

# Time For an Intermediate Court of Appeals: The Evidence Says "Yes"

STEPHEN SAFRANEK\*

## I. INTRODUCTION

We have "more variations of [federal law] than we have of time zones."<sup>1</sup> One source of these variations is the conflict between circuits caused by their differing interpretations of federal laws.<sup>2</sup> Investigations by various committees have resulted in several proposals to solve the persisting and increasing number of intercircuit conflicts.<sup>3</sup> Recently, these conflicts caused Senator Thurmond to introduce a bill which would create an intercircuit panel.<sup>4</sup> This bill, identical to the one he introduced in the 100th Congress,<sup>5</sup> seeks to create an intercircuit panel somewhat along the lines advocated by both the Freund and the Hruska commissions nearly fifteen years ago.<sup>6</sup>

Since the Freund and Hruska commissions released their reports, numerous other proposals have been forwarded regarding the necessity for and structure of such a court. Currently, the Federal Courts Study Committee's (Study Committee) agenda includes such a report.<sup>7</sup> Previously submitted proposals advocated the creation of such a court chiefly

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\* Visiting Professor of Law, University of Detroit; B.A., University of San Francisco, 1981; M.A., University of Dallas, 1983; J.D., cum laude, University of Notre Dame, 1988.

1. Baker & McFarland, *The Need for a New National Court*, 100 HARV. L. REV. 1400, 1408 (1987).

2. *Id.* at 1404. One of the prime roles of the Supreme Court is to ensure uniformity of federal law. Hellman, *The Business of the Supreme Court Under the Judiciary Act of 1925: The Plenary Docket in the 1970's*, 91 HARV. L. REV. 1709, 1713-14 (1978). See also Thompson, *Increasing Uniformity and Capacity in the Federal Appellate System*, 11 HASTINGS CONST. L.Q. 457, 458 (1984); *Rx for an Overburdened Supreme Court: Is Relief in Sight?*, 66 JUDICATURE 394, 395 (1983) (remarks of Prof. Daniel J. Meador).

3. U.S. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (1975), reprinted in 67 F.R.D. 195 (1976) [hereinafter HRUSKA REPORT]; FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (1972), reprinted in 57 F.R.D. 573 (1972) [hereinafter FREUND REPORT]; REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (April 2, 1990) [hereinafter STUDY COMMITTEE].

4. S. REP. No. 93, 101st Cong., 1st Sess. (1989).

5. S. REP. No. 239, 100th Cong., 1st Sess. (1987).

6. See *infra* Part II.

7. See STUDY COMMITTEE, *supra* note 3, at 109.

to reduce the Supreme Court workload.<sup>8</sup> The Freund and Hruska commissions found that courts have interpreted federal law in varying ways and that this inconsistency has caused national problems that the Supreme Court seems incapable of resolving.<sup>9</sup>

This Article presents a new proposal demonstrating the need for an intercircuit court. My task in this Article is to reevaluate the arguments for and against the creation of a court to resolve inconsistencies in national law, and to determine whether the arguments for uniformity lead to the conclusion that an intermediate court of some type would benefit the Supreme Court, the appellate courts, and most importantly, the citizenry.<sup>10</sup> In addition, I will add new reasons supporting the creation of an intercircuit panel. These new reasons extend the arguments set forth in previous proposals by showing that the circuits are unable to resolve intra- or intercircuit conflicts via en banc proceedings. An intermediate panel, such as the one I propose in this Article, would not only eliminate the conflicts between circuits, thus reducing demands on the Supreme Court's time, but would also reduce the need for en banc proceedings before the circuit courts, freeing them to decide more cases, or to spend more time deciding the same number of cases. In short,

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8. See HRUSKA REPORT, *supra* note 3, at 209; FREUND REPORT, *supra* note 3, at 577-84. The Court's increased work load is due, in part, to the increased supervision of judges by the Supreme Court. The Court's supervisory responsibility has grown from 179 judges in 1925 to 430 judges in 1970 and 742 judges in 1987. Baker & McFarland, *supra* note 1, at 1402. This growing supervision alone should warn us that the Court might become overburdened.

The underlying premise of these commissions is that "[t]he function of the Supreme Court is . . . not the remedying of a particular litigant's wrong, but the consideration of cases whose decisions involve principles, the application of which are of wide public or governmental interest." Taft, *The Jurisdiction of the Supreme Court Under the Act of February 13, 1925*, 35 YALE L.J. 1, 2 (1925). Chief Justice Vinson later echoed this view saying that "[t]he Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions." Vinson, *Work of the Federal Courts*, 69 S. CT. v, vi (1949). They held this view even though they were not faced with as great a degree of disparity between circuits in interpreting federal law as is apparent today. See U.S. CONST. art. III, § 2.

9. See HRUSKA REPORT, *supra* note 3, at 206. A perfect example of differing interpretations that had to be addressed by the Supreme Court is found in *Feeney v. Port Auth. Trans-Hudson Corp.*, 873 F.2d 628 (2d Cir. 1989), *cert. granted*, 110 S. Ct. 320 (1989), and *Port Auth. Police Benev. Ass'n, Inc. v. Port Auth. of N.Y. and N.J.*, 819 F.2d 413 (3d Cir. 1987), *cert. denied*, 484 U.S. 953 (1987). These courts' differing interpretations had to be redressed by the Supreme Court. See 129 CONG. REC. S1947-48 (daily ed. Mar. 1, 1983) (remarks of Senator Dole).

10. The creation of such a court would necessarily reduce the Supreme Court's role as a corrector of error in interpreting federal law. However, the Supreme Court now seems incapable of fulfilling this role. See Kurland & Hutchinson, *The Business of the Supreme Court*, O.T., 50 U. CHI. L. REV. 628, 629 (1983).

an intermediate panel could ensure consistency in the interpretation of federal law within and among circuits.<sup>11</sup>

Before elaborating on a proposal, I must first set forth the groundwork for it. In Part II of this Article, I will examine two formative proposals that advocate the creation of an intercircuit court and the Federal Courts Study Committee's recent proposal. In Part III, I examine various arguments made by those opposing formation of such a court and more recent proposals for such a court. I also examine proposals which argue that the same results could be achieved more simply than through the creation of an intermediate court of appeals. In addition, I explore how each differing proposal would solve some identified problems, but not others. In Part IV of this Article, I show that, even within circuits, conflicts in law are left unresolved because of the cumbersome nature of en banc proceedings. This Part briefly considers the historical development of en banc hearings and considers their usefulness in solving intra- and intercircuit conflicts. In Part V, I propose an intermediate court and explain why my proposal solves many problems earlier proposals do not solve.

Initially, I realize that any proposal I make may be long in coming to implementation. However, I am steeled for this wait, remembering that "[t]he 1891 Evarts Act, creating the circuit courts of appeals was passed nearly 100 years after the First Judiciary Act and more than forty years after it was first proposed."<sup>12</sup>

## II. PROPOSALS FOR AN INTERCIRCUIT PANEL: FIRST EXPLORATIONS

### A. Freund Commission

In 1972, the Federal Judicial Center established a panel to study, among other things, the degree of intercircuit conflict in federal law.<sup>13</sup> The Federal Judicial Center charged the panel with the responsibility "to conduct research and [to] study . . . the operation of the courts of the United States."<sup>14</sup> The panel considered the subject of unresolved intercircuit conflicts only because the committee implicitly believed that these conflicts reflected an inability of the Supreme Court to resolve

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11. This Article implicitly accepts the premise that uniform federal law is desirable. It will show that no justification for inconsistency exists. Moreover, the number of conflicts now present, added to the "almost conflicts" revealed in Part IV(C), call for a solution. The Freund and Hruska commissions asserted that this disarray was unquestionable. See *supra* note 9.

12. Baker & McFarland, *supra* note 1, at 1415.

13. See FREUND REPORT, *supra* note 3, at 573.

14. *Id.*

issues that it was designed to resolve.<sup>15</sup> The committee believed that these unresolved cases were part of the Supreme Court's nondelegable duties.<sup>16</sup> The number of such cases has become more acute in subsequent years and the justices, pressed for time, are even less likely to resolve them.<sup>17</sup>

The committee's chief proposal was 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 the circuits."<sup>18</sup> In most cases, this would be the court of final adjudication for appeals.<sup>19</sup> Cases of conflict would be argued, and would "be adjudicated on the merits" by this new court.<sup>20</sup> "Its decision would be final, and would not be reviewable in the Supreme Court."<sup>21</sup>

The primary benefit of such a court is that conflicts among circuits would be resolved by another court, thus freeing the Supreme Court to decide only those cases which are of importance irrespective of whether the cases involve a conflict among circuits.<sup>22</sup> As an added benefit, this new court would resolve conflicts now left unresolved by the Supreme Court.

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15. The panel believed that the Supreme Court is meant to secure the uniform application of federal law. *Id.* at 578.

16. *Id.* at 575. Nevertheless, it seems impossible for the Court to attempt to correct the errors of the courts of appeals and to serve as the ultimate interpreter of the Constitution. See Kurland & Hutchinson, *supra* note 10, at 629.

17. Six Justices of the Supreme Court have called for a scheme to reduce their workload. Brennan, *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230 (1982); Marshall, *Remarks at the Second Circuit Judiciary Conference* (Sept. 9, 1982) (available on request from the Public Information Office, United States Supreme Court); O'Connor, *Comments on the Supreme Court's Case Load*, delivered in New Orleans, Louisiana (Feb. 6, 1983) (available on request from the Public Information Office, United States Supreme Court); Rehnquist, *Are the True Old Times Dead*, (Sept. 23, 1988) (Mac Swinford lecture) (available on request from the Public Information Office, United States Supreme Court); Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177 (1982); White, *Challenges for the U.S. Supreme Court and the Bar: Contemporary Reflections*, 51 ANTITRUST 275, 280 (1982). Others have also commented on this need. Baker & McFarland, *supra* note 1, at 1401; Burger, *Annual Report on the State of the Judiciary*, 69 A.B.A. J. 442 (1983); Freund, *A National Court of Appeals*, 25 HASTINGS L.J. 1301 (1974); Hart, *The Supreme Court, 1958 Term - Foreward: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959). Even though the court has apparently not set as many cases as normal for argument in the 1989-1990 term, this does not change the basic arguments regarding the Court's overload.

18. FREUND REPORT, *supra* note 3, at 590.

19. *Id.*

20. *Id.* at 593.

