965 HJ SB 104 (FILE NO. 4)

THE LEGISLATURE OF THE STATE OF ALASKA
ELEVENTH LEGISLATURE

FISCAL NOTE

I. REQUEST SB 104
Bill/Resolution No.
Title An Act Establishing the Intermediate Court of Appeals
Requested by Senate Judiciary Committee Date 2/9/79

II. FISCAL DETAIL
Agency Affected Alaska Court System
Program Category Affected Due Process
Budget Request Unit(s) Affected Alaska Court System

EXPENDITURES (Thousands of Dollars)

		FY 79	FY 80	FY 81	FY 82	FY 83	FY 84
100	PERSONAL SERVICES		177.5	376.2	398.8	422.7	448.1
200	TRAVEL		15.0	31.8	33.7	35.7	37.9
300	CONTRACTUAL		57.2	121.3	128.5	136.3	144.4
400	COMMODITIES		5.0	10.6	11.2	11.9	12.6
500	EQUIPMENT		25.0				
600	LAND & STRUCTURES						
700	GRANTS, CLAIMS, ETC.						
	TOTAL		279.7	539.9	572.2	606.6	643.0

FUNDING (Thousands of Dollars)

GENERAL FUND		279.7	539.9	572.2	606.6	643.0
FEDERAL FUNDS						
OTHER (Specify)						

POSITIONS

FULL TIME		10	10	10	10	10
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

Attachment I - FY 80 Budget Detail

IV. DATE February 12, 1979 PREPARED BY Richard Barrier
AGENCY Alaska Court System
PHONE 264-0545

Original Legislative Finance
cc Budget and Management

ATTACHMENT I - FY 80 BUDGET DETAIL

This budget detail for FY 80 is based on the assumption that the effective date of this bill will be July 1, 1979 and that the intermediate court will be operational on January 1, 1980. The fiscal note incorporates all new costs associated with the intermediate court.

With the creation of the intermediate court, and the lessening of the Supreme Court caseload, it will be possible to reduce the FY 80 Supreme Court budget in a number of areas. The request for legal externs, $30,078, can be deleted, travel expenses reduced by $20,000, and contractual costs reduced by $15,000 on an annual basis. Additionally, the Supreme Court is considering reductions in other budget areas, including the deletion of the central legal staff positions in the Supreme Court office, $85,493, and several budget items in the Trial Court and Administration components.

Personnel:	3 judges: $54,370 + $5,900 benefits		$180,810
	3 secretaries, range 13: $17,940 + $5,971 benefits		71,733
	3 law clerks, range 15: $20,796 + $6,652 benefits		82,344
	1 court clerk, range 10: $14,820 + $5,227 benefits		20,047
			$354,934
Travel:			$30,000
Contractual:	Space rental - 4,500 sq. ft. at $1.10	$59,400	
	Phone, postage	20,000	
	Equipment rental	30,000	
	Other misc.	5,000	
			114,400
Commodities:			10,000
Equipment:			25,000
			534,334

FY 80 EXPENSE

One-time costs:	Equipment	$ 25,000
Operating Costs:	(1/2 year)	254,667
		$279,667

SUPREME COURT WORKLOAD:
Analysis of Proposed Solutions

[redacted]

Prepared By:
Office of Staff Counsel
Office of Administrative Director
September 16, 1977

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INTRODUCTION

The caseload of the Alaska Supreme Court has increased sharply over the past three years. While the Court has also increased its disposition of cases over this period, the increase in dispositions has not kept pace with the increase in filings.

In a memorandum dated May 24, 1977, the Chief Justice requested that the Administrative Director obtain data from other states relating to the workload of the supreme court. This same memorandum mentioned three possible methods of dealing with increased caseloads: (1) handling some cases by panels, (2) increasing the size of the court and (3) establishing an intermediate appellate court.

In response to this request the Administrative Office has undertaken a preliminary study of the supreme court workload. This report will present comparative data on the Alaska Supreme Court and the supreme courts in other comparable states. The report will also review several possible methods of dealing with increased caseloads and will discuss the advantages and disadvantages of the various possibilities.

Unfortunately, the report must begin with three caveats. First, it is very difficult to compare the data from various states as there is no widely-used standard method of defining and stating the pertinent information. Every effort has been made to compare only those figures which are truly comparable,

but, at best, the comparative figures in this report are a "good approximation" of the facts. Secondly, the discussions of the various possible methods of dealing with increasing caseloads are not intended to be exhaustive and conclusive. It would require a much more extended study in order to determine the likely effect in Alaska of adopting any one solution, and even the conclusions of such an extended study would necessarily be less than absolutely reliable. This report then attempts to present the alternatives and some of the more likely effects of each possible solution. Finally, although statistics can be gathered from other states and compared with Alaska, this report cannot answer the fundamental question of whether the Alaska Supreme Court is approaching or has reached its limit in terms of the number of cases it can handle without adopting one or more of the alternatives discussed here. There are no standards by which to measure overwork, and the answer ultimately must be the Court's judgment as to whether it can handle more cases without sacrificing quality.

I. STATISTICAL COMPARISON OF ALASKA WITH OTHER STATES

The memo which initiated this study expressed some concern about the relationship of the size and number of appellate courts to the population of the state and information on this relationship provides an interesting backdrop to the other statistical comparisons which follow.

The Court Administrator in Louisiana recently surveyed 52 jurisdictions (50 states plus Puerto Rico and the District of Columbia) to obtain data on the number of appellate judges in relation to population.[1/] The corrected[2/] data on Alaska is as follows:

See p 52

Trial judges per 100,000 population 4.46

Appellate judges per 100,000 population . . . 1.24

Appellate judges per 100 trial judges 27.77

These ratios are based on the following figures:

Trial court judges (general jurisdiction in 1975) 18

Intermediate appellate court judges 0

Supreme court justices. 5

Population (estimated 1975) 403,000

Of the 46 jurisdictions for which data is available, Alaska ranks tenth from the highest for trial judges per 100,000 population.[3/] Alaska is in a three-way tie for second place for appellate judges per 100,000 population.[4/] Alaska ranks sixth,

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1/ See Appendix I for charts prepared by Louisiana.

2/ The ratios calculated by Louisiana were based on an incorrect number of trial court judges (37) and on an incorrect population figure (330,000).

3/ The states ranking higher than Alaska are Illinois (5.4), Indiana (4.6), Kansas (5.7), Michigan (5.6), Minnesota (5.5), Nevada (4.7), Oklahoma (5.3), Puerto Rico (6.3) and the District of Columbia (5.9).

4/ Alaska is tied with Delaware and the District of Columbia. Only Wyoming ranks higher (1.4).

along with Hawaii, for appellate judges per 100 trial judges.5/

These figures indicate that Alaska already ranks among those states with the highest number of appellate judges in relation to the population. If Alaska should increase the number of appellate judges, either by increasing the size of the supreme court or by creating a new intermediate appellate court, it, of course, would rank even higher. For example, if the size of the supreme court were increased to seven justices, the number of appellate judges per 100,000 population would be 1.73, rather than the current 1.24. Alaska would then have more appellate judges in relation to its population than any of the other 45 jurisdictions included in the chart in Appendix I. If the supreme court remained as it is with five justices and a three-judge intermediate appellate court were created, the ratio would be even higher--1.98 per 100,000 rather than the current 1.24.

It is obvious that the unusually small population of Alaska skews these ratios to some extent, but it is equally obvious that, by any standards, Alaska already has a high number of appellate judges in relation to the population.

5/ The states ranking higher than Alaska and Hawaii are Delaware (38.8), Maine (50), New Hampshire (38.4), North Carolina (29) and Wyoming (33.3).

Such a high ratio may not be inappropriate, however, if the number of appellate judges is not high in relation to the amount of litigation in the state. For example, in 1976 in Alaska, 364 new appeals were filed with the supreme court. This is a ratio of 90.32 appeals per 100,000 population. In Idaho, for the same period, 295 new appeals were filed, which is a ratio of only 38.26 appeals per 100,000 population.6/ The ratio of appeals in Alaska to the population is more than twice the ratio in Idaho. While the ratio of appellate judges in Alaska to population is about twice the ratio in Idaho, the disparity is offset by the higher ratio of appeals to population.

Some tentative conclusions may be drawn from these figures. First, although the number of appellate judges in Alaska when compared to other states appears to be extremely high in relation to the population, the number is not so high when the amount of litigation in the state is taken into consideration. Secondly, the amount of litigation in Alaska is relatively large in relation to the size of the population.

Without regard to population figures, the charts in Appendix II present comparative data on the workloads of the supreme court

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6/ Perhaps more interesting is the comparison of appeals to trial court filings. In Idaho for this period there were 262,419 trial court filings, and one appeal for every 889 trial court cases. In Alaska, there were 102,239 trial court filings, or one appeal for every 280 trial court cases. In other words, three times as many cases are appealed in Alaska as in Idaho.

in Alaska and in eight other states.[7] These particular states were selected for comparison because, like Alaska, they have no intermediate appeallate court, and each of them has a five-justice court except for Maine, which has six justices. Based on the data in Appendix II, the 1976 workload of the Alaska Supreme Court, in comparison with other relatively similar states, appears to be about average.

During 1976, 364 appeals were filed with the Alaska Supreme Court, and 133 opinions were issued. Of the eight other supreme courts reviewed, only Nevada and New Hampshire reported having issued significantly more opinions than did Alaska during 1976.[8] The Nevada court issued 252 opinions and had 607 appeals filed during 1976. New Hampshire reported having issued 205 opinions from July 1, 1974, through June 30, 1975.

Three of the eight courts appear to have workloads much lighter than Alaska's. Hawaii reported 253 appeals filed from July 1, 1975 to June 30, 1976, with opinions issued in 84 cases. North Dakota reported for calendar year 1975 that 128 appeals and original proceedings were filed, and 93 opinions were issued. The Wyoming court issued 75 opinions during 1976, with 138 appeals having been filed.

