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Anastasoff, Unpublished Opinions, and Federal Appellate Justice

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ANASTASOFF, UNPUBLISHED OPINIONS, AND FEDERAL APPELLATE JUSTICE

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In *Anastasoff v. United States*,[1] a three-judge panel of the United States Court of Appeals for the Eighth Circuit recently invalidated the court's local rule of appellate procedure providing that "unpublished opinions are not precedent and parties generally should not cite them."[2] Eighth Circuit Judge Richard S. Arnold authored the opinion, holding that this local requirement violates Article III of the United States Constitution. Regardless of whether the provocative decision in *Anastasoff* is constitutionally sound, the opinion trenchantly emphasizes the critical significance of a public policy issue that has remained essentially untreated for too long.

Judge Arnold's *Anastasoff* opinion perceptively identifies the substantial complications created by burgeoning caseloads and the static resources available to resolve these appeals. It cogently admonishes that the federal judicial system is in serious difficulty if the volume of appellate filings and temporal restraints preclude the circuit bench from attributing precedential value to each case. Judge Arnold concomitantly rejects the proposition that deficient resources prevent judges from according all appeals precedential effect. He also repudiates the notion that appellate courts are currently developing an underground corpus of law that applies only to the litigants in a particular case. Instead, he argues that there must be sufficient resources to address mounting caseloads adequately, and if these funds are unavailable, every judge

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1. 223 F.3d 898 (8th Cir. 2000), *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000).

2. 8TH CIR. R. 28A(i). A more recent Ninth Circuit opinion upholds that court's similar rule, *see* 9TH CIR. R. 36-3, and rejects *Anastasoff*. *See* Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001).

must devote the requisite time to treat each of the filings competently, even if backlogs increase.

The three-judge panel, thus, threw down the constitutional gauntlet by invalidating the Eighth Circuit local rule while most other appellate courts continue to enforce analogous provisions. Evaluating the threat to the delivery of appellate justice posed by these local requirements as discussed in the *Anastasoff* opinion, however, is more important. This Comment also seeks to explore the most promising solutions to that pressing legal and public policy problem.

Part I of this Comment, therefore, traces the problem of a historical growth in caseloads without a corresponding rise in resources as addressed by the Eighth Circuit decision. Part II evaluates the *Anastasoff* holding and its implications. Increasing appeals, scarce resources, and the restrictions imposed by procedures like the Eighth Circuit local rule may well jeopardize modern appellate justice, as Judge Arnold's opinion eloquently demonstrates. Part III then presents recommendations for addressing this situation. It analyzes remedies that might solve or at least ameliorate these problems at the appellate level, principally through reductions in the volume of cases that attorneys and parties consider filing and, should this possibility prove deficient, measures that would respond directly to those appeals actually pursued in a prompt, inexpensive, and fair manner.

I. HOW CASELOAD GROWTH AND SCARCE RESOURCES ERODED DELIVERY OF APPELLATE JUSTICE

The problem of expanding appellate caseloads, scarce resources, and increased reliance on unpublished opinions has received thorough examination by legal scholars.[3] The quantity of appeals from federal district court decisions has increased

3. *See, e.g.*, THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 14-51, 106-50 (1994); COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS: FINAL REPORT 13-28 (1998) [hereinafter COMMISSION REPORT]; Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 75-79 (2001); William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 274-97 (1996); Carl Tobias, *Suggestions for Studying the Federal Appellate System*, 49 FLA. L. REV. 189, 192-96 (1997).

steadily since the 1970s.[4] Congress has partially addressed this expansion by committing more resources to the federal appellate judiciary, but its effort has been insufficient and may have even imposed various disadvantages. For instance, lawmakers have authorized additional active appellate court judgeships, but the number of new judicial positions has apparently failed to keep pace with exponential docket growth and might have actually contributed to the erosion of judicial collegiality and consistent decisionmaking. Congress has simultaneously enlarged the courts' administrative staff and their responsibilities, although this expansion may have aggravated the bureaucratic nature of the appellate justice system.[5]

