

Supreme Court of the United States

October

██████████ TERM, 1969

In the Matter of:

STEPHEN S. CHANDLER, UNITED STATES
DISTRICT JUDGE FOR THE WESTERN
DISTRICT OF OKLAHOMA

Petitioner,

VS.

JUDICIAL COUNCIL OF THE TENTH CIRCUIT
OF THE UNITED STATES

Respondent.

Docket No. 2
(Miscellaneous)

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Place Washington, D. C.

Date December 10, 1969

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STATEMENTS OF:

P A G E

Thomas J. Kenan, Esq., on behalf of Petitioner	3
Carl L. Shipley, Esq., As Amicus Curiae, for the Petitioner	35

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IN THE SUPREME COURT OF THE UNITED STATES

October

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STEPHEN S. CHANDLER, UNITED STATES)	
DISTRICT JUDGE FOR THE WESTERN)	
DISTRICT OF OKLAHOMA,)	
)	
)	Petitioner
vs)	
JUDICIAL COUNCIL OF THE TENTH CIRCUIT)	No. 2 Misc.
OF THE UNITED STATES,)	
)	
)	Respondent
)	

Washington, D. C.
December 10, 1969

The above-entitled matter came on for argument at
10:10 o'clock a.m.

BEFORE:

- WARREN E. BURGER, Chief Justice
- HUGO L. BLACK, Associate Justice
- WILLIAM O. DOUGLAS, Associate Justice
- JOHN M. HARLAN, Associate Justice
- WILLIAM J. BRENNAN, Associate Justice
- POTTER STEWART, Associate Justice
- BYRON R. WHITE, Associate Justice
- THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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(as amicus curiae)

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(for the U. S., as amicus curiae)

P R O C E E D I N G S

1
2 MR. CHIEF JUSTICE BURGER: Number 2, miscellaneous;
3 Chandler against the Judicial Council.

4 Good morning, Mr. Kenan; you may proceed whenever
5 you are ready.

6 ORAL ARGUMENT BY THOMAS J. KENAN, ESQ.

7 ON BEHALF OF PETITIONER

8 MR. KENAN: Thank you, sir, and may it please the
9 Court: Gentlemen, this case is here on motion for leave to
10 file a motion for a writ of prohibition and/or mandamus, in
11 the matter of the Honorable Stephen Chandler, Judge of the
12 Western District of Oklahoma, against the Tenth Judicial
13 Council of the United States.

14 I'll briefly state the facts in this matter.

15 On December 13, 1965 the Judicial Council of the
16 Tenth Circuit, entered an order, held after a secret meeting
17 at which Judge Chandler was not able to be present, and the
18 order effectively stripped Judge Chandler of his powers. He
19 was ordered not to hear any of the cases assigned to him, nor
20 was he to be allowed to hear any other cases that would be
21 filed in his court; the other judges of the court were ordered
22 to divide Judge Chandler's cases among themselves, and to en-
23 ter into a new order of business whereby none of the future
24 cases filed in the court would be assigned to Judge Chandler.

25 Your Honors, I think there are three, maybe four

1 judges. There is also an inactive judge, or there was at the
2 time.

3 MR. JUSTICE STEWART: A senior judge?

4 MR. KENAN: Yes, sir.

5 This order was signed by the Members of the Judicial
6 Council, not as members of judicial council, but as Circuit
7 Judges. It was filed in the 10th Circuit Court and it was
8 filed in the Western District Court and a deputy marshal was
9 ordered to serve it on Judge Chandler.

10 MR. CHIEF JUSTICE BURGER: How do you distinguish
11 -- how do you discern the form in which to act?

12 MR. KENAN: Well, sir, the order itself, the
13 signatories, the judges that signed it, beneath their signatures
14 they said, "Circuit Judge." This point, Your Honor, I bring
15 up, because it does have some bearing upon the jurisdiction
16 of this Court. It does enter into that argument. It does
17 have to do with whether or not the judges were entertaining
18 judicial powers or administrative powers. They were closing
19 about themselves the powers of the judicial offices which they
20 held, when they signed the order, Circuit Judge; filed it in
21 court and they got a deputy marshal to serve it.

22 MR. CHIEF JUSTICE BURGER: Well, when all of the
23 judges -- all of the Circuit Judges of a given circuit,
24 assemble and meet to address themselves to any business other
25 than an en banc hearing, are they not acting as a judicial

1 Council?

2 MR. KENAN: I don't believe they are, Your Honor.
3 Section 332 of Title 28 provides that a meeting of the judi-
4 cial council shall be called by the Chief Judge at least
5 twice a year. I'm not convinced that the Chief Judge can't
6 call a meeting of the Circuit Judges for other reasons.

7 If another judge calls a meeting, is it a proper
8 meeting of the judicial council? According to the statute,
9 only the Chief Judge can call it.

10 MR. CHIEF JUSTICE BURGER: Some judicial councils
11 meet once a month; sometimes twice a month; sometimes three
12 times a month, depending on the nature and quantity of ad-
13 ministrative problems they have in the court. I'm speaking
14 now as a counsel, not on a particular case.

15 MR. KENAN: Well, sir, the statute provides only
16 that they were to meet at least twice a year. They can
17 certainly meet more often.

18 MR. CHIEF JUSTICE BURGER: But you do not suggest
19 that other meetings were not meetings of the council if they
20 go beyond two meetings?

21 MR. KENAN: No, sir; I believe that this was a
22 meeting of the Judicial Council; I'm not questioning that.
23 It is the Judicial Council which uttered the order.

24 MR. CHIEF JUSTICE BURGER: Well, I was confused by
25 your comments about the signatures that they signed as Circuit

1 Judges. Of course, they hold their place on the council only
2 by virtue of their being circuit judges; is that not true?

3 MR. KENAN: That is true, Your Honor. I brought
4 this up only for the purpose of the jurisdictional problems,
5 which we will come to a little bit later.

6 This meeting effectively stripped Judge Chandler
7 of all his judicial powers. There was not the slightest
8 semblance of due process at the meeting. He was allowed to be
9 present; he didn't know what the charges were; he wasn't
10 allowed to cross-examine anyone; he couldn't have counsel.

11 The order presented spoke in rather strange terms
12 about why his cases were being taken away from him. It did
13 mention the effect on the business of Judge Chandler's Court
14 of his attitude and conduct. It mentioned that he was a party
15 defendant in both civil and criminal litigation. It stated
16 that one civil case was still pending and there were also two
17 disqualifications proceedings against him.

18 It stated that after a review of the entire
19 situation that Judge Chandler was either unable or unwilling
20 to discharge efficiently the powers of his office. And that
21 was why all of his cases were taken from him.

22 MR. JUSTICE STEWART: Again, I sustained the order.
23 Excerpts from it quoted and described in these various briefs.
24 Do we have a copy of the order?

25 MR. KENAN: Yes, sir; it is Exhibit A to the original

1 motion for leave to file, that was entered in this case. The
2 first matter filed.

3 After that -- after the handing down of the order,
4 we filed a motion for leave to file a written mandamus in this
5 Court. We also made application for stay of the Judicial
6 Council's order.

7 A few days later, there appeared Solicitor General
8 Marshall, representing the Judicial Council, and he advised
9 this Court that the order of the Judicial Council was intended
10 to be temporary only, pending further proceedings by the
11 Judicial Council. He stated that a hearing would be held, at
12 which hearing the Judicial Council would determine what powers
13 to use under three sections -- this is very interesting, Your
14 Honors -- it decided not only Section 332, which provides
15 administrative powers, we believe, for judicial councils, but
16 Section 137, which provides a method whereby judicial councils
17 can settle disputes among the District Judges when they can't
18 decide on how to assign new cases in their court; but Solicitor
19 General Marshall mentioned that the judicial council wanted
20 to consider what use of its power should be made under Section
21 372(b) which, as the members of this Court know, is a section
22 that bears upon the mental fitness of a Federal Judge.

23 In other words, he was suggesting to this Court
24 that reason existed, perhaps, for the judicial council to
25 certify to the President that Judge Chandler was permanently

1 mentally disabled.

2 Solicitor-General Marshall stated that the order
3 had been issued only to keep Judge Chandler from filling his
4 office while the conduct of his office was thus in question.
5 And it stated that the order was interlocutory, that pending
6 a full hearing into the fitness of Judge Chandler.

7 And then the Solicitor-General said that he had
8 carefully examined files in the Tenth Circuit and here in
9 Washington; that it was his conviction that the matter warranted
10 careful examination; that it was highly desirable to maintain
11 the status quo and that public confidence in the Federal
12 judiciary would be inevitably impaired if Judge Chandler were
13 to preside over his court while the question of his fitness
14 to serve was under consideration.

15 Well, we can quite understand why this Court denied
16 the application for a stay, based upon this very strong
17 language of the Solicitor-General. If you can understand it,
18 it happened.

19 Anyway, the application for stay was denied. After
20 that was denied the Judicial Council then did issue a second
21 order. In our opinion, this order did not call for the type
22 of hearing that had been represented to you gentlemen by the
23 judicial council would be held. Judge Chandler wasn't ordered
24 to come to any hearing. He was notified that a hearing would
25 be held and that if he wanted to appear, he might, and that he

1 could present to the hearing such matters as he deemed
2 desirable. There was no indication of any charges against
3 him. He wasn't ordered to come; he was told he could bring
4 counsel if he wanted.

5 Well, Judge Chandler advised both this Court and
6 the Judicial Council that he would not attend such a hearing;
7 that he challenged their jurisdiction to remove cases from him,
8 and upon that, the judicial council then decided that it
9 wouldn't hold a hearing.

10 MR. JUSTICE HARLAN: What did the second order
11 purport to do with reference to the first?

12 MR. KENAN: Your Honor, the second order merely
13 called for the hearing.

14 At the time that Judge Chandler stated that he
15 wouldn't appear at the hearing, then the other district judges
16 in Judge Chandler's court then advised Judge Chandler that the
17 original order had ordered them to redivide all the cases in
18 the court. This Court had denied his application for stay.
19 It appeared that we were in for a long session, with respect
20 to this matter.

21 At that point the District Judges advised Judge
22 Chandler that they ought to do something with respect to
23 replying to the first order of the judicial council. So, the
24 judges --

25 MR. JUSTICE DOUGLAS: Does the council undertake to

1 say that certain members of the Court of Appeals shall not
2 sit in certain cases?

3 MR. KENAN: No, sir; it doesn't.

4 MR. JUSTICE DOUGLAS: Is this running just -- I
5 know that Judge Chandler is a District Judge.

6 MR. KENAN: Well, Your Honor, the Judicial Council
7 is given the authority to examine the reports of the admini-
8 strator of the U. S. Courts and --

9 MR. JUSTICE DOUGLAS: I understand that; I'm just
10 asking as a matter of practice and what has the Tenth Circuit
11 done --

12 MR. KENAN: As a matter of fact, the judicial
13 council is the Tenth Circuit.

14 MR. JUSTICE DOUGLAS: I know, but what have they
15 done in respect to -- this is pretty wide, roving power, it
16 seems to me.

17 MR. KENAN: Your Honor, I don't know what they have
18 done with respect to the rest of the circuit. I just know
19 this one matter.

20 MR. JUSTICE STEWART: The last paragraph in Section
21 332, whether advertently, or inadvertently, Congress provided
22 only that District Judges shall promptly carry into effect all
23 orders of the Judicial Council. It does not mention Circuit
24 Judges.

25 MR. KENAN: That is correct, sir.

1 Well, after the District Judges then met to decide
2 upon a new order of business, since it appeared that Judge
3 Chandler was going to require some time to settle this
4 matter, Judge Chandler disagreed with the redivision of his
5 standing cases, those already assigned to him, among the other
6 judges, and he did agree, however, that in order to keep this
7 matter going and not to get into a complete brawl with the
8 members of the District Court, who were only trying to carry
9 out the orders of the Judicial Council, and were going to let
10 Judge Chandler contest them. He agreed that he wouldn't hear
11 any cases assigned -- any future cases filed in his court,
12 although he did not believe the Judicial Council had power to
13 take those away from him.