7/ Hawaii, Idaho, Maine, New Hampshire, Nevada, North Dakota, Vermont, and Wyoming.

8/ The New Hampshire statistics cover fiscal year 1975, the North Dakota statistics cover calendar year 1975, and the Hawaii statistics cover fiscal year 1976. All others cover calendar year 1976.

The three states having apparent caseloads and dispositions nearest to Alaska's were Idaho, Maine and Vermont. During 1976, 351 appeals were filed in the Vermont Supreme Court, and opinions were issued in 141 cases. Idaho reported 295 appeals filed during 1976, and 136 opinions issued. The Maine Supreme Court issued 168 opinions during 1976, but as the following chart indicates, the average number of opinions per justice in Maine was quite comparable to the Alaska average:

STATE	TOTAL OPINIONS	AVERAGE PER JUSTICE
Nevada	252	50.4
New Hampshire	205	41
Maine	168	28
Vermont	141	28.2
Idaho	136	27.2
Alaska	133	26.6
North Dakota	93	18.6
Hawaii	84	16.8
Wyoming	75	15

It is noteworthy, however, that for the first eight months of 1977, the Alaska Supreme Court published 128 opinions. If the court continues to publish opinions at this rate for the remainder of 1977, it could reach a total for the year of over 190 opinions.

Of the states included in this review, six of them have supreme courts which, like Alaska's, have both administrative and rule-making authority.[9] Of the remaining two, Nevada has no administrative responsibilities, but does have rule-making authority. The Vermont court, conversely, has administrative responsibilities, but no rule-making authority. The data in Appendix II shows that the Maine and New Hampshire courts, with both administrative and rule-making authority, issued more opinions than did the Vermont court, which lacks rule-making authority. While we know intuitively that a court which does not exercise either administrative or rule-making authority should be able to handle a higher number of cases than a court that does, this data does not tell us to what degree the absence of such responsibilities increases a court's capacity to handle cases.

Furthermore, the comparative data is insufficient to provide an answer to the question of whether the Alaska Supreme Court is approaching or has reached its limit in terms of the number of cases it can handle, or whether the Alaska court could be producing as many opinions as does the Nevada court, for example. Extensive research would be required to determine whether the Alaska Supreme Court is faced with a greater number of complex cases than are the courts that issue more opinions. Even more difficult to determine is the question of whether the quality of the opinions issued by these courts is up to the

present standard of the Alaska court, and whether our court would be willing to sacrifice some quality to increase substantially its rate of dispositions.

II. POSSIBLE SOLUTION TO THE CASELOAD PROBLEM

Although the workload of the Alaska Supreme Court has increased substantially over the last several years, neither the size of the court itself nor the number of law clerks has increased at all.[10/] During 1976, a total of 364 appeals were filed with the court, as compared to 249 in 1975. This represents an increase in appeal filings of 46% in one year. Because the increase in filings for petitions for review and original applications was not so high, the overall percentage increase in filings from 1975 to 1976 was 38%. Further, a recent statistical report by the Clerk of the Supreme Court showed that the number of pending cases in the "awaiting decision" category as of April 30, 1977, was nearly double the number in that category on the same date in 1976.[11/] It is therefore understandable that the staff and court are feeling burdened by the workload.

10/ Memo dated May 20, 1977, from Donna Spragg Pegues to Chief Justice Boochever.

11/ The number in that category on April 30, 1977 was 125, and on April 30, 1976, the number was 64. See, Memorandum to the Justices from Donna S. Pegues, 5/24/77.

The solutions which come most readily to mind and which have been used by other states to cope with increasing appellate caseloads are the following:

1. Increase the size of the supreme court.
2. Establish panels of the supreme court.
3. Limit appeals of right to the supreme court.
4. Establish central research and screening staff.
5. Establish intermediate court of appeals.

This report will review each of these solutions generally:

1. Increase the size of the supreme court. In many ways court expansion appears to be the simplest solution to the caseload problem. Increasing the number of justices on the court would obviously divide the workload among more people, so that the opinion writing burden on each person is reduced--and this is one of the important goals of any change in the appellate system. Court expansion is an attractive solution also in that it would not necessitate any change in appellate procedures.

The use of either a seven-justice or five-justice court would be compatible with the American Bar Association Standards relating to Court Organization, which state in part:

> A supreme court should be constituted of an odd number of judges, so the decisions can be reached by majority vote. The number most common and generally satisfactory is seven. This number facilitates the working relationships required to establish concurrence of opinion on difficult legal questions, while at the same time being large enough to provide breadth of viewpoint and the manpower to prepare the opinions that

> are the principal work product of appellate courts. Nevertheless, some appellate courts have operated effectively with five judges . . . [EMPHASIS ADDED]12/

A change in the size of the court could be achieved by an amendment to A.S. 22.05.020, which establishes the composition of the court.13/ No constitutional amendment would be necessary, since article IV, section 2(a), of the Alaska Constitution, authorizes the legislature to increase the number of justices upon the request of the supreme court.14/

However, the efficacy of court expansion as a solution to the caseload problem may be illusory. As stated in the American Bar Association Standards on Court Organization, "Adding additional judges to a highest court may actually slow down its operation rather than speeding it up."15/ The additional justices

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12/ American Bar Association Standards Relating to Court Organization, Standard 1.13, at 34 [hereinafter cited as ABA Standards on Court Organization].

13/ A.S. 22.05.020 provides: "Composition and general powers. The supreme court is a court of record and consists of three justices including the chief justice. On December 1, 1968, the total number of justices shall be increased to five. The supreme court is vested with all power and authority necessary to carry into complete execution all its judgments, decrees and determinations in all matters within its jurisdiction, according to the constitution, the laws of the state, and the common law. It may prescribe by rule the fees to be charged by all courts for judicial justices."

14/ Alaska Constitution, article IV, section 2(a) provides: "The supreme court shall be the highest court of the State, with final appellate jurisdiction. It shall consist of three justices, one of whom is chief justice. The number of justices may be increased by law upon the request of the supreme court."

15/ ABA Standards on Court Organization at 35.

would certainly make it possible for the court to increase its outpout of opinions, but, at the same time, each case might take somewhat longer to decide because there would be additional points of view to be dealt with and more justices among whom draft opinions and memoranda would have to circulate. Additionally, each justice would still have to review each draft opinion. Assuming that seven justices would produce more opinions in a given year than would five, the workload on each justice with respect to the opinion review function would actually increase with seven justices. One commentator has described the situation as follows:

> [W]hatever added work can be done by the extra judges is dissipated by the increased consultation time, by the difficulties inherent in drafting opinions to accommodate multiple points of view, and by the administrative problems involved in increased personnel.16/

Increasing the size of the supreme court has not been a widely-used method of dealing with appellate caseload problems. In fact, the National Center for State Courts reported to the Idaho committee that no state judiciary had expanded the size of its supreme court in recent years.17/

16/ Hufstedler, Constitutional Revision and Appellate Court Decongestants, 44 Wash. L. Rev. 577, 594 (1969), quoted in Donaldson, A Crisis in the Idaho Court System: An "Appealing Remedy, 13 Idaho L. Rev. 1, 4 (1976).

17/ An Investigation into the Problems Created by the growing Appellate Caseloads in Idaho, Report of the Supreme Court Appellate Court Committee, August 1977, Draft Report of June 29, 1977, at 37. [Hereafter cited as Draft Idaho Appellate Court Report.]

The projected cost of adding two justices to the supreme court, including staff, space and equipment requirements, would be approximately $300,000 the first year and $285,000 each subsequent year.

2. Establish panels of the supreme court. Another possible solution to the caseload problem is to divide the supreme court into panels of three. The advantage of sitting in panels is that, while three judges are hearing arguments or deliberating on or writing opinions relating to certain cases, the other two justices would be free to tend to other work of the court. The use of panels would necessitate some change in the internal procedures of the supreme court, but this solution does have the advantage of not requiring procedural changes for the attorneys or litigants.

There is no constitutional, statutory or administrative requirement that the supreme court sit en banc,[18] and Appellate Rule 16 does provide that three justices shall constitute a quorum.[19]

18/ A.S. 22.05.010(b) does include the following provision: "For the purpose of considering appeals of sentences on [the grounds that the sentence is excessive or too lenient], the supreme court may sit in divisions." [Emphasis added.] It is at least arguable that the principle of statutory construction inclusio unius est exclusio alterius would apply, and, if so, the use of divisions would be valid only for the specified sentence appeals.

19/ Appellate Rule 16(a) provides: "A quorum shall consist of a minimum of 3 justices or judges designated to sit on the supreme court."

It therefore appears that the change to panels could be made by internal administrative action, without the necessity of constitutional amendment or legislative action.

The commentators, however, are uniformly opposed to the use of panels by a state's highest appellate court. The American Bar Association Standards on Court Organization, for example, contend that the use of panels dilutes the appellate function, "particularly that of developing the law."[20/] The American Bar Association Standards Relating to Appellate Courts state a more emphatic position against the use of panels. The Standard itself reads as follows:

> 3.01 Internal Organization of Appellate Courts.
> (a) Supreme Court. In hearing and determining the merits of cases before it, the supreme court should sit en banc. Except for those who may be disqualified for cause or unavoidably absent, all members of the court should participate in the decision of each case. The court should not sit in panels or divisions, whether fixed or rotating, or delegate its deliberative and decisional functions to officers such as commissioners.[21/]

The Commentary explains the rationale behind this position.

> The internal organization of an appellate court should be designed to permit the court to fulfill its functions in the court system. The primary responsibility of a supreme court is that of developing and maintaining the consistency of the

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20/ ABA Standards on Court Organization at 35.

21/ American Bar Association Standards Relating to Appellate Courts, Standard 3.01, at 7-8 [hereinafter cited as ABA Standards on Appellate Courts]

law to be applied in subordinate courts in the system... In deliberating upon and deciding the legal questions that come before it, the supreme court's entire membership should participate so that its collective professional and intellectual resources are brought to bear in the development of the law. To the extent that such a court subdivides itself into panels or divisions, it creates possibilities of conflict or inconsistency in its decisions, which can be resolved only through en banc hearings.

