Kaitlin,

Please find attached the promised draft of Judge Miner's article, "Dealing With the Appellate Caseload Crisis: The Report of the Federal Courts Study Committee Revisited."

1. Are you available to discuss the article sometime next week?

2. I would like to ship down to NYLS L. Rev. a box (or two) containing copies of most of the sources used for the article. I think this would save a lot of time for the law review, especially as far as the more-difficult-to-find sources are concerned. Are you agreeable?

3. My cell phone number is 518.598.3403. Feel free to call me at any hour of the day or any day of the week to discuss the article or any questions or concerns that you (or law review members) might have.

4. I will have the signed agreement (the "Agreement") ready and signed for you on Monday. Would you like me to mail the Agreement, or will faxing the Agreement to you on Monday suffice?

Alicia and I look forward to working with the Law Review on the next stage of this process.

As always, many thanks.

-Matt

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"Dealing With the Appellate Caseload Crisis": The Report of the Federal Courts Study Committee

Revisited

by Roger J. Miner*

I. Introduction

The Federal Courts Study Committee (the “Committee”), created by Act of Congress in 1988, was charged with inquiring into the issues and problems confronting the Federal Courts of the nation and developing a long-range plan for the future of the Federal Judiciary.1 In its Final Report, issued on April 2, 1990, the Committee recognized the need to respond “to mounting public and professional concern with the federal courts’ congestion, delay, expense and expansion.”2 The Committee clearly identified the burgeoning volume of appeals as a major factor underlying this concern. Accordingly, the Final Report included a Chapter entitled “Dealing with the Appellate Caseload Crisis.” This portion of the Report responded to the unprecedented volume of litigation the Federal Courts of Appeals were then confronting.3 The Chapter began as follows:

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* Senior Judge, United States Court of Appeals for the Second Circuit. The majority of this Article was written by Judge Miner before he passed away on February 18, 2012. The remainder was completed by Judge Miner’s law clerks, Alicia Surdyk and Matthew J. Zappen, based on the Judge’s comprehensive notes and annotated research and also on the clerks’ extensive conversations with the Judge prior to his passing. This Article is published posthumously in his memory and represents the last in a long list of publications, many dealing with judicial administration and the “Appellate Caseload Crisis.”


3 Id. at 71.
However people may view other aspects of the Federal Judiciary, few deny that its appellate courts are in a “crisis of volume” that has transformed them from the institutions they were even a generation ago. Further and more fundamental change to the appellate courts would seem to be inevitable unless there is a halt to the climb in appellate workload. While it is impossible to read the future, we see little reason to anticipate such a halt.

In this Article, I revisit the Committee’s Report and describe how the “crisis of volume” has endured and intensified; analyze various causes giving rise to the crisis; review some of its consequences; evaluate the Committee’s Study, discuss the inadequacy of methods presently employed to deal with the proliferation of appeals; and, finally, propose the adoption, in part, of a method considered and rejected by the Committee for dealing with the appellate caseload crisis.

II. Describing the Crisis, then and now

Over twenty years ago, the Committee made the following observations in regard to the evolving increase in appellate caseloads and in the workloads of individual judges:
In 1945, litigants appealed about one of every forty district court
terminations; they now appeal about one in eight. As a result, appellant filing
has risen nearly fifteen-fold. (As we note in the Overview, they have increased
by ten-fold since 1958.) The number of appellate judges, however, has
increased since 1945 by a factor of less than three, from 59 to 168.
Consequently, the caseload per judge has multiplied by nearly six over the same
period. Circuit judges of the 1940s and 1950s would find today’s caseloads
unmanageable. Even in 1965, each appellate judge, sitting in panel of three,
participated in an average of 136 terminations after hearing or submission. By
1989, that number had almost tripled to 372 per judge. In all but two circuits it
exceeds 255, which is the Judicial Conference standard for an appellate judge’s
annual workload. In the five busiest circuits, the range is from 411 to 525. The
255 participation standard, furthermore, is too high according to most judges
who responded to the committee’s survey.\(^5\)

There has been a major expansion in the “appellate caseload explosion” described by
the Committee,\(^6\) and the crisis of volume is now much more acute than when the Committee
report was written. In 1990, 40,898 appeals were filed.\(^7\) By 2003, the number had climbed to
60,847.\(^8\) Five years later, the number of filings for the twelve-month period ending September
30, 2008, reached 61,104.\(^9\) For that year, there were 448 terminations on the merits and 156
procedural terminations per active judge nationally.\(^10\) The 255 participations per active judge,
considered the standard in 1990, has long since been surpassed. From the twelve-month
period ending September 30, 2008, to the twelve-month period ending September 30, 2010,

\(^5\) Id. at 72.
Caseload Profile, available at http://www.uscourts.gov/cgi-bin/cmsa2010Sep.pl; The Third Branch
(March 2011), available at: http://www.uscourts.gov/News/TheThirdBranch/11-03-01/Filings_in_the_Federal
\(^7\) ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORTS OF THE PROCEEDINGS OF
THE JUDICIAL CONFERENCE OF THE UNITED STATES 105 (Table B) (1990).
\(^8\) United States Courts, Federal Court Management Statistics, 2003, U.S. Court of Appeals, Judicial
\(^10\) Id.
total filings declined 9.2%, from 61,104 to 55,922; however, the terminations per active judge rose to 463 terminations on the merits and 161 procedural terminations on a national basis.\textsuperscript{11} The increase in the number of active judges from 168 twenty years ago to 179 today obviously has done nothing to stem the tide of individual judicial caseloads.\textsuperscript{12}

An overwhelming percentage of appeals are found to be without merit. For the twelve-month period ending September 30, 2010, of the 59,526 total appeals that were terminated for all circuits, 30,914 or (51.9\%) were terminated on the merits.\textsuperscript{13} Of those terminated on the merits, 24,588 were affirmed/enforced (including appeals reversed in part); 2,751 dismissed, 2,372 reversed; 574 remanded, and 629 terminated by other dispositions.\textsuperscript{14} Accordingly, less than ten percent of the cases were reversed outright. The same statistical report for the same year shows a “Percent Reversed” breakdown ranging from a high of 15.4 in the Seventh Circuit to a low of 4.9 in the Eighth Circuit.\textsuperscript{15} In my own Circuit, the percent


reversed was 7.1, a reversal rate which has varied very little over recent years.\textsuperscript{16} Nor has there
been much variation in the national “reversed” statistics.\textsuperscript{17}

Not included in the reversal rates are the cases where a lack of merit has resulted in
dismissal or remand. However, an outright reversal rate of less than ten percent in case
terminations on appeal leads to the inevitable conclusion that more than ninety percent of the
appeals filed were found to be without merit. Of course, an appeal found to lack merit
certainly does not mean that the appeal lacks an arguable basis or was brought without
substantial justification. But the statistics themselves compel the conclusion, by implication
and logic, that a large part of that meritless ninety percent consists of appeals that are clearly
meritless. It surely cannot be denied that the expansion of the appellate caseload explosion in
recent years has been exacerbated, if not caused by the filing of clearly meritless appeals.\textsuperscript{1}

\textsuperscript{16} UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 2010 ANNUAL
REPORT OF THE DIRECTOR 111 (Table B-5) (2010), available at

\textsuperscript{17} For the past two years, the percentages have been 8.3\% and 9.1\% respectively. See UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 2010 ANNUAL REPORT OF THE
DIRECTOR 111 (Table B-5) (2010), available at

\textsuperscript{1} As used in this article, a meritless appeal is an appeal that fails to present for appellate review any
cogent arguments adequately supported by law and fact. It is an appeal whose lack of merit is
immediately apparent to any reasonable appellate jurist. A meritless appeal generally can be identified
where there is a lack of thoughtful application of established law or precedent to ascertainable facts of
record. An appeal that puts forth a logical and well-reasoned argument for the extension of existing
law or for overturning precedent is not substantially meritless under this definition. But such an
appeal must have an objectively reasonable basis in law and fact. A meritless appeal, then, is one that
cannot be sufficiently justified.
Especially burdensome to the appellate courts are cases filed by pro se litigants. It is no secret that the vast majority of pro se appeals are clearly without merit. Much time and effort is spent in trying to discern the nature of the challenges raised by these litigants, and liberal consideration is given to their arguments.\(^\text{18}\) Despite the lack of success of pro se litigants, they continue to file at an alarming rate — 19,973 in 1995 and 27,209 in 2010.\(^2\) Pro se filings constituted 39.89% of the caseload nationally in 1995 and 48.59% in 2010.\(^19\)

III. Analyzing the Causes

What possibly could account for the fact that litigants now appeal one in every six district court decisions, and what possibly could account for the fact that such a large proportion of appeals are found to be without merit? In the absence of a scientific survey, the causes of the increased rate of filings must rest in speculation informed by experience, anecdotal evidence, and the speech of the legal community. It seems certain, however, that many such appeals are driven by clients whose attorneys advise of the futility of appeal but


nevertheless insist that the appellate court will see the “justice” of their cause or defense
despite the lack of legal merit. The costs of appeal constitute relatively small barriers to such
clients, who often have expended considerable sums on trial court proceedings. Some
appellants use the appellate process as a means of “stalling for time,” delaying through appeal
what they know to be the inevitable outcome. Some may press meritless appeals for
vindictive reasons, their aim being to cause additional expense and anxiety to their adversaries.

Appellants who pursue appeals simply because they have nothing to lose undoubtedly
account for some proportion of meritless appeals. In this category are pro se appellants who
are free of the need to pay attorneys and are responsible only for the payment of filing fees.
Those who proceed in forma pauperis need not even pay filing fees.\textsuperscript{20} Many indigent
appellants who have pro bono counsel also fall into the “nothing to lose” class. In the same
category are appellants in criminal cases who have the benefit of counsel appointed under the
provisions of the Criminal Justice Act.\textsuperscript{21}

\textsuperscript{20} FED. R. APP. P. 24(a)(5) (“A party may file a motion to proceed on appeal in forma pauperis in the
court of appeals within 30 days after service of the notice prescribed in Rule 24(a)(4). The motion
must include a copy of the affidavit filed in the district court and the district court’s statement of
reasons for its action. If no affidavit was filed in the district court, the party must include the affidavit
prescribed by Rule 24(a)(1).”); see also 2ND CIR. R. 24.1 (“Motion for In Forma Pauperis Status and
Related Relief”), available at http://www.ca2.uscourts.gov/clerk/Rules/LR/Local_Rule_24.1.htm
(“A motion for leave to appeal in forma pauperis, for appointment of counsel, or for a transcript at
public expense must include (1) the affidavit prescribed by FRAP 24(a)(1), and (2) a statement that
identifies the relevant facts and makes a showing of likely merit as to each issue the appellant intends
to present on appeal. Failure to comply with any of these requirements may result in denial of the
motion and dismissal of the appeal.”). See generally FED. R. APP. P. 24(a) (“Leave to Proceed in Forma
Pauperis”).

\textsuperscript{21} 18 U.S.C. § 3006A(d) (2006) (“Payment for Representation” under the Criminal Justice Act); see also
Lawyers themselves sometimes motivate meritless appeals. According to a recent survey, some lawyers simply overestimate their chances of success. Other lawyers pursue appeals lacking in substantive merit to demonstrate to the client that they continue to support the client’s cause. Some, embarrassed that they lost in the trial court after advising that the client would prevail encourage meritless appeals in order to have another court to blame for a loss occasioned by bad advice or bad lawyering. Some lawyers, loath to lose a client for failure to satisfy the client’s command to appeal, go forward merely to satisfy the client’s wishes. Some newly admitted attorneys, especially those associated with large law firms, pursue assigned pro bono appeals they know to be futile in order to gain experience in the appellate process. Finally, there are those lawyers who encourage appeals that have no chance of success simply (dare it be said?) to collect fees for briefing and argument in the appellate court.

Some blame for the spike in appeals must also fall on the academic sector of the legal profession. The centerpiece of law school teaching continues to be appellate court decisions. The leading moot court competitions involve appellate brief writing and oral argument.  

