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THE FEDERAL APPEALS PROCESS: WHITHER WE GOEST? THE NEXT FIFTY YEARS

HON. DONALD P. LAY†

In 1933, Justice Felix Frankfurter stated that in that year the United States Supreme Court had received a record 880 petitions for certiorari.¹ He warned that “the burden of examining any considerably greater number would be intolerable.”² We are now over a half a century later and we have seen the docket of the Supreme Court swell to nearly 4,500 petitions for certiorari.³ Similarly, the various dockets of both the federal district courts and the courts of appeals have greatly expanded to levels way beyond any predictions at that time. We have grown from forty-five authorized circuit judgeships and 155 authorized district judgeships in 1933 to 156 circuit judgeships and 575 district judgeships today.⁴ In the last ten years alone, we have seen a nearly fifty percent increase overall in the creation of new judgeships in the federal district and circuit courts.⁵

The possibility that in the next fifty years we shall see the same increases in judicial workload and number of judgeships as in the last fifty is certainly not beyond our comprehension. In fact, considering the exponential growth of the federal government in the past century as demonstrated by the increase of special interest groups, the creation and proliferation of various nontraditional forums, and the increase in the volume of both national and local laws, it is not unrealistic to imagine an

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1. Frankfurter & Hart, *The Business of the Supreme Court at October Term, 1933*, 48 HARV. L. REV. 238, 262 (1934).

2. *Id.* at 263.

3. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURT 1988 139 [hereinafter 1988 ANNUAL REPORT].

4. *Id.*

5. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 1978 104, 175 (in 1978 there were 97 circuit judgeships, excluding 46 senior judgeships, and 399 district judgeships, excluding 119 senior judgeships). See also WALLACE, *THE FUTURE OF THE JUDICIARY—AN UPDATE* 1–2 (presented to Conference of the Judiciary, Williamsburg, Virginia, March 1985).

even greater expansion of the number of judges and the workload of the courts. Moreover, any statistics relating to this type of growth in the last fifty years would show even greater increases in the state judiciary.⁶

In a study commissioned by former Chief Justice Warren Burger, Circuit Judge Clifford Wallace determined that there will be 289 circuit and 1,037 district judges by the year 2000.⁷ This has been the focus of national concern as reflected by Congress' creation of a federal judgeship committee which will study projections of the federal courts' workload and make recommendations as to jurisdictional restructuring.⁸ As with many other matters involving structural change, substantial decisions relating to the federal judiciary should be delayed until a more adequate and complete study can be rendered. This is an area that deserves more than merely one study by a single commission.

Perhaps the most notable improvement effecting the Supreme Court has occurred through recent legislation which provides the Court with discretionary jurisdiction in all areas where there had been mandatory jurisdiction.⁹ This particular relief did not come quickly. To spare the reader the long history of this proposal, suffice it to say that recommendations to Congress to eliminate mandatory jurisdiction were first made over twenty-five years ago and it has taken this long to attain any substantial achievement. The startling fact relating to this reform is that there was never any organized opposition to this proposal. The primary obstacle was simply Congressional lethargy in an area that affected the court system on a procedural basis. As exemplified by the recent salary debacle, Congress has shown little or no concern for the judiciary as far as internal effectiveness is concerned.

Attempts to deal with the expanding workload of the federal courts have bumbled along over the past fifty years with little concern for long-term planning. Court growth has operated more or less on the Peter Principle which thrives on problem-

6. See generally S. WASBY, T. MARVELL & A. AIKMAN, VOLUME AND DELAY IN THE STATE APPELLATE COURTS: PROBLEMS AND RESPONSES 42-46 (1979); Marvell, *State Appellate Court Responses to Caseload Growth*, 72 JUDICATURE 282, 284-85 (1989).

7. See Wallace, *Working Paper—Future of the Judiciary*, 94 F.R.D. 225, 228 n.4 (1981).

8. Federal Courts Study Act, Pub. L. No. 100-702, 102 Stat. 4644 (1988).

9. See, e.g., 28 U.S.C. §§ 1252, 1253, 1257 (1988).

solving through uncontrolled growth. All judges, lawyers, and indeed the citizenry at large must acknowledge that if we are to continue in our concept of government by law the judicial branch must be capable of providing the essential undergirding to that form of government. Consequently, we must pay heed to these growth projections and begin long term planning to enable the federal judiciary to continue to serve this nation and the various interests that it will encounter as our civilization progresses from one generation to the next.

