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THE IMPACT OF INTERMEDIATE COURTS.

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The most drastic reaction to appellate caseload growth is creating an intermediate appellate court (IAC) or greatly expanding the jurisdiction of an existing one. Such steps are typically preceded by long study and debate within the judicial and legislative branches, and the changes often require constitutional amendment.

The first IAC, with a full time cadre of appellate judges, was created in Ohio in 1883.<sup>1</sup> By 1915 IACs existed in 13 states,<sup>2</sup> and remained at that level for more than forty years, until Florida created its IAC in 1957 and Michigan in 1963. Appellate caseloads sank precipitously in the Depression and World War II,<sup>3</sup> reducing the demand for IACs. Since then, however, appeals have been doubling roughly every decade,<sup>4</sup> and

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<sup>1</sup> Intermediate courts are defined here as separate courts with full time appellate judges. They do not include appellate divisions of trial courts that consist of trial judges who sit part time as appellate judges. There were several such hybrid courts before Ohio created its IAC in 1883. The first was in New Jersey in the early 18th Century, followed by New York (1846), Ohio (1852), Missouri (1865), Illinois (1877), and Louisiana (1879). See Curran and Sunderland, "The Organization and Operation of Courts of Review," at 152-203 in Third Report of the Judicial Council of Michigan (1935).

<sup>2</sup> The thirteen states are Alabama, California, Georgia, Illinois, Indiana, Louisiana, Missouri, New Jersey, New York, Ohio, Pennsylvania, Tennessee, and Texas. Also, Colorado and Kentucky created temporary IACs, which were disbanded once the supreme court's backlog was under control.

<sup>3</sup> Marvell, "Historical Caseload Trends," 4 Appellate Court Ad. Rev. 2 (1983).

<sup>4</sup> Id. also see Bureau of Justice Statistics, The Growth of Appeals, 1973-83 Trends, and Marvell, "Court Caseloads Are Increasing Greatly," Judges Journal (forthcoming).

states have been creating IAC's at the rate of about one a year. At present 36 states have IAC's, and several more are considering them.<sup>6</sup> Meanwhile, many supreme courts over IAC's have also suffered extreme caseload pressures resulting from mandatory jurisdiction in some types of appeals. Consequently, a second category of structural change is transferring jurisdiction from the supreme court to the IAC, and at the same time adding judges to the IAC to enable it to meet the caseload growth. Such major changes have been made by fourteen states in the past two decades.<sup>6</sup>

The purpose of this study is to explore the impact of the creation and expansion of IAC's on appellate court operations and caseloads:<sup>7</sup> Do IAC's attract more appeals? Do IAC's lead to greater output of appeals? How great is the double appeal problem - the number of appeals from the IAC to the supreme court? And perhaps most important, do IAC's reduce delay?

Before addressing these questions it is necessary to describe more fully the reasons for and against intermediate

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<sup>6</sup> IAC's are under consideration in Delaware, the District of Columbia, Nevada, North Dakota, Utah.

<sup>6</sup> Alabama (1968), Arizona (1974) Colorado (1975), Florida (1979), Illinois (1971), Louisiana (1982), Maryland (1974), Missouri (1972), New Mexico (1983), New York (1985), Oregon (1978), Pennsylvania (1982), Tennessee (1978), Texas (1981).

<sup>7</sup> This study does not include the impact of IACs on supreme court decision-making (e.g., the number of decesss and the importance of the decisions), a topic addressed in a few studies: Groot, "The Effects of an Intermediate Appellate Court on Supreme Court Work Product: The North Carolina Experience," 7 Wake Forest L. Rev. 548 (1971); Gingrich, "The Arkansas Court of Appeals: Was it Worth the Trouble?" Arkansas Lawyer 140 (1984).

courts, and outline the various arrangements for dividing jurisdiction between intermediate and supreme courts.

Benefits of Intermediate Courts.<sup>9</sup>

The major reason for having an intermediate court is to increase appellate judicial capacity without adding judges to the supreme court. It enables the appellate system to decide more appeals, and it enables the supreme court justices to spend more time on cases important to the law making function. The extent of relief, of course, depends on how many cases are routed to the intermediate court - that is, on the jurisdiction arrangement, the topic of the next section. Supreme court justices consider intermediate courts an important way to reduce backlog.<sup>10</sup> Several studies have estimated the relief afforded and found it substantial.<sup>10</sup>

Since appeals decided by the intermediate court can be

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<sup>9</sup> Examples of the many writings that have discussed this topic are: Intermediate Appellate Courts (Chicago: American Judicature Society, 1968); M. Osthus and R. Shapiro, Congestion and Delay in State Appellate Courts (Chicago: American Judicature Society, 1974); Marvell, "Appellate Capacity and Caseload Growth," 16 Akron L. Rev. 43, 84-98 (1982).

<sup>10</sup> Osthus and Shapiro, supra, at 42-43.

