In 1961 Judge Henry Friendly reviewed Llewellyn’s *The Common Law Tradition: Deciding Appeals* for the *University of Pennsylvania Law Review*. He had been on the Court of Appeals for the Second Circuit for not quite two years. Judge Friendly started his review with this observation:

This is a heartening book for a recently appointed appellate judge—heartening, that is, after weathering the initial shock of being told that the bar is not merely “bothered about our appellate courts,” but “is so much bothered about these courts that we face a crisis in confidence which packs danger.” . . . He wonders for a moment whether it was wise to abandon the safety and comfort of practice for a post so precarious. But for a moment only. Professor Llewellyn is happy about appellate courts as they are today.³

Henry Friendly wondered “for a moment only” whether he had been wise to abandon his law practice because Karl Llewellyn was “happy about appellate courts as they are today.” If Professor Llewellyn were alive today he would be even happier, for he would have been able to rely on Judge Friendly’s opinions as shining proof that “the courts have returned to Reason—*ley est resoun.*”⁴ Within my lifetime, except for the giants (Holmes, Brandeis, and Cardozo) and possibly Learned Hand, no federal appellate judge has commanded more respect

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¹ Circuit Judge, United States Court of Appeals for the Fifth Circuit. A.B. 1925, Washington and Lee University; LL.B. 1929, Tulane University.


³ Id., Langbridge’s Case, Y. B. 19 Edw. III, 375 (Stonore, C.J.), cited in K. LLEWELLYN, supra note 1, at 52 n.46. Judge Friendly explained:

Professor Llewellyn does not mean that the courts have returned to justice; he is too good a Holmesian to speak in that term, although he excuses the gallant gentleman’s “I hate justice” as springing from and expressing “a normal appellate judge’s revulsion at the too frequent ranting about justice which hopes to conceal either a weak case or a shoddy preparation.” . . . Instead, the “justice-duty” of appellate courts is expressed in a felt responsibility to do what is “fair,” and “right,” and, to mark the minimum, “only decent.” . . . Or, to make matters entirely clear, “the main guide is felt sense and decency, the right result on the facts of case and situation (or, more wisely, on the facts first of the situation-type and only then of the particular case) . . . .”

Friendly, *supra* note 2, at 1040-41.
for his opinions and his writings than Henry Friendly. The striking feature that distinguishes his opinions is their measured reasoning, with a minimum of rhetorical flourishes.

I knew Judge Hand only distantly, but I have been engaged in three joint ventures with Henry Friendly, each covering an extended period of time. I have served with him on the Council of the American Law Institute for many years. Then for seven years we were members of the Institute’s Advisory Committee on the Study of the Division of Jurisdiction Between State and Federal Courts. Finally, for nine years I have been on the Special Railroad Court over which he presides.

The Institute has issued Restatements, Model Codes, and studies covering a wide variety of subjects. Each of these, after having been drafted by the Reporters and approved by its Advisory Committee, was subject to scrutiny and approval by the Council before it was submitted to the Institute. In Council meetings Judge Friendly excelled in the areas of jurisdiction, administrative law, federal procedure, corporate law, securities, and conflicts of law. One could predict this of the youthful author of The Historic Basis of Diversity Jurisdiction, published in 1928, and expect it of the seasoned judge, author of Is Innocence Relevant?: Collateral Attacks on Criminal Judgments, Some Kind of Hearing, and Indiscretion About Discretion. But he was sound and persuasive on any question, large or small, in any area of the law; no one did his homework better than Henry Friendly on the subjects that came before the Council.

As the scholarly articles of Judge Pollak and Professor Currie make clear, Henry Friendly’s contributions in the field of federal jurisdiction are outstanding. I well remember my delight in reading In Praise of Erie—and of the New Federal Common Law, for before and after it was published I had cases involving federal common law. That article unfuddled more befuddled judges than any law review article I have ever read.

