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## The Federal Judiciary—Inflation, Malfunction, and a Proposed Course of Action

*Daniel J. Meador\**

Though not recognized annually, September 24, the birthday of the federal judiciary, is an important date in American history. On that date in 1789, President Washington signed the first Judiciary Act.<sup>1</sup> That Act created the system of federal courts that, with a few significant changes, exists today. The Supreme Court and the district courts that the Act established still remain.

Although Congress has made many statutory alterations concerning the federal courts since that time, three changes stand out as truly significant. The first was the 1875 statute giving the federal trial courts, for the first time, general jurisdiction over cases arising under federal law and greatly enlarging the jurisdiction in diversity of citizenship cases.<sup>2</sup> The second—and the most significant structural change—was the introduction of a tier of intermediate appellate courts through the Evarts Act of 1891.<sup>3</sup> Our present-day U.S. Courts of Appeals descend from that Act. The third change was a jurisdictional rearrangement flowing from the creation of those new appellate courts. The result was a shift, through the Judges' Bill of 1925,<sup>4</sup> of the Supreme Court's appellate jurisdiction to a largely discretionary basis. Broadly speaking, the federal judiciary in 1981 is the system established by the Act of 1789, modified by these later changes.

As we move into the 1980's, the present judicial system, like the national economy, is beset with near runaway inflation. The inflation is of two sorts. One is inflation in the business of the courts, an explosive increase in the quantity of cases being filed

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1. Ch. 20, 1 Stat. 73 (1789).
2. Act of Mar. 3, 1875, ch. 137 18 Stat. 470.
3. Ch. 517, 25 Stat. 826 (1891).
4. Pub. L. No. 68-415, 43 Stat. 936 (1925).

and litigated. The other is inflation in the number and variety of personnel within the judicial branch. The inflation in personnel has been caused by, and is in response to, the inflation in caseloads. Dangerous consequences may follow, just as they may in a period of unrestrained economic inflation, if the inflation in caseloads and personnel remains unchecked or if measures are not adopted to equip the judiciary to function soundly under these altered circumstances.

The inflation in judicial business is well known and well documented. It began in the early sixties and was rolling in high gear by the advent of the seventies. It continues unabated. The year 1960—roughly two decades ago—is a convenient point from which to measure the magnitude of growth. Measured against that base year, case filings, civil and criminal, in the federal district courts increased 110% by 1979.<sup>5</sup> Dispositions in those courts increased 93%.<sup>6</sup> Filings in the courts of appeals increased a staggering 419%.<sup>7</sup> Dispositions in those courts increased 410%.<sup>8</sup> In the Supreme Court in the 1978 Term there were 4,731 cases on the docket,<sup>9</sup> an increase of more than 150% over the 1959 Term.<sup>10</sup> Over this same period of time the number of cases disposed of by full opinion rose from 97<sup>11</sup> to 153.<sup>12</sup>

There is another aspect to the inflation of caseloads that is difficult to quantify yet real in the view of participants and observers. This is the increase in the complexity of the courts' business. Today, as compared to 1960 and earlier, there are more "large" cases in terms of numbers of parties, issues, and stakes.

5. [1979] DIRECTOR ADMINISTRATIVE OFFICE U.S. COURTS ANN. REP. 4-7 [hereinafter cited as 1979 ANN. REP.]. In 1960, 59,284 civil cases and 29,828 criminal cases were commenced in federal district courts. In 1979, 154,666 civil cases and 32,688 criminal cases were commenced in federal district courts.

6. *Id.* In 1960, 61,829 civil cases and 29,864 criminal cases were terminated in federal district courts. In 1979, 143,323 civil cases and 33,411 criminal cases were terminated in federal district courts.

7. *Id.* at 3. In 1960, 3,899 appeals were commenced, while in 1979, 20,219 appeals were commenced. In fiscal year 1980, filings in the courts of appeals climbed to 23,200, an increase of 14.7% over the previous year. THIRD BRANCH, Oct. 1980, at 8.

8. 1979 ANN. REP., *supra* note 5, at 3. In 1960, 3,713 cases were terminated; in 1979, 18,928 cases were terminated.

9. *Id.* at A-1.

10. [1960] DIRECTOR ADMINISTRATIVE OFFICE U.S. COURTS ANN. REP. 66 [hereinafter cited as 1960 ANN. REP.]. During the October Term, 1959, there were 1,862 cases docketed in the Court.

11. *Id.*

12. 1979 ANN. REP., *supra* note 5, at A-1. The number cited refers to those cases disposed of by full opinion in the October 1978 Term.

The issues are also more difficult and complex. At the same time, there is also a greater volume of routine, even trivial business, unfamiliar to the federal judiciary in past decades.

Inflation in judicial personnel is readily documented, although perhaps not widely known. The inflation in judgeships, though significant, is perhaps not radical considering the rise in business and the growth in population of the country. In 1960 there were 226 federal district judgeships;<sup>13</sup> in 1980 there were 516,<sup>14</sup> a growth of 128%. In 1960 there were 68 courts of appeals judgeships; in 1980 there were 132, a growth of 94%.<sup>15</sup>

The most dramatic personnel inflation has been the rise in number, variety, and status of officials within the judiciary who are not Article III judges. There were 174 bankruptcy referees in 1960;<sup>16</sup> there are now 236 bankruptcy "judges."<sup>17</sup> Prior to 1968 there were no federal magistrates. By 1979 there were 196 full-time magistrates and 292 part-time magistrates serving in the district courts.<sup>18</sup> The number of law clerks serving the Article III judges rose from 264 in 1960<sup>19</sup> to 697 in 1979,<sup>20</sup> an increase of 164%. In 1960 there were no staff attorneys in the appellate courts; there are now 136.<sup>21</sup> Today there are 10 circuit executives.<sup>22</sup> Prior to 1971 this position did not exist. Overall, in 1960 there were 5,562 persons employed in the judicial branch of the federal government;<sup>23</sup> in 1979 there were 12,563,<sup>24</sup> an increase of 126%.<sup>25</sup>

There are virtually no signs of a tapering off or decline in the volume of judicial business. All indications point toward continued increases. Since 1970, in every year except fiscal year 1978, filings in the courts of appeals have increased.<sup>26</sup> Filings in

13. 1960 ANN. REP., *supra* note 10, at 85.

14. 1979 ANN. REP., *supra* note 5, at 7.

15. *Id.* at 3.

16. 1960 ANN. REP., *supra* note 10, at 163.

17. 1979 ANN. REP., *supra* note 5, at 23.

18. *Id.* at 128. The 292 figure represents 271 part-time and 21 "combination" positions. Magistrates replaced the part-time commissioners, who served prior to 1968.

19. 1960 ANN. REP., *supra* note 10, at 205.

20. 1979 ANN. REP., *supra* note 5, at 22.

21. *Id.*

22. *Id.*

23. 1960 ANN. REP., *supra* note 10, at 205. Supreme Court personnel are excluded.

24. 1979 ANN. REP., *supra* note 5, at 22.

25. More detailed information on the growth of personnel in the federal judiciary can be found in Meador, *The Federal Judiciary and Its Future Administration*, 65 VA. L. REV. 1031 (1979).

26. 1979 ANN. REP., *supra* note 5, at 43.

the district courts since 1970 have increased every year except fiscal year 1973.<sup>27</sup> Every year, Congress enacts statutes that give rise to fresh litigation. It is difficult to find any statute enacted by Congress in the last decade that reduces or eliminates any significant category of litigation. Few, if any, would predict that Congress will cease to legislate or will legislate to eliminate any sizable clump of cases. Moreover, the Supreme Court continues to hand down decisions opening up new avenues into the federal courts, either by the recognition of new substantive rights of action or by holdings on such threshold access questions as standing, ripeness, and mootness. The American people are uncommonly litigious, and present conditions in our society are not likely to diminish this trait. It seems highly probable that the volume of business handled by the federal courts will continue to increase year by year.

One possibility for a significant reduction in workload lies in the curtailment of the diversity of citizenship jurisdiction of the district courts. Bills to this effect have been under serious consideration in Congress since 1977.<sup>28</sup> Since then the House of Representatives has twice passed a bill to eliminate the general diversity jurisdiction,<sup>29</sup> but the Senate has not yet acted favorably on any such measures. Apart from this proposal, however, there is not pending any serious measure that would reduce significantly the intake of business into the federal judiciary.

Throughout the history of the federal judiciary, the volume of litigation has risen and fallen numerous times. A graph of the growth of business from 1789 to the present would not be a steady upward line; it would have peaks and valleys. But we have now exceeded all previous peaks and are on a steady upward line, bound for even greater heights. No comprehensive plan is before the country that would enable the judiciary to meet the conditions that threaten stability and uniformity in federal law.

27. *Id.* at 4-7.

28. *See, e.g.*, S. 679, 96th Cong., 1st Sess. (1979); H.R. 2202, 96th Cong., 1st Sess. (1979); H.R. 1046, 96th Cong., 1st Sess. (1979); H.R. 130, 96th Cong., 1st Sess. (1979); S. 2389, 95th Cong., 1st Sess. (1977); S. 2094, 95th Cong., 1st Sess. (1977); S. 1613, 95th Cong., 1st Sess. (1977); H.R. 10050, 95th Cong., 1st Sess. (1977); H.R. 9622, 95th Cong., 1st Sess. (1977); H.R. 9308, 95th Cong., 1st Sess. (1977); H.R. 9123, 95th Cong., 1st Sess. (1977); H.R. 7243, 95th Cong., 1st Sess. (1977); H.R. 761, 95th Cong., 1st Sess. (1977).

29. H.R. 10050, 95th Cong., 1st Sess. (1977); H.R. 9622, 95th Cong., 1st Sess. (1977). On Oct. 4, 1978, the Senate incorporated the text of H.R. 9622 into its pending measure, S. 1613. The House approved the bill, as amended by the Senate, the same day.

The major response thus far has been the addition of personnel. Adding judges is an obvious and understandable response to sustained growth in caseloads. Congress has taken this step many times throughout our history, most recently in 1978.<sup>30</sup> A significant new twist is the addition of non-Article III personnel, as mentioned above. Providing more personnel for the courts can of course equip them to deal with a greater quantity of business and thereby overcome delay in adjudication, one of the major evils of caseload inflation. However, adding judges at the appellate level creates in turn another serious problem: a heightened difficulty in maintaining a nationally uniform body of federal law. This threat to uniformity is one of the major problems now afflicting the federal judiciary. Its solution lies in restructuring or rearranging the judiciary at the appellate level.

In this respect, the present period resembles that quarter century from the close of the Civil War to the passage of the Evarts Act in 1891. Thus it may be useful, or at least interesting, to look briefly at the conditions in the federal courts at that time, the efforts to equip the courts to function under those conditions, and the step eventually taken by Congress.

### I. THE CREATION OF THE APPELLATE COURTS

The period beginning in the 1860's and culminating with the creation of the courts of appeals a quarter century later in 1891 presents interesting parallels to the period commencing in the 1960's. Then, as now, the federal judiciary was buffeted by changes in the nation—economic, political, and social—and by an enlarged jurisdiction. And then, as now, these altered circumstances posed great difficulties for the judiciary because it was not structured to deal with the new conditions. Ultimately the remedy lay in a new judicial structure—the insertion of the intermediate appellate courts—the very part of the system where the greatest structural deficiencies are being experienced now.