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24 See Michael D. Murray and Christy H. DeSanctis, APPELLATE ADVOCACY AND MOOT COURT 179 (2006) ("Moot Court competitions simulate appellate practice in particular . . ."). See also NEW YORK CITY BAR, SIXTY-FIRST ANNUAL NATIONAL Moot COURT COMPETITION, COMPETITION RULES AND COMMENTS 2 (2010–11) ("The New York City Bar Association's National Moot Court Competition is an annual inter-law school event designed to promote the art of appellate advocacy."); Colleen Walsh, Moot Points, HARVARD GAZETTE (Nov. 17, 2010) ("Established in 1911, the Ames Moot Court Competition unfolds in three rounds over the course of two years and challenges students to develop briefs and oral arguments addressing legal issues that the Supreme Court has not addressed or answered on-point.").
This emphasis on the appellate process encourages law students to believe that any adverse trial court determination can and should be tested on appeal. Reinforcing this belief by example, many law professors seek to advance their expansive approaches to legal doctrine through the use of the appellate process. Sometimes they do so as amici curiae and sometimes as counsel for those seeking to promote various social justice issues through the courts rather than through the legislative process where they belong. These professors often are assisted in their endeavors by law students in “clinical studies” programs. Is it any wonder that newly-minted lawyers see appellate courts as the most important locales for the application of their law school skills training? In this they are of course wrong, for the greater part of their work will be done in the trial courts, in administrative proceedings, in negotiations, in transactional activities, and in providing legal advice to clients, both public and private. Few cases are appealed, specialists in appellate work are few and far between, and a relatively small percentage of appeals are successful, as noted earlier in this article.

Why, then, do the law schools place such emphasis on appeals court decisions and processes? The fault lies of course with the increasing disconnect between the professoriate and other branches of the legal profession, a matter that has been the subject of widespread comment.\textsuperscript{25} Many professors have lost sight of their obligation to train lawyers in the skills and ethical responsibilities that will be pertinent to their employment. A good number of these academics have served as appellate clerks and have had little experience in the trial courts.

or in any type of legal practice. They are most comfortable teaching and litigating at the 
appellate level, which is a more familiar territory for them. Today, it is the rare professor 
who does not dwell on constitutional issues or Supreme Court decisions in whatever subject 
he or she might teach. In view of these developments, the proliferation of the “legal scholars” 
of academe as well as the proliferation of the students they educate, give cause for concern. I 
do not mean to say that there should be fewer law students and fewer professors just to cut 
down on the volume of appeals. I do say that greater emphasis in legal education should be 
placed on the duty of lawyers to assist in the effective functioning of the legal system. It 
seems to me that this duty includes the obligation to decline the pursuit of meritless appeals. 
The performance of this duty will be of great benefit to overburdened appellate courts. 

In any analysis of the causes of the appellate caseload crisis, criminal appeals are 
worthy of special scrutiny. As an early critic of the federalization of criminal law, I estimated 
that there were about 3,000 federal criminal offenses in the then-fifty titles of the United 

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26 The Law School Admissions Council reports that since the 2000–01 cycle, the number of Law 
School Admission Tests administered have risen steadily, from 109,000 in 2000–2001 to 171,500 in the 
2009–10 cycle. LSAC, LSAC VOLUME SUMMARY, available at 
http://www.lsac.org/LSACResources/Data/LSAC-volume-summary.asp. See also Rebecca R. Ruiz, 
Recession is Pushing Up Law School Applications and Interest in Graduate Studies, N.Y. TIMES, Jan. 10, 
2010 at A18; Debra Cassens Weiss, October LSAT Test-Taker Numbers Are 2nd Highest Ever, ABA 
Show Bigger Drop in High LSAT Applicants, ABA Journal, April 11, 2012, available at 
http://www.abajournal.com/news/article/are_smarter_people_discouraged_avoiding_law_school_stats 
show_bigger_drop_/ (last visited June 8, 2012); Matt Leichter, What the Numbers Don’t Say: Law 
School Applicants Are Getting Older, Not Dumber, The American Lawyer, April 19, 2012 (noting the 
wave of news stories about the latest Law School Admission Council’s (LSAC) Current Volume 
Summary, which shows a notable drop not only in the number of applicants but also in the number of 
applicants with high LSAT scores”), at 
2 Roger J. Miner, A Significant Symposium, 54 N.Y.L. Sch. L. Rev. 15, 19 (2009) (“[L]aw schools are 
falling short” in effectively providing the “required courses necessary for the training of lawyers— . . . 
that is, ‘persons learned in the law.’”).


Whatever the consequences of federalization and over-criminalization, it cannot be gainsaid that criminal cases are a major cause of an expanding appellate caseload. More federal crimes equals more criminal prosecutions. In 1990, 48,035 criminal cases were filed in the nation’s district courts.\footnote{The House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security has held two hearings on the problems of overcriminalization of conduct and over-federalization of criminal law. Hearing on: Reining in Overcriminalization: Assessing the Problems, Proposing Solutions Before the H. Subcomm. on Crime, Terrorism, and Homeland Security, 111th Cong. (2010); Hearing on: Over-Criminalization of Conduct/Over-Federalization of Criminal Law Before the H. Subcomm. on Crime, Terrorism, and Homeland Security, 111th Cong. (2009).}

By 2009, the number had climbed to 65,394.\footnote{[NYLS to look for source – to discuss with AJS and MJZ (we found different figures)]}
More criminal prosecutions of course equal more appeals. In 1990, when the appellate caseload crisis was identified, 9,642 criminal appeals were filed.\textsuperscript{34} In 2010, 12,797 criminal appeals were filed.\textsuperscript{35} This number has been fairly steady for the past three years,\textsuperscript{36} although a high of 16,060 was reached in 2005.\textsuperscript{37} The proliferation of federal crimes has required more law enforcement agents and more prosecutors but there has been no correspondent increase in the number of judges who hear criminal appeals.

All of this, of course, is the doing of Congress, which needs to take a hard look at over-criminalization and over-federalization, not only because of the impact of such factors on the caseloads of the federal courts, but also because it is the right thing to do. No sensible person would say that the transport of water hyacinths in interstate commerce should be a federal offense.\textsuperscript{38} Nor would any sensible person believe that garden variety state drug offenses should be prosecuted in federal court.\textsuperscript{39} The list goes on, and the result is a federal

\textsuperscript{34} [NYLS to look for source – to discuss with AJS and MJZ (we found different figures)]


\textsuperscript{38} See 18 U.S.C. § 46 (2006) (“Whoever knowingly delivers or receives for transportation, or transports, in interstate commerce ... water hyacinth plants ... shall be fined under this title, or imprisoned not more than six months, or both.”).

\textsuperscript{39} In a report released by the Director of the Office of Research and Data of the United States Sentencing Commission, it was reported that drug offenses represented 30.3% of the cases (25,206 convictions) in the federal system, including 760 convictions for “an offense involving simple possession of a drug.” United States Sentencing Commission, OVERVIEW OF FEDERAL CRIMINAL CASES FISCAL YEAR 2009 3, 7, available at http://www.uscc.gov/Research/Research_Publications/2010/20101230_FY09_Overview_Federal_Cri
system warehousing too many inmates at too great an expense,\textsuperscript{40} and an avalanche of federal
appeals filed on behalf of those convicted of these crimes. In the Committee Report, the crisis
of volume in the federal appeals courts was said to be caused “mainly by a heightened
proclivity to appeal district court terminations.”\textsuperscript{41} Having analyzed various factors underlying
an even more “heightened proclivity” two decades later, I now turn to some of its
consequences.

IV. Reviewing the Consequences

The Committee saw the consequences of a spiraling appellate caseload as jeopardizing
the need “to preserve the hallmarks of our judiciary.”\textsuperscript{42} Its Report defined the “hallmarks” to
include that the judges do most of their own work, grant oral argument in cases
that need it, decide cases with sufficient thought, and produce opinions in cases
of precedential importance with the care they deserve, including independent,
constructive insight and criticism from judges on the court and the panel other
than the judge writing the opinion.\textsuperscript{43}

The Committee opined that the foregoing “conditions are essential to a carefully crafted caselaw” and
concluded that “[m]odern society requires no less.”\textsuperscript{44}

\textsuperscript{40} According to the fiscal year 2009 annual report of the Bureau of Prisons, the BOP housed 208,759
federal inmates in 2009. Federal Bureau of Prisons, STATE OF THE BUREAU 2009 57 (2009); see also
(analyzing the issue as it existed in 1990).

\textsuperscript{41} THE FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY

\textsuperscript{42} THE FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY

\textsuperscript{43} THE FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY

\textsuperscript{44} THE FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY
More than twenty years ago, the Committee found that "[t]oday's federal appellate courts have been able to provide these conditions only through increases in productivity that seem to be approaching their limit."\textsuperscript{45} Attempts to further raise "productivity" by such measures as increasing staff and reducing oral argument were said to be such as could threaten the integrity of the process.\textsuperscript{46} Anyone familiar with the operation of the federal appellate court system over the past two decades will have noticed a continuing erosion of "hallmarks" that an overburdened judiciary just cannot maintain. One of the major consequences is the reliance on staff to achieve the necessary productivity.

While active courts of appeal judges usually are assisted by four law clerks and a judicial assistant,\textsuperscript{47} they also are assisted in their work by staff attorneys, who provide support to the judges in various aspects of their work.\textsuperscript{48} In my own court, the Staff Attorney Office is headed by a Director of Legal Affairs. There are four supervisory staff attorneys, twenty staff attorneys and an administrative staff of nine.\textsuperscript{49} The major responsibilities of the staff attorneys pertain to motions and pro se matters, for which they prepare bench memoranda and proposed dispositions. There is also a separate Immigration Unit consisting of two supervisory attorneys and nine immigration attorneys.


\textsuperscript{47} 28 U.S.C. § 712 (2006) ("Circuit Judges may appoint necessary law clerks and secretaries."); see also J. Daniel Mahoney, Law Clerks: For Better or for Worse?, 54 Brook. L. Rev. 321, (1988) ("The number of law clerks is not specified by statute; rather, a general provision for each court authorizes the hiring of law clerks, and the number of clerks is set in line items as part of the annual judicial appropriations act."
\textsuperscript{48} (citing 28 U.S.C. § 712)).


Their responsibilities lie in the processing of immigration cases assigned to the non-argument calendar.\textsuperscript{50} They prepare memoranda and proposed dispositions for the cases to which they are assigned. Our Civil Appeals Management Program ("CAMP") has two attorneys with preargument responsibilities in civil cases and an administrative staff of three.\textsuperscript{51} Among other things, the CAMP attorneys confer with counsel for the parties in civil cases in an attempt to narrow the issues for appeal and effect settlements.\textsuperscript{3} The Office of the Clerk of Court has two attorneys on staff — an administrative attorney and a motions staff attorney.

What use is made of all this legal firepower? It is used, of course, in the decisional process. It is no secret that the first drafts of opinions of the court frequently are undertaken by the judges' law clerks.\textsuperscript{52} Similarly, staff attorneys prepare proposed orders for the disposition of motions and, in our court, for the disposal of immigration cases scheduled for the non-argument calendar. The sheer volume of cases makes reliance upon staff inevitable. Some say that this is leading to the bureaucratization of the judiciary.\textsuperscript{53} It cannot be denied that appellate judges, although they still

\textsuperscript{50} See Elizabeth Cronin, \textit{When the Deluge Hits and you Never Saw the Storm: Asylum Overload and the Second Circuit}, 59 ADMIN L. REV. AM. U. 547, 555 (2007) ("To assist in [asylum cases on the non-argument calendar], the Staff Attorney's Office within the Office of Legal Affairs became authorized to hire a supervisor and . . . attorneys to establish an immigration unit."). Pursuant to Second Circuit Local Rule 34.2, the court maintains a non-argument calendar for immigration cases raising claims for asylum, withholding of removal under the Immigration and Nationality Act, withholding or deferral of removal under the Convention Against Torture, or a motion to reopen or reconsider an order involving one of the preceding substantive claims. 2ND CIR. R. 34.2 ("Non-Argument Calendar").


\textsuperscript{3} In my Court, almost all counseled civil appeals are referred to CAMP for review, and such participation is mandatory. See Local Rule 33.1; see also [sources/articles on CAMP]


\textsuperscript{53} [NYLS]
retain the power to decide, serve more and more as managers and editors in response to the demands
for productivity in the face of the expanding volume of cases. But laying out the path to a decision is
often the most important part of the decisional process. Rather than playing an adjunctive role in
this regard, staff increasingly provides the path. And therein lies the erosion of the hallmark that
judges do “their own work.”

