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A Proposal that Congress Create a Commission on Federal Court Structure

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> Predicting the shape and size of the federal judiciary in the future requires us to gaze into a rather clouded crystal ball; clouded, because the prediction of future changes in any institution is a hazardous business, and clouded even more in this case because political pressures as well as rational discourse will determine what the federal courts look like a generation hence.[1]

I. Introduction

In December 1993, the Federal Judicial Center completed a full-scale report on the alternative futures of the United States courts of appeals. The report, entitled *Structural and Other Alternatives for the Federal Courts of Appeals*,[2] examines the problems facing the federal appellate system. This report is a detailed and comprehensive study of the "stresses" (the report eschews the term "crisis") the circuit judges and the courts of appeals are experiencing.[3] It rejects the conclusions of others that the quantity of appeals has already affected the quality of work product in the courts of appeals, but cautions, "[a]t some point, especially if the workload of the courts of appeals continues to grow at its recent pace, changes in internal operating procedures may not be sufficient for the task."[4] It also concludes that if the national policy choice is to maintain the existing federal appellate structure, in order to restore traditional appellate procedures in all appeals, or in all appeals decided on the merits, there must be substantially fewer appeals or some massive increase in the number of judges and support personnel.[5] The Report squarely fa-

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* Adapted with permission from Thomas E. Baker, Rationing Justice on Appeal—The Problems of the U.S. Courts of Appeals ch. 10 (1994). This book began as a report of the Justice Research Institute for the Federal Judicial Center. The views and positions expressed here are those of the author alone.

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1. William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 Wis. L. Rev. 1, 1.

2. Federal Judicial Center, Structural and Other Alternatives for the Federal Courts of Appeals: Report to the United States Congress and the Judicial Conference of the United States (1993) [hereinafter Structural Alternatives].

3. *Id.* at 11.

4. *Id.* at 155. I believe that we are already past this point. *See generally* Thomas E. Baker, *Intramural Reforms: How the U.S. Courts of Appeals Have Helped Themselves*, 22 Fla. St. U. L. Rev. (forthcoming 1994); Thomas E. Baker, *Proposed Intramural Reforms: What the U.S. Courts of Appeals Might Do to Help Themselves*, 25 St. Mary's L.J. 1321 (1994).

5. Structural Alternatives, *supra* note 2, at 156.

vors non-structural reforms over more radical changes in the organization of the federal court system.[6]

This Federal Judicial Center Report is the culmination of three decades of studies, reports, committees, articles, and hearings which have discussed and debated what the appropriate response should be to the astronomical growth in the number of appeals in the United States courts of appeals. The next question, which this essay addresses, is what should follow this Report.

My recommendation is that Congress create a Commission on Federal Court Structure.[7] This is not a new or original idea, although I will put my own spin on it.[8] My hope is that such a Commission will allow for more rational discourse and less untoward political pressures as proposals for reform begin to take shape.

II. BACKGROUND

The Federal Courts Study Committee Implementation Act of 1990 suggested structural alternatives for the courts of appeals. It provided, in relevant part:

> The Board of the Federal Judicial Center is requested to study the full range of structural alternatives for the Federal Courts of Appeals and submit a report on the study to the Congress and the Judicial Conference of the United States, no later than 2 years after the date of the enactment of this Act.[9]

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6. STRUCTURAL ALTERNATIVES, *supra* note 2, at 5. Again, I disagree, but that is beside the point of the present essay. *See generally* Thomas E. Baker, *An Assessment of Past Extramural Reforms of the U.S. Courts of Appeals*, 28 GA. L. REV. (forthcoming 1994); Thomas E. Baker, *Imagining the Alternative Futures of the U.S. Courts of Appeals*, 28 GA. L. REV. (forthcoming 1994).

7. It was reported in the legal press that the Judicial Conference of the United States "rejected a proposal to establish a formal commission of representatives from the three branches of government to study the issue" of what to do in response to the growth in the number of judgeships. Marianne Lavelle & Marcia Coyle, *Judicial Conference Opposes Expanded Bench*, NAT'L. L.J. Oct. 4, 1993, at 7. The Preliminary Report contains no mention of the matter. Preliminary Report, Judicial Conference Actions, September 20, 1993, attached to Memorandum from L. Ralph Mecham, Director of the Administrative Office of U.S. Courts (Sept. 27, 1993).