<sup>10</sup> Clark, "American Supreme Court Caseloads: A Preliminary Inquiry," 26 Am. J. Comp. L. 217, 218 (1978); Marvell, supra note 8, at 86; John Stookey, "Creating an Intermediate Court of Appeals: Workload and Policymaking Consequences," in Philip Debois, ed., The Analysis of Judicial Reform (1982). But see, Flango and Blair, "Creating an Intermediate Court: Does It Reduce the Caseload of the State's Highest Court," 64 Judicature 75 (1980).

reviewed by the supreme court (except in Florida and, for a few cases, in Texas), the relief to the supreme court derives largely from three factors: 1) the portion of cases decided by the intermediate court that result in petitions for review, 2) the difference in the amount of work required to decide appeals on the merits and the work required to decide the petitions for review, and 3) the percent of the petitions accepted and, thus, granted full scale review. The evidence is that a sizeable portion of appeals end after the intermediate court decision,<sup>11</sup> that the petitions require relatively little work by the judges, and a very small percentage of the petitions are granted.<sup>12</sup> This issue is discussed in considerable depth later in the article.

An important additional benefit is that intermediate courts relieve supreme court justices of most of their dispute deciding duties, such that they can concentrate on the more important law making duties - that is, on the minority of cases that have major significance beyond the litigants. As a practical matter, however, the actual impact on the quality of law-making is probably impossible to estimate except through crude criteria such as opinion length.<sup>13</sup>

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<sup>11</sup> See the discussion on double appeals below.

<sup>12</sup> See especially Stooky, *supra*; Thomas Marvell, "The Problem of Double Appeals," 2 Appellate Ct. Ad. Rev. 23 (1979); England and McMahon, "Quality Discount in Appellate Justice," 60 Judicature 442 (1977).

<sup>13</sup> See, e.g., Groot, *supra* note 7.

### Drawbacks of Intermediate Courts.

These benefits of intermediate courts, especially the enhanced decision capacity, must be balanced against the drawbacks of extra expense and delay for litigants and extra cost to the state. The impact on the litigant depends largely on the number of double appeals. Petitions for review add slightly to the expense and delay of appellate litigation; and if review is accepted, the time required for final decision and the attorney expense can be substantial.<sup>14</sup> As discussed above, this issue is also key to whether creation of an intermediate court can reduce supreme court workload; and the topic will be addressed at length later.

The second major drawback is the expense of the intermediate court, especially salaries of judges and staff and the cost of more office space. A further drawback, difficult to evaluate, is the possible unattractiveness of intermediate appellate court judgeships.

### Division of jurisdiction.

The importance of the drawbacks and benefits depends largely on the jurisdictional arrangement to divide initial appeals between the supreme and intermediate courts. There are three basic systems for apportioning first appeals between the two court levels: 1) all, or virtually all, appeals are routed to the intermediate court, with discretionary review

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<sup>14</sup> See Marvell supra note 8, at 88-89.

thereafter in the supreme court,<sup>15</sup> 2) initial appeals are filed in the supreme or intermediate court, according to subject matter jurisdiction specified in statutes or court rules, and 3) the supreme court screens initial appeals and apportions them between itself and the intermediate court. States often shift from the second or third system to the first as caseloads increase.

The number double appeals depends largely on the method for dividing jurisdiction between the two courts. The first model, with nearly all initial appeals filed in the intermediate court, leads to the most double appeals; and the third arrangement, with pour over jurisdiction in the intermediate court, usually results in the fewest double appeals.

#### Extent of Intermediate Courts.

The present research measures the use of intermediate courts by the percent of cases decided there. This measure permits one to take into account both the existence of intermediate courts and the varying jurisdictional splits between the two court levels. The resulting figures are shown in Table 1. There has been a substantial shift of caseload from supreme courts to intermediate courts in most states. The average percent decided in intermediate courts for the states with data has grown from 22 in 1968 to 34 in 1974 to 54 in 1984.

#### Impact on Caseloads.

<sup>15</sup> In several states litigants have a right to mandatory review of some intermediate court decisions by the supreme courts, for example when there is a dissent in the former.

