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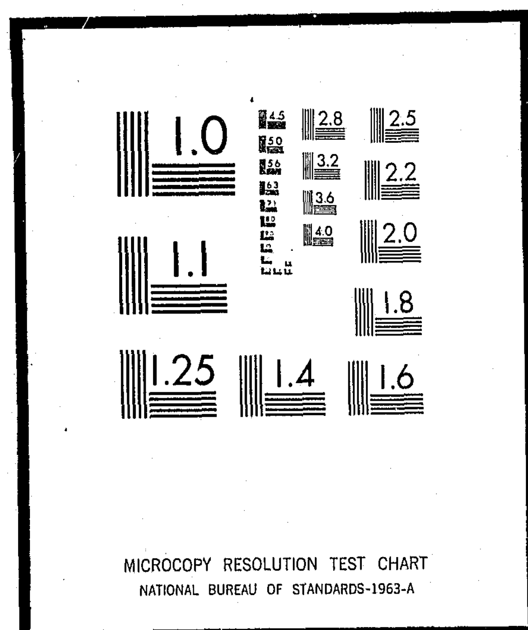

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CONGESTION AND DELAY IN THE STATE APPELLATE COURTS

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CONGESTION AND DELAY IN THE STATE APPELLATE COURTS

INTRODUCTION

Appellate court congestion has increasingly become a matter of concern to many appellate justices and all students of judicial administration. Increased urbanization as well as the economic and social complexities of our contemporary society have swelled appellate court workloads to such an extent that few states have entirely escaped its adverse consequences. As early as 1940, Dean Roscoe Pound registered his concern with these increases in an analysis of the 1920s in which he indicated that judges of our highest appellate courts had five times as much work to do in 1920 than judges of the same courts one hundred years before.[1] In the 1960s appellate congestion and delay have become widespread due to the fact that the appellate court has become more and more important to the whole judicial system.[2] Increasing reliance has also been placed on the appellate courts in an effort to have the courts assume more of society's complex problems. Yet insufficient manpower, faulty facilities, and poorly organized court structures, in certain instances, have caused the appellate court system in handling these increases to inefficiently administer justice -- a situation that needs correction and immediate attention. In 1962, for example, a study of congestion conducted by the Council of State Governments covering forty-three states found that every state but nine showed an increase in appellate court workloads.[3] And even a number of those states reporting no increases in caseloads found that the work involved in appellate procedures had increased significantly.[4]

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[1] Roscoe Pound, Appellate Procedure in the United States (Boston: Little, Brown and Co., 1941), p. 383.

[2] Glenn R. Winters, Executive Director of the American Judicature Society, suggests that appellate courts have become increasingly important to our entire judicial system today. These courts, he states, function to correct errors in judicial decision making, to reconcile conflicting holdings of lower courts, to declare new interpretations in the face of conflict, and to "institutionalize" judicial decision making. Glenn R. Winters, "New Approaches to Appellate Court Problems," a speech delivered before the Louisiana Conference of Court of Appeal Judges, March 21, 1969.

[3] Council of State Governments, Workload of State Courts of Last Resort, Chicago, 1962.

[4] Ibid.

Despite the workload increases that all but a few state courts have experienced, not all high appellate and intermediate level courts[5] have been prevented from efficiently exercising justice. The only way these courts have been able to efficiently handle these increases has been through making certain reforms in procedures, some structural reorganizations, or through the addition of extra personnel to handle these skyrocketing increases.[6] The measures instituted by those states proving successful in curbing judicial inefficiencies are what this report hopes to discover and perpetuate.

MAJOR CAUSES OF DELAY

Appellate congestion, no matter what its form, generally arises from one of four causes: (1) outdated and inadequate court rules and procedures of appellate justice ("procedural delay"), (2) negligence on the part of the lawyer and client in processing appeals, (3) lack of qualified personnel to fill judicial vacancies, or (4) the inflexibility in court structure and organization ("structural delay") to meet the needs of the court. According to a recent 1968-1969 American Judicature Society questionnaire survey on "Appellate Court Congestion,"[7] the most frequent causes of congestion at both the high appellate and intermediate appellate levels were the additional number of cases judges were required to hear "as of right" and the "number of opinions" that these judges are required to write. Tables 1 and 2 list the most severe problems with which these judges had to deal and seemed to lie at the heart of any congestion that their court suffered.

In addition, appellate court judges at both levels of the court system considered that the time they were required to spend reading lengthy briefs was a moderate inconvenience to them--one, it might be suggested, that might be dealt with without excessive revision in court procedure.

Another section of the survey asked the judges to divide their judicial week accord-

[5] Whenever the term "high court" or "high appellate court" is used in this report, it always refers to the court of last resort as distinguished from the intermediate appellate court. In some states this "high court" is known as the "supreme court" while in other states it is termed the "court of appeals."

[6] For a statistical breakdown of current overload in California, Florida, Illinois, Louisiana, Missouri, New Jersey, New York, Ohio, and Texas, see Report No. 20, "Intermediate Appellate Courts," (August, 1968), American Judicature Society, 1968.

[7] This survey, which served as the statistical basis for this report, was conducted as a random sample of high appellate and intermediate appellate court judges and surveys courts in 47 states and Puerto Rico.

