

# Revisiting and Confronting the Federal Judiciary Capacity “Crisis”: Charting a Path for Federal Judiciary Reform

Peter S. Menell\* and Ryan Vacca\*\*

*The modern federal judiciary was established well over a century ago by the Judiciary Act of 1891. Over the next seventy years, the structure and core functioning of the judiciary largely remained unchanged apart from gradual increases in judicial slots. By the mid-1960s, jurists, scholars, practitioners, and policy-makers had voiced grave concerns about the capacity of the federal system to function effectively in the face of ever-increasing caseloads.*

*Heeding calls for reform, in 1972 Congress charged a commission chaired by Senator Roman Hruska to study the functioning of the federal courts and recommend reforms. After extensive study, the Hruska Commission concluded that “[n]o part of the federal judicial system has borne the brunt of . . . increased demands [to protect individual rights and basic liberties and resolve difficult issues affecting the financial structure and commercial life of the nation] more than the courts of appeals.”<sup>1</sup> The Commission called attention to the Supreme Court’s capacity constraints and the risks to the body of national law posed by the growing number of circuit conflicts.*

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\* Koret Professor of Law and Director, Berkeley Center for Law & Technology, University of California, Berkeley, School of Law.

\*\* Professor of Law, University of New Hampshire School of Law.

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1. ROMAN L. HRUSKA ET AL., COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE I (1975) [hereinafter HRUSKA COMMISSION STRUCTURE REPORT].

*Based on these findings, the Hruska Commission recommended that Congress establish a National Court of Appeals to alleviate the strains on the Supreme Court and regional courts of appeals. The Supreme Court would have authority to transfer cases to the new intermediate appellate court and regional circuit courts would have authority to transfer cases posing circuit splits. The proposal was initially greeted with enthusiasm but ultimately failed. Apart from the substantial repeal of three-judge district courts, the division of the Fifth Circuit (creating the Eleventh Circuit), the creation of specialty courts for bankruptcy and patent appeals, and increases in the number of district court and appellate court slots, the fundamental structure of the federal appellate system has remained the same.*

*Does this mean that the problems that galvanized attention half a century ago have abated or been addressed through other means? The data on caseloads and capacity constraints suggest otherwise. District and appellate court caseloads per judge have continued to mount and the number of certiorari petitions has more than doubled. The major impediments to judiciary reform are political, institutional, and human. Judiciary reform has become a legislative third rail, too dangerous for politicians, or even academics, to discuss.*

*This Article revisits and confronts the growing caseload and congestion problems plaguing the federal judiciary. It begins by tracing the history and political economy surrounding judiciary reform. It then updates data on caseloads, processing times, certiorari petitions, en banc review, and other measures of judicial performance, revealing expanding caseloads and growing complexity and fragmentation of federal law. Part III explores the political, institutional, and human causes of the logjam over judiciary reform and offers an antidote: a commission tasked with developing a judiciary reform act that would not go into effect until 2030. The “2030 Commission” members would not know the identity or party of the President or who controls the Senate. Furthermore, any federal judges involved in the process likely would have taken senior status or be retired by the time any reforms went into effect and thus presumably would be less concerned about how reform proposals might affect them personally. By delaying implementation, the 2030 Commission members would effectively work behind a veil of ignorance that would enable them to focus on the best interests of future generations of citizens (and judges and practitioners) while at the same time drawing upon their own experiences. The article concludes by outlining a judiciary reform agenda for the 2030 Commission.*

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## INTRODUCTION

Nearly a century ago, Justice Felix Frankfurter and Professor James M. Landis remarked that “great judiciary acts, unlike great poems, are not written for all time.”<sup>2</sup> As democracies evolve through demographic, social, technological, and political changes, their judicial systems must progress as well. From the time of the American Revolution through the mid-1920s, the United States reformed the federal judiciary roughly every twenty-five years, although each reform was hard-fought.<sup>3</sup> Nearly half a century after Frankfurter and Landis made their profound observation, Professor Paul Carrington observed that “we have now set a new record for consecutive years of restraint from tinkering with the system.”<sup>4</sup>

Professor Carrington’s 1969 article provided powerful empirical support for the mounting sentiment among jurists, scholars, practitioners, and policy-makers that the federal judiciary was struggling to address the growing caseloads and complexity of the federal judicial docket.<sup>5</sup> Heeding calls for reform from the American Bar Association and the Federal Judicial Center,<sup>6</sup> in 1972 Congress charged a bipartisan and cross-branch commission chaired by Senator Roman Hruska to study the functioning of the appellate courts and recommend reforms. After three years of extensive study and hearings, the Hruska Commission concluded that

No part of the federal judicial system has borne the brunt of . . . increased demands [to protect individual rights and basic liberties and resolve difficult issues affecting the financial structure and commercial life of the nation] more than the courts of appeals. Since 1960 the number of cases filed in these courts has increased 321 percent, while the number of active judges authorized by the Congress to hear these cases increased only 43 percent.<sup>7</sup>

The Commission called attention to the Supreme Court’s capacity constraints and the risks to the body of national law posed by the growing number of circuit conflicts.<sup>8</sup>

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2. FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 107 (1928).

3. *See* Judiciary Act of 1789, ch. 20, 1 Stat. 73; Act of Feb. 13, 1801, ch. 4, 2 Stat. 89; Act of Mar. 3, 1837, ch. 34, 5 Stat. 176; Judiciary Act of 1875, ch. 137, 18 Stat. 470; Circuit Court of Appeals Act of 1891, ch. 517, 26 Stat. 826; Judiciary Act of 1925, ch. 229, 43 Stat. 936.

4. *See* 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, 543 (1969).

5. *See generally id.* (examining data on congestion in federal courts of appeal).

6. *See* AM. BAR FOUND., *ACCOMMODATING THE WORKLOAD OF THE UNITED STATES COURTS OF APPEALS* 1 (1968); FED. JUDICIAL CTR., *REPORT OF THE STUDY GROUP ON THE CASE LOAD OF THE SUPREME COURT* 17 (1972) [hereinafter FREUND STUDY GROUP REPORT] (recommending, among other proposals, that the Supreme Court’s screening function be delegated to a new national appellate court).

7. HRUSKA COMMISSION STRUCTURE REPORT, *supra* note 1.

8. *See id.* at 5–10.

Based on these findings, the Hruska Commission recommended that Congress establish a National Court of Appeals consisting of seven Article III judges to alleviate the strains on the Supreme Court and regional courts of appeals. The Supreme Court would have authority to transfer cases to the new intermediate appellate court. Regional circuit courts would have authority to transfer cases involving circuit splits.

The proposal was initially greeted with enthusiasm, but it ultimately failed to survive the legislative gantlet. No major structural changes to the federal appellate system came to pass then or since. Apart from the substantial repeal of three-judge district courts,<sup>9</sup> the division of the Fifth Circuit (creating the Eleventh Circuit),<sup>10</sup> the creation of specialty courts for bankruptcy and patent appeals,<sup>11</sup> and increases in the number of district court and appellate court slots,<sup>12</sup> the fundamental structure of the federal appellate system has remained the same.

We are now another half century past Professor Carrington's clarion call. Have the problems that galvanized attention many decades ago been abated or addressed through other means? The data on caseloads and capacity constraints suggest otherwise: district and appellate court caseloads per judge have continued to mount and the number of certiorari petitions has more than doubled.<sup>13</sup> The major impediments to judiciary reform are political, institutional, and human. Judiciary reform has become a legislative third rail, too dangerous for politicians—or even academics—to discuss.<sup>14</sup>

9. See Act of Aug. 12, 1976, Pub. L. No. 90-297, 90 Stat. 1119 (codified as amended at 28 U.S.C. § 2284 (2018)) (repealing 28 U.S.C. § 2282).

10. See Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (codified as amended at 28 U.S.C. § 41 (2018)); Robert A. Ainsworth, Jr., *Fifth Circuit Court of Appeals Reorganization Act of 1980*, 1981 BYU L. REV. 523, 531.

11. See *infra* Parts I.E.2, I.E.5, I.G.4.

12. See *infra* Parts I.E.1, I.H.3.

13. See RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 345 (1996) (observing that “one consequence of the heavy caseload pressures on the courts of appeals has been an increase in the deference paid by those courts to the rulings made by district judges”); Carrington, *supra* note 4, at 554 (hypothesizing that “[p]ressure of time may create a tendency to give greater deference to primary decision makers”); Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109, 1139 (2011) (finding that a surge of administrative agency cases into two circuit courts resulted in lightened appellate scrutiny in civil cases, suggesting an overload effect and “silent splits” in legal standards); Patricia M. Wald, *Thoughts on Decisionmaking*, 87 W. VA. L. REV. 1, 10 (1984) (asserting that “time and docket pressures very definitely constrict the judge”); *infra* Part II.

14. We note the exception that may prove the rule. Shortly after his appointment to the Seventh Circuit, Judge Richard A. Posner, the prolific and provocative former law professor, wrote *THE FEDERAL COURTS: CRISIS AND REFORM* (1985). A decade later, he updated his views. See POSNER, *supra* note 13.

More recently, Professor Steven Calabresi and Shams Hirji proposed substantial increases in the number of federal jurists. They make no effort to camouflage the political motivation driving their proposal: to undo President Barack Obama's judicial legacy. See STEVEN G. CALABRESI & SHAMS HIRJI, *PROPOSED JUDGESHIP BILL 1* (2017), <https://thinkprogress.org/wp-content/uploads/2017/11/calabresi-court-packing-memo.pdf/> [<https://perma.cc/MUW8-JL52>]. See also Richard Primus, *Rulebooks, Playgrounds, and Endgames: A Constitutional Analysis of the Calabresi-Hirji Judgeship Proposal*, HARV. L. REV. BLOG (Nov. 24, 2017),

This Article revisits and confronts the growing caseload and congestion problems plaguing the federal judiciary. Part I traces the history and political economy surrounding judiciary reform. Part II then updates data on caseloads, processing times, certiorari petitions, en banc review, and other measures of judicial performance, revealing expanding caseloads and growing complexity and fragmentation of federal law. Part III explores the political, institutional, and human causes of the logjam over judiciary reform and offers an antidote: a commission tasked with developing a judiciary reform act that would not go into effect until 2030. The “2030 Commission” members would not know the identity or party of the President or who controls the Senate. Furthermore, any federal judges involved in the process likely would have taken senior status or be retired by the time any reforms went into effect and thus presumably would be less concerned about how reform proposals might affect them personally. By delaying implementation, the 2030 Commission members would, in effect, be behind a veil of ignorance that would enable them to focus on the best interests of future generations of citizens (and judges and practitioners) while simultaneously drawing upon their own experience. The Article concludes by outlining a judiciary reform agenda for the 2030 Commission.

## I.

### EVOLUTION OF THE FEDERAL JUDICIARY<sup>15</sup>

The evolution of the federal judiciary reflects the challenges of balancing state and federal political interests, mitigating other political power struggles, and scaling to relieve the pressures of expanding geography, increasing population, massive economic growth, technological advance, and societal change.

Article III of the U.S. Constitution grants Congress broad authority to establish and reform the federal judiciary. Section 1 provides for “one Supreme Court” and for judges to receive life tenure and to be insulated from political influence.<sup>16</sup> The Constitution authorizes Congress to designate the number of Supreme Court members and to “ordain and establish” “such inferior Courts as [it] may from time to time.”<sup>17</sup> Section 2 provides that

judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties

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<https://blog.harvardlawreview.org/rulebooks-playgrounds-and-endgames-a-constitutional-analysis-of-the-calabresi-hirji-judgeship-proposal/> [<https://perma.cc/7CKW-8DAY>] (highlighting the political economy challenges of judiciary reform). The Constitution’s Article III requirement that federal judges have lifetime appointments makes the timing of judicial reform especially charged.

15. This section draws on PETER S. MENELL & RYAN VACCA, *FEDERAL JUDICIARY REFORM FOR THE 21ST CENTURY* ch. 1 (unpublished manuscript) (on file with author).

16. See U.S. CONST., art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).

17. *Id.*

made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another state;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.<sup>18</sup>

From the time of the American Revolution through the early twentieth century, Congress reformed the federal judiciary at approximately twenty-five-year intervals. The reform process, however, was bitterly fought and changes were hard-won, notwithstanding pressing challenges driven by a rapid expansion of the nation's geographic size, population, and economy. Since the 1920s, however, judiciary reform has proven far more elusive. While there has been a variety of reforms—increases in judicial slots and budget, the division of the Fifth Circuit to create the Eleventh Circuit, the authorization of circuit-based Bankruptcy Appellate Panels, and the establishment of the Federal Circuit—the fundamental structure of the federal system has remained the same. Despite substantial hand-wringing and studies recommending reform, there has been no significant legislative change since Congress last increased the number of judicial slots in the early 1990s.

#### A. *Early History of the Federal Judiciary*

Deep divisions among the nation's founders manifested in the struggle to establish the federal judiciary. These divisions hampered the establishment of a coherent intermediate appellate system for a century.

At the nation's founding and continuing to some extent to this day, Federalists and Anti-Federalists have divided over the scope of federal power. Federalists advocated a substantial national government and a strong lower federal judiciary. Anti-Federalists sought to weaken federal power, including judicial authority.<sup>19</sup> The latter advocated the passage of a Bill of Rights to protect citizens against the tyranny of national government and preferred judicial power to reside with the states. The clash of perspectives played out in the First Congress in 1789, resulting in a grand compromise that produced the Bill of Rights and a limited system of lower federal courts tied to state boundaries.<sup>20</sup>

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18. U.S. CONST., art. III, § 2.

19. See generally RUSSELL R. WHEELER & CYNTHIA HARRISON, *CREATING THE FEDERAL JUDICIAL SYSTEM* (3rd ed. 2005) (tracing the history of the federal judiciary).

20. Reflecting the complexity and dynamism of the issues and the times, James Madison, an early Federalist and advocate for ratification of the U.S. Constitution as the foundation for a strong national power, see *THE FEDERALIST* NO. 10 (James Madison), broke with Alexander Hamilton and the Federalist Party in 1791 and organized the Democratic-Republican Party with Thomas Jefferson. He played a central role in drafting and ratifying the Bill of Rights, a cornerstone of the Anti-Federalists' effort to weaken national power.



The 1789 Judiciary Act established three judicial levels: district courts, circuit courts, and, as set forth in the Constitution, “one supreme Court.”<sup>21</sup> The district court and Supreme Court levels corresponded roughly to their modern versions. Each state had a single district court. District court jurisdiction, however, was far narrower than the Constitution authorized. Congress empowered federal district courts to adjudicate admiralty, diversity of citizenship, federal criminal, and U.S. plaintiff cases. The original U.S. Supreme Court had a Chief Justice and five associate justices.<sup>22</sup>

The early circuit courts, however, were very different from their contemporary counterparts. The jurisdiction of the circuit courts was limited to cases involving diversity of citizenship, major federal crimes, cases brought by the U.S. government, and larger civil and admiralty cases. The three circuit courts (one for northeastern districts, one for central Atlantic states, and one for southern states) sat twice each year in one or two specified cities of each district. The circuit panel comprised two Supreme Court justices assigned to that circuit (hence the phrase “riding circuit”) and the district judge in that district.<sup>23</sup> There was initially only one district judge authorized for each district (state).

Soon after the enactment of the 1791 legislation, the Supreme Court justices protested riding circuit, prompting Attorney General Edmund Randolph to recommend that Congress eliminate circuit riding.<sup>24</sup> Congress declined to act on that request, but in 1793 approved legislation providing that only one of the Supreme Court justices together with the district judge could sit on the circuit court.<sup>25</sup> The justices renewed their requests over the next several years to no avail.<sup>26</sup>

In the election of President John Adams, an ardent Federalist, in 1796, the tide gradually shifted toward expansion of the federal judiciary.<sup>27</sup> Following a dramatic struggle over several legislative sessions,<sup>28</sup> Federalists eventually succeeded in passing judiciary reform legislation just as the Adams presidency was coming to an end. The 1801 Judiciary Act eliminated one Supreme Court

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21. Judiciary Act of 1789, ch. 20, Pub. L. No. 1-20, 1 Stat. 73; U.S. CONST., art. III, § 1.

22. See Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1756–69 (2003).

23. Circuit riding brought federal justices into contact with citizens throughout the nation and familiarized justices with trying cases and deciding appeals. See Roger C. Cramton, *Reforming the Supreme Court*, 95 CALIF. L. REV. 1313, 1326 (2007); Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127, 130–31 (1967).

24. See Glick, *supra* note 22, at 1764–78; Kathryn Turner, *Federalist Policy and the Judiciary Act of 1801*, 22 WM. & MARY Q. 3, 3, 5–6 (1965).

25. Judiciary Act of 1793, ch. 22, Pub. L. No. 2-22, 1 Stat. 333.

26. See Turner, *supra* note 24, at 6–7.

27. See *id.* at 7–11.

28. See *id.* at 10–21.

seat (to take effect at the next vacancy) and created sixteen judgeships for six circuit courts, which out-going President Adams filled as his final act.<sup>29</sup>

Soon after President Thomas Jefferson took office in an election that brought Republican majorities to both Houses, Congress repealed the Judiciary Act of 1801<sup>30</sup> and enacted the Judiciary Act of 1802. The latter Act restored the sixth Supreme Court seat<sup>31</sup> and retained the six regional circuits with some territorial adjustments, but without the creation of any new judgeships.<sup>32</sup> Each circuit court was assigned one Supreme Court justice and the local district judge. Therefore, Supreme Court justices would have to return to circuit riding. Since the circuit court panels had only two members, the panel could certify to the Supreme Court any question on which they disagreed. Furthermore, the 1802 Act provided that a quorum of only one judge could sit as the circuit court. This flexibility, as well as subsequent legislation,<sup>33</sup> gradually led to the decline of circuit riding, but it remained a tremendous burden into the late nineteenth century.<sup>34</sup>

As the United States' geographical reach expanded and a national economy developed, judiciary reform remained a perennial political issue.<sup>35</sup> In 1807, Congress added a seventh Supreme Court seat and established the Seventh Circuit covering Ohio, Kentucky, and Tennessee.<sup>36</sup> During the 1820s and 1830s, Congress and Presidents John Quincy Adams and Andrew Jackson wrangled over judiciary reform.<sup>37</sup> In his first annual message to Congress in 1829, President Jackson emphasized that one-fourth of the nation fell outside of the

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29. Act of Feb. 13, 1801, ch. 4, Pub. L. No. 6-4, 2 Stat. 89. *See generally* Kathryn Turner, *The Midnight Judges*, 109 U. PA. L. REV. 494 (1961) (describing the rush to appoint Federalist judges at the end of Adams's presidency).

30. *See* Jerry W. Knudson, *The Jeffersonian Assault on the Federalist Judiciary, 1802-1805: Political Forces and Press Reaction*, 14 AM. J. LEGAL HIST. 55, 55 (1970).

31. Act of Apr. 29, 1802, ch. 31, Pub. L. No. 7-31, 2 Stat. 156. The Supreme Court membership remained unchanged because no seats became vacant during the short life span of the 1801 legislation. MEMBERS OF THE SUPREME COURT OF THE UNITED STATES <https://www.supremecourt.gov/about/members.aspx> [<https://perma.cc/7ATX-8GE4>].

32. *Id.* The First Circuit covered New Hampshire, Massachusetts, and Rhode Island. The Second Circuit covered New York, Vermont, and Connecticut. The Third Circuit covered Pennsylvania and New Jersey. The Fourth Circuit covered Delaware and Maryland. The Fifth Circuit covered Virginia (including West Virginia) and North Carolina. The Sixth Circuit covered South Carolina and Georgia. Maine, Kentucky, and Tennessee were outside of the circuits. *See* WHEELER & HARRISON, *supra* note 19, at 10.

33. *See, e.g.*, Act of June 17, 1844, ch. 96 § 2, 5 Stat. 676, 676.

34. *See* Glick, *supra* note 22, at 1786-1829. Circuit riding was largely eliminated by the Evarts Act of 1891, *see infra* Part I.B.1, and formally abolished by the Judiciary Act of 1911, ch. 231, 36 Stat. 1087.

35. *See generally* Curtis Nettels, *The Mississippi Valley and the Federal Judiciary, 1807-1837*, 12 MISS. VALLEY HIST. REV. 202, 202 (1925) (describing the early judicial history of the Mississippi Valley states).

36. Act of Feb. 24, 1807, ch. 16, 2 Stat. 420.

37. *See* Nettels, *supra* note 35, at 224-26.

geographic span of the circuit courts.<sup>38</sup> On several occasions during that era either the House or the Senate approved a plan adding a new circuit court and an additional Supreme Court seat. But each time, parties opposed to the president, who would fill the new judicial slots, defeated the legislation.<sup>39</sup> The logjam eventually broke in 1837. Congress passed legislation reorganizing the Seventh Circuit to encompass Illinois, Indiana, Michigan, and Ohio, adding an Eighth Circuit (covering Kentucky, Tennessee, and Missouri), adding a Ninth Circuit (Alabama, Arkansas, Louisiana, and Mississippi), and creating two new Supreme Court seats.<sup>40</sup> Congress added a California Circuit in 1855, five years after California became a state.<sup>41</sup>

In his first State of the Union message to Congress in 1861, President Abraham Lincoln declared that “the country generally has outgrown our present judicial system.”<sup>42</sup> He noted that the eight recently admitted states had never had circuit courts “attended by supreme judges” and that adding enough justices to the Supreme Court to accommodate all the circuit courts that were needed would make the Supreme Court “altogether too numerous for a judicial body of any sort.”<sup>43</sup> Lincoln proposed fixing the Supreme Court at a “convenient number,” irrespective of the number of circuits, and dividing the country “into circuits of convenient size.”<sup>44</sup> The circuit courts could be served by either Supreme Court justices or judges appointed specifically for the circuit courts.<sup>45</sup>

In 1863, Congress added a tenth Circuit comprising California and Oregon and added a tenth seat on the Supreme Court.<sup>46</sup> After the Civil War, Congress redrew the circuit court boundaries and reduced the number of circuits back to nine.<sup>47</sup> The 1866 legislation also provided for the gradual reduction of Supreme Court seats from ten to seven.<sup>48</sup> Three years later, Congress set the number of

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38. FED. JUDICIAL CTR., LANDMARK LEGISLATION: EIGHTH AND NINTH CIRCUITS, <https://www.fjc.gov/history/legislation/landmark-judicial-legislation-text-document-4/> [<https://perma.cc/GQ2K-3L4F>].

39. See Nettels, *supra* note 35, at 212–24.

40. See Act of Mar. 3, 1837, ch. 34, Pub. L. No. 24-34, 5 Stat. 176.

41. See Act of Mar. 2, 1855, ch. 142, 10 Stat. 631.

42. See 5 Abraham Lincoln, *Message to Congress of Dec. 3, 1861*, in THE COLLECTED WORKS OF ABRAHAM LINCOLN 41–42 (Roy P. Basler ed., 1953).

43. *Id.*

44. *Id.*

45. *Id.*

46. Act of Mar. 3, 1863, ch. 100, Pub. L. No. 37-100, 12 Stat. 794 (“An Act to provide Circuit Courts for the Districts of California and Oregon.”). Due to illnesses, vacancies, and the repeal of the tenth slot, the Supreme Court convened as a ten-member court for only one week in December 1863. See Carl B. Swisher, *Lincoln’s Appointments to the Court*, 5 OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES 811, 839 (2010); FED. JUDICIAL CTR., LANDMARK LEGISLATION: TENTH CIRCUIT, <https://www.fjc.gov/history/legislation/landmark-judicial-legislation-text-document-6/> [<https://perma.cc/GQ2K-3L4F>].

47. Judiciary Act of July 23, 1866, ch. 210, 14 Stat. 209.

48. See STANLEY I. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS 48–63 (1968).

Supreme Court justices at nine,<sup>49</sup> where it has remained. The 1869 legislation also established separate circuit court judgeships, which attempted to create a more efficient allocation of judicial responsibilities.<sup>50</sup> Nonetheless, the 1869 reforms proved inadequate to address the mushrooming appellate backlog.<sup>51</sup>

In 1875, Congress expanded federal jurisdiction to encompass federal question cases alleging more than \$500 in controversy.<sup>52</sup> Growing dockets and budgetary pressures placed increasing strain on the federal judiciary. Much of the burden fell to the sixty-five-odd district judges, who, by the 1880s, were hearing close to 90 percent of the appeals in addition to their large and growing trial court responsibilities.<sup>53</sup> Furthermore, the Supreme Court was obliged to hear almost all cases in which litigants sought high court review, resulting in a massive logjam at the top of the federal judiciary pyramid.<sup>54</sup>

### B. Establishment of the Modern Federal Judicial System

A century after its establishment, the federal judiciary was in crisis.<sup>55</sup> Supreme Court justices were no longer circuit riding to a significant extent.<sup>56</sup> The number of intermediate circuit judgeships was inadequate to handle the rising appellate caseload, adding substantial additional burden to an overextended district judge corps. Moreover, broad access to the Supreme Court diminished its capacity to review cases in a timely manner. Dissatisfaction with the operation of the federal judiciary<sup>57</sup> ultimately led to passage of the Circuit Court of Appeals Act of 1891,<sup>58</sup> commonly known as the Evarts Act,<sup>59</sup> which laid the foundation for the modern circuit court system.

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49. Judiciary Act of 1869, ch. 22, 16 Stat. 44.

50. See KUTLER, *supra* note 48, at 58–59.

51. See *id.* See generally William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863–1875*, 13 AM. J. LEGAL HIST. 333 (1969) (analyzing the expansion of federal courts' power in the Reconstruction era).

52. Judiciary Act of 1875, ch. 137, 18 Stat. 470.

53. See FRANKFURTER & LANDIS, *supra* note 2, at 60, 79 (reporting that the number of cases pending in the federal courts rose 86 percent—from 29,000 to 54,000—between 1873 and 1890).

54. By 1890, the Supreme Court had 1816 cases on its docket, including 623 cases filed that year. See FRANKFURTER & LANDIS, *supra* note 2, at 101–02; Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1650 (2000).

55. See PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 37 (3d ed. 1988) (referring to the post-Civil War period as “the nadir of federal judicial administration”).

56. See Glick, *supra* note 24, at 1818–29; William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1, 9 (1986).

57. See BATOR, *supra* note 55, at 37.

58. See Act of Mar. 3, 1891 (Evarts Act), ch. 517, Pub. L. No. 51-517, 26 Stat. 826; WHEELER & HARRISON, *supra* note 19, at 16–18; ERWIN C. SURRENCY, HISTORY OF THE FEDERAL COURTS ch. 8 (1987).

59. The bill was named for Senate Judiciary Chairman William Evarts, who orchestrated the ultimate compromise notwithstanding his earlier resistance to separate courts of appeals. The final legislation favored the Federalist view. See WHEELER & HARRISON, *supra* note 19, at 17–18.

### 1. *The Evarts Act of 1891*

The Evarts Act established a court of appeals in each of the nine regional circuits<sup>60</sup> and authorized the appointment of nineteen circuit court judges, three for the Second Circuit and two for each of the others. The Act authorized the circuit's assigned Supreme Court justice, the circuit judges, or district judges to convene three-member panels to preside over appeals from the district courts. These panels were courts of last resort for diversity suits and patent, revenue, criminal, and admiralty cases. The appeals court could, however, certify cases to the Supreme Court, and the Supreme Court justices could also grant a writ of certiorari.

Although certiorari was initially envisioned as a fallback basis for Supreme Court review—with only two petitions granted in the two years following passage of the Evarts Act—it would in time transform the Supreme Court's process for reviewing cases.<sup>61</sup> The Evarts Act immediately relieved the pressure on the Supreme Court: new cases at the Supreme Court fell from 623 in 1890 to 275 in 1892.<sup>62</sup> Furthermore, the Act largely released Supreme Court justices from the responsibility of circuit riding. The Evarts Act continued the role of circuit courts operating as trial courts alongside the district courts.

### 2. *Bankruptcy Act of 1898*

The nation's founders authorized Congress to establish a uniform bankruptcy system,<sup>63</sup> but early legislative efforts to establish such a system proved unpopular and short-lived.<sup>64</sup> Congress eventually established an enduring bankruptcy regime in 1898.<sup>65</sup> The legislation empowered U.S. district courts to adjudicate bankruptcy matters, subject to appellate review in the circuit courts

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60. The D.C. Circuit Court of Appeals was not among the original circuit courts of appeals authorized by the Evarts Act. See John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical Review*, 92 VA. L. REV. 375, 386 (2006). Although the "Circuit Court of the District of Columbia" traces back to the early nineteenth century, serving as both a federal circuit court and a local court for the District of Columbia, its functions and stature have significantly grown. See *id.* at 377–82. When the Evarts Act was passed, the administrative state was in its infancy and the Circuit Court of the District of Columbia was seen to have a local character. See *id.* at 386. The modern D.C. Circuit was eventually brought into the modern federal appellate court system in 1934. See *id.* at 387. See also Act of June 7, 1934, ch. 426, 48 Stat. 926 (codified at 28 U.S.C. § 43). The D.C. Circuit was formally added to the U.S. Code in 1948. See Act of June 25, 1948, ch. 646, § 41, 62 Stat. 869, 870 (codified at 28 U.S.C. § 41).

61. RICHARD H. FALLON ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 37 (4th ed. 1996) (1953); Hartnett, *supra* note 54, at 1656–57.

62. See FED. JUDICIAL CTR., *U.S. CIRCUIT COURTS OF APPEALS*, <https://www.fjc.gov/history/timeline/u.s.-circuit-courts-appeals-0/> [<https://perma.cc/8SQS-SZ9S>].

63. See U.S. CONST. art. I, § 8, cl. 4.

64. See Act of Apr. 4, 1800, ch. 19, 2 Stat. 19 (repealed 1803); Act of Aug. 14, 1841, ch. 9, 5 Stat. 440 (repealed 1843); Act of Mar. 2, 1867, ch. 176, 14 Stat. 517 (amended 1874; repealed 1878); CHARLES WARREN, *BANKRUPTCY IN UNITED STATES HISTORY* 13 (1935).

65. See Bankruptcy Act of 1898, ch. 541, 30 Stat. 544. This regime was reformed in 1978. See *infra* Part I.E.2.

and the Supreme Court. The Bankruptcy Act authorized district courts to appoint a referee in bankruptcy to carry out many of its bankruptcy functions subject to review by a district judge.

### 3. *Three-Judge Court Acts*

Beginning in 1903, Congress passed a series of laws calling for three-judge district courts to hear certain cases of special importance, which would then go on direct appeal to the Supreme Court. The Expediting Act of 1903 concerned civil antitrust cases brought by the United States.<sup>66</sup> In 1910, Congress required use of the three-judge courts as a safeguard against a single federal judge enjoining the operation of a state statute based on the district judge's determination that the statute violated the U.S. Constitution.<sup>67</sup> The Three-Judge Court Act called for the chief judge of the circuit court of appeals to appoint a three-judge panel—comprising a circuit judge, the district judge to whom the case was initially assigned, and a second district judge—to resolve whether to grant or deny injunctive relief when a complaint alleged invalidation of a state statute on federal constitutional grounds.<sup>68</sup> The parties could appeal that decision directly to the U.S. Supreme Court. The Urgent Deficiencies Act of 1913 adopted the three-judge district court and the direct appeal device for judicial review of Interstate Commerce Commission orders.<sup>69</sup> Congress recognized at the time that these jurisdictional rules added to the work of already overburdened courts.<sup>70</sup>

### 4. *Judicial Code of 1911*

In 1911, Congress enacted the Judicial Code,<sup>71</sup> which consolidated all judiciary statutes and supplanted the Evarts Act. It carried over the language from Section 2 of the Evarts Act stating that a circuit court of appeals in each circuit “shall consist of three judges.”<sup>72</sup> Nonetheless, Section 118 expanded the number of appellate slots on the Second, Seventh, and Eighth Circuits to four judgeships, thereby creating some confusion regarding whether the circuit courts

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66. This expedited procedure initially applied only to suits in equity brought by the United States under the antitrust laws where the Attorney General certified that the case was of “general public importance.” See Act of Feb. 11, 1903, ch. 544, 32 Stat. 823.

67. See Act of June 18, 1910, ch. 309, § 17, 36 Stat. 539, 557. See generally Comment, *The Three-Judge Court Act of 1910: Purpose, Procedure and Alternatives*, 62 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 205 (1971); Note, *The Three-Judge District Court: Scope and Procedure under Section 2281*, 77 HARV. L. REV. 299 (1963).

68. See Act of June 18, 1910, ch. 309, § 17, 36 Stat. 539, 557.

69. See Act of Oct. 22, 1913, ch. 32, Pub. L. No. 63-32, 38 Stat. 208, 220. The statute was later amended to subject review of several other federal administrative agency orders to the three-judge procedure. See Bennett Boskey & Eugene Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals*, 121 F.R.D. 81, 84–85 (1988).

70. See S. REP. NO. 63-161, at 2 (1914).

71. See Act of Mar. 3, 1911, ch. 231, Pub. L. No. 61-475, 36 Stat. 1087.

72. See *id.* § 117.

could be characterized as “consist[ing] of three judges.”<sup>73</sup> Further legislation the following year<sup>74</sup> amended Section 118 of the Judicial Code to provide that

[t]he circuit judges in each circuit shall be judges of the circuit court of appeals in that circuit, and it shall be the duty of each circuit judge in each circuit to sit as one of the judges of the circuit court of appeals in that circuit from time to time according to law.<sup>75</sup>

The 1911 Act abolished the responsibility for circuit courts to sit as trial courts.<sup>76</sup>

### C. 1920s–1960s: Dealing with Docket Growth and Complexity

The Evarts Act transformed the federal judiciary. It substantially relieved the Supreme Court’s overloaded docket and provided for an orderly system of appellate review. As the nation and the economy continued to grow, and Congress expanded the role of the federal government, federal dockets increased apace.

The new regional appellate system provided a flexible structure for accommodating growth in federal adjudication, up to a point. Expansion in the number of appellate judges increased the appellate system’s capacity. Establishment of en banc review eased the Supreme Court’s burden by enabling courts of appeals to resolve intracircuit splits. But with the mounting growth of federal caseloads and the growing extent and complexity of federal law, the federal judiciary again reached a crisis by the late 1960s.

#### 1. Expanding Judgeships

After the creation of the circuit courts of appeals, each circuit had only two appellate judges with the exception of the Second Circuit (allotted three), which meant that panel decisions reflected the views of all members of each circuit. Congress gradually expanded the number of district and appellate court slots throughout the early twentieth century.<sup>77</sup> Even as Congress expanded the number

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73. See *id.* § 118.

74. See Act of Jan. 13, 1912, ch. 9, Pub. L. No. 62-54, 37 Stat. 52 (codified at 28 U.S.C. § 213) (repealed in 1982).

75. *Id.* Senator George Sutherland, who managed the bill in the Senate, clarified that the 1912 legislation “makes no change whatever in the existing law except to make it clear that the circuit judges in the various circuits of the United States shall constitute the circuit court of appeals.” 47 CONG. REC. 2736 (1911) (statement of Sen. Sutherland).

76. See FED. JUDICIAL CTR., *supra* note 62.

77. See U.S. COURTS, JUDGES AND JUDGESHIPS, CHRONOLOGICAL HISTORY OF AUTHORIZED JUDGESHIPS - COURTS OF APPEALS, <https://www.uscourts.gov/judges-judgeships/authorized-judgeships/chronological-history-authorized-judgeships-courts-appeals/> [<https://perma.cc/HMD3-63T7>] [hereinafter COURTS OF APPEALS SLOTS]; see also U.S. COURTS, JUDGES AND JUDGESHIPS, CHRONOLOGICAL HISTORY OF AUTHORIZED JUDGESHIPS - DISTRICT COURTS, <https://www.uscourts.gov/judges-judgeships/authorized-judgeships/chronological-history-authorized-judgeships-district-courts/> [<https://perma.cc/VX35-CSHL>] [hereinafter DISTRICT COURT SLOTS].

of circuit court positions to four and five in some circuits in the 1910s and 1920s, the circuits remained relatively intimate and intracircuit conflict did not arise.