With the close of the Civil War, large economic forces were unleashed across the United States, leading to industrialization, the development of the transcontinental rail system, and enormous growth in commercial activity over the remainder of the

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30. Omnibus Judgeship Act of 1978, Pub. L. No. 95-486, 92 Stat. 1629 (codified at 5 U.S.C. § 5108; 28 U.S.C. §§ 41 note, 44, 44 note, 45 note, 46, 133, 133 note, 1337, 1445) (1976 & Supp. III 1979). This Act added 35 courts of appeals judgeships and 117 district court judgeships, the largest single increase in the history of the judiciary.

nineteenth century.<sup>31</sup> This growth gave rise to substantial increases in litigation. Moreover, new federal legislation was enacted under which new kinds of legal controversies arose. New litigation also stemmed from the aftermath of the War and from Reconstruction measures.

The dockets of the federal trial courts and the Supreme Court climbed rapidly in the postwar years. The rising tide of federal litigation increased even more in 1875 with the enactment of the statute authorizing the federal trial courts, for the first time, to entertain cases generally arising under the constitution, laws, and treaties of the United States.<sup>32</sup> Liberalized removal provisions also contributed to the swelling of federal dockets,<sup>33</sup> as did an expansion of the diversity of citizenship jurisdiction to include any suit between citizens of different states.<sup>34</sup> The Supreme Court's docket doubled and then doubled again in the two decades before 1880.<sup>35</sup> The period, like the present, was one of an unprecedented increase in judicial business at all levels.

It was obvious that a serious problem existed, but no solution could be agreed upon. Beginning in the mid-1860's the idea of creating appellate courts, organized on the existing circuit basis, was persistently suggested and debated. With no consensus forming over that idea, Congress, in 1869, created the new position of circuit judge and authorized the appointment of one such judge for each of the nine circuits.<sup>36</sup> Although the circuit judges had some appellate functions as members of the circuit courts, the main effect of this measure was to enhance judicial manpower at the trial level. The new judgeships did nothing to relieve the Supreme Court's business or to provide any significant increase in terms of system-wide appellate capacity.

It became increasingly evident that the most serious problem afflicting the system was insufficient appellate capacity. A suggested solution during the 1870's and 1880's was to enlarge the Supreme Court in various ways and to authorize it to sit in sections or panels. This idea competed with the proposal to cre-

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31. This recapitulation of the events leading to the Circuit Courts of Appeals Act is drawn largely from F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 56-102 (1927).

32. Act of Mar. 3, 1875, ch. 137, 18 Stat. 470.

33. *Id.* § 1.

34. *Id.* §§ 2-4, 6, 7.

35. 13 CONG. REC. 3464 (1882) (remarks of Sen. Davis).

36. Act of Apr. 10, 1869, ch. 22, 16 Stat. 44.

ate permanent intermediate appellate courts. In 1875 Congress restricted Supreme Court review of admiralty cases and increased the monetary minimum of civil cases on appeal from the circuit courts from \$2,000 to \$5,000.<sup>37</sup> This measure afforded some relief, but it did not reach the fundamental problem, namely, that a single appellate court sitting over the entire federal judicial system simply could not hear and decide a sufficient volume of appeals.

The culminating efforts to solve the problem began in the late 1880's. Attorney General Augustus H. Garland actively entered the fray, strongly recommending the creation of intermediate appellate courts.<sup>38</sup> His successor as Attorney General, William H. Miller, continued to press this proposal.<sup>39</sup> The new President of the United States, Benjamin Harrison, was sufficiently persuaded of the seriousness of the problem to recommend, in his first message to Congress in 1889, the creation of the intermediate appellate courts.<sup>40</sup> Senator William J. Evarts of New York, who had previously been attracted to the idea of enlarging the Supreme Court, became converted to the intermediate appellate court idea and assumed congressional leadership of the movement. A committee of the American Bar Association also supported the idea and worked with Senator Evarts in developing the specific bill.<sup>41</sup>

As the bill worked its way through the two houses of Congress, there were the usual compromises and reshaping to meet the various interests. The most significant and unfortunate compromise was the agreement in Congress, largely as the result of pressures from the bar, to leave the old circuit courts intact. Thus the system was left with the oddity of two separate kinds of courts at the trial level. This was a price that had to be paid in order to enlist adequate support for the new intermediate appellate courts. The bill passed and was signed into law by the

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37. Act of Feb. 16, 1875, ch. 77, 18 Stat. 315.

38. [1887] ATT'Y GEN. ANN. REP. xv; [1888] ATT'Y GEN. ANN. REP. xiv.

39. [1889] ATT'Y GEN. ANN. REP. xviii-xix; [1890] ATT'Y GEN. ANN. REP. xviii-xix.

40. Benjamin Harrison, First Annual Message to Congress (Dec. 3, 1889), *reprinted in MESSAGES AND PAPERS OF THE PRESIDENTS* 5467 (1897).

41. Committee on Judicial Administration and Remedial Procedure, *Report*, 17 A.B.A. REP. 336, 337 (1894). The ABA Committee on Relief of the Supreme Court, which worked with Senator Evarts, consisted of David Dudley Field, Henry Hitchcock, Francis Rawle, J. Randolph Tucker, George H. Bates, Edward Otis Hinkley, William Allen Butler, Thomas J. Semmes, J. Hubley Ashton, and Walter B. Hill. 13 A.B.A. REP. 95 (1890).



President on March 3, 1891.<sup>42</sup> The bill created a court of appeals in each of the existing nine circuits consisting of three judges, two of whom were permanent circuit judges.

Another compromise was that these courts of appeals were not given appellate jurisdiction over all lower court decisions; in several categories of cases, appeals would still lie directly to the United States Supreme Court. Nevertheless, the new courts of appeals were given jurisdiction over a sizable proportion of all federal appeals.<sup>43</sup>

The new courts brought immediate and substantial relief to the Supreme Court. Thus, this structural innovation in the federal judicial system proved to be the appropriate remedy for the radical influx of litigation that had been going on for a quarter century. Restructuring of the system was not complete, however, until two later congressional enactments. One came in 1911 when the old circuit courts were finally abolished,<sup>44</sup> despite continued opposition from leading lawyers.<sup>45</sup> This step left the United States District Courts as the sole trial forums in the federal judicial system. The next reform came in 1925 with the so-called Judges' Bill that gave the Supreme Court a large measure of discretionary jurisdiction,<sup>46</sup> with almost all appeals from the district courts routed initially to the courts of appeals. No significant structural or jurisdictional alterations have occurred since 1925.

The federal judiciary today is, of course, far larger than it was a hundred years ago, or even fifty years ago, and its problems are likewise larger. However, the major problem is similar in that it is structural and can thus be met, as it was ultimately met in 1891, only by some structural alterations. Likewise, as in the period of a hundred years ago, numerous solutions for the current difficulties have been presented and debated. Are we now facing another ten years of debate, as our predecessors faced in 1881, or can we galvanize ourselves into action more quickly than that?

42. Evarts Act, ch. 517, 26 Stat. 826 (1891).

43. *Id.* §§ 5-7.

44. Act of Mar. 3, 1911, Pub. L. No. 61-475, § 289, 36 Stat. 1087.

45. 46 CONG. REC. 298-300 (1910). Opposition to the abolition of the circuit courts was led by Hollis R. Bailey, Joseph H. Choate, James Buchanon, Charles D. Merrick, Alex W. Smith, John D. Rouse, George D. Lancaster, James Quarles, Otto Raymond Barnett, James H. Matheny, Ralph W. Breckenridge, and C.E.S. Wood, all members of the ABA.

46. Act of Feb. 13, 1925, Pub. L. No. 68-415, 43 Stat. 936.

## II. A RESTRUCTURING OF THE FEDERAL JUDICIARY—VARIOUS PROPOSALS

During the quarter century before 1891, interest in restructuring the federal judiciary centered largely in Congress. At the present time, however, concerns about judicial problems have been much more widespread. Various nongovernmental groups and individuals, as well as Congress, have worked to develop new structural and jurisdictional arrangements that would enable the federal courts to function more effectively in contemporary circumstances. The major efforts since the late 1960's are described below.

*American Law Institute.* The first effort launched since 1960 was the study by the American Law Institute on the jurisdiction of the federal courts. It was initiated in response to a suggestion by Chief Justice Earl Warren, made in an address to the Institute in May 1959.<sup>47</sup> The study was completed in 1968, and the results were published in a book entitled *Division of Jurisdiction Between State and Federal Courts*.<sup>48</sup>

The basic categories of jurisdiction—federal question and diversity of citizenship—were preserved, but with certain adjustments. The aim was to realign state and federal jurisdiction in a rational and contemporarily useful way. The entire set of proposals was introduced into Congress<sup>49</sup> and has been pending there ever since. Hearings have been held at various times,<sup>50</sup> but the proposals have not advanced beyond the committee level in either house.

*American Bar Foundation.* The American Bar Foundation initiated a study which represented the first effort to deal specifically with the worsening federal appellate court problem. The results of the study were published in 1968 in a report entitled *Accommodating the Workload of the United States Courts of Appeals*.<sup>51</sup> The report recommended several internal arrange-

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47. Address by Chief Justice Earl Warren to the 36th Annual Meeting of the American Law Institute (May 20, 1959), reprinted in 36 ALI PROCEEDINGS 27-43 (1959).

48. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1968).

49. S. 1876, 92d Cong., 1st Sess. (1971).

50. *Federal Court Jurisdiction Act of 1971: Continuation of Hearings on S. 1876 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Judiciary Comm.*, 92d Cong., 2d Sess. (1972); *Federal Court Jurisdiction Act of 1971: Hearings on S. 1876 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Judiciary Comm.*, 92d Cong., 1st Sess. (1971).

51. AMERICAN BAR FOUNDATION, ACCOMMODATING THE WORKLOAD OF THE UNITED

ments and procedures that would enable the intermediate appellate courts to function more effectively. It recommended no basic restructuring or jurisdictional rearrangements. However, the report posed several suggestions for further consideration, including the splitting of circuits and the creation of a "National Circuit," using rotating circuit judges to resolve intercircuit conflicts.<sup>52</sup>

A significant by-product of this study was an article written by the project director, Professor Paul Carrington.<sup>53</sup> The most important suggestion in the article was that the dockets of the courts of appeals be divided along subject matter lines and allocated among panels on that basis.<sup>54</sup> The objective was to introduce greater stability into the law of the circuit.

*The Freund Committee.* The next effort was the *Report of the Study Group on the Caseload of the Supreme Court*.<sup>55</sup> The study group was known informally as the Freund Committee after its Chairman, Professor Paul Freund of the Harvard Law School. Appointed under the auspices of the Federal Judicial Center, the committee was charged with the mission of studying the Supreme Court's workload and recommending measures for handling that workload more effectively. The Report made several recommendations, including the elimination of three-judge district courts and the Supreme Court's obligatory jurisdiction.<sup>56</sup> Its most controversial proposal was to create a new court known as the "National Court of Appeals."<sup>57</sup>

This proposed new court would have no permanent judges of its own but would consist of seven U.S. Circuit Judges sitting for staggered three-year terms. Its major function would be to receive and screen all certiorari petitions and appeals. It would funnel approximately 400 to 500 cases to the Supreme Court annually, from which that Court would select approximately 200 for hearing and decision on the merits. The National Court of Appeals could retain cases of genuine circuit conflict for deci-

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STATES COURTS OF APPEALS (1968).

52. *Id.* at 6-8.

53. 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).

54. *Id.* at 587-96.

55. FEDERAL JUDICIAL CENTER, *REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT* (1972).

56. *Id.* at 47.

