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# Much Ado About the Tip of an Iceberg<sup>1</sup>

William M. Richman\*

I was delighted to be invited to attend this Washington and Lee School of Law Symposium and to contribute the views I expressed there to the published record of the symposium. To one who has spent the better part of a career studying the nonprecedent regimes of the United States circuit courts,<sup>2</sup> it is especially gratifying that the issue finally is beginning to attract attention beyond the narrow cadre of federal court junkies who for thirty years have constituted "the usual suspects."<sup>3</sup>

The occasion for the resurgence of interest in the topic is the decisions in *Hart v. Massanari*<sup>4</sup> and *Anastasoff v. United States*<sup>5</sup> and the promulgation of Proposed Federal Rule of Appellate Procedure 32.1(a) which provides:

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1. The allusion is mixed, recalling both Shakespeare and the more mundane iceberg aphorism. Elsewhere, Bill Reynolds and I have invoked the metaphor of the deck chairs on the Titanic, so the iceberg metaphor seems uniquely appropriate. See William L. Reynolds & William M. Richman, *Studying Deck Chairs on the Titanic*, 81 CORNELL L. REV. 1290, 1306 (1996) [hereinafter Reynolds & Richman, *Studying Deck Chairs*] (using the Titanic metaphor to highlight the need for change in the overworked courts of appeals).

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2. See generally William L. Reynolds & William M. Richman, *Justice and More Judges*, 15 J.L. & POL. 559 (1999) [hereinafter Reynolds & Richman, *Justice*]; William M. Richman, *An Argument on the Record for More Federal Judgeships*, 1 J. APP. PRAC. & PROC. 1 (1999); William M. Richman, *Rationing Judgeships Has Lost Its Appeal*, 24 PEPP. L. REV. 911 (1997); William L. Reynolds & William M. Richman, *The New Certiorari Courts*, 80 JUDICATURE 206 (1997); Reynolds & Richman, *Studying Deck Chairs*, *supra* note 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) [hereinafter Richman & Reynolds, *Elitism*]; William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals—The Price of Appellate Reform*, 48 CHI. L. REV. 573 (1981) (detailing an empirical study commissioned by the Federal Judicial Center and published separately as a monograph by the Center); William L. Reynolds & William M. Richman, *Limited Publication in the Fourth and Sixth Circuits*, 1979 DUKE L.J. 807 (1979); 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 (1978).

3. The most usual are Thomas A. Baker, Paul Carrington, Martha Dragitch, Arthur Hellman, Judith McKenna, Daniel Meador, John Oakley, Judith Resnick, William Reynolds, Lauren Robel, Carl Tobias, Patricia Wald, Stephen Wasby, as well as the participants in this symposium.

4. See *Hart v. Massanari*, 266 F.3d 1155, 1180 (9th Cir. 2001) (holding that the rule generally prohibiting citation to unpublished decisions and orders is constitutional, but counsel's violation does not warrant sanctions).

5. See *Anastasoff v. United States*, 223 F.3d 898, 899 (8th Cir. 2000) (holding that

**Citation Permitted.** No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like, unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions.<sup>6</sup>

Proposed Rule 32.1, designed to eliminate one of the most egregious ingredients of the nonprecedent program, proved quite controversial and produced an unprecedented number of comments. Because the rule is quite limited, the controversy is somewhat surprising. In the words of the Reporter,

It [the rule] takes no position on whether refusing to treat an "unpublished" opinion as binding precedent is constitutional. . . . It does not require any court to issue an "unpublished" opinion or forbid any court from doing so. It does not dictate the circumstances under which a court may choose to designate an opinion as "unpublished" or specify the procedure that a court must follow in making that decision. It says nothing about what effect a court must give to one of its "unpublished" opinions or to the "unpublished" opinions of another court. The one and only issue addressed by Rule 32.1 is the *citation* of judicial opinions that have been *designated* as "unpublished."<sup>7</sup>

From the historical perspective,<sup>8</sup> the uproar over the rule is even more curious, for the rule would affect only noncitation rules (and only in four of the

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unpublished opinions have precedential effect), *vacated en banc*, 235 F.3d 1054 (8th Cir. 2000).

6. COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, CIVIL, AND CRIMINAL PROCEDURE 31–32 (Aug. 2003). The rule also has a provision (32.1(b)) requiring a party who cites an unpublished judicial opinion, order, or judgment that is not available in a publicly accessible electronic database to file and serve a copy of the opinion with the brief or other paper in which it is cited. *See id.* at 32 (providing the proposed text of Rule 32.1(b)). Note that, because of the terms of Rule 32.1(a), subdivision (b) cannot be read to permit the court to require parties to file and serve copies of all of the unpublished opinions cited in their briefs or other papers unless the court generally requires parties to file and serve copies of all the published judicial opinions cited. The rule requires only the filing and serving of copies of an unpublished opinion if it "is not available in a publicly accessible electronic data base." Patrick J. Schiltz, *Much Ado About Little: Explaining the Sturm Und Drang Over The Citation of Unpublished Opinions*, 62 WASH. & LEE L. REV. 1429, 1431 n.8 (2005).

7. COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, CIVIL, AND CRIMINAL PROCEDURE 33–34 (Aug. 2003).

8. On the history and prehistory of the issue, see Penelope J. Pether, *Take a Letter, Your Honor: Outing the Judicial Epistemology of Hart v. Massanari*, 62 WASH. & LEE L. REV. 1553 (2005); *see also* Penelope J. Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1442–44 (2004) (explaining the roles of the Federal Judicial Center and the Commission on Revision of the Federal Court Appellate System in the

thirteen circuits), and those rules represent merely the tip of a much larger and more dangerous iceberg—the two-track system of justice in our federal appellate courts.

From 1890 (the year of their establishment) until the mid-1970s, the circuit courts handled their caseload by what we can term the traditional common law appellate model: the judges heard oral arguments, conferred with their colleagues on the panel, and sometimes with the help of a single clerk, wrote fully reasoned, precedential, published opinions in nearly all cases.

Beginning in the 1970s, in response to a geometrically increasing caseload, the judges began to abandon that model in favor of the two-track system of appellate justice that prevails today. Now, the courts apply the traditional model to about twenty percent of the caseload. The judges decide the remainder without oral argument, without the traditional panel conference, and without a signed,<sup>9</sup> published, and precedential opinion.<sup>10</sup> Moreover, the judges put relatively little effort into the vast majority of their caseload while lavishing attention on the few most worthy cases. Instead most of the work on "routine" cases is done by a large corps of staff attorneys, typically recent law graduates, assigned to the court at large rather than any particular judge.<sup>11</sup> Typically, the judges' input amounts to a "conference," lasting a few hours, in which a panel approves the staff attorneys' draft opinions in as many as fifty cases.

Finally, the judges often do not make the crucial justice-rationing decisions that determine which cases will fall on which track. Usually clerks and central staff screen the appeals to determine which cases will fall into the favored minority destined to receive traditional appellate process and which will comprise the vast majority to be decided by the truncated process.<sup>12</sup> Thus, an effective right to appeal error to the circuit courts no longer exists; instead, litigants must petition the staff to obtain access to the judges. In short, despite their statutory and historical role as courts of appeals, the circuit courts have become certiorari courts.

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original restrictions on publishing opinions to deal with increasing caseload volume).

9. See Arthur J. Jacobson, *Publishing Dissent*, 62 WASH. & LEE L. REV. 1607, 1632 (2005) (noting that, by signing an opinion, the judge takes moral and political responsibility).

10. Sarah M.R. Cravens, *Judges As Trustees of the Law: Publication as a Duty to Account*, 62 WASH. & LEE L. REV. 1637, 1644–46 (2005) (concluding that nonpublication reduces the accountability and perceived legitimacy of judicial decisions).

11. See Richman & Reynolds, *Elitism*, *supra* note 2, at 290 (explaining that the role of the central staff is to conserve judicial effort by screening cases and participating significantly in the opinion-writing and decision-making processes). Law clerks have trebled in the last thirty years, and the number of central staff, virtually unknown thirty years ago, now outnumber judges.

12. See Richard B. Cappalli, *The Common Law's Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755, 790 (2003) (noting that it is unwise to trust the tracking decision to staff attorneys and clerks, most of whom are recent law graduates with little knowledge of the legal method).