In some states having no intermediate appellate court, the supreme court sits in divisions in order to cope with a caseload which would be too large to handle if the court were to sit en banc in every case. This arrangement has often been used as a means of transition to the establishment of an intermediate appellate court. The result of such an arrangement is that the court functions simultaneouly as a court of intermediate review when it sits in divisions and as a court of subsequent review when it sits en banc. If the court's docket in such a system is carefully administered, so that important or difficult cases are identified before being heard and assigned directly for en banc hearing, a single supreme court can handle the system's appellate responsibilities in an effective way. Experience indicates, however, that such an arrangement may persist long after the point has been reached when an intermediate appellate court should have been established.

Moreover, internal inconsistency in the court's decisional product may be ignored or tolerated to an excessive degree in the hope of avoiding the cost of establishing an intermediate court.22/

The blue-ribbon committee which recently studied appellate caseload problems in Idaho considered the possibility of using panels of the supreme court, but the committee finally rejected that alternative:

[T]here seemed to be more arguments against the use of panels than arguments in favor: both of the "outside experts" who testified before the committee, Chief Judge Schwab and Chief Justice

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22/ Id. at 8-9.

> Cameron, urged that any Supreme Court has a law-stating function, and that this function is weakened by the operation of panels within a supreme court. Other committee members felt that decisions by panels should be final only if they are unanimous--meaning that a panel which developed disagreement would then have to return an appeal to the entire appellate body or to another panel, causing further delay. Other committee members felt that panels placed too much emphasis on the luck of the draw, and that panels are not appropriate for decisions of a court of last resort, although they would be useful for an intermediate appellate court. Committee members seemed to take the view that the function of a court of last resort is to take a broad and balanced view of the law and the needs of society, and that dividing any court of last resort into smaller units of decision would interfere with this basic role. The committee finally determined that the use of panels, either in connection with increasing the size of the Supreme Court or within the present structure, is not desirable.[23/]

In Nevada the legislature in 1976 gave final approval to a constitutional amendment which would permit the supreme court to sit in panels if there are more than five justices on the court. There are currently only five justices on the Nevada court, and this amendment has had no effect in practice, since no implementing legislation has been sought.[24/]

With the assistance of the Clerk of the Supreme Court, we have attempted to determine how panels might actually operate and to quantify to some extent the reduction in workload that

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23/ Draft Idaho Appellate Court Report, supra, note 17, at 31-32.

24/ David Frank, Legal Assistant to the Nevada Supreme Court, telephone conversation on June 16, 1977.

a panel system could be expected to produce.

By use of a standard mathematical formula, it was determined that in order to have the five justices sit in all possible combinations of three justices each, a total of ten panels would be required. The composition of each panel would be as follows:

Panel 1:	Boochever/Rabinowitz/Connor
Panel 2:	Rabinowitz/Connor/Burke
Panel 3:	Connor/Burke/Matthews
Panel 4:	Burke/Matthews/Boochever
Panel 5:	Matthews/Boochever/Rabinowitz
Panel 6:	Boochever/Connor/Burke
Panel 7:	Connor/Matthews/Boochever
Panel 8:	Matthews/Rabinowitz/Burke
Panel 9:	Burke/Rabinowitz/Boochever
Panel 10:	Matthews/Connor/Rabinowitz

It must be remembered that even if panels are utilized, each justice will still have the responsibility for drafting the same number of opinions each year as he would if panels were not used. The two areas in which the use of panels would reduce the workload of individual justices are in the preparation for oral argument and in the review of draft opinions from other justices. Since each justice will not be participating in four of the ten panels, the time he spends presently on preparation for oral argument and on reviewing drafts would be

reduced by a maximum of 40 percent. Assuming for purposes of illustration that a justice devotes 40 percent of his total time to these two tasks, then the panel system would theoretically reduce his overall workload by 16 percent.[25/]

In practice, however, the 40 percent reduction figure is unrealistically high when applied to total workload because a certain percentage of the total appeals will be heard by the Court en banc. For example, if the Court had an annual caseload of 200 appeals, and 50 of the 200 were heard en banc, then the workload reduction in the preparation and review functions would be diminished from the maximum 40 percent to 30 percent.[26/] Again assuming that a justice devotes 40 percent of his total time to these two tasks, the overall savings in workload for that justice would be 12 percent, or 4.8 hours per 40 hour week. And as the ratio of en banc cases to panel cases increases, the workload reductions are further diminished.

Even if the philosophical objections were set aside, the use of panels is generally agreed to be a temporary solution to the workload problem at best. The following chart illustrates that if the caseload continues to increase, then the actual

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25/ This figure is arrived at by multiplying the 40% reduction by the percent of total time spent on preparation for argument and review of opinions.

26/ If only 150 of the total 200 cases are heard by panels, then each justice would not be required to participate in 40% of the 150 panel cases, or 60 cases. These 60 cases represent 30% of the total 200.

workload of each justice under a panel system will approach and finally increase beyond the present actual workload within a relatively short period of time.

Year One

It is assumed that 200 cases will be filed, ready for argument, and decided during the year. It is also assumed that 25% of the total, or 50 cases, will be heard en banc.27/

Each justice must write opinions in	40 cases
Each justice must fully participate in	140 cases*

*50 cases en banc plus 90 cases in panels.

Year Two

It is assumed that the caseload increases by 25%, for a total of 250 cases. 25% of the total, or 63 cases, will be heard en banc.

Each justice must write opinions in	50 cases
Each justice must fully participate in	175 cases*

*63 cases en banc plus 112 cases in panels.

Year Three

It is assumed that the caseload will again increase by 25%, for a total of 325 cases. 25% of the total, or 81 cases, will be heard en banc.

Each justice must write opinions in	65 cases
Each justice must fully participate in	227 cases*

*81 cases en banc plus 146 cases in panels.

27/ The estimate of 25% en banc cases was somewhat arbitrary, since a more accurate figure could not be determined. It does, however, take into account the 1976 experience of dissenting opinions filed in 17% of the opinions, with the additional 8% intended to reflect those cases involving important questions of law requiring full court participation. It may be that the estimate is too low to adequately take into account the number of these cases.

Thus after two years, the actual number of cases that each justice must fully participate in will exceed the number of total cases from the hypothetical "Year One."

This chart also illustrates the problems attending the adoption of a solution that is geared toward percentage reductions in workload as is the panel system. At some point along the graph of caseload rise, a court will reach its saturation point. A justice has time to write only a certain number of opinions each year and can participate fully in only a certain number of cases each year without seriously sacrificing the quality of the court's work product. When the saturation point is reached, it hardly matters in practical terms that next year's workload will be reduced by 15 or 20 percent by the use of panels if the actual workload will exceed the capacity of the justices. The court will continue to fall behind, whether panels are utilized or not. At the trial court level, when a court reaches this saturation point, the solution is to add another judge so that judicial capacity is increased. It has been suggested that the panel system will provide real relief only if pro tempore appointments of superior court judges are included on the panels. The inclusion of pro tem justices on panels could be accomplished in at least two different ways.

If an extra judicial position were assumed to exist on the Supreme Court (to be filled each time with a different pro tem justice), then the judicial capacity for use on panels would

increase from 5 to 6. By using the same mathematical formula discussed above, 20 panels would be required to have the six positions combined into panels of three without repeating a combination. While this would certainly augment any workload reductions that would otherwise be achieved by panels, it would be administratively too unwieldy to attempt to manage 20 panels. If additional pro tempore assistance were to be used in concert with the panel system, it would be preferable to keep the same ten panels described above, and substitute a pro tem justice for each of the five sitting justices periodically and on a rotating basis.

There are, however, both philosophical and practical limitations on the frequent use of superior court judges on the panels as justices pro tempore. In order to achieve a significant additional workload reduction by use of pro tem assistance, a fairly large number of cases would have to be heard by panels made up of two justices and one pro tem justice. With only two of the five justices sitting on a large number of panel calendars, the Supreme Court's law-making function is even more diluted. The predictability of results declines, and the potential for conflicts among the panels increases greatly, necessitating further hearing by the Court en banc.

There is also a limit to the amount of time that a superior court judge can be expected to divert from his trial court duties. In this vein, it must be remembered as well that the

pro tem justice cannot work as efficiently as a full time justice. He may have one law clerk at the most, and will not have the level of assistance for preparation of pre-argument memoranda and draft opinions that a sitting justice has. Further, he lacks the advantage of being able to devote full time to appellate matters and thereby develop a routine for efficient disposition of these types of cases.

Some further problems should also be noted. It has been suggested that one way of meeting the objection concerning the dilution of the law-making function is to provide that in any case where the panel decision were not unanimous, or if a non-participating justice disagreed with the draft opinion, then the case would be referred to the court for en banc resolution. While this requirement would to some extent reduce the problems concerning the dilution of the law-making function, it would also mean that such a case would probably have to be argued again before the full court and certainly would require another conference. This would result in inconvenience and delay to counsel and litigants, and a duplication of effort for the members of the panel who initially considered the case.

As another means of safeguarding the lawmaking function, it has been suggested that before argument, a single justice on a panel should be empowered to order any case before the panel moved to the en banc calendar. Again, this would provide some additional safeguards. However, while it is impossible,

without some experience to draw upon, to predict how frequently this prerogative might be exercised, it would certainly be exercised to some extent, and this would result in further diminishing the overall percentage workload reduction that a panel system might achieve, by increasing the number of en banc cases.