### 2. *The Judiciary Acts of 1916 and 1925: Expansion of Discretionary Jurisdiction*

Although the Evarts Act relieved much of the pressure on the Supreme Court's docket, the Court was still subject to mandatory jurisdiction for some appeals. The Judiciary Act of 1916 narrowed the Court's mandatory jurisdiction to: (1) state court decisions invalidating a treaty, federal statute, or authority exercised under the United States; and (2) state court decisions rejecting a federal challenge to the validity of a state statute or authority exercised by a state.<sup>78</sup>

At the urging of Chief Justice William Howard Taft, Congress trimmed the Court's mandatory jurisdiction and expanded the Court's discretionary power to hear cases through the Judiciary Act of 1925.<sup>79</sup> The so-called "Judges' Bill"<sup>80</sup> largely eliminated mandatory direct appeals of district court decisions to the Supreme Court. Many cases from the U.S. circuit courts of appeals and the highest state courts could reach the Supreme Court only if the justices elected to grant a writ of certiorari.<sup>81</sup> The legislation retained mandatory Supreme Court review for cases from the courts of appeals invalidating a state statute on constitutional grounds and cases from the highest court of a state invalidating a federal law or denying a claim that a state law was contrary to a federal right. The Judges' Bill "made the Supreme Court primarily an arbiter of constitutional questions" of its own choosing.<sup>82</sup>

### 3. *The Ill-Fated Court-Packing Plan and Judiciary Act of 1937*

Following the stock market crash in 1929 and during the nadir of the Great Depression, Franklin Delano Roosevelt rode to the White House on a platform of economic justice and combatting corporate abuse in the 1932 presidential election.<sup>83</sup> The Roosevelt administration's ambitious regulatory plans, however, soon encountered headwinds at the U.S. Supreme Court, which struck down

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78. See Act of Sept. 6, 1916, ch. 448, § 2, 39 Stat. 726, 726; Hartnett, *supra* note 54, at 1658.

79. See Judiciary Act of 1925, ch. 229, 43 Stat. 936; Hartnett, *supra* note 54, at 1661–1713.

80. See FRANKFURTER & LANDIS, *supra* note 2, at 260, 280 (noting that "Congress gave the Court what it wanted—a very strictly confined Jurisdiction").

81. The number of mandatory appeals taken up by the Court remained high and resulted in many summary dispositions.

82. See *Olmstead v. United States*, 277 U.S. 438, 455 (1928) (noting that certiorari was "granted with the distinct limitation that the hearing should be confined to the single question whether the use of evidence of private telephone conversations . . . intercepted by means of wire tapping, amounted to a violation of the Fourth and Fifth Amendments"); Hartnett, *supra* note 54, at 1706–13; FED. JUDICIAL CTR., *Judges' Bill* (February 13, 1925), <https://www.fjc.gov/history/timeline/judges-bill/> [<https://perma.cc/5AT6-4FM8>].

83. See JEAN EDWARD SMITH, *FDR 236–37* (2007); JAMES MACGREGOR BURNS, *ROOSEVELT: THE LION AND THE FOX* 139 (1956).



several initiatives as unconstitutional.<sup>84</sup> After winning reelection in 1936 by a landslide, President Roosevelt proposed judicial reform aimed at shifting the Court's balance.<sup>85</sup>

Although Congress ultimately rejected President Roosevelt's gambit, the Court's decisions subsequently greeted President Roosevelt's programs more favorably.<sup>86</sup> President Roosevelt used his existing judicial selection power to shift the balance in support of greater government regulatory power. In 1937, he nominated Senator Hugo Black, a staunch Roosevelt ally,<sup>87</sup> to replace retiring Justice Willis Van Devanter, one of the "Four Horsemen," the conservative bloc that had opposed the New Deal agenda.<sup>88</sup> President Roosevelt next appointed William O. Douglas to the Supreme Court following the retirement of Justice Louis D. Brandeis in 1939. Justice Douglas's appointment reinforced the shifting balance on economic regulation and antitrust enforcement.<sup>89</sup>

#### 4. *Expansion of Three-Judge District Court Jurisdiction*

Although the court-packing plan did not come to fruition, Congress expanded the use of three-judge district courts to resolve suits seeking to enjoin the enforcement of federal statutes.<sup>90</sup> Like the Three-Judge Court Act of 1910,<sup>91</sup> the Judiciary Act of 1937 provided for direct appeal to the Supreme Court of three-judge court decisions.<sup>92</sup> The new statute also allowed the Department of

84. See, e.g., *Jones v. Secs. & Exch. Comm'n*, 298 U.S. 1 (1936) (rebuking the S.E.C.); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (section 9(c) of the National Industrial Recovery Act); *R.R. Retirement Bd. v. Alton R. Co.*, 295 U.S. 330 (1935) (Railroad Retirement Act); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (National Industrial Recovery Act).

85. The Judicial Procedures Reform Bill of 1937 would have allowed the President to appoint additional Justices, up to a maximum of six, for every sitting member over the age of 70½. The Act was characterized as a way to improve the workload for an aging tribunal, but was recognized as a political maneuver to increase the likelihood of New Deal legislation surviving constitutional review. See MICHAEL E. PARRISH, *THE HUGHES COURT: JUSTICES, RULINGS, AND LEGACY* 24–26 (2002).

86. See *id.* at 26. Following President Roosevelt's Fireside Chat announcing his court-packing plan, the Supreme Court upheld the constitutionality of New Deal initiatives. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (National Labor Relations Act); *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937) (Social Security tax).

87. See generally ROGER K. NEWMAN, *HUGO BLACK: A BIOGRAPHY*, 205–19 (2d ed. 1997) (discussing Black's support for President Roosevelt's court-packing scheme and eventual appointment to the Supreme Court).

88. See Louis H. Pollak, Lecture, *Philadelphia Lawyer: A Cautionary Tale*, 145 U. PA. L. REV. 495, 504 (1997).

89. See, e.g., *United States v. Columbia Steel Co.*, 334 U.S. 495, 535–36 (1948) (Douglas, J., dissenting) ("We have here the problem of bigness. Its lesson should by now have been burned into our memory by Brandeis. *The Curse of Bigness* shows how size can become a menace—both industrial and social . . . . The philosophy of the Sherman Act is that it should not exist . . . . Industrial power should be decentralized."); C. Paul Rogers III, *The Antitrust Legacy of Justice William O. Douglas*, 56 CLEV. ST. L. REV. 895 (2008).

90. Judiciary Act of 1937, ch. 754, Pub. L. No. 75-352, 50 Stat. 751.

91. See *supra* Part I.B.3.

92. Congress later enacted several other statutes requiring the use of three-judge courts as courts of first instance in some matters. See Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-5(b), 2000e-6(b) (2018) (A three-judge court is mandatory if requested by the Attorney General of the United States in

Justice to intervene in any suit in which an Act of Congress was attacked on constitutional grounds.<sup>93</sup> Congress later provided that challenges to civil rights laws, voting rights laws, and some other laws be adjudicated in the first instance by three-judge district courts.<sup>94</sup>

### 5. *Emergence of En Banc Review*

As the appellate bench expanded further in the mid-twentieth century, intracircuit divisions emerged. The Evarts Act “created in each circuit a circuit court of appeals . . . consist[ing] of three judges, of whom two . . . constitute[d] a quorum.”<sup>95</sup> Since no circuit court had more than three circuit judges, the question of whether circuit courts could sit en banc had not arisen.<sup>96</sup>

As late as 1930, no circuit court had more than five members. By the end of the 1930s, the Eighth and Ninth Circuits each had seven jurists, and the first intracircuit splits emerged.<sup>97</sup> It was unclear, however, whether the Judicial Code authorized appellate courts to sit en banc to resolve these splits.

In 1941, the Supreme Court interpreted the Judicial Code to authorize circuit courts to sit en banc.<sup>98</sup> Writing for a unanimous Court in *Textile Mills*, Justice Douglas endorsed not only the legal basis of en banc review, but also the logic and desirability of en banc review:

Certainly the result reached makes for more effective judicial administration. Conflicts within a circuit will be avoided. Finality of decision in the circuit courts of appeal will be promoted. Those considerations are especially important in view of the fact that in our federal judicial system these courts are the courts of last resort in the run

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any action under the public accommodations and equal employment provisions of this statute); Voting Rights Act, 42 U.S.C. § 1971(g) (2018) (making a three-judge court mandatory if requested by either the Attorney General of the United States or the defendant in any case in which the Attorney General is seeking a finding of a pattern or practice of discrimination in voting). *See generally* Joshua A. Douglas and Michael E. Solimine, *Precedent, Three-Judge District Courts, and the Law of Democracy*, 107 GEO. L.J. 413 (2019) (questioning the precedential value of summary Supreme Court decisions and the mandatory nature of circuit precedent on three-judge district courts).

93. *See* Note, *The Three-Judge Court Act of 1910: Purpose, Procedure and Alternatives*, *supra* note 67, at 206 n.9.

94. *See supra* note 92 and accompanying text.

95. *See* Act of Mar. 3, 1891, ch. 517, § 2, 26 Stat. 826, 826–27. Section 3 further provided that “[i]n case the full court at any time shall not be made up by the attendance of the Chief-Justice or an associate justice of the Supreme Court and circuit judges, one or more district judges within the circuit shall be competent to sit in the court according to such order or provision among the district judges as either by general or particular assignment shall be designated by the court.” *Id.* § 3.

96. REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 11 (1938) (recommending legislation to authorize a “majority of the circuit judges [in a circuit court of appeals with more than three circuit judges] . . . to provide for a court of more than three judges when in their opinion unusual circumstances make such action advisable”).

97. *See* *Lang’s Estate v. Comm’r*, 97 F.2d 867, 869–70 (9th Cir. 1938); *Comm’r v. Textile Mills Sec. Corp.*, 117 F.2d 62 (3rd Cir. 1940).

98. *See* *Textile Mills Sec. Corp. v. Comm’r*, 314 U.S. 326 (1941).

of ordinary cases . . . .<sup>99</sup>

Congress codified the Supreme Court's *Textile Mills* interpretation seven years later.<sup>100</sup> Section 46(c) of the Judicial Code of 1948 provided that a circuit court could sit en banc upon a majority vote of active judges in the circuit. Congress specified that "[a] court in banc shall consist of all active circuit judges of the circuit"<sup>101</sup> but left the specific procedures and standards to the circuit courts.

The circuit courts varied in their procedures and standards for en banc review, ranging from informal practices to formal rules.<sup>102</sup> Views about the efficacy of en banc proceedings varied widely.<sup>103</sup> The need for en banc review was modest in the early years.<sup>104</sup> By the early 1960s, most of the circuit courts had developed formal en banc procedures,<sup>105</sup> although the approaches varied.<sup>106</sup> Some circuits required en banc petitions to be presented in the first instance to the original hearing panel. Some allowed cases to be assigned to the full court prior to panel hearing. Several circuits provided for circulation of opinions among all members prior to issuance.

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99. *Id.* at 334–35 (citing H.R. Rep. No. 77-1246); see *To Create a Tenth Judicial Circuit: Hearing on H.R. 5690, 13567, 13757 Before the H. Comm. on the Judiciary, 70th Cong.*, 69, 72 (testimony of C.J. Taft and J. Van Devanter). Justice Douglas also cited the ongoing legislative initiatives to authorize circuit courts to sit en banc. He quoted the legislative history of that bill, stating that:

If the court can sit in banc the situation where two three-judge courts may reach conflicting conclusions is obviated. It also will obviate the situation where there are seven members of the court and as sometimes happens a decision of two judges (there having been a dissent) sets the precedent for the remaining judges. A similar result would be avoided with a court of five judges.

It seems desirable that where the judges feel it advisable they might sit in banc for hearing particular cases.

Comm'r v. *Textile Mills Secs. Corp.*, 314 U.S. at 334 n.14 (quoting H.R. REP. NO. 77-1246 (1941)).

100. Act of June 25, 1948, ch. 646, 62 Stat. 871.

101. See *id.* § 46(c).

102. See Note, *En Banc Procedure in the Federal Courts of Appeals*, 111 U. PA. L. REV. 220 (1962).

103. Judge Learned Hand, who served as Chief Judge of the Second Circuit from 1948 to 1951, wrote that he would "never vote to convene" a court en banc. GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 441 (Oxford U. Press 2011) (1994) ("Throughout his life, Hand had nothing but scorn for the utility of en banc hearings."); Wilfred Feinberg, *Unique Customs and Practices of the Second Circuit*, 14 HOFSTRA L. REV. 297, 311 (1986) ("Learned Hand strongly disapproved of in bancs . . . ."). By contrast, Judge Charles Edward Clark pointedly criticized the Second Circuit's unwillingness to sit en banc. See, e.g., *Lopinsky v. Hertz Drive-Ur-Self Sys.*, 194 F.2d 422, 424 (2d Cir. 1951) (Clark, J., concurring). The Second Circuit did not convene its first en banc hearing until 1956 and has long had a tradition of only rarely hearing cases en banc. See Michael B. de Leeuw & Samuel P. Groner, *En Banc Review in the Second Circuit*, 242 N.Y. L.J. 115 (Dec. 18, 2009).

104. Two circuits (First and Fourth) only had three judgeships through the 1960s, and many others were still relatively intimate. More than a decade after the *Textile Mills* decision, only six of the nine circuit courts with more than three judgeships had promulgated formal rules for en banc review. See Comment, *The En Banc Procedures of the United States Courts of Appeals*, 21 U. CHI. L. REV. 447, 451 (1954).

105. See Note, *supra* note 102, at 221–27.

106. See Peter Michael Madden, *In Banc Procedures in the United States Courts of Appeals*, 43 FORDHAM L. REV. 401, 403 (1974).

The Supreme Court brought greater consistency to en banc procedures through the adoption of the Federal Rules of Appellate Procedure in 1967.<sup>107</sup> The Advisory Committee Notes explain that

[g]iven the increase in the number of cases decided by the federal courts and the limitation on the number of cases the Supreme Court can hear, conflicts between the circuits may remain unresolved by the Supreme Court for an extended period of time. The existence of an intercircuit conflict often generates additional litigation in the other circuits as well as in the circuits that are already in conflict. Although an en banc proceeding will not necessarily prevent intercircuit conflicts, an en banc proceeding provides a safeguard against unnecessary intercircuit conflicts.<sup>108</sup>

Nonetheless, the Committee emphasized that it did not intend to “make the granting of a hearing or rehearing en banc mandatory whenever there is an intercircuit conflict.”<sup>109</sup> The Committee further clarified that “[a] panel decision creates a conflict when it conflicts with the decisions of *all* other circuits that have considered the issue. If a panel decision simply joins one side of an already existing conflict, a rehearing en banc may not be as important because it cannot avoid the conflict.”<sup>110</sup>

As reflected in Figure 1, the total number, as well as ratio of cases heard by en banc review, gradually rose through the 1950s, 1960s, and 1970s. With more slots being added to the appellate ranks and federal law, the economy, and social issues growing more complex, more intra- and intercircuit splits emerged. Although several circuits made only modest use of the en banc procedure—in some cases due to small size (e.g., the First Circuit); in others due to traditions disfavoring en banc review (notably the Second Circuit)—en banc review was seen as a regular part of the functioning of the appellate courts by the 1960s.

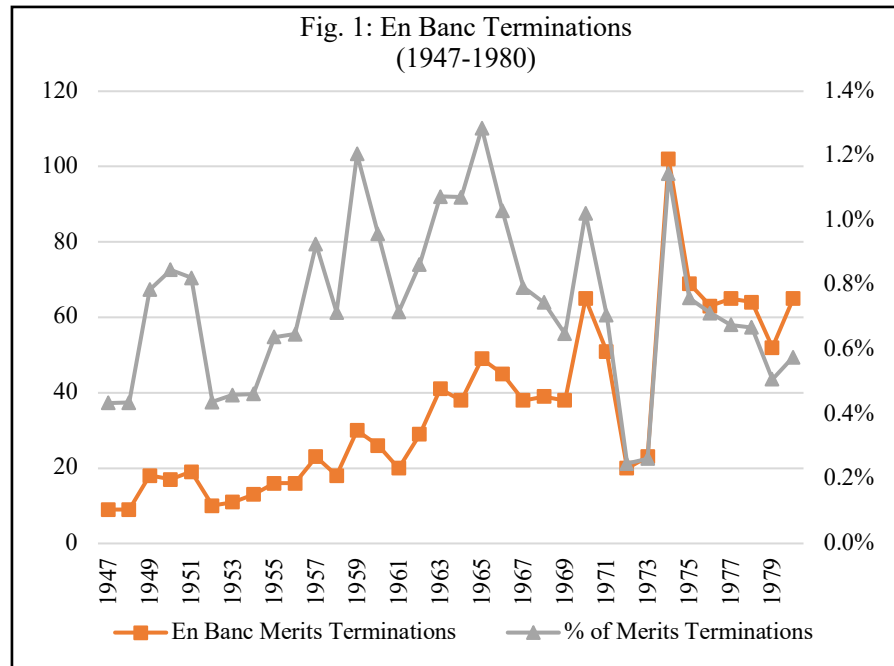
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107. See FED. R. APP. P. 35.

108. FED. R. APP. P. 35, advisory committee’s note to 1998 Amendment.

109. *Id.*

110. *Id.* (emphasis added).



### 6. *Vast Expansion of the Administrative State*

The rise of the administrative state during the first half of the twentieth century created new challenges for the federal judiciary. Beginning with the establishment of the Interstate Commerce Commission in 1887,<sup>111</sup> charged with regulating the rapidly expanding railroads, federal agencies emerged as an important facet of the American economy.<sup>112</sup> Congress established numerous administrative agencies in the ensuing years to regulate food and drug safety,<sup>113</sup> competition,<sup>114</sup> and other aspects of the economy.<sup>115</sup> Following the Great Depression, President Franklin Delano Roosevelt's New Deal greatly expanded the administrative state, adding the U.S. Securities and Exchange Commission,

111. Interstate Commerce Act of 1887, ch. 104, Pub. L. No. 49-104, 24 Stat. 379.

112. See Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1196 (1986) ("[T]hrough the mid-1880s . . . [f]ederal agencies did not generally inspect, investigate, or monitor any significant business activity to protect against unreasonable risks . . . . From a national perspective, commercial affairs took place in a world without regulation."); Paul Stephen Dempsey, *Transportation: A Legal History*, 30 TRANSP. L.J. 235, 266 (2003).

113. See generally PHILIP J. HILTS, *PROTECTING AMERICA'S HEALTH: THE FDA, BUSINESS, AND ONE HUNDRED YEARS OF REGULATION* (2003) (describing the history of the FDA and its impact on broader regulatory policies).

114. See Marc Winneman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 30 (2003).

115. See Marc T. Law & Sukkoo Kim, *The Rise of the American Regulatory State: A View from the Progressive Era*, in HANDBOOK ON THE POLITICS OF REGULATION 113, 119-20 (David Levi-Faur ed., 2011).

Social Security Administration, Federal Communications Commission, and National Labor Relations Board, among many others.<sup>116</sup> Congress passed the Administrative Procedures Act in 1946 to regulate and standardize the procedures governing federal agency decision-making.<sup>117</sup> The 1960s brought about a new wave of federal agencies addressing civil rights, environmental protection, and occupational health and safety, among other areas.<sup>118</sup>

The expansion of federal agencies meant that federal courts increasingly had to review federal agencies' procedures, rulemaking, and actions for compliance with substantive federal statutes, the Administrative Procedures Act, and the U.S. Constitution. The D.C. Circuit's role expanded as Congress provided for exclusive judicial review of many federal agencies' actions at that court.<sup>119</sup>

### 7. *Federal Judicial Center*

With federal litigation rapidly expanding, Chief Justice Earl Warren and the Judicial Conference of the United States recommended the establishment of the Federal Judicial Center (FJC). In 1967, Congress established the FJC to conduct research, provide continuing education for judges, and recommend improvements in the administration and management of the judiciary to the Judicial Conference.<sup>120</sup>

### 8. *Multidistrict Litigation*

The electrical equipment price-fixing scandal of the 1950s resulted in the filing of 1,912 separate civil actions in 36 district courts pleading 25,714 claims involving 20 product lines.<sup>121</sup> As a means of addressing this massive parallel litigation,<sup>122</sup> Chief Justice Earl Warren appointed a Coordinating Committee for Multiple Litigation of the United States District Courts.<sup>123</sup> The Committee responded to the civil litigation tidal wave by instituting consolidated national depositions and document depositories.<sup>124</sup>

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116. See *New Deal Programs*, THE LIVING NEW DEAL, <https://livingnewdeal.org/what-was-the-new-deal/programs/> [<https://perma.cc/R5WP-MGED>] (listing the “dozens of programs and agencies created by the Roosevelt Administration and Congress” in the 1930s).

117. See Administrative Procedure Act (APA), 5 USC § 551 (2018).

118. See generally 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* (2014) (providing a constitutional history of the civil rights movement); RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* (2004) (discussing the expansion of environmental regulation).

119. See Roberts, *supra* note 60, at 388–89.

120. See Act of Dec. 20, 1967, Pub. L. No. 90-219, 81 Stat. 664 (codified as amended at 28 U.S.C. § 620 (2018)).

121. See Colvin A. Peterson, Jr. et al., *Multidistrict Litigation: New Forms of Judicial Administration*, 56 A.B.A. J. 737, 737 (1970).

122. See Andrew D. Bradt, “*A Radical Proposal*”: *The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 854–63 (2017). See generally JOHN HERLING, *THE GREAT PRICE CONSPIRACY* (1962) (discussing the electrical industry's violations of antitrust law).

123. See S. Rep. No. 90-454 (1967).

124. See *id.*

Although the litigation terminated relatively quickly, the process highlighted the inefficiencies of parallel multidistrict litigation.<sup>125</sup> In the aftermath, the Committee, other judges, and legislative aides sought to codify the lessons of this tumultuous experience.<sup>126</sup> Congress eventually enacted a statute in 1968 to coordinate and streamline complex multidistrict litigation (MDL).<sup>127</sup>

The MDL statute created the Judicial Panel on Multidistrict Litigation, comprised of seven circuit and district court judges chosen by the Chief Justice of the U.S. Supreme Court, which has the power to transfer to any federal district court “civil actions involving one or more common questions of fact . . . for coordinated or consolidated pretrial proceedings.”<sup>128</sup> The Panel may consolidate cases *sua sponte* or upon motion “by a party in any action in which transfer . . . may be appropriate.”<sup>129</sup> After consolidation proceedings are initiated, “the parties in all actions in which transfers . . . are contemplated”<sup>130</sup> receive notice of a hearing at which the issue of transfer is argued. Consolidation is ordered “upon [the Panel’s] determination that transfers for such [coordinated and consolidated] pretrial proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.”<sup>131</sup> A party disagreeing with a Panel decision ordering transfer may seek review by extraordinary writ.<sup>132</sup> An order denying transfer for pretrial, however, is not reviewable.<sup>133</sup> The Panel has authority to promulgate rules “for the conduct of its business.”<sup>134</sup>

### 9. Appointment of U.S. Magistrate Judges

Soon after establishing the federal judiciary, Congress authorized federal judges to appoint commissioners to assist with various tasks, such as accepting bail and issuing arrest and search warrants.<sup>135</sup> Over time, the commissioners’

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125. See Bradt, *supra* note 122, at 861–63; Blake M. Rhodes, Comment, *The Judicial Panel on Multidistrict Litigation: Time For Rethinking*, 140 U. PA. L. REV. 711, 713–14 (1991).

126. See Bradt, *supra* note 122, at 863–907.

127. See Act of Apr. 29, 1968, Pub. L. No. 90-296, 82 Stat. 109 (codified as amended at 28 U.S.C. § 1407 (2018)).

128. 28 U.S.C. § 1407(a) (2018).

129. See *id.* § 1407(c).

130. See *id.* § 1407(a).

131. See *id.*

132. See *id.* § 1407(e). An extraordinary writ is requested pursuant to 28 U.S.C. § 1651.

133. See *id.*

134. See *id.* § 1407(f).

135. See Act of Mar. 2, 1793, ch. 22, § 4, Pub. L. No. 2-22, 1 Stat. 334, 334 (authorizing appointment of “discreet persons learned in the law” to accept bail in federal criminal cases); Peter G. McCabe, *A Brief History of the Federal Magistrate Judges Program*, 61 FED. LAW. 45 (2014); Leslie G. Foschio, *A History of the Development of the Office of United States Commissioner and Magistrate Judge System*, 1 FED. CTS. L. REV. 607, 608-09 (2006).

authority gradually expanded.<sup>136</sup> By 1940, commissioners designated by their district courts were able “to try petty offenses occurring on property under the exclusive or concurrent jurisdiction of the federal government.”<sup>137</sup> However, low salaries and limited resources hampered the commissioner system. In 1942, the newly established Administrative Office of the U.S. Courts reported that fewer than half of the commissioners were lawyers.<sup>138</sup> Drawing on this report, the Judicial Conference of the United States recommended raising commissioners’ fees and hiring lawyers.

In the late 1950s, Congress examined the status and role of the commissioner system.<sup>139</sup> Congressional hearings in the mid to late 1960s focused on commissioners’ qualifications, compensation, responsibilities, support services, and status.<sup>140</sup> Congress weighed whether to replace commissioners with new judicial officers similar to bankruptcy judges or downgrade their role to purely ministerial duties on the ground that only appointed Article III judges should decide important issues in criminal cases.<sup>141</sup>

Congress chose the former option of upgrading the commissioner system.<sup>142</sup> In 1968, Congress<sup>143</sup> replaced commissioners with U.S. magistrates (later renamed magistrate judges<sup>144</sup>) for the purpose of “cull[ing] from the ever-growing workload of the U.S. district courts matters that are more desirably performed by a lower tier of judicial officers.”<sup>145</sup> The Federal Magistrates Act of 1968 empowered magistrate judges to conduct trials in criminal matters where the maximum penalty was not more than one year in prison, a fine of \$1,000, or both. In addition, the Act authorized district judges to assign a broad range of duties in civil and criminal matters to magistrate judges, including serving as a special master, conducting pretrial or discovery proceedings in criminal and civil cases, preliminarily reviewing applications for post-trial relief in criminal cases, and “such additional duties as are not inconsistent with the Constitution and laws of the United States.”<sup>146</sup>

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136. See Act of May 28, 1896, ch. 252, §§ 19, 21, 29 Stat. 140, 184-85; Foschio, *supra* note 135, at 608-09.

137. See McCabe, *supra* note 135, at 45; Joseph F. Spaniol, Jr., *The Federal Magistrates Act: History and Development*, 1974 ARIZ. ST. L.J. 565, 570 (1974).

138. *U.S. Commissioner System: Hearings Before the Subcomm. on Improvements in Judicial Mach. of the S. Comm. on the Judiciary*, 89th Cong. 53-67 (1965) [hereinafter *Senate Hearings*].

139. See REPORT OF THE PROCEEDINGS OF A SPECIAL SESSION OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 290 (1959); Spaniol, *supra* note 137, at 566-67.

140. See *Senate Hearings*, *supra* note 138; Spaniol, *supra* note 137, at 567; McCabe, *supra* note 135, at 46.

141. See *Senate Hearings*, *supra* note 138, at 10-11.

142. See Spaniol, *supra* note 137, at 568.

143. Act of Oct. 17, 1968, Pub. L. No. 90-578, 82 Stat. 1107.

144. See Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089.

145. S. REP. NO. 90-371, at 9 (1967).

146. *Id.* See 28 U.S.C. § 636(b)(3) (2018); S. REP. NO. 90-371 (1967). See also H. R. REP. NO. 90-1629, at 19 (1968); McCabe, *supra* note 135, at 46-47.



To implement the Act, the Judicial Conference established a pilot program in five districts.<sup>147</sup> Based on the success of the pilot project, the Judicial Conference approved the appointment of 518 Magistrate positions—61 full-time positions, 449 part-time positions, 8 Referee-Magistrate positions, and 2 Clerk of Court-Magistrate positions.<sup>148</sup> By mid-1971, 542 magistrate positions had replaced more than 700 commissioner positions.<sup>149</sup>

*D. 1970s: The “Crisis of Volume” and Aborted Reform*

By the late 1960s, practitioners, scholars, and jurists were sounding alarm bells about the federal judiciary’s capacity to address the rising tide of cases and rapid expansion of federal law. The American Bar Foundation issued a report in 1968, directed by Professor Paul Carrington, that observed that

[a]t some point, perhaps less distant than commonly supposed, some circuits will have to be split, even if they have first been increased to 30 judges. When additional circuits are created, and perhaps before then, structural changes will have to be made to facilitate guidance and harmonization of federal law decided by the Courts of Appeal. This task is now performed by the Supreme Court by review of decisions of the Courts of Appeals. The recent rapid growth in federal judicial business in the Circuits, with the added burden created by enlargement of the number of circuits, will make it even more difficult, if not physically impossible, for the Supreme Court to perform this monitoring function in the future.<sup>150</sup>

The report called for dividing large circuits, splitting circuits beyond specified levels, and assisting the Supreme Court by instituting regional appellate panels, specialized appellate panels, or a “national circuit.”<sup>151</sup> Professor Carrington’s 1969 report provided powerful empirical support for the mounting sentiment among jurists, scholars, practitioners, and policy-makers that the federal judiciary was struggling to address the growing volume and complexity of the federal judicial docket.<sup>152</sup>

These concerns led to two reform studies: (1) the Study Group on the Caseload of the Supreme Court (Freund Study Group), focusing on the Supreme Court’s caseload burdens; and (2) the Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures (Hruska Commission), focusing on the geographic boundaries, structure, and internal

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147. See McCabe, *supra* note 135, at 47.

148. See REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 30, 67–70 (1970).

149. See Peter G. McCabe, *The Federal Magistrate Act of 1979*, 16 HARV. J. ON LEGIS. 343, 351 (1979).

150. AM. BAR FOUND., ACCOMMODATING THE WORKLOAD OF THE UNITED STATES COURTS OF APPEALS 7 (1968).

151. *Id.*

152. See Carrington, *supra* note 4, at 543–49.

procedures of the appellate courts. Both groups proposed a National Court of Appeals, albeit with different features.

*1. The Freund Study Group*

In 1971, Chief Justice Warren Burger, as Chairman of the Federal Judicial Center (FJC), appointed a Study Group to study the Supreme Court's caseload and to recommend adaptations to the Court's jurisdiction and practices in light of changing conditions.<sup>153</sup> Led by Professor Paul Freund, the Study Group<sup>154</sup> interviewed each sitting Supreme Court Justice and several law clerks, and also evaluated empirical data on the Court's caseload. The Study Group reported a tremendous increase in the Court's caseload driven by population and economic growth as well as by the expansion of civil rights, environmental, safety, consumer protection, and other social and economic legislation.<sup>155</sup> The Study Group predicted that the increase was likely to continue.

The Study Group recommended establishing a National Court of Appeals to screen all certiorari petitions.<sup>156</sup> The Supreme Court would then select which cases to decide. The Study Group envisioned that the National Court of Appeals would refer approximately 500 cases per year to the Supreme Court, of which the Supreme Court would hear 150 to 200. The National Court of Appeals would decide the cases that the Supreme Court declined to review. The Study Group further recommended that Congress abolish all mandatory (non-discretionary) appeals to the Supreme Court<sup>157</sup> and eliminate three-judge district courts.<sup>158</sup>

The Study Group's principal recommendation—using a National Court of Appeals to screen certiorari petitions—failed to gain traction.<sup>159</sup> Some observers, including retired Chief Justice Earl Warren, saw the Freund Study Group's proposal as usurping a critical Supreme Court function: the screening function which “permit[s] the Court not only to achieve control of its docket but also to establish our national priorities in constitutional and legal matters.”<sup>160</sup>

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153. See FREUND STUDY GROUP REPORT, *supra* note 6, at IX.

154. The other members of the Study Group were Professor Alexander Bickel, Peter D. Ehrenhaft, Esq., Dean Russell D. Niles (Director, Institute of Judicial Administration, N.Y.U. School of Law), Bernard G. Segal, Esq. (former President of the American Bar Association), Robert L. Stern, Esq. (former Acting Solicitor General), and Professor Charles A. Wright. *Id.* at V-VI.

155. See *id.* at 2–3.

156. See *id.* at 18. The National Court of Appeals would consist of seven U.S. circuit court judges assigned to the National Court for limited, staggered terms. See *id.* at 19.

157. See *id.* at 25–40.

158. See *id.* at 26–34.

159. See Daniel J. Meador, *The Federal Judiciary—Inflation, Malfunction, and a Proposed Course of Action*, 1981 BYU L. REV. 617, 627.

160. *Retired Chief Justice Warren Attacks, Chief Justice Burger Defends Freund Study Group's Composition and Proposal*, 59 A.B.A. J. 721, 728 (1973); see also William H. Alsup, *A Policy Assessment of the National Court of Appeals*, 25 HASTINGS L.J. 1313, 1332–42 (1974) (considering the disadvantages surrounding the creation of a National Court of Appeals); James F. Blumstein, *The Supreme Court's Jurisdiction—Reform Proposals, Discretionary Review, and Writ Dismissals*, 26 VAND. L. REV. 895, 911–20 (1973) (examining the virtues and risks of limiting the Supreme Court's

Shortly after the Study Group issued its recommendations, Judge Henry Friendly, one of the nation's most respected jurists, delivered a trenchant critique as part of a series of lectures exploring the challenges confronting the federal judiciary.<sup>161</sup> While reinforcing and further documenting the concern about the "explosion of federal litigation," Judge Friendly recommended streamlining federal jurisdiction<sup>162</sup> and establishing specialized appellate patent and tax tribunals<sup>163</sup> as the best ways to address mounting federal caseloads. Judge Friendly questioned the effect of the NCA on the "prestige and morale" of the courts of appeals:

One does not like to imagine what Judge Learned Hand would have said about having his decisions reviewed by anything like the National Court. To be sure, not every circuit judge now regards each member of the Supreme Court as his intellectual superior, but all have a respect and reverence for the Court as an institution that they could never entertain for a body like the proposed National Court.<sup>164</sup>

## 2. *The Hruska Commission*

Chief Justice Burger, the Chief Judges of all of the Courts of Appeals, the Judicial Conference of the United States, the Federal Judicial Center, and the American Bar Association called for reform.<sup>165</sup> In 1972, Congress charged a bipartisan, cross-branch commission with two tasks: (1) recommend changes that will promote expeditious and effective disposition of judicial business based on the Commission's study of the geographical boundaries of the federal judicial circuits;<sup>166</sup> and (2) recommend changes "as may be appropriate for the expeditious and effective disposition of the caseload of the Federal courts of appeal, consistent with fundamental concepts of fairness and due process" based on the Commission's study of the structure and internal procedures of the appellate courts.<sup>167</sup> Senator Roman Hruska chaired the Commission, which

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discretionary jurisdiction); Eugene Gressman, *The National Court of Appeals: A Dissent*, 59 A.B.A. J. 253, 257 (1973) (noting that the proposal would "isolate[]" the Supreme Court "from many nuances and trends of legal change throughout the land"); William J. Brennan, Jr., *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 474 (1973) (discussing the importance of the screening function); *infra* Part I.D.6 (discussing Judge Friendly's critique).

161. See HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 51–54 (1973).

162. See *id.* at 1–14, 55–152 (calling for repeal of the Federal Employers' Liability Act, replacement by an administrative workers compensation act, and elimination of diversity of citizenship jurisdiction, among other measures). See also Henry J. Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634, 640–43 (1974) (discussing proposals for reform, including minimizing cases arising from diversity jurisdiction and revising the Federal Penal Code).

