

Trends in Administration of Justice in the Federal Courts

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I. INTRODUCTION

The need to improve the administration of justice is not a recent phenomenon. Its seeds were planted in antiquity. The Hebrews were admonished in Leviticus to “do no unrighteousness in judgment,” to show no prejudice in favor of the poor, “nor favor the person of the mighty.”¹ Every person was to be judged on the scale of merit. In modern times, the administration of justice in the United States—the procedural infrastructure of our legal system—has been a primary concern of the organized bar and legal academia since Roscoe Pound’s epic speech in 1906 on the shortcomings of justice under our legal system.²

Some of the ills Pound diagnosed in the legal system of his day, such as the prevalence of a “sporting” theory of justice, have been alleviated in the intervening years. Unfortunately, other problems, such as inordinate delay and expense in the disposition of cases, have thus far eluded cure. These have been compounded by a host of new problems unimaginable by even the most prescient legal observer in 1906. Several distinguished legal commentators have discussed some of these problems and advanced solutions to them.³ In commenting on trends in the administration of justice, I shall seek to avoid trodding on analytical paths already blazed by others. I approach my task more as a couturier forecasting what fashions will unfold next season than as an oracle foretelling vaguely what the future will bring.

Any prediction of the future course of events, even the immediate future, is precarious. With 20/20 hindsight, one can see how reforms of yesteryear have themselves come to clog the machinery of the administration of justice. For example, the concern of the framers of the Constitution that local prejudice against out-of-state parties would result in injustice led to the creation of federal diversity jurisdiction.⁴ In the

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1. *Leviticus* 19:15.

2. R. POUND, *THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE* (1906), reprinted in 35 F.R.D. 241, 273 (1964).

3. See, e.g., Friendly, *The Federal Courts*, in *AMERICAN LAW: THE THIRD CENTURY* 197 (B. Schwartz ed. 1976); Kaufman, *Judicial Reform in the Next Century*, in *AMERICAN LAW: THE THIRD CENTURY* 229 (B. Schwartz ed. 1976).

4. Mr. Justice Frankfurter succinctly stated the basis for federal diversity jurisdiction as the belief, conscious or otherwise, that the courts of a state may favor their own citizens:

Bias against outsiders may become embedded in a judgment of a state court and yet not be sufficiently apparent to be made the basis of a federal claim. To avoid possible discriminations of this sort, so the theory goes, a citizen of a state other than that in which he

early days of our nation, when the federal courts had little business and xenophobia was not uncommon, granting the federal courts diversity jurisdiction was an innovation that made considerable sense. Today, however, as the caseloads of the federal courts have increased to staggering numbers and local bias against out-of-state parties has waned with the cementing of the bonds of nationhood, diversity jurisdiction has become an anachronism that the federal courts can ill afford. Another illustration of a reform that has gone awry is the liberalization of discovery in civil cases. The unforeseen by-product of reformers' concern for improving the quest for the truth has been an enormous increase in litigation expense, delay, and other abuses which now suggest that this reform is itself sorely in need of reform.

Change is inevitable in a dynamic society; it is natural in a progressive administration of justice. Fundamental concepts of justice may be eternal, but the delivery system must be shaped by the changing needs of society. Vitality in the system can only be maintained if it responds to the social and societal needs of the times. As Mr. Justice Cardozo observed, "Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the Nation. What is critical or urgent changes with the times."⁵ Many forces unquestionably enter the confluence of today's social, economic, and legal currents to shape the future of the administration of justice.

One evident force is the increasing litigiousness of our society as manifested by the escalating resort to the courts to settle disputes.⁶ A second is society's heightened sensitivity to civil rights. This is reflected in the civil rights legislation of the 1960s and the judicial resurrection of the civil rights legislation of the Reconstruction era. A third is the increased recognition of the rights of criminal defendants and prisoners. This increased recognition has extended not only to the conduct of the police and prison officials, but also to the conduct of virtually all stages of the criminal process itself. A fourth is society's increasing concern with personal health, safety, pensions, and retirement, reflected, *inter alia*, in Medicare and Medicaid legislation, the Employment Retirement Income

is suing or being sued ought to be able to go into a wholly impartial tribunal, namely, the federal court sitting in that state.

