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The Federal Appellate Judiciary in the Twenty-first Century

Cynthia Harrison and Russell R. Wheeler
Editors

Federal Judicial Center
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This publication was produced in furtherance of the Center's statutory mission to develop and conduct programs of continuing education and training for personnel of the federal judicial system. The statements, conclusions, and points of view are those of the authors. This work has been reviewed by Center staff, and publication signifies that it is regarded as responsible and valuable. It should be emphasized, however, that on matters of policy the Center speaks only through its Board.

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Contents

Chapter II

The Role of the Federal Judiciary and the Future Allocation of Jurisdiction

Chapter III

U.S. Courts of Appeals and U.S. District Courts: Relationships in the Future

Chapter IV

The Relationship Between the Federal and State Courts

Chapter V

Uniformity of Federal Law

Chapter VI

Perspectives from the Circuits: Maintaining the Character and Collegiality of the Courts of Appeals

Chapter VII

Perspectives from the Judicial Conference: Accommodating the Tension Between National and Decentralized Administration

Preface

John C. Godbold
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This isn't strictly CJ but is an interesting series of papers and should be of interest to courts and academic audiences.

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The October 1988 conference for all federal appellate judges, arranged by the Federal Judicial Center, recognized the 200th anniversary of the federal judicial system. It also provided an opportunity for collective analysis on the future of the appellate courts. This meeting, was, as far as we know, the first such conference in the history of the Republic. The conference examined the role of the federal appellate judiciary in 1988 and how this role might be performed in the future.

This is not a volume of conference proceedings. It is a volume of essays and commentary drawn from the proceedings and reworked for publication. There are contributions by appellate judges themselves; by those with whom they work most closely, such as district judges, justices of the Supreme Court, and state judges; and also by their familiar observers from academe.

I express the appreciation of the Federal Judicial Center to all the speakers and participants at the conference.[1] So, too, I extend my own thanks and the gratitude of the appellate judges to Judge Jon Newman, Second Circuit, chairman of the Center's appellate education committee in 1988, which planned the conference, and to his colleagues on that committee—Judges Daniel Friedman, Federal Circuit; James Logan, Tenth Circuit; and Kenneth Starr, then on the District of Columbia Circuit and now Solicitor General, all of whom also presided at conference sessions.

I would also like to recognize the staff of the Center for their fine work on this volume: for editing and design, Martha Kendall of the Editorial Department, and for help in creating the figures, Deirdre Golash of the Division of Special Educational Services and Joe S. Cecil, Donna J. Stienstra, and Patricia A. Lombard of the Research Division. Elizabeth McGrath, Chief of the Judicial Information Branch, Statistical Analysis and Reports Division, Administrative Office of the U.S. Courts, promptly provided the most recent data on court activity.

On some points there is no disagreement among the contributors to this volume concerning the role of the federal appellate courts and how it might be performed in the future. The appellate judiciary needs to maintain its capacity to interpret the law, to oversee the work of the district courts, and to provide a decent professional life for its members. The burgeoning caseload constitutes a threat to the character of the appellate bench. Docket clearing must not subvert the courts' constitutional responsibilities. On this much, there is no argument. Other questions, however, provoke considerable discussion.

Martin Redish, professor of law at Northwestern University, suggests that, in our concern with the crisis of overload, we risk jurisdictional excisions that would cause "significant harm to our political and constitutional values." He says that Article III courts remain uniquely competent interpreters of the federal law, more versed in it than state courts and more independent than administrative law judges. Indeed, despite the widespread worry about containing a growing caseload, Professor Redish urges the appellate judiciary to expand its authority in certain areas, particularly civil rights. Judge Newman, not necessarily in contrast, encourages us to shift to state courts areas of federal court jurisdiction similar to those in which state courts already routinely deal, preserving access to the federal courts on a discretionary basis.

Professor Lawrence Tribe, from the Harvard Law School, reminds us that historically litigants turned to state courts for some protections that have more recently become associated with federal courts. He recognizes, though, that concern over state courts' institutional independence clouds the analysis of what elements of current federal jurisdiction might be transferred to them. Thus he offers what he is careful to label "a very tentative proposal," a "thought-piece" on steps Congress might take to prompt state governments to ensure the integrity of their courts. Ultimately, however, merely moving cases from the federal to the state court arena will solve noth-

ing, Professor Tribe observes; alternative methods of dispute resolution must be found simply to reduce the caseload overall.

Are the intermediate appellate courts capable of providing the guidance, review, and support to the district courts that was the reason for their creation? Paul Carrington, professor of law at Duke University, finds a disquieting trend of unpredictability, arising from structural failings in the system: isolation, ideology, and the press of work. He thinks that a collection of minor palliative measures, however sensible, will not solve the problem, that "no answer will be found that leaves the appellate judiciary as it is." Rather, he proposes a unified appellate court, with specialized panels to resolve issues of law in specific areas; abolition of the "law of the circuit"; early appellate court resolution of disputed legal issues, possibly before trial; oral argument in every case to make lawyers accountable and judges visible; and written opinions, binding every district in the nation but only in cases of precedential importance.

It is possible for circuit judges to provide adequate guidance to the judges in their districts but leave untouched the problem of national uniformity in the law. A. Leo Levin, professor of law at the University of Pennsylvania, urges caution in leaping to a conclusion that uniformity has become a lost cause. He speaks well of some "percolation" but, recognizing the value of uniformity in the law, urges deference to other circuits, consultation within the circuit, and en bancs. Rotating specialized panels on the circuit court may encourage consistency, Professor Levin notes, as would exclusive venue on appeal in areas of law. Judge Mary M. Schroeder, speaking from the largest circuit, the Ninth, points to the utility of computerization to help keep track of decisions, within and among circuits, thereby avoiding "inadvertent conflict." She recommends a revised system of communicating with Congress, both before and after statutes are passed, in order to eliminate sources of conflict that emanate from ambiguous

statutory drafting. There is predictable debate from other essayists on the proposal for an intercircuit tribunal.

Many other suggestions appear in the pages that follow. For example, Chief Judge William J. Holloway, Jr., advises a more extensive use of certification of state law questions from the federal courts to the highest state courts. Chief Judge Levin H. Campbell would retain the concept of the "law of the circuit" by creating a second decisional tier in each circuit, with a discretionary docket, that would define the law. Other judges argue in favor of less supervision, permitting greater deference to district court judgments to lighten the appellate load. Chief Judge John J. Gibbons urges a presumption against both oral argument and published opinion and, by way of compensation, a written, unpublished opinion in every other case for the benefit of the parties.

Most of the proposals and suggestions in this volume implicate Congress as well as the courts. Several of the papers deal with various aspects of that relationship, such as how to foster more communication with Congress (and administrative agencies) about the statutes and rules the courts interpret, and whether we need additional channels of communication with Congress.

The final speaker at the conference was Justice William J. Brennan, Jr. He calls our attention to the exciting problems of space law in the next two centuries—a window into our future.

Justice Brennan rescues us from undue preoccupation with the prosaic dilemmas of contemporary judicial administration. On the other hand, how we resolve those dilemmas can have a profound effect on our country. Judge A. Leon Higginbotham, Jr., reminds us that "[i]f judicial reform benefits only judges, then it isn't worth pursuing. . . . It is worth pursuing only if it helps to redeem the promise of America." I am confident that we can devise means to serve that goal.

Notes

1. Chief Judge Paul H. Roney, Eleventh Circuit; Judge Richard Arnold, Eighth Circuit; Judge Charles Wiggins, Ninth Circuit; and Administrative Office Director L. Ralph Mecham also spoke at the conference, although their remarks, directed to immediate issues at the time of the conference, are not in this volume. The discussion by Russell Wheeler on the federal appellate judiciary since 1789 has been incorporated in *Creating the Federal Judicial System*, published by the Federal Judicial Center in 1989.

Introduction

William H. Rehnquist
Chief Justice of the United States
Chairman, Board of the Federal Judicial
Center

As we well know, the United States Constitution was drafted and signed in 1787, and the new government was formed in 1789. Some may wonder, then, what occurred in 1788 that warranted commemoration by a conference of federal appellate judges 200 years later.

There were, indeed, a number of what might be labeled "constitutional events" which occurred in 1788. No less than eight states ratified the Constitution in that year, beginning with Georgia in January and ending with New York in July, thus assuring that there would be enough states to form a new national government. The occasion for this conference, though, was the impending bicentennial recognition of the Judiciary Act of 1789, through which Congress put in place the federal court system. Thus, in October 1988, as the federal judicial system entered its 200th year, the Federal Judicial Center convened this meeting of federal appellate judges. Its purpose was to consider the condition of federal appellate courts and what might be done to ensure their continued vitality in their third century. The Center's Board and its appellate education committee thought it would be useful to depart from the usual sort of seminars that are the staple of the Center's programs and to take a longer perspective on the nature of our work as federal judges.

I extend my thanks to Judge Jon Newman, the chairman of the appellate education committee, and to his colleagues—Judges Daniel Friedman, James Logan, and Kenneth Starr—for their considerable efforts in planning the conference.

Before looking forward into the third century, I think it not amiss to take a brief look backward to see what the federal appellate judiciary was like at a couple of points in times past. One hundred years ago, of course, there were no courts of appeals. They would not be created until 1891—created, I am sure, amid grumblings from at least some of the bar and from the then-district and circuit judges that there was certainly no need for another layer of appellate review.

More recently, 50 years ago, the nation had a population of about 140 million people, and had then a total of 63 federal appellate judges. Now, with our population somewhere around 260 million, we have 168 federal appellate judges, or to be more exact, judgeships. The population of our country has increased less than twofold, but the number of federal appeals court judges has increased almost threefold. Some of the figures in this volume show an even more dramatic contrast between the growth of population and the growth of appellate cases.

Let us look back for a moment, too, at some of the judicial personalities on the bench 50 years ago. The Court of Appeals for the Second Circuit was graced by two Judges Hand—Learned and Augustus—and Judge Thomas Swan. Judge John Biggs sat on the Third Circuit, Judge John Parker on the Fourth, Judge Orrie Phillips on the Tenth—to name only a few. President Roosevelt had recently appointed the first woman circuit judge, Florence Allen of Ohio, to the Sixth Circuit. And Fred Vinson was honing his judicial skills on the District of Columbia Court of Appeals. But before swelling too much with pride at these distinguished predecessors, we should also note that the senior judge of the Second Circuit at that time (it was before the office of chief judge had been created) was Martin Manton. And Judges Joseph Buffington and John Davis were on the Third Circuit.

Times have changed in many ways. One of my good friends among the circuit judges made the observation that, as late as the 1950s, appointment to a court of appeals was considered a dignified form of semi-retirement—a far cry from the case today. One need only look at the current volume number of the *Federal Reporter* to realize that today's judges of the courts of appeals put in a full day's work and a full year's work.

As we turn from the past to the future, it is well to recognize that the idea of a federal judiciary sitting side by side with judiciaries in the 50 states, having concurrent jurisdiction over

the same territory, is something of a rarity in the world. There are a number of countries that we might call federations but which do not have federal courts operating in a dual court system. Canada, for example, carefully divides the powers of government between the federal government in Ottawa and provincial governments, but all the judges of the provincial courts are appointed by the federal government in Ottawa. So, in a sense, we in the United States are still all but unique in the kind of dual systems we have. There is, of course, no question that we will retain our federal court system in the third century. As Judge Henry Friendly said, "Not even the most violent iconoclast would think it worthwhile to raise" that issue. But there is a question—there will always be a question—of whether the precise allocations of jurisdiction and the complex of procedural rules which have served to define the two systems in the past are adequate for the future.

The papers and commentary in this volume deal with some very fundamental questions of this sort. What should be the scope of federal jurisdiction and of federal appellate jurisdiction in particular? Should we change in any way the manner in which the courts of appeals function with respect to the district courts? What share of the nation's judicial work should the federal courts assume, and what share is properly allocated to the state courts, which will be, in any event, the workhorses of the nation's judicial system? How can we better secure the optimal degree of consistency in federal law, given the ever-increasing size of the *U.S. Code* and the ever-increasing numbers of the volumes of the *Federal Reporter* system? The essays and commentary that follow do not answer these questions definitively, but they help us all to think more realistically about them.

Chapter I

The Functioning of the Federal Appellate Courts in the Future

Maintaining the Quality of the Federal Appellate Bench

Griffin B. Bell

I offer these observations as a former judge who was selected on what passed for the merit system. I was John Kennedy's campaign manager in Georgia, and we had a big win, and I was a very close friend of both senators. When I was Attorney General, we tried to change the system of selecting federal judges, and that experience, and the experience of overseeing the judicial nominating process, suggests to me several principles that we might well bear in mind as we consider how this process ought to operate in the future. I also want to comment on some aspects of the federal appellate judge's position that will make it difficult to select the best judges, regardless of the selection system.

