

A Generation Spent Studying the United States Courts of Appeals: A Chronology

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TABLE OF CONTENTS

INTRODUCTION.....	396
I. AMERICAN LAW INSTITUTE.....	397
II. AMERICAN BAR FOUNDATION.....	398
III. THE FREUND COMMITTEE.....	399
IV. THE HRUSKA COMMISSION.....	400
V. ADVISORY COUNCIL ON APPELLATE JUSTICE.....	402
VI. AMERICAN BAR ASSOCIATION ACTION COMMISSION.....	402
VII. DEPARTMENT OF JUSTICE.....	403
VIII. THE NYU STUDY.....	404
IX. AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON FEDERAL JUDICIAL IMPROVEMENTS.....	406
X. THE FEDERAL COURTS STUDY COMMITTEE.....	408
XI. FEDERAL JUDICIAL CENTER REPORT.....	411
XII. JUDICIAL CONFERENCE LONG RANGE PLAN.....	413
XIII. COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS.....	415
A PERSONAL POSTSCRIPT.....	422

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INTRODUCTION

Over the past generation, there has been a long line of studies, committees, commissions, *et cetera*—a Baker's dozen, pun intended—which have focused on the United States Courts of Appeals, to assess their status, to evaluate the harms from their increasing workload, and to make recommendations for their reform. The Commission on Structural Alternatives for the Federal Courts of Appeals, better known as the White Commission, queues up behind all these predecessor efforts.

This chronology is intended to be more expository than analytical.¹ My modest goal is merely to collect and to synthesize the findings of those previous studies—to describe their common sense of institutional crisis rather than to set out independently to define the threshold of crisis or to prove that it has been exceeded.² In this area of public policy, the routinely repeated perception is that the caseload has come to threaten the federal appellate ideal and therefore some reform is needed.³ Indeed, it is interesting just how much basic agreement there has been over the

¹ See generally Thomas E. Baker, *A Bibliography for the United States Courts of Appeals*, 25 TEX TECH L. REV. 335 (1994) (enumerating "all books and articles dealing with the United States Courts of Appeals available through June 1993"); Thomas E. Baker, *A Compendium of Proposals to Reform the United States Courts of Appeals*, 37 U. FLA. L. REV. 225 (1985) (examining effects that increased workloads have had on role of federal intermediate courts and reform measures taken to address this occurrence).

² "However people may view other aspects of the federal judiciary, few deny that its appellate courts are in a 'crisis of volume' that has transformed them from the institutions they were even a generation ago." REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 109 (Apr. 2, 1990) [hereinafter STUDY COMMITTEE REPORT]; see also DANIEL J. MEADOR, APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME (1974) (proposing development of new approaches to appellate review in face of increasing caseloads).

³ "Crisis" is a much overused word. Burgeoning caseloads are nothing new, nor is the sense that the system is on the verge of breakdown. What is new is the perception that the traditional remedies—enlarging the number of judgeships and auxiliary staff, creating new courts, or subdividing existing courts into smaller units—are no longer adequate.

Arthur D. Hellman, *Crisis in the Circuits and the Innovations of the Browning Years*, in RESTRUCTURING JUSTICE 4 (Arthur D. Hellman ed., 1990); see also Christopher F. Carlton, *The Grinding Wheel of Justice Needs Some Grease: Designing the Federal Courts for the Twenty-First Century*, 6 KAN. J.L. & PUB. POL'Y 1 (1997) (suggesting adoption of reform measures to mitigate problems arising from increased caseloads in federal appellate courts); Martha J. Dragich, *Once A Century: Time for A Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11, 12-13 (1996) (noting that although indications of appellate court success continue to exist, weight of opinion holds that crisis is "brewing, if not developed"); Lauren K. Robel, *The Politics of Crisis in the Federal Courts*, 7 J. DISP. RESOL. 115 (1991) (discussing relationship between Civil Justice Reform Act of 1990 and "crisis" of federal appellate courts' increased caseloads); Symposium, *Crisis in the Courts?*, TRIAL, Apr. 1993, 19-51 (1993) (exploring topics related to effectiveness of United States court system).

years. These previous studies have been conducted by leading court experts from multiple disciplines, using various evaluative methodologies. While their evidence and documentation are far too voluminous to be canvassed in the space of a few pages, their conclusions can be faithfully summarized and their recommendations can be compared in an effort to better understand all that has gone before. My fundamental premise is that this history is important context and necessary background against which to understand, in turn, the conclusions and recommendations of the White Commission.

I. AMERICAN LAW INSTITUTE

The first modern study of federal jurisdiction may be credited to Chief Justice Earl Warren. In a 1959 speech to the American Law Institute, he challenged, “[i]t is essential that we achieve a proper jurisdictional balance between the Federal and State court systems assigning to each system those cases most appropriate in light of basic principles of federalism.”⁴ The ALI Study begun in 1960, was completed in 1968 and published under the title *Study of the Division of Jurisdiction Between State and Federal Courts*.⁵ This far-reaching effort focused primarily on the district courts and their major heads of subject matter jurisdiction. Taking the Chief Justice’s theme, the ALI Study sought to redraw the federal/state judicial relation “in a rational and contemporarily useful way.”⁶ The proposals, for the most part, did not anticipate the burgeoning federal dockets. The ALI Study has little to offer this discussion, except for the fundamental demand-reduction proposition that a narrowing of federal jurisdiction at the district court would necessarily decrease the case load demand on appellate resources. Nothing significant came of the ALI Study⁷ and it may be dismissed today as academic.⁸ The implied assumption of the court insiders at the time was, naive in hindsight, that the Judicial Conference of the United States and Congress could seemingly forever continue to create new circuit judgeships on an *ad hoc* basis to keep up with caseload growth

⁴ Chief Justice Earl Warren, Address to the 36th Annual Meeting of the American Law Institute (May 20, 1959), in *A.L.I. Proceedings* 27, 33 (1959).

⁵ AMERICAN LAW INSTITUTE, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* (1969).

⁶ Daniel J. Meador, *The Federal Judiciary—Inflation, Malfunction, and a Proposed Course of Action*, 1981 *BYU L. REV.* 617, 625.

⁷ *Id.*

⁸ *Cf.* CHARLES ALAN WRIGHT, *THE LAW OF FEDERAL COURTS*, at iv (5th ed. 1994) (noting frequency with which reference to ALI Study appears in that volume).

without any untoward consequences.⁹

II. AMERICAN BAR FOUNDATION

The American Bar Foundation commissioned the first study to focus specifically on the burgeoning federal appellate caseload.¹⁰ Published in 1968, the report, entitled *Accommodating the Workload of the United States Courts of Appeals*,¹¹ recommended some intramural reforms to improve efficiency, and recommended an increase in appellate capacity. Most importantly for present purposes, the report proposed the following sequential strategy for dealing with the newly dawning reality of accelerating federal appellate growth over the long run.¹² Once a circuit reaches nine judges, the desirability of adding more judges should be compared to the alternative of splitting a circuit to create a new circuit, although, on balance, it is more desirable to add judges than it is to split circuits. When the number of judges in a given circuit exceeds fifteen, a "division" system should be adopted to assign judges on a rotating basis to decide appeals docketed by the subject.¹³ The division arrangement might accommodate as many as thirty judges on a court of appeals. Eventually some circuits will have to be split when the caseload exceeds the capacity of the maximum number of judges who can be efficiently employed under a "substantive divisions" organization.¹⁴ As the caseload grows and the number of circuit judges increases, the Supreme Court will need assistance in its role to guide and harmonize the federal law. This need for harmony might be furnished alternatively by regional appellate panels of the courts of appeals, by appellate panels with jurisdiction over specific matter, or by a "national circuit" that would resolve regional conflicts in the national law.

⁹ BAKER, *supra* note *, at 53-54.

¹⁰ See generally Quentin N. Burdick, *Federal Courts of Appeals: Radical Surgery or Conservative Care*, 60 KY. L.J. 807, 813-15 (1972) (tracing history of American Bar Foundation's special Task Force's attempts to solve problem of accommodating increased number of judges in federal appellate system).

¹¹ AMERICAN BAR FOUND., *ACCOMMODATING THE WORKLOAD OF THE UNITED STATES COURTS OF APPEALS* (1968).

¹² Burdick, *supra* note 10, at 814. See generally Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 604-17 (1969) (criticizing use of specialized courts and formation of new national court). Professor Carrington was the Project Director of the Advisors to the American Bar Foundation Study of the United States Courts of Appeals. See *id.* at 542 n.a1.

¹³ AMERICAN BAR FOUND., *supra* note 11, at 5.

¹⁴ Carrington, *supra* note 12, at 590.