Burford v. Sun Oil Co., 319 U.S. 315, 336 (1943) (Frankfurter, J., dissenting). Some litigants may prefer to litigate in the federal courts because of better calendar control of cases and the expectation of higher levels of damages.

5. 301 U.S. 619, 641 (1937).

6. The reasons for this are obscure:

[n]o evidence can be found to give adequate support to any theory fully accounting for the rising rate of appeal in federal courts. At the present time the causes of litigation, like the causes of many other forms of behavior, are too rich a mix to be susceptible of scientific methods of proof.

Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 547 (1969).

Security Act of 1974,⁷ and the Occupational Safety and Health Act.⁸ These four forces alone portend a continued increase in the volume and complexity of cases for an already overburdened federal judiciary.⁹

In order to counterbalance this trend, the courts of appeals have initiated changes in their internal operating procedures to greatly increase the number of cases which they are able to decide. These changes include: (1) a reduction in cases slated for oral argument;¹⁰ (2) a greater reliance on central staff attorneys to screen all appeals for jurisdictional defects, prepare memoranda of law and fact in appropriate cases, process and monitor pro se matters, and assist in a variety of miscellaneous matters; and (3) an effort to harness sophisticated computer technology to make the dispensation of justice run more efficiently.¹¹ The most significant change, however, is the dramatic increase in the use of alternatives to the traditional written opinion; for example, the Second Circuit's oral decisions,¹² the Third Circuit's judgment orders, and the Fifth Circuit's Local Rule 21.¹³ These innovations also permit more judicial time to be spent on complex and significant cases.

Emerging concerns that may require significant adjustment of our present system of administering justice include energy conservation, delivery of health care, protection of the disabled, and the rapidly growing aged and retired segment of the population. Impinging on these concerns are problems raised by automated data gathering and storage that

7. Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 (Supp. V 1975).

8. Occupational Safety & Health Act of 1970, 29 U.S.C. § 651 (1970). See also Clean Air Act, 42 U.S.C. § 1857 (1970); Federal Water Pollution Control Act, 33 U.S.C. § 1251 (Supp. V 1975); National Environmental Policy Act of 1969 (NEPA) 42 U.S.C. § 4321 (Supp. V 1975); Noise Control Act of 1972, 42 U.S.C. § 4901 (Supp. V 1975); The Radiation Control for Health and Safety Act of 1968, 42 U.S.C. § 263b (1970); Federal Environmental Pesticide Control Act of 1972, 7 U.S.C. § 136 (1976).

9. From 1962 to 1977 the number of federal appeals court judges rose by 24%, contrasted against a 327% increase in cases terminated. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1977 ANNUAL REPORT OF THE DIRECTOR 65a (1977) [hereinafter cited as 1977 ANNUAL REPORT].

10. In fiscal year 1977, 31% of the cases were decided solely on the briefs without oral argument. *Id.* at 71.

11. The federal courts now have at their disposal computer research tools (the Lexis system), and machines that transmit photocopies of printed material over telephone wires. The Third Circuit is currently engaged in an experimental program testing the utility of a computerized word processing and transmitting system. The system allows a letter or opinion drafted by a judge in his chambers to be placed on the word processor unit, from which distant judges can then retrieve a print-out.

The states have also been quick to capitalize on the latest hardware. The State of Pennsylvania is currently studying a process known as "computer-assisted transcription" in order to speed up trial court record transcriptions and expedite post-trial motions and appeals.

12. 2D CIR. R. § 0.23.

13. That rule provides for affirmance without opinion when (1) a judgment of the district court is based on findings of fact that are not clearly erroneous, (2) the evidence in support of a jury verdict is not insufficient, (3) the order of an administrative agency is supported by substantial evidence on the record as a whole, or (4) no error of law appears. In the first 11 months of 1977, only 37% of all dispositions were accompanied by published opinions. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, OPERATION OF CIRCUIT OPINION PUBLICATION PLANS DURING THE ELEVEN-MONTH PERIOD ENDING NOVEMBER 30, 1977, at Appendix A (1977).

threatens undue invasion of privacy¹⁴ and by the dramatic development and utilization of sophisticated medical procedures and technology.¹⁵

