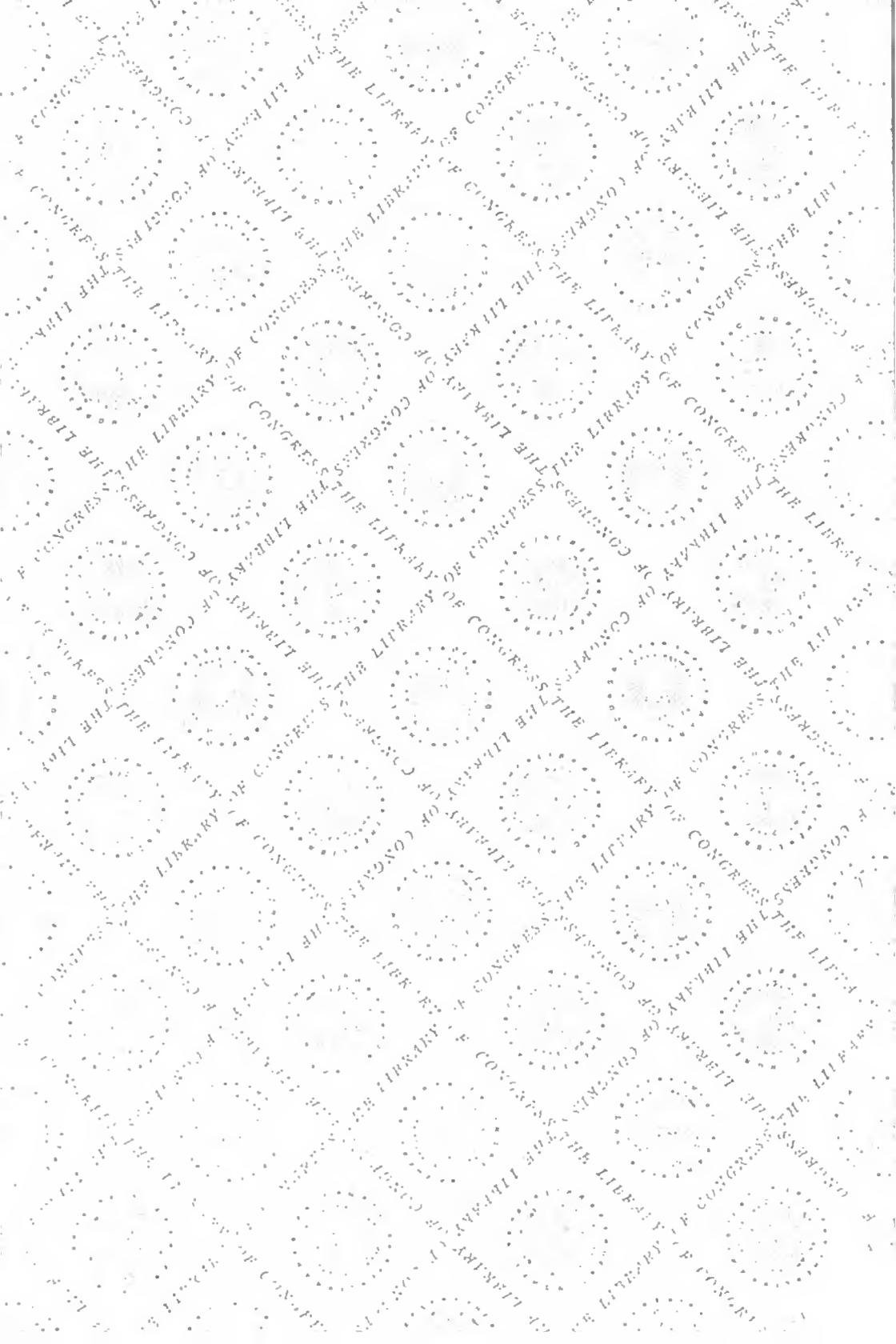


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**RELATING TO COMMISSION ON REVISION OF FEDERAL  
COURT APPELLATE SYSTEM**

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**HEARING**  
BEFORE THE  
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,  
AND THE ADMINISTRATION OF JUSTICE  
OF THE  
**COMMITTEE ON THE JUDICIARY**  
**HOUSE OF REPRESENTATIVES**  
NINETY-THIRD CONGRESS  
SECOND SESSION

ON  
**S. 3052**  
TO AMEND THE ACT OF OCTOBER 13, 1972

\_\_\_\_\_  
MAY 24, 1974  
\_\_\_\_\_

Serial No. 36



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WASHINGTON : 1974

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# RELATING TO COMMISSION ON REVISION OF FEDERAL COURT APPELLATE SYSTEM

FRIDAY, MAY 24, 1974

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,  
AND THE ADMINISTRATION OF JUSTICE  
OF THE COMMITTEE OF THE JUDICIARY,  
*Washington, D.C.*

The subcommittee met at 11 a.m., pursuant to notice, in room 2218, Rayburn House Office Building, Hon. Robert M. Kastenmeier, chairman of the subcommittee, presiding.

Present: Representatives Kastenmeier and Cohen.

Also present: Bruce A. Lehman, counsel; Herbert Fuchs, counsel; and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The subcommittee will come to order.

We will turn this morning to consideration of S. 3052, which is a bill to amend the act of October 13, 1972. This bill passed the Senate on March 26 of this year. It would extend the final date for the report of the Commission on Revision of the Federal Court Appellate System by 9 months. It would increase the appropriation of the Commission from \$270,000 to \$1 million.

The text of S. 3052 follows:

[S. 3052, 93d Cong., 2d sess.]

## AN ACT To amend the Act of October 13, 1972

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Act of October 13, 1972 (86 Stat. 807) is amended as follows:

(a) Section (2) of section 6 of such Act is amended by striking out "fifteen months" and inserting in lieu thereof "twenty-four months".

(b) Section 7 of such Act is amended by striking out "not more than \$270,000" and inserting in lieu thereof "not more than \$1,000,000".

Passed the Senate March 26, 1974.

Attest:

FRANCIS R. VALEO,  
*Secretary.*

At this time we would like to greet our distinguished colleague who has become a national figure in recent weeks, our friend, the Honorable Charles Wiggins, who will introduce our witness.

Mr. WIGGINS. Thank you very much, Mr. Chairman, and our colleague, Mr. Cohen.

Before I undertake the pleasant task of introducing Mr. Levin, I would like to make a few comments to the subcommittee about the subject matter before you at this time.

The Commission on the Revision of the Federal Court Appellate System is a creature of Congress and was a congressional response to the growing problem of caseloads within our circuits. It was clear that

something had to be done, and yet, the problem was sufficiently complex that it was felt that Congress should not undertake it without at least the advice or counsel of a panel of genuine national experts in this field. Accordingly, the Commission was created, and it has been my pleasure to serve on that Commission.

Three others of our colleagues on the Judiciary Committee in the House serve on the Commission, as do four United States Senators. In addition, there are distinguished members of the bench: Judge Lumbard, of the Second Circuit, is a member of the Commission, and is co-chairman; Judge Roger Robb, of the Court of Appeals for the District of Columbia; Judge Sulmonetti, who is a State judge in the State of Oregon, a presiding judge of the courts of general jurisdiction in the city and county area of Portland, who is recognized as one of the experts in judicial administration and management in that area. We have distinguished members of the bar: former Chairman Emanuel Celler is a member of the Commission; as is Mr. Kirkham from San Francisco, an outstanding practitioner of the foremost law firm in that city, and a former clerk for Chief Justice Hughes, back in the 1930's. We have outstanding members from the academic community: Professor Wechsler, who has written extensively on Federal jurisdiction; and our Executive Director, whom we treat as almost a member of the Commission, Prof. Leo Levin, from the University of Pennsylvania, who also has written extensively on the Federal courts and Federal jurisdiction.

Our legislative mandate was essentially bifurcated. Phase one was to redraft the territorial boundaries of the circuits. That was the easier of the two tasks assigned, and that task is essentially complete; and our recommendations are now pending before the Congress.

The second phase, however, is infinitely more complex, and frankly, more profound in its impact on the Federal system of appellate justice. It was to review the procedures under which appellate justice in this country is dispensed, to the end that it can be more efficacious, more efficient, and more just. That is an awesome mandate that we are proceeding under.

Experience has disclosed that it is impossible to discharge that mandate effectively within the time originally contemplated by the original legislation. And so we are back, Mr. Chairman, seeking an extension of time in which to perform our mission, and additional funds to carry out our task.

During my relatively brief tenure in Congress, it has been my honor to serve on various commissions. None, Mr. Chairman, has the potential for impacting the administration of justice as profoundly as does the Commission on the Revision of the Federal Court Appellate System. It is an enormously important Commission, one which can do an extremely valuable job for the Congress and for the country.

It is an honor for me to serve on it, and I am confident that our work product will give your subcommittee, Mr. Chairman, enormous grist for the subcommittee's mill. In the future we will be sending our recommendations in all probability to this subcommittee.

I am here to support the recommendations of our Commission for additional funding. And I would now like to introduce our executive director, Professor Leo Levin, from Pennsylvania, who will make a formal presentation on behalf of the Commission.

Thank you.

Mr. KASTENMEIER. We thank our colleague for coming this morning and for introducing our next witness, and for his own comments.

I would only say that I, too, had the pleasure of serving on one or two commissions at various times. One of the problems we invariably face, almost without exception, is that we underestimate the resources that we will need and the time that we will need to complete our task. For example, the National Commission on Wiretapping is going to have to ask for an extension. I serve on that Commission. It is strange that almost, as I said, without exception, we under-estimate the magnitude of the task, that is given to us when we serve on these commissions.

Also, we face the task of going before the House, which has a disposition in recent years to question the desirability of either creating or sustaining many commissions. While I certainly anticipate no difficulty with the subcommittee or our parent committee, I suppose we will need to be prepared to fully defend this request for more resources, the money, and the extension of time. This is what we are interested in this morning.

I appreciate your comments.

Mr. Levin.

#### **TESTIMONY OF A. LEO LEVIN, EXECUTIVE DIRECTOR, COMMISSION ON THE REVISION OF THE FEDERAL COURT APPELLATE SYSTEM**

Mr. LEVIN. I am very grateful and appreciate this opportunity to appear before you.

We have filed a statement and it may be helpful, subject to your pleasure, if instead of my reading it, I highlight some of the principal things and respond in whatever detail I am able to any questions which you may have.

Mr. KASTENMEIER. Without objection, your statement in its entirety will be accepted for the record, and you may continue, Professor Levin.

[Mr. Levin's prepared statement follows:]

#### **STATEMENT OF A. LEO LEVIN, EXECUTIVE DIRECTOR, COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM**

I very much appreciate this opportunity to appear before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice in support of S. 3052, a bill to extend the final date for the report of the Commission on Revision of the Federal Court Appellate System by nine months and to increase its appropriation authorization from \$270,000 to \$1,000,000.

The Commission on Revision of the Federal Court Appellate System was established by Public Law 92-489 and assigned two major objectives, each with its own timetable.

In Phase I, the Commission was to study the geographical boundaries of the several judicial circuits and make recommendations for change. It was to complete this assignment within 180 days. The report on circuit realignment was filed in timely fashion on December 18, 1973.

In Phase II, the Commission is to study "... the structure and internal procedures of the Federal courts of appeal system ..." and propose recommendations for change. Under the statute, as it now reads, this second assignment is to be completed and a report filed no later than September 21, 1974. The proposed legislation would extend this final filing date to June 21, 1975.

