

1996

# New Certiorari and a National Study of the Appeals Courts

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## Recommended Citation

Carl Tobias, *New Certiorari and a National Study of the Appeals Courts*, 81 *Cornell L. Rev.* 1264 (1996)

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# THE NEW CERTIORARI AND A NATIONAL STUDY OF THE APPEALS COURTS

Carl Tobias†

*Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*<sup>1</sup> is a thought-provoking critique of the United States Courts of Appeals. Professors William Richman and William Reynolds maintain that dramatic increases in appellate filings have transformed the appeals courts during the last quarter-century, prompting systemic constriction of procedural opportunities, particularly for parties with few resources or little power. The authors find these changes profoundly troubling and propose that Congress radically expand the number of appellate judges.

Individuals and institutions, such as expert study committees, which have analyzed the federal courts, agree with much of the authors' descriptive assessment.<sup>2</sup> Less consensus, and even some controversy, attend the writers' provocative suggestion that the creation of many additional judgeships will resolve the conundrum posed by growing dockets and numerous other difficulties which the appellate courts confront today. These factors mean that the authors' valuable contribution to understanding the appeals courts warrants a response. This essay undertakes that effort.

My paper invokes a number of federal court studies and applies insights gleaned from the continuing debate which involves possible division of the Ninth Circuit.<sup>3</sup> This court is instructive because its ex-

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† Professor of Law, University of Montana. I am a member of the Civil Justice Reform Act Advisory Group for the United States District Court for the District of Montana and of the District Local Rules Review Committee of the Ninth Circuit Judicial Council; however, the views expressed here are my own. I wish to thank David Aronofsky, Thomas E. Baker, Chris Flann, Arthur Hellman, Tom Huff, Jeffrey Renz, Lauren Robel, Peggy Sanner, and Rod Smith for valuable suggestions, Cecelia Palmer and Charlotte Wilmerton for processing this piece, as well as the Harris Trust and Ann and Tom Boone for generous, continuing support. Errors that remain are mine.

<sup>1</sup> William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273 (1996).

<sup>2</sup> See *infra* notes 15-22 and accompanying text.

<sup>3</sup> See S. 956, 104th Cong., 1st Sess. (1995); S. REP. NO. 197, 104th Cong., 1st Sess. (1995) (presenting the Senate judiciary committee's conclusions regarding a potential Ninth Circuit division); see also Carl Tobias, *The Impoverished Idea of Circuit-Splitting*, 44 EMORY L.J. 1357 (1995) (analyzing legislative attempts to divide the Ninth Circuit). See generally Thomas E. Baker, *On Redrawing Circuit Boundaries—Why the Proposal to Divide the United States Court of Appeals for the Ninth Circuit is Not Such a Good Idea*, 22 ARIZ. ST. L.J. 917 (1990) (arguing against a Senate proposal to divide the Ninth Circuit).

perience with mounting caseloads epitomizes developments in many regional circuits since the 1970s and typifies the treatment that the writers criticize.

I first evaluate the authors' descriptive account and identify aspects of their discussion with which a number of federal court observers concur and differ, and I find considerable agreement about most of the features. For example, numerous analyses of the federal civil and criminal justice systems and the ongoing controversy over the Ninth Circuit reveal that the appellate courts have undergone a transformation in the past several decades.

My response then assesses the writers' prescription. I ascertain that phenomena ascribed to multiplying appeals and many additional complications facing the appeals courts constitute a polycentric problem. This difficulty apparently requires application of a varied mix comprising myriad available solutions, but the precise combination of approaches which would be most efficacious remains unclear. The judiciary's expansion is only one potential remedy. However, it would also impose disadvantages, might be less effective than numerous alternative solutions, and might be politically unrealistic. The above difficulties show, therefore, that Congress should appoint a national commission to evaluate the appellate system. I conclude with recommendations for creating this entity and for how it might proceed.

## I

### THE DESCRIPTIVE ACCOUNT

#### A. A Brief Description

Richman and Reynolds find that increasing numbers of appeals have dramatically transformed the appeals courts from the institutions which they were as recently as a generation ago.<sup>4</sup> The authors assert that growing dockets have led the courts to implement numerous mechanisms that depart from the appellate ideal or the "Learned Hand tradition," whereby judges heard oral arguments in virtually all cases, closely conferred, and wrote thoroughly-reasoned opinions which explained the results and were publicly available.<sup>5</sup>

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<sup>4</sup> See Richman & Reynolds, *supra* note 1, at 274-75, 278-79; see also *infra* notes 16-19 and accompanying text (affording examples of individuals and entities that concur). See generally Levin H. Campbell, *Into the Third Century: Views of the Appellate System from the Federal Courts Study Committee*, 74 MASS. L. REV. 292 (1989) (detailing the effects of exploding caseloads on the appellate courts).

<sup>5</sup> See Richman & Reynolds, *supra* note 1, at 278-97; see also THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 21-27, 106-50 (1994) (defining appellate ideal and surveying mechanisms that depart therefrom); *infra* note 18 and accompanying text (affording examples of mechanisms).

The writers claim that certain appeals continue to receive the complete panoply of procedures.<sup>6</sup> These include major securities cases, which the authors contend that appellate judges perceive as important, typically measured in terms of large monetary stakes. Disposition of these appeals strikingly contrasts with the severely truncated treatment accorded to other actions, such as prisoner and social security appeals, which judges consider less significant.<sup>7</sup> Many of those cases receive no oral argument or published opinion, while court staff, rather than judges, effectively resolve the appeals.<sup>8</sup> The writers thus find glaring discrepancies between wealthy, strong parties and litigants with limited economic or political power who have narrowly circumscribed access to appellate courts.

Richman and Reynolds assign considerable responsibility for these developments to the federal judiciary.<sup>9</sup> The authors suggest that the bench, largely for reasons of professional satisfaction, including prestige and collegiality, has opposed the creation of additional judgeships to treat the conditions. The writers assert that countervailing concepts and empirical data refute the judiciary's arguments against expansion. For instance, numerous judges have stated that enlarging their numbers would erode the appellate bench's quality and undermine the collegiality which improves decisionmaking.<sup>10</sup> In response to these arguments, the authors observe that there are many highly qualified candidates who could fill the new judgeships.<sup>11</sup> The writers

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<sup>6</sup> See Richman & Reynolds *supra* note 1, at 19-21. See generally CHRISTOPHER E. SMITH, JUDICIAL SELF-INTEREST: FEDERAL JUDGES AND COURT ADMINISTRATION 1-13, 15-43, 95-124 (1995) (describing court administrative practices and priorities, particularly for treating increasing appeals).

<sup>7</sup> See Richman & Reynolds, *supra* note 1, at 295-97; see also Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 495-98 (1988-89) (analyzing judicial treatment of litigants with limited economic or political power).

<sup>8</sup> See Richman & Reynolds, *supra* note 1, at 280-81, 286, 290; see also *infra* notes 18, 30 and accompanying text (providing examples of truncated treatment and staff delegation). See generally Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940 (1989) (detailing the use of selective publication plans by appeals courts).

<sup>9</sup> See Richman & Reynolds, *supra* note 1, at 277-78, 297-339. The authors assign more specific responsibility to those whom they denominate the "Judicial Establishment." *Id.* at 277. See generally BAKER, *supra* note 5, at 287-89 (discussing the circuit judges' role in "reforming" the courts of appeals); SMITH, *supra* note 6, at 106-13 (exploring the relationship between systemic changes in the courts and judicial self-interest).

<sup>10</sup> See Richman & Reynolds, *supra* note 1, at 300-04, 323-25; see also S. REP. NO. 197, *supra* note 3, at 10 (discussing potential loss of collegiality on large appeals courts); *infra* notes 34, 41 and accompanying text (providing additional sources and commentary on enlarging the bench and collegiality). See generally FRANK M. COFFIN, ON APPEAL 213-29 (1994) (describing the workings of judicial collegiality at the appellate level).

<sup>11</sup> See Richman & Reynolds, *supra* note 1, at 300-02. See generally DAVID M. O'BRIEN, JUDICIAL ROULETTE (1988) (analyzing the judicial selection process and the candidates chosen); Laura E. Little, *Loyalty, Gratitude and the Federal Judiciary*, 44 AM. U. L. REV. 699 (1995) (reviewing the judicial selection process and its relationship to judicial decisionmaking).

also find little evidence that collegiality exists today, that a smaller complement of judges would necessarily foster this value, or even that it enhances decisionmaking.<sup>12</sup>

The authors claim that the transformation in the appeals courts—from a forum treating each case comprehensively to a more selective system of review—has imposed several disadvantages. This change has seriously compromised the appellate ideal, has prevented judges from fulfilling their oaths of office to “administer justice without respect to persons, and do equal right to the poor and to the rich,”<sup>13</sup> and has amended the statutory appeal as of right.<sup>14</sup> The writers contend that circuit judges have evinced greater concern for lawmaking than error correction, while the appellate courts have become *de facto* certiorari, not appeals, courts.<sup>15</sup> The authors consider these developments disturbing, and implore Congress to increase substantially the number of appellate judgeships.

