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## PERSPECTIVES ON THE ADMINISTRATION OF JUSTICE

### ADDING APPELLATE CAPACITY TO THE FEDERAL SYSTEM: A NATIONAL COURT OF APPEALS OR AN INTER-CIRCUIT TRIBUNAL?

A. LEO LEVIN\*

Change in the structure of the federal judicial system comes slowly. This is true even of less-than-monumental adjustments: the creation of a new circuit, the consolidation of two existing courts.<sup>1</sup> Major structural

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<sup>1</sup> The Eleventh Circuit was created by the Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 3254, to take effect October 1, 1981. See 28 U.S.C. § 41 (1981). "As early as March 1964 the Judicial Conference of the United States had adopted a resolution that the Fifth Circuit be split into two autonomous circuits." Ainsworth, *Fifth Circuit Court of Appeals Reorganization Act of 1980*, 1981 B.Y.U. L. REV. 523, 531 (footnote omitted). This division of the Fifth Circuit into two circuits was recommended in 1973 by the Commission on Revision of the Federal Court Appellate System (generally known as the Hruska Commission after its chairman, Senator Roman L. Hruska) in its initial report. See 62 F.R.D. 223, 230-34 (1974). Of course, recommendations for division of the circuit had preceded creation of the Commission itself. See D. BONN, *THE GEOGRAPHICAL DIVISION OF THE EIGHTH CIRCUIT COURT OF APPEALS: AN HISTORICAL ANALYSIS* (1974) (history of division of Eighth Circuit into Eighth and Tenth Circuits). The Hruska Commission also had recommended dividing the Ninth Circuit, but no legislative action yet has been taken to implement this recommendation. Instead, the Congress authorized creation of administrative units within the then Fifth Circuit and the current Ninth Circuit and added special provisions related to sitting en banc. See 28 U.S.C. § 41 (Supp. II 1978).

Consolidation of the Court of Claims and the Court of Customs and Patent Appeals has passed in separate bills of both houses of Congress and is currently awaiting conference approval. See S. 1700, 97th Cong., 1st Sess. (1981) (tabled by Senate on December 18, 1981); H.R. 4482, 97th Cong., 1st Sess. (1981) (passed in House as reported in H.R. Rep. No. 97-312, on November 18, 1981) (amended by Senate and passed as amended on December 8, 1981). The legislation is intended, among other things, to solve problems relating to forum shop-

change involving the United States Supreme Court occurs very rarely.<sup>2</sup> This is as it should be; the role of the federal judiciary in our society, and certainly the role of the Supreme Court, is too important to allow for easy tinkering. But the country continues to change rapidly; the role of federal law continues to expand, and the problems presented for judicial solution become more complex, mirroring the development of economic and technological forces we can only dimly understand.<sup>3</sup> The world shrinks even as our population grows, presenting novel issues for decision by federal judges. On the domestic front, new problems for judicial resolution follow expanding notions of how best to protect against impermissible discrimination, whether based on race, religion, sex, or age.<sup>4</sup> Again, all this is as it should be.

At some point, however, it becomes necessary to pause and inquire whether our courts as presently constituted can accommodate the changing scene and meet the new demands. There are times when change is essential to conserve basic values; the failure to make adjustments often leads to total breakdown. In a very real sense, stringent adherence to a policy of no-change serves to effect far-reaching change, adverse in its impact and not readily controlled.

For well over a decade, legal literature has reflected a deep concern with the capacity of the federal judicial system to function smoothly and effectively, particularly with respect to maintaining uniformity in the

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ping in patent cases which have long been the subject of concern. See COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE, reprinted in 67 F.R.D. 195, 369-71 (1975) [hereinafter cited as COMMISSION REPORT]. See also *The Sixth Annual Judicial Conference of the United States Court of Customs and Patent Appeals, May 9, 1979*, "A Talk Show—A Federal Appellate Court with Exclusive Patent Jurisdiction: An Idea Whose Time Has Come?," 84 F.R.D. 429, 465-82 (1979); *House Committee on the Judiciary, Court of Appeals for the Federal Circuit Act of 1980*, H.R. Rep. No. 96-1300, 96th Cong., 2d Sess. 18-21 (1980); see generally *Court of Appeals for the Federal Circuit—1981: Hearings on H.R. 2405 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice*, 97th Cong., 1st Sess. (1981) [hereinafter cited as *Hearings*].

<sup>2</sup> See, e.g., F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 258-60 (1927) [hereinafter cited as FRANKFURTER & LANDIS].

<sup>3</sup> COMMISSION REPORT, *supra* note 1, at 204. See also *id.* at 404-05 (views of Justice Blackmun, "The country has grown and surely it has become more complex."); F. COFFIN, *THE WAYS OF A JUDGE* 247 (1980) [hereinafter cited as COFFIN].

<sup>4</sup> Civil rights cases, exclusive of prisoner petitions, comprise a significant portion of all the civil litigation filed in the United States district courts. In 1981, 15,419 such cases were filed, a record high which constituted 8.5 percent of civil findings (180,576). Within the broad category civil rights cases, employment discrimination and "general civil rights" cases have shown the largest increases in recent years. Employment discrimination filings reached 6,245 cases in 1981, reflecting a 249.4 percent increase over 1973. During the same period, general civil rights cases increased by 63.8 percent. See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR 75 (1981) [hereinafter cited as DIRECTOR'S REPORT 1981].

national law.<sup>5</sup> Senator Howell Heflin of Alabama, a formidable figure in state judicial administration reform before his election to the Senate, and Congressman Robert Kastenmeier, Chairman of the Subcommittee on Courts, Civil Liberties and Administration of Justice of the Committee on the Judiciary in the House, have recently introduced legislation addressing these concerns.<sup>6</sup> Hearings have been held; the process of congressional consideration has begun.<sup>7</sup> It is a propitious time to examine both the nature of the problem and the solutions that have been proposed.

### *Adjusting to the Increase in Caseload*

In examining the present situation it is helpful to think of the federal judicial system as a pyramid. At the base are the United States district courts. In 1960, filings in the district courts were approximately 60,000.<sup>8</sup> In 1981, over 211,000 cases were filed.<sup>9</sup> As filings increase in the federal trial courts, it is possible to add additional judges, and the Congress has done so.<sup>10</sup> The Congress also has provided additional support by way of magistrates.<sup>11</sup> Moreover, judges have increased their productivity

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<sup>5</sup> See Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 542 (1969); AMERICAN BAR FOUNDATION, ACCOMMODATING THE WORKLOAD OF THE UNITED STATES COURTS OF APPEALS 6-8 (1968).

<sup>6</sup> S. 1529, 97th Cong., 1st Sess. (1981), was introduced by Senator Heflin on July 29, 1981, and was referred to the Senate Committee on the Judiciary. H.R. 4482, 97th Cong., 1st Sess. (1981), was introduced by Congressman Kastenmeier on September 15, 1981, and was referred to the Committee on the Judiciary, House of Representatives. On January 29, 1982, as this article was going to press, Senator Heflin introduced S. 2035, 97th Cong., 2d Sess. (1982), providing for the appointment of a Chancellor of the United States to be Presiding Judge of the National Court of Appeals, "a judge and administrator who will be directly responsible to the Chief Justice of the United States." 128 CONG. REC. S. 222-25 (daily ed. Jan. 29, 1982). The Chancellor would be appointed from judges serving on active duty as members of the United States circuit courts of appeals. His appointment would create a vacancy on the court on which he had been serving. All other judges sitting on the National Court of Appeals would serve in addition to their other duties.

