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INTERMEDIATE COURTS OF APPEALS: THEIR FUTURE

Presentation of Judge Kenneth W. Starr
United States Court of Appeals
District of Columbia Circuit

It is both an honor and pleasure to participate in this important dialogue about the future of intermediate courts of appeals. By virtue of my singular good fortune in having participated last year in the inaugural Canadian-American Legal Exchange, I am not entirely unfamiliar with the perspectives that are being brought to bear on this subject by my colleagues from the various intermediate appellate courts of this great country. Of particular pertinence is the advent of significant levels of constitutional litigation in the Supreme Court of Canada and the concomitant diminution in that Court's capacity to hear and resolve non-constitutional cases. This diminished capacity at the apex of Canada's judicial pyramid, it is increasingly recognized, places additional jurisprudential burdens on intermediate appellate courts, whose practical, functional role as a court of last resort has been considerably enhanced in consequence of fundamental changes at the top.

Of necessity, however, my perspective will parochially be driven by first-hand experience in and observations about intermediate appellate courts in the United States, and especially the appellate courts of my country's federal judicial system. It will likely come as little surprise that, in my view, for all their manifold differences the similarities in our respective judicial systems -- in the wake of the expanded role generally of intermediate appellate courts -- are in fact quite striking.

I

Allow me to begin with a series of observations about certain structural characteristics or realities that, in the course of this Century, have considerably expanded the role of federal intermediate appellate courts in the United States.

First. The United States Supreme Court now enjoys almost complete discretion over its vast docket. Each year, approximately 5,000 cases are filed in the Supreme Court. These cases come both from federal and state courts, but by virtue of the specific characteristics of our legal system, the Supreme Court enjoys jurisdiction over the judgments of the highest courts of the several States only if those cases raise a question of federal law. Thus, in contrast to the Supreme Court of Canada, the United States Supreme Court has no jurisdiction as such over common-law or other state-law questions.[1] That jurisdictional limitation is of obvious importance in keeping the total number of cases coming before the Court within manageable, albeit high, limits.

Of these approximately 5,000 cases, the lion's share are on the Supreme Court's "discretionary" docket. That is to say, over the years, the mandatory jurisdiction of the Supreme Court has been substantially diminished. In brief, those remaining vestiges of what was once almost an entirely mandatory docket can be summarized in the following way:

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1 State law questions can come before the Supreme Court in the review of federal diversity cases, where jurisdiction is based on the different state citizenship of the respective parties to the suit. 28 U.S.C. § 1332 (1982). However, as a practical matter, the Supreme Court invariably chooses, in the exercise of its discretion, not to hear such cases in the first instance. Even if the Court were inclined to hear the case, the Supreme Court would be bound by the interpretation of the common-law or state-law issue by the supreme court of the State in question. This pro-federalism aspect of the United States judicial system derives from the Supreme Court's decision in Erie R.R. v. Tompkins, 304 U.S. 64 (1938), where the Court held, as a matter of constitutional law, that federal courts were without power to weave a body of common law and were duty bound faithfully to apply the corpus of state law of that jurisdiction whose law applied.

The first category of cases over which the Supreme Court has mandatory appellate jurisdiction are appeals from the final judgment of the highest state court in which decision can be had where the state court upheld a state statute against the claim that it is repugnant to the Constitution, treaties, or laws of the United States. 28 U.S.C. § 1257(2) (1982).[2] Under the rather broad reading the Court has accorded the statutory language,[3] appeals under section 1257(2) are not uncommon.[4]

In a provision designed to parallel the Court's appellate jurisdiction over state court decisions, mandatory review of decisions by the federal courts of appeals is available when the federal court has invalidated a state statute. Id. § 1254(2). Despite its rather strict construction of section 1254(2), the Court

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2 Section 1257 also provides for review as a matter of right from final judgments of state courts invalidating federal statutes or treaties. 28 U.S.C. § 1257(1). The scope of this category is uncelar, as appeals under section 1257(1) are rare. It is thus not surprising that the most notable example of an appeal from a state decision invalidating a federal statute is Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304, 354 (1816), in which the Virigina court held invalid the provision in the First Judiciary Act providing for Supreme Court review of state decisions. For an example of relatively more recent vintage see Wissner v. Wissner, 338 U.S. 655 (1950), where the Court invalidated a state court judgment predicated on state property law as in conflict with a federal statute.

