

Structural and Other Alternatives for the Federal Courts of Appeals

Report to the United States Congress
and the Judicial Conference of the
United States

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Project Director

Federal Judicial Center 1993

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Introduction

The Federal Courts Study Committee, authorized by Congress and appointed by the Chief Justice to perform a fifteen-month study of the federal court system, identified the federal courts of appeals as an area needing the attention of the Congress, judges, lawyers, and the public over the next several years. In its 1990 report, the committee recommended that various structural alternatives for the courts of appeals be considered in more detail. Section 302(c) of the Federal Courts Study Committee Implementation Act of 1990 requested that the Board of the Federal Judicial Center "study the full range of structural alternatives for the Federal Courts of Appeals and submit a report on the study to the Congress and the Judicial Conference of the United States." This report describes the results of that study and is submitted at the direction of the Center's Board.¹

Concerns about the courts of appeals and the asserted decline of the appellate tradition are not new. Nor are many of the proposed solutions. Students of the federal court system have been commenting on the change in the nature of the appellate process and the possible relationship of that change to court structure for more than two decades. Some of this report draws directly on their work; all of the report is informed by it.²

Observers of the federal courts of appeals have proposed major and relatively minor structural changes to the system over the years, and we describe many of those proposals here. We submit that when policy makers consider proposed alternatives, those alternatives should be logically related to the nature of the perceived problems of those courts. Before pursuing major changes, it is useful to consider to what extent the problems have been caused by structural factors and to what extent they might be remedied by structural change. Thus before describing the proposals, we review the problems the committee and others have concluded afflict or threaten the courts of appeals. Where possible, we evaluate the nature and severity of those problems. We describe a range of structural changes and other alternatives and provide an initial evaluation of how, if at all, the proposed alternatives would ameliorate the perceived problems and how they would further or hinder the mission of the courts of appeals.

¹This report was prepared by Federal Judicial Center staff. Terms such as "we" and "our" throughout this report denote the author of the report and contributing staff. The author is responsible for the analyses and conclusions expressed here.

²The literature review done for this project by Prof. Thomas E. Baker was the beginning of our analysis. Especially helpful works on the federal courts of appeals are Paul D. Carrington et al., *Justice on Appeal* (1976); *Restructuring Justice* (Arthur D. Hellman ed., 1990); Richard A. Posner, *The Federal Courts: Crisis and Reform* (1985); J. Woodford Howard, Jr., *Courts of Appeals in the Federal Judicial System* (1981); and Robert M. Stern, *Appellate Practice in the United States* (1989).

Implicit in this assessment are judgments (most often educated guesses) about how an alternative will affect judicial caseloads and workloads, how it will affect decision making, and how it will be received by affected parties.³ We are not prepared to suggest how these factors or others ought to be weighed in deciding whether to choose an alternative to the present structure and, if so, which one. We believe that any major change should be evaluated according to how it satisfies society's informed preferences for how an appellate court should function. When structural change might solve one problem, the change's ancillary effects on the core values and functions of the courts must be considered in determining whether the solution is worth the cost. The same analysis might fruitfully be applied to the costs and benefits of maintaining the status quo.

We have not limited our inquiry to options that would change the architecture of the court system. Because many people knowledgeable about the courts believe that further efforts within the current structure can adequately handle the system's problems, we also describe "intramural" approaches. That is, we note what some or all courts are currently doing—or might do without major structural change—to avert or minimize the problems. Finally, because most observers believe the problems of the federal courts of appeals may be traced to caseload volume, we include jurisdictional and other changes that might reduce the flow of cases into the federal courts in general and the courts of appeals in particular.

In addition to the review of scholarly literature on the courts of appeals and other commissioned studies, we had extensive input from federal judges. Part of our analysis of problems and solutions rests on an October 1992 survey of all federal judges. That survey, conducted both for this project and in furtherance of the Center's support of the Judicial Conference Committee on Long Range Planning, obtained information and opinions from more than 1,400 judges about problems facing the federal court system and about proposed responses to those problems. About 80% of all circuit and district judges responded to our survey.⁴ Judges also discussed appellate problems and possible solutions at the Center's

³A detailed analysis of the financial costs and benefits of the various approaches is beyond the scope of this project. Some costs and cost savings are predictable. For example, adding circuits without changing how the courts are administered would require additional expenditures for circuit headquarters (clerk's office, circuit executive's office, and so on). Consolidating circuits or districts could ultimately result in lower administrative costs. But the possible combinations of changes that could be adopted are numerous, and many of the effects are not predictable. In any event, focusing on the budgetary impact of any particular set of changes might diminish the primarily qualitative thrust of this review.

⁴Response rates for the survey results included in this report were as follows: active circuit judges, 81%; senior circuit judges, 79%; active district judges, 83%; senior district judges, 75%. Responses of bankruptcy judges, magistrate judges, and judges on special courts are not included here. For most survey items, the responses of active and senior judges were similar. Therefore, unless otherwise noted, the percentages reported are of active and senior judges combined.

1993 National Workshop for Judges of the U.S. Courts of Appeals and its annual Workshop for Chief District Judges. Many of the issues were also addressed in smaller conferences of judges, lawyers, and policy makers. These conferences, sponsored by the Judicial Conference's Committee on Long Range Planning, focused particularly on the proper size and role of the federal judiciary.

I. Perceived Threats to the Mission of the Courts of Appeals

The structure and mission of the courts of appeals

The structure and mission of the courts of appeals in the federal judicial system are best understood in the context of the development of that system. We will not attempt to recapitulate the history of the federal courts; excellent accounts of their creation and evolution abound.⁵ The current structure of the federal judicial system is usually described as a pyramid. At the apex of the pyramid is the U.S. Supreme Court, the only federal court required by the U.S. Constitution.⁶ At the base of the pyramid are the ninety-four U.S. district courts. The district courts are the point of entry for much federal litigation and the source of much of the work of the system's intermediate tier, the U.S. courts of appeals. The district courts are the federal courts most closely tied to the states in which they sit.⁷ Each state has at least one federal district within it, and only one district crosses state borders.⁸ District judges are typically drawn from the districts they serve and, except for judges serving in the District of Columbia, must live in their districts during their active tenure.⁹ Bankruptcy judges constitute a unit of the district court known as the bankruptcy court for that district.¹⁰

The organization of the intermediate tier of federal courts is primarily regional. The ninety-four districts are grouped in twelve regions. The territorial jurisdiction of the regional courts of appeals is defined by the geographic boundaries of their circuits. The U.S. Court of Appeals for the District of Columbia Circuit contains only one district, but each of the other eleven regional courts of

⁵See, e.g., Felix Frankfurter & James M. Landis, *The Business of the Supreme Court: A Study of the Federal Judicial System* (1928); Paul M. Bator et al., *Hart & Wechsler's The Federal Courts and the Federal System* (3d ed. 1988).

⁶28 U.S.C. § 1 (1988) provides that the U.S. Supreme Court shall consist of a Chief Justice and eight associate justices. The number of justices on the Court fluctuated in the Court's first century but has remained at 9 for more than 100 years.

⁷As others have observed, state boundaries need not have served as the basis for federal court jurisdiction. Alternative systems, such as equal allocation of workload, could have been adopted and would have allowed for easier allocation of resources by periodic realignment. See Russell R. Wheeler & Cynthia Harrison, *Creating the Federal Judicial System* 9 (Federal Judicial Center 1989).

⁸The exception crosses not only state borders but circuit boundaries. To keep all of Yellowstone National Park within the same judicial district, the District of Wyoming, part of the Tenth Circuit, encompasses small parts of Idaho and Montana, which are in the Ninth Circuit. 28 U.S.C. § 131 (1988).

⁹28 U.S.C. § 134(b) (1988).

¹⁰28 U.S.C. § 151 (1988).

appeals contains the districts of at least three states, usually contiguous ones.¹¹ Except for the District of Columbia Circuit, created in 1948, and the Fifth and Eleventh Circuits, created by the division of the "old" Fifth Circuit in 1981,¹² the boundaries of the regional courts of appeals have remained constant since 1929. This continuity, along with the residency requirements for appointment and service as a circuit judge,¹³ have resulted in the development of distinct circuit identities and traditions.

The thirteenth court of appeals is the U.S. Court of Appeals for the Federal Circuit. That court is a national (or "nonregional") court that sits in Washington, D.C., and in other locations as necessary.¹⁴ It was created in 1982 to centralize the review of certain kinds of appeals from the district courts and boards of contract appeals.¹⁵ The court also acts as the reviewing court for the U.S. Court of Federal Claims, the U.S. Court of International Trade, the U.S. International Trade Commission, and, in certain cases, the U.S. Court of Veterans Appeals.

The jurisdiction of the courts of appeals. Before looking at how the courts of appeals work and how much work they do, it may be helpful to describe their subject-matter jurisdiction.¹⁶ In general, any civil litigant or criminal defendant aggrieved by a final judgment of a district court may appeal that judgment to the court of appeals for the circuit in which the district lies. There are exceptions. Some matters initially decided in the federal district courts, such as cases arising under the patent laws, must be appealed to the Court of Appeals for the Federal Circuit. Some cases in which the district courts serve as the first level of appellate review (typically federal administrative agency decisions) must be appealed to the Court of Appeals for the District of Columbia Circuit. Additionally, many agency actions are reviewable in the first instance in the courts of appeals, either in the circuit in which they arise or in the D.C. Circuit.

In certain bankruptcy matters, the federal district court operates as an appellate court.¹⁷ The Bankruptcy Code also provides an alternative route for appeal of a

¹¹The organization of states into judicial circuits is set out in 28 U.S.C. § 41 (1988).

¹²The Fifth Circuit was divided by the Fifth Circuit Court of Appeals Reorganization Act of 1980, Act of Oct. 14, 1980, Pub. L. No. 96-452, 94 Stat. 1994. The Act took effect October 1, 1981.

¹³See 28 U.S.C. § 44(c) (1988 & Supp. III 1991).

¹⁴28 U.S.C. § 48 (1988).

¹⁵For accounts of the creation and functions of the Court of Appeals for the Federal Circuit, see Daniel J. Meador, *Origin of the Federal Circuit: A Personal Account*, 41 Am. U. L. Rev. 581 (1992), and *The United States Court of Appeals for the Federal Circuit* (Marion T. Bennett ed., 1991). For the jurisdiction of the court, see 28 U.S.C. §§ 1291, 1292(c) and (d), 1295 (1988); 38 U.S.C. § 7292 (1988).

¹⁶For an overview, see Thomas E. Baker, *A Primer on the Jurisdiction of the U.S. Courts of Appeals* (Federal Judicial Center 1989).

¹⁷28 U.S.C. § 158(a) (1988).

bankruptcy court order to a bankruptcy appellate panel.¹⁸ After a district court or a bankruptcy appellate panel has issued a final order, judgment, or decree, an appeal may be taken to the court of appeals for the circuit in which the lower court sits.¹⁹

The functions of the courts of appeals. The courts of appeals perform two primary functions, often described in short form as “error correction” and “law declaring.” Error correction is shorthand for the function, guaranteed by the statutory right to appeal, that attempts to maximize the likelihood of a correct result in an individual case while accommodating other values of the system, including finality and economy. Error correction is of critical importance to aggrieved parties in an individual case, as it is meant to ensure that their cause will get a “second look” and that the final outcome will not be the result of power exercised arbitrarily or otherwise than in accordance with the law. The availability of an independent review enhances both the appearance and the reality of fairness and accountability.²⁰

The error-correction role of the appellate court is not a full-scale invitation to retry cases or to second-guess the district courts. The scope of appellate review is substantially constrained by rule and practice. With some exceptions, review is limited to final judgments. It is largely limited to matters complained of at the trial level so that litigants will be motivated to give trial judges the opportunity to correct inadvertent errors immediately.²¹ Standards of review also limit the extent to which a court of appeals may substitute its judgment for that of the initial decision maker. For example, in most cases factual findings by a trial judge may only be set aside if the appellate court concludes they are “clearly erroneous.”²²

¹⁸28 U.S.C. § 158(b)(1) (1988). A bankruptcy appellate panel comprises three bankruptcy judges drawn from courts other than the court from which the appeal arises. At the time of this writing only the Ninth Circuit had a functioning bankruptcy appellate panel system.

¹⁹28 U.S.C. § 158(d) (1988).

²⁰The classic text on appellate review in the United States describes this aspect of the appellate function: “The availability of the appellate process assures the decision-makers at the first level that their correct judgments will not be, or appear to be, the unconnected actions of isolated individuals, but will have the concerted support of the legal system; and it assures litigants that the decision in their case is not prey to the failings of whichever mortal happened to render it, but bears the institutional imprimatur and approval of the whole social order as represented by its legal system. Thus, the review for correctness serves to reinforce the dignity, authority, and acceptability of the trial, and to control the adverse effects of any personal shortcomings of the basic decision-makers.” Carrington et al., *supra* note 2, at 2.

²¹One reason for this is to discourage the parties from “sav[ing] their heavy artillery to use in the reviewing court and ... treat[ing] the primary trial as an opening skirmish.” Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 Harv. L. Rev. 542, 567 (1969).

²²Fed. R. Civ. P. 52.

In other cases review is constrained by principles of deference to the trial judge, who is in the best position to have assessed and determined many issues.

Typically, review for error focuses on whether the first-level decision maker applied the correct law to the facts of the case. If error was committed, and if the error was not harmless, the appellate court can reverse the judgment being appealed, remand the case for further proceedings, or take other appropriate action. The appellate court may also take these actions where the first-level decision maker did not commit an avoidable error, but where changed circumstances require that the first outcome be changed.²³ Changed circumstances can include developments in the law. One of the fundamental aspirations of Anglo-American justice systems is that like cases be treated alike. Equality of treatment under a consistent body of federal law does not only ensure fairness but also permits citizens to conform their behavior to the law and lawyers to predict the likely outcome of client behavior and individual lawsuits.

In the process of applying the same federal law to individual cases, courts articulate standards for when cases are “like cases” and when litigants or criminal defendants are “similarly situated.” This implicates the other aspect of the courts of appeals’ mission—law declaring. The law-declaring function focuses on maximizing the likelihood of correctness in future cases. As the term implies, part of the law-declaring function is to “say what the law is.”²⁴ The U.S. Constitution, federal statutes, and regulations form the framework; judicial decision making in individual cases fills in gaps and completes the structure. Thus the goal of uniformity is often in tension with the goal of developing the law in the light of individual cases and changing circumstances. Different applications of the law at the trial level may reflect this tension, as may conflicts between or among panels within a circuit. By custom and tradition, now embodied in written internal operating procedures, one panel of a court of appeals cannot overrule the decision of a prior panel and should not decide cases in a way contrary to a prior decision. This “prior panel rule” facilitates the development of a uniform law of the circuit. Conflicts within circuits are considered an evil to be avoided or, if not avoided, to be reconciled by the full court.²⁵

Despite the goal of uniform application of national law, there is no analogous “prior circuit rule” constraining a court of appeals to follow the decision that another circuit has reached on the same issue. Rather, the regional nature of the structure of our appellate system has allowed the development of a “law of the circuit.” Scholars have questioned the legitimacy of the concept because the

²³Judith Resnik, *Precluding Appeals*, 70 *Cornell L. Rev.* 603 (1985).

²⁴*Marbury v. Madison*, 1 *Cranch* 137 (1803).

²⁵The court may do so by a number of means, including rehearing the case en banc. As we will discuss, some circuits use en banc proceedings not only to foster the correctness and harmony of circuit law but, where possible, to avert conflicts between the circuits.

twelve regional circuits are not sovereignties.²⁶ A law passed by the national legislative body should, in theory, apply in the same way to persons in all parts of the nation. The tension between the desirability of national uniformity and the regionalism embraced by those who created the federal judicial system is discussed in more detail when we address the problem of intercircuit conflicts in section IV. Regardless of the perceived legitimacy of the concept, until the Supreme Court speaks to an issue of law, a trial court is bound only by the decisions of the court of appeals for its own circuit.

Processes of the courts of appeals. Statutes prescribe who will perform the appellate review function in the regional courts of appeals—the courts may authorize hearing and determination of cases by separate panels of three judges “at least a majority of whom shall be judges of that court.”²⁷ How the courts do their work is essentially a matter of common law and tradition, as codified in the Federal Rules of Appellate Procedure and in local rules and internal operating procedures of the courts. The courts of appeals have developed rather different ways of conducting their business according to their individual circumstances and preferences. It is therefore impossible to say that there is now a single appellate process in the federal system.

The Federal Courts Study Committee summarized the hallmarks of the appellate system in this way:

[T]he judges do much of their own work, grant oral argument in cases that need it, decide cases with sufficient thought, and produce opinions in cases of precedential importance with the care they deserve, including independent, constructive insight and criticism from judges on the court and the panel other than the judge writing the opinion. These conditions are essential to a carefully crafted case law.²⁸

The very statement of these hallmarks makes it clear that most of the claims concerning how the volume of appeals affects the quality of the process and product of the courts of appeals are impossible to verify or refute empirically, as they rest on subjective analyses. As we will discuss, some argue that procedural changes in the courts of appeals have allowed those courts to survive but have produced an appellate system in which judges do considerably less of their “own” work than they once did, do not hear oral argument in all the cases that “need” it, decide cases with too little thought (or at least too little collegial deliberation), and pro-

²⁶See, e.g., Walter V. Schaefer, *Reducing Circuit Conflicts*, 69 A.B.A. J. 452, 453–54 (1983).

²⁷28 U.S.C. § 46 (1988). The statute provides for exceptions in the case of emergencies restricting the availability of judges of the circuit. The statute does not speak to whether an appellate panel must include an active circuit judge.

²⁸Report of the Federal Courts Study Committee 109 (1990).

duce precedential opinions of insufficient clarity to warrant the appellation of "carefully crafted case law."²⁹

The traditional model of appellate review was one of "visible rationality." Aggrieved parties could petition the court in writing and orally argue their positions to the judges who would decide the case. Oral argument serves multiple functions in the courts of appeals. It gives litigants the opportunity to persuade the court, and it gives the court the benefit of input from those most knowledgeable about the case and most affected by its resolution. It allows litigants to come face-to-face with the decision makers who will, in all likelihood, be the last members of the judicial system to attend to their cause. It can enhance not only the appearance of contemporaneous attention by three judges but also the reality of collegial deliberation, as most case conferences on argued cases are held shortly after argument while the panel judges are still together.

In the traditional model, once the panel decided a case, the litigants usually received a signed, written decision that disclosed the reasoning of the court. That decision was to reflect not only the individual thinking of the writing judge but also the effect of the panel's collegial deliberation.³⁰ Publication of these decisions was thought to promote judicial accountability and to allow lawyers to predict litigation outcomes by learning both the law of the circuit and, to some extent, the philosophies of individual circuit judges on the court.

The ideal of visible rationality implies that an appellate court should have enough time and information to decide cases deliberately, collegially, and intelligently, and to so appear to the litigants and the public. In addition to ensuring that the appellate review function is performed, and performed reasonably expeditiously, an ideal appellate system would provide working conditions that would attract high-quality, well-respected judicial candidates and would foster the concern of judges for individual litigants.³¹ Choosing appropriate structures and procedures for the appellate courts is a matter of deciding what structures and procedures maximize these goals with available resources. It is also a matter of assessing the tolerability of the trade-offs necessary to keep the appellate system functioning.

²⁹Both judges and nonjudges express these fears. See, e.g., Howard T. Markey, *On the Present Deterioration of the Federal Appellate Process: Never Another Learned Hand*, 33 S.D. L. Rev. 371, 371 (1988) ("It is time . . . to cease sending to learn for whom the bells might someday toll. They are tolling now—and they are tolling the demise of the appellate process that was."); Robert S. Thompson & John B. Oakley, *From Information to Opinion in Appellate Courts: How Funny Things Happen on the Way Through the Forum*, 1986 Ariz. St. L.J. 1, 78 ("While conceding that judicial overload incident to bloated appellate dockets demands procedures to cope with it, we believe . . . that currently employed devices are unsatisfactory when measured against the values served and the goals sought by appeal.").

³⁰Stern, *supra* note 2, at 20.

³¹Carrington et al., *supra* note 2, at 11–12.

As we will see in some detail later, the trade-offs the courts have made to accommodate the growth of the appellate caseload without a corresponding increase in resources have changed the fundamental nature of the appellate review process in many cases. Many observers see these changes to the appellate process as detrimental in themselves; many others see them as symptoms of a larger problem that threatens the courts of appeals.

Reasons offered for structural change

Advocates for major structural change to the federal appellate system are responding to a volume of appeals that they believe threatens to overwhelm the appellate courts. Some consider the courts to be already enmeshed in a "crisis of volume" and doubt that the crisis will abate without major change either to the structure of the courts or to the accessibility of the courts.³² Other observers question the diagnosis of "crisis."³³ Many of them believe the courts to be functioning effectively now, but see major problems on the horizon if judicial workloads continue to grow. Still others see the courts as fully capable of handling likely caseloads of the future by growing as needed and by streamlining their procedures.

Not every aspect of the courts' situation has been or can be empirically demonstrated. Our purpose is not to quibble over whether the federal court system is under stress—it is important enough that a substantial number of its members and at least some of its users perceive that it is. We believe the response to that perception—whether structural change, increased procedural flexibility, or a determination to retain the system largely in its current form—ought to be governed to the extent possible by an objective description and analysis of the current situation of the courts.

In light of recent efforts to reduce cost and delay in federal civil litigation, it is worth noting preliminarily that these factors do not appear to be driving current

³²This was the conclusion of a majority of the Federal Courts Study Committee members. Report of the Federal Courts Study Committee 109 (1990). One committee member had previously described the federal courts as being in crisis. See Posner, *supra* note 2. It is interesting, therefore, to note that analysis by the subcommittee chaired by Judge Posner suggested that "terms like 'crisis' overstate the problem." Subcommittee on the Role of the Federal Courts and Their Relation to the States, Report to the Federal Courts Study Committee 2, in 1 Federal Courts Study Committee, Working Papers and Subcommittee Reports (1990).

³³Skeptics include dissenters on the committee. Report of the Federal Courts Study Committee 123 (1990). See also Michael C. Gizzi, *Examining the Crisis of Volume in the U.S. Courts of Appeals*, 77 *Judicature* 96 (1993); George D. Brown, *Nonideological Judicial Reform and Its Limits—The Report of the Federal Courts Study Committee*, 47 *Wash. & Lee L. Rev.* 973, 988–92 (1990); Jack M. Beermann, *Crisis? What Crisis?*, 80 *Nw. U. L. Rev.* 1383 (1986) (reviewing Richard A. Posner, *The Federal Courts: Crisis and Reform* (1985)). Others have noted that the rhetoric of crisis is not new to judicial reform efforts. See Lauren K. Robel, *The Politics of Crisis in the Federal Courts*, 7 *Ohio St. J. on Disp. Resol.* 115 (1991).

calls for structural change. In any individual case, delay may work to the advantage of a party, but we assume general acceptance of one goal: Litigants should obtain a final decision as quickly and economically as possible, consistent with reasoned adjudication. There appears to be no groundswell of discontent with the cost, at least to litigants, of the appellate process. Some of the procedural changes adopted by the courts of appeals to expedite appeal processing have probably reduced overall costs to litigants. Indeed, it may reasonably be argued that appeals are so inexpensive relative to the entire cost of litigating a case that there is an insufficient economic deterrent to meritless appeals.

Whether appellate disposition times amount to a problem of delay is more difficult to assess. In our description of the work of the courts of appeals in the next section, we present information about appellate disposition times and note that those times have in recent years stayed relatively stable, even as caseloads have grown. Absent a standard for the amount of time an appeal should take, we cannot say whether appellate disposition times are unacceptably long or not. If they are, it does not appear that the problem is one of court structure as distinct from other aspects of the system, particularly the volume of cases.³⁴ Structural changes of the sort generally proposed for the courts of appeals do not appear to be necessary to achieve delay reduction and may not contribute to achieving it. Indeed, some of the structural changes proposed, such as a new tier of appellate courts, could markedly lengthen the time to final disposition.

Thus, cost and delay are not the main factors spurring calls for change to the structure of the courts of appeals. The major problems that judicial and legal commentators identify in the appellate system can be described and classified in different ways, but for analytical purposes we have divided the asserted problems into three major areas of concern. In brief, they are

³⁴As with civil litigation at the trial level, most of the time between when an appeal is docketed and when it is terminated is attributable not to the time judges spend deciding a matter but to the time spent preparing the matter for decision. Prior research suggests that about 85% of the elapsed time of an appeal occurs before the case reaches the panel that will decide it. Only about 15% of an appeal's life is spent in the hands of the judges themselves. *A Summary of the Third Circuit Time Study, in Managing Appeals in Federal Courts* (Michael Tonry & Robert A. Katzmann eds., Federal Judicial Center 1988) (1974 report of 1971–1972 time study). Thus, if the time required for an appeal is deemed to be too long by as-yet unspecified criteria, it may be most fruitful to focus delay reduction efforts on the period between when an appeal is filed and when it is submitted to a three-judge panel for decision. Many courts have directed significant management efforts toward improving this stage of the appellate process. If the queue of cases ready for submission begins to lengthen, however, this may suggest insufficient judicial resources. Backlogs fluctuate. In recent years, some courts have been forced to cancel scheduled argument dates because there were no cases ready for submission; others, particularly courts with continuing judicial vacancies, have cases awaiting assignment to a panel.

Threat to just outcomes. Some who observe or participate in the appellate system fear that conditions in the courts of appeals—in particular, the amount of work each judge must do to keep up with the caseload—threaten the ability of judges to spend the time necessary for the deliberative work the courts of appeals have been known for, threaten the quality of life of the judges and the quality of the judiciary itself, and therefore threaten the quality of the product of the courts. In this view, loss of collegiality because of the press of business and the growth of the courts has diminished the quality of the appellate decision-making process for the judges themselves, with detrimental effects felt by the litigants, the bar, and the public.

Diminished quality of the appellate process. Some observers of the work of the courts of appeals fear that the courts' extraordinary attempts to accommodate the caseloads of the past two decades have significantly diminished the quality of the appellate process. Certain screening practices, the decline of oral argument, the increased use of summary decision modes, restricted publication practices, and other procedural responses to volume have "transformed [the appellate courts] from the institutions they were even a generation ago."³⁵

Inconsistent interpretations of federal law. Some who focus on the law-declaring function of the courts of appeals are concerned that the press of cases and the difficulties of keeping up with and reconciling decisions issued by a growing appellate bench have diminished the consistency and coherence of the national law, both within and among circuits. As a result, the same federal statute may be interpreted differently from one circuit to another, or even from one case to another in the same circuit. Some fear that the resulting uncertainty makes it difficult for citizens to conform their behavior to the law, complicates business transactions, and generates more litigation than would occur if the national law were uniform and predictable.

The major problems afflicting the courts can be linked to the volume of cases. For example, the problem of overwork is directly linked to caseload volume, at least with the current size of the judiciary. Keeping up with the work by truncating the appellate process, by delegating more responsibility to nonjudicial personnel, or by giving cases less time than they deserve leads to perceived problems more or less directly attributable to too many cases and too much work. A perceived problem of inconsistency can be linked to too many judges (a proliferation of mind-sets, with decreasing collegial opportunities to know each other's minds) or too many opinions (too much law to keep up with). But the number of opinions and the number of judges are driven by the volume of cases.

Our findings about the primary problems identified are set out in brief here and developed throughout the report:

³⁵Report of the Federal Courts Study Committee 109 (1990).

Threat to Just Outcomes

- Assessing the quality of the product of the courts of appeals is necessarily subjective. There is no adequate and generally accepted measure of the quality of appellate outcomes, so conclusions about the quality of current appellate performance and projections of the likely effects of change on quality must be considered speculative. We cannot conclude, as some assert, that the justness of appellate outcomes has been detrimentally affected by caseload volume. By prodigious effort and creativity, the courts of appeals have been able to keep up relatively successfully with their rising caseloads without obvious harm to the quality of their decisions, although some have questioned the quality of their opinions. The courts of appeals continue to develop and refine ways to handle their large caseloads without sacrificing the goal of just outcomes. At some point, especially if the workload of the courts of appeals continues to grow at its recent pace, changes in internal operating procedures may not be sufficient for the task. Some judges believe that point has been reached; others disagree. We cannot foretell the rate of caseload growth, but no major proposal for change to the structure of the courts would substantially reduce appellate filings in the near future.

Diminished Quality of Appellate Process

- Many proponents of structural change to the courts of appeals seek to reinstate traditions and procedures that were the norm more than twenty-five years ago. They believe that whatever the evidence regarding the quality of individual outcomes in the short term, the incremental changes in the appellate system over the past few decades have damaged other fundamental values of our system, including the visibility and accountability that contribute to the legitimacy of the federal court system in the long term. Some of these values, if determined to be of continuing vitality and importance, might be reaffirmed and strengthened by nonstructural or procedural change. However, if it is determined to be in the national interest to restore or create a system that guarantees the full panoply of appellate procedures in all appeals, or even in all appeals decided on their merits, one of two courses must be adopted: (1) there must be substantially fewer appeals to decide, or (2) there must be a massive increase in judicial system resources, including judgeships, supporting personnel, and facilities. Moreover, restoring the former system by substantially or rapidly expanding the appellate judiciary in the current structure is likely to worsen some problems that are now relatively minor.

Inconsistent Interpretations of Federal Law

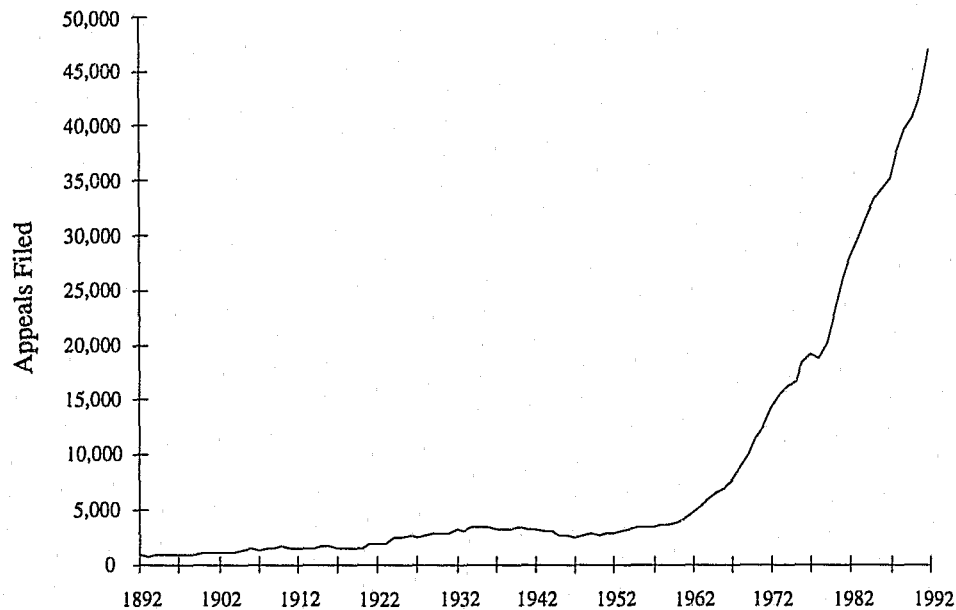
- Inconsistent interpretation and application of federal law by different courts of appeals is not at the present time a significant problem that warrants substantial structural change to the federal court system. Most important conflicts that reflect like cases being treated differently in different circuits are resolved within a reasonable period by the Supreme Court, by the courts of appeals themselves, or by intervening events such as legislative change. Intercircuit conflicts may be a problem in particular areas of the law (e.g., maritime law), but overall they probably represent a relatively small part of the legal uncertainty that affects the litigation and counseling functions of lawyers. Structural change to resolve intercircuit conflicts—for example, by creating a new court—is likely to provide relatively little benefit at relatively high cost. Nonstructural approaches such as encouraging consideration of the reasoning of other circuits may be beneficial. Proposals that would fundamentally change our system of precedent (such as national stare decisis) appear to be unpromising as solutions to any problem of inconsistency. Such proposals might be a necessary or desirable adjunct to a structural change made for other reasons, but do not in themselves seem likely to ameliorate any current problem.
- Inconsistent interpretation and application of federal law by panels within circuits is reported to be a problem in some circuits in some areas of law. The only substantial empirical work on the issue found little evidence for intracircuit conflicts in the largest circuit. Although certain structural changes might reduce intracircuit inconsistency, nonstructural efforts to deal with the problem are already under way and show promise. Making structural changes solely to reduce current levels of intracircuit inconsistency—for example, by extensively restructuring the circuits to create courts of appeals of nine or ten judges—is likely to do more harm than good.

II. The Work of the Courts of Appeals

The fundamental concern over the current state of the federal courts of appeals is that the growth of their workloads threatens or has already diminished the ability of the courts to perform their essential missions of error correction and law declaring. In this section we present information about the caseloads of the federal courts of appeals and how those courts do their work.

It is well known that the number of cases filed in the federal courts of appeals has risen remarkably over the past several decades. Figure 1 gives a 100-year picture of appellate filings in the U.S. courts.

Figure 1. Number of Appeals Filed, 1892-1992

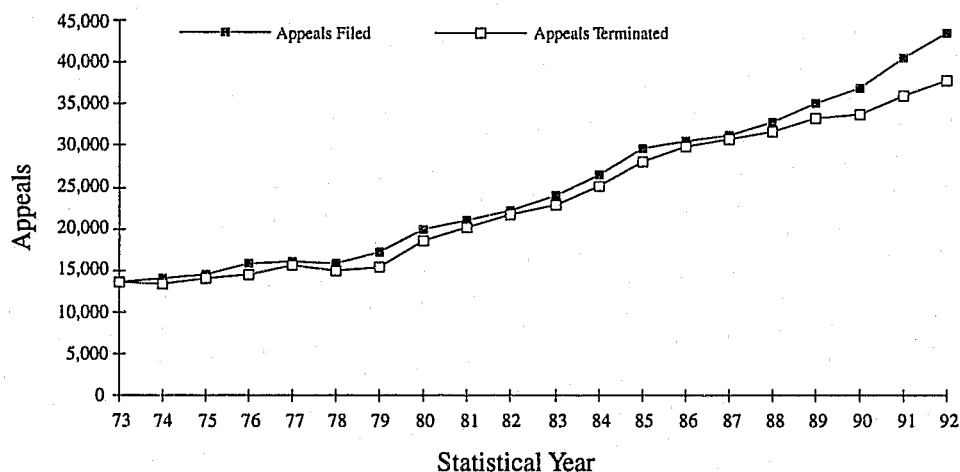


Much of the analysis we present in this section focuses on the last two decades. The problems asserted to afflict the courts of appeals have largely been attributed to sustained caseload growth during this period, and more in-depth information is available in computer-searchable form for these years than for earlier years.³⁶ Figure 2 shows the number of cases filed and terminated in the regional

³⁶Some analyses are constrained to fewer years because reporting requirements and definitions changed enough to make comparisons over a longer time span misleading. Those instances will be noted.

courts of appeals³⁷ over the past twenty years.³⁸ From July 1, 1972, to June 30, 1992, filings in the courts of appeals rose from 13,694 to 43,481, an increase of 218%. Terminations kept pace for much of this period, but in 1988–1989 they began to lag behind filings, rising 178% over the entire period.

Figure 2. Number of Appeals Filed and Terminated, 1973–1992



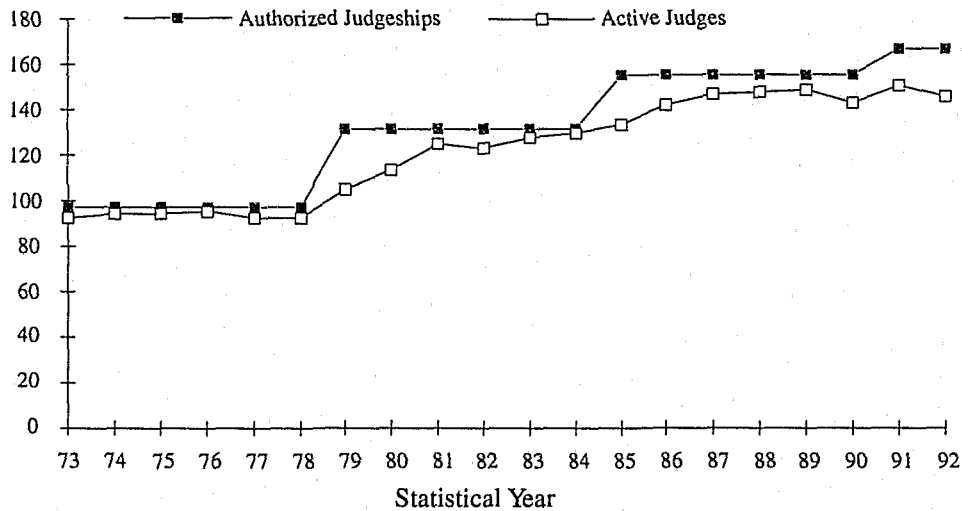
While the number of appeals grew rapidly during the period described above, the number of judgeships grew slowly. Filings increased by 218%, but the number of authorized judgeships increased by only 72%, and the number of active

³⁷Data for the U.S. Court of Appeals for the Federal Circuit are not available on the electronic database from which the information for many of these figures was obtained. The information the U.S. Court of Appeals for the Federal Circuit reports to the Administrative Office of the U.S. Courts (AO) is contained in Appendix G.

³⁸The AO reports caseload information by “statistical years.” Until recently, a statistical year began on July 1 and ended on June 30. Statistical year 1973 (hereinafter statistical year 73), for example, began July 1, 1972, and ended June 30, 1973. In 1992, the AO changed to a statistical year of October 1 to September 30. For ease of comparison, the 1992 figures we report here reflect cases filed (or terminated) from July 1, 1991, to June 30, 1992. The figures therefore differ slightly from statistical year 92 figures reported in the 1992 Annual Report of the Director of the Administrative Office of the U.S. Courts. Other figures may differ slightly because of different counting methods. For example, our analyses count consolidated appeals as a single case rather than as multiple terminated appeals.

judges grew by only 57%. Figure 3 shows the number of authorized and active circuit judges for the past twenty years.³⁹

Figure 3. Number of Authorized Circuit Judgeships and Active Circuit Judges, 1973–1992



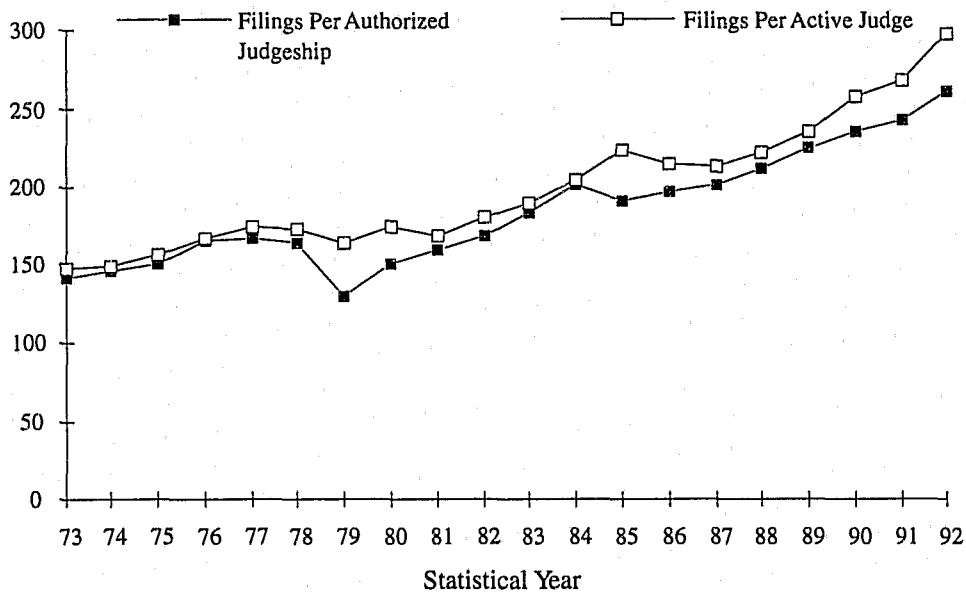
Note: The number of active judges was determined by subtracting “vacant judge months” (as reported in the AO’s Federal Court Management Statistics) from authorized judge months. Senior and visiting judges are not included in the number of active judges.

What has this rising curve meant for the burden borne by individual judges? One way to see the impact of appellate volume on the resources of the judiciary is to look at the per-judge caseload. As a consequence of the rapid growth in filings and the much slower increase in judgeships, the filings per judge have increased substantially over the past twenty years. Figure 4 shows the number of appeals filed per authorized circuit judgeship and per active circuit judge. As Figure 4 shows, the number of filings per active judge roughly doubled, from 148 filings per judge to 298 filings per judge, between statistical year 73 and statistical year 92. Figure 4 slightly overstates the workloads of active judges because it does not account for the contributions of senior and visiting judges, which can be substantial. Those contributions are addressed in somewhat more detail in section III, which describes how the courts of appeals have managed to cope with their caseloads. The per-judge burdens cited here are important to consider because

³⁹The increase in judgeships over time displays a “stair-step” distribution, indicating the influence of omnibus judgeship bills. The increase in sitting judges, in contrast, phases in over time as the allocated positions are filled.

they represent the workload that active circuit judges would have to carry if senior judges were to choose not to continue judging, or if the workloads of active and senior district judges precluded them from assisting the courts of appeals.

Figure 4. Number of Appeals Filed Per Authorized Circuit Judgeship and Per Active Circuit Judge, 1973–1992

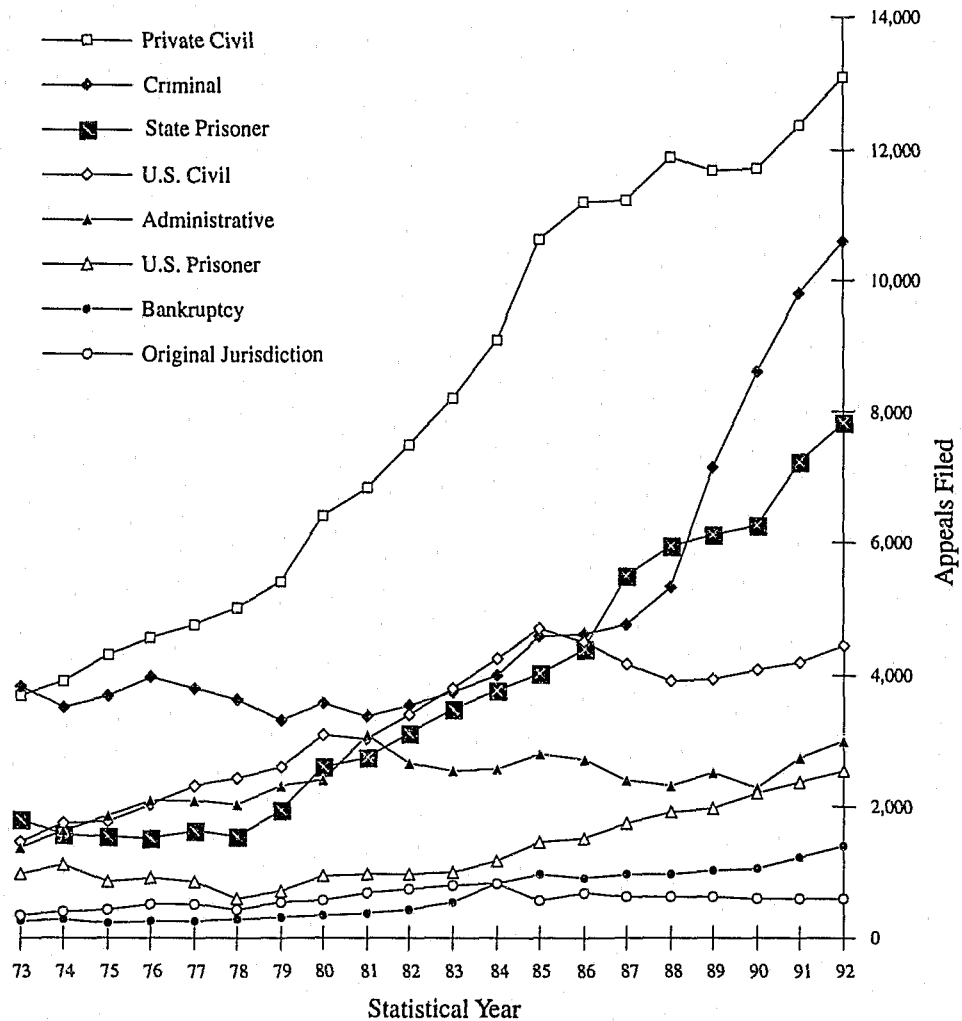


The burden of caseload volume on judges and on the system as a whole depends in part on the nature of the appeals filed. The mix of case types is important to consider in determining both the sources of stress in the system and the likely effects of proposed changes. We first present an overall look at the types of cases in the appellate caseload, then discuss what we know about rates of appeal in two major case categories: criminal appeals and civil appeals. Figures 5 and 6, respectively, show the absolute and relative changes between 1973 and 1992 in the major types of cases filed in the courts of appeals.⁴⁰

For the past decade, the overwhelming majority of appellate filings have been in four major case types: private civil, criminal, state prisoner, and U.S. civil. Private civil appeals and criminal appeals account for more appeals than all other categories combined. The proportion of each of these case types in the appellate caseload was not much different in 1992 than it was twenty years earlier (private

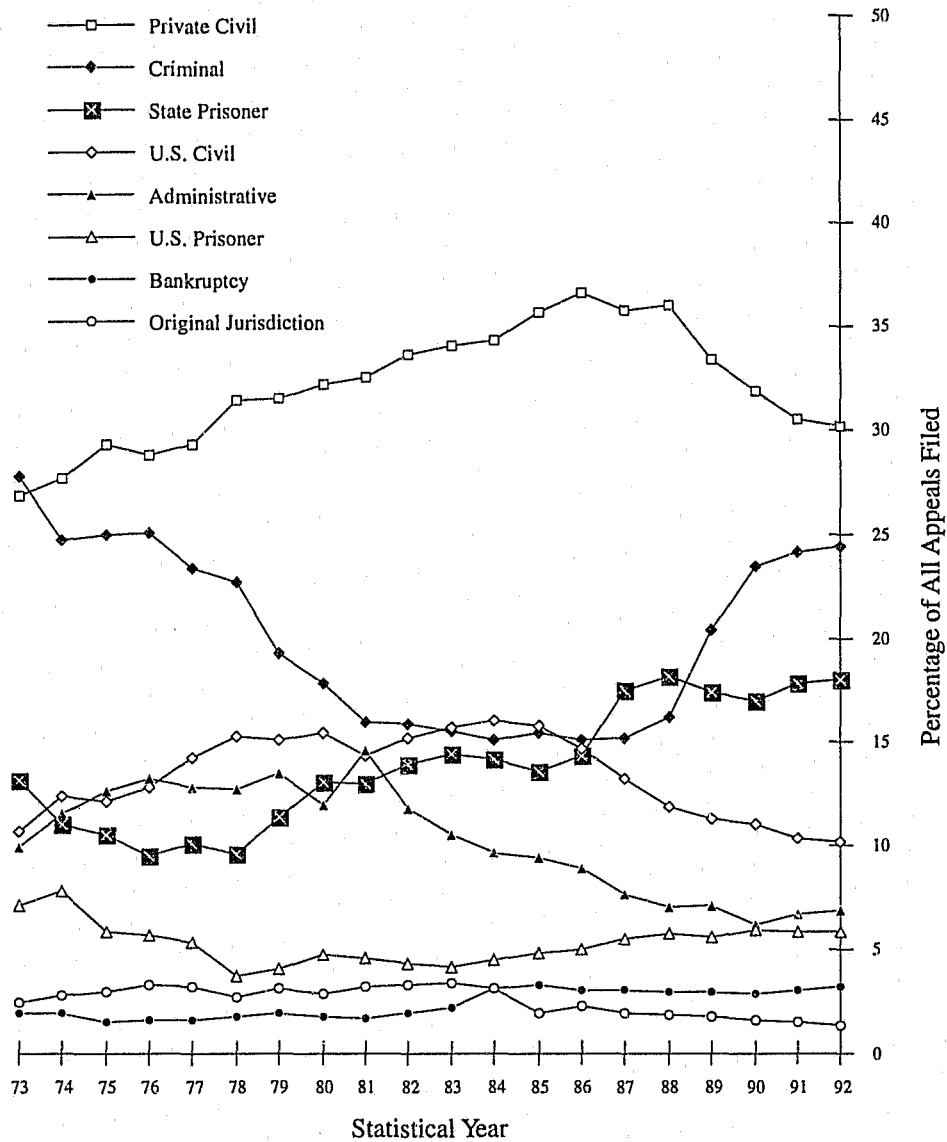
⁴⁰Graphs of national data mask considerable variation among the circuits in the kind of cases making up their workloads, as we discuss later in this section.