The increased use of staff itself has consequences. The majority of staff are fresh out of law
school and anxious to display their vast legal knowledge. The result is opinions that are overly
lengthy and replete with basic legal precedent that every opinion reader should be familiar with.54
One need not rehearse all the elements of a contract in every opinion resolving a breach of contract
claim. While it is true that the judge is the ultimate decision-maker, the system suffers when staff
provides a longer path when a shorter one will do. The result may be an opinion not only much
longer than necessary but also broader than necessary to resolve the issue before the court.4

The higher the volume of cases decided in the federal appellate courts, the higher the number
of inter-circuit conflicts there will be. The result is inevitable, given the fact that two or more of the
thirteen circuits are constrained to deal with novel issues of law and sometimes resolve them in
different ways. Every month, U.S. Law Week provides a list of conflicting decisions rendered in

54 See Planning for the Second Century of the Second Circuit Court of Appeals: The Report of the
Federal Courts Study Committee, 65 St. John’s L. Rev. 673, 712-13 (1991); see also Mahoney at 339-40.
4 Some research “suggests that the busier a court (in terms of the work required of each judge) the less
likely it is to cite to legal scholarship” and “predicts that reported opinions citing legal scholarship
decayed as in number of reported opinions authored per active circuit judge increases.” David L.
Schwartz and Lee Petherbridge, The Use of Legal Scholarship by the Federal Courts of Appeals: An
Empirical Study, 96 Cornell L. Rev. 1345, 1365 (2011). While some see this as a negative byproduct
of the caseload crisis, I think, as I always have advocated, that judges should be concerned with precedent
rather than the legal scholarship of today, such as The Case of the Missing Discipline: Finding Buddhist
Legal Studies. See Miner, supra note , at 18.
various circuits during the preceding month.\footnote{US Law Week website says that it's published weekly? Perhaps just the circuit splits are published monthly? – Editors can call U.S. Law Week [BNA] to confirm this} And although intercircuit conflict is one of the criteria for granting certiorari in the Supreme Court,\footnote{See The Federal Courts Study Committee, \textit{Report of the Federal Courts Study Committee} 124–25 (1990).} only a small proportion of intercircuit conflicts are resolved by the nation’s highest court each year.\footnote{See The Federal Courts Study Committee, \textit{Report of the Federal Courts Study Committee} 124–25 (1990).} Consequently, the law becomes “fractured,” with different rules applying in different parts of the country. This situation would seem to be intolerable to most citizens, although the Federal Court Study Committee had this to say about intercircuit conflicts:

Some conflicts, of course, may have the redeeming feature, especially in the constitutional area, of helping to develop legal doctrine and insight. Other conflicts need rapid resolution. Conflicts over some procedural rules and laws affecting actors in only one circuit at a time may have a negligible [e]ffect. A federal judicial system, however, must be able within a reasonable time to provide a nationally binding construction of these acts of Congress needing a single, unified construction in order to serve their purpose.\footnote{The Federal Courts Study Committee, \textit{Report of the Federal Courts Study Committee} 125 (1990).}

The Report went on to discuss various criteria established by commentators to distinguish “tolerable” conflicts from “intolerable” ones. The Committee ultimately recognized “the proposition that there are an excessive number of unresolved intercircuit conflicts.”\footnote{The Federal Courts Study Committee, \textit{Report of the Federal Courts Study Committee} 125 (1990).} The exploding federal caseload has led to a vastly increased use of summary dispositions marking the termination of the decisional process. These dispositions are sometimes referred to as unpublished opinions, although they now are actually published and available to the public on-line as

\footnote{The Federal Courts Study Committee, \textit{Report of the Federal Courts Study Committee} 125 (1990).}
well as in regular print publications. A great debate preceded the adoption of the present federal rule governing these summary dispositions, owing to the fact that many circuits either prohibited the publication or denied precedence to the dispositions they represented. One school of thought went so far as to consider such prohibitions unconstitutional. In any event, the new rule provides that a court may not prohibit or restrict the citation of a written disposition even though marked “unpublished,” “not for publication,” “non-precedential,” “not precedent” or similarly designated.

The summary orders issued by my court still contain the following designation: Rulings by Summary Order do not have precedential effect.” Other courts also deny precedential effect to designated opinions. But why cite an opinion that has no such effect? The courts themselves seem confused by the designation. For example, my own court has stated that “denying summary orders

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62 In 2000, the Eighth Circuit held that its local rule on discouraging citation to unpublished opinions, “insofar as it would allow us to avoid the precedential effect of our prior decisions, purports to expand the judicial power beyond the bounds of Article III, and is therefore unconstitutional.” Anastasoff v. United States, 223 F.3d 898, 900 (2000), vacated as moot on reb’g en banc, 235 F.3d 1054 (2000).

63 FED. R. APP. P. 32.1(a).


precedential effect does not mean that the court considers itself free to rule differently in similar cases."66 What then does it mean?

In any event, the use of summary dispositions has gained favor over time as a means of conserving judicial resources. These "unpublished opinions," whatever they are called, were developed strictly as a shortcut to a disposition and in response to a caseload that does not permit a full opinion in every case. Many of these abbreviated writings start out by "presuming that the reader is familiar with the facts and the procedural background of this case."67 The use of these dispositions is predicated on the assumption that the facts pertaining to the case are crystal clear and the applicable law well-settled. This is always a questionable assumption.

More than two decades ago, long before the "no publication" rules were superseded, the Committee wrote the following: "There are also doctrinal reasons for questioning the non-publication rules: litigants should be able to argue that they are indeed similarly situated to a party in a previous case even if the court thought it not significant enough to warrant publication."68 Any doctrinal concerns however have been outweighed by the need for summary disposition occasioned by the crisis of volume. And whether designated "unpublished" or "non-precedential," there has been a spectacular rise in such dispositions, as illustrated by the following national statistics issued by the Administrative Office of the United States Court:

In 1990, case dispositions classified as "oral" numbered 94. Dispositions classified as "written, signed" numbered 6,008 designated as published and 2,347 as unpublished. Dispositions classified as

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66 United States v. Payne, 591 F.3d 46, 58 (2d Cir. 2010), 2ND CIR. R. 32.1, cmt. ("Dispositions By Summary Order") (effective as of June 26, 2007 and subsequently amended).
67 See supra note 64.
"written, reasoned, unsigned" numbered 712 published and 9,669 unpublished. In the classification of "written, unsigned without comment" there were 4 published and 2,161 unpublished dispositions. Within these classifications, 14,204 dispositions by opinion or order were unpublished, 68.01% of the total.\(^6^9\)

Eighteen years later, there were no oral dispositions and in the "written, signed" category there were 4,949 dispositions unpublished and 5,870 unpublished. The "written, reasoned, unsigned" category included 388 published and 17,399 unpublished. The category designated "written, signed without comment" contained 40 published and 962 unpublished. The unpublished total for the year 2008 was 24,231, amounting to 81.84% of the total.\(^7^0\) Even under the new regime, when all dispositions are "published" and may be cited, one may wonder whether the non-precedential status of over 80% of all decisions leads to a confused jurisprudence.

Oral argument has been a big loser as caseloads continue to rise. Much has been written about the value of oral argument, which most lawyers and judges have always thought to be an important ingredient of appellate advocacy.\(^7^1\) To me, it has been a co-equal ingredient, along with the brief and

\(^6^9\) [AJS/MZ/2d Cir. Library cannot find source – NYLS to find appropriate source or use other figures]

\(^7^0\) [AJS/MZ/2d Cir. Library cannot find source – NYLS to find appropriate source or use other figures]


I should like to leave with you, particularly those of you who are among the younger barristers, the thought that your oral argument on an appeal is perhaps the most effective weapon you have got if you will give it the time and attention it deserves. Oral argument is exciting and will return rich dividends if it is done well. And I think it will be a sorry day for the American bar if the place of the oral argument in our appellate courts is depreciated and
appendix. Oral presentation gives counsel an opportunity to advance their contentions in a way
that the written brief does not. Appellate advocates who argue before the court are able to provide
emphasis to the points they consider important to their clients. Oral argument provides judges
with the opportunity to test counsel on the critical points in their cases and, through questioning of
the lawyers, to share their thoughts with their colleagues as well as counsel. Counsel usually relish
the opportunity to respond to questions from the court in order to dispel any doubts that the court
may have about the positions they have taken. A not unimportant function of oral argument is its
"public face." The exchange between counsel and judges in open court is the only means that the
public has to observe appellate courts in operation. The actual decision-making process is necessarily
accomplished out of public view, taking place as it does in the conference rooms and chambers of the
appellate judges. A well-known aphorism notes the need not only to do justice but to see justice
done. The oral argument of appeals provides the citizenry with some insight in this regard. It is for
oral advocacy becomes looked upon as a pro forma exercise which, because of tradition or
because of the insistence of his client, a lawyer has to go through.

John M. Harlan, What Part Does the Oral Argument Play in the Conduct of an Appeal?, 41 CORNELL L.
Q. 6, 7 (1955). But see Debra Cassens Weiss, Think Oral Arguments are Important? Think Again,

Roger J. Miner, Common Disorders of the Appendix and their Treatment, 3 J. APP. PRAC. & PROCESS
39, 39-40 (2001) ("The three elements of appellate advocacy — preparation of the brief, compilation of
the appendix, and presentation of oral argument — are co-equal in importance. Indeed, it is
excellence in all three elements of a case on appeal that is the hallmark of successful appellate
advocacy."). From my perspective — as one who has been a target of appellate argument for some 27
years — I disagree with those who would just as soon see oral argument to a final resting place, a
historical artifact to be celebrated only in law school moot courts.

See Michael Duvall, When is Oral Argument Important? A Judicial Clerks View of the Debate, 9 J. APP.
PRAC. & PROCESS 121, 39-40 (2007) ("Oral argument can prompt the judges to "zero in" on the
precise turning point in an important case, which helps both the courts and litigants achieve a
thorough, correct, and timely decision. In a "fifty/fifty," "fifty-one/fourty-nine," or even a
"sixty/fifty" case, the importance of this impact cannot be overstated.").

See R v. Sussex Justices ex parte McCarthy, 1 KB 256, 259 (1924) ("... it is not merely of some
importance but is of fundamental importance, that justice should not only be done, but should
this reason that I have long advocated the televising of oral arguments, especially arguments in the Supreme Court.\textsuperscript{75}

Whatever benefits oral argument may provide, those benefits are greatly diminished by the severe time limits now imposed by the courts of appeals. The Rule of the United States Court of Appeals for the Second Circuit in 1891 provided a time limit for oral argument of appeals as follows: Two hours on each side will be allowed for the argument, and no more, without special leave of the court, granted before the argument begins.\textsuperscript{5} As to motions, the Rule provided: "One hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins."\textsuperscript{6} Today, even the allowance of fifteen minutes for the argument of an appeal is a rarity. Argument time is fixed by the judge presiding over the panel to which the appeal is assigned, and it is the unusual case that does not fall into the seven-to-ten minute category for arguments. The Federal Rules of Appellate Procedure as well as our local rule in the Second Circuit allow the court to determine that oral argument is unnecessary and to dispose with it altogether.\textsuperscript{7} Many courts have established processes to "screen out" cases deemed not worthy of oral argument. Our long tradition in the Second Circuit has been to have oral argument in all cases, except for appeals by pro se incarcerated prisoners. We still do not employ a screening process, but


\textsuperscript{5} Rules of the United States Court of Appeals for the Second Circuit, Rule 25 (1891).

\textsuperscript{6} Rules of the United States Court of Appeals for the Second Circuit, Rule 21 (1891).

\textsuperscript{7} The Court need not permit oral argument in a case where a panel unanimously agrees that "the appeal is frivolous" or "the dispositive issue or issues have been authoritatively decided." \textsc{Fed. R. App. P. 34(a)(2); Second Circuit Local Rule 34.1(b).}
have established a non-argument calendar for certain types of immigration review cases,\(^8\) and at one
time maintained a non-argument calendar for some sentencing appeals.\(^9\)

It is now highly unusual for a motion to be argued in the Second Circuit Court of Appeals.
The Federal Rules provide that "[a] motion will be decided without oral argument unless the Court
orders otherwise."\(^{10}\) The Internal Operating Procedures of the Second Circuit Court of Appeals
provide that "[i]f the court orders oral argument on a motion, the motion will ordinarily be heard on
a Tuesday when the court is in session."\(^{11}\) The motions calendared for Tuesday in the Second Circuit
are designated as "counseled motions" and usually consist of five or six cases for which oral argument
is rarely ordered. When argument is heard, the usual time customarily allowed is five minutes.

Motions to file successive petitions for habeas corpus,\(^{12}\) motions by pro se litigants,\(^{13}\) and *Anders*
motions\(^{14}\) all are taken by the court on submission only on designated days of a sitting week. As
many as twenty-five to thirty motions may be submitted on one pro se motions day. As valuable as
the oral argument of motions, especially of counseled motions, might be, volume and time
constraints make the argument of motions all but impossible.