3 The Court has interpreted "state statute" to encompass state constitutional provisions, ordinances, court orders of general impact, and certain orders of administrative agencies. Similarly, the grounds of federal law on which a state statute may be held invalid have been held to include, in addition to those specified in the statute, conflicts with federal administrative regulations or common law that is intended to be binding on state courts.

4 For example, the Court recently heard an appeal from a decision of the Supreme Court of Florida upholding a state statute providing for state sales tax on aviation fuel against a challenge on Commerce Clause and Supremacy Clause grounds. Wardair Canada, Inc. v. Florida Dep't of Revenue, 106 S. Ct. 2369 (1986).

recently has confronted an increasing number of appeals brought under this provision.[5]

Appeals may also be filed from federal court decisions invalidating federal statutes in any action in which the United States is a party. Id. § 1252. The vast majority of these appeals are directly from the district courts, although appeals likewise come from the courts of appeals. This is the broadest provision for mandatory appellate jurisdiction, permitting appeal to the Supreme Court from any federal court and from any judgment, decree or order, interlocutory or final. The breadth of the provision reflects the Congressional desire for immediate and mandatory review of all decisions holding an Act of Congress unconstitutional that will be binding on the United States.[6]

A final avenue[7] for direct appeal to the Supreme Court is a narrow one indeed. Certain federal statutes provide for judicial review by specially constituted three-judge courts in particular circumstances. Review of the

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5 An example of such an appeal is Munro v. Socialist Workers Party, 107 S. Ct. 533 (1986), where the Court reviewed a decision of the court of appeals striking down on First and Fourteenth Amendment grounds a state statute requiring that minor-party candidates receive a certain minimum percentage of votes cast in the primary election before the candidate would be placed on the general election ballot.

6 A recent example of the invocation of section 1252 is Bowen v. Kendrick, 56 U.S.L.W. 4818 (June 29, 1988). In Bowen, the Supreme Court reviewed a district court judgment striking down a Congressional enactment as violative of the First Amendment.

7 In theory, the Supreme Court has mandatory appellate jurisdiction over one additional category of cases: issues of law certified by a court of appeals in any civil or criminal case. 28 U.S.C. § 1254(3). In fact, the Court has surrounded certification jurisdiction with so many barriers that its jurisdiction depends on its discretion. As a result, the Court has recently decided very few certified questions. See, e.g., Iran National Airlines Corp. v. Marschalk Co., 453 U.S. 919 (1981); Alison v. United States, 344 U.S. 167 (1952).

decisions of these panels lies directly in the Supreme Court. Id. § 1253.[8] The most notable contemporary example of an appeal from a three-judge court is Bowsher v. Synar, 478 U.S. 714 (1986), which involved a challenge to the Gramm-Rudman-Hollings Act. In the Act, Congress specified that any suit brought by a Member of Congress challenging the constitutionality of the Act must be heard by a special three-judge court. The Supreme Court in Bowsher affirmed the three-judge court's decision invalidating a feature of the Act on constitutional grounds.

As is hopefully evident, the remaining aspects of "mandatory" appellate jurisdiction are of considerable importance to our legal system. But they relate entirely to constitutional questions, and even those in a particular context (that is, as we have seen, striking down a federal statute on federal constitutional grounds, or upholding a state statute in the face of a challenge based on the federal Constitution). All other cases (save for the Supreme Court's very limited original jurisdiction) come before the Court on its discretionary or certiorari docket.

In all, the Supreme Court hears and resolves approximately 150 cases each year. Oral argument is provided for each such case (30 minutes per side), with four

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8 Although Congress passed a number of statutes providing for three-judge courts in the early and middle part of this Century, it was not until the 1960s and 1970s that the procedure was widely used. The sharply increasing volume, coupled with the enormously complicated body of law governing the applicability of the procedures and the rules for obtaining review of three-judge court decisions, led Congress in 1976 virtually to end the use of three-judge courts. See Pub. L. 94-381, 90 Stat. 1119 (1976) (repealing provisions providing for this review of certain constitutional claims by three-judge courts). Under the current scheme, three-judge courts are provided only "when . . . required by Act of Congress" or "when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." 28 U.S.C. § 2284(a) (1982). The major "Acts of Congress" requiring three-judge courts are the Civil Rights Act of 1964, see, e.g., 42 U.S.C. §§ 2000a-5(b), 2000e-6(b) (1982), and the Voting Rights Act of 1965, see, e.g., 42 U.S.C. §§ 1971(g), 1973b(a), 1973c (1982).