There cannot be a more appropriate or realistic statement to describe the state of the federal judicial system at this time than to say "the future is now." The purpose of this essay is not so much to discuss new issues as it is to consider some ideas that have been proposed in the past and to give some conception of the direction in which the courts should move.

I. THE SUPREME COURT

The undeniable facts are that the United States Supreme Court functions with the same number of justices that it had two hundred years ago and generates approximately the same number of opinions annually that it wrote some fifty years ago. At the same time, there has been an overwhelming increase in the number of petitions for certiorari and an awesome upgrading in the sophistication of the matters that come before the Court for final determination. The Court, from its beginnings, has undergone a good deal of study and analysis. However, notwithstanding numerous reports, organized resistance, committees, plans, programs, and proposals, we are still in the debate stage and little or nothing has been done to achieve any realistic improvement in dealing with the workload of the Supreme Court. We can understand the difficulty of the problems of change within the judicial system by examining this movement to relieve the Supreme Court of its ever increasing workload.

My history of attempts to reform the Supreme Court will start with the creation of the Freund Committee which was directed by Harvard Law School Professor Paul A. Freund.¹⁰ The Freund Committee recommended the creation of a national court of appeals which would sit as an intermediate

10. FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (1972), reprinted in 57 F.R.D. 573, 575 (1973).

court between the various courts of appeals and the Supreme Court. In effect, this proposal advocated building a fourth tier of review.¹¹ Without going into the details of the various studies that the Freund Committee undertook, it is enough to say that many of its proposals were poorly received by members of the bar and the Supreme Court itself. In fact, a new committee was subsequently created by Congress to study alternative proposals to relieve the burden of the increasing number of petitions for certiorari. There were various suggestions made including transfer jurisdiction and reference jurisdiction. There have also been proposals for the creation of a separate body that would hear many of these cases or at least make recommendations to the Supreme Court as to what cases it should accept and hear.

The Congressional study commission, headed by the distinguished senator from Nebraska, Roman Hruska, unanimously recommended the creation of a national court of appeals.¹² Through the organized efforts of members of the bar and many jurists, including some of the members of the Supreme Court, the Hruska Commission's proposals were opposed on many grounds including basic concerns relating to who might appoint the court and how the court might function. However, the principle argument made against a national court of appeals was again that it would simply create a fourth tier in the federal appellate process, and that it would result in more work for the Court because it would be possible that petitions for certiorari could be reviewed twice in the same case.

In recent years, former Chief Justice Burger has advocated a variation of the Hruska Commission proposal to create a national court of appeals.¹³ For the last several years, Justice Byron White has dissented from many denials of certiorari on the ground that there is a lack of uniformity in decisions made by the lower federal courts and that there is a need for resolution of these matters on a national level in order to make the law more uniform.¹⁴ Chief Justice William Rehnquist has also rec-

11. Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 CAL. L. REV. 913, 914 (1983).

12. See COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (1975), reprinted in 67 F.R.D. 195 (1976) [hereinafter COMMISSION ON REVISION].

13. Burger, *The Time is Now for the Intercircuit Panel*, 71 A.B.A. J. 86 (Apr. 1985).

14. See, e.g., *Dow Jones & Co. v. Simon*, 109 S. Ct. 377, 378 (1988); L.E. Myers

commended the study and creation of an intercircuit tribunal primarily intended to resolve conflicts among the circuits that relate to statutory questions.¹⁵ Contemporaneously, a complete study of this issue was done by two New York University professors who are former Supreme Court law clerks.¹⁶ This study demonstrated that there was not a sufficient number of serious conflicts during the 1985 and 1986 Supreme Court Terms to justify the creation of a national court of appeals. In any event, the debate goes on and it undoubtedly will be subject to continued attention by the House and Senate Committees on the Judiciary.

There are two primary bases upon which a concept for some form of national court of appeals can find legitimate support. The first basis concerns the great increase in the number of petitions for certiorari filed with the Court and the immense burden it places upon the Justices. When we consider the dramatic increase in the past fifty years of the number of certiorari petitions filed annually, it would seem that the burden has become intolerable just as Justice Frankfurter had predicted.¹⁷ Certainly, the number of petitions and the corresponding workload is deceptive to some extent due to the large volume of frivolous petitions. In fact, the Court has been able to cope with this problem without a great decrease in its productivity in writing opinions by adopting various procedures for screening and pooling the petitions among the Justices and their law clerks. Nevertheless greater attention must be given to the Court's ability to responsibly screen the ever-increasing number of petitions for certiorari.