Selection Mechanisms

There was quite a debate at the Constitutional Convention over selecting federal judges. The argument that Congress itself ought to select the judges lost, but they did settle on the idea that the President would select federal judges with the advice and consent of the Senate.

By the middle of the 20th century, the patronage system had altered dramatically. The President still selected the circuit judges he would nominate, but the selection of district judges was left almost entirely to the senators from the states with the vacant judgeships if the senator or senators were of the same political party; otherwise, to the party organization in the state. At length, the senators gained control of circuit nominations as well. After the 1976 election, President-elect

Carter and I met with Senator James Eastland, chairman of the Senate Judiciary Committee, who told us that he was open to ideas from the President-elect.

As governor of Georgia, Jimmy Carter had established a commission-selection system for judges, whereby the Chief Executive received a list of three to five names for each judicial position. Carter hoped to inaugurate a similar system at the federal level. After a meeting in Atlanta with President-elect Carter at the governor's mansion, Senator Eastland agreed that he would support reforms concerning judicial selection, but he warned that he would not likely be able to do much to alter the process with respect to district judges.

So we started out on that basis, with Senator Eastland's promise that he would encourage senators to use state selection commissions for district judges, and we would install commissions in the circuits to recommend court of appeals judges. In the beginning, we found that the commission members themselves were arrogating more power to themselves than was appropriate—asking questions about people's views on philosophy and topics of current interest and constitutional questions, in some cases even insulting them. But that was straightened out and, by and large, whether the senators were Republicans or Democrats, that system worked.

Some senators did resist this approach. One senator capitulated only after newspapers in his state started writing editorials in favor of a commission. He then named his own commission, which produced the same two names this senator had originally proposed—evidence, he later explained to me, of what a fine commission he had appointed. Another senator threatened to place his wife and his children on a commission if he were compelled to appoint one. Indeed, this was not a popular movement, and when President Reagan took office, the first thing the Department of Justice did was abolish all the commissions we had created. Still, I would argue, the commission system offered a real advantage in that it gave the President a group of people to select from rather than a single

choice. The choices were customarily ranked, and the ability to choose from among good candidates tended to improve the quality of the appointees.

I would propose for the future that such a system be reconsidered. I would also recommend that the Department of Justice (i.e., the Attorney General, not the White House staff) have the main responsibility for recommending nominees to the President. The White House is, rightly, the political center of the nation. The Department of Justice has a responsibility of rigorous neutrality—a far more fitting environment for the selection of judicial nominees.

I continue to believe, as well, that the American Bar Association ought to play a role—not have a veto, but play a role—in the selection of judges. Frequently privy to information not readily accessible to the FBI because of the Freedom of Information Act, the lawyers of the ABA can comment knowledgeably on the legal competence of judicial nominees as known by the lawyers and judges in the community. At times, it may be well to go beyond the ABA; for example, the National Bar Association, an organization of black attorneys, is in a good position to comment on a nominee's reputation for impartiality and freedom from racial prejudice.

Sources of Judicial Nominees

But in order to have the opportunity to select from among good candidates (whoever does the selecting), the federal bench must be an appealing prospect for those candidates. Assume for the moment that we will need the vast number of judges that the statistics indicate we will. Where will we find them?

Two[1] things keep good lawyers from wanting to be court of appeals judges: One is the quality of life—too many cases, too large a staff to have time for reflection. Judges now customarily have three or four law clerks, all of whom need supervision. Hiring an additional person to do the supervising only makes matters worse. Moreover, the large number of

cases precludes judges' handling all of the work associated with judging without the additional help. This situation is most unattractive.

The second deterrent is the level of pay relative to the income that lawyers earn. Judicial salaries do not even keep pace with the cost of living.

One group of prospective federal judges is not so disadvantaged in this regard. There are many former state judges now serving on the federal bench who are able to do so because they receive a state pension from their service, compensating to some degree for the low salary of a federal judge. President Carter objected strenuously to this arrangement but found ultimately that he couldn't maintain his disapproval in the face of the high-level vacancies he encountered. Former state judges certainly represent a fine pool of candidates.

I would also recommend, for virtually every court, a scholar of the law. Although law school salaries compete with judicial salaries, many law faculty may still be eager for the opportunity to put into practice the judicial theory that they teach. Such a perspective will indeed enhance the federal bench. Moreover, these professors may often have pensions available from teaching.

Finally, we need also to be mindful that the federal bench reflects to some degree the diversity of the people in our country. We have to have women, blacks, Hispanics—to name just three groups—on the bench, and we have made and must continue to make an effort to do that and without the pernicious stratagem of quotas.

In my judgment, however, the only route to ensuring the quality of federal judges lies in restructuring the system to reduce the caseload in order to make the job more attractive. The expansion of the appellate judiciary without curtailment of the caseload will present a tremendous problem in getting an adequate number of good judges to fill those slots. Perhaps a wider use of magistrates, a new tier, is indicated, permitting appeal from a magistrate to a district judge. Courts of appeals

could exercise more of a discretionary jurisdiction, hearing petitions to review instead of all appeals. (The only bargain left in the federal judiciary is to take an appeal. You can spend a million dollars litigating a case in the district court, and for $50,000 you can get a fine appeal in the most complex case. That may give you an idea why we have so many appeals.) Congressional reluctance to alter the judiciary will impede such innovations, but my recommendation for the future is change of that kind.

My hope is that 10, 15, even 20 years, even 50 years from now, the federal appellate system will be alive and well. It's the most important part of the system; it's where you go if you think something went wrong on the lower level—and sometimes things do go wrong on the lower level. With the goodwill and intelligence of both the members of the federal bench and Congress, we will no doubt find a way both to avoid an intolerable expansion of the federal bench and to maintain the high quality of judicial appointments characteristic of the federal courts for the past 200 years.

Notes

1. It may be worth noting, parenthetically, that a third deterrent to accepting a judicial nomination is the present procedure of clearing candidates for nomination to the Senate. During Senator Eastland's tenure, only he among the senators had access to the nominee's FBI file. Now this information is widely available—a troublesome development because virtually every FBI file contains some derogatory information. In addition, federal judge nominees must undergo checks by the Internal Revenue Service, a circumstance unique among top-level federal appointments. With the increasing politicization of judicial appointments, these candidates can rightly fear that any negative allegations will be made public. It is hard not to sympathize with the reluctance of those who do not wish to go through this kind of experience.

Maintaining Effective Procedures in the Federal Appellate Courts

John J. Gibbons

In 1969, when I joined the Court of Appeals for the Third Circuit, the court convened for three sessions of one week each, the judges heard oral arguments in every case, they published an opinion in every case, and at the end of each weekly session they had cleared their docket of every case where the briefing was completed. In 1970, my first year on the court, that regimen was still regarded as the ideal, but the materials in the graphs prepared by the Federal Judicial Center show clearly that the possibility of living up to that ideal has long since disappeared (see Figures 2, 4, and 5, pp. 254, 256, 257).

If one compares the available figures on oral argument with those describing published and unpublished opinions, the picture emerges of an institution whose work is very much less visible than it was 15 or 20 years ago. On the other hand, the visible parts of the court's work—oral argument and published opinions—while declining as a percentage of the whole, have increased in total. All of us are spending a greater part of our time on the bench than we did in the past.

As for published opinions, I note only that my name first appeared in volume 418 of Fed. 2d, and a mere 18 years later we're at volume 854—436 volumes occupying over 80 running feet of shelf space. For lawyers who pay rent for the space, that omnipresence in the library belies any claim that we're not supplying them with enough law. The opposite appears to be the case. The sheer volume of it raises questions about its practicable retrievability and thus about the consistency of its application.

Another troubling trend worth noting is that while our terminations have kept pace with our filings, our reversal rate has, when compared with that of prior years, declined markedly. The gross reversal rate was once 22%; it has declined to 13.6%. The decline in reversals suggests that the remarkable achievement in productivity has been attained at least in part by the adoption of a posture of increased deference to the rulings of the courts we're supposed to be supervising, something that Paul Carrington warned us against a number of years ago.

One final feature of our present situation worth noting is disclosed in Figure 8 of the materials prepared by the Center: the role of the Supreme Court in supervising the courts of appeals (see p. 260). The number of cases reviewed has been constant since 1940; as a percentage of cases reviewed, however, the Supreme Court's participation since 1970 has contracted to the point at which it fairly can be said to have virtually no role in maintaining the consistency or coherence of the law applied in the courts of appeals.

Today, therefore, the courts of appeals have these features:

1. All of them, though in somewhat different degrees, recognize that their primary task is dispute resolution and, thus, that closing files takes precedence over all other considerations.
2. Because the Supreme Court cannot, or at least does not, review any but a minute fraction of their work, they are virtually unsupervised, autonomous institutions.
3. In order to dispose of their caseloads, they have of necessity to resort to an increasingly bureaucratic approach to case management, with a steadily increasing percentage of appeals terminated other than on the merits.
4. Each year an increasing percentage of the courts' terminations on the merits is accomplished invisibly,

without oral argument and without published or even unpublished opinions.

5. Even as our work has become more invisible, our reversal rate has declined, which suggests that just as we are virtually unsupervised, district courts are gradually becoming so.

Absent a major restructuring of the federal appellate edifice—and I'm not optimistic about that—the future, it seems to me, holds for the court of appeals more of the same. There is no realistic prospect of a significant reduction in filings. Thus, our first priority will continue to be managing our work so that terminations and filings continue to remain roughly in balance.

Certainly no amount of ingenuity will produce a scheme whereby a circuit judge can hear argument in 330 or more cases a year. The oral-argument tradition in appellate courts is inherently inefficient because it is the one facet of the appellate courts in which the judge receives no help from fellow staff members, because it frequently involves travel time, and because all of us can absorb information far more quickly visually than we can orally. After 18 years of listening, I for one am ready to support a rule that there is a presumption against oral argument, that the norm should be appellate review on the papers. I make that suggestion mindful of the fact that such a rule would make more acute the public perception of the invisible, unaccountable judiciary. But the trend is inevitable, and articulation of the norm of appellate review on the papers would at least be candid.

While oral argument is inherently inefficient, the production of a reasoned written disposition in every case need not be. That goal can, I suggest, be achieved through a more efficient use of support personnel and a greater reliance on technology. We should recognize that our primary function as an institution is dispute resolution, that our primary constituency is the parties to those disputes, and that the parties to every dispute are entitled to a reasoned explanation for ev-

ery dispositive judgment. Shortly, every judge and law clerk will have a personal computer with data storage and retrieval capability, and with reasonable management of the available technology and staff it should be possible in every case to produce such an explanation intended only for the parties.

Note that I don't suggest more officially published opinions. I think we need fewer, not more, of them, because unlike unpublished opinions intended for the parties, published opinions have an impact on non-parties. As I noted earlier, 80 feet of law produced in 18 years by nearly 200 lawmakers has created massive problems of retrievability and consistency. Technology is about to solve some of the retrievability problems, for when every judge and every law clerk has access to the computerized legal research services from a desk-top computer, we will know all the cases in point. The consistency problem, on the other hand, will be magnified by such instant retrievability, and the net result probably will be less coherence in the law rather than more.

We have, it seems to me, far too much precedent; the very proliferation of the court of appeals precedents, unsupervised by the Supreme Court, gives district courts vast room for selectivity and increases the area in which they make discretionary judgments.

Thus, after having produced over 800 published opinions, I am ready to support a rule that there be a presumption against publication and that only opinions carefully selected for publication be regarded as precedential. Such a rule would be an overdue recognition that our primary function is dispute resolution and our lawmaking function is only incidental to that primary function.

The obvious question is how, under such a rule, opinions would be selected for publication and thus for their precedential value. One way would be to permit publication only if, after a opinion had been circulated or filed, a majority of the court voted affirmatively that it should be published. Alterna-

tively, the Judicial Conference of the United States would develop criteria for publication.

In the Third Circuit, our internal operating procedures state that the criterion for publication normally applied is whether the opinion has precedential or institutional value; an opinion which appears to have value only to the trial court or to the parties is ordinarily not published. That bland statement is essentially meaningless. In practice very little thought goes into the decision to publish, and I suggest that the real criterion for publication in my court or elsewhere is the time and effort put into the opinion by the judge or law clerk.

Moving the publication decision from the panel to the full court would have the effect of emphasizing that, while the panel's task is dispute resolution, the law of the circuit is an institutional responsibility and no new law should be added unless a majority of the full court agrees. It would, moreover, recognize the reality that the Supreme Court does not and probably cannot exercise responsibility for the coherence of federal law and that the courts of appeals should therefore be quite careful before adding precedent to the law.

If the presumption against official publication, and thus against precedentially effective opinions, were to be adopted, it would be likely to result in an increase in the number of cases which the court held en banc. That would produce inefficiencies in the dispute resolution process, since nothing we do is quite so inefficient as a court en banc. Nevertheless, absent a major restructuring in the federal appellate system, there does not seem to be any device other than the court en banc for some institutional control over the growth of inconsistency and incoherence in the national law.

