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The Federal Courts Today and Tomorrow: A summary and Survey

Erwin N. Griswold
Jones, Day, Reavis & Pogue (Washington, D.C.)

THE FEDERAL COURTS TODAY AND TOMORROW: A SUMMARY AND SURVEY

ERWIN N. GRISWOLD*

In his *Histories* Polybius wrote, "[T]here is in every body, or polity, or business a natural stage of growth, zenith, and decay . . . ."[1] The federal courts undoubtedly have been in a continuous state of growth ever since they were established by the Judiciary Act of 1789, nearly two hundred years ago. Only time will tell when they have reached their zenith and have commenced decay. I am not suggesting that this time has come, or is even close. But the growth has been great and it is continuing. Much depends on our ability to recognize the problems existing today as a result of that growth and on the manner in which we deal with them.

I. SOME BACKGROUND

Almost from the beginning the federal court system has had growing pains. When the system was established, the Supreme Court had very little to do in Washington. Each Justice, however, was required to ride circuit—that is, to sit with judges of the district courts in his circuit on a circuit court. Justice Iredell likened himself to a "travelling post boy." Indeed, in 1792 the Justices memorialized Congress requesting the elimination of circuit riding because it was "too burdensome" in that it required them "to pass the greater part of their days on the road, and at inns, and at a distance from their families."[2] Despite the pleas of the Justices, circuit riding continued for nearly a century on an ever increasing geographical scale. By the 1870s the Justices had more work to do in Washington than they could

* Member, Jones, Day, Reavis & Pogue, Washington, D.C. A.B., 1925; A.M., 1925, Oberlin College; LL.B., 1928; S.J.D., 1929, Harvard University.

1. POLYBIUS, THE HISTORIES VI, ¶ 51, at 501 (E. Shuckburgh trans. 1889).

2. *American State Papers, Misc. I*, no. 32, *quoted in* D. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 104 (1986).

handle. The Supreme Court was the sole court of appeal, and, consequently, the cases had piled up in Washington. Even though the backlog occurred more than one hundred years ago, it is a familiar story today.

In 1870 the Supreme Court had 636 cases on its docket. By 1880 the number had nearly doubled to 1212 cases. By the 1890 Term, 1816 cases were pending.[3] Accordingly, after a case had been docketed in the Supreme Court, years were required before it could be heard. For a period of twenty years or more, members of the Court, members of Congress, and the entire legal profession discussed the problem and its resolution. Many proposals were made, but little action was taken. Finally, Attorney General Garland pleaded for something to be done to relieve the Supreme Court. "[A]lmost every mail," he wrote, "brings me one or more letters about this matter from people of such legal or other standing as entitles them to a hearing."[4] Several Supreme Court Justices spoke out, seeking public support for congressional action.[5] Finally, in 1890 a bill was introduced that provided for the establishment of nine circuit courts of appeals, each with three judges. This bill became the Circuit Court of Appeals Act of March 3, 1891.[6]

This was surely an instance of growing pains. Moreover, the great length of time required to take decisive action provides an early illustration of the difficulty of developing a consensus for judicial reform and prompting Congress to act in this field. For a while, things proceeded fairly well under the new law. In 1911 Congress consolidated the laws relating to the judiciary in the Judicial Code. This statute combined the district courts and the old circuit courts, which had persisted after the enactment of the Circuit Court of Appeals Act.[7] Still, the burden on the Supreme Court continued to mount. This renewed pressure was relieved somewhat by the enactment of the Judiciary Act of 1925,[8] often known as the Judges' Bill. The Judges' Bill greatly extended the use of certiorari and thus went far towards giving the

3. F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 60 (1928).
4. 1888 U.S. ATT'Y GEN. REP. XIV; 1887 U.S. ATT'Y GEN. REP. XV.
5. F. FRANKFURTER & J. LANDIS, *supra* note 3, at 97.
6. Ch. 517, 26 Stat. 826.
7. *See* Judicial Code, ch. 231, § 289, 36 Stat. 1087, 1167 (1911).
8. Act of Feb. 13, 1925, ch. 229, 43 Stat. 936 (codified as amended at 17 U.S.C. §§ 47-48 (1982); 48 U.S.C. § 864 (1982); and at scattered sections of 28 U.S.C.).