The increasingly elaborate treatment of the favored twenty percent of the cases highlights the inequity of the two-track system. Before the 1970s, a typical circuit court opinion was relatively short and to the point, occupying an average of four pages in the Federal Reporter. Today, those opinions often exceed twenty pages and are researched and crafted with the care appropriate for scholarly law review articles or treatises.<sup>13</sup> Moreover, they are afforded hyperprecedential effect, controlling the decisions of subsequent panels unless overruled by the Supreme Court or the circuit court sitting en banc.

The most obvious way to deal with the problem of volume in the circuit courts without resorting to the two-track system is to create more judgeships. With its current number of judgeships, each judge must decide on the merits of over 400 cases, in addition to writing opinions in some smaller number. Clearly that caseload is incompatible with the traditional common law method of deciding appellate cases and thus necessitates the two-track appellate justice system. The complement of judges adequate to handle the job by the traditional method would be two or three times as great as the current roster of less than 170.<sup>14</sup>

Then why not do it? Why not double the complement of appellate judges and thus restore the traditional method of deciding each appeal with an argument, a conference, and a published precedential opinion written by Article Three judges? The answer, of course, is that the politics are all wrong; but most of the opposition has come from an unexpected source.

It would be understandable if the opposition were based on competing fiscal demands. Circuit judgeships are budgeted by the Administrative Office at close to \$1.5 million per year for each, so the arithmetic yields a figure of almost \$300 million annually to staff the circuit courts at a level adequate to do their job via the traditional method. That seems like a pretty respectable figure, but large numbers are understandable only by comparisons. President Bush's tax cuts have deprived the federal government of \$168 billion dollars per year,<sup>15</sup> and the effort to bring democracy to Iraq has cost upwards of \$100 billion per year.<sup>16</sup> In fact, the Federal

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13. Samuel A. Alito, *How Did We Get Here? Where Are We Going?*, Address to Washington and Lee University School of Law Symposium: *Have We Ceased to be a Common Law Country?* (Mar. 18, 2005) [hereinafter Alito, Symposium Address].

14. See GORDON BERMANT ET AL., FEDERAL JUDICIAL CENTER, *IMPOSING A MORATORIUM ON THE NUMBER OF FEDERAL JUDGES: ANALYSIS OF ARGUMENTS AND IMPLICATIONS* 9 (1993) (noting that the Judicial Conference has adopted 255 merits dispositions as the maximum desirable workload for a circuit judge).

15. Press Release, Citizens for Tax Justice, *The Bush Tax Cuts So Far* (July 2005) (calculating tax cuts using the Institute on Taxation and Economic Policy Tax Model and averaging the totals for 2001 through 2005), available at <http://www.ctj.org/pdf/gwbdata.pdf>.

16. See PHYLLIS BENNIS ET AL., INST. FOR POLICY STUDIES, *THE IRAQ QUAGMIRE: THE MOUNTING COSTS OF WAR AND THE CASE FOR BRINGING HOME THE TROOPS* 12-13 (2005)

Government spends less than 0.2% of the federal budget on the entire federal judiciary,<sup>17</sup> and the additional \$300 million required for 200 new judgeships would account for less than 5% of that 0.2%. With the stakes so small, it seems unlikely that the Congress or the Executive Branch would turn a deaf ear to determined lobbying by the judiciary and the bar along with the united advocacy of a widely disparate group of litigants.<sup>18</sup>

The opposition, however, has not come from the taxpayers or a fiscally responsible Congress (try to keep a straight face) or even from the military or other federal government cost centers; rather, it has come from the judges themselves. Based on an array of logically flawed and empirically groundless arguments,<sup>19</sup> the

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("Congress has already approved four spending bills for Iraq with funds totaling \$204.4 billion."), available at <http://www.ips-dc.org/iraq/quagmire/IraqQuagmire.pdf>.

17. News Release, Administrative Office of the U.S. Courts, Budget Cuts Leave 6% of Federal Court Jobs Vacant (Nov. 17, 2004), available at <http://www.uscourts.gov/PressReleases/LostJobs.pdf>.

