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AN APPELLATE COURT DILEMMA AND A SOLUTION THROUGH SUBJECT MATTER ORGANIZATION

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The recent litigation explosion presents a two-pronged dilemma for American appellate courts. If, on the one hand, the number of appellate judges is not expanded to keep abreast of growing case loads, there is a risk that courts will rely too heavily on professional staff, thereby watering down the decision-making process. If, on the other hand, the number of judges is proportionately increased with the growth in appellate litigation, the number of three-judge decisional units will also increase, thereby threatening predictability and uniformity in the law of the jurisdiction. This Article undertakes to explain that dilemma and to offer a solution for it.

I. THE DILEMMA

A. Undue Reliance on Professional Staff Assistance

The introduction of central staff attorneys was a major innovation in American appellate courts in the late 1960's and early 1970's. Central staff attorneys were viewed at that time as an emergency measure to equip appellate courts to cope with rapidly swelling dockets. They proved effective in that regard, and, in the process, proved their value in other respects. The majority of state and federal appellate courts now have central staffs, and this form of professional assistance appears to be a valuable and permanent part of the American judicial scene. Staff attorneys have various duties including screening, research, memorandum writing, and order and opinion drafting. It is difficult now to imagine a high volume appellate court without a central legal staff engaged in some or all of these functions.[1]

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1. For a discussion of the history and contemporary usage of central staff attorneys, see D. MEADOR, APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME 7-18, 31-125 (1974) [hereinafter cited as APPELLATE COURTS]; J. OAKLEY & R. THOMPSON, LAW CLERKS AND THE JUDICIAL PROCESS (1980); Cameron, *The Central Staff: A New Solution to an Old Problem*, 23 U.C.L.A. L. REV. 465 (1976); Hellman, *Central Staff in Appellate Courts: The Experience of the Ninth Circuit*, 68 CALIF. L. REV. 937 (1980).

From the beginning of the use of central staffs, however, there has been unease about the risk of delegation of judicial authority. One purpose of the Appellate Justice Project, sponsored by the National Center for State Courts in the early 1970's, was to identify the appropriate line between proper staff work and the core of nondelegable judicial responsibility.[2] Experience over the last decade has suggested that numerous aspects of judicial work can be delegated to either law clerks or staff attorneys as long as the judges continue to employ their own thought processes to reach their own conclusions. The appropriate line is difficult to draw and it is even more difficult to enforce. Ultimately, everything depends on each judge's good faith and conscientious devotion to the judicial task.

A continually rising caseload, however, puts pressure on even the best intentioned judges. Furthermore, as the volume of cases and number of professional assistants (including law clerks and staff attorneys) increases, so does the threat of undue delegation of judicial responsibilities. Early apprehensions tended to be drowned out by the overwhelming need for additional assistants to cope with the cases. More recently, apprehensions have resurfaced as both the size of central staffs and the number of law clerks have continued to grow. In the eighteen-judge Michigan Court of Appeals, for example, there are thirty-five attorneys on the central staff and six additional attorneys who work on motions; in addition, each judge has two law clerks.[3] In the twenty-three-judge Court of Appeals for the Ninth Circuit there are thirty central staff attorneys and three law clerks per judge.[4] Judges and commentators alike are becoming increasingly concerned about what is labeled the judicial "bureaucracy" or the "bureaucratization" of the judiciary.[5] Fears are voiced that appellate courts, with this "hidden judiciary," eventually will come to resemble administrative agencies, where a body of five or seven members sits atop a pyramid of dozens or even hundreds of staff who do the work and pass it up for review and approval. In such a setting the agency members do not work in the way that has been traditionally associated with appellate judges.

Along with the threat of undue delegation of judicial authority is the threat of erosion of the judicial process. If an appellate court places

2. *See* APPELLATE COURTS, *supra* note 1, at 126-37.

3. Speech by R. Danhof, Central Staff in the Michigan Court of Appeals, at the Regional Seminar of the National Committee of Appellate Court Staff Counsel, Chicago, Ill. (October 28, 1982).

4. J. OAKLEY & R. THOMPSON, *supra* note 1, at 92, 153-54.

5. *See* Bird, *The Hidden Judiciary*, 17 JUDGES' J., Winter 1980, at 4; Higginbotham, *Bureaucracy: The Carcinoma of the Federal Judiciary*, 31 ALA. L. REV. 261 (1980); Hoffman, *The Bureaucratic Spectre: Newest Challenge to the Courts*, 66 JUDICATURE 60 (1982); McCree, *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777 (1981); Rubin, *Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency*, 55 NOTRE DAME LAW. 648 (1980).

too much work in the hands of staff when the judges are overburdened with cases, there is a high risk that the deliberative process will beome unduly truncated. The likelihood grows that each judge will not be digesting the record, the pertinent legal authorities, and the arguments of counsel, independently reasoning his way to a decision. Paradoxically, the amount of assistance given to judges increases the threat of erosion of their judicial responsibility.