14 But he disagreed with respect to reassigning cases
15 already assigned to him. At that --

16 MR. JUSTICE BRENNAN: I gather that that District
17 Court doesn't operate from a master calendar, then; is that
18 right?

19 MR. KENAN: There is a system whereby the cases
20 are arbitrarily assigned to judges, Your Honor.

21 MR. JUSTICE BRENNAN: As they are filed?

22 MR. KENAN: Yes, sir, as they are filed by law.

23 MR. JUSTICE BRENNAN: And that's criminal law,
24 civil?

25 MR. KENAN: Yes, sir.

1 After this new division of order was entered into
2 the Judicial Council then did a strange things. It said, "Well,
3 we now have power under Section 137 to allocate cases in this
4 court, because there is a disagreement with respect to the
5 division of cases already on file in Judge Chandler's court.
6 Judge Chandler is disagreeing that these cases can be re-
7 assigned. Therefore," and this was their decision, "we're
8 going to let the present situation stand, as to existing cases,
9 but we're going to redivide the many filed cases.

10 Well, it didn't make any sense, nevertheless, that's
11 what happened, and they superceded the old order, they said.

12 Gentlemen, at this point, when the first order was
13 superceded, what we are questioning here today is the first
14 order. There are other facts in this case that go on, which
15 facts have a bearing upon whether or not this Court should
16 exercise its discretion, which granting of a writ of mandamus
17 always is, because these further facts bear upon the attitude
18 of the Judicial Council in the true spirit in which this
19 punitive order was entered into.

20 The facts can be boiled down, basically, to one
21 thing: for a couple of years thereafter, the Judicial Council
22 went through an elaborate procedure designed to create a paper
23 record that they were acting all along to assist Judge
24 Chandler in cleaning up a crowded docket. They got documents
25 from the Administrator of the court bearing upon his caseload.

1 The facts were, from the very beginning, Judge
2 Chandler's caseload was a number of cases less than he
3 normally decides in a year. The facts are that when the first
4 order was issued, there was no mention made of a crowded case-
5 load. This was an afterthought and it was designed by the
6 Judicial Council to try to attain some kind of firm ground
7 upon which to base their assault on Judge Chandler.

8 Your Honor, we came here and we based jurisdiction
9 of this case upon the All Writs Act. There is a very excellent
10 inquiry into the jurisdictional problems of this case that the
11 Solicitor-General has in his brief, and also the Counsel for
12 the Respondent.

13 These jurisdictional problems boil down basically
14 to a single question. For instance, both the Solicitor-
15 General and Mr. Wright do not disagree that the All Writs Act
16 does provide the authority for this Court to act. They dis-
17 agree only on the constitutional grounds of whether or not
18 this case is within the appellate powers of this Court.

19 And all that question boils down to one point:
20 Was the judicial council acting as a lower court or inferior
21 tribunal rather than an administrative agency in this pro-
22 ceeding?

23 Solicitor-General Griswold contends that it was.

24 MR. JUSTICE BLACK: That is was what?

25 MR. KENAN: That it was acting as a court --

1 MR. JUSTICE BLACK: As a court?

2 MR. KENAN: Yes, sir, when it issued this order
3 stripping Judge Chandler of his powers. He contends that no
4 matter what their nature, that they were acting as a court
5 would act.

6 Now, Your Honor, I agree that Congress intended
7 that the Judicial Council be an administrative agency. I
8 agree entirely, and yet this council is composed of judges who
9 have judicial power, and they acted in a way that judges would
10 act, and I contend that they were acting with the judicial
11 powers of their offices.

12 And I also will say this:

13 MR. CHIEF JUSTICE BURGER: Would you say the same,
14 Mr. Kenan, with respect to judges sitting on the Judicial
15 Conference of the United States, which is also a statutory
16 body?

17 MR. KENAN: Your Honor, I contend that the Judicial
18 Conference could act in a way in which was an exercise of the
19 judicial powers.

20 For instance, a judicial council is given the power
21 to remove a referee in bankruptcy. Now, this is the exercise
22 of judicial powers. It's admitted by Mr. Wright that it's the
23 exercise of judicial powers. This is given to the Judicial
24 Council statutorily; this right.

25 So, Congress did give, for instance, to a judicial

1 council, at least one specific and explicit instance of the
2 right to exercise judicial powers.

3 MR. CHIEF JUSTICE BURGER: You meant the Judicial
4 Conference there, didn't you?

5 MR. KENAN: NO, I was back on the Judicial Councils,
6 Your Honor. I don't --

7 MR. CHIEF JUSTICE BURGER: Which is the specific
8 judicial power which has been invested, in those terms, in the
9 Judicial Council to which you were referring.

10 The Council, now.

11 MR. KENAN: The Council, by statute of Congress, is
12 given the authority, when the District Judges cannot agree
13 upon the removal of the referee in bankruptcy, to remove the
14 referee in bankruptcy of their court by hearing. And this is
15 provided by Congress. So, it shows in this one statute, that
16 the Congress believe that a judicial council can act with the
17 judicial powers that the judges have.

18 MR. JUSTICE BLACK: Is that cited in your brief?

19 MR. KENAN: Sir?

20 MR. JUSTICE BLACK: Is that cited in your brief,
21 that section?

22 MR. KENAN: Your Honor, that is cited in Mr. Wright's
23 brief, the section -- I don't recall the particular statute at
24 this instant, but it is cited in there. It's a footnote in the
25 Solicitor-General's brief.

1 Your Honors, the question --

2 MR. JUSTICE WHITE: What makes that a judicial
3 function; the removal of an officer.

4 MR. KENAN: The removal of referee in bankruptcy?
5 Well, Your Honor, this referee in bankruptcy is acting over
6 cases --

7 MR. JUSTICE WHITE: I know, but his removal, why
8 is that a judicial function necessarily? I suppose the
9 President has power to remove from office various members of
10 the Executive Branch. When he does that he is performing a
11 judicial function?

12 MR. KENAN: No, sir, it is only an executive func-
13 tion when he does that, because these lesser officers are
14 exercising part of the executive powers given to the President.

15 Do you think when a District Judge removes a
16 probation officer, is exercising a judicial function?

17 MR. KENAN: If the judicial officer is able to
18 employ discretion in the performance of his duty, which dis-
19 cretion you would ordinarily think are those of the judge, then
20 I would say the judicial power is concerned.

21 MR. CHIEF JUSTICE BURGER: What about his law clerk;
22 if he dismisses his law clerk or secretary?

23 MR. KENAN: I wouldn't think so there; I think
24 that's an administrative assistance to the judge. He has full
25 power to remove his law clerk.

1 MR. CHIEF JUSTICE BURGER: How does a referee in
2 bankruptcy get his position in the first place?

3 MR. KENAN: By the court.

4 MR. CHIEF JUSTICE BURGER: Is that a judicial act
5 when the court appoints him?

6 MR. KENAN: Yes, sir, I think it is. If the court
7 is appointing an officer to perform certain judicial functions.
8 I think the referee performs certain judicial functions. I
9 think it's a very high honor for a lawyer to be appointed to
10 this. It certainly is an assistance of the judges of the
11 court in their carrying out their judicial functions.

12 And I think that when a Judicial Council acts to
13 remove from a judge all of his power to hear and cite cases
14 that now we have the strongest possible instance when someone
15 is exercising judicial power.

16 Your Honor, the main thing is this Section 332
17 which set up judicial councils, and what it means; and I want
18 to direct this Court's attention to, I think, the most sig-
19 nificant part of the case, and that is: what is the meaning of
20 Section 332?

21 And it is our contention that in 1948 when there
22 was a revision of the judicial code, that there were important
23 changes made that slipped by the Congress in such a manner that
24 Congressional intent could not have been involved and that these
25 these changes cannot be the law.

1 The Committee Report of 1948, stated, and it was
2 only eight pages long, with a big appendix to it with the
3 reviser's notes. The Committee Report said, "The reviser's
4 notes are keyed to the sections of the revision and explain in
5 detail every change made in the text." That's the notice
6 given to the Congress.

7 The reviser's notes on Section 332 said, "Changes
8 in phraseology were made," and two other remarks, but they
9 don't bear on this case.

10 Your Honor, if you will compare the 1939 statute,
11 which was the original one, and the 1948 statute, and I have
12 these two statutes laid out side-by-side on Page 13 of my
13 brief, I think that you can see what violence was done to the
14 1939 statute.

15 Now, the 1939 statute has cohesion and builds
16 logically from first, the calling of council meetings, to
17 second, the submission to the meetings of the Administrator
18 of the U. S. Court's reports; next to the taking of action
19 thereon by the council,, and finally, notice to the District
20 Judges of their duty to promptly carry out the directions of
21 the Council as to the administration of business of their
22 courts.

23 Your Honors, the 1948 revised version there has
24 been alot said about the fact that the word "order" was sub-
25 stituted for the word "directions," but that's not the

1 principal change that was made.

2 The principal change made is that in the 1948 Act
3 the Judicial Council was given two sources of authority.
4 In the 1939 Act it was given a single source of authority.
5 The 1948 Act, in the third paragraph continues, as the '39
6 Act did; it talks about the quarterly reports of the administra-
7 tor of the courts, and then says, "That council shall take
8 such action thereon as may be necessary." There is the source
9 of power for judicial councils.

10 Then it breaks a paragraph and it commences with
11 the final paragraph; and it commences with a second source of
12 power, which the 1939 Act didn't have. It says, "Each Judicial
13 Council shall make all necessary orders for the effective and
14 expeditious administration of the business of the courts within
15 its circuit. It's got two statements of authority. The '39
16 Act had one.

17 And now the sentence about the judges carrying into
18 effect the directions or orders -- I don't care what you call
19 it -- this section is put at the bottom, after the second
20 source of power of judicial councils.

21 Now, there has been a lot said about the powers of
22 judicial councils being just about plenary, and I can see why,
23 because when this 1948 revision was made, there was slipped
24 into this statute in the revising process, two sources of
25 power for judicial councils, and that was not the intent of

1 1939 Act.

2 MR. CHIEF JUSTICE BURGER: Well, do you recall the
3 details of how that last sentence happened to get in there,
4 in the legislative history. I don't know whether you have
5 covered that.

6 MR. KENAN: Well, sir, it was a very complicated
7 and extended procedure, the actual revising of the code. The
8 Bar was involved, the judges were involved, the justices were
9 involved; law professors were involved.

10 MR. CHIEF JUSTICE BURGER: No, I am speaking of the
11 specific sentence. Was that -- my recollection may be faulty.
12 My recollection of the legislative history is that at the time
13 the matter was before the Committee of the Judiciary of the
14 Senate, some Senators raised the question that this statute,
15 proposed Section 332 had no teeth in it; had no teeth, and
16 either a Senator or staff member, someone then reached into the
17 '39 Act and added this modification, which is the last sentence
18 of the 1948 amendments. Do you --

19 MR. KENAN: Your Honor, my memory may be faulty,
20 but with all due respect, I do not believe you are correct.
21 The change that was made was made in the House in the 1948
22 revision. This was a House bill. The particular statement
23 you are referring to about the Act has no teeth in it,
24 occurred in hearings before the Senate in the 1939 enactment.
25 In 1948 the Act originated in the House and was placed on the

1 consent calendar of the House, whereby it goes through
2 automatically, because the Committee Report says that there
3 aren't any substantive changes made in the old law, and
4 Congressmen are given this very slight notice: "This Act
5 isn't intended to change the law" and the appendix even said
6 in the House Report, that the law wasn't changed --

7 MR. CHIEF JUSTICE BURGER: Well, whether it's in
8 the '39 setting, or the '48 setting, it was in the setting of
9 members of the Senate who thought the statute had to be
10 strengthened to give greater authority to the council; is that
11 not correct?

12 MR. KENAN: Your Honor, I don't know if that was the
13 intention of their questioning. They did ask the question and
14 I don't recall whether it was Chief Justice Groner, or someone
15 who -- I believe it was him, as a matter of fact, said in
16 their opinion there were sufficient teeth, because if the
17 judicial council made a direction, that it would be carried
18 out, quite naturally, and no further words were needed. I
19 believe that that is the distillation(?) of the 1939 dis-
20 cussion about were teeth needed. I think maybe people may
21 have been concerned at the time about whether they could
22 put additional teeth in there if it came to a point of
23 taking a judge's cases away from him.