21. *Id.*

22. Hellman, *The Proposed Intercircuit Tribunal: Do We Need It? Will It Work?*, 11 HASTINGS CONST. L.Q. 375, 381 (1984).

However, it is unclear whether the formation of a court in accord with this proposal would eliminate many cases from the Supreme Court's docket. The Supreme Court now appears willing to let some conflicts within circuits persist, resolving only those conflicts which involve issues it deems of special importance. Therefore, the Court might accept some cases involving conflicts regardless of whether an intercircuit court had acted upon them. Nevertheless, it appears that the Supreme Court accepts cases that involve conflicts only because the conflicts cannot be allowed to persist, not because the issues in the cases are important.<sup>23</sup> The development of the intercircuit panel proposed by the Freund Commission would remove these cases from the Supreme Court's docket.

The other power to be given to the intercircuit court would be the ability either to deny review or to certify a case to the Supreme Court.<sup>24</sup> By giving the intermediate court this power, the Freund Commission suggested that an intermediate court could be given the power to decide which cases the Supreme Court would hear. Although Justice Stevens has suggested that such an alternative would be acceptable,<sup>25</sup> others may be unwilling to give a body other than the Supreme Court this much authority.

Finally, the panel outlined how judges could be assigned to the court. The panel suggested that the court consist of seven judges drawn from the circuits to serve as special judges for a limited time.<sup>26</sup> The problem with this solution is that it could create tension by allowing circuit judges' peers to review their decisions. Circuit judges would be less willing to accept a decision made by their colleagues than they would be to accept a decision made by a superior court.<sup>27</sup>

Several other problems would also face such a court. The size of the panel outlined by the Freund Commission, although not as cumbersome as some of the larger circuits, could complicate the law by resolving cases with special concurrences or dissents, thereby leaving the law vague. Lastly, the number of conflicts unresolved by the Supreme

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23. See *supra* note 9. See also Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1102 (1987); Kurland & Hutchinson, *supra* note 10, at 643.

24. FREUND REPORT, *supra* note 3, at 592.

25. See *infra* notes 113-114 and accompanying text.

26. FREUND REPORT, *supra* note 3, at 591. Judges in active service would be listed according to seniority. The judges would be taken from this list, alternating between the senior and junior judges. *Id.* The judges would serve for three years, and two judges from the same circuit could not sit on the court at one time. *Id.*

27. Indeed, this unwillingness to be bound by fellow judges appears to be part of the reason for conflicts between circuits. Judges could freely follow other circuits' decisions. See *infra* Part III(B)(1).

Court (ninety-eight in the 1970-1971 term), a number certain to have grown, and the number of petitions filed for certiorari would overwhelm this court.<sup>28</sup> Therefore, although the Freund Commission made a step in the right direction, its solutions, now over fifteen years old, are obsolete.

### B. Hruska Commission

In 1975, the Commission on the Revision of the Federal Appellate System (Hruska Commission) set forth its proposals which included a recommendation for an intermediate court of appeals.<sup>29</sup> This Commission was chaired by Senator Roman Hruska, and took its name from him. Besides recommending the creation of an intermediate circuit, it recommended the publication of internal operating procedures of the circuits,<sup>30</sup> new ways to allow the courts to manage their mounting workload,<sup>31</sup> and other various procedural changes. Most of these recommendations were quickly put into practice.<sup>32</sup>

Nevertheless, the recommendation that the Commission focused upon, and which it urged most strongly, still appears no closer to realization than it was in 1975. The Hruska Commission noted that "[i]t has been urged upon the Commission that intercircuit conflict and disharmony have proliferated to the point where 'jurisprudential disarray' threatens to become 'an intolerable legal mess.'"<sup>33</sup> The Commission found that in the 1971-72 term, the Supreme Court failed to hear ninety-eight cases involving direct conflicts, most of which involved interpretation of federal law.<sup>34</sup>

The Commission's central recommendation was the creation of an intercircuit panel.<sup>35</sup> The Commission recommended that a new court be formed to hear cases only by reference from the Supreme Court or by transfer from the circuit courts.<sup>36</sup> The Commission stated that the Supreme Court could "refer any case within its appellate jurisdiction to

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28. See STUDY COMMITTEE, *supra* note 3, at 125. The number of direct conflicts was estimated to be between sixty to eighty. *Id.* The study does not consider conflicts that involve "fundamentally inconsistent approaches to the same issues" to be direct conflicts. *Id.*

29. HRUSKA REPORT, *supra* note 3, at 195.

30. *Id.* at 200-01, 250-62.

31. *Id.* at 201-03, 266-73.

32. Of the four major recommendations, only the creation of the intermediate court has failed to be embraced and acted upon.

33. HRUSKA REPORT, *supra* note 3, at 206.

34. *Id.* at 222.

35. *Id.* at 208.

36. *Id.* at 199.

the National Court of Appeals.”<sup>37</sup> The National Court would “then select those cases which it would decide on the merits, and decline review in the others.”<sup>38</sup> However, the Supreme Court could require the National Court to dispose of a case on the merits.<sup>39</sup> Cases which come before the Supreme Court on appeal would either be decided by it or would be sent to the National Court to be decided.<sup>40</sup>

The Hruska Commission’s report also discussed transfers from the circuit courts to the intermediate court. A case filed before a court of appeals, the Court of Claims, or the Court of Customs and Patent Appeals would be transferable to the National Court in three situations. First, a case would be transferable if it turns on an issue of federal law and “federal courts have reached inconsistent conclusions with respect to it.”<sup>41</sup> Second, it would be transferable if it turns on an issue for which prompt adjudication by the intermediate court would outweigh any disadvantage of such swift adjudication.<sup>42</sup> Finally, a case would be transferable if it turns on an issue previously decided by the intermediate court and the extent of that decision needs to be interpreted in the pertinent case.<sup>43</sup> The committee provided some examples of cases which would be appropriate for transfer and set forth some basic principles upon which to develop a transfer procedure.<sup>44</sup> The transfer procedures were to “be fashioned on an individual basis by the . . . courts. . . . The procedures [were to] be designed to minimize both the burdens on the judges and the delay for the litigants.”<sup>45</sup>

This new court was to be composed of “seven Article III judges appointed by the President subject to confirmation by the Senate, and holding office during good behavior. It would sit only en banc.”<sup>46</sup> It was expected to “decide at least 150 cases on the merits each year.”<sup>47</sup>

The benefits of such a court, as well as its shortcomings, are several. First, this structure still requires the Supreme Court to sift through cases and decide which ones are suitable for this new court. Thus, it burdens the Supreme Court to a greater degree than it is currently burdened by asking it to decide which cases are important enough to be decided by

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37. *Id.* at 239.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 242.

42. *Id.*

43. *Id.*

44. *Id.* at 243-46.

45. *Id.* at 245.

46. *Id.* at 237.

47. *Id.* at 246.

this court.<sup>48</sup> If the Supreme Court neglected this responsibility, merely assigning all of the suggested conflicts to the National Court, the National Court would have no time for other business. In short, this court would be incapable of handling the large number of cases it would face under normal conditions. In addition, its size is the same as that suggested by the Freund Commission, and is therefore similarly defective insofar as such a court could often fail to delineate a clear interpretation for a case placed before it.<sup>49</sup>

On the other hand, this court has some particular advantages, including the ability to solve conflicts in the circuits even before they have time to develop. If the circuits willingly send cases to the intermediate court, it could create clear precedent, thereby precluding the development of some conflicts. In addition, the permanent nature of these judgeships, unlike those suggested by the Freund Commission, would provide this intermediate court with prestige and stability; the former would attract judges of the highest caliber, while the latter would help ensure consistency in federal law. Despite these clear benefits, the requirement that the Supreme Court largely screen this appellate court's docket would cause either a reduction in the Supreme Court's capacity to decide cases because of the burden of the screening process or it would cause the appellate court to be overwhelmed by the flood of cases sent to it because the Supreme Court did not carefully screen cases.<sup>50</sup> In either instance, neither the Supreme Court nor the new appellate court would be as effective as it could be under other proposals.<sup>51</sup>

### C. Study Committee

The Federal Courts Study Committee recently released its report on and recommendation for the federal courts.<sup>52</sup> The Chief Justice appointed this committee to review the "federal courts' congestion, delay, expense, and expansion."<sup>53</sup> The Study Committee focused only on institutional reforms that could better our federal courts.<sup>54</sup> It recognized that the

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48. Alsup & Salisbury, *A Comment on Chief Justice Burger's Proposal for a Temporary Panel to Resolve Intercircuit Conflicts*, 11 HASTINGS CONST. L.Q. 359, 364 (1984).

49. For a thorough critique see Owens, *The Hruska Commission's Proposed National Court of Appeals*, 23 UCLA L. REV. 580 (1976).

50. The Justices probably would foist this screening process on their clerks. If they did so to a large degree, law clerks, not article III judges, would be deciding what laws are deserving of clarification.

51. See *infra* Part V.

52. STUDY COMMITTEE, *supra* note 3.

53. *Id.* at 3.

54. *Id.*



increasing number of appeals to the circuits and the resultant caselaw made "problematic" uniformity of precedent within and among circuits.<sup>55</sup> After having summarily set forth various proposals for an intermediate appellate court, the Study Committee set forth its own recommendation.<sup>56</sup> Its recommendation was simple: conflicts between circuits should be resolved by having a third circuit decide the conflict en banc.<sup>57</sup>

The Study Committee proposed that when the Supreme Court determines that a conflict between circuits is worthy of national attention, it should refer the case to a court not involved in the conflict, which court will hear the case en banc.<sup>58</sup> This procedure has numerous shortcomings. First, it leaves the resolution of conflicts on the same level of authority as the level at which the conflict was created. Also, under this procedure, every appellate panel will be subject to control by decisions of courts of equal stature. This may lead panels in other circuits to distinguish their cases on narrow grounds because of an unwillingness to be governed by their equals.<sup>59</sup> Secondly, this proposed solution is burdensome. If, as the Study Committee notes, there are at least sixty direct conflicts and numerous indirect conflicts that the Supreme Court does not resolve every year, the Supreme Court could, under this proposal, certify at least sixty cases to intra-circuit panels. This would increase the number of en banc sittings by over fifty percent.<sup>60</sup> The amount of judicial time thus spent on hearing en banc cases could swamp the circuit courts.<sup>61</sup>

The Study Committee's proposal also errs by providing that the Supreme Court should be given the authority to determine which cases involve true conflicts.<sup>62</sup> It said that this "active participation in the experiment will make it possible to find out whether there are many or only a few conflicts that are both unsuitable for Supreme Court review and nonetheless deserve national resolution."<sup>63</sup> The Study Committee believed the Supreme Court is uniquely suited to this task.<sup>64</sup> Such a perspective fails to consider whether the Supreme Court has the time to consider whether cases of conflict are worthy of resolution. Given the Supreme Court's already overburdened position, the addition of this

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55. *Id.* at 7.