The responses to caseload growth with scarce resources have also varied among the regional circuits.[6] Practically all appellate courts have limited the procedures they accord appeals, especially by screening them in terms of their perceived significance and difficulty. For example, courts have granted oral arguments in a declining percentage of appeals, and the parties that do secure them frequently have less time to argue.[7] The appellate courts have also promulgated local rules governing opinion publication and citation identical or analogous to the Eighth Circuit provision invalidated by the *Anastasoff* panel. These prescriptions typically authorize three-judge panels or their individual members to designate certain decisions as unpublished, thus limiting their precedential effect.[8]

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4. *See, e.g.*, JUDITH A. MCKENNA, STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS 17-35 (1993); COMMISSION REPORT, *supra* note 3, at 13-17; Carol Krafka, *Civil Caseload Trends in the U.S. Courts of Appeals, in* COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, WORKING PAPERS 127, 127-144 (1998) [hereinafter WORKING PAPERS].

5. *See, e.g.*, COMMISSION REPORT, *supra* note 3, at 13-25, 30-37; Michael Abramowicz, *En Banc Revisited*, 100 COLUM. L. REV. 1600, 1603-04 (2000); Richman & Reynolds, *supra* note 3, at 286-97; *infra* notes 40-41 and accompanying text.

6. *See, e.g.*, MCKENNA, *supra* note 4, at 41-43; COMMISSION REPORT, *supra* note 3, at 21-27; Krafka, *supra* note 4, at 132-33; *see also* Carl Tobias, *A Federal Appellate System for the Twenty-First Century*, 74 WASH. L. REV. 275, 278 (1999).

7. *See, e.g.*, 4TH CIR. R. 34; 5TH CIR. R. 34; 11TH CIR. R. 34. *See generally* BAKER, *supra* note 3, at 108-17; COMMISSION REPORT, *supra* note 3, at 22, Table 2-6; WORKING PAPERS, *supra* note 4, at 103-06 (1998); Richman & Reynolds, *supra* note 3, at 279-81.

8. *See, e.g.*, 6TH CIR. R. 36; 9TH CIR. R. 36; *see also* BAKER, *supra* note 3, at 119-35; COMMISSION REPORT, *supra* note 3, at 22, Table 2-7; WORKING PAPERS, *supra* note 4, at 110-13; Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. &

Escalating appellate court caseloads, the static resources available for treating them, and the circuit bench's responses to those considerations have had detrimental consequences for lawyers, litigants, judges, and appellate justice. Most important, the judiciary's curtailment of procedural opportunities has significantly limited the expeditious, economical, or equitable disposition of appeals. Only in a dwindling percentage of cases is there comprehensive resolution on the merits after full briefing and oral argument before a panel of three circuit judges,[9] thereby restricting the visibility and accountability of the appellate bench.[10] This phenomenon decreases the ability of litigants to present their views thoroughly before the bench and to clarify matters that their briefs might not address. Reduced publication limits judges' responsibilities to justify their substantive determination and may erode public confidence in appellate decisionmaking.

II. ANALYSIS OF THE *ANASTASOFF* OPINION

In *Anastasoff*, the appellant asserted "precisely the same legal argument" that the Eighth Circuit had rejected eight years earlier in *Christie v. United States*.[11] The appellant contended, however, that the earlier ruling did not bind the three-judge panel because *Christie* was unpublished and, therefore, not a precedent under Eighth Circuit local appellate rule 28A(i), providing that "unpublished opinions are not precedent and

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PROC. 219 (1999); Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L. J. 177 (1999); Merritt & Brudney, *supra* note 3, at 75-79.

9. *See, e.g.*, MCKENNA, *supra* note 4, at 42-49. For analyses of appellate justice, see BAKER, *supra* note 3, at 14-30; MCKENNA, *supra* note 4, at 9-11.

10. According to Judge Posner:

> [D]enying oral argument when there are lawyers on both sides [of a case] . . . tend[s] to diminish the quality of the judicial consideration. . . . [You cannot] ask the lawyers questions and you [lack] a period of focused concentration on that case. [W]hen an opinion is published under the name of a judge, it enforces a certain responsibility of consideration on the judge. The worst type of disposition . . . just says, affirmed. . . . [T]hen the danger of an error of having overlooked something because you did not reason it out on paper is significant.

