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COMMENTARIES

THE NEED FOR A NEW NATIONAL COURT*

*Thomas E. Baker***
*Douglas D. McFarland****

Framers of judiciary acts are not required to be seers; and great judiciary acts, unlike great poems, are not written for all time. It is enough if the designers of new judicial machinery meet the chief needs of their generation.

— *Felix Frankfurter & James M. Landis (1927).*¹

The reason the public thinks so much of the Justices of the Supreme Court is that they are almost the only people in Washington who do their own work.

— *Louis D. Brandeis (1933).*²

Supreme Court Justices must now work beyond any sound maximum limits.

— *Warren E. Burger (1984).*³

By any measure, the Supreme Court is tremendously overburdened. Statistics speak clearly on this point; sometimes they shout. After the caseload relief provided by the Judges' Bill,⁴ which was passed in 1925 and took effect during the 1928 Term, the Supreme Court caseload grew slowly for thirty years. Beginning in the 1960s, growth sharply accelerated, and during the 1970s and 1980s, the numbers exploded. Each week during the 1928 Term, fifteen new cases were filed; during the 1958 Term, thirty-five; the 1970 Term, sixty-six; and the 1985 Term, eighty-five.⁵ In this last term, the

* The authors of the Commentaries have not seen drafts of each other's pieces. The Commentary format is not meant to be a debate, but rather is meant to present different perspectives on current issues of public importance.

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The views expressed in this Commentary are the authors' alone. We thank the staffs of the Administrative Assistant to the Chief Justice and of the Clerk of the Supreme Court for their assistance with the statistics.

¹ F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 107 (1927).

² C. WYZANSKI, *WHEREAS — A JUDGE'S PREMISES: ESSAYS IN JUDGMENT, ETHICS, AND THE LAW* 61 (1985) (quoting Justice Louis Brandeis).

³ W. BURGER, *1984 YEAR-END REPORT ON THE JUDICIARY* 6.

⁴ Judiciary Act of 1925, ch. 229, 43 Stat. 936.

⁵ Statistics provided by the Office of the Clerk of the Supreme Court [hereinafter Statistics] (on file at Harvard Law School Library).

Court's docket held 5158 cases, and the Court produced 146 signed opinions, on par with earlier Terms this decade.⁶ The consequences of this virtually unmanageable workload are fragmented majorities, separate opinions, and sometimes even inadequate analysis, as justices have insufficient time to fulfill their institutional charge of "securing harmony of decision and the appropriate settlement of questions of general importance so that the system of federal justice may be appropriately administered."⁷

Recently, some observers have suggested that this overwhelming workload can be alleviated by the creation of a new Intercircuit Panel, which would hear cases on reference from the Supreme Court.⁸ Such a court would hear cases primarily involving conflicts of federal law among the courts of appeals. The latest design calls for a five-year experimental panel of judges to be drawn one each from the thirteen courts of appeals.

This Commentary does not focus on the form of the proposed new court. Rather, it broadly considers two current problems with the federal court system: the unreasonably heavy workload burden on the Supreme Court and the inadequate capacity for achieving a satisfactory measure of uniformity in our national law. It then considers possible alternatives to an Intercircuit Panel, arguing that they are inadequate to solve these two problems.

I. THE NEED FOR RELIEF OF SUPREME COURT WORKLOAD

That the Supreme Court is drastically overworked has been known for years. Nearly thirty years ago, in a classic study of the Court, Professor Henry Hart prepared a time chart for the justices showing that "the Court has more work to do than it is able to do in the way in which the work ought to be done."⁹ In his time chart, Hart posited that justices have 1728 hours available for "fully focused and functioning intellectual effort" during the Term.¹⁰ Using Hart's categories and adjusting the numbers to reflect both a longer Term and the heavier current caseload, we find that the justices simply cannot do their jobs on Hart's week. Just to devote the same amount of time to each case as they did in Hart's day, the justices would have to

⁶ *Id.*

⁷ Address of Chief Justice Hughes at the American Law Institute Meeting, *reprinted in* 20 A.B.A. J. 341, 341 (1934).

⁸ *See, e.g., Hearings on S.704 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 99th Congress, 1st Sess. (1985) [hereinafter *1985 Hearings*].

⁹ Hart, *The Supreme Court, 1958 Term — Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 84 (1959).

¹⁰ *Id.* at 85. Hart assumed a set of eight hours of intensive work for six days each week for an average Term length of 36 weeks. We should note this included only time spent on the cases, not any of the myriad other demands on the justices' time.

work 2246 hours — 9.6 hours daily on a six-day week, or more likely 8.2 hours daily on a seven-day work week.¹¹ It is no surprise that every one of the Justices sitting in the October 1985 Term has expressed concern publicly over the Court's workload and procedures, albeit with differing proposals for relief.¹²

In 1925, the Supreme Court supervised a federal judiciary of 179 judgeships; in 1970, 430 judgeships; and in 1987, 742 judgeships.¹³ The pattern has been clear: as the nation's population and economy have grown and as legal assistance has become more widely available, the number of cases filed in federal courts, the number of federal judges, and the Supreme Court's docket have grown concurrently.¹⁴ In the 1980 and 1981 Terms, the Supreme Court began to feel the full impact of the thirty-five additional court of appeals judgeships created by the 1978 Omnibus Judgeship Act.¹⁵ Similarly, the 1986 and 1987 Terms inevitably will now show substantial caseload increases as the twenty-four new court of appeals judgeships created by the Bankruptcy Amendments and Federal Judgeship Act of 1984¹⁶ have now been filled and those judges are assuming their full caseloads.