TABLE 1

ATTITUDES OF HIGH APPELLATE COURT JUDGES ONLY

CAUSES OF DELAY:	Total N	Severe Problems		Moderate Problems		Not a Problem		Total
	(# Judges)	N	(%)	N	(%)	N	(%)	(%)
a. insufficient number of judges to handle the caseload	110	26	(23.6)	20	(18.2)	64	(58.2)	(100)
b. too many cases heard as of right	118	47	(39.8)	31	(26.3)	40	(33.9)	(100)
c. certiorari granted too often	81	5	(6.2)	16	(19.7)	60	(74.1)	(100)
d. too many opinions to write	107	38	(35.5)	33	(30.8)	36	(33.6)	(100)
e. too much time spent hearing cases	101	5	(4.9)	32	(31.7)	64	(63.4)	(100)
f. time spent reading overly lengthy briefs	101	5	(4.9)	57	(56.4)	39	(38.6)	(100)
g. too many administrative procedures demanding judicial time and too few judicial assistants (law clerks, etc.)	103	13	(12.6)	37	(35.9)	53	(51.5)	(100)
h. Failure of attorneys to file briefs on time, or continuances by attorneys due to inadequate preparation	104	11	(10.6)	56	(53.8)	37	(35.6)	(100)

TABLE 2

ATTITUDES OF INTERMEDIATE APPELLATE COURT JUDGES ONLY

CAUSES OF DELAY:	Total N	Severe Problems		Moderate Problems		Not a Problem		Total
	(# Judges)	N	(%)	N	(%)	N	(%)	(%)
a. insufficient number of judges to handle the caseloads	86	13	(15.1)	37	(43.0)	36	(41.9)	(100)
b. too many cases heard as of right	80	22	(27.5)	31	(38.7)	27	(33.8)	(100)
c. certiorari granted too often	71	1	(1.4)	8	(11.3)	62	(87.3)	(100)
d. too many opinions to write	84	22	(26.2)	36	(42.8)	26	(31.0)	(100)
e. too much time spent hearing cases	81	2	(2.5)	20	(24.7)	59	(72.8)	(100)
f. time spent reading overly lengthy briefs	78	7	(9.0)	42	(53.8)	29	(37.2)	(100)
g. too many administrative procedures demanding judicial time and too few judicial assistants (law clerks, secretaries)	80	14	(17.5)	16	(20.0)	50	(62.5)	(100)
h. failure of attorneys to file briefs on time, or continuances by attorneys due to inadequate preparation	84	9	(10.7)	35	(41.7)	40	(47.6)	(100)

TABLE 3

HIGH APPELLATE COURT JUDGES ONLY

JUDICIAL DUTIES:	Total No. Judges	% of Judicial Time Spent During Week					
		0-10	11-20	21-30	31-40	41-50	More
a. hearing arguments	121	44	47	25	4	-	1
b. writing opinions	114	7	22	39	27	9	10
c. in judicial conferences	117	65	33	11	5	3	-
d. doing legal research	109	15	23	31	24	13	3
e. administrative details (planning dockets, ordering supplies, etc.)	57	45	3	6	3	-	-
f. miscellaneous duties	33	21	4	5	2	1	-

TABLE 4

INTERMEDIATE APPELLATE COURT JUDGES ONLY

JUDICIAL DUTIES:	Total No. Judges	% of Judicial Time Spent During Week					
		0-10	11-20	21-30	31-40	41-50	More
a. hearing arguments	103	63	23	12	5	-	-
b. writing opinions	108	-	17	28	33	19	11
c. in judicial conferences	101	82	15	3	1	-	-
d. doing legal research	104	4	23	18	31	12	16
e. administrative details (planning dockets, ordering supplies, etc.)	59	51	7	1	-	-	-
f. miscellaneous duties	32	22	5	2	1	2	-

ing to the time they spent performing judicial tasks. As Tables 3 and 4 (see page 4) make plain, the duty that takes the appellate judge the longest time to perform is the "writing of opinions" and "doing legal research." Sixty-three of the 108 intermediate appellate judges, or 58.3 per cent of those responding, claimed, for example, that they spent more than 30 per cent of their time "writing judicial opinions." More than 40 per cent of the high appellate court judges spent a comparable time writing opinions. Both of these time-consuming tasks might be performed without burdening the judge if sufficient staff were assigned to assist him.

By pinpointing these causes of congestion, solutions can be developed to prevent excessive delay in the administration of justice. Responses from the judges in this survey should help to suggest remedies for the situation.

WAYS OF OVERCOMING CONGESTION AND DELAY

From the foregoing section on the causes of congestion, we now turn to possible methods to deal with its consequences. Four ways to remedy the excessive results of delay will be dealt with in this report. These include:

(1) The addition of personnel, including law clerks, court commissioners, special judges for particular purposes, etc.;

(2) Procedural changes including increasing judicial time for the disposing of cases, reducing the length of written opinions, reducing the length of briefs, and limiting the number and type of appeals;

(3) The separation of the highest appellate court into divisions; and

(4) The creation of an intermediate appellate court.

(1) The Addition of Personnel

Among those who have studied the problem of congestion, it is agreed that the appellate judge needs the use of a competent professional staff to function efficiently. These staff members may include law clerks, secretaries, administrative assistants and others. It would seem that High Court and Intermediate Appellate Court judges commonly make use of secretaries and law clerks, but fewer judges utilize the assistance of recorders and administrative assistants. (See Tables 5 and 6, page 6) Law clerks have proven their worth in assuming a good deal of the administrative detail work, which frees the judge to engage in other judicial business. Judge W. E. Doyle sums up the value of law clerks in the Colorado Supreme Court in these words:

> Most of the members of the court agree that the addition of law clerks to the court staff has been highly successful. The extent of their effective

use will vary in individual instances; however, experience has shown that they are capable of performing a wide variety of tasks . . . . This writer considers the law clerks a highly important adjunct and personally hopes that they continue on a permanent basis.[8]

TABLE 5

STAFF PERSONNEL OF HIGHEST COURT JUDGES

STAFF	Total No. Judges	Full Time	Part Time
secretaries	133	123	10
law clerks	111	96	15
recorders and stenographers	5	-	5
administrative assistants	4	1	3
others*	8	7	1

TABLE 6

STAFF PERSONNEL OF INTERMEDIATE APPELLATE JUDGES

STAFF	Total No. Judges	Full Time	Part Time
secretaries	94	89	6
law clerks	85	78	7
recorders and stenographers	9	3	6
administrative assistants	-	-	-
others*	17	8	9

*Includes the bailiff, court clerk, legal researcher, marshal.