Supreme Court control over its own docket. But many cases still were subject to direct appeal to the Supreme Court, including many decisions of the district courts.

It is now more than sixty years since the Judges' Bill was passed. The pressure, however, continues to mount. This is an inevitable consequence of a number of factors:

> (1) The continued growth in the number of people in the United States, from about 115 million in 1925 to approximately 250 million today.
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> (2) A parallel increase in economic development in this country, including great increases in the ease of transportation and communication, and an increase in the number and significance of contacts among Americans and between Americans and persons from all over the world.
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> (3) A great increase in social legislation and in regulatory provisions enacted by Congress, which have created many new duties, resulting in many more controversies with government agencies.
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> (4) A great increase in the atmosphere of litigiousness in this country. As problems have become more complex, it has become increasingly difficult for Congress to resolve them. Accordingly, people have turned more and more to the courts to solve their problems, and the courts have been receptive on a rather wide scale. The development of special interest groups with strong legal arms, such as the ACLU, the NAACP, the Natural Resources Defense Council, and others, has facilitated this litigiousness.
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> (5) The relaxation of standards or requirements that previously had limited the role of the courts within fairly narrow bounds. These include such legal concepts as standing, case or controversy, justiciability, the political question doctrine, and mootness.[9]

These factors have combined to produce an explosion in litigation far beyond anything seen in the past.

Various steps have been taken to handle this. In 1891 twenty-seven judges were on the circuit courts of appeals—three judges in each of nine circuits—and many of them were not very hard pressed. More than two hundred judges now sit on the courts of appeals, including senior circuit judges. Both these

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9. *See* Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543, 552-57 (1985).

judges and others, such as district judges designated to sit on courts of appeals, process cases that are subject to review by the Supreme Court. The Supreme Court, however, still consists of nine Justices. The same number of Justices, therefore, are confronted not only by more cases than at earlier periods of the Court's history, but by cases that are vastly more complex.

Thus, the federal court system clearly has reached another stage of growing pains. Observers have realized this for at least fifteen years. In 1971 Chief Justice Burger appointed a committee, with Professor Paul A. Freund as chairman, to study the Supreme Court's caseload and to make recommendations for improvements. The committee proposed the establishment of the National Court of Appeals, which would screen all filings and refer about four hundred cases each year to the Supreme Court. The Supreme Court would then decide which of those cases it would hear, and either deny the other cases or refer them back to the National Court of Appeals for hearing and decision there.[10] This report received wide criticism, particularly from Chief Justice Warren and other Justices on the Court.

Following the report of the Freund Committee, Congress established the Commission on Revision of the Federal Court Appellate System, with Senator Roman Hruska of Nebraska as chairman. This commission held hearings in many cities and published its recommendations in 1975.[11] The Hruska Commission likewise recommended the National Court of Appeals be created. The Hruska Commission, however, anticipated a rather different role for the new court than that envisioned by the Freund Committee. Under the Hruska proposal, the National Court of Appeals would not screen cases. Applications for review would go to the Supreme Court. The Court would choose which cases it would hear itself and transfer a further group of cases to the National Court of Appeals for decision.

Other recommendations of the Hruska Commission, such as the establishment of the Eleventh Circuit Court of Appeals, have been adopted fully. Also, the Court of Appeals for the Fed-

10. REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT, 57 F.R.D. 573 (1972).

11. COMM'N ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE, 67 F.R.D. 195 (1975) [hereinafter HRUSKA COMM'N].

eral Circuit may find some of its roots in the report of the Hruska Commission. Furthermore, the number of cases that can be taken by direct appeal to the Supreme Court has been reduced, though not entirely eliminated. Nothing, however, has been done about the central proposal of the Hruska Commission.

Over the past fifteen years, Chief Justice Burger, to his great credit, has been indefatigable in his efforts to bring about improvements in the federal judicial system, particularly with respect to the Supreme Court. In 1983 he warned that "only fundamental changes in structure and jurisdiction will provide a solution that will maintain the historic posture of the Supreme Court, will ensure 'proper time for reflection,' preserve the traditional quality of decisions, and avoid a breakdown of the system—or of some of the Justices."[12] He has proposed and actively supported a plan to establish an intermediate tribunal on an experimental basis for five years, staffed by judges drawn from the various courts of appeals. This tribunal would hear cases involving conflicts between circuit courts of appeals, and any other cases referred to it by the Supreme Court or transferred to it by courts of appeals.[13] Several Justices of the Supreme Court have supported this proposal. Others have opposed it, and a number of judges of the courts of appeals have been very unhappy about it. So far, nothing has happened, and nothing seems to be moving. Consequently, major problems still remain. I will try to analyze and discuss them in the remaining portions of this paper.

