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Two Cheers for the Commission on Structural Alternatives for the Federal Courts of Appeals

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Abstract

On December 18, 1998, the Commission on Structural Alternatives for the Federal Courts of Appeals issued its final report to the President and Congress. The Commission was charged to study the present division of the United States into judicial circuits, with particular reference to the Ninth Circuit, and to report its recommendations for improving the fair, expeditious and effective disposition of the federal appellate caseload. Professor Baker summarizes the Commission's recommendations and offers his editorial opinions in this essay. A Bibliography of some of Professor Baker's writings follows his essay, for the reader who wants to pursue these issues further

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I. Commission on Structural Alternatives for the Federal Courts of Appeals

For the last several years, many federal court-watchers, myself included, have been advocating for a congressional commission to study the courts of appeals that would make recommendations for needed reform legislation.

The 105th Congress created the Commission on Structural Alternatives for the Federal Courts of Appeals and gave it the statutory charge to perform the following functions by the end of 1998:

> (i) study the present division of the United States into the several judicial circuits;
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> (ii) study the structure and alignment of the Federal Court of Appeals system, with particular reference to the Ninth Circuit; and
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> (iii) report to the President and the Congress its recommendations for such changes in circuit boundaries or structure as may be appropriate for the expeditious and effective disposition of the caseload of the Federal Courts of Appeals, consistent with fundamental concepts of fairness and due process.

[P.L. 105-119, § 305 (1)(B)]

The Commission was created out of a compromise between those in Congress who wanted to divide the Ninth Circuit and those who did not. Chief Justice Rehnquist appointed the members: Retired Supreme Court Justice Byron White (Chair); Judge Gilbert S. Merritt from the Sixth Circuit; Judge Pamela Ann Rymer from the Ninth Circuit; Judge William D. Browning from the District of Arizona; and N. Lee Cooper, past President of the ABA.

The Commission reviewed the many previous studies. It also developed additional statistical data with the Federal Judicial Center and the Administrative Office of United States Courts and collected further information directly from the courts of appeals. The Commission consulted numerous court experts and conducted independent surveys of federal judges and lawyers who practice before the federal courts. Six public hearings were held between March and May 1998 in Atlanta, Dallas, Chicago, New York, Seattle, and San Francisco. Nearly one-hundred written statements were filed by interested parties in addition to the testimony at the public hearings.

The Commission published a draft report on October 7, 1998, inviting written comments by November 6, 1998. It received nearly 80 written comments on the draft report and made some important changes. The final report was delivered to the President and the Congress, with a copy to the Chief Justice, on December 18, 1998.

The final report, along with the earlier draft report and all submitted comments, together with all the testimonies at the public hearings and other supporting documents, are available on the Commission's web site. [http://app.comm.uscourts.gov]

In this essay I will summarize the final report. I will also include a few of my own editorial comments.

II. Problems of Growth

The problems of the United States Courts of Appeals have been and continue to be problems of growth. Beginning in the 1960s, those courts experienced unprecedented growth in their dockets -- more and more appeals. Congress created judgeships to close the gap between demand and supply for appellate decisionmaking. But more and more appeals keep coming and projections for the future are rather Malthusian. Some court experts are predicting that if docket growth does continue at recent rates the courts of appeals will be overwhelmed.

Anyone who remembers doing long-division at a grade school chalkboard, understands that doing math in public is usually boring and sometimes embarrassing. But to understand the problems of growth, we must appreciate some general statistical trends. [For more detailed statistics, see http://uscourts.gov (Administrative Office of U.S. Courts Homepage); see also http://fjc.gov (Federal Judicial Center Homepage)]

Between 1960 and 1990 -- over those thirty years -- the number of federal appeals multiplied by ten times, from about 4,000 to about 40,000. Today the number of annual filings is over 50,000 (53,777 in 1997).

This docket growth has led to the creation of new circuit judgeships -- more and more judges. In 1950, there were 65 circuit judgeships. Today there are 167 circuit judgeships on the regional courts of appeals.

Every so often, Congress has divided circuits when their caseloads and their benches got too big. The Tenth Circuit was carved out of the Eighth Circuit in 1929. The Eleventh Circuit was divided from the old Fifth Circuit in 1981. But that is about all Congress has been willing to do -- add judges and divide circuits.

