

Having Faced the Circuit-Splitting Conundrum - What About More Judges, Less Staff?

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The most precious resource in the federal appellate system is the cadre of circuit court judges. These judges are worth more than their pay and possess extraordinary ability and experience. Recently, there has been a dramatic increase in the appellate caseload that confronts these judges. Yet, increasing this resource has been the option of last resort. Instead, keeping the number of judges small, while shrinking the appellate process, and greatly expanding staff have been the methods of choice for dealing with caseload growth. However, even a small increase in judges has added enough size to some federal circuits that unwieldiness also has become an issue.

I. What the Commission Report Does - -Make Recommendations Regarding the Circuit Court Splitting Issue.

The Final Report of the Commission on Structural Alternatives for the Federal Courts of Appeals suggests realistic and admirable solutions to the questions it was asked to consider. The questions posed deal with certain limited aspects of the crisis in caseload volume in the Ninth Circuit and elsewhere. More particularly, the primary question posed is what should the President and Congress do about the court-splitting conundrum that presently exists in the Ninth Circuit as well as generally at large. n1 The answer to this 100 year-old dilemma n2 is perhaps not as critical as the questions that were not asked of the Commission. n3

II. What the Report Was Not Asked To Do - Address the Broader Problem of How To Handle Future Growth in Caseload.

For a generation there has been a crisis of volume in the federal appellate courts. n4

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The lesser-included issue within the crisis of caseload volume is what should be done regarding the organizational structure of increasingly large circuits. The Commission has suggested a commendable solution to this limited component of the more overriding concern of maintaining quality and legitimacy in the face of caseload volume. This suggested solution is essentially the same method used to deal with the increase in volume that occurred from the Sixties to the Nineties. The dramatic increases in staff and the transforming changes in operational methods have made it possible for federal appellate judges to handle a caseload that has grown much faster than the ranks of appellate judges.

There has been a great deal of controversy concerning the desirability of the changes which have already been implemented. The adoption of abbreviated internal processes combined with the employment of central staff attorneys and additional law clerks as well as the expansion of the functions of these non-judicial personnel have raised serious concerns. As the Commission noted:

Collectively, this transformation of process in personnel in the courts of appeals over the last three decades has given rise to concerns among judges, lawyers, and legal scholars that the quality of appellate decision making may have been eroded and that there has been undue delegation of judicial work to non-judges. As to appeals decided without oral argument, the process has become less visible and, when combined with a less than fully reasoned opinion or cryptic judgment order, raises apprehensions as to the degree of attention those appeals actually receive from judges themselves. The apprehensions are intensified when the court uses staff attorneys to draft proposed dispositions, prompting claims by some critics of an "invisible judiciary," in addition to assertions of an invisible process, sometimes summarized in the claim that appellate courts have become "bureaucratized." n5

Obviously, these changes have their supporters or else the changes would not have been implemented in the first place. The supporters are primarily the judges who face the task of somehow dealing with the increase in caseload volume. These judges have determined that the rationing of their time and expanding their staff are the best ways to cope with the increasing volume of appeals.

The majority of the increase in volume of appeals has come from the number of criminal appeals and from civil appeals of cases brought by prisoners. n6 The perception has developed over time that these cases present repetitive non-complex issues that can be handled with much less judge time than the traditional mix of appellate cases. To deal with these types of cases, the courts have implemented staff screening procedures to separate those cases that require significant judge time from those that do not. n7 A case will then be assigned to a redacted appellate process or a full appellate process. n8 The treatment a case ultimately receives depends on which of the two tracks the screening process deems appropriate. n9 It is thought that most of this criminal-related increase in caseload should be handled by streamlining procedures and delegating functions to staff rather than adding judges.

However, for better or worse, this solution has now reached its maximum effectiveness in the federal system, even in the eyes of many who do not attack it. The Commission itself declares:

We believe, however, that most courts have streamlined their procedures as much as they can without unacceptably compromising their essential functions. The use of nonjudicial staff, nonargument decision-making procedures, summary orders or unelaborated dispositions, and other procedural accommodations to caseload volume have made the courts more efficient, but at some cost to the appearance of legitimacy of the appellate process, and at some risk to the quality of appellate justice. n10

The expected increase in caseload volume after the Nineties will have to be met in other innovative ways if the basic goals of appellate courts are to be met. Not only have the courts already maximized efficiency to the limits of maintaining quality, but also, the next increase in

volume will almost certainly include not only an increase in cases that are easy to handle but also cases that are difficult to handle. Additionally, history does not support the assumption that future caseload growth will be restricted to criminal-related cases. ⁿ¹¹ Therefore, the circuit courts in the near future will face growth which is not only beyond their current capacity, but also growth that will be different in nature from recent experience.

The expected increase in volume after the Nineties will have to be met in other ways if the basic purposes of appellate courts are to be met. The next increase in volume should be addressed with not only an increase in judges but also an increase in the rate of increase of judges. The increase in rate will be necessary because the future increase in volume will probably not be limited to cases that can easily be streamlined for judges by staff. Growth in complex cases will require more judge time.