To minimize this risk, the authors of *Justice On Appeal* recommended limiting staff size to a three-to-one ratio.[6] Pursuant to this recommendation the total number of professional assistants on an appellate court — including law clerks and central staff — should not number more than three times the number of judges on the court. For example, on a court of twelve appellate judges, law clerks and central staff could not exceed thirty-six. The theory behind this formula is that judicial work cannot be delegated if there is no one to whom it may be delegated. The authors concluded that the number of judgeships on the court should be increased if an appellate court having the recommended maximum level of professional assistance cannot keep abreast of its work and render decisions within a reasonable time and with requisite deliberateness of process. In short, an increase in the number of judgeships coupled with a limitation on staff size is an effective way to guard against undue reliance on staff and to assure preservation of the deliberative judicial process. Adding judgeships, however, presents another threat to the law, which brings us to the other horn of the dilemma.

B. The Roulette Game and the Tower of Babel Effect

One suggested formula for adding judges to appellate courts is that a state appellate judge sitting on a three-judge panel should participate in no more than 300 dispositions on the merits annually; in other words, when the number of dispositions exceeds 100 per judgeship, the court needs more judges.[7] A judge on a federal Court of Appeals should not participate in more than seventy-five dispositions on the merits annually. In many state and federal jurisdictions judges already participate in more dispositions than this formula recommends.

One reason for legislative reluctance to add judgeships is that creating a new judgeship is expensive; it costs far more than adding a law clerk or staff attorney. Another reason is the apprehension that as the number of appellate judges on any given court increases, predictability and uniformity in the law are threatened. There are also apprehensions about

6. P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 48 (1976) [hereinafter cited as JUSTICE ON APPEAL].

7. *Id.* at 142-46, 196.

unmanageability and the loss of collegiality. These apprehensions are well founded in light of the way American intermediate appellate courts are organized. In appellate courts, judges typically sit in three-judge panels, and cases are randomly distributed among all panels. In most courts membership in the panel is constantly shuffled. Thus, there is no stability in the decisional unit and little continuity in its adjudications.

A court of nine or fewer judges is relatively free of such concerns and problems. Perhaps even a court of twelve judges presents no difficulties. When a court reaches fifteen or more judges, however, problems begin to arise. Although some judges on the Court of Appeals for the Fifth Circuit strongly resisted a division of that circuit when the number of its judges was increased to twenty-six, sentiment quickly jelled for division. Such a court is too large to sit effectively en banc, and its sitting in constantly rotating three-judge panels converts the appellate process into a roulette game under which no one can know the identity of the judges who will decide an appeal. Moreover, what should be a single voice of the law — the one appellate court — becomes a judicial Tower of Babel, a court speaking through multiple voices.[8]

In an appellate court of fifteen judges there are 455 possible combinations of three. In a court of twenty-three judges there are 1,740 possible threesomes. Given the kinds of varying jurisprudential approaches found among American appellate judges, the losing litigant in any case may reasonably believe that an appeal has at least some chance of success; because the three-judge panel that will decide the appeal is not known in advance, and because the losing litigant needs only two judges, there is always some possibility of his winning. The incentive is strong for the loser to spin the roulette wheel with the hope that the ball will drop into the threesome where there are two judges favorable to that side of the matter. This type of appellate organization creates an artificial incentive to appeal, which, in turn, may have much to do with the disproportionate growth of appeals compared with that of trial court dispositions.

In addition to introducing an element of gambling into the appellate process, a large number of panels at the same appellate level simultaneously deciding the same types of issues produce a cacophony of voices. Ideally, an appellate court would enunciate the law of the jurisdiction with a single voice and would apply the law uniformly to all matters coming before it. The more numerous its three-judge panels the less likely it is that an appellate court can approach that ideal. Moreover, the larger the appellate court grows, the more unwieldy the

8. The metaphor is, of course, derived from Genesis 11:4-9. It was first used in connection with contemporary appellate problems in Hazard, *After the Trial — The Realities of Appellate Review*, in THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION 60, 81 (H. Jones ed. 1965).

en banc procedure becomes and hence the less likely is its use. Indeed, some state intermediate appellate courts have no provisions at all for en banc procedure. The court of last resort, typically having from five to nine judges, becomes increasingly unable to control the multiple panels' adjudications at the intermediate level. The result is the Tower of Babel effect, rendering law unpredictable and lacking in uniformity.

II. Subject Matter Organization as a Solution

A. The Concept of Subject Matter Organization

As caseloads continue to grow, the dilemma increasingly confronting American intermediate appellate courts is this: if the number of judges remains relatively small, there is the ever-rising threat of undue delegation to staff and of dilution of the judicial process; conversely, if the number of judges increases to keep abreast of the caseload volume, and if the courts continue to sit in random panels deciding all types of cases, the law will progressively lose its predictability and jurisdiction-wide uniformity. The solution to this dilemma for a large intermediate appellate court is the adoption of a subject matter plan of internal organization. This method of appellate organization eliminates random assignments of judges and cases and permits the court to be enlarged to the size needed to cope with the increased quantity of cases, thus avoiding undue delegation to staff while simultaneously maintaining doctrinal coherence in the law.