18. For a comparison of the requested and received judicial budgets, see Press Release, Administrative Office of the U.S. Courts, Judiciary Budget: Facts and Impact, at <http://www.uscourts.gov/judiciary2005.html> (last visited Sept. 30, 2005). In recent years, Congress has been reluctant to fund the judiciary adequately, but the reluctance has focused principally on staff and other para-judicial personnel. It is not completely clear what Congress would do if faced with a compelling appeal from the judiciary for more judgeships, but it is clear that those appeals have not been made.

19. Perhaps the most common argument against adding additional judgeships to existing circuits is that the additional judges will decide more cases, and the law of the circuit will become muddled and inconsistent. Adding judges increases geometrically the total number of possible three-judge panels and thus decreases the predictability of decisions within the circuit. That uncertainty in turn decreases the disincentives to appeal; if the result in the case is less certain, then the conscientious advocate is more likely to recommend an appeal to his client.

The fatal flaw of this argument is that the available empirical research does not support it. There is no evidence that adding judgeships reduces the clarity of circuit law or increases the rate of appeal. Indeed, the available evidence suggests the contrary, that more decisional law within the circuit reduces uncertainty and increases the clarity of the law. Similarly, there is no empirical evidence for the proposition that rates of appeal are at all affected by the size of a circuit court or the amount of decisional law it produces. See JUDITH A. MCKENNA, FEDERAL JUDICIAL CENTER, STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS 93 (1993) (noting that a "strong majority" of appellate and district court judges believed lack of clear precedent was not a large problem); Arthur D. Hellman, *Breaking the Banc: The Common-Law Process in the Large Appellate Court*, 23 ARIZ. ST. L.J. 915 (1991) (concluding that a change in judicial structure would have an effect on confidence and predictability in the courts of appeals); Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practices of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541, 597-99 (1989) (concluding that panel decisions in the Ninth Circuit are not the only reason for inconsistency).

Similarly, there are arguments against increasing the number of circuits, principally that it would multiply the number of intercircuit conflicts, which the Supreme Court, because of its limited docket, would be unable to resolve. Once again, however, the available empirical

Judicial Establishment<sup>20</sup> has rejected the one obvious solution to the problem of appellate overload and the two-track system it has spawned: to petition Congress for a substantial increase in the number of judges.

The transparent weakness of the arguments against expansion of the judiciary generates the suspicion that there are ulterior motives for the resistance, chief among them being the judges' desire to maintain a small, elite federal judiciary. Judge Tjoflat, of the Eleventh Circuit, bases his anti-expansionism, in part, on the fear of diminished "collegiality," suggesting that "life as a judge on the jumbo court is comparable to life as a citizen in a big city—life on a smaller court to life in a small town."<sup>21</sup> Undoubtedly to him and many others, small-town life is more pleasant, but the judges' quality of life is a minor value compared to the need to assure adequate appellate capacity for the nation. Several writers have argued for the efficiency benefits from small size, but again, the empirical research does not support the arguments.<sup>22</sup>

A more alarming ulterior motive is the judges' desire to safeguard their own prestige and status. Sometimes the elitism appears as concern that an enlarged federal judiciary will be unable to recruit and retain judges of sufficient quality. Judge Newman worries that a larger appellate judiciary would include "an unacceptable number of mediocre and even a few unqualified people" and suggests that the quality of an enlarged federal

evidence is to the contrary. See ARTHUR D. HELLMAN, FEDERAL JUDICIAL CENTER, UNRESOLVED INTERCIRCUIT CONFLICTS: THE NATURE AND SCOPE OF THE PROBLEM V (Final Report: Phase I, Dec. 1991) (concluding that the numbers indicate a problem when the Supreme Court cannot take all cases of intercircuit conflicts); Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. PITT. L. REV. 693, 797 (1995) (studying unresolved intercircuit conflicts and concluding "that unresolved intercircuit conflicts do not constitute a problem of serious magnitude in the federal judicial system"). This argument, like many on the topic, relies on the "parade of horrors" rhetorical technique. See generally David S. Caudill, *Parade Of Horribles, Circles of Hell: The Ethical Dimensions of the Publication Controversy*, 62 WASH. & LEE L. REV. 1653 (2005).

