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Studying Deck Chairs on the Titanic

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INTRODUCTION

Learned Hand would not recognize today's federal appellate courts. In order to cope with a rapidly growing caseload, circuit judges no longer hear argument or write published opinions in half of the cases appealed to them, and they delegate much of their work to large numbers of clerks and staff, "para-judges," who are supervised in varying degrees by the judges themselves. The burden of these truncated procedures, what we called "Track-Two" justice, of course, has fallen disproportionately on the poorest and least sophisticated federal litigants.

The federal judicial establishment has resolutely resisted advocating the obvious solution—adding large numbers of new judges. In resisting that solution, the establishment has relied on arguments which neither make intuitive sense nor are supported by empirical research. Indeed, the arguments against expansion are often made in the teeth of well-known evidence to the contrary. We believe such unreasoned obduracy can only be explained by a desire to preserve the judges' own professional comfort and status, commodities that for some judges vary inversely with the size of the judiciary. The judges' desire to protect their status should not count for much, however, when balanced against the nation's dire need for substantial additional appellate capacity and the injustice of the currently uneven distribution of appellate court resources.

We wrote extensively about these changes and arguments in an article published earlier in this *Review*.[1] Professor Carl Tobias now has responded in a thoughtful fashion to our arguments.[2] His establishmentarian essay vividly illustrates the gulf between those who wish to temporize, and those who believe that the pathology of the circuit courts demands more urgent attention.

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

2 Carl Tobias, *The New Certiorari and a National Study of the Circuits*, 81 CORNELL L. REV. 1264 (1996).

I
DESCRIPTION

A. The Review They Require

Although Professor Tobias acknowledges that our description of the appellate process in the circuit courts is largely accurate,[3] he disputes several of our findings. The most significant area of disagreement is whether cases currently receiving "Track-Two" appellate justice (decision without oral argument in a brief, unpublished opinion drafted by staff attorneys) receive the review "which they require."[4] Tobias suggests that many of these cases, particularly fact-dependent pro se cases and social security appeals, do not require the full panoply of appellate procedures and that more elaborate consideration of them would not improve appellate decisionmaking.[5]

Professor Tobias apparently uses unchanged outcome as the standard for the sufficiency of appellate procedure: If increased appellate procedure would not alter the decision in a case, then it is not "required."[6] Even under this standard, he is probably wrong. It is, of course, difficult to show that the outcome of any appeal would be different if the judges had considered the case more carefully, but there is circumstantial evidence suggesting that at least some results would change. Some cases decided by the truncated procedures are reversals of district court judgments, and some have produced split votes—and even concurring and dissenting opinions—on the appellate panel.[7] In these cases there was some legal or factual controversy, and increased scrutiny by the appellate judges might well have changed a single vote and, thus, an outcome.

Far more important, however, is recognition that the unchanged outcome test is the wrong standard for measuring the propriety of "Track-Two" justice. Full appellate procedure produces benefits beyond insuring correct outcomes by providing visibility, accountability, and reviewability in ways that truncated procedures cannot.[8] In par-

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3 *Id.* at 1267-69.

4 *Id.* at 1269.

5 *Id.* at 1269-70.

6 *Id.* ("More consideration may not improve appellate decisionmaking generally or the outcome in many specific appeals which judges now address less thoroughly.").

7 *See* William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 612-21 (1981).

8 *See* JUDITH A. MCKENNA, FEDERAL JUDICIAL CTR., STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS: REPORT TO THE UNITED STATES CONGRESS AND THE JUDICIAL CONFERENCE OF THE UNITED STATES 155-56 (1993) (noting that restoration of visibility and accountability can only be accomplished by either reducing the number of appeals or massively increasing judicial system resources); William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1199-1204 (1978) (arguing that

ticular, oral argument and published opinions reassure litigants, particularly those most inclined to distrust government officials, that the judges themselves have carefully considered their appeals. Moreover, selective distribution of full appellate procedure decreases confidence in the legal system, and it causes many to suspect that the law has in fact become a "respecter of persons" and that the judges are not providing equal justice to poor and rich alike.[9]

Finally, trends in argument and opinion publication strongly suggest that caseload pressures, rather than the triviality of appeals, drive the increased use of "Track-Two" procedures. In the last twenty years, as caseload pressures have increased, the percentage of cases disposed of after argument by a published opinion has declined in *all* categories of litigation, not just those widely believed to be less meritorious.[10] Are we really to believe that the quality of antitrust, tax, and diversity appeals has diminished in that time? If not, it seems clear that the judges' tendency to regard a case as "trivial" or "unmeritorious" is a function of the caseload pressures under which they operate.[11] In other words, they have allowed the small size of the judiciary to dictate the available amount of high quality justice, rather than advocating judicial expansion to ensure high quality justice for all cases. More simply, judges have allowed the size of the tool to dictate the size of the job, rather than vice versa.[12]

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unpublished opinions reduce judicial responsibility, accountability, and the likelihood of reviewability); William M. Richman & William L. Reynolds, *Appellate Justice Bureaucracy and Scholarship*, 21 U. MICH. J. L. REF. 623, 630-36 (1988) (arguing that unpublished opinions and lack of oral argument combine to reduce judicial accountability); Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 B.Y.U. L. REV. 3, 56-57 (discussing the effect high caseloads have on accountability).

