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A Compendium of Proposals to Reform the United States Courts of Appeals

Thomas E. Baker
Florida International University College of Law

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A COMPENDIUM OF PROPOSALS TO REFORM THE UNITED STATES COURTS OF APPEALS

THOMAS E. BAKER*

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* Professor, Texas Tech University School of Law; on leave, 1985-1986, Judicial Fellow, Supreme Court of the United States. B.S. 1974, Florida State University; J.D. 1977, University of Florida, Holland Law Center. This article was solicited, written, and accepted for publication before the author's entry on duty. The views expressed here are those of the author alone.
I. INTRODUCTION

Judge Ginsburg has provided a judge's-eye view of the work of a United States Court of Appeals in her Dunwody Lecture. From her perspective as a judge on the District of Columbia Circuit, she has done a fine job describing the process of deciding appellate cases and composing a reasoned decision. But simply describing "things as they are" in the decisional process will not suffice in this article for two reasons. First, Judge Ginsburg has already done that, as have other judges. Second, one without personal experience in deciding cases should maintain an academic orientation. The focus here will therefore be on "things that never were" — proposals to reform the federal court system's middle tier.

The emphasis is neither accidental nor merely expedient. As the bicentennial of the First Judiciary Act and the centennial of the courts of appeals approach, the federal courts have drawn renewed attention. Over the years, and most recently, attention has been lavished on the Supreme Court and its problems.}

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**G. BERNARD SHAW, BACK TO METHUSELHA - A METABIOLOGICAL PENTATEUCH 7 (reprinted ed. 1949). The line was made famous by President John Kennedy and was often rendered by Senator Robert Kennedy in his campaign for the presidency. A. SCHLESINGER, ROBERT KENNEDY AND HIS TIMES 886 n. (1978).**

2. Id. at 207-12.
4. Act of September 24, 1789, ch. 20, 1 Stat. 75.
Understanding the middle tier, however, is the key to understanding the system because changes in the intermediate federal courts have reflected an evolution in the entire federal courts system.\(^7\)

Since 1891 the role and function of the intermediate tier has been constant, merely considered as a matter of statute.\(^8\) Yet, the mind reels from a centennial glimpse back at the social, economic and legal changes since those federal courts were created. Now, those pent up pressures for court reform show signs of overwhelming the venerable statutory framework, again suggesting that "great judiciary act," unlike great poems, are not written for all times.\(^9\) Prominent commentators have noted that the courts of appeals have felt the greatest pressure.\(^10\) Statistics bear out this conclusion. Filings in each of the three levels have increased in the last twenty years. While the civil filings in the district courts have increased by slightly more than a factor of three and the Supreme Court's docket has increased by less than a factor of three, filings in the courts of appeals have increased by nearly a factor of six.\(^11\) Despite periodic increases in the number of judges, present judgepower and administrative techniques under existing jurisdictional statutes are being taxed to the limit. Undue delay and backlogs are not the only costs of this situation. Also at risk is the important role the courts of appeals play in our federal system. Understandably, proposals for reforms have been growing in number and in urgency.

This essay considers first the ideal role of the intermediate court in the federal judicial institution. Against this ideal, the article explores the seriousness of the threat presented by workload growth. The focus of this presentation is on reform. Intramural reforms are distinguished from extramural reforms.\(^12\) Intramural reforms, both accomplished and proposed, involve changes in how the courts of appeals themselves choose to perform within their traditional role itself. Extramural reforms, both accomplished and proposed, involve congressional changes in the role. A few editorials have been included along the way,


\(^8\) See generally id. at 736-37 (Chronological Table of Federal Circuits).


\(^12\) For other classifications of proposed solutions, see generally J. Martin & E. Prescott, *Appellate Court Delay* 6-17 (1981); Note, supra note 6, at 1308-10.
expressing preferences for one type of reform and for some choices within each type.

One final note concerning the article’s approach merits an introductory mention. This essay discusses most all of the reforms that have been tried or proposed in the various courts of appeals. Those separate institutions are quite different, however, and likely will remain so unless a major structural extramural reform occurs. The First Circuit, with a handful of judges and a small geographic area, is quite different from the large and vast Ninth Circuit. The Second Circuit has a docket concentrated in one city. The District of Columbia Circuit bears a burdensome docket originating in the federal seat of government. Not all of the problems noted are found in each court of appeals, and the proposed reforms are not universal. Still, some value exists in collecting these proposals in one place; in short, in compiling a compendium.

II. THE ROLE OF THE UNITED STATES COURTS OF APPEALS

No apologies are necessary for beginning with the “ought.” Later discussion will deal with the courts of appeals as they have evolved into their present state. For now the essay is concerned with the received wisdom of appellate ideals. This discussion serves as some measure for what has been done, what is left to be done, and what cannot be done about the intermediate federal court.13

While many authors have sought to describe the ideal appellate function in various formulations, contemporary writers must concede that Karl Llewellyn and Roscoe Pound have “long ago uttered every pertinent observation.”14 Llewellyn and Pound taught that the dual appellate functions are correction of error (or pronouncing correctness) in particular litigation and declaration of law by creation, clarification, elaboration, or overruling.15 Professors Carrington,

13. Justice Holmes once wrote of ideals, “[i]t often is a merit of an ideal to be unattainable. Its being so keeps forever before us something more to be done, and saves us from the ennui of a monotonous perfection.” Holmes, Law in Science and Science in Law, 12 Harv. L. Rev. 443, 463 (1899).


From time to time, thoughtful scholars have challenged the excesses of the received wisdom. See, e.g., Leflar, The Multi-Judge Decisional Process, 42 Md. L. Rev. 722 (1983) (recapitulation of sound appellate practices); Wright, The Doubtful Omniscience of Appellate Courts, 41 Minn. L. Rev. 731, 779 (1957) (“I think we should refrain from agreeing that appellate courts are to do justice until we have seen the price we must pay for this concept.”).
Meador and Rosenberg have listed the process imperatives that assure appellate justice in terms of

judges who are impartial; are multi-partite; are identifiable, not anonymous, and not mere auxiliaries; think individually, but act collegially; respect the interest of adversaries in being heard, but inform themselves fully on the material issues, evidence, and law on which decisions are to be made; and announce their reasons for decisions.\textsuperscript{16}

In other words, the process must be "visibly rational" so far as judges function.\textsuperscript{17} This is the process imperative.

Those same authors have reduced the appellate system's function to a black letter ideal:

\begin{quote}
[T]he system must provide uniform and coherent enunciation and application of the law; decisions that are expeditious, involving as few steps as possible; working conditions for judges which attract lawyers of high quality, who command professional respect; and working conditions for judges which will foster their humane concern for individual litigants.\textsuperscript{18}
\end{quote}

This is the ideal system function. The reality of the actual appellate function and any proposed reform must be assessed asymptotically, as they approach but never reach the ideal.\textsuperscript{19} Furthering the present inquiry requires consideration of how these attitudes about the ideal system function may be restated within the context of our federal court system.

As for the dual appellate functions of correction and declaration, the courts of appeals owe their origin to a congressional desire to provide only the former.\textsuperscript{20} The correction function was alone the province of the courts of appeals in the 1891 design. Congress freed the Supreme Court from a duty to correct error so that it could better perform the declaration function, which it alone was to perform. With occasional lapses, the Supreme Court today remains true to the 1891 plan that it is not a court of error.\textsuperscript{21} Indeed, the Judges Bill of 1925 reinforced this notion by reducing the Court's appellate docket.\textsuperscript{22} Recent proposals would search out and destroy any vestiges of the correction function in the Supreme Court's jurisdiction.\textsuperscript{23}

Consistent with their original design, the courts of appeals continue to function as the federal judicial institution for correction of error. Indeed, over the

\textsuperscript{17} P. Carrington, \textit{supra} note 14, at 11.
\textsuperscript{18} Id. at 11-12.
\textsuperscript{19} Id.
\textsuperscript{20} When created, the courts of appeals were meant "to correct individual injustice and control erroneous or lawless behaviour by judges or other officials while the Supreme Court [was to] assure doctrinal coherence and national uniformity." \textit{Id.} at 200.
\textsuperscript{22} Act of February 13, 1925, ch. 229, 43 Stat. 936.
\textsuperscript{23} See generally Note, \textit{supra} note 6.
years the trend has been toward near complete reliance on the intermediate
courts to correct error, as greater demands have been placed on the federal
judicial institution at each level. 24 Significantly at odds with the original design,
however, the courts of appeals have come to share the declaration function with
the Supreme Court. 25 If not less fallible, at least these courts’ decisions are
becoming more final in all areas of federal law. 26 Justice Rehnquist has agreed,
admitting that the courts of appeals’ autonomy in performing the declaration
function has gone so far that the Supreme Court’s supervisory authority has
been severely diminished. 27 The Court cannot accept a sufficient number of
appeals to allow it to impose national uniformity. 28

Considering the highest level of abstraction, the roles of the federal appellate
courts have changed. In the original scheme, the Supreme Court performed
both the declaration function and what limited correction function that was
contemplated. No intermediate tier existed. When the correction function be­
came more important and the number of appeals threatened the Supreme Court’s
own declaration duty, Congress created the intermediate appellate court to serve
as the court of error. In the modern era, the volume of appeals requires the
courts of appeals today to perform the declaration function, to a large extent,
free from Supreme Court supervision. Thus, events have overtaken design.

At the less abstract level of appellate function, the key concepts are process
imperatives and system function. The process imperative of visible rationality
and the ideal system function of procedural regularity may be recast to fit the
unique federal court system. While Professors Carrington, Meador and Rosen­
berg have gone far to set the terms of the general debate over appellate function,
the present discussion is concerned with the ideal role of the United States
Courts of Appeals.

Judge Wald, United States Circuit Judge for the District of Columbia Cir­
cuit, has identified five objectives of the federal judicial institution that articulate
a federal process imperative:

24. See generally Carrington, Crowded Dockets and the Courts of Appeals: The Threat to the Function
    of Review and the National Law, 82 Harv. L. Rev. 542 (1969). The perhaps greater significance of
this larger role for correction in the relationship between trial and appellate court is beyond the
scope of this article. See generally Wright, supra note 15.

25. Justice White recently made the point:

    The Supreme Court of the United States reviews only a small percentage of all judg­
ments issued by the twelve courts of appeals. Each of the courts of appeals, therefore, is
for all practical purposes the final expositor of the federal law within its geographical
jurisdiction. This crucial fact makes each of those courts a tremendously important influence
in the development of the federal law, both constitutional and statutory.


26. This paraphrase is taken from Justice Jackson’s aphorism: “We are not final because we
are infallible, but we are infallible only because we are final.” Brown v. Allen, 344 U.S. 443,

27. Rehnquist, A Plea for Help: Solutions to Serious Problems Currently Experienced by the Federal

28. Id.
First, we want to make correct decisions on the myriad cases and motions they face. Basically, decisions should accurately reflect the facts in the record and existing law on the subject. Ideally, we also should aim to season the logic of our decisions with an understanding of real-world constraints on litigants (who are often government agencies in our court), the public, and the judiciary.

Second, the courts' opinions should contain reasoned explanations of their decisions to lend them legitimacy, permit public evaluation, and impose a discipline on judges.

Third, courts should produce timely decisions and opinions, meaning, quite candidly, that we should hold our feet to the fire.

Fourth, courts should strive for uniform decisions, especially, as in our circuit, when one tribunal is composed of a number of separate panels.

Fifth, the courts must bear in mind that, as the only unelected branch of our Constitutional triad, they must act always to preserve and to reinforce public confidence in their integrity. Historically, achievement of this objective has required judges to walk a fine and precarious line: to render decisions based on the facts and the law, resisting personal bias toward individuals or groups, while preserving the values of the judge's own personal reasoning, experience, and ultimately, sense of responsibility.

For a federal version of the ideal system function, reliance may be placed on the statement of conditions then professor Frankfurter believed "indispensable to a seasoned, collective judicial judgment":

1. Encouragement of oral argument; discouragement of oratory. The Socratic method is applied; questioning, in which the whole Court freely engage, clarifies the mind of the Justices as to the issues and guides the course of argument through real difficulties.

2. Consideration of every matter, be it an important case or merely a minor motion, by every Justice before conference, and action at fixed, frequent and long conferences of the Court. This assures responsible deliberation and decision by the whole Court.

3. Assignment by the Chief Justice of cases for opinion-writing to the different Justices after discussion and vote at conference. Flexible use is thus made of the talents and energies of the Justices, and the writer of the opinion enters upon the task not only with the knowledge of the conclusions of his associates, but with the benefit of their suggestions made at the conference.

4. Distribution of draft opinions in print, for consideration of them by the individual Justices in advance of the conference and then their discussion at subsequent conferences. Ample time is thus furnished for care in formulation of result, and for writing dissents. This practice makes for team play, and encourages individual inquiry instead of subservient unanimity. 30

Although Frankfurter presented this ideal for the Supreme Court, such an ideal system function would fit the courts of appeals, at least roughly. 31

30. F. FRANKFURTER & J. LANDIS, supra note 9, at vii-viii.
31. Hellman, Central Staff in Appellate Courts: The Experience of the Ninth Circuit, 68 Calif. L. Rev. 937, 938 (1980). Professor Hellman states that co-author Frankfurter was the originator. Id. at 938 n.1.

Of course, the comparison suffers when Justice Frankfurter's Supreme Court ideals are applied to an intermediate court with mandatory review authority which sits in multiple panels and decides thousands of appeals each year. Some accommodation of the ideal for the panel mechanism must be made in this context. His generalization remains a helpful starting place.

Another helpful statement of the ideals or goals is found in T. MARVEL, supra note 15, at 243-44 (app. B):

At the outset it is best to have as a foundation a list of goals for appellate court decision-making procedures. The major, overriding problem is how best to inform the judges so that they can decide cases as well as possible within the time constraints. This involves numerous subsidiary goals, but the list that follows is limited to those that have traditionally been troublesome in appellate courts.

1. The judges should receive as much relevant information about the case as possible. It is more important that information pertaining to the court's lawmaking function be complete than that pertaining only to the dispute-deciding function, for lawmaking decisions ordinarily have a greater impact on society. But the information, however used, should be as free as possible from time-wasting extraneous material.

2. Each judge sitting on a case should know enough about it to make his own informed, independent decision. He should delegate as little as possible to the judge assigned the case and to law clerks and staff attorneys. This, of course, is a matter of degree; time problems make delegation of independent research and study of the record necessary, and delegation of the search for information necessarily means some delegation of decision-making.

3. Similarly, each judge should participate in the content of any opinion, especially if published, with which he concurs (except for the details of writing style). A number of minds can produce an opinion more serviceable to the bar than can one mind alone. So, again, each judge must understand the case, and he must study and comment on draft opinions as thoroughly as time and the preservation of friendly relations at the court allow. Also, the author of an opinion should be receptive to his colleagues' suggestions.

4. A judge should be open-minded in that he should withhold his final decision until he is fully informed and should weigh carefully arguments presented to support the opposing sides.

5. Appeals should be decided quickly, and judges should save time whenever possible without lessening the quality of their work. Judges' time is in short supply at many courts because of increased case loads and administrative duties.

6. Judges should get as much help as they can from counsel, both to save time and to improve their decisions and opinions. Judges believe that the quality of much appellate advocacy is low, and the trend now is to rely less on counsel and more on staff research. But, at the least, judges should use counsel as much as they can if only to check the work.
The constitutional scheme mandates recognition of federalism and separation of powers when contemplating an ideal federal appellate system function. Federalism produces two opposing effects. On the one hand, federal appellate jurisdiction accomplishes uniformity, while centralizing judicial power and facilitating hierarchical control. On the other hand, it fosters diversity. Inferior federal courts in this country are unique among federal systems. Article III judges are the most significant national officials systematically located around the country. Consequently, national policies are diffused and, in turn, influenced by local political and social concerns.

Separation of powers doctrine legitimates the theory and exercise of judicial review by these appellate tribunals. Both of the lower federal courts serve with the Supreme Court as guardians of individual rights against legislative and executive excess. Independent judicial review traditionally has been central to the protection of individual rights. Toward this end, article III judges have been small in number, highly qualified, and free from popular control. Thus constitutional values of federalism and separated powers provide the larger context for identifying the ideal role and function of the federal intermediate court.

Articulating these concepts of ideal and role only begins the inquiry. The question of whether these norms have ever been achieved or if they are achievable, is left to others. This article will discuss the current state of the federal appellate judiciary to identify the threat to these essential qualities and the coping strategies already in place and proposed. In the process, the article explores whether the courts of appeals are moving toward or away from the political system's aspirations for them. A social demand does exist for a high quality federal judicial institution: The issue, in economic terms, becomes whether a decline will occur in appellate quality as the move from an elite to a mass distribution of federal judicial services continues. The best tradition of appellate

These goals are obviously very interrelated, and the categorization must be somewhat arbitrary. But they do provide a background for comparing present procedures with the procedures suggested here. In doing so, I shall try to present a balanced picture, explaining the major problems behind the suggestions along with their benefits.


33. "Inferior" is, of course, the Constitution's term, and is not to be taken qualitatively. U.S. Const. art. III, § 1.
advocacy and decision affords the parties a thorough and uninhibited presentation, and assures the judges a deliberative and collegial performance. The ultimate question is whether this generation of judges is presiding over the demise of the appellate tradition.38

III. PROBLEMS IMAGINED AND REAL

The question of whether the courts of appeals are so overburdened that they have compromised appellate traditions is one that cannot be answered with equanimity. Perhaps this and related questions about case load problems cannot be answered at all; perhaps only opinions and attitudes can be offered. Through use of three techniques — statistics, testimonials and studies — at least, a deeper understanding of the problems can be achieved.

A. Statistics

Statistics should not be used the way a drunken man uses a lamp post — for support rather than for illumination. Too often, too much is made of numbers. Indeed, federal court fans are like baseball fans; discussing statistics has become de rigueur. But the casual fan probably dismisses (the true fan would say “overlooks”) the numbers as some of the finer points of the game.39 Still, statistics have an important role to play. After all, the very origin of the courts of appeals depended on a concern for the volume of appeals in the federal system at the turn of the century.40

Many jurists and commentators have relied on statistics to conclude that the courts of appeals today labor under such a staggering workload that the appellate ideal has been lost.41 Present filings are compared with historical figures for bold impact. If the 1960’s were a time of “exploding dockets,”42 then the last twenty years have experienced a docket chain reaction. For example, former


39. “A study of the extent of the work of any court is somewhat intriguing — to the judges [and a few processors]. The members of the Bar may not be altogether bored by it.” Evans, A Work Sheet of Judicial Labor of Appellate Federal Courts, 1943 Wis. L. Rev. 313, 313.

40. “Whether a judicial system needs an intermediate set of appellate courts is determined by the volume of judicial business.” 9 J. Moore, W. Taggert & J. Wicker, Moore’s Federal Practice ¶ 100.01[1], at 3 (2d ed. 1976).

41. Perhaps, the more fruitful line of inquiry would be to assess the causes and consequences of selection of litigation for dispute resolution. Such an approach is beyond the scope of this article. See generally P. Carrington, supra note 14, at 4-7; Galanter, Reading the Landscape of Disputes: What We Know and Don’t Know (And Think We Know) About Our Allegedly Contentious and Litigious Society, 31 U.C.L.A. L. Rev. 4 (1983); Marcus, Judicial Overload: The Reasons and the Remedies, 28 Buffalo L. Rev. 111 (1979); Trubek, Sarat, Felstiner, Kritzer & Grossman, The Costs of Ordinary Litigation, 31 U.C.L.A. L. Rev. 72 (1983).