[8] W. E. Doyle, "The Battle of the Backlog in the Colorado Supreme Court," Journal of the American Judicature Society, Vol. 45 (1961), p. 19.

State appellate courts also report that secretaries and law clerks are regularly assigned to their courts on a permanent basis with administrative assistants frequently assigned to the highest appellate courts.

TABLE 7

COURT ASSISTANTS -- HIGH APPELLATE COURT ONLY

COURT STAFF	Total No. Courts	Full Time	Part Time
secretaries	28	26	2
law clerks	25	25	-
recorders and stenographers	14	13	1
administrative assistants	20	19	1
others*	8	8	-

TABLE 8

COURT ASSISTANTS -- INTERMEDIATE APPELLATE COURTS ONLY

COURT STAFF	Total No. Courts	Full Time	Part Time
secretaries	16	15	1
law clerks	12	11	1
recorders and stenographers	3	3	-
administrative assistants	5	4	1
others*	6	6	-

*Includes the bailiff, court clerk, legal researcher, marshal.

The court commissioner is also used in a few state courts. He is a trained lawyer who may make reports and recommendations, and, in some states, may even hear cases and draft advisory opinions for possible court adoption.[9] In 1950 an assessment of the effectiveness of court commissioners in Missouri was made by the Supreme and Appellate Courts Commissioners Study Committee of the Missouri Bar Association.

[9] John R. Dethmers, "Delay in State Appellate Courts of Last Resort," The Annals of the American Academy of Political and Social Science (March, 1960), p. 161.

This committee concluded that:

> In April, 1911, when the Commissioners first began their work for the Supreme Court, that court was about three and one-half years behind with its work, a deplorable condition, amounting to a denial of justice. It took over twenty-two years thereafter, with the aid of the commissioners, for the Supreme Court to achieve and maintain its present current basis. The work of the commissioners has also enabled the Judges to perform important and time consuming duties required of them by the new constitution, and has worked for better opinions, by making possible more conferences and study, freed from harrassing, futile hurry.[10]

Although court commissioners have proved valuable in some courts, few state courts at present make use of them. Only eight high appellate courts and two intermediate appellate courts reported ever having used court commissioners, while judges from 32 high appellate courts and judges from 16 intermediate appellate courts replied to the AJS survey questionnaire that they had never used the court commissioner to assist the appellate court.

The addition of judges to the court of last resort is still another means of handling congestion. Former Chief Justice John R. Dethmers of Michigan has summarized the positive and negative aspects of adding judges to the appellate court. States Dethmers:

> The time-saving advantage of increasing court membership is that it reduces the number of opinions each judge must write. It does not lessen the work of each judge necessary for the study of records and briefs, legal research, and examination of opinions in cases in which the other members write. This he must do, of course, in order to decide whether he agrees and will sign such opinions or write dissents. Enlarging a court does not decrease the amount of time required for listening to oral arguments of counsel and for conference, consultation, and discussion by the judges. In fact, increase of numbers increases the man-hours thus consumed and, perhaps, the number of court hours as well, because of resultant increase in number

[10]The Missouri Bar, "Report of the Supreme and Appellate Courts Commissioners Study Committee," Journal of the Missouri Bar, Vol. 6 (1950), p. 172.

> of questions addressed to counsel from the bench and more arguments and discussion by the larger number of judges in conference. Enlargement of court membership is, therefore, not necessarily 100 per cent gain.[11]

As of 1964, five states had courts of last resort composed of nine judges, 25 states had seven-judge benches, 16 states had five-judge benches, one state had four judges who sat on the high court and three states managed with three-judge benches at the highest appellate level.[12] The addition of judges to the high court without any accompanying revisions, however, did not prove to be a popular reform with either the high court judges or the intermediate court judges who responded to the AJS questionnaire.[13] At least 60 per cent of those responding to the survey strongly opposed this reform.

(2) Procedural Changes

Control over the number of written opinions, reducing hearing and decision time, expanding the court day and year, and adjustments in courtroom management can in many cases increase the efficiency of the appellate court. Written opinions, a task that takes the judge so much time and proves to be more than a moderate irritant,[14] for example, might well be replaced by memorandum opinions in certain instances. Supporting this reform, Judge J. J. Parker suggests that:

> A large percentage of the cases involve merely the application of well settled principles of law to states of facts which are not unusual; and these should be disposed of the memorandum opinions showing merely the questions that arise in the case and how they are answered by the court. The burden of keeping abreast of the reported cases in this country is becoming very great; appellate courts should not needlessly add to the burden by publishing lengthy opinions with relation to matters that are well settled and concerning which no lawyer of any ability entertains serious doubt.[15]

[11]Dethmers, op. cit., p. 158.

[12]Fred Breen, "Solutions for Appellate Court Congestion," Judicature, Vol. 47 (March, 1964), p. 229.

[13]Refer to Tables 9, 10, and 11 in this report.

[14]See Tables 1 and 2 of this report.

[15]J. J. Parker, "Improving Appellate Methods," New York University Law Review, Vol. 25 (1950), p. 13.