III. The Old Question - How to Handle the Growth in Volume From the Sixties to the Present - Truncate Procedures and Delegate To a Greatly Expanded Staff.

For the last thirty years, the crisis in volume in the appellate courts has been met primarily in two ways. One way has been through an enormous expansion of judicial resources by means of the addition of staff attorneys, law clerks, mediation attorneys, appellate commissioners, visiting judges, senior judges, court technical experts, librarians, clerks of court, and others.

The second response has been to ration and truncate the work of judges. Oral arguments have been reduced or eliminated, written opinions have been greatly reduced, conferences of judges have lessened, and screening and delegation of judicial functions to staff has increased. Unpublished opinions and no-citation rules are also part of this change in opinion issuance.

These changes to the system involved decision-makers whose identity is largely unknown. These changes also took a process that has always been private and made it even more private. Sometimes the final decision to alter the appellate process is not made publicly available. Sometimes the final decision cannot be cited. Sometimes the final decision is not part of the common law. Sometimes the final decision is not subject to public scrutiny.

The practical effect of these changes has been that before an appellate judge encounters a case, it is not uncommon for that case to have been screened by a staff attorney who determines which tier or track of consideration it will follow. Non-judicial personnel are making the threshold determination of whether a case will receive more staff time or more judge time. This development presents the appellate advocate with a new and daunting task. As an illustration of the new appellate paradigm, former Chief Judge Patricia Wald recently offered some tips for appellate advocacy. ⁿ¹² The first tip in communicating with a modern circuit court is to figure out how to get the attention of the judges:

The first hurdle for an appellate lawyer these days in our circuit is "getting there" - not to the circuit court as an institution, but to the judges as individual decisionmakers, the realpolitik of judicial review as it were.

... But even so, we dispose of over 40% of that relatively small number in a summary fashion. That means a panel of three judges, sitting for a few months at a time, assembles itself once every two weeks and proceeds expeditiously, some might even say whips, through 20-30 cases in a morning. If your case is so channeled, candidly, it means the three judges are more likely

than not to follow the recommendation of the memorandum written up by the staff counsel; ...
n13

This illustrates how the changes in process and staff can affect advocacy as well as decision-making. However, it is not just advocacy that changes. The process of deciding cases has also changed in many ways. The following is a brief description of the process by which appellate judges today go about disposing cases.

It is not unusual for a federal appellate court judge to receive at the beginning of a case a bench memorandum prepared by staff, which contains:

1. A description of the procedural history and posture of the case;
2. Statement of the issues;
3. Summary of facts necessary for decision;
4. Summary of arguments;
5. The staff attorney's or law clerk's own analysis of the law of facts;
6. The staff attorney's or law clerk's own recommendations of disposition;
7. A draft memorandum decision;
8. A recommendation on oral argument; and
9. Suggestions of issues to be discussed at oral argument. n14

A judge or the advocates or both traditionally did the first eight of these functions, but not staff.

There have been other equally significant changes in the decision-making process. Oral arguments have been radically shortened, sometimes abandoned, and usually they have been transformed in both style and function. Nominally, it is still called an argument by counsel, but the delivery of an organized, thought-out, and carefully reasoned presentation is rare. Instead, a chopped up, jerky defense of a position is common, and it is not unusual for oral argument to appear as a lobbying venue for decisions already made.

The briefing process and conference deliberations have also changed, but not as radically. Lawyers are required to address certain jurisdictional, procedural, and scope of review issues whether raised by an adversary or not. Length is reduced and synopsis is often required. As for conference deliberation, judge-to-judge time is often reduced and chamber-to-chamber communication through staff is usually substituted.

The availability of the record on appeal has also changed over time. It is usually not even sent to the Court of Appeals but remains in the District Court. A record appendix sometimes replaces even the joint appendix so that only a skeleton of the case accompanies the briefs to chambers.

Finally, opinions have been either shortened, held back from publication or citation, or abolished altogether. These changes streamline the process and enable judges to handle a higher caseload, but at what cost.

IV. The Argument that the Old Answer Was Good.

A. Quality Is Being Maintained While Speed and Efficiency Are Improved.

The source of the last generation of growth in the appellate caseload is different in nature from the traditional caseload. It stems from the criminal-related portion of the docket. The new growth does not require as much judge time. There is an initial need to screen cases, but this requires more staff and not more judges.

The primary source of increased appeals from the Sixties to the Nineties has been associated with the growth in criminal prosecutions. n15 There has been an increase in the number of direct criminal appeals, particularly since the federal sentencing guidelines were enacted. n16 The Commission has also noted that other related causes are stepped-up prosecutorial efforts, mandatory minimum sentences, the availability of appellate review of sentences even after a guilty plea, as well as the sentencing guidelines themselves. n17 Another huge increase in direct criminal appeals has come from the growth in civil suits by incarcerated prisoners, which now make up more than 30 percent of the docket. n18 When the civil and criminal portions of the prison-related appellate docket are combined, they constitute approximately 53 percent of the docket as of 1997. n19

