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A POSTSCRIPT ON PRECEDENT IN THE DIVIDED FIFTH CIRCUIT

by
*Thomas E. Baker**

I.

OCTOBER 1, 1981, marked a milestone in the history of our federal courts.¹ On that date, in moving closing ceremonies held in the Great Hall of the Court of Appeals Building in New Orleans, the United States Court of Appeals for the Fifth Circuit as created in 1891 ended.² On that date, in equally memorable ceremonies the former Fifth

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1. See N.Y. Times, Oct. 2, 1981, at A14, col. 1.
2. The Program of Fifth Circuit Closing Ceremonies included:

CLOSING CEREMONIES

HONORABLE JOHN G. GODBOLD
CHIEF JUDGE
PRESIDING

Processional of Judges

National Anthem

U.S. Navy Band New Orleans

G.F. Blalock, Director
Chief Warrant Officer, USN
Senior Chief Karl D. Fite, Conductor

Call to Order

Gilbert F. Ganuchau, Clerk

Court Business

Adjournment of Court

Remarks and Recognition of
Distinguished Guests

History of the U.S. Court of Appeals,
Fifth Circuit

Professor Harvey Couch

History of the Division of the Court

Honorable Griffin B. Bell

Remarks

Honorable Lewis F. Powell, Jr., Circuit
Justice

Remarks

Honorable Warren E. Burger
The Chief Justice of the United States

Presentations

Chief Judge John C. Godbold
Circuit Judge Charles Clark

Closing Remarks

Chief Judge John C. Godbold

Commemorative Program for the Closing and Opening Ceremonies for the Division of the United States Court of Appeals for the Fifth Circuit (Oct. 1, 1981, New Orleans, Louisiana). Only a limited version of the former Fifth Circuit survives until July 1, 1984.

Circuit was succeeded by two new courts, the new Fifth Circuit³ and the new Eleventh Circuit.⁴ An Article in the September 1981 issue of this

3. The Program of Fifth Circuit Opening Ceremonies included:
OPENING CEREMONIES

HONORABLE CHARLES CLARK
CHIEF JUDGE
PRESIDING

Call to Order	Gilbert F. Ganucheau, Clerk
Introduction and Oath to Office of Circuit Executive	C. Raymond Judice
Introduction of Attorneys' Advisory Committee	
Bob F. Wright, Esquire	M. Truman Woodward, Esquire
Leonard B. Melvin, Esquire	T. Kenneth Watts, Esquire
Finis Cowan, Esquire	Professor Thomas B. Black
Presentation of Local Rules	
Admission of Attorneys	Morris Harrell, Esquire President-Elect American Bar Edward F. Glusman, Esquire President, Louisiana Bar Leonard B. Melvin, Esquire President, Mississippi Bar Wayne Fisher, Esquire President, Texas Bar Betty H. Olchin, Esquire President, Panama Canal Zone Bar
Remarks	Honorable Rex E. Lee Solicitor General of the United States
Remarks	Circuit Justice
The New Fifth Circuit	Chief Judge Charles Clark
Adjournment	
Benediction	Rabbi Murray Blackman Temple Sinai

Commemorative Program for the Closing and Opening Ceremonies for the Division of the United States Court of Appeals for the Fifth Circuit (Oct. 1, 1981, New Orleans, Louisiana).

4. The Program of Eleventh Circuit Opening Ceremonies included:

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

PROGRAM SPEAKERS

National Anthem

Douglas N. Campbell, Esq., Attorney, Atlanta, Georgia

Opening Remarks—History of Court

Honorable Griffin B. Bell, former Attorney General of the United States;
former United States Circuit Judge, Fifth Circuit

Significance of Oath and the Judicial Robe

Honorable Elbert P. Tuttle, Senior Judge of the U.S. Court of Appeals,
former Chief Judge, U.S. Court of Appeals, Fifth Circuit

Presentation of Gavel

Broox G. Garrett, Esq., Vice President, Alabama State Bar Association

Admission of Attorneys

Broox G. Garrett, Esq., Vice President, Alabama State Bar Association

Samuel E. Smith, Esq., President, The Florida Bar

J. Douglas Stewart, Esq., President, State Bar of Georgia

Morris Harrell, Esq., President-Elect, American Bar Association

Journal, entitled *Precedent Times Three: Stare Decisis in the Divided Fifth Circuit*⁵ (hereinafter referred to as *Precedent Times Three*), considered "the novel issues of stare decisis raised by this division."⁶ That Article prophesied that the precedents of the former Fifth Circuit decided before the division would be binding on each multiple of the divided court; the limited version of the former Fifth Circuit that survives the split, the new Fifth Circuit, and the new Eleventh Circuit.⁷ "But prophecy, however honest, is generally a poor substitute for experience."⁸ Hence, the purpose of this *Postscript* is to describe briefly the early experience of these three courts regarding precedent. First, the September 1981 Article is summarized in order to establish a context. A report of the three courts' treatment of precedent follows. Finally, this Article ends with an evaluation of how the two new courts are faring and a few general observations on circuit splitting.

II.

Precedent Times Three told the history of the three-tiered federal court system by tracing the evolution of the intermediate court.⁹ That account

CEREMONIES

Honorable Collins J. Seitz, Chief Judge, Third Circuit
Most senior Chief Judge of U.S. Court of Appeals

Honorable Charles Clark, Chief Judge, Fifth Circuit
Newest Chief Judge of U.S. Court of Appeals

From the Executive Branch—Honorable William French Smith,
Attorney General of the United States

From the Legislative Branch—Honorable Howell T. Heflin,
United States Senator from Alabama, Senior Member of Senate Judiciary
Committee from an Eleventh Circuit State

From the State Courts—Honorable Alan C. Sundberg,
Chief Justice, Supreme Court of Florida

From the Supreme Court—Honorable Lewis F. Powell, Jr.,
Associate Justice, Supreme Court of the United States

From the Chief Justice of the United States—
Honorable Warren E. Burger, Chief Justice

Benediction
Rev. Howard W. Creecy, Sr.
Atlanta, Georgia

Commemorative Program United States Court of Appeals Eleventh Circuit Opening Ceremonies (Oct. 2, 1982, Atlanta, Georgia).

5. Baker, *Precedent Times Three: Stare Decisis in the Divided Fifth Circuit*, 35 Sw. L.J. 687 (1981).

6. *Id.* at 687. The literature concerning the division is quite extensive. See generally sources cited *id.* at 696 nn.77 & 79; 697 n.84; 699 n.99; 701 n.110; and 707 nn.164-66; Ainsworth, *Fifth Circuit Court of Appeals Reorganization Act of 1980*, 1981 B.Y.U. L. REV. 523; Heflin, *Fifth Circuit Court of Appeals Reorganization Act of 1980—Overdue Relief for an Overworked Court*, 11 CUM. L. REV. 597 (1980-1981); Tate, *The Last Year of the "Old" Fifth (1891-1981)*, 27 LOY. L. REV. 689 (1981).

7. Baker, *supra* note 5, at 706-07.

8. *West Ohio Gas Co. v. Public Utils. Comm'n*, 294 U.S. 79, 82 (1935) (Cardozo, J.).