II. Some Aspects of the Present Situation

Over the past several years, I have entered this fray on a number of occasions.[14] My efforts apparently have had no im-

12. Address by Chief Justice Warren E. Burger, Am. Bar Ass'n Midyear Meeting (Feb. 6, 1983), *reprinted in Annual Report on the State of the Judiciary*, 69 A.B.A. J. 442, 445 (1983).

13. Address by Chief Justice Warren E. Burger, Am. Bar Ass'n Midyear Meeting (Feb. 17, 1985), *reprinted in The State of the Judiciary Address: The Time Is Now for the Intercircuit Panel*, 71 A.B.A. J. 86 (1985) [hereinafter *Intercircuit Panel*].

14. Griswold, *Cutting the Cloak to Fit the Cloth: An Approach to Problems in the Federal Courts*, 32 Cath. U.L. Rev. 787 (1983); Griswold, *Equal Justice Under Law*, 33 Wash. & Lee L. Rev. 813 (1976); Griswold, *Rationing Justice—The Supreme Court's Caseload and What the Court Does Not Do*, 60 Cornell L. Rev. 335 (1975); Griswold, *The Supreme Court's Case Load: Civil Rights and Other Problems*, 1973 U. Ill. L.F. 615.

pact. They are rarely, if ever, cited or discussed. Some might conclude that the awesome silence is a consequence not only of the inadequacy of my efforts, but also of the fact that no problem really exists. I am unwilling to concede either contention. I think that a problem does exist and that it is a different and rather more serious problem than has been brought to focus in the past.

Previous efforts in this field have been directed toward the burden on the Supreme Court, and they have given only passing reference to other, albeit related, problems in the area.

Undoubtedly, the Supreme Court bears a heavy burden. In recent years more than four thousand applications for review have been filed in the Court each year, including petitions for certiorari and jurisdictional statements on appeal. Each Justice, therefore, must consider an average of about sixteen applications every working day throughout the year. This is in addition to the heavy duties of hearing oral arguments, of conferring with fellow Justices, and of writing opinions. The Justices work very hard and are subjected to great and continuous intellectual pressure.

It is apparent that this pressure has had adverse consequences. For better or for worse, the Supreme Court is well on its way to becoming a bureaucracy. Each Justice has four law clerks and other staff. With apparently only two Justices excepted, all applications for review are first screened by law clerks, many of which are never seen by the Justices.[15] The clerks are bright and eager, but they are inexperienced, and their judgments may be shallow. One might say that the lack of involvement by the Justices in evaluating applications for review is not important since so few of the applications for review can be granted anyway. This statement may be true, but it leads to a further point that I shall try to develop in the last portion of this paper.

Two excellent recent books, one by a judge of a court of appeals,[16] and the other by a political scientist,[17] discuss these

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15. Justice Stevens has confirmed publicly the manner with which the Justices consider applications for review. *See* Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177, 179 (1982).

16. R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM (1985).

17. D. O'BRIEN, *supra* note 2.

problems rather extensively. Professor O'Brien of the University of Virginia, who spent a year in the Supreme Court building as a Judicial Fellow under the Administrative Assistant to the Chief Justice, writes:

> [L]aw clerks have assumed a greater role in conducting the business of the Court. Their role in the justices' screening process is now considerably greater than it was in the past . . . . No less important, the greater numbers of law clerks and of delegated responsibilities contribute to the steady increase in the volume of concurring and dissenting opinions written each year and to the justices' production of longer and more heavily footnoted opinions.[18]

As the procedural situation has developed, the number of cases heard by the Supreme Court has become almost entirely subject to the discretionary control of the Justices of the Court. A sizeable number of appeals are filed with the Court each year, but they are manageable, and many of them are affirmed or dismissed by the Court without a hearing on the merits. Also, the original jurisdiction of the Court provides, at most, only a few cases each year. The rest of the cases come to the Supreme Court on petitions for certiorari that are subject entirely to the Court's discretion. The Court need not take any of them if it does not feel that they should be heard. Proof that the Supreme Court can handle its current workload lies in the fact that it does handle it. For the last fifty years, the Supreme Court has never closed a Term without having decided every case in which it had heard oral argument, except in a few cases each year, which are set down for reargument.