To deal with this increase in caseload, the judicial conference has developed a statistical formula to measure the need for judges. n20 Many judges agree and disagree with this formula. The formula is based on past appellate court experience as the most appropriate measurement of the need for additional judges. Some argue that the nature of the increase in appellate filings means these cases can be effectively handled without full appellate process, and thus should not be used in the formula for the allocation of additional circuit court judges. n21 Chief Judge Wilkinson of the Fourth Circuit also argues that judicial staffing based on a formula ignores important fundamental questions such as: how many judges are the optimal size for a circuit court; whether there is a point at which the addition of more judges creates more work for a circuit than it resolves; whether more efficiencies can be employed to eliminate the need for more judges; and whether there should be changes in federal jurisdictions. n22

There are certainly reasons to be cautious about adding more judges. Some of the major concerns about such an increase are the cost of expansion, the potential cheapening effect of expansion, the potential erosion of collegiality, and the potential lessening of coherence in the law of the circuit. n23 On the other hand, most of the arguments that quality is being maintained by improved efficiency come from the current judges on the circuit courts. They believe the current caseload is being handled well by the changes in process and staff.

V. The Argument That the Old Answer Was Bad.

A. Quality Is Being Sacrificed for Speed - A Lament for the Demise of the Traditional Model of Appeals.

In the traditional model, each judge would read the briefs with care and discrimination. Each judge would read the record to the extent necessary to understand the case and validate significant facts. Each judge would then hear oral arguments and listen attentively to the advocates who have lived with the case and who offer competing ideas through the technique of the adversarial system. Each judge would subsequently give independent thought to the case, and then engage in open-minded collaboration with colleagues. During this process, each judge or their law clerk would do independent research if appropriate. Finally, one judge would write an

opinion and the other judges would study and contribute to that opinion. Under this model, the judges themselves would be interested, impartial legal scholars who could think independently and act collegially. They would be known to the bar. Each judge was ultimately required and expected to have abundant wisdom and common sense.

However, since the 1960's, this traditional model has given way to a reliance on non-judicial personnel and the truncation of internal processes. Those who advocate more judges fear that these judicial responses to the increase in volume since the 1960's have gone too far. The addition of more law clerks and the radical conversion of their functions, along with their increase in tenure, the addition of central staff attorneys, mediation attorneys, and others, has reached the point of concern. The fear is that judicial functions are being delegated to nonjudicial court personnel.

The work of circuit courts has never been very public. When this is aggravated by the rationing and truncating of the work of judges, it becomes even less visible. The development of the unpublished opinion, when combined with a no-citation rule, further reduces the visibility of the courts and their processes. The restriction or abolishment of oral arguments, the diminished quality of briefs, the reduction in the number of written opinions, and the reduction in conferences of judges fuel the fears of those who believe too much delegation of judicial function is an insufficient response to the increase in caseload.

The public tends to view the workings of all of government with a healthy dose of skepticism. Judge Posner reminds us that the judicial branch is no different in the eyes of the public. n24 It has been said that "anonymity and irresponsibility go hand in hand, in all branches of government...." n25

The purpose of the federal circuit courts is to provide judicial review of an alleged error committed by a very powerful single-judge federal district court. A citizen has lost a dispute. The citizen does not believe the outcome was based on legitimate legal process but, rather, there was an error of law. The unsuccessful litigant in the trial court is entitled to judicial review that will either vindicate the litigant's view or legitimize the decision of the trial court.

In the past, the internal process of circuit court decision-making has been shielded from public view and rightly so. Judges as well as other decision-makers do a better job when initially given an opportunity to think, deliberate candidly, and test ideas with colleagues in private. While the decision making process was traditionally carried out in private, it was done by judges who were publicly known. When these judges completed their private work, they wrote public opinions which were considered precedential law. These opinions were then subject to the test of scrutiny by the parties, the public, other courts, and legal scholars.

The truncating of procedures, the addition of large staffs, and the further reduction of what was already a very limited public visibility has cast a shadow on this honorable tradition in the appellate courts. Many have expressed the concerns that the use of unpublished opinions creates a two-tiered body of law, one of which is in the shadows. These unseen decisions may be insulated from the rarifying effects of stare decisis, and this causes the members of the court to be less accountable. Other concerns revolve around the loss of the beneficial effect of the hard crucible of drafting written opinions by judges themselves; the loss of the legitimizing effect of visible publicly available decisions; a loss of quality in deciding cases; a loss of judicial precedent as a foundation of the common law; the loss of the beneficial effects of open

government in the judicial branch; the loss of accountability of appellate courts to the bar and the public; and the loss of accountability of trial courts to the appellate courts, the bar, and the public.

Trial courts, on the other hand, have always been far more visible than courts of appeals. The presentation of the entire case is public and the judge makes decisions that are seen personally. Yet, even the trial courts no longer have the same exalted aura for our citizens. Perhaps that is one reason there are more appeals.

On this balmy day in June, 100 Centre Street was an easy walk uptown from Wall Street. In all the years he had lived in New York and worked downtown, Sherman had never noticed the Criminal Courts Building, even though it was one of the biggest and grandest buildings in the City Hall area. An architect named Harvey Wiley Corbett had designed it in the Moderne style, which was now called Art Deco. Corbett, once so famous, had been forgotten except by a handful of architectural historians; likewise, the excitement over the Criminal Courts Building when it was completed in 1933. The patterns of stone and brass and glass at the entrance were still impressive, but when Sherman reached the great lobby within, ...

