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Comment

AN INTERMEDIATE NATIONAL APPELLATE COURT: SOLUTION OR DIVERSION?

I. INTRODUCTION

The proliferation of federal court cases in the last few decades has lately directed a great deal of attention toward the feasibility and desirability of creating a new intermediate national appellate court. Structural revision has not, however, been the sole means suggested to accommodate rising caseloads.

In 1959, due to the sharp increase in district court filings, the late Chief Justice Earl Warren instigated a study by the American Law Institute (ALI) of the jurisdiction of state and federal courts.\(^1\) Although the Study of the Division of Jurisdiction Between State and Federal Courts (ALI Jurisdictional Study) took the form of a legislative proposal when it was published in 1968, Congress failed to act favorably on the proposals embodied therein which would have affected the jurisdiction of all the federal courts.\(^2\) Already overburdened federal courts faced mounting caseloads at all levels, but the problem seemed most acute in the Supreme Court. The nature of the Court and its role as the last resort of all Americans regardless of status, left little room for administrative innovations which might alleviate the Justices' burden. As a result of these circumstances, in 1971 Chief Justice Warren E. Burger established a committee to study and report upon the case load of the Supreme Court.\(^3\)

The Study Group on the Case Load of the Supreme Court (Freund Committee), chaired by Professor Paul A. Freund,\(^4\) released a report\(^5\) which stated that the Court's docket is greatly overburdened.\(^6\) The principal remedy suggested to relieve the Court's burden was the creation of an intermediate appellate court which would screen all cases filed for Supreme Court review, and decide many of those cases which involve issues upon which the circuit courts were in conflict.\(^7\)

The initial negative response to this recommendation\(^8\) prompted Chief Justice Warren E. Burger to issue an invitation for more constructive

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3. FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASE LOAD OF THE SUPREME COURT ix (1972) [hereinafter cited as FREUND REPORT].
4. Paul A. Freund was the Carl M. Loeb Professor of Law, Harvard Law School.
5. FREUND REPORT, supra note 3.
6. Id. at 9.
7. Id. at 18.
criticism and alternative solutions. A wealth of material containing both alternative structures for a new court and criticisms of the various proposals has been published in reaction to the Chief Justice's challenge.

Part Two of this comment will detail the major structural proposals for a National Court of Appeals. Criticism of each proposal is included in order to trace the development of the controversy concerning such a tribunal and to enable the reader to better understand why particular variations were advocated in subsequent proposals.

Although the proposals which are collected in this comment deal with restructuring the federal court system, such remedies can be meaningfully evaluated only in conjunction with the threshold question of whether structural revision is indeed warranted. There is almost universal agreement that the federal courts are presently overburdened. However, there is less agreement as to how the situation might best be corrected.

In part, these different approaches are attributable to the initial perspective taken. While the Freund Committee dealt with the excessive burden currently being shouldered by the Supreme Court Justices and thus devised a plan designed to relieve the Court of its heavy screening burden, the Commission on Revision of the Federal Court Appellate System (Hruska Commission) — formed by Congress in 1972 to study the federal court system — focused upon the need for additional national appellate capacity and thus framed a proposal which would increase the capacity for nationally binding precedent. Taking a different approach, one distinguished federal judge viewed the problem as pervading the federal courts


Few have challenged the existence of a grave problem, and now it is the plain duty of the profession to explore all possible avenues of solution. Sterile, negative criticism is of little use to anyone, and it is the obligation of those who disagree with the solutions proposed to offer their own alternatives.

Id.


12. See notes 17–26 and accompanying text infra.


14. Henry J. Friendly, Judge, United States Court of Appeals for the Second Circuit. Judge Friendly was a member of the Advisory Committee on the ALI Jurisdictional Study.
at all levels and has thus suggested jurisdictional modifications aimed at alleviating the caseload on all levels.\textsuperscript{15} Since the extent of the problem has been demonstrated, and since each individual proposal has been subjected to criticism by a host of scholars,\textsuperscript{16} Part III of this comment will focus upon identifying the true character of the problem with which the federal court system is beset.

II. A NATIONAL COURT OF APPEALS: VARIOUS PROPOSALS

A. The Freund Committee Proposal: Starting Point

Believing that "\textquote{[t]he bare figures of the Court’s workload present the problem most vividly,}\textquote{17} the Freund Committee relied primarily upon raw statistical data\textsuperscript{18} as the basis for its conclusion that the Supreme Court’s docket has reached "the saturation point."\textsuperscript{19} Over the twenty year period ending with the 1971 term, the number of cases filed in the Supreme Court tripled to 3,643 and over one-half of these were indigents’ petitions;\textsuperscript{20} the backlog of cases rose from 146 to 864;\textsuperscript{21} and, since the number of cases argued before the Court remained relatively constant, the percentage of petitions for certiorari which were granted fell from 11.1% in 1951 to 5.8% in 1971.\textsuperscript{22}

Population growth, legislative enactments opening new areas to litigation, and changes in constitutional doctrines were among the factors found to have contributed to the increased filings.\textsuperscript{23} The Freund Committee

\begin{table}[h]
\begin{tabular}{|c|c|c|}
\hline
Term & IFP cases filed & Paid filings \\
\hline
1951 & 517 & 713 \\
1956 & 825 & 977 \\
1961 & 1,295 & 890 \\
1966 & 1,545 & 1,207 \\
1971 & 1,930 & 1,713 \\
\hline
\end{tabular}
\end{table}

\textit{Id.} Thus, while the number of paid petitions was about two and one-half times greater in 1971 than in 1951, the number of \textit{in forma pauperis} petitions grew almost fourfold.

