 1982, the Court has usually issued 500 unpublished opinions each year.

In analyzing delay and backlog in the Court's docket, the Committee focused on the four critical areas of each appeal and, using statistics provided by the Clerk's office, examined the Court's performance today vis-a-vis its performance ten years ago. This analysis is crucial because it helped to pinpoint where the problem areas are at each step of the appellate pro-

cess and suggests where reform efforts should be targeted. The four key areas and the trends in each are as follows:

1. The time between filing a notice of appeal and transmission of the record. This period has more than doubled over the past decade. In 1978, it took an average of 124 days to get the record filed; in 1987, it took an average of 256 days to accomplish the same task. In 1988, this figure decreased somewhat to 227 days, still nearly 7-1/2 months. This delay is wholly unacceptable, and the Committee is unanimous in its recommendation (discussed below) that significant reforms in court administration must be promptly undertaken regardless of one's views on the need for an intermediate court of appeals.

2. The time between transmission of the record and completion of the briefing. In 1978, it took an average of 134 days, or 4.5 months, for the parties to brief a case. In 1987, the figure had risen slightly to 157 days, or 5.2 months. 1988 witnessed a dramatic lengthening in this stage of the appellate process, to 237 days or nearly 8 months. In part, this increase may be attributable to an inclination by some lawyers to seek extensions of time because they know that the Court will not be able to hear a case promptly even if the briefs are timely filed. Indeed, we are advised by the Clerk's Office that the 2-1/2 month increase between 1987 and 1988 was caused in large part by the Court's reluctance to deny extension requests when it would not be able to hear the cases promptly in any event. Additionally, these delays generally may reflect the fact that

the Court's rising caseload has fallen disproportionately on the shoulders of institutional litigants such as the U.S. Attorney, the Public Defender Service, and the Corporation Counsel, each of which may have to seek extensions because of limited staff resources.

3. The time between filing the last brief and the date of oral argument or submission. In 1978, this process took an average of 93 days, or 3.1 months. The delay has grown steadily since then to an average of 127 days, or 4.2 months, in 1987. This increased to 152 days -- over 5 months -- in 1988. This trend is significant because it shows that the number of "ready" cases in the pipeline is growing at a faster rate than the Court can handle, despite the use of a variety of devices to conserve judicial time, such as submission of cases without oral argument and a 25 percent increase in the number of dispositions by MOJ.

4. The time between argument or submission and decision. This process took an average of 121 days, or 4 months, in 1978 and an average of 107 days, or 3.6 months, in 1987. That figure is slightly higher than the average in the 1983-1986 time frame and generally lower than the disposition time between 1975 and 1982. In 1988, this figure dropped to 76 days or 2½ months.

At first glance, these figures seem heartening because they suggest that the Court is able to keep up with its caseload once a case is presented to a three-judge division for decision. As we discuss below, however, this statistic is misleading because it lumps together the disposition rate for unpublished decisions,

which the Court decides very quickly, with published decisions, which average over eight months.

What conclusions can be drawn from these statistics? The first three areas measure how long it takes a case to reach a three-judge panel for decision, and the overall trend is not encouraging. The average time that it takes a case to move from notice of appeal to argument or submission has increased substantially over the past decade, from approximately 11½ months in 1978 to over 20 months in 1988. This situation is intolerable, and the Committee supports various administrative measures, such as speedier preparation of transcripts, in order to reduce the delay during this stage of the appellate process.

Superficially, administrative reform might appear to be all that is needed because the statistics suggest that once a case reaches a panel, the Court can dispose of cases as quickly now as ten years ago. Such a conclusion would be in error, however, because on closer examination, there are significant delays during the disposition phase as well as during the pre-argument phase, a fact which argues for more judicial resources in addition to administrative reforms.

As noted previously, the Court of Appeals took an average of 107 days to decide a case in 1987, the only year for which the comparable data for published opinions vis-a-vis MOJs has been

compiled.[10/] What this figure masks, however, is the fact that the Court takes considerably less time to issue an unpublished MOJ than it does to produce a written opinion, yet the 107-day figure is an average for both types of dispositions. If one separates out the disposition rate for MOJs from that for published opinions, a different picture emerges.

The Court does an excellent job of disposing of cases by MOJ in a matter of days or weeks. The Committee examined the 511 MOJs that were filed in 1987 and calculated that they were disposed of in an average of 23.8 days each, well below the overall average of 107.[11/] On the other hand, it took the Court an average of 254 days -- or roughly 8-1/2 months -- to decide the 296 cases in which a published opinion was deemed necessary.

The data strongly suggest that something similar occurred in 1988. For while the average time from submission to decision was reduced by a month (from 107 to 76 days), the number of published decisions (249) was at a 7-year low, while the number of disposi-

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10/ The Committee is indebted to committee member Alexander H. Stevas, who undertook the considerable burden of compiling this data by hand, examining each of the decisions themselves and referring, as necessary, to the actual case files.

11/ If anything, this figure is somewhat inflated because it includes 23 cases which took over 100 days to decide. If one deletes these cases from the calculations, the remaining 488 cases were decided in an average of 15.8 days apiece, broken down as follows: 379 criminal cases, 15.8 days; 48 civil cases, 19.2 days; 43 agency cases, 13.6 days; other cases, 13.2 days. Additionally, cases which were submitted on the briefs and not argued orally generally took three to ten days less time to decide than argued cases. (This analysis does not include 8 disciplinary matters disposed of by MOJ for which disposition time could not be determined.)

tions by MOJ remained relatively constant. These statistics suggest that the overall reduction in disposition time is attributable to the fact that there were nearly 50 fewer cases decided by published opinion in 1988.

To be sure, there are difficult cases which require careful consideration and contemplation. Nonetheless, the fact that it takes an average of over eight months for the Court to issue a published opinion suggests that the Court's overall workload is affecting its ability to decide significant, law-declaring cases in a timely manner. And from a litigant's standpoint, it is surely disheartening to wait 18 months for one's case to be heard and another 8-1/2 months for a decision, a total of nearly 2-1/4 years on average.

There is something wrong systemically when an appellate court takes that long to dispose of cases. Regardless of how many administrative reforms are introduced to speed cases through the pipeline or to induce settlements, the fact remains that there is a finite limit to the judicial resources which are available to handle a caseload which has grown dramatically over the past decade. Even if a judge largely delegates to a law clerk the responsibility for preparing draft MOJs pursuant to the judge's direction, the judge must still read the briefs and records in each and every case and reach a conclusion about how the case should be resolved. The time spent on these responsibilities, as well as all the other rulemaking and administrative duties with which the Court is charged, inevitably takes its toll

in the Court's ability to carry out its doctrinal, law-declaring functions in an efficient manner.12/

Our interviews with the judges clearly showed that the court's workload has also affected the quality of its decisions. Many published decisions are essentially the product of one judge. The amount of input from other (non-writing) judges on a case varies, but the time any judge can spend on opinions which others are assigned to write is limited. As a consequence, decisions in law-declaring cases are usually the product of only a few judges. Two judges can determine the law of the jurisdiction, and in practice, the law in any given case is largely shaped by the judge who is entrusted with writing the opinion.13/ § 3.01 of the ABA-Approved Standards Relating to Appellate Courts (ABA Standards-Appellate Courts) characterizes this as highly undesirable.

The Court of Appeals plays a role comparable to that of a state supreme court. It is responsible for interpreting District

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12/ In this regard, it should be noted that the Court of Appeals regulates admission to the Bar; prescribes rules of conduct for those it licenses to practice; oversees attorney discipline; and polices unauthorized practice. See D.C. Code § 11-2501 (1981). In addition, the Court must approve changes to the procedural rules of the Superior Court which modify the Federal Rules of Civil Procedure. See D.C. Code § 11-946 (1981).

13/ This problem may be compounded by the practice of tentatively (albeit, randomly) assigning a member of the division as the writing judge prior to argument. See Paragraph VII(B) of the Court's Internal Operating Procedures (1985 ed.). Many observers argue that the collegial process is better served by assigning cases after oral argument, when all members of the division have had an opportunity to assess the relative merits of all the cases heard during that sitting.

of Columbia statutes and for declaring the law to be applied in District of Columbia courts, and its decisions can be reviewed only by the U.S. Supreme Court. D.C. Code § 11-102 (1981); 28 U.S.C. § 1257. The Court of Appeals is highly unusual, however, in that it performs this function by three-judge panels, whereas state supreme courts ordinarily decide cases sitting en banc. The difference is vitally important. As § 3.01 of the ABA Standards emphasizes, a court which performs a law-declaring function should decide cases en banc in order to reduce the danger of inconsistent precedents, always a possibility when a court performs its work by panels. In addition, en banc review assures that the result in any particular case will be less influenced by the identities of the judges assigned to hear it. It requires decisions to be reached through the collegial process that is the hallmark of appellate courts, with the views of all members of the court reflected in the final opinions.14/

Of course, there are mechanisms in the present system intended to assure consistency between division decisions and to maximize participation by all members of the Court in important law-declaring cases. These are the provision for en banc argument and the "five-day rule" under which draft division opinions are circulated to all members of the Court for comment prior to

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14/ We acknowledge that federal circuit courts routinely sit in panels to decide cases. As we discuss more fully below, however, the analogy to the circuit courts is inapt here because the law-declaring function with respect to federal law ultimately resides in the U.S. Supreme Court.

publication. Based on our interviews with members of the Court, however, neither mechanism is achieving the goals of consistency and collegiality in the decision-making process to the desirable and appropriate extent.

First, individual members of the Court stated that workload constraints prevent them from hearing more than ten or so cases en banc each year, thus ruling out a fair number of other cases raising issues they believed were otherwise important enough to be considered by the full Court.15/ They indicated that, as a practical matter, en banc review is limited to cases where it is absolutely imperative, and those represent only about one-third of the cases deemed to merit en banc review. The view was also repeatedly expressed that where judges can "live with" or "write around" a particular panel decision, they are likely to vote against rehearing en banc.

Second, with respect to the five-day rule, our interviews disclosed that individual judges have varying views about the proper role of a judge who does not sit on a case, but who is presented with a draft opinion for comment. In some instances, a judge will provide extensive comments and may challenge the reasoning used or the result obtained by the division. In other situations, a judge (or a judge's law clerk) will simply check

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15/ The number of cases heard en banc from 1982 to 1988 has been: 1982-12; 1983-6; 1984-6; 1985-5; 1986-10; 1987-11; 1988-11.

the opinion to make sure that there are no inconsistent cases about to be issued from his or her chambers.

The five-day rule can perform a valuable function in preventing different divisions of the Court from directly contradicting each other in separate cases, but this mechanism is of quite limited utility (and desirability) insofar as the law-declaring function of the Court is concerned. Should a particular case raise challenging legal issues that excite the interest of judges who were not sitting on the division, the litigants and the public are best served by having those members of the Court, and indeed all members of the Court, read the briefs, review the record, and hear oral argument before a decision is actually rendered. Written comment from non-division members is a very poor substitute for fully informed consideration by all members of the Court. The Court's current workload severely limits the number of cases where such informed consideration by the full Court is practicable.

While predictions are chancy, it is difficult to see how the demands on the Court could be expected to subside. A number of complex statutes enacted fairly recently can be expected to gen-

erate significant numbers of appeals.16/ More civil appeals will also inevitably result from new common law theories,17/ and the trend toward litigating federal civil rights claims in the local

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16/ For example, the Council of the District of Columbia has enacted complex statutory schemes for the protection of the mentally retarded, nursing home residents, and the incapacitated. See the Mentally Retarded Citizens Constitutional Rights and Dignity Act of 1979, D.C. Law 2-137, §§ 6-1901 et seq. (1981); the Nursing Homes and Community Residence Facilities Protections Act of 1985, D.C. Law 6-138, D.C. Code §§ 32-1401 et seq. (1988 repl. vol.); and the District of Columbia Guardianship, Protective Proceedings and Durable Power of Attorney Act of 1986, D.C. Law 6-204, D.C. Code §§ 21-2001 et seq. (1988 cum. supp.). The Council has repealed prior workers' compensation legislation in the District and enacted a significantly different scheme, which has been generating scores of new appeals. See the District of Columbia Workers' Compensation Act of 1979, D.C. Law 3-77, D.C. Code §§ 36-301 et seq. (1988 repl. vol.). The Council has also enacted several new regulatory schemes likely to generate significant litigation. See, e.g., the District of Columbia Taxicab Commission Establishment Act of 1985, D.C. Law 6-97, 40 D.C. Code §§ 40-1701 et seq. (1986 repl. vol.) and the District of Columbia Alcoholic Beverage Control Reform Amendments Act of 1986, D.C. Law 6-217, D.C. Code §§ 25-101 et seq. (1988 cum. supp.). It has enacted complex legislation to govern employment and contracting by the District of Columbia government. See the District of Columbia Government Comprehensive Merit Personnel Act of 1978, D.C. Law 2-139, D.C. Code §§ 1-601.1 et seq. (1987 repl. vol.) and the District of Columbia Procurement Practices Act of 1985, D.C. Law 6-85, D.C. Code §1-1181.1 et seq. (1987 repl. vol.).

In addition, significant litigation will in all likelihood result from laws the electorate has adopted directly, such as the District of Columbia Right to Overnight Shelter Initiative Act of 1984, D.C. Law 8-146, D.C. Code §§ 3-601 et seq. (1988 repl. vol.). Much litigation has already resulted from the Child Support Guidelines, 115 Wash. D. L. Rptr. 2269 (Oct. 27, 1987), adopted pursuant to congressional legislation, namely Pub. L. 99-573, 100 Stat. 3228 (1986), codified at D.C. Code § 11-1732(j)-(4)(A) (1988 cum. supp.)

17/ See, e.g., Sandoe v. Lefta, No. 86-1506 (Dec. 15, 1988); Nelson v. Nelson, 548 A.2d 109 (D.C. 1988); District of Columbia v. Peters, 527 A.2d 1269 (D.C. 1987); Boykin v. District of Columbia, 484 A.2d 560 (D.C. 1984).

courts.[18] The increase in drug-related crime and its attendant violence is certain to lead to more litigation, and more appeals, on the criminal side of the docket.

In sum, the Court of Appeals cannot function acceptably and keep its docket current, much less reduce the tremendous number of cases in its backlog, without some form of relief.

III. Proposed Solutions.

A. Reducing the Number of Appeals.

The Committee studied the system used by the Supreme Court of New Hampshire, whereby litigants must in essence persuade the Court to review their cases. This system amounts to one in which the only appellate court has discretionary power to refuse review. The Committee believes that neither the bar nor litigants in the District would accept such a system. There are strong arguments against doing so.

As stated in the Commentary to § 3.10 of the ABA Standards-Appellate Courts, "[t]he right of appeal . . . is a fundamental element of procedural fairness as generally understood in this country." For that reason, § 3.10 provides that litigants should have a right to appeal except in cases involving minor matters, and that this right should involve, among other things, "thought-

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18/ See, e.g., Henderson v. District of Columbia, 493 A.2d 982 (D.C. 1985); Fisher v. District of Columbia, 498 A.2d 198 (D.C. 1985) vacated 591 A.2d 28 (1986) remanded with instructions to dismiss as moot, 514 A.2d 801 (1986).

ful consideration of the merits by at least three judges of the Court."

The Douglas Report rejected the approach of restricting appeals as of right and substituting a procedure, similar to that then in use in Virginia, in which the high court's jurisdiction was essentially discretionary. Douglas Report at 103-104. It did so principally because "the efficiency [of the Virginia system] has been achieved at a price to litigants in the quality of appellate justice which most Americans and their lawyers would or should be unwilling to bear." Id. at 104, quoting P. Carrington, D. Meador and M. Rosenberg, Justice on Appeal 133 (1976). Virginia has since itself significantly modified its former system in which litigants had essentially no right of appeal, but only an opportunity to petition for review.

B. Increasing Non-Judge Resources.

It is clear that increasing the number of law clerks or court-employed counsel cannot, without more, solve the Court of Appeals' workload problem. The crux of that problem, according to the judges, is that there is not enough "judge-time" available; there are simply too many cases on the docket for the judges to devote adequate attention to them. In too many cases, the law is declared essentially by one judge. En banc review is not possible in more than a handful of cases each year. In the opinion of some of the judges, there is already too much delegation to staff counsel and law clerks on motions and cases that do not involve published opinions.

There are powerful arguments that these judicial functions should not be delegated to non-judges, particularly to those who have limited legal or other experience. Perhaps to counter the argument that some cases simply are not worth much attention, the introduction to the ABA Standards-Appellate Courts states:

> [I]t is important to emphasize that the quality of appellate justice is to a large degree determined by that attention given to the merits of cases that are of little interest to anyone but the immediate parties. All appellate courts should remain mindful that every case, whether it has general importance or not, is important to the immediate litigants.

This does not mean, however, that some additional legal-trained court staff should not be employed. In some circumstances (if, for example, the court of last resort were to screen cases to determine whether they ought to be taken for immediate review or sent to the intermediate court), additional staff counsel would significantly enhance efficiency. See n.28, infra below.

It has also been suggested that hiring experienced counsel as commissioners to perform functions such as narrowing issues and promoting settlements may substantially reduce the backlog. However, recent experience in having senior judges undertake such functions has revealed that they are likely to be of limited assistance in relieving the judges of having to decide cases.19/

19/ The Clerk's office informs us that, in 1988, 71 cases were selected for such settlement conferences, and that only 7 of them Footnote continued

C. Temporary Expedients: Senior Judges, Temporary Judges.

A number of temporary expedients have been suggested to enable the Court of Appeals to cope with its workload problem. It has been pointed out that the State of Arizona used "temporary judges" -- i.e., private counsel appointed as judges for limited terms -- to reduce its backlog problem.20/ Another suggestion was that more intensive use of senior judges, coupled with the use of several experienced counsel as commissioners, might suffice to reduce the backlog.

The premise of these proposals is that the Court's workload problem is temporary; that the solution requires no more than a one-time effort to reduce the accumulated backlog of filings and that, thereafter, the Court should be able to remain current with minor additional assistance. But this premise will not withstand analysis.

The Court's backlog has continued to grow even though the Court has increased its output. As indicated above, while the Court has increased the number of cases it decides by opinion, filings have also increased. As a result, since 1980, the Court has only disposed of as many cases in a given year as were filed in that year on two occasions. The Court has not been able to stay current even though available data reveal that it has been

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were actually resolved in that process.

20/ See American Bar Association Lawyers Conference Task Force on Reduction of Litigation Cost and Delay, Defeating Delay 44; Ariz. Rev. Stats. §§ 12-145, 12-146; Admin. Order of May 7, 1984, of Ariz. Ct. of Apps., Division 1.

disposing of more cases per judge than similarly situated courts elsewhere.21/

Furthermore, it has been able to raise the number of cases disposed of to the current level only at significant cost. One such cost is apparent in the statistics: a growing proportion of cases is now decided by unpublished opinions. This indicates that at least some cases which do indeed merit the additional judicial consideration entailed where an opinion will be published are not now receiving such consideration. In addition, several of the judges stated that workload pressures prevent their according adequate consideration to cases. Thus it appears not only that the Court has failed to keep pace with filings, but that its efforts to do so have adversely affected the quality of justice the Court has been able to dispense.

But even if the premise of the proposed temporary expedients were correct, there are either doubts about their efficacy, or strong arguments against them in principle, or both.

Since the Horsky Report, the Court has been utilizing senior judges to the full extent those judges have been available. It is doubtful that substantial additional resources can be marshalled from this quarter. First, many of the judges who have

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21/ See National Center for State Courts Report, Appendix 3, Table 4, setting forth statistics for state courts of last resort with only limited discretionary jurisdiction in states without intermediate courts. According to that table, in the District, there were nearly 170 dispositions per judge per year. Only one other Court was even close to this (160 dispositions per judge); only two were over 100 dispositions per judge per year.

taken senior status in recent years have embarked upon new careers off the bench or have elected to devote considerable time to non-judicial activity. Second, there are legislatively-imposed limitations upon the extent to which senior judges can be compensated for their judicial efforts.22/ Third, it is simply not realistic to expect a judge who has retired to work as hard at being a judge as if he or she had not retired. The Clerk's Office informs us that its experience has been that, for those senior judges who continue to sit on cases regularly, three senior judges resolve approximately as many cases as one judge in regular, active service. There is no reason to expect more in the future, nor would it be either fair or reasonable to demand more from senior jurists.

The Douglas Report noted that the use of temporary judges "is not now a favored solution to appellate congestion and appears to constitute primarily a footnote to appellate court history." Douglas Report at 73. This is because, as the Commentary to § 3.01 of the ABA Standards points out, the use of auxiliary judges "deprives litigants of the opportunity for full consideration of their contentions by members of the court" and because the functions auxiliary judges perform "can ordinarily be per-

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22/ See D.C. Code § 11-1565 (1988 cum. supp.). The senior judges earn at the same daily rate as active judges but can only receive the difference between their retirement payment and an active judge's salary. Under the statute, one of the currently active senior judges can only be compensated for 33 workdays per year; a second for 60 days; a third for 108 days; and the fourth for 147 days.

formed as efficiently, and with greater authority, by an intermediate appellate court."

Temporary expedients, then, do not constitute a realistic solution to the Court's workload problem, both because that problem is not a temporary phenomenon, and because such expedients do not provide sufficient resources of an appropriate kind to alleviate the problem significantly.

D. An Intermediate Court of Appeals As Against Adding Judges To The Present Court.

Both the Douglas and Horsky Reports debated the relative effectiveness of adding judges to the present court, on the one hand, and creating a new intermediate appellate court, on the other. The Douglas Report rejected adding more judges; the Horsky Report recommended temporarily adding two to three judges to the Court of Appeals, in large part because the Horsky Committee believed that the idea of an intermediate court was not "politically feasible." See Horsky Report at 12-13; 19-21. See also id. at 7-12. Compare Douglas Report at 21-24; 68-70. As the Douglas Report points out (at 70), adding more judges only increases judge resources when a court sits in panels, and therefore its utility is closely tied to the advisability of the panel system. Id. at 69-70. Indeed, adding judges can only exacerbate the defects of the panel system. Therefore, these alternatives cannot be meaningfully assessed without adverting to the relative merits of a unitary appellate court which ordinarily sits in panels, as compared to those of a system in which a highest court of last resort sits en banc assisted by an intermediate court of

appeals.

There is wide agreement that an en banc court of last resort/intermediate court system is the preferable model. The Commentary to § 1.13 of the American Bar Association's Standards Relating to Court Organization (ABA Standards - Court Organization) states:

> [S]uch expedients as dividing the highest appellate court into panels . . . dilute the appellate functions, particularly that of developing the law. Adding additional judges to a highest court may actually slow down its operation rather than speeding it up. Hence, when improvements of efficiency of operation in the highest court cannot be achieved without dilution of the appellate function, the appropriate solution is the creation of an intermediate appellate court.

Furthermore, § 3.01 of the ABA Standards-Appellate Courts provides: "In hearing and determining the merits of cases before it, the supreme court should sit en banc . . . The Court should not sit in panels or divisions. . . ." The principal reason for the en banc requirement is to bring to bear a variety of intellects and experience in a highest court's law-declaring functions. See Commentary to § 3.01. Since, in performing that function, a court "makes law" in a very real sense, the importance of having such decisions reflect a variety of viewpoints and experience is manifest. The Commentary to § 3.01 also points out that sitting in panels is a device that is typically adopted when a high court's workload becomes too large; an expedient which tends to "persist long after the point has been reached

when an intermediate court should have been established."

The states overwhelmingly agree. Only thirteen states do not have intermediate courts of appeals.[23/] Since 1980, six states have established intermediate courts.[24/] The D.C. Court of Appeals has approximately twice as many mandatory appeals filed each year as the next busiest high court that has no intermediate court. See NCSC Report, Appendix 3, Table 4.[25/]

It was largely for these reasons that both the Douglas subcommittee, which was greatly assisted by the National Center for State Courts staff (see Douglas Report at 6-7), and the National Center itself in its 1986 Report, recommended an intermediate appellate court for the District of Columbia. The Horsky Report did not disagree in principle; its view was that an intermediate court was not politically feasible, particularly when other means of reducing appellate delay had not been attempted first. The Horsky Report did, however, rely in part on the fact that the federal courts of appeals sit in panels, rarely sit en banc, and are rarely reviewed by the Supreme Court. Id., 7-8.

As the predominant practice of the states reflects, the fed-

23/ These are Delaware, Maine, Mississippi, Montana, Nebraska, Nevada, New Hampshire, North Dakota, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming. In addition, Puerto Rico does not have an intermediate court.

24/ These are Hawaii, Idaho, Minnesota, South Carolina, Utah, and Virginia.

25/ In addition, as the Douglas Report points out (at 68-69), only two states have ever had courts of last resort with more than nine judges, one of which was Virginia in 1779-1788 when the court of last resort was principally a trial court.

eral circuit court of appeals model is inapposite for a court of last resort. The circuits are not the final expositors of federal law; the Supreme Court of the United States performs that function. Furthermore, while the Horsky Report (at 8) was accurate in pointing out that relatively few decisions in any circuit are reviewed by the Supreme Court, what it overlooked is that the Supreme Court is constantly providing definitive resolutions of legal questions for all the circuits. All, or virtually all, of the Supreme Court's decisions provide definitive law for all the circuit courts of appeals to apply.[26/] In a court of last resort, where the judicial lawmaking function of a jurisdiction resides, it is particularly important that the law be declared by a collegial body, both because decisions will be the product of greater wisdom, and because of the restraint engendered when decisions are forged from a consensus of different viewpoints.

There is really no question that the state court of last resort model applies to the D.C. Court of Appeals. Except for the District's history, and the fact that many members of the District's bar practice primarily in the federal courts, there might never have been a suggestion that the federal model applies.

There are two basic objections to providing the District with the same sort of appellate system as is already afforded in

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26/ The Supreme Court decides approximately 300 cases per year, and has been averaging 170-175 resolutions per year by written opinion, with the balance by per curiam or memorandum decision. See Note, The Supreme Court, 1987 Term, Leading Cases, 102 Harv. L. Rev. 354 (1988); Note, The Supreme Court, 1986 Term, Leading Cases, 101 Harv. L. Rev. 366 (1987); Note, The Supreme Court, 1985 Term, Leading Cases, 100 Harv. L. Rev. 308 (1986).

all other jurisdictions that have anything like the amount of litigation in the District. The first is that adding another level to the court system will not significantly reduce delay because the time saved in reaching resolution in the intermediate court will be offset by the time taken up by the additional step of repairing to the court of last resort. See Horsky Report at 9-12. The second is cost. See id. at 9, 12.

There are tested mechanisms for limiting the amount of delay caused by adding another level of review. One method, adopted in Massachusetts, is to have the court of last resort determine in the first instance which cases it will hear and which ones will be heard by the intermediate court.[27/] This procedure sharply limits the number of cases needing to be heard in both courts.[28/]

27/ See Massachusetts' G.L.Ch. 211A. §§ 10-12; Rule 27.1 Mass. Rules of App. Pro. Copies of these are reproduced in Appendix C.

28/ We are informed by the Court's Office of Chief Staff Counsel that, in fiscal 1988, only 15 (or 5.7%) of the cases heard by the Supreme Judicial Court have been heard first by the intermediate court. The relevant FY 1988 statistics are:

Cases filed, intermediate appellate court		
Screened by staff	1,057	
Considered by judges	200	
Accepted by SJC	130	130
Direct appeal by right to SJC	67	67
Direct appeal by request requested	82	
Accepted by SJC	51	51
Further review of decisions by intermediate app. ct.	15	15
TOTAL		263

Furthermore, while it requires that an additional document be filed prior to briefing, neither the preparation of that document, nor the screening process, need take a significant amount of time. Indeed, since an important part of the workload of a new court of last resort would be screening cases and deciding which ones should be heard, it is likely that a ruling on whether to hear a case could be issued relatively quickly. The Committee recommends that any effort to establish a new court of last resort and a new intermediate court of appeals provide for a screening procedure along the lines of that used in Massachusetts and other states.

In Maryland, for example, without requiring an additional document prior to briefing, the highest court makes a monthly review of appellants' briefs in the intermediate court, and selects those cases that it deems suitable for immediate review. 1987-88 Annual Report of the Maryland Judiciary, p. 14. Also, a petition seeking review in the highest court may be filed by any party in the intermediate court, at any time in the appellate process. Maryland Rule 812.

Even in the absence of such a procedure, however, the appellate courts ought to be able to provide considerable expedition of the entire process through the exercise of appropriate self-discipline. The conceptual basis for the intermediate court system is division of functions. The intermediate court is an error-correcting body; the high court is law-declaring. See the Commentary to ABA Standards, §§ 3.00 and 3.10. While, as with

all such distinctions, line-drawing problems arise in sorting particular issues and cases into these categories, in practice the division of functions should be clear enough. The job of the intermediate court is primarily to decide cases and to write only enough to provide guidance to the trial court. The job of the court of last resort is to provide reasoned decisions for interpretation of law and for resolution of conflicts among panels below.

An intermediate court that need not be concerned that it is establishing the law of the jurisdiction should be able to decide cases much more expeditiously than a court of last resort. Similarly, if the court of last resort limits the number of cases it takes to those that truly merit plenary review, it should be able to dispose of such cases relatively promptly while still affording them the kind of time and careful ratiocination which cases at that level of judicial review clearly deserve.

To ensure that the high court limits the cases it reviews directly, we recommend the adoption of a "term" system such as that employed by the Supreme Court of the United States. Under such a system, requests to hear cases are considered shortly after the certiorari petitions and any oppositions are filed. Cases argued in any given term are almost invariably decided before the court takes its summer recess. This system has enormous benefits in that it forces the court to stay current with its docket, and it provides an incentive against taking more cases than the court can hear and decide in a timely fashion. Finally,

it provides litigants with some idea of when a decision will be rendered in their particular cases.

The Committee believes that such a term system should be adopted for the court of last resort in the District of Columbia. The Committee is aware of, and sensitive to, the concerns which have been expressed that an intermediate court of appeals would simply add another tier of judicial review, thus driving up the cost of litigation and needlessly extending the time it takes to obtain a final decision. Adoption of a term system for a court of last resort would respond directly to those concerns.

Ideally, the time for determining whether the court of last resort will hear a case should not be much longer than the time presently consumed in disposing of petitions for rehearing or suggestions for rehearing en banc. Moreover, in those cases where review is granted, a lawyer will be able to advise a client when a decision is likely to be rendered, thus providing a measure of certainty -- now lacking -- important to client and attorney alike. Finally, a requirement that the court of last resort must finish its business by the close of a specific term makes it unlikely that the court will take on more cases than it can handle. If any backlog should develop, that will be a sign that the court is not performing its screening function adequately.

Even without a Massachusetts-type "cert. first" procedure or term restriction on the top court, a number of jurisdictions we have examined demonstrate how an intermediate court system can

work. Minnesota, for example, created on intermediate appellate Court in 1983. In its fourth year of operation, the intermediate court disposed of its appeals in a median time of five and one-half to six months (depending on whether oral argument was heard).29/ Furthermore, only 6 percent of the cases decided by the intermediate court were reviewed by the Supreme Court.30/

Maryland has posted a similar record. In fiscal year 1988, its Intermediate Court (the Maryland Court of Special Appeals) was disposing of its cases in an average time of from 4.2 to 5.1 months (again depending upon whether oral argument was heard).31/ Petitions for review by the highest court were filed in roughly 44% of the cases. 18% of those petitions were granted,32/ which means that only approximately 8% of all intermediate court cases were also reviewed by the highest court.

If, in addition, "cert. first" and term procedures are also adopted, we are confident that dual decisions in law-declaring cases can be avoided in the great majority of cases; law-declaring cases can be resolved in timely fashion; and the error-correcting cases should be decided promptly.

29/ Report of the Chief Justice at 37.

30/ Id.

31/ 1987-88 Annual Report of the Maryland Judiciary at 26, 32.

32/ Id. at 14, 16, 31.

Without question, creating an additional court is more expensive than adding judges to the existing body. The NCSC Report (at 30) recommended that the intermediate court be staffed initially with seven judges, and that the highest court be reduced by attrition from nine to seven or perhaps only five judges. However, it also foresaw that the intermediate court might have to be expanded to nine judges. Under the NCSC proposal, then, within the first year of operation, there would be 16 judges (9 on the top court, 7 on the intermediate) and later between 12 and 16 judges (5 on the top court plus 7 on the intermediate; or 5 and 9; or 7 and 9). That proposal is unquestionably more expensive than the Horsky Report's recommendation (at 19-20) that three judges be added to the existing court until attrition again reduces the number to nine.33/

On the basis of its own premises, however, the Horsky Report's recommendation is now unequal to the task. That recommendation was premised on a projection that new filings would plateau near 1200 per year. Instead, they jumped to over 1500 per year in 1981 and have remained well over that level for the rest of the decade (reaching a high of 1828).34/

33/ This is, of course, by no means the only way such a court of last resort could be seated. Unquestionably, the members of that Court should be drawn from the present D.C. Court of Appeals but there are other less sweeping ways to accomplish that.

34/ For that reason, and because the proposal "would not cure the fundamental problem of a highest court of a jurisdiction not sitting en banc", Mr. Horsky testified before Congress in 1988 that the Horsky Report's recommendations were not a solution to current problems. See Statement of Charles A. Horsky Before the Committee on the District of Columbia, U.S. House of Representatives, on H.R. 4366 at 3.

The most limited proposal put forward to address the problem is to add two permanent judges to the present court. That would leave the court with an odd number of judges, to prevent ties in en banc sittings. However, if the court of last resort were ultimately to be constituted of 5 judges (as envisioned, for example, by H.R. 4366, introduced in the last Congress), the additional costs of creating an intermediate court might be as little as those attributable to one more judge (if the intermediate court can be kept at seven).35/ Furthermore, while the inevitable occurrence of vacancies and recusals renders a five-judge high court less than ideal, it would nevertheless be a quantum improvement over the present situation: while occasionally decisions would be the product of only four, or perhaps even three, judges, now they are often the product of one or two.

Probably, however, the court of last resort should consist of seven judges. That is what the ABA Standards generally recommend. See the Commentary to § 1.13, ABA Standards-Court Organization (the "most common and generally satisfactory" size for a court of last resort). Hence, a court of appeals and intermediate court together would probably require something like five

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35/ In this regard, it should be noted that senior judges, whether of the court of last resort or the intermediate court, would only sit on the intermediate court. The active judges on the court of last resort would always sit en banc. If the number of judges on the intermediate court cannot be kept at seven, it need not be increased to the next odd number, because the intermediate court never sits en banc.

more judges than the present system, and three more than the alternative of adding judges to the present court.36/

It has been suggested that the District of Columbia is too small, geographically and in terms of population, to warrant a two-tier appellate system. The determining factor, of course, is not geography or population, but caseload. All states are larger than the District in territory, and some that manage without an intermediate appellate court have larger populations, but they have lesser caseloads.37/ Moreover, their populations do not swell like that of the District of Columbia during the working day. And, unlike the District, they are not commercial centers of an area with a population several times their own.

The ultimate question is whether the cost is worth incurring to provide those who depend on the District's courts (that is to say, all who depend on the criminal justice system in the District, as well as all those who work and do business here) with the kind of justice almost universally provided to others similarly situated. The committee has concluded that this question must be answered in the affirmative.

36/ As the NCSC Report recommends (at 31), the same clerk's office can be used for both.

37/ Mississippi, for instance, has almost four times the population of the District of Columbia and one appellate court of nine justices. But, in 1987, it had only 58% of the appellate caseload of the District, and appellate docket delay that year in Mississippi was even greater than in the District of Columbia. Mississippi Supreme Court, Annual Report, 1987, at 3-4. Nebraska, with a population more than twice that of the District of Columbia, had only 78% of the appellate caseload of the District; and the Nebraska Supreme Court during its 1987 fiscal year disposed of only 81% of the number of cases docketed. In each of the three previous years, it had also fallen behind. Nebraska Supreme Court, 1987 Annual Report at 1.

IV. Transcripts, Record, and Other Measures.

The Court of Appeals' Rules contemplate that the record on appeal should be transmitted from the Superior Court within 60 days from the filing of the notice of appeal. D.C. App. R. 11(a). The Rules contemplate, as well, that any transcripts needed to complete the record will also ordinarily be transmitted within 60 days of the notice of appeal. See D.C. App. R. 11(b). The Clerk of the Court of Appeals informs us that, with very few exceptions, records are now being transmitted within the 60-day period. However, records are not being completed for 7-8 months due to delays in receiving transcripts. In 1988, the average time from notice of appeal to completion of the record was 227 days; in 1987, 256 days; in 1986, 197 days. Indeed, there has been significant noncompliance with the 60-day standard for over a decade. The delay between notice of appeal and completion of the record was 124 days in 1978, and the delay has become progressively greater virtually every year since.

A. Transcripts

The Court Reporter Rules, as set out in the D.C. Rules Annotated, were promulgated effective March 12, 1973 by then-Executive Officer of the D.C. Courts, Arnold Malech and approved by then-Chief Judges Reilly and Greene. Those Rules required that all transcripts 300 or more pages in length be prepared for use on appeal within no more than 60 days. The new Manual, promulgated effective November 1, 1988 by Larry P. Polansky and Chief Judges Pryor and Ugast, has a phased schedule of time periods (see page 28) which does not require appellate transcripts (pre-

sumably of any length) to be available within 60 days until January 1, 1991 and thereafter.

Presently, transcripts need not be prepared in any less than 180 days; after July 1, 150 days; after January 1 of next year, 120 days; and after July 1 of next year, 90 days. This, notwithstanding the disclaimer on "Construction" in the current manual, which states that "this handbook is not intended to conflict with any relevant statutes or rules of court. In the event of such conflict, statutes and/or rules of court shall control."

None of the delay regarding transcripts is necessary. As the National Conference for State Courts observed in 1986, in the Montgomery County Circuit Court, transcripts are routinely available within 10 days. NCSC Report at 15. In pilot projects in Chicago, Phoenix, and Detroit, transcripts are available the same day. D. Moss, "Courtroom of the Future is Here", ABA Journal, February, 1989 at 26.

The Montgomery County system involves audio recording of proceedings and the use of contract reporting services rather than official court reporters. NCSC Report at 15. The audio recording system was modelled on the system installed (although almost never used) in Superior Court. The ABA Journal has pointed out that new, relatively low-cost technology is available that could entirely replace court reporters. K. Kloges, "Court Reporters on the Way Out?", ABA Journal, February, 1989 at 28.

The District of Columbia court system should no longer tolerate delays in preparing transcripts beyond 60 days. To ensure that such delays no longer occur, the highest court in the jurisdiction should be clearly placed in control of the administration of the court system. In the vast majority of other jurisdic-

tions, either the chief judge (or justice) of the jurisdiction's highest court, or the highest court, controls the administration of the court system.38/ This should be accomplished in the Dis-

38/ According to a National Center for State Courts study, in 21 state or territorial jurisdictions, the Chief Justice of the highest court exercises administrative authority over the state court system; in 17 other states, the Chief Justice exercises this authority on behalf of the Supreme Court, with the court retaining ultimate authority; in 9 other states, the Supreme Court exercises the authority itself. Three states, including D.C., place system administrative authority in a judicial council or its equivalent. Four jurisdictions make no provision for exercise of system-wide authority, and New York has a mixed system of authority shared by its highest court, the Chief Judge and a board of intermediate appeals judges.

National Court Statistics Project, National Center for State Courts, State Court Organization, 1980 (1982). The following table sets forth which jurisdictions have which system.

Chief Justice	Supreme Court Exercised by Chief Justice	Supreme Court
Alaska	Alabama	Idaho
Colorado	Arizona	Massachusetts
Connecticut	Arkansas	Montana
Delaware	Florida	North Carolina
Hawaii	Illinois	Oklahoma
Indiana	Iowa	Pennsylvania
Kentucky	Kansas	Tennessee
Maine	Louisiana	Texas (Criminal)
Maryland	Nebraska	Vermont
Michigan	New Hampshire	
Minnesota	New Mexico	
Missouri	Ohio	
Nevada	Oregon	
New Jersey	Rhode Island	
North Dakota	Washington	
South Carolina	West Virginia	
South Dakota	Wyoming	
Wisconsin		
American Samoa		
Puerto Rico		
Virginia		
Judicial Council	**Other**	**None**
California	New York	Georgia
Utah		Mississippi
D.C.		Guam
		Virgin Islands

trict of Columbia by repealing D.C. Code § 11-1701(a) and by enacting a provision pursuant to which the chief judge or chief justice of the highest court in the District, is responsible for the administration of the court system. That is the system employed in the majority of other jurisdictions. See note 38.

Even prior to this legislative change, the Joint Committee should direct that, if delays in producing transcripts still regularly exceed 60 days by January 1, 1990, alternative systems will be employed as needed to insure the elimination of such delays, including, where the equipment is available, the utilization of audio recording facilities and engagement of contract reporters.

The Joint Committee should also immediately direct that computer-aided transcription must be employed by all court reporters within 60 days of the issuance of the direction.

B. Records

The National Center for State Courts also recommended that the Court consider using original trial court files as the record on appeal (NCSC Report at 15-16). On the basis of current information that, with rare exceptions, trial records are being transmitted within 60 days from the notice of appeal, the Committee believes that such a change is not presently necessary.39/

39/ Apparently, the staff of the Appeal Coordinator's Office has been augmented by additional permanent positions.

Moreover, given the volume of proceedings and appeals in the District's system, it is prudent to retain the original records in Superior Court and provide copies to the appellate court.

The Horsky Committee recommended that, in agency proceedings, the agency provide only those parts of the record actually designated by parties. Horsky Report at 29. Such a procedure might not be prudent in small agency proceedings, in which a significant number of parties are pro se.[40/] However, there is clearly merit to the proposal for transcripts in very large agency proceedings, such as some of those involving the Public Service Commission or the District's Contract Appeals Board. The Committee recommends that, in cases in which the agency transcript exceeds 500 pages, the agency provide the Court with only those parts of the transcript designated by the parties.[41/]

V. The Dissenting Views.

A. Setting the Record Straight.

The Committee struggled with trying to diagnose the causes and nature of the Court of Appeals' workload problems for almost 18 months. It invited the views of everyone it thought might have insights and heard everyone who chose to address these problems. At the Committee's determinative decisional meetings,

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40/ There are reportedly many pro se litigants in appeals from denials of welfare benefits and in unemployment cases, for example.

41/ The Clerk of the Court informs us that, in practice, in some very large agency cases in the past, the Court has ordered the parties to submit only partial transcripts and to agree on those parts to be filed.

many Committee members stated that they had at one time inclined to the view that an intermediate court might not be necessary. Yet, with only three dissents, the Committee overwhelmingly decided that establishing such a court was the only way out of the Court's longstanding and increasing problems of backlog and delay.

Against this history, it is simply inaccurate to suggest that the Committee began with that conclusion and shaped its premises accordingly. See dissenting views at 10 ("we fear the problem is posited to justify the recommended solution");[42/] Nebeker dissent at 1 ("the majority report . . . is based on erroneous premises used to justify the result"). We reject out of hand the suggestion that this Committee was animated by ulterior motives ("Only lawyers would benefit financially from the extended litigation [that would result from the Committee's recommendation]", dissenting views at 12).

Nor is it either fair or accurate to suggest that the Committee denigrates the performance of the Court of Appeals. In our view, the Court of Appeals is doing an outstanding job under very difficult circumstances. It is that very fact which deepens our concern about the quality of justice that the Court is now able to dispense. But our concerns are also voiced in the views of the judges who sit on the Court. In this regard, we recognize that it was difficult for the judges to state frankly that the Court's circumstances have caused them to produce work which does

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42/ We refer to the principal dissent as "dissenting views," and distinguish it from Judge Nebeker's dissent.

not reflect what in their view the litigants deserve. We commend both their candor and their courage in doing so.

B. The Major Arguments.

The principal dissent argues that, because of increased efficiency in recent years, the Court of Appeals can now keep current with increased filings. Not only that, they urge, the Court can now actually dispose of the enormous and increasing backlog it has accumulated over 15 years in a single summer! Dissenting views at 2-8. The argument is not credible on its face.

It is based on a false premise. Its main support is the statistic that, in 1988, the Court reduced the average time from submission of a case to decision to 76 days, "the shortest time since 1971, the first year that the newly reorganized Court was in operation." Id. at 3. See also 6, 7. However, as we have pointed out ante at 9-10, 11-12, the 76-day figure is highly misleading, since it was achieved by drastically reducing (to a 7-year low) the number of published decisions, which normally require months to produce, while increasing an already relatively high number of MOJ's, which take, at most, weeks. Analysis discloses not that the Court was operating at greatly enhanced efficiency; but, rather, that it was deciding a smaller proportion of its relatively more difficult cases (or was deciding a greater proportion of such cases in a manner designed for less difficult cases).

Judge Nebeker's principal argument seems to that there should be many more decisions containing little if any discussion. Nebeker dissent at 1-2. There are two difficulties with this, one philosophical and one analytical.

On a philosophical level, it cannot be gainsaid that the best assurance that appointed judges will act responsibly is the requirement that they state publicly the reasons for their decisions. This also encourages public confidence in the fairness of the process. Indeed, this would appear to be one of the principal characteristics that sets the common law courts apart from "star chamber" prerogative proceedings. Surely, the Founders would view with alarm the suggestion that judges appointed for 15-year terms should decide many, if not most, of the matters brought to them without being required to give their reasons.

Furthermore, the statistical information available shows that writing shorter MOJ's would yield only marginal savings of judge time. Dispositions by MOJ already account for more than 60 percent of the cases decided by three-judge divisions. In 1987, the Court decided 511 cases by MOJs as against 296 by opinions. Moreover, it disposed of those cases in an average of 23.8 days apiece. Only 23 of them took more than 100 days to decide. See p. 11 & n.11, supra.

Nor are significant savings of judge time likely to flow from efforts to shorten the Court's published opinions. The length of published opinions has only varied within a very narrow range over the past decade (8.1 pages to 11.5 pages). There is

no real pattern from one year to the next. Thus, while opinions in the last two years have been on the average 1.1. pages longer than they were in 1980, the Court's published opinions in 1987 were slightly shorter on average than its published opinions in 1978 (11.4 vs. 11.5 pages, respectively).

Regardless of the actual length of opinions, the fact remains that the Court is finding it increasingly difficult to issue published opinions in a timely manner. Thus, an injunction to write shorter opinions will probably not make much of a dent in the Court's backlog, and at some point excessive reliance on such a policy may compromise the Court's responsibility to define and clarify the law for the benefit of the Superior Court, the bar, and the public generally. The problem, we submit, lies not in how much a judge may choose to write in a given case, but in the volume of work which the judges are presently asked to shoulder before they ever set pen to paper. It is that latter problem which must be addressed and the Committee has concluded that simply tinkering with the current system will not be enough.

C. Comparisons with the Circuit.

We have shown that analogizing the D.C. Court of Appeals to the D.C. Circuit is not appropriate in light of the different functions they perform in their respective systems. The D.C. Court of Appeals finally declares the law of this jurisdiction, while a federal circuit court functions as an intermediate court in the federal system. See ante at 23-24. We also submit that any comparison of the output of the D.C. Court of Appeals and the Circuit is inappropriate.

The nature of the D.C. Circuit's caseload is very different from that of the D.C. Court of Appeals, and the nature of the bar practicing before the Circuit is also different. Resources available to the D.C. Circuit are vastly more abundant and arguably of superior quality.43/ In addition, the Circuit does not have responsibility for regulating and policing the conduct of a huge bar and preventing the unauthorized practice of law, as does the D.C. Court of Appeals. These responsibilities have occupied an inordinate amount of this Court's judge-time in recent years.44/

Moreover in order to calculate the number of decisions issued per judge in 1988, the dissenters posit that there were 10 D.C. Court of Appeals judges. Id. at 5, n.7. This does not take into account the not inconsequential fact that the Court was short one of its nine judges in regular active service for more than half that year.45/ Further it counts the senior judges, using the formula that three senior judges equal one judge. Id. That, in turn, does not take into account that one of those senior judges was not used at all to hear cases for virtually all

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43/ Every Circuit judge has three law clerks. Judges on the D.C. Court of Appeals have two. In addition, the Circuit has 12 staff counsel, compared to the D.C. Court of Appeals' 5.

44/ See, e.g., 117 D. Wash. L. Rep. 945 (May 7, 1989) (Revision of admissions requirements, including technical matters such as whether equipercentile or standard deviation method should be used for scoring standardized tests); 116 Wash. L. Rep. 1892, (Sept. 13, 1988) (Revised standards of professional conduct).

45/ Judge Schwelb was not appointed to fill the vacancy left by Judge Nebeker (in the fall of 1987) until May, 1988 and did not begin sitting until June of that year. Chief Judge Pryor retired November 1, 1989 and his vacancy has not yet been filled.

of 1988, because the Court was using him in an attempt to establish a settlement process. Nor does it take into account that another of those senior judges did not sit at all for much of that year. The majority discussed that ratio as only applying to those senior judges who did, in fact, continue to sit regularly. Probably a fair calculation would have assumed 8.75 judges for that year.46/ which produces approximately 84 opinions per judge, rather than the 73.8 on which the dissenters so heavily rely. Id. at 5, 6.

In addition, it is not clear how accurate the 100 opinions per circuit judge figure used by the dissenters actually is. In the first place, Judge Mikva, cited as the source for that figure, refers to the "average federal judge," not specifically to the D.C. Circuit. As to the Circuit, all we know is that, while it had 11 judges in active service in 1988, those judges and the visiting and district court judges sitting by designation together issued approximately 350 published opinions.47/ This amounts to something less than 32 published opinions per regular active Circuit judge.48/

Using the same method of calculation, the approximately 8.5 judges in regular active service on the D.C. Court of Appeals in

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46/ The senior judges together sat on 21 regular calendar cases (i.e., those likely to produce opinions), while the judges in regular service averaged 84 sittings on such cases.

47/ Information obtained from the Circuit Clerk's Office.

48/ How much less depends on how many of these opinions were written by judges sitting by designation, a figure not readily available. What is known is that the Circuit had judges sitting by designation continually in 1988.

1988 accounted for 249 published opinions, or an average of over 29 published opinions per judge. Thus the difference in number of published opinions per judge is more like 3 opinions per year. And, in any event, as shown above, each Circuit judge has 4 lawyers to assist him or her, while each Court of Appeals judges has an average of 2.6 and the Court of Appeals does considerable rule-writing and other work in connection with regulating the bar that the Circuit does not do.

D. Premises.

One of the dissenters' premises is that there are not enough "significant" law declaring-cases to warrant a separate court. The majority argues in support of that premise that no more than 25 or 30 cases a year warrant en banc consideration. Dissenting views at 8-9. In support of that argument, they cite judicial statements to the effect that the court hears only about one-third of the cases that merit en banc treatment, and point out that, over the last six years, the Court has been averaging about 9 en banc hearings a year. Id. at 8. Thus, they conclude that the number of cases meriting en banc consideration must be less than 30 per year.[49/] However, such estimates are wrenched from their context, which was an inquiry into how many cases that

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49/ Even if that low estimate were to turn out to be accurate, it would not argue against organizing the appellate system to permit those cases deserving of en banc consideration to be so heard and decided, without impairing the ability of the appellate court to dispose of more routine cases in a timely fashion. If there is judicial time available on the highest court which is not required for en banc cases, justices can be assigned to sit on panels of this intermediate court by designation.

should be receiving en banc consideration are not in fact being heard en banc under the current system. Presently, en banc review is by necessity and by Rule, limited to extraordinary cases. What the judges were telling the Committee is that, even under this exceptionally demanding standard, there were many more cases warranting en banc consideration than were receiving it.

In effect, despite a nod in the direction of providing some help in the form of additional judges, the dissent would perpetuate institutional anomalies which cause the law to be declared in this jurisdiction on a regular basis by as few as two judges, one of whom often cannot spare the time to be heavily involved in how the decision is written.

Another of the dissenters' premises is that the Court's workload should not increase significantly in the near future. Dissenting views at 14-15. This argument is based on statistics purportedly showing that workload trends in the Superior Court make appeals less likely. The statistics are not persuasive. Chief Judge Ugast testified before Congress on May 11, 1989 that the Superior Court needs at least 8 additional judges, even without having to cope with additional cases resulting from increasing the numbers of police and prosecutors. See Judge Ugast's May 11, 1989 testimony before the Subcommittee on Fiscal Affairs and Health of the House Committee on the District of Columbia. Unless Judge Ugast's judgment is wildly inaccurate, more, rather than fewer, appeals seem almost certain.

Nearly a decade ago, the Horsky Committee predicted that an intermediate appellate court might prove unnecessary because it

was thought that the Court's workload was not likely to increase significantly in future years. That prediction was wrong. The worsening crime problem in the District is only one among many current indicators which clearly tell us that there is today even less reason for confidence that the dissenters' similar prediction will prove any more prescient.50/

VI. CONCLUSION

It is the Committee's view that more judges are demonstrably needed to process the current appellate caseload and to hand down correct decisions that are supported by reasoned explanations. The experience of other jurisdictions manifests that an appellate bench of the size now required for the District of Columbia is best and most efficiently organized in two tiers rather than one. Therefore, the Committee recommends creation of an intermediate court of appeals for the District of Columbia.

50/ It bears noting that while the Court's backlog and delay problems are significantly worse than when the Horsky Report issued, the dissenters believe the Court can eliminate the accumulated backlog with even fewer additional judges (two) than the Horsky Committee thought necessary (three) nearly ten years ago.

DISSENT AND MINORITY REPORT

Although we agree with the majority's conclusion that more judicial resources and administrative reforms would benefit the District of Columbia Court of Appeals (D.C.C.A. or Court), we respectfully disagree with the majority's call for grafting a whole new tier onto the current court system. We view the problems experienced by the Court differently, and we believe that they can be solved by means far less drastic, less costly, and more effective -- the permanent addition of two judges, two Appeals Coordinators, and some streamlined administrative procedures.

I. Simple Administrative Reforms Can Eliminate Most of the Court's Problems

Initially, we note our agreement with the majority that the court needs to undertake administrative reforms to reduce the inordinate amount of time currently consumed for the strictly mechanical task of preparing the record on appeal.[1/] This, together with the time spent awaiting the filing of the briefs, accounts for two-thirds of the delay in disposing of cases and is

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1/ Except where noted otherwise, the statistics that follow are derived from the tables in Appendix B, which were compiled by Al Stevas, a Committee member, from statistics published in Annual Reports of the District of Columbia Courts or obtained from the Court Clerk's Office.

the source of the Court's unacceptable backlog. 2/ Excessive delay and heavy backlog indisputably are the problems experienced by the Court which evoke calls for change in the current system. Accordingly, we concur in the majority's recommendation to the D.C.C.A. that it undertake immediate administrative action to eliminate the excessive delay and backlog attributable to the court reporters and appellate counsel.

II. The Current Court is Capable of Handling Its Own Affairs

Assuming that the time from filing to submission of the briefs is reduced to an acceptable level, there is every reason to believe that the current Court, assisted by the adjustments we propose, could manage its caseload very well, alleviate any undue pressure on the judges, and continue to provide litigants and citizens of the District of Columbia with the high quality of justice to which they are accustomed. Here we part company with the majority, who premise their support of an intermediate court upon outdated statistics and erroneous assumptions.

Experience and careful statistical analysis confirm our confidence in the ability of the current Court to handle well its affairs, with some additional help. The judges currently are

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2/ We note here that the Court currently is making significant strides in reducing the time needed for preparation of records and briefs in pending appeals. In September 1988, almost 400 appeals were awaiting briefs, and approximately 1100 appeals were awaiting preparation of the record or transcript. As of April 30, 1989, less than 100 appeals were carried in the former category and about 625 were in the latter category.

issuing written opinions in record time, are disposing yearly of as many or more cases than are filed, are writing more in their published opinions and taking less time to do so, are disposing of frivolous appeals at the outset, are issuing a reasonable and adequate percentage of published and unpublished opinions, and are carrying caseloads which, although heavy, are not unbearable.

Specifically, in 1988, the judges required an average of only 76 days to enter decisions in published opinions and unpublished Memorandum Opinions and Judgments (MOJs). That is, from the time of submission or oral argument to the time of decision, only 76 days elapsed. This represents the shortest time required since 1971, the first year that the newly reorganized Court was in operation. It also represents a significant decrease from the average over the past several years (in 1987 the average time was 107 days), and is well under the time recommended by the ABA's Appellate Judges Conference Standards Relating to Appellate Delay Reduction -- 120 days.

The number of case dispositions has equalled or exceeded filings during the past two years. In 1987, the D.C.C.A. disposed of more cases than were filed, in 1988 the dispositions and filings were approximately equal, and as of April 30, 1989, the Court has thus far disposed of more cases than have been filed. Thus, the high number of filings has not stymied the Court, as the majority would have readers believe.

Also during the past two years, the judges wrote more in their published opinions and took less time to do so than they

did in 1980. On average the judges wrote 1.1 more pages per opinion, and spent 30 fewer days on each opinion.3/ This occurred despite the fact that there were 300 more cases filed in 1988 than in 1980, and is a testament to the abilities of the judges to meet the demands of their caseloads. Moreoever, we note here that the quality of the judges' opinions indisputably remains very high. Representatives of the United States Attorney's Office, the Public Defender Service, the private bar, and Chief Judge Judith Rogers herself have praised the appropriate, studied, and fair nature of the D.C.C.A. opinions.

In 1988, the Court disposed of many more cases by entering orders, rather than opinions or judgments without opinions, than it had in the past. Over fifty percent of the cases filed were disposed of in this manner, requiring virtually no judicial attention. As the Court explained in the 1988 Annual Report of the District of Columbia Courts, the new requirement for the filing of a detailed docketing statement forced the parties to

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3/ We acknowledge, however, that quantity does not always reflect quality, and we echo the belief of some reasoned jurists and litigators that many judges tend to write too much, and for too many people. Their voluminous writings tend to disrupt the educational progress of practitioners as well as law students, and may be curtailed without sacrifice. See, for example, The Lester W. Roth Lecture, "For Whom Judges Write," by The Honorable Abner J. Mikva, Judge of the U.S. Court of Appeals for the District of Columbia Circuit, 61 So. Calif. L. Rev. 1357 (1988). See also the Report of the Young Lawyers Section, infra, note 5 at 4-5 (recommending that "consideration be given in appropriate cases to adopting the federal practice of abbreviated dispositions containing a notation of precedents and perhaps a brief memorandum without a statement of the facts already well-known to the parties").

define the issues at the outset and "enhanced the Court's ability to dispose of frivolous appeals and various procedural matters at an earlier stage" (page 18).

Also, despite the majority's suggestion to the contrary, the percentages of published and unpublished opinions issued by the current Court are appropriate, and have have not been questioned seriously.[4/] Representatives of the United States Attorney's Office and the Public Defender Service opined to the Committee that the percentages of published and unpublished opinions that were of concern to them (approximately 50% of the caseload) were "just about right." Very few counsel of the private or public bars request that unpublished opinions be published, and an in-depth 1986 Young Lawyers Section study found that the Court in almost all cases was implementing accurately its own guidelines in issuing unpublished opinions. [5/] The Committee was presented with no substantive or anecdotal evidence that more opinions should be published, and indeed the majority cites none. Accordingly, the majority tilts at windmills when it

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4/ By definition, unpublished opinions, or Memorandum Opinions and Judgments (MOJs), are neither law-declaring nor error-correcting. See the D.C.C.A.'s Internal Operating Procedures VIII.D.

5/ "Report and Recommendations of the Committee to Study Unpublished Opinions of the District of Columbia Court of Appeals" by the Young Lawyers Section of the Bar Association of D.C., Mary Ellen Abrecht, Committee Chair, April 1986, at 5. In fact, this Report recommended a few changes in the guidelines to allow for the issuance of more unpublished opinions in certain defined circumstances. Id. at 8-14. A copy of the Report may be obtained by contacting the Bar Association of D.C.

attempts to suggest that the Court erroneously issues too many MOJs.

Further, the judges on the D.C.C.A. are producing on average 73.8 published and unpublished opinions per judge per year.6/ This may represent a relatively heavy caseload, but it does compare favorably with the caseload carried by federal circuit court judges, which, according to one knowledgeable source, averages 100 signed and unsigned opinions per judge per year.7/ Moreover, some judges are current with their present caseloads, proving that the workload is not unmanageable.

We believe it noteworthy that the Court has accomplished all of this at a time when it seldom was at full complement, due primarily to delay in the judicial appointment process. Our confidence in the current Court accordingly is justified, and the majority's insistence on the Court's inability to deal with its own affairs falls of its own weight.

In declaring that nothing short of creating a new court could effectively assist the current Court with its problems, the majority report fails to give sufficient weight to the statistical trends of the past few years, preferring to base its

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6/ In 1988, the judges wrote a total of 738 published and unpublished opinions. Assuming that the D.C.C.A. at any given time consisted of ten judges (to encompass vacancies, recusals, the Clerk's Office estimate that generally three senior judges perform the work of one active judge, and each senior judge's current commitment to perform one-half the work of an active judge), each judge produced 73.8 opinions during the year.

7/ See note 3, supra.

analysis on figures representing the past eight, nine, ten or eleven years. The majority thus fails to give sufficient credence to the abilities of the current Court to dispose of as many cases as are filed (or more), to render opinions in an average of only 76 days, to dispose of frivolous cases much more quickly and briefly, and to begin to effectuate other administrative reforms.

Additionally, the majority relies on tracking the number of "filings" or "pending cases" to demonstrate the "overwhelming" number of cases awaiting judicial attention. Yet the experience of the past decade clearly shows that approximately 50% of the filings "melt" out of the system requiring little or no attention from the judges. By "melt" we mean that the cases are disposed of by one-judge orders which reflect either that the parties reached a compromise or that one party decided for whatever reason not to proceed with the appeal. An additional 30% of the case are decided by non-precedent setting, unpublished MOJs, and only 20% of the cases are error-correcting or law-declaring and are decided by published opinion. Assuming, as stated above, that in 1988 each judge put pen to paper in an average of 73.8 cases, then each judge issued published opinions in an average of 29.5 cases last year. This may be considered a substantial undertaking, but it certainly does not reflect an "overwhelming" backlog of cases on judges' desks, especially in view of the fact that judges are taking on average only 76 days to consider, write, circulate and publish each opinion.

Moreover, we note that even the number of filings, relied upon so heavily by the majority, peaked in 1984 and has decreased somewhat since then.

In sum, during recent years, experience and statistics confirm that the Court is issuing more quality opinions more quickly, is conforming to its own guidelines concerning the percentages of published and unpublished opinions, is according to each judge a manageable, if heavy caseload, and is making some progress in expediting the decisional process. Accordingly, the premises cited in the majority report -- that "the court cannot keep up with its docket," "the court is being asked to hear more cases," "these cases are taking longer to decide," "the court is also finding it harder to dispose of cases in a timely manner" (pages 5 and 6) -- are unfounded, and the reasoning that follows is flawed.

The only significant cog in the turning wheels of appellate justice is, as described above, the purely mechanical problem of obtaining the transcripts and briefs in a timely fashion. Once that problem is solved, any perceived "need" for major reform -- such as the addition of a whole new layer of appellate bureaucracy -- dissipates. To be sure, should the Committee's unanimous recommendation concerning the rapid production of transcripts be implemented, it appears that the Court temporarily would be inundated with a significant number of cases awaiting disposition. We believe that this "balloon effect" would be temporary, given the proven ability of the court to dispose of at least as many

cases as are filed each year, and could be taken care of a number of ways. One method would be to encourage all the active and senior judges, as well as the staff attorneys and other employees, to devote extra time and effort throughout the months of July and August (traditionally slow months for the Court) to handle the added caseload. Similar efforts have worked to reduce large backlogs in other jurisdictions and should not require more than one summer's worth of extra effort. Further, with the help of two more judges and Appeals Commissioners, as we recommend below, the demands on each individual judge assuredly would not be too great.

The majority errs further in positing that, under the current system, enough additional cases warrant en banc consideration to require the establishment of an intermediate court, and that decisional consistency is a problem.

It is true that some of the active judges have expressed concern about the limited number of en banc cases heard each year. However, Al Stevas, a Committee member who served as Chief Deputy of the U.S. Court of Appeals for the District of Columbia Circuit for seven years, as Clerk of the D.C.C.A. for ten years, and as Clerk of the United States Supreme Court for five years, reviewed the published opinions issued by the Court for 1987 and found few additional cases that arguably may have deserved en banc consideration. No one who has given serious attention to this issue, including majority members of our committee, has

suggested that more than 25 to 30 cases per year may warrant en banc consideration.

In fact, the majority, having cited the number of en banc cases heard each year since 1982 -- a number which averages 8.7 cases per year -- proceeds to explain that, in the opinion of one or more D.C.C.A. judges, "those represent only about one-third of the cases deemed to merit en banc review" (page 14). Thus, even the majority cannot count more than 25 to 30 cases yearly that arguably may merit en banc review. Surely the creation of a new and additional appellate court is not justified for this reason, and with the added assistance of two judges, two Appeals Coordinators, and some administrative reform, the current Court should be able to sit en banc more often, if indeed it ultimately decides to do so following its own procedural rules.8/

The additional resources we propose also should allow the judges more time to contemplate their decisions, as well as those of their colleagues.9/ The resources similarly should solve any perceived problem of decisional inconsistency, although we stress

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8/ The majority errs when it characterizes the current standard for en banc review as "limited to extraordinary cases" (page 48). The Court's Internal Operating Procedures XI.J. allows for rehearing en banc to reconsider precedent or in cases of exceptional importance. We believe this standard to be appropriate and reflective of that in other jurisdictions. The majority makes no specific argument that this standard is inappropriate, and thus fails to support its argument.

9/ Here we concur with the majority that the collegial process might be enhanced by instituting the purely procedural reform of assigning cases to judges for writing after oral argument, rather than before (page 13, note 13).

that the Committee received no substantive or anecdotal evidence to support the existence of such a problem in this jurisdiction. Indeed the majority can raise only the "possibility" of such a problem in its argument (page 12), and we fear that the problem is posited in order to justify the recommended solution.

Thus, the majority's contention that the current Court could under no circumstances control its calendar or caseload, continue to issue quality opinions, unburden the judges to a reasonable extent, consider enough cases en banc, or avoid decisional inconsistency is meritless, and is based upon outdated statistics, erroneous assumptions and flawed reasoning.

III. Dangers Would Ensue From The Addition Of Another Appellate Court in D.C.

Contrary to the contention of the majority, the best interests of the litigants, the judges and the legal system would not be served by the addition of another layer of appellate review. First, it would extend unduly the time cases would take to reach final disposition because all parties losing in the intermediate appellate court would be encouraged to file petitions for certiorari in the high court, and prevailing parties would feel forced to file oppositions. The high court then would spend time and effort reviewing numerous petitions and oppositions, and in cases where certiorari were granted, more time and effort would be expended on new briefs, oral arguments, opinion writing, dissents, concurrences, etc.[10/]

Second, the costs of the extended litigation would be significant and unnecessarily borne by the parties, including

those who prevailed in the trial and intermediate appellate courts, and by the taxpayers. One could anticipate that the taxpayers' funding of appeals under the Criminal Justice Act would increase, 11/ and the taxpayers would bear the heavy burden of funding a whole new layer of bureaucracy -- a layer of judges, staff, equipment, supplies, space and a new courtroom -- which it is estimated would cost more than $3,000,000 a year.12/ As the majority itself acknowledges, these costs would be significant, exceeding by far the relatively modest expenses involved in implementing our proposals. Only lawyers would benefit financially from the extended litigation imposed by the creation of another appellate court.

10/ The majority misleads the reader when it states that "with only three dissents, the Committee overwhelmingly decided that establishing [an intermediate appellate] court was the only way out of the . . . problems of backlog and delay" (page 41). Several, perhaps most of the members of the majority, remained unconvinced that the problems of backlog and delay would be solved by establishing an intermediate appellate court. Their reasons for favoring such a court varied, to include, for example, allowing more time for judicial contemplation, having more cases heard en banc, and following the states that have two-tiered systems.

11/ Total disbursements under the Criminal Justice Act rose from $4,980,000 in 1982 to $15,766,600 in 1987. The projected total for 1989 is $16,542,000. As there would exist no disincentive for lawyers paid under the Act to file petitions for certiorari with the high court, it is reasonable to assume that the already heavy disbursements would increase significantly.

12/ The D.C.C.A. estimated, in a separate budget filed for Fiscal Year 1990, that $1,217,480 would be needed annually to pay the salaries of 37 additional court personnel to the high court. When the added costs of judicial salaries, chambers, a new courtroom, equipment purchase and maintenance, supplies and other start-up and operating expenses are factored in, the price rises dramatically to well over $3,000,000 per year.

Third, the addition of another tier would not affect the salient characteristics of the Court's workload -- the "melt factor" would remain at 50%, 30% of the cases filed would be disposed of by MOJs, and 20% of the cases filed would be the subject of error-correcting or law-declaring opinions. Accordingly, justices on the high court would not be involved in 90 to 98% of the cases filed, and might be forced to find innovative ways to keep busy.

The total number of published opinions, which by definition encompass error-correcting and law-declaring opinions under the Court's Internal Operating Procedure VIII.D., has averaged 281 per year over the past nine years. The majority contemplates giving to the intermediate appellate court all of the error-correcting cases, and to the high appellate court all of the law-declaring cases. Putting aside the question of whether all law-declaring cases merit en banc consideration, and the majority's admission that only 25 to 30 cases per year might merit en banc consideration, it is evident that two separate courts are not needed to dispose of only 281 cases per year. Sound fiscal and public policy would not permit such a result. Assuming, moreover, that the intermediate court also would and should issue MOJs, which under the Internal Operating Procedure cited above are neither error-correcting nor law-declaring, the caseload would remain too small to justify adding another layer of process to our appellate court system.

Here we note that the majority, while pressing for a higher quality of justice which in their opinion is "almost universally provided to others similarly situated" (page 35), would allow the high court to regulate its own intake according to the number of cases that it felt it could handle within a "term". But what of those cases which are law-declaring or represent a conflict among the panels that would not be taken in order that the court remain current and handle everything "in term"? The litigants in those cases surely would not be afforded first-class justice. In our view, the current system affords to each and every litigant the fairest possible justice.

Fourth, as the new high court would sit only en banc, the justices would be free to disregard stare decisis, as enunciated in the 1971 M.A.P. v. Ryan decision.[13/] Thus, the ability of the high court to maintain uniformity of decisions and to enunciate law and policy would be undercut by its ability more easily to deviate from precedent. Our carefully developed body of law would be at risk.

We note here that in an attempt to reduce the inevitable additional delay and to streamline the more complicated procedures occasioned by the creation of two appellate courts, the majority proposes that a unified clerk's office be established. The economies of effort and money sought to be offered by a unified clerk's office may be elusive, however, for the state of

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13/ 285 A.2d 310 (1971) (D.C. Circuit decisions are considered binding precedent on the local courts, unless and until they specifically are overruled).

Virginia, which adopted a two-tiered appellate system in 1985, has found it desirable, beginning on July 1, 1989, to split its formerly unified clerk's office into two offices, one for each appellate court, and to hire additional staff and incur additional overhead.[14/] Insofar as the majority bases it recommendation about a unified clerk's office upon the Virginia model, it must be considered based on shaky ground.

We note further that the two appellate courts which currently exist to serve this relatively small city, the D.C.C.A. and the U.S. Court of Appeals for the District of Columbia Circuit,[15/] serve it well, and there is no justification for adding yet another court to the current system just because many "states overwhelmingly" have two-tiered systems.

Indeed it may be argued that the federal appellate model is more appropriate for emulation here. The systems share the Presidential appointment of judges, confirmation by the Senate, federal salary levels, some continuing service by senior judges, caseload characteristics, and high reputations. Both systems function well with provisions for panel and en banc reviews within one tier of appellate justice, and, contrary to the

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14/ This information was gained from an announcement in the National Conference of Appellate Court Clerks Newsletter, Vol. 16, No. 3, April 1989, and from a conversation with David Beach, Esq., Clerk of the Supreme Court of Virginia.

15/ The U.S. Court of Appeals for the District of Columbia Circuit decides many cases involving important local issues, e.g., prison litigation, demonstrations on federal property, discrimination against employees by the federal government, environmental impact statement cases, etc.

distinction made by the majority, both courts function in effect as courts of last resort for almost all of their cases.

Finally, we caution that a new appellate tier, once created, would be difficult if not impossible to eliminate. Accordingly, less expensive and delay-reducing alternatives should be implemented first.

IV. Proposed Adjustments To The Current System

To reduce further the backlog and delay presently experienced by the D.C.C.A., to allow the judges more time to decide cases in panels or en banc, and to permit the judges more time to review the work of their colleagues, we propose the immediate addition of two permanent active judges to the Court. This could be accomplished within the existing facilities at a fraction of the cost and expense of an added court. (We note that the Horsky Committee proposed such an addition to the Court, but unfortunately, its proposal never was implemented.)

There is every reason to expect that an eleven-judge Court could accomplish the work of the Court for the foreseeable future. The workload of the D.C.C.A. should not rise significantly in the next few years for several reasons. First, appeals from the Superior Court Criminal Division should not increase significantly. Superior Court workload statistics for criminal cases (which account for approximately 50% of the appellate caseload) reveal that the number of U.S. felony and misdemeanor cases pending at years' end has been reduced from a high of 5,816

in 1984 to 5,175 cases in 1988. 16/ The number of U.S. felony and misdemeanor cases tried before a jury or a court has decreased significantly since 1985. Dispositions by pleas of guilty have increased, but very few appeals are taken from these dispositions. And we note that even in the event that an increasing number of drug cases find their way to the D.C.C.A., these cases usually do not present complex legal issues nor do they generally result in lengthy opinions. In fact, the vast majority present appeals from denials of motions to suppress for lack of probable cause to search or arrest -- uncomplicated issues which routinely are dealt with on the summary calendar by brief MOJs. Moreover, current efforts by the United States Attorney's Office to prosecute proportionately more drug cases in the U.S. District Court for the District of Columbia will lighten the load on the District of Columbia trial and appellate courts.

Second, Superior Court statistics pertaining to civil, landlord and tenant, juvenile, and family cases (which generate approximately one-third of the appeals in the D.C.C.A.) reveal that no dramatic changes or increases in appellate case filings are expected.17/

16/ See note 1, supra.

17/ Id. Civil cases pending on the jury calendar have been reduced from a high of 4,465 cases in 1983 to a low of 3,276 at the end of 1987. The total number of cases on the non-jury calendar have been reduced from a high of 2,563 in 1983 to a low of 1,839 in 1987. The new case filings in Superior Court for civil, landlord and tenant, juvenile, and domestic relation cases, do not reflect any indications of unusual increased appellate activity.

Finally, the increased filings from District of Columbia agencies anticipated by the majority are illusory. The number of new filings from those agencies reflect a decrease from a high of 348 cases in 1984 to only 191 cases in 1988. However, if for some reason the number of such filings eventually becomes burdensome, an administrative board could be created which would act as an intermediate, specialized court of appeals to consider those cases.

To assist further the Court in streamlining its procedures and remove some of the administrative burden from the judges, we propose the continued and expanded use of mandatory pre-briefing conferences,18/ and the appointment of experienced litigators or senior judges as Appeals Commissioners to assist in the screening of cases, the sharpening of issues and the review of cases to avoid "decisional inconsistency." More specifically, the Appeals Commissioners could conduct the pre-briefing conferences, could assist the Motions Division in settling cases and/or clarifying issues, could review continually division opinions to alert the Court to possible inconsistencies, and could assist the Court in processing and disposing of Board of Professional Responsibility cases. As a result, some of the administrative burden could be

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18/ In this area the Court's experience to date has been limited, and no follow-up statistics have been compiled. Based on relevant experience here and in other jurisdictions, we believe that such conferences can be of value for purposes of issue-focusing as well as settlement.

lifted off of the judges, freeing them to contemplate further their own and their colleagues' positions.

VI. Conclusion

We believe that the majority report is based upon incomplete analysis and flawed reasoning. Experience and the most reasonable and relevant view of the statistics confirm that the Court's national reputation for administering high quality justice is well deserved, and can be maintained by making relatively minor adjustments to the current system.

Accordingly, we urge that other, less drastic solutions to the Court's problems be attempted before an entire new court, which would contribute to the problems rather than the solution, is created at tremendous added cost to the citizens of the District. We strongly recommend that the more effective solutions of adding two judges and Appeals Commissioners to the current Court, and streamlining some administrative procedures involving case screening and processing be implemented. These changes would enable the Court to process its caseload most efficiently and effectively, and to insure that the quality of its decision-making remains of first-class caliber.

Statement of Judge Frank Q. Nebeker in Dissent

As I read the majority report, it is based on erroneous premises adopted to justify the result. There is no question that an intermediate court of appeals can be created and the present work spread around -- the least interesting to the new court and the gravy to the top court with built-in leisure to work at a self-determined pace. I respectfully suggest that the cost of such a step is too great; the need for it is not justified; and a few changes in the present system are still available to be made in lieu of the one proposed. I add the following from my perspective as a former associate judge.

Much is made by the majority of the notion that the backlog creates one judge opinions which are presumed to be bad. To analyze this proposition is to refute it by facts and concept.

Judges of appellate courts are there to make judgments. They are not proofreaders and they are surely not scribes of the green eye shade, tall stool and sleeve garter type. The judgments they make individually and collectively stem from a review of the facts of a case, and gratefully in only a few cases do they make a judgment changing the law. In most cases, the legal decision is simply that the law was correctly or incorrectly applied to the facts. That few decisions wrought major law changes is what gives stability -- predictability -- to the law. The insistence of the majority that more en banc decisions are desirable is, I submit, open to serious question. It is an overstatement used to justify their conclusion. And it must be remembered

that an en banc court is bound only by sound judgment and not precedent. So I fail to see any evil in the present division-of-three practice. It does ensure the ability to know and predict our law. The idea of "writing around" an opinion of the court -- I call it distinguishing the case -- is not bad. It is a legitimate practice and necessary exercise and must be a major practice of any court perpetually sitting en banc, as well as one sitting in divisions.

Having observed that judgments are the work product of an appellate court, it is appropriate to question how to articulate them and to what extent. Over the past twenty-five to thirty years, as litigation has increased, most appellate courts have taken to very truncated statements of decision or judgment. Eighteen years ago Judge Kern and I proposed to this very court the device of a summary calendar for cases that appeared to be simple and properly decided by application of well-established law. I fear that but for Judge Newman, the unpublished opinions in those cases have become an indulgence in the verbose. Much time and effort is wasted on them. It ought to stop so the court can devote its efforts where needed. Again, it is a matter of judgment to write extensively on a case not warranting it. I believe that the court in most of its cases has fallen into a practice of running the gamut of a full opinion when a simple decision would do. All federal circuit courts and most state appellate courts use the short form of decision.

A misallocation of time happens when a summary calendar case is treated to a multi-page unpublished opinion. It is then that unwarranted time is spent by all three judges. There would be a great reservoir of time and energy available if those cases were accorded the time they deserve instead of the disproportionate time they receive. Given the number of summary calendar cases and the time devoted to them, I believe this change in approach itself would eliminate any argument for adding another court.

In this vein, I will digress to observe that most litigants and lawyers want a decision, not the equivalent of a Rembrandt opinion. While I am the first to agree that the work on an appellate court can be repetitive, appellate judges must avoid indulging themselves in intellectual ego trips in the name of refining the law. Too much time is consumed which could be better spent on other cases awaiting decision.

All of this takes me to my last point. After eighteen years on the court, I can say that no judge really permitted a one judge decision. The majority either misunderstands the judges or creates yet another "straw" argument as to this point. I refuse to believe that my former colleagues are not performing their lawful duties when it comes to participation in decisions. My experience tells me otherwise. Moreover, my premise that appellate judges make judgments and use staff to articulate them leads to the conclusion that a well-reasoned decision need only command a concurrence from the others on the division or court. Such opinions are often written, though they remain an efficiency

fondly to be hoped for. If these are one judge opinions we should have more of them.

On the other hand, I know of no member of the present court who shies from making suggestions as to reasoning and analysis either by a visit or through memorandum. Indeed, the court's opinions reflect, through separate concurring and dissenting opinions, a healthy individual effort by each judge.

I certainly do not begrudge my former colleagues the time they seek to be more contemplative in the cases warranting such effort, but I do not see a new and totally drab error correcting court as the answer. Cases can be speeded to submission, and, thereafter, sound judgments can be made to allocate less time and effort to those not warranting it, thus, leaving the time needed for the relative few complex ones. We must face the fact that many appeals are brought without regard to their substance. This is particularly so in criminal and some administrative cases. "Throwing" more judges at them, like money, is not the answer.

Thus, I submit, the majority's straw arguments of division inconsistency, one judge opinions, a need for more en banc action, and a need to treat all cases as if they were of near equal complexity when seen for what they are fail to justify the conclusion that yet another court should be added to the already expensive labyrinth of litigation.

Appendix "A"

PERSONS CONSULTED BY THE COMMITTEE

The Committee has called upon the expertise of numerous individuals in the area of appellate court delay and backlog reduction. Some were interviewed on several occasions; a few appeared before the Committee to present views and answer questions. Virtually all completed a detailed questionnaire and commented upon a number of proposals contained in a "Laundry List" of suggestions to reduce delay and eliminate the Court's backlog. Many provided additional thoughts and suggestions in written form.

Both Chief Judge Judith W. Rogers and former Chief Judge William C. Pryor appeared in person before the Committee, as did Senior Judge John W. Kern, III and, through the efforts of Judge Frank Nebeker, Chief Justice David Brock of the New Hampshire Supreme Court.