163. See FRIENDLY, *supra* note 161, at 153–71.

164. *Id.* at 53.

165. See THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS* 36 (1994).

166. See Act of Oct. 13, 1972, Pub. L. No. 92-489, § 1(a), 82 Stat. 807, 807 (codified as amended at 28 U.S.C. § 41 (2018)).

167. *Id.* § 1(b).

included four appointees by the President of the Senate, four by the Speaker of House of Representatives, four by the President, and four by the Chief Justice.<sup>168</sup>

The Commission convened numerous hearings,<sup>169</sup> appointed consultants, conducted studies, and solicited comments over several years. Notably, Congress limited the Commission's mandate to studying reform of "the Federal courts of appeal system."<sup>170</sup> The Commission was not authorized to consider the jurisdiction of the district courts or of the Supreme Court. Nonetheless, the Supreme Court's case selection practices figured prominently in the Commission's work. It released its first report, which addressed the geographic boundaries of the appellate courts, in late 1973 and its second report, which addressed the structure and internal procedures of the courts of appeals, in June 1975.

*a. The Geographical Boundaries of the Several Judicial Circuits:  
Recommendations for Change*

Following hearings in ten cities and the circulation of a preliminary report, the Hruska Commission completed its first charge in December 1973.<sup>171</sup> The Commission reported that caseloads per appellate judge had increased over 300 percent between 1960 and 1973, far greater than the 58 percent increase in district court filings per district judge during that same period.<sup>172</sup> Based on the dramatic growth in the caseload per judge in the Fifth and Ninth Circuits, both of which already had substantial numbers of appellate judges (fifteen and thirteen, respectively), the Commission concluded that "realignment," i.e., division, of both circuits was "a necessary initial measure."<sup>173</sup> The Commission cautioned that it "harbors no illusions that realignment is a sufficient remedy,

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168. In addition to Chairman Hruska, the Commission comprised Senators Quentin N. Burdick, Hiram L. Fong, and John L. McClellan; House of Representatives members Jack Brooks, Walter Flowers, Edward Hutchinson, and Charles E. Wiggins; President Gerald Ford's appointees Emanuel Celler, Dean Roger C. Cramton, Francis R. Kirkham, and Judge Alfred T. Sulmonetti; and Chief Justice Warren Burger's appointees Judge J. Edward Lumbard, Judge Roger Robb, Bernard G. Segal, and Professor Herbert Wechsler. *Hearings before the Comm. on Revision of the Fed. Court Appellate Sys.: Second Phase, Volume I*, 93rd Cong. iii (1975) [hereinafter HRUSKA COMMISSION HEARINGS – VOLUME I].

169. *See id.*; *Hearings before the Comm. on Revision of the Fed. Court Appellate Sys.: Second Phase, Volume II*, 93rd Cong. (1975) [hereinafter HRUSKA COMMISSION HEARINGS – VOLUME II].

170. *See* Act of Oct. 13, 1972, § 1(a), Pub L. No. 92-489, 86 Stat. 807, 807 (codified as amended at 28 U.S.C. § 41).

171. *See* COMM. ON REVISION OF THE FED. COURT APPELLATE SYS., THE GEOGRAPHICAL BOUNDARIES OF THE SEVERAL JUDICIAL CIRCUITS: RECOMMENDATIONS FOR CHANGE, 62 F.R.D. 223, 225 (1974) [hereinafter HRUSKA COMMISSION GEOGRAPHIC BOUNDARIES REPORT]. *See generally* Roman L. Hruska, *The Commission on Revision of the Federal Court Appellate System: A Legislative History*, 1974 ARIZ. ST. L.J. 579 (1974).

172. *See* HRUSKA COMMISSION GEOGRAPHIC BOUNDARIES REPORT, *supra* note 171, at 227.

173. *See id.* at 229–30 (noting that this recommendation was also proposed by the American Bar Association's Special Committee on Coordination of Judicial Improvements: "The American Bar Association itself, acting upon the report of that committee, has expressed its recognition of the 'urgent need' for realignment of the Fifth and Ninth Circuits and its support for such a change.").

adequate even for a generation, to deal with the fundamental problems now confronting the Courts of Appeals.”<sup>174</sup>

*b. Structure and Internal Procedures: Recommendations for Change*

In June 1975, the Hruska Commission recommended that Congress change the structure and internal procedures of the federal courts of appeals system.<sup>175</sup> The Commission based its recommendations on several analyses of unresolved circuit conflicts: (1) case studies of intercircuit conflicts;<sup>176</sup> (2) a study of certiorari petitions;<sup>177</sup> (3) a review of dissents from denial of certiorari;<sup>178</sup> (4) a study of the government’s propensity to relitigate decisions across circuits;<sup>179</sup> and (5) surveys of particular substantive areas of law.<sup>180</sup>

The 1975 report also emphasized the dramatic annual increases in appeals per authorized appellate judgeship, rising from 57 in 1960 to 169 in 1974.<sup>181</sup> The Commission found that the appellate courts had handled the rising caseloads through a series of “fundamental changes in the process of adjudication: widespread curtailment of oral argument, frequent elimination of the judges’ conference from the decision-making process, and, in hundreds of cases, decision without any indication of the reasoning impelling the result.”<sup>182</sup> While commending the goal of increasing efficiency through innovative procedures, the Commission cautioned that “many responsible voices have expressed concern that efficiency has been gained at too great a cost to the overall quality of the appellate process.”<sup>183</sup>

The Commission recommended that Congress establish a National Court of Appeals (NCA) consisting of seven Article III judges to alleviate the strains on the Supreme Court and regional courts of appeals.<sup>184</sup> The Hruska Commission’s NCA proposal differed significantly from the Freund Study

174. *Id.* at 229.

175. *See* HRUSKA COMMISSION STRUCTURE REPORT, *supra* note 1.

176. *See id.* at 76–90.

177. *See id.* at 91–111.

178. *See id.* at 111–33. *See also* Bailey v. Weinberger, 419 U.S. 953 (1974) (White, J., dissenting from denial of certiorari) (lamenting the docket pressures that limit the Supreme Court’s ability to review all of the intercircuit conflicts warranting review).

179. *See* HRUSKA COMMISSION STRUCTURE REPORT, *supra* note 1, at 133–43.

180. *See id.* at 144–68 (revealing forum shopping concerns in the tax and patent fields).

181. *See id.* at 1, 169–71 (Appendix C).

182. *See id.* at 1.

183. *See id.* at 1–2. *See also* Hearings Before the Comm. on Rev. of the Fed. Court Appellate Sys., *First Phase*, 92nd Cong. 895 (1973) (testimony of Judge Ben Cushing Duniway lamenting that appellate judges “are no longer able to give to the cases that ought to have careful attention the time and attention that they deserve”).

184. *See* HRUSKA COMMISSION STRUCTURE REPORT, *supra* note 1, at vii–viii, 5–39; Roman L. Hruska, *Commission Recommends New National Court of Appeals*, 61 A.B.A. J. 819, 819 (1975). The Commission also recommended various procedural and organization changes, including authorizing large circuit courts to limit en banc proceedings to nine members. *See* HRUSKA COMMISSION STRUCTURE REPORT, *supra* note 1, at 55–69.

Group's NCA proposal. Most notably, the Hruska NCA would not have supplanted the Supreme Court's certiorari screening function.

The Hruska NCA's docket would draw from two sources: (1) "reference jurisdiction"—cases referred by the Supreme Court; and (2) "transfer jurisdiction"—cases transferred by regional circuit courts. The Commission envisioned reference jurisdiction as the primary source of NCA cases, at least initially. The Supreme Court would retain discretion to decline referring cases that it believed would benefit from continued percolation in the regional circuit courts. The NCA would have discretion to decline transfers which it concluded were more appropriately heard in the regional circuit court.<sup>185</sup> The merits decisions of the NCA would be subject to Supreme Court review.

The Commission reasoned that the NCA would be able to decide at least 150 cases per year, thereby doubling the national capacity for resolving inter-circuit conflicts.<sup>186</sup> It did not see the new court as compromising the virtues of the existing system. Rather, the NCA would enhance the capacity at the top of the judiciary pyramid, expedite resolution of important questions, reduce litigation costs, and "bring greater clarity and stability to the national law."<sup>187</sup>

The Commission's charge did not extend to recommendations to the jurisdiction of the district courts and hence focused its attention on structural and procedural changes at the appellate level.<sup>188</sup> The Commission nonetheless noted that Congress could "avert[] the flood by lessening the flow."<sup>189</sup> The Commission noted, however, that while eliminating diversity jurisdiction and three-judge district courts "would provide a measure of immediate relief," it would not stanch the rapidly increasing flow of appeals.<sup>190</sup>

The Commission concluded that establishing the NCA would adequately address the forum-shopping concerns associated with particular substantive areas and thus declined to recommend a national patent or tax appellate tribunal.<sup>191</sup> It also credited the concern that such tribunals would promote "tunnel vision" and capture by special interest groups.<sup>192</sup>

A majority of Supreme Court justices expressed cautious support for the establishment of a National Court of Appeals, at least on an experimental basis or in a more limited form.<sup>193</sup> Chief Justice Warren Burger expressed "no doubt that if the Congress does not curtail the jurisdiction of the Supreme Court, in

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185. The regional courts' decisions to grant or deny motions for transfer as well as the NCA's decision to accept or deny transfers would not be reviewable. *See* HRUSKA COMMISSION STRUCTURE REPORT, *supra* note 1, at 35.

186. *See* HRUSKA COMMISSION STRUCTURE REPORT, *supra* note 1, at 39.

187. *Id.*

188. *See id.* at 55.

189. *Id.* (referencing Friendly, *supra* note 162).

190. *Id.* at 55–56.

191. *See id.* at 28–30.

192. *See id.* at 28–29 (referencing Simon Rifkind, *A Special Court for Patent Litigation? The Danger of a Specialized Judiciary*, 37 A.B.A. J. 425 (1951)).

193. *See* HRUSKA COMMISSION STRUCTURE REPORT, *supra* note 1, at 172–88 (Appendix D).

some way generally comparable to the 1925 Judiciary Act, then surely a solution must be found by creating [a National Court of Appeals].”<sup>194</sup> He concluded that

if no significant changes are made in federal jurisdiction, including that of the Supreme Court, the creation of an intermediate appellate court in some form will be imperative . . . . The changes brought on in the 20th century and the new social, political and economic developments have surely not diminished the importance of the questions presented to the Supreme Court and have vastly increased the volume of important questions which can have an impact of great significance on the country.<sup>195</sup>

All but two of the justices recognized that the federal judiciary needed reform immediately or in the not-too-distant future.<sup>196</sup>

### 3. *Speedy Trial Act*

While the Hruska Commission was performing its work, Congress passed the Speedy Trial Act of 1974 to ensure that neither prosecutors nor the federal courts deprived criminal defendants of their Sixth Amendment guarantee to a speedy trial.<sup>197</sup> The Speedy Trials Act’s stringent time limits for commencing criminal trials added further pressure on busy district judges and delayed civil cases.<sup>198</sup>

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194. *Id.* at 174.

195. *Id.* at 177–78. Justice Byron White enthusiastically supported establishment of the NCA but opposed transfer jurisdiction. *See id.* at 181–82. *See also id.* at 185–86 (views of Justice Lewis Powell, substantially agreeing with Justice White); *id.* at 186–88 (views of Justice William Rehnquist, noting that “[c]onflicting views on questions of federal law remain unresolved because of the Supreme Court’s unwillingness . . . to undertake to decide more than about 150 cases on the merits during each Term”); *id.* at 184 (views of Justice Harry Blackmun, observing “there is a breaking point somewhere at which one’s capacity will be exceeded or at which one’s work becomes second-rate. The Nation, in my opinion, deserves better than this.”); *id.* at 180 (views of Justice Potter Stewart, expressing uncertainty about the present need for the NCA, but recognizing that the day would come when a new court would be needed); *id.* at 183 (views of Justice Thurgood Marshall, recognizing “some changes are sorely needed,” but that restructuring of the federal appellate system was not necessary and could cause “considerable harm”).

196. Justice William O. Douglas opposed establishment of the NCA. *See id.* 179–80. Justice William Brennan questioned the need for the NCA but believed that reference jurisdiction was workable. *See id.* at 180.

197. U.S. CONST. amend. VI; Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat. 2080 (amended by the Speedy Trial Act Amendments of 1979, Pub. L. No. 96-43, 93 Stat. 327, 328) (codified as amended at 18 U.S.C. §§ 3161–3174).

198. *See Report of the Civil Justice Reform Act Advisory Group*, 69 N.D. L. REV. 741, 773 (1993) (noting that the district’s “heavy criminal caseload, combined with the requirements of the Speedy Trial Act, has made hearing civil trials and setting reliable civil trial dates a challenging task”); Charles F. Webber, *Mandatory Summary Jury Trial: Playing By the Rules?*, 56 U. CHI. L. REV. 1495, 1495–96, 1500–02 (1989) (questioning the use of summary jury trials).

#### 4. *Repeal of the Three-Judge Court Act*

Amidst the struggle to achieve structural reform, Congress relieved some pressure on the judiciary by largely abolishing three-judge courts in 1976.<sup>199</sup> Members of the Supreme Court, as well as the Freund Study Group and the Hruska Commission, considered this to be a beneficial way to ameliorate the federal caseload problem. The Senate Report noted the Three-Judge Court Act was “the single worst feature in the Federal judicial system.”<sup>200</sup>

#### 5. *Clarification and Expansion of Magistrate Judges’ Authority*

By the mid-1970s, appellate courts were deeply divided over the jurisdictional authority of magistrate judges.<sup>201</sup> Several circuits invalidated referrals to magistrates on the ground that the duties were beyond the scope of the authority delegated by the Federal Magistrates Act of 1968.<sup>202</sup> In dicta, the Seventh Circuit noted that delegation of motions to dismiss or motions for summary judgment would raise constitutional concerns if not barred by the statute.<sup>203</sup> Several cases raised policy concerns.<sup>204</sup> Other appellate courts, however, upheld a wide variety of references to magistrates under the 1968 Act.<sup>205</sup>

199. Act of Aug. 12, 1976, Pub. L. No. 94-381, §§ 2–3, 90 Stat. 1119, 1119 (repealing 28 U.S.C. §§ 2281-2282). Congress retained the use of three-judge district courts to resolve reapportionment of political districts. See David P. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 75 (1964) (noting that three-judge courts might be appropriate for cases featuring high degrees of federal-state friction, such as civil rights and reapportionment); Douglas & Solimine, *supra* note 92, at 433 (alluding to Congress’s decision to curtail the jurisdiction of three-judge district courts).

200. See S. REP. NO. 94-204, at 2 (1975), reprinted in 1976 U.S.C.C.A.N. 1988, 1989.

201. See McCabe, *supra* note 149, at 351–52.

202. See 28 U.S.C. § 636(b); see, e.g., TPO, Inc. v. McMillen, 460 F.2d 348 (7th Cir. 1972) (motion to dismiss a civil case); Wedding v. Wingo, 483 F.2d 1131 (6th Cir. 1973), *aff’d*, 418 U.S. 461 (1974) (evidentiary hearing in a habeas corpus action); Rainha v. Cassidy, 454 F.2d 207 (1st Cir. 1972) (same); Dye v. Cowan, 472 F.2d 1206 (6th Cir. 1972) (grant of a certificate of probable cause in a habeas corpus case); Ingram v. Richardson, 471 F.2d 1268 (6th Cir. 1972) (preparation of a report and recommendation in an appeal from denial of Social Security benefits by the Secretary of Health, Education, and Welfare).

203. See TPO, Inc. v. McMillen, 460 F.2d at 359.

204. See Ingram v. Richardson, 471 F.2d at 1270; Reed v. Bd. of Election Comm’rs, 459 F.2d 121, 123 (1st Cir. 1972). See also *Hearings on S. 1612 and S. 1613 Before the Subcomm. on Improvements in Judicial Mach. of the Comm. on the Judiciary*, 95th Cong. 225–26 (1977) (Federal Bar Association memorandum on the constitutionality of the proposed Magistrate Act of 1977, S. 1613); Joseph D. Gallagher, Comment, *An Expanding Civil Role for United States Magistrates*, 26 AM. U. L. REV. 66, 83–84 (1976–77).

205. See, e.g., Campbell v. U.S. District Court, 501 F.2d 196 (9th Cir. 1974), *cert. denied*, 419 U.S. 879 (1974) (motion to suppress evidence in a criminal case); Givens v. W.T. Grant Co., 457 F.2d 612 (2d Cir. 1972), *vacated on other grounds*, 409 U.S. 56 (1972) (motion to dismiss a civil case); Remington Arms Co. v. United States, 461 F.2d 1268 (2d Cir. 1972) (motion for summary judgment in a civil case); United States *ex rel.* Henderson v. Brierley, 468 F.2d 1193 (3d Cir. 1972) (review and recommendation in a habeas corpus case); Noorlander v. Ciccone, 489 F.2d 642 (8th Cir. 1973) (same); Parnell v. Wainwright, 464 F.2d 735 (5th Cir. 1972) (same).



In 1974, the Supreme Court ruled that a district judge lacked authority under the Habeas Corpus Act and the Federal Magistrates Act to designate a magistrate to conduct an evidentiary hearing in a habeas corpus action.<sup>206</sup> In dissent, Chief Justice Burger pointed the way for Congress to expand magistrate reference jurisdiction.<sup>207</sup> Two years later, however, the Court held that the 1968 legislation permitted a district court to refer social security administrative review cases to magistrate judges.<sup>208</sup>

A growing district court backlog<sup>209</sup> in conjunction with implementation of the Speedy Trial Act<sup>210</sup> spurred Congress to clarify and expand magistrate reference jurisdiction.<sup>211</sup> Ultimately, this new legislation overruled the Supreme Court's ruling in *Wingo v. Wedding* by expressly authorizing delegation of evidentiary hearings in habeas corpus cases to magistrates. It also expanded magistrate reference jurisdiction to include the range of duties that various circuit court decisions had held could not be referred.<sup>212</sup>

#### 6. *The Demise of the Hruska Commission Proposal*

The Senate subcommittee convened hearings on the Hruska Commission's NCA proposal in May and November 1976.<sup>213</sup> With consensus among the bipartisan cross-branch commission, as well as support from a majority of the members of the Supreme Court and the America Bar Association (ABA),<sup>214</sup> it

206. See *Wingo v. Wedding*, 418 U.S. 461 (1974).

207. See *id.* at 487.

208. See *Mathews v. Weber*, 423 U.S. 261 (1976).

209. See McCabe, *supra* note 149, at 353 n.53.

210. 18 U.S.C. § 3161 (2018).

211. See Act of Oct. 21, 1976, Pub. L. No. 94-577, 90 Stat. 2729 (codified as amended at 28 U.S.C. §§ 631-639, 3401-3402 (2018)); *Jurisdiction of United States Magistrates: Hearing on S. 1283 Before the Subcomm. on Improvements in Judicial Mach. of the Sen. Comm. on the Judiciary*, 94th Cong. 1-18 (1975); S. REP. NO. 94-625, at 3 (1976).

212. See S. REP. NO. 94-625, at 3-4 (1976). Notwithstanding this legislation, there remained uncertainty regarding magistrate judges' ability to conduct full civil trials with consent of the parties. See McCabe, *supra* note 135, at 49. The Magistrate Act of 1979 confirmed magistrate judges' authority to render final judgment in civil cases with or without a jury by consent of the parties. See Tim A. Baker, *The Expanding Role of Magistrate Judges in the Federal Courts*, 39 VAL. U. L. REV. 661, 665 (2005). It expanded the jurisdiction of magistrate judges to handle all federal misdemeanor cases and authorized magistrate judges to preside over jury trials in misdemeanor cases. It also established a merit selection system for appointment of federal magistrates and authorized funding for law clerks for magistrate judges. The 1979 Act authorized appeal of magistrate cases to the district court or direct appeal to the circuit court but favored the latter. See S. Rep. No. 96-322, at 8 (1979). The statute was later amended in 1996 to eliminate appeals to the district court. See Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 207, 110 Stat. 3847, 3850 (1996) (codified as amended at 28 U.S.C. § 1).

213. See *National Court of Appeals Act, Hearings on S. 2762 and S. 3423 Before the Subcomm. on Improvements in Judicial Mach. of the S. Comm. on the Judiciary*, 94th Cong. i (1976) [hereinafter 1976 NCA HEARINGS].

214. See *id.* at 29 (Statement of Robert J. Kutak, Esq., American Bar Association). See also *id.* at 38-42 (Statement of Hon. Shirley M. Hufstедler, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit, appearing as a member of the ABA Committee on Coordination of Judicial Improvements).

appeared that the NCA proposal, perhaps with some modifications,<sup>215</sup> was on track for passage. Anticipating resistance to transfer jurisdiction, Senator Hruska offered two bills: one containing both referral and transfer jurisdiction<sup>216</sup> and one without transfer jurisdiction.<sup>217</sup>

The first two days of hearings showcased strong support for the NCA from the ABA, Senator Hruska, Dean Erwin Griswold, and several other witnesses.<sup>218</sup> A few witnesses raised concerns,<sup>219</sup> but the legislation appeared on track for passage. After a four-month hiatus, a second set of hearings surfaced mixed reactions from federal appellate judges.<sup>220</sup> Judge Henry Friendly staunchly opposed establishment of the NCA at that time.<sup>221</sup> He did not believe that the case had been made for such a drastic remedy, especially before other policies—

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215. As noted above, several Supreme Court Justices opposed or questioned authorizing transfer jurisdiction. *See supra* Part I.D.2.ii.

216. *See* S. 2762, 94th Cong. §§ 1271–72 (1975).

217. *See* S. 3423, 94th Cong. § 1271 (1976). The bills also differed in how judges would be appointed to the NCA. S. 2762 authorized the President to appoint seven members of the NCA with the advice and consent of the Senate. *See* S. 2762, 94th Cong. § 21 (1975). Under S. 3423, the President, with advice and consent of the Senate, would appoint two of the initial seven NCA members and the Chief Justice would designate the five most senior circuit judges from a list of all circuit judges to serve for a four-year term. At succeeding four-year intervals the President would appoint, first, two additional judges and then three additional judges, with the remaining judges designated by the Chief Justice from the list of circuit judges in order of seniority. *See* S. 3423, 94th Cong. § 21(a)(2) (1976).

218. *See* 1976 NCA HEARINGS, *supra* note 213, at 29, 34, 54–60, 65–78.

219. *See id.* at 89–98 (testimony of former Supreme Court Justice Arthur Goldberg); *id.* at 125–26 (letter from Lloyd Cutler (referencing Friendly, *supra* note 162; Wilfred Feinberg, *A National Court of Appeals?*, 42 BROOK. L. REV. 611 (1976))).

220. *See* 1976 NCA HEARINGS, *supra* note 213, at 135–37 (testimony of Eighth Circuit Judge Donald P. Lay opposing the NCA); *id.* at 150–58 (testimony of Third Circuit Chief Judge Collins J. Seitz endorsing the NCA); *id.* at 158–67 (testimony of Seventh Circuit Judge Thomas E. Fairchild endorsing the NCA); *id.* at 168–86 (testimony of First Circuit Chief Judge Frank M. Coffin opposing the NCA). In the background, a groundswell of opposition to the NCA among appellate judges was mounting. *See* HRUSKA COMMISSION HEARINGS – VOLUME II, *supra* note 169, at 696 (statement of Judge Ruggero J. Aldisert, United States Court of Appeals for the Third Circuit, on behalf of himself, Judges Francis L. Van Dusen, John J. Gibbons, Max Rosenn, James Hunter, III, Joseph P. Weis, Jr., and Leonard I. Garth). Judge Aldisert’s statement also notes that the entire active bench of the Second Circuit, meeting as a Council, voted “unanimous opposition to the creation of a National Court of Appeals.” *Id.* at 703; Letter of the Honorable Wilfred Feinberg, United States Court of Appeals for the Second Circuit to Professor A. Leo Levin, Executive Director, Commission on Revision of the Federal Court Appellate System (May 7, 1975), *in* HRUSKA COMMISSION HEARINGS – VOLUME II, *supra* note 169, at 1307–09. Judge Fairchild’s Seventh Circuit colleagues, Judges Luther Swygert and Philip Tone, opposed the NCA proposal. *See* Letter of the Honorable Luther M. Swygert, United States Court of Appeals for the Seventh Circuit to Professor A. Leo Levin, Executive Director, Commission on Revision of the Federal Court Appellate System (May 15, 1975), *in* HRUSKA COMMISSION HEARINGS – VOLUME II, *supra* note 169, at 1372–74; Letter of the Honorable Philip W. Tone, United States Court of Appeals for the Seventh Circuit to Professor A. Leo Levin, Executive Director, Commission on Revision of the Federal Court Appellate System (May 15, 1975), *in* HRUSKA COMMISSION HEARINGS – VOLUME II, *supra* note 169, at 1376–77; Luther M. Swygert, *The Proposed National Court of Appeals: A Threat to Judicial Symmetry*, 51 IND. L.J. 327, 331–36 (1976).

221. *See* 1976 NCA HEARINGS, *supra* note 213, at 231–56.

such as streamlining of federal jurisdiction<sup>222</sup> and experimentation with specialized appellate patent and tax tribunals—had been attempted. Judge Friendly did not rule out the possibility that a National Court of Appeals might be justified in twenty or twenty-five years.<sup>223</sup>

The hearings ended roughly where the reform process began, with testimony from Professor Paul Freund.<sup>224</sup> Professor Freund reiterated his belief that the Supreme Court was experiencing a serious and growing caseload problem that a national court of appeals could address. He noted that S. 3423 avoided the principal objection to his study group’s proposal—namely that having the NCA screen certiorari petitions usurped control of the Supreme Court’s docket—but that in leaving the screening function with the Court, S. 3423 failed to relieve the burden on the Court. That said, Professor Freund believed that the proposal usefully expanded the decisional capacity of the appellate system and would resolve more circuit splits that breed litigation.

Notwithstanding the tremendous energy devoted to the judicial reform effort, it lost momentum and no major structural changes to the federal appellate system came to pass.

#### *E. Late 1970s and Early 1980s: Modest Reforms*

In conjunction with its consideration of the NCA, Congress pursued several significant, but less ambitious, judiciary reforms in the following years. Congress significantly increased the number of district and appellate court slots in the late 1970s and early 1980s. It also reformed the bankruptcy appellate system, established a specialized patent appellate court, and split the Fifth Circuit to create the Eleventh Circuit. Congress continued to consider ways of addressing the fragmentation of national law, holding hearings on the NCA proposal and assessing creation of an intercircuit panel, a more modest and flexible variant of the NCA.

##### *1. Expansion of Judgeships*

In response to the rapid growth in caseloads, Congress created the largest number of federal district and appellate judge slots in the late 1970s and early 1980s. Congress added 116 district court seats in 1978 and another 61 seats in 1985, growing the size of the federal district court from 400 to 576 district

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222. At the time that Congress was considering the Hruska NCA proposal, a committee within the Department of Justice produced a report recommending abolition of diversity jurisdiction, creation of Article I administrative courts to adjudicate and resolve appeals under most federal regulatory statutes, elimination of the Supreme Court’s mandatory jurisdiction, and creation of a permanent inter-branch “Council on Federal Courts” to plan judicial reforms. *See* U.S. DEP’T OF JUST. COMM. ON REVISION OF THE FED. JUDICIAL SYS., *THE NEEDS OF THE FEDERAL COURTS* 11 (1977). The Carter administration did not pursue the Committee’s recommendations. *See* Meador, *supra* note 159, at 630–31.

223. *See* 1976 NCA HEARINGS, *supra* note 213, at 251.

224. *See id.* at 265–74.

judges.<sup>225</sup> Congress added thirty-five appellate slots in 1978, twelve appellate slots in 1982 (in establishing the Court of Appeals for the Federal Circuit), and twenty-four appellate slots in 1984, increasing the size of the appellate bench from 97 to 168 circuit court judges.<sup>226</sup>

## 2. Bankruptcy Court Reform

The bankruptcy system increased strain on the federal judiciary by the mid-twentieth century.<sup>227</sup> The bankruptcy system seeks to resolve the debtor's estate promptly so as to avoid further losses to creditors.<sup>228</sup> Decisions of the bankruptcy court were initially appealed to the district court.<sup>229</sup> Parties could then appeal those decisions to the regional circuit court of appeals. Appeals to the district court forced increasingly overextended district judges to choose between postponing existing cases and undermining expeditious resolution of bankruptcy matters.<sup>230</sup> The expanding jurisdiction of district courts as well as the growth of credit and insolvency after World War II added to the judiciary's pressures.<sup>231</sup>

By the mid-1970s, district court judges joined bankruptcy judges, then called referees in bankruptcy, in advocating a more efficient method of processing bankruptcy appeals.<sup>232</sup> In addition to the growing caseload concern, many district court judges were uneasy second-guessing the complex and technical decisions reached by experienced, specialized bankruptcy judges.<sup>233</sup> This, in turn, bred distrust among litigants and attorneys.<sup>234</sup>

Bankruptcy judges and some commentators advocated appointing bankruptcy judges as specialized Article III district court judges.<sup>235</sup> The American College of Trial Lawyers (ACTL), led by former district court judge Simon Rifkind, opposed this proposal on the grounds that it would undercut the

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225. See Act of Oct. 20, 1978, Pub. L. No. 95-486, 92 Stat. 1629; Act of Jul. 10, 1984, Pub. L. No. 98-353, 98 Stat. 333.

226. See Act of Oct. 20, 1978, Pub. L. No. 95-486, 92 Stat. 1629; Act of Oct. 14, 1980, Pub. L. No. 96-452, 94 Stat. 1994 (splitting the Fifth Circuit into the Fifth and Eleventh Circuits); Act of Apr. 2, 1982, Pub. L. No. 97-164, 96 Stat. 25 (establishing the Federal Circuit); Act of Jul. 10, 1984, Pub. L. No. 98-353, 98 Stat. 333.

227. Congress created the Commission on Bankruptcy Laws of the United States in 1970 to study and propose changes in the bankruptcy laws. See Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468.

228. Lloyd D. George, *The Bankruptcy Appellate Panels: An Unfinished Experiment*, 1982 BYU L. REV. 205, 206.

229. Robert M. Howard & Shenita Brazelton, *Specialization in Judicial Decision Making: Comparing Bankruptcy Panels and Federal District Court Judges*, 22 AM. BANKR. INST. L. REV. 407, 415 (2014).

230. See *id.*

231. See Conrad K. Cyr, *Structuring a New Bankruptcy Court: A Comparative Analysis*, 52 AM. BANKR. L.J. 141, 143 (1978).

232. See George, *supra* note 228, at 206–07.

233. See *id.* at 207–08.

234. See *id.* at 208.

235. See Cyr, *supra* note 231, at 141–42; Lawrence P. King, *Bankruptcy Code – Specialized Court Supported*, 52 AM. BANKR. L.J. 193 (1978).

cross-pollination benefits of general jurisdiction courts, result in a specialized bar, and dilute the prestige of being a district judge.<sup>236</sup>

Congress ultimately declined to create Article III bankruptcy judgeships and focused on reforming bankruptcy appeals.<sup>237</sup> In deference to circuit judges who objected to adding direct bankruptcy appeals to their already overloaded dockets,<sup>238</sup> Congress authorized circuit courts to utilize three bankruptcy appeal options:<sup>239</sup> (1) review by the district court (subject to further review by the court of appeals); (2) review by a three-judge Bankruptcy Appeal Panel (BAP) that could be established by the court of appeals;<sup>240</sup> or (3) review by the court of appeals upon consent of all of the parties to the appeal.

In 1982, the Supreme Court struck down the Bankruptcy Reform Act of 1978 for improperly delegating judicial power to non-Article III bankruptcy courts.<sup>241</sup> In response, Congress restored the district courts' control by specifying that bankruptcy courts are statutory "unit[s]" of the district courts and bankruptcy judges are "judicial officer[s]" of the district court.<sup>242</sup>

### 3. *Division of the Fifth Circuit*

In 1980, Congress divided the Fifth Circuit Courts of Appeals to relieve pressure on the largest and most rapidly growing appellate docket,<sup>243</sup> and as part of the civil rights struggles dividing the south.<sup>244</sup> The legislation divided the "former" Fifth Circuit into the "new" Fifth Circuit (comprising the District of

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236. See Simon H. Rifkind, *Bankruptcy Code—Specialized Court Opposed*, 52 AM. BANKR. L.J. 187, 187–90 (1978). These objections echoed concerns that Judge Rifkind raised about specialized patent courts. See Simon H. Rifkind, *A Special Court for Patent Litigation?: The Danger of a Specialized Judiciary*, 37 A.B.A. J. 425, 425–26 (1951). Other federal judges warned Congress about diluting the prestige of the bench by appointing specialized Article III bankruptcy judges. See Cyr, *supra* note 231, at 141–42.

237. See George, *supra* note 228, at 209.

238. See *id.* at 211–12.

239. See Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549. See generally Thomas E. Carlson, *The Case for Bankruptcy Appellate Panels*, 1990 BYU L. REV. 545, 546–47.

240. The First and Ninth Circuits were the only appellate courts to establish BAPs. Howard & Brazelton, *supra* note 229, at 415.

241. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

242. See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 151, 98 Stat. 333, 336. The 1984 Amendments limited BAP review to cases in which the parties consent. The First Circuit elected not to reestablish a BAP. The Ninth Circuit has continued to allow the BAP to hear and determine appeals. Tisha Morris, Note, *The Establishment of Bankruptcy Appellate Panels under the Bankruptcy Reform Act of 1994: Historical Background and Sixth Circuit Analysis*, 26 U. MEM. L. REV. 1501, 1515–25 (1996).

243. See Act of Oct. 14, 1980, Pub. L. No. 96-452, 94 Stat. 1994. The Hruska Commission had recommended this legislation in its first report. See HRUSKA COMMISSION STRUCTURE REPORT, *supra* note 1. See also *supra* Part I.D.2.a.

244. See generally DEBORAH J. BARROW & THOMAS G. WALKER, *A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM* (1988) (exploring the complex civil rights political struggle underlying the division of the Fifth Circuit).

the Canal Zone, Louisiana, Mississippi, and Texas) and the Eleventh Circuit (comprising Alabama, Florida, and Georgia).<sup>245</sup>

#### 4. *Failed Revival of the Hruska NCA Proposal*

Citing the “urgent need” for judiciary reform, Senator Howell Heflin sought to revive the NCA proposal in 1981.<sup>246</sup> The new legislation was premised on the same grounds as the initial proposal: the Supreme Court’s crowded dockets, the lack of uniformity in national law, and the inability of appellate courts to resolve conflicts.<sup>247</sup> Like the initial bill, S. 1529 provided for reference jurisdiction. The new proposal, however, afforded the NCA more flexibility: it authorized the nine-member NCA court to sit in panels of “three, five, seven, or nine judges” as the court determined.<sup>248</sup> It also authorized the Chief Justice of the Supreme Court to assign judges from circuit courts of appeals to the NCA on a temporary basis.<sup>249</sup>

Senator Heflin’s testimony called attention to the Supreme Court’s denial of certiorari in *Brown Transport v. Atcon*,<sup>250</sup> which concerned a clear conflict among lower courts regarding the interpretation of federal regulations governing interstate commerce. Justice Byron White, joined by Justice Blackmun, dissented on the ground that “[t]his conflict among jurisdictions over an issue which ‘imperatively demand[s] a single uniform rule’ commands the Court’s immediate attention.”<sup>251</sup> Justice White’s impassioned dissent reported statistics on the low rate of certiorari grants and listed numerous declined petitions presenting circuit splits, conflicts with prior decisions of the Supreme Court, and important questions of federal law that the Supreme Court had not yet heard.<sup>252</sup> Chief Justice Burger also filed a dissent imploring Congress to address the desperate need for judiciary reform to address rising caseloads.<sup>253</sup>

On behalf of the American Bar Association, former Ninth Circuit Judge Shirley M. Hufstedler reiterated her and the ABA’s strong support for

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245. See Robert A. Ainsworth, Jr., *Fifth Circuit Court of Appeals Reorganization Act of 1980*, 1981 BYU L. REV. 523, 523.

