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Federal Review, Finality of State Court Decisions, and a Proposal for a National Court of Appeals—A State Judge’s Solution to a Continuing Problem

James Duke Cameron*

I. INTRODUCTION

Under the federal supremacy clause,¹ not only must state courts apply federal law where appropriate, but they are subject to review by the federal courts when federal law is applied improperly. Although state judges may disagree with particular decisions of the federal courts, state judges should have no quarrel with federal review of state court decisions involving federal questions. If there is to be any semblance of uniformity in the application of federal constitutional provisions by the state courts, it is inevitable, if not desirable, that federal courts, and particularly the United States Supreme Court, have the last word. Unfortunately, because of the manner in which federal review of state court decisions is exercised, state cases involving federal constitutional questions are no longer final, and excessive delay is commonplace, particularly in criminal cases. The resulting confusion and delay in the application of federal law by the state courts have detracted from the prestige of the state courts and eroded the force and effect of state court decisions. Assuming that the achievement of consistency, predictability, and reasonably prompt finality in state court decisions can be compati-

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I am indebted to Mack Jones, A.B., 1977, Northwestern University; J.D., 1980, University of Arizona College of Law, for his help and assistance. I wish also to thank Judge Clement Haynsworth of the Third Circuit, Dean Erwin Griswold, and John Frank Esquire for reading the initial draft of this Article and for their kind suggestions. The subject matter of this paper has been discussed previously in the American Bar Association Journal. Cameron, National Court of State Appeals: A View from the States, 65 A.B.A.J. 709 (1979). Special acknowledgment is made to Daniel J. Meador, James Monroe Professor of Law, University of Virginia, for his critical evaluation and helpful suggestions.

¹ U.S. Const. art. VI, cl. 2.
ble with federal review, this Article will discuss a proposed solution which, although designed to benefit the state judicial systems, would also assist the federal judicial system.

II. THE RELATIONSHIP BETWEEN STATE AND FEDERAL COURTS

When we became a nation, routine review by the federal courts of state court decisions was not contemplated, and there is some question whether the framers of the Constitution envisioned the establishment of federal trial courts at all, leaving to the state trial courts the responsibility of deciding federal questions in a trial setting. The Judiciary Act of 1789, however, created thirteen federal district courts, divided into three circuits. The resulting system was simple enough: state cases were tried in state courts, and federal cases, what few there were, were tried in federal courts. Our population was agrarian and small, commerce among the new states was limited, and the right to travel was a little-used privilege under our federal Constitution. That the law in one state was different from the law of a sister state was of little concern to the citizens or the courts. Professor Daniel Meador has commented:

In the first decade of its existence, the Supreme Court reviewed only seven state court decisions, and for the next several decades it reviewed about an average of one state judgment a year. The state judges, by virtue of the Federal Supremacy Clause, were compelled to apply federal law whenever it came into play, but federal law was so skimpy in the early decades that this posed little or no added burden on the state judges.

This pattern began to change during the Reconstruction period that followed the War Between the States. In 1867 Congress gave federal courts jurisdiction over petitions for writs of habeas corpus filed by state prisoners, and in 1868 ratification of the fourteenth amendment to the Constitution imposed due process and equal protection upon the states as a matter of federal law.

2. Ch. 20, 1 Stat. 73 (1850).
3. Id. §§ 2, 4. Each circuit court consisted of two Supreme Court justices and one district judge.
In 1908 the Supreme Court, in *Ex parte Young*, held that federal courts could enjoin state officials from conduct that violated the United States Constitution. This gave the federal courts substantial power and jurisdiction, requiring them to supervise the constitutionality of state officials' activities. Thus, federal district court judges have the power to hear evidence, make factual determinations, and issue injunctions. As a practical matter, these powers are in some respects greater than those enjoyed by the United States Supreme Court. The result has been the expansion of the business of the federal courts.

This interest of federal courts in state matters—the result of a cooperative venture among the United States Congress, the executive branch of the federal government, and the federal judiciary—came about during a period in which federal power was increasing and becoming more centralized. This expansion of federal jurisdiction reflected a concern for minimum, if not uniform, standards of justice for all citizens throughout the country, a concern that has continued to this day. As Justice Brennan has stated:

In recent years, however, another variety of federal law—that fundamental law protecting all of us from the use of governmental powers in ways inconsistent with American conceptions of human liberty—has dramatically altered the grist of the state courts. Over the past two decades, decisions of the Supreme Court of the United States have returned to the fundamental promises wrought by the blood of those who fought our War between the States, promises which were thereafter embodied in our fourteenth amendment—that the citizens of all our states are also and no less citizens of our United States, that this birthright guarantees our federal constitutional liberties against encroachment by governmental action at any level of our federal system, and that each of us is entitled to due process of law and the equal protection of the laws from our state governments no less than from our national one. . . . [S]tate courts no less than federal are and ought to be the guardians of our liberties.

The Task Force of the Conference of Chief Justices and the Conference of State Court Administrators, in its report on a State Justice Institute, noted that there is just as much national

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interest in the quality of justice as there is in the quality of health care or public education, and stated, "[T]he achievement of fair and equal rights as well as effective justice has always been thought of as an essential characteristic of American society." Unfortunately, along with this concern for minimum national standards has come the belief of some that federal courts offer the only solutions to certain problems.

III. PUBLIC PERCEPTION OF STATE AND FEDERAL COURTS: A SURVEY

Stating that problems can be remedied only in the federal courts is but another way of saying that state judges are unable to adequately address federal questions in the state courts. Professor Meador has noted that one of the "speculated" theories for the habeas corpus decisions was the Supreme Court's lack of confidence in state judges. Indeed, in the debate on the Civil Rights Act of 1871, Congressman Coburn stated: "The United States courts are further above mere local influence than the county courts; their judges can act with more independence, cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage . . . ." And Professor Neuborne has claimed that "parity" between the state and federal courts in the enforcement of federal rights is a "dangerous myth."

Judge Aldisert has suggested that the low public image of the state courts is a result of academia and the media rather than an actual difference in the quality of the two court systems:

There are significant reasons for the present infatuation with federal courts as the preferred forum for litigation. First, there is the influence of academia, exercised by the law professors and their captive audiences, the law students. A basic notion of modern legal academia is that the federal judiciary is a unique institution: That somehow the law is different there, or the proceedings more conducive to reasoned disposition; that

11. CONG. GLOBE, 42d Cong., 1st Sess. 460 (1871).
12. Neuborne, supra note 9, at 1105.
there is no politics in the appointment of federal judges; that federal judges come into their robes by a process akin to immaculate conception; that all federal judges are meritorious fountainheads of wisdom, whereas their state court counterparts are political hacks who happened to stump for a gubernatorial winner.