The official spokesman for the Judicial Conference explains that during the discussion of the general question of setting a limit on the size of the federal bench, a motion was made to propose the creation of a three-branch committee to study the idea. However, when it was learned that Chief Justice Rehnquist had requested the advice of the Judicial Conference Committee on Long Range Planning, in consultation with the political branches, the motion was withdrawn and the matter never came to a vote. Furthermore, what was contemplated was more of an informal committee than a formal commission. Telephone Interview by Greg J. Fouratt with David Sellers, Public Information Officer, Office of Legislative and Public Affairs, Administrative Office of U.S. Courts (Jan. 24, 1994).

My concerns are broader than the problems caused by the growth of the bench, although I share that worry. I hope my explanation of what the Commission would be like will help convince those in positions of power of the correctness of my proposal.

8. For example, in his "State of the Circuit Address," Chief Judge Wallace of the Ninth Circuit endorsed a creation of a "national conference, with representatives from all three branches of government, to study the problems facing the federal court system." Chief Judge of the Ninth Circuit Court of Appeals J. Clifford Wallace, State of the Circuit Address to the Judicial Conference of the Circuit 7-8 (Aug. 16, 1993) (transcript available in Mississippi College Law Review Office). Chief Judge Wallace reported that Justice O'Connor has publicly endorsed the idea. *Id.* at 8. He concludes, "[T]he time is right for a dialogue in which we can establish common ground about the mission of the federal courts now and in the future." *Id.* at 9. My proposal, however, would focus on structural and organizational issues.

9. Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101-650, § 302(c), 104 Stat. 5104, 5104 (codified as 28 U.S.C. § 620 note (Supp. II 1990)).

The House Report elaborated on this congressional request and referred to the "suggestion made by Judge Weis at the subcommittee hearing," which the statutory request was meant to codify.[10] The House Report described "a study of the structural alternatives for the court[s] of appeals . . . [that] may include, but need not be limited to, the five structural alternatives outlined in the Report of the Federal Courts Study Committee."[11] A reference-back in the House Report to the testimony of Judge Weis, who chaired the Federal Courts Study Committee, further described the study that Congress requested. Judge Weis told the subcommittee:

> Appellate restructuring is an issue that requires careful and detailed scrutiny. It is a matter that deserves priority but because it may ultimately require extensive changes, some of them perhaps disconcerting, it invites avoidance and delay by bench and bar. This highly important facet of the Committee's Report should not be allowed to languish because no one has assumed the initiative. I would therefore hope that your Committee would seriously consider requesting the Federal Judicial Center to conduct some, at least, preliminary surveys of the alternatives available so that in perhaps a year's time an interim Report might be submitted.
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> This survey could research published commentary—a not insignificant body of thoughtful proposals—and if time permitted seek comment from a limited group of judges, academics, and interested members of the bar. In addition, a compilation of pertinent statistics could be prepared which would provide some basis for assessing the extent of the problem.
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> A comprehensive study of this very complex area will require a rather detailed agenda. The survey that I suggest would lead to a blueprint for research and evaluation and, perhaps, the criteria for an appropriate body to conduct it. The success of the Federal Courts Study Committee composed of representatives from all three branches of the government, as well as the practicing bar and academia, may indicate that such a body could appropriately attack the appellate structure problem.[12]

Now that the Federal Judicial Center has completed its assigned task, neither the Judiciary nor the Congress seems to know what should happen next.

III. The Next Interim Phase

Before suggesting who should take extramural reform the next step, it may be helpful to identify those who should *not* be expected to accept that immediate responsibility. In my opinion, neither the judicial branch nor the Congress is the most appropriate forum for the next interim phase of debate and inquiry being advocated here. The judges cannot be expected to go it alone. Their domain is the intramural reform. By definition, extramural or structural reform requires the active involvement of Congress, but that poses problems, as well.

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10. H.R. Rep. No. 734, 101st Cong., 2d Sess. 17 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6863.

11. *Id.*

12. *Federal Courts Study Committee Implementation Act and Civil Justice Reform Act: Hearing Before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the House Committe on the Judiciary*, 101st Cong., 2d Sess. 90-91 (1990) [hereinafter *Study Committee Report*] (prepared statement of Joseph F. Weis, Jr., Chairman, Federal Courts Study Committee, and Senior Judge, U.S. Court of Appeals for the Third Circuit).

