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### Recommended Citation

J. Edward Lumbard, *Current Problems of the Federal Courts of Appeals*, 54 Cornell L. Rev. 29 (1968)

Available at: <http://scholarship.law.cornell.edu/clr/vol54/iss1/2>

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# CURRENT PROBLEMS OF THE FEDERAL COURTS OF APPEALS†

*J. Edward Lumbard‡*

When the Judicial Conference of the United States meets in Washington twice a year, the Chief Justice presides in a magnificent, oak-panelled, high ceilinged conference room in the Supreme Court Building. Behind him is the portrait of Chief Justice Taft, who conceived a separate home for the Supreme Court, who spurred the legislation that in 1925 gave the Court power to control most of its business through certiorari procedure, and who sponsored legislation to bring the federal judges into a national judicial system through the conference of senior circuit judges. Facing the Chief Justice from the other end of the room is the portrait of Charles Evans Hughes, who was Chief Justice in 1935 when the Supreme Court moved into its new home, symbolic of the Court's standing as one of the three separate and independent branches of our government. In 1939, under Chief Justice Hughes's lead, the business of operating the courts was taken from the Department of Justice and given to the courts themselves through the establishment of the Administrative Office. Even more important, with his strong support, Congress in 1934 gave the Court the power to make rules in civil cases, a power that the Court exercised through a committee of the bar and bench.

In the federal judicial system of which Chief Justice Hughes was a principal architect, the courts of appeals are the vital center. In the past seven years most of these courts of appeals have been confronted with increased business and have been compelled to re-examine the adequacy of their methods and their supporting staffs in the struggle to process this flood of judicial business efficiently.

The courts of appeals are the vital center of the federal judicial system in two respects. With few exceptions, federal litigation ends in the courts of appeals; less than three per cent of the cases decided there are considered by the Supreme Court. Although the filing of cases in the district courts increased only sixteen per cent in the past seven years, filings in the courts of appeals increased one hundred per cent during that time. During the same period the Supreme Court has

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† The Charles Evans Hughes Lecture to the New York County Lawyers' Association on March 21, 1968.

‡ Chief Judge, United States Court of Appeals for the Second Circuit.

kept its review of cases at a fairly constant numerical level—about one hundred cases each year from the federal courts of appeals.

The courts of appeals are also the vital center for supervision of the administration of justice in both the district courts and the courts of appeals. The active circuit judges in each circuit, sitting as the circuit council, are charged with the duty of supervising the administration of federal justice in those circuits; if new facilities are needed, if the district courts need more probation officers, if a judge is no longer able to discharge his duties properly, or if some officer or employee is failing in his duties, it is the council of circuit judges that must deal with the problem.

Except in litigated matters, the Supreme Court has no duty to supervise the administration of the lower federal courts.<sup>1</sup> Of its members, only the Chief Justice plays any part in administration.<sup>2</sup> The Administration Office is the body that instructs the Administrative Office and informs the Congress and the President of its views concerning the budget and legislation affecting the judiciary. The prime responsibility for day-to-day operation of the district courts and the courts of appeals, however, is lodged with the circuit councils.

We must now face the problem of how the courts of appeals can continue to dispose of their business with reasonable dispatch in the face of ever-increasing caseloads without diminution of the quality of their judgments. The multitude of problems now confronting the courts of appeals demands discussion of all relevant factors and possible means of relief so that the solution will be understood and approved by the bar and the public.

Creation of additional judgeships has only slightly alleviated the greater demands on the time of the circuit judges. The number of circuit judges has increased from sixty-eight to eighty-eight since 1960, a rise of only thirty per cent, but filings have increased one hundred per cent during the same seven year span. Of the eleven circuits, four now have at least nine judges; the Second and District of Columbia Circuits have nine; the Ninth Circuit will soon grow from nine to thirteen; and the Fifth already has thirteen active circuit judges and will soon have fifteen.

When the question whether to increase the number of circuit

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<sup>1</sup> The Justices, however, do select the Director of the Administrative Office.