56. *Id.* at 125.

57. *Id.* at 126.

58. *Id.*

59. *See infra* Part IV(C).

60. *See infra* notes 123-124.

61. *See infra* Part IV(B)(1).

62. Study Committee, *supra* note 3, at 127.

63. *Id.*

64. *Id.*

new responsibility is unwarranted. It would require that the Court not only determine whether a conflict exists, but whether the conflict is serious. In so doing, the Court must find that the conflict is serious enough to merit consideration by an en banc court, but not so serious as to merit consideration by the Supreme Court itself. In so adding to the Court's work, this recommendation fails one of the significant tests by which any proposal must be gauged — it must not increase, but should decrease, the Court's workload.

The proposal also causes one other problem. Because it relies on en banc courts to decide cases, large panels will decide the conflict cases.<sup>65</sup> Such large panels can prove unwieldy, with fragmented plurality opinions and disparate dissents. Such a result is likely when important issues are at stake, as in many conflicts. This consequence would leave the national law even more confused than it would be were each circuit to have clear precedent which conflicts with precedent of another circuit.

Thus, the Study Committee's proposal fails on all counts. It will increase the burden on both the Supreme Court and the circuit courts, and it may not be capable of establishing guiding precedent. As a consequence, the proposal should be rejected.

### III. OTHER PROPOSALS

#### A. . . . *Don't Fix It*

Two judges on the courts of appeals have protested the formation of any intercircuit panel<sup>66</sup> by writing articles against such an intercircuit panel.<sup>67</sup> Judge Ruth Bader Ginsburg of the District of Columbia Court of Appeals believes that such a court is unnecessary because Congress, not the courts, is to blame for the disarray in federal law throughout the country.<sup>68</sup> Congress, she believes, has caused intercircuit conflicts by drafting vague laws and by leaving the tough questions to judges.<sup>69</sup>

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65. The Study Committee does suggest that en banc panels should be made smaller, but even were they to consist of eleven judges, like the Ninth Circuit en banc hearings, they would still be quite large. See STUDY COMMITTEE, *supra* note 3, at 115.

66. Ginsburg & Huben, *The Intercircuit Committee*, 100 HARV. L. REV. 1417 (1987); Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehille?*, 71 CALIF. L. REV. 913 (1983).

67. Note, *Of High Designs: A Compendium of Proposals to Reduce the Workload of the Supreme Court*, 97 HARV. L. REV. 307, 315 (1983). "[L]ittle evidence suggests that intercircuit conflicts compose a particularly neglected portion of the docket" of the Supreme Court. *Id.*

68. Ginsburg & Huben, *supra* note 66, at 1420.

69. *Id.* As one commentary has stated, "[C]ongress often leaves the task of interpretation to the judiciary when it is unable to develop a consensus on the details of an issue." Baker & McFarland, *supra* note 1, at 1413.

Moreover, even if Congress had not created such problems, she believes that the benefits of intercircuit conflicts outweigh any detriment caused by them. The benefit, she perceives, is caused by allowing conflicts to “percolate.”<sup>70</sup> “Percolation” is explained as allowing conflicts to persist throughout the country so that the best solution to a problem can be found through trial and error.<sup>71</sup> This idea is identical to that of Judge Wallace of the Ninth Circuit Court of Appeals, who also thinks that percolation is a valuable effect of conflicts — allowing the observation of differing practices of the law.<sup>72</sup> He observes that “the very diversity of our vast country, with its many regional differences and local needs, *logically* supports a flexible system that can benefit, when appropriate, from federal law which takes account of these regional variations (e.g., in fields such as water rights).”<sup>73</sup>

These two judges’ perceptions of the benefits of percolation are indefensible when carefully weighed.<sup>74</sup> First, their perception of the benefits of percolation would only be accurate if Congress or the Supreme Court sent observers out to the circuits to see how the circuits’ differing interpretations of federal law affect the differing circuits’ citizenry.<sup>75</sup> Needless to say, such fact gathering is not done by the Supreme Court,<sup>76</sup> and nothing suggests that Congress does such either.<sup>77</sup>

Secondly, these two judges completely ignore the fact that Congress, when it implements federal law, expects its laws to be carried out uniformly.<sup>78</sup> If Congress wanted its laws to be carried out in different ways — according to local or regional differences — it could adopt language in its statutes to so guide judges.<sup>79</sup> To argue that percolation is good with respect to a specific federal law is to argue that federal law should itself not exist as a uniform law of the land.<sup>80</sup> In fact, it

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70. *Id.* at 1424. See Note, *supra* note 67, at 317.

71. Ginsburg & Huben, *supra* note 66, at 1424.

72. Wallace, *supra* note 66, at 929.

73. *Id.* at 930 (emphasis added).

74. Justice Stevens also has said that the number of conflicts is exaggerated, and has noted the value of percolation. See Stevens, *supra* note 17, at 183.

75. Kurland & Hutchinson, *supra* note 10, at 639.

76. Schaefer, *Reducing Circuit Conflicts*, 69 A.B.A. J. 452, 454 (1983). “The notion of the Supreme Court’s monitoring the results of experiments in more than 100 conflicting interpretations each year strains credulity.” *Id.*

77. Kurland & Hutchinson, *supra* note 10, at 639.

78. Thompson, *supra* note 2, at 458.

79. Congress could pass statutes which rely upon local, state, or regional distinctions. It could use non-federal laws as keys to federal law.

80. R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985). Posner argues that there “is a presumption that it [a conflict] should be allowed to simmer for a time at the circuit level.” *Id.* at 163. The reason for the presumption is unknown and unclear, and I think nonexistent.

argues for state or local laws. This belief, although arguably correct in specific instances, allows judges to arbitrarily shape the law to their particular circuit. Many believe that Congress makes too many national laws. However, the citizenry — through their elected representatives — should make that decision.<sup>81</sup> Judges should not assume that they have the ability to correct Congress's failure to account for regional differences by shaping the law to fit their perception of what the law should be. In so trying to correct congressional errors, they destroy the most elementary principle of *federal* law, coherency.<sup>82</sup> Such a role for federal courts directly counters the very reason for their creation.<sup>83</sup> Indeed, it is a claim for states' rights.<sup>84</sup>

Thirdly, Wallace's argument overemphasizes and underemphasizes regional and local differences. As a member of the circuit with the largest number of members and covering the most varied terrain, he should realize that San Francisco has more in common with Houston than it does with Spokane.<sup>85</sup> Yet, he does not think that he and members of the Ninth Circuit would be justified in ignoring decisions of other panels in his circuit if they found that local or regional differences justified this treatment. A system of percolation in the Ninth Circuit would actually be better than national percolation because judges like himself could keep a close watch on the results, thus saving the Supreme Court or Congress from such a task. In so doing, they could provide a valuable service to the courts and to Congress. However, the judges in the Ninth Circuit would not be pleased if panels began adapting laws to fit particular parts of the circuit and explicitly relied upon such differences. Yet, this is the essence of Wallace's and Ginsburg's argument.

Fourthly, the judges are unconcerned by inconsistencies in federal law that promote forum shopping. One commentator thinks that inconsistencies between circuits are one of the significant reasons for forum shopping.<sup>86</sup> Judge Wallace attempts to justify inconsistent results between circuits by noting that real persons are not those usually subject to forum shopping problems; instead, the burdens of the system are borne by big business. Thus, these conflicts are merely the cost of doing

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81. Even though we have also chosen circuits, Congress has never given them the right to decide cases due to the particular differences within the circuit.

82. See Strauss, *supra* note 23, at 1092.

83. THE FEDERALIST No. 80 (A. Hamilton).

84. See generally POSNER, *supra* note 80, chapter 6, where he discusses the relationship between the federal and state system in America.

85. Shaefer, *supra* note 76, at 454.

86. Marcus, *Conflicts Among the Circuits and Transfer Within the Federal Judicial System*, 93 YALE L.J. 677 (1985). He said that these inconsistencies provide a "significant incentive" for forum shopping. *Id.* Over 2,000 cases a year are transferred between circuits. *Id.* at 678. See also Thompson, *supra* note 2, at 469.

business.<sup>87</sup> This perception reveals Wallace's failure to see that the costs of doing business are ultimately paid for by citizens.

Judge Ginsburg's and Judge Wallace's arguments for percolation also fail to present any evidence in support of percolation. Neither of them cites a single instance in which percolation was valuable in helping Congress or the Supreme Court to rectify the law in light of the best practice. Indeed, differing interpretations of federal law produce conflicting precedents, none of which is practically better than any of the others, but all create problems with the conflict they present.<sup>88</sup> Indeed, a well-articulated basis for percolation does not exist. Therefore, the rising number of intercircuit inconsistencies indicates that something is broken.

### B. Fix It

Various scholars and practitioners of the law have been on the other side of this debate. Their views and their proposed solutions merit serious consideration.

1. *First in Time, First in Right.*—One practitioner who opposes Judges Ginsburg and Wallace's proposal is Walter Schaefer. He has proposed perhaps the clearest solution to the problem of intercircuit conflicts.<sup>89</sup> He advocates that the circuits merely follow decisions of other circuits.<sup>90</sup>

Schaefer's argument is one of the most logical of those proposed. He notes that "[t]here is no element of sovereignty in a federal judicial circuit."<sup>91</sup> As a result, he believes that the courts in each circuit do not have a right to ignore the rulings of other circuits. He believes that their failure to act consistently "ignores the impact of the law on real people."<sup>92</sup> In addition, he notes that judges themselves have resolved to ensure uniformity in their own circuits, and could mandate the same among circuits.<sup>93</sup> Just as no federal law mandates that one circuit panel follow the rulings of another panel in that circuit, so too, nothing mandates intercircuit harmony. Just as judges have opted for intra-circuit harmony, they can also opt for intercircuit harmony. Schaefer believes that the best rule would require circuits to follow the decision of the

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87. Wallace, *supra* note 66, at 931.