<sup>7</sup> *Hearings on S. 1529 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 1 (1981).

<sup>8</sup> Civil cases filed in the United States district courts during 1960 totaled 59,284. Criminal filings (original and transfer) totaled 29,828. See DIRECTOR'S REPORT 1981, *supra* note 4, at 56, 94.

<sup>9</sup> There were 201,387 cases filed in the United States district courts during 1981. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, MANAGEMENT STATISTICS FOR THE UNITED STATES COURTS 129 (1981) [hereinafter cited as 1981 STATISTICS]. Of these, 180,576 were civil cases. *Id.*

<sup>10</sup> The Omnibus Judgeship Act of 1978, Pub. L. No. 95-486, 92 Stat. 1629, authorized the creation of 117 district court judgeships. 28 U.S.C. § 133 (Supp. II 1978).

<sup>11</sup> The Federal Magistrate Act of 1979 (Act), 28 U.S.C.A. § 631 (Supp. 1981). Though the total number of United States Magistrate positions has remained almost unchanged since the Act became law on October 10, 1979 (increasing by only five positions to 490 in the spring of 1981), there has been a continuing shift from part-time service to service on a full-

significantly.<sup>12</sup> I do not mean to minimize the problems facing the district courts, but it seems fair to say that they are far more tractable than those facing the United States courts of appeals and the United States Supreme Court.

The United States courts of appeals comprise the next level of the pyramid. The increase of filings in these courts from 1971 to 1981 was almost exactly one hundred percent;<sup>13</sup> from 1961 to 1981, the increase was close to five hundred percent.<sup>14</sup> Here, too, some remedies have alleviated what would otherwise have become a totally intolerable situation. First, new procedures such as no oral argument in many cases, fewer opinions, and mechanisms for increasing settlements have contributed to increased productivity.<sup>15</sup> The Congress, too, has added judgeships<sup>16</sup> and provided for an additional circuit.<sup>17</sup> As caseloads continue to

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time basis. The effect of this shift on productivity is not yet clear. The legislation called for a study of the magistrate system and the submission of a comprehensive report to the Congress by January, 1982. See DIRECTOR'S REPORT 1981, *supra* note 4, at 27.

<sup>12</sup> See COFFIN, *supra* note 3, at 247. Discussing the performance of the judiciary in recent years, Coffin states: "As for judges, I cannot help thinking that the judiciary, both state and federal, has, in the past dozen years, dramatically extended its quantitative output per judge in an era when the law was becoming ever more complex—a collective job performance that I suspect is unrivaled in the history of the judicial profession."

For the United States district courts, the total number of cases terminated per judgeship increased from 311 in 1969 to 384 in 1981. 1981 STATISTICS, *supra* note 9, at 129; ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, MANAGEMENT STATISTICS FOR THE UNITED STATES COURTS 120 (1974) [hereinafter cited as 1974 STATISTICS] (comparison with 1969).

<sup>13</sup> In 1976, 12,788 cases were filed in the United States courts of appeals, and in 1981, 23,362 cases were filed in these courts. See 1981 STATISTICS, *supra* note 9, at 45.

<sup>14</sup> In 1961, 4,204 cases were filed in the United States courts of appeals. See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORTS ON THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES—ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 144 (1961).

<sup>15</sup> For the United States courts of appeals, the total number of appeals terminated per judgeship has increased dramatically from 93 in 1969 to 570 in 1981. See 1981 STATISTICS, *supra* note 9, at 13; 1974 STATISTICS, *supra* note 12, at 13.

The increase in productivity by the judges of the courts of appeals is evidenced by the following table:

Circuit	CASES TERMINATED PER JUDGE			
	1962	1970	1973	1976
5th	65	126	191	210
2d	61	131	162	216
4th	52	161	239	191
9th	52	117	165	198

See Shuchman & Gelfand, *The Use of Local Rule 21 in the Fifth Circuit: Can Judges Select Cases of "No Precedential Value"?*, 29 EMORY L.J. 195, 221 (1980). See also COFFIN, *supra* note 3, at 247.

<sup>16</sup> The Omnibus Judgeship Act of 1978 authorized the addition of 35 new circuit court judgeships. See 28 U.S.C. § 44 (Supp. II 1978).

<sup>17</sup> Fifth Circuit Court of Appeals Reorganization Act of 1980, 28 U.S.C.A. § 41 (Supp. 1981); see note 1 *supra*.

mount, still more judgeships will be required, and a variety of additional innovations and adjustments will have to be explored.

At the apex of the pyramid, the United States Supreme Court, the figures are no less dramatic. In its 1951 term, the Court had 1,353 cases on its docket.<sup>18</sup> Last term the Court's docket listed 5,144 cases;<sup>19</sup> understandably, there is serious question whether the Court is able to give adequate consideration to all the cases among those 5,144 that are deserving of decision.

These raw numbers alone understate the situation, because additional factors have compounded the problem. First, as already noted, our society has become more complex as have the issues presented to the Court. Second, the Supreme Court is not only at the apex of the federal court system; in a very real sense, it is at the apex of a second pyramid. This second pyramid has for its base the courts of the fifty states, and the United States Supreme Court is at the apex with so much of the business coming from the state courts.<sup>20</sup> The Supreme Court must resolve, with finality for the entire country, issues of federal law that come to it without ever having been part of the workload of the United States district courts or courts of appeals.

Further, as must be clear on a moment's reflection, solutions which are applicable to other federal courts do not apply to the United States Supreme Court. There can be no sitting in panels; realistically, there can be no increase in the number of Justices. Some ameliorative steps can be taken, e.g., legislation eliminating the obligatory or mandatory appellate jurisdiction of the Supreme Court to give it more control over how it disposes of its own docket. All sitting members of the Court in recent years formally expressed support for this step, and fortunately, Con-

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<sup>18</sup> ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORTS ON THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES AND ANNUAL REPORT OF THE DIRECTOR 197 (1956).

<sup>19</sup> DIRECTOR'S REPORT 1981, *supra* note 4, at A-1. In a recent interview, the Chief Justice was asked whether it bothered him that the Supreme Court had filled its oral argument docket for the 1981 Term before Christmas, "with six months still to go before argument." He responded: "Yes. In my 13 years on the Court, this is the first time we have ever filled the term's docket in the first three months of the term. Interview with Warren E. Burger, *Unlogging the Courts—Chief Justice Speaks Out*, U.S. NEWS & WORLD REPORT, Feb. 22, 1982, at 39.

<sup>20</sup> Appeals from state courts are provided for by 28 U.S.C. § 1257(1)-(2) (1976). Of the 4,371 cases docketed in the Supreme Court during the 1971-72 term, 1,341 (30.7%) came from the state courts. FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT, 57 F.R.D. 573, 620 (1972). See generally Casper & Posner, *A Study of the Supreme Court's Caseload*, 3 J. LEGAL STUDIES 339, 351 (1974); G. CASPER & R. POSNER, *THE WORKLOAD OF THE SUPREME COURT* (1976). The Supreme Court's state court burden has been about 1,000 cases a year for the last decade. Stolz, *Federal Review of State Court Decisions of Federal Questions: The Need for Additional Appellate Capacity*, 64 CALIF. L. REV. 943, 975 (1976).

gress is considering legislation to this effect.<sup>21</sup> Such legislation, however, is likely to provide greater relief to lower courts and to litigants than to the Supreme Court itself.