<sup>2</sup> He presides over the Judicial Conference of the United States and appoints its committee, designates the members of his court to act as circuit justices, passes upon all inter-circuit assignments of judges, and in certain disability situations he is the certifying officer. He is also the chairman of the directors of the recently created Federal Judicial Center.

judges in the Fifth Circuit beyond nine came before the Judicial Conference in 1964, the Special Committee on Geographic Distribution of the Courts reported that "in its judgment nine is the maximum number of active judgeship positions which can be allotted to a court of appeals without impairing the efficiency of its operation and its unity as a judicial institution."<sup>3</sup> Although the Committee recommended division of the Fifth Circuit into two circuits, the Conference bowed to expediency and, in view of the pressing need, approved four temporary judgeships. According to the principal corollary of Parkinson's Law, all temporary positions must be made permanent. The caveat allowing a maximum of nine was soon disregarded and the Fifth Circuit now has thirteen permanent active judges.

What are the alternatives to increasing the number of judges to meet greater caseloads?

## I

### REDUCING JURISDICTION

It has been suggested that the jurisdiction of both the district courts and the courts of appeals be reduced.

The district court proposals are highly relevant because eighty per cent of all appeals filed in the courts of appeals come from the district courts. Diversity jurisdiction accounts for about thirty per cent of the civil business of the district courts. The recommendations of the 1960-1965 American Law Institute study on diversity jurisdiction were expected to reduce the number of diversity cases by fifty per cent. None of the proposals, however, has been enacted into law, and it does not appear likely that Congress will take any action that will substantially reduce the flow of diversity cases to the district courts.

Something, however, can be done now about diversity cases. It would be of considerable immediate benefit if the district courts made closer inquiry, on their own initiative during pre-trial proceedings, to ascertain whether there is a substantial basis for claiming the 10,000 dollar jurisdictional minimum. In many diversity accident cases recovery after trial is less than that amount, and the great majority of settlements are for a small fraction of 10,000 dollars. In any event, it is time for Congress to increase the minimum to 15,000 dollars in view of the decrease in the value of the dollar.

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<sup>3</sup> JUDICIAL CONFERENCE OF THE UNITED STATES, PROCEEDINGS 15 (Mar. 16-17, 1964).

Any increase in district court business is soon reflected in more appeals, and the courts of appeals can do very little about it. They can deny review in only three situations which, at most, account for less than three per cent of the cases they consider: bankruptcy cases where less than 500 dollars are involved;<sup>4</sup> applications to hear interlocutory appeals under section 1292(b) of Title 28 upon certificate of the district judge; and petitions of state prisoners to appeal in forma pauperis when leave has been denied by the district court.<sup>5</sup> Thus, the courts of appeals have no choice in the matter in ninety-seven per cent of their cases; and these must be processed regardless of merit.

The suggestion has been made that there should be no right of appeal in diversity cases—that appeal be heard only upon application and leave granted by the court. Because many appeals in diversity accident cases are frivolous, this proposal, made by Chief Judge Hastings of the Seventh Circuit, merits further study by the Federal Judicial Center, under the direction of retired Supreme Court Justice Tom C. Clark.

It has also been suggested that appeals in civil cases with less than 10,000 dollars at stake should be only by permission. Many people, however, consider the right to appeal at least once from the court of first instance to be such an integral part of the right to litigate that any curtailment of that right, except where appeal is frivolous, would amount to a denial of due process.

Unfortunately, proposals to *increase* the jurisdiction of the courts of appeals are more numerous than those to reduce the caseload. The recent civil rights laws have brought many cases directly to the federal courts and have permitted the removal of many suits from state courts to federal courts. The Civil Rights Law of 1964 has also authorized appeals from district court orders remanding such cases to the state courts.<sup>6</sup> Legislation is pending to have Interstate Commerce Commission orders reviewed by the courts of appeals instead of by three-judge courts, with Supreme Court review only by certiorari. Another proposal would send appeals in government civil anti-trust cases to the courts of appeals rather than to the Supreme Court, except under certain circumstances. In the criminal field it is likely that Congress will authorize appeals from sentences where imprisonment of a year or more has been imposed.

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<sup>4</sup> 11 U.S.C. § 47(a) (1964).

<sup>5</sup> 28 U.S.C. § 1915(a) (1964).

<sup>6</sup> 28 U.S.C. § 1447(d) (1964).

## II

## USING JUDGES FROM OTHER COURTS

A second set of proposals deals with the use of judges from other courts and other circuits by courts of appeals that have a backlog. Almost all the courts of appeals call upon district judges within their circuit for some help. During the past few terms, the active circuit judges in the Second Circuit have handled ninety-three per cent of the sittings, with Senior Circuit Judge Medina and several of our district judges accounting for the remaining seven per cent. At least two active circuit judges sit on every panel. As our own district judges have become busier, largely because of four or five vacancies in the circuit which were only recently filled, we have sought the help of judges from other circuits.