For individuals interviewed out of the presence of the Committee as a whole, interview summaries were prepared by the respective interviewing teams. Copies of summaries were provided to all members of the Committee. The following persons were consulted by the Committee:

David Beach,
Chief Staff Counsel, Virginia State Supreme Court

The Honorable James A. Belson,
Associate Judge, D.C. Court of Appeals

The Honorable David Brock,
Chief Justice, New Hampshire Supreme Court

The Honorable A. Franklin Burgess, Jr.,
Associate Judge, Superior Court of the District of Columbia (former Chief, Appellate Division, Public Defender Service for the District of Columbia)

Shirley S. Curley,
Director, Court Reporting Division, D.C. Court System

The Honorable John M. Ferren,
Associate Judge, D.C. Court of Appeals

The Honorable George R. Gallagher,
Senior Judge, D.C. Court of Appeals

The Honorable Richard P. Gilbert,
Chief Judge, Maryland Court of Special Appeals

The Honorable George Herbert Goodrich,
Associate Judge, Superior Court of the District of Columbia, Joint Committee on Judicial Administration

Thomas A. Hammond, Jr.,
Chief Deputy Clerk, Superior Court of the District of Columbia

Samuel F. Harahan,
Executive Director, Council for Court Excellence

The Honorable Stanley S. Harris,
Judge, U.S. District Court for the District of Columbia (former Associate Judge, D.C. Court of Appeals)

Richard B. Hoffman,
Clerk, D.C. Court of Appeals

Charles A. Horsky,
President Emeritus, Council on Court Excellence (former Chair, D.C. Court System Study Committee which produced the "Horsky Report")

The Honorable John W. Kern, III,
Senior Judge, D.C. Court of Appeals

Mark Langer,
Chief Staff Counsel, U.S. Court of Appeals for the District of Columbia Circuit

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The Honorable Julia Cooper Mack,
Associate Judge, D.C. Court of Appeals

Gregory Mize,
General Counsel, Council of the District of Columbia

Richard B. Nettler,
Gordon, Feinblatt, Rothman, Hoffberger & Hollander (former Corporation Counsel, D.C. Administrative Agencies)

The Honorable Theodore R. Newman, Jr.,
Associate (former Chief) Judge, D.C. Court of Appeals

The Honorable William C. Pryor,
Senior (former Chief) Judge, D.C. Court of Appeals

The Honorable Gerard D. Reilly,
Senior (former Chief) Judge, D.C. Court of Appeals

Jay A. Resnick, Esquire,
Former Deputy Clerk and Senior Staff Attorney, D.C. Court of Appeals

The Honorable Judith W. Rogers,
Chief Judge, D.C. Court of Appeals; Chair, Joint Committee on Judicial Administration

The Honorable John M. Steadman,
Associate Judge, D.C. Court of Appeals

The Honorable John A. Terry,
Associate Judge, D.C. Court of Appeals; Joint Committee on Judicial Administration

The Honorable Fred B. Ugast,
Chief Judge, Superior Court of the District of Columbia; Joint Committee on Judicial Administration

The Honorable Curtis E. von Kann,
Associate Judge, Superior Court of the District of Columbia (former Chair, Subcommittee to study extent of conformity of practice and procedure of D.C. Court of Appeals to ABA Standards of Judicial Administration, which produced the 1977 "von Kann Report")

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Deborah DeMille Wagman,
Chief Deputy Clerk, D.C. Court of Appeals

The Honorable Rosalie E. Wahl,
Associate Judge, Minnesota Supreme Court

D.C. Court of Appeals

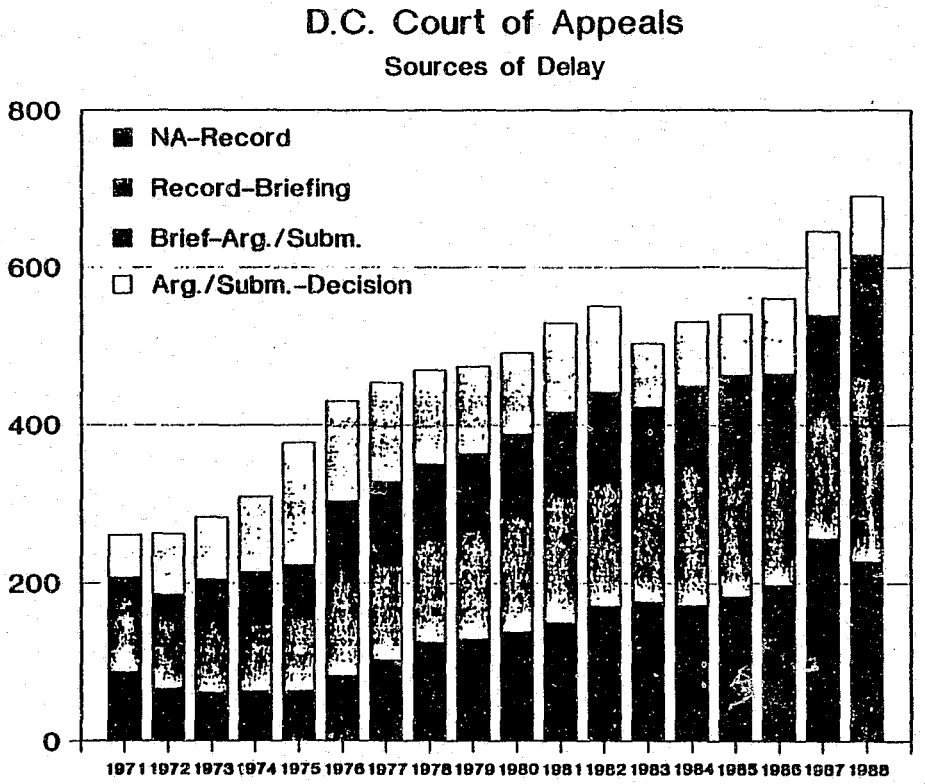
	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987	1988
TOTAL ALL FILINGS	619	796	960	1128	1221	1342	1327	1269	1196	1369	1585	1585	1580	1820	1798	1763	1540	1681
CRIMINAL	209	392	569	702	706	826	684	666	574	719	771	690	720	748	891	959	693	769
CIVIL	274	310	329	308	380	346	473	375	419	434	537	598	534	629	511	517	521	557
PETITIONS-AGENCY	70	94	82	118	135	170	170	152	124	134	204	191	207	348	266	183	174	191
SPECIAL PROCEEDINGS								76	79	82	73	106	75	46	55	42	79	98
DISCIPLINARY													33	39	47	53	37	26
APPLICATION / ALLOWANCE OF APPEAL						108	99	113	127	66	81	131	106	85	81	76	95	82
REINSTATED (ALSO REHEARING)													9	18	28	29	36	48
TOTAL ALL DISPOSITIONS	502	608	789	945	1120	1197	1288	1331	1278	1194	1215	1546	1587	1518	1570	1567	1622	1634
BY OPINION	190	219	221	251	247	307	279	352	319	240	224	305	298	322	318	279	296	249
MEMO OPN/DMT	86	165	284	382	494	297	393	376	334	373	412	597	505	485	481	503	519	489
JUDGMENT W/O OPN						76	81	64	66	58	35	69	72	57	49	58	109	66
BY ORDER	226	224	284	312	379	517	535	539	559	523	564	665	712	654	722	727	707	828
TOTAL PENDING	268	462	653	842	951	1147	1161	1109	1052	1256	1606	1645	1638	1948	2176	2372	2290	2347
TIME CONSUMED-DAYS																		
FROM-IVA-RECORD	57	65	61	62	63	82	103	124	127	137	149	170	175	171	183	197	256	227
FROM-RECORD-BRIEFING	97	96	97	90	94	122	124	134	142	151	166	161	156	178	164	160	157	237
FROM-BRIEFING-ARG/SUBM	24	25	47	62	67	101	103	93	94	101	102	112	92	100	117	108	127	152
FROM-ARG/SUBM-DECISION	55	79	81	97	155	127	126	121	112	105	114	110	82	83	79	97	107	76
TOTAL NOTICE-DECISION	243	265	286	311	379	432	456	472	449	474	508	544	487	513	521	566	651	679
3 JUDGE MOTIONS	545	764	1020	1107	1321	1737	1689	1388	1308	1343	1433	1445	1527	1940	1496	1437	1435	1814
1 JUDGE MOTIONS	1516	2286	3023	3457	3583	3935	4691	4963	4757	3922	4087	4225	4633	4993	5409	5885	6228	5982
NO. OF OPINIONS	190	219	221	251	247	307	279	352	319	240	224	305	298	322	318	279	296	249
TOTAL PAGES	902	1221	1371	1516	1713	2343	2151	3360	3292	2377	2696	2827	2418	2760	2045	2901	3370	2695
AVE. PAGES OVERALL	4.9	5.9	6.6	7.1	7.8	8.8	9.2	11.5	10.3	9.9	12	9.3	8.1	8.6	9.6	10.4	11.4	10.7
AVE. PAGES OVERALL (Completed)	4.7	5.6	6.2	6	6.9	7.6	7.7	9.5	10.3	9.9	12	9.3	8.1	8.6	9.6	10.4	11.4	10.8

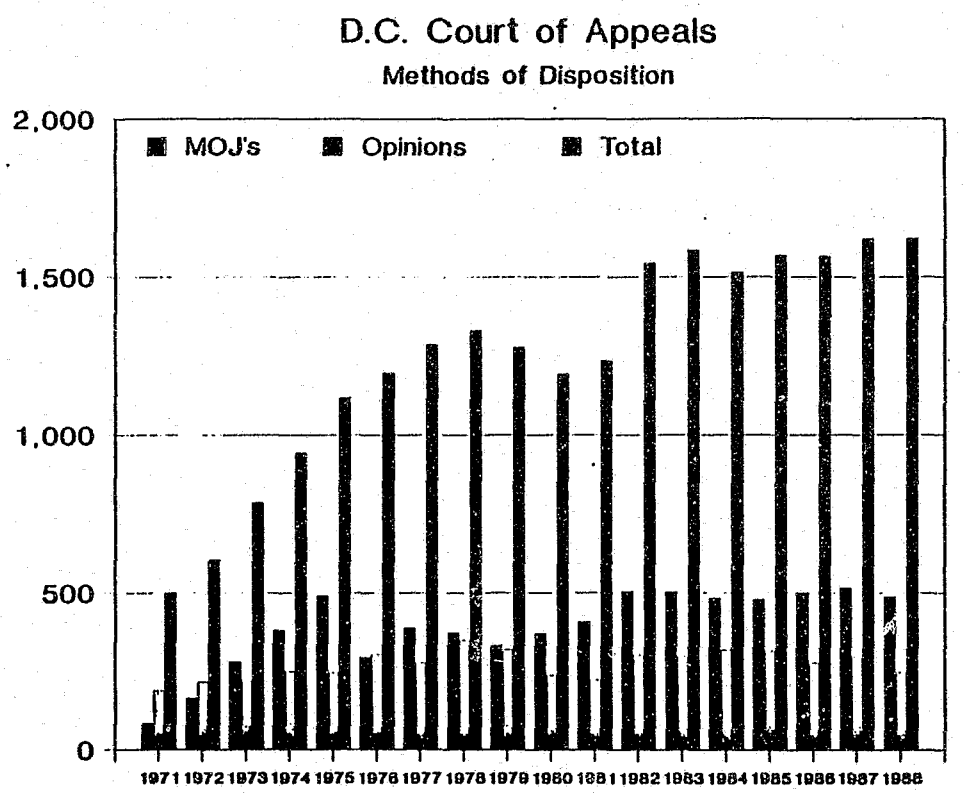
SUPERIOR COURT

IVIL DIVISION	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987	1988
OTAL CASES PENDING ON															
IVIL JURY CALENDAR	5,684	6,449	6,760	7,415	7,192	7,614	7,634	7,541	7,712	7,028	6,896	6,012	6,016	5,907	5,771
DISPOSITIONS	3,021	3,336	2,830	3,578	3,206	3,764	3,437	3,191	3,390	2,563	3,033	2,267	2,044	2,631	2,137
PENDING	2,663	3,113	3,930	3,837	3,986	3,850	4,197	4,350	4,322	4,465	3,863	3,745	3,972	3,276	3,634
OTAL CASES PENDING ON															
ION-JURY CALENDAR															
OTAL ON TRIAL CALENDAR	2,071	2,073	2,364	2,992	2,998	3,542	3,929	4,137	4,743	5,094	5,088	3,987	3,929	3,665	3,535
DISPOSITIONS	1,313	1,499	1,235	1,869	1,806	1,950	2,341	2,356	2,342	2,531	3,005	1,965	1,731	1,826	1,391
PENDING	758	574	1,129	1,123	1,192	1,592	1,588	1,781	2,401	2,563	2,083	2,022	2,198	1,839	2,144
EW CASE FILINGS															
CIVIL	11,361	11,716	12,674	12,862	14,063	16,607	17,705	18,587	16,569	15,486	14,443	9,475	10,899	11,118	12,256
L&T	116,782	120,608	114,408	110,461	107,701	102,497	104,792	101,825	89,694	84,222	84,817	87,767	85,139	80,690	76,295
FAMILY DIVISION															
JUVENILE	7,079	7,212	6,826	5,750	5,882	5,573	4,731	4,323	4,012	4,129	4,264	4,492	4,690	5,127	5,456
DOMESTIC RELATIONS	6,250	6,166	5,919	6,632	6,608	7,081	7,888	8,733	8,143	8,487	6,059	8,270	8,413	8,421	6,492
EP. TRANS. PAGES															
PRODUCED FOR APP REPORTERS	117,802	106,749	127,373	126,092	123,505	152,240	159,544	195,091	175,585	194,572	198,702	226,975	297,988	203,837	210,518
COURT TRANSCRIBER	880	751	763	321	284	759	1,033	440	633	1,657	2,557	2,319	4,831	5,066	
TRANSCRIPTION SERVICES	334	523	1,486	256	563	2,663	2,496	2,833	2,697	1,561	4,599	7,562	14,349	5,677	

SUPERIOR COURT

CRIMINAL DIVISION	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987	1988
U.S. FELONY INDICTMENTS	3,514	4,138	3,737	3,044	3,083	3,655	3,138	3,631	3,934	4,161	5,261	6,160	7,735	9,755	9,709
U.S. MISDEMEANORS	11,976	12,984	12,907	11,982	12,022	13,709	13,813	15,578	16,179	17,343	16,169	19,443	16,213	16,152	14,606
TOTAL	15,490	17,122	16,644	15,026	15,105	17,364	16,951	19,209	20,113	21,504	21,430	25,603	23,948	25,907	24,315
TRIALS-JURY															
U.S. FELONY	731	667	795	593	658	528	508	599	551	618	630	910	688	654	737
U.S. MISDEMEANOR	527	396	372	433	451	377	857	605	794	568	645	694	565	542	483
TOTAL	1,258	1,063	1,167	1,026	1,109	905	1,365	1,204	1,345	1,186	1,275	1,604	1,253	1,196	1,220
TRIALS-COURT															
U.S. FELONY	96	63	82	42	52	47	41	47	32	58	53	48	35	17	22
U.S. MISDEMEANOR	657	713	620	380	243	101	302	229	165	306	490	571	484	297	274
TOTAL	753	776	702	422	295	148	343	276	197	364	543	619	519	314	296
CRIMINAL PLEAS															
U.S. FELONY	2,296	2,463	2,807	2,016	2,287	2,367	1,970	2,455	2,426	2,765	3,409	4,377	5,589	6,862	6,401
U.S. MISDEMEANOR	2,637	3,350	3,675	3,353	3,982	4,313	5,242	5,283	6,126	7,167	6,573	7,454	6,708	5,994	5,335
TOTAL	4,933	5,813	6,482	5,369	6,269	6,680	7,212	7,738	8,552	9,932	9,982	11,831	12,297	12,856	11,736
PENDING															
U.S. FELONY							1,517	1,398	1,886	2,052	2,488	2,356	2,445	2,455	3,178
U.S. MISDEMEANOR							2,399	3,683	3,197	3,500	3,328	3,169	2,495	1,815	1,997
							3,916	5,081	5,083	5,552	5,816	5,525	4,940	4,270	5,175
CONVICTIONS BY JURY TRIAL OR COURT						714	1,109	992	1,039	1,091	1,221	1,581	1,265	1,002	1,036
APPEALS TAKEN						574	719	771	690	720	748	891	939	693	769
% APPEALS TO CONVICTION						80.4	64.8	77.7	66.4	66.0	61.3	56.4	74.2	69.2	74.2


D.C. Court of Appeals
Sources of Delay
800
600
400
200
0
NA-Record
Record-Briefing
Brief-Arg./Subm.
Arg./Subm.-Decision
1971 1972 1973 1974 1975 1976 1977 1978 1979 1980 1981 1982 1983 1984 1985 1986 1987 1988


D.C. Court of Appeals
Methods of Disposition
MOJ's
Opinions
Total
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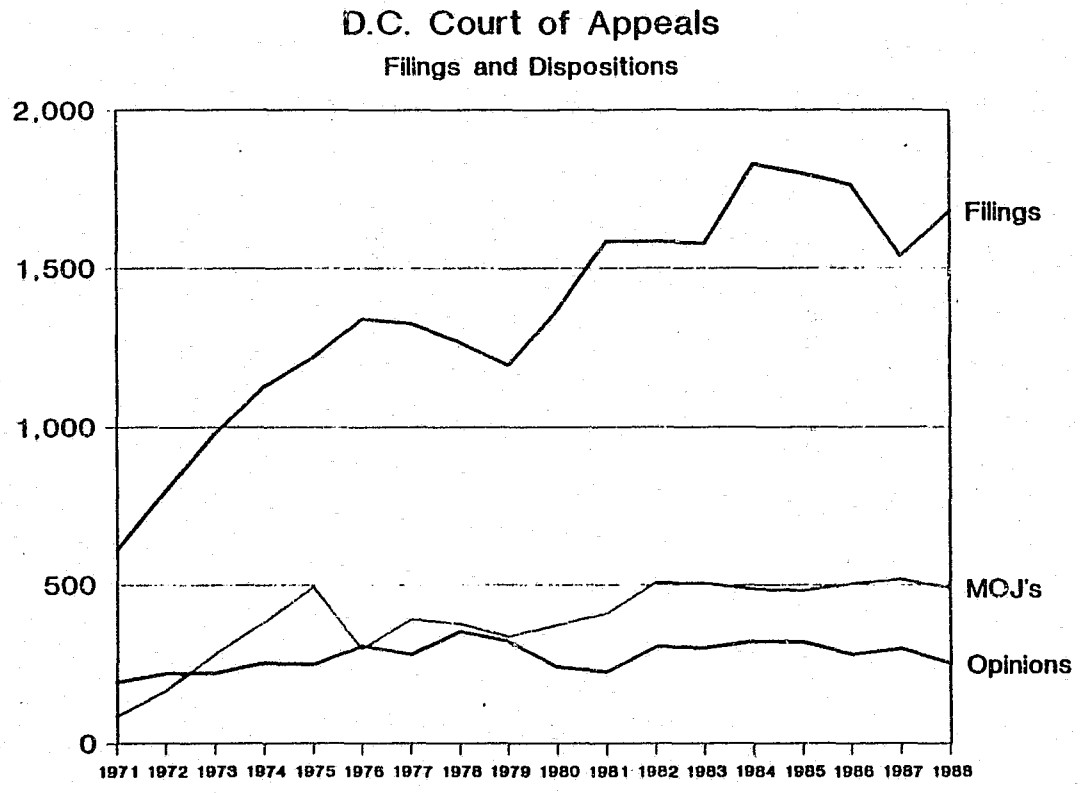
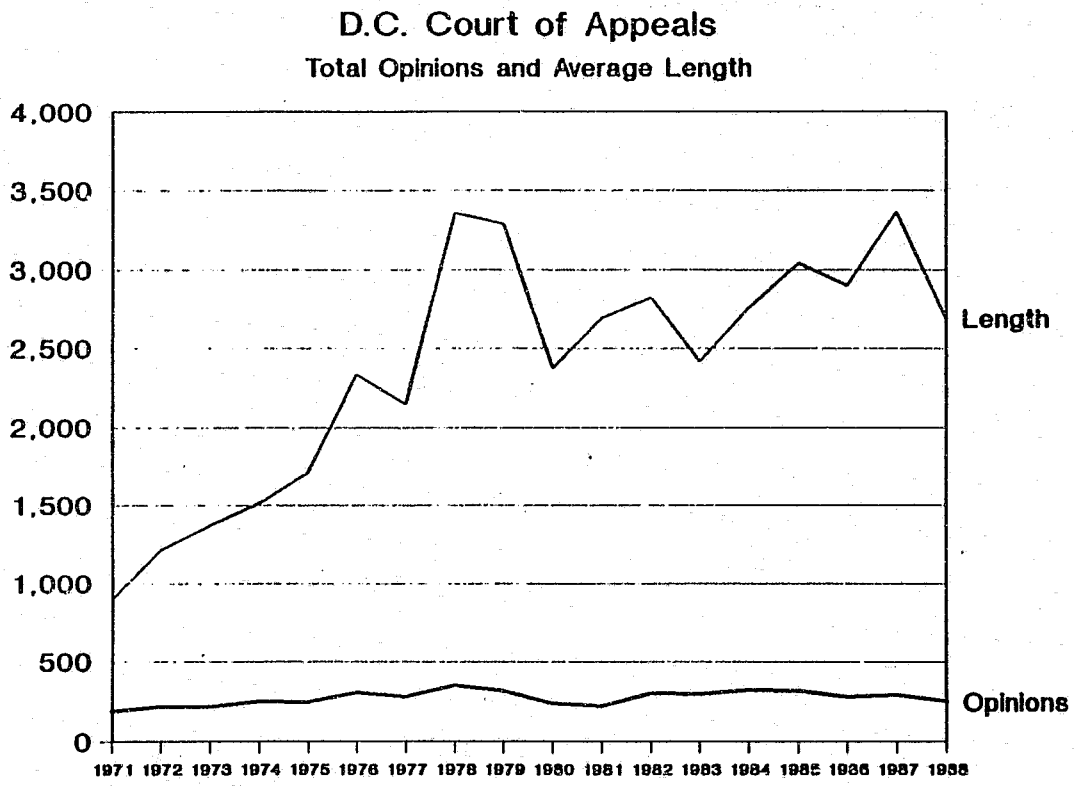
1,500
1,000
500
0
1971 1972 1973 1974 1975 1976 1977 1978 1979 1980 1981 1982 1983 1984 1985 1986 1987 1988


D.C. Court of Appeals
Filings and Dispositions
2,000
1,500
1,000
500
0
Filings
MOJ's
Opinions
1971 1972 1973 1974 1975 1976 1977 1978 1979 1980 1981 1982 1983 1984 1985 1986 1987 1988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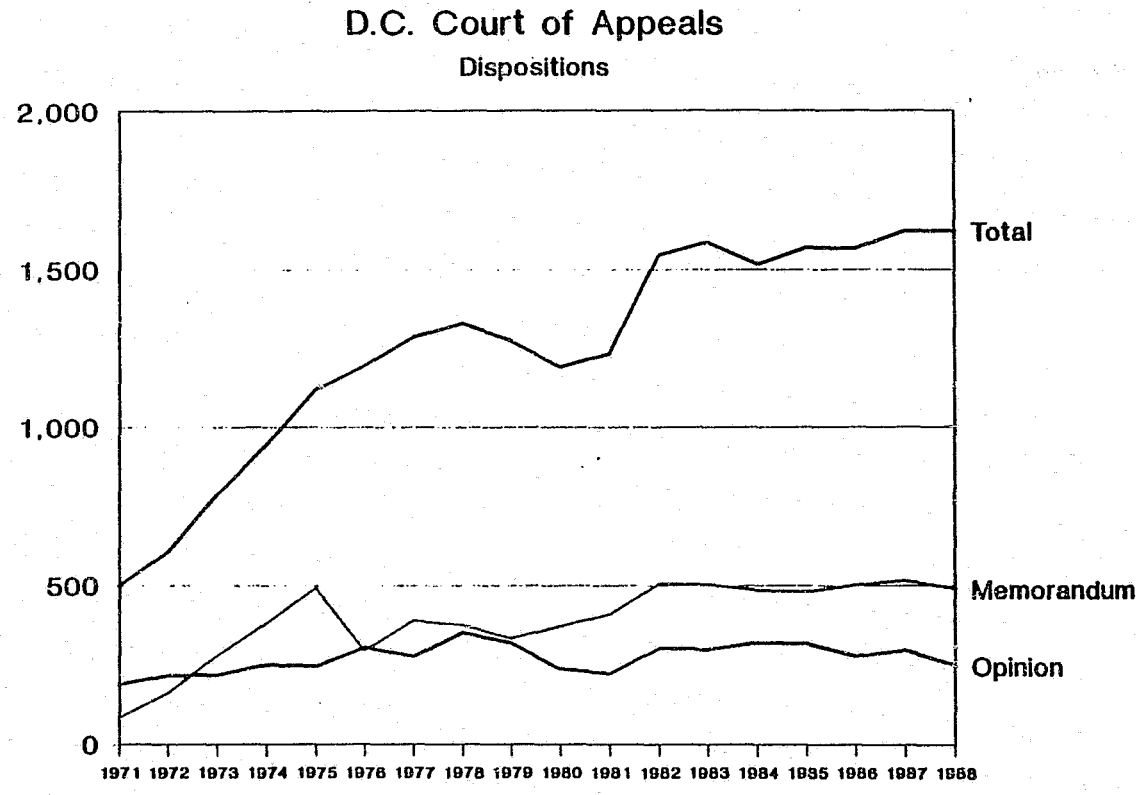
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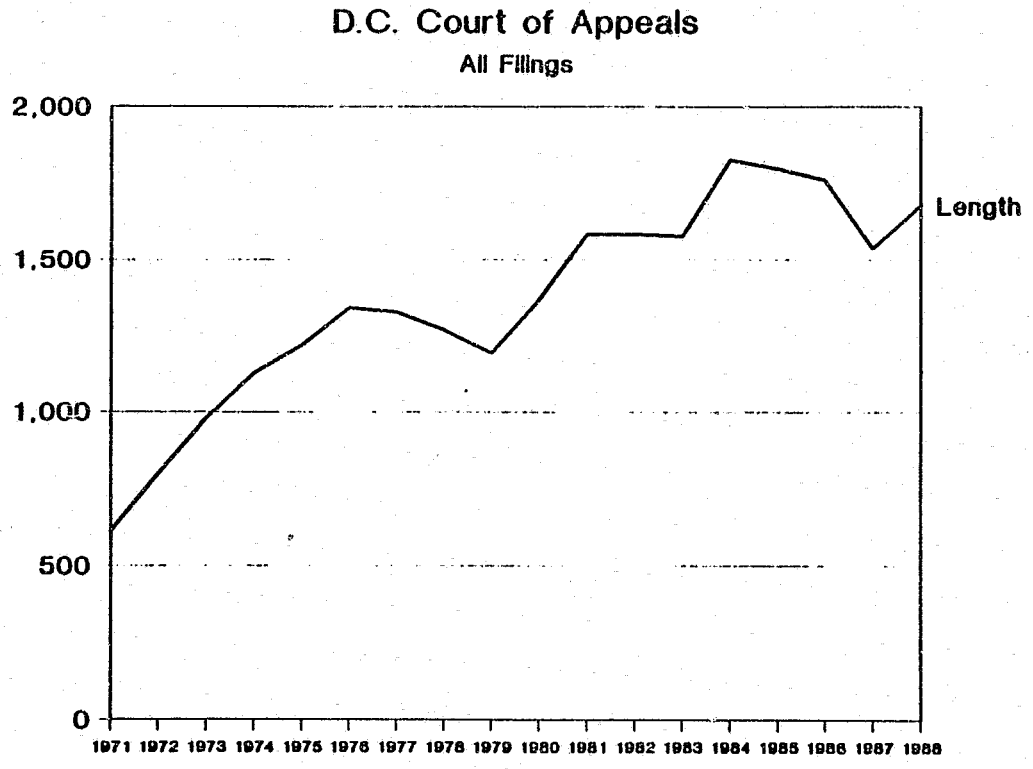
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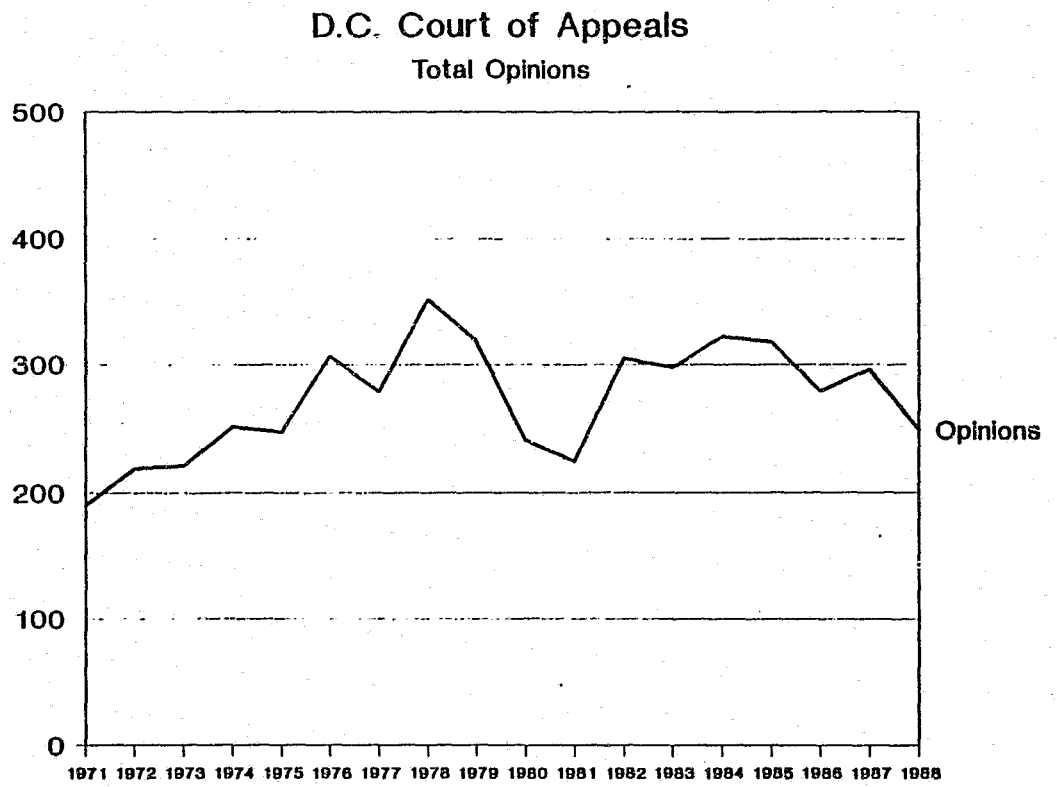
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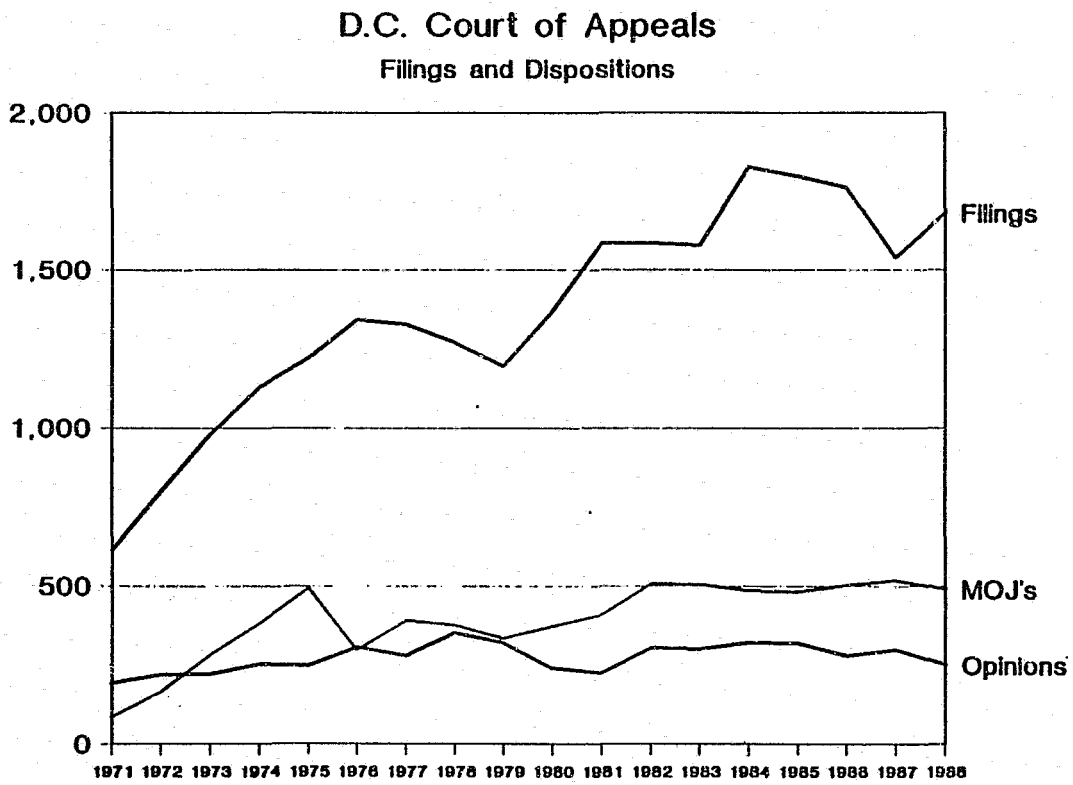
Opinions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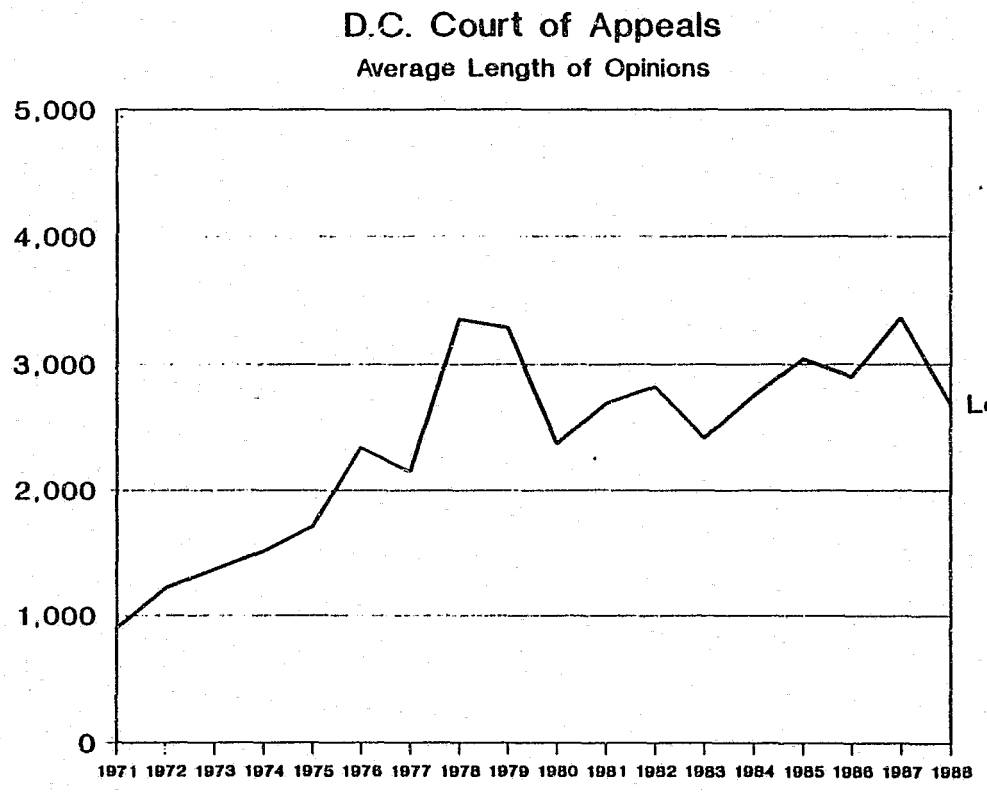
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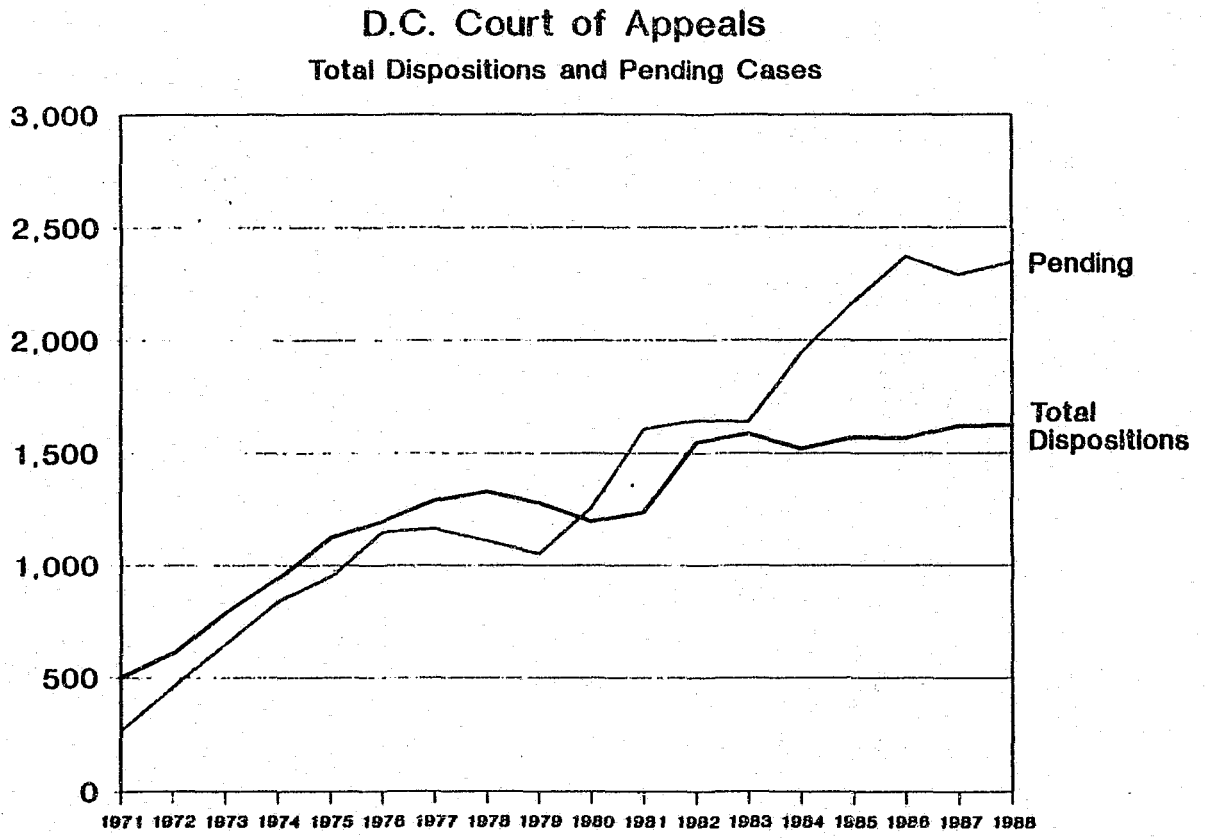
Length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Pending
Total Dispositions

A(III)-1

MASSACHUSETTS GENERAL LAWS, CHAPTER 211A, §§10-12

§10. Concurrent Appellate Jurisdiction; Review in First Instance by Appeals Court in Certain Cases

Subject to such further appellate review by the supreme judicial court as may be permitted pursuant to section eleven or otherwise, the appeals court shall have concurrent appellate jurisdiction with the supreme judicial court, to the extent review is otherwise allowable, with respect to a determination made in the appellate tax board and in the superior court department, the housing court department, the land court department, the probate and family court department, the Boston municipal court department in jury session, the Boston municipal court department appellate division, the juvenile court department, the district court department in jury session, and the district court department appellate divisions, except in review of convictions for first degree murder. A report from any such department of the trial court of any case, in whole or in part, or any question of law arising therein shall be deemed to be within the concurrent appellate jurisdiction of the supreme judicial court and the appeals court.

Without regard to whether review is by appeal, report or otherwise, appellate review of decisions made in the appellate tax board and in the superior court department, the housing court department, the land court department, the probate and family court department, the Boston municipal court department and the appellate division thereof, the juvenile court department, and the district court department, and the appellate divisions thereof, if within the jurisdiction of the appeals court, shall be in the first instance by the appeals court except in the following cases in which appellate review shall be directly by the supreme judicial court without the necessity of any prior hearing or decision by the appeals court on the merits of the issues sought to be reviewed:

(A) Whenever two justices of the supreme judicial court issue an order direct[ing] review by the supreme judicial court in any case on appeal, either at the request of one of the parties or at the court's own initiative, upon finding that the questions to be decided are: (1) questions of first impression or novel questions of law which should be submitted for final determination to the supreme judicial; (2) questions of law concerning the Constitution of the commonwealth or questions concerning the Constitution of the United

States which have been raised in a court of the commonwealth; (3) questions of such public interest that justice requires a final determination by the supreme judicial court.

(B) Whenever the appeals court as a body or a majority of the justices of the appeals court considering a particular case certifies that direct review by the supreme judicial court is in the public interest.

In each case where appellate review is not within the jurisdiction of the appeals court, appellate review shall be directly by the supreme judicial court, unless such case is transferred by the supreme judicial court to the appeals court for determination in accordance with section twelve of this chapter.

§11. Further Appellate Review.

There shall be no further appellate review by the supreme judicial court of any matter within the jurisdiction of the appeals court which has been decided by that court, except: -- (a) where a majority of the justices of the appeals court deciding the case, or of the appeals court as a whole, certifies that the public interest or the interests of justice make desirable a further appellate review, or (b) where leave to obtain further appellate review or late review is specifically authorized by three justices of the supreme judicial court for substantial reasons affecting the public interest or the interest of justice Upon the written order of a majority of the justices of the appeals court, the decision of a panel of the appeals court may be reviewed and revised by a majority of the justices of the appeals court Such a review shall not be a condition precedent to obtaining further appellate review by the supreme judicial court.

§12. Reporting of Cases or Questions to Supreme Judicial Court; Transfer of Matters to or from Appeals Court by Supreme Judicial Court

The appeals court may, prior to or after final determination, report any case in whole or in part or any question of law arising therein to the supreme judicial court for consideration and determination if in the opinion of the appeals court the unusual public or legal significance of the matter or the efficient administration of justice so requires. The supreme judicial court shall consider such report and accept the case or questions, in whole or in part, for final determination or, if no determination has been made by the appeals

court, may remand the case or questions, in whole or in part, to the appeals court for determination. Except as otherwise provided in section four A of chapter two hundred and eleven, the supreme judicial court may transfer to the appeals court for determination any case or issue pending before it which has not been determined by the appeals court, including those within the original jurisdiction of the supreme judicial court, those of which a direct review by the supreme judicial court has been allowed or claimed, those improperly entered in the supreme judicial court, and those coming within the direct appellate jurisdiction of the supreme judicial court. The supreme judicial court may order any matter, in whole or in part, or any issue therein, pending before the appeals court, transferred to the supreme judicial court for further proceedings.

RULE 27.1. FURTHER APPELLATE REVIEW

(a) Application; When Filed; Grounds. Within twenty days after the date of the rescript of the Appeals Court any party to the appeal may file an application for leave to obtain further appellate review of the case by the full Supreme Judicial Court. Such application shall be founded upon substantial reasons affecting the public interest or the interests of justice. Oral argument in support of an application shall not be permitted except by order of the court.

(b) Contents of Application; Form. The application for leave to obtain further appellate review shall contain, in the following order: (1) a request for leave to obtain further appellate review; (2) a statement of prior proceedings in the case; (3) a short statement of facts relevant to the appeal (but facts correctly stated in the opinion, if any, of the Appeals Court shall not be restated); (4) a statement of the points with respect to which further appellate review of the decision of the appeals court is sought; and (5) a brief statement (covering not more than ten pages of typing), including appropriate authorities, indicating why further appellate review is appropriate. A copy of the rescript and opinion, if any, of the Appeals Court shall be appended to the application. The application shall comply with the requirements of Rule 20.

(c) Opposition; Form. Within ten days after the filing of the application, any other party to the appeal may, but need not, file and serve an opposition thereto (covering not more than ten pages of typing) setting forth reasons why the application should not be granted. The opposition shall not restate matters described in

subdivision (b)(2) and (3) of this rule unless the opposing party is dissatisfied with the statement thereof contained in the application. An application shall comply with the requirements of Rule 20.

(d) Filing; Service. One copy of the application and one copy of each opposition shall be filed in the office of the clerk of the Appeals Court. Fourteen copies of the application, and fourteen copies of each opposition shall be filed in the office of the clerk of the full Supreme Judicial Court. Filing and service of the application and of any opposition shall accompany with Rule 13.

(e) Order of Further Appellate Review; Certification. If any three justices of the Supreme Judicial Court shall sign an order for further appellate review for substantial reasons affecting the public interest or the interest of justice, or if a majority of the justices of the Appeals Court or a majority of the justices of the Appeals Court deciding the case shall certify that the public interest or the interests of justice make desirable a further appellate review, the order or certificate, as the case may, shall be transmitted to the clerk of the Appeals Court; upon receipt, further appellate review shall be deemed granted. The clerk shall forthwith transmit to the clerk of the full Supreme Judicial Court all papers theretofore filed in the case and shall notify the clerk of the lower court that leave to obtain further appellate review has been granted.

(f) Briefs. Any party may apply to the Supreme Judicial Court within ten days of the granting of further appellate review for permission to file a separate or supplemental brief in the Supreme Judicial Court. If the application is granted, the court may impose terms as to the length and filing of such brief and any response thereto. If such permission is denied or not sought, cases in which further appellate review has been granted shall be argued on the briefs and appendix filed in the Appeals Court.

Mr. DYMALLY. Thank you very much, indeed.

Let's call on Mr. Fauntroy.

Mr. FAUNTROY. Thank you so very much, and I want to thank both you gentlemen and your associates for the exhaustive efforts you have put in over the years in grappling with this problem and the thoroughly considered judgments that you have brought forth with respect to this bill.

Some have suggested that the preferred method of dealing with the appellate backlog might be to create an appellate division within the D.C. Superior Court, and I wondered what your thoughts on that proposal would be.

Mr. SCHALLER. Well, Mr. Fauntroy, my thoughts would be that it would be the same, in my judgment, except not as efficient, as creating another three judgeships at the current D.C. Court of Appeals levels. All it really does is increase the possibility of decisional inconsistency among panels, and what it does is make available to the D.C. Court of Appeals judges whose primary function is not to render appellate review and appellate justice. Judges who, however capable and however well-intentioned, will not be able to do the job as efficiently as those people who have been appointed to the appellate bench.

I don't think it is a good idea, because I don't think it will produce an increase in efficiency and because I don't think it grapples with the problem of decisional inconsistency in en banc sitting.

Mr. RHYNE. I would like to add to that, if I may, that to do that without augmenting the number of judges in the superior court would simply contribute to the already overwhelming backlog in the superior court, because you would be giving those judges new functions, review functions, as well as trial functions.

If you did increase the size of the superior court so as to create an appellate division, it would still, in my opinion, not be as desirable as creating an intermediate appellate court, because you would then be asking trial court judges to review the decisions of their colleagues, and you build into it perhaps a bias toward affirmance or a concern about how that judge will be behaving when he or she is next sitting on an appellate panel to review my decision. I think that appellate judges should be appellate judges and not trial judges, except for temporary assignment.

In the one State that I am familiar with which has an appellate division of the trial court, New York, the assignments, for the reason I have stated, have tended to become rather long-term and permanent, and you really have created, in effect, an intermediate appellate court, although you have staffed it with trial court judges.

Mr. FAUNTROY. Mr. Schaller, you indicated in your answer that you would not agree with increasing the number of judges on the D.C. Court of Appeals, and, as you had indicated in your letter, that was your considered judgment.

What about the idea of a lower level trial court, like a municipal court, with the hope of curbing the number of appeals coming through the system?

Mr. SCHALLER. I don't know that a lower level trial court would not be a good idea from the standpoint of reducing the workload of the superior court. I don't think it would make any difference at

all in the number of appeals taken from the superior court to the D.C. Court of Appeals.

I believe that there are organizations, and I think the Council for Court Excellence and its court study committee, which have suggested that a lower trial level court be created, again, for the purpose of taking some of the burden off the presently overworked superior court but without any thought that would do anything to relieve the backlog or the strain on the appellate court.

Mr. FAUNTROY. Mr. Rhyne.

Mr. RHYNE. The Bar Association has taken no position on creation of a lower trial court, so I cannot speak from a policy standpoint. There is, however, experience in a number of other States with such courts, including the municipal court and justice courts in California. The chairman is undoubtedly familiar with that, as is Mr. Rohrabacher. So there is a wealth of experience to look to, to follow in that sort of a legislative endeavor.

Mr. FAUNTROY. Another issue of concern to us in addressing the bill is that of court administration, and assuming an intermediate court of appeals, in your view, should the chief judge of the supreme court be responsible for administering the entire system, or should a joint committee of judges at each level be responsible for the court system?

Mr. SCHALLER. The view that we took in the committee—and I should point out, Mr. Fauntroy and Mr. Chairman, that Mr. Rhyne is not only chairman of his own distinguished committee of the Bar Association but was a very hard-working member of the committee which I chaired for the D.C. Bar—the view which our committee, the D.C. Bar Committee, took was that administrative authority, ultimate administrative authority, should be centralized in the highest court and preferably in its chief judge or chief justice. That is the experience in the vast majority of jurisdictions, it seems to have worked, and that is what we would recommend here.

Obviously, where you have a lower court as sizable and numerous as the court you have here, you have to have some authority in the chief judge of that court, but the ultimate authority has to be reposed, in our judgment, in the chief justice or chief judge of the supreme court.

Mr. RHYNE. The Bar Association has taken no position for or against that transfer of administrative power from the joint committee to the chief judge of the supreme court, except that we feel that it should be the subject of separate legislative consideration because there are views that are held on both sides; you have already heard the chief judge of the superior court oppose that provision.

I, personally, happen to favor that transfer. If I did not, I would not have signed the report of the D.C. Bar which makes that recommendation. But I can certainly understand how strong views would be held on the other side by persons who feel that the administration should be a cooperative venture among courts by a committee on which a majority represents the court with the greatest number of judges, and I do not feel that the worthy provisions for creation of an intermediate appellate court to relieve that critical situation should be burdened with the opposition of persons who have strong views on the other side of that issue.

Mr. FAUNTROY. I thank you for your candid response to that question.

I would like your comment also on title III dealing with the judicial magistrates, particularly the inclusion of a local role in the appointment of judicial magistrates.

Mr. SCHALLER. The D.C. Bar Committee, as I pointed out in my letter to the committee, did not look into that, and I have not looked into it personally. I know that it is a matter of some controversy, but we did not take a position on it in our report, and I do not have a position on it personally.

Mr. RHYNE. The Bar Association has no position on that, except that it should be uncoupled and separately considered, and I have no personal position. It is outside the area of interest in my particular committee.

Mr. FAUNTROY. You know that it is addressed to the need to clear up much of the backlog in civil cases and to free our judges on the superior court to give considerably more time and attention to the criminal cases that are the concern of citizens all over the District, and I just wondered if you would just think with us about how we would go about clearing up a backlog that, in some suggestions, runs as long as 22 to 24 months in handling civil disputes.

Mr. SCHALLER. I can comment personally just from what I have heard and what I have observed more so than what I have concluded, because I am not certain that I have taken a sufficient look to have formed views.

I am a civil lawyer, I don't do any criminal work, and I know that a lot of people who do civil work before the courts of this jurisdiction, and particularly the local courts, feel that the civil litigation is the stepchild of the court system because of the fact that it is invariably bumped by the need to accord speedy justice in the criminal area. I am not so sure that feeling would be assuaged by bumping the civil cases to someone who is not quite a judge in the eyes of the people who are going to bring these cases.

Second, the bill, as I read it, would allow these judicial magistrates to sit on and render final decisions in nonjury cases up to $50,000 ad damnum, and that is a fairly serious case; that is a fairly sizable case, even in these latter days of six- and seven-figure verdicts and judgments.

So I think that the objective of lightening up the burden on the judges, particularly in the civil area, can possibly be accomplished by the bill's provisions. I do think that is going to draw the fire and the ire of some of the sitting judges and perhaps of some of the people who practice in the civil area in that court.

As I say, I don't have a forum to view on it. I understand what the legislation is intended to do. Whether that is the very best way to do it, Mr. Fauntroy, I am just not sure in my own mind.

Mr. RHYNE. In a way, the judicial magistrates provision is like the suggestion that a separate trial court be created. It is a device for deciding the less important cases at the trial level.

I don't have a view on that, as to whether that is the best way to do it, because there are other ways of relieving trial court congestion, including appointing more judges. But I would note that the appointing power is changed. The commissioners of the superior court are appointed by the judges. The bill proposes that the judi-

cial magistrates be otherwise appointed, and I can see how that might raise some concerns on the part of the judges. Again, I urge that the much needed appellate court provisions do not need that kind of baggage when they are so critically needed.

Mr. FAUNTROY. As a nonlawyer, I wonder if you would explain to me the differences in qualifications between that of a magistrate and a judge.

Mr. SCHALLER. I think that at least the court and the bar is pleased to think and believe that the qualifications to become a judge at any level in the District of Columbia are extremely high. It has never been put out that the qualifications for becoming a magistrate are quite that high. Indeed, the occupancy of the position of magistrate has, from time to time, been seen as a stepping stone to a judgeship.

Whether the qualifications in terms of cases tried to degrees or whatever don't overlap, I wouldn't be at all surprised to find people serving as magistrates who have as much in terms of experience as some people who are being seated as judges. But that, of course, is not the philosophy. The philosophy is that if you are appointed as a judge, that is a very serious and very elevated appointment, but the appointment to the position of magistrate, while certainly nothing to be taken lightly, is not quite of so elevated a degree.

Mr. FAUNTROY. Are magistrates around the country appointed pursuant to the judgment of judges or pursuant to the judgment of the citizens through a process which selects out those with the high qualifications you suggest who become judges?

Mr. SCHALLER. I think—and let me emphasize that word, I "think"—that it depends on the jurisdiction in which you are looking. Certainly the Federal jurisdiction is altogether different in terms of Federal magistrates. But I emphasize "I think" because I really don't know, Mr. Fauntroy; I haven't looked into it.

Mr. FAUNTROY. Mr. Rhyne.

Mr. RHYNE. Nor do I know what the process is in other jurisdictions.

Mr. FAUNTROY. But you rendered the judgment that perhaps changing the system by which judges now appoint qualified lawyers to serve as commissioners to one in which a nominating process involving the citizens might meet with some difficulty. Is that because, in your view, the judges would feel themselves in a better position to suggest or to appoint people to serve as commissioners or magistrates than would the people who had selected them to be judges?

Mr. RHYNE. I think the judges would view themselves as having more control.

Let me say that I think the suggestion for a judicial magistrate is one creative way of dealing with the problem. It may not be the best way. I just do not know. What I do know is that it has not had nearly the degree of focus of the bench and bar that have the appellate court provisions of this bill, which have now gone through several legislative processes, and that they have engendered controversy, and therefore I urged for the Bar Association they be separately considered.

Mr. FAUNTROY. Yes.

Mr. SCHALLER. The remarks that I made, Mr. Fauntroy, were not so much directed to the appointment power as to the function, and it was my thought—and it is only that—that judges may feel put upon, or put out, or however you want to put it, if they see magistrates taking over some of the jurisdiction which had previously been theirs, and that is why I emphasize that a civil case of $50,000 is a pretty big case.

Mr. FAUNTROY. But you are keenly aware of the serious backlog we have in civil cases, particularly, as you point out, because of the speedy trial provisions with respect to criminal cases. We do have to deal with those cases on a priority basis, and yet there are a great many people who are exasperated at waiting 2, 2½, and sometimes 3 years to get a routine civil matter handled by persons who have the same training and apparently qualifications that are approaching that of the judges, with the exception of the judges who have been selected. So that is a problem we are trying to grapple with.

Mr. SCHALLER. Absolutely, and certainly I yield to no one in my concern over the problem of civil delay and the fact that civil cases have had to await the criminal docket for many years.

All I am saying is, while I appreciate that this is one way of dealing with the problem, I am not at all sure that it is the very best way, given that it may cause some resentment and given the importance of some of the other elements of the bill, as Mr. Rhyne said.

Mr. FAUNTROY. May I just thank the chairman for allowing me to ask a few questions that I know Mr. Stark, Mr. Dellums, and Mr. Wheat would want asked, and for that purpose I just want to ask two more.

Mr. DYMALLY. I recognize that the rules for this committee are very flexible, Mr. Fauntroy.

Mr. FAUNTROY. Thank you.

I would like a comment from both of you on the changes in the judicial nomination and tenure commissions, which are included in this bill, which would give a greater role to the local community.

Mr. SCHALLER. Well, that, for sure, Mr. Fauntroy, is something that our committee didn't look into. I am not sure that I have a view on it myself. I know that Judge Rogers said that the present system has worked well. I think I concur in that judgment, that the present system has worked well. I am not necessarily an advocate indiscriminately of "If it ain't broke, don't fix it." You can sometimes improve upon things. I just haven't looked at this carefully enough to have a formed opinion on it.

Obviously, you want more local input into that process, and there are good reasons for wanting that. On the other hand, I am sure that there were good reasons for formulating those commissions the way they have been set up, and I just don't have enough background to make a judgment as to whether this is a good change or not.

Mr. FAUNTROY. Mr. Rhyne.

Mr. RHYNE. I have no personal opinion on that; nor has my committee considered it; nor has the Bar Association taken a position for or against those changes. Our only strong position is, those changes which need study and are likely to be controversial be un-

coupled from the two provisions that we strongly urge be promptly enacted and which could be enacted which, either way you go on these other provisions, that the appellate court be increased in size and reorganized in two tiers and that eight new judges be added to our trial court.

Mr. FAUNTROY. Mr. Rhyne, when you speak like that, I get visions of a Christmas tree and the train going around and the decoupling of them with a little device I had when I was a kid.

Would you also decouple the citizens advisory committees recommended in title V?

Mr. RHYNE. Yes, we would. That is a new idea, and it may be a very excellent idea, but it is an idea which has a citizens committee reporting directly to Congress, which the court may view as a runaround the court, and others may have strong thoughts on that which have not been given an opportunity fully to develop and to be stated, and I don't think that the much needed provisions for new judges should be tied to whether or not a citizens advisory committee is formed.

Mr. FAUNTROY. Mr. Schaller, would you help me? That is my last question. Can we keep something coupled here?

Mr. SCHALLER. I'm not advocating coupling or uncoupling of anything, but, like Mr. Rhyne, I really would like to see the additional judges for the superior court and, more than anything, the two-tier appellate level court with administrative responsibility in the supreme court or its chief justice.

I think that the citizens advisory committee is a very interesting and intriguing idea, but I think I do share Mr. Rhyne's concern that it has not undergone the kind of study and scrutiny that perhaps some people might feel it ought to have before this committee acts on it, and for that reason I am concerned to endorse it beyond the fact that, as I say, neither I nor my committee has studied it.

Mr. FAUNTROY. Yes.

Mr. Chairman, before yielding back the balance of my colleagues' time here, let me simply commend both Mr. Schaller and Mr. Rhyne and their associates for a really exhaustive study of this key provision of our bill and for a singly important contribution to these hearings and our final decisions.

Mr. DYMALLY. Mr. Fauntroy—and check with the timekeeper—I came to the conclusion not only that you used Mr. Stark's and Mr. Wheat's time but you used Mr. Parris' and Mr. Bliley's time also and a little bit of Mr. Rohrabacher's time.

Mr. Rohrabacher.

Mr. ROHRABACHER. Thank you, Mr. Chairman.

We all recognize Mr. Fauntroy's special interest in the District of Columbia and his special place on this committee and in the House of Representatives in dealing with issues concerning the District of Columbia. So although I may respectfully disagree with some of the points that he makes, I don't at all object to the fact that he wants to have that, all the time necessary to examine these issues that mean so much to him and mean so much to the people that he represents.

Even though he is missing my compliments right now—I just complimented you; that's all right. Even though I disagree with you, I made sure that there was a compliment.

It seems to me that what we are talking about here is a problem that the people of this area face, and it has been my observation—I may be wrong—that it seems that sometimes there are simple solutions to problems, and people come up with complex solutions, and the simple solution that I see is, we just add some new judges to this area so that they can take care of this high workload.

With that said, first of all, let me get your reaction to that simple approach.

Mr. SCHALLER. I hate to call it simple, but it is less comprehensive and, I think, less sophisticated than the approach which we have recommended.

It was previously recommended by, among other people, the Horsky committee and Mr. Horsky. In the first instance, it does not deal with the problem of decisional inconsistency among panels, and, in point of fact, the more judges you add to an appellate court, the more likely you are to increase that problem, because the more panels of three you can conceivably have, and there is a problem of decisional inconsistency, and all of the judges at the appellate level will tell you that it is an increasingly serious one.

It also doesn't deal with the need to sit en banc. In point of fact, it exacerbates that problem as well, because the bigger you make the court, the more difficult it is to get all the judges together to sit en banc and the more difficult that process becomes.

So that is a suggestion that has been made. In the past, it has been made by no less an authority than Mr. Horsky. He has come to recognize it as something that is not going to cure the problem, and it is something that our committee felt would not take care of the problem.

Mr. ROHRABACHER. OK.

Here are some statistics that I have in front of me about the D.C. Court of Appeals, and it says there were 2,347 cases pending on December 31, 1988, as opposed to 1,606 cases pending December 31, 1981, and there were 1,681 new filings in 1988, and for the same year, 1988, the court disposed of 249 cases by full written opinions, 489 cases by memorandum opinion and judgment, 66 cases by judgment without opinion, and 820 cases by order. The overall time for appeal is approximately 679 days, or 22 months.

How does this specific case load that we are talking about compare or rank with other courts of appeals?

Mr. SCHALLER. Well, I think it is much heavier than any other court system not having an intermediate court of appeals, of which there are only 13 remaining.

The next highest number is less than half of that kind of case load in every aspect.

The statistics that we were particularly concerned about revealed the trend over the past 10 years. In terms of case filings per year, we have gone from 1,300 to 1978 to 1,700 in 1988; in terms of cases pending, from just over 1,100 to 2,347, far more than 100 percent increase; in terms of the days pending, from 472 to 668 or, as you pointed out, 15½ months to 22½ months; that is an increase of 7 months; in terms of numbers of opinion, 600 to 700 in the late seventies, now up to 800, most of which are by way of memorandum opinion and judgment.

Mr. ROHRABACHER. Around the country, how does that rank? Do you know?

Mr. SCHALLER. It is a far busier court than most courts, certainly far busier than any other court system without an intermediate appellate court. I think Mr. Rhyne can probably add more specifics on that.

Mr. RHYNE. I can't really add more specifics, but I certainly confirm the conclusion that we have the busiest appellate court in the Nation that is not assisted by an intermediate appellate court.

I would like to speak to your suggestion that we ought to look for a simple solution rather than a complicated one. What we have proposed is the simple solution. It is the simple solution for dealing with appellate court overload.

We are not experts, or sometimes I think I am getting to be one, but I have looked at enough other matter written by experts, and the experts all say that when you get to the position where the District of Columbia is now, that you ought to create an intermediate appellate court. The American Bar Association created a commission 10 years ago or so to study this matter, and they published a guide called Standards for Judicial Administration, and it says very clearly that the optimum size for the highest court of a jurisdiction is seven judges; the permissible range is five to nine; after that, you impair the jurisprudential function of the court by simply adding more judges; and when the case load gets to the point where it cannot be handled by a court within that five to nine range, the next step, says the ABA, is the creation of an intermediate appellate court.

The ABA says also that the experience has been that when jurisdictions reach that step, they tend to look for band-aid approaches—they patch here, they patch there, they change here, they change there—and the result is that they defer long beyond the point where they should have created an intermediate appellate court the creation of that new body.

We are also not proposing here something that is novel, it is something that is in existence now in 38 other States, including the States on both sides of the District of Columbia.

Mr. ROHRABACHER. The overall time for appeal which I mentioned a moment ago is 679 days or 22 months. Of this time period—this is again through statistics that I have been given here, and please correct me if you think these statistics are wrong—227 days result from the time to notice to the filing of the record or the transcript, and, in addition, 237 days is composed from the time of filing of the record to the filing of complete briefs.

With that in mind, how can the creation of an intermediate court of appeals eliminate this period, which is basically a 15-month delay?

Mr. SCHALLER. Mr. Rohrabacher, that was one of the areas in which our committee was particularly interested.

There is no doubt but that the production, not so much the production of the record, because we were surprised to find, on looking into it, that 99.999 percent of all the records are complete within 60 days of the notice of an appeal, but the production of transcripts is a disgrace; there is no other word to use for it.

The problem is that curing that problem, which ought not to be difficult because the technology is there, it is common, and it is in common use in many court systems, but curing that is only going to change the area in which the backup occurs. In point of fact, the court of appeals has routinely allowed delays in filings and all the rest because they know that they are working at an overload situation now in handling the cases even though the number of dispositions has increased in recent years. That has been accomplished largely (a) by heroic efforts on the part of the judges and (b) by an increase in the number of MOJ's and unsigned opinions.

Let me give you some statistics that we did not include explicitly, but they are there by implication in our report. One of the members, in separate views, which he decided not to ask be published, took a look at this problem from the standpoint of the judges themselves and pointed out that in 1988 the nine judges of the court—and I should emphasize there that for most of the time we are talking about over the last 6 to 10 years we have always been talking about eight judges effectively, because there is always one judge who has just retired and they are awaiting the appointment of a new one.

But assuming nine, the nine judges of the court disposed of a record 1,624 cases in 1988. Of these, 249 were disposed of by published opinion, roughly twice the number of opinion issued annually by the Supreme Court of the United States. Another 489 were disposed of by unpublished MOJ, 886 by judgment without opinion or order. On a per judge basis, that is 27.6 full published opinion, 54.3 MOJ's, and 98.4 judgments without opinion.

Since the court sits in three-judge panels, that means that each judge on an average participated; that means, supposedly they read the briefs, they examined the record, they heard argument, if any, and they deliberated with their colleagues in 540.6 dispositions on the merits, 245.4 of them resulting in some form of written dispositions, and was principally responsible for the court's opinion or MOJ in 81.8 cases.

That is, we submit, an intolerable workload, at least if we expect the judges to devote even a modicum of thought, let alone collegial deliberation and legal research, to the decisionmaking process.

But these numbers take no account of the time devoted to the 1,435 motions decided by three-judge panels, or the 6,228 motions decided by single judges, or to the process of reviewing opinions under the 5-day rule in cases to which a judge is not assigned, or to the preparation of dissenting opinions, or to the substantial disciplinary and administrative responsibilities of the court, and, as chairman of the court's committee on unauthorized practice, I can tell you that those responsibilities are serious and time consuming.

So that is the look at the situation we now have from the end of the telescope where the judges find themselves.

Mr. ROHRABACHER. But to get back to the original point that I was zeroing in, that certainly we all recognize that there is a high workload and, in fact, that is totally recognized and accepted, but as we stated in the beginning of my question, we recognize that management is also a problem. Is it not? I mean this is something that is acknowledged, that there has to be some kind of procedural

changes and management changes that are part of this problem; it is not just high workload, as you are suggesting.

Mr. RHYNE. Mr. Rohrabacher, I think that our court of appeals has made mighty strides in management, and they have streamlined to the point where I believe they can no longer streamline. They have decided less cases by full opinion, more cases by summary decision.

You could clear up the backlog in the court by the end of this week if you simply tossed a coin and decided cases, but that is not what we want our judges to do. What we want our judges to do is to give considered judgment to cases, and that is being impaired by the case overload.

With regard to the unclogging of various stages of process, most notably the court reporters stage, I view this as a bunch of logs floating down a stream, and there are bottlenecks or jam ups at various places in the stream, but the ultimate jam up is the width of the mouth of the stream, it is only nine judges wide, and if you unclog upstream, which we certainly should do, you are simply going to jam those logs up at the mouth of the stream because you can only get so many decisions out from nine judges.

The solution is to widen the mouth of the stream by creating more judges or, as we propose, to take some of the big logs out of the mouth of that stream and get them over into a supreme court that can decide those time-consuming cases and let the others move on.

Mr. ROHRABACHER. I have heard very few arguments against increasing the number of judges. However, if we decide to go further beyond that and create another level, another judicial level, and realizing that there are these logjams, wouldn't we just be transferring the delay that we are facing today from one court to another court? We would just be transferring the delay from one group of people to another, and the basic solution is more judges.

Mr. RHYNE. Well, let's look at what happens across Western Avenue and Eastern Avenue in the State of Maryland where they do have an intermediate appellate court. That court decides about 92 percent of the cases decided in the appellate courts of Maryland, and it decides them in an average time of less than 6 months, 5.2 months according to the court's latest published statistics; 92 percent of the appellate cases in the State of Maryland are decided in 5.2 months. In the District of Columbia, it takes 22 months. In fact, it takes less time, on an average, to get a case through the entire system in Maryland, from the time you file in the trial court to the time you get a decision in the trial court, to the time you get a decision in the appellate court, it takes less time than it takes us to get a case through the District of Columbia Court of Appeals.

Mr. SCHALLER. That is a legitimate and a very serious concern that a number of people have expressed, Mr. Rohrabacher, and the way that we propose and this bill provides to take care of it is through this "cert. first" system. Not every case is going to go through both levels. You are not going to go invariably to the intermediate court and then have an appeal to the supreme court.

Those cases that ought to be in the supreme court, that involve lawmaking issues, will go immediately to the supreme court. Those cases which are deemed to involve only error correction will go in

the first instance to the intermediate court, and very few of those will go on to the supreme court.

Mr. ROHRABACHER. It sounds like a good plan. Sometimes the best laid plans—and you know the rest.

That is the end of my questions. Thank you.

Mr. DYMALLY. Mr. Rohrabacher and I must leave, but Mr. Fauntroy will continue to chair the meeting. I may miss you when I return, but I do want to say this, that it was our hope that the full committee would be able to mark up. We made that assumption with the thought that we might be here until December late, but apparently the leadership is thinking about adjourning for Thanksgiving. So I don't know that the full committee would have time to do a markup, and if that is the case, then I suspect we will probably mark up some time in January or February.

Mr. SCHALLER. Thank you, Mr. Chairman.

Mr. FAUNTROY [presiding]. Thank you.

Gentlemen, I thank you for your time.

As my junior colleagues leave to vote on the floor, of course, you are reminded that, while I am the ranking member of this committee, and while I serve on three committees of the House—the second ranking member of the Banking Committee, chairman of its Subcommittee on International Development, Finance, Trade, and Monetary Policy—I do not vote on the floor, and the unique situation by which the Judicial Nominations Commission functions—and, as you say, if it's not broke, don't fix it—is one which flows from article 1, section 8, clause 70 of the Constitution, which says that those of us who live here, unlike citizens who live in capitals of 115 democracies in the world, shall not have the input on local judgments that citizens throughout this country have with respect to their own States.

So I just make that point painfully as I continue to raise questions with you.

In addition to reading your very excellent report and that of the special committee studying the District of Columbia Court of Appeals, I did read the dissenting views, and some of the counter arguments to having a supreme court include, as you know, the notion that adding more judges to the appeals court could alleviate that backlog.

I read with much concern the statement of those who have minority and dissenting views that the problem experienced by the court can be solved by means of less drastic, less costly, and more effective means, the permanent addition of two judges, two appeals coordinators, and some streamlined administrative procedures.

What is your response to this statement of dissenting views?

Mr. SCHALLER. Well, again, as we have said in our response to the dissent, and as I think I mentioned to Mr. Rohrabacher and perhaps in answer to questions that you had posed, the notion that this problem can be handled by adding judges to the current court is, in our judgment, wrongheaded.

Measures short of creation of an intermediate court have, in large number, already been implemented. There are any number of summary disposition mechanisms being employed. The court is making more use of professional staff personnel. The court is highly computerized. There have been many streamlining meas-

ures put in place by the court over the years. They have not solved the problem, and, as I pointed out in the prologue to the report and in my letter to Chairman Dymally, the most authoritative critics, the judges themselves, say that the problem remains and that the most effective and probably the only way of solving the problem is by creation of an intermediate court, and, again, regardless of how much the addition of additional judges to this court of appeals could accomplish in terms of backlog or delay reduction—and we submit that it would not be much—it does not begin to grapple with the problems—in fact, it exacerbates the problems—of decisional inconsistency on the same court between panels and the problem of getting these judges to sit en banc for important law-making cases.

So beyond that, there is only one, as far as I know, historical precedent for a megacourt, a court of more than nine or so judges at the appellate level. That was in Virginia many, many years ago, and it did not work. So we just don't think that solution which has been proposed again and again by, as I said, among many other distinguished people, Mr. Horsky, that it no longer will withstand scrutiny or analysis, and Mr. Horsky himself has pointed out that it won't work.

Mr. RHYNE. To take a focus simply on the idea of increasing the court from 9 to 11, when you do have an important case that deserves en banc consideration, you then take 11 judges out of the stream of processing cases, and you have 11 judges giving consideration to that case.

Under our proposal, you would have 7 judges, 7 as opposed to 11, giving consideration to that, and they would not be taken out of the mainstream, there would still be 9 judges sitting in panels at the same time they are working on that case turning out the cases and the opinions in the more routine types of matters.

Mr. FAUNTROY. I thank you, gentlemen, and I do appreciate your indulgence of my questions, because we do want to zero in on some of the dissenting views that are being marketed on the Senate side and here in an effort to get views heard, and, for that reason, it has been pointed out that the District of Columbia judicial system is distinct, that it does not spread out in several different districts, and thus some contend that the management system need not rest with the chief justice of the supreme court, as it does in most State courts around the country. What is your response to that?

Mr. SCHALLER. Our response would be that the experience of these other jurisdictions is instructive. There are reasons for the highest judicial officer in a court system to have the ultimate authority.

There is no doubt—and I think that the chief judge or justice of the supreme court, if something like this concept is put into place, would be the first person to recognize that we have a very large trial court and a very busy trial court in this jurisdiction, and that the chief judge of that court must have some preliminary responsibility for the administration of that court, that there are systemic problems having to do with the judicial system which involves both courts, and under this system it would be three courts—the supreme court, superior court, the intermediate court of appeals, and the supreme court—and the administrative authority for that judi-

cial system must be reposed in the chief justice of the supreme court.

Mr. RHYNE. In my opinion, the concentrated population of the District of Columbia in a narrow geographic area is, if anything, an argument as to why an intermediate appellate court would work better here and more easily than in other jurisdictions. Compare, for instance, California, which has geographical appellate courts. In the District of Columbia, the highest court could routinely keep advised of the docket of the lower court and pluck out cases that are important cases at an early stage. That may be much more difficult to do for a highest court in a State like California that must contend with a number of appellate courts at widely dispersed geographic locations.

Mr. FAUNTROY. Opponents also argue that, due to the court's recent efficiency in handling appeals, it can now keep current and actually reduce its backlog, so why bother? Is that true, in your view?

Mr. SCHALLER. I think that efficiency is illusory and such efficiency as has been attained has come at a terrible cost. These judges—and I would emphasize to the committee that this jurisdiction is very lucky in its appellate court, which is a fine court; it is a very high caliber group of judges—these judges are working beyond their optimum capacity, it seems to me, and most of the increased efficiency which has come in the last 5 years, and the last couple of years particularly, is because of an increase in the number of memorandum opinion and judgments and in the number of decisions that are made without any kind of written opinion at all.

Now some people say that is great, these are unimportant cases, they don't deserve a full written opinion. We have taken the position, as the American Bar Association has, and has been the tradition in this country, that people who have an appeal of right are entitled to serious consideration of the issues raised on that appeal, and they are entitled to a careful consideration of those issues and a written opinion.

Where a discretionary appeal system has been put in place in other States, including Virginia, it has come to be looked upon with disfavor; the citizens, the people who come before the courts, have been unhappy with it; lawyers and judges have seen it as not measuring up to the standards of justice to which Americans are entitled. We don't think that is a good system, and when the judges themselves say, "We have cases that are coming before us which we think merit en banc consideration which we can't spare the time to go en banc to hear," when the judges themselves say, "We have issues that we would like to write on which we can't write on because we simply don't have the time," then we think that we have to respond to that complaint on their behalf and seek some help for them.

Mr. RHYNE. When we and the Bar Association first went on record 2 years ago, 1987, favoring an appellate court, we were told that if you just relax, that this problem is going to clear up, and at that time the average delay between filing and disposition in the D.C. Court of Appeals was 18 months, which was, we thought, totally unacceptable, three times the ABA standard, three times what most appellate court cases take in the State of Maryland, but we

looked at the last 10 years, and in only 2 of those 10 years were the number of filings exceeded by the number of dispositions, and then only by a bare margin. In every other year, the number of dispositions was outnumbered by the number of filings.

So we thought it would get worse instead of better, and, in fact, in the 2 years since the Bar Association went on record the time it takes to get a case decided in the D.C. Court of Appeals, on average, has increased from 18 to 22 months.

You can solve the problem, a court can solve the problem, by simply spending less time on cases, and there is a point of view out there that a lot of these cases just aren't worth a lot of time. To the individual litigant, the case he or she has is the most important thing in the world. It may not be Earth shaking in terms of the jurisprudential future of the District of Columbia, but it is very important to them, and they want to hear how the court arrived at its decision. It is not enough to simply say you win or you lose. They want the confidence that an explication of the reasons for the decision brings, and our court is no longer able to do that in many cases that deserve that sort of treatment.

Our court, in reviewing the decisions, of an administrative agency of the District of Columbia, says that we can't review unless you tell us what the basic factual foundation of your decision was and how you got to the conclusions that you reached. Says our court in the case of *Dietrich* v. *District of Columbia Board of Zoning Adjustment,* "The agency must disclose the basis of its order by an articulation with reasonable clarity of its reasons for the decision. There must be a demonstration of a rational connection between the facts found and the choice made," and I suggest that our court, because of its case overload, is unable to give precisely that kind of consideration to cases that it has before it that need the same kind of explanation.

Mr. SCHALLER. Can I add a word to that, Mr. Fauntroy?

Mr. FAUNTROY. Certainly.

Mr. SCHALLER. Again, referring to Earl Dudley's separate statement, because he took the idea of why it is necessary to have a written opinion and expressed it as well as I have heard it expressed. He points out that lawyers devote a lot of time to making arguments and preparing briefs for courts, and they really have a much easier task than the judges do, because they know where they want to come out at the end, and they feel that the court needs and the clients need to feel that the court has given due consideration to the arguments they have made.

Yet in 1988, Mr. Dudley writes, only 15.3 percent of the court's dispositions on the merits resulted in published opinions, and more than 54 percent resulted in no opinion or written explanation of the court's reasoning whatever.

Every lawyer knows that some positions which seem entirely reasonable in the context of a discussion simply won't write. The process of writing is an indispensable discipline in the kind of decision-making that appellate courts engage in, and that is part of the reason why we think that when this increase in efficiency comes at the cost of MOJ's or decisions without any written opinion, it means a decline in the quality of justice that this court is render-

ing, and the judges themselves see it that way, and we think rightly so.

Mr. FAUNTROY. I certainly want to thank you for that added bit of wisdom you have prepared me by saying it was probably said better than you had ever seen the point made, and I must concur. Would you care to read for me again the phrase about, it just doesn't write?

Mr. SCHALLER. Yes. "Every lawyer knows that some positions which seem entirely reasonable in the context of a discussion simply won't write."

Mr. FAUNTROY. Thank you. That is a great statement.

Now, Mr. Chairman, if I might just ask one more question.

Mr. DYMALLY [presiding]. I am prepared to let you have the other witnesses, but not the Chair.

Mr. FAUNTROY. I wonder, Mr. Schaller, if you would elaborate on the stare decisis implications of the new supreme court in view of the *MAP* v. *Ryan* case which opponents of the bill argue will influence the court's ability to deviate from precedent. They say—and I quote them—"Our carefully developed body of law would be at risk." Any of you, is that true?

Mr. SCHALLER. I don't think so. That is the view of those people who think that consideration, indepth, careful consideration of cases, doesn't make sense because you might find something wrong or you might go out of your way to find something wrong, with the precedential cases and then create a system where your stare decisis is really not of any effect.

I don't think that is the case, and I think that the judges of our current court of appeals have shown themselves careful, thoughtful judges who aren't in there to tinker around with legal precedent that makes sense.

Where changes need to be made after thoughtful and careful consideration, they ought to be made, and of course the authority of the intermediate court of appeals plus the supreme court would be nothing more than currently exists and resides in the current court of appeals. It would just be split out so that error correction would be in the lower court and the real lawmaking power would be in the supreme court. There would be no increase in authority, and the danger to the carefully worked out body of case law, I don't think there is any such danger. As a matter of fact, I think that protecting and refining in a thoughtful and intelligent manner that worked out body of case law would be advanced by the proposition that this bill embodies to create an intermediate court of appeals and a supreme court in the District of Columbia.

Mr. FAUNTROY. Thank you.

Thank you, Mr. Chairman.

Mr. DYMALLY. We want to thank the witnesses for their lengthy and helpful testimony, and we look forward to forwarding you some questions for your responses.

Mr. SCHALLER. Thank you very much.

Mr. RHYNE. We would be happy to respond. Thank you.

Mr. DYMALLY. Our next witness is Mr. Horsky.

STATEMENTS OF CHARLES A. HORSKY, COUNCIL FOR COURT EXCELLENCE, AND HON. CHARLES McC. MATHIAS, JR., PRESIDENT, COUNCIL FOR COURT EXCELLENCE

Mr. HORSKY. Mr. Chairman, I have filed a statement with Senator Mathias, who expected to be here. He is here on the Hill somewhere, and I will go ahead in his absence and make the statement on behalf of both of us in any event.

I am speaking for the Council for Court Excellence, of which I am a former chairman.

The Council for Court Excellence is an organization dedicated to improving the administration of justice in the District of Columbia and to improving the public understanding of the judicial system. Itd is composed of representatives of the bar, the business community, the local courts, District and Federal, and the public at large.

The executive committee of the council has reviewed H.R. 3470, and we have several comments. Title I of the bill, section 101 of the bill, establishes the Supreme Court of the District of Columbia, leaving the District of Columbia Court of Appeals as an intermediate appellate court. Whether this should be done has been a mooted question for more than a decade. In recent days, however, given the inordinate delays which litigants now experience in the present court of appeals, support for an intermediate court of appeals and the creation of a supreme court has been widespread. The council joins in that support.

Section 101 also appears to us as quite adequately creating the supreme court, defining its membership, its jurisdiction, and its procedures.

Having said that, we recognize that it necessarily involves a new allocation of administrative responsibility. The bill, properly, we believe, puts that responsibility on the chief judicial officer of the District court system, the chief justice of the supreme court. Section 103(g) of the bill, pages 21 to 24, does just that. This is consistent with the practice in the State courts throughout the United States. The joint committee is likewise reconstituted to reflect the new allocation of administrative responsibility in section 103(g)(1)(c).

Of course, as is made explicit in section 103(g)(1), pages 21 to 22 of the bill, the chief justice exercises administrative responsibilities in consultation with the chief judges of the other two courts, particularly in respect to matters affecting those courts. That would be good administration in any event, but we are glad to see it made explicit in the bill.

May I now introduce Senator Mathias, for whom I am also speaking at the moment.

Do you want to read this instead of me?

Mr. MATHIAS. Go right ahead.

Mr. HORSKY. That would be good administration in any event, but we are glad to see it made explicit in the bill. Indeed, it might be appropriate to make explicit that the chief judge of each court would have the primary responsibility for the day-to-day operations of his or her court.

The next paragraph, Mr. Chairman, I think is confusing. I checked the D.C. Code, and I found in the D.C. Code that judges in

the District of Columbia courts do not have to be residents of the District of Columbia. The home rule bill makes it clear that they do have to be. I am, at the present time, advised that the home rule bill language which is repeated in the bill is correct and that what I have said in here is in error. On the other hand, I still believe, and the council still believes, that it is a mistake to limit the availability of judges to residents of the District. As I say in the statement, a great many lawyers who confine their practice to the District live outside it.

The happenstance that he lives on the other side of the District line is no reason to eliminate one who may be eminently qualified to serve on the D.C. court. The District needs the best that is available, and reducing the available pool is not the way to achieve that goal.

Title II gives us only one problem. Section 201 reduces the terms of appointment of all judges in the District to 10 years from the present 15. We see no reason to make that change. Judicial ability grows with judicial experience. Moreover, an assured term of 15 years has helped to attract qualified lawyers to the District courts. We would urge that this provision of title II be eliminated.

We support, on the other hand, the provision in section 203 adding eight judges to the superior court. Judge Ugast does make a convincing case for the additional judges, particularly in the light of the huge increases in criminal cases which has resulted from the drug crisis. His court is forced to assign so many of the present judges to criminal trials that civil matters are subjected to quite unacceptable delays.

Title III creates judicial magistrates in place of hearing commissioners. Hearing commissioners, except in child support cases, do not enter final judgments which stand as an order of the superior court. Judicial magistrates, on the other hand, will do so in all matters committed to their jurisdiction. Their decisions are, of course, reviewable on appeal.

We believe judicial magistrates, like the eight additional judges, will be of great value in reducing the delays in the superior court. While the bill is not entirely unambiguous, we construe section 11-1732(f) on page 35 as vesting in the chief judge of the superior court the power and responsibility to determine just what types of cases shall be assigned to the magistrates within the jurisdictional limits specified in that section as set forth through court rules. This probably should be made clearer. The chief judge of the superior court can then utilize magistrates as the needs of the court demand. Given the expansive jurisdiction permitted to magistrates under section 11-1732, this authority in the chief judge should be of substantial assistance to the chief judge in eliminating the delays which now plague the superior court and making it unnecessary to add seven judges in addition to the eight already added by the bill which Judge Ugast thinks are also required.

Chief Judge Ugast expressed his concern that allowing anyone but a judge of his court to enter a final order would violate the policy established in 1970 of a single, unified trial court. We do not view it that way. Just as with the hearing commissioners who can enter a final order in a child support case, the magistrates will be a

part of the superior court, exercising such jurisdiction as the needs and the rules of that court provide.

On title IV, enlarging the membership of the Commission on Judicial Disability and Tenure and the Judicial Nomination Commission, we have no comment, except to say, as Chief Judge Rogers did, that the present arrangement has been working satisfactorily.

On title V, we have no comment, except to say that several bar associations and several civic organizations, such as the Council for Court Excellence, already monitor and vigorously comment on the performance of the courts. However, if title V is to be retained, some provision of funds for its operation should be added.

That completes my statement, Mr. Chairman.

[The prepared statement of Messrs. Mathias and Horsky follows:]

Statement of Hon. Charles MacC. Mathias and Charles A. Horsky, representing the Council for Court Excellence on H.R. 3470, District of Columbia Judicial Reorganization Act of 1989 before the Subcommittee on Judiciary and Education of the Committee on the District of Columbia United States House of Representatives November 2, 1989

The Council for Court Excellence is an organization dedicated to improving the administration of justice in the District of Columbia, and to improving the public understanding of the judicial system. It is composed of representatives of the bar, the business community, the local courts, District and Federal, and the public at large.

The Executive Committee of the Council has reviewed H.R. 3470. We have several comments.

Title I of this bill, Section 101 of the bill, establishes a Supreme Court of the District of Columbia, leaving the District of Columbia Court of Appeals as an intermediate appellate court. Whether this should be done has been a mooted question for more than a decade. In recent days, however, given the inordinate delays which litigants now experience in the present Court of Appeals, support for an intermediate court of appeals -- and the creation of a Supreme Court -- has been widespread. The Council joins in that support. Section 101 also appears to us as quite adequately creating the Supreme Court and defining its membership, its jurisdiction and its procedures.

Having said that, we recognize that it necessarily involves a new allocation of administrative responsibility. The bill, properly, we believe puts that responsibility on the chief judicial officer of the District court system -- the Chief Justice of the Supreme Court. Section 103(g) of the bill, pages 21-24, does just that. This is consistent with the practice in the state courts throughout the United States. The Joint Committee is likewise reconstituted to reflect the new allocation of administrative responsibility, Section 103(g)(1)(c), p. 23.

Of course, as is made explicit in Section 103(g)(1), pages 21-22 of the bill, the Chief Justice exercises administrative responsibilities in consultation with the chief judges of the other two courts, particularly in respect of matters affecting those courts. That would be good administration in any event, but we are glad to see it made explicit in the bill. Indeed, it might be appropriate to make explicit that the chief judge of each court would have the primary responsibility for the day-to-day operation of his or her court.

One other matter in Title I, Section 11-1501(b)(3) limits the availability of judicial candidates to residents of the District of Columbia -- a change from the present law which extends availability to lawyers in the surrounding areas of Maryland and Virginia who practice, nonetheless, in the

District. While we appreciate the desire to have District of Columbia positions filled by District residents, we favor the manner by which Congress has dealt with this matter in present Sections 11-1501. A great many lawyers who confine their practice to the District live in the suburbs. The happenstance that a lawyer lives on the other side of the District line is no reason to eliminate one who may be eminently qualified to serve on a District of Columbia court. The District needs the best that is available, and reducing the available pool is not the way to achieving that goal.

Title II gives us only one problem. Section 201 reduces the term of appointment of all judges in the District to 10 years, from the present 15. We see no reason to make that change. Judicial ability grows with judicial experience. Moreover, an assured term of 15 years has helped to attract qualified lawyers to the District courts. We urge that this provision of Title II be eliminated.

We support, on the other hand, the provision in Section 203 adding eight judges to the Superior Court. Judge Ugast does make a convincing case for the additional judges, particularly in light of the huge increases in criminal cases which has resulted from the drug crisis. His court is forced to assign so many of the present judges to criminal trials that civil matters are subject to quite unacceptable delays.

Title III created judicial magistrates in place of hearing commissioners. Hearing commissioners, except in child

support cases, do not enter final judgments which stand as an order of the Superior Court. Judicial magistrates, on the contrary, will do so in all matters committed to their jurisdiction. Their decisions are, of course, reviewable on appeal.

We believe judicial magistrates, like the eight additional judges, will be of great value in reducing delays in the Superior Court. While the bill is not entirely unambiguous, we construe Section 11-1732(f), on page 35 as vesting in the chief judge of the Superior Court the power and responsibility to determine just what cases or types of cases shall be assigned to the magistrates, within the jurisdictional limits specified in that section, as set forth through court rules. That probably should be made clearer. The chief judge of the Superior Court can then utilize magistrates as the needs of the court demand. Given the expansive jurisdiction permitted to magistrates under Section 11-1732, this authority in the chief judge should be of substantial assistance to the chief judge in eliminating the delays which now plague the Superior Court, and making it unnecessary to add seven judges -- in addition to the eight added by this bill -- which Judge Ugast thinks are required.

Chief Judge Ugast expressed his concern that allowing anyone but a judge of his court to enter a final order would violate the policy established in 1970 of a single, unified trial court. We do not view it that way. Just as with the

hearing commissioners who can enter a final order in a child support case, the magistrates will be a part of the Superior Court, exercising such jurisdiction as the needs and the rules of that court provide.

On Title IV, enlarging the membership of the Commission on Judicial Disability and Tenure and the Judicial Nomination Commission, we have no comment except to say, as Chief Judge Rogers did, that the present arrangement has been working satisfactorily. On Title V, we have no comment, except to say that the several bar associations and several civic organizations, such as the Council for Court Excellence, already monitor and vigorously comment on the performance of the courts. However, if Title V is to be retained, some provision of funds for its operations should be added.

Mr. DYMALLY. Thank you very much.

Senator, welcome back. This is not an unfamiliar committee to you, and I want to ask a question which is not unfamiliar either, and it is the whole question of residence. What is the most equitable way to handle this continuing controversy in the District?

Mr. MATHIAS. I think the council view is, as expressed by Mr. Horsky, that the needs of the District in terms of judicial talent, judicial competence, transcend the consideration of restricting membership on the courts to people who physically sleep inside the District, and therefore the council has concluded, as Mr. Horsky has said, that we should be able to draw on that larger talent, just as in the case of the Federal courts, there is a wider pool from which to draw.

Mr. DYMALLY. In the case of the Federal court, one does not have to be a member of the District Bar.

Mr. MATHIAS. That is true. They are drawn from all over the country on some occasions.

Mr. DYMALLY. Presently, there is no residential requirement for the Federal court.

Mr. MATHIAS. That is right.

Mr. DYMALLY. So you would apply that same rule to the court of appeals and the supreme court as proposed?

Mr. HORSKY. Yes, yes.

Mr. MATHIAS. I think that is right. I think that has traditionally been the council's position.

Charlie preceded me as the president and has a longer institutional knowledge of the council's position.

Mr. HORSKY. That has been the position of the council from the beginning.

Mr. DYMALLY. On page 3, you recommend the elimination of the provision in title II which reduces the term of appointment for judges in the District of Columbia from 15 to 10 years, and I believe a witness last week suggested we ought to stay with the 15.

Mr. HORSKY. Well, 15 years seems to us to be a perfectly appropriate term. It has worked well, and, as I say in the statement, the assurance of a 15-year term is attractive to lawyers who are asked to be judges, and I think we get a better quality of judges by lengthening the term. Moreover, as I said, they gain abilities as they gain experience. They are better judges at the end of the 15 years than they were before, and I don't see any reason to change it.

Mr. DYMALLY. On page 4, you make a point of disagreeing with Judge Ugast on whether or not anyone but a judge is "entering into a final order" would violate a 1970 policy. You disagree. Would you mind expanding on that and give your reasons for disagreement?

Mr. MATHIAS. I think, as Mr. Horsky indicated in his statement, we would view the magistrates as a part of the court, not as an independent or competitive institution. They would be a part of the whole judicial process and therefore would not in any way diminish the jurisdiction of the court. They would supplement it and strengthen it but not in any way compete with it.

Mr. HORSKY. At the present time, Mr. Chairman, one of the functions of the hearing commissioners is to enter final orders in child

support cases, and I have not heard anybody suggest that is contrary to the system that we have of a single unitary superior court.

Mr. DYMALLY. It is argued that this court system is distinct from most other court systems in that it is limited to the single territory of the District, hence centralized management in a single chief justice is not justified, and there are different views, of course, from other people. What are your views about this whole question of centralization?

Mr. HORSKY. Of administrative authority?

Mr. DYMALLY. Yes.

Mr. HORSKY. It doesn't seem to me to be relevant to the question as to how the administrative authority should be allocated, as to whether you are in the District of Columbia or whether you are in California. Someone has to be in charge of the administration of the courts, and the normal person in all parts of the United States to have that responsibility is the chief justice of the supreme court.

Now, having said that, I also point out, and I think it might be made more explicit in the bill, that the day-to-day administrative responsibility of, say, the superior court should be lodged in the chief judge of the superior court, and the day-to-day responsibility of the intermediate appellate court should be lodged in the chief judge of that court.