While courts in some states have control by the writ of error or by certiorari over the type and number of cases that they handle, the saving in time is not complete since the court must devote time to reading petitions and spend time in conference to decide the cases demanding review. Nevertheless, among the respondents to this questionnaire, limiting the "kinds of appeals as allowed by right" seemed to be the procedural reform suggested most strongly by the greatest number of judges.[16]

TABLE 9
ATTITUDES OF HIGH COURT JUDGES FROM STATES
WITHOUT INTERMEDIATE APPELLATE COURTS:
PROPOSED MODIFICATIONS OF PRESENT APPELLATE SYSTEM
WITHIN THE JUDGE'S STATE

MODIFICATIONS:	Total N (# Judges)	Advocate Strongly N	Advocate Strongly (%)	Undecided N	Undecided (%)	Strongly Oppose N	Strongly Oppose (%)
a. establishing an intermediate court system	87	47	(54.0)	20	(23.0)	20	(23.0)
b. adding judges to the highest court	75	11	(14.7)	19	(25.3)	45	(60.0)
c. divisional sitting of the highest appellate court	71	26	(36.6)	20	(28.2)	25	(35.2)
d. adding court commissioners to the highest court, to assist in hearing cases and writing opinions	72	12	(16.7)	22	(30.6)	38	(52.8)
e. limiting the kinds of appeals allowed as of right	79	50	(63.3)	15	(19.0)	14	(17.7)
f. increasing the number of court days and hours available for hearings	71	6	(8.4)	28	(39.5)	37	(52.1)
g. increasing the cost of appeals	74	4	(5.4)	21	(28.4)	49	(66.2)
h. affirming lower court decisions without written opinions	78	37	(47.4)	27	(34.6)	14	(17.9)
i. appointing judges so that time need not be spent campaigning	60	30	(50.0)	10	(16.7)	20	(33.3)
j. limiting the length of appeal briefs	62	26	(41.9)	27	(43.5)	9	(14.5)
k. using court administrators, law clerks and other assistants to assist higher court and/or intermediate appellate court procedure	69	49	(71.0)	11	(15.9)	9	(13.1)

[16] See Tables 9, 10, and 11.

TABLE 10
ATTITUDES OF HIGH COURT JUDGES FROM STATES
WITH INTERMEDIATE APPELLATE COURTS:
PROPOSED MODIFICATIONS OF PRESENT APPELLATE SYSTEM
WITHIN THE JUDGE'S STATE

MODIFICATIONS:	Total N (# Judges)	Advocate Strongly N	Advocate Strongly (%)	Undecided N	Undecided (%)	Strongly Oppose N	Strongly Oppose (%)
a. establishing an intermediate court system	35	32	(91.4)	2	(5.7)	1	(2.8)
b. adding judges to the highest court	26	1	(3.8)	2	(7.7)	23	(88.5)
c. divisional sitting of the highest appellate court	28	10	(35.7)	3	(10.7)	15	(53.6)
d. adding court commissioners to the highest court, to assist in hearing cases and writing opinions	28	8	(28.6)	3	(10.7)	17	(60.7)
e. limiting the kinds of appeals allowed as of right	29	22	(75.9)	4	(13.8)	3	(10.3)
f. increasing the number of court days and hours available for hearings	21	1	(4.8)	5	(23.8)	15	(71.4)
g. increasing the costs of appeals	22	1	(4.5)	6	(27.3)	15	(68.2)
h. affirming lower court decisions without written opinions	32	17	(53.1)	3	(9.4)	12	(37.5)
i. appointing judges so that time need not be spent campaigning	29	19	(65.5)	3	(10.3)	7	(24.1)
j. limiting the length of appeal briefs	24	11	(45.8)	6	(25.0)	7	(29.2)
k. using court administrators, law clerks and other assistants to assist in procedural matters of the highest court and/or the intermediate appellate court	26	21	(80.8)	2	(7.7)	3	(11.5)

TABLE 11
ATTITUDES OF INTERMEDIATE APPELLATE COURT JUDGES:
PROPOSED MODIFICATIONS OF PRESENT APPELLATE SYSTEM
WITHIN THE JUDGE'S STATE

MODIFICATIONS:	Total N (# Judges)	Advocate Strongly N	Advocate Strongly (%)	Undecided N	Undecided (%)	Strongly Opposed N	Strongly Opposed (%)
a. establishing an intermediate court system	79	73	(92.4)	1	(1.3)	5	(6.3)
b. adding judges to the highest court	64	12	(18.7)	9	(14.1)	43	(67.2)
c. divisional sitting of the highest appellate court	64	14	(21.9)	17	(26.6)	33	(51.5)
d. adding court commissioners to the highest court, to assist in hearing cases and writing opinions	64	14	(21.9)	13	(20.3)	37	(57.8)
e. limiting the kinds of appeals allowed as of right	75	50	(66.7)	14	(18.7)	11	(14.6)
f. increasing the number of court days and hours available for hearings	58	2	(3.4)	20	(34.5)	36	(62.1)
g. increasing the costs of appeals	68	13	(19.1)	11	(16.2)	44	(64.7)
h. affirming lower court decisions without written opinions	82	53	(64.6)	15	(18.3)	14	(17.1)
i. appointing judges so that time need not be spent campaigning	68	47	(69.1)	9	(13.2)	12	(17.6)
j. limiting the length of appeal briefs	63	29	(46.0)	26	(41.3)	8	(12.7)
k. using court administrators, law clerks and other assistants to assist in procedural matters of the highest court and/or of the intermediate appellate court	74	61	(82.4)	9	(12.2)	4	(5.4)

Besides the discretionary limitation of appealable cases, appeals may be reduced by increasing their costs, making the entire appeal process more complex, decreasing the time in which appeals may be taken, limiting jurisdiction, and decreasing the time for appeals. Neither the high court nor intermediate appellate court judges, however, approved of increasing the costs of appeals as a means of limitation.[17] Neither did they feel that increasing the number of court days and hours available for hearings was an acceptable solution.[18] They did, however, approve of the suggestion that written opinions which affirmed lower court decisions might be limited, and limiting the length of appeal briefs appealed to a good number of the appellate judges[19] as another way to overcome delay.

(3) Divisional Sitting of the Appellate Court:

Increasing the number of judges at the highest appellate level proved rather unpopular with the appellate judges as a solution to congestion.[20] But adding judges to the court in addition to structurally dividing the court of last resort into several sections has proved useful to a number of states in handling the increased caseloads. Division may occur along subject matter lines[21] or may arbitrarily be made; but whichever way is decided upon, the number of judges per division should be limited to three or four. Dean Roscoe Pound suggests that appellate courts of more than three judges are inefficient because of the size of the group. Where more than three judges sit there is likely to be a consultation on the prepared opinion rather than on the case. In addition, where more than three judges sit, the tendency in cases of no great difficulty is to resort to the abuse of one-man decisions. Divisions of three

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[17] Ibid.