One must accept the concept that the determination of the

Co., *High Voltage Div. v. Secretary of Labor*, 108 S. Ct. 479, 480 (1987); *Mulligan v. Hazard*, 476 U.S. 1174, 1175 (1986); *Mobil Oil Corp. v. Blanton*, 471 U.S. 1007, 1009 (1985); *Illinois v. Washington*, 469 U.S. 1022, 1024 (1984); *International Bhd. of Elec. Workers, Local Union No. 323 v. NLRB*, 464 U.S. 950, 951 (1983); *Castorr v. Brundage*, 459 U.S. 928, 931 (1982); *Kimble v. D. J. McDuffy, Inc.*, 454 U.S. 1110, 1113 (1981); *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 449 U.S. 1039, 1042 (1980); *Brown Transp. Corp. v. Atcon, Inc.*, 439 U.S. 1014, 1015 (1978); *Masri v. United States*, 434 U.S. 907, 908 (1977); *Taylor v. St. Vincent's Hosp.*, 424 U.S. 948, 949 (1976); *DeMarrias v. Poitra*, 421 U.S. 934, 936-37 (1975); *Bailey v. Weinberger*, 419 U.S. 953, 953-54 (1974).

15. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1, 12-14 (1986).

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

17. See *supra* notes 1-2 and accompanying text.

Supreme Court's own docket must be the responsibility of the Court and may not be subject to delegation. As Justice William Brennan stated in rebuttal to the recommendation that a separate institution pass upon the certiorari docket, the jurisdiction of the Court is part of the business of the Court and it would be an unconstitutional delegation of power to allow a separate body to determine which cases the Supreme Court should hear.¹⁸ I think this is certainly sound doctrine.

The fact nonetheless remains that the increasing volume of petitions for certiorari, notwithstanding that many of those petitions are frivolous on their face, shall place the Supreme Court in an "intolerable" situation. While the Court has managed to deal with five-fold growth in the past fifty years, it is preposterous to believe that it could deal with the same level of growth in the future. A five-fold increase in the present workload would mean 25,000 petitions for certiorari to review each year! One might scoff at such a projection as unrealistic. But I am sure that Justice Frankfurter would also have scoffed at the idea that during the 1988 Term there would be close to 5,000 petitions for certiorari presented to the Supreme Court. Certainly, at some number we are compelled to find that the workload of the Court has reached its magical limit and some change has to be made. I believe that this limit has already been reached.

The second basis upon which the proposal for a national court of appeals may find support—a basis which has been advocated primarily by Justice White¹⁹—relates to the number of cases that the Court is capable of hearing and deciding. The contention is that the Supreme Court does not have the capac-

18. Brennan, *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230, 233-35 (1983). See also Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 482 (1973).

19. See COMMISSION ON REVISION, *supra* note 12, 67 F.R.D. at 401-02. More than a decade ago, Justice White wrote:

I do not suggest that the Court should have granted certiorari in *all* of these cases or that it should review *all* cases of this kind in the future. The reason is that we are performing at our full capacity, *i.e.*, we are now extending plenary review to as many cases as we can adequately consider, decide and explain by full opinion. . . . There is no doubt that those concerned with the coherence of the federal law must carefully consider the various alternatives available to assure that the appellate system has the capacity to function in the manner contemplated by the Constitution. As others have already noted, there is grave doubt that this function is being adequately performed.

Brown Transp. Corp. v. Atcon, Inc., 439 U.S. 1014, 1023-24 (1978) (emphasis in the original, White, J., dissenting). See also Rehnquist, *supra* note 15, at 12.

ity to hear as many important issues of law as they should. As a result, there are more conflicts existing among the circuits relating to substantive law and, as Chief Justice Rehnquist emphasizes, statutory interpretation. This argument has often been made in the area of tax law and has echoed from as long ago as former Harvard Dean and Solicitor General Erwin Griswold's testimony before the Hruska Commission.²⁰

There is, of course, a logical appeal to this argument. However, most existing studies tend to refute the proposition that there are important substantive conflicts that exist on a national level today due to the Supreme Court's inability to resolve a docket overload.²¹ Additionally, Justice John Paul Stevens has stated to me that there has never been an instance during his tenure where the Court has denied a petition for certiorari in an important case because it was too busy to hear it.

I respectfully submit that the reasonableness of the charge that our highest court is so over-burdened that it cannot hear important cases depends upon one's philosophical view of the role of the Supreme Court. Should the Supreme Court serve as a court of error or should the Court limit its decisions to important issues and policy questions that affect the nation as a whole? I think most of us believe that the Court should assume the latter role. On that basis, it is difficult to find many cases in which certiorari has been sought and which should have been heard but were not reviewed by the Court. The fact that certiorari might be denied in given cases does not necessarily mean that the Court has overlooked a serious conflict in decisions by lower courts. All students of the Supreme Court know that denial of certiorari can be for many reasons, including jurisdictional and procedural questions as well as the merits themselves.²²

20. Indeed, Griswold has championed this particular proposal for more than forty years. See Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153 (1944).

