CHAPTER 10

Commissions, Studies, Reports, and Proposals

The previous chapters have exposed the deterioration of the United States Circuit Courts of Appeals over the last forty years. During that same forty-year period, the courts have been the subject of extensive study and investigation by various governmental and nongovernmental bodies. In fact, thirteen separate committees, commissions, study groups, reports, and plans have addressed the circuit courts' problems and have offered an array of solutions.

Those efforts have obvious historical interest; since they coincided with the sea change in the circuit courts, they provide a record of the perceived concerns of the judicial establishment during the transformation. From our point of view, however, not much can be said for the actual product of all that study. For one thing, some of the reports ignored the Hippocratic Oath: "First, do no harm." By recommending different tracks for different appeals, they helped to establish and engrain the Appellate Triage regime. Other aspects of the studies, especially the obsession with "coherence of the law," have not been harmful, but rather needless. The reason is that the available empirical evidence shows that the issues that garnered the most attention in the studies—precedent overload, unresolved conflicts among the circuits, alternate pyramidal structures for the courts—are not problematic. Other issues, which are problematic—the satisfaction of litigants with the Appellate Triage regime, for example—were not studied.

The study groups' perception of the courts' problems reflect the groups' memberships, mostly judges, law professors, and prominent practitioners. Thus, the law-declaration function of the courts receives a great deal of attention while their error correction function receives very little. Concomitantly, the studies devote very little attention to the decision procedures for the large majority of cases, those placed on Track Two by the Appellate Triage system. We conclude that most of the study groups' efforts have ignored the obvious solution to the problem: a substantial increase in the number of federal appellate judgeships. And to the extent that the studies have addressed that solution, their recommendations have been ignored.

This chapter is composed of two sections. The first section simply treats the studies in chronological order; the second abstracts from the several studies certain recurrent diagnoses, recommendations, and proposals and discusses them thematically.

A. THE STUDIES

1. Study of the Division of Jurisdiction between State and Federal Courts: American Law Institute

Prompted initially by a suggestion made by Chief Justice Warren in a speech to the American Law Institute, the A.L.I. formed an Advisory Committee to study and report on the appropriate division of the nation's judicial business between the state and federal courts. The membership of the committee reads like a roster for induction into the federal courts hall of fame. The Chief Reporter, Richard H. Field, was assisted by two Reporters, Paul J. Mishkin and Charles Allen Wright, and an Assistant Reporter, David L. Shapiro. David Cavers served as a Consultant on choice-of-law matters, and the committee's rank and file included such luminaries as Henry J. Friendly, Henry M. Hart, John Minor Wisdom, and Herbert Wechsler. The Committee devoted eight years to the study and produced a final report in 1969.

The objective of the study was to rationalize and modernize federal jurisdiction based on principle so

> [a]ccess to federal courts should not be frozen into a pattern set in 1789 or 1875, whether or not such pattern was right to meet the problems of its time, if it does not make sense in light of the conditions in the last half of the twentieth century.[1]

Guided by the principle that the purpose of diversity jurisdiction is "to assure a high level of justice to the traveler or visitor from another state,"[2] the report recommended a set of narrowly targeted changes to then current law. Most of these narrowed the jurisdiction, but some broadened it, and many have been adopted by Congress over the years. However, the report's most significant recommendation, to bar a plaintiff from bringing a diversity action in a federal court in his own home state, while clearly correct on principle, has not been enacted.

According to the Committee, the basic rationale for federal question jurisdiction is "to preserve uniformity in federal law and to protect litigants … from the danger

1. A.L.I., Study of the Division of Jurisdiction Between State and Federal Courts 6 (1969).
2. *Id.* at 2.

that state courts will not properly apply that law . . . ."[3] Based on that rationale, the Committee recommended several provisions to broaden the scope of that jurisdiction. The two most radical were to abolish the amount in controversy requirement for federal question cases (adopted by Congress in 1980) and to provide for jurisdiction in removal cases where the defendant relies on a federal defense or counterclaim (not adopted by Congress).

Strictly, the A.L.I. study is beyond the scope of this book since it deals with federal jurisdiction generally, rather than with the jurisdiction, configuration, and operation of the circuit courts of appeals in particular. Nevertheless, it is worth including in this chapter for several reasons. First, it preceded the massive increase in appellate case volume, which was just beginning as the study period ended. Thus it provides a baseline to compare with subsequent studies performed under the threat and then the reality of the increase. Second, its tone differs radically from that of many later studies. Absent are the apocalyptic predictions and defensive, self-serving anecdotes that characterize those later studies; by contrast, the A.L.I. study seems almost academic in tone. Related is the different focus of the A.L.I. study, which concentrates on the principles that determine the nation's need for federal jurisdiction. The later projects focus more on the configuration of the courts of appeals that will best conserve the federal courts' unique character, the consistency of federal law, or the judges' need for collegiality.

2. Accommodating the Workload of the United States Courts of Appeals: American Bar Foundation[4]

Conducted under the auspices of the American Bar Foundation with a grant from the American Bar Endowment, this study was performed by the Project Advisory Committee. Like the A.L.I. study, the project enlisted the efforts of luminary jurists, lawyers, and scholars, among them the Project Director, Paul Carrington, and Project Advisory Committee members, Bernard Segal, Leon Jaworski, David Louisell, Thurgood Marshall, and Paul Mishkin. Unlike the A.L.I. study, it focused more narrowly on the courts of appeals rather than the federal system as a whole.

The kernel of the problem, according to the Committee, appears prominently on the Report's first page:

> In the last decade, the rate of expansion of [the] workload [of the courts of appeals] has accelerated rapidly. The resources provided the Courts … to do their work have not …

3. *Id.* at 4.

4. Paul D. Carrington, Am. Bar Found., Accommodating the Workload of the United States Courts of Appeals: Report of Recommendations (1968).

> increased apace. As a result, there is imbalance between the demands upon the Courts of Appeals as a whole and their ability to respond to them.[5]

The Committee divided its brief Report (only eight pages) into two parts: "Proposals for Immediate Action—Better Use of Resources within the Current Framework" and "Proposals for Reflection—Structural Changes." Many of the recommendations in the first part consisted of "nuts and bolts" suggestions such as increasing the number of elbow clerks, fuller district court opinions that would allow the courts of appeals to affirm on the basis of the opinion below, greater dispatch in presidential appointments to vacancies, and stronger incentives for circuit judges to take senior status.

Other recommendations were more substantive and more controversial. First, the Report recommended that the courts adopt a sorting mechanism, permitting them to allocate time and effort to cases "according to their difficulty and significance." In less important cases there should be limitations on oral argument, greater use of short *per curiam* opinions, and decisions by two-judge panels. The Report did not indicate who should do the screening required to determine which cases warranted only the abbreviated procedures. Nor, of course, could it presage the set of thorny issues such a triage regime would create.

Second, the Report recommended creation of additional circuit judgeships but cautioned that "the expansion of the number of judges on a court, even though gradual in time, changes the nature of the court."[6] Believing enlarging circuits to be wiser than creating new ones, the Committee recommended adding judgeships to existing circuits until the number of judges on a circuit reaches fifteen. Once a circuit exceeds nine judgeships, it should be authorized to split by subject matter into divisions with rotating membership. Innovatively, the Report also recommended establishing a Washington-based "pool" of five or six additional circuit judges who would not be assigned permanently to individual circuits. Rather they would be assigned to duty on particular circuits as temporary needs arose.

The recommended numbers may seem small by today's standards, but the Committee's recommendations were actually quite bold and would have allowed for the possibility of significant growth. At the time, only two circuits had more than nine judgeships (13 in the Fifth and 10 in the Ninth), and no circuit exceeded the 15-judge limit.[7] The circuit courts had a total of 97 judges, and the Committee's recommendations conceivably could have permitted as many as 170. As will become apparent, later studies took a decidedly more conservative view of the possibilities for expansion.[8]

5. *Id.* at 1.
6. *Id.* at 5.
7. 399 F.2d vi–xviii (1969).
8. *See infra* sections 7, 9, 10, and 12.

In the second portion of its report, the Committee's suggestions have proved prescient indeed. The report noted that soon, even the fifteen-judge limit would not suffice to handle the appellate caseload in some circuits, and then there would be a choice between enlarging the circuits to unprecedented size or splitting them. Either way, the Committee foresaw the possibility of more conflicts than the Supreme Court could resolve. It then enumerated several possible solutions including a national court of appeals, nationwide courts with specialized subject matter jurisdiction, and division of the existing circuits into a small number of regional über-circuits. Even more presciently, the Committee saw a fundamental truth subsequent studies have tried to avoid:

> [T]he question is not whether we can preserve all of the present attributes of the existing system, … but rather in what respects they are to be changed.…
>
> ….
>
> There is no way in which adjustment to new workload conditions can be made that will leave intact all the present characteristics of the Courts of Appeals. These courts were an innovation themselves. Since their creation, they have been in constant process of transformation as the amount and kind of their work has changed.[9]

3. The Freund Committee

Charged by the Federal Judicial Center to study the caseload and problems of the Supreme Court, the Freund Committee conducted its work from 1971 to 1972. More formally known as the Study Group on the Caseload of the Supreme Court, the group got its nickname from its chair, Paul Freund of Harvard Law School.[10] Like its predecessors, it was staffed by the "usual suspects": eminent scholars of federal courts and constitutional law and prominent attorneys with experience practicing before the Court. Three of its members had served as law clerks to Justices on the Court.

In addition to studying a wide range of statistical data, the Committee conducted interviews of all of the then serving Justices and three present and former clerks. Its Report begins with a description of the Court's workload, noting that in the previous twenty years, filings had increased from 1,234 to 3,643. The most dramatic growth occurred in *in forma pauperis certiorari* petitions filed by criminal defendants and prisoners seeking post-conviction relief, but there was also substantial growth in the Court's mandatory appellate caseload. The Justices had been able to remain current by relying increasingly on their clerks (by that time increased to

9. Carrington, *supra* note 4, at 6, 8.

10. Fed. Judicial Ctr., Report of the Study Group on the Caseload of the Supreme Court (1972), *reprinted in* 57 F.R.D. 573 (1972).

three per judge), deciding an increasingly smaller percentage of the cases filed, and decreasing the time spent on each case.