9. Baker, *supra* note 5, Part II, section A.

demonstrated a persistent congressional preoccupation with the middle tier of the federal court structure. The Fifth Circuit Court of Appeals Reorganization Act of 1980¹⁰ thus may be viewed as the latest manifestation of this preoccupation. The specific events leading up to the division also are detailed in *Precedent Times Three*.¹¹ The initial congressional response to the former Fifth Circuit's surfeited docket was to add judges.¹² When this attempted solution proved inadequate, the Commission on Revision of the Federal Court System was appointed in 1972 to study the problem and to make recommendations.¹³ After a few false starts Congress enacted the Omnibus Judgeship Act of 1978.¹⁴ Besides adding still more judges, the 1978 Act provided that the Fifth Circuit judges could arrange themselves into administrative units and sit en banc without all active judges participating.¹⁵ This congressional delegation led to the Fifth Circuit Judicial Council arrangement of the Court into two administrative units, lettered Unit A and Unit B, that corresponded geographically to the two new courts.¹⁶ By then the congressional solution of adding more judges had become the problem. So many judges, sitting in so many multiples of three, made intracircuit decisional conflicts inevitable. Furthermore, the traditional unifying function of the en banc procedure had become unwieldy due to its size.¹⁷ The judges unanimously requested relief and Con-

10. Pub. L. No. 96-452, 94 Stat. 1994 (1980) (to be codified at 28 U.S.C. §§ 1, 41) [hereinafter cited as Reorganization Act].

11. Baker, *supra* note 5, Part II, section B. For a more recent account of the period from a sitting judge's perspective, see generally Ainsworth, *supra* note 6. For an account of the period from the senator who co-sponsored the legislation, see generally Heflin, *supra* note 6.

12. Baker, *supra* note 5, at 696-97.

13. *Id.* at 697-99.

14. Pub. L. No. 95-486, 92 Stat. 1629 (codified at scattered sections of 28 U.S.C. (Supp. IV 1980)); see Baker, *supra* note 5, at 699-703.

15. 28 U.S.C. § 41 (Supp. IV 1980); see Baker, *supra* note 5, at 702 n.118.

16. Baker, *supra* note 5, at 703.

17. Ainsworth, *supra* note 6, at 526-28; Tate, *supra* note 6, at 690-93. Originally, the en banc function was undisturbed. On Jan. 14, 1981, after the division legislation was enacted, the Judicial Council of the United States Court of Appeals for the Fifth Circuit adopted the following Interim Local Rule:

For panel decisions by Administrative Units of the Fifth Circuit bearing date on and after Jan. 15, 1981:

Whenever a majority of the Judges of Administrative Unit A who are in regular active service orders an appeal which has been submitted to a panel of Administrative Unit A to be reheard en banc, it shall be reheard by an en banc court composed of all judges of Administrative Unit A who are in regular active service.

Whenever a majority of the Judges of Administrative Unit B who are in regular active service orders an appeal which has been submitted to a panel of Administrative Unit B to be reheard en banc, it shall be reheard by an en banc court composed of all judges of Administrative Unit B who are in regular active service.

Decisions not specifically designated as made by an Administrative Unit are governed entirely by Fifth Circuit Local Rule 16. During the period that this Interim Rule conflicts with any provision of Fifth Circuit Local Rule 16, this Interim Local Rule shall control. All non-conflicting provisions of Local Rule 16 remain in full force and effect.

gress responded with the Reorganization Act.¹⁸ The Act divided the former Fifth Circuit into two completely autonomous judicial circuits: the new Fifth Circuit, composed of the District of the Canal Zone, Louisiana, Mississippi, and Texas; and the Eleventh Circuit, composed of Alabama, Florida, and Georgia.¹⁹

The Reorganization Act framed the central inquiry in *Precedent Times Three*: What would be the precedential status of former Fifth Circuit decisions, first, in the limited version of the Fifth Circuit that temporarily survives the division, second, in the new Fifth Circuit, and third, in the new Eleventh Circuit? Based on public statements and the results of an informal questionnaire, the prior Article prophesied that all three courts would view former Fifth Circuit case law as binding authority.²⁰ The issue then became how best to accomplish this task. After considering the three principal mechanisms available, statute, stare decisis, and local court rule, the logic of the situation selected the local court rule.²¹ Congress had neglected to provide an express statutory solution.²² As alternative mechanisms for installing the decisions of the former Fifth Circuit as binding precedents in the two new courts, an informal judicial consensus, a panel decision, and an en banc decision were each considered and discarded.²³ A judicial consensus was deemed too informal and too readily circumvented. Neither the mechanism nor the underlying policy of stare decisis would be any more than an announcement of judicial consensus. At either the three-judge panel or the en banc level, the announcement that all future panels of the two new courts would be bound by former Fifth Circuit precedents would be dictum.²⁴ Therefore, the only remaining mechanism was suggested; a rule was proposed for adoption by the two new courts as part of their en banc procedures.²⁵ The proposed local rule would have allowed a panel of the new courts to accept or reject former Fifth Circuit precedent. As a limitation on this authority, however, a panel decision overruling the former Fifth Circuit would be circulated to the entire court and would be subject to initial en banc consideration in the new court.

The analysis in *Precedent Times Three* next turned to whether the precedents of the former Fifth Circuit really should bind the two new courts.²⁶ The first considerations were the institutional tensions among panels and between panels and the en banc court. The formal en banc procedure developed when it became possible to have multiple panels of three judges.

See also infra notes 42, 46 & 87. For a discussion of the origin of the power to reorganize into internal divisions, see Baker, *supra* note 5, at 698-703.

18. *See* Baker, *supra* note 5, at 703-05.

19. Reorganization Act, *supra* note 10, §§ 1, 41.

20. Baker, *supra* note 5, Part III, section A.

21. *Id.* Part III, section B.

22. *Compare id.* text accompanying notes 174-91 with *id.* text accompanying notes 297-314.

23. *Id.* at 711-17.

24. *Id.* at 712-17.

25. *Id.* at 719.

26. *Id.* Part III, section C.

En banc review preserves two essential and related institutional values; one law of the circuit exists, and a majority of the judges establishes it.²⁷ The rule of interpanel accord is a necessary corollary to the en banc function. This rule requires that a panel "treat earlier decisions of any panel as binding precedent, absent intervening en banc or Supreme Court action."²⁸ Against this background *Precedent Times Three* considered whether the division made it appropriate to apply these intracircuit devices between the former Fifth Circuit and the two new courts.

According to the analysis in the prior Article, former Fifth Circuit decisions would bind the version of that court that temporarily survives the division based on nothing more than an obvious application of the rule of interpanel accord.²⁹ Because the new Fifth Circuit and the new Eleventh Circuit stand in the same relation to the parent circuit, the significance of the former Fifth Circuit precedents in each of the two new circuits should be the same. Federal court history did not suggest a solution. The 1929 division of the Eighth Circuit and the creation of a new Tenth Circuit was the only similar division. In that division neither Congress nor the two courts explicitly dealt with the precedent problem.³⁰ The analysis next turned to the Reorganization Act itself. It was argued that the legislative intent behind the 1980 Act was to create two new courts rather than to continue the former Fifth Circuit in one or both new courts.³¹ *Precedent Times Three* concluded, "Congress apparently intended the two new courts of appeals to be autonomous and independent, one from another and each from the former Fifth Circuit."³² Finally, the mechanism and policy of stare decisis, as analyzed in the prior Article, did not compel the wholesale transfer of former Fifth Circuit precedent into the two new courts:

While there is no question that the law of the former Fifth Circuit should be deemed uniquely persuasive for a time, no sufficiently weighty policy justification exists for requiring panels of the new courts to determine what the rule of former Fifth Circuit stare decisis means with enough precision to follow it, but without the authority to create law interstitially.³³

This, in broad-brush summary, was the logic behind *Precedent Times Three*. The Article prophesied that the judges on the two new courts would consider themselves bound by former Fifth Circuit precedent, it proposed a local rule to accomplish the goal, and then logically argued against the whole approach to the problem. "So much for the fallacy of

27. *Id.* at 721 n.261.