\textsuperscript{15} See notes 145–51 and accompanying text infra.
\textsuperscript{17} FREDN REPORT, supra note 3, at 2.
\textsuperscript{18} See id. at A1–A14 app.
\textsuperscript{19} Id. at 9.
\textsuperscript{20} Id. at 2–3. The numbers of both \textit{in forma pauperis} (IFP) and paid petitions filed over the period were as follows:
\textsuperscript{21} FREDN REPORT, supra note 3 at 2.
\textsuperscript{22} Id. at 3–4. Erwin N. Griswold has explained that in the Court’s 1973 term “there were approximately 150 oral arguments, and this number has been more or less constant for a number of years. It is, in fact, the maximum number that the Court can be expected to hear on the merits.” Griswold, supra note 10, at 340.
\textsuperscript{23} FREDN REPORT, supra note 3, at 3. “Civil Rights, environmental, safety, consumer, and other social and economic legislation” were cited as recent illustrations of legislative enactments. Id. Along with reapportionment and school desegregation doctrines, the expanded substantive rights of criminal defendants and their greater access to counsel were cited as examples of areas in which constitutional interpretations contributed to the rising caseload of the federal courts. Id. at 2–3. The reasons behind the growth in criminal cases was more fully considered by Professors Gerhard Casper and Richard Posner of the University of Chicago Law School. G. CASPER & R. POSNER, THE WORKLOAD OF THE SUPREME COURT 35-43 (1976). After an extensive analysis of the Supreme Court’s criminal docket, the professors were unable
reported that two undesirable consequences resulted from this mounting caseload: "[First], [i]ssues that would have been decided on the merits a generation ago are passed over by the Court today; and second, the consideration given to the cases actually decided on the merits is compromised by the pressures of 'processing' the inflated docket of petitions and appeals." Since the study group found little likelihood that the caseload would diminish, swift relief was recommended to enable the Court to meet its responsibilities effectively.

The major proposal advanced in the Report of the Study Group on the Case Load of the Supreme Court (Freund Report) called for the "creation of a National Court of Appeals which would screen all petitions for review now filed in the Supreme Court, and hear and decide on the merits many cases of conflicts between circuits." The new court would be expected to deny most of the petitions, certify several hundred cases to the Supreme Court each term, and decide on the merits those cases which involved actual conflicts between the circuit courts of appeals. If a case involved a conflict deemed sufficiently important to warrant a decision by the Supreme Court, it would be included among the certified cases. Both denials of certiorari and to definitively attribute its growth to the major Warren Court decisions in the area. Id. at 42. One particularly puzzling factor was the enormous increase in appeals by criminal defendants in federal cases, since the recent decisions by the Warren Court had merely extended to defendants in state criminal cases those rights which had long been enjoyed by defendants in federal cases. See id. at 35-41. Professors Casper and Posner theorized that the Criminal Justice Act of 1964, 18 U.S.C. § 3006A (1970), which provided appellate representation for federal defendants, may partially explain the increase. G. CASPER & R. POSNER, supra at 41-42. They noted, however, that the act does not explain the rise in paid cases on the criminal docket. Id. at 42. Notwithstanding their doubts concerning the effect of liberal Supreme Court decisions upon the aggregate caseload, the professors did find that the composition of the cases on the Court's criminal docket tended toward areas expanded by the Warren Court, and thus may have been affected by decisions concerning the rights of criminal defendants. Id. at 43. In any case, Professors Casper and Posner concurred with the finding of the Freund Committee that factors internal to the system — changes in the law — contributed to the caseload growth. Id. at 56.

24. FREUND REPORT, supra note 3, at 6.
25. Id. at 3. The history of ever increasing litigation led the Committee to project that "independent of other factors, the number of cases will continue to increase as population grows and the economy expands." Id. For a different interpretation of the situation, see text accompanying notes 45-49 infra.
26. The need for additional nationally binding precedent was illustrated as follows:
There has been a proliferation of federal regulatory and welfare legislation in recent years, legislation that requires interpretation, that produces conflicting judicial decisions, and that frequently raises constitutional problems. There is no basis to foresee anything but an intensification of this trend in the period ahead, and with a larger and active bar, increasing legal assistance, and the possibility of an increase in the number of federal judicial circuits, the prospects of a still further increase in the number of review-worthy cases reaching the Court cannot be gainsaid.
FREUND REPORT, supra note 3, at 6.
27. Id. at 18.
28. Id. The proposed new court would only have jurisdiction to decide those issues upon which the circuit courts were divided. Id. at 21.
29. Id. In cases of "serious doubt, the National Court of Appeals should certify a petition rather than [deny] review." Id. The Freund Committee estimated that approximately 400 cases would be certified to the Supreme Court each year. Id.
decisions on the merits by the new tribunal would be final and unreviewable. As the Report stated:

Once a case had been certified to it, the Supreme Court would, as now, have full discretion to grant or deny review or limited review, to reverse or affirm without argument, or to hear the case. In cases of conflict among circuits, the Supreme Court would, in addition, be able to grant review and remand to the National Court of Appeals with an order that the case be heard and adjudicated.

Additionally, the Supreme Court would be supplied with copies of all petitions filed in the new court and could preempt the jurisdiction of the new court by requiring that a particular case be certified to the Supreme Court either before a decision denying review had been made or prior to judgment when the National Court of Appeals was considering the case on the merits.

The composition and method of selecting the bench of any new court is also an important concern. The Freund Committee proposed a bench for the National Court of Appeals consisting of seven judges borrowed from the circuit courts of appeals for staggered three-year terms. After omitting from consideration certain senior judges and those who had served for less than five years at the appellate level, selection for the new tribunal would operate automatically by alternating between the most and the least senior judges in active service nationwide. No two judges from the same circuit would serve together, nor would anyone serve a second term until all eligible judges had served once.

Although criticism of the Freund Committee's proposal was almost universal, the particular faults found with it varied. There were three major lines of attack. First, several commentators asserted that there was no need to lighten the Supreme Court's workload. Second, many others argued that the proposed solution would not have the desired effect of substantially alleviating the Court's burden. Finally, as some fault was found with the

30. Id.
31. Id. at 22. A remand to the National Court of Appeals would indicate that, despite the existence of a conflict among the circuit courts of appeals, the case did not warrant a Supreme Court decision. Id.; see notes 28–30 and accompanying text supra.
32. FREUND REPORT, supra note 3, at 21. "The expectation would be that exercise of this power would be exceptional." Id.
33. Id. at 18–19.
34. Id. at 19. After a list of all active circuit court judges had been compiled, the following would be deleted as ineligible: "judges serving as chief judges, or who would have succeeded to a chief judgeship during their term of service on the National Court of Appeals had they been selected, and all judges with less than five years service as United States circuit judges." Id.
35. Id. Judges would, however, be permitted to decline appointment to the new court "for good cause." Id.
36. Id.
37. See notes 41–49 and accompanying text infra.
38. The scheme devised by the Freund Committee was labeled inadequate to alleviate the Supreme Court's workload because the 400 or so cases certified to the Court would presumably include the marginal cases which presently consume most of
responsible assignments to the new court, the most serious criticism focused upon the likelihood that the scheme would damage the Supreme Court as an institution.