Considering Judicial Resources: Considering the Appropriate Allocation of Judgeships in the U.S. Court of Appeals for the Seventh Circuit, Hearing Before the Senate Judiciary Subcomm. on Admin. Oversight and the Courts 10-11 (June 28, 1998) (statement of Seventh Circuit Chief Judge Richard Posner). *See generally* BAKER, *supra* note 3, at 108-21.

11. No. 91-2375 MN (8th Cir. Mar. 20, 1992) (per curiam).

parties generally should not cite them."[12] Yet the *Anastasoff* panel rejected this argument, holding that "the portion of Rule 28A(i) that strips the precedential weight of unpublished opinions is unconstitutional under Article III, as it purports to confer on the federal courts a power that extends beyond the 'judicial.'"[13]

In the second part of the decision, Judge Arnold supported the panel's substantive holding with a comprehensive historical exegesis on the doctrine of precedent. The jurist proclaimed that the concept was "well established" by the time of the Constitutional Convention. He also demonstrated that in the eighteenth century the judge's obligation to honor precedent emanated from the fundamental character of the judicial power, and that Alexander Hamilton, James Madison, as well as the Anti-Federalists "assumed that federal judicial decisions would become authorities in subsequent cases."[14]

In short, the doctrine of precedent was "well-established in legal practice, regarded as an immemorial custom," and "valued for its role in past struggles for liberty."[15] The duty of federal courts to follow previous opinions, meanwhile, "was understood to derive from the nature of the judicial power itself and the need to prevent it from creating a dangerous union with legislative authority."[16] Judge Arnold, thus, concluded "that, as the Framers intended, the doctrine of precedent limits the 'judicial power' delegated to the courts in

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12. 8TH CIR. R. 28A(i).

13. Anastasoff v. United States, 223 F.3d 898, 899 (8th Cir. 2000), *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000). *But see* Hart v. Massanari, 266 F.3d 1155, 1159-69 (9th Cir. 2001) (upholding the Ninth Circuit's similar Rule 36-3 and describing the reasons for its constitutionality). For an earlier rendition of several ideas that Judge Arnold subsequently included in the *Anastasoff* opinion, see Arnold, *supra* note 8, at 226.

14. *Anastasoff*, 223 F.3d at 900-03 (citations omitted). *But see Hart*, at 1162-69; Recent Case, Anastasoff v. United States, 114 HARV. L. REV. 940, 943 (2001). For analyses of the founders' views of precedent, see Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 662-66 (1999); Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81 (2000).

15. *Anastasoff*, 223 F.3d at 903.

16. *Id. But see Hart*, 266 F.3d at 1162-69 (disputing "that the Framers viewed precedent in the rigid form that we view it today"); Lee, *supra* note 14, at 660 n.64 ("During the latter half of the seventeenth and during the eighteenth centuries we find cases constantly followed in practice but a tendency to assert that they were not binding in theory."). *See generally* Arnold, *supra* note 8, at 226 (considering the constitutionality of forbidding citation to unpublished opinions).

Article III."[17]

In this section of his decision, Judge Arnold also explained what the case did *not* involve. The question *Anastasoff* presented was not whether appellate courts should publish opinions, "but whether [unpublished opinions] ought to have precedential effect."[18] He carefully observed that "'unpublished' in this context has never meant 'secret'" and that all of the opinions and orders rendered by every federal appellate court in the United States are available to members of the public.[19]

Judge Arnold then considered a more practical point. "Members of the federal appellate bench," he wrote, frequently observe that the "volume of appeals is so high that it is simply unrealistic to ascribe precedential value to every decision."[20] In essence, he intimated that judges lack sufficient "time to do a decent enough job . . . to justify treating every opinion as a precedent."[21] The panel remarked that, "[i]f this is true, the judicial system is indeed in serious trouble, but the remedy is not to create an underground body of law good for one place and time only."[22] The court then contended that the appropriate approach is to "create enough judgeships to handle the volume, or, if that is not practical, for each judge to take enough time to do a competent job with each case. If this means that backlogs will grow, the price must still be paid."[23] Judge Arnold further explained that local appellate strictures like Rule 28A(i) "assert that [appeals] courts have the power" to choose which opinions to follow and a number of local provisos even proscribe citation to unpublished decisions. Yet, wrote Arnold, this perspective "exceeds the judicial power,

17. *Anastasoff*, 223 F.3d at 903. *But see Hart*, 266 F.3d at 1160-69; Recent Case, *supra* note 14, at 943-44. *See generally* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 377-78 (1833).