cases heard each argument day. It is widely assumed, and I believe with sound reason, that the Supreme Court cannot further expand its case-hearing capacity. Indeed, there is a perception that, as matters now stand, the Court may be seeking to resolve too many cases,[9] especially in view of the custom, informed by the language of Article III of the United States Constitution,[10] that the Court sits and hears cases en banc, rather than in panels.

In short, the Supreme Court has, for a vast country with a litigious population, exceptionally limited capacity for resolving important legal issues. Of necessity, therefore, the Court has become primarily a constitutional tribunal. Absent a clear conflict in the decisions of two or more of the respective federal courts of appeals, it is singularly difficult to secure Supreme Court review of non-constitutional issues.[11]

Second. The necessary consequence of limited appellate capacity at the level of the Supreme Court is that the regional courts of appeal in the federal system, of

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9 Elaborate studies of the Supreme Court's caseload have been undertaken in recent years. See, e.g., Estreicher & Sexton, Redefining the Supreme Court's Role (1986) (Yale University Press); Alsop and Salisbury, A Comment on Chief Justice Burger's Proposal for a Temporary Panel to Resolve Intercircuit Conflicts, 11 Hastings Const. L.Q. 359 (1984); Federal Judicial Center, Report of the Study Group on the Caseload of the Supreme Court (1972), reprinted in 57 F.R.D. 537 (1972).

10 Article III, section 1 provides in pertinent part: "The Judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The establishment in the Founding document of "one" Supreme Court has been interpreted to mean that the Court's members (the number of which Congress does control) are to sit as a whole. For a related but different perspective, see Goldberg, There Shall Be "One Supreme Court," 3 Hastings Const. L.Q. 339 (1976).

11 The grave difficulty of securing Supreme Court review has given rise to individual specialists who are consulted or retained for the express purpose of preparing the necessary papers (in particular, a petition for certiorari). Even able trial and appellate lawyers not infrequently see fit to engage the services of, as it were, a Supreme Court "specialist" to carry on the legal battle.

which there are thirteen, are increasingly -- as a practical matter -- the "final" courts. Appeal in both civil and criminal cases is of right from the federal district courts (trial courts) to the United States Courts of Appeals, but from that point forward, further review by the Supreme Court is (for reasons already stated) both discretionary and, by virtue of the limited capacity of a Supreme Court sitting exclusively en banc, presumptively unlikely.

Third. The relative importance of the several courts of appeals has also grown by virtue of the substantial outpouring of federal legislation over the past three decades by the United States Congress. Increasingly, Congress sees fit to pass legislation, not infrequently in the form of a measure that is entrusted to a federal administrative agency to administer and enforce. Of especial note in this regard are the considerable number of environmental laws passed over the past 20 years. The Clean Air Act, 42 U.S.C. 7401 et. seq., and the Clean Water Act, 33 U.S.C. § 1251 et seq., provide but two examples of a veritable floodtide of legislation designed to restore and enhance the environment.

These sorts of modern-day statutory measures tend to be both complex and technical. In contrast to broader, "public interest" genre statutes passed during the course of the New Deal under President Franklin Roosevelt, the more typical present-day statute is of considerable detail and intricacy. Entirely new terminologies have been created, with generalist courts having to grapple with exceptionally complex and arcane statutory schemes. This recurring reality of highly difficult interpretive questions has put additional burdens on the regional courts of appeals, especially since Congress not infrequently sees fit to have actions of the administrative agencies reviewed directly by a regional federal appellate court, rather than a federal trial court.