Mr. DYMALLY. What about the overall management of the entire court system?

Mr. HORSKY. But the overall ought to be in the high court, as it is in the bill. We agree with the way the bill is structured.

Mr. DYMALLY. What are your views on the three-member joint committee represented by the superior court, the appellate court, and the chief justice?

Mr. HORSKY. The joint committee, as restructured by the bill, would leave the administrative responsibility in the supreme court. It would have a majority of the members, and that is the way it should be.

Mr. MATHIAS. But it would provide for some representation of the other benches.

Mr. HORSKY. Sure. It would be a collegial body. They would obviously cooperate, but the ultimate responsibility would lie, as it should, with the supreme court.

Mr. DYMALLY. In your statement, you indicated that the issue of an appellate court is moot. If this is the case, do you agree that the approach taken in H.R. 3470 which addresses trial and appellate court backlogs is an appropriate approach?

Mr. HORSKY. Yes, I do, completely.

Mr. DYMALLY. Now let's get back to the question of the joint committee. You will have equal representation on each one of the systems.

Mr. HORSKY. At the moment, the joint committee is dominated by the supreme court. It has a majority of the members of the joint committee, so that the ultimate responsibility for administering the District of Columbia courts lies with the lower court rather than the top court. We think that is wrong, and the bill changes it and puts the majority on the joint committee in the hands of the supreme court, so that the ultimate responsibility will be where it should be, at the top of the system.

Mr. DYMALLY. The bill proposes three in the supreme court, one in the appellate, and one in the superior.

Mr. HORSKY. Yes.

Mr. DYMALLY. You prefer that system to 1-1-1?

Mr. HORSKY. Well, 1-1-1 would leave the majority with the lower court.

Mr. DYMALLY. I see.

Well, we want to have the opportunity, Senator and Mr. Horsky, to forward some questions.

Mr. HORSKY. Certainly.

Mr. DYMALLY. We thank you for your appearance here.

I indicated before the Senator came in that it was our hope to mark up the bill this month, and it was our hope to have the full committee do so next month, but I understand we may eat turkey at home instead of Christmas ham. So we may not see any work from the full committee until probably January or February of next year. But we may be able to get it; I don't know; we will try.

Mr. HORSKY. We hope you can.

Mr. MATHIAS. Yes. We are going to talk with the chairman about this new schedule. Our original plan was early December, but we are going to hold a hearing on the 15th; we will mark up on the 15th.

Mr. MATHIAS. The council is very grateful to the committee for the attention it is giving to this matter.

Mr. DYMALLY. Thank you very much. A call from you to the chairman of the full committee might result in a markup just before we go home.

Mr. MATHIAS. Good.

Mr. DYMALLY. Thank you very much.

Mr. MATHIAS. Thank you, Mr. Chairman.

[Whereupon, at 10:47 a.m., the subcommittee was adjourned.]

H.R. 3470—DISTRICT OF COLUMBIA JUDICIAL REORGANIZATION ACT OF 1989

WEDNESDAY, NOVEMBER 15, 1989

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON JUDICIARY AND EDUCATION,
COMMITTEE ON THE DISTRICT OF COLUMBIA,
Washington, DC.

The subcommittee met, pursuant to call, at 10 a.m., in room 1310A, Longworth House Office Building, Hon. Mervyn M. Dymally (chairman of the subcommittee) presiding.

Members present: Representatives Dymally, Fauntroy, Parris, and Rohrabacher.

Also present: Edward C. Sylvester, Jr., staff director; Donald M. Temple and Johnny Barnes, senior staff counsels; Ronald C. Willis, senior staff associate; Victor Frazer, staff counsel; Mark J. Robertson, minority staff director; Howard Lee, minority assistant staff director; Rick Dykema, minority staff assistant.

Mr. DYMALLY. The hearing of the Subcommittee on Judiciary and Education will come to order.

Because of the fact that we have a joint session today to hear Mr. Lech Walesa of Poland, therefore we want to expedite this hearing as much as is practicable.

Today marks our third day of hearings on H.R. 3470, the bill to reorganize the District of Columbia court system. It is approximately 20 years since Congress established the local court system in 1970. This legislation and these hearings seek to revisit the premises upon which these local courts were created and, where appropriate, develop more efficient and responsible systems in the areas of case management, judicial delay and law development.

The court system of the District of Columbia in 1989 is significantly different than the court system of 1969 and 1979. The D.C. court system is no longer a new baby as it was in 1970. It is a proven and developed judicial institution with its own models and system and its own peculiar problems. Thus, our approach in 1989 must be consistent with such development and not necessarily consistent with the same factors which influence the court's creation in 1970.

In our previous hearings, we heard testimony from proponents of H.R. 3470. Today, we'll hear from those who oppose the legislation. We have received and will enter into the record testimony from the Department of Justice, the Office of Legislative Affairs, which expresses its opposition to this bill. Apparently, there's a consistent theme amongst opponents of H.R. 3470. They suggest that the bill

is inconsistent with the 1970 Court Reform Act and will result in inefficiency and judicial delay.

The subcommittee is interested in learning more about these views and, in particular, responses to the several studies which document a need for a supreme court in the District of Columbia.

At the end of the hearing, I intend to move some version of H.R. 3470 to the full committee. Further, I intend to take all proposed recommendations into consideration.

I thank our witnesses for taking time out of their schedules to be here today and look forward to their testimony. But before we call upon our witnesses, I'm pleased to call upon the author of the bill, Mr. Fauntroy, and then we'll go to Mr. Parris for opening remarks.

Mr. Fauntroy?

[The prepared opening statement of Mr. Dymally follows:]

OPENING STATEMENT

OF

THE HONORABLE MERVYN M. DYMALLY

CHAIRMAN, SUBCOMMITTEE ON JUDICIARY AND EDUCATION

COMMITTEE ON THE DISTRICT OF COLUMBIA

HEARING ON H.R. 3470

WEDNESDAY, NOVEMBER 15, 1989

GOOD MORNING.

THE SUBCOMMITTEE ON JUDICIARY AND EDUCATION IS CALLED TO ORDER.

TODAY MARKS OUR THIRD DAY OF HEARINGS ON H.R. 3470, A BILL TO REORGANIZE THE DISTRICT OF COLUMBIA COURT SYSTEM.

IT IS APPROXIMATELY 20 YEARS SINCE CONGRESS ESTABLISHED THE LOCAL COURT SYSTEM IN 1970. THIS LEGISLATION AND THESE HEARINGS SEEK TO REVISIT THE PREMISES UPON WHICH THESE LOCAL COURTS WERE CREATED, AND WHERE APPROPRIATE, DEVELOP MORE EFFICIENT AND RESPONSIBLE SYSTEMS IN THE AREAS OF CASE MANAGEMENT, JUDICIAL DELAY AND LAW DEVELOPMENT.

THE COURT SYSTEM OF THE DISTRICT OF COLUMBIA IN 1989 IS SIGNIFICANTLY DIFFERENT THAN THE COURT SYSTEM OF 1969 AND 1979.

THE D.C. COURT SYSTEM IS NO LONGER A NEW BABY AS IT WAS IN 1970. IT IS A PROVEN AND DEVELOPED JUDICIAL INSTITUTION WITH ITS OWN MODELS AND SYSTEMS — AND ITS OWN PECULIAR PROBLEMS. THUS, OUR APPROACH IN 1989

MUST BE CONSISTENT WITH SUCH DEVELOPMENT AND NOT NECESSARILY CONSISTENT WITH THE SAME FACTORS WHICH INFLUENCED THE COURTS' CREATION IN 1970.

IN OUR PREVIOUS HEARINGS, WE HEARD TESTIMONY FROM PROPONENTS OF H.R. 3470. ON TODAY, WE WILL HEAR FROM THOSE WHO OPPOSE THE BILL.

WE HAVE RECEIVED AND WILL ENTER INTO THE RECORD TESTIMONY FROM THE UNITED STATES DEPARTMENT OF JUSTICE, OFFICE OF LEGISLATIVE AFFAIRS, WHICH EXPRESSES ITS OPPOSITION TO THIS BILL.

APPARENTLY, THERE IS A CONSISTENT THEME AMONGST OPPONENTS OF H.R. 3470. THEY SUGGEST THAT THE BILL IS INCONSISTENT WITH THE 1970 COURT REFORM ACT AND WILL RESULT IN GREATER INEFFICIENCY AND JUDICIAL DELAY.

I AM INTERESTED IN LEARNING MORE ABOUT THESE VIEWS, AND IN PARTICULAR, RESPONSES TO THE SEVERAL STUDIES WHICH DOCUMENT A NEED FOR A SUPREME COURT IN THE DISTRICT OF COLUMBIA.

AT THIS POINT, I INTEND TO MOVE SOME VERSION OF H.R. 3470 FORWARD TO THE FULL COMMITTEE. FURTHER, I INTEND TO TAKE ALL PROPOSED RECOMMENDATIONS INTO CONSIDERATION.

I THANK OUR WITNESSES FOR TAKING TIME OUT OF THEIR SCHEDULES TO BE HERE TODAY AND LOOK FORWARD TO THEIR TESTIMONY.

Mr. FAUNTROY. Thank you, Mr. Chairman. With this hearing, you have again demonstrated that you are serious in your determination to provide some immediate solutions to the problem of drugs and to violence that has engulfed the Nation's Capital. Over several weeks under your stewardship, we have received valuable testimony from our witnesses as we have moved toward markup of this legislation and I look forward to listening to the statements we will hear today and to engaging in a dialogue with the witnesses appearing before us.

At the outset, however, Mr. Chairman, I must indicate my profound disappointment with the U.S. Department of Justice. First, I'm deeply disappointed that the Department is not appearing before us, choosing instead to submit a statement in writing. My deep disappointment is further aggravated by the substance and quality of the Department's statement which, in my estimation, raises more questions than it answers, yet they do not appear to answer those questions.

For example, the Department's statement concedes that the District of Columbia's U.S. attorneys office is, in part, responsible for the intolerable appellate delay in our judicial system because that office sometimes requests as many as three extensions of time for filing briefs in appeals. The answer to this problem, the Department argues, is to add additional assistant U.S. attorneys. That would seem to be inconsistent with the view then espoused by the Department that there is no need to add the resources to the court as proposed by this bill. Forty-eight States in the Union have done that, why not the District of Columbia?

Instead, the Department goes against a giant wave of opinion based upon more than a decade of careful study by independent, disinterested and, I believe, objective local bar organizations in suggesting that two judges be added temporarily to the D.C. Court of Appeals and that senior judges be used. Every witness to date has rejected this feeble suggestion.

The Department is right in one regard and one regard only. It refers to this proposal as a "stop gap."

Moreover, the Department does not deal with the massive problem of oppressive delays in civil litigation and entirely fails to address what will happen to the court system when the 1,000 additional police officers are added.

The Department should be here, Mr. Chairman. Perhaps the Department has decided not to be here because it would appear that the President has, in fact, declared a cease fire in our war on drugs in the Nation's Capital. I am, of course, referring to the recent veto by President Bush of H.R. 3026, the D.C. appropriation's bill for fiscal year 1990. The President's veto effectively eliminates the funds for the eight additional superior court judges authorized by H.R. 3470, the very judges which the Department contends would resolve the delay problems in our courts.

But that's not all, Mr. Chairman. The President, by his veto, also eliminated the remainder of the $31.8 million in drug emergency funds, money that would have gone to hire additional police officers, several hundred as provided by H.R. 1502 and 300 as provided by the D.C. government as its commitment to fighting the war against drugs.

Moreover, the President's veto eliminates money that would have gone for drug education in our schools and drug treatment for addicted pregnant women as well as funds for the construction of a new 800-bed correctional facility and the funds for additional attorneys and staff for the office of corporation counsel, which the Department states it supports.

There just seems to be many contradictions, Mr. Chairman, and the Department is not here to clarify these matters. It is disappointing and one can reasonably question whether some are as serious as we are and you are, certainly, in your resolve to do something about drugs and violence in the Nation's Capital.

I look forward to the testimony we will receive this morning, Mr. Chairman, and I have some questions that I would like to ask our witnesses who are appearing here this morning. It has been two decades since we last took a close look at major reform of our judicial system. Much has changed over those 20 years and we have never, during that time or before, experienced the demand on our court system that we are now experiencing and can expect to experience as we turn up the heat against those who would perpetrate violence and attempt to reduce many of our neighborhoods to drug havens.

As I have stated consistently, Mr. Chairman, the ultimate answer lies in education, treatment and prevention. But we must first contain the problem. This bill seeks to help do that while bringing our court system into the modern age. I am as serious and determined as you are to accomplish that task.

Thank you for allowing me to make these opening remarks.

[The prepared statement of Mr. Fauntroy follows:]

STATEMENT OF CONGRESSMAN WALTER E. FAUNTROY
BEFORE THE SUBCOMMITTEE ON JUDICIARY AND EDUCATION
COMMITTEE ON THE DISTRICT OF COLUMBIA
HEARING ON H.R. 3470
THE DISTRICT OF COLUMBIA JUDICIAL REORGANIZATION ACT OF 1989
1310 LONGWORTH HOUSE OFFICE BUILDING
WASHINGTON, D.C.
NOVEMBER 15, 1989

MR. CHAIRMAN, WITH THIS HEARING, YOU HAVE AGAIN DEMONSTRATED THAT YOU ARE SERIOUS IN YOUR DETERMINATION TO PROVIDE SOME IMMEDIATE SOLUTIONS TO THE PROBLEM OF DRUGS AND VIOLENCE THAT HAS ENGULFED THE NATION'S CAPITAL. OVER SEVERAL WEEKS, UNDER YOUR STEWARDSHIP, WE HAVE RECEIVED VALUABLE TESTIMONY FROM OUR WITNESSES AS WE HAVE MOVED TOWARDS MARK-UP OF THIS LEGISLATION, AND I LOOK FORWARD TO LISTENING TO THE STATEMENTS WE WILL HEAR TODAY AND TO ENGAGING IN A DIALOGUE WITH THE WITNESSES APPEARING BEFORE US.

AT THE OUTSET, HOWEVER, MR. CHAIRMAN, I MUST INDICATE MY PROFOUND DISAPPOINTMENT WITH THE UNITED STATES DEPARTMENT OF JUSTICE. FIRST, I AM DEEPLY DISAPPOINTED THAT THE DEPARTMENT IS NOT APPEARING BEFORE US, CHOOSING INSTEAD TO SUBMIT A STATEMENT IN WRITING. MY DEEP DISAPPOINTMENT IS FURTHER AGGRAVATED BY THE SUBSTANCE AND QUALITY OF THE DEPARTMENT'S STATEMENT WHICH, IN MY ESTIMATION RAISES MORE QUESTIONS THAN IT ANSWERS, YET, THEY DO NOT APPEAR TO ANSWER THOSE QUESTIONS.

FOR EXAMPLE, THE DEPARTMENT'S STATEMENT CONCEDES THAT THE DISTRICT OF

COLUMBIA'S UNITED STATES ATTORNEY'S OFFICE IS IN PART RESPONSIBLE FOR THE INTOLERABLE APPELLATE DELAY IN OUR JUDICIAL SYSTEM BECAUSE THAT OFFICE SOMETIMES REQUESTS AS MANY AS THREE EXTENSIONS OF TIME FOR FILING BRIEFS IN APPEALS. THE ANSWER TO THIS PROBLEM, THE DEPARTMENT ARGUES, IS TO ADD ADDITIONAL ASSISTANT UNITED STATES ATTORNEYS. THAT WOULD SEEM TO BE INCONSISTENT WITH THE VIEW THEN ESPOUSED BY THE DEPARTMENT THAT THERE IS NO NEED TO ADD THE RESOURCES TO THE COURT AS PROPOSED BY THIS BILL. FORTY-EIGHT STATES IN THE UNION HAVE DONE THAT. WHY NOT THE DISTRICT OF COLUMBIA?

INSTEAD, THE DEPARTMENT GOES AGAINST A GIANT WAVE OF OPINION, BASED UPON MORE THAN A DECADE OF CAREFUL STUDY BY INDEPENDENT, DISINTERESTED, AND I BELIEVE, OBJECTIVE LOCAL BAR ORGANIZATIONS, IN SUGGESTING THAT TWO JUDGES BE ADDED TEMPORARILY TO THE D.C. COURT OF APPEALS AND THAT SENIOR JUDGES BE USED. EVERY WITNESS TO DATE HAS REJECTED THIS FEEBLE SUGGESTION. THE DEPARTMENT IS RIGHT IN ONE REGARD. IT REFERS TO THIS PROPOSAL AS "STOP-GAP."

MOREOVER, THE DEPARTMENT DOES NOT DEAL WITH THE MASSIVE PROBLEM OF OPPRESSIVE DELAYS IN CIVIL LITIGATION AND ENTIRELY FAILS TO ADDRESS WHAT WILL HAPPEN TO THE COURT SYSTEM WHEN THE 1,000 ADDITIONAL POLICE OFFICERS ARE ADDED. THE DEPARTMENT SHOULD BE HERE, MR. CHAIRMAN. PERHAPS THE DEPARTMENT HAS DECIDED NOT TO BE HERE BECAUSE, IT WOULD APPEAR, THAT PRESIDENT BUSH HAS DECLARED A "CEASE FIRE" IN OUR WAR AGAINST DRUGS.

I AM OF COURSE REFERRING TO THE RECENT VETO BY PRESIDENT BUSH OF H.R. 3026, THE D.C. APPROPRIATIONS BILL FOR FISCAL YEAR 1990. THE PRESIDENT'S VETO EFFECTIVELY ELIMINATES THE FUNDS FOR THE EIGHT

ADDITIONAL SUPERIOR COURT JUDGES AUTHORIZED BY H.R. 3470, THE VERY JUDGES WHICH, THE DEPARTMENT CONTENDS, WOULD RESOLVE THE DELAY PROBLEMS IN OUR COURTS.

BUT THAT'S NOT ALL, MR. CHAIRMAN. THE PRESIDENT, BY HIS VETO, ALSO ELIMINATED THE REMAINDER OF THE $31.8 MILLION IN DRUG EMERGENCY FUNDS --- MONEY THAT WOULD HAVE GONE TO HIRE 1000 ADDITIONAL POLICE OFFICERS, 700 AS PROVIDED BY H.R. 1502, A BILL I INTRODUCED, AND 300 AS PROVIDED BY THE D.C. GOVERNMENT AS ITS COMMITMENT TO FIGHTING THE WAR AGAINST DRUGS. MOREOVER, THE PRESIDENT'S VETO ELIMINATES MONEY THAT WOULD HAVE GONE FOR DRUG EDUCATION IN OUR SCHOOLS AND DRUG TREATMENT OF ADDICTED, PREGNANT WOMEN AS WELL AS FUNDS FOR THE CONSTRUCTION OF A NEW 800-BED CORRECTIONAL FACILITY, AND THE FUNDS FOR ADDITIONAL ATTORNEYS AND STAFF FOR THE OFFICE OF CORPORATION COUNSEL, WHICH THE DEPARTMENT STATES IT SUPPORTS.

THERE JUST SEEMS TO BE MANY CONTRADICTIONS MR. CHAIRMAN, AND THE DEPARTMENT IS NOT HERE TO CLARIFY THESE MATTERS. IT IS DISAPPOINTING, AND ONE CAN REASONABLY QUESTION WHETHER SOME ARE AS SERIOUS AS YOU ARE IN YOUR RESOLVE TO DO SOMETHING ABOUT DRUGS AND VIOLENCE IN THE NATION'S CAPITAL.

I DO LOOK FORWARD TO THE TESTIMONY WE WILL RECEIVE THIS MORNING, MR. CHAIRMAN, AND I HAVE SOME QUESTIONS THAT I WOULD LIKE TO ASK OF THE WITNESSES WE WILL HEAR FROM.

IT HAS BEEN TWO DECADES SINCE WE LAST TOOK A CLOSE LOOK AT MAJOR REFORM OF OUR JUDICIAL SYSTEM. MUCH HAS CHANGED OVER THOSE TWENTY YEARS, AND WE HAVE NEVER DURING THAT TIME OR BEFORE EXPERIENCED THE DEMAND ON OUR COURT SYSTEM THAT WE ARE NOW EXPERIENCING AND CAN EXPECT TO EXPERIENCE

AS WE TURN UP THE HEAT AGAINST THOSE WHO WOULD PERPETRATE VIOLENCE AND ATTEMPT TO REDUCE MANY OF OUR NEIGHBORHOODS TO DRUG HAVENS. AS I HAVE STATED CONSISTENTLY, MR. CHAIRMAN, THE ULTIMATE ANSWER LIES IN EDUCATION, TREATMENT AND PREVENTION, BUT WE MUST FIRST CONTAIN THE PROBLEM. THIS BILL SEEKS TO HELP DO THAT WHILE BRINGING OUR COURT SYSTEM INTO THE MODERN AGE. I AM AS SERIOUS AND DETERMINED AS YOU ARE TO ACCOMPLISH THAT TASK.

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Mr. DYMALLY. Thank you very much, Mr. Fauntroy.

Mr. Rohrabacher?

Mr. ROHRABACHER. Mr. Chairman, I appreciate your holding this in the third series of the hearings on this proposed creation of an additional level of appellate court in the District of Columbia.

I believe that the witnesses today will be at least as helpful as the witnesses in our other two hearings in the understanding of the ramifications of H.R. 3470. However, I must express my concern about the subcommittee markup schedule for 9 o'clock tomorrow morning. Given the substantial disagreement and concerns expressed in the prepared testimony of today's witnesses, as well as by the Justice Department, and I have had some meetings and discussed this issue in private as well, that have given me reason for concern. I believe that having a markup tomorrow morning represents an unnecessary rush to judgment, especially considering the fact that we don't know exactly how long Congress is going to be in session next week and what our recess schedule is going to be about.

So, I think this is an unnecessary rush to judgment and perhaps we shouldn't be speeding toward a markup. If the markup goes forward as scheduled with no time for reflection or negotiation in response to the objections and concerns raised by the administration and raised by today's witnesses, I believe that the process will become unnecessarily confrontational and will likely result in a sustained Presidential veto, leaving us no closer to solving the evident problems in the District of Columbia court system, including the shortage of superior court judges.

So, Mr. Chairman, I would hope that together we can prevent this course of events from taking place and that instead of rushing into this even before we know whether or not we're going to be in session 2 weeks from today, maybe we should take it easy and have a little bit more reflection on some of the concerns of these witnesses and the administration.

Thank you very much.

Mr. DYMALLY. Being as good a mindreader as I am, of course, and anticipating the objection of Mr. Rohrabacher to the early hearing, we have postponed the markup for tomorrow. The fact is that Mr. Foley consults with me every morning. I can assure him that we will not be here until Christmas, so we'd be able to get home.

Mr. Fauntroy?

Mr. FAUNTROY. Mr. Chairman, I'm very pleased to hear of your anticipation of Mr. Rohrabacher's statement. But I wonder if we could substitute in lieu thereof a meeting with the same Justice Department staff that had the good judgment to meet with Mr. Rohrabacher so that we might be—they might answer some of the questions that we had hoped to be able to ask here pursuant to their written mission of a statement to the subcommittee.

Mr. DYMALLY. I'm very pleased that Mr. Fauntroy raised this issue and I'm glad to hear that the Department has consulted with Mr. Rohrabacher. I suspect my phone number is not listed and they have difficultly in reaching me as chairman of the committee. I trust Mr. Rohrabacher will arrange a meeting with the Department of Justice, Mr. Fauntroy and me before we adjourn.

Mr. ROHRABACHER. Mr. Chairman, I might note that it wasn't a meeting with the Justice Department. I did meet with Justice Kern—Judge Kern.

First of all, I would applaud your mind reading abilities. I think it's just—as well as your judgment. I appreciate the fact that—and I would agree that a meeting with the Justice Department would be a very positive step.

Mr. DYMALLY. Thank you very much.

Mr. Parris?

Mr. PARRIS. Thank you, Mr. Chairman.

First, let me take this opportunity to express my appreciation and thanks to those witnesses who have taken their time to come and testify on this bill. The gentlemen who are here and ladies represent a vast wealth of experience which I hope can be brought to bear in a positive way on the needs, the legitimate needs of the judicial system in the District of Columbia.

There should be no doubt that we have many problems and concerns which need to be confronted. Just as there are many problems, there are however many and various sincere alternative solutions. Our task is to find the best one for the current moment to accomplish in an effective way the improvement of the process. In finding that solution, we must consider the time it will require to implement a decision, the relative costs of the several options and the relative effectiveness of one option over another. We must, too, consider the political efficacy of the various proposals, some things that some of my colleagues occasionally overlook.

Finally, we must never fear to revisit that which has gone before us. It is not always necessary for us to recast that which others have built into our own image just because it is our image. In other words, we should probably leave some things alone. If it ain't broke, it's not absolutely necessary to fix it. That may go against the grain for some of us.

When, however, we recognize the thought, effort and understanding that went into the Court Reorganization Act of 1970, we may very well conclude that while some adjustments ought to be made, the premise contained in that legislation is fundamentally sound. I hope that we will proceed from that perspective as we continue our deliberations to improve the delivery of justice for the citizens of our Nation's Capital.

Let me just add one other thought, Mr. Chairman, if I might very quickly. I would like to register for the record a modest protestation to the previous comments made by my friend from the District of Columbia, Mr. Fauntroy, in engaging in what I consider to be a partisan attack on the Department of Justice. The political judgment that the President has declared a cease fire on the war against drugs—a blanket indictment against the efforts of the administration, in my opinion is not helpful.

He suggests that the bill that we have before us brings the court into the modern age and that's a judgmental question. A wholesale restructuring is, in the opinion of the Justice Department, not justified nor desirable. The chairman has entered the letter dated November 14, 1989 into the record, if I understood his comments previously. I would remind my colleagues—and if that is not so, then I would ask unanimous consent to do so—and remind my colleagues

that that letter states in part, "It is our belief that it would not address," it meaning this legislation, "would not address the fundamental challenges facing the courts of the District of Columbia and may even worsen rather than resolve existing backlogs and delays."

It says in another part, "We," meaning the Justice Department, "and the administration will be happy to work with the Congress and the court of appeals to fashion more limited and appropriate means for dealing with the delays in the court of appeals docket and the superior court. But consideration of wholesale restructuring of the District's court system has simply not been justified."

That statement, I think, categorically rejects the suggestion that any of us at any level are not sincerely interested in the most effective criminal and civil justice system in this city. I submit to you that we are and to suggest otherwise is not correct.

I thank you, Mr. Chairman.

Mr. DYMALLY. Thank you very much.

We will have one panel today consisting of Hon. Judge Kern, Hon. Judge Nebeker, and Mr. Herman. Will the three witnesses take their seats, please?

Judge NEBEKER. Good morning, Mr. Chairman.

Mr. DYMALLY. Thank you. Will you identify yourself for the record, please?

Judge NEBEKER. I'm Judge Nebeker.

Mr. DYMALLY. Before you begin, without objection, I will move to enter into the record the letter from the Department of Justice and any other testimonies that the members may wish to so enter.

Mr. PARRIS. Excuse me, Mr. Chairman.

Mr. DYMALLY. Yes.

Mr. PARRIS. If you'd indulge me just one moment, I have three other subcommittees and a full committee hearing all in process as we speak, one of which I feel very much compelled to attend. I wonder if I could ask unanimous consent that within the appropriate bounds of our normal processes that counsel be permitted to address questions to the witnesses.

Mr. DYMALLY. Indeed. We arrange for you to have those several meetings so you would not hear all the testimony from the opposition.

Mr. PARRIS. I appreciate your consideration, Mr. Chairman.

Mr. DYMALLY. Thank you very much.

Judge Kern, please? No, Judge Nebeker. Please identify yourself and proceed.

Judge NEBEKER. Yes, Mr. Chairman. I agreed that I would go first.

Mr. FAUNTROY. Mr. Chairman, if I may, may I make the same unanimous consent request with respect to conflicts which I have, some of which parallel those of Mr. Parris who is my colleague on Banking, Finance and Urban Affairs?

Mr. DYMALLY. We didn't want your feelings to be hurt and we didn't want you to hear the testimony either.

Mr. FAUNTROY. Thank you.

Mr. DYMALLY. So, you are excused. Yes, indeed.

Judge, proceed.

TESTIMONY OF HON. FRANK Q. NEBEKER, CHIEF JUDGE, U.S. COURT OF VETERANS APPEALS

Judge NEBEKER. Thank you, Mr. Chairman.

At the outset, I would like to introduce Ms. Constance Belfiore. She has submitted a statement and though she does not sit at the witness chair right now——

Mr. DYMALLY. She may join the table.

Judge NEBEKER. If she could, that would be appropriate.

Ms. BELFIORE. Thank you.

Judge NEBEKER. She will submit her statement to you, which is a synopsis of the dissenting views which she and I and Al Stevis shared in the Schaller committee report.

I've come here and asked to come here today because I feared that the issues have not been fully heard and I underline "listened to," before this committee because of undue attention to the proponents of an intermediate appellate court.

I recognize that some, including some of my former colleagues, are displeased with the position I take on reverting to a two-tiered appellate process which we had prior to 1970. But I submit there is far more merit to the minority's position in the Schaller committee report and that position has the better of the arguments, factual as well as policywise.

Mr. Chairman, the facts when viewed objectively do not, I repeat, do not warrant the creation of a pre-1970's two-tiered appellate process with its included delay, its necessary additional delay.

There are three reasons, I submit to you, why this is so. One, though many want it, an additional level of appellate review, as I say, is not needed. The present practice before and in the D.C. Court of Appeals gives rise to too many unpublished opinions of almost gargantuan length. I can suggest that while my tenure on the court is over 2 years ago at this point, the court produces for unpublished decisionmaking too many words. It is not needed and a great saving in time and energy can be saved there.

There's a junior bar committee which then Chief Judge Newman commissioned to study the court's usage of the unpublished opinion. Ms. Belfiore has brought that with her today. I commend it to your attention because it does spell out that there is too much time and judicial energy spent on unpublished opinions of far more length than is needed.

The present delay simply does not justify a new court. The present delay can be cut in half and should have been cut in half a long time ago by streamlining processes which I understand now are finally in the works. There are other delay remedies that are available and I urge that this rush to judgment, as it has been called this morning, be halted to see if those efforts, and I can guarantee you they will dissipate the arguments of delay that are the primary support for the effort at recreating a second tier of appellate review.

Such a second tier, I submit, will add to the delay, a second reason why the minority on the Schaller committee was correct.

The third reason which I suggest to you today in all sincerity is, I believe, a bit understated even by the Department of Justice in its letter of yesterday. I'm in the process of putting together a

seven-judge court with no antecedent entity at all. That is what you're proposing to do. That court is going to cost annually between $6 million and $7 million a year. Anybody who comes before this committee and suggests that a seven-judge intermediate appellate court will not cost that amount of money, I submit is blowing smoke.

There is no question that there is a demonstrable need for more judges and support staff at the trial level. Indeed, as the Department of Justice suggests, if it is perceived the court of appeals needs some respite, some help, simply adding two more judges, jading the manner in which the use of senior judges is commanded, can certainly aid greatly in that regard. But I submit that is where your attention must focus, not on creating a new appellate tribunal where other steps are available to reduce delay, not on creating another occasion for the generation of legal arguments, analysis and decisionmaking, thus adding to the ultimate time before a final decision can be made, and you surely will add to that time. There is no reason in the huge number of criminal cases that further effort at seeking review will not be undertaken at the expense of the Criminal Justice Act system, at the expense of the court's time and at the expense of civil litigation where attention must be focused on criminal matters.

Likewise, your attention should not be on creating another demand on the public fisc far out of proportion to any good which I am sure some members of this committee earnestly and honestly believe they will be doing by reverting back to the pre-1970's two-tiered system that existed in the District of Columbia.

I will not read my entire statement into the record. I think that you gentlemen have read it and can see the position that I take. I submit there is great merit to it and that there ought not to be the ringing of this bell which cannot be unrung once you have created that court.

Thank you.

Mr. DYMALLY. Without objection, your entire statement will be entered into the record.

Judge, if you don't mind, I'd like to hear the other witnesses first and then we can——

Judge NEBEKER. Certainly.

Mr. DYMALLY. Thank you.

[The prepared statement of Judge Nebeker follows:]

Statement of Chief Judge Frank Q. Nebeker
United States Court of Veterans Appeals
HR3470-The District of Columbia Judicial
Reorganization Act of 1989

to the

Subcommittee on Judicial Education
Committee on the District of Columbia
United States House of Representatives
November 15, 1989

Almost 20 years ago the courts of the District of Columbia were reorganized. I was serving on the District of Columbia Court of Appeals at the time. That court had been an intermediate appellate court since 1944. It had limited jurisdiction as had its earlier subordinate trial courts. The Municipal Court of Appeals-named the D. C. Court of Appeals in 1968-was, itself, subordinate to the U.S. Court of Appeals for the District of Columbia Circuit where by special leave its judgments could be reviewed. I, as an Assistant United States Attorney, participated in many cases which were reviewed in both appellate courts. I can attest to the added delay incident to that two tiered appellate structure. The reorganization of the Courts had the desirable effect of eliminating, for those cases, the judicial "two-step" process. H.R.3470-among other things-would return to that rejected process by creating again an intermediate appellate court of limited jurisdiction--limited to be sure by a case filtering process where only by mistake would the new court review anything of even medium importance to the law. Indeed, it might as well be called the Court of Doldrum Appeals.

But that is not my concern. I wish rather to speak of the added delay, lack of real need for, and the cost of such a court. Added delay there surely will be because finality of decision must await two steps instead of one and the looser will want time to analyze and criticize the intermediate decision. Of course time will be required to respond to the looser's argument and the final decision makers will need still more time to review all that has been said plus the record before an informed decision can be made by them.

Those who see merit in the second appellate tribunal proposal are, like the perceivers of beauty, persuaded by what their eye tells them they want to see. I respectfully submit that an objective analysis of the facts and statistics developed by the Schaller committee will vindicate the minority view that a need does not exist for a second appellate court. That view, expressed also by the former Clerk of the Court and the Clerk of the United States Supreme Court and an experienced member of the bar does, I suggest, demonstrate grave doubt as to the facts assented by second-court-supporters. The simple fact is that the present appellate system, established in 1970, is more than adequate, and return to a two step system would be unwise. Moreover, there has been a marked failure to exercise administrative control over record preparation and case management. If this alone were done much of the factual assertion about delay would crumble. In addition, it must be realized that the total case filing figures,

on which the proponents rely, must be viewed for what they do not reveal, that is, that nearly half drop out without even commanding judicial attention on appeal. The true appellate work load remains fairly level and indeed seems to be declining as Judge Kern has or will point out.

On the issue of budget support for a second appellate court I fear its actual cost has been understated, perhaps with a view toward a disarming approach. As you may know I took senior status from the D.C. Court of Appeals in 1987. After nearly two years in the executive branch I was appointed Chief Judge of a new seven judge court of appeals created by Act of Congress in 1988. That court, like the one HR3740 would create, had no antecedent court. Thus, space to house it (or space to house those displaced to make room for it in government owned facilities) must be leased. At best sufficient space for a seven judge appellate court and its nonjudicial staff will cost 1 million dollars per year. That is just the beginning. I represent to this Committee that a budget of seven million dollars will be needed and that doesn't take into account raising rent costs, pay raises and deficit reduction machinations required by recent mandate.

Thus I urge an approach to this proposal which recognizes that the relatively recent reorganization of the District's judicial system has been and is successful insofar as appellate rights are concerned. It's operation must and can be improved, but

restructuring would be a mistake. There is a demonstratable need for more judges and support staff at the trial level. That is where your attention must focus; not an creating a new appellate tribunal where other steps are available to reduce delay and efficiently manage and decide appeals; not on creating another occasion for the generation of legal arguments, analysis and decision making thus adding to the ultimate time before a final decision can be made; not on creating another demand on the public fisc far out of proportion to any good the proponents honestly but erroneously feel might be done with an additional appeal tribunal.

TESTIMONY OF HON. JOHN W. KERN III, SENIOR JUDGE, D.C. COURT OF APPEALS

Judge KERN. Mr. Chairman, my name is John W. Kern III. I'm a senior judge on the District of Columbia Court of Appeals. I have submitted a written statement. I will simply summarize my testimony.

Mr. DYMALLY. Without objection, your statement will be entered into the record. Judge, could you put the microphone a little closer?

Judge KERN. Yes.

Mr. DYMALLY. Thank you very much. You may proceed.

Judge KERN. I've never had a problem with people not hearing me. Generally, they hold the phone away from their ear when I'm on the other end. So, I'm unduly sensitive.

As a longtime resident of Washington, DC, Mr. Chairman and members of the committee, and a member of the District of Columbia Court of Appeals and its predecessor since I was appointed to that court in 1968 by President Lyndon Johnson.

I have both a personal and a professional interest in my court providing to my community the best possible appellate justice in the fastest time practicable.

Judge Rogers, the new chief judge of our court, invited comment to her from all the members of the court about the bill insofar as it calls for the creation of another appellate court. I wrote her a memorandum that miraculously took up one page. So I'll try to emulate the one page rather than the more lengthy statement that is now part of the record.

I suggested to the chief judge that creation of an intermediate appellate court would close the courtroom door of the highest court, the now District of Columbia Court of Appeals, soon to be, if the bill were enacted, the Supreme Court of the District of Columbia. The bill would close the courtroom door of the highest court to a majority of the appellate litigants in the District of Columbia, which I thought was an unfortunate result.

Number two, I suggested to her that the bill would insert another layer of appellate court into the judicial system for this system. It leaves a rather—understandably, I'm not criticizing the drafts person of the legislation—but it leaves a fuzzy line of jurisdiction between the proposed highest court and the intermediate appellate court which the D.C. Court of Appeals would become, which I think will make it more difficult for the citizens of this community to seek appellate relief.

Third, it seems to me that this removes the judges from the District of Columbia Court of Appeals and elevates them to the Supreme Court of the District of Columbia just at the very time when the judges, under the leadership of Chief Judge Rogers, are taking steps to address the various administrative delays that have plagued the highest court for the last several years.

It's a little bit like taking the offensive team of a football game to the sideline, discussing the strategy, agreeing on that strategy and then putting the defensive team on the field. You're bringing in nine new judges to a court which has a problem right now, primarily because of the delay in preparing records and briefs. You're

removing the team that has just adopted a series of plans that have been recommended by the American Bar Association's Special Committee on Reducing Appellate Delay, namely to adopt a case management plan which the court did in September. Second, taking control of the preparation of transcripts by the court reporters, which the court is presently doing. Third, in a sense, exerting control over an appeal from the very moment that it is filed in the D.C. Court of Appeals, which the court is also doing.

Finally, I would suggest to you that the creation of another appellate court to hear appeals from the superior court splinters the present appellate hearing process. By that I mean that at the present time the court hears and determines every appeal that is filed in the District of Columbia court system by the citizens of this community.

The court hears and determines those appeals in one of three ways. One way is to hear and determine the case, explain the reasons why the judgment appealed from should be affirmed in a so-called memorandum of opinion and judgment. That's a lengthy—on a long piece of paper of several pages in length which explains to the parties why the court is affirming the judgment below and is issued only when the court is affirming the judgment below.

The court also issues an opinion which is printed in the West Reporter System and is a precedent for lawyers and the trial judges in the form of so-called printed opinion. When the court determines that the case, the appeal, is controlled by a prior decision of the court which should be reconsidered or when the court determines that the case is of exceptional importance. The entire court, all nine judges, address that issue and issue what's known as an in-bank opinion.

So, my point is that nine individuals, nine judges, supported by five retired judges who are working anywhere from 6 to 9 months, are now dealing with every appeal filed in this city by the residents of this city and they're disposing of those appeals in writing, explaining their reasons why they're affirming, why they may be reversing or affirming that creates precedent. Finally, in those limited number of cases where the appeal is of exceptional importance or there is a determination by a majority of the court that the appeal is controlled by a prior decision that ought to be reconsidered.

The point is that the 14 judges, the 9 actives and the 5 seniors, are all involved in this process and every resident in the District of Columbia knows that he or she will have his or her day in the highest appellate court and the only appellate court in this city. The court disposes of the appeal by the citizen in a written way explaining its decision.

I respectfully suggest to the chief judge, and I respectfully suggest to this subcommittee that the creation of another appellate court will be a step backward for this community.

Thank you.

Mr. DYMALLY. Thank you, Judge. Your entire testimony will be entered into the record.

[The prepared statement of Judge Kern follows:]

STATEMENT OF THE HONORABLE JOHN W. KERN, III
SENIOR JUDGE, DISTRICT OF COLUMBIA COURT OF APPEALS
on
H.R. 3470 District of Columbia Judicial Reorganization Act of 1989
to the
SUBCOMMITTEE ON JUDICIARY AND EDUCATION
COMMITTEE ON THE DISTRICT OF COLUMBIA
UNITED STATES HOUSE OF REPRESENTATIVES

November 15, 1989

Thank you for the opportunity to submit this statement.

As a long time resident of Washington, D.C. and a member of the District of Columbia Court of Appeals, and its predecessor, since 1968, I have both a personal and a professional interest in my court providing to my community the best possible appellate justice in the fastest time practicable.

It has been urged recently before this distinguished Committee that HR 3470 will update the court system Congress created in 1970 for the city of Washington, D.C. by its enactment of the D.C. Court Reform and Criminal Procedure Act. I must respectfully but emphatically disagree. H.R. 3470 will not update the 1970 Act, but rather the proposed Bill will uproot the 1970 Act.

I was present at creation, so to speak, when Congress in

1970 created my court, the D.C. Court of Appeals, as the highest court in the city, as a part of court reform for Washington.[1] I can report to you that the aim of Congress, working with the then-President of the United States, was to eliminate the multiplicity of courts that plagued our community with overlapping and confusing jurisdiction which in turn produced both unsure and unspeedy justice for our citizens.

The 1970 Act adopted a simple but classic plan first urged by the great judicial reformer, Dean Roscoe Pound: A single trial court and a single appeals court for the Capital City. Thus, the citizens of Washington, whether confronted with a civil, criminal, tax, probate or family case or matter and no matter how small or how large, could to go the city's trial court, the Superior Court of the District of Columbia, and have their case or matter heard and determined by a judge of that court appointed by the President with the advice and consent of

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[1] Kern, The District of Columbia Court Reorganization Act of 1970: A Dose of Conventional Wisdom and a Dash of Innovation, 20 American University Law Review 237 (1970-71).

the Senate.

When our citizens were aggrieved by the Superior Court's decision, whether that decision was of general public import or a "garden variety decision," they had an absolute right, not dependent upon exercise of discretion by any judge or judges, to take their case to the city's highest court, the D.C. Court of Appeals, for a hearing and a determination.

H.R. 3470 would shut the door of the highest court henceforth to most appellate litigants in Washington, D.C. The proposed Bill would create two appeals courts of which the highest, consisting of seven judges, would hear and determine only the appeals that they choose to hear. While the other court, the proposed new intermediate appellate court, would hear and determine most appeals. It is not surprising that the chairperson of a D.C. Bar committee which studied the matter of another appellate court reported that the judges being elevated to the highest court favored this. However, on a matter of such significance, the entire 30,000 member D.C. Bar should be heard

from by means of a referendum, and the community's wishes should also be considered.

You have been cited to the view of outside consultants who insist that it is jurisprudentially "correct" for the highest court of any state to hear and determine cases only in banc, so that the decision of exceptional cases or cases involving difficult issues of law benefit from the views of all the judges of the highest court. The D.C. Court of Appeals presently does exactly that.

Congress in the 1970 Act modelled the city's appeals court after the nation's federal circuit courts of appeals, indisputably the most respected appellate courts in the nation. Thus, Congress provided that the single appeals court in Washington, D.C., like federal appeals courts, could hear and determine cases in banc whenever it chose to do so, although it would ordinarily sit in panels of three judges.[2] The D.C. Court

[2] D.C. Code § 11-705 (b) (1989 Repl.) provides: Cases and controversies shall be heard and determined by divisions of the court unless a hearing or rehearing before the court in banc is ordered. Each division of the court shall consist of three

of Appeals has in its published Operating Procedures declared that cases of exceptional importance and cases requiring reconsideration of prior decisional law can be heard and decided in banc, that is, by all the judges. Each year the court decides about a dozen such cases in banc.

It has been urged recently before this distinguished Committee that two appellate courts can decide more appeals more quickly than the present appellate court, the D.C. Court of Appeals. But that keen student of the city's court system, Mr. Charles Horsky, commented at the last session of Congress concerning a legislative proposal to add another appellate court to our city's justice system:

> The addition of another layer of judicial review in the District of Columbia court system has the potential for exacerbating the delay problem.

It is perfectly obvious that the insertion of another appeals court into the city's judicial system prolongs the litigation process, imposes greater cost upon our citizens who seek justice

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judges.

from the appeals process, and results in a delay of finality of judgment, whether criminal or civil, to the detriment of our community.

Some hope has been expressed that if those taking civil and criminal appeals have their cases heard and decided by the intermediate appellate court they will cease litigating and not seek to carry their appeals to the Supreme Court. This is wishful thinking at best. Sixty percent of the appeals each year are criminal. Convicted criminal defendants who are provided appellate counsel at community expense will understandably seek appellate review in both appellate courts, and their counsel will rest uneasy unless and until the highest court is importuned to hear and decide and does decide the appeal from the criminal conviction. Any civil litigant disappointed by the decision of the trial court and/or the lower appellate court will be strongly tempted to delay the finality of litigation by seeking review in the new Supreme Court. More time than is presently used to achieve an end to litigation is an inevitability.

It should be noted that the D.C. Court of Appeals has in 1987, 1988 and to-date in 1989 disposed of about as many appeals each year as were filed. The court's September 1989 Caseflow Report shows:

1987 Filings -- 1580	Dispositions -- 1622
1988 Filings -- 1681	Dispositions -- 1624
1989 Filings -- 1160	Dispositions -- 1204

The court in 1988 took on average only 76 days to issue decisions of appeals once submitted which is well within the maximum time (120 days) fixed by the American Bar Association's Standards Relating to Appellate Delay Reduction.[3] Is it realistic to assume that nine brand new judges appointed to the D.C. Court of Appeals when the present incumbents are elevated to the proposed Supreme Court would decide more appeals more quickly than their predecessors have?

The District of Columbia Courts 1988 Annual Report reflects

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[3] Standards Relating to Appellate Delay Reduction, Approved by the ABA House of Delegates, February 1988, American Bar Association Press (1988).

that the major cause of delay between the date of the filing of an appeal and the date of its disposition is the increased time now consumed by court staff in preparing the record on appeal and by appellate lawyers in preparing their briefs. These times far exceed the ABA Standards Relating to Appellate Delay Reduction:

	ABA Standard	DCCA 1981	DCCA 1988
Notice of Appeal to Filing of Record	30 days	149 days	227 days
From Record to Completed Briefing	70 days	166 days	237 days
Completed Briefing to Submission	60 days	102 days	152 days
Submission to Decision	120 days	114 days	76 days

Is it realistic to assume that nine brand new judges on the D.C. Court of Appeals could better eliminate these administrative delays than the court's present incumbents? Indeed, as Chief Judge Rogers reported, the D.C. Court of Appeals is now developing a plan to reduce the time taken for records and transcripts.

It has been suggested recently to this distinguished Committee that since Congress in 1970 created the D.C. Court of

Appeals the court's workload has increased to an unbearable level. The 1988 District of Columbia Courts Annual Report does not support this suggestion. Total filings in the Court of Appeals for each of 1987 and 1988 have remained essentially level at about 1,600, and the court's dispositions in each of those years has kept pace. The level of filings to date in 1989 suggest a total at this year's end of about 1,600. In 1988, the time taken by the court to decide appeals once submitted, 76 days, constituted a virtually all-time low in the court's 19-year history.

It should be noted that during the court's 19-year history, 50% of the appeals noted each year never even reach a panel of the court for hearing and disposition. Thus, in 1988, for example, over 800 appeals were disposed of without requiring an opinion.

Almost another 30% of the appeals noted each year are disposed of by a several-page, unpublished memorandum opinion of affirmance. These so-called MOJ's are used to dispose of appeals

only when the particular panel of three judges deciding an appeal unanimously determines that:

the decision or order appealed should be affirmed;

no new rule of law is being established;

no comment on or modification of an existing rule of law is being made;

no established rule of law is being applied to a novel fact situation;

the affirmance does not constitute the only precedent or the only recent precedent;

the appeal does not involve a legal issue of continuing public interest; and

no error of law has been found

The court disposes of the remaining 20% of its appeals each year by published opinions. During the past nine years the court's published opinions have ranged anywhere from 224 to 322 per year. It is fair to assume that the court's complement of nine full-time judges, together with its five senior judges,

constitute a judicial work-force of 10.[4] Assuming 300 published opinions and 500 MOJ's a year, each judge of the court is called upon each year to produce about 50 one or two page memorandum opinions of affirmance and about 30 published and precedential opinions. The total output of opinions per judge on the D.C. Court of Appeals of some 80 opinions compares with a total of about 100 published and unpublished opinions per federal appellate judge per year.[5]

It is important to note that the D.C. Court of Appeals in September 1989 adopted a case management plan -- an essential element in reducing delay according to the ABA Standards on Reducing Appellate Delay. The case management plan calls for deployment of court staff and judges, all 14 of them, to monitor

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[4] The five senior judges serve anywhere from six to nine months a year. Two law clerks are assigned to assist them. Each of the eight full-time associate judges has two law clerks and the chief judge has three law clerks. In addition, the court has a staff of three experienced attorneys and three law clerks.

[5] Congress in 1986 made the salaries of the local judges equal to those of the federal judges because the Superior Court and the Court of Appeals in Washington, D.C. carry a judicial workload "commensurate" with that borne by judges of federal district courts and federal circuit courts of appeals, respectively. The District of Columbia Judicial Efficiency Improvement Act, Pub. L. No. 99-573.

appeals and to assure prompt but fair decisions. The creation of another appeals court at this time and the elevation to it of all the judges now on the D.C. Court of Appeals will simply delay implementation of this plan, not expedite its development.

What should be done now? The ABA Standards Relating to Appellate Delay Reduction (p. 3-4) state that "[t]he first and most important [cause of delay in appellate litigation] is that appellate courts generally have exercised inadequate supervision of the movement of cases coming before them. Only the appellate court itself can provide such supervision. . . . A second contributing cause of delay is the absence of clear goals toward which the appellate courts can direct their supervisory efforts . . . . A third and more immediate cause of delay is delay in the trial courts' reporters' production of trial transcripts. This source of delay can be brought under control if court reporting in the trial court is properly organized and if transcript production is supervised directly by the appropriate court."

The D.C. Court of Appeals under the leadership of Chief Judge Rogers is now adopting the ABA Standards for Appellate Delay Reduction: the court is increasing its supervision of appeals; the court in September 1989 adopted a case management plan; and, the court is beginning to exert control over the production of transcripts. These administrative actions are far more effective and far less costly in reducing delay than creating an entire new court and apointing nine brand-new judges.[6]

Finally, the long delay in transcript/record preparation and preparation of briefs has placed a large number of appeals (some 800) currently in the appellate pipeline. The addition of two judges to the D.C. Court of Appeals to increase the decision-making resource to eleven full-time judges (aided by an

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[6] A recent study of the federal Ninth Circuit Court of Appeals, which provides the "governing law" for that circuit, concludes: despite the 25 judges and 10 senior judges adjudicating 2,500 cases (including 900 precedential opinions) each year, "intracircuit inconsistency" is not a serious problem, and "[i]f an additional tier of review were interposed between the Supreme Court and the regional circuits, the effect would be to increase the delay and expense of litigation." Hellman, Jumboism and Jurisprudence, 56 University of Chicago Law Review 541, 542-44 (1989).

anticipated six half-time judges in 1990) would be justified, particularly when the Congress is adding eight more trial judges. Once the present appellate case jam is dissolved by an increased judicial work-force sitting more frequently, Congress can review the court and determine whether a reduction in judicial personnel is warranted.

Thank you for your time and attention.

Mr. DYMALLY. Mr. Herman?

TESTIMONY OF ALLEN I. HERMAN, ESQ., FORMER CLERK, D.C. COURT OF APPEALS

Mr. HERMAN. Yes. I am here as the former clerk of court from 1981 until 1987. At that time, the court was in a period of increasing case filings. At that time, I would have predicted that by this time we probably would have needed an intermediate court of appeals. However, what's happened is that the appeals have leveled off and, in fact, have decreased, the number of case filings have decreased and the number of pending cases have decreased. The delay in the court is not caused by the judges. The delay in the court is caused by failure of the superior court to produce records on time for one reason or another and for parties to produce briefs.

That problem is now being addressed by the court in its case management plan which is long overdue. That problem should no longer exist in 2 or 3 years.

What I would suggest, and I elaborate on this in the statement that I have filed with the committee, what I would suggest is that there are several alternatives to meeting a backlog of cases which will occur before the judges themselves. At the present time, the judges have no problem in deciding cases quickly, in accordance with the American Bar Association standards, as long as the cases get to them. But the cases have not been getting to them in sufficient numbers and in sufficient time. If you note, over 600 days of the delay is attributable to prejudge time. The judges are taking less than 80 days to decide cases.

I suggest that there are three alternatives. A, you may recruit judges from other courts temporarily. That is really not a solution because the other courts are just as busy or busier than the D.C. Court of Appeals.

There is a possibility of adding an intermediate court of appeals. This, it seems to me, is a sledgehammer where a tack hammer is necessary.

Finally there is another method whereby you could increase the numbers of judges, either temporarily or permanently of the D.C. Court of Appeals to 10, 11, 12 or whatever it takes to dispose of the caseload that will, in fact, get to the judges once the delay below, delay in the clerk's office is resolved.

You should also note that of the numbers of cases that are received by the court, which have dwindled actually from some 1,800 down to approximately 1,600 a year, half of those appeals are never seen by the judges to speak of. They may be seen by the chief judge who will assign orders dismissing them, but the other judges never see those. They are not argued, they are not briefed. They are dismissed before they ever reach the judges.

The remaining cases will build as the time delays are solved. They will build so that the judges will take a great deal of time to get to them. That is a temporary problem and that can be resolved by the addition of temporary or permanent, if necessary, judges. Each judge, in my estimation, would add about 10 percent to the productivity of the court.

I'm open to questions.

Mr. DYMALLY. Thank you. Your statement will be entered into the record.

[The prepared statement of Mr. Herman follows:]

STATEMENT OF ALAN I. HERMAN, ESQUIRE
FORMER CLERK OF THE COURT,
DISTRICT OF COLUMBIA COURT OF APPEALS
on
H.R. 3470 District of Columbia Judicial Reorganization Act of 1989
to the
SUBCOMMITTEE ON JUDICIARY AND EDUCATION
COMMITTEE ON THE DISTRICT OF COLUMBIA
UNITED STATES HOUSE OF REPRESENTATIVES

November 15, 1989

I appreciate the opportunity the Subcommittee has provided for me to submit the statement which follows.

As a member of the District of Columbia Bar, a former Clerk of the District of Columbia Court of Appeals, and a student and teacher of judicial administration, I have a sincere interest in the efficient administration of the courts of the District of Columbia.

A few years ago, if I was asked whether the District of Columbia court system was going to need an intermediate appellate level of courts during the next few years, I would have answered yes. This opinion was based on the fact that 1. case filings were rising, 2. future filings predictions, based on Superior Court caseload and new legislation, indicated substantial increases, and 3. the methods the Court was using to manage and dispose of cases limited its capacity.

Today, after studying court statistics, reports, and recent actions of the court to solve the problems of delay, I must reach the opposite conclusion: I believe the District of Columbia courts will function far more efficiently, with fewer delays and

at far less cost to the public, under the current two-tier court system.

I. Workload

From the early 1980s, case filings increased significantly at the District of Columbia Court of Appeals, so that by the end of 1986, when the court received almost 1,800 appeals it could safely be predicted that in the next three to five years they would reach between 2,000 and 2,100. This was based on the fact that seven new judges and several hearing commissioners had been added to the Superior Court, workers' compensation appeals were anticipated under new legislation, and criminal filings in the Superior Court were increasing. In fact, filings have not increased in the Court of Appeals; on the contrary, they decreased and levelled out in the low 1,600s during 1987 and 1988, and filings for the current year have remained at that rate.

In 1987, the Court disposed of more cases than were filed. In 1988, dispositions were 96.6% of filings. For the first nine months of 1989, the Court once again has disposed of more cases than were filed: 1,204 dispositions to 1,160 filings. The overall result of the case filings and dispositions over the last few years is that the overall pending caseload has remained stable; in fact, it has decreased somewhat. At year end, 1986, cases pending before the court numbered 2,372. Although they

reached over 2,500 for a short period in 1987, by the end of years 1987 and 1988 they were below that number, and as of the end of September 1989 there were 2,303 cases pending before the Court. In short, the Court and its staff should be complimented for keeping the total backlog of cases under control.

III. Delay

Delay has been a chronic problem for the District of Columbia Court of Appeals for many years. However, the major causes of the delay do not include the Judges of the Court, who have decided cases argued before them within or close to accepted standards for appellate judges. Analysis of Table 8, page 24, of the 1988 Annual Report, District of Columbia Courts, indicates three inordinate periods of delay which contribute to the 22 month average time from filing to decision. More than seven months, on average, elapses between the filing of a case and the filing of the record and transcript for the case, whereas the court rules call for no more than 60 days. The court rules grant a total of 75 days briefing time for the parties; on average, cases closed during 1988 took eight months for briefing. Finally, it took an average of five months for a case to be calendared for argument before the Court after briefing had been completed.

To some degree, these are understandable delays if one premise is accepted: there is no rational basis for speeding up

the production of records, transcripts and briefs if the court is limited in its capacity to hear case arguments. I have heard this expressed as the "hurry up and wait" counterargument to pro-active case management.

I understand that two months ago, the Court adopted a Case Management Plan that promises to eliminate most, if not all of the major delays in obtaining an appellate decision. The Plan appears to be modeled after that in use in several federal circuit courts of appeal, which have, through its use, reduced average time from filing to decision to as little as five months. I understand that several new staff attorneys and deputy clerks will be tasked with screening cases, preparing scheduling orders, and preparing proposed dispositions in a newly created category of cases. There is no doubt that if strict adherence to the orders scheduling the filing of the record, briefs and motions, and the argument or submission of the case, is followed, as is the case in two federal circuits of which I am aware, the delays which have plagued the Court in the past will eventually disappear. The Court is to be congratulated for this giant step forward toward resolution of the problem of delay.

Moving the cases more quickly through the appellate process will have one predictable and unavoidable result. There will be a large number of cases ready for oral argument (if not submitted without argument) and decision with which the Judges must deal.

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III. The Disposition Process

Once again it is useful to refer to the 1988 Annual Report. Table 6 on page 23 indicates the dispositions of the Court by method. For 1988, the Court decided 249 of the cases before it by published opinion, 489 by unpublished opinion, 66 by judgment without opinion, and 820 by order. The cases in the last category are, in general, those disposed of without argument before a panel of the court. Many of them are civil cases which are settled by the parties. Others are cases dismissed for failure to prosecute the appeal. Significant is the fact that these, historically constituting approximately 45-50% of all appeals, are not decided on the merits of the case. Thus, one must conclude that the same percentage of all cases pending before the Court (2,303 at the end of September, 1989), will ultimately be disposed of in the same manner, i.e., without argument or opinion.

Several steps taken by the Court in its Case Management Plan should also prove to mitigate the impact of a possible backlog of cases awaiting argument and decision. The Court has created a third category of cases, called Summary Calendar Two, which is intended to include those cases which will, for the most part, be decided without oral argument and, presumably using staff attorneys to research and prepare draft memoranda opinions and judgments. This is an even more far reaching use of what was experimented with in 1985, when special summary argument

calendars were used on two monthly calendars to dispose of selected insignificant cases without argument. Since litigants will be aware of the status accorded to these cases early in the appellate process, many of these appeals may be withdrawn to avoid the time and expense in preparing records and briefs. Judge time will be vastly reduced in these cases, as much of the work will have been performed by experienced staff attorneys, rather than law clerks who presumably require closer supervision and hold one year positions. In general, the early attention given to all cases should have a salutory effect in weeding out those cases in which appeals are made for delaying purposes, or for other frivolous reasons, and having them removed from the docket.

However, even considering that only half of the cases filed will ultimately be decided by a panel of Judges, and that a substantial amount of work will be performed by staff attorneys to permit the Judges to attend to more significant cases, there will undoubtedly be created a backlog of cases to be argued from those already pending before the Court. The nine active judges, supplemented by four or five senior judges, have historically heard and decided approximately 8-900 cases a year (opinions, memoranda opinions and judgments, and judgments without opinions). The Court has apparently responded to a current increase in cases awaiting argument, since court statistics indicate that there has been a recent large increase in cases

scheduled for argument. Again, the Court is to be congratulated for taking the initiative to solve its problems internally. This too, will without doubt not be enough to cope with the anticipated backlog of cases to be heard and decided. Such assistance can be provided through several avenues.

IV. The Alternatives

In my view there are three basic solutions for a backlog of cases to be heard by an appellate court, short of limiting the right of appeal.

1. Recruit judges from other benches, e.g. the Superior Court.

2. Add judges to the present court

3. Create another appellate court.

The first solution could well be used for a temporary backlog, provided there would be little or no loss of needed productive time in the Court from which the Judge is recruited. I need not prove to this body that the District of Columbia Superior Court can little afford the luxury of providing its Judges for additional duties.

The solution in the legislation under review, a new appellate court, does not respond to the problem facing the District of Columbia Court of Appeals. The problems the Court has been facing up to this point has not been a lack of judges or a significant increase in cases over the past few years; it has

been one of delay from the date of filing to the point where a case is ready for argument. The Case Management Plan recently promulgated by the Court was developed to solve that problem in time. Rather than superimposing an entirely new court, the Plan should be permitted to work as it was intended. The backlogs of cases awaiting argument which will result from the Plan should be temporary, unless case filings increase substantially over the next few years. Interposing a new Court between the Superior Court and the District of Columbia Court of Appeals can only exacerbate the delays, as additional briefs and arguments would be required at the intermediate level, and the highest court would still be required to review for grants or denials of appeal. Litigants would wait even longer to achieve finality in their lawsuits.

The budget implications of an intermediate appellate court should also give one pause. Not only is the funding of new court facilities, judges, secretaries, law clerks and court staff required, but also the effect on other agency budgets must be considered: D.C. Corporation Counsel, the Public Defender Service, the United States Attorney's Office, Criminal Justice Act funding, are but examples. It would seem sensible to attempt all other solutions before coming to rest on one with such major fiscal implications.

I suggest that the only rational response to the problem confronting the Court is the appointment of additional Judges to the present Court. I would not venture to recommend the number,

which could be ascertained by making assumptions, setting goals with respect to time and numbers, and using reasonable argument schedules to attain the goals. It may be that the additional judges should be permanent, temporary, or some of each. Each judge added should be able to add 10% or more to the current productivity of the Court.

V. Conclusion

I have attempted in this short paper to explicate the view of an attorney, administrator, and citizen. I hope that it may be of some assistance to the legislative process by pointing out alternatives to a bill which I believe to be premature at the very least. I appreciate the attention given to this legislation and this statement by the Subcommittee members.

Mr. DYMALLY. Judge Nebeker, does your colleague wish to address the committee?

Judge NEBEKER. She declines.

Ms. BELFIORE. But I would be happy to answer any questions that you feel I may answer.

Mr. DYMALLY. To any one of you. I'm familiar, of course—it's the only court system I'm very familiar with is the California system where we have the municipal court for petty offenses, mostly traffic cases, small claims, then the superior court for felonies, and then the district court of appeals and the supreme court. What's your criticism of that system?

Judge NEBEKER. None. California is a big State, amply justified with its diversity of economic endeavors, agriculture, manufacturing, the sea, the mountains. It's fully justified in having a decentralized, intermediate appellate court system. The District of Columbia, on the other hand, is the antithesis of California geographically.

Mr. DYMALLY. According to the A.B.A., an en banc court of last resort, more specifically an intermediate court system, is preferable for law developing purposes. How would you present—how would the present system best accomplish the law development function?

Judge KERN. Well, as I've testified, the present system does it. The present system is modeled after the 11 Federal Circuit Courts of Appeals that are generally considered to be among our very best appellate courts in the country. At the present time, our court, when there is a case of exceptional importance or when the prior case should be overruled, is empowered to sit en banc and make a decision of what you call the law declaring type. But that doesn't happen very frequently during the year.

In short, we have that authority vested in our court now.

Ms. BELFIORE. May I add to that?

Mr. DYMALLY. Yes, of course.

Ms. BELFIORE. Thank you very much. I'd like to add that Alexander——

Mr. DYMALLY. Just mention your name for the record.

Ms. BELFIORE. I'm sorry. My name is Constance Belfiore. Alexander Stevis, who is a member of the minority on the D.C. Bar Committee, who was a former clerk of both the District of Columbia Court of Appeals and thereafter the U.S. Supreme Court, reviewed for the period of a year all the opinions of the D.C. Court of Appeals. In his estimation, and I give great weight to his estimation, he said that there was maybe one or two additional cases that did not receive en banc consideration that may arguably have deserved en banc consideration. However, for the rest of those cases, he determined they were, in fact, fairly decided by panels.

Now, the majority on our committee indicated but gave no support for their argument that more cases should be considered en banc. However, they were able to give no support and they were unable to challenge the current standard that the court of appeals uses to decide en banc cases because that standard is a pretty universally acceptable standard. To go en banc all the time means that precedent means less and it means the state of the law fluctuates more. I think in appropriate cases, en banc consideration is given right now under the current system.

I will just draw this subcommittee's attention to that fact and to the fact that although the majority on our committee made the argument that we needed more en banc consideration of more cases, they were unable to substantiate that argument in any way.

Mr. DYMALLY. Judge Kern, how often has the present appellate court met en banc to resolve important legal matters?

Judge KERN. I think on average about 12 times a year.

Mr. DYMALLY. At least once a month.

To any one of the panelists. Given that 48 States and the Federal Government have a supreme court system as courts of last resort, why does such a system cause problems here for the District of Columbia given the fact that the District of Columbia has more people than maybe two or three of the States?

Judge KERN. Well, I suppose I would answer that the District of Columbia has a population of a little over 600,000, as you know, and it's a jurisdiction of about 65 square miles. Hence, it lends itself to the ideal of the judicial reformers earlier in this century in this country who sought whenever possible to create a single trial court and a single appeals court with the belief, which I think is a very sound one, that our citizens ought to have the right to go to a court of general jurisdiction with their complaints at the trial level and ought to have the right to go to the highest appellate court when they take their appeal. But it's only in a rare situation when you have a combination of a relatively small population in a small geographical area that that could be done.

I think that it's a bit of irony that those who created the court system in 1970 thought of themselves as taking a step that would provide better justice to more people in the community by reason of having a single trial court and a single appeals court.

Now, that's not really practicable, obviously, in a State like California. You have an enormous State geographically, an enormous population. You have to have two levels of trial courts and two levels of appeals courts. A place like Idaho, you have a large geographical expanse and so on.

But in a compact area like the District of Columbia, it has seemed to me that the best justice is done for the most people in the community, which is, after all, our major objective, by having a single trial court that hears everything from a minor misdemeanor to a serious homicide and everything from a small claims court to multimillion dollar lawsuits and then every litigant who is displeased with the decision by the trial court is guaranteed his or her day in the appeals court of the District of Columbia Court of Appeals rather than to go to an intermediate appellate court and then petition another appellate court for access to jurisdiction of that appellate court.

I think that disserves the community, with all deference.

Judge NEBEKER. Mr. Chairman, may I add to that?

Mr. DYMALLY. Of course.

Judge NEBEKER. The assumption in your question is that all the States that have intermediate appellate courts, whether large, as California is, or small, as Idaho is, or Utah, small in terms of population, that all the sweetness and light in those jurisdictions, and I submit to you that after 18 years of running continuing appellate judge educational programs across the United States, all is not

sweetness and light with respect to the creation of intermediate appellate courts.

Idaho had a terrible time. Missouri is still having a terrible time. You might, if you don't rush to judgment, consider talking to some of the intermediate appellate court judges in Missouri. They'll give you a different picture.

Mr. DYMALLY. Mr. Rohrabacher?

Mr. ROHRABACHER. Thank you, Mr. Chairman.

Just a reaction from the panel in general. Whatever profession that we're talking about, there seems to be a principle that I guess was first developed in the military when they were trying to solve a problem. It was the KISS principle. I was wondering if you people believe that the KISS principle, which is keep it simple, Sam, or whatever, does this work in trying to solve our problems with legal problems as well?

Judge KERN. Absolutely. I believe in KISS.

Judge NEBEKER. It's a goal finally to be hoped for.

Judge KERN. The sad part of our situation is that—and here we are debating the creation of another court with significant impact on the members of the community and at considerable cost. We're all certainly going about this in absolute good faith when, as the statistics show, the whole reason we're in this problem is because over the years—for example, in 1980 it took 137 days to file the record, that is the transcript of the trial and the papers filed in the trial court. In 1988, it took 227 days. In 1980, it took 151 days to get the briefs in. In 1988, it takes 237 days.

That's the heart of the problem and it's a mechanical, administrative type of thing that needs to be dealt with. I suggest that under the principle of KISS, that to KISS the reporters and to KISS the lawyers into compliance with the rules is the first step and it's a step that the present court is taking.

Mr. ROHRABACHER. Your position is that even though everyone is coming with absolute goodwill and they've been stimulated to action by a problem, that the proposal of adding a new level of appellate court could actually have the opposite impact as to what they're trying to accomplish?

Judge NEBEKER. I submit not could, but would.

Mr. ROHRABACHER. It would.

Mr. HERMAN. I have no doubt that it would also. I think the position of just about everybody at this table is simply that if we give the case management a plan to work—it just was implemented a month or so ago—if we give it a chance to work, it will work. It has worked in a number of Federal circuits where delays are down to 5 months to decision from filing.

Mr. ROHRABACHER. It seems to me that when your automobile is sputtering and it's not getting you where you want to go and you look at the gas tank and it reads empty, that now isn't the time that you should decide to have the engine redesigned. Instead, perhaps, you should put some gas in the tank.

In this particular case, gas in the tank would be the appointment of a few more judges. Is that on target?

Judge KERN. As far as I'm concerned, yes.

Mr. ROHRABACHER. Do you think that the appointment of more judges and a streamlining of the process would take care of the

problems that we're facing rather than a restructuring of the system and an addition of an appellate court level?

Judge KERN. I think so for the reason that I cannot believe that nine new judges appointed to the proposed intermediate appellate court, which is the present District of Columbia Court of Appeals, can deal with the present delay problem that we've just alluded to because they're going to be new players. It's like putting the defense team in when you brief the offensive team. Then you're moving the experienced people who have been dealing with this problem up to the supreme court and to me that's—number one, it's counterproductive and, number two, perhaps I'm too much of a populist, but I believe that every citizen in this community ought to have his or her appeal heard and determined by the highest court in the jurisdiction. I'm enough of an optimist to believe that can be accomplished, as it is being accomplished now, in a quicker fashion.

We do have nine judges and we do have five senior judges and the addition of several more judges would enable the present court to keep the courthouse door open to every citizen who seeks an appeal.

Ms. BELFIORE. If I may too, I'd like to point out that the proponents of an intermediate court of appeals is perhaps putting a tiger in the tank instead of gas. The basis for this, when the proponents—and of course I dealt with them extensively over the course of our committee meetings, come right down to, "Well, in the face of these statistics, why do you still think an intermediate court of appeals is the best solution?" invariably come around and say, "Well, because we talked to the active judges on the D.C. Court of Appeals and they told us they thought it was a good solution."

My point here is that the judges of appeals were interviewed very early in our committee process. They were interviewed last winter. They were interviewed before the committee obtained the data which showed that most of the delay was not attributable to the judges themselves, but just to mechanical processes that occurred before an opinion ever hit the judges' desks.

They also gave their opinions prior to even the anticipated implementation of the case management system. Unfortunately, since they committed to their positions then, I am not at all sure that they would want to change them now, but I think in all honesty if they were apprised of the—well, what's ultimately contained in our minority report, which we came to only after a lot of discussion and decision. I know I came into this process with an open mind and it was only after analyzing the data and the policy issues and all the issues that I came to the conclusion that I did.

I believe that had the judges been interviewed later or had they had the benefit of the beginning of the implementation of the case management process, they may have come to a different conclusion. This may undermine some of the proponents who felt, "Well, who can question the experts on this?"

I just wanted to point this out because I think this may be responsible for some of the proponents' vigor on this issue.

Mr. ROHRABACHER. Thank you very much, Mr. Chairman. I have no more questions, but I think that the witnesses are to be commended because they're here, they're obviously concerned. They

want the system to work and they're very aggressive in advocating their position. I think that we should pay close attention to what they're saying and I appreciate you, Mr. Chairman, giving them the opportunity to express themselves here for us in this way.

Mr. DYMALLY. Before they leave, I'd like to hear their opinion on the pay raise.

Mr. Barnes, for Mr. Fauntroy.

Mr. BARNES. Thank you, Mr. Chairman. I think Mr. Fauntroy would agree with Congressman Rohrabacher that the witnesses have added to the body of testimony and information that the subcommittee has received and it's very valuable.

He did have several questions he wanted to put to the panelists and I'll sort of paraphrase them and hit the high points.

None of you addressed the issue of what may happen to the court system at the trial and appellate level when and if the 1,000 new police officers are added. Earlier testimony suggests that a conservative estimate is that each of these officers would make a minimum of seven arrests annually, with the potential of at least 7,000 new criminal cases in the system.

Would either of you have any thoughts on what that might do to the system and how we might anticipate dealing with that?

Judge NEBEKER. I suggest that it would increase the number of cases ultimately to be appealed. But if you'll bear in mind that fully half of those will die out anyway and fully 90 percent of them hardly merit enough attention to justify a full published opinion. The ultimate impact on the appellate process will not be as gargantuan as the doom sayers say it would be. Indeed, the addition of two judges probably take care of not only that increase but the temporary increase you're going to see when the court reporters are made to produce in the cases that are already in the system and awaiting the lethargy that is extant today.

Mr. HERMAN. If I may add, back in 1986 we were predicting that the case load was going to increase very substantially based upon what had happened in the last couple of years before that and, in addition, because of the addition of judges to the superior court, and also some legislation on worker's compensation. This, in fact, did not happen.

I would prevail upon the committee to consider that instead of presupposing an increase in cases at the District of Columbia Court of Appeals, let's wait until it happens.

Ms. BELFIORE. Moreover, I would add that the substance of most of those cases, unfortunately, will probably be drug cases and they'll be the relatively simple drug cases versus the complex, Edmonds type cases. Those do not lend themselves to a lot of attention on appeal because most of them will be pleas from which relatively no appeals are taken at all, only—it's very limited, the situation under which you can take appeal from any plea.

In addition, when there are appeals from drug cases, they do tend to rest on sufficiency of the evidence, suppressing of the evidence type of issues which are fairly easily decided from an appellate judge's viewpoint. So, I think if you consider the substance of the likely increase in the kinds of cases, that also should factor into exactly how much appellate judges time it will take up.

Mr. BARNES. According to the testimony today though, 60 percent of appeals are from criminal cases. Is that not correct?

Ms. BELFIORE. That sounds correct to me. I spent 8 years an assistant U.S. attorney.

I'm sorry, but I'm compelled to add at this point that I am a member of the D.C. Bar's Board of Governors, but my opinions do not reflect those of the D.C. Bar or the Board of Governors, only my own and those of the minority on the Schaller committee.

Thank you.

Mr. HERMAN. I would suggest that if the committee is using the figure of 60 percent of the appeals, I think it would be more significant if you addressed how many of the opinions of the court deal with criminal cases as opposed to civil cases.

Mr. BARNES. Yes. Mr. Fauntroy did want to get to the arithmetic, but he wanted to ask you, Mr. Herman, specifically a question.

You indicated that a few years ago you would have favored the creation of an intermediate court. But because the number of filings have decreased since 1986, you now have a different view.

Assuming the number of filings increased 1,800 or more, would your view then be that an intermediate court of appeals is justified?

Mr. HERMAN. Not at this time. First of all, we were predicting well in excess of 2,000 c' s that would reach the court of appeals based upon past statistics.

Second, the judges at that time were unwilling to put forth a case management plan such as the judges are doing today. In the light of that, I would give it at least 2 or 3 years to settle in and make sure that that case management plan worked. If it did not work, then I would reconsider.

Mr. BARNES. Mr. Fauntroy was intrigued by the arithmetic in all of the written submissions. I guess the proposal was that we add a couple of more judges to the court of appeals. I don't think you, Mr. Herman, wanted to be locked into a number.

But to any of the panelists, assuming we do have 2,300 or more cases pending and we add two judges and judges, according to the testimony, handle about 80 appeals a year, does that mean we're going to have to wait 10 or 15 years before that backlog is reduced? How does the arithmetic work?

Judge NEBEKER. Sir, I don't understand where you're coming from in terms of—you said 2,300?

Mr. BARNES. That's in the testimony.

Judge NEBEKER. Are you talking about 2,300 additional cases or 2,300 total.

Mr. BARNES. No, the pending appeals in terms of backlog.

Judge NEBEKER. I see. That's in your testimony.

Mr. HERMAN. Well, half of those appeals will not reach the court, if we base it upon past statistics. Half of the appeals are dismissed.

Mr. BARNES. No, these are pending appeals, as I understand.

Mr. HERMAN. That's correct. And if we use the same proportion of cases which are dismissed during the period, it could take 1 year or 2 or 3, these are dismissed without ever getting to the judges. I assume that the same proportion would apply to those cases which are pending. The cases which are pending are pending at all stages.

Mr. BARNES. Well, let's assume half then. If a judge, according to the testimony this morning, handles on the average 80 cases and you add two judges, that's 160 cases per year for those two judges added. You're still talking 10 years before the—according to your own arithmetic.

Mr. HERMAN. I don't see that. I see 11 judges deciding about 1,200 cases.

Mr. BARNES. Well, that assumes that those judges do nothing except deal with the pending appeals and don't take on any of the new ones. The testimony, as I understand it, was that the case dispositions have kept pace with the case filings the past couple of years and therefore there's really no need for an intermediate court of appeals but add a couple of judges to deal with it. But the case dispositions have not reduced substantially anyway the backlog over the years that the various reports called an alarm about.

Mr. HERMAN. There is no growing backlog. The backlog or pending cases is essentially approximately the same over the last 3 or 4 years. As a matter of fact, it's been reduced somewhat. If we add two or three judges, then the backlog will be reduced.

Judge KERN. If I could just add a point. I'm looking at the case load report for the court dated September 1989. It shows cases pending September 1, 2,297. Now, that number is a little bit like analogous to the number of bills that are presently pending in the House of Representatives. Namely, they've been introduced and they're sitting there in the House.

These are 2,200 cases sitting in the court, but they're going through a four-part process. Some are just sitting there and nothing is being done. Some are having the transcript of the trial being prepared. Some are having all the papers that were filed in the trial court being reproduced. Some are awaiting the appellant's brief. Then you D K to be presented to a three judge panel. Then you have another group that has been presented to a three judge panel and are awaiting a decision.

So, my point is the problem of using the 2,297 is that it doesn't take into complete account the fact that there are a lot of those 2,297 are in some stage of the process. Up until the time the case is fully briefed, the chances are good that the case is going to dispose of itself, either because the disappointed litigant who said, "I'm going to take you to the Supreme Court of the United States and you'll never collect from me," has had second thoughts after noting an appeal and withdraws the appeal or doesn't do the appeal.

So, in describing backlog, the backlog is, I think, a different number than the 2,297. The backlog would be those cases that are fully ready to be submitted to the court which is a considerably lower number. So, I think that accounts for the belief that all of us have that the addition of two more judges would enable this court—would, A, enable every litigant to have his or her day in the highest court and, B, enable this court to attack the backlog which is a different and distinct number than the pending cases.

Ms. BELFIORE. Excuse me. As Mr. Herman said, when a case is dismissed, it means the litigants, for whatever reason, pull it out of the court system. So it really requires no judicial attention. Either they've reached a settlement or they've just decided not to pursue it. Over the decade, it's remained consistent that approximately 50

percent or even a little bit more, melt out of the system in this way. So that's why to use the filings, which includes a 50-percent melt factor, is really irrelevant when you're talking about burden on the judges.

Mr. BARNES. I guess the problem is that the number of pending cases has remained constant. While filings and dispositions have leveled off, the number of pending cases over the years has remained constant. So, whatever type of case it is, whether it's amenable to slip opinions or to just an order from the court, that number has remained constant and there's been no real dent in it.

Mr. HERMAN. Which means, of course, that the present nine judges are able to handle 1,600 filings a year.

Mr. DYMALLY. Thank you very much.

Mr. Lee for Mr. Parris.

Mr. LEE. Thank you, Mr. Chairman.

Of the 2,200 cases that are filed, how many of these are consolidated in appeal for a final judgment and consolidated so that you actually take care of more than one case? I've heard a figure of about 10 percent.

Mr. HERMAN. There are cases which are consolidated. The pending cases—all of the case statistics that are given count each individual case, whether or not it's consolidated with another one. There may be—at one time there were a number of cases that were consolidated. As I recall, there might have been as many as 200 in the Embassy trespass cases.

Yet on average, I would say that you could reduce the total by some 10 or perhaps at the most 15 percent by the number of actual cases filing folders before the court.

Judge NEBEKER. You often get cases that are consolidated where you have three or four or five defendants in a narcotics case. As Mr. Herman pointed out, you had some cases where there were as many as 100. There are two ways of handling those kind of cases. One, you can consolidate them, or two, you can stack the bunch of them and take the guinea pig, decide it and let it control the others.

That happened a few years back in a single House veto litigation that emanated from the Supreme Court regarding the *Chadha* decision. A lot of those cases were simply stacked. They counted as a case filing, but they consumed no judicial resource.

Mr. LEE. I would pose to the judges, it's been suggested that—precluding some of your current colleagues, Judge Kern on the court, that increasing the number of judges on the court of appeals to 11 or 12 or whatever number the Congress may choose to increase it would make the court unwieldy.

I was wondering how many judges sit on the D.C. Circuit Court of Appeals and is that court unwieldy and why would the D.C. Court of Appeals be more unwieldy perhaps than the 11th circuit or the 9th circuit or the D.C. circuit if it has more than nine judges?

Judge NEBEKER. I don't see any reason why it would. If this court has any serious doubt about it, check with Chief Judge Paul Roney of the 11th circuit. He does a pretty good job. That court does a pretty good job of handling its numbers. The 9th circuit, likewise, seems to be able to do so. Nobody's advocating a court in the Dis-

trict of Columbia that size. It's often referred to, the 9th circuit, as somewhere between a jury and a riot in terms of its numbers. But the simple fact is it functions.

Judge KERN. I would refer you to a Law Review article, 56 University of Chicago Law Review, page 541. It's an article describing the 9th circuit, which has 25 full-time judges, 10 senior judges, and according to the article adjudicates in a single year nearly 2,500 cases and will publish as many as 900 precedential opinions.

The thrust of the article is that the author made this study to determine what was the risk of conflict with 26 judges and 10 judges part-time operating. Would one panel decide something inconsistent with the others? That's been a suggestion that that's the danger of a large, multijudge appellate court. He suggests that it's not the problem that he foresaw.

Plus the fact that in a multijudge court, every opinion that is published, that sets precedent, is circulated to every member of the court. Therefore, the judges, and that's the genius of having a single appeals court, the judges are aware of decisions that others are making and that's, in my judgment, a strength, not a weakness.

Mr. LEE. Judge Kern, you have made much about the fact that everybody has virtually unfettered right of appeal to the highest court here.

Judge KERN. Yes.

Mr. LEE. Would you or your colleagues favor some narrowing in some fashion this absolute right of appeal? For example, would it be possible that there's some process which might automatically result in a further review by the trial judge or some kind of an automatic remand for certain issues that were clarified and clearly stated by the appeals court so that perhaps some of the error correcting questions that get raised get resolved again or at least looked at once again at the trial level without a full hearing at the appeals level?

Judge KERN. Well, sometimes Judge Nebeker and I disagree. So he may have his own response. But I'm a great believer in the open courtroom door. I don't believe in trying to narrow the access of the appeals court to litigants as a general policy. I think that the strength of the D.C. Court of Appeals is that every litigant grieved by decision by the trial court or by a D.C. administrative agency has the right to enter our court. But that's my answer. Others may have different——

Judge NEBEKER. Mr. Lee, Mr. Chairman, it seems to me that there is a fertile area for consideration of discretionary review by the D.C. Court of Appeals in the area of unemployment compensation. If you look at the cases that come to the court in the area of unemployment compensation, you find that they're mostly frivolous. You could determine frivolity at a petition for review level rather than an appeal as a matter of right which goes on to trigger all the regular preparation and the briefing and so forth and so on.

That may now even be possible with respect to worker's compensation. It was relatively new a few years ago and the court needed an opportunity to adopt a body of jurisprudence. I suggest that's probably been adopted at this point. One pressure valve could be

the identification of some cases that probably, from the administrative level, which are not unlike the small claims stuff.

Bear in mind, small claims is appealed by discretion now in the D.C. Court of Appeals. So you would not be breaking precedent to simply enlarge beyond the small claims matters other identified appellate litigation probably from administrative agencies in the District of Columbia that really could be disposed of on an application for appeal rather than the full-fledged appeal. A motions panel could handle them with a minimum of judicial time and energy. They would not occupy a full spot even on a summary calendar of the cases to be argued by the judges on the calendar of the court.

Mr. LEE. Mr. Chairman, I have no further questions in light of our time.

Mr. DYMALLY. Thank you very much.

Mr. Willis for Mr. Dellums.

Mr. WILLIS. Only one question.

Mr. Kern, in your testimony on page 6, I want to make sure that we understand clearly the attitude expressed. You seem to question the right of review for those who receive counsel at community expense. Are you suggesting that those who receive justice at community expense are not entitled to an appeal?

Judge KERN. No. I suggested as strongly as I could that everyone who is aggrieved by the trial court go to the highest court. That's what's done now and whether the person who is aggrieved has funds himself or herself for counsel or whether the community most properly furnishes funds, I think that person has the right to go to the highest appeals court.

That's one of the reasons why I think that this is an unfortunate step backward. We're adding seven judges to the system. We're putting them in the supreme court and we're conferring upon the supreme court the absolute discretion to take such cases as the judges choose to hear. I favor the other way around, that a litigant chooses to appeal and that litigant is entitled to his or her day in the highest court.

Mr. DYMALLY. Thank you very much. Just one final question from Mr. Temple before we adjourn.

Mr. TEMPLE. Judge Kern, on that basis, I guess the question would be, one is whether there should be reform throughout the other States which have a supreme court system and how does that apply then to the United States Supreme Court where there is, like in States, courts which render final opinions and have a significant law development function?

Judge KERN. Well, as I've said, the D.C. Court of Appeals has the authority under the present statute to develop a law en banc. Again, referring to the Law Review article that I cited to Mr. Lee, the statement is made in there by the author, Professor Hellman, on many issues, especially outside the realm of constitutional adjudication, the governing law is the law of the circuit. If an additional tier of review were interposed between the supreme court and the regional circuits, like the ninth circuit, the effect would be to increase the delay and expense of litigation. That's just one person's opinion.

Mr. WILLIS. Sure, but the circuit is not analogous to the District of Columbia. That's clear because not only is this a supreme court, but we understand the circuit phenomena.

I want to ask a closing question on the law development function of the appellate court here. That is since the court is a court of appeals and hears appellate cases, is the review, discussion and decisionmaking regarding the present en banc appellate review of cases most efficient and most effective under the present system? Would it be more efficient under a limited, streamlined supreme court system?

Judge KERN. My answer is it is the most efficient because Congress has authorized our court to sit en banc whenever a majority of the judges choose to do so. Our court has articulated and published internal operating procedures that say initial en banc hearing may be ordered if there is a determination that the case is controlled by a prior decision of the court which should be reconsidered or that the case is of exceptional importance.

My position is that the present court can properly perform the law declaring function en banc when the case is of exceptional importance or when there's a need to revisit the law.

Mr. WILLIS. I guess the question is more specifically, if there was 30 en banc cases, as is suggested by the proponents of the legislation, how much time would that require for the court to render meaningful decisions with some degree of deliberation? How much time would that take away from the court's deliberation and consideration of its pending appellate caseload?