II. THE CASELOAD EXPLOSION

The increasing pressure on the federal courts to maintain a high quality decision-making process in the face of a crushing caseload has raised doubts about the ability of the present court system to stand the strain. Of the ameliorative proposals currently advanced, primary attention has been focused on efforts to refashion the structure of the federal appellate courts. Attention has been directed toward the appellate courts because appellate cases have shown the sharpest surge in volume.¹⁶ Unfortunately, not enough attention has been paid to the possibility of alternative treatment of cases at the point of entry to the federal judicial system.¹⁷ Appeal to the circuit courts is traditionally a matter of right in the federal system. Except for appeals that are technically defective, the circuit courts must decide appeals on their merits. The circuit courts lack the discretionary certiorari review of the Supreme Court. For the reasons expanded upon below, I believe that possible alterations in the present appellate structure may be attended by a de-emphasis of the court as the primary locus for the adjudication of disputes.

A. *Proposals for a New Article III Tribunal*

In 1971, Chief Justice Burger appointed a study group chaired by Professor Paul Freund, under the auspices of the Federal Judicial Center, to examine the administrative health of the Supreme Court.¹⁸ Discovering that only some five percent of the cases filed in the Supreme Court were disposed of by full opinion,¹⁹ the Freund Committee was concerned that the Supreme Court was wasting time deliberating on the selection of the appeals to be heard when it could have been deciding cases on their legal merits. As a remedy, the Freund Committee proposed a national court of appeals. This court, to be comprised of seven active regional circuit judges appointed on a rotating basis, would attempt to screen out unworthy petitions for review, leaving for the Supreme Court only the

14. See generally *Whalen v. Roe*, 429 U.S. 589 (1977).

15. See generally proposed legislation in Note, *The Tragic Choice: Termination of Care for Patients in a Permanent Vegetative State*, 41 N.Y.U.L. REV. 285 (1976). Some of the dangers are imaginatively portrayed in Robin Cook's recent novel, *Coma*.

16. "Assembly line processes cannot sustain those virtues for which we have always prized federal courts: scholarship, a generalist view of the law, wisdom, mature and dispassionate reflection, and—especially important for the perceived legitimacy of judicial authority—careful and reasoned explanation of their decisions." Bork, *Dealing with the Overload in Article III Courts*, 70 F.R.D. 231, 234 (1976).

17. See Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634 (1974).

18. See Study Group on the Caseload of the Supreme Court, *Report*, 57 F.R.D. 573 (1972).

19. In the 1971 term, 3,643 cases were filed; 143 cases were disposed of by 129 full opinions. *Id.* at 579, 581.

most pressing cases. This proposal promptly drew widespread resistance and ground to a dead halt.

The caseload explosion in the federal circuit courts of appeals²⁰ prompted Congress in 1972 to establish a Committee on Revision of the Federal Court Appellate System, chaired by then-Senator Roman Hruska.²¹ There was also a realistic concern in legal circles that the increase in volume and complexity of the caseload was "threatening to convert [the courts of appeals] from deliberative institutions to processing institutions,"²² especially in view of the precipitous decline in the opportunity for oral argument and the sharp increase in the proportion of cases disposed of without published written opinion.²³ Furthermore, it was widely perceived that the Supreme Court's limited ability to review the merits of circuit court cases (approximately one percent of those decided by courts of appeals) was producing instability and lack of uniformity in the law.

The Hruska Committee recommendation for a national court of appeals differed significantly from the proposal of the Freund Committee: rather than acting merely as a screen for unworthy cases, it would handle cases referred by the Supreme Court and the courts of appeals. In particular, the national court would hear cases presenting conflicts in decisions among the circuits and cases in legal fields the Supreme Court found difficult to monitor, for example, copyright and patent law. This proposal also failed to generate much support, primarily because it would not have directly alleviated what was perceived to be the most pressing problem—the workload of the courts of appeals.