Table 1

Court Structure: Use of Intermediate Courts and Panels

|         | Percent of Appeals<br>Decided by the<br>Intermediate court |             |             | Average Decision Unit (Panel) Size  |                                   |  |     |     |   |
|---------|--|-------------|-------------|-------------------------------------|-----------------------------------|--|-----|-----|---|
|         | <u>1984</u>  | <u>1974</u> | <u>1968</u> | <u>Intermed.<br/>Court<br/>1984</u> | <u>Supreme<br/>Court<br/>1984</u> | <u>Appellate<br/>System<br/>1984 1974 1968</u> |     |     |   |
| 01 Ala  | .  | .           | .           | .                                   | .                                 | .  | .   | .   | . |
| 02 Aka  | 61   | 0           | 0           | 3.0+                                | 5.0                               | 3.8  | 5#  | 3#  |   |
| 03 Ariz | 90   | 65          | 65          | 3.0                                 | 5.0                               | 3.2  | 3.5 | 3.5 |   |
| 04 Ark  | 65   | 0           | 0           | 3.0                                 | 7.0                               | 4.4  | 7#  | 7#  |   |
| 05 Cal  | 99   | 97          | 94          | 3.0                                 | 7.0                               | 3.1  | 3.1 | 3.2 |   |
| 06 Col  | 81   | 53          | 0           | 3.0                                 | 7.0                               | 3.7  | 3.9 | 5.0 |   |
| 07 Conn | 46   | 0           | 0           | 3.0                                 | 5.0@                              | 4.1  | 5.0 | 5.0 |   |
| 08 Del  | 0  | 0           | 0           | *                                   | 3.0@                              | 3.0  | 3#  | 3#  |   |
| 09 D.C. | 0  | 0           | .           | *                                   | 3.0@                              | 3.0  | 3.0 | .   |   |
| 10 Fl   | 95   | 90          | 83          | 3.0                                 | 7.0                               | 3.2  | 3.2 | 3.3 |   |
| 11 Ga   | 76   | 62          | .           | 3.0                                 | 7.0                               | 4.0  | 4.5 | .   |   |
| 12 Ha   | 34   | 0           | 0           | 3.0+                                | 5.0                               | 4.2  | 4.6 | 5.0 |   |
| 13 Id   | 51   | 0           | 0           | 3.0+                                | 5.0                               | 4.0  | 5.0 | 5.0 |   |
| 14 Ill  | 96   | 90          | .           | 3.0                                 | 7.0                               | 3.2  | 3.4 | .   |   |
| 15 Ind  | 76   | 74          | .           | 3.0                                 | 5.0                               | 3.5  | 3.5 | .   |   |
| 16 Iowa | 54   | 0           | 0           | 3.1                                 | 4.9@                              | 3.9  | 5.0 | 6.5 |   |
| 17 Kan  | 70   | 0           | 0           | 3.0                                 | 7.0                               | 4.2  | 9#  | 9#  |   |
| 18 Ky   | 85   | 0           | 0           | 3.0                                 | 7.0                               | 3.6  | 3.0 | 4.0 |   |
| 19 La   | 93   | 79          | 90          | 3.0                                 | 7.0                               | 3.3  | 3.9 | 3.4 |   |
| 20 Me   | 0  | 0           | 0           | *                                   | 6.0@                              | 6.0  | 5.5 | 5.5 |   |
| 21 Md   | 89   | 81          | 59          | 3.0                                 | 7.0                               | 3.4  | 3.7 | 4.0 |   |
| 22 Mass | 74   | 58          | 0           | 3.0                                 | 5.0@                              | 3.5  | 3.8 | 5.0 |   |
| 23 Mich | .  | .           | .           | .                                   | .                                 | .  | .   | .   |   |
| 24 Minn | .  | .           | .           | .                                   | .                                 | .  | .   | .   |   |
| 25 Miss | 0  | 0           | 0           | *                                   | 7.3@                              | 7.3  | 7.6 | 7.9 |   |
| 26 Mo   | 93   | 64          | 48          | 3.0                                 | 7.0                               | 3.3  | 3.7 | 4.6 |   |
| 27 Mont | 0  | 0           | 0           | *                                   | 6.0@                              | 6.0  | 5#  | 5#  |   |

Table 1 (continued)

|         | Percent of Appeals Decided by the Intermediate court |      |      | Average Decision Unit (Panel) Size |                    |                  |      |      |  |
|---------|--|------|------|------------------------------------|--------------------|------------------|------|------|--|
|         | 1984   | 1974 | 1968 | Intermed. Court 1984               | Supreme Court 1984 | Appellate System |      |      |  |
|         |  |      |      |                                    |                    | 1984             | 1974 | 1968 |  |
| 28 Neb  | 0  | 0    | 0    | *                                  | 6.7@               | 6.7              | 6.7  | 7#   |  |
| 29 Nev  | .  | .    | .    | .                                  | .                  | .                | .    | .    |  |
| 30 NH   | .  | 0    | 0    | *                                  | 5.0                | *                | 5#   | 5#   |  |
| 31 NJ   | 98   | 95   | 85   | 2.2                                | 7.0                | 2.3              | 3.2  | 3.6  |  |
| 32 NM   | 68   | 72   | 38   | 3.0                                | 3.0@               | 3.0              | 2.9  | 3.0  |  |
| 33 NY   | 93   | 91   | 90   | 4.6                                | 7.0                | 4.8              | 5.2  | 5.2  |  |
| 34 NC   | 88   | 86   | 71   | 3.0                                | 7.0                | 3.5              | 3.5  | 4.2  |  |
| 35 ND   | 0  | 0    | 0    | *                                  | 5.0                | 5#               | 5#   | 5#   |  |
| 36 Ohio | .  | .    | .    | .                                  | .                  | .                | .    | .    |  |
| 37 Okl  | .  | .    | .    | .                                  | .                  | .                | .    | .    |  |
| 38 Or   | 94   | 71   | 0    | 3.0                                | 7.0                | 3.3              | 3.6  | 5.0  |  |
| 39 Penn | .  | .    | .    | .                                  | .                  | .                | .    | .    |  |
| 40 RI   | 0  | 0    | 0    | *                                  | 4.2@               | 4.2              | 5#   | 5#   |  |
| 41 SC   | .  | .    | .    | .                                  | .                  | .                | .    | .    |  |
| 42 SD   | 0  | 0    | 0    | *                                  | 5.0                | 5#               | 5#   | 5#   |  |
| 43 Tenn | .  | .    | .    | .                                  | .                  | .                | .    | .    |  |
| 44 Tex  | 90   | 39   | 54   | 3.0                                | 9.0                | 3.6              | 6.6  | 4.1  |  |
| 45 Utah | 0  | 0    | 0    | *                                  | 5.0                | 5#               | 5#   | 5#   |  |
| 46 Vt   | .  | .    | .    | *                                  | 5.0                | .                | .    | .    |  |
| 47 Va   | 0  | 0    | 0    | *                                  | 3.5@               | 3.5              | 3.6  | 3.6  |  |
| 48 Wash | 87   | 78   | 0    | 3.0                                | 9.0                | 3.8              | 4.3  | 5.0  |  |
| 49 WVa  | .  | .    | .    | .                                  | .                  | .                | .    | .    |  |
| 50 Wisc | 91   | 0    | .    | 2.6                                | 7.0                | 3.0              | 7#   | .    |  |
| 51 Wy   | 0  | 0    | 0    | *                                  | 5.0                | 5#               | 5#   | 4#   |  |