The Supreme Court has already developed summary procedures—elimination of oral argument and decision without opinion—and it uses them extensively even in cases that federal statutes require the Court to review on the merits. Clearly, such decisions hardly can be accorded the same weight as those arrived at after plenary consideration and explained by an opinion. The Supreme Court has recognized as much.<sup>22</sup> For this reason, dismissal for want of a substantial federal question currently is considered more akin to a denial of *certiorari* than to a substantive determination that no substantial federal question was submitted.<sup>23</sup>

Analogous to dismissal for want of a substantial federal question is the summary affirmance. The significance of the summary affirmance is dramatically illustrated in the pages of the United States Reports, "When we summarily affirm . . . we affirm the judgment but not necessarily the reasoning by which it was reached," Chief Justice Burger wrote.<sup>24</sup> "Indeed," he added, "upon fuller consideration of an issue under plenary review, the Court has not hesitated to discard a rule which a line of summary affirmances may appear to have established."<sup>25</sup>

A whole literature has developed as to the meaning of the summary

<sup>21</sup> S. Rep. No. 95-985, 95th Cong., 2d Sess. 15 (1978) (letter to Senator DeConcini from the nine justices of the Supreme Court urging adoption of S. 3100, 95th Cong., 2d Sess. (1978) (Supreme Court Jurisdiction Act of 1978) to limit the Supreme Court's mandatory appeal jurisdiction). This bill did not become law. Similar legislation is now pending in the form of S. 1531, 97th Cong., 1st Sess. (1981) (hearing held November 16, 1981) (to provide greater discretion to Supreme Court in selecting cases for review).

<sup>22</sup> See text accompanying note 25 *infra*.

<sup>23</sup> Address by Mr. Justice Marshall, Federal Bar Council Annual Law Day Dinner (May 1, 1975) (transcript on file in WASHINGTON AND LEE LAW REVIEW office):

[I]n state cases we have the option of dismissing the appeal for want of a substantial federal question. But that, too, creates problems. If we are taken literally—god forbid—our dismissal for want of a substantial federal question means that the question was judged so insubstantial that it doesn't even rise to the level of federal cognizance. Yet we have construed the same words—a substantial federal question—very liberally in determining what is substantial enough to require the convening of a three-judge district court.

*Id.* at 10; see note 26 *infra*.

<sup>24</sup> *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C. J., concurring).

<sup>25</sup> *Id.* at 392. In one of the instances cited by the Chief Justice, the Court disapproved the holdings of three summary affirmances stating that it did so after further consideration of the issue following briefing and argument. *Edelman v. Jordan*, 415 U.S. 651, 671, *reh. den.*, 416 U.S. 1000 (1974). The Court also disapproved, to the extent inconsistent with its decision, an orally argued case, *Shapiro v. Thompson*, 394 U.S. 618 (1969). In *Shapiro* the issue had been raised and decided in the lower court, and was presented to the Supreme Court on appeal, but it was not "refer[ed] to or substantively treat[ed]" in the Supreme Court's opinion. 415 U.S. at 670.

dispositions.<sup>26</sup> That these procedures have involved substantial uncertainties in the lower courts and penalties to litigants is obvious. More than that, the procedures illustrate how hard-pressed the Court obviously has felt when it deals in this fashion with cases in which the Congress has provided for an appeal as of right. What has happened with respect to appeal as of right speaks more dramatically than any other arguments about whether the Court can do more than it is currently doing, whether the Court needs relief, or whether the Court can discharge all of its obligations fully under the present system.

### *Inadequate Federal Appellate Capacity and Its Consequences*

It is well to restate the basic question that emerges from the data concerning burgeoning caseloads and the effects of the summary procedures adopted by the court in the effort to cope. That question may be framed as follows: Is there today adequate capacity in the federal judicial system to maintain clarity and coherence in the national law? It is this question that was addressed by the Commission on Revision of the Federal Court Appellate System (Hruska Commission)<sup>27</sup> and is the subject of legislation currently pending in the Congress.<sup>28</sup> In simpler, perhaps simplistic terms, the question is whether the Supreme Court is able to do all that needs to be done, or are too many questions of federal law left unanswered for too long—again with unfortunate results for litigants who are entitled to and would like to have definitive answers to pressing, practical questions? Properly analyzed, the question inquires whether our system would be improved substantially by the creation of a national court of appeals or an inter-circuit tribunal.

The nature of the problem perhaps is best illustrated by two opinions in the recent case of *Brown Transport Corp. v. Atcon, Inc.*<sup>29</sup> The first opinion is by Justice White, with whom Justice Blackmun joined, dis-

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<sup>26</sup> See Levin & Hellman, *The Many Roles of the Supreme Court and the Constraints of Time and Caseload*, 7 U. TOL. L. REV. 399, 402-27 (1976). See generally Note, *The Precedential Effect of Summary Affirmances and Dismissals for Want of a Substantial Federal Question by the Supreme Court After Hicks v. Miranda and Mandel v. Bradley*, 64 VA. L. REV. 117 (1978); Note, *Summary Disposition of Supreme Court Appeals: The Significance of Limited Discretion and a Theory of Limited Precedent*, 52 B.U.L. REV. 373 (1972); *Impact of the Supreme Court's Summary Disposition Practice on Its Appeals Jurisdiction*, 27 RUTGERS L. REV. 952 (1974); text accompanying note 25 *supra*.

<sup>27</sup> COMMISSION REPORT, *supra* note 1. The membership of the Commission included—appointed from the Senate, in addition to Senator Hruska: Senators Quentin N. Burdick, Hiram L. Fong, and John L. McClellan; appointed from the House: Congressmen Jack Brooks, Walter Flowers, Edward Hutchinson, and Charles E. Wiggins; appointed by the President: Emanuel Celler, Dean Roger C. Cramton, Francis R. Kirkham, and Judge Alfred T. Sulmonetti; appointed by the Chief Justice: Judge J. Edward Lumbard, Judge Roger Robb, Bernard G. Segal, and Professor Herbert Wechsler. The author served as Executive Director.

<sup>28</sup> See S. 1529, H.R. 4482, *supra* note 6.

<sup>29</sup> 439 U.S. 1014 (1978).



senting from the denial of *certiorari* in this very prosaic case. The question for decision was "whether failure by [a common] carrier to comply with the time limits prescribed by [federal regulation] estops the carrier from collecting the freight charges. . . ." <sup>30</sup> The question had been litigated a number of times, both in state and federal courts, and the courts had divided on the issue. The issue was certainly not of great national moment, but for the litigants it was an important question. In the abstract, it raises the question of whether it is equitable for federal law to vary depending on geography, providing for one set of rights in one part of the country and denying them elsewhere. To put the point differently, should federal laws governing taxes or federal entitlements be different in Georgia than in Oregon? <sup>31</sup>

A single instance is inevitably of limited significance. Justice White, however, did not restrict his opinion to the case before the Court. He took up instead the entire conference list, the first for that term of Court, noting how very few cases are granted review. <sup>32</sup> The opinion includes some six printed pages of cases, and the questions then presented, in which *certiorari* was denied despite conflicts with decisions of either federal and state appellate courts, or arguable conflicts with United States Supreme Court opinions. <sup>33</sup> Notably, these cases were drawn from only one list at the beginning of one term. The Chief Justice, who did not join in the dissent, nonetheless filed a memorandum opinion indicating his view that the problem was pressing and that with the enlargement of the federal judiciary as a result of the Omnibus Judgeship Act, the demands on the United States Supreme Court, particularly with respect to assuring consistency in the federal law, would be even more pressing in the future. <sup>34</sup>

As the number of cases on the Supreme Court's docket increases, the percentage granted review continues to diminish. This is because the Supreme Court has determined that it cannot be expected to take any more cases than it presently does, and maintain quality. <sup>35</sup> Forty years ago the figure stood at 17.5 per cent, five years ago it had dropped to 3.6 per cent and there is every indication that the percentage will continue to diminish. The regional courts of appeals are becoming courts of last resort. <sup>36</sup>

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<sup>30</sup> *Id.* at 1014-15.