21. See, e.g., Carrington, *United States Appeals in Civil Cases: A Field and Statistical Study*, 11 Hous. L. REV. 1101 (1974); Casper & Posner, *The Caseload of the Supreme Court: 1975 and 1976 Terms*, 1977 S. CT. REV. 87; Estreicher & Sexton, *supra* note 16; Goldman, *Conflict on the U.S. Courts of Appeals, 1965-71: A Quantitative Analysis*, 42 U. CIN. L. REV. 635 (1973).

22. Note, *The Intercircuit Tribunal and Perceived Conflicts: An Analysis of Justice White's Dissents From Denial of Certiorari During the 1985 Term*, 62 N.Y.U. L. REV. 610, 620 (1987).

Nevertheless if we return to the projections of the Court's future workload, there is little doubt that the concerns presented by Justice White and Chief Justice Rehnquist can come true. The Court will need a greater capacity to decide important national issues. In evaluating the future it is imperative to recognize that the Court, barring constitutional amendment,²³ is permanently composed of its nine members and cannot write many more opinions than it writes today. Therefore, there must be either an admission that the Justices are writing cases that are improperly before the Court and consequently blocking review of more important cases, or a recognition that the number of important cases in which review is sought will eventually exceed the number of cases that the Court can hear. I perceive that there is eminent need for change. Although I have personally opposed the creation of a national court of appeals in the past,²⁴ the expanded workload of the Court and the great burden placed upon each individual Justice may mandate new ideas of structural change.

There has been opposition to the creation of a national court of appeals for several reasons. The principle reason, however, is that most proposals do nothing more than create a fourth tier in the appellate process. In speaking of the Supreme Court, Justice Robert Jackson once said, "We are not final because we are infallible, but we are infallible only because we are final."²⁵ This is an important axiom to remember in this discussion.

The proposal for a national court as a high level intermediate to the Supreme Court and the courts of appeals does not provide it with the same degree of authority that the Supreme Court enjoys. An intermediate court which simply passes upon issues with the hope that certain ones will fall out or become

23. See Stern, *Remedies for Appellate Overloads: The Ultimate Solution*, 72 JUDICATURE 103, 109-10 (1988) (discusses whether a constitutional amendment would be necessary to expand size of Supreme Court).

24. See *Supreme Court Workload: Hearings on H.R. 1968 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Comm.*, 98th Cong., 1st Sess. 174-83 (1983); *Hearings on S. 3052 Before the Commission on Revision of the Federal Court Appellate System*, 93rd Cong., 2nd Sess. 901-24 (1975) [hereinafter 1975 *Hearings on Federal Court Appellate System*]; see also Lay, *Query: Will the Proposed National Court of Appeals Create More Problems than it Solves?*, 66 JUDICATURE 437 (1983); Lay, *Why Rush to Judgment? Some Second Thoughts on the Proposed National Court of Appeals*, 59 JUDICATURE 172 (1975).

25. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

more authoritative provides little help to the Supreme Court because losing litigants will inevitably petition the Supreme Court. Furthermore, inherent in the current proposals for a national court is a basic oversight. Deciding a case on a national level seldom resolves conflicts so as to reduce litigation. On the contrary, cases decided on a national level often result in the proliferation of sub-issues causing even greater confusion and instability in the law. To paraphrase Aristotle, an inflexible and absolute rule will not have its intended effect in all cases.

For example, the Supreme Court's decision in *Board of Regents v. Roth*²⁶ hardly served to be the final word on the due process requirements in employment termination cases. Over the past twenty-seven years, scores of cases have come before the Court and distinguished *Roth*. Similarly, *United States v. Chadwick*²⁷ was initially considered the definitive explanation of the automobile exception in the context of warrantless searches of luggage found in motor vehicles. Nonetheless, the Court continues to hear numerous search and seizure cases with varied facts and circumstances that can be distinguished from *Chadwick*. This same pattern can be found in almost every major decision the Court passes upon.