We had a fine Advisory Committee on the Study of the Division of

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5 The Study began in 1961 and was completed in 1968. It was published in 1969. See American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts x-xii (1969).
7 Friendly, The Historic Basis of Diversity Jurisdiction, 41 Harv. L. Rev. 483 (1928).
Jurisdiction; I had to run my legs off to stay near the pack. It included Professors Henry M. Hart and Herbert Wechsler (as Director of the Institute he was an ex officio member). There were other distinguished lawyers, judges, and teachers.\textsuperscript{12} Professor Richard H. Field was the Chief Reporter. Professor Paul J. Mishkin (formerly of the University of Pennsylvania Law School) was the Reporter on General Diversity and Multi-Party Multi-State Jurisdiction, assisted by Professor David L. Shapiro. Professor Charles Alan Wright was the Reporter on Federal Question Jurisdiction. Judge Friendly had a major hand in the Study, principally, as I look back on it, in preserving a balanced view of what historically, constitutionally, and pragmatically is right and proper for federal courts to decide. The work on the Study began in 1961 and ended in 1968. During that period the Civil Rights Act of 1964 and the Voting Act of 1965 were adopted; section 1983 filings and prisoners' petitions increased. But relatively speaking, in those years the increase in filings was modest. Total filings in the United States district courts increased only from 86,753 in 1961 to 102,163 in 1968. There was, therefore, not the pressure to reduce filings by reducing federal jurisdiction that existed later and almost overwhelms federal courts today. Total filings for all district courts increased from 102,163 in 1968 to 278,478 in 1983.\textsuperscript{13} Filings in the courts of appeals increased sharply from 4204 in 1961 to 9116 in 1968 and to 30,786 in 1983.\textsuperscript{14}

The ALI Study was and is unquestionably extremely valuable—but I think of it as a springboard for Henry Friendly's *Federal Jurisdiction: A General View*.\textsuperscript{15}

\textsuperscript{12}Those who served on the Advisory Committee were: Judge Oscar H. Davis of the United States Court of Claims; Judge Edward J. Dimock of the United States District Court for the Southern District of New York (retired); Judge Henry J. Friendly of the United States Court of Appeals for the Second Circuit; Warner W. Gardner, Esq., of Washington, D.C.; Professor Henry M. Hart, Jr., of Harvard Law School; Judge Joseph S. Lord, III, of the United States District Court for Eastern Pennsylvania; Judge Albert B. Maris of the United States Court of Appeals for the Third Circuit (retired); Chief Justice Joseph Weintraub of the Supreme Court of New Jersey; Justice Arthur E. Whittemore of the Supreme Judicial Court of Massachusetts; and Judge John Minor Wisdom of the United States Court of Appeals for the Fifth Circuit. In addition, John G. Buchanan, Esq., of Pittsburgh, Judge Charles M. Merrill of the United States Court of Appeals for the Ninth Circuit, and Robert L. Stern, Esq., of Chicago joined the Committee in 1965, while the initial proposals of the Reporters were still under consideration. Norris Darrell, Esq., President of the Institute since 1961, his predecessor Harrison Tweed, Esq., Herbert Wechsler, Esq., Director of the Institute, and Judge Herbert F. Goodrich, Director of the Institute until his death in 1962, were members ex officio of the Committee.


\textsuperscript{14}See id. at 2.

\textsuperscript{15}H. Friendly, Federal Jurisdiction (1973).
In 1972, only three years after publication of the ALI Study, Judge Friendly recognized that its basic assumptions were inapplicable to the existing federal system because a tidal wave of litigation had engulfed the federal courts. In his independent study, he explained:

The assumption [underlying the ALI Study] was that the level of business in the federal courts was manageable and would remain so; the desideratum was to eliminate the most indefensible portion of the diversity jurisdiction, the suit by the instate plaintiff against the outstate defendant, and replace this with a roughly equivalent volume of cases more deserving of federal cognizance. Second, the Institute avoided such areas as suits under the Federal Employers’ Liability Act, automobile accident litigation, federal criminal jurisdiction, and the creation of specialized federal courts. In the third place, criticisms of the Institute’s proposals and further reflection have caused me to change my views in some respects.\(^{16}\)

This is not the time or place for a book review. I cannot resist the comment, however, that Judge Friendly’s great work has never had the impact it deserved: it could well serve as a guide for a much-needed revision of the Judiciary Act. Although there is some disagreement with the proposal to eliminate diversity jurisdiction, most federal judges I know feel that diversity jurisdiction has outlived its usefulness and that state courts are better qualified than federal courts to decide questions of state law. Judge Friendly would eliminate or greatly reduce the federal prosecutions for what is not essentially a federal offense, and reduce the number of civil cases that might more suitably be tried in state courts. For example, there is no good, nonpolitical reason for federal jurisdiction over truth-in-lending cases.

