



1976

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## Recommended Citation

Charles R. Haworth, *Circuit Splitting and the New National Court of Appeals: Can the Mouse Roar*, 30 Sw L.J. 839 (1976)  
<https://scholar.smu.edu/smulr/vol30/iss5/4>

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# CIRCUIT SPLITTING AND THE "NEW" NATIONAL COURT OF APPEALS: CAN THE MOUSE ROAR?

by

Charles R. Haworth\*

"The commission labored mightily, but produced only a mouse."<sup>1</sup>

Late in 1972 two events occurred that have had a significant impact on the continuing debate on the possible cures for the congestion problems that confront the federal court appellate system.<sup>2</sup> First, in October 1972 Congress established the Commission on Revision of the Federal Court Appellate System (the Commission).<sup>3</sup> The Commission<sup>4</sup> was charged with suggesting changes in boundaries for the United States Courts of Appeals and changes in the structure or internal procedures of those courts in order to expedite business.<sup>5</sup> Second, in December 1972 the

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1. Miller, *Supreme Court: Time for Reforms*, The Washington Post, Jan. 11, 1976, at F1, col. 4.

2. For review of those problems and earlier suggested solutions 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 (1969); Haworth, *Screening and Summary Procedures in the United States Courts of Appeals*, 1973 WASH. U.L.Q. 257; Wiener, *Federal Regional Courts: Solution for the Certiorari Dilemma*, 49 A.B.A.J. 1169 (1963); Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 TEXAS L. REV. 949 (1964).

3. Act of Oct. 13, 1972, Pub. L. No. 92-489, 86 Stat. 807, as amended, 28 U.S.C. § 41 (Supp. V, 1975). The amendment dealt only with lengthening the time within which the Commission was to file its final report and increasing the appropriation from \$270,000 to not more than \$606,000.

4. Pub. L. No. 92-489, § 1. The members were appointed in equal numbers by the four major branches of the federal government. The President appointed Emanuel Celler, Roger C. Crampton, Francis R. Kirkham, and Alfred T. Sulmonetti. The Chief Justice appointed J. Edward Lumbard, Roger Robb, Bernard G. Segal, and Herbert Wechsler. The President pro tempore of the Senate appointed Quentin N. Burdick, Edward Gurney (later replaced by Hiram L. Fong), Roman L. Hruska, and John L. McClellan. The Speaker of the House appointed Jack Brooks, Walter Flowers, Edward Hutchinson, and Charles E. Wiggins. A. Leo Levin was appointed Executive Director.

5. *Id.* Unfortunately, Congress did not also deem it appropriate for the Commission to study and make recommendations on the jurisdiction of the federal district courts with a view to recommending abolition of federal jurisdiction in classes of cases, such as diversity, or to reform some excesses in those courts' general jurisdiction. See H.R. CONF. REP. NO. 1457, 92d Cong., 2d Sess. (1972); Hruska, *The Commission on Revision of the Federal Court Appellate System: A Legislative History*, 1974 ARIZ. ST. L.J. 579, 602-03 [hereinafter cited as *Legislative History*]. Neither the Commission nor witnesses before it questioned the existence of this limitation. See, e.g., 2 Hearings before the Commission on Revision of the Federal Court Appellate System (Second Phase 1975) 696, 805, 1026-27 [hereinafter cited as *Commission Hearings*] (Aldisert, Coffin, Neal). This omission was unfortunate for fat exists in the intake of cases into the federal court system. See generally H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* (1973) [hereinafter cited as H. FRIENDLY, *FEDERAL JURISDICTION*]. At first glance this failure of Congress to study ways to avert the flow of cases into federal courts, cf. Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634 (1974), made it difficult to evaluate the desirability of the Commission's bifurcated proposals in the absence of firm figures with which to deal. 1975 Commission Hearings 924-25. Upon reconsideration now four years after the establishment of the Commission and longer still after impassioned pleas for relief from congestion in the federal system by numerous federal judges, see *Hearing on S.J. Res. 122 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. (1972) [hereinafter cited as *S.J. Res. 122 Hearing*], it appears that Congress is

Study Group on the Caseload of the Supreme Court (the Study Group)<sup>6</sup> issued its report. The Study Group was charged with studying the caseload of the Supreme Court "and to make such recommendations as its findings warranted."<sup>7</sup> The Study Group's final report proposed a wide variety of remedies for the problems with the workload of the Court, but sparked a lengthy, acrimonious debate only on whether to establish a National Court of Appeals with the power of final review over most cases in the federal system.<sup>8</sup>

In 1973 the Commission issued the first installment of a suggested two-step approach to the problems of the courts of appeals. Both the Fifth and Ninth Circuits would be split to create two new courts.<sup>9</sup> The second report of the Commission showed the profound effect the debate on the Study Group's proposal had on the work of the Commission. Although the primary recommendation of the Study Group has been reduced "to a residue of embers in legal journals,"<sup>10</sup> that proposal, the response to it, and an assessment of the lessons learned during the debate guided the Commission in reaching a final recommendation: the creation of a "new" National Court of Appeals.<sup>11</sup> The Commission also proposed, in response to criticism by lawyers and scholars of existing practices in the courts of appeals, enlarging the scope of oral argument and opinion-writing.<sup>12</sup> Finally, in an effort to achieve reform, the Commission recommended a major readjustment in federal-state court relations: the review of state supreme court decisions by an inferior federal court.<sup>13</sup>

Unfortunately for advocates of reform, the Commission's "mouse" did not arouse the "cat's" vigilant guard of the status quo. The quiet has been devastating.<sup>14</sup> The expected debate has not materialized, perhaps

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unlikely to do anything significant to avert the flood of cases in the district courts, in spite of constant urgings of the Chief Justice. See Burger, *Annual Report on the State of the Judiciary*, 96 S. Ct. Adv. Sh. No. 9 (1976).

6. The members of this group were Paul A. Freund, Chairman, Alexander M. Bickel, Peter D. Ehrenhaft, Russell D. Niles, Bernard G. Segal, Robert L. Stern, and Charles A. Wright. They were appointed by the Chief Justice as Chairman of the Federal Judicial Center.

7. Report of the Study Group on the Caseload of the Supreme Court ix (1972) [hereinafter cited as Study Group].

8. *Id.* at 18-24.

9. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, THE GEOGRAPHICAL BOUNDARIES OF THE SEVERAL JUDICIAL CIRCUITS: RECOMMENDATIONS FOR CHANGE 8, 13 (1973), in 62 F.R.D. 223, 228 (1973) [hereinafter cited as COMMISSION, GEOGRAPHICAL BOUNDARIES].

10. Leventhal, *A Modest Proposal For a Multi-Circuit Court of Appeals*, 24 AM. U.L. REV. 881, 889-90 (1975).

11. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE vii-viii (1975), in 67 F.R.D. 195, 199 (1975) [hereinafter cited as COMMISSION, STRUCTURE].

12. *Id.* at 46-53, 67 F.R.D. at 247-60.

13. *Id.* at 32, 67 F.R.D. at 227.

14. To date only twelve articles have dealt with the Commission's report. Alsup, *Reservations on the Proposal of the Hruska Commission to Establish a National Court of Appeals*, 7 U. TOLEDO L. REV. 431 (1976); Feinberg, *A National Court of Appeals?*, 42 BROOKLYN L. REV. 611 (1976); Hellman, *Legal Problems of Dividing a State Between Federal Judicial Circuits*, 122 U. PA. L. REV. 1188 (1974); Hruska, *The National Court of Appeals: An Analysis of Viewpoints*, 9 CREIGHTON L. REV. 286 (1975); Hruska, *Commission Recommends New National Court of Appeals*, 61 A.B.A.J. 819 (1975); *Legislative History* 579; Leventhal, *supra* note 10; Levin, *Do We Need a New National Court?*, 12 TRIAL, Jan. 1976, at 32; Levin & Fickler, *Realignment of the Fifth Circuit: A Necessary First Step*, 46 MISS. L.J. 659 (1975); Owens, *The Hruska Commission's Proposed National Court of Appeals*, 23 U.C.L.A.L. REV. 580 (1976); Rosenberg, *Enlarging the Federal Courts' Capacity to Settle the National Law*, 10 GONZAGA L. REV. 709

because no group or institution feels very threatened or because no reform will occur until after the 1976 elections. Thus, the Commission's recommendations seem headed, except for the Fifth Circuit split, for the same fate as that of the Study Group: one beaten to death and the other stillborn. With the hope that the mouse can be made to roar, this Article will examine the Commission's proposals and congressional reaction to circuit-splitting, the creation of a National Court of Appeals, oral argument and opinion writing, and National Court of Appeals' review of state court appeals. The thesis of this Article is that splitting the Fifth Circuit is necessary, that the problems generated by adding new courts of appeals can be alleviated by creating a National Court of Appeals, and that adding new courts will help solve the increasingly inaccessible and silent nature of the courts of appeals. The price of these reforms need not include reordering the division of jurisdiction between state and federal courts.

### I. THE UNITED STATES COURTS OF APPEALS

The courts of appeals are experiencing extremely serious congestion problems. One happy note may, however, be sounded: in contrast to the disagreement about the Supreme Court workload, no one, not even Justice Douglas, disputes that those courts are indeed surfeited.<sup>15</sup> One difficulty in proposing comprehensive solutions for the problems of the courts of appeals is that any acceptable plan must not only cure that problem, but also must have narrow ramifications for the remaining parts of the presently three-tiered federal court system. Armed with the limited mandate to study geographical boundaries first, the Commission began work.

#### A. *The Problem*

Commentators often refer to the problem of congestion in the courts of appeals as a crisis.<sup>16</sup> A brief summary will highlight the situation. In 1961 the courts of appeals, operating with 78 authorized judgeships, had 4,204 case filings.<sup>17</sup> By 1968, despite only a modest increase in the number of filings at the district court level,<sup>18</sup> filings to the courts of appeals more than doubled to 9,116.<sup>19</sup> By 1975, although Congress had increased the number of authorized judgeships to 97, case filings increased to 16,658.<sup>20</sup> Thus, over the fifteen-year period from 1961 to 1975, total filings

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(1975); *Commission Recommends Splitting Fifth and Ninth Circuits to Create Two New Federal Appellate Circuits*, 60 A.B.A.J. 209 (1974). Six were authored by members of the Commission or its staff.

15. *Tidewater Oil Co. v. United States*, 409 U.S. 151, 176 (1972) (Douglas, J., dissenting).

16. See Carrington, *supra* note 2; Haworth, *supra* note 2; Wright, *supra* note 2.

17. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT, Table 2, at 175 (1975) [hereinafter cited as A.O. ANN. REP. for the respective year]. All references are to fiscal years unless otherwise indicated.

18. In 1961 a total of 88,561 cases were filed in the district courts. By 1968 the total had only increased to 102,163. A.O. ANN. REP. 107, 117 (1968).

19. A.O. ANN. REP. table B-1, at 174 (1968).

20. A.O. ANN. REP. table B-1, at 323 (1975).

increased almost 300 percent, and in just the eight-year period from 1968 to 1975 filings per authorized judgeship increased 83 percent.<sup>21</sup>

Figures alone do not tell the whole story, but two additional statistics lay the basis for additional concern. In 1968 the courts of appeals left 6,615 cases pending; by 1975 that number had grown to 12,128.<sup>22</sup> This increase occurred despite almost doubling the number of case terminations per judgeship over that period.<sup>23</sup> Second, terminations in 1975 increased only 3.7 percent over 1974, with the District of Columbia, Ninth, and Tenth Circuits showing declines in terminations.<sup>24</sup> The dramatic increases in productivity may have come to an end.<sup>25</sup> If so, the courts of appeals may have difficulty continuing to cope with their ever-increasing workload and backlog,<sup>26</sup> absent amelioration of the current jurisdictional structure, court structure, or the manner of hearing and determining cases.

The traditional approaches to congestion have included creating new levels of courts,<sup>27</sup> appointing more judges,<sup>28</sup> tightening jurisdictional requisites,<sup>29</sup> urging judges to work harder and dispose of more cases,<sup>30</sup> and importing modern office techniques and human assistance into the judicial process.<sup>31</sup> More importantly, the courts of appeals over the last eight years have tended to cut the burden and speed the process by hearing fewer oral arguments, writing more per curiam opinions, and

21. A.O. ANN. REP. table 25, at 181 (1974); A.O. ANN. REP. table 1, at 174 (1975).

22. A.O. ANN. REP. table 1, at 174 (1975).

23. Terminations increased from 8,264 in 1968 to 16,000 in 1975. *Id.*

24. *Id.* at 173.

25. It is difficult to say how much excess capacity existed in the circuit courts in 1962 when the average disposition rate was 53 cases per judge. A.O. ANN. REP. table 2, at 99 (1971). One judge candidly admitted that when he was first appointed the caseload was cleared during the summer. *S.J. Res. 122 Hearing 97* (Brown). Those days are now gone. Regardless, the change to 165 dispositions per judgeship, A.O. ANN. REP. table 3, at 178 (1975), has undoubtedly caused heavy burdens on the judges, with resulting unfortunate side effects. See note 35 *infra* and accompanying text.

26. Few bright spots appear in the statistics. The district courts, after some encouraging signs of decreased activity, had a 13.3% increase in filings of civil cases and 8.9% of criminal. A.O. ANN. REP. 191, 250 (1975). Most troublesome, however, is that during 1972, 1973, and 1974, although the number of terminations by district courts had been declining slightly, the number of filings in the circuit courts continued to rise, although only by 1.4% in 1975. A.O. ANN. REP. 173 (1975). The increasing tendency for losers to appeal, rather than the usual theories of increased population and litigation, would seem to account for a significant part of the courts' problems. Judge Friendly noted this trend and pinpointed as the chief culprits both increased criminal appeals, in which the Government pays the costs, and the conversion of cases from dollars to principles. H. FRIENDLY, FEDERAL JURISDICTION 32-33. Judge Friendly also warns of additional troubles ahead as Congress, properly so, directs more appeals to the courts of appeals first, rather than directly to the Supreme Court. *Id.* at 33-34. Also, a significant boom in social security and other public welfare cases, forecast in Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 25 (1975), to reach perhaps 1,000 cases per year, began to show up in 1974 as social security cases increased 27.5% (from 193 to 246). A.O. ANN. REP. table 28, at 188 (1974). That figure held steady for 1975, A.O. ANN. REP. 180 (1975), but those cases seem to be simply caught in a logjam in the district courts since pending social security cases in those courts rose 65% from 1974. *Id.* at 201.

27. See, e.g., Circuit Court of Appeals Act of 1891, ch. 517, 26 Stat. 826 (The Evarts Act) (federal system); MICH. COMP. LAWS §§ 600.301-.321 (Supp. 1976) (state system).

28. Authorized federal district judgeships now total 400. A.O. ANN. REP. 188 (1975). The courts of appeals now have 97 authorized active judgeships. *Id.* at 174. Bills pending before Congress would increase these numbers by as many as 13 more appellate judgeships and 52 more district judgeships. See H.R. 4422, 94th Cong., 1st Sess. (1975) (appellate); H.R. 4421, 94th Cong., 1st Sess. (1975) (district).

29. See generally H. FRIENDLY, FEDERAL JURISDICTION.

30. Haworth, *supra* note 2, at 262.

31. The increasing importance of staff is detailed in D. MEADOR, APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME (1974).

disposing of cases without a written opinion.<sup>32</sup> Each of the solutions has a peculiar drawback. More judges may be a practical solution at the trial level, but the difficulties attending an increase in appellate judges may be insurmountable.<sup>33</sup> Limiting the flow of cases nearly always runs into opposition from interest groups that want to retain jurisdiction over particular specialties or from those who view the state and federal systems as basically unitary.<sup>34</sup> Pressing the judges to do more may finally have reached the maximum point of efficiency, and the workload plus allegedly inadequate pay has already produced unfortunate resignations from the bench.<sup>35</sup> Systems and staff are important and helpful, but we should cling to the expectation that judges do their own work. Finally, procedural shortcuts have risks and shortcomings that will be discussed in more detail later in this Article.<sup>36</sup>

### B. *The Solution—Phase One*

The first charge to the Commission was to study the "geographical boundaries" of the courts of appeals and to recommend any appropriate changes.<sup>37</sup> Congress ordered, and received, a report within 180 days of the appointment of the Commission's ninth member. One approach the Commission could have taken was to consider itself a constitutional convention for circuit boundaries and redraw circuit lines to equalize the burden of appeals and dispositions per judgeship across the entire country. This approach would have made a great deal of sense in a system that began with three judges per circuit court<sup>38</sup> but now ranges from fifteen in the Fifth to three in the First,<sup>39</sup> and 219 filings per judge in the Fifth to 124 in the District of Columbia.<sup>40</sup> The Commission declined to take this approach, citing the unsettling effect on circuit law that would result from a general realignment and a reluctance to disturb the "sense of community shared by lawyers and judges within the present circuits."<sup>41</sup> The Commission might have also concluded that a general realignment undoubtedly would have brought down a hail of negative reaction from the bench and bar that would have doomed the plan politically. So the Commission turned to the most likely candidates, the

32. See generally Haworth, *supra* note 2.

33. The Fifth Circuit, for example, has disclaimed any desire for more judges. A.O. ANN. REP. 81-82 (1971).

34. See S. REP. NO. 94-513, 94th Cong., 1st Sess. 6 (1975) ("[Congress] should not forego . . . enforcement or protection [of federal or constitutional rights] merely because additional cases will be brought into the courts."); Carrington, Book Review, in 4 *Appellate Justice: 1975, Materials for a National Conference*, San Diego, California, January 23-25, 1975, at 18, 20 [hereinafter cited as *Appellate Justice: 1975*]; Frank, Book Review, 59 A.B.A.J. 466 (1973) ("Solutions do not lie in moving the load from one pile to another.")

35. For instance, Griffin B. Bell of Atlanta, only 57 years old, recently resigned his circuit judgeship after nearly 15 years on the bench to return to private practice. The Atlanta Journal, Jan. 30, 1976, at 1. This resignation apparently had no connection with his recent appointment to the post of Attorney General. Forty-four federal judges recently sued the United States for damages and to force a pay increase. N.Y. Times, Feb. 11, 1976, at 1, col. 1.

36. See part III *infra*.

37. Pub. L. No. 92-489, § 1(a), 86 Stat. 807 (1972).

38. See Circuit Court of Appeals Act of 1891, ch. 517, 26 Stat. 826 (The Evarts Act).

39. 28 U.S.C. § 44 (1970).

40. A.O. ANN. REP. table 3, at 178 (1975).

41. COMMISSION, GEOGRAPHICAL BOUNDARIES 3, 62 F.R.D. at 228.

three largest circuits in terms of case filings per year: the Second, Fifth, and Ninth Circuits.<sup>42</sup> Each of these courts was attempting to cope with the overload with procedures that are troubling to the bar. The Second Circuit allows oral argument in every case, but has greatly increased the number of dispositions by an oral decision from the bench or a brief unpublished memorandum.<sup>43</sup> The Fifth Circuit denies oral argument in more than half its cases and disposes of almost forty percent without written opinion of any kind other than the simple notation "Affirmed. [or Enforced.] See Rule 21."<sup>44</sup> In the Ninth Circuit the backlog of civil cases has reached the point that two years may elapse between the time of filing the last brief and the time of oral argument.<sup>45</sup>

The Commission decided to do nothing to the Second Circuit. Witnesses before the Commission opposed any change in the composition of the states that currently comprise the Second Circuit.<sup>46</sup> Indeed, the resultant decision of the Commission was not surprising considering the great hostility toward creating a one-state circuit consisting only of New York and the slight additional burden imposed on that circuit by the two other states in the circuit.<sup>47</sup>

Turning then to the Fifth Circuit, the Commission found more fertile ground. The circuit is huge both in terms of geography and caseload. This size coincides with controversial procedural innovations designed to cope with a rising caseload,<sup>48</sup> a unanimous position by the judges against

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42. In 1975 the Fifth Circuit had 3,292 cases commenced; the Ninth Circuit 2,731; and the Second 1,739. A.O. ANN. REP. 324-26 (1975).

43. In 1966 the Second Circuit decided 60 cases, or 14.1% of its total terminations, from the bench; in 1973 the numbers had grown to 284 cases, or 35.8% of total dispositions. 1973 Commission Hearings, table 9, at 1052; *id.* table 8, at 1051 (Kaufman).

44. In 1974 the Fifth Circuit classified as Class II cases (no oral argument) 1,028 cases, or 54.9% of the cases screened. That same year the number of cases decided under rule 21 without written opinion totaled 633 or 34.9% of total cases disposed of after hearing and submission. 1975 Commission Hearings 883, 892 (Brown). After 9 months of 1975 the rule 21 cases were running at a rate of 38.6%. *Id.* at 892. In 24% of the Fifth Circuit's dispositions there is no oral argument and no written opinion. *Hearings on S. 2988, S. 2989, S. 2990 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 67 (1974) [hereinafter cited as *Hearings on S. 2988*]; 1973 Commission Hearings 520 (Brown). For a discussion of the rule 21 procedure see Haworth, *supra* note 2, at 271-74.

