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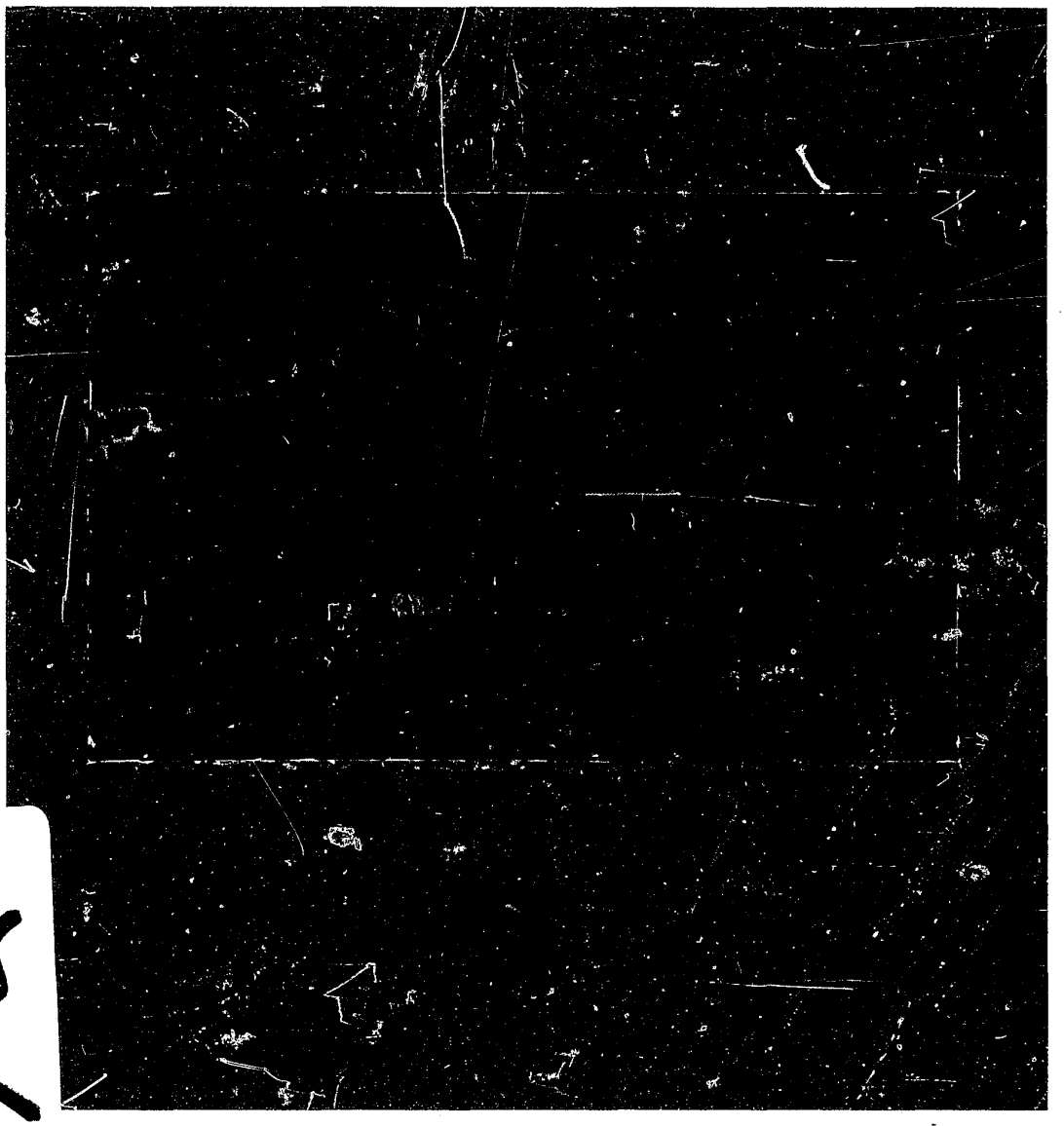

National Center for State Courts

DISTRICT OF COLUMBIA COURT OF APPEALS: WORKLOAD PROBLEMS AND POSSIBLE SOLUTIONS

Final Report
of the
Subcommittee on the Workload of the District of Columbia
Court of Appeals, District of Columbia Judicial Planning Committee

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CHAPTER I

INTRODUCTION

This report responds to an assignment from the District of Columbia Judicial Planning Committee to study the workload of the District of Columbia Court of Appeals, determine if the workload is beyond the Court's present dispositional capacity, and, if so, recommend a solution to the problem. This introductory chapter will outline the history of the workload problem, describe the methodology followed by the report's authors in addressing that problem, and identify the subject matter of succeeding chapters. The concluding chapter of the report will summarize the authors' findings and conclusions and set forth their recommended solution.

1) History of the Workload Problem and Responses

The District of Columbia judicial system was radically changed in 1971 by the District of Columbia Court Reorganization Act of 1970, which created a judicial system for the District comparable to a state judicial system. The Act transferred local District litigation from the

federal District and Circuit Courts to the District of Columbia Superior Court and the Court of Appeals. The Superior Court thus became the general jurisdiction trial court, and the Court of Appeals became the court of last resort. The Court of Appeals was expanded from 6 to 9 judges in 1971, and has remained at that size.

The transfer of jurisdiction from the District Court to the Superior Court was accomplished in several steps and was not completed until August 1, 1973. Most of the more important and difficult litigation, for example, major felony cases and civil cases with an amount in controversy exceeding $50,000, was shifted during the last part of the transition period.

The Court of Appeals workload rose precipitously from 1971 to 1976, largely as a result of the expanded jurisdiction in the Superior Court. The volume of appeals more than doubled, and the average appeal became more complex. Although the Court greatly increased its dispositions, it was not able to keep up with the expanding caseload, and backlog and delay problems developed. The Court responded by adopting several efficiency measures, including a summary calendar to discourage oral arguments, expanded use of unpublished opinions, and the addition of a second law clerk for each judge. These responses, however, were not sufficient, and a search for other measures became imperative.

In 1977 the Judicial Planning Committee of the District of Columbia created a Subcommittee to Study the Extent to Which the Practice and

Procedure of the District of Columbia Court of Appeals Conforms to the American Bar Association Standards of Judicial Administration Relating to Appellate Courts. In an extensive report, issued in December 1977, the Subcommittee found that the Court of Appeals was in basic conformance with the ABA standards, but it also listed and commented on several areas of nonconformance. The caseload problem was the major basis of nonconformance discussed in the report.

> One factor which has a major effect on the extent of the Court's conformance to the A.B.A. Standards is the considerable backlog of cases which has been building up on the Court's docket. . . .
>
> In the absence of any firm evidence that total annual filings in the Court will soon decline, the District of Columbia Court of Appeals now faces a very serious backlog problem which must be promptly addressed. Not only does such a backlog make it difficult for the Court to implement some of the Standards-recommended procedures discussed in the next section, some of which impose additional burdens on the time of the Court's judges and staff; it even forces the Court to seriously consider more extensive use of some devices--including dispensing with oral argument and disposing of cases through often unpublished memorandum judgments and order--which many practitioners, and the Standards themselves, regard as procedures to be used only in moderation and with utmost caution. In addition, the backlog contributes to increasing delay in the disposition of cases.[1]

The purpose of the 1977 report of that Subcommittee was solely to point to areas of conformance and nonconformance with the ABA Standards, and not to suggest specific changes or reforms. The report, however, did single out the Court's backlog problem and warn "that major action to deal with the problem is urgently required" to preserve the quality of appellate justice in the District.[2]

During 1978 the Judicial Planning Committee reviewed the report on conformance to ABA Standards and, in the 1979 Judicial Plan for the District of Columbia, determined that the Court of Appeals should substantially comply with the ABA Standards by September 1979, except that the goal for compliance with the time standards should be three years later.[3] But the 1979 Plan stated that compliance with the Standards would not be sufficient:

> It must be recognized, however, that compliance with ABA Standards by September 1, 1979, will not assure the solution of the Court's most critical problem, i.e., the rising caseload and backlog. Some JPC members believe that necessary control will not be obtained until the District of Columbia has an intermediate appellate court to share the caseload burden. Other members, conscious that the Bar already suffers adverse criticism for the expense of litigation, express reservations about adding another layer of litigation to the judicial system and therefore wonder whether the caseload and backlog problems can be met through mechanisms other than an intermediate court.[4]

The Judicial Planning Committee, while accepting as "a working hypothesis" that an intermediate appellate court is probably the best

solution to the workload problem,[5] determined that a thorough study was required to:

(1) identify and examine all prospective mechanisms for relief,

(2) articulate and weigh their respective advantages and disadvantages,

(3) provide current and complete documentation for its findings, and

(4) formulate a detailed and comprehensive plan for initiating and achieving an overall relief program, which program could conceivably involve more than one mechanism or vehicle.[6]

The program goal of the JPC in this area was "to determine by September 1, 1979, whether the District of Columbia should establish an intermediate appellate court or can meet identified problems through other mechanisms."[7]

To accomplish this goal, the Judicial Planning Committee created the Subcommittee on the Workload of the District of Columbia Court of Appeals to study possible solutions to the Court's problems. Acting as chairman of the Committee, Chief Judge Newman appointed ten members, who represent diverse parts of the District bar. In addition, four knowledgeable experts serve the Subcommittee as consultants. The membership and the consultants are shown below.

Chair: John W. Douglas

Members: Wiley A. Branton
Albert E. Brault
William C. Burt
Peter R. Kolker
Brooksley Landau
Leroy Nesbitt
John R. Risher, Jr.
William H. Taft, IV
Charles R. Work

Consultants: Richard W. Barton
John A. Terry
Curtis E. von Kann
Silas J. Wasserstrom

2) Subcommittee Activities

The Subcommittee commenced operation with an organizational meeting on September 20, 1978. It commissioned the Mid-Atlantic Regional Office of the National Center for State Courts to prepare a draft report for its consideration. The National Center staff - Douglas Dodge, regional director, Mae Kuykendall, project director, and Thomas Marvell, principal author of the report - were directed to present a balanced discussion of all the available alternative solutions to the workload problem. They were directed not to suggest a preferred alternative or to reach any conclusions in the initial draft. The final chapter (Chapter IX) was to be prepared only after the Subcommittee had reached a tentative decision. Chief Judge Newman designated Alexander Stevas, clerk of the Court of Appeals, and Claire Whitaker, first deputy clerk, as liaison between the Court and the National Center. They supplied

statistical and other information and reviewed a rough draft of the report.

The National Center submitted a draft report on January 8, 1979. During the following weeks the Subcommittee members studied the report and, in a meeting on February 6th, discussed its findings. At this meeting the Subcommittee unanimously adopted the tentative view that creation of an intermediate appellate court is the best solution to the Court of Appeals workload problem. The members also decided upon several specific features of the proposed appellate system.

The Subcommittee appointed a drafting committee to refine the tentative report, with particular attention to the final chapter. This committee, whose members were John W. Douglas, Charles R. Work, William C. Burt, and Curtis E. von Kann, met with and corresponded with the National Center staff during February and early March. The final staff submission was then sent to the Subcommittee members and, with revisions, adopted as the tentative report of the Subcommittee in a meeting on April 17, 1979.

The tentative report was widely distributed, and comments were solicited from all interested individuals and organizations. On May 29 and 30 the Subcommittee held public hearings in the office the Bar of the District of Columbia. The statements made there, along with written comments submitted by others before and after the hearings, are in the Subcommittee's file; they are available to the public and can be obtained from Alexander Stevas, Clerk of the D.C. Court of Appeals.

The Subcommittee met on June 12, 1979, to consider the hearing testimony and other comments. It unanimously concluded that the basic recommendations in the tentative report should be the Subcommittee's final recommendations. The Subcommittee, however, decided that the public comments required several modifications to the tentative report, and it created a three-member task force to draft revisions. The task force circulated drafts to the Subcommittee members on June 29, 1979, and the revisions were adopted, in accordance with the Subcommittee's previously-established procedures, three weeks later.

3) Report Organization

This tentative report evaluates the feasible changes in appellate organization and management that might alleviate the workload problem. Chapter II outlines the Court's jurisdiction, organization and procedures, describing at length several features of the Court's operation that help the Court to manage its caseload. Chapter III describes the workload of the Court of Appeals in terms of caseload, backlog, and delay statistics; discusses the possible appellate caseload trends in the District; and compares the Court of Appeals statistics with statistics from state high courts.

The next five chapters evaluate possible solutions to the workload problem. Chapter IV examines the benefits and drawbacks of enlarging the Court, making more use of retired judges and temporarily assigned trial judges, and using quasi-judicial personnel. Chapter V explores the uses of staff aides in the Court of Appeals and in other high courts. Chapter VI describes how a court can increase efficiency

through major deviations from traditional appellate procedures - e.g., drastic limitations on oral argument, sharp reduction in the number of written opinions, use of two-judge panels, and reliance on staff for information about appeals. Chapter VII describes the possibility of decreasing the Court's caseload by discouraging "meritless" appeals, by giving the Court discretionary jurisdiction over more appeals, and by establishing an appellate panel in the Superior Court. Chapter VIII discusses the final possible alternative, creation of an intermediate appellate court, outlines the many types of two-tiered appellate structures in the states, and evaluates the suitability of each type for the District. The concluding chapter, Chapter IX, summarizes the Subcommittee's findings with respect to the Court of Appeals' workload, the conclusions reached in Chapters IV-VIII regarding alternative solutions to the problem, and the Subcommittee's recommendations for a long-range and realistic solution.

CHAPTER II

COURT OF APPEALS OPERATING PROCEDURES

The use of a variety of internal procedures has enabled the Court of Appeals to adjust to its large caseload--a high workload level which is described in the next chapter. It is true that these procedures are similar to those adopted by congested courts elsewhere, but for the most part they are procedures typical of intermediate courts and are not suitable for courts of last resort. The most important of these procedures, one the Court has always had, is delegation of decisions to three-judge panels. Others include the use of extra judges to supplement the nine active judges, a large volume of decisions by unpublished opinions, a summary calendar to restrict oral arguments in routine cases, and more recently prehearing settlement conferences.

This chapter will give a background description of the Court's jurisdiction, organization and procedures, concentrating on the special features listed above. Chapters IV through VIII will discuss various other approaches that might help solve the Court's caseload problem. Throughout, the Court's operations will be compared with the operations of other high courts.

But our basic conclusion is that the present system of three-judge panels, although necessary if the Court is to ever keep up with its current workload, is a thoroughly unsatisfactory method of operation for the highest court is the District of Columbia, a court which is charged with important law-making functions. This conclusion, in turn, requires an examination of other possible methods of dealing with the Court's workload.

1) Jurisdiction and Further Review

The Court of Appeals hears all appeals from the Superior Court and almost all appeals from the District of Columbia government and agencies.[1] The Court is quite unusual in this respect. General jurisdiction trial courts in most states hear appeals from limited jurisdiction courts; but the District has a single court at the trial level. Agency appeals in many, if not most, states are usually taken to the trial courts. These two factors suggest that the Court's caseload is comparatively high in relation to the total volume of appellate litigation in the jurisdiction. On the other hand, habeas corpus writs are filed initially in the Superior Court (the District is typical here; habeas writs are generally filed in trial courts).[2]

Appeals to the Court of Appeals are of right except in a few limited types of cases. The most important exception is:

> Review of judgments of the Small Claims and Conciliation Branch of the Superior Court of the District of Columbia and of judgments in the Criminal Division of that court where the penalty imposed is a fine of less than $50 for an offense punishable by imprisonment of one year or less, or by fine of not more than $1,000, or both, shall be by application for the allowance of an appeal, filed in the District of Columbia Court of Appeals.[3]

The Court also has discretionary jurisdiction over some types of interlocutory appeals[4] and over agency appeals in motor vehicle safety responsibility cases.[5] In all, however, the Court's jurisdiction is basically mandatory; fewer than a tenth of its filings are applications for allowance of appeal and fewer than five percent of these are granted.[6]

The Court of Appeals is the court of last resort for the District in the same manner that a state supreme court is the court of last resort for its state. The Court is "the highest court of the District of Columbia" and its decisions are reviewable only by the U.S. Supreme Court.[7] For purposes of review in the U. S. Supreme Court, the Court of Appeals is designated as the "highest court of a state."[8] Court of Appeals rulings are, as a practical matter, final decisions; the Supreme Court grants certiorari in only about one case per year.

2) Judges and Staff

The Court of Appeals, as created in its present form in 1971, has always consisted of nine regular active judges.[9] The number of judgeships has not increased in response to the rising caseload. The appointment process begins with the selection of three candidates by the Judicial Nominations Commission. Within 60 days the President (or the Commission, if the President does not act) appoints one of the three, with the advice and consent of the Senate.[10] The judges have 15 year terms, and the mandatory retirement age is 70.[11] Over the years, by and large, the Court has operated with its full complement of nine judges, although there were unfilled vacancies for periods of about 16 months and 6 months in 1974-75 and 1977 respectively. The Court supplements its nine active judges with retired Court of Appeals judges and temporarily assigned Superior Court judges.[12] As will be discussed later, this has provided significant aid to the court.

The Court's staff numbers about 60 employees. Each judge has a personal secretary and two law clerks (the chief judge has three law

clerks). Retired judges were given law clerks for the first time in 1978; the three judges share two clerks. The clerk's office contains 26 people, 23 clerical staff and three staff attorneys. The clerical staff is the largest among state high courts, except the New York Court of Appeals.[13] The three staff attorneys, who are called "law clerks" by the Court, study substantive motions and prepare memoranda for the judges' use when deciding the motions. As discussed in Chapter V, the Court's 24 attorney aides—21 regular law clerks and three staff attorneys—exceed the number of attorney aides employed in almost all other high courts.

3) Outline of Internal Procedures

This section is a short background description of the Court's internal operations.[14] Subsequent sections will discuss in detail specific features of special importance in the Court's endeavor to handle high caseloads.

The initial act in an appeal of right is the filing of the notice of appeal from a Superior Court decision or the "petition for review" in agency appeals. If the case falls within the Court's discretionary jurisdiction, an application for allowance of appeal is filed. The application is reviewed by a three-judge panel and review is granted upon the request of any one panel member.

Appellants in civil appeals must file a "civil appeal statement" soon after the notice of appeal. This is used by the Court to decide whether a prehearing settlement conference will be held. Following the notice of appeal (or following an unsuccessful settlement conference, if

one is held) the appeals' coordinator, located in the Superior Court, compiles the record, which consists of the papers filed in the Superior Court and, typically, a reporter's transcript of the relevant portions of proceed- ings. The record is followed by the appellant's brief, the appellee's brief, and occasionally a reply brief. The record preparation and briefing stages typically take much more time than is called for in the court rules. Some of this delay can be attributed to the reporters and the attorneys. But the Court is also responsible in that it liberally grants extensions of time. It does not strictly enforce the time limits since doing so would only increase the delay between completion of briefing and decision by the Court.

Soon after briefing, the cases are apportioned between the summary and regular calendars. Counsel in summary calendar cases are informed that oral argument will not be had unless requested, and arguments that are held are limited to 15 minutes for each side. Oral argument is encouraged in regular calendar cases, and each side is allowed 30 minutes. Virtually all cases are heard and decided by three-judge panels (en banc rehearings occur in about one percent of the appeals). Before oral argument, principal writing responsibility for each case is assigned, through a random assignment procedure, to one panel member. Each judge reviews the briefs before argument. A panel hears arguments during one morning or one afternoon, and it meets afterwards to discuss and tentatively decide the cases. If the judge originally assigned writing responsibility for the case is in the majority, he prepares a draft opinion with the aid of his law clerks. If he is in the minority, the case is reassigned to another panel member. The draft opinion is

then circulated to the panel members, and a decision is reached when one other judge concurs with the author's decision. Dissenting and concurring opinions are unusual, largely because caseload pressures restrict the time necessary to prepare minority opinions. Opinions that are to be published are circulated to the whole Court, and en banc rehearing is possible if requested by a majority.

4) Prehearing Settlement Conferences

The remainder of this chapter is devoted to detailed discussions of several elements of the process just described. The first in terms of its place in the appellate process, but the most recently adopted, is the prehearing settlement conferences. Under Rule 7A, adopted in 1978, each appellant in a civil case must file a "civil appeal statement" within 15 days of the notice of appeal. The statement contains considerable information about the case, including the basis of the trial court's decision and the issues that will be raised on appeal. This form is used to determine whether to hold a settlement conference. The major purpose of the conference is to induce settlement between the parties; but, failing that, an attempt is made to narrow the issues raised in the appeal. At present, a retired judge presides over all settlement conferences.

It is too early to determine whether the settlement conferences have appreciably affected the Court's workload, either by settling cases that the Court would otherwise have to decide or by limiting the issues in cases it does hear. The prehearing settlement conference procedure in appellate courts is, in general, quite controversial. It is now used in

about fifteen other appellate courts, but only four are courts of last resort.[15] The major question about the efficiency of settlement conferences is whether they lead only to settlements that would have been reached by the parties on their own. In addition, the relief accorded by issue narrowing is uncertain. Even if the conferences have some benefit, one must balance that benefit against the help that the conference judge could give the Court if his time were spent on other activities. Also, the conferences require considerable time from the clerk's office staff.

There is evidence that settlement conferences have worked for at least one court, the California Third District Court of Appeal. The proportion of civil appeals settled reached 34 percent during the first three years of settlement conference operations, double the 17 percent during prior years.[16] In fact, the settlement conferences have been credited with reducing the Third District's backlog from twenty to three months.[17] On the other hand, a study of settlement conferences in the U.S. Court of Appeals for the Second Circuit found that 54 percent of the cases scheduled for settlement conferences were decided by the Court, as opposed to 62 percent of a randomly selected "control group."[18] This difference is not large. The conference mediator was a staff attorney, however; all other courts with settlement conferences use judges as mediators, apparently under the assumption that judges are more effective.

These general arguments indicate that the relief afforded the Court of Appeals by the settlement conferences is very much in doubt. In addition, two characteristics of the Court indicate that the ultimate relief possible is quite limited. First, as indicated in Table 2,

civil appeals typically comprise less than a third of the filings. The conferences will not affect the rest of the caseload. Second, even without the conferences, a very large proportion, almost half, of the civil cases have been settled or dropped without the impetus of settlement conferences.[19] This further reduces the margin within which the conferences can reduce the Court's workload. Thus, it is unlikely that the conference procedure, no matter how effective, will reduce the number of cases decided by the judges to levels comparable to those in most other high courts.

5) Summary Calendar

The summary calendar was adopted in November, 1974, to eliminate or shorten oral argument in those cases that, according to the Court's internal rules, "do not appear to present any new question of law and in which oral argument is deemed neither helpful to the Court nor essential to a fair consideration of the case."[20] Summary calendar cases are not orally argued unless counsel promptly request argument; and if a request is made, each side is allowed only 15 minutes, rather than the 30 minutes in regular calendar cases. Roughly two of every five appeals are placed on the summary calendar, and about 80 percent of them are decided without oral argument. In all, the Court hears arguments in about 70 percent of all appeals decided.

At present a retired judge screens appeals for placement on the summary calendar, reviewing the briefs soon after the appellee brief arrives. After the screening is completed, the clerk draws up a monthly calendar, scheduling six summary calendar cases and three regular

calendar cases for panel hearing in one morning or afternoon. The panels are rotated to apportion each active judge an equal number of summary calendar sessions. The time lapse between briefing and the day of argument (or submission) has, until recently, been shorter in summary calendar cases than in regular calendar cases.

Counsel in summary calendar cases are notified of the calendar placement and are told that oral arguments will not be held unless requested in writing within 10 days of the notification. The Court's practice is to grant virtually all such requests, which are received in about one case in five.

Summary calendar sessions are, of course, shorter than regular calendar sessions, both because most cases are not argued and because the arguments held are, with few exceptions, limited to 15 minutes per side. Occasionally, argument is waived in all six cases and no argument session is held. In any event, the panel meets to discuss the cases, and further procedures are the same as those in all appeals.

It seems unlikely that the summary calendar has had more than a moderate effect on the Court's ability to handle its caseload. The actual time saving resulting from fewer and shorter arguments is limited, for appellate judges spend only a small percentage of their working day on the bench. Thus, for example, by eliminating hour-long arguments in 300 cases during a year, the actual time saved for each judge amounts to less than two hours a week. The major time saving traditionally resulting from eliminating oral argument is the travel time of judges with offices far from the court seat. This does not apply to the Court of Appeals. (The fact that summary calendar cases

are usually decided by unpublished memorandum opinions, which require less judge time than full opinions, is attributable to the type of cases placed on the summary calendar, not the absence of oral argument.)

The number of cases decided by the Court (those disposed of by opinion or by judgment), nevertheless, did increase in the year after the summary calendar was initiated. There were 633 cases decided by opinion or by judgment in 1974 and 741 in 1975 (see Table 2). But this increase is merely a continuation of the trend in the prior three years. Very likely, also, it is due mainly to the addition, late in 1974, of nine new law clerks, who worked largely on summary calendar cases. In any event, the size of the increase - 108 dispositions - is not large compared to the overall caseload of the Court and did not keep pace with the caseload growth.

No matter what the time savings, one must address the question whether discouraging oral arguments through the summary calendar procedure is advisable. In other words, has the Court been forced by its workload to sacrifice an important and traditional element of the appellate process? ABA Appellate Standard 3.35 states that parties should be permitted oral argument unless the court concludes "that its deliberation would not be significantly aided by oral argument." This criterion is similar to that announced by the Court, as quoted above. However, the commentary to the Standard suggests a more restrictive criterion than the Court uses in practice:

> Oral argument is normally an essential part of the appellate process. It is a medium of communication that is superior to written expression for many appellate counsel and many judges. It provides a fluid and rapidly moving method of getting at essential issues. It contributes to judicial

> accountability, enlarges the public visibility of appellate decision-making, and is a safeguard against undue reliance on staff work. Oral argument should not ordinarily be allowed on applications for discretionary review or on motions or other procedural matters. When an appeal is considered on its merits, however, oral argument should never be discouraged routinely and should be denied only if the court is convinced that the contentions presented are frivolous or that oral argument would not otherwise be useful. The court should recognize that discouraging oral argument can lead counsel to underestimate its importance.
>
> Some appellate courts are so overburdened that they have felt compelled to deny opportunity for oral argument in a substantial proportion of the cases before them. In some situations this practice may be unavoidable and should be treated as a symptom of the need to restructure the court's organization or jurisdiction. In any event, the practice should be adopted only as an extreme measure when other means of keeping the court abreast of its caseload are insufficient. Studies of appellate court operations indicate that oral argument consumes only a small fraction of the court's time.[21]

The Court of Appeals summary calendar procedure escapes much of this criticism because argument is allowed when requested. Nevertheless, use of the summary calendar may mean that arguments are "discouraged routinely," a practice that the Standards deem inadvisable. Indeed, the reliance on the summary calendar may indicate, as suggested in the quotation above, a "need to restructure the court's organization or jurisdiction."

A further point of some importance is that state supreme courts seldom discourage oral arguments, and few hear arguments in a smaller proportion of appeals than does the Court of Appeals.[22] Decisions without oral argument are common in state supreme courts only in the exercise of discretionary jurisdiction. They are more common in intermediate courts, especially some Federal Circuit Courts, although

information about this topic is meager.

6) Three-Judge Panels

Probably the most startling feature of the Court of Appeals, when compared to courts of last resort in other jurisdictions, is the use of three-judge panels in almost all appeals. The chief judge randomly assigns judges to panels, and the clerk randomly assigns pending cases to panels. Thus, panel membership constantly changes, and a litigant cannot fear that his case is purposely assigned to a panel diposed to rule against him.

The involvement of nonpanel members depends on whether the opinion is to be published. If the panel chooses to issue an unpublished opinion, the draft is circulated only to the panel members. Once the decision is reached, copies of the final opinion are sent to the litigants and are also circulated to the other members of the Court. The nonsitting judges may or may not read it; but in any event, the decision has already been made. Should the losing litigant file a petition for rehearing en banc, the petition is circulated to all active judges and is granted at the request of a majority of the active judges. But petitions for rehearing en banc are uncommon; they are filed in roughly five percent of all cases decided, and the proportion is probably smaller in cases decided without published opinion. The number actually granted is very small.

On the other hand, an opinion slated for publication is circulated to the whole Court before the decision is announced. If a nonsitting judge objects to the opinion, he may attempt informally to persuade the panel members to revise it. Otherwise, review is by en banc hearing, held at

the request of a Court majority (either upon circulation of the opinion or upon a request for rehearing en banc). En banc reviews, however, are very rare, amounting to only about one percent of the cases decided. Panels, it should be added, must follow prior decisions of other panels; precedent can be overruled only by the full Court. (En banc hearings without a prior panel decision are permitted, upon application of a party or by the Court's own motion, when the Court wishes to reconsider a precedent or in other cases of exceptional importance. Such initial en banc review occurs only once every two or three years.)

The Court's practice of panel decisions in almost all appeals is so important that a separate appendix, Appendix A, is attached to this report describing the use of panels in high courts. Only 13, including the Court of Appeals, decide appeals in panels; nearly half are situated above intermediate courts.[23] The Court of Appeals is thus among a minority of 25 percent of high courts using panels. Also a far higher proportion of its decisions are by panels than most of the 12 other courts; they typically decide a large number of cases en banc. More important, the Court is only one of the seven courts in which panel decisions can be made by fewer than a majority of the full court, only one of four in which the panel size is smaller than a majority, and only one of two in which a two-judge panel majority can decide a case. The courts with panel procedures most like those in the Court of Appeals are three nine-judge courts with very high caseloads: the Minnesota and Mississippi Supreme Courts and the Texas Court of Criminal Appeals. Only in the latter are panel procedures comparable in all important respects to those in the Court of Appeals. The Texas court, as discussed in the

next chapter, is an unusual high court in that its jurisdiction is limited to criminal cases.

The use of panels in appellate courts is the subject of considerable commentary.[24] Certainly panels increase a court's efficiency. The judges hear fewer arguments, read fewer briefs, and review fewer draft opinions. (Panel hearings do not, however, reduce the number of majority opinions authored by each judge.) The Court of Appeals would soon fall hopelessly behind if it heard every case en banc.[25]

The drawbacks of the panel system in a court of last resort are substantial. The Court's decisions may not be consistent, leading to uneven justice to litigants and to inharmonious law in the jurisdiction. The panel judges may make overly fine distinctions to avoid precedent created by prior panel decisions. The knowledge and experience of all judges are not available when the Court performs its law-making function; the more complete the information used to fashion law, the sounder the law. The probability of a panel representing all significant points of view that the full Court would consider in a complex case is small. These are major problems, especially in the Court's law-making function. As a practical matter the full implications of the panel system cannot be measured accurately. Much damage, however, results from the suspicion that the problems occur, lessening public respect for appellate justice in the District.

ABA Appellate Standard 3.01 states absolutely that high courts should not sit in panels. Commentary to this section explains the matter in terms pertinent to this report:

> In some states having no intermediate appellate court, the supreme court sits in divisions in order to cope with a caseload that would be too large to handle

> if the court were to sit en banc in every case. This arrangement has often been used as a means of transition to the establishment of an intermediate appellate court. The result of such an arrangement is that the court functions simultaneously as a court of intermediate review when it sits in divisions and as a court of subsequent review when it sits en banc. If the court's docket in such a system is carefully administered, so that important or difficult cases are identified before being heard and assigned directly for en banc hearing, a single supreme court can handle the system's appellate responsibilities in an effective way. Experience indicates, however, that such an arrangement may persist long after the point has been reached when an intermediate appellate court should have been established. Moreover, internal inconsistency in the court's decisions may be ignored or tolerated to an excessive degree in the hope of avoiding the cost of establishing an intermediate court.[28]

The panel procedure suggested here as an effective answer to high caseloads is not the Court of Appeals procedure. The Court hears virtually all cases initially in panels, and only about one percent are heard later by the full Court. The passage also suggests the need to consider whether the panel system has persisted beyond the point when an intermediate court is needed the District.

7) Extra Judges

The Court of Appeals, as has been mentioned, is helped by retired judges and temporarily assigned Superior Court judges. During the past several years an average of about three part-time retired judges has been available, and at present the three retired judges work, on the average, somewhat over half-time. Retired judges can sit as panel members and otherwise participate in decision-making along with active judges (but they do not review petitions for en banc rehearing or sit in en banc hearings, except when they were members of the panel that originally

heard the case). Only two of the three retired judges now hear appeals. One sits on two panels a month (as opposed to about five per month for each active judge), and the second sits on one per month and, in addition, screens appeals for placement on the summary calendar. The third retired judge is the prehearing settlement conference mediator, and he no longer sits on panels.

Superior Court judges are less frequently used. One is assigned to a single panel sitting each month, increasing the Court's capacity by roughly the equivalent of one-fifth of a judge. The main reason these judges are not used more often is that the Superior Court itself has a significant caseload problem and cannot afford the loss of further judicial time.

About 65 percent of the state high courts use extra judges.[27] It appears, however, that the Court of Appeals uses them more than most other courts. Extra judges, for example, are often used only to fill vacancies, rather than supplement the full Court. In fact, although the information about other courts is incomplete, the Court of Appeals probably makes as much use of extra judges as any other high court.[28]

8) Decisions Without Published Opinions

The final procedure given extended discussion here is the use of unpublished memorandum opinions in a large number of appeals. During the past six years some 55 to 67 percent of the decisions have been "by judgment" rather than by regular published opinion. The great majority of the judgments (85 percent in 1978) are accompanied by unpublished memorandum opinions. The proportion of cases decided by judgment has not

changed greatly since 1973; there is no trend towards more reliance on this efficiency measure. Internal Operating Procedure VIII.D states that published opinions should not be issued if the ruling below is unanimously affirmed, the decision has "no precedential or institutional value," and one of the following circumstances exists:

1. That a judgment of the trial court is based on findings of fact which are not clearly erroneous;
2. That sufficient evidence supports a jury verdict;
3. That substantial evidence on the record as a whole supports a decision or order of an administrative agency;
4. That no prejudicial error of law appears;
5. That no new rule of law is established or an existing rule altered or modified; no legal issue of continuing public interest is involved; and no existing law is criticized.

The decision to issue an unpublished opinion is made by the panel deciding the case, but any one panel member may direct that the opinion be published. Also, a litigant in a case decided by an unpublished opinion may request that the opinion be published; but these requests are rare. The average unpublished opinion is about one fifth the length of the average published opinion.

Unpublished opinions cannot be cited in future cases (unless res judicata or the like is involved). Thus, they are not treated by the court as precedent. Published opinions are, of course, precedent, and they cannot be overruled except by en banc decisions. As a result, opinions to be published are circulated to and read by all judges before becoming final (non-panel members are given five days to consider an opinion before it is sent to the printer). Unpublished opinions, however, are not circulated beyond

the panel deciding the case until after release to the litigants.

Unpublished opinions have several advantages. First, and not really relevant here, they benefit the bar by reducing research burdens and law book expense. The major advantage to the Court is that unpublished opinions take much less time to prepare than published opinions. The facts need not be as thoroughly stated, because the only audience is the parties and trial judge, who are familiar with the dispute. The writing style need not be as polished, and checking for non-substantive mistakes, such as inexact citations, need not be as thorough. One appellate court expert has estimated that unpublished opinions take about half the judicial time published opinions take.[29] Court of Appeals judges, in addition, save time because they need not review unpublished opinions issued by other panels, especially because the ruling will not be binding precedent in future cases. ABA Appellate Standard 3.37 recommends that opinions be published only if they meet specific criteria, which are, on the whole, even more restrictive than the Court of Appeals criteria outlined above.[30]

Unpublished opinions, however, are the subject of considerable criticism. The major reason is the lack of accountability. A blunt statement of this position is found in the following passage from a synopsis of an A.B.A. conference discussion:

> Some appeals judges duck difficult rulings or try to hide faulty logic by ruling in secret, said (Arizona Chief Justice) Cameron. Even when those factors are not present, he said, the practice encourages the growing public mistrust of the courts.[31]

Table 1

OPINION PUBLICATION IN STATE COURTS OF LAST RESORT
NOT ABOVE INTERMEDIATE COURTS

State	Cases decided by opinion per judge (See Table 7)	Published	Unpublished
Texas (criminal)	302	NA (not all published)	
Oklahoma (criminal)	123	NA (not all published)	
South Carolina	88	268	170
Delaware	86	NA (not all published)	
DISTRICT OF COLUMBIA	81	352	376
Arkansas	74	265	223
Wisconsin	63	301	124
Nebraska	58	all	
Maine	54	almost all	
Minnesota	54	NA (not all published)	
Alaska	52	248	14
Montana	51	all	
New Hampshire	47	all	
Nevada	45	all	
Mississippi	42	291	90
Rhode Island	39	all	
Utah	36	all	
Idaho	34	all	
North Dakota	27	all	
Vermont	27	all	
South Dakota	26	all	
West Virginia	26	108	24
Connecticut	23	all	
Hawaii	23	75	12
Virginia	21	158	6
Wyoming	20	all	

Professors Carrington, Meador and Rosenberg also believe that unpublished opinions reduce visibility of appellate decision-making and may undermine the integrity of the legal process. They state, in addition, that the non-citation rule, which usually accompanies publication restrictions, as it does in the Court of Appeals, may well lead to inconsistent panel decisions.[32] Such a problem would be exacerbated by the Court of Appeals' almost exclusive use of panels.

The Court of Appeals opinion publication policy is extreme. State high courts have, by and large, continued to publish their opinions in the face of rising caseloads. Table 1 gives the available information about publication practices in high courts not above intermediate courts.[33] Quite obviously, greater publication restrictions are found in the courts with the highest outputs. The Court of Appeals is the only court indicated in Table 1 as issuing more unpublished than published opinions; only the Arkansas Supreme Court approaches this proportion.[34] However, information is incomplete for four courts in Table 1. At least one, the Texas Court of Criminal Appeals, published a very small percentage of its opinions.[35]

9) Conclusion

A charge of this study is to consider whether the Court of Appeals uses efficient procedures to meet its caseload. A review of the operating procedures of the Court lends no support to a contention that the Court has failed to take measures to handle the rising volume of cases. To the contrary, it has instituted several major procedures designed to increase its output. It has gone far beyond the practices

adopted by most other courts of last resort. This certainly accounts for the Court's ability to handle its huge caseload with comparative efficiency. However, the very unusualness of the procedures (the Texas Court of Criminal Appeals is the only state high court that approximates the Court of Appeals in this regard) suggests that the benefits may no longer exceed the costs and that appellate capacity in the District is now insufficient.

The Court's procedures resemble those of state and federal intermediate courts more than those of other courts of last resort. Some of the procedures are quite undesirable in a court of last resort. The routine use of three-judge panels is the most important example. The ABA Appellate Standards, as well as many practical and policy considerations, dictate that high courts sit en banc. Frequent use of unpublished opinions, which add to the hazard of inconsistency, makes the Court of Appeal panel system particularly objectionable. Therefore, the Court's use of panels should be abolished. But doing so would greatly lessen the Court's ability to manage its caseload unless major changes are made in the District appellate system.

CHAPTER III

CASELOAD AND CONGESTION IN THE COURT OF APPEALS AND IN STATE SUPREME COURTS

This chapter describes the position of the Court of Appeals in terms of caseload, backlog, and delay statistics; it also deals with factors affecting the prospective future level of the Court's caseload. The Court of Appeals statistics are then compared with statistics from other courts of last resort. But at the outset, we wish to emphasize that the current workload per judge, the current delays in dispositions, and the unsatisfactory nature of the system of three-judge panels point strongly to the need for a significant change or changes in the methods by which appeals are handled in the District of Columbia.

Statistics are presented to analyze three issues: a) court workload, as measured by the number of cases filed and the number decided by opinion, b) backlog, as measured by the number of cases pending, and c) delay, as measured by the time lapse between notice of appeal and the final decision. It should be noted that, unlike the Court of Appeals statistics, appellate court statistics in general are often incomplete and difficult to interpret. Nevertheless, the available information clearly indicates that the Court of Appeals faces a larger workload than the great majority of state supreme courts not situated above intermediate courts. The Court also faces a very high workload compared with supreme courts that, within the past 20 years, received relief by the creation of intermediate courts. This workload has resulted in substantial delay as well as backlog problems in the Court of Appeals,

but the Court's high productivity has prevented the growth of an enormous backlog such as many other high courts have accumulated. The backlog and delay problems will probably grow if, as expected, the volume of appeals increases in future years.