## B. Areas of Agreement

There is widespread consensus about numerous aspects of the writers’ descriptive account of the appellate courts’ transformation. For example, circuit judges with perspectives as diverse as Judge Edith Jones and Judge Stephen Reinhardt<sup>16</sup> and blue-ribbon commissions on the federal courts, such as the Federal Courts Study Committee and the Long Range Planning Committee of the Judicial Conference

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<sup>12</sup> See Richman & Reynolds, *supra* note 1, at 323-25; see also *infra* note 41 and accompanying text (providing additional sources and commentary on collegiality).

<sup>13</sup> 28 U.S.C. § 453 (1994) (judicial oath of office); see Richman & Reynolds, *supra* note 1, at 293-97; see also BAKER, *supra* note 5, at 287 (describing the differences between the appellate ideal and appellate reality); Kenneth W. Starr, *The Courts of Appeals and the Future of the Federal Judiciary*, 1991 Wis. L. Rev. 1, 3 (expressing concern about the health of appellate traditions and ideals).

<sup>14</sup> See Richman & Reynolds, *supra* note 1, at 293-94; see also 28 U.S.C. § 1291 (1994) (granting the statutory right of appeal); *infra* notes 24, 31 and accompanying text (providing additional sources and commentary on whether the appeal as of right has been amended). See generally Harlan Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62 (1985) (evaluating the purpose of the appeal as of right and its meaning); Donald P. Lay, *A Proposal for Discretionary Review in Federal Courts of Appeals*, 34 Sw. L.J. 1151, 1155 (1981) (advocating a modification of the appeal as of right).

<sup>15</sup> See Richman & Reynolds, *supra* note 1, at 293-97; see also 28 U.S.C. § 1291 (1994) (“The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . .”). See generally Paul D. Carrington, *The Function of the Civil Appeal: A Late Century View*, 38 S.C. L. Rev. 411, 417-28 (1987) (arguing that the courts of appeal have changed into “junior Supreme Courts” evincing greater concern for lawmaking and becoming *de facto* certiorari courts); Starr, *supra* note 13, at 2-7 (detailing the increased caseloads and responsibilities of federal appellate courts, particularly relating to lawmaking and published opinions).

<sup>16</sup> See Edith H. Jones, *Back to the Future for Federal Appeals Courts: Rationing Federal Justice by Recovering Limited Jurisdiction*, 73 TEX. L. REV. 1485 (1995) (book review); Stephen Reinhardt, *Surveys Without Solutions: Another Study of the United States Courts of Appeals*, 73 TEX. L. REV. 1505 (1995) (book review).

of the United States,<sup>17</sup> agree that expanding appellate dockets have substantially modified the appeals courts over the last quarter-century.

Most appellate courts and circuit judges recognize that they have promulgated and applied measures which alter the traditional treatment of appeals. These measures include limitations on oral argument and on published opinions, which are frequently codified in local rules of appellate procedure, and somewhat enhanced reliance on support staff to resolve cases.<sup>18</sup> Indeed, the Ninth Circuit proudly touts the implementation of many such mechanisms, which have yielded greater efficiencies, as a compelling argument against splitting the court.<sup>19</sup> Certain judges, such as Chief Judge Harry Edwards and Chief Judge Richard Posner, as well as other federal court observers, have also acknowledged that the appeals courts are becoming increasingly bureaucratized and have warned of the risks posed.<sup>20</sup>

There is considerable agreement with much else which the authors describe. One helpful illustration is the limited likelihood that Congress will circumscribe federal criminal or civil jurisdiction.<sup>21</sup> Few observers dispute that senators and representatives cannot resist the essentially cost-free political mileage derived from federalizing additional criminal activity and from recognizing new civil causes of ac-

<sup>17</sup> See FEDERAL COURTS STUDY COMMITTEE, JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 109 (1990) [hereinafter REPORT OF THE FEDERAL COURTS STUDY COMMITTEE]; JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 41-42 (1995), reprinted in 166 F.R.D. 49, 101-02 (1996).

<sup>18</sup> See, e.g., 1ST CIR. R. 36.1, 36.2; 4TH CIR. R. 34(a), 36; 7TH CIR. R. 34(f), 53; Arthur D. Hellman, *Central Staff in Appellate Courts: The Experience of the Ninth Circuit*, 68 CAL. L. REV. 937 (1980); Patricia McGowan Wald, *The Problem With the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?*, 42 MD. L. REV. 766, 776-79 (1983). See generally BAKER, *supra* note 5, at 108-17, 119-35, 139-47 (detailing the appeals courts' curtailment of oral argument and increased reliance on staff).

<sup>19</sup> See, e.g., Office of the Circuit Executive for the United States Courts for the Ninth Circuit, *Position Paper in Opposition to S. 956, Ninth Circuit Court of Appeals Reorganization Act of 1995 (12/7/95) and Companion Bill H.R. 2935 (2/1/96)*, (San Francisco, Ca.), March 7, 1996, at 1, 4 [hereinafter *S. 956 Position Paper*]; see also S. REP. NO. 197, *supra* note 3, at 27-28 (describing reforms within the Ninth Circuit that have purportedly increased efficiency). *But see* S. REP. NO. 197, *supra* note 3, at 4. See generally JOE S. CECIL, FEDERAL JUDICIAL CENTER, ADMINISTRATION OF JUSTICE IN A LARGE APPELLATE COURT: THE NINTH CIRCUIT INNOVATIONS PROJECT (1985) (evaluating the administrative reforms within the Ninth Circuit).

<sup>20</sup> See RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 26-28 (1985); Harry T. Edwards, *The Rising Work Load and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871, 918-19 (1983); see also Wade H. McCree, Jr., *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777 (1981) (expressing concerns about the effects of bureaucracy on the quality of the judicial work product); Wald, *supra* note 18 (describing the phenomenon of judicial bureaucratization). See generally SMITH, *supra* note 6, at 94-125 (discussing systemic problems arising from bureaucracy).

<sup>21</sup> See Richman & Reynolds, *supra* note 1, at 325-30. *But see* Jones, *supra* note 16, at 1486, 1499-1504.

tion.<sup>22</sup> This proposition assumes even greater force, now that economic concerns and budgetary restraints have made less feasible formerly successful means of cultivating constituents, such as creating entitlements.

Insofar as the transformation can be said to have amended the statutory right of appeal and narrowed access, particularly for parties who have little resources or power, most experts concur that these changes should not occur by default.<sup>23</sup> Rather, the alterations ought to be instituted only after careful consideration of relevant modifications and their benefits and disadvantages, of possible alternatives, and of the tradeoffs implicated as well as open, candid decisions by those, namely Congress, with responsibility for applicable policymaking.

### C. Areas of Less Consensus

There is less consensus about, and some controversy accompanying, certain elements of the authors' descriptive assessment. Illustrative is the writers' assertion that many cases, especially those pursued by appellants with limited resources or power, have not received the review which they require.<sup>24</sup> Quite a few judges have questioned whether numerous appeals need, or would benefit from, greater attention, while all of the regional circuits have treated some cases differently.<sup>25</sup> More consideration might not improve appellate decisionmaking generally or the outcomes in many specific appeals

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<sup>22</sup> See, e.g., Stephen G. Breyer, *Administering Justice in the First Circuit*, 24 SUFFOLK U. L. REV. 29, 34-37 (1990); Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135 (1995); William P. Marshall, *Federalization: A Critical Overview*, 44 DEPAUL L. REV. 719, 722-25 (1995); Tobias, *supra* note 3, at 1404; see also *infra* notes 28-31 and accompanying text (providing examples of Congress's role in expanding federal court jurisdiction). See generally WILLIAM W. SCHWARZER & RUSSELL R. WHEELER, ON THE FEDERALIZATION OF THE ADMINISTRATION OF CIVIL AND CRIMINAL JUSTICE (FEDERAL JUDICIAL CENTER, LONG RANGE PLANNING SERIES, PUB. NO. 2, 1994) (outlining the debate surrounding the federalization of state civil claims and criminal prosecutions).

<sup>23</sup> See Richman & Reynolds, *supra* note 1, at 277, 295-97; see also *supra* note 14 (providing sources which advocate thoughtful analysis of the appeal as of right). *But cf. infra* notes 24, 31 (suggesting that transformation has not amended the statutory right of appeal).

<sup>24</sup> See *supra* notes 6-8 and accompanying text. The writers argue that the transformation has amended the statutory appeal as of right. See Richman & Reynolds, *supra* note 1, at 293. However, appellate resolution without the full panoply of procedures is not tantamount to revision. See DANIEL J. MEADOR, CRIMINAL APPEALS: ENGLISH PRACTICES AND AMERICAN REFORMS (1973); see also *infra* note 31 (detailing arguments for and against the view that the statutory right of appeal is amended). See generally DANIEL J. MEADOR, APPELLATE COURTS STAFF AND PROCESS IN THE CRISIS OF VOLUME 168-71 (1974) (comparing "appeals as of right" in "discretionary courts" and in "obligatory-review courts"); Dalton, *supra* note 14 (assessing the rationales for and the role of appeal as of right).