Preference for federal courts is also reinforced by the poor public image of state courts. Although there is some professional literature, very few public accounts today praise the state judiciary. The media continually emphasizes the state judiciary's shortcomings; and the resulting public impression is that state courts do not amount to much, and the most constructive, judge-made, substantive law emanates from the United States Supreme Court or from the lower federal courts. Unfortunately, federal judges have not only fallen into the trap of believing their press notices, but are starting to say it themselves. 13

Of course, not everyone believes state judges are inferior. Judge Donald P. Lay, of the Eighth Circuit, has noted, "It would be presumptuous to claim that federal judges are more competent, conscientious, or learned than their state brethren in the area of federal rights." 14 And Professor A. E. Dick Howard, while admitting that the preference for federal courts is frequently based upon a distrust of state courts, notes that there is still support for the state courts: "To this day, the argument goes on between those who look to the federal courts as the primary vindicator of federal rights and those who, noting that state judges also are sworn to uphold the Constitution, would repose more trust in the state tribunals." 15

The idea that the state judiciaries are inferior has played a greater role in congressional legislation and federal court decisions than is willingly admitted. At this point we might ask if the assumed inferiority of the state judiciaries has any substance in fact. Of course, when we compare the smaller (fewer than 800 judges), better paid, and carefully selected federal judiciary with

the many state judges at all levels of responsibility and jurisdiction, some selected by local and questionable political considerations, the comparisons are not always flattering to the state judges. But when comparing the state trial judges of courts of general jurisdiction with their counterparts on the federal district court bench, there is no reason to believe that the quality of state judges does not equal the quality of the federal judges, differences in tenure and compensation notwithstanding.

The persons who should be in the best position to evaluate the performance of state judges, as compared to the performance of federal judges, are the lawyers who practice before the trial courts. These lawyers, who submit their clients’ cases for decision and who must rely upon the courts for their professional standing, as well as their professional income, should be in a position to compare the two court systems.

In order to ascertain their attitudes, a survey was made of ten jurisdictions in the United States:

San Diego County (San Diego), California
Gadsen County (Tallahassee), Florida
Palm Beach County (Palm Beach), Florida
Cook County (Chicago), Illinois
Sangamon County (Springfield), Illinois
Essex County (Newark), New Jersey
Monmouth County (Freehold), New Jersey
Bernalillo County (Albuquerque), New Mexico
Spokane County (Spokane), Washington
Milwaukee County (Milwaukee), Wisconsin.

The jurisdictions were selected on the basis of geographical location and on the basis of differences in judicial selection processes. New Mexico, for example, is a state in which the judges stand for election in a political campaign.\(^\text{16}\) New Jersey was selected because it is not considered to have a “political judiciary”; it has a selection process more akin to the federal system.\(^\text{17}\) Also, there was an attempt to compare urban and rural counties in two states: New Jersey and Illinois.

The clerks of the superior, district, or circuit courts in the selected state jurisdictions were asked to distribute a total of fifty questionnaires, one to each lawyer who had just filed a civil

\(^{16}\) N.M. Const. art. 6, § 4.
\(^{17}\) N.J. Const. art. 6, § 6, ¶ 1.
The attorneys were asked to state the nature of the case, for example, tort, contract, divorce, etc. They were then asked, "If there were no time or jurisdiction problems and you had a choice, would you have preferred to file this case in a federal court or in the state court?" They were also asked to make such comments as they felt necessary.

The actions were about equally divided among divorce (79), tort (71), and contract (74), with "other" accounting for 32 responses. Of those responding, the preference was:

<table>
<thead>
<tr>
<th></th>
<th>Federal court</th>
<th>State court</th>
<th>No preference</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>34</td>
<td>193</td>
<td>18</td>
</tr>
</tbody>
</table>

When asked the reasons for their preferences, 11 of the 34 favoring the federal court and 48 of the 193 favoring state courts cited quicker disposition as the reason. Superior procedure and the quality of the judges were the second and third reasons for preferring the federal courts, while familiarity and convenience were the second and third reasons for preferring the state courts. When asked if the interest of their clients would be better served in the federal court or state court, the results were:

<table>
<thead>
<tr>
<th></th>
<th>Federal court</th>
<th>State court</th>
<th>No difference</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>30</td>
<td>124</td>
<td>94</td>
</tr>
</tbody>
</table>

But when asked if the quality of the judges was better in the federal court or the state court, the results were:

<table>
<thead>
<tr>
<th></th>
<th>Federal court</th>
<th>State court</th>
<th>No difference</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>95</td>
<td>30</td>
<td>125</td>
</tr>
</tbody>
</table>

Of interest is the fact that, out of the 95 who said the federal judges were of better quality, 58 still preferred to file in the state courts, and 28 thought the interests of their clients were better served in the state courts. The results of the survey are given in the Appendix to this Article.

18. The matters were limited to civil cases because defense attorneys in criminal cases do not have a choice as to which court to appear in, and I assume they would be unhappy wherever they are forced to be at a particular time.

19. The one page questionnaire was contained in a stamped envelope addressed to me at my home address. There was no indication on the envelope or on the questionnaire that I was a state judge. The questionnaire did not have to be signed by the attorney, and although the county was indicated, the identity of the attorney was not known if he did not indicate it on the questionnaire.
A comparison of the results in four of the jurisdictions may be of interest. They include Essex (urban) and Monmouth (rural) counties in New Jersey, a state in which judges are selected in a manner similar to that of the federal system; Bernalillo County, New Mexico, which has a political system of election; and Cook County, Illinois, where politics in the selection of judges is reputed to be intrusive:

<table>
<thead>
<tr>
<th></th>
<th>Cook County, Illinois</th>
<th>Bernalillo County, N.M.</th>
<th>Monmouth County, New Jersey</th>
<th>Essex County, New Jersey</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(29 replies)</td>
<td>(28 replies)</td>
<td>(19 replies)</td>
<td>(22 replies)</td>
</tr>
<tr>
<td>Prefer to file in federal court</td>
<td>9</td>
<td>3</td>
<td>2</td>
<td>5</td>
</tr>
<tr>
<td>Prefer to file in state court</td>
<td>16</td>
<td>23</td>
<td>16</td>
<td>15</td>
</tr>
<tr>
<td>No preference</td>
<td>4</td>
<td>2</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Interest of client best served by:</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Federal court</td>
<td>7</td>
<td>5</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>State court</td>
<td>10</td>
<td>12</td>
<td>14</td>
<td>5</td>
</tr>
<tr>
<td>No difference</td>
<td>12</td>
<td>11</td>
<td>4</td>
<td>12</td>
</tr>
<tr>
<td>Believe quality of judges is better in:</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Federal court</td>
<td>15</td>
<td>12</td>
<td>8</td>
<td>10</td>
</tr>
<tr>
<td>State court</td>
<td>3</td>
<td>1</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>No difference</td>
<td>11</td>
<td>13</td>
<td>8</td>
<td>12</td>
</tr>
</tbody>
</table>

Despite the differences in the selection processes, there appears to be no striking correlation between the selection process and the attitude of the bar toward state and federal judges.

In fact, probably the most notable result of the survey in general is the lack of startling or conclusive differences that can be ascertained between state and federal judges or state and federal courts. Answers to one of the questions, for example, indicate that more lawyers (95 to 30) thought that the quality of federal judges was better than the quality of state judges, but one-half of those who answered the question (125) thought there was no difference. The preference for state courts as a forum for their clients may be the result of the nature of the case and more familiarity on the part of the lawyer with the procedures.
followed and the personnel of the court. The differences between the two systems, rather than differences between the quality of the judges, may well be the more important factor. In any event, the answers to the questionnaire do not indicate that either federal or state judges are clearly superior in the perception of the lawyers. On the contrary, if the answers indicate anything at all, it is that there is not a great deal of difference between the quality of judges or justice in the two court systems.