<sup>31</sup> See COMMISSION REPORT, *supra* note 1, at 206-07.

<sup>32</sup> 439 U.S. at 1016.

<sup>33</sup> *Id.* at 1017-21. The significance of conflicts as an important consideration governing review on *certiorari* is illustrated by Rule 17(1)(a) of the Revised Rules of the Supreme Court of the United States, effective June 30, 1980, and the predecessor Rule 19(1)(b), both reflecting the long-standing policy of the Court.

<sup>34</sup> 439 U.S. at 1025-32.

<sup>35</sup> See COMMISSION REPORT, *supra* note 1, at 394, 404, 401 (letters of Chief Justice Burger, Justice Blackmun, and Justice White, respectively).

<sup>36</sup> In 1941 there were 951 petitions for *certiorari* acted upon by the Supreme Court of which 166, or 17.5 percent, were granted. FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY

If our interest in the administration of justice includes dispensing justice promptly and efficiently to the litigants, it is helpful to explore the implication of the inability of the system to maintain clarity and coherence in the national law. Dean Erwin Griswold, who served in distinguished fashion as Solicitor General of the United States, illustrates what is involved by describing a problem in the valuation of mutual funds in a decedent's estate for tax purposes. The regulations issued were tested in the Tax Court, in four courts of appeals, and in a district court in the Fifth Circuit. Ten years after promulgation of the regulations the United States Supreme Court held them invalid. With the question coming up in "connection with thousands of estate tax returns every year," it is understandable that until the issue was finally resolved "thousands of cases [were] held in abeyance, and much bootless administrative conference and litigation [was] engendered"<sup>37</sup>—at substantial cost to the government and to the taxpayers.

Under our present system, relitigation of the same issue in one circuit after another, in some instances by the taxpayer, in others by the government, is to be expected. At times the government seeks an inter-circuit conflict because only in that way can it hope to be granted a hearing—and a favorable ruling—by the Supreme Court. Understandably, much of the discussion of the lack of appellate capacity on a national level tends to focus on unresolved inter-circuit conflicts and conflicts between state and federal lower courts on issues of national law.<sup>38</sup> The failure of the United States Supreme Court to hear cases squarely presenting such conflicts, and to resolve the disputed issues, is certainly the most dramatic evidence of the serious deficiency in the present system. The Congress, the Court, and the public have all expected that in the exercise of its *certiorari* authority the Court would continue to perform the important function of maintaining uniformity in the national law in the types of cases described above.<sup>39</sup> One does not fault the Court

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GROUP ON THE CASELOAD OF THE SUPREME COURT, *reprinted in* 57 F.R.D. 573, 580, 615 (1972) [hereinafter cited as Freund Report]. In 1980 there were 5,144 cases on docket of which 183 were granted review that term. See DIRECTOR'S REPORT 1981, *supra* note 4, at A-1.

See J. HOWARD, COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM 57-58 (1981). In a section entitled *The Finality of Circuit Decisions*, Professor Howard analyzes the data and concludes: "By 1975, the ratio of certiorari petitions granted was less than 1 percent of decisions appealed. . . . Formally, therefore, the three Courts of Appeals became courts of last resort in 98.1 percent of this cycle of federal appeals and made decisions that prevailed in 98.6 percent. Courts of Appeals are mini-Supreme Courts in the vast majority of their cases." *Id.* at 58.

<sup>37</sup> Griswold, *The Supreme Court's Caseload: Civil Rights and Other Problems*, 1973 U. ILL. L.F. 615, 630; 1 COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, SECOND PHASE, 192-93 (1974) (hearings) (testimony of Erwin Griswold).

<sup>38</sup> COMMISSION REPORT, *supra* note 1, at 206, 227-33, 281-98.

<sup>39</sup> Regarding the Supreme Court's role in settling inter-circuit conflicts, the Hruska Commission Report stated:

The resolution of inter-circuit conflicts is widely regarded as a primary function of our one national court, and it was so long ago that the leading treatise on the jur-

by recognizing that it simply has not done so; it has been too busy with issues of higher priority.<sup>40</sup>

It is important to recognize, however, that square conflicts in authority, what have been termed "direct" conflicts, are not the whole story. Indeed, it may not be an exaggeration to consider them as a mere tip of the iceberg. A large number of "partial" conflicts,<sup>41</sup> authorities that state opposing principles, albeit in cases that are distinguishable on their facts<sup>42</sup> require lawyers to give contingent business counseling. Once again, the result is relitigation of the same issue in a number of courts.

The price of inadequate capacity, however, is not limited to cases in which a conflict, direct or partial, actually develops. Posit for a moment that one circuit after another interprets a statute—any federal statute—in identical fashion. Until enough circuits have spoken, the law is still uncertain; counselling remains problematic, relitigation is invited.<sup>43</sup> Finally, there are those areas of the law where monitoring of the application of law to fact—as is noted below with regard to patent litigation—is necessary.

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isdiction of the Supreme Court could declare unequivocally that where there is a direct conflict between two courts of appeals on an issue of federal law, the Supreme Court grants *certiorari* as of course, and irrespective of the importance of the question of law involved.

COMMISSION REPORT, *supra* note 1, at 221. See also note 32 *supra*, and particularly the Supreme Court rules cited therein. The representation to the Congress, framed in terms of procedure, is thus described by the Freund Study Group:

Passage of the Judges' bill of 1925 followed upon representations by the Court that it intended to exercise its *certiorari* jurisdiction through the 'Rule of Four,' that is, by permitting the vote of only four Justices to bring a case before the full Court. Permitting a minority of the Court to require plenary review was based, first, on the concept that if so substantial a number of Justices (though a minority) wanted to hear a given case, a grant was an appropriate act of discretion for the Court as a whole. Further, at the time the Act of 1925 was adopted, fear was expressed that the Court would undertake to hear too few cases. Relaxation of the usual rule that the majority acts for the Court was therefore considered particularly appropriate for actions committing the Court only to hear a case.

FREUND REPORT, *supra* note 36, at 606. Of course, it has long been understood that the Court was free to allow an issue to "percolate;" thereby allowing the issue to be considered in different cases, typically with varying factual context, in a number of different courts. In short, the Court traditionally has avoided resolution of conflicts on difficult, sensitive constitutional issues. Nothing in the legislation currently pending would change this, for the new tribunal would acquire jurisdiction only by reference from the Supreme Court.

<sup>40</sup> See text accompanying notes 20-26 *supra* (discussion of summary dispositions in cases in which Congress has provided for appellate review as of right).

