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Institutional Reform in the Federal Courts

ALAN BETTEN*

The fear that haunts me with a hopeless obstinacy is a nightmare that would cause every lawyer or law student to quake. It is that one morning we will look out the window and see nothing but Federal Reporters rising from the earth to the heavens, shelves and shelves of them, stretching from one horizon to the other.¹

By virtue of our Constitution, Congress has the power to define both the jurisdiction of the lower federal courts and the appellate jurisdiction of the Supreme Court.² Congress has found it proper to add to the jurisdiction of these various federal courts,³ but rarely has Congress exercised its constitutional right to withdraw such jurisdiction.⁴ Since the mid-1960's, however, much discussion within Congress and among other interested groups has concerned the need for a basic revision and redistribution of the jurisdiction of the federal courts. To a large extent, the discussion has been prompted by the law explosion and by the overloaded dockets found at all levels of our federal and state judiciaries. Some commentators freely admit that they cannot adequately account for this sudden and staggering rise in caseloads.⁵ Other commentators, such as Judge Friendly, state that any explanations might include prior decisions of the courts, the attitudes of the litigants, and the multitude of substantive rights newly created by congressional legislation.⁶ Still other commentators, while not advancing explanations for the problem, have partially demonstrated that, contrary to conventional wisdom, litigation rates in the federal district courts do not necessarily parallel increasing economic growth or population.⁷

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¹Rosenberg, *Planned Flexibility to Meet Changing Needs of the Federal Appellate System*, 59 CORNELL L. REV. 576 (1974) [hereinafter cited as *Planned Flexibility*].

²U.S. CONST. art. III, § 1.

³See, e.g., Act of Sept. 24, 1789, 1 Stat. 73 (establishing the federal court system); Act of March 3, 1875, 18 Stat. 470; Interpleader Act, 28 U.S.C. §§ 1335, 1397, 2361 (1970).

⁴But see *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868).

⁵Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 543 (1969) [hereinafter cited as *Crowded Dockets*].

⁶H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 17-27 (1973).

⁷Grossman & Sarat, *Litigation in the Federal Courts: A Comparative Perspective*, 9 LAW & SOC'Y REV. 321-23 (1975) [hereinafter cited as *Litigation in the Federal Courts*].

Regardless of the underlying causes of this explosion the federal judiciary faces an immense problem. In order to grasp the enormity of the situation one need only state some elementary statistics.⁸ In 1960 federal district court filings totaled 89,112; in 1975 they totaled 160,602.⁹ This is an increase of about 4,800 filings per year. While the number of criminal cases filed rose about 25 percent from 1964 to 1974, the number of civil case filings increased 55 percent in the same time period.¹⁰ Furthermore, the rise in the number of criminal filings was accompanied by a 60 percent increase in the number of defendants who went to trial.¹¹ Other specific types of case filings showed even greater growth rates.¹²

The crisis is worse at the court of appeals level; while there were 3,899 appeals filed in 1960,¹³ 1975 filings totaled 16,658.¹⁴ Filings thus rose about 332 percent in the same period as district court filings increased about 80 percent. The number of cases disposed of after oral argument or submission on brief, a figure revealing more about the actual workload of these courts, showed an increase from 2,681 cases in 1960¹⁵ to 9,077 cases in 1975.¹⁶ Much of this workload increase has been caused by a sharp increase in criminal appeals.¹⁷ In the 1970-1975 period alone criminal case filings rose 57 percent, from 2,660 cases to 4,187 cases.¹⁸ Furthermore, while about 33 percent of the convicted defendants appealed in 1964, by 1974 almost 75 percent appealed to the courts of appeals.¹⁹

This article examines some problems of institutional reform of the federal judiciary and assumes that such administrative changes can have great effect upon both the caseload and the quality of the decisions of the federal courts. Although some of the changes discussed might well be

⁸Throughout this paper, district court and court of appeals caseload figures refer to fiscal years, while Supreme Court caseload statistics refer to Terms of the Court.

⁹ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 189 (1975) [hereinafter cited as A.O. ANN. REP. (1975)].

¹⁰Burger, *Annual Report on the State of the Judiciary*, 61 A.B.A.J. 439 (1975) [hereinafter cited as Burger, *Annual Report*].

¹¹*Id.*

¹²For example, civil rights cases increased from 296 in 1961, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 241 (1961), to 10,392 in 1975 (of which 1,355 were U.S. civil rights suits and 9,037 were private actions) A.O. ANN. REP. (1975), *supra* note 9, at 349, 354. Prisoner petitions increased from 2,609 in 1961, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 241 (1961), to 19,307 in 1975, A.O. ANN. REP. (1975), *supra* note 9 at 207.

¹³ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 150 (1960) [hereinafter cited as A.O. ANN. REP. (1960)].

¹⁴A.O. ANN. REP. (1975), *supra* note 9, at 323.

¹⁵A.O. ANN. REP. (1960), *supra* note 13, at 150.

¹⁶A.O. ANN. REP. (1975), *supra* note 9, at 323.

¹⁷Some of this increase in appeals might, in turn, be attributed to the Supreme Court's decision in *Anders v. California*, 386 U.S. 738 (1967) (requiring an appointed counsel to file an appeal if non-frivolous), and to the Criminal Justice Act of 1964, 18 U.S.C. § 3006A (1970), which provides for appointed counsel in the federal courts. See also Goldman, *Federal District Courts and the Appellate Crisis*, 57 JUDICATURE 211, 212 (1973).

¹⁹*United States v. MacCollum*, 96 S. Ct. 2086, 2098, n.8 (1976) (Stevens, J., dissenting) (1976); Burger, *Annual Report*, *supra* note 10, at 440.

implemented by the district courts, this article will focus on institutional and administrative changes concerning the federal appellate courts.

The first section examines caseload through the federal court system in order to note whether current proposals for federal court reform are based upon correct perceptions of the roles played by the courts of appeals and the Supreme Court. Various intracourt reforms which might be implemented by the courts of appeals are then analyzed in the second section. The third section discusses the screening process and growing docket of the Supreme Court, the effect of various reform proposals upon them, and other possible methods by which the Court can continue its conflict-resolving and policymaking roles.

I. RELATIONSHIPS AND ROLES OF THE FEDERAL APPELLATE COURTS

Implicit in most discussions concerning the federal court system is a hierarchical model which assumes that authoritative decisions are made by the Supreme Court and are then applied by the lower federal courts. Such a model suggests that public law is the product only of Supreme Court decisions. A second model of the system is that of a bureaucracy in which the Supreme Court makes important decisions and the lower federal courts implement them to varying degrees. The power of the lower federal courts is greater in the bureaucratic model than in the hierarchical model, though in reality the power consists of typical bureaucratic recalcitrance and incrementalism.²⁰

According to studies by Vines and Richardson,²¹ and Howard,²² however, neither of these models describes with complete accuracy the true relationships between the various levels of the federal court system or the roles which the courts of appeals and Supreme Court perform in that system. Both of these studies conclude that the courts of appeals play a more vital role in the formation of national law and that the federal court system is not as tightly controlled by the Supreme Court as either model assumes.

In an attempt to examine litigation flow within the federal judiciary and particularly to analyze the functions of the courts of appeals, Howard examined all non-consolidated cases, including administrative appeals, decided by the District of Columbia (D.C.), Second, and Fifth Circuits from 1965 to 1967.²³ Although all three circuit courts were asked to enforce

²⁰K. VINES & R. RICHARDSON, *THE POLITICS OF FEDERAL COURTS* 143-44 (1970) [hereinafter cited as *POLITICS OF FED. COURTS*]. For a discussion of the bureaucratic model, see Murphy, *Lower Court Checks on Supreme Court Power*, 53 AM. POL. SCI. REV. 1017 (1959).

²¹*POLITICS OF FED. COURTS*, *supra* note 20, at 93-161, *passim*.

²²Howard, *Litigation Flow in Three United States Courts of Appeals*, 8 LAW & SOC'Y. REV. 33 (1973) [hereinafter cited as *Litigation Flow*].

²³These circuits handled about 40 percent of the total courts of appeals caseload during this time period.

federal law, particularly by the federal government, Howard noted a great difference among the circuits as to the extent of use by various types of litigants. The federal government, for example, was party to 70 percent of the D.C. Circuit's cases, but only party to 51.7 percent of the Second Circuit's cases and 48.5 percent of the Fifth Circuit's cases. State governments, while party to 14.4 percent of the Fifth Circuit's cases, were party to only 8 percent of the Second Circuit's cases and 1 percent of the D.C. Circuit's cases. Similarly, the percentage of cases in which both litigants were private parties was 39.9 percent in the Second Circuit, 36.2 percent in the Fifth Circuit, and 28.2 percent in the D.C. Circuit.²⁴

The circuits were also differentiated by the subject matter of their caseloads: the Fifth Circuit had a heavy load of personal status cases;²⁵ the Second Circuit had a large number of morals offenses cases;²⁶ and the D.C. Circuit had the bulk of certain agencies' cases.²⁷ Such variations among the circuits may well lead to regional specialization and to regionalized national law. Thus, one must be wary of attempting to discuss *the* policy role of the courts of appeals.²⁸

Turning to the flow of litigation within each of the three circuits, Howard found that of the 12,406 district court trials completed during the period, 48.7 percent were appealed, but only 30 percent received post-hearing disposition. Of this latter group, 21.8 percent were reversed by the courts of appeals. Cohesion within the circuits might be discerned from the fact that the circuits heard less than one third of all district court decisions, yet affirmed over 75 percent of this one third. If one also includes those cases remanded for further consideration, the percentage of nonreversals among cases heard by the circuits rose to 87.3 percent, thus portraying a bottom-up view of decisionmaking within the federal judiciary.²⁹

Of the 4,941 cases disposed of by the Second, Fifth, and D.C. Circuits after hearing or submission on briefs, 20.3 percent, a figure substantially higher than the classical hunch of 10 percent, were appealed to the Supreme Court.³⁰ The Court granted the writ of certiorari in 1.9 percent of the 4,941 decisions, which translates into nearly 10 percent of all cases appealed. The Court then affirmed .5 percent and disturbed 1.4 percent of the 1.9 percent. While one might argue that the number of cases reviewed

²⁴*Litigation Flow*, *supra* note 22, at 36-37.

²⁵Personal status cases constituted 23 percent of the Fifth Circuit's caseload. *Litigation Flow*, *supra* note 22, at 38-39.

²⁶Morals offenses (mostly narcotics) made up 9.4 percent of the Second Circuit's caseload. *Id.*

²⁷For example, the FCC and other regulatory agencies. Other agencies such as the NLRB or Immigration and Naturalization Service were not so active in the D.C. Circuit. *Id.*

²⁸*Id.*

²⁹*Id.* at 41-42.