Most circuit judges are of the view that it is best to have appeals decided by the circuit judges themselves as much as possible, supplemented by some help from the district judges. Resort should be had to out-of-circuit help only in an emergency. The law of the circuit ought not to be determined by the vote of an out-of-circuit judge—a real possibility when there is a divergence of views in a three-judge panel.

Since two judges constitute a quorum, the suggestion has been made to have some cases argued before a panel of two judges, with a third judge to be added only if there be a difference of opinion or if the two judges request it. This would require some preliminary decision as to which cases should be so treated. I doubt the wisdom of this proposal. If any litigants are to be heard by three judges, then every litigant should be heard by three judges, however frivolous his appeal may seem. Although most purely procedural matters are passed upon by one judge, especially when no panel of the court is sitting, it has been the invariable practice in the Second Circuit to have three judges pass on all applications that determine the merits of a case or whether an appeal may be brought or maintained. The wisdom of this practice is recognized by the new Rules of Appellate Procedure.<sup>7</sup>

Senior judges can be an important source of additional judicial manpower. Obviously, the total available judgepower is increased if those judges who have reached a certain age and length of service elect to become senior judges in order that new judges may be ap-

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<sup>7</sup> See FED. R. APP. P. 27(c).

pointed. There is no limit in the federal system as to how long a judge may continue his active status. At present, the only limitation of any kind is that an active judge of a court of appeals or a multi-judge district court cannot serve as chief judge beyond his seventieth birthday.<sup>8</sup> However, judges may elect to become senior judges after sixty-five if they have served fifteen years, and after seventy if they have served ten years.<sup>9</sup>

The federal judicial system would be strengthened in several ways if every circuit and district judge became a senior judge at age seventy, or as soon after seventy as he has served ten years. Such retirement would add to the manpower of the courts and keep the administration of the courts in younger hands. Of course, the judge who chooses seniority should be assured on three matters: first, that he may continue working to the extent that he is able to do so and for as long as he wishes; second, that he will have suitable chambers; and third, that he will have such supporting personnel as he needs.

The importance of this potential additional judgepower is underlined by the reminder that by March, 1971, just three years hence, five of the nine active judges of our court of appeals will be eligible for seniority. This is a principal reason for my belief that, at least in the Second Circuit, there will be no need to increase the statutory complement of active circuit judges beyond nine for some years to come. Our roster of senior judges by March, 1971, should add about twenty per cent to the total judgepower of the court.

No matter how much senior help may be available to a court, senior judges alone should not and cannot handle the increase in business. They are necessarily an uncertain and fluctuating resource, dependent upon the uncertainties of age, health, and the idiosyncracies of the seniors. Not every judge can continue his participation in court business into his ninetieth year as did Learned Hand, or beyond his eighty-fifth year as did Thomas Swan, or as Harold Medina now does in his triumphant march into his ninth decade.

### III

#### SPECIAL COURTS OF APPEALS

A third group of proposals concerns the creation of special courts of appeals, those most frequently suggested being courts for tax cases or labor cases. In the view of most observers, our experience with

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<sup>8</sup> 28 U.S.C. § 136 (1964).

<sup>9</sup> 28 U.S.C. §§ 294(b), 371(b) (1964).

special courts has not been satisfactory. One of the reasons frequently advanced for this view is that it is difficult to attract potentially good judicial talent to the specialized courts. I believe the bar has more confidence in courts where the decision process is in the hands of judges who must become generalists because of the great variety of cases they decide. Moreover, there will be a better considered development in every field of the law if there are eleven courts of appeals studying similar problems rather than only one specialized court below Supreme Court review.

A variation of the suggestion concerning specialized courts is that the disposition of appeals within a circuit might be expedited by creating a special panel of the court to decide, for example, all labor cases or all criminal cases in the circuit for a period of a year. Although any court would have the power to so organize its business, such a division of labor seems ill-advised and of dubious value even as a time-saver. I cannot believe that any circuit judge would wish to concentrate for any appreciable time on one field of law. It would be bad for the judges, who would feel they were being demoted and difficult for the court because it would increase the possibility of en banc consideration. Accordingly, it would be highly undesirable for the bar and for litigants.