Today, by century's end, much of this sequential scenario has already come to pass and the remainder continues to be viable. Notice, for example, the conception of internally reorganizing the larger circuits into subdivisions. Here too we also see the characteristic ambivalence, even reluctance, about moving away from the generalist appellate court, in the direction of specialized appellate subject matter jurisdiction. It also is interesting to observe, almost quaint in retrospect, how the "nine judge barrier" was swept away by the reality of appellate workload trends.¹⁵ Many judges and members of Congress had long shared an almost mystical kind of numerology that the number of Supreme Court Justices was the absolute maximum number of judges that could operate as a single appellate court, that "nine" was a judicial constant like the speed of sound in physics.¹⁶ The debate persists, in theory and in practice, whether there really is some upper limit on the number of circuit judges who can constitute a single court of appeals.

III. THE FREUND COMMITTEE

The Report of the Study Group on the Caseload of the Supreme Court was published in 1972.¹⁷ Commissioned by the Federal Judicial Center, the Study Group of jurists, scholars, and attorneys came informally to be called after the name of its chair, Harvard's Professor Paul Freund. As its formal title suggests, however, the study focused primarily on the problems of the Supreme Court.¹⁸

The Freund Committee recommended several efficiency measures, such as the elimination of the three-judge district courts and the repeal of the Supreme Court's mandatory jurisdiction.¹⁹ One suggestion for systemic appellate capacity reform, that Congress create a national court of appeals, was met with a hailstorm of controversy and criticism.²⁰ Briefly described, the proposed new court would be staffed by seven

¹⁵ DEBORAH J. BARROW & THOMAS G. WALKER, *A COURT DIVIDED—THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM 2-7* (1988).

¹⁶ *Id.* at 5.

¹⁷ FEDERAL JUDICIAL CTR., *REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT*, (1972) (reprinted in 57 F.R.D. 573).

¹⁸ Chief Justice Warren E. Burger, as Chairman of the Board, appointed the group to "study the caseload of the Supreme Court and to make such recommendations as its findings warranted." *Id.* at 576.

¹⁹ FEDERAL JUDICIAL CTR., *supra* note 17, at 25-38.

²⁰ For a partial bibliography of the extended debate, see Kevin L. Domecus, *Congressional Prerogatives, The Constitution and a National Court of Appeals*, 5 HASTINGS CONST. L.Q. 715, 716 n.7 (1978), and J. Clifford Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 CAL. L. REV. 913, 914 n.9 (1983).

circuit judges sitting for staggered three-year terms. The proposed court would screen all *certiorari* petitions and appeals and refer only about 500 to the Supreme Court for the high Court's final selection of the approximately 150-200 cases the Supreme Court was accepting back then for full decision each Term.²¹ Additionally, the proposed court would retain and decide genuine conflicts among the circuits. These court experts felt the need for more national appellate capacity to maintain the desirable level of uniformity in federal law.²²

Criticism essentially centered around two themes: a concern for the dilution of Supreme Court authority and self-determinism, and a desire to preserve direct access to the Supreme Court. Seen by some as an attack on the Supreme Court itself, the proposal was "stillborn," to quote the diagnosis of a career midwife of federal court reform.²³ Indeed, the episode tended to reaffirm the lasting precedent of FDR's notorious failed attempt at Supreme Court packing: federal court reforms must show great respect and deference for the power and prestige of the High Court.²⁴ The episode did serve to focus attention on the federal appellate court system and its problems, however, and established some important *de facto* political limits on the dialogue of reform of the courts of appeals and the federal circuits.²⁵ It may not be unfair to observe that the experience of the Freund Committee demonstrates that thoughtful, informed study groups may sometimes hatch a genuinely goofy proposal. When reading one of these reports, we should apply a healthy skepticism to its assumptions and we should subject its proposals to a full debate.

IV. THE HRUSKA COMMISSION

Responding to the collective urgings of Chief Justice Warren E. Burger, the Chief Judges of all the Courts of Appeals, the Judicial Conference of the United States, the Federal Judicial Center, and the American Bar Association, Congress created the Commission on Revision of the Federal Court Appellate System in 1972.²⁶ Chaired by Senator Hruska,

²¹ FEDERAL JUDICIAL CTR., *supra* note 17, at 18-24.

²² *Id.* at 18.

²³ Meador, *supra* note 6, at 627.

²⁴ WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN—THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 132-162 (1995).

²⁵ Meador, *supra* note 6, at 627.

²⁶ Act of Oct. 13, 1972, Pub. L. No. 92-489, 86 Stat. 807. *See generally* H.R. CONF. REP. NO. 92-1457 (1972), reprinted in 1972 U.S.C.C.A.N. 3611 (explaining effect of establishment of Commission); S. REP. NO. 92-930, at 6-7 (1972), reprinted in 1972 U.S.C.C.A.N. 3602, 3605-

the Commission included foursomes from the Senate, the House, the Chief Justice's appointees, and the President's appointees. Although subject matter jurisdiction was explicitly placed off limits, the legislative charge was broad: to study the federal judicial system's geographical divisions, structure, and internal procedures and to recommend changes "most appropriate for the expeditious and effective disposition of judicial business."²⁷

In 1973, the Commission issued its first report recommending the division of the Fifth and Ninth Circuits.²⁸ This report also emphasized various efficiency reforms. Two years later, the Commission issued its second report, which considered the organization, structure and internal procedures of the federal appellate court system.²⁹ Again, one of the recommendations was the appellate capacity reform of the creation of a national court of appeals.³⁰ To be inserted between the courts of appeals and the Supreme Court, the proposed new court would have been staffed permanently with seven Article III judges. It would not perform any screening duties for the Supreme Court, the feature that doomed the Freund Committee recommendation, but the proposed new court would decide cases referred by the Supreme Court or transferred from the existing appellate courts. It would be subject to review in the Supreme Court on writ of *certiorari*. Aside from the split of the Fifth Circuit, which finally occurred in 1981, the Hruska Commission proposals did not fare very well in the legislative halls.³¹ They did garner relatively more attention within the ivy-covered walls, both favorable and unfavorable.³² The influence of the Freund Committee on the Hruska Commission is obvious, even in this brief summary. In the long line of studies, reform proposals come into fashion and go out of fashion among legal

06 (discussing broadened scope of study referred to Commission, created by act H.R. 7378).

²⁷ Act of Oct. 13, 1972, Pub. L. No. 92-489, 86 Stat. 807.

²⁸ COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, THE GEOGRAPHICAL BOUNDARIES OF THE SEVERAL JUDICIAL CIRCUITS: RECOMMENDATIONS FOR CHANGE, reprinted in 62 F.R.D. 223 (1973).

²⁹ COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE, reprinted in 67 F.R.D. 195 (1975).

³⁰ *Id.* at 237-47.

³¹ BAKER, *supra* note *, at 52-73 (Fifth Circuit split); Meador, *supra* note 6, at 628 (noting fate of Hruska Commission proposals).

³² See, e.g., Charles R. Haworth & Daniel J. Meador, *A Proposed New Federal Intermediate Appellate Court*, U. MICH. J.L. REFORM 201 (1978); Roman L. Hruska, *The Commission on Revision of the Federal Court Appellate System: A Legislative History*, 1974 ARIZ. ST. L.J. 579; Luther M. Swygert, *The Proposed National Court of Appeals: A Threat to Judicial Symmetry*, 51 IND. L.J. 327 (1976).

commentators in a way that resembles the “what’s hot – what’s not” lists in popular magazines. This may be partly due to the general fickleness which the legal *intellegencia* shares with readers of *People* magazine. Likewise, these trends may be attributed to a particular sense of judicial *realpolitik* that thinks of previously-overlooked proposals as being damaged goods.

V. ADVISORY COUNCIL ON APPELLATE JUSTICE

The little-known and often-overlooked Advisory Council on Appellate Justice (“Advisory Council”) was a nongovernmental body created in 1971 as a liaison to the Federal Judicial Center and the National Center for State Courts.³³ After a four-year study, the Advisory Council, comprised of judges, lawyers, and law professors, developed guidelines for restructuring the federal appellate system much in line with the recommendations from the Hruska Commission. The Hruska Commission more or less overshadowed the work of the Council.³⁴ The various efforts to study and report on the courts of appeals are related much like a set of *amicus curiae* briefs in a case on appeal: they line up on the same side of the issues; they repeat many of the same arguments; and they reach many of the same conclusions.

In retrospect, it is around this time that would-be-reformers began to uncouple the Supreme Court from the courts of appeals in their thinking about federal appellate restructuring. The next generation of proposals for structural reform sought to redesign the middle tier federal court. Tampering with the Supreme Court had become the lethal third rail of judicial policymaking.