24 Well, sir, Your Honor, I think the history of the
25 '39 Act really is a history that shows what was really intended

1 to be done in '39 was to set up an administrative procedure
2 for the courts to take away from the Attorney General the
3 necessity of attending to these details. They provided the
4 Administrator of the U. S. Courts, a new office.

5 And they tied to the Judicial Council the prepara-
6 tion of these data-gathering and statistics-compiling reports
7 of the Administrator of the courts in ~~the~~ the
8 councils and the councils acting thereon and then issuing
9 directions to the judges, who shall carry out the directions
10 -- in the words of the statute -- "as to the administration
11 of the business of their respective courts.

12 I contend that the 1948 revision, because of the
13 Committee Report, which is true legislative history in any
14 enactment, because of the reviser's notes that changes in
15 phraseology were made; that's all, I contend the original
16 intention of 1939 controls, and that the two sources of
17 authority for judicial councils to act now, don't really change
18 what the law is, because that wasn't the intention of Congress.
19 The Congress didn't intend to change the law.

20 Your Honor, I noticed that the Judicial Conference
21 in 1961 issued a report entitled, "The Powers and Responsi-
22 bilities of the Judicial Councils." This was a very elaborate
23 document; someone got Chairman Celler to print it as a House
24 Document and it's quite an elaborate defense of the Judicial
25 Councils, in fact it even appears to me that it's an attempt to

1 take care of any weaknesses in the authority of judicial
2 councils.

3 This report immediately focuses upon the -- the
4 first thing it does is talk about the 1948 revision, and
5 particularly the change of word "directions," to "orders."
6 Now, that's strengthening word, but that isn't a significant
7 thing. Nevertheless, the Judicial Conference says, "The
8 changes are one of form and emphasis, rather than substance."
9 No change in substance has occurred. That was the conclusion
10 of the Judicial Conference in 1961.

11 But it's important that that document makes no
12 mention of the fact that the '48 statute carries two sources
13 of powers for the judicial council, whereby the '39 Act only
14 carried one.

15 I submit there-had been no change in the intentions
16 of Congress.

17 Your Honor, I think that there is another issue
18 involved in this case and that is that taking all the cases
19 from a judge; all the cases, is tantamount to impeachment, and
20 I think this is a very serious question here. The constitution
21 gave impeachment powers to the House and to the Senate. "The
22 Senate shall have the sole power to impeach" -- I mean the
23 House. "The Senate shall have the sole power to try all im-
24 peachments."

25 I think the history of the constitution shows that

1 there was no intention to provide any other means for removing
2 a Federal judge from the bench. Federal Judges were given
3 their offices during good behavior and yet the Federalist,
4 in its Number 78 and 79, devotes itself to proving how impor-
5 tant judicial independence is to the rights and liberties of
6 the people and how the constitution secures that.

7 It talks then about the impeachment powers of the
8 House and Senate and says -- this is the only provision on the
9 point, which is consistent with the necessary independence of
10 the judicial character.

11 MR. JUSTICE STEWART: Now, your argument is made
12 upon the premise that the Judicial Council has taken all the
13 cases away from the Judge.

14 MR. KENAN: They did initially.

15 MR. JUSTICE STEWART: They did initially, but that
16 was superceded.

17 MR. KENAN: Well --

18 MR. JUSTICE STEWART: Well, am I incorrect in my
19 understanding of that?

20 MR. KENAN: They did supercede it, but then they
21 kept him from hearing any cases later filed in the court.
22 Furthermore, they pressured him into all of this, Your Honor.
23 They have been acting against him ever since --

24 MR. JUSTICE STEWART: I understand your argument;
25 all those argument, but am I incorrect in my understanding

1 that their action taking all cases away from him, was super-
2 ceded?

3 MR. KENAN: Yes, sir.

4 MR. JUSTICE STEWART: I'm incorrect on that; am I.

5 MR. KENAN: Yes, sir; you are correct.

6 MR. JUSTICE STEWART: I'm right in that under-
7 standing?

8 MR. KENAN: Yes, sir.

9 MR. JUSTICE STEWART: So, any argument based upon
10 the premise that there's an outstanding order taking all cases
11 away from him is based upon an incorrect premise; am I right?

12 MR. KENAN: Your Honor, the order has been super-
13 ceded. Because of the continuation of the council to act;
14 because of the importance to the judiciary of whether they
15 could do this, since the judicial council merely has to super-
16 cede any order when challenged, we think that it is within the
17 discretion of this Court to issue mandamus to the Judicial
18 Council to order them not to do this any more and to cease any
19 vestiges of its action against Judge Chandler, otherwise this
20 question can never be litigated.

21 MR. JUSTICE HARLAN: To follow up on Justice
22 Stewart's question, what is the exact situation of Judge
23 Chandler now. Is he being assigned cases?

24 MR. KENAN: His exact situation, Your Honor, is
25 that he has the remnants of four or five cases that had been

1 assigned to him before this matter arose. He has the remnants
2 of those still in his office. He has heard the rest of the
3 cases that have been assigned to him. He and the other judges
4 of his court have agreed that no further cases will be assigned
5 to him under the circumstances of this matter being before
6 this Court.

7 MR. JUSTICE WHITE: But that is at the order of the
8 Judicial Council, because at the time he agreed to that, he
9 disagreed with the assignment of cases that he already had.
10 He disagreed and the Judicial Council then entered an order,
11 didn't they, saying that he could keep his old cases, but that
12 he can't have any new ones.

13 MR. KENAN: That's correct.

14 MR. JUSTICE WHITE: Well, is that order still out-
15 standing?

16 MR. KENAN: That order was in effect until several
17 months ago, when the Judicial Council advised the other members
18 -- the other judges of Judge Chandler's court and him that if
19 they wished to enter into the new order for the division of
20 business, they might do so. The judges considered it and
21 stated that under the circumstances, they would allow the
22 existing order to continue.

23 MR. JUSTICE WHITE: Well, let's assume that Judge
24 Chandler said, "I want to be assigned my full quota of cases,"
25 and the other two judges disagreed and said, "Present division

1 should continue." Then there would be a disagreement. And
2 let's assume then that the Council, the Judicial Council,
3 entered an order saying, "No new cases." Would you say that
4 was beyond their power?

5 MR. KENAN: For him -- yes, sir, I would say it
6 was beyond their power.

7 MR. JUSTICE WHITE: On the same grounds that you
8 are using?

9 MR. KENAN: Well, Your Honor, I don't believe that
10 the Judicial Council can make such an order as to take away all
11 the cases of the judge.

12 MR. JUSTICE WHITE: Well, it purported to.

13 MR. KENAN: It purported to, yes, sir; and we
14 challenged that decision before this Court.

15 MR. JUSTICE WHITE: I don't know why you think you
16 would have to argue about the old order, when the superceded
17 order -- I mean the order superceding the old order is,
18 according to your approach, just as suspect as the old one.

19 MR. KENAN: I certainly do, Your Honor. Judge, any
20 disagreement in Judge Chandler's court was forced upon the
21 judges by the Judicial Council. They questioned his fitness.
22 They came before this Court and said, "Why, we might have to
23 act under 372(b), he may be mentally disabled." And yet they
24 turn right around thereafter and say it's all right for him to
25 hear all the cases assigned to him.

1 This whole thing is one cohesive things This has
2 been a struggle between the Judicial Council and Judge
3 Chandler and has continued down to this moment and when the
4 Judicial Council offered to the members of Judge Chandler's
5 court the ability finally to enter into a new order dividing
6 the business of their court, without interference from the
7 Judicial Council, the judges of this court said that under
8 the circumstances, the present order will stand.

9 The present order still stands, but it's agreeable
10 to the members of his court under the circumstances.

11 MR. JUSTICE STEWART: Is it your contention that
12 what you call the present order, which was promulgated under
13 Section 137, is not authorized by Section 137 or is it your
14 position that if authorized by 137 then Section 137 is un-
15 constitutional, as applied?

16 MR. KENAN: It is not my contention that Section 137
17 is unconstitutional. It is quite constitutional, Your Honor.
18 I do believe, however, that the Congressional intent behind
19 137 was that the Judicial Council can divide cases of the
20 District Court in the even that a genuine disagreement of the
21 judges of that court, as to the matter of dividing the cases.
22 This is not a genuine disagreement. This is one that the
23 Judicial Council created. It created a disagreement. I don't
24 think that that's --

25 MR. JUSTICE STEWART: Well, let's assume a genuine

1 disagreement among the District Judges. Would you agree or
2 disagree with the power of the Judicial Council to make such
3 an order as was made here; that is that no new cases shall be
4 assigned to Judge A, and all new cases will be divided among
5 Judges B, C, and D.

6 MR. KENAN: I would agree, Your Honor.

7 MR. JUSTICE STEWART: That Section 137 does
8 authorize the Council?

9 MR. KENAN: Yes, sir.

10 MR. JUSTICE STEWART: And that that's a constitutional
11 power?

12 MR. KENAN: Yes, sir, I agree.

13 MR. JUSTICE WHITE: I thought just a while ago you
14 said that a Judicial Council could not enter an order saying
15 that a judge could not have any new cases.

16 MR. KENAN: Your Honor --

17 MR. JUSTICE WHITE: And you say that 137, Section
18 137 does not authorize what the Judicial Council did in this
19 case, by saying, "no new cases."

20 MR. KENAN: Well, Your Honor --

21 MR. JUSTICE WHITE: If you assume that 137 does
22 authorize the second order of the council; assume that, you
23 would say that it's constitutional?

24 MR. KENAN: Your Honor, the Section 137 certainly
25 superficially authorizes the second order of the Judicial

1 Council, because the judges were disagreeing.

2 MR. JUSTICE WHITE: All right; assume that it does.
3 It is constitutional for the -- if two district judges say
4 to the third, "We don't like the way you are deciding cases;
5 we don't think any more ought to be assigned to you." And
6 the third judge says, "Well, I think I ought to have my quota
7 of cases." Then it goes to the Council. And the Council says,
8 "Well, we agree with the two judges and you can't have any
9 more cases."

10 Now, assuming 137 authorizes that, you nevertheless
11 say it's constitutional?

12 MR. KENAN: No, I would say, Your Honors, that that
13 is all right. That is the type of disagreement that that
14 second --

15 MR. JUSTICE WHITE: I know; I know, but what about
16 the constitutionality of Section 137, if so construed and
17 applied?

18 MR. KENAN: You mean with respect to the Judicial
19 Council removing the ability of a judge to hear any cases
20 thereafter.

21 MR. JUSTICE WHITE: Well, as soon as he runs out of
22 cases he isn't going to be hearing any.

23 MR. KENAN: Then they have removed him from his
24 office.

25 MR. JUSTICE STEWART: Well, when that point's

1 reached you are going to have a different case.

2 MR. JUSTICE WHITE: But that point has not yet been
3 reached in this case; isn't that correct?

4 MR. KENAN: Well, in effect, it has. He just has
5 the remnants of a few cases around.

6 MR. JUSTICE WHITE: Yes.

7 MR. JUSTICE BLACK: I want to understand what you
8 are saying. Are you saying that the Judicial Council has
9 constitutional authority to tell a Federal District Judge,
10 appointed for life, that he can't try any more cases?