246. See S. 1529, 97th Cong. (1981); *Court Reform Legislation, Hearing Before the Subcomm. on the S. Comm on the Judiciary*, 97th Cong 44 (1981) [hereinafter 1981 NCA HEARING].

247. See 1981 NCA HEARING, *supra* note 246, at 2.

248. S. 1529, 97th Cong. § 27(b) (1981). By contrast, S. 3423 required that the “[c]ases and controversies shall be heard and determined by the court in banc. Five of the judges of the National Court of Appeals shall constitute a quorum.” S. 3423, 94th Cong. § 27 (2d Sess. 1976).

249. S. 1529, 97th Cong. § 21(b) (1981). NCA judges would receive the same salaries as other circuit court judges. *Id.* § 23(b).

250. 439 U.S. 1014, 1014 (1978).

251. *Id.* at 1015 (quoting *Cooley v. Board of Wardens*, 53 U.S. 299, 319 (1852)) (White, J., dissenting) (citations omitted).

252. See *id.* at 1016-23.

253. See *id.* at 1030-32 (footnotes omitted) (Burger, C.J. dissenting). In response, Justice Brennan noted that he “remains completely unpersuaded, as he has repeatedly said, that there is any need for a new national court,” and referred to a law review article he had written. *Id.* at 1032. See Brennan, *supra* note 160.

establishment of an NCA. Several other witnesses testified in favor of the NCA proposal.<sup>254</sup>

As occurred at the 1976 NCA hearings, the Department of Justice (DOJ) opposed the establishment of an NCA on the grounds that it would create additional work for the Supreme Court in deciding whether to refer cases to the new court and whether to review decisions of that court. It would further increase litigation because litigants would more likely seek review of their cases in the new court.<sup>255</sup> The DOJ also observed that it would diminish the authority of circuit courts. While expressing concern for the problems that the NCA proposal sought to address, the DOJ believed that creation of a National Court of Appeals “would be inadvisable at this time.”<sup>256</sup> The DOJ did, however, support passage of S. 1531, which would convert the Supreme Court’s mandatory appellate jurisdiction to discretionary jurisdiction except when reviewing decisions of three-judge district courts.<sup>257</sup> The Senate took no action on any of the reform bills.

##### 5. *Establishment of the Federal Circuit*

Following the demise of the Hruska Commission’s NCA proposal, President Jimmy Carter’s Domestic Policy Review on Industrial Innovation pursued the creation of a specialized patent appellate court as a means of spurring research and development.<sup>258</sup> Advocates for a specialized patent appellate court believed that jurisprudential divisions among the regional courts of appeals undermined investment and innovative activity.<sup>259</sup> Some jurists, legislators, and key bar associations resisted the creation of a specialized patent tribunal, largely on the grounds that general jurists and regional courts best serve the administration of justice.<sup>260</sup> Supporters of consolidating patent appeals into a

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254. See S. 1529, § 21(b); 1976 NCA HEARINGS, *supra* note 213, at 26–37 (statement and testimony of Professor A. Leo Levin, Director, Federal Judicial Center); see also *id.* at 86–87, 89–102 (statement and testimony of James Duke Cameron, Justice, Arizona Supreme Court); see also *id.* at 87–89 (statement and testimony of John H. Pickering, attorney, Wilmer, Cutler & Pickering).

255. *Id.* at 120–25 (prepared statement of Jonathan Rose).

256. *Id.* at 125.

257. See *id.* at 125–30. The DOJ opposed S. 1532, which proposed to amend the voir dire examination provisions of the Federal Rules of Criminal Procedure and the Federal Rules of Civil Procedure to allow counsel to conduct examination of prospective jurors. Under the existing rules, such examination was subject to the district judge’s discretion. See *id.* at 130–32.

258. See H.R. Rep. No. 96-1307 (1980) (diagnosing the causes of economic stagnation as the “failure of American industry to keep pace with the increased productivity of foreign competitors”); Griffin B. Bell & Terrence B. Adamson, *Daniel J. Meador—Visionary*, 80 VA. L. REV. 1209, 1212–13 (1994) (describing Daniel Meador’s efforts as head of Office for Improvements in the Administration of Justice to establish the Federal Circuit).

259. See H.R. Rep. No. 96-1307 3 (1980) (explaining that a single court for patent appeals “will do a great deal to improve investors’ confidence in patented technology”).

260. See George C. Beighley, Jr., *The Court of Appeals for the Federal Circuit: Has it Fulfilled Congressional Expectations?*, *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 671, 689–90, 693–97 (2011); see also S. Rep. No. 97-275, at 40–41 (1981), as reprinted in 1982 U.S.C.C.A.N. 11, at 50–51 (“[T]he American Bar Association and the American College of Trial Lawyers have actively opposed

single tribunal countered that the proposed appellate tribunal, which merged appellate responsibilities for claims against the government, trade matters, and several other areas of jurisprudence with appeals of patent cases, belied the “specialized court” label. The proposed court would have a range of responsibilities and include generalist judges.<sup>261</sup>

The counterargument carried the day. Congress passed the Federal Courts Improvement Act of 1981,<sup>262</sup> establishing a new Article III appellate tribunal: the U.S. Court of Appeals for the Federal Circuit. Nonetheless, legislators circumscribed the Federal Circuit’s exclusive jurisdiction to preserve regional circuit court primacy in non-patent areas of law.<sup>263</sup>

### 6. *The Intercircuit Tribunal Proposals*

Congress continued to seek solutions to intercircuit conflicts. The House of Representatives and the Senate took up a flexible, experimental, less costly idea that grew out of alternatives to the NCA<sup>264</sup>: an intercircuit tribunal (ICT).<sup>265</sup> D.C. Circuit Senior Judge Carl McGowan succinctly captured the idea:

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that portion of S. 1700 that would remove patent appeals jurisdiction from the eleven federal circuit courts of appeals. They share my concern that creating such a specialty court is not in the best interest of the legal system.”).

261. See Daniel J. Meador, *Retrospective on the Federal Circuit: The First 20 Years—A Historical View*, 11 FED. CIR. B.J. 557, 558 (2002). See generally Daniel J. Meador, *Origin of the Federal Circuit: A Personal Account*, 41 AM. U. L. REV. 581 (1992) (recounting the events leading up to the formation of the Federal Circuit in 1982).

262. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25.

263. See 28 U.S.C. § 1295. As the Senate Report explains, the establishment of the Federal Circuit

is intended to alleviate the serious problems of forum[] shopping among the regional courts of appeals on patent claims by investing exclusive jurisdiction in one court of appeals. It is not intended to create forum shopping opportunities between the Federal Circuit and the regional courts of appeals on other claims.

See S. REP. NO. 97-275, at 19–20 (1981), reprinted in 1982 U.S.C.C.A.N. 11; see also STAFF OF H. COMM. ON THE JUDICIARY, 96TH CONG., REP. ON AMENDING THE PATENT AND TRADEMARK LAWS (1980) (statement of Hon. Robert W. Kastenmeier) (“[J]urisdiction of an appeal in a case involving a claim arising under any Act of Congress relating to copy rights or trademarks . . . will continue to go to the regional appellate courts, pursuant to section 1294 of title 28.”); Peter S. Menell, *API Copyrightability Bleak House: Unraveling and Repairing the Oracle v. Google Jurisdictional Mess*, 31 BERKELEY TECH. L.J. 1515, 1580–81 (2016).

264. See Harold Leventhal, *A Modest Proposal for a Multi-Circuit Court of Appeals*, 24 AM. U. L. REV. 881, 882 (1975); HRUSKA COMMISSION HEARINGS – VOLUME II, *supra* note 169, at 805–13 (testimony of Hon. Frank M. Coffin, C.J., U.S. Court of Appeals for the First Circuit); A. Leo Levin, *Adding Appellate Capacity to the Federal System: A National Court of Appeals or an Inter-Circuit Tribunal?*, 39 WASH. & LEE L. REV. 1, 16–17 (1982).

265. See *The Supreme Court and Its Workload Crisis: Hearings on H.R. 4149 and H.R. 4138 Before the Subcomm. on Courts, Civil Liberties & the Admin. of Justice of the H. Comm. on the Judiciary*, 99th Cong. (1986) [hereinafter *1986 House Hearing on The Supreme Court Workload and Its Workload Crisis*]; *Intercircuit Panel of the United States Act: Hearing on S. 704 Before the Subcomm. on Courts of the S. Comm. on the Judiciary*, 99th Cong. (1985) [hereinafter *1985 Senate Hearing on Intercircuit Panel Act*]; *Supreme Court Workload: Hearings on H.R. 1968 Before the Subcomm. on Courts, Civil Liberties & the Admin. of Justice of the H. Comm. on the Judiciary*, 98th Cong. (1983) [hereinafter *1983 House Hearings on Supreme Court Workload*].



How much more sensible [than an NCA] it would seem to be to create a temporary court with an experienced judge from each circuit to receive and dispose of such referrals as the Supreme Court chooses to make . . . ? No new courthouses [would be] required, and the extra expense to the system [would be] minimal.

Starting with a court of this character, and confining its jurisdiction in the first instance to receiving referrals from the Supreme Court of inter-circuit conflicts, is the best way to edge into this ticklish enlargement of our federal appellate capacity. It is also the one most likely to command, for its necessary legislative authorization, the support of the Supreme Court, the federal judges generally, and the legal community.

A provisional approach of this kind assures that the continuance of such a court will turn solely on the degree of its utilization and its effectiveness in performance. Its termination, if that should prove to be the popular verdict, would be uncomplicated.<sup>266</sup>

As envisioned in H.R. 1970,<sup>267</sup> the ICT would comprise twenty-eight judges who are in regular active service or who are senior judges. Each circuit would designate two judges to serve for not more than five years. The court would sit in panels of seven judges with no two judges from the same circuit sitting on the same panel at the same time. The Supreme Court would refer matters to the court, and parties could petition the Supreme Court for review of cases decided by the court. The ICT would run for five years, after which it would terminate. Congress could then decide the best path forward.<sup>268</sup>

The ICT received the support of advocates of the prior NCA proposals<sup>269</sup> as well as some converts.<sup>270</sup> Chief Justice Burger actively campaigned for its adoption.<sup>271</sup>

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266. Carl McGowan, *The View from an Inferior Court*, 19 SAN DIEGO L. REV. 659, 670–71 (1982).

267. H. R. 1970, 98th Cong (1983).

268. Senate Bill 704 would similarly have the ICT handle cases referred by the Supreme Court and would sunset after five years. See S. 704, 99th Cong. § 1260(a), 8(c) (1985). Under the Senate bill, the ICT would have nine judges and four alternate judges. The Supreme Court would fill these slots from the pool of active and senior judges of the circuit courts of appeals.

269. See, e.g., 1983 *House Hearings on Supreme Court Workload*, *supra* note 265, at 149 (testimony of Hon. Collins J. Seitz, C.J., U.S. Court of Appeals for the Third Circuit) (“I also fully agree with the five year experiment, not only because it is more politically expedient but also because it requires Congress to evaluate the experiment and translate its findings into a more permanent solution.”).

270. See *id.* at 37 (testimony of Professor Daniel J. Meador, School of Law, University of Virginia) (“I came relatively late to endorse this idea myself; that is, late in relation to the proposal of the Hruska Commission . . .”). Compare *id.* at 62–63 (statement of Lloyd N. Cutler) (endorsing ICT), with 1976 NCA HEARINGS, *supra* note 213, at 125–26 (statement of Lloyd N. Cutler) (opposing NCA).

271. See Warren E. Burger, Chief Justice of the United States, Remarks at the 60th Annual Meeting of the American Law Institute (May 17, 1983), *reprinted in 1983 House Hearings on Supreme Court Workload*, *supra* note 265, at 320–26; Warren E. Burger, Chief Justice of the United States, Annual Report on the State of the Judiciary, Remarks at the Annual Mid-Year Meeting of the American Bar Association (Feb. 6, 1983), *reprinted in 1983 House Hearings on Supreme Court Workload*, *supra* note 265, at 306–19.

Notwithstanding the ICT's modest approach, the legislative hearings surfaced wide and deep criticism, particularly among appellate court judges.<sup>272</sup> The Department of Justice opposed the legislation, although in less strident terms than it had opposed the NCA.<sup>273</sup> Rather than supporting the ICT, the DOJ pressed for streamlining federal court jurisdiction.<sup>274</sup>

Just as the ICT proposal was gaining traction, NYU Law Professors Samuel Estreicher and John Sexton released a detailed empirical study testing two key premises underlying the NCA and ICT proposals: that the Supreme Court was overlooking important circuit splits in its screening process and that it was not hearing enough cases.<sup>275</sup> Based on in-depth review of the Supreme Court's 1982 Term, the NYU Study challenged the findings of the Feeney Study<sup>276</sup> and the views of several Supreme Court justices<sup>277</sup> that the Court lacked the capacity to address the intercircuit splits.<sup>278</sup> Although the ICT constituted a relatively modest, experimental reform, Professors Estreicher and Sexton warned that the legislation would add to the Supreme Court's workload without materially improving the harmonization of national law.<sup>279</sup>

After extensive debate, the American Bar Association shifted its position and voted to oppose the ICT on the grounds that the new institution would increase the Supreme Court's workload, hamper the functioning of circuits by drawing away judges, add to the burdens of keeping up with new legal

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272. See 1983 House Hearings on Supreme Court Workload, *supra* note 265, at 156 (testimony of Second Circuit Chief Judge Wilfred Feinberg asserting that creating the ICT would be tantamount to adding a fourth tier that would cause delay and questioning the extent of intercircuit conflicts); *id.* at 178 (testimony of Eighth Circuit Judge Douglas Law opining that the ICT would virtually cripple every court of appeals in this country on an immediate basis, entail "mindboggling" logistical and administrative problems, and effectively create a fourth judicial tier that would delay and proliferate litigation); 1985 Senate Hearing on Intercircuit Panel Act, *supra* note 265, 85 (testimony of Second Circuit Judge Ralph K. Winter warning that the ICT "will almost surely accelerate the expansion of judicial power and the trend toward the constitutionalization of every perceived problem"); *id.* at 94–121 (testimony of Judges Patricia Wald, Harry Edwards, Ruth Bader Ginsburg); 1986 House Hearing on The Supreme Court Workload and Its Workload Crisis, *supra* note 265, at 21–28 (testimony of Judge Robert K. Bork); see also Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1419 (1987) (criticizing the intercircuit panel).

273. See 1983 House Hearings on Supreme Court Workload, *supra* note 265, at 236–39.

274. See 1985 Senate Hearing on Intercircuit Panel Act, *supra* note 265, at 58–85 (statement of Hon. James M. Spears, Acting Assistant Att'y Gen., Office of Legal Policy, U.S. Department of Justice). This posture, however, added political dimension to the reform effort. See *id.* at 80–81 (comments of Sen. Heflin).

275. See Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 704–09 (1984).

276. See *supra* text accompanying notes 186–87.

277. See *supra* text accompanying notes 193–96.

278. The study concluded that thirty-nine cases—24 percent of the total—were improvidently granted based on their managerial framework. Furthermore, of the 1,860 certiorari petitions denied review, they identified only twelve "intolerable" conflicts; and seven of those were properly denied on other grounds. See Estreicher & Sexton, *supra* note 275, at 758, 779.

279. See *id.* at 793–97; 1986 House Hearing on The Supreme Court Workload and Its Workload Crisis, *supra* note 265, at 64–97.

developments, and add another level of review and further delay ultimate decisions.<sup>280</sup> Congress ultimately dropped the ICT experiment.

#### F. Retrenchment of *En Banc* Review

President Ronald Reagan's electoral landslide in 1980<sup>281</sup> and reelection in 1984 brought about significant changes in the federal judiciary that strongly affected the perception of en banc review among sitting jurists and the public at large. Perceptions of the politicization of the judiciary produced tension around en banc review, which led to retrenchment by the early 1990s. This trend has continued, with the Federal Circuit as a notable exception, through the present.<sup>282</sup>

Although there has always been a political component to judicial selection, especially at the Supreme Court level, the U.S. Constitution and American governance traditions have long revered judicial independence and objectivity.<sup>283</sup> The institution of life tenure and strict limits on removal insulate federal judges from political interference once confirmed.<sup>284</sup>

Prior to the Reagan administration, the mechanics of judicial selection, developed across both Democratic and Republican administrations, emphasized competence and bipartisanship.<sup>285</sup> The American Bar Association had long played a significant role in vetting candidates.<sup>286</sup> As summarized in a transition

280. See Letter to Hon. Robert W. Kastenmeier from Robert D. Evans on behalf of the American Bar Association (Feb. 20, 1986), reprinted in *1986 House Hearing on The Supreme Court Workload and Its Workload Crisis*, supra note 265, at 128–31.

281. See Katherine Scott & James Wyatt, *Robert C. Byrd: Tactician and Technician*, in LEADERSHIP IN THE U.S. SENATE: HERDING CATS IN THE MODERN ERA 3 (Colton C. Campbell ed., 2018). Reagan's coattails affected Congress. Republicans gained twelve Senate seats in 1980, causing the largest Senate swing in decades. The resulting shift in Senate leadership and control of the Judiciary Committee reinforced the Reagan administration's use of judicial appointments to pursue its domestic agenda.

282. See *infra* Part II.B.2.

283. Scholars have long debated the role of politics in law. See RONALD DWORKIN, *LAW'S EMPIRE* (1986) (criticizing legal positivism); KENT GREENAWALT, *LAW AND OBJECTIVITY* (1995) (considering legal skepticism); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780–1860*, at 254–56 (1977) (identifying “[t]he desire to separate law and politics” as “a central aspiration of the American legal profession”); Charles E. Clark, *The Limits of Judicial Objectivity*, 12 AM. U. L. REV. 1, 10 (1963) (concluding that “judicial objectivity—taken to mean adherence to principles already established—can carry us only so far, and in fact not a great way in the new and undetermined area . . . where principles are in the process of creation”); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 631–32 (1958) (arguing that positivism distorts legal philosophy); H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 612–15 (1958) (disputing a mechanical application of law); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959) (arguing that the judiciary must be principled).

284. See U.S. CONST., art. III.

285. See SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* 9–14 (1997).

286. See Warren Christopher, Memorandum to My Successor 6 (Nov. 26, 1968) (Memorandum drafted by Deputy Attorney General summarizing the mechanics of judicial selection during the Johnson administration), described in GOLDMAN, supra note 285, at 9–11.

memorandum from President Lyndon B. Johnson's Department of Justice to the incoming Richard Nixon administration, "[r]ecommendations of a Senator of the President's Party from the state where a vacancy exists are very important. Moreover, the views of any Senator, whatever his [*sic*] Party, from the state where the vacancy exists cannot be ignored, for Senate tradition gives them a virtual right of veto."<sup>287</sup> President Carter sought to elevate merit and diversity over patronage in his judicial appointments.<sup>288</sup> Notwithstanding the realist critique of judicial objectivity,<sup>289</sup> the American system of government has long emphasized the independence, neutrality, and objectivity of judicial institutions.<sup>290</sup>

Following the controversy over the Supreme Court's decision in *Roe v. Wade* and some other Supreme Court decisions perceived as "activist," Ronald Reagan pledged as a key plank of his 1980 presidential campaign to "work for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life."<sup>291</sup> With a decisive electoral mandate,<sup>292</sup> President Reagan set out to appoint politically conservative jurists who would interpret the Constitution narrowly and support his larger "policy" reforms.

Soon after President Reagan took office, Attorney General William French Smith met with the Senate Judiciary Committee leaders to establish new procedures significantly increasing the Administration's role in selecting candidates and marginalizing the ABA's involvement.<sup>293</sup> With the assistance of the newly formed Federalist Society,<sup>294</sup> the Reagan White House exercised tight control over the judicial screening process, engaging in interviews that came to be seen as litmus tests for how judicial candidates would resolve particular legal questions. As Professor Sheldon Goldman reported, "[t]he highest levels of the White House staff . . . played an ongoing, active role in the selection of judges.

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287. See GOLDMAN, *supra* note 285, at 10.

288. See *id.* at 238, 260.

289. See Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 PHIL. & PUB. AFF. 205, 207 (1986); Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

290. See DWORKIN, *supra* note 283; GREENAWALT, *supra* note 283; HORWITZ, *supra* note 283; Clark, *supra* note 283; Hart, *supra* note 283.

291. *1980 Republican Platform Text*, reprinted in 38 Cong. Q. Wkly. Rep. 2030, 2046 (1980).

292. Although Ronald Reagan captured just over half of the popular vote, he won 91 percent of the electoral college. See Mark A. Peterson, *LEGISLATING TOGETHER: THE WHITE HOUSE AND CAPITOL HILL FROM EISENHOWER TO REAGAN* 127 (1993).

293. See GOLDMAN, *supra* note 285, at 287–90.

294. Founded in 1980 by three law students and the financial support of conservative organizations, the Federalist Society set out to counter what its founders believed to be "a form of orthodox liberal ideology which advocates a centralized and uniform society." See MICHAEL AVERY & DANIELLE McLAUGHLIN, *THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS* 1 (2013); see also SIDNEY BLUMENTHAL, *THE RISE OF THE COUNTER-ESTABLISHMENT: THE CONSERVATIVE ASCENT TO POLITICAL POWER* 60 (2008 ed.) (describing the student movement's opposition to "the liberal orthodoxy strangling opinion on the campus").

Legislative, patronage, political, and policy considerations were systematically scrutinized for each judicial nomination to an extent never before seen.”<sup>295</sup> Edwin Meese III, President Reagan’s close political advisor and second Attorney General,<sup>296</sup> played a central role in pursuing the strategy of shifting interpretation toward strict construction of the Constitution.<sup>297</sup>

The Reagan administration’s overt campaign to influence constitutional and statutory interpretation through judicial selection raised concerns about politicization of the federal judiciary.<sup>298</sup> The issue gained salience as President Reagan filled an unprecedented number of appellate slots. The Reagan administration benefited from unfilled slots created towards the end of President Carter’s term.<sup>299</sup> In addition, Congress created a large number of new slots during President Reagan’s terms in office in response to mounting caseloads.<sup>300</sup>

The 1980s saw the largest expansion of the circuit courts in any decade: from 133 slots to 179 slots.<sup>301</sup> Accounting for new appellate slots and vacancies, President Reagan filled 78 appellate slots during his two terms in office, substantially more than any prior president.<sup>302</sup> His appointments were notable for their party affiliation—not one of the 78 appointees were Democrats—and their high level of partisan activism.<sup>303</sup>

By the mid-1980s, the composition of many circuit courts had shifted to majority Republican presidential selections.<sup>304</sup> Several of these judges endorsed

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295. See GOLDMAN, *supra* note 285, at 292.

296. See *id.* at 301–02; John A. Jenkins, *Mr. Power: Attorney General Meese Is Reagan’s Man to Lead the Conservative Charge*, N.Y. TIMES, Oct. 12, 1986, at 19.

297. See AVERY & MCLAUGHLIN, *supra* note 294, at 8–10; Edwin Meese III, *Foreword to HENRY JULIAN ABRAHAM ET AL., JUDICIAL SELECTION: MERIT, IDEOLOGY, AND POLITICS*, at x (1990).

298. See, e.g., HERMAN SCHWARTZ, *PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION* (1988) (chronicling the historical background and impact of conservative court-packing); Laurence H. Tribe, *Amending the Constitution by Default*, N.Y. TIMES, Sept. 29, 1985, at E21 (criticizing political obedience to President Reagan’s judicial appointments).

299. The Omnibus Judgeship Act, Pub. L. No. 95-486, 92 Stat. 1629 (1978), created thirty-five new appellate court slots. With the shift in presidential and Senate leadership following the 1980 election, sixteen pending judicial nominations were allowed to lapse, expanding the seats to be filled by the incoming administration. See GOLDMAN, *supra* note 285, at 264.

300. The Judiciary Act of 1984 added twenty-two new appellate positions across the regional circuit courts. The Federal Courts Improvement Act of 1982, Pub. L. No. 97-164 § 3, 96 Stat. 25 (1982), created the Court of Appeals for the Federal Circuit. Those twelve slots were initially filled through reassignment of the twelve Article III judges serving on the former Court of Customs and Patents Appeals and United States Court of Claims. The Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 165, 96 Stat. 25 (1982); see also Howard T. Markey, *The Phoenix Court*, 32 CLEV. ST. L. REV. 1, 2 (1983).

301. Administrative Office of the U.S. Courts, *Authorized Judgeships – From 1979 to Present*, (2019) <https://www.uscourts.gov/sites/default/files/allauth.pdf> [<https://perma.cc/H3GQ-2A73>]. Eleven of those slots were added in 1990, and hence were filled by President George H. W. Bush. Judicial Improvements Act of 1990, Pub. L. 101-650, § 202, 104 Stat. 5089 (1990).

302. See GOLDMAN, *supra* note 285, at 336.

303. See *id.* at 343.

304. By the end of his administration, President Reagan’s appointees held majorities in the D.C., Second, Third, Sixth, Seventh, Eighth, and Tenth circuits. See Michael E. Solimine, *Ideology and En*

limited use of en banc review as a productive and legitimate means for addressing divisions within circuit law. Judge Frank H. Easterbrook of the Seventh Circuit Court of Appeals defended en banc review as “a stabilizing process that makes sure the majority’s voice is heard.”<sup>305</sup> Judge Alex Kozinski “strongly urged [his colleagues on the Ninth Circuit Court of Appeals] to conduct more en banc hearings.”<sup>306</sup>

The use of the en banc process became a lightning rod for concerns about politicization of the judiciary, especially in the D.C. Circuit, a particularly prominent appellate court due to its unique docket of government-related cases.<sup>307</sup> By the mid to late 1980s, members of the D.C. Circuit openly discussed the use of the en banc mechanism in speeches and law review articles.<sup>308</sup> As explored in Part II.B.2, regional circuit courts started to substantially scale back en banc review in the late 1980s.

### G. Late 1980s and 1990s: Renewed Study of Judiciary Reform

As federal caseloads continued to mount during the 1980s, Congress directed the Judicial Conference of the United States to “make a complete study

*Banc Review*, 67 N.C. L. REV. 29, 63 (1988); Note, *The Politics of En Banc Review*, 102 HARV. L. REV. 864, 865, n.4 (1989).

305. See Stephen Wermiel, *Full-Court Review of Panel Rulings Becomes Tool Often Used by Reagan Judges Aiming to Mold Law*, WALL ST. J., Mar. 22, 1988, at 70.

306. See Susan D. Rice, *Earl Warren Would Blush*, AM. LAW., May–June 1988, at 46, 48 (special supplement).

307. See SCHWARTZ, *supra* note 298, at 155 (opining that “[m]any cases in the District of Columbia Circuit were en banc because the conservative majority on the circuit led by Judge Bork was unhappy with the decision, and there are indications that this is happening in other circuits as well”); Wermiel, *supra* note 305, at 70 (quoting former Reagan Justice Department official Bruce Fein stating that “[t]he greater prevalence of en banc review . . . is because Reagan appointees are more aggressive about pursuing a philosophical agenda to put some coherence into the law of their circuits”); Aaron Freiwald, *The Mission: Stock Bench*, AM. LAW., May–June 1988, at 6 (special supplement) (suggesting that Reagan appointees’ calls for en banc rehearings “have deeply divided previously stable and congenial circuits”); Kenneth Karpay, *En Banc Furor, Liberal Fury*, AM. LAW., May–June 1988, at 10 (special supplement) (describing “the battle over en banc review” on the D.C. Circuit).

308. See, e.g., Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1335–36 (1998) (contesting the idea that ideology drives judicial decision-making); Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837, 855 (1991) (conceding that partisan politics may influence the judiciary’s decision-making); Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981-1990*, 59 GEO. WASH. L. REV. 1008, 1041–50 (1991) (presenting statistical data on en banc procedures of the D.C. Circuit); Patricia M. Wald, *Regulation at Risk: Are Courts Part of the Solution or Most of the Problem?*, 67 S. CAL. L. REV. 621, 645 (1994) (disputing role of ideology by noting infrequency of dissents on D.C. Circuit); see also Wilfred Feinberg, *The Office of Chief Judge of a Federal Court of Appeals*, 53 FORDHAM L. REV. 369, 376 (1984) (“My view . . . is that for the most part in bancs are not a good idea . . .”); James Oakes, *Personal Reflections on Learned Hand and the Second Circuit*, 47 STAN. L. REV. 387, 392 (1995) (“Our rule of thumb has been that most cases are either too unimportant or too important to en banc.”); Jon O. Newman, *Foreword: In Banc Practice in the Second Circuit, 1989-93*, 60 BROOK. L. REV. 491, 502 (1994) (“[T]he Second Circuit’s pattern of rarely rehearing cases in banc has been a sound policy.”); Jon O. Newman, *Foreword: In Banc Practice in the Second Circuit: The Virtues of Restraint*, 50 BROOK. L. REV. 365, 372 (1984) (commenting on the rarity of in banc rehearing in the Second Circuit).

of the courts of the United States and of the several States,” “recommend revisions to be made to laws of the United States as the Committee, on the basis of such study, deems advisable,” and “develop a long-range plan for the judicial system.”<sup>309</sup>

In addition, the elevation of William Rehnquist to Chief Justice in 1986 brought new leadership to the Court, the Judicial Conference of the United States, and the Federal Judicial Center (FJC), the principal governance institutions for the federal judiciary. Justice Rehnquist joined the call for structural reform in the mid-1970s<sup>310</sup> and the mounting caseloads since that time increased his concerns.<sup>311</sup> In the early 1990s, as Chief Justice, he observed that

[o]ne of the chief needs of our generation is to deal with the current appellate capacity crisis in the federal courts of appeals. Few would argue about the existence of such a crisis, born of both spiraling federal filings and an increasing tendency to appeal district court decisions.<sup>312</sup>

The Chief Justice pressed the Judicial Conference and the FJC to study and take concrete action to address the caseload challenges confronting the federal judiciary. Pursuant to Congress’s directive, he appointed a Federal Courts Study Committee drawn from all three branches of government to assess the “impending crisis” of the federal courts.<sup>313</sup> The Committee recognized in its 1990 report that “[h]owever 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.”<sup>314</sup> Echoing the Freund Study Group and the Hruska Commission, the 1990 report advised that

The most acute problems of overload are at the appellate rather than trial level—and problems of appellate overload are, as we have seen, more difficult to solve than are parallel problems in the trial courts. Therefore the central path of radical structural reform focuses on appeals, and it is forked. One fork leads to specialized courts, the other to additional tiers

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309. See Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702 § 105(1)–(4), 102 Stat. 4642; FED. COURTS STUDY COMM., JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 31 (1990).

310. See 1976 NCA HEARINGS, *supra* note 213, at 186–88 (Justice Rehnquist’s views on the NCA).

311. See Rehnquist, *supra* note 56, at 12 (stating that there is need for “more national decision-making capacity than the Supreme Court as presently constituted can furnish” and predicting that “we will in the not-too-far-distant future have another stage in the evolution of the Supreme Court. It will largely relinquish its role in run-of-the-mine statutory construction cases to a new court—whether called a national court of appeals or something else—which will function in effect as a lower chamber of the Supreme Court. The Supreme Court will continue to deal as it has in the past with questions of constitutional law and other federal questions that now come before it . . . . I think the creation of such a court makes eminent good sense.” (footnote omitted)).

312. *Chief Justice Addresses Federal Court Workload, Future Needs*, THIRD BRANCH, June 1992, at 4.

313. See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 309, at 4.

314. *Id.* at 109.

of intermediate appellate review.<sup>315</sup>

Notwithstanding this call to action and numerous studies, Congress did not enact any major structural judiciary reforms.<sup>316</sup> Congress did, however, act on the Supreme Court's longstanding request to eliminate mandatory jurisdiction, implement civil justice reforms aimed at speeding and improving civil litigation, expand the role of magistrate judges, add more Article III judges, and direct circuit courts to establish Bankruptcy Appellate Panels. Although Congress shelved plans to divide the Ninth Circuit, it took the pragmatic step of authorizing courts of appeals with more than fifteen judges to empanel a subset of members to perform en banc review.

### 1. *Abolition of Mandatory Supreme Court Jurisdiction*

After multiple failed attempts, in 1988 Congress eliminated nearly all the remaining vestiges of mandatory Supreme Court appeal jurisdiction.<sup>317</sup> With the enthusiastic approval of Supreme Court justices,<sup>318</sup> the Court became a virtually all-certiorari tribunal. This change sapped much of the impetus for reform from the top without addressing the more serious issue of unresolved intercircuit splits.<sup>319</sup>

### 2. *Civil Justice Reform Act of 1990*

By the mid-1980s, the stresses of an overloaded judiciary manifested in delay, high costs, and frustration among civil litigants.<sup>320</sup> Business groups

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315. *Id.* at 10.

316. See GORDAN BERMANT ET AL., FED. JUDICIAL CTR., IMPOSING A MORATORIUM ON THE NUMBER OF FEDERAL JUDGES: ANALYSIS OF ARGUMENTS AND IMPLICATIONS (1993); COMM. ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS (1995); COMM. ON STRUCTURAL ALT. FOR THE FED. COURTS OF APPEALS, FINAL REPORT (1998); FED. JUDICIAL CTR., THE FEDERAL APPELLATE JUDICIARY IN THE TWENTY-FIRST CENTURY (Cynthia Harrison & Russell Wheeler eds., 1989); FED. 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); REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 309.

317. See Supreme Court Case Selection Act of 1988, Pub. L. No. 100-352, 102 Stat. 662 (1988); Bennett Boskey & Eugene Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals*, 121 F.R.D. 81, 94-98 (1988).

318. See Letter from nine Justices of the Supreme Court to Hon. Robert W. Kastenmeier (June 17, 1982) in *Hearing on H.R. 2406, H.R. 4395, H.R. 4396 before the Subcomm. on Courts, Civil Liberties, and the Admin of Justice of the H. Comm. On the Judiciary*, 97th Cong. 24 (1983) (concluding that "[b]ecause the Court has to devote a great deal of time to deciding mandatory jurisdiction cases, it is imperative that mandatory jurisdiction of the Court be substantially eliminated. For these reasons we endorse H.R. 2406 and urge its immediate adoption.").

319. See *infra* Part II.C.1-2 (discussing the relatively modest impact of the 1988 legislation on the Court's plenary docket and the growing problem of unresolved circuit splits).