45. 1973 Commission Hearings 727 (Wright). The basic problems for civil litigants in the Ninth Circuit are the priority given to criminal cases and the screening procedure to which civil cases are subjected. *Id.* at 724, 823 (Wright, Kilkenny).

46. See 1973 Commission Hearings 1031 (Kaufman).

47. The other states in the Second Circuit are Vermont and Connecticut, which contributed in 1973 only 2.1% and 10.5%, respectively, of the appeals to the court. 1973 Commission Hearings, graph C, at 1061 (Kaufman).

Another factor in the Commission's decision was the evidence of relatively high acceptance of the procedure of affirming cases orally from the bench after oral argument. See 1973 Commission Hearings 1072-79, 1120 (Silverman, Bamberger); Drury, Goodman & Stevenson, *Attorney Attitudes Toward Limitation of Oral Argument and Written Opinion in Three U.S. Courts of Appeals* (Bureau of Social Science Research, Inc. 1974) [hereinafter cited as Drury, *Attorney Attitudes*]. This survey indicated that this practice was acceptable to 72% of the Second Circuit lawyers, but was acceptable to only 52% of Fifth Circuit lawyers and 53% of Sixth Circuit lawyers. *Id.* at 19. Interestingly, this practice, as a method to speed disposition, had better acceptance among Second Circuit lawyers than denial of oral argument, of which only 67% of Second Circuit lawyers, as opposed to 84% of Fifth Circuit lawyers, found acceptable. *Id.* The surveyors linked this acceptance to familiarity with the practice examined. *Id.* at 20-21. Second Circuit lawyers tend to accept oral dispositions perhaps because they are more familiar with that extensive practice.

48. See note 44 *supra*.

meeting that caseload with additional judgeships,<sup>49</sup> a majority of its own members in favor of splitting the circuit,<sup>50</sup> and predictions of backlogs developing.<sup>51</sup> These problems are not new in the Fifth Circuit. As early as 1950, a commentator noted the rising caseload and suggested dividing the circuit into two three-state circuits.<sup>52</sup> Thus, no surprise was discernible when the Commission recommended creating a new Eleventh Circuit comprised of Texas, Louisiana, Mississippi, and the Canal Zone, with the diminished Fifth Circuit to retain Georgia, Florida, and Alabama.<sup>53</sup> The proposal has a number of favorable features: the caseload would be evenly balanced between the two circuits;<sup>54</sup> no two-state or one-state circuit would be created; no other circuit's composition would be disturbed; the states are contiguous; each of the circuits would apparently contain "a diversity of population, legal business, and socio-economic inter-

49. See resolution adopted in October 1971, reproduced in REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, OCTOBER 28-29, 1971. In 1971 the Fifth Circuit had 2,316 filings. A.O. ANN. REP. 243 (1971). Filings for 1975 totaled 3,292, A.O. ANN. REP. 325 (1975), an increase of 41.7% with no increase in judges.

50. See Written Joint Statement of Hon. Walter P. Gewin, Hon. Lewis R. Morgan, Hon. Charles Clark, Hon. James P. Coleman, Hon. John C. Godbold, Hon. David W. Dyer, Hon. Bryan Simpson, Hon. Griffin B. Bell, Judges, U.S. Court of Appeals, Fifth Circuit, 1973. Commission Hearings 392-95. Chief Judge Brown has referred to this document as a "manifesto from the East" since there is a notable lack of signers from Texas and Louisiana. *Hearings on S. 2988*, at 78. In fact, the only expression of sentiment for a split from the west has come from Judge Ingraham of Houston, who has since taken senior status. *Id.* at 120. This division of opinion is not readily explainable and at least on the surface has nothing to do with the Mississippi problem to be discussed later. See text accompanying notes 102-16 *infra*. The judges, of course, express nothing but regard and affection for one another. See, e.g., 1973 Commission Hearings 400 (Gewin). One must wonder if some other reason might underlie the division of opinion.

51. *Hearings on S. 729 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 37 (1975) [hereinafter cited as *Hearings on S. 729*].

52. The suggestion was to create a new Eleventh Circuit comprised of Florida, Georgia, Alabama, Puerto Rico, and the Virgin Islands. The newly constituted Fifth Circuit would consist of Texas, Louisiana, Mississippi, and the Canal Zone. Wahl, *The Case for an 11th Court of Appeals*, 24 FLA. L.J. 233, 234 (1950). In 1964 the Judicial Conference approved the report of a special committee that recommended splitting the circuit. 1964 JUDICIAL CONFERENCE REPORT 14-15. The proposal was to create a new Eleventh Circuit comprised of Texas, Louisiana, and the Canal Zone. That proposal at a time of serious social upheaval in the South was viewed with what can charitably be described as suspicion and generated adverse commentary outside of judicial and academic circles. See Wright, *supra* note 2, at 955, quoting Editorial, *The Washington Post*, May 29, 1964, at A18, col. 1, and *Christian Science Monitor*, April 20, 1964, at 7, col. 3, which both questioned the wisdom of the creation of what was viewed as a Deep South Circuit from which racial liberals John Minor Wisdom of Louisiana and John R. Brown of Texas would be noticeably absent. Judge Brown recalls:

[W]e reached the conclusion as a court . . . that this [realignment] seemed to be inevitable. . . . [W]e first took the view that the judges ought not to have anything to do at all with the possible realignment [*sic*], the geographic nature of it, because with school cases and other voter registration cases and race cases then very much alive, any selection of States was then demonstrably selecting the outcome of cases because of the demonstrated actions of the particular judges. So, we thought that had to be left to somebody else.

Two of our judges, Judge Rives and John Minor Wisdom, had second thoughts about this. And Judge Wisdom was largely responsible for getting the Judicial Conference of the United States to change its mind. And this was done, I think, essentially because we could see the disturbing consequences of any circuit realignment of the six States in terms of the outcome of very sensitive cases.

*S.J. Res. 122 Hearings* 107-08. The debates on the Evarts Act in 1891 show similar proposals being offered. See Carrington, *supra* note 2, at 586 n.197.

53. COMMISSION, GEOGRAPHICAL BOUNDARIES 9, 62 F.R.D. at 232.

54. Using the figures for 1973 and apportioning administrative appeals, the numbers looked like this:



ests''; and, at the time of the report, neither circuit would have required more than nine judges.<sup>55</sup>

The Commission also attempted to deal with the Ninth Circuit, but encountered a more complicated problem. Although the Ninth Circuit is geographically huge, 64.2 percent of the cases come from California.<sup>56</sup> Even to approximate a balanced caseload after division of the circuit would require either creating a one-state circuit or placing part of California in one circuit and the rest in another. Either alternative had obvious unpalatable features, but the Commission opted for the California split.<sup>57</sup> The reaction from California was immediate and negative.<sup>58</sup> Despite extensive legislative efforts to meet objections to the proposal,<sup>59</sup> the Senate dropped an attempt to solve the California problem.

<u>Fifth Circuit</u>		<u>Eleventh Circuit</u>	
Florida	800	Texas	838
Georgia	451	Louisiana	477
Alabama	249	Mississippi	143
	<u>1,500</u>	Canal Zone	6
			<u>1,464</u>

*Id.*

55. The proposal satisfies all the Commission's general criteria for circuit realignment. The five criteria are: (1) Circuits should be composed of at least three states; no one-state circuits should be created. (2) No circuit should be created that would immediately require more than nine judges. (3) A circuit should contain states with a diversity of population, legal business, and socio-economic interests. (4) Avoid excessive interference in established circuit alignment. (5) No circuit should contain noncontiguous states. *Id.* at 7, 62 F.R.D. at 231-32.

56. *Hearings on S. 729*, at 127 (Chambers) (circuit executive figures).

57. The extensive analysis of the consequences of the split by the Commission's executive director probably helped tip the balance. *See Hellman, supra* note 14. The proposed realignment was as follows:

<u>Twelfth Circuit</u>		<u>New Ninth Circuit</u>	
California-Southern		California-Northern	
California-Central	998	California-Eastern	545
Arizona	234	Alaska	26
Nevada	70	Washington	183
		Oregon	121
		Idaho	30
		Montana	36
		Hawaii	38
		Guam	35
	<u>1,302</u>		<u>1,014</u>

COMMISSION, GEOGRAPHICAL BOUNDARIES 13, 62 F.R.D. at 236.

58. *See, e.g.*, Speech of Warren Christopher to the Chancery Club of Los Angeles, March 1974, in *Hearings on S. 2988*, at 180-85.

59. *See S. 729*, 94th Cong., 1st Sess. (1975). The bill introduced the "division" concept into circuit-splitting proposals, partly in response to the incredible argument from judges of the Fifth Circuit over which new court would retain the designation "Fifth," *see Hearings on S. 2988*, at 87, 108-09, but basically to meet the problem of possible conflicts on questions of both state and federal law potentially arising from splitting California. The bill provided for a special limited joint en banc hearing before the most senior judges of the two divisions, S. 729, *supra*, § 11, whenever there was a "conflict with a decision by the other division of that circuit and affecting the validity, construction, or application of any statute or administrative order, rule, or regulation, State or Federal, which affects personal or property rights in the same State." *Id.* § 25. A side benefit of the division concept was to ease the intercircuit assignment problem of district and circuit judges from one division to another as caseload demanded. *Id.* §§ 12, 13. In a nod to the supposed continued unity of the new courts, the courts could convene in one judicial conference. *Id.* § 20. In all other respects, the division concept effectively

### C. Reaction of Congress

The Senate Judiciary Committee substituted and recommended passage of S. 2752, which treats only the Fifth Circuit,<sup>60</sup> for the original bill, S. 729, which dealt with both circuits. In S. 2752 the Judiciary Committee rejected in two respects the Commission's recommended division of the Fifth Circuit. First, the Commission's second alternative proposal<sup>61</sup> for the alignment of Mississippi with the states to the east rather than with Texas and Louisiana was adopted.<sup>62</sup> Second, the Canal Zone was assigned to the eastern states.<sup>63</sup> Also, the bill, instead of naming one of the new circuits the "Eleventh," divides the existing Fifth Circuit into eastern and western divisions.<sup>64</sup> The bill would create eight new circuit judgeships, five in the western division and three in the eastern division. Total authorized judgeships would be 11 in the west and 12 in the east, with a per judge caseload of 141 and 145, respectively.<sup>65</sup>

Senate Bill 2752 appears simply to create "divisions" within the Fifth Circuit, but the effect is far deeper than merely placating those judges who protested the loss of the designation "Fifth."<sup>66</sup> In fact, a new court is created that for any major purpose is as separate as the First and Ninth Circuits.<sup>67</sup> Each division would have a separate chief judge, circuit executive, headquarters, and judicial council.<sup>68</sup>

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accomplished creation of new circuit courts. It would seem that a convincing argument could be made that California, Nevada, and Arizona, with combined filings in 1975 of 1,710 cases (exclusive of administrative appeals), would make a manageable-sized circuit. The Second Circuit had 1,739 cases filed in 1975, and although it has manpower available from senior judges, the three-state circuit created out of the Ninth could be manned with more than nine judges. Another problem would be the small caseload of the remaining states (472 in 1975), but that is about the size of the First Circuit.

60. S. 2752, 94th Cong., 1st Sess. (1975). The recommendation is contained in S. REP. NO. 94-513, *supra* note 34, at 15.

61. COMMISSION, GEOGRAPHICAL BOUNDARIES 10. The Commission said that either plan "would represent a significant improvement over the current situation." *Id.*, 62 F.R.D. at 233.

62. S. 2752, *supra* note 60, § 1.

63. *Id.* The caseload of the Canal Zone is insignificant, having contributed only 17 cases to the total load in 1975. A.O. ANN. REP. 332 (1975). The change was made because air travel is easier to Miami than Houston. S. REP. NO. 94-513, *supra* note 34, at 9.

64. S. 2752, *supra* note 60, § 1. The bill makes only one additional major substantive change in the law. The existing provision of 28 U.S.C. § 46 (1970), which makes a senior circuit judge competent to "sit as a judge of the court en banc in the rehearing of a case or controversy if he sat in the court or panel at the original hearing thereof," would be deleted to return the law to its form prior to the 1963 amendment to § 46. Act of Nov. 13, 1963, Pub. L. No. 88-176, 77 Stat. 331. That Act overruled the Supreme Court's decision in *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685 (1960), that only active circuit judges could sit en banc. 28 U.S.C. § 291 (1970) would also be amended to ease the problem of assigning judges for service in the other division. In other circuits the Chief Justice must order the assignment, but between divisions the chief judges would handle the assignment. S. 2752, *supra* note 60, § 12. See COMMISSION, STRUCTURE 61.

65. S. 2752, *supra* note 60, § 5; S. REP. NO. 94-513, *supra* note 34, at 11-12, 17.

66. *Hearings on S. 2988*, at 87, 108-09 (Brown, Wisdom).

67. Only two ties would remain. First is the easier assignment provision discussed in note 59 *supra*. Second is the authority provided by an addition to 28 U.S.C. § 333 (1970) for the two divisions to hold an annual joint judicial conference. S. 2752, *supra* note 60, § 20.

68. S. REP. NO. 94-513, *supra* note 34, at 27 (separate views).

The justifications for dividing the Fifth Circuit under either plan are numerous and convincing. The court recognized in 1971 that continual increases in the number of judges would eventually create more problems than the benefit of a slightly lessened caseload per judgeship.<sup>69</sup> A majority of the judges assert that the experimentation forced upon them earlier by increasing the court to fifteen judges has not worked well.<sup>70</sup> In 1964 Professor Wright favored more judges as the least objectionable alternative to the Fifth Circuit's problems. He argued that a split could always be made, that experimentation would allow a view of the workings of a large appellate court, and that "[i]f such a court is too unwieldy, if it shows inefficiency or disunity," then the split could be made.<sup>71</sup>

The problems encountered by the court are now clear and numerous. The large number of judges has created intra-circuit conflicts, or the appearance thereof, and disharmony to such an extent that instead of the one en banc case the court heard in 1964, the court heard twenty-nine in 1974.<sup>72</sup> The judges expressed substantial dissatisfaction with the time required to confer with fourteen other judges and the convention-like nature of en banc hearings.<sup>73</sup> Keeping track of the cases and the law of the circuit has become almost unbearable. At one hearing, Judge Clark displayed the "slip" opinions of the Fifth Circuit for one year: a stack measuring four feet two-and-one-half inches high.<sup>74</sup> The attempt to keep up with the caseload now causes the judges to question their ability to devote sufficient time for consideration of and reflection on their cases.<sup>75</sup> The new procedures adopted by the court in an effort to keep current,<sup>76</sup> in particular the denial of oral argument in about fifty percent of its cases and the disposition of almost forty percent of its cases without opinion, are further concerns.<sup>77</sup> Perhaps additional judges would enable the divisions to reduce the use of these devices. Several judges have also expressed the hope for a return to a more relaxed standard for oral argument.<sup>78</sup> The net result of these years of experimentation in the Fifth Circuit has been less deliberation, less explanation, and less visibility.<sup>79</sup> Circuit splitting may provide only temporary relief. But even Chief Judge Brown finally admitted that if, as projections show, the Fifth Circuit should

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69. See note 49 *supra* and accompanying text.

70. See note 50 *supra*.

71. Wright, *supra* note 2, at 978.

72. *Id.* at 972; A.O. ANN. REP. 185 (1974).

73. *Hearings on S. 2988*, at 11; 1973 Commission Hearings 392 (joint statement).

74. 1973 Commission Hearings 403 (Clark); *Hearings on S. 2988*, at 149. Judge Godbold gave the following example of the problems involved:

I have . . . called to my colleagues, to say, 'I have read your opinion . . . and how about reading the following cases, which I think you will find is [*sic*] directly contrary to what you have decided.' And in both instances, the judge wrote back and said, 'You are right, I will have to withdraw the opinion.'

1973 Commission Hearings 379.

75. 1973 Commission Hearings 355 (Wisdom); *cf.* Wright, *supra* note 2, at 960-61.

76. See part III *infra*.

77. 1973 Commission Hearings 155 (Brown).

78. *Hearings on S. 2988*, at 150.

79. 1973 Commission Hearings 115 (Carrington).

have twenty-six judges by 1977,<sup>80</sup> the court could not function at that size.<sup>81</sup> Thus, the only choice now before Congress is to increase the number of judges dramatically or to split the circuit.<sup>82</sup>

Unfortunately, some remain unconvinced. In a statement of separate views on the Judiciary Committee's report on S. 2752, five senators<sup>83</sup> argued that a split was unnecessary. In part they contended that (1) the split would afford little relief since the two new divisions would start with eleven and twelve judges who would still have to keep abreast of a large number of cases decided by the division, and (2) the en banc problem could be solved by having en banc hearings limited to nine judges.<sup>84</sup> These arguments have a surface appeal, but totally ignore the statistics and policies involved. If two divisions of eleven and twelve judges are created, the caseload of each division would be, using 1974 figures and the Committee's recommended division, 1,742 cases in the east and 1,552 cases in the west, or 145 cases per judge in the east and 141 in the west.<sup>85</sup> Thus, each judge in an effort to maintain uniformity in circuit law will have to consider only about one-half of the current number of decided cases. More importantly, the judges would be relieved of a portion of the 219 cases each has been currently carrying. Admittedly both divisions might rise quickly to fifteen judges and return to the problems that a large court with a large caseload experiences. This situation is preferable, however, to a terribly overburdened court, a backlog of cases, and the problems of administering a court of thirty judges. The dissenters' proposed method of deciding cases en banc<sup>86</sup> undoubtedly would lead to serious disharmony generated by those judges who believe that their views are not represented in the en banc court comprised of a minority of active judges.<sup>87</sup>

The dissenters' objection that two three-state circuits would be preferable is on sounder ground. The dissenters note that S. 2752 violates three of the Hruska Commission's standards:<sup>88</sup> (1) a two-state circuit is created, (2) both divisions would begin with more than nine judges, and (3) greater diversity of social and economic interests might be furthered by placing Mississippi with Texas and Louisiana, a criterion that is more expansively stated as a loss of federalizing influence.<sup>89</sup> Undoubtedly, the proposed western division would

80. *Hearings on S. 2988*, at 85 (administrative office projection).

81. *Id.* at 94. This remark was qualified by the desire for substantive reform of jurisdiction. Cf. note 4 *supra*.

82. *Hearings on S. 2988*, at 93-94 (Brown).

83. Senators Hart, Kennedy, Bayh, Tunney, and Abourezk.

84. S. REP. NO. 94-513, *supra* note 34, at 28 (separate views).

85. *Id.* at 11-12.

86. They propose selecting nine judges on the basis of seniority. *Id.* at 28 (separate views).

87. This problem was articulated by Judge Haynsworth:

I dislike the notion of two classes of judges . . . and there are practical problems in the proposal. It has been my experience that when all judges sit on divisive issues the minority readily accepts the result because they feel that their views have been fully heard and considered. This may not be true when some of the active judges are not members of the en banc court, and I can foresee problems of acceptance if a majority of a sharply divided en banc court did not represent the view of a majority of the whole court.

1975 Commission Hearings 1081.

88. S. REP. NO. 94-513, *supra* note 34, at 29-30 (separate views).

89. *Id.*

constitute a two-state division, but one wonders whether this criterion violation is important in a division containing Texas. Anyone who knows that state cannot help agreeing with non-Texan Circuit Judge Charles Clark that Texas is so diverse that it is one state only in the sense of being limited at the moment to two United States Senators.<sup>90</sup> The second alleged violation, however, is difficult to understand. When the Commission reported in 1973, the caseload for two nine-judge divisions would have been 167 filings per judge in the east and 163 in the west.<sup>91</sup> By the time the Judiciary Committee acted, however, the per-judge caseload for a nine-judge court had jumped to 178 in the west and 188 in the east, as opposed to a national average of 163.<sup>92</sup> Thus, even though a split would admittedly accomplish only a small decrease in the number of judges in each division compared to the present Fifth Circuit, a substantial reduction in per-judge filings would be effected. Congress is probably unwilling to reopen the whole question of nationwide circuit realignment and violently reject the principle of marginal interference to maintain nine-judge courts. The only other readily available solution is further dividing the Fifth Circuit into three two-state circuits, which could be labeled Fifth-Eastern, -Middle, and -Western Divisions.<sup>93</sup> This split would produce additional problems, the two most obvious being an unbalanced caseload between the three divisions,<sup>94</sup> and the creation of a circuit containing only Mississippi and Alabama.