1) Court of Appeals Workload, Backlog, and Delay

Filings. The major Court of Appeals statistics are given in Table 2.[1] The first figures show the number of cases filed in the Court (these cases include appeals from the Superior Court, petitions for review of administrative agency decisions, and original jurisdiction cases).[2] Filings have more than doubled since 1972, as have filings per active judge.[3] The rate of growth has slackened, however, and filings declined by small percentages in 1977 and 1978. The 1,269 filings in 1978 are a six percent drop from the 1976 peak of 1,342 filings. This drop, however, is partly a reflection of the Court's filing procedures; the clerk has recently urged defendants who were tried together in criminal cases to file joint appeals and thereby has helped reduce the number of separate appeals. The drop is also partly a result of the reporting period used, since the number of filings varies greatly from month to month. Filings for the Court's fiscal years, which end on September 30, do not suggest the downward trend indicated by calendar year figures in Table 2. There were 1149 filings in fiscal year 1975, 1229, in 1976, 1259 in 1977, and 1323 in 1978. Preliminary figures for 1979, in addition, indicate further caseload growth; 861 cases were filed during the first six months, 11 percent more than during the same period

Table 2

DISTRICT OF COLUMBIA COURT OF APPEALS STATISTICS

Number of Appeals and Petitions for Review Filed

	1971	1972	1973	1974	1975	1976	1977	1978
Criminal	269	392	569	702	706	826	684	742
Civil	274	310	329	308	380	346	473	375
Agency	70	94	82	118	135	170	170	152
Total	613	796	980	1,128	1,221	1,342	1,327	1,269
Increase over prior year	--	30%	23%	15%	8%	10%	-1%	-4%

Number of Appeals and Petitions for Review Filed Per Active Judge

1971	1972	1973	1974	1975	1976	1977	1978
68	88	109	125	136	149	147	141

Disposition of Appeals and Petitions for Review

	1971	1972	1973	1974	1975	1976	1977	1978
By Opinion	190	219	221	251	247	307	279	352
By Judgment	86	165	284	382	494	373	474	440
Total	276	384	505	633	741	680	753	792
By Order	226	224	284	312	379	517	535	539
Total Dispositions	502	608	789	945	1,120	1,197	1,288	1,331

Table 2 (continued)

DISTRICT OF COLUMBIA COURT OF APPEALS STATISTICS

Cases Disposed of Per Active Judge

	1971	1972	1973	1974	1975	1976	1977	1978
By Opinion	21	24	25	28	27	34	31	39
By Judgment	10	18	32	42	55	41	53	49
Total	31	43	56	70	82	76	84	88

Number and Length of Published Opinions

	1971	1972	1973	1974	1975	1976	1977	1978
No. Opinions	183	207	207	213	219	265	234	293
No. Pages	902	1,221	1,371	1,516	1,713	2,343	2,151	3,360
Average pages per opinion	4.9	5.9	6.6	7.1	7.8	8.8	9.2	11.5

Cases Pending at the End of the Year (Backlog)

1971	1972	1973	1974	1975	1976	1977	1978
268	462	653	842	951	1,110	1,161	1,109

Average Days from Notice of Appeal to Decision (Delay)

1971	1972	1973	1974	1975	1976	1977	1978
243	265	286	311	379	432	456	472

in 1978 and 6 percent more than 1977.

The main cause of the appellate caseload trend is the expanding jurisdiction of the Superior Court. That Court was established on February 1, 1971, and, in stages during the next 30 months, received jurisdiction over local cases formerly filed in the U. S. District Court.[4] Most cases falling in the expanded portion of the Superior Court's jurisdiction are more difficult and complex than cases in the District's local trial courts prior to 1971. In addition, many complex cases were transferred late in the transition period--e.g., civil actions with an amount in controversy exceeding $50,000, felony offenses, probate actions, and litigation involving title to land. The expansion of District trial court jurisdictions led quickly to more appeals and to more difficult issues in the appeals. At the same time the Superior Court's jurisdiction was expanded in 1971, the Court of Appeals replaced the federal circuit court as the appellate tribunal for several types of agency reviews, including difficult zoning cases. The volume of agency appeals, as indicated in Table 2, has more than doubled since 1971.

The composition of the Court's caseload has changed during the past eight years. All major categories of appeals have increased, but agency and criminal filings have done so at a faster pace than civil filings. The trends in recent years have been erratic, with substantial downturns for at least one category in both 1977 and 1978. Criminal appeal trends, as discussed later, follow closely the number of criminal trial dispositions in the Superior Court; in particular, these dispositions decreased by 23 percent in 1977, corresponding to a 17 percent decrease

in criminal appeals. Similar information is not available to explain the trends in civil or agency filings or the 1978 decreases in both categories. No factor, however, has been identified to suggest these cases will not continue the upward trend that predominated in prior years.

Dispositions and Backlog. The Court of Appeals has increased its output by substantial amounts each year since 1971. Of major importance here are cases disposed of by opinion or judgment. Those "disposed of by opinion" were decided with published opinions; by and large, these are the more difficult appeals. Those "disposed of by judgment" did not receive published opinions, but about 85 percent were announced in unpublished memorandum opinions. Cases disposed of by order are almost always cases dismissed without consideration of the merits--for example, because the appellant has abandoned the appeal or because the parties have settled. Thus, dispositions by opinion or by judgment are the best measures of the Court's output.

Each year, with infrequent exceptions, the Court has increased the number of cases decided both by published opinion and by judgment. Dispositions by either method rose from 31 per active judge in 1971 to 88 in 1978. Dispositions by opinion rose from 21 to 39 per active judge. More startling has been the increased length of the published reports, from 902 pages in 1971 to 3,360 pages in 1978. Most of this 273 percent increase is the product of longer opinions, reflecting the increased complexity of issues presented to the Court.

The major measure of appeals work indicates that the Court has become more productive each year. In fact, its disposition rate has increased

at an even faster pace than the caseload rise. Nevertheless, there were fewer dispositions than filings every year until 1978. Hence, the backlog (that is, the number of pending cases) increased four-fold, from 268 cases in 1971 to 1,109 in 1978. By the end of June 1979 the number of cases pending increased to 1,125.

Motions. In addition to the increase in appeals, the number of motions filed has also increased dramatically. These now total over 8,000 a year, four times the volume in 1971. Most of these are routine motions, such as requests to extend briefing deadlines, and are handled in the clerk's office. Many, however, are substantive motions that must be decided by three-judge panels and that often take considerable judge time. The major categories are motions to dismiss appeals, applications for allowance of appeal (i.e., motions for the exercise of discretionary jurisdiction), motions for summary reversal or affirmance, and rehearing petitions. The number of substantive three-judge motions has increased, according to figures supplied by the clerk's office, from 432 in fiscal year 1971 to 574 in 1972, 800 in 1973, 986 in 1974, 1,137 in 1975, 1,212 in 1976, 1,101 in 1977, and 1,165 in 1978. Applications for allowance of appeal have increased at a particularly fast pace, from 30 in 1971 to 149 in 1978.

Delay. It is not surprising, in view of the rising caseload and backlog, that the time required to decide appeals has increased steadily and rapidly. The average number of days from notice of appeal to decision, as shown in Table 2, has increased from 243 days in 1971 to the present 472 days (a little over 15.5 months). These figures are only

averages. Many appeals, especially civil appeals with full oral argument, take eighteen months or longer.

The ultimate cause of the increased delay appears to be the Court's inability to keep up with the rising caseload, rather than delay by attorneys and trial court reporters. Statistics do show that the time from notice of appeal to completion of briefing comprises more than half the overall time to decision (for example, 258 days in 1978 as opposed to about 160 days in 1971 through 1975); and the average times required for record preparation and briefing are much longer than the time allowed under the court rules. But much of this delay in the early stages is attributable to the backlog of cases briefed and awaiting decision. If record and brief preparation were more expeditious, the cases would just be added to the post-briefing backlog, and delay would be reapportioned the earlier to the later stages of the appellate process. Therefore, the judges and the clerk's office freely grant reporters and attorneys extensions of time that would not be granted if the Court were current.[5] The Court cannot require promptness from attorneys and from reporters until it is in a position to issue decisions promptly, which it presently is not.

Conclusion. The statistics presented in this section show that the Court's workload has expanded greatly, resulting in backlog and delay problems. These statistics by themselves, however, do not demonstrate that the caseload will remain prohibitively high or that the judges could not manage the present caseload by becoming more productive. The remainder of this chapter will address these points by examining trends

in the District and by studying statistics from other high courts. The conclusions are that the best forecast is a rising appellate caseload in the District, that the Court faces an unusually high caseload compared with other state supreme courts, and that the Court is one of the most productive and efficient high courts in the country.

2) Caseload Trends

A key question is whether the Court of Appeals caseload will continue to go up, will remain about as it is now, or will go down. A definite answer is not possible, but the best estimate is tnat the caseload pressures will not ameliorate and may increase at a substantial rate. This estimate is based on 1) a study of nation-wide trends in appellate caseloads and 2) factors peculiar to the District of Columbia.

National Trends. The number of appeals has been increasing throughout the country. Probably no state has escaped this trend. Table 3 shows the volume of appeals during 1971-1977 in the District and in 24 states for which information is available.[6] The figures in that table are the total numbers of initial appeals filed in the jurisdiction -- either in the intermediate court or the court of last resort.

Cases filed in the District increased by 116 percent during the six-year period from 1971 to 1977. The average yearly rate of increase is 14 percent,[7] higher than the rate for all but six of the 24 states in Table 3. The median rate of yearly increase for all states in Table 3

is 11 percent,[8] somewhat lower than the District's rate. On the other hand, after the rapid growth years of 1972 and 1973, caused largely by the Superior Court's expanding jurisdiction, the rate of increase through 1978 has been only 6 percent. In all, therefore, the increased volume of appeals in the District is a little less extreme than that encountered by state courts generally.

The major import of Table 3 is that there is a solid trend towards higher caseloads throughout the country, a trend that is very likely to encompass the District in the future. The 11 percent median rate of increase represents a doubling of caseloads every six and a half years. None of the jurisdictions in Table 3 shows a rate of increase smaller than 5 percent (which represents a doubling about every 15 years). Moreover, the percentage increases have risen somewhat du ing the 1971-1977 period;[9] there is every indication that appeals nation-wide will continue to increase rapidly in almost every state. Appellate caseload growth, somewhat surprisingly, is but slightly related to population growth.[10] Some of the slowest growing states, for example, Michigan and Ohio, have experienced large increases in appeals. Another important point is that the increase in any one jurisdiction is typically quite uneven. Filings actually decreased during at least one year in 16 of the 24 states in Table 3, even though the overall trend everywhere is upward. Thus, the recent departure from constant caseload increases in the Court of Appeals may be simply another example of the uneven growth typical elsewhere. Trends in the Court of Appeals are

Table 3

TRENDS IN THE NUMBER
OF TOTAL INITIAL APPEALS FILED IN STATES
(STATES FOR WHICH STATISTICS ARE AVAILABLE)

	1971	1972	1973	1974	1975	1976	1977	Average yearly rate of increase
DISTRICT OF COLUMBIA COURT OF APPEALS[a]	613	796	980	1,128	1,221	1,342	1,327	14%
Alaska Supreme Court	210[b]	240[b]	250[b]	278	337	466	613	20%
California Courts of Appeal (FY)	8,684	8,548	9,186	9,805	10,349	10,797	11,939	6%
Delaware Supreme Court	176	250	247	255	273	341	362	14%
Hawaii Supreme Court[a] (FY)	151	116	159	172	189	253	303	13%
Idaho Supreme Court	182	155	243	252	307	295	345	14%
Kansas Supreme Court and Court of Appeals[c] (FY)		368	341	342	368	438	464	5%
Kentucky Supreme Court and Court of Appeals[a]	1,098	1,135	1,144	1,120	1,299	1,275	1,892	11%
Louisiana Supreme Court and Court of Appeal[a]	1,469	1,787	1,633	1,642	2,170	2,408	2,700	11%
Michigan Court of Appeals	2,336	2,799	3,076	3,579	4,435	4,544		14%
Minnesota Supreme Court	584	603	677	781	921	911		9%
Mississippi Supreme Court[d]	455	563	626	601	613	780	658	7%
Montana Supreme Court	197	236	239	269	299	409	469	16%
Nebraska Supreme Court[c] (FY)	474	446	546	484	571	716	607	5%

Table 3 (continued)

	1971	1972	1973	1974	1975	1976	1977	Average yearly rate of increase
New Hampshire Supreme Court[e]	186	188	240	270	288	273	315	10
New Jersey Superior Court, Appellate Division (FY)	2,790	3,597	3,876	3,801	4,383	4,819	5,208	11
Ohio Court of Appeals	3,798	4,311	4,909	5,503	6,869	7,204	7,992	14%
Oklahoma Supreme Court and Court of Criminal Appeals	1,544	1,574	1,598	1,808	1,958	2,245	2,213	7%
Oregon Supreme Court and Court of Appeals	984	1,119	1,190	1,425	1,988	2,353	2,922	20%
Rhode Island Supreme Court[c] (FY)		325	349	345	355	422	438	6
Texas Court of Civil Appeals and Court of Criminal Appeals	2,668[b]	2,777[b]	2,952[b]	3,062[b]	3,634[b]	4,282	5,236	12%
Utah Supreme Court	408	406	370	389	462	556		
Virginia Supreme Court	1,329	1,398	1,249	1,256	1,526	1,672	1,932	7%
Washington Supreme Court and Court of Appeals[a]	905	1,252	1,201	1,367	1,439	1,569	1,803	13
Wisconsin Supreme Court (FY)	494	555	502	607	656	709	769	8%

a The statistics are the number of appeals, excluding requests to appeal from trial court judgments.

b These figures were estimated from a chart or graph in the annual report.

c These figures are for "cases docketed."

d These figures are for "records filed."

e These figures are for "cases entered."

The letters "FY" indicate that the figures are for the fiscal year ending in the year indicated. A blank space indicates that the number of filings for that year is not available. All statistics were obtained from court reports.

unlikely to deviate from long-standing nationwide trends towards higher caseloads.[11]

Trends in the District of Columbia. A second type of evidence about possible Court of Appeals caseload trends can be found by studying events peculiar to the District. This section will explore: a) trends in the caseload and dispositions in the Superior Court, b) trends in population, income, business activity, and crime in the District and the metropolitan area, and c) new legislation that may affect the volume and difficulty of appeals in the District.

a) Because appeals from the Superior Court comprise about 85 percent of the Court of Appeals filings, changes in Superior Court caseload or disposition patterns significantly affect the Court of Appeals workload. Available statistics indicate that some Superior Court filings and dispositions in categories of cases most likely to be appealed have increased little, or even declined, while others have grown. Civil filings have continued on an upward trend, albeit an erratic one. Criminal filings have remained level since 1975, while trial dispositions have decreased.

Table 4 gives trend statistics for major criminal triable cases and civil actions.[12] The volume of criminal filings rose rapidly to over twenty thousand in 1975, but has remained fairly steady since that year. Dispositions by means of trial, the most important indicator of criminal cases that are likely to be appealed, decreased by 26 percent between

Table 4

SUPERIOR COURT CASELOAD TRENDS

Major Criminal Triable Cases

	1972	1973	1974	1975	1976	1977	1978
Filings	11,509	16,341	17,577	20,300	20,754	20,708	21,068
Dispositions by trial	1,995	1,851	2,169	2,014	2,059	1,595	1,532
Pending	1,901	2,892	3,391	6,528	6,186	6,056	4,424

Civil Actions

	1972	1973	1974	1975	1976	1977	1978
Filings	9,734	10,981	11,361	11,716	12,764	12,862	14,058
Cases pending on trial calendar	2,925	3,330	3,421	3,687	5,059	4,960	5,052

1976 and 1978. Most of this decrease occurred in 1976, and accounted for a 17 percent decrease in criminal appeals during that year. In general, as Table 5 indicates, trends in criminal filings in the Court of Appeals closely follow trends in criminal trial dispositions in the Superior Court. Trend statistics are not available for civil actions decided by the Superior Court (disposition statistics do not adequately distinguish between civil cases actually decided by the Court and civil cases settled or withdrawn). Nevertheless, the increasing number of civil filings does suggest that more civil appeals can be expected.

For several reasons Superior Court filings and dispositions imperfectly indicate the immediate prospects for appellate caseload growth. First, the Superior Court has accumulated a large backlog, as can be seen by the number of cases pending in Table 4. If the trial court reduces this backlog through increased judgments, the appellate filings will probably rise significantly. Second, because of the criminal case backlog and the resulting delay in the Superior Court, the United States Attorney's office favors the federal courts. D.C. Code section 11-502(3) permits the U.S. Attorney to bring some cases in the District Court by adding a federal charge; should delay in the Superior Court become less than that in the District Court, the U.S. Attorney may well shift a sizeable number of cases to the Superior Court by not adding federal charges. Third, prosecutor policies affect the number of trial dispositions in criminal cases, and thus the number of potential appeals. The decrease in Superior Court trial dispositions is partially explained by a large increase in guilty pleas: such dispositions numbered 6,027 in 1974 and 10,595 in 1978. Apparently recent prosecution

offers are attractive to defendants and result in more guilty pleas. Should prosecutor policies in this regard change, as such policies often do, the number of court convictions and criminal appeals will increase.

Fourth, the number of appeals from the Superior Court is determined by the rate of appeal as well as by the number of dispositions that can be appealed. Appellate caseloads will rise in spite of fewer trial decisions if a much larger percentage of losing litigants appeal. Table 5 shows a trend towards a higher percentage of criminal appeals when compared with major criminal cases disposed by trial.[13] This indicates that criminal filings in the Court of Appeals are likely to rise even if the number of criminal cases tried remains level. (Similar information about the appeal rate of civil cases is not available because the Superior Court does not have sufficient information about civil case dispositions.)

Table 5

CRIMINAL APPEALS AS PERCENTAGE OF MAJOR CRIMINAL TRIABLE CASES DISPOSED OF BY COURT OR JURY TRIAL IN THE SUPERIOR COURT

	1972	1973	1974	1975	1976	1977	1978
Major criminal triable cases disposed of by trial	1,995	1,851	2,169	2,014	2,059	1,595	1,532
Criminal Appeals	392	569	702	706	826	684	666
Percentage	20%	31%	32%	35%	40%	43%	43%

b) Some commentators hold the view that changes in population, employment, income, business activity, and crime may affect future appellate caseloads, although no study presently documents the effects. In fact, as noted earlier, there is little relationship between population growth and appellate caseload growth in the 24 states listed in Table 3. Also, forecasts for population, income, business activity

and crime are uncertain; by and large they are extrapolations from earlier year statistics. An additional complication is the effect on caseloads of trends in the whole metropolitan area as well as the City of Washington. Nevertheless, exploration of these various trends will shed some light on appellate caseload trends.

Population. The District population has been decreasing for some time. In the period 1970 through 1977 the average yearly decline was 1.3 percent, a faster decline than that of any state.[14] Various forecasts have been made of the District population for the remainder of the twentieth century. Some of these project a slight decline, some project a stable population, and others forecast a slight or moderate increase.[15] The Metropolitan area population, however, has regularly increased in past years, growing by 4.4 percent from 1970 through 1976, compared with 5.3 percent for the total U.S. population.[16] The metropolitan area will probably grow at a substantial pace in the future.[17]

Employment, Income, Buying Power. Employment in the District remained quite steady from 1974 to 1978, while metropolitan area employment increased by almost seven percent.[18] The personal income of District residents increased by 15.8 percent from 1970 to 1977, compared with 25.8 percent for the nation.[19] Personal income in the metropolitan area, however, is increasing at a rate very close to the national rate.[20] The October 1978 Survey of Buying Power has projected that "effective buying income" will increase by 34 percent in the District between 1977 and 1982, by 50 percent in the metropolitan area, and by 52 percent in the nation as a whole. The

Survey's projected increase in retail sales is 18 percent for the District, 47 percent for the metropolitan area, and 55 percent for the nation. The two forecasts for the District are lower than those for any state.[22]

Crime. According to Federal Bureau of Investigation crime statistics, crime in the District has abated in recent years, while crime nation-wide has generally increased. The "crime index" for the District decreased by 11 percent from 1974 to 1977; nationally, it increased by seven percent.[23] Violent crime, especially, has gone down in the District - by 36 percent on a per-population basis between 1970 and 1977 according to FBI statistics.[24] Crime statistics, however, must always be interpreted with caution.

These trends and forecasts for the most part suggest an increase, with the exception of crime rates, in the underlying characteristics of the District and metropolitan area that might affect future caseloads. But the increase in the District, as opposed to the metropolitan area, will probably be less than that in most states. In all, however, one must bear in mind the uncertainty of predicted trends in all these areas and the lack of a precise basis for relating these trends to appellate caseloads.

c) The number of appeals may be affected by new legislation. Congress is now considering a new criminal code for the District.[25] If enacted, this would have two effects on the Court of Appeals. First, the existence of such a major revision of criminal law would almost surely create many issues requiring decision by the Court of Appeals. Secondly, the proposed code provides for appellate court review of sentences.[26]

This may well add greatly to the appellate caseload, although sentence appeals are often not time-consuming. Another possible legislative change is abolition of federal diversity jurisdiction, which would transfer a sizeable number of cases, including difficult contract cases, to the local courts.[27] Finally, since the District of Columbia received home rule in 1975, the amount of local legislation affecting the District has increased greatly, providing another source for additional issues on appeal.

Conclusion. The preceding discussion isolates possible predictors of appellate caseload. None provides a very certain forecast, but taken together they suggest a modest caseload increase. The only basis for predicting a lack of growth is the slight decrease in Court of Appeals filings during the past two years and the sizeable decrease in criminal trial dispositions in Superior Court. On the other side, however, are many indicators of caseload growth. The volume of appeals in the states has been growing rapidly, and the District is not likely to escape this prevailing tendency. Superior Court civil filings and backlog are increasing. Appeals are filed by a constantly rising proportion of those receiving trial convictions. Trends and forecasts in such areas as population and business activity of the District and metropolitan area suggest a modest increase in factors that may eventually affect caseloads (the major exception is a decrease in District crime statistics). Finally, prospective legislation in several areas is likely to produce additional appeals.

In view of these conflicting factors, a precise forecast of the number of future appeals in the District is not possible. A reasonable

inference, however, is that the appellate caseload will remain at least at its present level, and a substantial decrease appears highly unlikely. Most important, the existing caseload per judge is already excessively high and accordingly quite unsatisfactory.

3) Comparison of the Court of Appeals Caseload With That of State Supreme Courts Not Located Above Intermediate Courts

The remainder of this chapter will compare the Court of Appeals caseload, backlog, and delay with that of state supreme courts. The present section will compare the Court's filings and dispositions with those in other courts not aided by intermediate courts. The next section will address backlog and delay. The final section will compare the situation in the Court of Appeals with that in state supreme courts just before intermediate courts were created.

Comparative caseload statistics are given in Tables 6 and 7. A cautionary note is in order about these figures. Because court statistics are not collected and presented in a uniform manner, state-to-state comparisons should be treated as only rough approximations.[28] Comparing cases filed in a single court over a few years, as was done in Table 3, is, however, free of most problems.

A major difficulty in comparing caseloads is the meager statistics available for many courts. The emphasis here will be on the total number of filings and the total number of cases decided by opinion, because these are the types of information most commonly supplied in court annual reports. But neither, as will be discussed in some detail, is a totally accurate indicator of workload.

The major problem when comparing filings is that the difficulty of cases varies greatly from court to court. In particular, cases filed

include ordinary appeals of right from lower tribunals, requests for appeal (i.e., requests for a full hearing when the court has discretionary jurisdiction), and extraordinary writs. The latter two typically require much less judge effort than ordinary appeals. Yet, as can be seen from Table 6, court statistics often do not supply information about the composition of filings. Blank spaces in the table indicate that there is no information for that category; the court may not receive any of that specific type of case, or figures for that type may be included under another category.[29]

Another difficulty when comparing filings is that appellate courts use different events as the point of filing. Some use the notice of appeal, some use the filing of the record, others use the arrival of the first brief. Because many civil cases are settled during early stages of an appeal (it is not uncommon for a third to be settled), courts that count cases when the notice of appeal is filed show higher caseload figures than courts with comparable caseloads that count cases only when the record or brief arrives. As a practical matter, there is no way to compensate for this error.

After taking into account these problems, the statistics for the Court of Appeals are, in gross terms, comparable to those from other courts. The proportion of its caseload falling under discretionary jurisdiction, about ten percent, is probably somewhat less than that of most state supreme courts not situated above intermediate courts; although, as Table 6 indicates, statistics in this area are meager.[30] The Court has limited original jurisdiction because habeas corpus writs are filed in the Superior Court. Table 6 indicates that the Court of

Appeals receives proportionally fewer original jurisdiction cases than most courts, and many fewer than some. Because discretionary jurisdiction and original jurisdiction cases typically require less work than ordinary appeals, the Court of Appeals caseload figures probably understate its workload in comparison with figures from other courts. On the other hand, the Court of Appeals counts cases when docketed, soon after the notice of appeal is filed, and its caseload includes many cases that would not be included in courts that do not count a case until the record or brief arrives. Balancing these considerations, it appears that the Court's filing statistics fairly reflect its workload when compared with most other high courts not aided by intermediate courts.[31]

The second type of statistic commonly available is the number of cases decided by opinion. These cases comprise the bulk of a court's work; thus, in a sense, this statistic is a more important statistic than case filings. But it is still an uncertain statistic. Dispositions measure only the work done by the court, not the actual workload faced. Thus, if a court is particularly productive during a year, the number of cases decided by opinion overstates the actual workload before the court. On the other hand, if a court adds greatly to its backlog, the number of cases decided by opinion understates its real workload. Overall, if a court consistently has high opinion production, it can be assumed to be working hard.

An additional problem with opinion statistics is that courts issue different types of opinions. Unpublished and memorandum opinions generally require much less work than signed, published opinions. Information about the use of memorandum opinions is lacking for most

courts, but the Court of Appeals probably issues an unusually large number. The opinion publication practices of appellate courts are described in Chapter II, where Table 1 shows that few comparable high courts publish a smaller portion of their opinions than does the Court of Appeals. On the other hand, even though memorandum and unpublished opinions represent less work by the Court, they are not necessarily a sign of appeals that are less difficult than those decided with full opinions in other courts. The type of opinion is a product of a court's customs and caseload congestion; courts with relatively light caseloads have continued the traditional practice of publishing full opinions even in appeals without law-making importance. In fact, almost all cases decided by unpublished memoranda in the Court of Appeals would receive full published opinions in most state supreme courts.

Beyond the problems of understanding the meaning of caseload statistics, statistical comparisons must take into account the court's resources. A 9-judge court, for example, can be expected to handle a greater workload than a 5-judge court. Hence, Tables 6 and 7 are organized according to the number of filings per judge and the number of cases decided by opinion per judge. However, this somewhat understates the workload of large courts, including the Court of Appeals, because, as will be discussed later, these courts cannot be expected to decide as many cases per judge as small courts.

Similar comparison problems arise because some courts sit in panels or use retired judges or temporarily assigned trial judges. The extent that these enhance a court's ability to decide appeals is quite uncertain, as was discussed in the previous chapter. No adjustment is

Table 6

FILINGS AND FILINGS PER JUDGE IN
COURTS OF LAST RESORT NOT ABOVE INTERMEDIATE COURTS IN 1977

State	filings per judge	total filings	number of judges	composition of total filings: appeals	requests for appeal	original jurisdiction	year
Texas (criminal)[PJ]	538	4,838	9	3,104	--	1,734	1978
Oklahoma (criminal)	298	893	3	504	—	389	1977
Virginia[PJ]	264[a]	1,846	7	--	—	—	1978
South Carolina[J]	240	1,198	5	—	—	—	1978-79
Nevada[J]	207	1,035	5	426	--	609	1977
West Virginia	172[a]	861	5	—	--	—	1977
DISTRICT OF COLUMBIA[PJ]	159	1,429	9	1,225	149	55	1978
Wisconsin	129	903	7	769	—	134	1976-77
Alaska[J]	126	630	5	447	156	27	1978
Delaware[J]	120	361	3[b]	—	—	—	1977-78
Utah[J]	111	556	5	—	--	—	1976
Montana[J]	103	517	5	368	—	149	1978
Minnesota[PJ]	101	911	9	—	—	—	1976
Arkansas[PJ]	99	694	7	606	--	88	1977
Rhode Island	88	438	5	293	96	49	1976-77
Nebraska[PJ]	87	607	7	--	--	--	1976-77
Idaho[J]	75	374	5	345	—	29	1977
Hawaii[J]	74	372	5	--	--	--	1977-78
Mississippi[PJ]	73[a]	656	9	—	--	--	1978
Vermont[J]	72	359	5	348	—	11	1977-78
Connecticut[PJ]	70[a]	421	6	—	--	—	1977
New Hampshire[J]	62	310	5	276	—	34	1977-78
Maine[J]	59	412	7	—	--	—	1978
South Dakota[J]	56	280	5	249	16	15	1977

Table 6 (continued)

FILINGS AND FILINGS PER JUDGE IN
COURTS OF LAST RESORT NOT ABOVE INTERMEDIATE COURTS IN 1977

State	filings per judge	total filings	number of judges	composition of total filings: appeals	requests for appeal	original jurisdiction	year
North Dakota	37[a]	186	5	--	--	18	1977
Wyoming[J]	28	138	5	--	--	--	1976

[a]Appeals are probably counted upon arrival of the record or brief, rather than the notice of appeal. The time of filing in North Dadota is the oral argument.

[b]The Delaware Supreme Court was enlarged to five judges in October, 1978. The Court adopted the panel system in 1979.

[P]indicates that the court uses panels.

[J]indicates that the court uses extra judges.

The statistics in this table are those for the latest year available at each court. With two exceptions, the statistics were obtained from court reports. The Connecticut figures, which do not include requests for review, are from W. Kramer, Comparative Outline of Basic Appellate Court Structure and Procedures in the United States 40 (1978). The South Carolina statistics, for the year ending June 30, 1979, were obtained from the Supreme Court clerk's office. Almost all filings were appeals.

Original jurisdicton cases include bar disciplinary filings, which typically comprise a very small percent of a court's caseload.

made in the two tables for use of panels and extra judges. The letter "P" after a state indicates that the court sits in panels to hear at least some cases, and the letter "J" indicates that the court is known to use retired judges or trial judges.[32] The Court of Appeals probably makes greater use of these mechanisms than most courts of last resort.

Having given the necessary warnings, we can now analyze the statistics in Tables 6 and 7. Data in Table 6 indicate that only six of 26 courts of last resort not situated above intermediate courts in 1977 received more filings per regular, active judge than the Court of Appeals. The median number of filings per judge is about 100; the Court of Appeals filings per judge are well over 50 percent higher.

Five of the six courts (the exception is the South Carolina court) with more filings per judge than the Court of Appeals have special characteristics that distinguish them from the other courts in Table 6. The Texas and Oklahoma courts are specialized courts for criminal appeals. Each state has a supreme court and an intermediate court with civil jurisdiction only. This anomaly probably accounts for the enormous caseloads faced by these courts.[33] Filings in the Nevada Supreme Court consist largely of original jurisdiction cases, which represent less work than ordinary appellate filings. The Virginia and West Virginia Supreme Courts have almost total discretionary jurisdiction. They are the only supreme courts in states without intermediate courts that hear very few appeals of right. The unusual caseloads of the Nevada, Virginia, and West Virginia Supreme Courts are underscored when one compares Table 6 with Table 7. Although these courts have high levels of filings per

judge, they do not rank particularly high in the number of opinions per judge.

The statistics in Table 7 give the number of cases decided by published and unpublished opinions, including memorandum opinions. The Court of Appeals output in terms of cases decided by opinion per judge is almost twice as large as the median for high courts not aided by intermediate courts. Only four courts rank higher on this measure. Two are the unusual Texas and Oklahoma Courts of Criminal Appeals. A third, the Delaware Supreme Court, was enlarged in 1978 from three to five judges; so its opinion output per judge may drop substantially from the 1977 figure in Table 7. The South Carolina Supreme Court remains the only truly comparable court with more cases decided by opinion (as well as cases filed) per judge than the Court of Appeals.[34]

It is important to note that, besides the Delaware Supreme Court, several courts listed in Tables 6 and 7 have recently received aid. The Texas Court of Criminal Appeals was given four more judges in 1978 (earlier the court had 5 judges and 4 full-time commissioners). Wisconsin and Arksansas created intermediate courts, in 1978 and 1979 respectively, to aid their overburdened Supreme Courts. In addition, there are substantial movements to establish intermediate courts in Alaska, Hawaii, Idaho, Minnesota, South Carolina, Utah, Texas, and Virginia; and efforts are now underway to enlarge the Nebraska and Montana Supreme Courts by two judges each.[35]

To summarize this information about high courts not aided by intermediate courts, it appears that the Court of Appeals faces a typically large caseload. The figures, as has been emphasized, only

Table 7

CASES DECIDED BY OPINION PER JUDGE IN
COURTS OF LAST RESORT NOT ABOVE INTERMEDIATE COURTS IN 1977

State	cases decided by opinion per judge	cases decided by opinion	number of judges	year
Texas (criminal)[PJ]	302[x]	2,714[a]	9	1978
Oklahoma (criminal)	131[x]	394	3	1977
South Carolina[J]	88[x]	438	5	1978
Delaware[J]	86[x]	258[b]	3[c]	1977
DISTRICT OF COLUMBIA[PJ]	81[x]	728[d]	9	1978
Arkansas[PJ]	74[x]	516[a]	7	1977
Wisconsin	63[x]	439	7	1976-77
Nebraska[PJ]	58	406	7	1976-77
Maine[J]	54	381	7	1978
Minnesota[PJ]	54[x]	483	9	1976
Alaska[J]	52	262	5	1978
Montana[J]	51	257[b]	5	1977
New Hampshire[J]	47	235	5	1978
Nevada[J]	45	227	5	1977
Mississippi[PJ]	42[x]	381[d]	9	1978
Rhode Island	39	195	5	1976-77
Utah[J]	36	181	5	1976
Idaho[J]	34	169[a]	5	1977
North Dakota[J]	27	133[a]	5	1978
Vermont[J]	27	134	5	1977-78
South Dakota[J]	26	130	5	1977
West Virginia	26[x]	132[b]	5	1977
Connecticut[PJ]	23	140[b]	6	1977
Hawaii[J]	23	113	5	1977-78
Virginia[PJ]	21	149	7	1978
Wyoming[J]	20	100	5	1976

Table 7 (continued)

[a]This figure is the number of majority opinions. Thus, it probably does not include cases joined for decision in one opinion.

[b]This figure is the number of opinions. It may include minority opinions, and it probably does not include cases joined for decision in one opinion. The figure was obtained from W. Kramer, Comparative Outline of Basic Appellate Court Structure and Procedure in the United States (1978).

[c]The Delaware Supreme Court was enlarged to five judges in October, 1978.

[d]In addition, the court decided some appeals without opinion. The Mississippi Supreme Court disposed of 275 appeals without opinion. The District of Columbia Court of Appeals disposed of 64 appeals by judgment without opinion.

[x]Substantial numbers of opinions are not published. See Table 1.

roughly indicate the workloads faced by the courts. Nevertheless, the number of filings and the number of cases decided by opinion in the Court of Appeals are much higher than that in most other courts. The differences are so great that, irrespective of the uncertainties involved, there is little doubt that the Court of Appeals workload is among the greatest in the country among comparable courts. Also, the statistical evidence shows that the Court is unusually productive, and in spite of its backlog, is more efficient than most comparable appellate courts.

4) Comparison of Court of Appeals Backlog and Delay with That of State Supreme Courts Not Located Above Intermediate Courts

Backlog and delay in the Court of Appeals, discussed earlier in this chapter, have increased greatly during this decade. Backlog, as measured by the number of appeals pending, reached 1,109 at the end of 1978. Delay, as measured by the average time between notice of appeal and decision, exceeded 15.5 months for cases decided in 1978. Backlog and delay statistics both indicate a court's ability to handle its caseload. Of the two, delay is probably the more important statistic; litigants wishing an expeditious decision (no one knows how many such litigants exist, however) have every right to receive decisions within a reasonable length of time.

Backlog is perhaps too pejorative a term to apply to the number of pending cases, for even the most efficient courts must have a substantial number of cases yet to be decided. But the number of cases pending is the only commonly available statistic that sheds any light in this area. Table 8 presents the available backlog statistics for sixteen of the

Statistics are not available for ten of these 26 courts; comparisons based on the remaining sixteen, therefore, are necessarily incomplete. The number of cases pending by itself is not a very useful figure; a large court would be expected to have more cases pending than a small court. For this reason, Table 8 gives the number of cases as a percent of filings; this indicates the court's ability to manage its backlog. As can be seen, the Court of Appeals falls slightly below the middle.

Pending cases per judge, also given in Table 8, indicate the size of the backlog in comparison with a court's judicial resources. The 123 cases pending per judge in the Court of Appeals surpasses all but four

Table 8

PENDING CASELOAD (BACKLOG) IN
COURTS OF LAST RESORT NOT ABOVE INTERMEDIATE COURTS IN 1977

	Pending cases as percent of filings	Pending cases per judge
Hawaii	192%	143
Connecticut	128%	90
Idaho	122%	92
Rhode Island	119%	104
Alaska	99%	125
Wyoming	96%	26
Delaware	91%	66
Wisconsin	82%	106
Vermont	81%	58
DISTRICT OF COLUMBIA	78%	123
Maine	72%	42
Arkansas	49%	69
Texas (criminal)	53%	282
Oklahoma (criminal)	45%	133
Nevada	44%	91
Virginia	32%	83

courts in the table and is considerably above the median of about 90 cases per judge for all 16 courts. Hence, the Court faces an unusally high backlog, but it seems as able as most courts to manage the backlog.

Table 9

TIME FROM NOTICE OF APPEAL TO DECISION IN
COURTS OF LAST RESORT NOT ABOVE INTERMEDIATE COURTS IN 1977

	Months	Year
Connecticut	23[a]	1976-77
Hawaii	22[b]	1975-76
Wisconsin	19[c]	1976-77
Utah	19[d]	1977
Alaska	17	1978
DISTRICT OF COLUMBIA	16	1978
Mississippi	16[e]	1978
Minnesota	15	1976
New Hampshire	10[f]	1975
Wyoming	10	1976
Arkansas	10[e]	1977
North Dakota	7	1978

[a]From Case Management of the Dockets of the Supreme Court and Appellate Session of Superior Court Project, Summary of Project's Operations, May 1977-June 1978 70.

[b]The figure for Hawaii is only for civil cases decided with regular opinions.

[c]This is a median figure for the time from "docketing" to decision.

[d]This figure is for civil cases decided between January and August 1977. The average was 16 months in criminal cases.

[e]This figure is the average time from trial court decision rather than notice of appeal.

[f]From G. Pappagianis, "A Primer on Practice and Procedure in the Supreme Court of New Hampshire," 17 N.H.B.J. 182, 183 (1976).

The delay problem in the Court of Appeals is comparatively rather moderate. Table 9 shows the time required to decide cases in twelve high courts not aided by intermediate courts.[37] Information is not available for the remaining fourteen courts. Only five of the twelve courts have shorter delays than the Court of Appeals (although the 16-month time period for the Court is the median figure for the eleven courts). This, again, is evidence that the Court has been able to meet its large caseload with comparative efficiency.

The major import of Table 9, however, is not that the Court of Appeals is expeditious; rather, it is that delay is a common problem throughout the nation. The time required for the average decision in the Court of Appeals is longer than decisions should take according to the ABA Standards Relating to Appellate Courts. Standard 3.52 suggests a timetable that would lead to decisions in four to six months from the notice of appeal, the length of time depending on the type of case.[38] The Court of Appeals takes about three times longer to decide cases.

5) Caseloads and Congestion in State Supreme Courts Prior to the Creation of Intermediate Courts

This report will consider various alternative solutions to the high caseload volume in the Court of Appeals. A major alternative is the creation of an intermediate appellate court. Hence, it is helpful to know what situations have prompted states in the past to create intermediate courts. Table 10 gives supreme court caseload statistics for states that created intermediate courts during the last 20 years.[39] The statistics are for the year prior to that in which the first major action was taken by the legislature or the electorate leading

directly to the creation of the intermediate court. This action was legislation initiating a constitutional amendment, a constitutional amendment itself, or legislation establishing the intermediate court under long existing constitutional authority. (The initial act was some type of legislation in 14 of the 15 states in Table 10.) In other words, the statistics in this table are the information available to the legislature or the voters when making the first major decision leading to an intermediate court.

Table 10

CASELOADS IN THE DISTRICT OF COLUMBIA COURT OF APPEALS AND IN COURTS OF LAST RESORT PRIOR TO THE CREATION OF INTERMEDIATE COURTS (1959-1979)

State	Year	New cases filed per judge	Cases per judge disposed of with opinion
Oklahoma (civil)	1966	57	—
Kansas	1973-4	69	33
New Mexico (PJ)	1964	95	33
Washington (PJ)	1966	76	38
Michigan	1961	—	38
Arizona (PJ)	1963	98	41
Iowa (P)	1975	121	41
Colorado (PJ)	1968	84	42
Maryland (PJ)	1964-5	91	46
Massachusetts (P)	1970-1	—	49
Oregon (PJ)	1968	90	49
North Carolina	1963-4	—	60
Kentucky	1973	104	62
Wisconsin	1974-5	120	72
Arkansas (PJ)	1976	88	79
DISTRICT OF COLUMBIA (PJ)	1978	159	81

The Court of Appeals presently has a higher caseload than any of the 15 other supreme courts in Table 10 (although a few items of information are lacking, and one must keep in mind the uncertainties involved when using such statistics). In 1978 it disposed of almost twice as many cases per judge by opinion as most courts when intermediate courts were initiated,[40] and it received an equally larger volume of filings per judge. Again, however, this comparison is complicated by the Court of Appeal's greater use of panels (indicated by a "P" in Table 10) and extra judges (indicated by a "J"). In all, the indicators are that the Court of Appeals is a more productive court than were most courts when relief through creation of an intermediate court was initiated.

Little information is available about the number of pending cases and the extent of delay in the 15 supreme courts. Table 11 gives what information there is. It suggests the same pattern that exists with respect to current backlog and delay in supreme courts not above intermediate courts: the number of pending cases per judge in the Court of Appeals is unusually high, but the Court seems able to manage its pending cases comparatively well. Again, this does not mean that the Court is sufficiently current; rather, it suggests that the other courts allowed even more delay and backlog to develop.