28. *Id.* at 723; see also *infra* text accompanying note 69.

29. Baker, *supra* note 5, at 724-26. The continuation of the former Fifth Circuit raises many complex issues of precedent, only some of which have been addressed by the two new courts. See *infra* Part III.

30. Baker, *supra* note 5, at 726-28.

31. *Id.* at 728-30.

32. *Id.* at 731 (footnote omitted).

33. *Id.* at 734 (footnote omitted).

logical form."³⁴ By now, experience under the Reorganization Act may be substituted for the prophecy. This *Postscript* turns to that experience.

III.

Briefly stated, early experience³⁵ under the Reorganization Act demonstrates that predivision decisions of the former Fifth Circuit are binding precedents in all three courts. Detailed here, however, are some significant qualifications to this general rule.

A.

As part of the statutorily imposed transition procedures, the former Fifth Circuit continues to exist for matters that were submitted for decision before October 1, 1981.³⁶ As part of their individual internal operating procedures, both new courts have established the initial oral argument date as the date of submission in oral argument appeals, and the date on which the third screening panel judge concurs in summary or nonargument calendar disposition as the submission date for all other appeals.³⁷ Beginning with *Bright v. United States*,³⁸ the last predivision en banc decision of the former Fifth Circuit, appeals decided by this temporary version of the former Fifth Circuit are labeled in *Federal Reporter, Second Series* with an asterisk and the notation "Former Fifth Circuit case, Section 9(1) of Public Law 96-452—October 14, 1980."³⁹ To date,⁴⁰ approximately two-thirds of the estimated total of three hundred pending asterisk appeals⁴¹ have been decided.⁴² These asterisk decisions include appeals decided by panels of Unit A⁴³ and Unit B⁴⁴ and panels composed before the

34. The fallacy to which I refer is the notion that the only force at work in the development of the law is logic. . . .

And the logical method and form flatter that longing for certainty and for repose which is in every human mind. . . .

So much for the fallacy of logical form.

Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 465, 468 (1897).

35. The cut-off date for this Article was Feb. 25, 1982. All decisions of the three courts were considered through volume 666 of *Federal Reporter, Second Series*.

36. Reorganization Act, *supra* note 10, § 9(1).

37. UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, INTERNAL OPERATING PROCEDURES VI.A, at 18 (Oct. 1, 1981); UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, INTERNAL OPERATING PROCEDURES 8, at 21 (Oct. 1, 1981).

38. 658 F.2d 999 (5th Cir. 1981) (en banc). The former court announced this decision as part of the Closing Ceremonies. *See supra* note 2.

39. 658 F.2d at 999 n.*.

40. *See supra* note 35.

41. Harvey, *The Division of An Historic Circuit*, NAT'L L.J., Nov. 2, 1981, at 1, 29, col. 3.

42. As of Feb. 1, 1982, the various units had the following number of appeals awaiting decision after argument or submission: Preunitization panel Fifth Circuit: 4; Preunitization en banc Fifth Circuit: 7; Unit A panel: 20; Unit A en banc: 2; Unit B panel: 58; Unit B en banc: 2. FIFTH CIRCUIT REPORT OF DECISIONS AFTER ARGUMENT OR SUBMISSION (Feb. 1, 1982).

43. *E.g.*, Dawson v. Childs, 665 F.2d 705 (5th Cir. 1982); Alford v. City of Lubbock, 664 F.2d 1263 (5th Cir. 1982); Fernandes v. Limmer, 663 F.2d 619 (5th Cir. 1981); Washington

internal reorganization into units,⁴⁵ as well as en banc decisions of the former Fifth Circuit.⁴⁶ It comes as no surprise that among these asterisk cases, the rule of interpanel accord has been applied by Unit A panels⁴⁷ and by Unit B panels⁴⁸ to precedents of the former Fifth Circuit decided before the effective date of the Reorganization Act.⁴⁹ Because these appeals were decided by the former Fifth Circuit, the application of former Fifth Circuit precedent is of little moment. Somewhat more surprising, however, are asterisk decisions that rely on previously decided decisions of the new Fifth Circuit⁵⁰ or the new Eleventh Circuit.⁵¹ The significance afforded former Fifth Circuit precedent in the two new courts is of greater interest.⁵²

v. Watkins, 662 F.2d 1116 (5th Cir. 1981); United States v. Lacey, 661 F.2d 1021 (5th Cir. 1981); Barnstone v. University of Houston, 660 F.2d 137 (5th Cir. 1981); City of Seabrook v. E.P.A., 659 F.2d 1349 (5th Cir. 1981); Lyles v. Estelle, 658 F.2d 1015 (5th Cir. 1981); United States v. Platenburg, 657 F.2d 797 (5th Cir. 1981).

44. *E.g.*, Staton v. Wainwright, 665 F.2d 686 (5th Cir. 1982); United States v. Nicoll, 664 F.2d 1308 (5th Cir. 1982); Alderman v. Austin, 663 F.2d 558 (5th Cir. 1981); United States v. Tobias, 662 F.2d 381 (5th Cir. 1981); United States v. Hawkins, 661 F.2d 436 (5th Cir. 1981); Oldham v. Schweiker, 660 F.2d 1078 (5th Cir. 1981); United States v. Outler, 659 F.2d 1306 (5th Cir. 1981); Miller v. Turner, 658 F.2d 348 (5th Cir. 1981); Helms v. McDaniel, 657 F.2d 800 (5th Cir. 1981).

45. *E.g.*, United States v. Flynn, 664 F.2d 1296 (5th Cir. 1982); *In re* Grand Jury Proceedings, 663 F.2d 1057 (5th Cir. 1981); Kite v. Marshall, 661 F.2d 1027 (5th Cir. 1981); Helms v. Jones, 660 F.2d 120 (5th Cir. 1981) (on remand); New Orleans Pub. Serv., Inc. v. FERC, 659 F.2d 509 (5th Cir. 1981); Bradley v. HUD, 658 F.2d 290 (5th Cir. 1981); United Gas Pipeline Co. v. FERC, 657 F.2d 790 (5th Cir. 1981).

46. Most of the asterisk en banc decisions were decided by the entire former court. *E.g.*, Broussard v. South Pac. Transp. Co., 665 F.2d 1387 (5th Cir. 1982) (en banc); Brown v. Wainwright, 665 F.2d 607 (5th Cir. 1982) (en banc); United States v. City of Miami, 664 F.2d 435 (5th Cir. 1981) (en banc); Muir v. Alabama Educ. Television Comm'n, 662 F.2d 1110 (5th Cir. 1981) (en banc); Guice v. Fortenberry, 661 F.2d 496 (5th Cir. 1981) (en banc); Aretz v. United States, 660 F.2d 531 (5th Cir. 1981) (en banc); Estate of Bright v. United States, 658 F.2d 999 (5th Cir. 1981) (en banc). A few were decided by unit en banc courts. *E.g.*, Spiess v. C. Itoh & Co., 664 F.2d 480 (5th Cir. 1981) (Unit A en banc); Washington v. Watkins, 662 F.2d 1116 (5th Cir. 1981) (Unit A en banc); Williams v. Blackburn, 661 F.2d 1020 (5th Cir. 1981) (Unit A en banc); United States v. Hamm, 659 F.2d 624 (5th Cir. 1981) (Unit A en banc). *See also supra* note 17.