9 28 U.S.C. § 453 (1994) (requiring that each justice or judge "administer justice without respect to persons, and do equal right to the poor and to the rich"). Professor Tobias also suggests that our claim of unequal access to high quality appellate justice lacks empirical support. Tobias, *supra* note 2, at 1273. In fact, however, numerous studies and data collected annually by the Administrative Office of the Courts consistently show that prisoner cases, pro se cases, and social security appeals are disproportionately likely to receive what we have called "Track-Two" appellate justice rather than the traditional model. *See, e.g.*, Robel, *supra* note 8, at 61 tbl. 2 (argument), 65 tbl. 5 (publication).

10 *See* MCKENNA, *supra* note 8, at 43-44, 47-48.

11 Anecdotal evidence also supports the conclusion that cases that would have received full appellate treatment a generation ago do not receive it today. *See* Richman & Reynolds, *supra* note 1, at 274-76, 278-79.

12 *See id.* at 281 (describing published opinions as "'once the hallmark of the appellate courts' work'") (quoting Edith H. Jones, *Back to the Future for Federal Appeals Courts: Rationing Federal Justice by Recovering Limited Jurisdiction*, 73 TEX. L. REV. 1485, 1492 (1995)); *see also id.* at 282 n.39 (describing published opinions as "the 'working tool of lawyers and the building block of judges'") (quoting John Reid, *Doe Did Not Sit—The Creation of Opinions by an Artist*, 63 COLUM. L. REV. 59, 59 (1963)).

B. The Responsibility of the Judges

Professor Tobias also disputes our assessment of the responsibility of the circuit bench for the transformation of the courts of appeals. Here he carefully refutes several claims that we were quite careful not to make.[13]

For instance, we did not maintain that the circuit judges are the only actors who bear considerable responsibility for the change. As Tobias points out, Congress and the litigants bear chief responsibility for the caseload glut, to which the courts responded by truncating the appellate process.[14] Nor did we suggest that the circuit bench unanimously supported the transformation of the circuit courts into courts of de facto discretionary jurisdiction. We acknowledged and applauded the few judges who have spoken out against the transformation and in favor of a much larger circuit bench.[15]

Given the possibility for confusion as demonstrated by the Tobias reply, it is helpful to restate precisely our assessment of the responsibility of the circuit judiciary for the transformation of the circuit courts. It can be reduced to two propositions:

> (1) The circuit judges bear almost exclusive[16] responsibility for responding to the caseload glut by devising, instituting, and allocating unequally among the cases the set of appeal expediting procedures (reduced oral argument, limited publication, and use of central staff) that we have termed "Track Two" appellate justice or the New Certiorari.[17]

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13 *See* Tobias, *supra* note 2, at 1270-72.

14 *Id.*

15 *See, e.g.*, Richman & Reynolds, *supra* note 1, at 274 (quoting Judge Reinhardt's criticism of federal judges who cannot let go of the notion that Circuit Courts are small, pristine, and sheltered); *id.* at 299 n.129 (citing Judges King's and Reinhardt's calls for expansion of the bench); *id.* at 329-30 n.265, 332-33 n.283 (quoting Justice, then Chief Judge, Breyer's arguments that jurisdictional retrenchment will not forestall the need for expansion); *id.* at 338 (quoting Judge Wallace deploring the elitism of the anti-expansion arguments); *id.* at 321-22 n.228 (quoting Judge Haynsworth's argument that the judges' concern for prestige should not deter the growth of the bench).

While the judges cited above have supported expansion, their views have not controlled the institutional position of the circuit bench. The policy and planning apparatus of the circuit bench, what we have called the "Judicial Establishment," consisting of the Judicial Conference of the United States; the Judicial Councils of the several circuits; the Judicial Conference Committee on Courts, Administration and Case Management; the Judicial Conference Committee on Long Range Planning; and members of the Federal Courts Study Committee, as well as several outspoken and influential individual judges (*e.g.*, Judges Newman, Tjoflat, Jones, and Parker) have all argued forcefully for restricting the size of the circuit bench. *See* Richman & Reynolds, *supra* note 1, at 299, 307, 329.

16 Their responsibility is not exclusive because Congress has implicitly approved the expediting strategies by failing to reverse them legislatively and by funding them (e.g., by allocating money for staff attorney positions).

17 Professor Tobias seems to agree. *See* Tobias, *supra* note 2, at 1272. (characterizing the circuit judges' responsibility as "much responsibility").

> (2) The policy and planning apparatus of the federal judiciary, as well as many prominent circuit judges (a set of individuals and groups that we have called the Judicial Establishment), have lobbied forcefully and successfully against an expansion of the circuit bench commensurate with the caseload increase.

The second proposition is far more noteworthy. Just as it is news when man bites dog, it is remarkable when federal judges, historically protectors of the powerless and conservators of the Learned Hand Tradition, lobby against allocating the resources required to assure high quality appellate justice in every case on the docket.