It is difficult to escape the fourth tier concept. Seven or nine judges on a national court of appeals cannot have insight or be more correct on a given issue than a three judge or an *en banc* panel hearing of a matter by the court of appeals. A proposal which merely involves changing personalities and changing numbers will in fact be counterproductive to solving the Court's workload problems. My friend Luther Swygert, a late, great chief judge of the Seventh Circuit, believed that the national court of appeals "is a solution looking for a problem." His basic point was not so much that a problem does not exist; rather, he felt that the various proposals did not in any way attack the problem.²⁸

If one views the increasing number of petitions for certiorari which has created the problem, certainly the national court of appeals as an intermediate court could not in any way alleviate

26. 408 U.S. 564 (1972).

27. 433 U.S. 1 (1977).

28. See Swygert, *The Proposed National Court of Appeals: A Threat to Judicial Symmetry*, 51 IND. L.J. 327 (1976).

the Supreme Court's growing burden. There is no question that every time the national court of appeals would decide a problem the losing litigant, just as he or she does today, would petition for certiorari from the Supreme Court. Moreover, if there was some kind of reference jurisdiction involved with the national court of appeals, then the Court would have to look at many matters twice. Thus, instead of alleviating the workload problems, the proposed intermediate court would actually increase the number of petitions for certiorari that the Court would have to process.

Moreover, there is already so much delay in the litigation process at the present time that it will not serve the public to build more procedural processes within the system. The public is not interested in the procedural mechanics of the law. They are interested in a final decision. Litigants need to know whether they have won or lost. But the decision in a given case is often not the right decision until the final court has acted. On this very date I am working on an opinion involving a prisoner who claims he has been unconstitutionally denied proper medical treatment. The case began in 1984. It was decided by the district court in 1988. It will be decided by our court in 1989. If it goes to the Supreme Court of the United States, it might be 1990 or 1991 before the matter is resolved. In another case currently before our court, the complaint was filed in 1986 and the defendants' motions for summary judgment were granted in 1988. On appeal, we have raised *sua sponte* the issue of whether a federal court has jurisdiction over a number of the defendants. Obviously, if there is no jurisdiction, this case which is in its fourth year in federal court must be dismissed. If we were to dismiss the case on jurisdictional grounds and the litigants were to appeal this decision to the Supreme Court, this issue alone would not be finally disposed of until the early 1990s.

These cases demonstrate the rule rather than the exception of the kind of delay that currently exists in our litigation arena. Of course it is important to be right, and of course it is important to have quality analysis. But it is equally and sometimes more important to simply make a decision on a given matter. If the courts do not concentrate on trying to provide expeditious results and decisions, we risk losing the faith and support of the American people. This is perhaps the most important argument against a fourth tier being built into any appellate

process through the creation of a national court of appeals that is simply another intermediate level.

A worthwhile proposal for structural changes must necessarily involve a means of diverting a large percentage of the petitions for certiorari made to the Supreme Court. I would propose that the Court redefine its jurisdiction concerning petitions for certiorari. Today, under its present Rule 17, the Supreme Court may entertain petitions for certiorari in the following areas:

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the United States Court of Appeals for the Federal Circuit, the United States Court of Military Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.²⁹

By redefining the jurisdictional parameters of the Supreme Court to include only those cases which involve an interpretation of the United States Constitution, United States Statutes, or Federal Rules of Criminal or Civil Procedure, there would

29. SUP. CT. R. 17.

be a radical reduction of the number of certiorari petitions the Court must review while retaining jurisdiction to address all of the issues that truly involve the national interest. This sort of jurisdictional reform would mean that in most instances substantive review of agency decisions, diversity cases, and other non-public issues would achieve finality through the decisions of the United States Courts of Appeals. I think this is a sensible proposal which would reduce the workload of the Supreme Court and provide a more logical and realistic dimension to the workload problem created by the large number of certiorari petitions currently filed with the Supreme Court.

Where courts of appeals rule on agency decisions or other important areas of litigation by conflicting decisions, a new form of certiorari procedure could be developed to finally resolve these issues while avoiding the problems of a fourth tier concept. A seven judge national court of appeals could be created, and the certiorari procedure could allow the litigant the option of petitioning the Supreme Court of the United States or the new national court of appeals for final determination of a given matter. It would be mandatory under this proposal to petition for certiorari to the Supreme Court of the United States in all cases in which the Constitution or a federal statute or rule is involved. The alternative national court simply would not have certiorari jurisdiction in those areas. In all other cases, however, litigants could petition to the national court of appeals on a certiorari basis and that court could either grant or deny certiorari. In the event that the national court granted certiorari, whatever decision that court reached would be the final decision and no petition for certiorari would lie with the Supreme Court. Conversely, if the petition for certiorari is denied, then a similar bar would prevail and there would be no other petition for certiorari to the Supreme Court available to the parties. In essence, this proposal would create an optional forum for a party to petition for certiorari without creating a fourth tier of review.