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\(^8\) Second Circuit Local Rule 34.2(a)(1).
\(^9\) Starting in early 2008, certain types of sentencing appeals were assigned to the NAC. Once the
Court became current on the criminal docket in or around 2010, sentencing-only criminal cases were
calendarred instead of the regular argument calendar; however, they are now proposed as submitted
\(^{10}\) FED. R. APP. P. 27(e).
\(^{11}\) IOP 27.1.
\(^{12}\) [NYLS]
\(^{13}\) [NYLS]
\(^{14}\) [NYLS]
In reviewing the consequences of excessive volume, I now turn to the subject of collegiality, an important element of any enterprise requiring joint effort in pursuit of a common goal.\textsuperscript{15} The caseload crisis impacts collegiality in various ways. For one thing, courts of appeal are now more reliant on visiting judges to get the job done.\textsuperscript{16} District court judges from the same circuit and district and circuit judges from other circuits are called upon to assist the court of appeals that are more seriously burdened by their caseloads. An intercircuit assignment system is in place, and all courts of appeal now use visiting judge to some degree.\textsuperscript{17} There is therefore less opportunity to sit with judges of our own court. The number of seats on the court has an impact of collegiality because, as the number of judges grows, the rotation of panels becomes such that one will sit with a colleague fewer times during the course of a year.\textsuperscript{18} When I first came to my court, the membership of a panel was the same for an entire week at a time.\textsuperscript{19} After the completion of arguments, we would retire to chambers and each member of the panel would then circulate to the other panel members a brief voting memorandum pertaining to the cases heard that day. On Friday afternoon, the panel convened in the chambers of the judge who presided that week to confer and review our voting


\textsuperscript{16} See Memorandum of Dennis Jacobs to Judges of the Second Circuit Court of Appeals (Apr. 1, 2011) (stating that visiting judges participate in as many as 40% of the Court’s sitting days) (on file with author).

\textsuperscript{17} FEDERAL JUDICIAL CENTER, THE USE OF VISITING JUDGES IN THE FEDERAL DISTRICT COURTS — A GUIDE FOR JUDGES & COURT PERSONNEL (2001).

\textsuperscript{18} See generally Federal Judicial Center, Imposing a Moratorium on the Number of Federal Judges (1993).

\textsuperscript{19} See Mahoney at 328.
memoranda. After each judge was heard as to each case, a final vote was taken and the opinion
assigned by the presiding judge.20

Today, it is rare for one judge to sit for the entire week in the Court of Appeals for the
Second Circuit. Judges rotate, and out of each week’s panel, some sit for as little as one or two days.21
Accordingly, the conference of the judges is held after each day’s sitting and the discussions
customarily are brief. A tentative vote is recorded as to each case and the opinion assigned, but from
time to time the vote is postponed so that a memorandum may be circulated after the judges have had
more time to think about a proper disposition. The lengthy face-to-face discussions of the past are
replaced by abbreviated conferences with constantly changing judicial personnel. Obviously,
collegiality in the sense of the opportunity to interact with colleagues is lessened as the volume of
cases increases.22 In this way, the “hallmark” of the judiciary that “independent, constructive insight

20 Feinberg article might be cited here – need to check it. Also Mahoney article, but that is from 1988
and may not reflect the 1984 practices.
21 See 28 U.S.C. §§ 291(a), 292(d) or 292(e), 293(a) or 294(d) (2006); FEDERAL JUDICIAL CENTER, THE
USE OF VISITING JUDGES IN THE FEDERAL DISTRICT COURTS: A GUIDE FOR JUDGES & COURT
PERSONNEL [Pg. # & App’x C 49] (2001) (parenthetical); Guidelines for the Intercircuit Assignment of
Article III Judges (approved by the Chief Justice Oct. 21, 1997); see also Michael E. Solimine, Diluting
Justice on Appeal: An examination of the Use of District Court Judges Sitting by Designation on the United
22 See Charles Clark, A Healthy and Diverse Judiciary (“Such an unwieldy bureaucracy has the
potential to smother justice as we know it. Character and collegiality will become rare, if not extinct,
in such a swollen system.”), in C. HARRISON & R. WHEELER, EDs., FEDERAL JUDICIAL CENTER, THE
FEDERAL APPELLATE JUDICIARY IN THE TWENTY-FIRST CENTURY 166 (1989); Harrison L. Winter,
Goodwill and Dedication, in C. HARRISON & R. WHEELER, EDs., FEDERAL JUDICIAL CENTER, THE
FEDERAL APPELLATE JUDICIARY IN THE TWENTY-FIRST CENTURY 167 (1989); Patricia M. Wald,
Calendars, Collegiality, and Other Intangibles on the Courts of Appeals, in C. HARRISON & R.
WHEELER, EDs., FEDERAL JUDICIAL CENTER, THE FEDERAL APPELLATE JUDICIARY IN THE
TWENTY-FIRST CENTURY 167 (1989). See generally Roger J. Miner, Planning for the Second Century of
the Second Circuit Court of Appeals: The Report of the Federal Courts Study Committee, ___ St. John’s L.
Rev. at 682–83 (Date); DONALD JOHN MEADOR & JORDANA SIMONE BERNSTEIN, APPELLATE
COURTS IN THE UNITED STATES 36, (1994).
and criticism [should be provided] from judges on the court and the panel other than the judge writing the opinion” has been eroded.

Nevertheless, the use of senior judges is one measure to maintain collegiality and to respond to the increasing appellate caseload. The use of senior judges “fills the gaps caused by personnel needs,” because senior judges continue to serve on the circuit courts’ three-judge panels, participate in oral arguments, cast their vote or “tab,” author opinions, and remain a full part of the case’s decisional process. Indeed, the “number of senior judges has risen sharply since its inception in 1918.” But I agree that a “strong case may be made that the rise in senior judges has been a contributing factor to reducing the burdens of expanding caseloads.” Given the current caseload in the appellate courts, the circuit courts have had to rely on not only senior judges but also district judges to constitute daily panels in the circuit courts, which, although very beneficial, might also contribute to a lessened opportunity to interact with colleagues with lengthy face-to-face discussions because the regular use of visiting district judges essentially raises the number of rotating active judges being used.

V. Revisiting the Committee’s Recommendations

23 Todd Collins, Re-Opened for Business? Caseloads, Judicial Vacancies, and Backlog in the Federal Circuit Courts, 95 Judicature 20, 28 (July-August 2011). See generally 28 U.S.C. § 371 (providing that a federal judge may retire, or go “senior status,” and continue to receive a full salary with continuing participation in a reduced number of cases);
24 See id. at 29.
26 Id.
In this section I briefly review the Report’s recommendations for dealing with the
"Appellate Caseload Crisis" and the "crisis of volume." The Committee’s Report made
numerous recommendations on a variety of approaches and topics in the federal court system,
including the reallocation "of business between the state and federal systems," the creation of
additional capacity within the federal judicial branch, "concerns about sentencing, federal
court administration, and ways to protect against bias and discrimination in the judicial
branch and the judicial process." Of the appellate caseload crisis, however, the Federal
Courts Study Committee made, for the most part, what can be called structural
recommendations for dealing with the appellate caseload crisis. These recommendations,
which the Committee also ultimately recommended the rejection of, are premised on what
the Report describes as the "five fundamental characteristics" of the courts of appeals [that]

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29 FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 109 (April 2, 1990), available at 1990 WL 538955. For a thorough review and examination of the Federal Courts Study Committee’s recommendations both structural and non-structural in nature, see Roger J. Miner, Planning for the Second Century of the Second Circuit Court of Appeals: The Report of the Federal Courts Study Committee, 65 ST. JOHN'S L. REV. 673, 642, 683–690 (1991) (reviewing the major findings and recommendations of the Study Committee Report relating to federal courts of appeals and evaluating them in light of the condition of the Courts of Appeals for the Second Circuit). See generally id. at 690–98 (reviewing the Committee’s recommendations for changes in district court procedure); id. at 698–707 (reviewing the Committee’s recommendations for the “development of innovations for court management”); id. at 707–15 (decisional process); id. at 715, 715–24 (reviewing proposed adjustments in federal court jurisdiction that might affect the “flow of cases to the courts of appeals”).
32 id. at __; see also id. at 123 (Statement of Hon. Jose A. Cabranes) ("echoing the committee’s call for more study of this subject and reiterating that the committee has approved none of the various proposals noted in the text" (emphasis in original)).
have persisted since their creation in 1891.” 33 The characteristics, which pertain to the
traditional “decisional and geographic structures” and organization of the courts of appeals,
are that the courts of appeals “comprise the only intermediate tier of courts in the federal
system, provide litigants an appeal as of right, assign cases for decision by three-judge panels,
are organized geographically, and are divided into circuits roughly approximating the number
of Supreme Court justices.” 34

At the outset it bears noting that the Report’s proposals did not include an increase in
the number of federal circuit judges, the Committee having essentially reasoned that the
appellate caseload crisis could not be “solved by the continuous and indefinite expansion of

33 Martha Dragich, Back to the Drawing Board: Re-Examining Accepted Premises of Regional Circuit
Structure, 12 J. APP. PRAC. PROCESS 201, 231 (Fall 1011) (quoting REPORT OF THE FEDERAL COURTS
STUDY COMMITTEE at 113).
34 Id. (internal footnotes omitted); see also REPORT OF THE FEDERAL COURTS STUDY COMMITTEE at
113. I believe that the number of judgeships per circuit also goes to the structure and organization of
the courts of appeals and is therefore another structural characteristic addressed by the Committee’s
Report. REPORT OF THE FEDERAL COURTS COMMITTEE STUDY 111–12. On the other hand,
contemporary characteristics of the courts of appeals, which have evolved over time, have been said to
include non-structural characteristics such as “the rising caseloads of the courts of appeals and the
processes and procedures [the courts of appeals] employ to deal with expanded caseloads.” Dragich,
supra note 32, at 232. Other contemporary characteristics responsive to the increased appellate
caseload include the number of law clerks and other staff, reductions in oral argument time allowed,
the increased use of summary dispositions, and the use of settlement programs. REPORT OF THE
FEDERAL COURTS COMMITTEE STUDY 114; see also Dragich, supra note 32, at 232 n.187 (citing the
REPORT OF THE FEDERAL COURTS COMMITTEE STUDY 114). Another evolving characteristic of
the courts of appeals, which has been said to have been affected by the appellate caseload, is the caseload
makeup or types of cases before the circuit courts. See id. at 245 (“Given the marked shift in the
federal courts’ caseload from diversity to federal question cases, the federal courts today far more often
apply federal law (whether constitutional, statutory, or ‘genuine’ federal common law) than state
law.”); see also Roger J. Miner, Federal Courts at the Crossroads, 4 CONST. COMMENT. 251, 253, 254
(1987) (noting the direct correlation between (1) Congress’s “enthusiasm for enacting criminal laws”
and the general federalization of criminal law with (2) great volume of cases added to the federal
courts, giving rise to the “geometric progression of [the circuits’] workload.”).
the federal judiciary.” The Committee further reasoned that effective judicial performance was contingent on the judges of the circuit courts being “sufficiently few in number to feel a personal stake in the consequences of their actions.” The Committee also noted its concern about maintaining intra- and inter-court uniformity in federal law, which could suffer if there was an increase in the number of courts or judgeships. I have remarked that typically neither my colleagues nor other circuit judges, exhibit great enthusiasm for the expansion of the federal judiciary or for an increase in the number of judges sitting on our courts of appeals.

Turning to my review of the five structural alternatives proposed by the Committee’s Report, I reiterate that the Committee declined to endorse any of these proposals, so I only briefly review them here, although structural revisions and adaptations to the courts of appeals have served as cannon fodder to much scholarly debate on the topic. The first

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35 Roger J. Miner, Planning for the Second Century of the Second Circuit Court of Appeals: The Report of the Federal Courts Study Committee, 65 St. John’s L. Rev. 673, 682 (1991); see also id. at 683, 684 (noting that the Committee’s Report also rejected the 1975 Hruska Commission, formally known as the Commission on Revision of the Federal Court Appellate System, for the establishment of a National Court of Appeals—a nationalized appellate court “would not solve the problem of growth within the courts of appeals” and “could only resolve a piece of the problem”).