Mr. DYMALLY. Judge Nebeker?

Judge NEBEKER. I think an assumption in your question, sir, is that the lawmaking function is done exclusively by the en banc court. That is a misapprehension. The three-judge panel published opinion make a tremendous amount of law, refine the law and declare the law. It isn't just the en banc court that does it. The en banc court is limited to perceived conflicts among divisions and important, very important cases.

The assumption that you would have an en banc supreme court hearing the very important cases, I suggest to you, really overstates the magnitude of that function. There aren't that many really important cases that command the attention of the full court. The more of that sort of stuff you get, the less predictability there is in the law and that itself is a detriment to society. There's nothing wrong with three-judge panels declaring the law in the ordinary law declaring type cases and that's what's working today.

Mr. DYMALLY. The subcommittee wishes to thank all the witnesses and we would like to have the privilege of submitting to you some questions and we would appreciate very much if you could expedite your response.

Judge NEBEKER. By tomorrow, sir?

Mr. DYMALLY. Yesterday.

Thank you very much.

[Whereupon, at 11:15 a.m., the subcommittee was adjourned.]

MARKUP OF H.R. 3470—TO ESTABLISH A SUPREME COURT OF THE DISTRICT OF COLUMBIA

THURSDAY, MARCH 15, 1990

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON JUDICIARY AND EDUCATION,
COMMITTEE ON THE DISTRICT OF COLUMBIA,
Washington, DC.

The subcommittee met, pursuant to call, at 10:12 a.m., in room 1310–A, Longworth House Office Building, Hon. Mervyn M. Dymally (chairman of the subcommittee) presiding.

Members present: Representatives Dymally, Fauntroy, and Rohrabacher.

Also present: Donald M. Temple, senior staff counsel; Marvin R. Eason, staff assistant; Robert B. Brauer, senior staff assistant; E. Faye Williams, staff counsel; Mark J. Robertson, minority staff director; Howard Lee, minority assistant staff director; and Richard Dykema, minority staff assistant.

Mr. DYMALLY. Good morning.

The Subcommittee on Judiciary and Education is hereby convened to consider H.R. 3470, a bill which would establish a Supreme Court of the District of Columbia, improve the status and quality of hearing commissioners, and make several other changes in the local court system.

This legislation evolves, in part, from a 1979 Bar Committee report regarding the workload of the Court of Appeals in the District of Columbia. That report concluded that, "Resolution of virtually all of its cases, by majority vote of the judicial panels, is an altogether unacceptable modus operandi for a jurisdiction's highest court."

It also concluded that the court's then 15.5-month average delay from notice of appeal to decision is far too long, roughly three times longer than that recommended by the American Bar Association's appellate standards. The delay is approximately 22 months now.

These views were echoed in a 1987 resolution of the Bar Association of the District of Columbia which also urged the creation of an intermediate appellate court to alleviate appellate backlog.

Additionally, a national center for State courts study on the appellate delay in the D.C. Court of Appeals determined that between 1976 and 1986 appellate filings in the District of Columbia increased by approximately 34 percent and the case load of the D.C. Court of Appeals is "higher by far than any other court of last

resort not having an intermediate appellate court" when compared to other State appellate courts.

Against this backdrop, on April 13, 1988, Congressman Walter E. Fauntroy introduced H.R. 4366, the Supreme Court of the District of Columbia Establishment Act. In April 1988, the Subcommittee on Judiciary and Education held 2 days of hearings and received testimony from numerous witnesses about the backlog in appellate cases. Subsequent to these hearings, Congressman Fauntroy organized a distinguished group of attorneys to review court reorganization and other related problems in the District.

Based upon their findings and the hearings, Mr. Fauntroy introduced H.R. 3470, a revised bill. The subcommittee held 3 days of hearings on H.R. 3470 in October and November of 1989. The last day of subcommittee hearings was scheduled at the request of the minority members to hear the views of certain opponents of the bill.

In the last session, subsequent to and independent of our hearings, the Congress passed separate legislation which added 8 judges to the superior court, bringing the total number of superior court judges to 59. As a result, the legislation before us today does not contain any provisions which would increase further the number of judges on the D.C. Superior Court.

Based upon what we have learned in our recent hearings and from our own research, Congressman Fauntroy and I have revised H.R. 3470. The changes have been incorporated into H.R. 4257, an almost identical version of the amendment in the nature of a substitute which I forwarded to the subcommittee members last week.

Of course, I have been most interested in pushing this legislation forward. In the interest of facilitating maximum debate on this very important proposal, both sides of the subcommittee have reached a consensus to "refer H.R. 4257 to the full Committee on the District of Columbia without recommendation." Thus, today there will be no markup.

[The prepared opening statement of Mr. Dymally follows:]

OPENING STATEMENT

OF

THE HONORABLE MERVYN M. DYMALLY

CHAIRMAN, SUBCOMMITTEE ON JUDICIARY AND EDUCATION

COMMITTEE ON THE DISTICT OF COLUMBIA

MARK-UP OF H.R. 3470

THURSDAY, MARCH 15, 1990

GOOD MORNING, THE SUBCOMMITTEE ON JUDICIARY AND EDUCATION IS HEREBY CONVENED TO CONSIDER H.R. 3470, A BILL WHICH WOULD ESTABLISH A SUPREME COURT OF THE DISTRICT OF COLUMBIA, IMPROVE THE STATUS AND QUALITY OF HEARING COMMISSIONERS, AND MAKE SEVERAL OTHER CHANGES IN THE LOCAL COURT SYSTEM.

THIS LEGISLATION EVOLVES, IN PART, FROM A 1979 BAR COMMITTEE REPORT REGARDING THE WORKLOAD OF THE COURT OF APPEALS IN THE DISTRICT OF COLUMBIA. THAT REPORT CONCLUDED THAT "RESOLUTION OF VIRTUALLY ALL OF ITS CASES, BY MAJORITY VOTE OF THE JUDICIAL PANELS, IS AN ALTOGETHER UNACCEPTABLE MODUS OPERANDI FOR A JURISDICTION'S HIGHEST COURT."

IT ALSO CONCLUDED THAT THE COURT'S THEN 15.5 MONTH AVERAGE DELAY, FROM NOTICE OF APPEAL TO DECISION, IS FAR TOO LONG, ROUGHLY THREE TIMES LONGER THAN THAT RECOMMENDED BY THE AMERICAN BAR ASSOCIATION'S APPELLATE STANDARDS. THE DELAY IS APPROXIMATELY TWENTY-TWO (22) MONTHS NOW.

THESE VIEWS WERE ECHOED IN A 1987 RESOLUTION OF THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA, WHICH ALSO URGED THE CREATION OF AN INTERMEDIATE APPELLATE COURT TO ALLEVIATE APPELLATE BACKLOG.

ADDITIONALLY, A NATIONAL CENTER FOR STATE COURTS STUDY ON APPELLATE DELAY IN THE D.C. COURT OF APPEALS DETERMINED THAT BETWEEN 1976 AND 1986, APPELLATE FILINGS IN D.C. INCREASED BY APPROXIMATELY THIRTY-FOUR (34) PERCENT AND THE CASELOAD OF THE D.C. COURT OF APPEALS IS "HIGHER BY FAR THAN ANY OTHER COURT OF LAST RESORT NOT HAVING AN INTERMEDIATE APPELLATE COURT," WHEN COMPARED TO OTHER STATE APPELLATE COURTS.

AGAINST THIS BACKDROP, ON APRIL 13, 1988, CONGRESSMAN WALTER E. FAUNTROY INTRODUCED H.R. 4366, THE SUPREME COURT OF THE DISTRICT OF COLUMBIA ESTABLISHMENT ACT. IN APRIL, 1988, THE SUBCOMMITTEE ON JUDICIARY AND EDUCATION HELD TWO DAYS OF HEARINGS AND RECEIVED TESTIMONY FROM NUMEROUS WITNESSES ABOUT THE BACKLOG IN APPELLATE CASES. SUBSEQUENT TO THESE HEARINGS, CONGRESSMAN FAUNTROY ORGANIZED A DISTINGUISHED GROUP OF ATTORNEYS TO REVIEW COURT REORGANIZATION AND OTHER RELATED PROBLEMS.

BASED UPON THEIR FINDINGS AND THE HEARINGS, MR. FAUNTROY INTRODUCED H.R. 3470, A REVISED BILL. THE SUBCOMMITTEE HELD THREE DAYS OF HEARINGS ON H.R. 3470 IN OCTOBER AND NOVEMBER OF 1989. THE LAST DAY OF SUBCOMMITTEE HEARINGS WAS SCHEDULED AT THE REQUEST OF THE MINORITY MEMBERS TO HEAR THE VIEWS OF CERTAIN OPPONENTS OF THE BILL.

IN THE LAST SESSION, SUBSEQUENT TO AND INDEPENDENT OF OUR HEARINGS, THE CONGRESS PASSED SEPARATE LEGISLATION WHICH ADDED EIGHT (8) JUDGES TO THE SUPERIOR COURT, BRINGING THE TOTAL NUMBER OF SUPERIOR COURT JUDGES TO FIFTY-NINE (59).

AS A RESULT, THE LEGISLATION BEFORE US TODAY DOES NOT CONTAIN ANY PROVISIONS WHICH WOULD INCREASE FURTHER THE NUMBER OF JUDGES ON THE D.C. SUPERIOR COURT.

BASED UPON WHAT WE HAVE LEARNED IN OUR RECENT HEARINGS AND FROM OWN RESEARCH, CONGRESSMAN FAUNTROY AND I HAVE REVISED H.R. 3470. THE CHANGES HAVE BEEN INCORPORATED INTO H.R. 4257, AN ALMOST IDENTICAL VERSION OF THE AMENDMENT IN THE NATURE OF A SUBSTITUTE WHICH I FOWARDED TO SUBCOMMITTEE MEMBERS LAST WEEK.

OF COURSE, I HAVE BEEN MOST INTERESTED IN PUSHING THIS LEGISLATION FORWARD. IN THE INTEREST OF FACILITATING MAXIMUM DEBATE ON THIS VERY IMPORTANT PROPOSAL, BOTH SIDES OF THE SUBCOMMITTEE HAVE REACHED A CONSENSUS TO "REFER H.R. 4257 TO THE FULL COMMITTEE ON THE DISTRICT OF COLUMBIA WITHOUT RECOMMENDATION." THUS, ON TODAY, THERE WILL BE NO FORMAL MARK-UP.

AT THIS TIME, I WILL DEFER TO MR. PARRIS OR MR. ROHRABACHER FOR A STATEMENT.

Mr. DYMALLY. At this time, I would like to defer to Mr. Rohrabacher.

Mr. ROHRABACHER. Thank you, Mr. Chairman.

Mr. Chairman, your legislation to create a Supreme Court for the District of Columbia raises several questions. Among them are whether the creation of a new layer of the District court system is the best way of addressing an admittedly heavy workload and, if it is, whether the Federal Government rather than the District government should pay to set it up and whether we should be setting up permanent structures in the District government that might make the newly attractive option of retrocession more complicated.

Mr. Chairman, because of the desires of the bipartisan leadership of this committee and because the full District of Columbia Committee is small enough to be able to deal with these questions, I support the compromise agreement to refer this legislation to the full District of Columbia Committee without recommendation, so that it can be brought up later on this session, if that is what is in the cards, or perhaps it can be brought up next session when we have a dynamic, new, forward-looking Mayor of the District of Columbia.

Thank you, Mr. Chairman.

Mr. DYMALLY. Having said that, let me now call on the new, dynamic member of the District of Columbia, Mr. Fauntroy.

Mr. FAUNTROY. Thank you, Mr. Chairman.

Let me express my heartfelt appreciation to you and the members of the committee for referring this to the full committee. As you know, I have been working for several years to deal with the fact that we haven't revisited our Court Reorganization Act since 1970 and that, given the tremendous backlog of civil cases and the need to streamline our court system to make it more consistent with State systems around the country, we have been pursuing this goal for several years.

I think the hearings that you held on the matter tended to confirm the great interest among District residents in this proposal, and I look forward to the more extended debate on the substitute that you have fashioned, which is certainly commendable, when it gets to the committee.

I thank the gentleman, Mr. Rohrabacher, for his commiserations.

Mr. DYMALLY. Mr. Rohrabacher.

Mr. ROHRABACHER. Mr. Chairman, I move to refer H.R. 4257 to the full committee without recommendations.

Mr. DYMALLY. Fine.

Any objections?

Since this bill is a product of our hearing on H.R. 3470, does the gentleman have any objection to the transmittal of a background memorandum to the full committee members outlining our hearing record on legislation to create the supreme court, the objectives of this legislation, and a summary of its contents?

Mr. ROHRABACHER. I have no objection.

Mr. DYMALLY. Thank you very much.

Without objection, the measure is referred to the full committee.

Is there any other matter to come before the subcommittee?

If not, the meeting is adjourned.

[Whereupon, at 10:20 a.m., the subcommittee was adjourned.]

MARKUP OF H.R. 4257—SUPREME COURT BILL

TUESDAY, OCTOBER 2, 1990

HOUSE OF REPRESENTATIVES,
COMMITTEE ON DISTRICT OF COLUMBIA,
Washington, DC.

The committee met, pursuant to call, at 9:15 a.m., in room 1310A, Hon. Walter E. Fauntroy presiding.

Members present: Representatives Fauntroy, Dymally, Wheat, McDermott, Parris, Bliley, and Rohrabacher.

Also present: Edward C. Sylvester, Jr., staff director; Ronald C. Willis, Sr., senior staff associate; Donn G. Davis, Sr., senior legislative associate; E. Faye Williams, Sr., staff counsel; and Mark Robertson, minority staff director; Howard Lee, minority deputy staff director; Veronica Gonzales, Jeffrey Schlagenhauf, Trudy Boyd, and Rick Dykema, minority staff assistants.

Mr. FAUNTROY. After its consideration, our Subcommittee on Judiciary and Education forwarded this bill for full committee action. Modifications to the bill, as a result of the subcommittee considerations are before us in the form of an amendment in the nature of a substitute to H.R. 4257.

Without objection, the bill and substitute are considered read and entered into the record.

[The bill H.R. 4257 and the substitute follow:]

I

101ST CONGRESS
2D SESSION

H. R. 4257

To create a supreme court for the District of Columbia, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 14, 1990

Mr. DYMALLY (for himself and Mr. FAUNTROY) introduced the following bill; which was referred to the Committee on the District of Columbia

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A BILL

To create a supreme court for the District of Columbia, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "District of Columbia Judicial Reorganization Act of 1990".

TITLE I—SUPREME COURT OF THE DISTRICT OF COLUMBIA

SECTION 101. ESTABLISHMENT OF SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Title 11 of the District of Columbia Code is amended by adding after chapter 5 the following new chapter 6:

"Chapter 6. Supreme Court of the District of Columbia

"SUBCHAPTER I. ESTABLISHMENT AND ORGANIZATION

"SUBCHAPTER II. JURISDICTION

"SUBCHAPTER III. MISCELLANEOUS PROVISIONS

"SUBCHAPTER I. ESTABLISHMENT AND ORGANIZATION

"§ 11-601. Establishment; court of record; seal.

"(a) The Supreme Court of the District of Columbia (hereafter in this chapter referred to as 'the court') is hereby established as a court of record in the District of Columbia.

"(b) The court shall have a seal.

"§ 11-602. Composition.

The court shall consist of a chief justice and 6 associate justices.

"§ 11-603. Justices; service; compensation.

"(a) The chief justice and the justices of the court shall serve in accordance with chapter 15 of this title.

"(b) Justices of the court shall be compensated at 90 percent of the rate prescribed by law for justices of the United States Supreme Court. The chief justice shall receive $3,000 per year in addition to the salary of other justices of the court.

"§ 11–604. Oath of justices.

"Each justice, when appointed, shall take the oath prescribed for judges of courts of the United States.

"§ 11–605. Term; hearings; quorum.

"(a) The court shall sit in one term each year for such period as it may determine.

"(b) The court shall sit in banc to hear and determine cases and controversies, except that the court may sit in divisions of 3 justices to hear and determine cases and controversies certified for review under section 11–621 if the court determines that subsection (b)(2) of such section is the exclusive basis for such certification. The court in banc for a hearing shall consist of the justices of the court in regular active service.

"(c) A majority of the justices serving shall constitute a quorum.

"(d) A rehearing before the court may be ordered by a majority of the justices of the court in regular active service. The court in banc for a rehearing shall consist of the justices of the court in regular active service.

"§ 11-606. Absence, disability, or disqualification of justices; vacancies.

"(a) When the chief justice of the court is absent or disabled, the duties of the chief justice shall devolve upon and be performed by such associate justice as the chief justice may designate in writing. In the event that the chief justice is (1) disqualified or suspended, or (2) unable or fails to make such a designation, such duties shall devolve upon and be performed by the associate justices of the court according to the seniority of their original commissions.

"(b) A chief justice whose term as chief justice has expired shall continue to serve until redesignated or until a successor has been designated. When there is a vacancy in the position of chief justice the position shall be filled temporarily as provided in the second sentence of subsection (a).

"§ 11-607. Assignment of justices to and from other courts of the District of Columbia.

"(a) The chief justice of the Supreme Court of the District of Columbia may designate and assign temporarily one or more judges of the District of Columbia Court of Appeals or the Superior Court of the District of Columbia to serve on the Supreme Court of the District of Columbia whenever the business of the Supreme Court of the District of Columbia so requires. Such designations or assignments shall be in conformity with the rules or orders of the Supreme Court of the District of Columbia.

"(b) Upon presentation of a certificate of necessity by the chief judge of the District of Columbia Court of Appeals or the chief judge of the Superior Court of the District of Columbia, the chief justice of the Supreme Court of the District of Columbia may designate and assign temporarily one or more justices of the Supreme Court of the District of Columbia to serve as a judge of the District of Columbia Court of Appeals or the Superior Court of the District of Columbia.

"§ 11-608. Clerks and secretaries for justices.

"Each justice may appoint and remove a personal secretary. The chief justice may appoint and remove not more than three personal law clerks, and each associate justice may appoint and remove not more than two personal law clerks. In addition, the chief justice may appoint and remove law clerks for the court and law clerks and secretaries for the senior justices. The law clerks appointed for the court shall serve as directed by the chief justice.

"§ 11-609. Reports.

"Each justice shall submit to the chief justice such reports and data as the chief justice may request.

"SUBCHAPTER II. JURISDICTION

"§ 11-621. Certification to the Supreme Court of the District of Columbia.

"(a) In any case in which an appeal has been taken to or filed with the District of Columbia Court of Appeals, the Su-

preme Court of the District of Columbia, by order of the Supreme Court sua sponte, or, in its discretion, on motion of the District of Columbia Court of Appeals or of any party, may certify the case for review by the Supreme Court before it has been determined by the District of Columbia Court of Appeals. The effect of such certification shall be to transfer jurisdiction over the case to the Supreme Court of the District of Columbia for all purposes.

"(b) Such certification may be made only when, in its discretion, the Supreme Court of the District of Columbia determines that—

"(1) the case is of such substantial or immediate public importance as to justify the deviation from normal appellate practice and to require prompt decision in the District of Columbia Supreme Court; or

"(2) the case was pending in the District of Columbia Court of Appeals on the effective date of this section and, because the justices of the Supreme Court of the District of Columbia were familiar with the case while serving as judges of the District of Columbia Court of Appeals, the sound and efficient administration of justice dictates that the case be certified for review by the Supreme Court of the District of Columbia.

"§ 11–622. Review by the Supreme Court of the District of Columbia.

"(a) Any party aggrieved by a final decision of the District of Columbia Court of Appeals may petition the Supreme Court of the District of Columbia for an appeal. Such a petition may be granted and appeal be heard by the Supreme Court of the District of Columbia only upon the affirmative vote of not less than 3 of the justices that the matter involves a question that is novel or difficult, is the subject of conflicting authorities within the jurisdiction, or is of importance in the general public interest or the administration of justice. The granting of such petitions for appeal shall be in the discretion of the Supreme Court of the District of Columbia. The Supreme Court of the District of Columbia shall not be required to state reasons for denial of petitions for appeal.

"(b) On hearing an appeal in any case or controversy, the Supreme Court of the District of Columbia shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

"§ 11–623. Certification of questions of law.

"(a) The Supreme Court of the District of Columbia may answer a question of law of the District of Columbia certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, or the highest appellate court of any State, if—

"(1) such question of law may be determinative of the case pending in such a court; and

"(2) there is no controlling precedent regarding such question of law in the decisions of the District of Columbia Court of Appeals or the Supreme Court of the District of Columbia.

"(b) This section may be invoked by an order of any of the courts referred to in subsection (a) upon such court's motion or upon the motion of any party to the case.

"(c) A certification order under this section shall—

"(1) describe the question of law to be answered;

"(2) contain a statement of all facts relevant to the question certified and the nature of the controversy in which the questions arose; and

"(3) upon the request of the Supreme Court of the District of Columbia contain the original or copies of the record of the case in question or of any portion of such record as the Supreme Court of the District of Columbia considers necessary to determine the questions of law which are the subject of the motion.

"(d) Fees and costs shall be the same as in appeals docketed before the Supreme Court of the District of Columbia and shall be equally divided between the parties unless precluded by statute or by order of the certifying court.

"(e) The written opinion of the Supreme Court of the District of Columbia stating the law governing any questions certified under subsection (a) shall be sent by the clerk to the certifying court and to the parties.

"(f) The Supreme Court of the District of Columbia, on its own motion, the motion of the District of Columbia Court of Appeals, or the motion of any party to a case pending in the Supreme Court of the District of Columbia or the District of Columbia Court of Appeals, may order certification of a question of law of another State to the highest court of such State if, in the view of the Supreme Court of the District of Columbia—

"(1) such question of law may be determinative of the case pending in the Supreme Court of the District of Columbia or the District of Columbia Court of Appeals; and

"(2) there is no controlling precedent regarding such question of law in the decisions of the District of Columbia Court of Appeals or the Supreme Court of the District of Columbia.

"(g) The Supreme Court of the District of Columbia may prescribe the rules of procedure concerning the answering and certification of questions of law under this section.

"SUBCHAPTER III. MISCELLANEOUS PROVISIONS

"§ 11–641. Contempt powers.

"In addition to the powers conferred by section 402 of title 18, United States Code, the Supreme Court of the District of Columbia, or a justice thereof, may punish for disobedience of an order or for contempt committed in the presence of the court.

"§ 11–642. Oaths, affirmations, and acknowledgments.

"Each justice of the Supreme Court of the District of Columbia and each employee of the court authorized by the chief justice may administer oaths and affirmations and take acknowledgments

"§ 11–643. Rules of court.

"The Supreme Court of the District of Columbia shall conduct its business in accordance with such rules and procedures as the court shall adopt.

"§ 11–644. Judicial conference.

"The chief justice of the Supreme Court of the District of Columbia shall summon annually the justices and active judges of the District of Columbia courts to a conference at a time and place that the chief justice designates, for the purpose of advising as to means of improving the administration of justice within the District of Columbia. The chief justice shall preside at such conference which shall be known as the Judicial Conference of the District of Columbia. Each justice

and judge summoned, unless excused by the chief justice of the Supreme Court of the District of Columbia, shall attend throughout the conference. The Supreme Court of the District of Columbia shall provide by its rules for representation of and active participation by members of the unified District of Columbia Bar and other persons active in the legal profession at such conference.".

SEC. 102. TRANSITION PROVISIONS.

(a) ELEVATION OF JUDGES OF THE DISTRICT OF COLUMBIA COURT OF APPEALS AS JUSTICES OF THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.—

(1) Except as provided in paragraph (2), beginning on the effective date of this Act the chief judge of the District of Columbia Court of Appeals shall serve the remainder of the term to which he or she was appointed as the chief justice of the Supreme Court of the District of Columbia and the associate judges of the District of Columbia Court of Appeals shall serve the remainder of the respective terms to which they were appointed as associate justices of the Supreme Court of the District of Columbia. The Supreme Court of the District of Columbia shall conform to the numerical requirements of section 11–602 of the D.C. Code through attrition. Vacancies in the offices of chief judge and associate judge of the District of Columbia Court

of Appeals shall be filled in accordance with chapter 15 of title 11 of the D.C. Code.

(2) Any judge of the District of Columbia Court of Appeals may serve the remainder of the term to which he or she was appointed as a judge of that court by providing written notice to the chief judge of the District of Columbia Court of Appeals not less than 30 days after the date of the enactment of this Act.

(b) TRANSITION PERIOD FOR THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.—

(1) The chief judge of the District of Columbia Court of Appeals shall be responsible for the administration of the period of transition prior to the establishment of the Supreme Court of the District of Columbia, including the hiring of necessary staff, the preparation of facilities, and the purchase of necessary equipment and supplies.

(2) Not more than 120 days after the date of the enactment of this Act, the chief judge of the District of Columbia Court of Appeals shall submit to the Subcommittee on Government Efficiency, Federalism, and the District of Columbia of the Committee on Governmental Affairs of the Senate and the Committee on the District of Columbia of the House of Representatives a transition report, consistent with this Act, regarding

the establishment of the Supreme Court of the District of Columbia.

(3) The provisions of this subsection shall take effect on the date of the enactment of this Act.

SEC. 103. CONFORMING AND OTHER AMENDMENTS.

(a) AMENDMENTS TO THE HOME RULE ACT.—

(1) Section 431(a) of the District of Columbia Self-Government and Governmental Reorganization Act is amended—

(A) in the first sentence by inserting "Supreme Court of the District of Columbia," after "vested in the"; and

(B) by adding after the fourth sentence the following: "The Supreme Court of the District of Columbia has jurisdiction of appeals from the District of Columbia Court of Appeals and of cases certified to the Supreme Court under section 11–621(a), District of Columbia Code.".

(2) Section 431 of such Act is further amended in subsections (b), (c), and (g)—

(A) by inserting "chief justice or" before "chief judge" each place it appears;

(B) by inserting "justice or" before "judge" each place it appears; and

(C) by inserting "justices or" before "judges" each place it appears.

(3) Section 432 of such Act is amended—

(A) by inserting "justice or" before "judge" each place it appears;

(B) by striking "District of Columbia Court of Appeals" each place it appears and inserting "Supreme Court of the District of Columbia"; and

(C) in subsection (a)(1) by striking "law or which would be a felony in the District" and inserting "law or the laws of the District of Columbia".

(4) Section 433 of such Act is amended—

(A) in the heading by inserting "JUSTICES AND" before "JUDGES";

(B) by inserting "justices and" before "judges" each place it appears; and

(C) by inserting "justice or" before "judge" each place it appears.

(5) Section 434 of such Act is amended in subsections (b)(3) and (d)—

(A) by inserting "justice or" before "judge" each place it appears; and

(B) by inserting "justices or" before "judges" each place it appears.

(b) AMENDMENTS TO CHAPTER 1 OF TITLE 11, D.C. CODE.—

(1) Section 11–101(2), D.C. Code, is amended by redesignating subparagraphs (A) and (B) as subparagraphs (B) and (C), respectively, and by adding before subparagraph (B) (as so redesignated) the following:

"(A) The Supreme Court of the District of Columbia.".

(2) Section 11–102 of the D.C. Code is amended to read as follows:

"§ 11–102. Status of Supreme Court of the District of Columbia.

"The highest court of the District of Columbia is the Supreme Court of the District of Columbia. Final judgments and decrees of the Supreme Court of the District of Columbia and of the District of Columbia Court of Appeals where review is denied by the Supreme Court of the District of Columbia are reviewable by the Supreme Court of the United States in accordance with section 1257 of title 28, United States Code.".

(3) The item relating to section 11–102 of the table of contents of chapter 1 of title 11, D.C. Code, is amended to read as follows:

"11–102. Status of Supreme Court of the District of Columbia.".

(c) AMENDMENTS TO CHAPTER 3 OF TITLE 11, D.C. CODE.—(1) Section 11–301, D.C. Code, is amended to read as follows:

"§ 11–301. Jurisdiction of appeals from the Supreme Court of the District of Columbia.

"In addition to its jurisdiction as a United States court of appeals and any other jurisdiction conferred on it by law, the United States Court of Appeals for the District of Columbia Circuit has jurisdiction of appeals from judgments of the Supreme Court of the District of Columbia with respect to violations of criminal laws of the United States which are not applicable exclusively to the District of Columbia if a petition for the allowance of an appeal from that judgment is filed within 10 days after its entry.".

(2) The item relating to section 11–301 of the table of contents of chapter 3 of title 11, D.C. Code, is amended to read as follows:

"11–301. Jurisdiction of appeals from the Supreme Court of the District of Columbia.".

(d) AMENDMENTS TO CHAPTER 7 OF TITLE 11, D.C. CODE.—

(1) Chapter 7 of title 11, D.C. Code, is amended by striking sections 11–723 and 11–744 and by striking the items relating to such sections in the table of contents of such chapter.

(2) Section 11–703(b), D.C. Code, is amended by striking "$500" and inserting "$2,500".

(3) Section 11–707 is amended by striking "chief judge of the District of Columbia Court of Appeals" both places it appears and inserting "chief justice of the Supreme Court of the District of Columbia".

(4) Section 11–708, D.C. Code, is amended by striking "not more than three law clerks for the court." and inserting "law clerks for the court and law clerks and secretaries for the senior judges.".

(5) Section 11–722, D.C. Code, is amended by striking "Commissioner" and inserting "Mayor".

(6) Section 11–743 is amended by striking "according to" and all that follows and inserting "in accordance with such rules and procedures as it may adopt.".

(e) AMENDMENTS TO CHAPTER 9 OF TITLE 11, D.C. CODE.—

(1) Section 11–904(b), D.C. Code, is amended by striking "$500" and inserting "$2,500".

(2) Section 11–908, D.C. Code, is amended to read as follows:

"(b) When the business of the Superior Court requires, the chief judge may certify to the chief justice of the Supreme Court of the District of Columbia the need for an additional

judge or judges as provided in sections 11–607 and 11–707.".

(3) Section 11–910, D.C. Code, is amended by adding at the end the following new sentence: "In addition, the chief judge may appoint and remove law clerks for the court, who shall serve as directed by the chief judge.".

(4) Section 11–946, D.C. Code, is amended—

(A) in the first sentence, by striking "according to" and all that follows and inserting "in accordance with such rules and procedures as it may adopt.", and

(B) by striking the second and third sentences.

(f) AMENDMENTS TO CHAPTER 15 OF TITLE 11, D.C. CODE.—

(1) Section 11–1501, D.C. Code, is amended to read as follows:

"§ 11–1501. Appointment and qualifications of judges.

"(a) Except as provided in section 434(d)(1) of the District of Columbia Self-Government and Governmental Reorganization Act, the President shall nominate, from the list of persons recommended by the District of Columbia Judicial Nomination Commission established under section 434 of such Act, and, by and with the advice and consent of the

Senate, appoint all justices and judges of the District of Columbia courts.

"(b) No person may be nominated or appointed a justice or judge of a District of Columbia court unless that person—

"(1) is a citizen of the United States;

"(2) is an active member of the unified District of Columbia Bar and has been engaged in the active practice of law in the District for the five years immediately preceding nomination or for such five years has served as a judge of the United States or the District of Columbia, has been on the faculty of a law school in the District, or has been employed as a lawyer by the United States or the District of Columbia government;

"(3) is a bona fide resident of the District of Columbia and has maintained an actual place of abode in the District for at least 90 days immediately prior to nomination, and shall retain such residency as long as he or she serves as such judge, except judges appointed prior to December 23, 1973, who retain residency in Montgomery or Prince George's Counties in Maryland, Arlington or Fairfax Counties (or any cities within the outer boundaries thereof) or the city of Alexandria in Virginia shall not be required to be residents of the District to be eligible for reappointment or to serve any term to which reappointed;

"(4) is recommended to the President, for such nomination and appointment, by the District of Columbia Judicial Nomination Commission; and

"(5) has not served, within a period of 2 years prior to nomination, as a member of the District of Columbia Commission on Judicial Disabilities and Tenure or of the District of Columbia Judicial Nomination Commission.".

(2) Section 11–1504(a)(1), D.C. Code, is amended by striking the period at the end of the first sentence and inserting the following: ", except that a retired judge may not serve or perform judicial duties on the Supreme Court of the District of Columbia.".

(3) Section 11–1505(a), D.C. Code, is amended in the second sentence by striking "District" and all that follows and inserting "of the court of the District of Columbia on which the judge serves.".

(4) Subchapter I of chapter 15 of title 11, D.C. Code, is amended by adding at the end the following new section:

"§ 11–1506. Definitions.

"For purposes of this chapter—

"(1) the term 'judge' means any justice of the Supreme Court of the District of Columbia, or any judge

of the District of Columbia Court of Appeals or the Superior Court.

"(2) the term 'chief judge' means the chief justice of the Supreme Court of the District of Columbia, or the chief judges of the District of Columbia Court of Appeals or the Superior Court, as appropriate.

(5) Section 11–1526, D.C. Code, is amended—

(A) by striking "District of Columbia Court of Appeals" each place it appears and inserting "Supreme Court of the District of Columbia"; and

(B) in subsection (a) by striking "law or which would be a felony in the District of Columbia" and inserting "law or the laws of the District of Columbia".

(6) Section 11–1528, D.C. Code, is amended in subsection (a)(2)(C) by inserting "the Supreme Court of the District of Columbia or" after "elevation to".

(7) Section 11–1529, D.C. Code, is amended by striking "District of Columbia Court of Appeals" and inserting "Supreme Court of the District of Columbia".

(8) Section 11–1561, D.C. Code, is amended—

(A) in paragraph (1) by inserting "any justice of the Supreme Court of the District of Columbia," before "and judge"; and

(B) in paragraph (2) by inserting "a justice in the Supreme Court of the District of Columbia," before "a judge".

(9) The table of sections for subchapter I of chapter 15 of title 11, D.C. Code, is amended by adding at the end the following:

"11–1506. Definitions.".

(g) AMENDMENTS TO CHAPTER 17 OF TITLE 11, D.C. CODE.—

(1) Section 11–1701, D.C. Code, is amended—

(A) by amending subsection (a) to read as follows:

"(a) The chief justice of the Supreme Court of the District of Columbia, in consultation with the chief judge of the District of Columbia Court of Appeals and the chief judge of the Superior Court of the District of Columbia, shall be responsible for the administration of the courts of the District of Columbia. The Executive Officer of the District of Columbia courts appointed under section 11–1703(a) shall assist the chief justice in carrying out the chief justice's responsibilities under this chapter.",

(B) in subsection (b)—

(i) by striking "The Joint Committee" and inserting "In carrying out responsibilities under subsection (a), the chief justice of the Supreme Court of the District of Columbia";

(ii) in paragraph (1), by striking "policies" and inserting "policies with respect to nonjudicial employees";

(iii) in paragraph (9), by striking "With the concurrence" and all that follows through "other" and inserting "Other", and by striking "the District of Columbia Court of Appeals" and inserting "the Supreme Court of the District of Columbia, the District of Columbia Court of Appeals,"; and

(iv) by striking paragraph (6) and redesignating paragraphs (7), (8), and (9) as paragraphs (6), (7), and (8),

(C) in subsection (c)—

(i) by redesignating paragraphs (1), (2), (3), and (4) as subparagraphs (A), (B), (C), and (D);

(ii) by striking "(c)" and inserting the following: "(c)(1) There shall be a Joint Committee on Judicial Administration in the District of Columbia (hereafter in this chapter referred to as the 'Joint Committee') consisting of the chief justice of the Supreme Court of the District of Columbia (who shall serve as chairperson), the chief judge of the

District of Columbia Court of Appeals, and the chief judge of the Superior Court of the District of Columbia.";

(iii) by amending subparagraph (B) (as redesignated by clause (i)) to read as follows: "(B) formulate and enforce standards for outside activities of and receipt of compensation by the judges of the District of Columbia court system;"; and

(iv) in subparagraph (C) (as redesignated by clause (i)), by striking ", and institute such changes" and all that follows through "justice", and

(D) in subsection (d)—

(i) by striking "(d)" and inserting "(2)"; and

(ii) by striking "section" and inserting "subsection".

(2) Section 11–1702 is amended—

(A) in the heading by inserting "**the chief justice and the**" after "**of**";

(B) by redesignating subsections (a) and (b) as subsections (b) and (c), respectively;

(C) by adding before subsection (b) the following new subsection (a):

"(a) The chief justice of the Supreme Court of the District of Columbia, in addition to the authority conferred by chapter 6 of this title, shall have the final responsibility for the management of regular administrative matters of that court, including the implementation in that court of the matters enumerated in section 11–1701(b).''; and

(D) in subsections (b) and (c) (as redesignated by subparagraph (B))—

(i) by striking "supervise the internal administration" each place it appears and inserting "have the final responsibility for the management of regular administrative matters", and

(ii) by striking "Joint Committee" each place it appears and inserting "chief justice of the Supreme Court of the District of Columbia and the Joint Committee pursuant to section 11–1701".

(3) Section 11–1703, D.C. Code, is amended—

(A) in subsection (a)—

(i) by striking "Joint Committee" each place it appears and inserting "chief justice of the Supreme Court of the District of Columbia",

(ii) by striking "He" each place it appears and inserting "The Executive Officer", and

(iii) in the fourth sentence, by striking "judges" and inserting "judge of the District of Columbia Court of Appeals and the chief judge of the Superior Court of the District of Columbia";

(B) in subsection (b)—

(i) in the first sentence, by striking "Joint Committee on Judicial Administration" and all that follows through "Courts" and inserting "chief justice of the Supreme Court of the District of Columbia, in consultation with the chief judge of the District of Columbia Court of Appeals and the chief judge of the Superior Court", and

(ii) in the second sentence, by striking "Joint Committee" and inserting "chief justice"; and

(C) in subsection (d) by striking "the same compensation" and all that follows through "as" and inserting "a level of compensation, including retirement benefits, not to exceed the level of compensation provided for".

(4) Section 11–1721, D.C. Code, is amended to read as follows:

"(a) The Supreme Court of the District of Columbia, the District of Columbia Court of Appeals, and the Superior Court of the District of Columbia shall each have a clerk appointed by the chief justice or the chief judge of that court who shall, under the direction of such chief justice or chief judge, be responsible for the daily operations of that court

"(b) Each such clerk appointed under this section shall receive a level of compensation, including retirement benefits, determined by the chief justice of the Supreme Court of the District of Columbia in consultation with the chief judges of the District of Columbia Court of Appeals and the Superior Court of the District of Columbia, except that such level may not exceed the level of compensation provided for the Executive Officer.".

(5) Section 11–1725, D.C. Code, is amended—

(A) in subsection (a)—

(i) by striking "Subject to" and all that follows through "shall appoint" and inserting the following: "The chief justice of the Supreme Court of the District of Columbia, in consultation with the chief judge of the District of Columbia Court of Appeals and the

chief judge of the Superior Court of the District of Columbia, shall appoint", and

(ii) by striking "both" and inserting "all";

(B) in the first sentence of subsection (b)—

(i) by striking "The Executive Officer" and all that follows through "judges)" and inserting "Except as otherwise provided in this title, the Executive Officer shall appoint, and may remove, other nonjudicial personnel for the courts"; and

(6) Section 11–1726, D.C. Code, is amended to read as follows:

"In the case of nonjudicial employees of the District of Columbia courts whose compensation is not otherwise fixed by this title, the chief justice of the Supreme Court of the District of Columbia, in consultation with the chief judge of the District of Columbia Court of Appeals and the chief judge of the Superior Court of the District of Columbia, shall fix the rates of compensation of such employees without regard to chapter 51 and subchapter III of chapter 53 of title 5, United States Code. In fixing the rates of nonjudicial employees under this section, the chief justice shall be guided by the rates of compensation fixed for other employees in the executive and judicial branches of the Federal and District of Co-

lumbia Governments occupying the same or similar positions or occupying positions of similar responsibility, duty, and difficulty. The rate of compensation fixed for any employee under this section may not in any instance exceed the level of compensation provided for the Executive Officer.".

(7) Section 11–1727(a), D.C. Code, is amended by striking "The Executive Officer" and inserting "Subject to the supervision of the chief justice of the Supreme Court of the District of Columbia, the Executive Officer".

(8) Section 11–1730(a), D.C. Code, is amended—

(A) by striking "Judges" and inserting "Justices and judges";

(B) by inserting "11–609," after "sections"; and

(C) by inserting "chief justice or" after "respective".

(9) Section 11–1731, D.C. Code is amended—

(A) by striking "or the chief judge" and inserting ", the chief justice, or the chief judges";

(B) in paragraph (7) by striking "the District of Columbia Bail Agency" and inserting "the District of Columbia Pre-trial Services Agency"; and

(C) by striking paragraphs (10) and (11) and inserting the following:

"(10) the Department of Human Services.".

(10) Section 11–1741, D.C. Code, is amended—

(A) by amending the matter preceding paragraph (1) to read as follows: "Within the District of Columbia courts, and subject to the supervision of the chief justice of the Supreme Court of the District of Columbia (acting in consultation with the chief judge of the District of Columbia Court of Appeals and the chief judge of the Superior Court of the District of Columbia), the Executive Officer shall—";

(B) by inserting "chief justice or" before "chief" each place it appears in paragraphs (5), (7), and (9); and

(C) by striking "supervise," each place it appears in paragraphs (1) and (3).

(11) Section 11–1742(a), D.C. Code, is amended by striking "Joint Committee" and inserting "chief justice of the Supreme Court of the District of Columbia".

(12) Section 11–1743, D.C. Code, is amended—

(A) in subsection (a), by striking "Joint Committee" and all that follows through "annual estimates" and inserting "chief justice of the Supreme Court of the District of Columbia, in con-

sultation with the chief judge of the District of Columbia Court of Appeals and the chief judge of the Superior Court of the District of Columbia, shall prepare and submit to the Mayor of the District of Columbia annual estimates"; and

(B) in subsection (b), by striking "Bureau of the Budget" and inserting "Office of Management and Budget".

(13) Section 11–1744(5), D.C. Code, is amended by striking "Joint Committee" and all that follows and inserting "chief justice of the Supreme Court of the District of Columbia, in consultation with the chief judge of the District of Columbia Court of Appeals and the chief judge of the Superior Court of the District of Columbia.".

(14) Section 11–1745, D.C. Code, is amended—

(A) by striking "Joint Committee" each place it appears in subsections (a) and (b)(4) and inserting "chief justice of the Supreme Court of the District of Columbia"; and

(B) in subsection (b)(2), by striking "Commissioner" and inserting "Mayor".

(15) Section 11–1747, D.C. Code, is amended by striking "him" and inserting "the chief justice of the

Supreme Court of the District of Columbia or the Executive Officer".

(h) AMENDMENTS TO CHAPTER 25 OF TITLE 11, D.C. CODE.—

(1) Section 11–2501, D.C. Code, is amended—

(A) by striking "District of Columbia Court of Appeals" each place it appears and inserting "Supreme Court of the District of Columbia"; and

(B) by amending subsection (c) to read as follows:

"(c) Members of the bar of the District of Columbia Court of Appeals in good standing on the effective date of the District of Columbia Judicial Reorganization Act of 1990 shall be automatically enrolled as members of the bar of the Supreme Court of the District of Columbia, and shall be subject to its disciplinary jurisdiction.".

(2) Section 11–2502, D.C. Code, is amended by striking "District of Columbia Court of Appeals" and inserting "Supreme Court of the District of Columbia".

(3) Section 11–2503, D.C. Code, is amended by striking "District of Columbia Court of Appeals" and inserting "Supreme Court of the District of Columbia".

(4) Section 11–2504, D.C. Code, is amended by striking "District of Columbia Court of Appeals" and inserting "other courts of the District of Columbia".

(i) AMENDMENT TO CHAPTER 26 OF TITLE 11, D.C. CODE.—Section 11–2607, D.C. Code, is amended by striking "joint committee" and all that follows through "Commissioner" and inserting "chief justice of the Supreme Court of the District of Columbia shall prepare and annually submit to the Mayor".

(j) AMENDMENT TO CHAPTER 3 OF TITLE 13, D.C. CODE.—Section 13–302, D.C. Code, is amended by inserting "the Supreme Court of the District of Columbia," after "process of".

(k) AMENDMENTS TO CHAPTER 3 OF TITLE 17, D.C. CODE.—

(1) The chapter heading for chapter 3 of title 17, D.C. Code, is amended to read as follows: "SUPREME COURT OF THE DISTRICT OF COLUMBIA AND DISTRICT OF COLUMBIA COURT OF APPEALS.".

(2) Section 17–302, D.C. Code, is amended by striking "District of Columbia Court of Appeals" each place it appears and inserting "Supreme Court of the District of Columbia".

(3) Section 17–305, D.C. Code, is amended by adding at the end the following new subsection:

"(c) The Supreme Court of the District of Columbia shall apply the same standards regarding the scope of review

and the reversal of judgment as the District of Columbia Court of Appeals applies under subsections (a) and (b).".

(4) Section 17–306, D.C. Code, is amended by inserting "Supreme Court of the District of Columbia or the" before "District".

(l) AMENDMENT TO TITLE 28, UNITED STATES CODE.—Section 1257 of title 28, United States Code, is amended by striking "District of Columbia Court of Appeals" and inserting "Supreme Court of the District of Columbia".

SEC. 104. AUTHORIZATION OF APPROPRIATIONS.

(a) IN GENERAL.—In addition to any other sums authorized to be appropriated to the District of Columbia, there are authorized to be appropriated to the District of Columbia for costs incurred by the District of Columbia in implementing the amendments made by sections 101 and 103 and in carrying out the provisions of section 102 the following amounts:

(1) $1,200,000, for fiscal year 1991.

(2) $5,000,000, for fiscal year 1992.

(3) $4,000,000, for fiscal year 1993.

(4) $3,000,000, for fiscal year 1994.

(5) $2,000,000, for fiscal year 1995.

(6) $1,000,000, for fiscal year 1996.

(b) AVAILABILITY OF FUNDS.—Funds appropriated pursuant to the authorization referred to in subsection (a)

shall remain available to the District of Columbia until expended.

SEC. 105. EFFECTIVE DATE.

Except as otherwise provided, the provisions of this title shall take effect one year after the date of enactment of this Act.

TITLE II—JUDGES OF THE DISTRICT OF COLUMBIA COURTS

SEC. 201. DESIGNATION OF CHIEF JUDGE.

Section 11–1503(a), D.C. Code, is amended to read as follows:

"(a)(1) Except as provided in paragraph (2), the chief justice or chief judge of a District of Columbia court shall be designated by the District of Columbia Judicial Nomination Commission from among the judges of the court in regular active service. A chief judge shall serve for a term of 4 years or until a successor is designated, and shall be eligible for redesignation. A judge may relinquish the position of chief judge, after giving notice to the District of Columbia Judicial Nomination Commission.

"(2) Notwithstanding the first sentence of paragraph (1), the first chief justice of the Supreme Court of the District of Columbia shall be appointed in accordance with the provisions of section 102(a) of the District of Columbia Judicial Reorganization Act of 1990.".

SEC. 202. COMPOSITION OF SUPERIOR COURT OF THE DISTRICT OF COLUMBIA.

Section 11–903, D.C. Code, as amended by section 138 of the District of Columbia Appropriations Act, 1990, is amended by striking "Subject to the enactment of authorizing legislation, the" and inserting "The".

SEC. 203. EFFECTIVE DATE.

Except as otherwise provided, the provisions of this title shall take effect on the date of the enactment of this Act.

TITLE III—JUDICIAL MAGISTRATES

SEC. 301. JUDICIAL MAGISTRATES.

(a) IN GENERAL.—

(1) REPLACEMENT OF HEARING COMMISSIONERS.—Section 11–1732, D.C. Code, is amended to read as follows:

"11–1732. Judicial Magistrates.

"(a) ESTABLISHMENT.—There are established not fewer than 15 judicial magistrates for 1990, not fewer than 20 judicial magistrates for 1991, and not fewer than 25 judicial magistrates for 1992, who shall serve as judicial officers in the Superior Court and perform the duties enumerated in subsection (f) and such other duties authorized by the chief judge of the Superior Court, together with such other functions incidental to such duties as are consistent with the rules of the Superior Court and the Constitution and laws of the United States and the District of Columbia.

"(b) APPOINTMENT.—

"(1) IN GENERAL.—Judicial magistrates shall be appointed by the chief judge of the Superior Court of the District of Columbia, with the approval of a majority of the judges of the Superior Court in active service, from among individuals recommended by the District of Columbia Judicial Nomination Commission.

"(2) TRAINING PROGRAM.—The Joint Committee shall establish a training program for judicial magistrates to assist magistrates in performing their duties under this section.

"(c) QUALIFICATIONS.—No individual shall be appointed as a judicial magistrate unless that individual—

"(1) is a citizen of the United States;

"(2) is an active member of the unified District of Columbia Bar and has been engaged in the active practice of law in the District for the 5 years immediately preceding the appointment or for such 5 years has been on the faculty of a law school in District, or has been employed as a lawyer in the District of Columbia by the United States or District government; and

"(3) is a bona fide resident of the District of Columbia and has maintained an actual place of abode in the District for at least 90 days immediately prior to

appointment, and retains such residency during service as a judicial magistrate.

"(d) SERVICE OF JUDICIAL MAGISTRATES.—

"(1) Judicial magistrates shall be appointed for terms of 6 years and may be reappointed for terms of 6 years in accordance with section 433(d) of the District of Columbia Self-Government and Governmental Reorganization Act.

"(2) Upon the expiration of a judicial magistrate's term, a judicial magistrate may continue to perform the duties of office until a successor is appointed, or for 90 days after the date of the expiration of the judicial magistrate's term, whichever is earlier.

"(3) No individual may serve as a judicial magistrate after having attained the age of 74.

"(4) Judicial magistrates may not engage in the practice of law, or in any other business, occupation, or employment inconsistent with the expeditious, proper, and impartial performance of their duties as judicial magistrates.

"(5) Judicial magistrates shall abide by the same standards of conduct that apply to judges of District of Columbia courts.

"(e) COMPENSATION.—Judicial magistrates shall be compensated at a rate equal to 80 percent of the rate of compensation for a judge of the Superior Court.

"(f) DUTIES OF JUDICIAL MAGISTRATES.—A judicial magistrate, when authorized by the chief judge of the Superior Court and subject to the rules of the Superior Court, may make findings and enter final orders or judgments as provided by law, which shall constitute a final order or judgment of the Superior Court, with respect to proceedings concerning the following:

"(1) landlord and tenant disputes brought under chapter 15 of title 16 of the District of Columbia Code, or chapter 39 of the Act of March 3, 1901 (31 Stat. 1382; section 45–1401 et seq., D.C. Code);

"(2) small claims proceedings brought under chapter 13 of this title;

"(3) civil proceedings at law or in equity in which the amount in controversy does not exceed $25,000;

"(4) criminal misdemeanors;

"(5) proceedings to determine conditions of release pursuant to the provisions of title 23 of the District of Columbia Code;

"(6) preliminary examinations and initial probation revocation hearings in all criminal cases to determine if

there is probable cause to believe that an offense has been committed and that the accused committed it;

"(7) civil pre-trial discovery proceedings;

"(8) traffic offenses;

"(9) proceedings brought pursuant to the Mentally Retarded Citizens Constitutional Rights and Dignity Act of 1978 (section 6–1901 et seq., D.C. Code);

"(10) uncontested actions or proceedings assigned to the Family Division of the Superior Court under section 11–1101, unless, in an uncontested proceeding brought under section 11–1101(13), a child is alleged to have committed an act which would constitute a felony if committed by an adult;

"(11) contested proceedings brought under paragraphs (1), (3), (4), (10), or (13) of section 11–1101 involving the establishment or enforcement of child support or the modification of an existing child support order;

"(12) contested proceedings brought under section 11–1101(13) in which a child is alleged to be delinquent, neglected, or in need of supervision, to determine conditions of detention, release, or placement, or determinations of probable cause, unless the child is alleged to have committed an act which would constitute a felony if committed by an adult;

"(13) contested proceedings brought under section 11–1101(14) to determine probable cause;

"(14) contested proceedings brought under section 11–101(15) or section 11–1101(16); and

"(15) uncontested probate and fiduciary proceedings brought under title 20 of the District of Columbia Code.".

(2) CLERICAL AMENDMENT.—The item relating to section 11–1732 of the table of contents of chapter 17 of title 11, D.C. Code, is amended to read as follows:

"11–1732. Judicial magistrates.".

(b) REMOVAL FOR DISABILITY BY COMMISSION ON JUDICIAL DISABILITIES AND TENURE.—Section 11–1521, D.C. Code, is amended by striking "a judge" and inserting "a judge or judicial magistrate".

(c) APPOINTMENT OF JUDICIAL MAGISTRATES.—

(1) TRANSITION PROVISION REGARDING HEARING COMMISSIONERS.—Any individual serving as a hearing commissioner under section 11–1732 of the District of Columbia Code as of the date of the enactment of this Act shall serve the remainder of such individual's term as a judicial magistrate, and may be reappointed as a judicial magistrate in accordance with section 433(d)(1) of District of Columbia Self-Government and Governmental Reorganization Act (as added

by paragraph (3)(B), except that any individual serving as a hearing commissioner as of the date of the enactment of this Act who was appointed as a hearing commissioner prior to the effective date of section 11–1732 of the District of Columbia Code shall not be required to a resident of the District of Columbia to be eligible to be reappointed.

(2) APPOINTMENTS MADE FROM INDIVIDUALS NOMINATED BY JUDICIAL NOMINATION COMMISSION.—Section 434(b)(3) of the District of Columbia Self-Government and Governmental Reorganization Act is amended by striking the period at the end and inserting the following: ", and to submit nominees for appointment to positions as judicial magistrates of the Superior Court of the District of Columbia in accordance with section 11–1732 of the District of Columbia Code.".

(3) REVIEW OF CANDIDATES FOR REAPPOINTMENT BY TENURE COMMISSION.—Section 433 of the District of Columbia Self-Government and Governmental Reorganization Act (as amended by section 103(a)(4)(A)) is further amended—

(A) in the heading of such section, by striking "JUSTICES AND JUDGES" and inserting "JUS-

TICES, JUDGES, AND JUDICIAL MAGISTRATES"; and

(B) by adding at the end the following new subsection:

"(d) Not less than than 6 months prior to the expiration of such individual's term of office, any judicial magistrate of the Superior Court of the District of Columbia under section 11–1732 of the District of Columbia Code may file with the Tenure Commission a declaration of candidacy for reappointment. If a declaration of candidacy is so filed, the Tenure Commission shall, not less than 60 days prior to the expiration of the declaring candidate's term of office, prepare and submit to the chief judge of the Superior Court of the District of Columbia (hereafter in this subsection referred to as the "chief judge") a written evaluation of the declaring candidate's performance during the candidate's present term of office and the candidate's fitness for reappointment to another term. If the Tenure Commission determines the declaring candidate to be well qualified for reappointment to another term, then the term of such candidate shall be automatically extended for another full term, subject to mandatory retirement, suspension, or removal. If the Tenure Commission determines the declaring candidate to be qualified for reappointment to another term, then the chief judge may extend the term of such candidate for another full term, subject to man-

datory retirement, suspension, or removal. If the Tenure Commission determines the declaring candidate to be unqualified for reappointment to another term, then the chief judge may not extend the term of such candidate, and such candidate shall not be eligible for reappointment or appointment as a judicial magistrate or as a judge of a District of Columbia court. If a declaration of candidacy is not filed under this paragraph by any judicial magistrate, or if the chief judge does not extend the term of a declaring candidate determined to be qualified by the Tenure Commission, a vacancy shall result upon the expiration of the judicial magistrate's term of office and shall be filled by appointment as provided under section 434(e).".

(4) VACANCIES FILLED BY INDIVIDUALS NOMINATED BY JUDICIAL NOMINATION COMMISSION.—Section 434 of the District of Columbia Self-Government and Governmental Reorganization Act is amended by adding at the end the following new subsection:

"(e)(1) In the event of a vacancy in any position of a judicial magistrate of the Superior Court of the District of Columbia under section 11–1732 of the District of Columbia Code, the Commission shall, not later than 60 days following the occurrence of such vacancy, submit to the chief judge of the Superior Court of the District of Columbia (hereafter in this subsection referred to as the "chief judge") a list of 3

persons for possible nomination and appointment for each vacancy. If more than one vacancy exists at one given time, the Commission must submit lists in which no person is named more than once and the chief judge may select more than one nominee from one list. Whenever a vacancy will occur by reason of the expiration of such a magistrate's term of office, the Commission's list of nominees shall be submitted to the chief judge not less than 60 days prior to the occurrence of such vacancy.

"(2) In the event any person recommended by the Commission under this paragraph requests that his recommendation be withdrawn, dies, or in any other way becomes disqualified to serve as a judicial magistrate, the Commission shall promptly recommend to the chief judge one person to replace the person originally recommended.

"(3) In no instance shall the Commission recommend any person who does not, upon the time of appointment to service as a judicial magistrate, meet the qualifications specified in section 11–1732(c) of the District of Columbia Code.".

(d) CONFORMING AMENDMENTS.—(1) Section 11–1701(c)(1)(B), D.C. Code (as amended and redesignated by section 103(g)(1)(C)) is amended by inserting "and judicial magistrates" after "judges".

(2) Section 16–924, D.C. Code, is amended by striking "hearing commissioner" each place it appears and inserting "judicial magistrate".

(3) The District of Columbia Self-Government and Governmental Reorganization Act is amended—

(A) in section 431(g), as amended by section 103(a)(2)(B), by striking "justice or" and inserting "judicial magistrate, justice, or"; and

(B) in section 432, as amended by section 103(a)(3)(A), by striking "justice or" each place it appears and inserting "judicial magistrate, justice, or".

SEC. 302. STUDY OF UTILIZATION AND EFFECTIVENESS OF JUDICIAL MAGISTRATES.

(a) STUDY.—During each of the first 3 years that begins after the date of the enactment of this Act, the chief judge of the Superior Court of the District of Columbia shall, in consultation with members of the unified bar of the District of Columbia and other interested parties, conduct a study of the utilization and effectiveness of judicial magistrates in the District of Columbia court system.

(b) REPORT.—Not later than the last day of each of the first 3 years that begins after the date of the enactment of this Act, the chief judge of the Superior Court shall submit a report on the study conducted under subsection (a) to Congress and the Mayor of the District of Columbia.

SEC. 303. EFFECTIVE DATE.

The provisions of this title shall take effect on the date of the enactment of this Act.

TITLE IV—JUDICIAL NOMINATION COMMISSION AND COMMISSION ON JUDICIAL DISABILITIES AND TENURE

SEC. 401. DISTRICT OF COLUMBIA COMMISSION ON JUDICIAL DISABILITIES AND TENURE.

Subsection (a) of section 11–1522, D.C. Code, is amended to read as follows:

"(a) The Commission shall consist of 9 members appointed as follows:

"(1) The President of the United States shall appoint 1 member of the Commission.

"(2) 2 members shall be appointed by the Board of Governors of the unified District of Columbia Bar—

"(A) both of whom shall have been members of the unified District of Columbia Bar and have been actively engaged in the practice of law in the District of Columbia for at least 5 of the 10 years immediately preceding such appointment; and

"(B) at least 1 of whom shall be a resident of the District of Columbia.

"(3) The Mayor of the District of Columbia shall appoint 2 members of the Commission, one of whom shall not be a lawyer.

"(4) The Council of the District of Columbia shall appoint 1 member of the Commission who shall not be a lawyer.

"(5) The Chief Judge of the United States District Court for the District of Columbia shall appoint one member of the Commission. The member appointed by the Chief Judge shall be an active or retired Federal judge serving in the District of Columbia.

"(6) The Delegate to the House of Representatives from the District of Columbia shall appoint 1 member of the Commission.

"(7) The Chairman of the Council of the District of Columbia shall appoint 1 member of the Commission.".

SEC. 402. DISTRICT OF COLUMBIA JUDICIAL NOMINATION COMMISSION.

Section 434 of the District of Columbia Self-Government and Governmental Reorganization Act (as amended by sections 103(a)(5) and 301(c)(1)(B)) is further amended—

(1) in subsection (a) in the second sentence by striking "seven" and inserting "9"; and

(2) in subsection (b)(4) by inserting after paragraph (E) the following new paragraphs:

"(F) 1 member shall be appointed by the Delegate to the House of Representatives from the District of Columbia.

"(G) 1 member shall be appointed by the Chairman of the Council of the District of Columbia.".

SEC. 403. EFFECTIVE DATE.

The provisions of this title shall take effect on the date of the enactment of this Act.

TITLE V—CITIZENS ADVISORY COMMITTEE ON THE JUDICIAL SYSTEM OF THE DISTRICT OF COLUMBIA

SEC. 501. CITIZENS ADVISORY COMMITTEE ON THE JUDICIAL SYSTEM OF THE DISTRICT OF COLUMBIA.

(a) ESTABLISHMENT.—There shall be a Citizens Advisory Committee on the Judicial System of the District of Columbia which shall advise the Congress, the Mayor, and the Council of the District of Columbia concerning the fairness and efficiency of the courts and judicial system of the District of Columbia.

(b) MEMBERSHIP.—The Advisory Committee shall consist of 15 members appointed not later than 180 days after the date of the enactment of this Act as follows:

(1) 3 members appointed by the Chief Justice of the Supreme Court of the District of Columbia from among the judges of the District of Columbia courts.

(2) 1 member appointed by the Mayor of the District of Columbia.

(3) 1 member appointed by the Delegate to the House of Representatives from the District of Columbia.

(4) 1 member appointed by the President of the District of Columbia Bar.

(5) 1 member appointed by the Chairman of the Council of the District of Columbia.

(6) Eight members, one of whom shall be appointed by each member of the Council of the District of Columbia representing a ward of the District of Columbia.

(c) CHAIRPERSON.—The Advisory Committee shall elect a chairperson, who may not be a judge.

(d) MEETINGS.—The first meeting of the Advisory Committee shall be called by the Delegate to the House of Representatives from the District of Columbia. The Advisory Committee shall meet at such times as may be determined by a majority of the members and at the call of the chairperson.

(e) REPORTS.—The Advisory Committee shall submit an annual report to appropriate committees of the Congress,

the Mayor, the Joint Committee on Judicial Administration in the District of Columbia, and the Council of the District of Columbia concerning the administration of the courts of the District of Columbia and the operation of the system of justice of the District of Columbia. The Advisory Committee may submit such other interim reports as are considered necessary and appropriate.

(f) COMMENT ON PENDING CASES PROHIBITED.—The Advisory Committee may not include in any report submitted under subsection (e) any comment on a specific case or action pending before any court of the District of Columbia during the period of time covered by such a report.

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SHOWING EFFECT OF COMMITTEE AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 4257

[Insert the part which is underlined and strike the part which is printed in ~~linetype~~]

SECTION 1. SHORT TITLE.

This Act may be cited as the ``District of Columbia Judicial Reorganization Act of 1990''.

TITLE I--SUPREME COURT OF THE DISTRICT OF COLUMBIA

SECTION 101. ESTABLISHMENT OF SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Title 11 of the District of Columbia Code is amended by adding after chapter 5 the following new chapter 6:

``Chapter 6. Supreme Court of the District of Columbia

``SUBCHAPTER I. ESTABLISHMENT AND ORGANIZATION

``SUBCHAPTER II. JURISDICTION

``SUBCHAPTER III. MISCELLANEOUS PROVISIONS

``SUBCHAPTER I. ESTABLISHMENT AND ORGANIZATION.

``**§11-601. Establishment; court of record; seal.**

``(a) The Supreme Court of the District of Columbia (hereafter in this chapter referred to as `the court') is hereby established as a court of record in the District of Columbia.

``(b) The court shall have a seal.

``**§11-602. Composition.**

The court shall consist of a chief justice and 6 associate justices.

``**§11-603. Justices; service; compensation.**

``(a) The chief justice and the justices of the court shall serve in accordance with chapter 15 of this title.

``(b) Justices of the court shall be compensated at 90 percent of the rate prescribed by law for justices of the United States Supreme Court. The chief justice shall receive $3,000 per year in addition to the salary of other justices of the court.

``**§11-604. Oath of justices.**

``Each justice, when appointed, shall take the oath prescribed for judges of courts of the United States.

``**§11-605. Term; hearings; quorum.**

``(a) The court shall sit in one term each year for such period as it may determine.

``(b) The court shall sit in banc to hear and determine cases and controversies, except that the court may sit in divisions of 3 justices to hear and determine cases and controversies certified for review under section 11-621 if the court determines that subsection (b)(2) of such section is the exclusive basis for such certification. The court in banc for a hearing shall consist of the justices of the court in regular active service.

``(c) A majority of the justices serving shall constitute a quorum.

``(d) A rehearing before the court may be ordered by a majority of the justices of the court in regular active service. The court in banc for a rehearing shall consist of the justices of the court in regular active service.

``**§11-606. Absence, disability, or disqualification of justices; vacancies.**

``(a) When the chief justice of the court is absent or disabled, the duties of the chief justice shall devolve upon and be performed by such associate justice as the chief

justice may designate in writing. In the event that the chief justice is (1) disqualified or suspended, or (2) unable or fails to make such a designation, such duties shall devolve upon and be performed by the associate justices of the court according to the seniority of their original commissions.

``(b) A chief justice whose term as chief justice has expired shall continue to serve until redesignated or until a successor has been designated. When there is a vacancy in the position of chief justice the position shall be filled temporarily as provided in the second sentence of subsection (a).

``§11-607. Assignment of justices to and from other courts of the District of Columbia.

``(a) The chief justice of the Supreme Court of the District of Columbia may designate and assign temporarily one or more judges of the District of Columbia Court of Appeals or the Superior Court of the District of Columbia to serve on the Supreme Court of the District of Columbia whenever the business of the Supreme Court of the District of Columbia so requires. Such designations or assignments shall be in conformity with the rules or orders of the Supreme Court of the District of Columbia.

``(b) Upon presentation of a certificate of necessity by the chief judge of the District of Columbia Court of Appeals or the chief judge of the Superior Court of the District of

Columbia, the chief justice of the Supreme Court of the District of Columbia may designate and assign temporarily one or more justices of the Supreme Court of the District of Columbia to serve as a judge of the District of Columbia Court of Appeals or the Superior Court of the District of Columbia.

``§11-608. Clerks and secretaries for justices.

``Each justice may appoint and remove a personal secretary. The chief justice may appoint and remove not more than three personal law clerks, and each associate justice may appoint and remove not more than two personal law clerks. In addition, the chief justice may appoint and remove law clerks for the court and law clerks and secretaries for the senior justices. The law clerks appointed for the court shall serve as directed by the chief justice.

``§11-609. Reports.

``Each justice shall submit to the chief justice such reports and data as the chief justice may request.

``SUBCHAPTER II. JURISDICTION

``§11-621. Certification to the Supreme Court of the District of Columbia.

``(a) In any case in which an appeal has been taken to or filed with the District of Columbia Court of Appeals, the Supreme Court of the District of Columbia, by order of the Supreme Court sua sponte, or, in its discretion, on motion of

the District of Columbia Court of Appeals or of any party, may certify the case for review by the Supreme Court before it has been determined by the District of Columbia Court of Appeals. The effect of such certification shall be to transfer jurisdiction over the case to the Supreme Court of the District of Columbia for all purposes.

``(b) Such certification may be made only when, in its discretion, the Supreme Court of the District of Columbia determines that--

``(1) the case is of such substantial or immediate public importance as to justify the deviation from normal appellate practice and to require prompt decision in the District of Columbia Supreme Court; or

``(2) the case was pending in the District of Columbia Court of Appeals on the effective date of this section and, because the justices of the Supreme Court of the District of Columbia were familiar with the case while serving as judges of the District of Columbia Court of Appeals, the sound and efficient administration of justice dictates that the case be certified for review by the Supreme Court of the District of Columbia.

``§11-622. Review by the Supreme Court of the District of Columbia.

``(a) Any party aggrieved by a final decision of the District of Columbia Court of Appeals may petition the

Supreme Court of the District of Columbia for an appeal. Such a petition may be granted and appeal be heard by the Supreme Court of the District of Columbia only upon the affirmative vote of not less than 3 of the justices that the matter involves a question that is novel or difficult, is the subject of conflicting authorities within the jurisdiction, or is of importance in the general public interest or the administration of justice. The granting of such petitions for appeal shall be in the discretion of the Supreme Court of the District of Columbia. The Supreme Court of the District of Columbia shall not be required to state reasons for denial of petitions for appeal.

``(b) On hearing an appeal in any case or controversy, the Supreme Court of the District of Columbia shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

``§11-623. Certification of questions of law.

``(a) The Supreme Court of the District of Columbia may answer a question of law of the District of Columbia certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, or the highest appellate court of any State, if--

``(1) such question of law may be determinative of the case pending in such a court; and

``(2) there is no controlling precedent regarding such question of law in the decisions of the District of Columbia Court of Appeals or the Supreme Court of the District of Columbia.

``(b) This section may be invoked by an order of any of the courts referred to in subsection (a) upon such court's motion or upon the motion of any party to the case.

``(c) A certification order under this section shall--

``(1) describe the question of law to be answered;

``(2) contain a statement of all facts relevant to the question certified and the nature of the controversy in which the questions arose; and

``(3) upon the request of the Supreme Court of the District of Columbia contain the original or copies of the record of the case in question or of any portion of such record as the Supreme Court of the District of Columbia considers necessary to determine the questions of law which are the subject of the motion.

``(d) Fees and costs shall be the same as in appeals docketed before the Supreme Court of the District of Columbia and shall be equally divided between the parties unless precluded by statute or by order of the certifying court.

``(e) The written opinion of the Supreme Court of the District of Columbia stating the law governing any questions certified under subsection (a) shall be sent by the clerk to

the certifying court and to the parties.

``(f) The Supreme Court of the District of Columbia, on its own motion, the motion of the District of Columbia Court of Appeals, or the motion of any party to a case pending in the Supreme Court of the District of Columbia or the District of Columbia Court of Appeals, may order certification of a question of law of another State to the highest court of such State if, in the view of the Supreme Court of the District of Columbia--

``(1) such question of law may be determinative of the case pending in the Supreme Court of the District of Columbia or the District of Columbia Court of Appeals; and

``(2) there is no controlling precedent regarding such question of law in the decisions of the District of Columbia Court of Appeals or the Supreme Court of the District of Columbia.

``(g) The Supreme Court of the District of Columbia may prescribe the rules of procedure concerning the answering and certification of questions of law under this section.

``SUBCHAPTER III. MISCELLANEOUS PROVISIONS

``§11-641. Contempt powers.

``In addition to the powers conferred by section 402 of title 18, United States Code, the Supreme Court of the District of Columbia, or a justice thereof, may punish for

disobedience of an order or for contempt committed in the presence of the court.

``§11-642. Oaths, affirmations, and acknowledgments.

``Each justice of the Supreme Court of the District of Columbia and each employee of the court authorized by the chief justice may administer oaths and affirmations and take acknowledgments.

``§11-643. Rules of court.

``The Supreme Court of the District of Columbia shall conduct its business in accordance with such rules and procedures as the court shall adopt.

``§11-644. Judicial conference.

``The chief justice of the Supreme Court of the District of Columbia shall summon annually the justices and active judges of the District of Columbia courts to a conference at a time and place that the chief justice designates, for the purpose of advising as to means of improving the administration of justice within the District of Columbia. The chief justice shall preside at such conference which shall be known as the Judicial Conference of the District of Columbia. Each justice and judge summoned, unless excused by the chief justice of the Supreme Court of the District of Columbia, shall attend throughout the conference. The Supreme Court of the District of Columbia shall provide by its rules for representation of and active participation by members of

the unified District of Columbia Bar and other persons active in the legal profession at such conference.''.

SEC. 102. TRANSITION PROVISIONS.

(a) ELEVATION OF JUDGES OF THE DISTRICT OF COLUMBIA COURT OF APPEALS AS JUSTICES OF THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.--

(1) Except as provided in paragraph (2), beginning on the effective date of this ~~Act~~title the chief judge of the District of Columbia Court of Appeals shall serve the remainder of the term to which he or she was appointed as the chief justice of the Supreme Court of the District of Columbia and the associate judges of the District of Columbia Court of Appeals shall serve the remainder of the respective terms to which they were appointed as associate justices of the Supreme Court of the District of Columbia. The Supreme Court of the District of Columbia shall conform to the numerical requirements of section 11-602 of the D.C. Code through attrition. Vacancies in the offices of chief judge and associate judge of the District of Columbia Court of Appeals shall be filled in accordance with chapter 15 of title 11 of the D.C. Code.

(2) Any judge of the District of Columbia Court of Appeals may serve the remainder of the term to which he or she was appointed as a judge of that court by

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providing written notice to the chief judge of the District of Columbia Court of Appeals not less than 30 days after the date of the enactment of this Act.

(b) TRANSITION PERIOD FOR THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.--

(1) The ~~chief judge of the District of Columbia Court of Appeals~~ Joint Committee on Judicial Administration in the District of Columbia (in this subsection referred to as the ``Joint Committee'') shall be responsible for the administration of the period of transition prior to the establishment of the Supreme Court of the District of Columbia, including the hiring of necessary staff, the preparation of facilities, and the purchase of necessary equipment and supplies.

(2) Not more than 120 days after the date of the enactment of this Act, the ~~chief judge of the District of Columbia Court of Appeals~~ Joint Committee shall submit to the Subcommittee on Government Efficiency, Federalism, and the District of Columbia of the Committee on Governmental Affairs of the Senate and the Committee on the District of Columbia of the House of Representatives a transition report, consistent with this Act, regarding the establishment of the Supreme Court of the District of Columbia and the filling of vacancies on the District of Columbia Court of Appeals resulting from the elevation of

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the judges of such court to positions on the Supreme Court of the District of Columbia pursuant to subsection (a).

(3) This subsection shall take effect on the date of the enactment of this Act.

SEC. 103. CONFORMING AND OTHER AMENDMENTS.

(a) AMENDMENTS TO THE HOME RULE ACT.--

(1) Section 431(a) of the District of Columbia Self-Government and Governmental Reorganization Act is amended--

(A) in the first sentence by inserting ``Supreme Court of the District of Columbia,'' after ``vested in the''; and

(B) by adding after the fourth sentence the following: ``The Supreme Court of the District of Columbia has jurisdiction of appeals from the District of Columbia Court of Appeals and of cases certified to the Supreme Court under section 11-621(a), District of Columbia Code.''.

(2) Section 431 of such Act is further amended in subsections (b), (c), and (g)--

(A) by inserting ``chief justice or'' before ``chief judge'' each place it appears;

(B) by inserting ``justice or'' before ``judge'' each place it appears; and

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(C) by inserting ``justices or'' before ``judges'' each place it appears.

(3) Section 432 of such Act is amended--

(A) by inserting ``justice or'' before ``judge'' each place it appears;

(B) by striking ``District of Columbia Court of Appeals'' each place it appears and inserting ``Supreme Court of the District of Columbia''; and

(C) in subsection (a)(1) by striking ``law or which would be a felony in the District'' and inserting ``law or the laws of the District of Columbia''.

(4) Section 433 of such Act is amended--

(A) in the heading by inserting ``JUSTICES AND'' before ``JUDGES'';

(B) by inserting ``justices and'' before ``judges'' each place it appears; and

(C) by inserting ``justice or'' before ``judge'' each place it appears.

(5) Section 434 of such Act is amended in subsections (b)(3) and (d)--

(A) by inserting ``justice or'' before ``judge'' each place it appears; and

(B) by inserting ``justices or'' before ``judges'' each place it appears.

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(b) AMENDMENTS TO CHAPTER 1 OF TITLE 11, D.C. CODE.--

(1) Section 11-101(2), D.C. Code, is amended by redesignating subparagraphs (A) and (B) as subparagraphs (B) and (C), respectively, and by adding before subparagraph (B) (as so redesignated) the following:

``(A) The Supreme Court of the District of Columbia.''.

(2) Section 11-102 of the D.C. Code is amended to read as follows:

``§11-102. Status of Supreme Court of the District of Columbia.

``The highest court of the District of Columbia is the Supreme Court of the District of Columbia. Final judgments and decrees of the Supreme Court of the District of Columbia and of the District of Columbia Court of Appeals where review is denied by the Supreme Court of the District of Columbia are reviewable by the Supreme Court of the United States in accordance with section 1257 of title 28, United States Code.''.

(3) The item relating to section 11-102 of the table of contents of chapter 1 of title 11, D.C. Code, is amended to read as follows:

``11-102. Status of Supreme Court of the District of Columbia.''.

(c) AMENDMENTS TO CHAPTER 3 OF TITLE 11, D.C. CODE.--(1)

Section 11-301, D.C. Code, is amended to read as follows:

``§11-301. Jurisdiction of appeals from the Supreme Court of the District of Columbia.

``In addition to its jurisdiction as a United States court of appeals and any other jurisdiction conferred on it by law, the United States Court of Appeals for the District of Columbia Circuit has jurisdiction of appeals from judgments of the Supreme Court of the District of Columbia with respect to violations of criminal laws of the United States which are not applicable exclusively to the District of Columbia if a petition for the allowance of an appeal from that judgment is filed within 10 days after its entry.''.

(2) The item relating to section 11-301 of the table of contents of chapter 3 of title 11, D.C. Code, is amended to read as follows:

``11-301. Jurisdiction of appeals from the Supreme Court of the District of Columbia.''.

(d) AMENDMENTS TO CHAPTER 7 OF TITLE 11, D.C. CODE.--

(1) Chapter 7 of title 11, D.C. Code, is amended by striking sections 11-723 and 11-744 and by striking the items relating to such sections in the table of contents of such chapter.

(2) Section 11-703(b), D.C. Code, is amended by striking ``$500'' and inserting ``$2,500''.

(3) Section 11-707, D.C. Code, is amended by striking

``chief judge of the District of Columbia Court of Appeals'' both places it appears and inserting ``chief justice of the Supreme Court of the District of Columbia''.

(4) Section 11-708, D.C. Code, is amended by striking ``not more than three law clerks for the court.'' and inserting ``law clerks for the court and law clerks and secretaries for the senior judges.''.

(5) Section 11-722, D.C. Code, is amended by striking ``Commissioner'' and inserting ``Mayor''.

(6) Section 11-743 is amended by striking ``according to'' and all that follows and inserting ``in accordance with such rules and procedures as it may adopt.''.

(e) AMENDMENTS TO CHAPTER 9 OF TITLE 11, D.C. CODE.--

(1) Section 11-904(b), D.C. Code, is amended by striking ``$500'' and inserting ``$2,500''.

(2) Section 11-908, D.C. Code, is amended to read as follows:

``(b) When the business of the Superior Court requires, the chief judge may certify to the chief justice of the Supreme Court of the District of Columbia the need for an additional judge or judges as provided in section 11-607 and 11-707.''.

(3) Section 11-910, D.C. Code, is amended by adding at the end the following new sentence: ``In addition, the

chief judge may appoint and remove law clerks for the court, who shall serve as directed by the chief judge.''.

(4) Section 11-946, D.C. Code, is amended—

~~(A) in the first sentence, by striking ``according to'' and all that follows and inserting ``in accordance with such rules and procedures as it may adopt.'', and~~

~~(B) by striking the second and third sentences~~by striking ``District of Columbia Court of Appeals'' each place it appears in the second and third sentences and inserting ``Supreme Court of the District of Columbia''.

(f) AMENDMENTS TO CHAPTER 15 OF TITLE 11, D.C. CODE.--

(1) Section 11-1501, D.C. Code, is amended to read as follows:

``§11-1501. Appointment and qualifications of judges.

``(a) Except as provided in section 434(d)(1) of the District of Columbia Self-Government and Governmental Reorganization Act, the President shall nominate, from the list of persons recommended by the District of Columbia Judicial Nomination Commission established under section 434 of such Act, and, by and with the advice and consent of the Senate, appoint all justices and judges of the District of Columbia courts.

``(b) No person may be nominated or appointed a justice

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or judge of a District of Columbia court unless that person--

``(1) is a citizen of the United States;

``(2) is an active member of the unified District of Columbia Bar and has been engaged in the active practice of law in the District for the five years immediately preceding nomination or for such five years has served as a judge of the United States or the District of Columbia, has been on the faculty of a law school in the District, or has been employed as a lawyer by the United States or the District of Columbia government;

``(3) is a bona fide resident of the District of Columbia and has maintained an actual place of abode in the District for at least 90 days immediately prior to nomination, and shall retain such residency as long as he or she serves as such judge, except judges appointed prior to December 23, 1973, who retain residency in Montgomery or Prince George's Counties in Maryland, Arlington or Fairfax Counties (or any cities within the outer boundaries thereof) or the city of Alexandria in Virginia shall not be required to be residents of the District to be eligible for reappointment or to serve any term to which reappointed;

``(4) is recommended to the President, for such nomination and appointment, by the District of Columbia Judicial Nomination Commission; and

``(5) has not served, within a period of 2 years prior to nomination, as a member of the District of Columbia Commission on Judicial Disabilities and Tenure or of the District of Columbia Judicial Nomination Commission.''.

(2) Section 11-1504(a)(1), D.C. Code, is amended by striking the period at the end of the first sentence and inserting the following: ``, except that a retired judge may not serve or perform judicial duties on the Supreme Court of the District of Columbia.''.

(3) Section 11-1505(a), D.C. Code, is amended in the second sentence by striking ``District'' and all that follows and inserting ``of the court of the District of Columbia on which the judge serves.''.

(4) Subchapter I of chapter 15 of title 11, D.C. Code, is amended by adding at the end the following new section:

``**§11-1506. Definitions.**

``For purposes of this chapter--

``(1) the term `judge' means any justice of the Supreme Court of the District of Columbia, or any judge of the District of Columbia Court of Appeals or the Superior Court; and

``(2) the term `chief judge' means the chief justice of the Supreme Court of the District of Columbia, or the

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chief judges of the District of Columbia Court of Appeals or the Superior Court, as appropriate.''.

(5) Section 11-1526, D.C. Code, is amended--

~~(A)~~ by striking ``District of Columbia Court of Appeals'' each place it appears and inserting ``Supreme Court of the District of Columbia''; ~~and~~

~~(B) in subsection (a) by striking ``law or which would be a felony in the District of Columbia'' and inserting ``law or the laws of the District of Columbia''~~.

(6) Section 11-1528, D.C. Code, is amended in subsection (a)(2)(C) by inserting ``the Supreme Court of the District of Columbia or'' after ``elevation to''.

(7) Section 11-1529, D.C. Code, is amended by striking ``District of Columbia Court of Appeals'' and inserting ``Supreme Court of the District of Columbia''.

(8) Section 11-1561, D.C. Code, is amended--

(A) in paragraph (1), by inserting ``any justice of the Supreme Court of the District of Columbia,'' before ``any judge''; and

(B) in paragraph (2), by inserting ``a justice in the Supreme Court of the District of Columbia,'' before ``a judge''.

(9) The table of sections for subchapter I of chapter 15 of title 11, D.C. Code, is amended by adding at the

end the following.

``11-1506. Definitions.''.

(g) AMENDMENTS TO CHAPTER 17 OF TITLE 11, D.C. CODE.--

(1) Section 11-1701, D.C. Code, is amended--

(A) by amending subsection (a) to read as follows:

~~``(a) The chief justice of the Supreme Court of the District of Columbia, in consultation with the chief judge of the District of Columbia Court of Appeals and the chief judge of the Superior Court of the District of Columbia, shall be responsible for the administration of the courts of the District of Columbia. The Executive Officer of the District of Columbia courts appointed under section 11-1703(a) shall assist the chief justice in carrying out the chief justice's responsibilities under this chapter.'',~~

``(a) There shall be a Joint Committee on Judicial Administration in the District of Columbia (hereafter in this chapter referred to as the 'Joint Committee') consisting of the chief justice of the Supreme Court of the District of Columbia (who shall serve as chairperson) and two other justices of such court, the chief judge of the District of Columbia Court of Appeals, and the chief judge of the Superior Court of the District of Columbia and two additional judges of such court.'';

(B) in subsection (b)--

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~~(i) by striking ``The Joint Committee'' and inserting ``In carrying out responsibilities under subsection (a), the chief justice of the Supreme Court of the District of Columbia'';~~

~~(ii) in paragraph (1), by striking ``policies'' and inserting ``policies with respect to nonjudicial employees'';~~

~~(iii) in paragraph (9), by striking ``With the concurrence'' and all that follows through ``other'' and inserting ``Other'', and by striking ``the District of Columbia Court of Appeals'' and inserting ``the Supreme Court of the District of Columbia, the District of Columbia Court of Appeals,''; and~~

~~(iv) by striking paragraph (6) and redesignating paragraphs (7), (8), and (9) as paragraphs (6), (7), and (8),~~

(i) by amending paragraph (4) to read as follows:

``(4) Preparation and publication of an annual report of the District of Columbia court system regarding the work of the courts, the performance of the duties enumerated in this chapter, and any recommendations relating to the courts.''; and

(ii) by striking paragraphs (6) and (9) and

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redesignating paragraphs (7) and (8) as paragraphs (6) and (7); and

(C) in subsection (c)--

~~(i) by redesignating paragraphs (1), (2), (3), and (4) as subparagraphs (A), (B), (C), and (D);~~

~~(ii) by striking ``(c) The Joint Committee, with the assistance of the Executive Officer of the District of Columbia courts, shall--'' and inserting the following:~~

~~``(c)(1) There shall be a Joint Committee on Judicial Administration in the District of Columbia (hereafter in this chapter referred to as the `Joint Committee') consisting of the chief justice of the Supreme Court of the District of Columbia (who shall serve as chairperson), the chief judge of the District of Columbia Court of Appeals, and the chief judge of the Superior Court of the District of Columbia.~~

~~(iii) by amending subparagraph (B) (as redesignated by clause (i)) to read as follows:~~

~~``(B) formulate and enforce standards for outside activities of and receipt of compensation by the judges of the District of Columbia court system;''; and~~

~~(iv) in subparagraph (C) (as redesignated by clause (i)), by striking ``, and institute such changes'' and all that follows through~~

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~~``justice'', and~~

(i) by amending paragraph (2) to read as follows:

``(2) formulate and enforce standards for outside activities of and receipt of compensation by the judges of the District of Columbia court system;'',

(ii) in paragraph (3), by striking ``, and institute such changes'' and all that follows through ``justice'',

(iii) by striking ``and'' at the end of paragraph (3),

(iv) by striking the period at the end of paragraph (4) and inserting a semicolon, and

(v) by adding at the end the following new paragraphs:

``(5) submit the annual budget requests of the Supreme Court of the District of Columbia, the District of Columbia Court of Appeals, and the Superior Court to the Mayor of the District of Columbia as part of the integrated budget of the District of Columbia court system, except that any such request may be modified upon the concurrence of 5 of the 7 members of the Joint Committee; and

``(6) with the concurrence of the chief justice of the Supreme Court of the District of Columbia and the

respective chief judges of the other District of Columbia courts, prepare and implement other policies and practices for the District of Columbia court system and resolve other matters which may be of joint and mutual concern of the Supreme Court of the District of Columbia, the District of Columbia Court of Appeals, and the Superior Court.'', and

(D) in subsection (d)--

(i) by striking ``(d)'' and inserting ``(2)''; and

(ii) by striking ``section'' and inserting ``subsection''.

(2) Section 11-1702 is amended--

(A) in the heading by inserting ``the chief justice and the'' after ``of'';

(B) by redesignating subsections (a) and (b) as subsections (b) and (c); and

(C) by adding before subsection (b) the following new subsection:

``(a) The chief justice of the Supreme Court of the District of Columbia, in addition to the authority conferred by chapter 6 of this title, shall ~~have the final responsibility for the management of regular administrative matters of that court, including the implementation in that court of the matters enumerated in section 11-1701(b)~~

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supervise the internal administration of that court--

``(1) including all administrative matters other than those within the responsibility enumerated in section 11-1701(b), and

``(2) including the implementation in that court of the matters enumerated in section 11-1701(b), consistent with the general policies and directives of the Joint Committee.'';~~ and~~

~~(D) in subsections (b) and (c) (as redesignated by subparagraph (B))--~~

~~(i) by striking ``supervise the internal administration'' each place it appears and inserting ``have the final responsibility for the management of regular administrative matters'', and~~

~~(ii) by striking ``Joint Committee'' each place it appears and inserting ``chief justice of the Supreme Court of the District of Columbia and the Joint Committee pursuant to section 11-1701''~~.