IV. Unwarranted Federal Supervision of State Court Decisions

There being no great difference in the quality of judges or justice in the state and federal judiciaries, it may be questioned whether it is necessary for federal judges to review state court decisions to ensure that federal law will be enforced in the state courts. After all, state judges take an oath to uphold the Constitution of the United States as do federal judges, and state judges are just as capable of interpreting the Constitution and the decisions of the United States Supreme Court as are their brethren on the federal bench. Federal review, therefore, is not needed to ensure the quality of state court decisions; federal review is needed only to ensure consistency and uniformity in the application of federal constitutional standards in the state courts. The problem then is not that federal review of state court decisions involving federal questions is unnecessary; some form of federal review will always be necessary. The problem is that in discharging this review function the federal courts are guilty of delay and inconsistency and often review beyond the degree needed to ensure minimum federal standards of justice in the state courts, all to the detriment of state judicial systems.

Hart & Wechsler cites the Hawk case as an example of entangled and protracted procedures between the state and federal courts.20 Henry Hawk was sentenced in 1936 by a Nebraska trial court to life imprisonment for murder. Sixteen years later, after numerous actions in both state and federal courts, including six trips to the United States Supreme Court, Hawk was finally ordered discharged by a federal district court.21

21. Hawk v. O'Grady, 137 Neb. 639, 290 N.W. 911 (1940), cert. denied, 311 U.S. 645 (1940); Hawk v. Olson, 130 F.2d 910 (8th Cir. 1942), cert. denied, 317 U.S. 697 (1943); Ex
Today a criminal defendant typically can take six steps after a conviction in the state courts. (1) he may seek review by the state's appellate court (if there is an intermediate appellate court, there may be a two-stage appellate process), and (2) he may follow postconviction procedures in the state court that provide a basis for entry into the federal courts. Next, (3) the defendant can petition for a writ of certiorari or a direct appeal to the United States Supreme Court. If access to the United States Supreme Court is denied, as is most often the case, (4) the defendant then, by filing a petition for writ of habeas corpus, may go to the federal district court. If denied relief there, (5) he may appeal to the United States circuit court of appeals, and if he loses there, (6) he may go back again to the United States Supreme Court, this time from the decision of the court of appeals.

The recent case of Greene v. Massey is an example of these processes. In 1965, Greene and a codefendant, Sosa, were indicted for murder and were convicted. The conviction was set aside by the Florida Supreme Court, and a new trial ordered. The new trial was held, and Green was again convicted. This conviction was upheld by the Florida Court of Appeals against the defendant's double jeopardy claim. Greene then sought relief in the United States Supreme Court, which denied his petition for a writ of certiorari. Greene next petitioned for a writ of habeas corpus in the federal district court, which was denied. From the federal district court, Greene went to the United States Court of Appeals for the Fifth Circuit, which affirmed the federal district court. Again Greene petitioned to the United States Supreme Court, but this time certiorari was granted, and on June 14, 1978, the United States Supreme Court reversed the decision of the Fifth Circuit. But even this did not conclude


the matter in the federal courts. The United States Supreme Court did not finally dispose of this case, but instead remanded it to the Fifth Circuit Court of Appeals for a reinterpretation of the Florida Supreme Court decision of 1968 (some 10 years earlier) in light of later opinions of the United States Supreme Court. The United States Supreme Court stated: "The Court of Appeals will be free to direct further proceedings in the District Court or to certify unresolved questions of state law to the Florida Supreme Court."28

The delay and confusion caused by this method of federal review of state court decisions has resulted in what must be the most costly and inefficient system ever devised by man. Admittedly, we have grown callous to this delay, but I would suggest that it cannot be justified when viewed in the light of any reasonable concept of efficient administration. Some reform is necessary if the state courts, which decide 98.8% of the cases in this country,29 are to be able to apply federal law evenly and fairly, as the United States Constitution requires. The public and the parties are entitled to a reasonable, prompt determination of federal questions by a court that speaks uniformly and finally. As it is, there is neither promptness, finality, nor uniformity in federal review of state decisions.

State judges can take little satisfaction from the fact that only a relatively few state cases are actually overturned by the federal courts. The state judiciaries, like their federal counterparts, must depend upon public acceptance of their decisions to be effective. The damage done to the prestige of state courts and to the acceptability of their decisions is great. It is somewhat ironic that federal courts, in their stated desire to assure due process and equal protection to all citizens, are, by their efforts, robbing those citizens of some of the essential ingredients of due process and equal protection, to wit, speedy, final and predict-

28. Id. at 27.
29. A memorandum from Nora Blair of the National Center for State Courts to Francis J. Taillefer, Project Director, and National Courts Statistics Project (dated April 16, 1979 on file at National Center for State Courts) indicates that 98.8% of current cases are handled in state courts. See also Sheran and Isaacman, State Cases Belong in State Courts, 12 CREIGHTON L. REV. 1 (1978).

Task Force Report, supra note 8, at 5 n.5.

Our system is still structured on the basic premise that the state courts are the primary forums for deciding the controversies which arise in the great mass of day-to-day dealings among citizens.

Meador Speech, supra note 4, at 10.
able justice, uniformly and consistently applied. Chief Justice Burger stated, "The criminal process should not extend over a span of three, five or seven years, with repeated appeals and repeated collateral attacks on convictions. At some point, there must be finality. Without finality, justice is a myth."^{30}

If the delay is intolerable, so is the inconsistent application of federal law to the states by the federal courts. The state judicial system is generally consistent in its application of both state and federal law. The state's highest court is the last word on what the law is for that state, and it will be alert to the need for a unified and consistent body of state law. The result is a predictable, uniform, and final system of law within the state. Such is not the case within the federal system.

The law from circuit to circuit can be different, and basic United States constitutional questions can depend upon the federal circuit in which the state happens to be located. The law within the circuit can also depend upon which panel of the circuit hears the case. The confusion is even worse on the federal district level. In each state there may be just as many interpretations as there are federal district judges. Also, there can be different results where the petitions to the federal courts contain variant recitations of the facts of the case and the law to be applied. This is not a criticism of the federal trial judiciary; most federal district judges attempt to harmonize the law of their district. However, except for the United States court of appeals, there is no unifying court over the district to enforce consistency in the same manner that a state supreme court does for the state courts.

What has happened in the federal judiciary is that the sheer number of cases makes it impossible for the United States Supreme Court to supervise effectively the state and federal judicial systems. Professors Carrington, Meador and Rosenberg have stated:

The problem of national uniformity derives from a weakness in the federal appellate hierarchy. The weakness is a result of overgrowth: the hegemony of the Supreme Court of the United States is too attenuated to be effective as the unifying arch of the structure. By combined force of number of cases and complexity, the national law has outgrown the Court's su-

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pervisory capacities. The Court is forced to scant many of the matters for which it bears the ultimate responsibility.  

V. THE NEED FOR REFORM

As a possible solution to these problems, some observers suggest abolition of our dual system of justice. Professor Meador has compared recent trends with the consolidation of the courts in England:

The accretion of federal jurisdiction, the growing dominance of the federal judiciary and the drawing together of the two systems are reminiscent of developments in England centuries ago. After the Normans arrived and established the seeds of a central national government, there arose in England for the first time some central, national courts — Common Pleas, King’s Bench, and the Exchequer. But at the beginning and for many, many years, these courts had very limited jurisdiction. The great bulk of everyday dispute settlement rested in the local courts of various sorts—county seats, feudal courts, and others. Gradually, however, as the centuries passed, the jurisdiction of the central courts increased. By various procedural inventions and fictions they drew unto themselves an ever increasing amount of judicial business which previously had been in the hands of the local courts. Ultimately, the local courts were eclipsed, and the central courts became all embracing in their authority.