\* No intermediate court

+ Only three judges on the intermediate court.

# This figure represents supreme courts sitting en banc.

@ Supreme courts sitting in panels.

The initial issue is whether intermediate courts increase the volume of cases in the appellate system generally. That is, are there more appeals from trial courts and administrative agencies after intermediate courts are created.<sup>16</sup> In a superficial sense the answer is yes: states often increase overall appellate court jurisdiction when creating or expanding IAC's. Appeals from administrative agencies or limited jurisdiction trial courts are transferred from the general jurisdiction trial courts to the IAC's, relieving the trial courts. Such changes can lead to substantial increases in appellate workloads.<sup>17</sup> Beyond that, one can argue that IACs might attract new appeals because litigants can get a quicker hearing or because the courthouse is closer,<sup>18</sup> but when the jurisdiction increases are deleted from appellate filings, creation and expansion of IAC's is not associated with caseload growth. This result was obtained both with combining all states with available statistics in the analysis,<sup>19</sup> and when studying individual states, although

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<sup>16</sup> The issue here is the increase in initial appeals. If one includes supreme court petitions for review of IAC decisions when counting appeals, then the volume obviously increases greatly. See Flango and Blair, supra note 9. But these petitions are far less time consuming than initial appeals.

<sup>17</sup> States making major shifts of jurisdiction to the appellate system since 1970 are: Alaska, Arkansas, Connecticut, Minnesota, Oregon, Wisconsin.

<sup>18</sup> See, for example, Flango and Blair, supra note 9.

<sup>19</sup> Marvell, "Is There An Appeal from the Appellate Deluge?" 24 Judges' J. 34 (Summer 1985); Marvell and Moody, Factors Behind Appellate Caseload Growth (Bureau of Justice

the latter indicated that in a few states there may have been an impact, either positive or negative.<sup>20</sup>

#### Impact on the Number of Appellate Judges.

Creating IAC's or shifting jurisdiction to existing courts, in essence, are ways to expand appellate judicial capacity without expanding the supreme court. Such structural changes are virtually always accompanied by an increase in appellate judges.<sup>21</sup> Appellate judgeships increased 48 percent from 1970 to

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Statistics 1985). The results are based on a pooled time series cross section design, in which data are entered for a number of states over several years. The use of intermediate courts is measured by the percent of initial appeals filed in the intermediate court.

<sup>20</sup> The impact in individual states was estimated in a time series analysis, using autoregression procedures. The time series, however, is less than desirable for the regression, only 11 to 15 years of data are available. Nevertheless, a state-by-state analysis was done for states that created intermediate courts are greatly expanded the jurisdiction of existing ones. Fourteen states had sufficient statistics for this purpose (Alaska, Arizona, Colorado, Hawaii, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Oregon, Tennessee, and Texas). The analysis was done separately for criminal and civil appeals, using an autoregression. None of the states showed a significant impact, measured at the .90 level. Also, impacts at the .85 level were found in four states: positive relationships between IAC use and filing volume were found in Kansas, Louisiana, and Massachusetts; and a negative relationship was found in Missouri. On the civil side, highly significant positive relationships were found in Kentucky and Maryland, and lesser, but still significant, negative relationships were found in Tennessee and Hawaii. In all, therefore, the analysis of individual states affirms the results of the pooled time series cross section regression, but it does indicated that in a small minority of times IACs are created or changed there can be an impact, generally increasing caseloads.