(3) Section 11-1703(a), D.C. Code, is amended--

~~(A) in subsection (a)--~~

~~(i) by striking ``Joint Committee'' each place it appears and inserting ``chief justice of the Supreme Court of the District of Columbia'',~~

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(A) by striking ``He'' each place it appears and inserting ``The Executive Officer''; and

(B) in the fourth sentence, by striking ``judges'' and inserting ``judge of the District of Columbia Court of Appeals and the chief judge of the Superior Court of the District of Columbia''.

~~(B) in subsection (b)~~

~~(i) in the first sentence, by striking ``Joint Committee on Judicial Administration'' and all that follows through ``Courts'' and inserting ``chief justice of the Supreme Court of the District of Columbia, in consultation with the chief judge of the District of Columbia Court of Appeals and the chief judge of the Superior Court''; and~~

~~(ii) in the second sentence, by striking ``Joint Committee'' and inserting ``chief justice''; and~~

~~(C) in subsection (d) by striking ``the same compensation'' and all that follows through ``as'' and inserting ``a level of compensation, including retirement benefits, not to exceed the level of compensation provided for''~~

(4) Section 11-1721, D.C. Code, is amended to read as follows:

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``(a) The Supreme Court of the District of Columbia, the District of Columbia Court of Appeals, and the Superior Court of the District of Columbia shall each have a clerk appointed by the chief justice or the chief judge of that court who shall, under the direction of such chief justice or chief judge, be responsible for the daily operations of that court

``(b) Each such clerk appointed under this section shall receive a level of compensation, including retirement benefits, determined by the ~~chief justice of the Supreme Court of the District of Columbia in consultation with the chief judges of the District of Columbia Court of Appeals and the Superior Court of the District of Columbia~~ Joint Committee on Judicial Administration, except that such level may not exceed the level of compensation provided for the Executive Officer.''.

~~(5) Section 11-1725, D.C. Code, is amended--~~

~~(A) in subsection (a)--~~

~~(i) by striking ``Subject to'' and all that follows through ``shall appoint'' and inserting the following: ``The chief justice of the Supreme Court of the District of Columbia, in consultation with the chief judge of the District of Columbia Court of Appeals and the chief judge of the Superior Court of the District of Columbia, shall appoint'', and~~

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~~(ii) by striking ``both'' and inserting ``all'';~~

~~(B) in the first sentence of subsection (b)--~~

~~(i) by striking ``The Executive Officer'' and all that follows through ``judges)'' and inserting ``Except as otherwise provided in this title, the Executive Officer shall appoint, and may remove, other nonjudicial personnel for the courts''; and~~

~~follows:~~

~~(6) Section 11-1726, D.C. Code, is amended to read as follows:~~

~~``In the case of nonjudicial employees of the District of Columbia courts whose compensation is not otherwise fixed by this title, the chief justice of the Supreme Court of the District of Columbia, in consultation with the chief judge of the District of Columbia Court of Appeals and the chief judge of the Superior Court of the District of Columbia, shall fix the rates of compensation of such employees without regard to chapter 51 and subchapter III of chapter 53 of title 5, United States Code. In fixing the rates of nonjudicial employees under this section, the chief justice shall be guided by the rates of compensation fixed for other employees in the executive and judicial branches of the Federal and District of Columbia Governments occupying the same or~~

~~similar positions or occupying positions of similar responsibility, duty, and difficulty. The rate of compensation fixed for any employee under this section may not in any instance exceed the level of compensation provided for the Executive Officer.''.~~

~~(7) Section 11-1727(a), D.C. Code, is amended by striking ``The Executive Officer'' and inserting ``Subject to the supervision of the chief justice of the Supreme Court of the District of Columbia, the Executive Officer''.~~

(5) Section 11-1730(a), D.C. Code, is amended--

(A) by striking ``Judges'' and inserting ``Justices and judges'';

(B) by inserting ``11-609,'' after ``sections''; and

(C) by inserting ``chief justice or'' after ``respective''.

(6) Section 11-1731, D.C. Code is amended--

(A) by striking ``or the chief judge'' and inserting ``, the chief justice, or the chief judges'';

(B) in paragraph (7), by striking ``the District of Columbia Bail Agency'' and inserting ``the District of Columbia Pre-trial Services Agency''; and

(C) by inserting ``and'' at the end of paragraph

(9) and

(D) by striking paragraphs (10) and (11) and inserting the following:

``(10) the Department of Human Services.''.

(7) Section 11-1741, D.C. Code, is amended--

(A) by amending the matter preceding paragraph (1) to read as follows: ``Within the District of Columbia courts, and subject to the supervision of the chief justice of the Supreme Court of the District of Columbia (acting in consultation with the chief judge of the District of Columbia Court of Appeals and the chief judge of the Superior Court of the District of Columbia), the Executive Officer shall--'';

(B) by inserting ``chief justice or'' before ``chief'' each place it appears in paragraphs (5), (7), and (9); and

~~(C) by striking ``supervise,'' each place it appears in paragraphs (1) and (3).~~

(C) by striking ``and'' at the end of paragraph (8);

(D) by striking the period at the end of paragraph (9) and inserting ``: and;''; and

(E) by adding at the end the following:

``(10) be responsible for the allocation, negotiation

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for, and provision of space in the courts.''.

~~(11) Section 11-1742(a), D.C. Code, is amended by striking ``Joint Committee'' and inserting ``chief justice of the Supreme Court of the District of Columbia''.~~

~~(12) Section 11-1743, D.C. Code, is amended--~~

~~(A) in subsection (a), by striking ``Joint Committee'' and all that follows through ``annual estimates'' and inserting ``chief justice of the Supreme Court of the District of Columbia, in consultation with the chief judge of the District of Columbia Court of Appeals and the chief judge of the Superior Court of the District of Columbia, shall prepare and submit to the Mayor of the District of Columbia annual estimates''; and~~

~~(B) in subsection (b), by striking ``Bureau of the Budget'' and inserting ``Office of Management and Budget''.~~

~~(13) Section 11-1744(5), D.C. Code, is amended by striking ``Joint Committee'' and all that follows and inserting ``chief justice of the Supreme Court of the District of Columbia, in consultation with the chief judge of the District of Columbia Court of Appeals and the chief judge of the Superior Court of the District of Columbia.''.~~

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(8) Section 11-1745(b)(2), D.C. Code, is amended--

~~(A) by striking ``Joint Committee'' each place it appears in subsections (a) and (b)(4) and inserting ``chief justice of the Supreme Court of the District of Columbia''; and~~

~~(B) in subsection (b)(2)~~ by striking ``Commissioner'' and inserting ``Mayor''.

(9) Section 11-1747, D.C. Code, is amended by striking ``him'' and inserting ``~~the chief justice of the Supreme Court of the District of Columbia or~~ the Executive Officer''.

(h) AMENDMENTS TO CHAPTER 25 OF TITLE 11, D.C. CODE.--

(1) Section 11-2501, D.C. Code, is amended--

(A) by striking ``District of Columbia Court of Appeals'' each place it appears and inserting ``Supreme Court of the District of Columbia''; and

(B) by amending subsection (c) to read as follows:

``(c) Members of the bar of the District of Columbia Court of Appeals in good standing on the effective date of title I of the District of Columbia Judicial Reorganization Act of 1990 shall be automatically enrolled as members of the bar of the Supreme Court of the District of Columbia, and shall be subject to its disciplinary jurisdiction.''.

(2) Section 11-2502, D.C. Code, is amended by

striking ``District of Columbia Court of Appeals'' and inserting ``Supreme Court of the District of Columbia''.

(3) Section 11-2503, D.C. Code, is amended by striking ``District of Columbia Court of Appeals'' and inserting ``Supreme Court of the District of Columbia''.

(4) Section 11-2504, D.C. Code, is amended by striking ``District of Columbia Court of Appeals'' and inserting ``other courts of the District of Columbia''.

(i) AMENDMENT TO CHAPTER 26 OF TITLE 11, D.C. CODE.--Section 11-2607, D.C. Code, is amended by striking ~~``joint committee'' and all that follows through~~ ``Commissioner'' and inserting ~~``chief justice of the Supreme Court of the District of Columbia shall prepare and annually submit to the~~ Mayor''.

(j) AMENDMENT TO CHAPTER 3 OF TITLE 13, D.C. CODE.--Section 13-302, D.C. Code, is amended by inserting ``the Supreme Court of the District of Columbia,'' after ``process of''.

(k) AMENDMENTS TO CHAPTER 3 OF TITLE 17, D.C. CODE.--

(1) The chapter heading for chapter 3 of title 17, D.C. Code, is amended to read as follows: ``SUPREME COURT OF THE DISTRICT OF COLUMBIA AND DISTRICT OF COLUMBIA COURT OF APPEALS.''.

(2) Section 17-302, D.C. Code, is amended by striking ``District of Columbia Court of Appeals'' each place it

appears and inserting ``Supreme Court of the District of Columbia''.

(3) Section 17-305, D.C. Code, is amended by adding at the end the following new subsection:

``(c) The Supreme Court of the District of Columbia shall apply the same standards regarding the scope of review and the reversal of judgment as the District of Columbia Court of Appeals applies under subsections (a) and (b).''.

(4) Section 17-306, D.C. Code, is amended by inserting ``Supreme Court of the District of Columbia or the'' before ``District''.

(1) AMENDMENT TO TITLE 28, UNITED STATES CODE.--Section 1257 of title 28, United States Code, is amended by striking ``District of Columbia Court of Appeals'' and inserting ``Supreme Court of the District of Columbia''.

SEC. 104. AUTHORIZATION OF APPROPRIATIONS.

(a) IN GENERAL.--In addition to any other sums authorized to be appropriated to the District of Columbia, there are authorized to be appropriated to the District of Columbia for costs incurred by the District of Columbia in implementing the amendments made by sections 101 and 103 and in carrying out section 102 the following amounts:

(1) ~~$1,200,000,~~$500,000, for fiscal year ~~1991~~1992.

(2) $5,000,000, for fiscal year ~~1992~~1993.

(3) $4,000,000, for fiscal year ~~1993~~1994.

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(4) $3,000,000, for fiscal year ~~1994~~1995.

(5) $2,000,000, for fiscal year ~~1995~~1996.

(6) $1,000,000, for fiscal year ~~1996~~1997.

(b) AVAILABILITY OF FUNDS.--Funds appropriated pursuant to the authorization referred to in subsectioh (a) shall remain available to the District of Columbia until expended.

SEC. 105. EFFECTIVE DATE.

~~Except as otherwise provided, the provisions of this title shall take effect one year after the date of the enactment of this Act.~~

(a) GENERAL RULE.--Except as provided in section 102 and subsection (b), this title and the amendments made by this title shall take effect one year after the date of enactment of this Act.

(b) EXCEPTION.--The amendments made by section 103(g)(3) shall apply to the position of Executive Officer of the District of Columbia courts--

(1) after the individual in that position on the date of the enactment of this Act leaves that office, or

(2) one year after the date of the enactment of this Act,

whichever occurs later.

TITLE II--JUDGES OF THE DISTRICT OF COLUMBIA COURTS

SEC. 201. DESIGNATION OF CHIEF JUDGE.

Section 11-1503(a), D.C. Code, is amended by to read as

follows:

``(a)(1) Except as provided in paragraph (2), the chief justice or chief judge of a District of Columbia court shall be designated by the District of Columbia Judicial Nomination Commission from among the judges of the court in regular active service. A chief judge shall serve for a term of 4 years or until a successor is designated, and shall be eligible for redesignation. A judge may relinquish the position of chief judge, after giving notice to the District of Columbia Judicial Nomination Commission.

``(2) Notwithstanding the first sentence of paragraph (1), the first chief justice of the Supreme Court of the District of Columbia shall be appointed in accordance with section 102(a) of the District of Columbia Judicial Reorganization Act of 1990.''.

SEC. 202. COMPOSITION OF SUPERIOR COURT OF THE DISTRICT OF COLUMBIA.

Section 11-903, D.C. Code, as amended by section 138 of the District of Columbia Appropriations Act, 1990, is amended--

(1) by striking ``Subject to the enactment of authorizing legislation, the'' and inserting ``The'',

(2) effective October 1, 1991, by striking ``fifty-eight'' and inserting ``sixty'', and

(3) effective October 1, 1992, by striking ``sixty''

and inserting ``sixty-two''.

SEC. 203. STUDY OF FEASIBILITY OF ESTABLISHING DISTRICT OF COLUMBIA NIGHT COURT.

The Executive Officer of the District of Columbia courts shall conduct a study of the feasibility and desirability of establishing a District of Columbia Night Court as a division of the Superior Court of the District of Columbia, and shall submit a report on such study to Congress not later than 180 days after the date of the enactment of this Act.

SEC. ~~203~~204. EFFECTIVE DATE.

Except as ~~otherwise provided~~ provided in section 202, ~~the provisions of this title~~ the amendments made by sections 201 and 202 shall take effect on the date of the enactment of this Act.

TITLE III--JUDICIAL MAGISTRATES.

SEC. 301. JUDICIAL MAGISTRATES.

(a) IN GENERAL.--

(1) REPLACEMENT OF HEARING COMMISSIONERS.--Section 11-1732, D.C. Code, is amended to read as follows:

``11-1732. Judicial Magistrates.

``(a) ESTABLISHMENT.--There are established ~~not fewer than 15 judicial magistrates for 1990, not fewer than 20 judicial magistrates for 1991, and not fewer than 25 judicial magistrates for 1992,~~--

``(1) effective October 1, 1991, not fewer than 15

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judicial magistrates,

``(2) effective October 1, 1992, not fewer than 17 judicial magistrates,

``(3) effective October 1, 1993, not fewer than 19 judicial magistrates, and

``(4) effective October 1, 1995, not fewer than 20 judicial magistrates,

who shall serve as judicial officers in the Superior Court and perform the duties enumerated in subsection (f) and such other duties authorized by the chief judge of the Superior Court, together with such other functions incidental to such duties as are consistent with the rules of the Superior Court and the Constitution and laws of the United States and the District of Columbia.

``(b) APPOINTMENT.--

``(1) IN GENERAL.--Judicial magistrates shall be appointed by the chief judge of the Superior Court of the District of Columbia, with the approval of a majority of the judges of the Superior Court in active service, from among individuals recommended by the District of Columbia Judicial Nomination Commission.

``(2) TRAINING PROGRAM.--The Joint Committee shall establish a training program for judicial magistrates to assist magistrates in performing their duties under this section.

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``(c) QUALIFICATIONS.--No individual shall be appointed as a judicial magistrate unless that individual--

``(1) is a citizen of the United States;

``(2) is an active member of the unified District of Columbia Bar and has been engaged in the active practice of law in the District for the 5 years immediately preceding the appointment or for such 5 years has been on the faculty of a law school in District, or has been employed as a lawyer in the District of Columbia by the United States or District government; and

``(3) is a bona fide resident of the District of Columbia and has maintained an actual place of abode in the District for at least 90 days immediately prior to appointment, and retains such residency during service as a judicial magistrate.

``(d) SERVICE OF JUDICIAL MAGISTRATES.--

``(1) Judicial magistrates shall be appointed for terms of 6 years and may be reappointed for terms of 6 years in accordance with section 433(d) of the District of Columbia Self-Government and Governmental Reorganization Act.

``(2) Upon the expiration of a judicial magistrate's term, a judicial magistrate may continue to perform the duties of office until a successor is appointed, or for 90 days after the date of the expiration of the judicial

magistrate's term, whichever is earlier.

``(3) No individual may serve as a judicial magistrate after having attained the age of 74.

``(4) Judicial magistrates may not engage in the practice of law, or in any other business, occupation, or employment inconsistent with the expeditious, proper, and impartial performance of their duties as judicial magistrates.

``(5) Judicial magistrates shall abide by the same standards of conduct that apply to judges of District of Columbia courts.

``(e) COMPENSATION.--Judicial magistrates shall be compensated at a rate equal to 80 percent of the rate of compensation for a judge of the Superior Court.

``(f) DUTIES OF JUDICIAL MAGISTRATES.--A judicial magistrate, when authorized by the chief judge of the Superior Court and subject to the rules of the Superior Court, may make findings and enter final orders or judgments as provided by law, which shall constitute a final order or judgment of the Superior Court, with respect to proceedings concerning the following:

``(1) landlord and tenant disputes brought under chapter 15 of title 16 of the District of Columbia Code, or chapter 39 of the Act of March 3, 1901 (31 Stat. 1382; section 45-1401 et seq., D.C. Code);

``(2) small claims proceedings brought under chapter 13 of this title;

``(3) civil proceedings at law or in equity in which the amount in controversy does not exceed $25,000;

``(4) criminal misdemeanors;

``(5) proceedings to determine conditions of release pursuant to title 23 of the District of Columbia Code;

``(6) preliminary examinations and initial probation revocation hearings in all criminal cases to determine if there is probable cause to believe that an offense has been committed and that the accused committed it;

``(7) civil pre-trial discovery proceedings;

``(8) traffic offenses;

``(9) proceedings brought pursuant to the Mentally Retarded Citizens Constitutional Rights and Dignity Act of 1978 (section 6-1901 et seq., D.C. Code);

``(10) uncontested actions or proceedings assigned to the Family Division of the Superior Court under section 11-1101, unless, in an uncontested proceeding brought under section 11-1101(13), a child is alleged to have committed an act which would constitute a felony if committed by an adult;

``(11) contested proceedings brought under paragraphs (1), (3), (4), (10), or (13) of section 11-1101 involving the establishment or enforcement of child support or the

modification of an existing child support order;

``(12) contested proceedings brought under section 11-1101(13) in which a child is alleged to be delinquent, neglected, or in need of supervision, to determine conditions of detention, release, or placement, or determinations of probable cause, unless the child is alleged to have committed an act which would constitute a felony if committed by an adult;

``(13) contested proceedings brought under section 11-1101(14) to determine probable cause;

``(14) contested proceedings brought under section 11-101(15) or section 11-1101(16); and

``(15) uncontested probate and fiduciary proceedings brought under title 20 of the District of Columbia Code.''.

(2) CLERICAL AMENDMENT.--The item relating to section 11-1732 of the table of contents of chapter 17 of title 11, D.C. Code, is amended to read as follows:

``11-1732. Judicial magistrates.''.

(b) REMOVAL FOR DISABILITY BY COMMISSION ON JUDICIAL DISABILITIES AND TENURE.--Section 11-1521, D.C. Code, is amended by striking ``a judge'' and inserting ``a judge or judicial magistrate''.

(c) APPOINTMENT OF JUDICIAL MAGISTRATES.--

(1) TRANSITION PROVISION REGARDING HEARING

COMMISSIONERS.--Any individual serving as a hearing commissioner under section 11-1732 of the District of Columbia Code as of the date of the enactment of this Act shall serve the remainder of such individual's term as a judicial magistrate, and may be reappointed as a judicial magistrate in accordance with section 433(d)(1) of District of Columbia Self-Government and Governmental Reorganization Act (as added by paragraph (3)(B), except that any individual serving as a hearing commissioner as of the date of the enactment of this Act who was appointed as a hearing commissioner prior to the effective date of section 11-1732 of the District of Columbia Code shall not be required to a resident of the District of Columbia to be eligible to be reappointed.

(2) APPOINTMENTS MADE FROM INDIVIDUALS NOMINATED BY JUDICIAL NOMINATION COMMISSION.--Section 434(b)(3) of the District of Columbia Self-Government and Governmental Reorganization Act is amended by striking the period at the end and inserting the following: ``, and to submit nominees for appointment to positions as judicial magistrates of the Superior Court of the District of Columbia in accordance with section 11-1732 of the District of Columbia Code.''.

(3) REVIEW OF CANDIDATES FOR REAPPOINTMENT BY TENURE COMMISSION.--Section 433 of the District of Columbia Self-

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Government and Governmental Reorganization Act (as amended by section 103(a)(4)(A)) is further amended--

(A) in the heading of such section, by striking ``JUSTICES AND JUDGES'' and inserting ``JUSTICES, JUDGES, AND JUDICIAL MAGISTRATES''; and

(B) by adding at the end the following new subsection:

``(d) Not less than than 6 months prior to the expiration of such individual's term of office, any judicial magistrate of the Superior Court of the District of Columbia under section 11-1732 of the District of Columbia Code may file with the Tenure Commission a declaration of candidacy for reappointment. If a declaration of candidacy is so filed, the Tenure Commission shall, not less than 60 days prior to the expiration of the declaring candidate's term of office, prepare and submit to the chief judge of the Superior Court of the District of Columbia (hereafter in this subsection referred to as the ``chief judge'') a written evaluation of the declaring candidate's performance during the candidate's present term of office and the candidate's fitness for reappointment to another term. If the Tenure Commission determines the declaring candidate to be well qualified for reappointment to another term, then the term of such candidate shall be automatically extended for another full term, subject to mandatory retirement, suspension, or

removal. If the Tenure Commission determines the declaring candidate to be qualified for reappointment to another term, then the chief judge may extend the term of such candidate for another full term, subject to mandatory retirement, suspension, or removal. If the Tenure Commission determines the declaring candidate to be unqualified for reappointment to another term, then the chief judge may not extend the term of such candidate, and such candidate shall not be eligible for reappointment or appointment as a judicial magistrate or as a judge of a District of Columbia court. If a declaration of candidacy is not filed under this paragraph by any judicial magistrate, or if the chief judge does not extend the term of a declaring candidate determined to be qualified by the Tenure Commission, a vacancy shall result upon the expiration of the judicial magistrate's term of office and shall be filled by appointment as provided under section 434(e).''.

(4) VACANCIES FILLED BY INDIVIDUALS NOMINATED BY JUDICIAL NOMINATION COMMISSION.--Section 434 of the District of Columbia Self-Government and Governmental Reorganization Act is amended by adding at the end the following new subsection:

``(e)(1) In the event of a vacancy in any position of a judicial magistrate of the Superior Court of the District of Columbia under section 11-1732 of the District of Columbia

Code, the Commission shall, not later than 60 days following the occurrence of such vacancy, submit to the chief judge of the Superior Court of the District of Columbia (hereafter in this subsection referred to as the ``chief judge'') a list of 3 persons for possible nomination and appointment for each vacancy. If more than one vacancy exists at one given time, the Commission must submit lists in which no person is named more than once and the chief judge may select more than one nominee from one list. Whenever a vacancy will occur by reason of the expiration of such a magistrate's term of office, the Commission's list of nominees shall be submitted to the chief judge not less than 60 days prior to the occurrence of such vacancy.

``(2) In the event any person recommended by the Commission under this paragraph requests that his recommendation be withdrawn, dies, or in any other way becomes disqualified to serve as a judicial magistrate, the Commission shall promptly recommend to the chief judge one person to replace the person originally recommended.

``(3) In no instance shall the Commission recommend any person who does not, upon the time of appointment to service as a judicial magistrate, meet the qualifications specified in section 11-1732(c) of the District of Columbia Code.''.

(d) CONFORMING AMENDMENTS.--(1) Section 11-1701(c)(1)(B), D.C. Code (as amended and redesignated by section

103(g)(1)(C)) is amended by inserting ``and judicial magistrates'' after ``judges''.

(2) Section 16-924, D.C. Code, is amended by striking ``hearing commissioner'' each place it appears and inserting ``judicial magistrate''.

(3) The District of Columbia Self-Government and Governmental Reorganization Act is amended--

(A) in section 431(g), as amended by section 103(a)(2)(B), by striking ``justice or'' and inserting ``judicial magistrate, justice, or''; and

(B) in section 432, as amended by section 103(a)(3)(A), by striking ``justice or'' each place it appears and inserting ``judicial magistrate, justice, or''.

SEC. 302. STUDY OF UTILIZATION AND EFFECTIVENESS OF JUDICIAL MAGISTRATES.

(a) STUDY.--During each of the first 3 years that begins after the date of the enactment of this Act, the chief judge of the Superior Court of the District of Columbia shall, in consultation with members of the unified bar of the District of Columbia and other interested parties, conduct a study of the utilization and effectiveness of judicial magistrates in the District of Columbia court system.

(b) REPORT.--Not later than the last day of each of the first 3 years that begins after the date of the enactment of

this Act, the chief judge of the Superior Court shall submit a report on the study conducted under subsection (a) to Congress and the Mayor of the District of Columbia.

SEC. 303. EFFECTIVE DATE.

~~The provisions of this title~~ This title and the amendments made by this title shall take effect on the date of the enactment of this Act.

~~TITLE IV--JUDICIAL NOMINATION COMMISSION AND COMMISSION ON JUDICIAL DISABILITIES AND TENURE~~

~~SEC. 401. DISTRICT OF COLUMBIA COMMISSION ON JUDICIAL DISABILITIES AND TENURE.~~

~~Subsection (a) of section 11-1522, D.C. Code, is amended to read as follows:~~

~~``(a) The Commission shall consist of 9 members appointed as follows:~~

~~``(1) The President of the United States shall appoint 1 member of the Commission.~~

~~``(2) 2 members shall be appointed by the Board of Governors of the unified District of Columbia Bar--~~

~~``(A) both of whom shall have been members of the unified District of Columbia Bar and have been actively engaged in the practice of law in the District of Columbia for at least 5 of the 10 years immediately preceding such appointment; and~~

~~``(B) at least 1 of whom shall be a resident of~~

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~~the District of Columbia.~~

~~``(3) The Mayor of the District of Columbia shall appoint 2 members of the Commission, one of whom shall not be a lawyer.~~

~~``(4) The Council of the District of Columbia shall appoint 1 member of the Commission who shall not be a lawyer.~~

~~``(5) The Chief Judge of the United States District Court for the District of Columbia shall appoint one member of the Commission. The member appointed by the Chief Judge shall be an active or retired Federal judge serving in the District of Columbia.~~

~~``(6) The Delegate to the House of Representatives from the District of Columbia shall appoint 1 member of the Commission.~~

~~``(7) The Chairman of the Council of the District of Columbia shall appoint 1 member of the Commission.''.~~

~~SEC. 402. DISTRICT OF COLUMBIA JUDICIAL NOMINATION COMMISSION.~~

~~Section 434 of the District of Columbia Self-Government and Governmental Reorganization Act (as amended by sections 103(a)(5) and 301(c)(1)(B)) is further amended--~~

~~(1) in subsection (a) in the second sentence by striking ``seven'' and inserting ``9''; and~~

~~(2) in subsection (b)(4) by inserting after paragraph~~

~~(E) the following new paragraphs:~~

~~``(F) 1 member shall be appointed by the Delegate to the House of Representatives from the District of Columbia.~~

~~``(G) 1 member shall be appointed by the Chairman of the Council of the District of Columbia.''.~~

~~SEC. 403. EFFECTIVE DATE.~~

~~The provisions of this title shall take effect on the date of the enactment of this Act.~~

~~TITLE V--CITIZENS ADVISORY COMMITTEE ON THE JUDICIAL SYSTEM OF THE DISTRICT OF COLUMBIA~~

~~SEC. 501. CITIZENS ADVISORY COMMITTEE ON THE JUDICIAL SYSTEM OF THE DISTRICT OF COLUMBIA.~~

~~(a) Establishment.--There shall be a Citizens Advisory Committee on the Judicial System of the District of Columbia which shall advise the Congress, the Mayor, and the Council of the District of Columbia concerning the fairness and efficiency of the courts and judicial system of the District of Columbia.~~

~~(b) Membership.--The Advisory Committee shall consist of 15 members appointed not later than 180 days after the date of the enactment of this Act as follows:~~

~~(1) 3 members appointed by the Chief Justice of the Supreme Court of the District of Columbia from among the judges of the District of Columbia courts.~~

~~(2) 3 members appointed by the Mayor of the District of Columbia, of whom 2 shall be individuals selected by the President of the District of Columbia Bar and 1 shall be an individual selected by the President of the Washington Bar Association.~~

~~(3) 1 member appointed by the Chairman of the Council of the District of Columbia.~~

~~(4) Eight members, one of whom shall be appointed by each member of the Council of the District of Columbia representing a ward of the District of Columbia.~~

~~(c) Chairperson.--The Advisory Committee shall elect a chairperson, who may not be a judge.~~

~~(d) Meetings.--The first meeting of the Advisory Committee shall be called by the Delegate to the House of Representatives from the District of Columbia. The Advisory Committee shall meet at such times as may be determined by a majority of the members and at the call of the chairperson.~~

~~(e) Reports.--The Advisory Committee shall submit an annual report to appropriate committees of the Congress, the Mayor, the Joint Committee on Judicial Administration, and the Council of the District of Columbia concerning the administration of the courts of the District of Columbia and the operation of the system of justice of the District of Columbia. The Advisory Committee may submit such other interim reports as are considered necessary and appropriate.~~

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~~(f) Comment on Pending Cases Prohibited.--The Advisory Committee may not include in any report submitted under subsection (c) any comment on a specific case or action pending before any court of the District of Columbia during the period of time covered by such a report.~~

Amend the title so as to read: A Bill To create the Supreme Court of the District of Columbia, and for other purposes.

Mr. FAUNTROY. The substitute is available for amendment at any point. And after we have a discussion of the substitute I will entertain a motion for its adoption. After which, any further amendments will be in order. After a vote is taken on any further amendments and on the substitute, it will be in order to make a motion to report H.R. 4257, as amended, to the House floor.

I yield to the gentleman from California for an explanation of the bill.

Mr. DYMALLY. I thank you very much.

Mr. Chairman, at its meeting on March 15, 1990, the Subcommittee on Judiciary and Education decided, without objection, to refer H.R. 4257 to the full committee without recommendation.

Mr. Chairman, if I may address provisions of the bill, I'd like to thank you for convening this hearing. The bill has become a very key part in the legislative agenda for the Subcommittee on Judiciary and Education.

I wish to commend former Chief Judge William Pryor for his initial push of this legislation, and Chief Justice Judith Rogers for her continued pursuit of this goal after succeeding Judge Pryor in the court of appeals.

Our Subcommittee on Judiciary and Education held two hearings on this proposal in the 100th Congress. Thereafter, consistent with Mr. Fauntroy's leadership and recommendations at our subcommittee hearings, Mr. Fauntroy and I introduced a new bill, H.R. 3470. To ensure the best possible legislation, Mr. Fauntroy established a mission team on judicial reorganization, which held its own hearings in which also made significant contributions, and I want to take this opportunity to thank that panel for its study and its recommendations.

Mr. Chairman, the record before us is clear—there is considerable backlog in the D.C. Appellate Court system. This proposed court reorganization bill addresses that backlog problem and gives the court a new and improved structure and viability.

H.R. 4257, in creating a supreme court, will provide the local court system with an appropriate law development and law stating forum and a court of appeals that could focus more efficiently on its traditional function of correcting errors of law made at the trial level.

Operation of the new court would be most fluid since management would remain vested in a joint committee. This system has worked well for the District for the last 20 years and we have agreed that it remains the best suited system for continued management of the courts. Of course, the chief justice of the supreme court would become the court's chief judicial representative.

The magistrates' provisions provide increased authority and status to the present superior court hearing officers—and is designed to help the judges with their trial court calendar overload. Thus, we expressly provided the chief judge of the superior court sufficient authority to direct these new magistrates.

Overall, Mr. Chairman, I believe this legislation is a giant step in the right direction. I echo the remarks of our chairman and congratulate Mr. Fauntroy on his leadership on this bill.

I also commend Mr. Parris for his cooperative bipartisanship.

Finally, Mr. Chairman, like yourself, I commend full committee staff for the work on the bill, former senior staff counsel, Donald Temple; senior staff associate, Ronald C. Willis, and minority staff director, Mark Robertson. All of them helped very much in resolving some of the major differences and helped move this bill along.

I indeed support the compromise amendment and urge my colleagues to report this bill, as amended, to the floor of the House.

I yield back the balance of my time, Mr. Chairman, and thank you for your diligence in this matter.

[The prepared statement of Mr. Dymally follows:]

STATEMENT

OF

THE HONORABLE MERVYN M. DYMALLY

CHAIRMAN, SUBCOMMITTEE ON JUDICIARY AND EDUCATION

COMMITTEE ON THE DISTRICT OF COLUMBIA

MARK-UP OF H.R. 4257

TUESDAY, OCTOBER 2, 1990

MR. CHAIRMAN, I'D LIKE TO THANK YOU FOR CONVENING FULL COMMITTEE MARK-UP OF H.R. 4257. THIS BILL HAS COME A VERY LONG WAY AND THROUGH AN ARDUOUS REVIEW PROCESS.

I WISH TO COMMEND FORMER CHIEF JUDGE WILLIAM PRYOR FOR HIS INITIAL PUSH OF THIS LEGISLATION AND CHIEF JUDGE JUDITH ROGERS FOR HER CONTINUED PURSUIT OF THIS GOAL, AFTER SUCCEEDING JUDGE PRYOR IN THE COURT OF APPEALS.

OUR SUBCOMMITTEE ON JUDICIARY AND EDUCATION HELD TWO HEARINGS ON THIS PROPOSAL IN THE 100TH CONGRESS. THEREAFTER, CONSISTENT WITH MR. FAUNTROY'S LEADERSHIP AND RECOMMENDATIONS MADE AT OUR SUBCOMMITTEE HEARINGS, MR. FAUNTROY AND I INTRODUCED A NEW BILL, H.R. 3470.

TO ENSURE THE BEST POSSIBLE LEGISLATION, MR. FAUNTROY ESTABLISHED A MISSION TEAM ON JUDICIAL REORGANIZATION, WHICH HELD ITS OWN HEARINGS AND WHICH ALSO MADE SIGNIFICANT RECOMMENDATIONS.

MR. CHAIRMAN, THE RECORD BEFORE US IS CLEAR. THERE IS CONSIDERABLE BACKLOG IN THE D.C. APPELLATE COURT.

THIS PROPOSED COURT REORGANIZATION BILL ADDRESSES THAT BACKLOG PROBLEM AND GIVES THE COURT A NEW AND IMPROVED STRUCTURE AND VIABILITY. H.R. 4257, IN CREATING A SUPREME COURT, WOULD PROVIDE THE LOCAL COURT SYSTEM WITH AN APPROPRIATE LAW DEVELOPMENT AND LAW STATING FORUM AND A COURT OF APPEALS THAT COULD FOCUS MORE EFFICIENTLY ON ITS TRADITIONAL FUNCTION OF CORRECTING ERRORS OF LAW MADE AT THE TRIAL LEVEL.

OPERATION OF THE NEW COURT WOULD BE MOST FLUID SINCE MANAGEMENT WOULD REMAIN VESTED IN A JOINT COMMITTEE. THIS SYSTEM HAS WORKED WELL FOR THE DISTRICT FOR THE LAST 20 YEARS AND WE HAVE AGREED THAT IT REMAINS THE BEST SUITED SYSTEM FOR CONTINUED MANAGEMENT OF THE COURTS. OF COURSE, THE CHIEF JUSTICE OF THE SUPREME COURT WOULD BECOME THE COURT'S CHIEF JUDICIAL REPRESENTATIVE.

THE MAGISTRATES' PROVISIONS PROVIDE INCREASED AUTHORITY AND STATUS TO THE PRESENT SUPERIOR COURT HEARING OFFICERS -- AND IS DESIGNED TO HELP THE JUDGES WITH THEIR TRIAL COURT CALENDAR OVERLOAD. THUS, WE EXPRESSLY PROVIDED THE CHIEF JUDGE OF THE SUPERIOR COURT SUFFICIENT AUTHORITY TO DIRECT THESE NEW MAGISTRATES.

OVERALL, I BELIEVE THIS LEGISLATION IS A GIANT STEP IN THE RIGHT DIRECTION. I ECHO THE REMARKS OF OUR CHAIRMAN AND CONGRATULATE MR. FAUNTROY ON HIS LEADERSHIP ON THIS BILL. I ALSO COMMEND MR. PARRIS FOR HIS COOPERATIVE BIPARTISANSHIP SPIRIT. FINALLY, MR. CHAIRMAN, LIKE YOURSELF, I COMMEND FULL COMMITTEE STAFF FOR THEIR WORK ON THE BILL, FORMER SENIOR STAFF COUNSEL DONALD M. TEMPLE, SENIOR STAFF ASSOCIATE RONALD C. WILLIS, AND MINORITY STAFF DIRECTOR MARK J. ROBERTSON, FOR HELPING US TO RESOLVE SOME OF OUR MAJOR DIFFERENCES AND MOVE THIS BILL ALONG.

I INDEED SUPPORT THE COMPROMISE AMENDMENT AND URGE MY COLLEAGUES TO REPORT THIS BILL AS AMENDED TO THE FLOOR OF THE HOUSE.

Mr. FAUNTROY. Without objection, the opening statement of committee Chair, Ronald V. Dellums will be placed in the record in its entirety and will be considered as having been read.

[The prepared statement of Mr. Dellums follows:]

OPENING STATEMENT OF RONALD V. DELLUMS

The committee will come to order. The committee will now take up H.R. 4257, a bill to create a supreme court of the District of Columbia. Without objection, the bill is considered read and subject to amendment at any point. One year and a half ago this committee began the process of confronting what many of us consider to be the most serious problem we face in our Nation, that is the distribution and use of drugs. No area of the country has been left unaffected by this scourge. A new language has surfaced with words that depict the worst of our fears. "Crack babies" and "boarder babies," descriptive words that capture the imagination and chill the heart. At one point last year this great city of ours was reduced to being called the murder Capital of the Nation.

In an effort to confront this most dreadful and tragic of times, this committee, on a bipartisan basis, passed the first in a series of legislative packages that should begin to bring a level of relief to the citizens of the District of Columbia. H.R. 1502 authorized the appropriation of funds to the District of Columbia for 700 additional police officers; it called for the development of a community-oriented police department; it directed the District of Columbia to begin immediate construction of a new detention center, which includes a drug treatment center; it provided for the development of a classification system for individuals convicted of crimes in the District of Columbia; it directed that proceeds of forfeited property for law enforcement activities be used to finance law enforcement activities of the D.C. Metropolitan Police Department; and it provided for the participation of the D.C. Metropolitan Police Department in the national crime information system. In addition to H.R. 1502, this committee moved expeditiously to increase the D.C. Superior Court by 8 additional judges and appropriate support staff.

In keeping with the cooperative bipartisan effort of the first session of the 101st Congress, I am pleased to bring before the committee today the bill H.R. 4257 and am equally pleased to report to my colleagues on the committee that once again we have reached across our political differences and have been able to draft a compromise bill which, at the appropriate time, I will seek a motion to be introduced as an amendment in the nature of a substitute. However, before I yield to my distinguished colleagues for their opening remarks, I want to express my deepest gratitude to Fiscal Affairs and Health Subcommittee Chairman Walter E. Fauntroy for his diligence in working with the other members of the committee in bringing this legislation to full committee. Mr. Chairman, you have done well in your capacity as subcommittee chair. During the first session you led the way toward passage of H.R. 1502, the police authorization bill, you fought hard and won the battle for 8 additional superior court judges, your service to the citizens of D.C. and to this committee has been exemplary in helping us improve law and order and to insure the safety of D.C. citizens.

H.R. 4257 and the amendment in the nature of a substitute had their beginnings in 1986 when Chief Judge William Pryor engaged judiciary and subcommittee chairman Mervyn Dymally in considerable discussion about the creation of a local supreme court. On April 13, 1988, Messrs. Fauntroy, Dymally, and Mazzoli introduced H.R. 4366, a bill to establish a supreme court of the District of Columbia. On April 19th and 28th, 1988, the Subcommittee on Judiciary and Education held hearings on H.R. 4366. Witnesses included the Honorable William C. Pryor, then chief judge of the D.C. superior court; Larry P. Polansky, executive director, D.C. courts; and Richard Hoffman, clerk of the court of appeals. In addition, the subcommittee took testimony from Frederick D. Cooke, Jr., then corporation counsel of D.C.; the Honorable Wilhelmina Rolark, D.C. city councilmember; as well as other distinguished members of the bar.

Per the recommendation of Mr. Fauntroy's judicial mission team and their independent hearings, on October 16, 1989, Mr. Fauntroy introduced H.R. 3470, a similar but revised bill to establish a supreme court of the District of Columbia. This bill authorized eight (8) additional judges for the superior court of the District of Columbia and revised the present hearing commissioner system in the superior court of the District of Columbia.

Mr. Dymally held hearings on H.R. 3470 on October 26th and November 6th respectively and a November 15th hearing was held at the request of our colleague on the minority side.

A subcommittee mark-up of H.R. 3470, originally scheduled on March 6, 1990, was postponed to Thursday, March 15, 1990, per Mr. Rohrabacher's request.

On Thursday, March 15th, 1990, the Subcommittee on Judiciary and Education referred H.R. 4257 to the full committee for consideration.

Based upon a substantial hearing record, on March 14, 1990, Messrs. Fauntroy and Dymally introduced a new bill, H.R. 4257, which is a revised version of H.R. 3470. It includes several recommendations from the last series of hearings.

On Thursday, March 15, 1990, the Subcommittee on Judiciary and Education referred H.R. 4257 to the full committee. Further, it agreed to incorporate the record for H.R. 3470 as the record for H.R. 4257.

As presently amended, the bill does several things:

1. It establishes a seven-member supreme court by elevating the present nine-member appellate court and by attrition allowing the size to diminish to seven. The President would then appoint nine new judges to fill the appellate division.

2. It provides for four additional superior court judges, two to be appointed by the President in October, 1992; two to be appointed by the President in October, 1993.

3. It changes the make-up and size of the Joint Committee on Judicial Administration. Presently the committee has five members, two from the appellate and three from the superior court. Under the new bill, there would be a seven-member joint committee made up of the chief judge of the supreme court, two associate justices; the chief judge of the appellate court; and the chief judge of the superior court and two associate judges.

4. The new bill upgrades the hearing commissioners to judicial magistrates and increases their number from 14 to 20 by October 1, 1995.

5. The new bill deletes titles IV and V of H.R. 3470, which provided for the Judicial Nomination Commission and Commission on Judicial Disabilities and tenure and a citizens advisory committee on the judiciary system of the District of Columbia. The area of controversy was constitutional and revolved around appointments to the above commissions by the D.C. delegate and chair of the D.C. council.

6. The new bill authorizes $15.5 million over a 6-year period beginning October 1, 1992—ending October 1, 1997.

It is important to note that the appellate and supreme courts have two distinct functions. The intermediate court generally has an error correcting function—correcting errors in the lower court's application of law. The supreme court—as the highest State court—has a law stating (law development) function and a final error correcting function—being the final interpreter of the law. These functions are more logically performed by a court sitting en banc (as a whole) rather than by a subpanel of a larger court in the court of appeals.

In closing I want to personally thank Mervyn M. Dymally, subcommittee chair, Judiciary and Education Subcommittee, for his leadership in bringing H.R. 4257 to the full committee. As I stated early on in my remarks, this has been a non-partisan effort; therefore, I want to thank Stan Parris, the ranking Republican on our committee, and Mr. Thomas Bliley, for their personal assistance in making the way possible for the passage of this bill. Also I want to thank former senior staff counsel Johnny Barnes; former senior staff counsel Donald M. Temple; Mr. Ronald C. Willis, senior staff associate; Mr. Mark J. Robertson, minority staff director; and Mr. Jeff Schlagenhauf for their excellent work in bringing to the full committee the legislation we have before us.

SUMMARY

The committee will come to order. The committee will now take up H.R. 4257, a bill to create a supreme court of the District of Columbia. Without objection the bill is considered read and subject to amendment at any point.

In keeping with the cooperative bipartisan effort of the first session of the 101st Congress, I am pleased to report to my colleagues on the committee that once again we have reached across our political differences and have been able to draft a compromise bill which, at the appropriate time, I will seek a motion to be introduced as an amendment in the nature of a substitute. However, before I yield to my distinguished colleagues for their opening remarks, I want to express my deepest gratitude to Fiscal Affairs and Health Subcommittee Chairman Walter E. Fauntroy for his diligence in working with the other members of the committee in bringing this legislation to full committee. Mr. Chairman, you have done well in your capacity as subcommittee chair. During the first session you led the way toward passage of H.R.

1502, the police authorization bill, you fought hard and won the battle for 8 additional superior court judges, your service to the citizens of D.C. and to this committee has been exemplary in helping us improve law and order and to insure the safety of D.C. citizens.

As presently amended, the bill H.R. 4257 does several things:

1. It establishes a seven-member supreme court by elevating the present nine-member appellate court and by attrition allowing the size to diminish to seven. The president would then appoint nine new judges to fill the appellate division.

2. It provides for four additional superior court judges, two to be appointed by the president in October 1992; two to be appointed by the president in October 1993.

3. It changes the make-up and size of the Joint Committee on Judicial Administration. Presently the committee has five members, two from the appellate and three from the superior court. Under the new bill, there would be a seven-member joint committee made up of the chief judge of the supreme court, two associate justices; the chief judge of the appellate court; and the chief judge of the superior court and two associate judges.

4. The new bill upgrades the hearing commissioners to judicial magistrates and increases their number from 14 to 20 by October 1, 1995.

5. The new bill deletes titles IV and V of H.R. 3470, which provided for the Judicial Nomination Commission and Commission on judicial disabilities and tenure and a citizens advisory committee on the judicial system of the District of Columbia. The area of controversy was constitutional and revolved around appointments to the above commissions by the D.C. delegate and chair of the D.C. council.

6. The new bill authorizes $15.5 million over a 6 year period beginning October 1, 1992—ending October 1, 1997.

It is important to note that the appellate and supreme courts have two distinct functions. The intermediate court generally has an error correcting function—correcting errors in the lower court's application of law. The supreme court—as the highest State court—has a law stating (law development) function and a final error correcting function—being the final interpreter of the law. These functions are more logically performed by a court sitting en banc (as a whole) rather than by a subpanel of a larger court in the court of appeals.

In closing I want to personally thank Mervyn M. Dymally, subcommittee chair, Judiciary and Education Subcommittee, for his leadership in bringing H.R. 4257 to the full committee. As I stated early on in my remarks, this has been a non-partisan effort; therefore, I want to thank Stan Parris, the ranking Republican on our committee, and Mr. Thomas Bliley, for their personal assistance in making the way possible for the passage of this bill. Also I want to thank former senior staff counsel Johnny Barnes; former senior staff counsel Donald M. Temple; Mr. Donald C. Willis, senior staff associate; Mr. Mark J. Robertson, minority staff director; and Mr. Jeff Schlagenhauf for their excellent work in bringing to the full committee the legislation we have before us.

Mr. FAUNTROY. I thank the gentleman, not only for his explanation of the amendment in the nature of a substitute here, but also for his reference to the role which I had in bringing this to the committee.

In 1971, Congress passed legislation, as you may recall, creating the current structure of the District of Columbia court system. In many ways, this reorganized court system has improved the administration of justice in our Nation's Capital.

It became apparent to me, however, that these courts are failing to meet the needs of District of Columbia residents in significant ways. Presidentially appointed judges had become aloof and distanced themselves from the need of the citizens because they are in no way accountable to them.

Judicial administration had become chaotic and arbitrary; in some measure because the courts were poorly organized to respond to the drug crisis which overran the dockets of the court.

The delays in the processing of civil cases and appeals had become intolerable because of poor organization and internal politics. It seemed to me that the 20th anniversary of the Court Reorganization Act called for a thorough evaluation of the 1971 Reorga-

nization Act—I appointed a mission team to study the problem and report to me on their conclusions and recommendations. The team consisted of prominent local practitioners, law professors, a former clerk of the court, and counsel and the staff director of this committee.

The chief judges of the local courts were asked to appoint representatives, but they declined. The mission team conducted a detailed and extensive examination. Hearings were held where local judges, the U.S. attorney, representatives from all local bar associations, judges from surrounding jurisdictions, and a dean from a local law school all testified.

The mission team proposed a judicial reorganization plan in the form of a bill that I introduced, H.R. 3470. That measure proposed a new intermediate court of appeals; a reorganization of the court administration placing control in the chief judge of the new District of Columbia Supreme Court; the creation of judicial magistrates to handle less important matters, thereby freeing superior court judges for felony dockets and large civil cases; and expanding local appointments on the judicial nominating and tenure commission to interject more local involvement.

This was a conservative bill. The mission team deeply felt that the local appointment of judges was essential to the reform of the courts. It also recognized that such a measure would not be feasible in view of the current congressional suspicion of local leadership.

Major provisions were made in the bill, and major revisions, although significant features were retained in the one which you set before us. The bill before us, in my view, falls far short of my hope to have more local involvement in the courts, but in proposing an intermediate court of appeals and instituting a system of judicial magistrates, I think important steps have been taken; and for that reason, I will not object to the substitute which is before us.

Mr. Rohrabacher?

Mr. ROHRABACHER. Thank you, Mr. Chairman.

I regret that after these happy comments that I have to express opposition to H.R. 4257, which is to create a supreme court in the District of Columbia.

As vice chairman of the subcommittee with jurisdiction on this legislation, I sat through hearings in which witnesses for and against this bill were allowed to testify, and I was not convinced that the caseload and the structure of the District of Columbia court system is such that an additional level of an appellate review is required.

There are other, less expensive ways of addressing the problems of the District court system, as pointed out by some of the witnesses that we both heard testify.

I would also like to point out that the administration opposes this legislation and directly takes issue with the assertions that this bill will help fight crime in the District of Columbia. In fact, it is the contention of the Justice Department that this bill will hurt the fight against crime by placing additional appellate response burdens on the U.S. attorney's office, which, after all, is the office responsible for prosecuting criminals in this area.

Finally, I would like to note that I find it to be especially inappropriate for the Federal Government to be spending $15.5 million

on establishing another level of the local court system, right after approving an increase, based on a formula in terms of the District's control, in the authorization level of the District's Federal payment.

If the city council and the Mayor believe that this extra layer of judicial court system is needed, and they need a layer of appeal, they should be able to find the necessary funds in their own budget.

I, frankly, Mr. Chairman, don't believe that just adding this new layer of government in the form of a judicial layer will actually help in any way. I think it's going to be an expensive proposition and it's actually going to probably end up making it more difficult rather than more efficient in dealing with the criminal challenge that we face in this community.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Rohrabacher follows:]

STATEMENT BY HON. DANA ROHRABACHER AT MARKUP OF H.R. 4257, TO CREATE A SUPREME COURT FOR THE DISTRICT OF COLUMBIA OCTOBER 2, 1990

MR. CHAIRMAN, I REGRET THAT AFTER THESE HAPPY COMMENTS, I MUST EXPRESS MY OPPOSITION TO H.R. 4257, TO CREATE A SUPREME COURT FOR THE DISTRICT OF COLUMBIA.

AS THE VICE CHAIRMAN OF THE SUBCOMMITTEE WITH JURISDICTION ON THIS LEGISLATION, I SAT THROUGH HEARINGS IN WHICH WITNESSES FOR AND AGAINST THIS BILL WERE ALLOWED TO TESTIFY. I WAS NOT CONVINCED THAT THE CASELOAD AND STRUCTURE OF THE DISTRICT OF COLUMBIA COURT SYSTEM IS SUCH THAT AN ADDITIONAL LEVEL OF APPELATE REVIEW IS REQUIRED. THERE ARE OTHER, LESS EXPENSIVE WAYS OF ADDRESSING THE PROBLEMS OF THE D.C. COURT SYSTEM, AS POINTED OUT BY SOME OF THE WITNESSES BEFORE OUR SUBCOMMITTEE.

I WOULD ALSO LIKE TO POINT OUT THAT THE ADMINISTRATION OPPOSES THIS LEGISLATION, AND DIRECTLY TAKES ISSUE WITH THE ASSERTIONS THAT THIS BILL WILL HELP IN THE FIGHT AGAINST CRIME IN THE DISTRICT OF COLUMBIA. IN FACT, IT IS THE CONTENTION OF THE JUSTICE DEPARTMENT THAT THIS BILL WILL HURT THE FIGHT AGAINST CRIME BY PLACING ADDITIONAL APPELATE RESPONSE BURDENS ON THE U.S. ATTORNEY'S OFFICE, WHICH AFTER ALL IS THE OFFICE RESPONSIBLE FOR PROSECUTING CRIMINALS IN THE DISTRICT OF COLUMBIA.

FINALLY, I WOULD NOTE THAT I FIND IT TO BE ESPECIALLY INAPPROPRIATE FOR THE FEDERAL GOVERNMENT TO SPEND $15.5 MILLION ON ESTABLISHING ANOTHER LEVEL OF THE LOCAL COURT SYSTEM, RIGHT AFTER APPROVING AN INCREASE, BASED ON A FORMULA UNDER THE DISTRICT'S CONTROL, IN THE AUTHORIZATION LEVEL FOR THE

DISTRICT'S FEDERAL PAYMENT. IF THE CITY COUNCIL AND MAYOR BELIEVE THAT THIS ADDITIONAL LAYER OF APPEAL IS NECESSARY, THEY SHOULD BE ABLE TO FIND THE NECESSARY FUNDS IN THEIR OWN BUDGET.

Mr. FAUNTROY. I thank the gentleman.

Mr. PARRIS. Mr. Chairman?

Mr. FAUNTROY. Mr. Parris?

Mr. PARRIS. Mr. Chairman, I thank the gentleman from California, Mr. Dymally, for his gracious words and for his expression of the generally bipartisan support that this measure has received.

I would like to associate myself with the remarks of the chairman of this committee, Mr. Dellums, in his explanation in this matter, and particularly in ratification of the concept that with an intermediate court there is a fundamental function of correcting error in the trial or tribunals of one kind—in the lower court's application of the law, as pointed out by the chairman.

The supreme court has a law development function and is a final error-correcting function in terms of the interpretation of the law which, of course, then creates precedent for lower courts.

These functions and one of the reasons I support this measure is that I believe these latter functions are, as has been stated, more logically performed by a court sitting en banc, as a whole, rather than a subpanel of a larger court in the court of appeals.

I would suggest, however, the reason I make these comments is to, one, express my support of this measure in concept; but to take issue with one statement made by the chairman in his remarks, which have been included in the record. I have no desire to take issue with the editorial license of the statement. He has the obvious right to advocate any position he may choose.

But he says on page 3 of his statement, the supreme court that would be established by this measure, as the highest court has a law development function.

I just want the record to show, Mr. Chairman, that this supreme court has the highest judicial panel in this city, the Nation's Capital, which is not a State, but which is a place about which we are all concerned.

There is a subtle but very important distinction between those two positions, Mr. Chairman. I just wanted the record to reflect that point.

Mr. FAUNTROY. Yes, and we certainly accept the gentleman's misreading of the facts. We do know, as Members of this Congress, that the home rule charter delegated to the locally elected government most State, county, and municipal functions. So in fact, it functions as a State government, and one of these days that fact will be acknowledged around the country and around the world.

Mr. PARRIS. Mr. Chairman, you don't want to blow all this bipartisan harmony that we've created—that we've worked so hard to create. [Laughter.]

Mr. FAUNTROY. No, I just want to tell the truth in love and face the reality that we will disagree as to the nomenclature here.

Mr. PARRIS. We have agreed over the years, Mr. Chairman, that we—in my hope and in my view have never done it disagreeably, and I trust that we can continue to do so.

Mr. FAUNTROY. Thank you, and to your summary remarks.

As indicated at the beginning of the discussion of H.R. 4257, we will reserve final passage—a final vote on this—until we would have considered the next item.

Let me just, for the record, again state what this bill does. It establishes a seven-member supreme court by elevating the present nine-member appellate court and by attrition allowing the size to diminish to seven. The President would then appoint nine new judges to fill the appellate division.

Second, it provides for four additional supreme court judges—two to be appointed by the President in October 1992; two to be appointed by the President in October 1993.

Third, it changes the makeup and size of the D.C. Joint Committee on Judicial Administration. Presently, the committee has five members—two from the appellate, three from the supreme court.

Under the new bill, there would be a seven-member joint committee made up of the chief judge of the supreme court—two associate justices, the chief judge of the appellate court and the chief judge of the superior court with two associate judges.

Fourth, the new bill upgrades the hearing commissioners to judicial magistrates, and increases their number from 14 to 20 by October 1, 1995.

The new bill deletes title 4 and 5 of H.R. 3470, as I had crafted it, which would provide the Judicial Nomination Commission and Commission on Disabilities in tenure a citizen advisory committee on the judicial system of the District of Columbia. The area of controversy was constitutionally it revolved around appointments to the above commissions by the District of Columbia Delegate and the Chair of the D.C. Council.

Finally, the new bill authorizes $15.5 million over a 6-year period, beginning October 1, 1992 and ending October 1, 1997.

It's important to note that the appellate and supreme court have two distinct functions: the intermediate court generally has an error-correcting function, correcting errors in the lower courts' applications of law. The supreme court, as the highest State court, has a law development function, and a final error-correcting function being the final interpreter of the law.

These functions are more logically performed by a court sitting en banc as a whole rather than by a subpanel of a larger court in the court of appeals.

The Chair will now entertain a motion to agree to the amendment in the nature of a substitute to H.R. 4257.

If no one makes the motion, I'll make it.

Mr. McDERMOTT. So move.

Mr. FAUNTROY. Then moved, properly seconded.

All in favor say aye.

[Chorus of ayes.]

Mr. FAUNTROY. Opposed?

[No response.]

Mr. FAUNTROY. The ayes have it; so ordered.

With that we will defer final action on this until we take the——

Mr. ROHRABACHER. Mr. Chairman?

Mr. FAUNTROY. Yes?

Mr. ROHRABACHER. I ask for the standard 3 days to submit sending views for the committee report on H.R. 4257.

Mr. FAUNTROY. Without objection, so ordered.

[Whereupon, at 1:15 a.m. the committee was adjourned.]

APPENDIX

CONGRESSMAN WALTER E. FAUNTROY'S MISSION TEAM ON THE DISTRICT OF COLUMBIA'S JUDICIARY WORKSHOP ON JUDICIAL ORGANIZATION AND SELECTION

SATURDAY, APRIL 22, 1989

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE DISTRICT OF COLUMBIA,
Washington, DC.

The mission team met, pursuant to call, at 10 a.m., in room 1310, Longworth House Office Building, Hon. Walter E. Fauntroy (chairman of the team) presiding.

Members present: Hon. Walter E. Fauntroy, Johnny Barnes, Harley J. Daniels, Marialice Williams Daniels, Thomas A. Duckenfield, Ron Linton, Frank Pendleton, Anthony Rachal, Lee A. Satterfield, John E. Scheuermann, Nathaniel Speights and Julia B. Williams.

Mr. BARNES. Congressman Fauntroy is in route, but we'll go ahead and start the hearing by reading his opening statement into the record, and I'm sure he'll be here very shortly.

My name is Johnny Barnes, and I'm senior staff counsel for the D.C. Committee, also serving as Congressman Fauntroy's administrative assistant, and this is Congressman Fauntroy's opening statement.

The subcommittee will come to order.

This morning, we formally begin a process which has as its aim improving and perfecting the local court system in the District of Columbia. We begin this process with a sense of some of the problems currently confronting our courts, but without any preconceived notions or hard solutions to those problems. We have some ideas, of course, but those ideas are not etched in stone.

It has been two decades since we undertook a significant overhaul of our court system, and there are signs that major repair is needed.

Over the past 20 years, we have taken what can, at best, be described as patchwork action in an effort to keep our courts at pace with rapidly changing times.

We have added more judges to the D.C. Superior Court, made hearing commissioners an integral part of the court system, raised

the mandatory retirement age for all local judges, increased the jurisdictional limit in small claims court and created a 1-day, one-trial jury system.

But, these repairs are, perhaps, minor when measured against the real needs of our courts. For example, in 1981 there were 3,631 felony indictments presented before the D.C. Superior Court. In 1988, that number had increased to 9,709. Yet, during that same period of time, the number of D.C. Superior Court judges increased by only 7, from 44 to 51, and those additional judges are used for civil as well as criminal trials.

The D.C. Court of Appeals has also experienced increased demands on its resources. In 1979, a subcommittee of the Judicial Planning Committee on the workload of the D.C. Court of Appeals recommended the establishment of an intermediate appellate court. At that time, case filings totaled 1,200. Ten years later, there have been no changes at the appellate level in the district, yet, case filings last year totaled 1,681.

I have asked distinguished members of our community, lawyers and nonlawyers, to join me in this process, and I have organized a judicial mission team composed of those persons. I am pleased that Harley Daniels has graciously agreed to Chair the mission team, because he brings a wealth of background, experience and knowledge, not only to the issue of reshaping our court system, but also to the broader question of local self-government.

Harley has been assisted in preparing these hearings by two members of the mission team, Marialice Daniels and Jack Sherman. Marialice and Jack have worked tirelessly to organize what I believe will be historic proceedings.

Other members of our mission team are Attorney Frank Carter, Mr. Ron Linton, Pro. Charles Ogletree, Attorney Tony Rachal, Mr. Edward Sylvester, Mr. Sterling Tucker, Attorney Thomas Duckenfield, Attorney Nate Speights, Attorney Lee Satterfield and Mr. Frank Pendleton, who also serves on the committee on the judiciary for the D.C. Council.

Over the next several months, we will hold hearings like this one on various aspects of the judicial system. We will conduct a tour of the local courts. We will hold a hearing for the general public, and we will seek the advice and counsel of experts and interested persons.

By January 1990, we hope to have a bill prepared for introduction that takes into account the best ideas we have gathered through this process. As we proceed, given the exigencies occasioned by the drug-driven violence which has erupted in the District, it may be necessary to enact certain interim measures to continue our patchwork ways. Time will be the judge of that.

Finally, I should point out what we are doing, and about to do—and about to do should really be done by the local government. Unfortunately, the authority to act under title XI of the D.C. Code, the title which governs the courts, is solely that of the Congress and the President. The local government has no authority in this area.

Until we gain broader self-government, including the right to select our judges, to prosecute crimes and to legislate with respect to the courts, until we gain statehood for the people of Washington,

DC, I and other Members of Congress have the responsibility to do what we can to improve the delivery of justice in our Nations Capital.

Before we call upon our first panel of witnesses, I would like to allow the chairman of our judicial mission team, Attorney Harley Daniels, to make whatever opening remarks he may wish to make.

Mr. DANIELS. Thank you, John.

First of all, I'd like to welcome the members of the judiciary and court officials who took Saturday morning off to be with us and to give us their views and comments on these important issues, and we thank them for their patience in waiting for us to get started this morning.

I am particularly honored that Congressman Fauntroy asked me to take on this responsibility, and I am even prouder of the fact that we have been able to attract individuals of the quality that we have been able to attract, to help us do the work of this mission team.

We've had two meetings before today in order to plan for today's hearing. We have today's session, which will be chaired by Jack Sherman and Marialice Daniels. We have another session scheduled for next Saturday, where we will continue on the issues of judicial organization and judicial selection.

On May 20, we will have an additional workshop that will be held down at the District of Columbia Council on the issue of public accountability, and that will be chaired by Tony Rachal, who is sitting to my right.

We are scheduled after these three workshops to meet on June 17, where we are going to consider all of the evidence and information that we've been able to gather over the last several months, and decide at that time what interim actions need to be taken, given as the Congressman's statement indicated, what actions should be taken in view of present exigencies.

On July 15, after we will have our June meeting, we are going to have another workshop chaired by Francis D. Carter on the administration of justice, which will take up additional questions having to do with the allocations of responsibility between the Federal Government and the local government in the area of prosecutions, in the area of marshal service, and in the area of custody of prisons.

After these workshops, the rest of our mission for the remainder of the year will be taken up in attempting to fashion a comprehensive bill to deal not only with the model court system for the District of Columbia, and I might add that was the charge that Congressman Fauntroy gave me and the members of our team in coming together. He said he wanted the best court system in the District of Columbia that could be conceived of, and I think we've gone a long way in the District of Columbia in arriving at that model system. After 20 years of court reorganization we hope we can assist the judiciary and the community in finding what may be some missing pieces to give us what is truly the model court system in the United States of America.

I would also like to acknowledge the help and assistance of our mission team of Attorney Julia B. Williams, who has also agreed to

serve with us, and who has done stellar work in helping us put these hearings together.

Now, over the last several weeks since the invitations have gone out, we've had the opportunity and gotten phone calls as a result of our invitations from lawyers here in the District of Columbia, from judges in Maryland and Virginia, from individuals from around the country, telling us about their experiences, and comparing what they are dealing with with what we're trying to deal with here in the District of Columbia.

So, with that statement, I would like to ask Chief Judge Rogers—I've been notified by my counsel that she'll introduce the judges, but I would like to say that, in connection with that, that we received a letter as a result of our invitations from Chief Judge John J. Mitchell, who is the administrative judge of the 6th Judicial Circuit of Maryland, and I won't read it all, but I'd ask that the letter be placed in the record of these proceedings, and he says that: "As administrative judge of this court, I see the same problems and struggle for solutions. I do know that Chief Judge Fred B. Ugast is known nationally as a fine administrator. Your committee would be well served by paying close attention to his suggestions."

So, with that recommendation from Judge Mitchell, we're certainly going to pay very close attention to both what Chief Judge Rogers and Chief Judge Ugast would like to suggest to us.

I turn the hearings over to Jack and Marialice for further proceedings.

Ms. DANIELS. I would just like to state very briefly that, as you can well understand, the purpose of this entire exercise today is to open up a dialogue which we hope to continue over the next few months, in order to meet our mission as described by the Congressman.

I want to state that we do have the members of the mission team seated here in the front, and if we don't have any objection, we would like to initially allow any presentations by the chief judges and the clerks, and then we would like to open up the questioning, first of all, to my cochairman, Jack Sherman, and then after he has completed his round of questions, we'll open it up to the rest of the mission team.

But, again, we have such a diversified group of individuals up here. I'm sure that most of you are familiar with these individuals. We've all had some given background which has given us the experience to, we believe, open up, as I said, a dialogue. We really know that some of these issues are very sensitive, that there has certainly been legislative proposals made in some areas, but we would like—I just want to stress—the purpose of this is to keep an open dialogue between us all as parties who, obviously, all have the same common goal, which is to improve the court system of the District of Columbia.

With that, I would like to invite Chief Judge Rogers, and Chief Judge Ugast, and Mr. Hoffman, and Mr. Polansky to be seated at the table and we will begin.

Judge ROGERS. I'll say thank you to Congressman Fauntroy, thank you, Mr. Daniels, thank you, Ms. Williams.

We have, both Judge Ugast and I, prepared statements, and we have brought copies which could be circulated, if you like.

I'll start, and then Judge Ugast has a statement.

Mr. BARNES. Judge Rogers, as you know, your statements will be made a part of the record, and you may proceed as you wish.

TESTIMONY OF JUDGE JUDITH W. ROGERS, CHIEF JUDGE OF THE DISTRICT OF COLUMBIA COURT OF APPEALS

Judge ROGERS. Thank you.

I welcome this opportunity to share some thoughts about the District of Columbia courts. Established in their current configuration in 1970, Congress responded to the accumulated recommendations of many commissions and groups to upgrade the local courts in order to remedy shortcomings in the justice system.

i. The present District of Columbia court system was created by Congress as part of the District of Columbia Court Reform and Criminal Procedure Act of 1970. It transferred jurisdiction over criminal prosecutions and civil proceedings from the Federal courts to a new District of Columbia court system. Prior to the Court Reform Act the District of Columbia courts had very limited jurisdiction. For example, the D.C. Court of General Sessions had jurisdiction over civil matters involving less than $10,000. Its criminal jurisdiction was limited to trials involving misdemeanors and to hearings on probable cause in felony cases. Domestic relations were handled separately as were proceedings involving juvenile delinquency, neglected children and child support and paternity cases.

There was also a D.C. Municipal Court of Appeals. Six judges heard appeals from the five trial courts of limited jurisdiction. Petitions for review of decisions of the D.C. Municipal Court of Appeals could be taken to the Federal Appellate Court, the U.S. Court of Appeals for the District of Columbia Circuit. From there appeals were to the United States Supreme Court.

The Attorney General of the United States in 1972 described the old system as unacceptable in principle and unworkable in practice.

It was unacceptable in principle because a local judicial system deprived of all meaningful jurisdiction was inconsistent with developments toward self-government. It was unworkable in practice because the backlogs and delays which characterized the trial of felony cases in the United States District Court were rendering the system largely ineffectual.

Good morning.

Mr. FAUNTROY. Good morning.

Judge ROGERS. It's lovely to see you.

Mr. FAUNTROY. Thank you for forgiving my late arrival. I was at another community meeting.

Judge ROGERS. I just started, Congressman, my statement, and I'm on page 2.

Mr. FAUNTROY. Good.

Judge ROGERS. Viewed as a model paralleling the judicial systems in the 50 States, the Attorney General described the D.C. Court Reform Act as representing "a fundamental improvement in judicial administration: the inefficiencies and inadequacies of a multiplicity of local courts having been eliminated, and "every attempt having been made in this legislation to give real power and

stature to the local courts." Strengthened further by Congress in the enactment of the D.C. Self-Government and Governmental Reorganization Act, the court system provided after 1973 for the judges for the local courts to be selected by means of a nomination commission that included local government representation.

ii. Ten years after the court reform, the District of Columbia Bar evaluated the District's court system. The report of the committee chaired by Charles A. Horsky focused on the courts before and after court reform with particular emphasis on "the efficiency and effectiveness with which the courts of the District of Columbia schedule and dispose of matters brought before them." Its mission also was to recommend further improvements in the court system. Running over 1,000 pages, the Horsky report detailed a variety of internal improvements for the various divisions of the superior court and the court of appeals. Both courts undertook to implement the recommendations.

The Horsky committee reached no conclusion on whether or not the 44 judges authorized for the trial court provided sufficient judicial manpower. In recognition of the substantial backlog of cases in the appellate court, the committee recommended that three additional appellate judges be appointed for a temporary period, but this never happened.

The report of a second bar committee, chaired by John W. Douglas, addressed the workload of the court of appeals. It recommended the establishment of an intermediate court of appeals. The Douglas Report concluded that, "resolution of virtually all of its cases by majority vote of three-judge panels is an altogether unacceptable modus operandi for a jurisdiction's highest court."The committee further concluded that "the court's 15.5 months average delay from notice of appeal to decision is far too long; being roughly three times longer than that contemplated by the ABA Appellate Standards."

To assess what has happened to the courts of the District of Columbia, it is important to recognize what else was going on. During the 1960's and 1970's Congress enacted the legislative programs of the Great Society with the result that the States and the District of Columbia were required to conform to new Federal laws and regulations and to promulgate local regulations to carry out Federal laws. The Federal laws and local regulations created new rights and remedies, which, in turn, spawned new litigation in the local and Federal courts. In addition, with the enactment of the Home Rule Act, the new local government, beginning in 1975, enacted many new laws, thus creating new rights and remedies which also affected the workload of the courts.

iii. With this background we reach the point where the Washington Post editorializes that, "The Courts Can't Cope." The Court Reform Act created a unitary trial court and an appellate court as the highest court in the District of Columbia. Then Congress and the Council of the District of Columbia enacted many laws giving rise to new rights and remedies. Crime, as a result of whatever cause, continued to rise, and criminal prosecutions became the major portion of the courts' workload. Drugs and violence have exacerbated all of these trends.

To respond to these changing circumstances, Congress, in the mid 1980's, authorized the appointment of seven additional trial judges for the superior court. It also authorized the appointment of hearing commissioners. There are now 51 trial judges and 15 hearing commissioners handling matters in that court.

No such personnel increases occurred in the court of appeals, however. It has remained throughout its existence a court of nine judges. Faced with increasing caseloads, the court implemented a number of management changes to improve the effectiveness and efficiency of its operations. For instance, a summary calendar was established. This was principally in response to the increasing number of criminal appeals, resulting partially from amendments to the Criminal Justice Act making counsel available to indigent defendants. Thus, cases which presented no new question of law and asserted errors that could be easily disposed of would result, oftentimes without oral argument, in a memorandum of opinion and judgment rather than a published opinion.

A variety of other actions were taken by the courts to deal with the increasing volume of cases. Computers were installed in the clerk's office to expedite the handling of pleadings and to facilitate scheduling. Word processors were installed in judges' chambers. Court rules were revised and new procedures instituted to enhance the courts' ability to handle more cases. Settlement efforts were expanded. Various management improvements continue to be implemented.

Nevertheless, while the District of Columbia courts are coping, they are able to do so only at substantial costs to the justice system. For example, to respond to the rise in crime and the drug epidemic, the chief judge of the superior court has assigned 23 of the 51 judges to hear criminal cases. Consequently, civil matters and family proceedings face extended delays before coming to trial. Settlement and alternative dispute resolution mechanisms assist in disposing of some of these cases, but there remains a large number which require judicial attention. Maintaining the civil and family calendars even at this level is possible only by using retired judges more than they or the courts, and probably the community, ever contemplated.

All of these trends are evident at the appellate level as well. The statistics for the court of appeals show that the filings on appeal increased far beyond what had been anticipated at the time of the Horsky committee report. Between 1976 and 1986, appellate filings increased by approximately 34 percent, and I've attached a chart to this statement so you can see that. I think it might help just if I show you, blue is the number of cases filed in the court of appeals, red is the number of cases actually disposed of in the court of appeals. This, in 1971, is the volume of work that existed in the court of appeals when Congress authorized the highest court to have nine judges. This is the level at the time of the Douglas committee report and the Horsky committee report, that's 10 years, approximately, after court reform started. This is where we are today. You can see that the increase has not only been dramatic, but you can see as well that the same nine judges have become incredibly proficient and efficient in terms of handling the volume of cases that we have on appeal. Significantly, the larger increases in appeals oc-

curred in civil and agency areas rather than in criminal cases. The National Center for State Courts found that the caseload of the D.C. Court of Appeals, when compared to other State appellate courts is, based on 1986 statistics, "higher by far than any other court of last resort not having an intermediate appellate court."

The inevitable result, efficiency notwithstanding, was greater delay on appeal. You may recall that when the Douglas committee looked at the statistics, it was concerned that we were approximately at three times the ABA standards, that was 15.5 months. The average time a case is pending on appeal is now up to 22 months even with the assistance of the retired judges. Again, you can see the time on appeal, and it's been a fairly steady progression, and I think what is significant is that all of the chief judges of the court have implemented various procedures to expedite matters on appeal. For example, Chief Judge Pryor tried as an experiment for 6 months, and then the court amended its rules, so we require now a docketing statement to be filed, and that is a way of weeding out cases that are not seriously being appealed, or, I mean, it can be as simple as somebody has filed an appeal and failed to pay the filing fee. Sometimes that is enough to get rid of the case. But, nevertheless, even with that type of procedure to weed out frivolous appeals, we still have this type of delay resulting on appeal.

Mr. FAUNTROY. Judge Rogers?

Judge ROGERS. Yes.

Mr. FAUNTROY. I like your bar charts, and would it be possible to get those reduced for the record as well?

Judge ROGERS. Yes, and I have at the end of my statement some charts that we have submitted to the Council of the District of Columbia, and appear also in the annual reports, which are submitted to Congress.

Mr. FAUNTROY. Yes.

Judge ROGERS. Yet, and this point must be emphasized, while the judges continue to maintain high standards in resolving appeals, the statistics also show that the judges have become more efficient, disposing of more cases in less time.

This appellate efficiency has not been achieved without cost. Over the 18 years of its existence, the court of appeals has disposed of an increasing number of summary calendar cases and a decreasing number of regular calendar cases. For those of you who may not be familiar with the courts' organization, summary calendar cases are those cases which involve applying new facts to settled law. They are screen early on, once the brief is filed, and a determination is made that this case can be readily disposed of, and should not be subjected to full appellate treatment. The regular calendar cases are those cases which involve difficult questions of either applying facts to settled law, or, seeking the court to declare and clarify law. Those are the difficult cases that go through the full appellate process that we all anticipate, namely, full briefly, full oral argument, and a published opinion. In addition, the court seldom sits en banc, that is, all nine judges seldom sit together, even though, for all practical purposes, its decision in a case is the final decision. That is, while the parties have the right to petition the United States Supreme Court for review on a petition of certiorari, it is very unlikely that the Supreme Court is going to grant

cert in a local case. It is also more and more difficult for litigants who have been through State court systems to move over and relitigate matters in the Federal court system. So, that is why I say that, for all practical purposes, a decision of the court of appeals is the final decision. The jurisprudential role is, therefore, as the Douglas report decried, relegated to a majority in panels of three judges rather than the full court. That is, we regularly sit in three-judge panels in hearing all cases. A losing party has the right to request that the court sit en banc.

According to the "ABA Standards Relating to Court Organization," an appellate system should perform two basic functions:

1. To review trial court proceedings to determine whether they have been conducted according to the law and applicable procedure; and

2. To formulate and develop rules of law that are within the competence of the judicial branch to announce and interpret. And, that is the distinction our court has tried to make between the summary calendar case and the regular calendar case. When workload makes impossible the performance of both functions by the highest court in a jurisdiction, and improvements in efficiency and operations cannot be achieved without diluting the appellate functions, the ABA concludes that the appropriate solution is the formation of an intermediate appellate court.

iv. Twenty years ago the State court systems were like ours is today. However, the majority of States have restructured their appellate courts. Thirty-eight States have established intermediate courts of appeal; more are planning to do so. What this means is that the intermediate appellate court handles the cases involving new facts applied to settled law, the error review function, the jurisprudential function is handled by the highest court, and, normally, it is a discretionary review with the highest court. Results in other jurisdictions demonstrate that where intermediate courts of appeals exist, more error review cases are decided without sacrificing the jurisprudential function of the highest appellate court. More cases are decided in less time than would be true without an intermediate appellate court.

In 1986 the National Center for State Courts studied the District of Columbia Court of Appeals, and concluded that serious consideration should be given to the establishment of an intermediate appellate court. It proposed a high court of seven judges who would always sit en banc and an intermediate court of appeals of nine judges who would sit in panels of three. Appeal to the highest court would be discretionary with that court. To avoid delay, a single clerk's office would serve both appellate courts. As briefs were filed the clerk would route them to the appropriate court and, thus, avoid unnecessary delay when it is clear that the highest court will want to hear the case. This "pass through" procedure allows the highest court to consider cases expeditiously and more judges would be focusing on the initial appeal.

Other suggestions for reducing delay and congestion on appeal will not meet the need. Adding judges to the current court of appeals will simply exacerbate the present congestion and delay without separating the responsibility for jurisprudential and error review decisionmaking. As we exist now, when a three-judge panel

decides a case, that decision is binding on the rest of the court, unless the court sits en banc. Consequently, every judge has to keep abreast of what the other panels are doing. That is why I suggest to you that simply adding more judges, number one, we would just delay further the ability to decide the cases we have, and, second, sitting en banc after a certain number of judges becomes unmanageable, as is clear as to what has happened in the Federal circuits. The retired judges currently assist the court but cannot provide the needed judicial personpower. Criminal cases involve approximately 60 percent of our workload, but I know of no jurisdiction that is taking away the right to appeal in criminal cases in order to reduce appellate workload. Similarly, I know of no jurisdiction that is taking away the right to appeal in juvenile delinquency, domestic relations and other cases involving families. Denying appeals in agency cases would do little to solve the problem since these cases account for only 8 percent of the courts' workload. Moreover, a number of these appeals involve pro se litigants who have been denied, for example, unemployment compensation and want their day in court; even when the court affirms an agency's adverse decision, the litigants are often satisfied precisely because their grievance has been given serious consideration by the court.

In April 1988, a subcommittee of the House District Committee held hearings on a bill to establish an intermediate court of appeals. Then Chief Judge William C. Pryor testified in favor of the establishment of an intermediate court, as did the chairperson of the D.C. Council Committee on the Judiciary, Hon. Wilhelmina Rolark. Also testifying in support of an intermediate court was the Bar Association of the District of Columbia, the Washington Bar Association, and Charles A. Horsky, who had chaired the committee that had evaluated the court system after 10 years. Mr. Horsky concluded that, in view of the intolerable delay on appeal, to rectify "the fundamental problem of a highest court of a jurisdiction not sitting en banc, a supreme court of the District of Columbia and an intermediate appellate court, with appropriate allocation of jurisdiction to each court, now appear to me to be the most satisfactory alternative to the present system."

v. The District of Columbia is a unique phenomenon in our federalist system. Congress has struck a balance between the Federal and local interests and the court system has achieved the results that were sought by the court reform legislation of 1970. While the courts are not the ultimate solution to the problems facing our community, they are the part of our system of justice that is designed to assure that in solving local problems we do not forego the larger values on which our Nation was founded.

Now, when this community is beset by the twin plagues of drugs and violence, there are calls to increase the number of police officers and prosecutors and trial judges, and to increase the penalties of certain offenses. These are worthy calls. Little public outcry is heard, however, to protect justice on appeal. The need for an intermediate court of appeals was documented by the District of Columbia Bar 10 years ago, long before the current surge of drug cases coming into the courts. The need was documented again 3 years ago by the National Center for State Courts. What is required is prompt enactment of legislation to establish an intermediate court

in the District of Columbia. The significance of what is at stake demands no less.

Thank you, Mr. Chairman. Let me mention, I have included one other page of statistics, so that you can see not only the filings set forth separately, but the dispositions. You will see that over time there has been a continuing increase, although from year to year you will see ups and downs, and some of those surges are directly attributable to things like demonstration cases, where mass arrests are made, and there are a lot of appeals, and then you will see a drop off in the statistics.

But, I think the important thing is to look at the overall line, in which direction it is going, and that is why I provided statistics to show you the courts' workload from the beginning, in terms of when the court was first created, to the point where we are now.

I think it would be appropriate for me to let Judge Ugast talk about the local court and address some of the other concerns I know that the committee and the mission team have.

Thank you very much.

[The prepared statement of Judge Rogers with attachments follows.]

STATEMENT OF THE HONORABLE JUDITH W. ROGERS
CHIEF JUDGE OF THE DISTRICT OF COLUMBIA COURT OF APPEALS
to
Congressman Fauntroy and the Mission Team for the D.C. Courts
April 22, 1989

I welcome this opportunity to share some thoughts about the District of Columbia Courts. Established in their current configuration in 1970, Congress responded to the accumulated recommendations of many commissions and groups to upgrade the local courts in order to remedy shortcomings in the justice system.[1]

I.

The present District of Columbia court system was created by Congress as part of the District of Columbia Court Reform and Criminal Procedure Act of 1970. It transferred jurisdiction over criminal prosecutions and civil proceedings from the federal courts to a new District of Columbia Court system. Prior to the Court Reform Act the District of Columbia courts had very limited jurisdiction. For example, the D.C. Court of General Sessions had jurisdiction over civil matters involving less than $10,000. Its criminal jurisidiction was limited to trials involving misdemeanors and to hearings on probable cause in felony cases. Domestic relations were handled separately as were proceedings involving juvenile delinquency, neglected children and child support and paternity cases.

There also was a D.C. Court of Municipal Appeals. Six judges heard appeals from the five trial courts of limited jurisdiction. Petitions for review of decisions of the Municipal Court of Appeals could be taken to the federal appellate court, the U.S. Court of Appeals for the District of Columbia Ciruit. From there appeals were to the United States Supreme Court.

The Attorney General of the United States in 1972 described the old system as

> unacceptable in principle and unworkable in practice. It was unacceptable in principle because a local judicial system deprived of all meaningful jurisdiction

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[1] Mitchell, Introduction to Symposium on the Modernization of Justice in the District of Columbia, 20 Am.L.Rev. (Nos. 2 & 3, December 1970 - March 1971) xiv.

was inconsistent with developments toward self-government. It was unworkable in practice because the backlogs and delays which characterized the trial of felony cases in the U.S. District Court were rendering the system largely ineffectual.[2]

Viewed as a model paralleling the judicial systems in the 50 states,[3] the Attorney General described the D. C. Court Reform Act as representing "a fundamental improvement in judicial administration" the inefficiencies and inadequacies of a multiplicity of local courts having been eliminated, and "[e]very attempt ha[ving] been made in this legislation to . . . . to give real power and stature to the local courts."[4] Strengthened further by Congress in the enactment of the D.C. Self-Government and Govermental Reorganization Act, P.L. 93-198, the court system provided after 1973 for the judges for the local courts to be selected by means of a Nomination Commission that included local government representation.

II.

Ten years after the Court Reform Act the District of Columbia Bar evaluated the District's court system. The report of the committee chaired by Charles A. Horsky focused on the courts before and after Court Reform with particular emphasis on "[t]he efficiency and effectiveness with which the courts of the District of Columbia schedule and dispose of matters brought before them . . . ."[5] Its mission was also to recommend further improvements in the court system.[6] Running over 1,000 pages, the Horsky Report detailed a variety of internal improvements for the various divisions of the Superior Court and the Court of Appeals. Both courts undertook to implement the recommendations.

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[2] Mitchell, supra, at xiv-xv.

[3] Mitchell, supra, at xv,xvii.

[4] Mitchell, supra, at xv.

[5] Horsky, Preface to Report of the District of Columbia Court System Study Committee of the District of Columbia Bar, March 1982, prepared for the Senate Subcommittee on Governmental Efficiency and the District of Columbia, 98th Cong.,1st Sess, S.Pnt. 98-34 (April 1983) vii (Horsky Report).

[6] Horsky Report at vi.

The Horsky Committee reached no conclusion on whether or not the 44 judges authorized for the trial court provided sufficient trial judicial manpower. In recognition of the substantial backlog of cases in the appellate court, the Committee recommended that three additional appellate judges be appointed for a temporary period,[7] but this never happened.

The report of a second Bar committee, chaired by John W. Douglas, addressed the workload of the Court of Appeals. It recommended the establishment of an intermediate court of appeals.[8] The Douglas Report concluded that "resolution of virtually all of its cases by majority vote of three-judge panels [is] an altogether unacceptable modus operandi for a jurisdiction's highest court."[9] The committee further concluded that "the Court's 15.5 months average delay from notice of appeal to decision is far too long, [being] roughly three times longer than that contemplated by the ABA Appellate Standards."[10]

To assess what has happened to the courts of the District of Columbia, it is important to recognize what else was going on. During the 1960's and 1970's Congress enacted the legislative programs of the Great Society with the result that the states and the District of Columbia were required to conform to new federal laws and regulations and to promulgate local regulations to carry out federal laws. The federal laws and local regulations created new rights and remedies, which, in turn, spawned new litigation in the local and federal courts. In addition, with the enactment of the Home Rule Act, the new local government, beginning in January 2, 1975, enacted many new laws, thus creating new rights and remedies which also affected the workload of the courts.

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[7] Horsky Report at vii-viii.

[8] District of Columbia Court of Appeals: Workload Problems and Possible Solutions, Final Report of the Subcommittee on the Workload of the District of Columbia Court of Appeals, District of Columbia Judicial Planning Committee, August 1979 (Douglas Report).

[9] Id. at 140.

[10] Id.

III.

With this background we reach the point where the Washington Post editorializes that "The Courts Can't Cope."[1] The Court Reform Act created a unitary trial court and an appellate court as the highest court in the District of Columbia. Then Congress and the Council of the District of Columbia enacted many laws giving rise to new rights and remedies. Crime, as a result of whatever cause, continued to rise, and criminal prosecutions became the major portion of the courts' workload. Drugs and violence have exacerbated all of these trends.

To respond to these changing circumstances, Congress, in the mid 1980's, authorized the appointment of seven additional trial judges for the Superior Court. It also authorized the appointment of hearing commissioners. There are now 51 trial judges and 15 hearing commmissioners handling matters in the Superior Court.

No such personnel increases occurred in the Court of Appeals, however. It has remained throughout its existence a court of nine judges. Faced with increasing caseloads, the court implemented a number of management changes to improve the effectiveness and efficiency of its operations. For instance, a summary calendar was established. This was principally in response to the increasing number of criminal appeals, resulting partially from amendments to the Criminal Justice Act making counsel available to indigent defendants. Thus, cases which presented no new question of law and asserted errors that could be easily disposed of would result, oftentimes without oral argument, in a memorandum of opinion and judgment rather than a published opinion.

A variety of other actions were taken by the courts to deal with the increasing volume of cases. Computers were installed in the clerks' offices to expedite the handling of pleadings and to facilitate scheduling. Word processors were installed in judges'

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[1] "The Courts Can't Cope," Washington Post, March 23, 1989, editorial page, lead editorial.

chambers. Court rules were revised and new procedures were instituted to enhance the courts' ability to handle more cases. Settlement efforts were expanded. Various managment improvements continue to be implemented.