6) Conclusion

The Court of Appeals faces a large workload and it has a major backlog and delay problem. Its caseload is far higher than that of most high courts not aided by intermediate courts, and those courts with higher caseloads generally have either discretionary or totally criminal

Table 11

BACKLOG AND DELAY IN DISTRICT OF COLUMBIA COURT OF APPEALS AND IN COURTS OF LAST RESORT PRIOR TO THE CREATION OF INTERMEDIATE COURTS

	Pending cases per judge
Wisconsin	56
Kansas	73
Oregon	79
Kentucky	84
Iowa	116
Colorado	123
DISTRICT OF COLUMBIA	123
Arizona	127

	Pending cases as percentage of new cases
Wisconsin	46%
DISTRICT OF COLUMBIA	78%
Kentucky	80%
Oregon	88%
Iowa	96%
Kansas	104%
Arizona	130%
Colorado	146%

Time Between Filing and Disposition

Arkansas	10 month (average)
DISTRICT OF COLUMBIA	16 months (average)
Kansas	16 months (average)
Wisconsin	18 months (median)
Colorado	2 to 2 1/2 years (average)
Arizona	over 2 years (average)

jurisdiction. The Court of Appeals also has a higher caseload than that faced by every state supreme court which received relief through creation of an intermediate court in the past twenty years. The Court has responded to the increased filings by expanding its output, and it is far more productive than most comparable high courts. Nevertheless, the Court has been unable to decide appeals expeditiously; its average time for decisions is roughly three times longer than that suggested by the ABA Appellate Standards. Present caseload pressures prevent a substantial reduction of the delay.

There is some uncertainty about the appellate caseload trend in the District; but the slight downturns in 1977 and 1978 filings do not portend significant relief. Appellate caseloads are expanding rapidly throughout the nation, trends in the Superior Court are sources of more appeals, the socioeconomic growth of the District and metropolitan area will probably lead to more litigation, and prospective legislation will probably create more appeals. In all, these considerations suggest that there will be modest yearly increases in the Court's already large caseload. Given the present high level of work already confronting the court, the need for major relief is clearly indicated.

CHAPTER IV

POSSIBLE SOLUTIONS: MORE JUDICIAL CAPACITY

The remainder of the report will discuss possible solutions to the Court of Appeals' caseload problem. These fall into three broad categories: increasing the Court's capacity by adding more judges or more staff; decreasing the amount of judge time spent on each case; and lowering the volume of appeals to the Court. In general, this chapter and the next discuss the first type of solution, Chapter VI the second, and Chapters VII and VIII the third.

1) More Judgeships

The Court of Appeals could, without doubt, handle its caseload and greatly reduce delay if given more judges. Five additional judges (that is, creating a 14-judge court), for example, would bring its caseload per judge to roughly the median now faced by courts of last resort not above intermediate courts. The question to be addressed here, therefore, is whether such a solution is advisable. The answer must be sought from the practices of courts elsewhere and from the commentary of informed observers.

All 52 state high courts (including the specialized criminal courts in Texas and Oklahoma) have nine or fewer active judges. Eight have nine judges, 23 have seven, 19 have five, and one each have three and six.[1] The number of judges on the Court of Appeals, thus, is already at the limit of what other states appear to believe feasible. In fact, the available information indicates that during the nation's history only

two state courts of last resort, courts in New Jersey and Virginia, have ever had more than nine judges.[2] Adding judgeships, moreover, has not been a favored means of increasing supreme court capacity in recent years; only 11 states have enlarged their top courts since 1950 in spite of the tremendous caseload increase everywhere.[3] The ABA Standards Relating to Court Organization support the existing state practices; Standard 1.13(a) states that the highest court "should have not less than five nor more than nine members." The commentary to this Standard suggests seven as the preferred number.[4]

Judges and others advance many objections to large courts. The mechanics of internal decision procedure become overly cumbersome and time consuming. Communications become more difficult, and dissenting and concurring opinions may well proliferate unnecessarily.[5]

Perhaps the most often advanced argument against enlarging high courts is that there are diminishing returns in a court's capacity to handle its caseload. The addition of three judges to a nine-judge court, for example, may not increase productivity by a full third. The relief afforded lies in writing majority opinions, because this work can be apportioned among the judges. Additional judges, however, do not necessarily relieve each judge of other decision tasks, such as reading the briefs, hearing arguments, studying draft opinions, and discussing cases in conference. The time required to maintain a collegial climate increases.[6]

An exception occurs when the court sits in panels. Additional judges can be employed to form more panel sittings, and the output per judge should remain constant as long as decisions are not regularly reviewed by

nonpanel members. Intermediate courts, which typically hear all cases in three-judge panels, often function effectively with more than nine judges.[7]

If the use of panels continues, then the capacity of the Court of Appeals can be increased appreciably by adding more judges. Each judge would have to review a larger volume of opinions slated for publication, and en banc hearings would probably be more unwieldy and time-consuming than at present.[8] But the additional workload would be relatively small compared with the relief accorded because panel sittings and opinion writing would be apportioned to a larger number of judges.

Consequently, the advisability of enlarging the Court is closely connected with the advisability of the panel system. As was discussed in Chapter II, routine decision by panels, especially three-judge panels, is objectionable in a high court. One major disadvantage is the possibility of inconsistent decisions. The probability of this result of panel usage would increase proportionally with the enlargement of the Court; the numeric basis for variation increases with the enlarged number of possible panel compositions.[9] Even if it were believed that the problem of inconsistent decisions on the present nine-judge Court is not substantial enough to require a change, the addition of five judges, for example, would magnify the significance of the liabilities discussed here.

In conclusion, although additional judgeships would greatly help the Court solve its backlog problem, this solution suffers from a considerable weight of negative assessments and a lack of precedential models in the country.

2) Increased Reliance on Extra Judges

The Court's use of retired judges and temporarily assigned Superior Court judges was discussed earlier. In summary, they add significantly to the Court's present capacity. The question to be addressed here is whether increased reliance on these judges is a viable solution, or partial solution, to the caseload problem.

The answer with respect to retired judges is that this additional help depends on their availability. A prediction here is impossible; much depends on the judges' longevity and their willingness to help the Court after they retire. In fact, the Court has been very fortunate in recent years to have the services of three retired judges.

Relief from temporarily assigned judges is theoretically expandable. The chief judge has authority to "assign temporarily one or more" Superior Court judges to the Court of Appeals.[10] There appears to be no limit on the authority other than the requirement that the assignment must be temporary[11] and, of course, the fact that the Superior Court has a finite number of judges. There are three major problems with such a solution to the Court's caseload problem. First, the Superior Court itself is congested; more assignments to the Court of Appeals would, in effect, rob Peter to pay Paul. Second, although we believe that the present Superior Court bench is highly competent, the judges have little appellate experience and, thus, are less likely to prepare appellate opinions as proficiently as appellate judges.[12] Third, the potential for inconsistent decisions would be at least as great as that resulting from the addition of new judgeships.

3) Commissioners

One solution to appellate court congestion, common in earlier eras, is the employment of quasi-judicial personnel. This took a bewildering variety of forms. Periodically from 1848 until 1928 the Virginia Supreme Court of Appeals was relieved by a Special Court of Appeals, composed of temporarily assigned trial judges. It heard cases backlogged in the Supreme Court, and no further appeal was allowed.[13] Similarly, a New York Commission of Appeals, comprised mainly of judges voted off the state's high court, decided cases taken from the court's backlog during the 1870's. Its decisions were also final.[14] These extreme remedies for congestion deprive the jurisdiction of a single authoritative jurisdictional law-making body. They are not remedies suitable to the District.

A half dozen states, however, established commissions of bar members to hear cases pending before the supreme court and to make suggested decisions and write opinions.[15] The decisions were final only upon the approval of the supreme court. These commissions were usually short-term attempts to relieve congestion, and they were not used after the 1930's, when caseloads declined.

A more common use of "commissioners" was the assignment of attorneys to act essentially as judges. They heard oral arguments, discussed appeals in conference, and wrote opinions. But only the judges could vote. The only part of the decisional process not delegated was the making of the ultimate decision. The commission system, then, is essentially a way to add more judges to a court without actually creating more judgeships.

The commissioner system has disappeared from state high courts; the last two holdouts discontinued their use more than a year ago.[16] In addition, ABA Appellate Standard 3.01 states that a supreme court should not "delegate its deliberative and decisional functions to officers such as commissioners." The commentary to the standard gives the following reasons for this position:

> Because the commissioners are subordinate to the court's judges, employing them to prepare tentative decisions for consideration by the court involves little risk of inconsistency in decision. On the other hand, use of commissioners deprives the litigants of the opportunity for full consideration of their contentions by members of the court. Moreover, if the commissioners have the experience, ability, and staff assistance which they should have to perform their functions as auxiliary judges, they are in effect subordinate judges. Their functions can ordinarily be performed as efficiently, and with greater authority, by an intermediate appellate court.[17]

The commissioner system is not now a favored solution to appellate congestion and appears to constitute primarily a footnote to appellate court history.

4) Conclusion

This chapter has discussed three methods of increasing judicial capacity in appellate courts. Two methods, the use of extra judges and the use of commissioners, do not appear to be strong contenders in light of either Court of Appeal needs or the current state of opinion among appellate judges and scholars. Only the third, increasing judgeships, appears to merit serious consideration. Enlarging the Court, however, would create serious potential problems, especially the danger of

inconsistent decisions made by different panels. More judges would also mean that each judge must spend more time reading opinions slated for publication and participating in en banc hearings. Finally, no state supreme court has more than nine judges, the upper limit sanctioned by the ABA Standards.

CHAPTER V

POSSIBLE SOLUTIONS: INCREASED STAFF

The capacity of the Court of Appeals can be expanded by adding attorney aides, rather than adding judges. One advantage is cost; attorney aides receive lower salaries than judges and they do not require large offices. Another advantage is that the danger of inconsistent decisions, discussed in the previous chapter, is less than that caused by adding more judges. But the amount of staff help in the Court of Appeals is already much greater than most state courts receive, and it approaches the upper limit cited as advisable. This chapter will a) describe the functions of staff aides in the Court of Appeals and in other courts, b) compare the number of aides in the Court of Appeals with the number elsewhere, and c) consider the possibility of enlarging the Court's staff. Final determination of whether an enlarged staff is a viable solution to the Court's caseload problem, however, depends mainly on a concurrent decreased attention given each case by the judges. This will be the topic of the next chapter, Chapter VI.

1) Functions of Staff Aides

Appellate court attorney aides fall into two basic categories, law clerks and staff attorneys. A law clerk is the personal employee of a judge and is under his direct supervision. A staff attorney works for the whole court as a member of a central staff. Typically the chief judge hires and supervises the central staff, often with the help of a staff supervisor. Most staff attorneys and nearly all law clerks are recent

law school graduates and remain at the court for one year or, occasionally, two years. A number of courts, on the other hand, prefer experienced attorneys on their central staff, and many courts employ an experienced attorney as staff supervisor.

Much the same functions are performed by law clerks and staff attorneys.[1] In fact, courts that have central staffs essentially transfer to the staff attorneys duties often performed by law clerks in other courts. The major duty of law clerks and staff attorneys is to supply information to the judges by condensing and analyzing the parties' arguments and often by reading the record and conducting independent research. Typically, this involves writing memoranda, although attorney aides also may draft opinions. Staff attorneys' work is usually performed before the case is argued or submitted, and their memoranda or opinion drafts are circulated to all judges hearing the appeal. Law clerks at some courts perform this same function; at other courts they do not work on a case until after the argument stage, and their memoranda and draft opinions are not circulated to other judges.

Other functions of staff attorneys and law clerks are usually offshoots of the basic function just described. They may prepare memoranda on motions, original writs, or petitions to appeal. They may, in the process of studying cases, advise the court whether the case should be given summary treatment, such as by eliminating oral argument or by issuing an unpublished opinion. In addition, they may help the court in administrative matters, such as monitoring appeals, or they may help draft court rules. A valuable function of law clerks, but rarely of

staff attorneys, is to discuss cases with their judges and to criticize draft opinions before circulation to the court.

The Court of Appeals has 21 law clerks; each associate judge has two, the chief judge has three, and the three retired judges share two. The Court has a small central staff of three attorneys located in the clerk's office. The staff's work is limited to motions. It produces about 20 to 30 memoranda each month on major substantive motions, including applications for allowance of appeal. The judges' personal law clerks mainly work on merits decisions after oral argument or submission.[2] At least some judges ask their clerks to study appeals before argument and prepare memoranda. Pre-argument memoranda by clerks, however, are not circulated to the panel members.

2) Number of Staff Aides

A major long-term change in appellate courts is the increased employment of staff aides. Law clerks were first used late in the 19th century, and their number has steadily increased, rapidly so in recent years. State supreme courts, as a whole, now employ about 50 percent more law clerks than they did ten years ago.[3] Central staff attorneys were seldom used until the mid-1960's; since then roughly two-thirds of the nation's appellate courts have established central staff offices, varying in size from one attorney to more than thirty.

Much information is available about the number of law clerks and staff attorneys. Table 12 presents figures for high courts not above intermediate courts.[4] The 24 attorney aides in the Court of Appeals substantially outnumber those used elsewhere. No other court

Table 12

LAW CLERKS AND STAFF ATTORNEYS IN COURTS OF LAST RESORT
NOT ABOVE INTERMEDIATE COURTS IN 1978

	attorneys per active judge	total attorneys	total active judges	law clerks for chief judge	law clerks for each associate judge	central staff attorneys
Alaska	2.2	11	5	2	2	1
Arkansas	1.1	8	7	1	1	1
Connecticut	1.0	6	6	1	1	0
Delaware	1.0	3	3	1	1	0
DISTRICT OF COLUMBIA	2.7	24	9	3	2	3
Hawaii	2.4	12	5	3	2	1
Idaho	2.2	11	5	2	2	1
Maine	1.6	11	7	2	1.5	0
Minnesota	1.6	14	9	1	1	4
Mississippi	1.3	12	9	1	1	3
Montana	2.0	10	5	2	2	0
Nebraska	1.0	7	7	1	1	0
Nevada	2.0	10	5	1	1	5
New Hampshire	1.0	5	5	1	1	0
North Dakota	1.6	8	5	1	1	3
Oklahoma (crim.)	2.0	6	3	1	1	3
Rhode Island	3.0	15	5	3	2	4
South Carolina	1.8	9	5	1	1	4
South Dakota	1.4	7	5	1	1	2
Texas (crim.)	2.1	19	9	2	2	5
Utah	1.0	5	5	1	1	0
Vermont	1.0	5	5	1	1	0
Virginia	1.9	13	7	2	1	5
West Virginia	1.6	8	5	1	1	3
Wyoming	1.0	5	5	1	1	0

in Table 12 has more law clerks per judge; only six other courts have two clerks for each associate judge. The Court of Appeals central staff is also comparatively large; only six courts have more than three. The total number of attorney aides per active judge on the Court is 2.7, exceeded only by the figure of 3.0 in the Rhode Island Supreme Court, and well above the median figure of 1.6 for all high courts not above intermediate courts.

The picture is somewhat the same for intermediate courts and supreme courts above intermediate courts.[5] The median number of attorneys per judge is 1.5 and 1.7 respectively for these two types of courts. Again, only a minority gives their judges more than one clerk, and large central staff offices are rather uncommon.

Supreme court justices in California, Michigan, and Pennsylvania have three law clerks apiece.[6] The California and Michigan courts also have large central staffs of eleven and ten attorneys respectively. Other supreme courts with sizeable staff offices are Arizona, 5 attorneys; Iowa, 7; New York, 7; Ohio, 12; and Oklahoma, 14. These large staffs in supreme courts above intermediate courts, however, are typically used to process requests for review, rather than appeals accepted for full-scale review. In all, only five of the 28 supreme courts above intermediate courts have more attorney aides per judge than the Court of Appeals. The highest figure is 4.7 in California.[7]

The great majority of intermediate courts have only one law clerk per judge. Pennsylvania's two intermediate courts are striking exceptions; four clerks are authorized for each Superior Court judge and 3 for each Commonwealth Court judge.[8] About three quarters of the intermediate

courts have central staffs, a slightly higher proportion than supreme courts. Several of the central staff offices are very large: 22 attorneys in California, 15 in Illinois, 31 in Michigan, and 14 in Missouri. The New York intermediate court also has a large, but unknown, number of staff attorneys. All remaining intermediate courts for which information is available have fewer than 10 staff attorneys. Also, it is important to add, only a few intermediate courts (in Michigan and possibly New York) have more central staff attorneys than judges. The central staff of an intermediate court is usually quite small compared with the overall size of the court.

The Court of Appeals, in summary, already has considerably more staff assistance than is common in state appellate courts. Fewer than 10 state courts (and only one high court not above an intermediate court) have more attorneys aides per judge than the Court of Appeals.[9] This leads to a presumption that the Court has gone about as far as it should in providing staff assistance to the judges, a presumption that is supported by several prominent students of appellate courts. Professors Carrington, Meador and Rosenberg state:

> As a sound rule of thumb, we propose that no central staff be enlarged to include more professionals than there are judges to be served by the staff. To place this rule in relation to one previously suggested, we propose as a rule that not less than one professional of four serving in a high volume court should be a full-fledged judge; such a judge may be appropriately assisted by as many as two personal law clerks and the equivalent of one additional clerk serving in the central staff. To surround a judgeship in such a court with more supporting personnel would create risks we regard as excessive to the imperatives of appellate justice. As long as this rule is

> observed, there need be little concern about staff usurpation or the "bureaucratization" of the judiciary.[10]

This rule of thumb would not permit the Court of Appeals to add any more law clerks and would permit adding at most six more attorneys to the present central staff of three.

The ABA Appellate Standards are more liberal in this regard. Standard 3.62 and the following commentary state that busy appellate judges should be authorized as many as three law clerks.[11] In addition, the Standards permit a centralized staff, without specifying any size limit, but warn that the court "must be continually alert to the risk of internal bureaucratization and against any tendency to rely on staff for decisions that should be made only by judges personally."[12]

3) Forms of Major Reliance On Staff

If it is decided that the Court of Appeals should join the small number of appellate courts with large staffs, the next issue is how that staff can best help the Court. This issue will be addressed by describing the staff system in the Michigan Court of Appeals, the most extreme model, and the system in the Minnesota Supreme Court, a more typical use of staff attorneys.

The Michigan Court of Appeals judges decided in 1968 that their productivity was increased little by the addition of a second law clerk; so they decided to pool the second clerks into a central research staff, headed by a seasoned lawyer.[13] The chief judge has said that this change permitted the Court to keep abreast of its greatly increasing caseload.[14] The duty of the central staff, which now numbers more

than 30 attorneys, is to prepare prehearing reports in all cases submitted to the Court. These reports are lengthy memoranda that fully discuss the facts and analyze the legal arguments. Staff attorneys go beyond briefs; they read the record and usually conduct a great deal of independent legal research. They may even raise and discuss issues not brought forth by counsel.

After a quick review by a supervisor, the report is circulated to the three panel members hearing the case. The judges read the report before oral arguments (whether they also read the briefs is not known), and use it as a basis for deciding whether the case will be decided by a published or unpublished opinion. (Since the Court allows argument in all cases, the report is not used, as it is in some other courts, as a basis for determining whether argument will be allowed.) In routine cases, the staff attorney also prepares a brief per curiam opinion for possible acceptance by the Court. If a full opinion is to be written, the assigned judge and his law clerk use the prehearing report as a starting point for their research and opinion drafting.

The benefits claimed for creating central staff, as opposed to increasing the number of law clerks, are said to be that staff attorneys can prepare the prehearing reports without interference from other demands on their time and that the judges are spared the duty of supervising preparation of the reports.[15] In addition, staff attorneys can more easily establish important central files. The Michigan staff maintains and indexes a file of points covered in past memoranda, expediting research whenever issues recur. Also, the staff maintains a pending issue file, which allows the Court to assign cases

with similar issues to the same panel, preventing duplication of effort by different panels and decreasing the danger of conflicting panel decisions.

Other courts with central staffs rarely receive staff memoranda in all cases. A typical example is the Minnesota Supreme Court,[16] one of the busier supreme courts without discretionary jurisdiction. All appeals are forwarded to the staff and screened by the head staff attorney. He recommends whether the cases should be decided without argument, should be argued before three-judge panel, or should be argued before the full Court. His recommendations are usually accepted, but any judge can order a case placed on the en banc calendar. A staff memorandum is prepared only in cases submitted without oral argument, and it is accompanied by a recommended per curiam opinion. The full Court discusses these cases in conference, and often adopts the staff's per curiam opinion.

Professor Meador in 1974 recommended that the D. C. Court of Appeals adopt a system similar to that used by the Minnesota court.[17] The judges received second clerks that year, and Meador proposed that each second clerk work half time as the judge's personal law clerk and half time as a central staff attorney. This staff would screen criminal appeals (but not civil appeals) and would forward the more important cases to the Court for oral argument. Criminal cases with simple or insubstantial issues would be assigned to a staff member to prepare a memorandum and to draft a per curiam opinion. The staff products would then be circulated to panel members, who would ordinarily decide the case without oral argument, although any judge could request argument. The

Court did not adopt this system; the judges preferred to retain their second law clerks rather than establish a large central staff. At present, therefore, law clerks are the only staff aides who work on appeals; the Court's central staff of three attorneys handles only motions.

If the Court of Appeals adopts a central staff system for appeals, the number of attorneys employed must, of course, depend on the number of cases they handle. Experience in other courts suggest that each staff member can prepare eight memoranda a month, or about 100 a year, if assigned mainly routine cases.[18] Summary calendar cases typically number under 300 a year; therefore, a staff of only three attorneys could easily prepare memoranda and draft memoranda opinions in these cases. If the Michigan model is adopted, however, and the staff prepares memoranda in the complex as well as simple cases, each staff member could produce only about 70 to 80 memoranda yearly. Assuming 800 cases disposed of on the merits, this would require about a dozen staff attorneys, including an experienced attorney as supervisor. In addition, because the volume of substantive motions is now greater than can be managed by the Court's three motions attorneys, the present staff should be enlarged by one or two attorneys to handle present functions irrespective of any use of staff in non-motions work. In all, then, any plan to keep the Court current by means of a central staff would require the employment of some four to 14 more attorney aides, the number depending on how many cases are handled by the staff and the need to supplement the present staff for motions work.

4) Conclusion

This chapter has described the use of law clerks and staff attorneys in the Court of Appeals and in other appellate courts. The Court of Appeals at present employs a comparatively large number of these attorney aides, more than almost all other high courts. The presumption, thus, is that additional staff is not a suitable answer to Court's caseload problem. But a few other courts have attempted to meet rising caseloads by using very large staffs, and such a strategy in the Court of Appeals is feasible.

This chapter, however, has not discussed how the additional staff would actually enable the Court to meet its caseload. In fact, a large staff in itself cannot solve the caseload problem. That can be accomplished only if the judges use the staff in ways that increase their productivity. Which is to say that each judge must, on the average, spend less time on each case by giving to the staff some of the duties now performed by the judges.[19] That will be one of the major topics of the next chapter, which describes means of eliminating traditional elements of the appellate process.

CHAPTER VI

POSSIBLE SOLUTIONS: DEVIATIONS FROM THE TRADITIONAL APPELLATE PROCESS

In appellate decision-making, the amount of time a judge spends on each case is flexible. Appellate decisions theoretically can be (although they should not be) based on a cursory review of the parties' contentions or on presentations by the court's staff. Thus, an appellate court facing an increasingly large caseload with no major relief through jurisdictional changes or increased judicial capacity can select among several strategies. The judges can continue to expend the traditional effort on each appeal and thereby permit a large backlog to accumulate, or they can average less time on each case by eliminating some of the traditional elements of the appellate process. Most such appellate courts, like the Court of Appeals, adopt efficiency measures that somewhat increase the Court's capacity, but do not enable it to keep abreast of its workload. Some courts, however, do dispose of huge caseloads by adopting extreme departures from traditional appellate procedure. The topic of this chapter is the possible adoption of these departures by the Court of Appeals.

The traditional appellate decision-making process includes lengthy study of the issues by all judges hearing the case, although more so by the judge assigned to write the opinion. The judges

read the briefs and relevant portions of the record, and they listen to and question counsel during hour-long oral arguments. After arguments the judges discuss the case at length, reaching a tentative conclusion. Thereafter, the assigned judge and his clerk carefully study the record and briefs, conduct independent research for legal authority missed by counsel, and write an opinion fully explaining the reasons for the court's ruling on each issue raised. The non-assigned judges closely read the draft opinion and frequently suggest changes. The opinion is published in the state reports.

This description is an ideal probably never completely reached in most appellate courts, but it is a good approximation of how most courts traditionally operated until the recent caseload increases.[1] Courts with wide discretionary jurisdiction, and thus able to manage their caseloads, still generally follow this procedure in cases heard on their merits. But most other appellate courts have cut back important elements of the traditional procedure. The Court of Appeals, for example, has curtailed oral argument and opinion publication, as was discussed in Chapter II.

The purpose of the present chapter is to outline changes that other high-volume courts, generally intermediate courts, have made in recent years. These include two that the Court of Appeals has already made, limitations on oral argument and restrictions on opinion writing and publication. The question here is whether the Court can go further. Other possible changes are decisions by single judges or two-judge panels, limits on the volume of appellate papers, and

decisions with less attention given by judges to the parties' presentations. All of these deviations from the traditional appellate process necessarily risk lowering the quality of justice provided by an appellate court. Nevertheless, it is clear that some of the changes would increase the judges' productivity greatly and, if adopted, could quickly end congestion in the Court of Appeals.

1) Further Restrictions on Oral Argument

As was described in Chapter II, the Court discourages oral argument in a substantial minority (about 40 percent) of its cases by assigning them to the summary calendar. It could further restrict arguments by assigning more cases to the summary calendar and by not permitting arguments if requested by counsel. The reasons for or against restricting oral arguments were given in Chapter II and need not be repeated here in full. In summary, the time saving resulting from restricting arguments is not large, and many commentators feel that oral arguments are an important part in the appellate process except in the minority of appeals that contain clear-cut issues. In all, expansion of the summary calendar is neither an effective nor wise answer to the workload problem.

2) Opinion Publication and Preparation

Studies have shown that a large proportion of appellate judges' time is consumed in preparing opinions.[2] Hence, this aspect of the appellate process is a prime candidate for changes that could lead

to major relief. Three possible changes are discussed here: a) further restrictions on publication of opinions, b) decisions without opinions, and c) staff-authored opinions.

The Court's opinion publication policy was explained in Chapter II. Roughly 60 percent of the cases decided on the merits receive short unpublished memoranda, which average about two pages, about a fifth of the length of the average published opinion.[3] The Court's productivity might increase substantially if it issued fewer published opinions or if it decided a larger number of appeals without opinions.

Chapter II discussed in some detail the pros and cons of unpublished opinions. In general, they save judges a great deal of time, but, according to some commentators, they reduce the visibility and the integrity of the appellate process. In any event, the Court of Appeals could further restrict opinion publication. For example, paragraph VIII.D of the Court's Internal Operating Procedures requires publication if the decision is non-unanimous or if it does not affirm the ruling below. ABA Appellate Standard 3.37 does not suggest that these two factors require publication.[4] The number of opinions published solely because of these two requirements may be quite large, although information on this point is scanty.[5] Thus, substantial judge time might be saved by amending VIII.D along the lines of the ABA Standards. On the other hand, as noted in Chapter II, very few high courts publish a smaller proportion of their opinions than does the Court of Appeals.

A second way to decrease judge time spent on opinions is simply to decide many cases without written opinions; this can be done either by giving oral opinions at the conclusion of the arguments or by issuing orders without any reason for the decision.[6] Both practices have been used in a few very busy courts, apparently enabling them to handle huge caseloads expeditiously. Oral opinions are common in the U.S. Court of Appeals for the Second Circuit and the Oregon Court of Appeals.[7] The parties, or at least their attorneys, are informed of the judges' reasoning; decisions are made with the minimum of delay; and the time required to write opinions is saved.

Decisions without opinions of any sort are a common practice at a few courts. The United States Court of Appeals for the Fifth Circuit, for example, decides more than a third of its cases by orders that inform the parties of the disposition, but give no reason for the decision.[8] Probably only one state high court, the Mississippi Supreme Court, regularly decides cases without opinion.[9] In 1978 it disposed of 275 cases by simple order, or 42 percent of all cases decided on the merits.[10]

A third way to save opinion-writing time is to issue opinions written by law clerks or the central staff. Judges often receive draft opinions from law clerks, but time saving to judges is limited because they direct the clerk's research and writing.[11] At some courts, as was described in the preceding chapter, staff attorneys prepare draft memorandum opinions that are routinely accepted by the

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judges. Some judges may similarly rely on staff aides, delegating all facets of opinion drafting, when preparing ordinary signed opinions; but there is very little public information about this topic. Likewise, there is little public information about opinion writing practices of the Court of Appeals judges. Perhaps, however, there is room to delegate more to law clerks or staff attorneys.

These three means of freeing judges of opinion-writing duties - the use of oral opinions, decisions without opinions, and staff written opinions - can potentially save a great deal of time. But, of course, there are many objections.[12] If judges do not give reasons for decisions, the losing party may not be satisfied that sufficient attention was given to his contentions. That is, the court may seem arbitrary. This belief may spread beyond those immediately connected with Court to the legal community and even the general public. The act of writing opinions is also an important part of the decision-process; tentative ideas may not survive the test of putting them in writing. Finally, opinions are an absolute necessity under the common law tradition whenever the decisions create new law or change existing law. Here, especially, the statement of the law and the reasons behind it must be those of the judge rather than the staff. Besides developing the jurisprudence of the District of Columbia, opinions in these cases are vital because they are the non-sitting judges' major source of information about Court of Appeals legal developments. Without adequate opinions, the problem of inconsistent law discussed in Chapters II and IV, would be considerably worsened.

3) Decisions by One or Two Judges

Appellate court decisions on the merits have traditionally been made by at least three judges, even in intermediate appellate courts.[13] Recently, however, two intermediate courts have departed from this general rule. The New Jersey intermediate court now sits in two judge panels, except when the presiding judge orders a three-judge panel. Two-judge panels are not used if the issues are of public importance, of special difficulty, or of precedential value. Also, of course, a third judge must be brought in when the two judges disagree.[14] In the Wisconsin Court of Appeals, the state's intermediate court established in August 1978, a single judge hears appeals in several categories of minor cases.[15] A party can request a three-judge panel, but the chief judge can grant or deny the request at his discretion.

These rather extreme measures obviously increase appellate court productivity; only one or two judges need review the parties' contentions in each case. But the arguments against them are substantial. Decisions by one or two judges would increase the danger of inconsistent decisions. The decisions, also, may not be made with sufficient deliberation. ABA Appellate Standard 3.01 states that decisions should be made by at least three judges in intermediate courts (the Standards advise against any panel decisions in high courts, as was discussed in Chapter II). The commentary gives the following reason for the three-judge lower limit: "The basic concept of an appeal is that it submits the questions involved to collective

judicial judgment, and does not merely substitute the opinion of a single appellate judge for that of a single trial judge. A panel of three performs this function without entailing the costs involved in panels composed of a larger number of judges."[16]

4) Limiting the Volume of Appellate Papers

Under traditional decision procedures, much of a judge's time is spent reading the briefs and records, which may be longer than needed to supply the information required for decision. Various schemes have been proposed to require parties to limit the papers presented. The most common is court rules that ask parties to produce only those parts of the record (including the transcript) relevant to the issues raised. By and large, these rules are unsuccessful.[17]

However, a few innovative courts have recently established procedures that allow production of only those parts of the record that the court acting through staff advice deems necessary. The transcript is not brought to the appellate court unless one party requests it by designating portions to be prepared. The court staff reviews these requests and advises the court whether the designated portions of the transcript are needed, and the judges rule on the attorneys' request.[18] These procedures are still experimental; whether they actually reduce a court's workload has yet to be determined.

Suggestions have also been made to shorten briefs. The Court of Appeals now limits briefs to 50 pages, a common restriction in

appellate courts. A shorter page limit would probably invite many requests from counsel to waive the limit. However, a new, and yet untested, New Jersey rule may prove valuable in this area: Counsel are permitted to file informal letter briefs if fewer than 20 pages long.[19] The reduced expense of these briefs may tempt counsel to shorten their presentation. A second technique to reduce briefing is to encourage, in lieu of briefs, motions by appellants for summary reversal and motions by appellees for summary affirmance. The Court presently permits these motions, but they are not specifically mentioned in the Court's rules.[20] Whether additional use of summary procedures would significantly reduce the judges' workload is uncertain because there have been no studies in this area. The amount of relief depends on how often the motions are granted; those refused actually require additional work by the Court.

A procedure that would, without question, relieve the judges of time required to read briefs and records is the Arizona experiment. In this experiment, which will be described more fully in the next chapter, decisions were made without transcripts or full briefs. The judges' information came mainly from oral argument, supplemented by a short staff memorandum. This procedure, however, has not been adopted by any court, and it is seemingly predicated on the assumption that full-scale review is possible in a higher level appellate court, a possibility not available if the procedure were adopted by the Court of Appeals.

In summary, several schemes to limit appellate court workload by

decreasing the amount of paper presented might prove helpful should the Court of Appeals join those few courts that have experimented with these procedures. However, information about the effectiveness of these procedures is lacking; there is no indication that any or all of them would make more than a small dent in the overall workload of the Court of Appeals.

5) Less Judge Attention to the Briefs and Records

In this section we come to the final departure from the traditional appellate process: judicial decisions with only a cursory review of the parties' presentations. This topic is elusive. Judges do not often state that they decide cases without reviewing the briefs or records, and one would not expect an acknowledgment of the practice. The potential shortcuts are numerous, and many depend greatly on the use of staff attorneys or law clerks.

Some or all of the judges deciding a case could refrain from reading the briefs or the record. Probably the only common practice in this regard is leaving study of the record to the judge assigned to write the opinion. In some courts, at least in the past, the non-assigned judges have also delegated brief reading to the judge assigned to write the opinion;[21] the obvious threat is that the court's supposedly collegial decisions are actually made by one person. Study of the record might be left solely to the law clerks or staff attorneys. Finally, all study of the parties' presentations could be left to staff aides, whose memoranda would then be the judge's sole source of information about the issues. Any of these

procedures could be moderated somewhat by reliance on the staff or assigned judge in the first instance, supplemented by a quick review of the briefs or by attendance at oral arguments.

There are, of course, objections to these shortcuts. ABA Appellate Standard 3.34 states that "Each judge who is to participate in an appeal should read the briefs and become familiar with the record, the parties' contentions, and the principal authorities relevant to the questions presented." Excessive reliance on staff is a special source of anxiety among students of the appellate courts. There are constant warnings against bureaucratization of the courts and delegation of decisions traditionally made only by judges.[22] Perhaps the most spirited warning is this statement by Professor Leflar:

> In no case should the availability of memoranda, whether prepared by staff or another judge, serve as an excuse for a judge to fail to read briefs before cases are submitted either with or without oral argument. It is the responsibility of each judge to read the briefs; the memorandum is a supplement, affording additional and independent analysis. In his part of the decisional process, each judge should be able to take into account all the relevant material, both adversary and from other sources, that will aid him in reaching a sound conclusion. Only a lazy or badly overburdened judge will rely on staff memoranda without checking them. To use a staff memorandum as a basis for decision without such a checkup would be an abdication of judicial responsibility.[23]

Consideration of these sentiments leads to the conclusion that the addition of massive staff help as described in the preceding chapter probably cannot greatly increase the productivity of the Court of Appeals. The staff may improve the Court's decisions by supplementing counsel as a source of information. But if the judges

continue the traditional practice of reviewing thoroughly the parties' presentations, rather than relying on memoranda, it is unlikely that additional staff help can appreciably lighten the work required of each judge in each case.

6) Conclusion

This chapter has discussed a wide variety of deviations from traditional appellate procedures designed to help judges cope with massive caseloads by spending less time on each case. Most are recent innovations, adopted by high-volume intermediate courts. Without doubt, congestion in the Court of Appeals could be eliminated by adopting a program of such radical deviations. But the changes that would provide relief sufficient to meet the workload crisis are those that are the most unsuitable for a high court. Decisions by two-judge panels or by single judges are obviously improper in view of the severe drawbacks of any type of panel decisions. While opinion publication could be restricted somewhat further under the ABA Appellate Standards suggestions, the drastic curtailment needed for substantial relief cannot be recommended and would be virtually unique among high courts. Likewise, decisions without opinions or with staff-authored opinions would depart too much from accepted appellate processes. Also delegating study of the attorney's contentions to court staff is totally unacceptable. On the other hand, some changes might improve efficiency without depreciating the quality of justice, but these hold little promise as answers to the workload problem. In

particular, the experimental procedures designed to reduce record and brief length are still untested; and even if they prove worthwhile, they represent minor adjustments to the appellate process rather than the major relief mechanisms necessary.

CHAPTER VII

POSSIBLE SOLUTIONS: DECREASING THE NUMBER OF APPEALS

The preceding three chapters have discussed means to increase the number of judges on the Court of Appeals and means to reduce the time each judge spends on a case. The third broad type of solution to the Court's caseload problem is to reduce the number of appeals it must decide. One such method is to create an intermediate court; that will be left to the next chapter. The present chapter will outline a variety of other strategies: dissuading some litigants from appealing, increasing the Court's discretionary jurisdiction, and routing appeals to the Superior Court.[1] An additional way to reduce appeals, the prehearing settlement conference, was discussed in Chapter II and will not be considered again here.

1) Discouraging Appeals

In recent years there have been several proposals designed to limit the number of appeals, especially what are often called "meritless appeals," by reducing incentives to appeal. None has been shown to be effective, but they do merit serious consideration.

The first suggestion is that appellate courts routinely sanction attorneys or litigants in civil cases for bringing appeals that have little chance of success.[2] Provisions for such sanctions, typically granting the appellee damages or double costs, are rather common. But they have been seldom used.[3] Probably the most important objection to the routine use of such sanctions is that they may be awarded, or

appear to be awarded, arbitrarily. The standards for applying them are, and probably must be, imprecise. Hence, awarding of costs or damages will depend much on the varying predilections of judges and panel members. Another objection is that the proposals may not greatly reduce the court's workload. Appeals dissuaded by the sanctions would ordinarily contain only issues with clear-cut answers and, thus, would require relatively little court time. Also, the great bulk of meritless appeals are criminal cases, which are not affected by the proposals.

A similar suggestion is to increase the interest rate on civil judgments appealed. The assumption here is that some civil defendants appeal because the interest rate on judgements is lower than the cost of money elsewhere.[4] The present interest rate in the District of Columbia is 6 percent,[5] well below the prime rate. Very little is actually known about the effect of such a differential on the rate of appeal; but it seems unlikely that raising interests on judgments would affect more than a small percentage of the total Court of Appeals caseload.

Disincentives to criminal appeals are more difficult; an indigent defendant is provided free counsel and transcripts irrespective of the merits of his appeal. Professors Carrington, Meador, and Rosenberg have suggested that convicted defendants be given the estimated cost of an appeal should they choose not to appeal.[6] It is unlikely, however, that legislators would look favorably upon any such attempt to "buy off" defendants.

2) Discretionary Jurisdiction

The topic of this section is discretionary jurisdiction upon first appeal, either in appeals from trial judgments in the Superior Court or appeals from administrative agency rulings. Discretionary jurisdiction in second appeals presents separate questions; the next section in this chapter considers the possibility of discretionary jurisdiction from appellate review in the Superior Court, and the next chapter discusses discretionary jurisdiction upon review of intermediate court decisions.

At present the Court of Appeals has limited discretionary jurisdiction. As described in Chapter II, about a tenth of its filings are applications for allowance of appeal, generally small claims cases and minor criminal convictions. These applications are decided by motions panels, and very few are granted full scale review.

There are essentially two models for expansion of discretionary jurisdiction upon first review, a limited expansion proposed by the ABA Standards and the virtually complete discretion now exercised by the Virginia and West Virginia Supreme Courts. Intermediate degrees of discretionary jurisdiction are possible, but as a practical matter these two models point out the principal alternatives.

ABA Appellate Standard 3.80 and Trial Court Standards 2.74 and 2.75 call for appellate review of certain minor civil cases only if certified for review by the trial judge and if granted leave by the appellate court.[7] Generally, these provisions apply to cases involving an amount in controversy of less than $2,500, although an upper limit as high as $10,000 is considered permissible for large urban areas.[8]

The major purpose of this restriction on appellate review is reduction of litigant expense, but it would also reduce appellate court workload, because some appeals would be allowed only if the appellant obtains the permission of both the trial judge and the reviewing court.

Figures cited for a study of the Court of Appeals show that from 1975 through the first half of 1977, some 10.6 percent of the Court's civil appeals involved $2,500 or less.[9] This percentage, if applied to the 1978 filings, would result in 40 fewer appeals of right, or about a 3 percent reduction in the total filings. Hence, the relief would not be large. Even a limit of $10,000 would probably have little effect on the Court's workload, although no substantiating figures are available.[10]

Similarly, review of agency decisions could be made discretionary, especially if the appellant has been given a quasi-judicial review within the agency. The Michigan appellate courts, for example, have discretionary jurisdiction over many administrative agency orders.[11] Agency cases in the Court of Appeals constitute about 12 percent of total filings; thus, the Court's workload would be somewhat alleviated if some or all these were reviewable only upon granting an allowance of appeal. The next section will discuss the agency review workload in more detail.