Prominent among those who denied that the Supreme Court was overburdened were the late Chief Justice Warren, Justice Brennan, and former Justices Douglas and Goldberg. The late Chief Justice Warren contended that the burden was not as great as the statistics seemed to indicate since in forma pauperis petitions, which accounted for a large amount of the increase in requests for review, tended to be clearly without merit and, therefore, required minimal time to screen. Justice Brennan agreed, noting that after gaining experience in dealing with petitions for certiorari a "substantial percentage" of them can be disposed of merely by reading the questions presented, some of which are "clearly frivolous.'" At least partial support for the position taken by these Justices is found in the work of Professors Casper and Posner, who criticized the Freund Committee's statistical analysis as inadequate:

[A] simple aggregate of all of the applications for review filed each year . . . may disguise important changes in the composition of the caseload that affect the actual workload of the Court and the likelihood that the caseload will continue to grow in the future at the same rate as in the past.

By comparing the civil cases docketed in the 1956-1958 terms with those in the 1971-1973 terms, Professors Casper and Posner determined that although there were a number of categories which experienced substantial growth, there were also many areas in which the number of filings either declined or rose only marginally. This uneven growth among the various categories led them to conclude that factors internal to the legal system,
rather than external concerns such as population and economic activity, were primarily responsible for the burgeoning caseload. However, they were unable to controvert the Freund Committee’s projection that the number of petitions for Supreme Court review would continue to rise, and admitted that their findings could support a conclusion that the Supreme Court was already overburdened. Nevertheless, they emphasized that the statistics did “not compel acceptance of” a belief that measures must be taken to reduce the Court’s workload.

Despite the few commentators who questioned the burdens of the Court’s workload, the large majority of authorities conceded that the Court was overworked. Their primary concern, however, was that a national court in the form envisioned by the Freund Committee would impinge upon the effective functioning of the Supreme Court. There appears to be widespread agreement that the Supreme Court alone should have the authority to choose from among the petitions seeking review those cases which it believes are worthy of full consideration. As Professor Kurland has stated:

The essence of the complaint against the Freund Report is that somehow it threatens to reduce the powers that have been exercised by the Supreme Court. The notion is that by delegating to other judges the selection of the four hundred and fifty-odd petitions for Supreme Court consideration, the Court will be turned from its libertarian bent, that it will be deprived of its opportunities to amend earlier positions, and that it will lose the opportunity for self-education in the highways and byways of the law, an education it is supposed to get from reading all the thousands of petitions that are now assigned to it. The chief argument, however, is that the power totally to choose among the cases proffered should not be delegated.
These criticisms may have sounded the death knell for the national appellate court advocated in the Freund Report, but they also brought forth a number of alternative plans for an intermediate national appellate court, each aimed at alleviating the burden on the federal appellate court system while cautiously avoiding the criticism encountered by the Freund proposal.

B. Alternatives Still on the Table: Meeting the "Need for Definitive Declaration of the National Law"

Despite minor variations in a few specific elements of their recommendations, Judge Shirley M. Hufstedler, Dean Erwin N. Griswold, and the Hruska Commission, submitted substantially similar proposals for a new court. In formulating their proposals, they were less concerned than the Freund Committee had been with reducing the work of the Supreme Court. Rather, they tried "to determine whether the need for definitive declaration of the national law in all its facets is being met, and, if it is not being met, how best to assure that it will be met."  

1. Recommendation of the Hruska Commission

The Hruska Commission was formed by Congress in 1972 to study the various problems encountered by the federal court system. The commission's report included a sampling of issues upon which the circuit courts of appeals were in conflict and projected that the number of conflicts per year during the Court's 1971-1973 terms would range between forty-five and fifty-five, "the equivalent of about one-third of the number of cases given plenary consideration each term." Additionally, the commission found that although federal regulatory laws which often require judicial interpretation had increased in both number and importance, the Supreme Court's docket

56. Judge, United States Court of Appeals for the Ninth Circuit.
58. Hruska, supra note 10, at 546–47.
60. Hruska Report, supra note 50, at 76–90. The Hruska Commission listed twenty specific points on which there were conflicting federal court decisions which had not been resolved by the Supreme Court. Id. The illustrations were meant to show the advantage of transfer jurisdiction in a newly created court which "would result in a nationally binding decision at the first level of review." Id. at 78. See text accompanying note 69 infra.
61. Hruska Report, supra note 50, at 17. Professor Floyd Feeney of the University of California at Davis developed the projections after studying a large sample of petitions for review filed during the Court's 1971 and 1972 terms. Id. Refuting the suggestion that many of the conflicts were of a constitutional nature which should be left unresolved until "ripe for definitive adjudication," id., the commission explained that less than one-half of the conflicts concerned constitutional matters. Moreover, the commission further asserted that constitutional conflicts were the ones most likely to be quickly resolved. Id.
had shifted in the opposite direction: prior to 1960, less than one-third of the Court's holdings rested upon constitutional grounds; thereafter, well over one-half of the decisions rendered concerned matters of constitutional law.\(^6\)

Relying on both this fact and "[t]he perceptions of participants in the federal judicial system,"\(^6\) the Hruska Commission determined that the paucity of nationally binding decisions often bred uncertainty,\(^6\) forum shopping,\(^6\) and relitigation of issues previously decided in a different circuit.\(^6\) The views of those consulted by the Hruska Commission were found to "reflect deficiencies which we view as both serious and remediable. They underlie our conclusion that a need for additional national appellate capacity has been demonstrated and that, consistent with the mandate of the Congress, we should recommend a change in structure to meet that need."\(^6\)

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6. Id. at 8.
63. Id. at 10. Those consulted by the commission included the Supreme Court Justices, judges, litigants, and members of the federal agencies. Id. at 10-13, 26-27 & 133-68. The commission also noted Dean Griswold's claim that during the six years in which he was Solicitor General, he felt obliged to deny agency requests to petition the Supreme Court for review in at least twenty cases per term due to the Court's workload. Id. at 12, quoting Griswold, supra note 10, at 344.
64. HRUSKA REPORT, supra note 50, at 14. The Commission explained this facet of the problem as follows:

[The lack of capacity for definitive declaration of the national law frequently results in uncertainty even though a conflict never develops. The possibility of conflict, not knowing whether a potential conflict will mature into an actual conflict, is yet another consequence of our present system. In many cases there are years of uncertainty during which hundreds, sometimes thousands, of individuals are left in doubt as to what rule will be applied to their transactions.]