The growing size and complexity of the Court's caseload can be seen most graphically in the increasing length of the Court's annual Term. In 1873, Congress established the first Monday in October as the opening date for the Term.¹⁷ That date has remain fixed, but the adjournment date for the Term has been repeatedly moved back. For the rest of the nineteenth century, the Term recessed by the middle

¹¹ We used Hart's categories and expanded the time required based on the heavier caseload. Hart estimated that a justice would expend two hours studying the briefs in each of the 125 argued cases. Expanding the number of cases argued to 171, as in the 1985 Term, yields 342 hours instead of 250. Other categories were similarly adjusted (screening of cases up from 242 hours to 639 hours, oral argument down from 240 hours to 156 hours, conferences up from 132 to 149 hours, opinion writing up from 528 to 600 hours, studying opinions up from 140 to 164 hours, and miscellaneous judicial work constant at 196 hours).

¹² The statements of eight Justices are collected in Note, *Of High Designs: A Compendium of Proposals To Reduce the Workload of the Supreme Court*, 97 HARV. L. REV. 307, 307 n.4 (1983). The ninth, Justice Blackmun, said in 1982: "The Court is at the breaking point," Interview with Harry A. Blackmun, Cable News Network, Dec. 4, 1982 (transcript available at Harvard Law School Library) and called the 1985 Term "the most difficult of the 16 I have been privileged to serve on," Washington Post, July 26, 1986, at A2, col. 5.

¹³ Statistics provided by the Administrative Office of the United States Courts.

¹⁴ See FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT, reprinted at 57 F.R.D. 573, 579-80 (1972) (Paul A. Freund, Chairman) [hereinafter Freund Report].

¹⁵ Act of Oct. 20, 1978, Pub. L. No. 95-486, § 3(a), 92 Stat. 1629 (codified as amended in scattered sections of 28 U.S.C.).

¹⁶ Act of July 10, 1984, Pub. L. No. 98-353, § 201, 98 Stat. 333 (codified as amended in scattered sections of 28 U.S.C.).

¹⁷ See Act of Jan. 24, 1873, ch. 64, 17 Stat. 419.

of May.¹⁸ In the early part of this century, the recess date became the first week of June, and by the 1920s, it had moved to the middle of June.¹⁹ With the relief provided by the Judges' Bill in 1925, the recess date returned to the first week of June and remained there until World War II, when the middle of June again became common.²⁰ By 1970, late June had become the norm. For the last eight Terms, the Court has recessed during the first week in July.²¹ These extensions, although a pedestrian measure, indicate the relentless growth in the demands on the Court's time.

Another perspective on the justices' work can be gained by examining the actual demands on their time. To select which cases the Court will accept for plenary review from the more than 5000 on the docket, a justice considers up to:

- 250,000 pages of petitions for review,
- 62,500 pages of responses opposing review,
- 25,000 pages of replies favoring review,
- 37,500 pages of law clerk memoranda on the cases, and
- 80 hours of conference discussion.²²

A justice is thus faced with more than 1000 pages every day of the year simply to select cases for review. Once the cases in a Term are chosen, a justice is then presented with approximately:

- 20,000 pages of briefs on the merits and reply briefs,
- 3,000 pages of amici curiae briefs,
- 3,000 pages of law clerk memoranda on the cases,
- 160 hours of oral argument,
- 80 hours of conference discussion,
- 500 hours of drafting opinions,
- 4,000 pages of opinions drafted by the other justices, and
- 5,000 pages of emergency applications and other judicial work.²³

Of course, practices vary among the justices, and some of these numbers are overstated or understated depending on the particular justice. Nevertheless, these numbers suggest the magnitude of the workload now pressing upon the Court. Observers of the Court have expressed growing concern that the workload has led to overreliance on law clerks and other staff and leaves substantially less time for collegial decisionmaking of the sort Professor Hart described.

¹⁸ See G. CASPER & R. POSNER, *THE WORKLOAD OF THE SUPREME COURT* 14 (1976).

¹⁹ Statistics compiled by the Office of the Administrative Assistant to the Chief Justice, Supreme Court of the United States [hereinafter *Statistics*] (on file at Harvard Law School Library).

²⁰ *Id.*

²¹ *Id.*

²² See *Statistics*, *supra* note 19.

²³ *Id.*

Critics of structural change, although recognizing the increasing demands on the Court, have rejected proposals for relief on a variety of grounds. They argue, for example, that the raw numbers do not reflect the complexity of the cases, that the growth trend may not continue, or that, as two analysts have stated, the problem "has not reached — not yet, anyway — such crisis proportions as would justify far-reaching changes [in the federal courts]."²⁴ Nevertheless, most observers believe that the crisis is imminent. As one study of the subject concluded, "steady deterioration of the quality of review and guidance provided by the Supreme Court is an inevitable result of the existing appellate court structure."²⁵

What is being lost under this workload is the sort of careful judicial work that our system has always exalted. The 1925 Judges' Bill was passed by a Congress that contemplated attention by the justices to each individual case.²⁶ The Court's workload may have proved that goal unrealistic, but at least Congress and the public can expect some collective attention by the justices themselves to each case, rather than "law clerk justice."

