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AN ASSESSMENT OF PAST EXTRAMURAL REFORMS OF THE U.S. COURTS OF APPEALS*

Thomas E. Baker**

I. INTRODUCTION

My nomenclature needs explanation by way of introduction. This Article will evaluate reforms designated here "extramural" or "structural." Although the distinction between "intramural" and "extramural" reforms may seem a bit metaphysical, the line can be

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defended in terms of the separation of powers.

An *intramural* reform is a change in the way the courts of appeals hear and decide an appeal. These changes amount to procedural shortcuts, resulting in an abbreviated appellate process, justified for the most part by the press of a growing docket.¹ New internal operating procedures, screening and inventorying, the nonargument calendar, dispositions without opinion, larger numbers of staff attorneys and law clerks, and other related court-initiated reforms have allowed the courts of appeals to cope with the large increases in the numbers of appeals over the last generation. I believe that *intramural* reforms have all but played out and that the proposals for additional procedural reforms being considered do not represent sufficient additional efficiencies to allow the courts of appeals to continue to cope with projected increases in the numbers of appeals.

The subject of this Article is *extramural* reforms. These require congressional action. Unlike intramural reforms, which are changes in the way the courts of appeals perform their traditional role, extramural reforms purposively and directly change the role of the intermediate court in the federal system. This Article will discuss the historical methods Congress has used to come to the aid of the federal courts under threat of caseload. Separate sections will consider: Reducing Original Jurisdiction; Alternative Dispute Resolution; Creating Circuit Judgeships; Dividing Courts of Appeals; Creating Specialized Subject Matter Courts; and Improving the Quality of Federal Legislation. The worry expressed here is that these familiar reforms may no longer be feasible, for various reasons which will be discussed, or may not be sufficient to deal with the worsening problems of the U.S. Courts of Appeals.

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II. Reducing Original Jurisdiction

It may seem strange to begin a discussion of structural reforms of the courts of appeals with a section on reducing the original jurisdiction of the district courts. The most far-reaching proposals for dealing with the courts of appeals' dockets, however, do not directly concern appellate jurisdiction. Substantial reduction in the scope of the original jurisdiction in the district courts would have a dramatic, albeit derivative, impact on the error correction and lawmaking functions of the courts of appeals. Therefore, such proposals are properly considered here, at least as a preliminary matter. 2

Calls for a rational and coherent approach toward ordering the jurisdiction of the federal courts—a clear statement of their purposes and goals—have been heard ever since we have had federal courts. 3 Recently, Professor Rosenberg has provided an apt functional description:

The federal courts' central purposes and functions are to protect the individual liberties, freedoms and rights of these people; to give definitive interpretation and application to constitutional provisions and federal laws, and to assure the continued vitality of democratic processes of government. These are vital functions for the welfare of the nation and its people. No other agency or institution of government can perform these duties as effectively as the federal

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2 In some respects, the essential problem of caseload for a court system must derive from the trial level, since that is where the cases that enter a judicial system first appear. In that sense the appellate courts' cases are only a partial outline of what the court system must treat. Certainly dealing with the trial court level is one crucial part of examining such caseload considerations. William P. McLachlan, Federal Court Caseloads 109 (1984).

Essentially, the federal courts are "how the Constitution seeks to "establish justice," in the Preamble’s words. There is, however, a Constitutional rub. To have a valid claim on being just, the definition of “mission” must be free from baser political motives and ideology. Yet, the demarcation of federal court jurisdiction is given over to the plenary power of one of the political branches, Congress. For the most part, and from the beginning, defining the role of the federal courts has been an exercise in federalism. Only general lessons can be learned from the teachings of history, tradition, legislative and judicial precedents, and constitutional law.

Two decades ago, then-Second Circuit Chief Judge Friendly penned a remarkable book that remains this generation’s seminal work on reducing and rationalizing the jurisdiction of the federal courts. All his recommendations cannot fairly be summarized in

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7 See generally George D. Brown, Nonideological Judicial Reform and Its Limits—The Report of the Federal Courts Study Committee, 47 WASH. & LEE L. REV. 973 (1990) (arguing that the Federal Courts Study Committee should have dealt with the fundamental ideological issues concerning the proper role of federal courts in our nation); Richard H. Fallon, The Ideologies of Federal Courts Law, 74 VA. L. REV. 1141 (1988) (describing two competing models of judicial federalism and their influences on federal courts issues, and advocating the acceptance of a middle ground in resolving those issues).


9 HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW (1973) (recounting the late Chief Judge Friendly’s celebrated Carpenter Lectures at Columbia Law School). See also MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF POWER (2d ed. 1990) (examining allocation of jurisdictional and lawmaking authority among various components within federal system and tension between components); AMERICAN LAW
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.\textsuperscript{10} This task is uniquely political. Indeed, federal jurisdiction ultimately is politics. Congress must first preserve the constitutional value of redress for those claims and claimants that present the \textit{raison d'etre} for the courts of Article III. Second, public policy obliges Congress to ration remaining resources for cases that serve important non-constitutional national interests.

Chief Judge Friendly taught us these general lessons. He described the outer limits of the debate over the role of federal courts by contrasting a minimum model and a maximum model.\textsuperscript{11} The minimum model posits that:

the best course is to put trust in the state courts, subject to appropriate federal appellate review, save for those heads of jurisdiction, by no means insignificant in case-generating power, where everything is to be gained and nothing is to be lost by granting original jurisdiction to inferior federal courts.\textsuperscript{12}


\textsuperscript{11} Friendly, supra note 9, at 11.

\textsuperscript{12} Id. at 8 (citation omitted).
At the other extreme, the maximum model "would go to the full sweep of constitutional power" under Article III because "the federal courts provide a 'juster justice' than the state courts, [and] the more cases there [are] in federal courts, the better."13

Of course, no one is likely to take either of these extreme views of federal jurisdiction once and for all. Over the 200-plus year history of the federal courts, Congress has gone back and forth between these models, never fully or completely embracing one or the other, and often enacting jurisdictional legislation containing different provisions that endorse both models simultaneously. This legislative ambivalence cannot be denied.

Descending to a lower level of abstraction discloses at least three problematic implications from these lofty sentiments. First, during the recent "crisis" decades, the number of appeals has risen significantly higher than the number of cases filed in the district courts.14 Therefore, only a relatively large cutback on original jurisdiction—either across the board or selectively by categories that generate high numbers of appeals—will achieve significant appellate reductions. Second, consensus is lacking on which areas to target for change. The elimination of diversity jurisdiction, an obvious yet controverted solution, would relieve approximately one-fourth of the district courts' dockets and one-tenth of the courts of appeals' dockets.15 Considering the history of this jurisdiction, however, no one should expect it to be abolished in an existing lifetime plus twenty-one years. Third, congressional momentum is flowing in the opposite direction. Today, access to federal courts is

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13 Id. at 12 (citation omitted).
easier than ever before. Congress has encroached on traditional state law domains during this same period with neither rhyme nor reason. And there is no sign that Congress is going to change its attitude toward continually overcommitting the scarce resources of the federal courts.

A wholesale reassessment of the subject matter allocation of cases between federal and state courts most assuredly is beyond the scope of this Article. In a recent paper, Professor Martin H. Redish made a thoughtful attempt to identify and apply the factors that should go into an informed analysis of original jurisdiction: (1) facilitating state-federal court cross-pollination; (2) maintaining the autonomy of the two judicial sovereigns; (3) preserving some degree of litigant choice; (4) achieving litigation efficiency; (5) assuring fundamental fairness; (6) restraining the judicial branch within the judicial role; and (7) expecting an overall coherence and logical consistency of jurisdictional principles. This factorial approach is as good as any, and better than most, but it is endorsed here for what it leaves out: The missing factor is docket control. Professor Redish’s omission was intentional and nicely illustrates the point being made here. The concern for workload, the interest in reducing the dockets of federal courts, is not an appropriate

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17 The practice of “deficit jurisdiction” likewise does harm to principles of federalism. In his 1991 year-end report on the federal judiciary, Chief Justice Rehnquist expressed concern and alarm over the docket prospects of two bills pending in Congress. The first would provide for a federal criminal prosecution in virtually any case in which a firearm was used in a homicide, and the second would create criminal and civil federal court jurisdiction in the broad area of domestic-relations/spousal abuse. The Chief on the Judiciary: Less Is More, LEGAL TIMES, Jan. 6, 1992, at 6. See generally Victor Williams, Help Wanted—Federal Judges: Judicial Gridlock; Solving an Immediate Problem and Averting a Future Crisis, 24 Loy. U. Chi. L.J. 1 (1992).


19 Id. at 1785-87.
consideration for fashioning the rules of federal court jurisdiction. This is not to imply a lack of sympathy for federal judges facing impossible workloads or for litigants facing costly delays. Rather, Professor Redish deems it entirely appropriate for Congress to consider docket implications when fashioning substantive rights, or more to the point, to refrain from fashioning new substantive federal rights for that very reason. This is the most appropriate priority to give docket or workload considerations.

The congressionally created Federal Courts Study Committee explicitly endorsed this methodology:

Any human institution is improvable, and the federal courts are no exception. Many of our recommendations are in the spirit of this observation, and their merits are independent of the current crisis of the federal court system. In places we have recommended an expansion in the jurisdiction of the federal courts. We want a better federal court system, not a smaller one. Our proposals would not make the system smaller, even if all of them were adopted; they would merely prevent the system from being overwhelmed by a rapidly growing and already enormous caseload; and in doing so they would preserve access to the system for those who most need it.

In the present discussion, it is at once important and sufficient to explicitly endorse this methodology for future assessments of the original jurisdiction of the federal courts.