Professors Carrington, Meador, and Rosenberg soundly concluded that the judicial branch, particularly the Judicial Conference of the United States and the courts of appeals themselves, "cannot be realistically counted on to deal with the issues presented by the need for substantial revision of the federal appellate structure."[13] As those scholars noted, the views of the judges are quite relevant and their experience and expertise need to be tapped, but "[t]he quality of appellate justice should be a matter of interest to all, and the responsibility for the quality of justice cannot be delegated by Congress to any other group, however expert, respected or involved."[14] On the other hand, the problem with Congress is that its usual legislative processes are not conducive to the kind of study and evaluation that is most appropriate for the next contemplated phase of deliberations on extramural or structural reforms.

Congress needs to consider extramural reforms to preserve what remains of the appellate ideal and to recapture some of the lost federal appellate tradition.[15] Congress must act quickly by a congressional reckoning of time. The Cassandras on the Federal Courts Study Committee have predicted that "[d]elay 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."[16] Throughout federal court history, however, Congress has been slow to respond to the needs of the present, let alone the future. Several built-in impediments to congressional court reform must be overcome, including an agenda full of other more pressing national issues, a lack of an influential political constituency for court reform, special interest opposition, lawyer and bar negativism, and an endemic lack of continuity or overall legislative program for the third branch.[17] In the legislative halls, these are the courts "nobody knows."[18] Now Chief Judge Posner, of the Seventh Circuit, has described what is needed and what has to be overcome:

> More than additional patchwork is needed; bold new thinking and action are needed. There is no shortage of bold thinking . . . . Bold action is something else. The politics of judicial reform are depressing in the extreme. The benefits of such reform are highly diffuse: the beneficiaries of expert, expeditious, and inexpensive adjudication are scattered and, to a large extent, unidentified, and as a result do not constitute a cohesive, effective political pressure group. The opponents of judicial reform however, include a number of groups (within the bar, within the judiciary, within the executive branch of government) who are heavily invested in the mainte-

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13. PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 224 (1976) [hereinafter CARRINGTON]. The Long Range Planning Committee of the Judicial Conference of the United States is the most appropriate forum within the third branch for judges to focus on structural issues. *See* Thomas E. Baker, *Some Preliminary Thoughts on Long-Range Planning for the Federal Judiciary*, 23 TEX. TECH L. REV. 1, 8-9 n.30 (1992).

14. CARRINGTON, *supra* note 13, at 224.

15. *But see* Irving Wilner, *Civil Appeals: Are They Useful in the Administration of Justice?*, 56 GEO. L.J. 417 (1968).

16. *Study Committee Report*, *supra* note 12, at 117.

17. *See* Daniel J. Meador, *The Federal Judiciary—Inflation, Malfunction, and Proposed Course of Action*, 1981 B.Y.U. L. REV. 617, 637-41. *See generally* JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY (Robert A. Katzman ed., 1988).

18. J. WOODFORD HOWARD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM xvii (1981).

nance of the status quo and as a result have strong incentives to bring pressure to bear against change.[19]

There needs to be a careful study of the intramural reforms already in place and those proposed additional reforms of judicial origin. Congress needs to fully appreciate how the courts of appeals have re-formed themselves and what the consequences already have been for the federal appellate tradition. Congress must move beyond "easy tinkering."[20] What is needed is a legislative reformation of the federal appellate court structure that will conserve the federal appellate tradition and serve the nation for the next generation. As the Study Committee itself said, the key to overcoming imperfect knowledge of the problems, their solutions and their effects, is a thorough and careful study.[21] Within the third branch, the attitudes of federal judges must coalesce around a clear understanding of the problems of the courts of appeals, and there must be a shared judicial resolve that Congress needs to act to reform the federal appellate structure. A properly focused and carefully executed study could be the catalyst for such a judicial consensus, which currently is lacking but, in the past, has been a necessary prerequisite to every congressional reform of federal court structure.

There are many whose instinct it is to rebel at the very idea of yet another study. Normally, this is a very good instinct. Government studies have a Nero-like quality more often than not. Upon further reflection, however, that instinct should be overcome on this occasion. The Federal Courts Study Committee sought to focus attention on the crisis in the United States courts of appeals. The Study Committee did not attempt to prescribe solutions. Its effort, instead, was intended to set in motion a careful process of further study and debate, an interim process which is essential for the development of the comprehensive solutions that are needed. The Study Committee thus contemplated that there would be a follow-up interim phase, an interval during which the problems of the courts of appeals were studied and alternative solutions were developed in some detail.