In the view of the Committee, the Court was at its saturation point; further caseload increases would compromise its ability to perform its essential function—"to define and vindicate the rights guaranteed by the Constitution, to assure the uniformity of federal law, and to maintain the constitutional distribution of powers in our federal union."[11] The committee was especially concerned that the Court's workload would make it less likely to be able to resolve conflicts among the circuit courts.

In response to these perceived problems, the Committee made several recommendations, but two deserve special discussion. In detail, the Committee reviewed the various contexts in which the Court had mandatory appellate jurisdiction and recommended they be abolished with the Court's remaining jurisdiction comprised almost entirely of *certiorari* cases. Although not immediately, and with fits and starts, Congress eventually enacted this recommendation,[12] and it has been received enthusiastically.[13]

Not so for the Committee's other main recommendation, the establishment of a National Court of Appeals. The recommendation stemmed from the Committee's conclusion that two of the most important consequences of the growth in caseload were the time required to screen a mass of petitions for review and the Court's inability to resolve conflicts between circuits in a timely fashion. Very likely, the Committee had some empirical evidence for the first conclusion, having interviewed several of the justices and their then present and former clerks. The Committee did not offer any empirical evidence of the conflict problem, however; and, indeed it was taken as a given until much later empirical studies cast serious doubt upon it.[14]

After considering and rejecting several other possible configurations, the Committee settled on a National Court of Appeals consisting of seven active circuit judges serving for three-year staggered terms, and selected by a system of automatic rotation. Its jurisdiction would be discretionary and would encompass nearly all of the Supreme Court's appellate and *certiorari* jurisdiction. All such cases would be filed initially by petition in the new court, which could act on them in one of three ways.

One resolution would be denial of review, which would be final and thus cut off access to the Supreme Court. A second possibility would involve the new court's certifying the case to the Supreme Court; it would certify about four hundred cases per year, several times as many as the Supreme Court could be expected to hear.

11. *Id.* at 578.

12. Act of June 27, 1988, Pub. L. No. 100–352, 102 Stat. 662.

13. 16B Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 4003 (1996).

14. *See, e.g.*, Arthur Hellman, Fed. Judicial Ctr., Unresolved Intercircuit Conflicts: The Nature and Scope of the Problem (1991).

The Supreme Court would have discretion to grant or deny review on the merits or, in cases of intercircuit conflict, remand to the National Court of Appeals with an order to hear and decide the case. The latter category would include those cases of genuine intercircuit conflict that did not pose issues of sufficient comparative importance to warrant Supreme Court review. The third option open to the new court—likely to be exercised in most cases of intercircuit conflict—would be to set the case down for argument and decision on the merits.

The idea behind the Committee's recommendation was to spare the Supreme Court the tedious duty of screening while simultaneously supplying the nation with considerably greater capacity for resolution of intercircuit conflicts. Despite its good intentions, the Committee's recommendation got a chilly reception. Judges and others opposed the new court on the grounds that it diluted the authority of the Supreme Court and denied litigants with worthy claims access to the Court.[15] The resistance prompted one leading commentator to pronounce the court "stillborn,"[16] and another went so far as to suggest that the Committee's recommendation was "goofy."[17]

4. Commission on Revision of the Federal Court Appellate System

Congress established the Commission in 1972[18] in response to the rapid and unprecedented increase in the workload of the circuit courts. Consisting of sixteen members (four members from each house of Congress, four appointed by the President, and four appointed by the Chief Justice), the Commission was known informally by the name of its chair, Senator Roman Hruska. Congress charged the Commission:

> (a) [T]o study the present division of the United States into the several judicial circuits and to report … its recommendations for changes in the geographical boundaries of the circuits ….
> (b) [T]o study the structure and internal procedures of the Federal courts of appeal system, and to report … its recommendations for such additional changes … as may be appropriate ….[19]

15. Daniel J. Meador, *The Federal Judiciary—Inflation, Malfunction, and a Proposed Course of Action*, 1981 BYU L. Rev. 617, 627.
16. *Id.*
17. Thomas E. Baker, *A Generation Spent Studying the United States Courts of Appeals: A Chronology*, 34 U.C. Davis L. Rev. 395, 400 (2000). The chronological organization of this chapter follows the one used by Professor Baker in his fine article.
18. Pub. L. No. 92–489, 86 Stat. 807 (1972).
19. *Id.*

a. Phase One

Consistently with its bipartite charge, the Commission held hearings in several cities throughout the country and reported its findings and recommendations in two separate reports published in 1973 and 1975. In its first report,[20] the Commission noted the dramatic increase in the number of appeals, a less dramatic increase in the number of authorized judgeships, and the circuit courts' adoption of a set of appeals-expediting procedures to help cope with the overload. Accordingly, the Commission recommended that Congress create new courts and additional judgeships to respond to the crisis of volume.

Its most important recommendation was a split of the Fifth Circuit into two new courts: the Fifth Circuit, consisting of Georgia, Florida, and Alabama, and the Eleventh, consisting of Texas, Mississippi, and Louisiana. The Commission considered several other configurations including one involving three two-state circuits but found its recommendation superior when judged by the following set of criteria for circuit alignment:

- Circuits should span at least three states.
- No circuit should be created that would require more than nine judges.
- A circuit should contain states with diverse populations, legal business, and socioeconomic interests.
- Realignment should involve the least dislocation possible.
- No circuit should contain noncontiguous states.[21]

Applying the criteria to the Ninth Circuit, the Commission recommended splitting it in two, an arrangement that required dividing California between the Ninth Circuit and the proposed new Twelfth Circuit. Congress accepted the Commission's recommendation to split the Fifth Circuit, but retained the Ninth as a single unit, by far the largest in the system.[22]

b. Phase Two

The best-known recommendation of the Commission was to create a National Court of Appeals. Citing the steadily growing scope of federal regulatory authority and

20. Comm'n on Revision of Fed. Court Appellate Sys., The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change (1973), *reprinted in* 62 F.R.D. 223 (1974).

21. *Id.* at 231–32.

22. Congress did provide permission to each circuit court with over fifteen judgeships to divide itself into administrative units. *See* Pub. L. No. 95–486, § 6, 92 Stat. 1629, 1633, the relevant portion of which is:

> Sec. 6. Any court of appeals having more than 15 active judges may constitute itself into administrative units complete with such facilities and staff as may be prescribed by the

the steadily diminishing percentage of *certiorari* petitions granted by the Supreme Court, the Commission Report[23] concluded there was "no basis for confidence that the Supreme Court can be expected adequately to satisfy the need for stability and harmony in the national law as the demands continue to increase in the decades ahead."[24]

The Commission's remedy, a new National Court of Appeals, differed substantially from the Freund Committee's conception of such a court. First, instead of a rotating membership, it would be staffed by seven *permanent* Article III judges appointed by the President.[25] Second it would not screen cases for the Supreme Court. Rather, it would have "reference" and "transfer" jurisdiction. The first would consist of cases filed with the Supreme Court that it, in the exercise of discretion, referred to the new court for hearing and decision. The second group of cases would be those transferred from one of the circuit courts because of the perceived need for national law making; the new court then would have discretion to hear the case or decline to accept the transfer.[26] The proposal was largely ignored by Congress but received substantial attention from federal court scholars.[27]

More interesting, from our point of view, was the Commission's recognition that the internal operating procedures of the circuit courts had changed with an increasingly large percentage of their cases being handled without oral argument or a published precedential opinion and with the heavy involvement of staff attorneys.[28] In response, the Commission recommended an amendment to the Federal Rules of Appellate Procedure mandating in most cases oral argument and at least some record, available to the public,[29] of the reasons for the court's decision. The Commission took no position on the citation or precedential value of such abbreviated opinions, a problem which would wait more than thirty years for a partial solution.[30] It did however take a strong stand on the role of staff attorneys, which should not include drafting opinions or screening cases.[31] The circuit courts could have accomplished that change without the aid of legislation or federal rule making,

Administrative Office of the United States Courts, and may perform its en banc function by such number of members of its en banc courts as may be prescribed by rule of the court of appeals.

23. Comm'n on Revision of Fed. Court Appellate Sys., Structural and Internal Procedures: Recommendations for Change (1975), *reprinted in* 67 F.R.D. 195 (1975) [hereinafter Phase Two Report].

24. *Id.* at 212.

25. *Id.* at 237.

26. *Id.* at 238–46.

27. *See* Meador, *supra* note 15, at 626–28.

28. Phase Two Report, *supra* note 23, at 247–48, 260–62.

29. *Id.* at 258.

30. The solution to the citation portion of the problem is Fed. R. App. P. 32.1 (effective in 2006), which prohibits the circuit courts from forbidding citation to their unpublished opinions. The question of precedential value remains unresolved.

31. Phase Two Report, *supra* note 23, at 261.

but so far they have not and in fact have steadily increased the number and responsibilities of the staff attorneys.

5. Advisory Council for Appellate Justice

Created in 1970 and jointly sponsored by the National Center for State Courts and the Federal Judicial Center, the Council was chaired by Professor Maurice Rosenberg and composed of thirty judges, scholars, and practitioners.[32] It conducted a four-year study of the federal appellate courts, compiled a four-volume set of reading materials, and presented its recommendations to the Hruska Commission and at the National Conference on Appellate Justice held in 1975 in San Diego.[33]

Like the Hruska Commission, the Council recommended that Congress create a National Court of Appeals staffed by United States circuit judges assigned to the new court for a substantial term of years and capable of issuing decisions having nationwide precedential effect. Jurisdiction would lie in appeals referred to it by the Supreme Court and would include appeals of state court criminal convictions and cases involving conflicts among the circuits. Upon reaching a decision, the court would forward it to the Supreme Court, and it would become final after the lapse of a specified time if the Supreme Court took no further action.[34]

The Conference on Appellate Justice was attended by 360 judges, lawyers, and scholars and was, in the words of one of its prime movers, a "smashing critical success," but the Council's recommendations "resulted in scant reform."[35]

6. ABA Action Commission

The American Bar Association Board of Governors approved the creation of the Action Commission to Reduce Court Costs and Delay in 1978 and directed it "to

32. Meador, *supra* note 15, at 628. The membership included some genuine federal courts luminaries: inter alia "Seth (LA) and Shirley Hufstedler (9th Cir at the time), Harold Leventhal (D.C. Cir), John Frank (Phoenix), Murray Schwartz (UCLA), Griffin Bell (11th Cir.), John Minor Wisdom (5th Cir.), Al Tate (then Supreme Court of Louisiana), Roger Cramton (then an Assistant Attorney General), and Erwin Griswold (Solicitor General at the time)." Paul Carrington, Appeals and Federal Politics, *available at* http://paulcarrington.com/Appeals%20and%20Politics.htm (last visited Mar. 14, 2011) [hereinafter Appeals and Politics].