11 MR. KENAN: Your Honor, that is just exactly what
12 I am saying the Judicial Council cannot do.

13 MR. JUSTICE BLACK: Under the Constitution; not
14 under the statute?

15 MR. KENAN: First of all --

16 MR. JUSTICE BLACK: I'm talking about do you say
17 they can do that under the constitution?

18 MR. KENAN: No, sir; they cannot.

19 MR. JUSTICE BLACK: Why not?

20 MR. KENAN: Because it is tantamount to impeach-
21 ment.

22 MR. CHIEF JUSTICE BURGER: Let's back that up a
23 little bit, Mr. Kenan..

24 Suppose you have a judge who has not decided any of
25 his cases for five years, and he's holding these cases and this

1 is an extreme case I am suggesting in this hypothesis -- not
2 your case here -- five years have gone by and he hasn't
3 decided any of his cases and the litigants are clamoring for
4 action and the other judges then on division first, under
5 Section 137, decide that he gets no more new cases until he
6 gets his old business taken care of. Now, I understood your
7 responses previously were that that is a lawful power vested
8 in the courts.--

9 MR. KENAN: Yes, sir.

10 MR. CHIEF JUSTICE BURGER: Do you suggest that's
11 a judicial power or an administrative power?

12 MR. KENAN: I suggest that is a judicial power,
13 Your Honor.

14 MR. CHIEF JUSTICE BURGER: That they can do it
15 under the constitution?

16 MR. KENAN: Yes, sir. I think that what is involved
17 there is a legitimate determination that a judge is overworked
18 under the circumstances; he has a crowded docket and he should
19 refrain temporarily from taking on new cases. There we have
20 the facts supporting that, Your Honor.

21 In the case at bar, I contend we don't have the
22 facts supporting it and without the factual basis for it then
23 that make the difference between constitutionality and uncon-
24 stitutionality. Your hypothetical is quite constitutional,
25 until the judge catches up.

1 MR. JUSTICE BLACK: I had rather thought that the
2 judicial duty of a judge was to try lawsuits.

3 MR. KENAN: Yes, sir.

4 MR. JUSTICE BLACK: Well, where is there any trial
5 of a lawsuit in that administrative action which you are talk-
6 ing about which you call "judicial," and which I would call
7 "administrative?"

8 MR. KENAN: Well, Your Honor, I just believe that
9 taking cases away from a judge is a judicial action.

10 MR. JUSTICE BLACK: Why is it a judicial action?
11 Are they trying a case?

12 MR. KENAN: Well, Your Honor, I don't know, to tell
13 you the truth.

14 MR. JUSTICE BLACK: You know they are not trying a
15 case; don't you?

16 MR. KENAN: Well, it may be that we should draw a
17 fine line here, that with respect to future cases it is an
18 administrative decision because the judges' powers had not
19 yet been invoked, but with respect to cases already assigned
20 to the judge, removing through the judicial process, upon which
21 hearings have been held and matters are ready for final deter-
22 mination, then to pluck a case away from a judge, involves
23 the judicial process.

24 MR. CHIEF JUSTICE BURGER: Does it meet the
25 standards of the case in controversy, under the constitution;

1 this action?

2 MR.KENAN: Yes, sir; it does.

3 MR. JUSTICE BLACK: How does it?

4 MR.KENAN: Judge Chandler is contesting the right
5 of the Judicial Council to deny him the right to participate
6 in the judicial process. He had over a hundred cases already
7 assigned to him; some were moving toward final judgment. He
8 was ordered to retire from those cases; the appellate powers
9 of the court were involved, and Judge Chandler has contested
10 the right of this body in the taking on of those cases. There
11 is your controversy.

12 MR. JUSTICE STEWART: Do you concede, Mr. Kenan,
13 that if this was administrative action, rather than judicial
14 action by the Judicial Council, of the Circuit, that this Court
15 is entirely without jurisdiction?

16 MR. KENAN: Your Honor, I will concede that, but I
17 want to make one careful point here.

18 In my opinion the Congress intended to give to the
19 Judicial Councils in this type of matter, only administrative
20 powers. I believe that the Judicial Council, which also has
21 some judicial powers, exceeded its powers and it assumed
22 judicial powers.

23 It is a court and I believe that it should be con-
24 fined to the proper exercise of its powers, but it was --

25 MR. JUSTICE BLACK: What did you say it is;

1 a court?

2 MR. KENAN: The members of the council are members
3 of the court.

4 MR. JUSTICE BLACK: The members of the council are
5 judges.

6 MR. KENAN: Yes, sir, that's what I mean.

7 MR. JUSTICE BLACK: And you say the "members," as
8 a group constitute a court?

9 MR. KENAN: No, sir; I didn't mean to imply that,
10 Your HONor. I said the members of the council are members of
11 a court and when they act with full cloak of their office
12 around them; sign their orders, "Circuit Judge," file them in
13 the court's records, get marshals to serve them, remove
14 a judge from cases, they're acting as judges involved in the
15 judicial process.

16 They should be confined to the rightful exercise of
17 their duties.

18 MR. CHIEF JUSTICE BURGER: Mr. Shipley.

19 ORAL ARGUMENT BY CARL L. SHIPLEY, ESQ.

20 AS AMICUS CURIAE, FOR THE PETITIONER

21 MR. SHIPLEY: Mr. Justice, and may it please the
22 Court: In view of the lineup in which presentations will be
23 made, and our time situation, I would like to anticipate some
24 of the arguments of the Solicitor-General has included in his
25 brief and some of the arguments which are presented by

1 Professor Wright in his brief in this case.

2 I think that in considering the matter the Court
3 must necessarily bear in mind the long history involving good
4 behavior and the impeachment sections of the Federal Constitu-
5 tion, and measure Section 332 of the statute and the actions
6 of the Judicial Council in this specific case, against that
7 long history. A part of these two briefs to which I refer
8 address themselves to that problem of the history, and we all
9 know that from the time that John Randolph in 1787 made his
10 original resolutions respecting our national judiciary and
11 the Continental Congress when Mr. Dickinson moved that the
12 good behavior provision should be modified to follow the
13 British pattern, that where an address by the Congress and the
14 Senate to the President, might result in the removal of a
15 Federal Judge, that this was rejected in favor of the inde-
16 pendence of the Federal Judiciary.

17 So, we recall that Thomas Jefferson, of course,
18 strongly supported the idea of total independence except for
19 impeachment and then a few years later we find that he was
20 criticizing impeachment procedures as not being adequate.

21 And against that background we have to look at
22 what has happened in this specific case. It can only be
23 characterized as outrageous. Here is a Chief Judge of a
24 Federal District Court who has served with honor, with honesty,
25 with efficiency, for 26 years, and a chief judge for eight

1 years.

2 We know from public documents that are a matter of
3 public record in which in our brief we have asked this Court
4 to take judicial notice of, and which it properly can take
5 judicial notice of, and which it should take judicial notice
6 of; that there has been along friction in terms of jurisdic-
7 tion between what the Tenth Judicial Circuit thought it could
8 do, honestly, I suppose; in terms of Section 332 and Section
9 137 and Section 372; perhaps Section 371 of Title 28. And
10 this friction has manifested itself ultimately in the final
11 order of the Judicial Council, which was not its first order
12 against this judge.

13 In the Solicitor-General's brief there are
14 references to the Occidental Petroleum case and Texaco case.
15 They are referred to in the Judicial Council's order, not by
16 name, but simply saying that the judge has been involved in
17 some criminal and civil litigation which has had some impact,
18 to speak of his attitude and his conduct and the efficiency of
19 the court, without any factual showing as to how these relate
20 in anymanner to the difficulties any Federal Judge has over
21 many years in dealing with complciated cases and complicated
22 litigants.

23 The first question which concerns me against this
24 historical background is the threshold question, as the
25 Solicitor-General calls it, of whether this Court has

1 jurisdiction, which some of the Justices have raised.

2 Our position is that the Court does have jurisdic-
3 tion under Section 1651 of Title 28, that being the All Writs
4 Act, which incorporates, as we understand it, and as we
5 understand it, the Solicitor-General understands it.

6 It incorporates the old Section 13 and 14 of the
7 original Judiciary Act of 1789 and although Judge McGruder,
8 and I guess, the Josephson case, perhaps, suggested that there
9 has been some change by reason of the revision of these older
10 sections into the present Section 1651, the All Writs Act.
11 We agree with the Solicitor-General that this court has
12 jurisdiction by reason of that act.

13 A second point I think I would touch on briefly, is
14 that in our brief we suggested that the Court had inherent
15 power, and we also mentioned that it has power under the due
16 process provisions of the constitution, to deal with the
17 matter of this extraordinary significance in this context;
18 in this historical context, and in the practical immediate
19 context, because here these are live judges operating in a
20 very important circuit, where we have had a long, running
21 situation that's resulted in interference by somebody in the
22 operation of that court.

23 Our position is the Tenth Judicial Council has
24 unconstitutionally not impeached the judge and removed the
25 judge from the office, but they have removed the office from

1 the judge, in a kind of a reverse English procedure, which
2 certainly Congress could not possibly have intended, because
3 it would be unconstitutional, in our judgment on the face.

4 The provisions of the Federal Constitution relating
5 to this matter are so explicit in setting up a special court
6 in the Senate that requires a two-thirds vote; where every-
7 body is on oath and it names who the Chief Justice and pro-
8 viding officer shall be, and exactly what the procedures
9 shall be and the judicial proceeding to convict somebody.

10 And all of these things, we think, come within the
11 type of problem which is contemplated, yet can be reached
12 under Section 1651, under the Extraordinary Writs. These are
13 the writs for extraordinary circumstances. The action of the
14 judicial council here that energizes bringing the Section 1651
15 into play.

16 The inherent powers -- we didn't just make up the
17 term -- this Tenth Judicial Council, in three of the cases
18 cited in the Solicitor-General's brief; and I say the
19 Solicitor-General's brief does not touch on this; it makes
20 reference to the fact they have never heard of this Court
21 suggesting it had inherent powers; but in the Ritter case,
22 cited in the Solicitor-General's brief and the Texaco case
23 and the Occidental Petroleum case; all three, the courts there,
24 of the Tenth Circuit, said, "We are exercising our power under
25 Section 1651, or our inherent appellate jurisdiction." They

1 didn't care which and they specifically stated it in all
2 three cases.

3 And that's how they acted to issue extraordinary
4 writs against Judge Chandler in these three cases, which lie
5 at the base of the existing order, which we challenge.

6 Now, the second problem that seems to me that we
7 are concerned with, is that the Solicitor-General, putting
8 aside Professor Wrights position that this Court has no juris-
9 diction, we follow the Solicitor-General on that. We think
10 it does for the reasons he addresses himself to and the
11 reasons I have set forth.

12 The second problem is whether or not, and as I
13 understand the Solicitor-General's brief, he said, either the
14 case is moot or Judge Chandler is estopped from being here
15 because he has agreed to the present division in his court.

16 On the question of agreement, we have cited in our
17 brief that this was a kind -- this was not the kind of an
18 agreement that can lead to estoppel; just as it was not the
19 kind of disagreement that would energize Section 137 of Title
20 28, that would energize or activate the statutory authority
21 whereby the Tenth Judicial Council could divide the business of
22 the court.

23 And on that point, let me say that I do not agree
24 that an exercise of Section 137 so extreme when it deprives a
25 judge of all these cases, is a constitutional exercise of that

1 authority. I think 137 has to be measured against what they
2 are trying to do and it cannot be used to deprive a judge of
3 his office, any more than Section 332 can. It can be used,
4 when it's activated properly, by a genuine and bona fide
5 disagreement to divide the business of the court so we can get
6 on with the judicial business of the nation.

7 Now, with respect to whether or not that first order,
8 the order we challenge, was moot, I simply call the Court's
9 attention to the Grant case we cite, and to this Court's own
10 more recent case in the American Phosphate Exporter's case,
11 which was decided last November and which addresses itself to
12 this problem of mootness and I just have just a word --

13 MR. CHIEF JUSTICE BURGER: Mr. Shipley, before you
14 go on with that, could I ask you one question?

15 MR. SHIPLEY: Yes, sir

16 MR. CHIEF JUSTICE BURGER: You have now addressed
17 yourself to the possibility that certain actions under Section
18 137 might be lawful in the sense that they are authorized by
19 the statute, and authorized by the constitution; I take it?
20 If they are to get on with the business of the Court, but that
21 in this case, you then raise the question of whether that was
22 the good faith purpose.

23 Are there any findings -- has there been any deter-
24 mination by anyone we could review to determine whether they
25 were in good faith or in bad faith? How would this Court

1 review that issue you are claiming?

2 MR. SHIPLEY: I think the Court simply has to look
3 at the record before it. This matter came before this Court
4 on the Tenth Judicial Council's original order of December 13,
5 1965, where they said, and I quote directly from the order:

6 "In the past four years the Judicial Council had many meetings,
7 has discussed and considered the business of the United States
8 District Court for the Western District of Oklahoma, and has
9 done so with particular regard to the effect thereon of the
10 attitude and conduct"-- these are not words in any statute --
11 they made them up; and they can make up a lot more and any
12 Judicial Council could if this Court authorizes this kind of
13 action.