#### IV

##### INCREASING SUMMARY DISPOSITIONS

The fourth group of suggestions has to do with better use of judges' time—the exploration of means whereby judges can spend a minimum of time on frivolous and insubstantial appeals, thus leaving more time for the more difficult, complicated cases.

The Second Circuit has engaged in such exploration with some success. About ten years ago we began to set cases for a certain day and to sit as late as necessary to finish those cases. Under the old system, a judge could not always be sure which cases would be reached during the day he was appointed to sit. Under the new system, the judges for the first time studied every case before argument. The arguments were more fruitful and the judges were more often able to decide at the end of appellant's argument whether or not his appeal had any merit. Thus we developed the procedure of rendering summary judgment at the end of appellant's argument or at the end of both arguments. Of course, this is done only when all three judges

agree that there is no merit to the case. In the past two years an average of seventy cases, or 13.5 per cent of all cases argued or submitted, have been summarily decided, almost always with no opinion, the only record being the minutes of the clerk. In twenty-three per cent of our cases, a per curiam opinion was filed, and in 61.5 per cent more, signed opinions were written.

Although every appellant is entitled to have his appeal considered by the court, he is entitled to no more time than it takes for the judges to be convinced of the correct decision. I know of no case in which a petition for certiorari has been granted after the court has decided the merits from the bench.

In my opinion, if circuit judges were given more law clerk help, about one-third of the appeals argued and submitted could be decided summarily. Most appellate judges would agree that the result in about seventy-five per cent of appeals is clearly foreseeable after argument, regardless of which judges sit on those cases. However, in many of the foreseeable result cases we are under a duty to explain the road we have traveled. And in many seemingly clear cases we must write an opinion because of the novelty or precedential value of the questions involved or because of the importance of the case. The courts of appeals thus spend the great bulk of their time on only twenty-five per cent of the appeals they hear. The problem continues to be two-fold: how to spend less time on the open-and-shut cases and how to organize time and law clerk help to decide and write opinions in more important and difficult appeals.

Summary judgment can be rendered in a large proportion of the open-and-shut cases, and I believe we should try to do so. It is a waste of our time to write as many and as lengthy opinions as we now do, and it adds needlessly to the pages of the Federal Second reports.

An analysis of the disposition of appeals in recent years supports this thesis. Two areas of great increase are appeals from criminal convictions—a nation-wide increase of over two hundred per cent in ten years—and habeas corpus proceedings by state court prisoners—an increase of seven hundred per cent in ten years. Of course, the Criminal Justice Act,<sup>10</sup> which finances appeals by defendants unable to retain counsel, is a major reason for the great increase in appeals from federal convictions. Inevitably, a large percentage of these cases is frivolous. Ten years ago the percentage of reversals on criminal appeals was twenty per cent; last year it was 13.5 per cent; and in the Second Circuit only 8.7 per cent. This is also true of state prisoner appeals. These two cate-

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<sup>10</sup> 18 U.S.C. § 3006A (1964).

gories account for half the cases that the Second Circuit has decided summarily.

The great increase in civil appeals should occasion no surprise. In recent years the rules of most of the courts of appeals have been modified to make it easier and less expensive to appeal. The new Federal Rules, which became effective in July, 1968, follow and confirm this trend. Increasing business activity and prosperity make it possible for more persons to enjoy the luxury of litigation and of appeal to a higher court if they lose. Here, too, we find a smaller percentage of reversals as the number of appeals increases. For at least ten years the Second Circuit has consistently reported the lowest percentage of reversals in the federal system, but this fact does not seem to have kept anyone away.

Our use of summary disposition at argument suggests that steps may be taken prior to argument to pick out cases requiring only a minimum utilization of judicial resources for hearing the appeal. The District of Columbia has been setting up special summary calendars for such cases, which are selected by a committee of its judges, with arguments on each side limited to fifteen minutes. This is another way of doing what the Second Circuit has been doing. Whether, on balance, the judges save any time this way, I do not know. In any event it is clear that experimentation by different courts of appeals may be of great value in developing new methods of bringing about more summary dispositions. And, as the bar learns about such procedures, prosecution of frivolous appeals may be discouraged.

There is still another proposed method of speedy disposition—a refinement of the per curiam opinions that our court now uses to dispose of twenty-three per cent of its cases. Since these are, with rare exception, unanimous decisions, it would take little additional preparation for one of the judges to dictate the opinion from the bench, from notes or even a draft opinion written beforehand. The oral argument and the questions of the judges would determine whether one of the judges, perhaps designated in advance, could forthwith dictate the opinion in open court. The opinion could be further edited if the panel thinks it should be published. The English Court of Appeal decides over ninety per cent of its cases under this system, although in England all three judges frequently state their separate opinions even when they are in agreement.