My key proposal obviously is the presumption against an opinion becoming a binding precedent. Many judges think that problems of inconsistency and incoherence in the national law are too insignificant to warrant tinkering with the mystic evolution of law in the common-law tradition. They see themselves as participants in the centuries-long develop-

ment of judge-made law, paralleling the evolution of right-thinking by mankind, or, if their thoughts are not that lofty, at least as reporters of important results in the ongoing human experiment, and perhaps they are right.

After 18 years, however, I've become a skeptic about the judge-made law that I was once so enthusiastic about. It's one thing to search through hundreds of precedents accumulated over centuries among the relatively few decisions preserved in writing, compared to thousands that were made orally and lost, for rules of decision which ought to bind us over time. Those scarce preserved decisions may actually represent the accumulated wisdom of the ages. It's quite another thing to suggest that what the courts of appeals have spewed out in the last two decades in over 80 feet of shelf space is, simply because of its availability in a data base or Fed. 2d, equally worthy of consideration as binding law.

I don't mean to denigrate the importance of judge-made law as binding precedent; rather, I suggest that because it is to be so highly regarded, a great deal more care has to be taken in its production than is taken at present. It was not the common-law tradition that every inane opinion expressed by a judge had binding precedential value. It should not be the federal common-law tradition that every law clerk's bench memorandum, or even every court of appeals judge's handwritten draft, becomes part of the corpus juris federalis.

So my vision of the future would include a presumption against oral argument and a presumption against published precedential opinions, but a requirement for some form of written opinion in every case. That set of rules would make the job a lot less attractive to many judges, but it would conform judicial practices to the reality of the situation.

A judge's product is judgments. A judge's inventory is pending cases. The need to produce the product and to turn over the inventory will continue to dominate the lives of appellate judges. My proposals would recognize that reality while at the same time make our work more visible at least to

the parties and face our institutional responsibility for greater care in the formulation of binding precedents.

The Changing Character of Legal Clerkships

William J. Bauer

The topic I address is what the future holds with respect to judicial staff, including the roles of the law clerks and the judges. Peering into the future is novel for me, and I hope that the reader bears with me.

One of the things that I've done is a modest study of law clerks, and I have found that over the years, as we have increased the numbers of our judiciary on both the district court and the court of appeals levels, we have increased the impact of the law clerks as well. A similar phenomenon is visible on the state court level. And as more of us compete for law clerks, we confront an element that we haven't paid attention to before—the federal judiciary is financially noncompetitive to the point of foolishness.

There was a time when one could graduate from law school and undertake a clerkship to a judge at a modest financial sacrifice, as a worthwhile continuing education program. The clerkship enhanced both one's résumé and one's experience. Now, instead of a modest difference between salaries for clerks and those for new attorneys in private practice, law firms are offering $62,000, $72,000, $82,000 and even $90,000 to beginning lawyers. From a financial point of view, they would have to reject a position as a district court judge. Since most of the potential law clerk applicants leave law school burdened by a debt of $30,000 to $40,000, a clerkship is a choice they cannot afford to make.

Moreover, we ought to realize that our clerkships are in fact being subsidized in that some of the major law firms offer a bonus of $10,000, $15,000, or $20,000 to their new attorneys who come to their jobs from courts of appeals or district

court clerkships. This practice is a healthy one, but we must understand that we are being subsidized by the private bar.

Recognizing this problem, some state appellate courts, including those in the state of Illinois, offer the clerks additional perquisites. Some permit the practice of law part-time; some of them pay a good deal more than the federal judges are permitted to pay.

Since we have less control than we would like to have over the amount of money we can offer, we might look at least at ways to improve the working conditions of our clerks, a factor we can control. One of the things that we must stop doing is misusing the resources of the clerks themselves. To have two or more law clerks work on each memorandum or on proposed drafts of opinions—a common practice—is counterproductive, frequently resulting in a product that is an intellectual compromise. Moreover, this practice hurts morale; the clerks think that we don't trust them and that they are wasting time duplicating each other's work. In contrast, having one clerk work on one memorandum makes law clerks feel closer to the judge and to the process. Judges should consider this use of law clerks seriously; unless we make their jobs more attractive to them, we won't be able to have law clerks on our team.

One of the great advantages of having law clerks now is, of course, the familiarity a new lawyer is likely to have with the latest computer technology. But both the technology and law clerks' familiarity with it might pose a bit of a hazard. My concern is that the introduction of computer technology and computer-literate law clerks and secretarial assistants (many more so than the judges) will radically change the procedures of writing opinions. We will have them finding great opinions that we wrote ourselves and didn't publish, or memoranda that we had prepared ourselves perhaps on a different subject and had stored away in a data base. These will then become the foundation of new opinions.

My vision of the future includes an increase in the number of judges, whether we like it or not, and a declining number

of applicants for clerkships. Applicants will decline for two reasons: One is that clerkships are financially less attractive; the second is that the growth in the number of clerkships makes the position less and less exclusive, and therefore less impressive an entry on one's résumé.

I cannot with assurance predict the future of this course of events. My only guess at the moment is that we're going to have to rely on our own libraries, our own law clerks, our own yellow pads, and our own brains.

I have a fear that as the volume of our work intensifies and the electronic support becomes increasingly available the quality of our work will suffer. Such dependency will reduce the amount of creative writing. Gone will be the fresh approaches so necessary to keep the law a living, vital thing, able to meet changes in our needs and problems. May our willingness to look at problems afresh never change!

Governance of the Courts and Structure of the Circuits

John C. Godbold

Governance

The structures by which the federal courts organize and govern themselves on a systematic basis have developed during the last 60 years. In the "old days," before any systematic governance, each court, circuit and district, operated as a sort of feudal barony, isolated from others and accountable to almost no one except through appellate review. No ideas went out over the wall and the moat, and neither idea nor governance was permitted to come in.

There was a relaxed notion of individual accountability to the public and the litigants. Chief Justice Taft spoke in 1922 of the days in which "each . . . judge has had to paddle his own canoe and has done as much business as he thought proper. Thus one judge has broken himself down in attempting to get through an impossible docket, and another has let the arrears grow in a calm philosophical contemplation of them as an inevitable necessity that need not cause him to lie awake nights."

The structure of governance began with the creation of the Conference of Senior Circuit Judges, now the Judicial Conference of the United States, in 1922. A 1939 statute removed housekeeping for the federal courts from the Justice Department and placed it in the new Administrative Office of the U.S. Courts.

The same 1939 statute created the judicial councils of the circuits. Since then the authority of the councils has grown through statutory amendments, the development of implied

powers, and directions given to the councils by the Judicial Conference. Moreover, though not without some murmuring and occasional grumbling, there has been an institutional acceptance of the judicial councils as having an undefined monitorial function.

The office of Chief Justice of the United States has become an institutional leadership position since the days of Chief Justice Taft, reaching to the agencies of judicial administration and to a role as the voice and representative of the federal judiciary.

The positions of chief judge of the circuit court and chief judge of the district court were formally recognized by the 1948 judicial recodification, and in 1984 Congress authorized chief bankruptcy judges. Chief judges succeed as much by the art of persuasion as by the science of administration or the use of statutory authority. But their *presence* is now an essential component.

Judges engage in some self-governance through participation in the education and training activities of the Federal Judicial Center. From their studies, and from the FJC's own studies in court administration, ideas may be transmuted into action. The results are not uniform. Indeed, the action may be a decision not to act, but through this process, the dynamics of judicial institutions, stable in nature yet changeable and changing in methodology, are triggered.

Neither splendid isolation nor rigid hierarchy will serve the needs of the federal judicial system. Governance of the judiciary is a tough case, involving high-ranking officials scattered all over the land. The judicial branch agencies that have evolved to exercise the function of governance represent a healthy tension between national standards, local autonomy, individual judicial independence, and accountability. The tension is not perfectly calibrated. Depending on where one sits, one may fear overbearing centralization or fragmented, standardless localization. But by and large we seem to have achieved a tolerable balance.

The system is experimenting now with a new area of localized governance in the form of circuit control over expenditures of some funds. This is not the end of governance but rather a relocation of the situs of decision making and responsibility, from the Administrative Office to the circuits.

This brings us to the first challenge for future governance—the maintenance of a healthy balance between governance through national standards and methods, and the desire for local freedom of action. Turning our eyes to the future, surely we cannot anticipate less governance. There will be no return to the feudal baronies, each an island unto itself, without articulated standards or responsibilities and receptive to ideas only at the barons' whim. Rather, the task will be placing governance where it can best be exercised.

This brings me to a second, and the most difficult, challenge for future governance. It is not methodology, for we have shown ourselves capable of adopting means and amending them through trial and error. Rather, it is our willingness to accept the *responsibility* for governance. The responsibility goes with the turf. Is it not at least fair to look at our track record? Judicial discipline, revelation of our financial affairs, speedy trial, criminal sentencing—all of these are areas of revealed public and political concerns; and the judiciary found itself not able to answer or ameliorate these concerns to the satisfaction of those who expressed them. A forum for action was found elsewhere.

The winds of change do blow in our country from time to time. If we are to engage in responsible governance, necessarily we must ask ourselves continuously whether, in the Holmes phrase, the "felt necessities of the times" require at least self-examination and perhaps change.

Separation of powers and the traditional independence of the federal judiciary as a whole, and the corresponding independence of individual judges, give us a splendid foundation for self-examination and change. They may not properly serve as a cloak for ineffective self-governance. If, as our future un-

folds, we are not willing to govern where governance is needed, the vacuum will be filled by other institutions in our society that are willing to exercise their powers, including the public and Congress as voice for a national political will.

There are other governance issues for the future. We are currently in an era of citizen participation in the courts: court-watching groups, citizen involvement in judicial nominations, and the like. The future is not likely to see a decrease in these citizen demands to participate and, through television, to observe. Thus a third challenge for the future is whether we can develop mechanisms to accommodate legitimate citizen participation without sacrificing the integrity of the judicial process.

Governance is getting more complex, and we turn to automation to make our work easier. We may be looking toward a sort of judiciary technocracy, in which elements of court governance are taken beyond judicial control by the sophistication of what we call "support personnel." If this is a possibility, what means will be available to contain it? This is a fourth challenge.

The Number and Size of Circuits

Throughout the 19th century the circuits were structured and restructured as the country grew. The present circuit alignments were largely set by 1891, when Congress created the courts of appeals. The Tenth Circuit quietly split off from the Eighth in 1929. A half-century later the Fifth Circuit divided, and the Eleventh and the new Fifth emerged. The Ninth Circuit has elected to experiment with a unit system.

In the mid-1970s, the Hruska Commission on Revision of the Federal Court Appellate System recognized that the practical and political obstacles to a nationwide realignment of circuits are enormous. I doubt national realignment can occur short of a nationwide breakdown in the federal judicial system and a total top-to-bottom restructuring.

Despite the temptation engendered by this conference's spirit of bold new looks into the future, I am bound to suggest that changes in the number and the contours of circuits on a circuit-by-circuit basis will be few and far between. The circuits, although artificial creations of Congress, have taken on in the nearly 100 years since 1891 rich and unique identities. The concept of the circuit as an enduring entity grasps judges and lawyers and influences how they look at the law and the judicial process. Fundamental and powerful forces—judges and lawyers—rise up to oppose any proposed alteration in the status quo. And they are close to the levers of power. They can call to arms the bars of their states and the congressional representatives of those states. A few determined persons and one committee chairperson can derail the process.

There are various suggested alternatives to geographical alterations of circuits: specialist judges within each court; specialist panels, with judges rotating on and off; and elimination of assignments of judges to circuits, with all judges made fungible, placed in a national pool, and assigned where needed. Some of the pressure upon the circuits was eased by the creation of the Court of Appeals for the Federal Circuit.

Proliferation of jurisdiction—and perhaps of circuits—may be tempered by creation of Article I courts. The Veterans' Judicial Review Act, enacted by the 100th Congress, establishes an Article I Court of Veterans Appeals to adjudicate veterans' claims, and provides for limited review in the Court of Appeals for the Federal Circuit of decisions concerning the validity or interpretation of a statute or regulation. The judiciary opposed legislation that would provide for initial Article III judicial review of veterans' claims. The size of the bullet that we dodged is perhaps demonstrated by the fact that the new Article I court is to have 1 chief judge, 2 assistant chief judges, and up to 62 associate judges.

During the Carter administration there existed in the Justice Department the Office for Improvements in the Administration of Justice, under the direction of Professor Daniel

Meador as assistant attorney general. An agency such as this could be of material assistance to the judiciary in planning and implementing its future.

Chapter II

The Role of the Federal Judiciary and the Future Allocation of Jurisdiction

Martin H. Redish

No one can discuss the structure of federal jurisdiction in the next century without focusing on the workload crisis that many have claimed exists. Several years ago, Judge Richard Posner, in a thoughtful and provocative book,[1] suggested that the nature of federal adjudication and the quality of federal judges were seriously threatened by the dramatic increase in workload. Justice Antonin Scalia, in a now famous address,[2] waxed nostalgic for the days of 1960, when the federal courts were considerably smaller and perhaps a little sleepier, but, in his view, more prestigious. Both of these jurists as well as many others have suggested dramatic readjustments in the structure of federal jurisdiction in order to deal with this workload crisis.