Figure 5. Number of Appeals Filed, by Type, 1973-1992



civil: 27% in 1973, 30% in 1992; criminal: 28% in 1973, 24% in 1992). But Figure 6 shows that their prominence in the overall caseload fluctuated greatly over that period, and Figure 5 shows why. By 1973, the number of private civil appeals had already begun to increase, an increase that grew more rapid beginning in the late 1970s. The number of criminal appeals held fairly steady during the same period, so the proportion of criminal appeals in the caseload of the

Figure 6. Appeal Types as a Percentage of All Appeals Filed, 1973-1992



courts of appeals dropped dramatically. In 1984, the number of criminal appeals began to climb, first slowly, then rapidly.

The causes of the growth of appellate court caseloads have important implications for the debate over change to the structure of the courts. How caseloads grow affects decisions about whether major change is or soon will be necessary.

The factors influencing appellate caseload growth tell us something about how different policy choices might affect the work of the courts of appeals.

Factors contributing to caseload trends

The courts of appeals in recent decades have seen an increase in their caseloads disproportionate to caseload increases in the district courts. Changes in standards of review, uncertainty inherent in new legislation or new causes of action, new rights to appeal, broader rights to counsel in criminal appeals, and the increased scope of actions by state and federal prisoners have all been identified as potential explanations for this disproportionate rise.⁴¹ Each explanation is plausible, and each may contribute to the caseload picture, but their relative impacts are not clear.

There are three fundamental ways in which the size and structure of the federal courts might relate to appellate caseloads. First, size and structure may influence appellate caseloads directly by influencing the number of cases the district courts can handle, i.e., the number of first level terminations.⁴² Second, size and structure might affect the likelihood of appeal. Third, size and structure might affect the likelihood that an issue will be litigated in the first instance. (That is, structural factors at the appellate level might feed back into the first effect indirectly, by increasing the number of first-level terminations and thereby the number of appeals.) We consider the first two possibilities below, but have little or no information concerning the last. As we will discuss in the context of likelihood of appeal, the volume of litigation in the district courts is driven by many factors, and it is beyond the scope of this study to try to separate the effects of other factors from the effects of any indeterminacy that might be caused by the structure of the appellate courts.⁴³

First-level terminations. The most important factor contributing to the volume of appeals is the volume of litigation in the district courts and agencies whose work is reviewed by the courts of appeals. In a system that guarantees ac-

⁴¹See, e.g., ABA Standing Committee on Federal Judicial Improvements, *The United States Courts of Appeals: Reexamining Structure and Process After a Century of Growth* 4 (1989).

⁴²More than twenty years ago it was suggested that the increase already being seen might be attributable in part to the decreasing backlogs of the trial courts—with trial available sooner, settlement became less attractive and the burden of appellate delay lessened. Carrington, *supra* note 21, at 545.

⁴³Among others, critics of large courts of appeals believe the effects are significant. See, e.g., Gerald Bard Tjoflat, *More Judges, Less Justice*, 79 A.B.A. J. 70, 71 (1993) (“[J]umbo courts disturb the clarity and stability of the law, which, in turn, increases litigiousness and complicates the disposition of cases. . . . [L]itigants are more willing to bring (and defend) claims in the hope of exploiting the indistinct jurisprudence of the circuit . . .”). We are aware of no evidence on whether either the number of cases filed or the number of issues litigated is significantly affected by the size of the courts of appeals.

cess to at least one review of first-level final decisions, as the number of appealable cases rises the absolute number of appeals rises. Even with the same number of cases terminated, more appeals will arise if the number of appealable issues expands. When new causes of action are created, new legal issues must be resolved. When trial courts must rule on issues beyond the primary dispute, such as attorneys' fees and sanctions, the pool of appealable rulings may grow.

Likelihood of appeal. Some commentators argue that the need for structural change is apparent from the increased likelihood, or rate, of appeal.⁴⁴ The Federal Courts Study Committee reported the basic figures: In 1989, litigants appealed about one in eight district court terminations, up from one in forty in 1950.⁴⁵ Like many observers before it, the committee appears to have concluded from the figures and from the growth in the absolute number of appeals that disappointed litigants in virtually all types of cases have become dramatically more likely to take an appeal.⁴⁶ This "heightened proclivity to appeal," many argue, may reflect a general incoherence or increasing disarray in circuit or national law, perhaps resulting from the growth of the appellate courts.

Most would agree that the structural factors identified as potential sources of indeterminacy—too-large circuits issuing inconsistent decisions and fostering a "lottery" mentality by virtue of the number of possible panel combinations—are most likely to affect civil appeals, and that criminal appeal rates are not likely to be particularly sensitive to factors such as an increasingly unknowable appellate bench. Available data support this hypothesis. When we look at appeal trends by case type over the last few decades, we see that the likelihood of appeal is quite different in criminal and civil cases.

⁴⁴It is important to distinguish between the rate at which appellate caseloads grow or decline and the rate at which cases are appealed. The first is a simple mathematical calculation that compares the filings in one year with the filings in prior years. (The annual growth rate of appellate filings has been about 7.7% over approximately the last four decades—8.7% for criminal appeals and 7.5% for civil appeals.) Deriving a true "rate of appeal" requires dividing the number of appeals filed by the number of appealable events. That number is not ascertainable from published national statistics, but various estimates can be made. One Federal Judicial Center study tracked a multi-year sample of nearly 125,000 civil cases from their filing in district court to their exit from the federal court system to estimate the rate of appeal. See Carol Krafka et al., *Stalking the Increase in the Rate of Federal Civil Appeal* (1993) (unpublished manuscript, on file at Federal Judicial Center). The results of that study inform the discussion of rates of appeal in civil cases here.

⁴⁵Report of the Federal Courts Study Committee 110 (1990) and materials provided to the committee showing decennial appeal figures since 1950.

⁴⁶Thus, the committee concluded, "The [appellate caseload] crisis is caused partly by an increase in district court cases but mainly by a heightened proclivity to appeal district court terminations." *Id.* The committee hinted at an explanation for this heightened proclivity: "[T]he more appeals judges there are, the higher the rate of appeal, because it becomes more difficult to predict the behavior of the appellate court" *Id.* at 7.

Criminal appeals. Much of the rise in the likelihood of appeal from 1 in 40 to 1 in 8 is attributable to criminal cases—in 1950, 1 in 121 criminal terminations resulted in an appeal; by 1989, the figure had risen to 1 in 5. The increase in criminal appeals over the last several years most likely results from two major factors. First, the number of defendants prosecuted in the federal district courts has risen. Second, the Sentencing Reform Act of 1984 granted new rights of appeal to defendants and to the government.

The number of district court criminal cases reflects many factors that cannot be discussed in detail here. Some, such as the incidence of criminal behavior and capture and clearance rates, are beyond the immediate control of any branch of government, though they are undoubtedly affected by resource allocation and other public policy choices of various kinds. Other factors reflect choices made by the political branches, including a heightened tendency to use federal resources to combat crimes that traditionally have been prosecuted by state governments. These choices can be seen both in the growth of the prosecutorial function of the executive branch and in the expansion of federal criminal jurisdiction by Congress.

In 1992, prosecutors filed 48,366 criminal cases in federal district courts, 12,833 of them drug cases.⁴⁷ This reflects an increase in total criminal filings of 67% since 1980.⁴⁸ The percentage of federal criminal filings accounted for by drug cases rose from 15% to 31% in just ten years and is now approximately 27%. The increase in prosecutions was made possible by an increase in federal law enforcement resources. Between 1981 and 1992, the criminal enforcement staff of the Department of Justice grew by nearly 50%, and the department's budget grew by approximately 345%.⁴⁹

The growth of the Department of Justice largely coincided with a legislation explosion that created new mandatory minimum sentences for a wide range of offenses. The combination of that explosion and the implementation of the guideline sentencing scheme created by the Sentencing Reform Act may have significantly changed federal and state law enforcement incentives. For many offenses, particularly drug-related offenses, federal penalties are now substantially stiffer than state penalties for the same behavior. The increased availability and severity of federal prosecution and incarceration can affect prosecutorial decisions systematically or haphazardly. For example, the Federal Courts Study Committee received information that in some districts offenses involving crack cocaine are nearly always brought in federal court rather than state court. In at least one other

⁴⁷Administrative Office of the U.S. Courts, Annual Report of the Director, 1992, at Table D. (These figures are for the twelve months ending September 30, 1992.)

⁴⁸Administrative Office of the U.S. Courts, Annual Report of the Director, 1980, at Table D-1.

⁴⁹Office of the Attorney General, U.S. Department of Justice, Combating Violent Crime: 24 Recommendations to Strengthen Criminal Justice, at 2 (1992).

district, the decision to prosecute in federal court may depend not only on the type of drug seized but on the day of the week. That is, one day each week is designated "federal day," and drug arrests made that day are prosecuted in federal court.⁵⁰

As well as increasing the number of criminal prosecutions in the district courts, these legislative and executive choices have played a more direct role in the recent growth spurt in criminal appeals. The Sentencing Reform Act created new appellate rights and new law to be interpreted. Before 1987, appellate review of sentences was extremely limited and defendants who entered guilty pleas generally could not appeal their sentences. Nor did the government have the latitude it now enjoys to appeal sentences. Defendants and prosecutors availing themselves of these new opportunities have had a significant effect on the volume and mix of the caseload of the courts of appeals.⁵¹ It is too early to tell the long-term effects of the Sentencing Reform Act on the workload of the appellate courts. The short-term effect that the Act and concomitant developments have had on filings may be inferred from Figure 7, which shows the growth in the number of criminal appeals since 1988.⁵²

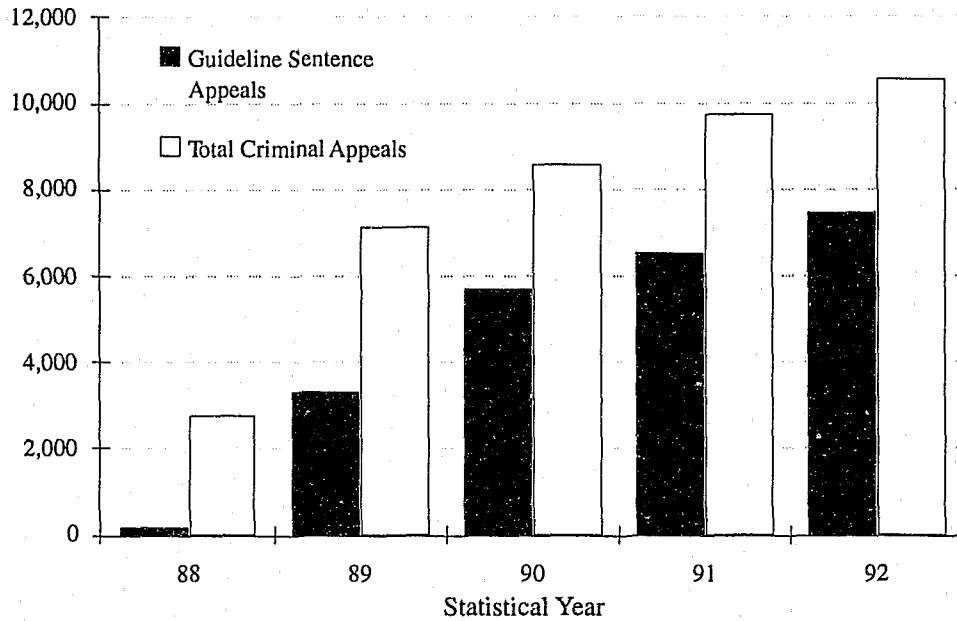
The rising number of criminal appeals is important information regarding the workload of the appellate courts, but it tells us little about flaws in the judicial system's structure. Most observers would agree that convicted defendants' heightened tendency to appeal is not strong evidence of a generalized "luck of the

⁵⁰Sara Sun Beale, Report to the Federal Courts Study Committee re Federal Criminal Caseload/Scope of Federal Criminal Jurisdiction 7 (1989), in 1 Federal Courts Study Committee, Working Papers and Subcommittee Reports (1990). The Judicial Conference has opposed legislative proposals that would write a "federal day" approach into law. Judicial Conference of the United States, Proc. 66, 72 (1990).

⁵¹Current data suggest more than 90% of sentencing appeals are brought by defendants. Generally, the government may only appeal a sentence that represents a downward departure from the sentence specified by the applicable guideline, and then only with the "personal approval" of the Attorney General, the Solicitor General, or a designated deputy solicitor general. See 18 U.S.C. § 3742(b) (1988). Because downward departures appear to be relatively rare events, the government has few opportunities to appeal; it probably does not exercise its right to do so in all cases.

⁵²We do not attempt to distinguish among the direct effects of the Sentencing Reform Act (e.g., expanded rights to review), indirect effects (e.g., prosecutorial preferences attributable to increased severity of federal sentences), other developments during the same period (e.g., expanded federalization of crimes, increased attention to drug law enforcement), and other factors that can affect the rate and number of appeals. It would not be accurate to attribute the entire rise in the number of appeals to the Sentencing Reform Act.

Figure 7. Number of Criminal Appeals Filed, 1988–1992, by Guideline Status



Note: The “Guideline Sentence Appeals” category includes appeals classified as “sentence-only,” “conviction and sentence,” and “general guidelines” for offenders sentenced under the new law. The “Total Criminal Appeals” category adds to these the number of “conviction-only” appeals and appeals by offenders sentenced under the pre-guidelines law.

draw” mentality created by increasing circuit sizes or of a general increase in the incoherence or unpredictability of national or circuit law.⁵³ More plausible explanations for the rise in criminal appeals are the availability of sentence review, the lack of disincentive to appeal, increased access to counsel, the perceived extremity of sentences meted out in the current system,⁵⁴ and the interpretive difficulties inherent in a new sentencing system that is subject (by design) to near-continuous amendment, at least in its early stages.

⁵³Whether major inconsistency exists is still an open issue, but the rate of criminal appeals does not shed much light on it.

⁵⁴Most sentencing appeals brought by defendants involve drug offenses, and most involve sentences imposed pursuant to a guilty plea (although sentences imposed after a trial are considerably more likely to be appealed, the number of appeals of sentences imposed pursuant to a plea is much higher because guilty pleas are much more frequent than convictions after trial). There is a strong positive relationship between the length of the sentence imposed and the likelihood that the sentence will be appealed.

Civil appeals. The change in the percentage of civil terminations appealed has not been nearly as striking as the change in criminal appeals. For example, between 1950 and 1989, appeals in private federal question cases increased from one in twenty-two to one in eight; in diversity cases, they increased from one in twenty-one to one in fifteen. Still, civil appeals, both in the aggregate and as a proportion of terminations, climbed notably beginning in the 1960s, with particularly steep growth between 1980 and 1988. As Figure 6 shows, civil cases (both private and U.S.) now account for about 41% of appellate filings (about 55% of the courts' terminations on the merits).⁵⁵

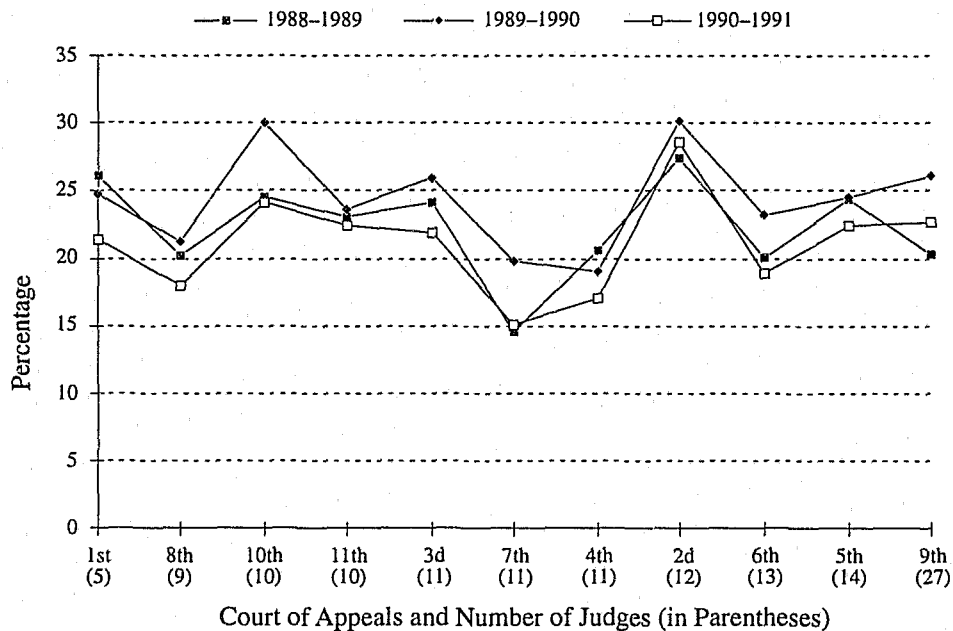
Many hypothesize that as courts grow, the large number of potential panel combinations, along with the volume of precedential opinions, creates an atmosphere in which litigants across the board are more likely to appeal. Inspection of civil appeal trends does not support this claim. It is true that the rise in civil appeals has outpaced the rise in district court civil terminations (by 67% between 1977 and 1991). But the disproportionate increase in civil appeals can be attributed principally to three case types: prisoner civil rights cases, other prisoner litigation, and nonprisoner civil rights cases. For example, between 1977 and 1991, prisoner civil rights cases represented 8.8% of district court terminations, but 14.3% of appellate filings. Figures for the other categories are similar: Other prisoner cases were 6.3% of district terminations, but 15.9% of appeals; nonprisoner civil rights cases made up 8.5% of district terminations and 17.9% of appeals. When those cases are removed from aggregate totals of appeals, the pattern of appeals corresponds closely to the pattern of district court terminations. That is, contrary to the impression often given by graphs of appeal trends, there has not been a steady upward climb in the likelihood that litigants and lawyers in most types of civil cases will appeal an adverse judgment. For most case types, the trend in civil appeals, at least over the last fifteen years, tracks fairly closely the trend in district court civil filings.

If we look at the relationship between civil appeal rates and court size, we find additional reasons to be skeptical of the assertion that the larger the court, the higher the appeal rate. Figure 8 shows, for statistical years 89, 90, and 91, the number of civil nonprisoner appeals filed in each regional court of appeals as a percentage of the estimated number of appealable terminations by district courts of that circuit in the prior year. The circuits are arranged in order of size (with several being equal).⁵⁶

⁵⁵These figures exclude original proceedings, administrative cases, bankruptcy appeals, and civil appeals by prisoners.

⁵⁶The measure of a court's size used for Figure 8 is the number of active judges sitting on the court in statistical year 90, calculated by rounding off the number of judge months reported in the AO's Federal Court Management Statistics.

Figure 8. Appeals Filed in Civil (Nonprisoner) Cases, as a Percentage of Estimated Appealable Terminations



The percentages shown here are crude measures of the rate of appeal and should not be taken as absolute values. The important point is that these percentages, which are calculated the same way for all the courts and focus on those case types most likely to be affected by growing indeterminacy, do not appear to be related to court size.⁵⁷ For example, when we look at nonprisoner civil appeals in

⁵⁷These appeal rates were calculated as follows: The numerator used was the number of U.S. civil, private civil, and bankruptcy appeals filed in the courts of appeals in each statistical year. Only original filings (not reopened cases) were counted. The denominator used was the number of civil cases terminated by the district courts in each circuit in the prior statistical year, excluding dispositions that could not give rise to an appeal (e.g., voluntary dismissals, settlements, and statistical closings). This method retains in the denominator some dispositions that would not be appealable, but these cases are not readily identifiable.

Also excluded from both numerator and denominator were cases resulting from prisoner petitions. We excluded prisoner cases from the analysis so as to focus on those case types that seem most likely to be sensitive to size-related indeterminacy. Prisoner cases are frequently pursued without the assistance of counsel, and the volume of prisoner litigation appears to be affected by incentives other than the likelihood of success either at trial or on appeal. There are other ways to estimate appeal rates for these and other purposes. For example, we might have used filings in the year of termination rather than the following year. See Posner, *supra* note 2, at 89-91. Other approaches might give higher or lower percentages, but should not be expected to change the relationships among the circuits. We excluded prisoner cases from the analysis so as to focus on those case

1991 as a percentage of 1990 appealable district court terminations, we find appeal rates ranging from a low of about 15% in the Seventh Circuit to a high of about 29% in the Second Circuit.⁵⁸ The lowest percentage was in the Seventh Circuit, the highest in the Second Circuit. From year to year the rankings vary, but one does not observe, for example, notably higher percentages in larger courts than in smaller ones. In the three years shown here, “rates” of appeal in civil cases to the Court of Appeals for the First Circuit (with five judges) were quite close to those in the Ninth Circuit (with twenty-seven judges), and in one year even higher.⁵⁹

The number of civil appeals, then, may be considerably less dependent on the size of the courts of appeals than on the volume of district court civil litigation. Notwithstanding the importance of caseload trends for the future of the courts and for other policy decisions, we have inadequate theories of caseload growth and relatively little empirical information against which a theory could be tested.⁶⁰ The volume of civil litigation, like that of criminal cases, depends on many complex factors. For example, labor and contract litigation rates are affected by local and national economic conditions. Tort filings can be affected by the rate of injury and other litigation-generating events. (Consider, for example, how the success of the automobile changed the tort litigation landscape some decades ago.)

The volume of civil litigation is also directly affected by the jurisdictional choices of Congress. A major factor determining the volume of federal civil litigation is the scope of federal jurisdiction. Legislation that creates new causes of action or provides new remedies for existing causes of action generates appeals because it generates more district court litigation. Even without expanded jurisdictional bases, district court litigation may increase as the mobility of the population and the interstate nature of business increase. Of the 230,509 civil cases

types that seem most likely to be sensitive to size-related indeterminacy. Prisoner cases are frequently pursued without the assistance of counsel, and the volume of prisoner litigation appears to be affected by incentives other than the likelihood of success either at trial or on appeal.

⁵⁸For reasons relating to the nature of its caseload, the D.C. Circuit has much higher numbers and is excluded from this graph. Also excluded are 1992 appeals as a percentage of 1991 terminations. Those data show a highly similar pattern, except in the Second Circuit, where the “rate” jumped from 30% to 50%. Sudden changes of this sort are suspect and are often attributable to data reporting changes, errors, or nonrecurring events in a court.

⁵⁹This result provides some evidence against a possible claim that a ceiling effect is at work and that the courts of appeals crossed the threshold of predictability and coherence when they grew larger than nine judges.

⁶⁰See Posner, *supra* note 2, at 59–93; Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. Rev. 4 (1983); Michael J. Saks, *What Do We Really Know About the Tort Litigation System, and Why Not?*, 140 U. Pa. L. Rev. 1147 (1992).

filed in the federal district courts in 1992, 22% rested on diversity of citizenship jurisdiction.

The executive branch affects the civil litigation arena as well. In 1992, the United States was a party in approximately 27% of civil nonprisoner cases in the district courts (as a plaintiff in 15% and as a defendant in 12%). Civil nonprisoner appeals of cases in which the United States was a party accounted for about 10% of the filings in the courts of appeals (about 24% of civil appeals from the district courts).⁶¹

Intercircuit variability in caseloads

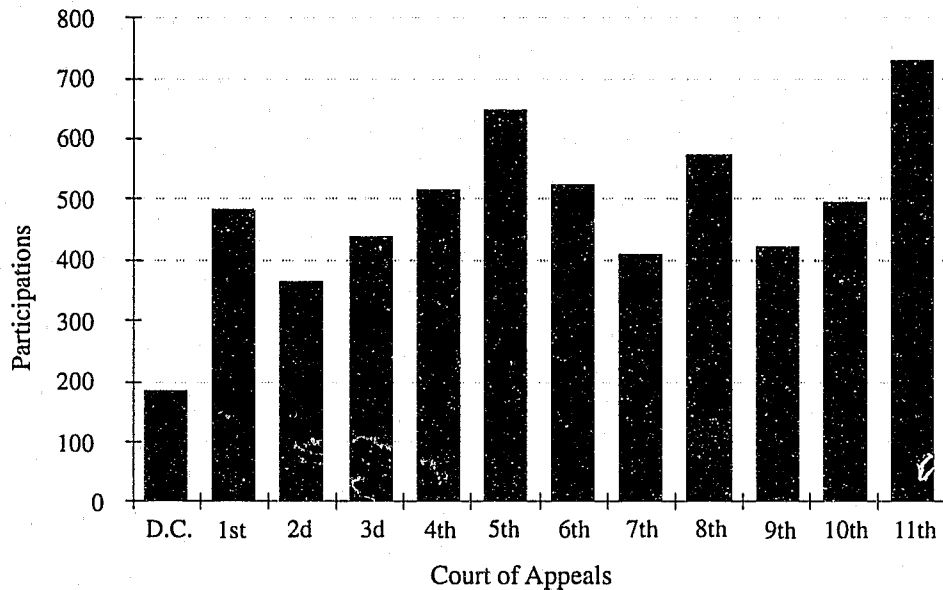
As with the other statistics we present, the national picture of filings and terminations is only one important view of the work of the courts of appeals. The courts of appeals vary greatly from one another in absolute numbers of cases, in filings and terminations per judge, and in the kinds of appeals they handle. Here a definitional note may be in order. The courts of appeals terminate cases either “on the merits” or “procedurally.” Merits terminations are typically cases decided by a three-judge panel on the factual or legal issues presented by the appeal. They generally require more judicial attention than do cases terminated on procedural grounds.⁶² Procedural terminations include dismissals for reasons other than the substantive merits of a party’s appeal—for example, because an appeal was not timely filed; because the court lacked jurisdiction for other reasons; because the underlying dispute was settled before the appeal was decided; or because required filing fees were not paid.

Appendix E gives a “snapshot” of the filings in the regional courts of appeals in statistical year 92. Variations of note include high percentages of administrative and U.S. civil cases in the District of Columbia Circuit, a high percentage of criminal cases in the Eleventh Circuit, and a low percentage of state prisoner cases in the District of Columbia Circuit and First Circuit.

⁶¹Administrative Office of the U.S. Courts, Annual Report of the Director, 1992, at Tables C-2 (district courts) and B-7 (courts of appeals). In statistical year 92, the United States was a party in 7,137 of the 30,328 civil appeals from the district courts (in 1,012 as a plaintiff and in 6,125 as a defendant).

⁶²Although this is generally true, some procedural terminations consume a considerable amount of judicial time, as do some motions, though neither category is currently “credited” to a court for purposes of determining its judgeship needs. In addition, courts differ in how they define, count, and manage their cases. Where an easy appeal is procedurally defective but the defect is nonjurisdictional, a court that uses judicial screening panels might find it beneficial to dispose of the case on its merits in the first instance. In a circuit where nonjudicial court staff do the first review, the same case might be terminated procedurally. The results for the litigants may be the same, but the courts’ statistics look different. The variations cause two interpretation difficulties: First, national statistics mask problems and successes in individual courts; second, it is difficult to compare statistics across circuits because the numbers obtained from each may represent different activities and levels of judicial effort.

Figure 9. Number of Merits Participations Per Judge, by Court of Appeals, Statistical Year 1992



Note: Appendix C gives the same information for each court for statistical years 85 to 92.

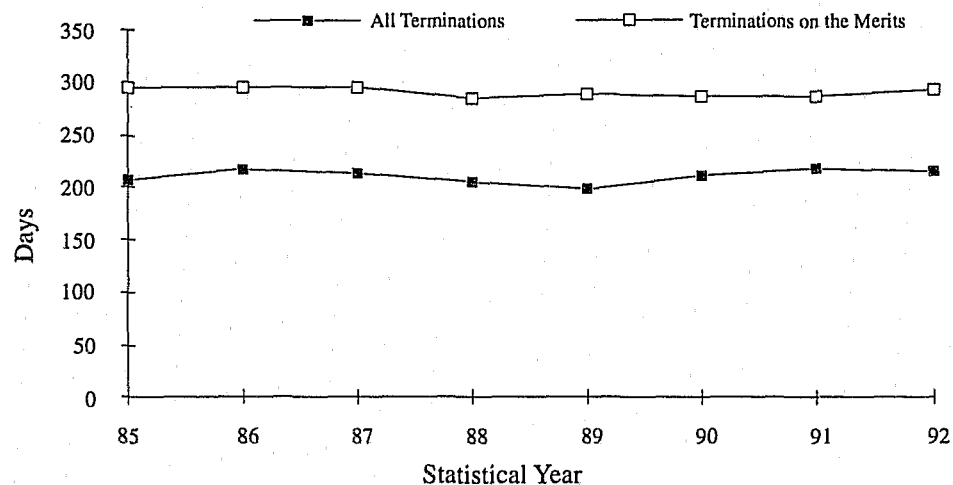
Differences across circuits in caseload mix and in internal operating procedures greatly affect the number of terminations per active judge. The number of terminations per judge is also affected by the number of judgeships a court requests and the number of authorized judgeships that remain unfilled for long periods. Figure 9 gives a snapshot for the regional courts of appeals of the number of merits terminations each active judge participated in during statistical year 92. Although eleven new judgeships were authorized in 1990, neither the First Circuit nor the Eleventh Circuit received a new judgeship in the resulting expansion, and both had judicial vacancies in statistical year 92. Although the Fifth Circuit received one additional judgeship, vacancies meant that the court had fewer active circuit judges in statistical year 92 than it had in statistical year 85. Given these differences in judicial staffing, it is not surprising that the courts of appeals vary markedly in the number of per-judge participations in merits decisions.

Disposition times in the courts of appeals

Notwithstanding the dramatic increases in the number of appeals filed over the last two decades, the courts have maintained a fairly consistent disposition time. Figure 10 presents the median time to disposition for the last eight years, mea-

sured in days from docket date to termination date.⁶³ Disposition time has remained remarkably stable over this period, particularly for cases decided on the merits. Median time to disposition is a little more than 200 days overall and about 300 days for merits dispositions. Like caseloads, disposition times vary from circuit to circuit. In statistical year 92 the disposition time for all terminations ranged from 86 days in the Second Circuit to 371 days in the Ninth Circuit. These two courts also set the outer limits of 163 days to 426 days for median disposition time in cases terminated on the merits.⁶⁴

Figure 10. Median Days from Docket Date to Judgment Date (All Circuits), 1985-1992



⁶³A picture of long-term disposition trends cannot be given with certainty here. We present an eight-year span because records kept for earlier periods are not directly comparable to current records of disposition times. We believe that a consistent definition of "termination on the merits" has been in use during the period presented in Figure 10 and that the definition more accurately reflects what is commonly thought of as a merits termination than definitions used in prior years.

⁶⁴Differences in disposition time can reflect differences in case management and record keeping as much as, or more than, judicial efficiency. The quick turnaround time in the Second Circuit, for example, is at least partly a result of the high number of cases procedurally terminated by a staff strictly adhering to procedural rules. But some of those cases come back: The Second Circuit has a far higher percentage of appeals reopened than any other circuit. (Nearly 12% of its merits terminations are of reopened cases; the other courts of appeals average about 1.6%.) When a case is reopened, it is newly docketed. Thus "days from docket date to judgment date" may be shorter in the Second Circuit because other circuits resolve procedural issues within the life of the original appeal, rather than immediately terminating procedurally defective cases and allowing some of them to be reopened. Either approach may be sensible management, but the differences make comparisons difficult.

The number of cases filed and terminated and the time it takes to dispose of them tell only part of the story of the work of the appellate courts and how that work has changed over time. The numbers do not tell us anything about the total amount of judicial time devoted to appellate decision making or about how that time is allocated among different types of cases. If, for example, much of the observed caseload growth has occurred among those case types that require less judicial time, then raw caseload figures are not as instructive as other measures of judicial burden, some perhaps yet to be developed.⁶⁵ However, if case types that appear in significant numbers in the caseload have increased in complexity, one cannot appreciate the increased work required of each judge by looking at filing and termination data alone.⁶⁶

The changing caseload mix we saw in Figures 5 and 6 may partly explain why the courts have managed to keep up with caseload growth, though we do not at this time know enough about the relative burdens of appeal types to draw this conclusion with certainty. Judicial experience and some data suggest that certain case types on average place less demand on judges than other types. For example, when courts have adequate staff support, the average prisoner petition or benefits review case involving a settled issue of law will demand relatively little judicial time.⁶⁷ Over the past two decades prisoner petitions and administrative cases of this sort collectively have accounted for about 20% to 30% of the appellate

⁶⁵At present, indicators of the "nature of suit" that may be useful at the district court level for estimating needed judicial resources are not particularly useful at the appellate level. This is an area ripe for further investigation. As directed by the Judicial Conference, the Center continues to work with the Conference's Committee on Judicial Resources to devise a more useful measure of appellate workload. See Judicial Conference of the United States (1993) (preliminary report of proceedings); General Accounting Office, *How the Judicial Conference Assesses the Need for More Judges*, GAO/GGD-93-31 (1993); Report of the Federal Courts Study Committee 111-12 (1990).

⁶⁶Judges have different intuitions about whether the appellate task is significantly more complex than in earlier times. Compare Dorothy W. Nelson, *Why Are Things Being Done This Way?*, *Judges J.* 12, 13-14 (Fall 1980) ("The problem is not just the number of cases but also the vast increase in their intricacy. Formerly, most cases involved just one or two issues and short briefs. Today, appeals involve records of hundreds of pages and briefs arguing dozens of appeals, with complex and novel cases growing twice as rapidly as routine cases.") with Ruggero J. Aldisert, *Appellate Justice*, 11 U. Mich. J.L. Ref. 317, 317 (1978) ("[T]he number of serious, arguable questions presented to my court from 1968 to 1977 has not increased proportionately with the increased caseload. Indeed, ... there has been only a slight arithmetical increase of the number of these serious, arguable questions in the nine years I have been on the court."). More recent evidence suggests that this divergence of opinion persists, but that the perception of increasing complexity may have grown. Few appellate judges reported in the Center's survey that an increasingly complex caseload presented a grave problem for the system, but more than half called it a moderate or large problem. (Available responses were as follows: "Not at all a problem"; "A small problem"; "A large problem"; "A grave problem"; and "No opinion.")

⁶⁷This is not to say that such cases do not constitute a significant burden on the judicial system, only that in most courts the resources devoted to them tend not to be the time of Article III judges.

caseload. In recent years, though, these generally less time-consuming cases have come to account for a smaller percentage of filings, while the percentage of criminal cases has increased. This change corresponds with the period during which the gap between filings, and terminations has widened. As both private civil and criminal cases increased relative to other case types, some of the less time-consuming cases, particularly administrative cases, dropped off substantially.⁶⁸ Although we cannot be certain, it is likely that the mix of cases brought to the courts of appeals over the last twenty years partially accounts both for the ability of the courts to keep up relatively well until recently and for the later slippage. However, at least as important to the success of the courts of appeals may be changes in how the courts manage their workloads, decide their cases, and disseminate their opinions.

⁶⁸As has been well documented elsewhere, much of the fluctuation in district court filings in the 1980s was attributable to executive branch policy choices. In particular, dramatic fluctuations in these case types may be traced to a huge increase in cases involving recovery of federal overpayments (mostly of veterans' benefits) and a 238% growth in Social Security cases following an effort in the early 1980s to reduce the number of recipients of Social Security disability benefits. When that effort was repudiated, Social Security appeals dropped considerably. See Marc Galanter, *The Life and Times of the Big Six*; or, *The Federal Courts Since the Good Old Days*, 1988 Wis. L. Rev. 921, 926; Saks, *supra* note 60, at 1201-02 nn.163, 164.

III. Effects of Caseload Volume on the Appellate Process

Some of the potential effects of increased caseloads on the courts of appeals are incremental and relatively invisible to those outside the judiciary. Such effects include slow changes in the collegiality of a court, in the attractiveness of a federal judgeship, or in the quality of judges' lives. Other changes can be more immediate and more visible to the users of the system, such as more decisions that inadvertently cause inconsistency in the national law or poorer quality written opinions that cause confusion and uncertainty. We look first at the individual case level—at how individual litigants, counsel, and judges experience the effects of increased caseload volume. In later sections we turn to the feared effects of that increase on the consistency of federal law.⁶⁹

To deal with their burgeoning caseloads, the courts have expanded their supporting staffs and adopted procedural innovations (some might say compromises or accommodations) to handle substantially more cases with only moderately increased resources. Whether a procedural innovation represents laudable efficiency or a serious blow to the appellate tradition is a question on which reasonable minds may differ. Many observers of the federal courts fear that the price for keeping current with a growing workload is a threat to the quality of the process and product of the courts of appeals. They are not alone. Slightly more than half of the appellate judges who responded to our October 1992 survey of federal judges agreed that the courts of appeals have streamlined procedures as much as they can without unacceptably compromising their essential functions. One-fifth of the appellate judge respondents believe that the line has been crossed—that the quality of appellate justice has been unacceptably diminished by measures adopted by the courts to cope with rising caseloads.

On the other hand, many of the appellate judges surveyed and many of the judges who attended the Center's 1993 workshop for appellate judges believe there is still room for improvement in appellate case management. Sixty-four percent of the appellate judges who responded to the survey did not agree that quality had diminished. Just over half agreed moderately or strongly with the proposition that appellate courts could effectively handle their caseloads without structural change by adopting additional procedural innovations (just over one-third disagreed moderately or strongly). Judges share their experiences and opinions about different ways of handling appeals in their speeches and their writings,

⁶⁹The distinctions drawn are, to be sure, somewhat artificial. Poor quality individual decisions can detrimentally affect the consistency of the overall body of case law, and some of the factors discussed here can contribute to problems of inconsistency (e.g., inadequate supervision of tasks delegated to staff). And unclear precedent can cause difficulties in individual cases.

when they sit as visiting judges, and when they attend multicircuit conferences, such as workshops of the Federal Judicial Center. In response to recent requests for more information about appellate case-management practices, the Center is increasing its efforts to disseminate information about programs courts have found useful so that judges in other circuits may consider whether similar programs might help their courts.

How the courts have handled the rising tide of appeals

Over the last few decades, the courts of appeals have handled their increased burden by departing from the traditional model of the appellate process. The most important changes adopted have involved increasing the use of judges other than active judges of the court to decide appeals, decreasing the likelihood that a case will be substantively reviewed on appeal, curtailing opportunities for oral argument, curtailing opinion writing and publication, and expanding the use of nonjudicial staff. Not all courts have adopted or retained all the approaches described here in the same way or to the same extent. Indeed, judges differ greatly over the utility and appropriateness of different approaches and over the implications of each for the values inherent in our appellate system.

Increased reliance on senior and visiting judges. We noted in section I that the composition of appellate panels is prescribed by statute. The traditional appellate process called for a panel of three active judges of the court of appeals for the circuit. Now, particularly in courts with long-standing judicial vacancies, panels often include only one active circuit judge; some include none. Senior circuit and district judges are common participants in the appellate review process across the country. Senior judges who continue to handle appeals in their own circuits have been particularly valuable in helping the courts of appeals cope with an increased caseload while maintaining a consistent circuit law. Active district judges also help ease the caseload burden, but are often invited to sit with the court of appeals for their circuits for other reasons. Visiting on the court of appeals may be especially helpful to newly appointed district judges because it integrates them into the circuit's judicial community while giving them a feel for the appellate review process and the importance of the trial court record.

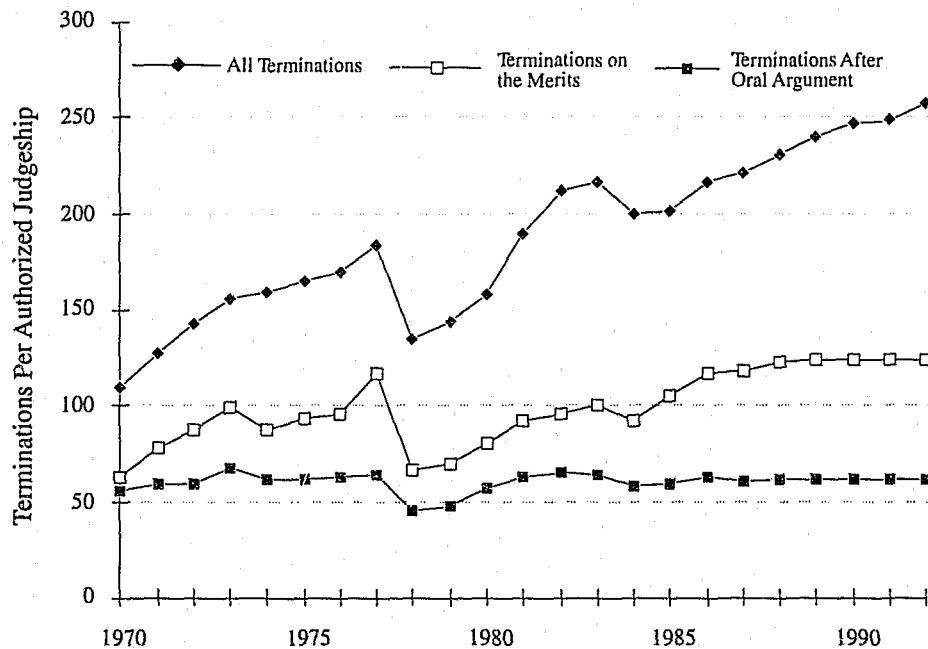
In 1991, resident senior circuit judges accounted for almost 12% of the judicial participations in appeals submitted on briefs or orally argued to the courts of appeals. Visiting judges accounted for another 7%.⁷⁰ Participation by visiting and senior judges varies considerably across the circuits. In 1991, the Court of Appeals for the District of Columbia Circuit used very few extracourt judicial resources (0.8% participations by senior circuit judges and only 0.4% by visiting judges). Meanwhile, senior circuit judges accounted for 15% of the participations

⁷⁰The source for both figures is the AO's Federal Court Management Statistics, 1991, at 28.

in merits terminations in the Sixth Circuit, and visiting judges accounted for another 13.3%. Some courts have long histories of extensively using visiting and senior judges. For example, in each year from 1986 through 1991, participations by senior judges accounted for 15% to 20% of all participations in argued or submitted cases in the Second Circuit. During the same period, participations by senior judges in the Fifth Circuit seldom exceeded 6%.

Increased use of procedural terminations. We discussed, in the context of the workload of the courts, the importance of distinguishing between merits and

Figure 11. Total Appeals Terminated, Appeals Terminated on the Merits, and Terminations After Oral Argument, per Judgeship, 1970-1992



Source: Administrative Office of the U.S. Courts, Annual Reports of the Director, 1970-1974 (Table 8), 1975-1985 (Table 6), 1985-1992 (Table B-5), 1988 (Table S-2), 1988-1989 (Table S-3), 1990-1992 (Tables 1, B-1).

Note: Because of changes in reporting requirements, the line for "Terminations on the Merits" has different meanings before and after 1985. For the years before 1985, the line represents terminations after argument or submission. For 1985 and the following years, it represents terminations on the merits. The sharp drop from 1977 to 1978 probably represents a reporting change as well. Circuit-by-circuit information on the percentage of appeals terminated on the merits since 1985 can be found in Appendix A.

nonmerits terminations. Appeals terminated procedurally may be a burden on system resources generally, but they do not require much judicial time.⁷¹ Figure 11 shows the number of merits terminations and terminations after oral argument per judgeship, relative to all appeals terminated.

Figure 11 shows that the number of merits terminations is much smaller than the total number of terminations and that the ratio has been shrinking over time (but see note to Figure 11). The line for terminations on the merits has been fairly flat after a period of increase, while the total number of terminations has continued to rise. One possible conclusion is that appellate courts are seeing growing numbers of cases that are meritless in the sense of being untimely filed or otherwise procedurally defective. Another possibility is that overburdened courts, or individual judges, adopt procedures that increase the likelihood that a case will be disposed of on procedural grounds and thereby reduce some of the demands of the merits decision process.

A rise in the proportion of procedural terminations is not by itself convincing evidence of diminished appellate process. Without knowing more about the nature of the cases terminated procedurally we cannot know whether the rise reflects a change in the case mix or a change in the accessibility of review, nor can we judge whether reduced access to review represents a problem. To the contrary, some procedural terminations may be evidence of success (e.g., of preargument settlement conference programs).

Appeal diversion programs. Most of the courts of appeals have adopted some type of preargument or prebriefing conference program staffed by nonjudicial personnel.⁷² The primary objective of these programs is to reduce the workload of judges. To that end, most have as one of their goals the resolution of appeals without judicial action. Even when cases do not settle, the programs may conserve judge time if they resolve procedural matters without judicial involvement. Finally, they may expedite decisions in cases that go to hearing panels by helping counsel to clarify the issues to be argued.

The Center has separately reported on some of the programs that have been implemented to manage and divert civil appeals.⁷³ Those reports set forth the op-

⁷¹"Not much" does not mean "zero" for all cases. Different court procedures require different levels of judicial involvement, and some nonmerits terminations involve complex legal decisions, as when a difficult jurisdictional dispute results in dismissal of an appeal.

⁷²Some kind of formal conference program exists in the First, Second, Sixth, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits. The Seventh Circuit's preappeal briefing conferences may touch on settlement, and the court may soon institute a more extensive mediation program. The Federal Circuit has no formal program, but the court may direct parties in counseled cases to discuss settlement within seven days of filing briefs and to certify compliance with that directive.

⁷³See James B. Eaglin, *The Pre-Argument Conference Program in the Sixth Circuit Court of Appeals* (Federal Judicial Center 1990); Anthony Partridge & Allan Lind, *A Reevaluation of the Civil Appeals Management Plan* (Federal Judicial Center 1983) (experimental evaluation of the

erational details of the examined programs. Here we note briefly the most salient aspects of the majority of preargument or prebriefing programs.