Over the same time period, the change in the nature of appeals has been just as important as the change in the number of appeals. The important point to understand is that the criminal portion of the docket has grown the most. Criminal-related appeals -- direct criminal appeals, prisoners' civil appeals, and habeas corpus appeals -- today account for about half the docket (51%), which is about twice the proportion it was back in 1960 (24%).

The change in the nature of appeals partly accounts for the fact that the courts of appeals have been able to cope with much larger caseloads in recent years without a commensurate increase in judgeships, simply because those appeals take relatively less judge time. The number of judgeships has increased only about two-and-one-half times to deal with a caseload that has

multiplied by a factor of ten times over the same period. In 1950, there were thirty-six filings per judgeship; in 1997 there were three hundred-plus filings per judgeship.

Over the last thirty or more years, the circuit judges have responded to explosive docket growth in two ways: by employing more staff and by developing differentiated decisional procedures. But solutions have a way of developing into problems. They have side effects. And the intramural judicial reforms -- what the judges and courts did to add staff and to modify traditional appellate procedures -- have created new, different problems for the court system.

Not that long ago, each circuit judge had only one law clerk in chambers. Today most active judges employ three clerks and in some circuits some judges have four elbow clerks. Along with this staff increase in chambers, circuits began to employ central staff attorneys in numbers roughly equal to the number of judgeships on the court, so that the judges have large numbers of "in house counsel" working on appeals.

So-called "differentiated decisional procedures" began in the 1960s and 1970s. Something of a siege mentality developed then in the biggest circuits with the biggest caseloads. Today these procedural shortcuts are the norm and everyone takes them for granted, judges and lawyers alike. The underlying rationale of all these so-called reforms is to reduce the time and attention judges give to some categories of appeals, thus allowing judges to decide more and more appeals.

The two most significant procedural shortcuts are the nonargument calendar and the unpublished opinion. Appeals are screened by panels of judges and then decided on the briefs without any oral argument. Some appeals are decided on the merits without a published opinion. Either a brief unpublished opinion disposes of the appeal or in some appeals there is no opinion whatsoever and the case is simply "affirmed without opinion." Still other appeals are diverted into court-administered settlement programs, designed to resolve the dispute without any further judge involvement.

The national figures for merits decisions are worrisome to anyone who is concerned with due process and procedural values, and the trend lines indicate that things are getting worse. Consider these nationwide figures: three out of five appeals (60%) are decided without an oral argument, and three out of four appeals (77%) are decided without a published opinion. So much for the federal appellate tradition that prevailed until this generation.

Perceptions do vary. Some observers and most judges insist that the courts of appeals are in pretty good shape. However, many observers and some judges have voiced serious concerns about workload problems and their impact on the federal appellate courts. Indeed, the law review commentary is full of pessimistic assessments and sounds of alarm. Here is a representative list of perceived problems and expressed concerns:

(1) Intra-circuit conflicts: different three-judge panels in the same circuit apply the law differently. If the law is a prediction of what the judges will do -- to paraphrase Justice Holmes -- then the law of the circuit has become

unpredictable because panels can find circuit precedents to rule either way in many appeals.

(2) Inter-circuit conflicts: there are too many important inconsistencies among the circuits on specific issues of federal law. The national law is becoming regional and developing more variations than we have time zones.

(3) Inadequate appellate capacity: there are too few judges deciding too many appeals to give them the attention the cases deserve, and things will only get worse.

(4) Truncated appellate procedures: the procedural shortcuts have degraded federal appellate justice. We have gotten too far away from the Learned Hand era when every appeal was fully briefed, orally argued, and decided collegially by a 3-judge panel with a published opinion.

(5) Inappropriate staff influence: judges rely on in-chambers law clerks and central staff attorneys too much and unduly delegate the judicial function. "Law clerk justice" has become prevalent and acceptable as a necessary evil.

(6) Undue appellate delays in some appeals: unreasonable delay in the decision of some individual appeals results in hardships to particular litigants and a general decrease in finality in the system.

(7) Unreasonable costs and delays in the system: the current appellate procedures are simply not adequate. The system is not performing efficiently in the run of cases. The rate of appeals is too high and there are too many frivolous appeals clogging the system.

(8) Diseconomies of scale: the large number of appeals being decided by large numbers of judges by the regional courts of appeals result in diseconomies of scale -- especially in the larger circuits like the Ninth Circuit -- for example, a worsening loss of collegiality among judges, higher court administrative costs, and generally more expensive appellate justice for lawyers and litigants.