What is needed and what is being proposed here is a middle phase between the Study Committee's preliminary effort and any further more formal congressional consideration, an interim study period insulated from overt political pressures, during which alternative models of structural reform can be fully elaborated and carefully evaluated. More needs to be known about the nature and extent of the problems before Congress acts. There needs to be a rigorous appraisal of alternative approaches before Congress acts. When this middle-phase study is complete, Congress will be prepped for the last phase of evaluation and debate within the tra-

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19. Richard A. Posner, *Introduction to Federal Courts Symposium*, 1990 B.Y.U. L. REV. 1, 2.

20. A. Leo Levin, *Adding Appellate Capacity to the Federal System: A National Court of Appeals or an Inter-Circuit Tribunal?*, 39 WASH. & LEE L. REV. 1, 2 (1982).

21. "The changes in the demands on the courts will be radical. The response of the procedural reformers is not likely to be. For this reason alone, procedural reform is not going to be the answer to all future needs." Charles Alan Wright, *Procedural Reform: Its Limitations and Its Future*, 1 GA. L. REV. 563, 575 (1967). *See also* James C. Hill & Thomas E. Baker, *Dam Federal Jurisdiction!*, 32 EMORY L.J. 3, 85-86 (1983) (calling for a body similar to the Federal Courts Study Committee).

ditional legislative forum. Then Congress will be prepared to act legislatively to solve the problems of the courts of appeals.

IV. The Proposed Commission on Federal Court Structure

A long-range perspective, a decidedly non-legislative perspective, is necessary in this undertaking. In his testimony before Congress, Judge Weis, the Chairman of the Federal Courts Study Committee, suggested a familiar and recently successful model for conducting the next phase of study of extramural reforms being proposed here: "The success of the Federal Courts Study Committee composed of representatives from all three branches of the government, as well as the practicing bar and academia, may indicate that such a body could appropriately attack the appellate structure problem."[22]

Structural reform best proceeds from such a study group's efforts. The recommendation here expressly seconds Judge Weis's proposal for an interbranch study group on federal appellate structure. For purposes of discussion here, the study group might be called the Commission on Federal Court Structure. Its efforts should draw on the accumulated wisdom of the Administrative Office of the United States Courts, the American Bar Association, the American Law Institute, the Department of Justice, the Federal Judicial Center, the Judicial Conference of the United States, the Judiciary Committees of both the Senate and the House of Representatives, and the National Center for State Courts. The Federal Judicial Center report could serve as a preliminary guide for the Commission. With a specific charge, an adequate staff and resources, and a reasonable deadline, the Commission could be expected to report back to Congress with specific recommendations and alternative models.[23] Then Congress could do what Congress does best. Congress could follow-up with hearings on particular proposals from the Commission and then draft legislation that would design a new appellate judicial machinery which will allow the third branch to meet the needs of the third century.[24]

In creating the Commission on Federal Court Structure, Congress should not merely provide for a sequel to the Federal Courts Study Committee; indeed, Congress should avoid repeating some of the mistakes made when the Study Commit-

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22. *Study Committee Report*, *supra* note 12, at 91. *See generally* Lars Fuller & Craig Boersema, *Judging the Future: How Social Trends Will Affect the Courts*, 69 Denv. U. L. Rev. 201 (1992); Edward B. McConnell, *Planning for the State and Federal Courts*, 78 Va. L. Rev. 1849 (1992); Edward B. McConnell, *Managing Courts: What Does the Future Hold for Judges?*, 30 Judges' J. 9 (1991).

23. Chief Judge Wallace suggests that the study group be made permanent with an even broader charge to include full implementation of the Federal Courts Study Committee's recommendations and other needed reforms. J. Clifford Wallace, *The Future of the Judiciary: A Proposal*, 27 Cal. W. L. Rev. 361 (1991).