Fourth. As federal courts become ever-increasingly courts of statutory interpretation, their time-honored role as courts of error diminishes in relative importance. To be sure, that historic role remains, with a substantial amount of the work of the regional courts of appeals consisting of review of the judgments of federal trial courts in both civil and criminal cases. But to the extent that federal appellate courts are embarked increasingly on resolving questions of statutory interpretation in an age of complex statutory and regulatory measures, the courts are in fact carrying on a law-articulation function. They are, to that extent, no longer reviewing for error, but determining, de novo, what the law means. Thus, instead of examining an elaborate trial record, the court may well find itself immersed in the detail of a complex statutory scheme, the ensuing web of regulations promulgated by a federal administrative agency, and (of some controversy of late) the details of the legislative history that preceded and accompanied the statute itself, such as committee reports, floor debates and the like.[12]

II

The result of these various developments in the United States is that the several courts of appeals in the federal system are increasingly the providers of the

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12 The use of legislative history, of which American courts have become quite fond in this century, has more recently been called into question in various opinions of the United States Supreme Court. See, e.g., Burlington Northern R.R. v. Oklahoma Tax Comm'n, 107 S. Ct. 1855 (1987); Pierce v. Underwood, 56 U.S.L.W. 4806, 4810-11 (June 27, 1988); United States v. Taylor, 56 U.S.L.W. 4744, 4749 (June 24, 1988) (Scalia, J., concurring). However, the practice of resorting to such materials in fact continues unabated, with there tending to be greater skepticism evidenced in the judicial literature as to the decisiveness of the legislative history of a particular measure. See generally, The Role of Legislative History in Judicial Interpretation: A Discussion Between Judge Kenneth Starr and Judge Abner Mikva, 1987 Duke L.J. 361; Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 Iowa L. Rev. 195 (1983).

"last word." In an age of exceptionally complex statutes and regulatory schemes, the Supreme Court has neither the time, nor possibly the inclination, to grapple with the inner workings of complex statutory mechanisms unless the question is one of manifest and obvious importance to the legal system. As a practical matter, that judgment is not atypically informed by the representations of the Executive Branch, in the person of its chief advocate in the Supreme Court, the Solicitor General of the United States. In contrast to the exceedingly remote prospects of securing Supreme Court review in the overwhelming majority of cases, prospects for securing review (a "grant" of certiorari) brighten considerably when the Solicitor General petitions the Court for review of a case. But the relatively high "batting average" enjoyed by the Solicitor General's Office is explained in no small meaure by the elaborate and rigorous screening function of that Office, namely in saying "no" much more frequently than not to governmental "clients" within the vast apparatus of government who seek, and must secure, the Solicitor General's approval for (and representation in) seeking Supreme Court review.

With that singular exception, the Supreme Court tends strongly to leave the decisions of intermediate appellate courts alone and in place, save in instances of a conflict among the courts in federal law. If, for example, the Ninth Circuit Court of Appeals (headquartered in San Francisco) rendered a decision on a point of law (typically, again, one of federal statutory interpretation) in conflict with a decision of the Second Circuit Court of Appeals (headquartered in New York City), then the prospects are increased for the Court to grant certiorari and resolve the conflict. Indeed, one will not infrequently see in the opening lines of a Supreme Court opinion a reference to the reason for the Court's exercise of its discretion -- to resolve a conflict between two or more courts of appeals.

It would be wrong, however, to assume that the existence of a conflict in the law will inexorably lead to Supreme Court review.[13] With the proliferation of cases competing for its attention, the Court has shown greater willingness to permit clear conflicts within the circuits to "percolate." The Court's unstated assumption appears to be that conflicts in the body of federal law may well disappear over time, or at least the law may move in such a direction that it will eventually come to pass that only one circuit proves to be out of step with the rest of its sister circuits across the country. In those circumstances, the "conflict" may well eventually resolve itself within the lower tiers of the system without the need for Supreme Court intervention.

Exceptions to the unstated "percolation" approach do exist, to be sure, with the principal example being federal tax cases. For obvious reasons, it would be impermissible in a system of "uniform" law for one rule of tax law to prevail in San Francisco (and throughout the vast domain of the Ninth Circuit) and another to obtain on Wall Street (and elsewhere in the jurisdiction of the Second Circuit). But the Court has, presumably by virtue of its increased caseload, otherwise been willing to permit such conflicts in the circuits to stand.