One might question whether litigants would have any incentive to seek review by the proposed national court of appeals if petitioning the Supreme Court of the United States for review remains an available alternative. In reflecting on this issue, one must consider where the litigant is more likely to receive certiorari review. Because the alternative national court would have a smaller volume of work than the Supreme Court, there

would be a greater likelihood that the national court of appeals would grant certiorari and hear an appeal. In other words, the opportunity for review of the average appeal would be enhanced by filing a petition for certiorari with the national court rather than with the Supreme Court. At the same time, structuring a national court of appeals in this way would provide the Supreme Court with greater capacity to consider cases which have national importance, such as those that relate to federal constitutional and statutory issues, while also providing a way for the Court to lighten its certiorari petition workload. Structurally, however, the federal judicial system would remain basically unchanged. There would still be just a single level of permissive review above the courts of appeals.

The process of appointment of judges to this national court is incidental to the purposes of lightening the certiorari load of the Supreme Court and providing the Court with a greater capacity to hear important cases. Under this proposal, these goals could be accomplished without the fears and problems that accompany the fourth tier concept.

II. THE COURTS OF APPEALS

A. *Circuit Division*

In 1933, when Frankfurter commented on the growth of the number of petitions for certiorari filed with the Supreme Court, there were 3105 cases filed in the federal courts of appeals.³⁰ In 1988, over half a century later, we find over 37,000 appeals filed with federal circuit courts.³¹ Of course in 1933 there were only forty-five judgeships in the United States as compared to 168 active and nearly fifty senior circuit judges today.³² This increase has been most prominent in the last twenty-three years since I have been on the Court of Appeals for the Eighth Circuit. In 1966 when I came on the court there were only eighty-eight circuit judgeships.³³ Based upon the growth projections of the docket contributed by Circuit Judge Wallace, by the year 2000 there will be an increase of 119% in

30. ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES FOR THE FISCAL YEAR 1933 132.

31. 1988 ANNUAL REPORT, *supra* note 3, at 1-7, 140.

32. *Id.* at 50.

33. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 79 (1966).

the present number of circuit judges.³⁴ While this figure is astonishing, it is not unrealistic. The past has truly been a prologue to the future in the area of workload and court expansion.

Today, there are thirteen courts of appeals in this country including the eleven numbered circuit courts of appeals, the D.C. Circuit, and the new Federal Court of Appeals. The number of judges on the circuits range from six on the First Circuit up to twenty-eight on the Ninth Circuit. The Ninth Circuit, by far the largest, has raised a good deal of concern as to whether it has become too large. Its size has been defended by former Chief Judge James Browning and many of the other judges of the Ninth Circuit. That court has divided itself up into regional courts and seems to be capable of dealing with its size.³⁵ Nevertheless the Fifth Circuit, which experienced similar growth and was eventually divided into the Eleventh and Fifth Circuits some ten years ago, is an example of how a circuit can be effectively divided. Of course the Eighth Circuit experienced a similar transformation in 1929 when it was divided into the Eighth and Tenth Circuits. One unique problem relating to any proposed division of the Ninth Circuit, however, is the fact that California is the largest state in the nation and, of course, provides the greatest number of appeals. It has been deemed improvident to have one circuit court include only one state. But there is the alternative problem of attempting to divide California into two different circuits.

If we accept present numerical projections, and if we decide to follow our previous course of creating additional circuits as growth requires, we could conceivably have over twenty different circuit courts of appeals in the near future. This would present incredible problems to the Supreme Court in terms of the probability of conflicts within the circuits. An alternative to increasing the number of circuits would be to double the number of judges in each of the circuits. This latter approach, which appears to be the strategy which Congress presently is prone to follow, would similarly aggravate rather than solve the problem by turning each circuit into an unwieldy and uncoordinated body of judges.

34. See *supra* note 6, at 228 nn.3-4.

35. 9TH CIR. R. 23.

There is no question that while an increase in the number of circuit judges is the easy answer, without internal structural changes it certainly is not the best answer. If faced with the prospect of fifty-six judges rather than the present twenty-eight, perhaps even the judges of the Ninth Circuit would agree that there are severe problems involved with increasing the number of judges within a given circuit. The growth of the number of judges in a circuit court makes it difficult to achieve a reasonable degree of predictability and creates problems of collegiality. In my own circuit, which presently has ten judges, there is a proposal to add two more judges in the next two to five years. I have for some time expressed concerns that we have already lost the necessary measure of predictability of the court by increasing the number beyond nine. Of course, there is no magic in the number nine. It has, however, served the Supreme Court of the United States well for a long time. Furthermore, keeping the unit number small provides a much better situation for the law to grow in a more organized and predictable manner.