My thesis is twofold. First, the existence of a crisis, with all that term implies, is, at best, unproven, and significant empirical work needs to be done before we can really say that there is a crisis. Second, to the extent that a crisis exists, there is a serious danger of skewing our perspective so that docket clearing takes precedence over competing alternative values. In short, there is a danger of allowing the tail to wag the dog.

First, is there a crisis? No one can dispute that the workload has increased dramatically. If one uses Justice Scalia's point of 1960 as a baseline, the increase is staggering. Yet such a dramatic increase is not surprising if one realizes that 1960 was (1) before the Supreme Court had rediscovered § 1983,[3] (2) before the Supreme Court had implied a private right of action in securities fraud cases,[4] (3) before passage of the 1964 Civil Rights Act,[5] (4) prior to the passage of the 1968 Civil Rights Act,[6] and (5) prior to the passage of the Truth-in-Lending Act.[7]

For good or ill, the federal government has exercised considerably more substantive legislative authority than it had chosen to in past years. The result is a significant increase in the litigiousness of our society. But the question is, does the mere existence of an increase in workload constitute a crisis? The argument that it does has two elements. First, in light of

such an increase, the quality of justice has to suffer; judges cannot devote the same amount of time, careful thought, and preparation to decisions that they once could. Second, because of this dramatic increase in workload, the quality of those who are willing to accept federal judgeships will suffer, if it has not already.

First, as to the quality of justice emerging from the federal courts: My admittedly unscientific and casual observation of the work of the federal courts reveals that the intellectual power, breadth, sophistication, and depth of the opinions are at least what they were in 1960. It is true, of course, that the percentage of decisions in which no opinion is issued is considerably higher today than it was in 1960. But this change should be viewed as a serious problem only if the cases decided without opinions deserved them. Though I cannot prove it, I suspect that most cases decided without opinions do not require detailed exposition, nor are they likely to make a real contribution to the development of the law. Thus, as long as courts of appeals are properly performing the "triage" function, relatively little harm should result from the declining proportion of cases with opinions. Therefore, I believe that the quality of the justice coming out of the federal courts has been stable.

The second question concerns the quality of the individuals accepting federal judgeships. I firmly believe that the quality of a judge today is easily equal to that of his or her earlier counterpart. Justice Scalia in his speech suggests that while the quality of the individuals accepting judgeships has not fallen off at this point, that is so because most of them were his contemporaries, who thought of the bench as it was in 1960; when the reputation of the courts catches up to reality, he insists, things will change. It is true that there are considerably more judges now than there were in 1960 and there probably will be more 20 years from now than there are today. But the number of federal judges still remains such an infinitesimally small percentage of the bar, not to mention the

entire population, that the danger of a significant loss of prestige is not likely for the foreseeable future.

If we ask why someone accepts a federal judgeship, we can understand without too much difficulty why the quality has not declined. One such motive is public service, the desire to give back to one's country something in exchange for all it has given. Workload increase will of course not affect that motivation. A second motive is interest in a new intellectual challenge. Justice Scalia suggests in his speech that not only are there more cases, but the nature of cases coming to the federal courts is qualitatively different from and not nearly so interesting as the nature of those heard in the past. But if our exclusive goal were to increase the intellectual satisfaction of federal judges (and that is a very big if), the time to go back to is not 1960, but rather 1965 to 1971, the post-*Dombrowski*[8] period, when federal courts had all the intellectual challenge that they could handle in rigorously enforcing federal civil rights protections against invasion by state legislatures or executive officers. One may suggest that it is absurd to readjust basic notions of judicial federalism simply out of concern for the intellectual satisfaction of federal judges. But that is exactly my point: Focusing so much on the need to keep federal judges satisfied can undermine important competing values.

No matter how heavy the caseload, judging remains indoor work with no heavy lifting. People do not accept federal judgeships in order to reduce their workload. Successful practitioners, and there are no other kind receiving federal judgeships, are not afraid of hard work. And academics who ascend to the federal bench could not be seeking a lighter workload, because it is physically impossible for a law school professor to find a job with a lighter workload. Hence, it is likely that fear of workload has not undermined the appeal of a federal judgeship, and it is not likely to do so in the future.

All other things being equal, of course, it would make sense to reduce judicial workloads, and therefore it is neces-

sary to consider the various devices that have been suggested toward that end. But it is important to realize that, for the most part, all other things are *not* equal. With only limited exception, a reduction in the workload of federal courts would cause significant harm to our political and constitutional values.

One proposed method of cutting federal caseloads is the traditional whipping boy, diversity jurisdiction. The original reason for diversity jurisdiction—prejudice against out-of-staters—does not exist today, if it ever did, or so the argument goes, and there is some truth to the point. On the other hand, it is certainly conceivable that state jurists subject to state pressures could exhibit prejudice towards out-of-staters. Perhaps, then, at least a certain degree of danger of prejudice to out-of-staters still exists. Moreover, there is a value of cross-pollination between the federal and state courts, of an interactive federalistic dialogue on the nature of state law. Finally, state judicial systems would be likely to object vigorously if all diversity cases were to be foisted back upon them. So whether diversity jurisdiction should be abolished completely may be subjected to reasonable debate. At the very least, dramatic increases in minimum jurisdictional amount—beyond those that recently went into effect[9]—should be imposed. Moreover, it is nonsensical to allow in-state plaintiffs to bring diversity cases; after all, we do not allow in-state defendants to remove to federal court because, if there is a danger of prejudice, presumably it would be in their favor. The same logic should apply to suits originally filed in federal court. This change may not completely solve the workload problem, but it represents a plausible improvement.

Another possibility is increased reliance on state courts. It is true that under the supremacy clause of the Constitution, state courts are both presumed competent and obligated to enforce federal law. However, there is a danger in viewing federal and state courts as fungible interpreters and enforcers of federal law. No matter how many federal cases state courts

handle, the bulk of their dockets will—and should—consist of state-created causes of action. I doubt they can ever achieve the familiarity and expertise with federal causes of action that federal judges are rightly expected to acquire. Moreover, the interest in federal uniformity could be significantly undermined if 51 state courts, rather than the 13 federal courts of appeals, speak to the issue. There are certain federal causes of action—Judge Posner recommended suits under the Federal Employers' Liability Act—in which the adjudication is primarily fact-based, and is therefore not likely to make important law, and which involve areas of the law very familiar to state judges. In these cases, it would not be unreasonable to make state-court jurisdiction exclusive. There may be political objections from the states as a result, but it is a nevertheless feasible, if limited, device.

Other suggestions include the creation of more Article I quasi-judicial bodies or, as Justice Scalia recommended in his speech, the elimination of judicial review of certain administrative agency determinations, such as Social Security cases. But these recommendations are problematic because of the significant tension between constitutional values and the administrative process. The tension exists not because the Constitution fails to make reference to administrative agencies—one can piece together the enumerated powers and the necessary-and-proper clause to constitutionally rationalize their creation—but because the separation of powers values embodied in the Constitution are undermined by administrative agencies.

In many senses, administrative agencies give rise to the worst of all possible worlds. They lack the prophylactic protections of independence that the federal courts possess in performance of their adjudicatory function, and they lack the electoral accountability that Congress has in the performance of its legislative functions. They are thus in something of a constitutional no-man's land.

It is, as a practical matter if not as a theoretical one, too late in the day to turn back the clock on the validity of the work of administrative agencies. However, that hardly implies that we should compound the problem by cutting off judicial review of their decisions. In fact, in the coercive nature of its adjudicatory function, the administrative process often borders on the Kafkaesque. Even in the noncoercive entitlement area, it is dangerous to trust an administrative law judge whose independence is nowhere near that of a federal judge.

The absolute dollars involved in Social Security benefits cases are often likely to be small on an objective scale, but quite probably extremely important to the individuals involved. On a more symbolic level, the opportunity for obtaining judgment from a truly independent federal judicial body is important to the continued faith of individuals in the system. In any event, with appropriate deference given to the administrative process, it is likely that there will be self-selection in appeals, because in many cases the cost of appeal would outweigh the minimal chance of reversal. Cases in which review is sought, then, are more likely to be those in which a reasonable possibility of reversal exists. In such circumstances, the value of having the federal judiciary act as the final arbiter is an important one to preserve.

One other possibility for controlling caseload is increased filing fees, as Judge Posner suggested in his book.[10] Perhaps that strategy might be appropriate in diversity cases, but it seems inappropriate in federal-question cases. In the federal-question area, the idea of increasing filing fees suffers from a fallacy that Congress recognized and corrected in 1980 when it removed the jurisdictional amount requirement in federal-question cases: It is simply impossible to equate the value of a federal right with a monetary amount.

Finally, Justice Scalia has suggested an increased use of specialized Article III courts. This suggestion does not present the danger of a lack of judicial independence. There is arguably the danger of cheapening the currency by increasing

the number of federal judges, but it is a small risk. Such a proposal would, however, affect the quality of individuals accepting such positions for the very reason that the tribunals would be so specialized. We compound that problem by making them so insular that they lack the generalist's perspective. I am therefore unsympathetic to that proposal.

Those are the ways that have been suggested to reduce federal dockets. Some have merit. But other proposals, which would actually increase court dockets, ought also to be entertained. I realize that, in light of the current workload, such suggestions may not be welcome in some quarters. However, these examples underscore the harm caused by focusing solely on the interest in docket control.

One such area is judge-made abstention, primarily in the exercise of the federal courts' civil rights jurisdiction. This doctrine is objectionable, not merely because the Supreme Court has ignored the clear superiority of federal judges over their state counterparts as a check on unconstitutional state action. Rather, it is unacceptable primarily because it ignores the unambiguous congressional directive, contained in both the substantive and jurisdictional civil rights statutes, that the federal courts provide a forum for enforcement of federal rights against state action. Judge-made abstention therefore constitutes a blatant and indefensible judicial usurpation of legislative authority and therefore violates fundamental notions of democratic theory and separation of powers.

Statutory grants are not discretionary; they are directions to the courts to enforce the substance of statutory programs. Congress has established a carefully structured statutory network of judicial abstention in the Anti-Injunction Act,[11] the Tax Injunction Act,[12] and the Johnson Injunction Act,[13] but significantly, the Supreme Court has never once pointed to any language in the text or legislative history of the Civil Rights Act of 1871, now § 1983, to suggest that judge-made abstention represents a legitimate judicial construction of congressional intent in the passage of that statute. Quite the

contrary, in *Mitchum v. Foster*[14] the Court made very clear, if only implicitly, that the unambiguous purpose of the statute is 180 degrees opposite from the policy underlying the doctrine of judge-made abstention.

It is ironic that we have a Supreme Court quite rightly priding itself on opposing undue judicial activism, recognizing the need for electoral accountability and democratic processes in basic legislative choices, and at the same time effectively asserting a judicial veto over an unambiguous legislative policy judgment. Perhaps that policy judgment is no longer valid; but, if so, it is for Congress, not the Court, to correct.

The second way to increase appellate dockets is to abolish the practice, overtly adopted in some circuits, covertly in others, of imposing fact-pleading requirements in civil rights cases. This practice should be eliminated for two reasons: First, the courts do not have a right to impose it. Rule 8a of the Federal Rules of Civil Procedure very explicitly adopts a notice-pleading system. Rule 9b expressly draws an exception to Rule 8a for fraud cases, but not for civil rights cases. In effect, then, the imposition of a fact-pleading requirement in civil rights cases amounts to civil disobedience on the part of the federal judiciary, which is overruling the Federal Rules of Civil Procedure. If these rules ought to be changed, they should be changed through regular procedures. But I would think that the last area of cases in which we would want to impose a fact-pleading requirement would be civil rights cases. It is ironic that the paradigm notice-pleading case was *Conley v. Gibson,*[15] a civil rights case. If there is one area of the law where we could be reasonably assured of an enormous disparity in the resources of the parties, it is civil rights cases. If there is one area of the law where we can be reasonably certain that substantive factual issues are often going to turn on motive, intent, and conspiracy, it is civil rights cases. Thus, while the elimination of a de facto fact-pleading requirement in civil rights cases will no doubt increase the judicial burden, there is, I believe, no legitimate alternative.

The final way that appellate dockets should be increased is by rejection of the so-called well-pleaded complaint rule, the rule of construction of general federal-question jurisdiction that provides that a case does not "arise" under federal law unless the federal issue appears in the plaintiff's well-pleaded complaint. The practical impact of that rule is the exclusion from federal courts of numerous cases that turn predominantly, if not exclusively, on federal law issues. The only opportunity for federal review in such cases is the unlikely possibility of Supreme Court review.