<sup>25</sup> See, e.g., Breyer, *supra* note 22, at 32-33; Donald P. Lay, *Reconciling Tradition With Reality: The Expedited Appeal*, 23 UCLA L. REV. 419 (1976). Examples of measures that prescribe differential treatment are in *supra* note 18; *infra* note 30.

which judges now address less thoroughly.<sup>26</sup> These particular cases include (i) a number of social security appeals that raise clearly-settled questions of law or that involve only factual issues which received multiple levels of review and (ii) numerous pro se cases that parties might not have filed had counsel been consulted.<sup>27</sup>

Less agreement also attends the authors' assignment to the federal bench of major responsibility for the transformation. This attribution seems unwarranted because several sources, most notably Congress, have created, or could have substantially affected, important dimensions of that modification, while the appellate judiciary has apparently played a narrower role than Richman and Reynolds suggest.

Senators and representatives actually contributed to significant aspects of the transformation and had considerable responsibility for, or might have influenced, other features. A valuable example is the nearly continuous passage of statutes that have expanded federal district court criminal and civil jurisdiction since the 1960s. This legislative activity has directly contributed to and propelled critical changes, namely rising dockets.<sup>28</sup> Congress failed to stop or temper the development by authorizing, for instance, sufficient, additional judges to treat the increased appeals which resulted.<sup>29</sup>

Senators and representatives even had some responsibility for local circuit procedures that limited appellate review because Congress did not modify several amendments to the Federal Rules of Appellate Procedure which facilitated the local requirements' adoption.<sup>30</sup> In-

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<sup>26</sup> Full review, therefore, may represent a less than optimal use of scarce resources of the appellate system, lawyers, and litigants. *But see* Richman & Reynolds, *supra* note 1, at 304-07 (criticizing the argument that additional judgeships are too expensive).

<sup>27</sup> According many appeals greater attention may also entail certain disadvantages, such as imposing more burdensome duties on court staff. *See infra* notes 54-57 and accompanying text. The ideas in this paragraph seem to warrant more refined analysis of cases' differential needs and solutions thereto. *See infra* notes 89-101 and accompanying text.

<sup>28</sup> *See, e.g.*, Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified at 42 U.S.C. §§ 13701-14223 (1995)); Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101-12213 (1994)). *See generally* Carolyn Dineen King, *A Matter of Conscience*, 28 HOUS. L. REV. 955, 956-57 (1991) (identifying passage of legislation beginning in the 1960s as cause of increased caseload); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 514, 518, 526 (1986) (same). Some statutes specifically authorize direct appeals to the appellate courts of agency decisions. *See, e.g.*, 30 U.S.C. § 1276 (1994); 42 U.S.C. § 7607(b) (1994).

<sup>29</sup> Since 1978, Congress has passed several acts authorizing many new judgeships. *See* Act of Oct. 20, 1978, Pub. L. No. 95-486, 92 Stat. 1629 (1978); Starr, *supra* note 13, at 2. *See generally* WILLIAM P. McLAUCHLAN, FEDERAL COURT CASELOADS 107 (1984) (concluding that the trend of adding judges reduced caseload per judge or per panel, but only delayed what appeared to be nearly inexorable rise in appeals pursued). However, the number proved inadequate to treat the increasing appeals. *Id.*

<sup>30</sup> *See, e.g.*, 5TH CIR. R. 34.2, 47.5, 47.6; 6TH CIR. R. 24; 9TH CIR. R. 34, 36; 10TH CIR. R. 36.1, 36.3 and FED. R. APP. P. 33's 1994 amendment and FED. R. APP. P. 34's 1979 amend-



deed, few senators or representatives have expressly acknowledged that mounting caseloads and ameliorative measures aimed at the dockets might have revised statutory appeal as of right.<sup>31</sup>

The appeals court bench may correspondingly have played a less important role in the transformation than Richman and Reynolds claim. For example, numerous judges, including Justice Ruth Bader Ginsburg and Judge Patricia McGowan Wald, have voiced clear concern about the very changes—shrinking appellate access and the judiciary's increasing bureaucratization—which Richman and Reynolds decry and have suggested responses that resemble the authors' proposed remedy.<sup>32</sup> The Ninth Circuit and the Judicial Conference are seeking ten additional positions for the court, while the Conference sent to Congress last year draft legislation that would authorize twenty temporary appellate judgeships.<sup>33</sup> A few members of the bench have specifically called for enlarging their numbers, and Judge Reinhardt even importuned senators and representatives in 1993 to double the circuit judiciary's size, a recommendation which apparently prefigured the writers' prescription.<sup>34</sup>

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ment. Circuit judges were primarily responsible for adopting local circuit rules, but Congress now monitors proposals to amend the national appellate rules rather closely. See 28 U.S.C. §§ 2071-77 (1994). See generally Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1018-20 (1982) (tracing the history of the Rules Enabling Act which prescribed the national rule revision process and suggesting increased tendency of Congress to intervene in process). Congress even had some responsibility for local circuit rules which it could have abrogated; however, Congress had insufficient time to do so and assigned primary responsibility for review and abrogation to judicial bodies. See 28 U.S.C. § 2071(a), (c)(2) (1994).

<sup>31</sup> Some judges and writers find that the caseloads and measures have changed appeal as of right. See, e.g., *supra* notes 18-20 and accompanying text; *infra* note 32 and accompanying text. But cf. *supra* note 24 (suggesting appellate resolution without full procedures is not tantamount to revising statutory appeal of right). Congress's delegation to the judiciary of responsibility for defining finality and interlocutory appeals through rule revision may suggest its views on this issue. See 28 U.S.C. § 1292 (1994). Numerous individuals, such as prisoners seeking to vindicate civil rights, whom Congress intended to benefit by recognizing new civil causes of action, ironically are the parties whose access the transformation has apparently limited. See *supra* notes 13, 24. See generally Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270 (1989) (concluding that the enforcement by many courts of the Federal Rules has adversely affected public interest litigants).

<sup>32</sup> See Ruth Bader Ginsburg, *Reflections on the Independence, Good Behavior, and Workload of Federal Judges*, 55 U. COLO. L. REV. 1 (1983); Alvin B. Rubin, *Views From the Lower Court*, 23 UCLA L. REV. 448 (1976); Wald, *supra* note 18; see also *supra* note 20 and accompanying text (discussing judges' acknowledgement of the increased bureaucratization of appeals courts and the risks posed). I realize that I am treating descriptions by invoking prescriptions; however, they are sufficiently important to warrant inclusion here.

<sup>33</sup> See Judicial Conference of the U.S., *Judicial Conference Acts on Cameras in Court* (Mar. 12, 1996); Tobias, *supra* note 3, at 1411; see also S. REP. NO. 197, *supra* note 3, at 6 (arguing that the Ninth Circuit's request for ten more judgeships renders the proposal to split the circuit especially urgent).

<sup>34</sup> See Stephen Reinhardt, *A Plea to Save the Federal Courts: Too Few Judges, Too Many Cases*, A.B.A. J., Jan. 1993, at 52-54. But see Jon O. Newman, *1,000 Judges—The Limit For An*

The bench did contribute to certain dimensions of the transformation, although district, not appellate, judges deserve greater credit. For instance, many additional appeals resulted from broad construction of federal constitutional, statutory, and procedural provisions in areas such as habeas corpus, civil and prisoner rights, and criminal law.<sup>35</sup> Trial judges issued numerous interpretations, some of which were fact-bound, and thus contributed significantly to the development.

The district courts concomitantly had substantial responsibility for the dramatic rise in trial court litigation and corresponding appeals that the Federal Rules of Civil Procedure encouraged.<sup>36</sup> District judges contributed greatly to the liberal regime, which pervaded the original 1938 Rules and continued in most subsequent amendments, and to those provisions' flexible, pragmatic application.<sup>37</sup> The Rules, as written and enforced, enhanced plaintiffs' ability to commence cases, conduct full discovery, and reach the merits, while facilitating the pursuit of numerous trial court actions and consequent appellate filings.<sup>38</sup> Finally, the appellate courts had much responsibility for the adoption and implementation of measures which limited access for the increasing numbers of appeals that arose.<sup>39</sup>

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*Effective Federal Judiciary*, 76 JUDICATURE 187, 188 (1993) (arguing against expanding the federal judiciary); Gerald B. Tjoflat, *More Judges, Less Justice*, A.B.A. J., July 1993, at 70 (same). See generally GORDON BERMANT ET AL., FEDERAL JUDICIAL CENTER, IMPOSING A MORATORIUM ON THE NUMBER OF FEDERAL JUDGES: AN ANALYSIS OF ARGUMENTS AND IMPLICATIONS (1993) (summarizing arguments for and against capping the number of federal district and circuit judgeships); King, *supra* note 28, at 958-60 (discussing why many judges oppose increasing the number of judgeships).

<sup>35</sup> See, e.g., Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 5-7 (1984); Resnik, *supra* note 28, at 516-17; see also *supra* note 28 and accompanying text (suggesting Congress passed statutes which contributed). The judiciary, which broadly read those provisions, can arguably reconsider and construe restrictively some of them because circumstances have changed or to promote fairness or efficiency.

<sup>36</sup> See, e.g., Resnik, *supra* note 28, at 498-507; Tobias, *supra* note 31, at 271-96; Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 646-66.

<sup>37</sup> See, e.g., Miller, *supra* note 35, at 8-9; Tobias, *supra* note 31, at 271-96; see also Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. 1589, 1592-98, 1606-17 (1994) (finding that the 1988 and 1993 revisions partially altered the regime).