320. See U.S. GEN. ACCOUNTING OFF., GGD-81-2, BETTER MANAGEMENT CAN EASE FEDERAL CIVIL CASE BACKLOG (1981).



complained about abuse of civil discovery, runaway litigation, and high jury awards in products liability and mass cases.<sup>321</sup>

In the 1984 Benjamin N. Cardozo Lecture, Judge Jon O. Newman of the U.S. Court of Appeals for the Second Circuit observed that “[w]hether we have too many cases or too few, or even, miraculously, precisely the right number, there can be little doubt that the system is not working very well. Too many cases take too much time to be resolved and impose too much cost upon litigants and taxpayers alike.”<sup>322</sup> He called attention to the paradox of attorneys who “bemoan[] the delays and costs of courtroom encounters while working mightily to refine the system in ways that make it even slower and more expensive.”<sup>323</sup> The key to addressing this paradox, he suggested, was in rethinking our conception of fairness:

[E]ach of us might find it useful to follow the approach of John Rawls and consider, from behind ‘the veil of ignorance,’ what type of a litigation system we would prefer to have if we did not know what our role in the system might be—whether litigant, witness, juror, lawyer, judge, or citizen. A view of the litigation system from that disinterested perspective would yield fresh insights into what we mean and ought to mean by fairness.<sup>324</sup>

In 1988, Senate Judiciary Committee Chairman Joseph R. Biden, Jr. encouraged The Brookings Institution to convene a diverse task force to examine the roots of problems plaguing civil litigation and to recommend constructive reforms.<sup>325</sup> Brookings assembled a task force that included litigators from the

321. See U.S. GEN. ACCOUNTING OFFICE, GAO/HRD-88-36BR, PRODUCT LIABILITY: EXTENT OF ‘LITIGATION EXPLOSION’ IN FEDERAL COURTS QUESTIONED, 2-3 (1988); Robert S. Banks, *Companies Struggle to Control Legal Costs*, 61 HARV. BUS. REV. 168, 169 (1983). *But cf.* DEBORAH R. HENSLER ET AL., RAND INST. FOR CIV. JUSTICE, TRENDS IN TORT LITIGATION: THE STORY BEHIND THE STATISTICS 6 (1987) (providing a careful analysis of tort liability and showing the trends across three litigation areas: routine personal injury torts (e.g., automobile accidents) experiencing slow growth; products liability, malpractice, and business torts, experiencing faster growth and large potential awards; and mass latent injury cases such as asbestos, drugs, and chemical exposure cases featuring enormous stakes); Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77, 81 (1993) (suggesting that the push for civil justice reforms lacked a clear empirical foundation).

322. Jon O. Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643, 1644 (1985).

323. *Id.* at 1643; *cf.* Amendments to the Federal Rules of Civil Procedure, 85 F.R.D. 521, 522–23 (1980) (Powell, J., dissenting, joined by Stewart and Rehnquist, JJ.) (“I doubt that many judges or lawyers familiar with the proposed amendments believe they will have an appreciable effect on the acute problems associated with discovery. The Court’s adoption of these inadequate changes could postpone effective reform for another decade . . . I do not dissent because the modest amendments recommended by the Judicial Conference are undesirable. I simply believe that Congress’ acceptance of these tinkering changes will delay for years the adoption of genuinely effective reforms.”).

324. See Newman, *supra* note 322, at 1658 (citing JOHN RAWLS, A THEORY OF JUSTICE 136 (1971)) (footnote omitted).

325. See Joseph R. Biden, Jr., *Equal, Accessible, Affordable Justice Under Law: The Civil Justice Reform Act of 1990*, 1 CORNELL J.L. & PUB. POL’Y 1, 4 (1992); Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 958–59 (1996) (suggesting that

plaintiffs' and defense bars, civil and women's rights lawyers, attorneys representing consumer and environmental organizations, representatives of the insurance industry, general counsels of major corporations, former judges, and law professors to explore ways of making civil litigation more just, speedy, and inexpensive. In September 1989, the task force produced its report, *Justice for All: Reducing Costs and Delay in Civil Litigation*, which called for a bottom-up approach to judiciary reform.<sup>326</sup> The report recommended that Congress require each of the ninety-four district courts to develop and implement "Civil Justice Reform Plans," track the results of these efforts, and streamline case management. The task force also called for Congress to increase funding for administrative support and judicial training, fill judicial vacancies, review the need for additional judges, and increase judicial salaries.<sup>327</sup>

The task force's approach to civil justice reform—entailing Congress's directing case management procedures—diverged from the traditional model of procedural reform.<sup>328</sup> The judiciary had long been the primary branch of government developing judicial procedures, such as the Federal Rules of Civil Procedure.<sup>329</sup>

Senator Biden's interest in civil procedure may have been a competitive response to Vice President Dan Quayle's Competitiveness Council).

326. The task force picked up on Judge Robert Peckham's ideas for reining in litigation costs and delay by staging discovery and case management. See Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253 (1985); Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770 (1981). But see Judith Resnik, *The Domain of Courts*, 137 U. PA. L. REV. 2219, 2221 (1989) (criticizing Judge Robert L. Carter's approach to the Federal Rules); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 495–96 (1986) (calling for review of the Federal Rules); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378 (1982) (questioning the efficacy of aggressive case management).

327. BROOKINGS INST., *JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION* 8–33 (1989).

328. See John Burritt McArthur, *Inter-Branch Politics and the Judicial Resistance to Federal Civil Justice Reform*, 33 U.S.F. L. REV. 551, 556 (1999); Carrington, *supra* note 325, at 966–75; Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 406–07 (1992) (discussing the traditional division of responsibility for procedural reforms, criticizing the meager empirical basis for the proposals, and suggesting that Brookings task force was tilted toward business interests).

329. See Rules Enabling Act of 1934, ch. 651, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (2018)) (granting the Supreme Court "the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts"). See generally Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901 (1989) (celebrating the longevity and influence of the Federal Rules of Civil Procedure). The Supreme Court has, pursuant to this authority, promulgated the Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, and other procedural court rules. In the early 1970s, Congress blocked the Federal Rules of Evidence from going into effect. See FED. R. CIV. P. Historical Note (describing the Supreme Court's adoption of the Federal Rules of Civil Procedure); Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1107 n.16 (2002) (describing Congress rejecting the proposed Federal Rules of Evidence).

Drawing on the Brookings report, Congress passed the Civil Justice Reform Act of 1990 (CJRA).<sup>330</sup> The legislation required each federal district court to implement a “civil justice expense and delay reduction plan” intended “to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes.”<sup>331</sup> The legislation set forth a process for developing these plans. Each district was required to convene civil justice reform advisory groups composed of lawyers, litigants, and government prosecutors to assess the docket and design a CJRA plan for streamlining litigation using the cost and delay reduction principles and techniques set forth in the statute.<sup>332</sup> Congress vested the district courts with ultimate authority to choose its plan by the end of 1993 and begin implementation, including setting up a case-tracking system. In addition, the CJRA created a pilot program consisting of ten district courts that would implement specific principles into their litigation management and cost and delay reduction programs.<sup>333</sup> These pilot programs were to serve as a basis for a report to Congress assessing the effectiveness of the reforms.<sup>334</sup>

The Judicial Conference commissioned the Rand Institute of Civil Justice (Rand) to conduct a study of the efficacy of the CJRA pilot districts. In 1997, Rand reported that the CJRA pilot program “had little effect on time to disposition, litigation costs, and attorneys’ satisfaction and views of the fairness of case management.”<sup>335</sup> Nonetheless, the study found that early case management practices, such as setting early trial dates, shortening the time to discovery cutoff, and having litigants attend settlement conferences significantly improved the speed of litigation.<sup>336</sup> These improvements in speed, however, came at a price.<sup>337</sup>

### 3. Increasing Judgeships

Congress added sixty-eight district court seats in 1990 and nine district court seats in 1999, increasing the size of the federal district court bench from

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330. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended at 28 U.S.C. § 471 et seq. (2018)).

331. 28 U.S.C. § 471; *The Civil Justice Reform Act of 1990 and the Judicial Improvements Act of 1990: Hearings on S. 2027 and S. 2648 Before the S. Comm. on the Judiciary*, 101st Cong. 551–52 (1990).

332. See 28 U.S.C. §§ 473(a)–(b).

333. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 105(c), 104 Stat. 5089 (codified as amended at 28 U.S.C. § 471 et seq. (2018)).

334. *Id.* § 105(c)(2)(C).

335. See JAMES S. KAKALIK ET AL., RAND INST. FOR CIVIL JUSTICE, JUST, SPEEDY, AND INEXPENSIVE?: AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 1 (1996).

336. See *id.* at 1–2.

337. See *id.* at 14 (describing the way early management might increase lawyer work hours).

576 to 653 district judges.<sup>338</sup> Congress added eleven appellate slots in 1990, increasing the size of the appellate bench from 168 to 179 circuit court judges.<sup>339</sup>

#### 4. *Bankruptcy Appellate Panel Reform*

The Federal Courts Study Committee<sup>340</sup> recommended moderate expansion of judicial specialization in tax, Social Security disability, and bankruptcy.<sup>341</sup> In addition to helping solve the caseload problem, the committee acknowledged that “these proposals [were] designed in part to provide information on an approach (specialized judges) that, as we have said, is exotic in the American legal culture.”<sup>342</sup> Drawing on the Ninth Circuit’s favorable experiment, the committee recommended the creation of BAPs in each circuit.<sup>343</sup> Heeding this advice, Congress passed the Bankruptcy Reform Act of 1994, which directed the judicial council of each circuit to establish a BAP unless it determined there were insufficient resources or that a BAP would result in undue delay or increased costs to parties.<sup>344</sup>

#### 5. *En Banc Reform*

With substantial expansion of appellate judgeships in some circuits and a stalemate over proposals to split the Ninth Circuit, Congress amended the Judicial Code in 1998 to authorize courts of appeals with more than fifteen judges to “perform [their] en banc function by such number of members of [their] en banc courts as may be prescribed by rule of the court of appeals.”<sup>345</sup> This reform aimed to make en banc review more manageable in large circuits.<sup>346</sup> Although the Fifth, Sixth, and Ninth Circuits qualify for mini en-banc panels, only the Ninth Circuit has utilized this procedure.<sup>347</sup>

Perhaps more significantly, nine of the thirteen circuit courts of appeals allow streamlined procedures for addressing intracircuit conflicts short of en

338. See Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 203(a), 104 Stat. 5089, 5099–5100; Consolidated Appropriations Act, Pub. L. No. 106-113, § 309(a), 113 Stat. 1501 (1999).

339. See Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 202, 104 Stat. 5089, 5098–99.

340. See *supra* Part I.G.

341. See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 309, at 11–12, 18–19, 74–79.

342. See *id.* at 12.

343. See *id.* at 74.

344. See Howard & Brazelton, *supra* note 229, at 415. Following the 1994 Act, five additional circuits adopted BAPs. See *id.* In 1999, the Second Circuit Judicial Council voted to terminate its BAP. See Judith A. McKenna & Elizabeth C. Wiggins, *Alternative Structures for Bankruptcy Appeals*, 76 AM. BANKR. L.J. 625, 644 (2002).

345. Act of Oct. 20, 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633.

346. See S. Rep. No. 95-117 (1977).

347. See 9th Cir. R. 35-3 (“The en banc court, for each case or group of related cases taken en banc, shall consist of the Chief Judge of this circuit and 10 additional judges to be drawn by lot from the active judges of the Court.”).

banc review.<sup>348</sup> Such informal en banc review occurs through acquiescence. The D.C. Circuit's *Irons* rule<sup>349</sup> is illustrative. The panel decision in *Irons v. Diamond* confronted a conflict in prior circuit cases. The panel circulated the opinion among active members of the circuit. Lacking objection, the panel inserted a footnote into its opinion stating that “[t]he foregoing part of the division’s decision, because it resolves an apparent conflict between two prior decisions, has been separately considered and approved by the full court, and thus constitutes the law of the circuit.”<sup>350</sup> Use of this procedure varies widely among the circuits.<sup>351</sup>

#### H. 2000s: Judiciary Reform Stagnation

The drive to address the “crisis of volume” faded as the new millennium began. Congress continued the expansion of magistrate judge authority. For the first time in memory, Congress expanded federal jurisdiction. Furthermore, the major governance organizations for the federal judiciary largely shuttered the reform studies and initiatives.

##### 1. Further Expansion of Magistrate Judge Authority

The Federal Courts Improvement Act of 2000 eliminated the requirement of defendant’s consent to magistrate judge disposition of petty offense cases.<sup>352</sup> The 2000 Act also authorized magistrate judges to punish parties for civil and criminal contempt.<sup>353</sup>

##### 2. Jurisdictional Expansion: Class Action Fairness Act of 2005

Defying the late twentieth-century push to “lessen[] the flow,”<sup>354</sup> Congress widened the federal court doorway to a new and complex area of litigation: state class actions.<sup>355</sup> The stated purpose of the Class Action Fairness Act of 2005 (CAFA)<sup>356</sup> was to assure fair recoveries for class members, provide for federal

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348. See Amy E. Sloan, *The Dog That Didn't Bark: Stealth Procedures and the Erosion of Stare Decisis in the Federal Courts of Appeals*, 78 *FORDHAM L. REV.* 713, 725–41 (2009); Steven Bennett & Christine Pembroke, *'Mini' In Banc Proceedings: A Survey of Circuit Practices*, 34 *CLEV. ST. L. REV.* 531, 544–57 (1986).

349. See *Irons v. Diamond*, 670 F.2d 265 (D.C. Cir. 1981).

350. *Id.* at 268 n.11.

351. See Sloan, *supra* note 348, at 726–28.

352. Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, § 203(b), 114 Stat. 2410, 2414.

353. See *id.* §§ 202–03.

354. See Friendly, *supra* note 162, at 657.

355. See Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 *U. PA. L. REV.* 1439, 1507 (2008) (describing how “the federal appellate courts pretty quickly put an end” to mass-tort class actions and how “the Supreme Court made it very difficult for the lower federal courts to certify” settlement classes).

356. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in 28 U.S.C. §§ 1332, 1711–12, 2071–72).

court consideration of cases of national importance under diversity jurisdiction, and benefit society by encouraging innovation and lowering consumer prices.<sup>357</sup> The more cynical view is that the Act was driven by defense bar efforts to obtain favorable federal forums to defend class actions.<sup>358</sup> CAFA substantially expanded defendants' ability to remove class actions to federal court by relaxing the jurisdictional requirements that had previously governed under the Federal Rules of Civil Procedure and court decisions.

Prior to the passage of CAFA, federal diversity jurisdiction could not be exercised if any named plaintiff was from the same state as a defendant. In addition, for purposes of establishing the required amount in controversy, the Supreme Court had held that the claim of every member of the plaintiff class must satisfy the requirement.<sup>359</sup> A class action could not be removed to federal court unless the matter would meet the test for original diversity jurisdiction.

CAFA made it easier to remove class actions to federal court by providing diversity of citizenship for proposed classes of one hundred or more if any class member is a citizen of a state different than that of the defendants.<sup>360</sup> Furthermore, CAFA raised the amount in controversy requirement to \$5 million, but provided that the claims of individual class members would be aggregated to determine whether the requirement was met.<sup>361</sup> Federal courts must decline jurisdiction, however, if the plaintiffs can prove that more than two-thirds of the putative class members are citizens of the state from which federal removal is sought.<sup>362</sup> The Judicial Conference warned that CAFA's provisions "would add substantially to the workload of the Federal courts and are inconsistent with principles of federalism."<sup>363</sup>

### 3. *Judgeship Stasis*

Notwithstanding the increasing caseloads throughout much of the federal judiciary, Congress largely halted the expansion of federal judgeships. Congress has created no new circuit court positions since 1990<sup>364</sup> and has added only twenty-five district court slots since 2000.<sup>365</sup>

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357. See Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(b), 119 Stat. 4, 5 (codified in 28 U.S.C. 1711 (2018)) (statutory findings and purposes); see also Burbank, *supra* note 355, at 1443 (discussing purposes).

358. See Burbank, *supra* note 355, at 1441 (noting political and social implications of CAFA); Richard L. Marcus, *Assessing CAFA's Stated Jurisdictional Policy*, 156 U. PA. L. REV. 1765, 1766-67 & n.8 (2007) (noting criticisms of statute's statement of purposes).

359. See Burbank, *supra* note 355, at 1450-52 (discussing pre-CAFA regime).

360. 28 U.S.C. § 1332(d)(2)(A) (2018).

361. *Id.* § 1332(d)(6).

362. *Id.* § 1332(d)(3)-(4).

363. H.R. 108-114, at 166.

364. See Courts of Appeals Slots, *supra* note 77. Congress transferred one circuit court slot from the D.C. Circuit to the Ninth Circuit in 2009. See Court Security Improvement Act of 2007, Pub. L. No. 110-177, § 609(a) 121 Stat. 2534, 2543 (2008).

365. See District Court Slots, *supra* note 77.

#### 4. *Judiciary Reform Dormancy*

The real judiciary reform story of the new millennium is the dog that didn't bark,<sup>366</sup> or perhaps more precisely, stopped barking. After three decades of concerted efforts toward the end of the last millennium to adapt the federal judiciary to substantial change, the reform machinery ground to a halt as the new millennium began. The frustration of so much study and unfulfilled promise appears to have sapped policy-makers' and judiciary leaders' will to confront the challenges. Even the legal academy, ever eager to experiment with innovative solutions to pressing societal problems, has lost its reform-oriented spirit.<sup>367</sup>

## II.

### EMPIRICAL ASSESSMENT OF FEDERAL JUDICIARY CASELOADS AND PRACTICES

This Section explores the evolution of each level of the federal judiciary over the past half century, the time since the consensus that the judiciary was in or near crisis.<sup>368</sup> We use a multitude of data to examine how judicial caseloads have increased from 1970 to the present and how this caseload is burdening each level of the federal judiciary.

#### A. *District Courts*

Although the major structural reform proposals discussed in Part I focused on the appellate system, district court reforms have been necessary to handle the burgeoning number of cases. This Section illustrates the caseload growth over the past half century and shows that caseloads per judge have significantly increased notwithstanding the rise in judgeships and expansion of magistrate judge responsibilities. It also shows that the uneven geographic distribution of the district court caseload compounds the problems. We also explore the effect of the MDL system on district court litigation and how processing time for district court litigation has risen.

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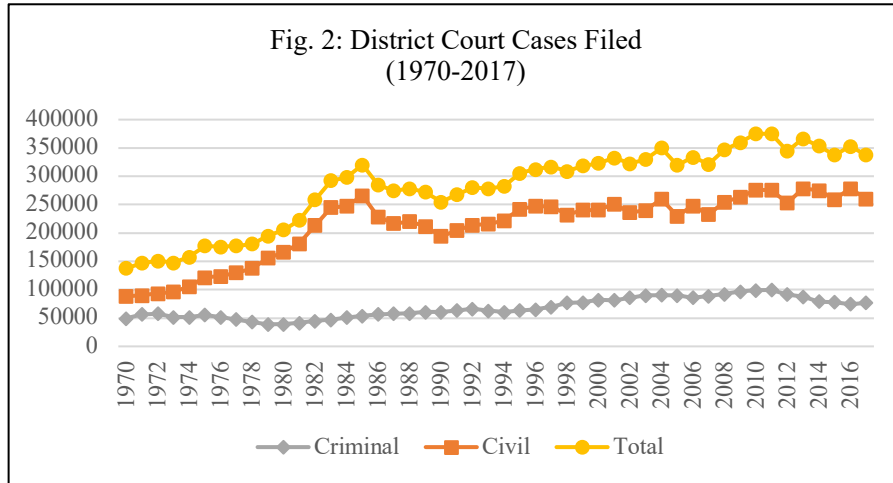
366. See Arthur Conan Doyle, *The Adventure of Silver Blaze*, in *THE MEMOIRS OF SHERLOCK HOLMES* 1, 42 (1894).

367. Compare Martha J. Dragich, *Once A Century: Time for A Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11, 17–18 (1996) (commenting on the need for and future of systemic reform), with David R. Cleveland, *Post-Crisis Reconsideration of Federal Court Reform*, 61 CLEV. ST. L. REV. 47, 49 (2013) (observing that “[w]hile the language of crisis has diminished, the caseload volume problem continues to bedevil the federal appellate courts”), and Thomas E. Baker, *Applied Freakonomics: Explaining the “Crisis of Volume”*, 8 J. APP. PRAC. & PROCESS 101, 114 (2006) (suggesting “we have lowered our expectations for appellate procedure. We have defined down our appellate values. We have all internalized the post-modern norms of minimalist procedural paradigm.”).

368. See HRUSKA COMMISSION STRUCTURE REPORT, *supra* note 1, at 3 (“The decision to recommend a new national court should not . . . be made to turn on whether present conditions have reached crisis proportions, although in the opinion of many a crisis clearly exists. A state of emergency should not be viewed as a prerequisite to the consideration of improvements in the federal judicial system. Rather, we should ask whether the system is operating as well as it could and should.”).

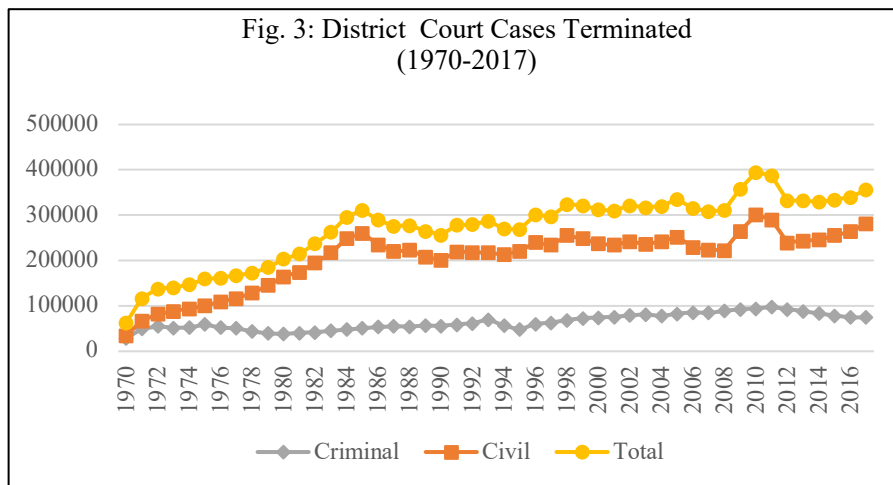
### 1. Caseloads

Figure 2 shows the number of district court cases filed per year, including a breakdown between civil and criminal cases.<sup>369</sup>



As Figure 2 shows, the annual number of filed cases has increased from 137,725 in 1970 to 337,418 in 2017—a 145% increase. Much of the growth in case filings is attributable to the civil docket.

As reflected in Figure 3, the story is similar for terminated cases.

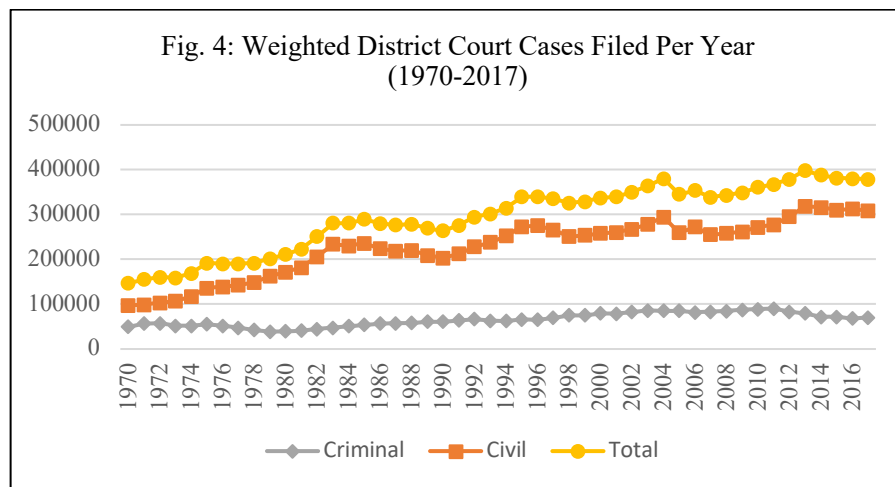


369. The data for most of the figures and charts come from the Federal Judicial Center and the Administrative Office of the U.S. Courts. The Administrative Office of the U.S. Courts codes and counts criminal cases based on the number of defendants. *See, e.g.*, United States Courts, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, Table D (2016) (reporting the number of defendants).



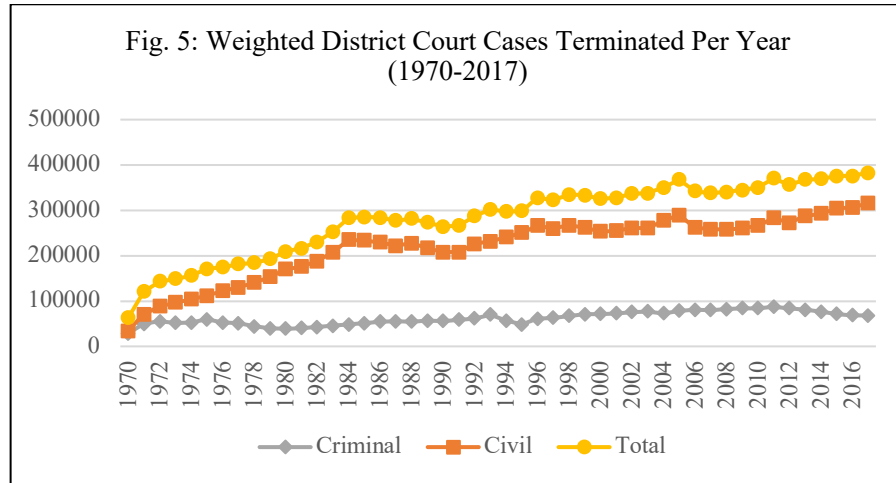
The annual number of cases terminated has increased 465% from 62,955 in 1970 to 355,706 in 2017. Civil terminations have driven much of this increase, although criminal terminations have nearly doubled over this time period.

Of course, not every case requires the same level of work. A death penalty or patent case takes, on average, far more time and effort than the typical social security benefit or drug possession case. In 2005, the Federal Judicial Center completed a study and updated its protocol for assigning relative weights to different types of civil and criminal cases.<sup>370</sup> To compare the caseload in the early 1970s with today's caseload, we retroactively applied the 2005 case weights to all cases from 1970 through 2017.<sup>371</sup> Figures 4 and 5 show the number of weighted district court cases filed and terminated per year.



370. FED. JUDICIAL CTR., 2003-2004 DISTRICT COURT CASE-WEIGHTING STUDY—FINAL REPORT TO THE SUBCOMMITTEE ON JUDICIAL STATISTICS OF THE COMMITTEE ON JUDICIAL RESOURCES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (2005).

371. We recognize that some aspects of cases could have changed over the nearly fifty-year period we examine and that the case weights, even if calculated the same way, could differ from what they are today. Also, we appreciate that the 2005 case weights are not perfect measures as there can be quite a bit of variation within types of cases. For example, a patent infringement suit involving pharmaceuticals is generally more complex than a patent infringement suit involving a simple mechanical invention. Nonetheless, the 2005 protocol provides a consistent, approximate measure of the complexity of cases.



As Figure 4 illustrates, the total number of weighted cases filed rose 158% from 1970 to 2017 (compared to a 145% increase for unweighted cases during this same period). Figure 5 illustrates that the total number of weighted cases terminated rose 508% from 1970 to 2017 (compared to a 465% increase for unweighted cases during this same period). Therefore, not only has the number of cases contributing to the caseload grown substantially since the early 1970s, but the cases have also, on average, become more burdensome.

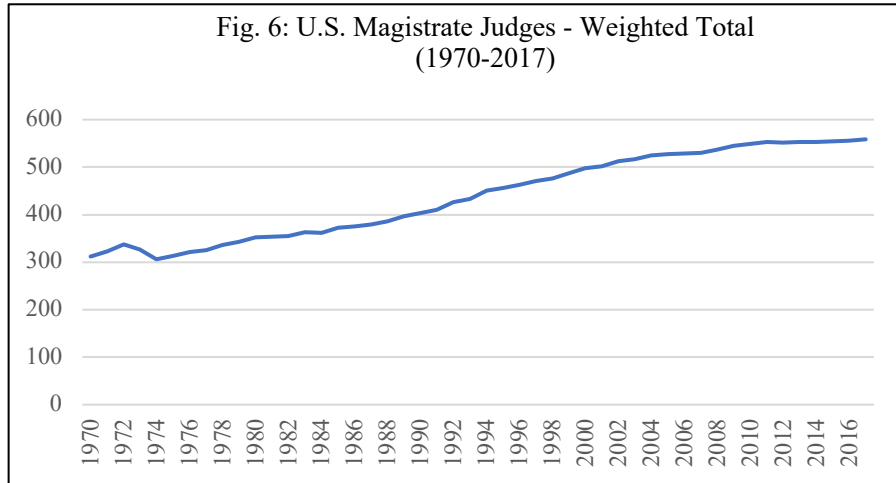
Because the number of judges has fluctuated over the years, it is important to adjust these measures to reflect the number of district judges in active service, senior district judges, and magistrate judges handling this burgeoning caseload. We used the data from Habel and Scott<sup>372</sup> to measure how many of the authorized district court judgeships were actually filled. Senior district court judges were counted as one-fourth of an active-status district court judge.<sup>373</sup>

Filling out the picture, there has been a significant increase in the effective number of magistrate judges. In 1970, there were 82 full-time and 466 part-time magistrate judges. By 2017, nearly all the magistrate judges worked on a full-time basis. As reflected in Figure 6, the total number of magistrate judge positions has nearly doubled since 1970 based on the assumption that part-time magistrate judges work half-time.<sup>374</sup>

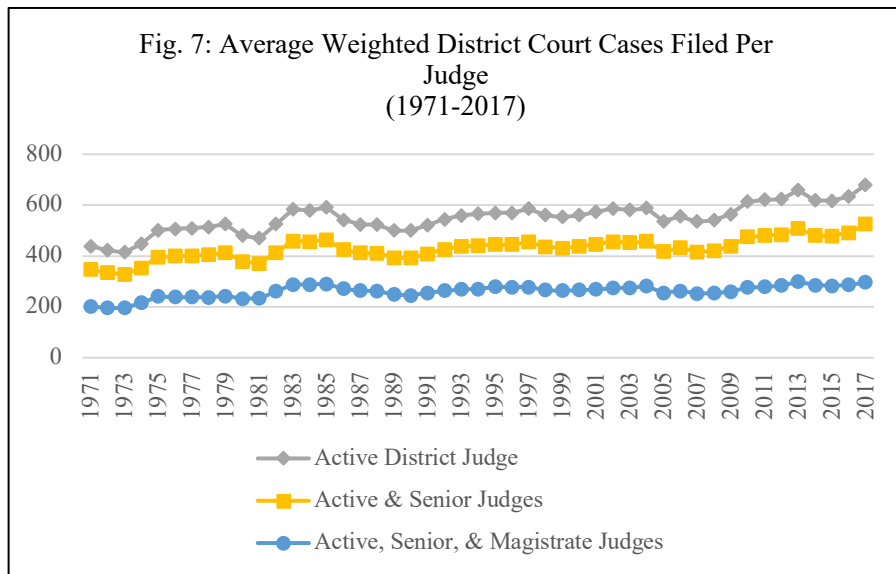
372. See Philip Habel & Kevin Scott, *New Measures of Judges' Caseload for the Federal District Courts, 1964–2012*, 2 J.L. & CTS. 153 (2014).

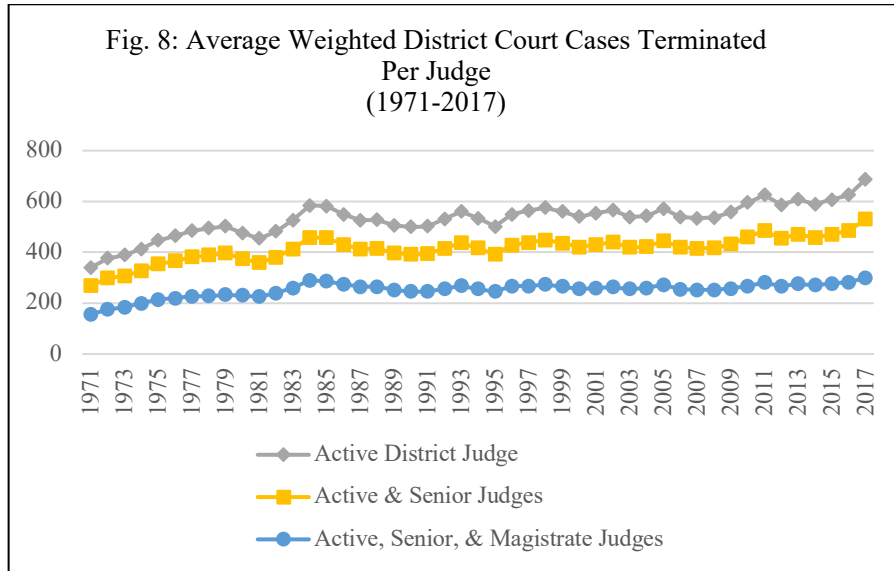
373. *Id.* at 163. We augmented their data to account for judgeships from 2013 to 2017.

374. These data are derived from the JUDICIAL BUSINESS OF THE UNITED STATES COURTS, <https://www.uscourts.gov/statistics-reports/analysis-reports/judicial-business-united-states-courts/> [<https://perma.cc/8FAW-XAV4>]. For the weighted total of magistrate judges in Figure 6, full-time magistrate judges were counted as one judge and half-time judges were counted as half a judge.



Figures 7 and 8 show the average number of weighted cases filed and terminated per judge from 1971 through 2017.





The rise in judgeships has partially counterbalanced the large rise in filings and case terminations over the past half century. Nonetheless, using the adjustments for senior judges and magistrate judges, weighted caseloads per judge have climbed 47% based on filings and 90% based on terminations from 1971 to 2017.<sup>375</sup>

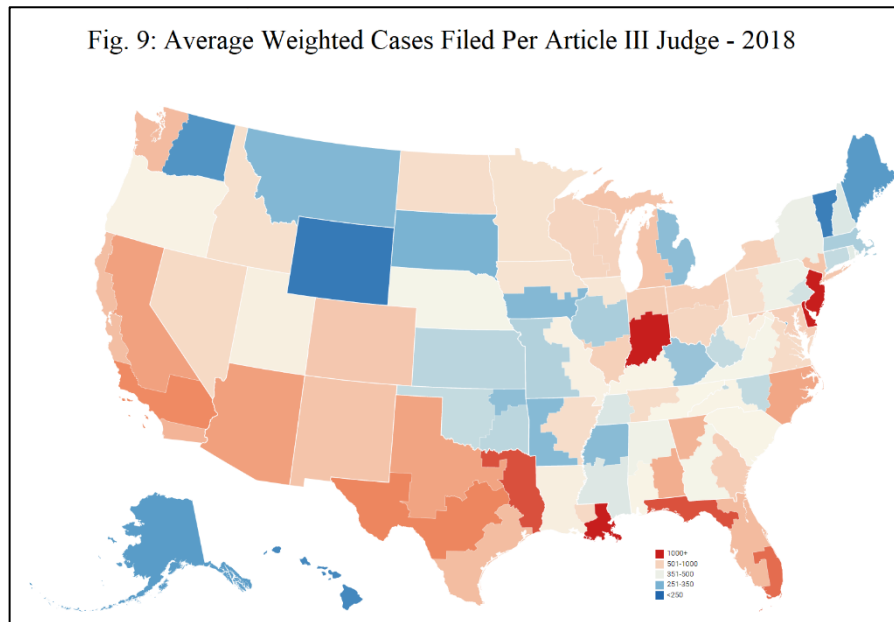
## 2. Geographic Distribution of Cases

Figure 9 illustrates the highly uneven distribution of caseloads by judicial district for 2018, which saw an average of 503 weighted cases per judge.<sup>376</sup> Judges in the heaviest districts received more than 1,000 cases. By contrast, judges in less busy districts received fewer than 250 weighted cases.<sup>377</sup>

375. This reflects a rise from 202 to 296 weighted cases per judge for filings and from 157 to 299 cases per judge for terminations.