The final major objection is whether a two-state circuit can display the appropriate federalizing influence. The initial focus is thus turned on Texas-Louisiana.<sup>95</sup> The Senate dissenters relied heavily on the testimony of Judge Wisdom in the subcommittee hearings on the predecessor bill to S. 2752.<sup>96</sup> Judge Wisdom argued against any split in the circuit on the ground that a "court composed of judges from only Texas and Louisiana would [not] be able to perform its federalizing function as well as the Fifth Circuit."<sup>97</sup> Proponents of the objection favor courts of appeals "composed of judges

90. *Hearings on S. 2988*, at 143-44. As a result of congressional actions in the area of energy, many Texans have within the last three years begun seriously to discuss their alleged right to divide into five states. See Joint Resolution of March 1, 1845, in 4 T.I.A.S. No. 113, 689-90 (Miller ed. 1934); 1973 Commission Hearings 410 (Flowers).

91. These figures assume Mississippi is placed in the west. COMMISSION, GEOGRAPHICAL BOUNDARIES 9, 67 F.R.D. at 233.

92. See S. REP. NO. 94-513, *supra* note 34, at 8-9, for 1974 figures.

93. The caseload, using 1974 figures, would be:

<u>Eastern</u>		<u>Middle</u>		<u>Western</u>	
Georgia	425	Alabama	298	Texas	920
Florida	725	Mississippi	120	Louisiana	484
Canal Zone	7	Administrative		Administrative	
Administrative		Cases	44	Cases	148
Cases	123		462		1,552
	<u>1,280</u>				

Administrative cases are proportioned on ratios established by other volume.

94. Although one division would require as many as eleven judges, another would have a case load the size of the First Circuit which had 387 filings in 1974. A.O. ANN. REP. 363 (1974).

95. Just as Professor Wright did 12 years ago. Wright, *supra* note 2, at 976.

96. *Hearings on S. 2988*.

97. *Id.* at 96.

who have practiced in different states, who have a wide variety of experience, who are free from the prejudices and the provincialisms which color the thinking of lawyers in any one state."<sup>98</sup> Admittedly a circuit with six states is more federalized than a circuit with two, but one wonders whether the difference is large enough to be significant. In many cases, a judge's judicial philosophy, which is explored before the President nominates and the Senate confirms that nomination, is more important than the state in which a judge resides at the time of appointment. Other facts occasionally mentioned, such as the effect of local education and idiosyncrasies of local practice,<sup>99</sup> lose their force as law schools become nationally-oriented in teaching approaches and local rules of procedure copy the Federal Rules.<sup>100</sup>

The critical issue with respect to circuit splitting is whether splitting the circuit can be accomplished without creating a "Deep South" circuit<sup>101</sup> that would not exhibit the appropriate federalizing influence or "a balanced concern for national justice and equality."<sup>102</sup> One consequence of the creation of such a court would be the expenditure of an inordinate amount of time by the Supreme Court to insure that the circuit's decisions conform to those of the Court. A subsidiary problem seems to be the fear that Mississippi will escape control of more liberal members of the proposed western division.<sup>103</sup>

98. Wright, *supra* note 2, at 974. Professor Wright was referring to more than civil rights cases.

99. *Id.*

100. The Senate dissenters' concern with the two-state circuit and its handling of civil rights cases, apparently only a concern when the Fifth Circuit is discussed, makes little sense when the specific situation is considered. No one would seriously contend that the judges of the proposed western division have lacked federalization in any case. A further argument about less "common law tradition" in the western division, *see* Wright, *supra* note 2, at 976, fails to note that the common law, with exceptions, has been the law in Texas since the days of the Republic. CONSTITUTION OF THE REPUBLIC OF TEXAS art. IV, § 13: "The Congress shall, as early as practicable, introduce, by statute, the common law of England, with such modifications as our circumstances, in their judgment, may require; and in all criminal cases the common law shall be the rule of decision." The common law was adopted by Act of Jan. 20, 1840, TEX. REV. CIV. STAT. ANN. art. 1 (1969). Spanish law influence, except in matrimonial property law, "is currently rather insignificant." Baade, *The Form of Marriage in Spanish North America*, 61 CORNELL L. REV. 1, 3 (1975). Texas lawyers must have been very surprised to find Texas labeled a civil law jurisdiction. *See* S. REP. NO. 94-513, *supra* note 34, at 8.

101. Critics of circuit splitting are primarily concerned that none of the more liberal judges would be in the proposed eastern division. Even a casual Fifth Circuit watcher would not be surprised at the suggestion that some western division judges are more liberal than Judge James P. Coleman. *Cf.* Friendly, *Of Voting Blocs, and Cabbages and Kings*, 42 U. CINN. L. REV. 673 (1973). For an analysis of blocs in the various courts of appeals *see* Goldman, *Conflict on the U.S. Courts of Appeals, 1965-1971: A Quantitative Analysis*, 42 U. CINN. L. REV. 635 (1973), who concludes: "The Fifth Circuit also demonstrated liberal and conservative blocs. The clearly defined liberal bloc consists of . . . Wisdom, Tuttle, Brown, and Rives . . . , Goldberg, Thornberry and Simpson. The conservatives identified [are] . . . Bell and Gewin, . . . Morgan, Ainsworth, Dyer, Coleman and Godbold . . ." *Id.* at 650.

102. S. REP. NO. 94-513, *supra* note 34, at 31 (separate views). An additional point against circuit splitting is that in energy-related cases judges from non-producing states lack the proper perspective. *Id.* The argument is so speculative, however, that little weight can be given it. The argument also ignores testimony that some of the states which could be placed in the proposed eastern division are energy-producing states. *See Hearings on S. 2988*, at 144.

103. *See* note 100 *supra*. This concern was certainly real in 1964 when it was rumored that Senator Eastland was determined to get Mississippi out of a circuit containing Judges Brown and Wisdom who are regarded as liberals in civil rights cases. *Christian Science Monitor*, April 20, 1964, at 7, col. 3, quoted in Wright, *supra* note 2, at 955 n.18.

In 1975 the Mississippi federal appellate judges urged Congress to place the state in the eastern division. *Hearings on S. 2988*, at 128-29, 143-45. Judge Clark said: "Mississippi has a historical kinship with Alabama, Georgia, and Florida. It has a particularly close affinity with Alabama, its

These fears have no rational basis today. There is no evidence that any judges of the Fifth Circuit have failed to enforce the law in civil rights cases.<sup>104</sup> But enforcing the law as laid down by Congress or the Supreme Court is one thing; leading the way into uncharted areas or applying expansive interpretations to statutes or prior decisions is quite another. Second, the members of the court from the proposed eastern division outnumber those from the western. Third, one should remember that Mississippi has only two judges on the court.

Those three simple facts should allay concern about the circuit split and the placement of Mississippi. However, additional analysis supports this conclusion. An examination of the performance of the Fifth Circuit in civil rights cases presenting difficult issues sheds some light on the sensitivity of the Fifth Circuit judges, their "concern for national justice and equality," and their perceptions of the directions that the Supreme Court is taking. The cases studied were the twelve civil rights en banc decisions rendered since January 1974.<sup>105</sup> These cases present an opportunity to study the voting patterns of the judges in complex and controversial cases raising for the most part close questions on the cutting edge of the law. The survey shows that the more conservative members of the court are in firm control of en banc decisions. Nine of the twelve decisions were decided along more conservative lines than those for which the dissenters argued.<sup>106</sup> Although the make-up of this conservative majority shifts, it can without too much disagreement be said to consist of Judges Gewin, Coleman, Dyer, Roney, Gee, and Tjoflat.<sup>107</sup> The moderates are Judges Brown, Thornberry, Ainsworth, Morgan, and Clark.<sup>108</sup>

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mirror-image twin, which not only is rooted in the past, but is also cemented into the foreseeable future." *Id.* at 145. Although the Commission had recommended putting Mississippi in the proposed western division, compare one of its reasons for not moving Arizona to the Tenth Circuit: "We have also heard extensive testimony about the close economic, social and legal ties between Southern California and Arizona . . ." *Id.* at 15. See also COMMISSION, GEOGRAPHICAL BOUNDARIES 9, 67 F.R.D. at 233. Since Mississippi is an energy-producing state, there may also be an argument that a proper balance requires that it be separated from the big energy producers of the proposed western division. See note 102 *supra*.

104. See Wright, *supra* note 2, at 955. As stated by Judge Friendly, identification of voting blocs should not lead to a "conviction that judges regularly vote on ideological lines; it is only in the closest cases that such attitudes may tip the balance." Friendly, *supra* note 101, at 677. See also 1973 Commission Hearings 392, 393 (joint statement): "We believe it is fair to say that the six states which . . . comprise the Fifth Circuit are far more integrated on all levels than any other six states in the nation. We have rendered more integration decisions than all of the other Appellate Courts of the nation combined. A very high percentage of these decisions were unanimous."

105. *Abbott v. Thetford*, 534 F.2d 1101 (5th Cir. 1976) (en banc) (first amendment); *Bryan v. Jones*, 530 F.2d 1210 (5th Cir. 1976) (en banc) (§ 1983, good faith defense); *Golden v. Biscayne Bay Yacht Club*, 530 F.2d 16 (5th Cir. 1976) (en banc) (racial and religious discrimination); *Warner v. Board of Trustees of Police Pension Fund*, 528 F.2d 505 (5th Cir. 1976) (en banc) (§ 1983); *Muzquiz v. City of San Antonio*, 528 F.2d 499 (5th Cir. 1976) (en banc) (§ 1983); *Ingraham v. Wright*, 525 F.2d 909 (5th Cir. 1976) (en banc) (cruel and unusual punishment); *Willingham v. Macon Telegraph Pub. Co.*, 507 F.2d 1084 (5th Cir. 1975) (en banc) (sex discrimination); *Reese v. Dallas County*, 505 F.2d 879 (5th Cir. 1974) (en banc), *rev'd*, 421 U.S. 477 (1975) (reapportionment); *Sims v. Fox*, 505 F.2d 857 (5th Cir. 1974) (en banc), *cert. denied*, 421 U.S. 1011 (1975) (due process; right to hearing); *United States v. Mississippi*, 499 F.2d 425 (5th Cir. 1974) (en banc) (racial discrimination); *Penn v. Schlesinger*, 497 F.2d 970 (5th Cir. 1974) (en banc) (racial discrimination); *Morrow v. Crisler*, 491 F.2d 1053 (5th Cir. 1974) (en banc) (racial discrimination).

106. The liberal judges tended to vote in favor of blacks and other minorities and against employers and authorities generally. The conservatives were outvoted only in *Reese*, *Mississippi*, and *Morrow*.

107. In the twelve cases these judges had the following conservative-liberal voting pattern: Gewin (10-2); Coleman (12-0); Dyer (10-1); Roney (10-2); Gee (9-2); Tjoflat (5-0). Not all judges participated in every case.

108. These judges had the following conservative-liberal voting pattern: Brown (4-8); Thornberry (7-5); Ainsworth (8-4); Morgan (5-7); Clark (8-4).

The liberals are clearly Judges Wisdom, Goldberg, and Godbold.<sup>109</sup>

If the Fifth Circuit were restructured by passage of S. 2752, these judges would be divided into two courts, with the eastern division composed of conservatives Gewin, Coleman, Dyer, Roney, and Tjoflat, moderates Clark and Morgan, and liberal Godbold. The western division would contain conservative Gee, moderates Brown, Thornberry, and Ainsworth, and liberals Wisdom and Goldberg. If the en banc decisions of the Fifth Circuit had been decided by the western judges alone, the result would have been different in two cases<sup>110</sup> and a tie would have resulted in another case.<sup>111</sup> Thus, the western judges, though not controlling the Fifth Circuit, could make a significant change in the outcome of cases if left to their own circuit. On the other hand, only one case would have been decided differently if decided by the eastern judges alone.<sup>112</sup> *Reese v. Dallas County*<sup>113</sup> presented the court with a peculiar form of alleged discrimination in the interpretation of "fair and effective" representation through "one man, one vote." The court was presented with a county in which all four county commissioners were elected in an at-large election, but a state statute required that a commissioner be elected from each of four residency districts. The districts were dramatically unequal in population, with almost half the voters residing in one of the four districts. The plaintiffs contended that their votes were diluted to the extent that they were forbidden to elect commissioners resident in the city in proportion to their numbers. The Fifth Circuit held, six judges dissenting, that the plaintiffs had made out an un rebutted case of prima facie discrimination, that the discrimination was odious, and remanded the case for fashioning appropriate relief.

The Supreme Court reversed, holding that the Fifth Circuit had improperly distinguished prior decisions which taught that in an at-large election "each commissioner represents the citizens of the entire county and not merely those of the district in which he resides."<sup>114</sup> Using that test, the Court concluded that the plan without more assured each elector an equal vote for, if not equal proximity to, the candidates. Thus, the one en banc case in which the conservatives voted substantially together but still could not muster a majority<sup>115</sup> was reversed by the Supreme Court. This is but one small indication,

109. These judges had the following conservative-liberal voting pattern: Wisdom (1-9); Goldberg (0-12); Godbold (1-10). Judge James C. Hill, who joined the court on May 26, 1976, was not included in the study because all of the cases were decided prior to that time.

110. Both cases, however, presented the same issues. *Muzquiz v. City of San Antonio*, 528 F.2d 499 (5th Cir. 1976) (en banc); *Warner v. Board of Trustees of Police Pension Fund*, 528 F.2d 505 (5th Cir. 1976) (en banc). Brown, Wisdom, Goldberg, and Thornberry dissented in both cases.

111. In *Golden v. Biscayne Bay Yacht Club*, 530 F.2d 16 (5th Cir. 1976) (en banc), Brown, Wisdom, and Goldberg dissented from a majority including Thornberry, Ainsworth, and Gee. A fourth case, *Ingraham v. Wright*, 525 F.2d 909 (5th Cir. 1976) (en banc), probably would have changed this result, but Judge Wisdom did not participate so his vote cannot be computed; Brown, Goldberg, and Ainsworth dissented.

112. *Reese v. Dallas County*, 505 F.2d 879 (5th Cir. 1974) (en banc), *rev'd*, 421 U.S. 477 (1975) (per curiam) (8-0 decision). The dissenters would have become a majority of Coleman, Gewin, Dyer, Clark and Roney. Simpson is not included because he had taken senior status. Those in the majority would have become dissenters, Godbold and Morgan. Judge Tjoflat had not yet joined the court. In *Mississippi* only Judges Coleman, Dyer, and Simpson dissented. In *Morrow* only Judges Coleman and Gee dissented.

113. 505 F.2d 879 (5th Cir. 1974) (en banc).

114. 421 U.S. at 480.

115. Another case of interest, although not heard en banc, is *Johnson v. Mississippi*, 488 F.2d



along with the absence of reversal in other cases, that rather than creating a "Deep South" circuit, the proposed eastern division would effectively carry out Supreme Court mandates. Perhaps the question to be asked is whether the proposed western division would need undue attention by the Court to restrain those judges' enthusiasm for enforcing their "concern for national justice and equality."<sup>116</sup> More importantly, this survey demonstrates that control of the Fifth Circuit is now located in the proposed eastern division. If fear of loss of control of Mississippi is the key to change, that loss has already occurred.

The proposed circuit split would create three new judgeships in the east and five in the west<sup>117</sup> that may be located where Congress and the President please. No matter where these judgeships or the Mississippi judges are placed, a delay in the passage of S. 2752 cannot be justified. The increasing backlog of cases in the Fifth Circuit makes the time ripe for Congress to provide relief. The placement of Mississippi is too minor a problem to hold up the reform.

## II. THE STUDY GROUP AND THE HRUSKA COMMISSION: A NATIONAL COURT OF APPEALS

Pursuant to the charge from Congress to study the "structure and internal procedures" of the courts of appeals and to recommend appropriate changes,<sup>118</sup> the Commission issued a second report eighteen months after the initial report on geographic boundaries. The major recommendation was to create a National Court of Appeals.<sup>119</sup> The tremendous influence on the Commission's recommendation by the controversy surrounding the Study Group's proposal for a slightly similar court makes an examination of that controversy before moving to an evaluation of the Commission's proposal helpful.

### A. *The Study Group's Perception of the Problem*

Charged with studying the caseload of the Supreme Court,<sup>120</sup> the Study Group determined that the Court was overworked.<sup>121</sup> The figures used to support this conclusion are persuasive.<sup>122</sup> The Group noted that the total number of cases filed in the Court had zoomed from 1,178 in 1941 to 3,643 in

284, *on petition for rehearing and rehearing en banc*, 491 F.2d 94 (5th Cir. 1974), *aff'd*, 421 U.S. 213 (1975). Rehearing en banc was refused over the dissents of Judges Brown, Wisdom, Thornberry, Goldberg, and Ainsworth. The Supreme Court, affirming the panel decision, held that § 245 of the Civil Rights Act of 1968, 18 U.S.C. § 245 (1970), did not provide a basis for removal to federal court under 28 U.S.C. § 1443(1) (1970) of charges filed in state court against civil rights protestors.

116. S. REP. NO. 94-513, *supra* note 34, at 31 (separate views).

117. S. 2752, *supra* note 60, § 5.

118. Act of Oct. 13, 1972, Pub. L. No. 92-489, § 1(b), 86 Stat. 807.

119. COMMISSION, STRUCTURE vii-viii, 67 F.R.D. at 199-200. Unfortunately, the Commission chose the same name for its new court as that used by the Study Group.

120. Study Group ix.

121. *Id.* at 3-9. The Study Group characterized the Court as "now at the saturation point, if not actually overwhelmed." *Id.* at 9.

122. *But see* Warren, *The Proposed New "National Court of Appeals,"* 28 RECORD OF N.Y.C.B.A. 627 (1973), in which the late Chief Justice said that the Study Group's use of figures was reminiscent of "McCarthy days." *See also* *Tidewater Oil Co. v. United States*, 409 U.S. 151, 174 (Douglas, J., dissenting).

1971,<sup>123</sup> a threefold increase while the number of Justices remained constant. At the same time, the number of cases heard and decided remained fairly steady, with a total of 143 cases decided by 129 opinions of the Court in the 1971 term against an average of 120 cases and 100 opinions for the fifteen preceding years.<sup>124</sup> The enlarged caseload and the increasing complexity of issues presented has made screening the cases for those deemed worthy of review a time-consuming job. Thus, during the 1973 term only about six percent of the paid cases were heard by the Court, as opposed to eighteen percent in 1951.<sup>125</sup> The Study Group concluded that these conditions were "incompatible with the appropriate fulfillment of [the Court's] historic and essential functions."<sup>126</sup>

### B. *The Proposed Solution*

The time required to sift through the cases filed in the Court each year and to pick those few accorded plenary disposition was perceived as a likely area for reform. Thus, the Study Group proposed the creation of a National Court of Appeals to be interposed in the existing federal hierarchy between the existing courts of appeals and the Supreme Court. The National Court was to supplant the Supreme Court as the locus of filing petitions for review now filed with the Supreme Court. Denial of review by the National Court of Appeals would be final, and no access to the Supreme Court would exist.<sup>127</sup> The remaining cases fall into two categories. Cases involving conflicts in decisions between the regional courts of appeals would be certified to the Supreme Court for decision if the case was otherwise of sufficient importance for Supreme Court review.<sup>128</sup> Other cases of conflict would be decided by the National Court, and no access to the Supreme Court would exist.<sup>129</sup> The

123. Study Group 2-3. Admittedly, *in forma pauperis* cases made up a large part of the increase. Only 178 such cases were filed in 1941, but in 1971 there were 1,930. *Id.* app., table II, at A2.

124. *Id.* at 5. The 1973 term showed an explosion to 4,187 cases filed, but that term was unusually long. Hruska, *The National Court of Appeals: An Analysis of Viewpoints*, 9 CREIGHTON L. REV. 286, 289 n.8 (1975). This aberration makes the 3,661 cases filed in the 1974 term look like leveling off is occurring, but the 3,939 cases filed in the 1975 term suggest that is unlikely. See 45 U.S.L.W. 3083 (July 27, 1976). The reasons for this general increase in caseload are unclear. The Study Group noted the increase in population, expanding federal legislation, and changes in constitutional doctrine. Study Group 3. A more recent study concludes that the Court itself, by expanding rights and creating uncertainty, has been the major contributor to the docket explosion. See Casper & Posner, *A Study of the Supreme Court's Caseload*, 3 J. LEGAL STUDIES 339, 360 (1974).

125. Griswold, *Rationing Justice—The Supreme Court's Caseload and What the Court Does Not Do*, 60 CORNELL L. REV. 335, 341 (1975). The importance of this gap is of course a matter of dispute. Dean Griswold suggests that the gap shows a lack of appellate capacity, although it might as easily show that the Court used to take cases that were not worthy of its attention. H. FRIENDLY, FEDERAL JURISDICTION 51; 1974 Commission Hearings 213 (Friendly).