Finally, in order for a panel system to operate efficiently, there must be a mechanism for identifying those cases that will be amenable to panel treatment. If unanimity on the panels is required, this means in addition that the identification process must include the ability to predict with some accuracy those cases that will be likely to result in a unanimous decision. (Otherwise delay and duplication of effort will be increased). It is unlikely that the recently established central staff attorney position will be able, without additional attorney assistance, to perform this screening function adequately and also provide substantial assistance to the court on motions and petitions. Additionally, the Clerk of the Supreme Court has expressed the concern that the initiation of a ten-panel system would require the hiring of an additional calendar clerk to coordinate the assignments and the calendaring of cases for the ten panels and for the en banc calendars.28/

28/ It would be possible, of course, to reduce the number of panels from ten to five, with each justice sitting on three different panels. The number of panels could not be fewer than five, however, and still maintain an equal distribution of panel assignments. In this event, it is estimated by the Clerk that an additional one-half time calendar clerk would be required. Five panels would achieve the same percentage workload reductions as would ten panels, but such a system would not be fully rotating.

It is anticipated that an additional central staff attorney and an additional calendar clerk would be required to implement the panel system. The approximate cost for the first year of an attorney, secretary, and equipment would be $69,000 and for each year thereafter $65,000. If a calendar clerk were added the total cost would be $90,000 for the first year and $74,000 each year thereafter.

Limit appeals of right to the supreme court. Since the primary goal of these changes in the appellate system is to reduce the workload of the supreme court, one direct method of dealing with the problem would be to permit fewer appeals. This could be done by abolishing appeals of right to the supreme court in certain types of cases or by totally eliminating appeals of right and authorizing the supreme court to grant writs of certiorari for those cases which it wishes to hear. The primary advantage of such a system is that it would produce an immediate reduction in the caseload of the supreme court and would enable the court itself to exercise control over the size of its caseload.

Although the right to at least one appeal is traditional in the American judicial system, such a right is not conferred by the United States Constitution. The American Bar Association Standards on Court Organization include the following statement: "[I]t should be recognized that a litigant has no unqualified right to an appeal..."29/

29/ ABA Standards on Court Organization at 35.

A limitation or abolition of appeals of right to the supreme court would require an amendment to A.S. 22.0 010(a), which currently reads in part:

> The supreme court has final appellate jurisdiction in all actions and proceedings. ...An appeal to the supreme court is a matter of right. ...

Article IV, section 1, of the Alaska Constitution grants to the legislature the authority to prescribe the jurisdiction of courts: "The jurisdiction of courts shall be prescribed by law." This would seem to preclude any constitutional problems with the elimination of appeals of right, but article IV, section 2, may place some limitation on the legislature's power to prescribe jurisdiction. Article IV, section 2(a), provides in part: "The supreme court shall be the highest court of the State, with final appellate jurisdiction." [Emphasis added.] Thus, although under section 1 the legislature has the authority to "prescribe jurisdiction", under section 2 it may not have the authority to grant final appellate jurisdiction to any court other than the supreme court.

Since no legislative attempt has been made to limit appeals of right to the supreme court, the Alaska Supreme Court obviously has had no opportunity to consider the constitutionality of such a limitation. However, if appeals of right were limited or abolished, the supreme court would retain the power to accept cases by certiorari, and the Alaska Supreme Court has indicated that the exercise of such a power is equivalent to the exercise of "final appellate jurisdiction". In State v. Browder[30/] the court stated:

30/ 486 P. 2d 925 (Alaska 1971).

> We think it significant that the legislature in prescribing this court's jurisdiction specifically provided that "The supreme court may issue injunctions, writs of review, mandamus, certiorari, prohibition, habeas corpus, and all other writs necessary or proper to the complete exercise of its jurisdiction." In our view this provision is a clear manifestation of the legislature's intent that the supreme court would be able to exercise its final appellate jurisdiction other than by appeal.31/

It is possible then that the limitation or abolition of appeals of right could be construed as a legitimate exercise of the legislature's power to prescribe jurisdiction and not as an unconstitutional grant of final appellate jurisdiction to a lower court. The resolution of this constitutional question, however, is far from clear, and it would have to be given serious consideration if an attempt is to be made to obtain an amendment of A.S. 22.05.010(a) so as to limit or abolish appeals of right to the supreme court.

The consensus of the commentators appears to be that limiting the right to appeal is not a desirable solution to the caseload problem. Hufstedler, for example, is strongly opposed to this approach:

> There are direct and indirect ways to trim an appellate docket. The direct way is to cut off or limit the right to appeal. The indirect way is to create a series of procedural or financial impediments which discourage appeals. We can dispose of the indirect methods summarily.

31/ Id. at 930.

> Entwining the appellate process in even more red tape than there is at present or making appeals even more expensive is a vigorous step backwards. There remains the direct route. The amputation method will undoubtedly cure congestion, but the treatment may be worse than the disease. [FOOTNOTE OMITTED.]32/

The American Bar Association Standards on Appellate Courts take the position that litigants generally should have at least one appeal of right.33/ The Commentary to Standard 3.10, Opportunity for Appellate Review, states in part:

> The right of appeal, while never held to be within the Due Process guaranty of the United States Constitution, is a fundamental element of procedural fairness as generally understood in this country. That right should be accorded an aggrieved party to a trial court proceeding.34/

Even if there are no legal problems with limiting the right of appeal, such a limitation does raise serious policy questions. Indeed, the Idaho committee rejected this approach solely for policy reasons:

> Ultimately, the suggestion that the right of appeal should be limited was rejected by the committee, but not on legal grounds. Overwhelmingly, committee members felt that in a state such as Idaho with a strong western tradition of independence, persons should have the right to at least one appeal from a trial judge's decision to allow for correction of error. Limiting the right to appeal in any way would not be popular with Idaho citizens and would be opposed. Thus, this alternative was discarded.35/

32/ Hufstedler, Constitutional Revision, supra, note 15, at 586-87.

33/ ABA Standards on Appellate Courts at 14.

34/ Id. at 15.

35/ Draft Idaho Appellate Court Report, supra, note 17, at 28.

The limitation of the right of appeal would create no significant new costs to the court system, and would probably result in a reduction of costs.

A less drastic alternative to direct limitation on the right to appeal would be to devise some disincentives to appealing. One possible disincentive would be to provide for substantially higher awards of attorney fees to the prevailing party. The criticisms of such an approach are identical to those surrounding the continuing Rule 82 controversy. Primarily, the objection is that meritorious appeals as well as unmeritorious ones are discouraged, and access to the court is denied on the basis of one's financial ability to take the risk of losing.

While Alaska's ratio of appeals to trial court cases is substantially higher than Idaho's, it may be that this higher ratio is more appropriate. (In fact, the relatively high reversal rate in Alaska suggests that at least in Alaska this may be the case.) Before any disincentives should be adopted as a method of reducing caseload, the Court must conclude that a substantial number of the appeals coming before it should not have been brought. And the particular disincentive chosen must be directed at discouraging only those that should not be brought. It might be appropriate, for example, to award substantial attorney fees to a prevailing appellee in a clearly frivolous appeal. Of course, the truly difficult question (and one that

goes beyond the scope of this study) is whether Alaskan litigants do in fact appeal "too many" cases, and if so, why they do. For until the cases that should not be appealed can be identified, and the reasons for appealing them divined, then disincentives cannot be fashioned that will discourage only these sorts of cases.

It has also been suggested that the Court consider limiting the right to oral argument. The advantage of such an approach is that the Court would spend less time preparing for and hearing oral arguments in cases that do not warrant it. For example, in the First District of the Court of Appeals in California, the central screening staff identifies the more routine cases that are amenable to summary disposition. If the panel assigned to the case agrees with the staff conclusion, then counsel are notified that the case will not be placed on the argument calendar unless the request for argument is renewed within a certain period of time. Such a procedure requires, of course, an operating central screening staff, but it does permit the Court to handle the more routine cases in a truly summary fashion. A similar approach (and more effective in terms of controlling workload) would be to permit oral argument generally only at the discretion of the court. This approach would also require careful review and recommendations from a central staff if substantial savings in

judicial time were to be achieved.36/

Finally, it has been suggested that the Court adopt a procedure whereby counsel can stipulate to disposition of their appeal without opinion. It is impossible to predict how many parties would choose this approach, but even a few such stipulations would provide some relief. Adoption of this suggestion would require a preliminary decision as to whether such a stipulation would require a waiver of oral argument, and procedures setting out time limitations would need to be drafted. Finally, the Court should retain discretion to disapprove the stipulation.

4. Establish central research and screening staff. There are currently several states which have established a central staff of attorneys to perform research and screening duties in an attempt to deal with the problem of increasing caseload. As outlined in the American Bar Association Standards on Appellate Courts, the duties of such a staff may include the following:

> (1) Monitoring and reviewing cases coming before the court to assure compliance with procedural rules, and making recommendations for disposition of routine procedural matters in accordance with criteria established by the court;

36/ Limiting the opportunity for oral argument may result in increasing the average time to dispose of cases. The addendum to the 1976 Appellate Delay Study prepared by the Administrative Office (6/21/76) showed that the average time from the assignment of a case on the briefs to the publication of the opinion was 218 days, while the average time from oral argument to publication was 159 days. This disparity may have lessened since the publication of that study, and the use of central staff to recommend dispositions in more routine cases would further alleviate this problem.

(2) Preparing case summaries, including procedural history, facts, and principal issues and authorities, for the court's use in managing its caseflow and conducting its deliberations;

(3) Reviewing all matters presented in propria persona and taking measures necessary to put them in correct and intelligible form;

(4) Supplementing the research of the judges' individual law clerks; and

(5) Acting for the court in supervising preparation of complex records...37/

In 1971 the National Center for State Courts began the Appellate Justice Project which established experimental central research staffs in Nebraska, Virginia, New Jersey and Illinois.38/ The evidence accumulated during these projects supported the following initial hypotheses of the project:

1. That a central staff of lawyers can increase an appellate court's productivity.

2. That a court with a staff can retain effective control over the decisional process and the final decisions.

3. That a substantial number of appeals are "routine" and can be decided appropriately by short, unsigned opinions.

4. That in such a routine case a central staff memorandum is helpful to the judges and makes it feasible to utilize a short, unsigned opinion.