Id. at 14.

65. Id. at 15. Forum shopping was found to be particularly evident in the field of patent law where "'mad and undignified races'" to invoke the jurisdiction of a particular federal court ensue. Id., quoting H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 155 (1973).

66. HRUSKA REPORT, supra note 50, at 133-43. The federal government has been known to relitigate matters in different circuits in the hope of a more favorable ruling. See id.

67. Id. at 27. Professors Casper and Posner took issue with the Hruska Commission's finding that there is a need for additional national appellate capacity. After revealing that they found only about half as many unresolved conflicts per term as had the Commission, they discounted the importance of any short term statistics. G. CASPER & R. POSNER, supra note 23, at 89-90. In their view, a study should focus upon discerning a trend rather than the collection of a few years' statistics. Id. at 90. Comparing the figures compiled on the 1958-1960 terms with those recorded on the 1971-1973 period, the professors found that the number of conflicts per term remained relatively constant, as did the number of conflict cases decided by the Supreme Court. Id. at 87-89. The average number of alleged conflicts rose modestly from 273 to 407. Id. at 87. The number of conflicts which the deciding court acknowledged to entail conflicting decisions changed slightly from 47 to 50. Id. at 89. In the earlier period, the Supreme Court accepted about 74% of the conflicts found to exist by the research assistants, and 67% were heard by the Court in the more recent time period studied. Id.

However, the Hruska Commission itself had recognized that it is preferable to postpone the final adjudication of some issues until several courts have addressed the question; yet the statistics offered in support of the conclusion that too many conflicts went unresolved each year did not take into account such justifiable delay. HRUSKA REPORT, supra note 50, at 14-15. The commission's own figures showed that approximately one-half of the constitutional questions and one-fifth of the remaining issues in which conflicts were found had been resolved by the Supreme Court within a
Specifically, the Hruska Commission recommended that Congress enact legislation creating a National Court of Appeals which would consist of seven life-tenure judges appointed by the President and confirmed by the Senate. The new tribunal would have two types of jurisdiction: 1) reference jurisdiction to hear cases referred to it by the Supreme Court; and, 2) transfer jurisdiction to decide cases transferred to it from the circuit courts of appeals, the Court of Claims, and the Court of Customs and Patent Appeals. The plan would allow the Supreme Court to choose among four alternatives in disposing of petitions for review: 1) the Court could grant review and proceed to hear and decide the case; 2) it could simply deny review and terminate the litigation; 3) in denying review the Court could refer the case to the new tribunal for a decision on the merits, and 4) the petition for certiorari could be referred to the National Court of Appeals which would be at liberty either to hear and decide the case or to deny review and terminate the litigation. Cases could be transferred to the new national court from the various other federal appellate courts if they involved conflicting interpretations of federal law, recurring factual situations upon which swift national precedent would be desirable, or issues which, although previously addressed by the National Court of Appeals, continued to present perplexing questions of interpretation or application. The National Court of Appeals could refuse to accept jurisdiction over any case transferred from another court. The decision to refuse a case within its transfer jurisdiction would be final and unreviewable. However, any few years. Id. at 17. Thus, the number of conflicts per term did not reflect the number of cases that the Supreme Court should have decided but for workload constraints; rather, a large percentage of such issues were apparently passed over because they were not yet ripe for definitive resolution. See G. Casper & R. Posner, supra note 23, at 90–91.

Professors Casper and Posner also criticized the Hruska Commission for disregarding the opinions of leading litigators who did not perceive any “problems of unsettled issues, conflicts, or undue delays in the areas of practice in which they specialize.” Id. at 91, citing Hruska Report, supra note 50, at 144-68 app. The Hruska Commission had merely appended to the report the views of those who saw no problems of nationally binding precedent while emphasizing, in the body of its report, the points made by those who supported the need for a new court. See Hruska Report, supra, note 50, at 10–13 & 144–68 app.

69. Id. at 32, 34.
70. Id. at 32–33. The four options would only be available for cases within the Supreme Court’s discretionary jurisdiction. Id. If the case were one in which the appellant had a statutory right to appeal, the Court would be required either to grant review and render a decision on the merits or to refer the case to the National Court of Appeals for full consideration. Id. at 33.
71. Id. at 34–35. The commission explained:
[T]he regional courts would be expected to give appropriate weight to the need for allowing difficult issues to mature, and to take account of the benefits to be gained from allowing the lower courts to consider a variety of approaches to difficult legal problems before a nationally binding decision is reached.
Id. at 36.
72. Id. at 35.
73. Id. Except for the new court’s authority to refuse to accept a case which had been transferred, any decision by a regional court of appeals upon a motion for transfer would be unreviewable. Id.
decision on the merits by the new court would be subject to discretionary review by the Supreme Court.\textsuperscript{74}

Apparently due to stiff opposition,\textsuperscript{75} the concept of transfer jurisdiction was not included in the proposals suggested by Judge Hufstedler and Dean Griswold.\textsuperscript{76} It was also not embodied in the pending Senate bill introduced by Senator Hruska.\textsuperscript{77} That bill, if enacted, would create a National Court of Appeals to decide only cases referred to it by the Supreme Court.\textsuperscript{78}

2. The Hufstedler and Griswold Variations

The scheme outlined by Judge Hufstedler, which has been adopted by the Advisory Council for Appellate Justice and approved by the American Bar Association’s House of Delegates,\textsuperscript{79} differs from the Hruska Commission's recommendation in a number of details. This court would be composed of fifteen, rather than seven, members to be selected from among the active federal appellate judges who would sit in panels of five or seven.\textsuperscript{80} While the precise means of selecting judges for the bench of the new court was not specified, Judge Hufstedler stated that she preferred a systematic selection designed to preclude "dominance by any administration or political 

\textsuperscript{74} Id. at 38–39. Although the Commission believed that few cases within the reference jurisdiction of the National Court of Appeals would be re-argued in the Supreme Court, it suggested that "expedited consideration" should be given to any case granted review under such circumstances. Id. at 39.