33. Carrington, Appeals and Politics, *supra* note 32; *see* 4 Advisory Council for Appellate Justice, Appellate Justice: 1975, at 163–64 (Paul D. Carrington ed., 1975), *available at* http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/appellate&CISOPTR=44.

34. Advisory Council for Appellate Justice, *Recommendation for Improving the Federal Intermediate Appellate System*, *in* 4 Appellate Justice: 1975, *supra* note 33, at 163–64.

35. Appeals and Politics, *supra* note 32.

test new ideas in actual court experiments"[36] and "to encourage lawyers and bar associations to improve litigation effectiveness."[37] Funded by the Law Enforcement Assistance Administration, the Ford Foundation, and the A.B.A., the Commission was composed of lawyers and leaders of the bar, consumer advocates, judges, academics, and representatives of organizations interested in improving the judicial system. The Commission began its work in 1979 and issued its first progress report a year later. The report contained a host of recommendations, but those of greatest interest here are the ones directed toward the problem of overload in appellate courts.

The so-called "Appellate Package" contained a series of recommendations, some of which had been tried separately but had not yet been instituted in a combined and coordinated program. The parts of the package included: (1) expediting the transmission of the trial record to the circuit court; (2) substituting an abbreviated (perhaps no more than ten pages) memorandum of points and authorities for the traditional appellate brief; (3) exchanging traditional oral argument for a conference type of argument with the judges actively participating; and (4) replacing the written opinion with an oral opinion from the bench at the close of the arguments or within a few days.[38]

Not all cases would receive the abbreviated process; the report advised the courts to "treat different cases differently" and recommended an early triage to determine which cases belonged on the abbreviated track and which would receive the traditional appellate process.[39]

Many of the Commission's recommendations have been implemented by the courts, not necessarily to the advantage of the litigants and the justice system. Thus, the triage system has become fully entrenched, probably beyond the wildest expectations of the members of the Action Commission, with 80 to 90 percent of the caseload receiving some or all of the abbreviated process.[40] The Commission's report did not specify who was to perform the screening, and it might come as a bit of a shock to the members that today, many (and in some circuits all) of the triage decisions are delegated to staff attorneys.[41] Some circuits make extensive use of oral rulings from the bench; and in some, a conference-style argument occurs, but the participants (beside the judges) are court-employed staff attorneys rather than the parties' advocates.[42]

36. Seth Hufstedler & Paul Nejelski, *A.B.A. Action Commission Challenges Litigation Cost and Delay*, 66 A.B.A. J. 965, 965 (1980) (discussing the founding of the Commission and a list of its recommendations); *see also* Joseph R. Weisberger, *Appellate Courts: The Challenge of Inundation*, 31 Am. U. L. Rev. 237 (1982).
37. Hufstedler & Nejelski, *supra* note 36, at 965.
38. *Id.* at 967.
39. *Id.* at 966–67.
40. *See* chapter 9, *supra*.
41. *See* chapter 8, *supra*.
42. *See id.*

It is easy to see why Commission members thought their suggestions might help appellate courts deal with the caseload glut, but the iron law of unintended consequences applies to efforts at court reform just as relentlessly as to other projects. In this case, the courts' implementation of the Commission's recommendations led to a bipartite system of appellate justice where large percentages of the caseload receive scant if any attention from Article III judges, while a small select group of cases enjoys the lion's share of the courts' resources. The Commission members may not have intended it, but the implementation of some of their recommendations has resulted in the rich getting richer while a majority of appellate litigants appear to have lost most of what used to constitute an appeal of right.

7. Two Initiatives from the Justice Department (1977)

In 1977, two separate groups within the Justice Department performed studies of the problems of the federal courts:

a. Department of Justice Committee on Revision of the Federal Judicial System

After a speech to the Sixth Circuit Judicial Conference about the problems facing the federal courts, President Ford directed Attorney General Edward H. Levi to create a Committee on Revision of the Federal Judicial System within the Department of Justice. Chaired by Solicitor General Robert H. Bork, the committee conducted numerous studies, discussed various proposals, and issued a report.[43]

The Report began by noting the threat to the judicial system posed by the alarming increase in filings and the expedients the courts had adopted to deal with it. The Report found decreased oral argument, reduction in written opinions, and increased use of administrative helpers to be the most troublesome of the time-saving devices.

> The American legal tradition has insisted upon practices such as oral argument and written opinions for very good reason. Judges, who must be independent and are properly not subject to any other discipline, are required by our tradition to confront the claims and the arguments of the litigants. They must demonstrate to the public that they are not acting out of whim, caprice, or mere personal preference. Our tradition requires that judges explain their decisions and thereby demonstrate to the public that those decisions are supported by law and reason. Continued erosion of traditional practices could cause a corresponding erosion of the integrity of the law and of the public's confidence in law.[44]

43. U.S. Dep't of Justice Comm. on Revision of Fed. Judicial Sys., The Needs of the Federal Courts, at iv (1977) [hereinafter DOJ Report]. The Committee consisted of eleven members, one of whom was then Assistant Attorney General Antonin Scalia.

44. *Id.* at 3–4.

To deal with such serious threats, the Report proposed solutions "broad in concept and effect" because smaller scope remedies are "simply not adequate to meet a problem of broad scale."[45]

(1) More Judgeships. The Report is somewhat ambivalent on the creation of additional Article III judgeships. While recommending an increase of unspecified size, it warned against wholesale increases, which would, in its view, damage collegiality and diminish personal interaction throughout the judiciary. Moreover, large increases would diminish the prestige of the office, making it more difficult to attract the best and brightest.[46] As we argue in a later chapter, there is no empirical evidence that prestige is a zero-sum game; and even if it is, restricting judicial supply to protect it reflects a seriously flawed value preference.[47]

A far better recommendation is to end the "senatorial courtesy" system of selecting judges in favor of a system of selection by a newly created Commission on the Judicial Appointments Process.[48] This recommendation makes eminent good sense and not only because it promises an improvement in the quality of the bench. By making the selection process less political, the recommendation could reduce the delay in filling open judgeships and thus functionally increase the capacity of the judicial system.

(2) Article I Administrative Courts. Considerably less controversial is the Report's recommendation to create a system of Article I courts to deal with cases arising from the many federal welfare and regulatory programs. While avoiding the pitfalls of an overly specialized court, a set of administrative courts could substantially relieve the burden on the federal courts by adjudicating a host of cases involving "repetitious factual disputes" that seldom give rise to "important legal questions."[49] Despite the lurking classism in this proposal, it has the virtue of improving the quality of justice for the large category of cases that currently receive such short shrift from the circuit courts. For those cases, adjudication by professional and *accountable* Article I courts is vastly preferable to the current system that consigns the bulk of the work on them to anonymous and publicly unaccountable central staff attorneys, with titular but only cursory review by actual appellate judges.[50]

(3) Jurisdictional Reform. Jurisdictional reform is a standard nostrum for the ills of the federal court system, but mostly it is a pipe dream with no chance for congressional implementation.[51] To some extent, the Report participates in this empty ritual by recommending the abolition of diversity jurisdiction. By contrast, however, the Report also includes recommendations which deserve and, in some

45. *Id.* at 4.
46. *Id.* at 6–7.
47. *See infra* chapters 11–14.
48. DOJ Report, *supra* note 43, at 6.
49. *Id.* at 9.
50. We believe some system of specialized courts should play a large part in the solution of the problems of caseload glut and two-track justice in the circuit courts. *See infra* chapter 12.
51. *See infra* chapter 13.

cases, have received congressional approval, such as the abolition of the Supreme Court's mandatory appellate jurisdiction[52] and an exhaustion-of-state-remedies requirement for prisoners' petitions.

b. The Office for the Improvements in the Administration of Justice

Although the Office functioned for only four years, its importance is disproportional to its longevity. With the beginning of President Carter's term, Griffin Bell became Attorney General of the United States. Having served for fifteen years as a judge on the Fifth Circuit, and having been involved in several studies of the courts, it is not surprising that Bell acted quickly on his long-standing interest in the administration of justice. Thus in 1977 he created the Office for the Improvement of Justice within the Justice Department[53] and placed it under the leadership of then Assistant Attorney General Daniel Meador, one of the nation's leading authorities on appellate justice. Its function was the study and improvement of the administration of justice in the nation's judicial and quasi-judicial dispute-resolving tribunals.[54]

The signature achievement of the Office was to conceive of the United States Court of Appeals for the Federal Circuit and to shepherd its implementing legislation through Congress.[55] The court, essentially a merger of the Court of Claims and the Court of Customs and Patent Appeals,[56] is unique among the circuit courts in that its jurisdiction is determined by subject matter, not geography.

Some of the reasons for its successful creation stem from lessons learned from prior attempts at judicial reform. Unlike the courts proposed by the Freund Committee and the Hruska Commission, it does not restrain access to the Supreme Court or create a four-tiered appellate structure; an additional tier would tax the resources of the litigants as well as the status and prestige of the circuit judges. Finally, the creation of the Federal Circuit helps to achieve one of the stated goals of many prior studies—national uniformity on questions of federal law.

It also sets some interesting precedents. Unlike the old Commerce Court, the Federal Circuit provides a *successful* example of an appellate court of specialized nationwide jurisdiction.[57] Further, unlike other proposed tribunals, it is staffed by a

52. DOJ Report, *supra* note 43, at 11–12; Pub. L. No. 100–352, 102 Stat. 662 (1988).

53. 42 Fed. Reg. 8140 (Feb. 3, 1977).

54. *Id.* at 8140–41. *See* Meador, *supra* note 15, at 631–34 (giving an account of the inception of the Office).

55. *See* Daniel J. Meador, *Origin of the Federal Circuit: A Personal Account*, 41 Am. U. L. Rev. 581 (1992) (giving a fascinating "blow-by-blow" account of the court's birth pangs).

56. *Id.* at 592. Besides the caseload of those two courts, the Federal Circuit has some additional jurisdiction.