VI. AMERICAN BAR ASSOCIATION ACTION COMMISSION

The American Bar Association (“ABA”) generally supported the Hruska Commission.³⁵ In 1978, the ABA created the Action Commission to Reduce Court Costs and Delay, which in turn developed a package of appellate reforms to expedite the disposition of appeals.³⁶ Its intramural proposals were concerned exclusively with appeal processing efficiency, however, and were addressed to how the judges could do better and do

³³ Meador, *supra* note 6, at 628-29.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Seth Hufstedler & Paul Nejelski, *ABA Action Commission Challenges Litigation Cost and Delay*, 66 A.B.A. J. 965 (1980).

more.³⁷

This, too, has been a common theme in the literature over the years: that intramural reforms, modifications in the procedures used to hear and decide appeals, promise ever greater efficiencies.³⁸ This aspect of judicial politics is somewhat reminiscent of the utopian notion that science and technology will solve all the world's problems. This naiveté about the future of the courts is all the more amazing, however, when one looks to the past and realizes that "[t]he history of procedure is a series of attempts to solve the problems created by the preceding generation's procedural reforms."³⁹

VII. DEPARTMENT OF JUSTICE

Appointed by then-Attorney General Edward Levi, a committee within the Department of Justice, chaired by then-Solicitor General Robert Bork, surveyed the problems of the federal courts and issued a Report in 1977.⁴⁰ The Report emphasized the problems of the whole federal court system and made several recommendations: the abolition of diversity jurisdiction; the creation of administrative courts under Article I for adjudication and appeals under most federal regulatory laws; the elimination of the Supreme Court's mandatory jurisdiction; and the creation of a permanent interbranch "Council on Federal Courts" to plan and coordinate judicial reforms.⁴¹ Because of the quick change between the Ford and Carter administrations, however, these proposals failed to gain any traction inside the Executive Branch.⁴² One may wonder whether a permanent, on-going study group would come to different conclusions or come up with different ideas than the regular, though *ad hoc* series of studies that in fact have been undertaken over the years.

In 1977, then-Attorney General Bell established a new unit within the Department called the Office for Improvements in the Administration of Justice (the "Office").⁴³ The Office was designed to develop and promote

³⁷ See generally Joseph R. Weisberger, *Appellate Courts: The Challenge of Inundation*, 31 AM. U. L. REV. 237 (1982).

³⁸ BAKER, *supra* note *, at 166-72.

³⁹ Judith Resnik, *Preclusion in a Federal System: Precluding Appeals*, 70 CORNELL L. REV. 603, 624 (1985).

⁴⁰ See DEP'T OF JUSTICE COMM. ON REVISION OF THE FEDERAL JUDICIAL SYSTEM, THE NEEDS OF THE FEDERAL COURTS (1977).

⁴¹ See *id.*

⁴² Meador, *supra* note 6, at 630-31.

⁴³ See 42 Fed. Reg. 8140 (1977).

court reforms and it achieved a fair degree of legislative success.⁴⁴ The most noteworthy appellate reform originating in this Office was the proposal, eventually enacted in 1982, to create the Court of Appeals for the Federal Circuit, the first ever intermediate federal appellate court with a nationwide subject matter jurisdiction.⁴⁵ Some court reformers deem this successful example of a subject matter appellate court as the harbinger of the future.⁴⁶ Other reformers see it as only the exception that proves the rule in favor of courts of appeals of general subject matter jurisdiction.⁴⁷ Tax cases and social security appeals are most often mentioned as potential subjects for further appellate specialization.⁴⁸ Yet, their numbers do not promise very much docket relief for the regional courts of appeals. Instead, there ought to be independent, valid reasons for a court of specialized jurisdiction.

These two efforts by the Justice Department illustrate another characteristic of the various studies of the courts of appeals: court reform is bipartisan. Perhaps better stated, court reform is nonpartisan. This is not to suggest that court reformers never have hidden political agendas, of course. Rather, my point is that court reform has an inherently low level of political interest. Executive branch initiatives, more often than not, are a low priority in any administration. In the legislative branch, it is difficult to get anyone in Congress, on either side of the aisle, to pay any attention to the needs of the federal courts. Court reform is not the stuff of headlines.

VIII. THE NYU STUDY

In 1986, professors Samuel Estreicher and John Sexton published a short book⁴⁹ that presented the findings of the New York University Law Review Project ("NYU Study").⁵⁰ That project had focused on the Supreme Court's caseload and the book argued for a new "managerial

⁴⁴ See, e.g., 18 U.S.C. § 3401 (1976); Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25; Federal Magistrate Act of 1979, Pub. L. No. 96-82, 93 Stat. 643 (amending 28 U.S.C. §§ 604(d)(3), 631-636, 1915 (1976)); .

⁴⁵ Daniel J. Meador, *Origin of the Federal Circuit: A Personal Account*, 41 AM. U. L. REV. 581 (1992).

⁴⁶ See *id.*

⁴⁷ BAKER, *supra* note *, at 221-24, 261-68.

⁴⁸ Meador, *supra* note 45, at 586.

⁴⁹ SAMUEL ESTREICHER & JOHN SEXTON, *REDEFINING THE SUPREME COURT'S ROLE: THE FEDERAL JUDICIAL PROCESS* (Yale Univ. Press 1986). For a critical review, see generally Thomas E. Baker, *Siskel and Ebert at the Supreme Court*, 87 MICH. L. REV. 1472 (1989).

⁵⁰ Samuel Estreicher & John Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681 (1984).

model" of the Supreme Court. This model called for complete discretion in the high Court to select the cases it would decide. The model also offered the Justices a checklist for selecting cases appropriate and deserving of Supreme Court review. In this way, the Supreme Court would achieve its full potential as the manager of the system of federal courts with the ultimate responsibility of developing a sound and coherent body of national law.⁵¹ The authors endorsed the existing balkanized hegemony of national law, what some of us view as the problem of intercircuit conflicts, and sought to recast it as one of the system's strengths. The Supreme Court would manage its caseload so as to allow conflicts in the federal law among the circuits to percolate before granting review of an issue of national law. Only then would the high Court decide and establish one rule for the nation.

The NYU Study further concluded that the general concern for intercircuit conflicts was exaggerated and that there were in fact few unresolved conflicts that were truly deserving of Supreme Court attention. The authors rejected the capacity reform proposal to create a new national appellate court to resolve conflicts.⁵² Instead, the authors suggested detailed criteria that the Supreme Court should apply to choose which cases to review. In addition, several suggestions were offered to the Justices on how they might perform their task of case selection more efficiently and more consistently.⁵³

As a matter of fact, in recent years the Rehnquist Court has been granting review in substantially fewer cases than the Burger Court.⁵⁴ It would be wholly speculative, however, to attribute this development to the NYU Study. Still, one possible, even plausible, explanation is that the current Justices have reached some kind of shared though unarticulated consensus on case selection to reduce the role of the Supreme Court.⁵⁵ In part, the Justices may be giving up on trying to

⁵¹ ESTREICHER & SEXTON, *supra* note 49, at 48-49.

⁵² *Id.* at 111-15.

⁵³ See also JOSEPH GOLDSTEIN, *THE INTELLIGIBLE CONSTITUTION* (Oxford Univ. Press 1992) (proposing standards to which Supreme Court justices should be held in communicating their interpretation of federal Constitution); Thomas E. Baker, *The Intelligible Constitution: The Supreme Court's Obligation to Maintain the Constitution as Something We the People Can Understand*, 10 CONST. COMMENT. 167 (1993) (reviewing JOSEPH GOLDSTEIN, *THE INTELLIGIBLE CONSTITUTION* (Oxford Univ. Press 1992)).

⁵⁴ Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403; see David M. O'Brien, *Join-3 Votes, the Rule of Four, the Cert. Pool, and the Supreme Court's Shrinking Plenary Docket*, 13 J.L. & POL. 779 (1997); Mark Tushnet, *Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29 (1999).

⁵⁵ See sources cited *supra* note 54.

resolve all conflicts that should be resolved.⁵⁶ Beyond this, not much more can be said about the NYU Study because its primary focus was on the Supreme Court and the Study only elliptically considered the courts of appeals. But notice that its legislative recommendations would have given over more discretion to the Justices and its other suggestions were addressed to the exercise of the Justices' discretion. The reform package would have strengthened, not weakened, the power and authority of the Supreme Court.

