



1994

## Imagining the Alternative Futures of the U.S. Courts of Appeals

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### Recommended Citation

Thomas E. Baker, *Imagining the Alternative Futures of the U.S. Courts of Appeals*, 28 Ga. L. Rev. 913 (1994).

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# IMAGINING THE ALTERNATIVE FUTURES OF THE U.S. COURTS OF APPEALS\*

*Thomas E. Baker\*\**

## INTRODUCTION

Any number of extramural or structural reforms have been proposed over the years to solve the present problems and to meet the future needs of the United States Courts of Appeals. Some have been on the drawing board for a long time, while others are much more novel. This Article gathers the more provocative—critics would say “radical”<sup>1</sup>—extramural or structural proposals that have coalesced thus far in the decades-long debate over what Congress should do about the intermediate federal appellate courts. The Final Report of the Federal Courts Study Committee is the point of departure for this “inquiry and discussion.”<sup>2</sup>

The discussion in this Article includes the structural alternatives examined by the Study Committee as well as other proposals from

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The author is grateful for the suggestions and comments of: Honorable Levin H. Campbell; Honorable John C. Godbold; Professor Arthur D. Hellman; Honorable James C. Hill; Professor A. Leo Levin; Honorable Richard A. Posner; William K. Slate, II, Esquire; Honorable J. Clifford Wallace; and Honorable Joseph F. Weis, Jr. Thanks are owed to Diana Nichols and Michael S. Truesdale for their able research assistance.

<sup>1</sup> See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 124 (Apr. 2, 1990) [hereinafter STUDY COMMITTEE REPORT] (containing additional statement of four committee members referring to “radical models”); see also Thomas E. Baker, *An Assessment of Past Extramural Reforms of the U.S. Courts of Appeals*, 28 GA. L. REV. 863 (1994).

<sup>2</sup> The Study Committee encouraged efforts like the present study. STUDY COMMITTEE REPORT, *supra* note 1, at 116-17; see *infra* text accompanying note 12 (encouraging further inquiry and discussion).

other sources.<sup>3</sup> This effort is meant to be descriptive rather than prescriptive. The commentary will attempt to summarize the strengths and weaknesses of the various structural proposals, however, in an attempt to better understand and compare the numerous proposed “solutions”—which often have a way of developing into the next set of problems for the federal courts. After identifying some basic assumptions, this Article will proceed to evaluate three general approaches: adoption of a certiorari-like system; abolition of the present circuit system and replacement with one of the several possible alternative structures; and retention of the present circuit system with the eventuality of generalizing the experience of the Ninth Circuit.

### I. SOME BASIC ASSUMPTIONS

In November 1988, the 100th Congress created the Federal Courts Study Committee as an ad hoc committee within the Judicial Conference of the United States.<sup>4</sup> Appointed by Chief Justice Rehnquist, the fifteen-person committee included represen-

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<sup>3</sup> This is the appropriate place to disclose that the present author served as Associate Reporter to the Federal Courts Study Committee and worked directly with the Subcommittee on Administration, Management and Structure. See Thomas E. Baker, *Shaping A Court System for the '90s—Federal Courts Study Committee Takes a Look Ahead*, TEX. LAW., May 28, 1990, at 32. The Subcommittee consisted of U.S. Circuit Judge Levin H. Campbell (Chair); J. Vincent Aprile, II, Esq.; Morris Harrell, Esq.; Senator Howell Heflin; and U.S. District Judge Judith N. Keep.

<sup>4</sup> Act of Nov. 19, 1988, Pub. L. No. 100-702, 102 Stat. 4642 (1988). See generally George D. Brown, *Nonideological Judicial Reform and Its Limits—The Report of the Federal Courts Study Committee*, 47 WASH. & LEE L. REV. 973 (1990); William K. Slate, II, *Report of the Federal Courts Study Committee: An Update*, 21 SETON HALL L. REV. 336 (1991) (summarizing work of Study Committee); Stanley Sporkin, *Reforming the Federal Judiciary*, 46 SMU L. REV. 751 (1992); Symposium, *The Federal Court Docket: Issues and Solutions*, 22 CONN. L. REV. 615 (1990) (discussing work of Study Committee and aspects of federal judiciary in general); Symposium, *Federal Courts*, 1990 B.Y.U. L. REV. 1 (discussing Study Committee); Joseph F. Weis, Jr., *The Federal Courts Study Committee Begins Its Work*, 21 ST. MARY'S L.J. 15 (1989) (discussing aspects and goals of Study Committee). The Study Committee's efforts soon developed legislative movement. See The Federal Courts Study Committee Implementation Act, Pub. L. No. 101-650, tit. III, 104 Stat. 5089, 5104 (1990) (requesting Board of Federal Judicial Center to study number and frequency of conflicts among judicial circuits in interpreting law).

This discussion is adapted, with permission, from: Thomas E. Baker, *On Redrawing Circuit Boundaries—Why the Proposal to Divide the United States Court of Appeals for the Ninth Circuit Is Not Such a Good Idea*, 22 ARIZ. ST. L.J. 917, 950-53 (1990).

tatives of the three branches of federal government, state government officials, practitioners, and academics.<sup>5</sup> Congress gave the Study Committee fifteen months to examine the problems facing the federal courts and to develop a long-term plan for the judiciary.<sup>6</sup> Among the subjects within the explicit charge to the Study Committee, Congress specifically asked for an evaluation of the structure and administration of the courts of appeals.<sup>7</sup> The section of the Study Committee's final report on appellate structure resembles something akin to a Chinese restaurant's menu of structural reforms and provides a useful framework for understanding the debate over the many varied proposals to reform the federal appellate structure.

The Study Committee began this section of the Final Report with a given: The federal appellate courts are faced with a "crisis of volume" that will continue and require some "fundamental change."<sup>8</sup> The current geographic circuits that thus far have survived the crisis all share a few essential characteristics that define their modern function: They are the only courts between the district courts and the Supreme Court; their jurisdiction is an appeal as of right; their basic decisional unit is the three-judge panel; they are geographically based; and their total number (thirteen) still reflects, though somewhat faintly, the congressional history that once correlated the number of circuits with the number of Supreme Court Justices.<sup>9</sup> The Study Committee did label as a "last resort"<sup>10</sup> the idea of changing the appeal-of-right feature of appellate jurisdiction to a discretionary, certiorari-like jurisdiction

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<sup>5</sup> Act of Nov. 19, 1988, Pub. L. No. 100-702, 102 Stat. 4642, 4644 (1988).

<sup>6</sup> *Id.* at 4645.

<sup>7</sup> *Id.* at 4644.

<sup>8</sup> STUDY COMMITTEE REPORT, *supra* note 1, at 109; *see also* AMERICAN BAR ASSOC., STANDING COMM. ON FEDERAL JUDICIAL IMPROVEMENTS, *THE UNITED STATES COURTS OF APPEALS: REEXAMINING STRUCTURE AND PROCESS AFTER A CENTURY OF GROWTH* 1-10 (1989) [hereinafter A.B.A. STANDING COMMITTEE]; William H. Rehnquist, *Introduction to THE FEDERAL APPELLATE JUDICIARY IN THE 21ST CENTURY* 11-13 (Cynthia Harrison & Russell R. Wheeler eds., Fed. Jud. Ctr. 1989). *See generally* Thomas E. Baker & Denis J. Hauptly, *Taking Another Measure of the "Crisis of Volume" in the U.S. Courts of Appeals*, 51 WASH. & LEE L. REV. (forthcoming 1994); Michael C. Gizzi, *Examining the Crisis of Volume in the U.S. Courts of Appeals*, 77 JUDICATURE 96 (1993) (predicting further increases in appellate court workload).

<sup>9</sup> STUDY COMMITTEE REPORT, *supra* note 1, at 113.

<sup>10</sup> *Id.* at 116.

and straightforwardly rejected the "single national appellate court" proposal.<sup>11</sup> The Study Committee's recommendation, such as it was, only went so far as to draw attention to the problems of the courts of appeals without endorsing any one solution: "Fundamental structural alternatives deserve the careful attention of Congress, the courts, bar associations and scholars over the next five years. The Committee itself has studied various structural alternatives. Without endorsing any, it lists a few here to stimulate further inquiry and discussion."<sup>12</sup> The Study Committee then went on to describe five possibilities.<sup>13</sup>

First, the present geographic circuits could be dissolved and new circuit boundaries could be drawn and redrawn periodically to achieve smaller regional courts with nine members.<sup>14</sup> All the regional courts could be bound to follow the prior precedent of any other panel in every other region, subject to Supreme Court overruling.<sup>15</sup> One central division of representative judges could review panel decisions and resolve remaining conflicts as a kind of national en banc court.<sup>16</sup> This would reduce the expectation of more frequent conflicts generated by creating more circuits, without having to rely on the Supreme Court.

Second, an additional appellate tier could be created.<sup>17</sup> Twenty to thirty regional appellate divisions of nine judges each could be created to replace the present thirteen circuits to hear appeals as of right, and four or five upper tier appellate courts could be created with larger regions to consider discretionary appeals from the regional divisions, with Supreme Court jurisdiction to hear a second discretionary appeal from the upper tier courts.<sup>18</sup> This structure could absorb the anticipated large cohorts of additional judgeships that will be necessary, and again, it would have a built-in feature to handle the likelihood of more frequent conflicts.<sup>19</sup>

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<sup>11</sup> *Id.* at 117.

<sup>12</sup> *Id.* at 116-17.

<sup>13</sup> *Id.* at 118-23.

<sup>14</sup> *Id.* at 118-19.

<sup>15</sup> *Id.* at 118.

<sup>16</sup> *Id.* at 118-19.

<sup>17</sup> *Id.* at 119-20.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

Third, national subject matter courts could be created with specialized national jurisdiction over such subjects as tax, admiralty, criminal, civil rights, labor, administrative, and other subjects, alongside the present circuits.<sup>20</sup> Alternatively, subject matter panels could be created within the existing circuits.<sup>21</sup>

Fourth, all the federal courts of appeals could be merged into a single, centrally organized court that could itself create and abolish special subject matter panels as deemed appropriate. The new organization could then develop some sort of new internal mechanisms for resolving conflicts.<sup>22</sup>

Fifth, the existing circuits might be consolidated into perhaps five "jumbo" circuits that might resemble in many ways the current Ninth Circuit.<sup>23</sup> Judges in the jumbo circuits could rotate among specialized subject matter panels or otherwise regroup themselves, perhaps hierarchically within the circuit, creating distinct and separate panels to handle the functions of error correction and law declaration.<sup>24</sup>

All these models, and their variations, share an underlying assumption for the future: More appeals will result in more judgeships. The objective is to concoct new structures better able than today's to perform the national appellate function on the grand scale that will be required in the foreseeable future. The Federal Courts Study Committee thus entreated us to reconceptualize the debate over the courts of appeals. Thematically, there are three directions of thought about structural reform: (1) adopting a certiorari-like system, permitting each court of appeals to control the number of cases it reviews; (2) abolishing the present circuit system and replacing it with any one of several new structures; and (3) retaining the present circuit system, with wider usage and further development of administrative and management techniques after the fashion of the Ninth Circuit to accommodate the larger dockets and the numerous judgeships of the resulting jumbo

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<sup>20</sup> *Id.* at 120-21.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 121.

<sup>23</sup> *Id.* at 122-23.

<sup>24</sup> *Id.* at 122.

circuits.<sup>25</sup> Anticipating the conclusion of this Article, the “up front” assumption is that each of these alternatives—including the option of retaining the present circuit system—represents a policy choice that requires the decisionmaker, i.e., Congress, to weigh costs and benefits and to seek the solution that best serves the judicial needs of the nation.

This Article thus explicitly takes issue with the characterization by the minority of the Federal Courts Study Committee that it is somehow possible to maintain the status quo ante.<sup>26</sup> The most serious burden is one of caseload, not of proof; the courts of appeals bear the burden, not would-be reformers. This Article considers the more “radical” structural reforms currently only being debated. *Nota bene:* The direction of thought of the Study Committee minority, to retain the present circuit system, is included here among the “radical” reforms because of what caseload and intramural responses already have done—and will continue to do—to the federal appellate ideal. The waves of cases will continue and will continue to erode the federal appellate tradition.

If Congress takes the approach of retaining the present circuit system, it should do so after careful study and deliberation, with a full understanding of the implications for the federal appellate system and not because of a political paralysis or out of an attitude of benign neglect.<sup>27</sup> The position taken here is that legislative inaction, doing nothing in the face of the demonstrably manifest problems of the United States Courts of Appeals would be irresponsible and, in effect, just as “radical” as any of the alternative courses of action discussed in this Article.

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<sup>25</sup> *Report of the Subcommittee on Structure to the Federal Courts Study Committee*, at 32, reprinted in 2 FEDERAL COURTS STUDY COMMITTEE, WORKING PAPERS AND SUBCOMMITTEE REPORTS (July 1, 1990) [hereinafter WORKING PAPERS].

<sup>26</sup> See STUDY COMMITTEE REPORT, *supra* note 1, at 123-24 (containing additional statement of Judge Cabranes, joined by Mr. Aprile, Senator Grassley, and Mrs. Motz).

<sup>27</sup> The Committee Report stated:

With respect to any alternative, we caution that caseload pressures are inexorable even now. Delay in seeking a remedy will make the situation worse and diminish the likelihood of making the right choice as a result of careful planning in advance. We hope that during the impending years the courts of appeals can continue to cope in their current format with the anticipated larger caseloads and thus allow adequate consideration of major structural alternatives.

STUDY COMMITTEE REPORT, *supra* note 1, at 117.

## II. SUBSTITUTING DISCRETIONARY REVIEW FOR THE STATUTORY RIGHT OF APPEAL

One simple way to respond to the caseload demand on the courts of appeals is to rethink the statutory right of appeal. The obvious analogy, of course, is the certiorari jurisdiction of the Supreme Court of the United States.<sup>28</sup> The courts of appeals, either individually or nationally, would need to develop standards and procedures for selecting which appeals to decide.<sup>29</sup> Chief Justice Rehnquist,<sup>30</sup> among others,<sup>31</sup> has criticized the cost and delay in the federal court system and has proposed that Congress might reconsider the basic assumption of the appeal as of right. The idea is that the first appellate review could be obtained only in the discretion of a panel of the court of appeals.

Like most ideas, this one is not new. In 1941, Roscoe Pound suggested that trial judges be arranged in divisions for review of a single judge's decision with a second appeal being at the discretion of the court of appeals.<sup>32</sup> Some obvious analogies may be seen in present federal practice, beyond appellate standards of review and

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<sup>28</sup> See 28 U.S.C.A. §§ 1254, 1257 (West 1993) (describing Supreme Court's method of review from courts of appeals or state supreme courts). See generally Bennett Boskey & Eugene Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals*, 121 F.R.D. 81 (1988) (discussing decline of Supreme Court's mandatory appeal jurisdiction).

<sup>29</sup> WORKING PAPERS, *supra* note 25, at 33-34. See generally SAMUEL ESTREICHER & JOHN SEXTON, *REDEFINING THE SUPREME COURT'S ROLE: A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS* (1986) (proposing new methods of Supreme Court review).

<sup>30</sup> Linda Greenhouse, *Rehnquist Asks Limit to Automatic Appeals*, N.Y. TIMES, Sept. 16, 1984, § 1, at 27; see Robert J. Martineau, *Frivolous Appeals: The Uncertain Federal Response*, 1984 DUKE L.J. 845, 846 n.5 (containing Justice Rehnquist's suggestions for more efficient appellate procedures); Michael Vitiello, *The Appellate Lawyer's Role in the Caseload Crisis*, 58 MISS. L.J. 437, 444 (1988) (discussing Justice Rehnquist's proposal).

<sup>31</sup> See, e.g., Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 107 (1985) (advocating "partial cert." system to increase appellate efficiency); Irving Wilner, *Civil Appeals: Are They Useful in the Administration of Justice?*, 56 GEO. L.J. 417, 419 (1968) (discussing historical background of unquestioning acceptance of appellate review); J. Clifford Wallace, Remarks at the 68th Annual Meeting of the American Law Institute (May 13, 1991).

