Chapter 5
Structure

THE federal courts function effectively under their present structures, but major problems loom on the horizon if judicial workloads continue to grow.

Projections based on available data indicate that the volume of cases adjudicated in the district courts and courts of appeals will continue to rise in the foreseeable future.[1] As discussed in Chapters 2 and 3, there is debate on how steep this rise will be and how quickly it will occur. The recommendations in this chapter are geared to a future of relatively modest growth in size and workload for the federal courts. In that scenario the courts' mission can be achieved without compromising the core values underlying the systems of trial and appellate justice.

It is possible, however, that the federal courts will be unable to avert a dramatic increase in caseload and a substantial need for additional judges, support staff, space, and facilities. If that future lies ahead, the quality of both the courts' process and product will be at risk. To ensure that a viable system of justice can be preserved with its core values intact, the necessary preparations must occur now. Otherwise, the present structure and function of the federal courts will require reevaluation as outlined in Chapter 10.

United States district courts (which include the United States bankruptcy courts) are charged with securing a just, speedy, and inexpensive determination in every controversy brought before them. In the federal system, these courts are the fact-finders and first-line dispute resolvers.

United States courts of appeals perform two primary functions, often described in shorthand as "error correction" and "law declaration." Review for error entails determining whether the first-level decision-maker applied the correct law to the facts of the case, and whether procedural error occurred that fatally tainted the process. Law declaration is the articulation of a rule of law; it serves to guide prospective behavior, control future cases, and ensure that all cases receive the same treatment.

To accomplish these functions, federal courts are best structured in a manner that: facilitates access for litigants, affords procedural fairness, ensures the correctness of individual decisions, promotes the consistent, accurate application of federal law, and maintains the independence of judges to decide matters before them. This plan is premised on the belief that the present structure of the federal courts is by-and-large appropriate for carrying out their functions[2]; it therefore recommends no major structural changes in the near term.[3] Proposals are

[1] See Chapter 2 *supra* and Appendix A *infra*.

[2] In reporting on the "problems and issues currently facing the courts of the United States," *see* Federal Courts Study Act, Pub. L. No. 100-702, § 102(b)(1), 102 Stat. 4642, 4644, the Federal Courts Study Committee (FCSC) neither identified the structure of the district courts as a problem area nor proposed any fundamental reorganization of the district courts. *See* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990).

[3] Although the FCSC recommended further study of structural alternatives for the courts of appeals, the ensuing

made in this plan to target emerging or existing problems that are likely to be exacerbated if present trends continue.

Organization of the Appellate Function

Traditionally, appellate review in the federal court system has had four characteristics:

- access to at least one meaningful review for litigants aggrieved by a decision of a trial court or federal agency
- review by a panel of three Article III judges
- consistent application of federal law
- appellate review performed by judges from the region in which the first-level tribunal sits.

Today, the greatest challenge to the appellate system is to ensure the continued high quality, coherence, and consistency of appellate decisions in the face of a surging workload that, since 1960, has increased twice as fast as that of the district courts, and has mandated "streamlining" changes in traditional appellate procedure. Among such measures are the institution of various screening programs, elimination of oral argument in some cases, and an increasing but necessary abandonment of fully articulated opinions to explain a court's decisions. There is also a greatly increased reliance on staff personnel at the appellate level.

Table 8
Appeals Filed in the United States Courts of Appeals[4]

1960	3,899
1965	6,766
1970	11,662
1975	16,658
1980	23,200
1985	33,360
1990	40,898
1995	49,671

These innovations have changed the face of federal appellate justice, some would say for the worse. Nonetheless, the plan is based on the assumption that the hallmarks of the federal appellate system will remain. Among them are:

- oral argument heard in all appropriate matters
- cases decided with sufficient thought
- opinions carefully produced after collegial deliberation in all cases of precedential importance.

The following recommendations are intended to preserve these hallmarks. They have been developed after considering the views expressed and options discussed in the Federal Courts Study Committee report and the subsequent Federal Judicial Center report on structural alternatives for the courts of appeals.[5]

Federal Judicial Center report concluded that the stresses imposed by "continuing expansion of federal jurisdiction without a concomitant increase in resources" were unlikely to "be significantly relieved by structural change to the appellate system at this time." JUDITH A. MCKENNA, STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS—REPORT TO THE UNITED STATES CONGRESS AND THE JUDICIAL CONFERENCE OF THE UNITED STATES 155 (Federal Judicial Center 1993).