<sup>38</sup> See, e.g., Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439-40 (1986); Miller, *supra* note 35, at 8-9; Maurice Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 137 U. PA. L. REV. 2197, 2202-07 (1989).

<sup>39</sup> See *supra* notes 18, 30 and accompanying text. Many sources other than judges contributed to the transformation. A few were as general as the changing nature of legal practice. See Miller, *supra* note 35; Resnik, *supra* note 28, at 515-39. A more specific factor was the rise of litigators. See Miller, *supra* note 35, at 3-4. Another was parties' increasing willingness to appeal. See CAROL KRAFFKA ET AL., FEDERAL JUDICIAL CENTER, STALKING THE INCREASE IN THE RATE OF FEDERAL CIVIL APPEALS (1995); Campbell, *supra* note 4, at 293-96; Yeazell, *supra* note 36, at 639-40. A few, such as the widespread use of duplicating equipment, may initially have seemed rather innocuous. See Stephen N. Subrin, *How Equity Con-*

Less consensus accompanies certain criticisms of the judiciary by Richman and Reynolds. Illustrative are reasons, which seem more defensible than the authors indicate, why judges oppose enlarging the bench. Many judges and federal courts observers believe that expansion will additionally fracture the fragmented federal law, will impede the judiciary's federalizing efforts to harmonize the Constitution and national policies with state and local concerns,<sup>40</sup> and will undermine collegiality, a value ostensibly promoted by having few judges on circuits.<sup>41</sup> The judiciary's elitism also appears less important to the transformation than the writers claim. Most appellate judges are conscientious, dedicated jurists who discharge the burdensome responsibilities to resolve substantial caseloads promptly, inexpensively, and fairly. The perceived need for such disposition, rather than elitism, may explain the decision to spend greater resources on appeals which seem to require more treatment.<sup>42</sup>

Some of the authors' assertions appear controversial because relatively little empirical data seem to support their contentions. The quintessential example is the writers' central assumption that many cases pursued by appellants with limited economic or political power receive inadequate attention.<sup>43</sup> The authors' surmise is problematic because compelling empirical information should support change as significant as that which the writers champion.

Some of the authors' assumptions actually appear counterintuitive. For instance, it seems more plausible that prisoners, who have

*quered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 912 (1987). See generally THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE (A. Leo Levin & Russell R. Wheeler eds., 1979) (examining numerous problems that contributed to rising caseloads and overburdened judicial system); Miller, *supra* note 35 (explaining how the rise in litigation resulted from "changes in the character and makeup of the legal profession;" for example, the prevalence of word processors).

<sup>40</sup> For analysis of fragmentation, see Tjoflat, *supra* note 34, at 71-73; Tobias, *supra* note 3, at 1371. For analysis of federalization, see CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 10-13 (5th ed. 1994); John Minor Wisdom, *Requiem for a Great Court*, 26 LOY. L. REV. 787, 788 (1980).

<sup>41</sup> "Collegiality" is controversial and resists felicitous definition, particularly given modern realities whereby many appellate judges work on cases out of their own chambers and communicate principally through written e-mail or by facsimile transmission. It is also unclear that the bench's expansion would reduce collegiality and, even if it did, that collegiality improves appellate resolution. For analysis of collegiality, see *The Ninth Circuit Split: Hearing on S. 956 Before the Senate Committee on the Judiciary*, 104th Cong., 1st Sess. 4 (1995) (statement of Diarmuid F. O'Scannlain, U.S. Circuit Judge for the Ninth Circuit) [hereinafter O'Scannlain Statement]; S. REP. NO. 197, *supra* note 3, at 10; see also COFFIN, *supra* note 10, at 213-29; Tjoflat, *supra* note 34, at 70.

<sup>42</sup> See Newman, *supra* note 34; Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 B.Y.U. L. REV. 3, 5-6, 37-47. See generally Howard T. Markey, *On the Present Deterioration of the Federal Appellate Process: Never Another Learned Hand*, 33 S.D. L. REV. 371 (1988) (discussing how judges feel compelled to delegate much responsibility to staff members in response to the "caseload crisis").

<sup>43</sup> See Richman & Reynolds, *supra* note 1, at 275-76.

much to gain and nothing to lose, would evaluate the possibility of appeal less rigorously than paying parties who typically undertake cost-benefit analyses. Indeed, a 1995 Federal Judicial Center study found that district judges grant a tiny percentage of prisoner petitions and dismiss most prisoner cases on procedural grounds, and the "high rate of appeal from [those] terminations suggests that many of these appeals raise issues that are untimely or addressed by well-established legal precedent."<sup>44</sup> It appears equally probable that pro se litigants would more readily appeal cases which lawyers, drawing on legal training and objectivity, would consider meritless. If these ideas are correct, they explain as well as the writers' surmise why prisoner and pro se appeals receive summary treatment much more often than securities cases. Some evidence even conflicts with the authors' assumption. For example, a brief search reveals numerous unpublished opinions in which panels, absent oral argument, reversed district courts that too peremptorily dismissed complaints filed by prisoners or unrepresented parties.<sup>45</sup> There are also a number of unpublished decisions in which appeals courts scrutinized, but ultimately affirmed, claims that were frivolous.<sup>46</sup> This material may lack strong empirical support; however, the many cases which seem to contradict the writers' surmise are troubling. Repetition of an assumption should not be a substitute for empirical evidence. In the final analysis, the authors' major hypothesis requires greater empirical substantiation.

In sum, Richman and Reynolds have thoroughly examined the transformation in the appellate courts and its ramifications. This assessment should alert the Congress, the federal judiciary, the legal community, and the public to what has happened so that they may

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<sup>44</sup> KRAFKA ET AL., *supra* note 39, at 18. The authors cite VICTOR E. FLANGO, HABEAS CORPUS IN STATE AND FEDERAL COURTS 61-65 (1994) and ROGER A. HANSON & HENRY W.K. DALEY, CHALLENGING THE CONDITIONS OF PRISONS AND JAILS: A REPORT ON SECTION 1983 LITIGATION 36 (BUREAU OF JUSTICE STATISTICS 1995) for the district court findings, KRAFKA ET AL., *supra*, at 18 n.8, and were "aware of no similar studies of appeals in prisoner cases," *id.* at 18. See also Martha J. Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11, 27-28 & n.91 (affording reasons for increase in criminal and habeas appeals).

<sup>45</sup> See, e.g., Allen v. Figueroa, No. 93-15848, 1995 WL 314704 (9th Cir. May 23, 1995); Deas v. Deas, No. 95-15023, 1995 WL 139235 (9th Cir. Mar. 29, 1995); Wood v. Avenenti, No. 93-15946, 1995 WL 128224 (9th Cir. Mar. 22, 1995); Hines v. Brown, No. 94-15721, 1995 WL 72371 (9th Cir. Feb. 22, 1995); Wolde-Giorgis v. Arizona State DOT, No. 94-15215, 1995 WL 11085 (9th Cir. Jan. 10, 1995). It bears emphasizing that this search involved one appeals court in a single year. See *infra* notes 89-101 and accompanying text (suggesting need for refined sense of exact nature of discrepancies in appellate justice that authors found and other issues they raised, which collection, analysis, and synthesis of empirical data by study commission might afford).

<sup>46</sup> See, e.g., Menefield v. Helsel, No. 94-16036, 1996 WL 109404 (9th Cir. Mar. 12, 1996); Jenks v. Hull, No. 94-15268, 1995 WL 574518 (9th Cir. Sept. 28, 1995); see also Cato v. United States, Nos. 94-17102, 94-17104, 70 F.3d 1103 (9th Cir. Dec. 4, 1995); Trimble v. City of Santa Rosa, No. 94-15567, 49 F.3d 583 (9th Cir. Mar. 9, 1995).

respond. The writers have described important modifications in the appeals courts, and considerable agreement attends most aspects of their account.

## II

### PRESCRIPTION

#### A. Commentary on the Authors' Prescription

Much more complex, and even controversial, is how best to address the transformation and its implications. The authors' solution of creating numerous new judgeships would address certain phenomena which are attributable to mounting caseloads. However, appellate docket growth derives from multiple sources, and some have responsibility which equals or surpasses that of the federal judiciary.<sup>47</sup> Moreover, the writers' remedy might not be the preferable way to resolve a number of problems ascribed to multiplying caseloads and numerous additional difficulties which the appeals courts confront. Most significantly, these complications constitute a polycentric problem that apparently warrants application of a finely-calibrated mix of many potential solutions, only one of which is the bench's expansion.<sup>48</sup> The authors' approach by itself could concomitantly create disadvantages, might be less effective than a number of other measures, and may be politically unrealistic.

First, implementation of the authors' prescription could have detrimental consequences, although it might be responsive to the transformation's impact that the writers consider most troubling: discrepancies in the appellate access which litigants with disparate resources or power receive. Increases in the judiciary of the size that the authors recommend would impose both predictable and unforeseeable disadvantages. For example, enlarging the bench would reduce the collegiality offered by having rather few judges on appeals courts and, therefore, limit its purported benefit, expediting the resolution of appeals.<sup>49</sup>

The writers' proposed remedy might also require division of the twelve regional circuits and the establishment of approximately eight new appellate courts.<sup>50</sup> This could further splinter the already balkan-

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<sup>47</sup> See, e.g., *supra* notes 28-31 and accompanying text.