The threshold question, when one seeks additional time and additional resources, is whether the assigned task is worth the effort. The answer appears to be clearly in the affirmative. The importance of the Federal judiciary in our system of government, or of the courts of appeals within the judicial system,

can hardly be doubted. For some years now the Courts of Appeals have been beset by difficulties—"a state of crisis," some have called it. Caseloads have burgeoned. To avoid intolerable delays the courts have resorted to truncated procedures—widespread denial of oral argument, for example. Judicial productivity has increased at tremendous rate, to the point where the distinguished chairman of the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, Senator Burdick, recently raised what he termed "the fundamental question of whether the increase in productivity by the Courts of Appeals has been achieved at the expense of a reduction in the amount of mature deliberation which each case is given in the adjudicating process". Other knowledgeable observers have asserted that despite the vast increase in the number of cases being processed, our system lacks adequate appellate capacity to meet the needs of the country today.

The underlying questions are complex, but brief reference to some of them may serve to explain why the Commission is of one mind in the view that both more time and more money are needed if the Commission is adequately to discharge the responsibility imposed upon it by the Congress. Allow me to mention a few.

#### *Maintaining the national law*

It is a familiar phenomenon of present practice that differences in interpretation of the revenue laws can go unresolved for years with the result that a provision in the Internal Revenue Code may mean one thing in Oregon and something else in Florida. Moreover, the problem is not limited to situations where two circuits have taken conflicting points of view on a single issue. As former Solicitor General Griswold has pointed out, so long as the possibility of creating a conflict exists, lawyers will engage in forum-shopping in the effort to create such a conflict. Repetitive litigation, needless in an efficient system, is encouraged. Often the effort is successful so that it takes a decade for an authoritative interpretation of a new revenue statute to emerge.

We rely today on the Supreme Court to resolve such inter-circuit conflicts when they do develop, but many of the issues seem to knowledgeable observers unworthy of the limited judicial resources of the highest tribunal in the land. They concern, for example, a detail of depreciation of a truck used in constructing a new building, or a technical problem in valuing mutual fund shares where all concerned agree that the choice between rules is relatively insignificant, but that choosing a rule, and giving definitive nation-wide effect to that choice, is indeed very important.

One solution that has been advanced by distinguished advocates is the creation of a National Division of the Courts of Appeals which would have final authority in such areas, subject only to Supreme Court review. At its mid-winter meeting in Houston earlier this year, the American Bar Association, acting through its House of Delegates, voted to recommend "the creation by Congress of a national division of the United States Court of Appeals" and authorized its President to present the position of the Association to the Commission.

Last month, the Commission held two days of hearings on the various proposals for the creation of a National Division of the Court of Appeals. The roster of witnesses eloquently demonstrates the importance attached by the bench and bar to the issues discussed. Former Supreme Court Justice Arthur J. Goldberg testified, as did Judge Henry J. Friendly of the Second Circuit, Chief Judge Clement F. Haynsworth, Jr., of the Fourth Circuit, Judge Floyd Gihson of the Eighth Circuit, and Judge Shirley Hufstедler of the Ninth Circuit. The witnesses also included distinguished professors, attorneys, a state supreme court justice, the president of the American Bar Association, and the distinguished former solicitor general, Dean Erwin N. Griswold.

In prepared statements and in responses to questions, these witnesses offered a wide variety of perceptions both as to the problems of the Courts of Appeals and the desirability of proposed solutions. Nor was this difference of opinion surprising. The underlying problems are complex. Well-intentioned reforms may spawn new difficulties. What all of the witnesses shared, I think, is a sense that any changes must be preceded by careful study to determine the nature and magnitude of the problems and the advantages and disadvantages of the alternative proposals already offered or yet to be developed.

### *Administrative Appeals; Patent Litigation*

Suggestions for substantial change in judicial review of appeals from administrative agencies have the potential of significant impact. Whatever decision the Commission may ultimately arrive at concerning their merit, they certainly deserve careful, unhurried consideration. We are working with the Administrative Conference of the United States and, again, the timetable which currently obtains is far too constricting.

Finally, in the area of structure, I should mention patent appeals. Modest proposals currently before the Commission give some promise of acceptability to wide segments of bench and bar and may provide some relief from present problems, particularly that of forum shopping. Judge Henry J. Friendly has described the present situation as one of "mad and undignified races . . . between a patentee who wishes to sue for infringement in one circuit believed to be benign toward patents, and a user who wants to obtain a declaration of invalidity or non-infringement in one believed to be hostile to them." We may, perhaps, be in a position to recommend beneficent change.

### *Internal procedures of the courts of appeals*

Rules governing the internal procedures of an appellate court are thought to be dull and prosaic. One would hardly expect proposals for change to evoke the intense, almost impassioned opposition which has in fact followed some recent departures from the familiar. But the world of internal procedures is not limited to technical details. Internal procedures encompass such departures from tradition as the decision in the Fifth Circuit, for example, to refuse to hear oral argument, not in a few isolated instances, but in most of the cases which come before it. They encompass the practice, in a very substantial proportion of the cases decided, of giving no reason for a decision, of affirming summarily without any indication even of the issues considered and determined.

Such changes are not necessarily to be deplored, but neither should we assume that all innovation inevitably represents progress. If it is important in a democratic society not only that justice be done, but that it appear to be done, such departures from the familiar must be studied carefully. The views of attorneys must be sought and evaluated; the savings and efficiencies gained must be measured and weighed against the losses.

Reference has already been made to a number of factors which support the Commission's request for additional time in which to complete its assignment. An additional factor bears some emphasis. The Commission considers it highly desirable, perhaps essential, not to finalize its recommendations until a preliminary report has been widely circulated for comment and criticism. This was the procedure followed by the Commission prior to its report of December, 1973.

We circulated a preliminary report on realignment, inviting reactions and suggestions from the bench, the bar and other interested citizens. Hundreds of responses were received and figured in the deliberations of the Commission as it prepared the recommendations which were later submitted to the President, the Congress, and the Chief Justice. The number of respondents and the reasoned quality of the comments were gratifying.

Understandably, the Commission would like to follow the same procedure with respect to its report on the second phase of its assignment, but with one important difference. In circulating its preliminary report on realignment, the Commission allowed very little time for response, a procedure necessitated by the statutory deadline on the filing of the Commission's report. Such stringency with respect to the second report could not help but be counter-productive. Compared to the subtleties and complexities involved in structure and internal procedures, realignment appears relatively simple. New proposals with respect to specialized courts, devices for resolving inter-circuit conflicts, and broad designs for national panels require thoughtful consideration. There is particular need to consider carefully the potential effects of any proposal for change. It is difficult enough to assess the significance of effects which are foreseen; only the widest possible exposure of new ideas to the scrutiny of a concerned and knowledgeable public can minimize the risks of the unforeseen.

A preliminary circulation of proposals being considered by the Commission can do much to clarify the intent of the proponents, to refine and amend the

suggested solutions, to allow the unfamiliar to become familiar—in short, to allow the recommendations to be tested, however preliminarily, in the crucible of public debate.

Translated into specifics, it appears clear that if the Commission is to file its final report in September, 1974, a preliminary report should be circulated next month or, at the latest, early in July. A preliminary report can be fashioned only after due deliberation which itself must follow analysis of the results of the research which the Commission has undertaken and would like to undertake. There simply is not sufficient time to accomplish that much within the period available under the Act as it now stands. It would appear far preferable to target a preliminary report for January or possibly early February, 1975, allowing the opportunity for further hearings this fall and for a final report by June, 1975.

The Commission has also asked for an increase in its appropriation authorization to \$1,000,000. At our request, the staff of the Office of Management and Budget reviewed the proposed budget of the Commission and found it "reasonable, and possibly conservative, given the scope of responsibilities of the Commission." The full text of the OMB analysis is appended to this statement and reference will be made to it in connection with specific items.

Preliminarily, however, it may be appropriate to comment on the cost to the Commission of the first phase of its work, that dealing with circuit realignment. There may have been those who thought of that task as one involving no more than the redrawing of a relatively few lines on a map, a task accomplished both simply and cheaply. The Commission, however, found it necessary to hold hearings in ten cities throughout the country. These proved exceedingly valuable. In one case, the hearings made clear that division of a circuit was not necessary at the present time and, as a result, the Commission made no recommendation for change. Other hearings amply demonstrated the need for revision and illuminated the factors to be taken into account in determining the specifics for change.

Reference has already been made to the preliminary report. Thousands of copies were distributed; hundreds of comments were received. This procedure and the hearings made demands on our modest budget, although in the view of the members of the Commission the expenditures were clearly justified.

The proposed budget includes funding for a preliminary report in the second phase, and for an adequate number of hearings and Commission meetings, so essential for adequate assessment of proposals received and for the careful development and maturation of new ideas.

A substantial sum, almost \$309,000, has been proposed for compensation of staff for the full life of the Commission—27 months. This figure has been characterized by the OMB report as "reasonable, if not conservative" and the report goes on to suggest the desirability of providing for one or two additional staff positions for professional researchers or writers.

The second major item is for experts and consultants. It totals slightly over \$240,000 and, with the allocation for staff, accounts for over half of the total proposed budget. Again, the OMB analysis characterizes the proposal as "reasonable but conservative."

The OMB analysis does suggest one area for possible savings: a reduction in the number of Commission meetings and the combining of hearings and meetings to reduce travel costs. We have already begun to implement the latter proposal. Moreover, we will continue, as in the past, to effectuate every possible economy, consistent with the faithful discharges of our mandate. It is not clear, however, how much net saving will be effected by combining meetings and hearings, particularly where hearings are not held in Washington. Whatever savings do result may serve to compensate for still other areas where we have, in the view of OMB, entered low estimates.

Some reduction in the number of meetings may be possible. Precisely how many will be required will depend in large measure on the diversity and complexity of the recommendations for change which are developed and on the extent of agreement and disagreement concerning them on the part of the members of the Commission. Certainly, the Commissioners have been most conscientious and hard-working and have shown every desire to accord the work of the Commission whatever time and energy is required.

The Congress, in establishing the Commission on Revision of the Federal Court Appellate System, has evidenced its awareness of the need to deal thoughtfully and imaginatively with the problems that face the Federal appellate courts. It is our hope that the opportunity which the Congress has created will not be frustrated for lack of either the time or the money necessary for the proper completion of the Commission's work.

#### APPENDIXES

(A) Proposed budget for full life of the Commission on Revision of the Federal Court Appellate System (27 months).

(B) Status of the appropriation for the Commission on Revision of the Federal Court Appellate System of the United States as of March 31, 1974 (expenditures and commitments).

(C) Analysis of proposed budget: Letter from Walter D. Scott, Associate Director for Economics and Government, Office of Management and Budget, dated April 5, 1974.

## Calendar No. 716

93D CONGRESS }  
*2d Session*

SENATE }

REPORT  
No. 93-742COMMISSION ON REVISION OF THE FEDERAL  
APPELLATE SYSTEM

MARCH 22, 1974.—Ordered to be printed

Mr. HRUSKA, from the Committee on the Judiciary,  
submitted the following

## REPORT

[To accompany S. 3052]

The Committee on the Judiciary, to which was referred the bill, S. 3052, providing for an extension of the term of the Commission on Revision of the Federal Court Appellate System, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill pass.

## PURPOSE

The purpose of the bill is to extend the final date for the report of the Commission on Revision of the Federal Court Appellate System by nine months and to increase its appropriation authorization from \$270,000 to \$1,000,000.

## BACKGROUND

The Commission on Revision of the Federal Court Appellate System, was established by Public Law 92-489 and assigned two major objectives, each with its own timetable.

In Phase I, the Commission was to study the geographical boundaries of the several judicial circuits and make recommendations for change. This phase of the work was to be completed within 180 days. The report on circuit realignment was filed in timely fashion on December 18, 1973.

In Phase II, the Commission is to study "... the structure and internal procedures of the Federal courts of appeal system ..." and prepare recommendations for change in those broad areas as well. Under the terms of the governing statute this second assignment is to be completed and a report filed no later than September 21, 1974. The proposed legislation, S. 3052, would extend this final filing date to June 21, 1975.