[4] These figures exclude the Court of Appeals for the Federal Circuit and its predecessors, the Court of Customs and Patent Appeals and the Court of Claims.

[5] MCKENNA, *supra* note 3.

Courts of Appeals

❒ RECOMMENDATION 16: **The federal appellate function should be performed primarily in:**

(a) a generalist court of appeals established in each regional judicial circuit; and

(b) a Court of Appeals for the Federal Circuit with nationwide jurisdiction in certain subject-matter areas.

Federal judicial credibility and accountability are fostered when appellate judges are drawn primarily from the region they will serve. History suggests the value of maintaining regional connections between appellate judges and the trial judges whose decisions they review, and between appellate judges and the litigants who appear in their courts. Regional courts of appeals should therefore continue as the bodies primarily responsible for reviewing the decisions of the district courts and other adjudicators whose decisions are now reviewable in the courts of appeals. Although the present geographical boundaries of twelve regional judicial circuits are not ideal, the arrangement nevertheless has served the country well. No problem has been identified that would be simply solved by the wholesale redrawing of circuit boundaries, a remedy that would cause more disruption than benefits.

This plan also declines to adopt proposals to create new specialized or subject-matter courts in the judicial branch. There are, admittedly, benefits in the centralized review of certain types of cases, particularly those involving areas of law in which national uniformity is crucial and the courts of appeals have taken significantly different approaches. The same is true where the subject matter is so technical that specialized expertise is necessary to render high quality decisions. (The experience with patent matters that led to the creation of the Court of Appeals for the Federal Circuit is an example of this latter class of cases.)

Nevertheless, in most instances the well-known dangers of judicial specialization outweigh any such benefits. Rather than create a new specialized Article III appellate court, it would be preferable to consolidate in the Federal Circuit those limited categories of cases in which centralized review is helpful.[6] Moreover, the present jurisdiction of that court should be carefully evaluated. Some matters now committed to its jurisdiction (*e.g.*, cases arising from the Court of Veterans Appeals) may not satisfy the above-stated rationale for centralized appellate review, while other subject areas in the jurisdiction of the generalist courts of appeals (*e.g.*, tax cases) might be handled more appropriately in a single forum. The principles supporting a preference for generalist appellate review might be served by some reallocation of jurisdiction between the Federal Circuit and the other courts of appeals. Also, the need for centralized review by the Federal Circuit in any subject area might be reevaluated from time to time in light of developments in the law and changes in the workload and structure of the other courts of appeals.

Finally, except in limited circumstances (see Recommendation 20 *infra*), this vision of the future rejects the notion of discretionary appellate review. To ensure the continued fairness and quality of federal justice, the principle of allowing litigants at

[6] Since the Federal Circuit has jurisdiction in only a few topical areas, it may be fairly characterized as a "subject-matter" rather than a "generalist" court. It is not, however, "specialized" in the sense of a tribunal limited to adjudicating a single category of cases involving relatively narrow issues.

least one appeal as of right to an Article III forum should be upheld.

Circuit Size and Workload

❒ RECOMMENDATION 17: **Each court of appeals should comprise a number of judges sufficient to maintain access to and excellence of federal appellate justice. Circuit restructuring should occur only if compelling empirical evidence demonstrates adjudicative or administrative dysfunction in a court so that it cannot continue to deliver quality justice and coherent, consistent circuit law in the face of increasing workload.**

As explained in Chapter 4, preservation of a distinct system of federal courts requires both a policy of "carefully controlled growth" in the Article III judiciary and limitations on federal jurisdiction that will obviate the need for more rapid growth. These general principles apply with special force to the courts of appeals.

Unrestrained growth has a different effect on the courts of appeals than on the district courts. The effectiveness, credibility, and efficiency of a court of appeals is intricately linked to its ability to function as a unified body. A judge's sense that he or she speaks for the whole court and not merely as an individual is critical to an appellate court's ability to shape and maintain a coherent body of law, and it contributes to the satisfaction of appellate judges. The resulting stability can make radical shifts in the law of the circuit less likely and thereby moderate to some extent the adverse effects of growth.