Scope, eligibility, and selection. Most preargument programs focus only on civil cases in which the parties are represented by counsel. Typically, the programs exclude original proceedings and prisoner cases; some programs also exclude cases involving administrative agencies. Some programs are voluntary, some are mandatory, and some are a combination. In the Eighth Circuit, for example, counsel must notify the clerk's office if they would like a conference, and the settlement director must determine that intervention would be useful. In other programs, counsel can be ordered to participate in a settlement conference and to obtain reasonable settlement authority from their clients. In most circuits only judges may order parties to participate in the program, but in at least one a senior staff attorney may direct parties to participate in a mediation program, and in most programs central staff are involved in identifying suitable cases. In the Sixth Circuit, conferences may be requested by counsel, or hearing panels may refer cases from their calendars if they appear suited for mediation.

Staff. Most courts with appeal diversion programs have assigned one or more members of the court's central staff to conduct preargument or prebriefing conferences. These attorneys may be called conference attorneys, settlement directors, or mediators. They may conduct conferences in person or on the telephone, depending on the program and the location of the litigants. An alternative to the court-employed conference attorney approach is employed by the Court of Appeals for the D.C. Circuit. In that court, volunteer mediators (experienced members of the local bar) serve in a court mediation program that facilitates settlement, clarifies issues, and resolves procedural problems.

Timing. Most programs hold conferences before the parties file their briefs. There are two reasons for this. First, the conference serves partly as a briefing conference and may be most useful to counsel at an early stage. Second, many program designers believe that parties are likely to reject settlement efforts and proceed to full decision by a judicial panel if they have already incurred the major expense of filing a brief and appendix. We know of no empirical evidence on this point, but it is plausible that this timing is most economical for the parties and most conducive to settlement.

Results. The Center's study of the Sixth Circuit's preargument conference program revealed several beneficial effects. Estimates for the calendar years studied (1985 and 1986) suggested savings in judge time of the work of 1.06 appellate judges, largely because of the approximately 12% increase in settlements of eligible appeals. About 23% more of the cases in the experimental group than in

Second Circuit's Civil Appeals Management Plan). Other information reported here was gathered in telephone interviews with court personnel in 1993.

the no-conference control group terminated before the filing of the appellant's brief or the joint appendix. Additionally, the program appears to have reduced the number of procedural motions filed in conferenced appeals.

By design, a program like the Sixth Circuit's postpones the preparation of briefs and appendices to save litigants the attendant costs and fees if possible. When settlement efforts fail, the ultimate decision in the case may be rendered later than had no diversion been attempted. Nevertheless, the programs appear to reduce both time to disposition and total time spent on conferenced appeals. In the Sixth Circuit, more than half of the attorneys who responded to a survey about the program reported that the program resulted in net savings in time spent on the appeal; only 9% thought the conference procedure increased the overall time spent on the appeal. In the Center's study of the Second Circuit's Civil Appeals Management Plan (CAMP), the evaluators concluded that the program "almost certainly results in faster disposition, not only of appeals that are settled or withdrawn as a result of staff counsel intervention but also of appeals that would have been settled in any event; it probably results in faster disposition of appeals that are argued."⁷⁴

Attorneys in both the Second and Sixth Circuits reported generally high levels of satisfaction with the programs. In the Second Circuit, most lawyers who practice before the court of appeals "regard the program favorably, and some are lavish in their praise."⁷⁵ Fully 84% of the responding attorneys who had handled appeals in the Sixth Circuit with and without conferences preferred the conference program.

Perhaps not surprisingly, judges are similarly disposed to appeal diversion programs. More than half of the appellate judges who responded to our survey strongly or moderately support increased use of appellate-level alternative dispute resolution and conferencing programs such as CAMP. These programs are still developing and may become even more useful as the courts learn in which types of cases settlement efforts are most likely to be successful.

Reduced opportunity to persuade the court. The traditional mode of appellate decision making included an opportunity for litigants or counsel to argue their appeals orally to a three-judge panel. During the work of the Commission on Revision of the Federal Court Appellate System (the Hruska Commission), it became clear that many judges believed that decisions in a substantial number of cases did not benefit from oral argument and could be made on the briefs and record alone. It was equally clear that many judges and attorneys believed strongly in the importance of oral argument in many cases and were concerned that denying oral argument could diminish both the soundness of the courts' deci-

⁷⁴Partridge & Lind, *supra* note 73, at 5.

⁷⁵*Id.*

sions and the legitimacy of the courts. Accordingly, in 1979 the Federal Rules of Appellate Procedure were amended. Courts would be permitted to decide more cases without hearing oral argument (there had always been nonargument decision making, as where counsel waived their argument rights). But the rule formally maintained a presumption in favor of oral argument as the preferred mode of process. The current rule provides:

Oral argument will be allowed unless (1) the appeal is frivolous; or (2) the dispositive issue or set of issues have been recently authoritatively decided; or (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.⁷⁶

After the rule was amended, the percentage of cases in which oral argument was heard declined substantially.⁷⁷ Over the past eight years of comparable data, the percentage of terminations on the merits that were orally argued decreased from 56% in statistical year 85 to 45% in statistical year 92.⁷⁸

In what types of cases are courts of appeals forgoing oral argument? As Figure 12 shows, prisoner cases have been and remain by far the case type least likely to be argued.⁷⁹ All case types have been affected by the trend toward nonargument decision making, but the argument rate in criminal cases has declined the most—18% from 1985 to 1992. Least affected by the nonargument trend have been civil cases other than those brought by prisoners. Their rate of oral argument experienced only a 6% decline from 1985 to 1992. Nonprisoner civil cases are currently the least likely to be decided on the merits, perhaps in part because they are the

⁷⁶Fed. R. App. P. 34(a).

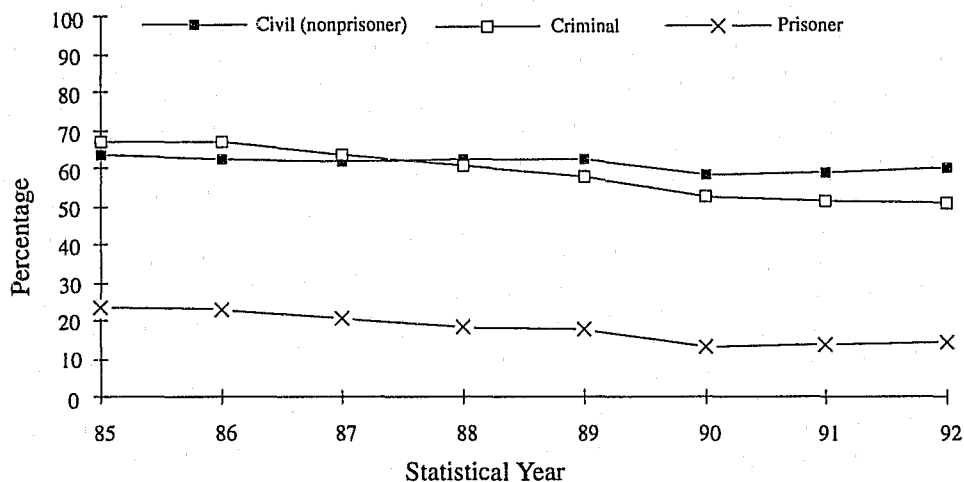
⁷⁷The history of the rise of nonargument decision making and an overview of how the courts of appeals used their expanded authority to deny oral argument can be found in Joe S. Cecil & Donna Stienstra, *Deciding Cases Without Argument: A Description of Procedures in the Courts of Appeals* (Federal Judicial Center 1985). A comprehensive study of the four major nonargument decision-making models used by the courts of appeals is reported in Joe S. Cecil & Donna Stienstra, *Deciding Cases Without Argument: An Examination of Four Courts of Appeals* (Federal Judicial Center 1987).

⁷⁸Additionally, the time allotted for oral argument has decreased. At the time Rule 34 was adopted, a majority of the courts of appeals had already limited oral argument to thirty minutes per side. See Fed. R. App. P. 34 advisory committee's note. Since then, courts have adopted shorter, and variable, argument times. In some cases, parties may argue for thirty minutes; in most, argument is limited to fifteen minutes or less.

⁷⁹This is likely attributable to two factors: First, the range of issues presented by prisoner cases may be narrow. When many cases present the same issue, oral argument is neither necessary nor helpful to the court in each. Second, incarcerated prisoners are not permitted to argue their own appeals and are usually unable to retain counsel. Courts appoint counsel for unrepresented prisoners if it appears argument would aid the court.

cases most likely to settle before decision. Of cases decided on the merits, however, they are the most likely to be argued.

Figure 12. Cases Argued as a Percentage of Cases Terminated on the Merits, by Case Type, 1985–1992



Oral argument is a valued tradition. Its importance to the correctness of appellate outcomes may not be quantifiable, but argument has long been seen as a fundamental part of the appellate tradition. Many judges value oral argument not only as a way to obtain information, but as a way “to demonstrate to the parties that the members of the panel have attended to the issues raised on appeal, to permit interaction with members of the bar, to provide a forum for the presentation of issues of public concern, to acknowledge the court’s responsibility for resolving such disputes, and to provide an opportunity for the judges to confer and hear each other’s views.”⁸⁰ Not all participants in the system believe this attitude predominates. They fear that judges increasingly prefer not to hear oral argument.⁸¹

Although denial of oral argument represents a diminished opportunity for persuasion by any one litigant or lawyer, it is not necessarily true that the legal issues raised by that litigant’s case get less than full attention. Many cases raise the

⁸⁰Joe S. Cecil & Donna Stienstra, *Deciding Cases Without Argument: An Examination of Four Courts of Appeals*, at 159–60 (Federal Judicial Center 1987).

⁸¹For example, Arizona attorney John P. Frank, commenting on attitudes of the bar toward the decreasing use of oral argument, reported: “So far as we are concerned, and I think I speak for a large number, we regard screening as a device to push the lawyer out of the law entirely. We just don’t count anymore.” Arthur D. Hellman, *Conference on Empirical Research in Judicial Administration*, 21 *Ariz. St. L.J.* 33, 126–27 (1989).

same issues, and the court may have all the information and argument it needs to decide fully and fairly without more from any one party. And many cases are simply easy—it is clear from the briefs that no additional argument would change the results.⁸² The major concern about the decline of oral argument is not that oral argument is not heard in every case, but that the process of determining which litigants will receive oral argument is beyond the reach of the adversary process, if not entirely invisible. We discuss this issue further in connection with the expanding use of judicial staff.

Restricted publication and judgment orders. Some observers draw from the figures on oral argument the conclusion that fundamental features of appellate review have been sacrificed to the pressures of time. “The work of correction takes time that circuit judges no longer feel they have. And making the performance of that work visible and convincing to the bar and the public requires more time than the judges are allowed by circumstance.”⁸³ Traditionally, courts made their work visible and convincing by explaining the reasons for their decisions and by publishing those explanations. Courts have kept up with their caseloads in part by offering fewer public explanations.

It is generally agreed that opinions written for publication consume more judicial time (on average) than unpublished opinions. This difference reflects both the causes and the effects of publication status. That is, the nature of the case often affects whether it is chosen for unpublished disposition, and the choice not to publish may affect how much judicial time is spent on the appeal thereafter.

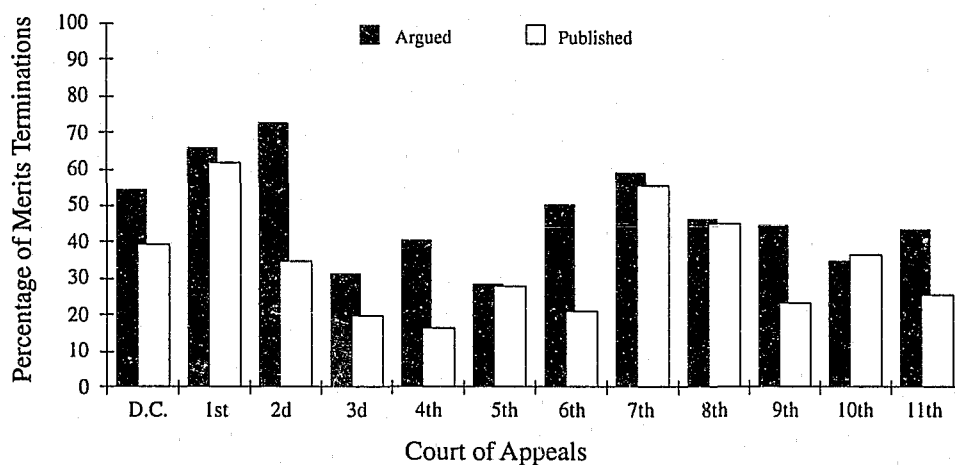
Ideally, the nonpublication route is chosen for decisions that are straightforward applications of clear precedent—another statement of the law is not required, and the decision does not involve application of the law in a context sufficiently novel that publication would be useful to the bar. If judges are accurately assessing the importance of a case to the body of circuit law, the cases resulting in published opinions are likely to be the more difficult or novel cases. For the same reasons, these cases also tend to be the cases in which the court grants oral argument. Figure 13 shows the close relationship in several circuits between the percentage of merits terminations that are argued and the percentage that result in

⁸²In addition to granting argument in a smaller percentage of cases and shortening the time allocated to counsel for oral argument, courts have restricted the number of pages permitted in each brief. National statistics about brief length are not collected, but the local rules of the various circuits reveal restrictions on the number of pages available for argument. Whether this sort of restriction leads to higher or lower quality advocacy can be debated.

⁸³Paul D. Carrington, *The Function of the Civil Appeal: A Late Century View*, 38 S.C. L. Rev. 411, 424–25 (1987).

a published opinion or order. The relationship is not mere coincidence. Relatively few cases that are not orally argued result in a published opinion.⁸⁴

Figure 13. Published Opinions and Oral Arguments as a Percentage of Merits Terminations, 1992



Note: Appendix B gives argument rates and Appendix D gives information on publications as a percentage of merits terminations for each court since 1985.

Oral argument does not necessarily presage publication, as can be seen from the different patterns seen in Figure 13. These patterns suggest different norms and traditions are at work in the various courts of appeals. For example, the Second Circuit's continuing commitment to oral argument is apparent. Some courts appear to have taken to heart the Judicial Conference's exhortation to publish selectively; their percentages of publication suggest a presumption against publication. In some instances, court staff interviewed about publication practices confirmed this inference; several reported that their courts published only cases that would add significantly to the body of precedent.

Cases leading to published opinions are likely to be more time consuming not only because they are more difficult or complex, but because the actual writing of the opinion adds to the time required. An opinion issued primarily for the benefit of the parties need not set out the facts and procedural posture of the case sufficiently to make the opinion valuable as a precedential tool. The authoring judge

⁸⁴There are at least two plausible, and not equally comforting, explanations for this: First, the criteria being used to select cases for oral argument are fairly accurate indicators of the precedential importance of an appeal; second, the preliminary decision about whether to schedule a case for oral argument significantly affects the panel's view of whether the case is worthy of the time required to produce an opinion for publication.

need not spend as much time clarifying details known to the litigants or repeating clear precedent. Finally, in most circuits, only opinions prepared for publication are reviewed by all judges of the court, so the aggregate amount of judge time spent on a published opinion typically exceeds the amount of judge time spent on an unpublished opinion.

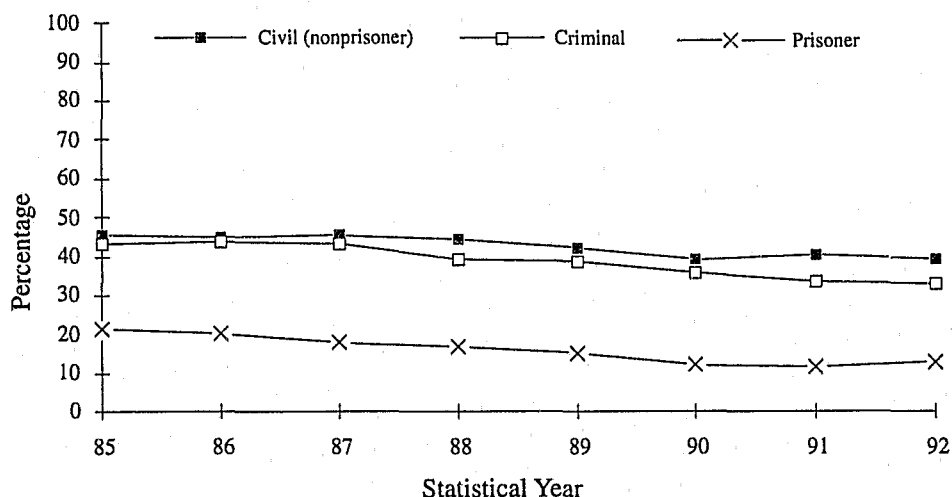
The increasing use of unpublished opinions may make it easier for courts to reduce their overall disposition times and to maintain a consistent body of precedent. Recognizing these potential benefits, courts have reduced the percentage of cases in which opinions are prepared for publication. Publication, once routine in the courts of appeals, has become increasingly infrequent. In statistical year 92, about 31% of merits terminations resulted in a published order or opinion, down from 41% since statistical year 85. The rate of publication has dropped in all types of cases. From 1985 to 1992, the biggest drop was seen in prisoner cases, always the least likely of the case types to result in a published opinion (see Figure 14). The smallest decrease was among civil nonprisoner cases, which were consistently the most likely to result in a published opinion.

Despite its benefits, nonpublication raises questions of access and accountability.⁸⁵ Unpublished opinions cannot be cited as precedent in most courts for most purposes. Nevertheless, unpublished opinions can be collected and analyzed by parties with the resources to do so. Repeat litigants, such as the Department of Justice, are able to amass the entire product of a court and analyze it for predictive purposes. Critics charge that this advantage ought to be available to all, and that restricted publication practices preserve the value of written decisions for litigants unequally.⁸⁶ However, the inaccessibility of unpublished opinions may have become a considerably less important problem as commercial providers of legal research services (such as LEXIS and WESTLAW) have made available on-line many technically "unpublished" opinions. Although these services are not equally within the financial reach of all participants in the legal system, it may be that most participants who could benefit from these services have, or soon will have, access to them. And in many areas of the law, litigants may suffer more from too many opinions than from too few.

⁸⁵See, e.g., Donna Stienstra, Unpublished Dispositions: Problems of Access and Use in the Courts of Appeals (Federal Judicial Center 1985); William M. Richman & William L. Reynolds, *Appellate Justice Bureaucracy and Scholarship*, 21 U. Mich. J.L. Ref. 623 (1988).

⁸⁶See, e.g., Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 Mich. L. Rev. 940 (1989).

Figure 14. Decisions Published as a Percentage of Cases Terminated on the Merits, by Case Type, 1985–1992



Concerns about access may be decreasing, but concerns about the relationship between publication and opinion content and quality are unabated. The “not for publication” opinion may once have been used for uncontroversial decisions of little general interest or applicability, but the percentage of unpublished opinions in some circuits belies that description today. For example, legal scholars have found significant numbers of unpublished opinions in which the decision was not unanimous and the legal issues not straightforward applications of well-established precedent.⁸⁷

Of even more concern to some observers are summary decisions, another time-saving mechanism by which some courts enable their judges to terminate more cases. That is, the court may affirm the judgment of the court below without stating any reasons for doing so. There are variations on this theme. A court may affirm “for the reasons stated by the district court.” It may affirm with only a reference to circuit precedent, particularly if the issue is well settled or has been recently decided. Or the court may issue a judgment order that simply affirms without comment or dismisses the appeal as frivolous.⁸⁸

⁸⁷Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 *Judicature* 307 (1990); Daniel N. Hoffman, *Nonpublication of Federal Appellate Court Opinions*, 6 *Just. Sys. J.* 405 (1981).

⁸⁸Reversals almost never occur without written reasons being provided, and remands without opinion are also rare. Most of the courts of appeals report that they never or infrequently issue merits decisions without a written statement of reasons. A few courts appear to do so relatively frequently. The U.S. Court of Appeals for the Third Circuit, for example, reported that more than 30% of the appeals it terminated on the merits in statistical year 92 were decided without oral argument and

Given the relationship between argument and publication, it seems clear that the focus of concern ought to be on whether cases are being routed appropriately to oral argument or nonargument disposition tracks. Although judges can and do divert cases from the nonargument calendar to the argument track, busy courts are likely to rely on the judgments of those with experience in making preliminary tracking decisions. Observers of the courts of appeals fear that the contours of appeal management programs are not well known to the bar and the public. In particular, counsel and litigants may not know who is screening their cases for argument or what criteria are being used in that screening.

Expanded use of nonjudicial staff. Over the past two decades, courts of appeals have increasingly used nonjudicial staff to handle duties that were previously carried out by judges, or to help manage the operations of the court. Each circuit employs a circuit executive, a court clerk, and numerous auxiliary personnel. There can be little doubt that over the last few decades court management has become increasingly professional and efficient. Many courts have developed creative approaches to case management designed to maximize the amount of time judges can devote to the tasks of judging.⁸⁹ However, some observers fear that the expansion of nonjudicial staff has led to several problems, including undue delegation of judicial tasks (or the appearance of undue delegation) and a disproportionate increase in the amount of time judges must spend managing their staffs. Some judges on the courts of appeals believe overdelegation is already a problem. Among our survey respondents, just over a quarter (about 28%) reported it to be a large or grave problem, although more judges (40%) reported it to be a small problem or not a problem at all. This distribution of responses may reflect individual differences in what judges see as core judicial functions, differences in the amount and kinds of judicial delegation, and judges' unfamiliarity with the practices of their colleagues.

without a written opinion stating the court's reasoning. No data are collected by the AO on the other summary decision variations, such as "affirmed for the reasons stated by the district court" (which might be reported by some courts as a decision without written reasons and by others as a written opinion, and which may have different policy implications than the other variations). As earlier reports have noted, court staff sometimes interpret data-collection and reporting instructions differently, and these differences can produce misleading comparisons. *See, e.g.,* Cecil & Stienstra, *supra* note 80, at 32 n.43 (D.C. Circuit staff reporting as "decision without reasons" opinions of the court that described the court's reasoning but did not fully explicate a legal rationale).

⁸⁹*See, e.g.,* Restructuring Justice (Arthur D. Hellman ed., 1990); Joe S. Cecil, Administration of Justice in a Large Appellate Court: The Ninth Circuit Innovations Project (Federal Judicial Center 1985); Donna Stienstra & Joe S. Cecil, The Role of Staff Attorneys and Face-to-Face Conferencing in Non-Argument Decisionmaking (Federal Judicial Center 1989) (describing procedures of the U.S. Court of Appeals for the Tenth Circuit).

Delegation of functions to central staff counsel. In most circuits, attorneys employed by the court review some or all appeals before judges do.⁹⁰ Staff attorneys are employed by the court to serve the court as a whole, not an individual judge. Originally, staff attorneys were assigned to assist courts with pro se litigation, and in some circuits that continues to be the bulk of their work. They may perform various duties, but the core of their role is to minimize the amount of judicial time spent on work that could be done by others. In some circuits, staff attorneys are involved solely or primarily in civil cases; in a few circuits, they handle only procedural motions. We have already discussed the role of staff attorneys in appeal diversion programs. Depending on an individual court's practices, attorneys employed either in the clerk's office or in an office of central staff counsel may also perform the following functions:

- **Preliminary jurisdictional analysis.** Central legal staff or attorneys employed by the clerk's office flag apparent jurisdictional flaws for the judge or panel of judges who will dispose of the case as appropriate. In some circuits, staff attorneys prepare and issue show cause orders noting the court's probable lack of jurisdiction, to which parties must respond before the matter is submitted to the court.
- **Screening of cases for oral argument calendars.**⁹¹ Central staff attorneys familiar with the court's practices and preferences may review cases for routing to argument or nonargument disposition. A nonargument determination is preliminary—parties are notified and have the opportunity to file a response explaining why the case should be heard. (In some circuits this function is performed only by judges; in others it is performed only by the senior staff attorney.)
- **Issue coding and appeal classification.** In some circuits, staff attorneys screening cases for argument or nonargument disposition also classify appeals according to the nature and complexity of the issues presented. This facilitates equitable distribution of the court's workload among its panels. Issue coding is also sometimes used to route cases presenting the same issues to the same judicial panel. Coding schemes differ greatly in their complexity, generally depending on the purpose of the coding. The Fourth Circuit uses a scale of estimated difficulty ("Easy," "Easy-Average,"

⁹⁰Exceptions are the courts of appeals for the Tenth Circuit, in which judges do all screening after a jurisdictional review, and the Third Circuit, in which judges screen all cases other than pro se cases.

⁹¹Several of the functions described in this section could be thought of as screening, but the term is typically used to describe the preliminary assessment of whether a case should be slated for nonargument disposition or calendared for oral argument.

“Average,” “Average-Hard,” “Hard”) and uses the classification to equalize workloads among panels. The Ninth Circuit uses a seven-category scale that takes into account the number of issues, their intellectual difficulty, the complexity of the relevant facts, the size of the record, and the extent to which the case is likely to result in a precedential decision. At the same time, more elaborate issue coding is done so that staff may route cases that present the same issue as one already being decided in a pending case to the same panel. The coding also facilitates staff review of opinions for consistency before they are issued.

- **Preparing appeals for disposition without oral argument.** Some circuits also use staff attorneys to prepare materials for cases not slated for oral argument. Staff attorney responsibilities in this regard vary from circuit to circuit. Some courts ask their staff attorneys to review the record, research the law, prepare a memorandum on the case, and draft a recommended disposition and order. Some include staff attorneys in the panel's conference on the case.
- **Handling motions.** In some circuits, the power to decide procedural motions has been delegated to the clerk's office or to staff counsel. Typically, these motions concern what paper will be filed in an appeal, and when it will be filed. For example, staff may decide motions for extensions of time, unopposed motions to file an amicus curiae brief, and motions related to the length and nature of appendices. Parties dissatisfied with the staff decision on the motion may seek judicial reconsideration, but many of these motions are unopposed. Other courts use central staff to handle more substantive matters.

The use of central staff attorneys has raised issues of delegation, accountability, and visibility since the practice began. In 1975, the Commission on Revision of the Federal Court Appellate System recognized the valuable contributions of central staff but recommended that staff attorneys should neither draft opinions nor screen cases for denial of oral argument.⁹² As we have seen, most courts of appeals have implicitly rejected those recommendations. The commission was similarly concerned about the relative invisibility of staff attorneys, and recommended that the circuits publish internal operating procedures that spelled out precisely the responsibilities of staff attorneys in their courts. That goal was achieved, and courts are now required to publish this information.⁹³ Still, it remains likely that litigants and counsel in an appeal decided without argument sel-

⁹²Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change*, at ix, 53-54 (1975).

⁹³28 U.S.C. § 2077(a) (1988).

dom know what role, if any, a staff attorney played in the handling of their appeal.

The circuit judges who responded to our survey were almost evenly divided on the question of whether to add more staff attorneys. Thirty-eight percent of the active circuit judges supported the suggestion to add more staff attorneys, 37% opposed it, and 21% had mixed feelings. In general, most circuit judges believe staff attorneys perform a valuable function by allowing the court to process more appeals without oral argument, even if many judges believe the limits of appropriate staff attorney functions have been reached.⁹⁴

Some commentators have suggested that the role of staff attorneys could be appropriately expanded if they were made more visible and if their work product were to be disclosed to the litigants.⁹⁵ The Court of Appeals for the Tenth Circuit has handled some of the problems inherent in delegation to central staff by requiring staff counsel to work with a mentor judge on each case. The mentor judge reviews the case before it is sent to the staff attorney, and guides the staff attorney's work on that case. This model of judge-staff interaction allows more feedback to staff and begins to approximate the judge-law clerk interaction in argued cases.

Judicial use of chambers law clerks. Most active circuit judges have three chambers law clerks.⁹⁶ Judges differ in how they use their clerks, but most clerks research the law and prepare bench memoranda for cases in which oral argument will be heard. Most also have some involvement in producing written opinions—some producing the first draft, others working with a first draft written by the judge. It would be a cause for grave concern if clerks were actually deciding cases, as decision making is unarguably a judicial function. But we have no evidence of law clerk decision making, and this is not the nature of the concern typically voiced about delegation and law clerk use. Rather, the argument is that while the case is actually decided by the judges, law clerks have too much influence over the final public product, the written opinion.

⁹⁴Administrative Office of the U.S. Courts, *Survey of Staff Attorneys' Offices of the United States Courts of Appeals*, at 27 (1991). This publication includes a brief history of the allocation and authorization of staff attorneys and an overview of their duties in the courts of each circuit. Until recently, each court of appeals was generally limited to a number of staff attorneys equal to its number of authorized judgeships, sometimes augmented by preargument conference attorneys and other positions, such as unfilled law clerk positions. The number of authorized staff attorney positions is now constrained only by annual appropriation acts. *See* 28 U.S.C. § 715(b) (1988 & Supp. III 1991).

⁹⁵Thompson & Oakley, *supra* note 29.

⁹⁶Chief judges are entitled to four, but some of them allocate at least one of those positions to the central legal staff. Some judges hire four law clerks and one secretary instead of three law clerks and two secretaries.

The concern about law clerk overinvolvement in the writing process is that if judges rely too heavily on law clerks to write the opinion that explains the result, opinions may reflect the clerk's reasoning processes and modes of analysis more than those of the authoring judge.⁹⁷ Some argue that the practice erodes the ability of readers of the opinions—especially the practicing bar—to get to know the minds of the judges and thereby predict later decisions by the court. As we have noted, the publication of opinions serves multiple goals, including judicial accountability and guidance of the bar. Law clerk involvement in opinion writing may serve the former goal by allowing judges to produce more published opinions. But the practice may disserve the goal of guidance by diminishing the extent to which published opinions reveal the judicial philosophies of the judges on the court. And it may, if not carefully supervised, contribute to the reality or perception of inconsistent interpretations of federal law. It is to that issue that we now turn.

⁹⁷For one judge's analysis of problems associated with law clerk opinion drafting, see Posner, *supra* note 2, at 102–19. For different models of how judges and staff may interact in the review process, see Thompson & Oakley, *supra* note 29, at 42–45.

IV. Effects of Caseload Volume on Intercircuit Conflict

Many of the proposed changes to the appellate system are motivated by a concern that the federal judicial system does not provide, within a reasonable time, a uniform construction of federal laws. In this section we discuss the nature of that concern and report empirical work to examine the seriousness and pervasiveness of the problem of intercircuit conflict; in the next section we consider the uniformity of federal law at the level of the individual circuit.

The Supreme Court supervises the national law in part by deciding cases that raise intercircuit conflicts. A petition alleging an intercircuit conflict is a prime candidate for the Court's attention.⁹⁸ Petitioners are therefore likely to assert a conflict whenever any argument can be made for its existence, regardless of whether the conflict is important or whether it had any practical effect on the underlying action. This means it is probable that the Court will be made aware of virtually the full range of intercircuit conflicts, but it also means that in any one term, many petitions alleging a conflict are denied. Some observers of the Court's work see the number of legitimate conflicts denied review as higher than it ought to be in a national system. Others, perhaps affected parties, see a particular unresolved conflict as important and therefore believe it is entitled to Supreme Court resolution. Both groups may conclude that the Supreme Court does not have the capacity to review enough cases to fulfill its role as final arbiter of federal law.

Critics concerned about the Court's capacity point not only to the Court's failure to resolve particular intercircuit conflicts but also to the decreasing percentage of total appellate court terminations that it accepts for review.⁹⁹ All other things being equal, as the number of appeals rises, the percentage that can be given plenary review by a court of fixed size must fall.¹⁰⁰ The percentage of cases to which the Supreme Court grants review is an imperfect guide to the Court's capacity to supervise the national law.¹⁰¹ The Supreme Court is not primarily a

⁹⁸See Sup. Ct. R. 10.

⁹⁹"As recently as 1960, the Supreme Court reviewed approximately 3 percent of all federal appeals. That proportion has dropped precipitously to less than 1 percent" Report of the Federal Courts Study Committee 124 (1990). As the committee also noted, during the same year (1989), the Court granted review to about 5% of all cases—state and federal—in which review was sought.

¹⁰⁰The absolute number of cases given plenary attention has also fallen in recent years. For example, in the 1987–1988 term, the Court heard argument in 167 cases and disposed of 151 cases by full opinions. In the 1991–1992 term, it heard argument in 127 cases and disposed of 120 by full opinions. Administrative Office of the U.S. Courts, Annual Report of the Director, 1992, at Table A-1.

¹⁰¹Consider, for example, the increase in the number of criminal appeals following implementation of the Sentencing Reform Act of 1984. It is likely that many of the criminal appeals filed in the

court for error correction, so the number of cases it declines to review is less important than the number of legal issues it leaves undecided despite a need for authoritative national resolution.¹⁰² National statistics cannot help us assess the latter number, although observers of the Court periodically study and comment on what the Court does and does not choose to decide in a given term. Nevertheless, the declining percentage of reviewed cases indicates that the courts of appeals are the courts of last resort for nearly all cases in the federal system. As a result, there can be multiple interpretations of federal law that affect citizens differently in different areas of the country.

The concern about the effects of increased caseload volume on the uniformity of national law is not new. Students of the federal courts have long lamented the low percentage of appeals granted Supreme Court review. Part of the response to that concern has been to remove vestiges of the Court's obligatory jurisdiction to free the Court to take only the cases it deems most important. Other responses have been to suggest new institutions to expand the review capacity near the top of the federal judicial system. As we discuss later in this section, proposals have included suggestions for a new court to help the Supreme Court screen petitions for certiorari, a new court to resolve intercircuit conflicts, temporary panels to resolve conflicts, and a procedure whereby the Supreme Court could refer intercircuit conflict cases to a randomly selected court of appeals not involved in the conflict. To date, no proposal has garnered widespread support; several have attracted vehement opposition.

Given this recurring attention to intercircuit conflicts, why do judges and many commentators oppose new structures that might speed their resolution? Given the vast number of legal issues they deal with, judges may see squarely different interpretations infrequently. Results of our survey of federal judges, as well as comments at the Center's 1993 national workshop for appellate judges, suggest that most of the judges of the courts of appeals see intercircuit conflict as a relatively minor problem in the context of problems facing the federal courts. We asked judges to rate the severity of the "difficulty of discerning national law due to inconsistencies between or among circuits." No active circuit judge reported it as a grave problem, and only 3.9% reported it to be a large problem. Approximately 64% of them reported it to be either not at all a problem or a

early years of the Act's implementation questioned the constitutionality of the guidelines promulgated under the Act. The Supreme Court chose few cases as appropriate vehicles by which to resolve the constitutional issues, but the resulting small fraction of criminal appeals granted certiorari does not logically demonstrate that the Supreme Court inadequately supervised the national law of sentencing that year.

¹⁰²We use the word *important* here in the context of the actual coherence of federal law. Whether the statistically low chance of Supreme Court review creates a public perception that the Court is remote or that the appellate route is hopeless is a separate, albeit significant, issue.

small problem. Active district judges were somewhat, but not greatly, more inclined than their appellate counterparts to report intercircuit conflict as a large problem (8.1%) or grave problem (1.1%). About 53% of them found it to be a small or nonexistent problem.¹⁰³

The number, tolerability, and persistence of intercircuit conflicts

When the Federal Courts Study Committee considered the issue of intercircuit conflict, it found little empirical evidence on the nature and extent of the problem. Based on the work of earlier commentators, the committee concluded that it was reasonable to estimate that every year the Supreme Court leaves unresolved sixty to eighty conflicts raised in petitions for review. But the committee also recognized the considerable lack of certainty about this estimate. While it has not been difficult in recent decades to cite instances of conflict, it has been impossible to tell how representative those instances are or to assess their practical importance.

We now have more information on these issues, obtained primarily from the Center's ongoing study of the frequency and tolerability of intercircuit conflicts denied review by the Supreme Court. For that study, Prof. Arthur D. Hellman of the University of Pittsburgh School of Law looked at a large sample of petitions denied review in three terms (1988, 1989, and 1990). The first phase of the study was undertaken in response to Congress' request that the Center report on the "number and frequency of conflicts among the judicial circuits in interpreting the law that remain unresolved because they are not heard by the Supreme Court."¹⁰⁴ In that phase, Hellman examined the petitions to get a sense of the number and nature of intercircuit conflicts denied review by the Supreme Court over several terms. He then concentrated on examining the conflicts in detail to assess their tolerability, including whether the conflict was of continuing importance and affected outcomes in later litigation. That work has continued in Phase II of the study, the preliminary results of which are also included in this section. Our description here is necessarily brief. For complete explanation of the analytical process, including citations to the cases examined, readers should consult the separate Center reports on the study.

¹⁰³In contrast, problems reported as grave by at least 20% of the appellate judges who responded include the volume of criminal cases (35.6%), the impact of the criminal docket on the district courts' civil dockets (34.6%), and delay in filling judicial vacancies (24.5%).

¹⁰⁴That study, like this one, was requested by Congress in the Federal Courts Study Committee Implementation Act of 1990, § 302 of the Judicial Improvements Act of 1990. Arthur D. Hellman, *Unresolved Intercircuit Conflicts: The Nature and Scope of the Problem, Final Report: Phase I* (Federal Judicial Center 1991).

The number of intercircuit conflicts. To get an estimate of the number of conflicts denied review in one year, Hellman concentrated on the Court's 1989 term. The petitions he selected for study included all the cases in which Justice White had dissented from the denial of certiorari (237 cases in 3 terms, 74 in the 1989 term). Along with the petitions in the dissent-from-denial group, Hellman examined a random sample of 252 (1 in 5) of the petitions on the Court's paid docket denied review in that term, plus a small sample of *in forma pauperis* petitions.¹⁰⁵

A petition was counted as a conflict denied review if the certiorari materials asserted a conflict that was (1) acknowledged by one or more of the courts that had decided the issue; (2) supported by the writings of judges, commentators, or other participants in the legal system; or (3) reflected a plausible reading of the purportedly conflicting decisions. From the seventy-four cases in the 1989 term in which Justice White had dissented from the denial of certiorari, Hellman identified fifty-nine substantiated claims of conflict.¹⁰⁶ From the random sample of 252 paid cases, he identified an additional 43 substantiated claims of conflict. Extrapolating from the random 1-in-5 sample of paid cases (i.e., multiplying 43 by 5), he estimated that the Supreme Court denied review to 215 separate conflicts during the 1989 term.¹⁰⁷ This was a considerably larger number of intercircuit conflicts than would have been predicted from earlier work by scholars in the area. In the first phase of the intercircuit conflict study, Hellman thus concluded that he could not rule out the possibility of an inadequate national capacity to declare the federal law solely on the basis of the number of unresolved conflicts.

How can we reconcile these findings with judges' opinions that intercircuit conflict is a relatively small problem? Some might suspect that judges do not see intercircuit conflict as a major problem because it is a problem that only affects others, especially litigants and potential litigants. If true, this would account not only for our survey results, but for the assertion that some courts of appeals create conflicts unnecessarily and even carelessly. Inconsistency of results in different circuits generates litigation and imposes costs, the argument goes, and "appellate judges do not pay these costs."¹⁰⁸ Under the current workload conditions of the courts of appeals, the argument is unpersuasive. Rational, overworked judges

¹⁰⁵For both paid and *in forma pauperis* petitions, the samples were drawn from the group of cases in which the respondent submitted a brief or memorandum in opposition (1,264 and 931 cases, respectively). The 252 cases in the random sample of paid cases included 7 cases also identified from Justice White's dissents; the 93 cases in the *in forma pauperis* sample included 3 such cases.

¹⁰⁶For the 3 terms studied, Hellman identified 166 substantiated claims of conflict from among the dissents.

¹⁰⁷The number of conflicts identified from the *in forma pauperis* sample was too small to allow confident extrapolation to the larger set of such petitions.

¹⁰⁸Paul M. Bator, *What is Wrong with the Supreme Court?*, 51 U. Pitt. L. Rev. 673, 689 (1990).

either do not cavalierly create intercourt conflicts or do not believe intercourt conflict generates needless litigation (or both).

The tolerability of intercourt conflicts. Alternatively, judges may simply see few harmful intercourt conflicts that remain unresolved by the Supreme Court. The Federal Courts Study Committee recognized that the Court denies certiorari in some conflict-presenting cases because they are not appropriate vehicles for deciding the issue in conflict. The existence of conflicts to which the Court denies review is not inconsistent with the belief that the Court resolves important conflicts when they are ripe for resolution and when a case appears that presents the issue squarely, clearly, and in a context that will facilitate a decision of broad application. Further, some instances of different treatment in different circuits are tolerable, and their resolution is not worthy of the Supreme Court's time and attention. Accordingly, one of the questions that has dogged the evaluation of the importance of intercourt conflict has been whether "intolerable" conflicts are resolved in a sufficiently prompt manner.

The second phase of Hellman's study considered the tolerability of conflicts that he identified and counted in Phase I. Some intercourt disagreements would be called tolerable by virtually any observer. These conflicts would include those that have little continuing importance; whether they ever get resolved is of little moment to anyone. Only a few of the conflicts identified in the first phase of the study fell neatly into that category. Hellman assessed the tolerability of the rest—the "live" conflicts—using criteria identified by the Federal Courts Study Committee (and, derivatively, by Congress) as hallmarks of troublesome nonuniformity. Applying these criteria, a conflict may be deemed to lean toward the intolerable to the extent that it (1) encourages "nonacquiescence" by federal administrative agencies, by forcing them to choose between the uniform administration of statutory schemes and obedience to the different holdings of courts in different regions; (2) encourages forum shopping among circuits, especially since venue is frequently available to litigants in different forums; (3) imposes economic costs or other harm on multicircuit actors, such as firms engaged in maritime and interstate commerce; or (4) creates unfairness to litigants in different circuits—for example, by allowing federal benefits in one circuit that are denied elsewhere.

Encouragement of nonacquiescence by federal administrative agencies. This potentially harmful effect of intercourt conflict did not figure prominently in the groups of cases Hellman studied. Few of the conflict cases studied involved challenges to government policies or practices of general applicability. Even fewer posed a serious threat to uniformity in agency operations. Based on his analysis of the overall pattern of conflicts, Hellman concluded that for a number of reasons, including the influence of the Solicitor General on Supreme Court case selection, nonacquiescence is not a problem that results from the Supreme Court's failure to resolve intercourt conflicts.

Encouragement of forum shopping. We do not treat forum shopping as an independent harm. If there is something intrinsically evil about having a choice of places to file suit, perhaps venue statutes should be revisited on a much grander scale than we can deal with here. Forum shopping may be evidence of a problem (e.g., that different laws subject a litigant to unexpected or inconsistent obligations) without itself being a problem. Concerns about forum shopping are subsumed in the concepts of harm to multicircuit actors and unfairness to litigants in different circuits.

Harm to multicircuit actors. Intercircuit conflicts may cause harm to multicircuit actors (e.g., corporations, labor unions, and pension funds) in two ways. First, an entity may be forced to choose between structuring its operations differently in different jurisdictions and conforming to the law of the most restrictive circuit. The former option may impose costs because it requires inefficient operations; the latter requires the entity to forgo in all circuits behavior that is lawful in some circuits. Second, the entity may be subject to different obligations in different jurisdictions. Structuring operations to conform to conflicting obligations is not a choice but a requirement for doing business in both jurisdictions. These sorts of conflicts were well represented in the cases identified by Hellman, although the likelihood of harm was not equally strong in all cases.¹⁰⁹

Unfairness to litigants. A related issue of concern is whether an intercircuit conflict results in unfairness to litigants. The essence of intercircuit conflict is that events that are similar in legally relevant respects are treated differently in different circuits, and that the difference can be traced to inconsistent rules adopted by the courts of appeals in those circuits. In his study, Hellman focused on unfairness as the extent to which a difference in circuit law would be likely to produce different outcomes in later cases. For this analysis, Hellman analyzed the actual and likely effects of the conflicts by looking at published decisions. Regardless of the effect of different decisions on the elegance and clarity of the body of law, if outcomes are unaffected by the differences, then it cannot be said that the conflict “creates unfairness to litigants in different circuits.”

The conflicts most likely to cause the harms identified by the Federal Courts Study Committee are those that determine outcomes in later litigation. Outcome-determinative conflicts that raise the specter of similarly situated citizens being treated differently merely because of where the case is brought are perhaps the prototypical notion of an intercircuit conflict that causes unfairness to litigants.

¹⁰⁹This sort of potential harm was evident in slightly less than a third of the “live” conflicts identified in the random sample from the Court’s paid docket, and in a somewhat smaller proportion of the dissent-from-denial sample. We cannot tell from this study whether these results suggest that “harm to multicircuit actors” is a more frequent effect of conflict than the other harms identified or that multicircuit actors (e.g., corporations) are better positioned than other litigants to pursue Supreme Court review.

For example, one petition in the 1989 term identified a conflict involving the state boards of medical examiners. In the Tenth Circuit, members of such boards enjoyed absolute immunity in suits under 42 U.S.C. § 1983. In the Sixth Circuit, they did not.¹¹⁰

For another group of conflicts, the choice of one court of appeals's interpretation over another will not directly determine case outcomes but will bias decisions systematically in favor of one side in a recurring class of disputes. This "systematic bias"¹¹¹ means that although applying one circuit's law rather than another's will not necessarily lead to different outcomes, it will ease the burden of proof or pleading for a claim or defense under federal law.¹¹² For example, one court might adopt a presumption that another rejects, or might announce a tendency or inclination to accept an argument that is disfavored elsewhere.

Some indeterminacy is inherent in a system of common law adjudication. Whether unresolved intercircuit conflicts constitute a serious problem in the federal judicial system depends in part on the weight ascribed to conflicts that produce systematic bias in the disposition of claims or defenses but do not lead to divergent outcomes in a class of cases that can be identified *ex ante*.¹¹³ If systematic bias of this sort is seen as evidence of malfunction of the system, whether it is serious enough to justify structural change depends primarily on the number of conflicts in this category and the speed and frequency with which the Supreme Court resolves the conflict issues. If the Court generally resolves the conflict issues fairly promptly in later cases, or if the conflicts are otherwise mooted or eliminated, the evidence would not support the existence of a problem to be remedied by structural reform.

The persistence and effect of intercircuit conflicts. Perhaps the most likely interpretation of the responses to our survey questions about intercircuit conflict is that judges do not universally view the occurrence of conflict as an unalloyed evil, so long as important intercircuit conflicts are resolved in due time by the Supreme Court. The repeated consideration of the same legal issue by multiple courts of appeals before Supreme Court resolution has been called "percolation."

¹¹⁰This conflict was later eliminated when the Court of Appeals for the Sixth Circuit, sitting en banc, overruled its earlier decision. The relevant case citations may be found in the report of Phase II. Arthur D. Hellman, *Unresolved Intercircuit Conflicts: The Nature and Scope of the Problem*, Second Interim Report, Phase II (1993) (unpublished manuscript, on file with the author).

¹¹¹The phrase was borrowed from Judge Posner's analysis of retroactivity in *Luddington v. Indiana Bell Tele. Co.*, 966 F.2d 225, 228 (7th Cir. 1992) ("Procedural innovations not likely to bias decision systematically in favor of one litigant rather than his opponent can, without serious affront to the values crystallized in the phrase 'rule of law,' be applied to cases pending when the innovations were adopted.").

¹¹²Twenty conflicts in the random paid group and forty-seven in the dissent group satisfied this test to one degree or another.

¹¹³Hellman, *supra* note 110.