³⁰*Id.* at 42. In 1974, the percentage of such cases appealed from the circuits to the Supreme Court reached 29.8 percent. Testimony of Judge Griffin B. Bell, *HEARINGS BEFORE THE COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, SECOND PHASE*, vol. II, 682 (1974-1975) [hereinafter cited as *COMM. ON REV., SECOND PHASE*].

was insufficient,³¹ the circuits were effectively the courts of last resort for 98.6 percent of the district court decisions, thus reemphasizing the bottom-up view of decisionmaking.³²

In their seminal study of the federal court system Vines and Richardson examined five hypotheses which concerned Supreme Court interaction with the lower federal courts and which were suggested by the hierarchical model: 1) the Supreme Court will more often review cases that have been reversed, rather than affirmed, at the appellate level; 2) the Court will more readily hear and reverse decisions concerning interlevel conflict than decisions concerning interlevel consensus; 3) the Supreme Court will more often support the court of appeals in an interlevel conflict; 4) the Supreme Court will hear more cases resulting from split panels than from unanimous panels; and 5) the Supreme Court will reverse a divided appellate court more frequently than a unanimous appellate court.³³

Using all of the Supreme Court's 1964-1965 docket with district court and court of appeals antecedents, Vines and Richardson found none of these hypotheses to be true. Fully 68 percent of the cases involved agreement between the district court and the court of appeals. Of this 68 percent, 70 percent were reversed by the Supreme Court, thus injecting conflict into the system and contradicting the first two hypotheses. Contrary to the third hypothesis, the Supreme Court upheld the district court in almost two thirds of the cases involving an interlevel conflict. Contradicting the fourth hypothesis, the statistics demonstrated that only 23 percent of these cases were from split panels. Finally, Vines and Richardson, rejecting the last hypothesis, found that while the Court reversed 69 percent of these split panel decisions, it also reversed 68 percent of the unanimous panel decisions.³⁴

In his study of litigation flow, Howard found that the Supreme Court disturbed more appellate court affirmances (41) than reversals (16) and that the Court reversed (21) more often than it affirmed (8) the circuit decision in the event of interlevel conflict.³⁵ Both of these results replicate the findings of Vines and Richardson and suggest that the Supreme Court was not reacting to lower court disagreement, whether intralevel or interlevel. As Vines and Richardson stated:

In many respects, the court is best understood as a high court, similar to the Court of Appeals in England. It functions as a kind of national council of review which interacts with the lower courts, not as a systematic court

³¹*Compare* Hufstедler, *Courtship and Other Legal Arts*, 60 A.B.A.J. 545, 547 (1974) with Statement of Judge Henry J. Friendly, COMM. ON REV., SECOND PHASE, vol. I, *supra* note 30, at 209-10.

³²*Litigation Flow*, *supra* note 2, at 42-46. This finding parallels that of *POLITICS OF FED. COURTS*, *supra* note 20, at 114.

³³*POLITICS OF FED. COURTS*, *supra* note 20, at 151.

³⁴*Id.* at 151-56.

³⁵*Litigation Flow*, *supra* note 22, at 47-49.

of appeals or as an adequate supervisor of the lower court system, but as a policy formulator for selected issues. Its task is public policy formulation, using lower court decisions as its medium. It selectively inspects and responds to political tendencies in the lower courts, encouraging, modifying, and restricting the political patterns set in motion by litigation. Thus, the lower courts and Supreme Court do "articulate a system," but the system is less structured and rigid than either the hierarchical or bureaucratic models suggested.³⁶

The Supreme Court therefore appears to be less interested in resolving interlevel conflict than it is in settling policy disputes. Indeed, both of these studies found that the Justices simply supported "whoever agreed with them in whatever interested them in [the] appeals" before them.³⁷ Because its function "is to make law, not to correct error in its application,"³⁸ the Court must rely upon the courts of appeals to enforce the supremacy and uniformity of the national law. The courts of appeals, however, due to the Supreme Court's selective oversight, have the ability to create and to balkanize national law.

Circuit judges filter issues on their way to the Supreme Court; they have substantial opportunity to create and to resist judicial policy when the Justices cannot or will not intervene, which is nearly all the time.³⁹

II. ADMINISTRATIVE REFORMS IN THE COURTS OF APPEALS

In discussing the effect of the Judiciary Act of 1925,⁴⁰ which granted the Supreme Court extensive certiorari jurisdiction, Chief Justice Taft stated that "the sound theory . . . is that litigants have their rights sufficiently protected by a hearing or trial in the courts of first instance, and by one review in an intermediate appellate court."⁴¹ One must remember that the courts of appeals, in addition to their lawmaking function, correct errors made by the district courts. The caseload problem threatens both functions of these intermediate appellate courts and can be remedied primarily by making the review process more efficient and by adding more judges or more circuits.

A. Reforms to Improve Efficiency

Any reforms motivated by efficiency should include the appointment of a circuit executive. Because some of the circuit chief judges, who are

³⁶POLITICS OF FED. COURTS, *supra* note 20, at 161.

³⁷*Litigation Flow*, *supra* note 22, at 49. See also, POLITICS OF FED. COURTS, *supra* note 20, at 154, 156.

³⁸Statement of Judge Friendly, COMM. ON REV., SECOND PHASE, *supra* note 30, at 210.

³⁹*Litigation Flow*, *supra* note 22, at 46.

⁴⁰Act of Feb. 13, 1925, ch. 229, 43 Stat. 936.

⁴¹Taft, *The Jurisdiction of the Supreme Court Under the Act of February 13, 1925*, 35 YALE L.J. 1, 2 (1925).

responsible for the circuits' internal administration, have neither the time nor the skill required for such a task, Congress authorized, in 1970, the judicial council of each circuit to appoint an executive to perform duties to be delegated by that council.⁴² Such duties might include monitoring day to day operations of the court, making studies and recommendations concerning the court's business, administering the district courts within the circuit, acting as a liaison between groups within the circuit, and acting as secretary of the circuit council.

By 1974 only the First and Seventh Circuits had not yet appointed a circuit executive from those certified by the procedure specified in the 1970 statute.⁴³ The other circuits have assigned various duties to their executives including acting as administrative assistants to the chief judges, assigning judges to three-judge district courts, reviewing claims for payment pursuant to the Criminal Justice Act, and summarizing reports from and drafting reports to the Judicial Conference, the Administrative Office, and the Federal Judicial Center. Still other jobs include aiding the district courts with various administrative problems, formulating case flow plans, and helping to better train district court clerks.⁴⁴ Regardless of the specific jobs given to these circuit executives, it seems obvious that they can aid in the efficient operation of the courts of appeals.

Improved case docketing constitutes a second method of administrative reform. Various circuits have undertaken reforms to shorten the time period from notice of appeal to final disposition in order to recover a sizeable portion of previously "lost time."⁴⁵ Many of these reforms have been aimed at shortening the time period in which the appeal is perfected.⁴⁶

The Second Circuit has led the circuits in docket reform with its Criminal Justice Expediting Plan.⁴⁷ After finding in 1973 that an average of 178 days was required to process a criminal appeal from the notice of appeal to final disposition, the circuit attempted to reduce the time span to approximately 90 days.⁴⁸ In the first phase of the reform the court decreed that trial counsel was required to remain as appellate counsel until relieved

⁴²28 U.S.C. § 332 (1970). For a good study of the role of the circuit council, see P. FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* 379-426 (1973).

⁴³Martineau, *The Federal Circuit Executives: An Initial Report*, 57 JUDICATURE 438-40 (1974).

⁴⁴*Id.* at 441, 444.

⁴⁵See Bell, *Toward a More Efficient Federal Appeals System*, 54 JUDICATURE 237, 237-39 (1971) [hereinafter cited as *More Efficient Fed. Appeals*].

⁴⁶For example, in the Fifth Circuit in 1968, the median time interval from filing of complete record to filing of last brief was 4.6 months, from filing of last brief to hearing or submission on briefs was 2.7 months, and from hearing or submission on briefs to final disposition was 1.5 months. Statement of Chief Judge John R. Brown, *HEARINGS BEFORE THE COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, FIRST PHASE* 157 (1973) [hereinafter cited as *COMM. ON REV., FIRST PHASE*].

⁴⁷*Id.* at 1140-42.

⁴⁸The 1973 average for all of the circuits was 278 days. Stecich, *Speeding Up Criminal Appeals in the Second Circuit*, 1 JUST. SYS. J. 43 (1975).

by the appellate court. The circuit also created the position of scheduling clerk, whose job was to set and to notify counsel of hearing dates. If the appellant missed a scheduled hearing, the appeal was dismissed. A form was also devised by which the trial judge could give the circuit certain basic information such as the identity of parties and counsel.⁴⁹

The second phase of the reform was designed primarily to foster better communication between the district court and the court of appeals. The courtroom deputy was to give a convicted defendant's counsel instruction sheets advising him how to proceed with the first steps of an appeal. The same clerk was then to fill out the information sheet containing the basic case information. The trial judge was to instruct counsel to order a transcript quickly and to settle all payments with a clerk specifically designated to send transcripts to the appellate court. Finally, the scheduling clerk of the court of appeals was to monitor and to insure the smooth operation of the process. The program's results were impressive; about six months after its initiation the Second Circuit's median time span was shortened to 116 days.⁵⁰

Screening processes also have generally helped the courts of appeals keep pace with their dockets. Unlike docketing reforms, however, screening processes lead to an appeals process in which some cases receive different treatment by the court.⁵¹ Screening processes are used to determine if a case is suitable for preargument conference and whether a case merits full, partial, or no oral argument prior to disposition.

The Second Circuit, with the aid of the Federal Judicial Center, has pioneered the first type of screening process reform. The Civil Appeals Management Plan for preargument conferences is an outgrowth of the seldom used Rule 33 of the Federal Rules of Appellate Procedure.⁵² The plan requires an appellant to file a preargument statement within ten days of filing notice of appeal. The statement, which delineates the issues involved, accompanies a form noting that the transcript has been ordered.

⁴⁹*Id.* at 44.

⁵⁰*Id.* at 45-48. In the face of the heaviest caseload of any circuit, the Fifth Circuit, in the late 1960's, began to implement docketing reforms. The median time interval for all cases from the filing of the complete record to final disposition in cases heard or submitted on briefs showed a precipitous drop from 8.8 months in 1968 to 4.9 months in 1973. Only the Second Circuit, whose median time interval was 4.8 months, and the Eighth Circuit, with a median interval of 4.5 months, had less lengthy intervals. Statement of Judge Irving R. Kaufman, COMM. ON REV., FIRST PHASE, *supra* note 46, at 1039. It is interesting to note that 1973 was also the year in which the Fifth Circuit screened the largest percentage of cases onto its summary calendar. In 1974, when the percentage of cases placed on the summary calendar dropped, this median time interval rose to 5.5 months. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 374 (1974).

⁵¹See generally Meador, *Appellate Case Management and Decisional Processes*, 61 VA. L. REV. 255 (1975).

⁵²As to Rule 33's neglect by the Second Circuit prior to this time, see M. SCHICK, LEARNED HAND'S COURT 85-90 (1970) [hereinafter cited as LEARNED HAND'S COURT]; Note, *The Second Circuit: Federal Judicial Administration in Microcosm*, 63 COLUM. L. REV. 874, 885-86 (1963). Rule 33 of the FED. R. APP. P. parallels the pretrial conference rule of FED. R. CIV. P. 16.

While the staff counsel and circuit executive would normally set a schedule for docketing, filing of briefs, and hearing oral argument under the old system, the staff counsel now determines whether the case is suitable for a preargument conference.

The conference, held an average of 19.5 days after the filing of notice of appeal, is conducted by the staff counsel so that a judge will not be forced to disqualify himself from the trial if settlement is not reached.⁵³ The staff counsel may be viewed as a neutral and respected representative of the court who can note the strengths and weaknesses of both parties' positions, stabilize the bargaining process, suggest reasonable outcomes and settlements, and sharpen the issues for both the parties and the court. If such a nonjudicial professional presides, not only will judicial time be saved, but the conference judge will less likely be accused of bias. The parties will not fear judicial retaliation if settlement is not reached, and one panel judge will not have an advantage over his two colleagues by virtue of prior familiarity with the case.⁵⁴ Though the staff counsel might not adequately fulfill the role of an institutional substitute, the judge will benefit because his time will not be spent in the preargument conference and because the case, if settled, will not come before his panel.