126. Study Group 5. Others have been less polite in their phrasing of the consequences of the workload. Professor Kurland, speaking of the 1975 term, said that "[a]s a whole, this year's opinions have not been those a law professor would find deserving of a good grade. I'd probably flunk them all." TIME, July 12, 1976, at 37, col. 1. Perhaps Professor Kurland is blessed with better law students than the rest of us.

127. Study Group 21.

128. The Study Group was unclear as to what they intended for state court cases. Apparently the National Court of Appeals could not decide cases of conflict between state courts and federal circuit courts. See Stolz, *Federal Review of State Court Decisions of Federal Questions: The Need for Additional Appellate Capacity*, 64 CALIF. L. REV. 943, 944 n.6 (1976). For discussion of the Hruska Commission's recommendation on this problem see part IV *infra*.

129. Study Group 21.

remaining cases, estimated at four hundred, would be certified for possible review. The Supreme Court could either grant or deny review, or in the case of circuit conflict remand the case for decision by the National Court.<sup>130</sup>

The composition of this new court was also detailed. Fearing a commitment to the permanent establishment of a new court,<sup>131</sup> the Study Group proposed a court consisting of seven circuit judges drawn from those in active service and excluding chief judges<sup>132</sup> and judges with less than five years' service. The selection was to be by automatic rotation for three-year staggered terms with no circuit represented by more than one judge.<sup>133</sup>

The Study Group conceded that "objections" could be raised to this plan. The proposal was justified on the grounds that relief was imperative, subjectivity in the exercise of discretionary judgments concerning review was limited, little loss of Supreme Court control of its functions would result, and the nature of the appointments to the National Court of Appeals permitted some experimentation without permanent commitment to a fourth tier of courts.<sup>134</sup>

### C. The Reaction

The proposal for a National Court of Appeals brought a firestorm of objections.<sup>135</sup> The critics have been described as "numerous . . . , some of

130. *Id.* at 22. In all cases the Supreme Court was to retain its power to grant review before judgment of the circuit court, before denial of review by the National Court, or before judgment there. *Id.* at 21.

131. *Id.* at 24.

132. The proposal also excludes those "who would have succeeded to a Chief Judgeship during their term of service on the National Court of Appeals had they been selected." *Id.* at 19.

133. *Id.*

134. *Id.* at 23-24. A number of other alternative approaches were explicitly considered but rejected by the Group. Turning the Supreme Court into a constitutional court was rejected because other important issues call for Supreme Court review. Constitutional issues are frequently entwined with statutory ones, and counsel would tend, as might the Court, to inflate an issue to a constitutional one. The Court would be deprived of broader issue experience. *Id.* at 10. Excluding certain classes of cases was thought to hazard occasionally eliminating very important issues. *Id.* at 11. Specialized courts offered no substantial impact on the number of cases reaching the Court. *Id.* at 12. A criminal court was feared as giving the appearance of discriminatory treatment. *Id.* Various screening devices were rejected as being incapable of uniform application or giving no substantial relief to the individual Justices. *Id.* at 15. A National Court of Review sitting in civil, administrative, and criminal divisions, each consisting of five judges who would decide 150 cases a year, or 450 cases total, which would be reviewable by the Supreme Court, was rejected reluctantly because of the more jolting nature of the proposal and the danger of specialization. *Id.* at 17-18. Finally, the establishment of a national court to accept references from the Supreme Court was rejected because the proposal afforded no work relief to the Court. *Id.* at 16. Three other recommendations of the Group were much less controversial, and some headway has been made on them. Elimination of three-judge district courts and direct review of their decisions by the Supreme Court, elimination of direct appeals of ICC and certain antitrust cases, and substituting certiorari for all appeals were recommended. Congress has revised the ICC and antitrust appeal laws. See Pub. L. No. 93-584, 88 Stat. 1917 (1975) (codified in scattered sections of 28, 49 U.S.C.) (ICC); Pub. L. No. 93-528, 88 Stat. 1706 (1974) (codified in scattered sections of 15, 47, 49 U.S.C.) (antitrust). An act eliminating three-judge courts except "when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body" was signed into law on Aug. 12, 1976. Pub. L. No. 94-381, 90 Stat. 1119 (1976). An administrative procedure for screening prisoner complaints was also suggested, and improved staff and secretarial facilities were though necessary. See Study Group 47-48.

135. The debate was centered in, but not reserved to, legal publications. The volume of writing, most of it negative, quickly became quite staggering. See A. BICKEL, *THE CASELOAD OF THE SUPREME COURT* (Domestic Affairs Study No. 21, 1973); Aisup, *A Policy Assessment of the National Court of Appeals*, 25 HASTINGS L.J. 1313 (1974); Black, *The National Court of Appeals: An Unwise Proposal*, 83 YALE L.J. 883 (1974); Brennan, *Justice Brennan Calls National Court of*

them important, some intemperate, some both, and some neither."<sup>136</sup> The criticisms ranged widely, but the main ones may be briefly noted. Basically, the National Court of Appeals was challenged as conflicting with the article III requirement that there be only "one supreme court";<sup>137</sup> by denying review in some cases and determining in others whether review might be had in the Supreme Court, the National Court of Appeals would be exercising part of the Court's jurisdiction.<sup>138</sup> A second and equally serious argument was the contention that deflecting most cases to the National Court of Appeals for screening would deprive the Supreme Court of its ability to change the law and would decrease the Court's awareness of the nature of the legal problems confronting the country.<sup>139</sup> Similarly, the finality of decision by the National Court of Appeals would destroy the appearance of the universal availability of the Supreme Court to resolve grievances of the populace.<sup>140</sup> Critics also contended that screening was a minor part of the Court's load and relieving that "burden" was not worth the costs.<sup>141</sup> Finally, members of the Court denied publicly that the Court was overworked.<sup>142</sup>

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*Appeals Proposal "Fundamentally Unnecessary and Ill Advised,"* 59 A.B.A.J. 835 (1973); Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473 (1973); Burger & Warren, *Retired Chief Justice Warren Attacks, Chief Justice Burger Defends Freund Study Group's Composition and Proposal*, 59 A.B.A.J. 721 (1973); Casper & Posner, *supra* note 124; Freund, *Why We Need the National Court of Appeals*, 59 A.B.A.J. 247 (1973); Freund, *A National Court of Appeals*, 25 HASTINGS L.J. 1301 (1974); Gressman, *The National Court of Appeals: A Dissent*, 59 A.B.A.J. 253 (1973); Gressman, *The Constitution v. The Freund Report*, 41 GEO. WASH. L. REV. 951 (1973); Goldberg, *One Supreme Court*, THE NEW REPUBLIC, Feb. 10, 1973, at 14; Kurland, *Jurisdiction of the United States Supreme Court: Time for a Change?*, 59 CORNELL L. REV. 616 (1974); Lewin, *Helping the Court with Its Work*, THE NEW REPUBLIC, March 3, 1973, at 15; Meredith, *The Supreme Court of the United States and the Proposed National Court of Appeals*, 29 MO. B.J. 441 (1973); Poe, Schmidt & Whalen, *A National Court of Appeals: A Dissenting View*, 67 NW. U.L. REV. 842 (1973); Stokes, *National Court of Appeals: An Alternative Proposal*, 60 A.B.A.J. 179 (1974); Warren, *Let's Not Weaken the Supreme Court*, 60 A.B.A.J. 677 (1974); Warren, *A Response to Recent Proposals to Dilute the Jurisdiction of the Supreme Court*, 20 LOYOLA L. REV. 221 (1974); Warren, *supra* note 122; Symposium, *Should the Appellate Jurisdiction of the United States Supreme Court Be Changed? An Evaluation of the Freund Report Proposals*, 27 RUTGERS L. REV. 878 (1974); Comment, *The National Court of Appeals: Composition, Constitutionality, and Desirability*, 41 FORDHAM L. REV. 863 (1973); Comment, *The National Court of Appeals: Freund or Foe?*, 21 LOYOLA L. REV. 142 (1975); Note, *The National Court of Appeals: A Qualified Concurrence*, 62 GEO. L.J. 881 (1974); Note, *The National Court of Appeals: A Constitutional "Inferior Court"?*, 72 MICH. L. REV. 290 (1973).

136. A. BICKEL, *supra* note 135, at 13.

137. U.S. CONST. art. III, § 1; see, e.g., Gressman, *The Constitution v. The Freund Report*, 41 GEO. WASH. L. REV. 951 (1973).

138. Gressman, *supra* note 137, at 958.

139. Black, *supra* note 135, at 888; Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473 (1973); Gressman, *supra* note 137, at 959.

140. See, e.g., Goldberg, *supra* note 135, at 14, 16. But see A. BICKEL, *supra* note 135, at 34, quoting from E. HEMINGWAY, THE SUN ALSO RISES.

141. A raging debate developed on whether a case could be screened in 5 or 6 seconds, 5 or 6 minutes, or however long. A. BICKEL, *supra* note 135, at 22, quoting Chief Justice Burger; H. FRIENDLY, FEDERAL JURISDICTION 50-51.

142. *Tidewater Oil Co. v. United States*, 409 U.S. 151, 174-77 (1972) (Douglas, J., dissenting); Brennan, *Justice Brennan Calls National Court of Appeals Proposal "Fundamentally Unnecessary and Ill Advised,"* 59 A.B.A.J. 835, 836 (1973) ("the Supreme Court is not overworked"). One study not only concluded that the Court was not overworked to the extent of having its essential functions impaired, but disputed the general contention that court congestion will get worse as population and other activities increase. Casper & Posner, *supra* note 124. Although the Study Group did not apparently rely heavily on the interviews in reaching its recommendation, the Report stated that the members conferred privately with each member of the Court then sitting. Study Group ix. Nothing in the Report suggests the views of the Court or the Justices individually, but later developments tend to show that a majority of the Justices see the problem as very serious. The Commission's second report contains letters or other comments from all nine Justices on the Court in 1975. COMMISSION, STRUCTURE app. D. at 172-88, 67 F.R.D. at 394-409. At least five could fairly be characterized as in favor of some change.

Critics also waged a collection of attacks on the structure of the proposed National Court of Appeals. They alleged that the constant rotation of the members of the court would prevent institutional stability;<sup>143</sup> the absence of stimulating work would deter acceptance of the position by qualified judges;<sup>144</sup> the possible lack of business would pressure the National Court of Appeals to keep cases;<sup>145</sup> and cases denied review in the Supreme Court, although possibly more important than those decided by the National Court of Appeals, would remain undecided unless a circuit conflict were involved.<sup>146</sup> Supporters of the plan were in the end simply overrun.<sup>147</sup>

#### D. *Lessons Learned*

Court reformers surely have learned from two years of heated debate the obvious lesson that inertia is a powerful force.<sup>148</sup> Nevertheless, those in favor of reform have continued their efforts, and the debate on the Study Group's report has led to statements of guidelines to be followed in any future proposals directed at court structural reform. Although stated in various ways, a synthesized list of considerations imperatively to be taken into account in any new plan includes:

- (1) No automatic fourth level of review should be added to the federal system.
- (2) Specialization of courts and judges must be avoided.
- (3) Criminal cases must, at least in appearance, be given treatment equal to civil cases.
- (4) If an intermediate additional level of review is added, a prestigious court, comprised of permanent article III judges, appointed and confirmed in a manner sensitive to political realities, and given important tasks, must be constructed.
- (5) Any new court should be so established as to maintain the prestige of existing courts and judges.
- (6) Any new court should operate free of jurisdictional disputes.

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143. Warren & Burger, *supra* note 135, at 729 (Warren).

144. Alsup, *supra* note 135, at 1338.

145. Black, *supra* note 135, at 892.

146. H. FRIENDLY, FEDERAL JURISDICTION 49. The Study Group plan provided for Supreme Court remand to the National Court of Appeals in cases of conflict in the courts of appeals with directions to that court to decide the case if the Supreme Court wished not to decide it. Study Group 22.

147. Not all the writing was critical. Defenders included the Study Group chairman, *see* Freund articles cited *supra* note 135, and Professor Kurland, *see* Kurland, *supra* note 135. For the neophyte the arguments pro and con are dispassionately reviewed by Professor Bickel, a member of the Study Group, in A. BICKEL, *supra* note 135. Bickel sets out the following arguments: every Justice except Justice Douglas admitted that the workload was heavy and the Court was working at capacity, *id.* at 23, and that a serious problem either existed or soon would exist, *id.* at 28; it is inconsistent to contend that screening petitions is a minimal part of the job but essential to the functioning of the Court, *id.* at 32; the National Court of Appeals would see the signals for new types of cases, *id.* at 33; access to the Supreme Court is now basically a symbol in light of the minute percentage of cases decided there, *id.* at 34; history supports the finality of decision by the National Court of Appeals as no usurpation of the Supreme Court's constitutional function, *id.* at 35-36; and the importance of the National Court of Appeals' functions would "sustain the new court as an institution," *id.* at 37. If one tries to read the arguments independently of their sources, a strong case is made for help for the Court. Judge Haynsworth is thus probably right when he places the demise of the Study Group proposal in the hands of Justices Warren, Goldberg, Douglas, and Brennan. *See* Haynsworth, *Improving the Handling of Criminal Cases in the Federal Appellate System*, 59 CORNELL L. REV. 597, 612-13 (1974).

148. *Cf.* Vanderbilt, *Brief for a Better Court System*, N.Y. Times, May 5, 1957, § 6 (Magazine), at 9: "Judicial reform is no sport for the short-winded."

- (7) Any new system should provide built-in flexibility to meet changing conditions of federal dockets.
- (8) Any proposal must not interfere with the Supreme Court's control over its docket, choice of cases, or policing of lower federal courts.<sup>149</sup>

The final criterion, control of access to the Supreme Court, was in a view of the Study Group the only viable solution to the problem seen as foremost: overwork resulting from the sheer volume of cases. In light of the reaction of present or former Justices of the Court to the suggestion that the Court was "unable adequately to meet responsibilities,"<sup>150</sup> and their carefully phrased denials that the workload was as unmanageable as represented by the Study Group,<sup>151</sup> an additional criterion should be added:

- (9) The need for a National Court of Appeals must be justified on a basis other than the oppressive workload of the Supreme Court.<sup>152</sup>

#### E. *The Hruska Commission*

The impact of these criteria was demonstrated when the Hruska Commission's chairman unveiled the basic outlines of its proposal at the National Conference on Appellate Justice in January 1975.<sup>153</sup> The most important part of the Commission's final report was the recommendation for the creation of a new court called the National Court of Appeals. The new court was not proposed to relieve the burden on the Supreme Court, but simply "to increase the capacity of the federal judicial system for definitive adjudication of issues of national law . . . ."<sup>154</sup> The court would be interposed in the federal court system between the Supreme Court and the existing courts of appeals. Seven judges would be appointed by the President and confirmed by the Senate. Their opinions would be binding on all lower federal courts and state courts on questions of federal law.<sup>155</sup> The court's docket would consist of cases drawn from two sources: "reference jurisdiction" cases referred to the court for

149. This list relies on the writings of Griswold, *supra* note 125, at 335-37; Hufstедler, *Courtship and Other Legal Arts*, 60 A.B.A.J. 545, 547-48 (1974); Rosenberg, *Planned Flexibility to Meet Changing Needs of the Federal Appellate System*, 59 CORNELL L. REV. 576, 587 (1974); Rosenberg, *supra* note 14, at 715-16.

150. Study Group 9.

151. See the articles by Warren, Goldberg, and Brennan cited in note 135 *supra*, and Douglas' dissenting opinion in *Tidewater Oil Co. v. United States*, 409 U.S. 151, 174-77 (1972). Justice Douglas took the position that the Court disposed of "vast leisure time." *Id.* at 177. Justice Brennan's descriptions were more constrained. His position was that the workload was "neither intolerable nor impossible to handle." Brennan, *supra* note 142, at 837. For a personal, intimate, and inside look by a clerk at the work and workload of the Justices and their law clerks see J. WILKINSON, *SERVING JUSTICE* (1973).

152. See Griswold, *supra* note 125, at 338-39:

But I have slowly come to the conclusion that we have been looking at the wrong problem. As long as influential members of the Court say that they are not overworked . . . it is hard to develop a satisfactory cure for an illness the existence of which is vigorously denied.

. . . [T]he real problem is inadequate final appellate capacity . . . .

153. Address by Senator Hruska, National Conference on Appellate Justice, Jan. 26, 1975, in San Diego, California.

154. COMMISSION, STRUCTURE 5, 67 F.R.D. at 208; cf. Griswold, *supra* note 125, at 350-51. A slightly different emphasis is placed on this historical progression in Alsup, *supra* note 14, at 433. Mr. Alsup suggests that the command of the statute establishing the Commission prevented study of the Supreme Court's caseload. Act of Oct. 13, 1972, Pub. L. No. 92-489, § 1, 86 Stat. 807. Of course that is technically true, but the entire thrust of the Commission's hearings and recommendations was to accommodate both sets of problems, and its final recommendation obviously has a great effect on Supreme Court procedures.

155. COMMISSION, STRUCTURE 30, 67 F.R.D. at 237.

resolution by the Supreme Court, and "transfer jurisdiction" cases transferred to the court by the regional courts of appeals. The reference cases would be of two types: cases referred by the Supreme Court for consideration but not necessarily plenary review, and cases designated by the Supreme Court for decision. Appeals would have to be decided by either the Supreme Court or the National Court of Appeals.<sup>156</sup> State cases were specifically included within the reference jurisdiction.<sup>157</sup>

The proposed "transfer jurisdiction" provoked the most controversy.<sup>158</sup> This scheme would allow, subject to National Court of Appeals approval, the transfer of jurisdiction from lower appellate courts<sup>159</sup> to the National Court in cases that present an issue on which conflicting authority already exists and need national resolution or that turn on doubtful application of a prior National Court of Appeals decision.<sup>160</sup> In either type of jurisdiction, the Supreme Court would retain certiorari power to review any decision of the National Court of Appeals.<sup>161</sup>

The only similarity between this proposal and that of the Study Group was the name and placement of the court. Practically every major objection to the "old" National Court of Appeals proposal had been met: the need for the court was based on the need to enlarge federal appellate court capacity; complete access to the Supreme Court in all federal cases was preserved; no automatic fourth-tier of review was added; no specialization would occur; criminal cases were not singled out; prestigious permanent judgeships were created; few legal issues regarding jurisdiction should arise.<sup>162</sup>

This recommendation must not be considered in isolation from the Commission's first report. Otherwise, the creation of a National Court of Appeals that will do nothing to alleviate the burden on the Supreme Court or that of the courts of appeals makes little sense. If one does not accept the Commission's argument that a crying need exists for increased national resolution of federal law issues to eliminate widespread uncertainty among judges and lawyers as to what "the law" is,<sup>163</sup> then numerous other proposals would more effectively cure whatever problem one perceives as *the* most pressing. Thus, if one sees the basic problem as too much federal law creating too much federal litigation which produces too many appeals and too many petitions for certiorari,<sup>164</sup> the simple solution would be to cut back on available grounds of

156. *Id.* at 32, 67 F.R.D. at 239.

157. For a discussion of the issues raised by this proposal see part IV *infra*.

158. Witnesses before the Commission were almost unanimously critical of the transfer jurisdiction. See 1975 Commission Hearings 1036, 1054, 1260, 1291, 1312, 1339 (Rubin, Stern, Dixon, Butzner, Friendly, Morrison). *But see id.* at 824 (Doyle). Professor Levin suggested recently that the transfer jurisdiction was not an "integral part of the Commission's proposal." Levin, *supra* note 14, at 39.

159. The Courts of Appeals, the Court of Claims, or the Court of Customs and Patent Appeals. COMMISSION, STRUCTURE 34, 67 F.R.D. at 241.

160. *Id.* at 35, 67 F.R.D. at 242. The National Court's caseload was estimated at 150 cases per year decided on the merits. *Id.* at 39, 67 F.R.D. at 246. The genesis of the transfer and reference jurisdiction may be traced to Carrington, *supra* note 2, at 614-15. Identical bills incorporating the Commission's proposal for a National Court of Appeals were introduced in Congress and are languishing there. See S. 2762, 94th Cong., 1st Sess. (1975); H.R. 11218, 94th Cong., 1st Sess. (1975).

161. COMMISSION, STRUCTURE 38, 67 F.R.D. at 246.

162. *But see* Owens, *supra* note 14, at 604-05.