37/ ABA Standards on Appellate Courts at 98-99.

38/ D. Meador, Appellate Courts: Staff and Process in the Crisis of Volume (1974). This book is the official report on the Appellate Justice Project and contains detailed discussions on how the staff functioned in each project state.

5. That appellate staff assistance of this sort is acceptable to the practicing bar.39/

However, for three other initial hypotheses, the evidence either did not support the hypothesis or the evidence was too ambiguous to permit a conclusion:

1. That adding a central staff would increase productivity more than providing additional law clerks for the judges.

2. That adding a central staff would increase productivity and preserve collegiality more effectively than adding judges to the court.

3. That adding a central staff would allow more judge time to be devoted to difficult cases.40/

The report on the project emphasizes the project did not disprove those unsupported hypotheses; it only failed to verify them.41/ The conclusion of the report which is most pertinent to this study is the following:

> Among the positive showings perhaps the most important point is that central staff lawyers do contribute to appellate productivity and expedition. A staff allows a court to handle a heavier caseload than the court could handle without it. Precisely how much a staff can step up the court's capacity depends on a number of variables, including the size of the staff and the court's internal procedures for deciding the staff processed cases.42/

A single staff attorney position was recently requested by the Alaska Supreme Court and funded by the legislature. Recruitment

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39/ Id. at 163.

40/ Id. at 163-64.

41/ Id. at 164.

42/ Id.

for this position closed July 5, 1977, and the position will be staffed by November 1, 1977. As proposed and currently contemplated, the central staff will consist of one attorney, who will report to and work with the Clerk of the Supreme Court. The Clerk of the Court will serve as staff director for the central staff. Temporary secretarial staff will be provided for the remainder of this fiscal year, and the request for permanent support staff will be renewed in the FY 1979 budget request. The proposed duties of the staff attorney are as follows:

1. Perform legal research on matters filed with the supreme court.
2. Review all appeals once all briefs are in and propose possible disposition of routine cases.
3. Recommend consolidation of appeals for argument.
4. Review petitions for review and prepare memoranda recommending appropriate disposition.
5. Review and research complex motions presented to the court.
6. Review and research briefs and records in sentence appeals and prepare memoranda recommending possible disposition.
7. Assist clerk in scheduling expedited appeals before the court.
8. Assist clerk in preparing complicated records on appeal.
9. Develop systems for operation of the staff attorney position.43/

43/ Recruitment Bulletin dated June 4, 1977. See Appendix III.

While the establishment of this one position may contribute to the administrative efficiency of the court's operations, as currently staffed it is by no means the equivalent of a full-scale program of central staff research and screening designed to increase significantly the court's capacity to process cases.[44] The experimental staffs which were established by the Appellate Justice Project included several staff attorneys, who worked under the supervision of a senior attorney functioning as the staff director. Of course, the courts participating in the project were much larger, higher volume courts than Alaska's.

In 1976 the Idaho Supreme Court established the position of central research attorney with the primary duties of screening petitions and motions and carrying out specialized research projects for the court.[45] In a telephone conversation on July 29, 1977, Carl Bianchi, Administrative Director of the Courts for the State of Idaho, indicated that the central staff approach is working very well and has been of particular benefit in the

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44/ The Administrative Office is currently developing a federal grant under which two additional clerical support positions for the central staff would be funded. The request for clerical support in the FY 1978 budget was denied by the Legislature.

45/ Draft Idaho Appellate Court Report, supra, note 17, at 21. This action was taken in accord with a proposal prepared by Carl Bianchi, Administrative Director of the Courts for the State of Idaho. A copy of this proposal has been forwarded to Donna Pegues, Clerk of the Supreme Court.

area of petitions for review and motions. The court currently has one staff attorney and is considering hiring an assistant staff research attorney in the near future.

The only real disadvantage of a central staff approach to the caseload problem is the risk that the staff may assume judicial responsibilities which properly should be performed by the justices. The Commentary to Standard 3.62, Legal Staff, of the American Bar Association Standards on Appellate Courts, comments on this problem:

> The problem created by use of a central legal staff is that judicial responsibility may be diffused among the staff to the detriment of the appellate process. Where a court employs a central staff, it must be continually alert to the risk of internal bureaucratization and guard against any tendency to rely on staff for decisions that should be made only by judges personally. Some arrangements involving central staff....seem to involve excessive delegation to staff.46/

Since the use of a central staff is purely a matter of internal operating procedure, such a system could be adopted by administrative action. No constitutional or statutory amendments would be required.

It is extremely difficult to quantify the workload reductions that a central research staff would achieve for the court. Cer-

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46/ ABA Standards on Appellate Courts at 100.

tainly the use of central staff for researching and making recommendations for disposition in petitions for review, complex motions, sentence appeals, and other routine appeals will free the justices' personal law clerks for work on draft opinions and bench memoranda. There is also some advantage to be gained from a permanent central staff in terms of both experience and the development of an efficient routine.

It has been suggested that the Court may wish to consider pooling five of the ten existing law clerk positions and relocating these five positions in the central staff, leaving each justice with one personal law clerk. While this suggestion may have some merit, it cannot be said conclusively that this would permit the Court to handle its caseload more effectively. As noted above, the National Center's Appellate Justice Project failed to demonstrate that the addition of central staff would increase productivity more than additional law clerks. Further, five additional attorneys are probably more than this Court requires for a central staff, although internal procedures could be designed to re-distribute some existing law clerk functions to such an augmented central staff.47/

47/ For example, the augmented central staff might be assigned all bench memoranda, leaving the personal law clerks only with the tasks of drafting opinions and preparing substantive and technical comments.

It appears in addition that centralizing law clerk positions would permit a more even distribution of workload among the non-judicial legal assistance and might well result in increased productivity for the Court overall. It is debatable, however, whether this redistribution of positions and workload would result in a sufficient increase in productivity to warrant the upheaval involved in making the change.

The projected cost of establishing a minimal central staff of two attorneys and one secretary, including space and equipment requirements, would be approximately $138,000 the first year and $130,000 each subsequent year. This includes the cost of the existing staff position, so the additional cost would be substantially less.

5. Establish intermediate appellate court. The commentators are uniformly in agreement that the most desirable method of dealing with increasing appellate caseloads is the establishment of an intermediate court of appeals. Several recent articles have advocated this solution,[48] and the American Bar Association Standards on Court Organization are emphatic in their

48/ See e.g., Hopkins, The Role of an Intermediate Appellate Court, 41 Brooklyn L. Rev. 459 (1975); Hufstedler, Constitutional Revision and Appellate Court Decongestants, 44 Washington L. Rev., 577 (1969); and Appellate Court Reform, 45 Miss. L. J. 121 (1974). Appendix IV to this report contains summaries of these articles prepared by the Idaho Administrative Office.

support of this solution:

> Where a supreme court by reason of workload is unable to perform both its principal functions, some additional mechanism of appellate review becomes necessary. This situation has long since prevailed in states with large population, and is becoming increasingly prevalent in states of smaller population. The immediate necessity for an intermediate appellate court may be met or postponed by such devices as use of per curiam and memorandum decisions in cases having limited general significance, by limiting oral argument in appropriate circumstances, and by improved efficiency in management of the highest appellate court's work... Since there seems little prospect for a long run decline in the volume of appellate litigation, once the surge of appellate cases has been felt in a state having only one appellate court, steps should be taken forthwith to establish an intermediate appellate court rather than temporizing with substitute arrangements. [EMPHASIS ADDED.]49/

In addition to being the solution most often advocated by the commentators, the creation of an intermediate appellate court is the solution which has been chosen most frequently to relieve congestion in a single appellate court.50/ Twenty-eight states now have intermediate appellate courts, and several states are studying their need for such a court.51/ The following table52/ indicates the status of intermediate appellate courts in the western states:

49/ ABA Standards on Court Organization at 35.

50/ Hopkins, supra, note 48, at 462.

51/ Draft Idaho Appellate Court Report, supra note 17, at 25.

52/ Id. at 26.

INTERMEDIATE APPELLATE COURTS IN WESTERN STATES

States With Intermediate Appellate Courts	States Without Intermediate Appellate Courts	States Considering Establishing Intermediate Appellate Courts
Oregon	North Dakota	North Dakota
Washington	South Dakota	
California	Montana	
Arizona	Wyoming	
New Mexico	Idaho	Idaho
Oklahoma	Utah	Utah
Texas	Hawaii	Hawaii
	Alaska	
	Nebraska	
	Nevada*	Nevada

* A constitutional amendment is pending in Nevada to create an intermediate appellate court. The amendment has passed one session of the Nevada Legislature.53/

Although the creation of an intermediate appellate court is the most often recommended solution as well as the most frequently adopted solution, the creation of such a court in Alaska would raise some of the same constitutional questions which were discussed above54/ in connection with limiting appeals of right to the supreme court.

The basic question which must be resolved is whether article IV, section 2, of the Alaska Constitution, which specifies that the supreme court has "final appellate jurisdiction", prevents the

53/ See Appendix V for a copy of the Nevada Legislation.

54/ See p. 25-26, supra.

exercise of final appellate jurisdiction by lower courts. Since no intermediate appellate court exists in Alaska, the Alaska Supreme Court obviously has had no opportunity to consider the question of the jurisdiction which may be exercised by such a court under the constitution. However, an analogous question did arise in State v. Marathon Oil Company.[55] In that case the criminal defendant had appealed a district court decision to the superior court, and the supreme court then had to consider whether the state could appeal the superior court's decision to the supreme court. In concluding that the state did have the right to such an appeal, the court treated the superior court as an intermediate appellate court and found that final appellate jurisdiction could not lie in that court:

> In this matter the superior court must be recognized as an intermediate appellate court since final appellate jurisdiction by reason of Article IV, Section 2, of the Alaska state constitution rests in this court:
>
> > "The supreme court shall be the highest court of the State, with final appellate jurisdiction."
>
> Once the appellate process is properly invoked, final appellate jurisdiction is in the Supreme Court; for to hold otherwise would contravene the explicit constitutional provision. [Emphasis added.][56]

55/ 528 P. 2d 293 (Alaska 1974).