C. The Judges' Reasons

Tobias's final objection to our description of the courts of appeals concerns the judges' reasons for opposing expansion. He finds those reasons more defensible than we do.[18] Inclined to see the judges as conscientious, dedicated jurists, he believes their opposition to expansion is based not on elitism and dignitary interests, but on concern about fragmentation of federal law and loss of collegiality.[19]

We agree that the judges are conscientious and dedicated, and that they have argued against expansion by citing concerns about collegiality and fragmented federal law. Indeed, we considered those arguments at length and, we believe, refuted them decisively.[20] The transparent weakness of the arguments caused us to consider other motives. The evidence for the elitism charge, however, comes largely from the judges' own words. Judge Jones, for instance, compares the judges to elite athletes:

> [A]s the docket is "dumbed-down" by an overwhelming number of routine or trivial appeals, judges become accustomed to seeking routine methods of case disposition. Their mental and organizational flexibility, so vital for performing the federal courts' classic tasks of defending the Constitution and harmonizing federal law, inevitably suffers. The situation is like that of a competitive tennis player forced to spend the bulk of his time rallying with novices. Just as the player's competitive edge will erode from lack of peer contact, so are judges' legal talents jeopardized by a steady diet of minor appeals.[21]

Judge Newman worries that expansion would cause the circuit bench to descend to the level of state judiciaries:

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18 *Id.* at 1273.

19 *Id.*

20 Richman & Reynolds, *supra* note 1, at 307-25.

21 Edith H. Jones, *Back to the Future for Federal Appeals Courts: Rationing Federal Justice by Recovering Limited Jurisdiction*, 73 TEX. L. REV. 1485, 1493 (1995).

> A federal judiciary of 3,000 to 4,000 would include some extremely able people and a large number of competent people. But it would also include an unacceptable number of mediocre and even a few unqualified people. Today, most observers regard the overall quality of the federal judiciary as higher than that of the average state judiciary. At a size of 3,000 to 4,000, its quality would be indistinguishable from the most pedestrian of state judiciaries.[22]

Chief Justice Rehnquist deplores the "ever-increasing caseload with an ever-larger percentage . . . of relatively routine work which neither requires nor engages the abilities of a first-rate judge,"[23] while Justice Scalia worries that a larger bench "only dilutes the prestige of the office and 'aggravates the problem of image.'"[24]

The proposals for jurisdictional contraction also support the charge of elitism. The cases targeted by the Federal Courts Study Committee and the Committee on Long Range Planning of the Judicial Conference are mostly the small-stakes cases brought by the poorest and least sophisticated federal litigants: diversity cases below a large amount in controversy, ERISA cases where the amount in controversy is $10,000 or less, prison civil rights litigation, social security cases, employment discrimination suits, and FELA and Jones Act appeals.[25]

In summary, although we agree with Tobias that the circuit judges are, by and large, a conscientious and dedicated group, their anti-expansionist rhetoric, their specific proposals for jurisdictional retrenchment, and their refusal to consider contrary evidence, compel us to stand by the charge of elitism.

II
PRESCRIPTION

Although Tobias largely agrees with our description of the problem, he disagrees with our prescription—more judges. He believes that our solution will have bad consequences, that other remedies are better, and that significant expansion is politically impossible. The first two arguments are wrong, and the last although problematic, cer-

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22 Jon O. Newman, *1000 Judges—The Limit for an Effective Federal Judiciary*, 76 JUDICATURE 187, 188 (1993). We considered the question of whether enough "qualified" judges could be found in Richman & Reynolds, *supra* note 1, at 300-01.

23 Carolyn D. King, Comment, *A Matter of Conscience*, 28 HOUS. L. REV. 955, 961 (1991) (quoting remarks made by Chief Justice Rehnquist in his 1976 speech to the American Bar Association).

24 Stuart Taylor, *Scalia Proposes Major Overhaul of the U.S. Courts*, N.Y. TIMES, Feb. 16, 1987, at A1, A12.

25 REPORT OF THE FED. CTS. STUDY COMM. 42-44, 48-50, 55-58, 60-63 (1990); COMMITTEE ON LONG RANGE PLANNING, JUD. CONF. OF THE U.S., PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS 27-35 (1995) [hereinafter COMMITTEE ON LONG RANGE PLANNING].

tainly cannot excuse the failure of the Judicial Establishment to ask Congress to adopt the best solution to the caseload problem.

A. The Bad Consequences of Expansion

Tobias opposes our prescription for radical enlargement of the judiciary because he fears it would lead to bad consequences.[26] Specifically, he argues that expansion will reduce judicial collegiality, will further fragment the law in the circuit courts, "might not enhance decisionmaking generally," and will increase the work of the Clerks' Offices.[27]

1. *Collegiality*

Tobias first focuses on the reduced collegiality he believes would be a necessary result of expansion. Tobias does not define "collegiality" (not an easy task to perform), and he does not explain why we should worry about its loss. More specifically, he does not explain why collegiality enhances either the quality or equality of judicial decisionmaking. He merely suggests in a single sentence of text that loss of collegiality is an evil that would attend expansion.[28] Because he examines neither the evidence nor the arguments we advanced on this point, it is hard to see how Tobias's remarks on collegiality advance the inquiry.

We argued at some length that the available evidence suggests that collegiality on the circuit courts is a myth.[29] Judges, it turns out, rarely talk about cases after the post-argument conference. This procedural lacuna is not a function of size; apparently it does not matter whether courts are large or small, or whether they are centrally located or geographically dispersed—judges simply do not spend much time talking among themselves about their cases.[30]

More important, we argued that there is no evidence or reason to believe that collegiality enhances the quality of appellate decision making.[31] Indeed, it could have quite the reverse effect. After all, strong disagreements among close friends can be uncomfortable; for that reason, a collegial court is likely to be a conservative court. There is no reason to believe, therefore, that regardless of how pleasant it may be, a collegial court dispenses better justice.

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26 Tobias, *supra* note 2, at 1275-77.