36 See id.

37 Id.

38 Id.

39 See generally, e.g., COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, FINAL REPORT 59–66 (Dec. 18, 1998) [hereinafter the “WHITE COMMISSION REPORT”] (opining that some changes to the structure of the courts of appeals will help them deal with the conundrum they will face as caseloads grow” and proposing two-judge panels as one possible change to alleviate increasing appellate caseloads); THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS (A REPORT OF THE JUSTICE RESEARCH INSTITUTE) 33–51 (1994) (collecting and synthesizing the findings of previous studies examining the appellate caseload crisis and proposed adaptations) [hereinafter RATIONING JUSTICE ON APPEAL]; AMERICAN BAR ASSOCIATION, REPORT OF THE ABA STANDING COMMITTEE ON FEDERAL JUDICIAL IMPROVEMENTS REGARDING THE RECOMMENDATIONS OF THE FEDERAL COURTS STUDY COMMITTEE 4 (August 1991) (noting the ABA’s Litigation Section’s disagreement with the Federal
recommendation envisioned multiple circuit courts functioning as a unified or nationalized appellate court operating through regional divisions and a federal circuit division from the United States Claims Court and the United States Court of International Trade. The current geographic circuit boundaries would be replaced by larger regional boundaries, with the nation evenly divided into regions. Under this approach nine judges would serve in each of the regional divisions, and inter-circuit conflicts generated by “the proliferation of panels would be handled in one of two ways: a rule could be adopted requiring adherence to precedents established by prior panel decisions in other divisions; or a central division of the unified court could be established to hear and decide conflicts among regional divisions.” It has been said that with a central division of representative judges, these judges could “review panel decisions and resolve remaining conflicts as a kind of national [in] banc court. This would reduce the expectation of more frequent conflicts generated by more circuits without relying on the Supreme Court.”

The Committee’s second structural proposal featured a four-tiered federal court system, whereby two appellate courts are interposed between the district courts and the

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Court's Study Committee Report's preference for a “small” judiciary and recommending that additional judgeships should be created and that existing vacancies should be filled promptly and that “the existing structure of the Federal circuits continue to be an appropriate way of deciding appeals”); [NYLS to cite additional sources here, several of which can be the previous studies noted in Baker’s book, “Rationing Justice on Appeal.” This footnote could, if NYLS is agreeable, serve as a great research/reference tool for collecting sources and research on this topic. MJZ can provide hard-copies of additional sources or send an updated footnote if desired.]

40 See Miner, supra note 35, at 685; REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 118. 41 See Miner, supra note 35, at 685; REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 118. 42 See Miner, supra note 35, at 685; REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 118. 43 RATIONING JUSTICE ON APPEAL 42.
Supreme Court. The first appellate tier would consist of twenty to thirty regional appellate divisions, with nine or ten judges per division. Appeals of right from the district courts within a designated geographical area would come to the first-tier appellate division covering that region. The second appellate tier would consist of four or five tribunals located in various areas of the nation, and each second-tier court would have seven judges and would take cases on a discretionary basis from a specified grouping of the first-tier courts. I have stated that one advantage of this structure “is said to lie in the ability of the higher tribunal to establish a more coherent body of law within a system that allows all the courts at both levels to remain small in size.” Under this proposed model, the Supreme Court would take cases only from the upper-level courts, allowing the upper-tier court to view and assess the development of uniformity in the decisions of the lower-tier courts. This approach would have the Court of Appeals for the Federal Circuit designated as a second-tier court, with appeals taken directly to it from the United States Claims Court and the United States Court of International Trade. Commentators have noted that this model would “absorb the expected large cohorts of additional judgeships and . . . would be designed to handle the expectation of more frequent conflicts.”

44 See Miner, supra note 35, at 685; REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 119.
45 See Miner, supra note 35, at 685; REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 119.
46 See Miner, supra note 35, at 685; REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 119.
47 See Miner, supra note 35, at 685; REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 119.
48 See Miner, supra note 35, at 685; REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 119.
49 See Miner, supra note 35, at 685; REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 119.
50 See Miner, supra note 35, at 685–86; REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 119.
51 RATIONING JUSTICE ON APPEAL 42.
The third structural revision proposed ordered the federal appellate courts according to subject matter, creating national subject matter courts.\textsuperscript{52} As we know, the Court of Appeals for the Federal Circuit is one such circuit court fitted to this mold.\textsuperscript{53} This model called for leaving in place the present geographic courts of appeals but proposed a number of subject-matter appellate courts.\textsuperscript{54} Appeals from the district courts would be taken according to the subject of the case on appeal. Under this approach the existing geographic “courts would be relieved of a substantial part of their caseload, and many areas of inter-circuit conflict would be eliminated.”\textsuperscript{55}

The fourth structural adaptation called for having all circuit judges act as members of a single court assigned to sit at locations primarily near their homes.\textsuperscript{56} Under this model, the circuit courts would again be structured as one “centrally organized tribunal.”\textsuperscript{57} This model would purportedly have the flexibility to allocate judges and resources according to need. It could establish its own precedents for the resolution of conflicts between panels and could experiment with subject-matter courts and internal tiers.\textsuperscript{58} This model, of course, could raise collegiality concerns as colleagues living in other locales would seldom be sat with, and the existing rotation of three-judge panels providing for random panel member selection would surely suffer. Circuit judges living in more remote regions of the country would essentially

\textsuperscript{53} [NYLS: Statutory jurisdiction, re: subject matter of Federal Circuit]
\textsuperscript{54} See Miner, supra note 35, at 686; REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 120.
\textsuperscript{55} See Miner, supra note 35, at 686.
\textsuperscript{56} See Miner, supra note 35, at 686; REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 119.
\textsuperscript{57} See Miner, supra note 35, at 686; REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 119.
\textsuperscript{58} See Miner, supra note 35, at 686; REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 119.
find themselves sitting on relatively static panels with little-to-no rotation of panel members.

This might also affect the consistency of federal law. Nevertheless, flexibility and the ability
to develop internal mechanisms for resolving conflicts remain the hallmarks of this model.\(^{59}\)

The final structural proposal envisioned consolidation of the existing circuit courts
into five large or “jumbo” circuits.\(^{60}\) Under this model, judges would be assigned to sit in
subdivisions of the five jumbo circuits.\(^{61}\) Judges could be assigned to sit in the subdivisions,
which would be made possible by the shifting of resources within each jumbo circuit.\(^{62}\) Intra-
circuit conflicts would be resolved by each jumbo circuit in its discretion, and “in banc
sittings, with rotating memberships, have been suggested as a means of maintaining
uniformity in jumbo circuit.”\(^{63}\) Because this proposal essentially recreates and multiples the
Ninth Circuit, adoption of this recommendation would seem unadvisable given the past and
current debate surrounding proposals to split the Ninth Circuit.\(^{64}\)

Because in my view it cannot be stated that the structural recommendations for
addressing the appellate caseload crisis have gained any serious momentum (one direction or
another) in Congress since issuance of the Federal Courts Study Committee’s Report,\(^{65}\)

\(^{59}\) *Rationing Justice on Appeal* 43.

\(^{60}\) See *Miner, supra* note 35, at 686–87; *Report of the Federal Courts Study Committee* 122.


\(^{63}\) See *Miner, supra* note 35, at 686–77; *Report of the Federal Courts Study Committee* 122.

\(^{64}\) See, e.g., *White Commission Report* 29–57; see also [NYLS: Additional Current Sources & Law Review Articles]

\(^{65}\) See *Miner, supra* note 35, at 687 (noting and briefly surveying the “[v]arious criticisms [that] have
been leveled at each one of the restructuring proposals,” which stem from, in part, “a simple reluctance
scholarship must also continue to examine the inadequacy of the present methods and non-
structural solutions, each of which I now turn to.

VI. Assessing the Inadequacy of Present Methods

I focus in this section on the availability and efficacy (or lack thereof) of the imposition
of sanctions, adjudication of an appeal by summary disposition, and the acceptance of *Anders*
b briefs as tools for managing the caseload crisis. What is apparent is that while they may be
effective methods by which a court may discourage and quickly dispose of frivolous appeals,
these methods are completely inadequate in their present employ to be used as tools for
managing meritless, but not frivolous, appeals.

A. Sanctions

An appellate court’s power to impose sanctions derives from several independent
inherent authority of the court.68 In addition, 28 U.S.C. § 1912 confers jurisdiction upon
courts of appeals, in each court’s discretion, to award single or double costs or damages for
“delay” to a prevailing party.69 However, the cumbersome nature of the procedures

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66 F.R.A.P. 38 (“If a court of appeals determines that an appeal is frivolous, it may, after a separately
filed motion or notice from the court and reasonable opportunity to be respond, award just damages
and single or double costs to the appellee.”).
67 28 U.S.C. § 1927 (2006) (“Where a judgment is affirmed by the Supreme Court or a court of appeals,
the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or
double costs.”).
68 See Pillay v. I.N.S., 45 F.3d 14, 17 (2d Cir. 1995); Giano v. Goord, 250 F.3d 146, 149–50 (2d Cir.
2001) (discussing inherent authority of the court).
69 This provision often has been applied to sanction frivolous appeals. See, e.g., Kaynard v. MMIC,
Inc., 734 F.2d 950, 954 (2d Cir. 1984).
established for the imposition of available sanctions, and the limited scope of the conduct to which sanctions may attach, discourages their regular application.

Sanctions against appellants currently are available to discourage appeals that are so very meritless as to be deemed “frivolous.” Rule 38 of the Federal Rules of Appellate Procedure provides for sanctions consisting of “damages” and single or double costs to the appellee upon a judicial determination that an appeal is frivolous. My Court has interpreted Rule 38 to permit an award of sanctions only in cases of clear frivolity, bad faith, or a multiplicity of filings. An appeal has been said to be frivolous where it “amount[ed] to little more than a continued abuse of process” and “was totally lacking in merit, framed with no relevant supporting law, conclusory in nature, and utterly unsupported by the evidence.”

An appeal that “appears to represent one more step in an outrageous abuse of civil process through persistent pursuit of frivolous and completely meritless claims” also has been

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70 Federal Rule of Appellate Procedure 38 provides: “If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.” While the requirement of notice and an opportunity to respond is, of course, not “cumbersome,” the courts’ narrow defining of “frivolity,” as I discuss further below, does constitute a significant obstacle in applying sanctions more broadly. See generally Charles Alan Wright, Arthur R. Miller, et al., Federal Practice and Procedure § 3984.1, at 527–39 (2008) (explaining the many reasons why a court may decide not to impose sanctions because, even if an argument contravenes circuit precedent or its probability of success seems weak, the appeal may still not be “frivolous”); see also Robert J. Martineau & Patricia A. Davidson, Frivolous Appeals in the Federal Courts: The Ways of the Circuits, 34 AM. U. L. REV. 603 (1985) (assessing the Second, Third, Fourth, Seventh, Eighth, Tenth, and the District of Columbia courts of appeals as either “uncertain” or “reluctant” when it comes to imposing sanctions for meritless appeals).

71 In addition, applications for sanctions themselves can give rise to further litigation. Roger J. Miner, Federal Courts at the Crossroads, 4 Const. Comment. 251, 255 (1987) (citing Oliveri v. Thompson, 803 F.2d 1265 (2d Cir. 1986)).

72 Formica v. Malone & Assoc., 907 F.2d 397, 400 (2d Cir. 1990) (“Since we . . . do not find [the] appeal to be frivolous, we deny [the] motion to dismiss the appeal and to impose appellate sanctions.” (internal citation omitted)).


74 United States v. Potamkin Cadillac Corp., 689 F.2d 379, 381 (2d Cir. 1982) (per curiam).
characterized as frivolous. Frivolous appeals have been described as those that rest upon “fanciful allegations of fact [or] inarguable assertions of law.” Clearly, then, all frivolous appeals fall within the meritless category, but not all meritless appeals can at present be sanctioned as frivolous.

Pursuant to 28 U.S.C. § 1927, sanctions may be imposed personally upon an attorney who so “multiplies” the proceedings in any case “unreasonably and vexatiously.” The sanctions for such conduct may include “the excess costs, expenses, and attorney’s fees” occasioned by such conduct. These sanctions are designed to discourage lawyers from burdening the opposing party with unnecessary delays. However, they do not necessarily discourage meritless appeals and seem to require the showing of some sort of intentional misconduct that is unreasonable and vexatious. Nor does the provision apply to discourage a meritless appeal by a pro se litigant.