From his vantage point as a former member of the court of appeals for the Fifth Circuit, Attorney General Griffin Bell recognized the need to relieve the federal courts from the exponential increase of their caseloads over the past decade. He therefore created within the Department of Justice the Office for the Improvement in the Administration of Justice. Building upon the early proposals for the restructuring of the appellate courts, that office, under the direction of Professor Daniel J. Meador, is now circulating a tentative proposal for restructuring a part of the appellate tier. Briefly, the proposal would remove from the docket of the courts of appeals many intricate and intensively litigated cases, particularly those in which the problem of forum shopping among the circuits has arisen. The proposal recommends the creation of a new article

20. In 1962, 4,823 cases were filed in the United States courts of appeals. In 1977, 19,118 cases were filed, an increase of 296%. The number of Circuit Judges rose in that period from 78 to 97, yielding a ratio in the growth of cases to increase of judges of almost 12 to 1. 1977 ANNUAL REPORT, *supra* note 9, at 65a.

21. See Commission on Revision of the Federal Court Appellate System, *The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change*, 62 F.R.D. 223 (1973).

22. Bork, *supra* note 16, at 233.

23. See note 10 *supra*.

III court of appeals by merging the present Court of Claims and the Court of Customs and Patent Appeals. This new tribunal would be called something like the Federal Court of Appeals. Its jurisdiction would reach well beyond that of the Court of Claims and the Court of Customs and Patent Appeals; it would also include exclusive jurisdiction of all appeals in patent, civil tax, and environmental cases²⁴ from the United States district courts and the Tax Court. Jurisdiction of this new court of appeals would be predicated on subject matter rather than traditional geographical limitations. Should such a court be created, amendatory jurisdictional legislation affecting every circuit would no doubt be required. Review would be in the Supreme Court by writ of certiorari.

Although there are strong differences of opinion in judicial circles about the desirability of such a court, there is much that speaks in favor of it. A broader range of jurisdiction than now exists in either the Court of Claims or the Court of Customs and Patent Appeals, would avoid the problem of obeisance to professional interests that can plague a special court with limited jurisdiction and a small, highly specialized bar. Furthermore, with the addition of only a small number of new judgeships, it could siphon off approximately 1300 cases per year now handled by the circuit courts. The Meador proposal also recites the uncertainties, ambiguities, and pitfalls that legal scholars and courts have found in the substantive and judicial review provisions of the National Environmental Protection Act, the Clean Air Act, and the Federal Water Pollution Control Act, and observes that numerous conflicts have already arisen in environmental matters. With these technical, highly complicated statutes, confusion exists respecting the appropriate circuit court of appeals for review. Creation of a federal court of appeals would end this confusion and would also heighten congressional awareness that enactment of complex federal statutes requires additional judges to resolve the disputes engendered by such legislation.

B. *Changing the Entrance Requirements for the Federal Courts*

Although a new circuit court of limited jurisdiction might temporarily ease the burden of the federal appellate courts, it would do little to stem the rising tide of federal litigation at the gateway to the federal court system—the district courts. A substantial number of cases now reaching the district courts on appeal from administrative agencies²⁵ are simply run-of-

24. Although the definition of "environmental cases" could be flexible, it would likely include cases arising under such legislation as the Clean Air Act, 42 U.S.C. § 1857 (Supp. V 1975), the Federal Water Pollution Control Act, 33 U.S.C. § 1251 (Supp. V 1975), and the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4521 (1970).

25. In recent years, some of the most important, complicated, and sophisticated litigation has emanated from federal administrative agencies, Congress having provided for direct judicial review of these agencies' decisions in the courts of appeals. Some of the more significant litigation arises under environmental, water pollution, and energy legislation, the National Labor Relations Act, the Longshoremen's and Harbor Workers' Compensation Act, and the Federal Trade Commission Act.

the-mill personnel cases. In the industrial relations world, these personnel disputes would be treated by routine grievance machinery and arbitration. In the past, personnel cases frequently reached the federal courts clothed in the mantle of important civil rights issues, but the guiding principles have now been fairly well established. Today, most civil service and other personnel cases raise merely factual issues.

Additional sources for the deepening stream of litigation flowing from the regulatory schemes enacted by Congress are "black lung" and other Social Security cases.²⁶ These cases, like personnel actions, rarely present questions that go beyond factual issues developed at the administrative hearing. Their disposition generally turns on the determination of the facts under clear legal principles or the interpretation of an obscure, often arcane, provision of the governing statute.