"Subject matter organization" is a form of internal organization in an appellate court whereby relatively stable panels or divisions of from three to five judges are assigned specified portions of the court's docket; the portions of the docket assigned to each panel are exclusively assigned to that panel. Each type of case goes on appeal from the trial court to a specified panel or division and to no other. Thus, whatever the type of case, the lawyers, litigants, and trial judge know from the outset of litigation in the trial court the precise judges who will decide any appeal that may result. Although stable, the panels are not permanent; they gradually shift through staggered rotation.[9]

Although novel to Americans, appellate subject matter organization has been used for many years in Europe. One of the best working examples can be found in the Federal Republic of Germany.[10] German

9. The subject matter method of appellate organization was suggested in Justice on Appeal, *supra* note 6, at 174-84, 204-07.

10. For a description of the German appellate courts and their internal organization, see Meador, *Appellate Subject Matter Organization: The German Design from an American Perspective*, 5 Hastings Int'l & Comp. L. Rev. 27, 37 (1981) [hereinafter cited as *German Design*].

appellate courts are extraordinarily large by American standards; the nineteen intermediate appellate courts range in size from 17 to 152 judges. The average size of these regional appellate courts is seventy-two. An appellate court of this size operating in the traditional American fashion would probably make a shambles of the law; chaos in legal doctrine would almost certainly result if a court of that size sat in ever-shifting panels, deciding randomly assigned cases. Yet for decades these German courts, with their hosts of judges, have functioned effectively and maintained a high degree of uniformity in the law through a subject matter plan of organization.

This method of internal organization is also employed in Germany in the highest court for ordinary civil and criminal cases, the *Bundesgerichtshof* (often referred to as the Federal Supreme Court). That court has 110 judges and is organized into eleven civil divisions; in addition, there are several criminal divisions and special divisions. Each division consists of seven judges.

Each civil division is assigned several categories of cases, and those types of cases are decided only by that one division. For example, Civil Division III is assigned cases involving water rights, mineral rights, loans and debts, aircraft noise, certain employment disputes, specified arbitration agreements, cases arising under the Convention on Human Rights, and several other types of cases.[11] The docket assignments for each division are stated precisely in a printed document known as the "work distribution plan," which also lists the judges assigned to each division. The plan is revised annually and is available to the public.[12] Thus, in any type of lawsuit the lawyers and litigants will know from the outset the appellate judges they will face if they appeal.

The subject matter plan is administered in Germany in a way that prevents most appellate judges from being "specialists." This is achieved by assigning to each division a mixture of types of cases so that the division is not exclusively focused on one category of case or one kind of legal issue. The judges of Civil Division III, for example, although responsible for only a small portion of the court's total business, deal with a rich variety of legal questions. The categories of cases assigned to that division involve questions of tort law, property law, contract law, and international law. Thus, the German system reaps the advantages of predictability and uniformity while avoiding the undesirable features of narrow specialization.

In the United States there are three examples of subject matter organization in the federal appellate courts. For many years the Court

11. *Id.* at 62-64.

12. The full text of the docket assignments in the work distribution plan for the *Bundesgerichtshof*, translated into English, is set out in *id.* at 59-72.

of Appeals for the Fifth Circuit maintained an "oil and gas" panel, consisting of several judges of the court to whom all appeals involving oil and gas law were assigned; such cases were assigned to no other judges on the court. The judges who sat on the oil and gas panel also sat on other cases. All appeals from federal district courts in cases arising under certain energy laws go to a specified group of judges who constitute the Temporary Emergency Court of Appeals.[13] They are the only judges deciding those cases, but they also sit on other cases. All appeals from the federal district courts in cases arising under the patent laws now go to the Court of Appeals for the Federal Circuit; the judges on that court also decide numerous other categories of cases.[14] In each of these instances there is a single appellate forum of known and stable membership, composed of judges who are not specialized.

Because the idea of comprehensive subject matter organization in appellate courts is unfamiliar to Americans, an effort is made in the appendix to present such a plan for two courts. One is a state intermediate appellate court, the appellate division of the New Jersey Superior Court; the other is a federal intermediate appellate court, the Court of Appeals for the Ninth Circuit. These two courts were selected for this exercise because they maintain statistical data in relation to categories of cases.[15] Although a subject matter organization plan requires more refined data, these courts maintain more detailed data than is generally employed for statistical purposes in American appellate courts. Indeed, the absence of data on appellate case types is a serious obstacle to designing a plan for subject matter organization. This obstacle can be readily overcome, however, by encouraging appellate courts to maintain case filing information on such a basis.

The charts in the appendix illustrate variations in panel size, judge rotation, and docket assignments. The Ninth Circuit plan presupposes a court of twenty-five judges sitting in divisions of five.[16] The New

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13. Economic Stabilization Act Amendment of 1971, Pub. L. No. 92-210, § 211, 85 Stat. 748-50.

14. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 127, 96 Stat. 25, 37 (to be codified at 28 U.S.C. 1295).