57. It thus poses the question whether other subject matter areas can be carved out of the circuit courts' workload. *See* Robert E. Rains, *A Specialized Court For Social Security? A Critique of Recent Proposals*, 15 Fla. St. U. L. Rev. 1 (1987).

permanent bench, not a rotation of judges from other circuits.[58] Finally, it is fully an Article III court and thus shows that courts of specialized subject matter jurisdiction need not be Article I courts and thus a part of the nation's regulatory, administrative apparatus.[59] Its success suggests that at least some portion of the problem posed by caseload increases and their perceived threat to the coherence of the law can be solved by specialized tribunals with nationwide jurisdiction.[60] They handle cases faster because their judges are experts, and they do away with the problems posed by intercircuit conflicts.

8. The N.Y.U. Study

In 1983, Chief Justice Burger proposed yet another version of a nationwide appellate court, the Intercircuit Tribunal (ICT), as a partial solution to what he perceived as an overwhelming increase in the volume and complexity of the Court's workload.[61] The ICT would have a lifespan limited to five years and consist of twenty-six circuit judges, two from each of the circuits. It would sit in panels of seven to nine judges for periods of six to twelve months and hear intercircuit conflicts and a limited set of statutory interpretation cases.[62] The arguments for and against the new body paralleled those that followed the national courts proposed by the Freund Committee and the Hruska Commission,[63] but the underlying assumption that the Supreme Court was overworked was mostly unquestioned.

The N.Y.U. Project[64] was an ambitious empirical effort to test that fundamental postulate. Conducted by two N.Y.U. law professors, Samuel Estreicher and John Sexton, and about two dozen student members of the *New York University Law Review*, its goal was to determine empirically whether in fact the Supreme Court was overworked. After examining the Court's entire docket (including the cases denied review), its controversial conclusion was that the overload resulted from the Court's choosing to hear cases that did not merit its attention, which constituted about 25 percent of the total.[65]

58. For example, the National Court of Appeals proposed by the Freund Committee. *See supra* section 3.

59. Contrast DOJ Report, discussed in section 7, *supra*.

60. See *infra* chapter 13, section A for an argument for such a solution and for citations to commentary pro and con.

61. Warren E. Burger, *Annual Report on the State of the Judiciary*, 69 A.B.A. J. 442, 447 (1983).

62. *Id.*

63. *See supra* sections 3 and 4.

64. *See* Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681 (1984).

65. *Id.* at 758.

The Study concluded that the cause of both the Supreme Court's overloading itself and the general frustration with the Court's inability to satisfy the nation's needs was a misconception of the Court's proper role. The Court should not act as an ultimate check on error in the system, but rather as "the manager of the federal judicial system, overseeing the work of the federal and state courts, and intervening only when necessary to resolve fundamental interbranch or federal–state clashes or to render a final resolution of a question that has ripened for decision after percolation in the lower courts."[66] Then, helpfully, if somewhat presumptuously, the authors proceed to instruct the Court quite specifically on the kinds of cases it should hear and those that do not require its attention.[67]

At this point, a fair question would be: What does this ambitious study of the Supreme Court's workload have to do with the thesis of this book? That there should be large increases in the number of circuit judgeships? The answer lies in the Study's thoughtful discussion of inter-court conflicts.[68] The Study begins with the concept of "square" conflicts, which occur "only when courts in a given jurisdiction—federal circuit or state—are bound to follow a legal rule contrary to the rule that must be followed in another jurisdiction."[69] Note this definition eliminates any conflicts that do not involve federal circuits or states' highest courts, and more significantly, it eliminates conflicts where one court's pronouncement is dictum or an alternative holding. Finally, it puts to the side cases in which courts purport to follow the same legal standard but appear to reach contrary conclusions, in other words, cases where factual discrepancies may account for disparate outcomes.[70]

The authors of the Study did not believe that all "square" conflicts are "intolerable." A conflict is intolerable only if (1) litigants can exploit it through forum shopping, (2) it prohibits multijurisdiction actors from adjusting their affairs to divergent commands, or (3) at least three courts have passed on the question. Using this definition on a pool of 1,860 petitions, the Study found only five petitions involving intolerable conflicts that were improperly denied review.

And yet again, what does this have to do with proper staffing of the circuit courts? One of the persistent arguments against creating enough circuit judgeships to permit the courts to afford traditional appellate process to all cases is that so many judges will proliferate intercircuit conflicts and generally render the law incoherent. The Study findings do not entirely refute this argument; however, by carefully parsing the concept of "a conflict," they give reason to doubt that an adequately sized corps of judges would produce so many intolerable conflicts that the Supreme Court would be unable to keep pace. That finding, confirmed by other more recent studies, is a crucial part of the refutation of the anti-expansionist argument. If

66. *Id.* at 812.
67. *Id.* at 720–40.
68. *Id.* at 722–31.
69. *Id.* at 722.
70. *Id.* at 726.

radical increases in the number of circuit judgeships will not cause an unmanageable increase in intolerable conflicts, the "incoherence of the law" argument suffers seriously. But that argument is a crucial part of the case for a small federal appellate judiciary. Without the threat of legal incoherency, using a truncated process for the majority of federal appeals looks like an unnecessary sacrifice undertaken to avoid a noncredible threat.[71]

9. Report of the ABA Standing Committee on Federal Judicial Improvements[72]

At the outset, the Committee noted its study was a follow-up to the American Bar Foundation's 1968 study of the appellate courts.[73] In the intervening twenty years, the Committee noted that numerous other studies of the federal courts system had occurred, but that most had addressed federal jurisdiction or the need for a national appellate court; few had proffered specific solutions to the problems faced by the courts of appeals.

The principal problem was then, and remains today, massive increases in caseload, but the obvious solution—proportionate increases in judgeships—seemed problematic to the Committee. Adding circuits would increase the likelihood of intercircuit conflict and result in nontraditional alignments (splitting states, one-state circuits, circuits composed of noncontiguous states). Increasing the size of the existing circuits posed another set of concerns, intracircuit conflicts, and unwieldy en banc procedures. Moreover, an increase in judgeships by either means would diminish the prestige of the position.

The Committee noted that the courts, left to their own devices, had devised a strategy for dealing with the problem, the system of Appellate Triage that is the major focus of this book. But that remedy, according to the Committee, threatened the fundamental function the circuit courts were created to serve: relieve the pressure on the Supreme Court; supervise and correct the errors of the district courts; and develop a body of coherent federal law.[74]

The Committee thus saw its function as advancing proposals designed to remedy the problems of the circuit courts while preserving their essential character and function. Thus, it took as its motto the admonition of Lord Macauly: "Reform, that you may preserve."[75] That sentiment parallels perfectly the theme of the earlier

71. See *infra* chapter 12 for a more complete version of this argument.

72. ABA Standing Comm. on Fed. Judicial Improvements, The United States Courts of Appeals: Reexamining Structure and Process After a Century of Change 3–10 (1989) [hereinafter ABA Report: Reexamining].

73. *See supra* section A.2.

74. ABA Report: Reexamining, *supra* note 72, at 8–10.

75. *Id.* at ii.

report of the Project Advisory Committee of the American Bar Foundation.[76] Both seem to acknowledge that change is inevitable and that the central question is: which of the many features of the circuit courts are most central to their mission.

In an attempt to begin that setting of priorities, the committee recommended four specific steps:

(1) to study intercircuit conflict and determine whether a set of nonregional subject-matter-specialized courts would help to solve it;
(2) to consider nationwide adoption of the limited en banc procedure;
(3) to reduce intracircuit inconsistency by assigning a part of the docket to subject-matter-specialized panels; and
(4) to study the use of the Appellate Triage devices in order to preserve the role of Article III judges in deciding appeals.[77]

The most constructive of the four steps are the two that suggest subject-matter-specialized courts and panels; these promise the advantages of expertise, efficiency, and consistency.[78] Experts in a particular subject matter area can be expected to render better decisions; outside of the judicial branch, this proposition seems to be a postulate, for there does not seem to be much sentiment for assigning labor law cases to the Nuclear Regulatory Commission.

Expert judges can work more efficiently because judges working in a particular area of the law learn that area well and can supply expert interpretation of the relevant statutes, case law, administrative regulations, and the policies that underlie them. Specialized judges decide more quickly because they do not need to learn the elementary principles of an unfamiliar subject for each new case on the docket. It is simply wasted effort to have a generalist judge become a "quick study" of admiralty law when the case could be decided by a judge who "makes her living" as an admiralty specialist. Finally, specialization can reduce inconsistency; if opponents of large increases in the circuit judiciary are right that adding more judges multiplies the possibility of legal inconsistency, then specialization helps by reducing the number of actors deciding cases in a particular area. The judges of many courts seem to have understood this truism because they engage in de facto specialization to a remarkable extent.[79]

76. *See supra* section A.2.

> The question is not whether we can preserve all of the present attributes of the existing system, … but rather in what respects they are to be changed.… .
>
> There is no way in which adjustment to new workload conditions can be made that will leave intact all the present characteristics of the Courts of Appeals.

Carrington, *supra* note 4, at 6, 8.

77. ABA Report: Reexamining, *supra* note 72, at 41.

78. See *infra* chapter 12 for more complete treatment of this theme.

79. *See infra* chapter 12.C.5.c. (citing Edward K. Cheng, *The Myth of the Generalist Judge*, 61 Stan. L. Rev. 519 (2008)).

As benign as this recommendation seems, it nevertheless proved quite controversial as there is a prejudice in our system for "generalist" judges. Indeed that sentiment caused three of the nine Committee members to take the unusual step of writing a Dissenting Statement.[80] Their dissent contains the standard set of arguments against judicial specialization: concentration of power, capture by special interests, and political controversy surrounding appointments.

There are responses to these arguments,[81] but the important point here is that any change in the circuit courts will provoke spirited opposition, yet change is inevitable. Indeed it has already happened and is continuing to happen. The change, of course, is in the internal case-processing system used by the circuit courts; i.e., the abandonment of the traditional model of appellate justice and its replacement by the Appellate Triage model we have already described. The question that remains is this: should we be satisfied with this de facto change in the courts chosen by the judges to reflect their own views on distributive justice? If not, then what—and whose—set of value preferences will inform and control alternative changes in the courts? If the virtues of the traditional model of appellate justice are sufficiently valuable, then other changes—perhaps, specialization—will have to occur, and Lord Macauly's maxim, "Reform that you may preserve," becomes most apt.