At present, litigants in personnel, social security, and "black lung" cases often enjoy the opportunity for multi-tiered appeals with both administrative and court review. For example, in *Twiggs v. United States Small Business Administration*,²⁷ a civilian employee of the Small Business Administration claimed that her voluntary lateral transfer between jobs in the agency, each carrying a GS-4 rating, was induced by the misrepresentation of her superior. She alleged that she accepted a lateral transfer to the loan division of the agency in the representation that it would afford her a greater opportunity for advancement. When that opportunity did not materialize and she continued to retain her rating as a clerk-typist, she filed a formal grievance through counsel pursuant to agency regulations.

The agency informed her by letter that after inquiry it had concluded that she was never promised a position as loan assistant and that she was reassigned at her own request. Her counsel thereupon notified the agency that she desired to process further her grievance under the agency's rules. The agency then referred the grievance to a hearing examiner who, after notice to the parties of a time and place, conducted his investigation by means of personal interviews with Twiggs in the presence of her counsel.

After first providing Twiggs' counsel an opportunity to review the grievance file and to comment, the hearing examiner made written formal findings of fact and found that Twiggs had failed to establish a reasonable basis for her grievance and denied the relief sought. Having exhausted her

Appeals in these cases, of course, should continue to be heard in the present courts of appeals or in the court suggested by the Meador committee.

26. For the period ending December 31, 1977, "black lung" cases declined substantially, although they can be expected to increase again in view of the liberalizing amendment enacted by Congress in 1977 and pending legislation to permit the filling of two judicial positions in the United States District Court for the Middle District of Pennsylvania, encompassing the Pennsylvania anthracite coal area. On the other hand, other Social Security filings for the same period increased by 33.1%—from 6,654 filings during the preceding 12 months, to 8,854 filings. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS, JANUARY-DECEMBER 1977, at Table 9 (1978).

27. 541 F.2d 150 (3d Cir. 1976).

administrative remedies, Twiggs then instituted an action in the United States District Court requesting a reversal of the agency's decision. The district court entered summary judgment for the defendants. Twiggs then appealed to the United States court of appeals.

Such four-tiered review of nothing more than ordinary personnel matters, Civil Service Commission cases, Social Security disabilities, and Consumer Products Safety Act cases constitutes a heavy drain of judicial time and resources. In recent years, agency hearing examiners have assumed increased responsibility and are now known more prestigiously as administrative law judges. It would appear that an expanded and strengthened system of administrative law judges, in conjunction with specific agency review commissions, should adequately dispose of the bulk of these regulatory cases. In the interest of ensuring an impartial tribunal free of agency influence, it would be appropriate to provide access to the federal district courts. Review by courts of appeals would be by writ of certiorari only to consider important questions of law. As former Solicitor General Bork has stated,

An increasingly regulated welfare state generates an enormous amount of litigation. The programs may have great social importance but the issues presented are in large measure legal trivia. Nevertheless, we have thoughtlessly moved this mass of litigation into the federal courts, without regard to whether it belongs or what we are doing to those courts.²⁸

Reallocation of these cases would go a long way toward relieving the current strains on the federal courts; it is an idea whose time has come.

Changes in the identity of adjudicative bodies will undoubtedly be accompanied by changes in the very nature of the adjudicative process. Present trends indicate that cases now disposed of by judge and jury trials will in the future be resolved by a variety of dispute-resolution processes. Building on an arbitration statute enacted almost 150 years ago, the Commonwealth of Pennsylvania in 1836 enacted a uniform system of compulsory arbitration²⁹ for all civil disputes, except those over real estate, when the amount in controversy is \$2,000 or less. These cases are first heard by a board of three members of the bar whose award has the force of a final judgment. The proceedings are informal and cases are heard and disposed of promptly. The right to appeal from the award and to a de novo jury trial is preserved, but there is a disincentive to appeal: before appealing, the dissatisfied party must pay up to one-half of the arbitrator's fee.³⁰ The system is operated so effectively that recently the jurisdictional limits have been raised to \$10,000 in the more populous counties and \$5,000 in the less populous or rural counties.³¹ In 1977, an excess of

28. Bork, *supra* note 16, at 237.

29. The current Pennsylvania provisions on arbitration begin at PA. STAT. ANN. tit. 5, § 1 (Purdon 1963).

30. *Id.* § 71.

31. *Id.* § 30 (Supp. 1978-1979).