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75 Der-Rong Chour v. I.N.S., 578 F.2d 464, 467 (2d Cir. 1987).
76 United States v. Davis, 598 F.3d 10, 14 (2d Cir. 2010); see also Neitzke v. Williams, 490 U.S. 319, 327 (1989) (describing an appeal as frivolous if it presents an “indisputably meritless legal theory” or “factual contentions [that] are clearly baseless”).
77 Pillay v. INS, 45 F.3d 14, 16 (2d Cir. 1995) (per curiam) (“[A]lthough Federal Rule of Appellate Procedure 38 permits the award of damages to an appellee in the case of a frivolous appeal, it does not authorize the dismissal of a frivolous appeal.”); Enmon v. Prospect Capital Corp., 675 F.3d 138, 143 (2d Cir. 2012) (noting that an award of sanctions must be supported by a finding that a party acted “in bad faith, i.e., motivated by improper purposes such as harassment or delay”); but see In re Drexel Burnham Lambert Group, Inc., 995 F.2d 1138, 1147 (2d Cir. 1993) (“The standard for the imposition of [sanctions under Rule 38] is where the appeal taken is found to be groundless, without foundation, and without merit, even though appellant did not bring it in bad faith.” (emphasis supplied)); Hyatt v. Metropolitan Transp. Authority, No. 08-5566-cv, 370 Fed. App’x 153, 154 (2d Cir. 2010) (denying a motion for sanctions where the appellant’s “argument on appeal [were] clearly meritless, [but] there [was] no indication that he was appealing the district court’s judgment in bad faith, or that he has made similar arguments in federal courts in the past”).
Leave-to-file or reporting requirements also may be imposed as a sanction, as an alternative or addition to costs and damages.\textsuperscript{79} "Courts may impose sanctions, including restrictions on future access to the judicial system," if a litigant "has a history of filing vexatious, harassing or duplicative lawsuits."\textsuperscript{80} Circuit Courts typically warn a litigant before imposing sanctions that restrict future access to the appellate courts. The court may enter an order barring an appellant from making any future filings without approval by the court when the court makes a determination that the litigant or appellant "abused the judicial process to harass [the opposing party] with vexations and frivolous suits."\textsuperscript{81}

Notwithstanding the availability of sanctions, they have been imposed in too few cases to penalize those who pursue frivolous appeals, to compensate those required to respond to them, and to discourage those who would unduly burden the appellate courts. It seems to me that courts, especially my Court, too often denies applications for sanctions, or issues slap-on-the-hand warnings,\textsuperscript{82} due to an over-sensitized fear that granting such applications would

\textsuperscript{79} Most recently, an appeal arising from a complaint alleging that former senior government officials caused the September 11, 2001, attacks captured the attention of the Second Circuit Court of Appeals.\textsuperscript{79} In this case, where the appeal (and the original complaint) were "brought without the slightest chance of success," the Court, \textit{nostre sponte}, ordered petitioner and her counsel to show cause why they should not pay double costs and damages under Rule 38, 28 U.S.C. § 1927, and the inherent power of the Court. Pursuant to subsequent Orders, the Court imposed sanctions on two of appellant's attorneys for filing a frivolous appeal and ordered them to pay double costs to the government along with damages in the amount of $15,000. The Court also imposed a one-year reporting requirement should either attorney file any matter in any federal court within the Second Circuit.

\textsuperscript{80} Hong Mai Sa v. Doe, 406 F.3d 155, 158 (2d Cir. 2005). The court first orders the litigant to show cause why a leave-to-file sanction order should not issue.

\textsuperscript{81} Sassower v. Sansverie, 885 F.2d 9, 11 (2d Cir. 1989).

\textsuperscript{82} See, e.g., Vargas v. Wughalter, No 09-3764-cv, 380 Fed. App’x 110, 110 (2d Cir. 2010); Jeffreys v. United Technologies Corp., No. 08-5853-cv, 357 Fed. App’x. 370, 373 (2d Cir. 2009).
"stifle [ ] enthusiasm" or "chill [ ] creativity."³⁸ Lest I be labeled as a "stifler" of the creativity of the bar, I instead suggest that such terms as "enthusiasm" or "creativity" no longer retain their original connotation but now include an all-too-often thinly veiled disguise for an argument completely lacking in merit. There certainly still is a place for the creativity and enthusiasm that characterize legitimate advocacy. As I have suggested previously, a meritless appeal is separate and distinct from one which, while perhaps not a "home run," has an objectively reasonable basis in law and fact or puts forth a logical and well-reasoned argument for the extension of existing law or for overturning precedent.

In the same vein, too many meritless appeals are considered to be non-frivolous and thus, in most cases, non-sanctionable. A sister circuit has opined that "it's pretty easy to distinguish a frivolous from a nonfrivolous case."³⁹ I respectfully think that this overstates what I believe to be "difficult business."⁴⁰ Distinguishing a frivolous appeal from one "likely without merit" has always proved to be a challenging task for me,⁴¹ and I have always thought that more meritless appeals belong in the frivolous category than perhaps some of my

³⁸ Oliveri v. Thompson, 803 F.2d 1265, 1268 (2d Cir. 1986); see also United States v. Davis, 598 F.3d 10, 14 (2d Cir. 2010) ("We have cautioned the bar that overreaching attempts to dismiss appeals as frivolous, like excessively zealous claims that adversary counsel should be sanctioned, will not be accorded a friendly reception by this court." (internal quotation marks and alteration omitted)); Eastway Const. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985) ("We do not intend to stifle the enthusiasm or chill the creativity that is the very lifeblood of the law.").
³⁹ United States v. Thouvenot, 596 F.3d 378, 381 (7th Cir. 2010) (Posner, J.).
⁴⁰ Accord WSM, Inc. v. Tenn. Sales Co., 709 F.2d 1084, 1088 (6th Cir. 1983) ("[F]rivolity, like obscenity, is often difficult to define.").
⁴¹ Love v. McCray, 415 F.3d 192, 194 (2d Cir. 2005) (per curiam).
counterparts. If that were the case, sanctions could serve more effectively as a deterrent for not only frivolous but also certain classes of meritless appeals.\textsuperscript{87}

B. Summary Dispositions and \textit{Anders} Briefs

Motions for summary affirmance and the filing of an \textit{Anders} brief also exist for coping with frivolous appeals. An appellee may make a motion for summary affirmance of the judgment of the district court. Such a disposition is a rare exception to full merits briefing and is available only upon a judicial determination that an appeal is truly frivolous.\textsuperscript{88}

Especially in the context of a criminal appeal, an easy case for which the outcome "seems obvious" is to be distinguished from a frivolous case that is inarguable or fanciful. "More than a finding that the correct resolution of an appeal seems obvious is required."\textsuperscript{89}

In the criminal context, defense counsel may file a brief pursuant to \textit{Anders v. California}, along with a motion to be relieved as appellate counsel, if he determines that no non-frivolous issues exist on appeal.\textsuperscript{90} The standard for granting such a motion is high; it will be granted only upon a judicial determination that "counsel has diligently searched the record for any arguably meritorious issue in support of his client's appeal" and "counsel's declaration

\textsuperscript{87} Different circuits consider different factors in deciding whether to award Rule 38 sanctions. See Meehan Rasch, \textit{Not Taking Frivolity Lightly: Circuit Variance in Determining Frivolous Appeals Under Federal Rule of Appellate Procedure 38}, 62 \textit{Ark. L. Rev.} 249, 273–75 (2009). For example, the Third Circuit applies a "reasonable attorney" test, by which the court determines whether "following a thorough analysis of the record and careful research of the law, a reasonable attorney would conclude that the appeal is frivolous." \textit{Id.} (citing Beam v. Bauer, 383 F.3d 106, 109–10 (3d Cir. 2004)).

\textsuperscript{88} United States v. Davis, 598 F.3d 10, 14 (2d Cir. 2010).

\textsuperscript{89} United States v. Davis, 598 F.3d 10, 13 (2d Cir. 2010).

that the appeal would be frivolous is, in fact, legally correct.\textsuperscript{91} While both summary dispositions and \textit{Anders} briefs certainly serve a purpose in deterring frivolous appeals, as with sanctions, they do not serve adequately to discourage meritless appeals.

While special circumstances in the criminal context require “easy” cases to be distinguished from frivolous ones, it still seems to me that more attorneys, especially those appointed as CJA counsel, should be filing \textit{Anders} briefs and motions to be relieved as counsel.\textsuperscript{92} It is not the rare case where I have seen an attorney travel from as far away as Buffalo or Syracuse to argue an appeal that instead should have been resolved by filing such a motion. While the requirements are many, my Court has prepared detailed instructions along with an “\textit{Anders} Checklist” to assist counsel with compliance with the requirements. Finally, defense counsel would be wise to bear in mind that “the right to appellate representation does not include a right to present frivolous arguments to the court [and] an attorney is under an ethical obligation to refuse to prosecute a frivolous appeal.”\textsuperscript{93}

VII. Advancing a Proposal

As the title of this Article indicates, my intent has been to revisit the 1990 Report of the Federal Courts Study Committee to illustrate that the problems identified by the

\textsuperscript{91} United States v. Burnett, 989 F.2d 100, 104 (2d Cir. 1993); see also Pillay, 45 F.3d at 16 (“In substance, the granting of motions for summary affirmance in \textit{Anders} cases is not significantly distinguishable from dismissal of appeals as frivolous.”)

\textsuperscript{92} Of note is a circuit split whereby the majority of the Circuits, including the Second Circuit Court of Appeals, require defense counsel to file an appeal upon a defendant’s request notwithstanding any plea bargain into which the defendant entered. The Seventh Circuit, in contrast, has held that a plea bargain relieves counsel of any duty to file an appeal. See generally Tamar Kaplan-Marans, \textit{An Appealing Split: Filing an Appeal after a Plea Bargain: Is Counsel Obligated to File a Meritless Appeal?}, 74 BROOK. L. REV. 1183 (2009) (citing Nunez v. United States, 546 F.3d 450 (7th Cir. 2008); Campusano v. United States, 442 F.3d 770, 777 (2d Cir. 2006)).

\textsuperscript{93} Smith, 528 U.S. at 272 (internal quotation marks omitted).
Committee in 1990 continue to remain at the forefront today. In that light, as part of this
revisit I also “re-advance” an idea that was proposed, but ultimately rejected by the
Committee in 1990. In its Report, it recommended that Congress reject adoption of a “loser
pays” rule or, as also commonly known, the “English Rule.” In doing so, it opined:

Although sometimes advocated, a general rule making losing parties fully liable
for the winners’ reasonable attorney fees is a radical measure that would be
inconsistent with traditional American attitudes toward access to courts. Such
a rule would work harshly in close cases, especially when a party advocates a
position that is reasonable but is nevertheless unsuccessful. It might excessively
discourage parties with plausible but not clearly winning claims, particularly
when a prospective party is risk averse as is likely to be true of middle-class
persons who cannot risk a big loss. Furthermore, the rule could actually make
settlement less likely: other things being equal, it increases the negotiation gap
between the litigants. Even jurisdictions like the United Kingdom that
formally follow the loser-pays rule often temper it substantially, as by imposing
only partial liability, providing broad public legal aid, or making the rule
inapplicable in significant classes of cases.

While rejecting recommendation of the “loser pays” rule, the Committee nonetheless noted
its support for attorney fee shifting in certain circumstances, such as “discovery motions and
in business litigation between well-financed adversaries.” Interestingly enough, these
“certain circumstances” now include over 200 federal statutes and 2000 state statutes that
provide for some type of fee-shifting.

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94 Under the English Rule, the successful party (upon the discretion of the court) may recover attorneys’ fees and expenses from the losing party. Eng. Civ. P. R. 44.3(1)–(2); Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 270–71 (1975).
ASSOCIATION, ABA BLUEPRINT TO IMPROVE THE CIVIL JUSTICE SYSTEM (1992)]—?.
97 See, e.g., 42 U.S.C. § 1988 (the Civil Rights Attorney’s Fees Awards Act); see also John F. Vargo, The
American Rule on Attorney Fee Allocation: The Injured Person’s Access to Justice, 42 AM. U. L. REV. 1567,
1588–89 (1993).
In the years since the Committee's rejection of this proposal, much has been written by both the proponents and opponents of the English Rule, but little has been done.\textsuperscript{98} I myself have long advocated a departure from the American Rule\textsuperscript{99} regarding attorney's fees in favor of the English Rule.\textsuperscript{100} In addition to better serving the interests of fundamental fairness, I believe that adoption of such a rule would better serve to deter frivolous and meritless appeals (and actions filed in the district courts).\textsuperscript{101} As I previously have written, I continue to advocate a meaningful shift toward (or at least experiment with) the English Rule.\textsuperscript{102}

Because I believe that a key benefit of the English Rule is that it better fulfill fundamental fairness, it is essential that judges be afforded the discretion, as is generally the case with the current fee-shifting statutes, whether ultimately to make an award.\textsuperscript{103} Judges are well-suited to making these types of determinations. A prime example is in the case of litigation arising under the Copyright Act, which provides that a "court in its discretion may


\textsuperscript{100} The Supreme Court has opined on several occasions that the American Rule is "deeply entrenched" as a "bedrock principle" in American Society. Fox v. Vice, 131 S. Ct. 2205, 2213 (2011); Hardt v. Reliance Standard Life Ins. Co., 130 S. Ct. 2149, 2156–57 (2010). While it might be the well-established rule in this country, I believe that, if put to a vote, the American people overwhelmingly would support adoption of the English Rule. See Roger J. Miner, \textit{Federal Courts at the Crossroads}, 4 Const. Comment. 251, 257 (1987).