<sup>21</sup> The only exception in recent years in New Mexico, where the Court of Appeals has remained at XX judges even though substantial jurisdiction was shifted in 1982.XXXXX

1984,<sup>22</sup> and half of the increase is due to judges added when IAC's were created or given more jurisdiction. Supreme courts are seldom enlarged; so all the increase in judgeships has occurred at the IAC level. In many states judgeship increases were delayed, even though caseloads rose greatly, because the legislature did not wish to expand the supreme court and it revised appellate structure only after a long period of study.<sup>23</sup>

Impact on Number of Appeals Decided.

It is a trivial observation that IAC's increase the number of appeals decided, since by definition there are more judges to decide cases. Table 2 gives the available information concerning the number of appeals decided by the supreme court in the year before the IAC was created and the number decided by both courts in the year afterwards<sup>24</sup>. Information is available for 15 of 18 states creating IAC's in 1968-85. The median increase is 70 percent, although there is considerable variation among the states, The 70 percent figure slightly lower than the

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<sup>22</sup> Marvell and Dempsey, "Growth in State Judgeships 1970-84: What Factors are Important," 68 Judicature 274 (1986).

<sup>23</sup> Id.

<sup>24</sup> That is, the year the IAC was created is not included in Table 2. Appeals decided are the number decided on the merits, excluding discretionary writs and petitions for review denied. In most states, the figures are the number of cases decided by opinion, although a few courts (most notably Virginia) decide appeals on the merits without opinion. These statistics are from Marvell and Moody, State Appellate Court Adaptation to Caseload Growth (1986).

Table 2

States Creating Intermediate Appellate Courts 1968-85

| State    | IAC<br>Began | Judges    |           | Number of Appeals Decided on Merits |           |                  |                     |
|----------|--------------|-----------|-----------|-------------------------------------|-----------|------------------|---------------------|
|          |              | IAC<br>Ct | Sup<br>Ct | Supreme Court<br>Prior Yr.          | Yr. after | IAC<br>Yr. after | Percent<br>Increase |
| Alaska   | Sept 80      | 3         | 5         | 320                                 | 209       | 166              | 17%                 |
| Arkansas | July 79      | 6         | 7         | 555                                 | 374       | 643              | 83%                 |
| Colorado | Jan 70       | 6         | 7         | 299                                 | 346       | 390              | 146%                |
| Conn.    | Oct 83       | 5         | 6         | 213                                 | 218       | 182              | 88%                 |
| Hawaii   | April 80     | 3         | 5         | 193                                 | 145       | 183              | 70%                 |
| Idaho    | Jan 82       | 3         | 5         | 141                                 | 185       | 100              | 102%                |
| Iowa     | Jan 77       | 5         | 9         | 482                                 | 424       | 382              | 67%                 |
| Kansas   | Jan 77       | 7         | 7         | 276                                 | 305       | 358              | 140%                |
| Kentucky | Oct 76       | 14        | 11*       | 857                                 | 430       | 1259             | 97%                 |
| Mass.    | Nov 72       | 6         | 7         | 421                                 | 200       | 273              | 12%                 |
| Minn.    | Nov 83       | 6         | 9*        | na                                  | na        | na               | na                  |
| No. Car. | Jan 68       | 6         | 7         | 465                                 | 67        | 536              | 30%                 |
| Oklahoma | Jan 71       | 6         | 9         | na                                  | na        | na               | na                  |
| Oregon   | July 69      | 5         | 7         | 345                                 | 212       | 348              | 62%                 |
| So. Car. | Oct 83       | 6         | 5         | 614                                 | 425       | 397              | 34%                 |
| Virginia | Jan 85       | 10        | 7         | 1439                                | na        | na               | na                  |
| Wash.    | Sept 69      | 12        | 9         | 336                                 | 158       | 401              | 66%                 |
| Wisc.    | Aug 78       | 12        | 7         | 418                                 | 247       | 1127             | 229%                |

\* In 1975 the Kentucky Supreme Court had four "commissioners", who were essentially judges. The commissioners were not used in 1977.

# The Minnesota Supreme Court was reduced to 7 justices after the IAC was created.

85 percent median increase in judges.

After receiving aid from the creation of IACs, supreme courts tended to reduce their output. Decision output dropped by more than a third in most supreme courts in Table 2, and only four increased output after the IAC was created. Presumably, the justices became able to spend more time on the important appeals. The overall output of the appellate systems increased, of course, because the IAC output more than made up for the supreme court reduction. In fact, the output per judge, including both the intermediate and supreme courts, increased in most states after the intermediate courts were created.

The important question is whether this increase is caused by the IAC itself or caused by associated factors, especially the addition of judges and the use of three-judge panels. As shown in Table 1, IACs tend to sit in three-judge panels, while most supreme courts sit en banc. Analysis showed that when these factors are controlled, the creation or expansion of IAC's have very little impact on decision volume.<sup>25</sup> Rather, IAC's increase the output of the appellate system simply because there are more judges.

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<sup>25</sup> Marvell and Moody, *id.* The use and size of panels have a very small impact on decision volume. The analysis does show a moderate increase in output per judge after IAC's are created, but it disappears when states experiencing increased appellate jurisdiction are deleted.