<sup>41</sup> Partial conflicts can be classified into two types: strong partial conflict—a case in which the decision below is in the same general area of the law as some other case and where the implications of the doctrine followed in one case would compel an opposite result in the other; and weak partial conflict—a case which involves some degree of letigimacy in the claim of conflict but in which the conflict is more attenuated than in the strong partial conflict category.

<sup>42</sup> See COMMISSION REPORT, *supra* note 1, at 298-300.

<sup>43</sup> See *id.* at 208-09.

Attitudes differ as to the seriousness of the problems resulting from the lack of capacity for definitive declaration of federal law. Often these differences result from differences in perspective and concern. Those who focus on the plight of litigants, on the cost of repetitive litigation, on the difficulties of counseling—or of socially unproductive tactics, designed to take advantage of real or hoped-for conflict—see a problem of serious dimension. Those who focus on whether society is threatened by wasteful procedures, by differing tax burdens, and by inconsistent judicial holdings concerning entitlements tend to view the present situations as tolerable, one not yet presenting a compelling case for remedial action.

There should, however, be agreement on at least one point: the test for whether or not remedial legislation is called for should not be whether the situation has already reached that level of crisis that the inevitable delay in effecting some change will be intolerable. The time to fashion solutions should come long before then. The proper question is whether our system would be substantially improved by some new tribunal that would add appellate capacity at the national level.

#### *The Views of the Justices*

In 1975, when the Hruska Commission had all but completed its work, before publication of its report recommending the creation of a national court of appeals, it invited each of the then-sitting Justices to submit his view for the record, and these statements were published as an appendix to the report. Perhaps the need for an additional court is best summarized by the statement of Justice White, who wrote: "For myself, I am convinced that there is a substantial number of such cases [that should be decided by a national court of appeals] and that there are enough of them to warrant the creation of another appellate court, at least on a trial basis."<sup>44</sup>

Justice White's statement is particularly interesting for he wrote from a perspective of more than ten years of service on the Supreme Court, years during which the pressure of Supreme Court business had resulted in an increase in the number of cases the Court accepted for plenary consideration, to the point that Justice White suggested reducing the number heard and decided by a third.<sup>45</sup>

Justice Powell described himself as in substantial accord with the views expressed by Justice White,<sup>46</sup> and Justice Rehnquist stated: "The Commission has made out a convincing case for the creation by Congress of a national court of appeals along the general lines described in your report."<sup>47</sup> The Chief Justice wrote the Commission: "Up to now I have

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<sup>44</sup> *Id.* at 401.

<sup>45</sup> *Id.* at 402.

<sup>46</sup> *Id.* at 406.

<sup>47</sup> *Id.* at 407.

neither advocated the creation of an intermediate court nor expressed any view, but I have no hesitation in stating, now, that if other remedial measures are not adopted, the creation of such a court is inevitable."<sup>48</sup> The Chief Justice elaborated on this view at some length in 1975<sup>49</sup> and took occasion, in the *Brown Transport* opinion referred to above, to reiterate it in 1978.<sup>50</sup>

The Justices, of course, could not be oblivious to the new stringency in accepting cases forced upon them by the pressures of volume. The point is made forcefully by Justice Blackmun who wrote: "Some of us here worry about the cases that we barely do not take, namely, those that almost assuredly would have been taken twenty years ago. The country has grown and surely it has become much more complex."<sup>51</sup>

Justice Stewart, in 1975, stated that he thought it likely that the day would come when a new court would be needed, and certainly the substantial increase in the size of the federal judiciary and in the volume of cases points to the need for examining whether that time has not already come.<sup>52</sup> Of course, there were—and still are—those in the Court who disagreed, namely Justices Douglas, Brennan,<sup>53</sup> and Marshall.<sup>54</sup> Justice Brennan's statement is particularly interesting for he wrote from a perspective of twenty years of service on the Supreme Court, years during which the pressure of Supreme Court business had resulted in an increase in the number of cases the Court accepted for plenary consideration. Nevertheless, Justice Brennan stated there was no need for another court, a statement he was lead to repeat in *Brown Transport* in light of the Chief Justice's intimations to the contrary.<sup>55</sup> It is interesting to note, however, that even among some who disagreed with the Commission's proposal, there was recognition of a need for providing additional capacity for consistency in federal law, albeit a view that alternative, less drastic remedies would be preferable, at least in the first instance. Justice Marshall's call for "a few well-placed changes in jurisdictional statutes" is illustrative.<sup>56</sup>

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<sup>48</sup> *Id.* at 399.

<sup>49</sup> *Id.* at 394-99.

<sup>50</sup> *Brown Transport Corp. v. Atcon, Inc.*, 439 U.S. at 1029.

<sup>51</sup> COMMISSION REPORT, *supra* note 1, at 405.

<sup>52</sup> *Id.* at 400. In an interview published in the January 1982 issue of THE THIRD BRANCH, Justice Stewart stated that he was still opposed to a national court of appeals, but was not unhappy "that all this attention has been given to the problem because I think it's a problem that may be a continuing one and may be an increasing one." Interview with Justice Potter Stewart, 14 THE THIRD BRANCH 1, 6, 9 (January, 1982).

<sup>53</sup> COMMISSION REPORT, *supra* note 1, at 400 (Justices Douglas and Brennan).

<sup>54</sup> *Id.* at 403 (Justice Marshall). The literature, too, reflects a diversity of views. See, e.g., REPORT OF THE DEPT. OF JUSTICE COMM. ON REVISION OF THE FEDERAL JUDICIAL SYSTEM 17-20 (opposing creation of a national court of appeals). For a review of the diverse views in this area, see AMERICAN ENTERPRISE INSTITUTE LEGISLATIVE ANALYSIS, PROPOSALS FOR A NATIONAL COURT OF APPEALS (1977).

<sup>55</sup> *Brown Transport Corp. v. Atcon, Inc.*, 439 U.S. at 1032 (Brennan, J., dissenting).

<sup>56</sup> COMMISSION REPORT, *supra* note 1, at 403.

*Exclusive Appellate Jurisdiction: The United States Court of Appeals for the Federal Circuit*

Although Congress has not acted to create a national court of appeals, the concept of restructuring appellate jurisdiction in the effort to address at least some of the problems resulting from inadequate appellate capacity has gained substantial congressional support. In December 1981, the Senate passed a bill that would merge the Court of Claims and the Court of Customs and Patent Appeals into a thirteenth court of appeals, the United States Court of Appeals for the Federal Circuit.<sup>57</sup> A similar bill had already passed the House,<sup>58</sup> but differences remained to be resolved in conference. The new court would be vested with exclusive appellate jurisdiction in all cases brought under the patent law so that a suit for patent infringement tried in the Northern District of Illinois, for example, would be appealed to the new tribunal rather than to the Court of Appeals for the Seventh Circuit.<sup>59</sup>

Exclusive jurisdiction in a single court was designed as a legislative response to widespread forum shopping among patent litigants. "[M]ad and undignified races," Judge Henry Friendly describes them, "...between a patentee who wishes to sue for infringement in one circuit believed to be benign toward patents, and a user who wants to obtain a declaration of invalidity or non-infringement in one believed to be hostile to them."<sup>60</sup> The new court would be expected to provide guidance and monitoring, not only with respect to patent doctrine, but of even greater significance, to assure conformity among trial courts in the application of doctrine to the specific facts of the case to assure reasonable uniformity in the administration of the patent laws.