The Court's use of its discretionary power has been a reasonably successful means of keeping its workload under control. But what has it done to our law? In the long run, a discretionary system of justice is inconsistent with the concept of "equal justice under law."[19]

Even with a largely discretionary system, the Court continues to work under great strain. Not only does it have a great volume of work to dispose of, but the cases that come to it are

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18. *Id.* at 135.

19. *Cf.* Shapiro, *supra* note 9, at 562-63, 575-76 (normal grant of jurisdiction does not confer unbridled authority to hear cases at Court's discretion).

almost always of great complexity. Even more importantly, these cases are extremely difficult in that they provoke strong and divergent views both within and without the Court.

One consequence of this is that "collegiality" appears to have fallen by the wayside. Opinions are no longer discussed, hammered out, improved, and adjusted in conference. Much of the interchange within the Court is now restricted to the exchange of memoranda.[20]

The loss of collegiality leads directly to the proliferation of opinions to which Professor O'Brien refers. The Court no longer appears to consider itself as a court. Instead, it seems to be a group whose members work on common problems individually and not together. The members of the Court seem to feel an obligation to express their own particular view. This results in such a proliferation of concurring and dissenting opinions that sometimes the Court renders a judgment without there being any opinion that has attracted the votes of a majority. In recent years these multiple opinions have become increasingly common.[21]

I do not mean to make an argument against dissenting and concurring opinions. Dissenting opinions have an important role to play in the development of the law, particularly when three or four members of the Court join in the dissent. It is more difficult, however, to find a justification for dissenting opinions written by a single Justice. In the old days, one or more Justices might not concur in the decision, but they felt no necessity to state their dissent or their reasons for it.[22] If a Justice feels that

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20. *See* B. SCHWARTZ, SWANN'S WAY (1986) (discussing in detail the development of the Court's opinion in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971)).

21. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Wolman v. Walter, 433 U.S. 229 (1977). In Note, *Plurality Decisions and Judicial Decisionmaking*, 97 HARV. L. REV. 1127, 1129 (1981), the author says of the *Wolman* decision that "[f]our of the provisions [of an Ohio statute] were upheld and two struck down in an opinion that should come with a scorecard."

Professor O'Brien records that between 1969 and 1984—the first fifteen years of the Burger Court—there were 111 plurality opinions, "more plurality opinions than were rendered in the entire previous history of the Court." D. O'BRIEN, *supra* note 2, at 266.

22. Chief Justice Hughes once wrote to an opinion writer: "I choke a little at swallowing your analysis, still I do not think it would serve any useful purpose to express my views." D. O'BRIEN, *supra* note 2, at 258. Justice Butler similarly noted: "I still think reversal would be better. But I shall in silence acquiesce." *Id.* In another case, he wrote to Justice Holmes that he had decided to acquiesce, "unless someone initiates opposition." *Id.* at 353 n.117.

he cannot silently allow an opinion of the Court to go forth when he disagrees with it or with a part of it, a simple notation could be made that "Justice X dissents," as was done many times in the early part of this century. Concurring opinions also can be useful. They often point out that the author of the opinion concurs in the decision, but not in some of the language or implications of the opinion that he regards as not essential to the result. Why do I take this time to refer to dissenting and concurring opinions? It is simply because the preparation of these opinions requires a good deal of the Justices' time and thus adds to their workload. Also, concurring and dissenting opinions can add to the confusion of the bar, resulting in more uncertainty than is needed in the development of the law.