47. *E.g.*, United States v. Colacurcio, 659 F.2d 684, 687 (5th Cir. 1981); Howard v. Gonzales, 658 F.2d 352, 359 (5th Cir. 1981).

48. *E.g.*, United States v. Adamson, 665 F.2d 649, 656 (5th Cir. 1982); United States v. Thevis, 665 F.2d 616, 626 (5th Cir. 1982); Wilson v. Taylor, 658 F.2d 1021, 1034-35 (5th Cir. 1981).

49. Of course, the rule never had application to the en banc court. Baker, *supra* note 5, at 723-24.

50. *E.g.*, Rivera v. City of Wichita Falls, 665 F.2d 531, 534 n.4 (5th Cir. 1982); Alford v. City of Lubbock, 664 F.2d 1263, 1266 (5th Cir. 1982); Royal Bank of Canada v. Trentham Corp., 665 F.2d 515, 519 (5th Cir. 1981). For the former Fifth Circuit to consider itself bound by new Fifth Circuit decisions makes little sense. *See* Baker, *supra* note 5, at 725-26. Perhaps, this can be explained by the new court's self-image as a mere continuation of the old court. *See generally infra* Part III, section B.

51. *E.g.*, United States v. Davis, 666 F.2d 195, 201 (5th Cir. 1982); United States v. Dean, 666 F.2d 174, 178 (5th Cir. 1982). For the former Fifth Circuit to consider itself bound by new Eleventh Circuit decisions makes even less sense than deferring to new Fifth Circuit decisions. *See* Baker, *supra* note 5, at 723-24.

52. The various categories of precedents raise a citation problem. Careful lawyers and judges must heed the judicial distinctions based on dates. In one asterisk court opinion, decisions of the former Fifth Circuit were cited from before and after Oct. 1, 1982. Cases

B.

While the new Eleventh Circuit had addressed the problem of precedent directly,⁵³ the position of the new Fifth Circuit must be gleaned from the court's "careful ambiguities and silences."⁵⁴ The new Fifth Circuit seems to view itself as a continuation of the former Fifth Circuit.⁵⁵ Neither the new Fifth Circuit's local rules⁵⁶ nor its internal operating procedures⁵⁷ address the precedent issue. No new Fifth Circuit en banc court has considered the question. New Fifth Circuit panel opinions have not discussed the issue directly. Several panel decisions in the new court, however, have expressly invoked the rule of interpanel accord and relied on former Fifth Circuit decisions.⁵⁸ In one new court decision the panel went so far as to apply the rule of interpanel accord to rely on an asterisk decision, a former Fifth Circuit decision decided after the effective date of the Reorganization Act.⁵⁹ Additionally, in referring to decisions of the former Fifth Circuit, several panels of the new Fifth Circuit have used language suggesting that the new court is actually a continuation of the old court.⁶⁰

Thus the new Fifth Circuit seems to have followed the approach taken by the Eighth Circuit when it was divided to create the Tenth Circuit. The new Fifth Circuit has gone about its business following its prior prece-

before that date were cited "(5th Cir. [year])." Cases after that date were cited "(Former 5th Cir. [year])." *United States v. McRary*, 665 F.2d 674 (5th Cir. 1982). This system, however, does not distinguish new Fifth Circuit cases. Perhaps this is appropriate if the new Fifth Circuit is a continuation of the old. See *infra* Part III, section B. One solution is to include the month and day of decision in the parenthetical, assuming that the reader will have a working knowledge of the pertinent principles of precedents.

53. See *infra* Part III, section C.

54. "[T]he careful ambiguities and silences of the majority opinion call for a full exposition of the [issue] . . ." *Bridges v. California*, 314 U.S. 252, 279 (1941) (Frankfurter, J., dissenting).

55. This impression is shared by at least two other commentators. See Keeffe, *Browser at Large*, 68 A.B.A. J. 220, 220 (1982); Tate, *supra* note 6, at 691-92; cf. Ainsworth, *supra* note 6, at 526-31.

56. See generally RULES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT—SUPPLEMENTING THE FEDERAL RULES OF APPELLATE PROCEDURE (Oct. 1, 1981).

57. See generally UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT INTERNAL OPERATING PROCEDURES (Oct. 1, 1981).

58. *E.g.*, *United States v. Brummitt*, 665 F.2d 521, 526 (5th Cir. 1981); *Raqueno v. Immigration & Naturalization Serv.*, 663 F.2d 555, 556 (5th Cir. 1981); *Placid Inv. Ltd. v. Girard Trust Bank*, 662 F.2d 1176, 1178 (5th Cir. 1981); *Ellis v. Schweiker*, 662 F.2d 419 (5th Cir. 1981); *Ryals v. Estelle*, 661 F.2d 904, 906 (5th Cir. 1981); *Vasquez v. McAllen Bag & Supply Co.*, 660 F.2d 686, 688 (5th Cir. 1981).

59. *Laje v. R.E. Thomason Gen. Hosp.*, 665 F.2d 724, 729 (5th Cir. 1982) (citing *Wilson v. Taylor*, 658 F.2d 1021 (5th Cir. 1981)); see also *Steere Tank Lines, Inc. v. ICC*, 666 F.2d 255, 256 (5th Cir. 1982); *United States v. McCarty*, 665 F.2d 596, 597 (5th Cir. 1982); *Flowers Transp., Inc. v. M/V Peanut Hollinger*, 664 F.2d 112, 114 (5th Cir. 1981).

60. *E.g.*, *United States v. Townley*, 665 F.2d 579, 582 (5th Cir. 1982) ("an earlier decision of this circuit has noted"); *Deyo v. City of Deer Park*, 664 F.2d 518, 522 (5th Cir. 1981) ("Similarly, in *Beverly v. Lone Star Lead Constr. Corp.*, . . . this court held"); *Reimer v. Smith*, 663 F.2d 1316, 1323 (5th Cir. 1981) ("In *Wagner v. Bonner*, . . . we stated"); *Salinas v. Schweiker*, 662 F.2d 345, 349 (5th Cir. 1981) ("Salinas relies on our decision in"); *Meyer v. Brown & Root Constr. Co.*, 661 F.2d 369, 371 n.2 (5th Cir. 1981) ("This Court has stated").

dent.⁶¹ All previously decided former Fifth Circuit decisions, whether decided before or after the effective date of the Reorganization Act, are being considered as binding precedents in the new court.⁶² The remarks of Chief Judge Clark at the new court's opening ceremonies suggest that this course has been by design and not by happenstance:

We recognize that the words Congress used to divide the Fifth Circuit are read by some as decreeing that we died today and that two new circuits were born. Such a construction shall not guide this court. The spirit of this legislation sought to strengthen the historic impact of this court, not to terminate it. The letter killeth but the spirit giveth life. We are determined to be of that strengthening spirit.

Long live the Fifth Circuit!⁶³

The new Fifth Circuit apparently has reached a judicial consensus that its panels will routinely apply the appropriate precedent of the former Fifth Circuit, subject to an en banc overruling. The new circuit has announced this consensus through its chief spokesperson and panels have thus far adhered to it.⁶⁴

C.