Judges who believe in the value of percolation may report intercourt conflict to be a minor problem because the undesirable effects of conflict are counterbalanced by the benefit to the system of multiple considerations of the same legal issue. In this view, the Supreme Court can resolve difficult issues of statutory interpretation more wisely and more efficiently after several courts have wrestled with the issues in the context of different cases and aided by different counsel. As one circuit judge commented in response to our survey: "Lack of consistency of national law should never be regarded as a problem. The law must be nourished and this can only be done by our present system. The Supreme Court is doing a fairly good job of resolving significant circuit splits."

The importance of percolation to the development of the national law can be overstated, and some question its validity. For our purposes, it is not helpful to cast the issue as one of "percolationists" versus "nonpercolationists." No one suggests that the Supreme Court be barred from taking up an issue before several courts of appeals have addressed it. Even those who suggest that percolation has value do not seek it as an end in itself.

It would be better, of course, if federal law could be applied uniformly in all federal courts, but experience with conflicting interpretation of federal rules may help to illuminate an issue before it is finally resolved and thus may play a constructive role in the lawmaking process.¹¹⁴

The question is how an assessment of percolation affects the view of intercourt conflict as a problem that warrants structural or other change. If most of the important intercourt conflicts are resolved by the Supreme Court reasonably promptly, then coping with the prospect of intercourt conflict and reconciling or rejecting different approaches to a legal issue can be seen as the essence of the appellate judge's task rather than as a problem.¹¹⁵ Whether the current system produces unmitigated harm or a mixture of burdens and benefits is relevant to the issue of whether to seek change primarily to resolve conflicts at the earliest possible moment.¹¹⁶

¹¹⁴John P. Stevens, *Some Thoughts on Judicial Restraint*, 66 *Judicature* 177, 183 (1982) (emphasis added).

¹¹⁵The "difficulty of maintaining consistent national law" was regarded as a large or grave problem by few of the appellate judges who responded to our survey. More than half found it not at all a problem or a small problem. As one judge explained: "[T]he circuits should consider carefully the views of the district courts and the courts of appeals of other circuits. However, then our duty is and should be to express our conclusions based on our independent best judgment freely, without hesitating to disagree with some or all other circuits. The Supreme Court can adequately resolve conflicts and will be best informed if the circuits speak out freely."

¹¹⁶Commentators have only recently begun to approach the percolation issue as an empirical question on which data might be gathered. See, e.g., Todd J. Tiberi, *Comment, Supreme Court*

How long does it take for conflicts denied review to be resolved or to disappear? Phase II of the intercourt conflict study confirms the perception that the Supreme Court resolves many important circuit splits within a few years of their appearance. In Phase II, Hellman followed the development of the issues raised by the petitions presenting 142 of the 184 distinct claims of conflict to which the Supreme Court denied certiorari in its 1984 and 1985 terms.¹¹⁷ Preliminarily, Hellman concludes that if a conflict is not resolved within about six years after the Court denies review, the likelihood is small that the Court will ever take up the issue. Of the forty-seven Supreme Court decisions that explicitly or implicitly resolved conflicts being followed in Phase II, all but three were handed down before the end of the 1990–1991 term, and one was slated for resolution in the following term. Two of the three conflicts resolved after June 1991 were in their early stages of development when the Court denied certiorari during the study period.

Whether a conflict gets resolved by the Supreme Court is only part of the analysis necessary to determine whether there are too many intolerable conflicts. Much of the concern about conflict is based on two hypotheses: (1) that the existence of a conflict continues to generate litigation of the issue and (2) that different decisions in different circuits subject parties to inconsistent obligations—that is, that the issues over which there is conflict are outcome determinative. To date, these concerns have been based on reasonable conjecture and perhaps on some experience with particular conflicts. The Hellman data address whether many unresolved conflicts actually presage continued litigation of the same issue and actually result in the same behavior being treated differently in different circuits.

Hellman followed each of the cases in the Phase II study group. He first analyzed whether the identified conflict could be classified as tolerable or intolerable by virtue of its persistence. Conflicts denied certiorari might not represent an intolerable problem that would warrant structural or other change. For example, a conflict may be “plainly waning” either at or soon after the time review is denied. (Indeed, 13 of the original group of 226 cases were dropped from the study group because their identified conflicts had been resolved by the time the certiorari petition was denied.) Conflicts that are plainly waning may not be worthy of the

Denials of Certiorari in Conflicts Cases: Percolation or Procrastination?, 54 U. Pitt. L. Rev. 861 (1993). So far we do not find persuasive empirical evidence for or against the percolation hypothesis.

¹¹⁷From the group of cases selected from the 1984 term, Hellman identified eighty-six distinct conflicts that had been acknowledged by a court of decision or recognized by other participants in the legal system. One additional conflict was included because two courts of appeals had articulated plainly inconsistent statements of law that led to contrary results. The 1985 term yielded fifty-four unresolved conflicts, all of which were acknowledged or recognized in the papers before the Court.

Supreme Court's attention because their resolution is not needed to serve as a guide to future behavior.

A conflict might be mooted or eliminated in other ways. New legislation may have addressed the point of disagreement, either by speaking directly to the issue over which the circuits disagreed or by filling a gap and thereby indirectly resolving the problem.¹¹⁸ The conflict also might be resolved by one or more of the courts of appeals involved in the conflict. Six of the conflicts in the Phase II study group fell in this category—in each instance the court whose decision had been cited to the Supreme Court as contrary to the ruling brought for review changed its position on the issue. These “eliminations by overruling” can be direct or indirect. Three of the six cases in the group were directly overruled by way of an en banc rehearing of a case in which the rejected precedent had been applied. The other three were less direct but equally important repudiations of the earlier precedent.¹¹⁹

Finally, conflicts denied review in one case may be resolved in a later case in which the Supreme Court grants certiorari. This occurred directly for thirty-seven of the intercircuit conflicts studied.¹²⁰ It also occurred indirectly for ten conflicts. In those, the Court decided closely related issues, and those decisions gave sufficient guidance to put the earlier issues to rest.

Of the conflicts denied review by the Court in two terms, fewer than half were mooted, eliminated, or resolved by a later Supreme Court decision during the period of the study. Some conflicts, however, simply disappeared from view. In the Phase II study group, four conflicts in addition to those immediately identified as “plainly waning” never gave rise to another reported decision. Ten others disappeared from view shortly thereafter.¹²¹ Sometimes disappearance may reflect other ways of dealing with the problem being litigated (if it becomes prohibitively expensive to litigate an issue, for example, potential litigants may simply conform their behavior). But some issues studied were simply questions seldom litigated to begin with. In at least one conflict studied, the two cases cited

¹¹⁸Sometimes, of course, the subsequent legislation may clarify one issue but leave or create others. Hellman cited a 1986 amendment to the Age Discrimination in Employment Act dealing with mandatory retirement for law enforcement officers. He noted that the amendment mooted a conflict over the “bona fide occupational qualification” defense, but left ample room for continued litigation over whether the defense applies in particular cases.

¹¹⁹One court, for example, disavowed its earlier approach by saying it had “never ruled squarely” on the issue. One disposed of the troublesome rule by limiting it to its facts. A third announced that it would thereafter follow the approach of other circuits, which had criticized the precedent. Details and citations will be found in the Center’s forthcoming report on Phase II of Hellman’s study of intercircuit conflicts.

¹²⁰Two of these decisions were in turn superseded by legislative amendments. One other writ was dismissed by stipulation of the parties before the Court decided the case.

¹²¹Among this group, no reported decisions addressed the issue after 1987.

as in conflict appeared to be the only reported decisions in which any federal court addressed the disputed proposition. These sorts of conflicts accounted for just over 55% of the conflicts identified in the Phase II group.

The remaining sixty-two conflicts continued to generate litigation in the lower courts. But for twenty-five of those sixty-two, Hellman found strong evidence that the conflict had not resulted in differential treatment. At the other end of the spectrum, he found thirty conflicts whose later history provided some evidence of differential treatment that could be traced to different rules adopted by different courts of appeals.

In sum, out of 142 conflicts that had been denied review in two Supreme Court terms, Hellman found fewer than 40 that had not been put to rest, had continued to generate litigation, and had controlled outcomes in one or more reported cases. Of those, he found about a dozen that had some potential for encouraging nonacquiescence or causing harm to multicircuit actors. The remainder implicated the other criterion of concern, unfairness to litigants merely by virtue of differential treatment. Hellman has preliminarily concluded:

How are we to assess the significance of this finding? To begin with the obvious, forty is a rather paltry harvest from two terms. To be sure, the study group did not include all of the conflicts that were denied review during that period, but it seems unlikely that a more comprehensive search would have yielded a substantially higher number of conflicts that are both persistent and outcome determinative.

In any event, there is a weightier reason for doubting that the numbers provide evidence of "a system that is jammed at the top." With the passage of time, it is no longer accurate to say that these conflicts *remain* unresolved because the Supreme Court did not hear them. Some of the issues have been presented to the Court in subsequent terms, but most have not. We have no way of knowing whether additional conflicts would have been resolved if litigants had given the Court a chance to consider them. What we do know is that at least since the 1989 term the Court has had room on its docket for more cases than were granted review.¹²²

The answer to whether intercircuit conflicts are too prevalent or too harmful may rest on the value one places on swift uniformity. In the next section we address additional measures that the courts of appeals use—or that have been recommended—to constrain the amount of conflict in the system. We then consider more drastic structural and jurisdictional changes to promote consistency and uniformity.

¹²²Hellman, *supra* note 110.

Nonstructural proposals for promoting the consistency of federal law

The Federal Courts Study Committee recommended that “when a court of appeals reviews a case raising an issue already decided in another circuit, it should accord considerable respect to that earlier decision; a panel contemplating disagreement with the panel of another circuit should circulate its draft opinion among the remaining judges of the court for their comments.”¹²³ The most important disagreements with the decision of another circuit are those resulting in published opinions, as they are the ones causing most of the identified harms of inter-circuit conflict. These opinions are circulated before they are published, and some courts require the issuing panel or authoring judge to flag for the other judges the conflict-creating aspect of the opinion. An indication of current efforts by the courts of appeals to maintain uniformity is the use of en banc review to consider cases in which a panel decision would create a conflict between or among circuits. At least four circuits provide for such review.¹²⁴

The committee’s recommendation is a useful reminder to judges that there are costs to nonuniformity, and it is difficult to argue against an exhortation to respect the opinion of a coordinate court in a national system. However, it may be that judges already give considerable respect to their counterparts, but temper that respect with the independent thought required of them as judges.¹²⁵ A panel in a later case cannot defer to an earlier panel in another circuit without considering the importance of uniformity on the particular legal issue, the quality of the reasoning in the first opinion, and the adequacy of the information available to the first court. Sometimes the first panel will “get it wrong.” Indeed, it seems reasonable to assume that the likelihood of “getting it wrong” might be strongest in the case of first impression. Experience with a particular legal rule may lead to a contrary evaluation of its soundness. Finally, as Hellman’s study of the persistence of intercircuit conflicts shows, part of percolation is evaporation—a court that finds itself alone in its position after other courts have considered an issue sometimes reverses itself or distinguishes its earlier precedent to eliminate or minimize the effect of the conflict. Eliminating this aspect of the percolation pro-

¹²³Report of the Federal Courts Study Committee 129 (1990). The Judicial Conference opposed this recommendation. Judicial Conference of the United States, Proc. 88 (1990).

¹²⁴The Fourth, Seventh, Ninth, and D.C. Circuits explicitly or implicitly include inter-circuit conflict as a ground for suggestions for rehearing en banc in their internal operating procedures or local rules.

¹²⁵At least one commentator has concluded that the courts of appeals “generally attempt to avoid inter-circuit disagreements, especially on statutory questions, if they can conscientiously do so.” Arthur D. Hellman, *The Proposed Intercircuit Tribunal: Do We Need It? Will It Work?*, 11 *Hastings Const. L.Q.* 375, 399 (1984).

cess might increase the burden on the Supreme Court to rectify errors that the middle tier now rectifies on its own.¹²⁶

National stare decisis models. Although most judges are sensitive to the need for national uniformity on many statutory issues, they stop short of supporting institutionalized or mandatory deference implied by proposals incorporating "national stare decisis." This approach to precedent is a feature of several of the structural alternatives described by the Federal Courts Study Committee and has been offered as a nonstructural solution to the problem of intercircuit conflict.

First panel model. The most far-reaching proposal for a system of national stare decisis would allow the first three-judge appellate panel to rule on an issue to bind the courts of all other circuits throughout the nation.¹²⁷ One variant of the proposal would permit another court to reach a contrary result, but only in an en banc proceeding. (The same circuit could also rehear the same case en banc, as it may under current practice.) An en banc panel's decision would then be binding unless overturned by the Supreme Court.¹²⁸

First en banc model. An alternative system of precedent would give nationally binding effect to the first en banc panel to rule on an issue. Under this formulation, all other courts would be bound by the first en banc decision and could express their disagreement only by certifying the case to the Supreme Court.¹²⁹ Commentary on this proposal has not addressed the question whether the "limited en banc" procedure authorized for courts of more than fifteen judgeships would suffice for this purpose.

Rule of three circuits model. Finally, a system of modified national stare decisis could allow limited percolation but provide reasonably early uniformity by giving binding effect to the position that first garners the support of three courts of appeals. This approach rests on the notion that the probability of three appellate courts getting an issue "wrong" is sufficiently small that the benefits of finality would outweigh the benefits of correcting the decision.¹³⁰

Any of these models, or variations of them, might provide an escape clause by which a court would be free not to defer to extracircuit rulings "in cases of great

¹²⁶The second part of the committee's recommendation raises additional questions of sub rosa overruling of panel decisions by nonpanel members of the court. These concerns are discussed more fully in section IV in our description of prepublication circulation of precedential opinions.

¹²⁷See Schaefer, *supra* note 26, at 455.

¹²⁸It is difficult to see that Supreme Court reversal would be likely if the practice were followed diligently. As there could (in theory) be no deviation from the en banc ruling of another circuit, no intercircuit conflict would arise. Thus that avenue of certiorari review would seldom be taken, except in the case giving rise to the en banc decision. This could increase the pressure on the Supreme Court to review en banc decisions, now numbering about 85-110 annually.

¹²⁹Such certification is permitted under 28 U.S.C. § 1254(2) (1988), but the procedure is seldom used, and the Court is not required to accept the case.

¹³⁰Posner, *supra* note 2, at 165.

significance.”¹³¹ For the first system, in which a single panel decision would be deemed precedential, some would provide for exceptions where the decision was clearly erroneous. The same exception might be provided for the second version, in which an en banc decision would otherwise be binding.

Discussions of this model have not articulated standards for when it might be appropriate to invoke the “great significance” exception, but the exceptions might well swallow the rule. In any event, the exception makes it impossible to predict how much the rule would actually reduce the frequency of conflict. An exception that would allow courts not to abide by the decision of another circuit’s court of appeals if that decision were clearly erroneous seems destined for similar problems. The clearly erroneous exception makes the most sense in a single-panel stare decisis system. But even there, courts in one circuit would be in the position of characterizing a decision of a coordinate court as erroneous, arguably a rather different statement from “we decline to follow the reasoning of the Xth Circuit.” Although the single-panel decision would be easier to discount as erroneous, a court will also sometimes be faced with implying that another court of appeals was derelict in not taking that case en banc to correct the error.

The proposals are not clear on whether district judges would also be free to invoke these exceptions. Presumably, if its own court of appeals had not spoken to the issue, the district court would be bound by the decision of the court of appeals (or three) that had spoken. The district court might be forced to predict whether its own court of appeals was likely to find the foreign decision erroneous or correct, or find the case significant enough to justify departure from the rule.

The argument for a system of national stare decisis is that it would reduce the number of intercircuit conflicts and thereby increase predictability and decrease the burden on the Supreme Court. Proponents argue that it would require no more than circuit judges giving the same respect to a panel in another circuit that they give to colleagues in their own circuits. If one panel (or one court of appeals en banc) is as likely to decide an issue correctly as any other panel or court, then a system of national stare decisis might settle the national law more promptly than the current system because conflicts would be resolved or averted at the court of appeals level. Except for the single-panel system, the proposals would keep the benefit of some percolation but would not permit matters to percolate indefinitely.

Proponents of national stare decisis suggest the benefits of uniformity can be achieved without adding significantly to the workload of federal appellate judges, but that conclusion is not self-evident. Currently, district and circuit judges must discern and apply the law of the circuit. If the decision of the first panel to rule on an issue is to be binding precedent throughout the country, judges will have an

¹³¹ *Id.*

affirmative duty to ascertain the state of the law in other circuits. Widening the scope of precedent that they must seek out, consider, and apply or reconcile would impose substantial new duties on judges. It does not seem plausible that these duties can be carried out without increasing the time and effort of judging at all levels of the system. Requiring an en banc proceeding before departing from the rule adopted by another circuit would only worsen the already significant costs of en banc review, particularly in circuits that cannot or do not choose to use limited en banc panels.

Lawyers and litigants would be similarly burdened. At present, counsel have an affirmative duty to bring to the court's attention binding precedent contrary to their position, at least if their adversaries do not cite it. Once judges have a duty to search the entire body of federal law for applicable precedent, it would be logical to impose the same duty on counsel for litigants. Such a duty can only be expected to increase the cost of legal services as lawyers will need to research, analyze, and often predict the law in all circuits before giving advice or writing a brief.¹³²

The problem of finding the entire body of relevant law may be tractable, but the problems of analyzing that law are not so easily resolved. Deciding whether courts in other circuits have squarely addressed the same issue in the same way is often difficult. Some decisions are relatively clear—a statute will be applied retroactively or not; the statute of limitations is two years for a given action.¹³³ Many other decisions are neither clear nor binary. The potential difficulty of determining whether another circuit has decided an issue differently can be seen in the difficulties scholars have had in defining conflicts and determining whether two opinions represent a square conflict, no conflict, or a "sideswipe."¹³⁴

Additionally, sideswipes may be concentrated in areas least clear and therefore most dependent on the processes of reasoning and statutory interpretation reflecting the approach of a circuit. A coherent appellate decision proceeds from the law of the circuit as it has been developed over time, perhaps in many areas of law. (Indeed, the interrelatedness of different areas of law is one of the reasons many critics oppose specialized courts.) To be bound by the decision of another circuit on a discrete issue when the circuit's own precedents lead in a different direction

¹³²These problems could be minimized if the rule adopted were to require adherence only to the en banc decisions of one or more circuits and if such decisions were more easily identified than they are with the present standard legal research tools. There might ultimately develop a significant body of en banc decisions to consult, particularly if the courts more frequently use limited en banc procedures, but the body of law should be manageable.

¹³³Even here we oversimplify, as such decisions may be context dependent. The point is that there is a range of clarity.

¹³⁴The term describes a situation in which two courts or panels have taken divergent approaches to the same legal problem on different facts, but it is not clear that they would reach different results on identical facts. Hellman, *supra* note 125, at 375, 408 n.140.

is to purchase uniformity at the price of coherence. One issue is settled; others may be thrown into disarray.¹³⁵

Variations on the national stare decisis theme are likely to encourage forum shopping by litigants and real or perceived issue shopping by courts. They could give one strong panel of a court of appeals the authority to bind the nation in a way that far exceeds the current powers of a panel, or one circuit the opportunity to shape national law according to the preferences of its judges.

National stare decisis would be a radical departure from current practice. Circuit judges are accustomed to being bound by the authority of the Supreme Court, and bind themselves by tradition and rule to the decisions of their colleagues on the same court. But they do so largely by reason of their role identification as members of a court of appeals for a particular circuit. Part of the concept of collegiality, discussed earlier, involves trust in the judges of one's court (or at least an ability to predict how they would decide an issue). Judges are unlikely to take kindly to the suggestion that they be bound by the decisions of essentially unknown judges from a court of equal authority in a different jurisdiction.¹³⁶ This is more than a matter of ego. It goes directly to the obligations of circuit judges: "If a federal court simply accepts the interpretation of another circuit without addressing the merits, it is not doing its job."¹³⁷ When circuit judges differ with their own colleagues, they have formal and informal avenues of recourse to resolve their differences, including the en banc procedure. No formal recourse exists by which circuit judges can revisit an issue with colleagues in other circuits. Deference to an earlier decision in the interests of uniformity may well be appropriate if it is a matter of choosing between equally plausible legal interpretations. But asking judges to defer to a court of coordinate authority when they are convinced that court was wrong may be asking them to violate their duty to apply the law as they understand it.¹³⁸

¹³⁵This result is far more destructive of the logic of circuit law than a clear legislative directive would be. A statute can be easily understood to "trump" developed case law; an opinion that adopts the reasoning of the court of another circuit merely because the other court decided the issue first could be enormously confusing and, at best, time-consuming to craft clearly.

¹³⁶As one judge has said, "The notion that any [federal judge] would defer on stare decisis grounds to a decision by a co-ordinate court with which he disagreed is unworthy of comment." *Consumer's Union of the United States v. Consumer Prod. Safety Comm'n*, 590 F.2d 1209, 1217 (D.C. Cir. 1978) (Robinson, J.), *rev'd sub nom.* *GTE Sylvania v. Consumer's Union of the United States*, 445 U.S. 375 (1980).

¹³⁷Richard L. Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 *Yale L.J.* 677, 702 (1984).

¹³⁸We do not consider here whether a formal system of authority could be created by which one court of appeals could bind the rest of the system. Precisely such a system is contemplated by the "random referral mechanism" discussed later.

In sum, national stare decisis would essentially destroy the jurisprudential concept of circuits while retaining their geographical and administrative structures. Notwithstanding the laudable goal of uniformity, we see little benefit in any proposed system of national stare decisis unless it is a necessary adjunct to a major structural rearrangement that becomes necessary for other reasons. Under current conditions, we see it as an unworkable and burdensome proposal.

Supreme Court referral of conflicts to randomly selected circuits. One option for enhancing uniformity would divert some of the present appellate capacity to conflict resolution. The Federal Courts Study Committee proposed that the courts experiment with a procedure whereby the Supreme Court could refer cases presenting conflicts to the court of appeals for a circuit not involved in the conflict. The general outline of the committee's suggestion is set out here.

Random Referral Procedure

Function: To stabilize the national law by deciding cases presenting conflicts that the Supreme Court believes need resolution but do not need to be resolved by the Court.

Procedure: Case selection—The Supreme Court would identify cases that present an intercircuit conflict in need of resolution. Identified cases could be referred before or after the Supreme Court granted or denied certiorari, and before or after the Court noted probable jurisdiction on appeal.

Referral—Those courts of appeals not involved in the conflict would be identified, and a court of appeals would be randomly selected from that group. The identity of the court would not be known to the Supreme Court before referral was made. The burdens on courts of appeals would be equalized by attempting to refer to each court a number of cases proportionate to its size.

Decision—The court would sit en banc, but larger courts could invoke the limited en banc provision allowing them to sit in smaller panels.

Finality and review: The en banc court's decision on the designated conflict issue would be final, subject only to the right of the party adversely affected by the decision to seek reconsideration or rehearing of that ruling by the Supreme Court within thirty days from the date the court of appeals renders its en banc opinion. No response to such a reconsideration motion would be permitted unless the Supreme Court requested it.

(Note: A dissenting statement argued that the referral court's decision should be final and unreviewable by the Supreme Court.)

Precedent: Unless modified or overruled by the Supreme Court, decisions of an en banc court in cases referred to it by the Supreme Court would be binding as if made by the Court.

Adapted from Report of the Federal Courts Study Committee 125-29 (1990).

One of the committee members dissented from the report's choice to retain possible reconsideration by the Supreme Court, arguing that giving up a little control is a fair price for the assistance provided by the random referral mechanism. Competing values are at stake. There is a substantial interest in finality and in concluding litigation at the earliest opportunity. Providing an opportunity for reconsideration lengthens the litigation process and adds expense, at least for the party seeking reconsideration. However, there is a countervailing interest in enabling the Supreme Court to speak the last word on a subject and to maintain control over the development of the law.

Among the lessons of the past are that two aspects of the current system are deeply valued: litigant access to the Supreme Court and Supreme Court control over both its docket and the development of the law. A random referral scheme without the possibility of Supreme Court review would preserve the first to some extent but sacrifice the second. The acceptability—and the constitutionality—of such a scheme are much less certain than for the procedure favored in the majority statement. Accordingly, we focus primarily on the version of the plan that would retain the possibility of Supreme Court review of the referral court's decision.

The advantages of the random referral procedure are straightforward. As the Federal Courts Study Committee noted, the procedure would rely entirely on existing court resources. It would not require that a new administrative structure be developed. The Supreme Court would continue to assess the importance of an asserted conflict and the suitability of an individual case as a vehicle for resolving it. The procedure would meet some of the objections to alternatives that would create a new tier between the courts of appeals and the Supreme Court, and it would provide some measure of the intercircuit conflict problem by identifying cases the Court finds worthy of resolution but is unable to review. Finally, the

approach has the advantage of being suitable for experimentation without incurring the significant costs associated with most structural changes.¹³⁹

The procedure's requirement that the referral court hear the conflict case en banc overcomes some of the objections to the notion of binding decisions by a single panel in another circuit.¹⁴⁰ But the en banc system entails considerable cost. If the Supreme Court were to refer the forty to sixty cases some have projected as the number of unresolved conflicts likely to be suitable for referral annually, it would increase the en banc burden on the courts by 50%. (Alternatively, it would leave the courts of appeals in the position of allowing their circuit law to languish in disarray while they resolve conflicts caused by other circuits.) Recognizing the significant burden imposed by en banc rehearings, the Federal Courts Study Committee also suggested expanded use of the limited en banc procedure authorized for courts of more than fifteen active judges. However, limited en bancs are controversial in some quarters even as a way of resolving circuit law, and nearly a third of the circuit judges who responded to our survey opposed wider use of limited en bancs in the current system.¹⁴¹

The substantial costs of a heavily used referral system, moreover, would be expended primarily on cases in which the underlying problem might best be addressed by the legislative branch. It is generally agreed that cases of constitutional interpretation should be resolved finally by the Supreme Court. (Indeed, it is the fear of rendering the Supreme Court a purely constitutional court that leads many to oppose not only the random referral procedure but also a national court of appeals, an intercircuit tribunal, or a new tier approach that could remove from the Court many of the cases that do not present constitutional issues.) Most likely to be referred are the cases requiring statutory interpretation—the very disputes of law most preventable by Congress and perhaps best suited for resolution by Congress.¹⁴² Creating a new judicial body to fill gaps left by the legislature—at least those gaps left inadvertently—seems a questionable approach to the root problem.

¹³⁹A demonstration program was proposed by Senator Howell Heflin, a member of the Federal Courts Study Committee. S. 1494, 102d Cong., 1st Sess. (1991). To date the program has not been authorized by Congress. The Judicial Conference has opposed the pilot project. Judicial Conference of the United States, Proc. 88-89 (1990). Critics of earlier proposals for an intercircuit tribunal have noted the tendency for experimental programs to become permanent.

¹⁴⁰See J. Clifford Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 Cal. L. Rev. 913, 935 (1983).

¹⁴¹It would be paradoxical but conceivable that using a limited en banc would be *more* acceptable when the panel is not declaring the law of an individual circuit with a distinct identity, but deciding among competing views of the law for the entire nation. We did not ask judges to comment on the use of limited en bancs as referral courts.

¹⁴²See Regina C. McGranery, *Random Justice: Shorting the Circuits*, 37 Fed. B. News & J. 358, 360 (1990).

Some of the effects likely to flow from the referral are similar to those mentioned in the section above concerning national stare decisis. Referral, and perhaps random referral in particular, merely brings with it the bare authority to decide the case, not the moral force of the Supreme Court. Referring a conflict to a court of appeals not involved in the conflict seems natural in a judicial system accustomed to norms of impartiality that require decisions by neutral fact finders who consider only the evidence in an individual case. But rendering a nationally binding decision on an issue of law is arguably a different task. It is not necessary to view circuit judges as representing regional constituencies to conclude that there are significant regional differences in the federal system. Regional variations affect the frequency with which legal issues are litigated in the various circuits, and may therefore affect the actual and perceived expertise of the judges in different circuits.¹⁴³

As do systems of national stare decisis discussed earlier, random referral of conflicts raises the fear that a court might interpret the resulting decisions narrowly in order to establish its own slightly different view in a later case.¹⁴⁴ This temptation might be especially strong because the referred court would be unable to enforce its decisions. A later case that presented a closely related issue would stand little chance of being referred to the same court. Yet that case, carefully distinguished from the one decided earlier, could establish new law for other courts to follow as they chose. The result could be the expense and difficulty of an en banc proceeding and a decision with low precedential value.

Proponents of the random referral procedure argue that referral to a panel in a circuit uninvolved in the conflict would increase the Supreme Court's docket capacity significantly.¹⁴⁵ It is not so clear that random referral would greatly improve the situation at the Supreme Court. There would be more room on the Court's docket for cases not involving conflicts, but it is an open question whether the burden of implementing the system would be worth the benefit. For each petition alleging intercircuit conflict, the justices would now have four options rather than three: grant plenary review, deny review, decide the case summarily, or refer the case to a court of appeals. Depending on the decision rule imposed by the procedure or adopted by the Court, and on whether the Court would also need to specify the precise issue referred for resolution, this could create sig-

¹⁴³*Id.* at 361.

¹⁴⁴"Judges of the conflicting circuits would not ignore the in banc decision of the circuit referred by the Supreme Court, but they would be sorely tempted to limit that decision as much as possible, minimizing the area of conflict resolved by the decision." *Id.*

¹⁴⁵Samuel Estreicher & John Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study* 59 N.Y.U. L. Rev. 681, 807-08 (1984).

nificant new potential for deadlock.¹⁴⁶ Once the Court agreed to refer the case, presumably someone would have to analyze the law of all the circuits to determine which circuits ought to be considered uninvolved for purposes of the random selection. Finally, under the most likely version of the procedure, the Court would review the decision in the referred case if submitted for reconsideration and, if necessary, rehear the case.

The assistance the Court would receive from the random referral mechanism may be seen as a mixed blessing for another reason. To deny certiorari is one thing; to empower a panel in a randomly selected circuit to make the law of the land is quite another. The effects of an incorrect decision from one of the courts of appeals are regionally circumscribed. A conflict denied review will surface again if it is important. A justice cannot be certain that the decision, even if erroneous, will return to the Court for reconsideration—or if it does, that a sufficient number of justices will find it worthy of further attention. Should the Court support the credibility of the process by not undercutting the referral court that has rendered assistance? Or should the Court scrutinize these decisions even more carefully because they are nationally binding?

So far, judges appear to be unconvinced that referral for conflict resolution is either necessary or wise. More than half of the active appellate judges responding to our survey opposed the idea, 38% of them strongly. Still, about a quarter of them moderately supported it, and 15% had mixed feelings about it. The range of judicial opinion and the paucity of scholarly analysis or public discussion of the random referral proposal suggest that it may bear further investigation. But if any such procedure is adopted experimentally, it is important that the institutions involved share their criteria for success, and in particular their notions of the conclusions to be drawn from the number of referrals made. If the Supreme Court refers few cases, should observers be relieved to find the problem of inadequate capacity to resolve conflicts is not as bad as some have feared, or conclude that the Court is more resistant than they had hoped? If the Court refers many cases, is it to be praised for ensuring that conflicts are resolved promptly, or criticized for not allowing percolation or for not doing its own work? Finally, any evaluation of the experiment would need to weigh the benefits of early resolution against the new burdens on the courts of appeals, perhaps including increasing problems of intracircuit inconsistency and longer disposition times as judicial resources are diverted to conflict resolution.

Structural proposals for resolving intercircuit conflicts

Wide ranging structural alternatives to increase the judicial system's capacity to resolve intercircuit conflicts have been proposed over the last several decades.

¹⁴⁶Similar objections were raised to the referral provisions in earlier structural proposals. See Hellman, *supra* note 125, at 425.

Some are of historical importance largely because of the commentary they engendered; others have been proposed for current or future consideration if the problem of intercircuit conflict is or becomes sufficiently serious to warrant structural change.

National Court of Appeals (the Freund Study Group proposal). In 1972, Chief Justice Burger appointed a national study group to examine the workload of the Supreme Court. The group, which came to be known as the Freund Study Group for its chairman, Prof. Paul A. Freund, concluded that the burdens on the Court were severe, and of particular concern was the amount of time the justices had to spend reviewing petitions for certiorari. The group suggested that the burden of review could be lightened by a National Court of Appeals.¹⁴⁷ That new seven-member court would screen all petitions for review by the Supreme Court, passing on to the Supreme Court the several hundred petitions deemed most worthy of review, from which the Court could form its docket. Decisions by the National Court of Appeals to deny review or to retain the case for decision would be final and unreviewable by the Supreme Court.

The new court would also decide some cases presenting conflicts, thus expanding the capacity of the appellate system to declare the national law. Its docket would include cases that it retained and cases remanded to it from the Supreme Court. Retained cases would be those the reviewers determined presented a genuine conflict—either an intercircuit or an intracircuit conflict—but deemed insufficiently important to warrant Supreme Court attention. Remand by the Supreme Court would signify the Court's agreement that the conflict presented was genuine but that the matter did not rise to the level of importance justifying Supreme Court plenary review.

The new court was to be staffed by active circuit judges who had at least five years' service as a circuit judge but who would not be eligible to serve as chief judge during the three-year term. The court would be housed in Washington, D.C., but its judges could continue to reside in their own circuits. Diversity of experience, age, and outlook were to be encouraged—no two judges from the same circuit could serve on the court at the same time, and judges would be selected by listing all eligible judges by seniority and alternating selections between most senior and most junior. Although judges for the new court would be borrowed from the ranks of active circuit judges, the Freund proposal anticipated that some additional judgeships would be required to meet the new demands on the system. The basic elements of the structure are set out in the box that follows.

¹⁴⁷ See Report of the Study Group on the Caseload of the Supreme Court (Federal Judicial Center 1972), reprinted in 57 F.R.D. 573 (1972).

National Court of Appeals (Freund Study Group)

Primary function: To reduce the workload of the Supreme Court by screening petitions for review.

Secondary function: To enhance the uniformity of federal law by deciding certain cases presenting intercircuit conflicts.

Composition: Seven circuit judges in active service, drawn on a rotating basis from the federal courts of appeals and serving staggered, limited (e.g., three-year) terms.

Jurisdiction: All cases within the jurisdiction of the Supreme Court, except original proceedings. All petitions for review now filed in the Supreme Court would be filed initially with the NCA.

Procedure: Screening—The NCA would review the petitions for importance, suitability for Supreme Court review, and existence of conflicts. Cases of genuine conflict would be retained and decided by the NCA, unless the NCA certified them as appropriate for review by the Supreme Court. For nonconflict cases, the NCA would select the 400–450 most review-worthy petitions each term and refer them to the Supreme Court. A vote of three of the NCA judges would suffice for certification. The remainder of the petitions would be denied, and such denial would be final. From the referred petitions the Supreme Court would determine which cases it would decide. Should the Court choose not to accept a referred case for review, the Court would have the option of remanding it to the NCA for decision.

Decision—For the cases it retained or received on remand after referral to the Supreme Court, the NCA would sit en banc to hear oral argument and would render a decision (presumably a written one).

Precedent: Decisions in cases heard by the NCA would be final and not reviewable by the Supreme Court. They would bind all other federal courts—and as to federal questions, state courts—unless overruled or modified by the Supreme Court in a later case.

Adapted from Report of the Study Group on the Caseload of the Supreme Court (Federal Judicial Center 1972), reprinted in 57 F.R.D. 573 (1972).

The proposal of the Freund Study Group met with considerable opposition. The idea that the Supreme Court would yield control over its own docket was

anathema to many critics. They believed that if Congress were to make available additional appellate capacity to decide cases the Supreme Court did not have time to decide, the Court should be able to use that capacity as it saw fit. (Technically, the Court would retain some control because it could grant certiorari before judgment in a court of appeals or before a case had been decided or denied review in the National Court of Appeals, but it was well recognized that this power would seldom be exercised, and there was no institutional mechanism proposed to facilitate the Court's ability to spot likely candidates.) Also, the finality of the new court's judgments troubled many observers. The idea of allowing an intermediate court to act as its own gatekeeper and then issue nonreviewable decisions in the cases it chose to retain raised questions of constitutionality and political acceptability.¹⁴⁸

National Court of Appeals (the Hruska Commission proposal). A different version of a new national court was proposed by the Commission on Revision of the Federal Court Appellate System (the "Hruska Commission"). Whereas the Freund Study Group focused on the workload of the Supreme Court, the Hruska Commission was created by Congress in 1972 to study the broader question of the overall capacity of the federal judicial system to provide definitive declarations of national law. Its proposed court differed in focus and composition from the Freund Group's court, although both were called a National Court of Appeals.

The Hruska Commission proposed expanding the appellate capacity of the federal system by creating a specially staffed court to assist directly in harmonizing the national law. The proposal, outlined in the box that follows, responded directly to the vigorous opposition to restricting litigant access to the Supreme Court (however unlikely actual review might be) by providing for "reference jurisdiction" in the new court.¹⁴⁹ The plan would have left the Supreme Court's screening function essentially intact, allowing the Court to set its own agenda, but also would have allowed the Court to refer some cases to the new court. The referral could be mandatory (the new court would be required to decide the case) or discretionary (the new court could decide the case or deny review).

The Hruska Commission's version of the National Court of Appeals would also have provided for that court's review of some cases before they reached the Supreme Court. The "transfer jurisdiction" provision gave the courts of appeals a new role in identifying questions in need of resolution. When a court of appeals identified a case as turning on a rule of federal law that needed prompt clarification, such as when inconsistent appellate decisions had been rendered, the court

¹⁴⁸For two of many critiques of the proposal, see William J. Brennan, *The National Court of Appeals: Another Dissent*, 40 U. Chi. L. Rev. 473 (1973); Eugene Gressman, *The Constitution v. the Freund Report*, 41 Geo. Wash. L. Rev. 951 (1973).

¹⁴⁹A. Leo Levin, *Adding Appellate Capacity to the Federal System: A National Court of Appeals or an Inter-Circuit Tribunal?*, 39 Wash. & Lee L. Rev. 1, 15 (1982).

of appeals could transfer the case to the National Court of Appeals for a nationally binding resolution.

National Court of Appeals (Hruska Commission)

Function: To expand the federal system's capacity to provide stability and harmony in the national law by deciding cases needing resolution at a national level but not needing Supreme Court resolution.

Composition: Seven Article III judges appointed specially to the court.

Jurisdiction:

Reference jurisdiction (discretionary)—Where certiorari is sought, the Supreme Court could refer the case to the NCA and allow the court discretion to decide the case on the merits or to deny review. Denial of review would terminate the litigation and would not be reviewable under any circumstances.

Reference jurisdiction (mandatory)—Where certiorari is sought, the Supreme Court could refer the case to the NCA with directions to decide it on the merits. In addition, the Supreme Court could refer cases within its obligatory jurisdiction (except those the Constitution requires it to accept); the NCA would be required to decide these cases on the merits.

Transfer jurisdiction—The courts of appeals could transfer to the NCA cases in which an immediate decision by the NCA would be in the public interest, provided the case (a) turned on a rule of federal law about which federal courts had reached inconsistent conclusions; (b) turned on a rule of federal law applicable to a recurring factual situation, and the advantages of a prompt and definitive determination of that rule outweighed any potential disadvantages of transfer; or (c) turned on a rule of federal law previously announced by the NCA, and there was a substantial question about the proper interpretation or application of that rule in the pending case.

Procedure: The NCA would sit only en banc.

Precedent: Unless modified or overruled by the Supreme Court, decisions of the NCA would bind all other federal courts and, as to federal questions, state courts.

Adapted from Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change* (1975).

Reactions to the Hruska Commission's proposed National Court of Appeals were also strong and chiefly negative.¹⁵⁰ Part of the controversy arose from concerns about who would appoint the members of the new court. (Unlike the court proposed by the Freund Study Group, this court's membership would be permanent.) Some of the sitting justices of the Supreme Court were concerned about the transfer jurisdiction proposed for the new court, although the reference jurisdiction aspect resolved some of the objections to the Freund Group proposal. Some critics feared that adding a decision point to the Supreme Court's process would only defeat the purpose of the new court by adding to the Court's burden.¹⁵¹ Perhaps to forestall more extensive consideration of a full-fledged new court, more modest proposals for conflict resolution structures surfaced, most taking the form of temporary or permanent panels of circuit judges who would sit to resolve intercircuit conflicts.

Intercircuit tribunal. In the early 1980s, Chief Justice Burger proposed a temporary Intercircuit Panel (ICP) to resolve intercircuit conflicts. This plan would create a pool of twenty-six judges (two from each circuit) who might serve terms of six months. Petitions alleging intercircuit conflict would be made to the ICP, which would be attached administratively to the Court of Appeals for the Federal Circuit. Ad hoc panels of seven to nine judges would be drawn from the pool to decide cases presenting intercircuit conflicts and perhaps some other statutory interpretation cases. Other variations have been proposed, but the key elements of the schemes are similar.¹⁵²

Commentary on Chief Justice Burger's proposal suggested that an intercircuit panel might more profitably be limited to seven to nine judges in its entirety, not

¹⁵⁰Indeed, the Federal Courts Study Committee went out of its way to note that it did not favor a national intermediate court of appeals like the one the Hruska Commission had proposed. That sort of structure, the committee believed, would only solve a piece of the problem besetting the federal courts and would not solve the overall problem of growth in the courts of appeals. Report of the Federal Courts Study Committee 117 (1990).

¹⁵¹Levin, *supra* note 149, at 15, citing Charles R. Haworth & Daniel J. Meador, *A Proposed New Federal Intermediate Appellate Court*, 12 U. Mich. J.L. Ref. 201, 208 (1978).

¹⁵²See, e.g., William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 Fla. St. U. L. Rev. 1, 12-14 (1986) (suggesting the intercircuit panel be a permanent feature of the judicial system).

a pool of twenty-six judges from which panels would be formed. Active and senior circuit judges would be eligible, and the panel would sit en banc in every case. Two-year terms, with a staggered rotation, were suggested as preferable to six-month terms in order to promote continuity and stability.¹⁵³ Much of the other commentary on the proposal questioned the empirical assumptions about the extent of the conflict problem and about the extent to which resolution by such a tribunal would prove significantly helpful in enhancing the consistency and predictability of federal law.¹⁵⁴

The Federal Courts Study Committee considered a recent variation on the inter-circuit tribunal theme that we will refer to as an En Banc Intercircuit Conference (EBIC). That proposal projected a docket of about twenty cases per year. If the Supreme Court were to refer all, or nearly all, of the conflict cases it now decides, the EBIC's annual docket might be closer to fifty. If the Court were also to refer many of the conflict-alleging petitions it now denies, the number would rise substantially. An outline of the ICP and EBIC proposals follows.

Intercircuit Panel (ICP)/En Banc Intercircuit Conference (EBIC)

Function: To expand the federal system's capacity to provide stability and harmony in the national law by deciding cases needing resolution at a national level but not needing Supreme Court resolution.

Composition: ICP—twenty-six judges (two judges from each of the present courts of appeals). EBIC option 1—thirteen experienced judges of the courts of appeals, possibly chief judges, who would serve one-year terms. One judge would be drawn from each of the existing courts of appeals. EBIC option 2—seven to nine judges, selected by a process that would equalize participation by the circuits over time.

Jurisdiction: ICP—all cases raising inter-circuit conflicts, plus unspecified statutory interpretation cases. EBIC—cases certified to the EBIC by a majority of the Supreme Court as presenting a federal question in which a conflict exists between at least two federal courts of appeals, or between a federal court of appeals and the highest court of a state. Its jurisdiction would be mandatory.

Procedure: ICP—seven- to nine-judge panels would be drawn from the pool. EBIC—the inter-circuit conference would sit en banc.

¹⁵³Daniel J. Meador, *A Comment on the Chief Justice's Proposals*, 69 A.B.A. J. 448, 449 (1983).

¹⁵⁴See, e.g., Hellman, *supra* note 125; Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 Harv. L. Rev. 1417 (1987).

Precedent: ICP—Supreme Court would retain certiorari jurisdiction. EBIC—subject only to review pursuant to a writ of certiorari in the Supreme Court; the holdings of the EBIC on federal law would bind all courts, including state courts. A panel of the EBIC could not overrule a decision of a previous panel, unless new legislation or Supreme Court precedent intervened.

Adapted from Chief Justice Warren E. Burger, *Annual Report on the State of the Judiciary*, 69 A.B.A. J. 442 (1983); Federal Courts Study Committee working papers, Vol. II, plan adapted from “In Banc Intercircuit Conference” proposal of Chief Justice Keith M. Callow, Supreme Court of Washington, to the Subcommittee on Administration, Management, and Structure.

Regional intercircuit conflict-resolution tribunals. A different way to expand appellate capacity to resolve conflicts would be to group the current circuits into regions. The regions could be constructed to have an equal number of circuits in each (e.g., four regions of three circuits), or to roughly equalize the caseload across regions.¹⁵⁵ When circuits within the region reached different results, a regional en banc panel could be convened to resolve the conflict. One of the proposals studied by the Federal Courts Study Committee called for four regional tribunals of five circuit judges each, drawn by an unspecified method from the circuit judges in the region. Each judge would serve a one-year term. The latter provision raises some concerns about consistency and predictability over time, but proponents of related structures suggest that problems can be minimized by adopting a “prior panel rule” similar to that already operating within the courts of appeals.

A system of regional intercircuit tribunals could provide regional stability of the law earlier than can be achieved if Supreme Court resolution is required, and could reduce the number of conflicts brought to the Supreme Court. Having several regions would retain, and might even concentrate, whatever benefits percolation offers. But the effects on conflict proliferation are unpredictable. As review of conflicting decisions becomes more likely, judges might become less inclined to create deliberate conflicts, and might develop a sense of responsibility for promoting regional consistency as well as circuit harmony. But this is uncertain. We do not know whether recognition of the rather low chance of Supreme Court

¹⁵⁵One model considered by the Federal Courts Study Committee but not included in its report as a sample structure depicts four regions grouping the circuits as follows: the First, Second, Third, and D.C. Circuits; the Fourth, Fifth, and Eleventh Circuits; the Sixth, Seventh, and Eighth Circuits; and the Ninth and Tenth Circuits. The residence of the plaintiff would determine which intercircuit tribunal would be used for conflicts involving the U.S. Court of Appeals for the Federal Circuit.

review currently causes some judges to avoid creating intercircuit conflicts, deferring to an earlier decision in another circuit even when they would have decided the issue differently on first impression. With more capacity for conflict resolution, judges may feel less constrained to avoid creating conflicts in the first instance. In short, the regional intercircuit tribunals might create their own markets.

Structural and jurisdictional proposals to prevent intercircuit conflicts

Proposals for diverting cases from the regional courts of appeals are typically of two types: those designed primarily to relieve the caseload pressures on the courts of appeals by diverting large classes of cases (with perhaps the side benefit of uniformity) and those designed primarily to foster uniformity and coherence in a particular area of law (and secondarily, if at all, to reduce caseloads). Cases suggested for alternative avenues of review—to remove them from the federal appellate docket—are often high-volume, fact-intensive cases that tend to result only rarely in precedential opinions. Social Security benefits claims, black lung, and some kinds of immigration cases are often mentioned; some would add criminal sentence appeals that involve review only of the underlying factual determinations and guideline calculation of sentences. We will discuss some of these proposals in a later section, but here we will keep our focus on proposals designed primarily to enhance uniformity.