Solicitor General McCree observed that in the year 1980 more appeals were filed in the Fifth Circuit alone than were filed in all the courts of appeals in 1940.\textsuperscript{43} For a second example, consider the analysis of Judge Posner, United States Circuit Judge for the Seventh Circuit:

In the year that ended on June 30, 1981, the number of appeals filed in the federal courts of appeals increased by 13.6 percent over the number filed in the previous fiscal year. It is now 58.3 percent higher than it was as recently as 1975, and more than 400 percent higher than it was in 1960.\textsuperscript{44}

As spectacular as these comparisons are, they may underestimate the effect of docket growth. Three other considerations illuminate the comparisons: The judge ratio, weighting cases, and the backlog. Consider the judge ratio. The number of judges has increased, as has the number of appeals, but the ratio has steadily declined.\textsuperscript{45} In 1940 each circuit judge was personally responsible for about sixty decisions. By 1980 the number had grown to 175.\textsuperscript{46} But even those numbers understate the workload of a judge who must sit in three judge panels, which in addition to opinion writing require a judge to prepare for and participate in the collegiate decision. The following progression illustrates the point:\textsuperscript{47}

\begin{center}
\begin{tabular}{|c|c|c|}
\hline
Year & Appeals & Per 3-Judge Panel \\
\hline
1940 & 3,446 & 184 \\
1950 & 2,830 & 131 \\
1960 & 3,899 & 172 \\
1970 & 11,662 & 361 \\
1980 & 23,200 & 527 \\
\hline
\end{tabular}
\end{center}

Within this decade, the pace has continued. In 1984 for the first time, the number of appeals filed and terminated in the twelve courts of appeals in one year exceeded 30,000—more than 700 per 3-judge panel.\textsuperscript{48}

\textsuperscript{44} Posner, \textit{supra} note 37, at 761-62.
\textsuperscript{45} "[T]he number of courts of appeals judges has increased 94\% since 1960, but the number of filings in the courts of appeals has multiplied more than nine times in the same period." C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3506, at 25-26 (1984) [hereinafter cited as C. Wright]. The ratio change is dramatic computed from either side: "Between 1961 and 1983, the number of appeals commenced in the United States Courts of Appeals increased by 705 percent. The number of authorized judgeships, however, increased by only one hundred percent." Martineau, \textit{Frivolous Appeals: The Uncertain Federal Response}, 1984 Duke L.J. 845, 845.
\textsuperscript{46} McCree, \textit{supra} note 43, at 781.
\textsuperscript{48} \textit{Annual Report of the Director of the Administrative Office of the United States Courts} 106 (1984) [hereinafter cited as \textit{Annual Report}].
The increased complexity of individual cases is a second aspect of caseload growth that is difficult to quantify, but which seems intuitively demonstrable. Comparing the number of filings and terminations provides a shallow measure of workload. More empirical work must be done. Some general agreement exists that in the last two decades there have been more "large" cases on appeal in terms of parties, issues, difficulty and significance. Judge Nelson, United States Circuit Judge of the Ninth Circuit, has estimated that such cases have grown at twice the rate of other cases.

A third concern is growth in the backlog. Once again, commentators and judges have relied on statistics to achieve a startling effect. The numbers are difficult to comprehend. Because such a large number of appeals have been filed nationally, the pending caseload is always large. A more sophisticated sense of the problem may be gleaned from a breakdown of pending appeals by length of time. As of June 30, 1983, these numbers were as follows:

<table>
<thead>
<tr>
<th>Total</th>
<th>1 to 3 Months</th>
<th>4 to 6 Months</th>
<th>7 to 9 Months</th>
<th>10 to 12 Months</th>
<th>More than 12 Months</th>
</tr>
</thead>
<tbody>
<tr>
<td>22,480</td>
<td>7,046</td>
<td>5,064</td>
<td>3,352</td>
<td>2,370</td>
<td>4,648</td>
</tr>
</tbody>
</table>

Thus, 20.7 percent of the appeals pending have been on the docket more than a year. Certain courts of appeals are in more serious crisis than others. For example, the Ninth Circuit's backlog, one of the largest, has grown from 250 cases in 1950, to 400 in 1960, to 500 in 1970, to its present 5,000.


53. ANNUAL REPORT, supra note 48, table 7, at 107.

54. Id. Cases under submission, as of September 30, 1983, tell a similar but less dramatic story:

<table>
<thead>
<tr>
<th>Total</th>
<th>3 to 6 Months</th>
<th>6 to 9 Months</th>
<th>9 to 12 Months</th>
<th>More Than 12 Months</th>
</tr>
</thead>
<tbody>
<tr>
<td>765</td>
<td>444</td>
<td>180</td>
<td>83</td>
<td>58</td>
</tr>
</tbody>
</table>

FEDERAL JUDICIAL WORKLOAD STATISTICS DURING THE TWELVE MONTH PERIOD ENDED SEPTEMBER 30, 1983, table 4, at 6 (Admin. Office U.S. Courts 1983). In 1984 filings and cases pending increased over the previous year. ANNUAL REPORT, supra note 48, at 106.

B. Testimonials

Statistics do illuminate the problem. Understandably, much attention has been lavished on available statistics. So much so that one is reminded of the second drunk, on his hands and knees under the lamp post searching for a coin dropped some distance away, who explains he is searching where the light is better. The statistical proof is impressive, but in law such proof, though usually relevant, is rarely determinative. The statistical conclusion that the problem is real and is really serious is supported additionally by testimonials. Expert witnesses help bring "the cold numbers convincingly to life." Nearly every article cited in this essay concludes that the workload problem facing the courts of appeals has created a crisis that jeopardizes their traditional function and role. Prominent government officials agreeing with this position include: Quentin N. Burdick, United States Senator from North Dakota; A. Leo Levin, Director of the Federal Judicial Center; Erwin N. Griswold, former Solicitor General; Wade H. McCree, former Solicitor General; and William French Smith, former Attorney General.

The judges agree. A majority of circuit judges in the Second, Fifth and District of Columbia Circuits responded affirmatively to the question, "Do you feel overloaded and overworked?" The best evidence that the courts of appeals' case load is no longer manageable is the testimony of the judges themselves. Many prominent circuit judges have agreed publicly: Ruth Bader Ginsburg,

56. Fed. R. Evid. 702 (defines an expert witness as one "qualified... by knowledge, skill, experience, training, or education").


58. Contrary commentary can be found, however, although it is decidedly in the minority. See generally Edwards, supra note 6.

59. Burdick, Federal Courts of Appeals: Radical Surgery or Conservative Care, 60 Ky. L.J. 807, 807 (1972) ("The Federal Courts of Appeals are afflicted with an illness. While it is not malignant, there is a potential prognosis of chronic incapacity or partial paralysis.").

60. Levin, Adding Appellate Capacity to the Federal System: A National Court of Appeals or an Intercircuit Tribunal?, 39 Wash. & Lee L. Rev. 1, 2 (1982) ("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....").

61. Griswold, supra note 10, at 791 ("The problem is a very real one. There can be no doubt about that. Those who say there is no problem seem to me to be largely unaware of its ramifications and insensitive to its consequences.").

62. McCree, supra note 43, at 781 ("Few would dispute that the caseload in the federal courts has reached crisis proportions.").

63. Smith, The Role of the Federal Courts, 88 Case & Com. 10, 10 (1983) ("[T]he burdens on the courts today are actually effecting a change in the character not only of our federal judicial system, but also of the legal profession and society.").

64. J. Howard, supra note 31, at 264.

65. See Edwards, supra note 6, at 876 (same observation regarding Supreme Court). Apart from their expressions of their own overwork, Supreme Court Justices have been sympathetic to the plight of the intermediate tier. See, e.g., Clark, A Commentary of Congestion in the Federal Courts, 3 St. Mary's L.J. 1, 1 (1976) ("The federal court system now has more work than it can properly handle."); Rehnquist, supra note 6, at 4-5 ("The [Supreme] Court cannot review a sufficiently significant portion of the decisions of any federal court of appeals.").
District of Columbia Circuit;66 Clement F. Haynsworth, Fourth Circuit;67 James C. Hill, Eleventh Circuit;68 Donald P. Lay, Eighth Circuit;69 Abner J. Mikva, District of Columbia Circuit;70 Dorothy W. Nelson, Ninth Circuit;71 Richard A. Posner, Seventh Circuit;72 and Alvin B. Rubin, Fifth Circuit.73 Academics long and loud have sung the chorus.74

That the crisis likely will continue and probably worsen is a central article of the federal court faith. Admittedly, good predictions cannot be made because an adequate theory of caseload growth does not exist.75 One spectacular prediction is that by the twenty-first century 5,000 courts of appeals judges will fill 1,000 volumes in the federal reporter disposing of more than 1,000,000 appeals — each year!76 Whatever the future will bring, this article has carried the burden of proof that the federal courts of appeals are in big trouble.

C. Studies

The system has not yet reached a gridlock. But reformers should not be so irresponsible as to await a complete breakdown. Assuming that the state of the dockets of the courts of appeals is now or soon will be intolerable, consideration of reforms is immediately appropriate. Appellate reforms may be grouped along

68. Hill & Baker, Dams Federal Jurisdiction!, 32 EMORY L.J. 3, 87 (1983) ("In whole, the flood of litigation is not averted. What is needed, to preserve the analogy, is the design and construction of a dam equal to the flood.").
69. Lay, supra note 52, at 1131 ("[C]ourts of appeals are so inundated by the volume of appeals of right [they] can no longer be given the full deliberative process to which they are entitled.").
70. Mikva, More Judgeships — But Not All At Once, 39 WASH. & LEE L. REV. 23, 23 (1982) ("Everyone knows by now that the caseload in the federal courts is too high.").
71. Nelson, supra note 51, at 13 ("The problem is not just the number of cases but also the vast increase in their intricacy.").
72. Posner, supra note 37, at 761 ("[T]he dismal subject of this paper...is the growing workload of the federal courts of appeals.").
73. Rubin, supra note 47, at 649 ("Appellate judges are confronted not only with the same vast increase in intricacy of cases but, in addition, with a staggering increase in the volume of their work.").
75. Posner, supra note 37, at 764.
three goals: (1) increasing the efficiency of the present capacity; (2) increasing the capacity at a constant efficiency; or (3) reducing the allowable demand on the system.\textsuperscript{77} Since the 1960's several efforts have been made to evaluate efficiency, capacity, and demand. A brief overview of those efforts provides further context and identifies the origin of many of the proposals to be discussed.\textsuperscript{78}

\textit{American Law Institute}. The first modern study of federal jurisdiction was the idea of Chief Justice Warren. In a 1959 speech to the American Law Institute, Warren challenged, "[i]t is essential that we achieve a proper jurisdictional balance between the Federal and State court systems assigning to each system those cases most appropriate in light of basic principles of federalism."\textsuperscript{79} The ALI Study begun in 1960 was completed in 1968 and published under the title \textit{Study of the Division of Jurisdiction Between State and Federal Courts}.\textsuperscript{80} This far-reaching effort focused primarily on the district courts and their major heads of jurisdiction. Taking the Chief Justice's theme, the Study sought to redraw the federal/state judicial relation "in a rational and contemporarily useful way."\textsuperscript{81} The proposals did not anticipate the burgeoning federal dockets, and the Study has little to offer this discussion, except for the demand-reduction proposition that a narrowing of federal jurisdiction will decrease the case load demand on appellate resources.\textsuperscript{82} Nothing significant came of the Study,\textsuperscript{83} and it may be dismissed today as academic.\textsuperscript{84}

\textit{American Bar Foundation}. The American Bar Foundation commissioned the first study of the burgeoning appellate caseload.\textsuperscript{85} Published in 1968, the report, entitled \textit{Accommodating the Workload of the United States Courts of Appeals},\textsuperscript{86} rec-

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77. Carrington, \textit{supra} note 24, at 555.
78. This summary relies substantially on Meador, \textit{supra} note 37, at 625-37. See generally C. Wright, \textit{supra} note 45, § 3510, at 43-49.
81. Meador, \textit{supra} note 37, at 625.
82. But see Wright, \textit{supra} note 74. Professor Wright appreciated the problem with characteristic foresight.
ommended some intramural reforms to improve efficiency, recommended an increase in capacity and, most importantly, proposed a sequential strategy for dealing with federal appellate growth over the long run:

1. Once a circuit reaches nine judges, the desirability of adding more judges must be compared to the most direct alternative, that of splitting a circuit to create a new circuit. On balance, it is more desirable to add judges than it is to split circuits.

2. When the number of judges in a given circuit exceeds 15, a "division" system should be adopted whereby judges would be assigned on a rotating basis to 5 or 7 judge-divisions, with each division having responsibility for specific substantive subject matter. Up to 30 judges could be accommodated within a given circuit under this "substantive divisions" concept.

3. Eventually some circuits will have to split when the caseload exceeds the capacity of the maximum number of judges who can be efficiently employed under a "substantive divisions" organization.

4. Contemporaneously in this evolutionary process there will be the need to furnish assistance to the Supreme Court in its function of guiding and harmonizing the federal law decided by the Courts of Appeals. Such assistance could be furnished alternatively by regional appellate panels of the Courts of Appeals, by appellate panels with jurisdiction over specific matter, or by a "national circuit."87

Much of this sequential scenario has come to pass and, as will become apparent, the rest remains viable.

The Freund Committee. The Report of the Study Group on the Caseload of the Supreme Court was published in 1972.88 Commissioned by the Federal Judicial Center, the Study Group of jurists, scholars, and attorneys came to be known by the name of its chair, Professor Paul Freund. As its title suggests, the study focused on the problems of the Supreme Court.89 The Freund Committee recommended several efficiency measures, such as the elimination of both the three-judge district courts and the Supreme Court's obligatory jurisdiction. However, a

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87. Burdick, supra note 59, at 814. See generally Carrington, supra note 24 (Professor Carrington was the Project Director).
89. The Judicial Center was created in 1968 to "research and study...the operation of the courts of the United States." Act of Dec. 20, 1967, Pub. L. No. 90-219, § 620, 81 Stat. 664, 734. Chief Justice Burger, as Chairman of the Board, appointed the Group to "study the caseload of the Supreme Court and to make such recommendations as its findings warranted." FEDERAL JUDICIAL CENTER, supra note 88, at ix.
hailstorm of controversy resulted from a capacity-reform suggesting the creation of a national court of appeals. 90 Briefly summarized, the proposed court would be staffed by seven circuit judges sitting for staggered three year terms. The court would screen all certiorari petitions and appeals and refer about 500 to the Supreme Court for the Court's selection of the 150-200 for full decision. Additionally, the court would retain and decide genuine conflicts among the circuits. Criticism centered on two themes: a concern for the dilution of Supreme Court authority and self-determinism, and a desire to preserve direct access to the Supreme Court. Seen by some as an attack on the Supreme Court itself, the proposal was "stillborn," to borrow the diagnosis of a midwife of federal court reform. 91 The episode did focus attention on the federal appellate court system and its problems, however, and served to establish some important political limits on the dialogue of reform. 92

The Hruska Commission. Responding to the collective urgings of Chief Justice Burger, the Chief Judges of all the courts of appeals, the Judicial Conference of the United States, the Federal Judicial Center, and the American Bar Association, Congress created the Commission on Revision of the Federal Court Appellate System in 1972. 93 Chaired by Senator Hruska, the Commission included foursomes from the Senate, the House, the Chief Justice's appointments, and the President's appointments. The legislative charge was broad, but non-jurisdictional: study the federal judicial system's geographical divisions, structure, and internal procedures, and recommend changes "most appropriate for the expeditious and effective disposition of judicial business." 94

In 1973 the Commission issued its first report recommending the division of the Fifth and Ninth Circuits. 95 This report was largely an efficiency reform. Two years later, the Commission issued its second report, which considered structure and internal procedures of the federal appellate courts. 96 Again, the capacity-reform of the creation of a national court of appeals was suggested. 97 To be inserted between the courts of appeals and the Supreme Court, the proposed court would be staffed permanently with seven article III judges. It

90. The commentary was hot and heavy. For a partial bibliography, see Domecus, Congressional Prerogatives, The Constitution and a National Court of Appeals, 5 Hastings Const. L.Q. 715, 716 n.7 (1978); Wallace, The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?, 71 Calif. L. Rev. 913, 914 n.9 (1983). See also C. Wright, supra note 45, § 3510, at 46 n.9; Meador, supra note 37, at 627 n.59.
91. Meador, supra note 37, at 627.
92. Id.
97. Id. at 237-47.
would not perform any screening duties, but would decide cases on the reference of the Supreme Court and by transfer from the existing appellate courts. It would be subject to review in the Supreme Court on certiorari. Aside from the split of the Fifth Circuit,98 the Hruska Commission proposals did not fare well in the legislative halls.99 They did garner much attention within the ivy-covered walls, both favorable and unfavorable.100

Advisory Council on Appellate Justice. This poorly publicized Council was a nongovernmental body created in 1971 as a liaison to the Federal Judicial Center and the National Center for State Courts.101 After a four-year study, this council of judges, lawyers, and law professors developed guidelines for restructuring the federal appellate system much in line with the Hruska Commission, which overshadowed the Council.102

American Bar Association. The A.B.A. generally supported the Hruska Commission.103 In 1978 the A.B.A. created the Action Commission to Reduce Court Costs and Delay, which developed a package of appellate reforms to expedite the disposition of appeals.104 Its intramural proposals are concerned exclusively with appeal processing efficiency.105

The Department of Justice. Appointed by then Attorney General Levi, a committee within the Department of Justice, chaired by then Solicitor General Bork, surveyed the problems of the federal courts and issued a report in 1977.106 The Report emphasized the problems of the federal system and made several recommendations: The abolition of diversity jurisdiction; the creation of administrative courts under article I for adjudication and appeals under most federal regulatory laws; the elimination of the Supreme Court’s obligatory jurisdiction; and the creation of a permanent interbranch “Council on Federal Courts” to plan and coordinate judicial reforms. Because of the change in administrations, however, the proposals failed to gain momentum.107 In 1977 Attorney General Bell established a new unit within the Department called the Office for Im-

98. See generally Baker, supra note 7.
101. Meador, supra note 37, at 628-29.
102. Id.
103. Id. at 629.
provements in the Administration of Justice.\textsuperscript{108} The Office was designed to develop and promote court reforms. It achieved a fair degree of legislative success.\textsuperscript{109}

These various studies have been complemented by congressional attention,\textsuperscript{110} judicial self-improvement,\textsuperscript{111} and the insights of dozens of commentators on the federal judicial scene.\textsuperscript{112} The conclusion seems inescapable that the federal judiciary is under serious stress at the appellate level. These studies confirm that some extramural structural reform is necessary. A better confirmation, however, may be found in the courts' own reactions to the stress and the effect this has had on the ideal system function and process imperative.

IV. Intramural Reform

As summarized above, the federal appellate system has been under pressure for some time now. Like a living organism, the system has adapted to those stresses. Without such adaptations, the system would not have survived. The evolution, however, has seriously compromised the ideal and function of the system. Furthermore, judicial reforms, labeled here as "intramural reforms," appear to be nearly complete.

Intramural reforms are measures that adapt the procedures for performing the accepted appellate role and function described for the federal system. They amount to shortcuts, to an abbreviated process justified by the press of docket. For convenience, intramural reforms have been grouped by appellate function: oral argument, briefing, opinion writing, case management, support staff, and miscellaneous proposals.

A. Oral Argument

The external stress of caseload has changed oral argument practices dramatically. The theory for this change was ably stated in a syllogism by Chief Judge Godbold of the Eleventh Circuit.\textsuperscript{113} First, appellate cases are not fungible, and courts can articulate and apply differentiating standards and procedures. Second, judicial resources are finite, and caseload demand outstrips supply and will continue to do so. Thus, the logic goes, an appellate court should be granted the discretion to choose not to hear oral arguments in some appeals.\textsuperscript{114}

As amended in 1979, Federal Rule of Appellate Procedure 34 provides for oral argument "in all cases" unless, under a local rule, a three-judge panel

\begin{footnotesize}
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\item 110. See Meador, supra note 37, at 634-36.
\item 111. See id. at 637.
\item 112. See id. at 629-30 nn.69-81 (citations).
\item 114. Id. at 864.
\end{itemize}
\end{footnotesize}
The local rule must articulate a standard that establishes oral argument as the norm. Three situations justify an exception to the norm: "(1) the appeal is frivolous; (2) the dispositive issue or set of issues has been recently authoritatively decided; or (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument." This Rule is an improvement over some preexisting local rules that provided a power to deny oral argument whenever the "case is of such character as not to justify oral argument." Such a standardless approach permitted a panel, a judge, or even a law clerk to deny oral argument by intuition.