88. See POSNER, *supra* note 80, at 236. He states, when criticizing too many dissents, that "[t]he case may involve one of those *frequent* questions where it is more important that the law be settled than that it be got just right." *Id.* (emphasis added).

89. Schaefer, *supra* note 76, at 452.

90. *Id.* at 455.

91. *Id.* at 454.

92. *Id.*

93. *Id.* at 455.

first court to rule on an issue unless that decision is overridden by an en banc panel in the second circuit which considers the matter.<sup>94</sup>

The obvious strength of this position is its simplicity. The court first to rule on an issue binds all future panels unless its decision is modified by an en banc panel. As a result, all conflicts are resolved by following the decision of the first court to decide an issue. However, several problems challenge this simple solution.

The foremost problem with Schaefer's proposal is its implementation. Even if the circuits were to adopt such a rule, several difficulties would arise. The circuits would need to agree on whether the first panel to hear the case or the first to publish its opinion has priority. If the former were adopted, a panel might be forced, months after its decision, to withdraw its decision and to realign the rights of the various parties in light of an earlier heard, later disposed-of case, or to delay its decision in anticipation of an earlier argued case. If the latter were adopted, panels might rush to publish knowing that their colleagues in another circuit were resolving the same issue. This could result in poor opinions being rushed to the presses. This problem could be resolved partially by a central processing center that informs the panels when a case with similar issues has been argued. Thus, panels could withhold their opinions awaiting an earlier argued case's resolution. This solution would probably create as many problems as it solves; among which is the failure of the processing center to see potential conflicts, thereby causing conflicts and the problems noted above.

The size of federal courts today is likely to lead to another problem: countless distinctions and a fracturing of federal law. Judges throughout the country, finding themselves bound by the opinion of two judges in another circuit, might be willing to distinguish their case from the earlier one on weak grounds.<sup>95</sup> This distinguishment would itself fracture federal law, leading to the type of balkanization that the rule of first in time was meant to prevent.<sup>96</sup> Furthermore, once such subtle distinctions have crept into the law, circuits themselves could find the need to hold more en banc reviews to resolve intra-circuit conflicts, thus wasting precious judicial time.

2. *Let the Conflicting Circuits Resolve the Conflict.*—One other commentator has noted that the Supreme Court is overworked and has structured a proposal to reduce its workload. He believes that the Court

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94. *Id.*

95. *See infra* Part IV(C).

96. *See infra* Part IV. I will show that such a problem already exists in the federal courts today.

could reduce its workload if it were able to choose its docket completely.<sup>97</sup> Coleman suggests that

[w]henever a circuit renders a decision that is in conflict with a prior decision of another circuit, the losing party should be allowed to petition the court issuing the conflicting opinion for a rehearing before a panel of seven judges, three from each of the two circuits which gave rise to the conflict, and a seventh to be assigned from another circuit by the Chief Justice.<sup>98</sup>

Coleman believes that this situation has six advantages over the current system, among which are: efficiency, because "the issue has already been briefed and argued before three of the judges conducting the rehearing"; fraternity, because "it does not elevate a group of circuit judges to a special panel to sit in judgment on their peers," and; confidence, because "it does not create the public impression of a 'supercourt' . . . that would undermine public respect for the circuit courts."<sup>99</sup>

These apparent virtues pale beside the problems that Coleman's proposal presents. First, Coleman presents no mechanism by which to determine whether a conflict has arisen. Apparently, a conflict would only arise when a panel of judges decided that it wanted to resolve an issue differently than a panel had in another circuit and articulated its view that a conflict existed. This could prevent judges on the second court, if they thought they might get an adverse seventh judge on an intercircuit panel, from stating that a conflict existed, thus causing the same fracturing as caused by Schaefer's proposal. If, in the alternative, the entire circuit had to vote on whether an intercircuit conflict had arisen, the vote could often progress upon the judges' opinions on whether they thought the panel had made a poor decision, and whether the decision would be rectified by the special en banc panel. This could lead in turn to another problem. The second panel, which was accused of creating the conflict, would have incentive to distinguish its case on the most insignificant facts, thereby contributing to the number of "almost conflicts" in the courts. This would be of even greater disservice to the citizenry than clear conflicts among the circuits because such conflicts at least provide a degree of certainty within a particular circuit.

Second, Coleman seems to believe that an intermediate circuit would "undermine public respect for the circuit courts."<sup>100</sup> I fail to see how

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97. Coleman, *The Supreme Court of the United States: Managing its Caseload to Achieve its Constitutional Purposes*, 52 *FORDHAM L. REV.* 1, 16-17 (1983).

98. *Id.* at 18.

99. *Id.* at 19.

100. *Id.*

an intermediate circuit court would necessarily undermine public respect. Even if it did, I fail to see what harm would result to the judiciary if such a decrease were accompanied by a greater respect for judges and the law in general, because of the law's consistency. No evidence suggests that the public would lose respect for the circuits because of a new intermediate court. Instead, the formation of an intermediate court could lead those who deal with the courts to realize that circuit judges are part of a web of persons charged with interpreting the law consistently. Circuit judges may be reluctant to accept a court with the ability and time to oversee their decisions, but their feelings in this matter should give way to the values of consistency in federal law. Such consistency would increase the citizenry's respect for the law in general, and would thereby lead to a greater respect for circuit judges even though their decisions would no longer be practically unreviewable except in less than one percent of the cases.<sup>101</sup>

Finally, Coleman asserts that his system would encourage judges to show "a greater respect . . . for the precedents of other circuits."<sup>102</sup> Yet, he fails to recognize that courts could now decide to follow the precedent of other circuits without the need for any legislation or a new court. Despite the courts' failure to follow decisions in other circuits, he believes that the courts themselves can be used to create consistency. The courts' failure to do so is due not only to an unwillingness to follow the will of their brethren, but also to an inability to do so even if they were willing. The very size of the courts and the number of cases they hear quite naturally result in inconsistencies that can only be resolved by a court whose purpose is to deal with inconsistencies and that has the power to oversee the circuits by ensuring that conflicts are resolved.<sup>103</sup>

3. *A National Court.*—Among various proposals regarding an intermediate court is one that proposes a National Court with judges drawn at random from various circuits.<sup>104</sup> This proposal has several unique features, some of which are strengths and some of which make the court unworkable.

This proposal allows judges drawn for the court to decide whether they have jurisdiction over a case.<sup>105</sup> Cases could come to this court on appeal from district courts when a party has petitioned it, claiming that the decision in the petitioner's case conflicts with published rulings by

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101. STUDY COMMITTEE, *supra* note 3, at 111.

102. Coleman, *supra* note 97, at 19.

103. See *infra* Part III(B).

104. Thompson, *supra* note 2, at 495.

105. *Id.* at 494.



two other circuits.<sup>106</sup> In addition, cases could come to this court by certiorari from any circuit court decision that conflicted with one of the new court's prior rulings.<sup>107</sup>

The advantage of this proposal is that it would not additionally burden the Supreme Court with having to screen cases for another court. In addition, this court would relieve some of the current pressure on the Supreme Court by hearing some of the cases now heard by the Supreme Court.

However, Thompson's proposal is still not adequate to the task at hand. First, although his panel of seven judges is arguably small enough to prevent numerous concurring opinions, it could still meet with a large number of concurrences. Any number larger than three makes possible more fractured opinions than is necessary.<sup>108</sup> There is no magic attached to the numbers five, seven, nine, etc. Not a single argument has been made showing that such numbers will help a new court deal with its workload. Indeed, a court composed of three judges — the smallest number possible which allows majorities and dissents — could do the job effectively. This is the same number of judges originally allowed in the circuits. A three judge panel, thus, seems ideal.

The second problem with this proposal is an administrative one. Because seven judges would be drawn randomly from the circuits and would sit on the panel for a regulated number of years, no convenient sitting place would exist for the judges. Judges of this court could not be expected to uproot themselves and their families to live in some central location for three (or less) years.<sup>109</sup> Therefore, the judges themselves would be required to travel somewhere distant at regular intervals to hear cases. This would place a strain on judges, decreasing their ability to hear and decide cases.<sup>110</sup>

The third problem is that the restricted ability of this court to hear conflicts allows percolation, with no certain end in sight. Only a decision by two circuits and one district judge would normally allow the National Court to hear a case. However, no reason exists to allow divergent interpretations of federal law to exist until three different circuits decide an issue. Two circuits may have an important conflict, yet the National Court could not hear it.

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106. *Id.*

107. *Id.*

108. R. POSNER, *ECONOMIC ANALYSIS OF LAW* 512 (3d ed. 1986) [hereinafter *ECONOMIC ANALYSIS OF LAW*]. Posner notes that the more parties one has to a transaction the more complicated it becomes in an exponential fashion. *Id.*

109. *Id.* at 499.

110. In addition, this court faces many other problems. See Alsup & Salisbury, *supra* note 48, at 367-68. These comments apply equally to Thompson's proposal.

Thompson's proposal, like the raft of other proposals, implicitly accepts the value of percolation and is wary of treading on circuit court judges' prerogatives. However, these authors fail to understand that a court which could provide clear and swift review of conflicts — within and among circuits — would aid the citizenry and the courts. Clear laws would make for fewer appeals, thereby saving citizens from needless litigation and allowing courts to spend more time considering other cases.

4. *Agency Acquiescence*.—A large proportion of federal law subject to review by the circuits involves the actions of administrative agencies. Currently, the Supreme Court allows these agencies to take inconsistent positions in different circuits.<sup>111</sup> As a result, agencies can press panels in one circuit to interpret the law in ways differently than it is interpreted by other circuits.<sup>112</sup>

What is freely given could be freely denied. The Supreme Court could, if it chose to, require agencies to adopt the ruling of the first circuit to rule on a matter. Although the rule only cuts against agencies and not those in disagreement with them, it could eliminate some of the conflicts in the circuits. This is especially true for those issues that are of little impact.

However, if a court's ruling is of little impact, it would seem that the agency would shepherd its resources and would not seek a different ruling in another circuit. In those instances, though, where the rule had a significant impact, the agency would seek to distinguish cases between circuits. If the issue did appear to be important, the courts would be more willing to perceive such a distinction.

Although this rule would have some impact, it would be hobbled by the same factors that would limit the effectiveness of Schaefer's program.