III. ALTERNATIVE DISPUTE RESOLUTION

Related to the reallocation of disputes between the state and federal courts, the theme of reallocating disputes out of the court

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20 See Hill & Baker, supra note 8, at 76-87.
21 Redish, supra note 18, at 1786.
22 REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 3-4 (Apr. 2, 1990) [hereinafter STUDY COMMITTEE REPORT].
system altogether through Alternative Dispute Resolution (ADR) has garnered much recent attention. The idea is to provide out-of-court resolution of otherwise federal controversies by negotiation, mediation, conciliation, and settlements. As was suggested in the above discussion about reducing original jurisdiction, the impact from this approach also would be felt most directly at the trial level and only derivatively at the middle tier. Considered from the particular perspective of the appellate court, however, more widespread reliance on ADR would resolve more disputes without the possibility of any appeal in those cases. Thus, each dispute resolved through some ADR technique represents one less potential appeal. Because at present these methods are not used as much as litigation is used to resolve disputes, they hold out a promise for significant caseload relief that many people find attractive. Circuit Judge Edwards, himself a recent convert, has suggested that if the caseload and inadequate coping mechanisms threaten the federal appellate ideal, an emphasis on ADR would preserve substantial rights and further enhance the quality of the remaining judicial determinations.

The purpose here is not to discuss the entire range of available ADR techniques, but a few may be identified to illustrate their

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24 Edwards, supra note 10, at 929.
substantially unrealized potential.\textsuperscript{25} Several federal district courts experimented with court-annexed arbitration during the mid-1980s, and Congress expanded the program.\textsuperscript{26} These forms of arbitration varied from voluntary to mandatory, and from case-by-case approaches to the diversion of whole categories of cases.\textsuperscript{27} Nearly thirty districts established either voluntary or mandatory forms of court-annexed mediation under the district's local rules.\textsuperscript{28} And the programs in some districts are very elaborate.\textsuperscript{29} In some districts, the ADR technique of choice is the summary jury trial.\textsuperscript{30} In other districts, the mini-trial is relied on.\textsuperscript{31} While these and other ADR techniques have been fervently "hyped" by some participants, other commentators on the scene have sounded notes of caution and concern.\textsuperscript{32} ADR is a relatively recent phenomenon, and these techniques must be evaluated objectively and empirically.\textsuperscript{33} The chief caution is more philosophical than procedural, although it is expressed as a concern for the lost procedure:

[W]e should be concerned that some ADR procedures abandon most of the formalities we associate with protections against arbitrariness, that the long-term


\textsuperscript{27} Robel, \textit{supra} note 25, at 24-25. \textit{See generally LIND & SHAPARD, supra} note 23.

\textsuperscript{28} Robel, \textit{supra} note 25, at 25-26.

\textsuperscript{29} \textit{Id. at} 26-27. \textit{See generally DORIS MARIE PROVINE, FEDERAL JUDICIAL CENTER, SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES} (1986).


\textsuperscript{31} Robel, \textit{supra} note 25, at 28. \textit{See generally PROVINE, supra} note 29.

\textsuperscript{32} \textit{See, e.g.,} Robel, \textit{supra} note 25, at 34 (proposing examination of process and underlying values before embracing ADR).

effect of the routine use of ADR procedures on underlying legal norms is unknown, and that application of certain forms of ADR to some classes of litigants and not others raises distributional concerns.\textsuperscript{34}

Despite such reservations, according to champions of ADR, "[o]ver the past two decades there has been a dramatic explosion of interest among academics, the bar, and (most importantly) users of legal services in ways that lawyers can help resolve disputes other than through litigation."\textsuperscript{35}

For the longest time, ADR methods were not widely used throughout the federal court system for three reasons. First, a widespread perception considered a judicial determination superior to any alternative.\textsuperscript{36} Second, the bar was 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{37} Third, any wholesale change required the active commitment of the federal government because of its prominent usage of the federal courts generally and of the federal appellate process in particular.\textsuperscript{38}

Whatever the intensity of the first two factors, the third factor appears to be in somewhat of a state of flux. In 1991, the executive branch announced the \textit{Agenda for Civil Justice Reform in America}, a report from the President's Council on Competitiveness, which endorsed voluntary dispute resolution.\textsuperscript{39} By Executive Order issued in October 1991, the President directed attorneys represent-

\textsuperscript{34} Robel, supra note 25, at 34.
\textsuperscript{35} John S. Murray et al., Processes of Dispute Resolution: The Role of Lawyers xix (1989); see also Christine B. Harrington, Shadow Justice—The Ideology and Institutionalization of Alternatives to Court (1985).
\textsuperscript{36} Edwards, supra note 10, at 927.
\textsuperscript{37} Ginsburg, supra note 10, at 19.
ing the United States to "make reasonable attempts to resolve . . . dispute[s] expeditiously and properly before proceeding to trial," and endorsed ADR when "feasible" or "appropriate."40 Recent congressional proposals likewise 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."41 There remains a profound need, however, for standards for making the decision about allocating


(c) Alternative Methods of Resolving the Dispute in Litigation. Litigation counsel shall make reasonable attempts to resolve a dispute expeditiously and properly before proceeding to trial.

(1) Whenever feasible, claims should be resolved through informal discussions, negotiations, and settlements rather than through utilization of any formal or structured Alternative Dispute Resolution (ADR) process or court proceeding. At the same time, litigation counsel should be trained in dispute resolution techniques and skills that can contribute to the prompt, fair, and efficient resolution of claims. Where such benefits may be derived, and after consultation with the agency referring the matter, litigation counsel should suggest the use of an appropriate ADR technique to the private parties.

(2) It is appropriate to use ADR techniques or processes to resolve claims of or against the United States or its agencies, after litigation counsel determines that the use of a particular technique is warranted in the context of a particular claim or claims, and that such use will materially contribute to the prompt, fair, and efficient resolution of the claims.

(3) Litigation counsel shall neither seek nor agree to the use of binding arbitration or any other equivalent ADR technique. A technique is equivalent to binding arbitration if an agency is bound, without exercise of that agency's discretion, to implement the determination arising from the ADR technique . . .

Id. It is too early to know the direction the new Administration will take. See generally Carl Tobias, The Clinton Administration and Civil Justice Reform, 144 F.R.D. 437 (1993) (providing overview of civil justice reform and possible issues that Clinton Administration will address); Carl Tobias, Executive Branch Civil Justice Reform, 42 AM. U. L. REV. 1521 (1993) (finding that Bush Administration initiatives warrant continued experimentation).

41 Griffin B. Bell, Crisis in the Courts: Proposals for Change, 31 VAND. L. REV. 3, 7 (1978); see also Marjorie Lakin & Ellen Perkins, Note, Realigning the Federal Court Caseload, 12 LOY. L.A. L. REV. 1001, 1009-12 (1979) (outlining arbitration use on experimental basis); cf. FED. R. CIV. P. 16(c)(7) (stating that subjects discussed at pretrial conference include "the use of extrajudicial procedures to resolve the dispute").
disputes between courts and ADR programs. Certainly, the most important issues involving constitutional rights belong before an Article III judge. On the secondary policy level, however, considerations such as the probability of error, the need for finality, the cost/benefit ratio, public demand, and user satisfaction all ought to affect the political allocation.

The most significant recent development for district court ADR procedures was initiated by Congress in the form of the Civil Justice Reform Act of 1990. This comprehensive legislation requires each district court to implement a civil justice expense and delay reduction plan. The plan is to be designed to facilitate the deliberate adjudication of civil cases on the merits, to monitor the discovery process, to improve overall litigation management, and to foster the just, speedy, and inexpensive resolution of civil disputes. One of the primary congressional directives in this statute is that the district courts expand and enhance the use of ADR. The pilot districts, early implementation districts, and demonstration districts, along with all the remaining districts, are busying

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43 Id.; see also Robert A. Baruch Bush, Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choices, 1984 Wis. L. Rev. 893.


These developments in ADR are part of larger changes in the legal culture of the United States. The federal courts are a central part of that legal culture and they necessarily must respond to changes in demographics, the economy, politics, and the life of the nation.\footnote{See generally Leo Dreyer, \textit{Litigation Management Proposals: Storm Clouds for Voluntary ADR?}, 1990 J. DISP. RESOL. 293 (examining current reform proposals relating to court-annexed ADR); Marc Galanter, \textit{The Day After the Litigation Explosion}, 46 MD. L. REV. 3 (1986) (examining litigation in United States); Marc Galanter, \textit{The Life and Times of the Big Six; Or the Federal Courts Since the Good Old Days}, 1988 WIS. L. REV. 921 (studying increase in caseloads in federal courts); Wolf Heydebrand & Carroll Seron, \textit{The Rising Demand for Court Services: A Structural Explanation of the Caseload of U.S. District Courts}, 11 JUST. SYS. J. 303 (1986) (analyzing changes in U.S. District Courts from 1904 to 1985); Thomas B. Marvell, \textit{Caseload Growth—Past and Future Trends}, 71 JUDICATURE 151 (1987) (examining caseload growth); Michael J. Saks, \textit{Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?}, 140 U. PA. L. REV. 1147 (1992) (examining tort litigation system); Austin Sarat, \textit{The Litigation Explosion, Access to Justice, and Court Reform: Examining the Critical Assumptions}, 37 RUTGERS L. REV. 319 (1985) (examining theories guiding court reform activity); Joseph F. Weis, Jr., \textit{Are Courts Obsolete?}, 67 NOTRE DAME L. REV. 1385 (1992) (contrasting the role of courts to other forms of dispute resolution and proposing changes in the court system).} As Chief Judge Breyer so presciently observed, however, there remains a good deal of uncertainty about ADR and about how many and which disputes ought to be resolved with judicial procedures or by other alternative procedures.\footnote{Stephen Breyer, \textit{Administering Justice in the First Circuit}, 24 SUFFOLK U. L. REV. 29, 44 (1990).} His key point is that "[t]his uncertainty arises from the fact that one's objective, in
seeking to resolve the disputes that lead to litigation, cannot be their settlement alone, but rather, must be their just settlement."