<sup>32</sup> ROSCOE POUND, *APPELLATE PROCEDURE IN CIVIL CASES* 390 (1941), *quoted in* David Newbern & Douglas L. Wilson, *Rule 21: Unprecedented and the Disappearing Court*, 32 ARK. L. REV. 37, 56-57 (1978); see also Charles R. Haworth, *Screening and Summary Procedures in the United States Courts of Appeals*, 1973 WASH. U. L.Q. 257, 321-26 (discussing proposal to create new appellate division between district court and court of appeals with discretionary review in latter).



doctrines such as plain error and sufficiency of evidence.<sup>33</sup> Leave to appeal presently is a feature of the federal procedures for interlocutory appeals<sup>34</sup> and prisoner petitions.<sup>35</sup> Rehearings and rehearings en banc currently are committed to the petitioned court's sound discretion.<sup>36</sup>

Proponents of discretionary review in the courts of appeals, such as then-Chief Judge Lay of the Eighth Circuit, promise profound benefits.<sup>37</sup> Judicial resources spent reviewing petitions for discretionary appeal arguably would approximate the present investments of time and energy in screening cases for the nonargument summary calendar, so there would be zero additional judicial effort. Obviating the full review of briefs and records, oral argument, and opinion preparation in the rejected appeals would represent a net savings of significant proportions, given the volume of appeals. Average delay between the notice of appeal and the opinion in decided cases would decrease. The threshold determination would help remedy the perceived inequity between appeals by indigents and paying appellants. Most importantly, all appeals deserving of plenary review would receive the full appellate treatment in a traditional deliberative and collegial procedure, presumably qualitatively improved by a lessening of pressures to process unreasonable numbers of appeals.<sup>38</sup>

There are any number of variations on this idea. There could be a requirement that a petitioner apply in the district court for a certificate of probable cause and good faith; if the certificate is

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<sup>33</sup> See generally STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, *FEDERAL STANDARDS OF REVIEW* (2d ed. 1992) (discussing general principles of review of civil cases).

<sup>34</sup> 28 U.S.C.A. § 1292(b) (West 1993) (discretion in district court to issue certificate and in court of appeals to hear appeal).

<sup>35</sup> 28 U.S.C.A. § 2253 (West Supp. 1993) (requiring certificate of probable cause for appeal).

<sup>36</sup> FED. R. APP. P. 35.

The idea being discussed is distinct from the recent congressional authorizations to define by federal court rule what is a final and appealable judgment, under 28 U.S.C.A. § 1291, and what is an entitled interlocutory appeal, under 28 U.S.C.A. § 1292(a). See 28 U.S.C.A. §§ 2072(c), 1292(e) (West 1993) (granting Supreme Court power to prescribe general rules to define when district court ruling is final for purposes of appeal).

<sup>37</sup> Donald P. Lay, *A Proposal for Discretionary Review in Federal Courts of Appeals*, 34 Sw. L.J. 1151, 1157 (1981).

<sup>38</sup> *Id.* Proponents suggest that as a valuable side effect there would be fewer subsequent petitions for review in the Supreme Court. *Id.* at 1158 n.16.

denied, the application would have to be renewed in the court of appeals.<sup>39</sup> Alternatively, access decisions could be made by a panel of appellate judges or even a single circuit judge, somewhat akin to the current motions practice in the courts of appeals.<sup>40</sup> Another variation would apply the discretionary appellate jurisdiction only to specified appeals by subject matter.<sup>41</sup> The attractiveness of the certiorari approach is that it can be "tailored almost infinitely to the needs of the system."<sup>42</sup>

In order to consider this proposal, of course, that venerable Supreme Court dictum must be accepted as correct: There is no federal constitutional right of appeal, and the right is purely a creature of statute, even in criminal cases.<sup>43</sup> If ever directly tested, this might prove incorrect.<sup>44</sup> Even if it passed constitution-

<sup>39</sup> See Donald P. Lay, *The Federal Appeals Process: Whither We Goest? The Next Fifty Years*, 15 WM. MITCHELL L. REV. 515, 532 (1989) (discussing procedure whereby civil appeal issued by district court, if denied, can renew petition in court of appeals). "Conceivably certiorari could be combined with such procedures as truncated review of a colleague's case by a panel of two or three district judges operating as an appellate division of the district court." STUDY COMMITTEE REPORT, *supra* note 1, at 116. See also *infra* text accompanying notes 96-99.

<sup>40</sup> Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 U. CHI. L. REV. 761, 773-74 (1989).

<sup>41</sup> See J. WOODFORD HOWARD, COURTS OF APPEALS IN THE FEDERAL SYSTEM 287 (1981) (noting diversity cases, administrative appeals, and prisoner petitions as chief areas of subject matter); J. Edward Lumbard, *Current Problems of the Federal Courts of Appeals*, 54 CORNELL L. REV. 29, 32 (1968).

<sup>42</sup> *Report of the Subcommittee on Structure, supra* note 25, at 34.

<sup>43</sup> See WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 27.1, at 1137 (2d ed. 1992) (noting Supreme Court precedent that constitutional right to appellate review does not exist); JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 13.10, at 516-20 (3d ed. 1986) (no constitutional right to appellate review).

One thing is clear, however. Although the Supreme Court has never held that an appeal is constitutionally required, the federal system and virtually all state systems now allow all litigants at least one appeal as of right. Changing that presumption, even in the civil area alone, would be a major departure from our tradition.

STUDY COMMITTEE REPORT, *supra* note 1, at 116. See *Michael H. v. Gerald D.*, 491 U.S. 110, 127-28 n.6 (1989) (discussing due process interpretive methodology for relying on history and tradition). See generally Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503 (1992) (developing due process argument for right to appeal in federal criminal cases); Alex S. Ellerson, Note, *The Right to Appeal and Appellate Procedural Reform*, 91 COLUM. L. REV. 373 (1991) (arguing for constitutional right to appeal in state criminal actions).

<sup>44</sup> See Paul D. Carrington, *The Function of the Civil Appeal: A Late-Century View*, 38 S.C. L. REV. 411, 412-17 (1987); Vitiello, *supra* note 30, at 444-59.

al scrutiny, however, there are serious policy objections to this proposal. The theoretical problem with discretion being the rule is the effect such a structural reform would have on the federal appellate ideal. The original design, in which the courts of appeals perform the error-correction function, already has been compromised with the de facto assumption by the courts of appeals of a substantial aspect of the lawmaking function the Supreme Court cannot perform. The discretionary appeal proposal would further diminish the error-correction function without necessarily improving the lawmaking function. It would create two levels of discretionary review, which may be one too many for any court system. Reliance on the comparison to the Supreme Court procedure is misplaced; certiorari furthers the Supreme Court's lawmaking function, which is its exclusive purpose.<sup>45</sup> The practical problem with the proposal is that it would confirm the worst criticisms of the existing screening practices in the courts of appeals to create two tracks of appeals and would formally ration appellate court resources to favored categories of appeals.<sup>46</sup> The most persuasive argument against discretionary review is that it would not likely improve things, since "it must be somewhat painstaking unless it is to do violence to the tradition of appellate error correction . . . [because] [l]ower appellate courts, unlike the Supreme Court, obviously cannot assume that ordinary errors have already been corrected."<sup>47</sup>

Perhaps the most troubling aspect of this proposal is the alluring argument that it would not take us that much further away from our appellate tradition than the courts of appeals already have gone. There is the related argument that the judicial resources saved in the denied appeals could be better spent on the appeals granted full review. Admittedly, there is an appellate gatekeeping

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<sup>45</sup> See Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 572 (1969) ("The procedure may also be suggestive of the certiorari practice of the Supreme Court, but this comparison is inappropriate because of the different roles of the courts.").

<sup>46</sup> HOWARD, *supra* note 41, at 287-88.

<sup>47</sup> *Report of the Subcommittee on Structure*, *supra* note 25, at 34; see also Graham C. Lilly & Antonin Scalia, *Appellate Justice: A Crisis in Virginia?*, 57 VA. L. REV. 3, 10-16 (1971) (discussing Virginia's discretionary review practice); Thomas B. Marvell, *Appellate Capacity and Caseload Growth*, 16 AKRON L. REV. 43, 71-74 (1982) (discussing appeal by right and Virginia's discretionary review system).

function being performed in the current procedures for screening of appeals as of right that is similar to how petitions for review would be processed.<sup>48</sup> Issues of delegation and staff responsibility are common to each approach. It comes down to a matter of tradition and philosophy. The prevailing notion of equal justice on appeal calls for meaningful access to appellate justice for individual litigants, not just for the run of cases on the docket; the principle is that appellate judges ought to "distinguish between cases that should receive more attention and those that should receive less."<sup>49</sup> To change this to a differentiation between some review or no review goes too far.<sup>50</sup> A certiorari discretion does not fit the role of the courts of appeals to correct error; it is a feature of the lawmaking role, which is ideally assigned to the Supreme Court. It would change the nature of the courts of appeals in a very fundamental way. Furthermore, certiorari jurisdiction in the courts of appeals would have the consequence of making the district court more authoritative than it has ever been in the history of the federal court system. A single-judge finality model asks too much of the district judge and takes away too much from the litigants.<sup>51</sup> The Federal Courts Study Committee recommended further study of certiorari in the courts of appeals only as a "last resort," presumably in the hope that Congress would settle on some other structural reform.<sup>52</sup>

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<sup>48</sup> See Melinda Gann Hall, *Docket Control as an Influence on Judicial Voting*, 10 JUST. SYS. J. 243 (1985) (offering view that discretionary dockets facilitate expression of personal preference by judges).

<sup>49</sup> A.B.A. STANDING COMMITTEE, *supra* note 8, at 33.

<sup>50</sup> See *Report of the Subcommittee on Structure*, *supra* note 25, at 34. If the courts of appeals were expected to reach the merits only in a portion of the appeals and deny review in most appeals, the certiorari model would resemble the summary calendar affirmance without opinion, which does so much violence to appellate ideals that it has deservedly fallen into disuse in the courts of appeals.

<sup>51</sup> Judith Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603, 619 (1985); see also Kathy Lanza, *Discretionary Review* (1990) (background paper), in *WORKING PAPERS*, *supra* note 25.

<sup>52</sup> The Study Committee's Report suggests a certain reluctance behind even this expression of curiosity:

Although we see certiorari for the courts of appeals as a last resort, we encourage further study of the concept. Any such change to discretionary review would have to accommodate the tradition of error-correction on appeal, a fundamental task of the courts of appeals but not the Supreme Court. To determine whether error could have occurred below, an appellate court must often conduct a comprehensive, time-consuming

### III. ALTERNATIVE STRUCTURES TO THE PRESENT CIRCUIT SYSTEM

It seems as if every judge and law professor who has thought about it has come up with a different alternative structure to replace the present circuit system. In fact, there may be more variations than there are would-be reformers. Most of these variations, however, seem to have sufficient features in common to be typed into five basic categories: (1) multiple small circuits; (2) a four-tiered system; (3) national subject matter appellate courts; (4) a consolidated, single court of appeals; and (5) a jumbo-circuit alignment. The option to retain the present structure will be discussed in a separate section.

#### A. MULTIPLE SMALL CIRCUITS

The Federal Courts Study Committee identified the multiple small circuit model as one example of how the present system might be remade.<sup>53</sup> Because dividing the large existing circuits "no longer appears practicable,"<sup>54</sup> the Study Committee's model would be stepped. The first step is to dissolve all existing circuit boundaries and redraw them with divisions of nine judges. Next, anticipated future growth in caseload and judgeships would be handled by some as yet undetermined mechanism to redraw the boundaries periodically. The potential for intercircuit conflicts presumably would be greater, but they would be prevented by requiring all courts of appeals to adhere to any previously decided precedents from any other court of appeals. This goal could be facilitated by circulation of all opinions prior to publication to all nine judges and by computer inventorying of issues. Finally, the model would include some central division of uncertain origin for

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examination, aided by briefs and the trial record. This kind of inquiry may require as much time and effort as courts of appeals currently expend in reviewing already-docketed cases for summary or other non-argument dispositions.

STUDY COMMITTEE REPORT, *supra* note 1, at 116. The decided trend in the states is away from a single certiorari appellate court to a system resembling the existing federal structure, with an intermediate appeal as of right and a second discretionary review.

<sup>53</sup> *Id.* at 118-19.

<sup>54</sup> *Id.* at 118.

en banc rehearings to resolve the conflicts that persist. Membership on the central division might be determined automatically by statute from among active judges. Service could be temporary and could rotate to allow for wide participation in the process of resolving persistent conflicts. The hope is that there would be fewer conflicts in this reorganization.

The most intriguing aspect of this model is that its most serious departure represents its greatest originality. The model gives up altogether on geography as the organizing principle of the intermediate court. It substitutes a judge-centered organization that emphasizes the relevant three-judge decisionmaking unit arranged in a coherent judicial unit of a court of nine. With today's airline travel and electronic communication, the argument is that geographical organization has become obsolete, a remnant of the eighteenth century circuit-riding era. A circuit judge in Pittsburgh can just as easily get on a plane going to Chicago as Philadelphia. Phone and electronic mail technology already allow a judge in Jacksonville to maintain chambers in Atlanta. Geography would be relevant only for the residence of the circuit judge, for purposes of senatorial courtesy and political considerations. Even state boundaries would not matter organizationally; the rule of precedent and the central division would be expected to deal with the possibility of conflicting diversity jurisdiction holdings of the same state's law.

This model would oblige circuit judges to reorient themselves to become members of a single, truly national and unified court of appeals. In their principal work, they would hear and decide appeals from designated district courts, presumably still geographically arranged. But their principles of precedent would oblige them to respect the previous rulings of all their peers, and they would be responsible for writing opinions with a national reciprocity. A decision by a panel in Philadelphia interpreting the Federal Sentencing Guidelines, for example, ought to earn the allegiance of a later panel in Los Angeles. At least that is the underlying philosophy of this model. The theoretical attractiveness and, at once, the practical difficulty of seemingly insurmountable proportion intrinsic in this model is this reconceptualizing of the courts of appeals to reflect the contemporary understanding of the national identity, in the economy and in other unities of federal law.

This model has its problems, however.<sup>55</sup> It proceeds from an inconsistency of logic. Conceding that circuit splitting is an extramural reform of marginal contemporary utility, how is it plausible to call on Congress to institutionalize the practice? The experience in the new Fifth and Eleventh Circuits demonstrates that caseload is distributive. Subdividing circuits without more will leave the same per judge workload as before. Thus, adding judges must be implicit in this model; it is designed to absorb large cohorts of circuit judges. Furthermore, the initial disruption of settled expectations of precedent and the legal culture in the existing geographical circuits would be very substantial. For this reason, most every previous study of the circuits has rejected a wholesale redrawing of those boundaries. This, of course, is not a persuasive argument against reform, if the reform promises some relief from existing problems.

Apparently, the goal of this model is to recapture the small, collegial court of yesteryear; even the mystical judicial "nine-ism" is invoked. One preliminary problem is how, practically, to subdivide the 180 judgeships into approximately twenty courts when some states, for example, Texas (seven active and seven senior circuit judges) and California (fourteen active and five senior circuit judges), have more than the limit of nine. The city of Chicago (six active and two senior circuit judges) needs one more to make a court. This initial reassignment would be less disruptive than the on-going problem of reassignment. The initial disruption of redrawing boundaries would be perpetuated and repeated as more and more judges are added as part of this plan, although how the mechanism for periodically reorganizing them into groups of nine might function is not readily imaginable. Moving from a geographical basis to a judgeship basis for redrawing boundaries seems to willingly abandon a well-developed set of norms.<sup>56</sup> The

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<sup>55</sup> *But see* Alvin B. Rubin, *Views from the Lower Court*, 23 UCLA L. REV. 448, 459 (1976) (suggesting that system with more circuits, acting with uniform size and workload, would help ensure right to appeal).

<sup>56</sup> At one time, consensus criteria for realignments included: (1) circuits should be composed of at least three states; (2) no circuit should be created that would immediately require more than nine judges; (3) a circuit should contain states with a diversity of legal business, socio-economic interests, and population; (4) realignment should avoid excessive interference with established circuit boundaries; and (5) no circuit should contain

history of congressional redrawing of circuit boundaries certainly does not give much hope that any legislative process will give the boundaries the required regular and routine attention that the model contemplates. The hardest sale seems to be the political one.