It is Professor Meador’s belief that the courts in the United States are presently in a period of transition and that the emergence of a federal structure quite different from the original state-federal design is not only possible but logical, as a strong federal judiciary, aided by Congress, asserts more federal authority over the state judiciaries. Chief Justice Burger, while perceiving a dim outline of “state court dockets and federal dockets becoming more and more alike,” 34 cautions that “[t]hese observers may be in the position of a small boy looking down a stretch of straight railroad track when, by optical illusion, the rails seem to converge, but this presumption is not frivolous.

33. Id. at 22-23.
Like symptoms of illness, we ignore them at our peril.\textsuperscript{35}

If uniformity alone is the goal, other countries provide examples. As Professor Meador has pointed out, in Australia and Canada, state court decisions are reviewed by a federal tribunal that decides all legal questions, both state and federal. The Federal Republic of Germany has no federal trial courts, the courts of first instance being provided by the states and reviewed in federal appellate courts.\textsuperscript{36} Adoption of this mode in the United States would require a radical restructuring of our historical state-federal relationship. It is highly unlikely that this model would ever be adopted in this country, even if desirable.

Since a merger of the two court systems is unlikely, unless radical measures are taken, the present dual system is likely to continue, with the state courts deciding the overwhelming majority of cases and the federal courts exercising some kind of review of state court decisions involving federal questions. However, the present inefficient and time-consuming system must be modified. What is needed is a method that will rely more heavily on the proven abilities of state judges and the admitted capacity of the state judicial systems, while at the same time preserving the minimum amount of review necessary to ensure that federal questions are properly and uniformly addressed by the state judicial systems. State courts must continue to follow and apply federal law where necessary, but this can be accomplished without excessive and disruptive interference by the federal courts.

VI. THE PROPOSAL: A NATIONAL COURT OF STATE APPEALS

It is therefore proposed that Congress create a National Court of State Appeals consisting of nine judges, appointed by the President pursuant to Article III of the United States Constitution, with original appellate jurisdiction to review state court decisions, both civil and criminal, in which federal questions have been raised and state remedies exhausted. This court would consider not only direct appeals from the state’s highest court, but would have exclusive original jurisdiction over all collateral attacks on state court decisions (presently filed in the federal district courts). This would completely divest the federal district courts of jurisdiction to review decisions of state courts on federal constitutional questions. It would be a discretionary

\textsuperscript{35} Id. at 4.

\textsuperscript{36} Meador Speech, \textit{supra} note 4, at 22.
court. It would also be a court of entry to the United States Supreme Court from decisions of the state's highest court.

The concept of a National Court of State Appeals is not new. In 1968 the American Bar Foundation first proposed a National Court of Appeals, but the concept provoked little interest.\(^37\) Judge Clement F. Haynsworth, Jr., proposed a court that would have "jurisdiction to review on writs of certiorari federal questions in convictions in the state and federal systems in which a conviction is called into question."\(^38\) The Study Group on the Caseload of the United States Supreme Court (The Freund Committee) proposed a National Court of Appeals which would be a screening court for the United States Supreme Court and would be empowered to decide cases of conflicts among the circuit courts.\(^39\) In 1975 the Commission on Revision of the Federal Court Appellate System (The Hruska Commission) proposed the establishment of a National Court of Appeals that would have reference jurisdiction from the United States Supreme Court and transfer jurisdiction from the Court of Claims or Court of Customs and Patent Appeals.\(^40\) Dean Erwin N. Griswold proposed a National Court of the United States which would be assigned cases by the United States Supreme Court after that court had granted the petition for certiorari.\(^41\)

All of the proposals for a National Court of Appeals had one thing in common. They viewed the problem from the standpoint of the federal judiciary and were concerned with relieving the pressure on the United States Supreme Court. There is no doubt that relief is needed, but if the individual litigant is to be relieved of the time-consuming process of federal review and if the states are to be given the proper guidance by the federal courts, then the needs of the state courts should be seriously considered in any proposal for reform of federal judicial procedure. For a

41. Griswold, Rationing Justice—The Supreme Court's Caseload and What the Court Does Not Do, 60 Cornell L. Rev. 335 (1975).
National Court of Appeals to be acceptable, the following conditions must be met:

1. The United States Supreme Court must remain supreme.
2. The position and prestige of the state courts must not be demeaned.
3. The federal judiciary should not be unduly expanded.
4. The new court must be able to attract competent and able judges.
5. The docket of the court must be manageable.
6. It must be constitutional.
7. Justice must be done.

Others, in stating the conditions for the establishment of a National Court of Appeals, have stressed the avoidance of a fourth tier of federal courts and the avoidance of specialization. These stated conditions are examined below in the hopes of overcoming some of the objections voiced by opponents of the concept of a National Court of State Appeals.


The proposal for a National Court of State Appeals was presented to the Conference of Chief Justices in Flagstaff, Arizona, in August of 1979, and the Conference deferred action. In Chicago, in February of 1980, action was again deferred. At that time, Chief Judge Lawrence H. Cooke, Chief Judge of the New York Court of Appeals, spoke in opposition based upon inadequate specification of the jurisdiction to be exercised and the inability of the court to handle the caseload. Chief Judge Cooke further opposed the resolution because:

3. Such a court would be an additional burden for the taxpayer.
4. With but one court in the entire country to handle these matters, great expense and inconveniences would be visited upon litigants and members of the bar, most of whom would be required to travel long distances to the seat of the court, wherever that might be.
5. It would be denigrating to the Supreme Courts of the states and convert their status from that of a final arbiter to that of an intermediate appellate court.
6. If the purpose of this new court is to end disparity between decisions of existing United States Courts of Appeals, the effort starts at the wrong end. Rather, there should be created for such a purpose a federal court to review the decisions of the federal Courts of Appeals.
7. Lastly and most importantly, the concept of such a court, as so briefly sketched in the resolution, is that, and I quote, “[it] would have jurisdiction to review on a discretionary basis criminal and quasi-criminal cases, including applications for writs of habeas corpus, presently reviewed by the Federal District Courts and the Circuit Courts of Appeal. . . . This jurisdiction would be in place of and not in addition to the jurisdiction presently exercised by the Federal District Courts and the Circuit Courts of Appeals.” Such a concept, without doubt, would be violative of the United States Constitution. Under Article 1, section 9, clause 1 thereof, the right of habeas corpus shall not be abridged.
A. The Supremacy of the United States Supreme Court

Of prime importance is that the United States Supreme Court remain supreme. Final state court decisions involving federal questions in criminal cases would bypass review by the federal district courts and the United States circuit courts of appeals but would not avoid review by the United States Supreme Court, which would have the ultimate review of these decisions and would be the final word on federal law. Two steps and two opportunities for federal courts to review state court criminal decisions would be replaced by one possible review by the National Court of State Appeals. Review of state court criminal decisions by the United States Supreme Court would be expedited, as there would be only one level of review between the highest state court and the United States Supreme Court. Since civil cases would also be routed through the National Court of State Appeals, there would be uniformity of processing for both civil and criminal matters.