Although it is the view of some that a comparatively small number of judges might be necessary for an appellate court to be collegial and perform effectively, others believe that the size of such a court is unrelated to its ability to shape and maintain a coherent body of circuit law. Indeed, it is true that having too few judges on a court can endanger both collegiality and quality; an inadequate number of judges can produce onerous workloads and make it more difficult for judges to maintain essential professional contact with other members of the court. On the other hand, as a court grows it may become more difficult for its judges to become familiar with their colleagues' views and to preserve the consistency of decisions. This may be a particular problem when new judges are added to courts in large groups.

Because reasonable minds may disagree on the extent to which a court of appeals may grow while maintaining its effectiveness, this plan does not suggest a fixed numerical limit to circuit size. In principle, each court of appeals should consist of a number of judges sufficient to: maintain traditional access to, and excellence of, federal appellate justice; preserve judicial collegiality and the consistency, coherence, and quality of circuit precedent; and facilitate effective court administration and governance. An appellate "court," in this special sense, is not merely an administrative entity. Nor should it consist of a large group of strangers—like a jury venire—who are essentially unknown to one another. Rather, a "court" is a cohesive group of individuals who are familiar with one another's ways of thinking, reacting, persuading, and being persuaded. The court becomes an institution—an incorporeal body of precedent and tradition, of shared experiences and collegial feelings, whose members possess a common devotion to mastering circuit law, maintaining its coherence and consistency (thus assuring its predictability), and adjudicating cases in like manner.

Increasing workload burdens on appellate judges pose a threat—and a challenge—to circuits of all sizes. Procedures currently utilized by various courts of appeals—*e.g.,* issue tracking, oral motion screening panels, and limited en banc courts—can effectively address some of these burdens. Technological solutions, such as circuit-wide electronic mail networks and chambers access to court dockets, can keep a court in close communication, helping to maintain a level of collegiality that otherwise would be unattainable.

Larger courts might appropriately undertake pilot projects involving internal structural or procedural innovations aimed at preserving decisional coherence and consistency. These experiments might include stable, but gradually rotating appellate panels to which cases are assigned on a subject-matter basis. By exchanging such useful ideas—born of necessity in large courts but applicable to smaller ones, as well—the circuits may find it possible to meet the challenge of increased workload without abandoning the flexibility the current structure allows.[7]

Fortunately, the federal courts of appeals have been successful in maintaining their tradition of excellence in the face of mounting appellate filings. In the future, however, other structural alternatives should be considered if these courts fail, through productivity and case management improvements, to fulfill their mission of providing litigants access to coherent, consistent decisions on issues of federal law. The question of appropriate size should be reviewed periodically with respect to each court of appeals, but restructuring of the judicial circuits—division of a particular circuit or realignment of circuit boundaries—should continue to be, as it has been historically,[8] an infrequent event. It should occur only when compelling empirical evidence demonstrates the relevant court's (or courts') inability to operate effectively as an adjudicative body or in the administrative realm. Any changes proposed to rectify such problems must be considered in the light of the disruption of precedent and judicial administration that such changes generally entail.

❒ RECOMMENDATION 18: **To the extent practicable, workload should be equalized among judges of the courts of appeals nationally.**

Today, the caseloads of the courts of appeals are, for the most part, nondiscretionary and effectively beyond the control of the federal judicial system. Caseload fluctuations among circuits cannot be predicted with confidence. Neither through circuit restructuring nor attrition is it possible to realign courts of appeals to achieve equality in either workload or the number of judges.

Notwithstanding such limitations, some measure of workload equalization can be achieved by applying improved workload measures or other appropriate formulae to the determination of future judgeship needs. Where necessary, short-term equalization of

[7] Consideration should be given to a statutory amendment that would authorize courts of appeals baving more than 13 active judges to establish administrative units within the court and perform the court's en banc functions with less than the full number of active circuit judges on the court. *Cf.* 28 U.S.C. § 46(c) (1988); Act of Oct. 20, 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633 (authorizing creation of administrative units and "limited" en banc panels where a court of appeals has more than *15* active circuit judges).