Observers of the Court who are troubled by the burgeoning workload have noted that a large number of the cases before the Court are intercircuit conflicts cases. Of the approximately 150 signed opinions issued by the Court — the maximum capacity of the current argument calendar — one-third are intercircuit conflicts cases.²⁷ Such cases do not merely add to the total caseload of the Court; they also burden the Court in its institutional task of securing harmony of decisions in federal law. The Court's difficulty in achieving this goal, which rivals its workload difficulties, adds further impetus to the call for an inter-circuit panel and will be addressed in the next Part.

II. THE NEED FOR MORE UNITY IN THE NATIONAL LAW

The Court cannot review a sufficiently significant portion of the decisions of any federal court of appeals to maintain the supervisory authority that it

²⁴ G. CASPER & R. POSNER, *supra* note 18, at 93; *see id.* at 7–8, 27–32. Since these objections were raised, ten additional Terms have confirmed the seemingly inexorable trend. As an indication of the growing complexity of the cases, the number of pages in *United States Reports* has risen from 2881 pages in the 1970 Term to 4130 pages in the 1984 Term.

²⁵ Thompson, *Increasing Uniformity and Capacity in the Federal Appellate System*, 11 HASTINGS CONST. L.Q. 457, 464 (1984).

²⁶ *See* Freund Report, *supra* note 14, at 575 (preface by Judge Alfred P. Murrah).

²⁷ The one-third portion has been consistent throughout all major studies of the Court's docket, the most recent of which is L. Beck, *Inter-Circuit Conflicts and the Supreme Court of the United States: A Study of the 1984 Term* (Feb. 1986) (unpublished manuscript available in the Office of the Administrative Assistant to the Chief Justice). Beck found that 54 of the 158 cases decided after plenary review in the 1984 Term involved intercircuit conflicts. For Terms 1980–1984, the average was 47 signed opinions disposing of conflicts cases. *See 1985 Hearings, supra* note 8, at 2 (statement of Senator Thurmond, based on Statistics, *supra* note 19).

maintained over the federal courts fifty years ago; it simply is not able or willing, given the other constraints upon its time, to review all the decisions that result in a conflict in the applicability of federal law.

—William H. Rehnquist (1984).²⁸

Were the Supreme Court's primary task to correct errors of lower federal courts and state supreme courts and to achieve absolute uniformity in the national law, the Court would be doomed to failure. The Court's impact is necessarily limited by the relatively small number of cases — 170 or so — that it can select for plenary review from among the tens of thousands of cases state and federal courts decide each year. The Court must instead confine itself to defining and vindicating general constitutional rights, maintaining a reasonable degree of uniformity in federal law, and preserving the constitutional distribution of powers between the states and the national government and among the three coordinate federal branches.²⁹ The Court accomplishes these constitutional goals by deciding select, discrete cases that involve recurring, unresolved issues of national significance.

As the system was originally designed in 1891, the newly created circuit courts of appeals were to play the basic role of error correction that the Supreme Court could not.³⁰ Docket growth at the court of appeals level has, however, threatened this design. During the last twenty-five years, appeals to the courts of appeals have increased ninefold; a caseload of 3713 in 1960³¹ grew to 33,360 in 1985.³² To cope with this avalanche of appeals, Congress has more than doubled the number of circuit judgeships.³³ All of those appellate judgments and all of those appellate judges, along with the thousands of decisions of federal law from the highest courts in the fifty states, are reviewable only in one Supreme Court of nine justices. As a result, the Supreme Court's ability to impose uniformity on the courts of appeals has been greatly diminished. In 1924, the Court reviewed about one in ten decisions of the courts of appeals.³⁴ Even twenty-five years ago, the Court reviewed between two and three percent of all court of appeals

²⁸ Rehnquist, *A Plea for Help: Solutions to Serious Problems Currently Experienced by the Federal Judicial System*, 28 ST. LOUIS U.L.J. 1, 4-5 (1984).

²⁹ See, e.g., Baker, *The Ambiguous Independent and Adequate State Ground in Criminal Cases: Federalism Along a Mobius Strip*, 19 GA. L. REV. 799, 838-59 (1985).

³⁰ See Circuit Court of Appeals Act of 1891, ch. 517, 26 Stat. 826.

³¹ See DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1960 ANNUAL REPORT 2.

³² See DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1985 ANNUAL REPORT 2.

³³ See Act of May 19, 1961, Pub. L. No. 87-36, 75 Stat. 80; Act of July 10, 1984, Pub. L. No. 98-353, § 201, 98 Stat. 333.