IX. AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON FEDERAL JUDICIAL IMPROVEMENTS

In 1989, the Standing Committee on Federal Judicial Improvements of the ABA (the "Standing Committee") issued a report entitled, *The United States Courts of Appeals: Reexamining Structure and Process After a Century of Growth*.⁵⁷ The Standing Committee examined the numerous studies, reports and proposals for reform of the federal appellate courts system since the American Bar Foundation study in 1968.⁵⁸ The report went on to evaluate the history of congressional legislative responses to increased appellate workload, such as increasing the number of appellate judgeships, dividing the Fifth Circuit, authorizing the limited *en banc* court in large circuits, and creating the Court of Appeals for the Federal Circuit.⁵⁹ The Standing Committee made the same finding that previous studies had made: the seemingly inexorable trend towards more appeals of greater complexity and difficulty threatens to overwhelm the century-old federal appellate structure. This group of bar leaders, jurists, and academic experts trenchantly concluded that "reform of the courts of appeals will not be a

⁵⁶ Intercircuit conflicts continue to accumulate and dissipate. Thomas Goldstein counts fifteen to twenty, on average, each month in "Circuit Split Roundup," published in *U.S. Law Week*. See generally Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. PITT. L. REV. 693 (1995) (describing method by which Federal Courts Study Committee examined inability of Supreme Court to hear unresolved intercircuit conflicts); Arthur D. Hellman, *Light on a Darkling Plain: Intercircuit Conflicts in the Perspective of Time and Experience*, 1998 SUP. CT. REV. 247 (examining impact of circuit conflicts on practice of law); Arthur D. Hellman, *Precedent, Predictability, and Federal Appellate Structure*, 60 U. PITT. L. REV. 1029 (1999) (arguing that independence of circuits contributes to unpredictability on appeal).

⁵⁷ AMERICAN BAR ASSOC., STANDING COMMITTEE ON FEDERAL JUDICIAL IMPROVEMENTS, *THE UNITED STATES COURTS OF APPEALS: REEXAMINING STRUCTURE AND PROCESS AFTER A CENTURY OF GROWTH* (1989) [hereinafter ABA STANDING COMMITTEE].

⁵⁸ See *supra* text accompanying notes 11-14.

⁵⁹ ABA STANDING COMMITTEE, *supra* note 57, at 25-28.

question of whether, but a question of when and how.”⁶⁰ In general, the Standing Committee urged continued study and monitoring of the problems facing the courts of appeals, more emphasis on screening procedures, and greater reliance on appellate subject matter specialization. The final report offered four specific proposals.⁶¹ First, the extent of the disuniformity among the courts of appeals should be studied to consider whether cases ought to be allocated by subject matter to non-regional courts with national jurisdiction. Second, the limited *en banc* procedures followed in the larger courts of appeals might be generalized to all the courts of appeals. Third, the idea of assigning appeals to panels by subject matter ought to be studied. Fourth, the intramural reforms for screening and deciding appeals with truncated appellate procedures ought to be critically examined to guarantee the preservation of the federal appellate ideal. The Standing Committee emphasized the foundational importance of Article III judges “doing justice on appeal.”⁶²

Perhaps the most important influence of the Standing Committee was felt a year later in the work of the Federal Court Study Committee, which is considered next. This, too, is a common phenomenon. Whatever current commission or committee usually begins by going back to pick up where the previous study left off. Judges and lawyers usually are polled, and thus are obliged to look up from their day-to-day grind and daydream about how their work could be done better or more efficiently. When it is its turn, the most recent study or report dominates the commentaries. For example, law reviews hold symposia. Often the delivery of a study or report is the occasion for bills to be introduced in Congress and for the judiciary committees to hold hearings. In short,

⁶⁰ *Id.* at 40.

⁶¹ *Id.* at 41. The most recent resolutions of the ABA once again echo these same concerns:

Resolved, That the American Bar Association urges the courts of appeals, both federal and, state and territorial, to . . . provide in case dispositions (except in those appeals the court determines to be wholly without merit), at a minimum, . . . reasoned explanations for their decisions.

Further Resolved, That the American Bar Association urges the Congress and state and territorial legislatures to provide the courts of appeals with resources that are sufficient to enable them to meet this responsibility.

American Bar Association, House of Delegates Report No. 8B, available at <http://www.abanet.org/leadership/journal/2000dailyjournal8b.html> (last visited Nov. 16, 2000).

⁶² *Id.*

one significant value, perhaps the principal value, of the experience we have had with *seriatim* committees or commissions has been that some episodic attention has been focused on the plight of the courts of appeals.

X. THE FEDERAL COURTS STUDY COMMITTEE

In 1988, Congress created the Federal Courts Study Committee (the "Study Committee") as an *ad hoc* committee within the Judicial Conference of the United States.⁶³ Appointed by Chief Justice William H. Rehnquist, the fifteen-person Study Committee included representatives of the three branches of the federal government, state government officials, practitioners, and academics.⁶⁴ The Study Committee members were thus broadly representative of the individuals and entities who share a compelling interest in the work of the federal courts. The Study Committee surveyed members of the federal judiciary and solicited the views of citizens' groups, bar organizations, research groups, academics, civil rights groups and others. Numerous public outreach meetings were held and regional hearings focused on published proposals, leading up to the Study Committee's Final Report. This is a typical set of methodologies for these studies.

Congress gave the Study Committee a fifteen month deadline within which to examine the problems facing the federal courts and to develop a long term plan for the judiciary. The Study Committee followed the typical pattern of these studies that is obvious to long time observers of federal court reform. Congress established a statutory deadline that was very brief; then there was some delay in appointing the members; then the study group used a big part of its lifetime getting organized; then it conducted its work considerably hurried by its impending sunset

⁶³ Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642, 4644 (1988) (codified at 28 U.S.C. § 331). See generally Maurice Rosenberg, *The Federal Courts in the 21st Century*, 15 NOVA L. REV. 105 (1991) (discussing committee's recommendations for reorganizing federal courts); William K. Slate, *Report of the Federal Courts Study Committee: An Update*, 21 SETON HALL L. REV. 336 (1991) (describing committee's recommendations and Congress's response to them); Stanley Sporin, *Reforming the Federal Judiciary*, 46 S.M.U. L. REV. 751 (1992) (asserting new proposals for reform and criticizing approaches of Congress and Weiss Commission); Joseph F. Weis, Jr., *The Federal Courts Study Committee Begins Its Work*, 21 ST. MARY'S L.J. 15 (1989) (explaining complexity of issues before committee); Symposium, *Federal Courts*, 1990 B.Y.U. L. REV. 1 (collecting articles that discuss pros and cons of issues facing committee); Symposium, *The Federal Court Docket: Issues & Solutions*, 22 CONN. L. REV. 615 (1990) (presenting opinions of leading legal scholars about need for federal reform). This is the appropriate place to disclose that the present author served as Associate Reporter to the Federal Courts Study Committee (1989-90).

⁶⁴ See sources cited *supra* note 53.

deadline. In the explicit charge to the Study Committee, Congress asked for an evaluation of the structure and administration of the courts of appeals. That section of the Study Committee's Final Report on appellate structure is something akin to a Chinese restaurant menu of structural reforms.

The Study Committee began this section of its Final Report with the given that the federal appellate courts are faced with a "crisis of volume" that will continue and that will eventually require some "fundamental change."⁶⁵ The Study Committee examined the present geographic circuits to note a few essential characteristics that define their current function: they are the only courts between the district courts and the Supreme Court; their jurisdiction is an appeal as of right; their basic decisional unit is the three-judge panel; they are geographically based; and their total number of thirteen still reflects, though somewhat faintly, the congressional history that once correlated the number of circuits to the number of Supreme Court justices.⁶⁶ The Study Committee's black-letter recommendation reads: "Fundamental structural alternatives deserve the careful attention of Congress, the courts, bar associations and scholars over the next five years. The committee itself has studied various structural alternatives. Without endorsing any, it lists a few here to stimulate further inquiry and discussion."⁶⁷ The list of structural options may be briefly summarized for present purposes.

First, the present geographic circuits could be dissolved and new circuit boundaries could be drawn and redrawn periodically to achieve smaller regional courts with nine members.⁶⁸ All the regional courts

⁶⁵ STUDY COMMITTEE REPORT, *supra* note 2, at 109. The Federal Courts Study Committee itself was divided over the seriousness of the appellate caseload crisis and what, if anything, should be done about it. *See id.* at 123-24 (listing additional statement of four members). One of the most prominent members of the Study Committee has gone back and forth on the question. *Compare* RICHARD A. POSNER, *THE FEDERAL COURTS — CRISIS AND REFORM* 317 (1985) (concluding that "the wolf really seems to be at the door"), *with* RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 185 (1996) (asking and answering "But is the system worse overall? I doubt it.").

⁶⁶ STUDY COMMITTEE REPORT, *supra* note 2, at 113.