Perhaps because denial of oral argument is against the American appellate tradition, local practices typically limit the power further. Present Eleventh Circuit Local Rule 23 is fairly typical. Under this Rule, a screening panel (three judges assigned together for a year) must unanimously classify a case for the nonargument calendar. At any time prior to decision any of the three judges can reclassify for the oral argument calendar, without explanation. Additionally, the decision on the merits must be unanimous and without special concurring or dissenting opinions unless all the parties agree to nonargument.

Nationwide, between forty and fifty percent of the appeals decided by the courts of appeals in recent years have been decided without oral argument. The savings in judicial resources and private litigants' resources are supposedly apparent. Chief Judge Godbold concludes:

In a simple case in which the result is clear and no close or significant issues of law are involved, transporting counsel to the place of holding court and paying them for attendance is a waste of societal assets in a world where there are other priorities. . . . Perhaps most important of all, the appellate court's function and value are demeaned by requiring it to carry out acts merely ceremonial, while pretending the facade is real.

Arguably, in many instances the cases involving settled principles may get even closer attention in determining whether they can be discarded summarily. Each judge will consider the issue in chambers through use of a draft opinion rather than by a cursory discussion after a truncated argument.

115. FED. R. App. P. 34(a). The amendment codified the prevailing practice among the courts of appeals. The Fifth Circuit had begun experimenting with a nonargument summary calendar in the late 1960's as one means of coping with the burgeoning caseload. See generally Haworth, supra note 74, at 865-67; Haworth, supra note 10, at 265-69.


117. Haworth, supra note 74, at 866.

118. Id.

119. Id.


121. See Godbold, supra note 113, at 865.
Even such an enlightened procedure must, however, generate some policy objections.\textsuperscript{122} Oral argument is not necessary in all cases, but it should be permitted in more than half of the cases. Several reasons support this position. First, the court time saved by eliminating oral argument is relatively small. The amount of time an appellate judge spends preparing for and conducting oral argument is not great, even when multiplied by three to account for the panel. Indeed, the missed opportunity to test and confirm a theory of the case may result in a longer decision time.\textsuperscript{123} Second, the government should be reluctant to step in to save private resources. The invisible hand of the market is more trustworthy than a robed planner. Nonargument could remain a private option when the appellant makes the choice or the parties agree. That would be a market allocation. But the real cost of the lost oral argument is in terms of legitimating the judicial function, establishing communication between bench and bar and allowing judges the opportunity to ask questions and thoughtfully focus on the major issues.\textsuperscript{124} The real value of oral argument lies in the legitimating function of allowing the litigants to address the decisionmaker face-to-face. Wholesale denial of oral argument represents a greater threat to the progress toward the appellate ideal.\textsuperscript{125}

Both the dilemma and its resolution are unattractive. In many cases, a practice of considerable importance to the appellate function has been eliminated, at least in part, to preserve its use in other cases in which it is deemed more useful.\textsuperscript{126} In the process, the federal court system has moved farther away from the ideal. Oral argument should not be an absolute right, but the denial rate has outgrown the justification for denial. Not surprisingly, an inverse proportion has arisen between the reversal rate and the growth in the nonargument calendar.\textsuperscript{127} Furthermore, when Congress has added judges in the past, the nonargument calendar has remained constant. One possible explanation is that, under Federal Rule of Appellate Procedure 34(a), almost half of the federal appeals are "(1) frivolous" or "(2) unauthoritative." A more likely explanation, however, is that the catch-all "(3) adequate briefing and insignificant for oral argument" is being used to establish a docket median below which expediency permits below average process. This suggestion is troubling. The experience of the Second Circuit, which alone among the courts of appeals provides oral argument as a matter of course despite a large docket, is a final example that

\textsuperscript{123} Carrington, supra note 24, at 558.
\textsuperscript{125} See supra notes 13-38 and accompanying text. See also P. CARRINGTON, supra note 14, at 25.
\textsuperscript{126} Wasby, supra note 124, at 342, 353.
\textsuperscript{127} See Haworth, supra note 74, at 867.
the other federal courts of appeals have been too hasty in eliminating oral arguments.\textsuperscript{128}

B. Briefs

The federal appellate courts have thus reduced oral argument dramatically in an effort to cope with increased filings. In making that choice, the courts have necessarily emphasized the importance of written presentation. Written briefs have several inherent advantages.\textsuperscript{129} Written submissions have an "absorption advantage" over the oral presentation, which is said and gone.\textsuperscript{130} In a process with a written opinion as an end product, the briefs serve as raw material. Briefs also are portable and convenient. Moreover, a common attitude exists among lawyers and judges that the brief is generally better prepared than the oral argument.\textsuperscript{131}

Some experts would deemphasize briefs, however, because they feel that oral argument is more conducive to process imperatives.\textsuperscript{132} The idea of completely dispensing with briefs goes a bit too far, although that is the English tradition and was the early American experience.\textsuperscript{133} More realistically, the idea of an oral calendar would allow for short written submissions — true "briefs." The Ninth Circuit has experimented with such a program on a voluntary basis.\textsuperscript{134} With this approach, written submissions are very short and filing time is greatly reduced. The oral argument session becomes the arena for presentation, advocacy, and decision.\textsuperscript{135} While this approach seems feasible, experience is limited. This is due largely to the implicit rejection of a briefing deemphasis in the more common nonargument calendar which chooses to deemphasize orality. Perhaps not enough has been done to test this implicit choice.\textsuperscript{136}

C. Opinions

Other ways of dealing with delay and backlog include reducing the length of opinions, even eliminating some opinions altogether, and selectively pub-

\textsuperscript{128} See J. Howard, supra note 31, at 23-27. Reliance is qualified by the admission that more than three-fourths of the docket comes from New York City so that only a taxi ride to the courthouse is involved and oral arguments are five or ten minute exchanges.

\textsuperscript{129} P. Carrington, supra note 14, at 25-27.

\textsuperscript{130} While most courts record oral arguments, one may question whether the judges replay the tapes or whether the practice is designed chiefly to aid the absent law clerk in later drafting an opinion. The tapes become significant, if at all, on the issue of concessions or stipulations. See 5th Cir. R. 34.7 (tape recordings are for the exclusive use of court).

\textsuperscript{131} See Wasby, supra note 124, at 348-53.

\textsuperscript{132} P. Carrington, supra note 14, at 26.

\textsuperscript{133} Id. at 27-28.

\textsuperscript{134} For a description, see Chapper, Fast, Faster, Fastest; Appellate Courts Develop Special Tracks to Fight Delay, Judges' J., Spring 1981, at 50, 56. See also J. Cecil, Administration of Justice in a Large Appellate Court: The Ninth Circuit Innovations Project 46-79 (1985).

\textsuperscript{135} See Chapper & Hanson, Expedited Procedures for Appellate Courts: Evidence from California's Third District Court of Appeal, 42 Md. L. Rev. 696, 697-98 (1983).

\textsuperscript{136} See infra text accompanying notes 272-74.
lishing opinions. The approaches are related because the unpublished opinion frequently is shorter than the published variety. How this appellate function is performed is decidedly important in the allocation of judicial resources because nearly one-half of a judge's time involves opinion preparation. This reality attracts reformers to the opinion writing process.

Although the art of good opinion writing should be encouraged, not every record on appeal presents a canvas deserving of a masterpiece. Too much of the appellate process is lost, however, unless the artist is obligated to apply at least a few brushstrokes beyond the signature. The very integrity of the appellate process requires that courts state their reasons. The appellate ideal and system function described earlier make explicit this basic assumption of the common law tradition of deciding appeals. Quantity/quality tradeoffs are frequently argued and, properly, have been pursued, because opinion writing is the most labor intensive feature of the appellate process.

An opinion serves three critical purposes. First, litigants and the public are assured the decision is the product of reasoned judgment and thoughtful evaluation rather than the mere exercise of whim and caprice. Second, the very writing of an opinion reinforces the decisionmaking and ensures correctness. Third, appellate opinions are the lifestream of the common law, for they create precedents.

The first purpose may be partly served without an opinion in every appeal. Granted, there would be sufficient writing to assure the general public that the courts are not acting altogether arbitrarily or casually. But neither the general public nor the particular litigants would have that assurance in the given opinionless decision. Litigants seem especially deserving of an explanation. Of course, arbitrariness can always be covered by an opinion, but that much cynicism obliges a belief in affirmative deceit not just arbitrariness, and a writing requirement does confine arbitrariness.

The second purpose for requiring a written statement in all cases is to ensure an important discipline for decision. A decisionmaker who must reason through

137. Much has been written on the subject. For a selective bibliography, see generally C. Bolden, Appellate Opinion Preparation — A Selective Bibliography and Survey 17-21 (1978).
138. See Haworth, supra note 74, at 867-68.
140. P. Carrington, supra note 14, at 31. See generally Ginsburg, supra note 1.
141. See supra text accompanying notes 13-38.
143. Id. at 435.
144. This is not to suggest that litigants have a constitutional right to a written opinion, but a decision on the record and a statement of reasons is part and parcel of the procedural due process that courts impose on the other branches, as a general matter of hornbook law. See J. Nowak, R. Rotunda & J. Young, Constitutional Law 555-56 (2d ed. 1984); Friendly, "Some Kind of a Hearing", 123 U. Pa. L. Rev. 1267, 1279-95 (1975). See also infra note 149.
to a conclusion in print has reasoned in fact. Misconceptions and oversights of fact and law are discoverable in the process of writing. Everyone familiar with the appellate process has heard and used the expression, "It will not write that way" to mean that a tentative vote will not withstand the careful discipline of record reading, legal research, and opinion drafting. Yet, without a writing requirement some tentative votes would escape such scrutiny. Abstractly, opinion writing prolongs the process and, on occasion, a correct decision that has been unduly delayed may be as detrimental as an incorrect decision. The answer to this criticism is to expedite the exceptional case for quick hearing and decision with a brief opinion. In the balance of interests involved, the value of self-restraint provided by writing deserves greater weight than the value of efficiency gained through decision by edict. Reasoned decision is possible without writing, but sufficiently less likely that the writing requirement should be preserved at almost all costs. More marginal resources should be spent in deciding when to write than in giving each decision its writing due.

The third purpose of writing is most important of all because of the traditional importance of precedent and the doctrine of stare decisis. A deciding panel participates in a dialogue that is both backward and forward looking, both inwardly and outwardly directed, and both upwardly and downwardly important. A decision builds on past decisions and shapes future decisions. An appellate judgment decides a particular controversy and guides the resolution of later controversies. The court of appeals supervises the district court and is supervised, in turn, by the Supreme Court. In all these relationships, the court of appeals must communicate its reasoning to perform its role. An expression of reasoning will always contribute to the body of precedent or usefully inform the Supreme Court.

The consensus has been that litigants are entitled, as a matter of policy, to some statement of reasons for a decision. The courts of appeals have violated this consensus by providing for and rendering judgments without any opinion. A Fifth Circuit innovation, the practice is anathema to the appellate function

145. Merrill, supra note 142, at 435.
146. See, e.g., 4TH CIR. R. 34.5 (expediting appeals). Indeed, on occasion it might be appropriate to announce a decision with an opinion to follow.
147. Baker, supra note 7, at 712.
148. See id. at 712-13, 731-34.
149. Merrill, supra note 142, at 435. The Supreme Court is hampered in the performance of its role when forced to review an opinionless decision. See Taylor v. McKeithen, 407 U.S. 191, 194 n.4 (1972), vacating 457 F.2d 796 (5th Cir. 1971). In this regard, the California Supreme Court's practice of ordering depublication (not printed in the official reports) of particular opinions of the state intermediate court is extraordinary. See generally Grodin, The Depublication Practice of the California Supreme Court, 72 CALIF. L. REV. 514 (1984).
150. Haworth, supra note 74, at 868.
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and role previously described.\textsuperscript{152} Avowedly never used to finesse or hide a difficult issue,\textsuperscript{153} an affirmance without opinion is permissible by local rule if: (1) the findings of fact are not clearly erroneous; or (2) the evidence supporting the jury's verdict is not insufficient; or (3) substantial evidence on the record as a whole supports an agency's order; and (4) "the Court also determines that no error of law appears and an opinion would have no precedential value..."\textsuperscript{154}

Initially justified solely as self-defense against the threat of a Fifth Circuit docket disaster, the number of affirmance-without-opinion dispositions has decreased over the years, and the judges have begun to use the technique differently.\textsuperscript{155} In 1977 slightly more than one-half of the nonargument calendar cases and about ten percent of the oral argument calendar cases were decided without opinion. By 1983 the nonargument calendar use had fallen to less than three percent and the oral argument calendar use had remained at seven percent. Judges have apparently receded from their initial enthusiasm and the technique remains most useful in cases in which oral argument confirms that no issue is in doubt. In these cases, a notice is sent to counsel after argument that in effect classifies the appeal as virtually frivolous.

Nevertheless, the appropriate accommodation of the competing interests requires some form of written opinion. Insufficient attention has been given to the abridged opinion, a written opinion primarily addressed to the parties, which identifies the issue on appeal, announces the court's disposition, and gives the principled basis for the ruling.\textsuperscript{156} Given the narrow audience, the facts and procedural history can be omitted.\textsuperscript{157} Less important and less complete, these opinions would naturally have less precedential impact, but not by the artifice of declaring "nonprecedential precedents."\textsuperscript{158} Standards for nonargument calendar selection and for affirmance without opinion disposition have already been articulated. Strangely, similar criteria and a uniform practice concerning the simple, traditional per curiam opinion are not available. Such a device would provide a "useful economy" in the majority of federal appeals.\textsuperscript{159} Criticisms of long opinion writing come not just from the ivory tower, but from the bench as well. For example, Judge Rubin, United States Circuit Judge for the Fifth Circuit, has recently cha-

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\item \textsuperscript{152} See supra text accompanying notes 13-38.
\item \textsuperscript{153} NLRB v. Amalgamated Clothing Workers, Local 990, 430 F.2d 966, 972 (5th Cir. 1970).
\item \textsuperscript{154} 5TH CIR. R. 47.6. See FED. R. APP. P. 47.
\item \textsuperscript{155} Figures cited here are from G. Rahnert & L. Roth, supra note 119, ch. 2, at 25 n.92.
\item \textsuperscript{156} Wald, supra note 29, at 782.
\item \textsuperscript{157} Id. See also P. Carrington, supra note 14, at 33-35.
\item \textsuperscript{158} "I think all I am speaking about is...a nonprecedential precedent." Hearings Before the Comm'n on Revision of the Federal Court Appellate System 2d Phase 537 (1974-75) (testimony of Judge Robert Sprecher), quoted in Reynolds & Richman, The Non-Precedential Precedent -- Limited Publication and No-Citation Rules in the United States Courts of Appeals, 78 COLUM. L. REV. 1167, 1167 (1978).
\item \textsuperscript{159} Carrington, supra note 24, at 559.
\end{itemize}
allenged the judges to spend less time worrying about the scholarly nature of their opinions.160

Admittedly, the shorter opinion is not always easier to write, and many a wag has made the point.161 The memorandum per curiam should be the standard, with the scholarly exegesis saved for the truly deserving decision. The time and resources saved by this shift in emphasis would not be limited to the actual drafting, but would also extend to future drafting and to efforts to stay abreast of the law.

For expediency, memorandum opinions could even be dictated in open court with only a little extra preparation in those cases in which oral argument reveals no issues in doubt.162 This procedure might not save much time over the memorandum opinion. Yet, the Second Circuit has used the oral per curiam opinion in a useful way for those cases in which the court is performing only a dispute resolution function and not a law generation function. However, the Second Circuit experience is not readily transferable because oral argument is guaranteed in each case and substantial central staff resources are used to settle appeals and monitor case flow, but not used in the decisional process.163 Furthermore, this Second Circuit practice reportedly has diminished markedly, and apparently for good reason. When an oral per curiam is delivered, the other members of the panel are reluctant to suggest changes, corrections, or additions. Circulation of a written opinion allows for more give and take. At bottom, the process of deciding an appeal without an opinion suffers from the fact that no standard or rule effectively limits the practice to truly frivolous cases. The reality is that the courts of appeals are silently deciding appeals that twenty years ago would have been thought to merit a full opinion.164 That reality is at odds with the appellate ideal and the proper concept of role. This is one example where the courts of appeals have pursued efficiency at too high a price.

Whether to publish the proposed memorandum per curiam opinions and, if not, whether to allow citation to unpublished opinions are two questions

160. American judicial opinions surpass in verbiage, in length and in citation those written anywhere else in the world. . . . Occasionally each of us may render a decision, perhaps in a highly significant case, that demands exposition of the full palette of our talents, but I fear that much of our time and the time of our clerks is spent merely in seeking felicitous expression, adding citations and attempting to produce works of art. It would be worthwhile for judges to experiment with much simpler opinion models. We will succeed, however, only if we de-institutionalize the demand for scholarly opinions. A good motto for us might be: Sufficient unto the case is the decision thereof.


161. "I have made this letter longer than usual because I lack the time to make it shorter." B. PASCAL, PROVERBIAL LETTERS XVI, quoted in Hayes v. Solomon, 597 F.2d 958, 986 n.22 (5th Cir. 1979), cert. denied, 444 U.S. 1078 (1980).


163. Oberman, supra note 74, at 851-52. Some court-watchers suggest that the Second Circuit does use staff resources in the decisional process in certain categories of appeals. Two examples are habeas and prisoner petition cases. Oral argument is rare in such cases even in the Second Circuit.

164. Edwards, supra note 6, at 895.
distinct. These are not new questions, limited to the burdened courts of appeals. As long as common law courts have decided appeals, debate has persisted concerning limited publication of opinions. In times of docket growth, however, the rhetoric becomes more shrill. In perspective, the published opinion is the centerpiece in the courts of appeals' performance of role and the function of precedent. Historically, limited publication has been the rule both in England and in this country, with control of selection and content in the hands of private concerns. Today, the West Publishing Company routinely publishes all opinions provided under the publication policy in each circuit. The modern issue is whether judges should have control over the selection of opinions for publication and citation, and, if so, by what standards.

Each of the circuits has its own limited publication/no citation plan, all of which share a common purpose but vary in their particulars. Limited publication means just that: The panel decides not to publish some opinions beyond communication to the litigants. Non-citation is just as literal a component of the typical plan. Once some opinions go unreported, the next question is whether the unpublished opinion may be cited to the court or by the court. The arguments for and against the policy are telling. Proponents of a non-citation rule argue: (1) unpublished opinions are written for the litigants only and would require substantial refinement to merit wider distribution; (2) if citation were permitted, a black market in unreported opinions would develop, which would frustrate part of the reason for nonpublication; (3) access would necessarily be unequal, as for example, between institutional litigators who could maintain an opinion bank and private persons; (4) properly unpublished opinions represent mere applications of settled principles, adding nothing but volume to the precedent stream. Opponents of a non-citation plan argue that citation is necessary to the rule of stare decisis. Today's practice decidedly follows the proponents'
view that a no-citation rule is part and parcel of a limited publication plan. If the purpose of the limited publication rule is to lower the costs of producing and consuming appellate decisions, a no-citation limitation should follow. The more difficult question is whether the nonpublication approach is appropriate.

Federal developments concerning nonpublication may be summarized briefly. In 1964 the Judicial Conference of the United States formally resolved that publication would be reserved for those opinions having "general precedential value." In 1972 the Federal Judicial Center and the Judicial Conference requested each court of appeals to develop a limited publication/no-citation plan. Little has changed since the establishment of each circuit as a laboratory.