³⁴ See Baker, *A Compendium of Proposals to Reform the United States Courts of Appeals*, 37 U. FLA. L. REV. 225, 228-34 (1985).

decisions.³⁵ In recent years, however, output of the courts of appeals has grown much more rapidly than the Supreme Court's maximum capacity for supervision, and in the 1984 Term the Court was able to review only 0.56% of courts of appeals decisions.³⁶ Thus, the decisions of courts of appeals have become as pure as ivory snow — 99 and 44/100ths percent free from review. Reality has overtaken theory as these courts of error, at least for practical purposes, have become the final expositors of federal law in their geographical region in all but a miniscule number of cases.

As a result of the Supreme Court's forced abdication, conflicting decisions among the circuits have made federal law less uniform than ever. Many conflicts go unresolved, and still more areas of federal law appear incoherent. In recent Supreme Court Terms, inter-circuit conflicts have accounted for approximately five percent of the entire docket and one-third of the signed opinions. In the 1985 Term just ended, the justices noted a conflict in no fewer than forty-four of the 146 signed opinions from the Court. In addition, dissenting opinions from the denial of certiorari noted at least forty additional conflicts cases in the 1985 Term, accumulating seventy-three total individual dissenting votes.³⁷ This is some measure of the intolerable number of conflicts on the docket that must be turned away.

Even these statistics have a tip-of-the-iceberg quality. A comprehensive study of the docket of the 1984 Term found fifty-four conflicts cases presenting fifty-seven distinct inter-circuit conflicts issues among the 158 cases decided after plenary review.³⁸ The study found an additional eighty-two inter-circuit conflicts cases properly presenting federal law conflicts among the 1560 paid cases from the courts of appeals summarily denied review.³⁹ In total, 166 conflicts cases were decided, consolidated, summarily disposed, or denied review in the 1984 Term.⁴⁰ In more than 200 additional cases, the pleadings suggested the existence of a conflict on the merits that was beyond the Court's resolution because of a jurisdictional or procedural defect or because the decisions were distinguishable.⁴¹ Finally, we may assume

³⁵ See Statistics, *supra* note 19 (based, in part, on annual reports of the Director of the Administrative Office of the United States Courts).

³⁶ *Id.*

³⁷ See Statistics, *supra* note 19. There were a total of 40 dissents from denials of certiorari, all of which were written by either Justice White or Chief Justice Burger. See *id.*

³⁸ See L. Beck, *supra* note 27, at xvi.

³⁹ See *id.* at xviii.

⁴⁰ See *id.* at xix-xx.

⁴¹ See *id.* at xx. Interestingly, Beck also found that because of the huge number of cases on appeal, "no single Court of Appeals judge is likely to become aware of, or participate in, a significant number of inter-circuit conflicts." *Id.* at xx-xxi. This finding suggests that court of appeals judges may not be able to recognize the magnitude of the problem of inter-circuit conflicts merely by extrapolating from their own experience.

that a great many decisions by the courts of appeals create conflicts that never reach the Supreme Court's docket. This assumption is supported by a 1982 study of the caseload of one of the twelve regional courts of appeals, which estimated that ninety decisions of that court that year involved a conflict with a decision of another circuit, thirty-six of which created a conflict for the first time.⁴² Multiplying that number by approximately twelve gives some idea of the enormous number of intercircuit conflicts that actually arise each year.

The large number of unresolved conflicts impedes the smooth and consistent functioning of our justice system. Our federal appellate courts provide guidance to citizens — and to the lawyers who advise them — on how to order their affairs, and to lower federal courts on how to decide disputes in a consistent and coherent manner. One would be naive to suggest that national law ought to be perfectly uniform, without flexibility or nuance; nonetheless, under the current system, in which conflict is not simply tolerated but actually encouraged, uncertainty or incoherence is inevitable.⁴³ This uncertainty makes the work of judges, lawyers, and administrators more difficult and more costly. The mere possibility that our judicial system will tolerate and sustain conflicting interpretations of the same statute creates uncertainty and invites relitigation.

The potential that courts will interpret the same provision of the Constitution or section of a federal statute differently in different parts of the country is exacerbated by the conventions of the courts of appeals. The concept of the "law of the circuit," sometimes called the rule of interpanel accord, obliges a panel of circuit judges to treat as binding precedent earlier decisions of that same court of appeals, absent intervening en banc or Supreme Court action. Decisions of other courts of appeals, however, are deemed merely persuasive. This practice weakens the theory of one national law.

The discrepancies created by this system attract strategic and inefficient litigation; private and institutional litigants alike have an incentive to forum shop and relitigate the same case in different circuits following an adverse ruling in one court of appeals only within that circuit.⁴⁴ For example, by the time the Supreme Court finally decided the seemingly straightforward issue of whether the United States Postal Service is immune from state court garnishment pro-

⁴² See *Hearings on H.R. 1968 and H.R. 1970 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 170 (1983) (statement of Chief Judge Godbold).

⁴³ See Meador, *A Comment on the Chief Justice's Proposals*, 69 A.B.A. J. 448, 449 (1983).