Alternative dispute resolution holds out some 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 fully implemented and fairly utilized, these applications could have a large positive effect on the structure of our federal court system. It is safe to say that this generation of federal courts is undergoing a basic reorientation of civil procedure. There are some indications that the legal culture is going about the task of reconceptualizing the fundamental norms of dispute resolution. It remains to be seen if all this will be carried so far as to stop thinking of ADR as an alternative to judicial proceedings and to begin to think of judicial proceedings as one of the many and varied alternatives to be matched with appropriate disputes to achieve a just and efficient resolution.

IV. CREATING CIRCUIT JUDGESHIPS

If demand for appellate judgepower is not decreased somehow, the other alternative is to increase supply. This can be done to some extent not by creating new circuit judgeships, but instead by mining existing personnel 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 kind of voluntary basis. Because they are replaced by active judges, their services are something of a bonus. Senior judges are relied on extensively now, however, and do not represent

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49 Id.
50 Edwards, supra note 10, at 936.
a likely source of additional appellate judgepower. 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. This practice serves to diffuse case congestion, but it is merely a short-term adjustment. Finally, federal district court judges may sit on panels by special designation. Again, this device has been used mostly by the large circuits facing the most severe docket growth. Of the three pools—senior judges, visiting judges, and district judges—recruiting from the ranks of district judges represents the only significant long term supply of extra appellate judgepower. More study and planning could maximize this potential. For example, it might be feasible to add a large number of judges at the district court level and then routinely designate them to sit on three-judge panels of the courts of appeals. This would be something of a variation of two historical practices: the circuit court in the original design of the federal court system and the three-judge district court of more contemporary times.

It might be suggested that the crisis of volume has exceeded existing judge-staffing mechanisms. The relentless docket growth

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54 28 U.S.C. §§ 46, 291 (1988); see United States v. Claiborne, 870 F.2d 1463, 1464-67 (9th Cir. 1989) (rejecting argument that failure to poll all Ninth Circuit judges as to their availability violated 28 U.S.C. § 292(d); see also Carrington, supra note 52, at 565. The Chief Justice has directed the Judicial Conference Committee on Intercircuit Assignments to take a more proactive approach to sending judges where they are needed. Between August and December 1991, for example, there were 82 intercircuit assignments, involving 62 Article III judges, among them two retired Associate Justices. Intercircuit Assignments Help Courts Cope With Workload, Third Branch, May 1992, at 5. “Intercircuit assignments meet emergency needs, supplement existing judicial resources, and help circuits cope with extenuating circumstances that could include protracted cases, a case in which all judges of the circuit disqualify themselves, or multiple cases transferred into the circuit.” Id.

55 See Carrington, supra note 52, at 564-65 (arguing present system is incapable of distributing the pressure of congestion as widely as possible). The visiting judge has to come from somewhere, so by definition the home court is disadvantaged. Furthermore, there is an often unarticulated concern that a judge from another part of the country does not share the legal culture in the visited court.


57 See Carrington, supra note 52, at 565.
in the Fifth Circuit so routinely outstrips its judicial capacity that in October 1991 then-Chief Judge Clark entered a "judicial emergency order," still in effect, that waived indefinitely the statutory requirement that the majority of a three-judge panel be active judges from the home circuit court.\textsuperscript{58}

If the general appellate judgeship shortage continues to worsen, it may not be too far-fetched to expect someone to suggest a short term supply solution, previously relied on by state courts, to keep appellate backlogs and delays from growing out of hand. Most of the states have relied on lawyers to serve temporarily as judicial adjuncts, pro bono publico.\textsuperscript{59} Although most of these programs have been in the state trial courts of limited jurisdiction, the enabling statutes in five states actually authorize the practice for the state appellate bench, as well.\textsuperscript{60} In theory, on the appellate level, this attorney-judge might serve along with two full-time judges, to combine this idea with the two-judge panel idea. An Article III judge and a lawyer-temporary judge could take the first review and a second Article III judge would be called in to break any ties. Things will have to become even more drastic than presently imaginable, however, for someone to be taken seriously to suggest that the federal court system borrow this practice. Temporary appointments to Article III courts raise profound and seemingly insurmountable constitutional problems.\textsuperscript{61} Therefore, without creating additional circuit judgeships, the reassignment of existing Article III judges, primarily district judges, to appellate hearing panels is the most that can be expected.

Two personnel developments at the district court level provide an additional perspective on staffing the federal appellate bench. A

dramatic growth in federal judgeships has occurred in the district courts. During the 1960s and 1970s, their ranks increased more than 100 percent in absolute numbers. 62 The trend continued unabated through the 1980s. 63 Additionally, the number of support personnel at the federal trial level increased substantially. Reliance on what Judge Edwards calls special "subjudges"—masters, magistrate-judges, and bankruptcy judges—has increased the supply of non-Article III decisionmakers, and their responsibilities at the federal trial court level have grown as well. 64

Two related points concerning these trial court developments are peculiarly relevant. First, the point deserves repeating that growth at the intake court with original jurisdiction inevitably places pressure on the appellate function. This is why large scale reductions in the original jurisdiction of federal courts have the potential to provide large dividends for appellate relief. Second, the offered solution of "subjudges" has historically been rejected for the courts of appeals, and many argue properly so. 65 Permanent adjuncts are seen by some as undesirable in a court of error with an incidental but important lawmaking function. This line of argument intersects the background debate over the creation of the appellate magistrate, whose possible duties have been the subject of keen debate. Here again, developments at the district court level may well be instructive. Limited use of senior judges, visiting judges, and district judges is to be first preferred. 66 But, in the

62 Carrington, supra note 52, at 565; see also David S. Clark, Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century, 55 S. Cal. L. Rev. 65, 71 (1981). Since the turn of the century, there has been an 83% increase in the ratio of federal trial judges to the U.S. population. Id.

63 See POSNER, supra note 10, at 353-57.

64 Clark, supra note 62, at 144-45; Edwards, supra note 10, at 879-80.

65 Bankruptcy appellate panels, consisting of three bankruptcy judges, can hear appeals from the Bankruptcy Court before a second appeal to the court of appeals. 28 U.S.C. § 158 (1988); see Michael A. Berch, The Bankruptcy Appellate Panel and Its Implications for Adoption of Specialist Panels in the Courts of Appeals, in Restructuring Justice—The Innovation of the Ninth Circuit and the Future of the Federal Courts 165 (Arthur D. Hellman ed., 1990) (arguing that courts of appeals should follow the system for review used in bankruptcy cases); Richard H. Deane & Valerie Tehan, Judicial Administration in the United States Court of Appeals for the Ninth Circuit, 11 Golden Gate U. L. Rev. 1, 16-17 (1981) (arguing that these panels have been working well).

long run, appeals ideally ought to be decided by permanent, active circuit judges from the particular circuit as much as possible. This manner of staffing helps to ensure the realization of one coherent law of the circuit supported by a majority of its judges. This is a vital feature of the federal appellate tradition.

On the supply side of solutions, creating more circuit judgeships already has had the practical effect of changing the federal appellate function, and if Congress continues this ad hoc approach, it promises to exacerbate many of the problems of bigness in the courts of appeals. The Framers of the Constitution contemplated a minimal number of federal judges to staff a few courts of quite limited jurisdiction. Alexander Hamilton, perhaps naively or perhaps disingenuously, wrote in *Federalist No. 81* of a single federal judge in only "four or five, or half a dozen federal districts." Today we have ninety-four federal districts with 649 federal judgeships. During their first decade, the nine courts of appeals were assigned thirty judgeships; today there are thirteen federal circuits with 179 circuit judgeships. Increases have followed the congressional palliative of dealing with caseload growth by creating judgeships. This has been the most frequent and predictable congressional response to caseload growth. Even so, the growth of the appellate bench still has not kept pace. Circuit judges have been delivered in litters by omnibus acts, and the litters have been getting larger. Ten new circuit judgeships were created in 1961; only five years later, six more were added; two years later thirteen more, in 1978 thirty-five new

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67 Lumbard, supra note 53, at 33.
68 Id.
71 Carrington, supra note 52, at 580 n.165.
72 28 U.S.C.A. § 44(a) (West 1994). Between 1900 and 1988, the population of the United States tripled and the number of appeals increased thirty-four-fold.
circuit judgeships were created; in 1984, after incremental additions in 1982 and 1983 were insufficient, another twenty-four judgeships were added; in 1990, the most recent but certainly not the last litter of eleven circuit judgeships was delivered.

Adding judges is a way to respond to growth in caseload, of course, but this ad hoc solution may contribute more to the problems of the large court. The turn-of-the-century design for consistency and harmony in the law—that the same three-judge panel would decide all the appeals in a circuit—passed from the scene a long, long time ago. (No one is heard today to advocate sixty circuits of three-judge panels.) Today there are thousands of permutations of three-judge panels in the large courts of appeals. The courts of appeals average thirteen judges; the Ninth Circuit has twenty-eight judgeships; only the First Circuit has fewer than nine judgeships, which for the longest time was thought the maximum. Monitoring the law becomes more onerous. Intracircuit conflicts become more likely. En banc rehearings, which developed as the traditional mechanism to maintain the unity of the law of the circuit, become unwieldy.

Worse, adding circuit judgeships does not achieve any lasting improvement. A detailed study of prior omnibus judgeship statutes found only a one-year impact on the appeals-per-panel ratio.

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81 See Edwards, supra note 10, at 918-19; Ginsburg, supra note 10, at 10-11.
The major benefit thus has been merely a kind of temporary braking effect, which is quickly overwhelmed. At the same time, to continue merely adding judges to the presently structured circuit system will worsen the unintended effects on the courts of appeals, individually and collectively. Increasing the number of circuit judgeships, within the existing structure, should be a reform of last resort. This is the view of concerned circuit judges. In March 1989, the Eleventh Circuit Judicial Council passed a formal and unanimous resolution to ask Congress not to add any more circuit judgeships, despite statistical-caseload justifications, because the judges feared that their bench simply would grow too large.