Although it obviously is difficult to determine which cases are suitable for preargument conferences, the Second Circuit scheduled 181 conferences in the first four and one-half months of the plan. The results, though inconclusive, were encouraging; while 27 cases were settled and seven were withdrawn prior to conference, an identical number of cases were settled and five were withdrawn after conference. Additionally, the conferences simplified issues in 18 cases.⁵⁵

The second and most commonly used form of screening, that of determining whether oral argument will be granted prior to disposition, is carried out to differing extents by various methods in all circuits with the exception of the Second Circuit.⁵⁶ For example, screening is used to decide whether a case will receive full, limited, or no oral argument in the Sixth Circuit;⁵⁷ in the Tenth Circuit the chief judge screens the cases, puts the unsubstantial appeals on a summary calendar, and places the quasi-substantial appeals on an accelerated docket for disposition with a

⁵³Kaufman, *The Pre-Argument Conference: An Appellate Procedural Reform*, 74 COLUM. L. REV. 1094, 1094-98 (1974).

⁵⁴Mack, *Settlement Procedures in the U.S. Courts of Appeals: A Proposal*, 1 JUST. SYS. J. 17, 26-31 (1975).

⁵⁵As 49 of the 66 cases concerned either personal injury, property damage, employment disputes and contract disputes, it appears that the staff counsel were discerning in using conferences more for monetary award cases than for injunction cases. Kaufman, *The Pre-Argument Conference: An Appellate Procedural Reform*, 74 COLUM. L. REV. 1094, 1098-1100.

⁵⁶Statement of Judge Kaufman, COMM. ON REV., FIRST PHASE, *supra* note 46, at 1033. *But see* Statement of Judge Griffin B. Bell, *id.* at 470, in which Judge Bell noted that, instead of limiting oral argument, the Second Circuit affirms from the bench about 30 percent of all cases argued orally.

⁵⁷*More Efficient Fed. Appeals*, *supra* note 45, at 239-40.

shortened briefing schedule and limited oral argument.⁵⁸ In the Fourth Circuit the staff law clerk and his staff perform the screening process. After reviewing 95 percent of all docketed cases, the staff, if it recommends that a case not be granted oral argument, will forward the record to the panel, the trial transcript, its recommendation, and a draft per curiam or memorandum opinion. Unpublished memorandum opinions are used in about one half of all docketed pro se cases, while one third of the remaining docketed cases are screened off the oral argument calendar. Thus, approximately 65 percent of the docketed cases do not receive oral argument in the Fourth Circuit.⁵⁹ In 1973, 1,142 of the 1,504 cases which received judicial action by the circuit were not orally argued. Of the 1,142 cases, only 145 were briefed. Other statistics seem to reinforce the notion that this type of screening process is effective in separating the "important" from "unimportant" cases; 97 percent of the orally argued cases received published opinions, while 84 percent of those cases that did not involve oral argument received unpublished opinions.⁶⁰

In their study of the Fourth Circuit's screening process, Flanders and Goldman found that when the judges' law clerks read the staff clerk's recommendation prior to transmitting it to the judges these clerks usually agreed with the recommendation.⁶¹ Six of the seven judges were also interviewed, and two of them estimated that recommendations to deny oral argument were reversed in about 20 percent of the cases. Although Flanders and Goldman concluded that in the majority of instances the staff clerks mirrored the views of the judges,⁶² it is tempting to query whether the reverse is more true and whether the judges have abdicated part of their judicial function through this screening process.⁶³

Faced with the heaviest caseload of any circuit, the Fifth Circuit has also been quite successful in implementing the screening procedures set

⁵⁸*Id.* at 240. See also Note, *Screening of Criminal Cases in the Federal Courts of Appeals: Practice and Proposals*, 73 COLUM. L. REV. 77 (1973).

⁵⁹Flanders & Goldman, *Screening Practices and the Use of Para-Judicial Personnel in a U.S. Court of Appeals: A Study in the Fourth Circuit*, 1 JUST. SYS. J. 1, 3-6 (1975) [hereinafter cited as *Screening Practices*]. But see Statement of Chief Judge Brown, COMM. ON REV., FIRST PHASE, *supra* note 46, at 638, in which he noted that the Fourth Circuit's caseload statistics are somewhat inflated because every prisoner's letter directed to the court is counted as a case filed. This does not, however, negate the finding by Flanders and Goldman that a large percentage of the circuit's cases do not receive oral argument.

⁶⁰*Screening Practices*, *supra* note 59, at 7. There was little relation between having or not having oral argument and affirmation or reversal by the court.

⁶¹*Id.* at 9-10.

⁶²*Id.* at 10.

⁶³*Id.* at 9-10. Another potential problem presented by this screening process is that while a permanent staff law clerk would add expertise to the process, his recommendations might be too readily accepted by the judges. See Testimony of Chief Judge David T. Lewis, COMM. ON REV., SECOND PHASE, vol. II, *supra* note 30, at 977, in which he noted that, although the Tenth Circuit was the first circuit to experiment with screening by a central staff, the program has been cut back because the judges found it "too easy to lean" on the central staff.

forth in its Local Rule 18.⁶⁴ Approximately 60 percent of the filed cases, selected due to their subject matter, are screened by staff attorneys, and the other 40 percent are screened by panels of judges. If a staff attorney decides that a case ought to be argued orally he places it on a tentative calendar and sends it to the panel's presiding judge, who determines whether the case was correctly classified. If he disagrees with the staff attorney the presiding judge then reclassifies the case and sends it to the regular screening panel. In order to deny oral argument in the case, the three judges of the screening panel must agree on both the screening class and the final opinion.⁶⁵

Screened cases are placed in one of four classes: Class I consists of frivolous cases; Class II consists of cases which do not merit oral argument; Class III consists of cases which are granted limited oral argument; and Class IV consists of cases which are granted full oral argument.⁶⁶ In 1972, 59.1 percent of the circuit's caseload were placed on the summary calendar (Classes I and II) and thus did not receive oral argument. It appears, however, that the circuit decided fewer cases without oral argument in 1973 (57 percent) and in 1974 (54.9 percent).⁶⁷ Although these innovations might well have permanent value⁶⁸ and although every case is screened only in order to determine "how the case should be given full appellate review on the merits,"⁶⁹ figures such as those cited above might prompt one to wonder whether the Fifth Circuit has granted too much freedom to mass production methods intended to control its burgeoning docket.

Indeed, no matter how the screening process is accomplished the quality and integrity of the appellate judicial process may be jeopardized by excessive resort to such expedient means as denial or oral argument. A survey of lawyers filing cases in the Second, Fifth, and Sixth Circuits clearly revealed a lack of desire to yield the quality of the appellate process to efficiency. They asserted that oral argument should only be denied in a frivolous appeal, not for avoidance of extreme delay.⁷⁰ Also, in those circuits in which lawyers must travel great distances to the court of appeals,

⁶⁴Statement of Chief Judge Brown, COMM. ON REV., FIRST PHASE, *supra* note 46, at 510-12, 544.

⁶⁵Testimony of Chief Judge John R. Brown, COMM. ON REV., SECOND PHASE, vol. II, *supra* note 30, at 870-71. See also COMM. ON REV., FIRST PHASE, *supra* note 46, at 145, in which he described the now unused standing panel method of screening.

⁶⁶Statement of Chief Judge Brown, COMM. ON REV., FIRST PHASE, *supra* note 46, at 145.

⁶⁷Statement of Chief Judge Brown, COMM. ON REV., SECOND PHASE, *supra* note 30, at 883. A further breakdown of the circuit's disposition of its 1973 caseload revealed that fully 44.2 percent of the cases placed on the summary calendar received a Rule 21 affirmation which did not contain any explanatory citation. Statement of Chief Judge Brown, COMM. ON REV., FIRST PHASE, *supra* note 46, at 274. See note 81 *infra* & text accompanying.

⁶⁸Statement of Chief Judge Brown, COMM. ON REV., FIRST PHASE, *supra* note 46, at 533-36.

⁶⁹*Id.* at 510.

⁷⁰COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 42-43 (1975) [hereinafter cited as COMM. ON REV., RECOMMENDATIONS].

counsel frowned upon the early stoppage of oral argument.⁷¹ Taking into account the concern of the bar, the Commission on Revision of the Federal Court Appellate System has recommended that oral argument be a matter of right in civil and criminal appeals unless "a) the appeal is frivolous; b) the dispositive issue or set of issues has been recently authoritatively decided; or c) the facts are simple, the determination of the appeal rests on the application of settled rules of law, and no useful purpose could be served by oral argument."⁷² The Commission did recommend, however, that oral argument be "shortened in cases in which the dispositive points can be adequately presented in less than the usual time allowable."⁷³

Little more can or should be done to speed up the decisionmaking process within the courts of appeals. Though it is true that in 1969 the Fifth Circuit adopted a local rule ordering the rendition of an opinion within 90 days after the case is readied for disposition (*e.g.*, after oral argument), such a rule really has more effect upon the opinion writing stage than upon the actual decisionmaking stage.⁷⁴ Most circuits use the conference system, in which pending cases are discussed at a weekly meeting. The Second Circuit, however, has for years used a memorandum system in which each member of the panel is expected to write an explanatory memorandum for each case prior to conferring with his brethren.⁷⁵ While collegial discussion at a weekly conference certainly requires less time than writing, circulating, and reading other judges' memoranda prior to conference, the members of the Second Circuit believe that their system forces each judge to study each case, promotes conference resolution, and prevents one-judge opinions.⁷⁶

Retention of these decisionmaking processes does not, however, preclude changing the form of the resultant opinions and the manner of their assignment among panel members. The signed opinion, even in cases decided after oral argument or submission upon briefs, is no longer the norm in the courts of appeals. In 1963, one observer noted that approximately one-quarter of the Second Circuit's opinions annually were memorandum opinions.⁷⁷ Furthermore, this circuit has for years rendered

⁷¹*Id.* at 43.

⁷²*Id.* at 48.

⁷³*Id.*

⁷⁴*More Effective Fed. Appeals*, *supra* note 45, at 239. One might argue that the opinion writing stage is an integral part of the decisionmaking process because a judge may change his vote at any point prior to announcement of the decision. It is my impression, however, that in many circuits much less vote switching occurs during the opinion writing stage than occurs during the same stage in the Supreme Court.

⁷⁵LEARNED HAND'S COURT, *supra* note 52, at 96-102; Note, *The Second Circuit: Federal Judicial Administration in Microcosm*, 63 COLUM. L. REV. 874, 891-95 (1963).

⁷⁶See note 75 *supra*.

⁷⁷Note, *The Second Circuit: Federal Judicial Administration in Microcosm*, 63 COLUM. L. REV. 874, 895, n.206 (1963).

oral decisions shortly after the completion of oral argument.⁷⁸ In the Third Circuit, only 30 percent of the cases heard orally or submitted on briefs in 1973 received signed opinions.⁷⁹ In addition to using a great number of per curiam opinions, Fifth Circuit judges may deliver an affirming opinion which simply states "Affirmed [Enforced]. See Local Rule 21."⁸⁰ Such an opinion may be used if: 1) the district court judgment based on findings of fact is not clearly erroneous; 2) the evidence to support the jury verdict is not insufficient; 3) the order of the administrative agency is supported by substantial evidence in the record taken as a whole; or 4) no error of law appears and an opinion would not have precedential value.⁸¹

Opinion writing clearly takes a large part of a judge's time. A 1971-1973 Time Study of the Third Circuit found that the judges spent 48.2 percent of their working time on writing and clearing opinions.⁸² Another study, which noted that the use of signed opinions by all circuits rose 32 percent and that the use of per curiam opinions rose over 100 percent from 1966-1970, also found a strong relationship between pressure on a circuit (measured by caseload) and the use of per curiam opinions.⁸³ Of course, selective publication could possibly relieve some of the pressure concerning the need for exact phraseology in opinions, might enable a court to more quickly dispose of its docket, and also might lower the number of opinions which the judges must digest. An excessive decrease in the number of explanatory opinions might, however, damage both the circuits' law-making and trial court review functions. Problems concerning the precedential value of unpublished opinions might also arise, although they probably could be resolved through standards set forth by the circuits.⁸⁴ The Commission on Revision, however, has recommended that every opinion, including per curiam or informal memorandum opinions issued only to the litigants, should contain some explanation, even if only an appropriate citation.⁸⁵

The opinion writing stage can also be made more efficient by assigning opinions to judges who, prior to donning their robes, specialized in certain

⁷⁸LEARNED HAND'S COURT, *supra* note 52, at 93-94; COMM. ON REV., RECOMMENDATIONS, *supra* note 70, at 43; Statement of Judge Bell, COMM. ON REV., FIRST PHASE, *supra* note 46, at 470. In all, five circuits allow decisions without written opinion. Haworth, *Screening and Summary Procedures in the United States Courts of Appeals*, 1973 WASH. U.L.Q. 257, 271.