⁴⁴ See Note, *Collateral Estoppel and Nonacquiescence: Precluding Government Relitigation in the Pursuit of Litigant Equality*, 99 HARV. L. REV. 847 (1986) (discussing the problem of agency nonacquiescence).

ceedings,⁴⁵ the government had relitigated the issue some twenty times in district courts and eight times in different courts of appeals.⁴⁶

Of course, the conclusion does not necessarily follow that anything need be done about this situation. One approach, known as “percolation,” holds that we should allow conflicts to continue, to increase in number, and to ossify through adherence to the rule of stare decisis within circuits. The rationale behind percolation is that allowing an issue to “simmer” while several judges and different courts approximate different solutions will provide guidance to the Supreme Court when it ultimately decides to resolve the conflict.

The percolation approach is the status quo; it has been embraced by those who do not admit the need for structural court reform. We remain unpersuaded. We cannot accept the underlying logic behind percolation — the notion that somehow a better reasoned Supreme Court decision will result from subjecting citizens in different parts of the country to differing interpretations of the same national law, either constitutional or statutory. The framers of the Constitution and the drafters of federal statutes did not intend that our national law have “more variations than we have time zones.”⁴⁷

When a state court is involved in a conflict with a federal court over an interpretation of federal law, supremacy of federal law trumps uniformity. Supremacy conflicts directly implicate questions of federalism — the tension between state sovereignty and national supremacy — and present a challenge to the constitutional role of the Supreme Court far greater than that posed by the de facto lawmaking power of the federal courts of appeal.⁴⁸ This is so whether one perceives that the state court has gone beyond the actual federal policy — as in some recent Supreme Court applications of the rule requiring independent and adequate state grounds to overturn state supreme court decisions⁴⁹ — or not far enough, as is assumed by the federal habeas corpus provision establishing federal court jurisdiction to review constitutional claims by state prisoners.⁵⁰

Finally, vertical conflicts — those in which an inferior federal court

⁴⁵ See *Franchise Tax Bd. v. United States Postal Serv.*, 467 U.S. 512 (1984).

⁴⁶ See *id.* at 519 n.12 (listing cases); see also Levin & Leeson, *Issue Preclusion Against the United States Government*, 70 IOWA L. REV. 113, 128 (1984) (discussing the abuse of relitigation).

⁴⁷ W. BURGER, 1985 YEAR-END REPORT ON THE JUDICIARY 13.

⁴⁸ See Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill*, 71 CALIF. L. REV. 913, 918 (1983); see also O.W. HOLMES, COLLECTED LEGAL PAPERS 295–96 (1920) (“I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states.”).

⁴⁹ See Baker, *supra* note 29, at 838–59.

⁵⁰ See Stolz, *Federal Review of State Court Decisions of Federal Questions: The Need for Additional Appellate Capacity*, 64 CALIF. L. REV. 943, 959–64 (1976).

or a state court deciding a federal issue strays from Supreme Court precedent — interfere in a profound way with the Court's ability to maintain and elaborate its own precedents. Because one Court can do, at best, an incomplete job of declaring and policing the law, a new national court, acting in harmony with the Supreme Court, could help police the precedents when a lower court explicitly declines to follow, treats as unauthoritative, inadequately distinguishes, or simply ignores some controlling decision.⁵¹

Tolerating numerous conflicts under the rubric of percolation creates an incoherence and uncertainty in national law that results in serious inequities. Conflicts threaten the very purpose of the establishment of one supreme national court: "to secure the national rights & Uniformity of Judgments" contemplated under one national government.⁵² Justice White stated well the great mischief worked by the current plethora of conflicts in our national law:

[D]enying review of decisions that conflict with other decisions of Courts of Appeals or State Supreme Courts results in the federal law being enforced differently in different parts of the country. What is a crime, an unfair labor practice or an unreasonable search and seizure in one place is not a crime, unfair practice or illegal search in another jurisdiction. Or citizens in one circuit do not pay the same taxes that those in other circuits must pay. It may be that occasionally it would be of use to leave a conflict unresolved in order to await the views of other courts; but for the most part, the conflicts that we turn down are not in that category, and they invite prompt resolution in this Court, which now is the only forum that can provide nationwide uniformity. And this is to say nothing of those cases involving no conflict but obviously important statutory or constitutional issues that warrant authoritative review.⁵³

Clearly, greater capacity is needed for achieving a satisfactory measure of uniformity in our national law. The question of how best to achieve it remains.

⁵¹ See Note, *Deciding Whether Conflicts with Supreme Court Precedent Warrant Certiorari*, 59 N.Y.U. L. REV. 1104 (1984) (identifying lower court misuses of Supreme Court precedent and stating in what circumstances the need is greatest for Supreme Court review).

⁵² Vinson, *Work of the U.S. Supreme Court*, 12 TEX. B.J. 551, 551-52 (1949) (quoting Constitutional Convention Delegate John Rutledge of South Carolina). Compare Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U.L. REV. 1, 14 (1986) ("The present proliferation of litigation . . . and the tremendously increased number of undecided federal questions . . . are presently preventing the Supreme Court from adequately discharging its role as the final arbiter of questions of federal statutory and constitutional law in the United States.") with Hellman, *Preserving the Essential Role of the Supreme Court: A Comment on Justice Rehnquist's Proposal*, 14 FLA. ST. U.L. REV. 15 (1986) (rejecting Justice Rehnquist's proposal).