Proposals for routing particular case types to specialized courts or to the Court of Appeals for the Federal Circuit are best characterized as ways to stabilize or maintain the uniformity of national law in particular subject areas. These proposals have two main advantages. First, judges on a specialized court develop greater knowledge and become more efficient when they see many cases of the same type. Second, the law issuing from a more specialized body is likely to be more coherent and consistent because it issues from a relatively small group with a shared body of knowledge. Cases typically suggested as suitable candidates for a subject-matter court do not make up such a large part of the appellate caseload that their diversion would provide significant caseload relief to the regional courts of appeals. Cases commonly identified as best suited for national review for uniformity include those brought under laws administered by agencies such as the Internal Revenue Service, Federal Communications Commission, and National Labor Relations Board. Recent proposals for a Social Security court focus on uniformity of application rather than on caseload reduction. Additionally, some case types involving complex or technical issues, such as environmental regulation or nuclear power, have been mentioned as candidates for diversion from the regional courts of appeals to the Court of Appeals for the Federal Circuit.

National subject-matter courts. Proposals to create courts defined by subject-matter jurisdiction more restricted than that of the regional courts of appeals have been many and varied. Some such courts already exist at the trial and appellate levels, created under both Article III (e.g., the Court of International Trade and the Court of Appeals for the Federal Circuit) and Article I (e.g., the Court of Federal Claims). It is probably fair to say that these courts are seen as success stories; others have not met with the same acceptance.¹⁵⁶

Judges tend to be wary of proposals that are redolent of subject-matter specialization.¹⁵⁷ They generally disfavor creating more Article III appellate courts like the Court of Appeals for the Federal Circuit.¹⁵⁸ Objections to courts with highly restricted subject-matter jurisdiction are grounded in a general hostility in the American legal system to judicial specialization. Such hostility is absent in many European systems, in which specialization is more common. The anti-specialization sentiment in the United States is strong and pervasive, although at least one commentator has referred to the concerns underlying it as reflecting "spectre and mythology."¹⁵⁹

Opponents of subject-matter courts articulate several concerns about specialization. The first concern relates to the selection of judges for a court of narrow jurisdiction. The "spectre" of a specialized court has judges selected for one highly specialized court and remaining there for an entire career. Judicial selection could become increasingly more politicized. It could be difficult to find qualified candidates who are not already associated with particular industries or other parties likely to come before the court, or associated with strongly held positions that could interfere with the appearance or reality of impartiality. Interested parties may be expected to focus their attention on the appointment process and work to assemble a court sympathetic to their needs and positions.

¹⁵⁶ See, e.g., George E. Dix, *The Death of the Commerce Court: A Study of Institutional Weakness*, 8 Am. J. Legal Hist. 238 (1964).

¹⁵⁷ Judge Posner has argued that federal judges are specialized in their function—judging—but not in their subject matter. Richard A. Posner, *Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. Cal. L. Rev. 761, 778 (1983).

¹⁵⁸ Fifty-eight percent of appellate judges who responded to our survey either strongly or moderately opposed the idea of creating more appellate courts with jurisdiction narrower than the regional courts of appeals but broader than a single subject area. Only 16% favored this approach.

¹⁵⁹ Daniel J. Meador, *An Appellate Court Dilemma and a Solution Through Subject Matter Organization*, 16 U. Mich. J.L. Ref. 471, 482 (1983). For general commentary on specialized appellate courts, particularly in the context of current caseload volume concerns, see Posner, *supra* note 157, and Stephen Breyer, *Administering Justice in the First Circuit*, 24 Suffolk U. L. Rev. 29 (1990). For discussion of particular subject-matter courts, see Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. Rev. 1 (1989); Lawrence Baum, *Judicial Specialization, Litigant Influence, and Substantive Policy: The Court of Customs and Patent Appeals*, 11 Law & Soc. Rev. 823 (1977).

Post-selection advantages can also accrue to “repeat players”—those who litigate regularly before the same tribunal. Regardless of whether the parties are inclined or able to influence the appointment process, the experience of litigating before the same judges over and over gives the frequent litigant the advantage of familiarity and predictability.¹⁶⁰ If the predictability that comes from small courts is an advantage, it seems a fair advantage to promote only if all parties benefit equally from it. Where a few parties benefit from litigating regularly before the same judges, outcomes could be apparently or actually skewed in their favor. The result can be unfairness and diminished judicial credibility.

In addition to the concerns about the pre- or post-selection “capture” of the judges on a court of specialized jurisdiction, there is the concern that the judges’ vision will narrow with continued service concentrating on a particular area. This “tunnel” or “slit” vision, the argument goes, contributes to the creation of an overly arcane, insular area of law.¹⁶¹

Finally, some believe specialized courts result in lessened prestige for their members. The status of the federal judge, it is argued, derives in part from the generalist nature of the position. The actual risk of boredom and the presumption of boredom by those who would not consider sitting on a specialized court could result in a court of diminished stature and, ultimately, diminished quality.

Notwithstanding a general hostility to specialized Article III courts, many judges do favor alternatives that would divert cases from Article III courts to other forums that could only be called specialized. For example, judges who responded to our survey favored more and different ways of dealing with high-volume case types, particularly review of administrative rulings on disability claims. They were less enthusiastic about diverting prisoner litigation, however burdensome, to another forum. Although there may be considerable support for developing effective grievance procedures in prisons and for requiring prisoners to use these procedures before resorting to the federal courts, there is a fair amount of opposition (particularly among appellate judges) to the idea of creating an Article I court to handle prisoner cases. Therefore, the main objection seems to be to a specialized Article III judiciary, not to specialization as a way of deciding cases (at least if Article III review is available at some point in the process).

One of the proposals the Federal Courts Study Committee suggested for further study would combine the regional features of the current system with some of the benefits of specialization. The courts of appeals would continue to hear most cases now within their jurisdiction, but cases in areas of the law found to be in particular need of uniformity or stabilization would be routed to a nonregional

¹⁶⁰Pierce found some evidence for this possibility in his study of the special oil and gas panel of the Fifth Circuit, although he does not suggest that outcomes were affected by the familiarity the panel developed over time with attorneys regularly arguing before it.

¹⁶¹See Ellen R. Jordan, *Specialized Courts: A Choice?*, 76 Nw. U. L. Rev. 745, 748 (1981).

court dealing with that subject matter. The scheme's basic structure is set out in the following box.

National Subject-Matter Courts

Structure:

U.S. Supreme Court (unchanged)

U.S. courts of appeals—twelve regional courts of appeals, plus subject-matter courts as established

U.S. district courts (unchanged)

Litigation path:

1. Trial:

U.S. district court

2. Appeal as of right:

To regional court of appeals for the circuit if no subject-matter court has been established for that case type. Regional court of appeals may route a case to a subject-matter panel if no subject-matter court for that type exists.

To subject-matter court of appeals if one has been established for that case type.

3. Discretionary review:

U.S. Supreme Court

Conflict avoidance/resolution:

Some conflict avoidance inherent in organization into subject-matter courts. Regional courts of appeals could establish subject-matter panels at their option.

Adapted from Report of the Federal Courts Study Committee 120–21 (1990).

Case types that have been suggested as possibly suited for centralized review include tax, Social Security, other administrative law areas, criminal, admiralty, and civil rights. We discuss only a few of the possibilities below. Different policy considerations apply to the many possible choices. Regardless of the subject-matter areas chosen for centralized review, it is critical that the nature of the cases or claims to be routed to a subject-matter court be clear and readily identified.

Otherwise, wrangling over the proper route of review will prolong litigation, increase costs, and impose new burdens on the courts to resolve jurisdictional issues. Many cases with an apparent "specialty" component actually present mixed or multiple questions that are generally within the purview of the regional courts of appeals.¹⁶² This can make it difficult to draft clear legislation prescribing the route of review but can also offset some of the dangers of specialization. For example, the fact that the Court of Appeals for the Federal Circuit reviews all cases brought under particular jurisdictional statutes, rather than isolated issues, means that the range of matters actually determined by this court of narrow jurisdiction is still fairly broad.

Centralized review of administrative agency actions. Occasionally, proposals are made to divert all administrative appeals to a specialized Article III court. There is some argument that this is already a partial reality, as the Court of Appeals for the District of Columbia Circuit handles nearly 40% of the caseload of the regional courts of appeals that can be readily categorized as review or enforcement of agency actions. Significant numbers of administrative cases are also reviewed by the Court of Appeals for the Federal Circuit.

Cases involving federal regulatory programs pose characteristic difficulties. Rule-making and rate-making actions often generate voluminous records and involve conflicting issues of fact and policy.¹⁶³ Resolution of disputes over federal regulations often involves complex technical, scientific, or economic issues. In these contexts, special expertise may be useful. Additionally, areas of law involving government programs often have a special need for uniformity to ensure both smooth operation of the programs and fairness to similarly situated citizens in different jurisdictions, so continuity of decision makers may be desirable.

The Administrative Conference of the United States (ACUS) has suggested criteria for selecting case types that might be suitable for diversion to a specialized tribunal. These criteria suggest selection of administrative programs from which a consistently large volume of cases may be expected, so that diversion would aid the generalist courts. Additionally, the case types should be those in which factual issues tend to predominate or in which the resolution would benefit from scientific or other technical expertise. Finally, specialized review may be most appropriate when uniformity in the agency's program administration is particularly important.

The ACUS does not favor diverting all administrative cases from the courts of appeals to a single specialized court, but recommends that if a specialized court is

¹⁶²Breyer, *supra* note 159, at 41.

¹⁶³Administrative Conference of the United States, *Specialized Review of Administrative Action*, Recommendation 91-9, 1 C.F.R. § 305.91-9 (1991). See also Gordon Bermant et al., *The Cases of the United States Court of Appeals for the District of Columbia Circuit* (Federal Judicial Center 1982).

created, its enabling legislation should preclude de novo review of factual issues already subject to formal adjudication at the agency. The legislation should also provide that the specialized court's decisions on questions of fact specific to the case (including the sufficiency of the evidence) would be final. Finally, if the specialized court is an Article I court, review of questions of constitutional or statutory interpretation should be available in an Article III court.¹⁶⁴

Centralized review of benefits decisions. In discussions of intercircuit conflicts, a commonly cited example of the potential unfairness of conflicts has a person being denied benefits that someone in another area of the country is granted because of different statutory interpretations by different courts of appeals. The usual example involves actions by the Social Security Administration, which must attempt to administer a vast national program equitably despite the possibility of different judicial decisions throughout the federal court system.

Benefit programs such as Social Security engender a great deal of litigation. (As the experience of the 1980s shows, much of this is within the control of the executive branch of the federal government.) The review of administrative decisions in these sorts of programs entails district-level review of massive records, frequently by magistrate judges. Diverting these cases to another forum could therefore substantially lighten the load of the district courts. Although the Federal Courts Study Committee rejected or deferred consideration of many variations on the specialization theme, it did recommend creation of an Article I court to review Social Security disability claims. Such a court might ultimately review other administrative benefits claims as well.

Diverting Social Security and other benefits cases would not substantially assist the courts of appeals. Nationwide, appeals involving the Social Security laws make up a small part of the docket of the courts of appeals (about 1.8% of all cases appealed from the district courts and about 2.5% of the civil cases). Thus, diversion of Social Security cases alone would not provide significant caseload relief to the courts of appeals. Moreover, the cases are generally perceived to be among the easier appeals to decide and seldom receive oral argument or result in a published opinion, so the judge time saved by diverting them would likely be minimal.¹⁶⁵ Nevertheless, circuit judges strongly favor creating an Article I court to handle appeals of administrative rulings on disability claims. Sixty-two percent of those who responded to our survey expressed support, while 23% opposed the

¹⁶⁴The ACUS opposes the allocation of review of all administrative cases to a single specialized court, in or out of the Article III system. Administrative Conference of the United States, *Specialized Review of Administrative Action*, Recommendation 91-9, 1 C.F.R. § 305.91-9 (1991). See also Harold H. Bruff, *Coordinating Judicial Review in Administrative Law*, 39 UCLA L. Rev. 1193 (1993); Richard Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. Pa. L. Rev. 1111 (1990).

¹⁶⁵Breyer, *supra* note 159, at 33.

idea. Similarly, 66% of district judges who responded supported such an Article I court, while 15% opposed it.

Centralized review of tax cases. The Federal Courts Study Committee found the area of federal tax law particularly in need of uniform treatment and a likely candidate for centralized decision making.¹⁶⁶ The committee recommended that Congress create an Article III appellate division of the United States Tax Court. That court would have exclusive jurisdiction over appeals in federal income, estate, and gift tax cases. The committee also recommended that the current dual-track system for trial-level adjudication of tax cases be changed.¹⁶⁷ Rather than tax cases being litigated in the district courts, the Court of Federal Claims, and the U.S. Tax Court, most tax cases would be routed to the trial division of the Tax Court. (Criminal tax cases and certain other types of cases would remain within the jurisdiction of the district courts.) Both the trial and appellate tax divisions would ride circuit as needed.

Alternative Tax Adjudication Structure

Structure:

U.S. Supreme Court (unchanged)

Regional court of appeals (unchanged), plus U.S. Tax Court Appellate Division (Article III)

U.S. district courts (unchanged)

U.S. Tax Court Trial Division (Article I)

Litigation path:

1. Trial:

U.S. district court—criminal tax cases, enforcement actions to fix jeopardy assessments, and actions to enforce federal tax liens

U.S. Tax Court Trial Division—all other tax cases

¹⁶⁶This was not a new suggestion. The idea of centralized tax adjudication or centralized review of tax cases has been floated repeatedly over the years, at least since Dean Erwin Griswold's proposal. See Erwin Griswold, *The Need for a Court of Tax Appeals*, 57 Harv. L. Rev. 1153 (1944).

¹⁶⁷Currently, tax claimants may pay the disputed tax and sue for a refund either in the appropriate district court (where they may receive a jury trial) or in the U.S. Court of Federal Claims. Alternatively, they may fail to pay the tax and contest the deficiency in the U.S. Tax Court.

2. Appeal as of right:

From U.S. district court to appropriate regional court of appeals. From U.S. Tax Court to Article III appellate division of Tax Court.

3. Discretionary review:

U.S. Supreme Court

Adapted from Report of the Federal Courts Study Committee 69-72 (1990).

These changes were predicted to “rationalize tax adjudication, reduce forum shopping, relieve workload pressures on the existing Article III appellate courts, and reduce the pressure on the Supreme Court to grant certiorari in tax cases to resolve intercourt conflicts.”¹⁶⁸ As the majority indicated, and as the dissenters stressed, the alternative system would not significantly lighten the caseloads of the regional courts of appeals.¹⁶⁹ The greatest advantage of the proposal, the committee believed, would be specialization. We have not attempted to validate the implicit belief of the majority that the current system of tax adjudication creates unnecessary disharmony, nor the statement of the dissenters that the number of intercourt conflicts in the tax area is not more than two or three per year. Some support for the latter conclusion is found in the report of a task force on the civil tax litigation process.

The existing problems of uncertainty and lack of uniformity in the application of the tax laws in our view are not significantly attributable to conflicting appellate decisions, or to the nonapplicability of stare decisis between circuit courts. Rather, these problems arise from the great complexity of tax legislation and of the economic transactions to which it applies, the inability (or economic impracticability) for taxpayers, their advisers, and IRS personnel to master all of the potentially relevant complexities, the constant legislative changes, and the absence of any guiding authority in the form of regulations, rulings or judicial decisions on many issues. Under such circumstances, taxpayer reporting and tax audits are quite lacking in uniformity, but little of this disparity can be ascribed to or solved by appellate procedures. Any perspective concerning the role of appellate procedure in promoting certainty in tax matters must consider that only a small proportion of the millions of

¹⁶⁸Report of the Federal Courts Study Committee 70 (1990).

¹⁶⁹As the committee noted, the number of tax appeals is not great relative to the total appellate caseload. In statistical year 91, only about 1.5% of the civil cases appealed from the district courts were tax suits. See Administrative Office of the U.S. Courts, Annual Report of the Director, 1991, at Table B-7.

matters reportable on tax returns ever reach appellate courts, that clearly conflicting appellate decisions are rare, and that many years ensue after the effective date of new legislation before that legislation is the subject of any judicial decision.¹⁷⁰

These views lead us to the final reason judges may see intercourt conflicts as less troublesome than many other problems in the federal system: Intercircuit conflicts are but one source (or reflection) of the indeterminacy of the law in a common-law system of adjudication. In this view, there are numerous sources of indeterminacy and uncertainty. Without looking at the broad range of sources, we cannot know how important different judicial interpretations of a statute are to the overall picture.¹⁷¹ The views quoted above about tax conflicts may be representative of a larger issue—that an important cause of indeterminacy is the inherent ambiguity of many federal statutes.

Our survey results accord with this perception: Judges were more inclined to attribute difficulty in knowing the law to a lack of legislative clarity than to intercourt conflict. Indeed, about two-thirds of the appellate judges responding to our survey found ambiguous legislation created at least a moderate problem, and nearly a third called the problem large or grave.

Legislative contributions to consistency

If judges and federal tax practitioners are correct, some intercourt conflicts could be averted by clear, thorough drafting of legislation. For example, one of the intercourt conflicts that may be resolved soon by the Supreme Court is whether the Civil Rights Act of 1991 should be applied retroactively. The question has been litigated in at least eight circuits. The executive branch has taken two different positions on the issue. The legislative history is unclear. Virtually all of the time devoted to litigating this issue in the courts of appeals and in the Supreme Court could have been avoided had Congress spoken clearly on the issue of retroactivity.

Legislation, particularly legislation as controversial as the Civil Rights Act, is inevitably the result of compromise, and legislative compromises often promote obfuscation. In some instances, Congress may deliberately refrain from deciding and clarifying some issues. The courts have no choice but to resolve open issues, but it would be inappropriate to suggest that differing statutory interpretations

¹⁷⁰Report of the American Bar Association Task Force on Civil Tax Litigation Process 22 (undated).

¹⁷¹And to the extent that different judicial interpretations of federal law are a source of indeterminacy, the number of circuits may not be the critical factor. Scholarly analysis of intercourt conflicts does not typically reveal twelve or thirteen different ways of construing a statute. More often, two or three plausible interpretations compete for judicial acceptance.

reflect a flaw in judicial structure if the source of the confusion is a deliberate decision to achieve legislative consensus by leaving the matter to the courts.

More often, perhaps, the linguistic ambiguity of statutes is inadvertent. Where bills are rushed through in the closing days and hours of a legislative session or simply given less than optimal attention, confusing language can become law. Recently, nonstructural efforts to address this problem have been undertaken. For example, the Judicial Conference's Committee on the Judicial Branch, with the help of the Governance Institute, has developed and implemented a program to alert Congress to court decisions that reflect judicial difficulty in ascertaining Congress's meaning in a particular statute.

Under that program, appellate court decisions that meet certain criteria are forwarded by court staff to the legislative counsel's office in the House of Representatives and in the Senate. Errors or ambiguities flagged in the decisions tend to be technical omissions (e.g., whether federal preemption over state law was intended, what statute of limitations was intended) or grammatical and linguistic glitches.¹⁷² The opinions are sent to alert Congress to problems being caused by these technical gaps or infelicitous wordings. Case selection guidelines are designed to ensure that the interbranch communication will focus on technical issues, not substantive issues of law. The goals of the guidelines are to "be respectful of the institutional prerogatives of either branch, not burden either branch, be technically sound and contribute to informed decision making by the judiciary and the Congress."¹⁷³

A more systematic approach to the gap filling and clarification—one that could reduce the amount of litigation over the meaning of statutes—can be found in suggestions for ad hoc or standing commissions whose mission is periodic law reform and revision. Rather than a third-branch solution of a new panel or court, or an interbranch solution of information exchange, such an approach would locate in Congress itself a conflict avoidance/conflict resolution mechanism of law clarification. In the early decades of the twentieth century, Roscoe Pound and Benjamin Cardozo made such proposals, for example, for a Ministry of Justice that would provide constant, scholarly review and reformulation of statutes and judge-made law.¹⁷⁴ Such commissions exist in some states and have been proposed at the national level.¹⁷⁵

¹⁷²Cris Carmody, *Branches Try to Communicate; Congress and the Courts*, Nat'l L.J., July 19, 1993, at 3.

¹⁷³Robert A. Katzmann, comments at *Assessing the Effects of Legislation on the Workload of the Courts*, conference held at the Federal Judicial Center (April 23, 1993).

¹⁷⁴Benjamin N. Cardozo, *A Ministry of Justice*, 35 Harv. L. Rev. 113 (1921); Roscoe Pound, *Anachronisms in Law*, 3 J. Am. Judicature Soc. 142 (1920).

¹⁷⁵For a list of legislative proposals to create such a mechanism at the national level, see Ruth Bader Ginsburg, *A Plea for Legislative Review*, 60 S. Cal. L. Rev. 995, 1012–13, n.117 (1987).

V. Effects of Caseload Volume on Intracircuit Conflict

Intracircuit inconsistency—the nature and extent of the problem

Concerns about the consistency and clarity of law within individual circuits arise from two related phenomena. First, as a court handles more appeals it produces more decisions. Other judges on the court are bound by these decisions and so must read more and more opinions to stay current with the law of the circuit. Second, as a court receives more appeals, it must grow if it is to continue giving appeals proper attention in a reasonable time. Therefore, the number of possible combinations of decision makers grows, increasing the chances of divergent approaches to the same legal issues.

Judicial views on the consistency of circuit law. Most of the judges who responded to our survey did not see intracircuit inconsistency as a major problem in the context of problems facing the federal courts. The vast majority of appellate judge respondents (80%) said the difficulty of discerning circuit law because of lack of clear precedent either was not a problem or was only a small one. Comments by circuit judges at the Center's national workshop for appellate judges revealed somewhat more concern about the consistency of circuit law than might have been expected from this pattern of survey responses. Fearing that aggregate survey responses might be masking a more significant problem in some circuits, we looked more closely at the results from individual courts. No judge reported the lack of clear precedent to be a grave problem. Only five judges (from four circuits) called it a large problem. The highest percentage of respondents calling the lack of clear precedent a moderate problem came from the Sixth Circuit, followed by the Ninth Circuit.

District court judges, like attorneys and litigants, are consumers of appellate opinions. They rely on their court of appeals for clear, consistent circuit law. If there is a problem of inconsistency, they are likely to experience it. Circuit judges may not be in the best position to evaluate the consistency and clarity of the legal rules they prescribe, so it is interesting to note that the responses of district judges did not differ substantially from those of circuit judges. A strong majority of the active district judge respondents (68%) called the problem of unclear precedent a small or nonexistent one. And in view of claims that intracircuit conflict is one of the dangers of large courts, it is especially interesting that the responses from district judges in individual circuits did not break out neatly by the size of their respective courts of appeals. As many might have predicted, the highest percentages of district judges calling the problem of unclear precedent large (17%) or grave (4%) came from the Ninth Circuit, the system's largest. But the next high-

est percentages (8% large, 4% grave) came from the First Circuit, the system's smallest.¹⁷⁶

Lawyers' views on the consistency of circuit law. Recently, the Appellate Practice Committee of the American Bar Association's Section of Litigation asked a subcommittee to study and report on circuit size. One of the issues the subcommittee focused on was the relationship between a circuit's size and its ability to avoid intracircuit conflicts. That subcommittee reported that it found "no evidence that a larger circuit necessarily causes significantly more intracircuit conflicts than a circuit of ten to fifteen judges." Moreover, the committee noted, conflicts are not necessarily unacceptable if promptly resolved.¹⁷⁷

In sum, despite concerns about the proliferation of precedent as the courts of appeals grow, there is currently little evidence that intracircuit inconsistency is a significant problem. Also, there is little evidence that whatever intracircuit conflict exists is strongly correlated with circuit size.

The empirical record—Ninth Circuit case law. In the only systematic study of the operation of precedent in a large circuit, Prof. Arthur D. Hellman studied the efforts of the largest appellate court in the federal system, the Ninth Circuit, to maintain a consistent body of law.¹⁷⁸

Hellman found that the Ninth Circuit has generally succeeded in avoiding conflicts between panel decisions. Although there can be disagreement over what constitutes an intracircuit conflict, he found that the points of dispute would be irrelevant in the vast majority of cases. His study found very few instances in which two panels reached contrary results that could not easily be reconciled on the basis of obvious differences in the factual or legal setting. Moreover, when decisions were not unanimous, dissenters rarely argued that circuit precedent compelled a result contrary to the majority's.

¹⁷⁶Note that the item did not ask judges to focus on the law of their own circuits, so it is possible judges were responding about the system as a whole and expressing concern about the state of the law in other circuits. In light of the overall response patterns and the unsolicited comments of several judges that they were responding about their own circuits, we believe this interpretation to be implausible, but not impossible. Also note that conclusions drawn from small numbers are problematic. These percentages are based on 105 responses from district judges in the Ninth Circuit and 26 responses from district judges in the First Circuit.

¹⁷⁷Subcommittee to Study Circuit Size, Appellate Prac. Committee, American Bar Association, *Report on Federal Circuit Size*, Appellate Prac. J. and Update 1 (Winter 1993).

¹⁷⁸Hellman analyzed one-fifth of the court's published panel decisions in calendar years 1983 and 1986, along with later cases involving the same issues. He also analyzed all published panel decisions in which dissents were issued in 1986. Hellman also attempted to determine what makes for unpredictability in appellate outcomes. To identify sources of unpredictability, he analyzed the cases in which one member of the panel dissented from the majority's decision or rejected its reasoning. The premise was that disagreements of this kind provide concrete evidence that an appeal might be decided differently depending on the composition of the panel.

Hellman also concluded that contrary to what some observers have hypothesized, in the Ninth Circuit the unpredictability of appellate outcomes is not primarily a consequence of the proliferation of precedents. The study found that what makes for an unpredictable outcome generally is not an oversupply of circuit decisions, but the absence of a circuit precedent that is closely on point.

From the perspective of lawyers and trial judges, the most serious problem associated with the large appellate court is the existence of multiple precedents governing the same issue. A "multiple-precedent issue" is created when the number of precedents is large, the results are varied, the decisions are handed down in a relatively short span of time, and the opinions discuss the operative facts in some detail. Typically, multiple-precedent issues involve fact-specific legal rules (e.g., defining the moment when a defendant has been arrested), but some arise when the law is in the process of evolution because the courts are still struggling to articulate the governing standard (e.g., a union's duty of fair representation). The study estimated that about one-sixth of the Ninth Circuit's published decisions may involve a multiple-precedent issue. The question remains whether these circumstances make the law unpredictable for lawyers and trial judges irrespective of the number of binding relevant precedents.¹⁷⁹

Current efforts to maintain the consistency of circuit law

It may be that judges do not see intracircuit inconsistency as a major problem in part because they are more aware than outsiders of how the courts work to minimize inconsistency. Different courts of appeals have adopted different ways of promoting the consistency of circuit law. Some have suggested additional ways of dealing with precedent problems that are arguably created by a large circuit. If such methods can be shown to succeed, large circuits might gain greater support within the judiciary and the disruptions of circuit-splitting might be avoided.

En banc review. As courts of appeals grew, the occasional failures of the prior panel rule, changing circumstances and court composition, and the decreasing likelihood of Supreme Court review required the courts to pay additional attention to the consistency and coherence of circuit law. For the past several decades, the primary formal way of declaring circuit law in troublesome areas has been to assemble the entire cohort of eligible active circuit judges to consider a case or issue en banc. Like all procedures and structures that add another level of review, en banc rehearings subjugate the value of finality to other values served by the appellate system. Although many rehearings are at the request of an

¹⁷⁹Full reports of this study can be found in three of Hellman's publications: *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. Chi. L. Rev. 541 (1989); *Maintaining Consistency in the Law of the Large Circuit*, in *Restructuring Justice* 55-90 (Arthur D. Hellman ed., 1990); and *Breaking the Banc: The Common-Law Process in the Large Appellate Court*, 23 Ariz. St. L.J. 915 (1991).

aggrieved party, circuit judges may also initiate en banc consideration if they can muster a sufficient number of votes. In this regard, the value of circuit law consistency and coherence is allowed to take precedence over the values of finality and economy to litigants.

En banc hearings and rehearings represent a tiny fraction of all cases decided by the courts of appeals. In statistical year 92, the courts of appeals issued 98 en banc decisions out of more than 25,000 cases terminated on their merits. The number of en banc decisions issued annually by the entire regional appellate court system has hovered around 85 to 110 for the last decade or so.¹⁸⁰ Courts vary in the frequency with which they use the procedure, but seldom does a court of appeals grant en banc review in more than 0.5% of its merits terminations in any year. En banc review by the full court is cumbersome and time-consuming, and can lead to bitterness and dissension.¹⁸¹ The knowledge that en banc rehearing is possible is thought to encourage judges to keep their decisions in line with the majority view of the court, although the impact of this constraint may be diminished with the diminishing likelihood that the procedure will be invoked.

Limited en banc panels. Courts of appeals of more than fifteen active judges are permitted to perform their en banc function with fewer than all active circuit judges.¹⁸² To date, only the Ninth Circuit has availed itself of this option, although two other courts of appeals now exceed the fifteen-judge threshold. The authorizing statute permits the court of appeals to prescribe by rule the composition of any en banc panel of fewer than all active circuit judges. By local rule, the Ninth Circuit provides for en banc panels comprising the chief judge of the circuit (or, in the absence of the chief judge, the next most senior active judge) and ten additional judges drawn by lot from the active judges of the court. An exception to the randomness requirement provides that if a judge is not drawn for three successive en banc courts, the judge's name is placed automatically on the next en banc panel assembled.

Some critics of the limited en banc procedure see it as undesirable because it could allow a minority view to become the judgment of the "full" court.¹⁸³ The Ninth Circuit's procedure provides a safety valve by which a majority of the court's active judges can cause a case decided by a limited en banc panel to be reheard by the full court. We understand that this provision has never been invoked, which is some indication of the court's views on the legitimacy of the process and on any danger of unrepresentativeness (or perhaps a recognition of the difficulty of an en banc proceeding with twenty-eight judges). Indeed, the

¹⁸⁰Appendix F gives precise figures for the years 1974 through 1992.

¹⁸¹Howard, *supra* note 2.

¹⁸²28 U.S.C. § 46(c) (1988); Pub. L. No. 95-486, § 6, 92 Stat. 1633 (1978).

¹⁸³And, as one of our survey respondents observed, "Limited en banc' is an oxymoron! It's either the court en banc or it isn't."

procedure may enhance collegiality: Some Ninth Circuit judges report a heightened sense of responsibility to represent the views of all the judges of the circuit when sitting on a limited en banc panel.

The Federal Courts Study Committee recommended that all the courts of appeals be permitted to perform their en banc functions by panels of whatever size the court chooses and prescribes by rule, so long as the panels include nine or more judges in those courts having nine or more authorized judgeships.¹⁸⁴ The Judicial Conference has taken no position on this recommendation.¹⁸⁵ Our survey reveals that appellate judges are divided on the desirability of the limited en banc procedure—about 37% strongly or moderately support it and about 30% strongly or moderately oppose it. Most, of course, have no experience with it, so individual circuit analyses are instructive. Ninth Circuit appellate judges overwhelmingly support increased use of limited en banc panels (44% strongly, 30% moderately). The American Bar Association's subcommittee report on circuit size reported observing no problems with the limited en banc practice to date and recommended that other circuits consider adopting it as they grow larger.¹⁸⁶

Prepublication circulation of opinions. In several courts, judges circulate draft opinions to other members of the court before publishing them.¹⁸⁷ Judges are expected to respond within a certain period of time (which varies across circuits) if they believe the opinion conflicts with the law of the circuit or if they have a case pending on a similar issue and a consistent approach is needed. In this way, some inconsistencies among panel decisions can be avoided before the opinion is released.

At least one court occasionally uses prepublication review to resolve apparent conflicts within the circuit. In the District of Columbia Circuit, if the panel's resolution of the issue is agreed to by the entire court, the panel decision may include a footnote indicating the resolution of the conflict and noting that the issue has been separately considered and approved by the full court, and thus constitutes the law of the circuit.¹⁸⁸ The First Circuit also minimizes resort to en banc petitions by circulating precedent-modifying opinions to the court before publication.

This sort of "informal" en banc review is not without its critics. Before the practice became common in some circuits, one commentator described its use in

¹⁸⁴Report of the Federal Courts Study Committee 114-15 (1990).

¹⁸⁵Judicial Conference of the United States, Proc. 89 (1990).

¹⁸⁶Subcommittee to Study Circuit Size, *supra* note 177, at 5.

¹⁸⁷Information obtained from the courts suggests that prepublication review of opinions is routine in the D.C., Second, Third, Fourth, Sixth, Tenth, and Federal Circuits, and is encouraged or required in several of the others under certain circumstances.

¹⁸⁸*See* *Irons v. Diamond*, 670 F.2d 265, 268 n.11 (D.C. Cir. 1981). The procedure came to be known on the court as an "Irons footnote."

a Second Circuit case as “perhaps more offensive” than en banc review to the tradition of litigant control in an adversary system.¹⁸⁹ More recently, a dissenting statement in the Federal Courts Study Committee report expressed concern about the committee’s recommendation that opinions that would create an intercircuit conflict be circulated before release for the comments of other judges on the court.¹⁹⁰

Nonjudicial staff contributions to consistency. As we noted in our discussion of the role of central staff attorneys, some courts use central staff to review panel decisions for consistency with the law of the circuit and to alert a panel when another case raising the same issue is pending before another panel.¹⁹¹ Such procedures may provide for problems identified by staff attorneys to be reported by memorandum to the panel or to the full court. The court can then decide whether there is a real inconsistency and, if so, how to resolve it.

Additional proposals to enhance the consistency of circuit law

If the consistency of circuit law becomes a major problem that needs to be addressed in some or all circuits, alternatives short of structural change might be useful first steps. These proposals call for organizational changes within the courts of appeals to promote the uniformity of decisions within the circuit. Some versions of the proposals could be adopted by the courts on their own; others might require statutory changes less drastic than reorganizing the circuits themselves.

Hierarchical organization within the current courts of appeals. One approach to curtailing the growth of intracircuit (and perhaps intercircuit) conflict without creating a full-fledged additional tier between the courts of appeals and the Supreme Court would permit or require the courts of appeals to create a two-level hierarchy within each court to help ensure uniformity. Judge Levin Campbell described one such system, suggesting “a senior panel empowered to speak definitively and finally for that circuit, which would define the law of the circuit through cases that it chooses to hear, and a second tier consisting as now of panels of three made up from the remaining judges, whose opinions would be published and precedential, until or unless overruled or modified by the senior circuit panel.”¹⁹²

¹⁸⁹Carrington, *supra* note 21, at 583 n.183.

¹⁹⁰Report of the Federal Courts Study Committee 129 (1990) (separate statement and dissent of J. Vincent Aprile II).

¹⁹¹We understand that the courts of appeals for the Ninth Circuit and the Federal Circuit use central staff for this purpose, and others may as well.

¹⁹²Levin H. Campbell, *A New Tier?*, in *The Federal Appellate Judiciary in the 21st Century* 55 (Cynthia Harrison & Russell Wheeler eds., Federal Judicial Center 1989). Judge Campbell later

This proposal may be within the current authority of the larger courts of appeals. The legislation that authorized courts of appeals with more than fifteen judges to organize themselves in divisions and carry out their en banc functions in smaller groups does not prescribe how the smaller groups should be formed. The Ninth Circuit has chosen to create its limited en banc panels by random selection (within certain constraints). If a court of appeals with more than fifteen judgeships wished to create a limited en banc panel of the active circuit judges with the longest tenure on the court, it could essentially implement the scheme now.¹⁹³ Alternatively, the court might choose to create standing limited en banc panels chosen for expertise in a particular subject matter. Or membership on the higher tier could be rotated periodically so that all the judges would share the responsibility of circuit law oversight. Whatever the method used to determine panel membership, the goal would be to promote doctrinal unity in the circuit.

Stable-panel organization of the regional courts of appeals. Courts that are growing might also maintain or enhance the consistency of circuit law by reducing the number of possible decision makers for any given case. Rather than have regular reshuffling of panel composition and quasi-random assignment of cases, the courts could organize themselves into more stable decisional units. Possible models for such reorganization differ according to panel composition and source of cases for each panel. The following box sets out a possible model.

Stable-Panel Organization by District from Which Appeal Arises

Court structure: Each regional court (perhaps each court larger than a certain number of judges, e.g., fifteen) would organize itself into divisions no larger than nine, with the number of panels to be determined by the volume of cases or the number of districts in the circuit.

Division and panel structures: Divisional assignment could be random or geographically based. Some judges might serve "at large." Panels would be randomly chosen, perhaps with constraints ensuring a minimum level of seniority represented on the panel. Panels would remain stable for long periods, though not permanently.

served on the Federal Courts Study Committee as chair of the Subcommittee on Administration, Management, and Structure.

¹⁹³The Federal Courts Study Committee recommended that the authorization for limited en banc be extended to all circuits, not just circuits of fifteen or more judgeships.

Litigation path: From any given district court, an appeal would lie to a particular three-judge panel (alternatively, to a panel drawn from a stable seven- to nine-judge pool). If administratively feasible, cases could be routed to particular panels according to the identity of the trial judge.

Adapted from Paul D. Carrington, *An Unknown Court: Appellate Caseload and the "Reckonability" of the Law of the Circuit*, in *Restructuring Justice* 206 (Arthur D. Hellman ed., 1990) and Donald P. Lay, *The Federal Appeals Process: Whither We Goest? The Next Fifty Years*, 15 *Wm. Mitchell L. Rev.* 515, 529 (1989).

Stable panels could also be established if and when a court found it desirable to stabilize a particular area of the law. Proponents argue that this arrangement would allow the courts to cope with growth and retain the desirable features of regional circuits without severely worsening problems of intracircuit conflict.¹⁹⁴ Their goal is to remedy what some perceive as a "Tower of Babel" effect, in which a court speaks through multiple, often disharmonious, voices. By having similar cases decided largely by the same judges for an extended period, the courts of appeals could increase predictability and uniformity. In brief, the approach would organize the current courts of appeals into panels or divisions whose five to seven members would hear and decide all appeals in a few broad categories of cases. Membership on a panel or division would change gradually, thus avoiding long-term specialization of individual judges and the associated problems of "capture" and "tunnel vision." The stability and predictability of circuit law could be enhanced without abandoning the values and traditions of a generalist judiciary.

The box that follows gives one example of how a court of appeals could organize two five-judge groups to provide consistency of decision making in seven areas of law. Judges A through E (Group 1) might hear all cases arising in the areas of admiralty, public lands, and tax. Judges F through J (Group 2) might hear all cases arising in the areas of copyright, trademark, securities, and Indian law. (The case types are only examples; actual case types could be selected by individual courts.) All the appeals in the designated areas would be routed to these panels, but the judges would spend most of their time on panels with other judges of the court. Thus, each judge would continue to be a generalist judge exposed to

¹⁹⁴The subject-matter organization approach was described briefly in Carrington et al., *supra* note 2, and developed further in Daniel J. Meador, *An Appellate Court Dilemma and a Solution Through Subject Matter Organization*, 16 *U. Mich. J.L. Ref.* 471 (1983), and Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 *U. Chi. L. Rev.* 603 (1989).

a wide array of cases, but areas that would benefit from some continuity of decision makers would receive it.

Stable-Panel Organization by Subject Matter

Structure: Each court of appeals would be permitted to organize itself as needed into smaller groups (e.g., five judges) that would decide all appeals arising in particular subject-matter areas. Three-judge panels would be drawn from the appropriate subject-matter grouping. The panels would be formed and rotated such that all members of the five-judge group would sit together with approximately equal frequency. Judges would also sit with other members of the court for appeals not in their subject area.

Example: Circuit X creates two five-judge groups (Judges A–E and F–J). These judges spend about one-third of their time on cases assigned to their subject groups; the other two-thirds of their time is spent on cases in which they sit with other members of the court.

Month	Group 1	Group 2
January	ABC	FGH
February	BCD	GHI
March	CDE	HIJ
April	DEA	IJF
May	EAB	JFG
July	ACD	FHI
August	BDE	GIJ
September	ABD	FGI
October	ACE	FHJ
November	BCE	GHJ

From Daniel J. Meador, *Struggling Against the Tower of Babel*, in *Restructuring Justice* 195 (Arthur D. Hellman ed., 1990).

One advocate of this sort of arrangement suggests that a court wanting to test the plan should start with relatively uncontroversial case types to work out administrative issues that will arise as the plan is implemented. Then, if the court finds the general approach acceptable, it could extend the system to cases in other

subject-matter areas that the court believes need to be stabilized. If successful, this advocate asserts, "one could imagine an appellate court twice the size of the present Ninth Circuit functioning without significant inconsistencies in the law if the entire court were organized into stabilized (but gradually rotating) panels on a subject-matter basis."¹⁹⁵

In its report on federal circuit size, a subcommittee of the ABA Litigation Section's Appellate Practice Committee recommended further study of the use of special subject-matter panels within circuits. Such panels, the subcommittee believed, are appropriate for study on a pilot-project basis. As an example, the subcommittee noted the possibility of a special panel reviewing cases in specialized areas such as tax, administrative agency decisions, antitrust, bankruptcy, admiralty, and intellectual property for a specified period, perhaps one year. The subcommittee concluded that the judges' increased subject-matter familiarity could promote efficiency and the development of a coherent body of law. But the report cautioned, "Any study of specialized panels should address the risk of a panel with a particular ideological persuasion setting inflexible precedent."¹⁹⁶

In current practice, specialization in the courts of appeals lies on a continuum. At one end is random assignment of cases to a randomly selected panel of judges; at the other is jurisdictional routing to a single court, such as the Court of Appeals for the Federal Circuit. In between, nonrandom assignment is not unusual. Within a given calendar period, some courts (for example, the Ninth Circuit) may route an appeal presenting a particular issue to a panel already considering that issue in another case. In some circuits, assignments are made in a quasi-random fashion so that cases of different levels of difficulty may be distributed equitably among the panels.

One circuit has adopted a de facto specialized panel to decide oil and gas cases. Since 1972, the Court of Appeals for the Fifth Circuit has had a special panel to consider cases involving oil and gas regulation. The panel was formed out of necessity, and not established because of any deliberate choice in favor of specialization as a way to enhance the consistency or correctness of decisions. Many of the active Fifth Circuit judges who would otherwise have sat on panels hearing these cases found it necessary to recuse themselves because of financial interests in the industries subject to the regulations. Rather than continue the administrative difficulties arising from repeated recusals, the circuit formed a panel of active circuit judges who did not have conflicts of interest in the area.¹⁹⁷

¹⁹⁵Daniel J. Meador, *Struggling Against the Tower of Babel*, in *Restructuring Justice* 203 (Arthur D. Hellman ed., 1990).

¹⁹⁶Subcommittee to Study Circuit Size, *supra* note 177, at 4.

¹⁹⁷Describing the creation of the panel in *Hall v. Federal Energy Regulatory Comm'n*, 700 F.2d 218, 219 (5th Cir. 1983), Judge Clark commented: "The inclusion of such appeals in the general mix of cases assigned to randomly selected panels of this court created an abnormal number of dis-

Originally, the panel's special cases arose out of the work of the Federal Power Commission (FPC); later, the agency involved was the Federal Energy Regulatory Commission (FERC), which took over the functions of the FPC in October 1977. Most of the cases involved one or more of five general categories of natural gas topics: producer rate regulation under the Natural Gas Act; curtailment of natural gas service under the Natural Gas Act; scope of Natural Gas Act jurisdiction over natural gas producers and pipelines; interpretation and application of the Natural Gas Policy Act; and issues arising out of FERC's efforts to deregulate and restructure the natural gas industry.

At the request of the Federal Judicial Center, Prof. David Pierce of Washburn University School of Law analyzed the decisions rendered by the special panel from 1972 through 1979. He compared them with the decisions on similar issues from the Court of Appeals for the Tenth Circuit, which handles similar oil and gas cases, but does not use a specialized panel to decide them. His co-investigator, Prof. Jonathan Entin of Case Western Reserve University School of Law, interviewed many of the judges who have served or now serve as members of the specialized panel.

The conclusions Pierce and Entin reached suggest that both hopes and fears for specialized panels may be warranted, at least when the subject matter is committed to regulation by a single agency. After reviewing decisions of both courts on oil and gas matters, Pierce concluded, for example, that although the makeup of the panel changed annually, the panel's approach to basic substantive and procedural issues appeared to remain fairly constant. Moreover, the panel's consistent approach played a major role in developing the law governing producer prices and pipeline curtailment plans.

Interviews with judges who have served on the special panel in the Fifth Circuit suggest that some benefits of internal specialization can accrue without triggering the concerns of the critics of specialization, but the judges' comments also lend support to some of the fears. Notwithstanding Pierce's generally favorable assessment of the work of the Fifth Circuit's special panel, most judges who have served on it do not favor greater specialization in the courts of appeals. They regard the oil and gas panel as a necessary evil and not an appropriate general model for the future. Even some of the judges who believed the special panel worked well emphasized that extending specialization more generally within a court might be divisive. They were especially concerned that specialization would raise concerns that specialist judges might have hidden agendas that could promote conflict within a court and suspicion among the public. However, a few

qualifications and resulted in numerous docketing problems. In response, the court administratively created a special panel of judges whose property ownership would not regularly cause disqualification in Federal Power Commission and Federal Energy Regulatory Commission cases."

judges suggested that certain categories of cases might be appropriately assigned to a specialized tribunal.

The judges believed that serving on the special panel led them to develop expertise that facilitated and improved their decision making. But the judges were quick to note the variety of issues that arose in the context of these special cases. And they emphasized that a capable generalist judge should be able to master the relevant concepts in the gas regulation field as well as in any other. The special panel judges did not feel that serving on the panel detracted from their competence in other areas of the law. They continued as active circuit judges in regular service, and only a small portion of their annual service was devoted to cases before the special panel. Because the number of cases coming before the panel was small, there was little danger that FERC-related expertise would crowd out other areas of professional or intellectual development. The judges saw little difference between how the special panel functioned and how other three-judge panels functioned. They did become slightly more familiar with the other special panel members over time as they repeatedly sat together, but they did not perceive that the familiarity affected the dynamics of the group in any significant way.

Even positive comments by the judges raised some concerns about the possibility that frequent litigants (e.g., the agencies) would enjoy an advantage before the special panel. Commenting about the generally high quality of advocacy in the cases before the special panel, several judges noted that they developed respect for certain attorneys as a result of seeing them in several cases. On the other hand, one judge criticized the effects of attorney specialization, observing that some attorneys who appeared before the panel seemed to have a narrower vision of the law than most generalist lawyers have. This narrow focus made it difficult for them to communicate arcane concepts to generalist judges. While the judge reported this was not a big problem, it does suggest that regular rotation is important to avoid the problems that might arise when specialist lawyers practice before relatively specialized judges.