18. *Anastasoff*, 223 F.3d at 904. "Indeed, most appellate courts now make their opinions, whether labeled 'published' or not, available to anyone online." *Id.*

19. *Id. See generally* Arnold, *supra* note 8, at 219-20 (describing the origins of unpublished opinions and the difference between unpublished and published opinions).

20. *Anastasoff*, 223 F.3d at 904.

21. *Id. See also supra* notes 3-6, 8 and accompanying text.

22. *Anastasoff*, 223 F.3d at 904.

23. *Id. Accord* Richman & Reynolds, *supra* note 3; *see also supra* notes 4-5 and accompanying text.

which is based on reason, not *fiat*."[24]

For purposes of clarification, the three-judge panel emphasized that the court was not "creating some rigid doctrine of eternal adherence to precedents," expressly acknowledged that opinions could and sometimes should be overruled, and stated that "this function can be performed by the en banc Court, but not by a single panel."[25] Judge Arnold observed that the appeals court has the authority to change precedents "[i]f the reasoning of a case is exposed as faulty, or if other exigent circumstances justify it," although the appellate judiciary has the responsibility to substantiate this modification by explicitly recognizing the precedent from which the appeals court is departing and by clearly and convincingly articulating the reasons why it has chosen to disavow the earlier precedent.[26] "In this way, the law grows and changes, but it does so incrementally, in response to the dictates of reason, and not because judges have simply changed their minds."[27]

The fourth section of Judge Arnold's opinion summarizes the panel's decision. Judge Arnold reiterates that "[f]ederal courts, in adopting rules, are not free to extend the judicial power of the United States described in Article III . . . [which power] is limited by the doctrine of precedent."[28] *Anastasoff* argues that local strictures such as Eighth Circuit Rule 28A(i) permit "courts to ignore this limit" and to depart from the law in "prior decisions without any reason to differentiate the cases," an exercise of discretion the panel found to contravene directly the traditional understanding of precedent.[29] This local Eighth Circuit requirement, thus, enlarged the judicial power beyond its Article III authority by empowering the appellate bench to decide what opinions would bind it and, insofar as Rule 28A(i) purported to circumscribe the precedential effect of earlier decisions, the provision was unconstitutional.

In the panel's thorough enunciation of the historical and legal rationales for finding local appeals court provisos like

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24. *See Anastasoff*, 223 F.3d at 904. *But see Hart*, 266 F.3d at 1159-74.

25. *Anastasoff*, 223 F.3d at 904. *Hart*, 266 F.3d at 1170-74, generally agrees with the views expressed in this Paragraph.

26. *Anastasoff*, 223 F.3d. at 904-05.

27. *Id.* at 905.

28. *Id.* (citation omitted).

29. *Anastasoff*, 223 F.3d at 905. *But see Hart*, 266 F.3d at 1163-74 (presenting a different view of the traditional role of precedent).

Eighth Circuit Rule 28A(i) unconstitutional, the *Anastasoff* opinion raises complex and arcane issues of constitutional history, theory, and law. The ruling involves complicated questions about the meaning of the judicial power in Article III and precedent in the federal system. Regardless of how the federal judiciary and constitutional scholars ultimately resolve these issues, the public policy concern about how appellate courts can best address increasing cases with static resources will have salience. Definitively resolving the constitutionality of provisions like Eighth Circuit Rule 28A(i)[30] is not necessary to a consideration of the important practical concerns. Even if the three-judge panel deciding *Anastasoff* erroneously deemed the local Eighth Circuit requirement unconstitutional, the problem created by mounting dockets and limited resources remains, and it can only become more acute in the future.