57. *Id.* at 18-25.

sions on the merits.<sup>58</sup>

The Report had a peculiar fate in that the proposal for a National Court of Appeals leaked to the press prior to publication. The proposal encountered vociferous opposition from influential judges and other parties.<sup>59</sup> The new court was seen by many as diluting the authority of the Supreme Court. Some also objected to depriving litigants with important questions of direct access to that Court. Unfortunately, the proposal was thought by some critics to be a covert attack on the Supreme Court. Whatever the reason, the proposal for this new appellate court was stillborn. The Report was significant, however, in that it focused nationwide attention on federal appellate problems. It also clarified some of the political limits on proposals for the restructuring of appellate courts.

*The Hruska Commission.* In 1972 Congress created the Commission on the Federal Court Appellate System, chaired by Senator Roman Hruska. The commission, the most important governmental effort of the period concerning the courts, consisted of four members of the Senate, four members of the House of Representatives, four persons appointed by the Chief Justice, and four persons appointed by the President. It had a full-time staff and held extensive hearings in various parts of the country. Its first report in 1973 recommended a division of the Fifth and Ninth Circuits.<sup>60</sup> Its second report, submitted in 1975, dealt with structure and internal operating procedures at the appellate level.<sup>61</sup>

The commission's most important and highly publicized recommendation was the creation of a "National Court of Ap-

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58. *Id.*

59. See, e.g., Black, *The National Court of Appeals: An Unwise Proposal*, 83 YALE L.J. 883 (1974); Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473 (1973); Goldberg, *One Supreme Court*, NEW REPUBLIC, Feb. 10, 1973, at 14; Gressman, *The National Court of Appeals: A Dissent*, 59 A.B.A.J. 253 (1973); Lay, *Why Rush to Judgment? Some Second Thoughts on the Proposed National Court of Appeals*, 59 JUDICATURE 173 (1975); Poe, Schmidt, & Whalen, *A National Court of Appeals: A Dissenting View*, 67 NW. U.L. REV. (1973); Address by Earl Warren to the Meeting of the Assoc. of the Bar of the City of New York (May 1, 1973), reprinted in part in 59 A.B.A.J. 721, 724 (1973).

60. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, THE GEOGRAPHICAL BOUNDARIES OF THE SEVERAL JUDICIAL CIRCUITS: RECOMMENDATIONS FOR CHANGE (1973).

61. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (1975).

peals"<sup>62</sup> by Congress. Though bearing the same name, this court had little or no resemblance to the court proposed by the Freund Committee. The proposed court would be inserted between the courts of appeals and the Supreme Court, with a case-deciding function and no certiorari-screening function. The court would consist of seven permanent Article III judges and would sit only en banc. Cases would be received in two ways—by reference from the Supreme Court and by transfer from the existing U.S. Courts of Appeals, the Court of Claims, and the Court of Customs and Patent Appeals. Any case decided by the new court would be reviewable by the Supreme Court on certiorari.

The Hruska Commission proposals were introduced promptly into Congress,<sup>63</sup> where they remain pending. The proposal to divide the Fifth Circuit has been adopted,<sup>64</sup> but there is no prospect of early action concerning the Ninth Circuit. The proposal to create a National Court of Appeals has received little congressional attention thus far, although it has been the subject of discussion in legal literature.<sup>65</sup>

*Advisory Council on Appellate Justice.* This nongovernmental body was created in 1971 to act as an advisor on appellate matters to the Federal Judicial Center and to the National Center for State Courts. Chaired by Professor Maurice Rosenberg, it consisted of thirty members, including judges, lawyers, and law professors. Over a four-year period it considered a variety of problems concerning both state and federal appellate courts. The council developed a set of considerations that should govern the creation of any new federal appellate court or any restructuring at the federal appellate level.<sup>66</sup> These and other

62. *Id.* at 8.

63. S. 2763, 94th Cong., 1st Sess. (1975); S. 2762, 94th Cong., 1st Sess. (1975); H.R. 11,219, 94th Cong., 1st Sess. (1975); H.R. 11,218, 94th Cong., 1st Sess. (1975).

64. The bill passed the Senate in June 1980. S. 2830, 96th Cong., 2d Sess. (1980). H.R. 7645, 96th Cong., 2d Sess. (1980). After this paper was presented, Congress enacted the bill dividing the Fifth Circuit, creating a new Eleventh Circuit. Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (to be codified at 28 U.S.C. §§ 1, 41).

65. See, e.g., Hruska, *The National Court of Appeals: An Analysis of Viewpoints*, 9 CREIGHTON L. REV. 286 (1975); Swygert, *The Proposed National Court of Appeals: A Threat to Judicial Symmetry*, 51 IND. L.J. 327 (1976); Comment, *An Intermediate National Appellate Court: Solution or Diversion?*, 22 VILL. L. REV. 1022 (1977). In July 1981, Sen. Howard T. Heflin introduced S. 1529, a bill to create a National Court of Appeals similar to that proposed by the Hruska Commission.

66. ADVISORY COUNCIL ON APPELLATE JUSTICE, *Recommendation for Improving the*

recommendations were made available to the Hruska Commission. They were then discussed at the National Conference on Appellate Justice in 1975, sponsored by the Advisory Council.<sup>67</sup> In part, the principles devised by the council would support the creation of a new court along the lines of the Hruska Commission proposal.

*American Bar Association.* Through its Special Committee on Coordination of Judicial Improvements and ultimately through House of Delegates action, the American Bar Association developed a position generally supporting the proposal of the Hruska Commission to create a National Court of Appeals, but with jurisdiction limited to cases referred to it by the Supreme Court.<sup>68</sup>

*Individual Judges and Lawyers.* The above efforts in the early 1970's focused attention on appellate problems, particularly in the federal appellate system, to a greater extent than at any time since the years preceding the Act of 1891, and perhaps as never before in the history of the American judiciary. As a result, appellate problems were the focus of discussion within various bar groups, at conferences, and in legal literature. Members of the judiciary who contributed to the debate included Federal Circuit Judges Friendly,<sup>69</sup> Haynsworth,<sup>70</sup> Hufstедler,<sup>71</sup> McGowan,<sup>72</sup> Leventhal,<sup>73</sup> Aldisert,<sup>74</sup> Bell,<sup>75</sup> Rosenn,<sup>76</sup> Rubin,<sup>77</sup>

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*Federal Intermediate Appellate System*, in 4 MATERIALS FOR A NATIONAL CONFERENCE ON APPELLATE JUSTICE 163 (1975).

67. *Id.*; ADVISORY COUNCIL ON APPELLATE JUSTICE, *Expediting Review of Felony Convictions After Trial*, in 3 MATERIALS FOR A NATIONAL CONFERENCE ON APPELLATE JUSTICE 34 (1975); ADVISORY COUNCIL ON APPELLATE JUSTICE, *National Court Development*, in 4 MATERIALS FOR A NATIONAL CONFERENCE ON APPELLATE JUSTICE 202 (1975); ADVISORY COUNCIL ON APPELLATE JUSTICE, *Reports and Recommendations on Improvements of Appellate Practices*, in 5 MATERIALS FOR A NATIONAL CONFERENCE ON APPELLATE JUSTICE 127 (1975).

68. SUMMARY OF ACTION TAKEN BY THE HOUSE OF DELEGATES OF THE AMERICAN BAR ASSOCIATION 4 (Feb. 1976).

69. See H. FRIENDLY, *FEDERAL JURISDICTION* (1973); Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634 (1974).

70. See Haynsworth, *Improving the Handling of Criminal Cases in the Federal Appellate System*, 59 CORNELL L. REV. 597 (1974); Haynsworth, *A New Court to Improve the Administration of Justice*, 59 A.B.A.J. 841 (1973).

71. See Hufstедler, *Courtship and Other Legal Arts*, 60 A.B.A.J. 545 (1974).

72. See Remarks by Carl McGowan to the National Conference on Appellate Justice (Jan. 23-26, 1975), reprinted in MATERIAL FOR A NATIONAL CONFERENCE ON APPELLATE JUSTICE (1975).

73. See Leventhal, *Appellate Procedures: Design, Patchwork, and Managed Flexibility*, 23 U.C.L.A. L. REV. 432 (1976); Leventhal, *A Modest Proposal for a Multi-Circuit Court of Appeals*, 24 AM. U. L. REV. 881 (1975).

and Lay,<sup>78</sup> as well as state appellate judges.<sup>79</sup> Numerous law professors and others also contributed to the interchange.<sup>80</sup>

From a restructuring standpoint, one of the most significant suggestions to appear in the literature was the proposal for a National Court of Criminal Appeals.<sup>81</sup> That court would hear and decide all criminal appeals from the United States District Courts and would entertain state criminal cases involving federal questions. The Supreme Court would exercise certiorari jurisdiction over the decisions of this new court.

*The Department of Justice Committee.* At the Sixth Circuit Judicial Conference in 1975, President Gerald Ford spoke on the problems and needs of the federal courts.<sup>82</sup> Pursuant to that Presidential interest, Attorney General Edward Levi appointed a committee within the Department of Justice, chaired by then Solicitor General Robert Bork, to survey the problems

74. See Aldisert, *Appellate Justice*, 11 U. MICH. J.L. REF. 317 (1978).

75. See Bell, *Toward a More Efficient Federal Appeals System*, 54 JUDICATURE 237 (1971).

76. See Rosenn, *Trends in Administration of Justice in the Federal Courts*, 39 OHIO ST. L.J. 791 (1978).

77. See Rubin, *Views from the Lower Court*, 23 U.C.L.A. L. REV. 448 (1976).

78. See Lay, *Reconciling Tradition with Reality: The Expedited Appeal*, 23 U.C.L.A. L. REV. 419 (1976).

79. E.g., Cameron, *The Central Staff: A New Resolution to an Old Problem*, 23 U.C.L.A. L. REV. 465 (1976); Cameron, *National Court of State Appeals: A View from the States*, 65 A.B.A.J. 709 (1979); Hopkins, *Reviewing Sentencing Discretion: A Method of Swift Appellate Action*, 23 U.C.L.A. L. REV. 491 (1976); Hopkins, *Small Sparks from a Low Fire: Some Reflections on the Appellate Process*, 38 BROOKLYN L. REV. 551 (1972).

80. See, e.g., P. CARRINGTON, D. MEADOR & M. ROSENBERG, *JUSTICE ON APPEAL* (1976); Betten, *Institutional Reform in the Federal Courts*, 52 IND. L.J. 63 (1976); Bright, *The Changing Nature of the Federal Appeals Process in the 1970's*, 65 F.R.D. 496 (1975); Cramton, *Federal Appellate Justice in 1973*, 59 CORNELL L. REV. 571 (1974); Finley, *The Appellate System: On a Vulnerable Plateau*, TRIAL, Nov.-Dec. 1971, at 19; Hazard, *Standards of Judicial Administration: Appellate Courts*, 62 A.B.A.J. 1015 (1976); Leflar, *Appellate Judicial Innovation*, 27 OKLA. L. REV. 321 (1974); Meador, *Appellate Case Management and Decisional Processes*, 61 VA. L. REV. 255 (1975); Robinson, *Proposal and Analysis of a Unitary System for Review of Criminal Judgments*, 54 B.U. L. REV. 485 (1974); Rosenberg, *Enlarging the Federal Courts' Capacity to Settle the National Law*, 10 GONZ. L. REV. 709 (1975).

81. See Haynsworth, *Improving the Handling of Criminal Cases in the Federal Appellate System*, 59 CORNELL L. REV. 597 (1974); Haynsworth, *A New Court to Improve the Administration of Justice*, 59 A.B.A.J. 841 (1973). A broader proposal for a court that would review both criminal and civil appeals was suggested by Chief Justice Cameron. Cameron, *National Court of State Appeals: A View from the States*, 65 A.B.A.J. 709 (1979).