VI. Proposals for Structural Change to Reorganize Appellate Capacity

Discussion of restructuring brings together those who favor wider access to the federal courts (and therefore support continued growth of the judiciary) and those who see growth as deplorable but inevitable. The proper size of the federal judiciary has been the focus of much attention of late—the debate has been extensive and public.¹⁹⁸ At one end of the spectrum, some favor an immediate cap on the number of federal judges, or even gradual reduction of the number through attrition. At the other end, one judge has advocated immediately doubling the number of circuit judges.¹⁹⁹ Others do not advocate a particular number of judges, but suggest that the logical way to determine the proper size of the judiciary is to determine the proper scope of its task and then the number of judges needed to perform that task. One point of agreement is that if the nation is to continue using the federal courts as it now does, and turns to the federal courts for even more services, the nation must support the changes necessary to allow the court system to provide high-quality service.

We assume for the purposes of discussing structural change that there will remain for the foreseeable future a large pool of district court and agency terminations that under the present system would be appealable. We have already considered the use of nonregional, subject-matter courts to promote consistency and concluded that this approach would not provide significant caseload relief to the regional courts of appeals because nonregional courts would not divert a sufficient number of cases. Similarly, alternatives for restructuring the current system without curtailing the fundamental right to appeal will do little or nothing to reduce the volume of appeals. No matter how a caseload of 50,000 appeals is distributed among the courts, 50,000 appeals must be handled.²⁰⁰ And if caseloads

¹⁹⁸The issues are set out at length in Gordon Bermant et al., *Imposing a Moratorium on the Number of Federal Judges* (Federal Judicial Center 1993). They have been debated by circuit judges at the Center's national workshop for circuit judges, at meetings convened by the Committee on Long Range Planning of the Judicial Conference of the United States, and in the press. See, e.g., Jon O. Newman, *1,000 Judges—The Limit for an Effective Judiciary*, 76 *Judicature* 187 (1993); Stephen Reinhardt, *Too Few Judges, Too Many Cases*, 79 *A.B.A. J.* 52 (1993); Gerald Bard Tjoflat, *More Judges, Less Justice*, 79 *A.B.A. J.* 70 (1993); Carolyn Dineen King, *A Matter of Conscience*, 28 *Hous. L. Rev.* 955 (1991).

¹⁹⁹Reinhardt, *supra* note 198, at 52.

²⁰⁰There are theoretical reasons to believe that certain realignment alternatives would curtail inter-circuit and intracircuit conflict, and thereby possibly reduce the flow of litigation by reducing legal uncertainty. But without evidence that these sources of uncertainty are causing large numbers of cases to be filed and appealed that otherwise would not be, we cannot offer this as a reason for restructuring.

grow as some project, many more appeals may need to be handled annually in the coming decades. Proposals for restructuring the federal judicial system, therefore, are concessions to growth and efforts to forestall deterioration.²⁰¹ In this section, we discuss some of these proposals. Our major findings and conclusions are set off as separate bulleted paragraphs.

At the root of most restructuring proposals is a belief about the ideal size of an individual court of appeals. Growth affects the courts of appeals differently from the district courts. In most professional areas, district judges act alone and circuit judges act either as a member of a three-judge panel or as a member of the entire court. The effectiveness, credibility, and efficiency of a court of appeals depend in part on its ability to function as a unified body. That, in turn, depends on norms of collegiality and the practical ability to observe those norms. What we know about collegiality and its importance to the courts of appeals comes from the observations of judges who have sat on small courts and on large ones, in times of great caseload pressure and in more leisurely eras.²⁰²

We do not use “collegiality” to mean conviviality or friendship among members of a court. In that sense, it is believed to enhance job satisfaction and thereby contribute to the stability of the bench. But we focus here on a meaning of the term that is much more critical to the quality of the appellate court’s product—collegiality as the relationship of circuit judges who are part of a unitary institution. Judges tell us that the ability of an appellate court to shape and maintain a coherent body of law depends in part on the sense of circuit judges that they speak for the court as a whole, not just for themselves. This sort of “representative collegiality” is often seen as a characteristic of successful appellate courts, and one on which the persuasive authority of their decisions rests. When judges feel themselves a part of a court and know the minds of their fellow judges, they can clarify areas of true disagreement but avoid inadvertent clashes with their colleagues. When members of a court feel a sense of responsibility to issue opinions reflecting as faithfully as possible the overall sense of the court, radical shifts in the law of the circuit may become less likely. The result is a body of law that is clearer and more harmonious than might otherwise be expected given the number of judges on the court.

Although collegiality may moderate the effects of growth, growth may ultimately diminish collegiality. The larger a court grows, the more difficult it is for its judges to become familiar with their colleagues. This may be a particular problem when new judges are added to courts in large groups. On the other hand,

²⁰¹ Determined opponents of growth may be less optimistic that restructuring will forestall deterioration, but most are convinced that growth without restructuring will worsen existing problems.

²⁰² See, e.g., Collins J. Seitz, *Collegiality and the Courts of Appeals*, 75 *Judicature* 26 (1991); Frank M. Coffin, *The Ways of a Judge: Reflections from the Appellate Bench* (1980). For a scholar’s view after observing three courts of appeals, see Howard, *supra* note 2.

having too few judges on a court can have the same effect. The greater the workload pressures on judges, the more difficult it is for judges to devote the time necessary to keeping up, either personally or professionally, with the court.

A decrease in collegiality because of court size may combine with a heavy workload to demoralize judges who become unable to do the kind and quality of work they expected to do when they accepted their nominations.²⁰³ Poor working conditions detract from the ability of judges to engage in the thoughtful, reflective analysis necessary for high-quality decisions. Morale may be adversely affected not only by sheer overwork—the need to work harder and faster in order to “crank out the decisions”—but also by the many accommodations the courts have made to cope with their caseloads. These accommodations have diminished opportunities for collaborative interaction among the judges of a court. With more judges, there are fewer opportunities to sit on a panel with any particular judge; with the use of oral argument substantially curtailed, the loss of personal interaction is still greater. With fewer opportunities to work collaboratively and face-to-face, it is more difficult for judges to develop the relationships of trust that led to harmonious courts (and, many argue, a more stable body of law) in an age of smaller courts and lighter workloads. Appellate judges assessed many other problems facing the federal system as more serious than the impact of workload on collegiality. Thirty-eight percent reported it was not a problem or only a small one. Still, more than half reported it to be a moderate problem or worse.

Unfortunately, we cannot distinguish between the effects of court size and the effects of workload on collegiality. The importance of court size, like the proper size of the federal judiciary as a whole, is a matter of some debate. The Federal Courts Study Committee described the debate over whether “bigger is better” as a debate centering on two different conceptions of an appellate court. One view is that a large circuit is a workable, or even preferred, model for a court of appeals, at least if the court is well managed and adopts procedures to monitor the consistency of circuit law (such as a limited en banc). The other view is “the traditional concept of a smaller, more intimate, unitary tribunal.”²⁰⁴ The committee surveyed federal judges and asked their opinion of the ideal size of a federal court of appeals. More than half of the 140 circuit judges who responded checked “8–10”; well over three-quarters of them checked either “8–10” or “10–15.”²⁰⁵

²⁰³See Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 B.Y.U. L. Rev. 3, for a report of the survey done for the Federal Courts Study Committee. One circuit judge commented: “Done properly, the work is overwhelming. The only way that I can do my work properly is to work nights and weekends. As long as one has the vigor, stamina and good health, it can be done. Eventually, this schedule is bound to take its toll.”

²⁰⁴Report of the Federal Courts Study Committee 122 (1990).

²⁰⁵*Id.* Our survey yielded similar results. About 45% of the appellate judges responding supported dividing circuits that now have more than fifteen active circuit judgeships, and about a third sup-

The Federal Courts Study Committee took no position on the matter of court size, except to note that the Ninth Circuit (then, as now, with twenty-eight judgeships) “apparently manages effectively” and may represent “a workable alternative to the traditional model.”²⁰⁶ More recently, the ABA Appellate Practice Committee’s subcommittee found “no compelling reasons why circuit courts of various sizes—ranging from a few judges to fifty—cannot effectively meet the caseload challenge. Indeed, for every argument in favor of smaller circuits, there is an equally compelling argument for larger circuits.”²⁰⁷

Members of the bar who served on the ABA subcommittee that studied circuit size acknowledged occasional problems in the Ninth Circuit that might have been size-related. The subcommittee’s recommendation on the point was not to reduce the circuit’s size but to ensure that large courts focus on developing management techniques and providing their clerks’ offices with the resources necessary to manage court business. Aside from that minor criticism, the subcommittee had only praise for the Ninth Circuit. Indeed, its report recommended that as other courts grow, they might do well to follow the Ninth Circuit’s lead in its “aggressive use of staff attorneys” (for issue classification and other functions) and its procedures for limited en banc.²⁰⁸

The debate over ideal and tolerable court size continues, and influences reactions to proposals on how to organize the federal system’s appellate capacity. We turn now to a discussion of the major structural proposals.

Total consolidation of circuits

One set of structural options for the federal court system would maintain the current review pyramid structure but transform the middle tier into one no longer differentiated into regional circuits with distinct identities. The Federal Courts Study Committee described one such option as a “Single, Centrally Organized

ported periodic redrawing of circuit boundaries to keep courts at nine to fifteen judges (but 42% opposed the idea).

²⁰⁶*Id.* at 123. As we have noted, there is evidence that the Ninth Circuit has succeeded reasonably well at maintaining the consistency of circuit law. See Hellman, *Jumboism and Jurisprudence*, *supra* note 179; Wallace, *supra* note 140. The court has also led the way in developing new operating procedures that enable it to function effectively and that may prove useful in other large courts. For an early report on those efforts, see Cecil, *supra* note 89. For a comprehensive description and largely favorable assessment of the functioning of the court somewhat more recently, see *Restructuring Justice* (Arthur D. Hellman ed., 1990).

²⁰⁷ Subcommittee to Study Circuit Size, *supra* note 177, at 5 (1993).

²⁰⁸*Id.* We are aware of signs of stress in the Ninth Circuit. Its median disposition times, for example, remain the longest of the circuits (15.4 months in statistical year 91, although this was only four months longer than the national average and probably still affected by the Loma Prieta earthquake). Outside observers disagree about whether a court as large as twenty-eight judges can work well. Not everyone accepts the analysis showing relatively little intracircuit conflict in the Ninth Circuit, but it is the only empirical work of which we are aware.

Court of Appeals.” This option would maintain the current number of tiers and points of review but change the structure of the middle tier to allow more flexible resource allocation. The committee’s description of the centrally organized court of appeals was necessarily general and at times vague. That description is summarized in the following box.²⁰⁹

Single, Centrally Organized Court of Appeals

Structure:

U.S. Supreme Court (unchanged)

Central court of appeals, comprising all U.S. circuit judges, assigned to panels as and where needed, with primary assignments near their homes. Conflict resolution mechanisms to be developed as needed by the courts, including internal second tier and/or subject-matter panels at each court’s option.

U.S. district courts (unchanged)

Litigation path:

1. Trial:

U.S. district court

2. Appeal as of right:

Central court of appeals. Cases could be routed to subject-matter panels as appropriate.

3. Discretionary review:

U.S. Supreme Court

Adapted from Report of the Federal Courts Study Committee 121 (1990).

Under this proposal, all appellate judges would be members of a single court of appeals. The proposal provides great flexibility to cope with changing caseload trends, as judges could be assigned to panels throughout the country as and where

²⁰⁹Some of the possible characteristics of these plans are set forth in the background papers of the Federal Courts Study Committee, and in particular in *A Proposal for a Unified Court of Appeals* by Judge Joseph F. Weis, Jr., who chaired the committee.

needed. The court could create and abolish subject-matter panels and conflict resolution mechanisms as its judges deem appropriate, including a second tier within the court to review matters for uniformity. This flexibility, the committee recognized, might come at the price of creating a large bureaucracy that might “counter the salutary trend in today’s federal courts toward decentralized administration, and perhaps discourage the accountability for circuit and district performance that is now an incentive for productivity in an otherwise enormous system.”²¹⁰

This approach would dissolve circuit boundaries but not necessarily the notion of circuits. The Federal Courts Study Committee’s description of the system notes that appellate judges would have their primary assignments near their homes. Regional identities akin to current circuit identities might remain or develop, particularly if appeals continued to be handled in the same locations as at present. That is, if appeals now filed in the Second Circuit will still be handled in New York, and Second Circuit judges continue to have their primary assignments in New York, the disruption caused by a centrally organized system might not be so great as it appears at first glance.

Partial consolidation of circuits

With the success of large courts of appeals an open issue, the Federal Courts Study Committee included in its report the option of consolidating several smaller circuits into a few, perhaps five, “jumbo” or “mega” circuits.²¹¹ As diagrammed in the committee’s report (and outlined below), this option would retain the current system of appeal as of right from all final district court judgments.

Consolidation into Jumbo Circuits

Structure:

U.S. Supreme Court (unchanged)

Five courts of appeals, which could sit in divisions. Circuits would be formed by consolidating present circuits as necessary to roughly equalize caseloads.

U.S. district courts (unchanged)

²¹⁰Report of the Federal Courts Study Committee 121 (1990).

²¹¹*Id.* at 122.

Litigation path:

1. Trial:

U.S. district court

2. Appeal as of right:

Court of appeals for the circuit

3. Discretionary review:

U.S. Supreme Court

Conflict avoidance/resolution:

To be developed by individual courts. Could include limited en banc panel (membership to be rotated among all judges) that would convene regularly for en banc rehearings.

Adapted from Report of the Federal Courts Study Committee 122 (1990).

Proponents assert that this sort of organization would allow flexible resource allocation within circuit borders and would limit the number of intercircuit conflicts because fewer circuits would exist. The latter advantage seems literally true but simply moves the issue of inconsistency and indeterminacy from between circuits to within them. If one were trying to address a problem of overload at the Supreme Court level, moving to a system of a few large circuits to reduce the number of intercircuit conflicts reaching the Court might be effective, but the same effect could be achieved by an intercircuit tribunal or a regional en banc system that left the present circuits intact. But most observers are concerned less with the capacity of the Supreme Court than with the capacity of the courts of appeals. As critics of large circuits have observed, increasing the number of judges increases the number of possible panel combinations (under current panel creation procedures) and multiplies the number of opinions a circuit judge must read. This proliferation of precedent would require, as the committee acknowledged, more effective ways to avoid or resolve conflicts within a court of appeals.

Reducing the size of the circuits

The main reason for reducing the size of the circuits would be to restore relatively small, collegial courts of appeals. Although caseloads would not decrease, judicial burden might decrease slightly as the number of opinions to read drops. Both the smaller number of judges and the likely reduction in travel could con-

tribute to the creation of a more intimate bench. To the extent that collegiality may be related to the quality of justice dispensed, this is no small advantage.

As we have noted, though, the relationship between court size and intracircuit conflict is not well defined. Nor do we have sufficient information about the effects of conflict on the behavior of lawyers, litigants, and judges. Thus, the desirability of an alternative whose primary advantage would be the reduction of intracircuit conflict must be considered in light of the other sources of legal uncertainty. If these other sources of legal uncertainty account for more problems in structuring business transactions and predicting litigation outcomes, a restructuring alternative whose chief advantage is the stabilization or reduction of intracircuit conflict might yield more upheaval than relief.

If the ultimate goal of federal court restructuring efforts is to restore and maintain courts of appeals of limited size without severely curtailing the growth of the appellate judiciary, the size of the courts of appeals must be reduced by changing circuit boundaries. Incremental change could be effected by dividing circuits whose courts are now larger than an agreed-on acceptable size, or dividing them as their courts reach a certain caseload or number of judges. Alternatively, all the present boundaries could be eliminated and the entire circuit arrangement redrawn.

Circuit splitting to remedy perceived growth problems in the Fifth and Ninth Circuits was the approach recommended in 1975 by the Hruska Commission. Ultimately, the twenty-six circuit judges of the Fifth Circuit agreed, and upon their request Congress divided the circuit, assigning fourteen of those judgeships to a new Fifth Circuit and creating the Eleventh Circuit with the other twelve.²¹² The Ninth Circuit judges did not request division, and Congress opted not to divide that circuit. Were Congress to adopt the commonly recommended standard of nine judges as the ideal size of a court of appeals, it would be necessary to split all but one of the present circuits. The Ninth Circuit alone would need to be split into at least three separate circuits. The Federal Courts Study Committee concluded that piecemeal circuit division no longer appears to be a practicable remedy for the problems of the courts.²¹³

The only other way to achieve the same result without adding a new tier would be to dissolve all circuit boundaries and redraw them. Most versions of this plan would redraw the circuits according to a formula based on the courts' current caseloads. Because of the importance of flexibility in the court system, however, it is generally recognized that it would be desirable to specify whatever the formula would be, so that periodic revisions could take place without the

²¹²These circuits now have seventeen and twelve authorized judgeships, respectively. Applying the current formula used to justify judgeship requests, they would be entitled to considerably more.

²¹³Report of the Federal Courts Study Committee 118 (1990).

same level of resources and attention now required for revisions to circuit structure. Flexibility could be built into the system by having periodic reconstruction of circuits triggered by a specified event, such as a census, or a predetermined number of filings. Versions entailing continued growth in the number of circuits (e.g., with splits triggered by growth in caseload volume or court size) invite the question of whether there is a point at which the very concept of "circuit" becomes meaningless. Assuming continued caseload growth, the periodic division approach would quickly break down if the goal were to achieve and maintain courts of the "ideal" size of nine to fifteen judges. This prospect might lead one to ask, as one judge did before the division of the Fifth Circuit, "[A]re we to continue the splitting process until it becomes mincing, with a United States Court of Appeals for the Houston Metropolitan Area?"²¹⁴

Even with current caseloads, redrawing the circuits to create rough caseload equality among circuits would require abandoning the criteria used in the past for circuit construction. For example, as a general rule, circuits have comprised at least three states, generally contiguous. Preferences for contiguity of states could not be accommodated in all cases. Proposals for a one-time revision of circuit boundaries to equalize and cap the number of judges on each court of appeals would, if developed, require more attention to workload burdens beyond the case-counting method. Without a more accurate measure of the burdens associated with different types of appeals, dividing the national appellate caseload among courts of a fixed size would likely result in disparate burdens on appellate judges.

- There is widespread, though far from universal, sentiment for courts of fewer than fifteen active judgeships. Our survey of federal judges discovered little sentiment, however, for most means to that end. Although there is generally more support for, than opposition to, dividing circuits with more than fifteen active appellate judges, the range of opinion on the question is substantial.

If circuit rearrangement ultimately increased the coherence of the law, as some argue it would, caseloads might decrease in the long run. In the short run, effects on litigation flow might depend on decisions about how precedents would be handled. When the Fifth Circuit was divided, the new Eleventh Circuit adopted the body of Fifth Circuit precedent as it existed at the time of the split, somewhat

²¹⁴Thomas G. Gee, *The Imminent Destruction of the Fifth Circuit; Or, How Not to Deal with a Blossoming Docket*, 9 Tex. Tech L. Rev. 799 (1978); see also Thomas E. Baker, *On Redrawing Circuit Boundaries—Why the Proposal to Divide the United States Court of Appeals for the Ninth Circuit Is Not Such a Good Idea*, 22 Ariz. St. L.J. 917 (1990).

limiting judges' and lawyers' burdens.²¹⁵ It is not clear that such precedent adoption or grafting could be successfully implemented in major realignments. Most plans call not for the "simple" division that occurred when the Eleventh Circuit was created, but for sweeping reorganization or at least the cobbling together of new circuits from portions of several current ones. In those circumstances, litigation might be expected to increase in the short run; both the unpredictability of a new court and the opportunity to establish favorable new circuit law could increase incentives to appeal.

Most observers fear that a large increase in the number of circuits will result in further "balkanization" of the federal courts. A system of many small circuits dilutes the federalizing function of the courts of appeals.²¹⁶ A system in which the law of the circuit is identifiable and predictable is advantageous where local predictability is important, and disadvantageous to the extent that it fails to create and maintain a uniform body of federal law. It is generally claimed that the inevitable result of circuit splitting would be a substantial increase in intercircuit conflicts. Even those who do not favor large courts may prefer a limited number of medium-sized and large circuits to the much larger number of circuits that would be necessary to create and maintain courts of eight to ten judges.

- Merely reorganizing the present circuits will not significantly reduce appellate caseloads. The post-reorganization restabilization of circuit law might increase litigation in the short run and decrease it in the long run if the new circuits achieve identities that reduce legal uncertainty. In the absence of evidence that litigation rates or appeal rates are driven to a significant degree by the characteristics of the present structure, we cannot predict such changes in either direction. We anticipate that they would be marginal. Adopting any of the proposed circuit realignment alternatives for the sole or primary purpose of reducing appellate court caseloads seems ill-advised.
- Dissolving the present circuits and reorganizing the nation into many smaller circuits might increase efficiency in some court operations (e.g., judge travel might be shorter and less frequent), but any savings might be offset by the costs of multiplying circuit administration functions and offices (e.g., more circuit executives, clerks, and staff would be needed). Reconstituting the system as many smaller circuits would also entail significant costs and enormous disruption to judges, other court employees, and the bar.

²¹⁵See Thomas E. Baker, *A Postscript on Precedent in the Divided Fifth Circuit*, 36 Sw. L.J. 725 (1982).

²¹⁶John Minor Wisdom, *Requiem for a Great Court*, 26 Loy. L. Rev. 787 (1980).

However, if the small circuit approach is desirable, it might best be combined with conflict-resolution mechanisms, as in the following proposal.

The Federal Courts Study Committee described a plan for "Multiple Circuit Appellate Courts Functioning as a Unified Court," under which present circuit boundaries would be dissolved and divisions of nine or ten judges each would be formed. The plan anticipates periodic redrawing of division lines according to an unspecified mechanism, preferably to be developed and applied by the Judicial Conference. Appeals from the decisions of one division would be by petition to the "central division." The text of the committee's report is unclear, but it appears that discretionary review by the central division would be limited to cases presenting conflicts between regional circuits. The central division, comprising the same number of judges as the number of divisions, would sit only en banc.

Although the text of the committee's report does not describe the central division in detail, it seems likely that the central division members would be drawn from the other divisions rather than be newly appointed. Indeed the notion of the unitary court of appeals is what distinguishes this idea from those that would create an additional tier. To reduce the possibility of divisiveness, the judges of the central division would be of the same rank or stature as the other appellate judges. Although they might under some variants be selected for their experience or by seniority, they would receive the same compensation as all other appellate judges.

Multiple Circuit Appellate Courts Functioning as a Unified Court

Structure:

U.S. Supreme Court (unchanged)

Central division of a unified court of appeals (number of judges to be determined)

Divisions of a unified court of appeals (Court of Appeals for the Federal Circuit, plus regional divisions of nine judges each)

U.S. district courts, U.S. Court of Federal Claims, U.S. Court of International Trade (unchanged)

Litigation path:

1. Trial:

U.S. district court, U.S. Court of Federal Claims, or U.S. Court of International Trade

2. Appeal as of right:

To appropriate division of the unified court of appeals (if from Court of Federal Claims or Court of International Trade to Court of Appeals for the Federal Circuit)

3. Discretionary review:

From divisions to central division of the unified court of appeals

From divisions to U.S. Supreme Court

From central division to U.S. Supreme Court

Effects on precedent and consistency:

Divisional courts of appeals would adhere to prior panel decisions in other divisions as well as their own.

Interdivision review panels could reverse other panel decisions deemed clearly erroneous.

The central division, sitting en banc, would decide conflicts between regional divisions.

Adapted from Report of the Federal Courts Study Committee 118 (1990).

Most models of a centrally organized or unified court of appeals share certain features. They would continue to provide an appeal as of right in all cases currently eligible for review, with an additional layer of review for at least some cases. Each would formally retain the three-tier structure and the primacy of the three-judge appellate panel. It appears that in each, at least as conceived by the Federal Courts Study Committee, the opinion of any one panel would bind the rest of the members of the entire appellate system.²¹⁷ They would require mechanisms to prevent and resolve conflicts among panels. The plan for a unified court with multiple divisions contemplates a formal and permanent "central division" assigned to resolve conflicts. The committee's description of a three-tiered model with a centrally organized intermediate tier did not specify methods for resolving conflicts, but recognized that the court would need to develop them. For example, it left open the possibility that the court might organize itself into two tiers. If the court chose this option, the "internal second tier" might serve the same function

²¹⁷The committee's report is not entirely clear on this point as it applies to the centrally organized court of appeals, but we infer from background papers and the descriptions of other approaches that some form of national stare decisis would be adopted.

that the central division serves in the multi-tiered proposal, but with more flexibility of membership.

The models also share the advantage of flexibility in allocation of resources. That flexibility may be seen as a disadvantage by those who are the resources to be allocated. The appellate judges who responded to our survey overwhelmingly opposed restructuring plans that would require judges to be available for duty anywhere they might be needed. One senior appellate judge commented that many qualified lawyers would not accept judicial appointments under this plan. A rigid or arbitrary assignment system might make the position of federal judge sufficiently unattractive to lower the quality of the bench. But temporary assignment to other courts is not uncommon now, and it might develop that most reassignment needs under a centrally organized system could be handled by voluntary, temporary transfers.

From the litigant's perspective, these proposals add another hurdle (or opportunity) to the litigation process. They are not always explicitly designated as structural changes that add a tier because the judges who would staff the central division in one plan, or perform conflict resolution functions in an "internal tier" in the other, are of the same rank as the appellate judges who decide the appeal in the first instance. Thus, the two proposals may be thought of as half-steps toward adding a new tier to the federal court system. Other proposals addressed by the Federal Courts Study Committee more explicitly did just that.

Multi-tiered courts of appeals options

Under one four-tiered structure, summarized in the following box, the district courts would remain as currently structured and staffed. Final judgments of the district court would be appealable as of right to one of twenty to thirty divisions of a lower tier appellate court ("Appellate I"). Six of these regional divisions of nine or ten judges each would be grouped in an area. From the regional courts, aggrieved litigants could petition for certiorari to a seven-judge higher tribunal for that area of the country. The Court of Appeals for the Federal Circuit would be on a par with the four area courts of appeals, and cases now appealable as of right to that court would continue to be heard there.

Four-Tiered Regional System

Structure:

U.S. Supreme Court (unchanged)

Appellate II tier—four area courts of appeals (1–4) of seven judges each, plus ten-judge Court of Appeals for the Federal Circuit

Appellate I tier—regional appellate court divisions of nine or ten judges each, in four groups of six

U.S. district courts, U.S. Court of Federal Claims, U.S. Court of International Trade (unchanged)

Litigation path:

1. Trial:

U.S. district court, U.S. Court of Federal Claims, or U.S. Court of International Trade

2. Appeal as of right:

To regional appellate division (if from Court of Federal Claims or Court of International Trade to Court of Appeals for the Federal Circuit)

3. Discretionary review:

From Appellate I tier to court of appeals for appropriate area (Appellate II tier), but from Appellate I tier to U.S. Supreme Court if regions are in conflict

From Appellate II tier to U.S. Supreme Court

Effects on precedent and consistency:

Appellate I conflicts among regional appellate divisions in same area—resolved by Appellate II area courts of appeals.

Appellate I conflicts between regional divisions in different areas—resolved by U.S. Supreme Court.

Conflicts between Appellate II courts—resolved by U.S. Supreme Court.

Adapted from Report of the Federal Courts Study Committee 119 (1990).

The Federal Courts Study Committee description of the four-tiered system does not speak directly to the issue of stare decisis in connection with this option, and it is not clear whether the structure the committee envisioned would allow a panel in one division of the Appellate I tier to bind others in that region or just the division. Nor does there appear to be any provision for en banc review.

Another multi-tiered system, described for the Federal Courts Study Committee by Prof. Daniel J. Meador, would abolish existing circuit lines and vest all jurisdiction currently with the courts of appeals in a new entity, the

United States Court of Appeals.²¹⁸ That court, the only federal appellate court between the district courts and the Supreme Court, would not be unified in the sense of the Unified Court of Appeals plans discussed above. Rather, it would be divided into parts. Under Meador's plan there would be numbered divisions, lettered divisions, and named divisions. The plan may best be characterized as the insertion of a new tier of courts between the district courts and the current courts of appeals, with the work of the new courts loosely concentrated in particular subject-matter areas, much as the work of the U.S. Court of Appeals for the Federal Circuit is now.

Numbered divisions of nine judges each would be created across the United States. The nine judges would be drawn from the circuit judges of at least two contiguous states, including the state containing the district court whose judgments would be reviewed by the division. Thus regional review would be maintained. The jurisdiction of these courts, which would decide the majority of appeals from district court judgments, would include diversity, criminal, constitutional, and statutory cases—all matters other than those in the jurisdiction of the "named divisions." The nine judges would sit in rotating three-judge panels to decide about 1,800 appeals annually. Screening would be permitted, but panels in the numbered divisions would hear oral argument much more frequently than most courts of appeals now do. Most decisions would be unpublished.

Parties aggrieved by the decisions of the numbered divisions could petition for review by a court in a lettered division (A–E). These seven-member divisions would grant review for reasons now typically associated with en banc review—for example, to eliminate conflicts involving numbered divisions in the jurisdiction and to issue authoritative decisions on important issues of federal law. Decisions of lettered divisions not to review a case from the numbered division would be final and not subject to review by the Supreme Court. Normally, the decisions of the lettered divisions in cases it chose to review would be published. Cases decided by the lettered divisions would be reviewable only by certiorari to the U.S. Supreme Court.

Finally, named divisions would review district court judgments and administrative agency orders in certain kinds of cases. These divisions would be formed by subject matter, and their jurisdiction would include those matters now within the jurisdiction of the Court of Appeals for the Federal Circuit. Named divisions might include Administrative, Commercial, Revenue, and State divisions. Others could be added as needed. The size of the division would depend on the volume of business of that division, but would be in the range of seven to fifteen judges.

²¹⁸This is a necessarily brief sketch of the proposal Meador outlined for the committee. Details of judicial selection, court governance, and jurisdiction are set out in his memorandum to the Subcommittee on Administration, Management, and Structure. 2 Federal Courts Study Committee, Working Papers and Subcommittee Reports (1990).

If successful, this kind of arrangement would restore some of the traditional appellate process to cases that no longer receive oral argument and collegial deliberation. Some regional presence and connection would be maintained where regional concerns are most pressing, but judges would no longer identify with a particular circuit. Rather, they would be expected to apply the national law. Most conflicts that result from regional interpretation of the national law would be resolved largely in the lettered divisions. Some advantages of specialization would be obtained where particularly beneficial to the national law, but judges would move among divisions over their careers and would not become "specialist" judges.

Four-Tiered Regional/Subject-Matter System

Structure:

U.S. Supreme Court (unchanged)

Five lettered divisions of seven judges each, sitting en banc

Multiple numbered divisions of nine judges, sitting in three-judge panels

Multiple named divisions of seven to fifteen judges. Possibilities:
Administrative, Commercial, Revenue, and State divisions

U.S. district courts, Court of Federal Claims, Court of International Trade
(unchanged)

Litigation path:

1. Trial:

U.S. district court, Court of Federal Claims, or Court of International Trade

2. Appeal as of right:

To numbered division if in a matter not within appellate jurisdiction of a named division

To named division if one exists for that case type

3. Discretionary review:

From numbered division to lettered division

If case reviewed by lettered division, by certiorari to U.S. Supreme Court; if case denied review by lettered division, no further review

From named division to U.S. Supreme Court

Effects on precedent and consistency:

Lettered divisions would resolve conflicts involving numbered divisions within their jurisdictions.

Adapted from memorandum of Daniel J. Meador, *in 2 Federal Courts Study Committee, Working Papers and Subcommittee Reports* (1990).

Adding a tier would maximize the ability of the system to absorb new judicial capacity without having any single court unit grow unacceptably large. By adding another layer of law declaring, it would also allow percolation to occur freely, perhaps faster than in the current structure. But the smaller number of law declarers might “produce a more compact body of primary precedent than the voluminous and increasingly disparate case law likely to be generated by 200 or 300 co-equal circuit judges. . . .”²¹⁹ The costs of another tier are substantial—in dollars, in disruption, and in the satisfaction of the judges who find another layer of authority and prestige has been inserted between their own and the highest level of the system.

- Judges who responded to our survey were overwhelmingly opposed to the addition of new tiers, whether between the district courts and the current courts of appeals, or between the courts of appeals and the Supreme Court.

²¹⁹Report of the Federal Courts Study Committee 120 (1990).

VII. Alternatives to Full Structural Reorganization: The Triage Proposals

Given the assumption of continued expansion of litigation at the district court and agency levels, is reorganization of the appellate court structure inevitable? The problem of appellate volume might be alleviated without major structural change or substantial increase in resources if there were to be a fundamental change in the right of appeal or the route of appeal. Although we believe the day is not yet here, it may be that the unrestricted right to appeal in every case must yield to the pressures created by caseload expansion without resource expansion.²²⁰ Alternatively, it may be time to acknowledge formally that not all appeals require—or now receive—the full panoply of traditional appellate process. In this way, it may be possible to retain some right of appeal in all cases yet cope with caseload growth.

Expanding the concept of “leave to appeal”

The guarantee of appellate review, whether or not of constitutional dimension, is a fundamental aspect of the American legal system. It provides more than a second look by another set of eyes. The federal judge (unlike, for example, an arbitrator) is bound by the law. Appellate review is meant to ensure that the trial judge is not a law unto himself or herself. Removing—or even significantly decreasing—the possibility of review vastly increases at least the perception of the “kingly power” of the district judge.²²¹ It would be a drastic step that would rightly spark lively debate.

As an alternative to outright elimination of the right to appeal in some or all categories of cases, appellants in these cases could be required to request leave to appeal. Leave to appeal is currently required for interlocutory appeals and for appellants who wish to proceed *in forma pauperis*. In the sense that expansion would give the courts of appeals discretion to deny review to individual cases, the system begins to look like the Supreme Court’s system of certiorari.²²² However, unlike the Supreme Court, the courts of appeals would remain in the business of review for error. They would simply exercise the function in fewer cases. They

²²⁰See Harlon L. Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 Yale L.J. 62 (1985).

²²¹During the debate leading to the Evarts Act, Congressman David Culberson of Texas said, “I have a supreme desire to witness ... the overthrow and destruction of the kingly power of district and circuit judges.” 21 Cong. Rec. 3404 (1890).

²²²Only a few legal systems in the United States do not guarantee one appeal of right in all cases. Virginia, West Virginia, and New Hampshire provide for review only by leave of court in some or all cases, as does the U.S. Court of Military Appeals. See Kathy Lanza, *Discretionary Review*, in 2 Federal Courts Study Committee, Working Papers and Subcommittee Reports (1990).

would not, under most conceptions of the system, become courts whose sole or primary function is to declare the law. The Federal Courts Study Committee encouraged further study of a system of certiorari for the courts of appeals, but characterized the option as one of last resort.

There are several ways to structure a system that would result in total or partial discretionary jurisdiction for the courts of appeals. The basic choices to be made in designing such a system are (1) What kinds of cases will be subject to discretionary review? (2) Who will screen, and who will grant or deny, petitions for review? and (3) What criteria will be used for deciding whether to grant or deny review?

Case types requiring leave to appeal. Some proposals would require leave to appeal (or allow courts of appeals to deny review) only in certain classes of appeal, typically defined by subject matter. The model the Federal Courts Study Committee described would allow the courts of appeals to set their own civil dockets (the issue of criminal appellate jurisdiction was recognized but not addressed). When there are too few judges to decide all the cases presented for review, and if all cases of some types must be reviewed, judges can only keep current by exercising their discretion to hear fewer of the optional types.

Choices about including or excluding entire classes of cases thus pose questions of access that affect all cases. Suppose, for example, that some classes of appeals would remain mandatory, such as criminal appeals. Civil litigants may now suffer the effects of a criminal litigation explosion in terms of delayed review, but a certiorari scheme applied only to civil cases will almost surely mean civil litigants will be less likely to obtain any review. However, if criminal appeals are not within the courts of appeals' mandatory jurisdiction, research suggests that fewer and fewer resources will be directed to "ordinary" criminal cases as discretionary resources are diverted to civil cases.²²³

Who will screen and decide petitions for review? Some propose that access to full appellate review be determined by a three-judge panel; others suggest a one-judge screening process with various safeguards built in (e.g., written decisions). As we have noted, screening for argument or nonargument disposition is done by judges in some courts and by staff attorneys in others. It seems likely that courts with a well-established system of staff attorney screening would choose to assign much of the preliminary review of petitions for discretionary review to staff attorneys as well. All the criticisms of increasing delegation to nonjudicial personnel come into play here. Still, it must be acknowledged that petitions reviewed by staff counsel may receive more scrutiny than they might if certiorari review were left entirely to overburdened judges.

²²³ See Thomas Y. Davies, *Gresham's Law Revisited: Expedited Processing Techniques and the Allocation of Appellate Resources*, 6 Just. Sys. J. 372 (1981).

Criteria for review. One model presented for consideration by the Federal Courts Study Committee would allow the individual courts of appeals to develop rules and screening procedures for determining when leave to appeal would be granted. Appellants might be required to seek a certificate of probable cause from the district court before appeal, analogous to the current requirement in the habeas corpus context. Most agree that denial of a certificate of probable cause should not be a bar to the grant of review, but the certification of the trial judge that the case was a close one, or that the circuit law is unclear, would be helpful to the reviewing court in exercising its discretion.

Analysis. An advantage of a system that gives courts discretion to deny full review to some cases is its adaptability to changing needs of the circuits. According to one subcommittee report to the Federal Courts Study Committee:

If the caseload were overwhelming, the grant or denial of certiorari could be turned into a less sensitive process. The judges would not be obliged, as they are when handling a true appeal, to satisfy their consciences that they approve or disapprove of a particular outcome. "Certiorari denied" could simply mean: "We don't have room, and your case seems less troublesome than others."²²⁴

This advantage to the appellate courts may be a disadvantage to those affected by their work. Adopting a discretionary review system would be such a significant departure from the present system that present fears of rationing and second-class justice are bound to worsen if the availability of review rests on whether an individual judge (or panel) finds the decision being appealed "less troublesome" than others on the docket. The tradition of visible rationality that we associate with appellate court opinions should, arguably, apply as well to criteria for screening. Clear, reasonably objective standards for granting review would enhance predictability and might thereby reduce the number of appeals taken. Clear standards would also preserve the legitimacy of the court by assuring litigants that appeals are being screened according to neutral, public criteria and not, for example, according to the status of the parties.

Critics of discretionary review proposals anticipate that they would not significantly reduce judicial resources needed to deal with the appellate docket. If the appellate courts are to remain in the business of review for error, preliminary screening must be careful enough to indicate whether further examination would be likely to reveal error. As the Federal Courts Study Committee observed, that sort of screening would require a fairly comprehensive examination of the record and briefs. In short, as judges have told us, "by the time you've decided if it's certworthy, you've decided the case." Judges already have the option of dispos-

²²⁴Subcommittee on Structure, Report to the Federal Courts Study Committee 35 (undated), in 2 Federal Courts Study Committee, Working Papers and Subcommittee Reports (1990).

ing of the case with an unpublished opinion, or no written opinion at all, so discretionary review of this sort might not add much efficiency. Where review is granted, moreover, there would be inefficiencies built in by virtue of a second review, perhaps months later, after the initial certiorari review.

These criticisms seem likely to be on target if the focus of discretionary review screening is whether the issues on appeal ought to be characterized as “error correction” (and therefore suitable for summary treatment or no review at all) or “law declaring” (and therefore suitable for more extended treatment). It may be that clear cases of one or the other are infrequent and not easily identified on a screening review—and they will become less easily distinguished once counsel learn which framing of an issue is more likely to get the attention of appellate courts. But if the focus of screening is, as now, to determine what process is needed, the experience of some circuits suggests that time would be saved. Judicial screening panels in the Tenth Circuit are reported to be operating well and saving the court a great deal of time.²²⁵

Sample Model for System Requiring Leave to Appeal

1. All defendants will have a right of full review in direct criminal appeals. Ordinarily, this review should include oral argument.
2. Appellants in civil cases will be required to file, along with the notice of appeal, a petition for discretionary review and a copy of the district court’s judgment and memorandum, if any. The petition for review would set forth the reasons the appeal should be allowed. It would be of limited length, perhaps ten pages.
3. A three-judge panel of the court of appeals will review the petition within a specified number of days of its filing (e.g., ten days). The panel may request a response to the petition for review from other parties.
4. Any of the three judges may grant the petition by directing the clerk to docket the appeal and require the docket fee to be paid (or *in forma pauperis* status certified). The appeal should be allowed if the petition pre-

²²⁵Reductions in the court’s backlog and median time to disposition, as well as overall judicial satisfaction, attest to the potential workability of judicial screening. But we have not studied the court’s practices empirically, and we note that the screening program coincided with the filling of several judicial vacancies, making strong inferences difficult.

sents any genuine issue of disputed law or presents a serious challenge to the sufficiency of the evidence.

5. Appeals may be taken automatically if the district court certifies that an appeal presents a genuine issue for review.

6. Petitions deemed to present issues that are genuine, but narrow or simple, may be set down for summary argument without plenary briefing, and disposed of summarily by opinion or order.

Adapted from Donald P. Lay, *A Proposal for Discretionary Review in Federal Courts of Appeals*, 34 Sw. L.J. 1151 (1981).

Appellate judges differ about the wisdom of reducing the caseloads of the courts of appeals by eliminating civil appeals as of right and adopting a "discretionary review" approach in the courts of appeals. Survey items suggesting this sort of approach to increasing caseloads drew positive and negative responses in substantial numbers. More appellate judge respondents opposed it (32% strongly, 13% moderately) than supported it (18% strongly, 18% moderately). Sixteen percent had mixed feelings. Discussions with appellate judges revealed varying reasons for opposition to discretionary review. Some oppose the approach in principle, believing strongly that at least one avenue of review ought to remain open in all cases. Others oppose discretionary review on the practical grounds that the approach would not yield significant burden-reducing advantages over current screening practices. However, some judges think discretionary review is the only practical option if the courts are to function as caseloads grow. And some believe it would be appropriate to make explicit the extent to which screening practices now used in some circuits approximate discretionary review.

Differentiated appeal management

Recently, the Judicial Conference's Committee on Court Administration and Case Management recommended to the Conference's Committee on Long Range Planning that the courts of appeals adopt a "two-track" method of appellate review. The goal of the procedure, summarized in the box that follows, is to reduce and keep down the size of the courts of appeals while still allowing the courts "to afford each case the attention it requires, provide due consideration of the merits, and conserve judicial time."²²⁶ It would do so by providing the court with

²²⁶Judicial Conference Committee on Court Administration and Case Management, Report to the Judicial Conference Committee on Long Range Planning (1993).

enough information to do a quick review for potential merit before a case is fully briefed.

Appellate Case Management Model (Judicial Conference Committee on Court Administration and Case Management)

Track One

Each case would begin with the filing of appellant's "Track One" brief, not to exceed fifteen pages (excluding the appendix and record), which would contain a list of all parties (unless the names appear in the caption of the case), a table of authorities, a jurisdictional statement, a short and concise statement of the questions presented for review, a concise statement of the facts material to the questions presented for review, and a concise argument of the merits of the appeal.

The brief would be accompanied by an appendix containing the judgments, opinions, orders, findings of fact and conclusions of law of the district court pertinent to the appeal, and record excerpts pertinent to the questions presented for review.

The appellee's Track One reply brief, also not to exceed fifteen pages, would contain the appellee's version of the same elements.

Track Two—plenary review

In any case assigned to Track Two review, the court of appeals could permit or require the parties to:

1. Supplement the briefs filed in Track One to the extent ordered.
2. Fully brief the questions presented for review.
3. Supplement the record or file the complete record.
4. Present oral argument.

Adapted from the Judicial Conference Committee on Court Administration and Case Management, Report to the Judicial Conference Committee on Long Range Planning (1993).

The committee's description of this model for appellate case management does not specify who would review the Track One submissions for disposition or routing to Track Two. As the report does not describe the model as one of discretionary review or speak of eliminating the three-judge panel rule, it appears to contemplate retaining the requirement that three judges decide appeals, including Track One submissions. Although the report is sketchy, it appears that appeals not routed to Track Two would be disposed of summarily, perhaps by judgment orders affirming the district court.

Courts that now use judges to screen cases for routing to oral argument or other modes of processing (e.g., the Tenth Circuit) allow a single judge of the three-judge screening panel to order a case to be calendared for oral argument. A similar "rule of one" procedure applied to the decision to move cases to the plenary review track might provide some safeguard against too hasty disposition.

Appellate magistrate judges or appellate commissioners. As we have seen, the courts of appeals vary greatly in the tasks they assign to central staff. The dominant model appears to be to have staff screen incoming appeals, flag jurisdictional or procedural flaws, and recommend cases for argument or nonargument disposition and perhaps for settlement tracks. In some courts, central staff bear considerable responsibility for preparing nonargued cases for disposition. Staff attorneys may recommend a particular disposition and draft an order and memorandum opinion accordingly. It is likely that their recommended dispositions are often adopted.²²⁷ This central staff function is largely invisible to the parties. The decision that the parties receive, whether reasoned or summary, is issued by the court itself, either per curiam or signed by three judges. Critics fear this procedure masks the heavy role of staff attorneys in the process. Yet it is clear that many circuits would have much more significant backlogs if they did not use staff attorneys in this manner. If caseloads grow and the judiciary does not, more delegation to staff seems inevitable.

Court staff also perform functions that were traditionally performed by judges but are not an essential part of the three-judge model of appellate decision making. Procedural matters, including many motions, are not necessarily most efficiently handled by judges. While arbitrariness must be avoided, most would

²²⁷We do not have data on the point, but if staff attorney recommendations were regularly rejected by the judges they serve, we presume the use of staff attorneys would have died out or changed fairly quickly. Studies of the screening process in the Ninth Circuit suggest that staff recommendations for argument or nonargument disposition are followed often enough to suggest the process is worthwhile and rejected often enough to suggest that judges are making their own assessments of what cases would benefit from oral argument. See John B. Oakley, *The Screening of Appeals: The Ninth Circuit's Experience in the Eighties and Innovations for the Nineties*, 1991 B.Y.U. L. Rev. 859.

agree that there is little need for an Article III commission to grant a motion to extend the time for filing a record because the court reporter has not yet transcribed it. In practice, many of these decisions are made by staff and ratified by a single judge. In some circuits the power to make the decision has been delegated to staff, with recourse to judges if a party seeks reconsideration.

One idea offered to expand the case-processing capacity of the courts of appeals is to create a new position of appellate magistrate judge or appellate commissioner.²²⁸ The terms are sometimes used interchangeably, which has led to some confusion. We will use them to describe two distinct models of the possible role of this addition to the staff of the court of appeals. The first model, for which we use the term "appellate commissioner," seeks to make visible the role now played by central staff attorneys in many courts. The second model, "appellate magistrate judge," represents a more ambitious attempt to expand appellate capacity.

The box below sets out a possible description of the appellate commissioner position. In many courts, this model could be implemented using the current complement of staff attorneys.

Appellate Commissioners

Functions:

Screen appeals for jurisdictional and procedural flaws likely to lead to procedural terminations.

Identify cases for preargument settlement or other conference programs.

Conduct preargument settlement conferences.

Work up cases not routed to oral argument panels. Draft memoranda of law; summarize record or otherwise structure material to be presented to appellate panel.

Issue show cause orders for the correction of correctable flaws.

Prepare orders on procedural motions, to be reviewed by a judge.

²²⁸See, e.g., Thompson & Oakley, *supra* note 29; Oakley, *supra* note 227.