Moreover, economic concerns may make Congress a more reluctant midwife, as new judgeships become more expensive in an era of ever-tightening budgets. According to official estimates, the initial one-time investment to create a single circuit judgeship is approximately $630,000. Maintaining a circuit judge, with chambers and staff, adds an estimated $814,000 to the national budget each year. Even on the national order of magnitude, delivering a large litter of new circuit judgeships is an expensive proposition over time. It might be said that a million dollars here and a million dollars there begins to add up over the years.

83 Howell Heflin, Fifth Circuit Court of Appeals Reorganization Act of 1980—Overdue Relief for an Overworked Court, 11 CUMB. L. REV. 597, 616 (1980-81) (citation omitted) ("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."); Patrick E. Higginbotham, Bureaucracy—The Carcinoma of the Federal Judiciary, 31 ALA. L. REV. 261, 270 (1980).


86 GORDON BERMANT ET AL., IMPOSING A MORATORIUM ON THE NUMBER OF FEDERAL JUDGES: AN ANALYSIS OF ARGUMENTS AND IMPLICATIONS 36 (Fed. Jud. Ctr. 1993). Furthermore, "[b]ecause the contribution of new judges is overstated, the huge financial and social costs imposed by new judges is hard to justify. Surely, such funds could be more effectively employed to increase the productivity of our existing judges." Gerald Bard Tjoflat, More Judges, Less Justice, A.B.A. J., July 1993, at 70, 73.

87 Admittedly, the additional expenses of a circuit judgeship are a relatively inconsequential sum in the national budget. PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 199 (1976). But it is at least a footnoteworthy digression to point out that every item in the federal
The corresponding not-so-hidden qualitative costs of expanding the federal appellate bench seem very high. As Judge Kaufman has remarked, "The government's ability to attract and retain capable judges is, at least partially, inversely proportional to the size of the federal judiciary."88 Part of the prestige of the judgeships on the courts of appeals has been their relative rarity. Until this generation, the authorized number of lifetime appointments was fewer than the number of U.S. Senators. The sincere concern is not that a judgeship would go begging but that lowered perceptions would attract lesser judges. An alternative worry is that having a huge number of judgeships would result in an on-going need for large numbers of nominations and confirmations, which could have the cumulative effect of devaluing these occasions for the political branches, which in turn could lower the quality of the federal bench. While this may not have happened yet, the concern is often voiced, more often than not by the judges themselves.89 Indeed, there are some observers who worry off the record that in fact it already has happened.

Concerns about large benches divide the judges. In a recent poll, the circuit judges were asked to choose between adding judges, as

budget can be subdivided into inconsequential component sums. Even the largest and most expensive and most elaborate weapons system can be broken down into sub-unit costs to suggest a marginal financial inconsequence compared to the total budget. The point is that the federal budget is the sum total of these inconsequential sums, and the federal judiciary makes its own contribution to government expense, and presumably government waste. Still the argument is relative and contextual:

[T]he cost of operating the judicial system is an infinitesimal part of our national expenditures. We spend only three-tenths of 1 percent of our federal budget on our court system. We spend almost as much on one Stealth bomber as we do on the whole federal judicial system. We could run the entire federal judiciary for 15 years on the cost of a single space station.


89 E.g., Kaufman, supra note 85, at 261 (noting that "an influx of new judges is bound to devalue the judicial currency"); Markey, supra note 82, at 371 (noting deterioration of the federal judiciary); Newman, supra note 79, at 187 (noting that an increase in number of judges will lead to a decrease in quality).
the caseload grows, or not adding judges, as the backlog grew longer: 52% preferred adding judges; 33% would resist adding judges, even if their workload increased; 11% would resist adding judges, even if the backlog continued to grow. These attitudes represent values in transition during a period of keen debate over whether the nation can afford the costs and benefits of an elite federal judiciary.

The case for a small elite federal bench was made by the Federal Courts Study Committee. The Study Committee expressed the concern that an indefinite expansion of the federal judiciary would take away from the prestige of the courts themselves:

The independence secured to federal judges by Article III is compatible with responsible and efficient performance of judicial duties only if federal judges are carefully selected from a pool of competent and eager applicants and only if they are sufficiently few in number to feel a personal stake in the consequences of their actions. Neither condition can be satisfied if there are thousands of federal judges.

The Study Committee went on to insist that "[e]ven if a highly competent federal judiciary consisting of thousands of judges could be created and maintained, the coordination of so many judges would be extraordinarily difficult." There are two underlying

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90 Robel, supra note 25, at 41 n.153.
91 See generally Michael Wells, Against an Elite Federal Judiciary: Comments on the Report of the Federal Courts Study Committee, 1991 B.Y.U. L. Rev. 923. But see Newman, supra note 79, at 194 ("[T]he federal court system was established for a special task. It was not created to be just like the state court systems, but instead to be a relatively small, specialized institution of distinction.").
92 STUDY COMMITTEE REPORT, supra note 22, at 7.
93 Id. The Report continued:
   The more trial judges there are, the more appeals judges there must be; the more appeals judges there are, the higher the rate of appeal, because it becomes more difficult to predict the behavior of the appellate court; the more appeals there are, the more difficult it is for the Supreme Court to maintain some minimum uniformity of federal decisional law, because its capacity to review decisions of the lower federal courts is limited. Even the maintenance of the necessary minimum uniformity of law within a single circuit becomes problematic if there are a great many
policy questions. First, how great are the benefits of an elite federal judiciary? Second, can the nation continue to afford an elite federal judiciary? Ultimately, these questions must be answered by Congress. When Congress takes the measure of what has happened to the courts of appeals and looks for solutions for the problems facing the federal courts, the decision may come down to a choice between doing nothing or trying to return to a lost tradition, an ideal that already has passed from the scene.

Pay scale and work conditions are also part of the picture. Higher private sector salaries and negative perceptions of the federal appellate treadmill can influence highly qualified judicial candidates to decline to serve. Although recent judicial pay raises have blunted much of the worry in this regard, a different worry for the coherence and uniformity in the law will be heard if more circuit judges are added to the system as it is now structured and administered. Setting aside the less tangible loss of collegiality, the instability of the law grows geometrically with the addition of judges. Not just an evil in itself, such instability also increases the workload as more panel rehearsings and en banc courts are required, and the uncertainty of outcomes creates an

judges in that circuit, and while this problem can be alleviated by increasing the number of circuits, the result is to increase the number of intercircuit conflicts and hence the burden on the Supreme Court.

Id. The Judicial Conference of the United States endorsed the following resolution in 1990:

[T]o support the concept of maintaining a relatively small Article III judiciary through limitations on the jurisdiction and caseload of the courts, but [to] oppose . . . any efforts to set a maximum limit on the number of Article III judgeships.


94 Wells, supra note 91, at 934-50.

95 Id. at 956-57.


97 See CARRINGTON ET AL., supra note 87, at 199-200 ("[G]iven the present structure of the federal appellate courts, more judgeships threaten the workability of en banc procedure and the development of a uniform law of the circuit."). Former Attorney General Smith expressed the concern that "[i]ncreasing the number of decision-makers issuing opinions threatens uniformity, evenhandedness, and stability in the application of the law." William French Smith, The Role of the Federal Courts, CASE & COM., Jan.-Feb. 1983, at 10, 12.
incentive for litigants to bring even more appeals.98 Chief Judge Tjoflat of the Eleventh Circuit explained these sequential developments:

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.99

The basic problem is not with numbers, but with priorities. Increasing the number of judgeships ought to be a reform of last

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98 Edwards, supra note 10, at 918-19; Ginsburg, supra note 10, at 11.
99 Interview with Judge Gerald Bard Tjoflat, in THIRD BRANCH, Apr. 1983, at 1, 3-4; see also Tjoflat, supra note 86, at 70 (arguing that increased court size results in decreased productivity of individual judges and lessening of clarity and stability in the law, thus resulting in increased litigation).
The unintended effects of such a "quick fix" are demonstrated by the unintended yet unalterable change in the basic structure of the courts of appeals. To go on simply adding judges to the current structure is itself a deceptively simple solution with serious negative 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 fully and finally destroying what remains of the received federal appellate tradition.

The current methodology for determining when to add new judgeships is surprisingly uncomplicated. The Judicial Conference surveys the caseload needs of federal courts every four years and makes recommendations to Congress to create judgeships, based on the use of rough workload formulae. After that, the political process operates like a black box to create judgeships. The addition of permanent Article III positions should always be a matter for serious study. A multi-faceted analysis of need should be developed. A 1981 Federal Judicial Center study considered the failings of the present approach and suggested several reforms. Admitting the difficulty of assessing judgeship need, the study nonetheless faulted the present system. First, the time lag in the present practice between identifying the need and the creation of a judgeship renders the new position less effective. The

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100 Higginbotham, supra note 83, at 270.
101 Id. at 271. Arguments for a cap on the number of federal judges are "based on [the] concern that if the present expansion continues unchecked, we will destroy the unitary nature of the federal judicial system. Even a casual historian knows that this was the raison d'etre for the establishment of the federal courts." Delores K. Sloviter, The Judiciary Needs Judicious Growth, Nat'l L.J., June 28, 1993, at 17.
102 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. Woodford Howard, Jr., Courts of Appeals in the Federal Judicial System 270 (1981).
103 Id.
106 Bermant et al., supra note 86, at 2-4.
process only contemplates positions already needed. There is no effort at prediction. This assures that supply will always lag behind demand for judgeships. Second, legislative litter of judges cause severe assimilation problems in terms of confirmation, orientation, staff, and office space. 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, often merely reflexive, to have sufficient judgepower to handle case filings. In terms of the appellate ideal, the optimum number of federal judgeships might be theoretically determined by the concept of the role fashioned for the federal courts. Judicial hierarchy mostly is determinative. Federalism defines that role vis-à-vis state courts. Assessments of federal judgeship needs ought to be addressed within the larger context of federal jurisdiction and the role of the federal courts. Clearly, only Congress should make these assessments and final adjustments.