Impact of Intermediate Courts on Backlogs.

One would expect the same answers with respect to the question of what impact intermediate courts have on backlogs and delay. The large jump in decision output when intermediate courts are created (see Table 2) suggests that backlogs, and therefore delays, are greatly reduced. This is confirmed by the information in Table 3. The extent of delay and backlog is measured by a common measure, the backlog index, which is the number of appeals pending at the end of the year divided by the number disposed that year.<sup>26</sup> This is a better measure of delay than calculating average time from filing to decision because the latter figure is greatly influenced by the situation in earlier years; in fact, when courts make a major effort to reduce delay, the average time to disposition tends to increase because many long-delayed cases are finally decided.<sup>27</sup> Ten of the 17 states creating intermediate courts since 1968 have sufficient pending and disposition information available to measure delay before and after IAC's were created. The backlog index for the typical appellate court is close to one (that is, cases are disposed in roughly a year on the average). Most supreme courts had enormous delay problems in the year before the IAC was created. The backlog index afterwards is measured by combining the number

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<sup>26</sup> This measure is commonly used to estimate court delay. See especially, Clark & Merriman "Measuring the Duration of Judicial and Administrative Proceedings," 75 Mich. L. Rev. 89 (1976); Church, et al. Justice Delayed 25-28 (1978).

<sup>27</sup> Wasby, Marvell, and Aikman, Volume and Delay in State Appellate Courts: Problems and Responses 25 (1979).

Table 3

Impact of Intermediate Court Creation on Delay

| State      | Backlog Index<br>(pending cases divided by dispositions) |                                       |  |
|------------|--|---------------------------------------|--|
|            | Supreme Court<br>Prior Year                              | Appellate System<br>One Year<br>Later | Appellate System<br>Three Years<br>Later |
| Alaska     | 1.31   | 1.30                                  | .89                                      |
| Colorado   | 2.06   | .87                                   | .80                                      |
| Conn.      | 1.49   | 1.06                                  | *  |
| Hawaii     | 2.64   | 1.51                                  | .80                                      |
| Idaho      | 2.36   | 1.70                                  | 1.43                                     |
| Iowa       | 1.30   | .73                                   | .89                                      |
| Kansas     | 2.26   | 1.22                                  | .99                                      |
| Kentucky   | .98  | .86                                   | .92                                      |
| Oklahoma   | 3.08   | 1.40                                  | 1.35                                     |
| Oregon     | .97  | .74                                   | .43                                      |
| Washington | 1.53   | 1.08                                  | 1.11                                     |

\* Information is not available because the IAC is new.

Information is not available for Massachusetts, Minnesota, North Carolina, South Carolina, Wisconsin, and Virginia.

of pending and disposed cases<sup>29</sup> in the two courts, obtaining a delay measure for the appellate system as a whole.

As seen in Table 3, delay was reduced in all ten states after IACs were created, although in a few states the full reduction was not obtained for several years. The extent of delay reduction varied greatly, with the greater benefits naturally occurring in states with the greatest initial delay. The backlog index dropped to less than half the pre-IAC figure in five of the ten states in Table 3.

The results suggested in Table 3 were confirmed by using a pooled time series cross section regression analysis to explore the impact of the use of an IAC on the backlog index. There is a negative relationship, which is significant but not particularly strong. For each ten percent increase in the percent of filings going to an IAC, the backlog index decreased by roughly .04. Hence if a state creates an IAC that receives half the initial appeals, as is typical of jurisdiction arrangements for new IACs, the backlog index would decrease by roughly two-tenths (or about two months).

#### Impact on Supreme Court Operations.

We have seen that the creation of IAC's relieves supreme courts in the sense that supreme court decision output usually drops (see Table 2). What other changes do supreme courts make? As was stressed below, one purpose of creating IAC's and thus

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<sup>29</sup> Petitions for review are excluded.

Table 4

Impact of Intermediate Courts  
on Supreme Court Opinion Publication

| State     | Percent of Decisions<br>Without Published Opinions |               |
|-----------|--|---------------|
|           | Prior<br>Year                                      | Year<br>Later |
| Alaska    | 15%  | 17%           |
| Arkansas  | 41%  | 0%            |
| Colorado  | 0%   | 0%            |
| Conn.     | 0%   | 0%            |
| Hawaii    | 47%  | 32%           |
| Idaho     | 0%   | 0%            |
| Iowa*     | 37%  | 26%           |
| Kansas    | 0%   | 15%           |
| Kentucky  | 79%  | 56%           |
| Mass.     | 0%   | 0%            |
| No. Car.  | 0%   | 0%            |
| Oregon    | 0%   | 0%            |
| So. Car.* | 64%  | 57%           |
| Wash.     | 0%   | 0%            |
| Wisc.*    | 33%  | 17%           |

\* Includes decisions without opinion.