28,000 cases, slightly more than ten percent of Pennsylvania's total dispositions, were resolved by statutory compulsory arbitration.³² Further evidence of the growing national utilization of the arbitration process is the more than doubling of the number of cases handled by the American Arbitration Association between 1971 and 1977—from 22,459 to 47,066.³³

This year the United States District Court for the Eastern District of Pennsylvania, at the instigation of the United States Department of Justice, has undertaken a one-year experimental program that closely parallels the well-established Pennsylvania arbitration procedure, although the jurisdictional amount in controversy can be very much higher. Two other federal district courts, the Northern District of California and the District of Connecticut, have also instituted similar experimental programs.

In the Eastern District of Pennsylvania, principally two broad categories of cases are eligible for referral to arbitration: (1) suits in which the United States is a party, only money damages are sought, the damages do not exceed \$50,000 exclusive of interest and costs, and the action is brought under the Federal Tort Claims Act or the Longshoremen and Harbor Workers Compensation Act; and (2) actions in which the United States is *not* a party, only money damages are sought, the damages do not exceed \$50,000 exclusive of interest and costs, and jurisdiction is based on certain specified statutes enumerated in the district court by its arbitration rule. The arbitration panel consists of three lawyers, each of whom has been admitted to the bar of the highest court of a state or of the District of Columbia and the district court for at least five years. They each receive a nominal, flat fee per case and probably make a considerable financial sacrifice but render the service out of a sense of professional obligation to aid the court in the speedy, effective, and fair administration of justice. By stipulation, the parties may agree to have the arbitration conducted by a single arbitrator and they may elect to designate one who is not a lawyer.

Of course, arbitration is not the sole alternative to judicial disposition of cases, and it will likely share in the future disposition of cases with other dispute resolution mechanisms, such as mediation and pretrial screening. Other processes, such as the operation of special medical malpractice tribunals, might be tailored to meet the needs of particular kinds of cases.³⁴ Minor disputes, particularly those of a largely factual nature, might be handled more efficiently and economically in community mediation panels, consumer complaint boards, and neighborhood justice centers. Family disputes could be resolved appropriately and effectively in family conciliation tribunals. The quality of state magistrates might be improved

32. See ADMINISTRATIVE OFFICE OF PENNSYLVANIA COURTS, 1977 REPORT 31 (1977).

33. AMERICAN ARBITRATION ASSOCIATION, 1977-1978 ANNUAL REPORT (1978).

34. See Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976).

and their jurisdiction expanded. The development of these mechanisms should leave the courts more time to adjudicate matters of a more complex nature.

Finally, it seems evident that the most radical approach to reducing the case load in the federal courts—withdrawing jurisdiction—may soon be implemented by curtailing diversity jurisdiction.³⁵ The agitation in recent years to abolish federal diversity jurisdiction totally has been unsuccessful, but there is considerable promise that the seeds of abolition planted in the past may bear fruit in the near future. Congress has been considering several bills that will terminate substantially all diversity jurisdiction. These appear to have solid support in the three branches of federal government, the organized bar, the state courts, and academia. If one of these bills is not enacted, another bill sponsored by the Department of Justice is predictably certain to pass. It will curtail diversity jurisdiction to the limited extent of depriving plaintiffs of access to the federal courts in the state of their residence. This compromise is a response to those trial lawyers who believe that a plaintiff all too frequently cannot obtain a fair trial of a foreign forum.

The amount-in-controversy requirement in federal question cases also has been under attack. The changing times appear to require its complete surgical excision from an anatomy of federal jurisdiction. In 1976, Congress took the first step in achieving this therapeutic result. It amended 28 U.S.C. § 1331 to provide that no amount in controversy is required in any federal question case instituted against the United States, any agency thereof, or any officer or employee of the federal government in his official capacity. The \$10,000 amount-in-controversy requirement remains, however, in suits arising under federal common law, civil rights suits against municipalities, and suits challenging certain aspects of state law. The House Judiciary Committee has proposed legislation totally abolishing the amount requirement in all federal question cases. This rational improvement is not expected to have any appreciable effect on the caseloads in the federal courts.