163. See, e.g., Griswold, *supra* note 125, at 341.

164. See, e.g., H. FRIENDLY, FEDERAL JURISDICTION.

federal jurisdiction or withdraw federal involvement in certain areas.<sup>165</sup> Others would suggest that the basic problem is too little staff assistance to the judges.<sup>166</sup> If so, additional staff could be provided at less cost and certainly greater appellate system efficiency than creating a new court.<sup>167</sup> If one perceives the problem as simply too great a burden for too few judges to handle, both at the Supreme Court and courts of appeals level, then jurisdiction could be cut back, the courts of appeals could be given a certiorari-type review, limitations could be placed on the right to file petitions with the Supreme Court, more judges could be added to existing courts, or more courts could be created.<sup>168</sup>

The Commission presents persuasive evidence that the Supreme Court even under the current structure increasingly fails to resolve existing inter-circuit conflicts and that the need for additional appellate capacity exists.<sup>169</sup> Critics of the National Court of Appeals proposal concede that the study reveals a system that is not working well.<sup>170</sup> Using the 1971 and 1972 terms of the Court, a study done for the Commission concluded that between sixty-five and seventy direct conflicts and about fifty strong partial conflicts were presented to but not resolved by the Court.<sup>171</sup> Decreasing that number by eliminating constitutional cases, duplications, resolutions of issues, and cases with serious procedural blocks to decision, the study projected thirty-two direct conflicts and twenty-two to twenty-four strong partial conflicts in the 1972 term.<sup>172</sup> The impact that several new courts of appeals might have on this problem must then be melded into the assessment of the recommendation. What addition would have to be made to these figures if two new circuits were created is difficult to estimate. Even a straight percentage increase to reflect the increased number of circuits would add thirteen cases a year to the total of direct conflicts and thus to the burden of the Court.

If the uncertainty and lack of predictability to settle questions of national law are serious problems, and the problem of "jumboism"<sup>173</sup> may be cured only by circuit-splitting, then both problems and the ramifications of a cure can be alleviated by the creation of the National Court of Appeals. One must

165. *But see* Leventhal, *supra* note 10, at 894: "We cannot halt the tide of federal law and federal concerns."

166. D. MEADOR, *supra* note 31; 1975 Commission Hearings 1002 (Goodwin); Brown, Statement on S.J. Res. 122, 92d Cong., 2d Sess. (1972), in *Hearings on S. 2988*, app. A, at 347, 362, 369-71.

167. 1975 Commission Hearings 953 (Carrington).

168. Rosenberg, *Planned Flexibility to Meet Changing Needs of the Federal Appellate System*, 59 CORNELL L. REV. 576, 584 (1974).

169. COMMISSION, STRUCTURE app. B, 67 F.R.D. at 281.

170. Owens, *supra* note 14, at 598. *But see* Alsup, *supra* note 14, at 435:

The evidence relied upon by the Commission . . . shows that the problem, to the extent that it exists at all, has been greatly exaggerated by the Commission. Indeed, the problem is so small that in order to keep busy the new court would have to decide not only cases presenting no conflicts at all, but also cases presenting major constitutional issues.

Mr. Alsup asserted that the unresolved conflicts noted by the Commission are "either procedural conflicts or minor substantive conflicts." *Id.* at 435-36. On the issue of certainty he correctly notes that National Court of Appeals decisions are subject to Supreme Court review that may come years later. *Id.* at 437.

171. COMMISSION, STRUCTURE 17-18, 67 F.R.D. at 222-23.

172. *Id.* at 18, 67 F.R.D. at 223.

173. 1973 Commission Hearings 393 (joint statement).



not lose sight of the integrated nature of the system with which we are dealing. Considering either the first or second parts of the Commission's report in isolation is a serious error. Standing alone, the case for a National Court of Appeals may not be strong, but coupled with the present need for additional circuits, the case becomes much more compelling. Under the Commission's proposed reference and transfer jurisdiction to settle inconsistent resolutions on issues of federal law, the National Court of Appeals could allay one of the most persistent and persuasive arguments for not multiplying circuits.<sup>174</sup> The National Court of Appeals can be a helpful and stabilizing influence. Any additional burden added to the Supreme Court by having to make the reference decision would be offset by relieving the Court of some of its conflict-resolving duties.<sup>175</sup>

As persuasive as these justifications for new appellate capacity may be, one cannot escape the feeling that a B-1 bomber is being called out to rid us of a mosquito. Chief Justice Burger suggested this concern in his letter to the Commission by reiterating alternate measures, such as repealing the three-judge court acts<sup>176</sup> and eliminating diversity jurisdiction, as first steps before a major overhaul of the federal court system is undertaken.<sup>177</sup> Others suggest that the additional national appellate capacity would be so insignificant that the immediate benefit would be unnoticeable.<sup>178</sup> One critic has even suggested that the Commission has "unwittingly endorse[d] the notion of planned obsolescence [by creating a] court, which by the Commission's own projections would soon be obsolete and which apparently could not be expanded or converted into a structure appropriate for the needs of the future."<sup>179</sup>

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174. As Professor Wright said in 1964:

If we choose to create additional circuits, rather than to name additional judges to existing circuits, we will hold intra-circuit conflicts at their present level, but we will increase inter-circuit conflicts. . . . Intra-circuit conflicts can be resolved, where necessary, by an en banc hearing of all the judges of the circuit. Inter-circuit conflicts can be resolved only by the Supreme Court of the United States. Any action which will increase the burdens on that great Court must be highly suspect.

Wright, *supra* note 2, at 973-74.

175. As several noted in reviewing the Commission's proposal, the Court now has in most cases brought before it only to decide whether to grant review. 1975 Commission Hearings 929, 966, 1312, 1317 (Haworth, Carrington, Friendly, Goldberg). The existence of the National Court of Appeals would introduce a second decision: whether, if review is denied, to refer the case to the National Court of Appeals. One commentator has raised the practical problem of Justices trying to refer cases to the National Court of Appeals to get a different result from that thought likely in the Supreme Court. Owens, *supra* note 14, at 604. Of the two Justices who expressed an opinion on the subject, neither thought the provision troubling. COMMISSION, STRUCTURE app. D, at 180, 182, 67 F.R.D. at 400, 402 (Stewart, White). The silence of other Justices supportive of the general plan may also be indicative of lack of concern. What must be kept in mind is the concomitant relief afforded the Court in releasing from its consideration numerous cases not thought terribly important but which present conflicts on issues of federal law or cases involving less important issues also needing resolution. Some examples are given by Dean Griswold at 1974 Commission Hearings 192-93. The real burden of that decision supposedly would fall on the law clerks in their initial evaluation of the petitions for certiorari. See Kurland, *supra* note 135, at 627. This slightly increased burden, however, would be outweighed by the lessened burden in conflict cases. The transfer jurisdiction was generally not seen as burdensome to the Supreme Court but was perceived as a burden to the courts of appeals. See, e.g., COMMISSION, STRUCTURE 182, 67 F.R.D. at 402 (White, J.). The main opposition to transfer jurisdiction in relation to the Supreme Court was the possibly accelerated, and undesirable, adjudications to police the National Court of Appeals. See 1975 Commission Hearings 1261 (Dixon).

176. See note 134 *supra*.

177. COMMISSION, STRUCTURE app. D, at 172, 67 F.R.D. at 397.

178. Alsup, *supra* note 14, at 442 n.42; Owens, *supra* note 14, at 603 n.123; 1975 Commission Hearings 1027 (Neal).

179. Owens, *supra* note 14, at 603.

It is submitted that adoption of the Commission's proposals to split the Fifth and Ninth Circuits and to create a National Court of Appeals would be the first tentative steps toward creating a court structure that can cope with the ever-increasing caseloads that seem inevitable. Rather than obsolescence, the plan contains the great virtue of any court reform: flexibility for the future.<sup>180</sup>

The chronic understatement of the number of appeals in the past, coupled with the projections for the future, favor the Commission's proposal. Total appeals to the courts of appeals were projected in 1970 to be 13,801 for 1975,<sup>181</sup> but the actual number was 16,658.<sup>182</sup> Total appeals to the Fifth Circuit were projected in 1970 to be 2,464 for 1975,<sup>183</sup> but the actual number was 3,292.<sup>184</sup> Shafroth's projection for 1981 is 38,875 appeals.<sup>185</sup> Thus, in simplest terms twelve fifteen-judge circuits would each be faced with as many cases as the Fifth Circuit now handles.<sup>186</sup> The problem is not that simple, however, because the caseload is unevenly distributed around the country. California produces a large percentage of the Ninth Circuit's business, as does New York for the Second Circuit.<sup>187</sup> New York already produces almost as many filings as do all the states comprising the Third Circuit, which has nine authorized judgeships.<sup>188</sup> In fact, the Southern District of New York alone produced 801 filings,<sup>189</sup> enough for about two circuits the size of the First Circuit.<sup>190</sup> If a proliferation of circuits begins, there may soon be a court of appeals for the southern tip of Manhattan Island.<sup>191</sup> At the same time, Congress and the bar will probably demand at least one appellate review with the usual trappings of oral argument and an opinion to assure litigants that the trial court's decision has been thoroughly considered. To accomplish this, the number of judges will have to be increased tremendously, either within the existing circuits or, more probably, coupled with the creation of new courts. As the caseload, the circuits, and number of decisions grow, the conflicts,

180. See text accompanying note 149 *supra*. See also Rosenberg, *supra* note 168, at 588-89; Rosenberg, *supra* note 14, at 716.

181. *NLRB v. Amalgamated Clothing Workers Local 990*, 430 F.2d 966, 969 (5th Cir. 1970).

182. A.O. ANN. REP. 323 (1975). The relatively slight increase in the number of appeals between 1974 and 1975, only 1.4%, had led to some optimism that the boom might be over. See 1974 Commission Hearings 162 (Goldberg); *Hearings on S. 2988*, at 9. Notwithstanding, the Director of the Administrative Office, based on filings for the first half of 1976 (8,937), projected total filings for 1976 at 18,700, an increase of 12.4%. See 1976 Semi-Annual Report of the Director, Administrative Office of the United States Courts 1-2.

183. *NLRB v. Amalgamated Clothing Workers Local 990*, 430 F.2d 966, 969 (5th Cir. 1970).

184. A.O. ANN. REP. 325 (1975). Even with a 1971 upward revision of the estimate for the Fifth Circuit to 3,188, see *Hearings on S. 2988*, at 364, the Shafroth projection was still short by 104 cases.

185. See *Hearings on S. 2988*, at 364. The Director of the Administrative Office projected in his May 1976 report that appeals for 1976 would reach approximately the half-way mark on this projection, forecasting 18,700 appeals for the year. 1976 Semi-Annual Report, *supra* note 182, at 1.

186. The Fifth Circuit for 1975 had 219 filings per authorized active judgeship. Brown, *The State of the Federal Judiciary in the Fifth Circuit*, C.A. table 1 (1976) [hereinafter cited as Brown, Fifth Circuit].

187. In 1975 the federal district courts in California generated 1,362 appeals out of 2,731 for the Ninth Circuit, and New York generated 1,265 of 1,739 for the Second Circuit. A.O. ANN. REP. table B-3, at 330, 333 (1975) (administrative appeals not apportioned).

188. The Third Circuit had 1,392 filings in 1975. A.O. ANN. REP. 330 (1975).

189. *Id.* This figure does not include a proportionate number of administrative appeals.

190. The First Circuit had 477 filings in 1975. *Id.*

191. *Hearings on S. 2988*, at 96 (Wisdom).

“sideswipes,”<sup>192</sup> and other problems arising from a lack of capacity to resolve national law issues will place such a burden on the National Court of Appeals that it would either seek to sit in panels, or, more likely, seek the creation of additional National Courts of Appeals.

The creation of an appellate division for the district courts within a limited geographic area with discretionary appeal from that court to a larger regional court, which is then policed by the Supreme Court, is a solution to the future crisis.<sup>193</sup> Our present regional circuit courts would become, in effect, that appellate division; the National Court would be a regional reviewing court with discretionary jurisdiction much like that which the Supreme Court now has. In this way, coupled with restoration of oral argument and opinion writing in the courts of appeals,<sup>194</sup> two of the original great virtues of the Evarts Act that created the basic structure of our present courts of appeals, control of the trial judges by the courts of appeals and a nationalizing influence on the possibly parochial approaches to issues of federal concern of those courts by the National Court of Appeals,<sup>195</sup> would be maintained.

If four tiers of review is troubling, so is the pervasive nature of federal law and federal judges that could generate 38,875 appeals by 1981. The rapidly disappearing art of advocacy in the federal intermediate courts is also distressing. The courts of appeals are on the brink of fulfilling the prophecy that summary dispositions would turn those courts into “virtually a branch of the trial court rather than an intermediate tribunal for plenary review.”<sup>196</sup> If the courts of appeals are required to cut back on their use of summary devices, as they should be, the creation of a National Court of Appeals is the first step necessary to meet the challenge the future promises.

### III. ORAL ARGUMENT AND OPINION WRITING

The courts of appeals are now widely using summary procedures in an effort to keep current with the caseload. This use has generated substantial controversy and produced major recommendations by the Commission in the second part of its report dealing with internal procedures of the courts of appeals. Those procedures, their effect, and the Commission’s response to them, although independently important, also lend persuasive support to the argument for additional courts of appeals.

#### A. *The Move Toward Summary Procedures*

Responding to a caseload crisis in the fall of 1968,<sup>197</sup> the Fifth Circuit instituted under the circuit’s rule 18 a procedure for identifying cases “of

192. A substantial divergence in approach to a common legal problem. COMMISSION, STRUCTURE 16, 67 F.R.D. at 221.

193. Haworth, *supra* note 2, at 321-25; Hufstedler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. CAL. L. REV. 901, 910 (1971); 1975 Commission Hearings 1039 (Rubin).

194. See part IV *infra*.

195. Carrington, *supra* note 2, at 612; Haworth, *supra* note 2, at 321; Wright, *supra* note 2, at 974-75.

196. Hazard, *After the Trial Court—the Realities of Appellate Review*, in THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION 60, 81 (H. Jones ed. 1965), quoted in Haworth, *supra* note 2, at 273.

197. The problem is vividly described by Chief Judge Brown of the Fifth Circuit in his statement in *S.J. Res. 122 Hearing*, at 55:

such character as not to justify oral argument."<sup>198</sup> Shortly thereafter, the court added rule 21, which allowed for disposition of cases by the court with the simple notation "Affirmed. [or Enforced.] See Local Rule 21."<sup>199</sup> Practically every circuit has since adopted some method for curtailing the usual full-blown appellate review of thirty minutes oral argument before a three-judge panel and written opinion disposing of the appeal.<sup>200</sup> In other circuits, where the press of business was not as great as in the Fifth, the usual justifications for implementing these truncated procedures were the frivolous or insubstantial nature of large numbers of appeals<sup>201</sup> and the poor quality of oral argument.<sup>202</sup>

The practice of writing opinions in all cases has long been under attack<sup>203</sup> and is recognized as a major consumer of judicial energies.<sup>204</sup> To save those energies and unclutter the lawbooks,<sup>205</sup> courts tentatively at first but then in growing numbers<sup>206</sup> began to decide cases with no opinion,<sup>207</sup> a brief oral opinion from the bench,<sup>208</sup> or a brief memorandum not for publication but for the private enlightenment of the parties to the litigation.<sup>209</sup>

### B. Critics Mount Counterattack

Many lawyers and some judges were not convinced by the justifications advanced for these procedures, and criticisms of the reductions in oral

In the fall of 1968 with the prospect (later made good) of 1,489 filings that year, we recognized that we could not possibly keep abreast of this inflow unless we found some new ways. We knew that we could not get enough visiting Judges. For that input . . . we would have required 64 court weeks. . . . [T]his would have required . . . 60 visiting Judges. We know [*sic*] we could not possibly obtain this number, and our experience with the use of 45 (in 1966-67) proved that it was impossible to effectively assimilate that many visiting Judges. This led us to adopt the Fifth Circuit screening procedure.

198. 5TH CIR. R. 18. This process is described in Haworth, *supra* note 2, at 274-77. See also Bell, *Toward a More Efficient Federal Appeals System*, 54 J. AM. JUD. SOC'Y 237 (1971); Note, *Screening of Criminal Cases in the Federal Courts of Appeals: Practice and Proposals*, 73 COLUM. L. REV. 77 (1973). After reaching a high of 59.1% in 1972 of cases classified as I or II (no oral argument), the 1975 figure fell to 51.2%. Brown, Fifth Circuit, *supra* note 186, C.A. table 2. The Fifth Circuit should not be singled out. The Third Circuit is reported to be denying oral argument in 50% of its cases. Segal, *Oral Argument in the U.S. Court of Appeals: Can It Be Salvaged?*, 2 LITIGATION 3 (1975).

199. 5TH CIR. R. 21; see Haworth, *supra* note 2, at 271-74.

200. By early 1973 every circuit save the Second had either a screening panel to limit or deny oral argument in selected cases or a rule allowing disposition without written opinion. See Haworth, *supra* note 2, at 265, 271. In October 1973 the Second Circuit in its local rules, 2D CIR. R. § 0.23, recognized its practice of disposing of cases by oral decision in open court or by summary order.

201. 1973 Commission Hearings 34 (Seitz, C.J. Third Circuit): "Sixty percent of all appeals are easy or frivolous and do not require an opinion." See also 1975 Commission Hearings 683 (Bell): 30% of appeals "ought not to be there."

202. C. WRIGHT, FEDERAL COURTS § 104, at 470 (2d ed. 1970); Segal, *supra* note 198, at 4.

203. The authorities are reviewed in Jacobstein, *Some Reflections on the Control of the Publication of Appellate Court Opinions*, 27 STAN. L. REV. 791 (1975).

204. COMMISSION, STRUCTURE 49, citing the Third Circuit Time Study showing that 48.2% of case-related judge-time was devoted to the writing and clearing of opinions.

205. NLRB v. Amalgamated Clothing Workers Local 990, 430 F.2d 966, 971 (5th Cir. 1970).

206. For example, in 1971 in the Fifth Circuit, 210 appeals received a "Rule 21" no opinion, 488 cases in 1972, and 629 in 1973. See 1973 Commission Hearings 520 (Brown). In the Second Circuit the number of dispositions from the bench jumped from 60 cases, or 14.1% of total cases in 1966, to 284 cases, or 35.8% of total cases in 1973. 1973 Commission Hearings 1052 (Kaufman). For the latest figures on this phenomenon see A.O. ANN. REP. 184 (1975), which shows 3,152 dispositions without opinions for 1975 in all the circuits.

207. See, e.g., 5TH CIR. R. 21.

208. 1973 Commission Hearings 1032 (Kaufman).

209. See, e.g., 2D CIR. R. § 0.23.

argument and the disposition of cases with no written or oral statement by the court began to mount.<sup>210</sup> The Commission, faced with this controversy, authorized an in-depth study of attorney attitudes on various summary devices. The results showed that the denial of oral argument and the lack of formal opinions gained majority acceptance in many circumstances.<sup>211</sup> For example, eighty-four percent of the Fifth Circuit attorneys agreed that denial of oral argument was an acceptable practice, and fifty-one percent found affirmance in a one-line judgment order acceptable, in the sense that cases could be imagined that would deserve those treatments.<sup>212</sup> Enthusiasm for these practices declined, however, when the same issue was presented in the context of other than frivolous cases.<sup>213</sup> Nearly all truncated procedures were rejected by a majority of the lawyers when placed solely on the ground of avoiding extreme delay.<sup>214</sup> One is left to wonder what the reaction of the bar would be to the fact that in 1973 in the Fifth Circuit 482 of 2008 cases received no oral argument and a rule 21 disposition.<sup>215</sup>

*Oral Argument.* One of the more disturbing parts of the Fifth Circuit's screening procedures was the absence of an articulated standard to guide the court and lawyers as to whether oral argument was appropriate in a particular case. When pressed, the Fifth Circuit judges are hard put to do more than assure the bar that they can "smell" an oral argument case<sup>216</sup> or that experience leads one to "feel" whether a case is one for oral argument.<sup>217</sup> The standard set forth in Fifth Circuit local rule 18 that the "case is of such character as not to justify oral argument" is simply no standard at all.<sup>218</sup>

Another point of concern not actively expressed but clearly in the minds of the judges was the extent to which law clerks have a say in the screening process. Despite assurances that decisions to deny oral argument were judge-made decisions,<sup>219</sup> hints began to appear that indicated that the clerks

210. Gardner, *Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?*, 61 A.B.A.J. 1224 (1975); Goldschmid, *Oral Argument, Summary Disposition, C.A.M.P.: The Second Circuit's Approach to Caseload Management*, in 5 Appellate Justice: 1975, *supra* note 34, at 3; Haworth, *supra* note 2, at 317-19; Segal, *supra* note 198; Wright, *Oral Argument and the Appellate Process*, 2 LITIGATION 5 (1975); 1973 Commission Hearings 59-60, 66 (Byrne, Marden); 1974 Commission Hearings 408-09 (Swygert); 1975 Commission Hearings 951-52, 993, 1337 (Carrington, Gibson, McGowan). *But see* Leventhal, *Appellate Procedure: Design, Patchwork, and Managed Flexibility*, 23 U.C.L.A.L. REV. 432, 438-39 (1976).