Personnel:

Depending on functions chosen by courts, appellate commissioners could be drawn from the ranks of current staff attorneys or senior staff attorneys, or could be newly appointed.

The list of functions to be performed by appellate commissioners could expand or contract with the level of responsibility deemed appropriate. Some courts might use appellate commissioners primarily as case managers, others more like law clerks. One basic requirement would be that the functions of the appellate commissioner be publicly disclosed. Indeed, there is a reasonable argument that all case-related materials that an appellate commissioner or staff attorney prepares for judges should be signed and made available at least to litigants. This would be a great departure from current practice in some courts, but might be defended as the price of increased delegation.²²⁹

The second model, set out in the following box, describes a position that brings non-Article III personnel more explicitly into the role of decision maker.

Appellate Magistrate Judges**Functions:**

Supervise screening program conducted by central staff.

Supervise appeal diversion programs adopted by the court. Conduct preargument settlement conferences.

Draft recommended orders and opinions in nonargued cases, with supporting material to be presented to appellate panel.

Issue orders requiring appellant to show cause why the decision appealed from should not be affirmed.

Rule on procedural and substantive motions.

Review, make recommendations, or rule on attorney fee petitions, Criminal Justice Act vouchers, etc.

²²⁹Thompson & Oakley, *supra* note 29.

Take evidence on matters requiring findings of fact (e.g., motions for appellate sanctions).

Personnel:

Functions chosen by courts may approximate functions already performed by senior staff counsel in some courts. Appellate magistrate judges could be drawn from their ranks.

Appellate magistrate judges could serve multiple functions. As some staff attorneys now do, they could prepare recommended dispositions, orders, and opinions in cases suitable for disposition without oral argument. They could also perform many of the functions now performed by some staff attorneys, such as handling preappeal conferences and motions, with appropriate oversight by the court. Their recommendations might be treated much like the reports and recommendations of magistrate judges or special masters in the district courts. The circuit judges ultimately responsible for the decision must be satisfied that the recommended decision is appropriate, and the decision would still issue from the court, but it could be styled as recommendations accepted, perhaps with modifications, by the court. And the identity of the appellate magistrate judge who made the recommendations could be made public.

When we surveyed judges in October 1992, we asked for their reaction to a proposal to "create the new position of appellate magistrate judge." Fully half of the appellate judges who responded to the survey strongly opposed this idea, and another 15% moderately opposed it. Only about 16% strongly or moderately supported it. The context of the item was a list of possible approaches to changing the size and resources of the federal courts, including expanding the role of magistrate judges in district courts, adding more judges, or capping the size of the Article III judiciary. It is therefore likely that the responses we received are best viewed as reactions to the sort of appellate magistrate judge model we describe above. Much of the opposition to the concept may stem from the notion of non-Article III court personnel ruling on the work of Article III district judges. Indeed, the survey responses of district judges seem to bear that out. Fifty-two percent were strongly opposed to the idea, and another 13% were moderately opposed. Only 5% supported it moderately or strongly. We did not directly ask judges about the staff attorney model for an appellate magistrate judge or appellate commissioner position.

Intermediate models might be developed, but at the extreme ends the two models have different implications and will probably evoke different reactions

from participants in the judicial system. Perhaps the greatest value in discussing the models will come from encouraging circuit judges to articulate what it is that they do that is uniquely judicial, and what functions others might perform without doing violence to the values of our appellate system.

- Proposals to have an appellate magistrate judge rule on the work of district judges are likely to encounter substantial opposition. However, support for the roles played by central staff is sufficiently strong in many courts to warrant further investigation of how that role might be both strengthened and made more visible. Development of an appropriately circumscribed position of appellate magistrate judge or appellate commissioner might be one means to that end, and we believe the concept is worth further discussion among judges and court staff.

District court review for error

Some contend that review for error must continue to exist, but that review need not always be located in the courts of appeals. Partial discretionary review could be implemented for some types of appeals by having some error-correction functions performed by the district court, with review by the courts of appeals only by leave. Various models for this sort of system have been proposed. All of them would ensure *some* review for all cases but would reduce the burden on the courts of appeals by locating the single appeal as of right earlier in the process, as in an “appellate division” or “appellate term” of the district courts.

Purpose. Proponents suggest district-level review can offer the benefits of discretionary review for the courts of appeals without sacrificing the fundamental traditional right to appellate review. In fact, such a system might serve to restore a meaningful right to appeal in cases that arguably do not receive all the attention they would have received from the courts of appeals in a less overburdened era. Adopting this as one of the primary purposes of a new system would entail focusing on providing more of the features of the appellate process that further the visibility and accountability of the courts. Such features include oral argument and an explanation of decisions. With adequate resources, such a system may dispose of appeals faster, and therefore bring an end to disputes. Alternatively, an appellate-division option could be established with the sole purpose of relieving the caseload burden of the courts of appeals without reinstating the features of the appeals process that have been abandoned.

Cases subject to district-level review. A fundamental requirement for the success of any district-level review scheme is that jurisdictional battles be avoided. Although disputes about what cases go where must be expected when a new system is implemented, ultimately the appellate route must become clear, or the system will fail to achieve the goal of reducing the workload of the courts of appeals. A district-level appellate review system should not just reduce the abso-

lute number of cases decided by the courts of appeals but should also change the nature of the courts' caseloads to allow greater focus on cases of institutional or precedential importance. These cases arise in all subject areas, so any "appellate division" scheme must ensure that no class of cases loses eligibility for consideration by the court of appeals. Additionally, no class of litigants should be, or appear to be, denied access to the higher courts.

Standard of review as a selection criterion. One way to avoid excluding classes of litigants from the appellate courts is to focus on the applicable standard of review. Appellate division panels might consider cases raising claims of abuse of discretion or insufficiency of the evidence. If only those issues were raised by the appeal, the case would be reviewable by the court of appeals only by certiorari. If, in deciding the appeal, the panel also decided other issues, the case might be reviewable as of right by the court of appeals.

Nature of suit as a selection criterion. Some cases are thought to be more typically examples of "error correction" than "law declaring." For example, district-level review may be appropriate for fact-based reviews of agency determinations such as decisions on federal entitlements, or fact-based reviews of sentences imposed under the Sentencing Guidelines. It will not always be possible to distinguish error-correction and law-declaring cases in advance by case type. Questions requiring each type of review will arise together in actual cases, particularly in developing areas of the law. Until a circuit's court of appeals resolves the major legal issues that control the review of facts, these cases might not be suitable for disposition by the district-level appellate division in that circuit. Once circuit law is authoritatively established on the point, however, cases in which the only issue is the proper application of the law to the facts could be handled at the district level. To take an example from the guidelines area, courts of appeals would determine whether a state conviction qualifies as a prior conviction if the defendant did not have the assistance of counsel. Once the issue was decided, the appellate division of the district court would review cases requiring only a determination of whether an offender had actually lacked counsel.

Process needed as a selection criterion. The articulation of a purpose for adopting the system is important to the choice of case types appropriate for district-level review and the procedures to be followed. If the purpose of an appellate division is solely to reduce the flow of work into the courts of appeals, it might be logical to select cases for district-level review that are not suited for oral argument. That distinction has advantages, including ease of implementation—no appellate courtroom would be needed for panels to hear argument. However, if the purpose is to restore a fuller review process, including the opportunity to argue to a three-judge panel and address any questions the reviewers may have, this selection method does not seem satisfactory.

Who will decide where an appeal will be handled? One way to structure an appellate division system without excluding entire classes of cases from the courts of appeals is to build on current screening programs. Essentially, courts of appeals acting as gatekeepers and retaining cases appropriate for disposition at their level would continue to be the avenue of first resort for appellants. In the Tenth Circuit, for example, judges now screen all appeals that have cleared an initial screening solely for jurisdictional defects. Judicial screening panels have three options for each appeal: (1) return the case to the clerk for briefing and argument by the parties; (2) route the case to central staff counsel to prepare the case for decision and disposition under Rule 34; or (3) retain the case in chambers for summary disposition by the screening panel. In a circuit with a district court "appellate division," a fourth option could be added: Return the case to the clerk for assignment to an appellate division panel.

An alternative way of deciding where an appeal will be handled is to allow appeal to a district-level panel as a party option, much as is now done in the bankruptcy appellate panel in place in the Ninth Circuit and authorized for every circuit. This might become a significantly more attractive option if backlogs worsen in the courts of appeals, or if district-level review provides opportunities not guaranteed by the courts of appeals (e.g., oral argument).

Who will decide the appeal? The composition of appellate division review panels could be flexible and could differ across circuits to allow experimentation with different procedures. Some early sketches of appellate division models allowed or required the judge who conducted the original trial to sit on the review panel.²³⁰ That arrangement has some advantages: The trial judge is likely to have notes of the testimony that would facilitate review without waiting for a transcript of the proceedings; most remands for further explanation or findings would be eliminated; and the trial judge could offer a unique perspective on the events of trial and the demeanor of witnesses. We did not ask judges about this model in our survey. However, we believe the disadvantages of having the trial judge on the review panel so outweigh the advantages that this alternative is not worth extensive consideration. However dispassionate district judges might actually be when they sit in review of their own work, the appearance of unfairness is likely to be so great as to make the process unacceptable to the bar and the public, if not to the judges themselves. This fear is reflected in current law, under which trial judges are disqualified from hearing or determining appeals from their own cases.²³¹

²³⁰See, e.g., Shirley Hufstедler & Seth Hufstедler, *Improving the California Appellate Pyramid*, L.A. Bar Bull., June 1971, at 275, 297.

²³¹28 U.S.C. § 47 (1988).

Alternatives that we believe merit consideration are panels of three district judges,²³² or of two district judges and one circuit judge.²³³ District judges sometimes express reluctance about reviewing the work of their colleagues. Some fear review will not be tough enough and will lead to “mutual backscratching” or its appearance. Others fear the opposite—review will be tough enough, but will diminish collegial relationships among district judges. It may be that these sorts of objections can be overcome by ensuring that district-level review panels do not include judges from the trial judge’s district. This is the model prescribed by statute for the bankruptcy appellate panel and is the approach taken by courts of appeals assigning visiting district judges to appellate panels. Judges on these panels appear able and willing to review the work of other district and bankruptcy judges. In some circumstances, review by district judges from other circuits would be appropriate (e.g., if the model were adopted in the District of Columbia Circuit), but there is likely to be some loss of effectiveness if reviewing judges are unfamiliar with the law of the circuit.

Procedure. In the box that follows, we outline one model that combines district review with discretionary review by the court of appeals. Many of the details, including time limits, could be varied. In the procedure described here, we try to incorporate the best of the reasons for including the trial judge in the review process by expanding slightly the current function of post-trial motions. The trial judge can most quickly rectify clear errors. New trials are likely to be rare, as they are now, but the requirement that “appeals” be filed first with the trial judge allows him or her to explain decisions complained of, perhaps more fully and more formally than would otherwise have been done. This would give the appellate review panel (regardless of its level) a fuller record and allow it to judge the merits of the appeal more quickly.²³⁴

²³²A variant of such a system was proposed decades ago for civil cases. Roscoe Pound, *Appellate Procedure in Civil Cases* 390 (1941). More recently, it has been suggested as the way to insert a new tier into the federal judicial structure to relieve the courts of appeals without entirely eliminating the right to review for any case type. Louis H. Pollak, *Amici Curiae*, 56 U. Chi. L. Rev. 811, 825–26 (1989) (book review).

²³³Joseph F. Weis, Jr., *Restoring the Authority of the District Court*, in *The Federal Appellate Judiciary in the 21st Century* 97 (Cynthia Harrison & Russell Wheeler eds., Federal Judicial Center 1989).

²³⁴Some may see a danger that allowing trial judges to review appellate briefs first will allow them to “appeal-proof” their decisions by entering findings or writing opinions that make reversal difficult notwithstanding the essential merits of the appellant’s argument. But trial judges are entirely free to do that now. In some sense, requiring appellate attorneys to lay their arguments on the trial court’s table may be analogous to the trend in civil practice of requiring litigants to lay out their arguments and evidence at an earlier stage, reducing gamesmanship and the role of superior advocacy skills.

Sample Model for District-Level Review

1. Within twenty days after entry of a final judgment, any aggrieved party may file a motion for review in the district court in which the trial was held. The motion for review takes the place of motions currently brought as post-trial motions in the trial court, including motions for new trial. The moving party files a statement of the points to be reviewed, a summary of facts on which the motion relies, and a legal argument. Other parties may respond within twenty days thereafter. (Provisions would also be needed for cross-appeals.) Parties are not entitled to a transcript of the trial, but may ask the court to supplement the record with transcribed portions of the trial as necessary.²³⁵

2. Within thirty days, the trial judge may grant or deny post-trial relief as under the present system. Whether or not relief is granted, the trial judge may add to the record of the case by issuing a written opinion (or a transcribed oral opinion) explaining trial decisions complained of or addressing other points raised in the motion for review.

3. After the thirty-day period expires, unless the trial judge grants relief that makes further review unnecessary, the clerk of the district court will transmit the motion for review and supporting papers to the clerk of the court of appeals for assignment to a district court review panel.

4. A review panel (e.g., composed of district judges from districts other than that of the trial judge) will hear oral argument on the motion within a specified time (or will set a schedule for additional briefing and argument). Panel decisions may be delivered orally or in writing, but must cover each point raised in the motion and state the panel's reasons for its decision. Where appropriate, the panel may adopt any or all of an opinion issued in the case by the trial judge. The panel may:

- a. grant relief—in most cases, this decision would be reviewable as of right by the court of appeals for the circuit;

²³⁵Parties would be permitted to obtain their own transcripts if they wished, but review would not be delayed for completion of the transcript except pursuant to a supplementation order.

b. deny relief and certify one or more issues immediately to the court of appeals—the court of appeals may accept or decline the certification, but there will be a presumption in favor of acceptance; or

c. deny relief and not certify any questions to the court of appeals—parties may obtain further review only by a petition to the court of appeals; the court of appeals may grant or deny the petition, but will usually limit further review to questions of law.

5. Decisions of the panel will not be precedential and may not be cited.

Analysis. A district-level review system, properly staffed, could add to the appellate capacity of the circuit. “Properly staffed” is likely to entail a substantial number of new district judgeships, but projections would depend on what kinds of cases would be reviewed at the district level and perhaps on whether senior judges would be available to perform some of the appellate functions. This expansion of the district bench would require substantially increased resources in addition to the judgeships themselves. The models are likely to work better in some circuits than in others, if only because administrative diseconomies would be more significant in some circuits, for geographical and other reasons. But this is also an advantage of the model: Like bankruptcy appellate panels, “appellate divisions” could be instituted in accord with local or regional needs, allowing for experimentation with the model before, or instead of, imposing the plan system-wide.

Conceptually, models of district-level review add another tier to the federal court system and, therefore, another hurdle that at least some litigants must clear before obtaining finality. Changes that add more steps to the litigation process have been resisted before and are likely to encounter resistance again.²³⁶ The expense and delay caused by adding an appellate division must be minimized for the approach to be successful. The appellate division should serve as the final review for most cases, and it should not impose extra financial burdens on litigants. The initial briefing could be the same as what is currently done for an appeal, and further briefing should be no more burdensome than a certiorari petition is now (in the short run, petitions may be more likely to be filed as the bar explores the likelihood that further review will be granted). Society has a strong interest in having disputes decided authoritatively and finally as soon as practicable—additional review steps are expensive and time-consuming. Because most

²³⁶See Edward J. Horowitz & Marc J. Poster, *The Proposed Panel to Resolve Intercircuit Conflicts: A Brief View from the Litigant's Perspective*, 11 *Hastings Const. L.Q.* 371 (1984).

appeals result in an affirmance of the lower court's order, the burden of an additional step will fall most heavily on those who have already succeeded in at least one court. Still, if the courts of appeals exercise their discretion sparingly, most appeals will end at the appellate division level, probably sooner than they would have if they went the current appellate route. Given the choice of a prompt opportunity to argue an appeal before three district judges or a long wait in the courts of appeals for a summary disposition, many litigants might opt for the former. However, the appellate-division option does not appear to have much support among judges at present.

- A large majority of both district and appellate judges registered strong or moderate opposition to a proposal linking discretionary review by appellate courts with error correction by a district court appellate division. Nevertheless, we believe it is an approach worthy of further consideration if sufficient resources would be provided to implement it.

VIII. Reducing the Need for Structural Change by Reducing the Flow of Cases

If, as some contend, the courts of appeals are at or near the limit of procedural adaptation, and if the present structure of the system is to be maintained without substantial growth, either caseloads must stop growing at their recent rates or the queue of cases will lengthen significantly. Caseloads might abate without structural or other change to the federal courts. Litigation might decrease for a number of reasons, including greater use of alternative dispute resolution procedures, greatly expanded use of diversion as an alternative to prosecution of some drug crimes, and greater resort to state courts. Caseloads might also abate if potential litigants begin to see the federal courts as a much less attractive forum than they do at present, whether because of the lengthening queue, the implications of truncated procedures, or other reasons. However, most observers believe it would be unwise to assume that filings will abate without intervention.

We have already addressed interventions that could lessen the flow of cases from the district courts and agencies to the regional courts of appeals by diverting them elsewhere. The flow of cases could also be reduced earlier in the litigation system by reducing the number of cases decided by the trial courts. Recall that historical data suggest that appellate caseloads closely track district court caseloads. Some kinds of intervention might make that correspondence less reliable, but we proceed here on the assumption that if district courts terminate fewer cases, appellate courts will receive fewer appeals.

Jurisdictional options for reducing the volume of litigation in the federal courts

No discussion of the problems of volume in the federal courts could be complete without reference to the ultimate source of the volume of cases: federal jurisdiction. We include jurisdictional and related options in the range of alternatives for the federal courts of appeals for three reasons. First, the jurisdiction of the federal courts is directly within the control of Congress, whereas most of the other factors believed to drive litigation volume are not. Second, the expansion of jurisdiction, as well as increased use of existing jurisdiction, has had a serious impact on federal court dockets. The final reason is related to the first two: Focusing on jurisdiction forces one to consider what the federal courts are for—what kinds of cases ought to be federal cases and why?

We do not attempt to answer that question. While members of the third branch are eminently qualified to contribute to a discussion of the question, its ultimate

resolution must of course be a political one.²³⁷ We do discuss in this section some of the jurisdictional proposals considered or recommended by the Federal Courts Study Committee. That committee was specifically asked to consider the question of the proper role of the federal courts. The committee's proposals and discussions reflect a particular view of that role—for example, that the federal courts are and ought to be courts of limited jurisdiction' and that Article III judges' time is and will remain a particularly scarce resource, best reserved for cases that are "fundamentally federal" (in the sense of needing the particular protections afforded by Article III judicial independence; a broad, multistate reach; or resources more readily available in the federal system).

The committee's recommendations for jurisdictional changes (more particularly, for the allocation of business between state and federal systems) were developed in light of an unarguably desirable goal: "to improve the federal courts' capacity to resolve disputes that most need federal court attention."²³⁸ Specific recommendations reflect the committee's principled view of federal jurisdiction and its sense that Congress could best achieve that goal for the federal courts "by relieving them of some functions that involve federal rights or interests only marginally if at all."²³⁹ An alternative approach to the same goal would be to improve capacity by expanding federal jurisdiction. The committee did not favor this approach, and even those who believe expansion is the preferred route are skeptical about whether there are sufficient resources or will to support a system of the size needed to handle the volume of litigation likely to ensue from current legislative efforts to expand federal jurisdiction. Thus, the recommendations are based on one or both of the following beliefs: (1) the federal courts should not greatly expand and (2) the federal courts will not be given sufficient resources to support substantial expansion.²⁴⁰

We do not, by citing the committee's work and conclusions in this area, endorse either the principles underlying its jurisdictional recommendations or its

²³⁷Judges who responded to our survey were divided on the matter of whether the scope of federal jurisdiction is itself a major problem. Responses of active circuit and district judges tended to cluster in the moderate problem/large problem category for both civil jurisdiction and criminal jurisdiction, but the responses were spread over the entire scale. Both groups were somewhat more likely to identify the scope of criminal jurisdiction as a moderate or large problem than the scope of civil jurisdiction. For an overview of the political implications of jurisdictional reform, see Mark Tushnet, *General Principles of the Revision of Federal Jurisdiction: A Political Analysis*, 22 Conn. L. Rev. 621 (1990). See also Remarks of Senator Joseph Biden to the Third Circuit Judicial Conference (1993).

²³⁸Report of the Federal Courts Study Committee 35 (1990).

²³⁹*Id.*

²⁴⁰The committee clearly held at least the first belief. One of its goals was to retain a federal judiciary "perceived as a small and special corps of men and women whose talents are reserved for issues that transcend local concern, rather than as a faceless, omnipresent bureaucracy." *Id.* at 8.

conclusion that the courts are now in crisis. Reasonable observers differ on the severity of the problem of volume. More important, they differ on whether the federal courts ought to remain the relatively small institutions they have been throughout their history.²⁴¹ Some participants in the debate want the federal judiciary to remain small, and they see contracting federal jurisdiction as a means to that end. Others believe federal jurisdiction should be narrow, and see contracting the size of the judiciary as a means to that end. Neither group is especially optimistic. Finally, some see increasing demand for the services of the federal courts as signs of the success of those courts and of the need for their special attributes. These observers argue for expansion of the courts to provide increased access.

None of this is to suggest that the proposals discussed here are not political in some sense—every jurisdictional choice is political. And it is no doubt true that the judges who responded to our survey did so out of their own frames of reference about the proper role of the federal courts. On the whole, however, it appears that the judiciary's concern about the scope of jurisdiction stems from the relationship between that scope of jurisdiction and the volume of cases. In its September 1993 meeting, the Judicial Conference approved proposals by its Committee on Long Range Planning that:

- reaffirmed the federal judiciary's historical commitment to the principle that the jurisdiction of the federal courts should be limited, complementing and not supplanting the jurisdiction of the state courts;
- endorsed the principle that the size of the Article III judiciary should be limited to the number necessary to exercise such jurisdiction, thus allowing a policy of carefully controlled growth; and
- reaffirmed the Conference's September 1990 position favoring "a relatively small Article III judiciary ... but oppos[ing] any efforts to set a maximum limit on the number of Article III judgeships."²⁴²

In sum, we offer no opinion on the proper scope of federal jurisdiction, but only reiterate the often observed and unsurprising conclusion that the continuing expansion of federal civil and criminal jurisdiction, at least without adequate resources, causes stress on the judicial system that affects the quality of adjudication at all levels and in all types of cases. Because our focus is on the effects of jurisdictional choices on the appellate burden, we address here only the sorts of jurisdictional changes that have been offered at one time or another at least nom-

²⁴¹The arguments on both sides of this issue are discussed extensively in Bermant et al., *supra* note 198.

²⁴²Memorandum of the Director of the Administrative Office of the U.S. Courts preliminarily reporting the proceedings of the Judicial Conference of the United States, September 1993.

inally because they would reduce caseload pressures or because there is a credible argument that the reasons for federal jurisdiction are no longer persuasive.²⁴³

Ameliorating the caseload problems of the courts of appeals by curtailing federal jurisdiction would require eliminating guaranteed access to the federal courts for a large number of cases almost universally regarded as fundamentally, even if not uniquely, federal (e.g., civil rights cases). Eliminating some of the arguably marginal areas of federal jurisdiction would provide some relief to the courts of appeals, but we cannot be certain how much.²⁴⁴ And most jurisdictional changes would do little or nothing to address whatever level of intercircuit conflict there may be in the system at present.

Elimination or restriction of diversity of citizenship as a basis for federal jurisdiction. Current law confers subject-matter jurisdiction on the federal courts over disputes between citizens of different states when the amount in controversy exceeds \$50,000.²⁴⁵ Defendants sued in state court may remove their cases to federal court so long as no defendant is a citizen of the forum state. Plaintiffs, too, may elect to bring suit in the federal court of their own state so long as no defendant is a citizen of that state. The history of diversity jurisdiction and the arguments for and against it are well documented and need not be fully elaborated here.²⁴⁶ Whether diversity jurisdiction was created to counter bias against

²⁴³ Accordingly, we do not discuss proposals to remove federal jurisdiction over particular substantive matters such as abortion, school prayer, and the like. For the most part, such proposals have been seen as attempts to alter case outcomes, shape national policy, or promote a particular view of the rights of states vis-à-vis the federal government. They do not have as their primary goal the reduction of the caseload burden on federal judges, and their adoption would not provide significant caseload relief. Nor do we discuss in detail the policy implications of more recent efforts to expand federal criminal jurisdiction.

²⁴⁴ The Federal Courts Study Committee estimated the combined effects of its recommended jurisdictional changes to be a reduction in appellate caseloads of about 17%. We cannot predict with certainty the caseload effects of expansion or contraction of jurisdiction. "Judicial impact statements" are only rough predictions about how federal legislation will affect judicial workloads. In the criminal arena, the impact on the courts' caseloads depends primarily on two factors: the base rate of the behavior to be punished as a federal crime and prosecutorial resources and policies. To take examples from recent federal legislation, one might predict that the Animal Enterprise Protection Act of 1992 (Pub. L. No. 102-346) will have relatively little impact overall on the federal system, whereas the Child Support Recovery Act of 1992 (Pub. L. No. 102-521) may have a significant impact on the federal courts. The Anti-Car Theft Act of 1992 (Pub. L. No. 102-519) might fall somewhere in between. These predictions are based solely on intuitions about the base rates of the behaviors to be punished (i.e., laboratory destruction, failure to pay child support, and car-jacking), and not on assumptions about prosecutorial interests at a national or local level.

²⁴⁵ 28 U.S.C. § 1332 (1988). In addition, 28 U.S.C. § 1335 provides for federal jurisdiction in interstate interpleader cases where more than \$500 is in controversy, and imposes a standard of diversity somewhat looser than the "complete diversity" requirement of § 1332.

²⁴⁶ See, e.g., the debate between M. Caldwell Butler and John P. Frank in *Abolition of Diversity Jurisdiction: An Idea Whose Time Has Come?* (Nat'l Legal Center for the Public Interest 1983);

out-of-state litigants, to allow creditors to escape a pro-debtor bias in state courts, or to secure for some litigant classes access to higher quality or more independent judges, it has proved remarkably resilient in the face of repeated suggestions to eliminate it.²⁴⁷

Nevertheless, diversity jurisdiction holds obvious attractions as a jurisdictional category to be curtailed if such curtailment is warranted. Although not a huge portion of the federal appellate caseload, it is one of the largest single case categories and one that is clearly and easily defined. Because diversity cases concern matters also within the purview of the state courts, the cases could be removed from federal court jurisdiction without creating new avenues of adjudication. If diversity jurisdiction were to be eliminated, the additional burdens on state courts would not be trivial, but they should be resource burdens only—the state courts, for example, would not be required to broaden the range of their expertise to new federal rights and would not be required to open their doors any wider than they are at present. Moreover, transferring this category of cases to the states would have the benefit of having state laws applied and interpreted primarily by state courts.

Proposals to curtail diversity jurisdiction fall on a continuum from modification to elimination.

Eliminating diversity of citizenship jurisdiction. The matter of diversity jurisdiction was predictably controversial in the deliberations and hearings of the Federal Courts Study Committee. Ultimately, the committee recommended that Congress limit federal diversity of citizenship jurisdiction to “complex multistate litigation, interpleader, and suits involving aliens. At the least, it should effect changes to curtail the most obvious problems of the current jurisdiction.”²⁴⁸ The committee’s discussion of the issue, as well as the materials it considered, are particularly worth noting because they reveal the frame of reference for the committee’s jurisdictional recommendations. Summarizing the results of its internal debate on diversity jurisdiction, the committee reported:

After extensive discussion, a substantial majority of the committee strongly recommends that Congress eliminate this basis of federal jurisdiction, subject to certain narrowly defined exceptions. ... We believe that diversity jurisdiction should be virtually eliminated for two simple reasons: On the one hand, no other class of cases has a weaker claim on federal judicial resources. On the other hand, no other step

American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 99–132 (1969).

²⁴⁷The American Law Institute recommended changes that would have restricted diversity jurisdiction in some cases and expanded it in others. American Law Institute, *supra* note 246. The American Bar Association is on record as opposing the elimination of diversity jurisdiction.

²⁴⁸Report of the Federal Courts Study Committee 38 (1990).

will do anywhere nearly as much to reduce federal caseload pressures and contain the growth of the federal judiciary. Given all the demands on the federal courts, there is little reason to use them for contract disputes or automobile accident suits simply because the parties live across state boundaries—especially when litigants who do not live in different states must bring otherwise identical suits in state courts.²⁴⁹

Eliminating diversity jurisdiction would, by itself, provide relatively little caseload relief to the courts of appeals. In statistical year 92, diversity cases made up only 9% of the appeals filed, and about 23% of civil (nonprisoner) appeals. In the same year, diversity jurisdiction accounted for approximately 21% of the filings in the federal trial courts. Eliminating diversity jurisdiction could, however, significantly improve the caseload picture for district courts: Diversity cases represented about 50% of the trials in the district courts.²⁵⁰

The Judicial Conference has long advocated the abolition of diversity of citizenship jurisdiction.²⁵¹ Nevertheless, despite the projected decline in their workloads, not all judges favor such a change. About 36% of the appellate judges who responded to our survey strongly supported the elimination of diversity jurisdiction, and another 17% expressed moderate support. But more than 35% opposed the change, 20% strongly. District judges were even less enthusiastic—a quarter strongly supported elimination, but more than 30% strongly opposed it. For some judges, perhaps particularly district judges, the workload reduction is not worth sacrificing the benefits of diversity cases. Along with whatever benefit it may be to litigants, diversity jurisdiction brings into federal court kinds of cases that provide a welcome change from other sorts. As one federal trial judge put it, “[I]f all we have is federal question jurisdiction, ours is going to be a dull existence.”²⁵² Diversity cases allow federal judges to become (or stay) familiar with state law, particularly that of the states in their circuits. Eliminating diversity ju-

²⁴⁹*Id.* at 39.

²⁵⁰We cannot determine precisely from available information how much caseloads would decrease if diversity jurisdiction were abolished. Counts of diversity cases, like much other statistical information about the federal courts, are based on information supplied to the AO by court clerks. The clerks obtain the information from a cover sheet completed by the attorneys who file the case. A suit may have multiple bases for federal jurisdiction, but only one is recorded. The AO's instructions to attorneys and clerks direct them to record federal question jurisdiction rather than diversity jurisdiction when both exist. But district court clerks generally do not verify the accuracy of the information supplied by attorneys, and there is no penalty for error so long as federal jurisdiction actually exists. A Federal Judicial Center study that sampled diversity cases filed in statistical year 86 found 16 of the 403 cases sampled had been improperly characterized as diversity cases, 15 of them because they also asserted either federal question or admiralty jurisdiction. See Anthony Partridge, *The Budgetary Impact of Possible Changes in Diversity Jurisdiction* (Federal Judicial Center 1988).

²⁵¹Judicial Conference of the United States, Proc. 8 (1977).

²⁵²Louis C. Bechtle, *A Few Observations on the Creation and Development of the Federal Judicial System*, 26 *Int'l Soc'y of Barristers Q.* 389, 396 (1991).

isdiction would not eliminate the need for judges to know state law (they will still have to apply it in federal question cases with pendent state claims, for example), but it would significantly reduce their exposure to it. Moreover, diversity jurisdiction provides opportunities for federal judges to stay at least loosely anchored to the people in their communities. Radical structural reorganization of the federal judicial system might abandon the tradition that links federal courts with state boundaries. But as long as the historical connection between judges and their regions is retained, there will remain some argument for the benefits of diversity jurisdiction.

Modifying diversity jurisdiction. If the concept of diversity jurisdiction is to be retained, should its availability be restricted? Many more judges agree that diversity jurisdiction should be curtailed, even if not eliminated. A great majority of appellate and district judges support another increase in the amount-in-controversy requirement. Sixty-seven percent of the circuit judges and 64% of the district judges who responded favored raising the amount in controversy in diversity cases. The Judicial Conference is on record as supporting an increase from \$50,000 to an indexed floor of \$75,000.²⁵³ Under this sort of proposal the minimum amount in controversy might be linked to measures of inflation, so periodic adjustment would be automatic.

The 1989 increase from \$10,000 to \$50,000 afforded the district courts immediate relief, but experience suggests the effect will be short-lived. Diversity filings in the district courts peaked in 1988 at 68,224. By 1990, the first year in which the impact of the new minimum was felt, diversity filings had fallen to 57,183. This was followed by two more years of decline, to 49,432 in 1992. This represents about 21% of the civil docket of the district courts.²⁵⁴ Thus, to have a significant and sustained effect on the federal caseload, the amount-in-controversy requirement might have to be raised substantially—some suggest a figure as high as \$250,000. Smaller increases may assist the district courts but have little effect on the courts of appeals if, as some hypothesize, the cases most likely to be pursued on appeal are the higher stakes cases.

Limiting diversity of citizenship jurisdiction to out-of-state defendants. There may be some classes of cases best suited to a federal forum, but not because of the citizenship of the plaintiff. Whatever the strength of the argument for retaining diversity jurisdiction to protect out-of-state litigants, the argument does not support retaining the option of a federal court forum for plaintiffs suing in their

²⁵³Judicial Conference of the United States, Proc. 60 (1990).

²⁵⁴Because diversity of citizenship cases are more likely to go to trial than many other kinds of cases, this figure understates their effect on district court workloads. In statistical year 91, for example, about 38% of the civil cases terminated by the district courts during or after trial were diversity of citizenship cases. Administrative Office of the U.S. Courts, Annual Report of the Director, 1991, at Table C4.

home states. If access to federal courts for in-state plaintiffs was once grounded in a perception of a state court bias in favor of debtors (or against creditors, who had sufficient influence to shape the debate in its infancy), it is hard to conclude that the justification survives. We are aware of no evidence that state courts are insufficient forums for vindicating state-created rights. The Federal Courts Study Committee recommended that this aspect of diversity of citizenship jurisdiction be eliminated, even if general diversity jurisdiction is to be maintained. Similarly, the Judicial Conference has long supported this restriction, and recently reaffirmed its position.²⁵⁵

- A great majority of appellate and district judges support a change to bar in-state plaintiffs from invoking diversity jurisdiction when suing out-of-state defendants (foreign defendants would still have the option to remove a case to federal court).²⁵⁶ We are aware of no credible argument for why plaintiffs need the special protections of an Article III judiciary or other benefits of a federal forum to prosecute claims in their home states.

The Judicial Conference also supports revision of the diversity jurisdiction statute to deem corporations citizens of every state in which they do business, not just of states in which they are incorporated or have their principal place of business.²⁵⁷

Effects of diversity jurisdiction modification on state courts. Of the proposals to modify diversity jurisdiction, proposals to raise the amount in controversy would have the least detrimental effect on the state courts because they would transfer the fewest cases to the state courts and because the sorts of cases likely to be transferred are the sorts already most familiar to them. A study by the National Center for State Courts (NCSC) on the effects changes in diversity jurisdiction would have on state court caseloads concluded that, in general, moving federal cases to state court represents a direct transfer of burden—a case eliminated from federal court is a case added to the docket of state trial courts. Some cases, though, would create a disproportionate burden if shifted to the states: The NCSC found that asbestos cases and high-stakes contract cases are more burdensome than ordinary tort or contract cases now filed in state courts.²⁵⁸

²⁵⁵Judicial Conference of the United States, Proc. 9 (1977); Judicial Conference of the United States, Proc. 60 (1990).

²⁵⁶Seventy-one percent of the appellate judge respondents in our survey favored barring in-state plaintiffs from invoking diversity jurisdiction (49% strongly, 22% moderately). Sixty-one percent of the district judge respondents favored the change (41% strongly, 20% moderately).

²⁵⁷Judicial Conference of the United States, Proc. 23 (1988).

²⁵⁸For extensive treatment of how diversity changes would affect the state courts, see Victor E. Flango, *How Would Proposed Changes in Federal Diversity Jurisdiction Affect State Courts?* (National Center for State Courts 1989).

Elimination of federal court jurisdiction over some federal civil claims where an adequate alternative remedy exists or can be created.²⁵⁹ Some classes of cases are litigated in federal courts not because they involve substantial or unique federal rights, but because they arise out of incidents that occur on federal property or involve federal employees. Others are brought in federal court because the subject matter at one time was of strong federal interest or was of a sort best suited for remediation by the federal courts. Some commentators argue that there are some case types for which federal jurisdiction might once have been appropriate but which no longer require handling in the federal courts. Two common examples are cited: cases brought by injured railway workers under the Federal Employers' Liability Act of 1908 (FELA) and cases brought by injured seamen under the Jones Act.

One may reasonably question whether the federal interest in the hazards of railroad work would be sufficiently strong today to justify federal jurisdiction. Most observers believe that were the matter to be considered anew today, the legislative response would not be the current fault-based system, but a scheme more akin to workers' compensation. Indeed, it is difficult to see why railroad workers injured while engaged in interstate commerce are uniquely in need of the protections of an Article III judiciary.²⁶⁰ The Federal Courts Study Committee reported that repeal of the FELA and the Jones Act could reduce the number of appeals slightly (by about 1%) and would be somewhat more beneficial to the district courts.²⁶¹ The committee recommended their repeal—a recommendation the Judicial Conference supports.²⁶²

The competing public policy considerations involved in deciding how to handle the claims of these workers are beyond the scope of this report and have been well addressed elsewhere.²⁶³ Without expressing any opinion on whether a FELA-like statute is required to encourage safety in the railroad industry, we believe it is fair to say that such a goal does not require federal jurisdiction over the claims of injured railway workers. The state administrative compensation schemes are reported to be faster and less costly than federal litigation, but a state

²⁵⁹ See Report of the Federal Courts Study Committee 62-64 (1990); Thomas E. Baker, *Why Congress Should Repeal the Federal Employers' Liability Act of 1908*, 29 Harv. J. on Legis. 79 (1992).

²⁶⁰ Henry J. Friendly, *Averting the Flood by Lessening the Flow*, 59 Cornell L. Rev. 634, 640 (1974).

²⁶¹ The committee found that FELA and Jones Act cases accounted for about 5% of civil trials and about 8% of civil jury trials in 1987 and 1988. Report of the Federal Courts Study Committee 62 (1990).

²⁶² Judicial Conference of the United States, Proc. 82 (1990).

²⁶³ Baker, *supra* note 259, at 79, 84 (asserting, "Although the societal, industrial, and legal environments at the turn of the century warranted the enactment of the FELA, the current societal, industrial, and legal environments do not justify the statute's continued existence.").

compensation scheme is not the only possible alternative for these claims. For our purposes, it is sufficient to note that numerous credible alternatives have been proposed.

- Slightly more than half of the appellate judges who responded to our survey moderately or strongly support the idea of giving state courts jurisdiction over claims in the nature of state claims (with some disagreement over just what claims fall in that category). Slightly fewer than half of the district judge respondents agreed. Absent compelling contemporary reasons to treat these classes of litigants differently from similarly situated litigants whose claims are handled in other forums, continued access to federal court jurisdiction in a time of scarce resources seems difficult to defend. Although the case types discussed do not represent a large portion of the federal caseload, they do consume time and resources that might be better spent protecting interests more clearly defined as federal.

Amount-in-controversy requirements for federal tort and property claims, and diversion of some cases to alternative procedures. Claims by persons incarcerated in federal prisons account for a significant portion of the federal caseload at both trial and appellate levels. Some have suggested that although the federal courts must remain open to "serious" civil rights claims by prisoners (however such claims might be defined and recognized) as well as others, the vast majority of prisoner litigation does not fall in that category. Although we have made no attempt to examine the quality of prisoner petitions, frivolous claims by prisoners are thought to be common. There are virtually no disincentives to filing claims, whether meritorious or not. "The inmate stands to gain something and lose nothing. ... Though he may be denied legal relief, he will nonetheless have obtained a short sabbatical in the nearest federal courthouse."²⁶⁴ This "sabbatical" incentive does not exist at the appellate level, as incarcerated litigants are not permitted to argue in the courts of appeals. Nevertheless, there appear to be sufficient other incentives (or insufficient disincentives) for prisoners to file claims that such litigation may continue to increase in the federal district courts, particularly as the prison population grows.

As prisons grow more crowded, the number of potential claims may grow even faster than the number of potential claimants. Claims arising from incidents during confinement may be meritorious, yet arguably not deserving of federal court attention. In most prisoner property claims, jurisdiction derives from the fact that the complainant is incarcerated in a federal facility, though the same incident arising elsewhere might be heard in a small claims court. Allowing prison-

²⁶⁴ Cruz v. Beto, 405 U.S. 319, 327 (1972) (Rehnquist, J., dissenting).

ers' small tort or property claims to be litigated in federal court may divert attention from more serious civil rights claims of the same litigants.

Alternative ways to handle these claims have been suggested. Judges have urged Congress to consider creating an exclusive rather than preliminary administrative remedy for small tort claims by prisoners.²⁶⁵ Others caution against the temptation to remove cases from federal jurisdiction based on the status of the parties involved rather than on a neutral basis, such as the type of case (i.e., subject matter) and whether that type of case warrants federal attention.²⁶⁶ An alternative that avoids explicit focus on the status of the claimant is to create a different remedy for small tort claims, and perhaps small contract claims.²⁶⁷ The Federal Courts Study Committee recommended that Congress "establish a \$10,000 minimum jurisdictional amount for federal tort claims (and possibly federal contract and debt cases) and establish a small claims procedure for claims below the minimum."²⁶⁸ The committee believed that alternative procedures worthy of consideration include an administrative tribunal (which might be independent, agency-based, or located in the Department of Justice), expanded jurisdiction of the Court of Federal Claims, and district court divisions that would be administered by magistrate judges.²⁶⁹

Partial discretionary jurisdiction for the federal trial courts. A less complete divestiture of federal jurisdiction over some of the cases discussed above may be feasible. One proposal would increase reliance on the state courts to decide cases now heard in federal courts without totally eliminating access to the federal courts. A discretionary access system would recognize that even if most cases of a given type do not warrant federal jurisdiction, some cases within the class might. Such a system makes three assumptions: (1) some categories of cases are best suited, for historical, political, or other reasons, for federal court adjudication; (2) some categories of cases routinely handled by the federal courts do not demand a federal forum and might more appropriately be handled by state courts or other tribunals; and (3) even within the latter categories, some individual cases are more appropriately decided by a federal court.

A system of discretionary federal jurisdiction might operate as follows:²⁷⁰ A plaintiff who seeks a federal forum for a case over which both state and federal

²⁶⁵ See, e.g., *Free v. U.S.*, 879 F.2d 1535, 1536, 1538 (7th Cir. 1989).

²⁶⁶ *Id.* at 1537 n.1.

²⁶⁷ *Id.*

²⁶⁸ Report of the Federal Courts Study Committee 81 (1990). Judges responded favorably to this idea on our survey. About 60% of appellate and district judges supported the proposal moderately or strongly.

²⁶⁹ *Id.*

²⁷⁰ See Jon O. Newman, *Discretionary Access to the Federal Courts*, in *The Federal Appellate Judiciary in the 21st Century* (Cynthia Harrison & Russell Wheeler eds., Federal Judicial Center

courts have jurisdiction would file a petition with the court of appeals. The petition would set forth facts and arguments showing why a federal forum is desirable or necessary. One circuit judge would review the petition and decide whether the plaintiff should be permitted to file the case in the federal district court. That decision would be a simple "yes" or "no"—no reasons would need to be stated and the decision would not be reviewable.

The gatekeeping function could be located in other places in the system (e.g., at the district court level) or be exercised in other ways (e.g., using a three-judge panel, allowing one judge to admit the case to federal court, but two to exclude it). And it might be desirable, at least in the early stages of operation, to have decisions issued with reasons. Opinions would allow the bar and the public to assess the likelihood of federal access for particular kinds of claims. This would allow litigation planning and, more important, accountability to ensure that access to the federal courts was not denied on unacceptable grounds (however those might be defined).

Without further specification of what occasional circumstances would justify access to the federal courts, it is impossible to project how this sort of proposal would affect the courts. Used to its theoretical maximum, the scheme's effect might be to eliminate a great number of the cases for which federal jurisdiction is not exclusive. A 30% reduction in the civil caseload has been suggested, but accurate projection from current data is impossible. As long as appellate review of these cases is located in the state court system, this scheme would reduce appellate court caseloads, although perhaps not significantly more than eliminating diversity jurisdiction.

An alternative version of the plan would preserve access to federal appellate courts for review of federal claims. The federal claim heard in state court could be reviewable by way of discretionary access to the federal appellate court, either on a whole-case basis or on issue jurisdiction. The benefit of such a plan to the courts of appeals would depend on whether the state appellate courts continued to have jurisdiction over appeals from these cases. It would make planning more difficult because the number of potentially appealable cases would be more difficult to know, and it could place the federal courts in an increasingly awkward relationship with the state courts.

Whatever the beneficial effects of such a proposal on the federal courts, its effects on the states are somewhat more problematic. As with the elimination of diversity jurisdiction, effects of discretionary access could be felt disproportionately by already overburdened state courts.²⁷¹ If there are areas of the country

1989); Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 U. Chi. L. Rev. 761 (1989).

²⁷¹ See Bernard S. Meyer, *Justice, Bureaucracy, Structure, and Simplification*, 42 Md. L. Rev. 659, 674 (1983). But see Posner, *supra* note 2, at 180-81.

where lawyers and litigants still perceive (however inaccurately) state court hostility to federal claims, their skepticism about state court willingness to enforce federal law can only grow if the state courts become truly hostile because the federal courts deliberately increase state workloads to suit their own jurisdictional preferences.

Respondents to the Center's survey were divided on the question of discretionary access to the trial courts. Nearly half of the district judge respondents favored such a proposal, but only about 37% of the appellate judges responding supported it (support was somewhat stronger among active appellate judges than in the group as a whole). And in both groups, well over a third opposed the idea. However, entry-level discretionary access to the federal courts has not received a great deal of scholarly attention, and its possibilities and pitfalls have not been well articulated.

Nonjurisdictional options for reducing the volume of litigation in the district courts

Increased use of alternative dispute resolution to divert cases from district courts. Diversion of cases from the trial courts into alternative dispute resolution (ADR) systems is a "flow reduction" option already in place and increasingly used. Its proponents are enthusiastic about its promise for relieving congestion in the district courts. Whether its prospects are equally bright for relieving the courts of appeals will depend on how many of the cases that get diverted are the cases that otherwise would have given rise to appealable judgments. If ADR proves to be effective primarily in resolving cases that would have settled in any event, it may preserve resources of the district courts and of litigants yet have no significant effect on the courts of appeals. We do not have sufficient information to know the number and types of cases in which ADR acts as an alternative to trial as distinguished from an alternative to other sorts of disposition. We do know that the vast majority of cases filed in the district courts never reach trial.

Moratorium on new district judgeships. One way of reducing the number of cases flowing to the courts of appeals is to make it more difficult to obtain a final judgment at the district court level. The simplest way of doing that is to stop adding district court judges. As the queue lengthens in the district courts, some argue, the federal courts will become a less attractive forum, and litigants with a choice of forum, or of dispute resolution mechanism, will go elsewhere.²⁷² In the meantime, the flow of terminations out of the district courts will slow, benefiting the courts of appeals (if no one else).