III. A POTENTIAL NEW BURDEN: SENTENCING REVIEW

Although considerable concern has been expressed and some movement is visible to relieve the courts from the constantly increasing caseload, the chief imponderable in this area is the volume of new litigation that may be spawned by future legislation. A proposal under discussion for many years and currently attracting respectable attention is to allow appellate review of criminal sentences. Mounting concern about

35. For the 1977 judicial year, 31,678 diversity cases, comprising almost 25% of the civil caseload, were filed in federal district courts. In the same year, 1,714 diversity cases, approximately 11% of the appellate caseload, were filed in the courts of appeals. 1977 ANNUAL REPORT, *supra* note 9, at A-10, C-2.

substantial disparities in the sentences of similarly situated offenders and arbitrary and capricious sentencing has produced considerable support for appellate review of sentences. The task of reviewing criminal sentences, however, may be the torpedo that will ultimately sink the appellate courts.

Perhaps the day for sentencing reform is long past due. The failure of the rehabilitative purposes of a sentence is now commonly acknowledged. Sentencing is a complex, burdensome, and worrisome problem.³⁶ Thrusting the enormous task of reviewing sentences upon the appellate courts could more than counterbalance all efforts to alleviate their caseload. Other alternatives should be explored first. Disparities in sentencing might be avoided by using judicial sentencing councils in the *nisi prius* courts. Sentencing councils are usually panels of three judges, consisting of the trial judge and two other judges of the same court or judicial district. The sentencing judge bears the ultimate responsibility for imposing sentence but he confers with his colleagues in determining the appropriate sentence to be imposed. Sentencing councils could provide the distillation of serious thought and experience by judges operating at the sentencing level; councils could draw upon the combined expertise of the judges and in due time should fashion standards to give sentencing greater consistency and fairness. If the sentencing judge or council were also required to articulate reasons for sentences and if a common law of sentencing were thus to emerge, the felt injustices in disparate sentences should be substantially reduced.

Some of the federal district courts are experimenting with varying types of sentencing councils. The Federal Judicial Center has been studying four of the United States district courts—Northern Illinois, Eastern New York, Eastern Michigan, and Oregon—to ascertain whether the range of variation in sentences has been significantly reduced following the adoption of their council sentencing procedure. A sentencing council approach is also contained in the proposed Kennedy-McClellan Federal Criminal Code.³⁷ Another partial solution may be determinate sentencing in every case. A third possibility may be to relieve the judiciary of the onerous and awesome responsibility altogether by assigning sentencing to administrative tribunals specially equipped to deal with the needs of the convict and society. This tribunal, composed of a lawyer, a psychologist, a social worker, and a trial judge would fix the term of sentence and character of treatment. Besides having the benefit of the composite intelligence, experience, and expertise of a specialized group,

36. Judge Arlin Adams recently expressed his cogent views on the need for a sentencing judge to articulate the reasons for a sentence. *United States v. Bazzano*, 570 F.2d 1120, 1130 (3d Cir. 1977) (Adams, J., concurring).

37. S. 1437, 95th Cong., 2d Sess. (1978).

the tribunal could act on the basis of reports submitted by social workers, probation officers, and interested parties.³⁸

Dean Norval Morris, speaking at a special Sentencing Conference in June 1977, appropriately predicted that the sentencing reform journey would not be short:

[T]here may be unfortunate detours through legislatively fixed sentences, but in the longer run we can reasonably expect a small reduction of crime and juvenile delinquency and, of at least equal importance, we can also reasonably expect the emergence of a principled, even-handed, effective yet merciful Common Law of Sentencing, consistent with human rights and freedoms, competent to the deterrence of crime, the adumbration of minimum standards of behavior and the better protection of society against its in-group predators.³⁹

IV. IMPROVING COMMUNICATIONS

A promising development in the administration of justice is improved communications among courts, the bar, and the public. Better communications should reduce the mysteries of the judicial process and improve the confidence of the bar and public in the integrity of the courts and the operation of the judicial system. The United States Court of Appeals for the Third Circuit broke new ground in this area when it recently developed formal Internal Operating Procedures. The publication and wide distribution of these Procedures by the court to the bench, bar, and administrative agencies met with highly favorable reaction.