This is Judge Friendly’s thesis:

\[T\]he general federal courts can best serve the country if their jurisdiction is limited to tasks which are appropriate to courts [as opposed to administrative agencies], which are best handled by courts of general rather than specialized jurisdiction, and where the knowledge, tenure and other qualities of federal judges can make a distinctive contribution.\(^{17}\)

I cannot find fault with this thesis or with most of his suggestions—there are many—for modifying present federal jurisdiction,

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\(^{16}\) Id. at 4.

\(^{17}\) Id. at 13-14.
sometimes at the expense of increasing filings. For example, I would go along with his "maximum model" expanding federal jurisdiction by doing away with any requirement as to amount in a federal question case. Naturally, there are some suggestions with which I disagree. Having been exposed to the gross abuse of civil rights that occurred in the 1960's and 1970's in one section of this country, I oppose any extension of the doctrine of abstention in civil rights cases. I would limit, not expand, Younger v. Harris.18 What has happened once can happen again and in any section of the country.

As a Friendly observer, I believe that Henry Friendly's most challenging task, the successful performance of which merits the gratitude of the nation, has been his stewardship of the Special Railroad Court.

By 1973 the railroads in the northeast and midwest regions of the country were in such desperate straits that there was no hope for resuscitation through section 77 of the Bankruptcy Act. Penn Central, the major rail carrier in the northeast and midwest, was in a reorganization proceeding. By March of 1973, Judge Fullam, supervising the reorganization, aware that Congress was considering the plight of the Penn Central and other railroads, warned, "On the basis of the record to date, it appears highly doubtful that the Debtor could properly be permitted to continue to operate on its present basis beyond October 1, 1973."19 There were many reasons for the decline of railroading: the facilities were old, often poorly located, physically rundown; the rapid rate of technological development in rival forms of transportation had radically changed the competitive position of the rail industry; basic changes had taken place in the underlying market conditions, such as shifts in the location of industrial activity and changes in types of freight suitable for rail transportation.20 Congress came to the rescue by enacting the Regional Rail Reorganization Act of 1973.21 The Act created the United States Railway Association (USRA) and Consolidated Rail Corporation (Conrail). USRA was vested with authority to prepare a "Final System Plan" (FSP) for reorganizing rail service in the northeast and midwest and, according to that plan, determine the rail properties to be transferred to Conrail by the bankrupt carriers, those to be sold, and those to be abandoned.22 Conrail, as a private but gov-

22 Besides the Penn Central, the railroads in the consolidated proceedings were the Erie Lackawanna, Lehigh Valley, Reading, Central of New Jersey, Lehigh and Hudson, and Ann Arbor.
ernment-supported organization, would operate rail service on the transferred properties and was to issue securities to the estates of the bankrupt railroads in exchange for their properties.

The Act required the Panel on Multidistrict Litigation to consolidate in a Special Court all proceedings with respect to the Final System Plan, and directed the Panel to select the members of the Special Court. I had been a member of the Panel since its inception in 1968 and was its Chief Judge at the time the Rail Act was enacted. The name that came immediately to my mind as the best possible presiding judge for the Special Court was Henry Friendly's. I telephoned him promptly. Everyone who knows him well knows that he is extremely conscientious and has a sensitive regard for duty and for the responsibilities incident to undertaking any important endeavor. He hesitated, asked for time to think about it, then called me back to say that he would do it. I think that he was principally influenced by the thought that the rail consolidation, as contemplated in the Act, offered the last opportunity to avoid nationalization of railroads in the Northeast Corridor. He felt a sense of duty to the country (he must have realized his special qualifications) but he was concerned about his responsibilities as a judge on what many consider the second most important appellate court in the country. And he was interested in a number of extracurricular activities, among them ongoing projects of the ALI. He solved his dilemma only partly by taking senior status, for he continues to sit on the court of appeals and he is still active in the ALI.

Henry and I then agreed that Judge Carl McGowan, who had served as general counsel for a railroad when he was practicing law, would be an excellent choice for the Special Railroad Court. Judge McGowan contributed notably to the important opinion on the constitutionality of the Act, but resigned after serving almost two years. I succeeded him in 1975. In effect, I appointed myself; I wanted the pleasure and learning experience of sitting with Judge Friendly.