⁶⁷ *Id.* at 116-17. The Study Committee did label changing the appeal-of-right feature of appellate jurisdiction to a discretionary, *certiorari*-like, jurisdiction to be a "last resort." *Id.* at 116. The Committee straightforwardly rejected the "single national appellate court" proposal. *Id.* at 117. *See generally* Thomas E. Baker & Douglas D. McFarland, *The Need for a New National Court*, 100 HARV. L. REV. 1400 (1987) (arguing that alternatives to Intercircuit Panel are inadequate to remedy courts' case overload and lack of uniformity). Presently, I do not regret that the Study Committee sounded the death knell of that idea.

⁶⁸ STUDY COMMITTEE REPORT, *supra* note 2, at 118-19. *See generally* Alvin B. Rubin, *Views From the Lower Court*, 23 UCLA L. REV. 448 (1976) (arguing that circuit courts are too large to achieve uniform consensus on law).

could be bound to follow the prior precedent of any other panel in every other region, subject to Supreme Court overruling. One central division of representative judges could review panel decisions and resolve remaining conflicts as a kind of national *en banc* court. This would reduce the expectation of more frequent conflicts generated by more circuits without having to rely on the Supreme Court.

Second, an additional federal appellate tier could be created.⁶⁹ Twenty to thirty regional appellate divisions of nine judges each could be created, replacing the present thirteen, to hear appeals as of right. In addition, four or five upper-tier appellate courts could be created with larger geographic regions to consider discretionary appeals from the regional divisions, with Supreme Court jurisdiction to hear a second discretionary appeal from the upper-tier courts. This structure could absorb the anticipated large cohorts of additional judgeships in the future and, again, would be able to handle the inevitability of more frequent intercircuit conflicts.

Third, national subject matter courts could be created alongside the present circuits with specialized national jurisdiction over such recurring, common subjects as tax, admiralty, criminal, civil rights, labor, administrative, and possibly other subjects.⁷⁰ Alternatively, subject matter panels could be created within the existing circuits.

Fourth, all the existing courts of appeals could be merged into a single centrally-organized court. The central court would administratively create and abolish special subject matter panels as appropriate. The new organization could develop its own internal mechanisms for resolving conflicts among panels.⁷¹

Fifth, the existing circuits might be consolidated into perhaps five "jumbo" circuits that might resemble in many ways the current Ninth Circuit.⁷² There are many possible variations. For example, judges in the

⁶⁹ STUDY COMMITTEE REPORT, *supra* note 2, at 119-20. See generally James A. Gazell, *The National Court of Appeals Controversy: An Emerging Negative Consensus*, 6 N. ILL. U. L. REV. 1 (1986) (discussing long-standing controversy regarding best remedy to reduce Supreme Court's growing caseload).

⁷⁰ STUDY COMMITTEE REPORT, *supra* note 2, at 120-21. See generally Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603, 607-11 (1989) (describing use of subject matter courts in foreign judicial systems).

⁷¹ STUDY COMMITTEE REPORT, *supra* note 2, at 121. See generally Joseph F. Weis, Jr., *Disconnecting the Overloaded Circuits — A Plug for a Unified Court of Appeals*, 39 ST. LOUIS U. L.J. 455 (1995) (arguing that unified court of appeals would reduce Supreme Court caseload without affecting its jurisdiction and would increase flexibility of circuit system).

⁷² STUDY COMMITTEE REPORT, *supra* note 2, at 122-23. See generally Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56

jumbo circuits could rotate among specialized subject matter panels.

The Study Committee also noted several other particular proposals: the Judicial Conference should develop a weighted caseload formula for determining the need for additional appellate judgeships; the political branches should expeditiously nominate and confirm judges to fill existing vacancies; an in-depth study by the Judicial Conference of the resources used to decide *pro se* litigation; congressional authorization of the limited *en banc* device for all the circuits; and a Federal Judicial Center study of the intramural reforms for case management already in place in the circuits.⁷³

Finally, the Study Committee urged serious attention and further study of the problems of proposed fundamental structural reform of our federal appellate system.⁷⁴ This is a common finesse of study groups: to come up with a list of themes and ideas that they deem merit further study but that time and resources do not allow them to pursue in their own effort. Items on these "someone-ought-to-take-a-look-at-this" lists of things to do often show up later. Some enterprising professor takes on the assignment in a law review. Or a successor committee or study group makes the matter a priority for its staff.

XI. FEDERAL JUDICIAL CENTER REPORT

Congress followed up on the Study Committee's recommendation for a separate study of the courts of appeals with a provision in the Federal Courts Study Committee Implementation Act of 1990.⁷⁵ That legislation called on the Federal Judicial Center to "study the full range of structural alternatives for the Federal Courts of Appeals and submit a report on the study to Congress and the Judicial Conference of the United States."⁷⁶

In December 1993, the Federal Judicial Center completed still another full-scale report on the alternative futures of the courts of appeals. That report, entitled *Structural and Other Alternatives for the Federal Courts of Appeals ("Judicial Center Report")*,⁷⁷ examined the problems facing

U. CHI. L. REV. 541 (1989) (examining intracircuit inconsistency in Ninth Circuit).

⁷³ STUDY COMMITTEE REPORT, *supra* note 2, at 111-16.

⁷⁴ *Id.* at 116-17.

⁷⁵ Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101-650, § 302(c), 104 Stat. 5104, 5104 (1990).

⁷⁶ *Id.*

⁷⁷ FEDERAL JUDICIAL CTR., *STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS: REPORT TO THE UNITED STATES CONGRESS AND THE JUDICIAL CONFERENCE OF THE UNITED STATES (1993)* [hereinafter *STRUCTURAL ALTERNATIVES*]. The author performed a literature review for the project. *Id.* at n.2.

the federal appellate system. It is a detailed and comprehensive study of the "stresses" (the report eschews the term "crisis") the circuit judges and the courts of appeals are experiencing.⁷⁸ Thus, it rejects the conclusions of some commentators and judges that the quantity of appeals has already affected the quality of work product in the courts of appeals. Still, the Judicial Center Report does sound a note of caution that "[a]t some point, especially if the workload of the courts of appeals continues to grow at its recent pace, changes in internal operating procedures may not be sufficient for the task."⁷⁹

The Judicial Center Report does admit to some concern for the future, however, if the national policy choice is to maintain the existing federal appellate structure. The Judicial Center Report concedes that in order to restore traditional appellate procedures in all appeals, or even in only the appeals fully decided on the merits, there must be either substantially fewer appeals or some massive increase in the number of judges and support personnel.⁸⁰ The likelihood of either of those scenarios is left to the reader's imagination. The body of the Judicial Center Report expertly keeps the promise of the title of the report to canvass various structural and other alternatives: total or partial consolidation; size reduction; multiple tiers; discretionary appeals; differential case management; district court error review; jurisdiction reduction; and miscellaneous other nonjurisdictional options. However, the Judicial Center Report comes down squarely on the side of non-structural reforms and rigidly resists any more radical changes in the organization and structure of the federal appellate court system "at this time."⁸¹

⁷⁸ *Id.* at 11.

⁷⁹ *Id.* at 155. I believe that we are already past this point. Thomas E. Baker, *Intramural Reforms: How the U.S. Courts of Appeals Have Helped Themselves*, 22 FLA. ST. U. L. REV. 913 (1995) (identifying and summarizing intramural reforms of various circuits); Thomas E. Baker, *Proposed Intramural Reforms: What the U.S. Courts of Appeals Might Do to Help Themselves*, 25 ST. MARY'S L.J. 1321 (1994) (discussing need for further reforms).

⁸⁰ STRUCTURAL ALTERNATIVES, *supra* note 77, at 156.

⁸¹ *Id.* at 155. Again, I disagree because I believe that we have reached the point that structural reform is in order. See Thomas E. Baker, *An Assessment of Past Extramural Reforms of the U.S. Courts of Appeals*, 28 GA. L. REV. 863 (1994) (discussing Congress' historical methods to help federal courts with caseload problems); Thomas E. Baker, *Imagining the Alternative Futures of the U.S. Courts of Appeals*, 28 GA. L. REV. 913 (1994) (evaluating structural alternatives for federal courts).