5. *Other Proposals for Intercircuit Panels*.—Among the various proposals for some type of intermediate appellate court has been that of Justice Stevens, who has suggested the creation of a court that would screen all certiorari petitions and select the docket of the Supreme Court.<sup>113</sup> This court was meant to be identical to the court proposed by the Freund Commission except for Steven's view that its selection of cases for the Supreme Court would be mandatory.<sup>114</sup> Thus, it has that proposal's strengths and weaknesses.<sup>115</sup>

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111. See *United States v. Mendoza*, 464 U.S. 154, 155 (1985).

112. Note, *Administrative Agency Intracircuit Non Acquiescence*, 85 COLUM. L. REV. 582 (1985). This right could be taken away at some point. See *Owens*, *supra* note 49, at 598.

113. Stevens, *supra* note 17, at 177.

114. *Id.* at 182.

115. See *supra* notes 12-28 and accompanying text.

Former Chief Justice Burger also proposed an interim court that would be authorized to decide all cases of intercircuit conflict.<sup>116</sup> This proposal is similar to the one recently introduced by Senator Thurmond.<sup>117</sup>

In his proposal, Burger calls for a temporary court attached to the United States Court of Appeals to the Federal Circuit.<sup>118</sup> This court would be authorized to decide cases involving intercircuit conflicts and possibly would decide cases involving statutory interpretation.<sup>119</sup>

Senator Thurmond has introduced a bill along similar lines.<sup>120</sup> This bill calls for an intercircuit panel composed of nine judges and four alternates who are to be designated by the Supreme Court.<sup>121</sup> This bill would amend Section 4(a)(1) of Chapter 81 of Title 28 U.S.C. so that "[t]he Supreme Court may refer a case in which it has found to exist a conflict with the determinations of another circuit of the United States Courts of Appeals to the Intercircuit Panel."<sup>122</sup> The Supreme Court could review the decisions of this intercircuit panel.<sup>123</sup>

These two proposals, which provide jurisdiction via the Supreme Court, would not solve one of the critical problems to which they were addressed — a decrease in the Supreme Court's workload. The reason that they would not is that the Supreme Court still would be forced to decide which cases were to be heard by this panel.<sup>124</sup> In addition, this court is even larger than that proposed by the Hruska and Freund commissions and would therefore pose the same problem of splintered opinions.

6. *Conclusion.*—A variety of arguments and counter arguments have been made regarding the need for and the efficiency of various types of intercircuit panels. The shortcomings of the various proposals essentially have been twofold. First, some of the proposed courts would actually burden the Supreme Court by requiring it to sift through cases for the new court. (Freund, Hruska, Study Committee, Thompson, Burger, and Thurmond proposals). Second, all of the courts are to be composed of such a large number of judges that splintered opinions would be likely.

Furthermore, various proposals have shortcomings, including temporary judges (Freund and Thompson) and administrative organization

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116. Burger, *supra* note 17, at 442.

117. For a full critique of this court, see POSNER, *supra* note 80, at 162-66.

118. Burger, *supra* note 17, at 442.

119. *Id.*

120. *See supra* note 4.

121. *Id.* at 2-3.

122. *Id.* at 5-6.

123. *Id.* at 7.

124. *See Stevens, supra* note 17, at 179.

(Shaefer, Coleman, and Thompson), making them less than ideal. In addition, the various proposals have failed to address Wallace's and Ginsburg's arguments.

In the Section which follows, I show that the need for the repair work originally proposed by the Freund and Hruska commissions has grown to new dimensions because the circuits have been unable to maintain reasoned uniformity of the law within each circuit. Thus, I add a new and even more potent argument to the arsenal of those calling for the creation of a new circuit.

In addition, I ultimately propose a court that is administratively simple, that will be capable of handling its potential workload, and that is likely to produce clear rules of law. First, however, I reassess whether en banc courts and the current court structure adequately handle conflicting interpretations of federal law.

#### IV. THE CURRENT EN BANC SITUATION

##### A. Introduction

In 1988, 117 cases were placed before en banc panels in the various circuits. In 1969, only thirty-eight such cases had been similarly placed.<sup>125</sup> The number of en banc cases heard by the circuits has not increased with the same degree of rapidity as have filings with the court of appeals. Nevertheless, the number of cases heard by en banc panels has nearly tripled in the past twenty years while the number of filings with the courts of appeals has quadrupled.<sup>126</sup> This tripling of en banc hearings

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125. The number of cases heard en banc has increased steadily, despite a few temporary drops, since 1968. In fact, the number of en banc hearings increased 236% between 1968 and 1988. The number of total cases heard increased 412% for the same period. These statistics are cited from the 1968 and 1988 *DIRECTOR'S ANNUAL REPORT*.

126. See *DIRECTOR'S REPORT* 195 (1979). The filings numbered 9,116, and the en banc hearings numbered 39 in 1968. In 1988, the filings were 37,524 and the en bancs numbered 92. *DIRECTOR'S REPORT* 2 (1988). One would have expected en banc hearings to increase at least as dramatically as filings because the number of cases filed and the increased number of judges, increasing from 97 to 156, would accelerate the chances for conflict. This result has been avoided by three factors: the increase in non-published dispositions which thereby cannot cause a conflict; the ability of judges themselves to vote for en banc hearings, thus allowing judges to limit en banc hearings, but not to limit filings; and the judges' creation of "almost conflicts" which has been noted above. Indeed, one commentator has said,

there remains a strong presumption against exercise of the en banc power. Judges view en banc hearings as divisive and seek to avoid the friction engendered by a procedure designed to resolve intracircuit conflicts. En banc sittings are costly as well, requiring the attention of each active judge in the circuit.

Note, *Playing with Numbers: Determining the Majority of Judges Required to Grant En Banc Sittings in the United States Courts of Appeals*, 70 VA. L. REV. 1505, 1508 (1984).

in less than twenty years reveals that conflicts within circuits have at least tripled in twenty years. Indeed, this Section shows that this increased number of en banc hearings would need to be even greater if circuits were to resolve all of their intra-circuit conflicts. The inability or unwillingness of each circuit to maintain uniformity in interpreting federal law is thus another reason to create an intermediate court of appeals. Current procedures for reviewing cases and maintaining uniformity within the circuits are unable to actually maintain intra-circuit harmony.

It was not until 1947 that Congress codified the law providing for en banc courts.<sup>127</sup> This enactment arose as a result of the Supreme Court's decision in *Textile Mills Securities Corp. v. Commissioner*.<sup>128</sup>

In that case, the Supreme Court was faced with interpreting a section of the United States Code which provided that "[t]here shall be in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, which shall be a court of record with appellate jurisdiction."<sup>129</sup> Two circuits had interpreted the code section differently. The Third Circuit had held that the court of appeals could sit en banc, with more than three judges deciding a case.<sup>130</sup> The Ninth Circuit held that the court of appeals could not sit in a number larger than three.<sup>131</sup> The Supreme Court analyzed the various statutes affecting the work of the circuit courts and concluded that the courts could sit en banc with more than three judges.<sup>132</sup> The Court noted that the benefits of en banc review were threefold: 1) more effective judicial administration, 2) conflicts within a circuit will be avoided, and 3) finality of decision in the circuit courts of appeal will be promoted.<sup>133</sup> It concluded that en banc hearings were allowed by statute. Today, circuits use en banc panels to maintain intra-circuit uniformity in applying a law.

Two rules have been developed to guide judges in voting for en banc hearing by their court.<sup>134</sup> A circuit "may" vote to hear a case en banc "when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance."<sup>135</sup> Although this language suggests that an en banc panel should be convened only to resolve conflicts

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127. 28 U.S.C. § 46(c) (1968).

128. 314 U.S. 326 (1941). See H.R. REP. No. 306, 80th Cong., 1st Sess. A6 (1947).

129. 28 U.S.C. § 212 (1968) (repealed 1982).

130. *Commissioner v. Textile Mills Sec. Corp.*, 117 F.2d 62, 67-71 (3d Cir. 1940) (en banc).

131. *Lang's Estate v. Commissioner*, 97 F.2d 867, 869 (9th Cir. 1938).

132. *Textile Mills*, 314 U.S. 326, 329-35.

133. *Id.* at 335.

134. FED. R. APP. P. 35.

135. *Id.*

within a circuit, at least one circuit has decided that intercircuit conflicts also are governed by this rule.<sup>136</sup> Nevertheless, not a single reported case appears to have been taken en banc for the sake of intercircuit harmony.<sup>137</sup> This absence indicates that the circuits themselves will not resolve intercircuit conflicts.

The need for an intercircuit court, as a court capable of resolving conflicts in interpretations of federal law, is highlighted by the circuits' inability to resolve these conflicts themselves. Another compelling reason for such a court is the inability of each circuit to resolve intra-circuit conflicts by means of en banc review. This argument has not been made before. Yet, its validity will be shown by considering the limits of en banc review.

### B. *Intra-Circuit Conflicts*

1. *Procedure for En Banc Review.*—Whenever discussion of conflicts among or within circuits begins, an advocate will attempt to distinguish the cases, thereby eliminating the conflict.<sup>138</sup> However, these distinctions generally are not based upon a real difference. In fact, such arguments could be used to eliminate the precedential value of any decision by confining it to its unique facts. These distinctions without a difference cost the courts and society.

They cost society because citizens within a circuit do not have a clear body of law to guide their actions. The law, as interpreted, does not give those subject to its power the rules by which to shape their actions. They cost the courts because the ambiguities result in more cases taken to court and more appeals taken to the courts of appeals. Therefore, both society and the courts would benefit from clear circuit precedent.

Each circuit has its own rules for preventing intra-circuit conflicts.<sup>139</sup> Generally, not only can counsel request rehearing en banc upon a belief

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136. Ninth Circuit Rule 35-1 states:

When the opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity, the existence of such conflicts is an appropriate ground for suggesting a rehearing *en banc*.

9TH CIR. R. 35-1, reprinted in U.S.C.S. Court Rules (Law. Co-op. 1983 & Supp. 1989).

137. Although I cannot conclusively state that no such cases exist, a broad search through the online computer services revealed no cases among the *en banc* decisions which were based solely upon an intercircuit conflict.

138. See Feeney, *Conflicts Involving Federal Law: A Review of Cases Presented to the Supreme Court*, 67 F.R.D. 301, 305-06 (1975).