82. The President's Remarks at a Breakfast for Participants Attending the Conference on Mackinac Island, Mich., 11 WEEKLY COMP. OF PRES. DOC. 745-47 (July 13, 1975).

and develop recommended solutions. The committee completed its work in 1976.<sup>83</sup>

The committee recommendations included proposals to create a set of administrative law tribunals, possibly with trial and appellate divisions, manned by Article I judges.<sup>84</sup> These courts would provide judicial review for a multitude of administrative actions under federal regulatory laws in fields such as health, occupational safety, social security, labor, and environmental protection.<sup>85</sup> If implemented, this proposal would divert from the existing federal courts some 20,000 or more cases annually.

The committee reasserted the Freund Committee's recommendation that the Supreme Court's obligatory jurisdiction be eliminated,<sup>86</sup> and it recommended abolishing diversity of citizenship jurisdiction.<sup>87</sup> The committee recommended the creation of a permanent interbranch Council on Federal Courts to work on continuous planning and coordinating improvements in the judiciary.<sup>88</sup> However, the committee did not favor the creation of a National Court of Appeals.<sup>89</sup>

Given the original Presidential impetus, the committee's report presumably would have served as the basis for an administration program to be urged upon Congress if President Ford had been elected in 1976. However, it was not until January 1977, a few days before the inauguration of President Carter, that the report appeared in print and became public. Because of this timing, the report unfortunately received little public attention, although several of the recommendations were pursued vigorously by the Carter administration.

*Office for Improvements in the Administration of Justice.* The last effort of the decade, outside of Congress and the courts, was initiated by Attorney General Griffin Bell. Shortly after he took office in late January 1977, he established, as a new unit within the Department of Justice, the Office for Improvements in the Administration of Justice (OIAJ).<sup>90</sup> This Office embodied the idea that the Department of Justice be committed perma-

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83. DEPARTMENT OF JUSTICE COMMITTEE ON REVISION OF THE FEDERAL JUDICIAL SYSTEM, *THE NEEDS OF THE FEDERAL COURTS* (1977).

84. *Id.* at 9..

85. *Id.*

86. *Id.* at 12.

87. *Id.* at 15.

88. *Id.* at 16.

89. *Id.* at 18.

90. 42 Fed. Reg. 8140 (1977).



nently, through a continuously functioning office, to justice system studies and improvements. Attorneys General from the beginning of the government have made proposals from time to time for improving the federal judiciary. As mentioned earlier, Attorneys General Garland and Miller were active in the late 1880's in the effort to bring about the establishment of the intermediate appellate courts. But until 1977 there was never an office with a mandate to work continuously on the entire range of the justice system, to identify its problems, and to recommend solutions. The former Office of Policy and Planning had dealt primarily with problems within the criminal justice field.

During the two years following its creation, OIAJ developed and attempted to promote in Congress, on behalf of the Department of Justice and the administration, several proposals to improve the federal judiciary. The earliest of the OIAJ proposals was a bill to enlarge the civil and criminal jurisdiction of federal magistrates. That proposal was designed to augment judicial manpower at the trial level. The bill was enacted in late 1979.<sup>91</sup>

OIAJ also developed a bill carrying forward the recommendations of the Freund Committee and the Levi-appointed Justice Department committee to eliminate the Supreme Court's obligatory jurisdiction.<sup>92</sup> The latter committee's recommendation to abolish the general diversity jurisdiction was also endorsed in the Congress.<sup>93</sup> The Office also developed proposals aimed at improving the administration of the federal judiciary by reducing the size and altering the composition of the Judicial Councils of the circuits and requiring the courts of appeals to appoint advisory committees to assist them in formulating rules of practice and internal operating procedures.<sup>94</sup>

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91. The Federal Magistrate Act of 1979, Pub. L. No. 96-82, 93 Stat. 643 (amending 28 U.S.C. §§ 631-636, 604(d)(3), 1915 (1976); 18 U.S.C. § 3401 (1976)).

92. *Supreme Court Jurisdiction Act of 1978: Hearings on S. 3100 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Judiciary Comm.*, 95th Cong., 2d Sess. (1978) (statements and discussions of Wade H. McCree, Jr., and Daniel J. Meador). The measure passed the Senate in 1979. S. 450, 96th Cong., 1st Sess. (1979).

93. *Diversity of Citizenship Jurisdiction/Magistrates Reform—1979: Hearings on H.R. 1046 and H.R. 2202 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 133 (1979) (statement of Daniel J. Meador); *Federal Diversity of Citizenship Jurisdiction: Hearings on S. 2094, S. 2389 and H.R. 9622 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 64 (1978) (statement of Daniel J. Meador).

94. S. 677, 96th Cong., 1st Sess. (1979). See *Federal Courts Improvement Act of 1979: Hearings on S. 677 and S. 678 Before the Subcomm. on Improvements in Judicial*

The most significant idea developed in OIAJ concerning the appellate courts was the proposal to create a new intermediate appellate court. The court would be known as the United States Court of Appeals for the Federal Circuit. This new court would be brought about by a fusion of the Court of Claims and the Court of Customs and Patent Appeals. The new court would have jurisdiction over all of the appellate business now handled by those two courts and, in addition, would have nationwide jurisdiction over all appeals from the district courts in patent cases as well as a few other kinds of cases. The proposal also included the creation of a new Article I forum known as the United States Claims Court. This court would handle the trial business of the present Court of Claims.<sup>95</sup> That proposal passed the Senate in 1979<sup>96</sup> and passed the House in 1980.<sup>97</sup> The bills contained minor differences, however, and the proposal died in conference in late 1980. It was reintroduced in 1981.

All of these proposals, formulated by OIAJ and endorsed by the Attorney General, were incorporated into a Presidential message to Congress on February 27, 1979.<sup>98</sup> The legislative proposals accompanying that message had been worked out collaboratively by OIAJ with key staff personnel of the Senate Judiciary Committee and the House Judiciary Subcommittee. The proposals were announced by President Carter at a White House press briefing attended by the Attorney General and members of the Senate and House Judiciary Committees.<sup>99</sup>

Thus, by the close of the decade, significant proposals designed to place the federal judiciary in a more effective position had received Presidential backing and were part of an administration program for congressional action. A similar development likely would have occurred had the Ford administration remained in office, in view of the interest voiced by President Ford and carried forward by the committee appointed by Attor-

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*Machinery of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 35, 71 (1979) (statement of Daniel J. Meador).

95. The proposal is discussed in the Proceedings of the Sixth Annual Judicial Conference of the United States Court of Customs and Patent Appeals (May 9, 1979), reprinted in 84 F.R.D. 429, 465-89; Haworth & Meador, *A Proposed New Federal Intermediate Appellate Court*, 12 U. MICH. J.L. REF. 201 (1978).

96. S. 1477, 96th Cong., 1st Sess. (1979).

97. H.R. 3806, 96th Cong., 2d Sess. (1980).

98. 15 WEEKLY COMP. OF PRES. DOC. 342-46 (Feb. 27, 1979).

99. 15 WEEKLY COMP. OF PRES. DOC. 340 (Feb. 27, 1979).

ney General Levi.<sup>100</sup>

That committee's recommendation that a Council on Federal Courts be created was sought to be implemented by OIAJ. However, after discussions among representatives of OIAJ, the Senate Judiciary Committee, the House Judiciary Committee, Vice President Mondale's Office, and the judiciary, the conclusion was reached that the formal creation of such a body was probably not feasible any time soon. As a result of those discussions, however, representatives from the three governmental branches met in Williamsburg, Virginia in early 1978. They have met there every year since that time in a seminar-style gathering under the aegis of the Brookings Institution. Representatives at these sessions discuss currently pending legislation concerning the courts, as well as problems of the judiciary that may be the subject of future legislation. Although informal and unofficial, these annual sessions provide a means of communication among the three governmental branches concerning the judiciary.

*Congressional Activity.* Although congressional action may seem small in relation to the magnitude of the judiciary's problems and the efforts of the last dozen years, it has not been insignificant. Congress created the Federal Judicial Center in 1968 to provide a research and educational arm for the federal courts.<sup>101</sup> The Center's budget has been regularly increased over the years since then. Currently the budget is in excess of eight million dollars.<sup>102</sup> The Act initiating the federal magistrate system was also passed in 1968.<sup>103</sup> Congressional activity over the next several years was devoted to hearings on the ALI proposals,<sup>104</sup> the creation of the Hruska Commission,<sup>105</sup> and to hearings on circuit splitting.<sup>106</sup>

Congressional concern with federal judicial problems entered a new phase in 1977. Beginning early that year, in the first session of the 95th Congress, the two subcommittees of the Sen-

100. See text accompanying notes 82-83 *supra*.

101. Act of Dec. 20, 1967, Pub. L. No. 90-219, 81 Stat. 664 (codified at 28 U.S.C. §§ 611, 620-29 (1976)).

102. 1979 ANN. REP., *supra* note 5, at 35.

103. Federal Magistrates Act, Pub. L. No. 90-578, 82 Stat. 1107 (codified at 28 U.S.C. §§ 631-639 (1976)).

104. See hearings cited at note 50 *supra*.

105. Act of Oct. 13, 1972, Pub. L. No. 92-489, 86 Stat. 806.

106. *Circuit Realignment: Hearings on S. 2988, S. 2989, and S. 2990 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Judiciary Comm.*, 93d Cong., 1st Sess. (1974).

ate and House Judiciary Committees charged with jurisdiction over courts stepped up congressional attention on these matters.

In the Senate, the Judiciary Subcommittee on Improvements in Judicial Machinery acquired a new chairman, Senator Dennis DeConcini of Arizona. During the next two years, that subcommittee was the center of Senate interest regarding court problems. Much of the subcommittee's agenda was worked out in collaboration with the Office for Improvements in the Administration of Justice. In addition, other measures were developed within its own staff and with the staff of the Judiciary Committee. The subcommittee held hearings on the bills to expand magistrate jurisdiction,<sup>107</sup> to limit or abolish diversity of citizenship jurisdiction,<sup>108</sup> to eliminate the Supreme Court's obligatory jurisdiction,<sup>109</sup> to authorize court-annexed arbitration in the district courts,<sup>110</sup> to create the U.S. Court of Appeals for the Federal Circuit,<sup>111</sup> the U.S. Claims Court, and the U.S. Court of Tax Appeals, and numerous other measures aimed at improving the federal judiciary.

In the House, the Judiciary Subcommittee on Courts, Civil Liberties, and the Constitution, chaired by Representative Robert W. Kastenmeier of Wisconsin, approached these problems by first holding exploratory hearings on the justice system in the spring of 1977. Numerous individuals testified about the needs and problems of the federal courts and the administration of justice generally.<sup>112</sup> Then, during the next two years the subcommittee held hearings on the magistrate bill,<sup>113</sup> the diversity of

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107. *Magistrate Act of 1977: Hearings on S. 1612 and S. 1613 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Judiciary Comm.*, 95th Cong., 1st Sess. (1977).

108. *Federal Diversity of Citizenship Jurisdiction: Hearings on S. 2094, S. 2389, and H.R. 9622 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Judiciary Comm.*, 95th Cong., 2d Sess. (1978).

109. See hearings cited at note 92 *supra*.

110. *The Court-Annexed Arbitration Act of 1978: Hearings on S. 2253 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. (1978).

111. *Federal Courts Improvement Act of 1979: Hearings on S. 677 and S. 678 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979); *Federal Courts Improvement Act of 1979: Addendum to Hearings on S. 677 and S. 678 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979).