10. Report of the Federal Courts Study Committee

Congress established the Federal Courts Study Committee within the Judicial Conference of the United States in 1988[82] and directed the Chief Justice to select the Committee's fifteen members "in such a manner as to be representative of the various interests, needs and concerns which may be affected by the jurisdiction of the Federal Courts."[83] Accordingly, the Chief Justice appointed four members of Congress (two from each house), three circuit judges, two district court judges, one state court judge, four practitioners (two from government practice—one state and one federal—and two from private practice), and a university president. The Committee's charge was to "make a complete study of the courts of the United States and of the several states and transmit a report to the President, the Chief Justice …, the Congress, the Judicial Conference … and [various state groups]"[84] Over fifteen months, the Committee, in its own words "conducted the most comprehensive

80. ABA Report: Reexamining, *supra* note 72, at 43 (dissenting statement by Frank A. Kaufman, James E. Noland, and Mary M. Schroeder).

81. *See* note 79, *supra*.

82. 102 Stat. 4642 (1988).

83. *Id.*

84. Fed. Courts Study Comm., Judicial Conference of the United States, Report of the Federal Courts Study Committee (1990) [hereinafter Report of the Federal Courts Study Committee].

examination of the federal court system in the last half century."[85] That examination, which included a survey of federal judges, numerous public hearings, and solicitations of opinions from attorneys, advocacy groups, academics, and other stakeholders in the federal courts,[86] resulted in a final report published in 1990.

Part I of the Report provided an overview of the Committee's perception of the crisis facing the federal courts, citing the usual alarming statistics. But the Report went on to state as fact some controversial and empirically baseless assumptions directly relevant to the theme of this book. Central among them is that the federal courts cannot meet the crisis by proportionate increases in judgeships because (1) the process of nomination and confirmation of judges would become pro forma, (2) a sufficient number of highly qualified candidates could not be found, (3) large increases in judgeships would lead judges to approach their jobs less responsibly, (4) appeal rates would increase, and (5) intra- and intercircuit conflicts would multiply. Based on these assumptions, the report concluded that any growth in the system must be limited and incremental.[87] Later on we will examine these assumptions in considerable detail; here we mention them simply to show the degree of group-think that permeates many of the studies considered in this chapter.[88]

Part I of the Report also offers a set of jurisdictional proposals, which, because they reduce the work of the federal court system generally, would help the circuit courts. Some are the usual suspects: abolition of diversity jurisdiction, at least where the plaintiff is a resident of the forum; and an exhaustion-of-remedies requirement for § 1983 cases. But the report emphasizes diversion more than its predecessors did. Its sensible recommendation is the diversion of Social Security claims, bankruptcy proceedings, Jones Act and FELA claims, and tax litigation to specialized Article III or Article I courts or administrative agencies. These recommendations have some appeal because they not only reduce the burden on the federal court system but also promise expert and expeditious treatment of discrete categories of cases. Nevertheless, by the Committee's own reckoning, they would reduce the circuit courts' caseload by only 17 percent,[89] a reduction easily made up by a few years' "normal" growth.

Chapter 6 of the Report is concerned specifically with the problems of circuit court overload. To its credit, the Committee is honest, reporting that, according to the Judicial Conference's workload standard,[90] the circuit judiciary required at the time a 30 percent increase in judgeships and within ten years likely would need to double the number. Less candid is its assessment of the effect of the Appellate

85. *Id.* at 3.

86. *Id.* at 32–33. *See also* Thomas E. Baker, Rationing Justice on Appeal 408 (1994). Professor Baker was an Associate Reporter for the Committee.

87. Report of the Federal Courts Study Committee, *supra* note 84, at 7–8.

88. *See infra* chapter 12.

89. Report of the Federal Courts Study Committee, *supra* note 84, at 27.

90. See *infra* chapter 11 for discussion of the formula.

Triage system on the quality of the courts' work: "But the appellate courts have avoided major deterioration only by pushing productivity to maximum levels and by adopting truncated procedures that probably have reached the limits of their utility without compromising the quality of the process."[91]

The passage is worth quoting in full because it is typical of the assessments found in many federal court studies. A study will conclude that Appellate Triage has reached a maximum acceptable limit; nevertheless, that limit will be exceeded in only a few years, and the next study will conclude again that the new level of truncation is the maximum allowable. Clearly the target is moving, and the study committees' views of the maximum allowable use of triage seem to coincide with the level prevalent at the time of the study. The problem here is not dishonesty but a gradual desensitizing, a shift in expectations of federal court observers and the tendency to find acceptable whatever conditions currently prevail. Unfortunately the all-too-obvious result is that the circuit courts use the truncated appellate process in a steadily increasing percentage of their cases, eventually transforming the circuit courts into courts of discretionary jurisdiction contrary to their statutory mandate.

One of the forces that has helped to keep the courts too small to handle their workload is concern that greater size will make the courts unwieldy and the law incoherent. Accordingly, the writers of the Report spend a good deal of effort laying out alternative possible configurations for the courts that will enable them to accommodate more judges:[92]

a. *Eliminate the current circuits and redraw new circuit boundaries,* which would themselves be redrawn as conditions require. Consistency could be maintained by requiring all courts to follow precedents established by panels of other courts. These precedents would stand until the Supreme Court spoke on the issue. If the Supreme Court proved unable to handle the volume of decisions requiring correction, intercircuit panels could be established to handle the overload.
b. *Create a four-tiered appellate system* by dividing the nation into as many as thirty regional appellate courts whose decisions would be reviewed by a few higher-level courts fitting between the regional courts and the Supreme Court.
c. *Create national subject-matter appellate courts* to handle tax, admiralty, criminal, civil rights, labor, administrative, and other specialized cases. These would take enough of the circuit courts' load to permit retention of the current circuit alignment.

91. Report of the Federal Courts Study Committee, *supra* note 84, at 110. Our studies have concluded that the use of the truncating devices had already passed the limit of compromised quality.

92. *Id.* at 118–22.

d. *Merge the circuits into a single unified national court of appeals.* This system exists in some states but would raise serious management issues if used in such a large system.
e. *Consolidate the current circuits into a few jumbo circuits,* each as large as or larger than the Ninth Circuit currently is. This alternative would reduce intercircuit conflict but would require significant tinkering with the en banc mechanism to avoid intracircuit conflicts.

The Report's treatment of alternative structure prompts two observations. First, a four-tier system should not be an option. The other configurations might entail additional work and inconvenience for the judges and other court personnel, but a four-tiered system would massively increase the burden on the litigants. In a significant portion of the cases, another level would require another round of briefs, another round of oral argument, and additional delay, thus increasing significantly the total societal investment in appellate justice.

Second, imagining alternative structures is a good thing, but it should not delay large increases in the number of judgeships. The problem of inadequate capacity is *actual and current*; the need to rearrange structure to accommodate problems that the increase in capacity *might* entail is *hypothetical and inchoate*. Waiting to add judgeships until a new structure is in place is a little like waiting to put out the fire until we can decide how to cope with the water damage.

11. The Federal Judicial Center Report

In its Report, the Federal Courts Study Committee did not endorse any of the various alternative structures for the courts of appeals; rather, it recommended that Congress, the courts, bar associations, and scholars give careful attention to and further study of the future of the federal appellate system.[93] Congress responded in § 302(c) of the Federal Courts Study Committee Implementation Act of 1990, which requested the Board of the Federal Judicial Center "to study the full range of structural alternatives for the Federal Courts of Appeals and submit a report on the study to the Congress and the Judicial Conference of the United States" within two years.[94]

The Board wisely handed over the study to three first-rate researchers[95] from the staff of the Center. Relying heavily on the files of the Study Committee and the

93. *Id.* at 116–17.
94. Pub. L. No. 101–650, § 302(c), 104 Stat. 5104, 5104.
95. Those researchers were Judith McKenna, Project Director, Donna Stienstra, and Joe Cecil.

work of prominent scholars in the area,[96] they produced a report and submitted it in 1993 to Congress and the Judicial Conference of the United States.[97]

The resulting study was thorough, undertaking both statistical analyses and attitudinal surveys. It considered each of the Federal Courts Study Commission's five structural alternatives[98] and developed them in greater detail. It considered the plusses and minuses of each alternative structure and indicated for each a "litigation path" to illustrate how the structural change would alter the route of an appeal through the federal appellate process.[99]

The Report also considered a series of "triage" proposals, which, although not technically "structural," involve change that might be considered equally radical:[100]

a. *Leave to Appeal.* This proposal would require disappointed district court litigants to obtain leave to appeal before they could present claims of error to the circuit courts. The Report then focused on three central questions that would determine the contours of any leave-to-appeal system: (1) what types of cases would require leave to appeal, (2) who would decide that preliminary screening question, and (3) what criteria would guide the choice. While a leave-to-appeal system would be a major statutory or *de jure* departure from the current appeal-of-right regime, it is, as we have pointed out elsewhere,[101] functionally the very same system that now prevails. Making that system the law as well as the practice would have the virtue of bringing it out of the shadows and into the light, thus subjecting it to the scrutiny of the bar and the public.
b. *Differentiated Appeal Management.* This system would involve dividing up the appeals into two or more classes of cases that would receive different types of appellate review. Its virtue is that it stretches appellate resources by concentrating them on the problematic cases, leaving the simple, routine cases to some lesser process involving Appellate Commissioners or Appellate Magistrate Judges. If this sounds familiar, it should. It is the system the circuit courts have already adopted de facto, with central staff attorneys[102] now performing the functions that Commissioners or Magistrates would under the proposal. Once again, the formal change would have the virtue of bringing the triage decision, essentially a question of distributive justice, to the attention of the bar and the public.

96. Notable among those scholars were Thomas Baker, then of Texas Tech School of Law, and Arthur Hellman of the University of Pittsburgh School of Law.

97. Judith A. McKenna, Fed. Judicial Ctr., Structural and Other Alternatives for the Federal Courts of Appeals (1993).

98. *See supra* section 10.

99. McKenna, *supra* note 97, at 105–21.

100. *Id.* at 123–38.

101. William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 Cornell L. Rev. 273 (1996).

102. *See supra* chapter 8.

c. *District Court Review for Error.* The idea here is to separate the functions of appeal into error correction and law declaration. Appeals that require only the former would be decided by special panels at the district court level. Decisions would be nonprecedential and could be appealed to the circuit level only by leave. The panels might consist of three district judges or two district judges and a circuit judge. The district judges could be from the same or a different district, and the trial judge might or might not be a panel member. Cases assigned for district level appeal could be chosen by case type, by standard of review, or by the need for oral argument, and the decision could be made by circuit court panels that would retain some cases and send others to the district level, or by party option.