Then Chief Judge Howard T. Markey of the Federal Circuit complained ten years ago about the "before" and "after" effects of caseload and procedural compromises which have moved the federal appellate system away from a judicial model of measured justice towards a bureaucratic model of case processing:

As performed as recently as [now thirty] years ago, the personally conducted federal appellate process comprised: (1) review of the record and briefs by the judge; (2) oral argument of thirty or forty-five minutes on a side; (3) preparation by the judge of a written opinion; (4)

assistance in each chamber by one elbow law clerk and one secretary; and (5) frequent and adequate conferences of the judges on the cases.

As performed today, the bureaucratically conducted federal appellate process comprises: (1) screening and track-setting by staff attorneys; (2) review of records and briefs by a law clerk or a staff attorney; (3) oral argument in less than one third of the cases, and then for fifteen or twenty minutes a side; (4) preparation of opinions by law clerks and staff attorneys; (5) dispositions without opinions in two-thirds of the cases; (6) assistance in each chamber by three law clerks and two secretaries and assistance to all chambers by a corps of staff attorneys; and (7) infrequent, short judicial conferences on the cases.

[Howard T. Markey, On the Present Deterioration of the Federal Appellate Process: Never Another Learned Hand, 33 S.D. L. Rev. 371, 376-77 (1988)]

In the last ten years, things have gotten worse. What is most worrisome is that the experts and insiders seem to be becoming more pessimistic that the familiar solutions are not keeping ahead of the growing problems. "'Crisis' is a much overused word. Burgeoning caseloads are nothing new, nor is the sense that the system is on the verge of breakdown," insists Professor Arthur Hellman, one of the most knowledgeable and informed federal courts experts, but he goes on to worry, "What is new is the perception that the traditional remedies -- enlarging the number of judgeships and auxiliary staff, creating new courts, or subdividing existing courts into smaller units -- are no longer adequate." [Arthur D. Hellman, The Crisis in the Circuits and the Innovations of the Browning Years, in Restructuring Justice -- The Innovations of the Ninth Circuit and the Future of the Federal Courts 1, 4 (Arthur D. Hellman, ed., 1990) (notes omitted)]

III. Whether to Divide the Ninth Circuit

The Commission on Structural Alternatives was specifically charged with making recommendations about the Ninth Circuit. It did not recommend that Congress split the Ninth Circuit, however. Instead, the Commission recommended legislation authorizing the Ninth Circuit to reorganize itself into three regionally-based divisions.

The Commission's primary position is that dividing the Ninth Circuit now would be counter-productive, that splitting the circuit is both impractical and unnecessary. Furthermore, the Commission believes that there are some good administrative reasons to preserve the Ninth Circuit intact. At least for now, I agree with the Commission and so those arguments will not be rehearsed again here, except to note that the Commission emphasized the importance of having a single body of federal decisional law in common across the western states and the Pacific seaboard.

Merely for the sake of completeness, the Commission did review the pros and cons of three very different realignment options, without endorsing any of them except to say that each of them is flawed. The Commission went on to say that the dozen or so other approaches bandied about in the literature are without any merit whatsoever. The "classical split option" would create a new Ninth Circuit including Arizona, California and Nevada, and a new Twelfth Circuit

including Alaska, Guam, Hawaii, Idaho, Montana, Northern Mariana Islands, Oregon, and Washington. The "realignment option" would shift Arizona to the Tenth Circuit: the new Ninth Circuit would include California, Guam, Hawaii, Nevada, and Northern Marianas Islands; the new Tenth Circuit would include Arizona, Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming; the new Twelfth Circuit would include Alaska, Idaho, Montana, Oregon, and Washington. The "California split option" would create a new Ninth Circuit including Districts of Arizona, Southern and Central California, Guam, Hawaii, Nevada, and Northern Mariana Islands and a new Twelfth Circuit including Districts of Alaska, Eastern and Northern California, Idaho, Montana, Oregon, and Eastern and Western Washington.

In my view, only the so-called "classical split option" will be viable in the Congress. To shift Arizona to the Tenth Circuit would be to disrupt two circuits and would draw opposition from the bench and bar in Arizona and in the States of the Tenth Circuit. The idea of subdividing California between two different circuits surely would be too much for the bench and the bar in California to accept. Any proposal must have the support of the bench and the bar to have any chance of enactment. Therefore, the second and third realignment options discussed in the final report should be declared "D.O.A."