\textsuperscript{103} Such is not the case in all "loser pays" jurisdictions. The law in Austria, Germany, and the Netherlands, for example, does not permit the courts such discretion. Bungard, \textit{supra} note [X], at 35–36.
allow the recovery of full costs by or against any party other than the United States or an
oficer thereof."104 Pursuant to the Supreme Court’s directive, the lower courts are guided by
the “Fogarty factors” as they exercise their equitable discretion in such cases. These
nonexclusive “Fogarty factors” include: “frivolousness, motivation, objective unreasonableness
(both in the factual and in the legal components of the case) and the need in particular
circumstances to advance considerations of compensation and deterrence.”105 In evaluating
these factors, the courts are instructed to remain “faithful to the purposes of the Copyright
Act.”106 It seems to me that the same must remain in an “English Rule world.” Courts must
remain faithful to a litigant’s right of access to the courts while balancing considerations of
“frivolousness, motivation, objective unreasonableness (both in the factual and in the legal
components of the case) and the need in particular circumstances to advance considerations of
compensation and deterrence.”107

While implementation of the English Rule may help to quell the tide of meritless civil
appeals, I concede that it would be a less effective tool for managing the crisis of volume
regarding criminal appeals. An overarching concern is that unlike a party wishing to appeal a
civil judgment, in our legal system, a criminal defendant is afforded with a general statutory
(but not constitutional) right to an appeal.108 Therefore, any deterrent (such as a shift in fees)

Finley, 481 U.S. 551, 555 (1987) (“We think that since a defendant has no federal constitutional right to
counsel when pursuing a discretionary appeal on direct review of his conviction, a fortiori, he has no
such right when attacking a conviction that has long since become final upon exhaustion of the
appellate process.”).
must not unreasonably discourage a criminal defendant from filing a legitimate appeal.\(^{109}\)

However, notwithstanding this right, legislatures cannot have intended to afford defendants
with an unfettered right to burden the federal courts with appeals containing solely "loser"
arguments. Therefore, I believe that meritless criminal appeals can and should be discouraged
by affirmative measures.

The Prison Litigation Reform Act ("PLRA")\(^{110}\) was one such affirmative measure taken
by Congress to dissuade and discourage frivolous litigation and appeals,\(^{111}\) but I believe that
the PLRA simply does not go far enough to effectively deter frivolous appeals.\(^{112}\) To this end,

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\(^{109}\) Cf. United States v. Rosa, 123 F.3d 94, 98 (2d Cir. 1997) ("[A]ny plea agreement which contains a
 waiver of an important right, such as the right to appeal, poses theoretical concerns.").

\(^{110}\) Prison Litigation Reform Act of 1995, Title VIII of the Omnibus Consolidated Rescissions and

\(^{111}\) See Whitfield v. Scully, 241 F.3d 264, 267 (2d Cir. 2001) ("Congress, in recent amendments to the in
 forma pauperis statute, aimed to reduce the volume of meritless litigation flooding federal courts by
 making payment of filing fees mandatory. [The PLRA] also provides a mandatory mechanism for
 collecting costs when assessed by courts against prisoners who are made to pay the consequences
 should they lose.").

\(^{112}\) See 28 U.S.C. § 1915(b) (2012) (requiring that an inmate pay court filing fees in full and providing
 that an inmate may pay the fee over time with monthly installments); 29 U.S.C. § 1915(g) (setting
 that a "court may order the revocation of such earned good time credit . . . that has not yet vested, if,
 on its own motion or the motion of any party, the court finds that — (1) the claim was filed for a
 malicious purpose; (2) the claim was filed solely to harass the party against which it was filed; or (3) the
 claimant testifies falsely or otherwise knowingly presents false evidence or information to the court
 ").

See generally Feliciano v. Selsky, 205 F.3d 568, 572 (2d Cir. 2000) (Miner, J.) (holding that under the
 PLRA "courts continue to have the authority to assess costs against an indigent prisoner" but noting
 that because the PLRA added a provision to the in forma pauperis statute requiring payment for costs
 in the same manner as the payment of the filing fee, an indigent prisoner may be required to pay "full
 costs [only] in the event that the judgment requires it" (emphasis in original)); Barbara Belbot, Report on
 2004 (surveying federal cases that have rejected constitutional objections to PLRA’s three-strikes
 provision that “preclude[s] a prisoner from proceeding IPP if he or she, while incarcerated or detained,
 has on three or more occasions brought an action or appeal that was dismissed on the grounds that it
 was frivolous, malicious, or failed to state a claim upon which relief could be granted.").
the PLRA, for example,\textsuperscript{113} should be amended to impose an assessment if a criminal
defendant’s appeal were found to be frivolous.\textsuperscript{114} However, because many criminal defendants
pursuing an appeal are either indigent or are serving lengthy sentences and therefore less likely
to be deterred by the threat of a monetary assessment, any amendment to the PLRA, for
example, should include a provision expressly providing for payment of an assessment from
the inmate’s commissary account.\textsuperscript{115}

Regardless of whether Congress amends the PLRA to expressly provide for monetary
sanctions imposed on an inmate’s prison account or commissary for pursuing frivolous

\textsuperscript{113} An amendment could also be made to 18 U.S.C. § 3013, which provides for special assessments on
convicted persons, to provide courts with the authority to impose an additional assessment on a
criminal-defendant litigant if that individual’s appeal was determined to be frivolous.

\textsuperscript{114} Mallory Yontz, \textit{Amending the Prison Litigation Reform Act: Imposing Financial Burdens on Prisoners
Over Tax Payers}, 44 J. MARSHALL L. REV. 1061, 1079–80 (Summer 2011) (“If a financial burden is
placed on prisoners who bring frivolous suits by way of an amendment to the PLRA, their zeal for
filing will likely be reduced to only those suits that boast legitimate claims. It is proposed that if a
prisoner files a frivolous suit, he or she should be subject to a monetary penalty in the form of a
deduction of a set percentage of his prison account balance.”).

\textsuperscript{115} See 28 C.F.R. § 506.1 (May 24, 2012) (“The purpose of individual inmate commissary accounts is to
allow the Bureau to maintain inmates’ monies while they are incarcerated.”); cf. 28 C.F.R. § 506.2
(explaining how deposits to an inmate’s commissary account are made to a “centralized inmate
regulations pertaining to inmate deposits to a centralized inmate commissary account designed to
“provide for the more efficient processing of inmate funds”); Inmate Commissary Account Deposit
Procedures, 64 Fed. Reg. 20125 (proposed April 23, 1999) (to be codified at 28 C.F.R. pts. 506 and
540); \textit{Yontz, supra} note 78, at 1080 (“When a person becomes a prisoner, a personal account may be set
up in his name to manage money he earns and spends while in prison. These accounts, referred to as
commissary[, inmate, prison,] or canteen accounts . . . can be used to purchase a variety of items from
the commissary including toothpaste or even candy bars, but money is also deducted from the account
if the prisoner has any legal dependents.” (internal footnotes omitted)). If a prisoner “does not have
enough money in the account to cover such costs, funds may nevertheless be deducted from the
account, in some cases leaving it with a negative balance.” \textit{Yontz, supra} note 78, at 1081. Because some
state correctional facilities will \textit{recoup} negative balances “[i]f funds become available or if the prisoner
reenters the jail at a later date,” prisoners do indeed “have an incentive to maintain a positive balance
in their accounts so that they may purchase desired items while incarcerated, and also because they are
litigation,\textsuperscript{116} there are provisions in place within the correctional systems—federal and state—to support such a practice. \textsuperscript{117} In the federal correctional system, correctional facilities are run and managed by the United States Department of Justice, Bureau of Prisons (the "Bureau" or "BOP"). The Federal Bureau of Prisons issues Program Statements on policies and management of the federal prisons. \textsuperscript{117} One of these Program Statements is the Trust Fund/Deposit Fund Manual, which pertains to an inmate’s commissary account. \textsuperscript{118} The Trust Fund/Deposit Fund Manual expressly provides that an inmate’s consent is not required for withdraw of funds from an inmate’s commissary account when compliance with a federal court order is required. \textsuperscript{119} In fact, the BOP’s Trust Fund/Deposit Manual also states that “Federal Court Orders requiring disbursement of funds from an inmate account must be followed. The court order serves as the source document for the withdrawal.” \textsuperscript{120} It likely would not be disputed that an inmate greatly values his or her commissary account and the funds in that account since many items, deemed essential or basic to living to individuals not

\textsuperscript{116} An alternative to monetary sanctions imposed for pursuing frivolous litigation is 28 U.S.C. § 1932 (another PLRA provision), which provides that a “court may order the revocation of such earned good time credit . . . that has not yet vested, if, on its own motion or the motion of any party, the court finds that—(1) the claim was filed for a malicious purpose; (2) the claim was filed solely to harass the party against which it was filed; or (3) the claimant testifies falsely or otherwise knowingly presents false evidence or information to the court.” 28 U.S.C. § 1932 (2012). See generally Tubwell v. Anderson, 776 So. 2d 654 (Miss. 2000) (holding that where a condition-of-confinement lawsuit is considered by the state or federal court and dismissed as frivolous, the statute providing for forfeiture of good-time credits passes constitutional muster).


\textsuperscript{119} See id. at 86 (“The requirement for prior inmate consent include withdrawals for committed fines, attachments, liens, or any other legal process for the satisfaction of claims. Exceptions are the IRS Tax Liens . . . and Federal court orders.”), available at http://www.bop.gov/policy/progstat/4500_008.pdf.

\textsuperscript{120} Id. at 96.
incarcerated, are available only for purchase in prison using funds from an inmate’s commissary account.\textsuperscript{121} It also likely cannot be disputed that an inmate contemplating the pursuit of a frivolous appeal would be deterred from doing so if he or she was aware that the federal court could impose monetary sanctions payable from the prisoner’s commissary account.\textsuperscript{122} Moreover, a federal court could set the amount of monetary sanctions at whatever amount it deems necessary to deter the inmate from pursuing frivolous appeals, because federal BOP “[i]nmates are not limited in the amount that may be maintained in their inmate account.”\textsuperscript{123}

\textsuperscript{121} See Yontz, supra note 78, at 1079 (“If you do not want someone to do something, chances are hitting him where it hurts—his pocket book—will likely prove to be an effective deterrent. At the very least, a financial burden will induce consideration before action. It is precisely this contemplation of human behavior, as it corresponds to personal economics, which is the foundation for the solution to excessive frivolous prison litigation.”); see also FEDERAL JUDICIAL CENTER, RESOURCE GUIDE FOR MANAGING PRISONER CIVIL RIGHTS LITIGATION 52 (1996) (“Although the majority of pro se litigants . . . have few assets that would make an award of monetary sanctions worthwhile to their opponents, such sanctions can still be an appropriate way to try to modify abusive litigants’ behavior. Like a partial filing fee, monetary sanctions can make it less likely that a prisoner will pursue worthless claims or engage in truly abusive litigation. However, the prisoner’s ability to pay must be considered in determining the sanction.” (citing In re Kunstler, 914 F.2d 505, 524 (4th Cir. 1990), cert. denied, 499 U.S. 969 (1991); Dodd Ins. Services, Inc. v. Royal Ins. Co. of America, 935 F.2d 1152 (10th Cir. 1991); Miltier v. Downes, 935 F.2d 660 (4th Cir. 1991)))).

\textsuperscript{122} See Whitfield v. Scully, 241 F.3d 264, 278 (2d Cir. 2001) (“With two separate ceilings, a prisoner has a relatively strong incentive to drop a frivolous lawsuit after he has filed the suit because, immediately after an adverse judgment, he could have to pay an additional 20 percent of his month income for costs arising from the suit. With one ceiling, a prisoner would have less incentive to drop a frivolous lawsuit because, no matter what costs are ultimately imposed on him, only 20 percent of his monthly income would be subject to recoupment—an amount already exposed to recoupment for filing fees.” (internal citation omitted)).