After rereading the per curiam opinions of the Second Circuit for the past two years, I see no reason why at least half of them could not have been dictated in open court with some little extra prepara-

tion. This procedure would result in a considerable saving of time in at least ten per cent of the court's decisions. Perhaps this is another way of saying that many per curiams need not be written at all and that these cases could better be handled by disposition in open court without opinion or by mere order of affirmance which need not be published.

## V

### IMPOSING COSTS

The next group of proposals concerns imposing costs or some kind of penalty on appellants in civil cases whose appeals are frivolous and brought only for delay or harassment. The law provides that "[w]here a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay and single or double costs."<sup>11</sup> Rule 26(b) of the Second Circuit Rules<sup>12</sup> provides that where an appeal has been brought merely for delay, the court may award damages not exceeding ten per cent of recovery in addition to interest.

Rule 38 of the Uniform Rules of Appellate Procedure, effective July 1, 1968, speaks in even broader terms: "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."<sup>13</sup>

The Second Circuit has imposed a penalty for delay in only one case; it added a four per cent penalty to a 214,000 dollar arbitration award in 1966.<sup>14</sup>

Logically, "just damages" would seem to cover the additional expense of reasonable counsel fees that the appellee must incur in responding to a frivolous appeal. Although we are committed to the notion of imposing only nominal costs against the losing party in the trial court, I submit that different considerations apply when it is apparent that pressing one's case further by appeal constitutes a needless expense to the other party and a waste of the time of the appellate court. Therefore, the courts of appeals should use rule 38 to deter the prosecution of frivolous appeals from district court judgments in civil cases.

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<sup>11</sup> 28 U.S.C. § 1912 (1964).

<sup>12</sup> 2d Cir. R. 26(b).

<sup>13</sup> Fed. R. App. P. 38.

<sup>14</sup> South East Atl. Shipping Ltd. v. Garnac Grain Co., 356 F.2d 189, 193 (2d Cir. 1966).

## VI

## ADDITIONAL SUPPORTING PERSONNEL

The next proposal is that the courts of appeals be given additional supporting personnel—specifically, law clerks, stenographic help, deputies in the clerk's offices, and an administrative assistant to the Chief Judge of each circuit.

It is the unanimous view of the active circuit judges of the Second Circuit that the court cannot adequately handle the prospective increase in its business for the next few years unless it is given sufficient supporting personnel and administrative assistance, neither of which it now has.

In my opinion additional law clerk help is imperative. It would be wise economy to give the courts of appeals all the law clerk help they can use. Each additional circuit judgeship costs about 100,000 dollars a year, and each new law clerk only 8,000 dollars. This proposition needs little elaboration or argument, but I think it advisable to describe briefly how the courts of appeals use law clerk help so that two matters are doubly clear: first, that well-trained law school graduates can do much to enable more efficient handling of court business because they can do much of a judge's work under instructions as well as, or better than, the judge, and second, that the final determination as to the handling of the court's business and the decision of cases must remain entirely with the judges.

Although each judge uses his law clerks according to his predilections and habits, I think I can fairly summarize their use in the Second Circuit. The briefs and appendices are usually distributed three weeks before argument. Both the judge and his law clerk study them. In most cases the law clerk prepares a brief written summary of facts and points. The judge, after reading the briefs, may ask the clerk to research a certain point, to secure parts of the record, or to call upon the parties to produce papers not in the appendix. In most cases the law clerk attends the argument. Of the approximately eighty-seven per cent of cases which are not disposed of after argument, fifteen or twenty per cent will receive a brief affirmance that day or shortly thereafter. Some of these per curiam opinions are drafted forthwith by the judge or his clerk.

The remaining two-thirds of the cases will be decided at a conference held the week following argument. Each judge prepares a voting memorandum, which may be one paragraph or ten pages, and

sends it to his two colleagues before the conference. This memorandum practice exists only in the Second Circuit. Some of these memoranda, in the light of the oral argument, require further study and examination of the record, and the judge will instruct the law clerk concerning matters to be studied or documents to be drafted by the clerk.

After the conference and the assignment of opinions, the judge instructs the clerk concerning work to be done on the opinions assigned to him. By this time considerable material is available as a basis for the first draft of the opinion by the judge or by the clerk.