112. *Hearings on the State of the Judiciary and Access to Justice Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Comm.*, 95th Cong., 1st Sess. (1977).

113. See hearings cited at note 93 *supra*.

citizenship bills,<sup>114</sup> and the bill to create the U.S. Court of Appeals for the Federal Circuit and the U.S. Claims Court.<sup>115</sup>

In addition to the activities in these House and Senate subcommittees, the Senate Judiciary Committee, in early 1979, launched consideration of a package of proposals, consisting of already pending measures plus an array of new ideas to improve the federal courts.<sup>116</sup> The carryover measures included the bills on diversity jurisdiction<sup>117</sup> and magistrates.<sup>118</sup> New proposals concerned the organization of the circuit Judicial Councils<sup>119</sup> and the creation of a U.S. Court of Tax Appeals,<sup>120</sup> U.S. Court of Appeals for the Federal Circuit,<sup>121</sup> and U.S. Claims Court.<sup>122</sup> All of these measures, except the proposal for a Tax Court of Appeals, had just been endorsed by the President in his message of February 27, 1979.<sup>123</sup>

Despite the many hearings and the considerable efforts of governmental and nongovernmental groups throughout the 1970's, Congress passed only three significant bills to equip the federal judiciary to deal with contemporary conditions: the Bankruptcy Reform Act of 1978,<sup>124</sup> the Omnibus Judgeship Act of 1978,<sup>125</sup> and the Federal Magistrate Act of 1979.<sup>126</sup> These all came near the end of the decade. Collectively, these measures enable the federal judiciary to adjudicate a larger number of cases within more reasonable periods of time. As suggested earlier, however, the substantial addition to judicial manpower and the change in judicial business have resulted in a different judicial system than existed just a few years ago.

114. *Id.*

115. *The Court of Appeals for the Federal Circuit Act of 1980: Hearings on H.R. 3806 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Comm.*, 96th Cong., 2d Sess. (1980). H.R. 3806 passed the House on Sept. 15, 1980 and the bill was sent to the Senate Committee on the Judiciary Sept. 17. The Senate committee discharged the bill and placed it on the Senate Calendar on Sept. 30, 1980.

116. See hearings cited at note 111 *supra*.

117. S. 2389, 95th Cong., 2d Sess. (1978).

118. S. 237, 96th Cong., 1st Sess. (1979).

119. S. 678, 96th Cong., 1st Sess. § 121 (1979).

120. *Id.* § 401.

121. *Id.* § 301.

122. *Id.* § 311.

123. 15 WEEKLY COMP. OF PRES. DOC. 342 (Feb. 27, 1979).

124. Pub. L. No. 95-598, 92 Stat. 2549 (to be codified in scattered sections of 11, 28 U.S.C. (Supp. II 1978)).

125. See note 30 *supra*.

126. See note 91 *supra*.

*Judicial Actions.* In addition to the changes wrought by the recent legislation, significant changes have been brought about within the courts during the past decade by the judges themselves. These have altered radically the way in which the business of the federal courts is conducted. The judges have introduced new management techniques at both trial and appellate levels. Computerization has made much headway. Some of the most striking changes have come within the courts of appeals through new internal operating procedures, the use of central staff attorneys, and the screening and tracking of appeals. These and other steps, which allow a substantial percentage of cases to be decided through expedited processes, have changed the face of the judiciary as compared to that in the mid-1960's and have enabled the courts to avoid disastrous breakdowns threatened by ever-rising case filings.

Although the legislation recently enacted by Congress is helpful in adding to the resources of the judiciary and in working a modest restructuring at the trial level, these enactments, combined with the actions taken by the judges, fall short of placing the judiciary in a position to deal effectively with its contemporary business. In particular, the problems of lack of uniformity in federal law are not ameliorated by these measures. Since congressional action is necessary to overcome the most significant deficiencies in the court system, we must understand the impediments to such action if meaningful results are to be achieved.

### III. IMPEDIMENTS TO CONGRESSIONAL ACTION

The impediments to congressional action stem from a variety of circumstances briefly described below. Any one of these poses difficulties for the proponents of court improvement legislation; in combination they are formidable.

*Congressional Priorities, Attention, and Time.* The American Congress is beset in the late twentieth century with an almost endless list of problems, demands, and challenges. These range from trivial matters to questions of national and global significance. They concern energy, national defense, disarmament, tax reform, medical care, education, immigration, and so on. Courts, the justice system, and related problems are also on the agenda. But the congressional agenda is filled with so many issues perceived to be of greater and more urgent importance that most members of Congress—indeed, all but a tiny hand-

ful—find courts far down on their list of priorities. They simply do not have the time or the inclination to focus on long-range problems concerning the judiciary. Their attention is dispersed over so many matters and is claimed by so many other demands that Congress as a whole finds it difficult to give the judiciary the kind of attention necessary to bring about significant reforms.

*Lack of Influential Political Constituencies.* An effectively functioning court system is everybody's business. There are few matters of greater general public importance. However, the subject is not one around which there has coalesced any influential political constituency that prompts Congress to act, as in other areas such as labor, welfare, taxation, medical care, education, agriculture, and so on. There are, of course, groups interested in judicial improvements, but they are relatively small and lack political clout. Thus judicial problems are not brought to the attention of Congress by the extensive lobbying efforts employed by other important interest groups.<sup>127</sup> This circumstance, in part, contributes to the priority problems already discussed.

The relative weakness of court reform interests in the political arena also makes it difficult to activate the President on this subject. Thus, court improvement bills pending in Congress seldom attract strong support from the administration.

*Special Interest Opposition.* Although there are no special interest groups of political magnitude affirmatively supporting court reform efforts, there are numerous special interest groups that will promptly rise in opposition to such efforts. Many of the influential political constituencies have watchdog services that pick up the slightest proposal to alter structure, jurisdiction, or procedure of the courts in any way that might arguably have some adverse impact upon their special interests. When that circumstance is coupled with the lack of an effective constituency affirmatively pressing for court reform, the result is predictable: no action by Congress. The totality of the circumstances—more urgent and pressing national priorities, lack of affirmative constituencies pushing reform, and special interests ready to rise in

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127. To provide a formal means of communicating the judiciary's concerns to the Congress, a proposal has been made for several years to invite the Chief Justice to address periodically a joint session. A bill embodying this idea passed the Senate in 1980. S. 2483, 96th Cong., 2d Sess. (1980). Hearings were held in the House on Sept. 19, 1980. *Hearings on H.R. 6597 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. (1980).

opposition—makes it difficult for any significant court reform measure to attract the serious attention of Congress and to progress through the legislative labyrinth.

*Lawyer and Bar Negativism.* Although a few individual lawyers have, at various times in American history, including the present, exercised significant leadership roles in bringing about court improvements, such individuals are an infrequent minority. Likewise, although bar organizations occasionally support court reform efforts,<sup>128</sup> such support is unusual. The dominant attitude among individual lawyers and among the organized bar is either indifference or negativism regarding proposals to alter existing structure, jurisdiction, or procedure.<sup>129</sup>

There appear to be several reasons for this indifference or negativism. One is simple inertia—the understandable human disinclination to alter a known and comfortable existing arrangement. Although this tendency is natural, it seems more prevalent among lawyers than among other breeds of mankind. Another reason for the negativism relates to the specialization of the bar. Today, to a far greater degree than in past decades, lawyers tend to concentrate in areas of the law where they represent distinct groups of clients. Consequently, lawyers tend to react to matters in terms of their clients' interests, rather than as independent, detached, and professional observers. A lawyer with a

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128. *E.g.*, Hufstедler & Neјelski, *A.B.A. Action Commission Challenges Litigation Cost and Delay*, 66 A.B.A.J. 965 (1980) (The ABA Action Commission to Reduce Court Costs and Delay was established to promote experimental procedures to expedite litigation and to make it less expensive.); *Report of the Special Comm. on Coordination of Judicial Improvements*, 101 A.B.A. REP. 350 (1976) (The ABA supported the adoption by Congress of S. 2762, a bill for the establishment of a National Court of Appeals, except as it related to transfer jurisdiction; in February 1974 the House of Delegates had adopted a resolution supporting in principle the creation of a new appellate court.).

129. This atmosphere is not easy to document because it is not always reflected in published material. A recent example that can be documented is the opposition of certain groups of trial lawyers to measures aimed at limiting or abolishing the diversity of citizenship jurisdiction. *See, e.g.*, *Hearings on Diversity of Citizenship Jurisdiction/Magistrate Reform 1979 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 54 (1979) (statement of John C. Shepherd); *Hearings on Federal Diversity of Citizenship Jurisdiction Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 96th Cong., 2d Sess. 28 (1978) (statement of John P. Frank); *Hearings on Diversity of Citizenship Jurisdiction/Magistrate Reform Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 70 (1977) (statement of Robert G. Begam). Leading members of the American bar opposed abolition of the U.S. Circuit Courts in the early 20th century long after they had ceased to serve any useful purpose. *See* note 45 *supra*.



truly general practice does not have this problem to the same degree. Because by definition he represents all types of clients from all walks of life, no particular client or class of clients claims any special lock on his thoughts, time, or income. Consequently, general practitioners may think more objectively about what may be good for the system, but such lawyers are now few.

A final possible explanation for lawyer indifference or negativism has to do with the lawyers' own economic interests. Sometimes proposals for court improvement are seen as threatening those interests. They may either diminish the lawyers' practice in some way or make their practice economically less rewarding. Whatever the reasons, when almost any proposal for a significant change in the courts is advanced, numerous lawyers and bar associations can be expected to come forward in opposition.

*Lack of Continuity of Program and Effort.* Another impediment to congressional action is the lack of continuity in the programs and efforts to reform the judicial system. This, in large part, is a result of all of the foregoing circumstances. Two factors make it unlikely that any well-developed program of reform will be pressed with continuity of effort over a sufficient period of time to bring it to fruition: the lack of congressional time and attention, because of other more urgent priorities, and the lack of an affirmative political constituency pushing for court reform. Such efforts as there are tend to be sporadic and aimed at relatively narrow, specific aspects of the court system, rather than at broad, system-wide problems. Even when an extensive, well-thought-out proposal is presented to Congress, continuity of effort seems to be lacking. Interest, organization, and resources are insufficient to maintain an impetus behind the proposal long enough for it to pass both Houses of Congress.

An additional reason why few of the significant judicial proposals of the last decade have been enacted may be the lack of consensus in American society about important public questions. The rise of single interest groups and the political fragmentation evident during the past decade probably interfere with the development of a coherent body of opinion concerning solutions to the courts' problems.

Despite these circumstances militating against significant court reform enactments in Congress, we cannot simply abandon efforts to equip the judiciary to cope with inflation and malfunction. We must devise a course of action that takes the impedi-

ments into account and is designed to achieve results despite them. Before thinking about courses of action to be pursued, however, we need to identify more precisely the problems of the federal judiciary on which attention should primarily be focused.

#### IV. PRIORITIES

At any given time, a host of matters concerning jurisdiction, procedure, and management of the courts could profit from study and change. Continuous efforts to improve the judiciary in all respects should of course be maintained. However, given the limitations on congressional time and on available resources within the bench and the bar, we must avoid dispersing effort over too large an array of matters. Instead, we should give priority to the most pressing system-wide problems, the resolution of which would most significantly aid the judiciary in administering justice under law. The chief objective should be to provide sound, expeditious adjudication and to maintain a high degree of nationwide uniformity in federal law.