I cannot escape the feeling that the lack of collegiality—the unwillingness to accept the "give and take" involved in reaching a consensus that would be a statement of the Court rather than of individual Justices—and the profusion of concurring and dissenting opinions are direct results of the proliferation of law clerks in the chambers of the Justices. The law clerks work hard, they are full of ideas, they write drafts; that is their job. They do not dominate the Justices,[23] but they are eager. For the most part, they do good work. Still, "as one justice put it, even though his concerns had been accommodated in the majority's opinion, 'it would break [his] law clerk's heart' to suppress his concurring opinion."[24]

In a few cases, this leads to a situation that can only be described as chaotic. In *Edgar v. MITE Corp.*,[25] for example, the official report of the decision includes six opinions. The first opinion is authored by Justice White. Following this is an opinion by Justice Powell, "concurring in part," followed by an opinion by Justice Stevens, "concurring in part and concurring in the judgment." Then, Justice O'Connor writes an opinion "concurring in part," which is followed by an opinion written by Justice Marshall, joined by Justice Brennan, "dissenting." Finally, Justice Rehnquist includes an opinion "dissenting." The reporter of

23. Professor O'Brien does record an instance when Justice Rutledge discovered that during his absence "two minor changes were made by [his] staff in the final draft of the opinion. . . ." D. O'BRIEN, *supra* note 2, at 249 (brackets in original).

24. *Id.* at 275.

25. 457 U.S. 624 (1982).

decisions, who does a remarkably fine job, obviously had great difficulty. This is evidenced by the running heading that appears at the top of each page. The first five pages are designated: "Opinion of the Court." But the first four and a half pages are simply the statement of facts. This is followed by a decision concurred in by five Justices that the case was not moot. Then follow twelve and a half pages designated as "Opinion of White, J." Thus, in the whole twenty-one pages of Justice White's opinion, only three pages, apart from the statement of facts, expound the opinion of the Court. The result has been vast confusion. It takes a very careful reading to discover that only two and a half pages of the opinion are authoritative. Judges in the lower courts, however, have sometimes given *Edgar v. MITE Corp.* an effect beyond its merits, and certainly beyond anything decided by a majority of the Court.[26]

What conclusion is to be drawn from all this? The Supreme Court still has a workload problem, which produces some bad effects, even though most of its docket is now subject to its own control. The real trouble is that the Court recognizes that it must consider more cases that ought to be decided by a court with national authority than it can comfortably handle. As a result, the Supreme Court is under constant internal pressure to take more cases because it feels that they should be decided by a national court. This pressure leads the Court to take too many cases, and out of this atmosphere has grown the bureaucracy, the numerous law clerks, the lack of collegiality, and the resulting proliferation in the number and length of opinions.

III. Too Little Appellate Capacity

The basic problem, on which we should focus, is not the workload of the Court, although that is and remains important. Our country has grown and developed enormously, and our court system has not developed adequately to handle the litigation load satisfactorily. The essence of the problem now is one of organization and allocation. Our court system provides too little appellate capacity on a national basis. More cases should be decided by a court with national appellate authority than the Su-

26. A similar cacophony is found in Metromedia v. City of San Diego, 453 U.S. 490 (1981).

preme Court can handle. The Supreme Court should remain the "one supreme Court" established by the Constitution. But ways should be found to enable it to limit its efforts to truly crucial cases—essentially, those cases involving important questions of constitutional law—without jeopardizing its ability to oversee the whole judicial system and take up any case that it believes should be decided by its ultimate authority.

The present docket of the Supreme Court, including all petitions and appeals, is five or six times as large than it was fifty years ago. But the number of cases actually heard and decided has not increased appreciably. About 180 cases are decided each year, with about 150 of these decided by opinion after briefing and oral argument. Thus, the Court now hears and decides a much smaller percentage of cases that are brought to it than it did in the past—about four percent now versus twenty-five percent fifty years ago.

The problem, however, is more serious than this. The fact that it is very difficult to convince the Court to take jurisdiction has a chilling effect on the filing of petitions for certiorari and appeals, particularly in view of the substantial expense involved. At the same time, the volume of cases filed in the courts of appeals has increased enormously. In 1963 about 5400 appeals were docketed in all the federal courts of appeals. In 1985 the number was about 30,000. The pressure on the courts of appeals is staggering. The number of courts of appeals judges has more than doubled in the past twenty-five years, but this increase has not provided enough judicial power to handle the load in the usual fashion. Accordingly, many senior judges and many district court judges are often designated to sit on the courts of appeals. The courts of appeals also have had to cut down on oral argument. Oral arguments generally are limited now to fifteen or twenty minutes per side. In a great many cases, no oral argument is allowed at all. Furthermore, a large number of cases are decided without opinion. Despite these changes, the task of the courts of appeals remains enormous and nearly overwhelming. Volumes of the Federal Reporter covering a single week now often contain a thousand pages of opinions, and the annual total is well over 40,000 pages.