There is an additional worry for any model that promises to exacerbate one of the more serious design defects in the present system. The built-in feature of more intercircuit conflicts expected as a result from doubling the number of circuits warns against this model, despite the precatory feature of a national *stare decisis* and the institutionalized policing of the central division. Presumably, there must be sufficient flexibility to allow a panel to reject a previously decided precedent deemed clearly erroneous. Yet this likely would render the national precedent feature unworkable as a practical matter. The national *en banc* feature in the central division might remedy this problem, or some arrangement of an upper division of review of panel decisions might be installed. Still, it is doubtful that the national *en banc* court could be expected to sort out all of the inevitable numerous conflicts and also continue to perform the law declaration function coherently. Eventually those rehearings would more likely grow in frequency and importance so as to amount to a fourth tier of federal court, which in effect would create a different model than the one being proposed. The chief contribution of this model, more than its particulars, is how it furthers the larger debate over reconceptualizing the courts of appeals into an integrated and unified whole, to create one truly national court. A serious shortcoming of the existing system is the ersatz autonomy that exists at the federal intermediate court level.

#### B. A FOUR-TIERED SYSTEM

The issue of whether a new national appellate court is needed is separate from the issue of what form it should take. In this section, some general background of the debate over the first issue anticipates the discussion of three proposed formats: the national

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noncontiguous states. Commission on Revision of the Federal Court Appellate System, *The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change*, 62 F.R.D. 223, 231-32 (1973). Developments in the last twenty years, however, may have rendered these criteria somewhat obsolete. See *supra* text accompanying note 9.



court of appeals; the in banc intercircuit conference; and a bi-level intermediate court structure.<sup>57</sup>

1. *Background.* Creating a new level of intermediate court is not such a new idea.<sup>58</sup> There have been several proposals considered over the years to expand the vertical structure of the federal courts by creating a new level of appellate review between the existing courts of appeals and the Supreme Court. Perhaps one long-term effect of the persistence of would-be reformers has been that proposals which first appeared radical and foreign seem more familiar, if not more acceptable, today. This certainly is true of the variations on the idea to create a fourth tier of federal court.

A report published in 1968 under the auspices of the American Bar Association focused on the burgeoning federal appellate caseloads: *Accommodating the Workload of the United States Courts of Appeals*.<sup>59</sup> The ABA report recommended various intramural reforms to improve docket efficiency and endorsed a sequential response to docket growth: adding circuit judges should be preferred over splitting circuits; organizing larger circuits into subdivisions would accommodate larger dockets and more judges; circuit splitting might become necessary; the Supreme Court eventually would require some assistance by the creation of regional panels of the courts of appeals or subject matter appeals courts or eventually some new national court of appeals. Whatever form that national court of appeals might take was left quite

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<sup>57</sup> This discussion relies, in part, on background papers the author prepared for the Subcommittee on Structure of the Federal Courts Study Committee. With their generous permission, the work product of then-Chief Judge Levin H. Campbell, the Chair of the Subcommittee, and Denis J. Hauptly, one of the Chief Reporters to the Study Committee, also is relied on here. See generally WORKING PAPERS, *supra* note 25.

<sup>58</sup> See, e.g., Edward Dumbauld, *A National Court of Appeals*, 29 GEO. L.J. 461 (1941) (discussing merits of creating national court of appeals); Herbert Pope, *The Federal Courts and a Uniform Law*, 28 YALE L.J. 647, 651 (1919) (suggesting that Federal Court of Appeals should serve as court of appeals for states in district and interpret uniform legislation); Frederick Bernays Weiner, *Federal Regional Courts: A Solution for the Certiorari Dilemma*, 49 A.B.A. J. 1169, 1170 (1963) (proposing national court of appeals "in the conviction that it is more inconvenient in the long run and far less desirable to live with a system under which the vast majority of palpably wrong decisions are virtually immunized from effective review simply because there are so many of them" and because pressure on Supreme Court would be greatly reduced).

<sup>59</sup> AMERICAN BAR FOUND., *ACCOMMODATING THE WORKLOAD OF THE UNITED STATES COURTS OF APPEALS* (1968).

indeterminate. Much of this scenario has come to pass. Further background provides a fuller understanding of why the proposal to add a national court of appeals has lost its momentum and how the related formats are freighted with negatives.

Commissioned by the Federal Judicial Center, a study group of jurists, attorneys, and scholars, popularly known as the Freund Committee, published a report in 1972 recommending the creation of a national court of appeals.<sup>60</sup> The proposed new court, staffed by circuit judges sitting for staggered terms, would have screened the Supreme Court's docket: first, culling out about 500 cases from which the High Court would select 150 to 200 cases for full decision; and, second, deciding itself cases involving intercircuit conflicts. This proposal went nowhere legislatively, but the hostile reaction set some limits to permissible debate, although it may be that more radical reform proposals will be met with relatively less hostility today.

In 1975, the congressionally created Commission on Revision of the Federal Court Appellate System again recommended a new national court with jurisdiction between the courts of appeals and the Supreme Court.<sup>61</sup> The Hruska Commission, as it was popularly called, proposed that the new court would be staffed with permanent Article III judges and would decide cases on reference from the Supreme Court and by transfer from the existing regional courts of appeals, and would be subject to review in the Supreme Court. That same year, the Advisory Council for Appellate Justice, an independently organized non-governmental panel often referred to as the Rosenberg Study, likewise recommended the creation of a new national court with jurisdictional rules to be established by the Supreme Court within congressionally designated outer limits.<sup>62</sup>

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<sup>60</sup> Federal Judicial Ctr., *Report of the Study Group on the Caseload of the Supreme Court*, reprinted in 57 F.R.D. 573 (1972).

<sup>61</sup> Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 237-47 (1975); see also Commission on Revision of the Federal Court Appellate System, *supra* note 56 (recommending various reforms for the courts of appeals, including splitting the Fifth and Ninth Circuits).

<sup>62</sup> See Maurice Rosenberg, *Enlarging the Federal Courts' Capacity to Settle the National Law*, 10 GONZ. L. REV. 709 (1975) (discussing pros and cons of creation of national court). Other contemporary studies contributed to the debate over the need for such a court and its necessary features. See, e.g., DEPT OF JUSTICE, COMM. ON REVISION OF THE FEDERAL

Not much happened legislatively beyond a few sporadic hearings, although the caseloads continued to grow and the untoward consequences seemed to worsen, prompting Chief Justice Burger to endorse a then-languishing proposal, developed in 1983, to create an experimental intercircuit panel (ICP).<sup>63</sup> The ICP would have been composed of one judge from each circuit, designated for part-time service for a brief term, who would sit in rotating nine-judge panels with four alternates. Various ways of designating these judges were considered, including selection by the Chief Justice or the Supreme Court and election by the circuit judges. The offered compromise would have created a temporary court for a five year trial period. At the time, Justices White, Rehnquist, Powell, and O'Connor supported the Chief Justice's idea.<sup>64</sup> For the first time since such proposals had been considered, subcommittees in both the House and Senate favorably reported bills based on the plan to their full judiciary committees.<sup>65</sup> But then the fourth-tier proposal stalled again.

Next came the New York University Supreme Court Project, conducted under the tutelage of Professors Samuel Estreicher and John Sexton.<sup>66</sup> This study took advantage of the inertia of the pending proposals to conclude that the ICP was an unsuitable remedy. More modest reforms in Supreme Court procedures for selecting and deciding cases would be sufficient, although the authors preferred other alternatives—modification of the rule of four, reforming the en banc courts, and adding more specialized courts—over the creation of a new layer of federal appellate

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JUDICIAL SYSTEM, THE NEEDS OF THE FEDERAL COURTS (1977); Seth Hufstедler & Paul Nejelski, *ABA Action Commission Challenges Litigation Cost and Delay*, 66 A.B.A. J. 965 (1980).

<sup>63</sup> Warren E. Burger, *The Time is Now for the Intercircuit Panel*, A.B.A. J., Apr. 1985, at 86; see also Warren E. Burger, *Annual Report on the State of the Judiciary*, 69 A.B.A. J. 442 (1983) (calling for special panel to resolve intercircuit conflicts and commission to study management of Supreme Court's caseload).

<sup>64</sup> Arthur D. Hellman, *The Proposed Intercircuit Tribunal: Do We Need It? Will It Work?*, 11 HASTINGS CONST. L.Q. 375, 377 (1984).

<sup>65</sup> *Id.* at 378.

<sup>66</sup> See ESTREICHER & SEXTON, *supra* note 29.

court.<sup>67</sup>

Before contemplating the form that any proposed new national appellate court should take, the question of need is best mentioned first.<sup>68</sup> Much of the commentary on the Supreme Court's workload regrettably has degenerated into an argument about how hard the Justices are working and how effectively. The debate over intercircuit conflicts—how many there are and even whether they are good or bad—has generated more heat than light. Proposals for a new national court most often depend on one or the other or some combination of two assumptions. First, the Supreme Court is faced with an unreasonably heavy workload burden that is beginning to jeopardize the performance of the High Court. While some believe that the problem never reached such a crisis proportion as to justify far-reaching reforms, over the years many commentators and individual Justices have worried that such a crisis was imminent. Second, the present federal court structure lacks sufficient capacity for achieving a satisfactory measure of uniformity in our national law. As will be elaborated in the following discussion, the first assumption is now being questioned. There are nearly as many suggestions on how to solve these two problems, however, as there are those who agree that these problems exist.

Since presumably a Supreme Court of nine Justices cannot meet the needs of the system, establishing another level of appellate court would be a logical solution to both these problems. There seems little chance of any particular design being implemented unless and until there is a consensus in the Third Branch and in Congress in two regards: first, that something drastic needs to be done and, second, just what that "something" should be. There are any number of designs available with various features about which

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<sup>67</sup> See also A.B.A. STANDING COMMITTEE, *supra* note 8. This report did not discuss the proposal for a new national court. Over dissent, the Committee recommended further study of the extent of disuniformity, limited en banc procedures, more reliance on screening devices, and assignment to panels by subject matter within the circuits.

<sup>68</sup> See generally Thomas E. Baker & Douglas D. McFarland, *The Need for a New National Court*, 100 HARV. L. REV. 1400 (1987) (discussing problems of Supreme Court and possible solutions); Robert L. Stern, *Remedies for Appellate Overloads: The Ultimate Solution*, 72 JUDICATURE 103 (1988) (reviewing methods of handling appellate overload problems).

knowledgeable persons may reasonably disagree.<sup>69</sup>

2. "Court X," A.K.A. *National Court of Appeals*. The name or designation given to this new court may be itself controversial. "National Court of Appeals" is freighted still with hostility against the Freund Committee's plan. "Intercircuit Panel" connotes the temporary panel unsuccessfully urged by Chief Justice Burger. The "In Banc Intercircuit Conference" discussed next conjures up a truncated jurisdiction. In deference to these conflicting attitudes, here the proposed new court will be called simply "Court X."

The constitutional requirements of case or controversy with all doctrinal gloss would apply, of course, to Court X as an Article III court. Statutorily, the final judgment requirement would also be a necessary jurisdictional feature. The more interesting jurisdictional questions relate to appellate flow: Court X's docket should come from whence and go whither?

The Supreme Court ought to be empowered to refer cases to Court X. This would preserve, and not add measurably to, the Supreme Court's screening authority over its own docket. Court X ought to be obliged to decide these referred cases. Additionally, it may be appropriate to authorize the courts of appeals—whether only en banc or also three-judge panels is uncertain—to certify appeals to Court X, although Court X might be empowered to decline jurisdiction. It would be a more profound structural change, without apparent added justification, to allow parties to petition Court X directly for review of a panel or en banc decision of a court of appeals. A most profound consideration of federalism, and a likely damning consideration of practical politics, would be raised if Court X were given jurisdiction to hear appeals from state supreme courts. The Conference of Chief Justices opposes jurisdiction to review state courts in any federal court other than the Supreme Court.<sup>70</sup>

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<sup>69</sup> See, e.g., James A. Gazell, *The National Court of Appeals Controversy: An Emerging Negative Consensus*, 6 N. ILL. U. L. REV. 1 (1986) (discussing alternatives to Supreme Court's caseload dilemma); Note, *Of High Designs: A Compendium of Proposals to Reduce the Workload of the Supreme Court*, 97 HARV. L. REV. 307, 310-18 (1983).

<sup>70</sup> A separate category of proposals would create a new national court to review state court decisions, both civil and criminal. For example, if different state courts were to disagree on the same federal question, the conflict could be resolved by a single national court of appeals. See James Duke Cameron, *Federal Review, Finality of State Court*

A central question of jurisdictional design is whether Court X should be limited to hearing conflicts or should be authorized to hear other appeals that raise important questions of national law. The most modest jurisdictional base that would justify establishing the new court would be a docket simply originating in references by the Supreme Court from its docket. To limit jurisdiction to circuit conflicts might unnecessarily send the Supreme Court and the new court on a kind of jurisdictional snipe hunt for "square" or "direct" conflicts. (Recall the jurisdictional experience of the three-judge district courts.<sup>71</sup>) Related to this is the issue of whether conflict review ought to be limited to issues of statutory interpretation or might include constitutional issues. Finally, there is the worry that the reference power might serve to attract more petitions requesting that the case be transferred to Court X, thus resulting in a net increase in the Supreme Court's workload.

Most of the Court X docket would consist of cases on "reference jurisdiction," more accurately considered as a reform of Supreme Court jurisdiction. Petitions for review would continue to be lodged with the Supreme Court, which would continue to have the discretion to grant review and decide the case on the merits or to deny review and end the litigation. The proposal would add two more options for the Supreme Court: first, to deny review but to refer the case to Court X for a mandatory decision on the merits; and second, to deny review but refer the case to Court X to allow the new court the option to grant review or deny review. Admittedly, the elimination in 1988 of the Supreme Court's mandatory jurisdiction lessens the need for this power to transfer.<sup>72</sup> Notably, screening the Supreme Court's docket and control of the Court's discretionary docket are preserved for the Justices under the Court X proposal, unlike the earlier, much-controverted Freund Committee proposal, which would have empowered that version of the new

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*Decisions, and a Proposal for a National Court of Appeals—A State Judge's Solution to a Continuing Problem*, 1981 B.Y.U. L. REV. 545, 555-60 (discussing proposal for national court of state appeals); see also Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal System*, 56 U. CHI. L. REV. 761, 774-75 (1989) (suggesting a system of discretionary appeals to U.S. Courts of Appeals from state trial courts for federal questions).

<sup>71</sup> See CHARLES ALAN WRIGHT, *THE LAW OF FEDERAL COURTS* § 50, at 295-99 (4th ed. 1983) (discussing Three-Judge Court Acts).

<sup>72</sup> See Boskey & Gressman, *supra* note 28.

court to screen the certiorari petitions, as a kind of judicial surrogate, on behalf of the Supreme Court.

The remainder of the Court X docket, "transfer jurisdiction," more accurately may be considered as an adjustment to the current jurisdiction of the various courts of appeals. An appeal in one of the courts of appeals might be transferred to Court X if (1) the controlling issue of federal law is the subject of conflicting holdings between circuits; (2) the appeal turns on a question of federal law applicable to a recurring factual situation, and it is concluded that the advantages of a prompt and definitive determination by Court X outweigh any potential disadvantages of transfer (an example would be the validity of the Sentencing Guidelines);<sup>73</sup> or (3) the appeal is controlled by a previous ruling by Court X and there is a substantial question about the proper interpretation or application of that rule of federal law. These transfer jurisdictions are analogous to two existing procedures: the rarely used procedure that allows a district court to certify a controlling question of law to a court of appeals<sup>74</sup> and the procedure for certification of issues of state law from federal courts to state courts, available in some states.<sup>75</sup> In later legislative proposals, transfer jurisdiction was left out in response to strong and diverse opposition.