The Commission is composed of four members from the Senate, Senators Roman L. Hruska (Chairman), Quentin N. Burdick, Edward J. Gurney, and John L. McClellan; four members from the House of Representatives, Congressman Jack Brooks, Walter Flowers, (vice William L. Hungate), Edward Hutchinson, and Charles E. Wiggins; four members appointed by the President, Honorable Emanuel Celler, Roger C. Cramton, Francis R. Kirkham, and Judge Alfred T. Sulmonetti; and four members appointed by the Chief Justice, Judge J. Edward Lumbard, Judge Roger Robb, Bernard G. Segal and Professor Herbert Wechsler (Vice Professor Charles Alan Wright).

The rationale for the extension of time and increase in the level of expenditure sought by the proposed legislation is best understood in light of the problems currently besetting the Courts of Appeals and the experience gained by the Commission during its first phase of activity.

#### *Problems Faced by the Courts of Appeals*

Congress established the Commission in response to a long-felt need. Numerous judges and court observers have addressed themselves in the past decade to the crisis which has been confronting the Courts of Appeals. Many commentators have voiced the concern that an ever-increasing load of cases, if unabated, will lead to a "breakdown" of these courts as we now know them.

The statistics of the workload of the Courts of Appeals indicate that during the period beginning at the turn of the last decade, these courts have experienced an increase in caseloads unprecedented in magnitude. In fiscal year 1960, a total of 3,899 appeals were filed in all eleven circuits; with 69 authorized judgeships, the average was 57 per judgeship. In 1973 the filings had soared to 15,629; with 97 authorized judgeships, the average per judgeship was 161, almost three times the figure for 1960. The filings themselves increased 301 percent during the same period, compared with an increase of only 58 percent in district court cases.

The floodtide of appellate filings has given rise to changes in internal procedures. The privilege to argue orally has been drastically curtailed. In one circuit, oral argument is denied in a majority of the cases which come before it. Traditional patterns of opinion writing have also changed radically, with the briefest notation of the action of the court made to suffice in large numbers of cases. Many of these changes may be desirable, worthy of emulation in their present form. Some may contain the germ of good ideas which need refinement if they are to be retained. Others may be no more than responses of the moment, designed to avoid intolerable backlogs, but generating concern in their implementation. Without passing judgment on any of them, suffice it to say that they present questions which merit careful study. They have commanded the attention of the legal community which has focused its interest on the Commission and its assignment.

#### *The Experience of the Commission*

In the course of its first phase of existence, the Commission has devoted substantial time to the problems with which it must come to grips in its second phase. This was inevitable, for the two assignments are in fact parts of a larger whole: a thorough review of the

operations of the intermediate federal appellate courts. This inter-relationship was apparent from the opening of the first hearings held by the Commission. Changes in a structure were urged as an alternative to the creation of new circuits; changes in internal procedures already effected by courts unundated with appellate filings, were sharply attacked and vigorously defended, all in the context of circuit realignment.

The net effect of the process has been to make the Commission keenly aware of the complexities of the issues with which it will be obliged to grapple in phase two; of the diversity of points of view among judges, scholars and practicing lawyers; and of the multiplicity of alternatives already developed and remaining to be developed in order to assure the continued vitality of the intermediate appellate courts. In short, the very substantial commitment of time and thought to problems of structure and procedure during the first six months served to demonstrate the need for adequate time to probe deeply, to explore carefully and thereafter to develop fully any recommendations which the Commission may choose to make before it can consider its task completed and its obligations discharged.

The experience of the first six months also yielded two important lessons concerning procedures.

First, the Commission circulated a preliminary report on realignment, inviting comment, criticism and suggestions from the bench, the bar and other interested citizens. Hundreds of responses were received and these figured in the deliberations of the Commission as it prepared the recommendations which were later submitted to the President, the Congress and the Chief Justice. The number of responses and the reasoned quality of the comments were gratifying. Understandably, the Commission would like to follow the same procedure with respect to its report on the second phase of its assignment, but with one important difference. In circulating its preliminary report on realignment, the Commission allowed very little time for response, a procedure necessitated by the Congressionally-imposed deadline on the filing of the Commission's report. Such stringency with respect to the second report could not help but be counterproductive. Compared to the subtleties and complexities involved in structure and internal procedures, realignment appears relatively simple.

New proposals with respect to specialized courts, devices for resolving inter-circuit conflicts, national panels mechanisms for assuring the finality of criminal convictions, both state and federal—all of these require thoughtful consideration.

Moreover, there is a particular need to consider carefully the potential effects of any proposal for change. This is difficult enough with respect to effects which are foreseen; only the widest possible exposure of new ideas to the scrutiny of a concerned and knowledgeable public can minimize the risks of the unforeseen. A preliminary circulation of proposals being considered by the Commission can do much to clarify the intent of the proponents, to refine and amend the suggested solutions, to allow the unfamiliar to become familiar—in short, to allow the recommendations to be tested, however preliminarily, in the crucible of public debate.

The second of the procedural lessons learned during the Commission's first six months arose from its experience with public hearings. The wisdom of on-site public hearings was clearly demonstrated.

The Commission held hearings on realignment in 10 cities from the far northwest to the deep south. Literally scores of witnesses appeared. The transcripts of their testimony are proving valuable for a better understanding of the courts and the judicial process. Additional hearings appear highly desirable, if not essential, but these must be scheduled with ample time for witnesses to prepare adequately and to focus sharply on the particular concerns of the Commission. In one sense, the hearings during the first phase served to focus on the problems facing the courts of appeals, the coming hearings must focus on solutions, on their relative merits and drawbacks. Once again, adequate time is essential for optimal results.

### THE AGENDA FOR PHASE II

In Phase II, the Commission will address the existing and proposed procedures relating to the structure and procedures of the Court of Appeals. In drawing up its agenda for this final phase, the Commission has identified a number of specific problem areas which should be studied and for which solutions must be found. Briefly, included are such subjects as: a more efficient mechanism for avoiding conflicting decisions between circuits; assuring the finality of criminal convictions; widespread denial of oral argument (in one circuit oral argument is denied in almost 60 percent of the cases); widespread decision of cases without opinions; substituting "leave to appeal" for the right to appeal; jurisdiction of patent appeals, and optimum size of Courts of Appeals.

There has been increasing concern about the need to create some new instrumentality which would maintain the national law in the face of conflicting holdings by different courts of appeals. It is a familiar phenomenon of present practice that differences in interpretation of the revenue laws can continued unresolved for years, with the United States Supreme Court too busy with more urgent matters to turn its attention to these inter-circuit conflicts.

A distinguished former Solicitor General, among others, has suggested the creation of a National Panel of the Courts of Appeals which would have final authority, subject only to Supreme Court review, in areas such as interpretation of tax statutes. The American Bar Association, at its past midwinter meeting, adopted a resolution recommending creation of "a national division of the United States Court of Appeals" for the purpose of alleviating a number of these problems and authorized its President to present testimony to the Commission on Revision of the Federal Court Appellate System in support of this position.

Conflicts between circuits are not limited to tax cases and creation of a National Panel is certainly not the sole proffered solution. The persevering question to which the Commission must address itself is: What should be done so that the law of the United States may be the

same for citizens in Maryland and Michigan, in North Carolina and North Dakota.

Few areas are in greater ferment than the administration of the criminal law. There is widespread concern with assuring the finality of criminal convictions and reducing the number of collateral attacks which add substantially to the burdens of the federal courts. Writing in the December 1973 issue of the *Harvard Law Review*, Professor David L. Shapiro reviews the relevant data—560 habeas corpus petitions by state prisoners in 1950, more than 9,000 in 1970 and a fairly steady 8,000 a year since then—and observes that the increase has been variously described as a “flood,” a “tidal wave,” and an “avalanche.”

Chief Judge Clement F. Haynsworth, Jr., of the Fourth Circuit has written several seminal papers, sharply criticizing the present situation as inadequate from the perspective of the prisoners and approaching the intolerable from the prospective of the courts. The implications of important proposals in this field are far-reaching for they would involve direct review of state adjudications by a court other than the Supreme Court.

Prisoner petitions which do not seek to attack a judgment of conviction, but relate rather to the conditions of imprisonment, have also increased in volume in recent years. These have become a significant portion of federal judicial business, commanding the concern of the Chief Justice among others. Suggestions for a specialized court dealing with all aspects of the criminal law, including conditions of detention, emerge and raise broad policy questions. The appeal of specialized courts in other areas, such as patents and taxation, is equally understandable, but cogent arguments in opposition have not been lacking. These are among the problems which the Commission must consider in phase two.

Proposals for reducing the number of cases reaching the federal appellate courts have an attractive quality, but they, too, require the most careful study so as to assure that the function of the courts, assuring justice to litigants, is neither aborted nor impaired. Increasing the rate of settlements at the appellate level is one suggestion. Denying the right to appeal and substituting appeal by leave of court, at least in some classes of cases, has been suggested by the Chief Justice as worthy of study. Siphoning off a large volume of appeals from the orders of administrative agencies by creating new, quasi-judicial bodies—for example in labor cases—is yet another possibility. These are matters which the Commission cannot ignore and yet remain faithful to its obligation to the Congress and to the judicial system.

Rules governing the internal procedures of an appellate court are thought to be dull and prosaic; one would hardly expect proposals for change to evoke the intense, almost impassioned opposition which has in fact followed some recent departures from the familiar. But the world of internal procedures is not limited to the technical details of moving a trial record from one court to another, to the fixing of responsibility for the timely preparation of the transcript below, important as these may be. Internal procedures encompass such departures from tradition as a court's decision to refuse to hear oral argument, not in a

few isolated instances, but in most of the cases which come before it. They encompass the practice, in a substantial proportion of the cases decided, of giving no reason for a decision, of affirming summarily without any indication even of the issues considered and determined. As suggested earlier, such changes are not necessarily to be deplored, but neither should we assume that all innovation inevitably represents progress. If it is important in a democratic society not only that justice be done, but that it appears to be done, such departures from the familiar must be studied carefully. The views of attorneys must be sought and evaluated; the savings and efficiencies gained must be measured carefully and weighed against the losses, if any.

The use of central staff by appellate courts, similar to procedures which have proved successful in England, has been urged for the federal system. At first blush, the argument may be persuasive, but the proposal has evoked concern among those who see the risk of delegation of judicial responsibilities to non-judicial personnel. The fears may be ill-founded, but again there is the need to assess and evaluate.

The internal procedures appropriate for a court of three active judges, the size of the First Circuit, can hardly be expected to serve the Fifth which, with 15 active judgeships, is the largest in the country. Judges themselves have been among the first to recognize that there is a limit to the number of judgeships which a court can accommodate and still function effectively and efficiently. In 1971 the Judicial Conference of the United States endorsed the conclusion of its Committee on Court Administration that a court of more than 15 would be "unworkable". At the same time, the Conference took note of and quoted from a resolution of the judges of the Fifth Circuit that to increase the number of judges on that court "would diminish the quality of justice" and the effectiveness of the court as an institution.

This is not to suggest that a court of 15 is satisfactory. The Commission has heard testimony to the effect that 9 is the maximum number of judges who can work effectively and efficiently together as a single court. These are matters which must command the attention of the Commission, for if the business of the appellate courts continues to increase apace, the solution cannot be found in dividing and subdividing circuits without limit. A proliferation of circuits to twenty-five or thirty would create problems of its own, forcing burdens on the United States Supreme Court which that court would be ill-equipped to handle.

The need for careful study and evaluation is a recurrent theme in the Commission's consideration of an agenda for the second phase of its work. Each problem which is identified and each proposal for change is accompanied by the call for research to aid in assessing the situation as it exists and as it might exist. Certainly such research is of the essence of the Commission's task; the Congress was explicit in asking for study as a preliminary to recommendations. Nor could the procedure have been otherwise, whatever the statutory language. It is appropriate, however, to note that much of the research must, by the very nature of the problems facing the courts of appeals, be

carefully designed and painstakingly executed. Some of the work can be done, and is being done, by the staff of the Commission. Other assignments call for the aid of outside consultants, experts in their respective fields who have indicated their willingness to be of service to the Commission.