[18] Ibid.

[19] Ibid.

[20] See Tables 9, 10, and 11.

[21] The American Bar Foundation suggests a division of cases by subject matter and assigning judges to corresponding divisions of the court. This would make possible a consistency in the law. See Glenn R. Winters, "New Approaches to Appellate Court Problems," March 21, 1969.

judges will maximize the use of available judicial time and avoid the tendency toward one-man decisions.[22] Judge J. J. Parker, former U. S. Court of Appeals judge also endorsed the efficiency of a three judge division and stated:

> Needless to say, sitting in divisions enables the court to hear more cases and thus keep up better with the work. Where important questions of law or of policy are involved, the entire court should, of course, sit, but any competent Chief Justice, by keeping an eye on his docket, can tell in advance what cases should be heard in this way. If a case heard before a division turns out to be one that should have been heard en banc, it is a simple matter to set it down for rehearings before the full court.[23]

Of course, this structural reform is not without objection. Justice Dethmers enunciated arguments against division of the court of last resort when he suggested:

> Criticisms raised against the system by some, but disputed by others are that it tends to increase the number of applications for rehearings, that it presents the possibility of conflicting decisions by the different divisions and that it results in two supreme courts in a state instead of one, with lawyers given an opening to select the one of their choice when the divisions are of a permanent character, as some are. The latter may be avoided by a rotating divisional scheme .... It seems more in keeping with American tradition and thinking that the matters presented to courts of last resort, any of transcendent importance to the people, call for the composite judgment of more than a division of such court.[24]

Proponents of this system claim that it saves money and is far less complicated than instituting an additional appellate level. Yet, as Glenn R. Winters suggests, if the court becomes much larger than nine judges, even when divided into sections, co-ordination of divisions can become a problem that may result in the loss of efficiency.[25]

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[22] R. Pound, Appellate Procedure in the United States, op. cit., pp. 383-385.

[23] J. J. Parker, "Improving Appellate Methods," New York University Law Review Vol. 25 (1950), p. 9.

[24] Dethmers, op. cit., p. 159.

[25] Winters, op. cit.

More high court judges in states without intermediate appellate courts favored the strengths offered by divisional separation of the highest court than those high court judges in states with intermediate appellate courts. The major advantage seen in divisional seating was that it appeared to be a more efficient system to handle backlog and appellate increases than to retain en banc seating of the high court. But these same judges from states without intermediate appellate courts who did not advocate strongly the system, complained that divisional seating produced "conflicts of decisions among divisions" and that litigants should have a "right to be heard by a court en banc." (Refer to Table 12 on page 16.)

Among those judges who came from states without intermediate appellate courts, those who advocated divisional sitting of the highest court came from the larger Mid-western states of Minnesota, Nebraska, Kansas, Iowa, as well as the states of Missis-sippi, Oregon, Kentucky, Washington, Arkansas, Colorado, Utah, and one response in favor of divisional seating from Massachusetts and Puerto Rico. (Refer to Table 13 on page 17.)

Judges from the states without intermediate appellate courts who did not advocate divisional sitting came from the New England states of Delaware, Massachusetts, Maine, Vermont, New Hampshire along with judges from the states of North and South Dakota, Washington, Wisconsin, Nebraska, Wyoming, Iowa, Montana, Virginia, Colo-rado, Kentucky, Oregon, and West Virginia. These states were either too small to need an alternative to the court of last resort sitting en banc or were not bothered by excessive caseloads that could not be handled by other means.

In states with intermediate appellate courts, fewer high court judges favored divisional sitting of the high court. Presumably they felt that the disadvantages of pos-sible conflicts between divisions and the disadvantages of undermining precedent law outweighed the advantages offered by this reform. (Refer to Table 14 on page 18.)

Intermediate appellate judges also felt that divisional sitting of the high appellate court was not the answer to congestion in their states. (Refer to Table 15 on page 19.) They complained particularly that such a division would "undermine the certainty of precedent law" and would not contribute advantages to outweigh the disadvantages of division.

High court judges from states with intermediate appellate courts that advocate divisional sitting of the high court came from the Southern states of Maryland, Alabama, Missouri, Tennessee, Texas, and the State of New Mexico.[26] Those high court judges

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[26] See Table 13.

TABLE 12
ATTITUDES OF HIGH APPELLATE COURT JUDGES IN STATES
WITHOUT INTERMEDIATE APPELLATE COURTS:
ADVOCATE DIVISIONAL SITTING OF HIGH COURT

REASONS:	Total N (# Judges)	Highly Important N	Highly Important (%)	Moderately Important N	Moderately Important (%)	Unimportant N	Unimportant (%)
a. it would significantly decrease the work load of individual judges	33	24	(72.7)	6	(18.2)	3	(9.1)
b. it is more efficient than sitting en banc because more cases can be heard at once with fewer judges involved	34	32	(94.1)	2	(5.9)	-	-
c. it would allow an increase in the number of judges while preventing the number from becoming unwieldy	31	14	(45.2)	6	(19.3)	11	(35.5)
d. it would make it possible to handle increasing caseloads without resorting to the establishment of intermediate courts	31	20	(64.5)	5	(16.1)	6	(19.4)

DO NOT ADVOCATE DIVISIONAL SITTING OF HIGH COURT

REASONS:	Total N (# Judges)	Highly Important N	Highly Important (%)	Moderately Important N	Moderately Important (%)	Unimportant N	Unimportant (%)
a. the level of appellate court congestion is insufficient to warrant its adoption	20	14	(70.0)	5	(25.0)	1	(5.0)
b. because of inevitable conflicts in decisions by various divisions and resultant repeat hearings, it would not decrease congestion	20	15	(75.0)	1	(5.0)	4	(20.0)
c. it would undermine the certainty of precedent law	23	15	(65.2)	5	(21.7)	3	(13.1)
d. litigants appealing to the highest court have the right to be heard by the court en banc	20	15	(75.0)	1	(5.0)	4	(20.0)