Decisions of Court X would be binding on all other courts, unless the Supreme Court promptly manifested its disagreement by a reversal. Presumably, the Supreme Court would have statutory discretionary authority to review the decisions of the new court, at least in theory, to preserve the constitutional edict that there be "one supreme Court."<sup>76</sup> Over time, one possible finesse might be expected to develop that statutory holdings would be less likely than constitutional holdings to gain the Justices' second look. It cannot be assumed, however, that the Supreme Court would review an excessive number of the cases it had referred for decision in the first place and thus frustrate the essential reasons to create a court: to reduce Supreme Court workload and to provide additional

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<sup>73</sup> See *Mistretta v. United States*, 488 U.S. 361 (1989) (upholding constitutionality of sentencing guidelines).

<sup>74</sup> See 28 U.S.C.A. § 1292(b) (West Supp. 1992).

<sup>75</sup> See generally Paul A. LeBel, *Legal Positivism and Federalism: The Certification Experience*, 19 GA. L. REV. 999 (1985) (discussing the jurisprudence of certification).

<sup>76</sup> U.S. CONST. art. III, § 1.

national appellate capacity.

Reformers have suggested a new court composed of as many as fifteen to as few as five judges. The court must have more than three judges, the court of appeals panel complement. On the other hand, there should not be so many judges that the court impersonates the diseconomies of scale of the large en banc courts, which are authorized by statute to sit in subsets of judges once the bench holds fifteen or more. Even numbers are not permissible, now that judges are all legal realists: That leaves five, seven, nine, eleven, thirteen, or fifteen chairs to fill. Just how many depends on several related features. For example, there should be more chairs if Court X will sit in panels larger than three. A rotating panel system, however, would counteract the chief purpose of achieving greater uniformity and certainty in the federal law. If selection is made representational by each existing circuit, there should be thirteen judgeships. Some provision for alternates might be made, in case of refusals or disqualifications. A quorum should be one more than a majority of the authorized judgeships.

Judicial selection is the most problematic feature. Permitting one President to appoint an entire national court for life is the historical Article III paradigm, but contemporary politics do not have much in common with George Washington's day. The designation of current circuit judges would avoid that difficulty but would create other difficulties. Who should designate the judges? The Supreme Court? The Chief Justice alone? The Judicial Conference? The judicial council in each circuit? The answer depends on various considerations. Selection by the Supreme Court would add a weighty responsibility to the duties of the Justices and might be likely to increase internal tension unduly. If the Chief Justice alone were to designate judges, that would give one individual a great deal of power to shape the second most powerful body in the same branch of government. Giving the appointment power over to the Judicial Conference or the judicial councils might unduly politicize those bodies and increase dissension, and, at bottom, would increase arbitrariness, both apparent and real, because such arbitrarily constituted panels could not be expected to mirror the Article III selection process. One possibility is to make service on the new court as automatic and mechanical as the



current statute for selecting the chief judge of the circuit.<sup>77</sup> The statutory provision might also set a term of years in such a manner as to regularly rotate part of the membership. After all, these judges already have once been nominated by a President and confirmed by a Senate. There are, however, obvious and telling arguments to rely directly on the traditional nomination and confirmation process to select permanent new judges for Court X.

While some early proposals, notably that of the Hruska Commission, would have created a permanent new court, more recent proposals endorsed by Chief Justice Burger would have created an experimental panel subject to an automatic "sunset" provision unless Congress reauthorized it. Establishing the new court on a temporary basis would build in complications, the most serious being that its supervisory authority over the courts of appeals inevitably would be weaker. Because even a permanent inferior federal court can be abolished, after a reasonably long period of operation and study, Congress could reevaluate the need and efficacy of Court X.<sup>78</sup>

There are any number of other issues of detail necessary to create a Court X. It may be prudent to recognize that these depend, in large part, on how the above enumerated preliminary decision points are handled. A nonexhaustive list of subsidiary issues about any proposed new Court X would include:

- Should the court sit in panels or only en banc?
- Should rehearings be allowed?
- Should the new court have the power to overrule its own precedents?
- Should the court be given discretion to decline to decide a case otherwise within its jurisdiction?
- Should senior circuit judges also be eligible to serve?

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<sup>77</sup> See 28 U.S.C. § 45 (1988) (defining process and requirements for selection of chief judge).

<sup>78</sup> Cf. STUDY COMMITTEE REPORT, *supra* note 1, at 125-26 (proposing a five-year experimental pilot project); see S. 2620, 101st Cong., 2d Sess. (1990) (proposing to implement a five-year intercircuit conflict resolution demonstration); 136 CONG. REC. S6154 (daily ed. May 14, 1990) (statement of Sen. Heflin).

- How long should a judge's term be, if it is less than lifetime?
- Where is the most appropriate location?
- What sort of delegations are appropriate to allow the new court to organize internal operating procedures, local rules, admissions of attorneys, and related administrative arrangements?
- What provisions are needed for budget and staff?
- How should disciplinary complaints against the judges be processed?
- How best can the new court be evaluated?

Finally, the persistent opposition of most circuit judges should be addressed. Admittedly, staffing the new court with existing circuit judges, by selecting one from each of the courts of appeals, would reduce the capacity of the overburdened courts of appeals by an increment of one judge, but that is an argument against that selection method or in favor of creating additional circuit judgeships. So long as the opposition is based on the increase of reviewability, a basic purpose besides aiding the Supreme Court, it may be readily discounted. The more general worry is that the authority and prestige of the courts of appeals, and in turn circuit judges, will be diminished by establishing a new court (even if composed of circuit judges) between the courts of appeals and the Supreme Court. Judge Clement F. Haynsworth of the Fourth Circuit once responded:

There is enough prestige in a circuit judgeship, however, to suffer no appreciable dilution when courts like mine are enlarged to meet rapidly rising caseloads. In any event, that kind of concern for personal prestige, or the prestige of one's office, can not be permitted to preclude accretions to the system which are necessary to its efficient functioning. . . . If [the system] needs enlargement, as I deeply believe it does, any reluctance on my part to look up to sixteen judges above me rather than nine should carry little weight. For my part, I am concerned with the system and its needs and I strongly feel

that meeting them will in no way diminish the prestige of my office, or that of any member of any of the present courts of appeals.<sup>79</sup>

In conclusion, the ultimate question is not whether the proposed new court will present some problems or might have some disadvantages, but whether it might aid the Supreme Court by lessening its workload and whether it might benefit the federal court system by increasing the uniformity and coherency of the national law. The controlling question, therefore, is not how the court should be described, but whether any new national court is needed. The Hruska Commission summarized the arguments of need:

The proposed National Court of Appeals would be able to decide at least 150 cases on the merits each year, thus doubling the national appellate capacity. Its work would be important and varied, and the opportunity to serve on it could be expected to attract individuals of the highest quality. The virtues of the existing system would not be compromised. The appellate process would not be unduly prolonged. There would not be, save in the rarest instance, four tiers of courts. There would be no occasion for litigation over jurisdiction. There would be no interference with the powers of the Supreme Court, although the Justices of that Court would be given an added discretion which can be expected to lighten their burdens.

The new court would be empowered to resolve conflicts among the circuits, but its functions would not be limited to conflict resolution alone: It could provide authoritative determinations of recurring issues before a conflict had ever arisen. The cost of litigation, measured in time or money, would be

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<sup>79</sup> Letter from the Honorable Clement F. Haynsworth, United States Court of Appeals for the Fourth Circuit, to A. Leo Levin, Executive Director of the Commission on Revision of the Federal Court Appellate System (Apr. 30, 1975), in *2 Hearings Before the Comm'n on Revision of the Federal Court Appellate System*, 94th Cong., 1st Sess. 1327, 1328 (1975).

reduced overall as national issues were given expedited resolution and the incidence of purposeless relitigation was lessened. The effect of the new court should be to bring greater clarity and stability to the national law, with less delay than is often possible today.<sup>80</sup>

The Federal Courts Study Committee rejected out of hand the proposal for a national court of appeals, and properly so.<sup>81</sup> Over the recent course of the debate about the national court of appeals, one of its main props has been knocked out from beneath it. In the last three October Terms, the Supreme Court has begun to manage its docket more cohesively and more carefully.<sup>82</sup> Consequently, the Court is taking roughly one-third fewer cases for plenary review. The Supreme Court seems to have decided to help itself, removing that motive from the reform movement. What is left is the need for more uniformity in the national law, and there are less drastic reforms that will meet that need without the drawbacks of Court X, a.k.a. the National Court of Appeals.<sup>83</sup>

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<sup>80</sup> Commission on Revision of the Federal Court Appellate System, *supra* note 61, at 246-47.

<sup>81</sup> "The committee does not favor the creation of a 'national intermediate court of appeals' as proposed in 1975 by the Commission on Revision of the Federal Court Appellate System." STUDY COMMITTEE REPORT, *supra* note 1, at 117.

It should be made explicit that the present author's expression of agreement with the Study Committee represents a changed opinion about the current needs of the federal court system. See Baker & McFarland, *supra* note 68. That earlier position is now expressly abandoned. "Wisdom too often never comes, and so one ought not reject it merely because it comes late." *Henslee v. Union Planters Nat'l Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting).

<sup>82</sup> See Linda Greenhouse, *Lightening Scales of Justice: High Court Trims Its Docket*, N.Y. TIMES, Mar. 7, 1992, § 1, at 1 (discussing shrinking of Supreme Court docket); Tony Mauro, *Light Schedule Leads to Tight Deadlines*, LEGAL TIMES, Feb. 17, 1992, at 8 (discussing consequences of Supreme Court's lighter caseload); Alexander Wohl, *The Dry Docket*, A.B.A. J., Jan. 1991, at 44 (offering views on the Supreme Court's reduced docket).

<sup>83</sup> See ARTHUR D. HELLMAN, UNRESOLVED INTERCIRCUIT CONFLICTS: THE NATURE AND SCOPE OF THE PROBLEM, FINAL REPORT: PHASE I, FEDERAL JUDICIAL CTR., EXECUTIVE SUMMARY V (1992). See generally Gazell, *supra* note 69 (discussing alternatives to Supreme Court's caseload dilemma); Shirley M. Hufstедler, *Bad Recipes for Good Cooks—Indigestible Reforms for the Judiciary*, 27 ARIZ. L. REV. 785 (1985) (offering various theories on judicial reform); Robert B. McKay, *Comm. on Federal Courts, The Inter-Circuit Tribunal*, 41 REC. A.B. CITY N.Y. 247 (1986) (opposing inter-circuit tribunal); Stern, *supra* note 68 (reviewing methods of handling appellate overload); Todd E. Thompson, *Increasing Uniformity and*

3. *In Banc Intercircuit Conference.* The In Banc Intercircuit Conference (IBIC) is the next generation proposal related to this family of fourth-tier proposals. The IBIC is designed to address the remaining systemic need for greater uniformity in the national law by creating a mechanism for the prompt and final resolution of conflicts in the law of the circuits. One consequence of the growth in the federal appellate caseload has been a de facto delegation of some of the Supreme Court's lawmaking function to the courts of appeals, and one consequence of this delegation is that the law of each circuit has become somewhat more autonomous. The worst mischief of unresolved conflicts among the circuits is that the same provision of the Constitution or the same federal statute is given differing authoritative meanings in different regions of the country.

Presumably, one of the attendant consequences of the Supreme Court's recent cutback in granting review in cases is that fewer conflicts will be resolved and more will accumulate and become persistent. The IBIC is designed to fill this gap in the capacity for uniformity in the national law. The IBIC would be composed of senior judges sitting on a rotational basis. Jurisdiction would be limited to intercircuit conflicts over federal questions; appeals would be certified over from the Supreme Court.<sup>84</sup> The design is to create a court with national decisionmaking capacity as an outgrowth of the existing courts of appeals.

The IBIC would be composed of thirteen circuit judges selected on the basis of seniority for a regular term, one from each of the existing courts of appeals. The most senior member would preside. If a court of nine judges is preferred, some rotational formula could be established to equalize participation by each circuit over time. This objective, mechanical selection procedure would obviate the political problems with appointment of new Article III judges or

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*Capacity in the Federal Appellate System*, 11 HASTINGS CONST. L.Q. 457 (1984) (suggesting alternations to federal appellate system); Richard H. Winters, *An Intercircuit Panel of the United States Courts of Appeals: The Costs of Structural Change*, 70 JUDICATURE 31 (1986) (discussing problems of proposed intercircuit panel).

<sup>84</sup> With some refinements, this discussion relies on the proposal by then-Chief Justice Keith M. Callow, Supreme Court of the State of Washington. Letter from the Honorable Keith M. Callow to the Honorables Joseph F. Weis, Jr. and Levin H. Campbell (June 1, 1989) (accompanying a memorandum on the *In Banc Intercircuit Conference Proposal*); see WORKING PAPERS, *supra* note 25.

designation of existing judges by the President, the Chief Justice, the Supreme Court, or any other procedure. Furthermore, it would eliminate the concerns that existing circuit judges would vie unseemingly for designation or that those not designated would suffer some perceived demotion in the federal judicial hierarchy. If the chief judges would object to serving on the IBIC out of a concern for increased workload, IBIC judges might be selected automatically by designating: (a) the most senior active judge who has not served and who is not eligible to serve as chief judge; (b) former chief judges who have taken senior status; (c) former chief judges who remain in active service; (d) the junior-most judge who has taken senior status and has not yet reached age seventy; or (e) active judges, other than those just mentioned, in order of seniority. Docketing and calendaring procedures arguably should also avoid the selection of a judge from the circuits in which the conflicting decision arose or the other circuit(s) in conflict. It would seem sufficient, however, for the statute to disqualify automatically any member of a panel being reviewed from sitting on the IBIC reviewing the particular decision.

A term of the IBIC should be brief, perhaps only one year, to widen participation among circuit judges and to minimize the workload increase felt by the individual judge and by the judge's circuit. Each judge's tour of duty would be for one term. While this creates a genuine worry for consistency and harmony, the response is that for statutory issues, "in most matters it is more important that the applicable rule of law be settled than that it be settled right,"<sup>85</sup> as Justice Brandeis once observed.

The constitutional requirements of a case or controversy with all doctrinal gloss would apply, of course, to the IBIC as an Article III court. Statutorily, the requirement of a final judgment should also be a necessary jurisdictional feature.<sup>86</sup> The jurisdiction of the IBIC would be restricted to federal cases certified by a majority of the Supreme Court to involve a conflict between two or more courts of appeals or between one or more courts of appeals and the highest court of a state, over the interpretation of a federal rule of procedure, a federal statute, or treaty. (This would be a departure from

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<sup>85</sup> *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

<sup>86</sup> See 28 U.S.C. § 1291 (1988).

the current Supreme Court screening procedure that follows the so-called "Rule of Four."<sup>87</sup>) Consistent with the position of the Conference of Chief Justices, the IBIC would not hear appeals from state courts.<sup>88</sup> Furthermore, issues of constitutional law would be beyond the jurisdiction of the IBIC. The IBIC would have mandatory jurisdiction over certified cases; that is, the Supreme Court's determination that a conflict existed would be binding on the IBIC, and the IBIC would not have the power to decline to decide a case otherwise properly certified.

Proponents estimate that the IBIC would have a docket of approximately twenty cases per year. This seems too low an estimate.<sup>89</sup> In recent Supreme Court Terms, intercircuit conflicts have comprised approximately five percent of the entire docket and about one-third of the signed opinions. Justice White, in recent Terms before his retirement, dissented from the denial of certiorari to leave a record of additional unresolved conflicts.<sup>90</sup> This means the Supreme Court had been resolving upwards of fifty conflicts and declining review in between twenty to forty more each October Term. Indeed, some experts have suggested these estimates are on the low side. Presumably, most of the conflicts now being resolved by the Supreme Court would be certified to the IBIC, along with at least some of the cases now being denied review. With the recent decline in the number of cases granted review, presumably more conflicts will accumulate. Therefore, a more realistic docket estimate would be close to a hundred in the first few years, perhaps eventually tapering off to between forty to sixty cases per year. Thus, the workload increment to be added to the designated circuit

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<sup>87</sup> See John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1 (1983) (exploring stare decisis and the "Rule of Four" used by the Supreme Court to process its certiorari docket).

<sup>88</sup> But see Cameron, *supra* note 70 (discussing proposal for a national court of state appeals).