III. SUGGESTIONS FOR THE FUTURE

Appellate courts have confronted escalating appeals with scarce resources. They have responded to caseload growth by generally restricting procedural opportunities and by specifically promulgating local publication rules identical or similar to the Eighth Circuit provisos invalidated in *Anastasoff* and upheld in *Hart*. The growth in the number of appeals is unlikely to abate, while the available resources will probably not expand. Given this predicament, the appellate courts can, thus, invoke two principal courses of action for addressing docket increases. First, lawmakers might institute approaches limiting the quantity of appeals parties could pursue and, if this proved inadequate, they could authorize appellate courts to employ measures that directly treat the rising cases in a prompt, inexpensive, and fair fashion causing minimal interference with appeals court operations.

30. For discussions of these constitutional issues, several of which criticize the views in *Anastasoff*, see *Hart*, 366 F.3d at 1163-74; Lee, *supra* note 14; Price, *supra* note 14; Recent Case, *supra* note 14; *see also* Merritt & Brudney, *supra* note 3, at 118-21 (reporting certain empirical results that support the *Anastasoff* ruling). *See also* Daniel B. Levin, Note, *Fairness and Precedent:* Anastasoff v. United States, 110 YALE L. J. 1295, 1300 (2001) (criticizing the *Anastasoff* rule because it would disadvantage resource-poor litigants).

A. Limiting the Number of Appeals

The classic way to reduce the volume of appellate filings would be to curtail the extensive civil and criminal jurisdiction of federal district courts. Two commissioners of the five-member Commission on Structural Alternatives for the Federal Courts of Appeals, which recently completed a comprehensive appellate court study, addressed the civil side of this approach by urging lawmakers to restrict diversity of citizenship jurisdiction.[31] Nonetheless, certain observers of the federal judicial and legislative branches doubt that the legislature will circumscribe jurisdiction generally or diversity specifically.[32] Over the last decade, Congress apparently federalized less criminal conduct than it had during the 1980s, created fewer new civil causes of action than Congress had during the prior two decades,[33] and restricted some civil jurisdiction.[34] Lawmakers did, however, pass a significant number of less important criminal statutes and general crime legislation between 1990 and 2000,[35] while adopting several comprehensive civil enactments.[36]

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31. Circuit Judge Gilbert Merritt, whom Justice Byron White joined, urged retention of this jurisdiction only when parties "show a concrete need for a federal forum . . . because of (1) the existence of local influence that threatens prejudice to an out-of-state litigant, or (2) the complex nature of interstate litigation." *See* COMMISSION REPORT, *supra* note 3, at 77-88. For evaluations of analogous ideas, see JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 134 (1995) [hereinafter LONG RANGE PLAN]; MCKENNA, *supra* note 4, at 141-53.

32. *See, e.g.*, Stephen G. Breyer, *The Donahue Lecture Series: 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).

33. *See, e.g.*, Consumer Product Safety Act, Pub. L. No. 92-573, 86 Stat. 1207 (1972); Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified in scattered sections of 7 & 16 U.S.C. (1994)); (Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (1982) (codified as amended at 18 U.S.C. §1501 (1994)); Major Fraud Act, Pub. L. No. 100-700, 102 Stat. 4631 (1988) (codified in scattered sections of 18, 28, & 41 U.S.C. (1994)).

34. *See, e.g.*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-32, 110 Stat. 1214 (codified in scattered sections of 18, 28, & 42 U.S.C. (Supp. II 1996)); Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-66 (codified in scattered sections of 11, 18, 28, & 42 U.S.C. (1994)); Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 19 U.S.C. (Supp. II 1996)). *See generally* Carl Tobias, *Common Sense and Other Legal Reforms*, 48 VAND. L. REV. 699, 702-17 (1995) (describing proposed procedural reforms in civil justice).

35. *See, e.g.*, Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 102-322, 108 Stat. 796 (1994) (codified in scattered sections of the United States Code).