56/ Id. at 295.

If the right to appeal to the supreme court from decisions of an intermediate court of appeals is retained in all cases, no constitutional question would arise. However, the primary purpose of establishing an intermediate court of appeals would be to reduce the caseload of the supreme court, and retention of appeals of right to the supreme court in all cases would defeat that purpose. On the other hand, of course, if appeals of right to the supreme court are abolished, the intermediate court of appeals would then be the court of final appellate jurisdiction, and arguably this would be a direct contravention of article IV, section 2, of the constitution, as interpreted in Marathon.

It is more likely, however, that the abolition of appeals of right to the supreme court would be found not to contravene the constitution. Any statute establishing an intermediate appellate court and abolishing appeals of right to the supreme court would most likely grant to the supreme court the authority to accept petitions for writs of certiorari and to hear cases on that basis at its discretion. Since the supreme court could exercise its discretion to hear any case, it could be found that final appellate jurisdiction still lies in the supreme court, although it may choose not to exercise that jurisdiction.57/

57/ As discussed above at p. 25-26, it appears that the supreme court in State v. Browder, 486 P. 2d 925 (Alaska 1971), interpreted the exercise of the power to grant certiorari to be equivalent to the exercise of final appellate jurisdiction. Such an interpretation would eliminate any constitutional problem with a grant of "final" appellate jurisdiction to an intermediate appellate court.

The primary benefits which can be expected to result from the creation of an intermediate court of appeals are a reduction in the court's backlog of cases and a reduction in the elapsed time between the submission of briefs and final disposition. In Oregon, for example, the average number of days from submission of briefs to a final decision dropped from 221 days to 130 days following the creation of an intermediate appellate court in 1969.

If a decision is made to create an intermediate appellate court, decisions must then be made on several subsidiary issues relating to such a court. We have not attempted in this report to resolve or make recommendations concerning these subsidiary issues, but the following are illustrative of some of the major issues. The primary question which must be resolved is what the jurisdiction of an intermediate court of appeals should be.58/ The American Bar Association Standards on Court Organization make the following recommendation relating to jurisdiction:

58/ In the Draft Idaho Appellate Court Report, supra, note 17, no specific recommendations were made as to the jurisdiction of the proposed intermediate appellate court. However, at its meeting on July 26, 1977, the committee decided to include a definite jurisdictional statement in its final report, and that statement is expected to receive final committee approval on September 16, 1977. Carol Bianchi, Administrative Director of the Courts for the State of Idaho, telephone conversation on July 29, 1977.

> Every level and division of appellate court should have authority to hear all types of cases; appellate courts of specialized subject-matter jurisdiction should not be established. An appellate court should have jurisdiction of original proceedings for mandamus, prohibition, injunction, and similar remedies, comparable but subordinate to that of the Supreme Court, to protect its supervisory authority.59/

The primary reason stated in the Commentary for not establishing courts of specialized subject-matter jurisdiction is that "the appellate court function of developing the law cannot be performed in a coherent and consistent way if jurisdictional divisions compel the law's fabric to be made in a decisional patchwork."60/

Another issue which must be resolved is how appeals should be lodged with the intermediate court. The American Bar Association standard on this point reads as follows:

> Appellate review should be initiated by a single filing procedure effective for the appellate court as a whole. Docketing of cases within the appellate court and transfer of cases between levels or divisions of the court should be by simple motion or order.61/

In line with the American Bar Association recommendations, a one-filing/one-fee procedure has been recommended for the proposed intermediate appellate court in Idaho.62/

59/ ABA Standards on Court Organization at 33.

60/ Id. at 37.

61/ Id. at 33.

62/ Draft Idaho Appellate Court Report, supra, note 16, at 41-42.

Still another matter about which decisions must be made is the process of appealing cases from the intermediate appellate court to the supreme court. The American Bar Association standard on this point reads as follows:

> Appeal as of right should be to the intermediate appellate court only. Review by the Supreme Court should be available only at the discretion or with the permission of that court, by certiorari or similar procedure, including discretion to allow an appeal directly from the trial court in cases of great emergency and importance.63/

The Commentary explains the rationale for this position:

> [A] litigant should have only one appeal of right, to the intermediate appellate court. Review by the highest appellate court is designed to serve the general public in the proper administration and development of the law and only secondarily the interest of litigants in having their cases considered by the highest judicial authority. Accordingly, review by the highest appellate court should be available only with its permission. There should be no category of cases in which such review is mandatory, even--as is now required in some states--in capital cases. At the same time, the highest court should have authority to permit an appeal to bypass the intermediate appellate court where there is urgent public necessity to do so--for example in litigation involving impending elections or deadlocked disputes as to the authority of government officials.64/

The Idaho committee approved this concept of discretionary appeals with this comment: "If a court system provides for automatic

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63/ ABA Standards on Court Organization at 33.

64/ Id. at 37.

review both at an intermediate level and before the court of last resort, no useful purpose is served by an intermediate appellate court."65/

Other matters which also would require attention are the number of judges on an intermediate court, how those judges would be selected, and what staff would be required for an intermediate court.

The clear advantage of establishing an intermediate appeals court is that it permits the Supreme Court to control its caseload via the exercise of discretionary review. The following table is an excerpt from a report provided by the Arizona Supreme Court, and illustrates how that court has kept pace from 1965 to the present, while during the same period experiencing an increase in filings of nearly 300%.66/

FILINGS		DISPOSITIONS				
		OPINIONS			TERM. W/O WRITTEN	CASES PENDING
YEAR	FILED	WRITTEN	MEMORANDUM	TOTAL	OPINIONS	DEC. 31
1965	321	176	0	176	262	462
1966	449	192	0	192	313	373
1967	448	158	0	158	401	258
1968	531	164	0	164	347	269
1969	575	205	0	205	360	320
1970	709	224	0	224	493	331
1971	688	186	0	186	482	383
1972	701	191	0	191	528	385
1973	714	230	56	286	478	341
1974	713	210	109	319	437	350
1975	799	222	68	290	659	307
1976	921	185	84	269	774	327

65/ Draft Idaho Appellate Court Report, supra, note 17, at 42.

66/ The Arizona Court of Appeals was established in 1965.

An intermediate court of appeals will bring long term and substantial relief to the Supreme Court's workload problems. The cost of establishing an intermediate court of appeals consisting of three judges, and including two law clerks and a secretary for each judge would be $440,000 for the first year and $425,000 for each year thereafter.[67]

III. CONCLUSIONS AND RECOMMENDATIONS

If the appellate caseload continues to increase at the rate of recent years, an intermediate court of appeals is the most desirable long term solution. Panels may provide some short term relief, but as the report demonstrates, the workload reductions are probably not going to be as significant in practice as they appear to be in theory. Further, while the effect of the dilution of the law-making function cannot be quantified, it is nonetheless a serious concern and should not be set aside lightly. And as noted in the report, the procedures suggested for meeting this concern (by permitting individual justices to transfer any case from a panel to the full court) not only diminish the overall advantages of using panels, but are likely to result in an increase in the amount of work spent on a case that is considered once by a panel and again by the full court.

67/ These figures do not take space requirements into account.

Based on the National Center's appellate project, it is safe to conclude that the use of central research staff will contribute to the more efficient and expeditious dispatch of the court's business, whether combined with one or mc the other suggested solutions discussed, or by itself. Unfortunately, the workload reductions that can be expected from the use of central staff cannot be quantified, as can the use of panels, without some experience to draw upon. Similarly, until this experiential base can be established, the optimum size of central staff cannot be determined or related statistically to caseload figures. While the court might understandably choose to experiment with panels because of the estimates of workload reduction are to some degree quanitifiable rather than await the results of the use of central staff, the use of panels cannot be recommended as a desirable solution.

As a final note, the solutions discussed in the report are not mutually exclusive, and obviously a large variety of compatible combinations of solutions could be considered. (For example, it would be possible to increase the size of the court as well as institute panels, and this combination might be instituted either with or without a central research staff.) However, because of the number of such combinations, and in order to keep the report a manageable size, we have dealt with each solution individually. The recommendations that follow do assume that combinations of solutions will be chosen.

Recommendations

1. The Supreme Court should not seek to increase the size of the court.

2. The Court should not establish a panel system. However, if the Court chooses to establish panels, it is recommended:

(a) For ease of administration, five panels should be used rather than ten unless the court believes it is important to have all possible combinations of justices sitting on the panels.

(b) For the reasons discussed earlier in the report, superior court judges should not be used initially on the panels except when necessary to replace a disqualified justice. If experience demonstrates that the panels are considering a fair number of cases that involve no significant new statements of law, then superior court judges might appropriately be assigned to panels for these types of cases.

(c) To insure maximum benefit in workload reductions from the use of panels, the Court should not implement the system until it has developed standards for identifying cases that should be heard by panels and until the newly established central research position has developed its screening capabilities.

(d) The Court should establish procedures for transferring cases from the panels to the full court and include these in the previously adopted internal operating procedures.

3. The Court should not seek to limit the right of appeal. However, the Court should consider adoption of the following:

(a) a rule amendment to permit the parties to stipulate to a disposition without opinion, subject to the Court's approval;

(b) a rule amendment limiting the right to oral argument in routine cases (along the lines of the procedure followed by the First District Court of Appeals of California);

(c) a firm policy of awarding substantial attorney fees to the prevailing appellee in a frivolous appeal.

4. The Clerk of the Supreme Court should carefully monitor the work of the newly established central research position and attempt to develop a quantifiable measure of the workload reductions achieved by the position. Preferably, such a measure should be calculated in a way that the number of central staff positions needed can be directly related to caseload.