I do want to go on record here to endorse the Commission's principled opposition to those in Congress, mostly Senators from the Northwestern states, who have been pushing for a division of the Ninth Circuit because they disapprove of particular decisions of the court or individual judges of the circuit. This would amount to judiciary gerrymandering and we should condemn it in no uncertain terms. There are good reasons and bad reasons to restructure the federal court system; there are sound policy reasons to divide circuits and to reassign states to different circuits, for example. But to pass off as "reforms" proposals that really have the purpose or intent to disapprove of some judges or some decisions -- in order to manipulate the law of the circuit to coincide with some Senators' political preferences -- should not be understood to be a congressional prerogative. It does violence to the separation of powers and the independence of the Third Branch. The proper way to change judicial interpretations of a particular federal statute is to enact legislation amending the statute. The proper way to affect the judicial philosophy of a federal bench is through exercise of the President's nomination power and the Senate's advice and consent authority.

IV. Structural Options for the Courts of Appeals

What is more interesting for federal court watchers and more important for the bench and the bar beyond the Ninth Circuit is that the Commission went on to recommend that Congress authorize all the other courts of appeals to reorganize themselves along divisional lines. The Commission also recommended that two-judge panels decide at least some appeals and went on to develop and recommend the entirely new idea of district court appellate panels.

A. Reorganizing the Courts of Appeals into Divisions

In a move that is sure to be as controversial as it is original and interesting, the Commission invented an entirely new way to deal with problems of more and more appeals and

more and more judges in the courts of appeals. The Commission drafted a proposed statute to amend 28 U.S.C. § 46 to authorize any court of appeal with more than fifteen judgeships to organize itself into adjudicative divisions. [Appendix C to the final report contains the proposed general statute, http://app.comm.uscourts.gov] This proposal would immediately apply to three of the regional courts of appeals: the Fourth Circuit (fifteen judges), the Fifth Circuit (seventeen judges), and the Sixth Circuit (sixteen judges). More importantly, it would portend the future of the rest of the courts of appeals as the growing appellate caseload increases pressure on Congress to create additional circuit judgeships.

According to the Commission, the particular details of the divisional reorganization should be left to the judges in each circuit and we should expect regional variations. Indeed, the Ninth Circuit judges responded to the draft report of the Commission by suggesting changes in the earlier draft statute. But the Commissioners resisted this overture and went on to describe in some detail how they imagined their divisional organization could work in the Ninth Circuit. Their Ninth Circuit blueprint illustrates how reorganization into regional divisions might work in the other circuits. [Appendix C to the final report contains the Commission's proposed statute for the Ninth Circuit, http://app.comm.uscourts.gov]

The Ninth Circuit would be divided into three regional divisions. Each regional division would have exclusive jurisdiction over appeals from the district courts within its region. A regional division would function as a semi-autonomous appellate court sitting in panels. A panel decision in one regional division would not be binding in another regional division. Each regional division would have a divisional en banc to rehear important cases or to reconsider a panel decision that creates a conflict with another regional division. Existing and still binding Ninth Circuit precedents along with divisional panel decisions could be overruled only within a division by the divisional en banc procedure. The Commission further recommended the creation of "Circuit Division for Conflict Resolution" to replace the present Ninth Circuit limited en banc court. The Circuit Division would have discretionary jurisdiction only to resolve direct conflicts between or among the three regional divisions.

Thus, the appellate procedural sequence would be an appeal-as-of-right before a three-judge panel of a "regional division," followed by a petition for rehearing to the "divisional en banc court." If and only if the decision created a conflict with a decision of another regional division, there could be a discretionary rehearing before the "Circuit Division for Conflict Resolution." Otherwise, the next step would be a petition for a writ of certiorari in the Supreme Court.

I agree with the Commission's proposed experiment with regional divisions in the Ninth Circuit for the recommended eight year period; at the end of the study period, the Federal Judicial Center would report to the Judicial Conference of the United States which would then recommend to Congress whether the divisional arrangement should be continued with or without modification. But I disagree with the related proposal to authorize the other courts of appeals to reorganize themselves into regional divisions. In my opinion, Congress and the Third Branch should wait and see how this divisional concept plays out in the Ninth Circuit before generalizing the experiment in the other courts of appeals and without further compounding the "Hawthorne

effect" by providing for judges in the other circuits to implement their own variations of the concept. Therefore, until some time and study of the Ninth Circuit proposal have passed, I cannot support such an open-ended and variable national experiment in all the rest of the regional courts of appeals.