<sup>48</sup> It is important to emphasize that the problems posed by docket growth and other difficulties facing the circuits are polycentric. This attribute complicates identification of efficacious solutions and counsels against single or narrow solutions, such as the judiciary's expansion, because they will be incomplete and could impose disadvantages. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-404 (1978); Yeazell, *supra* note 36, at 676-78; *infra* notes 94, 96 and accompanying text.

<sup>49</sup> See *supra* notes 12, 41 and accompanying text.

<sup>50</sup> I premise this on the increase in judges that the authors suggest. See Richman & Reynolds, *supra* note 1, at 297-98 & n.126; see also BAKER, *supra* note 5, at 239-42 (exploring

ized federal law and increase the potential for multiple interpretations of provisions in the Constitution, congressional statutes, and procedural requirements. Moreover, intercircuit conflicts would be more likely, increasing the demands on the Supreme Court.<sup>51</sup> The greater uncertainty and apparently enhanced opportunities for securing favorable rulings thus engendered might well encourage more district court litigation, additional appeals, and forum shopping.<sup>52</sup>

Expanding the number of appeals courts would correspondingly complicate the bench's efforts to reconcile the Constitution and national concerns with state and local policies.<sup>53</sup> The creation of many appellate judgeships and new appeals courts would also entail important, one-time expenses associated with appointing the judges, as well as certain ongoing costs.<sup>54</sup> Substantially enlarging the judiciary would invariably require more complex structures, and these in turn would impair the pursuit of appeals by litigants who have little power or money.

According increased attention to appeals of parties with limited political or economic power—the major reason why the authors propose that Congress approve new judgeships—could have adverse effects.<sup>55</sup> Most significantly, providing such treatment might not enhance decisionmaking generally or improve results in particular cases and, thus, could be unnecessary and waste scarce resources.<sup>56</sup>

similar numbers and circuit division). Combining the existing circuits into "jumbo" courts is a possibility. See J. Clifford Wallace, *The Case for Large Federal Courts of Appeals*, 77 JUDICATURE 288 (1994); Joseph F. Weis, Jr., *Disconnecting the Overloaded Circuits—A Plug for a Unified Court of Appeals*, 39 ST. LOUIS U. L.J. 455 (1995).

<sup>51</sup> See Tobias, *supra* note 3, at 1369-71; O'Scannlain Statement, *supra* note 41, at 5-6.

<sup>52</sup> See Tjoflat, *supra* note 34, at 71; S. 956 Position Paper, *supra* note 19, at 2. More appeals courts could differently construe procedures in the Federal Rules of Appellate, Civil, and Criminal Procedure and in Title 28 of the United States Code and could adopt diverse local appellate rules. See Gregory C. Sisk, *The Balkanization of Appellate Justice: The Proliferation of Local Rules in the Federal Circuits*, 67 U. COLO. L. REV. (forthcoming Fall 1996). See also *supra* note 28. Trial and appellate forum shopping might result. See generally Thomas O. McGarity, *Multi-Party Forum Shopping for Appellate Review of Administrative Action*, 129 U. PA. L. REV. 302 (1980) (arguing that the "race to the courthouse" method of appellate forum selection is inappropriate).

<sup>53</sup> See *supra* note 40 and accompanying text. As appeals courts encompass fewer states, their shrinking size may well reduce the breadth of experience and perspective that the nation currently expects of the federal appellate bench and, therefore, erode another important purpose of the federal courts—providing an impartial forum for out-of-state litigants.

<sup>54</sup> See Richman & Reynolds, *supra* note 1, at 304-07. Illustrative are annual operating expenses for staff, such as judges' law clerks, and costs of creating new clerk of court and circuit executive offices, of other support staff, and of constructing or remodeling courthouses. See S. REP. NO. 197, *supra* note 3, at 24-25; S. 956 Position Paper, *supra* note 19, at 4; see also *infra* note 59 (discussing the creation of a new fourth tier and the costs thereof).

<sup>55</sup> I already mentioned several such effects; however, they are sufficiently important to warrant treatment here. See *supra* notes 24-27 and accompanying text.

<sup>56</sup> See *supra* note 26 and accompanying text; see also *supra* notes 18, 25, 30 and accompanying text (finding that judges apparently found more attention so unwarranted that

For example, little purpose may be served by holding oral argument in the fifth social security appeal which raises a legal issue identical to one decided in four earlier cases, or in pro se appeals that involve only frivolous legal contentions. Affording large numbers of cases greater attention could also impose direct economic expenses. For instance, complete appellate review would increase the workloads of circuit staff in the offices of the clerks of court. Those personnel would have to treat numerous appeals through additional stages, in which the employees, lawyers, and litigants would participate in more activities, including oral argument, to final disposition.<sup>57</sup>

Some ideas that Richman and Reynolds espouse are responsive to certain questions which I raise. For example, the writers find the importance of collegiality overstated because minimal actual collegiality exists today even on appellate courts with relatively few judges, and the collegiality that remains offers little true benefit.<sup>58</sup> The authors also propose the establishment of another tier of courts, the creation of which would probably speak to additional concerns, such as the potential for increased fragmentation of federal law.<sup>59</sup>

A second, related reason why the writers' recommendation to enlarge the judiciary might not be the best approach is that many existing remedies alone, but especially in combination, appear to treat more effectively the problems ascribed to docket growth and numerous other complications which the appellate courts face. These solutions would specifically address a number of difficulties attributed to rising caseloads as well as, and resolve additional problems that the appeals courts confront better than, expanding the bench.

One effective measure, which might be particularly responsive to discrepancies in appellate access identified by the authors, would be

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they codified differential treatment in local rules). More attention would also multiply the quantity of precedent and might increase inconsistency and appeals' costs.

<sup>57</sup> Some savings might be realized because other personnel, such as staff attorneys, would have fewer responsibilities to review cases, such as prisoner appeals, which formerly received summary resolution. See also *infra* notes 69-71 and accompanying text (suggesting that Congress is unlikely to support expansion of the judiciary); *infra* note 91 (recognizing that the important value of litigant satisfaction may be lost).

<sup>58</sup> See Richman & Reynolds, *supra* note 1, at 323-25; see also Starr, *supra* note 13, at 2 (discussing wane of 7th Circuit collegiality); Carl Tobias, *The D.C. Circuit as a National Court*, 48 U. MIAMI L. REV. 159, 169-70, 181 (1993) (same as to D.C. Circuit); Stephen L. Wasby, *Internal Communication in the Eighth Circuit Court of Appeals*, 58 WASH. U. L.Q. 583 (1980) (same as to 8th Circuit); *supra* notes 10, 12, 41, 49 and accompanying text (discussing collegiality).

<sup>59</sup> See BAKER, *supra* note 5, at 242-61; Richman & Reynolds, *supra* note 1, at 307-08. The tier's creation could increase cost and delay, even in cases not receiving four levels of review, disadvantage litigants with little resources or power, increase intracircuit inconsistency, and prove less realistic than the appellate bench's expansion. See Baker, *supra* note 3, at 954; Tobias, *supra* note 3, at 1397-98. See also *supra* notes 40, 51 and accompanying text.

to place greater reliance on judges and courts with limited, subject matter jurisdiction.<sup>60</sup> For instance, these judges or tribunals might decide expeditiously, inexpensively, and fairly appeals of social security cases and challenges involving similar government entitlement programs. More particularly, the courts and judges could promote equity by increasing access, and they would probably possess or develop substantive and procedural expertise that might foster prompter, cheaper, or fairer resolutions.<sup>61</sup> These and somewhat analogous mechanisms, which numerous appellate courts have instituted and Congress has recently passed, might facilitate the similar disposition of many prisoner appeals that constitute a significant percentage of most appeals courts' dockets.<sup>62</sup>

Another approach, which could also be responsive to the disparities identified by the writers, would be to provide legal representation for the many pro se cases that might benefit from such assistance. Several sources, including the Legal Services Corporation and law school clinical programs, might supply this representation, which should facilitate pro se litigants' pursuit of appeals by more clearly articulating their claims.<sup>63</sup>

Professor Thomas E. Baker, who has comprehensively assessed the appellate system, recently developed a third possibility.<sup>64</sup> He suggested that Congress create twenty appeals courts, comprising nine judges each, and place responsibility for error correction under Rules

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<sup>60</sup> See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 17, at 120-21; Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 604-12 (1969); Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603 (1989).

<sup>61</sup> The authors approve of these courts and judges but caution that they might be narrow and subject to "capture." Richman & Reynolds, *supra* note 1, at 319-20 & n.224; see also S. Jay Plager, *The United States Courts of Appeals, The Federal Circuit, and the Non-Regional Subject Matter Concept: Reflections on the Search for a Model*, 39 AM. U. L. REV. 853 (1990) (analyzing subject matter courts and the Federal Circuit). The courts could also institutionalize resource-based inequities and prevent parties from vindicating rights in a public forum before an Article III Judge. See *infra* note 91 and accompanying text.