This, it bears noting, has not occurred without dissension within Supreme Court ranks. In particular, Justice Byron White has published brief dissenting opinions from denials of certiorari on the express ground that a conflict exists within the intermediate appellate courts.[14] However, it seems apparent by virtue

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13 It deserves mention in passing that there has been no movement within Congress to require the Court to hear such cases. That Congress enjoys such plenary power is without question, but it has simply not seen fit even to consider the matter, much less pass legislation to that effect.

14 See, e.g., Webb v. Maldonado, 108 S. Ct. 480 (1987); Lewis v. Florida, 108 S. Ct. 2025 (1988); United Steelworkers of America v. Cherokee Elec. Coop., 108 S. Ct. 1601 (1988); Cutillo v. Cinelli, 108 S. Ct. 1600 (1988).

of the regularity of his solitary dissents on this ground that Justice White stands alone in this particular vision of the Supreme Court's duty. Thus, with the singular exception of Justice White, the Court as a whole seems willing to forebear when presented with a circuit court conflict, and allow, as it were, nature to take its course.

III

This reality of appellate jurisprudence has placed two very different sorts of pressures on the federal appellate system. The first and most publicized is the call for a new tier in the intermediate appellate judicial system, namely a new court of appeals enjoying national (rather than regional) jurisdiction. The specific form for the proposed new tier has been the subject of vigorous debate. Not a few observers are entirely opposed to the creation of any new tier. Those who do favor a new level, for the purpose of providing additional appellate capacity, have advanced proposals ranging, at one end of the spectrum, from the creation of an entirely new, permanent "National Court of Appeals," to, at the other end of the spectrum, a temporary, experimental "Intercircuit Panel," which would be composed of sitting judges within present appellate ranks who carry on, temporarily, this additional "national" duty while continuing to discharge their functions as active members of their respective regional courts.

The second, and considerably less public, pressure is internal within the several courts of appeals to make use of devices, and in particular en banc sittings, to maintain uniformity within the circuit's law and to resolve questions of singular importance to the legal system (and which might otherwise escape Supreme Court review by virtue, again, of the discretionary nature of the latter Court's docket).

A

Fewer proposals have spawned more controversy than that advanced initially by the Commission appointed by former Chief Justice Burger, and which has come to be known as the Freund Commission (named after its distinguished chairman, Professor Paul Freund of the Harvard Law School). In brief, the Freund Commission called for the creation of an entirely new court, to be labeled the "National Court of Appeals," to screen all petitions filed in the Supreme Court and then refer a relatively smaller number (some several hundred) of those petitions deemed of greater importance and interest to the Supreme Court for its review. Thus, the proposed new court would be the screening mechanism for the Supreme Court, winnowing out the less important (less "certworthy") cases and thereby conserving the resources of the Supreme Court for the consideration and resolution of more substantial issues.

This proposal met with a firestorm of criticism, however, and was followed in short order by a more modest proposal by a Congressionally appointed Commission -- the Hruska Commission, named after its chairman, a United States Senator from Nebraska -- which built upon the Freund Commission's work but crafted a quite different proposal. Under the Hruska Commission's approach, the new National Court of Appeals would serve no screening function at all; instead, it would decide only those cases that were referred to it for resolution by the Supreme Court, which would for its part continue to review all petitions. The obvious benefit of the Hruska Commission's proposal was that more cases could be decided on the merits at the "national" level, but with the Supreme Court squarely in control of the entire docket of the new court.

Although discussion over these proposals continued throughout the 1970s, little movement occurred in Congress. With the proposals for structural change

thus effectively languishing on the shelf, Chief Justice Burger renewed the battle cry for reform in his 1983 Annual Report of the State of the Judiciary. There, the since-retired Chief Justice called for the creation of a temporary panel of the new United States Court of Appeals for the Federal Circuit, the newest addition to the intermediate appellate ranks of the federal judiciary. Under his proposal, two judges from each of the several circuits would comprise the temporary panel, thereby providing a pool of 26 judges. Panels of seven to nine judges would then be drawn from this judicial pool to sit for periods of six months. Their principal task would be to resolve intercircuit conflict cases. The Supreme Court would retain jurisdiction over the entirety of the intercircuit tribunal's work (and thus, presumably, obviating any constitutional concern over the bedrock requirement of "one" Supreme Court). Discussion of that proposal has continued, with several Justices (including now-retired Justice Powell and Justice O'Connor) speaking out publicly in favor of this sort of structural change; in addition, shortly before his elevation to the Chief Justiceship, then-Justice Rehnquist actively argued within the American Bar Association for that organization's approval of the proposal.