For the United States Supreme Court to remain supreme, however, it is not necessary that the Court remain open for every matter that is thrust upon it. This is the very reason the United States Supreme Court is presently overloaded. This overloading increases the danger that worthy litigants will be overlooked in the crush of frivolous and meritless petitions. Two procedures will allow the National Court of State Appeals to dispose of, with finality, the vast majority of cases presented to it while providing an avenue for review by the United States Supreme Court of those cases that need the Court's attention.

First, as suggested by Judge Haynsworth in his proposal for a National Court of Appeals and as followed in some states that have intermediate courts of appeal, certiorari or appeal from the National Court of State Appeals to the United States Supreme Court should be allowed only when one or more of the judges of the National Court of State Appeals dissent. Since the court will have nine judges, presumably of varying shades of philosophy by Congress. And that is exactly what such a court as proposed by the resolution would do! No longer would the United States District Courts or the United States Courts of Appeals have jurisdiction over habeas corpus. This National Court of State Review would have such jurisdiction, but only on a "discretionary" basis — thus a clear and definite abridgement if there ever was one.

and background, it is unlikely that appeal of a worthy case will be foreclosed by a unanimous opinion of the National Court of State Appeals.\textsuperscript{44}

Second, a procedure can be provided that would allow the parties or the Chief Justice of the National Court of State Appeals, after briefs have been filed and the matter is ready for submission, to petition the United States Supreme Court for transfer to that court. The parties would have to show extraordinary reasons why the matter should be transferred. For example, a case like \textit{Bakke},\textsuperscript{45} in which it was apparent to all that it should be decided by the United States Supreme Court, could, upon request, bypass the National Court of State Appeals and go directly to the United States Supreme Court. This method has been used effectively in Arizona to bypass the Court of Appeals.\textsuperscript{46}

These two procedures will allow ample opportunity for review by the United States Supreme Court without placing too great a burden on the Court to hear petitions for review of each and every case decided by the National Court of State Appeals. The National Court of State Appeals would not be independent of the United States Supreme court, but subservient and always subject to review by the Supreme Court, except when the national court's opinion is unanimous. The United States Supreme Court would remain supreme but would have to consider a constitutional question only once, on review or transfer from the

\textsuperscript{44} Haynsworth, note 38 supra.

I would cut off the right to apply to the Supreme Court for certiorari to any petitioner who did not get a single affirmative vote in the new court. Rejected cases of that category are the chaff with which the Supreme Court should not be burdened by formal petitions. I cannot believe that any petitioner who fails to get at least one affirmative vote in the new court could reasonably expect to get four affirmative votes in the Supreme Court. This should not foreclose the use of screening panels provided the panels are instructed to pass on to the full court a petition if its merit or lack of merit is reasonably debatable.

\textit{Id.} at 843.


\textsuperscript{46} The Arizona Rules provide:

19(a) Time for Filing. No later than 10 days after the appeal is at issue, any party to an appeal pending before the Court of Appeals may petition to the Supreme Court to order the transfer of the case to the Supreme Court.

19(b) Transfer by the Court of Appeals. At any time after the appeal is at issue but before oral argument or submission of the appeal, the chief judge of the division of the Court of Appeals in which the appeal is pending may petition the Supreme Court to order the transfer of the case to the Supreme Court.

\textsc{Ariz. R. Civ. App. P.} 19(a), 19(b).
National Court of State Appeals.

B. Upholding the Position of State Courts

A National Court of State Appeals would give speedy and consistent finality to state court decisions. It would avoid the present, demeaning practice of allowing federal trial judges to overturn the state supreme courts in criminal cases.

This concern with the propriety of a trial court overruling an appellate court is not new. The National Advisory Commission on Criminal Justice Standards and Goals, in recommending that challenges to state court convictions be heard only by the United States courts of appeals, stated, "That [recommendation] is based upon the Commission's view that overturning a conviction that has already been upheld by the State's appellate court system is a step of such seriousness that it should not be performed by a single judge of a court with general trial jurisdiction." With the creation of a National Court of State Appeals, only a federal appellate court would be able to review and reverse a state appellate court.

In civil matters the National Court of State Appeals would be able to give greater consideration to the diversity of state court procedures and would not be concerned with both federal and state procedures. Although the United States Supreme Court tries to recognize state court procedures, an appellate court with no federal court jurisdiction would be in a better position to recognize the rich diversity of state laws and procedures which, though different, do not violate federal constitutional standards.

C. Expansion of the Federal Judiciary

As can be seen, this proposal would expand the federal judiciary by only nine judges, a de minimus increase in the number of federal judges. While there would be an appellate tier between the state's highest court and the United States Supreme Court, the number of appellate courts between the federal district courts and the United States Supreme Court would remain the same.

47. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON COURTS 131 (1973) [hereinafter cited as REPORT ON COURTS].
D. The New Court’s Ability to Attract Competent Judges

Since the National Court of State Appeals would be authorized to take civil as well as criminal cases, it would not be a specialized court, a factor which should make service on the court more attractive. Service on the National Court of State Appeals would be more desirable than service on a court limited to criminal jurisdiction, as suggested by Judge Haynsworth. The judges should be appointed by the President pursuant to Article III of the United States Constitution. Since the National Court of State Appeals would be a truly national court and not a regional one, the salary should be greater than that of a judge on the United States Court of Appeals to ensure that the highest caliber of judge is attracted to the new court.

E. The Manageability of the New Court’s Docket

A most critical question concerns the ability of the new court to handle the volume of cases that will be presented to it. The number of habeas corpus petitions in the federal district courts by state prisoners has remained fairly constant over the last ten years, as shown by the following chart:

48. Haynsworth, supra note 38.
49. The method of selecting the judges of the new court has troubled previous supporters of a National Court of Appeals and seems to have had a chilling effect on past proposals for a national court. This problem could be overcome by providing initially for a form of merit selection as recommended by the American Judicature Society, and as provided in many states and as was followed in the selection of some federal circuit court judges during the Carter administration. There could also be an agreement that there be a balanced selection by the President between the political parties when the court is first appointed.
50. It should be kept in mind that the National Court of State Appeals would not have jurisdiction over civil rights petitions even if filed by state prisoners. These suits are independent actions in the federal district courts and would be reviewed by federal courts of appeal, as are all federal cases.
51. These and other statistics have been obtained from the 1980 Annual Report of the Director of the Administrative Office of the United States Courts. It is noted that while the number of habeas corpus petitions in the federal district courts by state prisoners has remained static, the number of civil rights petitions by state prisoners in federal district courts has increased:

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</tr>
</thead>
<tbody>
<tr>
<td>Cases</td>
<td>6,128</td>
<td>6,958</td>
<td>7,752</td>
<td>9,730</td>
<td>11,195</td>
<td>12,397</td>
</tr>
</tbody>
</table>

It should be remembered that very few of these habeas corpus petitions filed by state prisoners are of substance and require more than the briefest attention. These cases have been tried in the state trial court and have gone through a state appellate process and quite often through state postconviction procedures. The issues have been sufficiently refined so that they may be easily identified and quickly decided. 52

Statistics of the United States Supreme Court are not very helpful in determining the source of that Court's work. They do indicate, however, that the total number of cases docketed between 1976 and 1979 has remained under 5,000. 53

30. Thirty of the 50 petitions were dismissed without the court's requiring either a response from the defendants or a hearing. The reasons were:

1. Availability of state remedies 14
2. No habeas corpus claim (i.e., wrong type of action, lack of jurisdiction, or alleged errors not of constitutional dimension) 8
3. Issue correctly decided on direct appeal 2
4. No specific facts alleged 2
5. Claim not related to present confinement 2
6. Moot 1
7. Claim disposed of previously by district court 1

Hearings were required in only three cases out of the remaining 20, and in only one case was relief granted. That case concerned a prisoner who had been sentenced for contempt of court, and that matter was remanded to the state for a new hearing on the contempt.