For the third judge we agreed that we needed an experienced district judge living in or near Washington, D.C., our headquarters. We made no mistake in selecting Roszel C. Thomsen of Baltimore. He was exceptionally valuable in every respect, but particularly in resolving disputes over discovery, within the necessity of our convening a full court for a hearing. Incidentally, the average age of the judges on the court is over eighty-one, making us, I am sure, the oldest multi-judge court in the English-speaking world. By comparison, the United States Supreme Court is a youthful court.

As Judge McGowan notes in his tribute in this issue of the *Law Review*, the first important problems before the court concerned the constitutionality of the Act. Specifically, certain creditors of the bankrupt railroads argued that the Act violated the fifth amendment on two grounds: (1) the requirement that rail properties be conveyed to Conrail in exchange for its securities rather than for cash amounted to an unjust taking of property without adequate compensation; and (2) the requirement that rail service be maintained until adoption of the Final System Plan without compensating for the erosion of rail properties during this period was an unconstitutional taking of property (this was later termed “compensable unconstitutional erosion,” or CUE). Reorganization courts had divided on the subject of the constitutionality of the Act. The Special Court upheld the constitutionality of the Act, basing that conclusion “in considerable measure” on the railroads’ right to assert a claim for any shortfall or CUE in the Court of Claims under the Tucker Act. That opinion set the pattern for later blockbusters: each of the three judges wrote a part, but participated in the opinion as a whole; Judge Friendly took over the most difficult topics and wrote more of the opinion than his colleagues; the opinion was long (a hundred printed pages). When the case reached the Supreme Court Justice Brennan, writing for a seven-to-two Court, wrote:

The Special Court, speaking through Judge Friendly, comprehensively canvassed both issues, and in a thorough opinion, concluded that the Rail Act does not bar any necessary resort to the Tucker Act remedy and that the remedy is adequate. Our independent examination of the issues brings us to the same conclusion, substantially for the reasons stated by Judge Friendly in Parts VII and VIII-A of the Special Court opinion.

The Special Court is authorized to exercise the powers of a district

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26 Regional Rail Reorganization Cases, 419 U.S. 102, 121 (1974).
judge, including those of a reorganization court, and has "original and exclusive jurisdiction" in any civil action challenging the constitutionality of the Act or the legality of any action or inaction of USRA. A final order or judgment of the court is reviewable only upon petition for a writ of certiorari to the Supreme Court, except that any order or judgment determining the unconstitutionality or invalidity of the Act or action taken under the Act is reviewable by direct appeal to the Supreme Court.

This grant of jurisdiction enabled the court to decide an assortment of actions involving USRA, Conrail, and railroads in the consolidated proceeding. Many of these were important but did not bear on the difficult problem of valuation of the properties conveyed. This problem was, of course, triggered by the conveyance of the rail properties, designated in the Final System Plan, to Conrail on April 1, 1976.

Life was not made easier for us by the Railroad Revitalization and Regulatory Reform Act of 1976. This omnibus legislation incorporated regulatory reform and a program of aid for railroads outside the northeast region, but also extensively amended the 1973 Act to improve the effectiveness of the Final System Plan. The added complexities arose in large part from an amendment creating a new form of security, "certificates of value" (CV's), as part of the consideration payable to the railroads for their transfer of property to Conrail. These CV's, to be redeemed by USRA not later than December 31, 1987, constitute general obligations of the United States, and carry the pledge of its full

   (1) Notwithstanding any other provision of law, any civil action—
      (A) for injunctive or other relief against the Association from the enforcement, operation, or execution of this chapter or any provision thereof, or from any action taken by the Association pursuant to authority conferred or purportedly conferred under this chapter;
      (B) challenging the constitutionality of this chapter or any provision thereof;
      (C) challenging the legality of any action of the Association, or any failure of the Association to take any action, pursuant to authority conferred or purportedly conferred under this chapter;
      (D) to obtain, inspect, copy, or review any document in the possession or control of the Association that would be discoverable in litigation pursuant to section 743(c) of this title;
      (E) brought after a conveyance, pursuant to section 743(b) of this title, to set aside or annul such conveyance or to secure in any way the reconveyance of any rail properties so conveyed; or
      (F) with respect to continuing reorganization and supplemental transactions, in accordance with section 745 of this title; shall be within the original and exclusive jurisdiction of the special court.
faith and credit. A separate series of CV's is issued to each transferor.