The second model for discretionary jurisdiction upon first review is found in Virginia and West Virginia, where there are virtually no appeals of right. The supreme courts in these states, as can be seen from Table 6, have very high caseloads per judge. The Virginia Supreme Court is a much studied court,[12] and because much is known about its procedures, it alone will be discussed here. Requests to exercise discretionary

review, called "petitions for appeal" in Virginia, are given a cursory merit review by three-judge panels; the petitions are granted for full scale en banc review whenever the panel believes that the lower court decision is wrong or that the appeal presents major questions of law. The petition is accompanied by a short brief and a full record. The appellant, but not the appellee, is allowed a fifteen-minute oral argument before a panel, which decides whether to grant or deny review without stating its reasons. Denial, of course, is an affirmance of the trial court decision. Granted cases are argued for up to an hour before the whole court, and decided with published opinions.

In view of the high productivity of the Virginia Court (indicated in Table 6), it seems that the Court of Appeals could manage its present caseload with ease if given discretionary jurisdiction and if it adopts procedures similar to those in Virginia. However, there are severe drawbacks. The primary drawback is that, quoting Professor Leflar, "It is almost axiomatic that every losing litigant in a one-judge court ought to have a right of appeal to a multijudge court."[13] ABA Appellate Standard 3.10 also recommends appeal of right from trial court decisions except in the limited category of cases described earlier. The commentary to this Standard, however, appears at first glance to permit the Virginia procedure:

> In some jurisdictions, appellate review is provided through a procedure in which the applicant seeking leave to appeal presents a petition that is considered by a panel of the appellate court; the case is heard by the court as a whole only if the panel grants the petition. So long as the procedure for application involves the essential elements of the opportunity to be heard, this type of procedure in

> substance resembles that in which a matter on appeal is first heard by a division of a court and then considered en banc. The essential elements of the opportunity to be heard in appellate litigation are the rights to: (1) present the record of the proceedings below, (2) submit written argument in the form of briefs, (3) present oral argument except in cases where it has so little utility that it may justly be denied, and (4) thoughtful consideration of the merits of the case by at least three judges of the court. Procedures for appellate review that lack these elements do not provide a true appeal of right.[14]

These four essential elements virtually amount to the decision-making process in a regular appeal, raising the question of whether the Virginia procedure does, in fact, increase the capacity of an appellate court. The key essential element is the fourth; in fact there is considerable doubt that the Virginia three-judge panels do have the time to give thoughtful consideration to most petitions for appeal. "While this system has enabled Virginia to manage with but one appellate court, 'the efficiency' has been achieved at a price to litigants in the quality of appellate justice which most Americans and their lawyers would or should be unwilling to bear."[15] Moreover, it has long been contended by some that the Court is so overburdened that the state needs an intermediate court.[16]

3) Appeals to the Superior Court

A further form of relief - potentially quite substantial relief - to the Court of Appeals is to route many first appeals to the Superior Court. Now, of course, appeals from the Superior Court and, generally, from administrative agencies lie in the Court of Appeals. To replace this route in some cases, the Superior Court could receive appeals from

administrative agencies, or a panel of Superior Court judges could review trial decisions of that Court. Further review in both cases would be by allowance of appeal in the Court of Appeals. A major initial objection to both procedures is that the Superior Court is also heavily congested at present; therefore, additional workload shifted from the Court of Appeals must be accompanied by the addition of more judgeships to the Superior Court. The following discussion will assume some expansion of that Court.

Agency Appeals. A first means of transferring appeals to the Superior Court is to give that Court initial appellate jurisdiction over appeals from administrative agencies. Further review to the Court of Appeals would be discretionary. The Court received 152 agency cases in 1978, or 12 percent of the total filings. Agency cases vary greatly in their degree of difficulty. Forty-three of the 152 cases were appeals from the District Unemployment Compensation Board; these are typically very simple cases, often pro se appeals, and they take little of the Court's time. Most of the remaining 109 cases, however, are among the most time consuming. Their composition is as follows:

18 Police and Firemen's Retirement and Relief Board
16 Rental Accommodations Commission
12 Board of Zoning Adjustment
12 Metropolitan Police Department
12 Alcoholic Beverage Control Board
8 Board of Labor Relations
6 Department of Motor Vehicles
6 Board of Elections and Ethics
4 Office of Housing and Community Development
13 Miscellaneous

Many of these appeals contain long records and important questions of law. Zoning cases are particularly difficult. Hence, initial review of agency cases by the Superior Court might help relieve the Court of Appeals, although it would further burden the already excessively backlogged Superior Court. However, agency cases, other than those from the District Unemployment Compensation Board, often contain important legal issues that govern future agency operations. Thus, the Court would probably grant review of many Superior Court decisions in agency cases. The result would be duplication of work by the trial and appellate courts. Also, the litigants would not receive prompt resolution of their disputes, and agency operations may be hampered because the extended appellate process would leave major issues affecting administrative procedure unresolved for long periods.

Appellate panels. A second, and quite different, type of appellate review that can be assigned to the Superior Court is the use of appellate panels. These three-judge panels would hear appeals from decisions of their colleagues. The judges either would rotate on and off the panels or would sit permanently on panels while also participating in trial duty. (If panel members are permanent, full-time appellate judges, the panels would constitute an intermediate court,[17] the topic of the next chapter.) Such a procedure is rare in this country.[18] State courts of general jurisdiction often hear appeals from courts of limited jurisdiction. But the District, of course, cannot have such a system because it has a single unified trial court. Appeals in the Superior Court must be from the Court itself.

The idea of review panels is an old one. Roscoe Pound recommended in 1940 the following provision for review of court of general jurisdiction decisions:

> Rules should provide for regional or local appellate terms according to the requirements of the court's business. Thus there would be no need of intermediate tribunals of any sort. . . . Three judges assigned to hold the term would pass on a motion for a new trial or judgment on or notwithstanding a verdict, or for modification or setting aside of findings and judgment accordingly (as at common law upon a special verdict). If, as I assume would be true, it proved necessary to limit the cases which could go thence to the supreme court, rules could restrict review to those taken by the highest court on certiorari. . . . But heard before three judges at an appellate term it would not be a mere prefunctory step in review but a real hearing of the questions raised which should enable the case to stop there unless the points of law were serious enough to warrant certiorari.[19]

One benefit of such an organization is that appeals can be decided quickly. Another is that as long as the trial court is not overburdened, sufficient appellate capacity is ensured, since more judges can be assigned to appellate work as the volume of appeals rises.

More recently, a similar proposal, called the "Arizona experiment," has received much attention.[20] In order to demonstrate the feasibility of a quick, simple review in cases not presenting substantial questions of law, the experiment simulated review, using attorney volunteers instead of judges. A panel of attorneys heard oral argument almost immediately after the conclusion of the trial. The record and transcript were not prepared, but the panel was given losing counsel's motion for a new trial and the opponent's answer. Also a short memorandum describing the case was prepared by a law student. The

panel's information, therefore, came mainly from the oral argument. The attorneys on the panel then filled out questionnaires, which sought to determine if the attorneys believed they could reach a decision on the basis of the information received and, if so, what the basis was for decisions. (They did not actually decide the case; this was purely an experiment.) The results, based on 75 cases, were that in only a quarter of the cases the panels felt that they could not decide the issues (generally because they felt they needed the transcript).

This idea for expeditious and inexpensive review is not based on the assumption that trial judges would hear the appeals; but that could easily be the case. A three-judge Superior Court panel could hear the appeal immediately after the initial decision by the trial judge or jury. If the panel felt it could decide without transcript, it would do so, and further review to the Court of Appeals would be by allowance of appeal. If the panel contends that it cannot decide on the basis of the information before it, or if it believes the case involves a significant legal issue, appeal to the Court of Appeals would be by right.[21]

There are several objections to appellate panels composed of trial judges, including both the procedure suggested by Pound and the modification based on the Arizona experiment. Because the Superior Court now has a heavy workload problem, the creation of appellate panels would necessarily require a significant increase in the Court's size. Also, if, as suggested, rotating panels of such judges are used, any one judge would spend only a small proportion of his time on appellate panels and, thus, would not gain the experience needed for efficient appellate

decision-making,[22] especially the ability to write consistently outstanding appellate opinions and to identify quickly the key points from among counsel's various arguments. Even if panel assignments are long enough to permit some development of this expertise — for example, a one-year tour — that expertise would be largely dissipated upon reassignment to trial duty and the subsequent multi-year performance of trial responsibilities. Also, there is the further problem that litigants and lawyers may not view the panel decisions, especially if based on neither full briefs nor a record, as an adequate appellate review.[23] Such decisions are therefore more likely to be followed by applications for allowance of appeal in many cases.[24] Finally, the panel judges would review decisions of their colleagues on the Superior Court. Reversal may hamper the judges' working relationships. Or the panel judges may (or, equally bad, may appear to) be prone to affirm out of desire, probably subconscious, to preserve working relationships.

4) Conclusion

This chapter has discussed means to reduce the volume of appeals in the Court of Appeals. Attempts to discourage appeals by imposing sanctions for meritless appeals or by increasing the interest rates on judgments may provide some relief, but probably not substantial relief. Enlargement of the Court's discretionary jurisdiction, especially by compliance with the ABA Standards, is another potential source of partial relief. Total discretionary jurisdiction, however, presents grave risks to the quality of justice on appeal. Finally, routing some appeals to the Superior Court might be another viable partial solution to the

appellate caseload problem. But it would require enlargement of the Superior Court; and the major means of relief, appellate panels in that Court, is an untested innovation that may well provide inadequate appellate justice.

In all, the changes analyzed here that would provide major relief are of questionable merit, and some require the expense of more judgeships, an expense that could just as well be incurred by creating an intermediate court. The other relief mechanisms, which all involve limited expansion of discretionary jurisdiction in the Court of Appeals, would not, even if all were adopted, allow the Court of Appeals to reduce significantly its delay and backlog.

CHAPTER VIII

POSSIBLE SOLUTIONS: AN INTERMEDIATE COURT

The final form of relief for a congested high court is the creation of an intermediate court. At present 29 states have intermediate courts, and several more are actively considering whether to create them. This chapter will discuss in detail the many arguments advanced for and against an intermediate court. The major argument for creating such a court is the relief afforded the high court. A major drawback is the delay and litigant expense resulting when an appeal is subjected to a second review, and another is the expense of additional judgeships.

This chapter will also discuss in detail the various arrangements possible in a two-tiered appellate system. Intermediate courts vary greatly in size, jurisdiction, and other features. Under the most common arrangement, the supreme court receives some appeals directly from the trial court; but most appeals are filed initially in the intermediate court, and its decisions can be reviewed by the supreme court through the exercise of discretionary jurisdiction. Within this general model there are many features peculiar to only one or a few states, and several states have intermediate court systems quite unlike the general model. Some supreme courts must accept many appeals from the intermediate court. A few states have separate courts for criminal and civil appeals. Finally, supreme court justices in a few other states apportion the appellate caseload between the supreme court and the intermediate court. Some of these arrangements become quite complex.

One reason for describing the possible ways to organize a two-tiered appellate system is, of course, to help select the most suitable arrangement for the District of Columbia should it be decided that an intermediate court is the best solution to the Court of Appeals workload problem. Equally important, a thorough understanding of the possible arrangements is necessary before one can decide whether an intermediate court is the best solution; the actual decision whether to create an intermediate court may well hinge on the selection of an arrangement suitable to the District.

This chapter will first outline the general arguments for and against intermediate courts. Then it will describe the operation of two-tiered appellate systems in the various states, concentrating on the division of jurisdiction between the high court and the intermediate court. Finally, this chapter will outline a system suitable for the District. The following chapter gives the Subcommittee's detailed recommendations for the structure of the intermediate and high courts in the District.

1) Benefits of Intermediate Courts[1]

The major benefit of an intermediate court is the relief given the high court and the resulting reduction in backlog and delay. The extent of relief depends greatly on how appeals are divided between the two courts. Relief is minor if the intermediate court is small and the supreme court continues to receive most appeals from the trial court. Typically, however, the great bulk of appeals from the trial court are directed to the intermediate court, reducing the volume in the supreme court to a small fraction of its earlier volume, excluding requests to

appeal (that is, requests for the supreme court to exercise discretionary jurisdiction over intermediate court rulings). More will be said later about these jurisdictional arrangements.

The extent of immediate relief depends on whether appeals pending in the supreme court can be transferred to the intermediate court. Supreme court congestion can be eliminated overnight if almost all pending cases are transferred to a new court. But if the supreme court must retain jurisdiction over appeals already filed, the court may require several years to eliminate its backlog.

There is no doubt that the majority of supreme court judges consider intermediate courts an important way to reduce delay and backlog. A 1974 survey by the American Judicature Society found that about 70 percent of the appellate judges in states without intermediate courts believed that an intermediate court would reduce delay, and most of them believed that it would reduce delay significantly.[2] Eighty percent of the supreme court judges in states with intermediate courts said that the intermediate court had "very significantly" reduced the supreme court caseload, and only four percent said that no reduction had resulted.[3]

Exact information about the reduction of supreme court workload and delay is difficult to obtain. No comprehensive study has attempted to study the caseloads before and after the jurisdictional changes. The information available from a few states uniformly shows substantial decreases in high court filings.[4] But these statistics are difficult to interpret because one cannot easily measure the increased difficulty of the average appeal decided on the merits after a court is given discretionary jurisdiction, or measure the effort required to decide

requests for appeal. Above all, as was said, the amount of relief depends substantially on the particular jurisdictional arrangement, generally unique to each state.

Scattered information is available from a few states about some aspects of supreme court delay before and after the creation of an intermediate court. Delay reductions have been fairly large, though one cannot with any certainty claim that the reductions are caused by the jurisdictional changes. The time from docketing to decision in the Maryland Court of Appeals decreased from 9.4 months in fiscal year 1966-67 to 7.6 months in 1968-69 after the intermediate court was established in 1967. Similarly, the time from receipt of transcript to decision in the New Mexico Supreme Court decreased from 14.5 months to 10.5 months between 1966 and 1968. The time from filing to disposition for criminal cases in Colorado decreased from 27 to 15 months after the intermediate court was created. The time from notice of appeal to decision in the Oregon Supreme Court actually increased from 418 days in 1968 to 468 days in 1970 after an intermediate court was created in 1969; but after 1970 decision times rapidly declined to below 300 days by 1975. Finally, Iowa Supreme Court delay from the time appeals were ready for submission to decision decreased from a 12.2 month average in 1977 to 6.5 months the following year after an intermediate court was created late in 1976.[5] (As explained in the next section, creation of an intermediate court would also decrease the total time required for final disposition in the great majority of appeals, whether filed in the intermediate court or supreme court).

A major portion of relief to a supreme court derived from an intermediate court is the difference between the work required to decide appeals on their merits and the work required to decided requests to appeal from the intermediate court. The difference is probably very large, but information is scanty and subject to dispute among judges. As far back as 1957, Justice Traynor said that the "consideration of these petitions is a major task" in the California Supreme Court.[6] Justice England of the Florida Supreme Court, however, estimates that the petition for review process requires less than a tenth of his time. He estimated that an average of roughly twenty minutes is required for each petition, or less than five percent of his time needed for a case decided on the merits.[7] This estimate suggests that discretionary jurisdiction can provide enormous relief, but whether it is typical of other judges or other courts is not known.

An important additional benefit from an intermediate court, and the concurrent discretionary jurisdiction in the high court, is that the high court judges can focus on their law-making function. Only a minority of Court of Appeals cases have law-making significance. The Court, as discussed earlier, places about 40 percent of its appeals on the summary calendar; and it decides about 60 percent without published opinion (also, some opinions are published because the lower court is reversed or the decision is not unanimous, not because the issues are important). The Court docket, thus, presently contains far too many cases that need not be addressed by a high court. Correction of error can be left to the intermediate court when the issues involved have no precedential importance. Presumably, then, the high court justices can produce a

Table 13

REQUESTS TO APPEAL FILED AND GRANTED
AS PERCENT OF INTERMEDIATE COURT DECISIONS

	Year	Intermediate Court(s): Number of cases decided by opinion	Supreme Court: Number of requests to appeal	Percent of intermediate court decisions	Number of requests granted	Percent of intermediate court decisions
Alabama	1976-7	NA	292	NA	62	NA
Arizona	1978	1,223	664	54%	39[b]	3%
California	1977-8	6,093	3,140	52%	297	5%
Colorado	1977-8	652	353	54%	NA	NA
Florida[a]	1977	NA	1,196	NA	NA	NA
Georgia	1977	1,372[c]	404[c]	29%	73[d]	5%
Illinois[a]	1977	3,469[e]	918	26%	138	4%
Indiana	1977	737	195[f]	26%	19[g]	3%
Iowa	1978	382	137	34%	21	5%
Kansas	1977-78	305	112	37%	14	5%
Kentucky	(new intermediate court)					
Louisiana	1977	NA	NA	NA	NA	NA
Maryland	1977-8	1,010	491	49%	92	9%
Massachusetts	1975-6	286	115[c]	40%	12	4%
Michigan	1976	1,953	NA	NA	NA	NA
Missouri[a]	1976-7	1,095	315[f]	29%	69	6%
New Jersey[a]	1977-8	3,032	866	29%	82	3%
New Mexico	1978	350	174	50%	56	16%
New York[a]	1977	6,699	NA	NA	NA	NA
North Carolina[a]	1978	1,038	422[f]	41%	56[b]	5%

Table 13 (continued)

	Year	Intermediate Court(s): Number of cases decided by opinion	Supreme Court: Number of requests to appeal	Percent of intermediate court decisions	Number of requests granted	Percent of intermediate court decisions
Ohio[a]	1977	5,337	1,221	23%	111	2%
Oklahoma (civil)	1977	NA	181	NA	39	NA
Oregon	1978	1,818	408	22%	45	2%
Pennsylvania	1977	2,241	844	38%	118	5%
Tennessee	1977	1,424	647	45%	98	7%
Texas (civil)	1978	1,736	869	50%	97	6%
Washington	1977	694[h]	291	42%	NA	NA
Wisconsin	(new intermediate court)					

a These courts receive a sizeable number of appeals of right from the intermediate court.

b The number decided by opinion is substituted for the number granted.

c This figure is from W. Kramer, Comparative Outline of Basic Appellate Court Structure and Procedures in the United States (1978).

d This figure is from J. Weintraub and P. Meriwether, Analysis of Cases and Numerations of Error Decided by the Supreme Court of Georgia, September 1977-August 1978 12 (Georgia Supreme Court, 1978). The figure is for the year ending August, 1977, not the calendar year.

e This figure is the number of intermediate appellate court decisions by opinion and by Rule 23 order.

f This figure is the number of petitions disposed of, rather than the number filed.

g This figure is the number of civil petitions granted plus the number of criminal petitions not denied and decided with opinion.

h This figure is the number of opinions issued by the intermediate court, and it may include minority opinions.

wiser and more coherent body of law. As a practical matter, the actual effects here are all but impossible to document. Not much is known about whether the justices actually attempt to concentrate on law-making, as opposed to error correction, after an intermediate court is created.[8] Even less is known about whether the additional time available for law-making actually results in better law, but only because the quality of law is difficult to measure. Nevertheless, there is nothing that might counter the common sense presumption that more attention by the judges to law-devlopment will greatly benefit the jurisprudence of the District.

The establishment of an intermediate court is, more than anything else, a way to increase the number of appellate judges without enlarging the court of last resort. Such an enlargement, as was discussed in Chapter IV, may well endanger the consistency of the court's decisions and the law of the jurisdiction. Intermediate court decisions, especially if the court sits in many three-judge panels, may also conflict; but the inconsistencies can be resolved by the top court.

2) Drawbacks of Intermediate Courts

These benefits must be weighed against a rather extensive list of drawbacks. Probably the most important is the delay and expense of a second appeal. That problem, of course, does not exist when a second review is not sought. Table 13 gives available statistics for the number of decisions in intermediate courts and the number of requests for appeal.[9] Generally, further review is sought in less than half of the cases decided by an intermediate court. The median for the 19 states

TABLE 14

FILINGS AND DISPOSITIONS OF REQUESTS TO APPEAL:

	Year	Requests filed	Requests disposed of	Requests granted	Percent granted
Alabama	1976-7	292	292	62	21%
Arizona	1978	664	655	39[a]	6%
California	1977-8	3,140	3,140	297	9%
Colorado	1977-8	353	N/A	N/A	N/A
Florida	1977	1,419[b]	1,338	N/A	N/A
Georgia	1977-8	N/A	422[c]	52[c]	12%
Illinois	1977	918	880	138	16%
Indiana	1977	N/A	195	19[d]	10%
Iowa	1978	137	118	21	18%
Kansas	1977-8	112	91	14	15%
Kentucky	(new intermediate court)				
Louisiana	1977	N/A	N/A	N/A	N/A
Maryland	1977-8	491	491	92	19%
Massachusetts	1975-6	115[e]	N/A	12	(10%)
Michigan	1976-7	N/A	N/A	N/A	N/A
Missouri	1976-7	N/A	315	69	22%
New Jersey	1977-8	866	698	82	12%
New Mexico	1978	174	167	56	34%
New York	1977	N/A	N/A	N/A	N/A
North Carolina	1978	N/A	422	56[a]	13%
Ohio	1977	1,221	1,254	111	9%

Table 14 (continued)

	Year	Petitions filed	Petitions disposed of	Petitions granted	Percent granted
Oklahoma (Civil)	1977	181	188	39	21%
Oregon	1978	408	302	45	15%
Pennsylvania	1977	844	N/A	118	(14%)
Tennessee	1977	647	610	98	16%
Texas (Civil)	1978	869	899	97	11%
Washington	1977	291	261	N/A	N/A
Wisconsin	(new intermediate court)				

a. The number decided by opinion is substituted for the number granted.

b Only 1,196 petitions were for review of intermediate court decisions; the rest were petitions for review of trial court or agency decisions.

c These figures are from J. Weintraub and P. Meriwether, Analyses of the Cases and Numerations of Error Decided by the Supreme Court of Georgia, September 1977-August 1978 12 (Georgia Supreme Court, 1978)

d Number of civil petitions granted plus the number of criminal petitions not denied and decided with opinion.

e This figure is from W. Kramer, Comparative Outline of Basic Appellate Court Structure and Procedures in the United States (1978)

with available information is about 40 percent. The reason why most litigants losing in the intermediate court do not seek further review is probably the lack of any major issue that might prompt the supreme court to accept review.

Secondly, only a small minority of cases in which further review is sought are accepted by the supreme court. As is shown in Table 14, the percentages vary from 6 percent to 34 percent, although information is not available for several states.[10] The median is about 15 percent. Turning back to Table 13, it can be seen that the infrequent acceptance of review means that very small percentages of intermediate court decisions are given a second full-scale review. The percentage is probably five percent or less in most states.[11] In addition the absolute numbers are small; rarely are over 200 appeals given a second review, and in some states the number is astonishingly small, for example 12 in Massachusetts and 14 in Kansas. The number of second appeals depends on the particular jurisdictional arrangement in the state, a topic that will be discussed later at length.

The problems of delay and expense due to the creation of a second appellate level are substantial only in cases granted review by the high court. The extra expense is typically slight when requests for review are denied, as they are in the vast majority of cases. In state courts, as opposed to the U.S. Supreme Court, counsel can usually submit the same briefs that were filed earlier in the intermediate court, or a slightly revised version of them; and oral arguments are extremely rare at the request-for-appeal stage. The additional delay, likewise, is not great. Supreme courts, because they do not hear arguments or write opinions

concerning requests-for-appeal, probably dispose of most requests within a few months. This is supported by the little statistical information that is available on the point: In the early 1970's the time from intermediate court final decision to grant or denial of requests for review averaged about two months in Louisiana and about five weeks in Alabama.[12] Assuming the intermediate court is current, the total time to final decision on appeal is less than the time in an overburdened high court if no intermediate court existed. Thus, if an intermediate court in the District were to decide a case in 9 months, a typical period for a court with sufficient judges, and if a request for appeal were filed and denied in the District's high court, the total time for the appeal should be less than a year. If the intermediate court decisions were made in four months, the time suggested by ABA Appellate Standard 3.52, the total time would be half a year. In contrast, the average time from filing to decision in the Court of Appeals is now 15.5 months. This delay may be exceeded, but only slightly, in the few cases accepted for full-scale review by the high court.

A second major problem that would be caused by an intermediate court is the uncertainty whenever questions of law have been decided by the intermediate court but not by the high court. Several years may pass between an intermediate court decision announcing a new law and an authoritative ruling on the issue by the high court. Similar problems, alluded to earlier, can arise if the high court does not diligently search for and resolve conflicting decisions in the intermediate court. Much attention has been given to these problems in the federal judicial system,[13] but no study has attempted to determine their extent in the

states. The problems are mitigated if an intermediate court has a rule, similar to the rule in the Court of Appeals, that a panel must follow precedent created by an earlier panel decision. Also, the problem of potential panel conflicts is far less troublesome in the typical cases that would be decided by intermediate courts. Most important, any such conflicts would be subject to resolution by the high court.

A third major drawback is government expense. The creation of an intermediate court necessarily requires more judges, more staff, and more office space. This expense, however, is also required by some other possible solutions to the Court of Appeals workload problem, especially enlarging that Court or routing appeals to the Superior Court. The exact expense would depend on the size of the new court. Calculations will be deferred to later in the chapter after a suggested court size is given.

A fourth drawback is the possible unattractiveness of intermediate appellate court judgeships. Their prestige, it is sometimes claimed, is less than that of supreme court judgeships. The Subcommittee members, however, are knowledgeable about the District of Columbia bar, and they expect no shortage of qualified lawyers interested in judicial service on an appellate body. This judgment is based on several factors. The District of Columbia courts have long attracted able judges, and there is no reason to expect a change in this regard. The Court Appeals attracted able judges when it was an intermediate court, below the D.C. Circuit Court of Appeals, before the 1971 court reorganization. Four judges originally appointed to the old Court of Appeals have recently been scrutinized by the District of Columbia Commission on Judicial Disabilities and Tenure, and all were found to be "exceptionally well

qualified" — the highest rating available. Furthermore, the present Superior Court judges compose one pool of well-qualified potential applicants, because undoubtedly some of them would welcome a shift to intermediate court judgeships. The District also has a large and able bar from which well-qualified nominees could be drawn, particularly if the D.C. Judicial Nominations Commission should make an active search for potential applicants when it is considering the filling of vacancies for a new court.[14]

A fifth and last drawback often arises whenever the high court continues to have substantial mandatory jurisdiction after creation of an intermediate court. The division of jurisdiction between appellate courts, as delineated by statute or constitution, may be unclear for many appeals, leading to confusion among the bar and to additional issues that must be decided by the supreme court. More important, the jurisdictional division is very likely to cause uneven distribution of workload between the supreme court and the intermediate court. Except in the largest states, the intermediate court is usually rather small, about the same size as the supreme court; hence, the latter must receive a sizeable portion of the initial appeals to prevent excessive backlog in the intermediate court. Statutory or constitutional jurisdictional alignments based on the composition of the appellate caseload in one period may not be suitable a decade or so later; some types of appeals (for example, felony convictions in recent decades) may increase at a much faster rate than others, leading to disproportionate backlogs in the appellate courts.

3) Jurisdictional Arrangements

The magnitude of these many benefits and drawbacks depends largely on the type of jurisdictional arrangement selected when adding a second appellate level. There is a great variety of such arrangements. The major topic for the rest of this chapter is what type of appellate system would be best for the District of Columbia. The variety of models available makes this a complex topic.

The major questions in this section are: a) Should some appeals from the trial court continue to be filed directly in the high court? If so, what types of appeals? b) Should the high court be required to review, or be precluded from reviewing, some intermediate court decisions? c) Should there be a specialized criminal appellate court? d) Should appellate jurisdiction be delineated by statute or by court rule?

Much of this discussion is based on a study conducted for this report of the jurisdiction of the 28 state supreme courts in states with intermediate courts. The body of that study, which contains a state-by-state description, has been placed in Appendix B. Reference to it will be made in the text below.

a) Direct Appeals to the High Court. There are three basic systems for apportioning first appeals between an intermediate court and a court of last resort: 1) all, or virtually all, appeals of right are filed initially in the intermediate court, 2) initial appeals are filed either in the intermediate court or in the high court according to the subject matter of the case, and 3) the high court screens appeals and apportions them between itself and the intermediate court. The second and third are not totally mutually exclusive, but the first is inconsistent with the other two.

1) ABA Appellate Standard 3.10 favors the first system. It states that all appeals, with the possible exception of appeals from death sentences, should lie initially in the intermediate court.[15] The reason is, "Provisions conferring a right of direct review before a supreme court . . . have invariably resulted in inappropriate allocations of the supreme court's resources and sometimes in distortion of procedural rules in the attempt to extend or contract the scope of such provisions."[16] The inappropriate allocation results when the high court must decide many cases without substantial legal issues. The Standards emphasize that high courts should concentrate on the law-making function, and intermediate courts on the dispute-deciding function.[17] That goal is best reached if the supreme court can select, through the exercise of discretionary jurisdiction, the cases it hears.

On the other hand, there are some drawbacks to the ABA suggestion. The intermediate court, because it hears all appeals, must be larger (and thus more expensive) than if a substantial number of first appeals are filed in the high court. In the District the court would have to be at least as large as the present Court of Appeals and probably as large as twelve judges, considering the fact that the Court cannot now manage its caseload.[18] (As will be discussed later, an intermediate court half that size may be adequate if the high court hears many initial appeals.) In addition, there may not be enough cases with important issues to occupy fully the high court.

A second, and obvious, objection is that there are more second appeals if all first appeals go to the intermediate court. The number of

second appeals depends on how efficiently cases with major issues are routed to the high court for initial review. As will be seen later, and as has been suggested earlier, proper allocation of cases between appellate courts can nearly eliminate second appeals.

Appendix B indicates that a rather small, but growing, number of states have adopted the ABA model in that all or virtually all first appeals are filed in the intermediate court. These states are California, Michigan, New Jersey, Ohio, Oregon, Texas, and Wisconsin.[19] Oregon and Wisconsin joined this list in 1978. Most of these states are large industrial states with far larger appellate caseloads than the District of Columbia.

2) The second basic type of appellate organization is to divide initial appeals between the intermediate court and the supreme court on the basis of subject matter jurisdiction. This is by far the most common arrangement, existing in 17 states. Typically, initial appeals comprise the bulk of the high court's workload.[20] The types of cases appealed directly to the high court vary greatly from state to state, as can be seen from the descriptions in Appendix B. Direct appeals from death sentences (permissible under the ABA standards) are the most common category, found in 16 states. Nine of the 16 also provide direct appeal from sentences of life imprisonment, and three states allow direct appeal in various types of murder cases, irrespective of the sentence. Direct supreme court review is seldom required in other criminal cases. The exceptions are: all criminal appeals in Louisiana go to the Supreme Court, and defendants in certain major felony cases have appeal of right to the Indiana, Kansas, and Kentucky Supreme Courts.

Seven states provide for direct supreme court review whenever the constitutionality of a statute is questioned, and six more provide for direct review whenever the trial court rules a statute unconstitutional. About half a dozen supreme courts have direct review of specified types of agency cases, especially utility regulation appeals. Three states provide for direct supreme court review in election cases, and three more in cases involving the right to public office. In addition, supreme courts in several states must review various odd types of trial court rulings, for example equity cases in Alabama and certain water cases in Colorado.

Dividing jurisdiction in initial appeals along subject matter lines has several major drawbacks. The jurisdictional alignments, although typically based on judgments about the importance of various types of appeals, can only inexactly route the important issues, especially law-making issues, to the court of last resort. Thus, some appeals with important issues are initially filed in the intermediate court, requiring double appeals. Another problem is that jurisdictional alignment based on a state's appellate caseload in one period very often leads to an overburdened supreme court several years later. As caseloads rise, the supreme court must hear more appeals of right, many of which do not contain important questions and could be decided by the intermediate court. The supreme court's caseload may continue to increase drastically and overwhelm the court. Jurisdictional adjustment, by statute or constitutional amendment, often comes many years or even decades after relief to the supreme court becomes necessary.[21] One way to

alleviate this problem is to give the supreme court the authority to adjust jurisdiction by rule. This will be discussed later.

3) In the third type of appellate system the judges themselves apportion all or a sizeable portion of the cases between the two appellate courts. There are two ways this can be done. Under the first, all appeals are filed initially in the supreme court, which retains some and transfers the rest to the intermediate court. Typically, the court retains the law-making appeals and as many others as are necessary to balance the caseloads of the two courts. This system is used in Iowa, Oklahoma, and to a large extent in Massachusetts.

The second variation is the frequent use of a supreme court's bypass authority. Probably most supreme courts above intermediate courts have the authority to transfer appeals pending in the intermediate court, so that there is, in effect, a direct review from the trial court to the supreme court. The ABA Appellate Standard 3.10 recommends that this authority be used only if the supreme court "determines that the matter involves a question that is novel or difficult, is the subject of conflicting authorities applicable within the jurisdiction, or is of importance in the general public interest or in the administration of justice."[22] These criteria, although imprecise, suggest that bypass authority be seldom used and account for only a small part of the supreme court's caseload.[23] In fact, that appears to be the policy of most supreme courts with bypass authority. Nevertheless, a few do transfer many cases pending in the intermediate courts and, thus, go far beyond the ABA recommendations.[24] Presumably (although there is little information available on this point) these supreme courts attempt both to

relieve the workload of the intermediate court and to transfer cases that would probably be granted discretionary jurisdiction after the intermediate court decision, thus decreasing the likelihood of double appeals.

The advantages of these flexible procedures are that the caseloads of the supreme court and the intermediate court can be regularly adjusted so that neither court has more backlog or unused capacity than the other. Also, second appeals can be kept to a minimum by carefully selecting cases for direct review in the supreme court. A major drawback is that the high court may overburden the intermediate court in order to keep its own caseload light. An additional drawback to the procedures used in Iowa, Massachusetts, and Oklahoma is that the initial screening of cases adds to the appellate process an extra step that may contribute to delay. More important, the supreme court justices must spend extra time to place the cases; however, it is likely that these placement decisions are made with less expenditure of time than decisions on requests to appeal, since a case mistakenly sent to the intermediate court can be reviewed again after the decision below.

b) Review of Intermediate Court Decisions. Another important issue is whether the high court should have complete discretionary jurisdiction over appeals from the intermediate court. In some states the supreme court must grant review of certain types of intermediate court decisions, and in a few states the supreme court is precluded from reviewing restricted categories of intermediate court decisions.

ABA Appellate Standard 3.10 recommends that there be no appeal of right from the intermediate court, with the possible exception of death

sentence appeals. Commentary to that standard states:

> Limiting successive appeals gives recognition to the authority and responsibility of intermediate courts of appeal, to the difference in function between such courts and a supreme court, and to the principle that litigation must be brought to conclusion without undue protraction. The purpose of successive review by a higher appellate court is primarily that of resolving questions of law of general significance. Affording the parties a further opportunity for correction of error is at most a secondary objective.[25]

This policy is followed by the great majority of states with intermediate courts. Seldom is there a second appeal of right based on the subject matter jurisdiction of the case.[26] If there is appeal of right to the supreme court based on subject matter, the appeal should be from the trial court so as to lessen the likelihood of a double appeal. An exception to this statement arises, of course, when a major issue arises for the first time as a result of the intermediate court decision. The court may, for example, rule a statute unconstitutional after it was upheld at the trial level.

Review of intermediate court decisions is also mandatory in a few states if the intermediate court certifies the case to the supreme court or if the intermediate court decision is not unanimous. Certification is a procedure whereby the intermediate court determines that the issues in a case require supreme court attention. In many states, however, the supreme court can refuse to accept cases certified, and the procedure is simply a method by which intermediate court judges can advise the higher court that the issues are important. Only about five supreme courts must take cases certified from intermediate courts.[27] The ABA Appellate Standards approve of the certification, as long as it does not lead to an appeal of right.[28]

A similar procedure, also existing in five states, is appeal of right when there is a dissent in the intermediate court. Except in New Jersey and North Carolina, however, this requirement applies only to certain categories of cases. For example, the appeal of right in Missouri exists only when the dissenting judge certifies that the majority decision is contrary to an earlier decision of the supreme court or intermediate court.[29] In general, however, appeal of right from split decisions is objectionable because the dissent may stem from a disagreement over the facts or from some other factor not relevant to the importance of the legal issues.[30]

A different sort of issue is whether supreme court review of intermediate court decisions should be precluded in certain cases. Such a preclusion is a drastic means of avoiding second appeals and the resulting delay and expense. However, the supreme court's ability to develop and regulate the state's jurisprudence is jeopardized. Florida is the only state that has attempted to make intermediate court rulings final in more than limited categories of appeals, and the state's supreme court has expended much effort to define the limitations of its review.[31]

c) Specialized Criminal Appellate Courts. Four states have specialized criminal appellate courts. Alabama and Tennessee have separate intermediate courts for criminal and civil appeals, and Oklahoma and Texas have separate courts of last resort. Specialized appellate courts might be more efficient because the judges obtain specialized knowledge. However, criminal appellate courts have often been critized.[32] Studies of the Alabama and Tennessee appellate systems

have strongly recommended merger of their civil and criminal intermediate courts.[33] Exhaustive studies of the Federal appellate system and the appellate systems of several states have considered the possibility of creating specialized criminal appellate courts, and all recommended against them.[34] In fact, almost no recognized authority has advocated these courts.[35]

The arguments against criminal appellate courts are numerous. First, the division of an appellate system prevents the even distribution of appellate work among the judges. One court, typically the criminal court, is likely to be overburdened while the other remains current without difficulty.[36] Second, specialized appellate courts, especially criminal courts, have lower prestige than general jurisdiction appellate courts. Hence, they may not attract the best judges. Third, the judges' interests may become too narrow. They may lose touch with overall trends in legal thought and develop arcane language and overly technical rules. Fourth, a specialized judge may believe that his knowledge of the area entitles him to establish policy without due regard to legislation and to rules developed by other courts. Finally, the appointment of judges to specialized courts may be overly influenced by special interest groups. For example, prosecutors or defense attorneys may take an exceptionally strong interest, and play a strong role, in the selection of judges on a court of criminal appeals.

d) Jurisdiction by Statute or by Rule. A last major issue addressed here is whether appellate jurisdiction should be regulated by statute, by court rule, or by a combination of the two. (State court jurisdiction is often regulated by constitution, an alternative not now applicable to the

District of Columbia.) At least eight supreme courts have authority to regulate appellate jurisdiction through their rule-making powers.[37] The authority, however, is usually accompanied by a statutory or constitutional requirement that there be appeal of right to the supreme court in certain categories of cases; and the rule-making authority is limited to establishing additional categories of appeals of right to the top court. The benefit of jurisdictional rule-making authority is that the high court can adjust the appellate workload between itself and the intermediate court so that neither becomes more congested than the other. On the other hand, there is the danger, discussed above, that the supreme court will overburden the intermediate court. Also, the legislature may be wary of delegating this important authority.

4) District of Columbia Appellate System

Having considered the various methods of establishing two-tier appellate systems, it is now possible to outline a system for the District of Columbia. In the first place, the requirement advocated by the ABA Standards that almost all appeals be decided initially in the intermediate court is probably not suitable for the District. Initial appeals should be divided between the two courts so that the new judgeships required and the number of double appeals are kept to a minimum.

These goals require that a substantial number of appeals from the Superior Court and administrative agencies be reviewed initially by the District of Columbia high court. The jurisdictional arrangements should remain flexible so that the caseloads of the intermediate court and high

court can be adjusted as volume requires. There should be no legislatively mandated appeals of right to the high court. However, legislation should give the court jurisdictional rule-making authority. The court could either screen all initial appeals and apportion them between the two courts,[38] or it could issue rules that divide filings on the basis of the subject matter of the cases.[39] In any event, the high court would have discretionary jurisdiction over intermediate court decisions, but it would grant very few requests to appeal. That is, double appeals would be rare occurrences.

The high court should also have authority to transfer cases presently pending in the Court of Appeals to the intermediate court. Without this authority, the high court would remain backlogged for a year or two, and the intermediate court judges would have little business for several months while they await the briefs in cases filed after the court is established.

For reasons given earlier, the intermediate court and the high court should have both civil and criminal jurisdiction. Moreover, the high court should be able to review any intermediate court decision. But its review should be purely discretionary. It should not be required to review any decisions below, and it should not be required to hear a case simply because the intermediate court is not unanimous. The intermediate court should be able to certify a case, either before or after rendering a decision, but the certification should not be binding on the high court.

The details of the internal operations of the two courts should be left to regulation by court rule. The intermediate court would almost

surely sit in three-judge panels, as almost all intermediate courts do.[40] The high court, especially if reduced to seven members, would hear all appeals en banc. Also, the chief justice should continue to have authority to assign temporarily judges from one court to another. Thus if the intermediate court becomes congested, or the high court is shorthanded because of a vacancy or disqualification, lower court judges can be assigned. In addition, the chief judge should have authority to assign intermediate court judges to the Superior Court.[41] Therefore, the Superior Court could be relieved if the creation of an intermediate court should provide more than adequate capacity to handle the appellate caseload.