27 *Id.*

28 *Id.* at 1275.

29 Richman & Reynolds, *supra* note 1, at 323-25.

30 *Id.* at 324. Tobias also fails to mention the most serious "collegiality" problem on today's circuit courts—the relation between a judge and the numerous and rapidly growing central staff and personal clerks who do the great bulk of the work.

31 *Id.*

Finally, we argued that it is by no means clear that collegiality, valuable or not, is a function of size.[32] There is, for instance, simply no evidence that collegiality is impossible in a large circuit such as the Ninth (often used as a *bete noire* by the Establishment),[33] nor that collegiality is more abundant in small circuits.[34]

In lieu of evidence, therefore, there remains only the simple assertion, repeated by Tobias, that collegiality is a good thing and that enlargement would seriously damage it. In short, collegiality has become a mantra—a charm to be incanted against the evil of expansion. We had hoped that our lengthy treatment of the issue would advance the argument beyond that point. In the end, therefore, the only thing clear about collegiality is that the judges may prefer life on a smaller, more comfortable court.[35] We believe this is not a significant consideration—certainly not one worth the sacrifice of the Learned Hand tradition.

2. *Balkanization: Unstable Law*

The second bad consequence that Tobias predicts will result from expansion is the "Balkanization" of federal law.[36] Expansion, he argues, would require more circuits, which could "further splinter the already Balkanized federal law," that is, produce more circuit splits on issues of federal law that in turn would encourage more litigation and more appeals.[37] Tobias, however, supports his argument only with conclusory assertions.[38]

Once again, we critiqued this family of arguments at length,[39] and it is hard to see how Tobias's summary restatement responds to our critique or advances the inquiry. In particular, we showed that the Balkanization argument lacks empirical support: The available evidence from several studies shows no link between legal inconsistency and circuit size or between circuit size and rates of appeal. Further,

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32 *Id.* at 324-25.

33 *See, e.g.*, Gerald Tjoflat, *More Judges, Less Justice*, 79 A.B.A. J., July 1993, at 70, 72 (addressing the difficulties faced by the Ninth Circuit as a "jumbo court").

34 Richman & Reynolds, *supra* note 1, at 323-25.

35 Even this may not be true. A larger court can submerge personal animosities which might be distracting and discomforting on a small court. A larger court is also more likely to have minority and women members in significant numbers than is a small court. *See* Richman & Reynolds, *supra* note 1, at 339-40. It is also more likely to be diverse geographically. *See id.* It may be that judges do not like having "others" (at least in large numbers) in their club, but enhanced diversity certainly will be a major by-product of rapid expansion. Tobias does not address our argument based on enhanced diversity.

36 Tobias, *supra* note 2, at 1275-76.

37 *Id.*

38 Tobias, for example, does not even mention the seminal studies conducted by Arthur Hellman, and discussed at length in Richman & Reynolds, *supra* note 1, at 308-14. Those studies are devastating for proponents of the Balkanization argument.

39 *Id.* at 307-23.

the only systematic studies of intra as well as inter-circuit conflict found neither to be a significant problem.[40]

We also showed that the Balkanization argument is subject to a serious *reductio ad absurdum* attack.[41] If that argument is correct and more judges are bad, then fewer judges should be better. In other words, anyone who believes the Balkanization argument to be valid should be calling for a *reduction* in the current number of judges and opinions in order to further the coherence and consistency goals. Opponents of expansion do not explore the question of the desired amount of consistency (one panel for the whole nation, perhaps) nor do they offer any principled suggestion of the proper balance between the competing goals of perfect legal consistency and adequate appellate capacity.

Finally, the emphasis of the Balkanization argument is misplaced. It wrongly assumes that coherence—that is, law declaration—is the primary goal of the federal appellate courts. Those courts, however, originally were established as *error* correcting courts, and law declaration was to play a secondary role.[42] Although the importance of the latter function has increased over the years, the circuit courts remain the only federal tribunals that review for error below. The judges may prefer to hear the cases where they declare law, but their primary task is to check the awesome power possessed by the individual district judges.

Although we reviewed and rejected the arguments based on Balkanization[43] in our earlier articles, Professor Tobias, like the Judicial Establishment generally, insists on summarily restating them.[44] Balkanization, in other words, like collegiality, has become nothing more than a mantra. As we indicated in the preceding discussions of collegiality, it is difficult to form a response except to point out that it does not advance the discussion to repeat summarily an argument that has been analyzed and refuted in detail. Continued reliance on the Balkanization and collegiality arguments under such circumstances naturally creates suspicion about the judiciary's real motives for opposing expansion.

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40 *Id.* at 312-14.

41 *Id.* at 314-16.

42 *See* Paul D. Carrington, *The Function of the Civil Appeal: A Late-Century View*, 38 S.C. L. REV. 411, 424-25 (1987).

43 We also showed that consistency could be pursued by methods other than permanently stunting the nation's appellate capacity. Such methods include better legislation, improved communication among judges, increased use of specialized courts and panels, and another tier of courts. *See* Richman & Reynolds, *supra* note 1, at 316-23.

44 *See* Tobias, *supra* note 2, at 1275-76.

3. *Wasting Resources*

Tobias also suggests that expansion of the appellate courts might not be desirable because it would be wasteful unless doing so might improve results in individual cases.[45] This argument suffers from two fatal flaws.