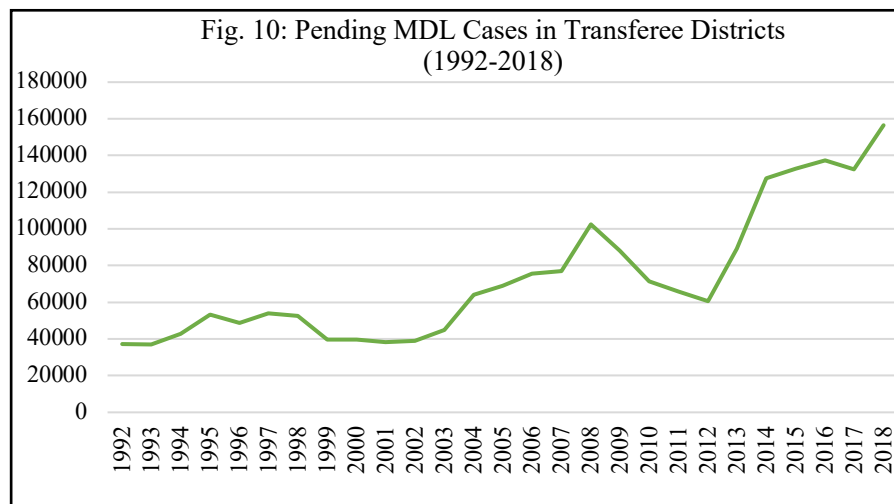
376. This excludes cases and judges in US territories. The weights for Figure 9 are based on the FJC's 2016 case weighting scheme. See FED. JUDICIAL CTR., COMPARISON OF EXISTING AND PROPOSED UPDATED CASE WEIGHTS BY CASE TYPE (2016) (on file with the authors); see also Judith Resnik, *Lawyers' Ethics Beyond the Vanishing Trial: Unrepresented Claimants, De Facto Aggregations, Arbitration Mandates, and Privatized Processes*, 85 *FORDHAM L. REV.* 1899, 1910 n. 31 (2017).

377. Case weights significantly affect the caseload picture. For example, the District of Delaware, with its heavy patent docket, goes from warm (773 cases per judge) to hot (1198 cases per judge).



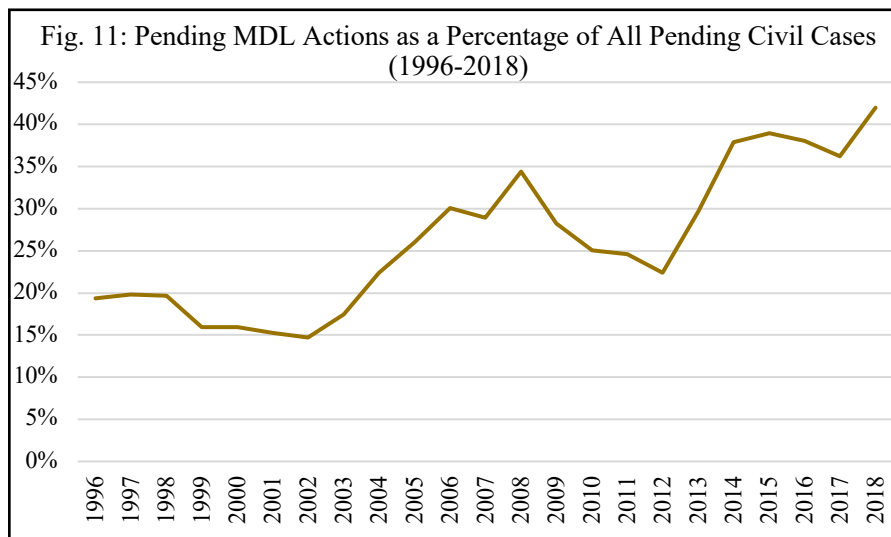
### 3. Multidistrict Litigation

Multidistrict litigation (MDL) represents perhaps the most important case management innovation of the past half century.<sup>378</sup> Figure 10 shows the total number of pending MDL actions from 1992 through 2018 and the steady increase during this time.



378. See *supra* Part I.C.8.

Figure 11 shows these pending MDL actions as a percentage of all pending civil cases from 1996 through 2018.



MDL actions currently constitute over 40% of the civil docket, a 5% increase over the past several years and more than double the levels from 1996 through 2005.

Both the number and size of MDL cases affect district court caseloads. As of March 15, 2019, there were 205 pending MDLs.<sup>379</sup> MDLs vary from fewer than ten pending cases to more than one thousand.<sup>380</sup> The data reveal that a staggering 88% of pending MDL actions are consolidated in one of the twenty-one large MDLs.<sup>381</sup> Considering that MDL actions constitute around 40% of the pending civil docket, approximately 35% of the entire national civil docket is handled by the twenty-one judges managing large MDLs.

The growth and significance of MDLs have important ramifications for understanding the composition of the federal docket and the effective number of cases per judge. Although the average caseload per judge has increased dramatically since the early 1970s, much of the burden has fallen to a small handful of judges handling the largest MDL cases. Of course, because these actions are centralized, MDLs realize economies of scale by streamlining case management across a large swath of cases. Thus, although the number of cases and cases per judge have risen substantially over the past half century, those raw

379. See United States Judicial Panel on Multidistrict Litigation, *MDL Statistics Report - Distribution of Pending MDL Dockets by District*, [https://www.jpml.uscourts.gov/sites/jpml/files/Pending\\_MDL\\_Dockets\\_By\\_District-March-15-2019.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-March-15-2019.pdf) [https://perma.cc/H9AZ-A437].

380. See *id.*

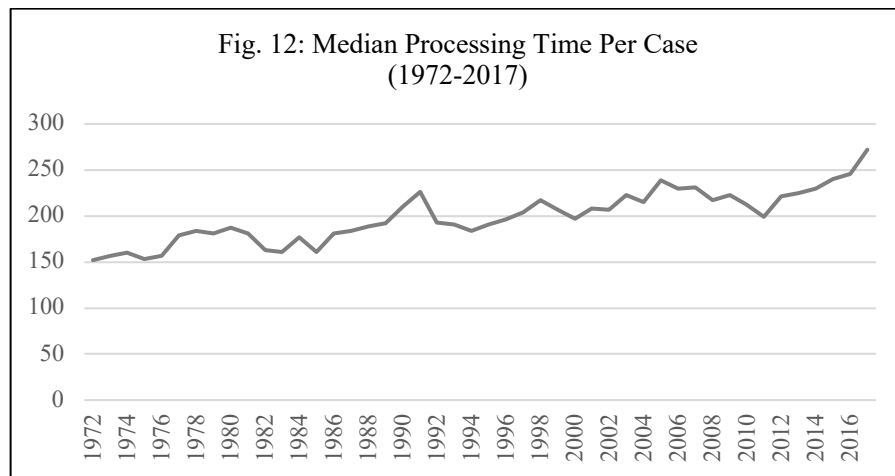
381. See *id.*

numbers should be adjusted downward to reflect the efficiencies and uneven distribution of cases.

But even if we discount today's caseload or average caseload per judge by 35%-40%, the data still show substantial docket growth since 1970. The advent of MDLs has not fully stemmed the tide or made the caseload more manageable.

#### 4. Processing Time

Figure 12 shows the median processing time per case from 1972 through 2017. The median processing time per case has risen 79% (from 152 to 272 days) from 1972 to 2017. Although there has been considerable increases over the last several years, processing time has grown through much of this period.



#### B. Courts of Appeals

The Freund Study Group reported a sharp increase (273%) in appellate caseloads from 1960 to 1972, from 3,899 filings in 1960 to 14,535 filings in 1972.<sup>382</sup> During this period, the number of authorized appellate judgeships increased only 24%, from seventy-eight to ninety-seven.<sup>383</sup> These statistics influenced Congress's decision to establish the Hruska Commission and focus the Commission's work on the appellate system.<sup>384</sup> The Hruska Commission Structure Report, released in 1975, focused on the demands placed on courts of appeals by the increasing caseload.<sup>385</sup> It found that appellate filings had increased 321% since 1960, while the number of authorized judgeships had increased only 43% during that time period. Although backlogs were expected, the median time from filing to disposition had decreased as a result of changes in the adjudication

382. See FREUND STUDY GROUP REPORT, *supra* note 6, at iv.

383. See *id.*

384. See *supra* Part I.D.1-2.

385. See HRUSKA COMMISSION STRUCTURE REPORT, *supra* note 1, at ix.

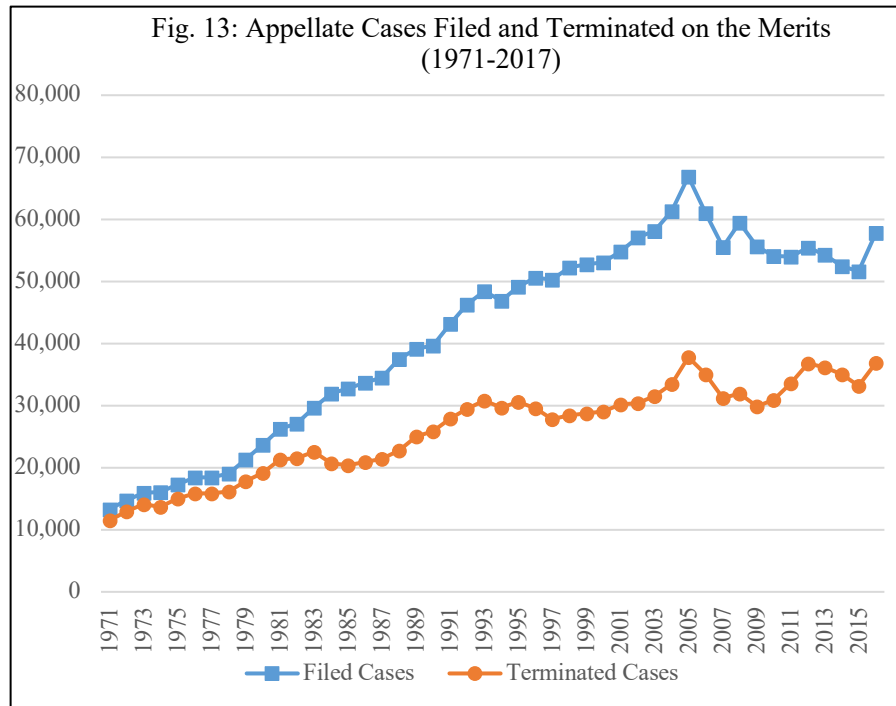
process. Oral argument was curtailed and hundreds of cases were disposed of without articulating the reasoning for the result. These procedural changes to manage the overwhelming caseload raised concerns about the quality of appellate justice.<sup>386</sup>

The Hruska Commission reported that in several circuits, half of all appeals were being decided without oral argument.<sup>387</sup> Furthermore, the number of terminated cases increased at a rate more than four times greater than the increase in hearings. Appellate panels were increasingly preparing summary opinions. By the early 1970s, only 30% of cases decided after hearing or submission resulted in signed opinions. The Hruska Commission was especially troubled by the large number of cases resolved on appeal by summary affirmance, i.e., without any explanation of the basis for the affirmance.

We have traced these patterns—filings, terminations, processing time, frequency of oral argument, and types of opinions—to the present.

### 1. Caseloads

Figure 13 shows appellate cases filed and terminated per year from 1971 through 2017.



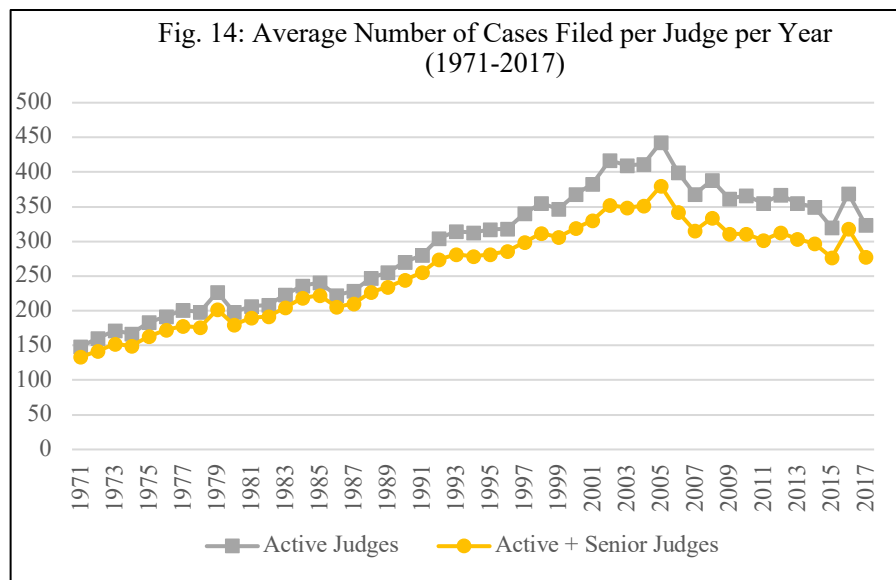
386. See *id.* at 63.

387. See *id.* at 41.



The number of filed cases per year grew 292% between 1971 and 2017, from 14,761 to 57,872. The number of cases terminated on the merits grew from 13,015 in 1971 to 36,851 in 2017, a 183% increase.

As previously discussed, Congress authorized additional circuit court judgeships during this time.<sup>388</sup> The number of appellate judges is based on data from Habel and Scott.<sup>389</sup> These data show how many active and senior circuit court judgeships are actually filled and, as with district judges, treat senior circuit court judges as one quarter of an active-duty circuit court judge.<sup>390</sup> Figure 14 illustrates how many cases were filed, on average, per appellate judge from 1971 through 2017.



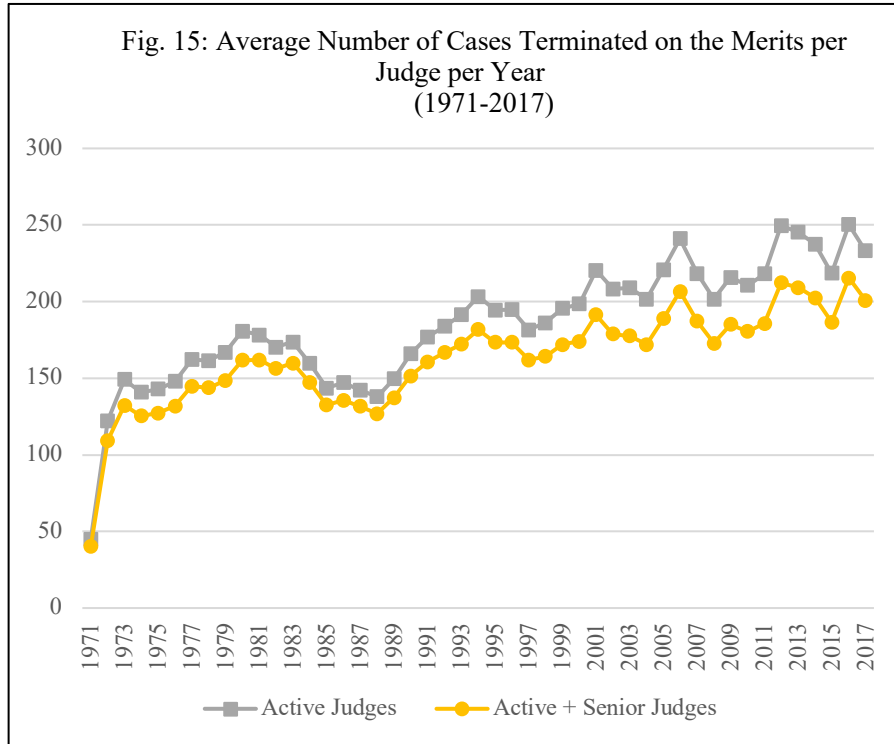
The average number of cases filed per judge increased from 148 (active judges only) or 142 (active and senior judges) in 1971 to 324 (active judges only) or 278 (active and senior judges) in 2017. Counting only active circuit court judges, this is a 119% increase in filings per judge. Counting active and senior judges results in a 96% increase in filings per judge. Thus, the caseload per judge has roughly doubled since 1971.

388. See Courts of Appeals Slots, *supra* note 77; *supra* Parts I.C.1, I.G.3.

389. We have updated the data to cover the period 2014–17.

390. See Habel & Scott, *supra* note 372, at 163.

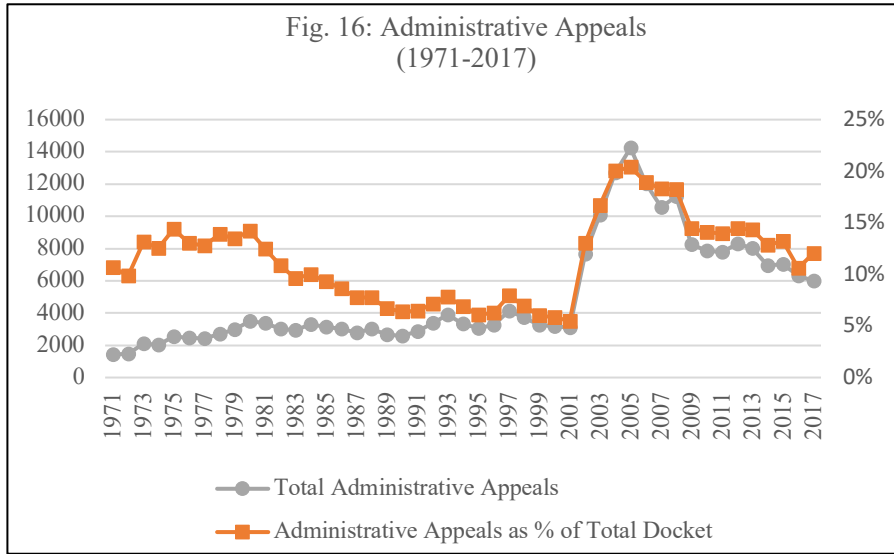
But not every case filed with the circuit courts is terminated on the merits. Cases are settled and voluntarily dismissed before the court disposes of the case on the merits. Figure 15 traces the trends in merits terminations per judge.



In the early 1970s, roughly 125 cases per year were terminated on the merits per judge (140 cases without senior judges). By 2017 that number had risen to 200 (233 without senior judges), a 60% increase (66% without senior judges).

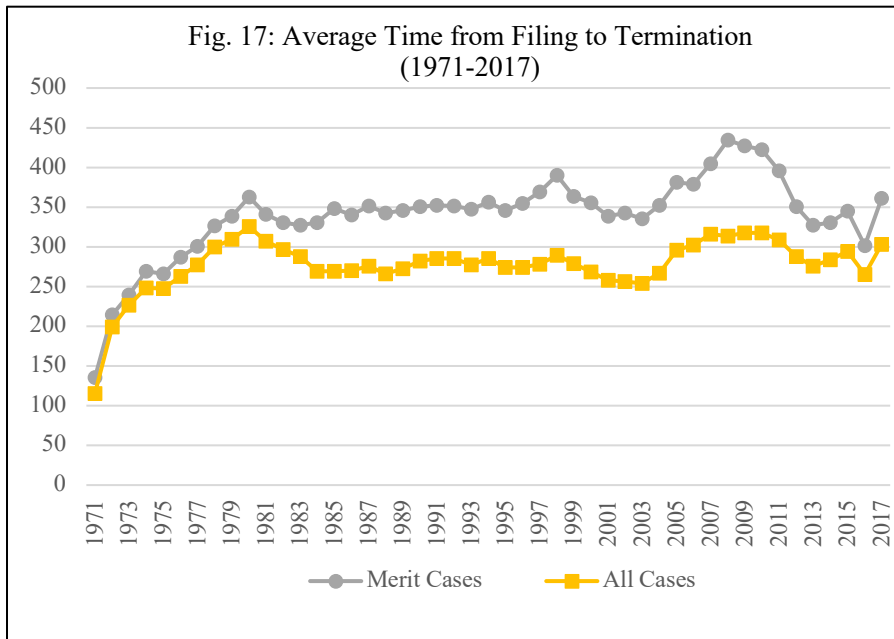
Finally, as described above, the growth of the administrative state has contributed to the appellate workload.<sup>391</sup> Figure 16 illustrates that since 1971, administrative appeals constitute between 5%-20% of the appellate docket.

391. See *supra* Part I.C.6.



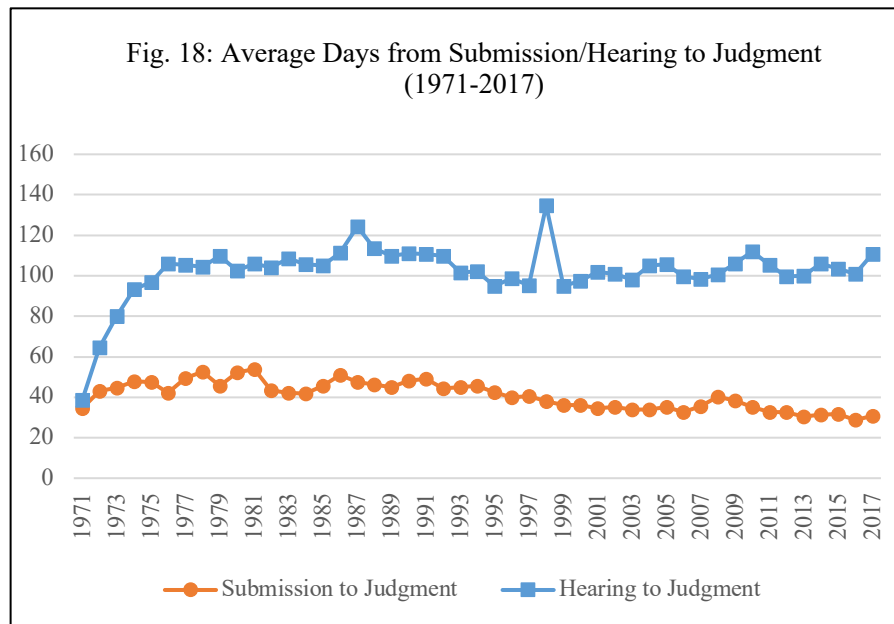
2. Processing Time

Figure 17 shows the average time from filing to termination per case. After a precipitous rise in the 1970s, the average processing time has fluctuated between 300 and 440 days for merits terminations. Regression analysis shows that, on average, cases filed one year later take a day and a half longer to terminate than cases filed the year before. Over fifty years, those small annual increases become significant, adding several months to average case pendency.



As reflected in Figure 18, the number of days between oral argument and judgment for cases decided on the merits has remained relatively steady at around one hundred days since the mid-1970s. For appeals without oral argument, the average time between submission of the case to judgment has declined from about forty days to thirty days.

Because of the increase in caseload per judge, one might have assumed that the average processing time for these cases would have increased. That has not occurred. One possible explanation for this is that courts have become significantly more efficient so they can dispose of cases with the same care and concern as they always have. Another explanation is that courts are spending less time with each case during the one hundred-day and thirty-day periods and sacrificing quality to keep their heads above water. The following Sections shed light on this puzzle.

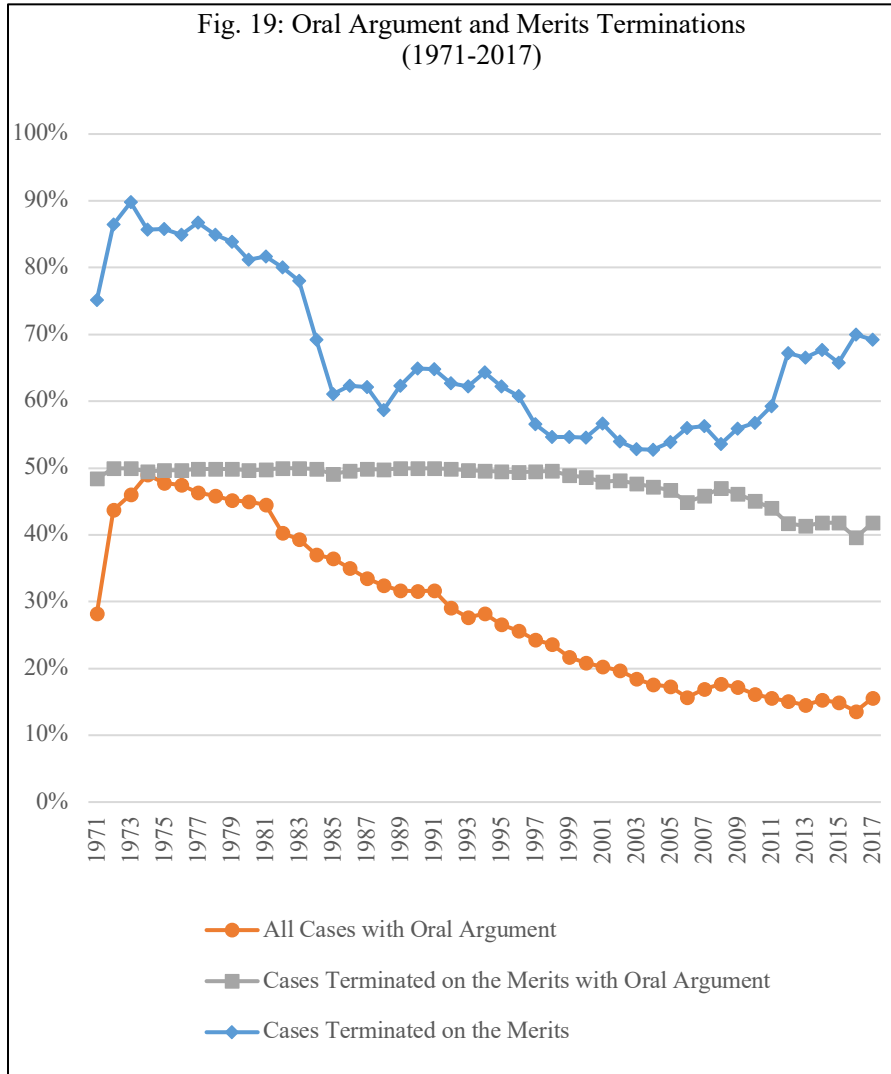


### 3. Oral Argument and Summary Disposition

Except for a steep rise in processing time in the early 1970s, appellate courts' processing times have remained relatively steady through changes in the adjudication process.<sup>392</sup> Figure 19 shows that the percentage of cases with oral argument has declined from about 45% to 15% since the early 1970s. Of course, some of these appeals might have been terminated on procedural grounds or voluntarily dismissed, so the more important number to examine is the percentage of appeals terminated on the merits with oral argument. Although that proportion remained steady from the early 1970s through the late 1990s at

392. Cf. HRUSKA COMMISSION STRUCTURE REPORT, *supra* note 1, at 1.

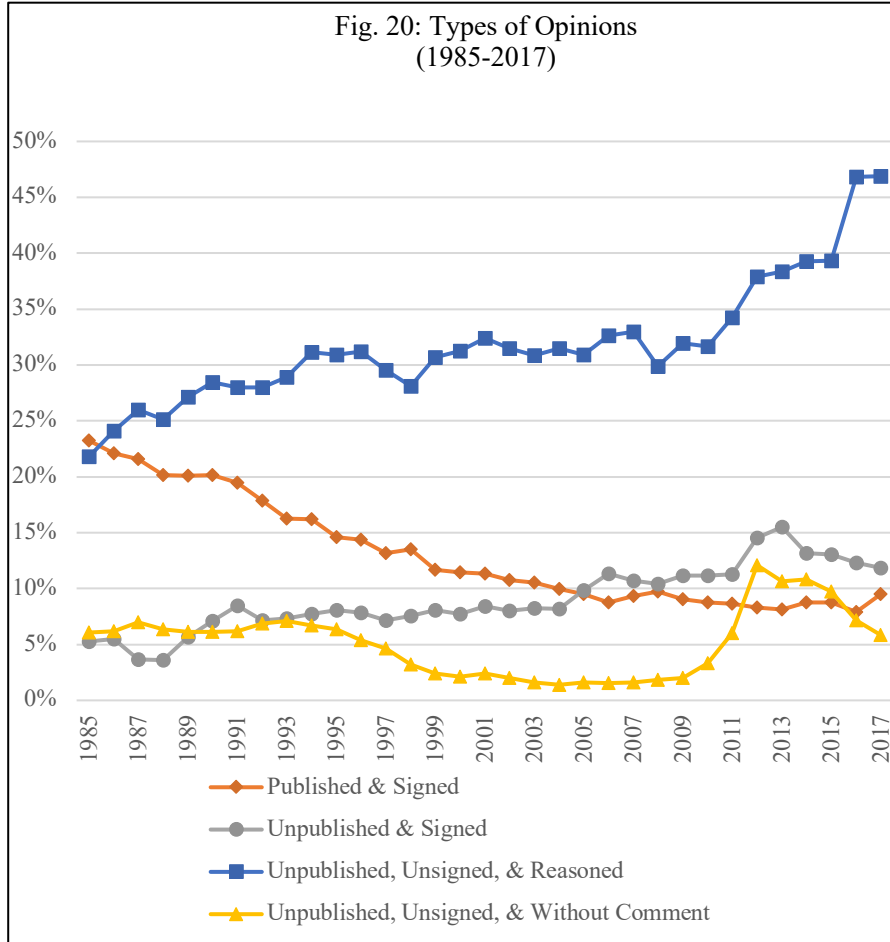
around 50%, Figure 19 shows that there has been a steady decline since that time, and the level currently hovers around 40%.



Similarly, Figure 19 shows that the percentage of cases terminated on the merits has declined since the early 1970s, but has been increasing over the last decade.

The manner by which circuit courts dispose of cases on the merits—published and signed opinions; unpublished and signed opinions; unpublished, unsigned, and reasoned opinions; and unpublished, unsigned, and uncommented

dispositions—also affects circuit courts' throughput. Figure 20 shows the trends.<sup>393</sup>



Of greatest significance, the percentage of published and signed opinions has steadily decreased during this time from 23% to less than 10%. To put this in perspective, the Hruska Commission was alarmed that only 30% of merits decisions were explained in signed opinions in the early 1970s.<sup>394</sup> These trends raise concerns about the care that goes into judicial decision-making, transparency of the process, and the public's trust in the appellate judicial system.

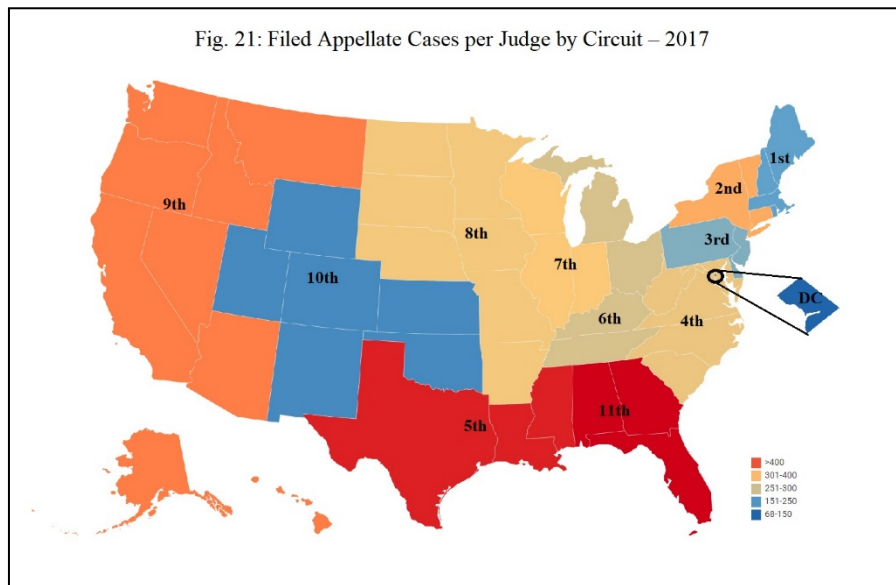
393. The available data begins in 1985 because the FJC changed its coding practices. There are other opinion dispositions in the data, but their combined use was only a few percentage points. Other than those codes, the remainder is made up of missing publication status data. These data were excluded from Figure 20 to avoid cluttering the chart.

394. See HRUSKA COMMISSION STRUCTURE REPORT, *supra* note 1, at 41.

The percentage of unpublished, unsigned, and reasoned opinions has climbed from 22% to 47%. Similarly, unpublished and signed opinions have increased from 6% to 12%. Unpublished and unsigned opinions without comment in 2017 were at the 1985 level, but their use dipped to around 1% to 2% during the 2000s and then spiked up during the first half of the mid-2010s before declining over the past few years. The Hruska Commission was troubled that hundreds of opinions were summarily affirmed without any indication of the reasoning in 1974.<sup>395</sup> By 2017, that number had grown to 3,057 case dispositions.

#### 4. Geographic Distribution of Cases

Figure 21 shows that the appellate caseload per judge varies tremendously across circuits.<sup>396</sup> The Fifth, Eleventh, Ninth, and Second Circuits carry the highest caseload. The D.C., First, and Tenth Circuits carry the lightest caseload. These distributions have been relatively stable over the past two decades. We note that this data does not reflect any weighting of cases.<sup>397</sup> The FJC does not have an appellate case weight metric.



395. *See id.*

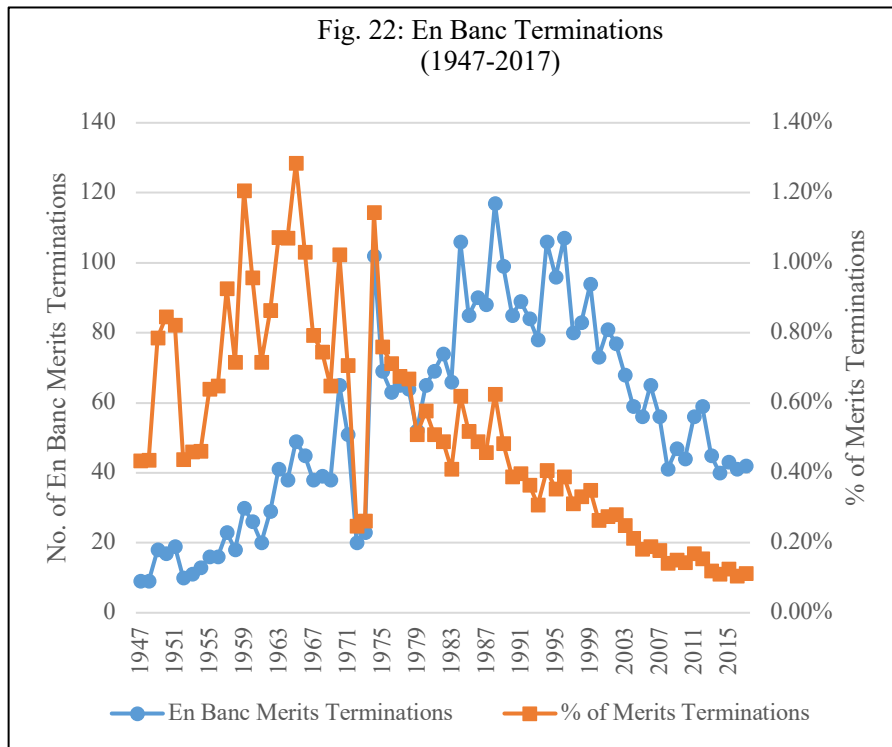
396. As before, these calculations use filled active and senior circuit court judges, with senior judges counting as one-fourth of an active judge.

397. The D.C. Circuit's regulatory cases, for example, might well require more time and effort than average appellate cases. There are also likely to be systematic differences between civil and criminal appeals.

### 5. *En Banc Review*

The Hruska Commission expressed particular concern about the fragmentation of national law resulting from the Supreme Court's limited capacity to resolve the rising tide of certiorari petitions presenting circuit splits.<sup>398</sup> The circuit courts of appeals can alleviate these problems through the use of en banc review.<sup>399</sup> En banc review is also critical to addressing intracircuit splits. Moreover, en banc review serves as a valuable mechanism for signaling important disputed issues to the Supreme Court.<sup>400</sup>

As reflected in Figure 22, the absolute number of en banc cases over the past seven decades has steadily declined from a high of 117 in 1988 to the current level of approximately 40 en banc decisions per year. The percentage of en banc cases as a share of appellate dispositions has fallen off far more precipitously, from over 1% in the 1960s and early 1970s to less than 0.1% in recent years.