XII. JUDICIAL CONFERENCE LONG RANGE PLAN

In December 1995, the Judicial Conference of the United States approved the report of an *ad hoc* committee entitled, Long Range Plan for the Federal Courts (the "Long Range Plan").⁸² This initiative followed up on another recommendation of the Federal Courts Study Committee.⁸³ Gazing into its crystal ball, the Long Range Planning Committee saw the possibility of an alternative future that was neither desirable nor acceptable: "In 2020 we may find a system of discretionary appellate review, of oral argument in only the exceptional case, and of staff personnel playing a dominant role in deciding the majority of the cases or at least identifying the cases that get the full attention of the judges."⁸⁴ Instead, the Long Range Plan emphasized that considering fundamental changes in the structure of the federal courts was prudent planning, but structural changes should be pursued if and only if less fundamental changes proved inadequate and structural alternatives became absolutely necessary.⁸⁵

For the most part, the third branch's long range plan for the courts of appeals is nothing more than a portrait of the current arrangement. The vision for the future is the image of the present. Consider the four bold recommendations. First, the federal appellate function should continue to be performed in the generalist courts of appeals, arrayed in geographic regions, alongside the Court of Appeals for the Federal Circuit with its nationwide jurisdiction over certain subject matters.⁸⁶ Second, as far as is practicable, the workload of circuit judges should be equalized nationally.⁸⁷ Third, only the Supreme Court of the United States should have the responsibility to resolve intercircuit conflicts.⁸⁸

⁸² JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS (DECEMBER 1995) [hereinafter LONG RANGE PLAN]. See generally Otto R. Skopil, Jr., *Long Range Planning in the Federal Judiciary: Some Observations on a Work in Progress*, 14 MISS. C. L. REV. 199 (1994) (describing formation and mission of Committee). This is the place to footnote that I was invited to attend an organizational meeting and give testimony to the Committee. Thomas E. Baker, *Some Preliminary Thoughts on Long Range Planning for the Federal Judiciary*, 23 TEX. TECH L. REV. 1, 1 (1992).

⁸³ LONG RANGE PLAN, *supra* note 82, at 2-3.

⁸⁴ *Id.* at 20. I submit that the future is now, that the Committee's fearful prediction has already come to pass. See generally Thomas E. Baker, *The U.S. Courts of Appeals: Problems and Solutions*, 45 FED. LAWYER 31, 32-33 (1998) (describing way in which staff personnel play dominant role in appellate process today).

⁸⁵ LONG RANGE PLAN, *supra* note 82, at 140.

⁸⁶ *Id.* at 43-44.

⁸⁷ *Id.* at 45-46.

⁸⁸ *Id.* at 46.

Fourth, actions by administrative agencies and Article I courts should be reviewable directly in the courts of appeals, but when the initial review is in the District Court any further review should be discretionary.⁸⁹

On the prospect of more radical change, brought on by growing caseload demands and increasing the size of the federal appellate bench, the Long Range Plan was decidedly unenthusiastic:

Each court of appeals should comprise a number of judges sufficient to maintain access to and excellence of federal appellate justice. Circuit restructuring should occur only if compelling empirical evidence demonstrates adjudicative or administrative dysfunction in a court so that it cannot continue to deliver quality justice and coherent, consistent circuit law in the face of increasing workload.⁹⁰

Thus, the official Long Range Plan is for the circuit judges to keep things pretty much the same as things are for as long as they can, no matter what. This is a common view among Article III judges. When a study committee is dominated by members of the judiciary, the group's report usually hews to the court party line.

But there are hydraulic pressures at work to call into question how realistic it is for the federal judiciary to maintain the *status quo* indefinitely into the future. For just two examples, consider the recent debate whether to increase the number of federal judges dramatically to meet caseload demands⁹¹ and the worrisome implications for federal court workloads resulting from the federalization of the law in the United States.⁹² But recall that no less an icon of the federal bench than Learned Hand once observed that federal judges as a species were "curiously timid about innovations."⁹³ Nevertheless, the courts of the United States must serve "We the People" not "We the Judges."

⁸⁹ *Id.* at 46-47.

⁹⁰ *Id.* at 44; *see also id.* at 131-33 (discussing alternatives).

⁹¹ *See generally* GORDON BERMANT ET AL., IMPOSING A MORATORIUM ON THE NUMBER OF FEDERAL JUDGES: ANALYSIS OF ARGUMENT AND IMPLICATIONS (Fed. Jud. Ctr. 1993) (analyzing arguments for and against imposing cap on number of judgeships); *see also* J. Harvie Wilkinson, III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147 (1994) (examining ways in which growth is compromising effectiveness of federal judicial function).

⁹² *See generally* WILLIAM W. SCHWARZER & RUSSELL R. WHEELER, ON THE FEDERALIZATION OF THE ADMINISTRATION OF CIVIL AND CRIMINAL JUSTICE (Fed. Jud. Ctr. 1994) (presenting arguments for and against federalization of civil and criminal law and examining several approaches to division of jurisdiction between federal and state courts).

⁹³ LEARNED HAND, *The Contribution of an Independent Judiciary to Civilization*, in THE SPIRIT OF LIBERTY 155, 158 (Irving Dilliard ed., 1960).

XIII. COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS

In December 1998, the Commission on Structural Alternatives for the Federal Courts of Appeals issued its Final Report to the President and the Congress.⁹⁴ The Final Report includes numerous provocative proposals.⁹⁵ Indeed, its major proposals already have been cut-and-pasted into bills and congressional hearings have been held.⁹⁶ Even a brief summary of this most recent imagining of the future of the courts of appeals reveals many *leitmotifs* borrowed from its long line of predecessors.

For the last several years, many federal court-watchers, myself included, have been instigating for a congressional commission to study the courts of appeals that would be obliged to make specific legislative recommendations for needed structural reform.⁹⁷ The 105th Congress created what has become popularly-known as the "White Commission," named after Justice Byron White, who served as its Chair. Congress gave the Commission the statutory charge to perform three functions: (1) study the present divisional lines of the judicial circuits; (2) study the structure of the courts of appeals with particular reference to the Ninth Circuit; and (3) report to the President and the Congress its recommendations to further "the expeditious and effective disposition of the caseload of the Federal Courts of Appeals, consistent with fundamental concepts of fairness and due process."⁹⁸

The creation of the White Commission was basically the result of a legislative stalemate between those in Congress who wanted to divide

⁹⁴ Commission on Structural Alternatives for the Federal Courts of Appeals, Final Report (Dec. 18, 1998) [hereinafter Final Report]. Citations to Final Report can be found at <http://app.comm.uscourts.gov> (last visited Oct. 25, 2000). Hard copies of all cited Final Report Documents are on file with the U.C. *Davis Law Review*. This portion of the Chronology is adapted from Thomas E. Baker, *Some Preliminary Comments on the Final Report of the White Commission*, 14 J.L. & POL. (forthcoming 2000). See also Carl Tobias, *A Federal Appellate System for the Twenty-First Century*, 74 WASH. L. REV. 275 (1999) (noting that commission issued report on December 18, 1998).

⁹⁵ See generally Baker, *supra* note 94; Pamela Ann Rymer, *Implications of the White Commission*, 34 U.C. DAVIS. L. REV. 351(2000).

⁹⁶ See S. 253, 106th Cong. (1999) (proposing many recommendations for Final Report).

⁹⁷ Thomas E. Baker, *A Proposal that Congress Create a Commission on Federal Court Structure*, 14 MISS. C. L. REV. 271 (1994).

⁹⁸ Pub. L. 105-119, § 305(1)(B), 111 Stat. 2440, 2491 (1997). See generally Carl Tobias, *A Proposal to Study the Federal Appellate System*, 167 F.R.D. 275, 281 (1996) (describing commission's functions); Carl Tobias, *An Analysis of Federal Appellate Court Study Commissions*, 74 DENV. U. L. REV. 65, 70 (1996).

the Ninth Circuit and those who did not.⁹⁹ By statute, Chief Justice William H. Rehnquist appointed the members: Associate Justice Byron White (Chair); Judge Gilbert S. Merritt from the Sixth Circuit; Judge Pamela Ann Rymer from the Ninth Circuit; Judge William D. Browning from the District of Arizona; and N. Lee Cooper past president of the American Bar Association.¹⁰⁰ Professor Daniel J. Meador, University of Virginia School of Law, served as Executive Director.¹⁰¹

The Commission reviewed the previous studies, developed statistical data from the Federal Judicial Center and the Administrative Office of United States Courts, and gathered new data directly from the courts of appeals.¹⁰² The Commission consulted experts¹⁰³ and conducted independent surveys of federal judges and lawyers who practiced before the federal courts.¹⁰⁴ Six public hearings were held¹⁰⁵ and nearly one-hundred written statements were filed by interested parties in addition to the formal testimonies delivered at the public hearings.¹⁰⁶ The Commission circulated a Draft Report and received nearly eighty written comments that prompted some important changes in the Final Report.¹⁰⁷ This was an Interneted effort: the Final Report, the earlier Draft Report and all submitted comments, and all the testimony at the public hearings with supporting documents are available on the Commission's Web site.¹⁰⁸

The White Commission was specifically charged by Congress to make some recommendations about the Ninth Circuit.¹⁰⁹ It is important to note, however, that the Commission did not recommend that Congress split the Ninth Circuit. Instead, the Commission recommended legislation reorganizing the Ninth Circuit into three regionally-based

⁹⁹ Final Report, *supra* note 94, at 1.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 3-4.