The proposal has the virtue of assuring every appellant a full review by Article III judges, but it suffers from two difficulties. First, it would entail a significant increase in the workload of the district courts, in turn requiring many new district court judgeships. There is no reason to believe such an increase would be less controversial than an increase in circuit court judgeships, which could solve the appellate overload problem without creation of a new route for appeal. Second, the proposal is really just a four-tier system in disguise, and adding tiers produces huge increases in expense for the litigants, as already noted in the preceding discussion of the four-tier proposal by the Federal Courts Study Committee.

A final word on the tone and the conclusions of the Report. It is not as alarmist as many other studies, characterizing the situation of the circuit courts as "under stress" rather than "in crisis." At the outset, the Report posed the question whether that stress had produced three threats: unjust outcomes, diminished quality of the appellate process, and inconsistent interpretations of federal law.[103] The Report could not conclude the caseload crunch had resulted in a higher incidence of unjust outcomes but warned that day was likely to come soon.[104] It was less confident on the threat to the quality of the appellate process, especially its visibility and accountability; however, it correctly concluded that a return to the traditional appellate process would require a massive increase in judgeships. Finally, relying on a comprehensive empirical study by Professor Arthur Hellman,[105] it concluded that the glut of appeals had not yet produced an increase in intolerable, persistent intercircuit conflicts sufficient to threaten the consistency and coherence of federal law.

12. Long-Range Plan for the Federal Courts

In an effort to generate a "more systematic capacity to anticipate broader societal changes and plan for more distant horizons," the Report of the Federal Courts

103. McKenna, *supra* note 97, at 13.
104. See the text accompanying note 91, *supra*, for a similar "not-yet-but-soon" conclusion.
105. Hellman, *supra* note 14, at iii.

Study Committee recommended that the Judicial Conference of the United States engage in long-range planning.[106] In response, the Judicial Conference created the Committee on Long Range Planning in 1990, staffed it with four appellate judges, three district judges, a bankruptcy judge, and a magistrate judge, and charged it to prepare a long-range plan for Judicial Conference approval. The Committee's preparatory activities[107] included: reviewing prior study reports; commissioning numerous research projects by its own staff, the Federal Judicial Center, and several independent federal courts scholars; conducting retreats at which invited judges, lawyers, and academics offered suggestions; preparing and circulating a draft report;[108] and holding three public hearings on the draft.

The process culminated in a proposed draft, which was then referred to the Judicial Conference. Individual Conference members were authorized to request additional study of any recommendation resulting in about half of the total 101 recommendations being referred to appropriate Judicial Conference committees, with the remainder being adopted as proposed. The purpose of this phase was to achieve consensus within the Conference on the more controversial recommendations of the Long Range Plan. The resulting Committee studies and reports produced substantial change in or deletion of about a dozen recommendations and resulted in the adoption of the remainder by the Judicial Conference.[109]

After assessing the current state of the judiciary, the Report lays out two opposing apocalyptic visions of the future of the federal courts in 2020. In one vision, Congress has continued to heap business on the federal courts and authorized court growth to accommodate the increase. There are more than one thousand circuit judges split into at least twenty circuits arranged in two tiers. Because of these numbers, the appointment and confirmation process takes up to three years, and judges resign often because of the alienation caused by being "only a small cog in … a vast wheel of justice." The Federal Reporter is now in its seventh series, and federal law has become "vaster and more incoherent than ever."[110]

Equally hysterical is an opposite vision. Funding for staff, salaries, and courthouses has dried up because of overall pressures on the federal budget, yet Congress has continued heaping work on a federal judiciary capped at one thousand judges. Dockets lengthen to the point that litigants seek justice from private providers, and fewer and fewer qualified lawyers are willing to serve on the federal bench under such austere conditions.[111]

106. Judicial Conference of the United States, Long Range Plan for the Federal Courts, appendix B, at 165 (1995) [hereinafter Long Range Plan].

107. *Id.* at 165–74.

108. Judicial Conference of U.S,, Comm. on Long Range Planning, Proposed Long Range Plan for the Federal Courts (1994).

109. Long Range Plan, *supra* note 106, at appendix B, 171–74.

110. *Id.* at 17.

111. *Id.* at 20.

Those frightening visions of a besieged federal judiciary and the consensus-seeking, judge-dominated planning process combined to produce a document that emphasized the needs of the judges, as opposed to other stakeholders. This tendency is apparent in the Plan's jurisdictional recommendations, some of which called for the legislative and executive branches of government to change their habits for the benefit of the courts. Thus the Plan deplored the increased burden on the courts resulting from the growing "federalization" of state crimes, caused by Congress's fear that state judicial and prosecutorial resources were inadequate.[112] And the Plan had recommendations for the executive branch as well, suggesting to the Justice Department that "the potential for harder federal sentencing … and the greater capacity in the federal prisons would be insufficient … to warrant prosecution under a federal, rather than a state, criminal statute."[113]

On the civil side, the key recommendations stressed sensible reductions in diversity jurisdiction and an array of diversion paths (mostly to Article I courts and administrative agencies) for cases believed to bog down the federal courts in low-dollar-amount, fact-intensive cases unlikely to implicate the courts' law-making function.[114] Additionally, absent a showing of state court inadequacy, Congress should be hesitant to enact new legislation enforceable in federal courts. These jurisdictional restraint measures would allow a "carefully controlled" growth of the Article III judiciary "so that the creation of new judgeships, while not subject to a numerical ceiling, is limited to that number necessary to exercise federal jurisdiction."[115]

It is not hyperbole to suggest that recommendations like those reveal inappropriate judicial hubris. Presumably, Congress chooses to "federalize" a crime and the Justice Department chooses to prosecute crimes in federal court in response to their perceptions of the needs of the nation for increased security from criminal activity. Similarly, Congress creates new civil remedies in response to its perceptions of other societal needs. As they should, those perceptions reflect political pressures placed on the legislative and executive branches by their constituents, and it is narcissistic to suggest those political pressures should yield to the judges' desires for retaining a compact federal judiciary charged with handling only a limited uniquely federal docket. The federal courts are a tool for accomplishing the nation's goals, and the size of the job should control the size of the tool rather than vice versa.

While the plan had ambitious recommendations for changes in the legislative and executive branches, it is conservative with respect to the courts of appeals. Thus the Plan was "premised on the belief that the present structure of the federal courts is by-and-large appropriate for carrying out their functions" and recommended "no

112. *Id.* at 26 (comment following Recommendation 4).
113. *Id.* at 27 (Recommendation 5(b)).
114. *Id.* at 28–33.
115. *Id.* at 38 (Recommendation 15).

major structural changes in the near term."[116] Thus, it approved of preserving the generalist regional circuit courts, retaining the Supreme Court as the only arbiter of circuit conflicts, and slow measured growth in the number of judgeships.[117]

The Plan's choice of its initial premise of adequacy is curious and probably disingenuous. On the one hand, the Plan acknowledged that there have been "streamlining" changes in appellate procedure, such as screening programs, elimination of oral argument in some cases, abandonment of fully articulated opinions, and increased reliance on staff.[118] Nevertheless, the Plan assumed the traditional hallmarks of the federal appellate system including "oral argument heard in all appropriate matters, cases decided with sufficient thought, [and] opinions carefully produced after collegial deliberation in all cases of precedential importance" could be preserved in the current structure.[119] Given the counterfactual premise and the blithe assumption that all will be well provided only that the *nonjudicial branches* come to their senses, it is hard to see how the Plan added much to a realistic discussion of the future of the circuit courts.

13. The White Commission

a. Origin and Composition

Congress established the Commission on Structural Alternatives for the Federal Courts of Appeals by statute passed in 1997[120] and charged it to:

(i) study the present division of the United states into the several judicial circuits;
(ii) study the structure and alignment of the federal court of appeals system, with particular reference to the Ninth Circuit; and
(iii) report to the President and the Congress its recommendations for such changes in circuit boundaries or structure as may be appropriate for the expeditious and effective disposition of the caseload of the federal courts of appeals, consistent with fundamental concepts of fairness and due process.[121]

116. *Id.* at 41.
117. *Id.* at 43–47, Recommendations 16, 17, and 19.
118. *Id.* at 42.
119. *Id.*
120. Pub. L. No. 105–119, § 305, 111 Stat. 2440, 2491.
121. Commission on Structural Alternatives for the Federal Courts of Appeals, Final Report (1998) [hereinafter Final Report]. This and the following two paragraphs are culled from the Report, at 1–4.

Pursuant to statutory directive, the Chief Justice appointed a five-member commission consisting of retired Justice Byron R. White, two circuit judges, a district judge, and one attorney (the past president of the American Bar Association). The Commission members elected Justice White as its chair and thus has been known informally as the "White Commission."[122]

The Commission reviewed the work of previous studies as well as workload data and statistics supplied by the Federal Judicial Center and the Administrative Office.[123] Its outreach was extensive, including six public hearings at which eighty-nine witnesses testified. It also solicited written statements (ninety-two were received), and the entire Commission or its representatives met with representatives of the Justice Department, the White House Counsel's Office, the judges of the Federal and District of Columbia Circuits (because there was no hearing in the District), and a few law professors (who briefed the Commission on the published research on the federal appellate system).[124] At the Commission's request, the Federal Judicial Center conducted separate opinion surveys of circuit judges, district judges, and a large sample of attorneys who had handled appeals in the circuit courts in the preceding twelve months.[125] In October 1998, the Commission published a draft report for public comment; it received seventy-six comments and submitted its final report before the end of the year.

b. The Ninth Circuit

The Commission owed its existence to the controversy in Congress and elsewhere over the possibility of splitting the Ninth Circuit, just as the old Fifth Circuit had been split in 1981. After several years of on-again, off-again discussion, the House and Senate split on the question and settled on the formation of the Commission as a compromise.[126] The Commission came down on the side of the opponents of a split, rejecting several possible solutions because they would "deprive the west coast of a mechanism for obtaining a consistent body of … law."[127] Moreover, any possible split—the Commission examined and rejected over a dozen[128]—would produce an inequitable workload division as well as violating one or more of the traditional circuit alignment conventions: each circuit must consist of at least three contiguous states and no state can be split between two circuits.