5) Size and Cost of an Intermediate Court

The final questions to be addressed are the size and expense of an intermediate court. In general, the expense depends almost totally on the number of judgeships. Standards for determining the number of judges on an intermediate court are almost entirely lacking.[42] Perhaps the best way to estimate the size is by estimating the number of appellate judges needed in the District. If, as suggested, the initial appeals would be divided between the two courts, and there are to be very few second appeals, then a good way to determine the judgeships needed is to use the median number of appeals per judge in state supreme courts not above intermediate courts. That number, taken from Table 6 in Chapter III, is about 100 appeals filed per year. Using this standard, the District would need about 14 appellate judgeships, since current Court of

Appeals filings numbered 1,429 cases a year.[43] Expected caseload increases, however, may require more judges.

If the high court has nine judgeships, as does the present Court of Appeals, the intermediate court would then have five judgeships. On the other hand, it would be best to reduce the higher court to seven judgeships, the size suggested by the ABA Standards.[44] This reduction could be accomplished by abolishing two present Court of Appeals judgeships upon the retirement of two judges. The intermediate court would then have 7 judges.

The cost of creating a seven-judge court would closely approximate the cost of seven present Court of Appeals judgeships. The intermediate court judges would receive nearly the same, if not the same, salary as the high court judges, and they would probably be given the same number of law clerks and secretaries. The present salary of a Court of Appeals judge is $51,750, that of a law clerk, $19,263, and that of a secretary, $17,532. The salaries of seven judges, fourteen law clerks, and seven secretaries total $754,654. A seven-judge intermediate court assumes reduction of the present Court of Appeals to seven judges as vacancies occur. Therefore, in the long term such a seven-judge intermediate court would involve the addition of five judges, or $539,040 at the present salary levels of judges and their staff.

The major uncertainty is the cost of office quarters. The present Court of Appeals facilities do not contain space for more judges. The intermediate court judges would have to be located outside the new courthouse or room would have to be made available there by displacing some of the present occupants. Rental quarters for the intermediate

court judges, based on current prices for office space in the vicinity of the new courthouse, would cost about $10,500 per judge (1,500 square feet at seven dollars per square foot) or $73,500 a year. In addition, supplies and overhead expenses would amount to about $25,000. An initial, one-time expense of about $5,000 per judge, or $35,000 for seven judges, would be required for furniture, books, and similar expenses.

Other costs would be negligible. The intermediate court could share the present appellate courtroom with the high court. The present Court of Appeals clerk would serve as clerk to both courts (supreme courts and intermediate courts located in the same city often share clerks). Not only would a unified clerk's office save expenses, but it would facilitate coordination of the two courts, especially in the division of jurisdiction. The present clerk's office would need few additional personnel because of the creation of an intermediate court, largely because the Court of Appeals' new computer would enable the clerk's office to monitor appeals before both courts. Nevertheless, it is anticipated the new court will necessitate one or two new positions in the clerk's office, especially if the caseload continues to rise.

The total yearly expense would, thus, be about $700,000 for the new seven-judge court, including salaries, office quarters, overhead, and some expansion of the clerk's office. This figure does not include the $35,000 initial start-up expense, nor does it include the cost of two judges on the Court of Appeals until that court is reduced to seven judges.

The cost of the new court would be roughly comparable to the cost of other ways to increase judicial capacity at the appellate level.

Expansion of the Court of Appeals sufficient to meet the workload would require the creation of about the same number of judgeships and would, thus, be about as costly. Frequent use of Superior Court judges on the Court of Appeals and appellate panels in the Superior Court both would require expansion of the Superior Court to compensate for the judges taken from present Superior Court duties. The expense per additional judgeship would be only slightly less, due to the lower salary ($49,050) of Superior Court judges and to the judges' one law clerk apiece, instead of two (although the suggested two clerks per intermediate court judge is not an absolute requirement). The need for office space and the other expenses would differ little from that of an intermediate court.

The $700,000 per year cost of the new court is not large in comparison with other expenditures of the District government. It is only 2.4 percent of the total estimated court budget for the District, 0.2 percent of the estimated public safety and justice operating budget, and 0.04 percent of the total estimated District budget for fiscal year 1980.[45]

CHAPTER IX

CONCLUSION AND RECOMMENDATIONS

1) Synopsis

The Subcommittee on the Workload of the District of Columbia Court of Appeals has determined that an intermediate appellate court should be established in the District of Columbia. This is the unanimous view of the Subcommittee's ten members as well as its four consultants, and the National Center for State Courts joins in the recommendation.

Two problems above all persuade the Subcommittee of the need for structural reform. First, the Court of Appeals, by sitting in panels at virtually all times, operates in a fashion entirely appropriate for an intermediate appellate court. However, the Subcommittee finds the Court's resolution of virtually all its cases by majority vote of three-judge panels an altogether unacceptable modus operandi for a jurisdiction's highest court. Second, the Court's 15.5 months average delay from notice of appeal to decision is far too long, roughly three times longer than that contemplated by the ABA Appellate Standards. These two problems are products of an excessively high caseload, which, in the Subcommittee's opinion, is unlikely to abate. The Court's caseload is much higher than that of most courts of last resort that are not aided by intermediate courts. The Subcommittee, therefore, concludes that the Court cannot function in a manner suitable to a high court unless it is given substantial caseload relief.

The Court of Appeals panel system, the excessive delay, and the high caseload call for a major structural change in the local court system. The Subcommittee has thoroughly studied a large number of possible solutions to these problems and has concluded that the correct solution is the creation of an intermediate court. The other possibilities are insufficient to provide either the needed numerical relief or the appropriate quality of appellate justice in the District. This recommendation is not advanced as a perfect solution to the court of appeals workload problems. As stated in the prior Chapter, arguments can be made for and against intermediate courts. But the Subcommittee firmly believes that a two-tiered appellate system, even though it would be the second restructuring of the District appellate courts since 1970, is the best current solution to the workload problem.

This final chapter will summarize in more detail the reasons for the Subcommittee's decision and will conclude with specific recommendations for the structure of the intermediate court and District of Columbia appellate system in general.

2) Present Problems in the Court of Appeals

The Panel System.* The Court of Appeals is the highest court for the District of Columbia; it is responsible for developing the court-made law of the District. In addition, because it is the only appellate court within its jurisdiction, the Court has an error-correcting function; it determines whether decisions of the Superior Court and the District of Columbia agencies conform with

* The Court's panel system is discussed in Chapter II and in Appendix A.

present law. Both functions are important. Because of the workload pressures, the Court sits in panels on virtually all cases. This is appropriate for error correction. However, having the law-developing function of the Court performed by three-judge panels, sometimes by two of three judges, rather than the full membership of the Court of Appeals, greatly concerns the Subcommittee.

Few state supreme courts compare to the Court of Appeals in panel procedures. Only twelve (or 23 percent) of the 52 state high courts use panels when deciding cases on the merits. More important, the Court of Appeals panel system is virtually unique among high courts: the Court sits en banc only five to eight times a year, or in about one percent of the cases decided; panel size is smaller than a majority of the Court; and panel decisions can be made by less than a Court majority, a practice found in only five other courts. Only one other high court, the Texas Court of Criminal Appeals, regularly decides cases by a two-judge panel majority. Such a panel system, where a small minority of the judges can speak for the Court, is not suitable for a jurisdiction's highest court. The Court has limited opportunity to benefit from the knowledge of all the judges when fashioning precedent. Law development may be influenced by views of the three judges hearing an appeal, views that may differ from the opinion of the full Court. Similarly, there is a substantial threat of conflicting legal pronouncements by different panels and of decisions that are made consistent only by tortured reasoning used to distinguish prior holdings.

For such reasons, ABA Appellate Standard 3.01(a) states that a high court should not sit in panels:

> In hearing and determining the merits of cases before it, the supreme court should sit en banc. Except for those who may be disqualified for cause or unavoidably absent, all members of the court should participate in the decision of each case. The court should not sit in panels or divisions, whether fixed or rotating, or delegate its deliberative and decisional functions to officers such as commissioners.

The commentary gives the following reasons:

> The internal organization of an appellate court should be designed to permit the court to fulfill its functions in the court system. The primary responsibility of a supreme court is that of developing and maintaining consistency in the law to be applied in subordinate courts in the system. . . .In deliberating upon and deciding the legal questions that come before it, the supreme court's entire membership should participate so that its collective professional and intellectual resources are brought to bear in the development of the law. To the extent that such a court divides itself into panels or divisions, it creates possibilities of conflict or inconsistency in its decisions.[1]

The commentary notes that some state supreme courts use panels for many appeals, hearing only important or difficult cases en banc. But this system is considered unsatisfactory:

> Experience indicates, however, that such an arrangement may persist long after the point has been reached when an intermediate appellate court should have been established. Moreover, internal inconsistency in the court's decisions may be ignored or tolerated to an excessive degree in the hope of avoiding the cost of establishing an intermediate court.[2]

The Subcommittee believes that the panel system has persisted beyond its proper term in the Court of Appeals and strongly recommends that it be abandoned. The Court's present caseload, however, precludes en banc

consideration of many appeals; without the panel system, extreme backlog and delay would develop. En banc consideration of all appeals is possible only if the Court receives the major relief that would be provided by creation of an intermediate appellate court.

Delay.* The second major reason for an intermediate court is the mounting delay in the Court of Appeals. The average time from notice of appeal to decision is now 15.5 months. In 1971 the average time was 8 months, and delay has increased substantially in every subsequent year. The present 15.5 months is much longer than appellate decisions should take, roughly three times longer than is specified in ABA Appellate Standard 3.52. The cause of delay is the high caseload. The delay is not attributable to lack of industry or to inefficient operations. As will be discussed later, the judges face a caseload larger than that of most other courts, and they have adopted modern and efficient internal operating procedures. Indeed, the Court is one of the most productive high courts in the country. The Subcommittee concludes that caseload reduction, such as that resulting from creation of an intermediate court, is an essential prerequisite to delay reduction.

Caseload. The Subcommittee has compiled considerable statistical information about caseloads in state supreme courts.+ These statistics, while they cannot be treated as exact data, indicate that the Court of Appeals has a far larger total caseload, and a far larger caseload per judge, than most high courts that are not aided by

* See Chapter III, sections 1, 4, and 5.
+ See Chapter III, sections 3 and 5.

intermediate courts. Few other courts have higher caseloads, and most that do have special characteristics: discretionary jurisdiction or exclusively criminal jurisdiction. In addition, the Court of Appeals has a higher caseload than any of the state supreme courts in those jurisdictions where, during the past two decades, steps were taken to create an intermediate court. The workload has forced the Court to adopt major efficiency measures, such as discouraging oral argument and frequently issuing unpublished opinions; and the judges do not have sufficient time to develop fully the number of dissents that court deliberations should ordinarily produce.

The Subcommittee has attempted to forecast future appellate caseloads in the District.* Although Court of Appeals filings decreased slightly starting in 1977, the Subcommittee believes that the overall trend will be greater appellate volume. Population in the metropolitan area and business activity in the District are expected to increase; the Superior Court has developed a large backlog of cases that will probably lead to more trial decisions and more appeals; future legislation, especially a new criminal code, will probably create new sources of appeals (for example, sentence appeals) as well as important new issues that must be resolved by the high court; and the volume of appellate litigation is increasing rapidly throughout the nation.

The Court's already unusually large caseload and the sources of caseload growth are persuasive indicators that structural relief is

* See Chapter III, section 2.

required for the Court of Appeals. The major arguments for an intermediate appellate court remain, however, the inappropriateness of the panel system and the excessive delay, problems that cannot be solved under the appellate system constituted by present District law.

3) Alternative Solutions

Chapters IV through VIII contain the Subcommittee's study of alternative solutions to the Court of Appeals workload problem. Only a brief outline of the arguments will be given here. In sum, the Subcommittee has concluded that no solution, except creation of an intermediate court, is both appropriate and sufficient to solve the workload crisis.

A solution to caseload problems used by some courts - but usually intermediate courts - is curtailment of traditional aspects of the appellate process. The Court of Appeals has already gone far in this direction, as discussed in Chapter II, by eliminating oral arguments and published opinions in many appeals. Very few state high courts have matched the Court in these two respects. The Subcommittee believes that the Court cannot substantially increase its efficiency by further restrictions on oral argument or publication of opinions without endangering the quality of appellate justice.* Decisions by single judges or two-judge panels are not acceptable alternatives;+ in fact, as has been emphasized, the present three-judge panel system is not

* See Chapter VI, sections 1 and 2.
+ See Chapter VI, section 3.

acceptable. Limiting brief or record length may provide some relief, but not enough to make more than a small dent in overall workload.* The last, and most drastic, efficiency measure that the judges might adopt is to decide cases with only a cursory review of the briefs and records, especially through reliance on memoranda written by staff attorneys.+ This measure is inadvisable; the Court of Appeals judges should decide cases based on first-hand knowledge of the parties' arguments. In sum, the Subcommittee believes that the Court has reached the limits of efficiency (and perhaps gone beyond the advisable limits), and it will not recommend new efficiency measures not acceptable for a high court.

The Court's workload might also be reduced by decreasing the number of appeals decided on the merits.[3] Techniques to discourage appeals, such as sanctions against litigants who bring meritless appeals, have not been shown to work elsewhere, and the amount of relief possible is only conjectural.# Replacement of mandatory jurisdiction with discretionary jurisdiction could also reduce the Court's workload since applications for allowance of appeal may be given less attention than cases decided on the merits. The Subcommittee, however, agrees with the consensus in American legal circles that litigants, except in cases involving small sums or minor infractions, should have one appeal of right with careful study of the issues by the judges.¢

* See Chapter VI, section 4.
+ See Chapter V and Chapter VI, section 5.
# See Chapter VII, section 1.
¢ See Chapter VII, section 2.

Another possible means of caseload relief is to route some appeals to the Superior Court, either by transferring some or all agency appeals to that Court or by establishing an appellate panel that would review trial decisions in that Court.* Several factors militate against these alternatives. Many types of agency appeals contain complex and important issues that should be brought initially to an appellate court. The remaining agency appeals do not constitute a substantial portion of the Court's workload, and transferring them to the Superior Court would thus provide little relief. Appeals from trial court decisions to an appellate panel of the same court, especially in major cases, are an unusual practice in this courntry. To adopt such a practice in the District would be a risky leap into an uncertain procedure. Major shortcomings are that the judges may appear somewhat prone to uphold their colleagues' decisions and that the judges would not be assigned appellate duty for periods long enough to obtain and apply appellate decision-making and writing expertise. In addition, adding an appellate function to the Superior Court would require that additional judgeships be created to relieve that already overburdened Court. The Subcommittee believes that additional judgeships created for an appellate purpose should be located in an appellate tribunal.

The remaining possible solutions to the Court of Appeals workload problem involve, as do Superior Court appellate panels, the creation of more judicial capacity. Expansion of the Court of Appeals would increase the Court's ability to handle its workload by increasing the

* See Chapter VII, section 3.

number of panel sittings and the number of judges to write opinions.* No high court in the country, however, has more than nine judges, the present number on the Court of Appeals. More important, such a solution would exacerbate the present problems with the panel system, especially by increasing the possibility of inconsistent decisions. Greater use of retired judges or temporarily assigned Superior Court judges would lead to similar problems, and availability of such judges is doubtful (except, of course, that more Superior Court judges would probably be available if that Court were expanded).+ Last, the commissioner system - the use of lawyers as quasi-judges - is, for good reason, in disrepute in this country and has been abandoned by every high court that has used it.#

The Subcommittee has also studied the possibility that some changes, while insufficient individually, might cumulatively enable the Court to manage its caseload. The conclusion, however, is that methods for major relief, other than creation of an intermediate court, would lower the quality of appellate justice in the District. The forms of relief not totally objectionable on this ground (e.g., slightly greater limitations on opinion publication, sanctions for frivolous appeals, slightly increased use of extra judges, shorter appellate papers, and routing of minor agency cases to the Superior Court) are essentially stop-gap measures that would probably not provide enough relief to enable the

* See Chapter IV, section 1.
+ See Chapter IV, section 2.
# See Chapter IV, section 3.

Court, even as it presently operates, to eliminate its backlog. They certainly would not provide enough relief to permit en banc decisions, which the Subcommittee believes necessary in a high court.

4) Conclusion: Intermediate Appellate Court is the Best Solution

The Subcommittee, having thus considered and rejected other possible solutions, singly and in combination, concludes that an intermediate appellate court is the best solution to the Court of Appeals workload problem. The benefits of an intermediate court are clear. The Court of Appeals would be relieved of a large portion of its caseload, permitting it to decide cases promptly and to abandon the panel system when performing its law-making function. The drawbacks to an intermediate court are not substantial. Because the Court of Appeals would presumably grant review of relatively few intermediate court decisions, double appeals, which increase delay and litigant expense, would be infrequent. This is particularly true if, as discussed, infra, cases containing important issues of law could be reviewed initially by the Court of Appeals, instead of by the intermediate court. Recruitment for the new court would present no problems; the Subcommittee members, who are knowledgeable about the District bar, expect no difficulty in attracting highly qualified lawyers to the new court. The extra expense of a seven-member intermediate court would be roughly $700,000 a year. This expense is little, if any, greater than the expense required by many other possible solutions to the Court's workload problem - that is, solutions requiring expansion of either the Superior Court or the Court of Appeals. Because the intermediate court could share present Court of

Appeals facilities and support services, especially the clerk's office, the expense of the intermediate court is essentially that of additional judges, and thus the expense would be very much the same for each new judge no matter how or where additional judgeships are created.

We have not attempted to relate the estimated cost of an intermediate court to the costs of other demands on the financial resources available to the District of Columbia. The resolution of competing demands on such resources is a matter for the political authorities in the Congress and the District of Columbia government. Having said that, it remains our view that there is a need for an intermediate court and that the estimated costs of that court are reasonable.

5) Proposed Appellate Structure for the District of Columbia

In recommending an intermediate appellate court, the Subcommittee proposes a court structure modeled on that of the ABA Standards Relating to Appellate Courts. The various components of the suggested structure are listed below.

An important distinction, mentioned earlier, underlying the Subcommittee's recommendations is that between an appellate court's error-correcting and law-making functions. The purpose of the error-correcting function is to ensure that trial court and administrative agency rulings conform to existing law. The law-making function involves the development of the common law and constitutional law, as well as interpretation of statutes. The Subcommittee believes that the District of Columbia high court should be primarily a

law-making court and the intermediate court primarily an error-correcting court. This view conforms to the general philosophy expressed in the ABA Standards, especially in the commentary to Standard 3.00:

> The appellate courts have two functions: to review individual cases to assure that substantial justice has been rendered, and in connection therewith to develop the law for general application in the legal system. In a court system having no intermediate appellate level, both functions are performed by the supreme court or a similar court with a different name. In systems having an intermediate appellate court, these functions are to an important degree differentiated. The intermediate appellate court has primary responsibility for review of individual cases and a responsibility, subordinate to that of the highest court, for extending the application of developing law within the doctrinal framework fashioned by the highest court; the supreme court exercises a function of selective review, the purposes of which are to maintain uniformity of decision among subordinate courts and to reformulate decisional law in response to changing conditions and social imperatives.[4]

In accord with this philosophical framework, the Subcommittee recommends an appellate structure that will enable the Court of Appeals to concentrate on important issues of law and to decide vitually all cases en banc, while the intermediate court performs the basic error-correction function in three-judge panels. This functional division, however, should not be absolute. The Court of Appeals must balance the workload of the two courts, especially while the present excessive appellate backlog in the District is being reduced. Inevitably there will have to be a transition period during which the Court of Appeals continues much of its present error-correction

function, thus helping the intermediate court to clear up the present backlog.

The Subcommittee recommends several specific operating procedures and structural elements, both for the final appellate system envisioned and for the transition period. Not every recommendation is the unanimous view of the Subcommittee, but no more than one member disagrees with any one recommendation. The first set of recommendations describe the appellate system which the Subcommittee believes should ultimately obtain in the District. All would be incorporated in the legislation creating the intermediate court. The next section will list further recommendations that would apply during the transition period while the present backlog is eliminated.

Subcommittee Recommendations for Final Appellate Structure and Operation. The recommendations for the final appellate court structure and operations are:

1) A three-tiered court system should be created in the District of Columbia. An intermediate appellate court should be placed between the Superior Court and the Court of Appeals, which will remain the highest court.[5]

2) The membership of the Court of Appeals should be reduced to seven judges, from the present nine. Seven is the size recommended by the ABA Court Organization Standards.[6] The reduction could be accomplished by abolishing judgeships when the next two vacancies occur. Under this plan, the Court will have eight or nine judges for some time after the intermediate court is created. The precise time required for the reduction to seven members depends on the cycle of vacancies.

3) The intermediate court should have seven to nine judges. The court's size will be determined by the appellate caseload in the District when legislation creating an intermediate court is passed.

4) The Court of Appeals should sit en banc, except in extraordinary circumstances. The intermediate court should sit in panels of three in conformance with the almost universal practice among state intermediate courts. Thus, the law-making function would be performed by the full Court of Appeals, and most of the error-correcting function by the more efficient three-judge panel system.

5) All appeals from the Superior Court and from administrative agencies should be filed in the intermediate court. Appeals to the intermediate court should be of right, except in the limited categories of cases over which the present Court of Appeals has discretionary jurisdiction. There should be no appeals of right from the intermediate court, the Court of Appeals having discretionary authority to review any decision of the intermediate court.

6) The Court of Appeals should have authority to transfer to it, at any stage of the proceedings, any case in the intermediate appellate court. This bypass authority would enable the Court of Appeals to review directly cases containing substantial questions of law or public importance, thereby avoiding the expense and delay of superfluous review in the intermediate court. Hence, second appeals would be very infrequent. It is important that the Court should transfer some appeals without important issues of law when necessary to balance the caseload of the two courts. The bypass authority should be exercised on a case-by-case basis; but the court should publish general standards,

either as court rules or as internal operating procedure guidelines, that inform litigants of the types of cases that the Court will transfer. Litigants and intermediate court judges could request that specific appeals be transferred, but the Court of Appeals should not be bound by such requests. The Court could also exercise its bypass authority on its own motion (sua sponte), without request by the parties or the intermediate court. As discussed in point seven below, a unified clerk's office will aid the judges to identify appeals that the high court should review directly. We are confident that the Court would exercise this bypass authority in a judicious fashion.

7) The present Court of Appeals clerk's office should serve as the clerk's office for both appellate courts. A unified clerk's office would not only save expense but would enhance coordination between the two courts. It would be a crucial asset to the high court's ability to monitor and control the appellate process. The intermediate court should, in addition, share as many other Court of Appeals facilities as possible, including the courtroom and library. One subcommittee member disagrees with this recommendation for a unified clerk's office.

Appellate Structure and Operations During the Transition Period. The Court of Appeals backlog, already substantial, will probably be so large when the intermediate court is created that the new court will not be able to eliminate the excessive delay immediately. The Court of Appeals, therefore, must continue to have a substantial error-correcting function—it must continue to decide many cases not containing important issues of law—to relieve the intermediate court until the backlog is eliminated. This transition period will last several years. The

precise amount of time will depend upon the Court of Appeals backlog at the time the new court is created as well as the later volume of appellate filings. During all or most of this transition period the Court of Appeals will have eight or nine judges; the extra one or two judges will greatly aid the Court's efforts to reduce the backlog.

The Subcommittee's proposals for the transition period are as follows:

1) The Court of Appeals should have authority to transfer to the intermediate court any case pending before it at the time the new court is created. The Court should retain cases that fall within its law-making function, and it should also retain as many other cases as required not to overburden the new court.

2) Many cases filed in the intermediate appellate court during the transition period will have to be transferred directly to the Court of Appeals, even though they do not involve significant law-making issues. That is, the bypass authority should be used frequently to balance the caseloads of the two courts. To facilitate this process, the Court of Appeals should establish guidelines which designate specific classes of appeals that will be transferred automatically from the intermediate court.

3) The Court of Appeals should have authority to sit in panels of three or more during the transition period. In this manner, the Court can perform its error-correcting function during the transition period in panels of three (or in panels of five, to constitute a majority of the Court), but perform its law-making function en banc.

APPENDIX A

PANELS IN STATE COURTS OF LAST RESORT

The purpose of this appendix is to describe the use of panels (sometimes called divisions or departments) in state courts of last resort. There are 53 state high courts, including the District of Columbia Court of Appeals and the specialized criminal courts of last resort in Oklahoma and Texas. Thirteen of these currently sit in panels for at least some appeals. These courts are listed in the accompanying table, and the panel procedure used by each is discussed separately.

Not included in this study are panels in intermediate courts, virtually all of which sit in panels or territorial divisions, generally consisting of three judges, panels used by courts of last resort for decisions other than final rulings on the merits (requests for appeal and motions are often decided by panels) and panels used for deciding original jurisdiction cases and sentence appeals.

Information about the use of panels is not easy to obtain. Constitutional or statutory provisions offer limited help; quite a few courts use panels even though not expressly permitted by law, and many courts do not use panels even though authorized by constitution or statutes. In addition, court rules infrequently mention panel procedure. Finally, the use of panels changes from year to year. Panels are often seen as temporary measures, to be abandoned when caseloads decrease and permit full-court decision.

Several sources of information were used for this study. Two previous studies have located courts using panels by looking at the number of judges sitting on cases, as indicated in published opinions. These are: G. Lilly and A. Scalia, "Appellate Justice: A Crisis in Virginia?" 57 Va. L. Rev. 3, 22-26 (1971) and B. Cannon and D. Jaros, "State Supreme Courts - Some Comparative Data," 42 State Government 260, 264 (1969). A third and more recent study is C. Huie, Sitting in Divisions -- Help or Hindrance? (Arkansas Judicial Department, 1975), based on questionnaires sent to and answered by all state supreme courts. However, even the last of these studies is out-of-date; most of them are incomplete; and they provide limited description of the actual panel procedures.

Most information used here, then, comes from several other sources: the appellate court sections of the state court system annual reports, law review articles and books describing internal procedures of courts, and the laws and court rules for courts known to use panels. A cursory review was made of supreme court opinions and decision notices in the latest bound volumes of the West regional reporters. Lastly, when required to obtain further information, appellate court personnel were telephoned. It is unlikely that courts regularly using panels were missed by this research procedure. However, courts using panels very infrequently or intermittently may have been overlooked.

The accompanying table lists all states and indicates the thirteen in which high courts sit in panels. The thirteen are

distributed rather evenly around the country. Notice also that panels are more common in larger courts. Two-thirds of the nine-judge courts use panels, compared with about a sixth of the seven-judge courts and only two of 19 five-judge courts. It is interesting that there is little relationship between panel use and the presence of an intermediate court. Six of the courts using panels are among the 29 courts sitting above intermediate courts.

Panel size varies from three to six judges. In most states panels contain at least a majority of the court. The exceptions are three-judge panels in four nine-judge courts: the District of Columbia Court of Appeals, the Minnesota Supreme Court, the Mississippi Supreme Court, and the Texas Court of Criminal Appeals. Panels in the Minnesota court, however, are for the purpose of holding oral arguments; decisions are made by the full court.

Panel decisions can be made by less than a majority of the court in six jurisdictions, Connecticut, the District of Columbia, Mississippi, Nebraska, Oregon, and Texas. (In two other states, Arkansas and Iowa, decisions by less than an majority do not automatically lead to an en banc hearing, however. En banc review is at the request of a judge, especially a dissenting judge.)

Table 15

PANELS IN COURTS OF LAST RESORT

	Number of judges	Intermediate court	Sits in panels	Size of panels	Votes needed to decide	Rotating (R) or permanent (P)	Approximate percentage of cases decided by panel
Alabama	9	X	X	5	5	P	80
Alaska	5						
Arizona	5	X					
Arkansas	7	X[a]	X	4	4[b]	P	60
California	7	X					
Colorado	7	X					
Connecticut	6		X	5	3	P	95+
Delaware	5		X	3	3	R	95+
District of Columbia	9		X	3	2	R	95+
Florida	7	X					
Georgia	7	X					
Hawaii	5						
Idaho	5						
Illinois	7	X					
Indiana	5	X					
Iowa	9	X	X	5	5[b]	R	76
Kansas	7	X					
Kentucky	7	X					
Louisiana	7	X					
Maine	7						
Maryland	7	X					
Massachusetts	7	X	X	4 or 5	4	R	90
Michigan	7	X					
Minnesota	9		X	3	3[c]	R	NA[c]
Mississippi	9		X	3	3	R	60

Table 15 (continued)

	Number of judges	Intermediate court	Sits in panels	Size of panels	Votes needed to decide	Rotating (R) or permanent (P)	Approximate percentage of cases decided by panel
Missouri	7	X					
Montana	5						
Nebraska	7		X	5	3	R	20
Nevada	5						
New Hampshire	5						
New Jersey	7	X					
New Mexico	5	X	X	3	3	R	60
New York	7	X					
North Carolina	7	X					
North Dakota	5						
Ohio	7	X					
Oklahoma							
Civil	9	X					
Criminal	3						
Oregon	7	X	X	4	3	R	60
Pennsylvania	7	X					
Rhode Island	5						
South Carolina	5						
South Dakota	5						
Tennessee	5	X					
Texas							
Civil	9	X					
Criminal	9		X	3	2	R	95+
Utah	5						
Vermont	5						
Virginia	7						
Washington	9	X					
West Virginia	5						

Table 15 (continued)

	Number of judges	Intermediate court	Sits in panels	Size of panels	Votes needed to decide	Rotating (R) or permanent (P)	Approximate percentage of cases decided by panel
Wisconsin	7	X					
Wyoming	5						

a Arkansas established an intermediate court, effective July 1, 1979.
b En banc hearings are held at request of one judge under certain circumstances.
c The Minnesota Court hears arguments in panels of three, but the full court decides all cases.

At three of these six courts some aspect of the panel procedure mitigates the fact that a majority is not needed for decision. The Connecticut five-judge panel is in effect a five-judge court; the sixth judge is the state court administrator, who seldom hears appeals. Any one judge on the Mississippi court can require that all nine judges review the decision of the three-judge panel, and cases with published opinions are generally decided by the full court. The Nebraska Supreme Court, where a three-judge panel majority can decide appeals, actually uses panels in only the more routine cases. A fourth court, the Oregon Supreme Court, plans to abandon the panel system in the near future. That leaves only two courts, the District of Columbia Court of Appeals and the Texas Court of Criminal Appeals. Both nine-judge courts regularly decide cases in three-judge panels, and a panel majority is all that is needed for a decision. They are also the only high courts in which decisions can be made by two judges.

The panels are rather permanent in three states, Alabama, Arkansas, and Connecticut. In Alabama and Arkansas the same judges generally sit together, and the chief justice sits on all panels. One Connecticut justice, the administrator of the state court system, traditionally hears very few cases. The remaining eleven courts rotate panel assignments, more or less randomly, so that the panel composition often changes.

The last column in Table 15 indicates the approximate percentage of cases decided by panel in each court. These figures were generally obtained by counting recent cases in the latest

volumes of the West regional reporters. (The Iowa figure was obtained from the Court's annual report, and the Delaware figure was obtained from the court clerk.) Since the sample of cases was generally small, some 20 to 30 cases per court, the figures are very approximate. They have been rounded to the nearest multiple of ten, except for the Connecticut, Delaware, District of Columbia, and Texas courts, where almost all cases are decided by panels. It is interesting to note that most courts using panels decide at least a substantial minority of their cases en banc. The rules and practices concerning the types of cases decided en banc are discussed later in the description of each court's panel procedure. As a general rule, en banc hearings are held in the more important appeals and in cases where a panel decision is not unanimous.

As was said earlier, panel use changes over the years. A comparison of findings in this study with those of the Lilly and Scalia study, which is mentioned above, reveals that panel use has been initiated during the past decade in Arkansas, Delaware, and Texas while it has been abandoned in Arizona, Colorado, Florida, Maryland, Missouri, and Washington. An Arizona justice recently wrote:

> "Arizona Constitution, Art. 6, Sec. 2, permits the court to sit in division of not less than three justices, but does not allow a law to be declared unconstitutional unless the court sits en banc. All oral arguments are recorded. If the three judges who heard the matter in panel cannot agree, the matter is ordered en banc by the chief justice and the

> absent justices can hear the tape of the oral argument before voting. This procedure prevents a 2-1 decision in panel which would be a decision by a minority of the full court." J. Cameron, "Internal Operating Procedures of the Arizona Supreme Court," 17 Ariz. L. Rev. 643, 646 n. 21 (1975).

However, the recent opinions of the Court show that all cases are now decided by the full court. This Court, as well as the Colorado, Maryland, and Missouri courts, received greater discretionary jurisdiction in the past decade; this fact is probably a major reason for abandoning panel decisions. The Oregon Supreme Court, in addition, plans to abandon panel decisions in the near future because it has recently received almost total discretionary jurisdiction.

The remainder of this appendix is a state-by-state description of the panel system in each of the fifteen courts. The descriptions include any relevant constitutional provision and court rules. Statutory provisions were not included unless necessary to supply information needed for the table discussed above. Court personnel were contacted for information only if information could not be located from other sources.

Alabama Supreme Court

"The Supreme Court hears most cases in panels. That is, the Court is divided into two divisions, each consisting of four justices plus the Chief Justice, who sits on both divisions.

"Cases are rarely heard on oral argument en banc. However, there are several circumstances which may cause the case to be considered by the full Court ("general conference"), rather than exclusively by the members of one of the two divisions. The two most significant situations are: in the event of a dissent within the division initially considering the case (since five affirmative votes are required to render a decision and a dissent at the division level automatically precludes the concurrence of five); and in the event that it is proposed to overrule an apparently controlling precedent of the Supreme Court." National Center for State Courts, Report on the Appellate Process in Alabama 29 (1973). The two divisions are permanent. Id. at 159. See also Alabama Rules of Appellate Procedure, Rule 16.

Arkansas Supreme Court

The Court may sit in two divisions, with three judges in each and the chief justice sitting in both. The Court must sit en banc in capital cases and in cases involving the interpretation of the state constitution. Also, if a judge dissents either he or the chief justice can require that the case be transferred to the full Court. See Arkansas Constitution Amend. 9, Sec. 1, and Ark. Stat. 1947 Ann., Sec. 22-206.

Connecticut Supreme Court

The Office of Reporter of Judicial Decisions informed us in November, 1978, that the court has no formal rules regulating panel sitting. One justice is the administrative director of the court system. Traditionally he sits only when one of the remaining five justices is disqualified or otherwise cannot sit. Three votes are a sufficient majority to decide an appeal.

Delaware Supreme Court

The Court began sitting in panels in January, 1979, shortly after it was expanded from three to five judges. Panels are composed of three judges. If a panel decision is not unanimous, the case is reheard en banc. The losing litigant may petition for a rehearing en banc, but only on the grounds that the case contains an exceptionally important question of law, the panel decision conflicts with earlier Court rulings, or the precedent upon which the panel decision is based should be overruled. See Temporary Rule 200 of the Supreme Court of Delaware, Constitution of Delaware, Art. IV, Sec. 2. The court clerk informed us that virtually all cases were heard in panels during January and February 1979.

District of Columbia Court of Appeals

The court sits in three judge panels in virtually all cases. A majority on the panel is needed for a decision. Panel assignments are random and are changed for each argument day. Opinions written for publication are circulated to all the judges. A panel cannot overrule a prior published opinion of the court. Appeals are heard en banc upon the request of a majority of the judges on the Court. The District of Columbia Court of Appeals and the A.B.A. Standards of Judicial Administration, A Study Report Appendix C, p. 5 (1977); District of Columbia Court of Appeals, Internal Operating Procedures 1, 13-15.

Iowa Supreme Court

"One of the most important innovations was the reinstitution of a practice prevalent from 1929-1943; namely, hearing and deciding cases in division with the chief justice and four associate justices on two rotating panels. Thus, instead of spending four days a month in Court hearing oral arguments, with the exception of the chief justice, the other eight justices spend two days hearing oral arguments. (During the monthly Court week, Wednesdays are generally reserved for conference and administrative matters.) Except in the most complex and controversial cases in which two or more justices request disposition en banc, cases before the Supreme Court are decided by division. The drafts of all proposed opinions are circulated to the entire Court. At any time prior to final approval of a proposed opinion, any two justices may request that a specific

case be decided en banc. The research staff initially screens all cases and recommends to a three-justice screening panel whether a case should be submitted en banc or to a division." 1978 Annual Statistical Report, Iowa Judiciary 13.

The research director of the Iowa Office of Court Administration informed us in a November 1978 conversation that the Court sits in five-man panels in almost all cases. The proposed opinion, whether it is to be a published or unpublished opinion, is circulated to all nine judges. The Court, thus, feels that the decisions are decisions of the Court. There is no formal rule concerning how many votes are needed for a panel decision. The informal practice is that there will be an en banc hearing if a dissenting judge and the judges off the panel desire it. As a practical matter, there is almost always en banc consideration if a panel judge requests it.

In 1976 95% of the cases disposed of by opinion were decided by panels; in 1977 the figure was 90%. Id. at 26. See also, M. McCormick, "Appellate Congestion in Iowa: Dimensions and Remedies," 25 Drake L. Rev. 133, 141-142 (1975). Legislation passed in 1974 allows three judge panels, but they apparently have not been used. Id. at 142.

Massachusetts Supreme Judicial Court

"There are seven justices of the court, five of whom sit in each of the eight sessions of the full bench. In matters of more than usual importance the entire court may sit en banc but this is on rare occasions only. Where there is a divided quorum the other judges may be brought in." P. Reardon, "The internal Operations of Appellate Courts," In Proceedings, Eighteenth Annual Meeting of the Conference of Chief Justices 13, 17 (1966).

Study of the Court's opinions reveals that a small minority of the panels (roughly one in five) contain only four judges. Also, many of the en banc cases are advisory opinions rather than appeals.

Minnesota Supreme Court

"If a case is to be set for oral argument, it will not necessarily be heard by the entire court. Most cases, depending upon the legal and judicial significance of the issues raised, will be assigned to a division of three justices. The

Commissioner recommends a hearing in division or by the entire court (en banc). Recommendations of the Commissioner usually are followed by the Court, but any one justice may order a case placed on the en banc calendar.

"However a case is processed - with or without oral argument, in division or en banc - the entire court is aware of its facts and the legal issues involved. Each justice participates in the consideration and decision of every case, unless he excuses himself for personal or ethical reasons." Minnesota State Court Reports, 1976-1977 7. See Minnesota Rules of Appellate Procedure, Rule 135. Opinions in all cases heard by three judge panels state that the case was "considered and decided by the court en banc."

Mississippi Supreme Court

"In 1974 the Court sat in two divisions or groups of five judges each with judges alternating between the two groups, presided over respectively by the Chief Justice and the Presiding Justice. In the event of a difference of opinion within the group, the case was carried to the regular weekly en banc conference. Commencing January 6, 1975, the Court began sitting in three division of three judges each, with judges alternating between the groups. The divisions are presided over by the Chief Justice and the two Presiding Justices. At the request of any judge, or upon a division of the panel, a case will be considered at an en banc conference of the judges." The Supreme Court of Mississippi, Twelth Annual Statistical Report, 1977 2.

"The Supreme Court shall have power, under such rules and regulations as it may adopt, to sit in two divisions of three judges each, any two of whom when convened shall form a quorum; each division shall have full power to hear and adjudge all cases that may be assigned to it by the court. In event the judges composing any division shall differ as to the judgment to be rendered in any cause, or in event any judge of either division, within a time and a manner to be fixed by the rules to be adopted by the court, shall certify that in his opinion any decision of any division of the court is in conflict with any prior decision of the court or of any division thereof, the cause shall then be considered and adjudged by the full court or a quorum thereof." Mississippi Constitution, Art. VI Sec. 149A. (Amended to the constitution when the court had 6 justices.)

Study of the Court's opinions also indicates that the full Court considers cases decided with publish opinions even though oral argument is occasionally before only three judges.

Nebraska Supreme Court

"The court may sit in two five-member divisions, with the addition of district court judges or retired judges when necessary for the prompt determination of cases. Divisions may decide all cases except those involving homicide or the constitutionality of a state statute, and decisions of a division may be reviewed by the full court. In recent years, the increasing caseload has required the court to sit in division more frequently." Office of the State Court Administrator, The Courts of Nebraska, A Report on their Structure and Operation 2 (1977)

"Whenever necessary for the prompt submission and determination of causes, the Supreme Court may appoint judges of the district court to act as associate judges of the Supreme Court, sufficient in number, with the judges of the Supreme Court, to constitute two divisions of the court of five judges in each division. Whenever judges of the district court are so acting the court shall sit in two divisions, and four of the judges thereof shall be necessary to constitute a quorum. Judges of the district court so appointed shall serve during the pleasure of the court, and shall have all the powers of judges of the Supreme Court. The Chief Justice shall make assignments of judges to the divisions of the court, and shall preside over the division of which he is a member, and designate the presiding judge of the other division. The judges of the Supreme Court, sitting without division, shall hear and determine all cases involving the constitutionality of a statute, and all appeals from conviction of homicide; and may review any decision rendered by a division of the court." Nebraska Constitution, Art. V. Sec. 2.

The Nebraska Supreme Court clerks office informed us in November 1978 that the Court uses panels whenever it wishes to clear a backlog of pending cases. The judges informally screen pending cases and schedule the more routine cases for panel sittings. A majority of a five judge panel can decide a case.