24. "Framers of judiciary acts are not required to be seers; and great judiciary acts, unlike great poems, are not written for all time. It is enough if the designers of new judicial machinery meet the chief needs of their generation." Felix Frankfurter & James A. Landis, The Business of the Supreme Court—A Study in the Federal Judicial System 107 (1927). Chief Justice Rehnquist has urged, "One of the chief needs of our generation is to deal with the current appellate capacity crisis in the federal courts of appeals." William H. Rehnquist, *Chief Justice Addresses Federal Court Workload, Future Needs*, The Third Branch (Admin. Office of the United States Courts, Washington, D.C.), June 1992, 4, at 4.

tee was constituted. The political compromises in the creation of that Study Committee somewhat hampered its efforts. Basically, the Study Committee did not have long enough, and it tried to do too much. The life of the Study Committee was a part-time pell-mell for very busy people, who were obliged to steal time from their full-time professional duties during an intense but brief interlude. The overall time frame was too brief; there simply was not adequate time to gather and synthesize all the necessary information, or to draft and publish proposals for public comment and then to collect and process all the feedback in a meaningful way. The Study Committee was instructed to consider virtually the entirety of the federal courts' jurisdiction, structure, practices, and procedures. That was too much. These are the reasons why the Study Committee recommended so many further studies of so many issues. The proposed Commission should be established for at least two years and its focus should be narrow and specific. The Commission needs a focused congressional charge.

The Commission should be charged to: (1) determine the nature and extent of the problems with the structure of the courts of appeals; (2) identify and review proposed extramural or structural reforms of the federal appellate court system; (3) evaluate the purpose of each proposal against the appellate ideal; (4) assess the likely costs and benefits of each proposal, in terms of the received federal appellate tradition; (5) measure the expected effect of each proposal for the district courts and the Supreme Court; (6) draft alternative legislative plans for reforming the structure of the federal court system; and (7) develop general criteria for the Congress to use to assess the various alternatives.

The Commission should have an adequate budget that will cover the expenses of travel and hearings and a full-time professional staff. The Study Committee depended too much on part-time volunteers. The Commission's staff ought to include salaried, full-time personnel who are experts in social scientific, empirical research; experts who can analyze demographic trends, weigh conflicting data, and determine how to collect needed additional data on the future demands on the federal courts.

The Commission ought to be inclusive to the nth degree in its membership and staffing. Representatives of all three branches of the federal government, state government officials, practitioners, and academics served on the Study Committee. As volunteer staff and advisors, the Study Committee gathered knowledgeable and experienced experts in all matters of federal court jurisdiction and administration and successfully organized their efforts to produce a comprehensive Final Report. The Study Committee's outreach efforts included inviting a multitude of interested organizations and groups to become involved, publishing for comment an interim report, and holding a series of public hearings around the country. The proposed Commission ought to borrow a page from the Study Committee's organizational manual. Indeed, if the Commission were to perform as well as the Federal Courts Study Committee performed many of its tasks, much good could be expected to come from it.

The Commission should try to improve on the Study Committee's efforts in one regard, however, by making a greater effort to learn more from the States. The States' experiences with appellate court reforms, while not controlling, are highly relevant to the task of the Commission. This comparative dimension ought to be given some priority in staffing and organization.

The Commission should not be dominated by Article III judges, although again it should be expected that federal judges will be represented and most assuredly ought to have substantial input.[25] Judges are engaged in the business of judging on a daily basis and appellate judges surely have a great deal of information and insights to offer during the next contemplated phase of study and debate. Likewise, scholars can help, although many federal jurisdiction scholars do not fully understand the administrative realities of the federal court system, and some suffer from the conceit that they know more than they really do about how the courts actually operate. The circuit judges themselves can be expected to best know the problems of the courts of appeals, but the district court perspective also should be represented. Judges should and will be influential on the Commission, but the recommendation here is that the identity of the Commission should be congressional.

Members of Congress, presumably prominent members of the two Judiciary Committees, ought to participate as hands-on architects of the alternative proposals to be developed in the next interim phase. With some notable exceptions, some of the congressional members of the Study Committee too often gave its work low priority. While this may have been understandable, given the important competing demands on their time, this took away from the overall effort of the Study Committee. It certainly represented a lost opportunity. If the members of Congress are only going to send their staff to the meetings of the proposed Commission, they might as well not create it in the first place. A personal commitment on their part is critical.