The debate over limited publication/no-citation plans centers on three assumptions: (1) full publication is not a necessary element of the appellate function; (2) the costs of full publication outweigh the benefits; and (3) judges can and will properly distinguish between the publishable and the not publishable. An opinion performs double duty, of course. As a mandate, an opinion adds substantially to the finality of the judicial resolution of the dispute between the party litigants. As a unit of precedent, an opinion makes law. The argument goes that some appellate decisions perform only the first and not the second duty when the appeal calls for the application of well-settled principles. In a very practical way, the view one takes reflects one or another philosophy of law. On one level, courts of appeals generate headnotes arranged under Key Numbers. The decision is then catalogued under the Key Number for some future invocation. The principle is the thing. On another level, actual applications of earlier established principles demonstrate those principles and describe their effective content. The application is the thing. How one answers the question, "Which is the real thing?" decides whether the appellate presumption is for or against publication; whether in other words, full publication is a necessary element. Appellate decisionmaking involves more than merely articulating and applying doctrine. Law, and appellate decisionmaking as a pure form of law, is and always will be more an art than a science. To understand, one must know how and why the Court's political power is being exercised.

In regard to the second assumption, the advocates of a limited publication/no-citation plan conclude that costs of full publication are so high that selective publication is preferable. Admittedly, the resource costs of opinion preparation are increased marginally for editing for publication, which presumably would

172. Haworth, supra note 74, at 869-70.
173. Reynolds & Richman, supra note 158, at 1186.
174. Reynolds & Richman, supra note 166, at 577-79.
175. 1964 JUDICIAL CONFERENCE OF THE UNITED STATES REPORT 11. Interestingly, the resolution went on to urge "that opinions authorized to be published be succinct." Id. See supra text accompanying notes 156-64.
176. 1972 JUDICIAL CONFERENCE OF THE UNITED STATES REPORT 33.
178. Reynolds & Richman, supra note 166, at 579.
179. Id. at 579-80.
not be done "just" for the litigants. Some pride and all concerns for future application are eliminated with a non-published, non-citable opinion. These costs are difficult to quantify, however, and seem somewhat speculative. Furthermore, the proposed memorandum opinion device — "sufficient unto the case" — would avoid these costs, if only as a matter of self-restraint.

Concerns for costs to captive readers and purchasers also gain the attention of nonpublication proponents. Library expenses increase with volume. Readership includes judges and courts who must apply precedents, scholars who must perform as critics, and advocates who must advise clients and write briefs. These concerns are not convincing because system collapse is not imminent, and because unprincipled nonpublication poses a more decided threat to the appellate ideal. The "flood of opinions" argument has been around for hundreds of years, yet private sector accommodations and specializations continue to cope.

Even if all the arguments in favor of nonpublication are accepted, the practice has grave consequences. The appellate ideal contemplates such a central role for the published opinion that a two-tracked system is a different system. In a profession that judges itself by the appearance of impropriety, limited publication appears at odds with accepted appellate tradition. Suspicions and accusations spring to mind, if not to reality. Stare decisis is twice diminished. First, the decision itself is freed from the responsibility to reason within full view. Second, an increment of precedent is rendered unusable. Nonpublication could allow arbitrary and unreasonable decisions to go unnoticed and unremedied, substituting a rule of men for a rule of law. First impressions might go unchecked. Judging in such cases might degenerate into an administrative-style case processing. One of the major means of holding article III judges accountable would be lost. The parade of possible horrors marches on and on.

Little of substance can be said of the actual experience of the courts of appeals with the nonpublication rules. Critics and champions alike have fought with speculations. The commentary has largely been negative, much of it intensely so. Professors Reynolds and Richman have attempted an empirical study. See Merrill, supra note 142, at 471.

We must not make the loads these captives bear an unbearable one or the system surely will collapse. It is on the critical appraisal of the scholar that the public must largely rely for an impersonal and knowledgeable assessment of the work of the courts. It is upon the discriminating briefing of the lawyers that we ourselves depend. We should strive to relieve these people from waste of time in reading that which really adds nothing to the substance of the law.

Id.

The resourcefulness of the specialized bar is not only equal to the task of coping with the opinion output but seems capable of circumventing the courts' reduction efforts. For example, the May 1982 issue of the Banking Law Journal carried an editorial requesting the readership to send in unreported opinions for unofficial publication in its pages. Dunne, Editor's Headnotes, 99 BANKING L.J. 387 (1982).

180. See Merrill, supra note 142, at 471.


182. Reynolds & Richman, supra note 166, at 581.

assessment of the various nonpublication plans in the courts of appeals.\textsuperscript{184} Expected benefits include swifter justice and increased productivity. The study found that appeals decided with unpublished opinions were resolved much more quickly, although Professors Reynolds and Richman found it impossible to determine how much of the time saved was attributable to the nonpublication designation and how much was the simple result of less judicial effort required for decision.\textsuperscript{185} While their study found no support for the hypothesis that limited publication enhances productivity, the researchers were careful to explain that any conclusion on productivity was impossible because of the number of variables.\textsuperscript{186}

The study sought to measure two costs of nonpublication: diminished opinion quality and suppression of precedent. The study divided all of opinion writing into three parts: reasoned opinions, decisions based on the opinion below, and decisions without discernible justification.\textsuperscript{187} At minimum the principal investigators preferred an opinion that identified the appeal and went on to give reasons for and to declare the ultimate result. Although most of the unpublished opinions did this, the authors were somewhat critical of the decision by reference to a trial court opinion. The decision-by-reference was criticized due to the lack of access by those not parties to the litigation and the appearance that the decision on appeal was merely a rubber stamp.\textsuperscript{188} These criticisms are not persuasive. Unpublished opinions are not designed to serve a constituency beyond the actual litigants, and a “reasoned opinion” that parrots the opinion below does little to dissuade the extreme cynic. The third category, decisions with no discernible justifications, marks only a difference in opinion typology between this author and Professors Reynolds and Richman. They criticized the nonpublication plans for including the previously discussed option to decide an appeal without an opinion.\textsuperscript{189} Certainly, the ad hoc use of the boilerplate opinion that recites simply “after due consideration” or “upon a review of the record and the briefs of the parties” is no better than the formal provisions that allow for a one word judgment “affirmed.”\textsuperscript{190} Those are not unpublished opinions, however, not because they are not published, but because they are not opinions.

The second cost Professors Reynolds and Richman addressed was the opinion that should have been published but was not; that is, the problem of suppressed precedent.\textsuperscript{191} Although they did not discover widespread suppression of prece-

\textsuperscript{184} See generally Reynolds & Richman, supra note 166; Reynolds & Richman, supra note 158; Reynolds & Richman, Limited Publication in the Fourth and Sixth Circuits, 1979 Duke L.J. 807.

\textsuperscript{185} See Reynolds & Richman, supra note 166, at 593-95.

\textsuperscript{186} See id. at 595-97.

\textsuperscript{187} See id. at 599-604.

\textsuperscript{188} See id.

\textsuperscript{189} See supra text accompanying notes 139-64.

\textsuperscript{190} Reynolds & Richman, supra note 166, at 603-04.

\textsuperscript{191} See id. at 606-21.
dent, the authors found opinions that they were persuaded should have been published. Examples of such holdings included novel state law questions, defective administration by an agency, inadequacies of national statutes, and district court mistakes. Additionally, they suggested that nonpublication was inappropriate, although actually rare, when judges articulate concurring or dissenting opinions or when the judgment was reversed.

On balance, Professors Reynolds and Richman concluded that the suppressed precedent is a less significant problem than the "shoddy" opinion. Their ultimate conclusion that any proposed rule must maximize the "benefits of limited publication while avoiding as many costs as possible" is the correct one. Their intermediate reasoning, however, is not fully persuasive. Although a satisfactory method for selecting which opinions to publish may not exist, the present patchwork system is unsatisfactory. Standards are necessary. Both the Advisory Council on Appellate Justice and the American Bar Association

192. Id. at 606-12.
193. See id. at 612-20.
194. See id. at 621. The authors also considered the disparate impact of nonpublication in certain categories of cases, the relationship between the nonargument calendar and nonpublication, and the role of the central staff, which taken together suggested that "the courts of appeals often behave much like courts with discretionary jurisdiction — like certiorari courts — in short." Id. at 625.
195. Id. at 626.
196. "[T]here is no satisfactory method of selecting which cases are to be published and which omitted." Jacobstein, supra note 181, at 794. See generally Walther, supra note 170.
197. At the behest of the Federal Judicial Center, a group of lawyers, law teachers, and judges joined with the National Center for State Courts to form the Council, which promulgated standards for the publication decision:
1. Standard for Publication
   An opinion of the (highest court) or of the (intermediate court) shall not be designated for publication unless:
   a. The opinion establishes a new rule or law or alters or modifies an existing rule; or
   b. The opinion involves a legal issue of continuing public interest; or
   c. The opinion criticizes existing law; or
   d. The opinion resolves an apparent conflict of authority.
   Opinions of the court shall be published only if the majority of the judges participating in the decision find that a standard for publication as set out in section (1) of this rule is satisfied. Concurring opinions shall be published only if the majority opinion is published. Dissenting opinions may be published if the dissenting judge determines that a standard for publication as set out in section (1) of this rule is satisfied. The (highest court) may order any unpublished opinion of the (intermediate court) or a concurring or dissenting opinion in that court published.
3. If the standard for publication as set out in section (1) of the rule is satisfied as to only a part of an opinion, only that part shall be published.
4. The judges who decide the case shall consider the question of whether or not to publish an opinion in the cases at the conference on the case before or at the time the writing assignment is made, and at that time, if appropriate, they shall make a tentative decision not to publish.

STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS (quoted in Walther, supra note 170, at 582 n.7).
Commission on Standards of Judicial Administration have drafted model rules. Since 1974 the courts of appeals have been left to their own devices. The time has come for rigorous evaluation and adoption of a uniform standard. The variety of present rules provides a menu, and experience under them provides a data base. An optimum uniform rule would create a presumption in favor of publication, and require that a nonpublication choice be panel unanimous. It would also list criteria for mandatory publication. The specifics of the proposal should await further study.

198. The A.B.A. Standard reads, in part:
Publication of Opinions.
(a) Public Access. Opinions of an appellate court should be a matter of public record. Parties should be provided copies of a decision and opinion when it is filed, even if general dissemination is withheld until the opinion is in printed form.
(b) Formal Publication. An opinion of an appellate court should be published in the series of printed volumes in which the opinions of the court appear only if, in the judgment of the judges participating in the decision, it is one that:
   (1) Establishes a new rule of law, alters or modifies an existing rule, or applies an established rule to a novel fact situation;
   (2) Involves a legal issue of continuing public interest;
   (3) Criticizes existing law; or
   (4) Resolves an apparent conflict of authority. A concurring or dissenting opinion should be published if its author believes it should be; if such an opinion is published the majority opinion should be published as well.
ABA COMM'N ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO APPELLATE COURTS § 3.37 (Approved Draft 1977).

199. See Note, supra note 169, at 146-48.

200. Although their proposal is not without its flaws, Professors Reynolds and Richman have developed a model rule that merits further consideration.
Rule — Opinions.
1. Minimum Standards:
Every decision will be accompanied by an opinion that sufficiently states the facts of the case, its procedural stance and history, and the relevant legal authority so that the basis for this court's disposition can be understood from the opinion and the authority cited.

Publication of Opinions:
a. Criteria for Publication: An opinion will be published if it:
   (1) establishes a new rule of law, or alters or modifies an existing rule of law, or calls attention to an existing rule of law that appears to have been generally overlooked;
   (2) applies an established rule of law to facts significantly different from those in previous applications of the rule;
   (3) explains, criticizes, or reviews the history, application, or administration of existing decisional or enacted law;
   (4) creates or resolves a conflict of authority either within the circuit or between this circuit and another;
   (5) concerns or discusses a factual or legal issue of significant public interest;
   (6) is accompanied by a concurring or dissenting opinion;
   (7) reverses the decision below, unless:
      (a) the reversal is caused by an intervening change in law or fact, or
      (b) the reversal is a remand (without further comment) to the district
D. Case Management Plans

As part of their response to caseload pressures, several courts of appeals have experimented with civil appeals management plans, acronymically known as CAMP.201 Although these plans differed in their particulars, they had common goals, albeit with different emphasis:202 (1) encouraging the resolution of appeals without court action; (2) accelerating the consideration and disposition of those appeals that go to argument; (3) clarifying the issues and improving the quality of briefs and arguments; and (4) resolving motions and procedural matters informally and expeditiously. Techniques include appeal tracking forms that allow processing to begin before filing of the record on appeal and briefs, staff tailoring and monitoring of the briefing schedule, case weighting and early assignment to panels, and, most importantly a pre-hearing conference.203

The pre-hearing conference takes place before briefing. A staff attorney administers the conference. It is attended by attorneys for both sides, who discuss the issues on appeal — freely and in confidence from the court.204 During that conference, the staff attorney explores the possibility of a nonjudicial resolution, develops possible stipulations, narrows the issues, and attempts to anticipate and resolve a variety of procedural issues by consent, such as a stay and the content of the joint appendix. Although encouragement of a nonjudicial resolution is an important emphasis, other features of the case management plans advance those appeals that do not settle.

The feasibility and effectiveness of case management plans that use a pre-hearing conference as a principal mechanism must be considered circuit-by-
Two considerations dominate the evaluation. First, in a court with a backlog of cases awaiting argument, attorney readiness need not be accelerated, although enhancement of presentation quality remains important. The prospect of long delay in those circuits may in fact increase settlement pressures, although no studies have been done. Second, geography becomes a problem for larger circuits in arranging face-to-face conferences. Distances and expenses have been overcome, however, by telephone conferencing in some circuits and staff attorneys might ride circuit.

Circuit-by-circuit evaluations suggest some inevitable consequences of case management plans. Plans characterized by a pre-hearing conference reduced the number of motions that judges had to decide, shortened the joint appendix, reduced the delay between briefing and argument, and reduced the time from notice of appeal to termination. Although briefs were not significantly shorter, there was some suggestion of their improved quality. Interestingly, the impact on the settlement rate is unclear. In some experiences the plan had a substantial effect on the settlement rates, and in others no substantial differences were discernible. The literature on the plans seems to indicate that their benefits outweigh their costs without considering the effect on settlement rates; but their real potential and ultimate justification will rest on settlement impact. That dimension remains uncertain and merits further experimentation and study. This task will be difficult, but developing a profile of the appeal with a high probability of settlement is a worthy endeavor. Scarce resources and extra efforts could then be spent more judiciously than in a plan that treated appeals as fungible.

E. Staff

As one barometer of change in the federal judicial institution, consider that over the decades of the 1960's and 1970's the number of support personnel

205. Modern internal operating procedures of courts of appeals without formal plans and conferences do include monitoring and facilitating by central court staff. See Johnson, Time Delays in the Fifth Circuit — From Docketing to Decision — Civil and Criminal Cases, 2 FIFTH CIR. REP. 345 (1985). See also Ginsburg, supra note 1, at 214.

206. A. PARTRIDGE & A. LIND, supra note 204, at 10-11.

207. Rack, supra note 202, at 923 n.7.

208. A. PARTRIDGE & A. LIND, supra note 204, at 10.

209. See generally J. Goldman, supra note 202, at 42-43 (Seventh Circuit); A. PARTRIDGE & A. LIND, supra note 204, at 10-11 (Second Circuit). CAMP procedures must be distinguished from two alternative approaches: The bygone view of treating every appeal alike and the summary calendar system already discussed. CAMP has both strengths and weaknesses. Volume remains a problem. Many cases are treated very preemptorily in a CAMP circuit under heavy docket pressure. A staff attorney handling the conference might not always review the record and carefully study the issue. Under the summary calendar approach, the judges seem to be more in control.

210. See Rack, supra note 202, at 934 ("a substantial number of settlements"). Compare J. Goldman, supra note 202, at 42-43 (Seventh Circuit — no difference) with A. PARTRIDGE & A. LIND, supra note 204, at 10-11 (Second Circuit — substantial difference).

211. "After trying for almost a year to select cases with high settlement potential, the [Sixth Circuit] program staff could discern no factors reliably predictive of settlement." Rack, supra note 202, at 926.
increased threefold. Support personnel in the offices of the clerks of court and in the judge's chambers represent the first line of defense against oppressive dockets. The actual management of an appeal involves a number of people in the clerk's office. Court reporter management schemes call for day-to-day management and supervision of an efficient court reporting service. The case manager handles all case management functions from docketing to the final issuance of the mandate. Staff attorneys conduct prescreening assessments of the appeals. Administering oral argument, filing, word processing, handling the voluminous mail, and library maintenance all demand substantial personnel resources. Circuit executives and their staff facilitate nonjudicial responsibilities of the court. In chambers, law clerks and secretaries aid the judge. The court family is large, indeed. For purposes of this discussion, administrative personnel will be distinguished from decisional personnel. While commentators have largely ignored the former group, the latter group, made up of staff attorneys and law clerks, has received a fair amount of attention because of its direct involvement in the decisionmaking process. Two related responses to the press of heavier caseloads have been to provide judges with more law clerks and to delegate judicial responsibilities to staff attorneys. During the docket crisis, both groups have assumed a greater prominence.

Much has been written about the origins and development of the law clerk from clerical assistant to an institution in itself. The federal court of appeals experience may be briefly described. Until relatively recently, each federal judge had only one law clerk whose role was "testing the judge's work" by criticizing opinion drafts and arguments, and acting as a sounding board.

212. Clark, Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century, 55 S. Cal. L. Rev. 65, 144 (1981). Judicial personnel, both article III and article I, also have increased dramatically. See infra text accompanying notes 336-89.

213. The position names change, but the responsibilities are the same, from circuit to circuit. Fifth Circuit terms will be employed here. See generally Johnson, supra note 205, at 246-50.

214. See generally Re, The Administration of Justice and the Courts, 18 Suffolk U.L. Rev. 1 (1984); Rubin, supra note 47, at 654. More attention needs to be afforded administrative efficiencies. See infra text accompanying notes 239-335.


217. For a consideration of comparable state court developments, see generally D. Meador, supra note 15, at 31-137.

Second and third law clerks were added as in-chambers assistants and central staff attorney positions were established. Today's ratio of authorized decisional personnel to judges is approximately four to one, a dramatic increase from the 1969 level of about one to one.\textsuperscript{219} An appellate judge's principal efforts take place in chambers: reading briefs, studying records, considering arguments, deciding, and writing opinions. Judging is deciding; that is the exercise of the article III power.

The worry of several commentators is that the clerk's role in the reading, studying, considering, and writing has encroached significantly on that of the judge.\textsuperscript{220} Judges have responded that the opinion writing process demands some trade-off among functions.\textsuperscript{221} They explain that the core function, the deciding, still resides with the judge, but that more and more of the opinion preparation function has been delegated to the law clerk. The workload, they contend, has forever changed the roles of clerk and judge. Judges decide the result and sketch a rationale. Law clerks prepare a draft opinion. Judges edit the draft. This has become the federal appellate paradigm.\textsuperscript{222} Appellate judges have joined the ranks of "senior partners, high government officials, and professors" who "scrupulously review and edit" the preliminary work of their junior associates.\textsuperscript{223} Supervision and delegation, however, are in inverse proportion in this new order.\textsuperscript{214} The workload has dramatically changed the relationship between judge and law clerk.

A return to the days of one law clerk, having a negligible role, is not feasible. By a judge's own estimate, a judge single-handedly researching and writing each opinion could produce a dozen or so opinions a year, and the courts of appeals would be overrun.\textsuperscript{225} The increase in number of clerks should, however, be ceased. Although the limits of delegation and supervision may not have been surpassed, they have certainly been reached.\textsuperscript{226} Multiplying judicial clerkships any more would jeopardize the tradition that federal judges are respectful because they do their own work.\textsuperscript{227}

Even proponents admit that increasing the number of law clerks would result in diminishing marginal returns. The judge who remains a judge becomes something of a bottleneck as appeals move through the chambers only as fast as

\begin{itemize}
\item \textsuperscript{219} See Posner, supra note 37, at 767.
\item \textsuperscript{221} See Ginsburg, supra note 1, at 217-18; Posner, supra note 37, at 769; Wald, supra note 29, at 778.
\item \textsuperscript{222} See Posner, supra note 37, at 769; Wald, supra note 29, at 778.
\item \textsuperscript{223} See Wald, supra note 29, at 778.
\item \textsuperscript{224} Supervising and coordinating a tripled staff of assistants place additional demands on the judicial resource. Posner, supra note 37, at 767-68.
\item \textsuperscript{225} See Wald, supra note 29, at 777. Even outside Judge Wald's District of Columbia Circuit with its complex cases, the productivity would not be too much higher.
\item \textsuperscript{226} "In any event, it seems to me undesirable that we move beyond three clerks" McGree, supra note 43, at 787. See also Kester, supra note 216, at 62.
\item \textsuperscript{227} C. WYZANSKI, WHEREAS: A JUDGE'S PREMISES 61 (1965).
\end{itemize}
the judge can review, evaluate, and act on recommendation and drafts. Staff attorneys, as an alternative, work for the court as a whole rather than for an individual judge. There is something of a paradox here. Unless the staff attorneys are doing work that otherwise would be done by judges, they do not increase the court’s productivity. Yet, if they do perform some of the judge’s duties, the judicial function is usurped. The philosophical resolution of this paradox assigns to staff attorneys tasks that have been, but need not be, performed by judges. Such a resolution, however, is not easily accomplished. The various courts of appeals have experimented with the job description of the staff attorney. Many of their results represent uncomfortable choices made in the face of the workload. One judge explains that it is the staff attorney who

acquires a case at the moment the notice of appeal is filed, shepherds it through each procedural step until the closing brief is in, prepares legal memoranda, drafts a proposed opinion or other disposition, recommends grant or denial of oral argument, and presents the complete package to the judges to be graded pass/fail.