The new Eleventh Circuit has directly considered the issue of what precedential import it should afford decisions of the former Fifth Circuit. Chief Judge Godbold⁶⁵ wrote for a unanimous en banc court in *Bonner v. City of Prichard*,⁶⁶ the first case to be heard and the first opinion to be published by the new United States Court of Appeals for the Eleventh Circuit.⁶⁷ The en banc court held:

61. Baker, *supra* note 5, at 726-28.

62. No decision has arisen in which the new Fifth Circuit has held itself bound by a decision of the new Eleventh Circuit. The rule of interpanel accord, of course, does not apply between circuits. *Id.* at 723-24, 732-33. *But see supra* notes 50-51.

63. Remarks of Chief Judge Charles Clark at the Opening Ceremonies for the Division of the United States Court of Appeals for the Fifth Circuit (Oct. 1, 1981, New Orleans, Louisiana); *see supra* note 3. Chief Judge Clark has described his address as "[t]he only public position on the subject of precedent." Letter from Chief Judge Charles Clark, United States Court of Appeals for the Fifth Circuit (Feb. 9, 1982). After quoting the language quoted in the text, Chief Judge Clark explained, "I know of no formal holding to this effect nor of any contemplation that one will be forthcoming. The name continues with all it implies." *Id.* In earlier correspondence, Chief Judge Clark stated that his remarks "commit our circuit to the course we are determined to follow." Letter from Chief Judge Charles Clark, United States Court of Appeals for the Fifth Circuit (Oct. 7, 1981).

64. For a discussion of the judicial consensus approach, see Baker, *supra* note 5, at 711-12. Arguably, the panel decisions relying on the former Fifth Circuit precedent cited *supra* notes 61-63 are themselves precedents for this approach to the former court's case law. *But see* Baker, *supra* note 5, at 712-16.

65. Not only is Chief Judge Godbold "the first individual in the nation's history to hold that position in two different circuits," Baker, *supra* note 5, at 707-08 n.168, but until July 1, 1984, when the former Fifth Circuit ceases to exist, he simultaneously serves as Chief Judge of both the new Eleventh Circuit and the former Fifth Circuit. Commemorative Program for the Closing and Opening Ceremonies for the Division of the United States Court of Appeals for the Fifth Circuit (Oct. 1, 1981, New Orleans, Louisiana).

66. 661 F.2d 1206 (11th Cir. 1981).

67. An appeal in an actual "case or controversy" was the necessary vehicle for deciding the issue. *See* Baker, *supra* note 5, at 713 n.203. To arrange for *Bonner v. City of Prichard* to

[T]he decisions of the United States Court of Appeals for the Fifth Circuit (the "former Fifth" or the "old Fifth"), as that court existed on September 30, 1981, handed down by that court prior to the close of business on that date, shall be binding as precedent in the Eleventh Circuit, for this court, the district courts, and the bankruptcy courts in the circuit.⁶⁸

be heard en banc was no simple task. The Reorganization Act provided for the processing of cases that prior to Oct. 1, 1981, had been filed in the former Fifth Circuit:

- (1) If the matter has been submitted for decision, further proceedings in respect of the matter shall be had in the same manner and with the same effect as if this Act had not been enacted.
- (2) If the matter has not been submitted for decision, the appeal or proceedings, together with the original papers, printed records, and record entries duly certified, shall, by appropriate orders, be transferred to the court to which it would have gone had this Act been in full force and effect at the time such appeal was taken or other proceeding commenced, and further proceedings in respect of the case shall be had in the same manner and with the same effect as if the appeal or other proceeding had been filed in such court.

Reorganization Act, *supra* note 10, §§ 9(1), (2). For a summary of the statutory transition procedures, see Baker, *supra* note 5, at 705-06. In *Bonner v. City of Prichard* the en banc court held that a case filed prior to Oct. 1, 1981, in the former Fifth Circuit was "submitted for decision" to the former court within the meaning of the Reorganization Act on the date the appeal was heard by an oral argument panel of the former court or was fully decided by a three-judge screening panel of the former court without oral argument. 661 F.2d at 1208. *Precedent Times Three* had suggested that in the latter nonargument type of appeal the sending of the briefs and records to the initiating judge on the screening panel should be the submission point. Baker, *supra* note 5, at 706 n.152. The practical difference between the suggested submission point and the en banc court's submission point is that the latter results in fewer appeals being decided by the former court since their transfer from a panel in a unit of the former court to a corresponding panel in the appropriate new court will occur up until the point at which the last screening judge concurs in the nonargument disposition. See generally Rahdert & Roth, *Inside the Fifth Circuit: Looking at Some of Internal Procedures*, 23 LOY. L. REV. 661 (1977).

As part of its internal operating procedures, the Eleventh Circuit has codified this part of the *Bonner v. City of Prichard* holding. UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, INTERNAL OPERATING PROCEDURES VI.A, at 18 (Oct. 1, 1981). *Accord*, UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, INTERNAL OPERATING PROCEDURES 8, 21 (Oct. 1, 1981).

The question remained how *Bonner v. City of Prichard* satisfied this definition of submission so that the new court could consider the appeal. The en banc court reasoned that an appeal designated for oral argument before Oct. 1, 1981, that was scheduled for oral argument after that date had not been "submitted" to the former court. *Bonner v. City of Prichard* was such an appeal. During routine screening in Sept. 1981 an initiating judge of a former Fifth Circuit Unit B screening panel assigned the case for oral argument. Since a nonargument disposition had not begun, such a disposition could not be completed, and since there were no oral argument panels sitting before Oct. 1, 1981, to which it could be argued, the appeal was in neither way "submitted for decision." Not having been submitted to the former court, the appeal became an Eleventh Circuit case under § 9(2) of the Reorganization Act, quoted above. 661 F.2d at 1208. The new Eleventh Circuit, by an informal consensus prior to Oct. 1, 1981, which was confirmed by a formal vote on Oct. 2, 1981, agreed to consider the case en banc to rule on the precedent issue. *Id.* 1207.

68. 661 F.2d at 1207. Just as Chief Judge Clark's speech forewarned the new Fifth Circuit's approach to precedent, see *supra* text accompanying note 63, the statement of Judge Frank M. Johnson, Jr. before the Subcommittee of the House Judiciary Committee forewarned the new Eleventh Circuit's approach: "We represent without reservation that as now constituted the Court can be divided into two three-state circuits without any significant philosophical consequences within either of the proposed circuits." Ainsworth, *supra* note 6, at 528 (quoting *Federal Court Organization and Fifth Circuit Division: Hearings on H.R. 6060, H.R. 7665 and Related Bills Before the Subcomm. on Courts, Civil Liberties, and the*

The en banc court generally followed the analysis, if not all the recommendations, in *Precedent Times Three*. Initially, the en banc court committed the new Eleventh Circuit to the absolute rule of interpanel accord that had been followed in the former Fifth Circuit; "a prior decision of the circuit (panel or en banc) could not be overruled by a panel but only by the court sitting en banc."⁶⁹ Having made this institutional commitment, the en banc court next considered the critical issues of whether it should adopt some established body of law as its own precedents and, if so, what established body of case law it should choose. Several reasons were offered for the en banc court's decision to adopt former Fifth Circuit precedents.