Information is not available for Minnesota, Oklahoma,  
and Virginia.

reducing supreme court workloads is to permit justices to give more attention to important appeals, especially appeals that fall within the law-making function of appellate courts. It follows that supreme courts should discontinue elements of decision procedure commonly used in high volume courts for less important appeals. Most of these procedures pertain to opinions: not publishing opinions, deciding cases without opinion, or writing memorandum or per curiam opinions. In practice, the changes have been slight.<sup>29</sup> Table 4 gives the percent of decisions without published opinion (i.e., appeals decided either without opinion or with unpublished opinions). Most of the 15 supreme courts published all opinions before the IAC was created, in spite of the large caseloads. In most of the remaining states the portion published usually decreased, although not by a great deal. Only in Arkansas and Wisconsin was the reduction substantial.

Likewise, several supreme courts made major changes in the use of unsigned opinions (memorandum or per curiam opinions): of the nine courts that regularly used such opinions before an IAC was created, four - in Idaho, Massachusetts, North Carolina, and Wisconsin - largely abandoned the practice.<sup>30</sup>

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<sup>29</sup> When discussing changes in supreme court procedure, with reference to Table 4 and elsewhere, the discussion refers to the changes from the year before to the year after the change. It is possible that the full impact does not occur until later, but in nearly all instances the situation one year after is very similar to that for the next few years. The exceptions are noted below.

<sup>30</sup> The change in unsigned opinions is Idaho 16% to 2%, Massachusetts 37% to 10%, North Carolina 27% to 3%, and Wisconsin 27% to 0%. (The second figure is the year after the IAC was

Supreme court use of panels, another common efficiency measure, usually stopped after the IAC was created. Supreme courts in Arkansas, Kentucky, and Washington began sitting en banc afterwards, having earlier sat in panels of four, three, and five respectively. On the other hand, the Iowa and Massachusetts Supreme Courts did not abandon their use of panels.

A final procedural change is curtailing oral arguments. Of the seven of the supreme courts in Table 4 that curtailed oral argument before IAC's were created,<sup>31</sup> only two changed practices: the Kentucky and Wisconsin Supreme Courts began hearing arguments in nearly all cases, whereas before the new IAC the Kentucky court heard virtually no arguments and the Wisconsin court heard arguments in only 40 percent of its appeals.

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created, except in Wisconsin it is after the second year.) On the other hand, the Kentucky Supreme Court continued to use unsigned opinions in most cases, and supreme courts in Alaska, Hawaii, Iowa, and Kansas maintained their level of use of unsigned opinions, using them in at least a fifth of their appeals (although the Iowa Supreme Court temporarily limited this practice immediately after the IAC was created).

<sup>31</sup> Of the seven, the Arkansas Supreme Court restricts arguments the most, hearing them in only about 10 percent of appeals. The South Carolina Supreme Court hears arguments in only a minority of cases, and the Alaska, Hawaii, and Iowa Supreme Courts heard arguments in some 50 to 80 percent of cases.

The Problem of Double Appeals.

As stressed earlier, the impact of IACs on the workload of supreme courts and on appellate delay is largely a function of how many cases are given a second review by the supreme court after the IAC decision. There are two types of second review, discretionary petitions for appeal and appeals on the merits. Decisions on petitions for review take much less judge time than merits decisions<sup>22</sup>, and they are usually decided in a matter of weeks. Therefore, the double appeal problem is largely limited to cases granted a second review.

Table 5 shows the volume of petitions for review and the volume in relation to intermediate court decisions. In the 24 states with available information, petitions for review are filed, on the average, in 35 percent of the intermediate court decisions. An average of 14 percent are granted by the supreme court. In all, in the average state, 5 percent of the intermediate court decisions are accepted for review on the merits by the supreme court. This discussion does not include appeals taken by right from the intermediate to the supreme court, but in all but a few states such appeals are far outnumbered by cases taken upon discretionary review.

Table 5, however, shows that these averages can be misleading because the figures for individual states vary greatly. Petitions for review in Arkansas are only 7 percent of the intermediate court decisions, while in Colorado and Maryland

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<sup>22</sup> England and McMahon, supra note 12.



Table 5 (continued)