⁷⁹COMM. ON REV., RECOMMENDATIONS, *supra* note 70, at 41.

⁸⁰*More Efficient Fed. Appeals*, *supra* note 45, at 243-44.

⁸¹*Id.*

⁸²COMM. ON REV., RECOMMENDATIONS, *supra* note 70, at 49.

⁸³Atkins, *Opinion Assignments on the U.S. Court of Appeals: The Question of Issue Specialization*, 27 W. POL. Q. 409, 411-12 [hereinafter cited as *Opinion Assignments*]. Using the Pearson product-moment correlation coefficient (r^2), which describes the percentage of the dependent variable's variance explainable by the independent variable, Atkins found that 67 percent ($r^2=.67$) of the variance in the use of per curiam opinions was due to the pressure on the circuit.

⁸⁴See Gardner, *Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?*, 61 A.B.A.J. 1224 (1975).

⁸⁵COMM. ON REV., RECOMMENDATIONS, *supra* note 70, at 50-51.

doctrinal areas. In his study of this issue, Atkins found not only specialization in some circuits but also a broad range in the nature and quantity of the specialties.⁸⁶ Surprisingly, despite some degree of specialization in most circuits, the opinion writing ratio, defined as the ratio of opinions written to the number of cases in which the judge was in the majority, was fairly constant within each circuit. Thus, most judges shared the circuit opinion load equally.⁸⁷

Although specialization can lead to expedition of cases and to increased legitimacy due to developed internal expertise, the practice should nevertheless be discouraged because it might lead to one-judge decisions if deference is given to the panel expert. One of the most important features of the courts of appeals is the collegial nature of decisionmaking. Though informal opinion assignments based upon expertise inevitably occur, opinion specialization should be carefully scrutinized before being institutionalized as a permanent reform. In order to continue performing their vital roles in forming national law and in effectively acting as courts of last resort for cases originating in the district courts, the courts of appeals should consist of generalists who will judge each case that comes before them, rather than specialists whose truncated knowledge of the law will deter their competent participation in each case.

B. Adding Judges or Circuits

The above procedural reforms, even if desirable, will have obviously limited effects on the efficiency of the courts of appeals if caseloads continue to grow. Once this limit is reached, adding judges and reshaping the circuits will be the only available reforms.

There are several methods of adding judges to the circuits without adding judgeships. The simplest method is to fill all available judgeships. Although there were 97 authorized judgeships in 1975, there were actually only 96 active judges serving the circuits. Despite the acknowledged political nature of the appointment process,⁸⁸ appointments must be made as quickly as possible in order to keep these courts fully staffed. Some

⁸⁶See *Opinion Assignments*, *supra* note 83, at 413-22. For example, in the Second Circuit, Judge Hays, who was a leading expert in labor law prior to his appointment, specialized in labor cases coming before panels on which he served, but he wrote relatively few opinions concerning criminal-constitutional law. In the Seventh Circuit, Judge Knock specialized in personal injury and contract cases, but wrote few tax opinions. Conversely, Judge Schrackenberg specialized in tax cases, but wrote almost no personal injury opinions. In the Fourth Circuit, Chief Judge Sobeloff specialized in multiple areas, while no other judge specialized in any single area. This study, however, only examined specialization manifested by written opinions and did not attempt to discern the existence of latent specialization, in which another judge directs the discussion and knows the relevant law, but for some reason does not write the opinion.

⁸⁷*Id.* at 416-24. This piece's findings should be used temperately due to some serious methodological problems built into the research design. One such problem was the failure to compare his findings using Kendall's coefficient of concordance (*W*) with findings that would result from a random assignment of opinions among panel members.

⁸⁸S. GOLDMAN & T. JAHNIGE, *THE FEDERAL COURTS AS A POLITICAL SYSTEM* 8-16 (1st ed., 1971).

circuits have suffered heavily due to appointment gaps. For example, in 1970-1975 the Second Circuit lost 48 judgeship months, and the Third Circuit lost 78 judgeship months.⁸⁹

By virtue of congressional authorization, the circuits may also use district judges and senior judges from either within or without the circuit.⁹⁰ Such use is not, however, devoid of problems. In order to use a visiting judge, the chief judge of the visitor's circuit must give his approval. Because most district courts and courts of appeals are overworked, such approval is not likely to be forthcoming. If he can spare a district judge, the chief judge would likely use him in his own circuit. If such a visit is approved or if the circuit looks to its own personnel, problems still arise because these additional judges may not be very familiar with circuit law and may add to intracircuit conflict. Moreover, the district judges sitting on a circuit might be uncomfortable reviewing the actions of their district court colleagues. Finally, district court judges might not be accustomed to the different procedures and nuances inherent in collegial appellate courts.

Senior judges are technically eligible for retirement, but many of them continue to sit for years after gaining such status.⁹¹ The Commission on Revision, however, has noted that the circuits definitely should not rely on these judges. Instead, these judges should be considered as a bonus and Congress should make it easier to attain senior judge status.⁹² More active judgeships would then be opened for new appointments. These new appointees, when added to the senior judges (the number of whom is not limited by Congress), might help relieve the crowded dockets and might help retain the judicial wisdom of the older, more experienced judges.

Even with complete utilization of these reforms, additional judgeships will still be required due to mounting caseloads. While these additions will enable the circuits to handle more cases, they will create other serious problems. Given the dynamics of collegial courts, the addition of judges means increased opportunity for intracircuit conflict within panels, between panels, and in en banc proceedings. Noting these potential problems in 1964, the Judicial Conference's Special Committee on Geographical Organization of Courts stated that the maximum feasible number of active

⁸⁹COMM. ON REV., RECOMMENDATIONS, *supra* note 70, at 63.

⁹⁰28 U.S.C., §§ 292(a), 295 (1970).

⁹¹In 1975 senior judges participated in 10.8 percent of the cases submitted on briefs or orally argued to the circuits. Indeed, senior judges participated in 30.3 percent of such cases in the Second Circuit in 1975. Together, senior and visiting judges participated in 22.6 percent of the cases submitted on briefs or orally argued to the circuits. A.O. ANN. REP. (1975), *supra* note 9, at 186.

⁹²COMM. ON REV., RECOMMENDATIONS, *supra* note 70, at 64-65. At the present time a judge may become a senior judge if he is 65 years old, with 15 years of service on the bench, or if he is 70 years old, with 10 years on the bench. The Commission proposed a "rule of 80" with 60 years old and 20 years of service, or 70 years old and 10 years of service as the rule's parameters. This would insure a minimum age of 60 years and a minimum length of service of 10 years.

circuit judges in a circuit was nine, the highest number of active judges then serving in any single circuit.⁹³

It appears, however, that each judge can competently dispose of only a finite number of cases in a term and that nine active judges might simply be incapable of staying abreast of mounting caseloads.⁹⁴ Thus, since 1969 the Fifth Circuit has operated with 15 active judges, and the Ninth Circuit has operated with 13 active judges.⁹⁵ Although no statistics have yet been gathered for all of the circuits, a rise in the number of active judges clearly adds to the potential for intracircuit conflict and might well necessitate en banc proceedings in order to settle the circuit law.

Sanctioned first by the Supreme Court⁹⁶ and then authorized by Congress,⁹⁷ en banc proceedings have rarely been used by the circuits to achieve internal uniformity.⁹⁸ In 1975, only .8 percent of all cases decided by the circuits after oral argument or submission on briefs were heard en banc.⁹⁹

Though predicated upon the belief that the attention of the full court of active judges¹⁰⁰ leads to more competent decisions, promotes harmonious institutional functioning, and adds the authority of the full court to decisions,¹⁰¹ there is a point at which the presence of too many judges turns a hearing into a convention. In addition to the time lost by requiring all of the active judges to sit in a single hearing, en bancs of 13 or 15 judges might well be too large for effective resolution of intracircuit conflict. As Fifth Circuit Judge Godbold stated to the Commission on Revision:

Also there seems to me to arise what one might call the silencing effect of a deliberative body's becoming too large. By this I mean the risk, particularly in en banc multi-issue cases, that the individual judge may conclude that there are so many viewpoints to be heard and considered on so many questions that he will not press and perhaps not even express his own views. Or if he presses them they may be lost or obscured in the shuffle.¹⁰²

⁹³Burdick, *Federal Courts of Appeals: Radical Surgery or Conservative Care*, 60 Ky. L.J. 807, 808-09 (1972).

⁹⁴Compare Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 TEX. L. REV. 949, 956-57 (1964) and Mishkin, *A Footnote to A "Crisis in Judicial Administration,"* 42 TEX. L. REV. 1049 (1964) with Statement of Judge Brown, COMM. ON REV., FIRST PHASE, *supra* note 46, at 507-32.

⁹⁵ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 97 (1970).

⁹⁶*Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247 (1953); *Textile Mills Sec. Corp. v. Commissioner*, 314 U.S. 326 (1941).

⁹⁷28 U.S.C., § 46(c) (1970).

⁹⁸The Second Circuit did not use them until after Learned Hand, who vehemently opposed their use, became Senior Judge. LEARNED HAND'S COURT, *supra* note 52, at 115-22.

⁹⁹A.O. ANN. REP. (1975), *supra* note 9, at 182.

¹⁰⁰A senior judge may sit on the en banc only if he sat on the original panel. 28 U.S.C. § 46(c) (1970).

¹⁰¹See Alexander, *En Banc Hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities, Part I*, 40 N.Y.U.L. REV. 563, 579-89, 726 (1964); Note, *En Banc Review in Federal Circuit Courts: A Reassessment*, 72 MICH. L. REV. 1637, 1648-51 (1974).

¹⁰²Statement of Judge John C. Godbold, COMM. ON REV., FIRST PHASE, *supra* note 46, at 377.

Furthermore, the use of an en banc proceeding does not guarantee an authoritative circuit decision: the en banc may be closely divided or evenly split, and all future panels of the circuit may not adhere to the decision.¹⁰³

Noting that the inevitable increase in the number of active judges will probably lead to more en banc proceedings, the Commission on Revision has recommended a different en banc structure for circuits in which nine active judges constitute a majority of the circuit's active majority. The Commission recommended that the panel judges be ineligible to sit on the en banc and that the en banc court consist of the chief judge and the eight most senior active judges.¹⁰⁴ This proposal is not without faults, however. First, by making the panel judges ineligible to sit on the en banc, the en banc, in effect, becomes an appeal from the panel decision, when in reality it should be a reconsideration of the panel decision. Second, by restricting the membership on the en banc to the active judges, the proposal simply disregards the experience and wisdom which senior judges might well bring to the proceeding. Finally, the possibility exists that those judges who do not sit on the en banc will feel less compelled to comply with its decision than if they had taken part in the proceeding.