139. All of these rules can be found in U.S.C.S. Court Rules (Law. Co-op. 1983 & Supp. 1989). Each of the circuits has developed its own rules, including whether they call it "en banc" or "in bank" or even a combination of the two. The First (Rule 35),

that an intra-circuit conflict exists, but judges within the circuit can suggest a hearing by the full court.<sup>140</sup>

Requests for en banc review can meet with a variety of responses.<sup>141</sup> First, the panel that has written the case can respond by modifying the opinion. In so doing, the panel may reverse itself or, more commonly, note a distinction revealing why its decision differs from the case with which it allegedly conflicts. Second, the panel can reject the petition without modification. Third, the conflict may be clear, and the panel may find itself bound by conflicting precedents; thus, it may request a vote for calling an en banc panel to decide the issue. If the vote is against the formation of such a panel, the original panel will then have to decide which of the conflicting precedents it will follow. Finally, an active sitting judge may request a vote for an en banc review. Again, the court may reject this suggestion, and the panel will proceed as in the previous situation.

Yet, even when requests are made for en banc consideration, judges in the circuit do not necessarily vote to hear the case en banc. Federal Rule of Appellate Procedure 35(a) outlines the requirements for a circuit to hear a case en banc. The rule states: "A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc."<sup>142</sup> This rule essentially requires a majority of the active judges to vote in favor of hearing a case en banc before the court will hear it.<sup>143</sup> The rule then outlines when such a vote is appropriate: "Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance."<sup>144</sup>

The problem with this rule is that it requires the various circuits to police themselves. Because "less than 1/2 of 1% of their decisions"<sup>145</sup>

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Fifth (Rule 35), Sixth (Rule 14), Eighth (Rule 16), and Tenth (Rule 35) Circuits all call it "en banc." The Third (Rule 22), Fourth (Rule 35), and Seventh (Rule 16) Circuits call it "in banc." The Fifth (Rule 14 and 35), Ninth (Rule 35-1 and index), and the Second (27(i) and index) Circuits seem to be confused as to what to call it; the Ninth Circuit shows the most confusion by calling the term "en banc" and "in banc." See also 28 U.S.C. § 46 (1988).

140. See Thompson, *supra* note 2, at 461. The Eighth Circuit Rule 16 is typical of such allowance.

141. See Note, *En Banc Review in Federal Circuit Courts: A Reassessment*, 72 MICH. L. REV. 1637, 1642-43 (1974).

142. FED. R. APP. P. 35(a).

143. This rule has been subject to varying interpretations in the circuits.

144. FED. R. APP. P. 35(a).

145. Markey, *On the Present Deterioration of the Federal Appellate Process: Never Another Learned Hand*, 33 S.D.L. REV. 371 (1988).

are reviewed by the Supreme Court, conflicts may stand unresolved if a majority of the judges are unwilling to decide an apparent conflict.

A variety of factors encourage the courts of appeals to allow intra-circuit conflicts to persist. The single most important factor is time. When an en banc panel is scheduled, all of the sitting judges are subject to being called to hear the case.<sup>146</sup> Reviewing the materials, traveling to the site of the hearing, participating in conference, and writing or concurring in an opinion all require some amount of a judge's time. At the very least, hearing a case en banc requires one full day of a judge's time.<sup>147</sup> In most instances, a good deal more time is required. This time is voluntarily spent insofar as the judges can decrease the likelihood of their being forced to spend this time hearing an en banc case by voting against the granting of an en banc hearing. Even the most conscientious circuit judge, already overtaxed by court matters, is less willing to hear a case to resolve a conflict than would a judge on a court whose very purpose is to resolve such conflicts.<sup>148</sup> As one commentator has stated, "[H]earings en banc are cumbersome and time consuming events and become impractical as the courts grow larger."<sup>149</sup>

Judges do not ignore the guidelines of Rule 35, but bleed its guidelines into each other. They do so because they are willing to overlook apparent conflicts on minor issues. They are willing to allow such cases to be distinguished on the most minor facts.<sup>150</sup> However, if the case is one of significant importance, or one which they believe is significant to society, they are more willing to seize upon the conflict and take that case en banc.<sup>151</sup> Thus, uniformity in the circuit is best maintained on those issues that the circuit judges consider most important.

So far, the analysis of this phenomena has been based upon an examination of the factors judges may weigh in their decision to vote either for or against en banc hearings. Judges act differently than has been asserted herein, and could in fact choose to resolve conflicts despite the incentives to leave conflicts unreconciled. However, judges' writings and case analyses provide evidence to support this analysis. The judges have marked the Federal Reporters with testimony that a conflict exists in a circuit, yet the circuit has refused to resolve it.

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146. In most circuits all the judges will hear the case. In the Ninth Circuit, a limited number of the judges are required to hear the case. Other circuits also have adopted this rule.

147. The judges must travel to the site of the argument, listen to counsel, decide the case in conference, and return home.

148. See Note, *supra* note 141, at 1644-45. Many other problems with en banc proceedings are well articulated there.

149. This was part of the reason for the Fifth Circuit split. *Id.*

150. Note, *supra* note 141, at 1647 n.55.

151. See Note, *supra* note 126, at 1530; Note, *supra* note 141, at 1639 n.8.



2. *The Call for En Banc Consideration.*—Judges throughout the circuits have complained about their colleagues' failure to take cases en banc. These complaints are one clear indication that en banc review does not ensure intra-circuit consistency, much less intercircuit consistency.<sup>152</sup>

Recently, Judge Kozinski criticized his colleagues in the Ninth Circuit for such a decision. The case, *Gutierrez v. Municipal Court of Southeast Judicial District*,<sup>153</sup> was a Title VII claim. The court ruled that Title VII prevented the Southeast Judicial District of the Los Angeles Municipal Court from requiring everyone to speak English during work hours when communicating with fellow workers unless "business necessity" could be shown.<sup>154</sup> The court there asserted that an earlier case in the circuit, *Jurado v. Eleven-Fifty Corp.*,<sup>155</sup> had a similar holding.<sup>156</sup> The court so argued even though no analysis of "business necessity" appears in the *Jurado* opinion.

Judge Kozinski noted this attempt to recharacterize an earlier decision and criticized his colleagues for failing to take *Gutierrez* en banc to resolve this conflict with *Jurado*.<sup>157</sup> Kozinski noted that *Jurado* had accepted the Fifth Circuit's analysis in *Garcia v. Gloor*.<sup>158</sup> It held that "if the employee is able to speak English, imposition of an English-only rule does not have a discriminatory impact."<sup>159</sup> Judge Kozinski noted that a finding of business necessity, as the *Gutierrez* panel thought existed in *Jurado*, could not exist in *Jurado* because that case involved an appeal from a grant of summary judgment. Kozinski stated, "I am aware of no case in this circuit, or anywhere else for that matter, affirming a grant of summary judgment in favor of an employer who relied on a business necessity defense."<sup>160</sup> In fact, such a decision is ready made at the summary judgment stage.<sup>161</sup>

Kozinski's dissent from the denial of a rehearing en banc is extraordinary. Judges rarely publicly castigate their colleagues for refusing to take a case en banc. In this instance, Kozinski's analysis, to an

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152. See also Note, *supra* note 141, at 1646-47. (Intra-circuit consistency is a secondary rationale for the use of en banc power.)

153. 838 F.2d 1031 (9th Cir. 1988).

154. *Id.* at 1040-41.

155. 813 F.2d 1406 (9th Cir. 1987).

156. *Gutierrez*, 838 F.2d at 1041.

157. *Gutierrez v. Municipal Court of S.E. Judicial Dist.*, 861 F.2d 1187 (9th Cir. 1988) (dissent from order rejecting the suggestion for rehearing *en banc*).

158. 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

159. *Gutierrez*, 861 F.2d at 1190.

160. *Id.*

161. See, e.g., *International Union, UAW v. Johnson Controls, Inc.*, 886 F.2d 871 (7th Cir. 1989).

unprejudiced eye, seems entirely accurate. His court's failure to take the case en banc can be read in either of two ways. On the one hand, some judges may have agreed with the outcome of *Gutierrez* and did not want to risk changing the result by allowing the case to go en banc. On the other hand, some of the judges may have thought the *Gutierrez* panel had read *Jurado* in a way such that en banc consideration was unnecessary. In either case, it seems unlikely that the judges would have thought that *Jurado* and *Gutierrez* would not confuse those who are focused to abide by their result — the citizens of the Ninth Circuit.

Other circuit judges also have had to deal with the refusal of their colleagues to hear cases en banc. Judge Hill dissented from a refusal to hear a case en banc on the Fifth Circuit.<sup>162</sup> This refusal forced a panel on that circuit to consider which previous case in the circuit should be relied upon as the law of the circuit. In *Georgia Association of Retarded Citizens v. McDaniel*,<sup>163</sup> the Eleventh Circuit explained that "intra-circuit conflicts are by no means novel."<sup>164</sup> In fact, it revealed that "[t]he court has, by necessity, developed rules that govern the choice among conflicting precedents."<sup>165</sup> The rules which govern are: (1) reject the precedent that is inconsistent with either Supreme Court cases or the weight of authority within the circuit; and (2) where no Supreme Court authority exists and no clear weight of authority exists within the circuit, "we must resort to common sense and reason' to determine the appropriate rule of law."<sup>166</sup> This case involved the awarding of attorney's fees and interest.<sup>167</sup> Although this may not have been a question that the members of the Eleventh Circuit considered of vital importance, their failure to resolve it had left the citizens of the circuit with conflicting precedent for over seven years. Even more important than this case itself, however, is the court's admission that conflicts within the circuit are not novel. Indeed, they are so common that the court had developed rules to guide its resolution of conflicts.

*Gutierrez* and *McDaniel*, one from the Ninth Circuit and the other from the Eleventh Circuit, respectively, reveal that circuits do allow clear conflicts to persist. Numerous other examples could be cited in which members of a circuit have themselves noted such conflicts.<sup>168</sup> Their

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162. *Gates v. Collier*, 641 F.2d 403 (5th Cir. 1981).

163. 855 F.2d 794 (11th Cir. 1988). A seven-year hiatus occurred between the creation of the conflict and its resolution in that circuit.

164. *Id.* at 797.

165. *Id.*

166. *Id.* (citations omitted).

167. *Id.* at 798.

168. See *Legros v. Panther Services Group, Inc.*, 863 F.2d 345, 352 (5th Cir. 1988) (Jones, J., dissenting); *United States v. Troup*, 821 F.2d 194, 197 (3d Cir. 1987); *Riddle*

existence reveals that even within the circuits, conflicts can persist unresolved.