Would the creation of such a court obviate the need for a national court of appeals? Patents, along with federal taxation, had long been pointed to as an area of the law in which lack of uniformity was particularly troublesome. Patent cases figured prominently in the discussion of the need for additional appellate capacity in the final report of the Commission on Revision, and if the Congress had refused to provide a single forum for review of patent cases, a national court of appeals would have been expected to deal with the problem of lack of uniformity.<sup>61</sup> The fact is, however, that the number of patent cases that the Supreme Court might have been expected to refer to a national court of appeals would not have been large. As already noted, the major difficulty in the patent field has been the monitoring of the application of doctrine to the facts of the particular cases, rather than the resolution of inter-circuit conflicts in the articulation of doctrine. In his 1975 study of conflicts

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<sup>57</sup> S. 1700, 97th Cong., 1st Sess. (1981).

<sup>58</sup> H.R. 4482, 97th Cong., 1st Sess. (1981).

<sup>59</sup> S. 1700, 97th Cong., 1st Sess. § 1295 (1981).

<sup>60</sup> H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 155 (1973).

<sup>61</sup> COMMISSION REPORT, *supra* note 1, at 369-71.

brought to the United States Supreme Court, Professor Floyd Feeney found that there were only three patent cases in a sample of ninety direct conflicts.<sup>62</sup> The demonstrated need of lack of capacity in the system for the prompt and efficient declaration of the national law on a national basis will not be met by the new Court of Appeals for the Federal Circuit, however salutary its impact in the resolution of the problems with which it is intended to deal.

Establishment of this new court of appeals deserves analysis from yet another perspective. Does the attempt to create the new court represent a new willingness to accept alternative approaches to assuring uniformity in the federal law, such as specialized courts and exclusive jurisdiction of a single appellate court for all cases arising under a particular statute? The proposal was vigorously opposed by the American Bar Association (A.B.A.) on the ground that it would create a specialized court, violating a principle of judicial administration that the A.B.A. considers important.<sup>63</sup> The argument is unpersuasive, and indeed has not persuaded the Congress, largely because the make-up of the docket of the new court could in no sense be viewed as specialized. To the cases already being heard by the Court of Customs and Patent Appeals, hardly limited to patent cases, there would be added the varied workload of the Court of Claims. The total number of additional patent cases from the district courts can be expected to constitute only a small percentage of the new docket.<sup>64</sup> The United States Court of Appeals for the Federal Circuit could hardly qualify as a specialized court.

Centralizing appeals concerning identified subject matter is a valuable technique, one utilized earlier in the Federal Communications Act,<sup>65</sup> specialized economic programs,<sup>66</sup> and the legislation developed in response to the failure of the old Pennsylvania Railroad.<sup>67</sup> Such centralization can serve to alleviate some of the more pressing problems resulting from what would otherwise be near-intolerable problems of inter-circuit conflicts. Indeed, Justice Marshall, in expressing his opposition to the creation of a national court of appeals, urged resort to ex-

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<sup>62</sup> *Id.* at 311.

<sup>63</sup> See *Hearings*, *supra* note 1, at 71-95.

<sup>64</sup> Data on file at the Administrative Office of the United States Courts show that there were only 120 patent appeals in the United States courts of appeals in statistical year 1980. The Court of Claims that year had 697 cases filed, including Indian litigation, actions by federal employees, and government contract cases among others. The Court of Customs and Patent Appeals had 169 filings, including customs, commerce, international trade litigation, and trademark cases.

<sup>65</sup> Communications Act of 1934, 47 U.S.C. § 402 (1976).

<sup>66</sup> See Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 796 (1970), as amended by The Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, § 211, 85 Stat. 743, 748-50 (1971) (creating Temporary Emergency Court of Appeals of the United States).

<sup>67</sup> See Regional Rail Reorganization Act of 1973, § 209, 45 U.S.C. § 719 (1976).

clusive appellate jurisdiction in some fields as an avenue to be explored as a possible solution.<sup>68</sup>

As must be evident, however, exclusive appellate jurisdiction is of relatively limited utility in terms of pervasiveness of the present lack of capacity in the federal appellate system. The subject matter of litigation in which conflicts continue to arise is simply too varied for exclusive appellate venue to provide an adequate solution.<sup>69</sup> Moreover, with respect to one of the more troubling areas, federal taxation, Congress has for good and valid reasons consistently refused to change the present jurisdictional patterns, evidencing particular resistance to any effort to take these cases out of the regional courts of appeals.<sup>70</sup>

### *Fashioning a Solution: The Feasibility of Reference Jurisdiction*

It would be ironic indeed if the remedy to a problem rooted in the Supreme Court's inability to assume further burdens were to add to those burdens. Central to the proposal of the Hruska Commission to create a national court of appeals is the provision that the new court be vested with jurisdiction to hear cases referred to it by the Supreme Court.<sup>71</sup> It has been aptly termed "reference jurisdiction." The only way the new tribunal would receive cases for adjudication would be by order of the Supreme Court itself. Nor is this provision a minor technicality, a detail introduced in the drafting stage. It is a necessary corollary of the principle that access to the Supreme Court shall not be curtailed, and it is precisely this provision that distinguishes the Hruska proposal from that of the Freund Study Group Report of 1972.<sup>72</sup> No one would screen the cases presented to the Justices for review except the Justices themselves. They would retain for adjudication whatever cases they chose to hear and decide; no individual, no group of judges would bar access.

This provision has led some to argue that the burden of deciding whether to refer or not to refer would create another decision point for the Justices, adding to their burden and defeating the purpose of the proposal itself.<sup>73</sup> It is tempting to speculate, and to argue the theoretical

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<sup>68</sup> See COMMISSION REPORT, *supra* note 1, at 403.

<sup>69</sup> See *id.* at 235-36, 281-98.

<sup>70</sup> But see Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153 (1944); Del Cotto, *The Need for A Court of Tax Appeals: An Argument and a Study*, 12 BUFFALO L. REV. 5 (1962).

<sup>71</sup> COMMISSION REPORT, *supra* note 1, at 239.

<sup>72</sup> See FREUND REPORT, *supra* note 36, at 590-95. The Freund Study Group recommended that a national court of appeals screen all petitions filed for review in the Supreme Court, then certify to the high court a number of cases to be further screened and approved. Cf. COMMISSION REPORT, *supra* note 1, at 239-47; Haworth & Meador, *A Proposed New Federal Intermediate Appellate Court*, 12 U. MICH. J.L. REF. 201, 206-08 (1978) [hereinafter cited as Haworth & Meador].