The judges of the courts of appeals, who have faced this onslaught with great determination and high ability, deserve our greatest respect. Nevertheless, under current conditions, the

idea that one panel of judges sits as a court of appeals is illusory. Each court of appeals has many judges, with as many as twenty-four in the Ninth Circuit. The judges sit in panels of three. Occasionally, a panel may have only one regular judge of the court of appeals, though that apparently is a rare event. The other seats on the panel are taken by senior judges, by judges from other circuits, including senior judges from other circuits, and by district judges from the same circuit. The inevitable consequence is that the panel that actually hears a case is a lottery, perhaps the greatest lottery in the history of the administration of Anglo-American justice, where fairly stable tribunals were once to be expected. In one year, not long ago, more than one hundred different persons sat on panels of the United States Court of Appeals for the Ninth Circuit. Clearly, it is sheer illusion to talk seriously in terms of there being a "court" of appeals.

One solution to the problem is to the follow the rule that a decision of any panel in a court of appeals, including one participated in by judges from other circuits, would establish the "law of the circuit" and would be binding on all subsequent panels of that circuit.[27] It is sometimes said that this is the current practice, but any observer quickly sees that this generally is not the case.[28] In the middle of the last decade, two different panels of the Ninth Circuit reached directly conflicting results on the same issue.[29] A petition for rehearing en banc was denied. The issue remained unsettled until the Supreme Court ruled on the issue a few years later.[30] Meanwhile, much further litigation was

27. One example of a circuit court panel respecting another panel's opinion as establishing the law of the circuit, regardless of its own view of the issue, can be found in Green v. McKaskle, 770 F.2d 445 (5th Cir. 1985) (en banc review granted, 772 F.2d 137 (5th Cir. 1985), but case remanded to the panel when the plaintiff withdrew his equitable claims, thus rendering the en banc hearing moot), *modified*, 788 F.2d 1116 (5th Cir. 1986).

28. *See* Schaefer, *Reliance on the Law of the Circuit—A Requiem*, 1985 DUKE L.J. 690. The author discusses, among other things, the impact of United States v. Rodgers, 466 U.S. 475 (1984), "which apparently destroyed any illusion that the decision of a court of appeals established the law that could be relied on within that circuit." Schaefer, *supra*, at 690-91.

29. *Compare* United States v. Cassity, 509 F.2d 682 (9th Cir. 1974) *with* United States v. Burns, 529 F.2d 115 (9th Cir. 1975) (dividing on whether passage of time severs interstate commerce nexus required for federal firearms violation under 18 U.S.C. App. § 1202(a)(1) (1982)).

30. Scarborough v. United States, 431 U.S. 563 (1977).

required. The question should have been settled by the court of appeals at the time it arose.[31]

More than ten years ago one writer pointed out that "the Supreme Court now hears fewer than 1 percent of the cases decided by the federal courts of appeals."[32] At the present time, the number of cases actually reviewed by the Supreme Court must be less than one-half of one percent, that is, less than one case out of every two hundred decided by the courts of appeals.

Among other things, this sparse review promotes a lack of discipline among judges sitting on the courts of appeals. I say this with great respect. I am fully aware that the judges are conscientious and hardworking, but our recent history has been one of innovation and activism among judges. Justice Douglas said in a television program that he would "rather create a precedent than find one,"[33] and many other judges share this view. When the judges realize that the chance that they will be reviewed and corrected is very slight, it may be difficult to resist the internal pressure to reach out and find new worlds to conquer.

The consequence of this is that we have very little in the way of a "system" in the federal courts of this country. A "system" is defined in the dictionary as "a group of interacting, interrelated, or interdependent elements forming or regarded as forming a collective entity." What we have, in very large part, and I do not believe I exaggerate, is a collection of very able judges who work very hard, but essentially on an individual basis, without very much in the way of careful guidance, and far too little authoritative guidance, from either their own circuit or from the Supreme Court. The consequence is that the system of

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31. Another example of an intracircuit conflict causing additional litigation is provided by the Ninth Circuit. *Compare* United States v. Davis, 447 F.2d 1376 (9th Cir. 1971), *cert. denied*, 405 U.S. 933 (1972) *with* United States v. Fox, 454 F.2d 593 (9th Cir. 1971). Although the *Davis* defendant's petition for rehearing and petition for writ of certiorari were denied, he attacked his conviction collaterally, claiming that the holding in *Fox* changed the law and thus required that his conviction be set aside. The collateral proceeding eventually reached the Supreme Court; the Court decided the limited issue of whether relief under 28 U.S.C. § 2255 (1982) (habeas corpus) is available because of an intervening change of law. Davis v. United States, 417 U.S. 333, 341-42 (1974). Because the Court rejected the opportunity to decide the merits of Davis' collateral attack, *id.* at 347, it remanded the case and further proceedings were necessary.