After rejecting a split of the Ninth Circuit, the Commission recommended instead a "divisional" arrangement of the circuit. While retaining the central

122. *Id.* at 1.
123. *Id.* at 5.
124. *Id.* at 2–3.
125. *Id.* at 4.
126. *Id.* at 34.
127. *Id.* at 52.
128. Four possible configurations are examined by the Commission in greater detail. *Id.* at 54–56.

administration of the circuit, the Report recommended the circuit be restructured into three regionally based *adjudicative* divisions plus a central "Circuit Division." Each regional division would have at least seven active circuit judges and would function as a semi-autonomous decisional unit, with its own en banc process. Decisions of the regional panels would constitute precedent in that region and could be overruled only by a regional en banc process; they would not be binding in other regions. Interregional conflicts would be settled by the Circuit Division, exercising discretionary jurisdiction over conflict-generating cases after review or denial of review by the regional en banc process. Mere error would not be sufficient for Circuit Division jurisdiction; an interregional conflict would be necessary. Regional panel errors that did not implicate interregional conflicts would be settled only by the regional en banc process. The chief judge of the circuit would serve on the Circuit Division, as would twelve active circuit judges, chosen by lot, equally from each division; service on the Circuit Division would be for a term of three years, with terms staggered to assure continuity and gradual rotation.[129]

The Report based its divisional arrangement recommendation in part on the belief that the Ninth Circuit was too big to ensure coherent and consistent interpretation of federal law. There were simply too many decisions for each judge to monitor. Another reason advanced by the Report was dissatisfaction with the then existing en banc process in the Ninth Circuit. The divisional arrangement would permit more frequent and more efficient en banc hearings, smaller en banc panels, and less judge-time involved in each hearing. More frequent en banc hearings would in turn contribute to greater consistency of circuit law. Finally, the divisional arrangement would respect "the unique character of the West," while guarding against parochialism by requiring that some of the judges on each regional division come from outside the region.[130]

One of the reasons cited for not splitting the Ninth Circuit deserves special attention as an excellent example of a particular type of argument that appears too often in the appellate justice planning context: the makeweight arguments used to advocate a conclusion already reached for other reasons (good or bad). At several places in the Report, the Commission notes the value of having a single coherent interpretation of federal law for the "West."[131] Surely this is a makeweight. It seems to suggest the "West" is a more defined, distinct, or cohesive unit than any other section of the country, citing the location of some of its states on the Pacific Rim and the particular legal issues that circumstance generates. But how is the "West" any more *legally* distinctive, unique, insular, or cohesive than the East Coast (separated into the First, Second, Third, Fourth, and Eleventh Circuits) or the South (separated into the Fourth, Fifth, and Eleventh Circuits) or the Canadian border region (separated into the First, Second, Sixth, Seventh, Eighth, and Ninth Circuits)? And

129. *Id.* at 43–47.
130. The Commission lists its reasons. *Id.* at 47–49.
131. *See id.* at 36, 49, 52.

why do Nevada, Arizona, and Montana need a distinct "Western" law, but Utah, New Mexico, and Wyoming do not?

We have no view on whether the Ninth Circuit should or should not be split, but we do care about the quality of the arguments used to justify any particular arrangement or allocation (geographic or by social class) of the nation's appellate resources. Having made a decision, it is useless and harmful (it degrades the debate) to add makeweight arguments to support it.

c. Structural Options for the Courts of Appeals

The Report made the customary recitation that the courts of appeals were then (1998) managing their geometrically increasing caseloads without unacceptably compromising the quality of the appellate justice they dispensed. They had accomplished that feat by streamlining the appellate process with the help of the Appellate Triage devices (reduced oral argument, nonpublication of opinions, and reliance on staff attorneys). The second half of the usual recitation is that the process could not be streamlined any *further* "without unacceptably compromising their essential function."[132] Of course, the rest of the story is that the following twelve years witnessed exactly the additional streamlining the Report warned against. In that time period, the oral argument rate dropped from 40 percent to 26 percent;[133] the percentage of unpublished opinions increased from 75 percent to 84 percent of the total;[134] and the size and responsibilities of central staff attorneys increased significantly.[135] The most appropriate metaphor seems to be the urban myth of the boiling frog.[136]

The subsequent progressively increasing rationing of appellate justice cannot be attributed to the fault of the White Commission. Its Final Report contained a full list of recommendations that might have helped avert the slow motion deterioration of the circuit courts. But whether the Report's cures are any better than the disease is an open question.

The Report recommended a three-pronged statutory approach that would allow the circuits to experiment with (1) the divisional concept recommended for the Ninth Circuit, (2) the use of two-judge appellate panels, and (3) district court appellate panels.[137] The divisional approach would involve a statute that permitted

132. *Id.* at 25.

133. *Compare* Admin. Office of U.S. Courts, Judicial Business of the United States Courts, table S-1 (1998), *with* Admin. Office of U.S. Courts, Judicial Business of the United States Courts, table S-1 (2010).

134. *Compare* Admin. Office of U.S. Courts, Judicial Business of the United States Courts, table S-3 (1998), *with* Admin. Office of U.S. Courts, Judicial Business of the United States Courts, table S-3 (2010).

135. *See supra* chapter 8.

136. *See* Wikipedia, *Boiling Frog*, http://en.wikipedia.org/wiki/Boiling_frog.

137. Final Report, *supra* note 121, at 60.

any circuit with more than fifteen judgeships to reorganize itself into divisions. The Commission preferred the divisional arrangement to circuit splitting because only two circuits could be split into smaller units that comprised at least three states, a key circuit alignment convention.[138] Both the recommendation and the reason are highly problematic. The divisional arrangement envisioned in the report is a four-tier system, which, in our view, is the least desirable alternative structure for the circuit courts.

First, the premise behind a four-tier system is that the current three-tier system is inadequate to maintain the coherence of the national law, i.e., that the Supreme Court's docket is too small to settle all the pressing intercircuit conflicts and that the existing circuits are so large that intracircuit conflicts are too numerous.

The problem is that there is no empirical evidence for either proposition; indeed, the only available empirical studies suggest that neither type of conflict is currently a serious problem.[139] Moreover, from the point of view of society as a whole, a fourth tier is by far the most expensive way to "solve" the non-problem. At first blush, that might not seem so; after all, adding more judges to a three-tier system is not much cheaper than a four-tier setup. The problem with that view is that it measures only the governmental cost of a four-tier system. A vastly larger portion of the total *societal* cost will be that paid by the litigants. In a four-tier system, each case of any importance will involve another set of briefs, another set of arguments, another set of attorneys fees, and the immeasurable but very real cost of additional delay before a binding resolution. All that cost will be incurred because it has been traditional (except when it's not—e.g., the D.C. Circuit and the Federal Circuit) to draw circuits that contain at least three states.[140] When the divisions are created, each will perforce not consist of three states. Will that be problematic? If not, why incur so much expense to make sure each circuit does?

The Commission's second recommendation was that Congress amend 28 U.S.C. § 46[141] to permit a circuit court by rule to provide for disposition of appeals by panels of two judges of the circuit. The two-judge panels would decide the cases now shunted to the truncated appellate process, and three-judge panels would be convened to decide cases of greater importance or precedential value. If the two judges were unable to agree, they could enlist a third judge or refer the case to a three-judge panel.

This proposal has some potential if the two-judge panel hears oral argument and disposes of the case by a hands-on precedential decision. Real attention from two Article III judges is better than processing by staff attorneys with cursory review by a three-judge panel. However, it is not completely clear the Commission intended the

138. *Id.* at 61.
139. *See infra* chapter 12.
140. *See supra* section A.4.a.
141. Final Report, *supra* note 121, at 62.

two-judge panel procedure to work that way. Indeed, the likely intent was that the two-judge panel would treat the Track Two cases in much the same way three-judge panels do now (no oral argument, minimal conference, desultory opinion drafted by staff attorneys).[142] If that is the proposal, it is unlikely to save much time because judges currently spend so little time on such cases. Alternatively, if the proposal is that the two-judge panel provide the traditional appellate process to the less important cases, then the arrangement would not save judicial time but would rather do the opposite; hands-on review by two judges costs more judge-hours than the currently prevalent cursory review by three. Another issue raised by the proposal is that it leaves the crucial question—who decides which cases get which treatment—up in the air.

The Commission's third proposal was that Congress authorize the circuits to experiment with District Court Appellate Panels (DCAP). The Judicial Conference would provide by local rule for the convening of three-judge panels consisting of one circuit judge and two district judges. Review of a DCAP decision would be in the circuit court but only by leave of that court. The Report suggested likely candidates for DCAP treatment would be diversity appeals, sentencing appeals, and, generally, any cases that require only application of well-settled law to varying facts. If the case presented an unanticipated significant issue, the DCAP could refer it to the circuit court, which would be required to take it.[143] The Report did not ultimately endorse the concept of DCAPs, but recommended experimentation, after which a more informed judgment would follow.

This proposal is not troublesome intrinsically; again, actual review of a case by two district judges and a circuit judge is better than virtual review by a three-judge panel that merely endorses a proposed disposition drafted by the central staff. There are, however, some potential issues. First, the proposal requires triage, and, again, the crucial question is who will decide if the case goes to a DCAP or to the circuit court: the DCAP, the central staff? Second, the proposal adds value only to the extent that it involves actual judicial attention to the screened cases. If instead most of the work, as now, is done by staff attorneys with DCAP ratification, it is difficult to see the value added. Finally, the proposal would require additional district court judgeships to handle the added work, and it is worth asking why creating additional district judgeships is any less problematic than, more simply, creating enough circuit judgeships to provide the traditional appellate process to all appeals.

d. Discretionary Review

The Report discussed but ultimately rejected a proposal to change the jurisdiction of the courts of appeals from mandatory to discretionary. Like the Supreme Court

142. *Id.* at 63.
143. *Id.* at 64–65.

and the high courts in many states, the circuit courts, under the proposal, would be able to choose the cases they decide, thus removing the right to at least one appeal currently afforded federal court litigants.

Although the idea was rejected, the Report's discussion speaks volumes about what any fair-minded observer would conclude from the last forty years of appellate reform. Initially, the Report noted the traditional distinction between *certiorari* and appeal of right and then continued to describe how the clear distinction had changed in the preceding thirty years (1970–1998).