The Freund Commission provided more detailed information for the 1971-1972 Term. The report showed that out of a total of 4,371 cases docketed, 1,341, or 30.7%, originated in the state courts. Of this number, 445 were civil appeals and 896 were criminal appeals.

If we assume that both the total caseload of the United States Supreme Court (under 5,000 cases a year) and the proportion of state cases to federal cases in the Court have remained substantially constant, approximately 1,500 cases presently heard by United States Supreme Court would be heard instead by the National Court of State Appeals. When this figure is combined with the 7,000 or more habeas corpus petitions presently filed in the federal district courts, the maximum potential caseload for the National Court of State Appeals is 8,500 cases. Such a caseload would, even with excessive resort to staff, be prohibitive. It is submitted, however, that the actual caseload would be much less.

It can be assumed that the present number of civil appeals from state court decisions will remain the same, about 500 a year. The number of criminal cases filed in the National Court of State Appeals will not, however, be as high as the number now filed in the federal district courts. Significantly fewer state prisoners will seek relief in a National Court of State Appeals than now seek relief in the federal district court; it is more difficult and possibly more intimidating to file in a national court than it is to "walk across the street" to the local federal district court. Also, a time limit beyond which a state prisoner could not appeal from the final decision of the state court would significantly reduce the number of prisoners who could file in the national court.

This willingness or unwillingness of a state prisoner to seek relief in a National Court of Appeals cannot be proven conclusively, but an indication of it can be seen in the statistics compiled by the Freund Commission. For the 1971 Term there were 1,721 criminal appeals to the United States Supreme Court from the United States courts of appeals. What proportion of these were state prisoner cases is not known, but the figure indicates the number of prisoners, state and federal, who were willing to

54. Freund Report, supra note 39, at 620, table V.
55. The term "appeals" includes both regular appeals and petitions for certiorari or habeas corpus.
56. Freund Report, supra note 39, at 620, table V.
pursue an appeal to the United States Supreme Court from the United States courts of appeals.

Another indication of the willingness of the state prisoners to appeal can be obtained from the number of present appeals to the United States courts of appeals from the federal district courts by state prisoners. In 1980, there were 1,090 criminal appeals filed in the United States courts of appeals by state prisoners. In other words, the number of state prisoners who desired to proceed further from the ruling of the federal district courts to the United States courts of appeals was only slightly more than the number of state prisoners (896) who appealed from state courts directly to the United States Supreme Court in 1971. This may reflect the results of Stone v. Powell and Wainwright v. Sykes as well as the relief now believed to be afforded by the civil rights petition. The figures do indicate the degree of willingness of state prisoners to follow the appellate process from a state court decision. However, the federal district court is somewhat different. The district court is nearer, and, being a trial court, there is more often the hope that the trial court will construe contested facts in the petitioner's favor. This is seldom done, but the hope blooms eternal. Such expectations do not usually extend to appellate courts.

There is, however, another reason a National Court of State Appeals would not have to consider all of the 7,000 cases now filed in the federal district courts. That is the certainty of the law and its even application. Today, a state prisoner lives in the belief that he will find the "right" federal district judge. That this rarely happens is immaterial, as long as the belief remains. No longer will the prisoner be able to shop for the sympathetic judge. The law will be certain, and the prisoner will not file his petition in the National Court of State Appeals in hopes of getting some new or different law. Professor Schuman has stated:

One reason why such a large percentage of criminal prosecutions are closed on a guilty plea without trial is that in most of these cases there is an extremely visible, rigid, appropriate (valid) statutory rule furnishing a standard to support the claim of the state and an absence of any standards to support the claim of the defendant.

A National Court of State Appeals would apply the federal standards in an even, uniform manner to all state prisoners. The state prisoners would be denied the hope of the "luck of the draw" now available in the federal district courts.

Civil cases may well provide more of a problem for the court because of the substance of the cases. It should be remembered, however, that this would be a discretionary court, and even if it is assumed that 500 civil appeals a year are filed, not all will be heard and decided by written opinion. The number of civil cases that the National Court of State Appeals would have to consider, while sufficient to provide a well-rounded and interesting docket, would not be so large as to overwhelm the new court.60

The sum of the three figures discussed above yields an accurate estimate of the number of criminal appeals that would reach the National Court of State Appeals: (1) the number of direct criminal appeals by state prisoners to the United States Supreme Court in 1971 (896); (2) the number of criminal appeals by both state and federal prisoners from the United States courts of appeals to the United States Supreme Court in 1971 (1,721); and (3) the number of criminal appeals by state prisoners to the United States courts of appeals from the roughly 7,000 decisions of the federal district courts in 1980 (1,090). The total number of criminal appeals by state prisoners from the decisions of the states' highest courts would be considerably less than the 7,000 cases now filed in the federal district courts. Giving the benefit of the doubt to the filing of an appeal, the total number of criminal cases appealed to the National Court of State Appeals by state prisoners should be fewer than 3,000, or three times the number of state prisoners who now take the trouble to appeal to the United States courts of appeals from the decisions of the federal district courts. Adding this figure to the estimated

civil appeals of 500, we arrive at a conservative estimate of 3,500 cases, fewer than the United States Supreme Court now processes, and a reduction in the United States Supreme Court’s caseload of some 1,400 cases, or 28%. For a pessimistic projection, if we allowed for an appeal to the National Court of State Appeals by half of the 7,000 state prisoners who now file in the federal district courts, the figure of 4,000 (3,500 criminal appeals plus 500 civil appeals) is still less than the United States Supreme Court’s present, more substantive caseload.

F. The Constitutionality of the New Court

One of the questions raised in opposition to the National Court of State Appeals is the constitutionality of depriving the federal district courts of the power to issue writs of habeas corpus involving state prisoners. This should not be a stumbling block as long as there is an alternative forum that is reasonably accessible in which petitions for the writs can be heard.