It is true, as Justice Frankfurter pointed out in the *Skelly*[16] case, that this doctrine has the beneficial effect of reducing the caseload of the federal courts. But so would a rule that says no one born under the sign of Aquarius could sue in federal court. That, however, is an unprincipled exercise of the judicial power. So is the well-pleaded complaint rule.

Justice Scalia tells a story in his speech about a visit his daughter made to a family in Germany. The family asked what her father did, and she said he was a law professor. Not surprisingly, they were dutifully impressed. Then she said, with even greater enthusiasm, that he was about to become a federal judge, and their faces dropped. The story underscores the dramatic difference between the role of the judiciary in our country and its role in other countries. In most countries, the judiciary consists largely of glorified bureaucrats. In this country, the situation is quite different. Our contribution to the history of political theory is that we have managed, in a large society, to maintain basic democratic electoral accountability combined with a qualified, independent, and highly respected federal judiciary, acting as an effective partner in the political process.

Adjudication by federal Article III judges and others is not fungible. Significant costs are incurred any time adjudication is transferred from Article III judges to another adjudicator. Therefore, while the concerns about "crisis" should not be

dismissed, they have to be tempered with recognition of these important countervailing considerations.

Notes

1. R. Posner, The Federal Courts: Crisis and Reform (1985).

2. Justice Antonin Scalia, Remarks before the Fellows of the American Bar Foundation and the National Conference of Bar Presidents, New Orleans, La. (February 15, 1987).

3. Monroe v. Pape, 365 U.S. 167 (1961).

4. J.I. Case Co. v. Borak, 377 U.S. 426 (1964).

5. Pub. L. No. 88-352, 78 Stat. 241.

6. Pub. L. No. 90-284, 82 Stat. 73.

7. Pub. L. No. 90-321, 82 Stat. 146 (1968).

8. Dombrowski v. Pfister, 380 U.S. 479 (1965).

9. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702 § 201, 102 Stat. 4642, 4646 (codified as amended at 28 U.S.C. § 1332(a) & (b) (1988)) (raising jurisdictional minimum in diversity cases to $50,000).

10. R. Posner, *supra* note 1, at 131–36.

11. 28 U.S.C. § 2283 (1982).

12. 28 U.S.C. § 1341 (1937).

13. 28 U.S.C. § 1342 (1934).

14. 407 U.S. 225 (1972).

15. 355 U.S. 41 (1957).

16. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950).

Commentary on

The Role of the Federal Judiciary and the Future Allocation of Jurisdiction

A New Tier?

Levin H. Campbell

Suggestions for pairing down jurisdiction have been made by people who fear that the growing caseload will destroy the quality and the coherence of the federal courts. A proposal we often hear is that we ease the burdens on the appellate courts by eliminating diversity jurisdiction. Others propose that we eliminate Article III review of Social Security disability claims as well as of comparable types of agency claims. A different kind of proposal is that of Professor Daniel Meador, mentioned with some approval by Justice Scalia a year or two ago. This is the proposal that we turn the lower federal courts to some degree into a group of specialist institutions—criminal courts, constitutional courts, administrative law courts, etc., somewhat in the manner of the West German court system. This arrangement would permit fewer judges to deal efficiently with more cases, as well as bring greater coherence to the federal law.

The rising caseload does pose a threat to the appellate courts, but I question whether the ultimate answer lies in paring down its jurisdiction or in creating specialist courts. I propose instead that we reorganize ourselves to cope with more cases.

We cannot do so simply by adding more circuit judges. While increasing the number of district judges can satisfactorily enable the trial courts to keep abreast of the rising caseload, adding circuit judges, whatever the impact on the caseload, also creates incoherence in the law. The chief role of an appellate court is to send to lawyers, judges, and the public reasonably clear messages as to what the law of the circuit is. By keeping the law clear, appellate courts enable lawyers to

settle cases and to give meaningful advice to clients; for trial judges, clear circuit law permits them to instruct jurors correctly and to resolve cases without grounds for appeal. But this ideal becomes further from reality the more appellate judges a circuit acquires.

With each added appellate judgeship, the likelihood increases that different panels will send out conflicting signals; as the number of conflicting signals increases, each appellate judge must take more time to make sense of what the other members of the circuit have done. A court like the Ninth Circuit—27 appellate judges, organized into a multitude of three-judge co-equal panels—is not well structured to produce clear law. If 20 years from now, the number of judges in that circuit has increased to 60, no one could seriously contend that the resulting congeries of three-judge panels could coherently state the law of that circuit.

So where do we go from here? The answer lies not in more computers or in more law clerks, not if we intend to keep the tradition that judges do their own work. The elimination of diversity jurisdiction is no solution, although no doubt we should raise the jurisdictional amount. The upward trend has been in federal-question matters, and this trend is likely to continue. Eliminating diversity would be no more than a stopgap; moreover, the loss of diversity jurisdiction could harm the country and diminish the quality of the federal courts. Diversity jurisdiction lets many of the nation's major commercial and economic cases proceed in federal courts, and thus, as Professor Redish points out, it keeps the federal judiciary in the mainstream of common law jurisprudence. The appellate judge's job would be considerably less interesting and the stature, the breadth, and the reputation of the federal judiciary might suffer if we lost all diversity jurisdiction. Similarly, elimination of review by Article III courts of Social Security cases and similar matters would reduce the number of cases to a small degree, but the problem would remain.

Finally, reconstructing the federal courts along the lines of the West German courts will not provide a viable solution. The power of the American judicial system has rested on the concept of having nonspecialist judges who come to the bench with years of active, practical legal and political experience. Specialized courts might succeed in some compact areas—tax law, perhaps—but the character of our courts would change dramatically if we adopted the German system. Not only would the courts have quite a different flavor, they would, I believe, lose some measure of authority and public support.

If none of the above proposals are answers to the increase in caseload, what other possibilities are there? There are many possibilities, but let me suggest one. First, we might equalize the size of the circuits by eliminating the present ones and dividing the country into new circuits of equal size, in addition to the circuit in the District of Columbia. There is no logic in the Ninth Circuit's encompassing a population so huge as to require 27 appellate judges while the First Circuit is so small as to require but 6. An overall federal system should have roughly equivalent administrative vehicles.

Second, I propose that each circuit have two tiers: a senior panel empowered to speak definitively and finally for that circuit, which would define the law of the circuit through cases that it chooses to hear, and a second tier consisting as now of panels of three made up from the remaining judges, whose opinions would be published and precedential, until or unless overruled or modified by the senior circuit panel. Thus, in a circuit of 14 judges, perhaps 5 would serve on a senior panel, which would be empowered to have the last word for the entire court of appeals of that circuit. I have in mind not merely an en banc panel, but a panel which, like the Supreme Court of my home state of Massachusetts, would have real control over the body of appeals in that circuit. The senior panel could pick and choose the cases it wished to hear and thereby maintain consistency within the circuit's precedent. A serious

problem presented by the concept is how to select the senior panel. I don't know, but perhaps it might be chosen by seniority; the point is not necessarily to have the "wisest" judges, but rather to establish with less ambiguity what the prevailing law of the circuit is. Such an appellate structure, modeled on the hierarchy now prevalent in many state systems, would provide some degree of coherence, a role the Supreme Court alone can no longer play nationwide. Perhaps this is a structure worth considering.

Federal Jurisdiction: The Essential Guarantor of Human Rights

A. Leon Higginbotham, Jr.

The proper allocation of federal jurisdiction is of profound importance to federal judges, but it is of even more importance to the future welfare of American citizens. How we deal with these issues of retrenchment, preservation of the status quo, or the expansion of jurisdiction of federal courts has more to do with our values, our appraisal, and our vision of America than it has to do with any subtle issues of subject-matter or federal-question jurisdiction.

My greatest fear is that in a drive for significant retrenchment, or the reallocation of resources, some of us may become oblivious to what could be a simultaneous diminution in the quality of human rights in America. I do not see preservation of jurisdiction for in-state plaintiffs, or the preservation of the right of removal from state courts by out-of-state defendants, as a sine qua non for the federal courts. However, human rights cases, more precisely civil rights cases—particularly since they constitute less than 10% of our total federal caseload—should never be written out of the federal courts or relegated to the state courts, nor should Social Security cases. It is essential that the federal courts retain civil rights jurisdiction.

Many scholars urge a retrenchment. They argue that the words of the framers, both in and outside the Constitution, should provide us with the firmest guidelines for our present institutions. They act as if our national institutions are still as unknown and untried as they were in 1787. But the real achievement of the framers was the courage to make new, to create the first functioning national democracy since Athens;

and, having left us an open-textured Constitution, to trust us to make new in our turn, according to the needs of our generation. As Thomas Jefferson put it, the earth belongs in usufruct to the living.

The framers indeed created a democracy, but one, like ancient Athens, that excluded the unpropertied, women, and slaves from the franchise. Therefore, constitutional rights could be entrusted to the state courts for the first century of our nation, because the rights of these disenfranchised, powerless groups had no protection within the Constitution. Chief Justice Roger Brooks Taney spoke for much of American jurisprudence when he maintained that "the black man has no rights that the white man is bound to respect."[1] Our national division into "We the people" and "We the *other* people" was evidenced in constitutional clauses restricting the franchise to male citizens and stating that slaves should count as three-fifths of a person. As a result, for most of our history, the Constitution and many other statutes specifically denied the full humanity of all blacks and women.

In order to clarify the issues at stake, perhaps we might look at them from the vantage point of a black person residing in a southern state around 1900, a mere decade before Learned Hand first joined the federal bench. From that perspective, would we view those times as do those individuals who argue that we should return to "the good old days" by reducing federal court involvement in human rights and punting this jurisdiction back to the state courts? If you did share that black person's perspective in 1900, you would be mindful of a recent Supreme Court case that affected practically every aspect of your daily life—for the worse.

In 1896, the Supreme Court announced in *Plessy v. Ferguson* that "separate but equal" was permissible under the Constitution of the United States.[2] When the case was argued, counsel for the plaintiff attempted to persuade the Supreme Court with a parade of horribles. He argued that "the same argument that will justify the state legislature in requiring

railways to provide separate accommodations for the two races will also authorize them to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities . . . ."[3] Justice Brown responded in his opinion "every exercise of the police power must be reasonable . . . and not for the annoyance or oppression of a particular class."[4] The implicit message of his counterargument is that it is "reasonable" to treat people with black skin differently from the way you would treat anyone else in the country, but obviously not reasonable to so distinguish redheads or noncitizens.

The states acted upon that contradictory presumption and expanded state power in precluding blacks from full participation in the broader society. In 1904, for example, Kentucky passed a statute that said that educational institutions might not teach blacks and whites within 25 miles of each other. Berea College, a private religious academy which had tried to follow its Christian principles by admitting all qualified students regardless of their race, was fined because it had the temerity to believe that black students could be valid members of their educational community. The U.S. Supreme Court, with Justice Harlan writing a brilliant dissent and Justice Holmes in the majority, held that the Fourteenth Amendment had not been violated.[5]

Let us move three decades later, to 1938, when *Missouri ex rel. Gaines v. Canada* was being argued before the U.S. Supreme Court.[6] Gaines was a fascinating individual; he was black and was from Missouri, and he had the audacity to believe that, as a citizen of Missouri, he should be able to go to the only state-supported law school in his state. But, to his great surprise, the Missouri Supreme Court said, in a unanimous opinion, that Gaines was not denied equal protection because all a state need provide was substantially equal facilities. Since the University of Nebraska was only 463 miles away from Gaines's in-state university, and since Iowa, Illinois, and Kansas also admitted blacks to their law schools, the Missouri

Supreme Court held that Missouri had no obligation to allow him to enter its law school. The U.S. Supreme Court reversed.

Was Missouri, in 1938, unique? As Charles Hamilton Houston's brief explains (in a footnote all the more powerful for its understatement), Missouri was no different from Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia—the states where 80% of the black people in the United States lived, and where they could not be admitted into the public graduate and professional schools. During Houston's examination of S.W. Canada, who was a registrar, Houston asked him: "If you are white from any state in the union, can you go to the University of Missouri?" and Canada replied, "Yes, sir." "If you are of Chinese ancestry, can you go to the University of Missouri?" "Yes, sir." "If you are of Japanese ancestry, can you go to the University of Missouri?" "Yes, sir." "If you are a Hindu Indian, can you go to the University of Missouri?" "Yes, sir." "If you are a black citizen, from the state of Missouri, having paid all of your taxes, can you go?" "No."

But perhaps *Gaines*—50 years ago—is distant history. Let's look at post–World War II cases like *Sweatt v. Painter*.[7] *Sweatt v. Painter* was argued before the U.S. Supreme Court in 1949. A black veteran, who had been willing to give his life for his country, wanted to go to the University of Texas School of Law. The University of Texas, instead of giving him the opportunity it gave every white student, built a whole law school for Sweatt to enter.

If you look at the whole corridor of history in terms of the state cases which came down within the last 50 years, with only one exception in any of the critical cases of human rights did the state courts ever protect human rights as the federal courts eventually came to do.