<sup>89</sup> See Thomas E. Baker, *Siskel and Ebert at the Supreme Court*, 87 MICH. L. REV. 1472, 1484-85 (1989) (discussing the management of intercircuit conflicts by the Supreme Court); Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541 (1989) (discussing the ability of the Ninth Circuit Court of Appeals to maintain consistency of the law).

<sup>90</sup> See Michael J. Broyde, 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 (1987) (using Justice White's dissents as a tool to analyze the merits of an Intercircuit Court of Appeals).

judges would not be insubstantial; in the long run it would amount to the equivalent of two or three or more circuit sittings per judge over the one-year term.

The decisions of the IBIC would be reported in the United States Reports, following behind the decisions of the Supreme Court. IBIC holdings would be binding precedent on all courts, federal and state, subject only to review pursuant to a writ of certiorari in the Supreme Court. A panel of the IBIC could not overrule a decision of a previous panel, absent intervening legislation by Congress or supervening Supreme Court precedent. Current procedures in the circuits for panel rehearings and en banc rehearings would not be changed.

The IBIC proposal is designed to enhance the authority and prestige of the courts of appeals by the creation of a mechanism within the existing intermediate tier for resolving conflicts at that level. This proposal is based on the assumptions that the current capacity for achieving a satisfactory uniformity in the national law is inadequate and that neither the Supreme Court nor any other institutional reform of the courts of appeals can sufficiently improve the situation.

This proposal, however, suffers from an overall lack of elegance. It would generate greater certainty and coherence in the national law, but it seems to be an overly compromised version of the national court of appeals. It appears far too cumbersome. By contrast, consider the more modest proposal of the Federal Courts Study Committee, which makes more efficient use of existing appellate structures. The Study Committee recommended that Congress authorize a five-year experiment to allow the Supreme Court to refer selected cases to the existing en banc courts in rotation for a definitive disposition that would be afforded the status of a binding national precedent.<sup>91</sup> Part of the recommendation is that the Judicial Conference monitor and evaluate the project and make some appropriate recommendation to Congress.<sup>92</sup> If the policy goal is to add greater capacity for achieving

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<sup>91</sup> STUDY COMMITTEE REPORT, *supra* note 1, at 126; see also Regina C. McGranery, *Random Justice: Shorting the Circuits*, 37 FED. B. NEWS & J. 358 (1990).

<sup>92</sup> STUDY COMMITTEE REPORT, *supra* note 1, at 137. The Committee left drafting details to Congress, but made some general suggestions. See *id.* at 127; see also S. 2620, 101st Cong., 2d Sess. (1990).



uniformity in the national law, the pilot approach is much to be preferred. Much would be learned from an experiment of this kind. And if it failed, to abandon it would cause far less disruption than the IBIC.

4. *Bi-Level Intermediate Appellate Court.* This model, like the preceding two, would extend the approach taken in the 1891 Evarts Act to create an additional level of court between the trial court and the Supreme Court.<sup>93</sup> To create the new first appellate tier, Congress would reassign the circuit judges to a number of regional appellate divisions composed of nine judges. As judgeships were added, the number of divisions would grow from twenty to thirty or more. The regional divisions would sit in three-judge panels to hear appeals of right from the district courts within their geographical region. A new second appellate tier would be created, arranged in perhaps four or more geographical regions, overlaying the first appellate tier. The second appellate tier would hear appeals on a discretionary basis from the first tier. The error-correction function would be assigned primarily to the first tier; the law-creating function would be assigned to the second tier. The second tier would consist of fewer judges and thus presumably could be expected to generate a more harmonious and coherent body of case law. The second tier would operate to review conflicts between first-tier divisions and to decide cases involving substantial issues of federal substantive law. The Supreme Court's focus in this model would be on the second appellate tier, and the theory is that the Court would more easily supervise the decisions of the four or five upper-level courts of appeals at the second tier.

This is designed to be a growth model: "Such an expanded system could absorb perhaps double or more the number of judges in the current system, would enable all the individual courts at both levels to remain small, and yet might restore the coherence threatened by untrammelled growth within the current circuits."<sup>94</sup> This proposal is designed along the lines of structural reforms enacted in many state court systems to create an intermediate appellate court, although the existing courts of appeals, of course,

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<sup>93</sup> See generally Stern, *supra* note 68 (reviewing various methods of relief for overburdened courts).

<sup>94</sup> STUDY COMMITTEE REPORT, *supra* note 1, at 120.

are already "intermediate" in the current federal system. There are important differences. The first tier would focus largely on error correction, much like the state intermediate courts. The smaller second tier would handle the laboring oar in the law-declaration function, subject necessarily to review in the Constitution's one Supreme Court. This design thus takes into account the contemporary reality that the courts of appeals are performing the error-correction function, as originally contemplated, but by default also perform a significant portion of the law-declaration function, which the 1891 structure assigned to the Supreme Court. In effect, this proposal would have Congress do again what it did in 1891, but with a nuanced set of expectations.

It might be fair to characterize this bifurcation as preserving the traditional function of the courts of appeals in the upper tier and relegating to the first tier the cases currently screened out of the system in the nonargument summary calendars, which are so prevalent and so heavily relied on in all the circuits. The obvious and most telling criticism of this model is that it creates two levels of appellate court *judges* at the same time it creates two levels of appellate *courts*.<sup>95</sup> Perhaps a corps of appellate magistrates, on the order of the magistrate judges in the district courts, might staff the first tier. This staffing solution would itself raise a serious problem, however, if the decision of an Article III district judge was made reviewable by a non-Article III appellate decisionmaker. This particular difficulty could be avoided by making any action by a non-Article III appellate magistrate merely a recommendation until a sufficient period of time had elapsed for an appeal to a panel of Article III judges on the lower tier. Upon this appeal, the panel would be expected in most cases to adopt a recommended affirmation of the district court, without need for further hearing or reasons beyond those provided by the appellate magistrate. In more difficult or close appeals, or when the recommendation was to reverse the district court, there would be a *de novo* review. Another possible feature, borrowed from the state experience, might authorize the upper second tier to "reach down" to take over appeals of obvious importance without the necessity of waiting for the completion of the first-tier review. Anyone familiar with state

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<sup>95</sup> "But it could be harder to attract able jurists to the lower-tier courts." *Id.*

court structures will recognize how this model overall resembles the bi-level appellate review in many states. Of course, this model would represent, in effect, a second subdivision of the federal intermediate appellate tier. The additional costs and delay in this model of adding a second tier certiorari before Supreme Court certiorari, of course, are shared in common with any model that adds another level of appellate consideration to the present system.

5. *A District Court Variation.* Conceptually, the theoretical decision to create a fourth tier in the federal courts does not determine the two implementation decisions of where the tier needs to be added and how it should be staffed. The so-called Court X and the IBIC, discussed above, would add the new level between the existing courts of appeals and the Supreme Court. The bi-level approach just discussed, in effect, would locate the two new tiers between the district court and the Supreme Court.<sup>96</sup> Previous discussion went on to consider possibilities for staffing and selection. For the sake of completeness, still another locational and staffing option needs to be mentioned here.

Presently, the district courts do in fact have the power and authority to sit en banc.<sup>97</sup> This practice might be retooled and routinized. A new level of the district court could be created, where the largest number of Article III judges presently exist. An appellate division of the district court could sit in three-judge panels, excluding the judge who tried the particular case, to review all the decisions of the district.<sup>98</sup> The judge-power already exists there in some districts and more judges can always be added more easily at the district court level. It would not create the problem of non-Article III review. It would not create castes of appellate judges. Even if the appellate division district judges were to become differentiated for lengthy periods or even permanently from

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<sup>96</sup> See Stephen Breyer, *Administering Justice in the First Circuit*, 24 SUFFOLK U. L. REV. 29, 41-42 (1990) (advocating the creation of a new tier to alleviate caseload difficulties).

<sup>97</sup> See John R. Bartels, *United States District Courts En Banc—Resolving the Ambiguities*, 73 JUDICATURE 40 (1989) (identifying present “ambiguities” in en banc courts and suggesting solutions).

<sup>98</sup> See Carrington, *supra* note 44, at 433-34 (citing Shirley Hufstедler & Seth Hufstедler, *Improving the California Appellate Pyramid*, 46 L.A. B. BULL. 275 (1971)); see also Louis H. Pollak, *Amici Curiae*, 56 U. CHI. L. REV. 811 (1989) (reviewing HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (3rd ed. 1988)).

trial division district judges, the district court might turn out to be a more resilient administrative location for the error-correction function and it does have a greater capacity for continued growth.

One alternative design may be sketched to illustrate how the federal district court jurisdiction could be redesigned to accommodate a new appellate function.<sup>99</sup> There are five basic propositions behind this design. First, not every case should be put through this new layer. Questions involving civil rights, for example, deserve expeditious and full treatment on appeal. Pure issues of law would not likely benefit from an additional layer of trial court review. Second, the jurisdictional rules need to be clear and certain, so that the resources of the parties and the courts are not wasted in elaborate proceedings to determine if there is subject matter jurisdiction. Third, cases selected for this layer should match the peculiar expertise and experience of district judges, which for the most part involves deciding fact-oriented disputes. Fourth, the design should accomplish a substantial reduction either in the number of appeals that are taken or in the number of issues that are appealed to the courts of appeals. Fifth, it would be politically unfeasible to suggest that a second class justice be afforded only to less powerful litigants. It will not do, for example, to place Social Security cases or prisoner civil rights cases on some secondary track with lower quality procedures. While diversity cases may be a logical category for being singled out for such a second track, again, practical politics counsel against even suggesting it.

The proposal is relatively simple. Indeed, this quality makes it attractive. The basic propositions summarized above can be incorporated into a kind of jurisdictional provision that for all intents and purposes amounts to a refinement of existing standards of review. An appeal from a final judgment of a district court would be appealed to a three-judge appellate panel of district court

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<sup>99</sup> This illustration is taken, with permission, from a Memorandum, dated April 7, 1993, authored by Denis J. Hauptly, Director, Judicial Education Division, Federal Judicial Center, and transmitted to Charles W. Nihan, Chief, Long Range Planning Office, Administrative Office of the U.S. Courts, on file with the author. This discussion does not deal with operational issues, such as selection and tenure of judges, although such matters are not so complex, and other useful models do exist. The question of how many new judgeships would be needed or could be expected is much more problematic, since it is difficult to predict the size and growth rate of the caseload of the appellate division being proposed.

judges if, and only if, the appeal included an issue alleging the abuse of discretion of the district judge or an issue arguing there was not substantial evidence to support the findings of some federal administrative agency. All other appeals that did not contain either of these two kinds of issues would proceed directly to the court of appeals, as is the current practice. The three-judge appellate panel of the district court would hear and decide the issues of abuse of discretion and substantial evidence, as well as any and all other issues presented in those appeals. But this is where the reduction in courts of appeals' caseload comes in: The abuse of discretion issues and the substantial evidence issues themselves would *not* be subject to any further review. All the remaining issues in those appeals, however, would proceed to the court of appeals for a review as of right. An appellant who wanted to avoid this new layer of district court review presumably could be permitted to waive those issues involving the abuse of discretion or the substantiality of evidence and then could bring an appeal raising other issues directly to the court of appeals, but that too would have the overall salutary effect of lessening the number of issues brought to the courts of appeals. To create a delay, an appellant might be tempted to file some vexatious appeal before the appellate panel of the district court alleging some pretextual issue of abuse of discretion or an appellee might do the same with a cross-appeal, but the procedures applicable to stays of judgments and the general provisions authorizing sanctions for such behavior ought to be sufficient to deal with those problems.

The existing circuits could remain in place as part of this proposal, perhaps even with some paring of circuit judgeships through attrition in the larger courts of appeals, to help perform the law-declaration function. This general approach might be combined with a certiorari feature in the courts of appeals to reinforce further the primary error-correction function of the appellate division district court.

Interestingly, this idea resembles the original design of the Judiciary Act of 1789, which created a district court with limited trial jurisdiction and a circuit court with a combined original and appellate jurisdiction. It also resembles the three-judge district court that was once much more prominent than it is now. Furthermore, this proposal has the advantage of restructuring existing

levels of courts, as would the bi-level appellate approach, and might be more appealing politically than other more radical proposals for the wholesale redesigning of the entire federal court system. The general idea deserves further consideration, at least to evaluate how it might reduce the courts of appeals' caseload and what tradeoffs there might be for the problem of intercourt conflicts.

The chief concern, at least transitionally, would be attitudinal. An appellate division district judge presumably might be more reluctant to overrule a close colleague, and litigants would have to be assured that the district judges were not trading affirmances with each other. Other objections to adding any fourth level mainly revolve around the concerns for costs and delay. One answer is that the existing court systems, for the most part, already have four levels. In the state court systems, with certiorari in the Supreme Court of the United States for federal questions, there are four levels. In the federal system, with panel and en banc rehearings, at least theoretically there are four levels now. The expected benefits of adding a fourth tier are: First, it would isolate and make more efficient the error-correction function; and second, it would yield more coherence and uniformity in the streamlined lawmaking function.

### C. NATIONAL SUBJECT MATTER COURTS

Specialized appellate courts have been a topic of discussion for many years. Here, a few additional comments of a general nature will introduce some specific proposals.<sup>100</sup> Specialization is a means used in many fields to maximize the impact of available resources. However, for courts generally and for Article III courts particularly, specialization often is viewed with near or actual disdain. While the actual practice of law has become increasingly specialized, and while courts will overturn criminal convictions because of an inadequate defense in cases where defense counsel lacked criminal experience, the judges themselves can still be expected to resist efforts at subject matter specialization. The generalist appellate bench may be thought of as one of the last

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<sup>100</sup> For additional background papers relied on here, see generally *WORKING PAPERS*, *supra* note 25; *see also supra* note 57.

remaining vestiges of the generalist legal tradition. More than nostalgia has sustained this tradition on the judicial side, long after it has all but disappeared in the practicing bar. Moving away from a generalist appellate bench, the worry goes, could be costly in terms of traditional appellate ideals.

The arguments raised against court specialization are really two. First, a specialized appellate court in an area such as tax law will prematurely end the judicial debate on any issue with its first opinion. If there were a national court of tax appeals, there would be no more than one appellate case on any emerging issue of tax law because the first decision would be definitive and final. Opponents of specialization argue that there is much value in "percolation" of difficult issues. But, of course, most issues in tax law and in other areas are not all that difficult, and the value of decisiveness in some areas of public policy outweighs the marginal and possibly speculative gains of percolation.<sup>101</sup> The theoretical underpinning of the Constitution, revealed in the Supremacy Clause and in the provision for one Supreme Court, is a commitment to a single uniform national law.

Second, there is a danger that specialized courts will be "captured" by one side or another.<sup>102</sup> This argument dates back to the experience with the Commerce Court at the beginning of this century. That court was perceived by many as having been captured by the railroad interests and was soon dissolved by Congress. Similarly, today some administrative agencies have been characterized as captured by those being regulated. Indeed, at various times in recent years, the NLRB has been described as captured by both labor and management, often at the same time, depending on who is doing the characterizing.

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<sup>101</sup> See generally J. Patrick Galvin, Jr. & Peter J. Reilly, Note, *An Intercircuit Tribunal or a Court of Tax Appeals: A Tax Litigation Perspective*, 11 J. LEGIS. 473, 488-89 (1984) (suggesting that expected benefits from "percolation" would likely be outweighed by quick and consistent decisions).

<sup>102</sup> See generally Lawrence Baum, *Specializing the Federal Courts: Neutral Reforms or Efforts to Shape Judicial Policy?*, 74 JUDICATURE 217 (1991) (discussing the impact of special interest groups on specialized federal courts). See also Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 332-42 (1991) (discussing the historical treatment of specialized courts).