The federal judicial system is malfunctioning primarily because the existing structure is not designed to handle contemporary business effectively. The problem is one of judicial architecture. A court system is like a building. As years pass, as the nature of the building's business changes, and as the traffic patterns are altered, the structure needs to be remodeled, renovated, or perhaps even rebuilt. The courts are no different. Structures are not created for all time. We create what seems to be best in light of the circumstances of the day, but we do so with the realization that conditions change.<sup>130</sup> Lord Macauley wisely observed that it is necessary to reform in order to preserve. One can change consistently with enduring principles. Indeed, the principles are unlikely to be kept alive and vigorous unless reforms are instituted from time to time. Today, as in the 1880's, we have come to a point where architectural modification of the system is needed at the appellate level. That should be assigned first priority.

*Intermediate Appellate Court Restructuring.* A natural response to the growing quantity of judicial business is to add judges to the courts. That response is based on analogies to other situations in which an increase in business tends to over-

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130. "[G]reat judiciary acts, unlike great poems, are not written for all time." F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 107 (1927).

load existing personnel. For example, as the number of customers attracted to a bank grows, the existing tellers' windows become insufficient to receive the increased volume of deposits and checks. A reasonable response is to increase the number of windows. To a considerable extent, this analogy holds true for trial courts. Adding trial judges will equip a trial court to handle a greater volume of cases. Apart from providing a sufficient number of courtrooms and clerical personnel, there is no serious institutional difficulty with that approach. Each trial judge is an autonomous decisionmaking entity. He sits alone, hears matters by himself, and renders independent decisions. The trial judge conducts adjudicative business essentially the same, whether the particular court has three judges or a hundred judges.

In an appellate court, the situation is significantly different. Appellate judges rarely, if ever, sit alone. Appellate decisions are rendered collegially. Thus, the addition of judges to an appellate court does not necessarily increase the court's capacity or efficiency, unless the court is divided so that it does not sit as a single decisional unit. This is what has been done in the U.S. Courts of Appeals and in other large appellate courts. Each U.S. Court of Appeals now sits in multiple panels of three. The only potential gain in adding appellate judges is to increase the number of three-judge decisional units within each circuit. This step increases the capability of the court to decide more appeals and thereby to cope with the problem of quantity.

But here we see an illustration of a phenomenon often encountered in judicial reform: a step taken to alleviate one problem sometimes creates other, equally troubling problems. Increasing the number of decisional units to meet the growth in quantity threatens uniformity, evenhandedness, and stability in the application of law. The most stable, certain, and predictable appellate arrangement would be a court composed of permanently assigned judges, all of whom sit on each appeal. The farther we move away from that model, the greater the risk of eroding those qualities. Multiple decisional units within a single appellate jurisdiction risk the creation of a judicial Tower of Babel.

For years following the creation of the U.S. Courts of Appeals in 1891, there were only two circuit judges in each of the federal judicial circuits. Both sat on virtually all appeals in the circuit, with either a Supreme Court justice or a district judge sitting as the third member of the panel. As judicial business has

grown in the twentieth century, the number of judges provided for each circuit has increased. However, the system of sitting in three-judge panels has continued. As the number of circuit judges grew, each court of appeals began to hear appeals in varying and shifting panels of three.<sup>131</sup> Although this practice introduced elements of uncertainty, as long as the court did not consist of more than six or seven judges, the level of uncertainty was not intolerable. Moreover, if there were no more than nine judges, a court of appeals could occasionally hold an en banc hearing to iron out any uncertainties or unevenness resulting from the use of multiple three-judge panels.

The federal judicial system has now reached the stage where the number of appellate decisional units risks serious unevenness and uncertainty within each circuit and between the circuits. Since passage of the Omnibus Judgeship Act of 1978, the Ninth Circuit has consisted of twenty-three judges. The Fifth Circuit consisted of twenty-six judges prior to its division on October 1, 1981.<sup>132</sup> Eight circuits now exceed nine judges in size.<sup>133</sup>

As the likelihood of differing interpretations and applications of federal law has increased, the efficacy of an en banc procedure to iron out internal circuit variations has greatly diminished. When an appellate court exceeds nine judges, it is widely believed that the en banc procedure is more cumbersome, less likely to be employed, and less productive of a coherent, collegial decision. Whatever might be the optimum number for an en banc body, it is clear that a single court of twenty-three or twenty-six judges makes a mockery of a judicial proceeding. The Fifth Circuit sat en banc several times after it was authorized twenty-six judgeships. An examination of some of the en banc opinions produced by that body suggests that it ceased to be the kind of appellate tribunal to which the Anglo-American legal system has been accustomed. Opinions were issued by clumps of judges, as though they were members of a convention or a legis-

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131. 28 U.S.C. § 46(c) (1976 & Supp. III 1979).

132. The Circuit was divided, effective October 1, 1981, into the Eleventh Circuit, consisting of Alabama, Georgia, and Florida, and the Fifth Circuit, consisting of Mississippi, Louisiana, and Texas. Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (to be codified at 28 U.S.C. §§ 1, 41).

133. District of Columbia Circuit, 11 judges; First Circuit, 4 judges; Second Circuit, 11 judges; Third Circuit, 10 judges; Fourth Circuit, 10 judges; Fifth Circuit, 14 judges; Sixth Circuit, 11 judges; Seventh Circuit, 9 judges; Eighth Circuit, 9 judges; Ninth Circuit, 23 judges; Tenth Circuit, 8 judges; Eleventh Circuit, 12 judges.

lative body instead of an appellate court.<sup>134</sup>

In a court of nine judges there are 84 possible combinations of three; in a court of fifteen judges there are 455 such combinations; in a court of twenty-three judges there are 1,771 possible groups of three. The diminished efficacy of the en banc proceeding, along with the greatly increased number of decisional units, places an enormous stress on the Supreme Court as the only means to iron out unevenness within each circuit as well as between circuits. Yet the Supreme Court, consisting of nine justices, is obviously limited in its capacity. In fact, the Supreme Court is simply incapable institutionally of monitoring the current volume of circuit court decisions. The statistics tell the tale: a generation or two ago the Supreme Court was reviewing upward of a third of all circuit court decisions; today the Court reviews less than one percent.<sup>135</sup>

In the years prior to 1891 the systemic problem was how to devise a coherent appellate supervision of trial court decisions where the number of trial courts and the volume of their decisions had swollen enormously. The Supreme Court, as the single federal appellate tribunal, had been overrun; it lacked the institutional capacity to deal with the number of appeals from the trial level.

Today the problem is similar; yet there is a significant difference. Intermediate appellate courts created to meet the 1891 lack of capacity now lack a similar capacity themselves. The courts at that level are unable institutionally to deal with the

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134. *E.g.*, *Bernard v. Gulf Oil Co.*, 619 F.2d 459 (5th Cir. 1980) (22 judges: 13 on the majority opinion, 5 on a concurring opinion, 3 for a second concurrence, 1 in dissent); *United States v. Dohm*, 618 F.2d 1169 (5th Cir. 1980) (23 judges: 10 on the plurality opinion, 4 on a concurring opinion, 1 concurring in the result only, 7 concurring in part and dissenting in part, 1 separately concurring in part and dissenting in part); *United States v. Williams*, 617 F.2d 1063 (5th Cir. 1980) (23 judges: 12 on the majority, 6 in a concurring opinion, 4 concurring in the result only, 1 separately concurring); *Harryman v. Estelle*, 616 F.2d 870 (5th Cir. 1980) (23 judges: 8 on the plurality opinion, 3 on a concurring opinion, 2 on a second concurrence, 9 on a third concurrence, 1 concurring in part and dissenting in part).

135. Hufstедler, *Courtship and Other Legal Arts*, 60 A.B.A.J. 545, 546-47 (1974); see Griswold, *Rationing Justice—The Supreme Court's Caseload and What the Court Does Not Do*, 60 CORNELL L. REV. 335, 341 (1975). Between 1974 and 1976 the Supreme Court gave plenary consideration to between 175 and 179 cases each term. See Hellman, *The Business of the Supreme Court Under the Judiciary Act of 1925: The Plenary Docket in the 1970's*, 91 HARV. L. REV. 1711, 1727 n.74 (1978). This compared with approximately 15,500 and 18,400 cases filed annually in the courts of appeals during the same period. [1977] DIRECTOR ADMINISTRATIVE OFFICE U.S. COURTS ANN. REP. 305, table B3.

swollen volume of appeals in a way that preserves a reasonable nationwide uniformity in federal law. The Supreme Court lacks the capacity to maintain that uniformity through its supervision of the intermediate appellate courts.

The response in 1891 was to alter the federal judicial structure by introducing an intermediate appellate level. The appropriate response today is much more complicated. The solution proposed by the Hruska Commission is to insert still another tier into the judicial structure, a National Court of Appeals, between the regional courts of appeals and the Supreme Court.<sup>136</sup> Thus far, however, the idea of an additional appellate layer has not elicited sufficient support to pass Congress. There is reluctance to lengthen the ladder between the bottom and the top of the system. Nevertheless, it is possible that this may be the best solution, considering all of its advantages and disadvantages.

Another approach to the problem, which has not been extensively explored, is to employ a subject matter organization within the intermediate appellate tier. This type of organization could accommodate numerous judges within a single appellate court to deal with a large volume of cases. Subject matter organization has been used for decades, apparently with sound results, in the appellate court system of Germany. Today in the Federal Republic of Germany there are appellate courts consisting of well over one hundred judges each.<sup>137</sup> Within each of these courts, docket and panel assignments are arranged along subject matter lines. Each of these courts is divided into groups of either five or seven judges, and each small group is assigned a designated but varied mixture of cases. Typically, each group has several categories of cases. Even so, each group's caseload represents a relatively small percentage of the court's docket. Under this system, even if the court itself has over 100 judges, there will be an identifiable appellate body of five, or no more than seven, judges who deal with a given type of case. The values of predictability and certainty associated with a small, fixed appellate forum are preserved as to each category of case, regardless of the total number of judges on the court. This system makes

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136. See notes 61, 63, 65 and accompanying text *supra*.

137. The numbers of judges on the German appellate courts can be derived from *Handbuch der Justiz* (1978 ed.). A description of the German appellate system is contained in HEYDE, *THE ADMINISTRATION OF JUSTICE IN THE FEDERAL REPUBLIC OF GERMANY* (1971). See also Meador, *Appellate Subject Matter Organization—The German Design from an American Perspective*, 5 *HASTINGS INT'L & COMP. L. REV.* — (1982).

the addition of judges and the expansion in the number of decisional entities at the appellate level far less difficult.

Subject matter organization could be installed in the U.S. Courts of Appeals. In the larger circuits—those exceeding nine judges—the docket could be allocated among panels on a subject matter basis. Panels could remain intact for substantial periods of time, perhaps three years, with a staggered, gradual rotation. In any one circuit, at any one time, there would be a fixed panel of judges dealing with each particular type of case, but no judge would be confined to a single type of case. The system would preserve the values of stability and continuity, while avoiding the pitfalls of a permanent specialization for any individual judge. For example, in the course of a judicial career of ten or fifteen years, a judge would rotate through several panels and deal with a variety of types of cases.<sup>138</sup> Presumably such an internal arrangement could be established by the individual court of appeals or by the Judicial Conference of the United States for all circuits. Alternatively, the plan could be embodied in legislation.

Using a subject-matter assignment system within each circuit would reduce the number of decisional units nationwide for most types of cases to the number of circuits, twelve. That is a vast improvement over the many dozens of such units that presently exist. However, even with twelve decisional units there will still be occasional inter-circuit conflicts and long delays in settling a disputed issue of federal law. For certain kinds of cases there is a compelling need for early resolution and a high degree of national uniformity. For those cases, a single appellate forum can be designated to entertain all appeals nationwide. For example, since the Second World War, Congress has created a Temporary Emergency Court of Appeals on two occasions, to deal with wage and price control and energy matters, on the theory that there was a compelling need for nationwide uniformity.<sup>139</sup>

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138. The idea of subject matter organization was put forward in Carrington, *supra* note 53, and was discussed in P. CARRINGTON, D. MEADOR & M. ROSENBERG, *JUSTICE ON APPEAL* 185-224 (1976).