The Federal Judicial Center has been most cooperative in providing research support for the Commission, particularly in the planning of what needs to be done. The Commission has drawn freely on the expertise of the Center, but that expertise has served in large measure to underscore the need for adequate time in which to develop research proposals, to implement them, and to allow for thoughtful analysis and evaluation of the data produced. All of this is preliminary to the consideration of the results by the Commission, for in the final analysis research can do little more than refine the policy choices which must, in the first instance, be made by the Commission and thereafter by those to whom the Commission's recommendations must be submitted, primarily the Congress.

It would be wrong, however, for the Commission to be obliged to act in haste, without the benefit of whatever study is in fact appropriate and feasible. Relatively little additional time—less than a year—can do much to assure the development of valuable material which can aid in meeting the problems of the federal judicial system,

#### BUDGET PROPOSAL

Increasing the sum authorized to be appropriated for the work of the Commission is, of course, but a preliminary step which in itself provides the Commission with no funds. To be effective, it must be followed by an appropriation. A detailed statement of the precise amounts requested, by category of expenditure, would be provided in the usual manner in connection with a specific proposal for a supplemental appropriation. A preliminary proposed two-year budget has been prepared by the Commission and will be submitted at the appropriate time subject, of course, to possible modification. (See Appendix, *infra*.)

It might be appropriate at this point to give some indication of the broad categories for which additional funds would be utilized.

There is need to supplement the present staff of the Commission, which in addition to the Executive Director and his Deputy, includes only one junior staff attorney full time.

Mention has already been made of the hearings of the Commission during the first phase. Significant interest has been shown in the publication of the transcripts of these hearings because of the valuable material which they contain. Future hearings will require substantial expenditures. The enabling legislation provides for services both by the Administrative Office in the United States Courts and the Federal Judicial Center on a reimbursable basis. Substantial additional funds are needed for this purpose.

Finally, the opportunity for major and significant research relevant to the present operation of the Courts of Appeals, and necessary for the evaluation of proposals for change, should not be lost for lack of

funding. A high proportion of any supplemental appropriation is likely to be allocated to this area.

The total requested, \$1,000,000, would cover the full two-year life of the Commission and is entirely consistent with the level of authorization for similar undertakings.

#### CONCLUSION

For the foregoing reasons, the Committee on the Judiciary recommends prompt enactment of the subject bill.

#### CHANGES IN EXISTING LAW

In compliance with Rule XXIX of the Senate, changes in existing law made by the bill are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman) :

#### PUBLIC LAW 489, 92D CONGRESS

#### 2D SESSION

(ACT OF OCTOBER 13, 1972

86 STAT. 807)

AN ACT To create a Commission on Revision of the Federal Court Appellate System of the United States

\* \* \* \* \*

SEC. 6. The Commission shall transmit to the President, the Congress, and the Chief Justice—

(1) its report under section 1(a) of this Act within one hundred and eighty days of the date on which its ninth member is appointed; and

(2) its report under section 1(b) of this Act within [fifteen months] *twenty-four months* of the date on which its ninth member is appointed.

The Commission shall cease to exist ninety days after the date of the submission of its second report.

SEC. 7. There are hereby authorized to be appropriated to the Commission such sums, but [not more than \$270,000] *not more than \$1,000,000*, as may be necessary to carry out the purposes of this Act. Authority is hereby granted for appropriated money to remain available until expended.

\* \* \* \* \*

## APPENDIX

*Proposed budget—2 years, 1973-75*

## Personnel Compensation:

## Commissioners:

Through December 1973-----	\$5, 400
Hearings (15x4)-----	6, 000
Meetings (15x8)-----	12, 000
Additional time-----	4, 000
<b>Total -----</b>	<b>27, 400</b>

## Staff:

Through December 1973-----	43, 400
Executive Director (\$36,000), Deputy Executive Director (\$24,000), 2 staff attorneys (\$42,000)-----	153, 000
Administrative secretary (\$11,700), 2 secretaries (\$16,100), Additional part-time staff (\$3,300)-----	46, 500
(Vacancies plus cost-of-living increases viewed as cancelling out) -----	24, 000
<b>Total -----</b>	<b>266, 900</b>

## Experts and Consultants:

Through December 1973-----	6, 300
General assistants (including Sheehan)-----	15, 000
Projects—high priority-----	130, 000
Additional projects-----	45, 000
<b>Total -----</b>	<b>196, 300</b>

## Personnel Benefits: (Government's contributions for retirement, life insurance, health insurance, and FICA taxes)

24, 100

## Travel:

Through December 1973-----	11, 100
Meetings (15x1,600)-----	24, 000
Hearings (15x1,600)-----	24, 000
Staff (conferences with consultants)-----	4, 000
Committee meetings-----	6, 000
<b>Total -----</b>	<b>69, 100</b>

## Rent and Communications:

Telephone, through December 1973-----	4, 900
Postage, through December 1973-----	6, 100
Copying equipment, through December 1973-----	6, 700
<b>Total -----</b>	<b>17, 700</b>

## APPENDIX—Continued

*Proposed budget—2 years, 1973-75*

<b>Printing and Reproduction:</b>	
Through December 1973 (transcripts)-----	4, 800
Transcripts-----	6, 600
Printing transcripts-----	105, 000
Printing reports-----	4, 000
Printing of studies-----	22, 000
<b>Total</b> -----	<b>142, 400</b>
<b>Other Services:</b>	
<b>AO &amp; FJC Reimbursable Services:</b>	
Through December 1973-----	5, 900
AO-----	18, 000
FJC-----	45, 000
Additional support services-----	41, 000
<b>Total</b> -----	<b>109, 900</b>
<b>Supplies and Materials:</b>	
Through December 1973-----	500
Stationery, et cetera-----	3, 000
<b>Total</b> -----	<b>3, 500</b>
<b>Equipment:</b>	
Through December 1973-----	4, 500
<b>Total</b> -----	<b>861, 800</b>
Less appropriation-----	235, 000
<b>Grand total</b> -----	<b>626, 800</b>

*Proposed budget for full life of the Commission on Revision of the Federal Court Appellate System (27 months)*

<b>Personnel compensation:</b>	
<b>Commissioners:</b>	
Through December 1973 <sup>1</sup> -----	\$5, 400
Hearings (20 X 7)-----	14, 000
Meetings (21 X 7)-----	14, 700
Commission time-----	4, 000
<b>Total</b> -----	<b>38, 100</b>
<b>Staff:</b>	
Through December 1973-----	43, 400
Executive Director-----	62, 000
Deputy Executive Director (\$24,500)-----	42, 875
Staff attorney after July 1, 1974 (\$20,000)-----	25, 000
Staff attorney until July 1, 1974 (12,500)-----	6, 250
Staff attorney after July 1, 1974 (\$16,000)-----	20, 000
Administrative secretary (\$12,573)-----	22, 000
2 secretaries (\$16,500)-----	28, 875
Additional part-time staff-----	58, 307
<b>Total</b> -----	<b>308, 707</b>

<sup>1</sup> These entries represent actual expenditures as reported to the Commission by AO.

## Personnel Compensation—Continued

## Staff—Continued

(Vacancy rate and cost of living plus merit increases viewed as canceling each other out.)

## Experts and consultants:

Through December 1973.....	6,300
General assistance (including Sheehan).....	18,750
Projects—high priority.....	162,500
Additional projects.....	56,250

Total .....	243,800
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Personnel benefits.....	30,125
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## Travel:

Through December 1973.....	11,100
Meeting (21 X 1,600).....	33,600
Hearings (20 X 1,600).....	32,000
Staff (conferences with consultants).....	5,000
Committee meetings.....	7,500

Total .....	89,200
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## Rent and communications:

Telephone, through December 1973.....	\$4,900
Postage through December 1973.....	6,100
Copying equipment, through December 1973.....	8,000

Total .....	19,000
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## Printing and reproduction:

Through December 1973 (transcripts).....	4,800
Transcripts .....	10,000
Printing reports .....	24,000
Printing of studies.....	22,000

Total .....	60,800
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## Other services:

AO and FJC reimbursable services through December 1973.....	5,900
AO .....	24,000
FJC .....	67,000

Total .....	96,000
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## Supplies and materials:

Through December 1973.....	500
Stationery, et cetera.....	6,000

6,500
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Equipment: Through December 1973.....	5,500
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Grand total .....	997,732
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Less appropriation .....	255,000
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Total requested .....	742,732
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STATUS OF THE APPROPRIATION FOR THE COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM  
OF THE UNITED STATES AS OF MAR. 31, 1974

	Amount available	Paid	Unpaid	Total	Reserve	Unobligated unreserved balance
<b>Personnel compensation:</b>						
Commissioners.....	\$20,000	\$2,550		\$2,550		\$11,450
Staff.....	137,000	68,302		68,302	\$44,810	-16,112
Experts and consultants.....	8,000	2,493		2,493		5,507
<b>Total.....</b>	<b>165,000</b>	<b>\$79,345</b>		<b>79,345</b>	<b>84,810</b>	<b>845</b>
Personnel benefits.....	14,000	5,969		5,969	6,749	1,282
Transportation of things.....		335	\$75	410		-410
Travel.....	36,000	13,633	2,460	16,093		19,907
<b>Rent, communications, and utilities:</b>						
Telephone.....	3,600	1,016	185	1,101	1,765	1,734
Postage.....	1,000		872	872		128
Rental of copy equipment.....	2,400	1,406	1,175	1,581	1,782	-963
Printing and reproduction.....	12,000	6,854	133	6,987		5,013
Other services.....	18,000	6,350	2,215	8,565	2,125	7,310
Supplies and materials.....	1,000	254	518	772		228
Equipment.....	2,000	1,902	66	1,968		32
<b>Total.....</b>	<b>255,000</b>	<b>117,064</b>	<b>6,599</b>	<b>123,663</b>	<b>96,231</b>	<b>35,106</b>

<sup>1</sup> Estimate.

<sup>2</sup> Reserve established for telephone service through the life of the commission.

<sup>3</sup> Reserve established for rental of Xerox copier through the life of the commission.

EXECUTIVE OFFICE OF THE PRESIDENT,  
OFFICE OF MANAGEMENT AND BUDGET,  
Washington, D.C., April 15, 1974

Dr. A. LEO LEVIN,  
Executive Director, Commission on Revision of the Federal Court Appellate  
System, Washington, D.C.

DEAR DR. LEVIN: At your request OMB staff has reviewed the proposed budget for the Commission on Revision of the Federal Court Appellate System. Because the Commission is under the jurisdiction of the Judicial Branch, we are only offering our observations for your use as you deem appropriate. We have applied the same general criteria to the Commission that we would to other temporary study commissions of a similar nature. The proposal, in our judgment, is reasonable, and possibly conservative, given the scope of responsibilities of the Commission.

The proposed budget you have outlined represents a 27-month operating program to carry you through September 1975, contingent upon extension of your authorization. We understand the Senate has acted favorably on a proposed extension to permit you additional time to do a more comprehensive job during the second phase of the Commission's life. The extension would also increase the appropriation authorization from \$270,000 to \$1,000,000. Your total proposed budget of \$997,732 would put you within this \$1,000,000 authorization level.

Your proposed staff complement of seven positions is reasonable, if not conservative, for the work to be done in Phase II. You might want to consider, however, the addition of one or two professional researchers or writers who could be useful in gathering information, developing analyses and drafting the final report of the Commission. While most of the Commission's work from this point on is very legal and technical in nature, some of it will involve procedural or managerial questions where the views of a person with management and organization expertise might be beneficial to the Commission. A consultant could serve this purpose, although a staff member would have a more involved role in your work.

Your proposed expenditure of \$243,800 for consultants and experts also appears reasonable but conservative. Where it is necessary to gather a large amount of information and distill it for use by a staff or commission, it is often desirable to contract significant parts of the work. But while consultants can do much of this work on their own, careful supervision of their activities is required to assure that what you want them to do is what they are actually doing. This, in turn, will involve your staff's time. You would find it useful, we think, to carefully outline the proposed work for consultants before they start, to establish guidelines for them, and then to monitor their activities while they are conducting their work.