First, it is impossible to determine whether different decisionmaking procedures would change the result in a specific case. We do know, however, that some cases receive significant attention from Article III judges, and some do not.[46] We believe that increased *judicial* attention to the latter cases necessarily will improve the quality of the decisionmaking in them. This, we hope, is obvious. The President nominates and the Senate confirms Article III judges on the basis of their training, intelligence, character, and judgment. It is very difficult to believe that the clerks and central staff have those same qualities—at least not to the degree possessed by Senate confirmed judges. If they do not, then increased judicial attention will necessarily improve the quality of appellate decisionmaking.

Once again, however, the more important point is that Tobias fails to address our fairness argument. As we have said many times, *even if* outcomes would not change, we believe that a basic right of each litigant is to be treated as equal with all others who appear in federal courts. It is this belief that sets us fundamentally apart from the Judicial Establishment.

4. *Overworked Clerks*

It is difficult to know what to make of Tobias's argument that expansion is bad because it will increase the work of the clerks' offices.[47] It is unclear how expansion would *disproportionately* increase the work of those offices. Increased use of oral argument might increase scheduling duties somewhat, but publishing more opinions should have little or no effect. Moreover, a marked reduction in central staff and personal law clerks might actually reduce the work of the clerks' offices.

Much more fundamentally, the overworked clerks argument raises the basic question of whether the courts exist to benefit society

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45 *Id.* at 1276-77.

46 Although most lawyers are not aware of the full nature of this delegation, it is quite well documented. *See* Richman & Reynolds, *supra* note 1, at 279-97.

We feel a good deal of irony in reporting this development. Both of the authors clerked for federal district judges in the 1970s. In those days, the roles were largely reversed: The clerks devoted most of their attention to complex civil litigation; our judges primarily handled the pro se, prisoner, and social security claims. Both of our judges are well respected within the federal judiciary. Neither felt it beneath his dignity to delve personally into the claims of the poor and powerless.

47 Tobias, *supra* note 2, at 1277.

or themselves. If it is the former, then concern over the burdens of the clerks' offices is legitimate only if the workload threatens to destroy irreparably the efficient operation of those administrators. Tobias presents no evidence that such destruction is inevitable or even probable. Thus, the argument misses the central point. The clerks' offices should be large enough to handle properly the basic work of the court; their size should not dictate how the judges go about dispensing justice. If preserving equal access to the Learned Hand tradition is worth doubling the size of the circuit bench, it is surely worth extra help in the clerks' offices.[48]

B. *Other Remedies*

Our proposed remedy to the problem of two-track appellate justice, a radical increase in the size of the circuit bench, can be evaluated only by comparison to other possible remedies. Professor Tobias suggests that alternative reforms could remedy the problem at considerably lower cost. In particular, he proposes greater specialization, public funding of counsel for pro se litigants, and the use of three-judge panels of district judges for low-level error correction.[49]

Specialization is a useful strategy which we and others have considered in some detail.[50] Specialized panels or courts using existing circuit judgeships would conserve judicial resources because judges who concentrate on particular types of cases presumably would work more efficiently. The order of magnitude of the savings, however, is far too small to solve the problem of caseload glut in the courts of appeals without significant increases in judgeships.[51]

An alternative, of course, is for Congress to create new specialized courts or panels to handle specific portions of the circuit courts' dockets. We have no principled objection to this solution; it is basically our prescription—a large increase in appellate capacity—with a different

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48 The incremental cost of adding personnel to the clerks' offices would constitute a tiny portion of the total amount to be spent on new judgeships. If high quality appellate justice is worth the major expense of the new judgeships, surely it is worth the minor additional expense of a few extra functionaries.

49 *See* Tobias, *supra* note 2, at 1277-79.

50 *See, e.g.*, THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 221-23 (1994); PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 167-84 (1976); MCKENNA, *supra* note 8, at 118-21; Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603, 607-15, 634 (1989); Richman & Reynolds, *supra* note 1, at 319-20.

51 As we have shown, the Courts of Appeals need an increase of almost 100 judgeships—about 60% of the current total—to meet current staffing models. *See* Richman & Reynolds, *supra* note 1, at 299. It is highly unlikely that efficiency gains from specialization could substantially reduce a shortfall of that magnitude.

label. It is thus better viewed as a way of accommodating expansion of the judiciary rather than as an alternative to that expansion.[52]

Another alternative proposed by Tobias is appellate review by three-judge panels of district judges.[53] Once again, however, this solution will require additional judgeships—albeit at the district, rather than circuit level—in order to make a significant dent in the caseload glut and thus permit full consideration of all appeals.[54] It is basically a variation of the four-tier theme that we have already endorsed;[55] it just adds the fourth tier between the district and circuit levels rather than between the circuit and Supreme Court levels. Its financial costs should be the same as conventional appellate expansion, but, like any four-tier system, it offers a potential advantage for the declaration of federal law.[56] It is hard to see any advantage that it has over other four-tier systems, except perhaps some savings in the circuit judges' status and prestige, but we question whether those are values worth very serious consideration.

It is important, however, not to lose track of the basic point. If specialization or a four-tier system is to have any meaningful effect on caseload and thus on the New Certiorari, either innovation must include a substantial increase in judgeships. Thus, either option should be viewed as a species of, rather than as an alternative to, our proposal for radical expansion of the circuit bench.