\textsuperscript{75} Senator Hruska listed the following opposition to the concept of transfer jurisdiction:

Justices of the Supreme Court, with one exception, either ignored the provision or opposed it. Witnesses at a series of hearings termed the proposal either impracticable or undesirable or both. Finally, the American Bar Association, acting through its House of Delegates on the recommendation of its Special Committee on Coordination of Judicial Improvements, while warmly endorsing the proposal for establishing a National Court of Appeals, withheld approval of the provisions . . . concerning transfer jurisdiction.


\textsuperscript{76} Compare Hufstedler, supra note 10, at 548 and Griswold, supra note 10, at 350–51 with Hruska Report, supra note 50, at 32–38.

\textsuperscript{77} S.3423, 94th Cong., 2d Sess., 122 CONG. REC. S 6987 (daily ed. May 12, 1976).

\textsuperscript{78} On December 10, 1975, Senator Hruska introduced a bill in the United States Senate which embodied the recommendation for the creation of a new national court which was made by the Hruska Commission. 121 CONG. REC. S21583–84 (daily ed. Dec. 10, 1975) (remarks of Senator Hruska). This bill, S.2762, included the Commission's proposals that the court's judges be appointed by the president and that the court have both reference and transfer jurisdiction. Id. at S21584. The bill which Senator Hruska introduced on May 12, 1976, S.3423, differed from S.2762 only in two respects; namely, the manner of appointment of the new court's judges and the omission of the court's transfer jurisdiction. 122 CONG. REC. S6985–86 (daily ed. May 12, 1976) (remarks of Sen. Hruska). The scheme for selection of judges for the new tribunal proposed in S.3423 provided for two judges to be appointed by the President immediately, two more to be appointed four years later and the remaining three to be appointed after eight years had passed from the initial selection. Id. at S 6987. The court would initially achieve a seven-member bench by a process which would automatically place the most senior circuit court judges (after excluding those who would reach senior status during their four-year term) on the court. Id.

\textsuperscript{79} See 60 A.B.A.J. 546 (1974).

\textsuperscript{80} Hufstedler, supra note 10, at 548.
party.\textsuperscript{81} Congress would be free to establish the jurisdictional parameters of the new intermediate court, and the Supreme Court would determine which cases would actually be referred to it.\textsuperscript{82} All decisions of the National Court of Appeals, would, under this plan, be filed with the Supreme Court and become final only if the Supreme Court failed to exercise its prerogative to take jurisdiction over the case within a specified time period.\textsuperscript{83}

Although he would call the new tribunal the “National Court of the United States,”\textsuperscript{84} Dean Griswold’s variation, in comparison to the Hufstedler proposal, was closer to the Hruska Commission’s recommendation. Dean Griswold anticipated that most cases referred to the national court would involve specialized areas of administrative law;\textsuperscript{85} however, to avoid unnecessary jurisdictional problems, he did not favor statutory restriction of the new court’s jurisdiction, as was recommended by Judge Hufstedler.\textsuperscript{86} While admitting that it may seem undesirable to have the entire original bench — of five or seven judges — appointed by one President, Dean Griswold asserted that selection should be the same as for the other federal judgships.\textsuperscript{87}

3. Reaction

Although most commentators addressed specific proposals, their criticisms should be considered in connection with any proposal for an intermediate court with reference jurisdiction. In a spirited attack upon those proposals which would create a new court with jurisdiction to hear cases referred to it by the Supreme Court, the late Chief Justice Warren raised the question of whether such delegation of the Court’s jurisdiction would be constitutional.\textsuperscript{88} He argued that “the determination as to what court shall exercise jurisdiction over certain classes of litigation is often a highly charged political question” which should be left to Congress.\textsuperscript{89} The late Chief Justice also doubted the wisdom of those proposals which would create a tribunal consisting of judges who would neither be chosen on the basis of competence, nor permanently appointed.\textsuperscript{90}

\textsuperscript{81.} Id. For possible selection methods, see notes 34–36, 78 and accompanying text supra.
\textsuperscript{82.} Hufstedler, supra note 10, at 548.
\textsuperscript{83.} Id.
\textsuperscript{84.} Griswold, supra note 10, at 350.
\textsuperscript{85.} Id. at 351. Griswold remarked: “The cases which would go to the National Court of the United States would presumably include most tax cases, many patent and antitrust cases, some diversity cases, NLRB cases, and some Power Commission and Trade Commission cases, among others.” Id.
\textsuperscript{86.} Id. See text accompanying note 82 supra.
\textsuperscript{87.} Id. at 350, 352. Dean Griswold thought, however, that some of the original appointees should be “relatively senior judges already on the bench of the courts of appeals.” Id. at 352.
\textsuperscript{88.} Warren, supra note 10, at 679. The late Chief Justice explained: “[T]here is a serious question whether Congress has the constitutional power once it has vested certain appellate jurisdiction in the Supreme Court, to delegate or authorize the delegation of any part of the jurisdiction to an inferior court.” Id.
\textsuperscript{89.} Id.
\textsuperscript{90.} Id.; accord, Friendly, supra note 10, at 654.
A significant criticism directed against the proposal which provided that decisions would become final only when the Supreme Court failed to act upon them was that, unless every decision by the National Court of Appeals were to be reviewed by the Supreme Court, the Court's imprimatur would be placed upon decisions in which it had played no part. Not all of the proposals for reference jurisdiction would be subject to this criticism, however. The recommendation of the Hruska Commission, for example, provided for the same type of discretionary Supreme Court review by writ of certiorari as is presently used to review appellate court cases. Furthermore, even if the Supreme Court's role were one of passive acceptance, the cases referred to the new tribunal by the Supreme Court would be of only secondary importance and rarely worthy of reconsideration after judgment had been entered by the National Court of Appeals.