From the opening gun, of course, the attorneys for the various parties, an exceptionally able group, had been preparing their cases. The Court, after numerous conferences with the Liaison Committee representing the parties, issued a comprehensive memorandum order in In re Valuation Proceedings Under Sections 303(e) and 306 of the Regional Rail Reorganization Act. This order sharpened the issues on valuation and provided a schedule for the submission of statements, reports, briefs, and affidavits or offers of proof on spelled-out issues. At that time, June 16, 1976, we contemplated the use of as many as ten special masters to take detailed evidence and for whom we could frame appropriate instructions based on our identification of the issues and the parties' statements of position. Later we decided not to use masters, but the memorandum order of June 16, 1976, and our opinion that followed helped narrow the issues in the case.

In particular, the court decided, among other things, that in valuing the properties the "fair and equitable" standard should not be distinguished from the "constitutional minimum value" (CMV) standard, in the absence of a specific and supported claim that a different result would ensue from application of such a standard. As stated in this order of the June 16, 1976:

Critical to ascertainment of the redemption price is our determination, § 306(c)(4), of the "base value" (BV) of each series. This is computed by determining the "net liquidation value" (NLV), to which the transferor may be entitled by virtue of transfer of property to Conrail, subtracting the value of other benefits provided under the Act (VOB), adding compensable unconstitutional erosion (CUE), and finally adding interest compounded annually at the rate of 8% per annum, . . . The formula, omitting the interest item and the final division, thus is:

\[ BV = NLV - VOB + CUE \]

A principal problem is that this new concept was superimposed on the concepts of "public interest," "fair and equitable," and "constitutional minimum" in § 303(c) without any clear indication in the statute itself, as distinguished from the legislative history, what Congress considered was the rela-

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32 In re Valuation Proceedings Under Sections 303(e) and 306 of the Regional Rail Reorganization Act, 425 F. Supp. 266.
33 Id. at 270.
tionship of the securities issuable to the transferors as prescribed by § 306 and the standards laid down in § 303.\footnote{Id. at 276-77 (footnote omitted).}

The order also stated:

It is clear that, under § 306(c)(4), the Court is bound to determine the net liquidation value to which the transferors are entitled by virtue of transfers of rail properties to Con-Rail under § 303(b)(1) as a step in determining the BV of the CV's, whether the value of the securities (including the CV's) issuable to the transferors is the same as or more or less than the constitutional minimum value (CMV). The statements, however, reveal serious differences of opinion how this task should be performed.\footnote{Id. at 281.}

In short, we faced no easy problem.\footnote{Id. at 288-89.}

In 1977 Judge Friendly was the principal author of two important decisions in \textit{In re Valuation Proceedings}. These are vintage Friendly

\begin{itemize}
\item \textit{Id.} at 276-77 (footnote omitted).
\item \textit{Id.} at 281.
\item This schedule gives some idea of the dimensions of the problem as it appeared in July 1976:
\begin{center}
\textbf{Schedule}
\end{center}
\begin{enumerate}
\item Subject (1) "Public interest"; "fair and equitable"; reorganization vs. eminent domain statute, reckless or deliberate disregard clause, § 209(a)(1)—see Part II, Items (1), (2), (3) and (4); relevance of possibility of sale for rail use to public bodies having power of condemnation, see Part III.
Opening briefs—August 23
Answering briefs—September 21
\item Method of handling the valuation of properties not owned by primary debtors, see Part II, Item (5).
Opening briefs—August 23
Answering briefs—September 21
\item Report by Acting Liaison Committee with respect to first stage discovery on NLV methodology and on efforts by USRA and transferors to effect sales for rail use to private parties.
August 23
\item Date on which USRA shall file detailed statement of value of other benefits.
December 1
\item Filing by transferors of statements and briefs with respect to compensable unconstitutional erosion: October 18
Response by Government parties: November 15
Replies: December 7
\item Briefs (accompanied by affidavits or offers of proof) on constitutional minimum.
Opening briefs—January 6
Answering briefs—February 20
Reply briefs—March 18
\end{enumerate}
\textit{Id.} at 288-89.
opinions. The first, the *CUE Opinion*, set out guidelines with respect to the accrual of "compensable unconstitutional erosion" to be included in the base value of the CV's.\(^{37}\) This involved what the Supreme Court called an "erosion taking" of property of the transferors for which the fifth amendment would require just compensation.\(^{38}\) Unconstitutional erosion arises when a losing business has been required to continue to operate against its will for more than a reasonable period. Penn Central's claim for preconveyance erosion ran to nearly $900 million. Subject to certain caveats, no railroad suffered preconveyance CUE.