[8] Apart from the division of the Eighth Circuit (creating the Tenth Circuit) in 1929, the division of the Fifth Circuit (creating the Eleventh Circuit) in 1981, and the creation of the Federal Circuit in 1982, the present arrangement of judicial circuits has endured since 1866. Nevertheless, realigning the states and territories in different combinations is not a novel idea: early in the nation's history, the New England states and New York comprised a single circuit and, since 1789, Congress has made 11 major changes to circuit boundaries (*i.e.*, in addition to adding new states to existing circuits).

workload can be achieved through flexible arrangements for the temporary assignment of circuit judges to assist courts of appeals in other circuits.[9]

Resolution of Intercircuit Conflicts

❒ RECOMMENDATION 19: **The United States Supreme Court should continue to be the sole arbiter of conflicting precedents among the courts of appeals.**

Current empirical data on the number, frequency, tolerability, and persistence of unresolved intercircuit conflicts (*i.e.*, those not heard by the Supreme Court) indicate that intercircuit inconsistency is not a problem that now calls for change.[10] At the present time, the Supreme Court appears to be capable of resolving significant differences of decisional law among the circuits with reasonable promptness. Until that situation seriously worsens, any attempt to expand the system's capacity for resolution on intercircuit conflicts is likely to generate more cost than benefit to the system. Therefore, the plan rejects, for the foreseeable future, proposals to consolidate the present circuits into a few "jumbo" circuits, create new appellate structures (*e.g.*, an intercircuit tribunal or a new tier of federal courts), or allow the Supreme Court to refer cases presenting conflicts to a court of appeals not involved in the conflict.[11]

Review of Administrative Proceedings

❒ RECOMMENDATION 20: **In general, the actions of administrative agencies and decisions of Article I courts should be reviewable directly in the regional courts of appeals. For those cases in which the initial forum for judicial review is the district court, further review in the court of appeals should be available only on a discretionary basis except with respect to constitutional matters and questions of statutory or regulatory interpretation.**

The point is made in Chapter 4 (see Recommendation 10 *supra*), that limited court resources can be conserved by relying on administrative agencies and Article I courts to adjudicate, in the first instance, claims for benefits and other fact-intensive issues arising under federal law. In such cases, both the trial function and the first level of appellate review should be conducted in an administrative or Article I judicial forum.

As a general matter, and except for the limited circumstances in which a centralized forum for review is appropriate (see Recommendation 16 *supra*), the regional court of appeals should be the sole Article III forum in which review of administrative agency and Article I court proceedings can be obtained as a matter of right. No new specialized Article III court should be created for review of agency action or Article I court decisions.

Under current law, the adjudicatory and rulemaking actions of administrative agencies are directly reviewable in a court of appeals only if that method of review is ex-

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[9] See Chapter 8, Recommendation 62 *infra*. In making use of temporarily assignments to meet workload needs, the courts of appeals should also consider the impact of visiting judges on collegiality and decisional consistency within a court.

[10] *See* Arthur D. Hellman, Unresolved Intercircuit Conflicts: The Nature and Scope of the Problem (Draft Final Report to the Federal Judicial Center, Oct. 1994).

[11] But see Chapter 4, Recommendation 11 *supra* (proposing that federal agencies be limited statutorily from seeking intercircuit conflicts through relitigation in multiple courts of appeals).

pressly authorized by statute.[12] Where no review process is specified, and in certain other cases,[13] a litigant seeking review of an agency decision or rule must first pursue a civil action in the district court. Although direct review in the court of appeals is generally preferable because agency cases require a court to engage in a process similar to appellate review of trial proceedings, these cases also frequently turn on application of settled law to specific facts—a process well suited to a trial-level forum like the district court.[14] When this is coupled, however, with a right to subsequent review in the court of appeals (which applies in these cases the same standards of review as the district court), the result is an often-unnecessary duplication of function between the two Article III forums.

The critical importance of Article III judicial review to ensure compliance with constitutional and other legal norms is historically proven. But on "substantial evidence" questions regarding the sufficiency of an agency's factual findings, only one opportunity for that review should be guaranteed as of right. Consequently, a party to an agency case that has been considered in a district court should be permitted further review in the court of appeals only with respect to constitutional questions or the interpretation of relevant statutes or regulations unless the latter court grants leave to appeal on other issues.