Even assuming *arguendo* that capture is something to worry about, a captured court presumably would decide the great majority of cases along the same lines as one that had not been captured. Moreover, the problem presented by capturing varies somewhat with the subject matter involved. A hypothetical Court of Constitutional Appeals captured by some fringe group would portend dire consequences for the Republic, because altering the outcome of its decisions might require the politically heroic procedure for amending the Constitution. On the other hand, a pro-government or pro-taxpayer Court of Tax Appeals may have its decisions reversed merely by congressional or perhaps even administrative action. A refinement on the capturing argument is "the possibility that [court] specialization will affect the substance of judicial policies—winners and losers in cases, the content of legal doctrine" in a subtle but effective way to secure advantage for the federal government itself and against all others who litigate against the United States.<sup>103</sup>

Lost percolation and fear of capture may or may not be valid concerns. But a fair question for this (and, for that matter, for all other proposals) is "What good will it do?" A Court of Tax Appeals would remove only two percent of the cases from the regional circuits. The Ninth Circuit would lose slightly more than 100 cases of its 6000 appeals. The incoming tide of new appeals would quickly wash away such a relatively tiny gain. A tax court may be justified by other reasons, but caseload relief is not one of them. Tax issues often are peculiarly difficult and can be very time consuming, especially for the generalist appellate judge. Consequently, reassigning tax appeals to a specialized bench might help the courts of appeals more than the raw statistics suggest. In addition, there is the proponents' routine argument that a specialized tax court would create the independent good of reducing the overall amount of tax litigation by resolving contested issues quickly and clearly. Although difficult to measure or to estimate, this would be a possible benefit for the federal court system at large.

A Court of Administrative Appeals would remove more cases, the exact number being dependent upon what jurisdiction was given to

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<sup>103</sup> Baum, *supra* note 102, at 217; *see also id.* at 224.



such a court. But assuming that such a court would primarily hear benefits cases, such as social security disability cases, the number of cases removed would be around 3000. While greater than the number of tax cases, this change is also not very significant, especially since the social security cases are universally regarded as quite easy to decide, and often are handled on the nonargument summary calendar. Again, the relief of caseload would not be significant.

The strongest justification for specialized courts is that they would provide greater uniformity in the specified area of federal law. As has been suggested, this is particularly desirable for "technical" areas such as tax, where the law is often artificial and it seems more imperative to have nationally consistent treatment of the same transaction. Yet, there still is some debate about how often conflicts arise even in the tax area. Even if the number were a high one, it does not necessarily mean there is a great problem. Congressional tax committees probably follow developments in the courts better than most other committees do. Tax laws are frequently rewritten, and court decisions are frequently reversed in that process. Congress is an awkward forum for resolution of court conflicts, but it is a forum nonetheless, and there is some inherent appeal in having an ambiguity in a statute resolved by its creators.

For these and other reasons, the Federal Courts Study Committee gave one thumb-up and one thumb-down on various particular proposals for specialized courts. The Study Committee's Final Report recommended that Congress "rationalize the structure of federal tax adjudication by (1) creating an Article III appellate division of the United States Tax Court with exclusive jurisdiction over appeals in federal income, estate, and gift tax cases and (2) restricting initial tax litigation to the trial division of the Tax Court (staffed by the current Article I judges)."<sup>104</sup> However, the Committee rejected the idea of an administrative law court.<sup>105</sup>

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<sup>104</sup> STUDY COMMITTEE REPORT, *supra* note 1, at 69. *But see* Comment, *The Federal Courts Study Committee Has Not Made the Case for Its Proposed Overhaul of the Tax Litigation Process*, 40 CATH. U. L. REV. 639 (1991).

<sup>105</sup> STUDY COMMITTEE REPORT, *supra* note 1, at 72-73. *See generally* Bruff, *supra* note 102; Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111 (1990) (reviewing the merits of existing specialized courts to assess the desirability of administrative law specialized courts).

The arguments for and against more general use of subject matter courts are more fully set forth in the recent *Report of the American Bar Association Standing Committee on Federal Judicial Improvements*.<sup>106</sup> In 1989, the ABA Standing Committee catalogued the numerous historical exceptions to the federal "rule" of regionalized appellate courts to ask the fundamental question: "What cases are appropriate for regional appellate review, as opposed to centralized national appellate review?"<sup>107</sup> The Standing Committee invoked many of the traditional arguments in favor of subject matter courts: that some subjects of federal law and some cases present a special need for national uniformity; that national appellate review reduces the pressure on the Supreme Court to resolve conflicts; that the resulting uniformity results in more equitable administration of the law by courts and agencies; and that the fears for narrowing and capture are exaggerated.<sup>108</sup> The ABA Standing Committee singled out tax and administrative law as the two most likely candidates for experimentation. While the Federal Courts Study Committee, which came later, was persuaded in the first instance but not the second, the contemporary attitude toward subject matter specialization was summed up by the ABA Standing Committee: "[T]he details of the jurisdiction are not as important as the principle . . . that cases of nationwide significance should be subject to review by a single, national forum."<sup>109</sup> At a high level of abstraction, this newly expressed consensus does suggest that the mistrustful attitude toward experimentation with subject matter courts may be a thing of the past.

At a level of application, the ABA Standing Committee offered another innovation: specialized panels, as a variation on the theme of subject matter courts.<sup>110</sup> This concept is an alternative device for reducing the risk of intracircuit conflicts:<sup>111</sup> "Instead of assigning cases randomly among panels of judges chosen randomly,

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<sup>106</sup> A.B.A. STANDING COMMITTEE, *supra* note 8, at 10-24.

<sup>107</sup> *Id.* at 11.

<sup>108</sup> *Id.* at 10-24.

<sup>109</sup> *Id.* at 21.

<sup>110</sup> *Id.* at 29-33.

<sup>111</sup> See Carrington, *supra* note 45, at 587-96 (suggesting division of larger circuits into courts along subject matter).

cases on specified subjects could be assigned to panels chosen from a small pool of judges, say five or six, whose membership rotated slowly among all the judges of the circuit."<sup>112</sup> The broader the area of specialization, however, the more problematic and less useful the specialized panel proposal becomes. For example, designating a criminal law pool of judges to decide the huge subset of those appeals could not be expected to achieve significantly greater uniformity than the present system. Specialized panels may have some potential in certain highly specialized boutique areas of the law—trademark law, for example. For most subjects and for most courts of appeals, however, even the larger circuits with larger caseloads, the greater potential for appellate court subject matter specialization is on the national level.

One elaborate national proposal merits explication here. Professor Daniel J. Meador, an innovative architect of federal judiciary structures, has proposed a highly developed plan for implementing the subject matter principle.<sup>113</sup>

The restructuring of the courts of appeals proposed by Professor Meador would result in a major overhaul of the federal appellate system. The present geographical circuits would be abolished and replaced with divisions consisting of nine judges each. In addition, there would be five lettered divisions (A through E) with regional jurisdiction to resolve conflicts among the numbered divisions. The lettered divisions would hear cases on a discretionary basis, through a certiorari process. Lastly, the court would also include four specialized divisions of limited jurisdiction, for example, commercial, revenue, administrative, and state. All divisions of the court would be staffed by Article III circuit judges of equal rank.

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<sup>112</sup> A.B.A. STANDING COMMITTEE, *supra* note 8, at 29-30. A related possibility is to assign judges to cases and to writing opinions based on ability and interest, rather than on a random basis. See Stuart S. Nagel, *Systematic Assignment of Judges: A Proposal*, 70 JUDICATURE 73 (1986) (suggesting that cases should be assigned to judges according to their interests and abilities).

<sup>113</sup> See Memorandum from Daniel J. Meador to the Subcommittee on Structure of the Federal Courts Study Committee Regarding Reorganization of the Federal Intermediate Appellate Courts (Aug. 18, 1989), reprinted in WORKING PAPERS, *supra* note 25; see also Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Court of Appeals*, 56 U. CHI. L. REV. 603 (1989) (advocating a nationally unified court of appeals as means to resolve inter-regional inconsistencies). Professor Meador was the Chairman of the ABA Standing Committee.

For the structure of the Meador model, the current twelve geographic circuits would be abolished and replaced with several divisions, each with nine judges. With the current number of statutorily authorized circuit judgeships, there would be approximately twenty divisions across the nation. Each division would have its own clerk's office and administrative facilities. Cases would be heard by three-judge panels from within the division. Of course, senior judges or visiting judges also would be eligible to sit on these panels. The Congress could authorize the Judicial Conference of the United States to monitor and realign the geographical boundaries of divisions, as the number of appeals fluctuated, so that the judicial membership could remain at nine. This would necessitate periodic redrawing of boundaries and reassigning of judges.

In addition to the twenty numbered divisions, there would be five divisions (A through E) that would resolve conflicts among the divisions, functionally corresponding to the proposals to create the so-called Inter-Circuit Tribunal on a discretionary basis that Chief Justice Burger endorsed several years ago. Each lettered division would have seven judges who would sit en banc, or perhaps in a revolving group of five. The primary difference between the lettered divisions and the Inter-Circuit Tribunal is that the lettered divisions would be permanent entities with stable membership.

Lastly, there would be four specialized divisions created. These would function like the Federal Circuit, which would be preserved as its own specialized division. One possible initial design of the court would include an Administrative Division, a Commercial Division, a Revenue Division, and a State Division. With the exception of the Revenue Division, which would have seven judges always sitting en banc, the other divisions would have nine judges.

As an Article III court, new judges for the court of appeals would be selected in the same method as all other Article III judges: appointed by the President with confirmation by the Senate. However, since this court is a restructuring of the current courts of appeals, all current active circuit judges would need to be assigned to a division by the Judicial Conference of the United States.

The numbered divisions would hear appeals from the district courts under their jurisdiction, except those cases that fall under the jurisdiction of specialized divisions. The decisions of the three-

judge panels would establish nationwide precedent unless overruled by a lettered division or by the Supreme Court. The lettered divisions would hear cases when two numbered divisions were in conflict. The lettered divisions would use their discretion to choose the cases they hear by granting a writ of certiorari. Cases they resolved would be reviewable by the Supreme Court. A decision of a numbered division that was denied review by a lettered division would be final and not subject to review by the Supreme Court.

The Administrative Division would have jurisdiction to hear appeals from administrative agencies (such as NLRB, FTC, FCC, INS, and others) as well as decisions of the district courts involving administrative agencies (such as social security appeals). The Commercial Division would have jurisdiction to review all district court judgments in patent infringement cases and in actions under the antitrust laws. It would also hear appeals from the Court of International Trade. The Revenue Division would hear appeals from the United States Tax Court, tax cases from the United States Claims Court, and tax cases from the district courts. The State Division would have jurisdiction to review final decisions of the highest state courts involving a question of federal law. In other words, this division would be assigned all of the jurisdiction currently vested in the Supreme Court to review state decisions (including the Supreme Court of Puerto Rico and the District of Columbia Court of Appeals). This jurisdiction would be entirely on a certiorari basis. Decisions of each of these divisions—Administrative, Commercial, Revenue, and State—all would be reviewable by the Supreme Court.

This proposal appears on first reading to be more exotic than it really is. Perhaps for that reason, the Federal Courts Study Committee described its own less complicated version. The Study Committee's model preserved the regional courts of appeals but added several subject matter courts of appeals, with national jurisdiction and subject to review by the Supreme Court. The model included but was not limited to subject matter courts for tax, admiralty, criminal, civil rights, labor, and administrative law. By identifying this more modest model in its Final Report, the Study Committee may have done a great deal to legitimate the concept of

subject matter courts as a future possibility.<sup>114</sup>

The preference for information before undertaking wholesale reform counsels in favor of the smaller experiment proposed by the ABA Standing Committee, perhaps conducted in one of the larger courts of appeals. More experience with subject matter courts, including the Federal Circuit,<sup>115</sup> is a legitimate expectation. More needs to be understood about the appellate subject matter jurisdiction already in place in the federal system. This is one implication of this discussion that deserves deliberate amplification. Just as the Ninth Circuit performs as a kind of laboratory for administering the large circuit, the Federal Circuit and the District of Columbia Circuit are both laboratories for subject matter specialization. While the former is more often mentioned in discussions of appellate specialization, the jurisdiction of each is characterized to some degree by designated special subject matter appeals that are included along with a more traditional and general mixture of other appeals. More data needs to be collected and evaluated from these two existing courts of appeals. This should be accomplished independent of other proposed experiments with appellate subject matter specialization. It may well be that the perceived drawbacks can be ameliorated and the benefits enhanced by some synergistic combination of subject matter designation with general appellate jurisdiction. There may be a possible solution to some of the problems of the courts of appeals right under our noses.

The present unknowns must be reduced, if not eliminated:

Do judges on a court with defined subject matter jurisdiction behave differently towards their cases—less sensitive to the individual and more willing to support the program—than do other judges? . . .

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<sup>114</sup> See STUDY COMMITTEE REPORT, *supra* note 1, at 120-21 (providing diagram of proposed national subject matter courts).

<sup>115</sup> See Brian C. Murphy & John D. Plaschkes, *A Portrait of the United States Court of Appeals for the Federal Circuit*, 33 FED. B. NEWS & J. 124 (1986) (recounting results of interviews with several judges and senior staff of Court of Appeals for Federal Circuit); S. Jay Plager, *The United States Courts of Appeals, the Federal Circuit, and the Non-Regional Subject Matter Concept: Reflections on the Search for a Model*, 39 AM. U. L. REV. 853 (1990) (identifying problems facing courts of appeals and discussing non-regional subject matter courts as alternative to specialization).

Is substantive law more or less uniformly applied? Does a judicial "narrowness" develop that is somehow institutional rather than individual? And is there a geographic or other permissible source of diversity within the system that is affected or lost in appointments to the one and not the other?<sup>116</sup>

The point is that these questions need to be considered along with the new willingness to consider subject matter courts. Justice Scalia recently concluded: "A nation of a quarter-billion people that no longer distributes the bulk of its judicial business regionally, through separate state systems, must simply consider distributing it [federally] through subject matter."<sup>117</sup>

#### D. A CONSOLIDATED INTERMEDIATE APPELLATE COURT

One of the illustrative models from the Federal Courts Study Committee Report proposed the consolidation of the present geographical courts of appeals into a single, centrally organized court.<sup>118</sup> Even to suggest such an entity is to admit that it "presents an enormous and complex picture."<sup>119</sup> The chief worry is that the resulting appellate leviathan would have all the worst characteristics of a bureaucracy without any of the efficiency, productivity, or accountability that are important in the Third Branch. To allay these fears, it is necessary to imagine the consolidation approach in some detail, with some internal structure and organization. It should be made explicit that none of the

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<sup>116</sup> Plager, *supra* note 115, at 866-67. See generally GORDON BERMANT ET AL., FEDERAL JUDICIAL CTR., THE CASES OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA (1982).

<sup>117</sup> Gary A. Hengstler, *Scalia Seeks Court Changes—Discounts Intercircuit Panel in Favor of Special Courts*, A.B.A. J., Apr. 1987, at 20 (quoting Justice Scalia). See also Edward V. DiLello, Note, *Fighting Fire With Firefighters: A Proposal for Expert Judges at the Trial Level*, 93 COLUM. L. REV. 473 (1993) (proposing magistrate judge experts).

<sup>118</sup> STUDY COMMITTEE REPORT, *supra* note 1, at 121.

<sup>119</sup> *Id.* It should be noted, however, that some of the largest state court systems have managed the problems of a unitary court system despite large numbers of appeals and many appellate judges. See, e.g., Edward M. Wise, *The Legal Culture of Troglodytes: Conflicts Between Panels of the Court of Appeals*, 37 WAYNE L. REV. 313 (1991) (discussing Michigan's system).

following discussion appears in the Final Report of the Federal Courts Study Committee.

Consolidation of the intermediate tier holds the theoretical promise of eliminating intercircuit conflicts, a peculiar evil of our current structure.<sup>120</sup> Two previous innovations designed to cope with caseload growth and judgeship creation, the en banc rehearing and the law of the circuit, today work in tandem to generate an ersatz autonomy that makes the intercircuit conflict possible. When Congress continued to create judgeships to deal with increases in filings, more permutations of three-judge panels began to threaten two institutional values of the intermediate court: consistency among panel decisions and the control of a majority of the circuit judges over the law of the circuit. The en banc court evolved as a mechanism to preserve these two values. However, en banc rehearings result in considerable expense and delay, for litigants and courts alike. Consequently, there developed a concept of the law of the circuit or the law of interpanel accord. This concept was conceived to minimize en banc rehearings by preventing intracircuit conflicts: A three-judge panel must adhere to previous panel decisions as binding precedent, absent an intervening decision by the en banc court or the Supreme Court. This regional stare decisis results in fewer intracircuit conflicts, but it makes possible intercircuit conflicts, because decisions by other courts of appeals are merely persuasive authorities.<sup>121</sup> As a result, each court of appeals has become a junior varsity supreme court, final if not infallible on an issue of federal law in each circuit unless and until the Supreme Court grants review. Because the Supreme Court reviews less than one percent of appellate decisions, the balkanization of federal law has grown more serious with the growing circuit dockets over the years. This has resulted in wasteful litigation and forum shopping.