> Up until three decades ago this right to appeal was assumed to include an opportunity to file briefs, to present oral argument to the court, and to receive from the court a written opinion explaining the decision. That conception of an appeal, however, has undergone modification as the appellate courts have adopted screening and tracking procedures through which a large proportion of appeals are decided by the court without oral argument and by judgment orders or unelaborated opinions.
>
> This development has blurred the distinction between obligatory and discretionary review. Under either type of jurisdiction, litigants file papers with the court containing arguments, facts, and legal authority, and the court considers those papers.… In other words, whether the court's jurisdiction is labeled obligatory or discretionary, litigants obtain a judicial examination of their contentions either through an abbreviated process [Track Two in the circuit courts and *certiorari* denial in the Supreme Court] or what is considered the traditional appellate process.[144]

Although the Report went on to consider but reject a hybrid intermediate process for most cases, it again conceded that the circuit courts already were exercising a form of de facto discretionary jurisdiction.

> In [some state appellate] courts, a denial of leave [to appeal] is in functional effect like a decision in a federal court of appeals to send a case through to decision without oral argument and dispose of it without a full opinion. The similarity is especially marked if the court issues only a one-line affirmance.[145]

These passages are truly remarkable; they show the judicial establishment had finally realized what some critics had been arguing for many years: the circuit courts were transforming themselves, without statutory authorization, from courts of mandatory jurisdiction into *certiorari* courts. Remarkably, the Report made this observation in a matter-of-fact fashion, with no apparent indignation or even disapproval.

144. *Id.* at 70–71.
145. *Id.* at 71.

B. SOME OBSERVATIONS ABOUT THE STUDIES

After reviewing a generation's worth of studies and proposals for reforming the federal appellate court system, it is possible to make some observations and draw some conclusions.

1. Alarmism: How Serious Is the Problem?

The studies reveal varying amounts of alarm for the future of the federal appellate courts, with the Long Range Plan leading the league with its two contrasting but equally apocalyptic potential futures for the courts. The amount of alarm is one question, but its target is another. The most extreme rhetoric seems to be directed at the possibility that the federal appellate system will become too large and "bureaucratic." Equally troubling to many of the study groups is the possibility of burgeoning and increasingly incoherent federal law. As a serious concern, this worry has been significantly discounted by empirical studies that demonstrate that incoherence and inconsistency are not currently dangers that face the federal appellate system.[146] Moreover, many of these empirical studies were carried out before the "information revolution" of the past twenty years, which has made dealing with large bodies of digitized data much less unwieldy.

Another cause for alarm that appears in the studies is the possibility that the circuit courts have so transformed their internal processes that some very large proportion of the docket receives scant demonstrable attention of the judges. Several points about this concern are worth noting. First, earlier studies tend to show more of this alarm than do later ones. Second, successive studies have warned that the circuit courts, as of the study date, had reached the limit of their ability to trim the appellate process without serious jeopardy to its central values. A few years later, with a larger portion of the docket committed to the truncated process, another commission will state the same conclusion. Taken together, these two points show that "intolerable damage to the circuit court's central mission" is a moving target. The further away the judges get from a time when the traditional process was the rule rather than the exception, the more tolerant they become of the Track Two process. The Appellate Triage regime began by using a truncated procedure on a small portion of the docket composed largely of pro se prisoner cases; today it accounts for the vast majority of the docket. We have said it before, but the metaphor of the boiling frog is so apt that it bears repeating; as long as the year-to-year change is gradual, the judges appear willing to concentrate their full attention on a

146. *See infra* chapter 12.

steadily decreasing fraction of the docket. Their willingness to tolerate the progressive restriction of the full appellate process to a smaller and smaller portion of the docket appears, so far, to be limitless.

2. Error Correction versus Law Declaration: For Richer, For Poorer

There is a strong consensus that the two functions of an appellate court are error correction and law declaration. The relative importance of the two and the amount of judge-time allocable to each are subject to greater controversy. For better or worse, the circuit judges have made their priorities clear, concentrating the vast majority of their time on the Track One cases, the very few that they (or the central staff attorneys) believe call for law declaration, at the expense of the large portion of the docket that requires only error correction.

By and large, the various studies reveal the same bias. The possibility of a National Court of Appeals, for instance, or some other alternative pyramidal structure is interesting only to the extent that the focus is on the courts' law declaration function. Such a court would not help the courts' error correction mission; its selling point is that it provides a method for coordinating the precedents of the several circuits. Similarly, the various four-tier proposals, the specialized court models, and the consideration of alternative configurations of the federal appellate system are all designed to enhance consistency and coherence of circuit and national law, but again that matters mostly for the "law declaration" cases. Likewise, the many discussions of appropriate circuit size routinely consider the maximum number of judges that could participate in an en banc hearing, a procedure rarely if ever used for Track Two cases.

Two observations about the various study groups' preoccupation with the law declaration function are useful. First, it seems to involve placing the cart before the horse; there is no evidence that law-declaration coherence is currently a problem within or among circuits. *The available empirical studies suggest otherwise*. The notion that doctrinal incoherence will necessarily accompany an increase in judgeships sufficient to accord traditional appellate process to the entire docket is treated as an unquestionable postulate.

The result is a highly suspect cost-benefit analysis: the *actual and current* problem of inadequate capacity is trumped by the future and hypothetical problem of doctrinal incoherence. In other words, the situation is this: today there is woefully insufficient capacity within the federal appellate system, but adding capacity may create problems of law-declaration coherence at some unspecified time in the future. A similar argument might encourage firefighters to allow the building to burn because putting out the fire *might* result in substantial expense required to repair water damage.

The second observation is that the studies' focus on law declaration at the expense of error correction is inherently classist. For most small, one-time litigants,

error correction is all that matters; by contrast, rich and powerful governmental and business entities, whose activities may spread across the country or around the world, care a great deal about consistent law declaration. For them, uncertainty is a needless expense. No doubt the composition of the study groups contributed much to this biased focus. With few exceptions, the study groups were made up of circuit and district judges, elected and appointed officials, and distinguished practitioners; there were few places at the table for public service attorneys and none at all for pro se litigants. Ironically, as the percentage of cases afforded full appellate process progressively dwindles, the number of "have-not" litigants has grown to include some with wealth and power, so perhaps the steadily increasing use of Appellate Triage may be self-limiting.

3. The Issues Not Studied

The study groups' focus on law declaration and the "big case" had a great deal to do with the issues they chose to study. But it also controlled the topics they tended to ignore, nearly all of which concern the treatment of the "less important" cases. With a fresh look at the problem, that seems like an odd set of choices. The law-declaration case or Track One case, about 15 to 20 percent of the docket, gets the full traditional appellate procedure, and there really is no dissatisfaction with that. By contrast, the error correction or Track Two case, the vast majority of the docket, gets the very truncated procedure, which many argue is inadequate. Why focus study efforts on the small slice that is satisfactory at the expense of the large slice that is problematic?

What questions did the study groups ignore by focusing so little attention on the mere "error correction" cases? The answer, it turns out, is a vast array of issues that might have made the truncated process more adequate. For instance, the studies include a substantial number of opinion surveys, but not one involving the comparative satisfaction of losing litigants in Track One versus Track Two cases. There are also no opinion surveys of pro se litigants, the vast majority of whom are screened away from the traditional process. There are ample surveys of judges, who do more of the work on the law declaration cases, but no surveys of the staff attorneys, who do nearly all the work on the less favored portion of the docket.

Apart from opinion surveys, it would help to know the racial and income breakdown of litigants in the Track One and Track Two cases. The answer to that question would help decide whether there is equal justice done to "rich and poor alike." There have been scholarly studies of intra- and intercircuit consistency in the law declaration, but not a single "second look" study to determine if some of the Track Two cases have been mischaracterized or even wrongly decided. We know a great deal about the coherence of the law that controls the big cases, but very little about the consistency, coherence, and need for development in the law governing Track Two cases.

The process for deciding Track Two cases also received scant attention. It is widely known that central staff do much of the work on Track Two cases, but the uses of central staff vary widely among the circuits. Where is the study and discussion of which circuit models are better and which are worse?[147] How should staff attorneys be hired and what qualifications should they have? Should they be interviewed by the judges or only the supervising staff attorneys? Should they work always at the circuits' headquarters or might they be spread around the circuit? Is it wise to let them specialize in particular types of cases, or should they all be generalists? Should their jobs be career positions, or should there be a fixed relatively short term (like law clerks)? Most of these questions have not been posed, much less studied by the succession of study groups.

A final overlooked question may be the most important of all: who should decide whether a case belongs on Track One or Two? As is clear by now, that decision controls not only the type of process the case will receive, but also has a potential effect on its outcome because reversal rates are so different for the two groups. There are several possibilities: a special panel of judges, a single judge (with responsibility for screening divided proportionately among the judges), or the staff attorneys? If it is to be the staff, should each attorney bear some portion of the responsibility, with freshly minted law graduates making triage decisions in their first week on the job? Alternatively, should only staff supervisors screen? In small circuits, there is likely to be only one supervisor; should one nonjudicial official have that much say about which cases are useful for law making?

These are all questions that would have profited from additional attention, but the approach of the several study groups in the main was to ignore them and devote more and more attention to a steadily dwindling portion of the docket. Like the two-track system itself, the differential focus of the study groups represents a curious set of policy choices. This observation supports the strong inference that study groups, largely made up of members and friends of the judicial establishment, will not address the real problems that face today's federal circuit courts. Rather, the focus has been on methods of preserving the status of the circuit judges (hence, the various efforts to shift work to the district courts). It is that focus, and the price society pays for maintaining that status, that we find so objectionable.

147. Scholars have paid some attention to these issues; see the sources cited in chapter 8, *supra*. Moreover, there are excellent papers written by the staff of the Federal Judicial Center. *See* Judith A. McKenna, Laurel L. Hooper & Mary Clark, Case Management Procedures in the Federal Courts of Appeals 8 (2000); Donna Stienstra & Joe Cecil, The Role of Staff Attorneys and Face-to-Face Conferencing in Non-Argument Decisionmaking (1989); Federal Judicial Center, Central Legal Staffs in the United States Courts of Appeals: A Survey of Internal Operating Procedures (1978). The reports of the blue ribbon panels, commissions, and study groups pay little attention to these resources. That lacuna should not surprise anyone who has read this far.