15. Data for the New Jersey Appellate Division were derived from figures provided by the Office of the Clerk, Appellate Division of the Superior Court. Data for the Ninth Circuit were derived from statistics provided by the Office of the Circuit Executive.

The Administrative Office of the United States Courts maintains data on more limited categories of cases for appeals in the federal circuits. *See, e.g.*, Administrative Office of the U.S. Courts, Federal Judicial Workload Statistics A-2-A-3 (March 31, 1982).

16. The Ninth Circuit is presently authorized 23 judgeships. Additional judgeships, however, have been requested, and, given the likelihood of continued caseload growth, it is probable that the court will grow to 25 or more judges.

Present law requires the courts of appeals to sit in three-judge panels. 28 U.S.C. § 46(b)-(c) (West Supp. 1982). The statute creating the Court of Appeals for the Federal Circuit authorizes that court to sit in panels of more than three judges. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 103, 96 Stat. 25, 25 (amending 28 U.S.C. § 46(c) (West Supp. 1982)). The

Jersey plan takes the appellate division's actual number of twenty-one judges and existing seven "Parts" as the basis for the plan. Under the Ninth Circuit plan each judge serves a five-year assignment in a division before rotating to another. Under the New Jersey plan, each judge serves a three-year assignment in a Part before rotating. Other variations, of course, could be adopted; these are offered simply to provide specific examples of two types of judicial rotation plans in the context of two distinctive court systems.

Ideally, the docket assignments to the court's various divisions would be based on a more detailed breakdown of case types. In the Ninth Circuit plan, the category of "general civil" is distributed among three divisions; in practice, that category would need to be broken down into the various types of general civil cases and distributed on some rational basis among these three divisions so that no type of case would be dealt with by more than one division. The data are sufficient, however, to provide a concrete illustration of how a subject matter organization plan could be installed in an American appellate court.

In allocating cases among the various divisions the plan should not confine any single division to a relatively narrow category of legal subject matter. Variety can be achieved in different ways. For example, a division could be assigned a group of wholly unrelated types of cases. Illustrations of this can be seen in the two plans in the Appendix. On the other hand, a division could be assigned a group of cases that are kindred in some way or at least not in alien fields. For example, in the New Jersey plan, Part (B) is assigned cases dealing with marriage and with juveniles, an area that can be defined as family law; in addition, it is assigned appeals from agencies in the fields of education, health, and corrections. Although the latter are not considered family law, they are not altogether unrelated to that field.

It is important that the actual workload of each division be roughly the same. Workload cannot be arrived at simply by counting the number of cases; some types of cases are more complex and time-consuming than others. Thus, a case-weighting system would be useful in arriving at a sound subject matter plan.[17]

Criminal cases present a special problem. They can be allocated among the divisions of the court in two basic ways. One is to distribute the criminal business throughout all divisions of the court so that every appellate judge sits on some criminal cases. One argument for that arrangement is that because criminal justice is a pervasive concern to society and has such emotional and political ramifications all judges

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desirability of five-judge panels is discussed in JUSTICE ON APPEAL, *supra* note 6, at 159-60.

17. For a description of the case-weighting system devised in the Ninth Circuit as a means of distributing workloads evenly among the various panels, see Hellman, *supra* note 1, at 962-64.

of the court should be responsible for regular participation in that business. Also, under that plan of distribution no judges at any time would have unduly large or exclusive concern with criminal appeals. This arrangement is illustrated in the New Jersey plan.

The other arrangement, illustrated in the Ninth Circuit plan, is the allocation of all criminal appeals to a single division. This maximizes the advantage of the subject matter plan of organization by assuring the highest degree of uniformity of decisions on criminal law questions. If the volume of criminal appeals is too large for any one division, two or more divisions may be employed, but that arrangement begins to dilute the advantages of the subject matter plan.

Even if criminal appeal business is distributed to more than one division of the court, some rational allocations can be made to maximize uniformity and efficiency. For example, like offenses can be grouped; all homicide offenses can be assigned to one division, all property offenses to another, and so on. Another way of allocating criminal business to more than one division is by source of appeals, with each division of the court handling all appeals from specified trial courts or geographical regions. This method is used in the German appellate courts.[18] Under any scheme for assigning criminal appeals, post-conviction review cases should be classified as criminal.

The advantage of five-judge divisions over three-judge divisions is stability in the appellate forum, which in turn heightens predictability and uniformity in the law. If, as in the Ninth Circuit plan, a division consisted of five judges, with only one departing each year, there would be greater continuity of membership than in divisions of three, as in the New Jersey plan. In other words, an annual one-fifth rotation is much less destabilizing than an annual one-third rotation. Both plans, however, can be employed to achieve the benefits of subject matter organization and they would be preferable to the traditional American system of random and ever-fluctuating assignments.

As a practical matter, the division size is closely related to the term each judge is assigned to a particular division. It would simply be more workable to have a three-year assignment on a three-judge panel and a five-year assignment on a five-judge panel than it would be to have assignments of some other duration. Even here there is room for variation consistent with the subject matter concept of appellate organization.