36. *See, e.g.*, Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104

Additional measures to restrict appeals appear equally infeasible or ineffective. For instance, the Commission decided not to recommend that Congress make appellate jurisdiction discretionary in all cases. Discretionary review contravenes the accepted notion that a losing litigant should have one opportunity to convince an appeals court that the trial judge committed prejudicial error. The Commission did expressly admit that the procedural limitations analyzed in *Anastasoff* and *Hart* have blurred the difference between mandatory and discretionary review.[37] Another possibility would be to expand the jurisdiction of the United States Court of Appeals for the Federal Circuit, but the improvement would likely be negligible because the entire appellate system would be addressing the same number of appeals.[38]

B. Treating Appeals Directly

One additional approach would be the prompt, economical, and equitable judicial treatment of those cases that litigants do pursue. A clear, if rather controversial, solution would be to increase staff support or authorize additional circuit judgeships. For example, the steady growth in appellate caseloads prompted the Judicial Conference of the United States, the policymaking arm of the federal courts, to request that Congress approve new members for numerous appeals

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Stat. 327 (1990) (codified as amended at 42 U.S.C. §§12101-213 (1994)). Congress will probably not cabin jurisdiction because many lawmakers capitalize on the basically cost-free political advantages realized by federalizing new fields of criminal activity and by recognizing more civil causes of action. The Supreme Court might narrow jurisdiction with the abstention or justiciability doctrines, but this could prevent resolution on the merits and would minimally decrease appeals' quantity, even were the approach less troubling. *See* Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 544 (1969); Martha Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11, 16-17.

37. *See* COMMISSION REPORT, *supra* note 3, at 70-72. For analyses of the relevant history, see BAKER, *supra* note 3, at 234-38; Dragich, *supra* note 36, at 52-54; Tobias, *supra* note 3, at 238-39.

38. The Commission assessed major reasons to centralize review of social security and tax cases in the Federal Circuit, but designated no new types of appeals Congress might usefully assign it. *See* COMMISSION REPORT, *supra* note 3, at 72-74. Because the Federal Circuit may lack special expertise in these two areas, this approach might not facilitate efficiency, offer systemic economies, or be fairer to litigants. *See* U.S. Dep't of Justice, Comments to the Commission on Structural Alternatives for the Federal Courts of Appeals (Nov. 6, 1998), *available at* http://app.comm.uscourts.gov/report/comments/DOJ.html [hereinafter Comments]; *see also* BAKER, *supra* note 3, at 222-27 (analyzing other ways to reduce appeals); Tobias, *supra* note 3, at 234-35 (analyzing even more ways to reduce appeals).

courts during the 1990s.[39]

Although enlarging the number of administrative employees and their duties or creating more appellate court judgeships might expedite case review, both alternatives could have detrimental effects. Increasing extra-judicial support or staff obligations might create additional bureaucratic obstacles and correspondingly reduce circuit judges' visibility and accountability.[40] The possibility of expanding the relatively large federal judiciary has contributed to the dispute over splitting the Ninth Circuit. Enlarging the bench might also reduce efficiency and magnify some complications identified by the Commission, such as deficient communications. Finally, expansion could engender staunch opposition from many judges, even if the Senate and the President could guarantee prompt confirmations for the newly established positions.[41]

A less problematic, more feasible approach would be to fill the current appeals and district court judicial vacancies. At various junctures during the 1990s, several circuits, (most prominently the Second, Third, Fourth, Sixth and Ninth), functioned without a number of the active appeals court judges authorized by Congress.[42] This situation required a few

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39. *See, e.g.*, William H. Rehnquist, *Overview*, THIRD BRANCH, Jan. 2001, at 1; *see also* S. 3071, 106th Cong. (2000). *But see* CHARLES E. GRASSLEY, U.S. SENATE JUDICIARY SUBCOMM. ON ADMINISTRATIVE OVERSIGHT & THE COURTS, CHAIRMAN'S REPORT ON THE APPROPRIATE ALLOCATION OF JUDGESHIPS IN THE UNITED STATES COURTS OF APPEALS, Executive Summary (1999).

40. *See, e.g.*, RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 26-28 (1985); CHRISTOPHER E. SMITH, JUDICIAL SELF—INTEREST: FEDERAL JUDGES AND COURT ADMINISTRATION 95-124 (1995); *see also supra* note 5 and accompanying text. For analyses of these increases and their disadvantages, see MCKENNA, *supra* note 4, at 49-54; COMMISSION REPORT, *supra* note 3, at 23-25.