The idea of a single, unified national court of appeals has an alluring simplicity: eliminate altogether the geographical bound-

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<sup>120</sup> See Baker & McFarland, *supra* note 68, at 1404-09. This discussion is adapted, with permission, from: Baker, *supra* note 4, at 954-59 (emphasizing discrepancies in appellate system created by conflicts among circuit courts of appeals).

<sup>121</sup> The Federal Courts Study Committee exhorted courts of appeals to resist creating intercircuit conflicts and suggested that a draft opinion that would create a conflict should first be circulated to the full court. STUDY COMMITTEE REPORT, *supra* note 1, at 129.



aries between the courts of appeals and consolidate them into one unified administrative and jurisdictional tier of an intermediate court. Logically, then, there could be no such thing as an *intercircuit* conflict. The unified court, however, would require some appropriate mechanism to deal with the equally logical inevitability of more numerous *intracircuit* conflicts among three-judge panels.

From time to time, various commentators have considered this proposal.<sup>122</sup> The unified model depends on the theoretical construct that there be a single United States Court of Appeals. All geographical circuits would be abolished, and presumably the Federal Circuit would be absorbed as well. Professor Paul D. Carrington, a proponent of this model, believes that this would relieve the circuit judges of their preoccupation with maintaining the law of the circuit (an effort he discredits as misguided) and also would make more efficient use of judicial personnel. A unified model presents sophisticated organizational options for administering such a necessarily large and complex institution. The present discussion is borrowed from Professor Carrington's blueprint for dealing with the judicial diseconomies of scale, although admittedly with some poetic license.<sup>123</sup> There are many possible variations on this theme. This discussion is merely intended to illustrate the direction of thinking toward national consolidation.

Professor Carrington's formulation includes "General Divisions," "Special Divisions," and a national "Administrative Panel" that presumably would resemble the present Judicial Conference of the United States. Appeals would continue to be decided by three-judge panels. Three-judge panels, however, would be consolidated from among general divisions, usually comprised of four judges

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<sup>122</sup> See Quentin N. Burdick, *Federal Courts of Appeals: Radical Surgery or Conservative Care*, 60 KY. L.J. 807, 812 (1972) (exploring elimination of boundaries between circuit courts of appeals); Maurice Rosenberg, *Planned Flexibility to Meet Changing Needs of the Federal Appellate System*, 59 CORNELL L. REV. 576, 591-95 (1974) (setting out plan for consolidation of existing courts of appeals); J. Clifford Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 CAL. L. REV. 913, 940-41 (1983) (suggesting consolidation of courts of appeals as means to address developing needs of appellate system).

<sup>123</sup> Letter from Professor Paul D. Carrington to Judge Joseph F. Weis, Jr., Chairman, Federal Courts Study Committee (May 21, 1989), in WORKING PAPERS, *supra* note 25. See generally Carrington, *supra* note 44; Carrington, *supra* note 45 (examining various means for dealing with problems created by congestion in federal courts of appeals).

from four different but proximate states. Thus, there would be forty or more regular general divisions. Active circuit judges would be assigned to general divisions by a national administrative panel that would be chosen by seniority to serve for a substantial term of years. Some provision might be made for automatic rotation among general divisions that prove too stable in membership (for example, no change in membership for three years).

Each general division would have jurisdiction to hear appeals from an appropriate number of specifically identified district judges. The district judges whose appeals were earmarked to a particular general division would sit in one of the four states represented in the general division. Although different general divisions of the court of appeals would regularly review different district judges in the same district, nevertheless, each individual district judge and the litigants in the case would have a fairly good idea of the appellate panel from the moment a matter was assigned to an identified trial judge. The argument is that any cost of greater perceived differences among trial judges in the same district, because they would be reviewed by different three-judge panels, would be offset by the benefit of the identifiable and stable appellate panel, presumably with a consistency in judicial philosophy.

Appellate procedures would be characterized by greater orality.<sup>124</sup> Indeed, the new appellate procedure in the typical appeal would imitate the English tradition with an emphasis on oral presentations by the advocates and an oral decision, with assurance of disclosure of the reactions of each panel member, delivered from the bench without conference. The written opinion for the court, John Marshall's innovation of the nineteenth century, would no longer be the norm.<sup>125</sup> Every effort would be made to take full advantage of modern technology by experimenting, for example, with closed circuit televised oral arguments.

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<sup>124</sup> See generally Daniel J. Meador, *Toward Orality and Visibility in the Appellate Process*, 42 MD. L. REV. 732 (1983) (tracking efforts to restore oral argument to appellate process).

<sup>125</sup> See Lumbard, *supra* note 41, at 37-38 (suggesting refinement of per curiam opinions as means to bring about more speedy dispositions); Charles M. Merrill, *Could Judges Deliver More Justice if They Wrote Fewer Opinions?*, 64 JUDICATURE 435, 471 (1981) (encouraging judges to ask if opinion is really warranted).

This plan assumes that few appeals would require the three-judge hearing panel to write full opinions. In individual appeals, this determination might be made at the oral presentation just described. In those appeals for which a written opinion was deemed appropriate, the hearing panel would be augmented to seven judges, as described below. The likely case for this augmented hearing would be an appeal raising a substantial issue of federal law, such as a difficult and novel issue of statutory construction. Only these augmented hearings would result in the published opinion produced in the Marshall manner, with a conference of the judges, collegial deliberation, and extended circulations with revisions of drafts. With the exception of a special division en banc rehearing explained below, these augmented panel decisions would be the law of the land, normally without expectation of further review in the Supreme Court, given their statutory nature. Thus, the current notion of the law of the circuit would be expanded and generalized nationally. More correctly, this would undo the perverseness of "percolation"—the idea that different judicial positions on the same issue of federal law are somehow advantageous—which is best understood as being "hurtful to the inherent nature of a national law."<sup>126</sup>

The augmentation of the hearing panel from three to seven judges in the Marshall-style opinion-of-the-court type of appeals would come from the membership of "special divisions." Assignment of a judge to a special division of approximately eight judges, by subject matter, would be supplementary to the general division assignment, keyed to the identity of the district judge, as already described. Thus, each active circuit judge would have a general division assignment and a special division assignment. Special division assignments would last perhaps as long as eight years and would be made by the national administrative panel by some calculus to include preference, seniority, location, and lot. There might be some provision for rotation, for example, one-judge-off/one-judge-on each year, but the special divisions would be selected to assure substantial stability.

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<sup>126</sup> Baker, *supra* note 89, at 1487. See generally Michael F. Sturley, *Observations on the Supreme Court's Certiorari Jurisdiction in Intercircuit Conflict Cases*, 67 TEX. L. REV. 1251 (1989) (exploring when inter-circuit conflict requires resolution).

There would be a special division for each subject of federal law in which a substantial number of full opinions would be required, for example, antitrust and related economic regulation, taxation, intellectual property, bankruptcy, government contracts, labor law, securities regulation, federal tort claims, federal crimes, federal civil procedure, federal criminal procedure, and civil rights legislation. Special divisions could be created or abolished by the above-mentioned national administrative panel. These judicial assignments might be analogized to committee assignments in the Congress that develop a particular expertise in the member to complement the generalist's competence. Each special division would be expected to maintain a coherent body of law on its subject matter. The present en banc responsibility would be shifted to the special divisions that, if necessary, could sit en banc and review the augmented seven-judge hearing panel.

This unified model, at the same time distinguished from the current system by greater orality and greater subject matter specialization, is designed to realize the ideal of an appellate system that is speedy, inexpensive, and just. Greater coherency in the national law is an important purpose behind this design. An effort to compromise the generalist-court versus specialist-court debate is much in evidence.<sup>127</sup> Subject matter grouping of appeals, which would be of dubious marginal worth within the present regional circuits, would offer substantial efficacy in dealing with a national docket of a national court.<sup>128</sup> Intercircuit conflicts would be eliminated by definition. The increased likelihood of intracircuit conflicts would be reduced, first, by the constancy of the general division in less significant appeals decided orally in summary fashion, and second, by the expertise of the special division in augmented panels and the capability of en banc

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<sup>127</sup> See generally Daniel J. Meador, *An Appellate Court Dilemma and a Solution Through Subject Matter Organization*, 16 U. MICH. J.L. REF. 471 (1983) (evaluating advantages and disadvantages of subject matter organization concept); Ben F. Overton, *A Prescription for the Appellate Caseload Explosion*, 12 FLA. ST. U. L. REV. 205 (1984) (suggesting new administrative techniques to address problems created by appellate caseload growth).

<sup>128</sup> See Daniel J. Meador, *Appellate Subject Matter Organization: The German Design from an American Perspective*, 5 HASTINGS INT'L & COMP. L. REV. 27, 57-58 (1981) (advocating subject matter organization as answer to problem of high volume in appellate courts).

rehearing. The delay and cost of panel rehearing and en banc rehearing in the current system would be replaced by the augmented panel and special division en banc rehearing, presumably with comparable measures of cost and delay, but with an offsetting expectation for greater coherency in the law.

The most obvious criticism of the unified model is that it fragments and specializes the federal appellate judiciary to great extents. As has been suggested, however, this model is more fairly viewed as a compromise of that larger debate, which will not be rehearsed here. Other more particular objections are more substantial.

First, each general division, unrestrained by publishing an opinion in the run of the cases, represents a potential aberration from the national law. This risk seems no different, however, from the current system of three-judge panels often deciding appeals with unpublished opinions, subject only to altogether rare en banc review and an empty threat of Supreme Court discretionary review. There is an admitted trade-off between the geographical stability in the present system and the doctrinal stability promised in the Carrington model, but the announced purpose of this model is to shift judicial emphasis from making the law of the circuit to making the national law on a particular subject.

Second, administrative worries appear daunting. Case assignment, however, would be just as automatic as in most courts of appeals in the current system.<sup>129</sup> Techniques and technologies that have been developed in the larger circuits, especially the Ninth Circuit, generally suggest the feasibility of administering a unified intermediate court. Of course, regional administration, similar to the current clerks' offices in the circuits, would be possible and probably would be necessary.

What might be called ancillary decisional differences may be exacerbated in the model. For example, the Special Division on Antitrust might interpret the same ancillary procedural issue differently from the Special Division on Civil Rights Legislation.

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<sup>129</sup> See Richard H. Deane & Valerie Tehan, *Judicial Administration in the United States Court of Appeals for the Ninth Circuit*, 11 GOLDEN GATE U. L. REV. 1, 10 (1981) (recounting process for inventorying cases); see also Stuart S. Nagel, *Systematic Assignment of Judges—A Proposal*, 70 JUDICATURE 73 (1986) (rejecting random assignment of cases in favor of considering judge's abilities and interests).

Arguably, the increased harmony in the principal subject divisions might justify this, and, perhaps, the procedural special division could reconcile such differences. Any loss of judicial collegiality from eliminating the current geographic circuits would be more than made up for in the assignments to a four-member general division and an eight-member special division.

Finally, the criticism that this organization would make it easier for Congress to add judges is quite apt, for the unified model can absorb an indeterminate number of circuit judges to be arranged in greater numbers of general and special divisions of expanding membership. This weakness, however, may be the model's greatest strength. Although adding judges to the courts of appeals is a remedy to be resisted in theory, the political reality of the last fifty years suggests judgeship creation is virtually inevitable. Many in Congress today think of the federal courts as another constituency service, although an important and powerful one. The problems plaguing the state courts, including funding woes and selection controversies, make it unlikely that an attitude of a new federalism will warrant any greater reliance on the state judiciaries. If anything, the future is more likely to bring greater and greater demands for new federal court jurisdictions and consequently still larger dockets. And larger dockets will inevitably result in the creation of more federal judgeships. Therefore, any new structural model ought to be designed to absorb more circuit judgeships.

The most serious and at once least tangible value to be lost in the total consolidation is the ethic of pragmatic experimentation that has developed in the recent history of the courts of appeals. The different regional courts of appeals have developed different local responses to the threats of caseload. Many of the best of these innovations have been nationalized throughout the circuits. Even the failed reforms have proven valuable to warn off later venture-some reforms. In matters of appellate procedure, the courts of appeals have been productive laboratories. A centralized operation promises to stifle this attitude and extinguish this zeal. The judges' willingness, sometimes out of a perceived desperation, to try something new might be replaced with the underwhelming enthusiasm of bureaucrats.

## E. DE JURE JUMBO COURTS OF APPEALS

The last particularized model for replacing the current system of regional courts of appeals is the de jure consolidation of the existing courts of appeals into four or five regional circuits. This necessarily would result in circuits that would be quite large, measured in caseloads and judgeships. Hence, the appellation "jumbo." As the Federal Courts Study Committee pointed out, there are certain efficiencies of scale in this approach that would reduce the number of intercircuit conflicts and would allow the courts to shift around judicial resources; limited en bancs might be used to resolve intracircuit conflicts.<sup>130</sup> The jumbo courts of appeals basically would resemble the present Ninth Circuit.

Adding judges and dividing courts of appeals is a congressional strategy that seems to have played out. Over the long run, it already may have proven to have been an inadequate approach to solving the problems of workload. If the addition of judges is accepted as an inevitable political response to a seemingly more inevitable growth in the appellate caseload, Congress may want to consider merging the smaller courts of appeals, measured by docket and judgeships. The Ninth Circuit thus may be better viewed more as a harbinger than as an aberration. The Ninth Circuit has not solved all the problems of the jumbo court of appeals, but it has survived. Since 1978, the Ninth Circuit has pursued reorganization and modernization while repeatedly exceeding each successively announced maximum number of judges in the process, calling into question those norms and the very notion that there is a norm. Innovations in appellate procedures have been augmented with technology. Reorganization into administrative units has helped to manage the caseload. A reformed en banc has been limited for the larger scaled court. Computers have helped improve caseload monitoring. Modern communications link chambers in San Francisco and Honolulu almost as instantaneously and just as reliably as two chambers on different floors of the same courthouse. Rather than divide the Ninth Circuit to make two new courts that soon enough will come to resemble the other beleaguered circuits,

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<sup>130</sup> STUDY COMMITTEE REPORT, *supra* note 1, at 122-23; *see Baker, supra* note 4, at 953-60 (offering Ninth Circuit as workable alternative to traditional model).

Congress ought to hold the mirror the other way, or so the argument goes. The tentative lesson to be learned from the Ninth Circuit may be that reorganization and modernization make possible a consistent and efficient court of appeals regardless of size, or at least for a number of judgeships far beyond currently articulated norms. Therefore, the alternative legislative attitude in the direction of merging the courts of appeals ought to be included amongst the choices of alternative structures.

Mergers on the intermediate tier hold the promise of drastically reducing intercircuit conflicts, which, as has been pointed out, represent a peculiar evil of the current structure. To repeat, although adding judges to the courts of appeals is a remedy to be resisted, the political reality of the last fifty years suggests that future judgeship creation is virtually inevitable. Therefore, any model ought to be designed to absorb new circuit judges.

Although this jumbo circuit proposal is an intuitive departure from the present assumptions about the federal court system, the dire contemporary reality begs for some alternative thinking. The Federal Courts Study Committee characterized the Ninth Circuit as being engaged in what amounts to a kind of debate with the other circuits over the future design of the federal intermediate appellate tier.