Nonetheless some growth in the number of authorized circuit judgeships is inevitable. To deal with this dilemma, we might follow the lead of former Chief Judge Browning in the Ninth Circuit and apportion the responsibility of the workload to regional courts within the circuit. Taking my own circuit for example, and supposing that we had twenty judges on the court rather than the present ten, the court could be structured in such a way as to divide the responsibility for the northern states and southern states by having nine judges in a southern district, nine judges in a northern district, and two judges who would sit at large. The judges could either rotate after serving three to five year terms or stay within their assigned district. Thus, despite the increase in the number of judges, the circuit would preserve its stability because there generally would be three panels of the same judges serving the northern section and three panels of the same judges serving the southern section.

Thus, rather than increasing the number of circuit courts, I would propose that we work on a principle to subdivide each circuit into divisional courts with judges specifically designated to sit in each division. Moreover, we should attempt to keep the number of active judges participating in each divisional court to nine as the optimum size.

B. En Banc Proceedings

In accord with the above suggestion, the rules governing *en banc* procedures would have to be drastically altered to provide uniformity and to lessen the chance of circuit splits. Today, with the increased number of new judges on the courts of appeals, there has been an increase in *en banc* proceedings. My own circuit is a good example of this trend. Before I came on the court in 1966, I argued one of only two *en banc* cases heard by the Eighth Circuit between 1956 and 1966.³⁶ The history of the other circuits is almost identical. Indeed, from 1966 to 1980, there were very few *en banc* cases. However, with the change of administrations and the appointment of more judges on the courts of appeals, the newer judges have demonstrated their desire to hear more cases *en banc*.

Many chief judges of the various circuits echo my observation that many of the newer judges in each circuit want to have an immediate expanded voice in the decision-making process. Consequently, these judges have a tendency to vote to hear cases *en banc* that depend solely upon a question of the exercise of judgment rather than a question of law. Indeed, many of the *en banc* cases do not deserve to be reheard by all of the judges in the circuit.³⁷ These issues include whether there is prejudicial error in a given case, whether the trial court abused its discretion, whether the panel correctly applied state law, and whether in a criminal case there was harmless error. These are questions that seldom if ever should require the full attention and energies of a court *en banc*. The Supreme Court has declared that suggestions for rehearing *en banc* should be entertained by the court not in terms of "the correctness" of the particular decision, but solely on the "significance" of the case.³⁸ This factor has generally been overlooked in the recent increase of *en banc* hearings throughout most of the circuit courts of appeals. There is no question that the time and expense involved in bringing ten or more judges together to hear one case over again should mandate that *en banc* review be a rare event. In fact, the Federal Rules of Appellate Procedure

36. McGraw-Edison Co. v. Van Pelt, 350 F.2d 361 (8th Cir. 1965). See also Bailey v. Henslee, 309 F.2d 840 (8th Cir. 1962).

37. Solimine, *Ideology and En Banc Review*, 67 N.C.L. REV. 29, 61-69 (1988).

38. See *Western Pac. R.R. Corp. v. Western Pac. Ry.*, 345 U.S. 247, 262-63 (1953).

require that a case be of exceptional importance if it is to be heard *en banc*.³⁹ This does not, however, deter the attorneys from suggesting *en banc* review in about ten percent of the cases decided by a panel. It also does not deter the majority of judges from voting to grant *en banc* review in a given case which is fact specific and should not require the resources necessary for consideration by all the circuit's judges.

The courts of appeals are already burdened with a heavy workload, and the time it takes the full court to read briefs, hear argument, and repeat the same deliberative process performed by the panel is extensive. The delay which accompanies *en banc* cases is apparent in the fact that, notwithstanding our own policy to try to expedite deliberation and dispose of all cases in ninety days,⁴⁰ some of the *en banc* cases take over a year to reach final disposition. These cases needlessly go through the appellate system twice and, because it takes longer for ten judges to make up their mind than it does for three judges, the time necessary for final determination invariably exceeds the limits of reasonable delay.