211. *See* Drury, *Attorney Attitudes*, *supra* note 47, at 19.

212. *Id.*

213. *Id.* at 20. Acceptance by Fifth Circuit lawyers of denial of oral argument fell to 72% in cases where the "issues are clear and can be decided by reference to precedent." Acceptance of one-line affirmances fell to 44% in that type of case.

214. *Id.* Limitation of oral argument to 15-20 minutes per side retained general acceptance, but only affirmance in a two-page memorandum otherwise retained majority support.

215. 1973 Commission Hearings 520 (Brown).

216. *Id.* at 416 (Gewin).

217. *Id.* (Morgan).

218. *Accord*, D.C. CIR. R. 11(e). *See also* 1ST CIR. R. 12 ("oral argument would not assist it"); 9TH CIR. R. 3(a) ("oral argument would not be of assistance to the court"). There is substantial doubt that courts have the power to promulgate these rules in light of the seemingly specific provision in FED. R. APP. P. 34(b). *See* Haworth, *supra* note 2, at 306-09; Wright, *supra* note 210, at 6. Nevertheless, the Third Circuit has construed rule 34(b) to establish only certain procedures in the event oral argument is granted. *NLRB v. Local 42, Heat & Frost Insulators*, 476 F.2d 275 (3d Cir. 1973) (en banc).

219. *S.J. Res. 122 Hearing* 89 (Brown). Indeed, Professor Carrington questions whether it would violate the Constitution to delegate the decision to a non-judge. *See* Carrington, *supra* note 2, at 573.

had more influence in the decision than was originally thought. The extent of this influence is demonstrated by descriptions by the clerks of their functions,<sup>220</sup> detailed statements by the judges about their own internal procedures in which the clerks were heavily engaged,<sup>221</sup> and by the Fifth Circuit staff screening of cases within selected subject matters and review of those decisions by a single judge.<sup>222</sup>

Another subject of concern has been the Fifth Circuit reversal rate which dropped off dramatically after rules 18 and 21 were instituted.<sup>223</sup> The ready response by three judges was that criminal appeals, many of which were frivolous or easy, increased substantially during the same period of time, and that accounted for the decline.<sup>224</sup> Indeed, the figures do show an increase in the number of criminal appeals from 339 in 1968 to 652 in 1972.<sup>225</sup> This explanation has the problem that even after throwing out criminal cases and refiguring the reversal rates for the years 1965-75, the last five years were all subject to rules 18 and 21 and show the lowest reversal rates among the ten-year period.<sup>226</sup>

*Opinions.* The attorney survey showed that up to seventy-two percent of attorneys thought that due process should require a court to write at least a brief statement of its reasons for decision.<sup>227</sup> The thought may be commendable, but no case supports that possible interpretation of the due process clause.<sup>228</sup> Nevertheless, a large part of the Commission hearings was taken up

220. Sweeney, *In United States Court of Appeals*, in *Law Clerkships—Three Inside Views*, 33 ALA. LAW. 155, 171, 176 (1972).

221. 1973 Commission Hearings 416-17 (Gewin, Coleman, Morgan, Clark).

222. 1975 Commission Hearings 870 (Brown).

223. Haworth, *supra* note 2, at 309-19. Administrative office figures show a drop in reversals in the Fifth Circuit from 24.5% in 1965 to 16.0% in 1975. A.O. ANN. REP. 302 (1965); *id.* at 325 (1975). Comparing rates back to 1945, the reversal rates for 1971, 1972, 1973, 1974, and 1975 are the lowest in the history of the circuit.

224. 1973 Commission Hearings 147-48, 358, 453 (Brown, Wisdom, Bell).

225. *Id.* at 515 (Brown).

226. *But see* Carrington, *A Statistical Analysis of the Workload of the United States Courts of Appeals*, in 1 Appellate Justice: 1975, *supra* note 34, at 45, in which Professor Carrington, after comparing figures for 1962-64 and 1970-72, concludes that "the reversal rate has maintained a fairly steady overall relationship to dispositions . . ." Even taking the Fifth Circuit's own figures for 1973, which differ from those of the Administrative Office, the reversal rate is figured to be 10.7% for criminal, prisoner, and § 2255 appeals, but only 19.0% for all civil appeals. 1973 Commission Hearings 518 (Brown). Although the figures are not absolutely comparable, the Administrative Office shows this to be the lowest reversal rate since at least 1945. The Fifth Circuit's own computations show the following:

Fiscal Year	No. of Cases Judged	% Reversed
1964	828	29.5
1965	716	25.1
1966	886	24.7
1967	970	25.3
1968	1089	25.5
1969	1279	24.8
1970	1427	24.1
1971	1812	19.5
1972	2025	14.9
1973	2167	15.6

1973 Commission Hearings 536 (Brown).

227. Drury, *Attorney Attitudes*, *supra* note 47, at 43.

228. See 2 K. DAVIS, ADMINISTRATIVE LAW § 16.13, at 488 (1958); Radin, *The Requirement of Written Opinions*, 18 CALIF. L. REV. 486 (1930). The court in *Ayres v. United States*, 44 Ct. Cl. 48, 79 (1908), which Davis cites for the contrary proposition, merely affirmed its right to publish an opinion.

by the problem of opinion-writing.<sup>229</sup> This is also an area showing promise for time-saving since the Third Circuit time study showed that about forty-eight percent of case time was devoted to that enterprise.<sup>230</sup>

In each case a court must decide whether an opinion of any sort is to be prepared, and whether an opinion, if prepared, is to be published. Five circuits now provide for affirmances without opinion.<sup>231</sup> This device has come under increased attack, with the consensus being that some statement of reasons for the decision, however informal and brief, written or oral, should be the due of every litigant as a matter of policy.<sup>232</sup> The potential for abuse and the lack of visibility of the courts' actions weigh heavily against approval of the one-line disposition.

Several circuits that issue a brief written memorandum order do not publish these orders.<sup>233</sup> The experience with unpublished opinions has not been a particularly happy one according to some commentators. The California state courts have recently come under direct and sustained attack for not publishing opinions setting out new points of law or applying old law to new facts.<sup>234</sup> After reviewing the workings of the non-publication rule in that state, one commentator concluded that instead of reducing only the volume of reiterations of settled law, the non-published opinions contained numerous valuable precedents.<sup>235</sup> Reviewing several cases from the Ninth Circuit, another commentator<sup>236</sup> concluded that those cases contained numerous "inconsistent decisions."<sup>237</sup>

Several years earlier, when unpublished memorandum decisions first became popular, the warning was sounded as to their potential abuse.<sup>238</sup> The difficulty of assaying results in dispositions without decisions prevents evaluating the extent of abuses, but the conclusions regarding the work of the California courts are consistent with the perceived virtues of judges having to write opinions that will be published; the publication of decisions promotes careful study of the case.<sup>239</sup> Is anyone really surprised if the absence of those disciplines has not produced quality results?

Unpublished memorandum decisions also raise the issue of whether unpublished opinions can be cited to a court. The arguments on both sides of the issue are powerful. Proponents of non-citation often make the following

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229. 1974 Commission Hearings 519 (Sprecher); 1975 Commission Hearings 735, 1056-57, 1239-40 (Sandalow, Stern, Pollak).

230. Third Circuit Judicial Time Study, 1974 Commission Hearings 525.

231. See D.C. CIR. R. 13(c); 1ST CIR. R. 14; 5TH CIR. R. 21; 8TH CIR. R. 14; 10TH CIR. R. 17.

232. See authorities cited at note 229 *supra*. The attorney survey showed that 62% of Second Circuit lawyers, 70% of Fifth Circuit lawyers, and 72% of Sixth Circuit lawyers thought that "the due process clause of the Constitution should be held to require courts of appeals to write at least a brief statement of the reasons for their decisions." Drury, *Attorney Attitudes*, *supra* note 47, at 143.

233. 1974 Commission Hearings 519-20 (Sprecher).

234. Kanner, *The Unpublished Appellate Opinion: Friend or Foe?*, 48 CALIF. ST. B.J. 387 (1973); Seligson & Warnlof, *The Use of Unreported Cases in California*, 24 HASTINGS L.J. 37 (1972); Comment, *Publish or Perish: The Destiny of Appellate Opinions in California*, 13 SANTA CLARA LAW. 756 (1973).

235. Kanner, *supra* note 234, at 442-43.

236. Gardner, *supra* note 210.

237. *Id.* at 1227.

238. Haworth, *supra* note 2, at 272-73.

239. 1975 Commission Hearings 735, 802, 951, 1239-40 (Sandalow, Field, Carrington, Pollak).

arguments: citation will lead to a "black market" in unpublished opinions, leading publishers to seize upon an untapped resource of "unpublished" opinions, thereby defeating one goal of the program; access to unpublished opinions may be unequal, especially between governmental agencies and private litigants; citation would inevitably lead to greater pains being taken in preparation of the order; and it is impossible to tell whether the decision has been overruled. On the other hand, opponents argue that prohibiting a litigant from citing any previous decision of a court is not only unfair, but also contrary to the rule of stare decisis.<sup>240</sup>

The "no-citation" forces have won the first round. All courts of appeals, save one, dealing with the problem either by rule or opinion favor non-citation.<sup>241</sup> In a perfect world this solution seems best because no precedential

240. See ACAJ, *Standards for Publication of Judicial Opinions*, in 2 Appellate Justice: 1975, *supra* note 34, at 86-87; ABA COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO APPELLATE COURTS § 3.37 (1976).

241. See, e.g., D.C. CIR. R. 8(f); 1ST CIR. R. app. B; 2D CIR. R. §0.23; 4TH CIR. R. 18; Jones v. Superintendent, Va. St. Farm, 465 F.2d 1091, 1094 (4th Cir. 1972); 6TH CIR. R. 11; 7TH CIR. R. 35; 9TH CIR. R. 21; 10TH CIR. R. 17. The Tenth Circuit allows citation in limited circumstances. See note 261 *infra* and accompanying text. The Seventh Circuit's new rule 35, *supra*, presents a comprehensive model:

The following rule is the Plan for Publication of Opinions of the Seventh Circuit promulgated pursuant to resolution of the Judicial Conference of the United States:

(a) Policy. It is the policy of this circuit to reduce the proliferation of published opinions.

(b) Publication. The court may dispose of an appeal by an order or by an opinion, which may be signed or per curiam. Orders shall not be published and opinions shall be published.

(1) "Published" or "publication" means:

(i) Printing the opinion as a slip opinion;

(ii) Distributing the printed slip opinion to all federal judges within the circuit, legal publishing companies, libraries and other regular subscribers, interested United States attorneys, departments and agencies, and the news media;

(iii) Permitting publication by legal publishing companies as they see fit; and

(iv) Unlimited citation as precedent.

(2) Unpublished orders:

(i) Shall be typewritten and reproduced by copying machine;

(ii) Shall be distributed only to the circuit judges, counsel for the parties in the case, the lower court judge or agency in the case, and the news media, and shall be available to the public on the same basis as any other pleading in the case;

(iii) Shall be available for listing periodically in the Federal Reporter showing only title, docket number, date, district or agency appealed from with citation of prior opinion (if reported) and the judgment or operative words of the order, such as "affirmed," "enforced," "reversed," "reversed and remanded," and so forth;

(iv) Except to support a claim of *res judicata*, collateral estoppel or law of the case, shall not be cited or used as precedent (a) in any federal court within the circuit in any written document or in oral argument or (b) by any such court for any purpose.

(c) Guidelines for Method of Disposition.

(1) Published opinions:

Shall be filed in signed or per curiam form in appeals which

(i) Establish a new or change an existing rule of law;

(ii) Involve an issue of continuing public interest;

(iii) Criticize or question existing law;

(iv) Constitute a significant and non-duplicative contribution to legal literature

(A) by a historical review of law;

(B) by describing legislative history; or

(C) by resolving or creating a conflict in the law; or



value attaches to an opinion that says nothing new. In other words, by definition ample precedent in addition to the unpublished opinion should be available to support the rule for which a party contends, otherwise the order would have been published. Of course, the difficulty is that apparently some of these decisions do have precedential value.

### C. *Proposed Solutions*

Clearly reform was needed in the areas of both oral argument and opinion-writing. The ideal solution would of course be that only non-frivolous appeals be taken and disposed of after oral argument with a written opinion. Absent that, and recognizing that frivolous appeals would continue to be taken to the appellate courts, the Commission's task was to strike a balance that gave flexibility but provided guidelines.

*Solutions for Oral Argument.* The Commission delivered a ringing endorsement of face-to-face confrontation with the court.<sup>242</sup> To remedy the situation that had developed, especially in the Fifth Circuit, the Commission proposed adding the following rule to the Federal Rules of Appellate Procedure:

1. In any appeal in a civil or criminal case, the appellant should be entitled as a matter of right to present oral argument, unless:

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(v) Reverse a judgment or deny enforcement of an order when the lower court or agency has published an opinion supporting the order.

(2) Unpublished orders:

(i) May be filed after an oral statement of reasons has been given from the bench and may include only, or little more than, the judgment rendered in appeals which

(A) are frivolous or

(B) present no question sufficiently substantial to require explanation of the reasons for the action taken, such as where

(aa) a controlling statute or decision determines the appeal;

(bb) issues are factual only and judgment appealed from is supported by evidence;

(cc) order appealed from is nonappealable or this court lacks jurisdiction or appellant lacks standing to sue; or

(ii) May contain reasons for the judgment but ordinarily not a complete nor necessarily any statement of the facts, in appeals which

(A) are not frivolous but

(B) present arguments concerning the application of recognized rules of law, which are sufficiently substantial to warrant explanation but are not of general interest or importance.

(d) Disposition is to be by Order or Opinion.

(1) The determination to dispose of an appeal by unpublished opinion shall be made by a majority of the panel rendering the decision.

(2) The requirement of a majority represents the policy of this circuit. Notwithstanding the right of a single federal judge to make an opinion available for publication, it is expected that a single judge will ordinarily respect and abide by the opinion of the majority in determining whether to publish.

(3) Any person may request by motion that a decision by unpublished order be issued as a published opinion. The request should state the reasons why the publication would be consistent with the guidelines for disposition of appeals as set forth in this rule.

*But see* P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 35-39 (1976), where the authors call for an end to non-publication and non-citation rules.

242. The Commission said:

Oral argument is an essential part of the appellate process. It contributes to judicial accountability, it guards against undue reliance on staff work, and it promotes understanding in ways that cannot be matched by written communication. It assures the litigant that his case has been given consideration by those charged with deciding it. The hearing of argument takes a small proportion of any appellate court's time; the saving of time to be achieved by discouraging argument is too small to justify routinely dispensing with oral argument.

COMMISSION, STRUCTURE 48.

- (a) the appeal is frivolous;
  - (b) the dispositive issue or set of issues has been decided; or
  - (c) the facts are simple, the determination of the appeal rests on the application of settled rules of law, and no useful purpose could be served by oral argument.
2. Oral argument is appropriately shortened in cases in which the dispositive points can be adequately presented in less than the usual time allowable.<sup>243</sup>

One can hardly quarrel with this test. The Second Circuit is not affected since that circuit hears oral argument in every case, but the Fifth Circuit will only be allowed to refuse oral argument in the type of cases for which screening was originally designed: the thirty percent of the docket that contains little or no merit.<sup>244</sup> Flexibility still remains, and judges will still be able to fit cases within a no-argument category when appropriate. Certainly much is left to their discretion, but judges must be trusted to apply the stated standard honestly. Few persons today expect the courts to afford oral argument in every appeal, but a substantial decrease in the percentage of dispositions without oral argument should result from the promulgation of this standard.<sup>245</sup>

The promulgation of this standard that is more strict than that currently in use by the courts, particularly the Fifth Circuit, presents a significant problem. For the first time in its history of struggling against the flood of cases, the Fifth Circuit is approaching inundation. Reviewing the state of the Fifth Circuit, Chief Judge Brown noted that the actual backlog as of the end of April 1976 was 359 cases, with a total of 519 estimated for the year.<sup>246</sup> The future looks even grimmer. Assuming that full screening remains in effect, Judge Brown estimates that by 1983 the Fifth Circuit will be hearing oral argument annually in 562 fewer cases than are ready for hearing, and of the 780 cases that can be heard, 631 will be preference cases.<sup>247</sup> Since the

243. *Id.* See ACAJ, *Report and Recommendations on Improvements of Appellate Practices*, in 5 Appellate Justice: 1975, *supra* note 34, at 127.

244. 1973 Commission Hearings 452 (Bell).

245. One problem with this standard is reviewability of a determination that oral argument is not warranted. One can envision petitions for writs of mandamus being filed with the Supreme Court seeking an order directing the circuit court to hear oral argument in a particular case. The stated test seems to leave enough discretion in the circuit court to evade such review. *But see* P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 241, at 18. They contend that oral argument ought to be heard in every case in which either party requests it.

246. Brown, Fifth Circuit, *supra* note 186, at 21.

247. Judge Brown's projections are:

**PROJECTION OF NUMBER OF NON-PREFERENCE CASES WHICH  
CAN BE CALENDARED FOR ORAL ARGUMENT—1976-1983**

F.Y.	(a) Cases for Hear- ing Calendar*	(b) Maximum Cases Which Can Be Orally Argued (41 Court Weeks)	(c) Preference Cases**	(d) Slots Remaining for Non-Preference Cases
1976	915	780	430	349
1977	970	780	456	323
1978	1028	780	483	296
1979	1090	780	512	267
1980	1155	780	542	237
1981	1192	780	560	219
1982	1263	780	594	185
1983	1342	780	631	148

\*Based on Projection for 1976, plus 6% Annual Increase.

\*\*47% of Cases for Calendaring.

Brown, Fifth Circuit, *supra* note 186, C.A. table 6(a).

preference cases will fill the docket, Judge Brown also estimates that the caseload will be so enormous by 1979 that it will take until 1987 to hear all the new non-preference cases that were ready for argument in 1979, a possible delay of eight years.<sup>248</sup> What must be done to bring these projections into

The following categories of cases, pursuant to specific Acts of Congress, and the rules of the Fifth Circuit Court of Appeals, receive priority in calendaring and decision in the order set forth:

- 1) Criminal Appeals (Rule 45(b), FRAP).
- 2) Appeals from orders refusing or imposing conditions of release.
- 3) Protracted, difficult or widely publicized cases in conformity with resolution of the Judicial Conference of the United States of October 29, 1971.
- 4) Habeas Corpus and Section 2255 (28 U.S.C.) Appeals.
- 5) Organized Crime Control Act.
- 6) Selective Service Criminal Cases.
- 7) Mandamus, prohibition and extraordinary writs.
- 8) Expedited Civil Appeals.
- 9) Interlocutory Appeals.
- 10) National Labor Relations Act.
- 11) Social Security Appeals.
- 12) Immigration & Naturalization Appeals.
- 13) Railroad Unemployment Insurance Act.
- 14) Norris-LaGuardia Act.
- 15) Administrative Orders, Review Act of 1966.
- 16) Clayton Antitrust Act; Robinson-Patman Price Discrimination Act.
- 17) Federal Trade Commission Act.
- 18) Federal Food, Drug and Cosmetics Act.
- 19) Fair Housing Act of 1968.
- 20) Small Business Investment Act of 1958.
- 21) Packers and Stockyards Act of 1921.
- 22) Federal Seed Act.
- 23) Fifth Circuit cases which have been remanded by the Supreme Court for further consideration or proceedings, Labor Board contempt or supplemental enforcement proceedings and second appeals involving the same parties or issues taken after reversal of a former appeal.

*Id.*, app.

248. The following projections show how preference cases can eventually exclude non-preference cases from court action:

<u>PROJECTION OF DATES OF HEARING OF NON-PREFERENCE CASES—F.Y. 1975-1979</u>					
(a)	(b)			(c)	
<u>Non-Preference Cases*</u>	<u>Year and Percent Non-Preference Case Will Be Heard</u>			<u>Maximum Non-Preference Cases Which Can Be Heard**</u>	
	<u>Year</u>	<u>%</u>			
Backlog of Non-Preference Cases from					
F.Y. 1975	330	1976	100.0	330	
New Non-Preference Cases To Be Readied:					
F.Y. 1976	485	1976	3.9	19	349
		1977	66.6	323	
		1978	29.5	142	
			100.0	485	
F.Y. 1977	514	1977	0.0	0	323
		1978	29.8	153	
		1979	51.9	267	
		1980	18.3	94	
			100.0	514	

sharper focus is to increase the number of cases ready for oral argument by decreasing the number disposed of by screening. Estimating that thirty percent of the total cases will be classified as Summary II (no oral argument), then some 600 more cases must be calendared for oral argument the first year alone. This load would require about fifteen weeks of sitting per year per active judge. While that load is not impossible, one must remember that judges need time to write opinions.