My endorsement, however, is not without reservation. There was another experiment in the 1980s with divisions in the old Fifth Circuit before that circuit was divided into the new Fifth Circuit and the Eleventh Circuit. The Fifth Circuit experiment suggests two cautions: first, the rules of stare decisis behind the concept of the law of the circuit became so complicated that they nearly defied description; second, the hindsighted political reality was that the divisional stage of development, implemented by the judges as an administrative experiment, almost immediately precipitated the permanent statutory division of the circuit by congressional reformers. So my worries are first that the divisional concept will increase the confusion and uncertainty in the law of the Ninth Circuit and second that it will prematurely accelerate the momentum towards a formal and complete division among judges and members of Congress.

I am also am concerned about the Commission's willingness to reject the venerable principle of the law of the circuit to the extent that decisions made in one regional division would not bind other divisions. Variations in the federal law -- when the same federal statute or the same provision of the Constitution is interpreted one way in one circuit and another way in another circuit -- admittedly are a necessary evil of the current federal appellate geography, but we should be looking for ways to reduce their frequency and persistence. The Commission's Circuit Division for conflict correction may not be equal to the task. This proposal would put an end to the limited en banc mechanism, which is one of the most problematic and ineffective features of the current system, and that would be an improvement. But the Commission's proposal would create a rather complex and subtle rehearing procedure from panel decisions. Panels in one division would not be bound by prior panel decisions in another division but their decision to create a conflict would be reviewable by the Circuit Division for conflict resolution. At the same time, each division would continue to rehear en banc panel decisions it deemed important or mistaken. I am not as sanguine as the Commission that these nuanced distinctions are easily made and readily distinguishable. But on balance, these are relatively small concerns.

B. Two Judge Panels

In a very troubling departure from our federal appellate tradition, the Commission recommended that Congress authorize the courts of appeals to sit in two-judge panels, at least in some cases. The expectation is that two-judge panels could decide those appeals clearly controlled by well-settled precedent that presently are being decided summarily without oral argument. Only if the two judges disagreed or if they determined that there would be some advantage would they bring in a third judge. [Appendix C to the final report contains the Commission's draft statute for two-judge panels, http://app.comm.uscourts.gov]

This is an unworthy idea. It takes away significantly from the quality of appellate decisionmaking with little promised gain. The three-judge panel long has been the federal tradition and the American norm for appellate review. Admittedly, the quorum rule of two has been on the

books a long time and works an expedient justice in exceptional cases when a panel member cannot complete an appeal, but that always has been understood as an exception-proving rule of necessity. [28 U.S.C. § 46(d)]

One less perspective on the appeal-as-of-right might diminish the quality of the particular decision and might reduce the overall quality of appellate decisionmaking in the run of cases. It might generate some subtle pressure on the part of the two judges not to disagree so as to avoid bringing in the third judge. It might increase the untoward influence of staff attorneys and in-chambers law clerks, as a consequence of the background assumption that the appeal has been screened to be so straightforward or so unimportant as not to be worthy of much attention even from the two judges. There are many times more combinations of two-judge panels than three-judge panels thus possibly increasing the hydraulic pressure away from consistency in the law of the circuit. We cannot know the frequency of one-one splits that would require a third judge and thus cancel the promised administrative savings; furthermore, uncertain procedural problems would need to be overcome to bring in a third judge. This experiment is not likely worth these risks. The Commission itself understands that the savings in judicial resources would not be a full one-third; the reclaimed judge time would amount to the time and effort the third judge now spends reading the briefs and conferring with the other two panel members only in categories of the most marginal appeals. The only saving grace of this proposal is the sunset provision suggested by the Commission that after three years the Judicial Conference would decide whether to recommend modifying or eliminating the two-judge panel authority, based on field studies conducted by the Federal Judicial Center.