Based on the growing size of appellate courts and the expansion of federal law from new legislation and technological, economic, and social change,

398. See HRUSKA COMMISSION STRUCTURE REPORT, *supra* note 1, at 13–14.

399. See *supra* Part I.C.5.

400. See Tracey E. George & Michael E. Solimine, *Supreme Court Monitoring of the United States Courts of Appeals En Banc*, 9 SUP. CT. ECON. REV. 171, 196–97 (2001).



increased use of en banc review since the 1970s would have been expected; instead the opposite has occurred.

Unfortunately, there is no systematic data on the number of en banc petitions filed each year. Available sporadic data show that it is very difficult for a litigant to obtain en banc review. From July 2016 through June 2017, the Fifth Circuit granted review of two of the 198 en banc petitions filed, approximately 1%.<sup>401</sup> The Fourth Circuit granted only 0.3% of en banc petitions.<sup>402</sup> Table 1 provides data on the number of en banc petitions filed and granted in the in the Ninth Circuit between 2013 and 2017.<sup>403</sup>

Table 1: En Banc Petitions at the Ninth Circuit (2013-2017)

Year	Petitions Filed for Rehearing En Banc	Grants of Rehearing En Banc	% of En Banc Petitions Granted
2017	874	11	1.26%
2016	810	19	2.35%
2015	796	16	2.01%
2014	785	17	2.17%
2013	832	17	2.04%

Although en banc review holds the promise of clarifying the law and reducing litigation in the long run, it requires greater judicial resources in the short run. En banc review increases scheduling burdens and entails more judicial time preparing opinions among large panels of judges. The general rise in caseloads likely contributed to these time- and resource-related concerns.

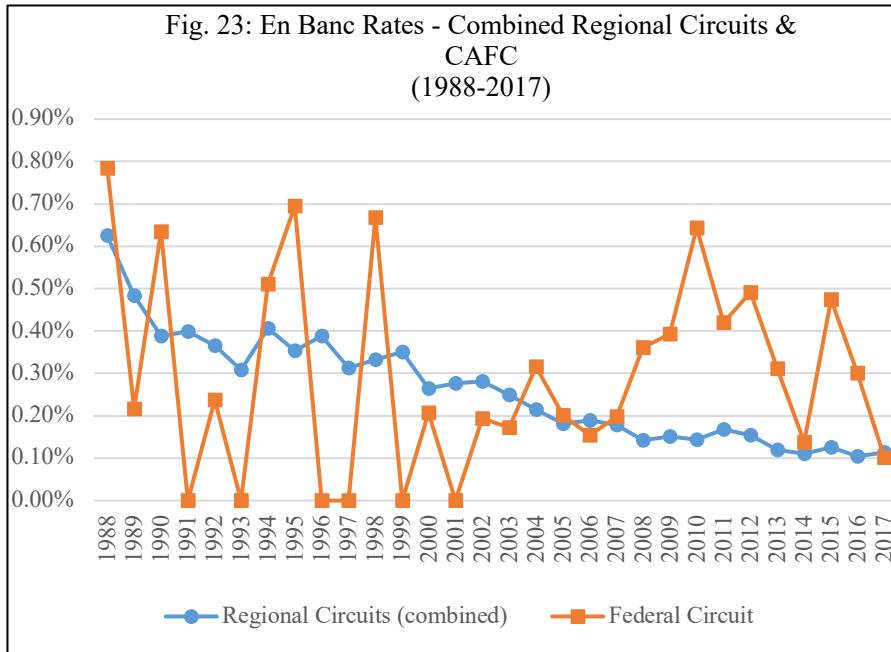
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401. Lyle W. Case, *Judicial Workload Statistics, United States Court of Appeals Fifth Circuit, Clerk's Annual Report July 2016 – June 2017* 31 (2017), <http://www.ca5.uscourts.gov/docs/default-source/default-document-library/clerk's-annual-report-july-2016-to-june-2017.pdf?sfvrsn=0/> [<https://perma.cc/6T3C-JHDW>].

402. United States Court of Appeals for the Fourth Circuit, FAQs—Statistics, <https://www.ca4.uscourts.gov/faqs/faqs---statistics/> [<https://perma.cc/A6J2-Z9TS>].

403. United States Courts for the Ninth Circuit, *2017 Annual Report* 43 (2017), [https://www.ca9.uscourts.gov/judicial\\_council/publications/AnnualReport2017.pdf/](https://www.ca9.uscourts.gov/judicial_council/publications/AnnualReport2017.pdf/) [<https://perma.cc/A2QV-NYC5>].

The Federal Circuit is a notable exception to the reduction in the use of en banc proceedings. Its specialized patent law docket makes it especially important to flush out intracircuit splits. Moreover, all of its members have chambers in the same courthouse, which makes it easier to convene en banc arguments. Figure 23 shows the rate of en banc decisions for the regional circuits (combined) and of the Federal Circuit's patent cases from 1988 through 2017.



Although the average en banc rate for the regional circuits (0.26%) is similar to that of the Federal Circuit (0.29%) over the entire period, the difference over the past fifteen years is striking. The average en banc rate from 2003-2017 for the regional circuits is 0.16%. For the Federal Circuit, the average is 0.31%—nearly double.

In addition to the frequency with which it decides cases en banc, the Federal Circuit's approach to en banc review is also unusual. The Federal Circuit frequently orders en banc rehearing sua sponte and freely invites amici to file briefs and sometimes participate in oral argument.<sup>404</sup> Moreover, the scope of the issues it hears en banc is expansive.<sup>405</sup> For example, in *Phillips v. AWH Corp.*, the Federal Circuit asked for briefing on seven questions related to claim

404. See Ryan Vacca, *Acting Like an Administrative Agency: The Federal Circuit En Banc*, 76 MO. L. REV. 733, 739-44 (2011).

405. *Id.* at 740-43.

construction—the heart of patent litigation.<sup>406</sup> Similarly, in *Therasense v. Becton, Dickinson & Co.*, the Federal Circuit sought briefing on six comprehensive questions relating to inequitable conduct.<sup>407</sup>

This approach is analogous to administrative law’s notice-and-comment rule-making.<sup>408</sup> Rather than the Federal Circuit serving merely as a tribunal disposing of the matters before it, it has taken a stewardship role in the creation and evolution of patent policy. The Federal Circuit’s exercise of this stewardship function has not always been favorably received by the Supreme Court, which has rejected several of the Federal Circuit’s en banc rulings in recent years.<sup>409</sup> Nonetheless, the court’s en banc process has framed issues in need of resolution for the Supreme Court and Congress during a period in which patent law has been strained by rapid advances in digital and bioscience technologies.

### C. Supreme Court

The late-1960s push to reform the federal judiciary focused significantly on the Supreme Court’s rapidly expanding caseload. The number of certiorari petitions set new records each Term. The preface to the Freund Study Group Report began by reporting the Supreme Court’s dramatic and unprecedented docket growth: “Approximately three times as many cases were filed in the 1971 Term as in the 1951 Term. The growth between 1935 and 1951 was gradual and sporadic, from 983 new filings to 1,234. But by 1961 the number was 2,185, an increase of 951, and by 1971, 3,643 . . . .”<sup>410</sup>

These trends have continued.

#### 1. Workload

The Court’s work today, at its core, consists of two principal tasks—screening applications for review and deciding cases accepted for review.<sup>411</sup> The Supreme Court has also traditionally had a mandatory review docket,<sup>412</sup> but Congress relieved the Court of the bulk of those responsibilities with repeal of the Three-Judge Court Act in 1976<sup>413</sup> and abolished most remaining mandatory

406. 376 F.3d 1382, 1383 (Fed. Cir. 2004) (per curiam) (order granting petition for rehearing en banc).

407. 374 F. App’x 35, 35–36 (Fed. Cir. 2010) (per curiam).

408. See Vacca, *supra* note 404, at 744–49.

409. See, e.g., *Lexmark Int’l, Inc. v. Impression Prods., Inc.*, 137 S. Ct. 1523 (2017); *SCA Hygiene Prods. Atkiebolag v. First Quality Baby Prods.*, 137 S. Ct. 954 (2017); *Bilski v. Kappos*, 561 U.S. 593 (2010); *Alice Corp. v. CLS Bank Int’l*, 573 U.S. 208 (2014); *Limelight Networks, Inc. v. Akamai Tech., Inc.*, 572 U.S. 915 (2014).

410. See FREUND STUDY GROUP REPORT, *supra* note 6, at 2.

411. See *supra* Part I.C.2 (describing the 1925 “Judges Bill” that expanded the Court’s discretionary power to hear cases and largely eliminated direct appeals of district court cases to the Supreme Court; the Act retained mandatory review for several significant sources of cases).

412. See, e.g., *supra* Parts I.B.3, I.C.4 (discussing the three-judge court acts).

413. See *supra* Part I.D.4.

review responsibilities in 1988.<sup>414</sup> The modern concern presented by the increasing workload is that the justices will need to choose among: (1) accepting more cases for review while spending less time on each case; (2) refusing to decide cases that warrant the Court's attention; and/or (3) spending less time identifying cases meriting review, thus increasing the likelihood of selection error.

The justices rely heavily on their law clerks to sift through the thousands of certiorari petitions.<sup>415</sup> Chief Justice Rehnquist described the general "cert pool" process and his particular practices as follows:<sup>416</sup>

Each of the thirty-odd law clerks in the pool divide them among themselves the task of writing memos outlining the facts and contentions of each of the some four thousand petitions for certiorari that are filed each term, and these memos are then circulated to the chambers whose clerks comprise the pool. When the memos come into my chambers, I ask my clerks to divide them up three ways, and that each law clerk read the memo and, if necessary, go back to the petition and response in order to make a recommendation to me as to whether the petition should be granted or denied . . . .

As soon as I am confident that my new law clerks are reliable, I take their word and that of the pool memo writer as to the underlying facts and contentions in the various petitions, and with a large majority of the petitions it is not necessary to go any further than the pool memo. In cases that seem from the memo perhaps to warrant a vote to grant certiorari, I may ask my clerk to further check out one of the issues, and may review the lower court opinion, the petition, and the response myself.<sup>417</sup>

The role of law clerks and the cert pool have not significantly changed over the past two decades. Clerks report that there is tremendous pressure to recommend denying certiorari.<sup>418</sup>

Chief Justice Rehnquist characterized his assessment of whether to vote to grant certiorari as a subjective decision requiring both intuition and legal judgment.

One factor that plays a large part with every member of the Court is whether the case sought to be reviewed has been decided differently

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414. See *supra* Part I.G.1.

415. See WILLIAM H. REHNQUIST, *THE SUPREME COURT* 224–38 (2d ed. 2001) (describing the evolution of the certiorari petition review process, the important role of law clerks in preparing recommendation memoranda in the "cert pool," and briefing the justices prior to certiorari conferences).

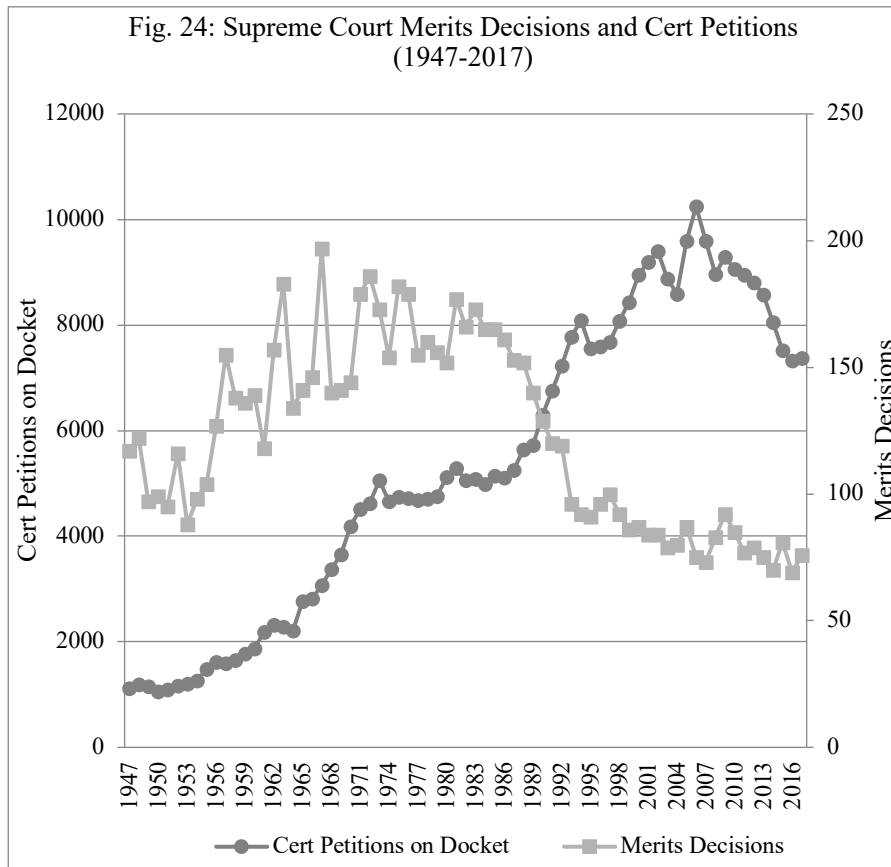
416. At the time that Chief Justice Rehnquist wrote this account, eight members of the Court (all except Justice Stevens) had their clerks participate in the "cert pool." See *id.* at 232.

417. See *id.* at 233–34.

418. One clerk observed, "You're in perpetual fear of making a mistake." Another described his practice as "find[ing] every possible reason to deny cert. petitions." Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1235–36 (2012).

from a very similar case coming from another lower court . . . . Another important factor is the perception of one or more justices that the lower-court decision may well be either an incorrect application of Supreme Court precedent or of general importance beyond its effect on these particular litigants, or both.<sup>419</sup>

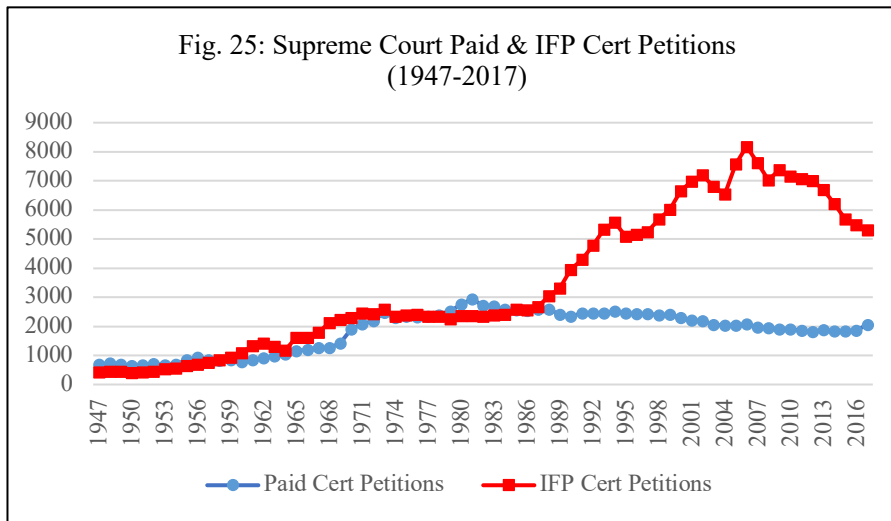
Figure 24 traces the Court's workload from 1947 through 2017.



The left scale measures certiorari petitions per year. The number of petitions filed at the Court steadily rose from approximately one thousand in 1947 to a peak of more than ten thousand in 2005. It has since fallen back to around seven thousand per year. The right scale measures merits decisions. The Court heard between 125 and 200 petitions per year from the mid-1950s through the late 1990s. That number has steadily declined to about seventy-five merits decisions per year.

419. REHNQUIST, *supra* note 415, at 234; see U.S. Sup. Ct. R. 10 (considerations governing review on writ of certiorari).

A closer look at the composition of certiorari petitions, however, suggests caution in drawing conclusions about the Court's workload. Figure 25 shows that the number of paid certiorari petitions has remained relatively constant since 1970. (1,903 in 1970 versus 1,850 in 2016 and 2,062 in 2017). Nearly all of the rise in filing is attributable to in forma pauperis petitions.<sup>420</sup>



Thus, the increase of in forma pauperis petitions for certiorari does not appear to be a cause of the Court's decline in merits decisions. Some observers have pointed to the rise of the cert pool in the early 1970s as the cause of the decline.<sup>421</sup> By contrast, based on an empirical analysis of Supreme Court Terms between 1940 and 2008, Professors Ryan J. Owens and David A. Simon found that growing ideological divergence among the justices explains the decline in merits review.<sup>422</sup>

Owens and Simon also attribute a significant portion of the decline in Supreme Court merits review to Congress's elimination of much of the Court's

420. Most in forma pauperis cases are criminal and prisoner petitions that are not considered strong candidates for grant of review. See Wendy L. Watson, *The U.S. Supreme Court's In Forma Pauperis Docket: A Descriptive Analysis*, 27 JUST. SYS. J. 47, 50–51 (2006). That is not to say that circuit splits cannot arise in in forma pauperis cases, but conventional wisdom suggests that many of these cases do not meet the Court's standards for granting certiorari and are routinely denied. See *id.* at 47–48.

421. See Owens & Simon, *supra* note 418, at 1235 (quoting Justice Stevens: "You stick your neck out as a clerk when you recommend to grant a case. The risk-averse thing to do is to recommend not to take a case. I think it accounts for the lessening of the docket."); Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1376–77 (2006).

422. See Owens & Simon, *supra* note 418, at 1243, 1282; see also Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737, 790–93 (2001) (contesting the relationship between the cert pool and grants of plenary review).

mandatory jurisdiction in 1988.<sup>423</sup> Professors Margaret Meriwether Cordray and Richard Cordray found, however, that the 1988 legislation accounts for only a small percentage of the decline in Supreme Court merits review. During the 1984-1987 Terms, the Court fully considered 108 appeals as of right.<sup>424</sup> During the 1990-1993 Terms, the Court granted plenary review in seventy cases in which the parties would have had a right of appeal under the pre-1988 law.<sup>425</sup> Thus, the 1988 legislation accounts only for a decline of about ten cases per Term.<sup>426</sup> And looking at the appeals of right and imputed appeals of right as a percentage of the total plenary decisions results in an insignificant decline attributable to the 1988 legislation.<sup>427</sup> Because the Court reduced its plenary decisions from 609 to 427 decisions, the 108 appeals during the earlier four Terms accounted for 17.7% of its docket, while the “‘would-have-been’ appeals” during the four subsequent Terms accounted for 16.4% of the docket.<sup>428</sup> Thus, they calculate the reduction in cases caused by the 1988 legislation to be approximately one or two cases per Term.<sup>429</sup>

Instead, other independent factors have contributed to the Court’s declining caseload. The homogeneity theory suggests that a long period of appointing like-minded federal judges would cause the Supreme Court’s plenary docket to shrink, because there would be fewer conflicts.<sup>430</sup> Although this theory fits with the decline in cases during the Reagan and George H.W. Bush presidencies, it should have produced an increase in merits review during the Bill Clinton presidency.<sup>431</sup> This did not occur. The Court’s plenary docket fell and continues to fall.

The most likely causes of the Court’s declining caseload appear to be (1) changes in the justices’ view of the Court’s role and (2) intra-Court dynamics.<sup>432</sup> From 1986 through 1994, six justices retired.<sup>433</sup> Their replacements were less inclined to grant review than were their predecessors.<sup>434</sup> Justice White’s

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423. See Owens & Simon, *supra* note 418, at 1272–83; Part I.G.1 (discussing 1988 legislation largely abolishing mandatory jurisdiction); Cordray & Cordray, *supra* note 422, at 753 (“[T]he Justices themselves seemed convinced that this change would relieve some of the pressure on their docket . . .”).

424. See Cordray & Cordray, *supra* note 422, at 755.

425. *Id.* at 756–57.

426. *Id.* at 757.

427. *Id.*

428. *Id.*

429. *Id.*

430. *Id.* at 771; see also Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 414 (1996).

431. See Cordray & Cordray, *supra* note 422, at 772.

432. See *id.* at 776; Hellman, *supra* note 430, at 429–31; David M. O’Brien, *The Rehnquist Court’s Shrinking Plenary Docket*, 81 JUDICATURE 58, 63 (1997).

433. See Cordray & Cordray, *supra* note 422, at 777.

434. *Id.* at 777–90.

retirement in 1993 was likely the most impactful in view of his outspoken support for granting certiorari in nearly all cases presenting circuit splits.<sup>435</sup>

## 2. Intercircuit Splits

Although the Hruska Commission's charge focused on appellate court structure, the Supreme Court's capacity to resolve circuit splits played a central role in the Commission's work.<sup>436</sup> The Commission and later policy-makers made various efforts to assess the extent of circuit splits and the Supreme Court's capacity to address them. The NCA and ICT proposals took direct aim at addressing concerns about the growing fragmentation of national law.

The Freund Study Group pointed to several statistics concerning the Court's certiorari petitions and the various categories of cases to explain the Court's workload, but failed to provide a reliable estimate of the number of unresolved circuit splits.<sup>437</sup> The Hruska Commission used three principal proxies: (1) case studies of intercircuit splits;<sup>438</sup> (2) Professor Feeney's review of petitions filed in the 1971 and 1972 Supreme Court Terms finding that approximately 5% of the certiorari petitions not granted review present direct intercircuit conflicts;<sup>439</sup> and (3) analysis of dissents from denial of certiorari.<sup>440</sup>

Based on a review of certiorari petitions filed in the early 1970s, Professors Gerhard Casper and Richard Posner found that only 1.3% of certiorari petitions that were denied review actually presented genuine conflicts.<sup>441</sup> Using certiorari petitions from the 1982 Term, Professors Samuel Estreicher and John Sexton concluded that the Court had granted review in thirty-nine cases that presented "tolerable" splits, while declining review of just thirteen petitions presenting "intolerable" splits.<sup>442</sup> Thus, based on Estreicher and Sexton's "managerial" thresholds for granting review,<sup>443</sup> the Court was remarkably close to the optimum level in granting review of 164 cases out of a paid certiorari pool of 2,061

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435. *Id.* at 788–89; *see also* Owens & Simon, *supra* note 418, at 1242–43, 1280–81.

436. HRUSKA COMMISSION STRUCTURE REPORT, *supra* note 1, at 5.

437. *See* Estreicher & Sexton, *supra* note 275, at 697.

438. *See* HRUSKA COMMISSION STRUCTURE REPORT, *supra* note 1, at 76–90.

439. *See id.* at 107 (T.24).

440. *See id.* at 111–33; *see also* Brown Transp. v. Atcon, 439 U.S. 1014, 1017–20 (1978) (White, J., with whom Blackmun, J. joins, dissenting from denial of certiorari) (listing numerous cases alleging clear intercircuit splits and lamenting the Court's capacity constraints that prevent the cases from being heard); Letter from Hon. Byron R. White to Hon. Robert W. Kastenmeier (Mar. 6, 1984), *reprinted in* 1983 House Hearings On Supreme Court Workload, *supra* note 265, at 360–61 (emphasizing that a National Court of Appeals or an intercircuit tribunal would address the Court's severe capacity constraint, which forces it to decline cases that are worthy of further review).

441. *See* GERHARD CASPER & RICHARD A. POSNER, THE WORKLOAD OF THE SUPREME COURT 89 (1976).

442. Professors Estreicher and Sexton concluded that only six of the thirteen "intolerable" splits were improperly denied review because other considerations justified rejecting those petitions. *See* Estreicher & Sexton, *supra* note 275, at 779–80.

443. *See id.* at 716–20.



petitions for the 1982 Term.<sup>444</sup> Professor Arthur Hellman came to a less sanguine conclusion based on a review of Supreme Court cases from 1988 to 1990. He found 166 intercourt conflicts based on Justice White's dissents (38 in 1988, 59 in 1989, and 69 in 1990),<sup>445</sup> and 220 conflicts based on a random sample of paid cases during the 1989 Term.<sup>446</sup> In a follow-up study of intercourt conflicts from the 1984 and 1985 Terms, Hellman determined that only 40 of the 142 conflicts from the two Terms had persisted.<sup>447</sup>

Since the time of these studies, the Supreme Court's docket has significantly changed. As reflected in Figure 24, the number of merits review cases has declined by more than half. Thus, there is reason to believe that the Court has reduced its grant rate of petitions presenting circuit splits.

In a recent in-depth study of circuit splits arising between 2005 and 2013, political scientists Deborah Beim and Kelly Rader found that the Supreme Court resolved only about one-third of circuit splits that emerged during that time.<sup>448</sup> Moreover, the unresolved splits continue to yield litigation, and they do not dissipate on their own or through legislative reform, administrative agency decisions, or circuit court decisions.<sup>449</sup> The Beim and Rader study suggests that even if the earlier analyses were correct, changed circumstances have led to an alarming number of intolerable circuit splits. Resolving legal uncertainty created by persistent circuit splits appears to be at least as important a judiciary reform goal today as it was in the early 1970s.

### III.

#### BREAKING THE JUDICIARY REFORM LOGJAM

The foregoing history and statistical analysis of the federal judiciary reveals a troubling pathology in American government.<sup>450</sup> Notwithstanding broad

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444. *See id.* at 708, 744.

445. Justice White's dissents in denial of certiorari petitions provide a useful sample, because he made a practice of dissenting when the Court declined to take a case presenting an intercourt split. *See* Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. PITT. L. REV. 693, 721 (1995).

446. *Id.* at 724; *see* ARTHUR D. HELLMAN, UNRESOLVED INTERCIRCUIT CONFLICTS: THE NATURE AND SCOPE OF THE PROBLEM 61–62 (1991) [hereinafter UNRESOLVED INTERCIRCUIT CONFLICTS]. Hellman also examined in forma pauperis cases, but because of the small sample of intercourt conflicts, an estimate for the three terms would have a large margin of error. As a result, he did not conduct further analysis of the in forma pauperis cases. *See* HELLMAN, UNRESOLVED INTERCIRCUIT CONFLICTS, *supra*.

447. *See* Hellman, *supra* note 445, at 792.

448. *See* Deborah Beim & Kelly Rader, *Legal Uniformity in American Courts*, 16 J. EMPIRICAL LEGAL STUD. 448, 456 (2019). Professors Beim and Rader assembled their data set from cases identified by the Seton Hall Circuit Review, a journal founded in 2004, which publishes two issues a year identifying circuit splits. *See Current Circuit Splits*, 1 SETON HALL CIRCUIT REV. 147 (2005).

449. Beim & Rader, *supra* note 448, at 468 (concluding that intercourt splits left unresolved “by the Supreme Court continue to cause meaningful legal discord for many years”).

450. The preamble to the US Constitution speaks of “establish[ing] Justice” as one of the nation's principal purposes. U.S. CONST. pmbl. Judge Learned Hand warned seven decades ago that “[i]f we are to keep our democracy, there must be one commandment: Thou shalt not ration justice.” Learned Hand,

recognition that federal litigation had exploded and that the judiciary was in serious need of reform in the 1970s, 1980s, and 1990s,<sup>451</sup> the nation failed to make significant changes. As Part II demonstrates, the problems have grown far more severe since 1970. Caseloads per judge have dramatically increased. The Supreme Court has substantially reduced its docket size, even as certiorari petitions have continued apace. The courts of appeals have considerably reduced oral argument, opinion writing, and en banc review. Four decades ago, Judge John Gibbons worried that the circuit courts' "remarkable achievement in productivity has been attained at least in part by the adoption of a posture of increased deference to the rulings of the courts we're supposed to be supervising . . . ."<sup>452</sup> More recently, Professor Bert Huang provided a compelling empirical demonstration of this effect.<sup>453</sup>

Although innovations in case management have expanded the district courts' efficiency, they have not solved many of the problems, and instead have raised due process and other concerns. The expansion of the magistrate judges' corps<sup>454</sup> and roles<sup>455</sup> has stretched the doctrine of legislative courts and raised questions about the scope of congressional power to delegate Article III judicial power to non-Article III tribunals.<sup>456</sup> Commentators on multidistrict litigation have lamented the lack of appellate scrutiny,<sup>457</sup> the substitution of clients' chosen lawyers with a court-appointed steering committee and lead MDL counsel,<sup>458</sup> the

Thou Shalt Not Ration Justice, Address Before the Legal Aid Society of New York (Feb. 16, 1951) in 9 LEGAL AID BRIEFCASE 3, 5 (1951) quoted in Victor Williams, *A Constitutional Charge and a Comparative Vision to Substantially Expand and Subject Matter Specialize the Federal Judiciary: A Preliminary Blueprint for Remodeling Our National Houses of Justice and Establishing a Separate System of Federal Criminal Courts*, 37 WM. & MARY L. REV. 535, 542 (1996).

451. See Chief Justice Addresses Federal Court Workload, *Future Need*, *supra* note 312, at 4 (observing that "few could argue about the existence of [an appellate capacity] crisis").

452. John J. Gibbons, *Maintaining Effective Procedures in the Federal Appellate Courts*, in THE FEDERAL APPELLATE JUDICIARY IN THE TWENTY-FIRST CENTURY 22, 23 (Cynthia Harrison & Russell R. Wheeler eds., 1989).

453. See Huang, *supra* note 13 (finding that greater appellate caseloads result in lightened scrutiny).

454. Although the number of magistrate judge slots has remained relatively stable, the conversion of part-time positions to full-time positions has significantly expanded the effective size of the magistrate judge bench. McCabe, *supra* note 135, at 51.

455. See *id.* at 52 (observing that magistrate judges have become "an integral and indispensable component of the federal district courts").

456. See Lucinda M. Finley, Note, *Article III Limits On Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act*, 80 COLUM. L. REV. 560, 571–80, 587–96 (1980); Note, *Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View*, 88 YALE L.J. 1023, 1038–40 (1979).

457. See Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 73 (2015); Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1643, 1647–57 (2011).

458. See Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. 1259, 1272 (2017); Burch, *supra* note 457, at 73; David M. Jaros & Adam S. Zimmerman, *Judging Aggregate Settlement*, 94 WASH. U. L. REV. 545, 562 (2017); Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 111–12 (2015).

long delays in resolution,<sup>459</sup> and the settlement of mass litigation without adequate procedural protections.<sup>460</sup> It is not clear that court-adopted Alternative Dispute Resolution (ADR) programs have reduced the caseload, processing time, or costs of litigation any more than by simply setting an earlier trial date and discovery deadlines.<sup>461</sup> Some studies find savings,<sup>462</sup> while other studies are inconclusive.<sup>463</sup> Furthermore, analyses of the impact of these alternatives on caseloads do not address the concerns about the importance of public adjudication in articulating legal norms and promoting the rule of law.<sup>464</sup>

Moreover, attempts to solve the problems through procedural requirements have caused unintended consequences. While speeding up criminal cases, the Speedy Trial Act has complicated and delayed civil cases. Similarly, the Civil Justice Reform Act has failed to produce significant tangible benefits.<sup>465</sup> And the Class Action Fairness Act has significantly added to the burdens on federal district courts.<sup>466</sup>

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459. See DeLaventura v. Columbia Acorn Tr., 417 F. Supp. 2d 147, 150–56 (D. Mass. 2006) (describing long delays in the MDL process); Burch, *supra* note 457; Redish & Karaba, *supra* note 458, at 150–51.

460. See Bradt & Rave, *supra* note 458, at 1261–64; Burch, *supra* note 457, at 116–18; Jaros & Zimmerman, *supra* note 458, at 562; Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After Ortiz*, 58 U. KAN. L. REV. 775, 801–02 (2010).

461. See Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169, 2211–15 (1993); Edward D. Cavanagh, *Federal Civil Litigation at the Crossroads: Reshaping the Role of the Federal Courts in Twenty-First Century Dispute Resolution*, 93 OR. L. REV. 631, 633 (2015) (observing that “the stated goal of the Federal Rules to provide the ‘just, speedy, and inexpensive’ determination of all civil disputes has grown elusive”); Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889, 928 (1991).

462. See Thomas J. Stipanowich, *ADR and the “Vanishing Trial”: The Growth and Impact of “Alternative Dispute Resolution,”* 1 J. EMPIRICAL LEGAL STUD. 843, 854–56 (2004) (describing FJC study about attorneys’ beliefs about saving time and money and study of the Western District of Missouri’s program of Early Assessment).

463. See Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871, 1922–23 (1997) (describing both the RAND and Federal Judicial Center studies as “less helpful . . . to conclusive findings about ADR”); Donna Stienstra, *ADR in the Federal District Courts: An Initial Report*, FED. JUD. CTR. 16 (2011), [https://www.fjc.gov/sites/default/files/2012/ADR2011.pdf/](https://www.fjc.gov/sites/default/files/2012/ADR2011.pdf) [<https://perma.cc/A455-RZAF>] (“[W]e cannot . . . get a sense of the impact of ADR on court caseloads or judicial workloads.”).

464. See Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1081 (1984); Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 PENN. ST. L. REV. 165, 196 (2003).

465. See Cavanagh, *supra* note 461, at 632; Edward D. Cavanagh, *The Civil Justice Reform Act of 1990: Requiescat in Pace*, 173 F.R.D. 565, 572 (1997).

466. See Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. PA. L. REV. 1723, 1750–54 (2008) (reporting that CAFA led to an increase in the number of diversity class actions filed in and removed to the federal courts, and that plaintiffs’ attorneys chose to file far more class actions raising state-law causes of action in the federal courts after CAFA).

The core concern driving judiciary reform in the 1970s, 1980s, and 1990s—fragmentation of national law—has been ignored.<sup>467</sup> The bottleneck at the top of the judiciary pyramid has become more constricting.<sup>468</sup> The lack of clarity of the law, in conjunction with the high stakes of litigation and relatively low cost of appeal, fuels spiraling litigation and undermines economic, social, and political decision-making and institutions.<sup>469</sup>

Perhaps most disconcerting, the salience of judiciary reform has dimmed. Access to the judiciary, fragmentation of national law, and problems of speed and cost plaguing the judiciary no longer garner sustained legislative attention. Even Judge Friendly, who steered the nation away from structural reform in the 1970s, candidly acknowledged that the time may come when more drastic judiciary reforms would be needed.<sup>470</sup> Yet little has been heard about these issues since the 1990s.

The argument might be made that the crises of volume and fragmentation were overblown. But even if Professors Estreicher and Sexton were correct nearly four decades ago that the Supreme Court was granting certiorari in nearly all of the “intolerable” intercircuit splits,<sup>471</sup> the system is far more overloaded

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467. See BAKER, *supra* note 165, at 31–51; Carrington, *supra* note 4, at 596–604; Levin, *supra* note 264, at 9–10 (noting that “[t]he failure of the United States Supreme Court to hear cases squarely presenting [inter-circuit] conflicts, and to resolve the disputed issues, is certainly the most dramatic evidence of the serious deficiency in the present system”).

468. See RICHARD A. POSNER, *THE FEDERAL COURTS—CRISIS AND REFORM* 317 (1985) (“It is not the number of cases alone that that makes a caseload crisis; it is . . . the difficulty of expanding a unitary judicial system to absorb an ever-growing number of cases that eventually brings about a critical situation. The federal judicial system is a pyramid the apex of which—the Supreme Court—is fixed in size. The midsection of the pyramid, consisting of the federal courts of appeals, is not fixed, but it cannot be expanded, beyond a point that seems to have been reached, without either creating extremely poor working conditions at the court of appeals level (by making each such court too large to function effectively) or placing unreasonable demands on the Supreme Court. In these circumstances, the fact that district judges can be added with relatively little threat to the effective operation of the district courts (the base of the pyramid) is only a small comfort.”).

469. See, e.g., Erwin N. Griswold, *The Supreme Court’s Case Load: Civil Rights and Other Problems*, 1973 U. ILL. L.F. 615, 630 (1973) (illustrating how decade-long litigation over the validity of IRS mutual fund valuation regulations affected thousands of cases at substantial cost to the government and taxpayers).