... To him, it was like the Port Authority bus terminal. n26

If the perception among the public of trial courts is that the impressive exterior image is in many ways a facade for a process much less majestic, what of the appellate courts? The appellate courts are largely unknown to the public and do not project much of an outward image. If the august trappings of black robed experienced judges in awe-inspiring surroundings listening to carefully delivered advocacy is perceived as myth, what might its image to the layperson become? Courthouses and courtrooms might disappear, judges may be crowded into a large mass of various other people who all work on the cases in a regionally based network of scattered offices. It might look to a layperson much like an administrative agency.

VI. The Commission's Suggestion for Circuit Organization For Large Courts.

While increases in staff and reductions in process have been the major responses to the increase in caseload volume, there has also been some increase in the number of appellate judges. This increase in the number of judges has enlarged some federal circuit courts to the point of being cumbersome. The principal task of the Commission has been to recommend solutions for the problems associated with the growth in the number of circuit court judges.

A. The Experience of Splitting the Old Fifth.

The details of this long and difficult process are described in *A Court Divided: The Fifth Circuit Court of Appeals and the Politics of Judicial Reform*. n27 The name of the work itself is revealing of the political process undertaken. In 1973, the Commission on Revision of the Federal Court Appellate System recommended splitting both the Fifth and the Ninth Circuits. n28 The splitting of the old Fifth into the newly created Eleventh and a new Fifth was a culmination of a protracted debate over sound judicial administration.

There remains wide disagreement regionally and nationally about the desirability of now splitting the Ninth Circuit and, if so, how it should be done. In the face of growing demand to do something, Congress created the Commission on Structural Alternatives for the Federal Courts

of Appeal. n29 Its mission was to study and report on structural alternatives for the federal courts of appeal in general, and the Ninth Circuit in particular. n30

There were a number of factors that the Commission considered and debated but one it did not.

There is one principle that we regard as undebatable: It is wrong to realign circuits (or not realign them) and to restructure courts (or leave them alone) because of particular judicial decisions or particular judges. This rule must be faithfully honored, for the independence of the judiciary is of constitutional dimension and requires no less. n31

The net result of this decision is to ask a political body to reconfigure a judicial body without using politics as criteria. It is possible but certainly not easy. The Commission has proposed a very well thought-out solution that has much to commend it.

B. Splitting the Circuits Generally.

In response to the circuit-splitting inquiry, the Commission recommends in general:

Although other courts of appeal may become large enough to require restructuring, circuit splitting as a means to that end will rarely be feasible without extensive and undesirable circuit reconfiguration.

To avoid the cost and disruptions of creating new circuits, Congress should authorize courts with more than 15 judgeships to restructure themselves into smaller adjudicated divisions.

The need to restructure will vary among the circuits, but as courts reach 18 to 20 judgeships, the need for restructuring becomes especially compelling, in order to maintain consistency and coherence. n32

C. Splitting the Ninth.

To implement the more general proposals set out above, the Commission recommends with respect to the Ninth Circuit in particular:

Splitting the Ninth Circuit itself would be impractical and is unnecessary. As an administrative entity, the Circuit should be preserved without statutory change.

The Circuit's Court of Appeals should continue to provide the West a single body of federal decision of law. To improve the consistency and coherence of that Court's decisions, however, Congress should restructure it into smaller, regionally based divisions - adjudicative divisions - each division to decide appeals arising within its region.

Each regional division should have from 7 to 11 active circuit judges. A majority should reside in the division, but some should serve for a term in a division other than where they reside to enhance interdivisional consistency.

Each regional division should perform an en banc function as if it were a court of appeals. The circuit-wide en banc process should be abolished.

A "Circuit Division" with 13 judges from all regional divisions, serving for limited terms in addition to their regular assignments, should resolve conflicts between the regional divisions.

Recourse from decisions of regional divisions, except when the circuit division exercises its discretion to resolve interdivisional conflicts, and from circuit division decisions should be to the Supreme Court. n33

VII. The Commission's Assessment of Then and Now - Truncating Processes and Delegating to Staff Has Reached Its Limits.

The recent growth in caseload volume since the Sixties has been handled outside of the traditional model. The next period of growth will include both the new type of criminal-related cases, which do not require as much judicial attention, and the traditional cases, which do require a greater amount of judicial attention.

The new model of truncating procedures and adding staff has reached capacity. Yet, the future growth in the number of traditional appellate cases as well as the recent swell in criminal-related cases must be met. Quality will deteriorate in the future unless more judges are added.