32. Hufstedler, *Courtship and Other Legal Arts*, 60 A.B.A. J. 545, 546-47 (1974).

33. *CBS Reports: Interview with Justice William O. Douglas* (CBS television broadcast, Sept. 6, 1972).

precedent on which the common law is based has lost much of its structure and influence. Each judge does his best and is very conscientious. Nevertheless, though the amount of legal materials, statutes, and decisions has increased enormously in this century, "the law" has become a gossamer web with very little in it on which a lawyer or judge can firmly and safely rely. In essence, what we now have is rapidly becoming a discretionary approach to justice.

As far as the federal courts are concerned, we are well on the way to a fundamental and unfortunate change in our concept of law. The law is never precise and mechanical, and often it must be unclear. But, in the past, there was much that was clear and could be safely relied on in making decisions and in advising clients. In many areas, that is no longer the case. Lawyers frequently have to decide between conflicting opinions from different circuits, with only inconclusive dicta from the Supreme Court to guide them.

In some ways, our legal system is becoming similar to Roman or civil law. There are fewer binding precedents, and judges look not so much to precedent as to doctrine.[34] Some of this doctrine comes from opinions of judges in other courts, and the approach of those courts is examined and evaluated, often at considerable length. A large amount of doctrine is developed by academic lawyers in treatises, in articles, and in speeches—as is the case with civil law. It may be thought—as I do—that law based on such a system fails to meet one of the fundamental objectives of law in that it is difficult to ascertain, unpredictable, and highly dependent on the outlook of the particular judge who considers the case.

IV. Are There Any Answers?

This is the consequence of our growing pains to date. What can be done about them? That is clearly a very difficult question. Much thought and paper have been devoted to it over the past fifteen years, though the results produced have been sparse. Some important ideas have been advanced, and the time has come for them to receive further consideration.

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34. *See* Tunc, "*It Is Wise Not to Take the Civil Codes Too Seriously*," in Essays in Memory of Professor F.H. Lawson 71 (1985).

The first of these is the proposal advanced by Chief Justice Burger that there should be an intermediate court of appeals.[35] Under his proposal, this court would be established for a period of five years. The judges of the court would be chosen from sitting judges of the courts of appeals by some method not yet clearly defined. This court would hear cases involving conflicts of decisions among the courts of appeals. It would also hear cases referred to it by the courts of appeals and by the Supreme Court.

The important aspect of this court is that it would decide cases on a national basis. Subject only to review by the Supreme Court, which would be rare, therefore, its decisions would establish precedents binding on all the lower courts throughout the United States. Thus, it would immediately come close to doubling the nationally authoritative appellate capacity available in this country.

This is important because, as I have tried to show, there is not now available adequate appellate capacity on a national basis to meet the needs of the country. Many cases involve questions that are not of first importance, but which raise questions that should be settled by a nationally authoritative court so that lawyers may know how to advise clients and government officers may know how to carry out their duties. Many of these are questions of statutory construction. Examples are the valuation of mutual shares under the federal estate tax,[36] or whether a person who makes an interest-free loan must pay gift taxes.[37] Many other examples could be given. These cases do not involve constitutional questions; they are not important in terms of civil liberties, national security, or federal-state relations. They do frequently recur, however, and it is important that they be decided promptly, definitively, and on a national basis.

If an appropriate tribunal with authority to decide such cases on a national basis were available, the Supreme Court would be relieved of the burden of having to decide cases that are not of first importance. It would have more time to fulfill its duties as the ultimate constitutional court in the country. Of course, the decisions of the National Court of Appeals would be

35. *See Intercircuit Panel, supra* note 13.
36. United States v. Cartwright, 411 U.S. 546 (1973).
37. Dickman v. Commissioner, 465 U.S. 330 (1984).

subject to review by the Supreme Court, but this power of review would be exercised very rarely. The questions decided by the National Court of Appeals would, almost without exception, be in areas of statutory construction, administrative law, taxation, and so on, in which Congress has full authority to correct any decision with which it disagrees.