A possible response to the problems caused by endlessly adding judges would be to decide that the courts of appeals, as well as the Supreme Court, should not attempt to perform both corrective and policymaking roles. Judge Hufstедler has proposed that a National Court of Review be placed between the district court and the court of appeals.¹⁰⁵ After a trial in the district court the aggrieved party could petition for review: this petition would preclude all other post judgment motions in the district court. The review panel, consisting of the district judge and two members of the Court of Review, would review all portions of the trial. After receiving the court's decision, an aggrieved party could appeal to the court of appeals, but the appellate tribunal would now have discretion to deny or to grant review.¹⁰⁶ Though this plan might expedite appeals, an intermediate appellate tribunal cannot totally divorce its corrective and policymaking functions. One might also doubt the trial judge's ability to effectively and objectively review his own previous actions.

The need to limit the number of judges who may effectively work on a collegial court may require the reorganization of the judges who presently sit on the courts of appeals. Rosenberg and Carrington suggest consolidating all of the present circuits and then dividing the judges into divisions based upon subject matter.¹⁰⁷ Such subject matter divisions might deal with criminal appeals, certain national law specialties to be designated by

¹⁰³Note, *En Banc Review in Federal Circuit Courts: A Reassessment*, 72 MICH. L. REV. 1637, 1646 (1974).

¹⁰⁴COMM. ON REV., RECOMMENDATIONS, *supra* note 70, at 60-63.

¹⁰⁵Hufstедler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. CAL. L. REV. 901, 910-11 (1971).

¹⁰⁶*Id.*

¹⁰⁷*Planned Flexibility*, *supra* note 1, at 589-96; *Crowded Dockets*, *supra* note 5, at 587-96.

Congress, customs and patents, and claims against the federal government.¹⁰⁸ Although each division would only deal with its subject matter, the judges could be rotated among the divisions in order to retain decisionmaking by generalists. Carrington has admitted, however, that this model will not meet the major problem of intercircuit conflicts.¹⁰⁹ Balkanization of the federal law and forum shopping among division panels located in geographically disparate areas might still occur. Furthermore, given the geographical spread of the divisions, administrative discretion would be increased and might well lead to administrative inefficiency.¹¹⁰

Splitting the present circuits appears to be the most extreme response to the problems caused by the additional judges. Since the circuits were created in 1891, only the Eighth Circuit has been split.¹¹¹ Though circuit splitting might resolve some of the problems caused by the additional judges, it may increase other problems such as intercircuit conflicts.¹¹² The problem of intercircuit conflicts might be substantially reduced if the Supreme Court viewed the settlement of such conflicts as its major function. It is clear, however, that the Supreme Court perceives the settlement of intercircuit conflicts as only one of its several functions, not as its major function.¹¹³

Another problem is that further splitting of circuits inevitably leads to a weakening of the "federalizing function"¹¹⁴ of the courts of appeals. The Commission on Revision recognized this problem when it formulated proposed splits of the Fifth and Ninth Circuits in 1973.¹¹⁵ The Commission attempted to adhere to five principles in its proposals: 1) a circuit should consist of at least three states; 2) no circuit should be created which would initially require more than nine active judges; 3) a circuit's states should have diverse populations, legal business, and socio-economic interests; 4) present circuits should be changed as little as possible; and 5) new circuits should not contain non-contiguous states.¹¹⁶

The problem of reduced regionalism is exemplified by the proposed split of the Ninth Circuit which, in 1973, had a caseload of 178 cases per judge, in contrast to the national average of 161 cases per judge.

¹⁰⁸Additionally, Rosenberg's plan would include divisions to aid the Supreme Court in both screening and deciding cases. *Planned Flexibility*, *supra* note 1, at 594.

¹⁰⁹*Crowded Dockets*, *supra* note 5, at 596.

¹¹⁰*Id.* at 596-604.

¹¹¹The Eighth Circuit was split in 1929 into the present Eighth and Tenth Circuits.

¹¹²Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 TEX. L. REV. 949, 970-75 (1964).

¹¹³See, section I *supra* and section III *infra*.

¹¹⁴Statement of Judge John M. Wisdom, COMM. ON REV., FIRST PHASE, *supra* note 46, at 354.

¹¹⁵COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, THE GEOGRAPHICAL BOUNDARIES OF THE SEVERAL JUDICIAL CIRCUITS: ALTERNATIVE PROPOSALS (1973) [hereinafter cited as COMM. ON REV., GEOGRAPHICAL BOUNDARIES].

¹¹⁶*Id.* at 6-7.

Consequently, the circuit was required to rely heavily on visiting judges. The proposed plan would create a new Ninth Circuit consisting of California-Northern, California-Eastern, Alaska, Washington, Oregon, Idaho, Montana, Hawaii, and Guam. A new Twelfth Circuit would consist of California-Southern, California-Central, Arizona, and Nevada. Despite some advantages, the splitting of California might engender both an extreme amount of forum shopping and multiple interpretations of that state's law.¹¹⁷ Similarly, one major objection to several of the proposed splits of the Fifth Circuit is that those judges recalcitrant on civil rights issues might be separated from their more liberal brethren of other states of the present circuit.¹¹⁸

III. CASELOAD GROWTH, THE SCREENING PROCESS, AND REFORM PROPOSALS CONCERNING THE SUPREME COURT

Prior to any discussion concerning either the Supreme Court's problems or solutions to those problems, one must answer the fundamental question — what role does the Supreme Court perform? Kurland has suggested that as an appellate court its role is to correct erroneous decisions made by lower courts, to maintain consistency among decisions of the lower courts, and to make national law and policy.¹¹⁹ Kurland further suggested that the Supreme Court acts predominantly as a selective policymaker.¹²⁰ In order to ascertain what functions the Court fulfills one must examine the Court's screening process and the growth of its caseload. The result of this examination will perforce affect later discussion of various reform proposals concerning the Court.

A. Caseload Growth and the Screening Process

With the exception of the addition of one law clerk for each Justice, no substantial change affecting the Supreme Court's capacity to deal with its increasing caseload has been made since 1925. While the 1925 Judiciary Act greatly increased the Court's ability to choose what cases it would hear, observers of the Act's short term consequences noted that shifting cases from the Court's obligatory to discretionary jurisdiction would not solve a long term caseload problem.¹²¹ Even recent proponents of the total

¹¹⁷*Id.* at 12-19. *But see* Statement of Erwin N. Griswold, COMM. ON REV., FIRST PHASE, *supra* note 46, at 27.

¹¹⁸Letter of Senior Judge Rives, *Hearings on S. 729 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 94th Cong., 1st Sess. pt. 2, 209-10 (1975).

¹¹⁹Kurland, *Jurisdiction of the Supreme Court: Time for a Change?*, 59 CORNELL L. REV. 616, 618-19 (1974).

¹²⁰*Id.*

¹²¹Casper & Posner, *A Study of the Supreme Court's Caseload*, 3 J. LEGAL STUD. 339, 341-43 (1974) [hereinafter cited as *Supreme Court's Caseload*]. After correcting the statistics used by

elimination of the Court's obligatory jurisdiction recognize that such a reform will not solve the purported Supreme Court caseload problem.¹²²

The majority of such students of the Court claim that its caseload problem can be easily discerned by simply examining various statistics, while those on the other side of the argument dismiss any relation between such statistics and a caseload problem. For example, Harper examined all denied certiorari petitions on the Court's Appellate Docket for the 1949-1952 Terms. After examining the opinions of the courts below, he decided that the Court had denied many petitions worthy of certiorari.¹²³

Hart, on the other hand, attempted to demonstrate that the need to screen a burgeoning caseload left the Justices little time for actual decisionmaking.¹²⁴ Hart stated that his results clearly demonstrated the extent to which the Justices were both overworked and forced to rely on their law clerks in the screening process.¹²⁵ More importantly, he believed that this caseload problem inevitably affected the quality of the decisions. Thus, he suggested that the Court accept fewer cases and better explain its decisions.¹²⁶

Justice Douglas, among others,¹²⁷ retorted that Hart's overworked Supreme Court was a myth. He noted that the Justices now heard oral argument on only four days, rather than five days a week, as had been the practice. Additionally, while there was a decline of approximately 53 percent in the number of written opinions over the 1938-1958 time span, there was an increase of 200 percent in the number of per curiam opinions issued by the Court. Furthermore, as filings increased 200 percent from 1938 to 1958, much of the increase consisted of in forma pauperis petitions. Justice Douglas noted that the majority of these petitions was frivolous

Frankfurter and Landis in their studies of the Act's effects upon the Court in its 1928-1930 Terms, Casper and Posner found that 39 percent of the cases filed in 1923 were within the Court's obligatory jurisdiction, while only 15 percent of cases filed in the 1930 Term were within such jurisdiction. *Id.*

¹²²*Cf.* FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT 25-38 (1972) [hereinafter cited as FREUND REPORT].

¹²³Harper & Rosenthal, *What the Supreme Court Did Not Do in the 1949 Term—An Appraisal of Certiorari*, 99 U. PA. L. REV. 293 (1950); Harper & Etherington, *What the Supreme Court Did Not Do During the 1950 Term*, 100 U. PA. L. REV. 354 (1951); Harper & Pratt, *What the Supreme Court Did Not Do During the 1951 Term*, 101 U. PA. L. REV. 439 (1953); Harper & Leibowitz, *What the Supreme Court Did Not Do During the 1952 Term*, 102 U. PA. L. REV. 427 (1954). See also Statement of Griswold, COMM. ON REV., FIRST PHASE, *supra* note 46, at 15.

¹²⁴Assuming that the Court sat for 36 weeks and that the Justices worked six, eight-hour days each week, Hart constructed the following breakdown for each Justice: 242 hours for initial review of 1,400 certiorari petitions and appeals, 240 hours for oral argument of 125 cases, 132 hours for 24 conferences with their brethren, 250 hours for studying the briefs and records of the 125 cases, 528 hours for writing an average of 22 opinions, 140 hours for studying the 176 opinions of colleagues, and 196 hours for miscellaneous judicial work. Hart, *Foreword: The Time Chart of the Justice*, 73 HARV. L. REV. 84, 85-93 (1959).

¹²⁵*Id.* at 95.

¹²⁶*Id.* at 96-101.

¹²⁷See, e.g., Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298 (1960).

and thus required little review by the Justices.¹²⁸ Several years later, Gressman echoed this sentiment, claiming that statistics concerning the mounting caseload were not indicative of an overload problem.¹²⁹ Gressman concluded that the constancy of the number of written opinions and certiorari petitions granted is the product of the Court's judgment of what constitutes an efficient workload.¹³⁰

Despite these arguments, the *Freund Report* relied upon statistical data to produce an obvious shock effect.¹³¹ The report noted that while the Court has stayed abreast of filings it has developed an increasing backlog of holdover cases. The in forma pauperis cases filed on the Miscellaneous Docket have increased from 517 in 1951, to 1,930 in 1971, and now constitute more than one half of all filings.¹³² The percentage of certiorari petitions granted dropped from 11.1 percent in 1951 to 5.8 percent in 1971.¹³³ Noting that the law clerks are now used to help screen cases and that the Justices have less time available for reviewing docketed cases, the study group concluded that cases that would have been decided on the merits a generation ago now are being passed over and that consideration given to cases decided on the merits is compromised by the pressures of "processing" an inflated docket.¹³⁴

Such statistics, however, hardly indicate the nature of the growth of the Court's docket. In their attempt to explain the qualitative as well as the quantitative change in the Court's docket, Casper and Posner posited five hypotheses:

First, . . . [o]ther things being equal . . . an increase over time in the volume of an activity should give rise to an increase in the number of legal disputes . . . arising from the activity. Second, the number of litigated disputes is expected to vary inversely with the certainty (predictability) of the law. . . . Third, the creation of new or expansion of existing substantive legal rights should produce an increase in the number of cases. . . . Fourth, the availability or cost of legal services may change over

¹²⁸Douglas, *The Supreme Court and Its Caseload*, 45 CORNELL L.Q. 401, 404-11 (1960). For a description of the speedy manner in which Justice Douglas reviewed certiorari petitions, see Cohen, *Justice Douglas: A Law Clerk's View*, 26 U. CHI. L. REV. 6 (1959).