<sup>62</sup> See, e.g., Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C.A. § 2241 (1996)); NINTH CIRCUIT JUDICIAL COUNCIL, 1994 NINTH CIRCUIT CAPITAL PUNISHMENT HANDBOOK (1994); see also *Felker v. Turpin*, 116 S. Ct. 2333 (upholding constitutionality of provision of Act governing habeas corpus), *reh'g denied*, 117 S. Ct. 25 (1996); *Caseload Increases Throughout Judiciary*, THIRD BRANCH, Mar. 1996, at 1, 2 (stating that 40% of 1995 appeals nationally were pro se and that most were prisoner petitions); *supra* notes 44-46 and accompanying text (discussing prisoner appeals); *infra* note 87 (suggesting reliance on other countries' experiences with specialized courts and judges).

<sup>63</sup> These ideas are here for purposes of discussion and may be as politically unrealistic today as the authors' suggestion. See *infra* notes 66-72 and accompanying text.

<sup>64</sup> Telephone conversation with Professor Thomas E. Baker, Texas Tech University School of Law (Mar. 15, 1996) [hereinafter Baker Conversation]; see also BAKER, *supra* note 5 (assessing the appellate system).



59 and 60 of the Federal Rules of Civil Procedure in three-judge district courts. From adverse determinations of these courts, parties could then file certiorari petitions with three-judge appellate panels, and, thus, capitalize on the greater judicial capacity in the district courts.<sup>65</sup>

In short, many potential solutions that appear equally effective as enlarging the judiciary presently exist. Despite the availability of numerous remedies, it is difficult to predict all of the benefits and disadvantages of applying specific solutions, much less how multiple techniques would operate together, and, therefore, precisely what mix of options would be most effective.

A third significant reason why expanding the bench might not be preferable is that it is politically unrealistic.<sup>66</sup> The ongoing controversy over splitting the Ninth Circuit and considerable activity of the 104th Congress illustrate that senators and representatives are unlikely to authorize more judges, especially on the order of magnitude recommended by Richman and Reynolds. For example, sponsors of the recent proposal to bifurcate the Ninth Circuit have not broached the prospect of augmenting the court's membership, although this possibility would clearly facilitate the measure's passage. No senator or representative has introduced a bill which would create additional judgeships for the appeals court, even though Senator Slade Gorton (R-Wash.), the foremost advocate of dividing the circuit, acknowledged that the court's caseload would have justified ten more judges in 1990,<sup>67</sup> the Ninth Circuit Judicial Council requested those positions during 1992, and the Judicial Conference asked Congress to authorize ten additional members in 1993.<sup>68</sup>

Factors which implicate the Ninth Circuit less expressly also indicate little legislative support for enlarging the judiciary. For instance, a Congress that has expended enormous energy debating the future of certain government entitlements, which many parties with limited

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<sup>65</sup> See Newman, *supra* note 34, at 187 n.1 (noting that "There are currently 649 district judges and 179 circuit judges . . ."). This idea efficiently and realistically treats deficient judicial resources and would foster collegiality, but it could further fragment the fractured federal law and erode courts' federalizing responsibility. See *supra* note 40 and accompanying text. For a thorough catalog of solutions, see BAKER, *supra* note 5, at 106-279. See also REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 17, at 116-24 (analyzing similar proposals); Tobias, *supra* note 3, at 1396-1404 (listing structural alternatives to the current federal court system).

<sup>66</sup> This alone would not be a compelling reason to criticize a suggested solution to the polycentric problem. Even if Congress eschews the authors' proposal, it could provoke discussion and lead to adoption of an effective remedy. My concern is that proposed solutions have a realistic prospect for being implemented and resolving the problem.

<sup>67</sup> *Ninth Circuit Court of Appeals Reorganization Act of 1989: Hearing on S. 948 Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 19 (1990) [hereinafter *Hearing on S. 948*] (position paper of Sen. Slade Gorton).

<sup>68</sup> See *supra* note 33 and accompanying text.

economic and political power seek to secure or protect on appeal, would probably not approve more judges who would resolve numerous cases involving those entitlements.<sup>69</sup>

Fiscal constraints also make the authorization of substantial numbers of additional judgeships politically unrealistic.<sup>70</sup> Senators and representatives who have devoted nearly an entire session to budget-cutting as a matter of principle might not approve many new judgeships, much less establish an entirely new fourth tier of courts, even if they deemed either action advisable on the merits. Congress has evinced growing reluctance to fund the Judicial Branch and has increasingly scrutinized its appropriations requests.<sup>71</sup>

Assuming that senators and representatives were more amenable than they now are to the bench's expansion, judicial opposition to this option makes its realization even more improbable. Congress appears unlikely to enlarge the judiciary in the face of resistance from numerous members of a coordinate branch of the federal government who are uniquely situated to predict the ramifications of, and could be significantly affected by, that action.<sup>72</sup>

Many ideas above—especially the adverse impacts which might attend implementation of the authors' recommendation and my selective assessment of comparatively promising solutions—suggest that the polycentric problem posed by mounting appellate dockets and numerous other difficulties which circuits experience would probably respond best to a sophisticated mix of the available measures. Although expanding the bench is one alternative, a number of the other options individually, and particularly in concert, seem more promising. Notwithstanding the existence of many potential remedies, it remains unclear exactly what combination of solutions would be most effective. However, the study proposed below could identify that mix which would be preferable.

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<sup>69</sup> Similar ideas apply to litigation which prisoners pursue. See *supra* notes 61-62 and accompanying text. The Republican Party, which dominates both houses in the 104th Congress, also would not create many judicial posts that a Democratic president would fill.

<sup>70</sup> See *supra* notes 54-57 and accompanying text.

<sup>71</sup> See Mark Hansen, *Court Spending Under Review*, A.B.A. J., Feb. 1996, at 24; William H. Rehnquist, *Year-End Report on the Judiciary*, reprinted in *Judiciary Makes Its Case in Chief*, LEGAL TIMES, Jan. 8, 1996, at 12. The controversy over the Ninth Circuit suggests that Congress is willing to fund the courts, but division's expense was so important that its proponents downplayed the costs. They also never proposed the creation of more judgeships. See *supra* notes 67-68 and accompanying text.

<sup>72</sup> This would implicate the delicate interbranch relationship. See Carl Tobias, *Judicial Discretion and the 1983 Amendments to the Federal Civil Rules*, 43 RUTGERS L. REV. 933, 961 (1991). Not all judges oppose increases. See, e.g., *supra* note 34 and accompanying text.

## B. National Study Commission

Numerous concepts examined already show that Congress should authorize a national commission to evaluate the appeals court system. Illustrative are the lack of consensus about the complications that are ascribed to multiplying caseloads, the many other problems that circuits confront, and the optimal combination of remedies for all of these difficulties.

Some factors which more directly implicate Congress suggest the advisability of creating an entity to study the appellate courts. Senators and representatives generally have insufficient time, interest, and expertise to collect, analyze, and synthesize those data that are relevant to the circuits. They also cannot identify the most urgent problems affecting the appeals courts, designate potential solutions, or delineate the best mix of options. The press of day-to-day legislative business simply precludes Congress from reflecting on the complex policy issues—involving constitutional theory, delicate interbranch relationships, and pragmatic politics—that are in question. Indeed, during 1989, Senator Mark Hatfield (R-Or.) astutely declared that “[f]or too long, the problems facing the Ninth Circuit, and the entire federal court system for that matter, have not received the thoughtful attention of Congress and [the] public discussion they deserve.”<sup>73</sup>

These concerns demonstrate the critical need, which a commission might satisfy, for senators and representatives to appreciate the compelling importance of the difficulties ascribed to mounting caseloads and other complications that appellate courts encounter. They also indicate the necessity for implementing effective remedies before the problems overwhelm the appeals courts or further compromise the appellate ideal. A commission, particularly by focusing the salient matters for legislative consideration, may assist senators and representatives in candidly confronting, rigorously struggling with, and carefully resolving the vexing issues of policy. These issues include such matters as whether numerous appeals require greater treatment and, if so, what that treatment should be.

More specifically, Congress is responsible for certain difficulties attributed to growing dockets and for additional complications that appellate courts experience, while senators and representatives could

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<sup>73</sup> See *Hearing on S. 948, supra* note 67, at 250 (statement of Senator Hatfield). Congress may deem the intermediate courts insufficiently important to warrant the type of attention needed to rectify the relevant problems. For example, Congress has yet to act on a study of the appellate system which it commissioned. See Federal Courts Study Act, Pub. L. No. 100-702, § 101, 102 Stat. 4642, 4644 (1988) (codified at 28 U.S.C. § 331 (1994)); see also FEDERAL JUDICIAL CENTER, STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS (1993) [hereinafter FEDERAL JUDICIAL CENTER].

address effectively these and other problems that the courts face. Symptomatic is Congress's virtually uninterrupted, three-decade expansion of civil and criminal jurisdiction, and its corresponding failure to treat the resulting surge in appeals by, for instance, increasing the number of judges.<sup>74</sup> Finally, Congress may respond more favorably to the findings and recommendations of a commission, especially if it carefully constituted this entity with significant legislative branch representation, articulated a clear charge, and allocated adequate resources for intensive research and the compilation of a thorough report.<sup>75</sup>

The numerous evaluations of the difficulties attributed to multiplying caseloads, of the additional complications that appeals courts encounter, and of the many remedies posited—some of which are mentioned in this essay and are integral to the Richman and Reynolds critique—indicate that they may have received sufficient examination and that Congress must now decide on a particular remedy.<sup>76</sup> Moreover, Richman and Reynolds pinpoint relatively specific problems and offer a comparatively particularized prescription.<sup>77</sup>

The considerable uncertainty about the phenomena ascribed to expanding appeals, numerous other difficulties confronting appellate courts, and the efficacy of the many available solutions, however, thwart current legislative efforts to resolve even the rather limited problems principally implicating docket growth. This lack of clarity complicates attempts to designate preferable remedies, while it suggests that there may be no single, superior solution, but that the best approach will probably be a complex, finely-tuned mix of numerous alternatives. The uncertainty concomitantly indicates that Congress cannot make decisions which are informed by current, accurate data and that it should therefore approve a new study.