Appeals in Bankruptcy Cases

❒ RECOMMENDATION 21: **The existing mechanism for review of dispositive orders of bankruptcy judges should be studied to determine what appellate structure will ensure prompt, inexpensive resolution of bankruptcy cases and foster coherent, consistent development of bankruptcy precedents.**

Presently, there are two methods for appellate review of bankruptcy judges' final or other dispositive orders entered under 28 U.S.C. § 157(b)(1), (c)(2).[15] The first is by appeal to a bankruptcy appellate panel ("BAP"), if (a) one has been established by the circuit judicial council,[16] and (b) the district judges in the respective district have authorized such appeals by majority vote.[17] The second is by appeal to the district court if (a) BAP review is not available, or (b) either party elects to have the appeal heard in the district court.[18] Final orders in either appellate forum may be further appealed as of right to the pertinent courts of appeals, with discretionary review thereafter possible by the Supreme Court.[19]

Some have argued that this two-tier system of appellate review promotes unnecessary delay without any meaningful corresponding benefit and have suggested moving to a single system of review by courts of appeals.[20] Empirical evidence,

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[12] No Article I court decisions are presently reviewable in the district courts.

[13] See, *e.g.*, 42 U.S.C. § 405(g) (1988) (Social Security Act).

[14] See Chapter 4, Implementation Strategy 9a *supra* (concerning judicial review of Social Security disability claims).

[15] 28 U.S.C. § 158(a), (b) (1988 & Supp. V 1993), *amended by* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 104, 108 Stat. 4106, 4109-11.

[16] At present, a BAP exists in only one circuit, the Ninth. However, Congress has recently required each circuit to establish a BAP (either for itself or in conjunction with one or more other circuits) unless the circuit judicial council finds that "there are insufficient judicial resources available in the circuit . . . or establishment of [a BAP] would result in undue delay or increased cost to parties in cases under title 11." Bankruptcy Reform Act of 1994, § 104(c), 108 Stat. at 4109-10 (amending 28 U.S.C. § 158(b)).

[17] *Id.* § 104(c), 108 Stat. at 4110 (enacting 28 U.S.C. § 158(b)(6)).

[18] *Id.* § 104(d), 108 Stat. at 4110-11 (enacting 28 U.S.C. § 158(c)(1)).

[19] *See* 28 U.S.C. §§ 158(d), 1254 (1988).

[20] *See* Final Report and Recommendations of the Long-Range Planning Subcommittee of the Judicial Conference

however, suggests that a two-tier appeals process may not be a problem in most cases. A recent review of the process by the Federal Judicial Center indicates that 73% of bankruptcy appeals in the district courts were disposed of with little or no judicial involvement. Moreover, appeals were handled more expeditiously in the district courts than in the courts of appeals: an average of 145 days in the district court versus 245 days in courts of appeals.[21] Preserving the opportunity for review at the district court level is also consistent with the bankruptcy court's configuration as a unit of the district court.[22]

This does not necessarily mean, however, that court of appeals jurisdiction in bankruptcy cases should be made discretionary. Under current practice, district court and BAP decisions are not treated as stare decisis in other cases—resulting in a "patchwork" of differing legal interpretations that encourage forum shopping and undermine the national system of bankruptcy law. If court of appeals review is not available as a matter of right, the problem of inter- and intra-district conflicts might be exacerbated unless other means of establishing binding precedent are developed.

It would be premature, at this point, for the judiciary to propose a different approach to bankruptcy appeals. The 1994 legislation requiring every circuit to establish a BAP (absent certain circumstances) may alter the process in unforeseen ways. Also, Congress has created a National Bankruptcy Review Commission to "investigate and study issues and problems relating to the Bankruptcy Code . . . evaluate the advisibility of proposals and current arrangements with respect to such issues and problems," and report findings and conclusions to Congress, the Chief Justice, and the President within two years after its first meeting.[23] Examination of both existing and possible alternative mechanisms for appellate review of bankruptcy judges' orders would be a logical part of that study. Any permanent change in the operative statutes should await the commission's report in that respect.