A court's publication of its internal operating procedures provides accountability for the court's administrative process and procedures. It offers an insight into the time constraints of the court, the reasons for the temporal requirements of the rules of court, the criteria by which oral arguments are allocated or denied, and the painstaking care with which opinions are circulated within the court. The bench and bar also are advised when they might expect full length opinions and under what circumstances the court would dispose of appeals by per curiam opinions or by judgment orders. This accountability to the bench, bar, and public by the adoption, publication, and distribution of formal rules for internal operating procedures should avoid the frequently leveled criticism that courts unnecessarily enshroud themselves in utter secrecy.

Another signal development in improving the channels of communication between bench, bar, and public is the creation of lawyers' advisory committees to the courts. Such committees should provide a vehicle for complaints and suggestions by lawyers and litigants; they should aid in the formulation of internal operating procedures, rules of practice, and in the improved efficiency of the courts. These committees

38. See Comment, *Appellate Review of Sentences: A Survey*, 17 ST. LOUIS U.L.J. (1972).

39. Morris, *Conceptual Overview and Commentary on the Movement Toward Determinacy*, in SPECIAL CONFERENCE ON DETERMINATE SENTENCING, SUMMARY REPORT 1, 5 (1978).

should also bolster confidence in the judicial system. The Third Circuit Court of Appeals established such a committee in 1976. The committee consists of active, seasoned practitioners at the federal bar of each district court who are appointed for terms of three years. When he informed the members of the committee of their appointments, Chief Judge Seitz advised them that their principal function would be twofold: (1) to receive from the court, from time to time, matters on which the committee's reactions, advice, or recommendations are sought; and (2) to communicate with the court concerning any matters touching the administration of justice in the circuit. The committee serves diligently and effectively. It provides valuable suggestions, performs important studies, and is a valuable two-way conduit for communication. It should enhance confidence in the court and improve the administration of justice.

The creation of a lawyers' advisory committee also implements a suggestion made several years ago by the American Bar Association Commission on Standards of Judicial Administration for a procedure that would provide opportunities on the part of members of the public and the bar to suggest, review, and make recommendations concerning proposed rules.⁴⁰ The Courts of Appeals for the District of Columbia and for the Seventh Circuit also have recently adopted rules creating advisory committees on procedures. The Office for the Improvement of Administration of Justice has been so impressed by the value of the lawyers' advisory committee that it is considering a proposal that these committees be required by statute in every circuit. Legislation appears to be unnecessary, however, since the committees can be established more readily and their functions formulated and altered more flexibly by rules of court without the rigidity that a statute would entail.

V. CONCLUSION

Henry Steele Commager, the distinguished Amherst historian, once wrote that although most of the political institutions Americans inherited from abroad were speedily modified by environment to produce something characteristically American, "law successfully resisted environmental modification. . . . Resourceful and ingenious in politics, Americans were content in the legal field to abide by familiar formulas."⁴¹ Any aversion, however, that nineteenth-century Americans may have had toward change in the administration of justice subsided in the twentieth century under the telling blows of legal scholars led by Holmes, Pound, and Brandeis. The mechanical jurisprudence of the nineteenth century

40. COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION, AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO COURT ORGANIZATIONS §§ 1.30-31 (1974); *see also* SECTION OF JUDICIAL ADMINISTRATION, AMERICAN BAR ASSOCIATION, COOPERATION WITH LAYMEN IN IMPROVING THE ADMINISTRATION OF JUSTICE (1952).

41. H. COMMAGER, *THE AMERICAN MIND* 359 (1950).

gave way in this century to what Holmes described as sociological jurisprudence and an administration of justice that is being shaped to the needs of the times.

The call for change unleashed by Pound's powerful message to the bench and bar in 1906 continues to reverberate. The sudden, upward surge in litigation during the past decade, especially in the number of appeals, took the legal community by great surprise. The numbness resulting from that stunning development, however, has begun to wane. One can sense a concerted, constructive movement by the total legal community, including academia, to shape the system to the demands of the hour. The Office for the Improvement of the Administration of Justice will be presenting us from time to time with the products of their research and study. A large and growing segment of the judiciary is alert and receptive to constructive proposals that would permit the courts to adapt themselves to changing societal requirements. As I have indicated, judges themselves are probing for new solutions to old problems. Some of their proposals should soon bear fruit in the form of new tools to assist courts in the effective, fair, and speedy disposition of justice.