14 "The attitude and conduct of Judge Chandler, who, as
15 Chief Judge of the District, is primarily responsible for the
16 administration of business. During that period Judge Chandler
17 has been a party defendant in both civil and criminal litigation.
18 One civil case is still pending --"

19 MR. CHIEF JUSTICE BURGER: This recital comes from
20 what the Council said, does it?

21 MR. SHIPLEY: This is the first order, which we
22 challenge and which we say is not moot and we rely on the
23 American Export case, which points out that the mere fact that
24 somebody takes subsequent curative action doesn't remove the
25 question of whether or not --

1 MR. CHIEF JUSTICE BURGER: I am still at a loss as
2 to just where there is something to review that would shed
3 any light on the presence or absence of good faith.

4 MR. SHIPLEY: Well, if you look at the order itself,
5 under Section 332; the original order, which is not moot, when
6 you look at the cases, and was simply stated interms that the
7 judge was literally -- his office was taken away from him,
8 then and there, and his cases were to be reassigned.

9 Section 137 had not been energized; they had no
10 authority under Section 137; there was no disagreement as to
11 the assignment of the work; there was no showing that there
12 was a backlog; there was no showing the court wasn't
13 operating efficiently. As a matter of fact, the statistics
14 from the office -- administrative office, are just the
15 opposite. He was doing his work and everybody else was doing
16 theirs. There wasn't the slightest question of the efficiency
17 of that court. The question was what they said, the attitude
18 and conduct of the judge; they plain didn't like him.

19 There was no objection from the Bar Association;
20 no objection from litigants; no objection from the lawyers in
21 the town; no objection from anybody, except the Tenth Judicial
22 Council,

23 MR. JUSTICE BLACK: Are you conceding that the
24 Council of judges would have had a right to call Judge Chandler
25 before him and try him to see whether or not he was attending

1 to his business officially?

2 MR. SHIPLEY: No, sir; they would have no such
3 authority under the Federal constitution. And I doubt that
4 Congress would have any authority to give any such jurisdic-
5 tional authority to anybody.

6 Now, there is a lot of discussion over all these
7 many years impending bills in Congress --

8 MR. JUSTICE BLACK: Well, are you conceding that
9 the Court of Appeals has any such inherent authority?

10 MR. SHIPLEY: No; but the Tenth Circuit says it
11 has it. It says they have inherent appellate --

12 MR. JUSTICE BLACK: Are you conceding that even
13 this Court would have such an inherent authority to test the
14 conduct of a Federal Judge's --

15 MR. SHIPLEY: No, sir, I think that the United
16 States, via the Solicitor General, has weapons available; a
17 writ -- it could follow some of its own suggestions to
18 challenge any public officer who wasn't doing his duty in
19 a certain way, but I think the constitution sets up a special
20 court to deal with judges and their tenure, and just as the
21 President has four years, the judge is appointed for good
22 behavior and when that question of good behavior is to be
23 resolved, the Congress itself must do it in a special court
24 provided in the constitution, with a two-thirds vote which no
25 pardon can issue under the constitution. The President can't

1 pardon a person and he is only removed from office and if there
2 is a crime or something else involved then he can be sub-
3 sequently subjected to double jeopardy, let us say --

4 MR. JUSTICE BLACK: Suppose the Council issued an
5 order and he refused to obey it. Do you agree then that there
6 could be anything done to him; or do you agree with what Mr.
7 Vanderbilt and Judge Groner said in the hearings, that that
8 would be perfectly just cause for the remedy and method of
9 impeachment, as provided by the constitution?

10 MR. SHIPLEY: Well, I think impeachment --

11 MR. JUSTICE BLACK: Do agree that there is any
12 other way to try it except there?

13 MR. SHIPLEY: No, sir; and the record of impeach-
14 ments in the history of our country, so that Federal Judges
15 had been impeached for drunkenness and convicted; they had
16 been impeached for corruption. There haven't been many, been
17 cause these aren't the type of men that are appointed to the
18 Federal Judiciary; but the weapon is there to be used and the
19 procedures are very adequate to serve so important a purpose.

20 May I ask the Clerk what the white light means.
21 Am I out of time or am I within some minutes of being out of
22 time?

23 MR. JUSTICE DOUGLAS: You have five minutes.

24 MR. SHIPLEY: And the red light, I'll be out of
25 time, because my colleague ran over so badly there, I don't

1 know just where we are. I will continue for the five minutes.

2 MR. CHIEF JUSTICE BURGER: You have just one
3 minute left.

4 MR. SHIPEY: Out of the five?

5 MR. CHIEF JUSTICE BURGER: of the five; yes.
6 The remainder is reserved for rebuttal, I take it, by Mr.
7 Kenan.

8 MR. SHIPLEY: Well, I think we have run out of our
9 time here and I do have some points I want to address myself
10 to and I wanted to know when the time is up for our side.

11 Or if the Court please, another very important
12 question which has come up that the Solicitor-General, I am
13 sure, will address himself to, is whether or not Judge
14 Chandler has agreed to the present division of business and by
15 this agreement -- although the Solicitor-General doesn't use
16 the term, but he is estopped, whether or not by this agreement
17 it makes the case moot or removes any cause for this court to
18 get into what the Solicitor-General called the "delicate
19 question;" the constitutional questions involved in Section
20 332.

21 We have pointed out in our brief that Judge
22 Chandler's agreement was not a bona fide agreement in the sense
23 that the law had contemplated that it should be to estop him
24 from complaining about something to which he had agreed. His
25 agreement was simply -- he put right in the letter -- that he

1 was signing under protest to avoid creating a disagreement
2 and that he would expect to address himself to the constitu-
3 tionality of the action, against Judicial Council, as outlined
4 in our brief.

5 I see that my time is out and I will just close in
6 saying this: I do agree with Congressman Celler and other
7 scholars who have said that good behavior, attitude, conduct
8 in these matters are not just issues; they are not just
9 questions that can be tried in any place except the Senate of
10 the United States, acting as a court of impeachment, in
11 accordance with the constitution.

12 And therefore, we would say this Court, in order to
13 clarify the matter, not to avoid what has been a delicate
14 problem, but to solve what's been 150 years of a complicated
15 problem and to speak forthrightly and completely and totally
16 so that the Federal Judges will know that the Judicial Council
17 will know exactly where their authority begins and ends under
18 Section 137 and under Section 332, because if this Court says
19 it doesn't have jurisdiction and steps away from this case, it
20 will compound what is a very serious situation which will con-
21 tinue in all the judicial circuits. Some of them may run wild.
22 We don't know what will happen, but certainly these are human
23 beings with the same personality frailties that have given
24 rise to this case and brought all of us here today.

25 Thank you.

1 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Shipley.
2 Mr. Wright.

3 ORAL ARGUMENT BY CHARLES ALAN WRIGHT, BSO.

4 ON BEHALF OF THE RESPONDENTS

5 MR. WRIGHT: Mr. Chief Justice, and if the Court
6 please: In my submission part of this case was in the
7 question Mr. Justice Stewart put to Mr. Kenan, when he said,
8 "Will you agree that if the action of the Judicial Council was
9 administrative in nature, that this Court would be entirely
10 without jurisdiction to review the matter.

11 And Mr. Kenan answered that question in the affirma-
12 tive, an answer that I think is compelled by a line of
13 authority going back to Marbury v. Madison, that unless the
14 proceeding that is brought there is judicial action by an
15 inferior tribunal, then this Court is being asked to exercise
16 original jurisdiction and that it might do only in cases to
17 which the state are parties or ambassadors or consuls are
18 involved.

19 Mr. Kenan, having agreed with the basic premise,
20 then suggested that in this particular instance the judicial
21 council acted in a judicial fashion, an argument that I must
22 confess I have some difficulty in following. His view, as I
23 understand it, is that Congress intended to create ^{an} administra-
24 tive agency called the Judicial Council. I agree entirely;
25 it seems to me the legislative history is clear; that the

1 literature is all in one direction on this, that no one, so
2 far as I know, prior to the Solicitor-General's brief in the
3 case, has ever suggested that a Judicial Council is vested
4 with any part of the judicial power of the United States.

5 It has always been understood to be merely an
6 administrative agency. Justices Black and Douglas, when this
7 case was here before, referred to it as a governmental agency
8 with limited administrative power.

9 Now, I agree entirely with this characterization of
10 the Judicial Council.

11 MR. JUSTICE DOUGLAS: I think "agency," can produce
12 a case or controversy. And I suppose that there would be no
13 case or controversy more vital in the life of a District
14 Judge than a proceeding against him to toss him out of office.

15 MR. WRIGHT: But it would not be a case or contro-
16 versy subject to review in this Court.

17 MR. JUSTICE DOUGLAS: Well, where would it be
18 subject to be?

19 MR. WRIGHT: Administrative agencies are subject to
20 review either under special statutory provisions or nonstatutory
21 review under 1361 in the District Court.

22 MR. JUSTICE BRENNAN: In this instance, it would
23 be the latter, I gather?

24 MR. WRIGHT: In my view, an action would lie in the
25 District Court under 1361; yes.

1 MR. JUSTICE DOUGLAS: So you -- I read your brief
2 differently -- perhaps I read it too fast, but you now say
3 that there is a case in controversy, but it is in the wrong
4 court?

5 MR. WRIGHT: I think the terms "case in controversy"
6 may be used here in two different senses.

7 MR. JUSTICE DOUGLAS: Let me see the Article 3
8 sense of the constitution.

9 MR. WRIGHT: Yes, sir. I doubt if there is a
10 proceeding between Judge Chandler and the Judicial Council.
11 What we are arguing this morning is a case in controversy.
12 I submit that it is a case in controversy that this Court
13 can't hear because it's not within your original jurisdiction.

14 In my submission what the Judicial Council did,
15 whether the relevant order be that of December 13, 1965 or
16 as I think, February 4, 1966, was not a case in controversy;
17 that it bore none of the earmarks of a judicial determination.

18 As you have suggested, Mr. Justice Douglas, an
19 administrative action may lead to a case in controversy. Say,
20 someone is dissatisfied with what an administrator has done
21 and then challenged that, but the appropriate place to challenge
22 that is in not in the first instance, the Supreme Court of the
23 United States.

24 MR. JUSTICE BLACK: Suppose this had been against
25 a judge of the Circuit Court of Appeals? Would he have had to

1 go to the District Court to try to assert his rights?

2 MR. WRIGHT: If the judicial council has power over
3 judges in the Court of Appeals --

4 MR. JUSTICE BLACK: Well, if it had inherent power,
5 why I suppose it has --

6 MR. WRIGHT: I'm not relying on any inherent powers,
7 Mr. Justice Black. The Judicial Council, in my view has the
8 powers that Congress has given it by statute and none other.

9 MR. JUSTICE BLACK : Suppose there was a statute
10 precisely, I guess, about the Court of Appeals and they had
11 removed a Court of Appeals judge, the Council had; would he
12 have to go to the District Court to assert his rights?

13 MR. WRIGHT: It seems to me his remedy, if any,
14 would be in the District Court; yes, sir.

15 MR. JUSTICE STEWART: I suppose that would be true
16 about a member of this Court if some administrative action were
17 taken against him that he didn't like, if this Court said just
18 because he happened to be a member of this Court, it
19 change the basic jurisdiction of the courts of the United
20 States; does it?

21 MR. WRIGHT: That is precisely my submission,
22 Justice Stewart.

23 MR. JUSTICE BLACK: Well, suppose it was about his
24 right to try cases, would he then have to go to the District
25 Court?

1 MR. WRIGHT: I think that he would have two remedies,
2 Justice Black; he could go to the District Court or he could
3 -- if he believed that the order were improper, could refuse
4 to obey it and the matter would then have to be tried by the
5 Senate sitting as a Court of Impeachment.

6 MR. JUSTICE BLACK: What's the impeachment pro-
7 vision of the constitution -- what purpose would it serve?
8 Like when a judge is deprived of his right to act as a judge?