New Mexico Supreme Court

"Original proceedings, motions and petitions for prerogative writs are heard by a panel of three Justices each Wednesday, unless otherwise directed by the Court. The panels for the hearings are assigned by the Chief Justice each month on a rotating basis. The Court disposes of these matters either by order or by written opinion.

"Petitions entered on the Habeas Corpus Docket are considered by the Court and disposed of by order or referred to the Public Defender for investigation or further action if indicated.

"Petitions for writ of certiorari to the Court of Appeals are considered by the entire Court, and are either granted or denied by order. If granted, a writ of certiorari issues and the case is assigned to a Justice for a written opinion or disposition by order.

"The remainder of the cases filed in the Supreme Court are placed on the regular docket to be submitted to the Court when at issue either on briefs or oral argument." Judicial Department of the State of New Mexico, 1977 Annual Report 15.

"A majority of the justices of the Supreme Court shall be necessary to constitute a quorum for the transaction of business, and a majority of the justices must concur in any judgment of the court." New Mexico Constitution, Art. VI, Sec. 5.

Oregon Supreme Court

"Although the Supreme Court historically has sat en banc, there have been times such as the past year when it heard some cases in smaller divisions, in order to keep up with the caseload." L. Hicks, "Appellate Caseload: How Oregon Moves It," 1 Appellate Court Administration Rev. 18, 20 (1978).

The state court administrator informed us in November, 1978, that the Court now sits in four judge departments in about two-thirds of the appeals. The judges screen the appeals, scheduling some for a four judge panel and some for hearing en banc. A decision can be made by a three judge panel majority (and a two-two split vote is treated as an affirmance of the trial court). Petitions for rehearing, however, are decided by the whole Court. If rehearing is granted, the case is heard en banc. The Court plans to abandon the division system in the near future. In January, 1978, its jurisdiction was changed from largely mandatory to almost totally discretionary; thus it will soon be able to reduce its backlog sufficiently to permit decisions en banc in all cases. However, as of June 1974 the court was still sitting in panels, according to the clerk's office.

Texas Court of Criminal Appeals

The Court of Criminal Appeals is the court of last resort for criminal appeals. A November 1977 amendment to the Texas Constitution increased the number of judges from five to nine, and it authorized the court to sit in three judge panels.

"For the purpose of hearing cases, the Court of Criminal Appeals may sit in panels of three Judges, the designation thereof to be under rules established by the court. In a panel of three Judge, two Judges shall constitute a quorum and the concurrence of two Judges shall be necessary for a decision. The Presiding Judge, under rules established by the court, shall convene the court en banc for the transaction of all other business and may convene the court en banc for the purpose of hearing cases. The court must sit en banc during proceedings involving capital punishment and other cases as required by law." Texas Constitution, Art. 5, sec 4.

The panel membership is rotated on a quarterly basis, and en banc hearings are held at the request of four of the Court's nine judges. Rules of the Court of Criminal Appeals, Rule 1, 2, and 12.

APPENDIX B

JURISDICTION AND SOURCE OF APPEALS — SUPREME COURTS IN STATES WITH INTERMEDIATE COURTS

The goal of this appendix is to describe the source of appeals in the 28 state supreme courts that are situated above intermediate courts.* It describes the types of cases appealable by right to each court and presents statistics that indicate how much of a court's workload falls under mandatory jurisdiction. This state-by-state description is at the end of the appendix. The first part of the appendix will summarize the findings and will describe the procedures used to gather the information.

The 28 states have been placed into six categories, classified according to the source of supreme court caseloads. The categories are only approximations, and some definitions are rather inexact. This is necessary because caseload statistics often are not available in sufficient detail to classify the courts with strict exactness. Nevertheless, with the exception of supreme courts in Kansas, Kentucky, and Pennsylvania, about which some uncertainty exists, the courts fit rather well into the categories. The classification is based on appeals only. That is, it does not take into account original jurisdiction

*Arkansas in July 1979 became the 29th state with an intermediate court; it is not included in this study.

cases, post-conviction writs, and disciplinary proceedings. The six categories are:

1) Mainly mandatory. Alabama, Georgia, Indiana, Louisiana, New Mexico, and Pennsylvania. In these states a large number of appeals are taken directly from the trial courts to the supreme courts as appeals of right. The number of petitions for review may also be large, but each court's jurisdiction is mainly mandatory in that at least 80 percent of the cases decided with full-scale review are appeals of right.

2) Largely mandatory. Florida, Kansas, New York, North Carolina, Ohio, and Tennessee. Some 50 to 80 percent of the appeals subject to full-scale review are appeals of right. In some of these states, for example, Ohio and New York, most appeals of right are from intermediate court decisions.

3) Largely discretionary. Illinois and Kentucky. In these two states, a sizable minority of the appeals decided after full-scale review are appeals of right from the trial courts.

4) Largely discretionary with transfer. Arizona, Colorado, Missouri, and Washington. Supreme courts in these states receive a fair number of appeals of right directly from the trial courts. In addition, they take a substantial number of direct appeals that would ordinarily be first decided in the intermediate courts. This is done by using supreme court authority to transfer cases pending in the intermediate court, and it is done partly to relieve the intermediate court. The actual number of cases arriving as appeals of right is often not available because court statistics may not distinguish between appeals of right and transferred appeals.

5) Mainly or completely discretionary. California, Michigan, New Jersey, Oregon (since January, 1978), Texas, and Wisconsin (since August, 1978). In these states only a small minority (less than 20 percent) of the Supreme Court cases given full-scale review are appeals of right, and the remaining cases are discretionary reviews of intermediate court decisions. Most of these courts, however, receive a few appeals of right. It should be added that almost all appeals to the Virginia and West Virginia Supreme Courts are discretionary, even though there are no intermediate courts.

6) Mainly or completely discretionary with transfer or screening. Iowa, Maryland, Massachusetts, and Oklahoma. Even though these courts have total or almost total discretionary jurisdiction, their caseloads contain many appeals taken directly from the trial courts. The Iowa and Oklahoma courts receive all appeals filed (civil appeals only in Oklahoma), retain some, typically the more important appeals, and transfer the rest to the intermediate court. The Maryland and Massachusetts courts of last resort transfer many appeals filed in the intermediate court. All four courts have discretionary review of intermediate court decisions, but, except in Maryland, these cases comprise only a small portion of their caseloads.

These categories are based both on the laws governing the courts' jurisdictions and on caseload statistics. Both sources of information are difficult to obtain, and the difficulties must be discussed in some detail.

Questions about rules that govern appellate court jurisdiction are often not easily answered. The rules in some states are concise and

centrally located; but in many others they are complex accumulations of constitutional provisions, statutes, court rules, and judicial opinions. Thus, any national survey of appellate court jurisdiction is a monumental task and has never been attempted. The present survey relies as much as possible on secondary sources; it relies on the knowledge and research of those familiar with the peculiar characteristics of individual states. The major secondary source used is the annual reports issued by the state supreme courts or their administrative offices. A second important source is recent law review literature discussing the jurisdictions of individual courts. Constitutions, statutes, and court rules were researched only if necessary. No attempt was made to determine the original jurisdiction of the state supreme courts, since this is a particularly difficult area.

The types of cases appealable by right to a supreme court differ considerably from state to state. The most common are appeals from capital convictions, especially if there is a sentence of death or life imprisonment, and appeals containing constitutional issues, especially if the lower court rules a statute unconstitutional. Beyond these, states require a wide variety of appeals of right to supreme courts, such as major felony convictions, workman's compensation cases, and public utility cases. Seldom is there complete discretionary jurisdiction.

In any event, knowledge of the categories of cases that must be taken by a supreme court often results in little information about how much of its workload is mandatory or discretionary. Obviously, for example, there is generally more of a certain category of appeals in a

large state than a small state. It is necessary, therefore, to look to court statistics for more precise information.

Study of appellate court statistics, however, presents numerous difficulties. The most obvious is that statistics for many courts are incomplete. The information used here comes from the latest annual reports in states with intermediate courts, supplemented in several instances by statistics from other sources. Still, many gaps remain. Table 16 gives figures for total filings and for the number of cases decided by opinion (including unpublished and per curiam opinions), the two most common categories of information given in annual reports. Even this information is not available for several courts.

Also important is the fact that statistics from different courts often are not comparable. The total filings given in Table 16, for example, contain petitions for review and original jurisdiction cases, in addition to regular appeals filed or appeals transferred from the intermediate court prior to decision below. Regular and transferred appeals typically require much more work than petitions for review and original jurisdiction cases. Thus, the total caseload of a court with mainly mandatory jurisdiction, such as the Alabama Supreme Court, cannot be compared to that of a mainly discretionary court, such as the California Supreme Court. More important, information about the various components of the total caseload is usually missing. The blank spaces in the table indicate that there is no information about that category. In some instances, such as in the transfer column, the blank spaces probably indicate that there are no or very few cases in that category. More

Table 16

CASELOADS OF SUPREME COURTS IN STATES WITH INTERMEDIATE COURTS[a]

State	Appeals Filed[b]	Trans-fers	Requests to Appeal Filed	Original Jurisdiction And Other Cases Filed[c]	TOTAL FILINGS	CASES DECIDED BY OPINION	Year
Alabama	324	–	292	130[d]	746	388[d]	1976-77
Arizona	37	82	620	266	1,005	242	1977
California	27	–	2,927	815	3,769	144	1976-77
Colorado	96	66	353	339	854	322	1977-78
Florida	301	–	1,419	533	2,253	344	1977
Georgia	874[d]	–	404[d]	240[d]	1,518[d]	764[d]	1977
Illinois	–	–	918	74	1,139	219	1977
Indiana	–	–	–	–	NA	171	1977
Iowa	–	–	–	–	875[e]	398	1977
Kansas[f]	–	–	–	–	NA	266	1977-78
Kentucky	–	–	328	–	454	430	1977
Louisiana	608	–	–	–	2,266	620	1977
Maryland	–	95	491	12	598	142	1977-78
Massachusetts	140	214	115[d]	–	469	305	1975-76
Michigan	–	–	–	–	1,227	129	1976-77
Missouri	158	–	–	–	667	77	1976-77
New Jersey	75	11	765	62	913	175	1976-77
New Mexico	273	–	167	189	629	187	1977
New York	–	–	–	–	NA	416[g]	1977
North Carolina	–	–	–	–	NA	150[g]	1977
Ohio	140	–	1,221	139	1,500	183[d]	1977
Oklahoma(civil)	–	–	171	–	1,019[e]	424[d]	1976
Oregon	466	–	311	108	885	322[g]	1977
Pennsylvania	–	–	844	–	1,667	473	1977
Tennessee	232	–	647	–	879	247	1977
Texas (civil)	5	–	766	255	1,026	100[g]	1977
Washington	222	–	291	125	638	158	1977
Wisconsin	(intermediate court created in 1978)						

[a] Except when indicated otherwise, the source of data for this table is state court annual reports.

[b] Appeals include advisory opinions and questions certified from federal courts. These constitute a very small portion of appeals.

[c] The "other" cases are mainly bar disciplinary proceedings. The vast majority of cases in this column are original jurisdiction cases.

[d] This information was obtained from W. Kramer, Comparative Outline of Basic Appellate Court Structure and Procedures in the United States (1978). The figures pertaining to opinions obtained from this source are the number of opinions issued. This may include minority opinions and may exclude cases joined with others for decision.

[e] Total filings in the Iowa and Oklahoma Supreme Courts are the number of cases filed minus the number transferred to the intermediate court.

[f] The intermediate court in Kansas was created at the beginning of 1977.

[g] This figure is the number of opinions that decide cases and, thus, does not include cases joined with others for decision.

often, however, the blank spaces mean that the information is missing or that the court has placed these cases under another category.

As a consequence, the statistics presented in the following discussion of the source of supreme court appeals are not in uniform categories. Rather, the statistics are those, no matter how categorized, that provide some information about the source of a particular court's workload. As a result, the statistics cannot be compared across courts, except in very general terms. The figures given are those presented in the annual report or other source for the type of case indicated, except that figures have been computed from other data given when the computations are clearly justified. Statistics about original jurisdiction cases are generally excluded.

The remainder of the appendix is the state-by-state description. Information about each state is classified under two topics: 1) A description of the types of cases in which there are appeals of right - i.e., the court's mandatory jurisdiction, and 2) statistics describing the portion of the court's caseload falling within its mandatory jurisdiction. Notice that the source of information about appeals of right is the same as the source for the statistics, unless a separate reference is given in the appeals-of-right section.

ALABAMA SUPREME COURT

Appeals of right:

"The Court hears certain cases as the initial reviewing court; in other cases, it sits in review upon one of the courts of appeal; specifically:

It is the initial reviewing court on appeals from circuit courts in cases in equity (other than domestic relations), in common law cases where the amount in controversy exceeds $10,000, and in appeals involving decisions of the Public Service Commission. Its civil appellate jurisdiction is technically stated as being cases not appealable to the Court of Civil Appeals.

It hears no criminal cases on direct appeal from the trial court, unless it has transferred such cases up from the Court of Criminal Appeals.

The Chief Justice may transfer undecided cases up from either of the courts of appeal, with the advice of the Court and of the Presiding Judge of the Court of Appeals involved, and he has recently done so in order to relieve the Court of Criminal Appeals.

It may review, on petition for writ of certiorari, cases decided in either of the Courts of Appeal. . . . . The application for writ of certiorari . . . . in a criminal case in which the death penalty was imposed as punishment will be considered as a matter of right." National Center for State Courts, Report on the Appellate Process in Alabama 27-28 (1973).

Statistics (FY 1976-7):

Appeals submitted: 324
Petitions for writs of certiorari pending preliminary consideration: 292

(The court granted 62 certiorari writs and denied 230.)

Source: Alabama Judicial System A-1 (1977).

ARIZONA SUPREME COURT

Appeals of right:

"Cases where the death penalty or life imprisonment has actually been imposed are directly appealed to the Supreme Court. Most other matters coming before the high tribunal are discretionary." The Arizona Courts Summary Report--History, Structure and Operation 8 (1977).

(The court also transfers many cases filed in the intermediate court, bypassing that court.)

Statistics (1977):

Filings:		
Civil appeals	2	
Criminal appeals	35	
Total appeals		37
Transfers from the intermediate court		82
Petitions for review		620

(Of 610 petitions for review disposed of in 1977, 48 were terminated by written opinion or memo decision, and 562 were terminated by other means, for a total of 610 petitions for review dispositions in 1977. The court decided 242 cases by written opinion or memo decision during the year.)

Source: The Arizona Courts - 1977 Annual Judicial Report 13.

CALIFORNIA SUPREME COURT

Appeal of right:

"Direct appeals to the Supreme Court are permitted only in criminal cases where judgment of death has been pronounced. Cal. Const. Art. VI. Sec. 11. In these cases, the appeal is automatic. Pen. Code, Sec. 1239 (b)."

Statistics (FY 1976-7):

Direct appeals filed (death penalty cases)	27
Petition for hearing of cases previously decided by the intermediate court - filings	2,927

(The court granted 231 petitions for hearing and denied 2,696. The court decided 144 cases on the merits - that is, with opinions. Of this total, 85 were in appeals and 59 were in original proceedings.)

Source: Judicial Council of California, Annual Report of the Administrative Office of the California Courts January 1, 1978 61-62.

COLORADO SUPREME COURT

Appeals of right:

"The Supreme Court has initial appellate jurisdiction over: 1) cases in which the constitutionality of a statute, a municipal charter provision, or an ordinance is in question; 2) cases concerned with decisions or actions of the Public Utilities Commission; 3) writs of habeas corpus; 4) water cases involving priorities or adjudications; and 5) summary proceedings initiated under Chapter 49, C.R.S. 1963, as amended (Election Code). The Supreme Court also has certiorari review over appeals which lie initially to the Court of Appeals." Annual Statistical Report of the Colorado Judiciary, 1975-1976 15.

Statistics (FY 1977-8):

Cases filed:		
Criminal appeals	99	
Civil appeals (including water cases, P.U.C. decisions, and constitutional questions)	63	
Total appeals		162
Petitions in Certiorari		353

(Criminal and civil appeals apparently include 66 cases transferred from those filed in the intermediate court, bypassing that court. The Supreme Court terminated 322 cases by opinion.)

Source: Annual Statistical Report of the Colorado Judiciary, 1977-1978 56, 59.

FLORIDA SUPREME COURT

Appeals of right:

"(1) Appeal Jurisdiction.

(A) The Supreme Court shall review, by appeal:

(i) final orders of courts imposing sentences of death;

(ii) final orders of trial courts and decisions of district courts of appeal initially and directly passing on the validity of a state statute or a federal statute or treaty, or construing a provision of the state or federal constitution.

(B) When provided by general law, the Supreme Court shall review, by appeal:

(i) final orders of courts imposing sentences of life imprisonment.

(ii) final orders entered in proceedings for the validation of bonds or certificates of indebtedness.

"(2) Certiorari Judisdiction. The certiorari jurisdiction of the Supreme Court may be sought to review:

(A) decisions of district courts of appeal that:

(i) affect a class of constitutional or state officers;

(ii) pass upon a question certified to be of great public interest;

(iii) are in direct conflict with a decision of any district court of appeal or of the Supreme Court on the same point of law;

(B) any interlocutory order passing upon a matter which, upon final judgment, would be directly reviewable by the Supreme Court;

(C) administrative action, including final orders of commissions established by general law having statewide jurisdiction." (footnotes omitted) 1977 Florida Rules of Appellate Procedure, Rule 9.030.

Statistics (1977):

Appeals filed:		
from intermediate court	54	
from circuit courts	167	
other	70	
Total		291
Petitions for Writs of Certiorari filed:		
from intermediate courts	1196	
from circuit courts	12	
from Industrial Relations Comm.	178	
from Public Service Comm.	33	
Total		1419

(The court disposed of 344 cases by opinion.)

Source: Florida Judicial System Statistical Report 1977 31, 39.

GEORGIA SUPREME COURT

Appeals of right:

"The Supreme Court is comprised of seven justices who hear appeals from Georgia's superior courts, state courts, juvenile courts, and the city courts of Atlanta and Savannah and other like courts in all cases that involve the construction of the Constitution of Georgia or of the United States; or of treaties between the United States and foreign governments; in all cases in which the constitutionality of any law of the State of Georgia or of the United States is drawn in question; and, until otherwise provided by law, in all cases involving title to land, equity, the validity or construction of wills, conviction of capital felonies, habeas corpus, extraordinary remedies, divorce and alimony, and all cases certified to it by the Court of Appeals for review. Also the Supreme Court may require by certiorari or otherwise any case to be certified to it from the Court of Appeals for review and determination and may decide cases transferred to it by the Court of Appeals because of an equal division between the judges of the Court of Appeals." Administrative Office of the Courts, Third Annual Report (July 1, 1975 to June 30, 1976), 9.

"A change in the jurisdiction of the Supreme Court and the Court of Appeals was effected by court rule after legislation which provided for comparable changes in jurisdiction was voided as unconstitutional by the state's high court. This in essence provided that appeals in cases of rape, armed robbery and kidnapping would be to the Court of Appeals, instead of to the Supreme Court, which formerly exercised jurisdiction in these matters. The court order also provides that all appeals involving the revenues of the state, election contests and cases in which the constitutionality of any municipal or county ordinance or other legislative enactment is in question be transferred to the jurisdiction of the Supreme Court. These changes became effective August 1, 1977." Administrative Office of the Courts, Fourth Annual Report (July 1, 1976 to June 30, 1977) 47.

Statistics (1977):

Number of appeals from final judgment filed	874
Number of applications for certiorari	404

(Also, 764 opinions were filed in 1977.)

Source: W. Kramer, Comparative Outline of Basic Appellate Court Structure and Procedures in the United States, 57 (1978).

In addition, during FY 1977-1978 the Georgia Supreme Court wrote opinions in 760 cases. It decided 411 certiorari petitions, granting 52 and denying 359. Eleven more were dismissed or withdrawn. Also, it decided 93 interlocutory appeal applications, granting 28 and denying 65. J. Weintraub and P. Meriwether, Analysis of the Cases and Enumerations of Error Decided by the Supreme Court of Georgia, September 1977 - August 1978 6, 12 (1978).

ILLINOIS SUPREME COURT

Appeal of right:

"It has original and exclusive jurisdiction in cases involving the redistricting of the General Assembly and in cases relating to the ability of the Governor to serve or resume office. It may exercise original jurisdiction in cases relating to revenue, mandamus, prohibition or habeas corpus and as may be necessary to the complete determination of any case on review. It has direct appellate jurisdiction in appeals from judgments of Circuit Courts imposing a sentence of death and as the Court may provide by rule in other cases. Appeals from the Appellate Court to the Supreme Court are a matter of right if a question under the Constitution of the United States or of this State arises for the first time in and as a result of the action of the Appellate Court or if a division of the Appellate Court certifies that a case decided by it involves a question of such importance that the case should be decided by the Supreme Court. The Supreme Court may also provide by rule for appeals from the Appellate Court in other cases. (III Const., Art. VI, Secs. 4 and 9)." Administrative Office of the Illinois Courts, 1976 Annual Report to the Supreme Court of Illinois 15.

Illinois Supreme Court Rules provide for appeal of right when a death sentence has been imposed, when the trial court ruled a statute invalid, and "in proceedings to review orders of the Industrial Commission." Appeals from the intermediate court are discretionary, except 1) where the intermediate court certifies that the case is "of such importance that it should be decided by the Supreme Court," and 2) where a constitutional question arises for the first time in the intermediate court decision. Illinois Supreme Court Rules, 301, 302, 316, 317, 604.

Statistics (1977):

Number of appeals from final judgment filed	118
Number of petitions to review intermediate court decisions	918

(The court filed 217 opinions.)

Source: W. Kramer, Comparative Outline of Basic Appellate Court Structure and Procedures in the United States 73 (1978).

CONTINUED

2 OF 3

INDIANA SUPREME COURT

Appeal of right:

"The Supreme Court has no original jurisdiction except in (a) admission to the practice of law; (b) discipline and disbarment of those admitted; (c) unauthorized practice of law; (d) discipline, removal, and retirement of judges; and (e) exercise of jurisdiction by other courts.

"Its appellate jurisdiction includes appeals from judgments imposing a sentence of death, life imprisonment or imprisonment for a term greater than 10 years; cases where a state or federal statute has been declared unconstitutional; appeals from denial of release in habeas corpus cases arising out of criminal, extradition or mental health proceedings; and, on petition, cases involving substantial questions of law, great public importance, or emergencies (Ind. Const., Art. 7, Sec. 4; Ind. Rules of Ct., App. Rule 4.)"

Statistics (1977):

Cases disposed of by opinion:

Direct appeals	138
Original actions	9
Petitions to transfer	18

(The court denied 116 petitions to transfer in civil cases, and granted 13. The court denied 60 petitions for transfer in criminal cases without opinion, and it decided 6 with opinion.)

Source: 1977 Indiana Judicial Report 2, 68-70.

IOWA SUPREME COURT

Appeals of right:

There are none. Iowa Code Ann. Sec. 684.1 states: "Any civil or criminal action or special proceeding filed in the Supreme Court for appeal or review, may be transferred by the supreme court to the court of appeals by issuing an order of transfer."

The Court's method of selecting cases is as follows: "Although the 1976 Session of the 66th General Assembly established a five-member Court of Appeals, all cases continue to be appealed directly to the Supreme Court which transfers cases to the intermediate court. Supreme Court justices in rotating three-member panels determine which cases to retain and which matters to route to the Court of Appeals. Pursuant to Rule 401, Rules of Appellate Procedure, the Supreme Court ordinarily shall hear (not transfer) cases involving: 1) substantial constitutional questions as to the validity of a statute, ordinance or court or administrative rule; 2) substantial issues in which there is or is claimed to be a conflict with a published decision of the court of appeals or supreme court; 3) substantial issues of first impression; 4) fundamental and urgent issues of broad public importance requiring prompt or ultimate determination; 5) cases in which life imprisonment has been imposed; 6) lawyer discipline; and 7) substantial questions of enunciating or changing legal principles. The Rule also suggests summary disposition of certain cases by the Supreme Court and transfer to the Court of Appeals of cases involving the application of existing legal principles."

Statistics (1977):

The court disposed of 398 appeals by opinion, and it transferred 356 cases to the intermediate court. In all, there were 1,431 filings disposed of in 1977; the remaining dispositions were routine dismissals. Statistics about petitions for review of intermediate court decisions are not available.

Source: 1977 Annual Statistical Report, Iowa Judiciary 3-4, 12, 20, 25.

KANSAS SUPREME COURT

Appeals of right:

The court has "appellate jurisdiction over cases involving class A or B felonies or a sentence of life imprisonment or over any case in which a Kansas or United States statute has been declared unconstitutional." Kansas Judicial Council Bulletin, 1978 8.

Statistics (1977):

Appeals from final judgment filed	307
Petitions to review intermediate court decisions	67

(The intermediate court was created in January, 1977; therefore the number of petitions to review will surely rise in the future. The Supreme Court filed 254 opinions in 1977.)

Source: W. Kramer, Comparative Outline of Basic Appellate Court Structure and Procedures in the United States 92 (1978).

KENTUCKY SUPREME COURT

Appeal of right:

"Appeals from a judgment of the circuit court imposing a sentence of death or life imprisonment or imprisonment for twenty years or more are taken directly to the Supreme Court, but other causes of great and immediate importance may be transferred from the Court of Appeals if a motion for transfer is granted. Decisions of the Court of Appeals may be appealed to the Supreme Court if granted a discretionary review as prescribed by rule of Court."

Statistics:

In 1977 the court received 126 appeals of right and original actions and 328 motions for appeal, transfer and review. The intermediate court is new, so the number of motions for appeal will probably increase rapidly in subsequent years. It decided 430 cases by written opinion.

Source: The Administrative Office of the Courts, Commonwealth of Kentucky, Annual Report, 1977 3, 100.

LOUISIANA SUPREME COURT

Appeal of right:

"A case shall be appealable to the supreme court if 1) a law or ordinance has been declared unconstitutional; 2) the defendant has been convicted of a felony or a fine exceeding five hundred dollars or imprisonment exceeding six months actually has been imposed." Louisiana Constitution, Art. V, Sec. 5(D). In addition, Section 5(E) states that review in other criminal cases is as provided by law.

In addition, appeals are taken directly to the supreme court if they involve the legality of a tax or other charge levied by a governmental authority, certain orders of the public service commission, or election contests not arising wholly within one court of appeal circuit. Institute of Judicial Administration, A Study of the Louisiana Court System 189 (1972).

Statistics (1977):

Appeals filed	608
Writ applications filed	1,622

Opinions rendered in appeals	475
Opinions rendered in writs	123

(The writ applications probably include postconviction writs as well as writs for review of intermediate court decisions. The court granted 317 writ applications, and dismissed or denied decisions 1,170. Of the 317 writs granted, 149 were "granted to be argued", and 168 were "granted with orders".)

Source: The Judicial Council of the Supreme Court of Louisiana, Annual Report with 1977 Statistics and Related Data 34.

MARYLAND COURT OF APPEALS

Appeals of right:

"The sole method of securing review" in the Court of Appeals "is by writ of certiorari." Maryland Rules of Procedure, Rule 810 (Cum. Supp. 1976).

The court, however, takes many cases pending in the intermediate court, bypassing that court. See W. Reynolds, "The Court of Appeals of Maryland: Roles, Work and Performance - Part I", 37 Md. L. Rev. 1, 19-24 (1977).

Statistics (1976):

Regular appeals filed	166
Petitions for Certiorari filed	477

(Apparently, the regular appeals are appeals in which certiorari has been granted or appeals transferred. The intermediate court's dispositions in FY 1976-7 include 109 cases transferred to the Court of Appeals. The Court of Appeals decided 480 petitions for certiorari in FY 1976-7; it granted 114.)

Source: Annual Report of the Maryland Judiciary, 1976-1977 7; Statistical Abstract, Annual Report of the Maryland Judiciary, 1976-1977 16.

MASSACHUSETTS SUPREME JUDICIAL COURT

Appeals of right:

The Supreme Judicial Court has authority to transfer almost all appeals between itself and the intermediate court. A three judge panel examines appeals filed in the intermediate court and removes many cases. These cases include those not likely to be settled with finality by the Appeals Court, but many are also removed simply to balance the caseloads of the two courts. Some categories of appeals are filed in the Supreme Judicial Court initially; many were transferred in 1974 after the intermediate court was established, but few have been in recent years. The Supreme Judicial Court has the authority to transfer all but a few appeals. The major exception is first degree murder convictions. The intermediate court can certify cases to the Supreme Judicial Court, but that authority is seldom exercised. D. Johnedis, "Massachusetts' Two-Court Appellate System in Operation," 60 Mass. L. Q. 77, 79-86 (1975). See Massachusetts Rules of Appellate Procedure, Rule 11.

Statistics:

Filings (FY 1975-76)

Cases required to be filed in the court	140
Cases transferred from intermediate court	214
Application for further review of intermediate court	115
Total	469

(Twelve of the applications for review were granted.)

Filings (FY 1976-77)

Cases filed in the court	149
Cases transferred from intermediate court	166
Applications for further review of intermediate court	111
Total	426

Sources: The Massachusetts Courts, 1975-1976 43; W. Kramer, Comparative Outline of Basic Appellate Court Structure and Procedures in the United States 121 (1978).

MICHIGAN SUPREME COURT

Appeals of right:

All appeals are discretionary, except review of a Judicial Tenure Commission order recommending discipline, removal, retirement, or suspension. See Michigan General Court Rules 851, 932. The intermediate court can be bypassed under limited circumstances. See Rule 852.

Statistics (FY 1976-77):

The court received 1,227 applications of various kinds; most were probably petitions for review. It disposed of 1,145. Of these, 913 were denied or dismissed, 103 were remanded or decided without opinion, and 129 were decided with opinion. During 1976 only three cases were appealed to the Supreme Court prior to intermediate court decision. State Court Administrator, Michigan, 1976-77 Report 7, 11.

MISSOURI SUPREME COURT

Appeal of right:

"The Court has exclusive appellate jurisdiction over all cases involving the construction of the U.S. Constitution or the Missouri Constitution; the validity of a treaty or statute of the United States or any authority exercised under the laws of the United States; the construction of the revenue laws of Missouri or the title to any Missouri state office; in all appeals involving offenses punishable by a sentence of death or life imprisonment; and in other types of cases provided by Supreme Court rule unless changed by law." Judicial Department of Missouri, Annual Statistical Report, 1977 4.

"If a participating judge dissents from a majority opinion filed in a district of the Court of Appeals and certifies that he deems said opinion to be contrary to any previous decision of an appellate court of this state, the case shall be transferred to this Court." Missouri Supreme Court Rules, Rule 83.01. Also, a majority of a panel deciding the case in the intermediate court can transfer it to the Supreme Court, even if there is no dissent. See Rule 83.02. The Supreme Court, at its discretion can transfer cases prior to decision below, either because it believes the issues are important or because it wishes to equalize workloads. See Rule 83.06.

Statistics (FY 1976-77):

There were 158 appeals filed, 246 "applications to transfer" were denied, and 69 "applications to transfer" sustained. Intermediate court dispositions include 39 cases transferred without opinion, apparently transferred to the Supreme Court. The Court disposed of 77 cases by opinion.

Source: Judicial Department of Missouri, Annual Statistical Report, 1977 4-6, 11.

NEW JERSEY SUPREME COURT

Appeal of right:

"Appeals may be taken to the Supreme Court from final judgments as of right: 1) in cases determined by the Appellate Division involving a substantial question arising under the Constitution of the United States or this State; 2) in cases where there is a dissent in the Appellate Division; 3) directly from the trial courts in cases where the death penalty has been imposed and in post-conviction proceedings in such cases; 4) in such cases as are provided by law." New Jersey Court Rule 2:2-1(a). The court may also grant review of cases pending in the intermediate court, bypassing that court. See Rule 2:12-2.

Statistics (FY 1976-77):

Appeals decided		
Appeals as of right	28	
Certification on petitions granted	98	
Certification on motion	15	
Appeals by leave granted	9	
Remand from U.S. Supreme Court	1	
Total		151

(The court disposed of 967 petitions for certification, and granted 126, although 14 were remanded when granted. The court disposed of 129 motions for leave to appeal, and granted 13. The court disposed of 52 motions for direct certification - to bypass the intermediate court - and granted 11.)

Source: Annual Report of the Administrative Director of the Courts, State of New Jersey, 1977 A-2, A-3, A-7.

NEW MEXICO SUPREME COURT

Appeals of right:

"Its appellate jurisdiction extends to all district court decisions in criminal cases imposing a death penalty or life imprisonment and in all civil cases where appellate jurisdiction is not vested in the Court of Appeals."

Statistics (1977):

Appeals filed:		
Civil	251	
Criminal	22	
Total appeals		273
Certiorari petitions filed		167
Total		440

(Terminations include 181 opinions or decisions that disposed of 187 cases. Of these 28 were on certiorari. The Court decided 173 petitions for certiorari, denying 130 and issuing 43.)

Source: Judicial Department of the State of New Mexico, 1977 Annual Report 15-17, 20.

NEW YORK COURT OF APPEALS

Appeals of right:

"Under its existing jurisdictional set-up, an appeal can normally reach the Court of Appeals only after the case has first been decided by one of the intermediate appellate courts -- generally the Appellate Division. There are, however, two situations in which appeals lie to the Court of Appeals in the first instance. One is where the constitutionality of a statutory provision is the sole issue on appeal from a final determination in a civil case, and the other is where the death penalty has been imposed in a criminal capital case.

"The avenues of further appeal to the Court of Appeals after determination by an intermediate appellate court vary, depending on whether the case is a civil or a criminal one. In criminal non-capital cases, such a further appeal is available only by permission of an individual judge -- generally a judge of the Court of Appeals, though in some instances such permission may be granted by a justice of the Appellate Division. In civil cases, on the other hand, depending on the procedural posture of the case, such a further appeal may be available either as of right, or by leave of the Appellate Division or the Court of Appeals, or by leave of the Appellate Division alone, or -- in situations involving an order granting a new trial or hearing -- only on the appellant's giving a stipulation for judgment absolute." (Footnotes omitted.) A. Karger, "The New York Court of Appeals: Some Aspects of the Limitations on Its Jurisdiction," 27 Record 370, 371-372 (1972).

There is generally an appeal of right in civil cases whenever the Appellate Division reverses or modifies the trial court decision and whenever there is a dissent in the Appellate Division. Id. at 373.

Statistics (1977):

Appeals decided by basis of jurisdiction

Civil cases:	
Reversal, modification, dissent in Appellate Division	315
Constitutional question	26
Stipulation for judgment absolute	2
Permission of Appellate Division	70
Permission of Court of Appeals	60
Other	22
Total	495
Criminal cases:	
Permission of justice of Appellate Division	67
Permission of judge of Court of Appeals	77
Other	2
Total	146

(In other words, only 137 of the 641 appeals decided by the Court in 1977 fell under its discretionary jurisdiction. The Court decided 1,445 applications for leave to appeal in criminal cases in 1977 and granted 86.)

Source: Report of the Administrative Board of the Judicial Conference and the Judicial Conference and the Office of Court Administration for the Calendar Year 1977 2, III-19.

NORTH CAROLINA SUPREME COURT

Appeals of right:

"The court's caseload consists of lower court actions involving the death penalty or life imprisonment, substantial constitutional questions, dissent at the Court of Appeals level, utilities rate-making decisions, or the exercise of the Supreme Court's own discretionary review."

Statistics (1977):

Disposition by opinion:	
Appeals of right	109
Discretionary appeals	41
Total	150

(The court disposed of 319 petitions for discretionary review.)

Source: North Carolina Courts, 1977 Annual Report of the Administrative Office of the Courts 1, 171.

OHIO SUPREME COURT

Appeals of right:

"The supreme court shall have appellate jurisdiction as follows:
(a) In appeals from the courts of appeals as a matter of right in the following:
  (i) Cases originating in the courts of appeals;
  (ii) Cases in which the death penalty has been affirmed:
  (iii) Cases involving questions arising under the constitution of the United States or of this state.
(b) In appeals from the courts of appeals in cases of felony on leave first obtained.
(c) Such revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law;
(d) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals;
(e) The supreme court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3(B)(4) of this article." Ohio Constitution Art. IV, Sec. 2(B)(2).

"Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination." Ohio Constitution Art. IV, Sec. 3(B)(4).

Statistics (1977):

Merit Docket - Type of Cases Decided

	Filed	Decided
Pursuant to Allowance	111	59
Originating in Court of Appeals	59	65
Tax	19	25
P.U.C.O.	27	25
Conflict	16	6
Capital Punishment	19	9
Habeas Corpus	37	30
Other Original Actions	102	101
Power Siting Comm.	0	1
Total	390	321

Motion Docket - Disposition

	Motion to certify	Motion for Leave to appeal	Total
Terminated	728	526	1,254
Overruled	656	487	1,143
Allowed	72	39	111

Source: Office of the Administrative Director, Ohio Courts Summary 1977 6-7.

OKLAHOMA SUPREME COURT

Appeals of right:

The intermediate court's jurisdiction consists solely of cases transferred to it by the Supreme Court. See Ok. St. Rev. sec. 30.1.

Statistics (1976):

Total cases terminated by Supreme Court	1,055
Cases terminated by transfer to the intermediate court	418
Certiorari filed in Supreme Court	171

(The Supreme Court disposed of 200 certiorari petitions; 37 were granted and 163 denied.)

Source: Administrative Director of the Courts, State of Oklahoma Report on the Judiciary, 1976 34, 40.

OREGON SUPREME COURT

Appeal of right:

"The Court of Appeals was created July 1, 1969, to relieve the intolerable caseload then burdening the Supreme Court. For seven and one-half years the two courts shared a specific division of jurisdiction of appeals, but commencing January 1, 1978, the Supreme Court became solely (with a few exceptions) a court of discretionary review and the Court of Appeals assumed all initial appellate jurisdiction. . . . Previous to 1978 . . . . the Court of Appeals heard appeals in criminal, domestic relations, probate and administrative law cases while the Supreme Court heard all other appeals." L. Hicks, "Appellate Caseload: How Oregon Moves It," 1 Appellate Court Administration Rev. 18 (1978). Judge Hicks, in addition, has informed us that the exceptions include original proceedings and Tax Court appeals.

Statistics (1977):

Appeals filed from Tax Court	21
Appeals filed from trial court	445
Petitions for review granted	39
Total	505

(235 petitions for review were denied in 1977.)

Source: Twenty-Fourth Annual Report Relating to Judicial Administration in the Courts of Oregon, 1977 6, 8, 13.

PENNSYLVANIA SUPREME COURT

Appeal of right:

There is direct appeal to the Supreme Court from the Courts of Common Pleas in the following cases:

(i) Felonious homicide (Appellate Court Jurisdiction Act Sec. 202(1));
(ii) Right to public office (202(2));
(iii) Decisions of Orphans' Court Division (including charitable nonprofit corporation matters) (202(3));
(iv) Direct criminal contempt and contempt in matters appealable directly to the Supreme Court (202(5));
(v) Supersession of a district attorney (202(7));
(vi) Right to issue public debt (202(8));
(vii) Judgment declaring unconstitutional any law except a local ordinance or resolution (202(9)).

In addition there is an appeal of right from the Commonwealth Court (an intermediate appellate court) in appeals in matters arising in the Board of Finance and Revenue and in matters originally commenced in the Commonwealth Court. See Administrative Office of Pennsylvania Courts, "Commonwealth of Pennsylvania - Unified Judicial System (as of April 12, 1975)."

Statistics (1977):

Appeals filed	823
Petitions for allocatur filed	844

(Petitions for allocatur are petitions for review; 118 were granted. The court filed opinions in 473 cases.)

Source: Administrative Office of Pennsylvania Courts, 1977 Report 24.

TENNESSEE SUPREME COURT

Appeal of right:

"The Supreme Court must hear an appeal directly from a trial court in 1) cases which involve resolving a question of law only (not a factual issue), 2) cases involving workmen's compensation, and 3) cases involving constitutional or other public law issues." Executive Secretary, Tennessee Supreme Court, 1977 Annual Report 6.

A more elaborate description of the court's jurisdiction is found in Resource Planning Corporation, Tennessee Court Study: Profile of the Tennessee Courts I-9 to I-11 (1977): At least a dozen types of appeal, besides those listed above, are appealed directly to the Supreme Court, mainly appeals from trial court review of decisions by specified administrative agencies.

Statistics (1977):

Direct appeal filed	232
Certiorari petitions filed	647

(Of the 610 Certiorari petitions decided, the court granted 98. It disposed of 247 cases by opinion.)

Source: Executive Secretary, Tennessee Supreme Court, 1977 Annual Report 33.

TEXAS SUPREME COURT

Appeal of right:

"Pursuant to a 1940 Constitutional amendment and the resulting statutory mandate, the Supreme Court is vested with jurisdiction over direct appeals from trial court orders granting or denying an interlocutory or permanent injunction on the grounds of the constitutionality or unconstitutionality of any statute of this State, or on the ground of the validity or invalidity of any administrative order issued by any State Board or Commission. Like other provisions authorizing Supreme Court appellate review, this jurisdictional prerogative has been narrowly circumscribed by the Court." (Footnotes omitted. The constitutional and statutory amendments referred to are Texas Constitution, Art. V, Sec 3-b, and Art. 1738(a), Tex. Rev. Stat. (1962)). J. Sales and J. Cliff, "Jurisdiction in the Texas Supreme Court and Courts of Civil Appeals," 26 Baylor L. Rev. 501, 521 (1974).