❒ RECOMMENDATION 22: **Pending completion of the study of bankruptcy appellate structure recommended above, the dispositive orders of bankruptcy judges should be reviewable directly in the court of appeals in those cases where the district court or bankruptcy appellate panel (BAP) certifies that such review is needed immediately to establish legal principles on which subsequent proceedings in the case may depend.**

There are bankruptcy cases in which direct review of bankruptcy judges' orders by the court of appeals—bypassing consideration by a district judge or BAP—is more expedient. One example is when there is a conflict of law within a district or circuit. Another is when the stakes are sufficiently high that the parties will exhaust the entire panoply of their appellate options, but where an expeditious determination is essential to the success of the overall bankruptcy case. As noted, the average times for resolving bankruptcy appeals are long in both the district courts and courts of appeals.

Committee on the Administration of the Bankruptcy System 16-17 (June 1, 1993).

[21] Memorandum from Fletcher Mangum, Federal Judicial Center, to the Judicial Conference Committee on Long Range Planning (Dec. 23, 1993).

[22] However, the practice of referring bankruptcy appeals to magistrate judges should be discontinued. It is questionable both in terms of efficient resource allocation and in its impact on expeditious resolution of appeals.

[23] Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, §§ 601-610, 108 Stat. at 4147-50.

According to the preceding recommendation, the overall approach to bankruptcy appeals should be reexamined by the new Bankruptcy Review Commission and, if appropriate, revised according to the commission's findings. Until that reexamination occurs, it is essential that some temporary mechanism to short-cut the existing appellate process be provided in those cases where circuit precedent is needed without delay.[24] This kind of bypass should not be used for routine issues—leading to increased workload for the already overburdened courts of appeals. However, a requirement that the district court or BAP certify the need for direct court of appeals review should be sufficient—at least on an interim basis—to limit that route of appeal to appropriate cases.[25] Certainly, the courts of appeals may wish to scrutinize these certifications carefully in particular cases to guard against premature appeals that may delay, rather than promote, speedy resolution of bankruptcy cases.

Appeals of Magistrate Judge Decisions

❒ RECOMMENDATION 23: **Where parties to a civil action have consented to the case-dispositive authority of a magistrate judge, judgments entered in such actions should be reviewable only in the courts of appeals, and not by a district judge.**

In civil cases decided by magistrate judges with the consent of the parties, current law permits an appeal of the judgment either directly to the court of appeals or, if the parties agree, to a district judge followed by discretionary review in the court of appeals.[26] Although the latter route was intended as a less-expensive means of obtaining appellate review, its existence is inconsistent with the principle underlying the "consent" authority of magistrate judges —that the parties agree to disposition of their case without involving a district judge.

To encourage the full utilization of magistrate judges needed to relieve workload burdens in the district courts, review by a district judge should be eliminated as an alternative route of appeal in civil consent cases. The practical impact of this change on litigants should be modest: from 1992 through 1993, only 33 districts reported appeals to district judges in civil consent cases, with 25 of those districts having three or fewer such appeals and 18 having only one.

Organization of the Trial Function

The federal courts are committed to affording litigants access to just, speedy, and economical resolution of civil and criminal disputes. At the trial (*i.e.*, initial dispute resolution) level, adjudication in national, specialized tribunals is appropriate—and well established—in limited subject areas: certain tax litigation, claims against the federal government, and matters involving international trade. Bankruptcy proceedings are properly conducted in the first instance by judges who specialize in that field. With those exceptions, however, the traditional allocation of original jurisdiction to generalist trial courts organized on a geographic basis should be preserved. Public confidence in and respect for the federal judiciary is best fostered when justice is dispensed and administered by judges, jurors, and

[24] A similar mechanism for review of bankruptcy court orders was provided in the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 236(a), 92 Stat. 2549, 2667.

[25] The legislation required to implement this change should also authorize interlocutory appeals from bankruptcy appellate panels to the courts of appeals under the same circumstances as such appeals are presently allowed from the district courts. *Cf.* 28 U.S.C. § 1292(b) (1988).

[26] *See* 28 U.S.C. § 636(c)(3)-(5) (1988). Under FED. R. CIV. P. 73(c), review directly in the court of appeals is the normal route for appeals in these cases.

other court officials associated with the geographical region served by the court. Moreover, to ensure continued access and quality in federal justice, it is important that court organization and procedures be made more efficient and flexible as workload demands increase.