|         | Petitions filed |      |                          |      | Petitions granted      |      |                          |      |                             |      |   |
|---------|-----------------|------|--------------------------|------|------------------------|------|--------------------------|------|-----------------------------|------|---|
|         | Number          |      | Percent of IAC Decisions |      | Percent of those filed |      | Percent of IAC Decisions |      | Percent of Sup Ct Decisions |      |   |
|         | 1984            | 1974 | 1984                     | 1974 | 1984                   | 1974 | 1984                     | 1974 | 1984                        | 1974 |   |
| 29 Nev  | *               | *    | *                        | *    | *                      | *    | *                        | *    | *                           | *    | * |
| 30 NH   | *               | *    | *                        | *    | *                      | *    | *                        | *    | *                           | *    | * |
| 31 NJ   | .               | 817  | .                        | 33   | .                      | 14   | .                        | 4.5  | .                           | 88   |   |
| 32 NM   | 168             | 83   | 37                       | 31   | 29                     | 18   | 11                       | 5.6  | 23                          | 15   |   |
| 33 NY   | 2935            | 1492 | 30                       | 26   | 6                      | 16   | 2                        | 4.3  | 23                          | 43   |   |
| 34 NC   | 469             | 273  | 36                       | 32   | 15                     | .    | 5                        | .    | 38                          | .    |   |
| 35 ND   | *               | *    | *                        | *    | *                      | *    | *                        | *    | *                           | *    | * |
| 36 Ohio | .               | .    | .                        | .    | .                      | .    | .                        | .    | .                           | .    | . |
| 37 Okl  | .               | .    | .                        | .    | .                      | .    | .                        | .    | .                           | .    | . |
| 38 Or   | 879             | 300  | 32                       | 49   | 12                     | 11   | 4                        | 5.4  | 56                          | 13   |   |
| 39 Penn | *               | *    | *                        | *    | *                      | *    | *                        | *    | *                           | *    | * |
| 40 RI   | *               | *    | *                        | *    | *                      | *    | *                        | *    | *                           | *    | * |
| 41 SC   | .               | .    | .                        | .    | .                      | .    | .                        | .    | .                           | .    | . |
| 42 SD   | *               | *    | *                        | *    | *                      | *    | *                        | *    | *                           | *    | * |
| 43 Tenn | .               | .    | .                        | .    | .                      | .    | .                        | .    | .                           | .    | . |
| 44 Tex  | 1966            | 586  | 27                       | 47   | 20                     | 15   | 5                        | 6.9  | 48                          | 4    |   |
| 45 Utah | *               | *    | *                        | *    | *                      | *    | *                        | *    | *                           | *    | * |
| 46 Vt   | *               | *    | *                        | *    | *                      | *    | *                        | *    | *                           | *    | * |
| 47 Va   | *               | *    | *                        | *    | *                      | *    | *                        | *    | *                           | *    | * |
| 48 Wash | 545             | 210  | 41                       | 39   | 14                     | 15   | 6                        | 6.0  | 39                          | 21   |   |
| 49 WVa  | *               | *    | *                        | *    | *                      | *    | *                        | *    | *                           | *    | * |
| 50 Wisc | 627             | *    | 44                       | *    | 10                     | *    | 4                        | *    | 41                          | *    |   |
| 51 Wy   | *               | *    | *                        | *    | *                      | *    | *                        | *    | *                           | *    | * |

\* No intermediate court.

they are over half. The percent given a second review varies from one percent in Arizona to almost 10 percent in Maryland.

Another interesting difference is the ratio of cases granted review by supreme courts to the number of cases decided there on the merits. The California Supreme Court granted review in a lot more cases than it decided (probably because it developed a backlog). A few other supreme courts receive most of their cases through the petition for review process, but usually the great bulk of the supreme court business comes directly from the trial courts or administrative agencies (or upon mandatory review of the intermediate court, especially in New York). This review is sometimes accomplished by the supreme court reaching down to take cases filed in the intermediate court before it has reviewed them (especially in Maryland, Wisconsin, and Washington).

The analysis attempted to determine whether the number of petitions for review affects judge productivity in terms of the number of appeals per judge decided on the merits. That is, if the number of writs increases, does this work detract from the judges work on appeals and, thus, reduce the decision output per judge? The analysis, however, was not able to answer this question. When the number of petitions per judge was placed in the analysis it showed an very large positive relationship to decision output, apparently because the number of petitions for review which is largely determined by the number of cases decided in the intermediate court. The causal uncertainty, therefore, rendered the analysis uninterpretable.

A second analysis explored the impact of petitions for review granted. As discussed earlier, the measure of filings used here includes only cases filed initially in either the supreme or intermediate courts, and it does not include petitions for review excepted (this was done to prevent double counting of appeals when analyzing the reasons for growth of appeals filed). To compensate for this, the number of petitions for review granted was entered into the analysis as an additional input variable.<sup>33</sup> In the analysis, the variable has a very slight impact which is not statistically significant (coefficient = .01, T Ratio = .70, as opposed to .61 and 17.27 for the number of initial appeals). This is a slightly incomplete measure of the impact of double appeals because it does not take into consideration mandatory appeals from the intermediate courts to supreme courts. These, however, are rare in the great majority of the states studied.

#### Conclusion.

As a general rule, the impact of creating or expanding IACs is as the proponents argue: supreme court caseloads are reduced, the appellate system is able to decide more cases, and delay and backlogs are reduced. On the other hand, supreme courts typical-

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<sup>33</sup> Information for this variable was not available for all years in all states, and the analysis included 479 observations, as opposed to 542 for the basic analysis in Table 3.2. The number of petitions granted is, like the number of filings and decisions, the logarithm of the number of cases per judge.

ly to not change procedure in a way one would expect - that is, most do not adopt the traditional, full scale appellate procedures after an IAC is created - probably because a large portion of the appeals still come directly to the top level. Finally, the "double appeal problem" really is not much of a problem; the volume of double appeals is very small in relation to the total number of appeals.