<sup>73</sup> Haworth & Meador, *supra* note 72, at 208; COMMISSION REPORT, *supra* note 1, at 274-75.



possibilities, but on this issue we have the views of the Justices themselves. Even so vigorous an opponent of the proposal to create a national court of appeals as Justice Brennan, noted in his comments to the Commission that he "was unable presently to perceive any reasons indicating that [the] proposed reference jurisdiction would be unworkable."<sup>74</sup> Not one Justice, proponents or opponents, expressed a contrary view.<sup>75</sup> This testimony is the more persuasive because the Commission had indeed recommended a second source of jurisdiction, transfer jurisdiction,<sup>76</sup> and a number of the Justices, Justice Brennan among them,<sup>77</sup> took occasion to express either reservations or opposition to this aspect of the proposal.<sup>78</sup>

#### *A Permanent Court or an Inter-Circuit Tribunal?*

Even if the need for additional appellate capacity for definitive resolution of issues of federal law is persuasively demonstrated, and the feasibility of reference jurisdiction established, a host of issues remain concerning the specifics of an appropriate court. The most obvious response is creation of a new tribunal, a permanent court composed of Article III judges appointed by the President and confirmed by the Senate.<sup>79</sup> Details can be filled in with relative ease: number of judges, provision for sitting only en banc rather than in panels, seat of the court, provision for sitting elsewhere, and choice of a name.<sup>80</sup> What may be viewed as start-up problems can be more difficult, but hardly intractable: shall a single president be empowered to select the membership of the full court, with the risk that its members will reflect a common ideological cast?<sup>81</sup> Shall some of the judges be selected initially from the circuit courts, to sit for a term until the full permanent membership of the court is in place? These are details, important and potentially of far-reaching significance, but legislative proposals have been developed,<sup>82</sup> alternatives are available,<sup>83</sup> and choices can be made without serious risk to the functioning of the new tribunal.

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<sup>74</sup> COMMISSION REPORT, *supra* note 1, at 400 (views of Justice Brennan).

<sup>75</sup> *Id.* at 394-409.

<sup>76</sup> *Id.* at 241-47, 404.

<sup>77</sup> *Id.* at 400.

<sup>78</sup> *Id.* at 402, 406, 408.

<sup>79</sup> *Id.* at 236-38.

<sup>80</sup> *Id.*

<sup>81</sup> One possible scheme of appointment of a new appellate court would allow the President to appoint only three members of the court, with the others sitting by designation of the Chief Justice until, perhaps four years later, three additional permanent appointments are made by the President.

<sup>82</sup> The Act of Congress creating a new appellate court could provide for a pattern of appointment similar to that described in note 81 *supra* and could further prescribe requirements with respect to those sitting by designation. For example, designation might be limited to active judges of the courts of appeals who had already served for a minimum of five years, with no two designated from the same circuit.

<sup>83</sup> See COMMISSION REPORT, *supra* note 1, at 401 (views of Justice White).

An imposing array of distinguished jurists, while recognizing the need for a new tribunal, have cautioned against immediate creation of a permanent new court, preferring instead what has been variously termed an inter-circuit tribunal,<sup>84</sup> a multi-circuit court of appeals,<sup>85</sup> or a rotating panel for the resolution of inter-circuit conflict.<sup>86</sup> Chief Justice Warren E. Burger,<sup>87</sup> the late Judge Harold Leventhal,<sup>88</sup> Chief Judge Frank Coffin,<sup>89</sup> then-Chief Judge Floyd Gibson,<sup>90</sup> Chief Judge Donald P. Lay,<sup>91</sup> and, most recently, Judge Carl McGowan<sup>92</sup> all have recommended some form of this approach as a preferable alternative to the creation, *ex nihilo*, as it were, of a national court of appeals.

Common to these proposals is the basic idea that the judges of the new tribunal should be experienced jurists from within the federal system, judges sitting on the various courts of appeals who would accept this new assignment either as an additional duty or for a term of years. Closely associated with this basic idea are the convictions that so radical an innovation should be introduced on an experimental basis,<sup>93</sup> that the enabling legislation should include a sunset provision,<sup>94</sup> and that the court be tested in the crucible of experience before being made a permanent fixture.<sup>95</sup> One or another of these ingredients, in varying forms and with varying modifications and embellishments, is found in each of the alternative proposals that have been suggested.

Four reasons are urged in favor of choosing some lesser remedy than creation of a permanent court interposed between the Supreme Court and the present courts of appeals. First is the argument in favor of experimentation before making a permanent change in the structure of the national judiciary.<sup>95</sup> Closely related and yet analytically distinguishable is the argument that something other than a permanent new court

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<sup>84</sup> See note 6 *supra* (H.R. 4482).

<sup>85</sup> See note 88 *infra*.

<sup>86</sup> See note 90 *infra*.

<sup>87</sup> COMMISSION REPORT, *supra* note 1, at 396.

<sup>88</sup> Leventhal, *A Modest Proposal for a Multi-Circuit Court of Appeals*, 24 AM. U.L. REV. 881, 882 (1975).

<sup>89</sup> 2 COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, SECOND PHASE 805, 806-13 (1974) (hearings) (testimony of the Honorable Frank M. Coffin) [hereinafter cited as REVISION HEARINGS].

<sup>90</sup> 1 REVISION HEARINGS, *supra* note 89, at 225 (testimony of the Honorable Floyd R. Gibson).

<sup>91</sup> Lay, *Why Rush to Judgment?*, 59 JUDICATURE 172, 179 (1975).

<sup>92</sup> The View from an Inferior Court, Address by the Honorable Carl McGowan, California State Bar Assoc., Annual Meeting, The Morrison Lecture (Oct. 12, 1981) [hereinafter cited as View from an Inferior Court] (transcript on file in WASHINGTON AND LEE LAW REVIEW office).

<sup>93</sup> See COMMISSION REPORT, *supra* note 1, at 396, 401, 405, 406 (Chief Justice Burger, Justice White, Justice Blackmun, and Justice Powell, respectively); note 92 *supra* (Judge McGowan).

<sup>94</sup> See note 6 *supra* (H.R. 4762, § (d)(1)-(2)).

<sup>95</sup> See View from an Inferior Court, *supra* note 92.

will experience less difficulty during the inevitable start-up period.<sup>96</sup> During that period, the Justices of the Supreme Court understandably will want to feel their way slowly in the exercise of their newly conferred authority to refer cases for decision. Also, during the trial period the relationship of the new court to the existing "inferior" courts will be developed. Indeed, concern for the stature and prestige of the present courts of appeals, conceivably at risk of being diminished by the presence of a new court superior to them but inferior to the Supreme Court, is an important reason for a less-than-permanent court.<sup>97</sup> Finally, the needs of economy and efficiency are always of concern but never more than in the present climate of preoccupation with growing deficits and the national debt. Each of these factors deserves careful consideration; the credentials of the proponents as well as the intrinsic force of the arguments require no less. Moreover, since we do not have a single proposal offered as an alternative to a permanent national court of appeals, but rather a range of alternatives, permitting and indeed requiring significant choice in the shaping of legislation, each of the factors must be weighed in terms of its potential to advance or to impede achievement of the basic goal: improved capacity to provide clarity and consistency in the national law.

One cannot seriously object to a provision requiring Congress to evaluate the utility of the new court after a term of years, with abolition the price of failure. Seven years, however, may be preferable to five. The first term can be expected to be a start-up period and a report adequate for a congressional decision would normally be expected at least

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<sup>96</sup> See *id.*

<sup>97</sup> See *id.* See also Leventhal, *supra* note 88, at 908. Judge Henry J. Friendly has described the effect of a national court of appeals in the following terms:

Quite obviously creation of the National Court would decrease the prestige of the courts of appeals and the consequent attractiveness of membership on them. This is especially serious at a time when necessary increases in judgeships have already impaired this to a considerable degree—not to speak of the problem of inadequate judicial salaries. You could well respond that creation of the National Court ought not to have this effect since the plan would simply raise the percentage of cases reviewed from say 6% to 12%, still less than the percentage of twenty years ago. But such figures ignore the large, and vastly increased, proportion of court of appeals cases that decide themselves. If one should assume that as many as a third of the cases are of real legal interest, a percentage that is probably on the high side, the figures would be more like 18% and 36% if the National Court were established. Beyond that, the psychology of judges is not measurable by statistics. Petty though it may be, a judge of a court of appeals does take satisfaction in the fact that he is, and is publicly known to be, subject to correction only by the 'one Supreme Court' we all revere. Of course, a diminution in prestige of the courts of appeals would simply have to be borne if the National Court is really needed. But it is a disadvantage that must be weighed since these courts will continue to be the work-horses of the federal appellate process.