Your budget proposal provides for 20 hearings and 21 commission meetings between the time you receive your reauthorization and additional appropriations and the expiration of the Commission. While it may be necessary from a substantive viewpoint to hold this large number of meetings, particularly to gain the benefit of public input from the hearings, we have observed from our experience with other commissions that it is very difficult to hold this many meetings in such a short time frame. For one thing, considerable staff work is involved, both before and after meetings, in order to gain maximum benefit from them. While we understand that participation by members of the Commission has been very good in the past, we fear that so extensive a schedule may necessarily limit involvement because of other demands on the Commissioners. For these reasons, we would suggest you limit the number of meetings you hold to a very few—perhaps combining commission meetings with hearings. This would alter your proposed budget levels for both compensation of commission members and travel.

The administrative service items in your proposal are in line with those of similar commissions. Your estimate of printing costs may be low based on our previous experience, although this depends on how extensive the commission reports are to be.

On the whole, the proposed budget level appears reasonable and consistent with the expenditures for temporary study commissions of a similar nature that we have worked within the past. The observations we have made reflect our previous experience and are offered only for your consideration. We are pleased to note that the Commission's work in the past has been thoroughly and professionally done and has been presented within the legislatively established timeframe. We appreciate the task you have before you and are ready to offer any additional assistance you may desire.

Sincerely,

WALTER D. SCOTT,  
*Associate Director for  
Economics and Government.*

Mr. LEVIN. Thank you very much.

I think we start off noting the fact that we were given 180 days to file our first report, and we filed it in a timely fashion; we met that deadline. The Commission did so, even though it published a preliminary report, which was very widely circulated, concerning which there were literally hundreds of comments received. And we managed that all within the 180 days; and then we faced up promptly to the second phase of the work.

As we entered into the second phase of the work, it became clear that we could file some report within the additional 6 months given us, even if we were to publish a preliminary report before that. However, it also became clear that, given the kind of problems that we have uncovered, some of which had not really been obvious before, and given the value of certain of the procedures which we had followed—hearings in different places and some careful, in-depth study—that, incrementally, the added time would be very worthwhile.

Here are some of the problems that we are dealing with, if I may touch on them briefly. First there is the question of maintaining the national law. Are there unresolved inter-circuit conflicts, so that a taxpayer in Oregon is treated differently than a taxpayer in North Carolina. We heard substantial testimony to the effect that there is such a problem. Is the problem such that there ought to be some other body besides the U.S. Supreme Court to interpret Federal statutes, including tax statutes, and to do so with relative speed?

In many cases, we have been told it really is of no great moment to anyone whether you decide an issue one way or another; Congress can amend the statute and these may be "small" issues. Yet tens of thousands of people need to know the answer. It is a little bit like driving

on the highway. It is not so important which side you say to drive on, but everybody on the road ought to have the same answer and ought to have it promptly.

We are exploring the question of first, the unresolved actual inter-circuit conflicts. We are also exploring the extent to which there are statutes that would benefit from a rapid determination of questions of an authoritative interpretation, on the national level. That is one of the problems that we have been dealing with. We have had extensive hearings on the subject for it is related to the question of creating a national division of the U.S. Court of Appeals. The ABA has proposed such a tribunal at its last mid-winter meeting.

We heard a great deal of testimony from prestigious people for and against; and from others who are in the middle, saying that there are certain things that may be desirable, certain other things that may not be desirable.

#### ADMINISTRATIVE APPEALS

The Administrative Conference of the United States has expressed a real willingness to work with us to do research in order to see whether judicial review of administrative decision is at the optimum level right now; or whether there are ways we can expedite the process—and expedite not for the sake of speed in adjudication alone—but in a manner which would achieve a fair and proper ultimate result. Because after all, this is not only the mandate of the statute, but this is our interest.

#### PATENT LITIGATION AND FORUM SHOPPING

This is an area that deeply concerns us. We heard a lot of testimony, received a lot of letters on alternatives to the present system. I cannot say what the Commission will recommend, but certainly these are areas that we ought to explore in some depth and with some care.

A word on the internal procedures of the Court of Appeals. In one circuit today there are close to 60 percent of the cases in which there is no oral argument allowed—this in the U.S. Court of Appeals. Other circuits also are increasing the number of cases that go that way, that is cases in which no oral argument is allowed.

We have heard in an open hearing from a court of appeals judge who indicates that he will vote on a case without having heard oral argument, without himself having read the brief, without having attended a conference, simply because of the great pressure of business, even though he works all day on Sundays. He works from another judge's memos, and he says he checks the points of the lawyers to see whether the memo has covered them. These are things we think we ought to be concerned with, not necessarily with the idea that we have to arrange for a greater flow of cases before these same judges, but asking whether the Federal courts are really doing the kind of job that we want them to do, in view of the importance of the Federal judiciary today to the country, really—and at times this might sound clichéd and hackneyed, but I really believe it and believe it deeply.

Perhaps, Mr. Chairman, if I may, I will turn to the funding; and here, maybe, making a preliminary observation and thereafter respond as best I can to all types of questions about the details.

Originally there were those who may have felt that all we had to do was take a circuit realignment from a number of proposals that had

already been prepared. Indeed, there were prepared proposals. We studied maybe 40 printouts that had been prepared by computer. We found, incidental, something that was almost amusing on one such printout. The computer had been told there was no objection to dividing a State, and came up with a solution that would have had Oklahoma in three different circuits. And the Commission felt that although that might be appropriate for some States, it was really not necessary in the case of Oklahoma.

But the Commission felt that the best way to go about this was to go and hold hearings, which we did: four on the west coast; four in the fifth circuit; hearings in New York; hearings in Washington. And we learned a tremendous amount from this. We thought it was not enough just to pick a plan and then send it to Congress as a recommendation. We published a preliminary report and circulated thousands of copies in addition to those that were published in the Federal reporter system, and received valuable advice.

For the moment, now, we have a number of research projects we would like to complete. Some of them relate to practices within the courts of appeal; some of them relate to intercircuit conflicts; some of them relate to opinion writing, to denial of oral argument. There are some difficult questions about weighted caseloads. We speak of a "case," but an NRLB appeal just turning on the facts may be very, very different than an administrative law appeal in the area of environmental quality and in ambience problems, issues of this sort.

We want very much to get away from easy generalizations concerning the existence of intercircuit conflicts, and, instead, to have someone, with a number of assistants, study literally every single circuit petition for 2 years, at least those on the paid docket. Was there an intercircuit conflict or not? If so, was it resolved? We are also talking to the consumers—the litigants are the ultimate consumers, but at least we want to talk to the lawyers who have been representing them—and ask: Is there really a problem in your practice because of the failure to resolve intercircuit conflicts, and similar things that are broadly alleged? Doing all of these things, this research, really costs some money.

We asked the Office of Management and Budget to review our budget as submitted with the request for increasing the authorization for appropriation, for the full 27 months of the Commission, to \$1 million. Their response is the last appendix in my statement. And that response, I must say, worried me, because it indicates that we may have asked for too little. The OMB letter is couched in very lovely language—and I quote from the first paragraph: "The proposal, in our judgment, is reasonable and possibly conservative." Then they went over one item after another and said, in effect, this is probably conservative, or this is in line with other commissions, but it may be conservative. The bulk of the letter consists of suggestions for expenditure over and above the \$1 million request for authorization.

This letter is before you. It is attached to the statement.

I think that we can and we will and we must live within what we have asked for, if the Congress deems it appropriate to authorize and thereafter to appropriate the balance—this is for the full 27 months.

But I did want to call your attention to this conclusion of OMB. I thought, in addition, subject to your pleasure, to break down each of

the items; because the major items really relate to the staff for the full 27 months—about \$350,000 with the personnel benefits; and to research consultants and contracts—research was about \$240,000. They are both probably conservative, as indicated in the OMB appraisal.

We have been pinching pennies, and I think being a public commission, we have to continue to do that.

I would be glad to respond to any detailed questions, but I would say there is only one area where they thought that we could cut: In the number of hearings and meetings—to combine them to save some travel. We have been doing that. I am not sure whether we can cut down on the total; it depends on the complexity of the recommendations, because the Commission has been very dedicated, very hard working. And if you sit through a meeting for about 4 or 5 hours and try to thrash out a problem the feeling is often that it needs another meeting after you have worked through other aspects of the problems, prepared another draft. We certainly would not want to say that we cannot call another meeting; we are sorry, we cannot afford it. To illustrate the tight budget on which we have been living, let me say that I have already had one commissioner who offered to come to hearings at his own expense this from the west coast to the east coast. I said we might have a tight budget but not that bad.

So, gentlemen, it would be my pleasure to go into further detail if this is appropriate, or to respond to your questions as you prefer, and go right through the full budget and the full program, subject to your pleasure.

Mr. KASTENMEIER. Thank you.

We have some general questions.

In 1972, the Commission was established and \$50,000 was thought adequate for at least the first phase of your investigation, the report on the realignment of the judicial circuits. But in fact, that was not enough, was it, by a long shot.

Mr. LEVIN. May I respond?

One of the Congressmen who was involved with it long before I came on the scene told me that they had the idea that there are plans waiting in the Federal Judicial Center; that the Federal Judicial Center simply said that they would not go through a policy determination; that you needed the Commission to pick one of the existing alternatives. As I tried to describe, the Commission did not feel that way about it. We have had no regrets at all about the procedures and the hearings cost money and the time involved cost money, the publication cost money. The hearings are very rich. We received a number of library requests for them.

Mr. KASTENMEIER. Was it contemplated originally within the statutory mandate that you would have these hearings throughout the country?

Mr. LEVIN. The statute only said that the quorum for hearings is three. It did not speak beyond that. And we are having currently most of our hearings in Washington.

On the other hand, the seventh circuit was after us so vigorously that we will be going out there 2 days in June. Part of the feeling is on geographical realignment, that the people in the area affected ought to be able to speak without the burden of coming from the ninth circuit, for example, to Washington.

Part of it, too, is that we have learned so much from people who could come to a relatively local hearing, both on procedures and attitudes, for example, on delays in the ninth circuit. The problems are incredible.

Mr. KASTENMEIER. I was under the impression that the first part of your mission, geographic realignment of the judicial circuits, was more or less completed.

Mr. LEVIN. It is complete. The final report is filed. I mentioned this only because we used up a good proportion, not an excessive proportion, of the funds allocated for that.

What I am really saying is, I think the original figure, in the \$255,000 range was fixed in part on the notion that we would spend almost nothing of that on circuit realignment. But, with the hearings, with the travel, with the preliminary proposals, we had to spend a good proportion of that—not excessive in terms of the original 18 months. That is why I referred to it, sir.

Mr. KASTENMEIER. Your request envisions over \$300,000 for staff and \$240,000 for experts and consultants. I suppose originally it was thought that this work could be performed by other entities, such as the Administrative Conference or the Judicial Conference itself, which does so much in terms of caseloads. And you mentioned the Federal Judicial Center.

Are these other resources not adequate for the purposes of your work, that you should require so much staff and other expert consultants?

Mr. LEVIN. I am truly grateful for the question, because the response falls into two categories. First, the statute provided that the Federal Judicial Center and the Administrative Office of the United States should service us on a reimbursable basis. Part of this money—those three little words, “on a reimbursable basis”—part of the funds in here—indeed, almost \$100,000—is for reimbursement and they are not charging us a full rate. The AO, the Administrative Office, is reimbursed for administrative services. I am not sure, but I believe that they have not really been charging us the full amount they say that we are costing them. You mention the Federal Judicial Center. It is very clear that we have consultations with them, we have tapped their resources. But it is reimbursable and there will be a lot of money on that.