The one exception to all of these cases is a judgment rendered by a great chancellor of the Delaware Chancery Court

by the name of Collins Seitz. Seitz was the only state judge who had the fortitude to say that if blacks did not have access to a university in their own state of the quality of the University of Delaware, he would not require them to endure a generation of inferior education at a small school like Delaware State College, where they didn't have even 10,000 books in their library, until a better school was built. Seitz decided that the University of Delaware itself would have to accept these students.[8]

The human rights of blacks, and also of women, have been breached, ignored, and violated far more frequently by state courts than by federal courts, as imperfect as even the federal courts have been on these critical issues. It would be the greatest error to support a system which would take away from the federal courts their important human rights agenda and, I submit, their human rights obligations.

The quest for meaningful improvement in the way we settle disputes is a priority of the first order. But our goal cannot be reform that seeks merely to ease the courts' caseload, oblivious to our past and to the dangers of the future. For what does it profit us if, in making things easier for ourselves as federal judges, we make things more difficult for others? What does it profit us if, in shifting our burdens to other agencies and institutions, we make impossible the burdens on those who must deal with those agencies and institutions? What does it profit us if, in putting our own judicial houses in order, we have no room in them for those who have relied, and must continue to rely, on the hospitality of the federal courts for the vindication of their rights? What does it profit us if, by using a judicial and administrative scalpel, we cut our workloads down to more manageable levels and leave the people without any forum where they can secure true justice?

I do not contend that this will happen; certainly, it need not. But we must be aware of the temptation to proceed as though the judicial process involves only parties and not people. If judicial reform benefits only judges, then it isn't worth

pursuing. If it holds out progress only for the legal profession, then it isn't worth pursuing. It is worth pursuing only if it helps to redeem the promise of America. It is worth pursuing only if it helps to secure those constitutional and statutory rights which, because they should be enjoyed by all of our citizens, have made our democracy, despite its faults and failures, a significant model for the world.

Notes

1. Dred Scott v. Sandford, 19 How. 393, 407 (1857).
2. 163 U.S. 537 (1896).
3. *Id.* at 549.
4. *Id.* at 550.
5. Berea College v. Kentucky, 211 U.S. 45 (1908).
6. Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).
7. 339 U.S. 629 (1950). *See also* McLaurin v. Oklahoma Regents for Higher Educ., 339 U.S. 637 (1950).
8. Parker v. University of Delaware, 75 A.2d 225 (1950); *see also* Gebhart v. Belton, 87 A.2d 862 (1952) (elementary and high school education may not be segregated).

Discretionary Access to the Federal Courts

Jon O. Newman

How one approaches the possibility of doing something about the allocation of federal jurisdiction starts from how one perceives the nature of the problem. If we can now manage, and, in the foreseeable future, continue to manage, the volume of our business, then there is little need for thinking hard about significant rearrangements. I don't share that optimism.

Since 1960 the number of appeals filed per judge has more than tripled. Granted that there are a few more easy cases, or frivolous cases, but basically the increase means either that those judges in 1960 had a lot of free time (which I doubt) or that, on the average, we're giving perhaps a fourth as much attention to each appeal as they did.

I don't suggest it's quite as stark as that. But when caseload increases consistently at that rate, there is reason for concern. Civil filings in 1980 in the district courts were just shy of 170,000; in 1988, they were 240,000. There cannot be unabated growth of volume in the district courts and tripling of appeals per judge without adverse consequences. And the trend suggests it will get worse.

What are some of the consequences? There is at least a risk that the quality of judicial appointments will suffer. We've seen this phenomenon in the states: Once the number of judges reaches a critical level, it is easier to add to the bench a person who would not have been approved at an earlier time when the appointment process was more visible. It's one thing to name somebody to an appellate bench of 15, but when the circuit becomes 50 or 60 or 70, it becomes difficult

to advance a strong argument that a 70-member court could not tolerate one or two people of questionable merit.

What about the decision-making process itself? Professor Redish is comforted that, as he reads the law reporters, he notices no significant diminution in quality. But I am concerned that increased volume will degrade the decision-making process itself; there will be less time for deliberation and less time to consider the content of panel opinions. We do not now have the time to give serious and sustained consideration to the substance of the text that comes across our desks from the other members of the panel. The problem is a serious one, and we must deal with the growth of our caseload.

The proposal that I offer is to make far greater use of the state court system than we now do. I realize that the state courts already see themselves as overwhelmed, but the numbers are these: If we reduced the caseload of the federal courts by transferring 30% of our cases to the state courts, we would be increasing the caseload of the state courts by 1%. I do not think the nature of the state court litigating process will be altered by a 1% increase. I do believe the nature of the federal court litigating process will be saved by steps that can achieve a 30% reduction in caseload.

How would it be done? I quite agree with Judge Higginbotham that you do not consign to the state court system those categories of cases most in need of sensitive handling by the federal court system—those cases governed by the Fourteenth Amendment, the realization of which we've only lately begun to enjoy. But it is possible to identify classes of cases that could lie within the jurisdiction of the state courts—where they already lie, incidentally (as Professor Redish reminds us, *Testa v. Katt* [1] is still good law). State courts are obliged to exercise federal-question jurisdiction; the categories of cases in which federal jurisdiction is exclusive are few.

For example, prison-condition claims could well be heard in the state courts. A case in which a prisoner claims that he was put in solitary confinement because of race should per-

haps be viewed as an equal protection matter, appropriate for the federal courts. But when a prisoner complains that prison officials lost his hobby kit or that doctors came and saw him only three times and not the six he demanded, it is not vital to have the case heard in a federal court, certainly not by the hundreds and thousands.

Similarly, with respect to federal torts, is it vital to the federal fisc that the majesty of the federal courts entertain the claim every time a postal truck injures somebody? I think not. Diversity, which has been discussed repeatedly, remains an obvious choice for caseload transfer. Indeed, one of the ironies of our country is that our federal system will hear a $10,000 case, while the Texas courts hear the $10 billion case involving Texaco and Pennzoil.

Though there are many categories of cases that could be heard in the state courts, we need not close the federal court's door to all the cases within such categories. We could provide discretionary access to the federal courts when a particular case warrants a federal forum. Imagine, for example, a petition directly to a federal court of appeals in a federal-question case from a prisoner who would normally be obliged to go to the state court, or from the victim of a postal truck accident, asking to be heard in the federal court because this case was a particularly significant one. The petition would be granted or denied by one judge, a decision unreviewable by the Supreme Court (because it would be the first decision in the case, not the last). The person files a petition and it's up or down, yes or no, no opinions. If he loses on his petition, his case goes to the state court; if he wins on his petition, he has entrée to the federal courts.

After a state trial of the federal claim, he could still have discretionary access to the federal courts for a federal appeal. There could well be a taking of the appeal on an issue-jurisdiction basis to the court of appeals, which could have the discretion to exercise either whole-case jurisdiction or issue jurisdiction as it saw fit. Thus, there would be a route into the

federal trial court as a discretionary matter, and there would be a route into the federal appellate court as a discretionary matter, but under such a system, the federal courts would take cases within designated categories by the scores and perhaps hundreds, but not by the thousands and tens of thousands and indeed hundreds of thousands.

Such changes would preserve the nature of the federal judiciary as it now exists. If our system goes from its present 800 judges to 1,000, 2,000, 3,000—numbers that I suggest are quite realistic—it will change radically. It is changing already. Professor Redish calls our attention to end runs around the exercise of federal jurisdiction, in the form of abstention. Are we abstaining in the cases least deserving of federal court consideration? I suggest we are not. Many of the cases in which we are obliged to abstain are the ones where a federal court decision might be significant, where a federal court decision might vindicate the values Leon Higginbotham so eloquently invokes. Abstention needs to be a more discretionary matter, so that district courts might abstain but need not. Similarly with the well-pleaded complaint rule: Federal-question jurisdiction should be available to entertain a federal defense, but also on a discretionary basis.

Indeed, the answer to many diversity matters may be to make jurisdiction discretionary rather than mandatory. Federal district judges understand that there are some serious, important commercial concerns that militate in favor of providing federal forums for certain diversity cases. That standard may be preferable to one that permits a federal forum simply because the plaintiff's lawyer has succeeded in framing a complaint that surmounts the current dollar threshold. District judges and courts of appeals judges can be counted upon to use discretion wisely in deciding which categories of cases and which cases within those categories ought to be in the federal court in the first instance and which ought to come into the federal court at the appellate level after a case has been tried in the state trial court.

State courts are the courts of plenary jurisdiction; they have mandatory jurisdiction, and they're now receiving 7 million civil cases a year. Unless the federal courts are given discretion to run a flexible system, one that looks primarily to the state courts to handle the run of the mill cases, we will not have the type of federal judicial system that we want to have in 50 years.

Without any significant reduction or alterations in the mandatory nature of our jurisdiction, appellate judges in 50 years will be a more harassed group than even we are; it will be a group that administers a judicial bureaucracy where there are not merely 2 or 3 staff counsel per circuit, but 10, 20, 30, or 40; the appeals court will look much more like an administrative agency than it does even today, and it will be as bogged down as administrative agencies are.

That is the fate that awaits the federal judiciary unless the judges and the Congress think hard about ways of limiting—not eliminating, but limiting—appellate jurisdiction, subjecting it to informed discretion at both the appellate and district court levels. We must be able to entertain the claims we honestly believe should be entertained—we need not entertain the others—so that we can maintain a federal judiciary of the sort we want to leave for those who follow us.

Notes

1. Testa v. Katt, 330 U.S. 386 (1947).

Chapter III

U.S. Courts of Appeals and U.S. District Courts: Relationships in the Future

Paul D. Carrington

Appellate judges may have more in common with Napoleon than they suppose. Napoleon's army in Russia suffered disabling losses at Borodino. Describing the battle, Leo Tolstoy tells us that

> it was not Napoleon who directed the course of the battle, for none of his orders was executed and during the battle he did not know what was going on before him. . . . [The battle] occurred independently of him, in accord with the will of hundreds of thousands of people who took part in the common action. It *only seemed* to Napoleon that it all took place by his will.[1]

Most appellate judges surely observe on occasion that, amidst the din and smoke of the courtrooms of the United States, there are events and relations of which they cannot know. They also know that in those distant scenes of struggle, many of their "orders" are not "executed," for they are lost, garbled, misunderstood, or sometimes even ignored.

Viewed from the trenches of district judges and litigators, appellate courts must seem increasingly remote and incomprehensible. In court administration as in other enterprises, size strains communication, causing decline of effectiveness. Signs of such strain are apparent in the courtrooms and law offices of the United States. Four specific failings make the utterances of appellate judges less effective and the outcomes of federal civil appeals less predictable. These failings are structural, not personal.

What Has Lowered Predictability of Appellate Decisions?

One reason district judges and lawyers encounter difficulty in executing appellate instructions is that the identity of the appellate judiciary is largely unknown. Realists all, lawyers and district judges perceive that the meaning of the directions they receive depends in part on who issues them. They know that words do not make decisions. Utterances are contextual and derive from the experience of those who make them. They are, in Holmes's metaphor, but "the skin of a living

thought."[2] Karl Llewelyn, in his 1960 encomium to American judge-made law, assured us that our law is predictable on account of the process by which it is made. In his list of "steadying factors," he emphasized what he described as the "known bench."[3] Words gain meaning from a knowledge of their users. Among family members, a few words can transmit much meaning. Among strangers, many words may transmit little. The perpetual transition of appellate panels makes appellate judges strangers to those they address. With each additional judgeship, a court of appeals is less a known source of guidance and more a chance at a gaming table. In this respect, court of appeals panels gain resemblance to juries.

Second, to the extent that district judges and lawyers can know who the court of appeals is, they are also more aware of keen differences among appellate judges. We have achieved greater diversity in the social and political composition of the federal judiciary. That achievement magnifies the differences between judges in the values and the experience they bring to the task of applying the law, increasing the apparent likelihood that different outcomes may result according to who sits on a given panel. Furthermore, lawyers' and district judges' consciousness of such differences among judges has been elevated in recent decades as the appointment process has celebrated ideological considerations.

A third factor may be the diminishing knowledge of appellate judges about individuals who serve in the district courts. Not only are circuit judges having less frequent contact with each individual district judge in their circuit, but also each district judge is now surrounded with a growing number of itinerant supernumeraries, whose participation increases unevenness of performance of the district courts and thus contributes to unevenness in the process of review. District courts know that appellate judges do not know them. This growing sense of anonymity on the part of district judges is likely to make them less subject to the discipline of appellate constraint.

Fourth, predicting appellate outcomes is impeded by necessary abbreviation of appellate procedure. Oral argument, published opinions, and unhurried conferences of the judges were each also identified as "steadying factors" by Karl Llewelyn. No doubt he was right that these procedural amenities make appellate outcomes more predictable. Oral argument and opinions disclose the thinking and values of the individual judges whose reactions must be predicted; unhurried conferences tend to cabin idiosyncratic panel decisions.