Statistics (1977):

Regular Causes Docketed (for full scale review)

By granted applications for writ of error	70
By granted motions for leave to file petitions for writ of mandamus	16
By direct appeals filed	5
By granted habeas corpus filed	3
By Rule 483 (Texas Rules of Civil Procedure)	9
Total	103

(The court disposed of 91 "regular causes" in 1977, five of which were "direct appeals". In 1977 the court granted 102 writs of error, out of 717 dispositions. The court also granted, for treatment as a regular cause, 19 of 263 mandamus, habeas corpus, and prohibition writs.)

Source: Texas Judicial Council and Office of Court Administration, Forty-Ninth Annual Report 122-127 (1978).

WASHINGTON SUPREME COURT

Appeal of right:

"Direct appeal to the Supreme Court is permitted in those cases in which actions of state officials are involved; a trial court has ruled a statute or ordinance unconstitutional; conflicting statutes or rules of law are involved; or in proceedings involving issues of broad public import which require prompt and ultimate determination. The aggrieved party has a right to review by the Supreme Court when the Court of Appeals reverses a superior court decision by less than a unanimous vote. In other cases, a review is discretionary."

Statistics (1977):

Direct appeals filed	222
Petitions for review filed	291

(Many appeals filed are cases transferred from the intermediate court, but the number of these transfers is not given. In 1977 the Court's dispositions included 158 by written opinion. Also, 25 cases were transferred to the intermediate court, apparently from among the appeals filed. No statistics are given concerning the number of petitions for review granted or denied.)

Source: Judicial Administration in the Courts, State of Washington, 1977 5-8.

WISCONSIN SUPREME COURT

Appeals of right:

Chapter 187, Laws of 1977, created an intermediate court, to be established on August 1, 1978. There are no appeals of right to the supreme court. The supreme court can, at its discretion, accept appeals before decision by the intermediate court either on its own motion, upon the application of a party, or upon certification by the intermediate court. Memorandum, "Analysis of chapters 187 and 449," to Justice Roland Day from Bruce Feustel, Legislative Reference Bureau, Wisconsin, July 7, 1978.

Statistics:

Because the intermediate court is new, no statistics are available concerning the extent of discretionary jurisdiction.

NOTES FOR CHAPTER I

1 The District of Columbia Court of Appeals and the ABA Standards of Judicial Administration 7-9 (1977). Footnotes to the quoted passage are omitted.

2 Id. at 10.

3 Judicial Planning Committee, 1979 Judicial Plan for the Improvement of the Courts in the District of Columbia 7 (1978).

4 Id. at 8.

5 Id. at 11.

6 Id. at 13.

7 Id. at 7.

NOTES FOR CHAPTER II

1 See D.C. Code, Sec. 11-721, concerning review of the Superior Court, and Sec. 1-1510, concerning review of the District government agency decisions.

2 The District of Columbia statutory provision is D.C. Code, Sec. 16-1901(c). A recent survey of state appellate courts, based on questionnaires sent to court clerks, found that in only 9 of the 47 states answering can post-conviction writs be filed directly in an appellate court; in the remaining states writs are initially filed in the trial courts, and can be reviewed by appeal. W. Kramer, Comparative Outline of Basic Appellate Court Structure and Procedures in the United States, passim (1978).

3 D.C. Code, Sec. 11-721(c).

4 D.C. Code, Sec. 11-721(d).

5 D.C. Code, Sec. 40-420.

6 In the fiscal year ending September 30, 1978, 148 applications for allowance of appeal were filed. Only 5 of the 122 applications decided during that period were granted.

7 D.C. Code, Sec. 11-102.

8 28 U.S.C. 1257, 2113.

9 D.C. Code, Sec. 11-702.

10 D.C. Code, Sec. 11-1501, 1502.

11 D.C. Code, Sec. 11-1502.

12 D.C. Code, Sec. 11-707, 11-1504.

13 W. Kramer, supra note 2, at 293-298. In addition, the Court of Appeals has fewer clerical staff per filing than all but eight state high courts.

14 This description, and that in the following sections, is based mainly on the following sources: D.C. Code, Secs. 11-701 to 722, Secs. 17-301 to 307; Rules of the District of Columbia Courts of Appeals; District of Columbia Court of Appeals, Internal Operating Procedures (1978); T. Newman, "The State of the District of Columbia Court of Appeals," 27 Catholic U. L. Rev. 453 (1978); "Report of Chief Judge Theodore R. Newman, Jr., on the State of the Judicial System of the District of Columbia," in District of Columbia Courts, 1977 Annual Report 6 (1978); The District of Columbia Court of Appeals and the A.B.A. Standards of Judicial Administration, A Study Report, Appendix C (1977);

A. Stevas, Appellate Courts in Operation, Monitoring and Tracking Procedures in the District of Columbia Court of Appeals (1975); and D. Meador, Proposals for the Use of Screening Procedures and Legal Assistants in the District of Columbia Court of Appeals (1974). Some information was also obtained from the Court of Appeals Clerk's Office.

15 A 1978 nation-wide survey of state appellate courts found that the settlement conference procedure is used in only eleven courts, including the Court of Appeals. W. Kramer, supra, note 2, at 293-298. More recently it has been adopted in the Ohio Court of Appeals 8th District and the Nebraska, Rhode Island and Connecticut Supreme Courts. (The fourth court of last resort using settlement conferences is the Minnesota Supreme Court.) Settlement conferences were originally initiated in the U.S. Court of Appeals for the Second Circuit, which apparently remains the only Circuit Court using the procedure.

16 See G. Paras, Supplemental Report on Settlement Conference Program, Third District Court of Appeal (1978). The author of this report is one of the conference judges.

17 See D. Benjamin and E. Morris, "The Appellate Settlement Conference: A Procedure Whose Time Has Come," 62 A.B.A.J. 1433, 1434-1435 (1976).

18 J. Goldman, An Evaluation of the Civil Appeals Management Plan: An Experiment in Judicial Administration 36 (Federal Judicial Center, 1977).

19 Court of Appeals statistics for the fiscal year ending September 30, 1977, (that is, the year before the conferences were started) show that 199 civil cases were decided by judgment or opinion, and 204 were dismissed by the court or by counsel. Presumably, the great majority of the latter were withdrawn or settled.

20 District of Columbia Court of Appeals, Internal Operating Procedures, VI(B).

21 ABA Standards Relating to Appellate Courts 56-57 (1977). Similar guidelines were set forth by the Advisory Council for Appellate Justice, a group of 33 judges and scholars. The Council stated that arguments are "an important part of the appellate process" because they contribute to judicial accountability, guard against too much reliance on staff aides, and help the judges understand the issues presented. The Advisory Council, nevertheless, said that arguments may be eliminated in a minority of cases, where the appeal is frivolous, where the issues have recently been authoritatively decided, or where "the facts are simple, the determination of the appeal rests on the application of settled rules of law, and no useful purpose would be served by oral argument." Advisory Council on Appellate Justice, "Report and Recommendations on Improvements of Appellate Practices," in Appellate Justice: 1975,

Vol. V. 127 (1975).

22 There is a considerable amount of information about the frequency of oral argument in courts of last resort. Only some six or seven supreme courts hear arguments in less than 70 percent of their appeals decided on the merits. See T. Marvell, Appellate Courts and Lawyers: Information Gathering in the Adversary System 75-76 (1978); S. McConkie, "Decision-Making in State Supreme Courts," 59 Judicature 337, 340-341 (1976).

23 It has been suggested that the use of panels by the U.S. Circuit Courts of Appeals supports their use by the highest court in the District of Columbia. We disagree. In the first place, the commentary to Standard 3.01 of the ABA Appellate Standards makes clear that the U.S. Circuit Courts of Appeals are considered intermediate courts and the text of that Standard states explicitly that intermediate courts should sit in panels and that high courts should set en banc. It is true, of course, that the Circuit Courts have substantially greater law making functions and are reviewed less frequently than state intermediate courts. Nevertheless, their decisions are subject to review by the Supreme Court upon certiorari. Moreover, to the extent that the Circuit Courts are the courts of effective last resort, we do not believe that disposition by panels is desirable; the facts of the matter are that the workload of those Circuit Courts makes the panel system essential and that it would be wholly impractical to inject still another court below the Circuit Courts, with the resulting three-tiered, unwieldy appellate system.

24 The major discussions about the use of panels in state courts of last resort are: E. Curran and E. Sunderland, "The Organization and Operation of Courts of Review," in Third Report of the Judicial Council of Michigan, 52, 116-147 (1933); C. Wolfram, "Notes from a Study of the Caseload of the Minnesota Supreme Court: Some Comments and Statistics on Pressures and Responses," 53 Minn. L. Rev. 939, 964-975 (1969); G. Lilly and A. Scalia, "Appellate Justice: A Crisis in Virginia?" 57 Va. L. Rev. 3, 22-25, 34-42 (1971); R. Shapiro and M. Osthus, Congestion and Delay in State Appellate Courts, 48-54 (American Judicature Society, 1974); C. Huie, Sitting in Divisions — Help or Hinderance? (Arkansas Judicial Department, 1975); and ABA Standards Relating to Appellate Courts 7-9 (1977).

25 The Court could not "function effectively, in the absence of an intermediate court, if it were required to sit en banc in each case." The District of Columbia Court of Appeals and the A.B.A. Standards of Judicial Administration, A Study Report Appendix C, p. 5 (1977).

26 ABA Standards Relating to Appellate Courts 8-9 (1977).

27 Information about the use of extra judges is not easily obtained. One study found that 25 of 50 state supreme courts used extra judges. See Lilly and Scalia, supra note 24, at 22-26. However, this study is somewhat out-of-date, and the authors missed quite a few

courts. The best estimate, based on the Lilly and Scalia study and on other sources, especially annual reports, is that 34 courts of last resort use extra judges (there are 53 courts of last resort including the Court of Appeals and the criminal courts in Texas and Oklahoma). Table 6 indicates which courts not above intermediate courts use extra judges. The remaining courts are supreme courts in Alabama, Arizona, Florida, Iowa, Kentucky, Louisiana, Maryland, New Jersey, New Mexico, Ohio, Tennessee, and Washington. In addition, the Oregon Supreme Court used extra judges until 1978.

28 This discussion is based on the descriptions in Lilly and Scalia, supra note 24, at 22-26 and on discussions in several court annual reports. Typical information from the latter is that extra judges wrote 11 of 488 majority opinions in the Arizona Supreme Court during 1977, 14 of 181 opinions in the New Mexico Supreme Court, and 4 of 247 opinions in the Tennessee Supreme Court. The greatest use located is in the Oregon and Mississippi. Extra judges wrote almost a fifth of the Oregon Supreme Court opinions in 1977; but that court stopped using extra judges when its discretionary jurisdiction was expanded in 1978. Twenty-eight trial judges heard 101 (or 15 percent) of the cases decided by the Mississippi Supreme Court in 1978.

29 Comment, "A.B.A. Midyear Meeting Wrap up; Do Unpublished Opinions Hamper Justice?" 64 A.B.A.J. 318 (1978). Justice Smith, of the Arkansas Supreme Court, gives a lengthy description of the reasons why time is saved in G. Smith, "The Selective Publication of Opinions: One Court's Experience," 32 Ark. L. Rev. 26, 29-30 (1978).

30 See ABA Standards Relating to Appellate Courts 62-64 (1977). See also Advisory Council for Appellate Justice, Standards for Publication of Judicial Opinions (1973). Both sources also have good discussions of the reasons why opinion publication should be limited.

31 Comment, supra note 28, at 318.

32 P. Carrington, D. Meador, and M. Rosenberg, Justice on Appeal 35-41 (1976). A number of other scholars have questioned the unpublished opinion practice, especially because of the danger of inconsistent decisions. See, for example, J. Gardner, "Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?" 61 A.B.A.J. 1224 (1975).

33 Most of the information in Table 1 is for 1977 or FY 1977 and is from Kramer, supra note 13, at passim. The number of unpublished and published opinions were obtained from annual reports or court supplied statistics in South Carolina, District of Columbia, Arkansas, Wisconsin, Alaska, and Hawaii. For these states the dates for the figures in Table 1 are the dates in Table 7, except that the Hawaii figures are for 1976-77. The last two columns refer to either the number of opinions or the number of cases decided by opinion. Information from the Kramer book

is presented in terms of the number of opinions, but in some states it may be the number of cases decided by opinion. Several high courts over intermediate courts issue unpublished opinions. Available information indicates that of these only the Kentucky court issues more unpublished than published opinions (239 unpublished opinions out of 430 opinions in 1977 and 624 out of 750 in 1976). Kentucky established an intermediate court in 1976, and this relief will probably lead to fewer unpublished opinions by the supreme court. In addition to the Kentucky court, two other supreme courts aided by intermediate courts issue substantial numbers of unpublished opinions: Iowa (82 unpublished out of 374 opinions) and Louisiana (200 out of 603).

There appears to be a trend towards use of unpublished opinions in courts of last resort. A 1962 study based on questionnaires sent to these courts found that in "the vast majority of the 45 courts answering, all opinions were published." The major exceptions were the Mississippi and Tennessee courts. Council of State Governments, Publication of Official Reports of State Courts of Last Resort iii, 8-14 (1962). The Mississippi Supreme Court has continued its publication practices to the present day. Whether Tennessee has done so is unknown; a second intermediate court was established in 1967, and the corresponding decrease in mandatory jurisdiction has probably resulted in fewer unpublished opinions.

34 The Arkansas "unpublished" opinions are actually published in the advance sheets (but not in the bound volumes); so they escape much of the criticism leveled at nonpublication. See Smith, supra note 29, at 34.

35 This court decided about 80 percent of its cases with per curiam opinions, and study of the Court's reported cases indicates that about this percentage of opinions are published.

NOTES FOR CHAPTER III

1 Most of the statistics in Table 2 were obtained from the 1978 Annual Report of the District of Columbia, 39-42, or were calculated from statistics given there. The backlog and opinion length statistics were supplied by the Court of Appeals clerk's office.

2 The filing statistics exclude applications for allowance of appeal, substantive motions, and bar disciplinary proceedings. These will be discussed later. The figures in Table 2 for criminal appeals in 1978 include 76 special proceedings. Special proceedings is a new category of cases, compiled for the first time in 1978, and includes 44 extraordinary writs (mandamus and prohibition) filed initially in the Court of Appeals and 33 habeas corpus, extradition, and mental health appeals from the Superior Court. In earlier years, the great majority of these cases were categorized as criminal appeals; therefore, they are placed in that category in Table 2, although doing so overstates the number of criminal appeals by a small amount.

3 Table 2 somewhat overstates the number of filings (and decisions) per judge because the active judges are supplemented by three retired judges and, occasionally, the temporary assignment of Superior Court judges. This additional judicial manpower, which is discussed later at some length, cannot be readily quantified in a way that can be used to calculate caseload-per-judge statistics.

4 D.C. Code secs. 11-921 to 11-923.

5 See "Report of Chief Judge Theodore R. Newman, Jr., on the State of the Judicial System of the District of Columbia," in District of Columbia Courts, 1977 Annual Report 6, 9 (1978), where the Chief Judge said, "Because of the length of time required on appeal anyway, the Court is less inclined to adopt a rigid policy of denial of such extensions." A similar statement is contained in the ABA Standards Relating to Appellate Courts 84 (1977): "Moreover, an appellate court should realize that if it has long delays in deciding cases after submission, it cannot effectively demand punctuality from counsel and court reporters in readying cases for decision."

6 The purpose of Table 3 is to give statistics for all first appeals filed in a state's appellate court or courts during 1971-77 (or the fiscal years ending in 1971, etc.). This information, obtained from court annual reports, is not available for most states, either because appellate caseload statistics are not given in the annual reports or because the statistics for supreme courts and intermediate courts are not presented in such a way as to rule out the double counting of a substantial number of second appeals. The statistics in Table 3 are derived from three types of states: a) states in which there is only one appellate court, b) states in which virtually all first appeals are filed in the intermediate court, such that intermediate court filings provide a close approximation of the actual number of appeals, and c) states in

which statistics for filings in two appellate courts permit one to add the caseload in each court without double counting cases that are appealed from the intermediate court to the court of last resort. Most figures in Table 3 include original jurisdiction cases and requests to appeal, as well as appeals of right from trial courts or administrative agencies. The exceptions are noted in the table. Changes in court jurisdiction may affect some statistics, but this problem is rare outside the District. The 48 percent increase in Kentucky in 1977 accompanied the creation of an intermediate court in August, 1976. The executive officer of that Court informed us that there was no jurisdictional change that would account for more appeals, but that the added convenience of the intermediate court, which sits in several locations around the state and decides appeals promptly, may account for much of the caseload increase.

7 This figure is the average of the six annual percentage changes in cases filed. It is similar to, but not always the same as, the rate of increase which, if compounded, would lead to the overall six year increase. The average annual increase differs considerably from - it is typically much lower than - the total percentage increase divided by six, the number of years.

8 The median is the middle figure; as many of the 24 states have a rate of increase at or above the median as have a rate at the median or lower. The average, which is obtained by adding the percentages in each jurisdiction and dividing by the number of states, is about 10 percent. The median figure is used here because it is affected less by the wild swings often occurring in one or two states during a particular year. Of course, no claim can be made that the median for all states is also 11 percent. The sample of 24 states is based on the availability of data, rather than their representativeness of all 50. It should be noted that 50 percent of the states in Table 3 do not have intermediate courts, as opposed to 44 percent nationwide. These percentages are quite similar. (Also, the rate of increase in states without intermediate courts in Table 2 is about the same for states with intermediate courts.)

9 The median percentage increases in the 24 states for the 6 years are: 11 percent, 1971-72; 6 percent, 1972-73; 6 percent, 1973-74; 17 percent, 1974-75; 13 percent, 1975-76; and 12 percent, 1976-77. Figures are missing for a few states for the first and last of these periods.

10 The table below gives the average yearly percent population growth from 1970 and 1977 and the appellate caseload growth rate from Table 3. Population growth figures were obtained from Statistics Abstract of the United States, 1978 14.

Alaska	4.1	20
Idaho	2.5	14
Utah	2.5	7
Hawaii	2.1	13
New Hampshire	1.9	10
Texas	1.9	12
Oregon	1.8	20
Virginia	1.4	7
California	1.3	6
Montana	1.3	16
Oklahoma	1.3	7
Kentucky	1.0	11
Louisiana	1.0	11
Mississippi	1.0	7
Washington	1.0	13
Delaware	0.8	14
Nebraska	0.7	5
Wisconsin	0.7	8
Minnesota	0.6	9
Kansas	0.5	5
Michigan	0.4	14
New Jersey	0.3	11
Ohio	0.1	14
Rhode Island	-0.2	6

Caseload growth seems greater, on the average, in states with rapid population growth, but the relationship is weak. The same result is obtained when one uses population growth figures from earlier years.

11 Long-term trends in appeals have been the subject of a study by the National Center for State Courts to be issued in 1979. The general trend during the past century has been rising appellate caseloads, but the rise has not been constant. Caseloads rose rapidly and fairly consistently in the late 19th and early 20th centuries. After a hiatus during World War I, the increase continued and reached a peak during the late 1920's and early 1930's. From then until the late 1940's appellate court caseloads dropped dramatically to roughly half those of the earlier peak, resulting apparently from the depression and World War II. Then appellate caseloads resumed their climb, a climb that has now lasted some 30 years. Table 3 represents only the most recent stages of the climb. Caseloads now far surpass the high levels attained half a century ago. In sum, therefore, study of the long-term trends suggests that appellate caseloads nation-wide will continue to increase, absent a catastrophic event, such as a major war or depression, or absent new, strict disincentives to appeal.

12 These statistics are obtained from pages 50 and 60 of the 1977 Annual Report, District of Columbia Courts for the years 1973 to 1977 and from the Superior court for the year 1978. Major criminal triable cases are felonies, misdemeanors, and serious District of Columbia traffic cases. Civil actions are cases in the Superior Court civil division, excluding small claims and landlord and tenant cases. The statistics in Table 4 also do not include cases in the Superior Court Family, Social Services, Tax, Probate, and Auditor-Master Divisions.

13 The percentages given in Table 5 are only approximations of the appeal rate. A very few criminal appeals are not major criminal triable cases, and appeals from cases decided by the Superior Court late in the year would not be filed until the next year. As discussed in note 2, the criminal appeal category includes a few cases that are not appeals from trial judgements below, for example habeas cases. Changes in the Court's statistical reporting methods in 1978 deleted these cases from the criminal category. The 666 criminal cases for 1978 in Table 5 are all appeals; thus, the 43 percent figure for that year understates the appeal rate in comparison with previous years.

14 United States Department of Commerce, Statistical Abstract of the United States, 1978 14 (1978).

15 Id. at 16; and Metropolitan Washington Council of Governments, "Cooperative Forecasting - Round II" (1979). Each source gives three forecasts; the Council of Government forecasts, which are generally higher than the Department of Commerce forecasts, give an intermediate figure of a 6 percent increase by 1990 and a leveling off thereafter. The Council's lowest forecast is for a 4 percent increase by 1990.

16 Department of Commerce, supra note 14, at 14, 22.

17 Council of Governments, supra note 15.

18 See Metropolitan Washington Council of Governments, "Employment in the District of Columbia" (1978), and "Employment in the Washington SMSA" (1978). The Council has recently forecasted a modest increase in District employment through the century and a very substantial increase for the surrounding parts of the metropolitan area. Council of Governments, supra note 15.

19 Department of Commerce, supra note 14, at 448.

20 See United States Department of Commerce, Bureau of Economic Analysis, Local Area Personal Income 1971-1976 1, 153 (1978).

21 See Department of Commerce, supra note 20, at 398.

22 "Projections of U.S. Metropolitan Markets to 1982," 121 Sales and Marketing Management 51, 53, 59 (October, 1978).

23 United States Department of Justice, FBI Uniform Crime Reports, Crime in the United States, 1977 35, 81 (1978), and the 1974 edition at pages 55 and 97.

24 Department of Commerce, supra note 14, at 179.

25 District of Columbia Law Revision Commission, Recommended New Basic Criminal Code for the District of Columbia, S.6, 95th Cong., 2nd Sess. (1978).

26 Id. sec. 22-2052.

27 The House has passed a bill which would abolish diversity jurisdiction. A Senate bill is now before the Judiciary Committee; according to the Committee's counsel, it will probably pass the Senate, although perhaps amended to prohibit only instate plaintiffs from evoking diversity jurisdiction and, thus, abolishing about half of the present diversity jurisdiction caseload. Some indication of the additional appellate caseload in the District resulting from abolishing diversity jurisdiction is that in fiscal year 1978 the United States Court of Appeals for the District of Columbia received 44 diversity jurisdiction cases, 25 of which were contract actions. Annual Report of the Director of the Administrative Office of the United States Courts 305 (1978).

28 Only the most important problems with court statistics are discussed in the text. There are many others. Some examples are: The terminology given in the court annual reports is sometimes difficult to interpret; hence the compilation of statistics quite often requires educated guesses about how to categorize cases. When there are several defendants in a criminal appeal, some courts consider it one case, while some often or always consider it a different case for each defendant. The same problem also arises when cross-appeals are filed. The number of cases filed in a particular year can be uncharacteristically high or low for the court (Table 3 shows the uneven trends in many courts). Some filings, such as petitions for bail pending appeal, are counted as cases in some courts and as motions in others. Some courts including the Court of Appeals, count a case granted after a request for appeal as a separate case from the original request; so there is double counting of the few cases that are granted (this amounts to about five cases a year in the Court of Appeals). Finally, the difficulty of ordinary appeals may differ from court to court; especially, it is often asserted that civil appeals are, on the average, more difficult than criminal appeals; and a few supreme courts, such as in Alaska and Maine, decide an appreciable number of sentence appeals, which are counted here as regular appeals even though they are typically much less time-consuming than other appeals.

29 Notice that the Court of Appeals places requests for appeal (called "applications for allowance of appeal" by the Court) in the category "motions." Other courts typically include them in statistics for total case filings.

30 The most common type of case in which supreme courts not above intermediate courts have discretionary jurisdiction is interlocutory appeals. Recent statistics for the number of petitions from interlocutory orders (as well as appeals from final trial court decisions) are given for most courts in W. Kramer, Comparative Outline of Basic Appellate Court Structure and Procedures in the United States, possim (1978). The numbers vary widely from courts to court. In the 16 state supreme courts not above intermediate courts for which information is available, the percentage of interlocutory orders varies from zero to over 50 percent of the sum of appeals from final orders and from interlocutory orders. The median figure is about 12 percent.

31 On the other hand, statistics from the Court of Appeals cannot be compared to statistics from courts that are situated above intermediate courts, because its subject matter jurisdiction differs considerably from that of these courts. Statistics for courts of last resort above intermediate courts can be found in Appendix B. See also note 34.

32 The courts that use panels are discussed in Appendix A. The Virginia Supreme Court sits in three-judge panels (and uses retired judges) when hearing requests for appeal, but not for decisions on the merits. The source of information about the use of extra judges is given in note 27 of Chapter II.

33 Criminal cases, especially post conviction writs (which comprise the bulk of the original jurisdiction cases), are typically considered less time consuming than other appellate cases. In addition, the Chief Judge of the Texas Court of Criminal Appeals has contended that litigants and attorneys appearing before a criminal appellate court are less able than civil litigants and lawyers to champion the needs of their court. See National Center for State Courts, Report on the Appellate Process in Alabama 90 (1973).

34 Although caseloads of supreme courts above intermediate courts are generally not comparable to those of courts, like the Court of Appeals, not above intermediate courts, a few do appear to have workloads similar to, or even greater than, the Court of Appeals workload. Appendix B contains a table with available statistics from supreme courts situated above intermediate courts. The great majority of these courts decide from 10 to 50 cases by opinion per judge. The Georgia Supreme Court, however, decided 764 cases by opinion in 1977, or 109 per judge; and the Louisiana Supreme Court decided 620 cases by opinion, or 89 per judge. Both figures are higher than the 81 per judge figure in the Court of Appeals. No other court exceeds that figure, but the Kentucky, New York, and Pennsylvania courts decided 65, 59, and 68 cases by opinion per judge. To this work one must add the often substantial effort required to rule in requests for appeal; hence their caseloads are probably as great as that of the Court of Appeal.

In general, however, one cannot cite these five courts as indications that some courts of last resort are able to manage caseloads as large as that facing the Court of Appeals. The Georgia Supreme Court received substantial relief in August, 1977, by giving the intermediate court jurisdiction over many felony cases (see Appendix B). The Louisiana and Pennsylvania Supreme Courts are now actively seeking relief (see note 21 of Chapter VIII). The Kentucky intermediate court is new; so the number of cases decided by opinion in the Supreme Court will probably decrease substantially in subsequent years (see Appendix B).

35 The Alaska Supreme Court has announced that it is studying alternative means of dealing with its caseload, and "may recommend to the Legislature that an intermediate court of appeals be considered." Alaska Court System, 1977 Annual Report 8. The Hawaii Supreme Court has recommended that an intermediate court could be created. The Judiciary, State of Hawaii, Annual Report, July 1, 1976 to June 30, 1977 10. A recent study of the Idaho appellate system recommended an intermediate court. Supreme Court Appellate Subcommittee, An Investigation Into the Problems Created by the Growing Appellate Caseload in Idaho (1977). The Office of the Court Administrator in Minnesota has recently informed us that a bill has been introduced in the state legislature to create an intermediate court; the Supreme Court supports the bill. The South Carolina Supreme Court clerk's office informed us that legislation creating an intermediate court was passed in July 1979 and now awaits the governor's signature. The Texas chief justice recently recommended that the state's intermediate courts be expanded and given criminal jurisdiction to relieve the Court of Criminal Appeals. J. Greenhill, "State of the Judiciary," in Fifthieth Annual Report of the Texas Judicial Council 9, 10 (1979). A study of the Utah Supreme Court has recently suggested an intermediate court. Western Regional Office, Utah Supreme Court Project Report 23-52 (National Center for State Courts, 1977). An earlier study of the Virginia court system recommended an intermediate court, but the recommendation was not followed. See Report of the Court System Study Commission to the Governor and the General Assembly of Virginia 11 (1971). (Also, during the past three years there have been several unsuccessful attempts to enlarge the Nebraska Supreme Court from seven to nine judges. See The Courts of Nebraska, A Report on Their Structure and Operation, 1977 3. And the Montana Senate recently passed and sent to the House a bill that would enlarge the state supreme court from 5 to 7 judges. See From the State Capitals, March 26, 1979.)

36 These statistics are taken from court reports. The time periods covered are the same as those in Table 6. The statistics for the Court of Appeals include only appeals and petitions for review, while those for other courts typically include requests to appeal and original jurisdiction cases. Thus, the backlog per judge in the Court of Appeals is comparatively even larger than Table 8 indicates.

37 The figures in Table 9 are the case processing times for cases decided on the merits, and do not include cases dismissed before reaching

the merits. Again, the major sources of statistics in this table are court annual reports. Footnotes to the table indicate where information was obtained elsewhere. Delays in other types of courts - intermediate courts and supreme courts above intermediate courts - are not quite as high as in the courts listed in Table 9; a rough overall average is about a year in the courts for which information is available.

38 ABA Standards Relating to Appellate Courts 86 (1977).

39 This table includes all states creating intermediate courts since 1959. The initial acts leading to the new courts were: Oklahoma - Legislative Referendum No. 164 (1967) placing a constitutional amendment before the voters; Kansas - 1975 legislation, K.S.A. 20-3002; New Mexico - Joint Resolution No. 5 (1965), placing a constitutional amendment before the voters; Washington - Joint Resolution No. 6 (1967), placing a constitutional amendment before the voters; Michigan - Constitution of 1963 (adopted pursuant to a constitutional convention); Arizona - Laws 1964, Ch. 102; Iowa - Act 1976 (66 G.A.) ch. 1241; Colorado - Laws 1969, p. 265; Maryland - joint resolution, Laws 1966, Ch. 10, placing a constitutional amendment before the voters; Massachusetts - Statutes 1972. Ch. 740; Oregon - Laws 1969, Ch. 198; North Carolina - constitutional amendment proposed by the General Assembly in 1965; Kentucky - constitutional amendment proposed by the General Assembly in 1974; Wisconsin - constitutional amendment proposed by the legislature in 1976; Arkansas - Senate Joint Resolution No. 5 (1977), placing a constitutional amendment before the voters.

Legislative action leading to a constitutional amendment permitting an intermediate court was considered the action initiating the new court only if legislation creating the court was passed soon after the constitutional amendment was ratified. In Kansas and Arizona constitutional amendments were passed three and four years prior to the enabling legislation and the date of the latter is used for Table 10.

The statistics in the table are from court annual reports and from D. Clark, "American Supreme Court Caseloads; A Preliminary Inquiry." 26 Am. J. Comm. L. 217 (Supp. 1978). The Michigan statistics for the year prior to the constitutional amendment are not available. The 1961 figure is from Council of State Governments, Workloads of State Courts of Last Resort 1960-62 (1963). Filing statistics include requests to appeal and original jurisdiction cases.

40 It is very unlikely that any of these 15 courts decided more than a few cases without opinions in the years indicated. As will be discussed in Chapter VI high courts today generally decide almost all cases with opinions. A 1962 questionnaire survey of state supreme courts received replies from 12 of the 15 courts in Table 10 (all but the Oklahoma, Maryland, and Kentucky courts), and all said that they wrote opinions in all cases. Council of State Governments, Publication of Official Reports of State Courts of Last Resort, Table I (1962).

NOTES FOR CHAPTER IV

1 The number of judgeships is obtained from Council of State Governments, State Court Systems 2 (1978), except that recent changes in the Delaware Supreme Court (to five judges) and the Texas Court of Criminal Appeals (to nine judges) have been included.

2 A history of the number of state supreme court judges in 34 states can be found in E. Curran and E. Sunderland, "The Organization and Operation of Courts of Review," in Third Report of the Judicial Council of Michigan 52, 61-62 (1933). Information is not available about the other 14 states. It is unlikely that the number of judges increased between 1933 and the early 1950's because caseloads decreased greatly during that period. Nation-wide surveys of the number of judges were made in Council of State Governments, The Courts of Last Resort of the Forty-Eight States 4 (1950) and in successive editions of State Court Systems. These indicate that no state court of last resort has had more than nine judges since 1950. The Virginia Court of last resort had 11 judges from 1779 to 1788 when the Court was mainly a trial court. The New Jersey court of last resort had 15 or 16 judges from 1844 until 1948. See, Harrison, "New Jersey's New Court System," 2 Rutgers L. Rev. 60, 65 (1948). Several appellate courts have employed commissioners, who as explained below were quaisi-judges, and the number of judges plus commissioners has exceeded nine in a few rare high courts.

3 This information was obtained by comparing the Council of State Governments publications cited in the previous footnotes. Four of the eleven states, Alabama, Minnesota, Mississippi, and Texas, increased the size of courts of last resort to nine judgeships during this period.

4 ABA Standards Relating to Court Organization 32, 34 (1974).

5 See, for example, W. Stuart, "Iowa Supreme Court Congestion: Can We Avert A Crisis?" 55 Iowa L. Rev. 594, 597 (1970); G. Lilly and A. Scalia, "Appellate Justice: A Crisis in Virginia?", 57 Va. L. Rev. 3, 21, 27-28 (1971).

6 An often quoted comment about the diminishing returns from additional judges is this statement by Judge Dethmers of the Michigan Supreme Court in J. Dethmers, "Delay in State Appellate Courts of Last Resort," 328 Annals 153, 158 (1960):

> The time-saving advantage of increasing court membership is that it reduces the number of opinions each judge must write. It does not lessen the work of each judge necessary for the study of records and briefs, legal research, and examination of opinions in cases which the other members write. This he must do, of course, in order to decide whether he agrees and will sign such opinions or write dissents. Enlarging a court does not decrease the amount of time required for listening to oral arguments of

counsel and for conference, consultation, and discussion by the judges. In fact, increase of numbers increases the man-hours thus consumed and, perhaps, the number of court hours as well, because of resultant increase in number of questions addressed to counsel from the bench and more arguments and discussion by the larger number of judges in conference. Enlargement of court membership is, therefore, not necessarily 100 percent gain.

7 In some states intermediate courts act essentially as one court, with rotating panels. In other states the intermediate courts sit in divisions, each with a separate territorial jurisdiction; the divisions are, in effect, separate courts. The former group includes six courts with more than nine judges: Colorado, 10 judges; Maryland, 13 judges; Michigan, 18 judges; New Jersey, 22 judges; Oregon, 10 judges; and North Carolina, 12 judges. See Council of State Governements, State Court Systems 2 (1978). In addition, of course, several U.S. Circuit Courts of Appeals contain more than nine judges.

8 Perhaps, also, the problems involved with en banc hearings involving many judges would tempt an enlarged Court of Appeals to hold even fewer en banc hearings than the present Court does. This would have a detrimental effect on the court's law-making functions. It is important to note that a major study of the Federal Circuit Courts of Appeals emphasized the problems of en banc review as a reason for limiting the enlargement of Circuit courts. Commission on Revisions of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change 57-59 (1975). The Commission, however, decided that "the creation of additional appellate judgeships is the only method of accommodating mounting caseloads without introducing undesirable structural change or impairing the appellate process." Id. at ix. It, therefore, recommended that if a court contains ten or more judges, en banc hearings be limited to nine judges, selected mainly on the basis of seniority. Id. 60-61.

9 The problem of inconsistent decisions in state intermediate courts is greatly ameliorated by the possibility of supreme court review of conflicting decisions. This answer, of course, is not applicable in the District of Columbia.

10 D.C. Code Sec. 11-707(a).

11 The legislation could be amended to permit long term assignment of trial judges, as is permitted in several other states. This would help meet the problem, discussed later in the text, of the trial judges' lack of appellate experience. However, long-term assignments would run into almost all the disadvantages of increasing the number of judges on the Court.

12 For example, a Missouri intermediate court recently made a concerted, and successful, effort to decrease its backlog. But one strategy that did not work was the use of temporarily assigned trial judges during 1977, a year in which the court's output dropped. A study of this court by the National Center for State Courts states:

> The hiatus in the 1977 dispositions resulted from a daring but unsuccessful experiment during the summer of having trial judges take some cases and write opinions on them. Due to the unfamiliarity of the trial judges with the process, the opinions were late in coming and most had to be redone. It is estimated that the experience set the court back approximately 50 cases for the year. (Unpublished memorandum, National Center for State Courts, 1978.)

The Washington Supreme Court, according to one of its justices, has experienced similar problems with temporarily assigned trial judges. H. Rosellini, "Crisis in the Supreme Court," 3 Gonzaga L. Rev. 8, 14-15 (1968). Information elsewhere about this topic, however, is not available, probably because appellate judges are reluctant to criticize their lower court colleagues.

13 See D. Sutelan and W. Spencer, "The Virginia Special Court of Appeals: Constitutional Relief for an Overburdened Court," 8 W & Mary L. Rev. 244 (1967).

14 E. Curran and E. Sunderland, "The Organization and Operation of Courts of Review," in Third Report of the Judicial Council of Michigan 52, 65 (1933). In addition, Curran and Sunderland note that Texas in 1879 established a two-year commission that made final rulings in appeals submitted to the Supreme Court, but the commission received cases only upon agreement of the parties.

15 The various uses of commissioners are discussed in Curran and Sunderland, supra note 14 at 65-95. Nineteen state supreme courts had used commissioners in one form or another by 1933, the time of that study. But at that date they were being used by only four courts. For a more recent description of the commissioner system see R. Leflar, Internal Operating Procedures of Appellate Courts 82-83 (1976).

16 A recent survey of state supreme courts, Council of State Governments, State Court Systems 29 (1978), lists twelve courts employing commissioners. In all but two instances, however, they are not what are traditionally called "commissioners"; most are regular staff attorneys or retired judges. The two exceptions are the Missouri Supreme Court and the Texas Court of Criminal Appeals. The Missouri court, at least during 1977, assigned its four commissioners to the state's intermediate court.

Judicial Department of Missouri, Annual Statistical Report 4. In 1977, the five-judge Texas Court of Criminal Appeals used four full-time and three part-time commissioners. All but two (full-time commissioners), however, were retired judges or intermediate court judges. A November 1977 constitutional amendment enlarged the court to 9 judges; and the clerks office has informed us that the court discontinued the use of commissioners.

17 ABA Standards Relating to Appellate Courts 9 (1977).

NOTES FOR CHAPTER V

1 Law clerks' duties are described in Council of State Governments, State Court Systems 30-31 (1978) and T. Marvell, Appellate Courts and Lawyers: Information Gathering in the Adversary System 86-97 (1978). Available evidence indicates that most law clerks prepare draft opinions, and almost all others prepare memoranda. Duties of staff attorneys are described in D. Meador, Appellate Courts: Staff and Process in the Crisis of Volume (1974); T. Lesinski and N. Stockmeyer, "Prehearing Research and Screening in the Michigan Court of Appeals: One Court's Method for Increasing Judicial Productivity," 26 Vand. L. Rev. 1211 (1973); National Center for State Courts, The California Courts of Appeal 71-119, 168-194 (1974); J. Cameron, "The Central Staff: A New Solution to an Old Problem," 23 U.C.L.A. L. Rev. 465 (1976); R. Leflar, Internal Operating Procedures of Appellate Courts 83-94 (1976); Federal Judicial Center, Central Legal Staffs in the United States Courts of Appeals, A Survey of Internal Operating Procedures (1978).

2 There is little information available about what the law clerks actually do, including whether they prepare draft opinions for their judges.

3 This information is derived from Council of State Governments, State Court Systems 77-81 (1968) and Council of State Governments, State Court Systems 30-31 (1978). The 1968 edition lacks information for two states. The cause of the increase is both the initial use of law clerks in a few courts (all the courts now use law clerks) and the authorization of a second clerk per judge in several courts. Law clerks in state intermediate courts have proliferated at an even faster pace than clerks in supreme courts; based on rather incomplete information it seems that they have at least doubled in the past five years. See W. Kramer, Comparative Outline of Basic Appellate Court Structure and Procedures in the United States, passim (1978) and P. Barnett, Law Clerks in the United States Courts and State Appellate Courts (American Judicature Society, 1973). The latter study found that the number of law clerks in all state appellate courts increased by about 75 percent since a similar study done in 1969, but this increase probably includes staff attorneys in a few courts.

4 The information for this table was taken primarily from Kramer, supra note 3, passim. In addition, information in Council of State Governments, State Court Systems 29-31 (1978) was used to supplement the figures in the Kramer book and to resolve some ambiguities there. Even so, the data may not be totally accurate for all states; notice particularly that the figures for total attorneys in the Minnesota and Texas courts do not seem consistant with the figures given for law clerks and staff attorneys. The Court of Appeals figures similarly do not total correctly because, of course, there are two law clerks for the retired judges.

5 This information is derived from the two sources given in the previous note, except that State Court Systems does not include information about intermediate courts. Consequently, information is missing for intermediate courts in Florida, Indiana, New York, Ohio, and Pennsylvania.