The illustrative plans for the Ninth Circuit and the New Jersey Appellate Division show the assignments of the judges to the various divisions, with subsequent rotations through six- and ten-year periods

18. *German Design, supra* note 10, at 46.

respectively.[19] When any appellate court adopts a subject matter plan of organization there will be an initial transitional period during which judges will rotate more frequently than they will in the long run. This is necessary to set in motion a long-range plan of staggered rotation. Rotations too frequent would undermine stability — a major purpose of the plan. Once the start-up period has passed, the regular pace of rotation can set in on either a five-year basis (as in the Ninth Circuit plan) or on a three-year basis (as in the New Jersey Appellate Division plan).

Although these plans show the assignments of all judges of the court through the first two complete rotations, it is unlikely, as a practical matter, that all judges now sitting on those two courts will be on the court through the entire period and there will be no new judge joining the court. Changes will undoubtedly occur in any appellate court through death, retirement, and resignation. When a vacancy occurs, the new judge must be fitted into the scheme by being either put into the shoes of the judge he replaces or assigned to some other divison, with adjustment there to make room for him. The plans shown in the appendix simply illustrate how any given judge would progress during the first two complete rotations, if he remained on the court.

If the docket assignments are carefully made and the categories of cases are described with sufficient precision, the plan should be easy to administer. In the German appellate courts, for example, there is an experienced administrative official who reviews each case as it is filed and routes it to the appropriate division. The plan describes the cases with sufficient clarity to enable this official to identify each case type. In the occasional instance where a case is misdirected it is dispatched by the division receiving it to the appropriate division.[20] A similar arrangement would be workable in American appellate courts. A staff attorney, for example, could screen the cases (much as staff attorneys already do in many courts) and route the cases to the appropriate divisions.[21] The docket allocations under a subject matter plan should in no sense be considered jurisdictional; they are simply internal administrative arrangements. No litigant should have any right to litigate over the appropriate division to which the case should be assigned.

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19. Tables 2 and 5 in the appendix show the progression of each judge. Tables 3 and 6 show the composition of each division through those initial rotational cycles.

20. For a description of this administrative system in the German appellate courts, see *German Design, supra* note 10, at 48-49.

21. For descriptions of screening by staff attorneys in American appellate courts, see JUSTICE ON APPEAL, *supra* note 6, at 48-51; APPELLATE COURTS, *supra* note 1, at 31-40; Cameron, *supra* note 1, at 470-71; Dahlen, *Supreme Court Rule 24: Appellate Court Research Departments,* 69 ILL. B.J. 766-71 (1981); Hehman, *Judicial Administration in the United States Court of Appeals for the Sixth Circuit: Organization and Procedures to Address the Volume Crisis,* 10 U. TOL. L. REV. 645, 651-56 (1979); Hellman, *supra* note 1, at 944, 957-64.

The central staff attorneys in an appellate court that has adopted a plan of subject matter organization could be organized on the same subject matter basis. Each division of the court would then have specified staff attorneys working on its cases. This should heighten efficiency among the staff attorneys and also provide better working relationships between the judges and the support staff. Indeed, the Ninth Circuit central staff is already organized on a subject matter basis.[22] It would be a short step for the court's cases to be assigned in the same groupings to stabilized panels of judges, the staff subject matter organization thereby being taken to the level of the judges.

B. Advantages of Subject Matter Organization

There are three advantages to subject matter organization in American appellate courts. The first of these is uniformity, evenhandedness, and stability in the law. These goals can be achieved through a relatively fixed group of identifiable judges who would take all appeals of a specific type. On any question of law and within any category of case, the appellate court would speak with a single voice, thereby avoiding the Tower of Babel effect produced by large appellate courts operating under random assignment procedures.

The second advantage to subject matter organization is the ability to preserve judicial authority and avoid undue delegation. The plan achieves these objectives by permitting substantial increases in the numbers of appellate judges without threatening the uniformity of the law; such increases in judgeships would obviate the necessity for assembling an ever-growing number of central staff attorneys and law clerks. All modern appellate courts need professional assistance of this sort; the threat comes when the size of the professional staff becomes disproportionately large in relation to the number of judges on the court. Before that point is reached, new judgeships should be created. The subject matter plan of organization makes that possible without undermining the coherence of the jurisprudence or the collegiality among the judges.

The third advantage to subject matter organization is the expedition and soundness of decisions. These objectives are achieved under the plan by narrowing the range of matters with which any one judge must cope from day to day. Although not confined to a single category of case, each judge deals with a span of legal problems that is narrower than the entire range of the court's docket. During any three- to five-

22. The subject matter division of work among the central staff in the Ninth Circuit was patterned on a proposed plan of subject matter organization for a hypothetical federal court of appeals set out in JUSTICE ON APPEAL, *supra* note 6, at 178-80. *See* Hellman, *supra* note 1, at 947-48.

year period a judge might come in contact with roughly one-fifth of the categories of cases with which the court as a whole must deal. This system improves decision making because each judge can achieve a higher level of expertise on the subjects with which he is regularly dealing during the three- to five-year assignment.