These four causes unite to impair materially what Llewelyn boastfully described as our law's "reckonability." In more contemporary terms, the "indeterminacy" of our law is growing. As Daniel Meador recently informed the members of the Ninth Circuit,[4] a reasonable lawyer looking at the court could convince himself that, with a lucky draw in the panel selection, he had at least a chance to win almost any appeal. Or, as it was put in a biting quip muttered in response to Meador: "Las Vegas is the capital of the Ninth Circuit." That quip I repeat not as a criticism of the Ninth Circuit, but as an unrehearsed comment on federal appellate practice.

What Is the Result of Less Predictable Appellate Decisions?

There are important and related consequences of indeterminacy in our law. It affects the conduct of lawyers in both litigation and settlement; and it reallocates power within the judiciary, making appellate courts less effective and conferring increased discretion on individual district judges.

With respect to lawyers, increasing indeterminacy of federal law weakens the constraints of professionalism that operate on lawyers as they draft and file pleadings, motions, and discovery requests to be filed in federal courts. The willingness of lawyers to make contentions resting on legal premises of doubtful merit is increased. Lawyers are more likely to "press the inside of the envelope" of legal entitlements to the burst-

ing point, thus imposing unjust costs on adversaries as well as courts and themselves.

It was concern for the general weakening of professional self-constraint that animated the 1983 amendments to the Federal Rules of Civil Procedure designed to reinforce the professional duty of lawyers to refrain from filing pleadings or motions which the appellate court will later find to be groundless. A cause for distress about these amendments is the lack of confidence of lawyers in their own judgment as to what is truly groundless in the minds of an unidentified and diverse panel of circuit judges. This anxiety is especially great in fields such as civil rights law, where the range of discrepancy among circuit judges is greatest.

Lawyers afflicted with greater difficulty in predicting appellate outcomes are likely also to experience greater difficulty in settling cases. The durability or nonsettlement of civil disputes turning on nonfactual issues appears to have increased significantly over the last 30 years. This partly explains the much greater increase in appeals than in trials. If parties were settling nonfactual disputes in 1988 at the same rates as they were in 1958, appellate caseloads would be much less onerous than they are (see Table 1). To the extent that indeterminacy impedes settlement and increases caseload, there is troubling irony in amended Rule 11: We may be punishing lawyers for not predicting legal outcomes as a response to a situation resulting from the rising difficulty of making such predictions.

Another consequence of the increasing difficulty of forecasting appellate outcomes is the ineffable effect on power relations within the federal judiciary. I do not suggest that many district judges today are loose cannons such as most of us used to know a few decades ago and who seem to have been common among federal judges a century ago. But today's district judges in their daily work are less constrained by an appellate presence than were district judges of not long ago.

This effect is partly a direct result of the indeterminacy of the federal law, but also the result of other causes. Thus every

district judge who has observed appellate procedure knows that courts of appeals do not have the time or attention to give to most particulars, such as narrow applications of law to fact, or findings of fact in seemingly humdrum cases, or exercise of discretion under that wonderfully plastic charter, the Federal Rules of Civil Procedure. This observation is confirmed in the declining rate of reversal in civil cases, a phenomenon that few district judges can have failed to notice.

District judges would be more than human if they did not feel a measure of license greater than that felt by predecessors in this century, and more akin to that felt in the latter 19th century. Given this increased license, it seems almost certain that district judges, whether consciously or not, are exercising their prerogatives more according to their own lights and less according to those of the appeals courts than would have been true for judges holding the same offices three decades, or one decade, ago. The relationship between what appellate judges say and what district judges do is less certain. Appellate opinion writing is thus more academic than it was. I do not say that the *Federal Reporter* has yet acquired the diminished significance of a scholarly journal. But appeals judges look each year not only more like jurors, but also more like professors. Like Professor Redish, I like what is written in the *Federal Reporter* as much as ever, but I increasingly doubt its accuracy as a description of events in district courts and law office conference rooms.

There are secondary effects of the weakening of appellate control over district courts, but they are not easy to assess. Perhaps in some minds it is desirable for trial judges to enjoy more freedom, for it allows them more room to respond to situations, to do justice as they see it. Maybe district judges were too constricted 30 years ago. Whether our system needs more such discretion is a question that some may ask. There are, however, six observations that I would like to make about this enlargement of district court autonomy and discretion, each questioning the wisdom of the drift.

First, the increasing autonomy of district courts comes at a time of increasing federal judicial power and responsibility. No one doubts and few protest that the federal judiciary has come in recent decades to play a larger role in our polity. Indeed, the United States now confers greater responsibility on its judges than any government perhaps in the history of organized society. I speak especially of our extraordinary engine of civil law enforcement, driven by the pistons of expansive pretrial discovery, and fueled by the energies and talents of a creative and highly compensated bar. Our courts are much more effective even than many of our own administrative agencies at exposing and deterring misconduct by persons or organizations that are subject to civil liability. Where other legal systems use their courts for dispute resolution, we perhaps alone have developed civil justice in the federal courts as an instrument of social, economic, and political regulation and reform. Or, as Kenneth Scott has put it, federal courts are now engaged not merely in dispute resolution, but in behavior modification.[5] In no other country would a business or government officer be so likely to be advised that illegal conduct is very likely to result in serious adverse legal consequences. In no other country is a parliament so likely to call on the courts to bear the responsibility for correcting undesirable conduct.

In the cockpit of this remarkable system is the U.S. district judge. Some observers have described recent decades as the Triumph of Equity, and indeed district judges have come increasingly to exercise powers inherited from the ancient chancellors, and thus from the English royalty itself. The district judge is the modern chancellor exercising the federal judicial power and responsibility with sweeping effects on individuals, organizations, and communities. Solitary U.S. district judges have reformed major private and public institutions, such as public school or prison systems, or even legislatures themselves.

It seems strange that as we enhance the sweeping powers of the federal courts we vest responsibility for the exercise of those powers in increasingly autonomous individuals. Indeed, declining coherence and rising idiosyncrasy are antithetical to the aim of behavior modification. Parenthood, even childhood, teaches that conflicting signals defeat training.

Second, not only has the power of the district court over the affairs of citizens been greatly enhanced, but so has the intended role of the district judge within the court. The 1938 rules are cast in language that speaks often of discretion. In this respect, those rules were written for a system in which the intermediate appellate courts were at leisure to oversee the exercise of that discretion and could be counted upon to do so, thus to share in the responsibility for the quality of the proceedings.

More recently, particularly since the 1983 revision of the rules, we have come to accept the role of the district judge as a manager of litigation—not merely as a passive officer forming the third member of the classical triad, but as an active promoter of just resolution, even in settlement. Also, as noted, the district judge is now supported in that role by growing numbers of magistrates, special masters, and court-annexed "arbitrators." The administrative–managerial style of judging, whether sound or not, surely enlarges the district judgeship and increases the need for appellate oversight.

A third irony is that increased autonomy of district courts is proximate in time to the admirable increase in the heterogeneity of the federal judiciary. It would seem that increased diversity of judges should occasion stronger efforts to harmonize and integrate them to achieve synthesis of their diverse values, not greater autonomy and thus greater diversity of result in individual cases.

With respect to factual issues, increased autonomy of the district court magnifies the effect of the reduction in the size of civil juries and the increase in the diversity of jurors, two events that coincided almost 20 years ago and that, together,

reduce the predictability of jury verdicts. Not only do jury verdicts swing over a broader range of possible verdicts, but the powers of district courts to guide and constrain juries are exercised less predictably. These events have likely contributed to the increase in the number of trials, if indeed indeterminacy impedes settlement.

Fourth, it is also ironic that appellate participation is diminishing while trials are becoming more complex and longer. The precipitate increase in large polycentric disputes to be decided on the basis of ever more advanced expertise would seem to call for more appellate oversight. Yet it is accompanied by less.

Fifth, while district judges may be less like other folks than I suppose, it is my impression that they need and even want the appellate courts to share more in their many moments of travail. None, I am sure, wish to be reversed more frequently. But only an uncaring or unknowing judge would wish to perform so awesome a duty without others near at hand to give approval, advice, occasional correction, and moral support. Appellate judges are their "support group."

Under the best of circumstances, their job is very difficult. It must be very trying to exercise so much responsibility in so great a solitude. Not only are our district judges increasingly undercompensated by their penurious employer, but they must suffer increasing neglect from those who are their support. It is a wonder that their professionalism remains as high as it does.

A manifestation of the increasing anxiety of the district courts has been the proliferation of standing orders and local rules of court in the last 20 years. These orders and rules may indicate the felt need of district courts for more structure, collegiality, and sharing of responsibility in their work.

Some of these orders and rules seem to be a product of local bar group efforts to reduce the diversity of practice between individual judges sitting on the same district bench, and some seem to be generated by the district judges themselves.

However initiated, local rules signal the rebalkanization of the federal judiciary and a need for greater, not less, oversight.[6]

Sixth, it is well to remember that the excessive autonomy of district courts is not unprecedented. It was the major problem of judicial administration in the federal courts in the last half of the 19th century. The Evarts Act of 1891,[7] which called circuit appellate courts into being, was entirely a response to the problem of balkanization of the federal judiciary. The overloaded Supreme Court justices had become unable to provide support, guidance, and supervision for the federal trial judges sufficient to assure the conformity of their judgments to the apparent mandates of the law. Absence of control aroused widespread mistrust of the federal judiciary. The federal judge was an 800-pound gorilla who sat where he liked. Decisions by district or circuit judges sitting alone when the law contemplated three-judge trial courts were widely decried. Congressman David Culberson, in calling for the creation of appeals courts, denounced the "kingly power" of the federal trial judges.[8]

Over the course of the last century, not least on account of the presence of the U.S. Courts of Appeals, the American people have come to trust the federal judiciary. This trust is not complete, and it may be ephemeral, but it is presently wide and deep. For that reason, federal appellate courts may be justified in some smugness in a job well done. But we ought not forget the problem which courts of appeals were summoned to solve, for that problem of public mistrust of the federal courts can return. Once back, we will not soon chase the demon away.

What Should Be Done?

Federal appellate courts have, to be sure, taken some notice of district court autonomy, sometimes without acknowledging that they have done so. For example, enlarged use of the writ of mandamus authorized by Section 1651 of the Judicial Code (a provision traceable to the 1789 Judiciary Act)

and the development of the collateral order doctrine both occurred three to four decades ago partly as a response to district court prerogatives developing around the 1938 rules. These essentially fungible doctrines, both hemmed with disclaimers, each reflect the willingness of the courts of appeals to share some of the larger responsibilities faced by district courts in the conduct or proceedings prior to trial and to control the occasional excesses of district judges. The combined effect of these two doctrines and the statutory provisions authorizing interlocutory appeals from certain kinds of orders is to assure, even if it is not said, that there are no major procedural steps taken by district courts in the disposition of civil cases that are wholly immune from appellate review.

Interlocutory review must, of course, be used cautiously, lest appellate proceedings become too intrusive and costly. It can be made less costly and more effective with greater clarity and less fetish by means of reform in the controlling procedural law. Such reform could be advanced by court rule making, as recommended by the American Bar Association House of Delegates.[9] Even with such reform, however, the willingness and ability of the courts of appeals to share responsibility through wise use of interlocutory review is not a comprehensive response to the problem of trial court autonomy.

Even the development of limited interlocutory review and a companion development of the law regarding the scope of review of district court decisions have in recent years been made to yield to the pressure of caseload. It appears that one reaction to the caseload crisis, if it is a crisis, is to try to discourage appeals by restricting the appellate role. If that is a strategy, it may be counterproductive; widening the compass of unrestrained district court action may create a situation in which settlement is less likely and the rate of appeal continues to rise.

We all know and appreciate that appeals judges strive hard to avoid indeterminacy and to guide district courts. Enormous energy and talent are devoted to the cause, in thousands of

opinions published each year, ever longer, with ever more footnotes, filling ever more shelf feet per year, aiming to articulate with ever greater precision exactly what the federal law is. Just as overworked and almost as underpaid as the district judges, we might well ask, what more can be done?

I have no answer except to say that longer opinions don't help. Even better ones don't help. A modest suggestion is that more appellate energy might be invested in thoughtful directions to guide remands and less on dicta to guide the disposition of future cases. A second is to replace some academically oriented staff with persons willing and able to read transcripts and search for errors of judgment and discretion. A third is that appeals judges might more frequently address the problem of district judge morale, commending their work in opinions when justified and advocating a return in the judicial pay scale to a system that more nearly recognizes the great personal responsibility of the district judge.

These are mere palliatives. What is needed is substantial structural change that will enable appeals courts to share more effectively in the power being exercised in the district courts and that will facilitate the recovery of some of that quality of "reckonability" extolled by Llewelyn.

Appendix A is "A Roscoe Pound Vision," an approach to relations between appellate and trial courts derived almost wholly from the writings of Roscoe Pound. Pound spoke and wrote from experience as an appellate court judge.[10] This sketchy "Pound Vision" is offered only to suggest that there are different structures, perhaps many of them, that would assure greater control and determinacy than the framework to which we are accustomed.