Moving to an analysis focusing on the legislative process of judgeship creation, the Federal Judicial Center study made recommendations for overcoming perceived inadequacies in what might be called the political black box of the status quo:

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

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107 A broader policy question of separation of powers is whether the executive's impact on the federal judiciary should be paced along presidencies. Id. at 3. Chief Judge Sloviter of the Third Circuit concludes, "[I]ncreases in these courts, even if justified by the caseload, should be made only incrementally, limited to 15 percent to 20 percent every three years." Sloviter, supra note 101, at 18.

108 Congress has "neglect[ed] important considerations of organizational dynamics and judicial purpose." BAAR, supra note 105, at 46.

109 Id. at 47. Judge Reinhardt argues:

My proposal is simply that Congress double the size of the courts of appeals. I base this not on studies or statistics, but on practical knowledge and experience. I think that the current system of determining when new judges will be added on the basis of workload surveys has led us all down the wrong track. A totally fresh look is required.

I believe that we have already compromised the quality of justice beyond the point of toleration—160 federal appellate judges is simply far too small a number for a nation of over 240 million people.

Reinhardt, A Plea to Save the Federal Courts, supra note 87, at 53-54.
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.\(^{110}\)

This proposed reform has some problems, but it represents a substantial improvement over the ad hoc process now in place.\(^{111}\) Of course, there is no good reason to expect Congress will ever delegate Article III patronage. And there are good constitutional and policy reasons why it should not.

A final issue on judgeship creation is whether, going beyond a filings-per-judge focus, an overall institutional limit exists on the number of appellate judges beyond which stability and coherence are not possible. It seems evident that the present circuit structure has a finite capacity for absorbing new judgeships. As a matter of

\(^{110}\) BAAR, supra note 105, at 48. Number six may pose constitutional problems that were not evident when the study was conducted. See INS v. Chadha, 462 U.S. 919, 944-59 (1983) (ruling unconstitutional an immigration statute provision authorizing single House of Congress to invalidate decision of executive branch regarding deportation).

\(^{111}\) See generally Robert W. Kastenmeier & Michael J. Remington, Court Reform and Access to Justice: A Legislative Perspective, 16 HARV. J. ON LEGIS. 301 (1979) (surveying five different policy approaches taken in response to increased court caseloads); Abner J. Mikva, More Judgeships—But Not All at Once, 39 WASH. & LEE L. REV. 23 (1982) (opining that legislative response to increased judicial caseload is too slow to be effective and suggesting some power be delegated to judiciary itself).
philosophy, Justice Frankfurter recognized that federal judgeships should not be considered 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. Inserting a fourth tier, with or without appellate subject matter specialization, would make it possible for a greater number of circuit judges to work together in a rational, coherent way. Even such revised systems, however, will eventually encounter limits of scale.

Chief Judge Breyer recently took the time to explain the system-wide disadvantages to what may seem like an obvious solution to simply add circuit judgeships. At the appellate level, the problem is functional. If the courts of appeals existed only to

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112 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.

Lumbermen's Mut. Casualty Co. v. Elbert, 348 U.S. 48, 58-59 (1954) (Frankfurter, J., concurring). See also FRIENDLY, supra note 9, at 44-46; Robert H. Bork, Dealing with the Overload in Article III Courts, 70 F.R.D. 231, 234 (1976) (listing detrimental results, including decreased prestige and collegiality, from increased number of judges).

113 Meador, supra note 66, at 642. Judge Newman argues:

In sum, a federal judiciary of no more than 1,000 judges will be of generally high quality in both personnel and performance, with only a modest bureaucracy. There will be a tolerable number of circuits, with courts of appeals of tolerable size. The body of federal law will be reasonably coherent, and the Supreme Court will be able to maintain uniformity of federal law. A federal judiciary rising above 1,000 and heading for 3,000 judges will be of lesser quality and dominated by a burgeoning bureaucracy of law clerks, staff counsel, magistrate judges, and other ancillary personnel. It will be divided into an unmanageable number of circuits or plagued by appellate courts of unmanageable size, with an incoherent body of federal law and a Supreme Court substantially incapable of maintaining uniformity of federal law.

Newman, supra note 79, at 194.

correct error, the system might be able to absorb an unlimited number of circuit judges.\textsuperscript{115} Indeed, consider that over the last century the structure has absorbed the addition of 149 judges to the original complement of thirty. The structural problem with adding circuit judgeships comes into play in the law-declaring function. A court of appeals "must explain, clarify, and develop the law. Insofar as it does so, other courts, the bar, and those subject to its jurisdiction, must follow what it says, and others outside of its jurisdiction may also read its opinions and find guidance."\textsuperscript{116} Chief Judge Breyer identifies three serious disadvantages to the so-called solution of adding appellate judges to deal with caseload growth.\textsuperscript{117} First, he refers to the point made earlier that having too many judges will lessen the opportunity for the appellate courts to speak authoritatively. Conflicts among the circuits that disagree on the rule of law that ought to apply are only part of the problem, although a serious and visible part. There are other, more subtle, less detectable conflicts Chief Judge Breyer describes: "decisions involving other sorts of rules, rules that grow out of the facts at hand, that arise out of the use of an example."\textsuperscript{118} Second, he suggests that law professors, students, and practicing attorneys simply cannot keep up with the 15,000 appellate opinions written annually by circuit judges. As a consequence, "federal law lacks the criticism necessary for modification and development."\textsuperscript{119} Third, such a large and unwieldy system will more and more work to the advantage of those with the resources to take advantage of its size—large law firms, institutional litigators, and the government—to the disadvantage of others.\textsuperscript{120}

Furthermore, what data we have should discourage Congress from adding circuit judgeships to deal with case load. In 1950, when there were sixty-four circuit judgeships, 2.5\% of the terminations in the district courts were appealed, a 1:40 ratio. In 1989, when there were 165 circuit judgeships, 13\% of the terminations

\textsuperscript{115} Breyer, \textit{supra} note 48, at 37-38.  
\textsuperscript{116} \textit{Id.} at 37.  
\textsuperscript{117} \textit{Id.} at 38-40.  
\textsuperscript{118} \textit{Id.} at 38.  
\textsuperscript{119} \textit{Id.} at 39.  
\textsuperscript{120} \textit{Id.} at 40.
were appealed, a 1:8 ratio. These statistics suggest that appellants today are much more willing to take an appeal and gamble that a three-judge panel will set aside their trial court defeat. The widely shared perception apparently is that the odds for reversal are better today.

The projections we have are quite disturbing in this regard. In 1975, one federal jurisdiction seer predicted that in the twenty-first century, 5000 circuit judges would be filling 1000 volumes of Federal Reporter, Umpteenth Series, disposing of approximately a million appeals—each and every year. More recent estimates from the Administrative Office of the United States Courts predict an increase from 38,000 filings in 1988 to 66,000 filings by the year 2000. Increases in filings of this magnitude will render the wholesale creation of additional judgeships inevitable. There are bound to be numerously more litters of circuit judges and the litters are bound to be much larger between now and the not-too-distant end of the century.

This inevitability raises in turn the question of whether there is


To fully explore all the implications of these figures would require an analysis beyond the scope of the present study. It would take into account such factors as the federalization of state criminal procedure and the expansion of federal constitutional rights, including the right of access to courts and the right of counsel on appeal in criminal matters. Statutory developments, such as the recent jurisdiction to review federal criminal sentences, likewise are implicated. On the civil side of the appellate docket, one might speculate that the cases that make it through the trial system are the least likely candidates for settlement and the marginal costs of an appeal often are small compared to the judgment that is at stake. Finally, perceptions that the law is less predictable and the chances for reversal are better, particularly in the larger courts of appeals, may contribute to the higher rate of appeals. Further speculations must be left for another time.


123 Statement Submitted by the Circuit Executive, U.S. Courts for the Ninth Circuit, reprinted in Ninth Circuit Court of Appeals Reorganization Act of 1989: Hearing on S. 948 Before the Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary, 101st Cong., 2d Sess. 340, 342 (1990) [hereinafter Ninth Circuit Executive Statement]. "In this decade, we will decide whether in the next century the federal judicial system will remain at a size that enables it to be true to its purpose, or become a vast faceless bureaucracy that will undermine the very need to have a federal judiciary." Newman, supra note 79, at 194.

124 Ninth Circuit Executive Statement, supra note 123.
some absolute maximum size of a court sitting in panels. A committee of the Judicial Conference fixed on the number nine in 1964, apparently based on the numerology of the Supreme Court that became revelation after the failure of the 1937 court-packing plan. The Judicial Conference's last official position, in 1974, was to set the maximum per court of appeals at fifteen judgeships. Today, only the First Circuit (6 judgeships) is below the 1964 limit; and the Third Circuit (14), Fourth Circuit (15), Fifth Circuit (17), Sixth Circuit (16), and Ninth Circuit (28), have all reached or surpassed the limit set in 1974. So much for such limits. Most certainly, more study is called for. This issue needs to be addressed directly by judges and legislators.