¹⁰³ The author was among a "small number of law professors" invited to participate in a research symposium with the members of the Commission and the staff. *Id.* at 3.

¹⁰⁴ Commission on Structural Alternatives for the Federal Courts of Appeals, Working Papers 3-72 (July 1998).

¹⁰⁵ Final Report, *supra* note 94, at 3.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 4.

¹⁰⁸ See Commission on Structural Alternatives for the Federal Courts of Appeals, <http://app.com.uscourts.gov> (providing links to Commission Reports) (last visited Nov. 16, 2000).

¹⁰⁹ See *supra* text accompanying notes 87-88.

divisions.¹¹⁰ The White Commission's primary position is that dividing the Ninth Circuit now would be counter-productive and splitting the circuit is both impractical and unnecessary.¹¹¹ Furthermore, the Commission believes that there are some good administrative reasons to preserve the Ninth Circuit.¹¹² Those arguments will not be rehearsed here, except to note that the Commission emphasized the importance of having a single body of federal decisional law across the western states and the Pacific seaboard.¹¹³ Seemingly only for the sake of completeness, the White Commission reviewed the pros and cons of three very different realignment options without endorsing any of them, except to say that each of them is flawed.¹¹⁴ The Final Report also concludes that the dozen or so other approaches bandied about in the literature are without any merit whatsoever.¹¹⁵

In a move that is sure to be as controversial as it is original and provocative, the White Commission imagined an entirely new way to deal with problems of more and more appeals and more and more judges in the courts of appeals. The Commission drafted a proposed statute to amend 28 U.S.C. § 46 to authorize any court of appeal with more than fifteen judgeships to organize itself into adjudicative divisions.¹¹⁶ This proposal would immediately apply to the two largest regional courts of appeals: the Fifth Circuit (seventeen judges) and the Sixth Circuit (sixteen judges).¹¹⁷ But more importantly, it would portend

¹¹⁰ Final Report, *supra* note 94, at 41-50.

¹¹¹ *Id.* at 29-57.

¹¹² *Id.*

¹¹³ *Id.* at 36. I am on record to take much the same position. Thomas E. Baker, *On Redrawing Circuit Boundaries — Why the Proposal to Divide the United States Court of Appeals for the Ninth Circuit is Not Such a Good Idea*, 22 ARIZ. ST. L.J. 917 (1990); see also Joseph N. Akrotirianakis, Paul Garo Arshagouni & Zareh A. Jaltorossian, *Jerry-Building the Road to the Future: An Evaluation of the White Commission Report on Structural Alternatives for the Federal Courts of Appeals*, 36 SAN DIEGO L. REV. 355, 769 (1999) (noting commission recognized benefit in maintaining single circuit); Marybeth Herald, *Reversed, Vacated, and Split: The Supreme Court, the Ninth Circuit, and the Congress*, 77 OR. L. REV. 405, 491 (1998) (arguing reversal rate is not reason to split Ninth Circuit); Jennifer E. Spreng, *The Icebox Cometh: A Former Clerk's View of the Proposed Ninth Circuit Split*, 73 WASH. L. REV. 875 (1998) (arguing for Ninth Circuit split); Carl Tobias, *Why Congress Should Not Split the Ninth Circuit*, 50 SMU L. REV. 583, 601 (1997) (arguing that Congress should keep Ninth Circuit intact).

¹¹⁴ Final Report, *supra* note 94, at 54-57.

¹¹⁵ *Id.* at 53. See generally Jennifer E. Spreng, *Three Divisions in One Circuit? A Critique of the Recommendations from the Commission on Structural Alternatives for the Federal Courts of Appeals*, 35 IDAHO L. REV. 553 (1999) (criticizing proposals to split California between two circuits).

¹¹⁶ Final Report, *supra* note 94, at 60-62, 96-98 (Appendix C(2)).

¹¹⁷ *Id.* at 27 (Tables 2-9).

the future for the rest of the courts of appeals as the growing appellate caseload ineluctably increases pressure on Congress to create additional circuit judgeships.¹¹⁸

According to the White Commission, the particular details of the divisional reorganization should be left to the judges in each circuit and we should expect regional variations.¹¹⁹ In fact, the Ninth Circuit judges responded to the Draft Report of the Commission to suggest changes in that earlier draft statute.¹²⁰ But the Commission resisted this overture and rejected the Ninth Circuit's suggestions as being inconsistent with the Commission's concept of regional divisions.¹²¹ The Commission went on to describe in some particular statutory detail how the divisional organization concept might work in the Ninth Circuit.¹²² Therefore, the White Commission's blueprint for the Ninth Circuit illustrates and illuminates our understanding of the novel concept of reorganization of the circuits into regional divisions.¹²³

The Ninth Circuit would be divided into three regional divisions.¹²⁴ Each regional division would have exclusive jurisdiction over appeals from the district courts within its region.¹²⁵ A regional division would function as a semi-autonomous appellate court sitting in panels.¹²⁶ A panel decision in one regional division would not be binding in another regional division.¹²⁷ Each regional division would have a divisional *en banc* to rehear important cases or to reconsider a panel decision that

¹¹⁸ BAKER, *supra* note *, at 232. See generally William M. Richman & William J. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273 (1996) (recommending expansion in size of federal appellate judiciary); William M. Richman, *An Argument on the Record for More Federal Judgeships*, 1 J. APP. PRAC. & PROCESS 37 (1999) (stating that increase in federal judgeships will restore circuit courts to traditional model).

¹¹⁹ Final Report, *supra* note 94, at 61. A large majority of the senior and active judges on the Ninth Circuit (25 of the 35 judges who voted) remained convinced that the White Commission's regional division proposal is a bad idea and joined their Chief Judge in opposition. Chief Judge Procter Hug, Jr., *Analysis of the Final Commission Report* (1999) (with May 6, 1999, cover letter from Chief Judge Procter Hug, Jr., to Thomas E. Baker (on file with author)). See generally Arthur D. Hellman, *The Unkindest Cut: The White Commission Proposal to Restructure the Ninth Circuit*, 73 S. CAL. L. REV. 377 (2000) (criticizing White Commission proposal as uncompromising radical restructuring).

¹²⁰ Final Report, *supra* note 94, at 56.

¹²¹ *Id.* at 51-52.

¹²² *Id.*

¹²³ See *id.* at 40-47, 93-96 (Appendix C(1)).

¹²⁴ See *id.* at 40-41, 93.

¹²⁵ See *id.*

¹²⁶ See *id.* at 43.

¹²⁷ See *id.*

creates a conflict with another regional division.¹²⁸ Existing and still binding Ninth Circuit precedents along with divisional panel decisions could be overruled only within a division by the divisional *en banc* procedure.¹²⁹ The Commission further recommended the creation of "Circuit Division" for conflict resolution to replace the present Ninth Circuit limited *en banc* court.¹³⁰ The Circuit Division would have discretionary jurisdiction only to resolve direct conflicts between or among the three regional divisions.

Under the regional division organization, the appellate procedures would be as follows. From the decision of the district court, there would be an appeal-as-of-right before a three-judge panel of a "regional division" followed by a petition for rehearing to the "divisional *en banc* court."¹³¹ If and only if the decision created a conflict with a decision of another regional division could there be a discretionary rehearing before the "circuit division" for conflict resolution.¹³² Otherwise, the next step is a petition for *certiorari* in the Supreme Court.¹³³ The Commission proposed an eight year experiment with regional divisions in the Ninth Circuit.¹³⁴ At the end of the study period, the Federal Judicial Center would report to the Judicial Conference, which would then recommend to Congress whether the division arrangement should be continued with or without modification.¹³⁵

Another of the White Commission's recommendations, one that gave me a terrible *frisson* when I read it, is that Congress authorize the courts of appeals to sit in two-judge panels, at least in some cases.¹³⁶ The expectation is that two-judge panels could decide those appeals clearly controlled by well-settled precedent that presently are being decided

¹²⁸ *See id.*

¹²⁹ *See id.* at 43, 95.

¹³⁰ *See id.* at 43, 93.

¹³¹ *See id.* at 45.

¹³² *See id.*

¹³³ *See id.*

¹³⁴ *See id.* at 95 (Appendix C).

¹³⁵ In my statement to the Commission on its Draft Report, I suggested that it would be better to wait and see how this divisional concept plays out in the Ninth Circuit before generalizing the experiment in the other courts of appeals and without further compounding any Hawthorne effect that might result simply from obliging the other circuits to implement their own peculiar variations of the concept. *Statement of Thomas E. Baker to the Commission on Structural Alternatives for the Federal Courts of Appeals on the October 1998 Tentative Draft Report* (Nov. 2, 1998), available at <http://app.comm.uscourts.gov/report/comments/baker.htm> (last visited Oct. 16, 2000) (on file with author).