In the Commission's own words:

We believe, however, that most courts have streamlined their procedures as much as they can without unacceptably compromising their essential functions. The use of nonjudicial staff, nonargument decision making procedures, summary orders or unelaborated dispositions, and other procedural accommodations to caseload volume have made the courts more efficient, but at some cost to the appearance of legitimacy of the appellate process, and at some risk to the quality of appellate justice. Some courts have adopted these procedures in an effort to avoid requesting new judgeships, because their judges believe the deleterious effects of expanding the appellate bench outweigh its benefits. Courts can absorb caseload growth without large judgeship increases when that growth occurs largely in the types of cases that take little judicial time to resolve. There is no guarantee - and history does not support the assumption - that caseload growth will be restricted to these areas. We suggest in this report structural alternatives to address the effects of growth, when growth becomes necessary, that will avoid circuit reconfiguration while maintaining appellate . decisional units of acceptable size and enable the courts to continue to render decisions in a fair, timely, and reasonable manner. n34

The Commission's conclusion from its survey results were that "in general, the courts have successfully accommodated their increased caseloads by streamlining their processes and developing efficient methods of appellate case management." n35 On the other hand, the Commission also concluded that most courts have now reached the maximum streamlining that is acceptable. n36

VIII. The New Debate - How to Handle the Growth in Volume After the Nineties.

A. Deja Vu All Over Again.

Regardless of whether past administrative efficiencies have gone too far or have been completely successful, the consensus seems to be that something will have to be done differently in the future. The debate will soon return again to the issue of whether to add significant numbers of judges or whether to adopt alternative methods of handling the increase in volume.

B. Courts Under Siege.

Truncating procedures and delegating judicial functions to staff is a natural choice for those who have no power to reduce the flow of cases as well as no desire to let the cases back up. After adding staff and truncating procedures, however, the courts still find themselves besieged by increasing volume. The newest techniques resemble defensive siege tactics. The drawbridge of subject matter jurisdiction and personal jurisdiction is now more difficult to cross. Procedural alligators in the moat of filings and deadlines are more numerous and vicious. Cauldrons of issues not raised are poured on those who would come in. Arrows of issues not preserved are rained on others who would come in. Catapults of procedural stones are launched. Calling up reserves to reinforce those on the front line is frequent. Establishing ravelins outside the walls to cover the gateway is common. Heavy crossfire from the towers is not uncommon. Nonetheless, more cases keep coming from outside the walls.

IX. What Are the Courts Trying to Do and Where Are the Courts Trying to Go?

Before circuit courts can develop successful new strategies for dealing with the increase in volume, there must be a re-examination of the mission for which these strategies are deployed. What are the courts trying to do? What are the primary purposes of appellate courts? Most would quickly recognize two primary functions of appellate courts:

1. To correct error in the trial court.
 2. To declare law - both by enunciating law and harmonizing law.
- Others would also add to that list:
3. To do substantial justice.
 4. To supervise the lower courts and add legitimacy to the process.

These are the traditional purposes behind the operation of the courts of appeal. These purposes remain valid and should be vigorously pursued in the disposition of future appeals.

X. The New Primary Purpose of Appellate Courts - Move the Docket.

However, anyone who has more than a passing acquaintance with appellate practice knows that there is a new and overriding primary purpose for appellate courts, and that is moving the overcrowded docket. "We have arrived at the modern appellate wisdom that it is more important that an appeal be decided than that it be decided rightly." ⁿ³⁷ Moving the docket has been the primary goal behind all of the new procedures for truncating the process. It has been the primary goal behind rationing judge time and adding large staffs to whom work can be delegated. It is the primary goal behind the increase in procedural rather than merit dispositions.

Therefore, stressed trial courts, new legislation, new causes of action, enhanced rights of criminal defendants and other factors have increased the volume of cases to the point that moving the docket has become supremely important.

The purpose of any new strategies to deal with caseload volume should be to provide more high quality judicial production. One way to do this is to add more judges. Another way is to do

this is to find more time for judges to do their judging by freeing them from tasks that others can do. Congress has been parsimonious in adding judges. The courts have been liberal in finding ways to free up judge time.

It may be useful at this time to step back for a moment and look at the American citizens' purpose for appellate courts. One way to state this primary purpose might be to judge appealed cases correctly and to be perceived as judging them correctly. However, it is not enough to be right, and it is not enough to use the right process. As Lord Herschell remarked to Sir George Jessel: "Important as it is that people should get justice, it was even more important that they should be made to feel and see that they were getting it." n38 In a similar vein, it has long been recognized that: "... Next to doing right, the great object in the administration of public justice should be to give public satisfaction." n39

XI. The Other Purposes of Appellate Courts.

There are a number of consumers of the production of the appellate courts. These include the appellate judges themselves, the trial court judges, lawyers, litigants, and citizens. The needs of all of these constituencies should be met. It should also appear to the public that these needs are being met.

How can that be done? "O wad some Pow'r the giftie gie us to see oursels as others see us!" n40 The new king of Jordan has recently disguised himself in order to walk among the people and determine how they see their government. It is often said that a doctor should have to be a patient. Perhaps circuit judges should be anonymous litigants in other circuits under a pseudonym. A report of that experience to their colleagues in that circuit might be useful information.

As a result, whatever methods are used to deal with the future increases in volume, at a minimum they must include:

- . Well informed decisions.
- . By capable, experienced judges.
- . That are accountable to the public.