¹²⁹He noted that Chief Justice Hughes stated that 60 percent of the Court's Appellate Docket cases were wholly-without merit and that Justice Harlan estimated that more than one half of the certiorari petitions filed in the 1955-1957 Terms were unwarranted. Echoing Justice Douglas, Gressman stated that the greatest case increase in the 1952-1962 period consisted of in forma pauperis cases (up 1,064), not of Appellate Docket cases (up 319), and that most of the former cases were frivolous. Gressman, *Much Ado About Certiorari*, 52 GEO. L.J. 742, 745-46 (1962).

¹³⁰*Id.* at 753.

¹³¹It reported that case filings had swollen from 983 in 1935, to 1,234 in 1951, to 2,185 in 1961, and, finally, to 3,643 in 1971. FREUND REPORT, *supra* note 122, at 2.

¹³²During the same 1951-1971 period the amount of non-in forma pauperis case filings rose about 250 percent. *Id.* at 2-3.

¹³³Both the in forma pauperis and paid cases reflected this decline, with 3.3 percent of the former and 8.9 percent of the latter accepted by the Court. *Id.* at 3-9.

¹³⁴*Id.* at 4-8.

time and . . . affect the number of cases brought. . . . Fifth, we may expect secular caseload changes to be self-limiting.¹³⁵

Using these hypotheses in response to both the Warren Court's decisions and the increased availability of legal services, Casper and Posner suggested that the Supreme Court's constitutional and criminal dockets should show faster growth than its nonconstitutional and civil dockets. Nonetheless, they hypothesized that the rate of increase of the Court's docket would show a decline.¹³⁶

The examination of the Court's Appellate Docket for the 1957-1972 Terms by Casper and Posner indeed showed uneven growth. Since the 1957-1958 Terms, the constitutional docket grew 214 percent while the nonconstitutional docket grew only 32 percent. The criminal docket increased more than the civil docket.¹³⁷ In addition, much of the increase in the civil docket was attributable to doctrinal developments. For example, civil rights and reapportionment cases accounted for a large percentage of the total increase in civil cases from 1957 to 1972.¹³⁸

Casper and Posner posited that those areas of nongrowth or decline, such as taxation and FELA suits, might result from an essentially settled state of the law in these areas.¹³⁹ Nevertheless, the docket of nonconstitutional cases continued to increase.¹⁴⁰ Thus the hypothesis stating that appeals from marginally important cases would be self limiting might not be valid.¹⁴¹ Overall filing rates, though, tended to support the broader hypothesis that fewer cases will be filed as the Court's caseload increases and as the percentage of certiorari petitions granted declines.¹⁴²

Casper and Posner stated that if the average merit of filed cases has increased, then so has the merit threshold required to receive the writ of certiorari.¹⁴³ The deterrence of marginal cases by not granting the writ also means that the remaining pool will be more meritorious. Indeed, if the

¹³⁵*Supreme Court's Caseload*, *supra* note 121, at 346-48. See also *Litigation in the Federal Courts*, *supra* note 7, at 321-26.

¹³⁶*Supreme Court's Caseload*, *supra* note 121.

¹³⁷Exact percentages could not be calculated due to the absence of the Miscellaneous Docket figures. *Id.* at 352.

¹³⁸*Id.* at 357-60. State criminal cases on the Appellate Docket increased 324 percent due to the declaration of novel rights by the Warren Court. Federal criminal cases increased 219 percent because of a better legal environment, greater availability of legal services, and more congenial habeas corpus rulings by the Court. *Id.*

¹³⁹*Id.* at 354-57.

¹⁴⁰*Id.* at 349.

¹⁴¹One might posit, for example, that a lawyer might appeal a marginally important case only in order to prove to his client that he has done everything possible to win the case.

¹⁴²*Supreme Court's Caseload*, *supra* note 121, at 361-62. The increases are based upon the filing differential between the first and fifth years of each time period. Also, it should be noted that even if the case filing should level off in accordance with the self-limitation thesis, the Court still could not possibly review enough cases to fulfill the three roles outlined above. Using five year periods, Casper and Posner found a 45 percent increase in filings for 1957-1962, a 31 percent increase for 1962-1967, and only a 21 percent increase for 1967-1972.

¹⁴³*Id.* at 365-66.

percentage of cases accepted for review had not declined, then the number of filings would have increased even more than it did.¹⁴⁴ By assuming a change in the merit threshold it appears that the Justices use the screening process to further their policy objectives and that the Justices do not feel bound to review any fixed class of cases.

The Commission on Revision has made detailed studies in order to determine whether, and to what extent, the second assumption was valid for the Court's docket. The Commission's report clearly stated that the Court does not satisfactorily stabilize and harmonize national law.¹⁴⁵ Examining the certiorari petitions denied and appeals summarily disposed of in the 1971-1972 Terms, the Commission found 93 unresolved clear conflicts. Partially confirming Casper and Posner's data regarding constitutional conflicts, the Commission found that while almost one half of the constitutional conflicts were reviewed, only one fifth of the nonconstitutional conflicts were reviewed.¹⁴⁶ Finally, the Commission found a 225 percent increase in the number of dissents from denials of certiorari since 1969, thus confirming the thesis that the merit threshold has risen.¹⁴⁷ While Justice White informed the Commission that some of the cases which receive summary disposition warrant plenary disposition,¹⁴⁸ Justice Rehnquist's letter to the Commission even more specifically designated inter-circuit conflicts as the area in which Supreme Court supervision is most inadequate.¹⁴⁹

The findings of these two studies adequately demonstrate that the Court primarily plays the role of selective policymaker. Examining only statistics may cause observers to look at the wrong illness. As Griswold has stated, the Supreme Court may not be overworked *because* it controls its own docket.¹⁵⁰ The inevitable effect of such self-control is to ration justice to an extent greater than was contemplated by the framers of the 1925 Act. Cases deemed worthy of certiorari 20 years ago now do not receive plenary disposition. Griswold has admitted that as Solicitor General he refused to appeal certain cases to the Court simply because he knew that it was too busy to review them.¹⁵¹ Thus even the Solicitor General, the single most

¹⁴⁴*Id.* at 366-68.

¹⁴⁵COMM. ON REV., RECOMMENDATIONS, *supra* note 70, at 8.

¹⁴⁶*Id.* at 104-05. See also *id.* at 5-8, 91-111.

¹⁴⁷*Id.* at 19-21, 111-33. Though the bulk of this increase is due to Justice Douglas, the Commission believed that the reasons stated in 60 percent of the dissents clearly demonstrated that certain types of litigation were not being reviewed by the Court: statutory questions appropriate for definitive resolution; conflict with Supreme Court decisions; important national questions ripe for resolution; and conflict among the lower federal courts. It is arguable that the 225 percent increase was a result of a change in the norm concerning the propriety of such a dissent.

¹⁴⁸*Id.* at 181.

¹⁴⁹*Id.* at 186-88.

¹⁵⁰Griswold, *Rationing Justice—The Supreme Court's Caseload and What the Court Does Not Do*, 60 CORNELL L. REV. 335, 339-40 (1975).

¹⁵¹*Id.* at 338-44.

important screener of appeals to the Court other than the Justices themselves, has been forced to act in accordance with Casper and Posner's self-limitation hypothesis. As Griswold once said, "We are . . . suffering materially, both in terms of individual justice and in terms of the institutional effectiveness of an appellate system, from a serious lack of nationally binding appellate capacity in this country."¹⁵²

Raw statistics also do not explain the manner in which the Justices use the screening process. The *Freund Report* assumed that the process is used to separate the worthy from the unworthy cases. This assumption, however, does not state whether there are certain types of cases worthy of certiorari which are consistently denied review. The screening process, like the Court's docket, might expose a policymaking bias.

When discussing whether the Court will grant the writ of certiorari, one might assume that Rule 19 is the controlling standard:

A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered.¹⁵³

The list of reasons includes: 1) when the court of appeals decides a point of local law in conflict with local interpretations; 2) when the court of appeals departs from, or sanctions a departure from, the usual course of judicial proceedings; 3) when a conflict between circuits exists; 4) when a lower court ruling conflicts with a Supreme Court ruling; and 5) when the case concerns an important question on which the Supreme Court has not yet ruled.¹⁵⁴ Despite these standards, 33.1 percent of the certiorari petitions granted during the 1956-1958 Terms gave no reason for the grant, while 20.1 percent stated that the writ was granted to decide the issue presented. Of the remaining 46.8 percent which were accompanied by Rule 19 reasons, 56.9 percent cited the issue's importance,¹⁵⁵ thus hardly aiding lawyers in deciding whether to file a petition for the writ in future cases.

If one cannot find a policymaking or other bias in the explanation given by the Court itself, indirectly observable cues must be examined. In a series of articles, Harper suggested that the Court examined the justice of the lower court decisions, the number of similar cases litigated or likely to

¹⁵²*Id.* at 349. *But see* Statement of Judge Friendly, COMM. ON REV., SECOND PHASE, *supra* note 30, at 209-10.

¹⁵³Tanenhaus, Schick, Muraskin & Rosen, *The Supreme Court's Certiorari Jurisdiction: Cue Theory*, in JUDICIAL DECISION-MAKING 113 (Schubert ed. 1963) [hereinafter cited as *Supreme Court's Cert. Jurisdiction*].

¹⁵⁴*Id.*

¹⁵⁵*Id.* at 114-15. *See generally* Prettyman, *Petitioning the U.S. Supreme Court — A Primer for Hopeful Neophytes*, 51 VA. L. REV. 582 (1965); Prettyman, *Opposing Certiorari in the U.S. Supreme Court*, 61 VA. L. REV. 197 (1975).

be litigated, the number of people affected by the decision, and the severity of the penalty in a criminal case.¹⁵⁶ Gibbs, on the other hand, suggested that the Justices looked first for jurisdictional defects and denied the petition if any were present. If no jurisdictional defects appeared and if it would not be tactically unsound to review a case, the Court then sorted the cases into "yes," "no," and "gray" areas. Finally, if tentative examination showed that the lower court decision in a "gray" case was incorrect, the Justices would grant the petition.¹⁵⁷ Of course, the basic problem with this theory is that the process would be too time consuming if used upon every petition.

One recent study has posited the use of cues and is based upon three hypotheses: 1) Rule 19 is an unsatisfactory explanation of the Court's exercise of its certiorari jurisdiction; 2) certiorari petitions are so numerous that the Justices do not give more than cursory attention to a majority of them; and 3) a large share of the petitions are totally frivolous.¹⁵⁸ The authors of the study theorized that if the Court granted the writ in 15-17 percent of the 40-60 percent nonfrivolous Appellate Docket cases, then 25-43 percent of those petitions which have at least one cue would be granted the writ.¹⁵⁹ Using a sample of Appellate Docket cases from the 1947-1958 Terms, they tested the following cues in order to note if their presence in the petition led to the petition's being granted the writ more often than those petitions in which different cues were present: federal government as a party; dissension between judges on the court below or between two or more courts; a civil liberties issue; and an economic issue. They found that the different granting rates were statistically significant for all of the cues except for the presence of an economic issue. By far the most significant statistic was the first; when the federal government favored granting the writ, 47.1 percent of such cases were accepted by the Court.¹⁶⁰

Thus, it would appear that a careful examination of the growth of the Court's docket and of the screening process demonstrates that the Court plays a selective policymaking role. One might well argue that settling

¹⁵⁶See note 123 *supra*.