	N	(%)
ADVOCATE	34	(36.6)
DO NOT ADVOCATE	23	(24.7)
NO OPINION	36	(38.7)
Total N	93	(100)

TABLE 13

ATTITUDES OF HIGH APPELLATE COURT JUDGES IN STATES WITHOUT INTERMEDIATE APPELLATE COURTS:

DIVISIONAL SITTING OF HIGHEST APPELLATE COURT

Judges Advocate	Some Judges Advocate/ Do Not Advocate	Judges Do Not Advocate	
Arkansas	Colorado	Colorado	South Dakota
Kansas	Iowa	Delaware	Vermont
Minnesota	Kentucky	Maine	Virginia
Mississippi	Massachusetts	Montana	West Virginia
Puerto Rico	Nebraska	New Hampshire	Wisconsin
Utah	Oregon	North Dakota	Wyoming
	Washington		

ATTITUDES OF HIGH COURT JUDGES FROM STATES
WITH INTERMEDIATE APPELLATE COURTS

DIVISIONAL SITTING OF HIGHEST APPELLATE COURT

Judges Advocate	Some Judges Advocate/ Do Not Advocate	Judges Do Not Advocate	
Alabama	Maryland	California	Louisiana
Missouri	New Mexico	Florida	Michigan
	Tennessee	Georgia	New York
	Texas	Illinois	Oklahoma
		Indiana	

ATTITUDES OF INTERMEDIATE APPELLATE JUDGES

DIVISIONAL SITTING OF HIGHEST APPELLATE COURT

Judges Advocate	Some Judges Advocate/ Do Not Advocate	Judges Do Not Advocate
Alabama	California	Georgia
Arizona	Florida	Louisiana
Missouri	Illinois	Maryland
New Mexico	Michigan	New York
	New Jersey	North Carolina
	Tennessee	Pennsylvania
	Texas	

TABLE 14

ATTITUDES OF HIGH APPELLATE COURT JUDGES IN STATES WITH INTERMEDIATE APPELLATE COURTS: ADVOCATE DIVISIONAL SITTING OF HIGH COURT

REASONS:	Total N (# Judges)	Highly Important N	Highly Important (%)	Moderately Important N	Moderately Important (%)	Unimportant N	Unimportant (%)
a. it would significantly decrease the work load on individual judges	8	6	(75.0)	2	(25.0)	-	-
b. it is more efficient than sitting en banc because more cases can be heard at once with fewer judges involved	8	8	(100)	-	-	-	-
c. it would allow an increase in the number of judges while preventing the number from becoming unwieldy	8	4	(50.0)	1	(12.5)	3	(37.5)
d. establishment of the intermediate court system alone has not coped adequately with backlogs or speeded up the judicial process	6	2	(33.3)	2	(33.3)	2	(33.3)

DO NOT ADVOCATE DIVISIONAL SITTING OF HIGH COURT

REASONS:	Total N (# Judges)	Highly Important N	Highly Important (%)	Moderately Important N	Moderately Important (%)	Unimportant N	Unimportant (%)
a. the level of appellate court congestion is insufficient to warrant its adoption	15	10	(66.7)	1	(6.6)	4	(26.7)
b. because of inevitable conflicts in decisions by various divisions and resultant repeat hearings, it would not decrease congestion	16	13	(81.2)	1	(6.3)	2	(12.5)
c. it would undermine the certainty of precedent law	16	12	(75.0)	3	(18.8)	1	(6.2)
d. litigants appealing to the highest court have the right to be heard by the court en banc	15	11	(73.3)	-	-	4	(26.7)

	N	(%)
ADVOCATE	8	(25.0)
DO NOT ADVOCATE	16	(50.0)
NO OPINION	8	(25.0)
Total N	32	(100)

TABLE 15

ATTITUDES OF INTERMEDIATE APPELLATE COURT JUDGES: ADVOCATE DIVISIONAL SITTING OF HIGH COURT

REASONS:	Total N (# Judges)	Highly Important N	Highly Important (%)	Moderately Important N	Moderately Important (%)	Unimportant N	Unimportant (%)
a. it would significantly decrease the work load on individual judges	19	17	(89.4)	1	(5.3)	1	(5.3)
b. it is more efficient than sitting en banc because more cases can be heard at once with fewer judges involved	17	16	(94.1)	1	(5.9)	-	-
c. it would allow an increase in the number of judges while preventing the number from becoming unwieldy	17	8	(47.1)	-	-	9	(52.9)
d. establishment of the intermediate court system alone has not coped adequately with backlogs or speeded up the judicial process	12	2	(16.6)	5	(41.7)	5	(41.7)

DO NOT ADVOCATE DIVISIONAL SITTING OF HIGH COURT

REASONS:	Total N (# Judges)	Highly Important N	Highly Important (%)	Moderately Important N	Moderately Important (%)	Unimportant N	Unimportant (%)
a. the level of appellate court congestion is insufficient to warrant its adoption	34	19	(55.9)	4	(11.8)	11	(32.3)
b. because of inevitable conflicts in decisions by various divisions and resultant repeat hearings, it would not decrease congestion	35	24	(68.6)	6	(17.1)	5	(14.3)
c. would undermine the certainty of precedent law	34	26	(76.5)	5	(14.7)	3	(8.8)
d. litigants appealing to the highest court have the right to be heard by the court en banc	34	20	(58.8)	6	(17.6)	8	(23.6)

	N	(%)
ADVOCATE	19	(18.6)
DO NOT ADVOCATE	35	(34.3)
NO OPINION	48	(47.1)
Total N	102	(100)

in states with intermediate appellate courts that did not advocate divisional sitting of the high courts included the larger states of New York, Michigan, California, Illinois, as well as judges from the states of Florida, Georgia, Tennessee, Texas, Indiana, Maryland, New Mexico, Louisiana, and Oklahoma. It would seem that in states with intermediate appellate courts many of the advantages of divisional sitting of the high court in a large state are already compensated for by an efficient intermediate appellate court.