C. *Arguments Against the Plan*

There are basically two arguments against the appellate subject matter plan. One is rooted in the spectre and mythology of "specialization." The other is rooted in concerns that judges will become bored and will lack intellectual challenge. A properly designed plan of subject matter organization can avoid the force of these objections.

The "specialization" argument is largely derived from a misunderstanding about the subject matter method of organization. A properly designed plan does not set up a system of specialization, and it does not make specialists out of appellate judges. A contemporary dictionary defines a "specialist" as "one who devotes himself to one subject or to one particular branch of a subject or pursuit."[23] A properly designed subject matter plan of appellate organization will not force appellate judges into a single category of case or single type of legal issue. The German experience illustrates how docket assignments providing a mixture of legal questions and case subjects can be given to a particular division of the court while allocating to the division only a small portion of the court's total docket.

The proposed plans for the Ninth Circuit and the New Jersey Appellate Division also provide examples of subject matter diversity. Under the Ninth Circuit plan, for example, Division Three would have responsibility for deciding appeals in a third of the general civil cases and appeals from the Immigration and Naturalization Service, the Tax Court, and the Bankruptcy Court. Under the New Jersey plan, Part F, for example, would decide cases involving real property, wills and estates, and condemnation; appeals from the Departments of Insurance and Banking; one-seventh of the criminal docket; and, a portion of the cases from the "miscellaneous" category. It would do violence to the concept of specialization to apply it to any of these clusters of docket assignments. A judge can remain very much a "generalist" and yet not simultaneously sit over every type of issue and case that can come before the court.

Americans generally dislike the idea of "specialist" judges and "specialized" courts for three reasons.[24] One reason is that a truly

23. RANDOM HOUSE COLLEGE DICTIONARY 1261 (rev. ed. 1980).

24. These objections are discussed in JUSTICE ON APPEAL, *supra* note 6, at 168-72; H. FRIEND-

specialized court — one limited to a specific, relatively narrow subject — is vulnerable to being captured by special interests in that field. The judicial selection process for such a court is apt to become a sharply focused target of intense lobbying efforts by interest groups having a direct stake in the field; there is also a danger of politicizing the selection process in an undesirable way. Another criticism of true specialization is that judges confined to such a narrow range of judicial work may tend to develop arcane views of the law, to lose sight of broader considerations and values that should infuse all judicial decision making, and, in general, become less wise and balanced in their judgments. The third reason is the fear that judges so limited in their work will lack the status traditionally accorded the judicial office; diminished status will in turn result in an inability to attract able lawyers to the bench.

A properly designed plan of subject matter organization can avoid these problems. Under such a plan no judge is initially selected for the court with a view toward his sitting on particular types of cases. Nothing would be changed in relation to judicial selection. A judge would be chosen to sit on the court for all purposes, just as judges are now chosen for appellate courts. Only after assuming his seat on the court would a judge begin the assignment pattern. Because he would be periodically rotated, he would not sit on the same group of cases throughout his career. Thus, the risks of "capture" and of politicizing the selection process are not intensified.

The danger of developing arcane, overly narrow views of the law — or "slit vision" — is obviated by the subject matter plan in two ways. One is that the allocation of cases among the various divisions could assure a varied mixture of questions and case types. No appellate judge would be confined to any one category of case or any one kind of legal issue. Second, whatever the cluster of cases a judge sits on for a period of three to five years, at the end of the period he will rotate to an entirely different cluster of cases. Thus, in a judicial career of ten to twenty years an appellate judge will hear cases concerning the entire range of the court's docket. A well-administered subject matter plan provides no basis for apprehensions about the development of judicial views that ignore the general values and considerations permeating Anglo-American jurisprudence.

Apprehensions concerning boredom and lack of intellectual challenge appear misplaced. This is true for the reasons that will prevent specialization of judges. The assignments of any division of the court are diverse

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LY, FEDERAL JURISDICTION: A GENERAL VIEW 153-96 (1973); Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for an Optimum Forum*, 75 COLUM. L. REV. 1, 68-74 (1975); Jordan, *Specialized Courts: A Choice?*, 76 NW. U.L. REV. 745 (1981).

enough to prevent boredom. In addition, a judge will not be permanently assigned to the same group of cases. A court can pick its own period; it can be three, four, or five years. The period of assignment should be long enough to assure continuity and stability in the decision-making unit; a period of less than three years seems too short to provide adequate assurance of this. On the other hand, a period longer than five years would heighten the risk of boredom. Thus somewhere between three and five years seems optimum as the rotational cycle for each judge.

The plan used in the Arizona Court of Appeals in workers' compensation cases is not a good example of the kind of subject matter organization discussed here. In that court, one three-judge panel is assigned all appeals in workers' compensation cases, and those cases constitute almost all the business of that panel. That arrangement results in something close to a truly specialized forum. Judges who have sat on the panel for periods of one year each are said to have found the work to be dull and lacking in variety. These pitfalls are avoided by the docket assignments and rotational schedules proposed in the Ninth Circuit and New Jersey plans.