41. *See* Gordon Bermant, Jeffrey A. Hennemuth & A. Fletcher Mangum, *Judicial Vacancies: An Examination of the Problem and Possible Solutions*, 14 MISS. COL. L. REV. 319 (1994); Dragich, *supra* note 36, at 45-49; Carl Tobias, *Federal Judicial Selection in a Time of Divided Government*, 47 EMORY L. J. 527 (1998). New positions may afford few long-term benefits and only be a stopgap that worsens some problems, namely inadequate intracircuit uniformity and collegiality, which can attend the administration of large courts and implicate circuit-splitting. *See, e.g.*, BAKER, *supra* note 3, at 202; Tobias, *supra* note 3, at 235; Carl Tobias, *The Impoverished Idea of Circuit-Splitting*, 44 EMORY L. J. 1357, 1388-89 (1995); *see also* WILLIAM P. MCLAUCHLAN, FEDERAL COURT CASELOADS 107 (1984) (describing how more judges may not yield permanent improvement); S. 346, 107th Cong. (2001) (prescribing a Ninth Circuit split).

42. *See* COMMISSION REPORT, *supra* note 3, at 30; Carl Tobias, *The Judicial Vacancy Conundrum in the Ninth Circuit*, 63 BROOK. L. REV. 1283 (1997); Shirley M. Hufstedler, Comments to the Commission on Structural Alternatives for the Federal Courts of Appeals (Oct. 23, 1998); Los Angeles County Bar Ass'n, Comments to the Commission on Structural Alternatives for the Federal Courts of

appellate courts, such as the Sixth and Ninth Circuits, to cancel oral arguments, thereby imposing unwarranted cost and delay, and to rely substantially on judges apart from their own active members when assembling three-judge panels.[43] In fact, approximately one-third of the panels terminating cases after oral argument nationwide during the 1997 fiscal year included at least one participant who was not an active judge of the court, with the Eleventh Circuit employing visitors at a rate nearly double the national average.[44] Too great dependence on visiting judges can have negative effects, including more expensive or slower dispute resolution. One possible solution would be to ensure that courts have available every authorized active circuit judge to hear cases. For example, if the Ninth Circuit could function with all twenty-eight active members, it might be able to render decisions more promptly. To fill open appeals court judgeships, the President should carefully consult senators before formally nominating candidates, and senators should cooperate closely with the President in confirming judges for openings.[45] Even if every appeals court were working with its total judicial contingent, however, the appellate judiciary might lack enough resources to resolve mounting caseloads as expeditiously, inexpensively, and equitably as is desirable.

An additional direct, but controversial, way of addressing docket growth would be to further restrict the procedural options of those filing appeals. For instance, appellate courts could further decrease the declining percentage of cases accorded a comprehensive treatment, including oral arguments and published opinions. This approach would help resolve appeals quickly and cheaply, although it may threaten fairness, undermine visibility and accountability, and diminish public

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Appeals (Nov. 6, 1998).

43. *See, e.g.*, Carl Tobias, *Filling the Federal Appellate Openings on the Ninth Circuit*, 19 REV. LITIG. 233 (2000); Viveca Novak, *Empty-Bench Syndrome*, TIME, May 26, 1997, at 37.

44. *See* WORKING PAPERS, *supra* note 7, at 108, Table 6a. For assessments of appeals courts' reliance on visiting judges, see BAKER, *supra* note 3, at 198-201.

45. White House and Senate political party control are now reversed; however, President Bush has realized little more success than President Clinton in appointing judges. There are currently more than 90 vacancies and over 50 pending nominations. *Vacancies in the Federal Judiciary* (April 19, 2002), *at* http://www.uscourts.gov/vacancies/judgevacancy.htm; *see also* Sheldon Goldman & Elliot Slotnick, *Introduction: Clinton's Judicial Legacy*, 84 JUDICATURE 227 (2001).

acceptance of appellate determinations.[46]

Other measures that directly respond to increasing dockets seem impractical or ineffective, principally because of the possible detrimental side effects. For example, certain alternatives to dispute resolution, such as arbitration,[47] and panels of two rather than three circuit judges,[48] would foster the prompt, economical resolution of more appeals. Yet reducing the number of judges that review a case can jeopardize equitable decisionmaking and erode the visibility and accountability of the appellate court bench.[49] Judges might also capitalize on case management techniques such as those used by the Ninth Circuit, which applies special screening panels to resolve appeals with truncated processes and employs greater "batching" of cases that involve analogous issues or similar legislation, thereby expediting disposition.[50] Although these types of actions could yield efficiencies, the remaining advantages that courts can derive from procedural modifications nevertheless appear relatively minute.