The problems that arise from the oral argument standard lead to the conclusion that splitting the Fifth Circuit is about the only practical alternative to a court of gargantuan size. The two new courts would each have approximately the same number of judges as the existing Fifth; this growth of the judiciary is necessitated by the additional pressure of a nationwide standard for oral argument. The benefit, which is worth the cost, is that oral argument in every meritorious case will be heard.<sup>249</sup>

*Solutions for Opinion Writing.* Taking a more flexible approach to the question of opinion writing, the Commission recommended that the Federal Rules of Appellate Procedure be amended to require that some record of the grounds for decision, however brief, be provided the litigants in every case although the decision need not be published.<sup>250</sup> The Commission also urged

F.Y. 1978	545	1978	0.0	0	296
		1979	0.0	0	
		1980	26.2	143	
		1981	40.2	219	
		1982	33.6	183	
			100.0	545	
F.Y. 1979	578	1979	0.0	0	267
		1980	0.0	0	
		1981	0.0	0	
		1982	0.0	0	
		1983	25.6	148	
		1984-87	Bal.	430	
F.Y. 1980	613				237
F.Y. 1981	650				219
F.Y. 1982	689				185
F.Y. 1983	730				148

\*Columns (a) less column (c) of Table I.

\*\*See Column (d) on Table I.

*Id.* C.A. table 6(b).

249. Perhaps the Fifth Circuit sees the writing on the wall, for it has recently amended its local rules to provide:

*Request for Oral Argument*—If counsel for appellant desires oral argument, counsel shall include in appellant's brief (as a preamble thereto), a short statement of the reasons why oral argument would be helpful. Appellee shall likewise include in his brief a statement of why oral argument should or need not be had. The Court will accord these statements due weight, though not controlling, in determining whether oral argument will be heard in the case.

5TH CIR. R. 13(j)(2). This is the first recognition of the problem generated by that court, and is a step forward in its attempt to mollify members of the bar.

250. COMMISSION, STRUCTURE 50, 67 F.R.D. at 397. One problem may be how to enact this requirement. Under 28 U.S.C. § 2072 (1970), the Supreme Court might promulgate a rule reflecting the proposal discussed in the text, report the amended rule to Congress, and wait 90 days for the rule to become effective. If the rule were then an Act of Congress, a serious question as to its constitutionality would be raised under the separation of powers doctrine. See 1975

the use of alternatives to the signed opinion, including memorandum and per curiam opinions.<sup>251</sup> If adopted, these procedures will not really weigh heavily on any court, including the Fifth Circuit where the reported number of rule 21 opinions reached 633 cases or 34.9 percent of the docket in 1974.<sup>252</sup> Some judges are now adding a case or a sentence to the bare notation.<sup>253</sup> Nevertheless, a reasoned disposition, however brief, will add to the burden on the courts. It is fairly clear that the tremendous increase in productivity achieved by the Fifth Circuit from 1968 to 1972 was in large part the result of the local rule 21 procedure.<sup>254</sup> Thus, any cut-back in the summary manner of disposition exemplified by a rule 21-type procedure will increase the power of the arguments for more circuit judges and the creation of additional circuits.

The Commission's approval of non-published opinions is unlikely to halt the debate on the appropriateness of that practice. The problem in the Ninth Circuit, which does not publish informal dispositions, was perceived by one commentator as so bad that he proposed a procedure that would allow any member of the bar in the Ninth Circuit to demand publication of an opinion otherwise designated for non-publication.<sup>255</sup> That solution seems unworkable in a system designed to help ease the burden of preparing opinions that are not to be published. One of the chief benefits derived from non-publication is the absence of the refined draftsmanship that is needed for a published opinion.<sup>256</sup> The unpublished opinion was adopted as a device which would cure the evils, or supposed evils, of the Fifth Circuit practice of affirming with no opinion. The no-opinion practice made it virtually impossible to determine whether rule 21 decisions were producing inconsistent results within the circuit. Such a determination would require incredible research facilities and personnel to reconsider the briefs and records in every case to dig out the inconsistencies. No one has tried, and probably no one will. The non-published opinion procedure allows attorneys to evaluate court determinations, yet retains the time-saving benefit of the no-opinion procedure. A review of the inconsistencies demonstrated by the Ninth Circuit's unpublished opinions<sup>257</sup> suggests the danger that is inherent in the Fifth Circuit's no-opinion procedure.

The non-published opinion procedure has tremendous potential for saving time and ridding advance sheets of worthless cases. If the judges are unable or unwilling to police themselves, however, a return to the publication of every opinion may be the course to follow. The Ninth Circuit has taken a small step in the right direction by authorizing requests for publication to be made to the

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Commission Hearings 683-84 (Bell); *cf.* *Vaughan v. Harp*, 49 Ark. 160, 4 S.W. 751 (1887); *Houston v. Williams*, 13 Cal. 24 (1859); *State ex rel. La France Copper Co. v. District Court*, 40 Mont. 206, 105 P. 721 (1909); *Degnan, The Law of Federal Evidence Reform*, 76 HARV. L. REV. 275, 288-89 (1962).

251. COMMISSION, STRUCTURE 51, 67 F.R.D. at 258.

252. 1975 Commission Hearings 892 (Brown). For 1975 the rate was running at 38.6%. *Id.*

253. Judge Griffin Bell stated his adjusted practice:

I might say, since June 1 [1973], I have not written a Rule 21 opinion. I started trying out the idea of saying Affirm, See Local Rule 21, and then write something, and I find that is an easy thing to do. I can write a paragraph, sometimes a sentence, see such and such a case, so it is not a burden at all on a judge to do this.

1975 Commission Hearings 683.

254. *See* Haworth, *supra* note 2, at 288.

255. Gardner, *supra* note 210, at 1227.

256. COMMISSION, STRUCTURE 50, 67 F.R.D. at 257.

257. Gardner, *supra* note 210.

clerk;<sup>258</sup> those few individuals with access to unpublished opinions can request that decision to be published if an important or inconsistent decision is spotted.

Before more drastic steps have to be taken, judges should take a different approach to the non-publication of opinions. At present, the presumption is against publishing unless the case clearly falls within generally accepted categories of publishability.<sup>259</sup> The emphasis should be in the other direction: every decision should be published unless all panel members agree that nothing new has been added to the body of law. To err on the side of publishing does little harm; to err the other way leaves a court open to the kinds of criticisms that have been leveled at the California state and federal courts. These criticisms could eventually lead to the loss of an important judicial tool in the fight against the ever-increasing flood of litigation.

The Commission was wise not to enter the debate regarding whether unpublished opinions may be cited to the court. Most courts of appeals that have taken a position on this issue deny counsel the right to cite unpublished opinions to the court except for *res judicata*, collateral estoppel, or law of the case purposes;<sup>260</sup> the Tenth Circuit allows citation if counsel furnishes a copy of the opinion to opposing counsel.<sup>261</sup> At first glance this approach will not work well since counsel undoubtedly will cite favorable cases and let unfavorable ones remain buried and hidden from view. Nevertheless, the experimentation should be interesting to monitor, and the Commission properly refused to recommend a rigid approach to a problem with which the courts have not yet had sufficient experience.

The courts of appeals have commendably introduced new and innovative procedures into the traditional method of appellate process. They may have overreacted, however, to the increasing backlog of cases. Some time-saving devices may still be utilized in the appropriate circumstances, but procedures designed to accomplish a fair disposition of cases must eventually lead to the need for more courts and judges to help avoid scandalous backlogs.

#### IV. REVIEW OF STATE COURT DECISIONS

Early in our history the question arose whether the Supreme Court had appellate jurisdiction over cases that were within the judicial power of the United States but decided in state courts.<sup>262</sup> In *Martin v. Hunter's Lessee*<sup>263</sup> Justice Story held that jurisdiction did extend to those cases. That decision does not cause significant controversy today,<sup>264</sup> but buried away in the

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258. 9TH CIR. R. 21(g).

259. See, e.g., 1ST CIR. R. app. B(a) ("a presumption, in the absence of justification, against publication").

260. See D.C. CIR. R. 8(f); 7TH CIR. R. 35(b)(2)(iv).

261. See note 241 *supra*. 10TH CIR. R. 17(c) provides in part that: "Unpublished opinions . . . can nevertheless be cited, if relevant, in proceedings before this or any other court. Counsel citing same shall serve a copy of the unpublished opinion upon opposing counsel." The recently promulgated 4TH CIR. R. 18 provides for generally the same procedure.

262. An elementary proposition regarding the division of jurisdiction between state and federal courts is that state courts generally have jurisdiction to hear and determine questions of and cases arising under federal law. C. WRIGHT, *supra* note 202, at 171.

263. 14 U.S. (1 Wheat.) 304 (1816).

264. The decision in *Martin* and the later decision in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), reaffirming the Court's appellate jurisdiction under § 25 of the First Judiciary Act, Act

Commission's discussion of the reference jurisdiction of the National Court of Appeals is the statement that "[t]he reference power would extend to any case before the Supreme Court on petition for certiorari or on jurisdictional statement; we specifically intend to include cases from the highest state courts . . . ."<sup>265</sup> The Commission's obvious purpose was to give the National Court potential control over all conflicts in decisions on federal law matters. The argument can be made that the review of state court decisions by any federal court other than the Supreme Court is unconstitutional.<sup>266</sup> This argument was suggested to the Commission during its hearings, but most of the discussion was directed to the wisdom of the proposal.<sup>267</sup> This part of the Article will suggest the constitutionality of the proposal, but question the necessity for adoption of the proposal.

The Constitution does not explicitly support Supreme Court review of state court decisions.<sup>268</sup> Examination of article III, therefore, does not in itself offer an answer to the question presented. The Constitutional Convention, the fight for ratification, and the cases decided thereafter may be looked to for guidance on the question of the extent of federal court control over state courts.

#### A. *The Constitutional Convention*

The members of the Constitutional Convention early accepted the need for a federal check on the autonomy of the states. Submitting the Virginia Plan for the new constitution at the opening of the Convention, John Randolph enumerated the many defects and failures of the confederated government which were a result of the states' protection of their sovereignty.<sup>269</sup> James Madison suggested that checks were necessary to "controul the centrifugal tendency of the States; which, without it, will continually fly out of their proper orbits and destroy the order & harmony of the political system."<sup>270</sup> So clear were these facts to the Convention delegates that the Virginia Plan, which expressly provided the national legislature with the power to "negative all laws passed by the several States, contravening in the opinion of the

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of Sept. 24, 1879, ch. 20, § 25, 1 Stat. 73, 85, to review federal issues in state cases caused significant controversy at the time. See 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 443-53, 547-64 (rev. ed. 1937). For a discussion of more recent controversy see H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 456-57 (2d ed. 1973).

265. COMMISSION, *STRUCTURE* 32, 67 F.R.D. at 239.

266. The constitutional argument raised against the Study Group's recommendation that its National Court of Appeals would violate the Constitution's requirement of "one supreme Court," U.S. CONST. art. III, § 1, by establishing another court to exercise the Supreme Court's appellate jurisdiction sparked extended commentary. See, e.g., A. BICKEL, *supra* note 135, at 35-36; Black, *supra* note 135, at 885; Gressman, *supra* note 143; Freund, *supra* note 135, at 1310. Although the Commission's recommendation quieted most of these critics by assuring access to the Court in all cases, some lingering doubts have been voiced as to Congress' power under the "exceptions and regulations" clause, U.S. CONST. art. III, § 2, to allow the Court to delegate or assign cases to another court once the Court's jurisdiction has been invoked. See 1975 Commission Hearings 1263-66, 1319-23 (Dixon, Gressman).

267. 1974 Commission Hearings 73, 135 (Gressman, Roberts); 1975 Commission Hearings 648, 699, 824, 929, 1017, 1238, 1264, 1305, 1323 (Kutak, Aldisert, Doyle, Haworth, Pugh, Pollak, Dixon, Fairchild, Gressman).

268. See generally R. BERGER, *CONGRESS V. THE SUPREME COURT* 223-36 (1969).

269. 1 M. FARRAND, *RECORDS OF THE FEDERAL CONSTITUTIONAL CONVENTION* 18-19 (rev. ed. 1937) [hereinafter cited as FARRAND].

270. *Id.* at 165.

National Legislature the articles of the Union . . . ,” was passed at the outset without debate or dissent.<sup>271</sup>

The means of implementing a federal check upon the states was debated hotly later. The national legislative “negative” came under attack, sparked by Pinckney’s proposal to expand this veto further to all laws which the national legislature should “judge to be improper.”<sup>272</sup> Fearing that the “Nat’l Legislature with such a power may enslave the States”<sup>273</sup> and that under such a plan the “large States [would] crush the small ones,”<sup>274</sup> delegates introduced the New Jersey Plan that provided for one supreme tribunal and required that the state judiciary be bound by federal laws in their decisions.<sup>275</sup> The Convention finally adopted the judicial check and supremacy clause and rejected the legislative negative.<sup>276</sup> Although the judicial check was strenuously opposed by Madison and Wilson, who preferred the “preventive” over the “corrective” approach, the Convention stood firm in its preference for court rather than congressional negative on state laws.<sup>277</sup>

The Convention also had a great deal of trouble agreeing about inferior federal tribunals.<sup>278</sup> One side argued for reliance on state courts as the final guardians of both state laws and constitutions against unauthorized incursions by the federal government; these state courts should yield to national authority only where necessary to the interests of federal uniformity.<sup>279</sup> Rutledge argued that “the State Tribunals might and ought to be left in all cases to decide in the first instance the right of appeal to the supreme national tribunal being sufficient to secure the national rights & uniformity of Judgments . . . .”<sup>280</sup> On the other hand, some delegates favored mandatory inferior federal courts. Randolph stated best the fears of the nationalists that “the Courts of the States cannot be trusted with the administration of the National laws. The objects of jurisdiction are such as will often place the General & local policy at variance.”<sup>281</sup>

Although at first the nationalists appeared to win passage of the provision for “one or more inferior tribunals,”<sup>282</sup> Rutledge obtained reconsideration of the matter, and a motion to strike out “inferior tribunals” triumphed five-to-four with two states divided.<sup>283</sup> The Committee of the Whole then passed by a vote of eight-to-two, with one state divided, a resolution “that the

271. *Id.* at 21, 54.

272. *Id.* at 164.

273. *Id.* at 165.

274. *Id.* at 167.

275. *Id.* at 244-45.

276. 2 *id.* at 28-29; U.S. CONST. art. VI, § 2.

277. 1 FARRAND 164-66; R. BERGER, *supra* note 268, at 226. Jefferson wrote to Madison on June 20, 1787: “Would not an appeal from the State judicatures to a federal court be as effectual a remedy [as the legislative negative]?” *Id.* at 227 n.25, quoting C. WARREN, CONGRESS, THE CONSTITUTION, AND THE SUPREME COURT 30 (1925).

278. See I W. CROSSKEY, POLITICS AND THE CONSTITUTION 612 (1953).

279. R. BERGER, *supra* note 268, at 263.

280. 1 FARRAND 124. See also Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 65 (1923). Although Pinckney recorded Rutledge as being “of the opinion that it would be right to make the adjudications of the State judges appealable to the national judiciary,” it seems clear that his reference was to the Supreme Court only, because the provision for inferior federal courts had just been dropped. 1 FARRAND 125.

281. 2 FARRAND 46.

282. 1 *id.* at 95.

283. *Id.* at 125.



National Legislature be empowered to institute inferior tribunals.<sup>284</sup> After some debate this resolution was adopted by the Convention without dissent<sup>285</sup> and was a compromise between the two contending groups, both appearing content to leave the question open for Congress to resolve.<sup>286</sup>

At this point note should be made that most delegates to the Convention presumed that the state courts would have jurisdiction over federal questions.<sup>287</sup> The New Jersey Plan proposed the creation of only a "supreme Tribunal" and provided that the state judiciaries were bound by federal laws and treaties in their decisions.<sup>288</sup> The unstated premise of this plan was the belief that state courts already had plenary jurisdiction to hear federal questions.<sup>289</sup> There was no significant dispute at the Convention or shortly afterwards that an appeal would lie from state courts to the Supreme Court.<sup>290</sup>

Although the Supreme Court clearly was to have this power of review, the pertinent discussions at the Convention are unclear on the scope of federal review of state courts at a level below the Supreme Court. The compromise nature of the provision for inferior federal courts and the concomitant lack of necessity to flesh out the powers of those potential courts, since article I seemed to contain ample congressional authority for future use, made further debate unnecessary. A tantalizing motion was made and seconded, but then withdrawn, that would have provided original jurisdiction over federal questions in the state courts "but with appeal both as to Law and fact to the courts of the United States . . . ."<sup>291</sup> No other mention is made of this motion, an unfortunate omission for the issue at hand, and withdrawal of the motion is of course ambiguous evidence.

### B. *Ratification and the Judiciary Act*

In *The Federalist* Hamilton persuasively argued for congressional authority to provide review of state court decisions by inferior federal tribunals and the advantages to be obtained by so doing:

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284. *Id.*

285. 2 *id.* at 46.

286. See Corwin, *The Establishment of Judicial Review*, 9 MICH. L. REV. 102, 123 (1910); Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 503 (1974). See also B. COXE, AN ESSAY ON JUDICIAL POWER AND UNCONSTITUTIONAL LEGISLATION, BEING A COMMENTARY ON PARTS OF THE CONSTITUTION OF THE UNITED STATES 342-48 (1893).

287. R. BERGER, *supra* note 268, at 247.

288. 1 FARRAND 244, 245; R. BERGER, *supra* note 268, at 247.

289. See THE FEDERALIST NO. 82, at 608 (J. Hamilton ed. 1868) (A. Hamilton):

[The United States] may not commit the decisions of causes arising upon a particular regulation to the federal courts solely . . . ; but I hold that the state courts will be divested of no part of their primitive jurisdiction . . . , and I am even of opinion that in every case in which they were not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the causes to which those acts may give birth.

290. See R. BERGER, *supra* note 268, at 270-72. Corwin's conclusion after reviewing the discussions was that:

Nothing could be plainer than the purport of the discussion and of these votes, namely that jurisdiction in the first instance of causes of this kind specified in the Constitution of the United States, with subsequent appeal to the United States Supreme Court, was the maximum concession that was demanded in the Convention by the Pro-State party.

Corwin, *supra* note 286, at 123. See also H. HART & H. WECHSLER, *supra* note 264, at 12: "[The grounds of the Convention's actions] show unmistakably . . . that the framers contemplated the review by the Supreme Court of state court decisions on matters of federal concern."

291. 2 FARRAND 424.

But could an appeal be made to lie from the state courts, to the subordinate federal judicatories? . . . The following considerations countenance the affirmative. The plan of the convention, in the first place, authorizes the national legislature 'to constitute tribunals inferior to the supreme court.' It declares, in the next place, that 'the JUDICIAL POWER of the United States *shall be vested* in one supreme court,' and in such 'inferior courts as congress shall ordain and establish;' and it then proceeds to enumerate the cases, to which this judicial power shall extend. It afterwards divides the jurisdiction of the supreme court into original and appellate, but gives no definition of that of the subordinate courts. The only outlines described for them are, that they shall be 'inferior to the supreme court,' and that they shall not exceed the specified limits of the federal judiciary. Whether their authority shall be original or appellate, or both, is not declared. All this seems to be left to the discretion of the legislature. And this being the case, I perceive at present no impediment to the establishment of an appeal from the state courts, to the subordinate national tribunals; and many advantages attending the power of doing it may be imagined. It would diminish the motives to the multiplication of federal courts, and *would admit of arrangements calculated to contract the appellate jurisdiction of the supreme court.* The state tribunals may then be left with a more entire charge of federal causes; and appeals in most cases in which they may be deemed proper, instead of being carried to the supreme court, may be made to lie from the state courts, to district courts of the union.<sup>292</sup>

Relevant evidence in the fight for ratification, other than in *The Federalist* and in the debate on the First Judiciary Act, is scarce. The issue fought in the ratification conventions was whether the provision for inferior federal courts should remain, and several amendments were proposed to delete that provision and provide an appeal from state courts to the Supreme Court.<sup>293</sup> Those attempts are ambiguous in intent, but coupled with section 25 of the Judiciary Act of 1789, which established Supreme Court review of state court decisions in limited instances,<sup>294</sup> lend some support to the argument that this route, and no other, was acceptable to the states.<sup>295</sup>

### C. Cases

The early case law is not quite as conclusive as Hamilton would lead one to suppose. Undoubtedly, the early cases lead to the conclusion that general federal appellate jurisdiction over state courts exists. In *Martin v. Hunter's Lessee*<sup>296</sup> Justice Story said:

292. THE FEDERALIST NO. 82, *supra* note 289, at 609-10 (capitals in original; first emphasis in original; second emphasis added). See also I W. CROSSKEY, *supra* note 278, at 654:

Thus, the existence, in the Court of full appellate power over the courts of the states, in all the cases enumerated in Article III, was avowed . . . even in *The Federalist*; and Hamilton, therein also argued, with complete correctness, that Congress could, if it wished, set up inferior national courts with appellate jurisdiction over the state courts, as well.