CONCLUSION

The great benefit of appellate subject matter organization is that it assures that in any jurisdiction there will be only one appellate voice speaking on any given area of the law. In each of the federal circuits, for example, there would be one group of appellate judges deciding a given type of federal appeal. Under the existing organizational scheme there are dozens of different appellate entities in each circuit deciding each category of case. This extraordinary multitude of appellate voices would be reduced to one in each federal circuit. In a state such as New Jersey, for example, instead of seven Parts delivering decisions on the same legal questions, there would be only one such Part deciding each type of question.

Although states having a single statewide intermediate appellate court can derive maximum benefit from subject matter organization, states whose intermediate courts are divided geographically can also benefit from the arrangement. In California, for example, where there are five appellate districts, each having its own court of appeal, the organization of each such court by subject matter would lead to a single appellate voice in each district. A realization of the benefits to be derived from statewide subject matter organization might lead some states to abolish geographical districting. Organizing California's fifty-eight intermediate appellate judges on a statewide subject matter basis would heighten predictability and uniformity in the law, promote efficiency

in appellate litigation, and enable the state supreme court to monitor the law more effectively. The same would be true in other large states divided territorially at the intermediate appellate level, such as New York and Ohio.

In the federal judiciary, subject matter organization may be the only way to prevent continuous circuit-splitting. Up to now circuit-splitting has been seen as the only way to maintain coherence in the law of the circuit and to preserve collegiality among the judges. Under a subject matter plan these qualities would be preserved even if the circuit grew to thirty or forty judges or more. Indeed, appreciation of the values of subject matter organization could lead to consolidation and reduction in the number of circuits, thereby assuring an even larger measure of uniformity in federal appellate decisions.

As American jurisdictions continue to face pressure to add more judges at the intermediate appellate level, the subject matter plan of organization may become increasingly attractive. Eventually, it may be seen as the only way, in a large jurisdiction, to maintain uniformity and collegiality while providing the court with the number of judges sufficient to handle its business. The idea cries out for testing.

APPENDIX*

Table 1

Appellate Division, Superior Court of New Jersey[1]
Subject Matter Organization of Docket

Part A	Contract	288
	Foreclosure	7
	Criminal	225
	TOTAL	520
Part B	Adoption	4
	Juvenile Delinquency	60
	Matrimonial	183
	Department of Corrections	
	Parole Board	10
	Division of Corrections and Parole	2
	Department of Education	11
	Department of Health	4
	Department of Higher Education	5
	Department of Human Services	13
	Division of Medical Assistance and Health Services	1
	Division of Public Welfare	5
	Criminal	225
	TOTAL	523
Part C	Election	2
	Impeachment of Public Officials	2
	Public Office and Employment	22
	Department of Civil Service	56
	Department of Labor & Industry	4
	Board of Review	110
	Public Employees' Relations Commission	21
	Division of Workers' Compensation	108
	Public Employees' Retirement Assistance Board	10
	Criminal	225
	TOTAL	560

* The author would like to thank Mary Nash Kelly, Class of 1984, University of Virginia School of Law for her assistance in preparing the tables in this appendix.

1. Data for the New Jersey Appellate Division was derived from figures provided by the Office of the Clerk, Appellate Division of the Superior Court. The figures used show cases decided

Part D	Department of Law & Public Safety	8
	Board of Medical Examiners	7
	Board of Pharmacy	1
	Division of Alcoholic Beverage Control	5
	Division of Civil Rights	19
	Division of Consumer Affairs	1
	Municipal Ordinances and Zoning	86
	Department of Energy	
	Board of Public Utilities	12
	Department of Environmental Protection	12
	Department of Community Affairs	5
	Criminal	225
	Miscellaneous[2]	155
	TOTAL	536
Part E	Torts	
	Auto Negligence	77
	Other	189
	Traffic Violations	42
	Division of Motor Vehicles	14
	Department of Transportation	5
	Criminal	225
	TOTAL	552
Part F	Real Property — Title & Possession	27
	Wills and Estates	34
	Department of Insurance	6
	Condemnation	15
	Department of Banking	1
	Criminal	225
	Miscellaneous[2]	221
	TOTAL	529

during the 1980 court year. Statistics on filings in the Appellate Division are not shown by subject matter.

2. The "Miscellaneous" category consists of 546 cases. It is divided in this table among three Parts. If the court adopted a subject matter plan, this category should be divided more precisely on the basis of more refined data.