Tobias' third proposal—providing legal representation for pro se litigants[57]—is a different kettle of fish. Presumably, implementation of this proposal will head off or streamline appellate litigation by pro-

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52 It is possible to see how this alternative responds to the anxieties of the anti-expansionists. Increasing the number of judges by creating specialized courts still entails the same monetary costs as conventional expansion, but it threatens the coherence of federal law less because the additional judges could work only on specific types of cases. Such an alternative might also minimize concerns about status and prestige, particularly if the new judges are appointed under Article I, but that would produce another difficulty: Article III judges (U.S. District Judges) being reviewed by Article I judges.

Solving the problem by using specialized courts to treat social security, prisoner, and pro se cases does not completely eliminate the problem of two-track appellate justice, but the "Track-Two" cases would at least get full consideration, albeit from other judges. Further, if the dichotomy were approved by Congress, it would eliminate the lawless element of the current system in the courts of appeals.

53 Tobias, *supra* note 2, at 1278-79.

54 It might not require quite as many new judgeships as would be required by an expansion of the current bench. The widespread use of district judges as circuit court visitors, discussed in Richman & Reynolds, *supra* note 1, at 287, suggests that the circuit judges believe the trial courts are less burdened. Thus, some may have additional time to allocate to appellate functions and, as such, fewer new positions may be requested.

55 *See id.* at 321-23.

56 A four-tier system provides a large base for the appellate pyramid thereby assuring adequate numbers of error correctors as well as a narrow apex to focus law declaration. The result is enough judges to afford full appellate procedure to all claims while still maximizing the coherence and consistency of federal law. *See id* at 321.

57 Tobias, *supra* note 2, at 1278.

viding pro se litigants with advice about the weakness of their claims. However, this proposal is unlikely to solve the problems of appellate glut or the New Certiorari. For one thing, it will likely carry very high financial and political costs. A public defender or legal aid attorney can be expected to handle only thirty to fifty appeals a year;[58] a federal circuit court judge is expected to participate in 255 cases per year.[59] It requires a panel of three judges to hear and decide an appeal. Dividing 255 by three yields 85, which is thus the number of terminations allocable annually to each circuit judgeship. A comparison of these two workload figures makes it apparent that the appellate process (for relatively simple, high volume cases) requires about two lawyers for every judge.

Perhaps the idea is that fewer attorneys would be required because many pro se litigants would give up after advice by counsel, but experience with pro se litigants suggests a more likely hypothesis. Many would speak to the appellate lawyer, hear her advice about the futility of appeal, and insist on proceeding anyway or jettison the attorney and appeal pro se, thus forfeiting the savings in judge-time. Would we then cut off the right to proceed pro se? Further, adding lawyers to the litigation process seldom speeds things up. In at least some pro se cases, a zealous advocate would likely find issues worthy enough to take the case out of the "Track-Two" docket and thus expend more judge-time. It is hard to see how a net savings could result.

Even if it could, where would the funds come from to recruit, hire, and administer the several hundred lawyers required to run the program? Tobias mentions legal aid offices and law school clinics,[60] but those offices are financially strapped nowadays and not looking for extra work. Eventually the money would have to come from the public fisc; and trying to sell a budget-minded Congress on funding a whole new cadre of government lawyers for indigent and pro se appellate litigants is a fool's errand if ever there was one.

C. Political Impossibility

Tobias's third critique of our solution is that massive increases in the circuit bench are politically unrealistic.[61] Congress, he asserts, will never approve the expenditure.[62] This point is curious in that Congress regularly approves nearly all of the judgeships requested by the

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58 Telephone interview with Bob Burke, Staff Attorney, Defender Division, National Legal Aid and Defenders' Association (May 6, 1996); telephone interview with Dennis M. Hendersen, Chief Attorney, Appellate Division, Maryland Office of the Public Defender (May 6, 1996).

59 *See* Richman & Reynolds, *supra* note 1, at 298 n.126.

60 Tobias, *supra* note 2, at 1278.

61 *Id.* at 1279-80.

62 *Id.*

Judicial Conference. To date, the problem has not been getting Congress to approve the positions; rather, it has been getting the courts to ask for them.[63] The judges could make a very appealing case, citing the chronic shortage of judgeships according to current staffing models and their own failed attempts to provide high quality justice without adequate Article III personnel.

Tobias also cites political opposition from the judiciary.[64] Here, he seems to misunderstand the purpose of our article. We attempted to neutralize the political opposition from the judiciary. We hoped that fair-minded jurists, exposed to the factual and logical flaws in the anti-expansionist arguments and to the elitism of the anti-expansionist rhetoric, would abandon both. Further, we suspect that the anti-expansionist stance is not the position of the majority of circuit judges, but rather that of a vocal and powerful minority. If our assertion is correct, we hope our article will encourage the remaining judges to tell Congress that they would welcome the help required to return the circuit courts to the tradition of Learned Hand and to the goal of equal justice for all litigants.[65]

III
YET ANOTHER STUDY

Instead of an immediate move to expand the circuit bench, Professor Tobias argues that the complexity of the problems of the circuit courts requires yet another major study.[66] His proposed "National Study Commission" would identify "the most troubling complications that rising appeals are causing and that the appellate courts are facing, the precise sources and effects of the problems, and the most efficacious combination of solutions."[67] This would be a most ambitious project, involving members of Congress, federal judges, Executive Branch Officials, members of the public, and a "staff of full-time professionals."[68] The goal of this expensive and lengthy undertaking would be to reach a consensus about a number of issues on which consensus either has existed for many decades—equal justice for all—or on which no consensus is possible—a cost/benefit analysis of collegiality.