139. The Emergency Price Control Act of 1942, ch. 26, § 204(c), 56 Stat. 31, established the Emergency Court of Appeals. Its jurisdiction was expanded by the Housing and Rent Act of 1948, ch. 161, § 202, 62 Stat. 93 (codified at 50 U.S.C. app. §§ 1884, 1894, 1898 (1976)); and the Defense Production Act of 1950, ch. 932, 64 Stat. 798 (codified at 50 U.S.C. app. §§ 2061-2166 (Supp. II 1978)). Authority for that Emergency Court terminated in 1962. The Temporary Emergency Court of Appeals was later established pursuant to the Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, 85

The two types of cases where the need for uniformity today is considered most prevalent are tax and patent cases. There have been recurrent suggestions to create jurisdiction in a single forum over tax appeals, and a bill was introduced in 1979 to establish such a forum.<sup>140</sup> Another pending bill would create a U.S. Court of Appeals for the Federal Circuit, which would have nationwide appellate jurisdiction over patent cases. No doubt there are other categories that could be identified as special needs arise, and there are, of course, various ways in which a forum can be established to entertain such nationwide appeals.

Two of these ways are illustrated in the currently pending bills. The Court of Appeals for the Federal Circuit would be a permanent appellate court manned by its own circuit judges. The proposed tax appeals court would be a forum consisting of judges drawn from the existing U.S. Courts of Appeals, sitting by designation for terms of years and convening periodically to hear tax appeals. Each of these courts would be on line with the existing courts of appeals.

All of the above are simply suggested approaches to resolve the current difficulties at the intermediate appellate level. As explained by Professor Paul Carrington twelve years ago, the current situation poses a substantial threat to the national law.<sup>141</sup> The threat has not diminished and, indeed, is rising with the increase in the number of appellate decisional units and the inefficacy of the en banc procedure.

Three other problem areas in the federal judiciary require immediate attention. None of the three is clearly superior to the others. Therefore, the order in which they are set forth below does not necessarily indicate their relative importance.

*Non-Article III Judicial Officers and Adjuncts.* As noted earlier, reactions to swollen caseloads have caused a sizable growth in the non-Article III personnel of the federal judiciary. The relative status of these judicial officers has also been heightened. Bankruptcy "referees" have been converted, by the Bankruptcy Reform Act of 1978,<sup>142</sup> into bankruptcy "judges," with

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Stat. 743 (codified at 5 U.S.C. § 5305 note, 12 U.S.C. § 1904 notes, 15 U.S.C. § 1026 (1978)); and the Emergency Petroleum Allocation Act, Pub. L. No. 93-159, 87 Stat. 627 (codified at 15 U.S.C. §§ 751, 754 (1976)).

140. S. 678, 96th Cong., 1st Sess. (1979); see hearings cited at note 111 *supra*.

141. 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).

142. See note 124 *supra*.



additional personnel and support. The "bankruptcy court" is now virtually a separate court system within the federal judiciary. Federal magistrates have been given broadened authority to try civil and criminal cases. These magistrates are, in function, becoming a subordinate tier of courts under the district courts. Central staff attorneys in the courts of appeals have grown in number; for example, there are now approximately thirty in the Ninth Circuit.<sup>143</sup> They perform important tasks in screening appeals, preparing memoranda on the cases, and recommending dispositions. These developments have raised apprehensions that the independence of the judiciary, the status of Article III judges, and the quality of adjudication may be eroded by the extensive use of persons who are not Article III judges.<sup>144</sup>

At the same time, there is rising interest among students of judicial organizations in the use of judicial "adjuncts." These are professionals of various kinds within the judiciary who perform tasks similar to those performed in part in the past by special masters and receivers. In the public-law litigation that has blossomed in the federal judiciary over the past two decades, adjuncts have even wider roles in assisting judges to develop appropriate forms of relief and to oversee the implementation of judicial decrees.<sup>145</sup> The introduction of judicial adjuncts can be helpful and, indeed, may be essential to enable the judiciary to perform adequately. But extensive use of such persons raises concern about the role of Article III judges.

Non-Article III judges and adjuncts have come into the federal system and have grown in status and responsibility without any overall planning about their appropriate use and the limits on their use. The time has come for a comprehensive canvass of the use of such persons. This could include the drafting of proposed legislation that would revise the use of these persons, integrate them more uniformly into the federal judicial structure, or convert some of them into Article III judges.

The inquiry would also include consideration of the proposal of the Levi-appointed Justice Department committee to cre-

143. Hellman, *Central Staff in Appellate Courts: The Experience of the Ninth Circuit*, 68 CALIF. L. REV. 937 (1980); Oakley & Thompson, *Law Clerks in Judges' Eyes: Tradition and Innovation in the Use of Legal Staff by American Judges*, 67 CALIF. L. REV. 1286, 1294 (1979).

144. *E.g.*, Higginbotham, *Bureaucracy—The Carcinoma of the Federal Judiciary*, 31 ALA. L. REV. 261 (1980).

145. J. Weinberg, *The Role of Judicial Adjuncts in Implementing Public Law Remedies* (paper submitted to Council on the Role of Courts, Jan. 1980).

ate a separate set of Article I administrative law courts.<sup>146</sup> These courts, perhaps with trial and appellate divisions, would review the great mass of disputes arising out of federal regulatory laws on such matters as health, occupational safety, social security, and the environment. The separate courts might absorb much of the present work handled by administrative law judges, whose role might also be included within this study.<sup>147</sup>

In short, what is needed is a system-wide inquiry into the appropriate allocation of functions between Article III judges and all other non-Article III officers and personnel that are or might be involved in the adjudicative work of the nation under federal law.

*Availability of Federal Trial Courts for the Resolution of Controversies Governed by State Law.* Article III of the Constitution gives Congress the power to determine to what extent, if any, the federal district courts may entertain controversies governed wholly by state law between parties from different states. Congress has always authorized some measure of diversity jurisdiction, although it was narrowly limited until 1875. The question of the appropriate extent of such federal trial court jurisdiction has been a matter of discussion and debate throughout American history.<sup>148</sup> In recent years serious efforts have been made to eliminate entirely the presently existing general diversity of citizenship jurisdiction in the district courts.<sup>149</sup> That effort has wide and substantial backing, but it also encounters opposition from some segments of the litigating bar. Thus far that opposition has proven successful in blocking congressional action to alter diversity of citizenship jurisdiction.

Given the political influence of certain litigating lawyers and the general congressional inertia on questions of court reform, enactment of the proposal to eliminate the general diversity jurisdiction seems unlikely in the near future. Moreover, the de-

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146. DEPARTMENT OF JUSTICE COMMITTEE ON REVISION OF THE FEDERAL JUDICIAL SYSTEM, *THE NEEDS OF THE FEDERAL COURTS* (1977).

147. For pertinent discussion, see Abrams, *Administrative Law Judge Systems: The California View*, 29 AD. L. REV. 487 (1977); Mans, *Selecting the "Hidden Judiciary": How the Merit Process Works in Choosing Administrative Law Judges* (pt. 2), 63 JUDICATURE 130 (1979); Scalia, *The ALJ Fiasco—A Reprise*, 47 U. CHI. L. REV. 57 (1979); Segal, *The Administrative Law Judge—Thirty Years of Progress and the Road Ahead*, 62 A.B.A.J. 1424 (1976).

148. P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1051-53 (2d ed. 1973).

149. See note 28 *supra*.

bates of recent years have identified certain situations in which a federal district court can serve a useful contemporary function by providing a forum where no state court could adjudicate the entire controversy. The existing interpleader jurisdiction is an excellent example.<sup>150</sup> Other situations that have been identified include the so-called "mass tort" cases. Perhaps the best illustration of this is a commercial airline disaster, which may give rise to dozens or even hundreds of claims on behalf of persons residing in many states. In those situations suits typically are filed in many states, and there is no way to gather them all into a single state forum.

In other situations no single state forum may be available because the cases involve multiple defendants located in several states. Supreme Court decisions have placed limits on the reach of state in personam jurisdiction.<sup>151</sup> In these situations a federal district court given extended in personam jurisdiction by statute can provide the useful function of settling the entire case in a single lawsuit. The ALI study sought to deal with this problem.<sup>152</sup> If separate actions were filed in different federal districts or state courts, a combination of appropriate removal provisions, the transfer authority,<sup>153</sup> and action by the multidistrict panel<sup>154</sup> could gather the suits into a single federal district.

The contemporary role of diversity jurisdiction needs a comprehensive reexamining. The American Law Institute study in 1968 made an excellent start.<sup>155</sup> It attempted to identify situations where a single state court, because of dispersed parties, cannot adjudicate an entire controversy. However, the study left intact much of the present diversity jurisdiction. Future efforts should seek to eliminate diversity jurisdiction unless there is a compelling, demonstrable, and useful purpose to be served by making available a federal trial court for purely state law cases.

Under diversity jurisdiction, the substantive rights and interests involved are beyond the reach of congressional power; typically these cases are governed purely by state law. Yet there is no way for the state courts to review and correct erroneous

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150. 28 U.S.C. § 1335 (1976).

151. *E.g.*, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

152. AMERICAN LAW INSTITUTE, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* §§ 2371-2376 (1963).

153. 28 U.S.C. § 1404(a) (1976).

154. 28 U.S.C. § 1407 (1976).

155. *See note 48 supra*.

decisions in the federal courts. Additionally, Congress has no authority to deal with the substance of those decisions. Congressional authority comes into play only for the limited purpose of making available a federal trial forum. Thus, federal diversity jurisdiction can be restricted or eliminated without Congress' dealing with sensitive underlying substantive rights and interests. The potential relief to the federal courts is substantial; involved are well over 34,000 district court cases annually, almost one-quarter of the entire civil docket of the district courts.<sup>156</sup>

*System-Wide Administration of the Federal Judiciary.* At the national level the administration of the federal judiciary is fragmented; it lacks any single official charged with the responsibility of administering the system.<sup>157</sup> The highest administrative authority is the Judicial Conference of the United States, a collegial body consisting of twenty-four judges, which deals with administrative policies.<sup>158</sup> Subordinate to it is the Administrative Office of the United States Courts, the judiciary's housekeeper, paymaster, and statistician.<sup>159</sup> The Federal Judicial Center, which operates under its own board of directors, is the research and education arm of the judiciary.<sup>160</sup> The Chief Justice of the United States chairs the Judicial Conference. In addition, he has come to perform a wide variety of administrative tasks, simply because there is no other official charged with these particular responsibilities. These tasks, which cannot be performed by a collegial body or by administrative personnel who are not judges, must be performed by someone.

One result is a serious overloading of the office of Chief Justice. In addition to having the same judicial duties as the other eight justices, the Chief Justice is charged with presiding over the Supreme Court and all of its business. The responsibility is more than enough for one official. There is little time to perform system-wide administrative chores in addition to presiding over the Supreme Court. One of these jobs is likely to be slighted. As

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156. 1979 ANN. REP., note 5 *supra*.

157. This problem and possible solutions to it are more fully discussed in Meador, *The Federal Judiciary and Its Future Administration*, 65 VA. L. REV. 1031 (1979).