9 MR. WRIGHT: I submit --

10 MR. JUSTICE BLACK: If he can't rely on the pro-
11 visions of the constitution whereby he can only be removed by
12 impeachment. Removal is taking away the right to try cases.

13 MR. WRIGHT: I respectfully disagree, sir.

14 MR. JUSTICE BLACK: Well, that's not it?

15 MR. WRIGHT: This Court can -- in Booth versus the
16 United States, suggested that taking away the right to try
17 cases is not removal so long as the office and the salary con-
18 tinues, that the taking away of the right to try cases is not
19 barred by the constitution.

20 MR. JUSTICE BLACK: And you mean this Court has
21 held where it was a point to be decided in a case --

22 MR. WRIGHT: No; it was dictum by Justice Roberts
23 in 291 U.S.

24 But, the position we take, of course, is that this
25 Court has no occasion in this proceeding to decide whether

1 impeachment is, as some people, or is not, as others believe,
2 the only way that action can be taken against a Federal Judge.

3 We think that first you lack jurisdiction to hear
4 the case altogether; that Petitioner has misconceived the
5 proper forum in which to seek a remedy;

6 Second, we believe that if the Court had juris-
7 diction that on the merits it could not now reach the question
8 of whether or not the order of December 13th was an attempt
9 to remove Judge Chandler, or whether it was a proper order
10 but this Court does not issue advisory opinions about things
11 that have long since gone out of existnece, but the orders now
12 in effect are those of February 4, 1966, September, 1967 in
13 which the Judicial Council has provided that Judge Chandler
14 may hear the cases that Judge Chandler certified that he wanted
15 to hear.

16 Under the order of the Judicial Council anytime the
17 judges of the Western District agree on a new division, that
18 will go into effect immediately; if they disagree, they have
19 only to disagree, and it will go to a statutory power of the
20 Judiciary Council and it then resolves the disagreement.

21 The one time there was a disagreement, it resolved
22 the disagreement in the direction that Judge Chandler had
23 asked for, rather than the direction the otherjudges had asked
24 for.

25 MR. JUSTICE WHITE: Well, Professor, what would you

1 say if there was a disagreement and there was a Council order
2 saying to a judge to first clean up all of his cases before he
3 takes any more; that order goes into effect, and he does clean
4 up his cases. And then he wants a change in the order. The
5 other District Judges don't want a change in the order.

6 So there is disagreement and the Council then says,
7 "We will leave the order stand; no more cases." Is that within
8 the reach of 137?

9 MR. WRIGHT: I submit that it is clearly within the
10 statutory power granted to the Judicial Council. A question
11 could then arise whether that particular form of exercise of
12 the power of the Judicial Council is constitutional.

13 MR. JUSTICE WHITE: What about that? I know you
14 don't think that question is here, because there is no juris-
15 diction, but --

16 MR. WRIGHT: I don't think that question is here,
17 because that's not this order, Justice White. That is a
18 hypothetical case that might be immensely difficult.

19 MR. JUSTICE WHITE: Do you think it's no different
20 -- that the question isn't here because he still have the
21 remnants of five cases?

22 MR. WRIGHT: And if he wants more cases he has only
23 to make that fact known.

24 MR. JUSTICE WHITE: Well, we don't really know that,
25 do we?

1 MR. WRIGHT: No, we don't know it; but we don't
2 know it the other way.

3 MR. CHIEF JUSTICE BURGER: That's why you take the position
4 the case isn't here? That case isn't here.

5 MR. WRIGHT: Yes.

6 MR. JUSTICE WHITE: The rest would be if the
7 Judicial Council has got some authority to enter an order upon
8 a dispute, but when it knows, as well as anybody else knows,
9 when a judge has tried his cases, or has only one or two left,
10 is it empowered to leave its order, in effect, or should it
11 change it?

12 Is it qualified to just sit there and say well,
13 if the judges want to leave this order in, that they may.

14 MR. WRIGHT: I suggest that the Judicial Council
15 has shown no inclination to follow the course of conduct,
16 Justice White, you suggested. The Judicial Council on its
17 own initiative, noting that Judge Chandler had at that time,
18 only 12 cases left, suggests to the Judges of the Western
19 District that they make a new division. The judges reported
20 back and said, "No, the current division is agreeable to us."

21 MR. JUSTICE WHITE: And so the Judicial Council
22 said, well, we will just leave our order in effect, even
23 though this means that Judge Chandler never gets another case.

24 MR. WRIGHT: We will leave the order in effect until
25 the judges decide that they want to change the division of

1 business.

2 MR. JUSTICE BLACK: If anyone disagrees with you,
3 as I do, I think the question is here that you say is not
4 here, in your judgment is the action of the Council constitu-
5 tional?

6 MR. WRIGHT: I have no doubt, Mr. Justice Black,
7 that the present orders of the Council are justified by the
8 constitution.

9 MR. JUSTICE BLACK: Are what?

10 MR. WRIGHT: Are justified by the constitution.

11 MR. JUSTICE BLACK: But suppose you are wrong about
12 what's here, as I think you are, and maybe -- I don't know
13 whether any others will think so or not, but I do; was that
14 act of the Council constitutional?

15 MR. WRIGHT: Given its overtly interlocutory nature,
16 I would say yes. I would have serious doubts if the Council
17 had purported to say, "Judge X, you may never again hear a
18 case."

19 When the Council, as it represented to the Court,
20 through its Solicitor-General, said that this was intended
21 only to be interlocutory, until we could get a proper hearing
22 to the matter, I think that that temporary power may
23 constitutionally be --

24 MR. JUSTICE BLACK: You think they could temporarily
25 strip the judge of his power to try cases, under the

1 constitution?

2 MR. WRIGHT: Yes, sir.

3 MR. JUSTICE WHITE: Well, what about the initial
4 order of the Council; do you think there was some question
5 about that?

6 MR. WRIGHT: Oh, I would think that if that was
7 purported to be a permanent order, that there would be the
8 greatest question about it on procedural ground alone, without
9 even reaching the substance.

10 MR. JUSTICE WHITE: Well, there wasn't any expira-
11 tion date on it, was there?

12 MR. WRIGHT: It said, "Until further order." And
13 then the Council then represented to this Court that it in-
14 tended to dispose of the matter promptly. I believe that we
15 have to accept what the Council has said at its face value.

16 I think there are even some circumstances in which
17 constitutionally a judicial council or someone other than the
18 Senate, can tell a judge that he is not to hear any cases at
19 all in the future. I think that when there is a certification
20 under Section 372(b) and a new judge is appointed, the judge
21 who is found to be physically and mentally disabled under the
22 statute, becomes junior in seniority, but it would be un-
23 believable that a judge who has been found mentally disabled
24 to act as a judge, then would be free to hear cases. And I
25 can't conceive that that is what the statute contemplates;

1 that that is the practice or that that is what the constitu-
2 tion would require under those circumstances.

3 MR. JUSTICE BLACK: You mean that although the
4 constitution provides a way to remove judges, you think that
5 because the necessities might, in somebody's judgment, re-
6 quire it, he could be removed without impeachment?

7 MR. WRIGHT: Yes, sir.

8 MR. JUSTICE BLACK: That's what you say?

9 MR. CHIEF JUSTICE BURGER: But he is not deprived
10 of the prerequisites of office in the form of his compensation?

11 MR. WRIGHT: That's right. The title of judge
12 cannot be taken away and his compensation cannot be taken
13 away.

14 MR. JUSTICE BLACK: You mean that the only way he
15 is granted independence is by getting his compensation; do
16 you think that is all our constitution means about the
17 independence objective?

18 MR. WRIGHT: I think our constitution means a great
19 deal more than that, about the independence of judges, Mr.
20 Justice Black. But I think that judicial independence is a
21 quality that goes far beyond the very limited issues that are
22 here at stake. I think that judicial independence means that
23 nobody is to tell a judge how he is to decide a case; that he
24 is not to be answerable except to the Appellate Courts for his
25 viewsof the law. Judicial independence means this and much

1 else, but I do not think that judicial independence means that
2 a person who has been found by a judicial council and by the
3 President of the United States, to be mentally unable to
4 function as a judge, should be permitted to go ahead and func-
5 tion as a judge.

6 MR. JUSTICE BLACK: You mean that the President
7 of the United States, in your judgment, has the power under
8 our constitution to determine whether a judge is mentally able
9 to try his cases? Is that what you are saying?

10 MR. WRIGHT: I am saying exactly that; yes, sir.

11 MR. JUSTICE BLACK: I think I understand you now.

12 MR. JUSTICE STEWART: Well, that is precisely what
13 the statute provides; isn't it?

14 MR. WRIGHT: It is precisely what the statute
15 provides and again --

16 MR. JUSTICE STEWART: Not this statute, but we're
17 talking about other statutes.

18 MR. WRIGHT: This statute, I hasten to say, has no
19 relevance to this case.

20 MR. CHIEF JUSTICE BURGER: Now, the legislative
21 history behind that statute indicates that Congress concluded
22 that there should be a means of relieving the public and
23 the litigants from a disabled judge, short of impeachment,
24 but without taking the office of judge, or the salary, away
25 from him?

1 MR. WRIGHT: Exactly, Mr. Chief Justice.

2 MR. JUSTICE STEWART: And I suppose the constitu-
3 tion, in addition to providing for an independent judiciary,
4 also provides for a good many rather important things, and one
5 of them is the right of litigants to get due process of law
6 and presumably you can't get that from a mentally incompetent
7 or physically incompetent judge; is that correct?

8 MR. JUSTICE BLACK: Don't you think that a law
9 that is negligent enough to leave it to be determined by the
10 President of the United States a political officer, to decide
11 whether judges are able to hold their jobs?

12 MR. WRIGHT: I believe that the constitution left
13 it to the Congress to create procedures for these exigencies,
14 and the Congress did so many years ago in this Court, again
15 by way of dictum, in Booth, expressly spoken of that procedure
16 as being a constitutional.

17 MR. JUSTICE BLACK: Was that decided?

18 MR. WRIGHT: That was by way of dictum, Mr. Justice
19 Black.

20 MR. JUSTICE BLACK: It was not decided.

21 MR. WRIGHT: It was not decided.

22 MR. CHIEF JUSTICE BURGER: But that statute is not
23 involved in this case.

24 MR. WRIGHT: That statute is not involved in this
25 case, nor with respect in our view, are many of the matters

1 that we have been discussing here.at oral argument. What is
2 involved inthis case, the original jurisdiction of this Court.
3 What is involved in this case is an order resolving a dis-
4 agreement among the District Judges as to how the business
5 should be divided and in my view it does not help us to speak
6 hypothetically of what the situation might be if some judge
7 were to be told that he may not hear any cases. That is not
8 here; we have no judge who is in that position and I cannot
9 think that it is the notion of this Court to imagine unlikely
10 hypothetical cases that may arise in the future and to
11 pronounce judgment upon them before they come up.

12 MR. JUSTICE BLACK: Well, do you mean to say this
13 case is not here at this time?

14 MR. WRIGHT: The case is here, but the case of the
15 judge who is not allowed to hear any case is not before us at
16 this time. Judge Chandler has cases pending on his docket.

17 MR. JUSTICE BLACK: Which have been allotted. The
18 only ones he's been left with.

19 MR. WRIGHT: That is correct.

20 MR. JUSTICE BLACK: But he is a judge appointed for
21 life and the litigants can't depend on him to try their cases,
22 so other judges, who are not more lifetime judges than he,
23 decided that he shouldn't take them, without any authority --
24 express authority alone, unless it ld be drawn from the
25 vague provisions of the administration bills.

1 MR. WRIGHT: The litigants whose cases are pending
2 before Judge Chandler, will have their cases tried by Judge
3 Chandler.

4 MR. CHIEF JUSTICE BURGER: Do I understand as to
5 the division of cases after that, he has agreed with the other
6 judges of his court; is that correct?