Tobias's solution is a recipe for further delay, for the fundamental transformation of the federal appellate process is an issue that has

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63 *See generally Perspectives on Court-Congress Relations: The View from the Hill and the Federal Bench*, 79 JUDICATURE 303, 304 (1996) (noting that the judiciary's budget was increased 5% in fiscal year 1996, despite general cutbacks amid deficit worries).

64 Tobias, *supra* note 2, at 1280.

65 *See* Richman & Reynolds, *supra* note 1, at 342.

66 Tobias, *supra* note 2, at 1281.

67 *Id.* at 1283.

68 *Id.* at 1284-85.

been studied to death.[69] The causes, effects, and possible solutions to the demise of the Learned Hand tradition are very well known. The past quarter-century has seen any number of blue-ribbon studies which have examined all or part of the crisis in the federal appellate system.[70] Those studies include reports made by the American Law Institute (1969),[71] the American Bar Foundation (1968),[72] the Freund Committee (1972),[73] the Hruska Commission (1973),[74] the Advisory Council on Appellate Justice (1975),[75] the Hruska Commission (1975),[76] the American Bar Association Action Commission (1980),[77] the Department of Justice (1977),[78] the New York University Study (1986),[79] the Federal Courts Study Commission (1990),[80] the American Bar Association Standing Committee on Federal Judicial Improvements (1989),[81] and the Committee on Long Range Planning of the Judicial Conference of the United States (1994).[82] There has been a good deal of academic writing on the problem as well.

These studies have produced a small library shelf of reports, but no effective solution to the problem of two-track justice in the circuit

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69 *See* BAKER, *supra* note 50, at 303-426 (providing an extensive bibliography of books and articles pertaining to the United States Courts of Appeals through January 1993).

70 *See id.* at 34-43 (summarizing these reports).

71 AMERICAN LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969).

72 *See* AMERICAN BAR FOUND., ACCOMMODATING THE WORKLOAD OF THE UNITED STATES COURTS OF APPEALS: REPORT OF RECOMMENDATIONS (1968).

73 *See* FEDERAL JUD. CTR., REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (1972), *reprinted in* 57 F.R.D. 573 (1973).

74 *See* COMMISSION ON REVISION OF THE FED. CRT. APPELLATE SYS., THE GEOGRAPHICAL BOUNDARIES OF THE SEVERAL JUDICIAL CIRCUITS: RECOMMENDATIONS FOR CHANGE (1973), *reprinted in* 62 F.R.D. 223 (1974).

75 *See* 1-5 ADVISORY COUNCIL FOR APPELLATE JUST., APPELLATE JUSTICE: 1975, MATERIALS FOR A NATIONAL CONFERENCE, SAN DIEGO, CALIFORNIA (1975).

76 *See* COMMISSION ON REVISION OF THE FED. CRT. APPELLATE SYS., STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (1975), *reprinted in* 67 F.R.D. 195 (1976).

77 *See* Seth Hufstedler & Paul Nejelski, *A.B.A. Action Commission Challenges Litigation Cost and Delay*, 66 A.B.A. J. 965 (1980) (discussing the study undertaken by the American Bar Association Action Commission to Reduce Court Costs and Delay).

78 *See* DEPARTMENT OF JUST. COMM. ON REVISION OF THE FED. JUD. SYS., THE NEEDS OF THE FEDERAL COURTS (1977).

79 *See New York University Supreme Court Project*, 59 N.Y.U. L. REV. 677-1929 (1984).

80 *See* Maurice Rosenberg, *The Federal Courts in the 21st Century*, 15 NOVA L. REV. 105 (1991) (discussing the report by the Federal Courts Study Committee).

81 AMERICAN BAR ASS'N STANDING COMM. ON FED. JUD. IMPROVEMENTS, THE UNITED STATES COURTS OF APPEALS: REEXAMINING STRUCTURE AND PROCESS AFTER A CENTURY OF GROWTH (1989).

82 COMMITTEE ON LONG RANGE PLANNING, *supra* note 25. In addition, the Federal Judicial Center has published a number of splendid monographs on discrete aspects of the current crisis in federal appellate procedures. *See, e.g.*, DONNA STIENSTRA & JOE S. CECIL, FEDERAL JUDICIAL CENTER, THE ROLE OF STAFF ATTORNEYS AND FACE-TO-FACE CONFERENCING IN NON-ARGUMENT DECISIONMAKING (1989).

courts.[83] Indeed, the twenty-five year history of study coincides almost perfectly with the life history of the appellate-expediting devices (reduced argument and publication, and increased use of central staff). That coincidence is not accidental because both phenomena—endless study and the development of two-track justice—are ways of responding to the caseload glut without changing significantly the size and status of the current circuit bench. The "National Study Commission" will not change that. It will be composed of "the usual suspects": judges, legislators, scholars, and members of the public.[84] And it will certainly fall prey to the influence and dominance of anti-expansionist judges serving as Commission members. Thus, the concern of the judiciary for its own dignitary interests will be overvalued. The proposed Commission is, thus, the bureaucratic equivalent of placing the fox in the henhouse[85] and will undoubtably produce the standard report calling for a few process reforms and major jurisdictional restraints. Predictably, Congress will adopt the former and ignore the latter, and, at the end of the day, the circuit courts will still be vastly overloaded and will still ration justice via the two-track system to keep pace. But four more years will have passed, the Learned Hand tradition will be further devalued, and it will be time for the apologists to propose yet another fruitless study. We know what we need to know;[86] it is time to act.