Congressional involvement and participation will provide those individual members with a full opportunity to study and understand the problems of the courts of appeals. This understanding will improve the follow-up hearings that are expected to be held by their Judiciary Committees in the final phase of legislative consideration. Furthermore, the congressional members of the proposed Commission likely will be the champions of anticipated legislation. Those bills should bear their imprint. They themselves should identify personally with the important work of the Commission. Sustained and meaningful participation by members of Congress over the entire process, from the very beginning, will help insure that

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25. Chief Justice Rehnquist described the legitimate expectations for the separation of powers in this regard: Judges realize that it is Congress and the President, through the legislative process, who must make the final decision on most matters relating to the structure of the federal judiciary; but they think that the decision will be better informed if the judges are consulted, and their views taken into consideration, in reaching it.

Chief Justice Issues 1992 Year-End Report, THE THIRD BRANCH (Admin. Office of the United States Courts, Washington, D.C.), Jan. 1993, 1, at 4-5 (reprint of Chief Justice Rehnquist's 1992 Year End Report).

the Commission will answer its charge and ultimately will improve the legislative chances of achieving the needed structural reforms.

Early and constant involvement of members of Congress also will serve to keep the Commission within the realm of the politically possible. Congressional members of the Commission will have one eye on the various constituencies whose support will be critical to successful enactment, such as the organized bar and institutional litigants, and the other eye on their congressional colleagues, whose legitimate expectations for political considerations must be taken into account somewhere along the line. Judges cannot be expected to be up to speed on such matters. Even less can be expected, on this score, from academics. In the art of the possible, judicial reform is a form of incrementalism and must be conceived with a certain simplicity and elegance of form. A Rube Goldberg design for new judiciary machinery, covering 100 pages of a law review, complete with 3-D diagrams, is worth the paper it is written on. However, it is a sure bet that it will never be written up as a bill, let alone be enacted into law.

The Commission being proposed would most resemble the Hruska Commission of the 1970s.[26] The congressional membership would dominate and should come from the Judiciary Committees in the House and Senate, where the Commission's models ultimately will be evaluated. The Chair preferably ought to be a member of Congress; if a jurist is selected, a member of the United States Supreme Court, active or retired, might be considered.[27] The executive branch needs to be represented, as well, probably by some high level official from the Department of Justice.

All these particulars about the proposed Commission are subject to political considerations, of course. The framers of the Constitution wisely left the structure of the federal courts to the legislative will of Congress, and Congress most assuredly will have its way. But Congress should rise above partisan politics on such an important occasion when so much is at stake.

It is important that this brief discussion of particulars be understood as merely spinning out one set of alternatives, among various and sundry possibilities. The discussion here is merely suggestive, a preliminary attempt to identify issues and potential problems in the creation of the proposed Commission. The particulars suggested here are not essential or controlling. Critics should not be allowed to find comfort in objecting to the general idea of creating a commission with a complaint about some particular suggestion mentioned here. The burden of this discussion is to persuade the reader that creating a Commission on Federal Court Structure is the best way to proceed. It is the best way to organize the necessary interim phase between the Federal Courts Study Committee and the enactment of the needed legislation by Congress. Further debate over what form the Commis-

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26. *See generally* COMMISSION ON REVISION OF THE FED. CT. APP. SYS., STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE, 67 F.R.D. 195 (1975); COMMISSION ON REVISION OF THE FED. CT. APP. SYS., THE GEOGRAPHICAL BOUNDARIES OF THE SEVERAL JUDICIAL CIRCUITS: RECOMMENDATIONS FOR CHANGE, 62 F.R.D. 223 (1973).

27. *See generally* Roger J. Miner, *Federal Court Reform Should Start at the Top*, 77 JUDICATURE 104 (1993).

sion should take and how it actually might go about executing its charge is expressly postponed to a later time and a different forum.

V. CONCLUSION

Describing what he called the "current appellate capacity crisis," Chief Justice Rehnquist confidently predicted, "[a]lthough no consensus has yet developed around any particular set of changes to the status quo—and to be sure any alternatives will present practical and political difficulties—it is safe to say that change will come."[28] The Constitution tasks Congress with the responsibility to design a new federal court structure for the twenty-first century. The proposed Commission on Federal Court Structure will prepare the way for the congressional architects.

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28. Chief Justice William H. Rehnquist, Welcoming Remarks at the 1993 National Workshop for Judges of the U.S. courts of appeals (Washington, D.C., Feb. 8, 1993) *cited in* THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL 302 n.40 (1994). *But see* Michael C. Gizzi, *Examining the Crisis of Volume in the U.S. Courts of Appeals*, 77 JUDICATURE 96 (1993).