7 MR. WRIGHT: Twice; on January 25, 1966 and again
8 in September 1967.

9 Now, I --

10 MR. JUSTICE BLACK: That's what someone might call
11 a shotgun wedding, isn't it?

12 MR. WRIGHT: And in fairness to Judge Chandler,
13 Mr. Chief Justice, I think it must be said that on January
14 25th agreement he noted that it was done under protest and
15 that he did not want to waive any of his rights to challenge
16 the then still-existing order of December 13th.

17 The September 1967 agreement said the present
18 provision was agreed on under the circumstances.

19 MR. JUSTICE HARLAN: May I ask you this question,
20 Professor Wright: Assuming that when the time comes when
21 Judge Chandler runs out of business, the present assignments,
22 and that there is a disagreement among the District Judges as
23 to whether any more cases should be assigned to him, is there
24 anything to show on the record that the Circuit Council would
25 not step in and break that log jam?

1 MR. WRIGHT: There is nothing whatever in the record
2 to show that the Council would not step in; there is nothing
3 whatever in the record to show that the Council would not give
4 Judge Chandler whatever division he thought equitable.

5 I would be pure speculation to propose anything to
6 the contrary.

7 MR. JUSTICE BLACK: Why do you say that when you
8 admit that without his being there they passed the order they
9 did. How can you say that? I don't understand that.

10 MR. WRIGHT: I find it difficult, Justice Black,
11 understand how the fact that they met without him present on
12 December 13th says anything as to what they will do in the
13 future, in ^a particular hypothesis put to me by Justice Harlan.

14 MR. JUSTICE BLACK: There has been a statement for
15 many years in which many people give some confidence: "That
16 coming events cast their shadows before them."

17 MR. CHIEF JUSTICE BURGER: We can always deal with
18 that case when it reaches here, of course, can't we, Professor?

19 MR. WRIGHT: Well,--

20 MR. JUSTICE BLACK: Well, suppose some of us think
21 it's here now.

22 MR. WRIGHT: Obviously some of you do, Justice
23 Black. I can only respectfully disagree.

24 The jurisdictional question, it seems to me to be
25 of the greatest importance. This, I think, is a little

1 different, Justice Black, from the matter that you and I just
2 disagreed on.

3 You think that the December 13th order is out
4 before us -- before you. I would disagree on that.

5 MR. JUSTICE BLACK: You what?

6 MR. WRIGHT: You think that the order of December
7 13, 1965 is properly here. As Counsel, I disagree; but there
8 is a different question and that is whether anything is
9 properly here, even if the December 13th order were still in
10 full force and effect and it is an order of the constitution-
11 ality of which I think I can safely predict your view on, at
12 least, that would not create original jurisdiction in this
13 Court.

14 Original jurisdiction does not arise out of
15 necessity; it does not arise because something that has hap-
16 pened that may be gravely unconstitutional. Original
17 jurisdiction is carefully defined by the constitution and the
18 best known case that this Court has ever decided tells us that
19 you simply can't go beyond that.

20 The doctrine in drawing the line between original
21 and appellate jurisdiction has been laid down many times and
22 it bears such famous names as: Marshall, Storey, Coney,
23 Brandeis and that is that this Court can act only if an in-
24 ferior tribunal has acted judicially. And I submit that what-
25 ever the judicial council did, right or wrong, that the

1 judicial council is not a court and what it's action is is not
2 judicial. If it was administrative action, it may have been
3 as my friends on this side of the table think, and as someone
4 outside of the bench think, a very terrible thing that the
5 Council did, but administrative agencies on occasion, do do
6 terrible things and that fact of itself is not enough to
7 create original jurisdiction in this court; nor does it permit
8 this Court to act immediately on the theory that it might come
9 here sometime and therefore, it's potentially within our
10 appellate jurisdiction.

11 The appellate jurisdiction in this Court -- the
12 potential appellate jurisdiction, does not begin to exist
13 until the case has reached some judicial tribunal of the
14 United States. And I am aware, of course, of the concurring
15 opinion of Mr. Justice Douglas in *Hiroda v. McArthur*, suggest-
16 ing a somewhat different view on that and, with respect, I
17 disagree.

18 MR. JUSTICE BLACK: Well, you indicated a moment
19 ago that the names of the famous judges whose names you in-
20 voked, had passed on this question. In what cases did they
21 pass on the question before us?

22 MR. WRIGHT: *Marbury v. Madison*; *United States*
23 *v. Ferreira*, *Tutun v. the United States*.

24 Yes, I think they passed on exactly that.

25 MR. JUSTICE BLACK: The question we have before us.

1 MR. WRIGHT: Yes; the jurisdictional question.

2 MR. JUSTICE HARLAN: May I ask you this question:
3 As I understand the differences and agreements between you and
4 the Solicitor-General, you are in disagreement on the basis
5 question as to whether there is a judicial function involved;
6 is that right?

7 MR. WRIGHT: On whether or not this is an attempt
8 to invoke original jurisdiction or appellate jurisdiction.

9 MR. JUSTICE HARLAN: Well, from your point of view,
10 if your position is accepted, that would -- you would never
11 get to the scope of the question of the All Writs Act?

12 MR. WRIGHT: Exactly.

13 MR. JUSTICE HARLAN: On the other hand, I understand
14 you are in agreement with some dubitate, some doubt, that if
15 the Solicitor-General's position is accepted on the basic
16 question as to whether this is an administrative or judicial
17 function, with some doubt you share his view that the All Writs
18 Act will reach it.

19 MR. WRIGHT: That's exactly right, Mr. Justice
20 Harlan.. And then when we get beyond that I am in agreement
21 entirely with the Solicitor General --

22 MR. JUSTICE HARLAN: On the mootness question.

23 MR. WRIGHT: On everything, but going to the merits
24 of the case.

25 MR. JUSTICE HARLAN: That's the way I read your

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MR. WRIGHT: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Professor Wright.

Mr. Solicitor-General.

ORAL ARGUMENT BY ERWIN N. GRISWOLD, SOLICITOR

GENERAL OF THE UNITED STATES,

AS AMICUS CURIAE

MR. GRISWOLD: May it please the Court: I would like to correct a possible misunderstanding which results from the way this case was listed in the hearing list by the Clerk's office. It is there said that the Solicitor-General will appear as a Friend of the Court for the Respondents.

I do not understand that I am appearing for the Respondents or for the Petitioner.

MR. JUSTICE DOUGLAS: That was my first question. I was going to ask you that.

MR. GRISWOLD: But simply as a Friend of the Court. I have tried, with the aid of my former associate, Philip Lacovara, to make as complete an examination of the problems here as we could in an effort to be as helpful to the Court as possible.

MR. CHIEF JUSTICE BURGER: You are, then, what is sometimes referred to as a "True Friend of the Court."

MR. GRISWOLD: A True Friend of the Court.

The first question to which I will address myself

1 is this Court's jurisdiction of this matter. It is plain,
2 of course, that the Court has jurisdiction only as an exer-
3 cise of appellate jurisdiction; that this case is here as an
4 original matter; it is obvious that neither the United States
5 nor a state nor a foreign minister or ambassador is a party
6 and there is no basis for original jurisdiction.

7 I may say that when I started consideration of this
8 case I had the tentative view that there was no jurisdiction
9 here, that this was not an exercise of appellate jurisdiction;
10 that indeed, the arguments presented by Professor Wright was
11 the sound analysis. I learned my Federal jurisdiction from
12 Professor Frankfurter and I tend to take a rather strict view
13 of these matters and also to regard them as important.

14 But, after my associate, whom I regret, has now
15 left government service, Mr. Lacovara, presented me an elaborate
16 memorandum on the matter and I discussed it with him at some
17 length. I came to the conclusion that that was probably wrong.

18 I would like to make it plain that I do not regard
19 this as by any means a matter of black and white. It will be
20 clearer after this Court has decided it than it is now.

21 It does not help, it seems to me, to say that this
22 is administrative action. That is an example of the tyranny
23 of words, because if this is judicial administration it may
24 present a situation which is different than anything with which
25 the Court has previously dealt.

1 It is, of course, fair and accepted in many fields
2 that it is the constitution we are dealing with and that the
3 understanding of the constitution grows and develops with the
4 development of problems and the approaches to problems.

5 It was probably true at an earlier time that we
6 had a very small conception of judicial administration of the
7 function and the responsibility of courts in seeing to it
8 that their business is soundly and effectively handled, in
9 addition to the process of the actual decision of the case in
10 court.

11 Over the past generation there has been a great
12 expansion in the awareness of the importance of the function
13 of the judicial administration and we had people like Chief
14 Justice Hughes and Chief Justice Groner and Judge Parker and
15 Arthur Vanderbilt and others, who were largely responsible
16 for the development of the statutory provisions which now
17 exist, establishing not only the Judicial Conference of the
18 United States, which is not involved here in any way whatever,
19 but also the judicial councils.

20 Now, the judicial councils, it is perfectly plain,
21 are simply the Courts of Appeals sitting en banc. period.

22 MR. JUSTICE HARLAN: Isn't there one exception?
23 There is a District Judge out in --

24 MR. GRISWOLD: No. There are no District Judges
25 sitting on the judicial councils.

1 MR. JUSTICE HARLAN: Oh, there are not?

2 MR. GRISWOLD: The judicial councils consist of
3 simply the judges of the Courts of Appeals sitting en banc,
4 period; no more; no less.

5 MR. CHIEF JUSTICE BURGER: Does any statute
6 relating to the judicial councils and their formation, refer
7 to them as sitting en banc in those terms?

8 MR. GRISWOLD: No. The statute says that the
9 chief judge of each circuit -- this is Section 332 of Title
10 28, "shall call at least twice in each year and at such places
11 as he may designate, a Council of the Circuit Judges for the
12 Circuit, in regular active service at which he shall preside.
13 Each Circuit Judge, unless excused by the Chief Judge, shall
14 attend all sessions of the Council."

15 No refernece to District Judges, no exceptions
16 from the judges of the Court of Appeals, except that it applies
17 only to those in regular, active service.

18 MR. CHIEF JUSTICE BURGER: Do you think the
19 statute permits the council to meet in executive private
20 session, non-public; not open to anyone?

21 MR. GRISWOLD: I so, sir. I see no reason why --

22 MR. CHIEF JUSTICE BURGER: Are you then suggesting
23 they can then carry out judicial functions in other than a
24 public hearing?

25 MR. GRISWOLD: They can certainly engage in

1 discussion as this Court engages in conferences which are not
2 public sessions.

3 Whether they can take actions which are valid in
4 the form of orders in other than a public session, I do not
5 know. I know that orders issued from this Court which do not
6 come forth in a public session. I don't see why that is an
7 earmark of the judicial action.

8 MR. CHIEF JUSTICE BURGER: But those processes are
9 always preceded by an opportunity, argument and briefing and
10 a great many other things, are they not?

11 MR. GRISWOLD: Not always argument, Mr. Chief
12 Justice.

13 MR. CHIEF JUSTICE BURGER: Argument in --

14 MR. GRISWOLD: Sometimes not much opportunity for
15 briefings, in terms of stay orders and things of that kind
16 which are done by the Court.

17 I would like to suggest that in Section 137 of
18 Title 28, the statute now reads that this is the last para-
19 graph of Section 137, "If the District Judges in any District
20 are unable to agree on the adoption of rules or orders for
21 that purpose, it now says the judicial council of the circuit
22 shall make the necessary orders." It would be only a verbal
23 difference if it said, "The Court of Appeals sitting in banc.
24 shall make the necessary orders."

25 Now, Section 332, the last paragraph, which is at

1 the top of Page 4 of my brief. It says, "Each Judicial
2 Council shall make all necessary orders," and there again, if
3 it said, "Each Court of Appeals sitting in banc, shall make
4 all necessary orders," it would be exactly what we have here,
5 and I find it difficult to see just what is a verbal dif-
6 ference only, having no effect upon either the persons who
7 participate or the capacity in which they participate, should
8 make this into something which is nonjudicial.

9 MR. CHIEF JUSTICE BURGER: Mr. Solicitor-General,
10 how are enbanc courts convened; how does it come into being
11 under the statutes?