The key assumption here is that these tasks need not be performed by judges. The motions process, for example, no longer simply sends along the matter for judicial consideration and action. Before the motion reaches a judge, a staff attorney reviews it and prepares a memorandum explaining the motion and recommending a disposition with an attached proposed order. Admittedly, these staff attorney evaluations save a substantial amount of judge time. Deciding whether a case deserves oral argument and how a case should be decided, however, lie at the core of the judicial function. A major concern is that the widespread dependence on staff attorneys has created a bureaucratic judicial process.

The premise of the staff attorney position is that one staff attorney does the work of three law clerks, one in each panel member’s chambers. Critics of the expansion of central staff attorney responsibility echo the concerns expressed in regard to the expansion of law clerk responsibility. Both types of legal assistants encroach on the judging responsibility, but the situation is worse with the staff attorney because the supervision present with the elbow law clerk is

231. For a circuit by circuit review, see generally Ubell, supra note 229.
234. See McCree, supra note 43, at 788.
235. See Ubell, supra note 229, at 263.
lacking. Proponents, on the other hand, maintain that the harsh reality of caseload demand prevents judges from doing everything they once did. Staff attorneys perform tasks low on the judicial scale, thus allowing judges to perform the important appellate tasks that oblige an article III decisionmaker. Conceding the departure from appellate traditions, proponents assert that the wise use of central staff attorneys does more good than harm.

The proponents of an expanded use of staff attorneys and law clerks, however, rest their arguments on an unstable foundation. With three law clerks and one staff attorney for each appeals judge, the judges are at the limit of their ability to supervise subordinate decisional personnel. Thus, adding more law clerks or more staff attorneys is no longer an acceptable method of coping with the caseload.

F. Miscellaneous Reform Proposals

Intramural reforms take many shapes. Possible changes in how the courts of appeals perform their role and function are not limited to those described in the preceding sections. Other reforms, presently under experimentation, and others still on the drawing board, deserve brief mention. These proposals represent mostly tinkering with the coping mechanisms already in place. Admittedly, no one can oppose better court management until costs must be paid in terms of money, judicial resources, and appellate ideals. Both reforms achieved and reforms proposed invoke such familiar themes as working harder, delegating more authority, streamlining procedures, and rationing resources along priorities.

1. Better Legislation

The first consideration is for Congress. Judge Edwards has complained that the courts of appeals are choking on "ambiguous and internally inconsistent statutes." Incoherence, vagueness, and conflicting purposes all burden judicial resources and decisional division. More careful drafting and a clear statement of purpose are required. Vague legislation is not the sole product of ineptness; characteristically, the legislative process is full of compromise and agreements achieved through escapes to higher levels of abstraction. Congress is unlikely to change even though the vagaries of the legislative process frequently are more

237. See Gammon, supra note 228, at 446; Hellman, supra note 31, at 1003.
238. See P. CARRINGTON, supra note 14, at 48 (two law clerks and one central staff attorney is the limit).
239. J. HOWARD, supra note 31, at 274.
240. Id. For an outline of the present national administrative structure and contemporary problems with some suggestions for centralized reform, see generally Meador, The Federal Judiciary and Its Future Administration, 65 Va. L. Rev. 1031 (1979).
242. Id. at 425-26.
frustrating to the courts. Congress can do more, however, to remedy outmoded judicial statutes, answer unanticipated questions, and reconcile conflicting statutory schemes.\textsuperscript{243} Legislative responsiveness is preferable to legislative inaction or judicial legislating.\textsuperscript{244}

Such obligations are generally within the legitimate expectations of Congress. Appellate federal jurisdiction is a scarce resource that must be rationed.\textsuperscript{245} Congress must be forced to rank the competing demands on the appellate resources, recognizing that the docket demand outstrips decisional supply and that deficits in jurisdiction debase the appellate remedy. Congress must articulate a hierarchy of appeals. Thus far it has only identified a large number of preferred categories of appeals without any internal consistency.\textsuperscript{246} Once this uniquely political process equalizes supply and demand and assigns supply priorities, Congress must not practice deficit jurisdiction. For the solution to be long lasting, Congress must monitor and maintain the equilibrium. Just as important, Congress must consider jurisdictional impact statements and expressly reorder the hierarchy with each new statute that has an impact on the federal appellate docket. This idea is not new. Chief Justice Burger first urged such impact statements in 1970.\textsuperscript{247} Such an approach is needed today more than ever.\textsuperscript{248}

2. Technology

The appellate judiciary must do its part in the administrative realm. Few proposals go beyond the reforms in place; administrative reforms have been all but exhausted. A few recently proposed innovations, however, merit brief mention. Sometimes taken for granted and too often overlooked, technology and its application should be of strong interest to those concerned with appellate court reform. State of the art hardware is a minimum requirement. That means at the least, word processing equipment and related electronic document transfer capability.\textsuperscript{249} Several courts of appeals are presently experimenting with direct electronic transmission of opinions between chambers and to the publisher.\textsuperscript{250} But the need goes beyond hardware. Further research and development is required in the area of computer-based case and court management information

\begin{itemize}
\item \textsuperscript{243} Id. at 427.
\item \textsuperscript{244} Id. at 427-29.
\item \textsuperscript{245} Hill & Baker, supra note 68, at 85.
\item \textsuperscript{246} Id. at 82-85 n.333. \textit{See generally The Impact of Civil Expediting Provisions on the United States Courts of Appeals, 37 Rec. A.B. Cty N.Y. 19 (1982) (a discussion of appellate priority and proposals for reform).}
\item \textsuperscript{248} See Meyer, \textit{Justice, Bureaucracy, Structure, and Simplification}, 42 Md. L. Rev. 659, 671-72 (1983); Rubin, supra note 47, at 658.
\item \textsuperscript{249} See Wallace, \textit{Our Judicial System Needs Help: A Few Inside Thoughts}, 12 U.S.F. L. Rev. 3, 13-14 (1977). Today Judge Wallace’s plea for help has been answered. Word processing equipment is in place in all the courts of appeals. Still the need for updating and improving remains.

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systems. Possible applications of technology include video conferences and even video arguments with judges and attorneys simultaneously appearing before camera. Such innovations should be encouraged and subsidized.

3. Administrative Units

Congress has recognized the peculiar administrative problems of the so-called super-circuits, the large courts of appeals. In 1978, section 6 of the Omnibus Judgeship Act authorized courts of appeals with more than fifteen active judges to reorganize themselves internally into administrative units and to reorder its en banc procedures by court rule. Only the former Fifth Circuit (before creation of the new Fifth and Eleventh Circuits) and the Ninth Circuit, however, qualified and implemented administrative unit plans. These plans served to decentralize the clerks' offices but accomplished little else. In any event, the provision is of limited applicability because only the new Fifth, the Sixth, and the Ninth Circuits have the qualifying number of judges.

4. Differentiated Case Management

The principle of differentiated case management has been the most common response to the docket growth of the last twenty-five years. Most significant for the appellate ideal has been a trend away from managing and processing each case uniformly, and toward adoption of differentiated case management. While at first an unconscious byproduct of coping with docket growth, this trend has become the guiding principle of the federal appellate process. The larger circuits have led the way. A hallmark of this case management approach is monitoring each stage of an appeal: notice of appeal, briefing, submission, and decision. The large circuits have relied on case screening to assign cases to the argument or nonargument calendar. Such plans are extolled and their extension recommended.

Another proposal worthy of serious consideration within a case management scheme is a sua sponte dismissal process for lack of jurisdiction. Private and judicial resources may be wasted by the failure to consider jurisdiction at the threshold.258 At times litigants and judges lose sight of the federal judicial role as limited courts of a limited sovereign.259 An appeal brought outside the court of appeals’ jurisdiction is beyond its power to decide, and the court is obliged to dismiss, even sua sponte.260 Although no system can identify every jurisdictional defect, some courts have experimented successfully with formal jurisdiction screening.261 Screening might be accomplished as early as the notice of appeal stage or in the principal brief.262 Such a system could save appreciable appellate resources with a minimal investment.

5. Inventorying Cases

Proposals to screen cases for argument or nonargument calendars show signs of developing into a broader approach of differentiating appeals, sometimes called “inventorying.” More complete control over case flow requires more complete monitoring as well as early classification. Inventorying provides more useful information at each stage of the appellate process.

Consider briefly the Ninth Circuit’s system.263 A staff attorney obtains a full set of briefs and checks first for jurisdiction. Next, an inventory card is prepared with essential information, and the issues on appeal are identified and classified. Along with a brief summary, the staff attorney suggests a weight; that is, an estimate of the relative amount of judicial time required for resolution. The weight is the used to equalize panel workloads.

Issue classification encourages the assignment of similar appeals to a single panel to avoid duplication and inconsistent resolution. Such clustering gives the judges a broader perspective on the issues and contributes to a more comprehensive series of decisions. Recurring issues are identified in several manifestations to allow for greater guidance to the trial courts and the bar. Inventorying assesses subject matter and difficulty to provide a basis for differentiation.264 Similar cases can be dealt with together. Difficult cases may be culled for complete review. A well-developed coding system even permits computerization.265 Computerization allows a judge or law clerk to ascertain essential information from a glance at a printout. Computer sorting and retrieval facilitates case differentiation for appropriate procedures and identifies trial and appellate

262. The Fifth Circuit requires that “[e]ach principal brief shall include a concise statement of the statutory or other basis of the jurisdiction of this Court, containing citations of authority when necessary.” 5TH Cir. R. 28.2.5.
263. See generally Hellman, supra note 31, at 957-64.
264. Meador, supra note 74, at 259-81.
265. Deane & Tehan, supra note 254, at 10.
court patterns. For example, cases ripe for preargument conference and settlement might be identified.

Another system of inventorying is the District of Columbia's approach to the identified "big cases." A "big case" typically involves an important administrative issue or a large and complicated record. Preargument conferences are used to clarify issues and consolidate the record. Oral arguments are arranged by subject area rather than by party. Post-argument memoranda and conferences might aid opinion preparation on highly technical questions. Thus, inventorying identifies the cases calling for peculiar procedural adjustments.

6. Fast Track Appeals

Inventorying may also be used to identify appeals appropriate for a "fast track" process and for monitoring their disposition. Expedited appeals are nothing new. A consistent goal has been to reduce the docket by reducing the time in the briefing, argument, and decision sequence. Some courts have experimented with an interesting variation. When the parties voluntarily elect the fast track after briefing, the court advances the case on its docket. The court may then allow oral argument, and announce a decision without opinion. Speed is the obvious advantage of this procedure. The attorneys are allowed full participation. Just as obvious, the chief disadvantage is the lost opinion, a real concern under the appellate ideal. But notice that here the parties, rather than the court, make the choice. Admittedly, this election undercuts some of the earlier criticisms.

7. Greater Orality

One recent proposal reevaluates the deemphasis of oral argument in federal appeals. Professor Meador has called for greater orality. In his proposal, written filings would be kept to a minimum and oral argument would have no time limit. The success of this approach would depend upon counsels' pres-
entation of argument and authority, the judges' questions, and the judges' ability to confer with each other during and after argument. Similar to the English tradition, this approach would combine oral argument and court conference in one proceeding. Inventorying would be necessary, either to identify whole categories of cases or to screen cases for assignment to the oral track.

Several experiments suggest the soundness of Professor Meador's proposal. It could not become the exclusive model, however. Orality proves inefficient in many situations: (1) when the case is complex; (2) when the issues are numerous and sophisticated; (3) when the trial transcript is delayed; (4) when the backlog would delay argument long after trial; (5) when the court is not convenient to the bar; and (6) when the judges are resistant. Greater orality sounds good, and it lends itself to routine cases that involve common legal principles. Difficult issues, however, require substantial advance work by judges. Written briefs promote efficient resolution of these issues. Furthermore, the variety of legal issues confronting the courts of appeals makes it difficult to attain the mastery required by complete orality. Nevertheless, orality could provide an efficient option within an inventory system for the truly commonplace appeals.

8. Maintaining Judicial Productivity

Proposals for reform within the existing appellate structure are not limited to non-decisional, administrative matters. Many judges and commentators have suggested ways to improve the judging art. These suggestions have peculiar application to the courts of appeals. In short, they ask that judges do more and do better.

If the appellate ideal is to be realized, judges must have time for study, deliberation and collegiality. Oral argument panel participations require preparation. The courts of appeals now appear at their limit of effective operation, averaging one week of oral arguments per month. Of course, memorandum opinions would increase productivity by allowing more nonargument calendar cases to be decided.

Deadlines would also force judges to do more. The Supreme Court follows a term-end deadline for all decisions in cases argued each term. Lawyers must live with briefing deadlines. Similar restrictions would be appropriate for appellate judges. The District of Columbia Circuit, for example, has imposed internal procedures that (1) bar judges from hearing cases in a new term if they have not circulated draft opinions in more than three cases argued at least

273. Id. at 749.
274. Besides the English and early American experience, simulations in Arizona, Colorado, and California have been well-received. Id. at 738-47.
275. Carrington, supra note 24, at 558; Wright, supra note 74, at 962.
276. See supra text accompanying notes 137-200.
six months previously, and (2) require judges to respond to a circulated draft within seven days, and authorize the writing judge to release the opinion after thirty days pass without dissent. Such measures merit study and, perhaps, more widespread application.

9. Two-Judge Panels

Another possible way to increase productivity without creating additional judgeships involves rethinking the three-judge panel. A three-judge panel has been the federal tradition and the American norm for an intermediate court sitting in panels. On occasion, however, one member has been unable to continue and a quorum of two has decided the appeal usually with no untoward result. This exception could be made the rule. In the run of federal appeals, two judges would be sufficient, if they agreed, and a third could be brought in only when the two could not agree. In fact, the routine nonargument case generally proceeds in this manner, as an initiating judge drafts a proposed opinion and solicits a second vote.

This proposal, however, contains some distinct disadvantages. One fewer perspective might reduce the quality of decision. It might also increase the influence of law clerks and staff attorneys as decisionmaking becomes more in-chambers than between chambers. The entire decisionmaking process would be changed, perhaps in unknown ways, by moving from a triad to a dyad. The dyad necessarily would be less representative of the whole court. The frequency of division is not predictable. Arrayed against these concerns is the savings of one-third of the judgepower now expended. Inventorying also might select proper cases for this truncated panel.

10. Improving Judicial Decisionmaking

Several related and modest proposals suggest ways the courts of appeals could perform better. These proposals are not meant to degrade the quality of the courts' work. However, the federal legal system can be made more "intelligible." No one could oppose this reform. The trick is how to accomplish

278. Wald, supra note 29, at 785. See also Ginsburg, supra note 1, at 215.
279. Utilizing senior judges, visiting judges, and district judges as a third panel member also would avoid the creation of additional court of appeals judgeships. See infra text accompanying notes 336-89. Almost all that can be done in this regard, however, has already been done. See generally Carrington, supra note 24, at 563-66.
283. See generally Carrington, supra note 24, at 561-63.
284. "[N]o one will understand me to be speaking with disrespect. . .[for] one may criticize even what one reveres." Holmes, The Path of the Law, 10 HARV. L. REV. 457, 473 (1897).
it. As a beginning point, judges must recognize that they administer the law in partnership with the bar. Indeed, on a day-to-day basis the principal administrators of the law are the lawyers at work in their offices.286

This idea of partnership between bench and bar has a significant ramification for the attorney. First, the bar must shoulder some of the blame for what has been called the "Let's Everybody Litigate" mentality.287 That attitude contributes to clogged dockets.288 Second, once on appeal, attorneys can no longer brief and argue cases as though the traditional process has remained intact.289 Modern appellate procedures barely resemble those of a less litigious era. Reducing expectations and demands through limits on briefing and arguing would be beneficial. Indeed, the resourceful advocate takes advantage of the modernized procedure. Clearer, shorter, more definitive opinions make the work of both judges and lawyers more effective.

Judges must do their part to make the law more understandable, more predictable and hence, more administrable.290 This goal has an important by-product. The more certain the law, the more predictable the outcome, and appeal is less likely. This is important because the most effective way to reduce the appellate workload is to reduce the number of appeals filed.291 Part of this certainty arises from principled decisionmaking. Cases must be decided on the basis of general, articulated principles of common application.

In the majority of decisions, courts can simply identify and apply the principle in the common law tradition. But the role of the judge is not so limited, as Judge Edwards, Circuit Judge for the District of Columbia Circuit, has explained.292 He has described the importance of the judge’s role in a few contexts of what he calls "wide-angled adjudication."293 When an appeal presents a specific type of recurring problem, disposes of an enormously important problem, or presents an opportunity for clarification of existing law with the anticipation of future litigation, then Judge Edwards argues for a broader decisional sense.294 Wide-angled decisionmaking requires a broader analysis and prediction to better guide attorneys and future courts. On such occasions, the court must provide a clear, precise, and fully-reasoned decision.295 At first this position seems at odds with the earlier exhortation to brevity and clarity. But in the long run, the law is better served by selective and discriminating use of wide-angled adjudication. The key is discrimination in the use of the approach.