293. See R. BERGER, *supra* note 268, at 252, 273.

294. Act of Sept. 24, 1789, 1 Stat. 73, 85-86.

295. Legislative history relating to § 25 is virtually non-existent. C. WARREN, CONGRESS, THE CONSTITUTION, AND THE SUPREME COURT 104 (rev. ed. 1935). For the debates in the House on the Judiciary Act see 1 ANNALS OF CONG. 826-66 (1789).

296. 14 U.S. (1 Wheat.) 304 (1816). It should be noted that Story's views in this case as to the mandatory nature of the establishment of federal courts and federal jurisdiction, *id.* at 327-32, have been thoroughly discredited. See H. HART & H. WECHSLER, *supra* note 264, at 13 n.46.

But the exercise of appellate jurisdiction is far from being limited by the terms of the constitution to the supreme court. There can be no doubt that congress may create a succession of inferior tribunals, in each of which it may vest appellate as well as original jurisdiction. . . .

As, then, by the terms of the constitution, the appellate jurisdiction is not limited as to the supreme court, and as to this court it may be exercised in all other cases than those of which it has original cognizance, what is there to restrain its exercise over state tribunals in the enumerated cases? The appellate power is not limited by the terms of the third article to any particular courts. The words are, 'the judicial power (which includes appellate power) shall extend to all cases,' &c., and 'in all other cases before mentioned the supreme court shall have appellate jurisdiction.' It is the case, then, and not the court, that gives the jurisdiction. If the judicial power extends to the case, it will be in vain to search in the letter of the constitution for any qualification as to the tribunal where it depends.<sup>297</sup>

But in *Ableman v. Booth*,<sup>298</sup> while discussing the Court's role as final arbiter of many controversies, Chief Justice Taney suggested a *quid pro quo* arrangement that a National Court of Appeals ill-fits:

In organizing such a tribunal [as the Supreme Court], it is evident that every precaution was taken, which human wisdom could devise, to fit it for the high duty with which it was intrusted. It was not left to Congress to create it by law; for the States could hardly be expected to confide in the impartiality of a tribunal created exclusively by the General Government, without any participation on their part. And as the performance of its duty would sometimes come in conflict with individual ambition or interests, and powerful political combinations, an act of Congress establishing such a tribunal might be repealed in order to establish another more subservient to the predominant political influences or excited passions of the day. This tribunal, therefore, was erected, and the powers of which we have spoken conferred upon it, not by the Federal Government, but by the people of the States, who formed and adopted that Government, and conferred upon it all the powers, legislative, executive, and judicial, which it now possesses. And in order to secure its independence, and enable it faithfully and firmly to perform its duty, it engrafted it upon the Constitution itself, and declared that this court

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297. 14 U.S. (1 Wheat.) at 338. See also *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 417, 421 (1821), in which the Court noted that even under the Articles of Confederation national courts were capable of receiving appeals in all cases of capture and that under the Constitution:

The American people may certainly give to a national tribunal a supervising power over those judgments of the state courts, which may conflict with the constitution, laws, or treaties of the United States, without converting them into federal courts, or converting the national into a state tribunal.

See also *The Justices v. Murray*, 76 U.S. (9 Wall.) 274, 279 (1869) (emphasis added):

It seems to us also that cases of Federal cognizance, coming up from State courts, . . . cases involving questions arising under the Constitution, the laws of the United States, and treaties, or under some other Federal authority . . . are as completely within the exercise of the judicial power of the United States, as much so as if the cases had been originally brought in some inferior Federal court. *No other cases tried in the State courts can be brought under the appellate jurisdiction of this court or any inferior Federal court on which appellate jurisdiction may have been conferred.*

And see *The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 252 (1867):

Jurisdiction, original or appellate, alike comprehensive in either case, may be given. The constitutional boundary line of both is the same. Every variety and form of appellate jurisdiction within the sphere of the power, extending as well to the courts of the States as to those of the nation, is permitted.

298. 62 U.S. (21 How.) 506 (1859).

should have appellate power in all cases arising under the Constitution and laws of the United States. So long, therefore, as this Constitution shall endure, this tribunal must exist with it, deciding in the peaceful forms of judicial proceeding the angry and irritating controversies between sovereignties, which in other countries have been determined by the arbitrament of force.<sup>299</sup>

An argument can be advanced on the basis of Hamilton's theory in *Federalist No. 82* that the National Court of Appeals as an inferior federal court was assented to when the Constitution was ratified even though the court would not meet the level of impartiality that the Supreme Court considered itself to possess. An additional argument suggests that the policy of uniformity underlying the theory for any federal judicial review of state court judgments on federal matters would be promoted by a National Court of Appeals.<sup>300</sup> But a National Court of Appeals will never be the Supreme Court, either in power or prestige. *Ableman* suggests, in addition to the more obvious problem of permitting Congress power to destroy the court upon the failure to respond the way Congress deems appropriate,<sup>301</sup> that no tribunal other than the Supreme Court is able to give the states the impartial adjudication that their sovereignty deserves, and that the states in ratifying the Constitution consented to nothing less. The acceptance of the judicial check and of judicial review by the Supreme Court in article III cases also supports the thesis. Hamilton's suggestion that the original or appellate jurisdiction of the inferior courts is determinable by Congress is correct but says nothing of the matter at issue. The implied authority to provide appellate jurisdiction might well be limited to cases brought originally in federal court. To argue that the framers, having provided the Supreme Court to maintain federal supremacy and uniformity, satisfied the need of the new government and satisfied the pro-state faction is equally easy.<sup>302</sup> There was no need to subject the states to further control.

Two other lines of authority may be used to justify appellate review of state court decisions by a National Court of Appeals. First are the removal of statutes.<sup>303</sup> In *Martin v. Hunter's Lessee*<sup>304</sup> Justice Story said that removal jurisdiction is a form of appellate jurisdiction.<sup>305</sup> This argument is tenuous

299. *Id.* at 521.

300. There is an "obvious interest, if for no other reason than uniformity of application, in having federal law construed as well as declared by an institution of the general government." A. BICKEL, *THE LEAST DANGEROUS BRANCH* 10 (1962). See also *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816), stating as an important motive for federal review:

[The] necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution. . . . If there were no revising authority to control these jarring and discordant [state court] judgments . . . into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states. . . . The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution.

301. History teaches that life tenure of judges does not protect a court from being abolished. *Commissioner v. Textile Mills Sec. Corp.*, 117 F.2d 62, 69-70 (3d Cir. 1940), *rev'd on other grounds*, 314 U.S. 326 (1941) (abolition of circuit courts); F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 166-73 (1928) (abolition of Commerce Court).

302. See authorities cited at note 290 *supra*.

303. See generally 28 U.S.C. §§ 1441-47 (1970).

304. 14 U.S. (1 Wheat.) 304 (1816).

305. The argument was:

and has been seriously questioned.<sup>306</sup> A second argument is that a habeas corpus proceeding, especially under the expansive interpretations of the writ set down in *Brown v. Allen*<sup>307</sup> and *Fay v. Noia*,<sup>308</sup> is lower federal court appellate review of a state court decision.<sup>309</sup> The Court's theory of decision in *Fay* was grounded on the writ's acting upon the body of the petitioner, not as revision of the state court judgment.<sup>310</sup> Justice Harlan observed in dissent, however, that if the writ is granted the result is nonetheless nullification of the state court judgment.<sup>311</sup>

Although the argument that review by a Supreme Court independent of congressional pressure was what the states and the people bargained for, Hamilton's argument, which seems based primarily on the article I power of Congress to establish inferior tribunals,<sup>312</sup> is sufficient to carry the day. Congress probably possesses the power to provide appellate jurisdiction in the National Court of Appeals to review federal issues in state-trying cases.<sup>313</sup> Whether Congress should do so, however, is an entirely different question. At least ten witnesses before the Hruska Commission discussed the proposal.<sup>314</sup> Perhaps that number is significantly lower than one would expect considering the controversies that have surrounded even Supreme Court

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This power of removal is not to be found in express terms in any part of the constitution; if it be given, it is only given by implication, as a power necessary and proper to carry into effect some express power. . . . [I]t presupposes an exercise of original jurisdiction to have attached elsewhere. . . . If then the right of removal be included in the *appellate jurisdiction*, it is only because it is one mode of exercising that power, and as Congress is not limited by the constitution to any particular mode, or time of exercising it, it may authorize a removal either before or after judgment. . . . [A]nd if the appellate power by the constitution does not include cases pending in state courts, the right of removal. . . cannot be applied to them.

*Id.* at 349-50 (emphasis added). *But see* *The Justices v. Murray*, 76 U.S. (9 Wall.) 274 (1869), holding that removal of a jury-trying case after judgment to federal court for a retrial violated the seventh amendment.

306. *See* *Railway Co. v. Whitton's Administrator*, 80 U.S. (13 Wall.) 270, 287 (1871):

We may doubt, with counsel, whether such removal [from state to federal court] before issue or trial can properly be called an exercise of appellate jurisdiction. It may, we think, more properly be regarded as an indirect mode by which the Federal court acquires original jurisdiction of the causes.

307. 344 U.S. 443 (1953).

308. 372 U.S. 391 (1963).

309. One commentator said that the writ after *Fay* represents "a transfiguration from a concept for collateral review to a concept for appellate review." Badger, *A Judicial Cul-de-Sac: Federal Habeas Corpus for State Prisoners*, 50 A.B.A.J. 629, 634 (1964); cf. P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 241, at 116, where the authors propose to have state supreme court criminal cases reviewed directly by the regional courts of appeal.

310. 372 U.S. at 430-31.

311. *Id.* at 469 (dissenting opinion). *See also* *Brown v. Allen*, 344 U.S. 443, 510 (1953) (opinion of Frankfurter, J.):

Insofar as this jurisdiction enables federal district courts to entertain claims that State Supreme Courts have denied rights guaranteed by the United States Constitution, it is not a case of a lower court sitting in judgment on a higher court. It is merely one aspect of respecting the Supremacy Clause of the Constitution whereby federal law is higher than State law. It is for the Congress to designate the member in the hierarchy of the federal judiciary to express the higher law.

312. U.S. CONST. art. I, § 8, cl. 9.

313. *Accord*, Stolz, *Federal Review of State Court Decisions of Federal Questions: The Need for Additional Appellate Capacity*, 64 CALIF. L. REV. 943, 948 (1976). The problem of whether issues of state law could also be reviewed is beyond the scope of this discussion. *See* *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590 (1875). *See generally* C. WRIGHT, *supra* note 202, § 107, at 487-88. The rule is that state courts "speak with final authority on questions of state law." *Id.* at 488. *But see* 2 W. CROSSKEY, *supra* note 278, chs. 23-26.

314. *See* note 267 *supra*.

review of state court decisions.<sup>315</sup> For an issue so fraught with the emotionalism of division of power between the states and the federal government, maybe the surprising aspect of the proposal was the failure to draw more attention.

The burden of persuasion facing proponents of federal review was demonstrated during the hearings in a statement by Justice Samuel Roberts of the Supreme Court of Pennsylvania:

A proposal for direct review of decisions of the highest state court by any federal tribunal other than the Supreme Court of the United States will be greeted with less than enthusiasm by state judges. It is a drastic change and one which should be pursued only after the strongest of justifications and only after we are certain that it will further the proper relationship between state and federal courts.<sup>316</sup>

To meet this challenge for justification, the Commission's report said only that the National Court should have the power to review state cases referred by the Supreme Court. The report declined to emphasize a study of Supreme Court review of state court decisions by Professor Stolz or his conclusion that "[i]t is not possible today for the United States Supreme Court to maintain more than token supervision of the resolution of federal law questions by the state courts."<sup>317</sup> The Commission declined to accept the Stolz study because of the difficulty of proving "this proposition with objective data and objective assessments will differ."<sup>318</sup>

An examination of the data shows why proof of the proposition is so difficult. To reach the conclusion offered one must accept as true on the scantiest of evidence an unsupported hypothesis. For example, on the assumption that state court litigation has increased about as rapidly as population, and that the percentage of state cases that raise federal issues had remained about the same, Stolz concluded that the universe of state cases available for but not receiving federal review has increased. At the same time, the number of state cases on the Supreme Court docket was not increasing. Stolz asserts as the probable reason the realization by lawyers of the futility of the exercise.<sup>319</sup>

The premises on which this entire argument is based are open to serious question. First, doubt exists whether litigation is tied in any way to population; at least this was the conclusion of a recent study of the Supreme Court's own caseload.<sup>320</sup> Second, although the conclusion that the percentage of state cases presenting federal issues is not declining may be more reasonable than other explanations, over the years gaining access to federal court

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315. Prior to the Civil War seven states denied the right of the Supreme Court to review their decisions, eight legislatures adopted resolutions protesting this power of the Court, and at least ten bills were introduced in Congress to deprive the Court of that jurisdiction. See Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act*, 47 AM. L. REV. 1, 3-4 (1913). More recent controversy is summarized in H. HART & H. WECHSLER, *supra* note 264, at 456-57.

316. 1974 Commission Hearings 135.

317. COMMISSION, STRUCTURE 8 n.8, 67 F.R.D. at 212 n.8, quoting from study by Professor Preble Stolz; see Stolz, *supra* note 313, at 959.

318. COMMISSION, STRUCTURE 8 n.8, 67 F.R.D. at 212 n.8.

319. Stolz, *supra* note 313, at 958.

320. Casper & Posner, *supra* note 124, at 360.

certainly has become easier. Today nearly any case arising under the Constitution, laws, or treaties of the United States can be brought originally in the federal district court.<sup>321</sup> This might explain, for example, the slight decline in the percentage of state civil cases appearing on the paid appellate docket.<sup>322</sup> Third, no evidence shows that the workload of state courts has dramatically increased.<sup>323</sup> Fourth, until 1962 state cases constituted an increasing share of Supreme Court filings, but between 1962 and 1972 the absolute figures did not show a marked decline, although the percentage did.<sup>324</sup> This time-span reflects almost exactly the explosion in criminal dockets brought about by increased habeas corpus filings and providing paid counsel in federal criminal litigation.<sup>325</sup> Fifth, the decline in the number of opinions issued dealing with state court cases is not unprecedented in the actions of the Supreme Court in previous years,<sup>326</sup> and may be consistent with the shift in the Supreme Court to adjudications of federal constitutional issues,<sup>327</sup> which appear equally well in state or federal litigation.<sup>328</sup>

321. See *Snyder v. Harris*, 394 U.S. 332, 342-43 n.2 (1968) (Fortas, J., dissenting), in which Justice Fortas is able to cite only cases involving state or federal unconstitutional action as falling within the jurisdictional amount requirement of 28 U.S.C. § 1331(a) (1970). The decision in *Lynch v. Household Fin. Corp.*, 405 U.S. 538 (1972), removed the state action problem by opening up 28 U.S.C. § 1343(3) (1970) to personal and property right actions. One other possible exception is cases based on federal common law. See *Illinois v. Milwaukee*, 406 U.S. 91 (1972).

322. Casper & Posner, *supra* note 124, at 351, show a decline from 19% in 1957 and 1958 to 15.7% in 1971 and 1972. Stolz, *supra* note 313, at 956.

323. Stolz's figures show a relatively stable docket in the California appellate courts since 1969. Stolz, *supra* note 313, at 953. This is not to suggest that the number of appeals in state courts has not increased dramatically over the last 15 years. See P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 241, at 4-5.

324. Stolz's figures show a gradual increase in the percentage of state court cases filed in the Supreme Court from 44.5% (526 out of 1182) in 1948 to 49.5% (965 of 2161) in 1962, and then a decline to 26.1% (904 of 3461) in 1972. Stolz, *supra* note 313, app. at 978.

325. In 1962 there were 2,948 prisoner petitions filed in the district courts; in 1972 this total was 16,267. A.O. ANN. REP. 119 (1972).

326. Stolz shows that in 1972 the Supreme Court reviewed 23 state court cases. In 1951 it was 22 and in 1959 it was 17. Stolz, *supra* note 313, at 951.

327. It has been estimated that Supreme Court decisions are now comprised of one-half to two-thirds constitutional issues. COMMISSION, STRUCTURE 8, 67 F.R.D. at 212.

328. Building on his shaky and unproved premise, Stolz proposes to create obligatory review of all state cases properly raising a federal question. One's first reaction to this proposal is to try to grasp the magnitude of the workload envisioned for this new court. As Stolz admits, "there seems to be no way of estimating the universe of potential cases." Stolz, *supra* note 313, at 975. Certainly this is so for state civil cases that raise federal issues. But Professor Carrington, in analyzing the probable caseload for any new national court, suggests that there may be 25,000 criminal appeals per year in the state system, and, with appropriate reductions, the caseload of a National Court might be 3,000-10,000 cases, "with the probabilities favoring a lower number within that range." Carrington, *Federal Appellate Caseloads and Judgeships: Planning Judicial Workloads for a New National Forum*, 4 Appellate Justice: 1975, *supra* note 34, at 168, 171-72. Such a caseload, which must be expanded to include civil litigation, is clearly unmanageable from the start. That caseload is comparable to that of the Supreme Court or to the Fifth Circuit, but the new court would not have the luxury of controlling its own docket as does the Supreme Court, and unless one wants a court of "jumbo" size to begin with, the caseload might be oppressive. If a discretionary review is substituted for a mandatory one, the benefits expected in habeas corpus—a substantial decline in collateral review of state court decisions with the advent of the reality of direct federal review—would not accrue. In fact, contrary to the assertions of several commentators, see Haynsworth, *Improving the Handling of Criminal Cases in the Federal Appellate System*, 59 CORNELL L. REV. 597, 598, 604 (1974), Rosenberg, *Planned Flexibility to Meet Changing Needs of the Federal Appellate System*, 59 CORNELL L. REV. 576, 690 (1974), and Gibbons, Book Review, 48 N.Y.U.L. REV. 564 (1973), that federal review would import finality into criminal litigation, there is no assurance that this would occur. See H. HART & H. WECHSLER, *supra* note 264, at 1513-14. Finally, a new court with such a tremendous workload could hardly be expected to perform the other duty expected of it—to maintain uniformity of decision among the federal courts of appeals.

Balanced against this equivocal evidence is the importance of maintaining a proper balance in federal-state relations, continuing confidence in and respect for state courts, and avoiding friction in the maintenance of dual court systems in our federal union. Clearly the Commission had hoped to provide empirical evidence that the need existed, but none was provided. Thus, the Commission's recommendation fails to meet the correct burden of proof set out by Justice Roberts.<sup>329</sup> There is little need for a gratuitous intrusion by a court, simply from its placement in the federal appellate hierarchy, that will never have the prestige of the Supreme Court. No citation to empirical studies or scholarly works would prove or disprove the point, but one must feel that the introduction of such review would denigrate state supreme courts. This would be a step backward at a time when the Supreme Court is continuing to rely upon the state courts as vindicators of federal constitutional rights,<sup>330</sup> and institutions such as the National Center for State Courts are vitally interested in improving the quality of justice in those courts. The notion that the strain would eventually disappear<sup>331</sup> hardly justifies the initial invasion. This unprecedented reallocation of review should be debated at length before any change is made.

#### V. CONCLUSION

Congress must do something. The condition of several courts of appeals is critical and calls for immediate relief. At the expenditure of more than half a million dollars, Congress sought the advice of a distinguished group appointed by each branch of government. Their recommendations seem headed for the fate suffered by most other recent commissions. Their labors may have produced a mouse, but after the Study Group controversy, a mouse was probably perceived as the only politically palatable animal. Now even this product seems to be too controversial. Unfortunately, basic reforms are necessary before other adjustments in the present procedures, such as increasing oral argument and opinion-writing, can be implemented. That reform need not include an unprecedented redesign of the division of power between the state and federal governments in a pell-mell rush to secure uniformity of decision. Moving Congress to act eventually may be occasioned only by the complete collapse of the courts of appeals and years of delay in deciding appeals everywhere, not just as now in the Fifth and Ninth Circuits. That time is not far off.

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329. See text accompanying note 316 *supra*.

330. See, e.g., *Stone v. Powell*, 96 S. Ct. 3037, 3051 n.35, 49 L. Ed. 2d 1067, 1087 n.35 (1976): "Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States." See also *Younger v. Harris*, 401 U.S. 37 (1971).

331. 1975 Commission Hearings 824 (Doyle).