The law clerk system works because the clerks come to us well-trained to do research, and because they quickly learn to assemble facts and to put on paper what the judge needs. They know enough to be of great help, but not quite enough to do much judging.<sup>15</sup>

During the past few terms, the judges in the Second Circuit and many judges in several other circuits have had the services of two law clerks, only one of whom is paid the law clerk salary of 8,000 dollars. The second law clerk receives only the messenger's salary of 4,000 dollars. The Judicial Conference has recommended that the 1969 budget allow each circuit judge to employ two law clerks. Thus far Congress has authorized only three extra law clerks for each circuit. Contrast the staff supporting the Second Circuit Court of Appeals, with its ten judges (nine active and one senior); with the staff supporting the nine judges of the New York Appellate Division, First Department.<sup>16</sup> Apart from judges' salaries, and excluding Appellate Division clerks handling admissions to the bar, the Second Circuit establishment costs 411,000 dollars a year while that of the Appellate Division costs just over 1,000,000 dollars a year.<sup>17</sup>

Experience has shown that in appellate work a judge can cover twice as much ground with a good law clerk as he can cover alone, and with two law clerks I believe he can come close to doing three times as much. The Chief Justice now has three law clerks, and the Associate Justices of the Supreme Court have two each. Although the justices write considerably fewer opinions than the circuit judges, they are asking Congress for more law clerk help.

It is only with sufficient law clerk help that the judges will be

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<sup>15</sup> The interaction of judge and clerk was well described to me by a member of the bar who clerked for one of my predecessors. He said that the judge usually expanded the clerk's facts by about 100% and reduced his law by 50%.

<sup>16</sup> Seven judges, plus two retired judges sitting by designation.

<sup>17</sup> The effect of the recently announced New York law firm salary rate of \$15,000 for law school graduates upon the recruitment of law clerks by federal judges in New York City is a cause of some anxiety.

able to screen cases for summary disposition and explore methods that will reduce the time the judges spend on frivolous and insubstantial cases.

With both summary procedures and extra law clerk help, the Second Circuit has kept well abreast of its business. In recent years we have actually reduced the median time between filing and disposition of cases heard or taken on submission. Last year the average median time for all eleven circuits was nearly nine months; in the Second Circuit it was slightly over six months, the best in the country except for the First Circuit which, although having only three judges, has the smallest caseload per judge.

#### CONCLUSION

A proposal has been framed to meet the contention that a court of more than nine active judges loses its character as a court and becomes a convention. The proposal is that the number of judges be increased to thirteen, or fifteen, or whatever number the circuit may require, but that only the nine most senior of the active judges would constitute both the circuit council and the court for en banc purposes. Whether it would be constitutionally permissible to create such a distinction between judges of the same court is certainly doubtful. In any event, the proposal is wholly repugnant to the concept that all judges of a court must have equal standing to participate in the work of the court. To give some of the judges of a court the power to overrule and negate the decisions of their juniors, in particular cases or in matters of administration, would be highly disruptive. The objectionable features of the proposal clearly outweigh its possible advantages; for if a court is to have character as a unit, all active judges must be equal.

Deciding cases is not the sole duty of the circuit judges. The active circuit judges are also charged with supervising the administration of federal justice in each circuit. This is based on the principle that supervision can best be accomplished by those in touch with what is going on. As members of the judicial council in each circuit, the circuit judges must meet twice a year, at the call of the Chief Judge, but in the Second Circuit they usually meet five or six times a year. The statute provides that "[e]ach judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council."<sup>18</sup>

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<sup>18</sup> 28 U.S.C. § 332 (1964).

The circuit council must consider and report on a multitude of diverse matters: new court facilities at Waterbury, New London, and New Haven; whether the Eastern District Court should sit in Mineola; whether a district needs another referee in bankruptcy and what his salary should be; the program for the Judicial Conference of the Circuit; the creation of a panel of lawyers to serve under the Criminal Justice Act; supervision of the district court plans under the Criminal Justice Act; the assignments of counsel under the Act; the assignments for sittings of the court of appeals and the setting up of panels to pass upon emergency applications and hear cases during the summer; consideration of the reports of the Administrative Office, particularly of cases long held under advisement by district judges; the need for supporting personnel in the clerk's office and in the district court offices; whether senior judges should be redesignated to sit and the needs of the senior judges for chambers and supporting personnel; the elevator service at Foley Square; and much more.