The second opinion, the *CMV Opinion*, of October 12, 1977, dealt with "compensable minimum value," net liquidation value (NLV), and the value of other benefits (VOB).\(^{39}\) This opinion established that the transferors are entitled to compensation for the properties under the FSP for whatever they could have realized in the absence of the Rail Act. That was the ultimate issue in *In re Valuation*. The Court held that even as to nonbankrupt transferors, the Act is a valid reorganization statute and payment may be made in CV's with cash payable only for any shortfall; that in determining NLV, liquidation for scrap was not the only liquidation Congress contemplated; that potential sales to government bodies could be considered; that consideration of the taker for purpose of determining CMV, by attempting to reconstruct a bargaining process between the transferors and the United States, would be inconsistent with the basic principle of eminent domain; and that, in the interest of avoiding the expense incident to complex engineering studies, the court would not consider estimates of reproduction costs or variations on that theme such as "assemblage values," value of materials "in the place," trended original costs, gross liquidation value, or societal value.

The third blockbuster in the *Valuation Proceedings* was the *Rail Use Opinion* in 1981, an opinion of 200 printed pages; the table of contents in fine print took up one page.\(^{40}\) Penn Central, representing eighty percent of the case in terms of property value, had settled with the government for $1.46 billion.\(^{41}\) Other transferors followed suit, leaving only the Erie Lackawanna, Central Railroad of New Jersey,

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\(^{38}\) Regional Rail Reorganization Cases, 419 U.S. 102, 118 (1974).


\(^{41}\) With interest from the conveyance date, April 1, 1976, the total amount was $2.1 billion.
Ann Arbor, and Lehigh at New England as the transferors with claims still at issue. After the opinion had been substantially completed the Erie Lackawanna agreed to a tentative settlement. Nevertheless, the court decided to publish the opinion before approval of that settlement for various reasons but chiefly because we thought that justice required that the nonsettling railroads be advised of our conclusions as soon as we were ready to announce them. The settlements complicated the case for the transferors in the preparation of their briefs because the Penn Central had taken the lead role for the transferors. The government parties' opening brief was in nine volumes, totaling 5000 pages, not counting a thirty-two volume appendix. The transferors submitted twelve volumes of brief and a fifty-two volume appendix.

The opinion is so long and dealt with so many topics it cannot be adequately summarized here. Simplistically stated, it dealt in the main with the valuation of railroads or segments of railroads that had established earning power and would be continued in rail use on that account. This required consideration in depth of the position of each party, the bargaining process for properties having earnings value, the effect of inflation, the methodologies employed, the discount rate, the rehabilitation costs, labor protection costs, consideration of timing and ICC conditions, possible acquisition of terminals and passenger lines by public bodies, especially with regard to Central of New Jersey, and proffers of freight lines at capitalized earnings. The opinion is loaded with statistics, experts' estimates, and railroad terminology. Somehow or other, we attempted to provide an answer to every question relating to the valuation of the conveyed properties for continued rail use. The opinion contains a valuable summary of the five pretrial orders that laid out the parameters of the trial and set the schedules for submission statements and briefs.42

In the Rail Use Opinion we deferred the questions concerning the valuation of railroads that would be continued in rail use despite lack of earning power or with earning power but without the prospect of competitive bidding. We deferred such questions to a second or non-rail use phase of the proceeding and referred to the values to be determined in the second phases simply as X. Broadly speaking, X is the value that could be obtained by sale for the next most valuable use, that is, a break-up of the railroad and sale of its component parts. For most, but not all purposes, X is "scrap value."