286. Id.
289. Meador, supra note 74, at 293.
292. See Edwards, supra note 3, at 415.
293. Id.
294. See id. at 413-14.
295. Id. at 419.
Such discrimination leads to a sensitive subject, without mention of which no federal jurisdiction article would be complete: judicial restraint. Judicial restraint in the present context means the court of appeals should abide by the appellate ideal vis-a-vis the district court. As explained before, the federal court system must remain integrated, with decisionmaking power concentrated at the lowest level.\footnote{296 Statutes, precedents, and rules of court define the appellate role to consider only those questions within its scope of authority. The courts of appeals must discontinue the trend of drawing power to themselves and away from the trial courts.}{298}

11. Advisors

While the foregoing proposals are largely aspirational and noncontroversial, one more concrete suggestion for reform has recently resurfaced amidst mild disagreement. The idea is to provide judges access to expert advisors. The idea is not new; thirty years ago Judge Wyzanski appointed an economist as his law clerk during a complex antitrust trial.\footnote{299 In its preliminary report, the Hruska Commission\footnote{300 suggested that a pool of scientific advisors be created to function analogously to law clerks in appeals calling for high level sophistication in science and technology.\footnote{301 The preliminary suggestion was withdrawn, due to critical reaction primarily concerned with the possibility that information and arguments might reach the decisionmaker without knowledge of the parties and without being tested by the adversary process.\footnote{302 More recently, an Eighth Circuit panel hired a university professor as a contract consultant to prepare reports and memoranda to assist the court in understanding the record in a difficult Investment Companies Act case.\footnote{303 The panel allowed the parties to respond to the consultant’s reports and the parties bore no expenses from the experiment.\footnote{304 Because the reports incorporated materials dehors the record, the Supreme Court criticized the practice.\footnote{305}}}}}} In its preliminary report, the Hruska Commission\footnote{300 suggested that a pool of scientific advisors be created to function analogously to law clerks in appeals calling for high level sophistication in science and technology.\footnote{301 The preliminary suggestion was withdrawn, due to critical reaction primarily concerned with the possibility that information and arguments might reach the decisionmaker without knowledge of the parties and without being tested by the adversary process.\footnote{302 More recently, an Eighth Circuit panel hired a university professor as a contract consultant to prepare reports and memoranda to assist the court in understanding the record in a difficult Investment Companies Act case.\footnote{303 The panel allowed the parties to respond to the consultant’s reports and the parties bore no expenses from the experiment.\footnote{304 Because the reports incorporated materials dehors the record, the Supreme Court criticized the practice.\footnote{305}}}} suggested that a pool of scientific advisors be created to function analogously to law clerks in appeals calling for high level sophistication in science and technology.\footnote{301 The preliminary suggestion was withdrawn, due to critical reaction primarily concerned with the possibility that information and arguments might reach the decisionmaker without knowledge of the parties and without being tested by the adversary process.\footnote{302 More recently, an Eighth Circuit panel hired a university professor as a contract consultant to prepare reports and memoranda to assist the court in understanding the record in a difficult Investment Companies Act case.\footnote{303 The panel allowed the parties to respond to the consultant’s reports and the parties bore no expenses from the experiment.\footnote{304 Because the reports incorporated materials dehors the record, the Supreme Court criticized the practice.\footnote{305}}}} The preliminary suggestion was withdrawn, due to critical reaction primarily concerned with the possibility that information and arguments might reach the decisionmaker without knowledge of the parties and without being tested by the adversary process.\footnote{302} More recently, an Eighth Circuit panel hired a university professor as a contract consultant to prepare reports and memoranda to assist the court in understanding the record in a difficult Investment Companies Act case.\footnote{303 The panel allowed the parties to respond to the consultant’s reports and the parties bore no expenses from the experiment.\footnote{304 Because the reports incorporated materials dehors the record, the Supreme Court criticized the practice.\footnote{305}}}

\footnote{296 Hill & Baker, supra note 68, at 81.}
\footnote{297 Carrington, supra note 24, at 562.}
\footnote{298 Id. See generally Wright, The Doubtful Omniscience of Appellate Courts, 41 MINN. L. REV. 751 (1957). But see Goldbold, Fact Finding by Appellate Courts — An Available and Appropriate Power, 12 CUM. L. REV. 365 (1982) (appellate fact finding is proper and does not injure the judicial system).}
\footnote{300 See supra text accompanying notes 93-100.}
\footnote{301 Comm'n on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change, A Preliminary Report 83 (1975) (quoted in Hellman, supra note 31, at 983).}
\footnote{302 The sequence of events is chronicled in T. Marvell, supra note 15, at 353 n.17, Hellman, supra note 31, at 981-82.}
\footnote{303 Collins v. SEC, 532 F.2d 584, 605 n.40 (8th Cir. 1976).}
\footnote{304 Id.}
\footnote{305 "We are not cited to any statute, rule, or decision authorizing the procedure employed by the Court of Appeals." E.I. DuPont de Nemours & Co. v. Collins, 432 U.S. 46, 57 (1977) (citations omitted). But cf. Roe v. Wade, 410 U.S. 113 (1973) (the Supreme Court, using a similar approach, did not allow response to additional material); Meyer, supra note 248, 679-80.}
The appellate ideal seemingly will not countenance anyone but the judges roaming beyond the record. Brandeis briefs, solicited supplemental briefs, and amicus curiae appearances, however, are all part of the appellate tradition and serve the same purpose. Perhaps, the Court has implied that these are sufficient, and properly so. Generally, expert witnesses, like all witnesses, should be limited to the trial courtroom.\textsuperscript{306} Court-appointed experts at trial are subject to careful restrictions providing for notice and adversary evaluation.\textsuperscript{307} If an appellate judge cannot comprehend a factual record so carefully constructed, the solution may be to assign the controversy outside the adversary process altogether. Additionally, no justification exists for referring legal questions. Judges are the experts on the law. In sum, article III decisionmaking requires an article III decisionmaker.\textsuperscript{308}

12. Frivolous Appeals

One last proposal for intramural reform merits special emphasis. It may represent the most significant reform in the category, yet has gone virtually unused until recently. While their jurisdiction is for Congress alone to change, the courts of appeals show signs of ending the tradition of unimpeded appellate access by imposing sanctions in frivolous appeals.\textsuperscript{309}

The prevailing perception of the docket crisis is that a large number of appeals are frivolous or hopeless, and simply drain judicial resources for naught.\textsuperscript{310} In criminal cases, both paying and indigent defendants have profound incentives to appeal, and indigent appellants have no costs or disincentives at all.\textsuperscript{311} Sanctions for frivolous appeals are therefore best considered in civil cases. Courts impose sanctions for compensation and deterrence: compensation to the opposing party for the time and expense of the appeal; deterrence to those who would take the wasteful appeal, thereby delaying consideration of valid appeals.\textsuperscript{312}

Identifying the truly frivolous appeal is essential yet somewhat metaphysical.\textsuperscript{313} The determination necessarily involves some measure of the appellate

\textsuperscript{306} FED. R. EVID. 702, 703.
\textsuperscript{307} Id. 706 (provides for a specific charge, notice to the parties, discovery, party access and cross-examination, and guarantees the parties their own experts).
\textsuperscript{308} As obvious as this might seem, some commentators take seriously the suggestion that difficult legal issues be referred to outstanding law professors for study and recommendations. See Nelson, supra note 51, at 46. \textit{But see} Ginsburg, supra note 1, at 208.
\textsuperscript{309} The recent trend has not escaped the notice of commentators. \textit{See}, e.g., Cochran, \textit{Trouble on the Horizon: The Caseload Problem and the "Frivolous Appeal"}, 2 FIFTH CIR. REP. 249 (1985); Ginsburg, supra note 1, at 221-22; Martineau, supra note 45; Oberman, supra note 74; Note, \textit{Disincentives to Frivolous Appeals: An Evaluation of an ABA Task Force Proposal}, 64 VA. L. REV. 605 (1978).
\textsuperscript{311} Id. at 374. Professor Davies found that criminal appeals consistently lose to civil appeals in the competition for appellate court resources. Id. at 373.
\textsuperscript{312} Martineau, supra note 45, at 847-48. \textit{See also} Oberman, supra note 74, at 844.
\textsuperscript{313} "Frivolity, like obscenity, is often difficult to define." WSM, Inc. v. Tennessee Sales Co., 709 F.2d 1084, 1088 (6th Cir. 1983).
court's perspective, expectations and receptivity to the issue raised.\textsuperscript{314} Various factors of hopelessness, jurisdictional and substantive, inform the determination.\textsuperscript{315} Appellate conduct which is dilatory or misleading to an adversary or to the court should also play a prominent role.\textsuperscript{316} Some courts have vacillated between subjective and objective standards of frivolity, between an actual bad faith motivation and a reasonably prudent attorney standard.\textsuperscript{317} Other courts have framed the choice between a negligence standard and an intent standard.\textsuperscript{318} Still other courts have been preoccupied only with how the appeal is conducted.\textsuperscript{319} Although the courts have been less than straightforward, the key to understanding the various frivolity standards is determining whether the merit of the appeal or the motive of the appellant should control.\textsuperscript{320} Whatever the standard, sanctions may be imposed for frivolous appeals under statute,\textsuperscript{321} rule,\textsuperscript{322} and the courts' inherent power.\textsuperscript{323}

Monetary sanctions include double costs,\textsuperscript{324} damages, attorneys fees, and fines.\textsuperscript{325} The court may assess these sanctions against the attorney or the appellant. Historically, courts have been reluctant to impose such sanctions. Whether the recent renaissance of monetary sanctions is more than episodic, and whether it will serve as an effective deterrent, is not yet known.\textsuperscript{326} At the very least,

\begin{itemize}
\item\textsuperscript{314} Davies, \textit{supra} note 310, at 375-76.
\item\textsuperscript{315} Martineau, \textit{supra} note 45, at 850-51.
\item\textsuperscript{316} Id.
\item\textsuperscript{318} See Comment, \textit{Awards of Attorneys' Fees Against Attorneys}: Roadway Express, Inc. v. Piper, 60 B.U.L. Rev. 950, 962-68 (1980).
\item\textsuperscript{319} See Martineau, \textit{supra} note 45, at 856.
\item\textsuperscript{320} Id. at 857. See \textit{generally} Oberman, \textit{supra} note 74.
\item\textsuperscript{321} 28 U.S.C. § 1912 (1982) (courts of appeals have discretion to award the prevailing party "just damages for his delay, and single or double costs"). See Martineau, \textit{supra} note 45, at 857-58. 28 U.S.C. § 1927 (1982) (provides, in part, that an attorney "who so multiplies the proceedings in any case unreasonably and vexatiously" may be ordered "to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct"). See also Prossnitz, \textit{Fines Against the Trial Lawyer}, \textit{Litigation}, Fall 1983, at 36.
\item\textsuperscript{322} \textit{Fed. R. App. P.} 38 (authorizes an award of just damages and single or double costs to the appellee in frivolous appeals).
\item\textsuperscript{323} See, \textit{e.g.}, \textit{Roadway Express, Inc. v. Piper}, 447 U.S. 752, 764 (1980). Some courts of appeals have a local rule on the subject passed under the general authorization of \textit{Fed. R. App. P. 47. See 5th Cir. R. 42; 11th Cir. R. 18. Additionally, Fed. R. App. P. 46 contemplates sanctions in the courts of appeals' disciplinary authority over attorneys.
\item\textsuperscript{324} Single costs or interest payment are authorized in any appeal under \textit{Fed. R. App. P. 37, 39}.
\item\textsuperscript{325} \textit{See generally} Martineau, \textit{supra} note 45, at 865-69.
\item\textsuperscript{326} See, \textit{e.g.}, \textit{Tatum v. Regents of Nebraska-Lincoln}, 103 S. Ct. 3084 (1983) (the Supreme Court may have delivered an important signal to the courts of appeals when a five-Justice majority entered a one-sentence order assessing five hundred dollars in damages to a pro se petitioner under \textit{Sup. Ct. R. 49.2}); \textit{United States v. Atkinson}, 748 F.2d 659, 602 (Fed. Cir. 1984) (where court
\end{itemize}
the present amorphous sources of authority should be consolidated and integrated into a concise framework for analyzing sanction issues. The principal nonmonetary sanction, of course, is dismissal of the appeal. A truly frivolous appeal necessarily would be unsuccessful and, thus, dismissal is not truly a sanction. The result is the same as if the court heard the appeal and affirmed. Dismissal, then, should be more widely used, wholly apart from monetary sanctions.

The best analogy for the dismissal of frivolous appeals in the court of appeals is the Supreme Court's mandatory appellate jurisdiction. Not every case which satisfies the Court's appellate jurisdiction statute receives plenary consideration. Instead, the appeal must initially raise a "substantial" federal question as that nonstatutory requirement has been developed and evolved in Court decisions. However, a proposal for change at the intermediate court need not be the equivalent of a certiorari jurisdiction. Certiorari jurisdiction is a matter of discretion with a presumption against exercise. A suggestion for more vigorous dismissal of frivolous appeals would be based on overcoming a presumption of jurisdiction on the appeal as of right. Properly implemented, this would be more than a half-empty/half-full distinction. The key would be to articulate a standard for dismissal consistent with the appellate ideal. This articulation does not seem impossible. The real problem is that the proposal resembles the disposition without opinion criticized earlier. Articulating a standard that avoids those same dangers to the appellate ideal may be impossible. However, some attempt should be made.

G. A Postscript

Looking back on federal appellate reforms, both accomplished and proposed, leaves two impressions. First, a willingness to experiment is important for temporary expediency and for long term improvement. Learned Hand was not describing this generation of circuit judges when he stated that federal judges were "curiously timid about innovations." Contemporary courts of appeals

ordered party filing frivolous appeal to pay the government twice the costs the government incurred in defending the appeal); Reid v. United States, 715 F.2d 1146, 1155 (7th cir. 1983) (where the court deemed an assessment of double costs for frivolous appeal appropriate). See generally Carrington, supra note 24, at 569-70; Lumbard, supra note 162, at 38.

327. Martineau, supra note 45, at 878-85.
328. Id. at 864.
331. See infra text accompanying notes 444-57.
332. Others have tried, with mixed success. See Martineau, supra note 45, at 878-85; Oberman, supra note 74, at 850; Note, supra note 309, at 611-24.
333. See supra text accompanying notes 137-200.
have performed remarkably in the face of docket threat. Second, intramural reforms have been virtually exhausted in the effort to cope with the caseload. This pragmatic approach, however, has steered the federal judiciary farther and farther away from the deliberative, judicial model in the appellate ideal and toward a bureaucratic model of case processing. Further intramural reforms promise further slippage. In short, Professor Wright's prescient warning to be wary of time-saving reforms that may have unanticipated substantive consequences has gone unheeded.

V. EXTRAMURAL REFORMS

Significant departures from the appellate ideal and federal traditions have already occurred. The increase in the caseload has placed a premium on case management techniques. The courts of appeals have avoided a docket gridlock by implementing intramural reforms. New internal operating procedures, screening and inventorying, the nonargument calendar, dispositions without opinion, larger numbers of staff attorneys and law clerks, and administrators with increased responsibilities, have all helped the judges cope. Reforms in place have contributed nearly all they can. Remaining intramural proposals, with few exceptions, do not promise to make much more of a difference. Yet, the docket siege continues. Real progress has meant that things are getting worse at a slower pace.

The remaining types of reform are those termed "extramural" or "structural." Although the distinction between intramural and extramural reforms may seem a bit metaphysical and subjective, the line may be defended in terms of separated powers. Intramural reforms are all court-created mechanisms. Extramural reforms require congressional action. In terms of the appellate ideal, intramural reforms merely change how the courts perform their traditional role. Extramural reforms consciously and directly change the role itself. While intramural reforms cumulatively redefine the appellate ideal indirectly, extramural reforms do so individually and directly. That difference is more than an order of magnitude. Hence, extramural reforms should be viewed as a more serious threat to the federal appellate tradition. Three extramural reforms have already been accomplished: (1) adding judges; (2) creating specialized courts; and (3) circuit splitting. These reforms will be considered separately. In addition, the discussion will catalogue several structural reforms that are still on the drawing board.

A. Adding Judges

If demand for appellate judgepower is not decreased by, for example, requiring only two judges per panel, one other choice is to increase supply. This can be done without creating new judgeships, by mining existing personnel

336. See supra text accompanying notes 279-82.
resources represented by senior judges, visiting judges, and district judges. Senior judges are those who have retired from regular active service but remain eligible to sit on a voluntary basis.\textsuperscript{337} Because they are replaced by active judges, their services are something of a bonus.\textsuperscript{338} Senior judges are relied on extensively now, however, and do not represent a likely source of additional judgepower.\textsuperscript{339} Visiting judges from other circuits do not increase the overall judge supply but they have been an important means for matching supply with demand, especially in the larger, more threatened circuits.\textsuperscript{340} This practice serves to diffuse congestion, but it is merely a short term adjustment.\textsuperscript{341} Finally, federal district court judges may sit on panels by special designation.\textsuperscript{342} Again, this device has been used mostly by the large circuits facing the most severe docket growth.\textsuperscript{343} Of the three, the latter represents the only long term supply of extra appellate judgepower. More study and planning would maximize this potential.

A dramatic growth in federal judgeships has occurred at the district court level. During the 1960's and 1970's their ranks increased more than 100 percent in absolute numbers.\textsuperscript{344} Additionally, the number of support personnel increased substantially. Reliance on what Judge Edwards calls special "subjudges" — masters, magistrates, and bankruptcy judges — has increased the supply of non-article III decisionmakers as well as their responsibilities.\textsuperscript{345}

Two points concerning these trial court developments are significant. First, growth at the intake court of original jurisdiction necessarily places pressure on the appellate function. Second, the solution of "subjudges" has been rejected for the courts of appeals, and properly so.\textsuperscript{346} Permanent adjuncts are not desirable in a court of error with important law making functions. Limited use of senior judges, visiting judges and district judges is preferred.\textsuperscript{347} But, in the long run, appeals ought to be decided by permanent, active circuit judges as much as possible.\textsuperscript{348} Decision in this manner helps ensure one law of the court supported by a majority of its judges.

338. See Carrington, supra note 24, at 563-64.
340. See Carrington, supra note 24, at 564.
341. See id. at 564-65.
343. See Carrington, supra note 24, at 565.
344. Id. See also Clark, supra note 212, at 71. Relatively, an 83 percent increase in federal trial judges per million population has occurred since the turn of the century. Id.
345. Clark, supra note 212, at 144-45; Edwards, supra note 6, at 879-80.
347. See Meador, supra note 37, at 647-48. Some critics, as we have seen, have expressed a concern lest staff attorneys and law clerks evolve into "subjudges." See supra text accompanying notes 212-38.
348. Lumbard, supra note 162, at 33.
Adding judges has already changed the federal appellate structure, and continuing Congress' ad hoc approach will exacerbate the problems of growth. During their first decade, the courts of appeals were assigned thirty judgeships; today one hundred and sixty-eight judgeships exist. The congressional palliative for the recent caseload growth has been adding judges. Although this rate eclipsed general population growth by a wide margin, added judgeships still did not keep pace with filings. The single most notable legislative response was to add judges in fits and spurts. Between 1975 and 1982 the number of court of appeals judges grew from ninety-seven to one hundred thirty-two. Thirty-five judgeships were added in 1978 and another twenty-five in 1984. This resulted in some very large courts. The Ninth Circuit now has twenty-eight authorized judgeships, and only the First Circuit has fewer than nine members, once thought the maximum. The turn of the century certainty of precedent, when the same three judges decided each case, has been lost due to the present thousands of permutations of panel membership. Conflicts are inevitable. Monitoring the law is nearly impossible. The traditional unifying function of the en banc court has become unwieldy due to size.

Over the course of this growth, the internal structure of relationships of judge to judge, panel to panel, and panel to en banc court has become so complex that it cannot be said to be the same appellate system as before the additions. Worse still is that the additional judgeships have not achieved any lasting improvement. Detailed study of each large increase in the number of judges discloses a sharp impact on the appeals per panel ratio which lasts only one year. The major benefit of adding judges seems to be this temporary braking effect.

The corresponding costs seem very high. As Judge Edwards has remarked, the government's ability to attract and retain capable judges is, at least in part,
inversely proportional to the size of the federal judiciary. Part of the prestige of the judgeships on the courts of appeals has been their relative scarcity. Until this generation, the authorized number of lifetime appointments was fewer than the number of Senators. The concern is not that a judgeship would go begging but that lowered perceptions would attract lesser judges. Of course, this has not happened yet, but the concern is often voiced and, more often than not, by the judges themselves.

Pay scale and work conditions are also part of the picture. Higher private sector salaries and negative perceptions of the appellate treadmill can influence highly qualified candidates to decline to serve. A more immediate concern is the threat to coherence and uniformity in the law. Ignoring the intangible loss of collegiality, the instability of the law grows geometrically with the addition of judges. Not just an evil in itself, instability also increases the workload as more panel rehearings and en banc courts are required, and the uncertainty of outcomes becomes an incentive generating more appeals.

362. Edwards, supra note 6, at 918.


On the other hand, the monetary cost of an additional properly-paid judgeship and staff represents an almost inconsequential sum in the national budget. See P. Carrington, supra note 14, at 199.


365. Edwards, supra note 6, at 918-19; Ginsburg, supra note 66, at 10-11. Judge Tjoflat of the Eleventh Circuit recently explained:

One of the biggest problems facing the federal judiciary is the instability of the rule of law that results when we create great numbers of additional judgeships. The more judges we create at the appellate level, the larger we make courts of appeals, the more unstable the law becomes. If you have three judges on a court of appeals, the law is stable. It is stable for litigants, lawyers, and district judges. The outcome of a suit, should one be filed, is predictable. When you add the fourth judge to that court, you add some instability to the rule of law in that circuit because another point of view is added to the decision-making. When you add the fifth judge, the sixth judge, when you get as large as the old Fifth Circuit was, with twenty-six judges, the law becomes extremely unstable. One of several thousand different panel combinations will decide the case, will interpret the law. Even if the court has a rule, as we did in the old Fifth, that one panel cannot overrule another, a court of twenty-six will still produce irreconcilable statements of the law.