Although the Hruska Commission operated under a self-imposed constraint that it could not advocate a plan which would add to the Supreme Court's workload, the reference jurisdiction proposal has been criticized for doing just that. The Court's responsibility to refer cases to the new tribunal would obviously add to its present burden and could substantially increase the time spent on screening cases to decide whether to refer cases to the National Court of Appeals and, if so, whether to require the new tribunal to dispose of the case on its merits.

91. See G. Casper & R. Posner, supra note 23, at 107-08; Friendly, supra note 10, at 653-54. Judge Friendly explained the problem as follows: One of two consequences would follow: either the Court would have to take a larger proportion of these decisions than it now does of decisions of courts of appeals in the same area of law, or the "national law" would be established by a rotating group of judges without the prestige and, particularly if selected on an automatic basis, of distinctly less ability than the Justices of the Supreme Court. Id. at 654.

92. See Warren, supra note 10, at 679. Elaborating on the point, the late Chief Justice stated: "The Supreme Court would be expected to take the responsibility for final judgments entered in its name without having fully participated in the essential processes that precede the judgments. The very vitals of the Court's decisional processes will have been cut away." Id.

93. See note 74 and accompanying text supra. The bill presently pending in the Senate also calls for review by writ of certiorari. See S.3423, 94th Cong. 2d Sess., 122 CONG. REC. S 6987 (daily ed. May 12, 1976).

94. See Griswold, supra note 10, at 351.


96. See G. Casper & R. Posner, supra note 23, at 105-06. See also Warren, supra note 10, at 678.

97. For the options available to the Supreme Court under the recommendation of the Hruska Commission, see note 70 and accompanying text supra. As an example of the added considerations which would come into play, Professors Casper and Posner explained that a Justice might regularly vote to deny certiorari in a class of cases because he believed the majority would not resolve the issue in a satisfactory manner. For him a "rational" reference decision might require a prediction of the likely outcome in the national court. The screening function would thus assume greater importance, which would make it more difficult to discharge and therefore more time consuming.

G. Casper & R. Posner, supra note 23, at 106. Perhaps this example illustrates the late Chief Justice Warren's apprehension that "the court would be thrown into the political arena." Warren, supra note 10, at 679. See text accompanying note 89 supra.
Unlike the Freund Committee’s proposal, the recommendation of the Hruska Commission has not, as yet, generated broad-based opposition. As Senator Hruska stated:

[N]ot a single voice from among the active Justices of the U.S. Supreme Court has doubted that reference jurisdiction is feasible nor has any voice asserted that it would impose added burdens on the court. On the contrary, it stands endorsed as a feasible, practicable mechanism, one which would make it possible for the National Court of Appeals to achieve those benefits for which it was designed.

Of course, Senator Hruska’s optimistic assessment of the reaction to the proposal ignored the criticisms sounded by the late Chief Justice Warren and other commentators.

C. More Proposals: Miscellanea

Although a proposed National Court of Appeals with jurisdiction to hear cases referred to it by the Supreme Court is presently the focal point of discussion, other schemes have also been advanced, none of which has generated much enthusiasm or support.

1. The Rosenberg Plan: A Hodgepodge of Alternatives

An extensive and somewhat radical plan to restructure the federal appellate court system was proposed by Professor Rosenberg. His “Flexible Model” called for a merger of all the federal appellate courts into a single “Court of Appeals of the United States.” The newly titled court would have four separate divisions, three of which — the Circuit Division, the Claims Division, and the Custom and Patents Division — would essentially carry on as had their predecessors with the single modification of realigned circuits within the Circuit Division. The fourth division — the Central Division — would be carved into four distinct sections. A Section for Criminal Appeals would be charged with the responsibility of ensuring that the federally protected rights of criminal defendants were not violated. It would hear cases on appeal from the highest state courts and the federal appellate courts in the Circuit Division. A Section for National

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98. For a discussion of the reaction to the Freund Report, see notes 37–55 and accompanying text supra.
100. See notes 88–90 and accompanying text supra.
101. See notes 91–97 and accompanying text supra.
102. Maurice Rosenberg is the Harold R. Medina Professor of Procedural Jurisprudence, Columbia University.
103. Rosenberg, supra note 10, at 591–95.
104. Id. at 591–92.
105. Id. at 592.
106. Id.
107. Id.
108. Id. The effectiveness of this chamber would require that legislation be passed which would preclude relitigation of “issues previously heard or disclaimed in an approved and opportune fashion by the court system rendering the criminal judgment.” Id.
Law Specialties would be created to hear all cases within certain areas of federal specialty law. Congress would list the areas of federal specialty law which could be delegated to this division by the Supreme Court, and the Court would specify from time to time those areas over which the division’s jurisdiction would actually extend. Cases would reach this panel by direct appeal from a district court or an administrative agency, and the section’s decisions would be “recommended” to the Supreme Court, becoming final absent action by the Court within 60 days. A Section for Certiorari Review would prepare brief memoranda recommending whether certiorari should be granted or denied by the Supreme Court. Again, the recommendations would be accepted unless the Court acted within a specified time period. The final section of the Central Division would decide individual cases referred to it by the Supreme Court. Presumably, referrals would consist of “cases the Justices believe[d] need[ed] a preliminary decision to be made by the Central Division and transmitted to the Supreme Court with a recommendation.” Professor Rosenberg considered this fourth section to be of “only marginal utility compared to the other three chambers.”