Still, this most recent proposal, as considerably scaled down from the more ambitious Freund Commission approach, like its predecessors has made little headway. Indeed, criticism of <u>any</u> structural change continues, as evidenced by a recent piece in the Harvard Law Review co-authored by one of my very able colleagues on the Court of Appeals, Judge Ruth Bader Ginsburg.[15] The prospects for its adoption, which would of course require Congressional action, seem to me quite remote, notwithstanding the experimental, less far-reaching nature of the current proposal.

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15 Ginsburg and Huber, The Intercircuit Committee, 100 Harv. L. Rev. 1417 (1987).

B

The result is that the intermediate appellate courts will be increasingly required to focus their energy and attention on internal ways for achieving greater uniformity and consistency in their respective bodies of law. Inasmuch as the several courts of appeals sit in panels of three judges, the likelihood for conflicts emerging within the courts themselves has grown significantly with the substantial increase in the appellate caseload and Congress' creation of additional judgeships to help meet the increased load.

That is to say, not only has the caseload per judge increased markedly in the federal system, but the number of judges has also dramatically increased. In contrast to what are now seen as the halcyon days of American appellate jurisprudence, the time of Learned Hand's small, closely knit Second Circuit Court of Appeals, the modern-day federal appellate court is quite large and diverse. My own court, when at full strength, consists of 12 judges. In addition, our court not infrequently calls upon federal district judges in the District of Columbia to sit with our court "by designation," as expressly permitted under federal law. From time to time, "visiting judges" from other circuit courts of appeals join with us for a four-day sitting period to assist in carrying out our work. With this increased number of judges (including "visiting" judges) the opportunity for conflict obviously expands as well. This has reached rather significant proportions in our largest circuit, the Ninth Circuit Court of Appeals, which now has almost 30 active judges. The upshot is that, for en banc hearings, a randomly drawn pool of 11 judges is selected, even though the "en banc" court under this procedure in fact represents less than half of the Ninth Circuit's active judges.

It goes without saying, however, that en banc sittings provide yet another, and not insubstantial, burden on the intermediate appellate courts. Nonetheless,

with diminished capacity at the Supreme Court level (in terms of the sheer percentage of cases within the system that it is, practically speaking, able to hear) there are increasing pressures on courts to consider more cases en banc. A direct and very immediate consequence of this reality is the current proliferation of petitions for rehearing and suggestions for rehearing en banc. This adds considerably to the already substantial reading burdens imposed on federal appellate judges, and invariably takes a toll on the vital quality of collegiality within the courts. En bancs, in short, are never pleasant occasions, as the work of one panel is by definition being called into question by their colleagues (a request for en banc review must, to be successful, be approved by over half of the judges in active service; this contrasts with the widely known, informal "Rule of Four" in the Supreme Court, by which the favorable votes of four Justices will result in the petition for certiorari being granted).

That harsh reality notwithstanding, there will likely be increased pressures for according en banc treatment to cases, as for example a decision by a panel that would create a conflict with the law of another circuit. Indeed, the latter procedure, which is the subject of active discussion in judicial circles at present, is but a sober reflection of the reality of the Supreme Court's inadequate capacity to resolve conflicts within the circuits.

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For all these reasons, the role of the intermediate appellate courts in the United States as final arbiters of statutory and regulatory law is destined to grow. Although there is under the Constitution only "one supreme Court," the proliferation of litigation has resulted inexorably in greater decisional autonomy being enjoyed by the intermediate courts. It is, in consequence, inevitable that the intermediate appellate courts will increasingly become tribunals which give

direction and focus to the law, as opposed to their traditional role of reviewing the work of lower tribunals and correcting them of error. And the practical limitations on the Supreme Court's ability to ensure uniformity in the vast corpus of federal law means, less happily, that conflicts in that body of law will continue to abound, with the need thus apparent to create, possibly without structural changes in the system, more creative internal mechanisms for maintaining coherence and consistency in federal law.