A second proposal that I have espoused over a considerable period of years is to create more courts of appeals that are set up on a "topical" basis, rather than on a "geographical" basis. Actually, we now have some courts that operate on a topical basis. These include the Court of Appeals for the Federal Circuit, the Court of Military Appeals, and the Emergency Court of Appeals, which decides cases involving energy on a national basis. More than forty years ago, I proposed that there should be a Court of Tax Appeals to which all appeals in tax cases would be taken.[38] While the decisions of the Court of Tax Appeals would be reviewable by the Supreme Court, little occasion to grant review would arise because the decisions of the Court of Tax Appeals would be binding on lower courts and would settle the tax law definitively. Similarly, we might have a court of appeals for various kinds of commercial cases, such as antitrust or Federal Trade Commission issues. As these courts are established and prove to be successful, we might move into other areas. For example, there might well be a United States court of appeals that would consider all cases on appeal from the highest courts of the states. The states might regard this as less demeaning than the present system under which many decisions of state supreme courts are reviewed by a single district judge. This court might also establish federal law on a national basis, which would guide the state supreme courts in making their own decisions on federal statutory or constitutional questions.

The existing courts that have been set up on a national basis—the Court of Appeals for the Federal Circuit, the Emergency Court of Appeals, and the Court of Military Appeals—have been successful. Very few of their decisions are taken to the Supreme Court for review. More importantly, they have clarified the law in the areas with which they deal.

Although problems with these proposals may exist,[39] the

38. Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153 (1944).
39. *See* Winters, *An Intercircuit Panel of the United States Courts of Appeals:*

need is clear. The present situation is changing much of our law from a system of precedents to one of doctrine, in which each judge draws on all sources to make, not find, the law of the case. This, in my view, plays a considerable role in the rapid increase in litigation in this country. It makes much work for lawyers, but that seems to be a rather poor objective. Members of the bar will not be reluctant to join in support of new arrangements that will provide more certainty and clarity in our law and will minimize the lottery system that now exists. A lottery may be fun for the lawyer who occasionally is surprised when he wins a case, but it must leave many clients with a sense of grievance that the law is so uncertain and that the road to justice is so long and costly.

Indeed, an important element in the problem is that appellate justice in this country is now administered far too much on a discretionary basis.[40] The reasons for this development of discretion are clear. The courts of appeals are badly overworked. They decide close to one-half of the cases without oral argument and a considerable number of the remainder without opinion. They make their decisions with few guidelines from the Supreme Court, and that guidance comes mostly through cases that are selected on a discretionary basis by the Supreme Court. This means that whole fields of the law that do not interest the Supreme Court or do not involve ultimate fundamental problems are rarely reviewed by the Supreme Court. There are just too many cases to be reviewed by too few Justices, and the system is not presently organized to provide regular and clear guidance to the lower courts through the hierarchy.

One of the most discouraging aspects of this problem is that the judges have been slow to acknowledge it.[41] One possible conclusion to be drawn from this is that no problem really exists. I do not think this is true. I have great respect for the judges who feel that way, but it seems to me that their conclusions may be unconsciously affected by a sort of conflict of interest. Some are concerned that the prestige of judicial office will be lessened if

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The Costs of Structural Change, 70 JUDICATURE 31 (1986).

40. *Cf.* K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969) (discretion is used too frequently in federal administrative law decisions).

41. *See* Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473 (1973); Letters from the Justices, in HRUSKA COMM'N, *supra* note 11, at 394-409; *see also* Warren, *Let's Not Weaken the Supreme Court*, 60 A.B.A. J. 677 (1974).

there are more judges, with the result that highly qualified people may not accept appointment to the bench. Others may prefer the freedom the present system gives them since, under it, they may often use their minds freely, without great restraint from authoritative decisions, whether in the courts of appeals or in the Supreme Court.

In my view, a system of justice that is heavily based on discretion will not work satisfactorily. Some may think that such a system is the zenith of the federal judicial system. Those who feel the risk that it may be the beginning of signs of decay should join together in trying to solve the historically difficult problem of making the federal judicial system work more effectively for the sound administration of justice.