Intermediate appellate judges who advocated divisional sitting of the high court came from the states of Texas, Tennessee, New Mexico, Missouri, Michigan, Arizona, Illinois, Florida, California, Alabama, New Jersey. Those intermediate appellate judges that did not favor the adoption of divisional sitting came from the large states of New York, California, Michigan, Pennsylvania, Illinois, Texas, as well as New Jersey, Tennessee, North Carolina, Maryland, Louisiana, Georgia, and Florida.[27]

(4) The Creation of an Intermediate Appellate Court

Certain states such as Missouri, California, Florida, Tennessee and Indiana have found it necessary to combine divisional sitting of their highest court with an intermediate appellate court system to efficiently handle appellate overload. As of 1968, some twenty states had incorporated some form of the intermediate appellate court.[28]

Generally, some final appellate jurisdiction is vested in the intermediate court when an intermediate system functions as it should. Either some jurisdiction is vested in the intermediate court subject to a second appeal to the highest court, or jurisdiction may be vested exclusively in the highest court, the appeal being taken directly to that court as a matter of right. The extent to which intermediate courts can relieve the caseload burden on the highest court depends on the extent of its final jurisdiction and the scope of the certiorari, writ of error and certification policy. Unless the intermediate court has some final jurisdiction, adding it to the judicial system would only promote added litigation in the form of double appeals.

The high appellate judges serving in states that have intermediate appellate courts seem to be well satisfied with the intermediate courts' accomplishment. (Refer to Table 16 on page 21.) Among the strengths of the intermediate appellate system, these judges pointed to the decrease in the "number of appeals going to the highest court." They also suggest that the intermediate appellate judges have been "effective in handling the large case backlog." The high court judges felt that all the possible

[27]Refer to Table 13.

[28]See Report 20, op. cit. for details regarding the instigation of the intermediate appellate court system in these twenty states.

TABLE 16
ATTITUDES OF HIGH APPELLATE COURT JUDGES IN STATES WITH INTERMEDIATE APPELLATE COURTS
STRENGTHS

SPECIFICS:	Total N (# Judges)	Highly Important N	Highly Important (%)	Moderately Important N	Moderately Important (%)	Unimportant N	Unimportant (%)
a. it makes appeal available for more cases	25	20	(80.0)	2	(8.0)	3	(12.0)
b. geographical division of the court reduces the inconvenience to litigants of traveling long distances	25	13	(52.0)	7	(28.0)	5	(20.0)
c. it provides a means of appeal at less expense to the litigant	24	14	(58.3)	5	(20.8)	5	(20.8)
d. it significantly decreases the number of appeals going to the highest court	29	25	(86.2)	2	(6.9)	2	(6.9)
e. it is the best available measure for dealing with large backlog	28	26	(92.8)	1	(3.6)	1	(3.6)

WEAKNESSES

SPECIFICS:	Total N (# Judges)	Highly Important N	Highly Important (%)	Moderately Important N	Moderately Important (%)	Unimportant N	Unimportant (%)
a. it is more costly to the taxpayer to maintain a three-level system	26	2	(7.7)	5	(19.2)	19	(73.1)
b. it increases the length of time between the initiation of litigation and final resolution of the case	25	2	(8.0)	11	(44.0)	12	(48.0)
c. it increases cost to litigants by frequently making an extra appeal necessary	24	3	(12.5)	9	(37.5)	12	(50.0)
d. it undermines the certainty ot precedent law	25	1	(4.0)	8	(32.0)	16	(64.0)
e. the added court mahinery and added judicial personnel tend to decrease the quality of the state's appellate judiciary	24	-	-	6	(25.0)	16	(75.0)

reservations against the adoption of the intermediate system were inconsequential, and that the worst any judge could say about the system was that it "increased the length of time between the initiation of litigation and final resolution of the cases."

Intermediate judges who responded to the AJS survey also seemed well satisfied with their court system and their own effectiveness in its operation. Intermediate appellate judges felt that the greatest value of the system was, as the high appellate judges had suggested, that it served to "cut backlogs" and to significantly "reduce the number of appeals to the highest court." Again the only weakness of the system which could be determined was that an intermediate appellate system might increase the time between initiation of litigation and final resolution of the case.

The most significant and interesting response to the questionnaire came from the highest appellate judges from states without intermediate appellate courts. Their attitude toward instigation of such a system was more favorable than not. Nearly 46 per cent of those judges who had an opinion for or against the system would favor the adoption of an intermediate appellate court in their state hoping that this system would aid in reducing the number of appeals to the high court and provide a more efficient method to handle case backlog. State appellate judges who would advocate the establishment of an intermediate appellate court represented the Southern states of Arkansas, Virginia, West Virginia[29], Mississippi, and Kentucky, as well as the Midwest states of Wisconsin, Minnesota, Kansas, and Iowa. Other states represented by judges who advocated adoption included judges from Washington, Oregon, Colorado, Alaska, and North Dakota.

Opposition against the instigation of an intermediate appellate system was much weaker than those who would support an intermediate court system. Among the high appellate court judges in opposition, most of them came from the New England states and the Mountain states of Montana, Wyoming, and Utah. In addition, certain judges from the states of Nebraska, South Dakota, Kansas, and Iowa were also in opposition. The opposition pointed to the fact that either the level of congestion in their states did not warrant such a move or that the time lag between initiation and final resolution of the cases was too great to establish the system.