Even if the circuits are not restructured, I would hope that the federal judiciary committee recommends rigid limitations on the use of *en banc* procedures. In my judgment, *en banc* consideration is justified only when there is a question of intra- or inter-circuit conflict on significant issues. In any event, if we follow former Chief Judge Browning's example in the Ninth Circuit to make divisions within each circuit, the number of circuits could remain the same and local or national rules could be enacted to require only nine judges on an *en banc* panel regardless of the size of the circuit.⁴¹ This nine judge panel could be set up on a rotational basis with each judge in the circuit serving for an equal period. In this manner, even though our projected growth would give the Eighth Circuit one of the larger circuits in terms of number of judges on a federal court of appeals, these procedures would ensure effective self-policing so as to maintain consistency in the circuit's decisions.

39. See FED. R. APP. P. 35(a).

40. INTERNAL OPERATING PROCEDURES OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT VI(A).

41. Cf. 9TH CIR. R. 25. See also Bennett & Pembroke, "Mini" In Banc Proceedings: A Survey of Circuit Practices, 34 CLEV. ST. L. REV. 531 (1986).

C. *The Permissive Appeal*

Another effective, albeit controversial, modification to reduce the workload and lessen the need to increase the number of judges would be to limit the right of the litigant to come to the court. In other words, this proposal would change the rule of appeal as a matter of right to a rule where there is appeal on a permissive basis.⁴² In order to accommodate many of the objections that have been made to this type of proposal, I must state at the outset that not all cases should be subject to permissive appeal. For instance, a right of appeal must exist in all criminal cases. I would further propose to handle all civil appeals as we do today in cases involving habeas corpus and in forma pauperis⁴³ by having some preliminary review by the district court and the court of appeals as to whether a certificate of probable cause or leave to appeal should issue. I think that generally the burden should be on the district court in each instance to certify whether an appeal in a civil case should be taken, much in the same manner that the district court reviews petitions for certificate of probable cause and certificate of good faith related to in forma pauperis appeals.⁴⁴ If the certificate is denied by the district court, then as in habeas corpus cases, application can be made in the court of appeals. If the petition is denied, then the court of appeals should issue an order to show cause as to why the appeal should not be dismissed. In many instances appeals are taken in civil matters that relate to evidence and instructions which seldom carry prejudicial error. These cases could be singled out through a very narrow preliminary basis and the merit of the appeal judged rather quickly.

There is another proposal originated by the late Judge Albert Bryan of the Fourth Circuit. Years ago he wrote an article suggesting that, following trial, litigants who wish to appeal should file notice and request to have oral argument within thirty days of that filing. Notice would simply include a statement of the issues and no briefs would be required since the trial briefs would contain the law.⁴⁵ In most appeals, there is

42. Lay, *A Proposal for Discretionary Review in Federal Courts of Appeal*, 34 Sw. L.J. 1151, 1155-58 (1981).

43. 28 U.S.C. § 1915(a) (1982).

44. See also FED. R. APP. P. 24.

45. Bryan, *For A Swifter Criminal Appeal—To Protect The Public As Well As The Accused*,

no need to have a complete written transcript. The parties can state the facts and, if there is disagreement, the court of appeals could certify to the district court reporter to have that particular portion of the transcript sent to the court so as to resolve the factual differences. In most cases, parties will be able to adequately argue on appeal immediately after trial because the record and arguments will be fresh in the minds of both counsel. Additionally, the case retains its momentum and the appeal process in most cases could be terminated within a reasonable time after the trial.⁴⁶

Most appeal issues that arise in civil cases involve such matters as whether the court has applied the state law correctly, erred on instructions, improperly admitted evidence, or incorrectly ruled on pleading questions. These are issues that could be most easily dealt with shortly after trial. Under Judge Bryan's proposal, appeals could be disposed of quickly and economically.

Because of limitations of time and space, I have not addressed the workload problems of the district courts. However, solutions and changes within the district courts directly affect the courts of appeals. Therefore, I must offer a word of concern: while it is easy to reduce workload by cutting back our subject matter jurisdiction of cases, we need to proceed cautiously in this area. Our judicial structure must continue to adjust to meet the expanded needs caused by the growth of the law and ensure the fair adjudication of human rights. Arbitrarily slashing areas of subject matter jurisdiction may very well be counter to these objectives.

Whatever transpires in the next twenty-five years, we need to act carefully. Once structural changes in an institution take place, it is difficult to turn back. Nonetheless change, even if it comes slowly, will come. In the meantime, our collective concern should help those who chart the course.

25 WASH. & LEE L. REV. 175, 182-83 (1968). See also 1975 Hearings on Federal Court Appellate System, *supra* note 24, at 902 (testimony of the Honorable Donald P. Lay, Chief Judge, Eighth Circuit Court of Appeals).

46. Lay, *Reconciling Tradition with Reality: The Expedited Appeal*, 23 UCLA L. REV. 419, 424-26 (1976).