IV
THE RED HERRING OF POLYCENTRISM

Intermingled with his call for a "National Study Commission" is Tobias's argument that the question of proper appellate procedure is "polycentric"[87] and, therefore, beyond the abilities of the judges to

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83 Tobias cites the "success" of the Federal Courts Study Commission as a model. Tobias, *supra* note 2, at 1284. We do not know how it can be called a "success." It changed nothing. Not a single one of its jurisdictional recommendations has been introduced in Congress—let alone enacted. Worse, since the Commission reported, we believe the system has deteriorated even further. *See* LEONIDAS MECHAM, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1995 REPORT OF THE DIRECTOR 20 (showing that although no new judgeships were authorized between 1991 and 1995, the number of cases filed rose from 43,027 to 50,072).

84 Tobias, *supra* note 2, at 1284. It is unlikely that those chosen will be critics of the two-track system.

85 Tobias attempts to ameliorate this effect by including significant numbers of nonjudicial personnel with diverse perspectives. *Id.* at 1285. We do not believe that that will remove the foxes from the henhouse; the judges will inevitably dominate any committee they serve on.

86 One motive for additional study might be the hope that some data will emerge to support the Balkanization or collegiality arguments. That seems most unlikely; the coincidence in those areas between the intuitive and empirical results is not fortuitous. Further study is unlikely to yield supporting data.

87 Tobias, *supra* note 2, at 1285, 1287. The concept of polycentrism first appears in an essay by Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978),

resolve. A "polycentric" problem is one that defies judicial resolution because its solution is so indeterminate that it cannot be captured in a reasoned opinion. All judicial problem-solving is polycentric to some extent: A decision to suppress illegally obtained evidence or to enforce the parol evidence rule necessarily entails costs and creates ripple effects throughout society. Striking the proper balance among such competing choices can be very difficult. Nevertheless, federal courts do not hesitate to make "polycentric" antitrust, national security, and products liability decisions that have important national ramifications. Given that willingness, we find it difficult to understand why *the concept of polycentricism should excuse the failure to seek* sufficient resources to extend equal appellate review procedures to all cases within the courts' congressionally-mandated appellate jurisdiction.

More importantly, there are some trade-offs that courts simply do not make, no matter how polycentric a problem might be. The decision to integrate the nation's schools, for example, although certainly indeterminate in some sense, did not invite polycentric hand-wringing and redundant study by commissions. The Court ignored competing values, viewing the goal of integration as so important that it transcended all countervailing considerations. To label an issue "polycentric," in other words, is simply to record a preference that a vast array of competing values receive careful consideration in its solution.

The point of our article, however, is that attempts to solve the problems of the circuit courts have failed precisely because they have over-considered and overvalued some trivial interests. The collegiality of the courts and the judges' status and job satisfaction may have some value, but they do not carry the same weight as the goal of preserving the Learned Hand tradition of assuring high quality appellate justice to all litigants. The "polycentric" label and the call for more study are thus objectionable for the same reason. They are an invitation to consider the comfort and orderliness of the deck chairs as the Titanic slips beneath the waves. We believe that equal, high quality justice is a transcendent value and that balancing it against trivialities is a fundamental moral error.[88]

The most critical flaw in the Tobias argument on polycentrism, however, is that it misconstrues the nature of the problem. The polycentric label is one used to excuse a court from deciding an issue that cannot be solved via traditional legal analysis in a judicial deci-

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reprinted in abridged form in HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 397-403 (1994) (providing a reprint of the famous 1958 "tentative" edition).

88 We emphasize that the fiscal implications of expansion are neither comparatively nor proportionally significant with respect to other fiscal authorizations. In any event, it is up to Congress to make the "polycentric" trade-off between equal justice and, say, price supports for tobacco farming.

sion. But, we have not suggested that the judges should *themselves* decide to add substantial numbers to their rolls. Polycentric or not, the problem is one for Congress to solve. Our criticism of the judicial establishment is based on its very long-standing *reluctance to ask Congress* for additional appellate capacity. The failure to lobby for the Learned Hand Tradition and to encourage Congress to supply the resources needed to permit the courts to live up to their fundamental promise that the law is no respecter of persons cannot be excused.

CONCLUSION

Little separates Tobias from us with respect to the existence of the problem of appellate decisionmaking procedures or the range of possible solutions. Two basic issues, however, do separate us: First, we believe we have considered carefully and refuted the anti-expansionists' arguments that have been articulated so far. We do not believe that the discussion can be advanced by summarily restating invalid arguments. We would welcome a response to our critiques, but mere recitation of discredited positions is not a response. Second, we disagree on the weights to be assigned to the opposing values in the judicial expansion debate. Tobias would call the problem "polycentric," consider a set of values we find trivial (if not wrong), and charge a commission to balance those values against the Learned Hand tradition of equal, high quality appellate justice. By contrast, we see that tradition as a transcendent value incommensurate with concerns about the judges' prestige, status, or job satisfaction. The only way to preserve this value is through a radical expansion of the circuit bench; we call on the judges to encourage Congress to authorize that expansion. But Congress cannot delay much longer; the tradition must be saved while there are still those who remember and cherish it.