2. A Separate Criminal Court: Proposed and Rejected

Professor Rosenberg’s proposed Section for Criminal Appeals is similar to Judge Haynsworth’s suggestion that there be “a new national court of appeals to review [criminal] convictions in the federal and state judicial systems.” Judge Haynsworth asserted that such a court would substitute “an efficient system for prompt direct review” for the present system which relies upon “collateral review of federal questions arising in criminal prosecutions.” Under his proposal, the new court would additionally be

109. Id. at 593.
110. Id. Professor Rosenberg illustrated the selection procedure as follows: “The categories will be drawn from a Chinese-menu style list, prepared by Congress and naming such federal specialties as labor relations, social security, environmental protection, antitrust, or whatever fields the Supreme Court regards as most in need of unifying, harmonizing decisions.” Id.
111. Id. Professor Rosenberg explained this to be “the essence of the concept of planned flexibility. The Supreme Court has its hand on the throttle or the valve — determining when classes of cases or particular functions shall flow into and out of the Central Division.” Id. at 593–94.
112. Id. at 593 (emphasis in original).
113. Id. at 594.
114. Id. A losing litigant would be permitted to respond to a recommended denial of certiorari; however, the Supreme Court could promulgate rules to require that motions for a rehearing be very brief. Id.
115. Id.
116. Id.
117. Id. Since the Rosenberg Proposal is merely a hodgepodge of several more narrow proposals, the criticisms which have been leveled against the other suggested measures apply equally to the broad scheme advanced by Professor Rosenberg. For the applicable criticisms, see notes 37–54, 88–92 and accompanying text supra and notes 124–29, 133–36 and accompanying text infra.
118. Haynsworth, supra note 10, at 598. Clement F. Haynsworth, Judge, United States Court of Appeals for the Fifth Circuit.
119. Id.
"authorized to hear and decide cases referred to it for decision by the Supreme Court."120 This nationwide supervision over criminal convictions and prisoners’ complaints would, in Judge Haynsworth’s view, assure uniformity in the application of constitutional standards.121 Moreover, by precluding the use of habeas corpus in cases in which there either was or could have been an appeal to the new national criminal court, collateral attacks would be curtailed.122 Judge Haynsworth suggested that review by the Supreme Court should be allowed only when the National Court of Criminal Appeals “disposed of a case on the merits or denied certiorari with one or more dissents.”123

The Freund Committee had considered and rejected the idea of a separate court to handle criminal matters,124 primarily because it foresaw a likely polarization of constitutional views among judges serving on such a specialized court.125 Further, the new tier of appellate review would not lighten the Supreme Court’s burden unless its decisions were unreviewable and this was seen as inexcusable discrimination against criminal defendants.126 Judge Friendly cautioned that if provision were made for Supreme Court review as Judge Haynsworth had proposed, “there would be no general agreement that the Supreme Court was right and the National Court was wrong” in cases of reversal by a sharply divided Supreme Court.127 This would have a detrimental impact upon the effectiveness of both tribunals.128 Judge Friendly’s chief argument against the Haynsworth proposal, however, was that the problems generated by collateral attack on criminal convictions could be better solved by legislation which is in the offing.129

120. Id. Concerning the new court’s jurisdiction by reference from the Supreme Court, Judge Haynsworth merely explained that “[t]he most likely category of such referenced cases would be those involving conflicts in statutory interpretation or decisional law which should be resolved for the sake of uniformity and predictability in the law.” Id. at 605.
121. Id. at 604.
122. Id. at 606. See also Haynsworth, A New Court To Improve the Administration of Justice, 59 A.B.A.J. 841, 843-44 (1973). The utility of a new criminal court may have diminished due to recent Supreme Court decisions which have tended to reduce the availability of collateral review of criminal convictions. See Stone v. Powell, 428 U.S. 465 (1976).
123. Haynsworth, supra note 10, at 613.
124. FREUND REPORT, supra note 3, at 12.
126. FREUND REPORT, supra note 3, at 12; accord, Freund supra note 125, at 1306.
127. Friendly, supra note 10, at 639.
128. See id. at 639-40.
129. Id. at 636-37. Judge Friendly noted that bills had been introduced in Congress which would restrict the availability of collateral attacks, and expressed confidence that a bill being prepared by the Special Committee on Habeas Corpus of the Judicial Conference would adequately deal with the problem. Id. He concluded: “There is thus every reason to think that, at long last, collateral attack on criminal convictions is on the way to solution by well-considered legislation addressed directly to the problem, and there will be no need to create a new court for that purpose.” Id. (footnote omitted).
3. A Court of Administrative Appeals

A national court similar to Professor Rosenberg’s suggested Section for National Law Specialties\textsuperscript{130} — but with more permanently set jurisdictional parameters — might be helpful both to unify regulatory law\textsuperscript{131} and to alleviate the burden on the circuit courts of appeals.\textsuperscript{132} While recognizing that such a court might prove to be a worthwhile reform, the Freund Committee dismissed consideration of such a proposal because of the negligible impact it would have upon the Supreme Court’s workload.\textsuperscript{133} A tribunal of this nature has also not been accorded serious consideration due to widespread antipathy toward specialized courts.\textsuperscript{134} It is felt that a specialized court would lose the general perspective achieved with diversity,\textsuperscript{135} and appointments to its bench would possibly be politicized by intense pressures from lobbies with narrow interests.\textsuperscript{136} These criticisms, however, are directed toward specialized courts whose jurisdiction is severely limited in scope. They are inapposite in evaluating the desirability of a national court of administrative appeals whose docket would consist of a wide range of diversified topics. If there were but a single court, rather than a court for each of a number of regulatory areas, the chances of politicization would be no greater than with any other proposed national court.\textsuperscript{137}

III. IS A NEW NATIONAL COURT THE SOLUTION?

The intense controversy precipitated by the Freund Report heightened awareness of the fact that relief for the federal court system must be prompt to be effective. However, the remedy suggested by the Freund Committee and by those whose recommendations are set out above illustrate but one approach available in solving the problem. The Hruska Commission noted that “there are two alternative approaches to alleviating the burdens of the federal appellate system. One seeks to accommodate rising caseloads by providing the courts of appeals with the means of disposing of greater

\textsuperscript{130} See notes 109–12 and accompanying text supra.

\textsuperscript{131} See generally Hruska Report, supra note 50, at 8. The Commission noted, however, that “the problem of inadequate appellate capacity is not limited to one or two areas of the law.” Id. at 30.

\textsuperscript{132} This would only be if the new court, as Professor Rosenberg suggested, were to hear appeals directly from the district courts and administrative agencies. See text accompanying note 112 supra.

\textsuperscript{133} Freund Report, supra note 3, at 11–12.

\textsuperscript{134} See Hruska Report, supra note 50, at 28–29; Freund Report, supra note 3, at 11–12; Alsup, supra note 10, at 1342; Griswold, supra note 10, at 337; Hufstedler, supra note 10, at 547. See also Rifkind, A Special Court for Patent Litigation? The Danger of a Specialized Judiciary, 37 A.B.A.J. 425 (1951).