⁵³ 1985 Hearings, *supra* note 8, at 147-48 (prepared statement of A. Leo Levin) (quoting Justice White).

III. ALTERNATIVE SOLUTIONS

*[An Intercircuit Panel] is the only serious proposal that could help relieve the Supreme Court's burden and also add to the system's capacity for achieving a more uniform national law.*⁵⁴

*Until someone comes along with a better idea, I submit that this experiment is worth trying.*⁵⁵

— Warren E. Burger (1985).

Having identified two pressing needs of the Supreme Court and the federal court system — a reduced workload and greater uniformity — we turn to consideration of possible solutions. Many of the ideas suggested have some potential for meeting one of these needs, but not the other. Other proposals might respond in a limited way to both needs but are simply too unrealistic. We lay aside at the outset proposals such as extending the length of the Court Term or increasing the number of summary dispositions. Such steps might increase national appellate capacity, but only at the expense of an intolerable increase in the workload burden of the Supreme Court.

There are two possible approaches to the problem. Assuming that the Court is indeed working at or near its limits, then additional capacity for conflict resolution must be sought either internally — by substantially reducing the Court's nonconflicts caseload to allow it to resolve more conflicts — or externally — by substantially increasing national appellate capacity outside the Supreme Court. We will first consider ideas to reduce the other business of the Court.

The Supreme Court workload has two primary components: screening — selection of cases for review from among the more than 5000 cases on the docket — and plenary review — the disposal of about 170 cases selected from the 5000, with about 150 signed opinions.⁵⁶ About one-third of the signed opinions are cases involving conflicts. Thus, if the other two-thirds of the cases could be reduced, the Court would gain additional capacity to review conflicts cases.

Several proposals have been advanced for reducing the number of cases granted review generally, which would also open up more capacity for hearing conflicts cases. One such proposal is to change the Court's traditional "Rule of Four" into a "Rule of Five," requiring five votes instead of four to grant certiorari.⁵⁷ In pressing for passage of

⁵⁴ W. BURGER, *supra* note 47, at 13.

⁵⁵ W. BURGER, *The Time is Now for the Intercircuit Panel*, 71 A.B.A. J. 86, 91 (1985) (reprint of an address by Chief Justice Burger to the ABA Meeting in Detroit, Feb. 17, 1985).

⁵⁶ See Statistics, *supra* note 5. There were 151 signed opinions each in 1982 and 1983, 139 in 1984, and 146 in 1985. *Id.*

⁵⁷ See Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 10-21 (1983).

the 1925 Judges' Bill, the Justices made solemn representations to Congress that access to the Court would be preserved because the Rule of Four would remain inviolate.⁵⁸ Even if we could forgive the breach of such historic oaths, compelling arguments augur against adopting a Rule of Five. That rule would "make certiorari review appear to foreshadow judgment on the merits."⁵⁹ Moreover, it would abrogate the principle that a minority of the justices can oblige the Court to hear a case.⁶⁰ The potential gains in efficiency are also doubtful; a Rule of Five would provide no relief at all to the justices in their case selection burden. Relief in the Court's case burden would be only speculative, as the number of cases granted review after the adoption of a Rule of Five might not shrink appreciably.⁶¹

Another proposal involves reducing the number of conferences that the justices currently hold almost every week to consider requests for review. Some observers have suggested that less frequent conferences would allow the justices a broader view of the contours of the docket, leading them to grant review in fewer cases.⁶² Under current Court practice, however, as evidenced by docket cards, the justices grant review to few cases at their first conference consideration. As with the Rule of Five, this proposal would provide no relief to the justices in case selection burden, and only slight, speculative relief from their case decision burden.

Division of the Supreme Court into panels to hear cases was initially raised and rejected in 1972.⁶³ Since then, no one has supported the idea, and it seems unlikely to gain new political life. In any event, the practice would provide little workload relief to the justices. If the system functioned as it does in the courts of appeals, an en banc rehearing would be allowed, involving all nine justices in rescreening; as a result, a sizeable proportion of the panel decisions would most likely be redecided. If this time-consuming process were not permitted, division into panels would merely replace intercircuit conflicts with conflicts among panels of the Supreme Court.

Finally, one idea to reduce the argument calendar can only be described as bizarre: the creation of a "second look" panel to oversee the justices' grants of certiorari.⁶⁴ Under this plan, any petition

⁵⁸ See *Hearings on H.R. 8206 Before the House Comm. on the Judiciary*, 68th Cong., 2d Sess. 20 (1924).

⁵⁹ Note, *supra* note 12, at 319.

⁶⁰ See Freund Report, *supra* note 14, at 40.

⁶¹ See D. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 192-95* (1986) (stating that the Rule of Four "operates in a small number of cases").

⁶² See Estreicher & Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 803-04 (1984).

⁶³ See Freund Report, *supra* note 14, at 7-8.

⁶⁴ See Estreicher & Sexton, *supra* note 62, at 802-03. The authors further recommend that the justices take a "straw vote" at the time of granting review to see whether the case will

granted certiorari would be sent to a panel of staff for review of whether the Court had committed an "improvident grant." Presumably, after such a panel decreed that the justices had in fact made an improvident grant, the Court would then see the error of its ways and reverse its decision to grant certiorari, thus shrinking the argument calendar. Leaving aside the chutzpah of composing a panel of lawyers "of the caliber of the Justices' clerks,"⁶⁵ we rather doubt that the justices would be receptive to the corrections of this "second guess" panel.