¹⁵⁷Gibbs, *Certiorari: Its Diagnosis and Cure*, 6 HASTINGS L.J. 131 (1955). See also Schubert, *Policy Without Law: An Extension of the Certiorari Game*, 14 STAN. L. REV. 284 (1962); Hanus, *Denial of Certiorari and Supreme Court Policy-Making*, 17 AM. U.L. REV. 41 (1967).

¹⁵⁸*Supreme Court's Cert. Jurisdiction*, *supra* note 153, at 118-19.

¹⁵⁹The 40-60 percent figure was derived from the remarks made by Chief Justice Hughes and Justice Harlan. See note 129 *supra*.

¹⁶⁰*Supreme Court's Cert. Jurisdiction*, *supra* note 153, at 119-27. The 47.1 percent figure could be attributable to both the presence of the federal government as a party and the Solicitor General's screening of appealable cases. Two later studies confirmed only the importance of the first cue. Zimmerman, *The Decision to Decide: A Statistical Analysis of the Preliminary Decision-Making Process of the U.S. Supreme Court* (1970) (unpublished dissertation University of California at Riverside); Ulmer, Hintze & Kirklosky, *The Decision to Grant or Deny Certiorari: Further Consideration of Cue Theory*, 6 LAW & SOC'Y REV. 637 (1972). One study used the 1955 Term pool of petitions but deleted from this pool those petitions which the Justices, in conference, decided were too frivolous to be considered. Ulmer,

intercircuit conflicts could be encompassed within this role. The point, however, is that settling such conflicts is *not* one of the policy areas in which the Justices have chosen to concentrate their valuable time. There is a caseload problem, but raw statistics simply do not uncover its essential nature. The problem is not one of too many worthy cases and of too little time; the problem is that the Justices execute one important role to the near exclusion of other important roles. Any proposals advanced to alleviate the situation must be directed at the true problem.

B. *Proposals to Aid the Supreme Court*

By extending the studies performed by Casper and Posner and the Commission on Revision, one should theoretically be able to identify those classes of cases which systematically are reviewed either insufficiently or not at all by the Court. Such identification need not be overly concerned with the exact number of cases because a case which may appear to an observer to be a conflict ripe for resolution nevertheless may appear to a Justice to be too unrefined for resolution. Once identified, a committee for each class of cases could be formed within the Judicial Conference so that circuit judges, who perhaps best know which conflicts present serious problems to the uniform application of national law, could either informally advise or formally certify to the Court selected cases from these classes.¹⁶¹

Another minor proposal is to empower the Court to use a limited grant of the writ of certiorari. This might enhance the Court's policymaking role and also might enable it to hear other classes of cases now insufficiently reviewed. Bice, a proponent of granting this power, has noted that the Court would be able to deal with issues it believes to be important and would not be distracted by minor side issues.¹⁶² The use of such a limited grant of the writ might also encourage prospective petitioners to discard the shotgun approach in their certiorari petitions.¹⁶³ Bice admitted that the

Hintze and Kirklosky used Justice Burton's docket book in order to note which cases were deemed too frivolous to be placed on the conference list. Using the same hypothesis as that used in *Supreme Court's Cert. Jurisdiction*, *supra* note 153, the study found that the ratio of grants to denials increased from one in ten, to one in three. The important question was how a case is placed on the Court's conference list. *Further Consideration of Cue Theory*, *supra*, at 639-40. In another study, Ulmer clearly demonstrated that the decisions to deny or to grant the writ of certiorari varied among the Justices and that the four cues were positively correlated with the certiorari votes of at least one Justice in the 1947-56 period. Ulmer, *Revising the Jurisdiction of the Supreme Court: Mere Administrative Reform or Substantive Policy Change?* 58 MINN. L. REV. 121, 139-52 (1973). See notes 183-86 *infra* & text accompanying.

¹⁶¹For a detailed analysis of the structure and operation of the Judicial Conference, see P. FISH, *POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* 228-300 (1973). See also Carp, *The Scope and Function of Intra-Circuit Judicial Communication: A Case Study of the Eighth Circuit*, 6 LAW & SOC'Y REV. 405 (1972).

¹⁶²Bice, *The Limited Grant of Certiorari and the Justification of Judicial Review*, 1975 WIS. L. REV. 343, 343-45 [hereinafter cited as *Justification of Judicial Review*].

¹⁶³*Id.* at 343-45, 358-62. Bice found that less than ten percent of the Court's orders granting certiorari for the 1961-71 Terms delineated any questions for counsel. *Id.* at 357.

counterargument to this proposal emphasizes that the federal courts, pursuant to Article III, are required to review only "cases and controversies." Also, a question concerning the denial of due process might arise from the differential burden placed upon the party who would benefit from the Court's decision on the merits of the avoided issue. He noted, however, that a statute presently provides for certification to the Court of issues, not whole cases.¹⁶⁴ Furthermore, such problems might be outweighed by the saving of judicial time, the possible improvement in the quality of the Court's decisionmaking, and the realization and enhancement of the Court's policymaking role. Finally, Bice correctly noted that the traditional justification of judicial review expressed in *Marbury v. Madison*,¹⁶⁵ that it is the duty of a court to deal with all relevant issues in a case, really applies more to a trial court than to an appellate court with discretionary review.¹⁶⁶

One of the leading proposals intended to counter the caseload problem is found in the *Freund Report*. The study group, after rejecting proposals to limit the range of cases that the Court could hear, rejected proposals to use panels of three Justices or to increase reliance upon a senior staff to perform the screening process.¹⁶⁷ It also rejected the concept of a National Court of Review, composed of 15 judges divided into three panels to hear civil, criminal, and administrative appeals. Under this proposal the Supreme Court would be able to review only those cases actually reviewed by the Court of Review.¹⁶⁸

Instead, the study group's plan would institutionalize the screening process outside of the Supreme Court, in a National Court of Appeals. The new court would be staffed by seven circuit judges, sitting for limited and staggered three-year terms. The court would have the same appellate jurisdiction as the Supreme Court, and any denial of review by the new court would be final. The National Court of Appeals could certify an important intercircuit conflict case to the Supreme Court or decide the case itself, a decision which would then be final. While the Supreme Court would still exercise its Rule 19 jurisdiction in regard to certified cases, the new court would be expected to grant certiorari in approximately 400 cases. Thus, in theory, the Supreme Court, after screening only these 400 cases, would refer the less important cases to the new court and would retain the

¹⁶⁴28 U.S.C. § 1254(3) (1970).

¹⁶⁵5 U.S. (1 Cranch) 137 (1803).

¹⁶⁶*Justification of Judicial Review*, *supra* note 162, at 390-93. See *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

¹⁶⁷The study group obviously looked with some disfavor upon the current pooling of law clerks for screening purposes by Chief Justice Burger and Justices Powell, Blackmun, Rehnquist, and White. Concerning the better use of staff personnel in the screening process, see Stockmeyer, *Rx for the Certiorari Crisis: A More Professional Staff*, 59 A.B.A.J. 846 (1973); Rehnquist, *Whither the Courts*, 60 A.B.A.J. 787, 790 (1974); Black, *The National Court of Appeals: An Unwise Proposal*, 83 YALE L.J. 883, 895-98 (1974).

¹⁶⁸FREUND REPORT, *supra* note 122, at 10-18.

more important cases for its own decision. While the Court could review the lower national court's decisions (except in intercircuit conflict cases), the study group expected the Supreme Court to review few such decisions.¹⁶⁹ Without really examining the policy implications of such an institutional reform, the study group concluded its discussion of the new court:

Again, some measure of loss of control by the Supreme Court itself is inevitable if the Court's burden is to be lessened. We believe this recommendation involves the least possible loss of control.¹⁷⁰

Though not without influential supporters, including Chief Justice Burger, the study group's plan has been subjected to much justified criticism.¹⁷¹ First, the study group obviously did not discuss with all of the Justices the actual screening methods which they employ. Justice Brennan, one of the few Justices who personally reads all of the certiorari petitions, believes that the screening process does not compromise case deliberation because many of the petitions are frivolous and may be disposed of very quickly. He has also noted that the first conference of the Term usually deals with about one quarter of all of the petitions for that particular Term and that only 30 percent of all accepted cases are actually discussed in conferences throughout the Term.¹⁷²

Second, as Justice Brennan also noted, experience in screening cases equalizes the increased filings load.¹⁷³ Such experience also enables a Justice to "feel" which cases are worthy of certiorari. As Justice Harlan has stated: "Frequently the question whether a case is 'certworthy' is more a matter of feel than of previously ascertainable rules."¹⁷⁴ It is interesting to note that some of the newer members of the Court have been the leaders demanding changes in the screening process.

Third, as Chief Justice Warren, Justice Brennan, and Gressman have noted, the National Court of Appeals will really screen only those frivolous cases upon which the Justices now spend little time. The 400 cases referred

¹⁶⁹*Id.* at 19-23. See generally Freund, *A National Court of Appeals*, 25 HASTINGS L.J. 1301 (1974).

¹⁷⁰FREUND REPORT, *supra* note 122, at 23.

¹⁷¹Burger & Warren, *Retired Chief Justice Warren Attacks, Chief Justice Burger Defends Freund Study Groups Composition and Proposal*, 59 A.B.A.J. 721 (1973) [hereinafter cited as *Warren Attacks, Burger Defends*]. The criticism does not, however, apply to all of the study group's recommendations. For example, the study group correctly noted that some of the Court's docket problem would be alleviated by repeal of 28 U.S.C. §§ 2281, 2282 (1970), which allows direct appeals to the Court from three-judge district courts. Thus, while such cases constituted only 2.7 percent of the 1971 docket, they constituted 22 percent of the cases argued orally in the 1969-71 Terms. FREUND REPORT, *supra* note 122, at 29.

¹⁷²Brennan, *Justice Brennan Calls National Court of Appeals Proposal "Fundamentally Unnecessary and Ill-Advised"*, 59 A.B.A.J. 835, 837 (1973).

¹⁷³*Id.*

¹⁷⁴*Warren Attacks, Burger Defends*, *supra* note 171, at 728.

to the Supreme Court will consist of the difficult cases upon which the Justices presumably now spend most of their screening time.¹⁷⁵

Fourth, screening allows the Court to perform summary justice in some cases while retaining policy flexibility.¹⁷⁶ By reviewing all of the filings, the Justices believe that they can remain somewhat attuned to the pulse of the legal order. Indeed, Justice Douglas has stated that selecting cases across the broad spectrum of issues presented is the very heart of the judicial process and that "in many ways it is the most important work we do."¹⁷⁷ In addition to possibly becoming isolated from various nuances and trends in the law, the Court might be foreclosed from reviewing complete categories of cases by a hostile National Court of Appeals.¹⁷⁸

Most importantly, the Justices would not be able to establish national priorities in the constitutional and legal orderings. They would neither be able to find important new issues by themselves, nor be able to accept cases in order to explain or to pursue implications of precedents.¹⁷⁹ In reality, the problem is simply that the Justices will not be able to transmit to the judges on the National Court of Appeals any comprehensive concrete standards to use in the screening process. Such transmission would also be made more difficult by the temporary nature of the panel on the proposed court.

Thus, control of the ultimate decisional process depends upon control of both the scope and the nature of the questions to be decided by the Supreme Court. Screening is *not* a preliminary or ancillary task that can successfully be granted to another gatekeeper with the Court's subsequently experiencing only "a measure of loss of control."¹⁸⁰ A substantive change affecting fundamental values and power relationships might result from ostensibly administrative and procedural changes. The question is not *if* subjectivity will be used in screening cases, but rather *whose* subjectivity will be used.¹⁸¹ If the "rule of four" portrays idiosyncratic voting patterns by the Justices, the question naturally arises whether the values of the judges on the National Court of Appeals will match those of the Justices.¹⁸²

In his attempt to answer this question, Ulmer posited that if the Justices differed among themselves in their certiorari petition voting patterns, then they would differ from that of any other set of judges. Also, if

¹⁷⁵*Id.* at 726; Brennan, *Justice Brennan Calls National Court of Appeals Proposal "Fundamentally Unnecessary and Ill-Advised."* *supra* note 172, at 838-39; Gressman, *The National Court of Appeals: A Dissent*, 59 A.B.A.J. 253, 254-55 (1973).