When we initiated this phase of the proceedings, it appeared that

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a number of railroads would be involved. By the time of the argument, however, only Central Railroad of New Jersey (now Central Jersey Industries, Inc. (CNJ)) and Lehigh & New England Railway were involved; all of the other railroads had settled. In our Rail Use Opinion we had found that despite CNJ's lack of earning power, in the absence of the Rail Act, New Jersey would have bought all of CNJ's conveyed properties. In its brief and argument CNJ presented two theories. The first, the "perception theory," better described as the "constructive offer" theory, attempted to construct what would have happened in the real world if there had been no Rail Act. The second theory was the scrap value model. The estimates of value produced by CNJ differed widely from those of the government. We concluded that CNJ had not met its burden of showing by clear and convincing evidence that New Jersey would have made an offer at any ascertainable figure. We then examined every alleged element of value, from cabooses and roadway small tools to winddown costs, and came up with conclusions leading to a figure less than CNJ and Lehigh and New England wanted and more than the government wanted to pay.

The valuation proceedings are over. At this point our clerk of court has 245,000 pages in files covering 187 linear feet. Each judge's office has many feet of shelving occupied by railroad files. The government, however, has a viable railroad in the northeast and midwest regions of the country, one that now is the subject of competitive bidding.

I hope some day to pick up a law review and find an article discussing the methods and procedures the Special Railroad Court employed to handle the massive litigation generated by the creation of Conrail. All of the testimony was in writing with cross-examination by deposition. This avoided the use of a number of special masters, who would have complicated the valuation process. This also permitted the parties to make their own agreements on how the discovery process should be handled and to conduct as many as half a dozen cross-examinations simultaneously. A series of pretrial orders, preceded by statements from the parties on the issues and by hearings on the proposed orders, enabled the court to sharpen the contentions of the parties and to clarify and narrow the issues. Briefs were exchanged simultaneously without prejudice to any party, because the positions of the parties

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43 The 1981 opinion is characterized by the parties as the Rail Use Opinion, and it was contemplated there would be a Non-Rail Use Opinion. Instead, the opinion that was written is referred to as the CNJ Opinion.  
44 Lehigh and New England was operated for a number of years as part of the CNJ system. It relied virtually exclusively on CNJ's arguments in the rail litigation.  
were well known. The court worked closely with the Liaison Committee. This is a sketchy oversimplification with serious omissions of procedures that were effective in an unusually complex proceeding. The key to the court's success was not in procedures but in the personality of the presiding judge. I use the word "personality" in the sense that Eugen Erlich used it: "There is no guaranty of justice except the personality of the judge."  

It is unnecessary to discuss the Staggers Act and NERSA, both of which amended the Rail Act, except to note that NERSA authorized the assignment of additional judges to the Special Court. The Judicial Panel on Multidistrict Litigation assigned Judges Oliver Gosch, William B. Bryant, and Charles R. Weinger, who function as a separate panel (the section 1152 Panel of the court). Because NERSA made important changes in the Act, especially with regard to labor, the section 1152 Panel will relieve the original members of the court of a substantial portion of the burden they would otherwise carry.

In sum, Henry Friendly's performance as Presiding Judge of the

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50 The Special Court amended its rules to provide for a second panel, the § 1152 Panel. The Court noted:

This Court's understanding of § 1152(d) is that the three additional judges (hereafter the § 1152 Panel) are empowered only to exercise the jurisdiction described in § 1152(a), and that the judges previously designated (and their successors) are empowered (1) to exercise exclusively all other jurisdiction of this Court, and (2) to participate, to such extent as the § 1152 Panel may desire and as they may be willing, in the exercise of the jurisdiction described in § 1152(a).

Section 1152(a) provides:

(a) Notwithstanding any other provisions of law, the special court shall have original and exclusive jurisdiction over any civil action—
1. injunctive, declaratory, or other relief relating to the enforcement, operation, execution, or interpretation of any provision of or amendment made by this subtitle, or administrative action taken thereunder to the extent such action is subject to judicial review;
2. challenging the constitutionality of any provision of or amendment made by this subtitle;
3. to obtain, inspect, copy, or review any document in the possession or control of the Secretary, Conrail, the United States Railway Association, or Amtrak that would be discoverable in litigation under any provision of or amendment made by this subtitle; or
4. seeking judgment upon any claim against the United States founded upon the Constitution and resulting from the operation of any provision or amendment made by this subtitle.
Special Railroad Court demonstrates that he is unsurpassed as a judge—in the power of his reasoning, the depth of his knowledge of the law, and his balanced judgment in decisionmaking. Karl Llewellyn would have been happy about that performance.