While the report of the Commission deals primarily with administration, the next step in the process must also include concerns for adjudication.

The Commission's report next observes that "the quality of a circuit's decisional law is a function of its court of appeals as an adjudicative body, and is largely unrelated to the administration of the circuit." n41 The Commission's recommendation that the Ninth Circuit and others "organize themselves into adjudicative divisions, to function selectively through two-judge panels, to establish district court appellate panels" is a recommendation based on a fundamental assumption. n42 This fundamental assumption is: "Assuming, of course, that the system has the necessary number of judges and other resources." n43 If the fundamental assumption is false, the recommendations lose their support.

In examining strategies to accomplish these goals, it is important to examine the costs of both old strategies and new strategies. It has been discussed above that the old strategies of truncating

processes and delegating to staff risk a loss of legitimacy in the eyes of the public as well as a loss of quality in the deciding of appeals. n44

One characteristic of the old strategy has been the silent transformation of much of the process from an adversarial system to an inquisitorial system. Instead of having advocates point out procedural flaws of adversaries, the court itself employs staff to inquire and screen for procedural and jurisdictional defects. In partial substitution for reading the briefs of advocates, courts employ additional clerks and staff to inquire into the case, filter it down, and provide independently produced synopses and recommendations. In place of listening to carefully prepared and organized oral presentations, courts either abandon that portion of the adversarial process entirely or, in the alternative, abandon the adversarial nature of it and convert it to an inquisition of counsel by the court on points of interest raised by the court rather than by the advocates.

XII. Some Possible New Paths to the Old Goals.

There are a number of approaches which do not have these costs but which might nonetheless conserve judicial resources. One of these would be to adopt the English model of extensive oral presentations followed by open public deliberations by the judicial panel and a public pronouncement of the decision and the reasons, all at the same sitting. There would be no need for elaborate screening. There would be no need for the time-consuming process of writing opinions because there would be no need to search through mountains of written opinions because they would not exist in the first place. There would be an open consideration of the case by the judges themselves in front of the litigants and the public.

Another source of help may be found in Paul Carrington's Roscoe Pound model. n45 The availability of inexpensive video recording could have the same transforming effect on the law as it has had on public entertainment. Testimony could be taken during depositions at a time and place convenient to the witnesses and lawyers without participation by court or jurors. Presentation of testimony in this form could be cleaned of error and redundancy in order to shorten trials and eliminate mistrials. The familiar order of trial and appeal could be reversed. The premise of the "clear error" doctrine would evaporate. Appellate judges would have the same access to the trial record as a trial judge.

There are a variety of other approaches that may conserve precious judicial resources. A partial solution could be to increase the capacity of the courts to process appeals in the traditional model by adding a significant numbers of judges. Another method might be to eliminate some of the frivolous volume developed within the prison system. Special handling of Social Security cases has also been widely studied, n46 as well as special systems for the handling of bankruptcy matters n47 and tax appeals. n48 Additional use of alternative dispute resolutions might also be helpful.

Drug court is a little discussed alternative that is being experimented within some state courts. These courts offer a different and new approach to addiction-related crimes. If a case is effectively handled through an alternative drug court, there will be: no trial, no appeal, no incarceration, and no civil suits arising from incarceration. These courts seek to attack addiction-related criminal conduct through a closely supervised treatment and rehabilitation program. It is still early but the results may offer hope to all who are affected - defendants, victims, families, the courts, and the public.

A method which has not been encouraged by the courts is to eliminate much of the current staff, abolish some of the current methods, save the cost of those current methods, and substitute, at the same or less cost, more judicial capacity. More particularly, this proposal would reduce the structures and staff which enable the truncating of judicial process and delegation to staff, and would instead add more frontline judges and put them in direct contact with the cases. If the administrative machinery is taken away, there cannot be as much delegation and truncating of traditional appellate decision making.

An example of the current administrative machinery can be found in the testimony of Chief Judge Hatchett of the Eleventh Circuit. n49 Judge Hatchett described the Eleventh Circuit as consisting of twelve active judges, four law clerks per judge, forty-seven staff attorney positions (forty-three of which are currently filled), and twenty-eight visiting judges. In other words, there are over 100 individuals with legal training who make decisions about cases in the Eleventh Circuit. Many of these are unseen, unknown, young, and relatively inexperienced. Another large staff of legal librarians, paralegals, secretaries, human resources staff, and others supports these individuals.