Other proposals attempt to alleviate the Court's screening burden by reducing the number of cases coming into the Court. Whether this solution would create any additional national law-unifying capacity would, however, be speculative at best. One such proposal is to eliminate the mandatory jurisdiction of the Supreme Court. Of all the proposals discussed, eliminating mandatory jurisdiction is the only one that has potential to relieve *both* work components — screening and deciding. Nonetheless, the relief offered would be insufficient,⁶⁶ because the Court already treats jurisdictional statements in appeals much like petitions for certiorari.⁶⁷ During the 1985 Term, only thirty-six cases that came to the Court by appeal were decided by signed opinions;⁶⁸ one cannot be confident that many of these, if brought on certiorari, would have been denied plenary review.⁶⁹

A second idea for reducing the Supreme Court's intake is for the Court to issue definitive guidelines for when a petition will be granted, thereby reducing, so the argument goes, both the time required to review petitions and the number of petitions submitted.⁷⁰ The Rules of the Supreme Court, enacted shortly after the Judges' Bill of 1925, mention only "special and important reasons," "important question[s] of federal law," and conflicts cases,⁷¹ providing little guidance for prospective certiorari petitioners. The reason why the Court has not

produce an authoritative opinion rather than "only a plurality opinion and a splintered Court." *Id.* at 803.

⁶⁵ *Id.* at 802.

⁶⁶ We recognize that the proposal encompasses more than relief for the Supreme Court and would seriously affect intergovernmental relationships. See Simpson, *Turning Over the Reins: The Abolition of the Mandatory Appellate Jurisdiction of the Supreme Court*, 6 HASTINGS CONST. L.Q. 297 (1978); Tushnet, *The Mandatory Jurisdiction of the Supreme Court — Some Recent Developments*, 46 U. CINN. L. REV. 347 (1977); Note, *supra* note 12, at 322.

⁶⁷ See R. STERN, E. GRESSMAN & S. SHAPIRO, *SUPREME COURT PRACTICE* § 7.10, at 411-13 (6th ed. 1986).

⁶⁸ See Statistics, *supra* note 5.

⁶⁹ The elimination of mandatory jurisdiction has remained pending in Congress for years despite the approval of all nine of the justices and the lack of appreciable opposition. We thus do not even consider more controversial systemwide workload reduction proposals in Congress, such as the elimination of diversity jurisdiction.

⁷⁰ See, e.g., G. CASPER & R. POSNER, *supra* note 18, at 116.

⁷¹ SUP. CT. R. 17.

issued definitive guidelines should be readily apparent: either they would be so general as to be of no assistance or they would be so specific that the justices could not agree on them. Since 1925, Congress and litigants have relied on the individual discretion of the justices through the Rule of Four to set the agenda for the Court. In practice, the Court has given a great deal of guidance through statements in individual cases declaring reasons for granting review. Counsel who are unwilling to familiarize themselves with this information would not likely be more impressed with detailed statements in Court rules.

Other more general proposals have also been suggested to alleviate the workload of the justices. These proposals include more technical improvements for the Court, such as additional law clerks; dividing the screening function among panels of justices, or even delegating the task to others; and healing the "self-inflicted wound" of overgranting and overwriting.⁷² Because these ideas offer negligible potential for additional national law-unifying capacity, we will not discuss them individually.

Several proposals have been advanced to remedy the problem of intercircuit conflicts directly. Any number of ways exist external to the Supreme Court to respond to the perceived problem of the "Tower of Babel" in the national law without creating a new national court. Each of the alternatives, however, is more problematic than the Intercircuit Panel.

First, Congress could monitor and resolve the conflicting decisions of the courts of appeals. This solution obviously would not work for constitutional conflicts; the large numbers involved and legislative reality make it an equally unlikely solution to problems of statutory conflicts. The vagueness of many statutes is a realistic indication of the difficulties of the legislative process. Congress often leaves the task of interpretation to the judiciary when it is unable to develop a consensus on the details of an issue.

A second possibility is to declare that the first court of appeals to decide an issue en banc would establish the law for the nation on that issue. But this would allow a simple majority of one court of appeals — for example, a three judge majority of the Court of Appeals for the First Circuit, which has only five judges — to set national policy. The background, experience, and expertise that some circuits have accumulated — such as the Fifth Circuit in civil rights or the D.C. Circuit in administrative law — would not be utilized. Such an approach might even induce additional en banc treatment of cases, as en banc courts might compete to establish national policy.

⁷² See, e.g., Goldberg, *Managing the Supreme Court's Workload*, 11 HASTINGS CONST. L.Q. 353 (1984).

A third alternative is to establish that once a court of appeals has decided an issue, a second court of appeals would not be allowed to decide that same issue differently, and thus create a conflict, unless the second circuit goes en banc. This proposal would involve too many costly delays, however, and it unrealistically assumes that an entire court somehow would be less independent and less willing to create a conflict than a three-judge panel.