¹³⁶ Final Report, *supra* note 94, at 62-64, 96-98 app. C(2).

summarily without oral argument. Only if the two judges disagreed or if they determined that there would be some advantage would they bring in a third judge. Of course, the savings in judicial resources would not be a full one-third; the reclaimed judge time would amount to the time and effort the third judge now spends reading the briefs and conferring with the other two panel members only in categories of the most marginal appeals. The Commission further recommended a sunset provision that after three years the Judicial Conference would decide whether to recommend modifying or eliminating the two-judge panel authority based on field studies conducted by the Federal Judicial Center.¹³⁷

Perhaps the most original and the most intriguing idea the White Commission developed is the proposal for District Court Appellate Panels.¹³⁸ The Commission proposed that each circuit be authorized to create a "District Court Appellate Panel Service" on an experimental basis.¹³⁹ Three-judge panels would consist of two district judges and one circuit judge.¹⁴⁰ District judges could not participate in appeals from their own district.¹⁴¹ The district court appellate panels could hear only appeals in designated categories; the Commission suggested diversity cases and sentencing appeals.¹⁴² Thereafter, there would be an appeal to the court of appeals, but only with leave of the court.¹⁴³ A district court appellate panel could always transfer an appeal if it was determined to involve a significant legal issue.¹⁴⁴

It is important to note that this proposal is not based on an assumption that there presently is an excess supply of district court judgepower. Rather more insightful, the Commission's rationale is that creating more district judgeships at the base of the federal court pyramid would not place additional strain on the organizational structure of the federal court system. Additional district judges would actually be available to do both appellate work and trial work as needed.¹⁴⁵ As with its other statutory proposals, the White Commission recommends an eight year experiment, monitored by the Federal Judicial Center, followed by a

¹³⁷ *Id.* at 63-64.

¹³⁸ *Id.* at 64-66, 98-99 app. C(3).

¹³⁹ *Id.* at 64.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 65.

¹⁴² *Id.* at 64.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 64-65.

¹⁴⁵ *Id.* at 65.

recommendation from the Judicial Conference to Congress whether to continue, modify, or eliminate the district court appellate panel service.¹⁴⁶

The White Commission was not persuaded that it would be a good idea to replace the statutory appeal-as-of-right¹⁴⁷ with an appellate jurisdiction that was across the board discretionary.¹⁴⁸ However, the White Commission's discussion of discretionary review is illuminating. By distinguishing between the Supreme Court's *certiorari* authority and what the Final Report labels the "Virginia type" of discretionary review, the Commission has contributed an important clarification and focus that will help inform future debate.¹⁴⁹

Everyone is familiar with the Supreme Court variety of discretionary jurisdiction by way of the writ of *certiorari*.¹⁵⁰ The Justices have an unfettered discretion to take a case or to refuse to take a case on petition and a refusal has absolutely no precedential effect.¹⁵¹ By contrast, the more obscure Virginia variety of the writ has English common law roots and is found today in the Virginia and West Virginia state court systems as well as in the federal system in the United States Court of Appeals for

¹⁴⁶ See generally Daniel J. Meador, *Enlarging Federal Appellate Capacity Through District Level Review*, 35 HARV. J. ON LEGIS. 233 (1998) (proposing establishment of new, first level of limited review within trial court structure); Franklin S. Van Antwerpen, Jason H. Miller & Adam J. Wasserman, *Plugging Leaks in the Dike: A Proposal for the Use of Supplemental Opinions in Federal Appeals*, 20 CARDOZO L. REV. 1233 (1999) (advocating adoption of procedure which would allow district judges to write opinions explaining trial court's actions while appeal is pending). But see Richard B. Saphire & Michael E. Solimine, *Diluting Justice on Appeal?: An Examination of the Use of District Court Judges Sitting by Designation on the United States Courts of Appeals*, 28 U. MICH. J.L. REF. 351 (1995) (describing and criticizing current practice of district judges sitting on appellate panels).

¹⁴⁷ See 28 U.S.C. § 1291 (1993) (setting forth automatic right to appeal all final decisions of district courts of United States). See generally THOMAS E. BAKER, *A PRIMER ON THE JURISDICTION OF THE U.S. COURTS OF APPEALS* (Fed. Jud. Ctr. 1989).

¹⁴⁸ See generally Robert M. Parker & Ron Chapman, Jr., *Accepting Reality: The Time for Adopting Discretionary Review in the Courts of Appeals Has Arrived*, 50 SMU L. REV. 573 (1997) (arguing that solution to volume crisis of federal courts of appeals is to decrease number of cases that are filed in district courts or not to permit appeals from all final judgments); Donald P. Lay, *A Proposal for Discretionary Review in the Federal Courts of Appeals*, 34 SW. L.J. 1151 (1981) (contending that because federal appellate courts are so overburdened, time has come to ponder question of exercising discretionary jurisdiction); William L. Reynolds & William M. Richman, *Studying Deck Chairs on the Titanic*, 81 CORNELL L. REV. 1290 (1996) (asserting that expansion of number of judgeships will best resolve rapidly growing caseload).

¹⁴⁹ Final Report, *supra* note 94, at 70-72.

¹⁵⁰ See 28 U.S.C. §§ 1254, 1257 (1993) (conferring Supreme Court review by writ of *certiorari* for federal courts of appeals and state supreme courts respectively).

¹⁵¹ *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950), *denying cert.* to *Baltimore Radio Show v. State*, 67 A.2d 497 (Md. 1949).

the Armed Services.¹⁵² The Virginia variety of the writ involves discretion of a different kind: the appellate determination to grant or deny leave to appeal contemplates an examination of the merits and a denial means that the appeal does not present an issue of reversible error.¹⁵³ Arguably, this second variety is more compatible with the history and tradition of the courts of appeals.

Thus, the White Commission has now taken its place at the end of the long line of studies of the courts of appeals. It has advanced the debate in many of its particulars. As was true of its predecessors, and as will be true of its probable successors, the White Commission gave us some ideas that were old, some ideas that were new, some ideas that were borrowed, and some ideas that really blew. What *should* become of these ideas is the subject of this Symposium. What *will* become of these ideas is up to the Congress.

A PERSONAL POSTSCRIPT

The rest of this most excellent Symposium considers the White Commission Final Report, so I have reached the end of this Chronology, at least for now. I am confident, however, that what is past is prologue. Most likely some as-yet-to-be-named committee or commission will line up next, behind these others, and take its turn and place its report on the courts of appeals' bookshelf.¹⁵⁴ As someone who first got in this line back in 1981¹⁵⁵ and who over the years since has stood alongside the NYU Study,¹⁵⁶ the Federal Courts Study Committee,¹⁵⁷ the Federal Judicial Center Report,¹⁵⁸ the Judicial Conference Long Range Plan,¹⁵⁹ and the White Commission,¹⁶⁰ I have come to appreciate the perspicacity of Arthur T. Vanderbilt's oft-quoted cliché that "judicial reform is no sport

¹⁵² Final Report, *supra* note 94, at 71.

¹⁵³ *Id.* I believe that the intramural procedural shortcuts already establish a *de facto*, if not a *de jure*, system of discretionary appellate jurisdiction that violates the spirit, if not the letter of the appeal-as-of-right statute. See Baker, *supra* note 84, at 33.

¹⁵⁴ See Thomas E. Baker, *2020 Year-end Report on the Judiciary by the Chief Justice of the United States*, 24 PEPP. L. REV. 861 (1997) (predicting changes that will occur in federal court system in first two decades of twenty-first century).

¹⁵⁵ Thomas E. Baker, *Precedent Times Three: Stare Decisis in the Divided Fifth Circuit*, 35 SW. L. J. 687 (1981).

¹⁵⁶ See *supra* note 49.

¹⁵⁷ See *supra* note 63.

¹⁵⁸ See *supra* note 77.

¹⁵⁹ See *supra* note 82.

¹⁶⁰ See *supra* note 103.

for the short-winded.”¹⁶¹

¹⁶¹ MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION: A SURVEY OF THE EXTENT TO WHICH THE STANDARDS OF THE AMERICAN BAR ASSOCIATION FOR IMPROVING THE ADMINISTRATION OF JUSTICE HAVE BEEN ACCEPTED THROUGHOUT THE COUNTRY xix (Arthur T. Vanderbilt ed. 1949). See generally Alan V. Lowenstein, *The Legacy of Arthur T. Vanderbilt to the New Jersey Bar*, 51 RUTGERS L. REV. 1319 (1999) (discussing important contributions to American jurisprudence made by Arthur T. Vanderbilt).