Some of the research is done through them. They are interested in it. Our policy has been wherever research has been done, we utilize it. Some of it is outdated; some of it needs to be updated; some of it has data which is not published. We latch on, frankly, to other projects—I feel almost like a parasite—to find a scholar who is studying opinions and just pay a little increment for particular data we need.

The short answer is all these other resources are exceedingly valuable. Without it, the figure would have to be very much higher. Some of it is on a reimbursable basis; other research requires additional work, which we would then have to pay for. And all of the projects which I have listed, posit work beyond what is available to us.

Our first step is always to talk to the people and to utilize what there is, including the committees of the Judicial Conference of the United States.

Mr. KASTENMEIER. Presently you are authorized \$270,000. Presently you have appropriated to you \$255,000.

Of that \$255,000, how much already has been expended?

Mr. LEVIN. This was actually expended as of April 30, 1974. Actually paid out is \$123,241. Unpaid is another \$10,000. We have actually spent \$135,000 in rough figures, with another \$100,000 obligated. But there are a number of obligations in the research area which go beyond that. What I filed, Mr. Chairman, is the latest monthly report as AO has given it to us for March 31, 1974, and I was now reading from the report 1 month later.

I think we really did our circuit realignment for under \$100,000, probably about \$90,000. The AO report tentatively comes out \$83,800, but it had some postponed payments.

Mr. KASTENMEIER. The date of your creation was October 13, 1972, is that correct?

Mr. LEVIN. Mr. Chairman, if I may suggest, this was the effective date of the statute.

Mr. KASTENMEIER. You were created to commence on what date?

Mr. LEVIN. The statute provided that our timetable, our clock begins to run at the time the ninth member is appointed. This occurred on June 21, 1973.

Mr. KASTENMEIER. Therefore, your present life is until September 21, 1974?

Mr. LEVIN. Yes, that is when the report would have to be filed— with the provision that we then have thereafter another 90 days to subside, to pass out gracefully. So our report, if we did not change the timetable and without additional funding, we would have to file a preliminary report almost in a matter of weeks. If we had to, we would meet the obligation. But everybody on the Commission felt that, incrementally, there just was not any comparison to what the value could be with an extension.

Mr. KASTENMEIER. What is proposed, then, is that you are authorized to continue and file your final report on June 21, 1975, with 90 additional days thereafter?

Mr. LEVIN. That is exactly right.

Mr. KASTENMEIER. Which is more or less 12 months plus 90 days.

Mr. LEVIN. From now.

Mr. KASTENMEIER. From now.

You have been in existence slightly less than a year. You have prospectively, if your request is agreed to, slightly more than a year to go. You have presently spent about \$125,000, more or less, and you propose that you be authorized to spend \$875,000 more or less more in just over 1 year of your proposed existence.

I take it that you are gearing up in terms of staff consultants, contracts, and all that?

Mr. LEVIN. Exactly. I have a roster here. We desperately need someone else on the staff. Part of the happy difficulty is, the interest in the country has been such that the volume of correspondence that goes through, the requests for things, the responses to our inquiries has just been huge. Our chief secretary has been around a lot of offices, and has said this volume is sort of unheard of.

This has put a great burden on the staff, which is just undermanned—totally. We propose an increase of one additional professional. And as I say, OMB said that is really too little. But we can live with that.

On to the list of consultants, some of whom one way or another we have to do this work. There is almost \$250,000 worth of research which we would like to send out immediately. Without it, our report is meaningless. That is where the extra comes, the extra staff that is involved, and particularly the research material provided for here.

Mr. KASTENMEIER. If you were to follow the OMB suggestion that the 20 hearings and 21 Commission meetings could be cut back, I assume that you would be able to save some of the money you are requesting?

Mr. LEVIN. If we were to follow all their suggestions our total expenditure would be higher than what we propose.

Mr. KASTENMEIER. Why is that?

Mr. LEVIN. The reason is, they told us in the third paragraph on the first page that we really ought to increase the staff to include a research person and a person to write matters up. And if we were to put somebody like that on, it would be more than we are saving on all that they propose. Then they go ahead and on the next page, say that consultants and experts also appears reasonable, but conservative. And they suggest further that this requires money and may require more staff to supervise the consultants.

That is true. The staff, thank God, is working far more than the normal staff. It is exciting work; 10 o'clock, 11 o'clock at night, that is the way it ought to be. And there is another aspect that they, OMB, think we have provided too little for, the printing, ultimate publication and costs of publication of the hearings and so on. It would be a little conservative. If we followed what they suggested, the net would be more than what we proposed.

The risk, the only place where I played it a little more carefully than the barest minimum, was in the hearings and meetings. On the other hand, our experience has been unusual. Since December we have already had 5 days of hearings and meetings and will have had 7 within 2 or 3 more weeks. We are only talking of 41 days. We have had 7 already.

Half of our Commission are Members of Congress who cannot always give a full day. You can have a half a day meeting. The attendance is not as good, however, when you have 2 days of hearings with a half a day meeting included. If the Commission is pressed to go and have hearings somewhere else, in another city, which is sometimes cheaper, you cannot call the whole Commission out there because you will lose money rather than save by combining the hearings and a meeting.

It is not a Commission that says, "What the heck." Every one of them is dedicated. Everyone is dedicated, really tremendously. We may have to use this full 41 days. As I say, 7 will have been used up already. It depends entirely on whether we achieve a rapid consensus or whether we keep working through details.

Mr. KASTENMEIER. At this point, I would like to say, notwithstanding the good work and the need for the work that your Commission has undertaken, and without any reflection on you or any member of the Commission, the fact is in the House, particularly, we have a great deal of difficulty with commissions in terms of increasing their funding authorization and extending their life.

This subcommittee on two occasions handled the Administrative Conference in its early years, and had a great deal of difficulty.

A commission such as the Administrative Conference performs work that is somewhat technical, and as a consequence it is easy for a Member to vote against it to save some money. Likewise, I think the work of your Commission, however excellent it may be, is not commonly appreciated among Members of Congress.

The result is we may have difficulty with a House very concerned with saving money. I express this apprehension to you so that Mr. Wiggins and others will know the urgency of actively supporting this legislation. We will ask for help elsewhere as well.

What I am saying is, through difficult experience I have learned that casual commissions, commissions that are not notorious, and yours is not notorious, have a tendency to get lost in the congressional bureaucracy, especially when the Commission does not have a constituency large enough to appreciate its work. So let me ask you this question in that context:

If it were felt that \$1 million were too great an amount to invest in your work, is there any lesser figure that you could submit that you could live with?

Mr. LEVIN. Mr. Chairman, let me say that we will live with whatever the Congress determines that we have to live with. We will not overspend. We will not violate the law. Perhaps I should tell you how this million-dollar figure came about. I was asked—this is just by way of confession of my inadequacy—I was originally asked to prepare an additional budget, and I prepared a small one and I brought this to members of the Commission who were in Congress—as a matter of fact on the House side—and they said, this is not enough. If you run short here, you are in trouble.

We had a conference with OMB. Their notion was, you have not asked for enough. In short, my whole approach to this budgeting has been one of really sticking with the rock bottom. I have been subjected to the experience of reviewing budgets for I have sat in budget reviews, as an administrative officer at the university, with millions of dollars going through; and I am well aware of the phenomenon where you ask for too much, then you try to get it bargained down. I guess I developed such an abhorrence of that type of thing, I said: Level with me. We must have this, this is optional and so on.

All I can respond to you is, this really represents the lowest we feel is tenable for doing the job within the period. Less than that, we either have to cut research—research that ought to be done, because some of the reports that have come out to the country have just been based on impressions. People said we could not do this research; we do not have the opportunity. We should do the necessary research.

We think it would serve will to cut out meetings of the Commission. If it turns out we needed them it would be pretty bad. I will only say this, because I think this is true of all the members of the Commission: if the luck of the draw works out that after getting the money we do not have to spend every last cent, it would be our greatest pleasure to turn back whatever is not absolutely needed. This we can pledge you. We have absolutely been rigorous up to now, even when we thought we had more than enough for the particular period, exceedingly rigorous, and we will continue that way.

It will be viewed as kind of an achievement, to get our report out, whatever deadline is set, and then turn back and say, we do not need all this money. That would be the greatest achievement.

Mr. KASTENMEIER. Mr. Cohen.

Mr. COHEN. Thank you, Mr. Chairman. I have very little to add, other than to express the same sort of apprehension, assuming that Chairman Kastenmeier is in fact prophetic. I guess the question I had was, where could we point, on the House floor, to items that might be cut back with the least amount of harm?

Mr. LEVIN. I am worried about where. I think we would just have to cut down on some of the research, although again, it has been on a penny-pinching thing, the national law and the antitrust and so on.

Mr. COHEN. For example, looking at your budget, what are projects, high priority, \$162,000?

Mr. LEVIN. Let me go right down them. The study of circuit petitions I referred to, we hope to bring it in at \$10,000. An opinion survey in three circuits on the need for oral argument and unpublished opinions. This would be of members of the bar who actually argue before the court as to how they react to the practices of either denial of oral argument or having an unpublished opinion, which is a practice saving a lot of time and so on—\$35,000.

In five separate areas to ask whether intercircuit conflicts have affected lawyers in their practice including forum-shopping—patent, tax, antitrust, securities, labor, law. We think we can bring each of them in at \$7,000, \$35,000. A study of the administrative law area—

Mr. COHEN. May I interrupt for a moment? Is forum shopping in the court of appeals a prevalent practice?

Mr. LEVIN. In an appeal from an administrative order that will go directly to the court of appeals, you may get forum shopping, or you may get forum shopping in the district court, because of a difference either in the law or attitude by the court of appeals.

Mr. COHEN. That brings me to a second question. If I could read from the legislative history:

While the conferees recognize that the study of changes in the structure of internal procedures in the courts of appeals must necessarily take into consideration the types of cases which enter the judicial system at the district court level, the conferees intend by use of such language to limit the commission's recommendations to improvements in structure and internal procedures of the appellate process, rather than authorize study and recommendations with respect to basic jurisdictional, civil or criminal, of the district court.

I could see an argument developing that by the scope of the court of appeals inquiry, you in essence are getting back to the district court level.

Mr. LEVIN. Mr. Cohen, at the last hearings of the Commission this week, I quoted that identical section, which I have been quoting in letters I have sent all over. Indeed, it was John Frank who appeared as a witness here earlier today, who appeared in Los Angeles, who asked for an opportunity to talk to the question of retaining diversity jurisdiction. We said, this is forbidden territory. We are staying out of it.

The only thing at all that may raise a question, because we have been very rigorous on that—not studying district court jurisdiction—we do not want to study it, we do not want to get involved in it—is where you have something by way of the unresolved intercircuit conflicts—possibly in the patent area, for example, which may affect where a litigant chooses to start his litigation. It would still be in a U.S. district court, in any event, you see. Our sole concern would be unresolved intercircuit conflicts.

Because then there would be the question, for example, if the CCPA could have a beneficial influence if its jurisdiction is expanded. Beyond that we just do not touch the district courts.

I am grateful for the opportunity to make this clear, because we have been very sensitive to it. I must say that Chairman Celler has been very alert wherever a dictum came out from witnesses to point out this particular passage.

Mr. COHEN. If we could go back to the projects of high priority.

Mr. LEVIN. In addition to that, for example, we are thinking of maybe \$25,000 for a study of the administrative law area, some of which could be very good. If we could get all of that on the budget of the Administrative Conference it would be our great desire to do so.

A study of the extent to which there ought to be the possibility of moving from the highest court of a State over to an intermediate Federal appellate court—it has been suggested in the criminal area and may have applications in other areas.

A study of a court of appeals to see the dynamics of the court with respect to why there are long delays. If we could do that, we would love to do that for \$15,000.

A study of weighted caseloads—what does it mean to a court of appeals to have one type of case rather than another—so we can understand the data on filings better. The volume of filings do not show the work the judges do, and with luck we could do that somewhere between \$15,000 and \$25,000, latching onto funds of the Federal Judicial Center, that wanted to do it very modestly on their own. But we would extend it from one circuit to three because we need to know more than just data on a single circuit.