An experienced Article III federal judge, however, can certainly dispose of routine cases in a far more efficient manner than these staff persons can. Some circuit judges have preferred to do their own screening because they can do it much faster than law clerks, and the time of law clerks can be focused on what they are most experienced at doing, legal research. Judge Seymour of the Tenth Circuit reports that when it implemented its judge-screening process in lieu of staff attorneys as screeners, the number of cases fully briefed and ready for calendaring dropped from almost 1,000 in 1989 to between 200-300 in 1990. n50 Judge Seymour felt that judicial input in the beginning, before any staff review, constituted a far more effective use of staff and judicial resources than if the staff had conducted the initial screening. n51

In Tom Baker's delightful report on the judiciary in the year 2020 by Chief Justice Hillary Rodham Clinton, he observes that the judiciary has become more focused on deciding appeals than in deciding them correctly. He satirically states that:

Therefore, how the courts of appeals go about deciding appeals simply does not matter. Appellate procedures are merely means toward a greater end. Ineffective procedures, procedures that place demands on scarce judicial resources, procedures like oral arguments and written opinions, must be discarded. Innovations like the coin toss calendar and the scratch-an-appeal demonstrate judicial ingenuity and a commitment to the greater end of the termination of appeals. The ultimate measure of appellate procedures is how much they contribute to the mission of the court of appeals. That mission is to decide appeals, not to create works of art. n52

To avoid this satirical future, Professors Meador, Rosenberg, and Carrington suggest that if the maximum number of law clerks is limited to two per judge and the maximum number of staff attorneys is limited to the number of judges on the court, n53 there may be a solution which does not require a large increase in cost. Unfortunately, it is difficult to locate detailed budget information on the federal circuit courts, but there is some aggregate data that helps put comparative costs of judges and staff in perspective. n54 The figures, however, do not reveal the full costs of the courts but only salaries and expenses.

From the table below, some comparisons can be made between judicial resources and staff

resources.

SEE ORIGINAL SEE ORIGINAL The ratio of staff to judges and the ratio of cost of staff to cost of judges are striking. If approximately 14% of the cost of staff were sacrificed, the number of judges could be doubled with little effect on cost.

XIII. There Is Not Yet Enough Information to Know How to Get There.

The process of truncating procedures, adding staff, and moving toward an inquisitorial substitution for many adversarial methods has been done primarily with an eye toward efficiency, but it has been done with little true study of the costs, either in dollars or efficiency. There has been little or no management study or audit to determine how cost effective the current staff and judicial structure is. In fact, no studies are publicly available and the financial details needed for analysis are not publicly available. Circuit court figures are aggregated with each other and with District Court figures. Repeated inquiries for cost information for this article were not successful. Therefore, if someone would like to compare the cost of a judge on a circuit court to the cost of a career law clerk or the cost of the court's library or the cost of security, it cannot be done with any published figures.

It is obvious, however, that the cost of circuit court judges is a small fraction of the cost of the judiciary, which is itself a small fraction of the cost of government. It would be important to compare this cost to the cost of other staff and procedures that are currently being used. What are unknown, however, are the relative costs of multiple law clerks, multiple staff attorneys, and multiple other support staff in comparison to the cost of adding a judge. Gross figures suggest that the actual cost of judges is a minimal financial addition to the system. If this is true, additional judges could be added relatively inexpensively if there is no increase in staff. It is possible that they could be added at no cost or even at a savings if there is a reduction in staff. The probability is that an experienced judge can produce more efficient judicial results for fewer dollars than a more expensive group of staff members.

Fellow professionals in the field of education and psychology may have much to teach us about learning methods of judges and what provides the best quality and efficiency. Verbal, written, and other methods have received much recent study, particularly with regard to the quality and efficiency of learning by students. Before one of these avenues is abandoned, more should be learned.

Is an oral presentation helpful to the learning process? How long should it last? Is an uninterrupted presentation better or is a question and answer method better, or both? Should a short uninterrupted presentation be followed by a question and answer period? Perhaps a time with a blue light for the lawyers, followed by green, yellow and red for the judges. Should it be more like a lecture or a sermon or a debate? Should the lawyers be allowed to submit videotape presentations of arguments? Should judges be prohibited from asking what they already know?

What study has there been of decision methods? The advantages to quality and efficiency in decision-making which derive from independent study, the clash of ideas through the adversarial process, deliberative conferring with colleagues and the purifying effects of writing are unknown. But others study decision methodology in other contexts and much could be learned from their research.

Finally, what studies have been done regarding the cost of legitimacy? To this point, very little

has been done. Yet, survey research capabilities have developed a high level of sophistication and reliability. This help could be sought.

The concerns that expanding the number of judges might adversely affect costs, cheapen the image of the judiciary, reduce collegiality, and harm coherence are all based on personal opinions. No studies or analyses have been conducted to determine what effect the increase in staff and reduction in procedures might have on costs, image, collegiality or coherence or how it compares to the effect of adding judges.

Do judges really cost more than other staff and structure? Do courts like the Eleventh Circuit with its forty-something clerks and forty-something staff attorneys and visiting judges on each panel really function in the classical collegial manner? Would it be better or worse with fifteen more judges and sixty fewer staff attorneys and law clerks? Is the coherence in the circuit law better enhanced or more obscure with many unpublished opinions as well as some published opinions produced as the system currently permits? Would frequent verbal decisions by the judges in public forum combined with selective written opinions be better?

What is the answer to meeting the increased volume in the circuit courts after the Nineties? There is simply not enough information available to develop good answers. There are great quantities of information about caseloads and case disposition. There is a paucity of information about the costs of the various components of the judicial system. A management-like analysis of costs for results is needed. An educational psychology analysis of learning methods would also be helpful. Finally, an assessment of perceptions of the public, in addition to the perceptions of the members of the circuit courts, is necessary. When more is known, better solutions can be found.