Nevertheless, while the District of Columbia courts are coping, they are able to do so only at substantial costs to the justice system. For example, to respond to the rise in crime and the drug epidemic, the chief judge of the Superior Court has assigned 23 of the 51 judges to hear criminal cases. Consequently, civil matters and family proceedings face extended delays before coming to trial. Settlement and alternative dispute resolution mechanisms assist in disposing of some of these cases, but there remains a large number which require judicial attention. Maintaining the civil and family calendars even at this level is possible only by using retired judges more than they or the courts, and probably the community, ever contemplated.

All of these trends are evident at the appellate level as well. The statistics for the Court of Appeals show that the filings on appeal increased far beyond what had been anticipated at the time of the Horsky Committee Report.[12] Between 1976 and 1986, appellate filings increased by approximately 34 percent. See Chart 1. Significantly, the larger increases in appeals occurred in civil and agency cases rather than criminal cases.[13] The National Center for State Courts found that the caseload of the D.C. Court of Appeals, when compared to other state appellate courts is, based on 1986 statistics, "higher by far than any other court of last resort not having an intermediate appellate court."[14]

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[12] Testimony of Charles A. Horsky, Esq., before the House Subcommittee on the Judiciary, April 28, 1988, on H.R. 4366.

[13] Appellate Delay in the D.C. Court of Appeals, District of Columbia Delay Reduction Project, Southeastern Regional Office, National Center for State Courts, Volume 1 (July 1986) 9. (NCSC).

[14] NCSC at 12.

The inevitable result, efficiency notwithstanding, was greater delay on appeal: the average time a case is pending on appeal is now up to 22 months even with the assistance of retired judges. This is almost double what it was when the Douglas Committee recommended 10 years ago that an intermediate appellate court be established.[15] See Chart 2. Yet, and this point must be emphasized, while the judges continue to maintain high standards in resolving appeals, the statistics also show that the judges have become more efficient, disposing of more cases in less time.[16] See Chart 3.

This appellate efficiency has not been achieved without cost. Over the eighteen years of its existence, the Court of Appeals has disposed of an increasing number of summary calendar cases and a decreasing number of regular calendar cases. In addition, the court seldom sits en banc even though, for all practical purposes, its decision in a case is the final decision. The jurisprudential role is, as the Douglas Report decried, relegated to a majority in panels of three judges rather than the full court.

According to the ABA Standards Relating to Court Organization, an appellate system should perform two basic functions:

> 1. To review trial court proceedings to determine whether they have been conducted according to the law and applicable procedure; and
>
> 2. To formulate and develop rules of law that are within the competence of the judicial branch to announce and interpret.[17]

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[15] Section 3.52 (b) of the A.B.A. Standards Relating to Appellate Delay Reduction, Appellate Judges Conference, Lawyers Conference Task Force on the Reducation of Litigation Costs and Delay (approved by ABA House of Delegates February 1988), provides in part:

> Compliance with the time standards enunciated for [administrative, lawyer and judicial functions] should allow intermediate appellate courts and the state's highest court to issue an opinion on an appeal within 280 days of the filing of the notice of appeal.

[16] NCSC at 19 (Table 9).

[17] NCSC at 28 quoting ABA Standards Relating to Court Organization at pages 32-33.

When workload makes impossible the performance of both functions by the highest court in a jurisdiction, and improvements in efficiency in operations cannot be achieved without diluting the appellate functions, the ABA concludes that the appropriate solution is the formation of an intermediate appellate court.[18]

IV.

Twenty years ago the state court systems were like ours is now. Today, the majority of states have restructured their appellate courts. Thirty-eight (38) states have established intermediate courts of appeal; more are planning to do so. What this means is that the intermediate court handles the cases involving new facts applied to settled law, the error review function of the appellate court; the highest court handles the cases that involve new questions of law, the jurisprudential function. Results in other jurisdictions demonstrate that where intermediate courts of appeals exist, more error review cases are decided without sacrificing the jurisprudential function of the highest appellate court. More cases are decided in less time than would be true without an intermediate appellate court.

In 1986 the National Center for State Courts studied the District of Columbia Court of Appeals, and concluded that serious consideration should be given to the establishment of an intermediate appellate court.[19] It proposed a high court of seven judges who would always sit en banc and an intermediate court of appeals of nine judges who would sit in panels of three. Appeal to the highest court would be discretionary with that court. To avoid delay, a single clerk's office would serve both appellate courts. As briefs were filed the clerk would route them to the appropriate court and, thus, avoid unnecesary delay when it is clear the highest court will want to hear a case. This "pass through" procedure allows the highest court to

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[18] NCSC at 28-29 quoting ABA commentary on its Standards Relating to Court Organization.

[19] NCSC at 3.

consider cases expeditiously and more judges would be focusing on the initial appeal.

Other suggestions for reducing appellate delay and congestion will not meet the need. Adding judges to the current court of appeals will exacerbate the present congestion and delay without separating the responsibility for jurisprudential and error review decision making. The retired judges currently assist the court but cannot provide the needed judicial personpower. Criminal cases involve approproximately 65 percent of our workload,[20] but I know of no jurisdiction that is taking away the right to appeal in criminal cases in order to reduce appellate workload. Similarly, I know of no jurisdiction that is taking away the right to appeal in juvenile delinquency, domestic relations and other cases involving families. Denying appeals in agency cases would do little to solve the problem since these cases account for only 8 percent of our workload.[21] Moreover, a number of these appeals involve pro se litigants who have been denied unemployment compensation and want their day in court; even when the court affirms the agency's adverse decision, the litigants often are satisfied precisely because their grievance has been given serious consideration by the court.[22]

In April 1988, a Subcommittee of the House Committee on the District of Columbia held hearings on a bill to establish an intermediate court of appeals. Then Chief Judge William C. Pryor testified in favor of the establishment of an intermediate court of appeals, as did the Chairperson of the D.C. Council Committee on the Judiciary, the Honorable Wilhelmina Rolark. Also testifying in support of an intermediate appellate court was the Bar Association of the District of Columbia, the Washington Bar Association, and Charles A. Horsky, who had chaired the Bar

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[20] NCSC at 24.

[21] Id.

[22] Remarks of Michael Milwee, Esq., counsel for the D.C. Department of Employment Services, at D.C. Courts Judicial Training Cconference in 1987.

Committee that evaluated Court Reform after ten years. Mr. Horksy concluded that, in view of the "intolerable" delay on appeal, to rectify "the fundamental problem of a highest court of a jurisdiction not sitting in banc, ... a Supreme Court of the District and an intermediate appellate court, with appropriate allocation of jurisdiction to each court, now appear to me to be the most satisfactory alternative to the present system."[23]

V.

The District of Columbia is unique in our federalist system. Congress has struck a balance between the federal and local interests and the court system has achieved the results that were sought by the court reform legislation of 1970. While the courts are not the ultimate solution to the problems facing our community, they are the part of our system of justice that is designed to assure that in solving local problems we do not forego the larger values on which our nation was founded.

Now, when this community is is beset by the twin plagues of drugs and violence, there are calls to increase the number of police officers and prosecutors and trial judges, and to increase the penalties for certain offenses. These are worthy calls. Little public outcry is heard, however, to protect justice on appeal. The need for an intermediate appellate court was documented by the District of Columbia Bar ten years ago, long before the current surge of drug cases coming into the courts. The need was documented again three years ago by the National Center for State Courts. What is required is prompt enactment of legislation to establish an intermediate appellate court in the District of Columbia. The significance of what is at stake demands no less.

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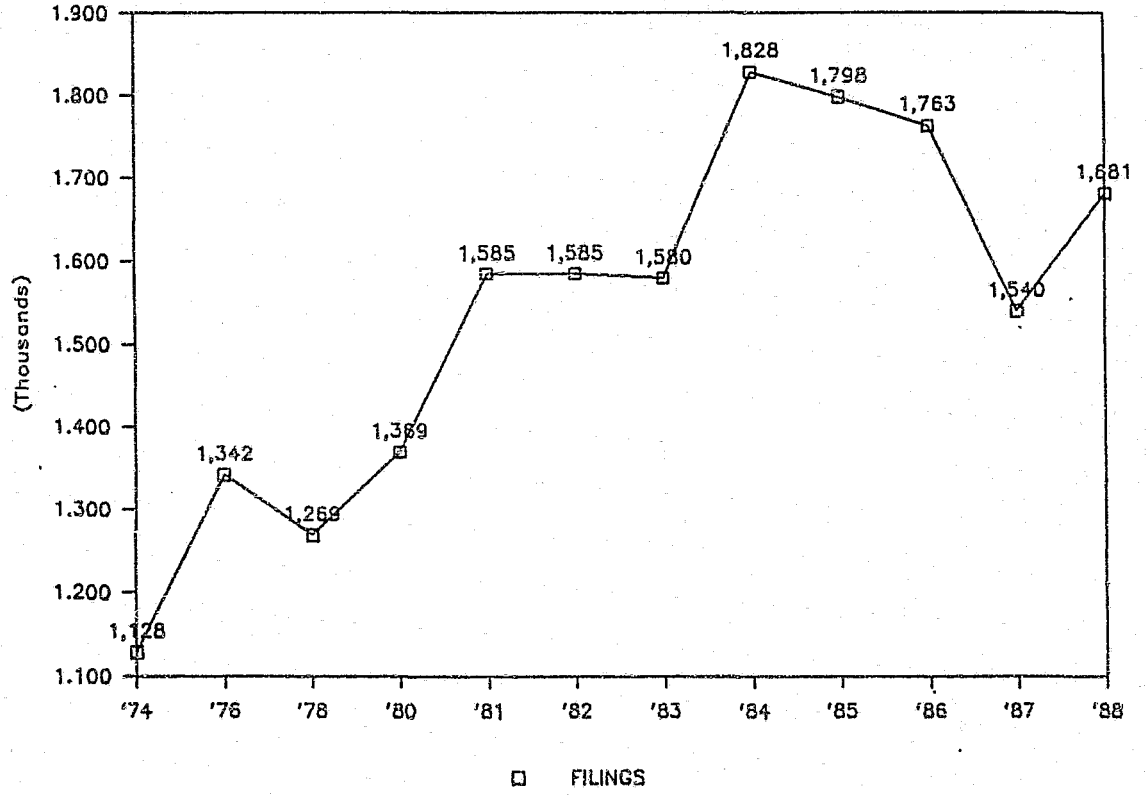
[23] Horsky, supra note 12, at 3.

Chart 1

DISTRICT OF COLUMBIA COURT OF APPEALS

FILINGS 1974 – 1988



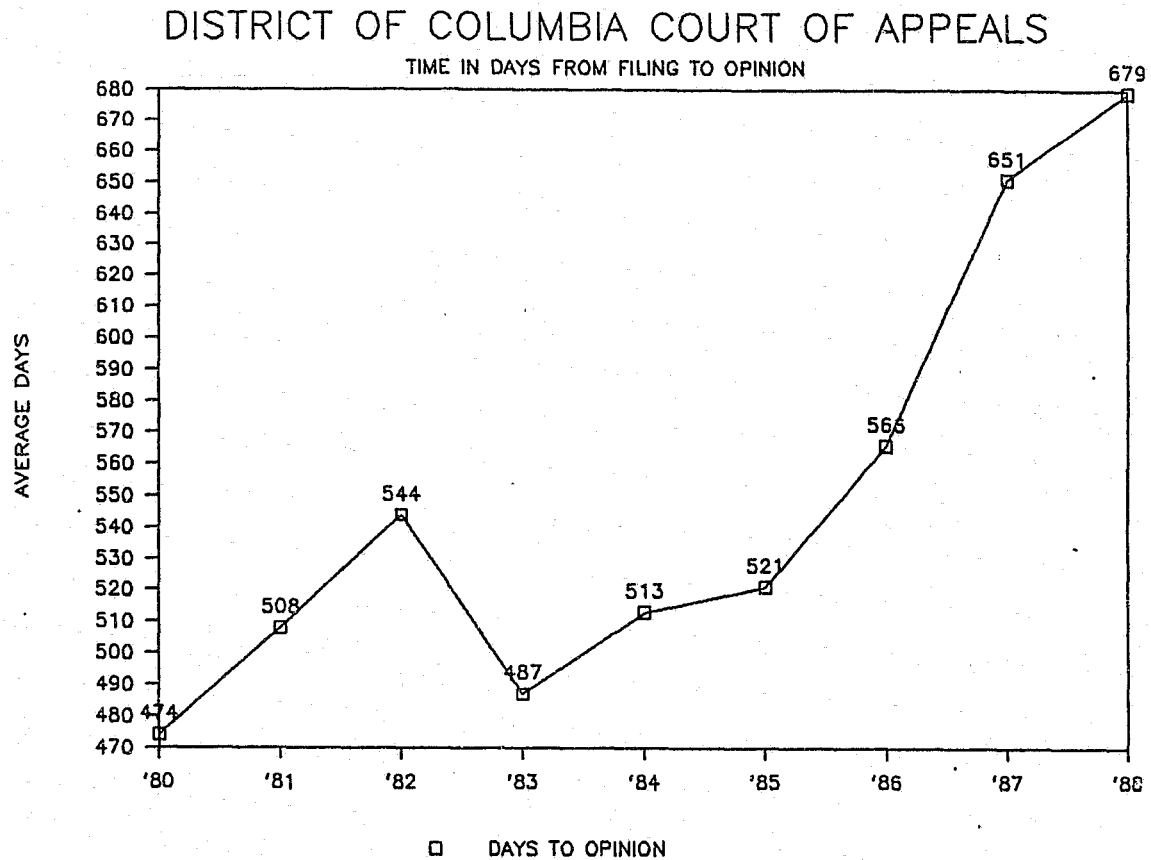

DISTRICT OF COLUMBIA COURT OF APPEALS
TIME IN DAYS FROM FILING TO OPINION
AVERAGE DAYS
680
670
660
650
640
630
620
610
600
590
580
570
560
550
540
530
520
510
500
490
480
470
474
508
544
487
513
521
565
651
679
'80
'81
'82
'83
'84
'85
'86
'87
'88
DAYS TO OPINION

Chart 2

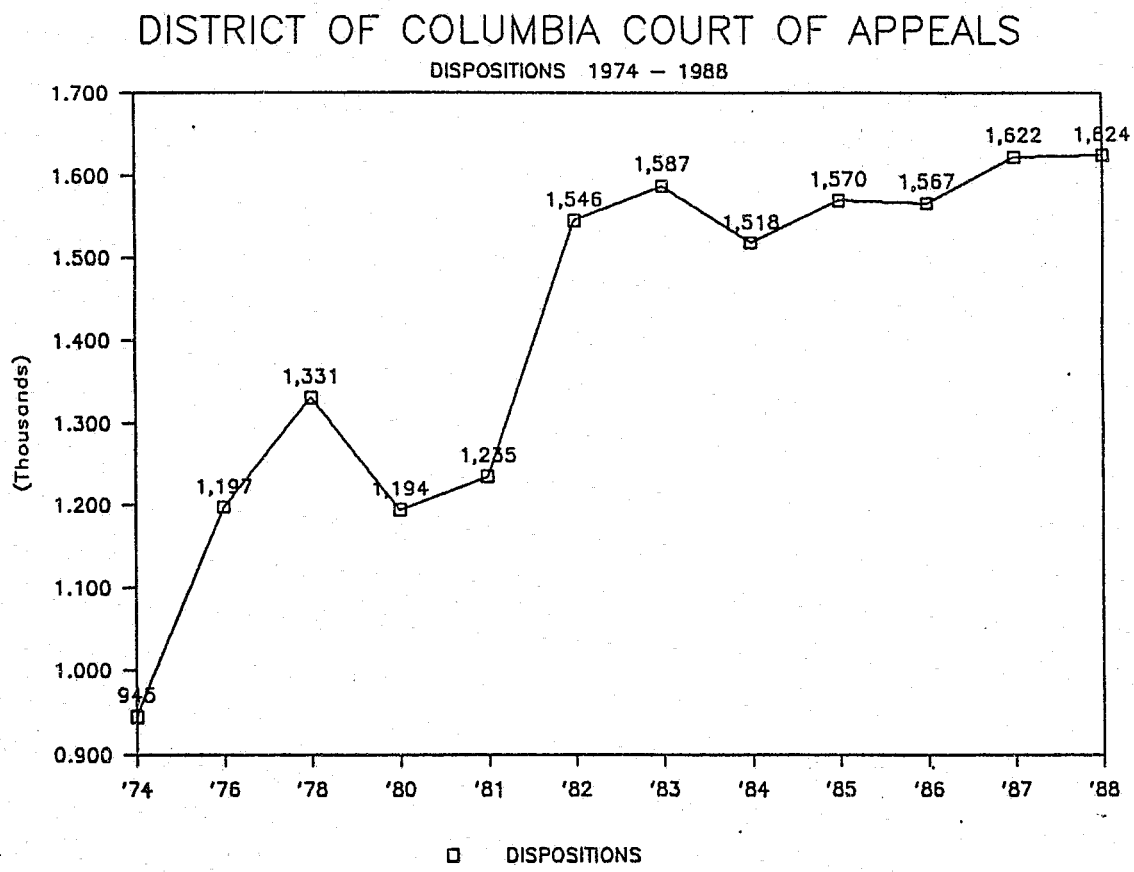

DISTRICT OF COLUMBIA COURT OF APPEALS
DISPOSITIONS 1974 – 1988
(Thousands)
1.700
1.600
1.500
1.400
1.300
1.200
1.100
1.000
0.900
945
1,197
1,331
1,194
1,235
1,546
1,587
1,518
1,570
1,567
1,622
1,624
'74
'76
'78
'80
'81
'82
'83
'84
'85
'86
'87
'88
DISPOSITIONS

Chart 3

Mr. FAUNTROY. We thank you, and look forward to dialogue with you following Judge Ugast's statement.

Judge Ugast, it is a real pleasure to have you, and I appreciate so much the preparation that both of you have given for this hearing. We look forward to your presenting it.

TESTIMONY OF CHIEF JUDGE FRED B. UGAST, SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Judge UGAST. Thank you, Congressman, and members of the mission team.

As Chief Judge Rogers has indicated, a great deal, I believe, has occurred since the reorganization of the District of Columbia courts over the period 1970 to 1972. I think great progress has been made despite, over the course of those years in varying degrees, fiscal and judicial resource constraints have played a major part. I think it's important also to note that the legislative history of the Court Reorganization Act revealed that an agreed upon need for 51 superior court judges was indicated at that time, and, yet, only 44 were authorized, 37 in 1971, and seven more in 1972. It took almost 15 years, I guess, for seven additional judges to be authorized in November 1984. Of course, by that time, the needs of the trial court were much, much greater than they were in 1970.

The achievements of my predecessors, former Chief Judge Green and former Chief Judge Moltrey, I think, are enormous and speak for themselves over the years that they've led the court, and, hopefully, I've contributed some further innovations and improvements.

Chief Judge Green was responsible in the infancy of the court for developing the court, getting it set up, getting facilities. We had 17 courtrooms over in the old Pension Building when we started, first in the Potomac Building and then over there, developing rules for everyone of the divisions of the court, and some of you may have been involved at that time in the development of all those rules and procedures, and bringing the court along so that it had both credibility and the reputation as the trial court for the city. Then Judge Moltrey, in 1978, led the court in the years as it began to mature and take on its own meaning and reputation throughout the Nation, as I find going around, as a well-thought-of, well-run, big-city urban court, not without problems, but a model in many, many ways.

So, I look upon my role as of the last 3 years, as at a period when we are seeking to fine tune and refine much of what has gone before us, having to make some modifications and changes to meet changing times and very heavy caseloads. More particularly at this particular time in the last few years, of the drug epidemic in our city, is driving the criminal justice system, and since we are a unified court, it has impact on every division of the court.

I want to mention a few of these innovations and modifications and accomplishments, but let me just set the stage a bit by, as background, noting how the trial court looks at this time. As I say, we are a totally unified court. We are the only trial court in the city responsible for the resolution and trial of local matters. We have 51 active judges authorized. We have 15 retired judges who have been certified to sit when they are available, and I can call

them back. We have 14 hearing commissioners, and we have a mental health commissioner.

We are composed of five litigating divisions, the civil, criminal, family, probate and tax. Our judges rotate their assignments from one division to the other.

Judge Moltrey began, first established a presiding judge for each of the divisions, and I determined, because of the increase in the complexity of the day-to-day operation that we would have both a presiding judge and a deputy presiding judge responsible for the day-to-day operations of each division. The divisions have monthly meetings, and work throughout the year in terms of considering both case management, as well as substantive problems confronting that particular division, and the judges sitting in those various assignments.

I extended the rotation for 1 year. When I first came on the court in 1973, we sat 1 month at a time in a division, and so, we really moved. Then, Judge Moltrey changed it to 3 months, and I decided that with other changes we were making that 1 year in a division gave some continuity, both to the judges and their familiarity with the various procedures of that division, and assisted in the disposition of cases, which I think has been well received, both by the judges and the bar.

Some of the other aspects of those accomplishments over the years, just in general, and then I'll be a little more specific, if I may. We have had case-delay reduction programs, as well as a study made in 1978; a weighted caseload study; enhanced data processing systems throughout the court; documentation of operating procedures and issuance of manuals; a superior court benchbook; a court reporting benchbook and rules; automated docketing; a courtroom availability system, as you get bigger and the numbers of judges you are dealing with, it becomes much more complicated in terms of just trying to make available courtroom space for all the judges that are sitting. As I say, the hearing commissioners were made permanent, the authorization of hearing commissioners, other than in the family division, were made permanent in 1986, and we, particularly, at that time were seeking authorization to use the hearing commissioners in the criminal division and for family matters. Our alternative dispute resolution programs have been nationally acclaimed, and then our improved jury management, which was mentioned in the opening statement, resulted in our establishing the "One Trial/1 Day" jury system a year ago.

Now, as to today's special problems, we've analyzed our current needs and the additional requirements, in particular, in relation, at this particular moment in time, with the federally supported effort with respect to drugs and drug violence. We made a report to the Mayor, as well as a report to Doctor Bennett, which reflect our preliminary estimates of the impact of this effort to address this critical problem in our city. I have taken the position in appearances before the Senate committee and in speaking with others that the court, as an integral part of the criminal justice system, and has its role, but it's very important that the criminal justice system be viewed as a unified system, and an integrated system, and that what the court does, and what the court attempts to do in terms of modifications, or assignment of judges, or the utilization of the

three sources, must be—is affected by and must be coordinated with the approach that's taken by the law enforcement authorities, the strategies that they deem appropriate, the type of arrests, the type of charges and the prosecutors' policies in terms of what type of charges and what type of cases will be focused on.

It is in that posture that I testified briefly before Senator Harkin, and Congressman Fauntroy was present, and I am scheduled to appear, I believe, on May 11 before your subcommittee to further indicate how we see our needs in the event the 700 police officers are authorized for the city.

But, our court's needs transcend the drug problems, and we are here today, I think, talking in a larger context. Obviously, we have to deal with the short term and the immediate needs and the immediate crisis, but the court's needs do transcend the drug problem. As I say, all divisions are affected in however we approach any of the problems of the court, including the critical problem today. We are not now able to consistently meet national trial delay standards for any of the divisions of the courts, and in order to achieve those standards we do need to add resources to our civil and family divisions, and as Chief Judge Rogers has reported, with respect to the need for the intermediate appellate court.

Those delays aren't outrageous, but they are not ideal, and they are not what we want. They compare favorably with some places in the Nation, and not so favorably with others, but they are not what we want, and not what we feel ultimately we want to achieve.

Let me just briefly mention, just give you a quick thumbnail sketch of the divisional setups, and I think in that fashion you'll get a feel for the operational approach that we've taken. Starting with the criminal division, the number and complexity of the criminal cases continues to increase, and is affected, obviously, by the drug epidemic, which isn't just the last few months. It goes back to, I'd say, 1982, really, and has gradually been escalating. The violence that has gone along with it in the last year has brought it so that it's vivid, and our community is outraged, scared, and frustrated. But, it's not something that has just happened.

We started our drug testing in the court in 1984, and at that time, we brought to light certain trends that, really, hadn't been looked at in terms of what the drug use of preference was at that time, although, our purpose was solely to assist the commissioners and the judges in the setting of conditions of release.

But, in the criminal division, as Chief Judge Rogers indicated, I have almost half the judges sitting in that division, and that's been a gradual change of adjusting, and "robbing Peter to pay Paul," or trying to get senior judges to try to meet the need that I see in terms of the filings. So, we have 23 judges, active judges, I have three senior judges sitting, who have sat throughout this year of assignment in the criminal division, and I have five hearing commissioners sitting in the criminal division.

What that means is that, we have—well, let me just say, as you indicated in the opening statement, we had 9,700 felony indictments. Sixty-two percent of those felony indictments last year involved drug charges. We have 16 felony calendars, six misdemeanor jury calendars, one misdemeanor nonjury calendar, and one trial, traffic and D.C. calendar, plus, the arraignment presentment

court, and the preliminary hearing court and the traffic calendar control court. That is the operation in the criminal division.

Now, over the last few years, changes we've had to make is, how many misdemeanor calendars. I reduced the misdemeanor jury calendar by one a year or so ago, because the misdemeanor charges were going down and the felony charges were going up, as part of the prosecutorial policy and the type of arrests that were being made.

We established a nonjury calendar alone, rather than have the nonjury cases, as some of you will recall, included under the misdemeanor jury calendars, and they were being tried when they could be worked in. We find it's much more efficient, those nonjury cases ought to be tried within 30 days, so we established a nonjury calendar.

We've established at this time an accelerated felony—two accelerated felony calendars—to meet the need of an individual who has extensive criminal records, the career criminal type of individual, the pretrial detention case, the cases that needed to, obviously, be on a very fast track, so we have two of those kind of calendars.

Those are the kind of modifications we do with changing times and with changing filings.

We have a meeting once a month, or every 6 weeks or so, with most of the law enforcement authorities, individuals, whether the Park Police, the Capital Police, the public defender's service, the U.S. attorney's office, all of the organizations, it's a large meeting, but we try to have that every 6 weeks or so, every 2 months, so that everyone involved in the system is kept aware of any problems that are coming up in terms of procedure, and that type of—and the calendars, that type of thing.

I was instrumental in reestablishing what, apparently, had been done many, many years ago, but hadn't been done in a long time, of bringing together the regional chief judges in our area, the presiding judges, Judge Mitchell from Rockville, Judge McAuliffe from Prince Georges County, Judge Griffith from Fairfax, and Judge Kent from Alexandria, and I believe a new chief judge over in Arlington. So, we have met three times over the past 3 years, and, in fact, there's plans being made for a regional conference of the judges of the region with respect to drugs, and I believe at this point it's January that they are talking about.

So, it's a dynamic operation. It's something that has to be flexible enough to be fashioned to the needs of the moment, but it also is important that any change, any modification, any shifting of resources, affects civil, affects family, and that is important.

On the family division side, and that court handles the juvenile cases, juvenile delinquency cases, the divorce cases, the neglect cases, mental health, child support, paternity, very broad based, very emotional, very important issues to the community and the lives of many, many people. It's a difficult division and the assignment is difficult.

Well, in this year, the juvenile petitions arose to 5,400 petitions. That's a substantial rise, and that has also involved young people, youngsters, with a number of drug charges. I believe somewhere near 33 to 35 percent of the youngsters arrested were tested posi-

tive for drug use last year, in the neighborhood, I think, of 33 percent. I saw some drop, I think it was 29 percent most recently.

But, what's terribly distressing, the age has dropped, age 13 the last statistics I got for a month ago. I believe 21 percent of those were 13-year-old's, or of the 13-year-old's tested positive, and that is, of course, frightening, and a deep concern for all of us involved in the entire criminal justice system.

All right. This year, I was able to shift a judge over there with senior judges. We established individual calendars in the juvenile calendars and in the neglect calendar. Those juvenile calendars, those cases are being disposed of in 30 days, which does meet the standards around the Nation, both as to those incarcerated and those that are in the community. That has worked well.

We are hoping, we have established three calendars for the divorce cases, where there is a very large volume, and we are working toward—considering, if I don't have to take resources from the family division in October when the assignments change, to establishing those as true individual cases. We have three calendars that are operating with divorce cases, but only one as a true individual calendar.

The neglect calendar, Judge Alfred handled that calendar, who formed a corporation council this past 6 months, I believe he disposed of over 450 cases and had that many involved, which far exceeds any number we've ever had by at least double in disposing of those cases. But, that is a direct result, we believe, from what we see of what's happening in the drug field. So many of these youngsters that are coming into the system either involve families that are also involved in drugs, or families that do not wish—say we can't handle our children, that you'd ordinarily send home, we can't handle them. That accounts for why more of those youngsters are being detained, but it's also involved in the increased number of neglect cases we are seeing.

Child support is another area of deep concern to the city. We were probably the lowest in the Nation in our ability to assist and to develop child support and to our collections from the custodial parent. DHS deserves a great deal of credit, and Dr. Irma Neal, who was brought in here from Indianapolis, it involves coordination between DHS, the corporation counsel's office, and the court. It was at that point that—and then, Congress with the amendments that were made to the Social Security Act in, I believe, 1984, and then further in 1987, establishing—requiring this establishment of child support guidelines, a very controversial issue, and the States are all dealing with that issue. Here in the District, it was determined by the council that the court should develop the guidelines. We have taken on a great deal of responsibility in the court that previously had been either in DHS, or, as in some jurisdictions, are in the administrative agency. There has been a tremendous improvement in the collections in this area.

As a result, we have seven hearing commissioners assigned to child support initial hearings. That was provided for by the council in the implementing or complimenting legislation that was enacted after the Federal legislation.

So, those are just two of the areas, but we've seen tremendous improvement in what we are trying to do in the family division,

and more to come if I don't have to go over there and say to Judge Mencher, I've got to take a judge or two, or I have to go to Judge Gardener in the civil division and say, I've got to take a couple of judges, because the criminal division, come October, is going to be needing further resources.

Then, let me just kind of end up with the civil division, the division that I am looking at and hoping to do a great deal more with in terms of change, and you can only do so much at a time. Automation has been the big thing first in the civil division, it seems to me. We've just, since 1986, begun to get the civil division automated. That may sound like a long time, but the entire court, we were way ahead in the criminal division back in the early days, but using an older system that now needs to be changed over to a data base. Then with resource problems, some of the divisions never did get automated until fairly recently.

Small claims and landlord and tenant, this past year, were automated, are high-volume courts, and I think are proving to be very, very helpful. People now say, how did we do it manually. But, small claims, we have about, oh, 44,000 complaints a year with the reinstatements, and in the landlord and tenant, about 80,000 a year.

We have three individual calendars. The civil I calendars which we've had for a number of years as the complex type of cases, and then we have—what I'm hoping to do, as I say, is to look at the entire civil division with respect to evaluating its needs, its procedures, every aspect of it, with a particular goal of establishing individual calendars. Whether it's a mix, or totally unified individual calendars remains to be seen. But I established a task force just about 2 weeks ago, on April 12, chaired by Judge Paul Webber, the deputy presiding judge of the civil division, with six other judges, Judge Gardiner, ex officio, is the presiding judge, and I asked six members of the bar who are involved in a good deal of civil litigation, Mr. Jake Stein, Mr. Nate Speights, actually, Keith Waters, I believe, several members of the bar, Ms. Patricia Gern, people of that type of person who have some familiarity with the civil division, to sit with the judges and the internal task force, that has been working on this for several months, and, hopefully, to make recommendations to me as to changes that we can make, hopefully, establishing individual calendars, as well as the statutory calendars that I have to cover, including landlord and tenant, small claims, judge in chambers, motions court, that type of calendar.

Then, the probate and tax, we've begun automation there. We have a new register of wills, Ms. Connie Starks, and we have a new guardianship and conservatorship bill that will be effective October 1, which is going to make substantial changes in that area of the law. We are trying to gear up right now with rules, procedures and the hiring of additional staff to meet that legislation.

Then, just let me mention the social services division. It's a big division, almost 200, I believe, headed up by Al Schumann, which handles all probation. A number of innovative programs that had been established to deal with some of the issues that we have, in terms of individuals that are convicted of crimes, as well as some diversion, we have about 14,000 adults and juveniles under probation supervision at this time, about 9,700 adults and about 4,000

some juveniles, about 10,000 presentence investigation reports last year, very, very heavy load.

We have established a Intensive Probation Supervision Program for adults, which, with more resources, we're expanding, which means almost daily contact with the probationer, electronic monitoring at times, that type of thing. We have a new program, High Intensity Treatment Supervision Program, called HITS, that we're using with our juveniles in the same vain, and we're seeking to expand that with additional resources, all directed at the needs that we see happening at this time in our city, and with the individuals coming into the system.

I know I'm taking longer than I want to take, so let me just quickly indicate that our report to Mr. Bennett, and to the committee on May 11, will indicate, and has indicated the need for 10 more criminal judges and one juvenile judge, and supporting resources in the event the Metropolitan Police Department's authorized strength is increased by 700 officers, as well as present need for four additional judges in the civil division.

With that, of course, goes the need for facilities, and space, through foresight and planning at the court, both by my predecessors and some things we've done, we have a major capital expansion going on for the construction of 11 additional courtrooms and judicial chambers, which we hope will be completed by—certainly by year end, and with some luck maybe by early November.

We have made some modifications in moving things around the courthouse. Unfortunately, we had to ask the U.S. attorney and the corporation counsels to move, but they are adjacent to us and very close, but we have moved the entire criminal division operation down to the C level, those of you are familiar with the court, and when you come, we'll be happy to show you. We think by consolidating everything on the C level, the same level where the big major cell block is, and using the old court—what was courtroom 1, they've all been renumbered now, as the principal arraignment and presentment court, means we don't have to transport prisoners up and down elevators and things like that. Pretrial service, the Criminal Justice Act, the drug testing is all on that level on that side court, we think as the bugs shake out, we've only had it in force about 2 months, it's going to be a great deal of help.

Of course, the intermediate court of appeals would create the need for significant additional space.

Training, that's another thing I'm very proud of. We have done, to some extent over the years, but that I felt was so important that we tried to institutionalize, if I may use that term, training. We have a training day for all our judges just before the assignments change. All judges are required to spend that day in training, with respect—and, orientation may be a better word—with respect to the procedures, and problems and substantive issues in the division to which the judge is being assigned.

We have an annual training program, and then we have a training officer, I have a training committee, chaired by Judge Hamilton, of seven judges, and they are responsible for the overall training.

For the orientation of new judges, we have a 2-week orientation for every new judge when they are coming aboard, and then we

have established a non—for our staff, a Career Development Training Program once a month.

I'm very proud of those things, and I think they are beginning to pay off.

Now, just let me briefly mention the small claims court. I said there were about 44,000 filings, with a basic 2-week turnaround. Several years ago, we supported legislation to increase the jurisdictional limit from up to, I believe we suggested $2,500. The legislation has placed it at this point at $2,000.

At that time, we also thought it appropriate that the legislation permit administrative adjustment of that ceiling by the board of judges, and I would say to you at this time, from our analysis, we may well be reaching the point when a further increase in that jurisdictional limit is appropriate. Proceedings can be handled more expeditiously for the parties by the small claims procedures, and would take some of the burden off the civil division and the other type actions.

I would be considering requesting legislation to permit the superior court board to establish the jurisdictional limit. We have found, for example, that if the limit were raised to $2,500, about 1,200 cases would be included. If it went to $3,000, it would run, oh, probably closer to 3,000 cases might well be affected by that change.

Employee salaries is a concern. We have been affected by the cap on our employees' salaries because of the artificial limits of the Federal GS grades, and certain changes that were made are eliminated for the District, but have not been addressed for the courts, and we would address that with you more formally as well.

I know there's been mention, and Congressman Fauntroy mentioned to me last time I was there, about the idea or concept of a separate inferior trial court of limited jurisdiction, and I indicated at that point informally that it was my present feeling that would probably not be desirable, practical or cost effective. At least, that's my present feeling, and I think that's based on my feeling that we really want—we jealousy guard, I guess is the right way to say, the unified trial court concept that was designed for our courts with court reorganization.

You can argue for a long time about specialization, special courts, juvenile courts, domestic relation courts as well, but it seems to that administratively it has worked well and has given us a flexibility for the assignment of judicial and staff resources, as the need arises.

I am inclined to think that ought to be looked at very carefully, because, as I indicated to you, Congressman Fauntroy, on April 4, if our court were given the necessary resources, as I've indicated, for the civil division, and which would be required to establish a separate court of limited jurisdiction, we, I believe could accomplish our goal of timely disposition of cases. We could do it effectively and quickly, and give us greater flexibility.

Also, there was some mention about adjudicatory uniformity, and I know that was an issue that was raised and discussed. I, again, my inclination certainly at this time is that it would not serve any useful purpose to transfer any of the existing adjudicatory functions of the administrative agencies to the trial court.

I would note, however, that there has been previous discussion of certain types of superior court cases being handled by an administrative tribunal. But, in any event, I think at this point I would say that not enough information has really been made available, and, certainly, my knowledge of it, to evaluate the concerns that may be implied in such a suggestion.

Well, I was going to talk a little about administration of the court system, and how it has been satisfactory to date, and Judge Rogers and I each try to handle, to the best of our ability on a day-to-day basis, the operations of our individual courts. We have independent clerks, each of us, and we have the court executive, the executive officer, who coordinates the efforts of all the courts, both in planning and administrative support, and then the joint committee, which has operated over the years, which is formed of five judges of the two courts, I think has served the court, at least in the sense that system-wide decisions have been made, and with the interest of both courts considered.

In the event an intermediate court of appeals is established, of course, that will involve a change in the structure of the way the court is administered, including changes possibly, obviously, in the way the—in the makeup of the joint committee, or the role of the joint committee, as well as possibly the role of the court executive.

So, let me just end by saying that I think the court has come a long way. I'm proud to have been a member of that court for over 15 years now. I think we can reflect with pride upon our achievements, and we can draw upon a wealth of experience to provide the impetus for future growth and development.

There's much to be done. There are resource problems. We can always do things better, and we want to try to work toward refining the way we handle litigation, as well as other responsibilities in the court of an administrative nature.

We remain open to innovative solutions, and are willing to employ the concepts of modern management practice, and utilize the state-of-the-art technology to the extent that budget and human resources permit.

We're proud that the District of Columbia courts stand out as a leader among modern judicial systems, and that's, again, not to say there aren't plenty of things that we want to do and can do to improve, but we intend to persevere with dedication, to do all that we can to achieve the highest level of excellence for those of who serve the goal of justice, as well as the community to which we are dedicated.

I would just close by saying that, the recommendations we have made, in a general way today, and those that we've made to Doctor Bennett in connection with the specific needs that may be involved in the drive on the drug epidemic, with the increase of law enforcement, I think can only work to strengthen the quality of justice here in our city.

Thank you very much.

[The prepared statement of Judge Ugast follows:]

Statement of
Chief Judge Fred B. Ugast
Superior Court of the District of Columbia
Before
Congressman Walter E. Fauntroy
and the
Mission Team for the District of Columbia Courts

April 22, 1989

A great deal has occurred since the reorganization of the District of Columbia Courts in 1970-72 and great progress has been made despite fiscal and judicial resource constraints. It is important to note that the legislative history of the Court Reorganization Act reveals an agreed upon need for 51 Superior Court judges in 1970 and, yet, only 44 were authorized as a result of legislative compromise. It took almost 15 years to get those seven (7) additional Superior Court judges, and by then, the Court's need was far greater.

The quality of our judges and staff is unequalled. Our work in the uses of technology has been copied by courts across the nation. We have reviewed and re-reviewed our operations and made changes designed to improve the effectiveness of our organization and to "do more with less." Much has been done but far more remains to be done.

The achievements of my predecessors are enormous and, hopefully, I have contributed to further innovation and improvement.

Some of these innovations and accomplishments are: case delay reduction programs; a weighted caseload study; enhanced data processing systems throughout the Court; the documentation of operating procedures and issuance of manuals; a Superior Court Benchbook; a court reporting benchbook and rules; automated docketing; a courtroom availability system; designation of presiding and deputy presiding judges for the administration of the individual divisions; the appointment of hearing commissioners for criminal and family matters; Alternative Dispute Resolution programs including civil arbitration, mediation and settlement programs; improved jury management and the initiation of the "One Trial/One Day" jury system.

As to today's special problems, we have analyzed our current needs and the additional requirements of the District's federally supported war on drugs and drug violence. Our report to Mr. Bennett's Office of National Drug Control Policy reflects our preliminary estimate of the impact of this greatly needed effort to address this critical problem.

However, the Court's needs transcend the drug problem. We are not now able to consistently meet national trial delay standards for any of the Divisions of the Courts. In order to achieve minimum standards, we need to add resources to our Civil and Family Divisions and, as Chief Judge Rogers reports, we need an Intermediate Appellate Court.

The number and complexity of the criminal cases in the Superior Court continues to increase and is affected by the many forces operating in this City, such as, the drug epidemic, and countermeasures, such as, "Operation Clean Sweep". We have attempted to stay abreast of these workload demands through projects specifically directed at improved case flow and management of operations. Our court utilizes "Individual Judge" calendars in those situations where it is beneficial to do so; for example, in all criminal cases, and in Civil I cases which are complex and demand the attention of a specific judge over a sustained period of time. We are experimenting with individual Family Division calendars in juvenile and neglect cases and for domestic relations cases. I have recently appointed a Task Force of judges, court staff and local practitioners to study the feasibility of individual Civil calendars and administrative issues in the Civil Division. Moreover, to promote continuity, assignments to the various Divisions are now at a minimum of one year intervals which we find to be far less disruptive and permits closure in many more cases.

Our report to Mr. Bennett indicates the need for ten Criminal judges, and one juvenile judge and necessary supporting resources in the event the Metropolitan Police Department's authorized strength is increased by 700 officers, as well as a need for four Civil Division judges.

With the need for resources comes the need for space and facilities. Through foresight and planning the Court's Capital Budget construction project, with currently expected completion before year end, will provide eleven (11) additional courtrooms and judicial chambers in the Main D.C. Courthouse building at 500 Indiana Avenue. This will provide courtrooms and chambers in the Main Building, not only for the seven judges presently located in the outer Buildings (A and D), but also for four new judges, and make available seven additional courtrooms and chambers in Buildings A and D.

The addition of eleven (11) more judges, however, would require the use of all the newly constructed judicial chambers as well as all the chambers in the outer buildings. With the continued use of the seven (7) courtrooms in Court Building A (515 Fifth Street, N.W.) and Court Building D (451 Indiana Avenue, N.W.), we will also be able to accommodate the courtroom needs of an eleven (11) judge increase.

However, since our Hearing Commissioners sometimes utilize available courtrooms, we project that we will need at least four (4) additional hearing rooms to accommodate their needs. This would require additional Building D renovation and/or the rental of space in one of the several newly constructed office buildings in the Judiciary Square area.

In addition, the approval of an Intermediate Appellate Court will create the need for significant additional space.

I believe that the quality and effectiveness of personnel is assisted by a well developed continuing training program. Our Court is assisted in this effort by a Judicial Training Committee and a full-time Courts' Training Officer. This has resulted in the development of a curricula for the orientation of new judges and hearing commissioners, has provided the means for designing the program for our annual training conference and has provided refresher courses to facilitate the process of rotating judges among various court assignments. The Training Officer with the Clerks of the two Courts also develops programs for court management staff and has established a monthly training program for all Court staff in various subject areas relevant to our employees' professional and personal development.

Several years ago we supported legislation to increase the jurisdictional limit for small claims court to $2,000 and we also felt that it was appropriate to provide enabling legislation to permit the administrative adjustment of that ceiling by the Court. We may very well be reaching the time when a further increase in the jurisdictional limit is appropriate. Since proceedings can be handled much more expeditiously by the small claims procedures, cases more appropriately handled at this level take some of the burden off of the rest of the Civil Division. Again, we would like to request legislation to permit the Superior Court Board of Judges to establish the jurisdictional limit for small claims cases.

I would also suggest that this group consider the Court's 1988 request for legislation to eliminate the cap on our employee salaries that prohibits the creation of an equitable salary structure for our management staff. The artificial limits of federal GS grades, provided by the 1970 statute, have been eliminated for the D.C. Government but have, inadvertently, not been addressed for the Courts.

As to the concept of a separate inferior trial court of limited jurisdiction, I do not feel it would be desirable, practical or cost effective. We are proud of and jealously guard the unified trial court concept designed for the District of Columbia in the Court Reorganization Act. Administratively, it makes sense and it provides for flexibility in the assignment of judicial and staff resources as the need arises. Had we had a

separate criminal court when project "Clean Sweep" was initiated, there would have been no way for us to respond to the additional demands on this Court without the ability to transfer resources. As I noted in response to a question from Congressman Fauntroy in a Senate Hearing on April 4th, if this court were given the resources which would be required to establish a Municipal Court, we could accomplish our goal of timely disposition of cases. We could do it quickly and could do it effectively. In addition, it would provide us with even more flexibility to respond to other emergency needs.

In response to your inquiry regarding "adjudicatory uniformity", I do not feel that it would serve any useful purpose to transfer any of the existing adjudicatory functions of the various District of Columbia administrative agencies to the trial court at this time. I would note, however, that there has been previous discussion of certain types of Superior Court cases being handled by an administrative tribunal. In any event, not enough information has been made available to evaluate the concerns implied by such a proposal.

As to the administration of the Court system, our experience to date has been more than satisfactory. I attempt to manage the Superior Court to the best of my ability on a day-to-day basis as does Chief Judge Rogers in the operation of the Court of Appeals. We each have independent Clerks who assist us in those duties and the overall system provides an Executive Officer who coordinates these efforts and provides both planning and administrative support to both Courts.

The Joint Committee on Judicial Administration, during the time that I have served as a member and the dozen prior years of observation from my appointment in 1973, has been representative of both Courts and consistently has made system-wide policy decisions objectively and with the interest of both Courts fully considered. I recognize that with the approval of an intermediate appellate court, which we can all agree is needed, it will be necessary to restructure the body responsible for administrative operation of the Courts, including the role and responsibility of the Executive Officer. I sincerely believe, however, that whatever concept is adopted, each court must continue to have the day-to-day flexibility to manage and operate its own business without outside interference and that each court must also have a substantial voice in system-wide policy development.

It is evident that the Superior Court of the District of Columbia has come a considerable way. We are able to reflect with pride upon the Court's achievements and to draw upon a wealth of experience to provide the impetus for future growth and development. We will continue to remain open to innovative solutions and are willing to employ the concepts of modern management practice and utilize the tools of state-of-the art

technology to the extent that budgetary and human resources permit. Proud that the District of Columbia Courts stand out as a leader among modern judicial systems, we will persevere with renewed dedication and vigor to be all that we can be - to achieve the highest level of excellence for those of us who serve the goal of justice as well as the community to which we are dedicated.

In conclusion, may I say that the recommendations we have made to Dr. Bennett and here today, in my opinion, can only work to strengthen the quality of justice in the District of Columbia.

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Mr. FAUNTROY. Thank you so very much, Judge Ugast.

I want to reiterate my appreciation to both you and Judge Rogers for the thoroughness with which you have addressed the questions that we have posed, and I want now to just raise a few questions, initial questions with you, and, thereafter, maybe a couple of the members of the panel may be interested as well.

Judge Rogers, first of all, what standards do you use to determine the number of appeals court judges that you need in order to carry out these assignments we're dispatching, of course, keeping in mind the demands of justice?

Judge ROGERS. Well, as you know, we've only been authorized to have nine judges, but there are some standards, the National Center for State Reports, and a book called Justice on Appeal, it is sort of the Bible in this area.

Mr. FAUNTROY. Yes.

Judge ROGERS. They talk about 100 cases per judge. We are more than double that. Furthermore, we are more than double, for example, the number of cases that are handled by D.C. Circuit Court judges now. Obviously, D.C. Circuit Court cases, Federal Appeals Court cases are different, but the complexity of local litigation certainly is comparable in many respects.

Our judges are handling many more cases, and I think the significant part of this, as those charts show, is that despite the management improvements, both in terms of the court system itself, as well as within judges' chambers, the backlog of cases awaiting disposition by the court is increasing.

So, when the National Center looked at the court system in 1986, noting that the number of cases coming into our court and being decided by our court were higher than of the courts around the country, without an intermediate court, I think that is the theory on which they came up with the notion of a seven-judge high court, and then an intermediate court of nine judges. That pattern is not unusual throughout the country, and it's a question of being able to move quickly.

Right now, so you are clear on this, we have a number of institutional litigants in the court, the U.S. attorney, the corporation counsel and the public defender, necessarily, because of their staff loads, a number of continuances are requested and granted routinely by the court, so that they are able to get their briefs in before the matter is ready to be heard. As a practical matter, that delays things further.

Another area of delay within the court system has been in the court reporters getting the transcripts available on appeal. Chief Judge Ugast and my predecessor, Chief Judge Pryor, worked out a system so that the court reporter division regulations were revised, and a 3-year program is underway looking toward the day when the court reporters will be able to have the transcripts available for the court of appeals within 60 days. We'll see if it happens, and then there will be question if it doesn't happen, then what happens next?

But, I know, Congressman, you are very familiar with the effort over the years to try to resolve some of these problems involving the court reporters.

But, taking all those things into account, we're still talking about how much can a human being handle, and I think the significant thing that you can see over the years, that regardless of who the judges are, regardless of what the cases are, there is a volume of cases that nine people can handle. I use the number nine because, over our history, we've always had vacancies. So, we've had some retired judges who can help out, and I think the statistics show something like, for every three retired judges, you get almost one judge. So, if you take an average of nine judges over the years, you will see anywhere from 250 to 300 dispositions a judge. That's about all you are going to get, and that's much higher than what is happening around the country.

If you look at appellate court statistics of any of the States, judges are simply not deciding that many cases.

Mr. FAUNTROY. Do you have standards for assessing the productivity for——

Judge ROGERS. On the court of appeals, each judge receives an equal assignment, in the sense that every month there are a certain number of calendars set, and each judge gets the same number of cases.

I meet monthly with the judges, and we review all of the cases that are pending in chambers, where an opinion has not been written.

In addition, the judges file monthly with the Judicial Tenure Commission a report on the status of cases before them, all decisions rendered.

Mr. FAUNTROY. In what percentage of your cases do you hear or grant oral arguments?

Judge ROGERS. In the regular cases that I described, namely, those cases which are complex, approximately 60 percent of the cases result in oral argument.

There is a right to oral argument under our rules in regular cases, regular calendar cases, but sometimes it will be waived.

In summary calendar cases, those are the simple cases, not raising any new questions of law, and normally only involving a single issue, there is no right to oral argument, but a party may request oral argument, and that oral argument would be half the time of a regular oral argument, so it would be 15 minutes.

Mr. FAUNTROY. Does that require a full briefing of the parties?

Judge ROGERS. We have a number of schemes whereby we can avoid full briefing. As I mentioned, the docket system initiated by Chief Judge Pryor and adopted by the court, highlights the nature of the case, so that we can either move toward a settlement process that we have under our rules, or we can move for summary reversal or summary affirmance, which is a decision on a motion paper.

Absent that working out, then the case will be briefed, and that's, basically, what the courts around the country are doing. They have different mechanisms for doing it, but, basically, a docketing statement is filed if there's something that looks unusual about the case, or it appears to be untimely filed, or we don't have jurisdiction, we will issue an order to show cause as to why this appeal should not be dismissed.

The parties have the opportunity to indicate whether they think there is any chance of settlement, and, again, a party may move

for summary affirmance or summary reversal, simply on a motion paper.

Mr. FAUNTROY. Judge Ugast, you recall that we, a few years ago, passed a law establishing a "1 Day/One Trial" system for the jurors. How is that working now?

Judge UGAST. Well, we've just completed the first year, as of around January 4, and we are evaluating the entire system.

We have found a great deal of community satisfaction. There have been some down sides, in that we are having a bit of a problem educating folks to the fact that it was one trial as well as 1 day, that if you have one trial, you are there a while, and it's on the summons. We are changing the summons to put it in big letters, "ONE TRIAL." We are having problems with the addresses. They are based on the voter registrations and the motor vehicle registrations, which people don't change their address except every 4 years, it appears. That has caused us some problems in terms of the total returns, because we are now handling the entire qualification and summoning process in our court.

We are working on trying to see how that can be improved. It's all automated, and if any of you had the pleasure to come down, you know that we have the, what do you call it, the bar code, and we just go across the bags, and that puts the individual's name into the computer, and then the panels can be drawn up at random in that fashion.

The judges have some difficulty, particularly, in the afternoons, with people, again, as I say, feeling, well, I'm OK today, but, gee, I can't be here tomorrow. That has caused some concern. We are thinking of adopting a one deferral policy automatically, so that, if folks come in and say, well, I've got a problem tomorrow, or I've got some problem, automatically given them a deferral, but they must come back within 90 days. They pick their date, but it must be 90 days. That's one of the modifications we're looking at. There are several, but, overall, we are pleased with the concept and with the reception, although, it has some problems that comes with it.

Mr. FAUNTROY. I had to explain that to my wife on this "1 Day/One Trial" question. She was beginning to—she was about to have me call a hearing.

Judge UGAST. I take it she got on a jury.

Mr. FAUNTROY. Yes. Well, she stayed on one trial for weeks.

I wonder if you'd describe for me the selection of the hearing commissioners process that you have.

Judge UGAST. All right.

When the commissioners—when the permanent legislation was adopted in the fall of 1986, establishing the appointment of hearing commissioners for the court, and, particularly, at that point, the new commissioners were required for the child support changes and the child support hearings that were required and mandated both under the Federal statute and our local statute, I established a committee of seven judges, which I have maintained, but their charge was to develop procedures and rules, in essence, for the selection, appointment and tenure of hearing commissioners.

From that, that group has prepared for us a set of procedures, which includes the qualifications, which are, basically, I might add, similar to those required of judges, residency in the District of Co-

lumbia, 5 years engaged in the active practice of law, or a faculty of a law school, member in good standing of our bar, and then we established, as well, an advisory merit selection panel, composed of seven individuals, composed of lawyers and lay persons, designed to develop a pool of possible applicants when vacancies might occur. That is chaired at this time by Mr. Fred Abertson.

Then, those that applied were screened by this committee, and then recommendations were ultimately made to me, and I recommended four individuals to the board of judges, and it requires a majority approval by the board of judges, and they are now appointed for 4-year terms, and then there will be an evaluation process that I will establish as the 4-year terms come up.

Those commissioners who are already employed are now subject to the 4-year term.

Mr. FAUNTROY. What consideration has the court given to implementing a single judge calendaring system for civil?

Judge UGAST. Well, as you know, the criminal division is entirely individual calendars. We established three individual calendars in the family division this year for the first time. We have three individual calendars in the civil division, and this task force, I've been considering for some time, one of the problems has been, we needed to get the civil division automated, and then we needed to be sure that I had enough judicial resources to be able to successfully, or, at least, likely be successful in establishing individual calendars, and be able to operate on a continuing basis. Then, I had to be sure I had a minimum number of judges that could be assigned.

This task force—I established a task force internally about 6 months ago in the clerk's office that's been reviewing the procedures in the division, and now I've expanded it to include members of the bar, including Mr. Speights, and seven judges, to work, meeting starting next month, meeting monthly to assess and evaluate the entire civil division procedures, everything the way it's done, the way it's been done, with suggestions, hopefully, leading to the establishment of individual calendars as a result of that.

So, that is now ongoing, and is something I have great hopes for. A lot will depend maybe on the resources and the criminal problems that develop in the fall.

Mr. FAUNTROY. You mentioned the small claims court, the level being raised to $2,500. What do you feel is adequate?

Judge UGAST. Well, our own feeling is that $3,000 might be the right limit at this point. It's at $2,000 now. We recommended $2,500 a few years ago, and, as I say, our analysis of the cases filed that now are filed in the civil division that would be brought into the small claims if the limit were raised would be somewhere in the neighborhood of 3,000 cases. So that, we would consider requesting legislation along those lines.

Mr. FAUNTROY. Thank you.

I wonder if you'd mind if I'd ask a couple of the panel members to just ask a couple questions.

Jack Scheuermann, would you?

Mr. SCHEUERMANN. Thank you, Congressman.

With your permission, Chief Judge Rogers, and, Chief Judge Ugast, and the permission of my fellow panel members, what I would like to do is address some broad topics, and then try to de-

velop a dialogue between yourselves and us within the confines of those topics, and see if we can kind of come to some consensus as to where we are and where we would like to go on a couple of areas.

I'd like to start off with Chief Judge Rogers. Chief Judge Rogers, in the 100th Congress, Congressman Fauntroy introduced H.R. 4366, which was a bill to establish a supreme court for the District of Columbia. I'm sure you are familiar with that bill.

Is the intermediate court of appeals structure that we've talked about here this morning embodied in that bill pretty much? In other words, is that what you would like to see eventually come to fruition? And if not, how would you like to see it changed?

Judge ROGERS. I've met with the Congressman to discuss that, along with Mr. Daniels and Mr. Barnes, and I've indicated that the structure that I'm proposing is that recommended by the National Center for State Courts, and we've been working on that as an approach.

Mr. SCHEUERMANN. I see.

How does that differ, or does it differ in any major respect, from what was contained in H.R. 4366?

Judge ROGERS. Well, my approach has been to urge the Congressman, as well as other elected representatives, to focus simply on the court structure, and to leave a number of other matters of concern to him, I know, and to other elected representatives, and I'm sure to this mission team, for consideration in separate legislation.

What I'm concerned about as a chief judge of the court is, we need some relief. We are talking about protecting the right of people to have matters that are decided by a single judge reviewed by more than one judge before a matter becomes final. That is the whole theory behind our system, that while there is great deference to the trial court judge, that is a single judge's decision, and one of the joys, I suppose, of appellate practice, from the perspective of a judge, is like the person who has to understand that it's "1 Day/One Trial," you need at least one other judge to agree with you in order to write an opinion.

Certainly, in the more serious issues that are presented by the court, it ought to be the full court that is looking at a matter.

Mr. SCHEUERMANN. Judge Rogers, how do you envision the creation of an intermediate court of appeals impacting upon the current operation of the Joint Committee on Judicial Administration?

Judge ROGERS. I think that the intermediate court system that the National Center has talked about, that the Douglas committee has talked about, should be patterned after those around the country, where you have the administrative responsibility vested in the highest court through the chief judge, and you have a joint committee, as we've styled it in this jurisdiction, made up of the, in our circumstance, it would be the three chief judges of the court.

As you know, the current system has a five-member joint committee, three trial judges and two appellate judges. I know of no system around the country that has such a structure, and I think that when this legislation is enacted, that it should clearly establish that the administrative responsibility for the court system rests with the chief justice of the highest court. You will find that is what is done throughout this country with one or two exceptions,

and those exceptions are not models, candidly, of anything, and they are trying to move to that system.

I think that the joint committee structure we've had over the years, there have been problems with it. It was designed to meet a special circumstance, but I think the point is now, we have a court system that is operating, I think, very well, when you look at not only the trial court, but the appellate court, by comparison to what is happening around the country, it's something that, it seems to me, citizens of the District can take pride in.

So, it's a matter of trying to perfect what we have and simply give the courts the resources they need to do the job that everyone is interested in.

Mr. SCHEUERMANN. Thank you very much.

I'd like to open up the questioning to my fellow panel members, if I may.

Mr. FAUNTROY. Yes.

Let me yield to—Marialice, did you have any questions?

Ms. DANIELS. No, I don't have any.

Mr. FAUNTROY. All right.

Are there other panelists who would——

Ms. DANIELS. Oh, yes; I do have one.

Mr. FAUNTROY. Yes.

Ms. DANIELS. I'm sorry.

You had discussed in your statement earlier about the need, and showed us the charts specifying the caseloads that would justify the intermediate court. Then, Judge Ugast mentioned later on in his presentation that it was the—he felt that to a large extent the problem with crime drugs in the District of Columbia was, literally, driving his court with respect to the allocation of resources.

What I'm wondering is, have you looked at, specifically, the area since the State courts generally have tended to implement an intermediate court of appeals where there has been a specific subject matter need, and I'm wondering if we have that same problem here, that there's a specific subject matter area which would make it necessary for us to implement this?

Judge ROGERS. I assume you are talking about some courts where it's like an intermediate court of special criminal appeals.

Ms. DANIELS. Exactly.

Judge ROGERS. Let me give you some preliminary answers to this.

I think some of the points Chief Judge Ugast made are critically important. When Congress was looking at the court system in the District of Columbia, we had a number of separate trial courts, and there were simply inefficiencies associated with that operation.

In addition, I think we can all recognize that in terms of attracting capable people to the bench, it is important not to have a full diet of nothing but minor cases that are terribly repetitious. Variety is important, not only in terms of intellectual stimulation, but simply to assure that the attention that is given is of the quality and nature that we're interested in.

I have not urged that we proliferate appellate courts. I think that it will be difficult enough, speaking very candidly, to get another appellate court in this jurisdiction. But, even if I thought it was going to be easy to get an appellate court, I think that in

terms of some of the things that we're interested in, in terms of the structure, and how this court would operate, it makes sense, based on what we see around the country, not to have specialized courts of appeal.

The intermediate court that is proposed would sit in panels of three. I have met with the corporation counsel, the U.S. attorney and the director of the public defender's service to talk about some of these concerns, not on the question you are talking about, but, specifically, what would happen to the types of cases they are interested in? When you look around the country, a number of these error review cases are criminal cases.

For example, somebody is convicted of armed robbery, and the only issue being raised on appeal is the sufficiency of the evidence. Given our standard of review, that we look at the evidence in a light most favorable to the government, you can read a brief very quickly and make a preliminary determination that this is going to be a simple case to resolve, or it is not. If it is such a simple case, that can be put on a summary calendar, or it can even be disposed of on a motion for summary affirmance.

It seems to me, in this jurisdiction we don't have the justification for proliferating a number of courts. I think that the efficiency that you have with being able to rotate judges, the efficiency that comes from having the style that is not the civil law style of experts, where, on appeal you would have a tax judge, you would have a zoning judge, you would have a criminal judge, just based on my experience on the court of appeals, it's tremendously important to have different points of view focusing on something.

So that, what I've been urging is, an intermediate court where all appeals coming from the trial court would initially be filed in the intermediate court. Pursuant to guidelines promulgated by the court, the clerk of the court would make a preliminary determination as to whether or not the case that is filed is likely to be one that the highest court will resolve.

The highest court would then look at it, and say, we agree, we will take that case now, thereby cutting out the delay associated with an intermediate resolution.

The result is that more judges are looking at initial appeals, and I think you continue to have the efficiency, and what I call, what I think is important, the stimulation for judges in handling the appellate work in this jurisdiction.

Mr. FAUNTROY. I've just looked at my watch here. I'm slipping beyond time, but I'll entertain any other questions the panelists have.

Let's start here, and then quickly.

Mr. DUCKENFIELD. Thank you, Mr. Congressman.

Chief Judges Rogers and Ugast, Mr. Polansky and Mr. Hoffman, I would be amiss if I did not commend you for your leadership of the court and also for the staff for doing a fine job under difficult and, often, trying times.

Over the years, I know the court has tried to address the caseload and delay, and it has been done through many innovative efforts as you have so eloquently enumerated here this morning, Chief Judge Ugast.

However, as you mentioned, recently there has been some discussion raise with respect to a municipal court. I would ask that you share with us, if you will, what are your views and assessment as to the efficacy, the quality, cost effectiveness of such reorganization, and also, are there not better options, such as, perhaps, increasing the number of judges, increasing the authority and scope of the commissioners?

Let me elaborate on the aspects of commissioners. It is my understanding now that the rulings and decisions by the commissioners must necessitate a review by a judge and approval. If there is some way that we could increase the authority and scope of the commissioners so that there will be no need for review, unless there's a specific request or demand by the parties involved.

I'll stop there.

Judge UGAST. Well, let me just start with the limited court. I start, with fairness, that we are speaking in general terms. I haven't heard any particular recommendation or proposal in terms of what would be involved in such a court. But, assuming that it was a court of limited jurisdictions, as some jurisdictions have, which would involve possibly landlord and tenant, small claims, traffic, even certain type of misdemeanor cases, it depends on what someone would envision in terms of what would be the jurisdiction of the court of limited jurisdiction. So, that is something that I haven't heard enlarged upon.

But, I guess my thought is that the concept goes counter to the entire philosophy decided upon in court reorganization to develop a unified trial court that would be responsible for all types of litigation within the city, whether it be murder one, or major malpractice cases, or small claims, landlord and tenant, or certain types of traffic offenses, serious traffic offenses. Other traffic offenses have been decriminalized.

With respect to resources, it seems to me, whether it be possibly, as you suggest, expansion of the utilization of hearing commissioners in some of those areas, might very well be part of the modification that we would want to consider.

We use a commissioner to assist the judge in small claims. We do not use a commissioner in landlord and tenant matters.

The commissioners have authority to act without review of a judge only in setting of bond and conditions of release, those type of matters, and their initial hearings in the child support hearings, under the new legislation they do have authority to do those without review. But, they are subject to review further, and in connection with other rules in a complex they are to be certified to a judge.

But, yes, for example, in the misdemeanors, the commissioners are only authorized, at this time, to try nonjury matters, and that do not exceed 90-day penalty. They cannot take pleas in misdemeanor cases where the penalty exceeds 90 days. That's an area that we think could well be explored.

Such things like that, as you are talking about, I think are worthy of consideration.

Mr. DUCKENFIELD. Mr. Congressman, may I ask one more question?

Mr. FAUNTROY. Certainly.

Mr. DUCKENFIELD. Chief Judges Rogers and Ugast, as I move about the city, I some time get the sense that the court is not viewed as an institution of the community. It's more as a foreign institution.

Considering that being so, assuming it being so, what do you think can be done to enhance the representativeness of the judiciary and the administration of justice in the District of Columbia? That's my question.

Judge UGAST. Well, I'm not sure. Let me just say, an awful lot of our judges go out into the community and are speaking to the various community groups. I do it myself. Judge Reggie Walton has done it a great deal lately. A number of judges are doing that on a continuing basis.

No doubt, at those meetings we are—the concerns of the community and the citizens have a tendency to be more specific in terms of daily decisions of the judges, or, one I went to once, unfortunately, a victim of a burglary several years previously, the individual had been convicted, and I had sentenced the individual, and she had some concern about some aspect of that. Possibly, I think the charges, part of the counts had been dropped, but I couldn't say that to her.

But, it's important that the court be viewed as part of the community, and it's our deep concern, and I honestly think the "Day/One Trial," or, "One Trial/1 Day," is very important. We are seeing a number of people.

I'm also, as I meet with the grand juries, we have four grand juries going all the time, and I make a special effort with each one of those grand juries to encourage them to talk about their court, to tell their friends about it, and just tell them about what they've seen and what goes on.

So that, you know, there's a certain mystique about courts anywhere, and you go around the country and you see that, but I think that's marked.

Mr. POLANSKY. If I might, one of the other things that I think——

Chairman FAUNTROY. Well, just identify yourself.

Mr. POLANSKY. I'm sorry, Larry Polansky. I'm the executive officer of the D.C. courts.

Chairman FAUNTROY. Very good.

Mr. POLANSKY. One of the things that I think that will help, Tom, and it's a long-range thing, is that we have expanded our school programs considerably, provided a film for them when they enter the building, and have a specific kind of tour, the ability for the kids from the local schools to get in and see what the courtrooms are doing, and what the court is about. That's a long-range picture, I think that will help.

Mr. DUCKENFIELD. There is one key word, representativeness, would you kindly address that?

Mr. SPEIGHTS. Wally, this may be just the perfect opportunity for me to inject my ignorance in this session, which I say as a layman, not as a general observation of my ability.

First of all, let me compliment both chief justices, in saying that, for a layman, your comments and your presentations are very in-

structive. My involvement with the legal profession is minimal, and with the courts, even more minimal.

But, Chief Justice Rogers, I'm intrigued by a quick statement in your presentation that maybe follows on this, where it says, "Congress has struck a balance between the Federal and local interests." I'm intrigued by that because, even though I've lived here in the District 30 years, I have this dim recollection of democracy, as how it is practiced where I grew up, became an adult, and did move as an adult for a while, and that is the State and the local courts dealt with issues that were State and local, and the Federal courts, and the U.S. attorney dealt with issues that were the U.S. Government's concern.

Now, this suggests that the U.S. Government's concerns are addressed in courts that also address State—what would be State, if this were a State, and local concerns.

So, my curiosity is that, one, if that is the case, is it appropriate? Why is it necessary for the U.S. Government to involve its business in courts that should be addressing the concern of the citizens who live in the jurisdiction over which the courts are responsible? Wouldn't it be appropriate to separate that and, thus, not have to worry about balance between Federal and State interests, but to address what our interests, those of us who live here, and let the Federal Government, which I respect greatly, address its interests in those courts that are designed for it?

Just as I've been puzzled, having grown up and lived in areas where the people were allowed to elect their own prosecuting attorney, who prosecuted those that violated the laws of the jurisdiction in the courts, we don't do that here.

I see on the witness list that our U.S. attorney will be meeting us, and I think I might ask that question of him as well, but I think it's appropriate for the two of you to address it.

Why do the people of this jurisdiction not have the right to elect their judges, and wouldn't they have a much more sensitive feeling to their relationship to the court system if they did? Wouldn't your appearances in the community have a great deal more meaning if you relate as elected officials, than as appointed officials through a process that very few citizens understand?

Mr. SCHEUERMANN. That's a pretty cosmic question.

Judge ROGERS. Well, let me say, I'm here as a chief judge. I'm not here as an individual, and I have indicated to the Congressman that I am happy to provide any information I can to assist the task force in its consideration of the court system.

I am not here to discuss political issues, and I have to make that very clear.

I would like to go back to a point that Mr. Duckenfield raised, though. I think that it is important to consider what role we want our courts to play in this respect. Chief Judge Ugast mentioned the notion, when you go to community meetings there are always, before you leave, and I'm sure the Congressman knows this better than any of us, somebody who has a personal experience and they are unhappy about the way it has been resolved. That will happen, in my view, under any system.

So, the question is, what kind of system do you want? It seems to me that one of the things that this jurisdiction has been blessed by

is that we have a judiciary which has not suffered the experiences that you read about in the paper around the country. We have independent judges. We have judges with integrity, and I think you want to be very careful, as the Congress has in the past, to assure that whatever system you set up, that you make certain that the judges can approach cases from a neutral and independent perspective.

Sitting on the court of appeals, I can tell you, undoubtedly, there are cases we decide where the trial judges disagree with us. There are, obviously, cases we decide that the trial judges will disagree with the court of appeals. But, nevertheless, we each have our role, and I think it is important, and the community, I think, is a little more sophisticated than we sometimes give them credit for, in terms of understanding what is the role of our courts.

Historically, if you look at why the common-law judge is respected, such that litigants who appear before that judge, even the loser, leaves understanding that they have had a fair day in court. It is largely because of the understanding that the judge is independent, and has integrity, and is approaching their case without any bias or predisposition.

So, I would leave my comments on that note.

Mr. SCHEUERMANN. May I just ask one additional question?

Mr. FAUNTROY. Let me first yield to Anthony Rachal, who has asked for an opportunity to raise a question, and then, quite frankly, I do want to move on, because I think I hear hunger pangs in Jay Stephens—I mean, excuse me, go right ahead.

Mr. RACHAL. Thank you, Congressman Fauntroy. I'll be very brief.

I'd just like to supplement the record. Chief Judge Ugast indicated a number of innovative things that the court has been doing. I think he overlooked some of the process that you've implemented that has saved hundreds of cases, and as a tax, some of the oldest cases on the docket, in terms of giving the litigant a chance to have his case addressed.

Judge UGAST. I wanted to mention the ADR, but then our time, the entire mediation process, the settlement week, incidentally, which is May 15. We are proud of it. Have you been a part of that?

Mr. RACHAL. Yes, and I'm not speaking from personal experience, I'm speaking from the impact that we all on the bar feel when many cases have been lifted, and that a month earlier that were going to trial on other matters because of your efforts to speed up the whole docket process.

I'd also like to point out that you've taken steps to revise the court rules to require a $50,000 certification by the bar, with regard to certain civil matters that are before the court, and I wondered, what has been the impact of relieving the docket with respect to that rule?

Judge UGAST. The entire ADR program, our multidoor program has national acceptance, which includes mediation in domestic relations and small claims. We now are having it available in the regular civil II cases, as you may know, and in the civil I cases, such things as summary jury trials, early neutral evaluation, many trials.

The arbitration experiment is one we've just received the report, we had a grant to do that experiment. We're going to extend for another 2 years the process with tight monitoring and a controlled group of cases.

Our analysis indicated that it may well be a positive step in both court delay, but without the controlled group of cases it wasn't conclusive.

It seems to me it has enough positive potential, both to reduce caseload and give another means for disposal of litigation quicker, and so, we're going to extend it for 2 more years with some changes that tighten the monitoring and the time frames.

Mr. RACHAL. Right.

With respect to another $50,000 issue, that is a cloud on a horizon as I see it, with regard to the pending rules in the Federal courts to raise the jurisdictional amount from $10,000 to $50,000. Have there been any projections as to what impact that will be on our local courts and on the court of appeals?

Judge UGAST. I asked the court executive's office, and they have been following the legislation, which I believe is effective May 18, or something of that sort.

Mr. RACHAL. That's correct.

Judge UGAST. Yes.

Mr. POLANSKY. It is. In response, to our advantage, there has been a national study of the number of cases that would theoretically come based on a previous year's activity.

The numbers are not as large as one might think. The problem that we cannot answer right now is, however, are those cases going to come over and require trial, or will they be the 95 percent/5 percent, or 98 percent/2 percent, that's 98 settled, 2 go to trial, if that's the case, we do not have a problem.

If they are real trial cases, we've got one heck of a problem.

MR. FAUNTROY. Thank you so much.

Mr. Scheuermann, you had——

Mr. SCHEUERMANN. Just one question.

Mr. FAUNTROY [continuing]. One quick question.

Mr. SCHEUERMANN. More addressed to Mr. Polansky and Mr. Hoffman, than it is the chief judges, and, that is, I would like to know what preliminary thoughts you've given to the increased administrative support that you would require if you got a supreme court in the District of Columbia, and if you got 15 new trial judges in superior court, in terms of courtrooms, in terms of support staff and the like.

Mr. POLANSKY. I would bow to Mr. Hoffman and Chief Judge Rogers on the intermediate court of appeals.

In terms of the 15 judges, you should know that in the information that was provided to the Mayor and also to Doctor Bennett, when they were looking at your proposed 700 additional police officers, and the addition of additional law enforcement resources, we did calculate, to the best of our ability anyhow, what we would need to accommodate 11 or 15 new judges in the trial court.

The gross figures, and these are from memory at this point, an 11-judge figure required 79 supporting staff, and, in addition to that, additional probation officers to pick up the increased loads that would be there.

The 4 civil judges would require a proportionate number, the 4 would be in the area of an additional 30 persons to support those 4 judges. It's about seven something persons per judge, and additional facilities, additional space as well.

Mr. Hoffman?

Mr. HOFFMAN. Yes. I'm Richard Hoffman, clerk with the court of appeals.

In the submission that we made to the Mayor and to Mr. Bennett, we calculated that the conditional costs associated with the intermediate appellate court would involve the obvious capital costs of space and added staff in terms of every judge you add you, of course, need some law clerks and secretaries.

But, maintaining a similar combined clerk's office would keep to a modest level, and I'm saying, somewhere in the order of 6 to 10 added people, the number of additional staff members that you would need in the clerk's office to run it.

Mr. POLANSKY. One last comment if I might, Congressman Fauntroy, you indicated earlier to Judge Rogers that you appreciated the statistical charts. In light of that, I'd like to pass out to your group some statistical charts representing the end of the year, December 31, 1988, in both courts.

Mr. FAUNTROY. Thank you so very much, and, Mr. Polansky, and, Mr. Hoffman, I appreciate your joining Judge Ugast and Judge Rogers at the panel this morning, your patience in remaining as long as they have remained.

May I simply ask as well of you, could you provide us copies of the submissions that you referenced to Mr. Bennett and to the Mayor——

Mr. POLANSKY. Certainly.

Mr. FAUNTROY [continuing]. So that we could get a specific reference to what you just stated.

Mr. POLANSKY. Shall I provide those to Mr. Barnes?

Mr. FAUNTROY. Yes, if you would.

Mr. POLANSKY. That would be fine.

Mr. FAUNTROY. Thank you.

Thank you so much, Judge Rogers. Thank you so much, Judge Ugast, for just a wonderful morning you've given us and the thoughtful testimony which will certainly help us to assess where we want to be going.

Judge ROGERS. Thank you very much.

Judge UGAST. Thank you.

Mr. FAUNTROY. Thank you.

I want to ask that the distinguished U.S. attorney for the District of Columbia, Mr. Jay Stephens, would now come, and you will notice, Mr. U.S. attorney, you will notice that we are starting you promptly 1 hour—at 11 o'clock Eastern, I mean, daylight, I mean——

Mr. STEPHENS. Pacific Standard Time.

Mr. FAUNTROY [continuing]. No, Eastern Standard Time, we've just moved ahead.

But, in preparing to receive your testimony, let me express my appreciation to you as well for your presentation to the Senate D.C. Appropriations Subcommittee, which it was my privilege to hear,

and ever since then I've looked forward to your testimony here as well.

I am under a time bind myself, and, if you don't mind, I'm going to ask staff counsel, Johnny Barnes, to preside at this point, but we are looking forward to your testimony, and thank you so much.

TESTIMONY OF JAY STEPHENS, U.S. ATTORNEY FOR THE DISTRICT OF COLUMBIA

Mr. STEPHENS. Thank you very much. It's a pleasure for me to be here.

I've seen legislative filibustering this morning, and I've witnessed, I guess, judicial filibustering, but I will not engage in any filibustering myself.

But, in all due respect, I thought this morning's session has been very informative presentations by the two chief judges, and I do welcome the opportunity and appreciate the invitation to contribute whatever I can on behalf of the U.S. attorney's office to the considerations that the mission team is taking. I know it's a serious objective and important objective that you are leading and chairing.

I really would just like to, as a way of introduction, emphasize a couple points, and then really make myself available for comments and questions by the panel.

I think it is important to underscore the fact that the criminal justice system, in particular, but the judicial system also, really is an integrated system and it must function as an integrated system. The impact of things going on in the street, or impact of litigants has an effect on the agencies, has an effect on investigative agencies, whether they be police or other. In turn, that has an impact on prosecutors, and that has an impact on the courts and the prison system, the correction system, the treatment system. It really all works together very much. And, by making a change in one area, you can have a substantial impact on another area.

With regard to the U.S. attorney's office, let me give you just a very, very quick synopsis of sort of where we are and how we are organized, and then open it up to you to address the kinds of questions that are of particular interest to you.

We have changed a lot since court reorganization in 1970. In fact, I would say dramatically. Just in terms of growth, in terms of structure, in terms of size, we do today have about 210 assistant U.S. attorneys. This is the largest office in the United States by far. I think the next largest office is somewhere in the neighborhood of 140. We have been authorized some additional assistant U.S. attorneys, I'm in the process of bringing on board, and anticipate that by midsummer we will have approximately 235 full-time assistant U.S. attorneys. Of course, we are looking to get some additional special assistants in to assist us in the immediate crunch and crisis going on with respect to narcotics and violence here in the city, so the numbers may, in fact, go above that.

We have an active specialist program, where we try to recruit and work out sort of a symbiotic relationship with a number of agencies around town to utilize some of their assistants and attor-

neys in the misdemeanor area, in particular, in exchange for training them and involving them in the litigation process.

We have done a number of things in the U.S. attorney's office, and I would say since the 1st of November, when I was sworn in as a residentially appointed U.S. attorney, we probably have made more dramatic changes in the U.S. attorney's office than it has seen, perhaps, in the past 20 years altogether.

We've made an effort to bring, as I indicated, a number of new assistants on. We've hired about 35 new assistants since October. We are in the process of bringing some more in May, and some more in the summer.

We have reorganized our whole narcotics approach, and I would like to emphasize, I think, at the outset, that while we have a superior court division and a Federal criminal court division, by and large, all of the lawyers in our office focus on criminal activity that relates to the District of Columbia. It's not as if we're handling some matter that is involved in Ohio or Missouri. There are some international issues, for example, the international terrorism cases that are brought here that are more specifically venued here, but, by and large, particularly, in the area of violent crime and narcotics, whether a case is in Federal court or in superior court, it involves activity almost always affecting and related to the District of Columbia.

So, we have reorganized that to create a new narcotics unit that has a trial unit that is designed to focus on cases where we can utilize the best penalties available to us, where we can utilize certain statutes that I think we can use more effectively. We've implemented an asset forfeiture unit to try to take some of the proceeds and profits out of drug trafficking, by utilizing a Federal asset forfeiture law, and I might point out, that is an area that you might want to consider in terms of legislation, whether the D.C. government should enact a forfeiture law.

In the area of homicides, I've set up a drug homicide strike force to focus on some of the very difficult investigative and prosecutive efforts being made to deal with homicides growing out of narcotics trafficking, and these are difficult for the police to deal with, and they are equally difficult for the prosecutor to deal with, to develop credible evidence at trial. In fact, we've increased substantially the number of prosecutors assigned to handle homicide and homicide-related matters.

We are also taking a whole look at the superior court operation to determine whether we can use our pretrial detention better, whether we should increase some additional resources in the area of certain kinds of violent crime. In fact, we're doing a whole review of the office to try to use the resources we have, and we all operate, as I'm sure you appreciate it from listening to the chief judges, we all operate in a world of limited resources, the Congress, the executive branch, the legislatures, everybody, in the process we never have everything we want. So, it is important to use what we have in the best way we can, to have the maximum effect on our objective.

Our objective here, of course, is to, in a fair and tough manner, bring those who violate the laws of the District of Columbia, and

who victimize the citizens of the District of Columbia, to bring them to justice.

With that, I'll just defer to your questions, and try to respond to some of the issues I know that may be of particular interest to you.

Mr. SCHEUERMANN. Thank you very much, Mr. Stephens. I'd like to start off with, again, a broad generic type of question.

Your organization is the largest institutional user of the D.C. court system. In an ideal world, if you could amend, change, reform the current court structure, what is it that you would like to see changed from what is the current system as it exists in the District of Columbia?

Mr. STEPHENS. I think your assumption is correct. We do appear before, overall, probably more than 85 judges, D.C. Federal judges, operating and sitting here in the District of Columbia. That's a lot of masters to report to, if you are an attorney or a trial attorney, in particular, to be here, be there, and to be doing what you are supposed to be doing all the time.

It is difficult for me to step back and assess simply the court structure, if that's what you are asking me to, or some of the underlying issues that also give rise to that. I think there are some things, assumptions that I guess I'd ask the team to think about, and, that is, to go back and look at some of the underlying factors that give rise to the numbers. Why do we have more litigation? Are there some processes and procedures that are involved in the court system that, perhaps, are duplicative, or unnecessary, or could be streamlined?

You know, we all operate in the structure, there are more cases, there are more litigants, there are more lawyers, there's more stuff happening, there are more rights, there will necessarily be more remedies, but in some respects, some of this is demand driven and in some respects it's, you know, supply, judges' pull, I mean, the system somehow always seems to go up to the level of available time and resources that we have in the judiciary, as well as in the prosecution area.

I think there are some areas we could streamline, and while these are preliminary thoughts, in the misdemeanor area, for example, in the courts in the District of Columbia, one could suggest, perhaps, that some of these cases, if not all of these cases, perhaps, with the exception of firearms, could be tried by commissioners, and that would free up some judicial resources.

There's no constitutional necessity that they be jury trials, for example. If you would increase the number of judge trials, court trials on misdemeanor offenses, you could try the cases much more rapidly, you could bring them to conclusion, you could free up both prosecutorial resources and judicial resources, and, frankly, I think you would end up with a product at the end that might be better than the kind of justice that we're dispensing now, and I say that for two reasons.

One is, I think overall the certainty and the swiftness in which one can reach a result in the judicial system has an effect on, particularly, in criminal behavior. If you have a misdemeanor who is arrested for, let's say, narcotics possession or shoplifting—well, shoplifting is different now, but a minor theft, and they are in the process for several months, and they go through a long jury trial,

and the result at the end of that jury trial is the imposition of a probationary sentence. I'm not sure what signal that is sending to someone who violates the law.

If, on the other hand, that same individual was brought into court within 30 days, or 60 days, tried before a judge, if found guilty imposition of a sentence, whether it be, if it's a first-time offender, perhaps, a lower sentence, if it's a second-time offender, perhaps, some type of mandatory. You don't need lengthy sentences in many of these cases, but the certainty of some sentence and the certainty of getting the issue resolved, I think, can move the cases through the system, and it also sends a signal to those who violate the law at that level.

So, that's one area. There may be some other areas in terms of preliminary hearings, why we have judicial resources being utilized in preliminary hearings when everything goes through the grand jury anyhow. All felony indictments, obviously, come out of the grand jury. Is this a duplication of efforts? We frequently don't have that approach on the Federal side. I think a lot of other State systems do not have that. It really is, I would question whether it is critical in many, many areas.

Those are just a couple of ideas. There's a whole range of other issues, I think, in terms of the effect on the court system here, the effect on the quality of justice that you may want to consider. They may be directed not to the court specifically.

Mr. SCHEUERMANN. If the power of the commissioners were to be expanded to include criminal misdemeanor trial authority, do you have any notion as to how many additional commissioners might be appropriate, or do you have any comment on the testimony of Chief Judge Ugast with regard to the additional judges that he would like, principally, in the criminal trial calendar?

Mr. STEPHENS. If I remember correctly from Chief Judge Ugast's testimony and from our own allocation of resources, we're currently serving, it's either five or six misdemeanor judges, and we prosecuted about 10,000 misdemeanor cases last year. That's almost half of the numbers involved in the system.

So, I would think that would permit freeing up at least a substantial part of those judges. You would still, perhaps, want some kind of appeal process from the commissioner to a judge, whether it be on a bond, or whether it be some type of right of appeal, but I think in most cases that would not necessarily be exercised.

So, I think we're talking about a lot of cases, and it would provide substantial additional resources if you added five more commissioners to replace those five judges. It may take a few more than that in order to move things through the system, but the process of selection, and I'm not an expert on that, of selecting commissioners, is one that can be accomplished with much greater expediency than the selecting of a different judge or another judge. Particularly, where we are in a situation of demands on the system now, and the immediacy of some of those demands, that provides an avenue, I think, for a more immediate solution to some of the problems, and then reallocation within the unified court system, it could provide some benefit.

As I say, this is a preliminary idea, something you may wish to consider.

Mr. SCHEUERMANN. Do you see the immediate need kind of driving the whole structure of where we are going in reform, and do you see the current immediate need being relatively permanent, or do you see it tapering off? Is there some light at the end of the tunnel tapering off?

Mr. STEPHENS. Well, I do think the immediate problem with regard to drugs and violence is driving a lot of what you've heard this morning, it drives our office substantially. As I've indicated, maybe as Chief Judge Ugast indicated, about half of our cases are drug-related cases. That involves a lot of resources, if you look at the number of attorneys that are assigned to prosecute those cases, the number of judges.

We have seen, and I would say this past year, and it's hard to know what this is attributable to necessarily, but we've seen a leveling off in the number of cases coming into the system. So, it may be that we've maxed out, simply because the police are not able to make more arrests, or the courts are not able to handle more cases, and the prosecutor isn't able to handle anymore cases.

There was a long period of time where it was rising, and then it has leveled off in the neighborhood of 21,000 cases being filed for the last 2 or 3 years.

I wish I could say there is a light at the end of the tunnel. Obviously, I think there is a light at the end of the tunnel. I'm a person that believes that we need to turn this siege mentality that the city seems to be operating under into one of community involvement, and organizing the community, and community mobilization to really turn this thing around and get on top of it, because I think we can. In many ways I think the drug situation we are seeing in the city is a guerrilla war almost. We've seen some evidence of that this past week. It's a very tragic and sad situation to see the level sometimes of support for certain networks in the city, and it suggests that some people benefit from that.

I think you either have to be part of the problem here, or you are going to be part of the solution, and I think it's time for those who are suffering, as well as the courts, and the prosecutors, and the political leaders, everybody needs to understand that it's time to start drawing the line here, and not give any support to those who are out there peddling drugs, peddling death to the people of the city that can least afford to deal with it.