The former chief judge of the Ninth Circuit once delivered an appropriate "oral argument" for *de jure* merger, using his court of appeals as a prototype:

The Ninth Circuit is the only remaining laboratory in which to test whether the values of a large circuit can be preserved. If we fail, there is no alternative to fragmentation of the circuits, centralization of administrative authority in Washington, increased conflict in circuit decisions, a growing burden on the Supreme Court, and creation of a fourth tier of appellate review in the federal system. If we succeed, no further division of circuits will be necessary. Indeed, combining the circuits into four or five might well be feasible—creating stronger and more effective appellate courts, lightening the burden on the Supreme Court, and resulting in a decentralized and



more efficient administrative system for the federal judicial system.<sup>131</sup>

Finally, *de jure* merger holds out the promise of restoring a modicum of coherence to the circuit boundaries. Then-Attorney General Richard Thornburgh testified before the Federal Courts Study Committee on the general problem:

What the Committee has not done, nor could it have reasonably been expected to do in the short time allotted, is to evaluate measures to return logic to the chaos and historical accident of circuit boundaries. It makes little sense to have one circuit with six judges (the First Circuit) and another with 28 judges (the Ninth Circuit). We must ultimately come to grips with the historical anomalies of the regional circuits and develop ways to maintain consistency and predictability.<sup>132</sup>

These jumbo circuits need not merely resemble the present Ninth Circuit. Refashioning the present courts of appeals into a handful of jumbo circuits might afford the opportunity for additional administrative and organizational reforms. Each jumbo court of appeals might, for example, be organized pyramidally along the lines of the bi-level intermediate court proposal. There might be a central panel, however selected, which would perform the law-declaration function for the circuit. Or there could be specialized subject matter panels with the same kind of authority as the en banc court to declare the law of the circuit on a designated subject. One direction of reform within the jumbo circuit approach, therefore, is to take the experience of the Ninth Circuit to one of several possible next levels of appellate evolution. The jumbo circuit might evolve in any of these directions. As is true of the idea of restructuring the district courts into appellate and trial

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<sup>131</sup> Mary M. Schroeder, *Jim Browning as a Leader of Judges: A View From a Follower*, 21 ARIZ. ST. L.J. 3, 7 (1989) (quoting Chief Judge James R. Browning).

<sup>132</sup> Attorney General Richard Thornburgh, Statement Before the Federal Courts Study Committee 7 (Jan. 31, 1990), *quoted in* Baker, *supra* note 4, at 961 n.198.

divisions, the idea of first geographically regrouping the existing courts of appeals and then experimenting with internal hierarchical reorganization has the advantage of working from a familiar starting place and then adding innovations. It might be more politically attractive to the judges and to Congress.

The drawbacks to merging the courts of appeals into four or five or more jumbo circuits are the same reservations usually expressed about the Ninth Circuit itself. The debate over the division of the Ninth Circuit neatly frames those issues of size, consistency, and coherence. One point to make is that, so long as the Ninth Circuit continues to exist, it will be held up as a counterexample to the assumptions that gave rise to the present federal appellate structure and the expectations that continue to sustain it. Finally, depending on what internal hierarchical reorganization is pursued within the jumbo circuit model, there needs to be careful debate and comparative evaluation of the alternatives. Likewise, some empirical evaluation should be conducted as follow-up; that is essential.

#### IV. RETAINING THE PRESENT STRUCTURE

Besides certiorari and abolishing the present structure, the last logical choice is to try to maintain the status quo. This does not refer to the nineteenth century appellate paradigm. What remains to be seen is what the future holds for the courts of appeals if the present structure persists, by design or by neglect. The burden of this section is to argue that sooner, rather than later, the present structure will come to resemble the Ninth Circuit, and the design of the Evarts Act once and for all time will be buried in appeals. The conclusion is that for Congress to choose to do nothing, in effect, is to opt for the jumbo circuit model. Caseload growth and added judgeships will make that the de facto choice of public policy inertia.

The argument here is not that the appellate courts have experienced caseload increases far exceeding their capacity to decide. The available statistics belie that argument: In 1990, the courts of

appeals had pending less than a year's worth of cases.<sup>133</sup> The courts of appeals are remarkably current. Rather, the argument here is that the pressures of caseload have resulted in comprehensive compromises of the appellate ideal, to the extent that the federal appellate procedures of today scarcely resemble those of thirty years ago, and the conclusion here is that those compromises have all but played out. Staying current has been costly in terms of lost appellate traditions. Ideals have been compromised. The statistics tell the story. However, statistics should not be used the way an inebriated person uses a lamppost—for support rather than for illumination. Statistics do illuminate the future of the courts of appeals, if only faintly.

Trend analysis is fraught with uncertainty. Past growth patterns can be used to forecast future trends, so long as it is understood that the forecasts are merely projections based on assumptions and that the assumptions might not prove correct. This business resembles weather forecasting, with all of the hedging and qualifying. Two helpful measures of historical trends provide some perspective: the three-judge ratio and weighted caseload.<sup>134</sup>

One measure of a circuit judge's workload is the ratio of cases per three-judge panel.<sup>135</sup>

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<sup>133</sup> In 1990, the courts of appeals terminated 38,520 cases and had 32,396 cases pending. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 1-3 (1990) [hereinafter ANNUAL REPORT]. Aggregate delay in the appellate time intervals has grown dramatically.

<sup>134</sup> See Thomas E. Baker, *A Compendium of Proposals to Reform the United States Courts of Appeals*, 37 U. FLA. L. REV. 225, 235-36 (1985) (discussing these trends and demonstrating statistics).

<sup>135</sup> *Id.*; ANNUAL REPORT, *supra* note 133, at 1-3 (table 1). The following decade comparisons are also instructive:

	1950	1960	1970	1980	1990
<i>Courts of Appeals</i>					
Judges	65	68	97	132	156
Appeals	2,830	3,899	11,662	23,200	40,898
Terminations	3,064	3,713	10,699	20,887	38,520
Pending	1,675	2,220	8,812	20,252	32,396
Terminations per judge	47	55	110	158	247

*Hearing before the Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary*, 102d Cong., 1st Sess. 102-36 (1991) (statement of Judge Charles Clark) (footnote omitted; this is a portion of the chart).

<i>Year</i>	<i>Appeals</i>	<i>Per Three-judge Panel</i>
1950	2,830	131
1960	3,899	172
1970	11,662	361
1980	23,200	527
1990	40,898	787

These figures show the trend in the workload of a judge who basically works in conjunction with two colleagues, drafting opinions, reading briefs, preparing for argument, reviewing records on appeal, editing proffered opinions, writing concurrences and dissents, considering staff screening recommendations, et cetera.

A second possible measure is to evaluate the complexity of individual cases—to attempt to quantify difficulty. The problem is that available measures are rather crude. A truly useful measure of appellate workload thus far has eluded the experts. The Judicial Conference uses 255 “case participations” as the approximate measure of one appellate judge’s annual workload when recommending the creation of new circuit judgeships.<sup>136</sup> In 1990, the national computation was 262.<sup>137</sup> Based on the rough case participation index, Congress would have been obliged by those numbers to create fifty new circuit judgeships and the courts of appeals would average seventeen judgeships each to achieve the recommended ratio of judges to participations.<sup>138</sup> More empirical work needs to be done.<sup>139</sup> The Federal Courts Study Committee explained:

Congress and the courts need an indicator that reflects differences in the work that different kinds of cases require—a “weighted caseload index.” . . .

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<sup>136</sup> STUDY COMMITTEE REPORT, *supra* note 1, at 111. The three leading experts on appellate courts estimated a 225 maximum only eighteen years ago. PAUL D. CARRINGTON ET AL., *JUSTICE ON APPEAL* 196 (1976).

<sup>137</sup> ANNUAL REPORT, *supra* note 133, at 1-3. Appeals commenced, 40,898, divided by authorized judgeships of 156.

<sup>138</sup> Levin H. Campbell, *Into The Third Century: Views of the Appellate System from the Federal Courts Study Committee*, 74 MASS. L. REV. 292, 293 (1989).

<sup>139</sup> See generally HARRY O. LAWSON & BARBARA J. GLETNE, *WORKLOAD MEASURES IN THE COURT* (1980) (containing several empirical studies); WILLIAM P. MCLAUCHLAN, *FEDERAL COURT CASELOADS* (1984).

Courts of appeals vary in their caseload mix. Not only will a weighted index provide a more precise measure for assessing each court's need for judges; it will help determine the best combination of staffing and procedures to assist each court.<sup>140</sup>

Less quantitative, more anecdotal comparisons suggest that over the last three decades there has been a higher percentage of "large" or "complex" cases on appeal, in terms of parties, issues, difficulty, and significance, which demand more judicial resources.<sup>141</sup> We need to move beyond anecdotes.

The Ninth Circuit presently has twenty-eight judgeships. It decides approximately 6000 appeals each year. In the 1993 round of requests for judgeships based on caseload increases, the Ninth Circuit wanted ten more, which would bring it to thirty-eight judges. The Ninth Circuit de facto "jumbo model" is becoming Malthusian. How long will it take, if Congress chooses to retain the present appellate structure, for the other courts of appeals to reach these levels? When they do, can we expect that they will come to resemble the Ninth Circuit in all its Byzantine intramural reforms that have allowed it to survive? The second question is more rhetorical than real at this point. The first question may not appear as inevitable, but the statistical trends suggest otherwise.

The Federal Courts Study Committee described possible trends in alarming terms, looking less than a decade into the future:

In the past three decades the number of appellate judges nationally has almost trebled, ranging now from six in the First Circuit to twenty-eight in the Ninth. The average court of appeals has thirteen judges. If caseload were the sole determinant, and using the Judicial Conference's 255 participations standard, there would today be 206 judgeships for the twelve regional circuits, not the present 156.

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<sup>140</sup> STUDY COMMITTEE REPORT, *supra* note 1, at 111-12.

<sup>141</sup> See, e.g., Wade H. McCree, Jr., *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777, 781-82 (1981) (discussing increased volume of litigation and complexity of individual cases); Dorothy W. Nelson, *Why Are Things Being Done This Way?*, JUDGES J., Fall 1980, at 13, 13-14 (stating that increased intricacy of cases is a large part of problem).

The average court would have seventeen judges, and at least four of the courts would be on the brink of twenty judgeships. Applying the same standard to conservative caseload projections suggests a need by 1999 for 315 appellate judges, with an average court of twenty-four judges (and forty-nine on the Ninth Circuit). Tribunals of seventeen, much less twenty-four, sitting in panels of three, may resemble a judgeship pool more than a single body providing unified circuit leadership and precedent. Still, large courts such as these may be workable. Whether tribunals of thirty or forty judges will be workable is more problematic. The question is not simply one of administration but of the effect, both within the circuit and nationally, of so many uncoordinated opinions from so many judges.<sup>142</sup>

The Study Committee obtained twenty-year forecasts from the Administrative Office of the United States Courts based on four scenarios, using different base years and different assumptions.<sup>143</sup> Looking at the “most realistic” of the four scenarios (there were two worse scenarios), twenty years from now all but the D.C. Circuit and the First Circuit will achieve—and most will far exceed—the current level of judgeships and caseload in the Ninth Circuit.<sup>144</sup> All the courts of appeals, if Congress does nothing over the next twenty years, will become clones of the Ninth Circuit. Doing nothing, leaving the present structure alone, in effect is to choose the Ninth Circuit model for all the Courts of Appeals. The Study Committee understood these two choices in this reality and described them in terms of a “debate” between the past tradition of the courts of appeals and the new wave of judicial administration on the West Coast:

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<sup>142</sup> STUDY COMMITTEE REPORT, *supra* note 1, at 114.

<sup>143</sup> Vincent Flanagan, *Appellate Court Caseloads: A Statistical Overview*, Tables 21 & 22 (1989), reprinted in *WORKING PAPERS*, *supra* note 25.

<sup>144</sup> See Letter from Steven C. Suddaby, Statistician, Administrative Office of the United States Courts, to Denis Hauptly (July 20, 1989), in *WORKING PAPERS*, *supra* note 25 (explaining each scenario and demonstrating related statistics).

The current debate between the Ninth Circuit and the other circuits revolves around two very different conceptions of an appellate court. The Ninth Circuit works as a rotating system of three-judge panels (over 3,000 combinations are possible) covering an enormous geographic area, bonded by a very capable administration and served by the nation's only small, or limited, in banc of ten randomly selected judges and the chief judge. Other courts prefer the traditional concept of a smaller, more intimate, unitary tribunal, even as their growing caseload makes this ideal more and more difficult to sustain. Perhaps the Ninth Circuit represents a workable alternative to the traditional model. If not, the entire present appellate system needs restructuring before other circuits become the "jumbo" courts toward which they are gradually evolving.<sup>145</sup>

Notice that the Study Committee did not consider "if" but talked about "when"; if Congress does nothing to change the structure of the courts of appeals, the rising tide of appeals and the expected cohorts of new judgeships will prove as irresistible as the sea. The federal appellate tradition will come to resemble the lost city of Atlantis.

The inexorable conclusion is that Congress cannot maintain the status quo ante. In one sense, it already is too late; in another sense, the future will not permit it. The numbers (of appeals and judgeships) will do something "radical" before too long. This message must get through to Congress. Then-Chief Judge Campbell, a member of the Study Committee and the Chairman of the Subcommittee on Structure was insistent:

We hope, however, that one message will penetrate: we are headed for times where every circuit may look like today's Ninth, and the Ninth (and others) may double in size. In the time left, we must ask ourselves whether a different structure is preferable, or

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<sup>145</sup> STUDY COMMITTEE REPORT, *supra* note 1, at 122-23.

whether we will be best served by retaining in place as we begin the third century of the federal courts the same scheme the Evarts Act established a century ago as the federal courts began their second century.<sup>146</sup>

## V. CONCLUSION

These concluding comments can be brief. It has been wisely said about the federal courts that what is past is prologue.<sup>147</sup> The future of the courts of appeals is not shrouded in mystery. We can be confident of one thing: It is inevitable that there will be more and more federal appeals. Alongside the quantitative demands of more appeals, the courts of appeals will be expected to perform a more qualitative role in articulating and defining our national law.<sup>148</sup> Congress will need to make some difficult choices before the end of this century, now less than a decade away. These matters, ultimately, are part and parcel of the near-plenary power of Congress to "ordain and establish" the federal courts.<sup>149</sup>

The specifications for structural reform have not changed in the 200-plus years of the federal court system. The essential attributes of any federal appellate system include: maintaining the important function of the courts of appeals in error correction; assuring sufficient judgeships and resources to allow for the expeditious resolution of appeals; assigning individual judicial workloads that permit personalized attention and individualized reflection; arranging judicial groupings that foster collegial decisionmaking and collegiality; guaranteeing regionalized and decentralized review when regional concerns are strongest; guaranteeing nationwide review when the need for consistency and harmony is strongest; and preserving the unique role of the Supreme Court as the court of last resort.<sup>150</sup>

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<sup>146</sup> Campbell, *supra* note 138, at 298.

<sup>147</sup> Kenneth W. Starr, *The Supreme Court and the Future of the Federal Judiciary*, 32 ARIZ. L. REV. 211, 211 (1990).

<sup>148</sup> See Kenneth W. Starr, *The Courts of Appeals and the Future of the Federal Judiciary*, 1991 WIS. L. REV. 1, 7 (discussing future role of judiciary).

<sup>149</sup> U.S. CONST. art. III, § 1.

<sup>150</sup> Memorandum from Daniel J. Meador, *supra* note 113, at 8-9.



Whatever Congress decides to do, or not do, over the next decade and into the next century, it is appropriate to sound a note of caution. This is an area calling for thoughtful reflection and careful study, for "[o]nce structural changes in an institution take place, it is difficult to turn back."<sup>151</sup> The point must be repeated for emphasis: The conclusion of the present Article is that we have reached the point for action. The options discussed in this Article—certiorari jurisdiction, abolishing the present structure, or retaining the present structure—all are fraught with some uncertainty and some risk. For Congress to postpone and to procrastinate is to choose one scenario for the future structure of the United States Courts of Appeals:

Even as recently as 1960, the structure of the courts of appeals was adequate to the tasks assigned to them. This is no longer true today. To deny that serious problems exist in the federal intermediate appellate courts—and that they are likely to become worse—is to ignore the enormous increase in the number and complexity of cases that these courts must now decide. For Congress, the federal judiciary, and the legal profession to fail to act to meet these problems would be a serious failure of public responsibility.<sup>152</sup>

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<sup>151</sup> Lay, *supra* note 39, at 533.

<sup>152</sup> A.B.A. STANDING COMMITTEE, *supra* note 8, at 41-42.