\textsuperscript{135} See Hruska Report, supra note 50, at 28; Freund Report, supra note 3, at 11; Rifkind, supra note 134, at 425.

\textsuperscript{136} See Hruska Report, supra note 50, at 29.

\textsuperscript{137} Justice Marshall has suggested that federal regulatory law could be harmonized without creating a new national court by assigning appeals from the decisions of each administrative agency to only one circuit court. Id. at 183 app. This is presently the case with some Federal Communications Commission decisions, appeals from which are restricted to the Circuit Court of Appeals for the District of Columbia Circuit. Id.
numbers of cases. The other seeks to reduce the caseloads themselves. The congressional directive restricted the commission’s inquiry to the first alternative of increasing the decisional capacity of the federal courts. The Hruska Report stated:

We take note of the number of witnesses who, mindful of our mandate, nevertheless urged that our task was made more difficult by the unambiguous limitation thus imposed. Yet, it would be wrong to leave the impression that limitations on trial court jurisdiction are in themselves likely to prove an adequate remedy for appellate problems, particularly in the light of the modest reach of pending legislation. Unless change is far more sweeping than can now be foreseen, the net effect is likely to be little more than to slow or to stop the rate of growth. At the least, it would appear unwise, for planning purposes, to act on the assumption that the caseload will diminish or even that it will cease to grow. We should rather plan to provide the courts of appeals with a measure of flexibility adequate to accommodate whatever additional demands upon them may be considered wise. It would be intolerable if proposals sound on their merits had to be rejected solely for lack of capacity in the system.

Perhaps the Hruska Commission’s projection of the future caseloads in the federal courts will prove to be accurate. However, the creation of a new national court can hardly be considered “a measure of flexibility.” Rather, it is a substitute for the pleas for more federal judges and additional federal circuit courts which have been made for years. Even if such a court were established, however, the calls for more judges and new circuits would be likely to continue since the federal courts are overburdened at all levels. The problem is not merely one of excessive work in the Supreme Court — the aspect addressed by the Freund Committee — nor is it one of insufficient nationally binding decisional law as Judge Hufstedler, Dean Griswold and the Hruska Commission believed.

Rather than concentrating upon structural revisions at the top of the court system, perhaps jurisdictional revisions such as those recommended by The American Law Institute and Judge Friendly should be the focal point for discussion. Among the more important suggestions made by

139. Id.
140. Id. at 2–3.
141. For a similar projection by the Freund Committee, see notes 25–26 and accompanying text supra.
143. See notes 25–26 and accompanying text supra.
144. See note 67 and accompanying text infra.
145. See note 152 and accompanying text infra.
146. Friendly, supra note 10, at 640–46.
147. Although the full impact of the modifications advocated by Judge Friendly have not been measured, it has been estimated that circuit court filings would be reduced by approximately one-third. Id. at 645; see H. Friendly, Federal Jurisdiction: A General View (1973).
Judge Friendly were the elimination of diversity jurisdiction, fewer federal criminal sanctions where states have concurrent jurisdiction, more effective use of administrative agencies for fact-finding and enforcement, and the creation of new courts for patent and tax cases so that these issues may be removed from the other federal courts.

The ALI Jurisdictional Study included recommendations concerning almost all aspects of federal court jurisdiction, including diversity and federal question jurisdiction, and provisions dealing with three judge courts, removal, and the issuance of stays by both federal and state courts.

Current jurisdictional revision suggestions which would affect all levels of the federal court system are too intricate and extensive to be considered in this comment. In evaluating the best means to correct the deficiencies of the


149. Friendly, supra note 10, at 641-42.

150. Id. at 642, 644-45. Judge Friendly specifically recommended that orders of the National Labor Relations Board be made self enforcing. Id. at 644-45.

151. Id. at 643-44.

152. See AMERICAN LAW INSTITUTE, supra note 1. The ALI Jurisdictional Study found “that diversity jurisdiction continues to serve an important function in our federal system, but that it presently extends to classes of cases with no valid justification for being in the national courts and omits some that should have access to a federal forum.” Id. at 1-2. Thus, the study found that the “basic principle” of diversity jurisdiction

is to assure a high level of justice to the traveler or visitor from another state; when a person’s involvement with a state is such to eliminate any real risk of prejudice against him as a stranger and to make it unreasonable to heed any objection he might make to the quality of its judicial system, he should not be permitted to choose a federal forum, but should be required to litigate in the courts of the state. Id. at 2.

Governed by the belief “that federal question jurisdiction is necessary to preserve uniformity in federal law and to protect litigants relying on federal law from the danger that state courts will not properly apply that law,” id. at 4, the study recommended an expansion of federal question jurisdiction.

The other recommendations found in the ALI Jurisdictional Study were meant “to clarify the jurisdictional lines rather than to alter them,” id. at 5, and “to achieve both a more rational and a more clearly stated allocation of jurisdiction between state and federal courts.” Id. at 5-6.

The study made no attempt to ascertain the effect which these proposals would have upon the federal courts but added that the added litigation in state courts “would not add noticeably to the burdens of those courts.” Id. at 6.
federal court system, however, jurisdictional modifications should be considered in conjunction with structural revision. It seems clear that, although a new court would not completely alleviate the overwhelming burden being shouldered by those presently sitting in the district and circuit courts, jurisdictional modification would affect the flow of cases into all levels of the system. Thus, since jurisdictional revisions are likely to be required whether or not a National Court of Appeals is created, they should be implemented prior to a decision to establish a new tribunal.

At the time of the Hruska Commission hearings, Justice Marshall noted that “when the enthusiasm for reform catches on, it often appears short-sighted and timid to recommend limited and modest forms of relief. . . . [A] few well-placed changes in jurisdictional statutes would serve us all a lot better than wholesale revision of the federal court system.”153 The proposals for a new court — wholesale revision — have focused attention upon the problems which confront the federal court system. They are valuable and should remain on the table, but not one should be enacted until the caution sounded by Justice Marshall has been heeded.

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153. HRUSKA REPORT, supra note 50, at 183 app.