Part G	Contempt	2
	Counsel Fees	14
	Navigation Offenses	1
	Waterfront Commission of N.Y. Harbor	1
	Other Agency	5
	Department of Treasury	9
	Division of Tax Appeals	47
	Division of Pensions	23
	Other Non-Criminal	21
	Criminal	225
	Miscellaneous[2]	170
	TOTAL	518
OVERALL TOTAL		3738

Table 2

Appellate Division, Superior Court of New Jersey
21 Judges, 7 Parts
Rotation Plan at Three-Year Intervals

Judge	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6
A	A	A	A	B	B	B
B	A	A	G	G	G	D
C	A	F	F	F	E	E
D	B	B	B	C	C	C
E	B	B	E	E	E	A
F	B	D	D	D	G	G
G	C	C	C	D	D	D
H	C	C	B	B	B	E
I	C	A	A	A	F	F
J	D	D	D	E	E	E
K	D	D	F	F	F	C
L	D	B	B	B	A	A
M	E	E	E	F	F	F
N	E	E	D	D	D	G
O	E	C	C	C	B	B
P	F	F	F	G	G	G
Q	F	F	A	A	A	B
R	F	G	G	G	C	C
S	G	G	G	A	A	A
T	G	G	C	C	C	F
U	G	E	E	E	D	D

Table 3

Appellate Division, Superior Court of New Jersey
21 Judges, 7 Parts
Composition of Parts (based on assignment of judges in Table 2)

Part	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6
A	ABC	ABI	AIQ	IQS	QSL	SLE
B	DEF	DEL	DLH	LHA	HAO	OAQ
C	GHI	GHO	GOT	OTD	TDR	DRK
D	JKL	JKF	JFN	FNG	NGU	GUB
E	MNO	MNU	MUE	UEJ	EJC	JCH
F	PQR	PQC	PCK	CKM	KMI	MIT
G	STU	STR	SRB	RBP	BPF	PFN

Table 4

U.S. Court of Appeals, 9th Circuit[3]
Subject Matter Organization of Docket

Division 1	Criminal	811
	Federal Post Conviction	29
	TOTAL	840
Division 2	State Habeas Corpus	96
	⅓ General Civil[4]	526
	Writ	215
	TOTAL	837
Division 3	⅓ General Civil[4]	526
	Immigration & Naturalization Service	193
	Bankruptcy Court	65
	Tax Court	76
	TOTAL	860
Division 4	⅓ General Civil[4]	526
	National Labor Relations Board	182
	Other Agency	193
	TOTAL	901

3. Data for the Ninth Circuit were derived from statistics provided by the Office of the Circuit Executive. The statistics show filings for the period July 1, 1980—June 30, 1981.

4. The category of "General Civil" should be broken down into more precise categories to avoid duplicating work among the three divisions to which it is assigned. More refined data, however, are not presently available.

Division 5	Civil Rights Cases	465
	Civil Cases in Which U.S. Government is a Party	427
	TOTAL	892
OVERALL TOTAL		4330

Table 5

U.S. Court of Appeals, 9th Circuit
Rotation Plan at Five-Year Intervals (Using Divisions numbered 1-5)

Judge	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8	Year 9	Year 10
A	1	1	1	1	1	2	2	2	2	2
B	1	1	1	1	5	5	5	5	5	4
C	1	1	1	4	4	4	4	4	3	3
D	1	1	3	3	3	3	3	2	2	2
E	1	2	2	2	2	2	5	5	5	5
F	2	2	2	2	2	3	3	3	3	3
G	2	2	2	2	1	1	1	1	1	5
H	2	2	2	5	5	5	5	5	4	4
I	2	2	4	4	4	4	4	3	3	3
J	2	3	3	3	3	3	4	4	4	4
K	3	3	3	3	3	4	4	4	4	4
L	3	3	3	3	2	2	2	2	2	1
M	3	3	3	1	1	1	1	1	5	5
N	3	3	5	5	5	5	5	4	4	4
O	3	4	4	4	4	4	3	3	3	3
P	4	4	4	4	4	5	5	5	5	5
Q	4	4	4	4	3	3	3	3	3	2
R	4	4	4	2	2	2	2	2	1	1
S	4	4	1	1	1	1	5	5	5	5
T	4	5	5	5	5	5	1	1	1	1
U	5	5	5	5	5	1	1	1	1	1
V	5	5	5	5	4	4	4	4	4	3
W	5	5	5	3	3	3	3	3	2	2
X	5	5	2	2	2	2	2	1	1	1
Y	5	1	1	1	1	1	2	2	2	2

Table 6

U.S. Court of Appeals, 9th Circuit
Composition of Divisions (Based on assignment of judges in Table 5)

Division	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8	Year 9	Year 10
1	ABCDE	ACBDY	ABCYS	ABYSM	AYSMG	YSMGU	SMGUT	MGUTX	GUTXR	UTXRL
2	FGHIJ	FGHIE	FGHEX	FGEXR	FEXRL	EXRLA	XRLAY	RLAYD	LAYDW	AYDWQ
3	KLMNO	KLMNJ	KLMJD	KLJDW	KLDWQ	JDWQF	DWQFO	WQFOI	QFOIC	FIOCV
4	PQRST	PQRSO	PQROI	PQOIC	POICV	OICVK	ICVKJ	CVKJN	VKJNH	KJNHB
5	UVWXY	UVWXT	UVWTN	UVTNH	UTNHB	TNHBP	NHBPE	HBPES	BPESM	PESMG