This tremendous potential for instability in the rule of law creates a great deal of litigation. So you have a situation where you add judges to dispose of more cases, and at the court of appeals level, at least, the new judges may well cause more litigation than they can terminate.

... .

If we are to save for tomorrow the system of justice the framers gave us, we must be ever mindful of this problem.

Interview with Judge Gerald Bard Tjoflat, reprinted in Third Branch, Apr., 1983, at 1, 3-4.
The problem is not with numbers, but with priorities. Increasing the number of judgeships ought to be a reform of last resort.\textsuperscript{366} The unintended effects of such a "quick fix" are demonstrated by the unalterable change in the basic structure of the courts of appeals.\textsuperscript{367} To go on simply adding judges is itself a deceptively simple solution with serious consequences. The important issues become how to determine when an increase is necessary and whether some diseconomy of scale suggests a point beyond which the system cannot go without utterly destroying the appellate function.

The current methodology for determining when to add new judgeships is surprisingly uncomplicated. The Judicial Conference surveys the judgepower needs of federal courts every four years and makes recommendations to Congress. After that, the political process operates like a black box to create judgeships.\textsuperscript{368} The addition of permanent article III positions should always be a matter for serious study. A multi-faceted analysis of need should be developed.\textsuperscript{369} A 1981 Federal Judicial Center Study considered the failings of the present approach and offered a reform.\textsuperscript{370} Admitting the difficulty of assessing judgeship need, the study still faulted the present system.\textsuperscript{371} First, the time lag between identified need and creation renders the new position less effective. Second, legislative litters of judges cause severe assimilation problems in terms of confirmation, orientation, staff, and office space.\textsuperscript{372} Third, the present system has increased dependence on a judgepower strategy to the exclusion of other methods of coping with caseloads.

The narrow emphasis on judgeship creation has been the result of a felt need to have sufficient judgepower to handle case filings.\textsuperscript{373} In terms of the appellate ideal, the optimum number of federal judgeships should be determined by the concept of role fashioned for federal courts.\textsuperscript{374} Federalism defines that role vis-a-vis state courts. Assessments of federal judgeship needs ultimately must address the present imbalance that allows what are essentially state claims into the federal system.\textsuperscript{375} Clearly, Congress must make this ad-

\textsuperscript{366} See Higginbotham, \textit{supra} note 36, at 270.
\textsuperscript{367} \textit{Id.} at 271.
\textsuperscript{368} The judicial needs of the country do not always play a controlling or even prominent role in the political process. For example, Congress allowed the needs to build until the Democrats recaptured the White House and then raised the appellate positions from 97 to 132 in 1978. J. Howard, \textit{supra} note 31, at 270.
\textsuperscript{371} \textit{Id.} at 2-4.
\textsuperscript{372} A broader policy question is whether the executive’s impact on the federal judiciary should be paced along presidencies. \textit{Id.} at 3.
\textsuperscript{373} Congress has “neglect[ed] important considerations of organizational dynamics and judicial purpose.” \textit{Id.} at 46.
\textsuperscript{374} \textit{Id.} at 47.
\textsuperscript{375} This situation may be termed the “in-out” principle. Hill & Baker, \textit{supra} note 68, at
justment. Moving from the long range position to the short range, the Federal Judicial Center Study made creative recommendations for overcoming the inadequacies of the present political black box:

1. Authority to create federal court judgeships should be delegated to the Judicial Conference of the United States.

2. The Judicial Conference should develop explicit and public procedures for the exercise of this new authority.

3. Judgeship creation should be limited to no more than eight additional positions per year.

4. The Judicial Conference should have authority to shift judgeships from one district or circuit to another, by ruling that the next vacancy in a designated district or circuit not be filled.

5. No additional judgeships should be created in a year in which overall federal case filings have declined, provided that judgeships can be shifted as proposed in item 4.

6. Congress can veto in whole or in part the actions taken by the Judicial Conference under the authority conferred above, by simple resolution passed within ninety days of Conference submission of its recommendations to the House and Senate.

This reform has difficulties, but it represents a profound improvement over the ad hoc process now in place.

A final issue on judgeship creation is whether, going beyond a filings per judge focus, an institutional limit exists on the number of appellate judges beyond which stability and coherence are not possible. As a matter of philosophy, Justice Frankfurter recognized that federal judgeships could not be con-


376. Hill & Baker, supra note 68, at 85-87. the difficult task remains to articulate some meaningful standards of what disputes require an article III decisionmaker and reviewer.

377. C. Barr, supra note 370, at 48.

sidered a limitless resource. At some point, the courts of appeals would become a "Tower of Babel" with too many circuits and too many judges to pursue effectively their appellate ideal and system function.

The problem is to establish a specific maximum effective size of a court sitting in panels that can operate as a single administrative unit. A committee of the Judicial Conference selected the number nine, *deus ex machina*, in 1964 and announced that no court of appeals could be expected to stay efficient and unified if the active judgeships exceeded that number. As noted earlier, that limit has long since been overrun. Nonetheless, the experts agree that a limit should exist.

Until now, practical necessity has overcome this principle with each enlargement of the federal appellate courts. Recently, the advocacy of limits has enjoyed a renaissance. The shared perception is that at some point large courts stop resembling courts under the appellate ideal and begin to function as administrative agencies or, worse, legislatures. Judge Posner has suggested a moratorium on the creation of district court judgeships. Because the trial courts are operating near capacity and the courts of appeals are roughly keeping pace, his solution would suspend appellate docket growth. The consequent queuing at the trial level might force the type of system overhaul federal jurisdiction sorely needs.

The consequences that [the expanding federal caseload] entails for the whole federal judicial system . . . cannot be met by a steady increase in the number of federal judges . . . . The function and role of the federal courts and the nature of their judicial process involve impalpable factors, subtle but far reaching, which cannot be satisfied by enlarging the judicial plant . . . . In the farthest reaches of the problem a steady increase in judges does not alleviate; in my judgment, it is bound to depreciate the quality of the federal judiciary and thereby adversely to affect the whole system.


380. See Meador, supra note 37, at 642.
381. Carrington, supra note 24, at 584 n.189. See also supra text accompanying notes 249-51.
383. See supra text accompanying notes 349-59.
384. "For the courts of appeals the view is widespread that there comes a point when the number of judges is so large that the court cannot function effectively as a collegial body." C. Wright, supra note 45, § 3510, at 33.
385. See Wright, supra note 74, at 968.
386. See Burdick, supra note 59, at 808-10; McCree, supra note 43, at 782.
387. "[T]here is general recognition today that there is a natural limit on the number of federal court of appeals judges and that we are either near, or already have exceeded, that limit" Posner, supra note 37, at 762.
388. Id at 765-67. See also W. McLachlan, supra note 360, at 109.
389. See generally Hill & Baker, supra note 68.
B. Specialized Appellate Courts

The subject of specialized courts is, at once, divisive and rather boring. Little remains to be said in a general way. However, one rather provocative recent proposal deserves mention.

Specialized appellate courts have been a part of the federal system for a long time and their number has recently increased. Since 1950 the United States Court of Military Appeals has had appellate jurisdiction over the military justice system. The Temporary Emergency Court of Appeals has exclusive jurisdiction to review decisions of all the district courts in the energy field. In 1981 Congress established the United States Court of Appeals for the Federal Circuit and reassigned the nationwide appellate jurisdiction of the eliminated Court of Claims and Court of Customs and Patent Appeals. There are not more such courts because the creation of specialized courts has been consistently disfavored. Further specialized courts have been suggested, often depending on the proponent's like or dislike for the subject area, in tax law, administrative law, and criminal law.

Court specialization holds the promise of deepening expertise, uniformity and stability, as judges become experienced and encounter the full dimension of their subject matter. Proposals for specialized courts have been rejected for several reasons: (1) specialized judges develop too narrow a perspective; (2) a stratified bar would develop with specialist attorneys having peculiar relationships with their bench; (3) balkanized procedural rules would develop and substantive principles would evolve in a sheltered environment; (4) a narrower subject matter jurisdiction would open the possibility that special interests would have undue influence on the area of the law; and (5) limiting jurisdiction would limit prestige and attract less able judges. Specialization simply threatens

393. E.g., P. Carrington, supra note 14, at 167-84; J. Howard, supra note 31, at 284-86; R. Leflar, Internal Operating Procedures of Appellate Courts 41-42, 70-71 (1976); Higginbotham, supra note 36, at 268; Lumbard, supra note 162, at 34-35.
the generalist assumptions of the common law order.\textsuperscript{398}

Professor Meador has proposed a compromise which seems to offer the benefits of a specialized court while minimizing the disadvantages.\textsuperscript{399} His approach calls for selected assignment of appeals by subject matter to designated court divisions. Each court of appeals would be divided into relatively permanent administrative divisions. For example, a twenty-member court might consist of four divisions each with five judges who would sit in panels of three. Each division would be assigned several categories of law. For example, division one might be assigned antitrust and securities cases. The divisions must be relatively permanent to assure continuity and avoid stagnation. One judge in each division might rotate to another division each year. Meador's proposal is an obvious effort to compromise between the generalist status quo and the feared specialist system. The proposal merits close consideration as a possible structural reform by Congress.\textsuperscript{400} It just might work.\textsuperscript{401}

C. Circuit Splitting

The present circuit boundaries are quite arbitrary, the product of historical accident.\textsuperscript{402} Since the court of appeals system was created in 1891, two splits

\textsuperscript{398} One commentator summed-up the worries for specialized courts:
\[ \text{[A] body of law, secluded from the rest, develops a jargon of its own, thought-patterns that are unique, internal policies which it subserves and which are different from and sometimes at odds with the policies pursued by the general law.} \]

\text{One you complete the circle of specialization by having a specialized court as well as a specialized Bar, then you have set aside a body of wisdom that is the exclusive possession of a very small group of men who take their purposes for granted. Very soon their internal language becomes so highly stylized as to be unintelligible to the uninitiated. That in turn intensifies the exclusiveness of that branch of the law and that further immunizes it against the refreshment of new ideas, suggestions, adjustments and compromises which constitute the very tissue of any living system of law. In time, like a primitive priest-craft, content with its vested privileges, it ceases to proselytize, to win converts to its cause, to persuade laymen of the social values that it defends. Such a development is invariably a cause of decadence and decay.}


\textsuperscript{400} But cf. Meador, supra note 37, at 646 (suggesting either a judicial or a legislative implementation).

\textsuperscript{401} The proposal is modeled after a fully operational West German system. See Meador, \textit{Appellate Subject Matter Organization: The German Design From an American Experience}, 5 Hastings Int'l. & Comp. L. Rev. 27 (1981). Another application might involve assigning diversity appeals to standing panels of judges familiar with a particular state's substantive law. Now in the Fifth Circuit a Texas law decision may be reviewed by three judges from Louisiana. Even in courts of appeals with fewer than three judges from one state, the out of state judges assigned in this way would develop some expertise during their assignment.

\textsuperscript{402} Baker, supra note 7, at 736-39 (chronological table).
have occurred: The Eighth Circuit was redefined into the Eighth and Tenth Circuits in 1929, and the Fifth Circuit was redefined into the Fifth and Eleventh Circuits in 1981.\footnote{See generally Baker, \textit{supra} note 359 (discussion of Congress' division of the former Fifth Circuit into the new Fifth and Eleventh Circuits); Baker, \textit{A Primer on Precedent in the Eleventh Circuit}, 34 MERCER L. REV. 1175 (1983) (same); Baker, \textit{supra} note 7 (same).} For a time circuit splitting, dividing the largest courts of appeals into two or three new courts, was a commonly mentioned solution.\footnote{See generally Burdick, \textit{supra} note 59, at 810-12 (discussing the policy behind splitting the Fifth and Ninth Circuits); McCree, \textit{supra} note 43, at 784-85 (same).} The problems of the large court, to which splitting is offered as a solution, are chiefly the result of simple-mindedly adding judgeships to meet a rising caseload.\footnote{The problems of adding judges are described above. \textit{See supra} text accompanying notes 337-89.} At some point, even Congress must realize that the addition of judges decreases the overall effectiveness of the judicial system.\footnote{"Congress recognize[s] that a point is reached where the addition of judges decreases the effectiveness of the court, complicates the administration of uniform law, and potentially diminishes the quality of justice within a circuit." Heflin, \textit{Fifth Circuit Court of Appeals Reorganization Act of 1980 — Overdue Relief for an Overworked Court}, 11 CUM. L. REV. 597, 616 (1980-81) (citation omitted).}

There is a predictable downside to splitting circuits. The more courts of appeals, the higher the likelihood of intercircuit conflicts. Furthermore, splitting irreversibly dilutes the "federalizing function of courts of appeals."\footnote{Wisdom, \textit{Requiem for a Great Court}, 26 LOY. L. REV. 787, 788 (1980) (footnotes omitted).} The fewer states the circuit includes, the less national the court becomes. Of course, everyone agrees that adding judges and dividing courts is a limited strategy.\footnote{"[A]re we to continue the splitting process until it becomes mincing, with a United States Court of Appeals for the Houston Metropolitan Area?" Gee, \textit{The Imminent Destruction of the Fifth Circuit; Or, How Not to Deal with a Blossoming Docket}, 9 TEX. TECH. L. REV. 799, 806 (1978).} Perhaps the most important argument against splitting existing circuits is that the reform does not work. Some large circuits which might need splitting, like the District of Columbia, Second, and Ninth Circuits, are practically indivisible.\footnote{Carrington, \textit{supra} note 24, at 587 (discussing how some circuits are not amenable to division); Hellman, \textit{Legal Problems of Dividing a State Between Federal Judicial Circuits}, 122 U. PA. L. REV. 1188 (1974) (same).} The division of the former Fifth Circuit did not work any miracle. The new Fifth Circuit is back to its pre-division statistical crisis level in terms of filings.\footnote{Speech by Gilbert Ganucheau, Fifth Circuit Appellate Advocacy Seminar (Oct. 18, 1984), reprinted in 2 FIFTH CIR. REP. 301 (1985). \textit{See also supra} note 356 (despite division of the Fifth Circuit, filings continue to be heavy in the Fifth and Eleventh circuits).} The Ninth Circuit, which escaped the 1981 axe is doing well enough to continue to resist division.\footnote{Frank, \textit{Split 9th Circuit?}, 71 A.B.A. J. 30 (1985). \textit{See also supra} note 255.}

Rather than splitting existing circuits, the entire geographical scheme could be redrawn.\footnote{The Hruska Commission targeted the Fifth and the Ninth Circuits for splitting rather than produce the unsettling effects of nationwide reorganization. Baker, \textit{supra} note 8, at 698 n.91. \textit{See supra} text accompanying notes 93-100.} Such a strategy has its difficulties. Judge Rubin would struggle to...
equalize size and workload by creating approximately twenty circuits.413 Judge Wallace would consolidate the courts of appeals and dramatically reduce their number.414 Neither approach directly addresses the real problem. Redrawing circuit boundaries, by itself, is not worth the effort. More circuits would increase the likelihood of intercircuit conflicts. Fewer circuits would increase the likelihood of intracircuit conflicts. Circuit splitting must therefore be dismissed as a red-herring, the result of Congress' linear strategy of adding judges.

D. Proposed Structural Reforms

Several structural reforms have been proposed. Some have been on the drawing board a long time, while others are more recent. Five proposals are of particular interest: (1) reducing original federal jurisdiction; (2) instituting alternative dispute resolution; (3) creating a new intermediate court; (4) granting the courts of appeals discretionary control of their dockets; and (5) consolidating the present intermediate tier into one court. The first two proposals might be grouped together as remedies for the entire federal judicial institution, but their impact on the middle tier would be great. The last three proposals directly relate to the courts of appeals and their particular crises.

1. Reducing Original Jurisdiction

The most far-reaching proposal for dealing with the courts of appeals' dockets does not directly concern appellate jurisdiction. A profound reduction in the scope of the original jurisdiction in the district courts would have a radical, albeit derivative, impact on the error correction and lawmaking functions of the courts of appeals. Hence, such proposals are properly considered here.

More than a decade ago then Second Circuit Chief Judge Friendly penned a remarkable book which so far remains this generation's seminal work on reducing and rationalizing the jurisdiction of the federal courts.415 All his recommendations cannot be considered in so small a space as this. Chief Judge Friendly's themes, however, bear directly on the thesis here and merit repeating. Disciples of his philosophy call on Congress to redefine federal court jurisdiction so that the courts can better perform their constitutional mandate.416 This task

413. Rubin, supra note 291, at 459.
414. Wallace, supra note 90, at 940-41.
416. Rubin, supra note 47, at 657. See also Edwards, supra note 6, at 922 (advocating that federal courts concentrate jurisdiction resources to art. III claims); Ginsburg, supra note 66, at 15 (same); Hill & Baker, supra note 68, at 81-85; McCree, supra note 43, at 794 (same). The approach is related to the earlier discussed proposal for ranking priority appeals. See supra text accompanying notes 246-47.
is uniquely political.\footnote{417}{See Edwards, supra note 6, at 922-24.} Congress must first preserve the constitutional value of redress for those claims and claimants which present the raison d'etre for the courts of the third article. Second, public policy obliges Congress to ration remaining resources for cases that serve important non-constitutional national interests.


## 2. Alternative Dispute Resolution

Related to Chief Judge Friendly's reallocation of disputes to the state courts, the theme of reallocating disputes out of the court system altogether has garnered

\footnote{417}{See Edwards, supra note 6, at 922-24.}
\footnote{418}{See Haworth, supra note 10, at 261.}
\footnote{419}{Id. (statistics).}
\footnote{422}{See Haworth, supra note 10, at 261.}
much recent attention. The idea is to provide out-of-court resolution of otherwise federal controversies by negotiation, mediation, conciliation, and settlements.\textsuperscript{425} The impact here would also be felt most directly at the trial level and only derivatively at the middle tier. Because at present these methods are not widely used, they hold a potential for caseload relief that some find attractive. Judge Edwards, a recent convert, suggests that if the caseload and coping mechanisms threaten the federal appellate ideal, then an emphasis on alternative dispute resolution would preserve substantive rights and enhance the quality of judicial determinations.\textsuperscript{426}

Alternative dispute resolution methods are rarely used on the federal level for three reasons. First, a widespread perception considers a judicial determination superior to any alternative.\textsuperscript{427} Second, the bar has been slow to embrace these alternatives although market forces seem to be moving attorneys and clients away from a litigious mindset as litigation becomes more costly in terms of expenses and delays.\textsuperscript{428} Third, any such change would require the active commitment of the federal government because of its active role in the appellate process.\textsuperscript{429}

Whatever the intensity of the first two factors, the third factor appears to be in a state of flux. Recent congressional proposals go far toward recognizing that "[a]ccess to an appropriate forum does not always require a public hearing before a life-tenured judge operating under formal rules of evidence and procedure."\textsuperscript{430} There is a profound need for standards for making the decision about allocating disputes, however.\textsuperscript{431} Certainly, the most important issues of constitutional rights belong before an article III judge. On the secondary policy level, however, such considerations as probability of error, the need for finality, the cost/benefit ratio, public demand, and user satisfaction all affect the political allocation.\textsuperscript{432}


\textsuperscript{426} Edwards, supra note 6, at 929.

\textsuperscript{427} Id. at 927.

\textsuperscript{428} Ginsburg, supra note 66, at 19. See also supra text accompanying notes 290-95.

\textsuperscript{429} Wald, supra note 29, at 774. The United States is a party in more than one-third of the civil cases on the district courts’ dockets. C. WRIGHT, THE LAW OF FEDERAL COURTS § 22, at 113 (4th ed. 1983).

\textsuperscript{430} Bell, Crisis in the Courts: Proposals for Change, 31 VAND. L. REV. 3, 7 (1978). See also Note, Realigning the Federal Court Caseload, 12 LOY. L.A. L. REV. 1001, 1009-12 (1979). Cf. FED. R. CIV. P. 16(c)(7) (1983) (subjects to be discussed at pretrial conference include "the use of extrajudicial procedures to resolve the dispute").