12 MR. GRISWOLD: The -- it provides after this that
13 the Chief Judge shall --

14 MR. CHIEF JUSTICE BURGER: I mean the court en
15 banc in the judicial sense: five votes; is it not?

16 MR. GRISWOLD: I'm sorry, Mr. Chief Justice, I'm
17 not --

18 MR. CHIEF JUSTICE BURGER: Well, if you will assume
19 I am correct in stating that the statute requires that it takes
20 five votes to convene a court en banc, or if it's a nine-man
21 court; a majority of the court.

22 MR. GRISWOLD: Maybe a majority of the court; he
23 couldn't take five votes in the first circuit, because there
24 are only three there.

25 MR. CHIEF JUSTICE BURGER: That majority of the court

1 MR. CHIEF JUSTICE BURGER: It takes a majority of
2 the Court to convene an en banc Court of Appeals; does it not?

3 MR. GRISWOLD: I do not know.

4 MR. CHIEF JUSTICE BURGER: Well, that is the
5 statute.

6 MR. GRISWOLD: Whether the Chief Judge has any
7 authority with respect to convening the Court en banc or not.

8 MR. CHIEF JUSTICE BURGER: He does have authority
9 to convene on his own initiative the council, does he not?

10 MR. GRISWOLD: And I could simply provide in the
11 statute that the court sitting en banc could be convened by
12 the Chief Judge for this purpose.

13 It still seems to me that what the court is doing;
14 what the judicial council is doing here is exercising what
15 has come to be recognized, not only as judicial power, but as
16 an important judicial responsibility, to see that the judicial
17 business of the circuit is effectively and expeditiously
18 administered.

19 This was not an accident; it was not an arbitrary
20 action; it grew out of such experiences as those which Chief
21 Justice Taft lived through in the 1920s when there was no
22 such power and I just happened on a letter written by Chief
23 Justice Taft in the 1920s, in Alphius Mason's biography of
24 Taft. He wrote a letter to a District Judge who had not
25 disposed of a case which had been pending before him for four

1 years and he felt that he had to put into that letter the
2 following, and think of this from an ex President and Chief
3 Justice of the United States:

4 "Of course I write this letter with no assumption
5 that I may exercise direct authority over you in the dis-
6 charge of your duties, but I as head of the Federal Judiciary,
7 I feel I do have to appeal to you in its interest and in the
8 interest of the public whom it is created to serve, to end this
9 indefinite situation." And the objective -- the intended
10 objective was to provide a judicial authority within the
11 judiciary -- nobody outside; no executive authority; no
12 legislative authority. The courts were to run their own house;
13 were to do it without interference and their representative
14 said, "Give us the change; give us the power and we will take
15 care of it."

16 Now, it is also clear that they contemplated that
17 it would very rarely be necessary to do anything to enforce
18 it. These are high-level people and if it became necessary
19 for the Judicial Council to issue an order the odds were very
20 strong that it would be complied with, however reluctantly.

21 But the statute does expressly give the Judicial
22 Council, which I repeat, is the Court of Appeals sitting en
23 banc by another name, does give them expressly authority to
24 make those orders and it provides that it shall be the duty
25 of the District Judges to carry them out.

1 Such an order was issued in this case. I have no
2 doubt that the constitutional requirement of case or controversy
3 is met here. Chief Judge Chandler sought leave to file a
4 petition for a writ of mandamus or prohibition, to review the
5 validity of that order and there, as I said, it is not fully
6 clear. It does seem to me that that was a judicial order
7 entered by a judicial body in carrying out judicial responsi-
8 bility and that the review of that order before this Court is
9 an exercise of appellate and not original jurisdiction.

10 Now, I would turn to the question on the merits,
11 where I do agree with Professor Wright's position in represen-
12 tation of the Tenth Circuit Judicial Council. In the first
13 place, the only paper before this Court; the only pleading
14 before this Court is Judge Chandler's petition or motion for
15 leave to file and petition for a writ of mandamus which was
16 filed in January 1966. And in that petition he prays that a
17 writ of prohibition or mandamus be issued to restrain the
18 Respondent from exceeding its jurisdictional power in ordering
19 that until his further order, the Petitioner shall take no
20 action whatsoever in any case or proceeding now or hereafter
21 pending in the United States District Court for the Western
22 District of Oklahoma.

23 And that order no longer exists. It was completely
24 superceded on February 4, 1966 in the document which is marked
25 "F" in the return or response which has been filed by the Tenth

1 Circuit Judicial Conference and as far as the record is con-
2 cerned, since that date there has been no dispute; no con-
3 troversy between the Tenth Circuit Judicial Council and Judge
4 Chandler.

5 Now, I think that that can most clearly be shown
6 by examining the item which is Item K in the return of the
7 Tenth Circuit, which is a letter on the stationery of Judge
8 Chandler, signed by all five judges of the Western District
9 of Oklahoma, leading off with Stephen J. Chandler as the first
10 signature, addressed to the Tenth Circuit Judicial Conference
11 in response to the letter of the Honorable David C. Lewis to
12 the active judges of the United States District Court for the
13 Western District of Oklahoma and the minutes of the meeting of
14 the Judicial Council attached thereto: "We advise that the
15 current order for the division of business in this district is
16 agreeable under the circumstances." Now, Judge Chandler makes
17 a lot out of that "under the circumstances." He refers to the
18 fact that his previous letter in February 1966 by which he
19 joined with the other judges in agreement as to the division
20 of the business, was under protest. He says that this is under
21 duress.

22 However, it seems to me clear that Judge Chandler
23 cannot have it both ways. He cannot either consent and not
24 consent at the same time. By this letter he has consented.
25 There is, thus, no dispute between him and the Tenth Circuit

1 Judicial Conference.

2 MR. JUSTICE BLACK: You mean unconditionally con-
3 sented?

4 MR. GRISWOLD: Yes, Mr. Justice, I believe that he
5 has unconditionally consented.

6 MR. JUSTICE BLACK: What did you do with the "under
7 these circumstances?"

8 MR. GRISWOLD: I don't know what "under the circum-
9 stances" means. There these are the same; I suppose anyone
10 acts under the circumstances; any appearance or any consent is
11 if
12 -- but/Judge Chandler does not consent; all he has to do is to
13 say so, in which case it will become incumbent upon the
14 Judicial Council under Section 137 to issue an order for the
15 division of judicial business in the Western District of
16 Oklahoma. And if Judge Chandler doesn't like that order he can
17 take whatever steps may be appropriate at that time.

18 MR. JUSTICE WHITE: Well, Mr. Solicitor-General
19 what do you think the Judicial Council should do when Judge
20 Chandler is out of business on his old cases or so close there-
21 to that to say he has old business is rather a farce? Do you
22 think the Judicial Council is entitled to leave its order in
23 effect, just because the District Judges say it is satisfactory
24 to them?

25 MR. GRISWOLD: Yes, Mr. Justice; not only entitled,
but I don't believe they have the power with respect to it.

1 MR. JUSTICE WHITE: So, three District Judges, as
2 long as they all agree, can say that one judge will never have
3 anymore cases?

4 MR. GRISWOLD: No, Mr. Justice. Only all of the
5 judges of the Western District of Oklahoma can agree as to --

6 MR. JUSTICE WHITE: Well, that's what I just said.
7 I just said that all of the judges of a district agree that one
8 judge will never be able -- will never do any more work?

9 MR. GRISWOLD: Yes, sir, Mr. Justice, I believe
10 they can. I believe that if they do, the Judicial Council has
11 no authority with respect to it and if that results in an
12 inappropriate situation, it should be reported to the Judiciary
13 Committee of the House of Representatives and they can con-
14 sider whether this is an occasion for impeachment.

15 Now, there may be possibilities under Section --

16 MR. JUSTICE WHITE: That answer is essential to
17 your case?

18 MR. GRISWOLD: No, Mr. Justice, I am about to
19 qualify it, if I may be allowed to.

20 There may be possibilities under Section 332. I
21 was thinking solely in terms of Section 137, the division of
22 judicial business in the District. There may be circumstances
23 which would be relevant with respect to that under Section 332
24 under which each judicial council shall make all necessary
25 orders for the given expeditious administration of the business

1 of the courts within its circuit, and I suppose that if all of
2 the District Judges of the Western District of Oklahoma
3 entered an order by which they agreed that no business would
4 be assigned to any of them, that it would certainly be appro-
5 priate for the Judicial Council to act under Section 332 and
6 it would then be the statutory duty, as well as the moral duty
7 of the judges to carry out that order.

8 MR. CHIEF JUSTICE BURGER: But the situation you
9 pose would arise equally, would it not, ^{kf,} without entering any
10 order to that effect, they simply refused to do any work?

11 MR. GRISWOLD: Yes, Mr. Justice.

12 MR. CHIEF JUSTICE BURGER: So, it isn't the order
13 that triggers this, it's the conduct; isn't it?

14 MR. GRISWOLD: Yes, Mr. Justice, it is the statutory
15 responsibility of the Courts of Appeal sitting en banc and
16 thereby being known as the Judicial Council, to make appropriate
17 order for the effective and expeditious handling of the
18 business of the District Courts and a situation where all of
19 the District Judges in a District failed to meet their respon-
20 sibilities would clearly be a situation calling for the exer-
21 cise of that power.

22 Now, various things have been said about the order
23 which was entered by the Judicial Council in December of 1965.
24 That it was done without a hearing and without notice and so
25 on.

1 In our brief we indicate that we think that as of
2 that time it may have been difficult to support that action.
3 It was quickly explained as having been interlocutory and I
4 can conceive of situations where it would be appropriate for
5 the judicial council to take action of this sort without a
6 hearing, and indeed, without notice.

7 Justice courts repeatedly grant temporary restrain-
8 ing orders on ex parte applications because something has to
9 be done quickly. I can imagine a situation where a judge had
10 gone stark, raving mad, something had to be done. I can
11 imagine situations where it would be entirely appropriate for
12 the judicial council to order that no further cases be assigned
13 to a judge and that he not sit on any pending cases, presumably
14 after notice in the hearing.

15 For example, if a judge were indicted for having
16 accepted bribes in connection with his handling of cases and
17 he announced, "Well, who cares about that; I'll be in court
18 Monday; go ahead."

19 I can imagine that it would be appropriate for the
20 judicial council to issue an order such as was issued here or
21 even stronger than was issued here, providing that he should
22 no longer -- should not sit on pending matters and should have
23 no new matters assigned to him until the indictment had been
24 disposed of. Now, that is not this case. In this case it is
25 my own view that the Tenth Circuit Judicial Council did not

1 act with the proper procedures, but on February 4, 1966 that
2 order was completely superceded. It is no longer in effect.
3 I don't think the anti-trust case of last year has any real
4 application to this; there is no threat or risk that the Tenth
5 Circuit Judicial Council will do further acts which would be
6 inappropriate.

7 Since February 4, 1966 the only order that has been
8 outstanding has been one which is in entire accord with the
9 position of Judge Chandler. Item 1: Judge Chandler agreed with
10 the judges of the District Court for the Western District of
11 Oklahoma that no new business will be assigned to him, and
12 Item 2: all pending cases before Judge Chandler are left to
13 him without interference in any way. He, thus, has exactly
14 what he asked for currently. If he thinks that isn't all that
15 he wants, he can change it; with respect to pending cases, that
16 may soon be cleared out; with respect to future cases all he
17 has to do is to tell his fellow District Judges that he doesn't
18 agree and wants some cases assigned to him.

19 If his fellow judges do agree to assign cases to
20 him and he accepts that there will be no disagreement and there
21 will be no basis for the Tenth Circuit Judicial Council to act
22 under Section 137.

23 If, on the other hand, his fellow District Judges
24 do not agree then there will be a disagreement; it will be
25 appropriate for the Tenth Circuit to take whatever action may

1 appropriate under the circumstances and I have no idea of what
2 that action would be.

3 Thus, I submit for the Court's consideration that,
4 although it is novel and that this is a case within the
5 appellate jurisdiction of the Supreme Court of the United
6 States. But that the motion for leave to file a petition for
7 a writ of mandamus should be denied because there is no longer
8 any existing controversy outstanding.

9 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor
10 General. Thank you, Mr. Wright; Thank you, Mr. Kenan and Mr.
11 Shipley. The case is submitted.

12 (Whereupon, at 12:05 o'clock p.m. the argument in
13 the above-entitled matter was concluded)