The congressional extramural strategy of adding judges does show some signs of playing out. Enlarging the federal judiciary is costly. It places strains on the appointment process and makes more likely the possibility that unqualified or unworthy candidates will be given life tenure. A larger appellate judiciary results inevitably in more conflicting opinions, which in turn create greater uncertainty and generate more litigation. The larger the appellate bench, the less familiar and less collegial the judges become, and the esprit de corps suffers along with their work product. As the opportunity for individual contribution and recognition diminishes, so too do accountability and the attractiveness and prestige of the position. The Federal Courts Study Committee dramatically described the current situation:

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129 "In the absence of such [empirical] evidence, the maximum number of judges who can sit on a single circuit will remain a matter of guesswork. . . ." AMERICAN BAR ASS'N, STANDING COMM. ON FEDERAL JUDICIAL IMPROVEMENTS, THE UNITED STATES COURTS OF APPEALS: REEXAMINING STRUCTURE AND PROCESS AFTER A CENTURY OF GROWTH 9-10 (1989).

130 Baker, supra note 69, at 949.
In the past three decades the number of appellate judges nationally has almost trebled, ranging now from six in the First Circuit to twenty-eight in the Ninth. The average court of appeals has thirteen judges. If caseload were the sole determinant, and using the Judicial Conference's 255 participations standard, there would today be 206 judgeships for the twelve regional circuits, not the present 156. The average court would have seventeen judges, and at least four of the courts would be on the brink of twenty judgeships. Applying the same standard to conservative caseload projections suggests a need by 1999 for 315 appellate judges, with an average court of twenty-four judges (and forty-nine on the Ninth Circuit). Tribunals of seventeen, much less twenty-four, sitting in panels of three, may resemble a judgeship pool more than a single body providing unified circuit leadership and precedent. Still, large courts such as these may be workable. Whether tribunals of thirty or forty judges will be workable is more problematic. The question is not simply one of administration but of the effect, both within the circuit and nationally, of so many uncoordinated opinions from so many judges. 131

A few years ago, Judge Posner suggested a moratorium on the creation of district court judgeships. 132 Because the trial courts are operating near capacity and the courts of appeals presently are roughly keeping pace, his suggestion would have the practical,

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131 STUDY COMMITTEE REPORT, supra note 22, at 114. The same projection would predict a need for 392 circuit judges by 2009 (33 per circuit with the Fifth at 49 and the Ninth at 61 judges). Flanagan, supra note 121, at Table 22. If any trend is discernable, these predictions have become more dire over the years. See J. Clifford Wallace, Working Paper—Future of the Judiciary, 94 F.R.D. 225, 228 n.4 (1981) (estimating that by year 2000 there would be 239 circuit judges).

132 Posner, supra note 125, at 765-67. "There is general recognition today that there is a natural upper limit on the number of federal court of appeals judges and that we are either near, or have already exceeded, that limit." Id. at 762; see also MCLAUCHLAN, supra note 2, at 109, 201-02 (suggesting that adding judgeships is only a temporary solution to caseload problems).
statistical effect of suspending appellate docket growth. The
district court case-queuing that would result from such a Colonel
Travis-style line-drawing at the trial level in theory would force the
type of system overhaul federal jurisdiction sorely needs. Because
Congress has even less to overcome to create a district judgeship,
it is highly unlikely that the line will be drawn there.

Several circuit judges have engaged in a remarkable recent
public debate about the feasibility and advisability of Congress
declaring a moratorium on the creation of judgeships at the courts
of appeals level.133 The arguments are elaborate, but the political
reality is simple.134 Congress will never impose a moratorium on

133 Judge Newman of the Second Circuit favors a moratorium to limit the overall number
of federal judges to about 1000. Newman, supra note 79. Judge Reinhardt of the Ninth
Circuit would double the size of the courts of appeals. Reinhardt, A Plea to Save the Federal
Courts, supra note 87, at 53. Chief Judge Sloviter of the Third Circuit supports a measured
course of growth. Sloviter, supra note 101, at 18. Chief Judge Tjoflat of the
Eleventh Circuit views the creation of new appellate judgeships as one of the main problems
facing the federal courts. Tjoflat, supra note 86. In September 1993, the Judicial Conference
of the United States, by a close vote, rejected a proposal to call on Congress to set a 1000­
judge limit on the federal judiciary. The Judicial Conference did reaffirm, however, the
judicial branch's commitment to the principle of limited federal courts staffed by the number
of judges needed to perform their proper role. Henry J. Reske, Keeping a Trim Federal
Courts, A.B.A. J., Dec. 1993, at 26; Marianne Lavelle & Marcia Coyle, Capping Judges,

134 The arguments over a moratorium can be listed:
1. Continuing increases in the size of the federal judiciary will eventually create unacceptable problems:
   a. Unchecked expansion of district and circuit judgeships vitiates the historic understanding, based on federalism, that the federal judiciary is a specialized body of limited jurisdiction.
   b. Cohesiveness and efficiency will be impaired.
   c. The quality of federal courts will decline because:
      (1) As the number of judgeships increases, the ability of the office to attract the most qualified individuals will decline.
      (2) As the number of vacancies to be filled increases, it will become increasingly difficult for executive and legislative branches to nominate and confirm with sufficient care.
   d. A larger federal judiciary will require more resources than Congress will be willing to appropriate.
2. Without an explicit moratorium, the federal judicial workload will continue to grow, leading Congress to continue to add more judgeships to the system.
3. A moratorium will allow the courts to avoid growing larger because it will force Congress to control jurisdictional expansion and restrict unnecessary access to the courts, and it will force the courts to develop
the number of circuit judges and for good reason. For the last 200-plus years, practical political necessity has overcome abstract concerns of limits with each enlargement of the federal appellate bench. And past congressional conduct is the best predictor of future policymaking. Chief Judge Sloviter has provided the best summing up of this debate: "[T]he federal courts must expand, if at all, under a set of reasoned principles rather than by ad hoc congressional decisions. . . . Measured growth, together with congressional and executive restraint, are the roads to a reasoned solution."135 The most important result of the circuit judges' recent public debate is that some attention has been focused on the problems of the U.S. Courts of Appeals.

V. DIVIDING COURTS OF APPEALS

Congress once demonstrated a ready willingness to redraw circuit boundaries and to reassign states to existing or newly created circuits.136 During the modern period, Congress twice has divided existing circuits into two new circuits: in 1929 to separate the new Tenth Circuit from the Eighth Circuit, and in 1981 to separate the new Eleventh Circuit from the Fifth Circuit.

In 1925, efforts to alleviate the congestion in the circuit dockets centered on the Eighth Circuit.137 That court then covered thirteen states from Minnesota in the north to New Mexico in the

4. A cap on the number of judgeships can be successfully implemented.
   a. A statutory change can be effective.
   b. Only an unequivocal cap, identified and argued for as such, will assist the federal courts.
   c. Geographic shifts in demand for judicial services can be accommodated.

BERMANT ET AL., supra note 86, at 24.

136 Sloviter, supra note 101, at 18. Judge King of the Fifth Circuit once offered an appropriate reality check: "[I]n the 1980s and forevermore thereafter, we have had and will have a great number of judges. That reality is simply a fact of life and something that judges themselves would do well to recognize. There is no point in clinging to the past if the future arrived years ago." Carolyn D. King, A Matter of Conscience, 28 Hous. L. REV. 955, 959 (1991).

137 This discussion has been adapted, with permission, from: Baker, supra note 69, at 923-25.

southern and from Iowa in the east to Utah in the west. In 1927, an ABA committee, without the formal endorsement of the ABA, proposed to redraw all the existing circuit boundaries and in the process create a new Tenth Circuit to include Arizona, California, Idaho, Montana, Nevada, Oregon, Utah, and Washington.\textsuperscript{138} The opposition to the proposal proved diverse and effective. Opponents complained chiefly about switching states from one circuit to another and the consequent changes in the law, although buttressing arguments were heard: that the workload in the Eighth Circuit did not justify a division, that the bill would not adequately address the docket problem because it failed to create new judgeships, and that the one-to-one ratio of circuits to Justices on the Supreme Court should not be abandoned.\textsuperscript{139} After that, Chief Justice Taft, exercising characteristic leadership, suggested that Congress could divide the Eighth Circuit and leave alone all the others.\textsuperscript{140} Members of the bar and the judges on the Eighth Circuit supported this proposal and, after debating various bills to divide the court in different ways, Congress passed a statute in 1929 dividing the court and creating two new judgeships.\textsuperscript{141}

Since then, the Eighth Circuit has included Arkansas, Iowa, Minnesota, North Dakota, and South Dakota; and the Tenth Circuit has included Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming.\textsuperscript{142} Since 1929, active judgeships have increased in the

\begin{itemize}
\item\textsuperscript{138} Id. at 124 (citing DENISE BONN, FEDERAL JUDICIAL CTR., THE GEOGRAPHICAL DIVISION OF THE EIGHTH CIRCUIT COURT OF APPEALS 4 (1974) (research report written for the Federal Judicial Center)).
\item\textsuperscript{139} Id. at 124-25.
\item\textsuperscript{140} To Create a Tenth Judicial Circuit: Hearings on H.R. 5690, H.R. 13567, and H.R. 13757 Before the House Comm. on the Judiciary, 70th Cong., 2d Sess. 66 (1928) (testimony of Chief Justice Taft).
\item\textsuperscript{142} Because the District of Wyoming includes all of that state and such portions of Yellowstone National Park as are within Montana and Idaho, the Tenth Circuit contains areas outside the six listed states. 28 U.S.C. § 131 (1988); WRIGHT, supra note 38, § 2, at 8 n.3. An even more obscure provision is the Ninth Circuit's statutory mandate to decide issues arising out of the Snake River Watershed via the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §§ 839-839h (1988). 9TH CIR. R. 15-2.1. This moves the Ninth Circuit's jurisdiction into Wyoming, a Tenth Circuit state, as far as Jackson Lake. See generally Arthur D. Hellman, Legal Problems of Dividing a State Between Federal
\end{itemize}
Eighth Circuit from five to eleven and in the Tenth Circuit from four to twelve. The dockets of the courts of appeals in 1929, the year of the division, have so little in common with contemporary dockets in size or in scope, however, that a comparison is not very helpful. These two courts of appeals today are typical in that increased staff and procedural innovations have enabled them to stay afloat. What is noteworthy about even this brief of an account is the legislative reluctance to redraw all the circuit boundaries and the congressional strategy to focus, instead, on dividing one large "problem" circuit. The same conclusion was reached again and was explained further in 1973 by the so-called "Hruska Commission":

We have not recommended a general realignment of all the circuits. To be sure, the present boundaries are largely the result of historical accident and do not satisfy such criteria as parity of caseloads and geographical compactness. But these boundaries have stood since the nineteenth century, except for the creation of the Tenth Circuit in 1929, and whatever the actual extent of variation in the law from circuit to circuit, relocation would take from the bench and bar at least some of the law now familiar to them. Moreover, the Commission has heard eloquent testimony evidencing the sense of community shared by lawyers and judges within the present circuits. Except for the most compelling reasons, we are reluctant to disturb institutions which have acquired not only the respect but also the loyalty of their constituents.