The en banc court first emphasized the importance of stability and predictability in the rule of law.⁷⁰ The three states in the new Eleventh Circuit had been a part of the former Fifth Circuit since 1866.⁷¹ During this time district courts and bankruptcy courts have provided the appeals, the present Eleventh Circuit judges have made recent contributions, lawyers have litigated countless cases, and the public has ordered its affairs in reliance on the body of law developed by the former Fifth Circuit.⁷² By adopting the former Fifth Circuit precedents, a measure of these values would be preserved.⁷³ The en banc court also relied on the historical precedent when Congress divided the Eighth Circuit in 1929.⁷⁴ Finally and most importantly, while theoretically possible, the failure to select a body of precedent would be practical hopple. Litigants, their attorneys, panels, and the en banc court would be forced to examine every issue in every appeal as an issue of first impression. Such a state of affairs was deemed unnecessary and undesirable.⁷⁵ Refusing to embark on their judicial mis-

Administration of Justice of the House Comm. on the Judiciary, 96th Cong., 2d Sess. 21 (1980) (statement of the Honorable Frank M. Johnson)). Judge Robert A. Ainsworth, Jr. echoed this sentiment: "Our judgment should be trusted that the judicial philosophy of the two courts after the division will not differ from what it is today . . ." Ainsworth, *supra* note 6, at 529.

69. 661 F.2d at 1209; *see Baker, supra* note 5, at 723-24; *see also Tate, supra* note 6, at 690.

70. 661 F.2d at 1209-10 (quoting *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970)).

71. *See Baker, supra* note 5, app. at 736-39.

72. 661 F.2d at 1210. These reasons parallel the general policy arguments of *stare decisis* that Judge Frank identified and criticized: justice, stability, symmetry, attorney reliance, and institutional convenience. *See Baker, supra* note 5, at 731-32.

73. The en banc court, of course, would be able to overrule any former Fifth Circuit precedent. 661 F.2d at 1210. Arguably, this power renders the *Bonner v. City of Prichard* disposition a Catch-22 type of dictum. *See Baker, supra* note 5, at 716-17.

74. 661 F.2d at 1210 (citing *Thompson v. St. Louis-S.F. Ry.*, 5 F. Supp. 785 (N.D. Okla. 1934), and *In re Meyers*, 1 F. Supp. 673 (W.D. Okla. 1932), *rev'd on other grounds sub nom. Burbee v. Spurrier Lumber Co.*, 64 F.2d 5 (10th Cir. 1933)). *But see Baker, supra* note 5, at 726-28, concluding that "[t]he creation of the Tenth Circuit precedent . . . is inconclusive." *Id.* at 728.

75. 661 F.2d at 1211. "The prospect of decades of writing on a clean slate in pursuit of the possibility that in some case or cases we might find a rule we like better (or even conclude that an old Fifth Circuit decision is wrong) is at best unappealing, at worst catastrophic." *Id.* The rejected approach would have transformed every panel opinion into a potential en banc appeal, as a new precedent "of exceptional importance." *Id. But cf.*

sion without a body of precedent, the judges concluded, "We choose instead to begin on a stable, fixed, and identifiable base while maintaining the capacity for change."⁷⁶

The en banc court's analysis then considered how to proceed in adopting the former Fifth Circuit precedent. It was unwilling to adopt precedent by an informal and unrevealed consensus among the individual judges because of the lack of notice and the inherent instability in such an approach.⁷⁷ The rule-making power was deemed an inappropriate method for adopting a body of precedent because the task was substantive and judicial, not procedural and administrative.⁷⁸ Having implicitly rejected the panel mechanism by its grant of en banc review in *Bonner v. City of Prichard*, the only remaining mechanism for the wholesale adoption of former Fifth Circuit precedent was the en banc decision in the case sub judice.⁷⁹

The en banc court, however, did not incorporate all former Fifth Circuit precedent without qualification.⁸⁰ Instead, the court adopted only decisions of the former Fifth Circuit decided on or before September 30, 1981, the day before the effective date of the Reorganization Act.⁸¹ The effect on Eleventh Circuit law of other categories of former Fifth Circuit case law was reserved for "future consideration."⁸² Thus left in litigatory limbo were decisions of the former Fifth Circuit handed down after September

Baker, *supra* note 5, at 731 n.321 (suggesting that the application of the rule of interpanel accord between two circuits might violate the spirit of FED. R. APP. P. 35). The en banc court also made an analogy to the nearly wholesale adoption in this country of English common law. 661 F.2d at 1211; *see* Baker, *supra* note 5, at 710-11.

76. 661 F.2d at 1211. For a discussion of the doctrine of *stare decisis et non quieta movere*, relied upon so heavily by the en banc court, *see* Baker, *supra* note 5, at 712-17.

77. 661 F.2d at 1210 (citing Baker, *supra* note 5, at 711). The rejected judicial consensus tactic seems to be close to the approach taken by the new Fifth Circuit. *See supra* Part III, section B.

78. 661 F.2d at 1210-11 (citing Baker, *supra* note 5, at 717). *But see* Baker, *supra* note 5, at 718-20 (proposing an administrative solution as part of the local rules for en banc procedures). Consistent with *Bonner v. City of Prichard*, neither the local rules nor the internal operating procedures of the new Eleventh Circuit deal with the precedent problem. *See generally* INTERIM LOCAL RULES OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT (Oct. 1, 1981) (The interim rules will be tested for one year and then reviewed and revised. *Id.* at 1); UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT INTERNAL OPERATING PROCEDURES (Oct. 1, 1981).

79. For a discussion of the intransigent problems of *stare decisis* involved in the panel and en banc mechanisms, *see* Baker, *supra* note 5, at 713-18. The en banc court also implicitly rejected the statutory mechanism and the argument made in *Precedent Times Three* that the legislative intent behind the Reorganization Act discouraged adoption of former Fifth Circuit precedent. *See id.* at 728-30; *see also* Heflin, *supra* note 6, at 614.

80. 661 F.2d at 1209.

81. The last ten decisions of the former Fifth Circuit adopted in *Bonner v. City of Prichard* were decided on Sept. 30, 1981. *United States v. Lerma*, 657 F.2d 786 (5th Cir. 1981); *Louisiana Chem. Ass'n v. Bingham*, 657 F.2d 777 (5th Cir. 1981); *Vicon, Inc. v. CMI Corp.*, 657 F.2d 768 (5th Cir. 1981); *United States v. Wilson*, 657 F.2d 755 (5th Cir. 1981); *Johnson v. Uncle Ben's, Inc.*, 657 F.2d 750 (5th Cir. 1981); *Hollis v. Itawamba County Loans*, 657 F.2d 746 (5th Cir. 1981); *McKinney v. Estelle*, 657 F.2d 740 (5th Cir. 1981); *United States v. Mouton*, 657 F.2d 736 (5th Cir. 1981); *United States v. Cook*, 657 F.2d 730 (5th Cir. 1981); *NLRB v. Decibel Prods., Inc.*, 657 F.2d 727 (5th Cir. 1981).

82. 661 F.2d at 1209 n.5.

30, 1981, in appeals submitted to that court before October 1, 1981. All post-September 30th panel decisions of Unit A and Unit B and en banc decisions of the former Fifth Circuit are in this category, and they carry the asterisk described above.⁸³ The en banc court in *Bonner v. City of Prichard* thus avoided a dictum concerning the effect of these limbo decisions not relevant to the merits.⁸⁴ Considered in perspective, these limbo decisions may be of limited consequence among the vast number of precedents that *Bonner v. City of Prichard* did incorporate into Eleventh Circuit law.⁸⁵ The Reorganization Act, however, mandates that the former Fifth Circuit continue to exist to decide appeals submitted before the effective date as "the fifth judicial circuit of the United States as in existence on the day before the effective date."⁸⁶ The statute makes no distinction between appeals decided on or before September 30, 1981, and those appeals decided after that date. In order to draw such a distinction in a future decision, the new Eleventh Circuit will have to explain any disparate treatment of the case precedents in terms of the policies already discussed that militated in favor of incorporating some former Fifth Circuit case law.⁸⁷

In any event, the en banc decision in *Bonner v. City of Prichard* has been followed in the Eleventh Circuit. Panels of the new Eleventh Circuit have expressly applied the rule of interpanel accord to appropriate decisions of

83. See *supra* text accompanying notes 38-42.

84. *Mitchum v. Purvis*, 650 F.2d 647 (5th Cir. 1981), decided on July 13, 1981, controlled the merits that involved the due process rights of a prisoner in an action under 42 U.S.C. § 1983 (Supp. IV 1980). Perhaps the decision to adopt former Fifth Circuit precedent was made easier by the agreement of both parties in *Bonner v. City of Prichard*. Appellant and appellees joined in urging that the court adopt former Fifth Circuit precedent; the latter, however, urged that the en banc overrule *Mitchum*. 661 F.2d at 1212. While the en banc court could have overruled *Mitchum*, it chose not to do so. *Id.* at 1211-12.