Another option would be the creation of specialized subject matter tribunals — for example, a tribunal for tax appeals.⁷³ This proposal has some merit, and the success of the Court of Appeals for the Federal Circuit points the way. That court has successfully applied concentrated expertise to patent and trademark cases and to customs appeals. Alone, however, specialized tribunals are an insufficient answer. In the 1984 Supreme Court Term, which is representative, only four of the 139 signed opinions were tax cases.⁷⁴ To work, this proposal would necessitate the creation of too many such specialized tribunals.

Having determined that any or all of the above ideas are insufficient to meet the two needs we have identified, we are left with the Intercircuit Panel. If such a panel were in operation, one-third of the cases now on the Court's argument calendar — intercircuit conflicts cases — could be removed.⁷⁵ Although the panel will not materially alter the justices' case selection burden, it will relieve the Court of the need to engage in plenary review of many cases, while providing substantial additional appellate capacity.

IV. CONCLUSION

For democracy is a method of finding proximate solutions for insoluble problems.

— Reinhold Niebuhr (1946).⁷⁶

We have separated the issue of whether a new national appellate body is needed from the issue of what form it should take. This Commentary is about the former, not the latter, and we hope to avoid here a frustrating aspect of the debate thus far. Opposition to the Intercircuit Panel has generally been characterized by a dissonance we find peculiar and confused. Objections to specific features of the proposal, such as the manner of selection of the judges, have by and large not been kept separate from disagreement with the arguments

⁷³ See 1985 Hearings, *supra* note 8, at 114 (statement of Judge Ruth Bader Ginsburg).

⁷⁴ See Statistics, *supra* note 5.

⁷⁵ See *supra* note 27.

⁷⁶ R. NIEBUHR, *THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS* 118 (1944).

made here over whether the federal court system needs a new national appellate court. Just as we have attempted to focus our arguments on specific needs of the system, so, we believe, should critics of the proposal.⁷⁷ Two noteworthy observations about the debate over form, however, provide a backdrop for the debate over the needs issue. First, constructive criticisms of earlier proposals have shaped the current proposals so that the fourth and latest generation of bills differ substantially in form and scope from their prototypes. We cannot pause to chronicle that evolution, but note that cumulative criticisms do not all apply to current versions.⁷⁸

Second, the length of this fifteen-year debate should not reflect poorly on the proposal at issue. Judicial reform has, historically, been slow in coming. The 1891 Evarts Act,⁷⁹ creating the circuit courts of appeals, was passed nearly one hundred years after the First Judiciary Act,⁸⁰ and more than forty years after it was first proposed.⁸¹ Congress took twenty more years to abolish the anachronistic circuit courts and to complete the task of establishing the intermediate appellate courts.⁸² By this standard, progress on the new national court has been breathtaking. Indeed, the recognition that “[j]udicial reform is no sport for the short winded”⁸³ has today become hackneyed. To counsel patience from a more recent example, one need only be reminded of the process leading up to the modest reforms of the Federal Courts Improvement Act of 1982.⁸⁴ Delay and evolution are hallmarks of judicial reform. At the same time, historically short-sighted critics should realize that Congress has redesigned or adjusted our

⁷⁷ Judge Robert H. Bork of the United States Court of Appeals for the District of Columbia Circuit made this critical distinction when he described his own conversion:

I have been opposed to the concept of a National Court of Appeals since I first studied the proposal in 1976.

That view, however, has been shaken. Members of the Supreme Court whose judgment I respect have endorsed the idea in very positive terms. They are certainly more familiar with the problem of inadequate national appellate capacity than I am. If they say there is a real problem, I cannot plausibly dispute their assertion.

This has forced me to rethink my position and to ask how much of my dislike of the proposal stems from the basic concept and how much from the specific features of the proposal now before you. Upon reflection, I think it is the specifics of the bill rather than the fundamental idea that trouble me.

Hearings on H.R. 4238 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 99th Cong., 2d Sess. (Feb. 27, 1986) (prepared statement of Judge Robert H. Bork).

⁷⁸ For a summary of S. 704 as amended, the bill that went to the Senate floor, see S. REP. NO. 99-431, 99th Cong., 2d Sess. (1986).

⁷⁹ Act of Mar. 3, 1891, ch. 517, 26 Stat. 826.

⁸⁰ Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

⁸¹ See CONG. GLOBE, 30th Cong., 1st Sess. 398-99 (1848).

⁸² See Act of Mar. 3, 1911, Pub. L. No. 61-475, 36 Stat. 1087.

⁸³ A. VANDERBILT, *MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION* xix (1949).

⁸⁴ Pub. L. No. 97-164, 96 Stat. 25 (1982). See Petrowitz, *Federal Court Reform: The Federal Courts Improvement Act of 1982 — and Beyond*, 32 AM. U.L. REV. 543 (1983).

national court machinery many times in 200 years;⁸⁵ the creation of the Intercircuit Panel would not be stretching tradition.

Two serious needs exist in the federal court system: reduction in the Supreme Court workload and provision of adequate national law-unifying capacity. The urgency of these needs is irrefutable, and a solution must follow. We believe the best approach is the creation of an Intercircuit Panel.

⁸⁵ See Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 542-43 (1969).