3. *Conclusion.*—Perhaps the disease is better than the cure. Even when an en banc panel decides an issue, its decision can fail to clarify the law. Special concurrences and dissents can result in such ambiguity in the court's decision that the decision provides guidance no further than resolving the conflict before it. As a result, federal law cannot be truly said to be promulgated.<sup>169</sup> Persons who attempt to comply with the law as decided by the circuit, even if they do so with the best intentions, may act contrary to it. Ambiguity at this stage is worse than a slightly bad law which is capable of being understood. Thus, en banc opinions, because they are composed by a panel of many judges, lend themselves to creating ambiguity.<sup>170</sup> Indeed, since the cases called en banc are usually of special importance, judges are likely to see the case in differing ways, and this ambiguity will infect some of the most important laws. This variety of problems with the current en banc system might legitimate an intermediate court. However, in addition to these problems is a pervasive and ultimately more problematic tendency — “almost conflicts.”

### C. “Almost Conflicts”

“Almost conflicts” are certain to develop in a system like the circuit courts in which a limited capacity for reviewing cases exists. “Almost conflicts” involve cases that interpret a law or set of laws to avoid conflicts, thus creating distinguishing characteristics of the cases or ad hoc justifications. These cases make the law needlessly fact-specific. As a result, a law or set of laws that Congress has enacted becomes fractured. This situation arises when judges are faced with a case that is similar, but not identical to a previous case decided by a previous panel in the circuit. The new case, judges believe, can be distinguished on some factual basis leading to a different outcome than that mandated by the case with which the new case is almost in conflict.

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v. Secretary of Health & Human Services, 817 F.2d 1238, 1244 (6th Cir. 1987) (Engel, J., dissenting); District Counsel 47, *Am. Fed'n v. Bradley*, 795 F.2d 310, 316 (3d Cir. 1986) (Aldisert, J., dissenting); *Church of Scientology of Cal. v. Foley*, 640 F.2d 1335, 1336 (D.C. Cir. 1981) (Spottswood, J., dissenting); *Hockenbury v. Sowders*, 633 F.2d 443, 445 (6th Cir. 1980) (Keith, J., dissenting); *United States v. Williams*, 519 F.2d 368, 369-70 (8th Cir. 1975).

169. Two examples in which the en banc decision is difficult to assess are *Lowry v. Baltimore & Ohio R.R. Co.*, 707 F.2d 721 (3d Cir. 1983) (en banc) and *Meadows v. Holland*, 831 F.2d 493 (4th Cir. 1987) (en banc).

170. See Note, *supra* note 141, at 1647, 1650.

The consequence of these types of decisions are twofold. Those subject to the law and its interpretation by the court cannot know where their case stands if it is not squarely on point with a previous case. Thus, they are likely to pursue litigation to defend what may be their right.<sup>171</sup> This costs the citizens a fair amount of time and money.<sup>172</sup> This pursuit of rights leads to another consequence, an increase of cases placed before the judiciary. Courts face an increase in cases because their precedents are seen as fact-specific.<sup>173</sup> In short, "almost conflicts" spawn more litigation, which may in turn fashion more ambiguity.

That "almost conflicts" exist is easily shown. First, the previous Section, which shows that true conflicts are allowed to exist, is persuasive evidence that "almost conflicts" would also be allowed. If judges are willing to let the more egregious problem, clear conflicts, exist, they will also allow the less problematical case, the "almost conflict," to exist. The second proof of such conflicts can be found in the cases themselves.

One need not look far for instances in which a circuit has adapted a federal rule or previous decision of a panel in the circuit to comport with its view of what the law should be. Several examples underscore this situation.

*1. Case Examples.*—The Ninth Circuit has long advocated that an Administrative Law Judge's (ALJ) findings in social security cases should be upheld if they were based upon substantial evidence in the record.<sup>174</sup> This rule allowed the circuit to show some degree of deference to the ALJ and to keep it from having to reweigh the facts in the record when a party sought review before the Ninth Circuit.

In 1983, a panel of the Ninth Circuit chose to modify this general rule with regard to the pain testimony of a claimant. In *Murray v. Heckler*, Murray contended that the ALJ should be required to make a specific finding on the credibility of his pain testimony, or the ALJ's decision should be overturned.<sup>175</sup> The Ninth Circuit endorsed Murray's position and adopted a rule requiring the ALJ to make specific findings rejecting a claimant's pain testimony.<sup>176</sup> This modification of the general rule requiring deference to an ALJ's decision if based on the record

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171. See ECONOMIC ANALYSIS OF LAW, *supra* note 108, at 515.

172. POSNER, *supra* note 80, at 91.

173. See STUDY COMMITTEE, *supra* note 3, at 110. The committee noted that in 1945, one of every forty district court determinations was appealed, now the number is one of every eight. *Id.*

174. *Murray v. Heckler*, 722 F.2d 499, 501 (9th Cir. 1983) (the court there set forth the history of the judge-fashioned rule).

175. *Id.*

176. *Id.* at 502.

was accepted by the court without dissent.<sup>177</sup> Nevertheless, it was a clear reshaping of the law. Under *Murray*, if the ALJ did not make specific findings regarding subjective allegations of pain, the ALJ's decision must be remanded even if substantial evidence supported the ALJ's findings. This, in effect, limits the holding that the ALJ's findings are upheld if they are substantially supported by the record. It creates an exception to the broad rule. Yet, that was not enough for the Ninth Circuit. It seemed to be distressed that an ALJ, on remand, could discredit pain testimony, which discrediting would be subjected to the "substantial evidence" standard on appeal. Therefore, it carved out an even larger exception. In *Varney v. Secretary of Health and Human Services*,<sup>178</sup> it took the step to prevent such discrediting on remand. The court there decided that "where it is clear from the administrative record that the ALJ would be required to award benefits if the claimant's excess pain testimony were credited, we will not remand solely to allow the ALJ to make specific findings regarding that testimony."<sup>179</sup> The court did not want the ALJ to make a factual finding on subjective pain testimony. Instead, the claimant is awarded the appropriate claims even if the weight of contrary testimony overwhelms the claimant's testimony. In a later case, *Varney* was used to further eviscerate the rule of deference to the ALJ. There, a Ninth Circuit panel held that one could provide the claimant a remedy, absent the situation of *Varney*, where "delay experienced by [claimant] has been severe and because of [claimant's] advanced age."<sup>180</sup>

These cases were crafted by a variety of panels so as not to explicitly repudiate the general principle of deference to the ALJ's findings. Yet, they allow any claimant who claims pain to force the ALJ to make specific findings regarding such pain. If the ALJ fails to make such findings, the Ninth Circuit has shown a willingness to shape its decisions so that the claimant may receive an award. Similarly, this line of cases could be developed with regard to a whole host of claims made by claimants before an ALJ. There is nothing peculiar to pain testimony that makes it deserving of this special protection. Indeed, one could see why subjective pain testimony is least deserving of this sort of benefit because of its non-objectivity. This line of cases presents a clear picture of a panel reaching for a decision, and thereby causing "almost conflicts" with prior precedent. Indeed, the court in *Hammock v. Bowen* continued to recite the rule that "[w]e affirm a denial of benefits when the

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177. See *Miller v. Heckler*, 770 F.2d 845, 848-49 (9th Cir. 1985); *Taylor v. Heckler*, 765 F.2d 872, 876 (9th Cir. 1985).

178. 859 F.2d 1396 (9th Cir. 1988).

179. *Id.* at 1401.

180. *Hammock v. Bowen*, 867 F.2d 1209, 1214 (9th Cir. 1989).

Secretary's decision is supported by substantial evidence and is free from legal error,"<sup>181</sup> while at the same time they eviscerated the rule. The unwary ALJ and the well-crafted complaint can combine to allow someone unworthy of benefits to receive them as a matter of law. In the process, the general rule has been excepted in one significant respect. Further exceptions to the rule could be developed by judges. This exception will encourage litigants to take appeals to the Ninth Circuit, hoping that one of its panels may carve out another exception to fit the appellant's unique situation. This line of cases shows how "almost conflicts" can develop. Indeed, this line of cases cannot be cut back without causing further conflict within the circuit.

The Ninth Circuit also has shown its ability to make distinctions and to cause confusion in areas dealing with constitutional law. The requirement of ripeness for claims alleging substantive and procedural due process and takings has been decided in a number of cases. In *MacDonald, Sommer & Frates v. Yolo County*,<sup>182</sup> the Supreme Court held that regulatory takings claims can only be brought when "a final and authoritative determination of the type and intensity of development legally permitted on the subject property" has been made.<sup>183</sup> Absent such a finding, the court stated that a regulatory taking claim could not be brought.<sup>184</sup> The first Ninth Circuit case dealing with regulatory takings after *Yolo County* failed even to cite it. In *Norco Construction, Inc. v. King County*,<sup>185</sup> the court stated that

under federal law the general rule is that claims for inverse taking, and for alleged related injuries from denial of equal protection or denial of due process by unreasonable delay or failure to act under mandated time periods, are not matured claims until planning authorities and state review entities make a final determination on the status of the property.<sup>186</sup>

Thus, the court paralleled the holding of *Yolo County*, but failed to use any of its analysis. *Yolo County* and *Norco* were both deficient insofar as they failed to explain what was meant by "final," perhaps the most crucial word in their holdings.

The Ninth Circuit acted quickly to fill that lacuna. In *Kinzli v. City of Santa Cruz*,<sup>187</sup> the court held that to assert a regulatory takings claim,

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181. *Id.* at 1212.

182. 477 U.S. 340 (1986).

183. *Id.* at 348.

184. *Id.*

185. 801 F.2d 1143 (9th Cir. 1986).

186. *Id.* at 1145.

187. 818 F.2d 1449 (9th Cir. 1987).

a claimant must "establish two components: (1) that the regulation has gone so far that it has 'taken' plaintiff's property, and (2) that any compensation tendered is not 'just.'"<sup>188</sup> The first component demands that one have a final decision from the pertinent governmental body. A final decision involves: (1) a rejected development plan; and (2) rejected variances which would permit uses not allowed under the regulations.<sup>189</sup> The court also held that an equal protection claim "is not ripe for consideration by the district court 'until planning authorities and state review entities make a final determination on the status of the property.'"<sup>190</sup> Finally, the court held that substantive due process claims are ripe only when the plaintiffs have "final decisions regarding the application of the regulations to their property and the availability of variances."<sup>191</sup> Therefore, under *Kinzli*, finality is required for claims of takings, equal protection, and substantive due process with regard to regulation of one's property.