Whether circuit courts should employ the English model, add judges, add or reduce certain staff components and other resources, further truncate and delegate, whether new technology can provide helpful changes, are all questions that cannot now be answered, have not been answered, and should be answered soon.

FOOTNOTES:

n1. See 28 U.S.C. 41 (West Supp. 1997).

n2. See Commission on Structural Alternatives For The Federal Courts Of Appeals, Final Report 17 (1998) [hereinafter Final Report].

n3. The members of the Commission debated the proposed scope of its work. The majority believed the jurisdiction of the District Courts was beyond its mandate to consider. A minority expressed additional views about diversity jurisdiction. See *id.* at 77-84. A reduction in diversity jurisdiction does not solve the volume problem but does shift the burden to the state.

n4. Judicial Conference Of The United States, Long Range Plan For The Federal Courts 10, 156 (1995).

n5. Final Report, *supra* note 2, at 24.

n6. See *id.* at 15.

n7. See *id.*

n8. See *id.*

n9. See *id.* at 16.

n10. *Id.* at 25.

n11. See *id.*

n12. See Patricia M. Wald, 19 Tips From 19 Years On The Appellate Bench, 1 *J. Appellate Prac. & Process* 7 (1999).

n13. *Id.* at 7-8.

n14. See Paul D. Carrington et al., *Justice On Appeal* 51-54, 233-42 (1976).

n15. See Final Report, *supra* note 2, at 15.

n16. See U.S. Sentencing Commission, *Guidelines Manual* 1997, Ch. 1.

n17. See Final Report, *supra*, note 2, at 15.

n18. See *id.*

n19. See *id.*

n20. See U.S. Senate Judiciary Subcomm. on Administrative Oversight and the Courts, Chairman's Report on the Appropriate Allocation of Judgeships in the United States Courts of Appeals, 106th Cong. (Mar. 1999) [hereinafter Chairman's Report].

n21. See *id.*

n22. See *id.*

n23. See Carrington et al., *supra* note 14, at 14, 45, 159.

n24. See Richard A. Posner, *Law and Literature* 32 (1998).

n25. George Rose Smith, *The Selective Publication of Opinions: One Court's Experience*, 32 *Ark. L. Rev.* 26, 32 (1978), quoted in Charles E. Carpenter, Jr., *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency For Overloaded Appellate Courts Justify the Means of Secrecy?*, 50 *S.C. L. Rev.* 235, 256 (1998).

n26. Thomas Wolfe, *The Bonfire of the Vanities*, 381 (1988).

n27. See Deborah Barrow & Thomas Walker, *A Court Divided: The Fifth Circuit Court of Appeals and the Politics of Judicial Reform* (1988).

n28. See Commission on Revision of the Federal Court Appellate System, *The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change* 8-13 (1973).

n29. See 28 U.S.C. 41 (West Supp. 1997).

n30. See *id.*

n31. See Final Report, *supra* note 2, at 6.

n32. See *id.* at iii.

n33. See *id.*

n34. Id. at 25.

n35. Id. at 24-25.

n36. See id. at 25.

n37. Thomas E. Baker, 2020 Year-End Report on the Judiciary, 24 Pepp. L. Rev. 859, 884 (1997) (offering a tongue-in-cheek vision of the direction the courts are taking).

n38. Roscoe Pound, Justice According to Law, 13 Colum. L. Rev. 696, 701 (1913), quoted in Appellate Judicial Opinions 15 (Robert A. Leflar ed., 1974).

n39. 3 William Blackstone, Commentaries 391, quoted in Appellate Judicial Opinions 15 (Robert A. Leflar ed., 1974).

n40. Robert Burns, To A Louse on Seeing One on a Ladies Bonnet at Church, in Selected Poems 86 (Carol McGuirk ed., Penguin Classics 1993).

n41. Final Report, supra note 2, at ix.

n42. Id. at xi.

n43. Id.

n44. See Charles A. Wright, Law of Federal Courts 23 (5th ed. 1994).

n45. See Paul D. Carrington, Thoughts for a Third Century: A Roscoe Pound Vision, in Federal Judicial Center, The Federal Judiciary in the 21st Century 227-30 (Cynthia Harrison & Russell R. Wheeler eds., 1989).

n46. See Final Report, supra note 2, at 74.

n47. See id. at 67-70.

n48. See id. at 73-74.

n49. See Chief Judge Joseph W. Hatchett, Statement before the Commission on Structural Alternatives for the Federal Courts of Appeal, (visited Nov. 11, 1999) <<http://app.comm.uscourts.gov/hearings/atlanta.htm>>.

n50. See Chairman's Report, supra note 20, at 44.

n51. See id.

n52. Baker, supra note 37, at 880.

n53. See Daniel J. Meador et al., Appellate Courts: Structures, Functions, Processes, and Personnel 437 (1994).

n54. See The Judiciary, Budget Estimates For Fiscal Year 2000, Congressional submission, Courts of Appeals, District Courts and other Judicial Services Salaries and Expenses.

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