What I think I tabulated here is over a little, over \$200,000. I am not directly dealing from this list.

Mr. KASTENMEIER. If the gentleman will yield.

Are you adding just a little over \$200,000 for projects of high priority?

Mr. LEVIN. Our notions have changed a little bit on this. I originally did this very conservatively, even this projection is very conservative. I will not bother you with \$2,000 amounts, or \$1,000.

Mr. COHEN. We ought to have a little more explanation, I think, of the detail of these projects in order to justify them. We would appreciate your furnishing us with it.

Mr. LEVIN. If you would like a submission, it will be my great pleasure.

Mr. KASTENMEIER. It is an excellent idea. We not only would like it, I think it may be essential to justify some of the items you have here.

[The information referred to follows:]

**SUPPLEMENTAL STATEMENT OF A. LEO LEVIN, EXECUTIVE DIRECTOR, COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM**

I very much appreciate the opportunity to submit this supplemental statement in support of S. 3052, a bill to extend the date for the filing of the final report of the Commission on Revision of the Federal Court Appellate System and to increase its appropriation authorization.

At the hearing on this bill, the distinguished Chairman of the Subcommittee, Congressman Kastenmeier, and Congressman Cohen suggested that it would be helpful if we would provide further detail concerning (a) the number of hearings and meetings scheduled in the proposed budget; and (b) the Commission's plans for research. This supplemental statement is filed in response to that request.

Research constitutes so large a proportion of the total budget, and is so clearly dependent on approval of an increase in authorization for appropriation, that we particularly appreciate the opportunity to provide added information on this subject. The number of meetings and hearings was the one item questioned by the Office of Management and Budget which, at our request, reviewed the Commission's budget proposal (see letter from Walter D. Scott, Associate Director for Economics and Government, OMB, to A. Leo Levin, dated April 15, 1974, copy filed with original statement of A. Leo Levin). It should be observed, however, that all other suggestions by OMB would result in a net increase in the total budget and in the requested authorization, well beyond the sum provided in S. 3052.

#### HEARINGS AND MEETINGS

On an annual basis the Commission has projected fewer hearings during the second phase of its work than it held during the first phase. The Commission completed its report on circuit realignment in timely fashion within 180 days of the appointment of its ninth member. During that period the Commission held eleven days of hearings, two in Washington, D.C., and nine in various other parts of the country. If the Commission were to continue to hold eleven days of hearings during each six months of the eighteen months projected for the development of its final report, the total number of hearings during this phase of its operation would total thirty-three days rather than the twenty days which are provided in the proposed budget. The proposed schedule thus represents a reduction of more than one-third.

We hope to achieve this reduction, without sacrifice of the exceedingly valuable input which the first-phase hearings provided, by effective use of alternative mechanisms for learning the views of lawyers, judges and other interested citizens with ideas and information to contribute. The Commission is making every effort to develop its record by way of submitted statements in lieu of personal appearances, including detailed correspondence with representative members of various segments of the profession. Perhaps it may prove possible to reduce still further the number of hearings provided for in the budget. On the other hand, it should be noted that compared with the problems of circuit realignment, the problems relating to the structure and the internal operating procedures of the Federal courts of appeal system are far more complex. A significant national debate has already developed with respect to certain proposals which are presently before the Commission, and it may well be necessary to provide for hearings, not only during that period of time in which the Commission prepares a preliminary report, but, in addition, during the period between the publication of a preliminary report and the adoption of the Commission's final report. To lose the valuable input which the appearances of witnesses can provide, with the exchange of views and the questioning by members of the Commission, might seriously limit the ability of the Commission to evaluate proposals which are before it and to refine its own proposals so that they are of maximum utility to the Congress, the President and the Chief Justice when they are finally submitted.

A similar analysis proves helpful in evaluating the budgetary provision for twenty-one meetings. Prior to the filing of its preliminary report, the Commission met on seven separate days, including two informal meetings for organizational purposes prior to the official creation of the Commission. At the same rate, the Commission would meet on twenty-one days during the second phase of its work, precisely what is provided for in the budget. (The Congress has provided for the Commission to continue in being for ninety days after the submission of its report. The above projection does make provision for meetings during this period to deal with policy decisions relevant to the termination of the Commission's life.) It must be emphasized again, however, that the problems involved in the second phase of the work are far more complex than those involved in circuit realignment. No recommendations for change in the structure of the Federal appellate courts should be made without full exploration of all foreseeable ramifications. Similarly, for the Commission to make any recommendations for change with respect to internal procedures is a delicate matter, even if such changes were to call for action by the Judicial Conference of the United States rather than by the Congress.

For a proposed budget to fail to provide adequate opportunity for the Commission to develop, to discuss, to consider and to reconsider proposals in these areas would be highly unfortunate. It is difficult, for example, to predict with confidence the number of meetings, or the hours of meeting time, which may be required to formulate, refine and ultimately to accept or reject a proposal for a

new Federal appellate court, such as a National Division of the United States Court of Appeals, urged upon us by the American Bar Association. Viewed in this perspective, and considering the number of proposals, large and small, already before the Commission (some of which are mentioned below), perhaps it would have been prudent for the Commission to have provided for more meetings than have been projected.

We believe, however, that we can live within the proposal as submitted. In this regard, it is worth emphasizing that one half of the commissioners are members of the Congress. They are rarely free to take a full day, much less to spend two or three consecutive days, away from their offices and from the floor. A meeting has its maximum utility, and maximum participation, if it is scheduled to extend for a period of no more than six consecutive hours, including recess time. The Commission has already acted to combine meetings and hearings in order to achieve a reduction of cost, but the results have not been ideal, for inevitably it becomes very difficult for busy commissioners to participate adequately in both phases.

It may be helpful to develop more fully the nature of the agenda which is contemplated for the meetings of the Commission. Following reports from our research consultants, there must be opportunity for discussion of data and conclusions. Particularly, there should be opportunity for the Commissioners to explore with the experts implications with respect to recommendations for change. Subjects likely to require protracted discussion include the denial or limitation of oral argument; reduction in the number of full-dress opinions being written; the use of such alternatives as judgment orders, per curiams and memorandum opinions which are mailed to the parties, but which are not published and which may not be cited as precedent; the use of central staff, analogous to the prevailing practice in some state appellate courts; development of a program for the appointment of commissioners at the appellate level, analogous to the use of magistrates in the District Courts; assessment of the likely impact on future case loads of proposals in the area of habeas corpus; changes in the procedure for judicial review of administrative agencies; the use of two-judge panels as is done by the Court of Appeals for the District of Columbia with respect to motions, to mention but a few. None of these may require quite the time and thought needed by the proposals for a new Court, discussed earlier, but each is complex and difficult and, potentially, of great significance to the administration of justice in the federal system. The list of topics is suggestive rather than exhaustive, as will be seen from the roster of proposed research projects below. Moreover, each involves a policy decision, requiring deliberation and action by the Commission itself.

The Commission hopes to continue the practice of carefully reviewing a draft of its proposed preliminary report, with the opportunity further to review a revised preliminary report before publication.

On the basis of past experience and the widespread interest already in evidence, the Commission may expect literally hundreds of comments and suggestions following publication of its preliminary report. This will certainly be true if the Commission chooses to include alternative recommendations in the preliminary report. The responses will be studied and evaluated, and a final report drafted, revised and approved, following the procedure set forth above with respect to the preliminary report. In short, to accomplish this much it may be possible to reduce the number of days of meetings, but it does not appear prudent to budget for less than the twenty-one days provided in the proposal as submitted.

## II. RESEARCH PROPOSALS

### A. ADEQUACY OF THE PRESENT APPELLATE STRUCTURE OF THE FEDERAL JUDICIAL SYSTEM; UNRESOLVED INTER-CIRCUIT CONFLICTS

A major contention of proponents of change in the existing federal courts of appeal system is that there are serious problems of unresolved inter-circuit conflicts; and that the system lacks capacity to resolve questions of national law, particularly involving statutory interpretation, resulting among other things in undesirable forum-shopping. This assertion is the foundation-stone on which the American Bar Association proposal for a National Division of the United States Court of Appeals is based. Prestigious students of the Federal Judicial system have argued that such deficiency does in fact exist. Equally prestigious witnesses, however, have disputed the contention. At times it has almost seemed that there exists a plethora of solutions without anyone's having substantiated the existence of a problem. True, we have been cited examples of tax statutes which have not been definitively interpreted for long periods, with resultant inequality in the treatment of taxpayers, but more is needed to define the existence

of a problem which would warrant structural change in our judicial system. What problems do in fact exist, of what order of magnitude, of what significance, with what impact?

The following research proposals are designed to provide the necessary data for conclusions on the basis of which the Commission can make recommendations.

- |  |           |
|--|-----------|
| 1. Study of all petitions for certiorari and jurisdictional statements in the Supreme Court for a 2-year period to identify assertions of conflict; to determine how many are valid; and to analyze those conflicts which are verified.....                                  | \$12, 500 |
| 2. Analysis of alleged unresolved intercourt conflicts brought to our attention; history and significance of each.....   | 8, 000    |
| 3. Survey of the bar concerning unresolved intercourt conflicts and unresolved questions of national law, by field of interest. (In each case Government attorneys and members of the academic profession, as well as all segments of the practicing bar, will be surveyed): |           |
| (a) Labor law.....   | 5, 000    |
| (b) Antitrust law.....   | 3, 500    |
| (c) Tax.....   | 6, 500    |
| (d) Securities regulation.....   | 4, 500    |
| (e) Patents.....   | 6, 000    |

(N.B. The patent area is of particular interest because of proposals for centralizing all patent appeals in the Court of Customs and Patent Appeals.)

Subtotal .....	<u>46, 000</u>
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#### B. OTHER RESEARCH RESTRUCTURAL CHANGE

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|---|----------------|
| 4. State court appeals and petitions to U.S. Supreme Court: Statistical study of recent trends and analysis of their implications for alternative routes..... | 10, 000        |
| 5. Study of workload of new court under various proposals received by the Commission.....   | 1, 400         |
| Subtotal .....  | <u>11, 400</u> |

#### C. ORAL ARGUMENT AND OPINION PRACTICES

A recent time-study of the third circuit shows that the writing and editing of opinions consumes close to one-half of judge's case-related time. Understandably a number of circuits have developed practices designed to effect major savings in this area. The second circuit, e.g., decides a substantial number of its cases from the bench without opinion. The area is of central importance in evaluating internal procedures.