District Courts

❒ RECOMMENDATION 24: **Except in certain limited contexts (*i.e.*, bankruptcy proceedings, international trade matters, and claims against the federal government), the primary trial forum for disputes committed to federal jurisdiction should be a generalist district court whose judges are affiliated with, and required to reside in, the court's general geographic region, and whose facilities are reasonably accessible to litigants, jurors, witnesses, and other participants in the judicial process.**

Generalist trial courts have worked very well in the federal system and should be retained. Any change to the existing geographic arrangement of judicial districts should seek to redress inefficient and inflexible allocation of judicial resources.

Over time, various approaches have been suggested to improving resource allocation in the federal district courts, including partial restructuring (*e.g.*, consolidating existing districts within state borders; redrawing district lines across borders where major metropolitan areas might be better served) and total restructuring (*e.g.*, all district, magistrate, and bankruptcy judges would be available at any time for service anywhere in the nation). However, because of the key historical connection between state affiliation and district judge appointments and its proven fairness and effectiveness, this plan calls for no such restructuring at this time.

Consistent with our federal system and for reasons of credibility and accountability (*i.e.*, familiarity with local law and legal traditions), judges in the district courts should continue to be drawn from the states they are appointed to serve or at least endorsed by representatives of those states. It is important to maintain a state-defined organization for the district courts so long as local affiliations remain integral to the judicial selection process. Although some may regard judges selected in this manner more as regional or local officials than as jurists chosen to interpret and apply national law, the process has withstood the test of time.

The system should not, however, be inflexible with regard to geographic boundaries in allocation of resources. As discussed below, the existing district boundaries and methods of organizing support functions should be reexamined to assess the extent to which merger or division of districts (and the consequent reallocation of judicial and administrative resources) can enhance performance. In addition, the standards and procedures for assigning judges between districts should remain sufficiently flexible that judge power can be allocated wherever needed.[27]

District Alignment

❒ RECOMMENDATION 25: **The judicial districts should continue to be allocated among and within the states so that each district comprises a single state or part of a state.**

[27] See Chapter 8, Recommendation 62 *infra*.

By adhering to state boundaries, the current alignment of judicial districts comports with traditional concepts of federalism and reflects long-standing political conventions with respect to selection of candidates for judicial appointment. In the past, states have been divided into two or more judicial districts for reasons not necessarily related to the needs of judicial administration. As a result, the current array of 94 judicial districts may not be optimal for allocating work and resources at the trial level. Although districts should not be combined in states where geographic distances and other factors would make a single district court impractical, administrative redundancies might be avoided and existing judge power utilized more effectively if certain existing districts were combined.[28] By the same token, there may be greater efficiency in some locations if districts covering large geographic areas or populations were divided.

While arguments exist for creation of multistate or regional districts (*e.g.*, districts with the same boundaries as the judicial circuits), this plan does not adopt that view. The preferable approach is to maintain the current system of districts organized within state boundaries absent convincing evidence that such realignment would increase efficiency. In certain areas, however, administrative convenience and flexible resource allocation ultimately may compel establishment of districts that include more than one state or an entire region.[29]

As a first step, consideration should be given—where a larger court organization is otherwise indicated—to merging districts within states, or at least to merging judicial support functions between and among those districts.[30] In time, further consolidation may be appropriate, but in the near term the advantages of larger court organization should be demonstrated through statewide entities or small-scale consolidations.

❒ RECOMMENDATION 26: **The impact of district alignment on access to the courts and efficient judicial administration should be studied periodically. Any such study should examine the functional and administrative costs and benefits which merger or division of districts would produce.**

The time has come to begin a serious and recurring inquiry into the optimal manner of organizing districts. Periodic study of existing districts within states (and divisions within districts) would make it possible to evaluate whether existing organizational structure aids or inhibits access to the courts and efficient judicial administration. Assessment of the continued need for more than one district within a state (or divisions within a district), or whether an existing district is too large, should include input from each of the affected districts and coordination with pertinent representatives of the executive and legislative branches. Even if political considerations dictate retention of most district boundaries as they presently exist, serious consideration should be given to merging at least smaller districts within states, or dividing larger districts, where adjudicative and administrative efficiencies can be realized.

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[28] An example of this may be found in Oklahoma, which currently is divided into three judicial districts. 28 U.S.C. § 116 (1988).