Certain of the above factors, particularly the polycentric nature of the conundrum to be solved, also caution against presently applying the writers' prescription to the relatively narrow problems attributed to multiplying appeals. The judiciary's expansion is a single remedy among many, and mounting caseloads are only one of numerous applicable complications. Implementing the authors' solution, therefore, would necessarily leave untreated, and could even exacerbate, a

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<sup>74</sup> See *supra* notes 28-31 and accompanying text.

<sup>75</sup> Some of the above ideas, such as Congress's lack of time and need to focus, may seem to conflict; however, this emphasizes the critical need for a commission which could ameliorate important problems by focusing the critical issues for resolution.

<sup>76</sup> See Reinhardt, *supra* note 16, at 1512; see also BAKER, *supra* note 5, at 33-43 (summarizing ten recent studies of the growing federal appellate dockets); Thomas E. Baker & Denis J. Hauptly, *Taking Another Measure of the "Crisis of Volume" in the U.S. Courts of Appeals*, 51 WASH. & LEE L. REV. 97 (1994) (same, and suggesting an alternative analysis).

<sup>77</sup> See Richman & Reynolds, *supra* note 1, at 278-97, 339-40.

number of problems beyond the comparatively limited ones that they ascribe to growing dockets.

Finally, although evaluators have performed numerous studies, the analyses have varied greatly. For instance, a number of assessments have considered intracircuit inconsistency, but a Federal Judicial Center report on appellate structure characterized Professor Arthur Hellman's work as the "only systematic study of the operation of precedent in a large circuit."<sup>78</sup> Professor Baker also suggested that evaluators have overemphasized relevant difficulties while devoting insufficient attention to promising solutions.<sup>79</sup>

In fact, Professor Baker and the Federal Courts Study Committee, an independent, expert entity which recently analyzed the courts and developed recommendations for their improvement, proposed that a thorough assessment of the circuits be conducted to clarify imperfect understanding.<sup>80</sup> Moreover, Senator Howell Heflin (D-Ala.), who was a member of the Study Committee and served as chair of the Judiciary Subcommittee on Courts, stated at the September 1995 hearing on the Ninth Circuit's division that there "needs to be a careful evaluation of the entire circuit court structure and the administration of justice."<sup>81</sup>

The particulars of the analysis warrant rather brief treatment here because similar proposals have been explored elsewhere<sup>82</sup> as recently as the March 1996 Senate floor debate on the bill that would split the Ninth Circuit.<sup>83</sup> Congress should mandate a systematic, national assessment of the appellate courts which meticulously identifies the most troubling complications that rising appeals are causing and that the appellate courts are facing, the precise sources and effects of the problems, and the most efficacious combination of solutions.

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<sup>78</sup> FEDERAL JUDICIAL CENTER, *supra* note 73, at 94; *see also* Arthur D. Hellman, *Maintaining Consistency in the Law of the Large Circuit*, in *RESTRUCTURING JUSTICE* 55-90 (Arthur D. Hellman ed., 1990) (examining the consistency in the Ninth Circuit); Arthur D. Hellman, *Breaking the Banc: The Common-Law Process in the Large Appellate Court*, 23 *ARIZ. ST. L.J.* 915 (1991) (same); Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 *U. CHI. L. REV.* 541 (1989) (same).

<sup>79</sup> *See* Baker Conversation, *supra* note 64; *see also supra* note 76 (describing multiple studies of appellate court difficulties).

<sup>80</sup> *See* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 17, at 116-17; BAKER, *supra* note 5, at 292-300; *see also* Federal Courts Study Act, § 101, 102 Stat. at 4644.

<sup>81</sup> S. REP. NO. 197, *supra* note 3, at 19-20 (statement of Sen. Heflin).

<sup>82</sup> *See* BAKER, *supra* note 5, at 292-300; *see also* Thomas E. Baker, *A Proposal That Congress Create a Commission on Federal Court Structure*, 14 *MISS. C. L. REV.* 271 (1994) (suggesting a congressional study of appeals courts and their dockets); Tobias, *supra* note 3, at 1407-09 (same).

<sup>83</sup> The Senate passed a bill that would create a study commission. *See* 142 CONG. REC. S2544 (daily ed. Mar. 20, 1996); *see also* Senate Judiciary Committee Markup of S. 956 (Dec. 7, 1995) (statement of Sen. Feinstein) (offering similar proposal).

The relative success of the Federal Courts Study Committee and of the Hruska Commission,<sup>84</sup> which performed a similar evaluation during the early 1970s, shows that they could function as informative models. Senators and representatives should analyze those endeavors to avoid the difficulties that they encountered. For example, Congress probably assigned the Study Committee, consisting of individuals with many other important obligations, overly broad duties which were difficult to complete in a year and a half. These prior experiences indicate that senators and representatives must authorize a full-time professional staff, enunciate a clear charter, and provide the entity more than eighteen months to conclude its task.

Congress ought to establish a commission resembling the Federal Courts Study Committee or the Hruska Commission. This commission should include people, such as Senator Heflin or Ninth Circuit Judge Charles Wiggins, with prior experience serving on either the Federal Courts Study Committee or the Hruska Commission.<sup>85</sup> The commission must be comprised of many senators and representatives, most of whom serve on the respective Judiciary Committees, numerous federal judges, and some Executive Branch officials. It should probably encompass state government officials, practicing lawyers, legal academicians, and the public. The chair might be a senator or representative or a member of the federal bench, such as a Supreme Court Justice.

The two Houses of Congress and the federal judiciary should have substantial representation for several reasons. The service of many senators and representatives will be crucial because Congress must ultimately resolve the complex policy questions that are at issue, and will probably consider the determinations and suggestions of a commission in which numerous members of the Senate and House have participated more persuasive. The inclusion of many federal judges will be equally critical, as the decisions that Congress premises on the results of the study will substantially affect the federal bench. The judiciary must implement those policy choices and may more readily accept determinations based on the findings and suggestions of an entity which included numerous colleagues. Indeed, meaningful reform probably cannot be achieved until judges agree on a statement of the problem and reach consensus on a solution.

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<sup>84</sup> See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 17; Commission on Revision of the Federal Court Appellate System, *The Geographic Boundaries of the Several Judicial Circuits: Recommendations for Change*, reprinted in 62 F.R.D. 223 (1973) [hereinafter Hruska Commission].

<sup>85</sup> See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 17, at iii; Hruska Commission, *supra* note 84, at 224. See generally BAKER, *supra* note 5, at 296-99.

Congress should supply funding to support travel, hearings, and a commission staff of full-time professionals. A number of these employees must possess relevant expertise relating to the collection, evaluation, and synthesis of data which implicate demographic trends and future demands that the federal civil and criminal justice systems will experience. Some personnel should have more specific familiarity with the phenomena which are attributed to circuit caseload growth, including the differential appellate justice that the authors believe parties with limited resources or power receive, numerous additional difficulties confronting the federal courts, and the efficacy of a broad spectrum of possible remedies.

The entity's appointed members and its staff should be diverse, especially in terms of their perspectives on federal civil and criminal justice.<sup>86</sup> The committee must promote the greatest feasible participation in commission endeavors by interested persons and organizations. The study group should solicit the assistance of many public and private institutions, such as the Judiciary Committees, the Federal Judicial Center, the American Bar Association, and the National Center for State Courts,<sup>87</sup> which have much applicable expertise and material regarding the federal courts. The entity will obviously want to capitalize on the efforts of similar, earlier projects by, for instance, consulting the wealth of information which the Federal Courts Study Committee and the Hruska Commission compiled.<sup>88</sup>

Congress must ask that the entity identify the problems ascribed to mounting appellate dockets, other complications facing the federal courts, and the most effective solutions to these difficulties. The committee can best accomplish those tasks by initially remembering that all of the complications constitute a polycentric problem, and by assembling, assessing, and synthesizing the relevant empirical data.<sup>89</sup>

At the outset, the group should also attempt to answer certain normative questions, or at least to articulate clearly and comprehensively the normative assumptions which underlie its work. Most of

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<sup>86</sup> See BAKER, *supra* note 5, at 297; see also *supra* text accompanying note 16 (affording example of diversity).