85. The burgeoning docket that led to the division of the former Fifth Circuit also resulted in an enormous output. By 1981 total filings in the former court approached 5,000; of nearly 2,500 opinions, nearly 1,600 were published. Tate, *supra* note 6, at 693-95. Given this remarkable recent output and the 90-year life of the former Fifth Circuit, the limbo decisions are almost negligible.

86. Reorganization Act, *supra* note 10, § 10(1); see Baker, *supra* note 5, at 705-06.

87. See *supra* text accompanying notes 70-79. The new Eleventh Circuit was reluctant to adopt as precedent those decisions of the former Fifth Circuit decided by Unit B of the old court after Sept. 30, 1981. This reluctance seems strange because Unit B was composed of the same states and the same judges as the Eleventh Circuit. Another consideration may reveal why the Eleventh Circuit was so careful in its holding. The more recent former Fifth Circuit cases also include appeals decided by Unit A of the old court, which was composed of the same states and the same judges as the new Fifth Circuit. To adopt Unit B's post-September 30th case law is reasonable, but to adopt that of Unit A without the ability to participate in any Unit A en banc review is less justifiable. See *supra* note 7. Judge Tate explained the problem created by unit en banc courts:

Thus, if a majority of Unit A judges disagreed with a Unit B precedent, they were bound by it until in its own case, a Unit A en banc decision overruled it—following which, Unit B would be bound by this Unit A en banc opinion, until a Unit B opinion overruled. Despite theoretical difficulties that may be envisioned, the expectation was realized that, in fact, little practical problem would be created during the short transitional period between January and October, 1981.

Tate, *supra* note 6, at 692. The en banc court in *Bonner v. City of Prichard* held that a decision of either unit of the former Fifth Circuit would be binding so long as it was decided on or before Sept. 30, 1981. 661 F.2d at 1211 n.8.

the former Fifth Circuit.⁸⁸ Several opinions have expressly relied on *Bonner v. City of Prichard* for the general proposition that the appropriate former Fifth Circuit case law is binding on the panels of the new Eleventh Circuit.⁸⁹ In addition, some opinions in the Eleventh Circuit refer to selected former Fifth Circuit decisions in language suggesting that the two courts are one,⁹⁰ just as has been done in some new Fifth Circuit opinions.⁹¹ Finally, the rule of interpanel accord already has developed in the new Eleventh Circuit with panels of the new court considering themselves bound by their own nascent precedents.⁹²

IV.

The problem of precedent, so carefully analyzed in *Precedent Times Three*, is not the most critical issue raised by the division of the former Fifth Circuit. Clearly, “[i]n the future, Congress should legislate with respect to the viability of precedents across redrawn boundary lines.”⁹³ The tack of the new Fifth Circuit and the decision of the new Eleventh Circuit in *Bonner v. City of Prichard* have solved the problem of precedent in large part. Indeed, recognizing the increasing finality of the courts of appeals in our federal judicial system,⁹⁴ the problem of precedent would be settled “in the course of a generation”⁹⁵ without any definitive ruling. Judges,

88. *E.g.*, *United States v. Burns*, 662 F.2d 1378, 1383-84 (11th Cir. 1981); *United States v. One (1) Douglas A—26B Aircraft*, 662 F.2d 1372, 1377-78 (11th Cir. 1981).

89. *E.g.*, *Fitzpatrick v. IRS*, 665 F.2d 327, 329 n.4 (11th Cir. 1982); *Ultracashmere House, Ltd. v. Meyer*, 664 F.2d 1176, 1182 n.11 (11th Cir. 1981); *United States v. Miller*, 664 F.2d 826, 827 n.2 (11th Cir. 1981); *United States v. Scott*, 664 F.2d 264, 264 n.1 (11th Cir. 1981); *Fehlhaber v. Fehlhaber*, 664 F.2d 260, 262 n.5 (11th Cir. 1981); *Goodman v. Keohane*, 663 F.2d 1044, 1046 n.1 (11th Cir. 1981).

90. The panel in *McLaughlin v. City of La Grange*, 662 F.2d 1385 (11th Cir. 1981) explained:

On October 2, 1981, this court sitting en banc adopted all existing precedent in the United States Court of Appeals for the Fifth Circuit on September 30, 1981, as its own. Reference to “this Court,” “we,” “us” and cases decided by the “old Fifth Circuit” are based on that ruling.

Id. at 1388 n.2; *see also, e.g.*, *Strode Publishers, Inc. v. Holtz*, 665 F.2d 333, 335 (11th Cir. 1982) (“The general rule has been stated by us several times.”); *United States v. Cox*, 664 F.2d 257, 260 (11th Cir. 1981) (“We have reversed convictions because of similar remarks.”); *Erkins v. Bryan*, 663 F.2d 1048, 1051 (11th Cir. 1981) (“This Court has held”); *Cowart v. Schweiker*, 662 F.2d 731, 734 (11th Cir. 1981) (“In several recent cases, this circuit has concluded”).

91. *See supra* text accompanying note 60.

92. *E.g.*, *United States v. Rivamonte*, 666 F.2d 515, 517 (11th Cir. 1982); *United States v. Schwartz*, 666 F.2d 461, 463 (11th Cir. 1982).

93. *Baker, supra* note 5, at 734.

94. The Fifth Circuit last year heard 18.8% of all cases appealed to the eleventh federal circuit courts of appeal. For a substantial percentage of federal litigants, it was thus in effect a court of last resort, since during the past year the United States Supreme Court granted only twenty-four petitions for certiorari to review its 2,743 opinions, less than 1% of the opinions entered.

Tate, supra note 6, at 694; *see also Baker, Constitutional Law*, 27 LOY. L. REV. 805, 862 (1981) (Fifth Circuit Symposium).

95. The reports of a given jurisdiction in the course of a generation take up pretty much the whole body of the law, and restate it from the present point of view. We could reconstruct the corpus from them if all that went before were burned. The use of the earlier reports is mainly historical

attorneys, or commentators have not yet had time to discern the degree and quality of differences in law between the two new courts.⁹⁶ The initial institutional reactions to the division, perhaps, have postponed the inevitable. Presumably, future differences between the new Fifth and new Eleventh Circuits will eventually be just as pronounced as the present differences between the Eighth and Tenth Circuits.⁹⁷ The more critical issue to the future of our federal courts is whether circuit splitting is the appropriate congressional response to the problems facing the large courts of appeals. This issue was largely ignored in *Precedent Times Three* and may only be introduced here.