So, I think we can make a difference here, and we certainly are doing everything we can in terms of focusing our resources on the most serious offenders, to try to take out some organizations. But, we also need to send a consistently clear signal to all levels of offenders, that you can't engage in this, what sometimes seems like almost mass lawlessness. The numbers of people who are arrested, the numbers of people that go through the criminal justice system, the numbers of people who are convicted, and even the rate of incarceration, while we might argue, and argue very strongly, that should be increased, are substantial.

There is a substantial change of values that has to go on here, and I know that's not necessarily what you look at a prosecutor to say, but law enforcement is a—even if it's very aggressive, and I want to tell you, I think we will be as aggressive, and we are as aggressive as we can be. Even then, you are in a defensive posture.

It's time that we be able to take the offensive, and that requires family, it requires values, changes, it requires community involvement, it requires demand reduction, it requires treatment facilities. I mean, there may be areas, for example, in our diversion program, which we have a program, if you are a first offender for certain kinds of low-level misdemeanor cases, if you perform—if you go through certain steps and stages, the charges won't go to conviction against you.

If we had better drug treatment facilities, for example, it might make that program more effective. It would certainly help solve some of the problems in the streets, so that, rather than just running people through the criminal justice system, we'd move them into a treatment area, at certain levels. I'm not talking about the big dealers. I'm talking about those who possess.

Mr. SCHEUERMANN. Do I take it then in your view we would probably be better off in expanding the number of commissioners and enhancing the authority of commissioners in superior court, as opposed to creating permanent new judgeships, as suggested by Chief Judge Ugast, as a way to address the immediate problem?

Mr. STEPHENS. I wouldn't say better. I wouldn't say the two are exclusive at all, and it's not my role, I guess, to suggest that we expand the number of judges. I know the court is overworked. I know what the court calendars are.

I think it would be helpful to have additional judges on the superior court. I think it would help the system run more smoothly, and how many, I can't say. I don't think adding more commissioners is necessarily exclusive of adding more judges. I think it's a quicker, more temporary solution. On balance, I think it's more important in the long term to have judicial resources that can deal with the broad range of cases that come in. It just helps management of the court system, the unified nature of the system, rather than addressing a specific problem for the immediacy. But, I think the two—both of them are plausible solutions, particularly, if they are used together.

Mr. SCHEUERMANN. Has the individual calendar system in criminal helped substantially in moving cases?

Mr. STEPHENS. Yes. It's a real benefit, I think, overall, to try to keep some level of efficiency and management where there are large numbers of cases which we have.

Mr. SCHEUERMANN. Pass it around.

Ms. DANIELS. I defer to Harley Daniels.

Mr. DANIELS. Mr. Stephens, I know that recent things that your office has done, I found it extremely brilliant, particularly, last weekend's operation. I think more of that kind of thing will have a long-term impact.

But, the question—we're talking about the sort of broader issues here, issues looking over the next 5, or 10, or maybe 15 years, in addition to the immediate crime problem in front of this community.

I'd like to ask you a couple questions. As I understand it, you are the only U.S. attorney within the continental United States that has jurisdiction over all prosecutions within your framework, is that true?

Mr. STEPHENS. With the caveat, as you said, of the continental United States, because the Virgin Islands has that, and Guam has that.

Mr. DANIELS. There's some territorial governments that have similar ones.

Mr. STEPHENS. We are, and I think there's a real advantage to that, particularly, where you are dealing with a contiguous geographic area, which, you know, in a defined area, for example, the District of Columbia. We are able to do what—here, with virtually no difficulty, what many other offices, DA's offices and U.S. attorney's offices around the country have had more difficult doing, and that is to use our resources in both courts, to move them around, to do what we essentially call cross designation. For example, the drug homicide strike force, if homicides relate to Federal narcotics charges, they can be tried in Federal court. If they relate to District of Columbia Code charges, they can be tried in superior court. We can focus our resources and move them around in a way that really gets at what I would like to do, and, that is, to make the most—essentially, to have the most impact you can, using the best statutes where they may, and using and utilizing all of the court resources, and not to overload one system or the other.

I mean, you can move these cases a little bit, and there's some, obviously, you can't do it completely, but the answer to your question is, yes, and it has had, and I think it can have, a very positive effect in terms of your ability to prosecute cases.

Mr. DANIELS. I'd like to do a brief followup, if I may, because——

Mr. SPEIGHTS. Can I just interpose one thing, Harley?

Mr. DANIELS. I yield to the gentleman from Michigan.

Mr. SPEIGHTS. Again, my apologies. I'm a layman. I'm not a lawyer, I'm not involved in the judicial system. But, as I listen to you say that, and assume that you say that's a good system, doesn't that argue then that we should abolish the elected prosecuting attorneys throughout the country and turn it over to the U.S. attorneys, so that they could have that same flexibility?

Mr. STEPHENS. Well, I don't think it necessarily goes that far. I'm saying, this system, I think, has worked well. I think it can work even better.

In some respects, I concur in, and, in fact, in most respects, the comments of Chief Judge Rogers, that it is not clear, I think, that you would get a better quality of justice simply by having elected DA's around the United States or in Washington, DC, or anywhere else. You are assuming that by having elected judges, or elected DAs, that has some magic in terms of the quality of justice. I'm not sure I would agree with that assumption. Because Michigan may have elected DA's, and they are up every 2 years, it's not clear that you get better law enforcement in Michigan than you would in New York or Washington or wherever else maybe.

Mr. SPEIGHTS. Then, as a social scientist, I would say that since this is the only exception in the country, that, perhaps, we should propose then that we select out a number of others, like, say, Wayne County, Bronx County, Los Angeles County, and try this so we can compare the two, because the rest of the Nation works differently. It works where an elected prosecuting attorney or local

district attorney brings to the felony court of that jurisdiction the cases made by the local police department.

This, as far as I understand it, is the only place where a U.S. attorney brings to a felony court that is a local court cases made by a local police department.

If it's a good way to do it, then we ought to try it some other places as well. If it's not—if the other ways are serving their people well, why are we different?

Mr. STEPHENS. I think we are serving our people very well. I think this is a very professional office. I think if you looked at comments around the United States, I think that you'd find that the U.S. attorney's office in Washington, DC, is probably viewed as one of the most professional prosecutive offices in this country. As long as I'm here, I intend to keep it professional and not political, and I think that's critical.

You can hire very talented people. You call judgments on the merits. You don't politicize the process. You don't make judgments based on politics. You make judgments based on handling the cases and moving them through the system as best you can with the resources you have, and I think we do have a very professional office here.

Mr. SPEIGHTS. I hold the office in high regard, and you also, sir, but I am a politician, and even where there is no elections, there's an awful lot of politics played in this country.

Thank you very much.

Mr. DANIELS. I'll just point out that this whole subject will be the subject of the workshop that we are going to be holding in July, and we won't burden the record too much more with questions about this topic.

Mr. DUCKENFIELD. Mr. Stephens, we welcome you here this afternoon.

Over the years, I have had a number of persons to come to me after serving on jury duty, and say to me, gosh, I really don't understand why that case was brought in the first instance.

What has been done to automize the papering process? I recognize some of these cases will get through, but what has been done to automize that process so we don't have too many of our people leaving the court system feeling that resources were wasted when they have been directed to more serious cases?

Mr. STEPHENS. You raise an excellent point. There's always two sides to every question. For everyone that comes forward like that, we have the police officers coming in, or another citizen coming in and saying, why didn't you charge this case of assault, or why didn't you charge this case of possession, or why didn't you charge this?

We try to evaluate every case on the merits. We try to have some general framework of the kinds of cases that might be available, to get, as I indicated before, diverted out of the system. We charge, as a general practice, I think it comes into the neighborhood of between 75 and 80 percent of arrests that are presented to us are charged in the criminal courts here in the District.

I don't disagree with anything that you suggested, because I think it's important for the resources of our office, the resources of the courts, that we try to make as many of those difficult decisions

at the front end of the system, because once a case is into the process, it takes on a life of its own, particularly, if it moves to an indictment stage, it becomes more difficult to just dismiss it because there was some basis there that a grand jury said there's probable cause, this offense was committed.

We are taking a look at our intake process. This past, well, about 2 weeks ago now, I started a whole review of our procedures and processes there, because I think it is important to—it's never easy not to charge a case where there's been an arrest, unless there's some fundamental problem with the arrest, or some technical violation of the law, or some violation, perhaps, of a defendant's or a target's rights somewhere along the line, it's never easy to sort of have to say we don't think that is important enough, or we don't think a jury will convict on that. But, those are the kind of decisions that it's important for a prosecutor to make early on in the process.

Normally, we get the criticism from the other side that, why aren't you charging more of these cases, rather than fewer. It is a tough line to draw. It's important that it be done consistently, as consistently as possible.

In point of fact, sometimes cases get developed as they go along. You realize that some cases get better and some cases don't get any better. They might even get worse as they go along, and so decisions need to be made then, would they be dismissed before trial.

Some cases end up being tried, because there's a genuine dispute about the facts. Obviously, the government doesn't bring to trial cases which we believe are not justified in bringing, and we wouldn't do that, and we dismiss cases if we have substantial doubt, certainly, about the guilt of an individual. That's part of the justice of the process. We're not here just to try cases and see what happens at the other end. We're here to bring cases against individuals we believe, not only the grand jury has found that there's probable cause, but what we believe there is substantial probability of conviction at trial.

Anyhow, the answer to your question, surely, I think it is a critical point in the process, we are taking a look at it and reviewing it. We are trying to make those judgments as tightly as we can, so that we don't use the resources unnecessarily.

Mr. DUCKENFIELD. One last question.

How many of the attorneys in your office reside in the District of Columbia?

Mr. STEPHENS. I don't know the answer to that, Mr. Duckenfield. I think probably in the neighborhood—I really don't know. I'm sure it's 60 to 70 percent or more, but I don't know the answer. Most of them do, but some live out in the suburban areas also.

Mr. DUCKENFIELD. OK, thank you.

Ms. WILLIAMS. Mr. Stephens, could you tell me, what is the present allocation of the attorneys in your office to the superior court and the District court? Also, in considering that response, could you tell me why some cases that could be paper—that are paper in superior court, which could also be tried in Federal court, why do they end up in superior court?

Mr. STEPHENS. OK.

The allocation of resources, it is difficult to give you a precise answer, so let me work backward, and you'll get a sense of the dedication of resources to the kinds of problems of, let's say, drugs and violence, which out of the 210 lawyers currently in the office, we have about 20—in the neighborhood of, say, 25 that are doing what I would call more white collar crime related offenses, fraud, corruption, terrorism, that kind of thing, although, terrorism is certainly not a white collar crime kind of offense, but different kinds of cases.

We have about 30 lawyers in a civil division that handles civil suits involving the United States as a party. So, that's, what is that, that's approximately 55, if you subtract that from 210.

The remainder of the lawyers are dealing with violent crime and narcotics, and that's over 150, I guess. Now, some of them are in an appellate division, some are in misdemeanor trials, some are in felony trials, some are in grand juries, some are in the chronic offender unit, some are in the felony I unit, some are in our new narcotics unit, some are in the drug homicide strike force I mentioned, which will try cases both ways, some are in a new trial unit, a drug trial unit, that will try to bring more of those cases that you've suggested that have been brought in superior court, but where there is a jurisdiction in a Federal court, particularly, where there are mandatory penalties available, to bring those cases in Federal court because the penalties are better, the statutes are better, there is prison space, obviously, not necessarily any better, but we seem to be able to get them in and keep them there a little better.

So, the answer to your question is, in many areas I suppose there's joint—theoretically, joint jurisdiction. We try to use the resources to bring the cases where the statutes are best. If we have a CCE statute, continuing criminal enterprise statute, or a RICO statute or a mandatory penalty statute, Armed Career Criminal Act statute, those are Federal statutes, we would try to use those more. If it's something involving a violent crime where we can use the pretrial detention statute in superior court, we would attempt to use that jurisdiction more.

By and large, most of the violent crime, however, homicides, rapes, robberies, burglaries and drugs, are brought in superior court, but we are moving more cases to the Federal court in the narcotics area, simply because of resources, and penalties, and statutory schemes that are available, and also to use the forfeiture law that's there, and also to get at—to be able to investigate the cases better.

I think in many cases we are finding that rather than—if you can use an investigative grand jury and work up in some of these organizations, drug organizations, in particular, that's important, rather than just dealing with the first guy that walks in the door who may have made the sale. He may know something about the next level, and that takes time, and it takes more resources, but we need to do a little bit more of that, and that's why we are able to do that a little bit more on the Federal side, just because of the availability of the grand jury process there that's more investigative oriented than is the D.C. side.

Does that answer your question?

Ms. WILLIAMS. Yes.

But, along with that, would you say that the more experienced assistant U.S. attorneys are used in the Federal court?

Mr. STEPHENS. Yes and no. I think the most able forensic attorneys, who have the most defense-trial talent and skills, end up on both sides, and we've tried to move people back and forth.

In fact, I set up a new—this new drug unit that I've talked about, it deliberately moves people from superior court, to District court and back to superior court, so they can try cases on both sides.

The people trying the most serious cases, the first-degree murder cases, the rape cases, the pretrial detention cases, are very experienced attorneys. For the most part, they are—some of them had prosecutorial experience before they got to our office. All of them had substantial legal experience before they got to our office, because we generally don't hire anyone who hasn't at least had 1, 2, 3 or 4 years of legal experience. All of them have, you know, 5 to 6 years of experience.

In the drug homicide unit I set up, we have two or three people who have 10 or 15 years prosecutorial experience. They are the most senior people in the office.

There are some people in the white collar area who have more years in the office, but it doesn't necessarily mean, because they have been there longer, and they are skilled at white collar investigations, that they would be skilled homicide prosecutors.

So, we try to put—for me, the most critical cases are homicide cases. I think those are the thing that sends—that's the most important thing in any criminal justice system, is how you deal with that. That's the most violent offense, it has the most significant impact on people's lives. It has the most significant sense on your basis civil right to safety and security in your home and in the streets. So, we try to put the most talented people that can handle those kind of cases on those kind of cases.

Mr. BARNES. Mr. Stephens, we certainly appreciate your testimony.

Let me just say that, as a member of the bar, I appreciate the balance and quiet professionalism that you have brought to the office, and I have three quick questions that require short answers.

Correct me if I'm wrong, but as I understand it, each time a superior court judge is added, the Justice Department will automatically allocate seven additional assistant U.S. attorneys in their district?

Mr. STEPHENS. It's—nothing is automatic. I can tell you nothing is automatic, because we did get a substantial increase in resources in January, but it wasn't automatic.

Generally, if they put on a new felony trial calendar, we staff that with three assistant U.S. attorneys, not seven, but three. It isn't automatic, but if we get a new judge, it gives us some substantial predicate to argue that we need additional lawyers to service that judge.

So, that's the short answer.

Mr. BARNES. Is the same true when they are hearing examiners or hearing commissioners added to the court?

Mr. STEPHENS. That has not been the case to date. As, I think, Judge Ugast indicated, I believe there are five hearing examiners

in the criminal area, that hasn't given us additional resources. We adjust our resources to deal with that.

If we were to go to something more substantial as we talked about—Mr. Sherman and I discussed a little bit ago, that might give us a predicate to ask for more resources. That has not been addressed to be linked.

Mr. BARNES. Do you know how many assistant U.S. attorneys live in the District of Columbia?

Mr. STEPHENS. I think I tried to respond to that to Mr. Duckenfield, and I'm not sure. I can try to provide that to the team. My sense is, it's probably 60 to 70 percent. I think, certainly, the majority do.

Mr. BARNES. OK.

How many are minority?

Mr. STEPHENS. We have a very active minority hiring practice and policy, and I think it's important to reach out in the pool of applicants to ensure that we are bringing minority applicants to be hired.

I was trying to think, in the 35 people, I believe, that I've hired in October, December, January and February, I know in the January group there were 13—12 lawyers hired, and I think there was only one white male in that group. There were some white females. There were some black males, and some black females.

I have tried to—I have done this on merits, and I think we deal with this problem by recruiting and bringing people into the pool process. We have, I just appointed four new chiefs in my district court, for example, of those four, one is a black woman, one is a black male. We have a black female that's head of our chronic offender unit. I have two of my executive assistants, my two executive assistants, one for management, one operations, one is a black male and one is a black female.

I think we have a very aggressive approach and policy to try to recruit and promote minorities in the U.S. attorney's office, because I think it is good to have those opportunities, I think it is important to this community that that be done, and, most importantly, I think it's on the merits, that when you are good you deserve to be promoted, and they are good, so I promote them.

Mr. BARNES. Thank you.

Mr. LINTON. Mr. Stephens, if I might, I want you to know, I mean, you do know, that I am one of your biggest supporters in terms of restoring the U.S. attorney's office to the high degree of professionalism, from taking politics out of the office.

But, I am concerned as I listened to your comments and the comments of the chief judge, that, perhaps, as lawyers we are sometimes not aware that problems of perception are reality. That, my friend from Michigan was talking about a serious problem in the District of Columbia, and, that is, the protection of the citizen group. The lay people, as I go out and speak in the community, are always concerned about having faith in the court system, and in the prosecutorial offices that you mentioned.

My question to you is, not to belabor the point, but are you aware of the fact that the citizen group feels that, perhaps, the court system is not, and including the prosecutors, are not as accountable as they should be? I think you are aware what efforts

have to be taken to make the office more accountable, or to improve your image with the citizens.

Mr. STEPHENS. Thank you, Mr. Linton. I appreciate your comments. Let me say that I am aware of this issue, I'm very much aware of it. One of the things that I have tried to do is to develop what I think is some credibility in this community. I think a prosecutor's most valued commodity and quality is credibility. Without that, you basically have lost, if not all, you've lost a lot of your ability to make decisions that you can see are going right down the line, because sometimes some people would be unhappy about this decision, and other times others will be unhappy about that decision.

We have made an effort to develop what I will call a community outreach program. Initially, this was being developed by Norm Mitchell, my executive assistant for management, and it involved going out to deal with community groups, community councils, schools and drug demand reduction programs. Judy Smith, who is here with me this morning, has just come on recently as my special assistant, and one of her efforts is to enhance and build our community outreach program, because I do think it's important.

I'm keenly aware, and I think it's critical, that a community understand that, and I will understand that the prosecutor is on their side, and that's one of the proudest reasons I'm a prosecutor, because I think we represent the victims, we represent those who are victimized, and it's important that they understand that they have a voice downtown. It isn't just someone who is coming out, and no disrespect for the defense bar, who is representing the defendant, but that the government, the District of Columbia, the people, the victims have a voice downtown. That would be the prosecutor's voice, and we are there to try to protect their rights.

We have done some things in the victims' rights area. We set up a victims assistance unit, and I have taken that very seriously. In a recent case we prosecuted, the *Ian Blair* case, I spent quite a bit of time in that personally, meeting with the victims personally, and they had a substantial input into our handling of that case. There was no plea offer made in that case. We fought tooth and nail to avoid a plea, to an Alford plea, which is, I don't admit my responsibility, but I don't want to sit here and listen to the testimony any longer.

I think victims in the community have a substantial input into how cases are handled. Now, let me say on the bottom line, of course, it is the prosecutor's professional responsibility to make the ultimate decisions about how a case is going to be handled. It isn't a matter of 10 people feel this way and 9 people feel that way, so let's do this, but I think our decision should be informed by victims and how they have been treated and how they feel about the crime.

So, yes, we are aware of it, and we're trying to develop a very active community outreach program, so the community understands that the prosecutor is on their side. We want to win their support, because, ultimately, and part is what you said and what the gentleman next to you had said, the prosecutor—the criminal law is the law of the community, it grows out of the community. The community is responsible for the moral judgments that are

embodied in the criminal law, and the prosecutor is really the mechanism to take that forward and to enforce it.

So, it depends upon community support, whether it be in terms of justification for decision made, or when you get to the trial point, as Mr. Duckenfield was talking about, so that the jurors sense that we're here as part of the community to render justice, because we believe that the system is working.

Mr. LINTON. One final question in that regard. As I say, I was deeply troubled by his response, because I don't think that the cries of the community for elected judges, elected prosecutors, are a result of unwarranted fear. We are involved in a crisis in this community, and it is as much a crisis of confidence as it is a crisis of crime.

In that regard, I am interested in what recommendations the U.S. attorney has made to Mr. Bennett.

Mr. STEPHENS. Let me address two points there quickly, Mr. Linton. One is the issue of confidence, and I think your first comment goes to an approach that I have tried to take, and, that is, to work very closely with the people of this community and the officials of this community, and not to set up any kind of counterpoint situation here. I think that is critical. We are all part of the same system, all part of the same process. We need to work together, and I think in many respects those relationships have improved significantly.

With regard to Mr. Bennett, the kinds of recommendations made, let me say, I think, and I'm not here to defend or to attack the Bennett plan. I mean, we are, in part, a recipient, but we are part of the overall process that addresses.

I think I would look at that in two ways. One is, I think he was looking at it as a limited Federal initiative to provide, as he said, I think, to provide some breathing room in both the terms of prison space, a few additional prosecutors, and to focus on certain kinds of the mid- and upper-level organizations or groupings that are dealing in drugs and violence, and to try to focus some resources there in the short term.

It does not mean we don't need to do a lot more in treatment, in demand reduction, in prison construction, or, perhaps, in judicial resources, or additional prosecutorial resources.

So that, the second thing is, I think the function, at least I see it serving as a catalyst. I think he's focused some attention on the issue here, he's tried to get people involved in the process, and by the nature of the beast, Mr. Bennett's office is not an operational office, it's not one that's going to have hands-on authority in terms of how the District or the Federal Government, for that matter, manages its affairs here in the District of Columbia.

I think it has brought— there is a lot of attention focused on this problem now. It's sort of a catalyst to get all of us working and started on this. Ultimately, it's going to be our responsibility of how we carry that out, and I think all of us working together are going to make the difference. It's not going to be the involvement or noninvolvement of a drug czar in this area.

Ms. DANIELS. I just wanted to make a comment, because I had the pleasure of working with your staff in setting up your arrival here, and I just wanted to commend you on the cooperativeness of

your office in making you available, and we thoroughly appreciate it.

Mr. STEPHENS. Well, thank you. I appreciate it.

As I said when I started, I really appreciate the opportunity to participate, because there's a lot of players in this. Nobody has a monopoly on truth here, by any stretch. Some of us had different kinds of experiences, and different kinds of exposure. I think it's helpful to talk about these issues, because I know you are well meaning, and I, hopefully, can contribute a little bit to that, while maybe trying to come to take a look at and see if there are some changes that need to be made here in the system.

Mr. BARNES. On that, we'll here from the defense bar next. Thank you, Mr. Stephens.

Mr. STEPHENS. Thank you very much.

Mr. BARNES. OK.

I understand that we have a great compromise, in that our next witness has agreed, acknowledging that we're wearing down our reporter, to defer her testimony until 2 o'clock. So, the subcommittee will stand in recess until 2 o'clock.

[Whereupon, at 12:54 p.m., the subcommittee recessed, to reconvene at 2 p.m. the same day.]

AFTERNOON SESSION

Mr. BARNES. We were about to hear from Kim Taylor, who is the public defender for the District of Columbia. We also note the presence of Dean Jack Friedenthal, who will immediately follow Ms. Taylor.

We're delighted to have you. We have your written statement. It will be inserted into the record in its entirety and you may proceed as you wish.

TESTIMONY OF KIM TAYLOR, PUBLIC DEFENDER FOR THE DISTRICT OF COLUMBIA

Ms. TAYLOR. Thank you very much. Let me say good afternoon to everyone. I'm very happy to be here this afternoon on behalf of the D.C. Public Defender Service.

What I intend to do is basically read the comments that I have drafted because I think that they answer some of the questions that I at least heard raised earlier. I'd be happy to answer any questions after that.

The District of Columbia court system can take pride that in the 20 years since court reorganization it has remained committed to the goal of providing quality services to the citizens of the District of Columbia, including the poor and disadvantaged.

Indeed, now at a time when the current epidemic of violent crime is causing many individuals to call for a relaxation or suspension of constitutional rights in order to expedite the arrest, prosecution and incarceration of persons accused of crimes, we remain confident that the District of Columbia court system will not bow to this pressure and will continue to safeguard the treasured rights of all of our citizens.

One of the characteristics which distinguishes the District of Columbia court system from court systems in other jurisdictions is its

willingness to undertake precisely this type of self-examination, not only to assess its successes, but to develop methods for improving the overall quality of its system. Indeed, many of the issues which this team seeks to explore are of great importance to the D.C. Public Defender Service and the clients that we serve.

Today I intend to address two areas which this team has identified, court delay and the quality of justice currently being dispensed in the District of Columbia. I hope to identify some of the problems that lawyers within my agency have experienced and to offer proposals for improvements to the criminal justice system as a whole.

Because the District of Columbia has recently experienced one of the most dramatic increases in the rate of crime in its history, every component of the criminal justice system has been experiencing the real sensation of bursting at the seams. There are more arrests and more trials than every before. Indeed, our courts are choked with cases.

One consequence of the ever-increasing numbers of cases in the court system is pretrial delay. As attorneys for many indigent men and women charged with criminal offenses in the superior court, we are all too familiar with the cost that prolonged pretrial incarceration impose on criminal defendants and their families. Too often our clients remain in the overcrowded D.C. jail for months, only to be found not guilty after a trial or to be released when the charges against them are dismissed.

Remedies to this problem of delay are clearly needed. The U.S. attorneys office has recently suggested that one answer to this problem is to transfer more cases to the Federal district court. While at first blush this proposal may seem attractive to some, we believe it amounts to little more than a shell game, succeeding in only shifting the problem of increasing numbers across the street to another courthouse. Furthermore, we fear that a large-scale transfer of cases would have detrimental constitutional implications for indigent defendants prosecuted in Federal court.

At present, the Federal court does not enjoy the services of a public defender organization, while it is true that the Federal court is currently considering establishing a small Federal defender office separate from the D.C. Public Defender Service. We believe that such an organization would lack the institutional experience and expertise to provide the level of representation that indigent defendants have come to expect in the District of Columbia and, indeed, have the right to expect.

In light of this, the transfer of cases to Federal court does not provide an answer and, in fact, creates the potential for even greater problems in the future.

In our experience, we have found that some pretrial delay in superior court can be attributed to the practice by some prosecutors to take 9 months to return an indictment, the maximum time before a case is automatically dismissed as abandoned. The superior court judges, to their credit, have begun conducting status hearings in the most serious felony cases to monitor a case's progress through this preindictment period. However, those status hearings are often less than effective. Prosecutors are permitted to come

into court, to offer excuses for their delay, which are accepted routinely and then future dates are set.

We would propose that such status hearings, if accompanied by sanctions on the government for inappropriate delay, could provide a meaningful tool to the courts for the movement of cases through the system.

Another cause of delay in the superior court is the practice of providing limited discovery in the District of Columbia. Obtaining discovery from the prosecution, like investigation, is a fundamental obligation of defense counsel. The more discovery the prosecution gives the defense, the less the defense needs to cover the same ground in its investigation and the sooner the defense can get ready for trial.

Since defense lawyers are never at the scene of the crime at the same time as the police, discovery is also the only way for the defense to obtain information and evidence for trial preparation, such as the results of fingerprints, blood, hair or fiber analysis or ballistics evidence.

Moreover, it may well be that if the defense learns about evidence through discovery early enough, the parties can streamline the trial by stipulating facts or evidence that is really not disputed. Indeed, early discovery may enable defense counsel to convince a client to resolve a case short of trial.

The open file discovery policies of our neighboring jurisdictions allow for much faster trial preparation. At a panel discussion late last year under the auspices of the District of Columbia Bar, the chief assistant States attorney for Montgomery County justified the policy, not only the ground that it is fairer, but also because in his experience it tends to help the prosecution by encouraging defendants to plead guilty in some cases, rather than going to trial despite overwhelming but hidden evidence.

Neither Montgomery County nor a State such as Florida, which allow broad pretrial discovery, have ever reported problems of witness intimidation as a result of their policies.

By contrast, the prosecution's discovery policies in the District of Columbia are unusually restrictive. It is often difficult to get timely discovery of video taped statements or line up video tapes, even though disclosure is clearly required by the rules.

Other information routinely disclosed by Maryland prosecutors and by Federal prosecutors in most other jurisdictions is almost never provided here. For example, in Maryland, defense counsel will receive the names and addresses of government witnesses. This hardly ever happens in the superior court.

Finally, although rule 16, which governs pretrial discovery, requires disclosure upon request of the defendant, and defendant applies throughout the rules to anyone who has been arrested and charged with a crime even before an indictment is returned, the policy of the U.S. attorneys office is to refuse discovery until there has been a indictment. This means clearly discoverable evidence, such as the defendant's statement to the police, is withheld, even though it has been in the government's possession since the very first day of the case.

Prosecutors do conduct some preindictment discovery in cases on the accelerated felony trial calendars in order to meet the strin-

gent time limitations of the preventive detention law. However, we would submit that legislation could be drafted which would make open file preindictment discovery mandatory in all cases as a means for expediting cases through the system.

As the number of arrests continue to rise, legislators across the country have been seeking new methods to reduce the backlog in our court systems. Indeed, in other jurisdictions, legislators have enacted statutory provisions which effectively divert large numbers of cases out of the court system.

In the State of Oregon, for example, which experienced a 214 percent increase in its volume of cases between 1982 and 1986, the legislature adopted legislation providing that certain misdemeanors could be reduced from criminal offenses to violations.

In addition, legislators in other jurisdictions have enacted statutes which authorized automatic diversion provisions for first offenders and for misdemeanors in specific categories. Currently, the U.S. attorneys office for the District of Columbia does operate a diversion program for misdemeanors. However, this program owes its existence and operation solely to prosecutorial discretion.

We would propose, in an effort to reduce the high volume of cases that can cause delays in superior court, that the Congress consider legislation which would provide for automatic diversion programs in addition to the discretionary programs operated by the U.S. attorneys office.

Finally, in order to combat court delay, there is clearly a need for more judges, commissioners and support personnel. However, the criminal justice system functions effectively when it operates in balance. Employment of sufficient prosecutors, sufficient judges and sufficient defenders creates a just criminal justice system and promotes public confidence in that system.

In short, one cannot provide additional resources to one component of the criminal justice system without providing a balance of resources to other component parts. More judges require more prosecutors, more defense attorneys, more support staff. In fact, as the American Bar Association has recognized, when one component of the system is under funded, the system as a whole becomes less efficient. The D.C. Public Defender Service is supportive of any efforts to increase the amount of resources provided to the court system as long as they are provided in balance.

With respect to the quality of justice currently being dispensed in the District of Columbia, let me begin by reiterating that the District of Columbia has taken the lead in its efforts to dispense justice fairly in the 20 years since court reorganization.

The concern that I intend to voice today arises as a result of the current climate of anxiety over the increasing crime that has been experienced both locally and across the Nation. It is incumbent on our legislators and our courts to safeguard fundamental constitutional rights and to fight against any attempts to suspend or erode those rights which we hold dear.

On a daily basis, we have been witnessing the steady deterioration of the presumption of innocence. As incidents receive increased media attention, we as defense attorneys are finding that by the time an individual is arrested, he has been tried and convicted by the press and the public. Citizens read that someone has

been arrested and they breathe a sigh of relief, "Good, they caught the guy." They presume guilt before any evidence has been presented.

But the presumption of innocence requires the exact opposite response. We must presume innocence unless the government presents proof that convinces us beyond a reasonable doubt of an individual's guilt. The presumption of innocence, a cornerstone of liberty in our country, cannot be allowed to dissolve into empty words.

We, of course, recognize that there are competing interests involved here. The sixth amendment rights of an accused must be balanced by the first amendment rights of the press.

However, one must consider that the problem of obtaining a fair trial is particularly acute in the District of Columbia because we do not have the opportunity to request a change of venue. In other States, defendants can make a showing detailing their inability to impanel an impartial jury and can request a transfer of the case to another jurisdiction within that State. This option is not available in the District of Columbia.

In light of that, legislators may need to fashion innovative methods to insure that criminal defendants within the District of Columbia receive a fair trial. One possibility is to expand the type of voir dire procedures that are currently utilized in superior court, allowing individual voir dire conducted by attorneys rather than general voir dire procedures conducted by judges.

In the past 20 years, the District of Columbia court system has been open to change and efforts to improve the quality and quantity of the services it provides. I remain confident that in the next 20 years, and hopeful that in the next 20 years, it will continue to make strides in providing services to those involved with the court system.

Thank you.

Mr. SCHEUERMANN. Thank you very much, Ms. Taylor. I'd like to start off the questioning and start with a question as to what additional resources your agency would need. Assuming the Congress was able to give both the court system and the U.S. attorneys office locally the additional resources it has requested, what additional resources would the D.C. Public Defender Service need to keep the balance that you mentioned in your statement?

Ms. TAYLOR. We have, in this current budget process, requested additional attorneys, 5 additional investigators and 2 additional social workers. That initial budget request was approved by the District of Columbia Council and we are hoping that we will get approval from the Congress as well.

In addition to that though we would need some support staff, support resources. Every time the District of Columbia starts talking about increasing the number of police officers that they're going to employ, that means the numbers of arrests will go up, which means that we need the numbers of attorneys to go up to be able to handle the numbers of cases that are coming in.

So, at this point we've asked for as many lawyers as we can physically handle in our current location. We would, of course, request more attorneys if we had more space, but at the moment we can't even place them.

Mr. SCHEUERMANN. Assuming Mr. Stephens' comments this morning about three additional prosecutors per additional judge and judicial resource person, would the same numbers hold true for you?

Ms. TAYLOR. We don't assign our attorneys to judges as the U.S. attorneys office does. We rotate. So, our numbers don't break down quite as simply as that. But if the U.S. attorney—I believe that he mentioned that he was requesting 35 or 25 additional positions by the summer, we would certainly need a portion of that, I would assume about 5 or 10 more attorneys, to be able to handle the numbers that will be coming in.

Mr. SCHEUERMANN. What percentage of criminal appointments is the D.C. Public Defender Service handling in the superior court today?

Ms. TAYLOR We handle something under 15 percent of all of the indigent criminal cases that come in. We handle approximately 50 percent of the most serious felonies that come in, indigent felonies that come in.

Mr. SCHEUERMANN. If you got the additional resources that you've just identified, would you be able to maintain that percentage?

Ms. TAYLOR. We would. Our percentages have been dropping because we haven't been able to handle the increasing numbers of cases that have been coming in. Our number of attorneys have remained constant since, I believe, 1984. It's only now that we're asking for an increase in numbers so that we can deal with the number of cases that are coming in.

Mr. SCHEUERMANN. I will now turn it over to Mr. Daniels for any questions he might have.

Mr. DANIELS. Ms. Taylor, I'm particularly interested in this discovery problem, because I've just spent many years practicing criminal law in another jurisdiction that had an open discovery policy. Immediately after arraignment, initial arraignment, the prosecutor would send to you his entire file which included all police statements, interviews. Even, interestingly enough, if the case were brought by indictment, you'd get the grand jury tapes. I know that seems extraordinary.

Ms. TAYLOR. That's Heaven.

Mr. DANIELS. I never found any particular secrets in the tapes, but I did find that a lot of information proved to be very interesting in trial when the testimony changed from the testimony given to the grand jury and then the testimony ultimately given in the trial.

I noticed in your testimony that there have been some discussions looking toward loosening these rules up. What has been the product of these discussions?

Ms. TAYLOR. At the moment, there has been no movement. We still have a relatively strict or restrictive discovery process.

Mr. DANIELS. What is the justification? I'm sorry that I didn't ask Mr. Stephens when he was here. I would have like to have gotten into this with him. But what is the justification for the kind of restrictive discovery that is an every day fact in the superior court?

Ms. TAYLOR. The main argument that was proposed, at least at the D.C. Bar hearings or meeting was that they were concerned about the intimidation of witnesses. As I indicated in my comments, that was specifically addressed by the State's attorney in Maryland.

Mr. DANIELS. I know that many of the States' rules that I have reviewed actually have a provision which allows the prosecutor to make application to the judge to withhold certain materials subject to the judge reviewing it and deciding if there was a possibility of intimidation.

Ms. TAYLOR. Absolutely.

Mr. DANIELS. Do you feel that we won't have any progress on this issue unless Congress takes the lead, perhaps by legislation, in mandating open discovery procedures in the District of Columbia?

Ms. TAYLOR. That's what I'm proposing. Because, I don't think that we have gotten very far in terms of the informal discussions that we've had. I think that despite the kind of evidence that you've been discussing and the type of statistical backing that we have for the defense perspective here that there should be open file discovery, our U.S. attorney's office is resistant.

Mr. DANIELS. Don't you feel that the kind of discovery they have now, closed discovery, places a tremendous burden on court time——

Ms. TAYLOR. Absolutely.

Mr. DANIELS [continuing]. Prosecutor time and public defender time getting information that you would normally receive in the matter of course in another jurisdiction?

Ms. TAYLOR. That's correct. It basically boils down to cost in terms of investigation. You can reduce some of that. In terms of the actual court time, what happens now is under the Jank's Act we are handed certain statements that a witness has made. And those are not producible. The judge cannot compel production until after the witness has testified on direct examination. So often you have delays between direct examination and cross-examination while the defense attorney reviews the statements. If that was provided before trial, then the trial itself could be streamlined.

Another thing that I have found, on occasion there have been some assistant U.S. attorneys who have been willing to give you a little bit more information. I've had occasions where one assistant, who is now a judge, read to me—read transcripts of the grand jury—and based on his reading of the grand jury statements, I was able to convince my client that he did not have a prayer and that he needed to plead guilty and he did. So, a lot of time that might have been wasted in terms of making sure we should—or deciding whether or not we should go to trial was avoided.

Mr. DANIELS. Under Brady, don't you also get in a position that the prosecutor is deciding what materials may be exculpatory to your client? I've always discovered that I like to decide what questions I'm going to ask on cross-examination——

Ms. TAYLOR. Absolutely.

Mr. DANIELS [continuing]. Rather than have the district attorney decide that for me.

Have you prepared legislation or a bill or language? If you haven't, I've also looked at some and I'd sure like to bring it before

the mission team at least for discussion and for possible inclusion in a bill, because I agree with you. I think this is a terrible waste of resources, not to mention a real infringement on effective assistance of counsel not to have the kind of discovery they have in virtually every State in the Union.

Ms. TAYLOR. I agree, and I would be happy to offer the services of my office. We would be willing to help in the drafting.

Mr. BARNES. Go ahead.

Ms. DANIELS. Ms. Taylor, I do not practice criminal law, but I have certainly had a number of people who are involved in the system and who do regularly as attorneys represent indigent individuals under the CJA provisions. I suppose the biggest complaint that I have heard is that it is very difficult to get vouchers approved and so forth.

What is your role with respect to the CJA office? Would you see that there could be a change in that relationship so as to ease the situation?

Ms. TAYLOR. We currently don't have a role in terms of approving vouchers or reviewing vouchers. Currently, those vouchers are submitted by CJA attorneys to the individual judges that they have a case in front of. I have heard similar complaints that vouchers are either not approved in a timely manner or at times vouchers are cut. It presents individual defense attorneys with some difficulty in providing the kind of quality representation that they would like to do for their clients.

One thing that has been proposed is that the D.C. Public Defender Service could take a more active role in the administration of the Criminal Justice Act office. We currently have two employees that help with the paper work involved in the appointment of counsel process, but they don't actually take part in terms of the actual appointment of individual lawyers.

I am currently intending to meet with the presiding judge of the criminal division and the deputy presiding judge—actually, I believe next week—to discuss standards that could be used for the appointment of counsel. So, we are at least trying to develop some type of method of improving that system.

Ms. DANIELS. So you do feel that in the spirit of unification and streamlining procedures and so forth that it would make good sense in fact to attempt to coordinate in some better manner?

Ms. TAYLOR. Oh, I agree.

Ms. DANIELS. As a manager—and I certainly feel that I have been one in many jobs that I have had in the government and elsewhere—don't you find it to be an unusually burdensome and inefficient use of a justice's time in reviewing those vouchers? Or, is there some special reason that you know of why those justices would be singularly able to make those decisions?

Ms. TAYLOR. I'm afraid I'm not aware of how much time they put into reviewing the vouchers. I've heard complaints about them, but I honestly don't know what they do. I think that probably improvements could be made to the system, and I think that one of the things that we need to do is to look into it a little bit more. But we are attempting to do that by way of this beginning meeting coming in the next week or so.

Mr. BARNES. Any other members? Go ahead.

Mr. DUCKENFIELD. Ms. Taylor, you raise some very strong inferences. In fact, you made certain statements with respect to your concern about the diminution of the quality of representation for indigent clients if in fact the U.S. attorney should bring more cases in the Federal court.

Is there a statutory prohibition against attorneys in PDS being involved with representation of clients in the U.S. District Court?

Ms. TAYLOR. Not at the moment there isn't. Right now there is not an established defender organization. What we do on occasion is—actually 1 percent of our cases are in Federal court—we handle appointments based on a call from a judge saying, "I have a particularly complicated case. Can you send a lawyer over?" And we will. So we do that now.

What I was addressing in my comments is that the Federal court has a proposal pending for the establishment of a separate Federal public defender. They anticipate that a separate Federal public defender would handle 75 percent of the indigent cases that come into Federal court. The remaining 25 percent will be handled by a panel of CJA attorneys.

My concern is that when you have a limited or rather a small Federal defender that's separate from an already established public defender, I think that it's going to have certain problems. It's not going to have the same kind of institutional experience, institutional expertise. I think that frankly, from my perspective, the prosecutors will probably take advantage of the fact that they have a fledgling office, they have new attorneys, and they will attempt to try cases in a manner that I don't think will be in the interest of our clients.

Mr. DUCKENFIELD. Are there any impediments, political or otherwise, that would keep PDS from becoming the institutional presence in the Federal court?

Ms. TAYLOR. There are no political—certainly, no legal impediments. The law says that a Federal defender can be established or a community defender organization. We would fit under the later rubric. We could qualify as a community defender organization.

At the moment, the Federal court is looking into the issue and I don't know what they will do as a result of it. They should be making a decision sometime soon.

Mr. DUCKENFIELD. You indicated that you probably need to expand to 15 more attorneys?

Ms. TAYLOR. We've asked for that, yes.

Mr. DUCKENFIELD. From a comparative analysis, how cost effective would that be as opposed to expanding the CJA program?

Ms. TAYLOR. I think——

Mr. DUCKENFIELD. Dollarwise.

Ms. TAYLOR. I'm sorry?

Mr. DUCKENFIELD. Dollarwise.

Ms. TAYLOR. Unfortunately, I don't have any figures in front of me that might be able to give you an accurate account of numbers. But I think that certainly the request that I'm asking for should not be considered exclusive. I think that there should be additional attorneys or additional funding placed in the Criminal Justice Act fund as well for attorneys that pick up cases under the CJA statute.

In terms of whether or not we are more cost effective than CJA attorneys, I think that it has been found that in terms of doing felony cases we are. In terms of doing misdemeanor cases, we may not be. We may be somewhat more expensive on a dollar-by-dollar basis than a CJA attorney.

Mr. DUCKENFIELD. There is a perception that PDS has an opportunity to pick the cases or choose the cases it would like to handle. Is that true?

Ms. TAYLOR. I wish it was, but it's not, no.

What has happened is that, primarily because the judges recognize that we have a number of resources—we have an offender rehabilitation division which has social workers and a number of different job coordinators, people that can develop sentencing proposals. We have a number of different resources that we can tap in terms of representing a client, and a number of judges recognize that we have that. We have the institutional experience to handle a number of the serious felonies, so they tend to give us a lot of those.

But we certainly don't pick them. Our attorneys are placed on a list just like the CJA attorneys. The appointing judges, which would be at present Judge Walton and Judge Schuger, appoint according to whatever case comes in. We cannot call over and say we would like a certain case. It just doesn't happen that way.

Mr. DUCKENFIELD. You have indicated a very strong interest in the quality of justice as rendered on behalf of the indigents, and PDS has a reputation of having a most extraordinarily effective training program for its attorneys. Have you made this training program available to those attorneys who participate in the CJA program?

Ms. TAYLOR. What we have done is we've established a monthly training program for CJA attorneys. We train 2 days every month. The training involves just basically an introduction to superior court. We will deliver a number of documents to the attorneys who are picking up cases about how the superior court works. We take them through the initial meeting with the client all the way to sentencing and trial tactics. We have an investigator that comes in and talks about the steps that you need to take in terms of completing an investigation in a case. It's a pretty thorough 2-day program.

What we have talked to the presiding judge of the criminal division about is establishing a subsequent training period for more advanced felony training, but we have not actually established that as yet.

We do take part in the Criminal Practice Institute Trial Practice Program that happens annually. Indeed, we write the book for that, the trial manual for that. So we do try to take part in providing training to the CJA attorneys.

Mr. DUCKENFIELD. Thank you.

Ms. DANIELS. We've talked on several different occasions today about greater utilization of the commissioners in disposing of cases to a larger extent than they are currently able to. Would you please give us your views on whether or not you feel that the expansion of commissioners' authority would be valuable or whether or not you think it would be a detriment to the system?

Also, include in your response the issue of whether or not we need to change, perhaps in the commissioner system and also on municipal court—some folks have said that seems to be a step backwards. Others don't feel that way. I'd like to hear your opinion.

Ms. TAYLOR. OK. In terms of utilizing the commissioners more, I heard some discussion about the possibility of having commissioners with juries. I don't know if that's something that is possible. But I think that if we're talking about expanding the jurisdiction of the commissioners and you don't have juries attached to that, I think that's a problem.

I think that if you're concerned about the numbers of misdemeanor cases or the numbers of less serious cases that are coming in, there are other ways of dealing with that as opposed to expanding the jurisdiction of the commissioner. One way is what we proposed, that you establish automatic diversion programs so that you divert a large number of those misdemeanors out of the system.

I think that's a more cost-effective way of dealing with the numbers. I think that eventually that's what ends up happening, that a judge or commissioner hears it, makes a determination and places the person on probation. So, you could avoid that whole process by diverting them out before they get into the system.

I think that if there is some ability to have a jury panel along with a commissioner, then that might be something that would be acceptable. But I'm not sure of the legality of that.

Ms. DANIELS. When you say diversion programs——

Ms. TAYLOR. I can explain. In a lot of jurisdictions—actually it might help—I was involved in a study that took place in the State of Oregon and they were looking at the soaring cost of their court system.

One of the things that I noticed out there was that the legislature had indicated that first offenders could automatically divert out of the court system and divert into community service programs. So basically what happens is someone is arrested, but because it's that person's first offense and it's a first offense within a limited category of cases, that person does a certain number of hours of community service and never enters into the court system.

Ms. DANIELS. I certainly understand that. I ran a very small project in a very small community and wanted to get my building painted through a diversion program, which allowed me to have this building painted because I was a nonprofit organization.

Ms. TAYLOR. I think that it works in terms of not only reducing numbers, but it gives the individual who is involved in that a sense that they have to pay something back to the community. It's something that the community benefits from as opposed to just locking them up someplace.

Mr. SATTERFIELD. Ms. Taylor, a large part of your presentation had to do with delay. Could you quantify in any way the number of days or months?

Ms. TAYLOR. In terms of the major felonies, the most serious felonies, the felonies that are categorized as felony I cases in superior court, which involved first degree murder, sexual assault cases, the U.S. attorney's office tends to take up to 9 months to indict a case.

Now, there are some cases that are on accelerated calendars and an indictment process takes place a lot faster.

But in those cases, for example the first-degree murder cases, generally the client is detained. I believe that one of the reasons why the U.S. attorney does not move quicker is that they know that the person is locked up and they are guaranteed that the person is locked up for 9 months. So there's really no hurry to bring an indictment and go to trial. But the problem is that cases tend to backlog as a result of that.

Mr. SATTERFIELD. How about the disclosure process? Could you quantify that?

Ms. TAYLOR. In terms of the discovery that we receive, preindictment on first-degree murder cases, it's almost nonexistent. You will not get very much discovery until the case has been indicted. So, there's basically a 9-month period of dead time before you receive the kind of discovery that you would in other jurisdictions.

Mr. BARNES. Ms. Taylor, we want to thank you for your well prepared, enlightening and thought provoking testimony.

I have one question and I don't really want a lengthy response, although it could require that. Would a local speedy trial act help with the delay program that you've described, a speed trial act regulating the times between arrest and actually going to trial? Could you comment on that?

Ms. TAYLOR. I think it may. There was a proposal, I believe, in the last couple of months by the District of Columbia Council for a speedy trial. The problem that we had with that particular bill, although we supported it in theory, was that the time limits we thought were not realistic in terms of the kind of discovery that we could get and discovery was not built into that particular speedy trial act.

I think that if you have a speedy trial with the guarantees that we will have open file discovery, with the guarantees that there are sanctions on the government for not bringing the case within a certain period of time, that it's something that's workable.

Mr. BARNES. Thank you very much. Dean Jack Friedenthal is here. He's the dean of the National Law Center at George Washington University and has been patiently waiting. We appreciate that.

We're also going to ask Judge Vincent Femia from the 8th District in P.G. County to come to the table and ask that these two witnesses be treated as a panel.

Judge Femia?

Judge FEMIA. If you don't mind, I'd like to have my law clerk sit with me, Mr. Rob Dorsey.

Mr. BARNES. Don't mind at all, Judge.

Dean Friedenthal and Judge Femia, welcome. Both of you may proceed as you wish.

TESTIMONY OF JACK H. FRIEDENTHAL, DEAN, NATIONAL LAW CENTER, GEORGE WASHINGTON UNIVERSITY

Mr. FRIEDENTHAL. Well, let me just begin by saying that I'm here a little bit under false pretenses. I've only been in the District for roughly 8 months, having come from California. Although I've

practiced fairly consistently over the years, it is a much different system and you may have to actually educate me as I talk. But I hope I can give you some notions about the overall methods of improvement that might take place, as I've studied them, within the short period of time that I've had and since I was asked to come.

I would like to say that you must, at the outset, distinguish between making the system better in the abstract and making sure that the system is a just one. We too often, and the person who testified last illustrates that, that so often what we're talking about in the system in terms of making it more efficient may actually injure the rights of the individuals before the system and you can't do that. On the other hand, you have to find a way to, when you do make changes, to make sure that both of those goals are served.

I don't know if you want to start out and say something before——

TESTIMONY OF VINCENT J. FEMIA, ASSOCIATE JUDGE, EIGHTH JUDICIAL CIRCUIT OF MARYLAND

Judge FEMIA. Well, Dean, I can only say that if you're here under somewhat false pretenses, I'm under totally false pretenses.

This letter that I have before me was received in chief judges chambers on April 7 and he called me in last week before I talked to Mr. Daniels and said, "Would you please go down and represent the circuit for us?"

I said, "Sure, Chief, I'll be glad to go down and represent the circuit. What the hell am I doing?"

He said, "Go down and answer any questions they ask. That's all."

And that's essentially why I'm here, is to—I've been a judge for 17 years and was a prosecutor for 10 years before that.

Mr. BARNES. The reason we asked you is because of your experiences not in the District of Columbia because we wanted to learn more about the dean's experiences in California and the judge's experiences in Maryland and how they might apply to the District.

So, you are both here under proper pretenses.

Judge FEMIA. Let me temper anything I may say to you today by telling you up front that I was originally admitted to the District of Columbia on the old municipal court system, practiced there and practiced under the old system under reorganization, did not practice after reorganization, for what I hope would be obvious reasons.

Quite frankly, the general view of the D.C. court system, the reputation of it, in my business is that it's one of the better systems in the country, quite frankly. I think if you list all the big city systems in the country, you'd find this system on the top five. The ladies and gentlemen of the staff of your judiciary have a very, very high reputation in our business. So, anything I say is going to be very much in the abstract, but I'll be glad to help in any way. I'll sit here until you tell me to go away.

Mr. FRIEDENTHAL. Let me say that there is one thing I haven't heard discussed and that does come out of my experiences, my own personal experiences in California. That is the use of lawyers as pro tempore judges. I don't know if you have done much of this. Certainly I've sat in the California small claims system, which is

somewhat similar to the District of Columbia system, at least two dozen times as judge, without pay, which is important because what you're talking here is increasing judicial resources without the need for extra financial resources. Also, in small civil cases.

The opportunity to—and I would suggest if one was going to do this to have a screening group or screening board or perhaps using one of the panels that already is involved. But the number of people who are willing to come down and spend some time on small cases that can be dealt with in a short period of time is amazing. Judging from the number of people who are willing to at least come over to our school and teach for the pittance that we tend to pay, I think the resources are there and you can increase on the civil side the use of your resources, or maximize use of your resources by using lawyers to sit on a vast array of cases.

Now, what happened in California is the parties were asked to consent. If they refused consent, they are entitled, of course, to go before a judge. There's no animosity in that, but I don't think I've ever recalled a case, certainly in the small claims court, where I've been turned down.

There's several advantages to this. Actually lawyers who sit as judges will spend a morning or a day and they have a little bit more time. You can spread out the cases and people get heard a little bit longer. I think there's a little bit more patience, if you're only sitting 1 day a month or something of that kind, to hear these matters. So there's a better feeling about it.

Now, in the California system, lawyers are not permitted. The plaintiff waives jury trial and the lawyers if he or she goes to small claims court. The defendant does not. The defendant can get a trial de novo in the superior court. But, in fact, it's almost never requested. Then it doesn't matter who the judge is, whether it's a lawyer or not.

So, I think one might consider using attorneys on a volunteer basis or maybe an expense-paid basis to decide a number of these smaller cases, and also indeed on occasion they are used even in small jury cases, small jury trial cases. That can free your judicial resources for the problem that exists, which of course is the serious criminal calendar problems that everyone has. I don't know the extent to which that's done.

I also suggest something else. When you have a system, particularly one like California's in the small claims system that does not require attorneys, you can get volunteers to sit on weekends and in the evenings. There is no reason for the courts to be dark in the evening. For many people, that's the convenience, not the bane. People who are working would just as soon have their cases heard in the evenings or on the weekends. If you're using lawyers, individual lawyers, as judges, particularly in a system where lawyers are not required or allowed actually in the small claims court, that doesn't involve the convenience of members of the bar which sometimes gets in the way with that kind of a system. There's no reason why you shouldn't be hearing that kind of small claims, it seems to me, in the evening and on weekends. It's for the convenience of everybody.

So, there are a few things that might be of some significance.

Mr. SCHEUERMANN. Dean, I would appreciate it if you would enlighten us a little bit because most of us are unfamiliar with the court structure in California. How is it structured? Is it a unified system such as we have in the District of Columbia with divisions or are there multiple levels of——

Mr. FRIEDENTHAL. They're multiple level courts, or two levels. There's a superior court and a municipal court. The jurisdiction in civil cases I believe is 15,000. Misdemeanors go to the municipal court, felonies go to the civil court. There is no indictment in most cases. Most cases are produced on information with a preliminary hearing and that takes place for felony cases. Misdemeanors always go directly on information to the trial, to the municipal court.

But the municipal court hears criminal cases in felonies on the preliminary hearing. In other words, information is filed just like a civil complaint. They then hear it and decide whether to hold the person for trial in the superior court. If they do, then the case is immediately transferred up to the superior court.

But the small claims court is a creature of the municipal court, in essence, but it has its own rules and its own particular procedures. Judges investigate, for example. Judges have the right to go out and develop evidence. No lawyers. We have a system in which almost uniformly either law students or volunteer lawyers, usually young people, will sit and aid people before they go into the courtroom, give them help in putting their cases together. It can be done days before. It doesn't have to be done on the day in question, so people can gather things. But it's a fairly effective system that way.

Now, like everything else, there are some counties that work well and some that don't. Almost all of these depend upon the quality of the judge and very frequently, frankly, on the quality of the presiding judge and how much control the person exerts. But I will assure you, and I've been through the State doing a number of studies of one kind or another, and by and large the system is a good one.

I do agree with the judge here that the D.C. system, given the strains and stresses and the nature of the jurisdiction, can be proud of what it does. I offer these, what I say, only as possible suggestions for improvement.

Mr. SCHEUERMANN. Judge Femia, you also come from a jurisdiction that has a two-tiered trial level.

Judge FEMIA. That's correct. There's four levels of courts in Maryland, two tiers in the trial level and two tiers in the appellate level. We have the inferior court jurisdiction in the district court, the general jurisdiction in the circuit court, which I serve.

Mr. SCHEUERMANN. Do you have any thoughts or views as to how well that system works as opposed to the unified system that we have here in the District?

Judge FEMIA. Right now, Maryland is going through terrible problems with their two-tier system because of an anomaly called prayer for jury trial or de novo appeal. It is tying the Maryland system up terribly. People will go into the district court say for the second or third time, decide, "I don't like this judge. I'm out of here. I demand a jury trial." That gives him another 60 days be-

cause then he's got to be transferred to the local circuit court for jury trial, at which point, of course, they decline to take the jury trial and say, "I like this judge. I'll take him."

I happen to be personally involved with that in Prince Georges County since I handle every one of them that comes out of the district court, all 3,132 last year. Out of the 3,132, 46 actually got trial and less than 20 actually got jury trial.

So, we suffer with that division of trial levels. However, we suffer only because of this de novo right and this jury demand right. There's great effort right now to legislatively correct that.

On the other hand, by having a two-tiered system, we have the built-in master system, in effect. I offer no denigration to my colleagues on district court where I sat for 5 years. But the fact of the matter is the judges on the district court are very able to process huge volumes of smaller cases and treat them as they should be treated, as smaller cases, and thus free the whole system up to devote more time and attention to the cases that take life and things like that from people.

So, the good news is the two-tier system works very well for us in winnowing out the smaller cases. However, the bad news is because of this built-in jury demand, which defense bar, are not about to let go of, we're right now having in Maryland a tremendous problem.

Mr. SCHEUERMANN. Judge, how many district court judges do you have in Prince Georges County?

Judge FEMIA. Ten.

Mr. SCHEUERMANN. How many circuit?

Judge FEMIA. Seventeen.

Mr. SCHEUERMANN. Approximately, if you can tell us, how many cases are filed in district court on an annual basis?

Judge FEMIA. Well, I can tell you in Prince Georges County, and this is pretty close, in the neighborhood of 38,000. Now, that's everything from parking tickets to theft of automobiles.

Mr. SCHEUERMANN. And the circuit court? What's the case load?

Judge FEMIA. Circuit court, in what we call criminal trials docket, indictments of the grand jury, about 1,900. Criminal fields docket, what I handle, we're down this year. We've been down every year for 5 years. We're down to about 2,800 this year. Our civil docket hovers in the 2,800, 2,900 range.

But see, these figures can be extraordinarily deceptive in this business. You're familiar with the statistician who drowns in a river with an average depth of 3 inches, I'm sure. That is exactly what happens in the law business. No one, to my knowledge, that is not billing legal fees out of a large law office, has yet come up with a way to quantify what judges are doing.

For instance, I handled 140 cases yesterday. I went home at 2:30 o'clock. You say, "My God, this man is a miracle man. Buy him. We need him." Well, I'm not telling you the whole story. Yes, I handled 140 cases. Each one took approximately five seconds. They were fine and cost hearings.

"You owe $90 bucks. You got it?"

"No."

"Take him out."

"You owe $95 bucks. You got it?"

"No."

"Take him out."

At the end of the day, nobody was in jail, the money was in the till. Sure, I handled 145 cases or whatever the devil it was, but the 145th case I sat on for 2 days, it was a jury trial. So, how do you quantify that?

I have a colleague right now who's stuck in a horrendous drug murder case. He's only been there for 5 days. You say, "He's only handled one case. You handled 140." Come on. He's dealing with gas. I'm dealing with $95.

You can't just make generalizations. "This judge is really good. He handles a lot of work. This judge must be slow as molasses in winter because he only handled one case." You can't do that. Nobody, to my knowledge, has really come up with a system of quantifying, forget qualifying—God forbid you should ask me to quantify justice those 140 cases done yesterday—but quantify what a judge does. It's a problem.

Mr. FRIEDENTHAL. I'd just like to put a little footnote on this. In California, there is a provision that a lawyer can disqualify one judge. You have a preemptory challenge, in effect, to one judge and no lawyer goes into a California court without a 170.6 paper in his pocket and when the wrong person comes out, you just pull it out and fill in the name and hand it to him and then you get assigned somebody else.

I'm not so sure that's a bad system. I used to think it was terrible and in certain cases—I know in San Francisco there were two people that were always disqualified on criminal cases and the chief judge would simply switch them. So, if you started out on one docket, you got the other.

But there is sometimes a little bit of flexibility that tends to help in situations of this kind. California does not have the same kind of appeal and de novo. If there's a right to jury trial in a misdemeanor case or a civil case in the lower courts, it is tried there with a jury. The appeal was actually to a three-panel appellate court in the superior court itself. That's essentially where it stands, unless the supreme court of California grants a hearing.

So, you can have a limited appeal process and it doesn't have to be de novo and so on. The tendency tends to be to get rid of the jury in those cases for many reasons, not the least of which is that the attorneys who are involved simply don't feel it's worth their while in most of the cases. The amounts involved or the penalties involved don't usually justify jury trial cases. So, that works as a pretty good system.

I don't know whether or not the volume justifies that or whether you'd be causing more problems that you have now in a unified system. It doesn't seem to me that the problems stem so much from the unified system, it stems from the lack of resources within the system. I think that what you want to do is to try to increase those resources as best you can and as cheaply as you can. Of course, everybody would like—it's always easy if you have the money to say, "More judges, more courtrooms, more prosecutors, more defense counsel," and so on. That's the easy way. But the problem, of course, is very real, that we don't have the money to do that.

Mr. SCHEUERMANN. Dean, how are judges pro tempore selected in California?

Mr. FRIEDENTHAL. They're actually selected by the chief judge who has usually a list. Often they will go to the bar or there are committees of the bar or groups who assist the Governor and the judicial selection system in picking permanent judges. So, they sometimes go and just simply say, "Who might be interested?"

I think a formalized system isn't bad. I mean in a discreet city like Washington, one could ask for people who would be interested and they could be screened and no one has to know. I would say a screening committee would be a very good way to pick people. Again, remember, the parties would have the right to sign off or ask for a regular member of the judiciary. They do have that right, but it's rarely exercised. As I say, I've never seen it exercised in a case unless perhaps they know the judge or it's a law partner of the fellow who is trying the case, something of that kind.

Mr. SCHEUERMANN. Thank you.

Ms. WILLIAMS. Judge Femia, I have a question for you. In the D.C. process there's such a thing as calendar judges. Several judges that are accounting for the felony calendar and so forth. Does that system work or is that system utilized in Prince Georges County?

Judge FEMIA. Yes. I think you'll find almost every court system in the country that is dealing with large quantities of cases has a calendaring system of one sort or another. Now, we call it status call, pretrial conference. We have many names for it. But every court system has, in effect—in fact, most court systems in the area here copy what District of Columbia has been doing for years because it works.

Again, you have to understand, we were somewhat surprised when we got this letter. We always thought your system worked very, very well. We keep sending people down—first we keep stealing the personnel out of the system. You know, they're trained and they work cheap. Second, we send people down here to look at the way your system works because you have an awfully lot of good things in your system that are being copied by other systems. I trust you wouldn't think of throwing that baby out with the bath water.

So, the direct answer to your question is yes, we have a similar system, but so does every court of any magnitude. You have to. It's a matter of self-preservation.

Ms. WILLIAMS. No further questions.

Mr. BARNES. Any other members have questions?

Mr. DANIELS. Yes.

Mr. BARNES. Go ahead.

Mr. DANIELS. Now, Dean, I take it you had most of your experience in the State of California.

Mr. FRIEDENTHAL. Almost all of it, except for a case I argued in the eastern district of Virginia about 2 months ago.

Mr. DANIELS. Now, does this pro tempore use of lawyers require legislation or is it by court rule?

Mr. FRIEDENTHAL. It has been by court rule and by tradition, although it certainly might require legislation here. There is no specific legislation because it is done with the consent of the parties. So it's always thought to be OK and it's never been seriously challenged.

Mr. DANIELS. Now, California has a four-tier court system, doesn't it?

Mr. FRIEDENTHAL. That's correct.

Mr. DANIELS. What do they call the lowest court?

Mr. FRIEDENTHAL. Well, it's the municipal court.

Mr. DANIELS. OK. Either municipal court, superior court, court of appeals, supreme court.

Mr. FRIEDENTHAL. Court of appeals and the Supreme Court of California.

At one time there were either—each district had either a justice court or a municipal court. It was a little more complex. You had one superior court and then you had a justice court or a municipal court. Justice courts were in counties or areas of very small population and have limited jurisdiction. Since the superior court's jurisdiction is derivative, it has all the jurisdiction that the lower tier does not have.

The superior court's jurisdiction would depend upon whether or not there was a justice court or a municipal court, and justice courts did not have to have lawyers. In some remote areas, it's difficult to find lawyers. You might very well find that the judge was your mailman. It's kind of interesting because one of my first students was a young woman who had been a judge for 5 years and it was a little hard to teach her civil procedure, I'll tell you the truth.

Mr. DANIELS. Now, did you find that there was a utility in having a divided superior court and municipal court?

Mr. FRIEDENTHAL. I don't think that there was a great deal of utility. I think that you're going to divide cases up under your calendar, whatever you call it. There are going to be judges who are going to be assigned to the—call it division 1 or 2 as you may do it, and judges are essentially judges. Unless you feel that some are inferior in a sense to others, it really makes no sense.

Most of the people that I found on the bench over the years were equally competent whether they were on the base bench or the above and could handle all the cases. It seemed to me that it was almost a foolish division that had come up from tradition rather than from commonsense.

You are going to divide cases up on calendars. As I say, I did a study for the Federal district court, but the study was of the State court system. You find that chief judges make distinctions on where they place their judges according to their talents. Some people end up on more difficult cases and some people end up on the least difficult cases and some people tend to end up in settlement matters because they're real good human beings but they have a lot of trouble getting the work out.

Mr. DANIELS. Now, how are judges selected for each level of the judiciary?

Mr. FRIEDENTHAL. They're selected by the Governor of the State of California. They're appointed by the Governor. They are for the remaining period of a term and then they are elected for 6-year terms. So, once you are—you may be selected by the Governor—now, of course, if the spot is open, then there is no selection. But if someone just resigns at the end of a regular term, the spot is open and there's an election. It is a contested election. People do run for it on a nonpartisan basis.

Mr. DANIELS. It's nonparty politics.

Mr. FRIEDENTHAL. It's nonparty politics, although you and I are not naive enough to think that any election is totally nonparty. We often know that people run from different parties. However, I would say there's less of that and usually bar associations make endorsements and they are not based on whether a person is Republican or Democrat or statehood or whatever party it might be, but far more on their reputation in the community and the style that they would have.

Do elections make sense? Very few judges have been turned out over the years. Those that have been turned out, there's usually a pretty good reason for it. However, there have been a few instances where district attorneys and others have run against city judges on the grounds that they're not tough enough in situations where a major crime case comes up. Many of us have been deeply, deeply concerned that if that became a pattern, it would be a very serious one.

The first judge, for example, to integrate the schools in Los Angeles had been on the bench for 24 years and one of the truly, truly fine judges. He was defeated in the election the next year by, frankly, a muckraker and a racist. It was a pretty awful business. But it hasn't happened too often.

There is a council that is set by the judicial council, which is under the control of the chief justice of California, chief justice of the supreme court, and appointed by the chief justice, but always from members of the bench and the bar with impeccable credentials. That is a judicial fitness, serves as a judicial fitness council and has the obligation to investigate complaints and to make recommendations to the supreme court for the removal of judges. It has worked very, very well. It has been operative. It has removed some judges. Most of the judges, of course, leave when they know that the jig is up or the situation is that they can no longer handle the work or something has happened.

So, I think that I prefer that system and would just as soon get rid of the elections. Our appellate judges run yes or no and many of you have heard about the *Rose Byrd* case where she and two of her cohorts, one a Chicano justice, Cruso Noso, and another, a professor, bit the dust, if you will. That was the first time in California that anyone had ever voted no. I must say though that the issues there were very complex. Competency was a real question and I don't mean to denigrate that process. Sometimes that's a good one because it's very difficult to get rid of a justice who——

A judicial commission did, in effect, help to get rid of a justice on the supreme court itself a number of years ago where that person had simply grown too old to do the job.

But, I don't know. I like the yes/no system. I do not like the system where someone runs in an open election on political grounds.

Mr. DANIELS. There has been some suggestion of interjection that the application of political process to the judicial system is perhaps corrupting and compromise the integrity of the system. Do you feel that those two go hand in hand? What's your experience in that?

Mr. FRIEDENTHAL. There are judges that you would like to retain, most of them, the vast, vast majority. There are a few that need to

be replaced. You have to decide what's the best way. I would point out to you, rather than have what California has, the election system in the superior and municipal court, the 6-year election system, I would eliminate that, at least a yes/no. That would be better. Would I eliminate it entirely for the judicial commission? On balance, yes. I think that would be better. But you have to have the active commission.

Mr. DANIELS. You would eliminate the yes/no even?

Mr. FRIEDENTHAL. Yes. I would eliminate the yes/no in the trial courts.

Mr. DANIELS. What about for the appellate courts?

Mr. FRIEDENTHAL. I think I would retain the appellate courts, because I think it's just too difficult for a commission to be replacing. After all, their recommendations are to the very court that they may be removing people from. So, the yes/no system, it's had its ups and downs and the frequency of its use is fairly limited. I think it would not be bad if one could put it in for an experimental period and then either confirm it by—I would do it by vote of the people and confirm it by vote of the people or go to something else.

Mr. DANIELS. Can I ask Judge Femia to go over sort of the same ground from his perspective in Maryland and tell us about——

Judge FEMIA. Maryland has a very similar system. As we sit here today, the district court, there's a 10-year appointment by advise and consent. The circuit court, which is the last in the constitutional courts, the court I sit on, has a nonpartisan elective process. You're appointed, must run in the next general election on a nonpartisan basis. You have to run in both parties. Now, that, gentlemen and ladies, is just so much of what I was putting on my garden this morning.

I'm in Prince Georges County. The Democrats in Prince Georges County hold their meeting in a telephone booth literally. I mean not Democrats, the Republicans hold their meeting in a telephone booth. One would be foolish in the extreme to suggest that I was elected to the bench in 1978 because I was such a nonpartisan. That's ridiculous. I was appointed by a Democratic Governor, although grudgingly, at the request and demand of the head of the Democratic machinery. I garnered the most of my votes. I can't even tell you the amounts, but they were outrageously varied. That's ridiculous to suggest that it's nonpartisan.

The realities of life are the judge is cast into a partisan election. If you're a Democrat in Orange County, California and you're going to challenge the appointed member of the superior bench there, you'd better figure something else to do on election day too, because win is not going to be one of the things you're going to do.

The sad part of that—I'm not doing this just for humorous effect—the sad part of that is that once you're elected you're in for 16 years. I keep telling people, "You're stuck with me until 1993. You can vote for more in 1994." But there's a down side to that. There is a judicial ethic which is law in Maryland that says you may not participate in any partisan politics, meetings, donations, bumper stickers, you can have nothing to do with partisan politics. So, guess what I've not been doing for the last 11 years as a circuit court judge? I've not been obeying the law. We have an extremely

strong judicial disabilities commission, extremely powerful. Some say draconian. Of course I'm not one of those people that says that.

Here's 1993 coming up. Suppose some very well known Democratic prosecutor decides, "This is the year we take Femia out." It's not going to be tough to do. He's been in politics every 4 years regular as clockwork. He knows where all the money is. He knows where all the folks are.

What the hell can a judge promise you? What can I promise you, Joe Citizen, as a judge? I'll pave your streets? No, I won't. I'll throw a case your way? No, I won't. I won't even hear your case if I talk to you about it. What am I going to promise you? He can get up, and it happened in our county, he can get up and promise, "All the drunk drivers are going to jail, all the murderers are going. I'm going to do it."

Mr. SCHEUERMANN. Judge, how many sitting judges have not been retained?

Judge FEMIA. In Prince Georges County?

Mr. SCHEUERMANN. Yes.

Judge FEMIA. None. But that's not the case elsewhere in the State of Maryland. Baltimore City, they're having a hard time finding people to appoint to the bench because they're closing their law practices. They may not be around next year. So, there's ups and downs to this elective process.

I personally like it because I'm crazy. I like to go out and run around. It's a night out for me. But it was very sad in the extreme for me to run with my chief judge. This man had been a judge forever and here he is out in a partisan election. It's very embarrassing, very embarrassing. I think it was so embarrassing, the opponent withdrew. I'm serious. He withdrew from the election. The guy was running and he wanted to bump one of us off. He withdrew.

The grief that comes out of these partisan elections, even though they call them nonpartisan, if you saw the piece on "60 Minutes" of the judge who was sitting in the *Penn Oil* case and here's the lawyer in the party——

Mr. SCHEUERMANN. Judge, would it be better though if instead of having a contested election if it were simply a yes or no vote?

Judge FEMIA. Retention election?

Mr. SCHEUERMANN. Correct.

Judge FEMIA. I don't know anybody who is not in favor of retention elections and I'll tell you why. There are three things that tend to keep judges temperate. One is the judicial disabilities commission. Two are retention elections, knowing that you're going to have to go face the public. And three, interestingly enough, are cameras in the courtroom. You'd be surprised what you won't do on camera. Your mother could be looking.

Mr. DANIELS. Let me ask just another couple of questions. I know, Judge, you have an elected clerk in Prince Georges County.

Judge FEMIA. Yes, but he's just been neutered. So that's over. He's just been taken under the blanket of the State budgetary process. So, he's almost become titular.

Mr. DANIELS. Is that right? You don't think there's any utility, for example, on having an elected clerk?

Judge FEMIA. None whatsoever. In this day and age, when we speak clerk of court, we're talking top-flight management. Get as top a management or administrator as you can find and stop all this nonsense that it's some sort of officer of the court. He's there to run computers, clerical staff and throw the grease on the wheels and make them keep going around.

Mr. DANIELS. Dean, I see you're sort of concurring. Perhaps you might put your concurrence on the record.

Mr. FRIEDENTHAL. Oh, there's no question about it. A good clerk makes all the difference in the world, both in terms of the judiciary and for the lawyers. A good deal of the law practice that's done the right way is done because the clerk could tell you how to do it. I used to always invite the local court clerk to come into my class and talk to my students. Not because he had so much to say, but it gave me a chance to take him to lunch.

Mr. DANIELS. Do you feel that the political aspect of judicial selection and elections are undermining the integrity of the court or do you find that it interjects into—just looking at your colleagues and how you've viewed it over the years, do you find that there is an element interjected in the decisionmaking that you think is maybe not——

Judge FEMIA. Are you addressing that to me, Mr. Daniels?

Mr. DANIELS. Yes, sir.

Judge FEMIA. Let me tell you something. One thing I'll tell you about judges, inside secret. We're all egotists. We're all convinced that we're the best that ever was. We're the meanest dude in the valley. You're not going to catch us doing things that are unethical. We're just too proud. It's not because we're not tempted, God knows. But judges that I know, and I know them by the hundreds, just the thought is anathema.

That's not really the big problem with the politics in the process. The big problem is what the public perceives. The public's perception in these political situations, those of you who watch "60 Minutes," your perception must be—I don't care how erudite you think yourself. I'm a judge and I can relate to what that judge was saying. But my God, my wife is sitting there saying, "What is he talking about? A quarter of a million dollar donation and he didn't think about it when he was——." That's ridiculous.

Public perception is what gives us our suasion. If people don't think I can have them hauled off, they don't care anything about me. It's what is going on in their mind is my job to manipulate for good. That is the definition of justice, what people believe it is.

That political process is an abomination. When you get these races like they have out in California every 6 years—I mean what do you say about Congressmen who sit right where you all sit? "Hey, they're elected. What's their first job? Get reelected." Well, why would you not think that about a judge? Now, it may not be true, but again, what's the public think of somebody who has to run in a partisan election? That's what we rankle at, is the public perception.

Mr. BARNES. Judge, I understand there's a vacancy in the D.C. court system here, if you're interested.

Judge FEMIA. Let me tell you, you've got more qualified people than you know what to do with around here.

Let me say, and I'll shut my mouth after this, I would recommend two things to this mission. Number one, I don't care what else you do, you take out the judges from your location, D.C. Superior Court, take them to some comfortable location, fill all their glasses with their favorite libation and listen to them. Listen to what they say. You heard Ms. Taylor talking about discovery and the problems of discovery. You listen to the judges. They deal with it everyday. You sit up here and say, "Why wasn't this done before," but when we get together, believe me, we talk about it. You'd be surprised what we talk about when we get together. We have to have that libation. It loosens the lip a tad.

For instance, in Prince Georges County, our prosecutor has an excellent system. He calls the defense lawyer, he sends in a letter and says, "Come up and look at the file. The file is open. Read anything you want. You want copies? Dime a page. We'll make you copies. What do you want?" You know why he does it? Because years ago, when I was the deputy, I discovered the way to make people plead guilty is tell them what the evidence was against them. You'd be surprised how many trials would be cut out.

Judges talk about that very thing, how to expedite discovery. Talk to those judges, folks. They've got ideas that you and I may have if we sit here long enough, but they're dealing with them everyday.

The second thing I recommend very, very highly that you recommend to whoever is ultimately making the decision here. The courts of Maryland were reorganized in 1970. The chief judge of the State of Maryland, a very young, progressive man by the name of Robert C. Murphy. One thing that he imposed on the court system, and he did it by way of court rule which makes it law, mandatory continuing judicial education. You have the same thing in California, as I recall. To the extent that we now have the Maryland Judicial Educational Institute. Twice a year, every judge in the State, by order, goes back to school. He goes back kicking and screaming of course. Who wants to go to school? I just finished 2 days last week and we don't talk about esoteric things. We talk about blocking, tackling. We talk about contempt citations. We spent a half a day on judicial ethics, a half a day on judicial process. We talk about hearsay rules. We talk about how to rule on objections. It's mandatory and it has probably been one of the best things that happened to our court.

You heard Ms. Taylor talking about her excellent education program. What good is an excellent education program where you teach the lawyer what to object to and how to object, if the judge sitting up there has never heard of the objection that nobody's talked to him about?

I would recommend very strongly to you that whatever your ultimate recommendation is, mandatory continuing judicial education. I don't mean, "Let's meet in courtroom 5 and talk." I mean get them out of there, get them away from their families, stick them down in a retreat somewhere and you would be stunned at the rewards you will reap from such a system.

We in Maryland are very, very proud of what we've been able to accomplish and we patterned ourselves after the California system, which is considered an extraordinarily excellent education system.

Mr. BARNES. We want to thank both of you for your spirited and very informative presentations. I think that the committee has been well served by your presence here. Thank you for coming.

Mr. FRIEDENTHAL. Thank you.

Judge FEMIA. Thank you.

Mr. BARNES. Our final witness is David Grimaldi, who is the former president of the Bar Association of the District of Columbia.

Welcome, Mr. Grimaldi.

Mr. GRIMALDI. Good afternoon.

Mr. BARNES. I am not Congressman Fauntroy. He had to step out for a bit. But we're proceeding anyway. You may proceed as you like.

TESTIMONY OF DAVID GRIMALDI, BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA

Mr. GRIMALDI. I have the sense that all of you have had a long day. Since I'm the last person here, I'll try to be direct and make my remarks and, of course, answer any questions that any of you might have.

I am here as the official representative of the Bar Association of the District of Columbia. We thank you for asking our organization to participate. The reason our immediate president is not here and I am in his place is that I've had the advantage for the past 25 years of being a trial lawyer in this town and down in what was first the municipal court, going back to 1964, and then the court of general sessions and now the superior court.

Ninety-five percent of my practice is representing insurance companies at the courthouse on a daily basis on the civil side of the court. It's not the most exciting side of the court, but I have had the experience of being down there for 25 years and I would think that this committee would benefit from a practitioner's viewpoint of what's going on down at that courthouse.

From the civil side, I think I can generally state that everything is fine. When you approach what I think are the three areas down at the superior court, the facility itself, the judges, the calibre of judges, and third the calendars, generally I think the superior court, with all of its problems, is a court that this city can be proud of.

The facility itself, you can imagine our pleasure being there after trying cases in the old A and B buildings of the municipal court, trying cases in the Pension Building when that was being used, trying cases in the old Potomac Building when that was used as a trial court and the walls were so thin that you could hear the jury deliberating if you just leaned against the wall while they were out considering your case. My motto was stay as far away from that wall as you could because I didn't want to hear what they were saying. It would scare me too much as a trial lawyer to hear that type of discussion going on.

The improvements being made there, with the new 5th floor courtrooms and the other construction going on, I think gives us an adequate facility with courtrooms of good size. Of course, with a growing court, attention has to be given to expansion. But from a practitioner's point of view, that facility is a good facility.

With regard to the judges on that court, driving down here I was thinking about how many of the judges from the superior court are now on our Federal court. When you think of George Rivercomb and Joyce Green and Harold Green and John Penn and Norma Johnson, these were all judges who were on our superior court, got their training there, so to speak, and now sit on the Federal bench. My feeling is, and I think I've appeared—if there's 52 or 54 judges down there, I think I've appeared before 50 of them at one time or another.

I think we have two kinds of judges on that court. We have good judges on that court and we have better judges on that court. As far as I'm concerned, when you make comparisons between the superior court and the Federal court, and I now practice 50/50 in each of the courthouses, it's very much comparable as to what type of reception and what type of justice you get in those two courts.

Why we're in two courts brings up the third point and that's the one of the calendar. On the civil side of the court, plaintiff's lawyers stumble over themselves to get their case into superior court under adversity because of the calendar there. In the Federal courthouse, you're at a trial in 6 months. In the superior court, in civil cases, we are now getting trial dates in the spring of 1991. That, of course, has to be improved.

In the Federal court, the calendar is almost too fast. They don't have the volume that the superior court has. Under the new Federal statute which now makes diversity $50,000 to get into the Federal courthouse instead of $10,000, I would think that's going to further diminish the case load in the Federal courthouse and it's going to increase the civil case load in the superior court. So there's going to be even more civil litigation in the superior court because they won't qualify for the Federal court.

I think the answer to the civil calendar—and let me say this as an aside. I don't think the court should be judged today in what is sort of a crisis atmosphere. The drug problem in this city, the criminal calendar at the courthouse affects the civil calendar as well. When judge manpower is taken and used on the criminal calendar, there's less judges for the civil calendar. We civil lawyers know that we are not the favored or the most important matters down at that courthouse.

I remember being in a trial when the chief judge called the judge in the courtroom with a witness on the stand and the jury in the box and requested that judge adjourn and go to a felony court. I heard the Judge say, "I'm in the middle of a trial." "Well, you're needed over there. Stop that civil trial and go to the felony court."

So, we realize that presently, with the crime problem, there's a further burden on that court. Generally and overall in judging that court, out of fairness, I think it does a superb job.

The answer to the calendaring problem, in my mind, is one that right now is experimental. We now have, for the first time, mediation and we now have, for the first time, arbitration. Those two factors are going to be the key to moving the civil docket. The lawyers in this town aren't even that well acquainted with the fact that mediation is available at superior court on every pending case. One party requests it and the other party is ordered down for compulso-

ry mediation. Arbitration is available. These factors will take away from the 3-day judge time for trials.

Let me emphasize this. I'm not here as a spokesman for the insurance industry, but I'm an insurance company lawyer. The insurance companies don't want to be in the superior court litigating their cases. One very large carrier that I represent took 100 cases out of litigation by requesting that the plaintiffs' counsel agree to remove those pending cases from the courtroom and put them into judicate.

Why do the insurance companies want to do that? Insurance companies don't want to be paying lawyers for the cost of litigation in superior court, the discovery that goes with it, the jury trials, the preparation, time consumption and the cost of defense. They would prefer to be outside of your arena.

If you give the insurance companies—and I would assume this is just as true for plaintiffs' counsel in civil cases—the option of mediating or arbitrating the litigation, I believe that they would opt for it every time rather than going through a full-blown jury trial.

Last, the recommendation I would make that I don't think is under consideration at the present time is this. I know from my experience that there are certain judges on the superior court who are acutely aware of factors in civil litigation who have a special ability to evaluate cases and have a special ability to close cases by settlement rather than trial. My suggestion would be, and I know the judges are rotated and I know there's favorite assignments with judges and assignments that are dreaded, but I think if the chief or the committees down there—and they're identifiable—selected those judges that have this special ability in civil cases, those judges would have the ability to settle cases rather than take them into the courtroom and tie it up 3 days. I know from my own experience, when I'm assigned to a judge, I can tell you whether that case is going to settle or whether that case is going to be tied in trial for 3 days.

If the chief could persuade the rest of the court to go along with that and allow certain judges who are identifiable to sit in civil for an extended period of time, I believe that would cut down on the congestion in the civil calendar.

Those are my remarks. I appreciate being here. If there's any questions, I'll be happy to answer them.

Mr. SCHEUERMANN. Thank you, Mr. Grimaldi.

Just to start off for the committee, the average time for joinder of issue to disposition of a civil II case today is 24 months approximately. I think it seems to have capped out at that. What would you see as being a good target to aim for as an average time from joinder of issue to disposition?

Mr. GRIMALDI. Anywhere from a year to 18 months. I absolutely believe that the civil calendar in the Federal courthouse is too fast. You can't get things done in 90 days, as many of the judges on the Federal court would like you to. The comments that I hear about the Federal court in the Eastern District of Virginia, it's called the rocket docket over there, where you have 60 days to get your discovery done and be ready for trial. It's almost too fast. But anywhere from a year to 18 months would be a good calendar.

Mr. SCHEUERMANN. Two years ago the superior court did implement an expanded use of commissioners as a device to assist according to its business. As someone who is intimately familiar with superior court, do you have any views on how well the commissioner program is working and whether or not there ought to be some expansion of the role of commissioners in the system?

Mr. GRIMALDI. I do have a view on that, and I have already expressed it or at least inquired about it. The commissioners right now, and I believe there are eight or more, are not used in civil. They are used in the family division. They are used in the criminal misdemeanor division. But they are not used in civil.

I made the inquiry some time back that commissioners could be used for pretrial conferences, for motion arguments, for discovery motions, that type of thing, rather than discussing an inferior or a lesser jurisdiction court. I think expansion of the commissioner system would be one that could be utilized in our superior court and free up judges for more meaningful things, the criminal calendar, jury trials, and the like.

I was told that it was under consideration, but that right now the real need was outside the civil division and was working well in the other divisions where it's being utilized.

Mr. SCHEUERMANN. Another proposal that has been raised in the civil context is to implement some form of an individual calendaring system in civil.

Do you have any thoughts on that?

Mr. GRIMALDI. I don't think it would work. They have the benefit and luxury of that across the street in the Federal court because they don't have the volume. But because of the volume in the superior court and because of the rotation factor, it's been visited before and most practitioners don't see it as a viable alternative at this time.

Mr. SCHEUERMANN. How long do you think judges should be assigned in a rotation to the civil branch of the court?

Mr. GRIMALDI. Well, I can't answer that, because I think they shouldn't be rotated. But don't tell any of the judges that I said that. As I said earlier, my experience is there are judges whose background was in civil. There are judges who have the courage of their convictions about civil litigation and what a case is worth and what it should settle for. And there are judges who, quite frankly, civil litigation is foreign to them. When they get in there they're uncomfortable and they do not have the type of persuasion to dispose of cases.

My thought would be to get eight of the judges that have a civil background that have an inclination toward it and put them in civil and keep them there. I can assure you the calendar would move.

Mr. SCHEUERMANN. Statistically, the selection process of judges seems to be weighted in favor of individuals who have come more from a criminal law background than a civil law background.

Do you have any thoughts as to how that could be balanced out in some fashion?

Mr. GRIMALDI. Most of the judges not only come from a criminal background, but they come from the U.S. attorney's office in the Justice Department.

My emphasis would be on selecting judges on that court who were practitioners. Because, these judges I think have a broader comprehension of what the problems are at that courthouse and I think they can deal with them more. I don't think all of these judges should come out of the Government. I'm not criticizing any one of them, but if you look at the numbers, a tremendous number of judges have come out of the U.S. attorney's office of the Justice Department, too many of them.

Mr. SCHEUERMANN. Thank you, sir.

Mr. Daniels?

Mr. DANIELS. Nothing.

Mr. SCHEUERMANN. Mr. Duckenfield?

Mr. DUCKENFIELD. Mr. Grimaldi, good afternoon.

Mr. GRIMALDI. How are you?