Most of the decisions on council matters must be made between meetings of the council. Consequently, the Chief Judge must act in the light of precedent and previous discussions, or he must talk to enough of his colleagues to be assured that he speaks for the court.

The Chief Judge has limited power to act by himself. He can do so, for example, in the appointment of three-judge district court panels to hear certain cases, in the assignment of judges within and without the circuit to sit in district courts, in passing upon extra compensation under the Criminal Justice Act, and in calling meetings of the circuit council and the Judicial Conference of the circuit.

Thus, a multitude of matters demands the daily attention of the Chief Judge, who acts always in light of the views of a majority of his colleagues.

The Chief Judge is only one among equals; he has only one vote and, in a court of nine, until he can be reasonably sure that four of his colleagues agree with him, he acts at his peril. When the court had only six active judges, it was usually sufficient to contact two judges; with the addition of three judges in 1961, the Chief Judge must contact at least four judges. Consequently, the greater the number of active circuit judges, the more time the Chief Judge must spend in contacting his fellows and in securing their views and their concurrence in any proposed action.

Moreover, many problems raise questions of such a delicate nature that they should be handled informally in the first instance. For example, the possible incapacity of a judge to perform his duties

or the failure of a judge to decide cases for an extended period of time can usually be handled informally; a formal order of the circuit council is highly undesirable and should be used only as a last resort.

Only if the executive group is small enough so that matters can be handled informally, as they arise, can the circuit council, through the Chief Judge, effectively perform a substantial part of its supervisory duties. It is inevitable that if the complement of any court of appeals is increased beyond nine judges that court will become progressively less effective as a means for supervising the administration of justice in that circuit.

A recent survey<sup>19</sup> of the courts of appeals disclosed that the Chief Judges "all have heavy administrative duties on which they spend from one-third to one-half their time."<sup>20</sup> The Judicial Conference has recently approved the appointment of an administrative assistant to the Chief Judge of each circuit, and we await action by the Congress. Although an administrative assistant can save much of the Chief Judge's time on routine matters, only the Chief Judge can speak effectively with his colleagues and other judges on council matters.

Chief Justice Hughes's 1937 letter to the Senate Judiciary Committee, which was then considering the court-packing bill, stated a principle and a conclusion that applies with equal force today to the courts of appeals. The Chief Justice wrote:

An increase in the number of Justices of the Supreme Court, apart from any question of policy, which I do not discuss, would not promote the efficiency of the Court. It is believed that it would impair that efficiency so long as the Court acts as a unit. There would be more Judges to hear, more Judges to confer, more Judges to discuss, more Judges to be convinced and to decide. The present number of Judges is thought to be large enough so far as the present adequate and efficient conduct of the work of the Court is concerned.<sup>21</sup>

It is unfortunate that the Fifth and Ninth Circuits have chosen to meet increasing caseloads by adding more judges before they have fairly tested the many other means whereby the judges can process a larger number of appeals. I hope that the successful use of these other means in the Second and other circuits will persuade them to change their present course. In any event, before Congress increases the num-

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<sup>19</sup> This excellent survey by Will Shafroth, Esq., former Deputy Director of the Administrative Office, can be found in 42 F.R.D. 243 (1967).

<sup>20</sup> *Id.* at 284.

<sup>21</sup> Letter from Charles Evans Hughes to Senator Wheeler, March, 1937, in 81 CONG. REC. 2813, 2815 (1937).

ber of circuit judgeships beyond nine in any more circuits, serious thought should be given to division of those circuits and creation of new circuits or rearrangement of circuits so that no circuit would have more than nine judges.

In 1929 the Eighth Circuit was divided, thus creating the Tenth Circuit. The heavens did not fall. There is much less danger to the character of the federal system in the creation of more circuits than there is in having some of our most important circuits become so unwieldy that the en banc procedure becomes unworkable, and flexible and informal means of supervising the administration of justice within the circuit are lost.

Our principle concern should be the maintenance of the character of our courts of appeals and the quality of their product. Otherwise, the courts of appeals will suffer an inevitable disintegration of their authority and they will be diminished in the esteem of the bar and the public.

A matter of such importance to the federal judicial system merits the full attention of the bar. It is only by a full, frank, and free discussion of the above considerations that we may fashion solutions that will maintain a level of judicial performance and a quality of administration that will be in keeping with the traditions of the federal courts.