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|---|----------------|
| 6. A 3-circuit survey of attitudes of lawyers practicing in the courts of appeal (through the Federal Judicial Center).....                       | 35, 000        |
| 7. Nature and volume of opinions in habeas corpus litigation (added data and analysis in connection with a study independently commissioned)..... | 1, 500         |
| 8. Length of opinions as a function of number of opinions; impact of provisions that unpublished opinions not be cited as precedent.....          | 26, 000        |
| Subtotal .....  | <u>62, 500</u> |

#### D. ADMINISTRATIVE APPEALS

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|--|----------------|
| 9. The Commission is working closely with the Administrative Conference of the United States to examine methods for improving judicial review of administrative decisions. Immigration cases, NLRB cases, environmental law litigation, are all significant components of the large volume of such cases now before the U.S. Courts of Appeals. Review of administrative law cases which come to the Courts of Appeals from the District courts must also be considered. The Administrative Conference is expected to bear a significant share of total cost. Our estimate of the Commission's share of total cost ..... | <u>55, 000</u> |
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## E. STATISTICAL ANALYSIS AND PROJECTIONS

10. Weighted case loads—It is immediately obvious to everyone concerned with the work load of the courts of appeals that some cases take far more time than others. A petition to enforce an order of the NLRB may take almost no judge-time whatever; a complicated appeal in an environmental law case may require, literally, 100 times as many hours. Yet, we have virtually no tools for dealing with these differences. The Federal Judicial Center has tentatively projected a study of "weighted case loads" in the District of Columbia circuit. It is not however, a "typical" circuit; on the contrary, its "mix" of cases is quite atypical. To extend the study to two other circuits would require-----	20,000
11. Rates of appeal—It has been asserted that the rate of appeal has been rising rapidly in the Federal courts, but the assertion has been denied. A careful study of this complex question is needed.---	4,000
Subtotal -----	24,000

## F. COSTS TO LITIGANTS

12. A study of place of argument, legal fees, use of records as it relates to the costs to litigants would be highly desirable-----	14,000
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## G. OTHERS PROPOSALS

13. Use of 2-judge panels, analogous to present practices in the District of Columbia circuit for disposition of motions. This is a proposal which is vigorously pressed, having been made by the American Bar Foundation Study Group in 1968. Evaluation of the proposal and of present practices requires, among other things, a careful review of dissents in the courts of appeal, considered on a national basis -----	5,000
14. Availability of records and briefs filed in the various courts of appeals; a national depository (the problem has been put on our agenda by Commission action)-----	2,000
Subtotal -----	7,000

## H. STUDY IN DEPTH OF A COURT OF APPEALS

There are obvious advantages to a thorough study of 1 or 2 courts of appeals as operating institutions. The interplay of different rules and procedures can only be revealed by studying 1 court as an entity. How can a court eliminate delays which in some circuits, at least, are the source of serious complaints? Ideally, 2 courts should be studied, but this might easily cost \$50,000 to \$60,000. We would like to project a modest \$25,000 for 1 court of appeals-----	25,000
Total -----	244,900

## CONCLUSION

The OMB review of the Commission's budget proposal, referred to above, characterized our proposed expenditure for consultants and experts as "reasonable but conservative." A careful review of our research plans convinces us that the OMB characterization is fully justified; that a larger sum might well have been appropriate, but that the requested authorization can be made to assure an adequate research foundation on the basis of which the Commission will be enabled to discharge the obligations imposed upon it by the Congress.

Mr. LEVIN. Would you prefer it on any items other than research?

I would be pleased to give it. I think all the others are clear. For example, personnel compensation of Commissioners is governed by statute. The staff proposal lists each position, and we are told it is very modest. OMB said, you should increase it.

On the experts and consultants, I would be very pleased to submit further data on any other subject you like.

Mr. KASTENMEIER. The plan for 21 meetings and 20 hearings must have been arrived at after some thought, particularly since it has been questioned by the OMB. It might be well to have a statement of justification for the number of meetings and hearings.

Mr. LEVIN. I would be delighted to do that.

Mr. COHEN. The difficulty is, when you look at the original budget, the House bill appropriated \$50,000, the Senate bill appropriated \$370,000. At conference they arrived at \$270,000. Now, what you have is a Commission which has completed half of its work and now needs three times more the amount of money.

Mr. LEVIN. If I may suggest, sir, the \$50,000 was for only circuit realignment. That was a notion that the plan was there already, No. 1. And the subsequent one, the \$300,000 sum, was for a total life of 18 months, 15 plus 3. What is being suggested now is a 9-month addition. I spoke to the person who prepared the original budget. It really did not start off with what do you need to do, because nobody was on board. I was not on board. The Commission was just starting. So, instead of asking, what do you need to do, they said, could we come up with some figure and prepare it.

Mr. COHEN. Even with an extension, you have added only half again as much time as the original life of the Commission, yet at twice the cost. That is what is going to be difficult for us to justify.

Mr. LEVIN. I will try very hard to get every detail down. It would be my pleasure to respond to you or staff there if there are any questions about the subsequent submission.

Mr. COHEN. That is all I have, Mr. Chairman.

Mr. KASTENMEIER. I just wanted to ask, apart from your request for money, is the Commission considering the three-judge court or the proposal for a mini-Supreme Court?

Mr. LEVIN. On the three-judge court, we have done very little on it because of the tremendous history. I would not be surprised if no change develops in the interim, that we will make a recommendation on it. We heard from ACLU, for example, at our last hearings. We just asked them, what is your position on the three-judge court. And it was Mr. Wulf who was testifying on another matter. He responded, he said, even though the legal defense fund has come out against it, our position is we will speak neither for it nor against. That is one of the few times he said the ACLU has disagreed with the position of Mr. Anthony G. Amsterdam. It would not surprise me that we have enough already in the record in various places and from conferences that we may speak of a three-judge court if the Commission deems it appropriate. Certainly, I would expect us to expedite the notion of direct appeals to the U.S. Supreme Court in antitrust cases, if nothing has happened in Congress until then. With respect to the ICC three-judge courts on which the Administrative Conference has spoken: Following the chairman's suggestion, things that they were finished working with, we do not replot; we take what they have and we consider it briefly. And on the ICC arrangement for direct appeal to the U.S. Supreme Court, I would expect us to speak to that if nothing has happened legislatively before that.

On the minicourt, our basic approach is, I think we are not focusing on the proposal as such. We have a number of suggestions for what are best termed a national division of the U.S. Court of Appeals. It is very different than the minicourt, although it has often been confused with it. It is very, very different, and it comes in different packages.

We will address ourselves and we will work very hard addressing ourselves to the question whether additional appellate capacity is needed within the system and under the Supreme Court, and how it may relate to the Supreme Court. At our April 1 and 2 hearings we heard from Justice Arthur Goldberg, who was good enough to come down and testify, from Ervin Griswold, from Judge Shirley Hufstедler, the president of the ABA, Judge Gibson of the eighth circuit, Clement Haynsworth, chief judge of the fourth circuit. Paul Freund came down in opposition because, in a gentle kind way, he saw things in that proposal from his vantage point that he found questionable. I do not name all the witnesses. We had a few from the tax section of the ABA—the dean of the University of Pennsylvania Law School. They spoke to a variety of things.

We have had any number of individual conferences. I would be surprised if we did not address ourselves to the notion of an additional immediate appellate court and how it can avoid the fourth tier, what its impact would be on the United States Supreme Court, and so on. I do not anticipate a recommendation for a mini-Supreme Court. God knows how the appellations get fixed.

There is a great sensitivity on the part of many of the Commissioners—I need not name them. You know some of your colleagues, you know some of the other people from the past—to make sure that what we do is not just simply to see papers passed, but to see that justice is done.

Mr. KASTENMEIER. This is the last question I have.

Are you considering in addition to caseloads any jurisdiction, in terms of Federal appellate system, the cost of litigation, the cost of pursuing matters through appeal for a litigant?

Mr. LEVIN. We have hit it tangentially a number of times. We were deeply involved in circuit realignment and had occasion to consider cost factors dictated by geographical factors. In addition to paying the cost of the lawyer's plane ticket, the client may have to pay for the lawyer's time while he is riding on the plane. We have hit it in connection with denial of oral argument, we have hit it in connection with other devices. We have not so far attempted to address ourselves directly to cost as such. But it is very much involved in the impact on the litigant on a number of these other things. We are very concerned with that. It comes up directly in connection, let us say, with putting all patent appeals in one court—panels of the court certainly may have to travel around the country. Otherwise, it is unfair to the litigant. That is the way so far that that has been coming up.

Mr. KASTENMEIER. I agree. I think that it is tangential to your work. But obviously, the cost of seeking justice in the Federal appellate court system is a factor in determining whether justice is had or denied.

Mr. LEVIN. The Commission has been sensitive to that. There is another cost in terms of Government that comes up. One important official in the Department of Justice tells me in civil litigation in the ninth circuit that invariably they have to file a supplemental brief, because the delay is such that from the time they have submitted their brief until the time you present your argument, the law is changed. This is a cost.

Mr. KASTENMEIER. Professor Levin, both Congressman Cohen and myself and members of the committee who could not be here today thank you very much for your presentation. The Commission has a rather difficult task. We will be appreciative of the additional materials that you will be furnishing us.

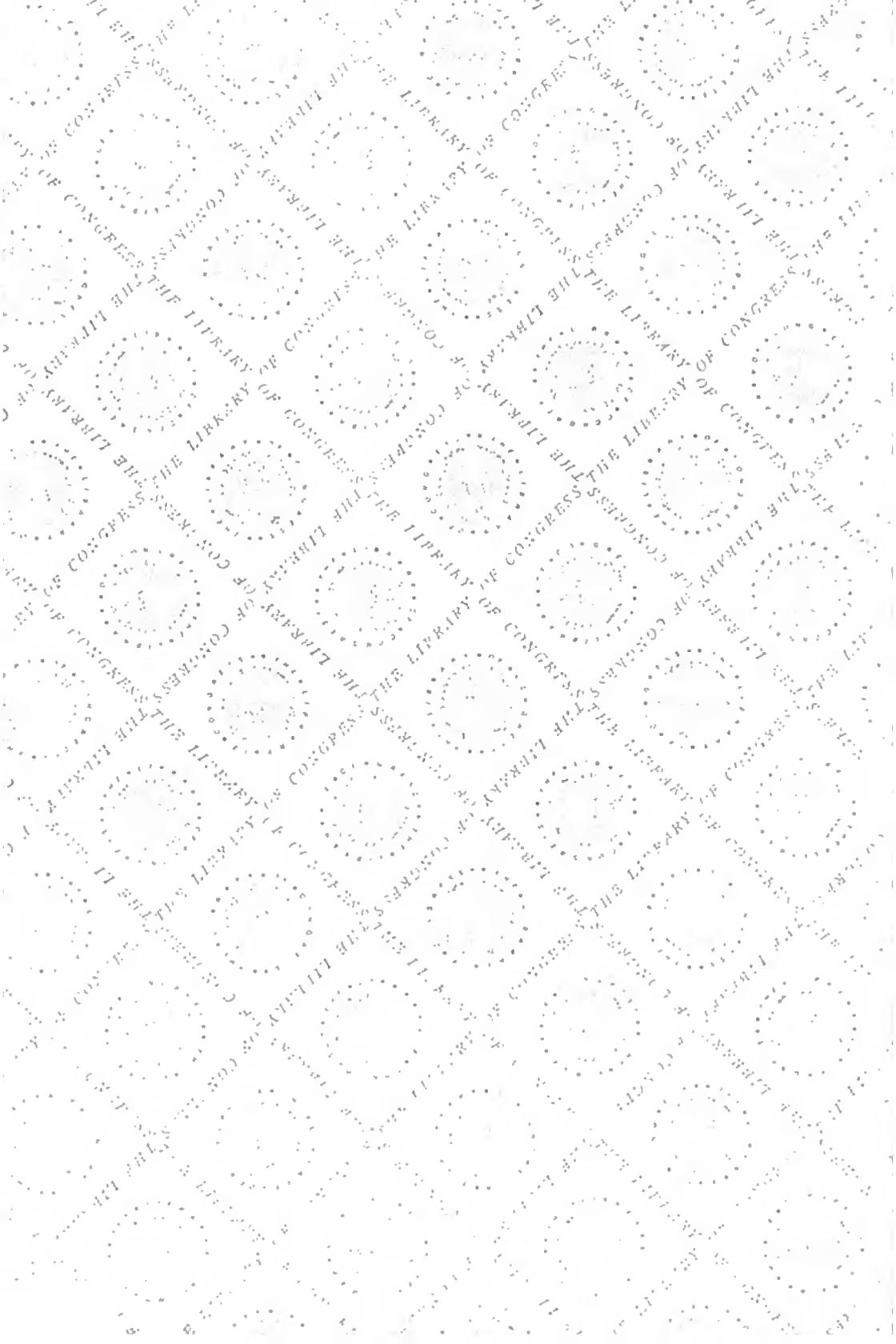
Until the time when this subcommittee will meet in markup session on this and other bills, the committee stands adjourned.

[Whereupon, at 12:05 p.m., the subcommittee was adjourned, subject to the call of the Chair.]

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