Mr. DUCKENFIELD. You mentioned mediation and arbitration. For some years, there's been some discussion about mandatory arbitration in the District of Columbia. As you well know, in some jurisdictions there is mandatory arbitration.

What is your view with respect to mandatory arbitration with the right of trial de novo?

Mr. GRIMALDI. I would be in favor of it as I am in favor of the elective arbitration which is available now. I think the present experimental program is that every 20th civil case filed is put into arbitration as an experiment.

With the trial de novo, I have no problem with arbitration whatsoever. Arbitration without a trial de novo scares me, because you lose a lot of the rules of evidence, you lose the right of appeal, and from a defense standpoint you're a little helpless in that kind of a proceeding. From the court's viewpoint, I think it would be terrific. I think it would really help the calendar. If you had the trial de novo, I think it should be used more often. As I've said, my clients would prefer it.

Mr. DUCKENFIELD. Suppose we had mandatory arbitration with trial de novo, but with another provision that if you do not do 10 percent better——

Mr. GRIMALDI. There should be sanctions.

Mr. DUCKENFIELD [continuing]. Than you did in arbitrations.

Mr. GRIMALDI. There should be sanctions. No, I agree with that wholeheartedly.

Mr. DUCKENFIELD. I gather from your statement that you suggest creating a kind of core of judges that remain, let's say in the civil division, longer than the—are being rotated. Would you want this on a permanent basis or perhaps, let's say, a 3-year basis as opposed to——

Mr. GRIMALDI. They presently have an extended calendar for civil I cases. Those cases designated civil I because of their complexity. I believe that goes for a year to 18 months. I wouldn't want it to be permanent, but I would think that if they put a year to 18-month calendar with selected judges for civil II, that effort would dramatically reduce the number of cases that are pending on a civil II calendar. You perhaps have heard the stories about Judge Milton Corman when he was on that bench and the remarkable ability he had to settle cases. He was proud of it himself. But there are others on that court who have a similar knack for it. If you

combine the right judges with arbitration and mediation, I think that calendar can be controlled.

Mr. DUCKENFIELD. Perhaps from your experience you probably realize that often times the cases on the calendar and lawyers are inclined to sit around for hours only to be told in midafternoon that the case is not going to come up on the calendar and is put off for the next 6 months or whatever the case may be.

Would you consider experimenting with the certification of cases 48 hours before trial——

Mr. GRIMALDI. Very much——

Mr. DUCKENFIELD [continuing]. Which will guarantee that the case will come up for trial on that particular day?

Mr. GRIMALDI. Very much so. But I think Chief Judge Ugast and Judge Gardner, the chief of the civil division, have already addressed this problem. The problem is this. They put 24 cases on the calendar everyday. They anticipate having six judges everyday. One would get called to fill in in landlord/tenant, one would be called to fill in in felony. They'd have four judges left. With all those cases, they'd move maybe six or seven cases out of the entire load set for a given day. There were times when lawyers wouldn't even prepare when their case is up for trial knowing it was the first time and in the priorities knowing it was not going to go forward.

What the court has done is reduce the number of cases scheduled on a given day. There might be 10 or 12 now. But in order to do that, they'd had to extend out trial dates and that's why we have dates now in January 1991. But the theory is with the reduced number of cases on the calendar and spreading these cases out, when you get to January 1991, your case is going to go to trial. At least it's a date certain and you can expect to go forward on that.

Mr. DUCKENFIELD. Thank you very much.

Mr. BARNES. Mr. Grimaldi, on behalf of Congressman Fauntroy, we want to thank you for sharing the benefit of the wealth of experience you've enjoyed in our court system. Your presentation was clear and crisp and the committee will benefit from it, I'm sure. Thank you for coming.

Mr. GRIMALDI. Thank you for having me here. Good day.

Mr. BARNES. The subcommittee will stand in recess until Saturday, April 29 at 10 a.m.

[Whereupon, at 4:21 p.m., the subcommittee recessed, to reconvene on Saturday, April 29, 1989, at 10 a.m.]

HEARING ON JUDICIAL ORGANIZATION AND SELECTION

SATURDAY, APRIL 29, 1989

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE DISTRICT OF COLUMBIA,
Washington, DC.

The mission team met, pursuant to call, at 10 a.m., in room 1310, Longworth House Office Building, Hon. Walter E. Fauntroy (chairman of the mission team) presiding.

Members present: Congressman Fauntroy; Johnny Barnes; Don Temple; John E. Scheuermann; Harley J. Daniels; Marialice Williams Daniels; Anthony Rachal; Lee A. Satterfield; and Julia B. Williams.

Mr. BARNES. The Subcommittee on the District of Columbia Judiciary Workshop on Judicial Organization and Selection will reconvene. This is the extension of the hearing that began last Saturday the 22d, where the subcommittee is conducting oversight hearings into the state of the judicial system in the District of Columbia and Congressman Fauntroy will be along shortly. We're fortunate to have as our first witness Fred Cooke who serves as a corporation counsel for the District of Columbia and before Mr. Cooke begins I'd like to defer to our distinguished cochair who is responsible for organizing this hearing, Marialice Daniels for such opening remarks as she may wish to make.

OPENING STATEMENT OF MARIALICE DANIELS

Ms. DANIELS. Thank you, Mr. Barnes. I appreciate those kind words. Good morning, Mr. Cooke. I am very happy that you were able to respond to our invitation and I do know that you have, prior to this hearing, met with another, well with Harley Daniels who is our chairperson of this mission team, so I know that some are familiar to some extent with your views.

However, last week we had some very interesting comments that came from the various witnesses. We had the chief judge of the court of appeals and the chief judge of superior court. We were then fortunate enough to have with us a justice from Prince Georges County, Judge Femia and with him we had the new dean of the National Law Center at George Washington University. Kim Taylor as well was here, the chief public defender.

We did have some interesting questions that were issues that were discussed and some interesting questions that were raised but it seemed to me to be very apparent that up front in the minds of everyone of course is the fact that as Judge Ugast stated so aptly

he felt that his court assignment and management was being driven by the increase in drug related cases which were coming to the court system.

So my cochairperson, Jack Sherman I'm sure you're familiar with, and I'm sure you have at least a passing acquaintance with everyone else on this group, would all like to direct questions at you this morning with a view toward coming to some kind of discussion about how we can alleviate this, what we hope is a temporary problem, number one. But number two, I wanted to stress that since we all have practiced law, those of us who are up here in one manner or another, and are familiar with the courts, if to the extent that we can have an opening dialogue with you, we would really appreciate doing that.

Whatever information you have we will have for the record and we would certainly hope that you would feel comfortable in sharing with us your ideas about some of the perspective changes that have been recommended to this point.

Mr. COOKE. I'm more than happy to do that. That may be the way we best ought to proceed. I see that in changing bags to bring my umbrella I didn't bring my written statement so we can do it that way.

Ms. DANIELS. OK, but if you would like to give us just a few words to start off and we'll open up the questioning.

TESTIMONY OF FRED COOKE, CORPORATION COUNSEL, DISTRICT OF COLUMBIA

Mr. COOKE. I'm very happy to be here this morning and I hope to contribute some useful information to the subcommittee as it does its work.

I think you have indicated I'm corporation counsel for the District of Columbia and have practiced law in the District of Columbia and have been a resident for my entire life.

Clearly, the administration of justice in the District of Columbia is an important item for me and that is part and parcel to analyzing the present state of the court system and what changes, if any, need to be made to resolve the current problems that exist in the administration of justice.

I have spoken with Judges Rogers and Ugast on a number of occasions, I'm fairly familiar with their views on this issue or issues related to the court system. I concur with many of them. I think that there is no question but that the significant case log jam in the Superior Court of the District of Columbia both on the criminal and civil side is primarily a function of the crushing burden of drug related cases that are brought in our court.

We have what one might properly call a disproportionate allocation of resources to the criminal side of the court's business. That makes it less likely or there are lesser resources available for matters on the civil side, matters in the family division.

There is a constant tension in the court on court resources which are fairly limited to address those kinds of concerns. The administration of justice in my view is more than of course criminal law. It is the means by which this society and this community metes out justice to its citizens. It is the means by which that person who has

been offended in a civil context can be recompensed, if appropriate. But it does very little for the credibility of the system if that recompense takes place many years down the road because we just don't have the judges or the judges don't have the time to get to that matter because we decided as a matter of societal priority that dealing with criminal matters is more important than dealing with civil matters.

That is a problem. It is a problem in terms of the credibility of the criminal justice system if we are not able to promptly and efficiently process people who are charged with criminal offenses through the system. It tends to work to the disservice of the system. It tends to make the system less credible. It tends in that sense to serve as less of a deterrent to crime than it might otherwise.

So I think that any effort to look at the present court system, any effort that is designed to make it work better, any effort that is designed to enhance the administration of justice is a laudable effort and we all ought to work toward that end. I'll be happy to do whatever I can and provide whatever information I can.

Ms. DANIELS. I would like to start out by telling you about two specific recommendations that we heard last week and to get your comments on those.

One of the recommendations which the new dean at George Washington University indicated was being utilized in the California system was to have attorneys who had been members of the bar for more than 5 years to apply to whatever kind of selection group there is to hear, I believe he said, I can't remember the length of time they served but so many cases and of course it would be not for compensation, certainly we know the motivation for people wanting to do it, but at any rate he said that he felt it worked extremely well and of course there was some limitation as there is with our commissioners to the extent which they could in fact make decisions in certain areas.

The second recommendation which we heard was by I believe it was Justice Femia from P.G. County. But he talked about having the courts opened to serve the needs of the system at times other than traditional hours, from 9 to 5 o'clock and so forth. Then there were several other recommendations which came up which other people I'm sure will raise. What are your views on those two?

Mr. COOKE. Why don't I do the second one first. The Mayor and I have talked on a number of occasions about extending the hours of the court, at least suggesting to Chief Judge Ugast and Judge Rogers that the hours of court be extended beyond the normal sort of 9 to 5 o'clock.

The practical problems with that are that obviously it costs more for more court personnel. I don't think the judges necessarily are so adverse to it but it may create problems in terms of overtime expense for superior court personnel and we've got to find a way to take care of that cost in this particular budgetary period, that money's not very easily found.

The larger practical problem, however, is the involvement of the U.S attorney, the U.S. marshal service and other Federal entities that the District of Columbia government has no control over. It is going to be a problem I think to get those entities to buy into this

because they're going to have to find the budgetary money for their people to work overtime as well. It is one of the difficulties of our system in the sense that we do not have what I would call home rule, or a bastardized form of it. As a consequence we are dependent on the Federal Government in the criminal justice system at least for a significant part of the operation of the system.

So I think that conceptually it is a good idea. We just don't have control over enough of the system to make it work. The first issue you raised I've talked about with some of the judges on the superior court and it could work, I believe, again there's the prospect of some additional money but not as much because the judges themselves would not be compensated.

It is done in other jurisdictions around the country, however, and it may serve as a way for people to figure out whether they really want to be judges or not, who may have some interest but after they do it for a while may decide is this something I really want to do or is this something I really don't want to do at all.

I think that's something that the judges in superior court are not insensitive to because we have had in the recent past a fairly high number of young judges appointed, some of whom are suffering burnout because of the case load or maybe just disillusionment with the fact that being a judge wasn't as hot an idea as they thought it was when they put on the robe the first time.

So maybe it's an opportunity for people to get a bit more practical experience, a bit closer experience with it to make that decision so we don't have judges who become disillusioned or disenchanted or are undermotivated.

But I think the big concern for me is that notion is premised on the fact that this is a temporal problem, that it is something that we're going to be able to do for a fairly short period of time to address a backlog that is only a blip on the screen.

I'm not sure that's what it is at all. I think that unless, certainly on the criminal justice side, we really as a community get handled on the symptoms or the causes of the symptoms and we're going to have this problem forever. We arrested 43,000 people, or 47,000 people in 18 months. We can do that again the next 18 months and the next 18 months. Until we find a way to get people out of the motivation to be involved in criminal activity, more specifically, drug activity, we're going to get ahead of this.

Ms. DANIELS. I think and I should say we as a group last week in our discussion tended to be somewhat optimistic in hoping that there would be some end to this problem in sight. Therefore, we're somewhat mindful of putting into place systems that are created statutorily which we can't undo and thereby wind up with cost built into our system and so forth that may only be needed for a temporary amount of time.

I think one of the other major recommendations was made last week, and that there seemed to be some agreement in the room, was the idea that with our present system of commissioners perhaps should expand their responsibility with respect to which types of cases they can handle, since they do have such limitations and we looked at it not just at the standpoint of the criminal cases but also with respect to other civil cases in which they could perhaps, and I think from my own personal experience as a rather new at-

torney in private practice in the superior court, I look at the domestic relations branch and I cringe, not having been able to settle an issue outside of the court and having to go through that process.

So what would be your comment about the expansion of authority?

Mr. COOKE. I have no problem with that. I think that could be very useful in terms of increasing efficiency of the court and moving cases along more quickly. So I think that would be a good idea. I should point out that another way to increase efficiency, certainly on the criminal side, is being explored by my office and the office of the U.S. attorney and that is a revision to some degree of the District of Columbia Criminal Code. We believe that by making some changes in the code, by reducing the sanctions for some offenses, by bringing the code more in line with the reality of practice in the criminal division of the superior court, we can have cases move more quickly on the criminal side.

We have just begun to explore this and we're going to hopefully in the next few months be able to have some more concrete ideas or articulations of what we want to do or what we propose to have done and see how that can affect it as well.

Mr. SCHEUERMANN. Mr. Cooke, to interject a little bit with my cochair and to maybe carry this dialogue on a little further, what I hear you saying is that you are talking about tinkering with the current court structure in the District of Columbia in terms of trying to make it more efficient and workable, but basically within the same structure that was created in 1970.

Have you given any thought or has your office given any thought or have you been engaged in any discussions that went beyond that to maybe contemplating some major institutional changes in the structure of the system itself as a means of addressing these problems? If so, what have you contemplated?

Mr. COOKE. I think I've talked to Judges Rogers and Ugast about some structural changes that were proposed, not necessarily by them. I guess as you know Judge Rogers is a proponent of an intermediate court of appeals.

Mr. SCHEUERMANN. We're aware of that.

Mr. COOKE. We don't in the executive branch of the government oppose that.

Mr. SCHEUERMANN. Do you see a need for it?

Mr. COOKE. Yes. I mean I think that—I talked about it with Judge Pryor before he left the bench. Judge Pryor and I think Judge Roger see the intermediate court of appeals as primarily an error correction function as opposed to pronouncing the law. I think that's a legitimate objective or purpose for that court to be involved in the more mundane and the more routine correction of errors and let the big court speak to the law.

Mr. SCHEUERMANN. As an administrator probably more so than a judge you're much more interested in cost benefit analyses of approaching the various problems.

Do you see the creation of an intermediate court of appeals as a cost beneficial approach to separating out the error correction functions of the court of appeals from the pronouncing jurisprudential principles portion of the court of appeals' function?

Mr. COOKE. I think it could be yes. I think it could be. I think depending upon processes put in place before, in the intermediate court of appeals you could have matters disposed of much more quickly and therefore save time, money, resources than they are currently disposed of in the error correction mode.

If we were to use certain kinds of summary procedures as opposed to preparation of completion transcripts and records—so I think that could work.

Mr. SCHEUERMANN. Mr. Cooke, to your knowledge has the court of appeals ever engaged in any kind of a study to determine what kinds of court of appeals cases occupy the majority of their time versus those that don't?

Mr. COOKE. I do not know. The second part of your question was, and I talked to Judge Ugast about the probability of a sort of municipal court that would be added sort of below, trial court. I don't think that's a good idea.

Mr. SCHEUERMANN. Why?

Mr. COOKE. I think for us being a relatively young jurisdiction or a young court it brings back the court of general sessions or the municipal court notions. It brings back the notions of an inferior trial court. I think that we are positively blessed with an integrated court system, an absolutely unique animal in the United States.

I think it works well. I think it could be made to work better, but I don't think that we are all any better served by having a municipal court that handles matters involving less than $25,000 or whatever number you want to use or sanctions below a certain type.

I really don't think that does anything except create a sort of little court notion that in my mind is associated with a kind of less than high quality justice.

Mr. SCHEUERMANN. Over the past 10 years I won't say substantial but significant chunks of legal disputes that have previously been adjudicated in superior court have been filtered off into various D.C. agencies under the rubric of your civil infractions program.

Your administrative law judges are now engaged in cases where they render substantial judgments, thousands and thousands of dollars in many cases on controversies that have previously been adjudicated before judges in superior court. Does that practice in your view similar to the creation of a municipal court do violence to the unified nature of the court system?

Mr. COOKE. It happened before I became corporation counsel, so I can say yes. I really don't think that's a practice we ought to continue very much more of. I would rather see us—the reason those things came about was because of the relative slowness of the court system and the inability of the government, the executive branch of the government, to have matters dealt with that needed to be dealt with very—or better dealt with promptly as opposed—did not but couldn't because of the backlog in the courts and that was sort of an alternative approach.

If we could make the superior court system work more efficiently there would be less need for these civil infractions.

Mr. BARNES. Mr. Scheuermann, may I just follow a little bit on that? Mr. Cooke, the Federal Government I guess operates in much the same way growing out of the so-called—the creation of the so-

called alphabet agencies. To a large extent the courts have continued to and on an expanded basis deferred to the expertise of the administrative agencies.

Do I judge by your comments that you find trouble with the way the Federal Government works as well as you would find trouble with the way the District government now works with its alphabet agencies?

Mr. COOKE. I guess the short answer is probably yes, but I think there's a point at which the size of it gets to be a significant factor and may make the decision different, the ultimate decision different because of the shear volume that you're dealing with.

Maybe on the Federal level when you're dealing with 10,000 cases an administrative civil infractions route makes the thing work better, but when you're on a local level and you've got 100 cases, maybe they ought to stay in court. I just don't know about the numbers on the Federal side but basically I guess I think that a lot of these things are not so arcane in terms of substantively that a judge can't resolve them. I don't think they're that complicated.

Mr. SCHEUERMANN. In your view would a practical distinction between whether it should be adjudicated before the administrative body or in superior court depend on whether or not it is traditionally viewed as an administrative law issue as opposed to a traditional and judicially resolution, resolvable dispute?

Mr. COOKE. I don't know. I guess lawyers are smart enough to figure out how to make anything in one of those spots or the other.

But I guess you know administrative law conceptually is sort of a strange thing.

Mr. SCHEUERMANN. The eye of the beholder.

Mr. COOKE. That's right. It's whatever people say it is.

Mr. SCHEUERMANN. If we were to recommend or if we should recommend some restructure of the present role of the commissioner in the superior court system, your institution is either the largest or at least the second largest user of superior court from landlord and tenant court through the court of appeals. You probably have more attorneys appearing on a day-to-day basis in superior court than anybody.

Mr. COOKE. About 30 percent of the court's caseload are cases that——

Mr. SCHEUERMANN. That's pretty significant. How would you like to see that institution changed to better accommodate the needs of the District of Columbia in its business before that court?

Mr. COOKE. It's not so much that the court needs to change as my office needs to change. One of the problems we have is that we don't have enough bodies to do as good a job of handling that case load as we need to. For example, in the family division of the superior court there are assigned there, I forget the exact number of judges and commissioners, each of those judges' and commissioners convene every day and hear matters. I don't have enough attorneys to cover each of those judges' and commissioners' courtrooms on a daily basis. That creates problems for the court and for my office. Because judges when they hear a matter they expect to see somebody from our office there because there are matters that the District of Columbia bring or has a role in. The whole process tends to

work less smoothly because my attorneys are going from courtroom to courtroom as opposed to handling matters in a more orderly fashion before a judge.

I think that on the civil side where we've got cases on the civil I and civil II calendar it's somewhat less of a problem but it can be a problem when judges decide to celebrate a case and don't have quite the flexibility in my office to have an attorney spend his or her time expediting that case and ignoring the rest of their case load because there are other judges in other matters that aren't expected to show up. So it's not really a problem for us in that way.

Mr. SCHEUERMANN. As a manager have you ever factored out how many additional attorneys and support staff you would need for each additional judge to be added in superior court or each additional commissioner?

Mr. COOKE. Not really. We sort of have a sense of that but we have never—I don't think we have a scientific way.

Mr. SCHEUERMANN. I'm not sure there is. What is your sense of that?

Mr. COOKE. We think we need an attorney, paralegal and investigator probably per two judges. Then we need a secretarial support person probably for every three lawyers that we have.

But it depends on where we put them all.

Ms. DANIELS. Can you give us some idea of how your office resources are broken down at the present time? You've indicated earlier that so much of it was going toward the criminal side.

Mr. COOKE. We have in the office approximately 185 lawyers, approximately 125 support staff. The lawyers are and support staff too for that matter, are divided into eight substantive divisions. There's an appellate division, civil division, criminal division, community development division, public works division, mental health division, consumer affairs trade regulation division and legal counseling division.

The appellate division has eight lawyers and they handle all of the appellate work for the District of Columbia both civil litigation, some criminal division litigation as well as administrative appeals, various administrative boards in the District of Columbia. Last year those eight attorneys prepared approximately 175 briefs that were filed either before the U.S. Supreme Court, the U.S. Circuit Court of Appeals for the District of Columbia circuit or the District of Columbia Court of Appeals. I don't know how familiar you are with the appellate practice but that's a lot of briefs for eight attorneys and those were not, that's not all they did, that's just the briefs they filed. They did a number of what we call memoranda and other pleadings that had to be filed in cases as well. They do a tremendous job, not enough resources.

That division of eight attorneys currently only has two secretaries and one part time paralegal. In my view, that's totally inadequate task, but we make do.

The civil division is a larger division in the office. It has approximately 103 people. That's about 50-odd attorneys and another 50-odd support staff. The attorneys are divided into general litigation sections in which there are three, major case section, a correctional litigation section and a special litigation section. The special litigation section generally handles offensive litigation where we become

the plaintiff, the District of Columbia—we become the plaintiff. We seek to recover moneys from individuals who owe the District of Columbia money and that effort is sort of caught in the financial crunch as we don't have to file those law suits. So those attorneys sometimes get diverted to defensive law suits where we have to respond.

I also forgot the civil division child support section which is essentially funded through the department of human services and we are involved there in trying to collect moneys for children from noncustodial parents and I think we have had some significant success over the last year including the District's performance vis-a-vis the other States in the country. We've moved from basically dead last to some place like number 36 in about a year which I think is a very significant move and we hope to do better.

But the general litigation sections handle the general litigation. We defend the District of Columbia in virtually any lawsuit which the District of Columbia is named, from the most complicated medical malpractice to the most simple slip and fall from some sidewalk imperfection where someone slips and falls. We do all of that.

That area is where in the general litigation section is where we come up with this case load of which we have at any point in time about 10,000 cases pending in the office. Some of them are very significant, some of them very minor but it's still 2,000 cases you've got to deal with.

In addition to the 2,000 cases we have also approximately 2,000 claims pending in any point in time. A citizen of the District of Columbia who feels he or she has been offended typically files a claim against the government first. That claim oftentimes is resolved in favor of the citizen and it never turns into a lawsuit. Again, in an almost equal frequency the citizen is not happy with the offer of settlement and then litigation ensues.

So we've got about 2,000 case pieces of live litigation going at any point in time and about 2,000 live claims, some of which will turn into lawsuits at some point in time.

Our experience is that it takes about 30 months for a lawsuit to get resolved in our office from the time it's filed to the time it's disposed of in court it's about a 30-month process.

We have a number of attorneys. We have a totally inadequate number of paraprofessionals to assist the attorneys and that's very difficult in terms of managing the case load. The attorneys carry as you might imagine very high case loads and that's troublesome for us, especially when the attorneys on the other side sometimes have two or three attorneys per case and we often have one.

Mr. SCHEUERMANN. I don't mean to dominate the discussion here. I invite everybody.

Ms. DANIELS. Any questions? Lee?

Mr. SATTERFIELD. Mr. Cooke, how long have you presently been in your position?

Mr. COOKE. Two years—2 years this month come to think of it.

Mr. SATTERFIELD. I know as a matter of fact it is a short period of time and I just want to say you've been doing a tremendous job in terms of professionalizing the office in the work that it does and the members of your staff whom I have come in contact with in the

practice of law for the most part have been professional and handled their cases well.

Mr. SCHEUERMANN. We'll go to some length to keep you out of the discussion.

Mr. SATTERFIELD. Did you hear all that good stuff?

Mr. COOKE. I heard all of that good stuff. I was—I'm not so sure I deserved it but I could hear it.

Mr. SATTERFIELD. No, I really, I sincerely want to congratulate you on the fine job that you've done. I do have a couple of questions that I would like to ask and it may not fall into keeping the discussion going but at the beginning you said taking a look at revision of the criminal code to bring it into a line of what is in practice being done, could you give us an example of what you're talking about so we can again have that in the record?

Mr. COOKE. Sure. For example, in the current District of Columbia Criminal Code possession of a controlled substance such as cocaine, very common offense charge in superior court has associated with it a sanction that can have a person incarcerated for up to 4 years I believe it is, for first offense, simple possession. For possession, almost no one in superior court receives that sanction. It's just unheard of because as you may have heard we also have a prison overcrowding problem so nobody who is charged with the first offense cocaine possession goes to jail.

But that case is treated as a felony offense and has to go through that whole process. If we were to change the sanction for first offense simple possession of cocaine to a misdemeanor it could be dealt with by a commissioner. It could be treated summarily. You wouldn't have to get involved in a whole involvement that it currently takes and the result would be essentially the same. The person is never going to go to jail anyway so why have this apparatus set up to send him or her to jail when that's not where they're going to go.

So we think by doing things like that by having the code and the sanctions conform to what we actually do in court, what judges and prosecutors actually think should happen in court to certain criminal offenses that will serve the long-term interest of the system.

So we're looking at those kind of things and it may be somewhat premature to talk about it here today because we haven't really decided on anything. I don't mean to make Jay Stephens complicit in this at all except to say that we had discussions and the discussions may lead us to conclude this is a bad idea, we don't want to do it but think it's something worth exploring.

Mr. SATTERFIELD. Thank you. Another question which I had as you were speaking has to do with the recommendation for the intermediate court when as an error correction function as opposed to a pronouncement of the law, in terms of your office experience in practicing before the present court if you know what side of the equation would the majority of the cases that you participate in fall into? Would it be error correction or would it be pronouncement of the law?

Mr. COOKE. I think most of them are error correction as opposed to pronouncement of the law.

Mr. SATTERFIELD. Unlike the U.S. attorney, I gather from your comments you do not assign attorneys per se to a particular judge's courtroom?

Mr. COOKE. We can't.

Mr. SATTERFIELD. You don't have the resources.

Mr. COOKE. That's right. We'd like to but we can't.

Mr. SATTERFIELD. If you had the resources you would like to do that?

Mr. COOKE. Yes, I think that the whole system tends to work better for us in handling juvenile matters because then you get a sense of what the judge prefers, what the judge's predilections are and you can help the D.C. Department of Human Services' case workers present matters in a way that the judge is more prone to be responsive to.

So we think it's much better if we can have a judge or a commissioner rather and an attorney assigned to each other on a long-term basis.

Mr. SATTERFIELD. Thank you.

Ms. DANIELS. Julia Williams?

Ms. WILLIAMS. Mr. Cooke, when you were speaking earlier about the recommendations for the extension of the hours, you did not mention either putting employees on shifts or flex time. I know the government does have provisions for flex time. Has that ever been considered?

Mr. COOKE. I don't know whether Judge Ugast actually considered it or not. I know that they weren't terribly enthusiastic to the idea without some means of providing for overtime.

The court system overtime—well, like our office, the court system isn't very fat in terms of personnel. It's difficult not to have all the people you have there. The thing doesn't work as well. You don't have a lot of people sitting around without doing something.

So it really turns into an overtime proposition or a new-hire proposition because during the bulk of the day but basically 9 to 5 o'clock the people that are there are people that you basically need to make the thing work. If you tried to put them on some kind of shift where they overlap you would I think not realize efficiencies and you would probably suffer some inefficiency unless you had more bodies.

So either you're going to have I think more people so that you can have people who only come in at 3:30 o'clock and work until midnight or you're going to have to have overtime.

Ms. WILLIAMS. That's what I meant by shift time.

Mr. COOKE. Then there's more people but I guess it's effectively the same thing. Again it depends on how big an operation you have beyond the normal 9 to 5 o'clock hours. Are you going to operate the court at a 100-percent kind of judge population all day or are you going to have 50 percent of them in different parts. I just don't know.

Ms. WILLIAMS. Also has there been any consideration given to incorporating the true suggested recommendations such as part-time workers with the voluntary lawyers acting as the judges?

Mr. COOKE. I don't know if the board of judges has ever discussed part-time judges to any length. I know I've had conversations with

a couple of judges who I just happen to know about it, but I don't know if it's actually been discussed by the board of judges.

Ms. WILLIAMS. Also, thinking of some of the family cases I guess you'd call them more juvenile cases and this would be the neglect cases, it seems that I know there's been some efforts to speed these cases through the court. Have there been any other thoughts in terms of speeding the neglect cases because they are quite—I think they are related to the increase in drug cases and also affects the neglect cases also because most of the parents have some type of drug problem, they're neglecting their children.

Mr. COOKE. There's no question. Last year my office handled a record number of child abuse neglect cases and this year we're ahead of that pace already. It's clearly an aspect of the drug problem in the city. We have so many children of people who are involved in this particular activity that there is a consequential increase in number of abused and neglected children.

Ms. WILLIAMS. Since this is not of a neglect statute—is not a criminal statute, I mean, has there been any thought given to using commissioners? I think now there's only one judge that handles these cases?

Mr. COOKE. I think there's more than one judge but one of the problems with the child abuse neglect cases really ties into the D.C. Department of Human Services' case worker staff. It ties into the D.C. Department of Human Services' ability to place these abused and neglected children. That system needs some attention in a lot of ways. All parts of it. I think we need more lawyers and staff to process the cases. I think the superior court would like to assign more judges to handle these kinds of cases but I'm equally certain that the D.C. Department of Human Services needs to have more case workers to prepare these cases and to develop placements. We need more resources in terms of places to place these abused and neglected children when they have to be removed from their homes or families. It's real big.

Ms. WILLIAMS. Have you any idea as to how many more judges you think would be able to adequately handle these cases and the support staff?

Mr. COOKE. I really am not a good person to speak to that. I think that clearly you could have two more judges with this but I don't know what Judge Ugast will tell you—that he needs three.

Ms. WILLIAMS. You mentioned there had been some consideration as to the increase in your staff. Do you have any idea how many more attorneys you would need to handle these cases or should have to handle these cases?

Mr. COOKE. Well we need attorneys and paralegals to do the work in child abuse and neglect. Beverly Burke who is the deputy in charge of the criminal division under which child abuse and neglect section functions has told me on more than one occasion she needs more lawyers and we currently have assigned there four lawyers and we think we could use eight.

The volume is just that large and it's growing. It's a very, very sad situation. One of the difficulties of the case workers is that the cases are fairly complex. They're very, very bad cases in terms of abuse of the juveniles and very, very difficult cases in which to find appropriate placements because there's no family or inadequate

family or there are such limited resources inside and outside the government to place these children.

Mr. SCHEUERMANN. Mr. Cooke, I take it from your comments that you would have no serious reservation about expanding your role of commissioners to be able to function in this area of the court's businesses, judicial officers.

Mr. COOKE. No.

Mr. SCHEUERMANN. What limits do you think there ought to be on the role of commissioners versus judges in the system?

Mr. COOKE. I really don't know. I mean I guess the more I think about the more I think as we expand they turn into judges, why do we have commissioners anyway? I'm not really clear on that. I don't know where the line is. A lot of them, a lot of the things they do are things that when I was a very young lawyer practicing is what judges did. I'm having a difficult time figuring out why they're not judges.

Mr. SCHEUERMANN. They're cheaper.

Ms. DANIELS. Donald Temple wanted to ask a couple of questions.

Mr. TEMPLE. I just wanted to ask you, you were speaking of the child-abuse calendar or numbers of cases. You said the volume is high. How high is high in that instance? What numbers are you talking about?

Mr. COOKE. I don't have the statistics right here but last year we handled—we processed some 600 child abuse neglect cases and we're running ahead of that this year and that was a record last year.

Mr. TEMPLE. You have four lawyers and the average number of cases divide 4 into 600 you come up with that?

Mr. COOKE. Sure. That's basically how they do it.

Mr. TEMPLE. But while those cases are pending for example I'm just looking at the implications of those cases that perhaps on the victims or on the situation and I do know of a case that's probably before you now. I'm just wondering is the backlog and the resolution of those cases, what kind of implications does it have on children, victims in this case?

Mr. COOKE. Well it's not so much that, it's the limitations or the limited resources we have which deal with the cases substantively anyway. That's what creates the problem. Appropriate versus inappropriate placement of the juvenile either before or after disposition is the problem. It's not so much the time it takes is we just don't have places for them to go.

Mr. TEMPLE. I wanted to ask you about the times and numbers of criminal cases handled by your office.

Mr. COOKE. The kinds of criminal cases?

Mr. TEMPLE. The numbers that you are handling.

Mr. COOKE. That's a big number because our jurisdiction is limited as you know. We are limited to prosecuting adult criminal offenses for which the sanction is either confinement for less than 1 year or a fine of less than $300. When it's both then it's within the jurisdiction of the U.S. attorney.

Under that falls the overwhelming majority of traffic offenses that are still criminal. Last year for example drunk driving, driving while intoxicated and driving under the influence are cases that my office prosecuted. Last year we did some 14,000 of those.

We did a number, we did another 3,000 or 3,800 other misdemeanor cases, disorderly conduct, incommoding, things of that sort. It's a high-volume business but a lot of the people plead guilty, pay the fine, so we don't have a lot of trials.

Mr. TEMPLE. How many lawyers handling?

Mr. COOKE. In law enforcement? We also do housing code violations. We also do civil infractions that aren't paid that turn into a criminal offense. We've got I think 16 lawyers, maybe 17 lawyers in the law enforcement side of the office that handles these cases.

Mr. TEMPLE. I have one last question for you. It goes to the expanded jurisdiction of hearing commissions. There is a bill created by the Supreme Court, which you know about, which changes the title of hearing commissioners. It upgrades it to magistrates without basically expanding their jurisdiction. But based on your comment about the criminal code have you thought about the possibility of expanding jurisdiction for hearing commissioners to hear first-time felony offenses as well as some increased expanded jurisdiction for perhaps landlord and tenant and other kinds of cases which would then alleviate the calendar for those sitting judges and allow those more important criminal and some civil cases?

Mr. COOKE. I really haven't given any thought to that. I see the logic is clearly there but I don't know if that's—I just haven't thought about it, whether it's a good thing or not.

Ms. DANIELS. Well that would certainly impact upon your office particularly.

Mr. COOKE. Absolutely.

Ms. DANIELS. And make the need since we're going to be speeding these cases into the system it would put additional pressure, speaking of which Jay Stephens was here last week as well and he was of course asked a question as to why does the U.S. attorney's office or how does he feel about the continuing responsibility of the U.S. attorney's office handling those cases which you've alluded to for the District of Columbia when they exceed certain jurisdictional limits and money. And of course we would want to ask you that question as well. How would it impact your office if the responsibility were switched. What is your view of that change and also I would like to add to that question another little small part which is as you know in many other jurisdictions the individual who has your responsibility is an elected official and how would it, if any, impact you, your office if that were to be the case?

Mr. COOKE. In many more times than not the attorney general—let me back up to explain—last December 1988, the culmination of efforts begun by then corporation counsel now Chief Judge Rogers' effort was realized. The District of Columbia was formulated as a member of the National Association of Attorneys General and along with the 50 States in the other five jurisdictions so we get to sit at the table and act like attorneys general.

In doing that I think that we have begun to move ourselves closer to what I see as our ultimate objective, vis-a-vis statehood and having my office treated as it is appropriately, should be appropriately treated as the attorney general of the District of Columbia.

The overwhelming majority of attorneys general in this country are elected. I think 43 States have elected attorneys general. I be-

lieve five States have appointed attorneys general and I believe, appointed by the Governor, and the other two are appointed either by the legislature or the supreme court. In Tennessee, the attorneys general are appointed by the supreme court for an 8-year term. In Maine, they're appointed by a vote of the legislature for a 4-year term.

That's not bothersome to me. I clearly—because I'm an incumbent because of a whole bunch of other things—I'm not going to ever be appointed or elected to office, but clearly that's what happens in the majority of jurisdictions in this country.

I think that the appropriate expansion of the criminal jurisdiction of the office of the corporation counsel which I would prefer at that time to be called the office of the attorney general, would just mean that we would have a much larger office than we have now because we need approximately the same staffing that Mr. Stephens has devoted to the superior court on the criminal docket to process the cases in our area or prosecute the cases there.

We are as you know an absolutely unique jurisdiction in the sense that we are the only jurisdiction in the country that has a Federal prosecutor prosecute local criminal offenses. We're the only jurisdiction in the country that has the chief prosecutor completely disconnected from the—completely disconnected from appointment by people who are appointed by the electorate or elected by the electorate. I just think that's wrong. I have nothing against Mr. Stephens, I think Jay is a real fine person and he and I have a very good dialogue in the time that he's been in the office, but I think fundamentally that is an incorrect way to run a railroad so I am a very strong advocate of shifting that jurisdiction from the Federal prosecutor to a local prosecutor.

Most jurisdictions in point of fact, the attorney general is not given the responsibility for prosecuting criminal offenses. That is typically a function handled by an elected again States attorney or State prosecutor. So that could happen here. It doesn't have to be in what is called the office of corporation counsel or maybe the office of the attorney general. But still it ought to be a person who is either appointed by people we elect or elected by the people still. So that could happen very nicely, I think. I don't think it's as complicated as people might have you believe. It is not brain surgery. There is some very fine criminal lawyers who are resident in this city. The reality is that lawyers who want to have that criminal experience are going to go where the action is and if that happens to be the District of Columbia government then they're going to work for the District of Columbia government. They're not wedded to federalism in the sense that I've got to work for the Federal prosecutor. They want to try criminal cases. We have them. We'll get their attention. I don't see that as a significant impediment at all.

Ms. DANIELS. Congressman Fauntroy has joined us and I'm sure he has some comments he'd like to make.

Mr. FAUNTROY. Thank you so much. I simply want to express my appreciation both to the mission team and to Mr. Cooke, Mr. Forrester and Ms. Walters for agreeing kindly to share this session with us. I am very pleased in the way in which we're proceeding because in this sort of roundtable fashion—In fact, I think we'll

glean by our dialogue much of the basis on which—a basis for which I hope that as a team we'll come up with some meaningful legislation to move through this Congress.

I unfortunately for the team and for our witnesses have one slight other obligation which I carry on for $1 a year and that is the pastor of New Bethel Baptist Church and one of my most faithful trustees is about to give his daughter away in marriage at noon and I'm to preside. So that if you don't mind I'm sure that each of you will appropriate the wisdom of our three witnesses and pour it into my head at the appropriate time.

Thank you so very much.

Ms. DANIELS. Thank you. Do we have any more questions for Mr. Cooke? Oh, Harley Daniels.

Mr. DANIELS. Mr. Cooke, I would just like to follow along on the last set of questions that you were asked and responded to. It's another issue that we're looking at and that's the question of judicial selection in the District of Columbia. You indicated that you felt the direction, as I do, is toward statehood and toward fashioning a more State-like criminal justice system. Do you have a position, first of all, on whether it would be appropriate to expand the judicial nominating commission which is as I read it now 4—3 maybe there would be some dispute about that but only three really relate to the local process at all, would you be in favor of greater local representation there and some members I've even heard talk about possibly electing members to the judicial nominating commission?

Mr. COOKE. I would in fact be in favor of a greater local participation. I think that it's important that the judiciary and citizens, the electorate, feel connected to one another. It strikes me that having the judges of the local court appointed by the President of the United States detracts from that feeling of connectedness—that sense of we have had some participation in selecting the juries for this jurisdiction. So I would very strongly advocate that.

I am not very warm to the notion of electing judges. I just think that's—I guess I'm just too old fashioned. I think judges ought to be appointed and they ought not to be involved in politics as a primary function.

Mr. DANIELS. Would that go to, 38 States now elect judges in one form or another from all the way from purely Republican/Democrat partisan politics all the way to retention elections which are becoming sort of the trend now in combination with Missouri plans which we've had since 1974. How would you feel about retention elections as opposed to full-scale partisan politics and the election of judges? That is a yes or no after serving for 2 or 3 years?

Mr. COOKE. Somewhat better but not real warm to it. I'm still a stick in the mud. I think judges ought to be appointed. I think they ought—the Federal model in terms of lifetime appointment with removal for impeachment purposes is something that I guess I just feel more comfortable with.

Mr. DANIELS. Thank you, Mr. Cooke.

Mr. SCHEUERMANN. Mr. Cooke, Mr. Daniels opened up an area that I'd like to follow just a little bit and that is if the role of the commissioners were expanded significantly would you be in favor of also changing the method by which they were appointed to make them more like a judicial nomination—that is have them consid-

ered by the judicial nominations commissioner or maybe appointed by the Mayor with the advice and consent of the council as opposed to being selected by the board of judges as is presently the case?

Mr. COOKE. I don't know. I really haven't thought about that. I don't know. Obviously the more they take on the functions of judges the more compelling is the logic that they ought to be chosen as one would choose judges but if they really aren't judges then maybe that doesn't work either.

I'm just not sure about that.

Mr. SCHEUERMANN. Well a judge like administrative law is a little bit in the eye of the beholder and depending on where you sit.

Mr. COOKE. Yes, yes. I don't know. I'm not clear on that. I have to think about that a little bit more.

Mr. BARNES. Mr. Cooke, you've given generously of your time this morning. I have just one or two final questions.

Given the current climate there is almost certain to be some changes as a result of legislation on the Hill with respect to the courts and the U.S. attorney's office if nothing more, one would expect that additional resources would be added to those two elements of our justice system.

It may be also an opportunity to provide for participation in felony matters by the corporation counsel's office. In your office I know that every government employee local and Federal believes they're overworked and underpaid. I know I do. But would your office be prepared to participate in an experiment of that sort to help enhance the resources available for the prosecution of the drug-driven criminal cases that are now before the court and the many more that will be expected if 700 additional, 700, 800 additional police officers are added?

What's your thinking on that?

Mr. COOKE. We would certainly be willing to help. I just don't know where they would come from. We just don't have the people to give to it. We are currently participating in the task force along with Henry Hudson who is the U.S. attorney for the Eastern District of Virginia at the Lorton Reservation; we've provided two attorneys to participate as a special assistant, United States attorneys to prosecute the adult felons who commit criminal law violations on the Lorton Reservation and that has been very successful.

Beyond those two attorneys who are working for Mr. Hudson's office I just don't know where I can get the bodies to do it. It's just going to be real tough for us to find the people. But conceptually I have no problem with that. I think it's something we should be doing. It would be a good incentive, a good training vehicle for my attorneys but I just don't know where I'm going to get them.

Mr. SCHEUERMANN. In an ideal world, Mr. Cooke, how many additional bodies would you need? Assuming 700 new police officers, 15 new judges, 10 new commissioners, whatever.

Ms. DANIELS. And a supreme court.

Mr. COOKE. It depends on how big a piece of this we're going to bite off but as a part of our proposal to Mr. Bennett, we requested, well we identified the need for four additional attorneys in the juvenile delinquency section of the office to handle what we think is going to be an increase in juvenile delinquency cases in the office

and that was a modest request because we weren't trying to be grandiose.

But if we were going to try to expand to include any significant number of assistance on the adult felony side it would depend on how many people they wanted, but any number we get would have to be over—it would have to be added to what we—it can't come out of existing resources so if we're going to contribute four people then somebody would have to find a way to fund four people because we just don't have four people here.

But we could do four. We could do two. We could do six, whatever was appropriate but resources would have to be found because we couldn't do it.

Mr. SCHEUERMANN. Should we keep in mind the formula of two assistants plus support staff for each additional judicial office?

Mr. COOKE. No. That works on the civil side, not so well on the criminal side. It's more direct. It's less on the criminal side, not as much paper flying.

Mr. SCHEUERMANN. How many additional personnel, that is attorneys, would you need to be able to do what the U.S. attorney is doing and that is assign individual assistants to individual judges or commissioners?

Mr. COOKE. The reason I don't know is I can't remember exactly how many judges and commissioners are assigned currently in the family division. I think it's like 16 or 18 and that's how many lawyers I would need and those lawyers probably get half of that in terms of paralegals—each of them could share one. Two could share one. Something like that. We don't have that many right now.

Mr. SCHEUERMANN. Fair enough.

Mr. BARNES. Mr. Cooke, we have all known you as a superior lawyer and this morning by your command of the information and facts you've demonstrated you're also a superior manager and given the proper resources that corporation counsel's office can really make an impact. We thank you for your testimony and as the Congressman pointed out it will be important to the committee's consideration of what legislative formulations ought to be undertaken to help improve the quality of justice in the District of Columbia.

We appreciate your time.

Mr. COOKE. Thank you very much for the opportunity and to the degree that I can provide you with more concrete documentation on some of these numbers, I'll go back to my office and put that together and if the record remains open for a brief period of time for me to submit a writing that gives you the various formula and the numbers, I'd be happy to do that.

Mr. BARNES. Anything you wish to submit, the record will remain open as is customary.

Mr. COOKE. Thank you very much.

[The information was not received in time for printing.]

Mr. BARNES. Our next witness is Gordon Forester from the Counsel on Court Excellence. Mr. Forester, I was pleased to have you proceed as you wish.

Mr. FORESTER. Thank you very much. Chairman, I did bring copies of a prepared statement for the members of the committee.

Mr. BARNES. Good, Mr. Daniels will circulate them. Your entire statement will be made a part of the record and you may read it or summarize it, whatever.

TESTIMONY OF GORDON FORESTER, CHAIRMAN, COURT IMPROVEMENTS COMMITTEE, COUNCIL FOR COURT EXCELLENCE, ACCOMPANIED BY JOHN WILLIAMS, ASSISTANT DIRECTOR OF THE COUNCIL FOR COURT EXCELLENCE

Mr. FORESTER. Thank you very much. I'm not going to read to you. I will summarize it. With me today is John Williams who is the assistant director of the Council for Court Excellence.

Mr. BARNES. Mr. Williams, you are welcomed to come to the table if you like.

Mr. FORESTER. He's very helpful because when I get in trouble he can help me out.

Mr. BARNES. I understand.

Mr. FORESTER. I am here today in my capacity as the chairman of the Court Improvements Committee, Council for Court Excellence. Many of you I'm sure know the council is a broad-based community organization which is devoted to improving the administration of justice. We have worked in the past on jury reform. The council takes some credit for the change in the jury system to the superior court, a 1 day/one trial which we see in operation today and we might add I see it working extremely well.

The council has been involved in victims' rights and in child abuse, family neglect work. It is a broad-based organization as I say comprised of lawyers, judges, and representatives of the community.

I want to base some of my remarks and proposals on some hard-core statistics. They're set out for you in just a brief summary. The median disposition time for civil delay in the superior court is 2¼ years for the less complicated cases. Now remember that's a median time. It goes on up that 90 percent of the cases are resolved in 4.1 years. You still have 10 percent of those cases that are taking more than 4 years.

This is even more aggravated in the civil I cases which 10 percent are not resolved until 5.1 years. Remember too that this median time is somewhat skewed by the fact that the lower end in many cases never come to issue, many cases are dismissed, many cases are settled, so you're looking at the higher end of the delay.

I was interested in Mr. Cooke's estimate of 30 months for his civil cases. I think that's a good round middle figure too.

One of the figures that is very significant—we only have figures for 1987—1988 has not been made available to us yet. In 1987 there were 11,018 civil cases filed in superior court. That does not include of course the small claims court nor landlord/tenant, just the civil cases; 4,400 of those were resolved. Now simple mathematics says where are the other 6,000? Also simple logic says this is cumulative. It's going to get worse and worse.

This is highlighted by a table which is on page 2 as showing the civil actions filed, the increases from 1985 to 1987, compared to the other side with felony indictments from 1985 to 1987. Now we all know that 1988 was much higher in felony indictments than 1987.

We know and we're hearing that they are going to be much greater in 1989. We get the resultant impact on the civil side when these criminal indictments increase, when our civil filings increase, when we have more than half of our judges assigned to the criminal side it becomes worse and worse.

This median time is serious now, it's going to become incredible in the next 2 to 3 years.

Now we have many, many problems facing our court system administration of justice today. Certainly with the highest drug indictments per capita of any jurisdiction in the United States, certainly with the number of criminal cases that are growing every year, homicide rate, and maybe some people could say well we have bigger problems than civil delay. Of course we do, but civil delay impacts on so many people in this city.

We estimate that over 300,000 people come into contact with the superior court every year. Now these people are coming to solve their problems. I don't care if he's going to small claims, that is the biggest problem in his life that day. If he's going there for landlord and tenant, that is his problem and he is not worried about felony indictments or homicide rate on that day. He comes there to have his problems solved and he deserves to have them solved. Not put off, not wait, not 3 years, not 5 years.

We are not here today on behalf of the council to suggest any criticism of the judges that sit on our superior court. They are overworked. They are underpaid. They are extremely competent, extremely conscientious. In fact, we heard someone mention this morning, judicial burnout. It's a serious problem for these men and women to sit on this court. We have the utmost respect for them and the work they are doing.

We know of course that you can solve these problems by just adding more judges. I'm sure 100 judges on there could solve all of our problems. That is not the answer, that is simply covering up the problems that exist today and overlooking them and complicating the problems for the future.

We want to look at the problems and the court system with a fresh approach with an eye for the 1980's, for the 21st century and say look because we've been doing it this way for the last 20 years does not mean it's the only way it can be done. Let's step back and take a look.

One of the problems is you look around this room you see busy lawyers, you see busy judges down in the court. We are all so close to the problem it's difficult to step back and take a look at it.

The automation problem, the automation as a solution poses marvelous possibilities. We have all of these sophisticated systems and communication of vehicles that we can utilize we feel could be utilized more. Now we know the court has recently automated its criminal dockets and its civil dockets. I do not know the type of automation that's there. But we are told that in the future a lawyer will be able to connect up to the computer system in the court with a modem in his office and see, pull up a case packet and see where it stands. That's marvelous. Hopefully these modems will be available in bar offices and in central offices so sole practitioners and other lawyers can do this as well.

That helps. The more sophisticated, the more we utilize the computers that are available today, the more efficient we can handle our dockets and processing of motions and what is happening in court. To give you a personal example, I started a trial last week in superior court. It was April 26. There were no motions or pleadings in that docket file from early March. Many motions had been filed, transcripts filed of depositions. They simply weren't there. Fortunately the lawyers know this and we all have file stamped copies but we submit those up and we proceed. A computerized docket system would eliminate many of those problems.

Other courts have experimented with the use of fax machines in issuing orders, emergency orders, temporary restraining orders, family matter orders. These can be looked at, can be done that way. Other courts have done scheduling conferences by telephone. They don't have to bring six lawyers to court to have a scheduling conference, hook them up by telephone and talk about the case and the problem. These are innovative approaches that the court and I hope this commission will look at.

Another proposal that we're concerned about is early judicial control. Many lay people outside the system are shocked when they hear that a case can be filed in the superior court and be pending for 3 years and until it comes to pretrial is never looked at by a judge. There's no early judicial control. Now that's not every case. Civil I of course does get early judicial control. The motions are filed. We have discovery problems, the judge gets involved but the majority of the cases they do not.

We want to help develop a local legal culture that says the court rules will be enforced. We want the court to require lawyers to follow the rules, lawyers will get away with murder when they can and they do. I know, I'm one of them.

Enforcement of discovery rules. Enforcement of rule 41 which says a case that is not prosecuted is dismissed. These rules can be enforced uniformly. They do not have to be drastic sanctions for penalties. We want the court to look at and consider seriously the individual assignments. That is, for all cases over 10,000. The court will take charge of that case and it will be assigned to one judge from the date of issue throughout. The cases, some of them, take more discovery and they can be settled, they can be spread out for a longer discovery period. Some cases need little or no discovery and can proceed to trial rapidly. All cases don't fit in the same mold.

We think the single judge assignment system could utilize scheduling conferences, discovery control and then come down and have a pretrial conference as meaningful. Today's pretrial conference in a superior court is simply a waste of time.

Instead, a pretrial conference should require briefs on legal issues, should require exhibits marked and exchanged, should require voir dire questions to be submitted, jury instructions submitted. The case, a complete paper trial so that when you get ready to start that trial the following month or 6 months it moves much more efficiently, much more expeditiously.

We also propose a differentiated case management system. Over 60 percent of the cases filed in this civil division superior court are $10,000 and under. That means in 1987 approximately 6,600 of

those cases were under $10,000. Most of these cases are debt suits, subrogation claims. They can be handled on an expedited basis. Most of them need no discovery. These cases could be assigned to senior judges, they could be grouped, they could be brought in and if there are material facts and issues set aside for trial, if not, considered under summary judgment, many of them are not at issue. Many of them can have defaults entered. At this point let me part from this for just one moment. Here is an area too where we think the commissioners in civil court can be utilized. This is my personal opinion that it's ludicrous to have to use a judge to sit and hear ex parte proof when a default has been entered. To bring those commissioners forward to hear these cases on an ex parte proof, council could bring in proposed findings of fact like they do before a commissioner in an uncontested divorce case. He could put on his proof before a commissioner. The commissioner can sign those findings of fact, submit them to a judge, to enter a judgment. Right now I do not believe the commissioner has the power to enter a judgment.

We have also proposed a study that is Council for Court Excellence of a lower court system. I want to emphasize council has not approved or endorsed a lower court system but they have endorsed formally an inquiry study into the use of a lower court system.

This proposal as you've already heard would assign all cases, say $10,000 and below to a lower court, the landlord and tenant branch, the small claims branch, part of the family division, the nonjuried misdemeanors would be heard by the lower court system. Again, utilizing a state-of-the-art computer system, utilizing a new set of rules for discovery for the lower $10,000 cases would permit a jury of six persons to hear these cases when demanded but have not a trial de novo as other courts do, other States do but a direct appeal if which there is a lower appellate court would go directly through that court for errors and commissions.

We believe that the proposal has merit. We believe it should be considered. This is not a return to the court of general sessions. This is not a return to the old days. Forty-five States have a lower court system. When you consider the number of cases below $10,000, when you consider the opportunity to get to a single judge assignment which is impacted by the fact that these judges must serve in the landlord and tenant court, small claims court and the civil assignment court and the judge in chambers, they have so many duties that it is difficult to let them focus on a single docket. If we take this out of the court system the superior court judges then would focus entirely on felonies, serious misdemeanors and the major civil cases over $10,000; $10,000 is an arbitrary cutoff right now because we see this dramatic percentage of 60 percent in superior court. It might be a higher jurisdiction level.

We must also be mindful that this month or in May the jurisdictional level in diversity cases increases in Federal court from $10,000 to $50,000 and that is going to have an impact on the superior court as well.

Expanding just a little bit further on this lower court the one suggestion is that the judges would serve for 7-year terms. It would be paid a percentage of the salaries to superior court judges and it would be used as a stepping stone to the superior court. The judges

who perform well, the judges who show that they are indeed of judicial caliber would then move on up to the superior court.

This is again going to emphasize an ability to step back and take a look at it. We want to note too that Judge Ugast has appointed a commission of bench and bar to look at certain aspects of civil delay. We are hoping that will also impact and we hope the Council for Court Excellence a contribution.

We see serious problems for the 21st century. We want to look at solutions now at this time before we are drowning in the problems of civil delay.

Thank you very much. I'm happy to discuss any of these matters or answer any questions.

Mr. SCHEUERMANN. Thank you, Mr. Forester. I would note that most of the suggestions that you have raised in your opening remarks would not seem to address specifically any legislative changes in the court structure but rather seem to go to the internal operations of the court as it's presently structured.

Other than the long hard look at a lower trial court that you've addressed what of the proposals that you have put forward do you feel would require congressional action versus internal adjustments to the court's current operating system?

Mr. FORESTER. Actually very few of you have noted, however, these proposals we think impact on congressional action. For example, we don't believe we can get single judge assignment calendars until the court looks seriously at, or the Congress looks seriously at a lower court system.

We don't, we believe, for example, the proper use of commissioners should be expanded and this is not a definite proposal to the council. We have looked at the utilization of commissioners. All of this will impact on the reorganization.

Mr. SCHEUERMANN. We've heard testimony about the need for additional judges and the need to expand the role and the scope of commissioners in the current superior court system. Does the council have a position on the extent to which the Congress ought to increase the superior court bench, increase the number of commissioners and what the appropriate numbers would be in that regard?

Mr. FORESTER. The council has taken no position on the expansion of judges on superior court or on the commissioners. The council and our committee specifically have talked at some length about the utilization of commissioners and their authority which we hope the Congress will take a look at. The statute now of course restricts them severely.

Mr. SCHEUERMANN. How would you like to see us take a look at that in terms of what do you think the scope of their authority ought to be?

Mr. FORESTER. I think if I may the utilization of the magistrates in the Federal system is a very good parallel and very good analogy and I don't believe we use our commissioners nearly to the extent that the magistrates are used in the Federal system. I think you need to look at the comparison of the two as a parallel for both courts.

Mr. SCHEUERMANN. Currently the commissioners are appointed by a committee based upon a recommendation to the board of

judges by a committee of lawyers. Would you have any views on whether or not that appointment to process ought to change if the role of the commissioners in superior court is expanded?

Mr. FORESTER. Again, you're going beyond anything that council has considered but just speaking as Gordon Forester on that subject, I've always been concerned frankly that the magistrates in Federal court are appointed by the board of judges in the Federal system.

I do think the appointment and the qualifications of the commissioners should be looked at. I don't know, I'm not at this point qualified to say how that process should be, but I heard you earlier talking about perhaps going through the judicial nominating commission for the commissioners.

I'm not sure that's necessary; as long as we're able to find qualified people willing to serve.

Mr. SCHEUERMANN. Does the council have you on the creation of an intermediate court of appeals and if so, what is that view?

Mr. FORESTER. Yes, the council has endorsed the intermediate court of appeals. The executive committee has. The details are still not quite clear to us. We have discussed, studied some of the proposals and we do not have any recommendation on the specific for those proposals at this time. The court, in concept, we do favor.

Mr. SCHEUERMANN. One of the things that became very apparent over the last couple of months as we've started to look at the issue is the impact of drugs on the court system and the extent to which it causes grave distortions in the allocation of resources within the system.

How do you think in the context of the reality that we're dealing with, that is the current drug epidemic, what is going to be almost certainly an increase in the court's business as a result of that, stemming from the, assuming there are 700 additional police officers added and the like, how do you think the court ought to deal with that as an institution in terms of structuring and organizing itself to meet what is going to be coming down the pike?

Mr. FORESTER. Well we believe that most of our proposals would assist in dealing with these increases and you call it a current drug epidemic. I don't see it ever changing. To me it's a fact of life for the rest of our lives and that we have to deal with it again proves this type of proposal with looking at a lower court system looking at the use of the commissioners with more efficient and, when you talk about legislative consideration, I think the legislature that Congress should consider, what kind of funding is needed in superior court for state-of-the-art computer systems.

We're not utilizing these tools. We have to utilize these tools if we're going to deal with this epidemic of drug related violence and crime.

Mr. SCHEUERMANN. I would like to open the questioning up to other committee members.

Ms. DANIELS. I'd like to go back to one point that you made earlier. You did talk about the possibility of instituting this court of lower jurisdiction and that the individuals who would be selected to fill the judgeships or magistrate or commissioner roles, whatever it would be, in that court would then be a training ground for eventual appointment to the superior court.

Given that, in the event we were to create such an animal, and with the limitations that you indicated, would you then see, as well, as additional role for the commissioners to play? Would you see an elimination of those commissioners or how exactly would that be implemented? I'm curious.

Mr. FORESTER. I think the commissioners would still play a very significant role in the superior court in handling arraignments and handling bond hearings and handling certain discovery functions. That's why I used a parallel of the magistrate system in the Federal court. Discovery problems are handled almost universally by the magistrate and that would certainly be, the hearing commissioners would be even more important, I believe, under this proposal.

Ms. DANIELS. What about the selection process? What would you see as the—would there be some change in the standards you would utilize to select these individuals for the court of lower jurisdiction?

Mr. FORESTER. Oh, I don't think it would be any change in the standard at all. You still want the highest possible standard of experienced lawyers to serve on that lower court. Again, I've sort of suggested the carrot, you're not going to be dealing with this lower court jurisdiction all your life if you do a good job because you then move up.

Ms. DANIELS. I guess the problem I have to some extent is that I become very concerned with the individuals who become appointed to such a court of lower jurisdiction, would as of necessity have to be individuals who had their finger on the pulse, so to speak, because that is where you see your everyday ordinary type of situation. Would you want some additional factors in the selection process? Or do you really see it being comparable? A lot of people have expressed concern over the last 2 weeks about our current system for the appointment to the superior court and I would only those issues such as the fact that they come from backgrounds where they have not necessarily had exposure to these so called day-to-day-problems. I would see that only compounded in a court of lower jurisdiction.

What is your feeling about that?

Mr. FORESTER. I'm reminded of something that Paul McCartle told me once. He came from Covington & Burling which as you all know is a rather prestigious firm here. He came out of small claims court and said to me, you know Gordon, this is the people's court. This is where the people come and really meet justice on the firing line. This is the most important court, most important branch of the superior court. He really meant that.

Now I suppose what you're saying is and I guess I would have some problems too. If you had someone who had specialized in advocacy for the supreme court all of a sudden pointed to the lower court you might not have necessary contact with the people but I believe that frankly small claims lower cases, landlord and tenant they deal with human problems. They deal with due process, they deal with legal questions. I don't think they're demeaning just because the amounts are less, the problems and the issues are still there and there is still significant, not an antitrust case, but nevertheless the human problem is just as great at that level.

I don't know, I haven't really tried to say what is a profile of the lawyer who should be appointed to this court but certainly I would want someone that had some human understanding other than, and legal abilities. But other than that, I don't think it would be significantly different.

Ms. DANIELS. Thank you.

Mr. SATTERFIELD. Mr. Forester, I'm familiar with the council and I was somewhat struck by the way you formulated your testimony and I guess it has more to do with your work on problems in the superior court as opposed to D.C. Court of Appeals, for example, you talk about restructure and the restructure is at the superior court level or below dealing with the other courts. You talk about the need for study. Is that a study that has come from your group or are you asking us or some other group to do a study?

Mr. FORESTER. I'd be delighted to see your group initiate a study. We intend at council to initiate a study. Funding is a problem but we're working on that.

Mr. SATTERFIELD. Hopefully if you get the funding do you have some time frame that you expect that study will be completed?

Mr. FORESTER. I'm not looking at an exhaustive analysis of this concept. We're talking more about the statistical information about the impact that such a court would have on the superior court on the speedy trial for the felonies, areas that are more statistical rather than a long drawn out conceptual analysis.

Mr. SATTERFIELD. OK.

Mr. FORESTER. So we're talking about hopefully within the next 6 to 8 months.

Mr. SATTERFIELD. Did you focus at all on a similar need or a similar study for the intermediate court?

Mr. FORESTER. No, we have not because this year our committee has been devoted to civil trial delay. We have spoken with other judges or appellate court judges about working on the appellate delay. This is something we want to do but we just have so many resources that we are able to devote and this has been trial, although as I said the executive committee has endorsed the concept of the intermediate appellate court.

Mr. SATTERFIELD. One additional question that has to do with computerizing the clerk's office or the court system. Do you have experts in your group who are familiar with the process who could be helpful in terms of developing what is needed in order to make something like that function?

Mr. WILLIAMS. We have in the past, working with the district court, have utilized local area businessmen and perhaps other individuals who have expertise in technological areas. We do not have on staff that capacity. We generally have the ability to obtain it.

Mr. SATTERFIELD. Do you have a paper or anything that describes how something like that would be done and could you share it with this committee?

Mr. WILLIAMS. We could share with you our past experience with the U.S. District Court along those same lines. We'd be happy to do so.

Mr. SATTERFIELD. If the committee thinks that is useful perhaps they will ask you for it. I would ask you for it for my own benefit but that's a committee decision. Thank you.

Mr. SCHEUERMANN. Mr. Forester, Mr. Williams, I'm sure you're both familiar with the 1978 Friesen study of civil delay in superior court and if I recall correctly that study determined that something like 85 percent of judicial time was devoted in civil cases to 15 percent of the court's civil docket. Had that study been looked at by the council or do you contemplate looking at that study as those figures might exist in 1989 as opposed to 1978? And have you looked at it also in addition. Would that be something again that you would look at in conjuncture with your examination for a need for an intermediate appellate court?

Mr. FORESTER. We are currently awaiting a new study which has been done by the or being done by the National Association of State Courts. We understood that the study would come out in this past September. It has been put off and off and off.

It concentrated on a number of jurisdictions including the District of Columbia and comparable jurisdictions for comparison of what is going on and what the problems are and some solutions. That we feel is much more current than the 1978 study which we would like to have this for 1988 or hopefully 1989, and that goes through 1987 figures.

Hopefully that will be out momentarily. I'd like to comment a little bit and maybe in self-defense on the appellate courtwork that we have not done. We have—I spoke recently with Judge John Kern of the D.C. Court of Appeals who asked me for some information which I supplied him and informed me of the difficulty he had just learned of getting transcripts up to the court and that the delays were running 8 months, 10 months, 12 months. So Judge Belsen also told us this past week of hearing an appellate argument on a panel in which the defendant had been sentenced to a minimum of 40 months; I forgot what the maximum was, in jail. They heard the appeal in the 39th month of his sentence. That was—the conclusion is obvious. But there are so many problems there in the appellate court that can be looked at too in terms of such as these transcripts.

I was told last week in superior court that they are short eight court reporters and therefore we had to start voir dire in a case because we couldn't find a court reporter. Now why can't they find court reporters? I don't understand because those people are well paid. They work hard. You would hope that those court reporters are available.

Mr. SCHEUERMANN. Would you advocate going to some other form of transcription other than the physical use of a live body court reporter?

Mr. FORESTER. The ABA Journal recently reported the experiment of using a television videotape reporting. I think that has some real possibilities. I think all of these have to be looked at just because we are so accustomed to having a stenotypist there does not mean there are not other ways to do it. There are also computer produced transcripts from the reporting that could be done.

Mr. RACHAL. Mr. Chairman, I have a couple of questions for Mr. Forester. There are many of us I guess on the panel that are keenly interested in the one-judge assignment and I wanted to inquire if you had any information as to what impact this would

have positively on the court's docketing in terms of reduction of court delay?

Mr. FORESTER. Well, I think this has to go hand in hand with getting the $10,000 and under cases on a separate track or out of the court. Once you do that then you're concentrated on $5,000 cases filed in 1987 which presumably will conclude in a period of time some earlier than others. As I said one of the real advantages is even though you have a case over $10,000 it may be a very simple case. And a judge by an earlier scheduling conference say can bring the parties in and say you really don't need any discovery period here, why don't you do your two depositions and let us set this thing down, maybe we'll waive your jury trial, we'll proceed, maybe they won't proceed or we can proceed within 60 days, within 90 days whereas another major medical malpractice case for example with six defendants and all kinds of depositions and you know discovery is going to on in the next year or the year and a half so that is scheduled for, you know, you don't treat all cases alike. You base the cases on what their needs are. That alone will give you expedited results.

Mr. RACHAL. Is there some possibility short of getting to a lower court in place of amending the rules that we now have with regard to designation of civil I and civil II cases to do what you suggest in terms of some dollar amount as being one factor that the court would look at in designating a case as civil I versus civil II?

Mr. FORESTER. I think the court could do this without any serious rule amendment, just to take the $10,000 cases and put them on a fast track. Obviously, if they're going to limit discovery they're going to have to change it but that's why we've asked the court to assign these cases to senior judges to bring them in in bunches and take a look at them and see what their needs are.

Mr. RACHAL. What is the council's view with regard to the issue of part time use of judges?

Mr. FORESTER. We at the council have not discussed that. I would like to suggest if I may put on my personal hat as a lawyer instead of the council the work that's being done in the various alternate ways of resolution as much as mediation and arbitration I find are very effective and I'm very pleased with them. I believe that is something that should be pursued vigorously. Now we have not gotten any statistics back on the number of cases arbitrated and then sought a trial de novo. That's going to be significant.

If the majority of them are being resolved with arbitration then I think we should increase the efforts to arbitrate and I think there is where the part-time judges come in, sit as an arbitrator or lawyers sit as arbitrators and do a good service to the court and really eliminate a lot of—or speed up a lot of these cases.

Mr. RACHAL. I noticed earlier that you were doing part of the testimony by corporation council, Mr. Fred Cooke. Do you have a view with regard to the issue of expanding the court hours to provide for say a night court or evening, weekend court?

Mr. FORESTER. No. There again the counsel hasn't acted on this so please accept this as my view and I consider this just like anything else, let's utilize any vehicle we can. I see no reason not to have a night court, not to have landlord and tenant or a small claims court or other courts sitting at night. Obviously you need

staggered times for judges and court personnel but she instructed Mr. Cooke about flex time and that's certainly a vehicle that can be utilized and I think to me it's not even debatable. These people need time in court. Why do they have to take off work and come to court? Give them a time, an alternate time, they can come at night. We used to have a night time small claims court. I don't know what happened to it.

Mr. SCHEUERMANN. We still do, Mr. Forester, as a matter of fact it was mandated by the Congress in the small claims statute. Small claims, 163901 and sequence of the District of Columbia Code.

Mr. BARNES. For the record it's in the rules of court.

Mr. SCHEUERMANN. Both Wednesday evening and Saturday morning sessions, but the court has discouraged litigants from scheduling cases at those off-hour times. Does the council have a view on that?

Mr. FORESTER. No sir; obviously I didn't know that.

Ms. DANIELS. Any other questions?

Mr. RACHAL. Yes, just a couple more. I personally appreciate your commenting about the use of the commissioners with regard to the ex parte proof hearings and I think we will take a serious look at that recommendation as we search for ways to better deploy the use of commissioners. But let me also ask what has the council done anything with regard to looking at this whole burgeoning area of L & T cases? Because in your prepared text on page 2 the table indicates there's some 80,000 cases in 1987 that were filed in the L & T area. Is there an ongoing study? I would just also mention that council needs to be commended on the recommendation that's made with regard to small claims court area where the jurisdictional models have been changed and helped move that whole process along. Also helped move along the issue of having attorneys not having to appear on behalf of corporations so is there anything going on in your think tank with regard to L & T cases?

Mr. FORESTER. Actually, we have not taken any active look at the landlord and tenant branch. Again, I guess the squeaking wheel gets the grease, but my own personal view is even though they are handling 80,000 cases they seem to be handling them extremely well.

I don't know, I'm not a litigant in that court and I'm not a defendant in that court. I don't know how they view it but at least from the outside numbers and from the way I see that is operating I see them as handling themselves in the court very well.

Now I could be totally wrong if the council should be taking a look at it, I'd like to know.

Mr. SCHEUERMANN. I would note that the numbers in the landlord and tenant court are down to 80,000 from a high I think of around of 118,000 in 1977 so that you're looking at efficiency, I suspect you could look to the landlord and tenant clerk's office as probably one of the most efficient organizations in the city of moving paper and cases through that system.

Mr. FORESTER. I quite agree. Actually, that's also a reflection on decline in low-income housing in the District during that period of time.

Mr. SCHEUERMANN. Sure, you're right on that one.

Mr. RACHAL. I have nothing further.

Mr. BARNES. Mr. Forester, I understand that in the past at least the council has taken, has supported further expansion of small claims court jurisdiction. Last week, Chief Judge Ugast testified that if the amount were expanded to $3,000 I believe it could, the small claims court could take in another 3,000 cases. I wonder what you think the council's current view would be on expanding the jurisdictional amount in small claims court as the way of dealing with those close to or more than 6,000 cases that are under the $10,000 amount jurisdiction. I would suggest, for example, that it seems to me it would be far easier to absorb 3,000 to 6,000 into small claims court where they currently handle 30,000, than it would then to create a lower court to try and do that. I don't know. I'm asking what you think the council would think about that as an approach or has more thought been given it?

Mr. FORESTER. Well, I would see when the council advocated it and I think it was really the driving force behind the increase from $750 to $2,000 they were seeking actually a greater increase at that time. How much were they asking for?

Mr. WILLIAMS. I thought it was $2,500.

Mr. FORESTER. Maybe $2,500. Certainly there are impact studies on this. There seems to be a monetary level of the case that is more subject to a small claims dispensation.

I'm a little reluctant to say how much further we should go. I don't know for example. It could be the jurisdiction could be $5,000. I don't know. I would say though that I believe the council would normally advocate the increase in the jurisdiction of small claims court.

Now as to the other part of your question that would be the answer to a lower trial court. I think that is an area that is part of the area I'm talking about and needs careful examination.

We don't know that we should have a lower trial court. Maybe this could be an answer. On the other hand there are many of those cases that are $10,000 or below that are not subject to a small claims summary disposition. They have to have court time and attention. They do need a judge to guide them through. They do need some discovery. But it's certainly an area that I think that again with an open mind we should look at all possibilities of ways to resolve the critical periods we're facing in civil delay.

Mr. SCHEUERMANN. Mr. Forester, if the role of the commissioners in superior court were expanded as you have heard the discussion flow this morning, as a practical matter would that not address the problems that you are looking potentially to a lower trial court to address?

Mr. FORESTER. I don't think so, Mr. Scheuermann. I think the commissioners' roles have to be expanded with an eye on due process of just how far they can go and what they can dispose of. When I suggest they handle ex parte proof, when I suggest they handle discovery problems and they can be an enormous assistance of relieving judicial time but I don't think they are the answer for this crisis that we're facing in the numbers of civil cases that are going to be set aside as the felony cases increase.

I don't think they're the answer. I think they can help solve some of our problems now and we should utilize them, maximize their efficiency.

Mr. BARNES. OK, Mr. Forester, recently Senator Weicker voted one of our statesmen who he said on one occasion said that if everybody saying the same thing ain't nobody thinking and I know that Congressman Fauntroy appreciates the role that the Council for Court Excellence plays, the conscience, if you will of the court and your testimony here this morning has demonstrated that that is an important role and continues to be. We really appreciate you taking your time to share this information with us.

Mr. FORESTER. Thank you very much. I appreciate the commission listening to us.

Mr. BARNES. Our final witness is Keith Watters who is the president of the Washington Bar Association. We certainly welcome you here this morning. I note that you have a statement which will be distributed among the panel members. You may proceed as you wish either reading this statement or summarizing it. It will be made, the entire statement will be made a part of the record.

TESTIMONY OF KEITH WATTERS, PRESIDENT OF THE WASHINGTON BAR ASSOCIATION

Mr. WATTERS. Thank you very much. I'm very glad to be here. I'm honored that the committee has asked the Washington Bar Association for its comments. I'm sure many of you are familiar with the Washington Bar Association. We are primarily black lawyers here in the District of Columbia in private and government practice and on the bench.

We are an affiliate of the National Bar Association. I am actively practicing in the District of Columbia courts and I also practice in the State of Maryland. I think this gives me a unique focus on comparing the ways things are done differently in the different jurisdictions.

By and large I'm happy with the way things are progressing in the District of Columbia courts. As we all know there's always room for improvement everywhere.

I have thought about the need for an intermediate court of appeals and I endorse Judge Rogers' testimony which I studied and he gave here last week.

I'm not going to read my testimony. I'd rather spend my time answering questions because I think it's more valuable, that type of interchange. Briefly stated Maryland and Virginia have courts of lesser jurisdiction which I find to be extremely useful in resolving things. For example, the general district court in Maryland in the criminal side which I have appeared many, many times goes through cases first offenders, misdemeanors, extremely efficiently and the results are generally very good. I think this could also be done on the civil side. I don't do as much on the civil side as I do on the criminal side but if you don't like what you get, start all over again.

I think it's very important to have efficient methods of going to court. My clients, they come to me and very often I say I'd love to take your case but it's going to be too expensive in superior court.

Telling people that doesn't make them happy. We are in danger of losing the traditional family practitioner in this city because of the amount of time it takes to go to superior court.

I think that would be a very, very serious loss if a number of practitioners keep declining because people have legitimate rights that need to be litigated and addressed. If the courts are not accessible in terms of efficient time and cost efficient methods of resolving your disputes, you're in trouble.

To meet a litigated case in the criminal branch of the District I regularly charge more now than I charge in Maryland because it's going to take a lot more time, back and forth, back and forth. Maryland—even in the circuit court will very often—one or two trips and the whole case is resolved. For a first offender, someone charged not with a serious crime, I think this should really be the rule rather than the exception.

I hear a lot about more and more judges—I haven't thoroughly studied this issue but sometimes—let me give you an example—I do a lot of personal injury work and I sign, every time an authorization for medical records comes from a doctor. I'm saying to myself why am I signing for these things. How about getting a rubber stamp? The point I'm making is we can add and add judges and it seems to me the Xerox machine, the fax machine, the telephone, every time there's a technological advance we seem to create more paper, more rules, more regulations. If someone has a relatively simple problem and someone has good experience and good sense of the problem, you sit down and say this is the way to resolve the problem. That may be a broach. We set up so many mechanisms. I believe every time you create a judge in no time at all his docket is going to be full. It's the old saying about prison; you put a prison someplace it's going to be full. Is that going to stop crime? Are people safer because we have that prison? I don't necessarily believe by arresting people en masse without addressing the other line symptoms of what's creating the problem we're going to resolve it.

What I'm saying is I'd like to see some of the things they've instituted in Maryland like trial de novo, broad expungement statutes. If you have a first offender, someone who goes to work every day why not give him a break? Why not say, listen if after 3 years, as they do in Maryland, if you do everything you're supposed to, you'll get a fresh start in life.

I think that's very important for people to continue to be good citizens; to say I got a break too in the criminal system. People are not really evil people. People make mistakes, involved with drugs; involved with writing a bad check. We don't have a broad expungement statute in the District of Columbia. I think that's very important. The prosecutor or judge could say I'm going to give you a chance. That case can get resolved in 10 minutes instead of three, four, five trips back and forth to court using up precious resources on people who end up on probation anyway.

When we arrest people en masse we should have probation programs and resources that make sure they don't come back to court. I think that's just as important as the eschewing the right to due process; just as important that these people are redirected in their lives. Criminal cases are staggering. What are we doing about help-

ing these people not come back again. It's just as important to put the resources there.

Maryland uses what's called ABA pleas where the judge, the prosecutor and the bench attorney can agree on the sentence before the plea is entered. It's commonsense if you know what you're going to get you're not going to spend a lot of time filing for motions and going back and forth. It can be resolved very quickly. Not all judges utilize it.

The more tools you have for keeping people out of litigation process which I really feel is a breakdown in communication, good lawyers should be able to settle the case. I have literally hundreds of personal injury cases we settle each year. We don't go to court. We go to court as last resort because we know it's generally inefficient to go to a court system. So we let the insurance companies, they know, the lawyers for the insurance companies know this, so it's a tremendous tool actually to stay out of it because we don't want to go to court.

Actually you're going to go to court in the District of Columbia and you know you're going to spend more in legal fees in waiting than settling this case. So I think it's very, very important to have these lower courts because it allows people to get into court quickly and this works for both sides, whether you're plaintiff's attorney or defendant's attorney. If you have a legitimate complaint and you want justice you can get it quick and fast.

What they use in Maryland is also stet dockets. This is another way of if you're good, you're still going to have a record but we're going to dismiss it after a certain period. State's attorneys office in Prince Georges County—Alex Williams who runs it now—is a very fine and competent man and many of you know him. They give a lot of discretion to those State's attorneys about making decisions. Here in the District very often you have to go up the bureaucratic chain to get permission to do anything. How can the U.S. attorney be making decisions that are efficient and fast if he doesn't have discretion?

We're always stressing the importance of the number of black judges on the bench. We feel it should be representative of the city. I am always striving to see that the racial makeup of the bench is reflective of the city. It's not and we feel improvement needs to be made in that area.

I want to just highlight some of the other things I have on this testimony I prepared. I would just really like to add by saying comradery between bench and bar is very, very important. When I go to court in Upper Marlboro, they pride themselves on how well the bar and the bench get along with one another. We feel that this is very, very important to encourage this, because if my client respects me when I'm in court and the judge respects me and I respect the judge, they're going to listen to my advice and not going to start saying well you know you really don't know what you're doing. You got to have confidence in the lawyers and judges and we have to keep that in the forefront at all times.

That's just generally highlighting what I had to say. If you have any questions I'd like to answer them.

Mr. SCHEUERMANN. I'd like to start off by asking you to opine as to why the comradery that you see between the bench and the bar in Prince Georges County does not exist in the superior court?

Mr. WATTERS. As you know this is probably a very sensitive area so I'm going to have to try to let you know what I think in terms that are going to appreciate the fact that I do represent all the lawyers of my association.

One thing judges in Maryland and I know the exact system, I think they're appointed and elected, appointed for a period and then they have to be elected, I'm a strong advocate of home rule. I live in the District of Columbia. I would like to see us more involved in the selection of judges. The President makes the final decision in the District of Columbia and the President is not necessarily responsive to the needs of the constituencies. He's not directly answerable to the constituents. I don't think in the White House they have somebody who's in charge of District affairs, that's going to be looking out for our interests.

I think it's very important the bar play a vital, important role in the selection of judges. That way the relationship is cemented. The head of the Prince Georges County Bar Association is a judge. It's Steve Platt. They come out, mix, and we discuss things. We have a different tradition here in the District of Columbia. It's almost as if the judges are afraid to talk to the lawyers, afraid that there's going to be some accusation of impropriety or something, but I'd like to see that.

Mr. SCHEUERMANN. How would you like to see the current Commission Presidential Appointment Senate Confirmation Selection System change?

Mr. WATTERS. I would like to see a local based commission have the final selection and perhaps give—still have the Senate confirm that person. I don't necessarily know if the President needs a role. I'm not sure why the President of the United States needs to decide who is to sit on the local bench. I don't understand. Perhaps you have a better understanding of that but I was never familiar with that.

Ms. DANIELS. I think that's largely been a problem and I'm sure you recognize that some of the issues you raised have been issued by other individuals. I don't want you to feel that you are at all alone in that regard.

I certainly feel very strongly about your comments with respect to the relationship between the bench and the bar, having just left the jurisdiction where I would have expected that there would not have been good relations. I was living in New Mexico for many years and one of the things that made it easy for me to do my job—I was a volunteer director of legal services project of my own creation as well as my husband's and the relationship between my office, for example, and the local judges was close to the extent that we were able to assist in the speedy administration of justice because of that relationship.

I suppose what has shocked me in the last year since I've been in the District of Columbia is that number one, everything you say is so true. The time that you spend. How can you go to a courthouse on Monday morning when you're scheduled for a hearing at 9 o'clock and your client gets that notice that says 9 o'clock. They

walk into a room in JM125 or whatever it's currently called and they sit there for 45 minutes to 4 hours to 6 hours and sometimes never have their case called. You know they've anticipated, as you say, this day for so many months because this is going to be the one time where the most important thing in their life is going to take place. Yet they sit through this grueling process and then you find out that you can't even find out where you're going to be that day until you go to some other courtroom and you don't go. Only your attorney goes and you sit there quaking in your boots because you don't know when your attorney is coming back. You're afraid listening to the loudspeaker that you could miss your one opportunity. Then the next thing you know your attorney comes back and says well I'm not sure, we don't know yet. I've got to get back in this other line and find out again, only to find out that things have changed that day.

For the life of me I don't understand why there's no—why you don't just walk into the court and there isn't a list that says where you're going to be going that day. Computers or no computers, automation or no automation; I just don't understand. I guess I've moved a long way from the relationship between the bench and the bar. But at the same time it comes back to the idea that if some of these justices, it seems to me, had some experience being members of the local bar and going through this process, that perhaps this process wouldn't exist in this way. Again I think it's important not only that justices reflect racially to some extent the population of the District but that they need to have a certain sensitivity to that community which I think you can only get if you're forced in some regard to participate in the events in the community.

You mentioned the Maryland system. One of the things we talked about last week was the retention election nonpartisan type of mechanism, whereby the citizens can say well yes, I think this person has been doing a terrific job and yes, he or she will continue to do so. I'm wondering if you have any feeling about that type of system being brought into the District as opposed to the system we have now and if you think that would perhaps make our justices more reflective of the community and have a sensitivity of problems that they may seem to not have such a sensitivity to it at the time.

Mr. WATTERS. I would agree with much of what you say. I'm sorry——

Ms. DANIELS. I've been waiting for 2 weeks to get all of that out. I just needed a forum.

Mr. WATTERS. I haven't really studied all the aspects of getting the judiciary more involved in the community. But I think it's very, very important. I think getting away from a presidential final selection is a big step. Looking at what they do at Maryland, I think it would be very instructive to us. I think the more we have citizens involved in the justice system the better the system we're going to have, because we'll all have to answer to a different constituency; I do. You folks do. Accountability is the name of the game and if you're not accountable you tend to lose touch with who puts you there and why you're there.

Ms. DANIELS. Thank you.

Mr. SCHEUERMANN. Currently, you've heard the testimony of the prior witnesses. The court system is being driven by the drug problem that exists in the District of Columbia, while not absent from Prince Georges County and perhaps not as acute a driving force in the judicial system there as it is here, what response do you think is appropriate from the judiciary to the current epidemic of drugs that are inundating its resources?

Mr. WATTERS. As you know, the drug problem is probably consuming more of our time and effort in the court system and in the media than any of these other issues. This era is Vietnam. We have no solution no matter what we do. I think we need to look at radical approaches to the drug problem in ways we handle it. I think it needs to be approached as a health problem. I think law enforcement is ill equipped to get to the root of the individual, no matter where he is, rich or poor, who is sitting at home now, addicted to drugs. I think as Judge Green once told one of my clients, Henry Green, that you're risking getting AIDS by continuing to shoot up with dirty needles. There's nothing I'm going to say to you that's going to make you stop using drugs. I think that's the reality of the situation here that no matter what we're going to do to people, as long as they want to use drugs they are going to continue to use drugs. I think our resources are better spent placed in drug prevention, education programs, showing the children in the city what drugs can do to them and then when people want to get help, making help available. I think prosecuting people is not really going to get us anywhere.

Mr. BARNES. Questions? OK, Mr. Watters.

Mr. RACHAL. For the record I'd like to thank Mr. Watters for coming.

Mr. WATTERS. It's a pleasure to be here.

Mr. BARNES. Mr. Watters, we appreciate your testimony and many of the things you had to say. There are those of us who agree with it and I'm sure that the committee will consider your thoughts as it proceeds in trying to deal with both the near-term and long-term problems faced by the judicial system in the District of Columbia.

The Washington Bar Association is a very important entity in the District of Columbia and the advice and counsel of that association over the years has been critical to the work of the committee and will continue to be and we appreciate your taking time out of your Saturday to join us this morning to share those views with us.

Thank you.

Mr. WATTERS. Thank you.

Mr. DANIELS. Johnny, if I may I'd like to first of all thank Jack Schenermann and Marialice Daniels for the wonderful job they did in putting these hearings together last Saturday and this Saturday.

I know there was an enormous amount of work involved and in helping answer my phone over that period of time I know that there's a lot of material that didn't get on the record that has been recorded in my mind and I know Jack's mind and in Marialice's mind. That is the people who called us and consulted with us and who were kind enough to take time to share some of their views all the way from the Federal courts down to the courts in Maryland

and Virginia. So I do thank Jack and Marialice for an incredible job they've done.

Then pass the torch on to Mr. Rachal. Speaking of public accountability, which was sort of the last note that was hit here in Tony's hearings, we'll be chairing his workshop on May 20, I believe, down at the city council and I urge you all to continue your participation and involvement and then after Tony's hearing in June we'll be meeting again. The exact place we really haven't decided yet but we'll be meeting to take all these issues and ideas that we've heard over the last couple of weeks and seeing what interim recommendations, if any, at this time we wish to make to the Congress and to the District Committee.

So once again I thank Jack and Marialice and I thank Johnny Barnes for his magnificent chairmanship and stewardship of these hearings. I'm very proud of what we're doing so far.

Mr. BARNES. With that last comment we need say nothing further. The subcommittee stands adjourned. Thank you.

[Whereupon, at 12:37 p.m., the mission team was adjourned.]

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