158. The Judicial Conference evolved from the Conference of Senior Circuit Judges, which had been established in 1922 primarily to aid the Chief Justice in the effective use of his intercourt assignment power. 28 U.S.C. § 331 (1976). See P. FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* 34 (1973).

159. See *The Administrative Office Act of 1939*, Pub. L. No. 76-299, 53 Stat. 1223 (codified at 28 U.S.C. § 620 (1976)).

160. 28 U.S.C. §§ 611, 620-29 (1976).

the federal judiciary grows, this problem will worsen.

There is need to create a single officer within the judiciary with sufficient status and authority to enable him to administer the system effectively on a day-to-day basis. There is more than one way to achieve this.<sup>161</sup> A judicial officer could be appointed as an assistant to the Chief Justice to perform the administrative tasks. Alternatively, an administrative head could be designated to perform this function, responsible directly to the Judicial Conference. An appropriate title for such a position might be "Chancellor of the United States Courts." However such a new administrator is positioned and structured, he should have unambiguous authority to oversee the operations of the Administrative Office and to perform system-wide administrative tasks presently being performed, out of institutional default, by the Chief Justice. Careful study is needed to determine how the new office can best be inserted near the top of the federal judiciary.

Identification of the foregoing four problem areas is not intended to suggest that there are not numerous other matters needing prompt and serious attention. For example, the proposal to eliminate the Supreme Court's obligatory appellate jurisdiction, now pending before Congress, should be enacted without delay. This idea has been studied for many years and is universally endorsed.<sup>162</sup> It requires no further study, only congressional action.

Other proposals currently pending before Congress should also be enacted. These include creation of advisory committees on rules of procedure and internal operations for the courts of appeals, alteration of the terms of chief judges, and creation of a Court of Appeals for the Federal Circuit and a U.S. Claims Court.<sup>163</sup>

In summary, the top four priorities for congressional action concerning the federal judiciary are:

1. Intermediate appellate court restructuring;
2. Non-Article III judicial officers and adjuncts;
3. Availability of federal trial courts for the resolution of controversies governed by state law;

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161. The two suggestions contained in this paragraph are more fully developed in Meador, *The Federal Judiciary and Its Future Administration*, 65 VA. L. REV. 1031 (1979).

162. See note 92 *supra*. See also Gressman, *Requiem for the Supreme Court's Obligatory Jurisdiction*, 65 A.B.A.J. 1325 (1979).

163. These proposals were all contained in S. 677 and S. 678, cited at note 94 *supra*.

4. System-wide administration of the federal judiciary.

## V. A PROPOSED COURSE OF ACTION

Any course of action adopted to deal with the federal judiciary should have two objectives: first, the development of a set of proposals aimed at the priority problems of the federal courts, proposals that are also likely to enlist substantial support; second, the enactment of the proposals by the Congress. The achievement of those two objectives calls for, among other things, effective leadership, continuity of effort, the involvement of all three branches of the federal government, and the active participation of lawyers and key bar groups.

The time is ripe for a fresh initiative. All of the work of the last dozen years has been useful, and perhaps even necessary, to pave the way toward some larger, more fundamental steps. Congressional increases in judicial personnel and the actions of the courts themselves in reshaping ways of managing and conducting business have put the entire federal judiciary in a new posture. Although these steps have worked improvements and have enabled the judiciary to deal better with its volume of business, basic problems remain and new problems have arisen. These problems can be tackled anew, in light of the perceptions gained from all the studies that have gone before and from the changes that have been wrought in the judiciary since the mid-1970's. With the present system now larger and different, we know more now than we knew then.

The ingredients necessary for a successful effort might best be supplied in the form of a commission. A carefully constructed commission could, in a unique way, bring to bear on these problems the wisdom, ideas, and interests of the three branches of the federal government, the bar, the public, the researchers, and the scholars. Such a body should have a clearly identified mission and timetable. It should have sufficient resources and an adequate lifespan to enable it to develop the necessary proposals, to enlist support behind them, and to see them through to congressional enactment.

The timetable must be realistic. Experiences in the years before 1891 and since 1968 indicate that quick results are unlikely. Although the timetable should be such as to bring about results within a reasonable time, it must allow for the building of a consensus around the key proposals. The year 1989 provides a useful and symbolic target. It would allow eight years from the

present, a period which compares favorably with the eleven years consumed after 1880 in bringing about the Evarts Act. The job could be completed before the present decade is over, and 1989 marks the 200th anniversary of the creation of the federal judiciary. The body charged with developing and promoting the significant judicial reforms might be called "The 1989 Commission on the Federal Judiciary."

Given the target date of 1989, this plan of action should fall into three phases. The first involves the establishment and organization of the commission. With perseverance and luck this could be accomplished by the fall of 1982. Once organized, the commission's initial task would be to develop proposals to deal with the priority problems outlined above. This would involve a survey of all available ideas in the literature and existing studies and reports. In addition, submission of new ideas and fresh data should be widely encouraged. Two years should be allotted to this phase. Thus by the end of 1984, proposals should be ready for introduction in Congress.

The last phase of the plan involves the efforts necessary to bring about congressional enactment of the proposals. Under the suggested timetable, bills embodying the proposals would be introduced at the beginning of the 99th Congress, convening in January 1985. That timing is particularly advantageous since the introduction of the proposals would coincide with the beginning of a new presidential term, thus allowing four years and two Congresses for their consideration, free of the distorting interferences of a presidential election. Experience suggests that two Congresses are usually necessary for the enactment of most new measures; dispersion of congressional attention, the building of the necessary political support, and the hearing processes in two Houses make it difficult to bring a bill from introduction to enactment within the two-year span of a single Congress. If this timetable is adhered to, the proposals would be enacted by the close of the 100th Congress and become effective not later than 1989, the 200th anniversary of the federal judiciary and of the ratification of the Constitution.

An important part of the commission's work would involve the building of support for its proposals. Proposals without a realistic chance of political acceptance are pointless. The building of support would start during the two-year period when the proposals are under development. The process of development would involve bringing in persons and groups across the country,

enlisting their interest and ideas, and hence, ultimate support for the resulting product. Once the proposals were introduced into Congress, the commission would concentrate on stimulating the kinds of political support that typically are lacking in judicial reform efforts. This would involve liaison with state and local bar groups, collaboration with congressional committees in developing hearings, and a general educational effort through the news media to stimulate public support for the measures.

The commission would, of course, require adequate financial support. An able, full-time director would be necessary, assisted by perhaps two professionals and two secretarial/clerical persons. Funds also would be necessary for office expenses and the expenses of commission members in attending meetings. A total of approximately two million dollars should be sufficient for the commission to carry out the entire plan.

How should "The 1989 Commission" be established? There are three possibilities: congressional action, presidential action, and private, nongovernmental action.

Congress could establish such a commission, just as it established the Hruska Commission. In several respects this would perhaps be the best process. A statutory enactment could bring to the commission key persons from all branches and ensure, more effectively than other means, their serious attention to the subject. Adequate funding could be provided. Since the enterprise would have been given an initial congressional blessing, the proposals subsequently recommended by the commission might be treated more seriously by Congress.

A disadvantage of attempting to secure congressional creation of the commission is that this effort in itself could become a major undertaking consuming several years. Moreover, as is illustrated by the nonaction in the six years since the submission of the Hruska Commission report, there is no guarantee that a congressionally created commission will move Congress to act. If, however, key members of the House and Senate Judiciary Committees are interested in the idea and are disposed to move promptly, this route should be pursued.

A more expeditious means of bringing the commission into being might be a presidential executive order. The moment is opportune for the launching of such a presidential initiative. A new President took office in January 1981. As with any new administration, there likely will be interest in new programs and fresh starts on numerous fronts, with an opportunity to include



judicial reform on the agenda. There will be no better time for at least another four years to obtain presidential backing for such a significant step on behalf of the courts.

Assuming that the President would agree to the creation of such a commission, the next crucial step would be to obtain the cooperation and support of key people from the other two branches of government. Contacts should be made on behalf of the President with the chairmen and ranking minority members of the Senate and House Judiciary Committees and perhaps with other members of those committees. Similar contacts should be made with the Chief Justice. These contacts should be made to obtain the cooperation and support of these officials in the judicial and legislative branches. Every effort should be made by the administration to deal with the problem in a bipartisan way, sharing responsibility and involvement with the other two branches of the government and with key members of the major political parties. The interbranch seminars on the federal judiciary, held for the last four years, should facilitate such communication on court problems.<sup>164</sup>

One way to obtain bipartisan involvement of the other governmental branches would be to ask the chairmen and ranking minority members of the two Judiciary Committees to designate persons to sit on the commission and likewise to ask the Judicial Conference and the Chief Justice to designate members. The President would, of course, designate members also. The resulting commission would thereby reflect the interests and concerns of all three branches of the government.

In the absence of action by Congress or the President, the enterprise might still be launched through the initiative of individuals and nongovernmental institutions. The first step would be to secure adequate funding over a period of years. The sources for such funding would be private foundations. But who would seek such funding? The task could be undertaken by some existing organization such as an educational institution or an independent research entity. Alternatively, a few well-organized individuals might take the initiative to secure the necessary funding, although the supporting foundations might require that the funds be vested in an existing entity in which the founda-

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164. For a description of these seminars, under the aegis of the Brookings Institution, see Cannon & Cikins, *Interbranch Cooperation in Improving the Administration of Justice: A Major Innovation*, 38 WASH. & LEE L. REV. 1 (1981).

tions have confidence. While this initial step would not be easy, given sufficient interest and determination by at least some influential individuals or organizations, it is not insuperable.

Whatever the means of bringing the commission into being, its composition should reflect the perspectives, ideas, and interests of the three branches of the federal government, various segments of the bar, and students of the judiciary. To achieve this, the commission should consist of members of the Congress, the judiciary, and the executive branch. If such officials themselves are not available to serve, or prefer not to serve, persons designated by them should be included on the commission. Indeed, in some instances, designees of the officials would be preferable to the officials themselves in that such persons could devote more time to the commission's work and could function free of awkward or possibly conflicting political considerations. A body of approximately twenty members should be large enough to accommodate all of the desired perspectives and interests yet small enough to work collegially and effectively.

The following is a list of the officials and institutions, governmental bodies, nongovernmental groups, and other groups that should be represented on the commission, with a suggested number of persons in each category:

- the chairmen and ranking minority members of the Senate and House Judiciary Committees (four persons);
- the Attorney General of the United States (one person);
- the Chief Justice of the United States (one person);
- the Judicial Conference of the United States (two persons);
- the Director of the Federal Judicial Center (one person);
- the Director of the National Center for State Courts (one person);
- the Conference of Chief Justices (two persons);
- each of the major national organizations concerned with law and the courts, including the American Bar Association, the American Judicature Society, the National Bar Association, the National Association of Women Lawyers, and perhaps others (one person each);
- the academic world, including law professors knowledgeable about the federal judiciary (two or three persons).

In addition, the group should include one person experienced in management and organization of large, complex enterprises.

The twelve years of study and effort that have gone by will not be wasted if we build upon that work and move on with a

coherent plan of action. Determined, positive, and prompt steps must be taken, however. With no powerful constituency, with no identified leader in the political arena committed to the cause, and with no public demand, action is unlikely unless individuals in public and private life who are concerned with the problems of the federal judiciary band together as a catalytic force. The number need not be large, but it must include persons of influence respected in law and government. The primary mission of this group would be to bring into being the kind of commission described above, which in turn would be charged with getting the job done not later than 1989. Putting the federal judiciary in a position to perform its mission effectively under Article III of the Constitution would be the best possible celebration of its 200th anniversary.