C. District Court Appellate Panels

Perhaps the most intriguing idea the Commission developed is the proposal for District Court Appellate Panels. But I predict it will be unpopular -- probably very unpopular -- among judges and lawyers. [Appendix C to the final report contains the Commission's draft statute for District Court Appellate Panels, http://app.comm.uscourts.gov]

The Commission proposed that each circuit be authorized to create a "District Court Appellate Panel Service" for an eight year experiment followed by monitoring, reporting, and evaluation. Three-judge panels would consist of two district judges and one circuit judge. District judges could not participate in appeals from their own district. The district court appellate panels could hear only appeals in designated categories; the Commission suggested diversity cases and sentencing appeals. After that there would be an appeal to the court of appeals but only with leave of the court. A district court appellate panel always could transfer an appeal if it was determined to involve a significant legal issue.

The cleverness of this idea is that it shifts some of the appellate workload to the level where more judges already exists -- the district judge level -- although the proposal is not based on an assumption that there presently is an excess supply of district court judgepower. Rather more insightful, the rationale is that creating more district judgeships at the base of the federal court pyramid would not place additional strain on the organizational structure and the new judges would be available to do both appellate work and trial work as needed. As with its other

statutory proposals, the Commission recommends an eight year experiment, monitored by the Federal Judicial Center, followed by a recommendation from the Judicial Conference to the Congress whether to continue, modify, or eliminate the district court appellate panel service.

I wholeheartedly endorse this proposed experiment. It is an idea whose time has come. Court historians will see a family resemblance to the First Judiciary Act of 1789, which created two different nisi prius courts: a district court with limited trial jurisdiction and a circuit court with a combination of original and appellate jurisdiction. The now-rarely-convened three-judge district court and the current bankruptcy appellate panels are somewhat analogous, as well. More importantly, present practice suggests this proposal will work: in recent years district judges have been sitting on three-judge hearing panels in upwards of twenty percent of the merits appeals in the numbered circuits. The Commission sounds the right note of caution, however, to call for a temporary experiment characterized by careful monitoring, reporting, and evaluation.

V. Appellate Jurisdiction

The Commission on Structural Alternatives hedged its bets somewhat on a few other reform issues. The final report recommends against authorizing direct appeals to the courts of appeals from the bankruptcy appellate panels until the completion of an on-going study being conducted by the Judicial Conference Committee on the Administration of the Bankruptcy System. The Commission also considered, without making any actual recommendation, the idea of making the jurisdiction of the courts of appeals discretionary, in at least some cases, and the final report merely mentions the possibility of adding to the subject matter jurisdiction of the Federal Circuit.

A. Bankruptcy Appeals

During the study period, another Commission -- the National Bankruptcy Review Commission -- recommended that appeals of decisions by bankruptcy judges in core matters be heard directly in the regional courts of appeals, instead of the present system that allows those appeals either to go to a district court or to a bankruptcy appellate panel.

A bankruptcy appellate panel ("BAP") is comprised of several bankruptcy judges who decide appeals from bankruptcy courts from outside their own court. The Bankruptcy Reform Act of 1994 authorized Judicial Councils to create BAPs. Without a BAP, or in a case when the parties exercise the option, an appeal from a bankruptcy judge goes to the article III district court. In a circuit with a BAP, so long as the district judges from that district approve of the procedure, an appeal from a bankruptcy judge goes to a panel of three bankruptcy judges from outside the district in which the case was filed. An appeal from a final judgment of a BAP goes to the court of appeals.

The Commission on Structural Alternatives urged Congress to await the outcome of the Judicial Conference's comprehensive study before enacting legislation authorizing direct appeals to the courts of appeals from bankruptcy courts. The Commission's primary concern was for

adding to the appellate workload (approximately 3,400 more appeals each year), but the final report suggests there may be other, better alternatives to direct appeals to the court of appeals.

In 1998, the House of Representatives passed a comprehensive bankruptcy reform bill that contained an authorization for direct appeals to the courts of appeals from bankruptcy courts. It will be interesting to watch how Congress ultimately chooses between the opposing recommendations of these two congressionally-created commissions.

B. General Discretionary Review

The Commission on Structural Alternatives for the Federal Courts of Appeals simply was not persuaded that it would be a good idea to replace the appeal-as-of-right across the board. [See 28 U.S.C. § 1291]

Several judges and commentators have long maintained that this would be the best solution to the problems of the courts of appeals. Furthermore, some have insisted that the current reality -- screening panels and decisions without oral argument and without published opinions -- amounts to a system of de facto discretionary appeals. They argue that the judges are affording more important appeals more careful attention and the less important appeals get only an affirming nod. But the Commission was not ready to recommend this idea, at least not now, although this part of the final report reads more like a "maybe someday" -- maybe some day, but not today.