Lack of empirical evidence also afflicts many of the arguments marshaled against Rule 32.1. See Stephen R. Barnett, *The Dog That Did Not Bark: No-Citation Rules, Judicial Conference Rulemaking, and Federal Public Defenders*, 62 WASH. & LEE L. REV. 1491 (2005) (reporting empirical evidence casting doubt on arguments against Rule 32.1 that were marshaled by Ninth Circuit judges and lawyers).

20. This is not to say that every Circuit Judge opposes a radical increase in the number of judgeships; indeed some have supported it publicly. See, e.g., Stephen Reinhardt, *A Plea to Save the Federal Courts—Too Few Judges, Too Many Cases*, A.B.A. J., Jan. 1993, at 52 (proposing that Congress double the size of the Courts of Appeals to give each case the treatment it deserves). The point is rather that the judges who have been the most vocal and most public and who control the courts' request to Congress have rejected that solution.

21. Gerald B. Tjoflat, *More Judges, Less Justice*, A.B.A. J., July 1993, at 70.

22. See Richman & Reynolds, *Elitism*, *supra* note 2, at 311–12 (attributing the increase in appeal rate to changes in the justice system rather than the increase in judgeships).

judiciary would be "indistinguishable from the most pedestrian of state judiciaries."<sup>23</sup> Judge Rubin is even more explicit, linking the prestige of the court to the exclusiveness of its docket: "The desirability of being a federal judge is inversely proportionate to the number of routine cases brought to federal court. . . . The professional quality of those who seek a federal judgeship is inevitably affected by the prestige, the challenges and the responsibilities of being a federal judge."<sup>24</sup>

In the same vein, former Chief Justice Rehnquist deplored 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," and Justice Scalia frets that a larger corps of judges "only dilutes the prestige of office and aggravates the problem of image."<sup>25</sup> Were there any doubt about the disdain some judges feel for the majority of their caseloads, Judge Edith H. Jones dispels it with this marvelous comparison 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. . . . 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.<sup>26</sup>

Beyond the arrogant rhetoric, the judiciary's proposals for jurisdictional contraction also suggest that elitism is a major reason for the opposition to expansion. The cases proposed for elimination are usually the small-stakes appeals brought by the poorest and least sophisticated federal litigants: diversity cases below a large amount in controversy; ERISA claims; FELA and Jones Act appeals; and prisoner's civil rights, social security, and employment discrimination actions.

The judges are telling us in several ways, and as clearly as possible, that they are far too important to be wasting much time on the "bottom" eighty

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23. Jon O. Newman, *1,000 Judges—The Limit for an Effective Federal Judiciary*, 76 JUDICATURE 187, 188 (1993).

24. Alvin B. Rubin, *Bureaucratization of the Federal Courts: The Tension between Justice and Efficiency*, 55 NOTRE DAME L. REV. 648, 657 (1980).

25. Justice Antonin Scalia, Remarks before the Fellows of the American Bar Foundation and the Natural Conference of Bar Residents (Feb. 15, 1987), in WILLIAM W. SCHWARZER & RUSSEL R. WHEELER, FEDERAL JUDICIAL CENTER, ON THE FEDERALIZATION OF THE ADMINISTRATION OF CIVIL AND CRIMINAL JUSTICE 44 (Long-Range Planning Series, Paper No. 2, 1994).

26. 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).



percent of the docket.<sup>27</sup> The quest for elite status and stimulating work, like the desire for a small-court culture, are not evils in and of themselves. Still, they weigh little in the balance compared to the nation's need for adequate appellate capacity and the federal court system's need to retain its ability to "administer justice without respect to persons, and do equal right to the poor and to the rich."<sup>28</sup>

Judge Alito's response to the call for more judgeships is both more honest than the arguments advanced by the judicial establishment and more humble than the arrogant pronouncements of some of its prominent spokespersons. He argues, quite correctly, that the additional judgeships would radically change the nature of the circuit courts by requiring one or more of the following changes: much larger circuits, many more circuits, specialized appellate courts, or an additional level of appellate courts, either one between the circuit courts and the Supreme Court, or one between the district courts and the circuit courts.<sup>29</sup>