¹⁷⁶*Supreme Court's Caseload*, *supra* note 121, at 368-69, observes that the new court's power to settle intercourt conflicts might mean that it would not be able to decide other types of cases which the Supreme Court now is forced to reject.

¹⁷⁷*Tidewater Oil Co. v. United States*, 409 U.S. 151, 175 (1972) (Douglas, J., dissenting).

¹⁷⁸Gressman, *The National Court of Appeals: A Dissent*, *supra* note 175, at 256-57.

¹⁷⁹*Id.*; Warren Attacks, Burger Defends, *supra* note 171, at 727-28.

¹⁸⁰Black, *The National Court of Appeals: An Unwise Proposal*, *supra* note 167, at 889-91.

¹⁸¹Ulmer, *Revising the Jurisdiction of the Supreme Court: Mere Administrative Reform or Substantive Policy Change?*, 58 MINN. L. REV. 121, 136-37 (1973).

¹⁸²*Id.* at 136-39.

the values that influenced such voting could be identified, one could then know which policy areas would be in jeopardy from a new court.¹⁸³ Using the four cue variables already enumerated,¹⁸⁴ Ulmer sampled one third of the certiorari petitions discussed in conferences during the 1947-1956 Terms. By using Justice Burton's docket book he was able to record not only the whole Court's vote, but also the votes of individual Justices. Utilizing various statistical methods, Ulmer found that there was some significant and non-random positive association with at least one variable for 11 of the 15 Justices who served during this period.¹⁸⁵ By controlling three variables in order to note the effect of only the fourth variable, Ulmer was able to note that the federal government cue showed the most significant influence upon a sizeable number of the Justices.¹⁸⁶

Obviously, establishing a new National Court of Appeals might well change the subject matter mix of the cases chosen for Supreme Court review or might restructure various group and interest relationships which depend upon court-made policies. The Supreme Court might well become, in effect, an inferior national court.

In order to forestall this one other proposal hypothesizes a Court which continues to screen its own cases but which actually decides cases within specific categories. Kurland has proposed: 1) each Justice screen and make recommendations concerning one ninth of the petitions for his brethren; 2) the Court publish a petition dead list in order to inform counsel about which categories of cases it will not review; and 3) the Court limit itself to constitutional cases.¹⁸⁷ While this proposal obviously narrows the Court's policymaking role from its present scope, it would not necessarily alleviate much of the caseload problem. Many litigants might simply rephrase their petitions so that their cases appear to be of constitutional dimensions.

In a similar vein, Chief Judge Haynsworth has proposed that a National Court of Appeals be formed to expeditiously hear criminal appeals and othe postconviction suits.¹⁸⁸ This proposal has been perceived both as an excessive response to the problem of prisoner petitions¹⁸⁹ and as based upon imponderables concerning the continuing caseload of the new

¹⁸³*Id.* at 139-40.

¹⁸⁴See note 160 *supra* & text accompanying.

¹⁸⁵Ulmer, *Revising the Jurisdiction of the Supreme Court: Mere Administrative Reform or Substantive Policy Change?*, 58 MINN. L. REV. 121, 141-48 (1973).

¹⁸⁶*Id.* at 148-52.

¹⁸⁷Kurland, *Jurisdiction of the United States Supreme Court: Time for a Change?*, 59 CORNELL L. REV. 616, 628, 631 (1974).

¹⁸⁸Haynsworth, *A New Court to Improve the Administration of Justice*, 59 A.B.A.J. 841 (1973); Haynsworth, *Improving the Handling of Criminal Cases in the Federal Appellate System*, 59 CORNELL L. REV. 597, 598-607 (1974); Statement of Chief Judge Clement F. Haynsworth, Jr., COMM. ON REV., SECOND PHASE, vol. I, *supra* note 30, at 90, 91-92, 95-97, 98-101.

¹⁸⁹Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634, 638-40 (1974).

court.¹⁹⁰ If the Supreme Court refuses to review many of the new court's decisions and if the new court declines to review marginal cases, the docket of this National Court of Appeals might well decline to a level which would not warrant the court's separate existence.

The most recently proposed plan to meet the caseload problem appears to take into account both the real nature of the growth of the Court's docket and the policy importance of the screening process. As set forth by the Commission on Revision, the most salient feature of the plan is that the Supreme Court would continue to initially screen all filed cases and that it could subsequently refer cases to a new inferior national tribunal.¹⁹¹ Pursuant to this plan the new National Court of Appeals would consist of seven permanent judges sitting en banc in Washington, D.C. The Supreme Court would have the following options with regard to appellate jurisdiction cases arising on certiorari petition: 1) it could retain the case and decide it on the merits; 2) it could deny the writ and terminate the case; 3) it could deny the writ and refer the case to the National Court of Appeals for decision on the merits; or 4) it could deny the writ and refer the case to the new court, while allowing that court the option to accept or to reject the case. With a case arising on appeal, the Supreme Court could retain the case and could decide it on the merits, or could refer the case to the National Court of Appeals for decision on the merits.¹⁹²

Cases filed in the courts of appeals, Court of Claims, or Court of Customs and Patent Appeals could be transferred to the National Court of Appeals if: 1) the case turns on a rule of federal law and the federal courts are in conflict; 2) the case turns on a federal law or rule applicable to a recurring factual situation and the advantages of a transfer outweigh the disadvantages; or 3) the case turns on a federal rule announced by the National Court of Appeals, and there is a substantial question concerning its correct interpretation in the instant case. The National Court of Appeals could use its discretion to either accept or to reject a transfer case and the decision would be nonreviewable.¹⁹³

This plan assumes that the Supreme Court will refer about 150 cases each Term to the new court and that these cases will mostly concern those areas currently neglected by the Court, such as tax, NLRB, antitrust, and diversity suits. Constitutional cases of less significance might also be referred to the National Court of Appeals. The Supreme Court will be able

¹⁹⁰*Supreme Court's Caseload*, *supra* note 121 at 370-71. One might anticipate that the flood of habeas corpus petitions will recede slightly due to the recent Supreme Court decision in *Stone v. Powell*, 96 S. Ct. 3037 (1976). However, lawyers could maintain this level of petitions by asserting that a full and fair hearing concerning the search and seizure was not available at trial.

¹⁹¹COMM. ON REV., RECOMMENDATIONS, *supra* note 70, at 30-34. For related proposals, see Hufstедler, *Courtship and Other Legal Arts*, *supra* note 31; Griswold, *Rationing Justice—The Supreme Court's Caseload and What the Court Does Not Do*, *supra* note 150.

¹⁹²COMM. ON REV., RECOMMENDATIONS, *supra* note 70, at 30-34.

¹⁹³*Id.* at 34-38.

to review all decisions of the new court, although it is expected that the Court will review relatively few. Nevertheless, the decisions of the new court will still be binding nationally.¹⁹⁴

The plan as thus envisioned might greatly remedy the docket and screening problems discussed throughout this section. The Court would still be able to remain attuned to the national legal pulse while presumably providing for more national review than was previously possible. Furthermore, of the sitting or retired Justices, only Justices Douglas and Brennan have as yet rejected this plan.¹⁹⁵

IV. CONCLUSION

Underlying this paper has been the assumption that institutional change of the federal appellate court system can have a profound effect upon the roles played by these courts. Thus, administrative reforms stressing efficiency within the courts of appeals will allow these courts to dispose of more cases. Such efficiency, however, might also impair the integrity and quality of the resulting decisions. Furthermore, by allowing these courts to dispose of more cases, the reforms will enlarge the scope of the courts' policymaking role and will add to the potential for multiple, conflicting interpretations of law. Of course, this same potential will arise if judges are added to the circuits or if new circuits are added. Thus, either option might, in the end, add to the already very real docket problem of the Supreme Court.

The Supreme Court might be able to cope with these problems by reformulating its policymaking priorities. It will not, however, be able to cope with all of the problems, and thus the courts of appeals will effectively become the final expositors of the law in those areas which the Supreme Court cannot control. No matter how wide the "ripples" from Supreme Court decisions extend, there will be salient areas of national law for which the courts of appeals will be the courts of last resort. Nevertheless, the Commission on Revision's proposal, recently submitted to the Senate,¹⁹⁶ might aid in breaking the circle.

The added capacity of the federal court system to handle its caseloads may actually lead to an increase in filings at every level. Thus, being continuously overloaded or at least continuously complaining about being overloaded and overworked may be the best manner by which the judges of

¹⁹⁴*Id.* at 38-39.

¹⁹⁵*Id.* at 179-80. Justice White, who would prefer not to have the additional work of selecting 150 cases for the new court, has approved the plan because he believes that this task will be lightened by the Supreme Court's power to refer cases to the new court for the exercise of that court's discretionary acceptance or denial. *Id.* at 181-82.

¹⁹⁶A subcommittee of the Senate Judiciary Committee began hearings on S. 2762 and S. 3423 in May, 1976, while H.R. 11218 was pending in a House Judiciary Committee subcommittee as of August, 1976.

these courts can stem the tide of frivolous appeals.¹⁹⁷ Federal judges at all levels might also increase their use of various measures which are at their disposal in order to penalize those who bring frivolous suits or appeals.¹⁹⁸

It is difficult, however, to view most of the above proposed reforms as anything other than temporary cures for an illness with a source very deep in the foundations of our legal and social order. Quite simply, too many issues are brought to the federal courts and indeed to the state courts. Judge Friendly was quite correct in stating that the only viable, semi-permanent solution to the caseload problem of the federal judicial system, including the district courts, is to revise and to redistribute the jurisdiction of the federal courts.¹⁹⁹ Litigation which logically ought to be adjudicated in state courts, such as diversity suits, should be pared from the jurisdictional purview of the federal courts.²⁰⁰ Friends of both the state and federal judiciaries must eventually decide if there are competent, alternate methods of resolving some of the societal conflicts which are presently brought to the courts. In the end, an examination of the possible restructuring of the state and federal judiciaries must weigh not only the systems' capacities against the general societal need to resolve certain types of conflict in an orderly manner, but must also weigh the systems' capacities against the ability of other modes of social control to resolve these conflicts.²⁰¹

¹⁹⁷See, e.g., COMM. ON REV., RECOMMENDATIONS, *supra* note 70, at 172-78; *Chief Justice Burger Calls for Action on Several Proposals*, 61 A.B.A.J. 303 (1975); Burger, *Report on the Federal Judicial Branch—1973*, 59 A.B.A.J. 1125 (1973).

¹⁹⁸For example, increased use of Rule 11 of the Federal Rules of Civil Procedure or Rule 38 of the Federal Rules of Appellate Procedure.

¹⁹⁹Friendly, *Averting the Flood by Lessening the Flow*, *supra* note 189, at 640-46; H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW*, 75-196 *passim* (1973). Such redistribution might include establishing specialized courts, such as a Patent Court, to handle diverted cases. *Id.* at 153-96.

²⁰⁰Of course one can argue that the state courts are already overloaded, while the obvious retort asserts that the reform and restructuring of these courts can aid them in coping with the problem.

²⁰¹See generally, Galanter, *Why the "Haves" Come Out Ahead*, 9 LAW & SOC'Y REV. 95 (1974); Sarat & Grossman, *Courts and Conflict Resolution: Problems in the Mobilization of Adjudication*, 69 AM. POL. SCI. REV. 1200 (1975).