Revision Hearing 1311, Commission on Revision of the Federal Court Appellate System (April 22, 1975) (letter on file in WASHINGTON AND LEE LAW REVIEW office).

one full year before sunset. An adequate period for normal functioning and development should be provided in the interim.

A requirement that eligibility for appointment to the national court of appeals be limited to judges presently sitting on the circuit courts or that the functioning of the new tribunal be evaluated by the Congress after a term of years, with abolition the price of failure, hardly would affect seriously the functioning of the new court as it goes about its business of deciding cases referred to it by the Supreme Court. On the other hand, if the membership of the inter-circuit tribunal were to be picked at random from all federal appellate judges for each case referred for decision—an alternative no one has proposed—the new court likely could not contribute significantly to the stability or predictability of federal law, whatever the nature of its docket.

There are many attractions to the creation of an inter-circuit tribunal composed entirely of judges presently sitting on the United States courts of appeals who would assemble to hear cases as the demands of the docket dictated. No need would arise for the full complement of support personnel, including additional law clerks and secretaries, although it would be necessary to provide for the maintenance of a separate docket and for the performance of other services provided by a clerk's office.<sup>98</sup> What is particularly attractive to some is the absence of the need to appoint additional judges as in the case of the Temporary Emergency Court of Appeals<sup>99</sup> and the Multidistrict Panel,<sup>100</sup> assignment to the inter-circuit tribunal would be in addition to the normal duties of each of the judges.

Here, a word of caution is appropriate. So long as the docket is small and the burdens of this additional assignment not excessively onerous, there would be much to be said for this procedure. If the docket of the inter-circuit tribunal should grow, the pressures of a demanding additional assignment are likely to prove unacceptable. Judges are sensitive to their obligations to their home courts and, as must be evident to any observer of the federal judicial scene, the courts of appeals are already burdened. Not every judge would, in any event, be willing to accept assignment to an inter-circuit tribunal, and if such an acceptance implies either an unfair workload on a judge's colleagues or excessive burdens on the judge himself or herself, declinations probably would be common.

Clearly, availability of additional judicial resources to a home circuit, by way of designation by the Chief Justice of visiting judges, would alleviate the problem. These techniques, however, are already widely

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<sup>98</sup> Compare the arrangements with respect to the Multi-District Panel, *infra* note 100.

<sup>99</sup> Section 211 of the Economic Stabilization Act of 1970, as amended by Economic Stabilization Act of 1971, P.L. No. 92-210, 85 Stat. 748.

<sup>100</sup> 28 U.S.C. § 1407 (1976). Section 1407 authorizes a judicial panel on multi-district litigation to transfer civil actions in different districts involving one or more common questions of fact to a single district for coordinated or consolidated pretrial proceedings.

used and there are limits on the available resources. Should the Congress ever think well of providing some extra judgeships, the incumbents being available for nationwide service to fill particular demands,<sup>101</sup> again the problem would be alleviated, but the savings would be reduced. If the Congress establishes this new tribunal without creating new judgeships, the workload should be monitored and added resources provided when that proves necessary.

Perhaps the most important variable is the size of the panel of judges constituting the inter-circuit tribunal. Under one model, the size of the court itself could be large indeed, even in excess of twenty, with panels for particular cases drawn from this larger group. Whatever the size of the panel that would hear cases referred by the Supreme Court, the fact that the sitting personnel would rotate would result in the unpredictability of the decision as the court develops doctrine relevant to the various issues presented to it. This inevitably invites relitigation, both by the government and by individual litigants. It invites courts obligated to consider the precedent of the inter-circuit tribunal as binding to make fine distinctions in the hope that a later panel will limit the impact of a prior decision, short of over-ruling it. The larger the group from which a panel hearing a particular case is drawn, the greater the unpredictability and the uncertainty and the likelihood of relitigation. An analogy can be found in the difficulties experienced by courts of appeals with a large number of judges in maintaining uniformity in the law of the circuit.

If it were considered desirable that no judge sitting on the circuit court sit on the inter-circuit tribunal that reviews a case from his own circuit,<sup>102</sup> it still might be possible to have a court constituted of nine court of appeals judges with a minimum of seven sitting, always en banc.

The need for predictability also argues for a longer, rather than a shorter, term. If a sunset provision of five years were to be built into legislation creating the new court, each of the judges selected should be selected for a full five year period. In the ultimate, staggered terms are to be preferred to sharp variations in the personnel of the court at a particular point in time. If the experiment were to be for a longer period, appointment initially for a seven year term would be preferable to any lesser period. Inevitably, resignations, disability, and other factors will result in some changes in personnel, but change in the personnel of the court should be minimized rather than facilitated. The desirability of a rather long period of service argues against too heavy a reliance on senior judges. Appointment of seniors appears, at first blush, to disrupt their home circuits least, and yet the work which virtually every senior judge does in the federal judicial system indicates that their removal to an inter-circuit tribunal would entail a substantial cost in terms of

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<sup>101</sup> See FRANKFURTER & LANDIS, *supra* note 2, at 233-36 & n.53.

<sup>102</sup> H.R. 4762, 97th Cong., 1st Sess. § 61 (1981).

judicial service available to the home court. Moreover, seniors are available for assignment to other courts; their willingness to give of themselves beyond what is called for under the law could be utilized to good advantage in ways other than serving on the inter-circuit court.

*Achieving Broad-Based Acceptability and Congressional Approval*

It is certainly true that appointment to a permanent national court of appeals would present a more attractive judicial assignment to individuals who might be somewhat hesitant to accept appointment to an inter-circuit tribunal. It is also true, as many have pointed out, that relations with the judges now sitting on the courts of appeals would be expected to be far more congenial if the new court were appointed as a temporary court, and if their own brethren and colleagues staffed the new court. Again, these are factors which are likely to prove more significant in the short run than in the long run, but easing the problems of transition has much to commend it.

One cannot ignore the fact that the acceptability of a new tribunal, not only within the federal judiciary, but by the profession as a whole and by the Congress would be enhanced substantially if the court were viewed as a five or seven year experiment. Those who are firmly convinced that it will perform a necessary function should be willing to recognize the political difficulties of creating, at one fell swoop, a national court interposed between the Supreme Court of the United States and the several courts of appeals. Moreover, the advantage of moving forward at this time, as opposed to waiting for another decade or two, or even three, is significant. The increase in the order of magnitude of the demands our society imposes on the federal judicial system is such that we should no longer ignore the need for increasing the capacity of the system to deal with contemporary problems. The time has indeed come for the Congress to move forward, however cautiously and experimentally, toward increasing the capacity of the system to provide for what has aptly been termed, "the known certainty of the law," for as has been said many centuries ago, "the knowne certaintie of the law is the safetie of all."<sup>103</sup>

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<sup>103</sup> COKE, 1st INSTITUTE, BOOK 3, EPILOG 395A (1817).