6 The Pennsylvania justices may be authorized four clerks. See note 8 below.

7 The other four are supreme courts in Arizona, Michigan, New York and Pennsylvania.

8 American Judicature Society, Pennsylvania's Appellate Courts: A Report of the American Judicature Society to the Supreme Court of Pennsylvania 23, 30 (1978). The report also states, "It seems that each Justice (on the Pennsylvania Supreme Court) is authorized to employ four personal law clerks, and that some do employ that number." Id. at 9. But according to a recent survey, Council of State Governments, State Court Systems 30 (1978), that seven judge court is only authorized 20 clerks in all. In any event, outside Pennsylvania probably no state appellate judge (except the California chief justice) is authorized more than 3 law clerks. Apparently, also, no intermediate court outside of Pennsylvania has more than two clerks per judge, but, as was said in note 5, information is lacking for a few courts.

9 United States Courts of Appeals tend to use more staff aides than state intermediate courts. A recent study found that these eleven courts employ from one to about 24 staff attorneys. However, staff attorneys outnumber active judges only in the Fifth and Ninth Circuits. Each circuit judge, in addition, has two or three law clerks. See Federal Judicial Center, supra note 1, passim.

10 P. Carrington, D. Meador, and M. Rosenberg, Justice on Appeal 48 (1976).

11 ABA Standards Relating to Appellate Courts 96-98 (1977).

12 Id. at 99.

13 The Michigan Court of Appeals staff system is described in Meador, supra note 1, at 198-208 and in Lesinski and Stockmeyer, supra note 1, passim.

14 Lesinski and Stockmeyer, supra note 1, at 1215.

15 Reasons given for use of staff attorneys as opposed to additional law clerks can be found in Meador, supra note 1, at 112-114; Lesinski and Stockmeyer, supra note 1, passim; and Cameron, supra note 1, at 467-68.

16 The functions of the Minnesota Supreme Court staff are described in Meador, supra note 1, at 225-229, and in Minnesota State Court Report 7 (1977). The combination of screening cases for argument or submission on the briefs and preparing memorandum in more routine cases seems to be the most common staff function.

17 D. Meador, Proposals for the Use of Screening Procedures and Legal Assistants in the District of Columbia Court of Appeals (Criminal Courts Technical Assistance Project, 1974).

18 Discussions of staff productivity can be found in Meador, supra note 1, at 84-89, and National Center for State Courts, supra note 1, at 168-173.

19 Professor Meador has said "Experience with central staffs in four courts in the Appellate Justice Project strongly suggest that adding additional professional assistants will not have substantial impact on an appellate court's productivity unless the use of the additional assistants is coupled with some abbreviation of the traditional appellate process." Meador, supra note 17, at 9. See also Meador, supra note 1, at 97-107.

NOTES FOR CHAPTER VI

1 See American Bar Association, Methods of Reaching and Preparing Appellate Court Decisions (1942) and American Bar Association, Internal Operating Procedures of Appellate Courts (1961).

2. A 1974 questionnaire survey of appellate judges found that more than three quarters of the state supreme court judges responding believed they spent at least 20 percent of their time writing opinions, and over a third believed they spent more than 30 percent of their time. The figures for intermediate court judges are very similar. M. Osthus and R. Shapiro, Contestion and Delay in State Appellate Courts, 25 (American Judicature Society, 1974). Similarly, a more exact study of the time spent by judges on the U.S. Court of Appeals for the Third Circuit found that 48 percent of the judges time spent on cases (and about 29 percent of their total working time) was devoted to opinion preparation. Federal Judicial Center, Summary of the Third Circuit Time Study 4 (1974). No similar information is available about the amount of time spent by Court of Appeals judges on opinion preparation, but there is no reason to believe the Court differs greatly from other courts in this regard.

3 The average lengths of opinions are set forth in The District of Columbia Court of Appeals and the A.B.A. Standards of Judicial Administration, A Study Report Appendix C, 63-64 (1977). The average full opinion increased from 7.8 pages in 1975 to 11.4 pages in the first half of 1977. (See also Table 2.) During this period, "the majority of memorandum opinions and judgments averaged two pages, with approximately ten percent being over 3 pages." Id. at 64. The clerk's office has indicated, however, that memorandum opinions now probably average over two pages in length.

4 These two limits are not common in other courts that restrict opinion publication. See, for example, the descriptions of the opinion publication rules in D. Dunn, "Unreported Decisions in the United States Courts of Appeals", 63 Cornell L. Rev. 128 (1977).

5 Statistics for fiscal year 1977 show that 580 cases, or 78 percent of the Court's dispositions by opinion or judgment, were affirmances. The remaining 166 cases were reversed, remanded, reversed and remanded, or otherwise not affirmed. Presumedly, these 166 cases require published opinions under the present rules. If so, they constitute some 60 percent of the 275 cases disposed of with opinion. The number published solely because the lower court was not affirmed (i.e., there was no other reason for publication) is

not known. Additionally, there is no information about the number of nonunanimous decisions published solely because there was a dissent. In all, however, these two categories probably account for a sizable minority of the published opinions.

6 The Court of Appeals in 1978 decided 64 cases by judgment order without opinion, or 8 percent of the 792 cases decided by opinion or judgment. It is unclear just what these 64 cases are; presumedly they include dispositions upon motions for summary affirmance or summary reversal and dismissals in criminal cases following counsel's petition to withdraw because there are no grounds for reversal (that is, Anders petitions). Although information is lacking, many other courts probably also make decisions without opinions in these types of cases.

7 These are probably the only two American courts that have substantial experience with oral opinions. English appellate courts, however, have long decided cases from the bench. Also, the California Court of Appeal, First Appellate District, is presently experimenting with a summary calendar in which opinions are given from the bench, but are tape recorded for the parties' use. The Second Circuit in 1974 disposed of almost half its appeals by oral decision at the conclusion of oral arguments or by a summary order rendered shortly after the arguments. Committee on Federal Courts, The Association of the Bar of the City of New York, Appeals to the Second Circuit 45 (1975). Information about later periods is not available. The Court's median time from notice of appeal to decision in 1977 was 4.5 months in criminal cases and 6.4 months in civil cases; both times are much lower than elsewhere in the federal system. Annual Report of the Director of the Administrative Office of the United States Courts 309 (1977). The court, however, has adopted many procedures, other than oral decisions, designed to reduce delay. In 1977 the Oregon Court of Appeals disposed of 620 cases by "bench decisions", or 41 percent of the 1,514 cases decided on the merits. Twenty-Fourth Annual Report Relating to Judicial Administration in the Courts of Oregon, 1977 19. This court received 320 filings per judge in 1977 (twice that of the D.C. Court of Appeals) and its average time from notice of appeal to decision was 177 days (well less than half that in the Court of Appeals). Id at 20. Whether the bench decisions are a major reason for this great efficiency is not known.

8 Thirty-five percent of the Fifth Circuit's decisions in 1974, and 39 percent in the first nine months of 1975, were "affirmances without opinion." Commission on Revision of the Federal Court Appellate System, Hearings and Second Phase, Volume II 892 (1975). The Fifth Circuit, in general, has probably gone as far as any appellate court in abandoning traditional appellate procedures. Most if its cases are placed

on a summary calendar, after screening by the court's central staff, and are decided without oral argument and without a conference of the panel members. Any one judge, however, can order oral arguments, and arguments are allowed if the panel is not unanimous. See G. Rahdert and L. Roth, "Inside the Fifth Circuit: Looking at Some if Its Internal Procedures," 23 Loyola L. Rev. 661, 667-675 (1977).

A good summary of the arguments against decisions without opinions in the Fifth circuit, and in several other circuit courts, can be found in W. Reynolds and W. Richman, "The Non-Precedential Precedent - Limited Publication and No-Citation Rules in the United States Courts of Appeals," 78 Colum. L. Rev. 1167, 1173-1176 (1978).

9 This statement is based on a search of the state court annual reports. A partial exception is that appellate courts may not issue opinions in summary affirmances or in decisions upon Anders petitions. See note 6. It is possible that a few state intermediate courts decide a significant number of cases without opinion, but information is incomplete on this point. The New Jersey intermediate court is authorized to decide cases by simple order. New Jersey Court Rules Governing Appellate Practice, Rule 2:11-3. This rule went into effect in May 1975, but the latest annual report indicates that all cases are decided by opinion. Administrative Director of the Courts, Annual Report, 1976-77 B-6.

10 Supreme Court of Mississippi, Thirteenth Annual Statistical Report, 1978 4,6,12. It is not totally clear that these cases are actually decided without opinion. The Report states that the form of decision was published or unpublished opinion in 381 cases and "per curiam" in 275 cases; the implication is that the latter received no opinions.

11 See T. Marvell, Appellate Courts and Lawyers: Information Gathering and the Adversary System 87-90 (1978). Some have severely criticized the use of law clerks or staff attorneys to draft opinions, especially opinions with precedential value. See R. Leflar, Internal Operating Procedures of Appellate Courts 93-94 (1976); G. Edwards, "Exorcising the Devil of Appellate Court Delay," 58 A.B.A.J. 149, 153 (1972).

12 For discussions of these objections see: ABA Standards Relating to Appellate Courts 60 (1977); P. Carrington, D. Meador, and M. Rosenberg, Justice on Appeal 9-10, 31-32 (1976); Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change 49-51 (1975). All three, while

emphasizing the need for some statement of reasons for a decision, recommend that short memorandum opinions be used in some cases.

13 A 1978 survey of appellate courts found that all appellate court panels contained at least three members (although information was not obtained for a very few courts). W. Kramer, Comparative Outline of Basic Appellate Court Structure and Procedures in the United States, passim (1978).

14 New Jersey Court Rules Governing Appellate Practice, Rule 2:13-2(b). This rule became effective in November, 1978.

15 "The Court of Appeals will sit in panels of 3 judges to dispose of cases on their merits, except in small claims municipal ordinance violation, traffic regulation violation, mental health, juvenile and misdemeanor cases. In these specified cases the case will be heard by a single court of appeals judge, unless a request for a 3-judge panel is granted." Memorandum from Bruce Feustel to Justice Roland B. Day, "Analysis of Chapters 187 and 449," p. 3 (Wisconsin Legislative Reference Bureau, July 13, 1978). See Wisc. Stat. sec. 752.31; Wisconsin Supreme Court Rule 809.41

16 ABA Standards Relating to Appellate Courts 9 (1977).

17 See for example W. Whittaker, "Differentiated Case Management in United States Courts of Appeals," 63 F.R.D. 457, 459 (1974); B. Martin, "Kentucky's New Court of Appeals," 42 Ky. Bench & Bar 8, 12 (April, 1977).

18 See "CBA Judiciary Sections's Proposed Expedited Appeals Process," 6 Col. Lawyer 1132, 1135-1136 (1977); New Hampshire Proposed Rules of Appellate Procedure, Rules 10 and 11. A similar procedure has been suggested for the Court of Appeals. Study Report, supra note 3, at 25-26. It should be noted that the problem of excessive record length is somewhat mitigated in the Court of Appeals by the fact that a limited record is usually ordered in criminal cases (see Id. at 34) and by the fact that parties must designate the relevant portions of the transcript if it is longer than 200 pages (Rules of the District of Columbia Court of Appeals, Rule 30).

19 New Jersey Court Rules Governing Appellate Practice, Rule 2:6-3(b).

20 Study Report, supra note 3, at 27. The report states that summary dispositions reduce the workload of the Court, but raise "the possibility of cursory treatment for a matter that really merits greater consideration." Id. at 28. The report then gives

specific guidelines that might serve to mitigate this danger. ABA Appellate Standard 3.13, it should be noted, suggests that court rules provide for summary decisions.

21 A 1957 questionnaire survey of appellate courts (including Federal and intermediate courts) found that 16 of the 93 courts responding stated that not all the judges read the briefs in every case. Institute of Judicial Administration, Appellate Courts. Internal Operating Procedures. 1959 Summary and Supplement 3 (1959).

22 See Carrington, Meador, and Rosenberg, supra note 12, at 9-10, 48; ABA Standards Relating to Appellate Courts 99 (1977).

23 Leflar, supra note 11, at 92-93.

NOTES FOR CHAPTER VII

1 It has been suggested that the Court of Appeals workload might be reduced by requiring litigants to file petitions for rehearing in the Superior Court before they file appeals and by then restricting issues raised on appeal to those raised in the rehearing petition. We have not sought to address the question of total litigation volume -- and of associated questions of costs and attorneys fees -- because of their fundamental complexity and their location outside of the Subcommittee's charter. We note, however, that the suggested requirements would be unlikely to reduce the Court's workload significantly, that mandatory rehearing petitions are not recommended by the ABA Standards because they add "an additional step in getting on with the appeal," ABA Appellate Standards 33, and that the suggested procedure would handicap litigants for their lawyers' inability to spot major issues soon after the trial -- a problem compounded by the fact that the lawyers would often file rehearing petitions without access to the trial transcript, because of substantial delays in preparing transcripts.

2 The U.S. Department of Justice recently circulated a proposal that U.S. Court of Appeals tax attorney fees as costs in civil appeals when affirmed, unless a judge certifies that the appellant had a significant likelihood of success. Additionally, it was suggested that a Circuit Court give appellee damages or double costs if it determines that the appeal is frivolous or was brought for purposes of harassment or delay. Office for Improvements in the Administration of Justice, United States Department of Justice, Proposal for Improvements in the Federal Appellate Courts 1-5 (unpublished memorandum, June 21, 1978). Similar proposals were made a year earlier by the American Bar Association Task Force in Appellate Procedure. These proposals are reprinted in Note, "Disincentives to Frivolous Appeals: An Evaluation of the ABA Task Force Proposal," 64 Va. L. Rev. 605, 625-628 (1978).

3 See Note, supra note 2, at 613-614; P. Carrington, Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law," 82 Harv. L. Rev. 542, 569-570 (1969). District of Columbia Court of Appeals Rule 38 provides: "If this court shall determine that an appeal is frivolous it may award just damages and single or double costs to the appellee." Apparently, these damages or costs are rarely awarded. In fiscal year 1978 there were only 5 motions for award of counsel fees or costs; whether any were granted is not known.

4 See Note, supra note 2, at 616-618, for a discussion of this problem. The Department of Justice and the ABA Task Force reports also suggested increasing interest rates.

It is also possible the delay in the Court of Appeals prompts some appeals, either because of the interest rate differential or because of the longer time available to negotiate a settlement at more favorable terms than the trial court judgment. In addition, the delays allowed for briefing permit the appellant to negotiate at length without incurring

the expense of preparing his brief. These problems, however, cannot be addressed without first solving the overall problem of congestion.

5 D.C. Code, sec. 28-3302.

6 P. Carrington, D. Meador, and M. Rosenberg, Justice on Appeal 93-96 (1976).

7 ABA Standards Relating to Appellate Courts 109-111 (1977); ABA Standards Relating to Trial Courts 129-138 (1976).

8 There has been no recent nation-wide study of the extent of discretionary jurisdiction upon first appeal. A 1950 survey found that nine state supreme courts not above intermediate courts (and not having general discretionary jurisdiction) had discretionary jurisdiction in appeals involving small sums; the pecuniary limits varied from $100 to $300. It is doubtful that this picture has changed substantially since 1950; and probably very few states have dollar limits similar to those suggested in the ABA Standards. One exception is Iowa:

> "Except where the action involves an interest in real estate, no appeal shall be taken in any case where the amount in controversy is less than $3,000 unless the trial judge certifies that the cause is one in which appeal should be allowed. In small claims actions, where the amount in controversy is $1,000 or less, the Supreme Court may exercise discretionary review. All other final judgments may be appealed to the Supreme Court." Iowa Judiciary, 1977 Annual Statistical Report 3. See also, Iowa Code Sec. 631.16.

9 The District of Columbia Court of Appeals and the A.B.A. Standards of Judicial Administration, A Study Report Appendix C, p. 122 (1977).

10 A study of the Kansas Supreme Court, then the only appellate court in the state, found that the number of cases with an amount in controversy of less than $10,000 was 43 in 1973, or about 10 percent of the total caseload. Kansas Judicial Study Advisory Committee, "Recommendations for Improving the Kansas Judicial System," 13 Washburn L. J. 271, 329 (1974).

11 Michigan General Court Rules, Rule 806.

12 See G. Lilly and A. Scalia, "Appellate Justice: A Crisis in Virginia?" 57 Va. L. Rev. 3 (1971); T. Morris, The Virginia Supreme Court; An Institutional and Political Analysis (1975); G. Lilly, The Appellate Process and Staff Research Attorneys in the Supreme Court of Virginia, A Report of the Appellate Justice Project of the National Center for State Courts, 1972-1973 (1974); L. I'Anson, "How the Supreme Court of Appeals of Virginia Functions," 71 Rep. Va. St. B. Ass'n. 221 (1960).

13 R. Leflar, Internal Operating Procedures of Appellate Courts 4 (1976).

14 ABA Standards Relating to Appellate Courts 14-15 (1977). The Standards also state that each judge should read the briefs. Id. at 54.

15 Carrington, Meador, and Rosenburg, supra note 6, at 133.

16 Lilly and Scalia, supra note 12, at 42-58; Report of the Court Study System to the Governor and the General Assembly of Virginia 11-16 (1971).

17 The intermediate courts in New Jersey and New York are such courts, composed of trial judges permanently assigned to appellate duty.

18 An exception is in Connecticut. Before 1978 the Appellate Session of the Superior Court received appeals from the state's limited jurisdiction court. The trial courts were unified in that year, and the Appellate Session has continued to operate as a reviewing body for cases that formerly would have been decided in the lower court, but are now decided by the Superior Court. However, the Appellate Session is not a permanent court; 1978 legislation authorized it to continue for one year, and 1979 legislation extended its life for two more years, until June 1981. See Con. Gen. St. sec. 51-197c and 51-197d.

There are, we believe, no other trial court appellate panels that act as intermediate courts reviewing decisions of the trial court. It should be noted, though, that in the District of Columbia and in many, if not most, states the supreme court once consisted of trial court judges who sat part of the year as supreme court judges. This system was abolished in all jurisdictions as appellate caseloads become large enough to support full-time appellate courts.

The ABA Standards Relating to Trial Courts No. 2.74, which applies to civil cases of intermediate amount, suggests review by a single trial judge. The reason for review, however, is to satisfy the need for jury trial or for a trial on the record, when demanded, after a more informal judge trial. The review is not a substitute for an appeal that would ordinarily go to an appellate court.

19 R. Pound, "Principles and Outline of a Modern Unified Court Organization," 23 J. Am. Jud. Soc'y 225, 228 (1940). See also, R. Pound, Appellate Procedure in Civil Cases, 389-392 (1941).

20 See E. Jacobson and M. Schroeder, "Arizona's Experiment with Appellate Reform," 63 A.B.A.J. 1226 (1977); E. Jacobson, "The Arizona Appellate Project: An Experiment in Simplified Appeals," 23 U.C.L.A.L. Rev. 480 (1976). The initial idea for the Arizona experiment arose from a suggestion by Judge Hufstedler of the Ninth Circuit Court of Appeals; the panel reviewing the case would consist of the trial judge who decided

the case plus two intermediate court judges, and further review would be at the discretion of the next higher appellate court. See S. Hufstedler, "New Blocks for Old Pyramids: Reshaping the Judicial System," 44 S. Cal. L. Rev. 901, 910-911 (1971).

21 The Arizona experiment was limited to civil cases. The main disadvantage to this procedure in criminal cases is that defendants may routinely request further review after adverse panel rulings. Much depends, of course, on whether indigent defendants are provided counsel at this stage, a question not addressed here.

22 See the discussion in note 12 of Chapter IV.

23 The procedure would "provide minimal adequate conformity to the imperatives of appellate justice in all routine cases." Carrington, Meador, and Rosenberg, supra note 6, at 165.

24 An Iowa Supreme Court justice recommended against trial court appellate panels largely on this ground, saying "There would probably be considerable objection to this procedure if the decision were final. If intermediate only, it could result in more work for the trial judges without decreasing the load on the appellate court." W. Stuart, "Iowa Supreme Court Congestion: Can We Avert a Crisis?" 55 Iowa L. Rev. 594, 602 (1970).

NOTES FOR CHAPTER VIII

1 A great many writings have discussed the arguments for and against intermediate courts. Several have been published by the American Judicature Society: Intermediate Appellate Courts (1968); Congestion and Delay in the State Appellate Courts 20-26 (1968); M. Osthus and R. Shapiro, Congestion and Delay in State Appellate Courts 41-48 (1974); and M. Osthus, Intermediate Appellate Courts 4-8 (1976). Other valuable discussions can be found in: R. Leflar, Internal Operating Procedures of Appellate Courts 65-66 (1976); G. Lilly and A. Scalia, "Appellate Justice: A Crisis in Virginia?", 57 Va. L. Rev. 3, 45-56 (1971); and E. Curran and E. Sunderland, "The Organization and Operation of Courts of Review," in Third Report of the Judicial Council of Michigan 52, 152-204 (1933).

2 Osthus and Shapiro, supra note 1, at 42. The results of this study must be considered only approximate estimates, because the response rate is rather low (about one-third to one-half, varying with the category of judges and the specific questions) and because data are presented in such a way that one cannot tell what answers were given by judges from different courts. Thus if, as one might expect, all judges from a few courts answered, the results would be highly biased.

3 Id. at 43.

4 A study of caseload trends in selected courts showed a decrease in filings after intermediate courts were created in Maryland (904 filings in 1966 to 569 filings in 1967); Oregon (629 in 1968 to 458 in 1969); and Washington (673 in 1969 to 376 in 1970). D. Clark, "American Supreme Court Caseloads: A Preliminary Inquiry," 26 Am. J. Comp. L. 217, 218 (Supp. 1978). Also, Arizona Supreme Court filings decreased from 672 in 1964 to 311 in 1965 due to the creation of an intermediate court, and Kentucky Supreme Court filings decreased from 1,299 in 1975 to 819 and 454 in the following two years, after an intermediate court was created in 1976. Arizona courts Summary Report, History, Structure and Operation 11 (1976); the Administrative Office of the Courts, Commonwealth of Kentucky, Annual Report, 1977 100.

5 Administrative Office of the Courts, Maryland, Annual Report 1968-1969 26, Annual Report of the Director of the Administrative Office of the Courts, State of New Mexico 19 (1969), Annual Statistical Report of the Colorado Judiciary, July 1, 1977, to June 30, 1978 41; Judicial Administration in the Courts of Oregon 1977 11, 1978 Annual Statistical Report, Iowa Judiciary 24 (1979). It is not clear what is meant by "ready for submission" in Iowa and "docketing" in Maryland. These five states are the only states for which delay statistics are available before and after the establishment of an intermediate court. It should be noted that the decision time for cases decided in the year a new court is created, and often for the following year also, remains very high because the supreme court is clearing its backlog of long-delayed appeals. The delay-reduction effect of intermediate courts typically do

not turn up in court statistics until two or three years after an intermediate court is created.

6 R. Traynor, "Some Open Questions on the Work of State Appellate Courts," 24 U. Chi. L. Rev. 211, 214 (1957).

7 A. England and M. McMahon, "Quantity Discounts in Appellate Justice," 60 Judicature 442, 446-449 (1977). Justice England's time figures are estimates of the minimum time various tasks should require; they are not intended as the actual time expended. The average time for cases decided on the merits is estimated from other figures presented in the article.

9 An attempt has been made to determine whether the North Carolina Supreme Court concentrated on law-making activities to a greater extent after the creation of an intermediate court. The conclusion, based on many criteria, was that the court did so to a limited extent. R. Groot, "The Effects of an Intermediate Appellate Court on the Supreme Court Work Product: The North Carolina Experience," 7 Wake Forest L. Rev. 548 (1971).

10 The statistics in Table 13 are, except when otherwise indicated, taken from state court annual reports. The number of intermediate court cases decided by opinion includes those decided by oral opinion. A few courts may also decide cases without any opinion whatsoever, but information is lacking on this point. The intermediate court decisions in some cases were made in the year before the requests to appeal were filed or decided. Therefore, the percentages given in Table 13 are only approximations of the portion of intermediate court cases in which further review is sought or granted. Statistics are not given for three states that have recently received intermediate courts because the patterns of review have not been established there. The Oregon Supreme Court, it should be added, has recently received greatly expanded discretionary jurisdiction, and the number of requests to appeal will surely increase greatly in following years.

10 The figures in this table are also from court annual reports, except where indicated otherwise.

11 This analysis is complicated by the fact that several states (indicated by an "a" in Table 13) grant appeals of right from a sizable number of intermediate court decisions. New York and Ohio stand out in this regard, and the figure of two percent in Ohio is, thus, misleading. That Court had an additional 140 appeals of right from the intermediate court; thus the proportion reviewed is actually about five percent. Statistics on this point are not available for other states.

12 Institute of Judicial Administration, A Study of the Louisiana Court System, 199 (1972). National Center for State Courts, Report on the Appellate Process in Alabama 49 (1973).

13 See, for example, Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change 5-40, 76-168 (1975).

14 The recent expansion of federal judgeships provide additional evidence that intermediate appellate courts nation-wide attract capable judges. Of the 138 people nominated as of June 1, 1979, by judicial nominating committees for U.S. Circuit Court judgeships, 13 were state intermediate court judges, as compared with 18 state supreme court judges (Memorandum from the Judicial Selection Project, Washington, D.C., May 1979). Also biographical information in the American Bench: Judges of the Nation (1979) indicates that about a quarter of the state supreme court judges, in states which have had intermediate courts for at least five years, were previously intermediate court judges.

15 ABA Standards Relating to Appellate Courts 13 (1977). The same position was taken earlier in ABA Standards Relating to Court Organization 33 (1974). Professors Carrington, Meador, and Rosenberg disagree with the standards, stating that in medium-sized states some appeals should go directly to the supreme court in order to decrease the number of double appeals. P. Carrington, D. Meador, and M. Rosenberg, Justice on Appeal 151-152 (1976). A similar position is also taken by Leflar, supra note 1, at 70-71.

16 ABA Standards Relating to Appellate Courts 16 (1977).

17 Id., at 4, 15-16.

18 The intermediate court could handle more cases per judge than the present Court of Appeals because the judges would not have to sit en banc, the non-sitting judges need not carefully review opinions slated for publication, and the judges would have fewer administrative duties.

19 Not all these states comply totally with the ABA standards. The Oregon and Texas Supreme Courts receive some direct appeals besides death penalty cases. The New Jersey and Ohio courts have mandatory jurisdiction over some appeals from intermediate court decisions, which does not conform with Standard 3.10. It should be noted that several other supreme courts (in Iowa, Maryland, Massachusetts, and Oklahoma) have complete or nearly complete discretionary jurisdiction, but still take many appeals directly from the trial courts.

20 One study, for example, concluded that in 11 of the 24 states with intermediate courts in the early 1970's the courts were "not intermediate but terminal" because second appeals were very infrequent. Lilly and Scalia, supra note 1, at 46.

21 Examples of such states can be found by looking at the statistics in Appendix B. They include Alabama, Florida, Georgia, Louisiana, New York, and Pennsylvania. The Florida and Louisiana Supreme Courts have recently established committees to study their caseload problems and to recommend legislative or constitutional changes in their jurisdictions. A study commissioned by the Pennsylvania Supreme Court recently concluded that the Court should be relieved of all mandatory jurisdiction. American Judicature Society, Pennsylvania's Appellate Courts: A Report of the American Judicature Society to the Supreme Court of Pennsylvania 1-3 (1978). Maryland is one of the very few states where the legislature has frequently and promptly changed supreme court jurisdiction in response to rising case loads. See W. Reynolds, "The Court of Appeals of Maryland: Roles, Work and Performance - Part I," 37 Md. L. Rev. 1, 4-5 (1977).

22 ABA Standards Relating to Appellate Courts 13-14 (1977).

23 In fact, commentary to Standard 3.10 states that bypass authority "is properly exercised only infrequently." Id. at 18.

24 As is indicated in Appendix B, these courts are the courts of last resort in Arizona, Colorado, Maryland, Missouri, and Washington. (All of these courts, except the Maryland Court of Appeals, are required by constitution or statute to accept direct review of trial court decisions in certain categories of cases.) In Washington the intermediate court transfers many cases to the supreme court prior to a hearing below, and the Supreme Court can accept a case transferred or can return it to the intermediate court. The Supreme Court transfers some cases initially filed in the Court to the intermediate court. See National Center for State Courts, Washington Appellate Courts Project, passim (1975).

In addition to the courts listed above, the New Jersey Supreme Court for many years transferred cases pending in the state's intermediate court in order to relieve that court, and these cases constituted the bulk of the Supreme Court's case load. See A. Vanderbilt, "Improving the Administration of Justice - Two Decades of Development," 26 U. Cin. L. Rev. 155, 270 (1957). However, the number of cases heard upon review of the intermediate court has increased steadly; they now dominate the court's calendar, and only a few cases are transferred from the intermediate court prior to decision there.

25 ABA Standards Relating to Appellate Courts 15-16 (1977).

26 The major exception is Ohio, where the Supreme Court must review several categories of appeals from intermediate court decisions, including those involving constitutional questions. The Alabama, Illinois, and Pennsylvania Supreme Courts must also accept appeals containing certain issues from intermediate courts, but the categories are rather narrow. See Appendix B.

27 Georgia, Illinois, Massachusetts, Ohio, and New York appear to be the only states in which certification creates an appeal of right in the absence of a dissent in the intermediate court. See Appendix B.

28 See ABA Appellate Standard 3.10(c). The reasons against appeal of right, given in the commentary at page 17, are that that the intermediate court may shift its decisional responsibilities to the supreme court and that the supreme court should have the final authority to determine which cases merit its attention.

29 Missouri Supreme Court Rules, Rule 83.01. The other two states providing for appeal of right from split decisions are New York (when the intermediate court reverses or modifies the lower court decision by a split vote in a civil case) and Washington (when the intermediate court reverses any case by split vote). See Appendix B.

30 "The existence of a dissent in the court below may indicate nothing about the importance of the issue involved." ABA Standards Relating to Appellate Courts 17 (1977). See also Leflar, supra note 1, at 76.

31 See Note, "The Eroding of Final Jurisdiction in Florida's District Courts of Appeal," 21 U. Fla. L. Rev. 375 (1969), and see Appendix B for the jurisdictional rules in Florida. ABA Appellate Standard 3.00 advises against precluding review by the supreme court, and the commentary states, "Attempts to foreclose such review categorically, by making an intermediate appellate court's decisions unreviewable in specified circumstances, tend to result in forced or hypertechnical reasoning in the application of the criteria that determine whether further review may be had." ABA Standards Relating to Appellate Courts 5 (1977).

Besides Florida probably only two other states, New York and Texas, prevent Supreme Court review of some intermediate court decisions. The New York Court of Appeals cannot, with some exceptions, review a decision by the Appellate Division of the Supreme Court (the state's major intermediate court) when the latter's ruling is based on a review of facts, as opposed to an interpretation of the law. The Texas Supreme Court, which is the court of last resort for civil cases, cannot review intermediate court decisions in several categories. These include some reviews of county court decisions, some slander cases, and some divorce cases. See A. Karger "The New York Court of Appeals: Some Aspects of the Limitations On Its jurisdiction," 27 Record 370, 376-7 (1972); J. Sales and J. Cliff, "Jurisdiction in the Texas Supreme Court and Courts of Civil Appeals," 26 Baylor L. Rev. 501, 509-17 (1974).

32 The major recent writings on this subject, besides those in following two footnotes, are: ABA Standards Relating to Court Organization No. 1.13; ABA Standards Relating to Criminal Appeals No. 1.2; Carrington, Meador, and Rosenberg, supra note 15, at 168-172; P. Carrington, "Crowded Dockets and the Courts of Appeals," 82 Harv. L. Rev.

542, 604-612 (1969); C. Guittard, "Unifying the Appellate Courts," 14 Judges' Journal 18 (January 1975); and Lilly and Scalia, supra note 1, at 37-39.

33 National Center for State Courts, Report on the Appellate Process in Alabama 86-92 (1973), and Institute of Judicial Administration, The Judicial System of Tennessee 24-26 (1971). In addition, the Institute of Judicial Administration studied the Maryland courts when the intermediate court was a criminal court and recommended that the court be given civil jurisdiction also. Institute of Judicial Administration, Survey of the Judicial System of Maryland 26 (1967).

34 See Commission on Revision of the Federal Court Appellate System, supra note 13, at 28-30; "Report of the Kansas Judicial Study Advisory Committee," 13 Washburn L.J. 271, 343-344 (1974); Colorado Legislative Council, Intermediate Court of Appeals for Colorado 40-44 (1968); Court Structure and Jurisdiction Subcommittee, Report, October, 1972, to the Citizen Study Committee on Judicial Organization, Wisconsin 80-81 (1972).

35 Probably the only writings of any importance arguing for a specialized criminal court are those by Judge Haynsworth of the U.S. Court of Appeals for the Fourth Circuit. See C. Haynsworth, "A New Court to Improve the Administration of Justice," 59 A.B.A.J. 841 (1973). An intermediate court with criminal jurisdiction only, however, is being seriously considered in South Carolina. From the State Capitols, May 14, 1979.

36 Delay statistics are available for criminal and civil intermediate courts in Alabama and Tennessee. In 1970-1972 the median time to decision in the Alabama Court of Civil Appeals was 203 days, and the time in the Court of Criminal Appeals was 287 days. National Center for State Courts, supra note 33, at 46. The time in the Tennessee civil court was 24 weeks in 1970 and that in the criminal court 38 weeks, Institute of Judicial Administration, supra note 33, at 21, 23. But the gap between the two Tennessee courts narrowed; the times were 192 and 217 days in 1975. Resource Planning Corporation, Tennessee Court Study: Profile of the Tennessee Courts 2-15, 3-11 (1977). The caseloads in the nation's other two courts of criminal appeals, the Texas and Oklahoma courts, appear to be excessive, as can be seen from Tables 6 and 7 in Chapter III.

37 The search for courts with jurisdictional rule-making power was not exhaustive, but it is unlikely that many more have this power. The eight are:

> Arkansas: "The Court of Appeals shall have such appellate jurisdiction as the Supreme Court shall by rule determine." Ark. Con. Am. 58.

Georgia: The Supreme Court in Collins v. State, 239 Ga. 400, 236 SE2d 759 (1977), announced that it has inherent power to require the intermediate court to transfer specific categories of cases to the Supreme Court, in effect creating an initial appeal of right to the Supreme Court.

Illinois: Article VI, Section 4(b) of the Illinois constitution provides for appeals of right to the Supreme Court from the trial court in specific types of cases, and Section 4(c) provides for appeal from the intermediate court in other specific types. Both sections add that the Supreme Court may by rule provide for appeals in other cases. An example of the exercise of this rule-making authority is Illinois Supreme Court Rule 302. This provides direct review to the Supreme Court from circuit court "proceedings to review orders of the Industrial Commission." Rules 316 and 603 also affect the Supreme Court's jurisdiction.

Indiana: The Indiana Constitution, Article 7, Section 4, states that "the Supreme Court shall exercise appellate jurisdiction under such terms and conditions specified by rules except that" certain appeals must go directly to the Supreme Court. Section 6 states that the intermediate court "shall exercise appellate jurisdiction under such terms and conditions as the Supreme Court shall specify by rules. . ." The Supreme Court has set forth the jurisdiction of the two courts in Indiana Rules of Appellate Procedure, Rule 4.

Iowa: The Supreme Court has authority to transfer any appeal to the intermediate court, and the court "shall promulgate rules for the transfer of matters to the court of appeals. Those rules may provide for the selective transfer of individual cases and may provide for the transfer of cases according to subject matter or other general criteria." Iowa Code Ann. sec. 684.1. The Court's rule made persuant to this authority can be found in note 38 below.

Kentucky: Section 110(2)(b) of the Kentucky Constitution states that there is appeal of right from the trial court to the Supreme Court from sentences of death, life imprisonment, or imprisonment of 20 years or more. "In all other cases, criminal and civil, the Supreme Court shall exercise appellate jurisdiction as provided by its rules." The Kentucky Supreme Court rules, however, do not evidence any appeals of right beyond those mandated by the constitution.

Missouri: The Supreme Court's jurisdiction includes "types of cases provided by Supreme Court rule unless changed by law." Judicial Department of Missouri, Annual Statistical Report, 1977 4. The Missouri constitution contains no express authority for this. Article V, Section 3, formally said the Court's exclusive appellate jurisdiction included "other classes of cases provided by supreme court rule unless otherwise changed by law". But this phase was

deleted in a 1976 amendment. It seems, however, that the Supreme Court still believes it has authority to enlarge its jurisdiction, for the current court rules provide for the transfer of some appeals from the intermediate court. See Missouri Supreme Court Rules, Rules 83.01-83.04.

Pennsylvania: Article V, Section 10(c) of the Pennsylvania Constitution states that the court has "the power to prescribe general rules governing practice, procedure, and the conduct of all courts, . . . including the power to provide for assignment and reassignment of classes of actions or classes of appeals among the several courts as the needs of justice shall require, . . . if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant, nor affect the right of the General Assembly to determine the jurisdiction of any court or justice of the peace, nor suspend nor alter any statute of limitation or repose." However, the Supreme Court apparently has exercised this power sparingly. See R. Potter, "Forward: The Supreme Court of Pennsylvania in 1974-1975: Some observations on Appellate Process," 37 U. Pitt. L. Rev. 217, 219 (1975).

In addition, the American Bar Association Model Judicial Article, Section 8, provides that the state supreme court have ruling making power over appellate jurisdiction. See D. Dodge and V. Cashman, "The ABA Model Judicial Article," 3 State Court J. 8, 43 (Winter, 1979).

38 An example of the division of appeals between the court of last resort and the intermediate court can be found in the Iowa Rules of Appellate Procedure, Rule 401 (b) and (c):

> (b) The Supreme Court shall ordinarily retain the following types of cases: (1) cases involving substantial constitutional questions as to the validity of a statute, ordinance or court or administrative rule; (2) cases involving substantial issues in which there is or is claimed to be conflict with a published decision of the Court of Appeals or Supreme Court; (3) cases involving substantial issues of first impression; (4) cases involving fundamental and urgent issues of broad public importance requiring prompt or ultimate determination by the Supreme Court; (5) cases in which life imprisonment has been imposed; (6) cases involving lawyer discipline, and (7) cases appropriate for summary disposition.
>
> (c) Other cases shall ordinarily be retained by the Supreme Court or be transferred to the Court of Appeals as follows: (1) cases which involve substantial questions of enunciating or changing legal principles shall be retained and (2) cases which involve questions of applying existing legal principles shall be transferred.

Notice that number 7 in Section (b) states that the Supreme Court retains cases appropriate for summary disposition. Hence, the high court retains some of the insubstantial cases and mitigates the objection that under this procedure the intermediate court would be delegated all the routine cases.

39 Perhaps the body making appellate jurisdictional rules should include, besides the high court judges, three or four intermediate court judges. This would help answer the objection that the higher court would make rules without sufficiently incorporating the desires and needs of the intermediate court judges.

40 There is considerable discussion in the literature about the best organization for intermediate courts: a single court or separate divisions, rotating or permanent panels, hearings in one or several locations, and en banc review permissible or not. See Carrington, Meador, Rosenberg, supra note 15, at 147-184. These decisions should be made by the supreme court under its rule-making authority. (As said in the prior footnote, perhaps several intermediate court judges should be included in the rule-making process.) In general, however, it seems that the intermediate court should be organized roughly in the same manner as the present Court of Appeals, except that en banc decisions would not be needed because the court of last resort could resolve any conflicts between intermediate court decisions.

41 The chief judge now has authority to assign Court of Appeals judges to the Superior Court upon certification of necessity by the chief judge of the Superior Court. D.C. Code sec. 11-707.

42 Professors Carrington, Meador, and Rosenberg (supra note 15, at 143-146) suggest 100 dispositions on the merits per year per judgeship as "the most efficient number" in a state intermediate court. This assumes that the court sits in three-judge panels (and, therefore, that each judge rules on 300 cases a year), that a third of the cases are decided without oral argument, and that about three-quarters of the cases are decided by memorandum opinions (and about a quarter by full opinions). Under this formula a six judge intermediate court could decide 600 appeals and 8 judge intermediate court 800. This suggests that a court smaller than that recommended in the text may prove adequate under current caseload conditions.

43 This figure is from Table 6. It includes applications for allowance of appeal and original jurisdiction writs.

44 ABA Standards Relating to Court Organization 43 (1974). However the standards state that a nine-judge court is permissible.

45 Fiscal year 1980 budget information was obtained from: District of Columbia Government, FY 1980 Executive Budget vii, 36, 56-57 (1978).

NOTES FOR CHAPTER IX

1 ABA Standards Relating to Appellate Courts 8 (1977).

2 Id. at 8-9.

3 It is not within the province of the Subcommittee to search for ways in which court litigation itself might be reduced; rather our job is to assess the volume of appellate litigation in this jurisdiction and to examine ways in which to cope with that workload.

4 ABA Standards Relating to Appellate Courts 4.

5 It has been suggested that the new court should be the court of last resort and that the present Court of Appeals should be the intermediate court. However, there is a total lack of historical precedent for such a change; no state supreme court has been transformed into an intermediate court. Furthermore, since the Court of Appeals is composed of able, hard-working and experienced judges, we see no reason for any such departure from established precedent here. Such a court would have the added advantage of being able to more effectively supervise the allocation of appellate responsibilities during the transition period. The Subcommittee makes no recommendation as to the futute names of the high court and the intermediate court.

6 ABA Standards Relating to Court Organization 34 (1974). Seven is said to be "the most common and generally satisfactory" number, although the Standards would also permit five or nine judges. It is conceivable also that the Court of Appeals could be reduced to five judges at some future date after the transition period, although such a change would have to await developments in the appellate caseload.

END