Asked about the size and resources of the federal courts, one-third of the appellate judges and a slightly higher percentage of district court judges responded

²⁷²"Freezing the number of district judges would probably stop further growth of the appellate caseload in its tracks." Posner, *supra* note 157, at 765.

that they oppose adding judges to the district courts. (However, fewer judges in both groups were willing to support an actual cap on the number of district court judges.)

Effective as such a moratorium might be, its premises go completely against the grain of current efforts in all branches of government to improve access to the just, speedy, and economical resolution of disputes. We do not view it as a promising approach without jurisdictional changes sufficient to maintain traditional levels of service.

Conclusion

Our study of the federal courts of appeals reveals a system with a tradition of high quality and responsiveness to American society's need for responsible supervision of first-level adjudicators and for the reasoned elaboration of federal law. While we have not joined in the chorus of crisis, there can be no doubt that the system and its judges are under stress. That stress derives primarily from the continuing expansion of federal jurisdiction without a concomitant increase in resources. It does not appear to be a stress that would be significantly relieved by structural change to the appellate system at this time.

We return now to the basic problems that have led many to consider whether structural change to the appellate system is needed, and reiterate our findings:

Threat to Just Outcomes

- Assessing the quality of the product of the courts of appeals is necessarily subjective. There is no adequate and generally accepted measure of the quality of appellate outcomes, so conclusions about the quality of current appellate performance and projections of the likely effects of change on quality must be considered speculative. We cannot conclude, as some assert, that the justness of appellate outcomes has been detrimentally affected by caseload volume. By prodigious effort and creativity, the courts of appeals have been able to keep up relatively successfully with their rising caseloads without obvious harm to the quality of their decisions, although some have questioned the quality of their opinions. The courts of appeals continue to develop and refine ways to handle their large caseloads without sacrificing the goal of just outcomes. At some point, especially if the workload of the courts of appeals continues to grow at its recent pace, changes in internal operating procedures may not be sufficient for the task. Some judges believe that point has been reached; others disagree. We cannot foretell the rate of caseload growth, but no major proposal for change to the structure of the courts would substantially reduce appellate filings in the near future.

Diminished Quality of Appellate Process

- Many proponents of structural change to the courts of appeals seek to reinstate traditions and procedures that were the norm more than twenty-five years ago. They believe that whatever the evidence regarding the quality of individual outcomes in the short term, the incremental changes in the appellate system over the past few decades have damaged other fundamental values of our system, including the visibility and accountability that con-

tribute to the legitimacy of the federal court system in the long term. Some of these values, if determined to be of continuing vitality and importance, might be reaffirmed and strengthened by nonstructural or procedural change. However, if it is determined to be in the national interest to restore or create a system that guarantees the full panoply of appellate procedures in all appeals, or even in all appeals decided on their merits, one of two courses must be adopted: (1) there must be substantially fewer appeals to decide, or (2) there must be a massive increase in judicial system resources, including judgeships, supporting personnel, and facilities. Moreover, restoring the former system by substantially or rapidly expanding the appellate judiciary in the current structure is likely to worsen some problems that are now relatively minor.

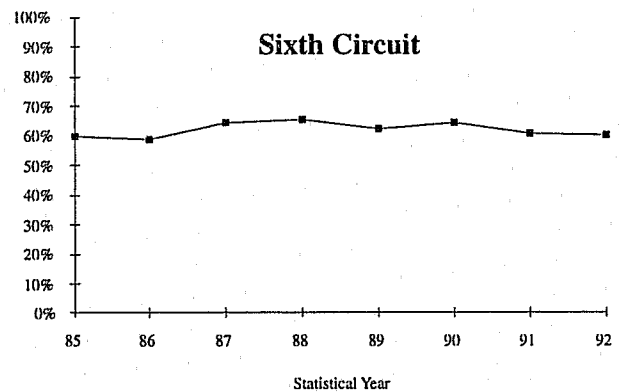
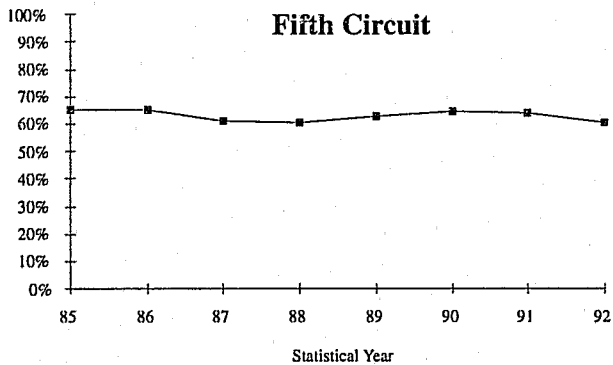
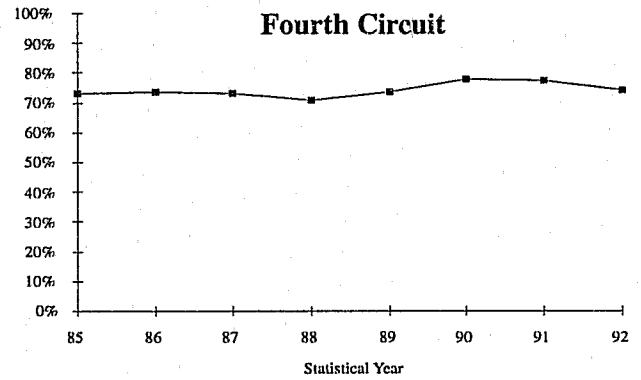
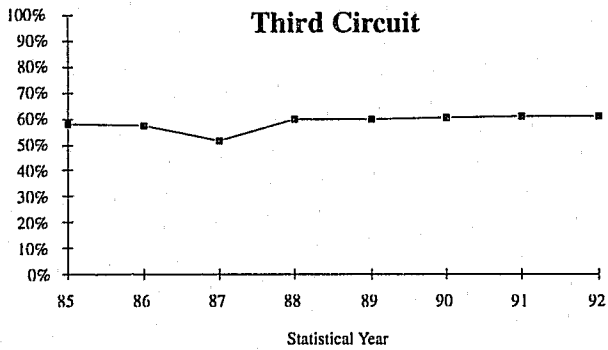
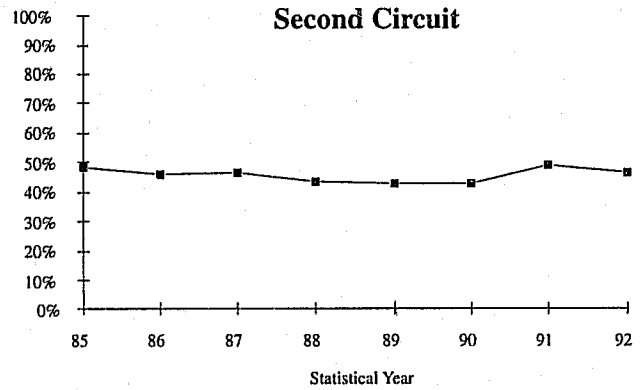
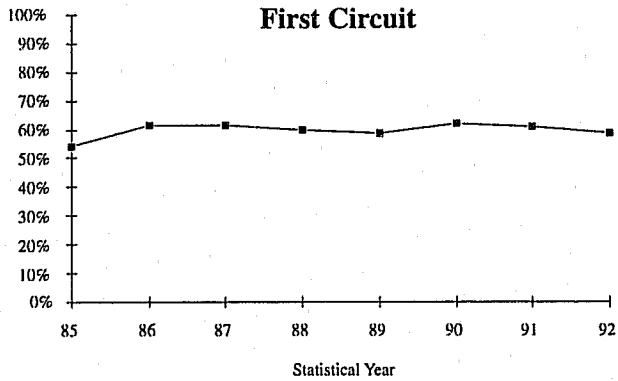
Inconsistent Interpretations of Federal Law

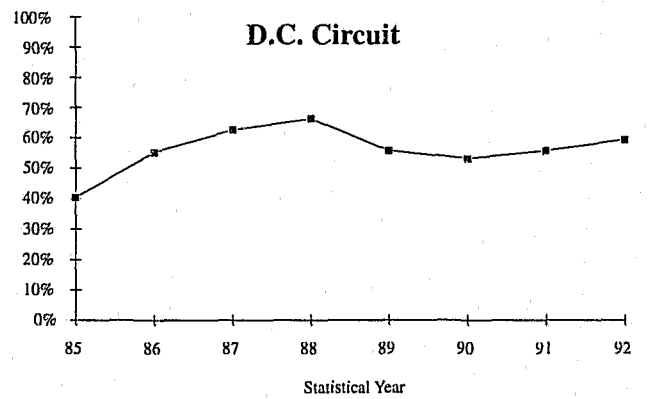
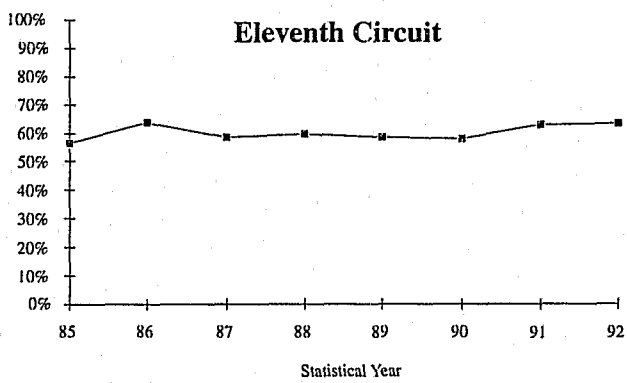
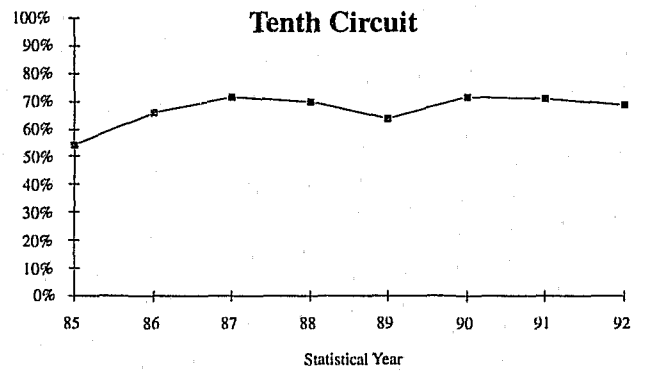
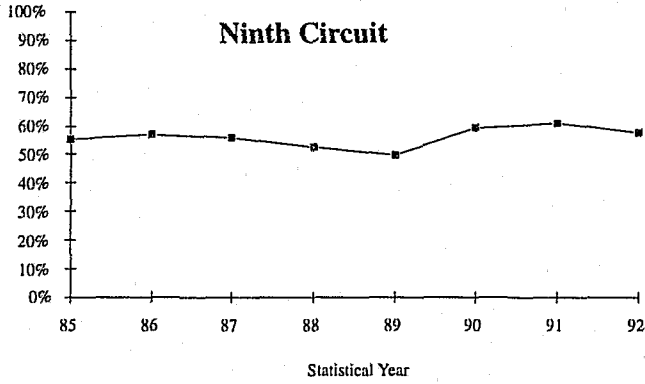
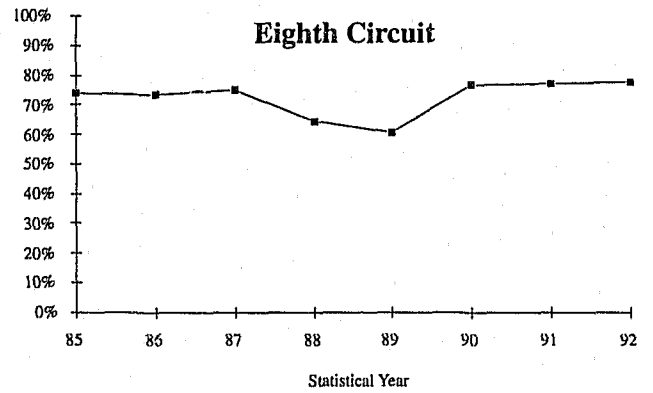
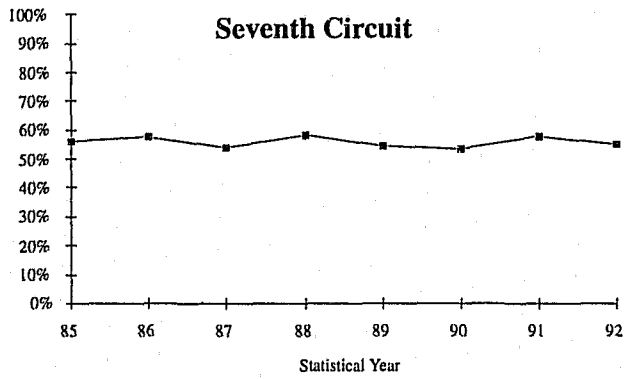
- Inconsistent interpretation and application of federal law by different courts of appeals is not at the present time a significant problem that warrants substantial structural change to the federal court system. Most important conflicts that reflect like cases being treated differently in different circuits are resolved within a reasonable period by the Supreme Court, by the courts of appeals themselves, or by intervening events such as legislative change. Intercircuit conflicts may be a problem in particular areas of the law (e.g., maritime law), but overall they probably represent a relatively small part of the legal uncertainty that affects the litigation and counseling functions of lawyers. Structural change to resolve intercircuit conflicts—for example, by creating a new court—is likely to provide relatively little benefit at relatively high cost. Nonstructural approaches such as encouraging consideration of the reasoning of other circuits may be beneficial. Proposals that would fundamentally change our system of precedent (such as national *stare decisis*) appear to be unpromising as solutions to any problem of inconsistency. Such proposals might be a necessary or desirable adjunct to a structural change made for other reasons, but do not in themselves seem likely to ameliorate any current problem.
- Inconsistent interpretation and application of federal law by panels within circuits is reported to be a problem in some circuits in some areas of law. The only substantial empirical work on the issue found little evidence for intracircuit conflicts in the largest circuit. Although certain structural changes might reduce intracircuit inconsistency, nonstructural efforts to deal with the problem are already under way and show promise. Making structural changes solely to reduce current levels of intracircuit inconsistency—for example, by extensively restructuring the circuits to create

courts of appeals of nine or ten judges—is likely to do more harm than good.

Appendix A

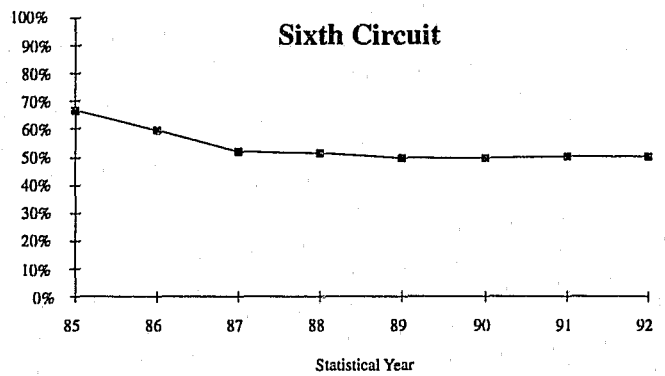
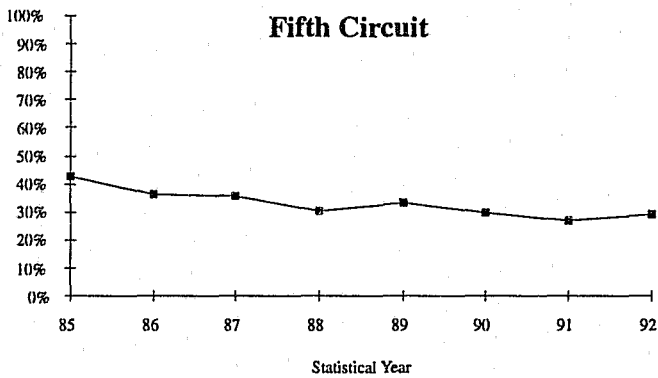
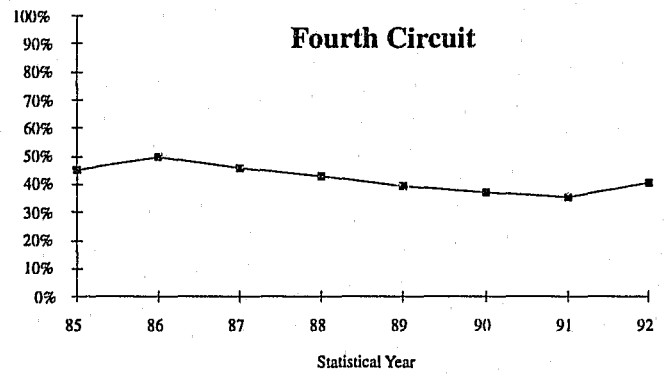
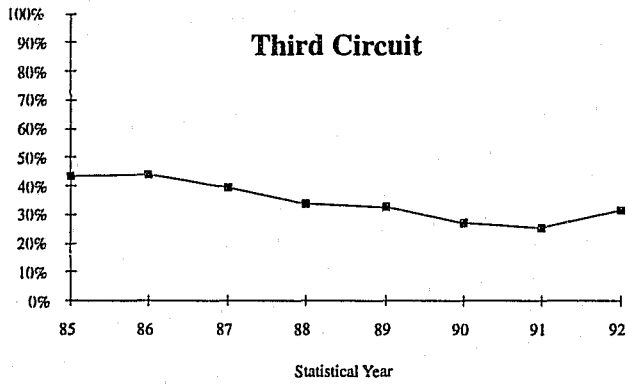
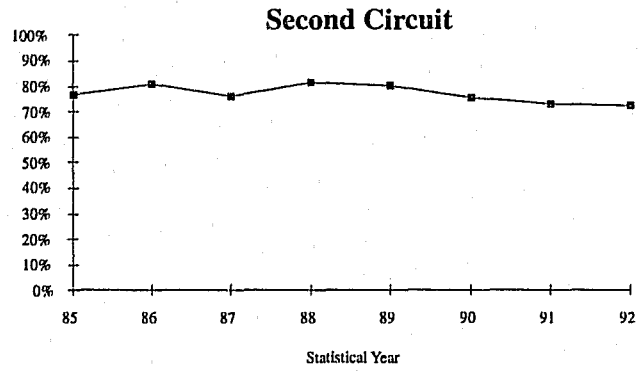
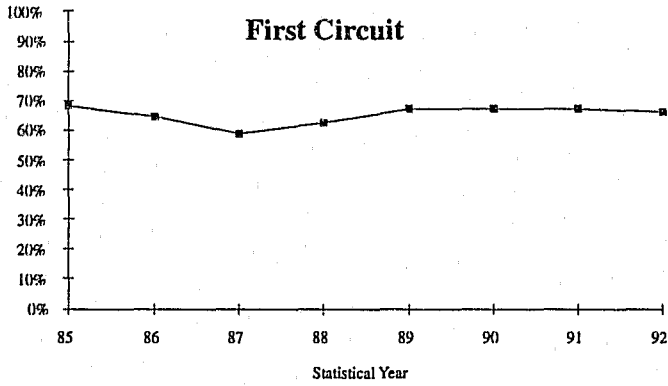
Percentage of Appeals Terminated on the Merits, by Circuit, Statistical Year 85-92

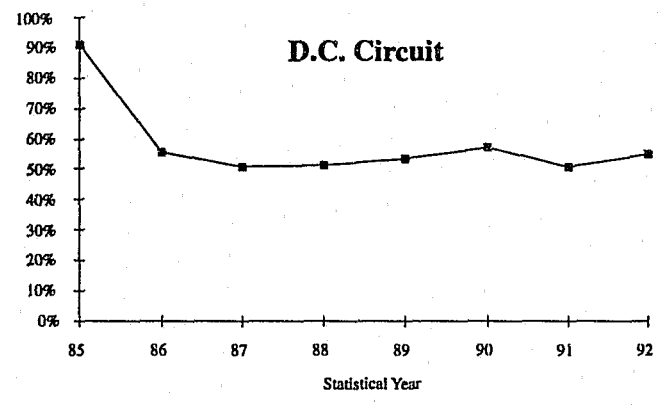
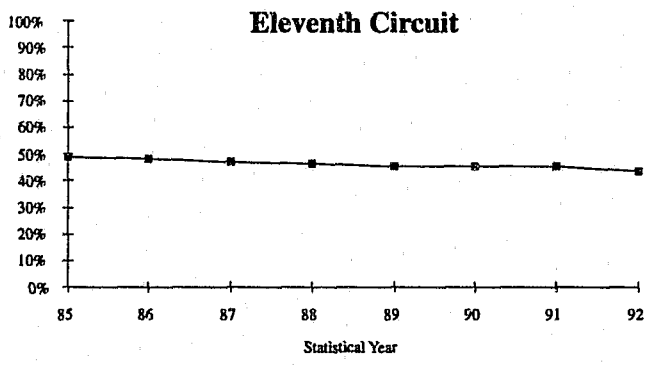
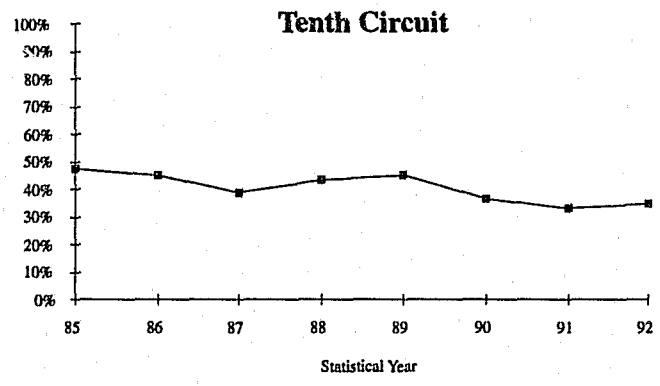
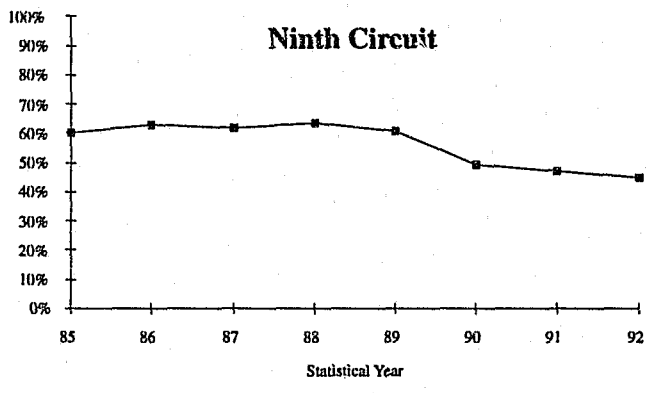
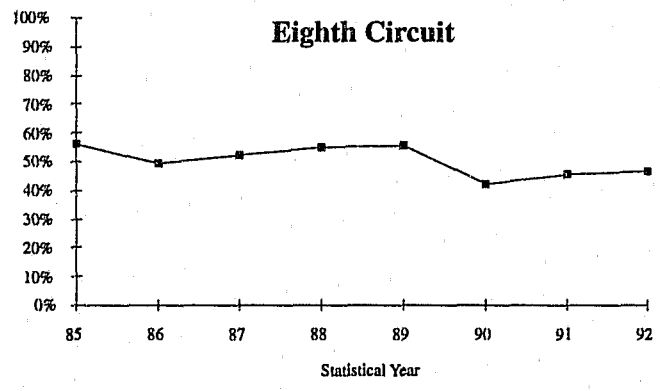
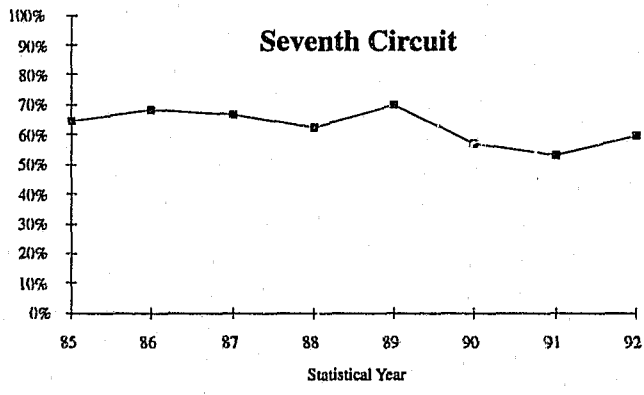




Appendix B

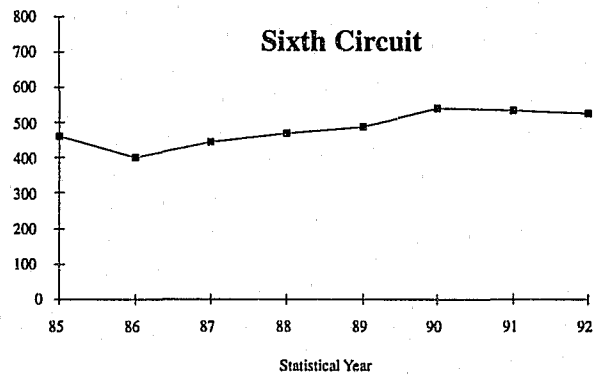
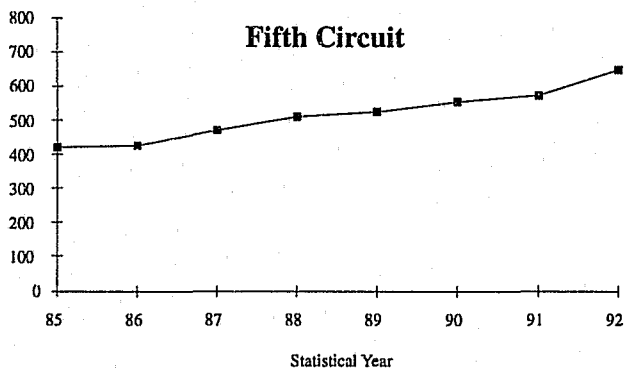
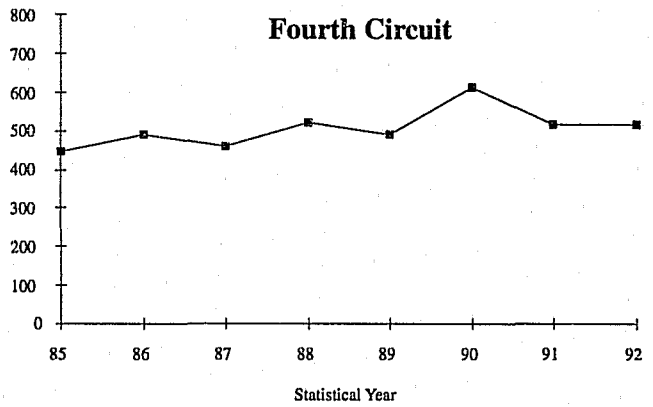
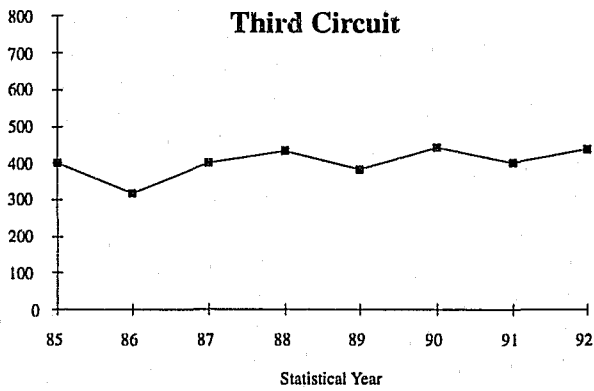
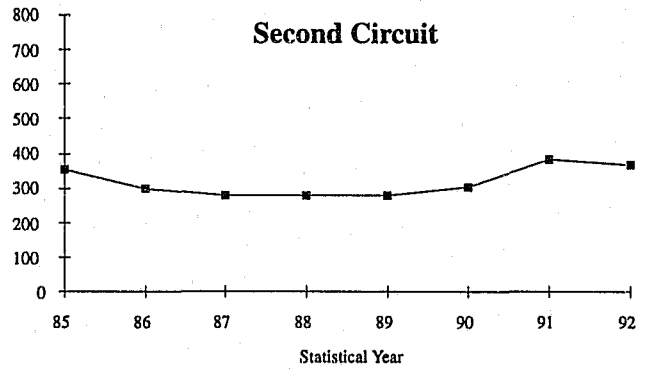
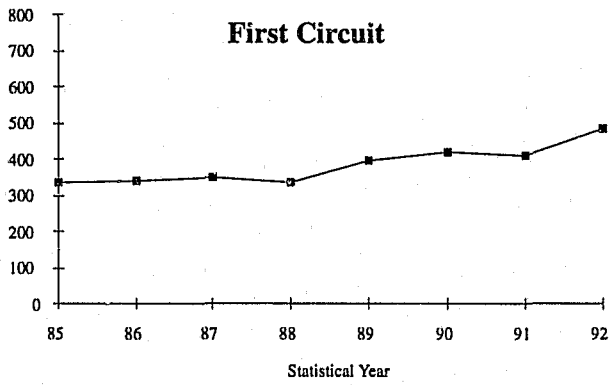
Percentage of Terminations on the Merits that Were Argued, by Circuit, Statistical Year 85-92

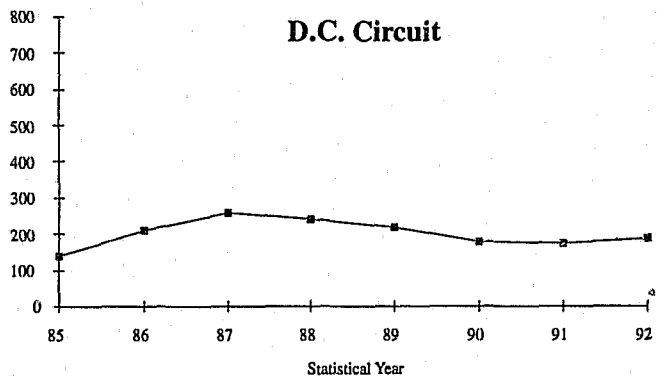
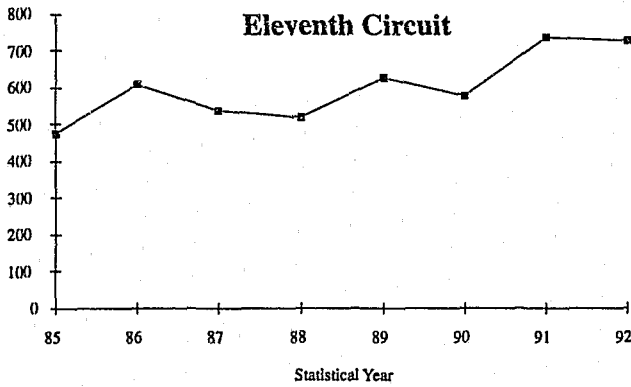
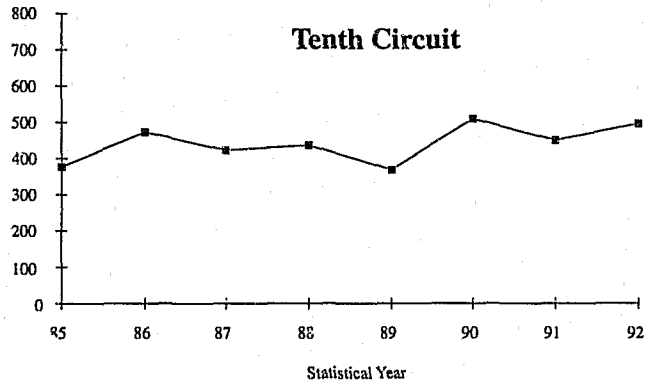
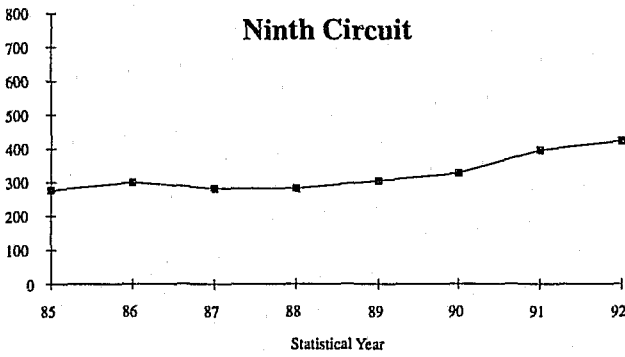
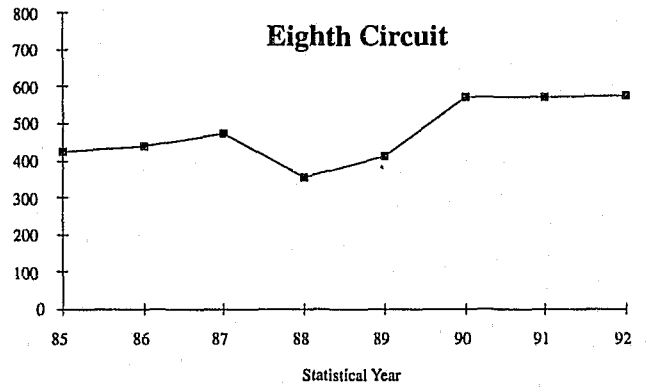
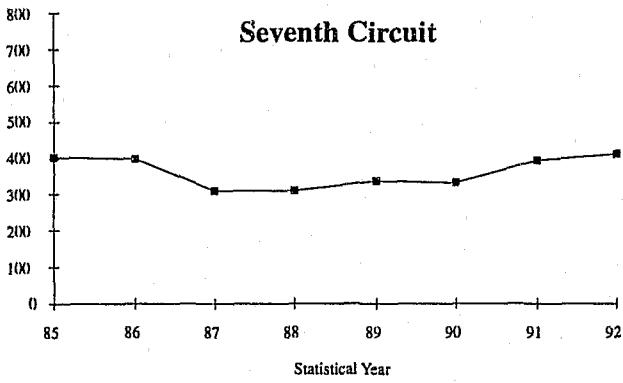




Appendix C

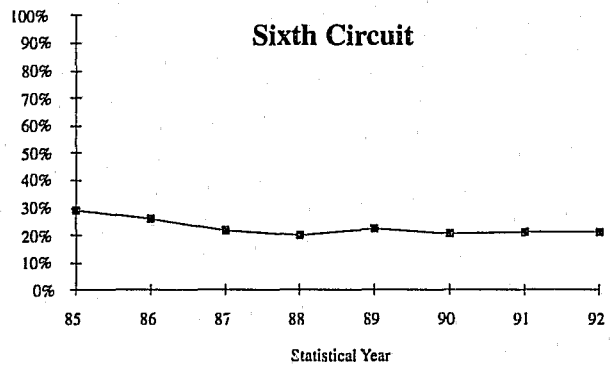
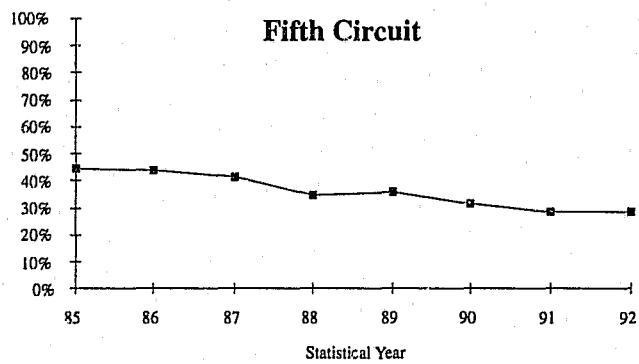
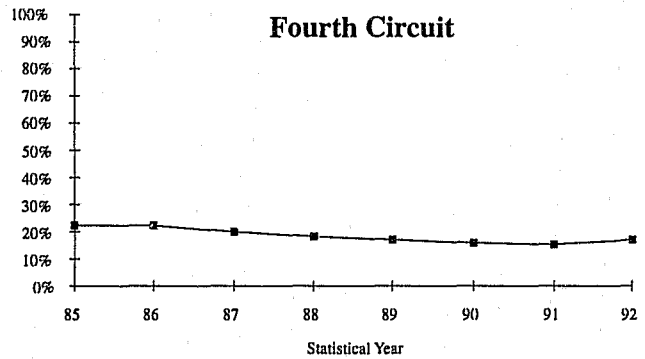
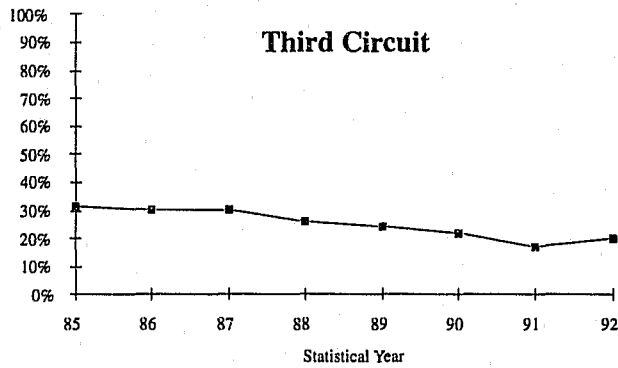
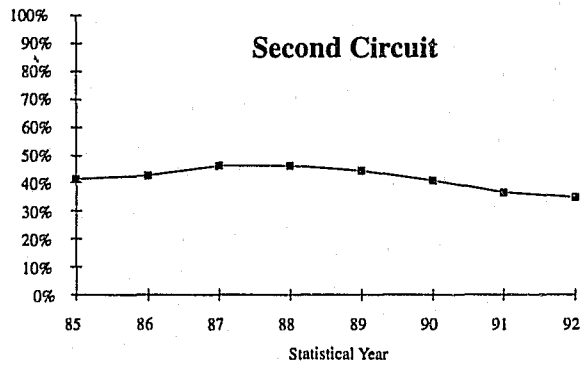
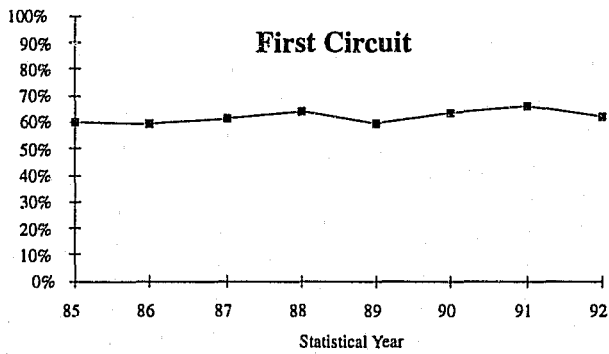
Number of Per-Judge Participations in Appeals Terminated on the Merits, by Circuit, Statistical Year 85-92

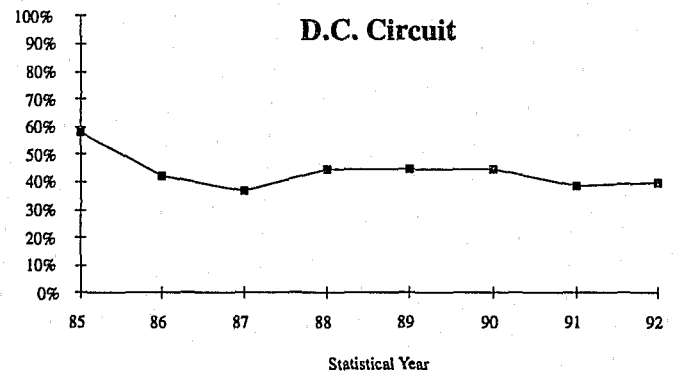
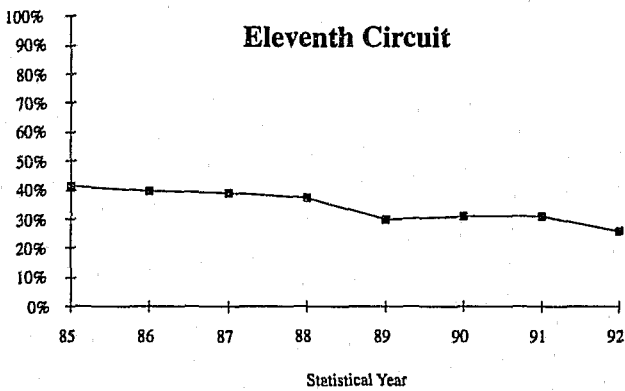
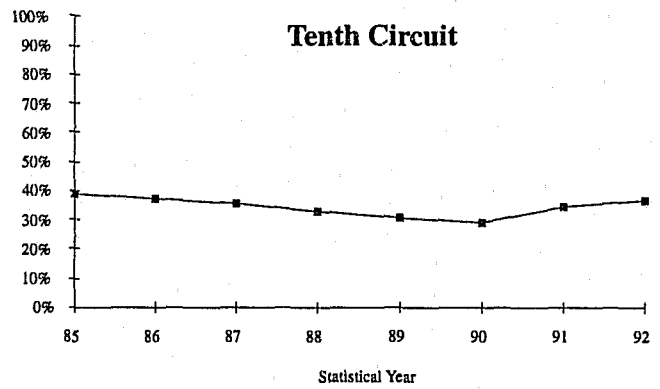
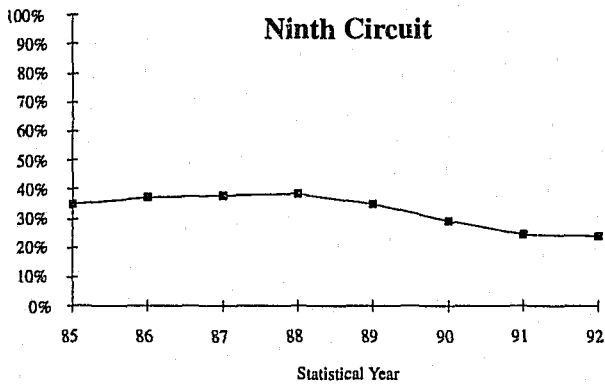
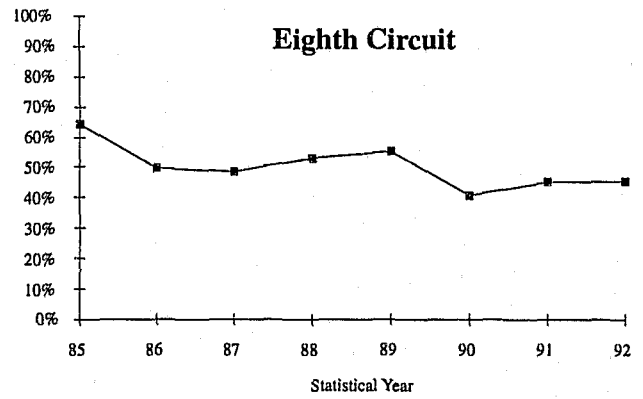
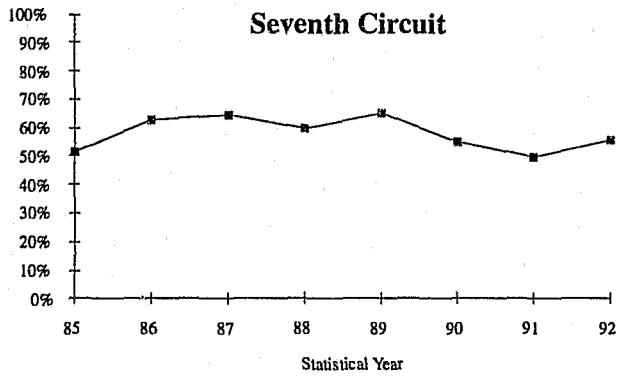




Appendix D

Percentage of Terminations on the Merits that Resulted in Published Opinions, by Circuits, Statistical Year 85-92





Appendix E

Case Types as a Percentage of All Appellate Filings by Circuit, Statistical Year 92

Circuit	Case Type							
	Private Civil	Criminal	State Prisoner	U.S. Civil	Admin-istrative	U.S. Prisoner	Bank-ruptcy	Original Jurisdiction
D.C.	13%	18%	1%	25%	37%	4%	0%	3%
First	42%	26%	5%	15%	6%	4%	2%	1%
Second	41%	21%	12%	10%	6%	5%	3%	1%
Third	40%	19%	18%	9%	6%	5%	3%	1%
Fourth	24%	23%	22%	8%	7%	9%	5%	0%
Fifth	33%	23%	23%	7%	5%	4%	4%	2%
Sixth	29%	23%	23%	10%	5%	6%	2%	1%
Seventh	30%	20%	23%	8%	6%	10%	3%	1%
Eighth	26%	22%	25%	12%	4%	8%	3%	1%
Ninth	28%	27%	15%	12%	9%	4%	4%	2%
Tenth	31%	23%	19%	12%	4%	6%	4%	1%
Eleventh	25%	38%	18%	8%	2%	6%	2%	1%

Appendix F

Number of En Bancs and Number of En Bancs by Case Type,* Statistical Year 74-92

Statistical Year	Number of En Bancs	Number of En Bancs by Case Type		
		Civil (nonprisoner)	Prisoner	Criminal
74	23	10	3	6
75	49	19	8	15
76	53	17	13	15
77	47	23	9	9
78	44	23	6	5
79	34	16	6	7
80	53	32	1	12
81	80	47	8	14
82	84	49	11	17
83	83	42	13	13
84	117	54	15	35
85	89	55	18	14
86	90	58	17	9
87	90	51	18	13
88	118	56	29	17
89	132**	67	16	47
90	93	51	22	13
91	97	49	13	24
92	98	48	23	19

*The number of en bancs by case type will not add up to the total number of en bancs because not all types of cases are included.

**Although the electronic database of information gathered by the Administrative Office continues to show this total, the AO's Annual Report amended the number of en bancs in 1989 to ninety-nine. Because we have used the electronic database to generate the other figures in this report, and are unable to determine which case types account for the difference, we include the higher figure, but note it should be interpreted with caution.

Appendix G

U.S. Court of Appeals for the Federal Circuit Appeals Filed, Terminated, and Pending During the Twelve-Month Period Ended June 30, 1991

Source of Appeal	Pending July 1, 1990	Filed	Terminations			Percent Reversed	Pending June 30, 1991
			Total	By Judges	Other		
Total*	709	1,484	1,424	901	523	14	769
Secretary of Agriculture	-	1	-	-	-	-	1
Board of Contract Appeals	55	80	84	68	16	16	51
Court of International Trade	37	32	40	38	2	38	29
Court of Veterans Appeals	-	40	22	15	7	-	18
Department of Veterans Affairs	5	61	37	8	29	-	29
U.S. Claims Court	108	166	169	136	33	22	105
U.S. District Courts	194	263	278	206	72	25	179
International Trade Commission	6	9	6	2	4	-	9
Merit Systems Protection Board	225	676	627	312	315	2	274
Patent and Trademark Office	74	135	137	94	43	13	72
Writs**	5	21	24	22	2	-	2

* There were no appeals from decisions of the Secretary of Commerce or the General Accounting Office.

**This category includes writs of mandamus, other extraordinary writs, petitions for permission to appeal, and discretionary petitions for review.

The Federal Judicial Center

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The Federal Judicial Center is the research, education, and planning agency of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620–629), on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States chairs the Center's Board, which also includes the director of the Administrative Office of the U.S. Courts and six judges elected by the Judicial Conference.

The Court Education Division provides educational programs and services for non-judicial court personnel such as those in clerks' offices and probation and pretrial services offices.

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The Planning & Technology Division supports the Center's education and research activities by developing, maintaining, and testing technology for information processing, education, and communications. The division also supports long-range planning activity in the Judicial Conference and the courts with research, including analysis of emerging technologies, and other services as requested.

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The Interjudicial Affairs Office serves as clearinghouse for the Center's work with state-federal judicial councils and coordinates programs for foreign judiciaries, including the Foreign Judicial Fellows Program.

Federal Judicial Center

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