The Judiciary Act of 1789, gave the federal courts the power to issue writs of habeas corpus. The issuance of the writ, however, was limited only to prisoners held in custody by the United States. It would appear that the federal courts at that time limited the inquiry in habeas corpus cases to jurisdiction of the sentencing court. It wasn’t until 1867, after the Civil War, that the scope of the writ was expanded to state prisoners, but even then the power was given only to the federal circuit courts and not to the federal district courts. Federal circuit courts were authorized to give relief “in all cases where any person [might] be restrained of his or her liberty in violation of the constitution, or any treaty or law of the United States.” The scope of the writ was further expanded in the case of Frank v. Mangum to include proceedings in which a state defendant had been convicted in a trial which had been mob dominated. The scope of the writ was again judicially extended in Brown v. Allen and in Fay v. Noia. The United States Supreme Court

61. See note 43 supra.
62. See note 2 supra.
65. Id.
67. 344 U.S. 443 (1953).
recently limited the scope of the writ in *Stone v. Powell,*\(^69\) stating, "[W]here the State has provided an opportunity for full and fair litigation of a fourth amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced at his trial."\(^70\)

Not only has the scope of the writ as to state prisoners been restricted by United States Supreme Court decisions, the jurisdiction to issue the writ has been restricted by Congress. Section 2255 of the Federal Habeas Corpus Act provides that "an application for writ of habeas corpus . . . , shall not be maintained," if the person has not availed himself of federal postconviction relief or has been denied such relief.\(^71\) The United States Supreme Court case of *Swain v. Pressley*\(^72\) should be persuasive on this question. In that case the Court construed a statute that prohibited federal district courts from considering applications for writs of habeas corpus brought by a person in custody pursuant to sentence imposed by the Superior Court of the District of Columbia. The United States Supreme Court stated:

> Respondent argues (footnote omitted) that § 110(g), if read literally, violates Art. 1, § 9, cl. 2, of the United States Constitution, which provides:
>
> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.
>
> His argument is made in two steps: (1) that the substitution of a remedy that is not "exactly commensurate" with habeas corpus relief available in a district court is a suspension of the writ within the meaning of the Clause; and (2) that because the judges of the Superior Court of the District of Columbia do not enjoy the life tenure and salary protection which are guaranteed to district judges by Art. III, § 1, of the Constitution, the collateral-review procedure authorized by § 23-110(g) of the District of Columbia Code is not exactly commensurate with habeas corpus relief in the district courts.\(^73\)

The Supreme Court then held that the federal district court

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\(^70\) Id. at 482.
\(^73\) Id. at 379-80.
could be deprived of habeas corpus jurisdiction as long as alternate relief was available that was neither inadequate nor ineffective.\textsuperscript{74}

Others have had no problem in limiting the use of habeas corpus by federal trial courts. The National Advisory Commission on Criminal Justice Standards and Goals stated, in standard 6.5, that “[c]hallenges to state court convictions made in federal courts should be heard by the United States Courts of Appeals.”\textsuperscript{75} The commentary to standard 6.5 reads:

The standard also recommends that insofar as defendants convicted in State criminal proceedings have access to Federal courts for further review beyond direct review by the U.S. Supreme Court of the State courts’ affirmation of the decision, they should be permitted to challenge their convictions only in the U.S. courts of appeals. This would eliminate further review in the U.S. district courts as is presently available.\textsuperscript{76}

The National Court of State Appeals would provide the habeas corpus petitioner the same relief he presently receives. The only practical problem, as the Advisory Commission recognized, would be that the National Court of State Appeals, being an appellate court, could not conveniently hold hearings on issues of fact. Although the federal district courts, in fact, rarely do this now, usually relying upon the state record in the matter, some cases would need a factual determination to ensure that full relief is afforded. The National Advisory Commission on Criminal Justice Standards and Goals recommended that the circuit courts could refer matters to the trial court for factual determination where “[t]he defendant asserts a claim of constitutional violation which, if well-founded, undermines the basis for or the integrity of the entire trial or review proceeding, or impairs the reliability of the factfinding process at the trial.”\textsuperscript{77}

Since this would be a National Court of State Appeals, any referral for an additional factual determination should be made to the state court rather than the federal district court. One of the problems with collateral attacks upon state court decisions in the federal district courts has been the difference in pleadings

\textsuperscript{74} Id. at 383-84.  
\textsuperscript{75} REPORT ON COURTS, supra note 47, at 128, standard 6.5.  
\textsuperscript{76} Id. at 131.  
\textsuperscript{77} Id. at 128, standard 6.5. See also Sumner v. Mata, 101 S. Ct. 764 (1981), which held that the federal court had to apply a “presumption of correctness” in reviewing factual determinations of the state courts.
and the difference in the testimony upon which factual determinations have been made in the federal court as opposed to those already made in the state court. By referring any factual determination back to the state court, the National Court of State Appeals would be assured that the state court files already in existence would be available and thus allow for a more consistent factual determination.

In summary, there should be no constitutional impediment to taking jurisdiction of habeas corpus petitions by state prisoners away from the federal district courts and giving it to the National Court of State Appeals.

G. The New Court's Ability to Achieve Justice

The thrust of this proposal is to satisfy the primary interest of the states in a system of federal review that will function with reasonable promptness, uniformity, and absolute finality. The cause of justice is served by these same goals.

There must be an end to litigation. The sooner a matter is settled, the sooner the litigants can go on with their business, or the sooner a prisoner can concentrate on rehabilitation instead of dreaming, as he does now, that somewhere, someday he will find a federal district judge who will turn him loose and even recompense him for the violation of his civil rights by the state court. It should be remembered that, in criminal cases, by the time a prisoner reaches the federal courts, he has been given about all of the due process he is entitled to receive. The defendant has been found guilty by a jury or has pleaded guilty, often as a result of a plea agreement approved by the state court. The case has been reviewed by the state's appellate court, and the conviction has been affirmed. Frequently he has also been denied postconviction relief. Chief Justice Burger has noted, in discussing the cost and time involved in extended review of criminal convictions, "The tragic aspect was the waste and futility, since every lawyer, every judge and every juror was fully convinced of defendant's guilt from the beginning to the end." And Chief Justice Schaefer of Illinois has stated, "What bothers me is that almost never do we have a genuine issue of guilt or innocence." If the chance that a defendant has a valid claim of

79. Remarks by Walter v. Schaefer, Conference of the Center for the Study of Dem-
NATIONAL COURT OF APPEALS

reversible error is extremely small, the chance that a defendant will have been convicted of a crime that he did not commit will be even smaller.\textsuperscript{80} And the fact that access to the United States Supreme Court would be reduced does not mean that justice will be denied. Justice Jackson stated:

\textit{Reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.}\textsuperscript{81}

In civil cases, although there are not the same number of frivolous appeals, the facts and issues will likewise have been distilled to the point that the constitutional questions are readily apparent, and the National Court of State Appeals could quickly decide whether to take the case. Here again the litigant has been before the state courts and through the state appellate process. The chance that he has been unjustly treated is small. Federal appellate review of state civil decisions serves more to clarify the law than to prevent injustice in a particular case.

The proposal of a National Court of State Appeals would not be acceptable if, in operation, the court would damage the federal system or detract from the supremacy or prestige of the United States Supreme Court. This proposal would neither harm the federal system nor detract from the position of the United States Supreme Court. It would, however, provide an extra number of authoritative federal law decisions upon which the states and others could rely with a reasonable expectation that they are final and binding.

A National Court of State Appeals could review federal


80. It has been suggested that no petition for a writ of habeas corpus by a state prisoner in the federal court should be considered unless there is a colorable claim of innocence. There would be, of course, some exceptions to this rule:

1. Lack of jurisdiction in the traditional sense, for example, double jeopardy.
2. Where the error is one that could conceal from the trial court and the court on appeal the extent of the error: for example, inadequate or no representation by counsel, which could not only concern the degree of the crime, but also affect the severity of the sentence.
3. Where there has been a change in basic constitutional law.


questions decided by state courts expeditiously and uniformly with less cost than is incurred under the present structure. Such a court would provide swifter and more consistent justice for the people that both the federal and state courts must serve.