\textsuperscript{123} Inmate Commissary Account Deposit Procedures, 69 Fed. Reg. 40315, 40315 (Final Rule published July 2, 2004) (codified at 28 C.F.R. pts. 506 and 540) (citing U.S. DEPARTMENT OF JUSTICE BUREAU OF PRISONS, PROGRAM STATEMENT 2002.02, ACCOUNT MANAGEMENT MANUAL (Oct. 15, 1986)). Although the BOP has established a monthly spending limitation from an inmate’s commissary account “to eliminate the disparity between affluent inmates and inmates with few resources,” this should not affect the payment of a court-ordered sanction because such payment would neither constitute “spending” by the inmate nor serve the underlying purpose of the spending limitation—to
Several states also have statutory or institutional provisions in place to allow—or at the least that do not prohibit—their state courts to effectively deter frivolous litigation through the use of, inter alia, monetary sanctions deductible from an inmate’s commissary. Such express authority obviously goes beyond the current express PLRA provisions allowing for the taxing of costs and filing fees. For example, in my home state of New York, the regulations provide that a state court may, “in addition to or in lieu of awarding costs,” “impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct.” As to the correctional institutions’ policies in New York, the correctional facilities in New York State are run and managed by the New York State Department of Corrections and Community Supervision (“DOCCS”), which “is responsible for the confinement and habilitation of approximately 56,000 [inmates] held at 60 state facilities . . . .” In its Handbook made available to inmates and their families, DOCCS states that “often there are court surcharges, fees, or other encumbrances that inmates may have that are unpaid. Monies coming in from the outside will be applied to those outstanding obligations. Other than the inmate’s incentive wage, funds may not be available for commissary [purchases] and other items until these obligations are satisfied.” Although the foregoing does not expressly state that sanctions may be levied on an inmate’s account, the

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126 NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, HANDBOOK FOR THE FAMILIES AND FRIENDS OF NEW YORK STATE DOCS INMATES, INMATE MONIES/INMATE ACCOUNTS 18 (DECEMBER 2007) (emphasis omitted).
Handbook’s provision clearly puts the inmates on notice that their inmate accounts are subject to “court surcharges, fees, or other encumbrances,” which obviously may include monetary sanctions imposed by a court.\textsuperscript{127} Moreover, despite the lack of specific federal or New York code and regulations providing courts with express authority to impose sanctions on an inmate’s commissary, federal\textsuperscript{128} and state\textsuperscript{129} caselaw appear to support the practice, and several other states have enacted statutory provisions expressly allowing for sanctions to be deducted from prisoner’s accounts.\textsuperscript{130}

\textsuperscript{127} Cf. \textit{STATE OF NEW YORK, DEPARTMENT OF CORRECTIONAL SERVICES, COLLECTION \\& REPAYMENT OF INMATE ADVANCES \\& OBLIGATIONS (DIRECTIVE \\# 2788) 8-11 (Aug. 6, 2009)} (discussing only encumbrances on an inmate’s account resulting from required filing-fee and costs payments under the PLRA and CPLR and remaining silent on procedures for the payment of other types of encumbrances from an inmate’s account such as monetary sanctions imposed by a state or federal court). \textit{But see id. at 1} (setting forth “[c]examples of financial obligations which inmates may incur,” which include those derived from “[c]ourt orders.”).

\textsuperscript{128} See \textit{Lay v. Anderson}, 837 F.2d 231, 232 (5th Cir. 1988) (per curiam) (taxing costs to the prisoner-appellant and holding that those “costs are payable from his prison account or any other source of assets or income he may have”); \textit{see also}, \textit{e.g.}, \textit{Hickson v. Crawford}, 832 F.2d 1263 (Oct. 22, 1987) (Table) (assessing costs to be paid from prisoner’s trust fund); \textit{cf. Whitfield v. Scully}, 241 F.3d 264 (2d Cir. 2001) (concluding that “the \textit{in forma pauperis} statute, 28 U.S.C. \S 1915, permits the recoupment of filing fees and costs at a total rate of 40 percent of a prisoner’s monthly income—20 percent for fees and 20 percent for costs”). \textit{But see Tucker v. Branker}, 142 F.3d 1294, 1298 (D.C. Cir. 1998) (holding that \S 1915 “never exacts more than 20\% of an indigent prisoner’s assets or income.”). \textit{See generally Neil H. Cogan, The Inherent Power and Due Process Models in Conflict: Sanctions in the Fifth Circuit}, 42 SW L.J. 1011 (1988–1989) (noting the “development by the court of new remedies against unwanted litigants,” including orders requiring prison officials to “withdraw moneys from prisoners’ trust accounts”); \textit{see also id. at Appx.} (listing unpublished Fifth Circuit cases where monetary sanctions were imposed).


\textsuperscript{130} See, \textit{e.g.}, \textit{KAN STAT. ANN. \$ 60-211(f) (2011)} (“If the court imposes sanctions on an inmate in the custody of the secretary of corrections, the secretary is hereby authorized to disburse any money in the inmate’s account to pay such sanctions.”); \textit{OHIO REV. CODE ANN. \$ 5120.011 (2012)} (providing that an inmate is subject to one or more of several delineated sanctions—including the loss of commissary privileges, and extra work without pay, for 60 days—if a court determines that the inmate’s action or appeal is frivolous); \textit{12 OKLA. STAT. tit. 12, \$ 2011(B)-(D) (2010)} (authorizing, inter alia, the confiscation an inmate’s “nonmandatory trust funds” in the event a court imposes sanctions
In addition to affirmative measures to deter the filing of frivolous and meritless criminal appeals, more can be done internally by the courts to manage their calendars. I previously have argued that sentencing-only appeals should be directed to a non-argument panel.\textsuperscript{131} Although my Court adopted this procedure for a short period of time during the post-\textit{Booker} years, sentencing-only criminal appeals are no longer routed to the NAC, it having been determined that such an approach was no longer necessary, given the reduction in backlog. This was a mistake. In the dozens of sentencing-only criminal appeals that I see each term, most of the appeals are meritless, with the appeal generally amounting to court-appointed counsel applying varying sets of facts to well-settled law.\textsuperscript{132} Such appeals are better placed on the NAC where specially-trained staff attorneys could (as the immigration staff attorneys currently do) prepare bench memoranda and proposed dispositions.\textsuperscript{133} Under the current model, a significant amount of time in my chambers is devoted to reviewing the briefs, preparing sitting notes and bench memoranda, and drafting and reviewing, in most cases, summary orders. Time also is allocated to oral argument, where requested.\textsuperscript{134} This is a

\textsuperscript{131} St. John’s Article at 703.
\textsuperscript{133} St. John’s Article at 703.
\textsuperscript{134} Sentencing-only appeals are proposed as submitted cases, but a party may request oral argument time.
waste of judicial resources, and time, a scarce resource, is better spent allocated between
calendared appeals that pose (hopefully!) meritorious arguments.\(^{135}\)

In this same vein, for decades, I have advocated that, notwithstanding my Court’s
“long tradition” of affording oral argument to nearly all who wish it, that a screening system
be employed to ferret out those easily-resolvable cases where oral argument would not be
beneficial.\(^{136}\) As I recommended then, I continue to advocate that the Second Circuit better
utilize our specialized staff attorneys to accomplish this screening process, as I have
recommended that they do with sentencing-only appeals. As is already the case, these staff
attorneys pre-screen cases for jurisdictional issues and then identify, for scheduling purposes,
the issues raised by the briefs. The staff attorney then assigns a ranking to the case, from easy,
medium, or hard. These rankings are then used in organizing the calendar and providing each
panel with a diversified caseload. Because the staff attorneys already are engaged in this
process, court resources would be better served by permitting these attorneys to flag “easy”
cases that do not identify any meritorious arguments and to direct them to the NAC.\(^{137}\) As is

\(^{135}\) See Roger J. Miner, Federal Courts at the Crossroads, 4 Const. Comment. 251, 258 (1987) (discussing
the proposal that oral argument be eliminated in such cases where “the proper disposition of a case is
apparent at a glance from the briefs”); see also J. Clifford Wallace, Improving the Appellate Process
Worldwide Through Maximizing Judicial Resources, 38 VAND. J. TRANSNAT’L L. 187, 200 (2005);
ADMINISTRATIVE OFFICE OF THE U.S. COURTS LONG-RANGE PLANNING OFFICE, STRATEGIC
PLAN FOR THE FEDERAL JUDICIARY 4 (Sept. 14, 2010) (“Exemplary and independent judges . . . well-
reasoned and researched rulings, and time for deliberation and attention to individual issues are among
the hallmarks of federal court litigation.”).

\(^{136}\) Planning for the Second Century of the Second Circuit Court of Appeals: The Report of the

\(^{137}\) Case management practices vary widely among the Circuits. In the First Circuit, for example,
senior staff attorneys make recommendations about whether appeals should be placed on the regular
argument calendar, with certain types of cases, such as pro se, bail appeals, social security appeals,
Anders brief cases, and cases from the BIA, tending not to receive oral argument. Levy, supra note [x]
at 336. In the Fourth Circuit, the default rule is that pro se cases are to be resolved without argument.
our established procedure for the NAC, any judge on the non-argument panel could refer any case to the RAC for full argument.

VIII. Conclusion

Judge Miner wrote continually over his long career as a jurist about the problems of volume facing the federal judiciary.138 It is then fitting that his last article should address this same topic. [Forthcoming]

OTHER [NYLS Law Review: The following come from Judge Miner’s notes and should be inserted into the article where possible. If not possible, these points can be deleted/disregarded.]

- Equal Access to Justice Act: permits an award of fees and costs to certain classes of “prevailing part[ies]” where the position taken by the government was not

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Similarly, social security, immigration, and *Anders* brief appeals “almost always are slated for decision without argument.” Levy, *supra note* [x] at 338.

"substantially justified."\textsuperscript{139} These cases lie "[b]etween frivolous and meritless" cases, and are "justified to a degree that could satisfy a reasonable person and hence has a reasonable basis in law and fact."\textsuperscript{140} "The case must have sufficient merit to negate an inference that the government was coming down on its small opponent in a careless and oppressive fashion."\textsuperscript{141} [NOTE: RJM's case was Friere v. Holder, 647 F.3d 67 (2d Cir. 2011)]

- An applicant moving for free transcripts must demonstrate to the district or circuit court that "the appeal is not frivolous (but presents a substantial question."\textsuperscript{142}
- The Court will expand a COA nostra sponte only if "a petitioner makes the necessary showing that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further."\textsuperscript{143}
- Motion for appointment of counsel: The court "ask[s] first whether the claimant has met 'a threshold showing of some likelihood of merit."\textsuperscript{144}
- Line of cases in the 10\textsuperscript{th} and 11\textsuperscript{th} Circuits that hold that "[b]ecause arbitration presents such a narrow standard of review, Section 1927 sanctions are warranted if the arguments presented are completely meritless."\textsuperscript{145}

\textsuperscript{140} United States v. Thouvenot, 596 F.3d 378, 381 (7th Cir. 2010).
\textsuperscript{141} United States v. Thouvenot, 596 F.3d 378, 381–82 (7th Cir. 2010).
\textsuperscript{142} 28 U.S.C. § 753(f).
\textsuperscript{143} Smith v. Duncan, 411 F.3d 340, 346 (2d Cir. 2005).
\textsuperscript{144} Johnston v. Maha, 606 F.3d 39, 41 (2d Cir. 2010) (quoting Cooper v. A. Sargenti Co., 877 F.2d 170, 174 (2d Cir. 1989)).
Notwithstanding any filing fee . . . that may have been paid, the court shall dismiss the case at any time if [it] determines that the action or appeal is frivolous. 28 U.S.C. § 1915(e)(2)(B)(i).

This extends not only to the courts of appeals but also to the district courts. 146

145 DMA Int'l, Inc. v. Qwest Communications Int'l, Inc., 585 F.3d 1341, 1345 (10th Cir. 2009) (quoting Lewis v. Circuit City Stores, Inc. 500 F.3d 1140, 1153 (10th Cir. 2007); see also B.L. Harbert Int'l LLC v. Hercules Steel Co., 441 F.3d 905 (11th Cir. 2006).

146 Fitzgerald v. First East Seventh Street Tenants Corp., 221 F.3d 362, 364 (2d Cir. 2000) (per curiam).