In short, the legislative and judicial branches should carefully scrutinize and consider applying approaches to reduce the number of appeals. Failing that, they should directly treat in a prompt, inexpensive, and fair manner those cases

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46. *See supra* note 40 and accompanying text.

47. *See, e.g.*, JAMES B. EAGLIN, THE PRE-ARGUMENT CONFERENCE PROGRAM IN THE SIXTH CIRCUIT COURT OF APPEALS: AN EVALUATION (1990). For assessments of alternatives to dispute resolution, see BAKER, *supra* note 3, at 136-47; Tobias, *supra* note 3, at 230.

48. *See* LONG RANGE PLAN, *supra* note 31, at 131-32; MCKENNA, *supra* note 4, at 127-33. For analyses of these panels, see COMMISSION REPORT, *supra* note 3, at 62-66; Dragich, *supra* note 36, at 58-62.

49. *See supra* note 40 and accompanying text. Seven chief judges criticized the Commission idea for District Court Appellate Panels, saying that it rested on the "flawed premise that cases are easily divisible into two categories," error correction and law declaration, and would add another level of review for most cases, which would be "expensive to litigants and unacceptable." The idea would burden the judiciary, could require more "district judgeships for appellate purposes, which does not seem to be good public policy," and would provoke "virtually monolithic opposition by district judges." Harry Edwards et al., Comments to the Commission on Structural Alternatives for the Federal Courts of Appeals (Nov. 10, 1998), *available at* http://app.comm.uscourts.gov/report/comments/Becker.htm. *Accord* Comments, *supra* note 38.

50. *See* NINTH CIRCUIT EVALUATION COMM., INTERIM REPORT 17 (Mar. 2000); Procter Hug, Jr., Responding to Ninth Circuit Concerns: The Innovative Work of the Evaluation Committee (2000) (unpublished manuscript, on file with author). *See generally* Procter Hug, Jr. & Carl Tobias, *A Preferable Approach for the Ninth Circuit*, 88 CAL. L. REV. 1657 (2000) (describing techniques used to facilitate the disposition of cases in the Ninth Circuit).

actually brought. Such measures, however, may have limited feasibility or efficacy. Further, appellate courts seem to have exhausted the benefits they can extract from such procedural reforms as refined screening and related management techniques. Because the problem of docket growth may now resist definitive resolution and could even be intractable, there may be little value in applying these ideas. Instead, the federal judiciary might need to forge a consensus on the best means of addressing caseload expansion. For example, judges could undertake a finely-calibrated assessment of current and projected docket magnitude as well as the resources available to combat growing appeals while evaluating how effectively courts deliver appellate justice. If resources for deciding cases are inadequate to provide sufficient justice, the solution may be to increase the number of judgeships or extra-judicial personnel. Members of the bench must first reach greater accord, however, about the best remedies to combat increasing appeals with relatively static resources. Until then, the problem could well remain unresolved and perhaps worsen.

IV. CONCLUSION

A three-judge panel of the Eighth Circuit recently found unconstitutional a local appellate rule stating that "unpublished opinions are not precedent and parties generally should not cite them." Despite the validity of the constitutional holding in *Anastasoff*, the decision elucidates and accentuates the critical issue of rising caseloads in the face of scarce resources to decide them. Judge Arnold astutely observes that appellate courts will be in serious difficulty if this situation prevents judges from ascribing all appeals precedential effect. After Judge Arnold provides a compelling critique of this notion, he recommends devoting adequate resources to caseload resolution and, should this prove infeasible, admonishes that his colleagues commit sufficient time to address each appeal competently, even if backlogs accumulate. The federal legislative and judicial branches must heed *Anastasoff's* warning by redoubling their efforts to resolve the complications presented by docket increases and limited resources, because these problems will grow and promise to continue eroding appellate justice.