Congressional anticipations of the effects of the Reorganization Act included a decreased likelihood of intracircuit conflicts, a more manageable output of opinions, a simplification of en banc procedures, and a savings of time and expenses due to reduced travel by litigants and court personnel.⁹⁸ The primary purpose, however, was "to provide consistent, expeditious justice for the citizens of the circuits."⁹⁹ While an evaluation of how the two new courts are faring is somewhat premature, several knowledgeable commentators have formed some first impressions.¹⁰⁰ The former Fifth Circuit's docket matched the mammoth proportions of its geographical size.¹⁰¹ The docket was so large that each of the new court's dockets after the division is still large when compared to the other circuits. If the former Fifth Circuit's filings for the twelve-month period ending September 30, 1980, were allocated to the two new circuits, the new Fifth Circuit would be second only to the Ninth Circuit in filings, and the Eleventh Circuit would rank sixth among the twelve circuits.¹⁰² Despite its crushing docket, the former Fifth Circuit became "current" just before the effective date of the Reorganization Act, largely due to the increased judgepower from the

Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897).

96. See Harvey, *supra* note 41, at 29.

97. See Baker, *supra* note 5, at 726-28.

98. Heflin, *supra* note 6, at 616-17.

99. *Id.* at 617; see also Baker, *supra* note 5, at 728-30.

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

H.R. REP. NO. 1390, 96th Cong., 2d Sess. 1, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 4236, 4237.

100. See generally Ainsworth, *supra* note 6; Heflin, *supra* note 6; Rubin, *Fifth Circuit Symposium Introduction*, 25 LOY. L. REV. 441 (1979); Tate, *supra* note 5; Wisdom, *Requiem for a Great Court*, 26 LOY. L. REV. 787 (1980).

101. Between 1970 (2,014) and 1980 (4,225) filings more than doubled and it was estimated that by 1982 in excess of 5,000 cases would be filed. Heflin, *supra* note 6, at 597. The workloads of all the circuit courts increased nearly 100% in the decade of the 1970s. *Id.* at 598 n.6. "[S]tatistical summaries abound." Baker, *supra* note 5, at 697 n.83 (citations of summaries and reports).

102. Ainsworth, *supra* note 6, at 523 n.2.

Omnibus Judgeship Act of 1978.¹⁰³ Compared with the prior year's filings, in 1981 the states in the new Fifth Circuit experienced an eight percent increase and the states in the new Eleventh Circuit experienced a twenty-four percent increase.¹⁰⁴ Just how long the two new courts can remain current is unclear. In any event, each of the two new courts is a large court and is likely to experience such eventual docket growth that its effective functioning will be endangered.¹⁰⁵ Inevitably, Congress will consider further divisions in the new Fifth and Eleventh Circuits and in other circuits. The critical issue then will be circuit splitting itself rather than the problems of precedent.

The debate has already been joined. A congressional proponent of circuit splitting has opined, "Congress recognized that a point is reached where the addition of judges decreases the effectiveness of the court, complicates the administration of uniform law, and potentially diminishes the quality of justice within a circuit."¹⁰⁶ Chief Justice Burger has called for legislation to divide the Ninth Circuit into three "full-fledged" circuits,¹⁰⁷ a solution that he has suggested is inevitable in the new Fifth and Eleventh Circuits.¹⁰⁸ Opponents of circuit splitting object that adding judges and dividing courts will not only fail to solve the problem but "it irreversibly dilutes the federalizing function of courts of appeals."¹⁰⁹ Senior Judge

103. Tate, *supra* note 6, at 693.

104. *Id.* at 693 n.6. The discrepancy between filing increases in the two new courts is explained by the fact that the early appointment of the new Fifth Circuit district judges affected the filings in 1980 while the new Eleventh Circuit district judges were appointed later, postponing the effect of the appeals they generated until 1981. *Id.* Current predictions suggest a normal growth rate of 6% in filings in each court. *Id.* at 693-94.

105. Wisdom, *supra* note 100, at 789-92; see Baker, *supra* note 5, at 696, 723.

106. Heflin, *supra* note 6, at 616 (footnote omitted). In the former Fifth Circuit, the congressional solution for docket growth was adding judges. This solution itself became the problem; too many judges made division necessary. See Baker, *supra* note 5, Part II, section B.

107. Year-end Report on the Judiciary, by Chief Justice Warren E. Burger (Dec. 28, 1981).

108. "Ultimately, however, these Circuits [the former Fifth and the present Ninth] must be divided into three units but we should not wait." Letter from Chief Justice Warren E. Burger to Representative Peter W. Rodino, Jr. (Sept. 19, 1980), *quoted in* Ainsworth, *supra* note 6, at 525 n.8. For a description of the present Ninth Circuit situation, see Baker, *supra* note 5, at 702 n.118. The filings in Texas alone, in the new Fifth Circuit, exceed the Eighth Circuit and are double those in the First Circuit. Wisdom, *supra* note 100, at 790. The problems of precedent in a new two-state circuit comprised of one state from each of the present Fifth and Eleventh Circuits would stretch the theory of stare decisis in new directions. *Cf.* Baker, *supra* note 5, at 725 nn.283-84.

109. Wisdom, *supra* note 100, at 788. Judge Wisdom explains:

If this process were carried to its logical conclusion, the states of Texas, California and New York would each constitute a circuit. A United States Court of Appeals does not just settle disputes between litigants. It has a federalizing function as well as a purely appellate function of reviewing errors. The federal courts' role is to bring local policy in line with the Constitution and national policy. Within the framework of "cases and controversies" and subject to all the appropriate judicial disciplines, federal courts adjust the body politic to stresses and strains produced by conflicts (1) between the nation and the states (2) between the government (national, state, and local) and private citizens asserting federally-created or federally-protected rights. The federalizing role of circuit courts should not be diluted by the creation of a circuit court so

John Minor Wisdom of the former and new Fifth Circuit, a long time opponent of splitting, argues that within a year the filings per judge in the two new courts will be nearly at 1978 crisis levels.¹¹⁰ He laments, "[t]he sad fact about the destruction of our great circuit is that it is pointless."¹¹¹ Judge Wisdom's solution is much more profound: Congress should reduce federal jurisdiction radically.¹¹²

Within the larger context of whether circuits should be divided, the problem of precedent in a divided circuit pales into insignificance. *Precedent Times Three* sought to prescribe a cure for the split circuits' problems of stare decisis. This Article has sought to describe how the two new courts have coped with their schizophrenia. Congress must ultimately decide if the cure is worse than the disease, whether circuit splitting solves the problem of one circuit or creates problems for two.

narrowly based that it will be difficult for such a court to overcome the influence of local prides and prejudices.

Id. (footnote omitted). The use of circuit splitting is limited. "[A]re we to continue the splitting process until it becomes mincing, with a United States Court of Appeals for the Houston Metropolitan Area?" Gee, *The Imminent Destruction of the Fifth Circuit; Or, How Not to Deal with a Blossoming Docket*, 9 TEX. TECH L. REV. 799, 806 (1978).

110. Wisdom, *supra* note 100, at 789. Judge Wisdom lists four causes: (1) the addition of 35 new district judges in the two courts who will generate in excess of 40 appeals each per year; (2) population and industrial growth in the South; (3) congressional legislation increasing rather than decreasing jurisdiction by the creation of new federal rights; and (4) more appeals resulting from attorneys believing the dockets are clear. *Id.*; see also Rubin, *supra* note 100, at 442-43.

111. Wisdom, *supra* note 105, at 789.

112. *Id.* at 792 n.7 (citing H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW (1973)).