470. See HRUSKA COMMISSION HEARINGS—VOLUME I, *supra* note 168, at 204–05 (recognizing that adoption of jurisdiction streamlining proposals “would not solve the problems of the courts of appeals for all time. As the country continues to grow and Congress subjects still more areas to federal regulation, the savings effected by these measures will gradually be eroded . . . . Hopefully, by the year 2000, we will have learned where to preserve the adversary system and where to substitute something else.”). Apart from the establishment of the Federal Circuit and the elimination of the Supreme Court’s mandatory jurisdiction, Congress did not enact the streamlining proposals that Judge Friendly advocated. Furthermore, the Class Action Fairness Act expanded the federal judiciary’s jurisdiction.

471. There are persuasive reasons to question the Estreicher/Sexton study and its conclusions regarding the ICT legislation. A majority of members of the Supreme Court favored the NCA and advocated for the ICT proposal. See Letter to Hon. Robert W. Kastenmeier from Hon. Warren E. Burger (Feb. 26, 1986) with attachment (Annual Message on the Administration of Justice (Feb. 17, 1985)), *reprinted in 1986 House Hearing on The Supreme Court Workload and Its Workload Crisis*, *supra* note 265, at 105–20; Letter to Hon. Robert W. Kastenmeier from Hon. Bryon White (July 8, 1985) with attachment, *reprinted in 1986 House Hearing on The Supreme Court Workload and Its Workload Crisis*,

today by their own measure. If the ratio of grants to petitions was approximately correct in the early 1980s, then there is reason to believe that nearly half of the certiorari-worthy petitions are being denied review today.<sup>472</sup>

Thus, there is good reason to believe that the interrelated and growing challenges of volume and fragmentation in the judiciary would have been better addressed had Congress established the Intercircuit Tribunal. At a minimum, the nation would have obtained valuable experimental results at minimal cost. At this stage in American history, vital judiciary arteries have clogged, reducing the ability of the system to process cases based on sound and consistent interpretations of the law. Furthermore, there are significant new pathologies ailing the federal judiciary, ranging from the uneven geographic distribution of caseloads to the need for greater expertise.

As means of addressing these problems, this Section first explores the political, institutional, and human causes of the judiciary reform logjam. It then offers an antidote: a commission tasked with developing a judiciary reform act that would not go into effect until 2030. Part IV sketches a reform outline for the 2030 Commission.

#### A. *Impediments to Judiciary Reform*

As chronicled in Part I, federal judiciary reform has never come easily, having long been undermined by legislative politics. The experiences of the past half century reveal two other important impediments: the institutional conservatism of the federal judiciary and the pride, prestige, and morale of federal judges.

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*supra* note 265, at 121–27; Justice William H. Rehnquist, J., The Changing Role of the Supreme Court, Speech at the Florida State University, (Feb. 6, 1986), *reprinted in 1986 Senate Hearing on Intercircuit Panel Act*, *supra* note 265, at 134–61; John Paul Stevens, J., Address at the luncheon meeting of the Federal Bar Association (Oct. 23, 1985), *1986 House Hearing on The Supreme Court Workload and Its Workload Crisis*, *supra* note 265, at 164–65 (expressing the view that the Supreme Court is deciding too many cases and suggesting that “[i]f the number [of cases that should be decided by a national court each year] is in the range of 300 or 400, the case for creating a junior Supreme Court is indeed a strong one. On the other hand, if there are only 100, or perhaps 150 or even 200 such cases, every possible means of expanding the decision-making capacity of the existing Court should be studied before making a major structural change in the federal judicial system.”). The materials cast doubt on Professors Estreicher’s and Sexton’s principal argument against the ICT: that the additional “screening burden” associated with referring cases to the ICT would be onerous. *See Estreicher & Sexton*, *supra* note 275, at 740 n.219. In fact, Justice White considered the inability to grant review in more cases to be a deep source of frustration, causing him to devote substantial energy to dissenting from denials of certiorari petitions. He clearly considered the option to channel some of those cases to an intermediate appellate tribunal to be a substantial benefit and an efficient use of time. Professors Estreicher’s and Sexton’s suggestion that the ICT would contribute to “incoherence and instability” does not square with the obvious benefit of resolving circuit splits. *Id.* at 797.

472. More recent studies provide further reasons to question the applicability of the conclusion that the Supreme Court is taking all or nearly all “intolerable” circuit splits. *See supra* Part II.C.1–2.

### 1. *Politics of Judiciary Reform*

For a century following the nation's founding, the power struggle between Federalists and Anti-Federalists over the extent of federal power hampered the development and reform of the federal judiciary.<sup>473</sup> Beyond the struggle between federal and state power, partisan politics also came into play. The political party out of power often opposed reforms to avoid granting their opponents more judicial appointments. This issue arose during the Lincoln administration and the decades leading up to the Evarts Act.<sup>474</sup> Later, President Roosevelt's failed court-packing plan represented a high-water mark in the politicization of judiciary reform.<sup>475</sup>

Partisan politics reared its head again in the 1980s as President Reagan reshaped the judiciary through partisan judicial appointments. The resulting shift in the balance of power on the D.C. Circuit and some other circuit courts contributed to the retrenchment of en banc review<sup>476</sup> and played a role in defeating the ICT initiative. Such polarization has been particularly apparent in the heated Senate confirmation battles since Judge Robert Bork's nomination to the Supreme Court.

As the history of the American republic reveals, politics have frequently stymied judiciary reform. Rather than simply waiting for the stars to align in favor of one party or another, the nation needs to develop a method for minimizing or avoiding political logjams if it is to ensure a robust, well-functioning federal judiciary.

### 2. *Institutional Conservatism of the Federal Judiciary*

Beyond legislative politics, the nature of judicial institutions has played a central role in scuttling judiciary reform. As "Tradition," the opening song in *Fiddler on the Roof*,<sup>477</sup> poignantly captures, social and religious communities are prone to adhere stubbornly to traditional roles and practices even as the world around them changes. Following the struggles to implement structural judiciary reforms in the 1970s and early 1980s, Justice Rehnquist similarly observed that "[l]awyers and judges as a profession are conservatives in the sense that most all of us are: we are familiar with a certain way of doing things and would prefer not to see that system change."<sup>478</sup>

Various features of the judiciary inculcate and perpetuate this conservatism and opposition to change. Judicial institutions value stability and predictability.

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473. See *supra* Part I.A.

474. See *supra* Part I.A.

475. See *supra* Part I.C.3.

476. See *supra* Part I.F; Note, *supra* note 304, at 866–75.

477. See BARBARA ISENBERG, TRADITION!: THE HIGHLY IMPROBABLE, ULTIMATELY TRIUMPHANT BROADWAY-TO-HOLLYWOOD STORY OF FIDDLER ON THE ROOF, THE WORLD'S MOST BELOVED MUSICAL (2014).

478. Rehnquist, *supra* note 56, at 12.

Moreover, new judges are taught the systems and procedures that have been established, and there are high thresholds for changing these rules. Furthermore, the seniority system of the judiciary, like those of other human organizations, promotes stasis. Experienced judges mentor younger judges, which reinforces deference to senior colleagues. As judges move up the ranks and pay their dues, they benefit from the seniority rules and reinforce the values that have been instilled.

Among those values is the use of generalist federal judges. No other nation uses this system. Even though litigation has grown more specialized over time, federal judges come to see this feature of their job as a hallmark of the American justice system. We see this perspective in former Judge Rifkind's staunch opposition to the creation of a specialized patent tribunal.<sup>479</sup> However, as Judge Friendly and many others came to realize, specialization can be advantageous in some aspects of federal adjudication.<sup>480</sup> Judge Friendly's advocacy for the specialty patent court undoubtedly played a significant role in moving the needle on this issue, although the federal judiciary remains strongly inclined toward general jurisdiction.

As he was nearing elevation to Chief Justice and recognizing the pressing need for structural judiciary reform, Justice Rehnquist sought to move the judiciary and the legal profession beyond institutional conservatism, noting that "change has been the destiny of our federal court system since it was first brought into existence in 1789."<sup>481</sup> As the next Section explains, the barriers to structural reform continue to be deeply engrained in human motivations.

### 3. *Pride, Prestige, and Morale*

As the hearings on judiciary reform reveal, it would be a mistake to assume that judges' neutrality in judging others carries over to their views on matters affecting one of their most cherished professional accomplishments and badges of honor: the pride and prestige of being a federal judge. That prestige is especially important as judges move up the judicial hierarchy. For that reason, judges' views on the policy effects of judiciary changes that affect their own stature should be viewed with a more skeptical eye.

Appellate judges have driven much of the resistance to the NCA proposal. Retired Supreme Court Justice Tom Clark, testifying in opposition to the National Court of Appeals, suggested that Congress should weigh this factor heavily in the policy balance:

[T]his National Court is going to have more prestige than the courts of appeals. That's another thing that worries me. I have a high regard for the courts of appeals of the United States, and I hate to see them

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479. See Rifkind, *Bankruptcy Code—Specialized Court Opposed*, *supra* note 236; Rifkind, *A Special Court for Patent Litigation*, *supra* note 236.

480. See FRIENDLY, *supra* note 161, at 155–59.

481. Rehnquist, *supra* note 56, at 12.

downgraded, put back in the background. I [want] to see them up in the foreground. I think we ought to keep them there . . . .<sup>482</sup>

Judge Friendly, whose stature is beyond reproach,<sup>483</sup> recognized the psychological dimension of judiciary reform forthrightly:

Quite obviously creation of the National Court would decrease the prestige of the courts of appeals and the consequent attractiveness of membership on them. This is especially serious at a time when necessary increases in judgeships have already impaired this to a considerable degree—not to speak of the problem of inadequate judicial salaries . . . . [T]he psychology of judges is not measurable by statistics. Petty though it may be, a judge of a court of appeals does take satisfaction in the fact that he is, and is publicly known to be, subject to correction only by the ‘one Supreme Court’ we all revere. Of course, diminution in prestige of the courts of appeals would simply have to be borne if the National Court is really needed. But it is a disadvantage that must be weighed since these courts will continue to be the work-horses of the federal appellate process.<sup>484</sup>

Chief Justice Burger captured the concern more light-heartedly:

[A]t one Judicial Conference, a Circuit Judge came up to me and inquired how we were getting along with this ‘caseload problem.’ I gave him a brief response, and he said, ‘I want to tell you I am completely, wholeheartedly, 100 percent for these proposals, but my wife—she is not.’ I knew I was being baited to ask why, and of course I did.

His answer was about like this. “My wife is active in volunteer hospital work, church work, and the bridge club. People ask her, ‘What does your husband do,’ and she answers, ‘My husband is a Circuit Judge.’ And she always straightens up when she says that. So the questioner may say, ‘Is that like Judge Jones or Judge Butler?’—some local judges who may be justices of the peace or municipal judges. And my wife answers a firm, ‘No. My husband is on the *second* highest court in the country.’ And, by George, Chief, she does not want to say I’m on

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482. See HRUSKA COMMISSION HEARINGS—VOLUME II, *supra* note 169, at 1139 (statement of Thomas Clark, Associate Justice (ret.), United States Supreme Court).

483. See David M. Dorsen, *Judges Henry J. Friendly and Benjamin Cardozo: A Tale of Two Precedents*, 31 PACE L. REV. 599, 602 n.18 (2011) (quoting Chief Justice Warren Burger: “I can’t possibly identify any judicial colleague more highly qualified to have come to the Supreme Court of the United States than Henry Friendly”; quoting Harvard Law School Dean Erwin Griswold: “In my opinion, [Judge Friendly] was the ablest lawyer of my generation.”); Michael Norman, *Henry J. Friendly, Federal Judge in Court of Appeals, Is Dead at 82*, N.Y. TIMES, Mar. 12, 1986, at B6 (quoting Chief Judge Wilfred Feinberg: Judge Friendly was “one of the greatest Federal judges in the history of the Federal bench”; quoting Seventh Circuit Judge Richard A. Posner describing Judge Friendly as “the most distinguished judge in this country during his years on the bench”).

484. See HRUSKA COMMISSION HEARINGS—VOLUME II, *supra* note 169, at 1311 (letter of Henry J. Friendly, J., Second Circuit Court of Appeals); see also Feinberg, *supra* note 219, at 615 (stating that “[a] principal effect of the new court would be ‘the diminution of authority and prestige of the courts of appeals,’ in the words of Chief Judge Kaufman. Or, as Judge Oakes colorfully put it, the proposal ‘would tend to denigrate, if not emasculate, the present courts of appeals.’”).



the *third* highest!

Now, we have even taken care of this lady's concerns. Courts of Appeals will, of course, always be "Number Two." They will continue to be final, as they always have been, in 97 to 98% of their cases. The Intercircuit Panel can remain in the same category as the other special panels created by Congress in recent years using designated judges. The Judges of the Intercircuit Panel will be Circuit Judges on special assignment. For all this lady knows, her husband may be on the new Panel.<sup>485</sup>

As his comment makes clear, policy-makers took the perceptions of appellate judges into consideration as they tinkered with the design of an alternative to the NCA. However, Judge Patricia Wald of the D.C. Circuit did not find the ICT solution comforting:

[T]he reason most of us are where we are today is because we feel a special legitimacy, credibility, respect, and morale, about being a member of the Federal judiciary.

Senator Heflin suggested that no judge likes to have his or her opinions overruled by a higher court, and he is absolutely right. It is not a pleasant feeling. I would like to think, however, that most of us are not operating on that basis alone when we oppose the creation of a new intercircuit tribunal.

But there is no question that if we are going to be overridden, I, and I think others, would like the Supreme Court to do it. Or, if the Senate and the House want to 'bite the bullet' and establish a fourth tier, Presidentially selected, senatorially confirmed tribunal to pass on our rulings that has its own constitutional legitimacy, so be it. That certainly is your call.

But there is something constitutionally untidy about handpicking a few circuit judges out of the various circuits, putting them on this supercircuit court to serve for a few years as a council of revision with respect to circuit law, while the rest of us sit with life tenure on our own particular courts.

There is no question in my mind it would create a corps of elite among the circuit judges, and that that particular form of elitism would probably carry weight in the internal deliberations of our own circuits.

Courts are cloistered but intensely intimate bodies, and the dynamics of personal prestige and influence are subtle. The creation of a 'super' court composed of a 'super' judge from each circuit could not but help affect intercircuit decision-making as well.<sup>486</sup>

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485. Warren E. Burger, Chief Justice of the United States, Annual Message on the Administration of Justice, Remarks at the Midyear Meeting of the American Bar Association 12 (Feb. 17, 1985), reprinted in *1985 Senate Hearing on Intercircuit Panel Act*, *supra* note 265, at 28.

486. *See id.* at 95–96.

The following colloquy between Representative Robert Kastenmeier, Chairman of the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice, and Robert M. Landis, Chairman of the ABA's Standing Committee on Federal Judicial Improvements, captures the role of appellate judges in influencing the ABA's position on the ICT legislation:

Mr. Kastenmeier. [Mr. Landis, y]ou are not here, of course, to speak for the American Bar Association [because of the ABA's vote against the Standing Committee's recommendation to support the ICT], but perhaps you can at least give us the benefit of what you consider to be the reason that the support for [the ICT] apparently has withered within the association. I say that because at one time I think the ABA had endorsed the concept of a national court of appeals.

Mr. Landis. I know that full well, because it has been my committee that has been riding herd on these proposals as they have come along.

Mr. Kastenmeier. And at another time, more recently if I recall the ABA has said, well, it sounds like a good proposal, but we don't want the Chief Justice to make all the appointments. Representatives of the ABA thought that would be excessive power in any one person and that seemed to be a preoccupying concern.

Mr. Landis. And now the Court will do the designating so that I will say this much . . . . I can't explain why it developed that way except that there has been a fairly conscious and obvious effort at politicking the delegates, and that is really what took place. I asked people who feel strongly about it, a number of the judges who were encouraging the opposition and spearheading it.

Mr. Kastenmeier. It is true, is it not, that most judges of the circuit courts of appeal, oppose an Intercircuit Tribunal?

Mr. Landis. I haven't taken account of all the circuits. I know that some of them are just adamantly against it . . . . I never did a count, but there are quite a number of them who feel very strongly about it, who are spearheading opposition.<sup>487</sup>

The upshot of the foregoing is twofold: appellate judges have played an outsized role in judiciary reform (principally in opposition) and their input is influenced, at least in part, by the prestige of their positions under the status quo, their discomfort with being reversed, and the interplay of collegiality and reputation.<sup>488</sup> Furthermore, litigators and litigator organizations are disinclined

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487. See 1986 House Hearing on *The Supreme Court Workload and Its Workload Crisis*, *supra* note 265, at 93.

488. While collegiality is undoubtedly a desirable social convention in many respects, it can lead judges to exercise undue caution when rocking the boat by, for example, granting en banc review of colleagues' decisions. Cf. Stephen L. Wasby, *Why Sit En Banc?*, 63 HASTINGS L.J. 747, 780-86 (2012) (documenting reasons judges give for granting and denying en banc review). Thus, circuit courts are more likely to grant en banc review when the judge who authored an opinion (or the entire panel) favors overturning circuit precedent.

to disappoint judges. And legislators afford judges tremendous deference on judiciary structural reform. While judges are experts in the workings of the judiciary and their input is therefore essential, their views should also be subject to scrutiny given that their personal stake in the status quo may cloud their assessment of the best, long-term national interest.

### *B. Antidote: A 2030 Commission*

Unless Congress can overcome the impediments to judiciary reform, the American justice system will continue to experience the erosion of its capacity to fulfill its essential role. Thus, there are two critical challenges to achieving beneficial judiciary reform: developing a balanced, forward-looking reform package and overcoming the political, institutional, and human impediments to enactment. These two challenges are intertwined, and this relationship adds to the difficulty of achieving reform.

Drawing on John Rawls' seminal "veil of ignorance" construct,<sup>489</sup> the best chance of breaking the logjam is for Congress to establish a judiciary reform commission tasked with developing a judiciary reform act that would not go into effect until 2030. The "2030 Commission" members would not know the identity or party of the President or of the Senate majority. Furthermore, any federal judges involved in the process likely would be senior or retired by the time any reforms went into effect and thus presumably less concerned about how reform proposals might affect them personally. By delaying implementation, the 2030 Commission members would operate behind a veil of ignorance that would enable them to focus on the best interests of future generations of citizens (including judges and practitioners), while at the same time drawing upon their own experiences.

In selecting the 2030 Commission, Congress should heed Chief Justice Rehnquist's insight, derived from his struggles to achieve judiciary reform:

[I]n the words of the World War I Premier of France Georges Clemenceau, 'War is too important to be left to the generals,' [so too] the shape of the federal court system is too important to be left to the judges. The [Judicial Conference's Long Range Planning] Committee must develop its vision of the future and shape of the federal judiciary in part by listening to all those who have an interest in the work of the federal courts.<sup>490</sup>

The 2030 Commission should be broadly representative of the nation. Therefore, Congress must look beyond the parochial interests of sitting judges and focus on adapting the federal judiciary for the 21st century.

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489. See JOHN RAWLS, A THEORY OF JUSTICE 136 (1971).

490. See William H. Rehnquist, *Seen in a Glass Darkly: The Future of Federal Courts*, 1993 WIS. L. REV. 1, 4-5 (1993); see also William H. Rehnquist, Chief Justice of the United States, Remarks at the Just Solutions Conference 6:02 (May 3, 1994) ("Reform of the justice system is too important to be left to lawyers and judges.").

The 2030 Commission would conduct its study and develop judiciary reform recommendations within two years, allowing Congress to consider and shape a long-range plan well in advance of when the 2030 balance of political power would be known. Congress could also implement interim reforms sooner, or in phases while the 2030 Commission pursues its long-range assessment. It might also wish to pursue experimental reforms with sunset provisions.

The 2030 Commission proposal is in no way intended to detract from any claim that judiciary reform is urgently needed. All of the empirical evidence indicates that what was perceived as a judiciary crisis in 1969 is far more acute today. But if Congress pursues urgent reform, the political, institutional, and human impediments will likely produce the same outcomes as in the 1970s, 1980s, and 1990s reform efforts: stalemate and status quo. The veil of ignorance—which can only be created through delayed implementation—creates the best conditions for constructive judiciary reform. It would be better to have thoughtful and balanced judiciary reform in 2030 than inaction each of the next ten years (and every year after that). Shifting the focus to the best system for the future, even while recognizing that reform is needed now, allows Congress to gain perspective and diminish partisanship and self-interest. There is, of course, nothing preventing an intervening Congress from blocking implementation. However, the 2030 Commission's reform plan would have legitimacy which could enable it to survive.

#### IV.

##### TOWARDS A JUDICIARY REFORM AGENDA

The challenges facing the federal judiciary in the 21st century are complex and vast. Furthermore, judiciary reform has not been systematically assessed since the Judicial Conference's Long Range Plan in the 1990s. Consequently, the 2030 Commission should be afforded broad authority to study and recommend judiciary reforms.

##### *A. Judiciary Capacity*

As Part II demonstrated, the judiciary overload problems that sparked the judiciary reform efforts of the 1970s have become far more dire. The district courts face unprecedented caseloads. The fragmentation of national law has worsened as the Supreme Court has reduced its docket to only one-third the level it resolved in the 1980s, and circuit courts have similarly scaled back en banc review. Furthermore, the data show uneven distribution of cases at the district court and appellate court levels. The concerns can be addressed through jurisdictional, structural, staffing, and procedural reforms.

##### *1. Jurisdiction*

Judge Friendly's principal critique of the NCA was that "general federal courts can best serve the country if their jurisdiction is limited to tasks which are

appropriate to courts . . . of general rather than specialized jurisdiction, and where the knowledge, tenure and other qualities of federal judges can make a distinctive contribution.”<sup>491</sup> He saw the federal judiciary not merely as an adjudication factory, but, as serving a distinct and special role in the nation’s justice system. This led him to prefer a parsimonious approach to jurisdiction that had, in his view, been undermined by Congress’s expansion of the federal courts’ jurisdiction.<sup>492</sup> Consequently, his primary approach to reforming the federal judiciary was to streamline federal jurisdiction through: (1) repealing the Federal Employers’ Liability Act<sup>493</sup> and replacement by an administrative workers compensation act; (2) eliminating the diversity of citizenship jurisdiction; (3) limiting concurrent federal-state criminal jurisdiction; (4) shifting more burden on administrative agencies prior to judicial review; (5) limiting collateral attack on judgments of conviction; and (6) requiring state prisoners complaining of Civil Rights Act violations with respect to the conditions of their confinement to exhaust state administrative and judicial remedies before pursuing federal court review.<sup>494</sup>

Beyond largely abolishing the Supreme Court’s mandatory jurisdiction, Congress did not ultimately pursue Judge Friendly’s streamlining proposals. Diversity of citizenship jurisdiction remains, even as the federalism concerns animating that feature have faded in importance. Moreover, Congress has expanded the jurisdiction of the federal courts, most notably through passage of the Class Action Fairness Act, adding substantial new challenges to some federal district courts. The 2030 Commission’s examination of jurisdiction could begin by reviewing the broad range of federal jurisdiction and assessing options for adjusting the role of the federal courts vis-a-vis state courts and administrative tribunals based on an analysis of contemporary conditions and values.

## 2. Structure

The federal judiciary’s capacity to address fragmentation of national law has significantly diminished since the early 1970s, when this concern was already considered a major problem. Under the current structure, the fundamental bottleneck can only be relieved by expanding the Supreme Court’s merits docket or by having the circuit courts sit en banc more frequently when cases pose intercircuit splits. The trend lines, however, are going in the opposite direction. Thus, the ICT proposal looks more attractive today than when it was floated in the 1980s and 1990s.

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491. See FRIENDLY, *supra* note 161, at 13–14.

492. The development and expansion of federal protection for civil rights, voting rights, worker safety, product safety, investor protection, and the environment during the 1960s greatly expanded federal court dockets. *See id.* at 22–26.

493. The Federal Employers’ Liability Act (FELA), 45 U.S.C. § 51 et seq. (2018), protects and compensates railroad workers for job-related injuries.

494. See FRIENDLY, *supra* note 161, at 55–152; Friendly, *supra* note 162, at 640–43.

The ICT could also efficiently resolve circuit splits by taking advantage of the uneven distribution of appellate cases. The current distribution of cases indicates that there is ample capacity across the entire circuit court system to relieve the burdens in the busiest circuits and at the Supreme Court.<sup>495</sup> Such a plan could easily double or triple the number of intercircuit splits resolved without significantly adding to the burdens on the Supreme Court. Currently, the Supreme Court is screening approximately seven thousand certiorari petitions per year, from which it grants about seventy cases for review. Instead of granting or denying review, the Court could designate a third set of petitions (e.g., one hundred petitions) for ICT resolution. Even if 40 percent of the ICT decisions were appealed to Supreme Court and 10 percent of those cases were to be reviewed by the Supreme Court—an order of magnitude increase in the certiorari and grant rates for ICT decisions—the Supreme Court’s merits caseload would increase by only four cases per year.

Furthermore, the ICT model would also avoid some of the collegiality concerns that limit en banc review. A flexible ICT would not involve judges from the circuit courts from which the split arises. As Judge McGowan recognized, the ICT could be implemented at relatively low cost.<sup>496</sup>

### 3. *Judgeships*

Increasing the number of federal judgeships has been fraught with political complications. The 2030 Commission should consider ways of depoliticizing the process of adding judgeships based on demand for federal litigation.

Furthermore, the caseload strains on the federal judiciary have expanded the role of magistrate judges. In some district courts, magistrate judges are on the assignment wheel and hear cases in the same manner as district judges with consent of the parties. Although the federal system would effectively grind to a halt without magistrate judges performing this work, it raises concern about non-Article III judges playing such a role.

Finally, the 2030 Commission should explore ways of more easily shifting judgeships geographically to balance caseloads and address hot spots like the ones shown in the heat maps.<sup>497</sup>

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495. Congress could experiment with using the D.C. Circuit to serve as a pilot referral body. It could also host visiting judges for this purpose. The D.C. Circuit is widely seen as an elite court with judges drawn from a national pool. It has produced a disproportionate number of Supreme Court nominees over the past half century. Four of the current Supreme Court justices—Chief Justice John Roberts, Justice Clarence Thomas, Justice Ruth Bader Ginsburg, and Justice Brett Kavanaugh—sat on the D.C. Circuit. Thus, an ICT role could serve to prepare D.C. Circuit judges for possible elevation to the Supreme Court. Resolving intercircuit splits would expose D.C. Circuit judges to the wider range of cases in the national pool, and more of the types of cases handled by the Supreme Court. *Cf.* Marin K. Levy, *Visiting Judges*, 107 CALIF. L. REV. 67, 136 (2019) (noting that D.C. Circuit judges are especially well respected, have lighter workloads, and are well positioned to assist other courts, and that they have not pursued visiting other circuit courts frequently).

496. See McGowan, *supra* note 266.

497. See *supra* Figures 9 and 21.

#### 4. Procedure

The 2030 Commission should also consider procedural adjustments to address capacity constraints. For example, even without an ICT, the Supreme Court could remand intercircuit splits for en banc review. It could also assign such disputes to a neutral circuit for en banc review. The 2030 Commission could also assess procedural ways of shifting caseloads to better utilize judicial resources.

##### B. Expertise and Specialization

The 2030 Commission should consider how specialized judges or courts might result in more efficient and accurate decision-making. In addition, the 2030 Commission should examine methods to exploit the expertise of legal systems in the United States and around the world to assess the best ways of ensuring swift and fair justice.

The federal judiciary remains a largely generalist judge institution. Many factors affecting the tradeoff between general and specialized jurisdiction have shifted over the past two centuries. The law has become far more complex and specialized. Newly appointed judges increasingly come from relatively specialized practice areas. Moreover, the Speedy Trial Act imposes constraints on district judges' dockets that can adversely affect civil case management.

Furthermore, the subject matter of particular legal areas increasingly brings scientific, technological, and other specialties into play. Patent law provides a vivid example. As a former federal magistrate judge candidly acknowledged, juries in patent cases often struggle to comprehend the testimony being presented.<sup>498</sup> Congress shifted appeals of patent cases to a specialized appellate court, but the expertise challenge remains at the trial level.

The Supreme Court suffers from a different, but very serious, expertise deficit. It relies on recent law school graduates with relatively limited professional experience to play a key role in screening certiorari petitions. Letting even a single decision warranting review slip through the cracks can wreak long-term havoc throughout the judiciary, society, and economy. Drawing again from the patent field, the Supreme Court denied review of a 1998 Federal Circuit decision. The court's ruling that any business method was eligible for patent protection so long as it produced a "useful, concrete and tangible result"<sup>499</sup>

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498. See Paul Grewal, former N.D. Cal. Magistrate Judge, Keynote Address at Stanford Law School Patent Law in Global Perspective Conference: Scientific Evidence on Trial: Time to Get Real (Oct. 20, 2017) (concluding, based on his post-trial debriefings following his patent jury trials, that "most jurors understood almost nothing about the technical and economic evidence they just heard . . . [They typically] lack any reasonable tools to do their jobs. Few of them could pass any kind of test on the technical subject matter presented. Fewer still can even articulate why they decided that one side's thin distinction prevails over the others. Because of the sanctity we hold for jurors and deliberations, no one really knows just how bad the problem is.").

499. *State St. Bank & Tr. v. Signature Fin. Grp.*, 149 F.3d 1368, 1375 (Fed. Cir. 1998), cert. denied, 525 U.S. 1093 (1999).

unleashed a patent system crisis that continues to reverberate more than two decades later.<sup>500</sup> Few, if any, of the Supreme Court clerks would have had the experience to appreciate the significance of this decision and its questionable basis.<sup>501</sup> The members of the Supreme Court had relatively little experience with patent law at that juncture.

The 2030 Commission could provide candid assessment of the advantages and disadvantages of greater specialization and use of expertise at all levels of the judiciary. Other nations have developed enlightened approaches to dealing with legal and technical complexity from which the United States could learn.<sup>502</sup> At a minimum, the Supreme Court should be exploring ways to improve its ability to screen the most important disputes. For example, the Federal Judicial Center could play a role in drawing together legal experts—treatise authors, professors, practitioners, federal judges—to identify the most salient intra- and intercircuit splits.

### C. Interpretative Dissonance

The lack of a consistent framework for interpreting federal statutes causes tremendous uncertainty and division in the law.<sup>503</sup> A 2030 Commission can explore ways of harmonizing interpretive methodology.<sup>504</sup>

### D. Judicial Performance and Succession

The 2030 Commission should also explore judicial competence, discipline, and succession. While promoting judicial independence, lifetime appointments also insulate judges from discipline and removal for poor performance. At the Berkeley Judicial Institute Symposium, several of the panelists spoke candidly

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500. See JAMES BESSEN & MICHAEL J. MEURER, PATENT FAILURE: HOW JUDGES, BUREAUCRATS, AND LAWYERS PUT INNOVATORS AT RISK, 147 (2008); Jeffrey A. Lefstin et al., *Final Report of the Berkeley Center for Law & Technology Section 101 Workshop: Addressing Patent Eligibility Challenges*, 33 BERKELEY TECH. L.J. 551, 592 (2018); Peter S. Menell, *Patent Showdown at the N.D. C[orr]al*, 18 CHI.-KENT J. INTELL. PROP. L. 450, 491 (2019); Peter S. Menell, *Forty Years of Wondering in the Wilderness and No Closer to the Promised Land: Bilski's Superficial Textualism and the Missed Opportunity to Return Patent Law to its Technology Mooring*, 63 STAN. L. REV. 1289, 1291–92 (2011).

501. Former D.C. Circuit Judge and Solicitor General Kenneth Starr explains law clerks' inexperience and bias against recommending certiorari: "The prevailing spirit among the twenty-five-year old legal savants, whose life experience is necessarily limited in scope, is to seek out and destroy undeserving petitions . . . . Self-confident law clerks can rest assured that few, if any, recriminations will attend their providing guidance to the Court to deny certiorari." Starr, *supra* note 421, at 1376.

502. Germany, for example, tries patent cases to technically trained judges. See ALEXANDER HARGUTH & STEVEN CARLSON, PATENTS IN GERMANY AND EUROPE: PROCUREMENT, ENFORCEMENT AND DEFENSE 21, 93 (2nd ed. 2017).

503. Compare ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012) (offering a textualist approach), with ROBERT A. KATZMANN, JUDGING STATUTES (2014) (embracing a functionalist approach).

504. Cf. Marin K. Levy & Tejas N. Narechania, *Interbranch Information Sharing: Examining the Statutory Opinion Transmission Project*, 108 CALIF. L. REV. 917, 923 (2020) (exploring the use of greater "dialogue" between the courts and Congress).



about the “10% problem”: a rough estimate of the percentage of district court judges who are considered unfit or limited in their capacity to dispense justice fairly. The 2030 Commission could assess policies for addressing this concern. As one option, some states afford litigants a peremptory challenge to the trial court judge assigned to the case.<sup>505</sup>

Life tenure also distorts the functioning of the judiciary as a result of age-related infirmities and the political effects of remaining in active service. The relatively small number of Supreme Court justices creates the potential for random and strong political swings based on retirements and deaths. This issue generates the most political rancor surrounding the federal judiciary. The 2030 Commission could usefully provide thoughtful insight on the age or term limits for federal judges.

### *E. Other Reforms*

#### *1. Budgetary Independence*

Recent government shutdowns have put the independence of the judiciary at risk. The 2030 Commission should explore options for ensuring that the federal judiciary is not vulnerable to budgetary impasses.

#### *2. Technology*

Advances in technology continue to open new opportunities for improving the effectiveness and reducing the costs of judicial institutions. Furthermore, technological advances can also promote greater access to justice. The 2030 Commission should examine the ways in which technology can be deployed more effectively to improve the functioning of the federal judiciary.

### CONCLUSION

The federal judiciary serves as a critical part of the foundation of the American republic. It checks the operation of the other branches of government and ensures that all people and institutions are subject to and derive the protections of the rule of law. The functioning and capacity of the judiciary are vital to the success of the American democratic experiment. Yet that experiment depends on the judiciary’s adaptability to economic, social, technological, and political change, a feature that has substantially eroded over the past century.

Judiciary reform has never come easily or quickly. As Arthur Vanderbilt, Chief Justice of the New Jersey Supreme Court and proponent of judicial modernization, observed toward the end of his career in 1957, “[j]udicial reform is no sport for the short winded.”<sup>506</sup> The politics surrounding judicial

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505. See Cal. Civ. Proc. Code § 170.6 (2019).

506. Arthur Vanderbilt, *Brief for a Better Court System*, N.Y. TIMES MAGAZINE, May 5, 1957, at 9.

appointments as well as the inherent resistance of life tenure institutions to change impose substantial impediments to reform.

Half a century ago, leading scholars, practitioners, jurists, and policy-makers recognized that the judiciary was not adequately scaling with the growth and challenges of the nation. The Hruska Commission nearly surmounted the activation energy necessary to bring about structural judiciary reform, but its key proposal—a National Court of Appeals—failed to reach fruition. A more modest version nearly gained passage a decade later, but it too was derailed. After another failed reform push in the 1990s, the candle of judiciary reform dimmed.

Former FJC Director A. Leo Levin's observations nearly four decades ago resonate with even greater force today:

The increase in the order of magnitude of the demands our society imposes on the federal judicial system is such that we should no longer ignore the need for increasing the capacity of the system to deal with contemporary problems. The time has indeed come for the Congress to move forward, however cautiously and experimentally, toward increasing the capacity of the system to provide for what has aptly been termed, 'the known certainty of the law,' for as has been said many centuries ago, 'the knowne certaintie of the law is the safetie of all.'<sup>507</sup>

A 2030 Commission offers a promising path for breaking the judiciary reform logjam and preparing the nation's judiciary for the next chapter of the American democratic experiment.

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507. Levin, *supra* note 264, at 21 (quoting EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 395 (19th ed., 1832)).