[29] At present, one judicial district (Wyoming) includes territory of adjoining states—those parts of Yellowstone National Park located within Idaho and Montana. 28 U.S.C. § 131 (1988). Similarly, the District of Hawaii includes certain Pacific island territories that are not part of the state. *Id.* § 91. For purposes of legal uniformity and administrative efficiency, an exception to the principle of state-based districts should be retained in these cases and similar ones that may arise in the future.

[30] In considering the alignment of districts within states, attention should be given to federal enclaves currently located within more than one district.

Organizing the courts on a larger geographic scale does not mean that functions such as jury selection should not be administered more locally. Where local administration is appropriate, smaller administrative units could still be established for limited purposes within a statewide or larger court. For example, such units might be used to accommodate the special challenges and needs faced by courts in large metropolitan areas. Likewise, it may be desirable for districts to share administrative support functions (*e.g.*, probation and pretrial services) without altering district boundaries.

Bankruptcy Courts

The 1978 Bankruptcy Reform Act[31] assumed that all bankruptcy matters should be handled expeditiously by a specialized bankruptcy court. Although the Supreme Court in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[32] later held that the Act's jurisdictional scheme extended unconstitutionally the exercise of Article III power to non-Article III courts, the fact remains that the nature and complexity of bankruptcy matters require judges who are expert in the field. The Bankruptcy Amendments and Federal Judgeship Act of 1984,[33] which attempted to address the constitutional infirmities of the 1978 Reform Act, nevertheless sought to do so in a way that would promote the efficient resolution of all bankruptcy matters by a corps of experts, the bankruptcy judiciary. The following recommendations attempt to further that basic premise.

❒ RECOMMENDATION 27: **Each district court should continue to include a bankruptcy court consisting of fixed-term judges with expertise in the field of bankruptcy law.**

Implementation Strategies:

27a *The bankruptcy court should exercise the original jurisdiction of the district court in bankruptcy matters to the extent constitutionally and statutorily permissible.*

27b *Congress should be encouraged to clarify the authority of the bankruptcy courts. For example, legislation should be enacted that expressly recognizes the civil contempt power of bankruptcy judges and also affords them limited jurisdiction to hold litigants or counsel criminally liable for misbehavior, disobedience, or resistance to a lawful order.*

Serious constitutional and statutory questions remain regarding the authority of bankruptcy courts. At this juncture, however, most of those questions—particularly constitutional ones—are largely speculative. Despite such uncertainties, the bankruptcy system continues to work well. Therefore, no major changes are needed other than to urge Congress to clarify bankruptcy judges' authority to conduct the proceedings before them, including express authority to deal directly with civil contempt and limited power to punish criminal contempt.[34]

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[31] Bankruptcy Reform Act of 1978, Pub L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101-1330 (1994) and scattered sections of title 28, U.S. Code (1988 & Supp. V 1993)).

[32] 458 U.S. 50 (1982).

[33] Pub. L. No. 98-353, 98 Stat. 333 (1984) (codified as amended at 11 U.S.C. §§ 101-1330 (1994) and scattered sections of title 28, U.S. Code (1988 & Supp. V 1993)).

[34] *Cf.* Chapter 8, Recommendation 66 *infra* (limited contempt power for magistrate judges). At the present time, there is conflicting appellate precedent regarding civil contempt authority in the bankruptcy courts. *Compare* In re Walters, 868 F.2d 665 (4th Cir. 1989) (bankruptcy judges possess civil contempt power under 11 U.S.C. § 105(a)), *with* In re Sequoia Auto Brokers Ltd., 827 F.2d 1281 (9th Cir. 1987) (Congress has not provided civil contempt authority to bankruptcy judges).

Jurisdictional lines in bankruptcy, as elsewhere, need to be made clear and bright. At a minimum, however, the bankruptcy courts must continue to exercise pervasive jurisdiction over matters affecting a debtor's bankruptcy.[35]

[35] Recent legislation has clarified certain powers relating to bankruptcy case management and expressly authorized bankruptcy judges, in proceedings where the right to trial by jury applies, to conduct jury trials "if specially designated to exercise such jurisdiction by the district court and with the express consent of the parties." Bankruptcy Reform Act of 1994, §§ 104(a), 112, 108 Stat. 4108-09, 4117 (enacting 11 U.S.C. § 105(d) and 28 U.S.C. § 157(e)).