143 Judicial Circuits, 122 U. PA. L. REV. 1188 (1974). At least theoretically, every state is located within two different courts of appeals, since the Court of Appeals for the Federal Circuit has a nationwide jurisdiction.


145 See Baker, A Compendium of Proposals, supra note 1, at 273-74.

That comprehensive study recommended, instead of a national reconfiguration, that Congress divide the two largest courts of appeals—the Fifth Circuit, which has occurred, and the Ninth Circuit, which remains under congressional consideration still today.

The division of the Fifth Circuit and the debate over the Ninth Circuit are closer in time and more relevant to the present consideration. Congress divided the former Fifth Circuit in 1981 essentially because it was so large in geography, population, docket, and judgeships. But both new courts of appeals, the new Fifth Circuit and the Eleventh Circuit, continue to be plagued by dockets that effectively exceed their judicial capacity. The debate over whether to divide the Ninth Circuit has focused on recent bills and the relevant congressional debate. Considering the full scale arguments pro- and con-division, the congressional impasse may be considered a good thing. A moratorium on congressional consideration of circuit splitting, at least until the fate of the Ninth Circuit can be decided within the larger context of determining the future of the entire system of regional courts of appeals, makes considerable sense. The Ninth Circuit experience with a large court of appeals can be instructive in that larger determination. Discussions of what happened in the Fifth Circuit division and what should happen with the Ninth Circuit will not be rehearsed here. Rather, the inquiry here addresses the extramural reform of circuit splitting more generally.

For a time, circuit splitting, dividing the largest courts of appeals into two or three new courts, was a commonly mentioned solution. The problems of the large court, for which splitting is offered as a solution, are chiefly the result of the simple-minded approach just discussed of adding judgeships to meet a rising caseload. At some point, the argument here is that Congress must come to realize that the addition of appellate judges decreases the

147 Baker, supra note 69, at 945-61.
overall effectiveness of the judicial system.\textsuperscript{149}

There is a predictable downside to splitting circuits. The more courts of appeals there are, the greater the likelihood of intercircuit conflicts. Furthermore, splitting irreversibly dilutes the "federalizing function of courts of appeals.\textsuperscript{150} The fewer states the circuit includes, the less national the court becomes. Of course, everyone agrees with the logic that at some point adding judges and dividing courts becomes a limited strategy.\textsuperscript{151} Perhaps the most important argument against splitting existing circuits is that the reform has not worked to alleviate workload. Some large circuits that might need splitting, like the District of Columbia, Second, and Ninth Circuits, for various reasons are as a practical matter indivisible.\textsuperscript{152} The division of the former Fifth Circuit did not work any lasting miracle. The new Fifth Circuit is back to its pre-division statistical crisis level in terms of filings.\textsuperscript{153} The Eleventh Circuit's docket continues to grow. The Ninth Circuit, which so far has escaped the axe, is doing well enough to continue to resist division, at least for now.\textsuperscript{154}

Rather than splitting existing circuits, the entire geographical scheme could be redrawn. Generally, such a strategy has its inherent difficulties. Consider for a moment two examples. The late Judge Rubin once argued that Congress should strive to equalize size and workload by creating approximately twenty circuits.\textsuperscript{155} Chief Judge Wallace would have Congress consolidate

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\textsuperscript{149} "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, supra note 83, at 616 (citation omitted).


\textsuperscript{151} "Are we to continue the splitting process until it becomes mincing, with a United States Court of Appeals for the Houston Metropolitan Area?" Thomas G. 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).

\textsuperscript{152} Carrington, supra note 52, at 587 (discussing how some circuits are not amenable to geographical division); Hellman, supra note 142 (same).

\textsuperscript{153} Gilbert Ganucheau, Speech at the Fifth Circuit Appellate Advocacy Seminar (Oct. 18, 1984), in \textit{2 FIFTH CIRCUIT REP.} 301 (1985).


the courts of appeals and dramatically reduce their number.\textsuperscript{156} 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. If the principal concern is for conflicting decisions and conflicts in the federal law, the downside of having fewer circuits may be preferable in the abstract over the downside of multiplying the number of circuits. The existing mechanisms of the law of the circuit and the en banc court might prove sufficient to cope with numerous intracircuit conflicts, and new mechanisms also might be devised within the circuits to remedy the problem of more intracircuit conflicts. On the other hand, only the Supreme Court can effectively deal with the problem of intercircuit conflicts given the present federal court organization. Intracircuit conflicts are a lesser evil than intercircuit conflicts. If the principal concern is for workload, however, neither approach has much to offer on the upside.

Redrawing circuit boundaries has the same effect on appellate workload as a weather forecaster's map markings have on the weather. Circuit splitting must therefore be dismissed as something of a red herring, the result of Congress's linear strategy of adding judges. It is a solution that has not solved the problem.

Short of a final and full division, a circuit can be reorganized into administrative units and achieve some of the benefits of division. Then-Chief Judge Lay, picking up on the abbreviated experience of the former Fifth Circuit and the longer, more elaborate experience of the Ninth Circuit with administrative units, has suggested that Congress should authorize circuits to subdivide, as it were.\textsuperscript{157} Former Chief Judge Lay's idea is that the present appellate structure must be reconfigured to increase its capacity to absorb the additional circuit judgeships he deems necessary and inevitable. Beginning with the Ninth Circuit model,\textsuperscript{158} he would take it further:

\begin{itemize}
  \item \textsuperscript{156} J. Clifford Wallace, \emph{The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?}, 71 CAL. L. REV. 913, 940-41 (1983).
  \item \textsuperscript{157} Donald P. Lay, \emph{The Federal Appeals Process: Whither We Goest? The Next Fifty Years}, 15 WM. MITCHELL L. REV. 515, 529 (1989).
\end{itemize}
Taking my own [Eighth] Circuit for example, and supposing that we had twenty judges on the court rather than the present ten, the court could be structured in such a way as to divide the responsibility for the northern states and southern states by having nine judges in a southern district, nine judges in a northern district, and two judges who would sit at large. The judges could either rotate after serving three to five year terms or stay within their assigned district. Thus, despite the increase in the number of judges, the circuit would preserve its stability because there generally would be three panels of the same judges serving the northern section and three panels of the same judges serving the southern section.\textsuperscript{159}

Because Congress has authorized any court of appeals with more than fifteen active judges to constitute itself into administrative units,\textsuperscript{160} further legislative authorization would be required to allow the smaller courts of appeals to experiment with this idea.\textsuperscript{161}

VI. SPECIALIZED APPPELLATE COURTS

The subject of specialized courts is sometimes divisive and often boring. Little remains to be said in a general way. However, one prominent champion deserves an honorable mention here. This discussion will offer relevant background.

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

\textsuperscript{159} Lay, supra note 157, at 529.


\textsuperscript{161} The Federal Courts Study Committee apparently intended to recommend only the general authorization of the limited en banc and not the administrative units. STUDY COMMITTEE REPORT, supra note 22, at 114-15.
appellate jurisdiction over the military justice system. The Temporary Emergency Court of Appeals was vested with subject matter jurisdiction over price-wage regulations and then was assigned jurisdiction to review regulations 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 out the promise of deepening expertise,

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165 E.g., CARRINGTON ET AL., supra note 87, at 167-84; HOWARD, supra note 102, at 284-86; ROBERT ALLEN LEFLAR, INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS 41-42, 70-71 (1976); Higginbotham, supra note 83, at 268; Lumbard, supra note 53, at 34-35.


uniformity, and stability, as judges become more experienced and encounter the full dimension of their subject matter. Proposals for specialized courts have been resisted 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. At bottom, specialization simply threatens the generalist assumptions of the common law order.

One commentator summed up the worries for specialized courts:

laymen of the social values that it defends. Such a development is invariably a cause of decadence and decay.\textsuperscript{170}

Not all commentators are skeptical about specialized courts. For example, Professor Meador, a long-time participant and scholar of federal court reform, has been a dedicated and prominent champion of further experiments with subject matter courts.\textsuperscript{171}

The idea of specialized subject matter courts got typically mixed reviews from the Federal Courts Study Committee. The Committee’s Final Report recommended that Congress “rationalize the structure of federal tax adjudication by (1) creating an Article III appellate division of the United States Tax Court with exclusive jurisdiction over appeals in federal income, estate, and gift tax cases and (2) restricting initial tax litigation to the trial division of the Tax Court (staffed by the current Article I judges).”\textsuperscript{172} However, the Committee rejected the idea of an administrative law court.\textsuperscript{173} What finally can be said about the possibilities for specialized federal appellate courts? Proposals will have to overcome resistance, and experimentation on a limited scale may lead to more large-scale implementation. But the predictable attitude will be one of caution.


\textsuperscript{172} STUDY COMMITTEE REPORT, \textit{supra} note 22, at 69.