Any of these measures would create an institution far different from the circuit courts we know today and would require the courts to abandon several cherished traditions: the small size and elite status of the federal judiciary, the historical role of federal judges as generalists, the practice of allowing conflicts to "percolate" before they reach the Supreme Court, and the traditional conventions of circuit alignment.<sup>30</sup>

As comforting and familiar as these traditions are, however, they are also peripheral. The defining characteristic of the federal appellate courts has been that the judges did their own high quality work, created a body of federal precedent, and did not ration justice according to the status of the litigants. The current two-track system of appellate justice, of course, jeopardizes those defining characteristics. If the cost of saving them is the abandonment of some peripheral traditions, though the price may be high, it is certainly a worthwhile exchange.

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27. See COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, CIVIL, AND CRIMINAL PROCEDURE 33 (Aug. 2003) ("The thirteen courts of appeals have cumulatively issued tens of thousands of 'unpublished' opinions and about 80% of the opinions issued the courts of appeals in recent years have been designated as unpublished.").

28. 28 U.S.C. § 453 (2005) (giving the judicial oath of office).

29. See Alito, Symposium Address, *supra* note 13.

30. See William M. Richman, Testimony Before the Commission on Structural Alternatives for the Federal Courts of Appeal (Apr. 3, 1998), available at <http://www.library.unt.edu/gpo/csafca/hearings/chicago/richman.htm>.

Further, the loss of the peripheral traditions is inevitable anyway. As caseloads continue to rise, the system will seek to accommodate by increasing the use of screening and triage, but at some point Congress, the bench, the bar, and the public will cease to tolerate a regime that screens ninety or ninety-five percent of the cases out of the traditional appellate process. The pressure to expand will be irresistible, and loss of the peripheral traditions will occur anyway.

To return to the central question of the symposium, it is apparent that the circuit courts have ceased to operate as common law courts, denying even persuasive authority to as many as eighty percent of their decisions.<sup>31</sup> But when we broaden the focus and consider the entire two-track appellate justice system, it seems clear that the situation is worse yet. The courts, over time and deliberately, have abandoned not merely the common law, but the rule of law itself, or at least their obligation to be bound by it. After all, what is the rule of law if it does not constrain the powerful, the law givers?

Without statutory authority, they have transformed themselves from courts of mandatory jurisdiction (whose primary function is error correction) into de facto certiorari courts, taking only those cases suitable for making law.<sup>32</sup> Like the Supreme Court, which by contrast has statutory authority, they hear the cases and own the decisions that they choose, consigning the remainder to a process that differs importantly from the traditional ideal of an appeal of right.<sup>33</sup> This is not hyperbole, as will become all the more apparent when the percentage of track-two cases rises from eighty to ninety or ninety-five. At that point, the only distinction between track-two affirmances and the Supreme Court's denials of certiorari will be the judges' assurances that they really do "decide" the track-two cases. Those assurances have become harder and harder to take seriously as the absolute number of track-two cases has increased.

Moreover, every indication is that the circuit courts are just as their leading spokespersons would have them. The two-track system, which began as a strategy of necessity for dealing with a caseload glut, has become congenial and satisfying. It increases the judges' prestige and reduces their boredom. Thus, prominent jurists have worked hard to resist any changes that would

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31. COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, CIVIL, AND CRIMINAL PROCEDURE 33 (Aug. 2003) (noting that eighty percent of Courts of Appeals opinions are unpublished).

32. See Reynolds & Richman, *Justice*, *supra* note 2, at 560 ("[T]he federal circuit courts have drastically changed their procedures in order to accommodate caseload pressure.").

33. See Richman & Reynolds, *Elitism*, *supra* note 2, at 341 ("The routine, trivial cases—usually the ones brought by poorer, weaker litigants—are relegated to track-two appellate justice.").

return the courts to their original, mundane mission of error correction. I see the orchestrated opposition to Rule 32.1 as part of that same campaign. The rule is a first and very small step toward reestablishing in the circuit courts both the mandatory appeal of right and the demanding, if sometimes unglamorous, common law tradition. Of course it will be resisted.