VII. SOME QUESTIONS

A. Time Limits

There is a question as to what, if any, time limits should be placed upon a person seeking national court review of state court decisions. One of the purposes of a National Court of State Appeals would be to bring litigation to a conclusion within a reasonable time. It is proposed that a person seeking relief from a decision of the state’s highest court be required to do so within ninety days of final action by the state court. This should work no hardship on the litigant and would ensure that the court would not be burdened with reviewing stale decisions. In criminal cases, if there is a change in the law or there is newly discovered evidence, these matters can be first litigated in the state courts through state postconviction procedures, and the petition to the National Court of State Appeals would be based upon the denial of relief by the state’s highest court.

B. Distance and Increased Costs

Another objection that has been made is the increased costs involved in having to travel to the National Court of State Appeals to argue cases that previously were argued in the local district court or the United States courts of appeals. For some, this would admittedly be a burden. But cost alone should not be the basis for allowing federal trial judges to sit in judgment of state appellate courts. Moreover, there are some solutions to the cost factor. First, the enacting legislation could allow the National Court of State Appeals to travel and hear cases at selected places around the country. This is done by appellate courts in many states and has been beneficial to both the court and the litigants. Second, with the increased use of technology, provisions could be made for oral argument by video phone. Increased use of technology and a willingness on the part of the National Court of State Appeals to travel should eliminate some of the additional costs that may be incurred by the litigants in seeking appeal to a national court rather than a federal district court. Actually, there will be a saving of both time and cost in
most cases in that the litigation route from the state's highest court to the National Court of State Appeals and then to the United States Supreme Court involves one less step than the present procedure from the state's highest court to the Federal District Court, to the United States Court of Appeals, and then to the United States Supreme Court. All of this usually occurs after a prior petition to the United States Supreme Court from the state's highest court has been denied by the United States Supreme Court.

VIII. CONCLUSION

There will always be some tension between the federal courts and the state courts in the exercise of the supremacy clause by the federal judiciary. Accepting this tension as the logical result of our dual system of courts does not mean that this power and obligation on the part of federal courts to review state court decisions on federal questions should be used to the unnecessary detriment of the state court systems or the litigants. State courts are entitled to prompt and consistent review of their decisions. They are not now receiving such review and indeed cannot receive it under the present procedure. It may be that the burden of multiple review by the federal courts is an even greater burden on the federal judiciary than it is on the state judiciaries. But it is a burden to both, and there exists in both systems a need for reasonably prompt and consistent review of state court decisions involving federal questions. A National Court of State Appeals would satisfy that need.

Whatever the mistakes of the past, state courts are aware that the federal judiciary will step in when federal constitutional law is ignored by the states. Restricting the power of the federal district courts to interfere in state appellate court decisions and transferring that power to a National Court of State Appeals will be a step in ensuring consistency and prompt finality in state court decisions. The system and the litigants deserve nothing less.
Appendix

Total Compilation of Questionnaire Results

Number of Questionnaires — 500
Number of Replies — 252

1. Nature of action:

<table>
<thead>
<tr>
<th>Nature of action</th>
<th>Number</th>
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<tbody>
<tr>
<td>Divorce</td>
<td>79</td>
</tr>
<tr>
<td>Tort</td>
<td>71</td>
</tr>
<tr>
<td>Contract</td>
<td>74</td>
</tr>
<tr>
<td>Other</td>
<td>32</td>
</tr>
</tbody>
</table>

2. If there were no time or jurisdiction problems and you had a choice, would you have preferred to file this case in a federal court or in the state court?

<table>
<thead>
<tr>
<th>Decision</th>
<th>Number</th>
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</thead>
<tbody>
<tr>
<td>Federal court</td>
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</tr>
<tr>
<td>State court</td>
<td>193</td>
</tr>
<tr>
<td>No preference</td>
<td>18</td>
</tr>
</tbody>
</table>

3. Would you please list briefly your reasons. [Not all responded; some gave more than one reason.]

a. Those who prefer to file in federal court (34):

   1. Quicker disposition of cases
   2. Superior procedure
   3. Quality of judges
   4. Quality of federal court system
   5. Individual case assignment method
   6. Larger damage awards
   7. Federal Rules of Evidence
   8. Shorter trials
   9. More apparent authority
  10. Less likelihood of political influence

b. Those who prefer to file in state court (193):

   1. Quicker disposition of cases
   2. Familiarity
   3. Convenience
   4. Cooperation with attorneys and litigants
   5. Jurisdiction
   6. Jury system (12 jurors and voir dire)
   7. Local issues best resolved by state courts
   8. Arrogance of federal courts
   9. Quality of judges
  10. Judges know state law
  11. More efficient system
  12. Less judicial interference
  13. Federal court preference for criminal cases
  14. Inflexible procedure of federal courts
  15. Small case
  16. Inexperience with federal courts

   1. Quicker disposition of cases
   2. Familiarity
   3. Convenience
   4. Cooperation with attorneys and litigants
   5. Jurisdiction
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   a. Those who prefer to file in federal court (34):

   b. Those who prefer to file in state court (193):

   c. Those who gave no preference (18):

   1. Quality of judges equal
2. Disposition of cases equally fast 1
3. Procedural rules identical 1
4. Simple action 1
5. Federal judges experienced in state court system 1

4. In general, do you feel that the interest of your client is better served in the federal court or the state court?

Federal court 33 State court 124 No difference 94

5. In general, do you believe that the quality of judges is better in the federal court or the state court?

Federal judges 95 State judges 30 No difference 125

6. Any comments you may wish to make. [Not all responded with comments; some made more than one comment.]

a. Those who thought federal judges were better:

1. Merit selection system 5
2. Preparation 3
3. Law clerks better 2
4. Superior knowledge 2
5. Fairer to out-of-state plaintiffs 1
6. Competence 1
7. State judge quality uneven 1
8. Higher paid 1
9. Lower number of federal judges 1
10. Pressure on state judges 1
11. Dignified 1
12. More compassionate on social matters 1

b. Those who thought state judges were better:

1. Elected, so responsive to needs of community and bar 3
2. More sympathetic to needs of attorneys 2
3. Federal judges arrogant because appointed for life 3
4. Federal judges do not understand state law 1
5. State judges diverse 1
6. State judges allow litigants to litigate 1
7. State courts efficiently administered 1
8. State judges qualified 1

c. Those who found no difference:

1. Quality of judges equal 2
2. Federal judges not responsive to public because not elected 1
3. State judges have more consideration for litigants and attorneys 1
4. Federal judges not influenced by local pressure 1
5. Federal judges not familiar with local issues 1
6. Trial dates earlier in state system 1
7. Life appointments encourage omnipotent behavior 1
8. Bar is negligent in evaluating judges 1
9. Availability of two court systems is confusing 1
10. Illinois Rules of Evidence superior to federal rules 1
11. Federal Rules of Civil Procedure should be adopted in California 1
12. Federal courts usurp state’s control of family matters 1

7. Those who thought federal judges were better, but
   a. preferred to file in state court 58
   b. felt the best interests of the clients were better served by the state court 28

* The results of the survey in each of the counties individually are on file at the editorial offices of the Brigham Young University Law Review.