\textsuperscript{173} \textit{Id.} at 72-73.
VII. IMPROVING FEDERAL LEGISLATION

The last mentioned extramural proposal is for Congress in its own domain as lawmaker. Judge Edwards has complained that the courts of appeals are choking on "ambiguous and internally inconsistent statutes." Incoherence, vagueness, and conflicting purposes in statutes all waste judicial resources and cause decisional division. More careful drafting and a clear statement of legislative purpose are required. Vague legislation is not the sole product of ineptness; characteristically, the legislative process is full of compromise and agreements reached through escapes to higher levels of abstraction. Congress is unlikely to change its habits even though the vagaries of the legislative process frequently are frustratingly felt by the courts. Congress can be expected to do more, however, to remedy outmoded judicial statutes, answer unanticipated questions, and reconcile conflicting statutory schemes in the first place. Legislative responsiveness is preferable to legislative inaction or judicial legislating.

Then-Judge Ginsburg once proposed that Congress itself "do more and do better" by way of monitoring the federal courts' efforts at statutory interpretation in the second place. She complains that Congress "expresses itself too often in commands that are unclear, imprecise, or gap-ridden" and that poor statutory drafting is not only a problem for the first court that addresses the statute, but also for subsequent courts that are obliged to make the statutory scheme workable. Rejecting the third branch solution as the approach of the past, she argues for Congress to follow through on legislation to monitor court interpretations, to approve or disapprove judicial gloss, and to correct ambiguities and omissions in an orderly and routinized effort at legislative oversight. One possible mechanism for accomplishing this task would be to establish a standing "second look" committee in each house or a

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175 Id. at 427-29.
176 Id. at 1429-34.
joint committee "commissioned to oversee the tasks of statutory reexamination and repair." There is no question that "[a] legislative second view, set in motion by court decisions on unclear or incomplete congressional prescriptions, could advance the coherence of federal law."179

The District of Columbia Circuit, on which Judges Edwards and Ginsburg served together, developed a pilot project for inter-branch communication aimed at improving federal legislation. The program began in 1992 between the D.C. Circuit and the House of Representatives, but soon the Senate agreed to participate and it is anticipated that the First, Third, Seventh and Tenth Circuits will soon join. Basically, the staff attorney at the court of appeals reviews slip opinions and culls those that address federal statutes with problems of poor drafting, ambiguous wording, or technical mistakes. The court of appeals then reviews these and selects

178 Id. at 1432.
179 Id. at 1435. Somewhat related to this proposal is the value of due process of lawmaking, which essentially is the expectation that Congress save its best effort for important legislation. See Fullilove v. Klutznick, 448 U.S. 448, 548-54 (1980) (Stevens, J., dissenting). See generally Hans A. Linde, Due Process of Lawmaking, 55 NEB. L. REV. 197 (1976) (discussing due process formula and relation to creation of laws); Terrance Sandalow, Judicial Protection of Minorities, 75 Mich. L. Rev. 1162 (1977) (analyzing problem of balancing judicial protection of minorities with respect for values expressed in legislation); Laurence Tribe, Structural Due Process, 10 Harv. C.R.-C.L. L. Rev. 269 (1975) (proposing addition of structural due process analysis along with substantive and procedural due process).

180 The project originated with the Governance Institute, a privately funded Washington-based think tank. Presumably, the D.C. Circuit and the House of Representatives were the first to be linked partly as a coincidence of the elevation of Chief Judge Mikva, who served in the House. Cris Carmody, Branches Try To Communicate, Nat'l J., July 19, 1993, at 3; see also 138 Cong. Rec. S17537 (Oct. 8, 1992).
181 The local procedures in the D.C. Circuit provide as follows:

PILOT PROJECT - D.C. CIRCUIT
As a statutory "housekeeping effort," some opinions of U.S. Court of Appeals for the District of Columbia Circuit will be forwarded without comment to the House of Representatives for its information.

1. Decisions will identify technical, noncontroversial problems which might be of congressional interest. Specifically, the following categories of cases apply:
   (a) Grammatical/Drafting Mistakes. Statutes containing errors in grammar, syntax, punctuation or spelling.
   (b) Ambiguities. Statutory provisions that are susceptible to more than one meaning and where the legislative history provides no direction or no clear direction as to the intended meaning.
the appropriate ones for transmittal to the offices of legislative counsel in the House and Senate, where the opinions are reviewed and routed to congressional leaders and drafting committees. This vents the interpretation frustrations of the judges and places Congress on notice of the problems with existing legislation. So far, the D.C. Circuit has sent over several opinions, but Congress has not yet taken any formal legislative action.\(^\text{182}\) This pilot program has obvious potential for constructive communication within the context of the separated powers of lawmaking and law interpreting. If it bears fruit, there is no reason that it should not be extended to all the courts of appeals. The ball is now in Congress's court, so to speak.

Such obligations are generally within the legitimate expectations of Congress. Appellate federal jurisdiction is a scarce resource that must be used wisely. For example, Congress ought to rank the competing demands on appellate resources, overall recognizing that the docket demand outstrips decisional supply and that deficits in jurisdiction debase the appellate remedy. Congress should attempt to articulate a hierarchy of appeals. Thus far it has only identified a large number of preferred categories of appeals without any

\(\text{(c) Gaps.} \) Cases where the court is required to fill a gap in an effective date or other similar gap.

2. The opinions selected for referral will not include those which are decided on the basis of substantive policy questions.

3. Decisions will not be referred if another federal statute provides a solution to the interpretation problem. For example, generic provisions in title 28 may resolve questions regarding venue, jurisdiction, or the proper statute of limitations. Similarly, the Administrative Procedure Act (5 U.S.C. § 551 et seq.) and its judicial review provisions (5 U.S.C. § 701-706) may also provide a solution.

4. Decisions will not be referred where the application of the traditional rules of statutory construction resolve the ambiguity.

5. Statutory silence on policy choices (such as the awarding of attorneys' fees) will not in itself be considered a gap or ambiguity (i.e., not a subject for referral).

internal consistency. First, this uniquely political process must rationalize supply and demand and assign supply priorities. From then on, Congress must not practice deficit jurisdiction. For the list of priorities to be long-lasting, Congress must monitor and maintain the equilibrium as an on-going duty. Just as important, Congress should consider jurisdictional impact statements and expressly reorder the hierarchy with the enactment of 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. Such an approach is needed today more than ever.

The Federal Courts Study Committee recommended a modest first level phase for this sort of approach. The Committee urged the creation of a “checklist” for legislative staff to apply to proposed legislation dealing with technical problems such as the appropriate statute of limitations, whether a private cause of action is contemplated, whether preemption of state laws is intended, how to define key statutory terms, et cetera. The Study Committee went on to endorse something functionally akin to Judge Ginsburg’s concept, but proposed to locate the oversight function in the judicial branch. It recommended that an “Office of Judicial Impact Assessment” be created in the federal judiciary “to advise Congress on, inter alia, the effect of proposed legislation on the judicial branch and legislative drafting matters likely to lead to unnecessary litigation.” The Study Committee’s proposed office would evaluate proposed legislation for two purposes: “forecasting additional judicial branch resources necessary to dispose of the litigation the bill would create; and spotlighting drafting defects that might breed

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186 STUDY COMMITTEE REPORT, supra note 22, at 91-92. As of this writing, a bill has been introduced to establish such a legislative checklist. S. 1569, 103d Cong., 2d Sess. (1992).
187 STUDY COMMITTEE REPORT, supra note 22, at 89.
unnecessary litigation." The Study Committee also suggested, "Congress may also find it helpful to develop its own resource for committees and staff" for these purposes.

Judges, legislators, and commentators can be hopeful that some of these suggestions for Congress to "do more and do better" legislatively will be embraced in the same spirit with which the circuit judges have responded over time to the same challenge relating to their caseload.

VIII. CONCLUSION

There is nothing inherently inadequate about the extramural reforms of the past. The reforms identified in this Article have worked in the past and would be adequate to stave off the future threat of appellate caseload if pursued in earnest. However, the reforms of the past seem to have lost some of their luster, either out of familiarity or as a result of half-hearted implementation in recent years.

Consider some expectations about the congressional realities, based on the psychological insight that past behavior is the best predictor of future behavior. Congress will not reduce the original jurisdiction of the district courts. Political considerations do not permit this. ADR represents some of the same case management shortcuts for the trial court that the courts of appeals have relied on for years and will create a new set of problems. Creating circuit judgeships has become a reluctant response to appellate caseload, and rightly so, considering the negative by-products of adding judges to the existing federal court structure. Congress lately has shown signs of abandoning the technique of dividing circuits, at

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188 Id. at 90.
189 Id. Some members of the Study Committee expressed additional views to urge Congress to go further to create a new entity in the legislative branch:
(1) to assist congressional committees to assess the impact on the federal judiciary (and perhaps the federal prisons) of proposed litigation; (2) to call to the attention of the Congress decisions by the courts and the executive branch that have important consequences on the courts or the Congress; and (3) to facilitate communications between the branches by providing a contact point for judges and other officials.

Id. at 92-93. The Administrative Office of U.S. Courts responded to this recommendation by reorganizing its legislative office and creating an Office for Long Range Planning.
least temporarily. Again, this is a wise recognition of the distributive property of appellate caseloads. At the same time, there are some signs that creating specialized appellate courts may be coming into legislative fashion. The plea for Congress to "do more and do better" seems to have some as yet unrealized potential to preserve scarce judicial resources, but Congress will have to reform.

Individually, and collectively, these old stand-by extramural reforms continue to offer some hope for relief, but the hope cannot be described as enthusiastic. Recently, the Federal Courts Study Committee, a blue-ribbon panel of federal court insiders, urged Congress and the nation to take the debate over extramural or structural reforms to the next level. This is the next task for federal courts scholars, to imagine the alternative futures of the U.S. Courts of Appeals.190