The Commission's discussion of discretionary review is illuminating, however, and the final report serves to advance the debate on this subject. By distinguishing between the Supreme Court's certiorari authority and what the final report labels the "Virginia type" of discretionary review, the Commission has contributed an important clarification and focus that will help inform future discussion.

Everyone is familiar, of course, with the Supreme Court variety of discretionary jurisdiction by way of the writ of certiorari. The Justices have an unfettered discretion to take a case or to refuse to take a case on petition and a refusal has no precedential effect. By contrast, the Virginia variety -- which has English roots and which is found in Virginia and West Virginia state court systems and in the federal system in the United States Court of Appeals for the Armed Services -- involves discretion of a different kind: the appellate determination to grant or deny leave to appeal contemplates an examination of the merits and a denial means that the appeal does not present an issue of reversible error.

I second the Commission's rejection of a Supreme Court-like certiorari authority for the courts of appeals. But I respectfully disagree with the Commission's conclusion to wait-and-see about the Virginia type of discretionary review. I am of the opinion that the procedural shortcuts and intramural reforms already implemented by the judges in the courts of appeals violate the spirit, if not the letter, of the de jure appeal-as-of-right statute. I submit that it would benefit the federal appellate system to admit to this reality and to formalize and nationalize appellate procedures.

C. Federal Circuit

In 1982, Congress created the United States Court of Appeals for the Federal Circuit. It has a nationwide jurisdictional boundary to hear appeals from certain lower courts and administrative bodies (Court of Federal Claims; Court of International Trade; Court of Veterans Appeals; Merit System Protection Board) and exclusive appellate jurisdiction for all appeals from all district courts in patent infringement cases.

The Commission did not go so far as recommending legislation. Instead, this section of the final report merely identified two categories of cases that Congress might possibly consider adding to the jurisdiction of the Federal Circuit: tax appeals and social security appeals. My own sense of these two almost off-hand mentions is that the number of appeals that would be shifted away from the regional courts of appeals would not amount to a large reduction in their caseload so other policy reasons, for example, a desire for greater consistency in outcomes or streamlining administrative procedures, should be the motivation for pursuing legislation.

VI. What Will the Future Bring?

The final report represents the best thinking of a talented and experienced and dedicated group of Commissioners and staff, informed by broad study and developed with an eye towards judicial and congressional politics. It serves to defend judicial independence. It moves the debate far away from the infinite regress of past congresses to add judgeships and to split circuits without a grand design. It analyzes and guides a conscientious member of Congress through the thirty-plus year debate over the Ninth Circuit. It broadens its scope to include all the courts of appeals and their future. It focuses the seemingly endless academic discussion of proposed reforms by drafting implementing statutes that will be introduced as bills in anticipation of hearings and, perhaps eventually, the passage of legislation. It advances the debate over the future of the federal courts on several critical subjects.

All this was accomplished with small numbers and in a short time and the members of the Commission and their staff deserve our kudos. But one more report -- even one more excellent report -- is not the goal of those of us concerned with the future of the federal courts. What will that future bring?

Based on the past, we can be confident that the future will bring two things: more appeals and more judges. Indeed, every study and commission and committee that has studied the courts of appeals has predicted that the future will bring continued appellate docket growth and its attendant problems will continue to worsen, although no one seems to know for sure why or even how much to expect.

At the beginning of this decade, the predecessor group to the present Commission, the Federal Courts Study Committee, observed: "However people may view other aspects of the federal judiciary, few deny that its appellate courts are in a 'crisis of volume' that has transformed them from the institutions they were even a generation ago." That Study Committee confidently

predicted that "[f]urther and more fundamental change to the courts of appeals would seem to be inevitable . . . ." [Federal Courts Study Committee Report 109 (1990)]

The Constitution tasks Congress with the authority and the responsibility to design a new federal court structure for the twenty-first century. The 106th Congress seems poised to address the problems of the Ninth Circuit. That legislative moment may well include some of the ideas suggested by the Commission on Structural Alternatives for the Federal Courts of Appeals. Those ideas have the potential for reconfiguring the organization and procedures of all the other courts of appeals for better or for worse. Court watchers will be watching Congress for a change.

A Selective Bibliography of Some of Professor Baker's Related Writings

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