5. The Court should request the Administrative Director to begin planning for the establishment of an intermediate court of appeals as soon as possible. Recommendations should be prepared for the Court's consideration concerning the following matters:

(a) The number of justices and personal staff required;

(b) Jurisdiction of the intermediate court and the supreme court;

(c) Requirements relating to the clerk's office staff, including recommendations for consolidated versus separate offices;

(d) Facilities requirements and alternatives for providing necessary space;

(e) Transitional measures to deal with cases already filed in the supreme court when the intermediate court is ready to begin operations; and

(f) A detailed analysis of the fiscal impact of the recommendations and any alternative recommendations.

APPENDIX I

Louisiana Survey on Number of Appellate Judges

STATE	TRIAL COURT	INTERMEDIATE APPEALS COURT	COURT OF LAST RESORT	TRL JDG PER 100,000 POP	APP JDG PER 100,000 POP	APP JDG PER 100 TRL JDG
ALABAMA	108 0	8 0	9 0	3.0	0.4	15.7
ALASKA	37 0	0 0	5 0	5.4	1.5	27.8
ARIZONA	72 0	12 0	5 0	3.4	0.8	23.6
ARKANSAS	56 0	0 0	7 0	2.7	0.3	12.5
CALIFORNIA	520 0	56 0	7 0	2.5	0.3	12.1
COLORADO	94 0	10 0	7 0	3.8	0.6	18.0
CONNECTICUT	40 0	4 0	6 0	1.3	0.3	25.0
DELAWARE	18 0	4 0	3 0	3.1	1.2	38.8
FLORIDA	287 0	25 0	7 0	3.7	0.4	11.1
GEORGIA	91 0	9 0	7 0	1.9	0.3	17.5
HAWAII	18 0	0 0	5 0	2.1	0.6	27.7
IDAHO	27 0	0 0	5 0	3.5	0.6	18.5
ILLINOIS	610 0	34 0	7 0	5.4	0.3	6.7

STATE	TRIAL COURT	INTERMEDIATE APPEALS COURT	COURT OF LAST RESORT	TRL JDG PER 100,000 POP	APP JDG PER 100,000 POP	APP JDG PER 100 TRL JDG
INDIANA	248 0	9 0	5 0	4.6	0.2	5.6
IOWA	92 0	5 0	9 0	3.1	0.4	15.2
KANSAS	131 0	7 0	7 0	5.7	0.6	10.6
KENTUCKY	87 0	14 0	7 0	2.6	0.6	24.1
LOUISIANA	152 0	30 CIV 0	7 0	4.0	0.9	24.3
MAINE	14 0	0 0	7 0	1.3	0.6	50.0
MARYLAND	90 0	13 0	7 0	2.2	0.4	22.2
MASSACHUSETTS	0 0	0 0	0 0	0.0	0.0	0.0
MICHIGAN	512 0	18 0	7 0	5.6	0.2	4.8
MINNESOTA	215 0	0 0	9 0	5.5	0.2	4.1
MISSISSIPPI	65 0	0 0	9 0	2.8	0.3	13.8
MISSOURI	115 0	22 0	7 0	2.4	0.6	25.2
MONTANA	29 0	0 0	5 0	4.0	0.6	17.2

STATE	TRIAL COURT	INTERMEDIATE APPEALS COURT	COURT OF LAST RESORT	TRL JDG PER 100,000 POP	APP JDG PER 100,000 POP	APP JDG PER 100 TRL JDG
NEBRASKA	45 0	0 0	7 0	2.9	0.4	15.5
NEVADA	26 0	0 0	5 0	4.7	0.9	19.2
NEW HAMPSHIRE	13 0	0 0	5 0	1.6	0.6	38.4
NEW JERSEY	271 0	21 0	7 0	3.6	0.3	10.3
NEW MEXICO	0 0	0 0	0 0	0.0	0.0	0.0
NEW YORK	0 0	0 0	0 0	0.0	0.0	0.0
NORTH CAROLINA	55 0	9 0	7 0	1.0	0.3	29.0
NORTH DAKOTA	19 0	0 0	5 0	2.9	0.7	26.3
OHIO	184 0	38 0	7 0	1.7	0.4	24.4
OKLAHOMA	143 0	6 0	9 CIV 3 CRI	5.3	0.6	12.5
OREGON	70 0	6 0	7 0	3.1	0.5	18.5
PENNSYLVANIA	0 0	0 0	0 0	0.0	0.0	0.0
PUERTO RICO	187 0	0 0	8 0	6.3	0.2	4.2

STATE	TRIAL COURT	INTERMEDIATE APPEALS COURT	COURT OF LAST RESORT	TRL JDG PER 100,000 POP	APP JDG PER 100,000 POP	APP JDG PER 100 TRL JDG
RHODE ISLAND	17 0	0 0	5 0	1.7	0.5	29.4
SOUTH CAROLINA	25 0	0 0	5 0	0.9	0.1	20.0
SOUTH DAKOTA	0 0	0 0	0 0	0.0	0.0	0.0
TENNESSEE	117 0	18 0	5 0	2.8	0.5	19.6
TEXAS	261 0	42 CIV 0	9 CIV 5 CRI	2.2	0.4	21.4
UTAH	24 0	0 0	5 0	2.0	0.4	20.8
VERMONT	19 0	0 0	5 0	4.0	1.0	26.3
VIRGINIA	107 0	0 0	7 0	2.2	0.1	6.5
WASHINGTON	101 0	12 0	9 0	2.9	0.6	20.7
WEST VIRGINIA	57 0	0 0	5 0	3.1	0.2	8.7
WISCONSIN	0 0	0 0	0 0	0.0	0.0	0.0
WYOMING	15 0	0 0	5 0	4.2	1.4	33.3
WASHINGTON DC	44 0	0 0	9 0	5.9	1.2	20.4

APPENDIX II

Comparative Data on Workloads

ALASKA SUPREME COURT
January 1, 1976-December 31, 1976*

APPEALS (Including Sentence Appeals)		
Pending at Start		241
Filed		364
Terminated		241
**Opinions Filed	123	
Other Dispositions	118	
	241	

Petitions for Review and Original Proceedings		
Pending at Start		17
Filed		102
Terminated		94
**Opinions Filed	25	
Review Denied	52	
Other Dispositions	17	
	94	

***Motions and Petitions for Rehearing	
Pending at Start	Not Available
Filed and Terminated	340

*Source: Clerk of the Alaska Supreme Court

**Opinions filed include total of 16 per curium opinions and 2 cases disposed of by special summary order of the Court. The total number opinions filed in 1976 was 133. The total shown here is greater because of the separate ~~Court~~ of cross-appeals disposed of by same opinion as the first appeal.

***Estimated. Excludes approximately 500 routine motions for extension of time, etc.

Count

25
123
148

HAWAII SUPREME COURT
July 1, 1975-June 30, 1976*

APPEALS		
Pending at start		218
Filed		253
Terminated		155
Opinions Filed	84	
Withdrawn or dis-continued	50	
Dismissed on Motion	14	
Other	7	
	155	
ORIGINAL PROCEEDINGS		
Pending at start		3
Filed		12
Terminated		11
Opinion Filed	5	
Other	6	
	11	
MOTIONS/PETITIONS FOR REHEARING		
Pending at start		7
Filed		375
Terminated		354
Opinion Filed	6	
Other	348	
	354	

*Source: Hawaii 1976 Annual Report

IDAHO SUPREME COURT
January 1, 1976-December 31, 1976*

APPEALS		
Pending at start		312
Filed		295
Terminated		
Opinions filed (Includes 29 P.C.'s)	136	228
Other	92	
	228	
ORIGINAL PROCEEDINGS		
Pending at start		3
Filed		32
Terminated		20
Opinion filed	4	
Other	16	
MOTIONS/PETITIONS FOR REH		
Pending at start		823
Filed		794
Terminated		Not Available

*Source: Idaho Administrative Director of Courts

MAINE SUPREME COURT
January 1, 1976-December 31, 1976*

APPEALS		
Pending at start		246
Filed		262
Terminated		236
Opinion (Includes 11 P.C. and 2 "advisory" opinions)	168	
Dismissed	68	
	236	

ORIGINAL PROCEEDINGS
Not available

MOTIONS/PETITIONS FOR REHEARING
Not available

*Source: State of Maine, Administrative Office of Courts, 1977 Annual Report.

NEVADA SUPREME COURT
January 1, 1976-December 31, 1976*

APPEALS		
Pending at start		256
Filed		607
Terminated**		
ORIGINAL PROCEEDINGS		
Pending at start		(Included in 256 above)
Filed		120
Terminated**		
MOTIONS/PETITIONS FOR REHEARING		
Pending at start		(Included in 256 above)
Filed		59
Terminated**		
TOTAL DISPOSITIONS		803
By order of court	535	
By opinion	252	
Consolidated cases	16	
	803	

*Source: Statistics provided by Nevada Supreme Court

**The number of each type of proceedings terminated was not broken out from total dispositions.

NEW HAMPSHIRE SUPREME COURT
July 11, 1974-June 30, 1975*

APPEALS	
Pending at start	Not Available
Filed	Not Available
Terminated by opinion	205
Includes 38 P.C.	
15 Memorandum	
15 "Opinions of Justices"	

ORIGINAL PROCEEDINGS
Not Available

MOTIONS/PETITIONS FOR REH.
Not Available

*Source: 17 New Hampshire Bar Journal 3 (1976)

NORTH DAKOTA SUPREME COURT
January 1, 1975-December 31, 1975*

APPEALS		
Pending at start		0
Filed		128
Terminated		128
Opinion	93	
Dismissed	10	
Other	25	
	128	

ORIGINAL PROCEEDINGS
(Original Proceedings are included in the appeals.)

MOTIONS/PETITIONS FOR REHEARING		
(Includes only Petitions for Rehearing)		
Pending at start		0
Filed		20
Terminated		20
(Denied apparently without opinion)	20	

*Source: National Center for State Courts--Williamsburg Project.