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[29]In states such as Virginia and West Virginia, where no appeals as of right exist, the movement for an intermediate appellate court is especially strong.

TABLE 17
ATTITUDES OF INTERMEDIATE APPELLATE JUDGES
STRENGTHS

SPECIFICS:	Total N (# Judges)	Highly Important		Moderately Important		Unimportant	
		N	(%)	N	(%)	N	(%)
a. it makes appeal available for more cases	89	67	(75.3)	7	(7.9)	15	(16.8)
b. geographical division of the court reduces the inconvenience to litigants of traveling long distances	91	56	(61.5)	19	(20.8)	16	(17.6)
c. it provides a means of appeal at less expense to the litigant	81	46	(56.8)	20	(24.7)	15	(18.5)
d. it significantly decreases the number of appeals going to the highest court	94	90	(95.7)	3	(3.2)	1	(1.1)
e. it is the best available measure for dealing with large backlogs	88	80	(90.9)	5	(5.7)	3	(3.4)

WEAKNESSES

SPECIFICS:	Total N (# Judges)	Highly Important		Moderately Important		Unimportant	
		N	(%)	N	(%)	N	(%)
a. it is more costly to the taxpayer to maintain a three level system	90	10	(11.1)	16	(17.8)	64	(71.1)
b. it increases the length of time between the initiation of litigation and final resolution of the case	92	10	(10.9)	32	(34.8)	50	(54.3)
c. it increases cost to litigants by frequently making an extra appeal necessary	90	9	(10.0)	32	(35.6)	49	(54.4)
d. it undermines the certainty of precedent law	90	11	(12.2)	23	(25.6)	56	(62.2)
e. the added court machinery and added judicial personnel tend to decrease the quality of the state's appellate judiciary	89	5	(5.6)	15	(16.8)	69	(77.5)

TABLE 18

ATTITUDES OF HIGH APPELLATE COURT JUDGES IN STATES WITHOUT INTERMEDIATE APPELLATE COURTS: ADVOCATE ADOPTION OF AN INTERMEDIATE APPELLATE COURT IN MY STATE

REASONS:	Total N (# Judges)	Highly Important N	Highly Important (%)	Moderately Important N	Moderately Important (%)	Unimportant N	Unimportant (%)
a. it would make appeal available for more cases	36	8	(22.2)	8	(22.2)	20	(55.5)
b. it could reduce the inconvenience to litigants of traveling long distances	37	13	(35.1)	13	(35.1)	11	(29.8)
c. it would provide a means of appeal at less expense to the litigant	37	13	(36.1)	14	(38.9)	9	(25.0)
d. it would decrease the number of appeals going to the highest court	45	42	(93.3)	1	(2.2)	2	(4.4)
e. it is the best available measure for dealing with large case backlog and/or speeding up the judicial process	40	28	(70.0)	7	(17.5)	5	(12.5)

DO NOT ADVOCATE ADOPTION

REASONS:	Total N (# Judges)	Highly Important N	Highly Important (%)	Moderately Important N	Moderately Important (%)	Unimportant N	Unimportant (%)
a. it would be more costly to the taxpayer to maintain a three-level system	16	10	(62.5)	4	(25.0)	2	(12.5)
b. it would increase the cost to the litigant by making an extra appeal necessary	15	11	(73.3)	3	(20.0)	1	(6.7)
c. it would increase the time between the initiation of litigation and final resolution of the case	17	13	(76.4)	2	(11.8)	2	(11.8)

DO NOT ADVOCATE ADOPTION (Continued)

REASONS:	Total N (# Judges)	Highly Important N	Highly Important (%)	Moderately Important N	Moderately Important (%)	Unimportant N	Unimportant (%)
d. the added court and added judicial personnel would tend to decrease the quality of the state's appellate judiciary	13	6	(46.2)	2	(15.3)	5	(38.5)
e. the level of appellate court congestion is insufficient to warrant measure	18	15	(83.3)	1	(5.6)	2	(11.1)

	N	(%)
ADVOCATE	45	(45.9)
DO NOT ADVOCATE	18	(18.4)
NO OPINION	35	(35.7)
Total N	98	(100)

TABLE 19

ATTITUDES OF HIGH COURT JUDGES FROM STATES WITHOUT INTERMEDIATE APPELLATE COURTS REGARDING THE ADOPTION OF AN INTERMEDIATE APPELLATE COURT FOR THE JUDGES' STATE

	JUDGES ADVOCATE	SOME JUDGES ADVOCATE; SOME DO NOT	JUDGES DO NOT ADVOCATE
STATES REPRESENTED	Alaska Arkansas Colorado Kentucky Minnesota Mississippi N. Dakota Oregon Puerto Rico Virginia Washington West Virginia Wisconsin	Iowa Kansas Massachusetts	Delaware Maine Montana Nebraska New Hampshire S. Dakota Utah Vermont Wyoming

It is obvious that the individual characteristics of each state must be taken into consideration before congestion and delay can be wholly dealt with. In some states a combination of procedural and structural reforms have been used to bring efficiency into appellate proceedings. In other states only procedural or structural changes have proved successful, but every state appellate court system that has managed to keep abreast of new demands on it has had to make some adjustments. Among the respondents to the AJS questionnaire, both high court and intermediate court judges seem desirous to control the number of appeals coming to the highest level and desire, as well, to handle any backlog and delay in the most efficient means. For some state courts this will consist of more judicial appointments, the addition of more law clerks and court administrators. For other states it will require the division at the highest appellate level or the instigation of an intermediate appellate court system. It is absolutely essential that before a state attempts to solve its problems of congestion, it must first pinpoint its own particular problem. What works as a solution in one state to bring efficiency into the appellate level may not work in another. But through careful observation and study and communication among the courts and agencies interested in the efficient administration of justice, it is hoped that some reforms will be able to meet head-on the congestive circumstances of the state court and will allow it to become more relevant to the needs of its people.

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