<sup>87</sup> This list is obviously not exhaustive. For more suggestions, see BAKER, *supra* note 5, at 295-96. The entity should rely on states' experiences in reforming their appellate systems. See *id.* at 298. See generally COFFIN, *supra* note 10, at 43-65 (describing the relationship between state and federal courts). It must also consult other countries' experiences. See Martin Shapiro, *Appeal*, 14 LAW & SOC'Y REV. 629 (1980). See generally HENRY J. ABRAHAM, *THE JUDICIAL PROCESS* 288-300 (6th ed. 1993) (outlining the role of appellate review in several European countries).

<sup>88</sup> See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 17; Hruska Commission, *supra* note 84.

<sup>89</sup> The effort to marshal data will be an important departure point; however, the two-year study that some observers and I envision will probably not permit the commission to conduct its own empirical studies. See *supra* notes 83, 84, 88 and accompanying text.

these issues defy felicitous resolution and are relatively abstract. For example, what do "appeal as of right" and "just, speedy, and inexpensive" appellate disposition mean today?<sup>90</sup> Some questions have theoretical and practical dimensions. For example, how important is litigant satisfaction, and do parties differentiate between Article III and Article I judicial decisionmakers and, if so, how does this distinction affect the litigants' views of the federal courts?<sup>91</sup> A few issues are primarily practical. For instance, how much should the nation spend, and what amount will Congress appropriate, to reattain the Learned Hand tradition? These queries assume that reinstating that tradition would benefit parties who now receive less attention in the appellate system and could be harmonized with the prompt, cheap and equitable resolution of appeals.<sup>92</sup>

Typical of those fundamental inquiries that the entity might pursue is the effort to define "modern appellate decisionmaking." For example, how much time should judges devote to disposition by discussing cases in conferences and by deliberating or writing opinions alone, and is there an ideal mix? These types of questions implicate the continuing applicability of the normative values implicit in the Learned Hand model for all appeals, given the current and future realities of expanding dockets and contracting resources.<sup>93</sup>

When the commission specifically considers possible problems, it should rely upon the greatest quantity of applicable empirical material, while keeping in mind the above normative issues and the

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<sup>90</sup> See FED. R. APP. P. 3. "Appeal as of right" could be critical to the study. The commission might define the idea by asking whether the primary responsibilities of appeals courts today are correcting error, lawmaking, or promoting intracircuit uniformity. See *supra* note 15 and accompanying text. For discussion of these and related issues, see BAKER, *supra* note 5, at 14-30; Dalton, *supra* note 14, at 66, 69-86; Starr, *supra* note 13, at 2-7. "Just, speedy, and inexpensive" resolution of disputes is the ideal expressed in FED. R. CIV. P. 1, and should be equally applicable to appellate procedure.

<sup>91</sup> Although litigant satisfaction is a significant value, defining modern appeal as of right is more important to the commission's work. I include litigant satisfaction here primarily for illustrative purposes. See Dalton, *supra* note 14, at 66-68, 75-86; Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L.J. 1153, 1172-77.

<sup>92</sup> The queries also assume that the tradition's time-honored nature would warrant its reinstatement; however, historical custom does not necessarily support modern usage. I mention costs here primarily for illustrative purposes. The commission should consider the costs of promising alternatives after identifying them. See *infra* note 100.

<sup>93</sup> There are many other value-laden issues, such as whether increasing appeals and judges' geographic dispersion in most appellate courts mean that future collegiality will primarily involve judges and law clerks, and whether electronic communications might ameliorate these conditions. See *supra* notes 12, 41, 49, 58 and accompanying text. Questions, such as the textual one, may ultimately be left to judicial discretion, which standards or categorical requirements could guide. Others seem almost rhetorical. For discussion of these and related issues, see BAKER, *supra* note 5, at 14-30, 287-302; COFFIN, *supra* note 10, at 15-41, 301-25.



polycentric nature of the complication which it is confronting.<sup>94</sup> The committee might pinpoint the phenomena that can be ascribed to multiplying appellate caseloads, their sources, and the difficulties which they pose. The group also ought to ascertain whether judges have limited the appellate access afforded to parties with relatively little economic or political power and, if so, determine why, in what circumstances, and whether the discrepancies warrant treatment. Should the entity find disparities, it ought to determine, for instance, how often the provision of oral argument or the issuance of published opinions would have been important in social security appeals raising well-settled questions of law or in pro se cases presenting frivolous legal arguments. Because individual evaluators and independent, expert study commissions have thoroughly analyzed numerous relevant problems, the committee should focus its efforts on potential solutions.<sup>95</sup>

Assuming that the group will deem necessary some remediation of particular complications, such as discrepancies in appellate justice, it must employ a carefully-calibrated assessment. The entity should attempt to designate the best approach by invoking the largest amount of pertinent empirical information, and by remembering the applicable normative questions and the polycentric character of the problem which it is addressing.<sup>96</sup>

The commission ought to evaluate the efficacy of many, diverse remedies, quantitatively and qualitatively scrutinizing their benefits and detriments. Measures that simultaneously facilitate realization of the Learned Hand tradition and expeditious, inexpensive, and fair resolution of appeals should generally be considered promising.<sup>97</sup> When the committee analyzes the specific solution of expanding the bench, it should predict the substantive effects on cases which receive less attention and the impacts, such as additionally fragmenting fed-

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<sup>94</sup> See *supra* notes 48, 90-93 and accompanying text.

<sup>95</sup> See *supra* note 79 and accompanying text.

<sup>96</sup> Because a polycentric problem involves multiple sources that interact and contribute to the problem, it is important to identify and allow for the sources, their interactions, and respective contributions while isolating and accounting for other relevant variables when identifying efficacious solutions. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975) (analyzing polycentricity in administrative law context); Carl Tobias, *Rule 19 and the Public Rights Exception to Party Joinder*, 65 N.C. L. REV. 745, 769-92 (1987) (same in procedural context).

<sup>97</sup> This is rather general and assumes that the above questions implicating the Learned Hand tradition can be resolved. The commission might identify solutions by capitalizing on the efforts of appeals courts to satisfy both goals. See, e.g., 3RD CIR. R. 34.1(c) (authorizing panels to specify issues counsel must elaborate in oral argument); see also 4TH CIR. R. 34(b) (providing for submission of informal briefs and for appointment of counsel for indigent pro se litigants when further briefing and oral argument would be of assistance); Tobias, *supra* note 3, at 1363-64, 1405-06 (affording examples of circuit experimentation).

eral law and further eroding appeals courts' federalizing responsibility, on appellate structure.<sup>98</sup>

The group must correspondingly attempt to match possible remedies with the difficulties found. For instance, if the entity ascertains that a significant number of pro se litigants would benefit from the assistance of counsel, it could explore means of affording legal representation, such as greater pro bono contributions by the practicing bar or increases in the budget of the Legal Services Corporation.<sup>99</sup>

If, as now appears probable, the committee cannot identify one superior solution for rising appeals and other complications experienced by appellate courts, it should designate that mix of alternatives which would be most beneficial, especially by predicting how multiple remedies might work together. Finally, the group must compile those measures that seem most promising and develop criteria for their evaluation which Congress in turn can consider.<sup>100</sup>

After the Senate and the House of Representatives assess the commission's findings and recommendations, Congress must draft proposed legislation that embodies the best combination of approaches.<sup>101</sup> Once both Houses hold hearings on these possibilities, senators and representatives should be able to agree on solutions for the problems which are attributable to docket growth and additional difficulties that the appellate courts face.

#### CONCLUSION

Professors Richman and Reynolds have significantly enhanced understanding of the recent transformation in the appeals courts and its important implications. The authors describe how expanding caseloads led the appellate courts to limit procedural access, particularly for parties with minimal resources or power, and propose that Congress respond by dramatically enlarging the federal bench.

Because considerable uncertainty remains about all of the phenomena ascribed to increasing dockets and numerous other complications confronting the appeals courts, as well as the best solutions to these problems, senators and representatives should create a national commission to study the appellate system. That entity must evaluate the difficulties attributable to multiplying caseloads and additional

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<sup>98</sup> See *supra* notes 40, 53 and accompanying text.

<sup>99</sup> See *supra* note 63 and accompanying text.

<sup>100</sup> For example, the measures' cost will be an important parameter. See *supra* note 90 and accompanying text. See generally BAKER, *supra* note 5, at 296-97 (discussing the proposed Commission on Federal Court Structure).

<sup>101</sup> I rely substantially in this paragraph on BAKER, *supra* note 5, at 296-97. See generally FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT, A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 107-27 (1927) (suggesting that "designers of new judicial machinery meet the chief needs of their generation").

complications which the appeals courts face and suggest solutions to the problems identified. With this information, Congress should be able to prescribe remedies that the judiciary can implement effectively and that will address the major difficulties which the appellate courts experience.<sup>102</sup>

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<sup>102</sup> Time pressures precluded my thorough response to the response by Professors Reynolds and Richman to this piece. See William L. Reynolds & William M. Richman, *Studying Deck Chairs on the Titanic*, 81 CORNELL L. REV. 1290 (1996). I do offer one terse suggestion. Even were Congress and the federal judiciary substantially more amenable to increases in the appellate bench on the order of magnitude that Reynolds and Richman recommend, do we actually know with sufficient certainty the precise effects of radically expanding the bench's size? In other words, might the increase suggested be a Titanic mistake? Would doubling deck chairs on the Titanic have made any difference?