VERMONT SUPREME COURT
January 1, 1976-December 31, 1976*

APPEALS		
Pending at start		286
Filed		351
Terminated		346
Opinion (Includes 21 P.C.)	141	
Withdrawn or Discontinued	112	
Dismissed on motion	93	
Other	-	
	346	

ORIGINAL PROCEEDINGS		
Pending at start		1
Filed		15
Terminated		14
Opinion (Includes 2 P.C.)	3	
Withdrawn	1	
Dismissed by Court	10	
	14	

MOTIONS/PETITIONS FOR REHEARING**	
Pending at start	3
Filed	12
Terminated	15

*Source: "Judicial Statistics, State of Vermont," Office of the Court Administrator 1976.

**Includes Petitions for Rehearing only.

WYOMING SUPREME COURT
January 1, 1976-December 31, 1976*

APPEALS

Pending at start		Not Available
Filed		138
Terminated		116
By Opinion	75	
Dismissed	34	
Other	7	
	116	

ORIGINAL PROCEEDINGS
Not Available

MOTIONS/PETITIONS FOR REHEARING
Not Available

*Source: National Center for State Courts - Williamsburg Project.

APPENDIX III

Recruitment Bulletin for Staff Attorney Position

ALASKA COURT SYSTEM

AN EQUAL OPPORTUNITY EMPLOYER

RECRUITMENT BULLETIN

JOB TITLE	SALARY	LOCATION
SUPREME COURT STAFF ATTORNEY	$2,296./mo. to start (Range 20/22*)	JUNEAU

Job Duties:

Under the general direction of the Clerk of the Supreme Court performs legal research related to cases and other matters filed in Supreme Court. Reviews all appeals which have been fully briefed. Recommends consolidation for argument of appeals which involve similar legal issues. Proposes possible disposition of routine cases. Reviews Petitions for Review requiring extensive legal research and preparation of memoranda recommending appropriate disposition. Reviews, researches and makes preliminary analysis of complex motions presented to the court. Reviews and researches the briefs and records in sentence appeals and prepares memoranda for the Court concerning possible disposition. Assists Clerk of Court in scheduling expedited, complicated appeals before the Supreme Court. Works with the Clerk of Court in the preparation of complicated records on appeal. Develops appropriate systems for efficiently accomplishing the duties of the position.

Minimum Requirements:

Graduation from an accredited law school and either membership in a state bar or current active pursuit of membership. Previous legal experience would be valuable.

* This position is flexibly-staffed, salary range 20/22. The successful applicant will be hired at salary range 20. After six months of successful job performance and admission to the Alaska Bar Association the employee may be promoted to a salary range 22.

Selection Process:

Applicants must meet the minimum requirements as stated above. The most qualified applicants will be invited to a personal interview.

How to Apply:

Applicants should submit an Alaska Court System application to the Personnel Office at 303 "K" Street, Anchorage, Alaska 99501. Applications may also be submitted to the Personnel Clerk, Room 241 at the Juneau court building. Applications must be filed no later than July 5, 1977.

APPLICATIONS FROM MINORITIES ARE ENCOURAGED

Date of Bulletin: 6/24/77

APPENDIX IV

Summaries of Articles

APPELLATE COURT REFORM
45 Mississippi Law Journal 121 (1974)

The function of the highest court of any state is ~~to~~ two fold: To correct errors made in the determination of the rights of the litigants and, more importantly, to determine the standards by which persons within the jurisdiction are to conduct their affairs. Where such a court is delayed in the performance of these two duties, the ends of justice are not served. Increases in the workload of a highest court of a jurisdiction either reduce the amount of time which may be spent on a case or increase the time required to dispose of all cases before the court. An increase in appellate workload ultimately causes delay which is regarded by most judicial reformers as inherently evil.

The workload of nearly every high court has substantially increased and shows no signs of subsiding. Two methods of reducing the workload and congestion of appellate courts are: (1) Those which increase the efficiency of the court and (2) those which reduce the amount of work required of the judges of the highest court.

I. INCREASE IN EFFICIENCY

Efficiency of the court can be dramatically improved by the use of a professional court administrator. This is a generally accepted technique and is utilized by the majority of all of the states. Another method is for the highest court to exercise its

rulemaking power in order to increase the efficiency of judicial operation. Controlling oral arguments and the expeditious use of law clerks are also means of increasing the efficiency of the high court. Other methods are the reduction in the size of records and briefs and use of merit selection in judges.

II. REDUCTION IN THE WORKLOAD PER JUSTICE

Another solution to case overload problems is to reduce the number of cases handled by each justice. This can be accomplished by: (1) Increasing the number of justices on the court; (2) hearing cases in panels; (3) using court commissioners; (4) taking legislative action to reduce the number of cases eligible for appeal. All of the above methods have numerous disadvantages but with modifications can be used in certain circumstances.

III. CREATION OF A PERMANENT LOWER APPELLATE COURT

The most permanent and effective way of reducing the workload of a highest level of a state court system is the creation of a lower appellate court. As of 1971, at least 23 states had a lower appellate level in their court system. This method of workload reduction is greatly favored by both judges and commentators. The benefits of introduction of a lower appellate court into a court system are: (1) The lower appellate court can reduce the workload of the highest appellate court thus allowing an improved work product; (2) it allows a division of the workload

between the lower and highest appellate court keeping both from being overworked; (3) it allows the traditional American concept of the right to one appeal in every case to be retained; and (4) in some cases allows the appellate court to accommodate more litigants. Objectionable characteristics to the creation of an intermediate appellate court are: (1) Increased expense to the taxpayer for additional courts; (2) instances of double appeals causing increased delay and expense to the litigants and (3) the creation of additional work for the highest level in settling disputes over original appellate jurisdiction.

CONCLUSIONS AND RECOMMENDATION

Many of the measures which were discussed to relieve court congestion have been implemented and are helpful, however they have not proven to be solutions but merely forestall the burden under which the courts labor. The establishment of a lower appellate court could greatly relieve the congestion in the appellate system.

CONSTITUTIONAL REVISION AND APPELLATE COURT DECONGESTANTS
(Shirley M. Hufstedler 44 Washington Law Review 577 (1969)

The most venerable criticism of the courts is delay. Delay is the offspring of court congestion caused by surging urban population growth, by inadequate court systems, by cumbersome and archaic judicial and administration procedures, and by the rising expectation of all of our people about the availability and quality of justice.

Successful judicial reformation comes in two packages, constitutional revision and implementing legislation. A judicial article should include no more than is absolutely necessary to create the essential structure of the judicial system. All details should be filled in by statutes and rules which are more easily changed when the need arises.

Individuals studying state judicial articles have generally devoted their attention to three major topics: (1) The structure of the judicial system; (2) selection, tenure and removal of judges; and (3) court administration. The structure of the judicial system considers such questions as whether there should be one trial court or two, should there be a single appellate court or should there be a court of last resort and an intermediate appellate court. Plans for the selection, tenure and removal of judges are generally divided into two categories: (1) those in which a panel of nominees is initially selected by a commission, from whose number the governor must appoint and (2) those

in which the nominees are selected by the governor who thereafter submits their name to a council which has a veto power. Tenure of judges varies from lifetime appointments, to short term, partisan, terms of office. The creation and maintenance of an adequate and efficient system of court administration is essential for the effective administration of justice. Not only should the courts be subject to the same management standards as industry, but judges should not have to spend their time on non-judicial duties.

APPELLATE COURT DECONGESTANTS

The capacity of an appellate court to handle its caseload depends upon the number of cases docketed in a given year, the number of judicial hours which must be devoted to each case, and the number of judicial hours available during the year. Reducing a backlog and thus reducing court congestion requires treatment of the following: (1) The size of the docket, (2) the judicial time expended per case, and (3) the judicial time available.

Dockets can be reduced directly by cutting off or limiting the right to appeal and indirectly, by creating a series of procedural impediments to discourage appeals. However, as appellate courts exist to formulate policy and precedent, to assure uniformity in the administration of justice, and to provide executive direction and assistance to trial courts, such is not an adequate solution.

No one has suggested that judges reduce their backlog of cases by giving less than an adequate time to each case. Although efficient time saving techniques should be employed by appellate court judges, they still must have adequate time to ponder and consider each case.

One solution some states have used in order to reduce the backlog of cases is to divide the court in two departments or divisions consisting of three or more judges. However, divisional sitting only modestly increases the productive capacity of a court and may create more administrative problems which ultimately eliminate any advantage to the divisional sittings.

Another way to alleviate appellate court congestion is to increase the number of appellate judges. However, this has practical application only within very narrow limits. Whatever additional work can be done by the extra judges is dissipated by the increased consultation times, by the difficulties inherent in drafting opinions to accommodate multiple points of view. and by the administrative problems involved in increased personnel.

The most practical solution presently available to decongest a supreme court is to create a new tier of appellate courts to undertake the caseload. As of 1969 there were 21 states with intermediate appellate courts.

The jurisdiction of the supreme court and the intermediate courts of appeal is usually established by provisions of the judicial article of the state constitution. Certain threshhold questions need to be determined such as whether the appellate courts shall have any original jurisdiction, and whether there is an appeal to the supreme court from the appellate court as a matter of right.

The modern trend in structuring a two-tiered appellate system is to eliminate all direct appeals as a matter of right to the supreme court except in cases where the death penalty or life imprisonment has been imposed. Critics of the development of the two-tiered system have often raised the specter of the waste of judicial resource by creating the potential of double appeals. However, if the supreme court judiciously exercises its power to order transfer of causes to the supreme court, and if there is no appeal from the intermediate appeal as a matter of right, that problem is eliminated. Additionally, double appeals are by no means necessarily wasteful and it is often thought that the double appeal actually presents a better opportunity for a true consideration of the issues involved in the case.

A final consideration is the composition and structure of the intermediate appellate court. There are two general types: (1) Those in which there is more than one intermediate appellate court, each of which occupies its exclusive geographical territory and (2) those in which there is a single state-wide