*Herrington v. Sonoma County*,<sup>192</sup> decided six months after *Kinzli*, used its specific facts to create a futility exception to the finality requirements for substantive due process and equal protection claims. The court there stated that the finality requirement of *Kinzli* applies to substantive due process and equal protection.<sup>193</sup> However, the court distinguished *Herrington* from *Kinzli* by stating that even though a completed zoning application had not been made, it was as good as made. Thus, it met the first finality requirement outlined in *Kinzli*. Second, the court held that an application for a variance would have been futile, and was therefore not required.<sup>194</sup> Thus, *Herrington* was the first case which tried to limit the ruling in *Kinzli*.

The Ninth Circuit soon created more confusion in this area. In *Shelter Creek Development Corp. v. City of Oxnard*,<sup>195</sup> the court cited *Lake Nacimiento Ranch v. San Luis Obispo County*<sup>196</sup> for the proposition that "the 'futility exception' is unavailable unless and until landowner has submitted at least one 'meaningful application' for development of the property and one 'meaningful application' for a variance."<sup>197</sup> This limitation on the futility exception was held to apply to takings, sub-

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188. *Id.* at 1453 (citing *Yolo County*, 477 U.S. 340).

189. *Id.* at 1454.

190. *Id.* at 1455.

191. *Id.* at 1456.

192. 834 F.2d 1488 (9th Cir. 1987).

193. *Id.* at 1494.

194. *Id.* at 1496.

195. 838 F.2d 375 (9th Cir. 1988).

196. 830 F.2d 977 (9th Cir. 1987).

197. *Shelter Creek*, 838 F.2d at 379.

stantive due process, and equal protection claims.<sup>198</sup> *Shelter Creek* thus seems to create a conflict in the Ninth Circuit by conflicting with *Herrington*.

Further confusion was added by two later cases. In *Austin v. City and County of Honolulu*,<sup>199</sup> the court found that a takings claim requires finality, for example, a rejected development plan and denial of a variance.<sup>200</sup> This case did not consider whether a futility exception was possible. Thus, this case is squarely on point with *Kinzli* with regard to takings claims.

Continuing to add to the confusion, the court decided *Bateson v. Geisse*.<sup>201</sup> There, the court held that a substantive due process claim is ripe even though the plaintiff did not "seek 'just compensation.'"<sup>202</sup> The court did not even discuss any of the finality criteria established in *Kinzli* and its progeny. It did not explicitly reject *Kinzli*'s criteria; it merely allowed a substantive due process claim when a governing body arbitrarily withheld Bateson's building permit.<sup>203</sup> The court there, unlike the *Herrington* court, did not even try to meet the requirements of finality established in *Kinzli*.

The Ninth Circuit continues to add cases to this confusing morass. Again, these cases possibly could be distinguished on various factual grounds. Yet, they seem to conflict or almost conflict on numerous points. Indeed, they are further evidence that the citizenry and the courts of appeals would be well-served by a court capable of taking such a host of cases and developing consistent logic for the circuits.

2. *Conclusion*.—Recently, a partner in a California law firm noted one instance of "almost conflicts" in the Ninth Circuit.<sup>204</sup> His survey of one area is not new, nor is it rare. Although the two examples I have drawn came from the Ninth Circuit, their application is not limited.

198. *Id.* *Lake Nacimiento* itself is not a clear authority for this proposition because it states, in the space of one paragraph, that "[t]he Ranch correctly argues that it can avoid the ripeness requirement of a final determination if it can show that the submission of a development plan and an application for a variance would be futile." 830 F.2d at 980. It then states, 10 lines later, "[s]ince the Ranch has failed to submit such applications [for development and a variance], it may not argue that it would be futile to secure a final determination from the County." *Id.* at 980-81. Thus, *Lake Nacimiento* seems to cause a conflict within the circuit.

199. 840 F.2d 678 (9th Cir. 1988).

200. *Id.* at 680. This is in accord with *Lai v. City and County of Honolulu*, 841 F.2d 301, 303 (9th Cir. 1988).

201. 857 F.2d 1300 (9th Cir. 1988).

202. *Id.* at 1303.

203. *Id.*

204. Perry, *9th Circuit Splits Over Summary Judgment*, Los Angeles Daily J., Feb. 23, 1989, at 7, col. 1.



An experienced practitioner in any of the circuits could note specific examples of "almost conflicts." Such cases provide further justification for a new court of appeals.

#### D. History

A final justification for a new intercircuit court can be drawn from history. Many historical parallels can be drawn between the situation present when the circuit courts were first established and what would prevail were a new intermediate court established.

First, the circuit courts were originally created "to play the basic role of error correction that the Supreme Court could not"<sup>205</sup> with regard to the various district courts. The Circuit Court of Appeals Act of 1891 granted the circuit courts jurisdiction over appeals from district courts in nearly all admiralty, diversity, non-capital criminal, patent, and revenue cases.<sup>206</sup> At that time, the relatively small size of the circuit courts, generally only three judges per circuit, ensured uniformity *within* the circuits, and the relatively fewer circuits and cases heard by them allowed the possibility of uniformity *among* the circuits. The same role could be played by an intermediate court, ensuring uniformity within and among the circuits. Indeed, this historical perspective reveals that the position taken by Judges Wallace and Ginsburg is contrary to the very reason why these two judges are circuit judges.

#### V. A NEW NATIONAL COURT

The various proposals advocating a new intermediate court have all failed to recognize that the federal courts are an interconnected system so that any change in one part of that system will have and does have repercussions for the whole system. They have failed to see that the Supreme Court's inability to review conflicts between the circuits not only suggests that the Supreme Court is overworked, but that the circuit courts themselves are stressed. This Article has attempted to show that not only is the Supreme Court incapable of resolving the numerous intra-circuit conflicts that arise every year, thus providing support for a court that could do so; but also that the circuit courts are incapable of ensuring uniformity within themselves, thus providing support for a court that could do so. I believe that an intermediate court of appeals could resolve conflicts among the circuits and within the circuits, thereby

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205. Baker & McFarland, *supra* note 1, at 1405 (citing Circuit Court of Appeals Act of 1891, ch. 517, 26 Stat. 826).

206. See CONGRESSIONAL QUARTERLY, GUIDE TO THE UNITED STATES SUPREME COURT 265 (1979).

ensuring that federal law is applied fairly, for example, evenly, throughout our federal system.

I propose the creation of a court with the power to resolve conflicts among and within the circuits. This court would have the following features:

i. Parties could appeal to this court directly, instead of being certified via the Supreme Court as some of the aforementioned proposals advocated. A party who thought that the decision of a circuit court resulted in a conflict either within the circuit in which the decision was rendered, or among any of the federal circuits, could first seek rehearing before the panel that first heard its case. If the panel failed to reconcile the conflict, the party could appeal to the intermediate court. The intermediate court could then decide whether a conflict truly existed and was therefore in need of resolution.

ii. This intermediate court should resolve conflicts that a court of appeals creates. If a panel in any of the circuits says in its opinion that it has decided to resolve a federal law in a manner that would create a conflict with another circuit, the intermediate court would be forced to hear that case if either party sought review before it.

iii. Decisions of this court could be appealed to the Supreme Court. However, the Supreme Court could choose not to hear these appeals. This procedure would allow the Supreme Court to decide those cases it deemed wrongly decided, yet allow it to let stand cases it deems unimportant or correctly decided. The Court would not need to take cases merely because a split between the circuits was causing national problems.

iv. The judges of this new court would be nominated by the President and confirmed by the Senate, just as are current courts of appeals judges. They would be article III judges. The court would consist of three judges headquartered in a central geographical location such as Chicago or Denver, yet capable of hearing cases anywhere in the country.

The new intermediate court would ensure that conflicts within and among circuits are not allowed to fester. Not only would the citizenry of this country be aided by this court which would keep the law uniform throughout the country, but the court system also would be aided in several ways. First, the intermediate court could eliminate the time consuming en banc review of cases. This would allow the circuits to concentrate on cases brought before them in the normal course. Second, the court system would be aided by clearer laws. Because the intermediate court could resolve "almost conflicts" within circuits if it believed that a case caused an actual conflict, the circuits would have their interpretation of law more clearly defined so that all panels in a circuit would decide similar cases consistently with one another. This would aid the circuits in applying the law to cases before them, and would lead to a

decrease in the number of appeals because litigants would be able to perceive the rationale in the law of the circuit and would be less willing to spend their money in hope of landing the right panel. The Supreme Court would also be aided insofar as all the cases of conflict that it now decides, and those that it is incapable of deciding, would now be resolved by another tribunal. Thus, the Court could decide cases it thinks are important in their own right, and not merely important because they have created a national conflict.

The number of potential cases such a court should hear may threaten to swamp it. Thus, I suggest that it normally resolve conflicts by adopting the rationale of one of the courts from which the conflict arose. This presumption would allow the court to easily resolve at least 250 cases per year. I believe that this type of review would be sufficient to resolve most of the conflicts that now arise between and within circuits. If this court was incapable of handling all of the conflicts, Congress could create two panels of three judges, splitting the country between them. These two courts would be required to follow the other panel's precedent if the other panel previously decided a case involving the same issue. A central filing office could track potential conflicts between the intermediate courts, and advise the respective panels accordingly.

The court I propose has a host of advantages. First, it allows for resolution of conflicts without requiring the Supreme Court either to resolve them or to determine that another court should. Thus, my proposal lightens the Supreme Court's burden without saddling it with other duties. Second, it provides for swift resolution of numerous conflicts. Third, it establishes a court with clear authority to resolve conflicts. At least one of these three benefits has been lacking in one manner or another in all the other proposals.

## VI. CONCLUSION

The United States Supreme Court and the federal appellate courts are currently incapable of providing a consistent interpretation of federal law. This inconsistency is, in part, a consequence of the vast number of cases faced by courts of appeals and the increasing number of appellate judges.

The consequences of this disarray are several. Litigants may forum shop hoping to find a circuit whose judges have interpreted federal law in a beneficial manner. The judges themselves cannot find clear precedent for their decisions. As a result, even citizens seeking to comply with the law may be incapable of doing so because they cannot discern it from the various ad hoc interpretations of the law. As a result, the law can hardly be considered true law.

An intermediate court of appeals could resolve this situation. A court composed as I have suggested would not only relieve some of the

pressure on the Supreme Court — a benefit that has been sought by two commissions — but would create consistency among and within circuits. As a result, judges on all levels would benefit from clear precedent. Most importantly, however, the citizenry would have clearer, uniform precedent by which they could gauge their actions.