\textsuperscript{431} See generally Sarat, supra note 51.

\textsuperscript{432} Id. at 307-08.
Alternative dispute resolution holds the promise for a long-term reduction in demand for federal judicial resources. It may also allow for improved processing of some routine, fact-specific grievances presently before federal courts. If implemented, these proposals could have a significant effect on the structure of our federal courts system.

3. A New Intermediate Court

Creating a new intermediate court is not a new idea. Rather than discuss the multitude of proposals to expand the vertical structure of the federal courts by creating a national court of appeals between the present courts of appeals and the Supreme Court, this section will focus on Chief Justice Burger's recent proposal. His proposal may be traced back to the Freund Commission and Hruska Commission plans. However, it contains important refinements that give it an excellent chance of passage. The Chief Justice first endorsed the specific recommendation in February 1983. For the first time since such proposals have been considered, subcommittees in both the House and Senate favorably reported bills based on the plan out to their full judiciary committees. Presently, the Chief Justice's plan calls for creation of a temporary and experimental panel—the Intercircuit Panel—composed of court of appeals judges selected by the Supreme Court. One judge would be selected from each of the courts of appeals, creating a panel of nine with four alternates. Cases would continue to move from the courts of appeals to the Supreme Court, but the Supreme Court would have discretion to refer cases to the Intercircuit Panel for final national resolution of conflicts and decision of significant federal questions subject to subsequent Supreme Court review.

Understandably, most of the debate has centered on whether this proposal would meaningfully relieve the Supreme Court. However, those arguments

433. Edwards, supra note 6, at 936.
434. “In connection with currently discussed plans for reform of the Federal judiciary, consideration might well be given to the proposal to create a National Court of Appeals, intermediate between the Supreme Court of the United States and the several circuit courts of appeals.” Dumbauml, A National Court of Appeals, 29 Geo. L.J. 461 (1941) (citation omitted).
436. See generally Note, supra note 6, at 1310-17.
437. Burger, supra note 436, at 443-44.
440. The alternates would sit for two two-week sessions each year. Burger, supra note 439, at 88.
441. Id.
442. E.g., Alsup & Salisbury, A Comment on Chief Justice Burger’s Proposal for a Temporary Panel.
will not be rehearsed here. Considering the Chief Justice's proposal from the viewpoint of the courts of appeals, the experiment risks little and affords great promise. Additional appellate capacity could be used to reduce conflicts and achieve more national uniformity more quickly. In performing the lawmaking function, the Intercircuit Panel would represent a return to the original judicial plan, in which the courts of appeals perform the error correction function. The strongest argument for Chief Justice Burger's plan is his own candid admission that he does not know whether it will work. He has proposed a five-year "sunset" provision. If the Intercircuit Panel withstands an actual test, it can be renewed. If it proves a failure the plan can be abandoned; even before the five-year period has elapsed, the Supreme Court could stop referring cases. The Chief Justice's plan should be viewed as a temporary measure. Ultimately a basic restructuring of the intermediate tier is needed, but such a restructuring does not appear to be immediately forthcoming.443

4. Discretionary Courts of Appeals

In a recent speech criticizing the cost and delay in our federal courts, Justice Rehnquist proposed that the basic assumption of the appeal as of right be reconsidered.444 His solution would allow review only when granted in the discretion of a panel of the court of appeals.445 Of course, such a proposal assumes the right to an appeal is not a matter of due process.446 Some analogies may be seen in present practice, beyond such appellate doctrines as plain error and sufficiency of evidence review. Leave to appeal is a feature of the current federal procedures for interlocutory appeals447 and prisoner petitions.448 Rehearings and rehearings en banc are committed to the petitioned court's discretion.449

The basic problem with discretion being the rule is the effect such a structural reform would have on the federal appellate ideal. The original design, in

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444. N.Y. Times, Sept. 15, 1984, at 27, col. 1 (quoted in Martineau, supra note 45, at 846 n.5).

445. Id. This again is not a new idea. In 1941 Roscoe Pound suggested that trial judges be arranged in divisions for review of single-judge decisions with appeals being at the discretion of the court of appeals. R. Pound, Appellate Procedure in Civil Cases 390 (1941) (quoted in Newborn & Wilson, Rule 21: Unprecedented and the Disappearing Court, 32 Ark. L. Rev. 37, 56-57 (1978)). See also Haworth, supra note 10, at 321-26 (proposal to create a new appellate division between district court and court of appeals with discretionary review in the latter).

446. Rubin, supra note 291, at 460 n.43. If venerable Supreme Court dicta is accurate, no federal constitutional right to appeal exists even in criminal cases. E.g., Jones v. Barnes, 436 U.S. 745, 749 (1983); McKane v. Durston, 153 U.S. 684, 688 (1894). See generally Carrington, supra note 24, at 574-79.

447. 28 U.S.C. § 1292(b) (1964) (discretion to issue certificate and to hear appeal).


which courts of appeals perform the correction function, has already been confused by assignment of substantial lawmaking function. Justice Rehnquist’s proposal would further diminish the correction function without necessarily improving the lawmaking function. It would create two levels of discretionary review — one too many. Comparison with the Supreme Court and its pure lawmaking function is inappropriate. A compromise position would apply discretionary review only in selected areas like diversity cases and administrative appeals of expert fact finding. Creating these two tracks would formally recognize what some commentators believe now occurs informally, as less favored categories receive less judicial attention in the appellate screening process already in place.

Proponents of discretionary review in the courts of appeals, such as Chief Judge Lay of the Eighth Circuit, promise profound benefits. Judicial resources spent reviewing petitions for discretionary appeal would approximate the present investment in screening cases for the nonargument calendar. Obviating the full review of briefs and record, oral argument, and opinion drafting in rejected appeals would save significant resources over the volume of appeals. Average delay between notice of appeal and opinion in decided cases would improve. The threshold determination would help remedy a perceived inequity between appeals by indigents and paying appellants. Most importantly, all appeals deserving of plenary review would receive the full appellate function in a traditional deliberative process significantly improved by a reduced calendar.

The proposed system of discretionary review power does not diverge greatly from the intermediate court’s functions of error correction and lawmaking, as those functions are performed today. Both systems have a gatekeeping feature, whether it is called screening or petitions for review. Issues of judicial responsibility and staff utilization are common to both systems. Whatever the ideal solution, the real-world choice is between one appeal as of right, along with a complex four-level judiciary, or “a system of institutionalized case processing.”

5. Consolidation of the Intermediate Tier

The direct cause of conflicts among the courts of appeals is not the Supreme Court's lack of appellate capacity, but rather the individual sovereignty accorded the coordinate courts of appeals. Two relatively recent innovations, the en banc court and the doctrine of the law of the circuit, work together to create

References:
450. Carrington, supra note 24, at 572.
451. J. Howard, supra note 31, at 287; Lumbard, supra note 162, at 32.
453. Lay, supra note 52, at 1157.
454. Proponents argue that a byproduct of this reform would be a decrease in the number of second petitions for discretionary review in the Supreme Court. Id. at 1158 n.16.
455. J. Howard, supra note 31, at 288.
456. See supra text accompanying notes 212-38.
457. Rubin, supra note 291, at 460 (citation omitted).
458. Note, supra note 6, at 1317.
a degree of sovereignty akin to the juridical deference afforded state to state, or nation to state. As Congress increased the number of appellate judges, more multiples of three-judge panels threatened two institutional values: uniformity among panel decisions, and control of the law of the court of appeals by a majority of its judges. The en banc court comprised of all active judges developed to preserve these two values. En banc review involves substantial delay and expends precious judicial resources. Therefore, the rule of interpanel accord developed to minimize en banc rehearings. This principle obliges a panel to respect earlier decisions of any panel as binding precedent in the absence of an intervening en banc or Supreme Court decision. Together, these principles support a balkanized system of precedent; each court of appeals has become something of a regional supreme court. Forum shopping, one consequence of this system, reduces effectiveness of legal planning and makes possible the odious recent practice of the "race to the courthouse" in administrative appeals.

From time to time, a structural proposal has been put forward which would eliminate altogether the geographical boundaries between courts of appeals. The unitary court of appeals might maintain regional offices and courthouses, but would maintain a single calendar and one body of precedent binding its three-judge panels with some provision for a representational selection of en banc court. Administrative difficulties, however, might prove insurmountable. A single United States Court of Appeals with nationwide jurisdiction would be more preferable. However, such a preference does not overcome the concern for settled expectations and implementation difficulties. Unifying the courts of appeals would create a profound disturbance of stare decisis. More importantly, a unitary court of appeals simply is not politically possible.

Merely redrawing court boundaries would have the same effect on the present federal appellate crisis that a weatherman’s map marks have on the weather. Compromises are possible, however, which would combine boundary realignment with meaningful structural change. The current hegemony could be par-

459. Id. at 317-18. Elsewhere, the author has traced the evolution of these two innovations. See generally Baker, supra note 7, at 720-24. Recently, a disquieting problem has appeared which independently challenges the majority rule principle. As a result of strict compliance with recusal requirements, a minority of judges on a court of appeals may control the rehearing procedure. See Harper, The Breakdown in Federal Appeals, 70 A.B.A. J. 56 (1984).

460. Baker, supra note 7, at 723.

461. Id. See also Carrington, supra note 24, at 580.

462. For a review of the negative consequences of this system, see Carrington, supra note 24, at 596-604.

463. Id. at 598-600. Frequently, the controlling question becomes which party appealed in which court of appeals first to attach jurisdiction. See id. at 600.


465. See also P. Carrington, supra note 14, at 223.


467. Such "ideal solutions are not attainable and... political compromise will be essential to any improvement that comes." P. Carrington, supra note 14, at 223.

468. See supra text accompanying notes 402-14.
tially undone by creating one permanent national en banc court to replace the present thirteen,\textsuperscript{469} or by authorizing the Supreme Court to refer cases to existing en banc courts on a random or rotating basis\textsuperscript{470} for final national decision. Professor Rosenberg proposes that Congress consolidate existing courts of appeals into a unified administrative and jurisdictional system.\textsuperscript{471} Once consolidated, the federal appellate institution would be arranged in divisions. The jurisdiction of the current Federal Circuit is one division; the jurisdiction of the present courts of appeals marks a second division; and a new central division would include sections divided by functions such as criminal appeals, designated national law specialties and cases on reference from the Supreme Court.\textsuperscript{472} Professor Rosenberg's far-reaching proposal would achieve dramatic flexibility by developing a unified court of appeals with many of the features of Professor Meador's earlier discussed compromise for specialized units within one national court of appeals.\textsuperscript{473} Although Professor Rosenberg's plan is somewhat utopian, he is correct in that any meaningful reform must cut through the present forms and reformulate the structure of the present arrangement of panel and en banc courts.

One last observation must be made about court of appeals sovereignty and the hierarchy of the en banc court. The current crisis obliges a reconsideration of the en banc mechanism and how it performs. Such evaluation is critical to full consideration of structural reform.\textsuperscript{474} Former Chief Judge Kaufman of the Second Circuit recently delivered a scathing indictment of the en banc proceeding.\textsuperscript{475} He concluded that in his experience the disadvantages of the en banc mechanism clearly outweigh the advantages.\textsuperscript{476} Inefficient and wasteful uses

\textsuperscript{469} Wallace, \textit{supra} note 90, at 936-40.
\textsuperscript{470} \textit{Id.} at 935-36.
\textsuperscript{472} \textit{See} Carrington, \textit{supra} note 24, at 587-96.
\textsuperscript{473} \textit{See supra} text accompanying notes 399-401.
\textsuperscript{474} Chief Judge Feinberg, of the Second Circuit, has offered an agenda:
A careful study of the disposition of requests for en banc hearings in the last decade in particular circuits might shed light on the following: (a) To what extent do the circuits differ in their receptivity to convening an en banc court? (b) What should be the criteria? Are these criteria actually used? (c) Do en bancs accomplish anything in settling doctrine? It was common knowledge on the Second Circuit that Learned Hand thought they were a waste of time. Do subsequent panels bow to the new doctrine or tend to find ways to avoid it in instances where the panel majority disagrees with the conclusions of the en banc court? (d) How often are en banc decisions relegated to relatively inconsequential status by prompt Supreme Court intervention? (e) Does the growing size of circuit courts make the en banc procedure unworkable without substantial change? A detailed analysis of what has occurred in the [large courts of appeals]... might be helpful.


\textsuperscript{476} \textit{Id.} at 7.
of judicial resources include the necessity of: (1) considering motions for rehearing; (2) conferencing; (3) opinion drafting; and (4) arduous consensus building. These tasks are accomplished five times slower than a panel deposition.477 The typical result is a majority opinion characterized by careful ambiguity or a litany of divergent opinions each with one or two subscribers — all in the name of uniformity.478

Perhaps rehearings en banc should be discarded, rather than merely disapproved.479 If one “law of the circuit” is to prevail, however, some device must be available to reconcile conflicting panel decisions. Panel rehearing might provide a sufficient intermediate court second look, as might substitution of some of the earlier discussed proposals.480 In the meantime, more specific and enforceable guidelines for the proceeding must be developed.481

E. A Postscript

Because the courts of appeals are but an intermediate level of the federal judicial system, any lasting reform must implicate the system’s structure. Adding judges, the traditional congressional solution, seriously weakens existing structure and function. Techniques for adding capacity to the existing structure seems to have been exhausted, as existing courts struggle to cope with large contingents of judges. In addition, experience demonstrates the futility of splitting courts of appeals. The prospect of specialized courts, without more, holds out little hope for sustained progress toward the appellate ideal. Proposals hold more promise than past experience. Reducing demand by narrowing the federal courthouse door or by steering disputants through other doors might provide long-term relief, if jurisdiction reduction and alternative dispute resolution prove possible. More direct and radical changes are warranted. Adding vertically to the appellate capacity is an attractive short-term solution and should be pursued cautiously. Establishing discretionary jurisdiction and challenging conventions of en banc sovereignty should also be considered.

VI. Conclusion

When the courts of appeals were created, the federal judicial system was a specialized court system primarily concerned with limited areas of federal concern.482 As the intermediate level’s centennial approaches, pressure for change

477. Id. at 7-8.
478. Id. at 8.
479. Cf. FED. R. APP. P. 35(a) (“Rehearings en banc are not favored and ordinarily will not be granted. . .’’).
480. Some proposals would preserve the en banc device to prevent intercircuit conflict by requiring an appeal to be heard en banc when there is an existing intercircuit conflict or when the panel is disinclined to follow an earlier holding of a sister court of appeals. See Handler, What to Do with the Supreme Court’s Burgeoning Calendars?, 5 CARDOZO L. REV. 249, 273 (1984).
481. Wald, supra note 29, at 784.
482. Clark, supra note 212, at 148.
is building. The country’s population has increased threefold and the nature and volume of federal court litigation no more resembles the litigation these courts were created to meet than the current federal presence resembles that at the turn of the century. The present structure may no longer be able to accommodate this change and continue to meet new demands. The intensity of the discussion about the federal appellate system during the last decade has increased to the 1891 level; that prior debate precipitated that last major structural change. Some signs indicate that a significant reform will soon break loose.

A widely shared perception of crisis has emerged. In that context, consider the foregoing discussion of intramural and extramural reforms, both in place and proposed. Significant intramural changes have been wrought by judges and court administrators during the last two decades. These changes have sought to preserve the appellate ideal from workload threats by adjusting the method by which courts of appeals perform their traditional role. These measures have already changed the face of appellate procedures for oral argument, briefing, opinion preparation, and support staff responsibilities. Little remains to be done on this level. Remaining intramural proposals, such as the elimination of frivolous appeals, also have serious implications for the appellate ideal. Experiments and expedients have kept the courts of appeals afloat. Regression is unlikely.

The attack of an overwhelming docket has been blunted. But this has not been accomplished without concomitant threats to the federal appellate function. Efficiency related procedures have fundamentally changed the courts of appeals.

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483. Griswold, supra note 10, at 790.
484. Levin, supra note 60, at 2.
485. Griswold, supra note 10, at 788.
486. On a philosophical level, perhaps, judges, administrators, lawyers, legislators, and researchers may recognize the virtues of a reform philosophy of experimentation, evaluation, modification, and change; but in practice there is substantial disparity between [pragmatic] principles and contemporary appellate court reform.

Currently, techniques that may or may not reduce delay often are not regarded as experimental mechanisms. Rather they are viewed as “solutions,” often monolithic ones, which should “work,” that is, produce the desired effects (preferably immediately) within the context of any appellate system. All too often, contemporary appellate court reform is characterized by a process whereby (a) a court selects and implements a technique or a group of techniques for reducing delay, without first objectively assessing its needs; (b) the techniques are subjectively rather than objectively evaluated; (c) the techniques are either viewed as successes and continued as part of standard procedure in the form originally adopted or are written off as failures and abandoned; and (d) a second court selects and tries a single technique or group of techniques, and the process continued. Three flaws in this model of appellate improvement are evident: first, the selection of a technique without consideration of whether it will actually address the court’s problems; second, the lack of objective analysis and documentation in determining the success or failure of any particular technique; and third, the failure of courts to exchange information about their experiences. Thus, under this model, analysis and interchange, fundamental components of serious appellate court reform, are undoubtedly all too often disregarded entirely.

J. Martin & E. Prescott, supra note 12, at 77-78.
487. See Edwards, supra note 6, at 894.
To preserve and further what remains of the appellate ideal, Congress must consider extramural reform. Congress, however, has been slow to respond. Several impediments to congressional court reform must be overcome, including an agenda full of other national issues, a lack of an influential political constituency, special interest opposition, lawyer and bar negativism, and a lack of continuity of program and effort. Although they are held dear by the profession, these courts are the ones "nobody knows." Ultimately, reform — real structural reform — must come from Congress. However, Congress must first contemplate the effect of the courts' efforts to help themselves and then choose with care among its many options and combinations. Although demands on the courts appear radical and acute, the structural reforms cannot be. Congress must be above "easy tinkering." Study is the key to overcoming imperfect knowledge of the problems, their solutions and their effects. A long-range perspective is desperately needed. The structural plan must be flexible to meet the changed needs of today and the anticipated needs of a long tomorrow.

Congress should not proceed unguided. A blue ribbon commission should study the problems of the federal judicial institution and particularly the problems of the courts of appeals. Structural reform best proceeds from such study and dialogue. The study should draw on the formidable resources of the Administrative Office for the Federal Courts, the American Bar Association, the American Law Institute, the Department of Justice, the Federal Judicial Center, the Judicial Conference of the United States, and the Judiciary Com-

488. This assumes that appeals merit preservation. But see Wilner, Civil Appeals: Are They Useful in the Administration of Justice?, 56 Geo. L.J. 417 (1968); supra text accompanying notes 444-48 (abolish).
489. Meador, supra note 37, at 637-41.
491. This is important. "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." Wright, Procedural Reform: Its Limitations and Its Future, 1 GA. L. REV. 563, 575 (1967).
492. Levin, supra note 60, at 2.
493. Wright, supra note 491, at 578.
494. After all, the process seems cyclical at centuries. See Burdick, supra note 59, at 815.
495. Hill & Baker, supra note 68, at 85.
496. Burger, supra note 424, at 447; Rehnquist, supra note 6, at 6-7. See generally Hill & Baker, supra note 68, at 85-87. See also S. REP. No. 275, 97th Cong., 2d Sess. 3, reprinted in 1982 U S. Code Cong. & Ad. News 11, 13. "No single change in the organization, procedure, or jurisdiction of the Courts of Appeals could substantially reduce congestion of their dockets unless the change were so dramatic that it would also effect major change in their function in the federal system." ABA REPORT ON ACCOMMODATING THE WORKLOAD OF THE UNITED STATES COURTS OF APPEALS 1 (1968).
mittees of both Houses of Congress.498 Above all, the study must not lose sight of the purpose of our federal judicial institution. Chief Justice Burger said it best: "We must constantly keep in mind that the duty of lawyers and the function of judges is to deliver the best quality of justice at the least cost in the shortest time."499