There are three major points that Pound would have emphasized in presenting his ideas. The first is that the appellate process, if it does nothing else, must assure all concerned that responsibility for judicial decisions is not vested in a single judge but is ultimately exercised by a known group sharing its authority deliberatively. To give this assurance, Pound pro-

posed to consolidate appeal with the motion for new trial in a single, final stage of litigation, uniting trial and appeals courts. Had he been able to consider the implications of videotaped testimony, he would have proposed to bring the appellate panel into proceedings still earlier. The tradition of trial of disputed facts prior to resolution of disputed legal issues was in part the product of their relative costs, for the appeal that resolved the legal questions necessitated travel that was in early times very burdensome. It is now the trial and pretrial preparation that is expensive, so Pound might have suggested that the legal issues be gathered and decided conclusively as early in the process as can be, even prior to trial.

Second, even in today's hurried circumstance, Pound would have insisted on oral argument in every civil case, whether desired by counsel or not. For him, oral argument was not merely a means of providing visibility to the judges' thinking, but also a means of accountability for lawyers. Lawyers, he thought, should be publicly cross-examined about the legal and factual basis of their contentions. He would have been especially keen to insist on this at a time when lawyer responsibility in filtering groundless claims, defenses, and appeals is suspect. On the other hand, Pound would have excused judges who reveal their study of adversary contentions in oral argument from writing opinions in any but extraordinary cases. Usually, he would ask only a few explanatory words at the conclusion of oral argument, perhaps supplemented by a per curiam unpublished memorandum of authorities, and a rescript if the decision is for reversal.

Third, Dean Pound would have urged that issues of statutory interpretation that must be resolved at a level below the Supreme Court be decided by special panels of the same unified court. He would have assigned every U.S. circuit judge a role in the performance of that task, giving to the judges themselves the tasks of organizing appropriate panels by some noninvidious method and matching recurring cases with those panels in order to settle them quickly.

Pound's vision would require a change in the professional paradigm of a circuit judge. Pound's circuit judge would be a national officer, not a mere regional one. The national law-making duty of circuit judges would be only part of their work, analogous in important respects to the committee responsibilities of senators and congressmen. The bulk of each judge's work would be enforcement of law made by others. While Pound's circuit judges would write many fewer opinions, those they wrote would have significance far exceeding that of the material appearing in the *Federal Reporter* today. Indeed, one might say that an opinion written for Pound's unified court would be at least 13 times as important as an opinion written by a circuit court of appeals.

Because Pound's court could speak with a single voice on these issues of statutory interpretation, its existence would materially lighten the burden on the Supreme Court. Large fields of federal litigation, such as taxation, for example, could, if the Court chose, be left wholly to the unified court. Just as patent cases have largely disappeared from the Court's docket with the advent of the Federal Circuit, so might cases arising under other laws deemed by the court less needful of its attention. Moreover, such a unified court having national jurisdiction could be given power to review decisions of the highest state courts in cases decided on the basis of federal law. This, in turn, would facilitate the relocation of judicial business into state courts, to the extent that this may be desirable.

Pound's vision would leave no place for the law of the circuit. Although unimaginable to the minds of the 1891 draftsmen, and even to the minds of those who wrote the Judiciary Act of 1925,[11] the law of the circuit is central to what many circuit judges think that they were commissioned to do. Pound would have forgone the alleged advantages of so-called "percolation" of questions of statutory interpretation through multiple courts of appeals. Whatever the merits of percolation of constitutional issues such as might be resolved by the

Supreme Court over a generation, Pound would have regarded percolation of ephemeral issues of statutory interpretation as a cruel waste for litigants and lawyers and even for judges. Whether it is the Internal Revenue Code or a welfare law that need be interpreted, it is in almost every instance best for disputants and for the system to have the issue settled at once on a national scale insofar as the federal courts are concerned, leaving it to Congress in due course to correct mistaken interpretations.

The demise of the law of the circuit would likely evoke little protest. Little attention is given to the law of the circuit either by scholarly journals or by writers of texts for lawyers. At a recent circuit conference, I asked several lawyers if they might be interested in buying a multi-volume treatise I proposed to write on the law of their circuit. The suggestion was greeted with a snickering observation that such a treatise would be "mostly pocket parts." None questioned the fidelity of their judges to circuit doctrine, but they are mindful that the frequent intrusion of Congress, the Supreme Court, later panel decisions, and en banc opinions makes the law of the circuit evanescent. I was not speaking to district judges, who may be less charitable; a recent survey in one circuit found that a majority of the district judges did not generally expect that one panel of their circuit would adhere to the decisions of another.[12] It is in any case axiomatic that utterances of an en banc panel are faltering guides to the reactions of randomly selected three-judge panels to significantly different facts arising in later cases. While the law of the circuit serves usefully to prevent highly idiosyncratic panel decisions, it is seldom the basis for settlement negotiations and almost never the basis for planning legal transactions.

Making the law of the circuit depends on en banc procedures. The costs of en banc procedures are substantial. That cost is paid in the time and money of the disputants. Because involvement of the full court is unpredictable, it may create just another element of uncertainty about outcomes. Espe-

cially in a large circuit, en banc procedure seats too many judges on a bench, or alternatively, is not really a proceeding of the full court. Even when not actually employed, it consumes time and emotional energy invested by circuit judges in reading one another's slip opinions to identify cases suitable for en banc decision. For all these reasons, Pound would have regarded the costs of the law of the circuit as greater than its benefits as a source of predictability.

Pound would, however, have been troubled by the consideration that the law of the circuit gratifies the territorial instincts of circuit judges, instincts that reflect the same impulse to autonomy manifested by district judges and most others in authority. The concept of the law of the circuit has become in the last four decades ingrained in our legal culture.

In place of this gratifying role as a junior supreme court making wholesale policy decisions for a region, Pound's vision would invest appeals courts more heavily in the often humdrum work of enforcing at retail the rights of individual litigants in particular proceedings. For judges accustomed to working at higher levels of abstraction, this might seem a demotion. The adverse effects of such a change in the paradigm of mature professionals should not be underestimated. Judges, like others, are right to object when outsiders propose that they alter their work and perhaps their lifestyles in order to pursue someone else's vision, even if the vision is that of Dean Pound. As one waggish lawyer quite reasonably asked during a recent discussion of this subject: "Now that our judges have seen the city of philosophy, how can we ask them to go back to the old farm of dispute resolution?" It is a worthy question.

The answer must be provided by persons attentive to the will of the circuit judges. Congress has primary responsibility, but it is not likely to act without encouragement and support from the federal appellate judiciary. Unless the will is found among the judiciary, indeterminacy and autonomy will continue to increase, and public trust in the federal judiciary will subside.

It is also true that no answer will be found that leaves the appellate judiciary as it is. Any solution having any chance of constructive effect will alter the work and probably even the lifestyles of judges. If it is a condition of acceptance that the solution permit the federal appellate judiciary to continue as is, then we are doomed to a decline in the predictability and acceptability of federal district court judgments and decrees.

Just possibly such change can be effected. Contemporary science, we are told, is undergoing a comparable change in paradigm, or redefinition of what is excellent. Increasingly fashionable in science is preoccupation with disorder in data, especially older data bearing on functions and relations long deemed orderly. Data ignored or discounted as irregularities of measurement are now being reexamined to see if there are not smaller patterns previously unnoticed by scientists bent on testing larger hypotheses.

Illustratively, a founder of the science of "chaology," Edward Lorenz, is known, among other things, for his discovery of the Butterfly Effect, so named for the butterfly in Brazil who may by beating his wings set off a chain of causation resulting in a material shift in the weather across the hemisphere.[13] Lorenz teaches that long-range weather prophecy is impossible, that vast theoretical hypotheses intended for use in weather prediction are probably vain, and that truth, at least in his field, is more effectively pursued at a lower altitude of generalization, with humbler pretensions and expectations.

Until recently, the badge of sovereignty in the hierarchy of science has been work presenting transcendent abstraction. Such work is now less likely to be regarded as "cutting edge" stuff. Rising in science is an appreciation of work that rediscovers reality in the homely details of familiar natural occurrences. Having seen the city of philosophy, many scientists seem now content to return to the farms to plow the old furrows, maybe for a new species of corn that might produce a slightly higher yield.

Is a similar adjustment in the paradigm of a federal appellate judge timely? I suggest the possibility.

Table 1

U.S. Courts of Appeals and U.S. District Courts Nonsettlement of Civil Cases, 1958 and 1988

1958		1988
Civil Cases Commenced in U.S. District Court		
67,115		239,634
	(257% increase)	
Civil Trials Completed		
7,062		12,536
	(78% increase)	
Court of Appeals Civil Cases Terminated on the Merits		
2,831		19,178
	(577% increase)	
Nonsettlement Rate (Court of Appeals Terminated on the Merits as a Percentage of District Court Filings)		
4.2%		8%

A major decline in the rate of nonsettlement of pending federal civil litigation accounts for much of the increase in federal appellate caseload. If parties were settling pending civil litigation prior to submission to a court of appeals at the 1958 rate of 95.8%, the courts of appeals would have been asked to decide only 10,065 civil appeals in 1988 instead of 19,178.

Note: All data are from Annual Report of the Director of the Administrative Office of the U.S. Courts, 1958 (Tables B-1, C-1, C-8), 1988 (Tables B-1, C-2, C-7).

Notes

1. L. Tolstoy, War and Peace 876 (1942) (1864).

2. Towne v. Eisner, 245 U.S. 418, 425, 62 L. Ed. 372, 376, 38 S. Ct. 158 (1918).

3. K. Llewelyn, The Common Law Tradition: Deciding Appeals 34–35 (1960).

4. Address by Daniel Meador, Ninth Circuit Judicial Conference, Coeur d'Alene, Idaho (August 1988).

5. Scott, *Two Models of the Civil Process,* 27 Stan. L. Rev. 937 (1975).

6. Fed. R. Civ. P. 83 and Fed. R. Crim. P. 57 recognize just this problem.

7. Act of Mar. 3, 1891, 26 Stat. 826.

8. 21 Cong. Rec. H3404 (daily ed. Apr. 15, 1890).

9. Reports with Recommendations to the House of Delegates, American Bar Association Annual Meeting, Toronto, Canada (August 9–10, 1988), Recommendation of the Standing Committee on Federal Judicial Improvements, § 104A.

10. From 1901 to 1903, Pound served as one of nine Commissioners for the State Supreme Court of Nebraska, appointed to conduct hearings and perform other duties as the court directed. In that capacity, Pound wrote approximately 250 reported opinions (Nebraska Reports, vols. 61–69). During this time, he also taught law at the University of Nebraska and conducted a botanical survey of the state. A. Sutherland, The Law at Harvard: A History of Ideas and Men, 1817–1967, at 236–37 (1967).

11. Act of Feb. 13, 1925, 43 Stat. 936.

12. Sixty-eight percent of the district judges participating in the survey disagreed with the statement, "There is consistency between panels considering the same issue." Ninth Circuit Judicial Council, Survey of District Court Judges Regarding the U.S. Court of Appeals for the Ninth Circuit, conducted by the Office of the Circuit Executive at 4 (July 1987), Ninth Circuit Judicial Conference Reference Materials (1987).

13. E. Lorenz, Predictability: Does the Flap of a Butterfly's Wings in Brazil Set Off a Tornado in Texas? Address at the annual meeting of the American Association for the Advancement of Science, Washington, D.C. (Dec. 29, 1979). See also Lorenz, *Deterministic Nonperiodic Flow*, 20 Journal of the Atmospheric Sciences 130–41 (1963). Lorenz's work is described in J. Gleick, Chaos: Making a New Science 9–32 (1987).

Commentary on

U.S. Courts of Appeals and U.S. District Courts: Relationships in the Future

Certifying Questions to State Supreme Courts

William J. Holloway, Jr.

I recognize fully the strength of points made by Professor Carrington on the perception of distant, unpredictable appellate panels and on the impression of uncertainty in our decisions. Because of these serious criticisms, we must consider bold, specific new procedures that may help to deal with these problems. Nevertheless, I must express some serious reservations and some sharp disagreements about some of the suggestions that have been laid out by Professor Carrington, some even coming from the eminent Dean Pound.

First, I must disagree with the suggestion that we reorganize the courts of appeals into a new national court, with the appellate judges serving as part of a national cadre. This is a form of judicial *perestroika* unwise for the public, for the litigants, and very unhappy for us as judges. This general concept was considered in the early '70s at the time the Freund Commission was addressing the idea of a national court of appeals. There is, I think, a real case for our regional, identifiable courts of appeals, even if we are larger and less distinctive than we were some time ago. With all their limitations, these courts have a far greater familiarity with the policies and problems of the separate regions of our country. The separate courts are also in a better position to supervise the district courts than a national court would be. I would certainly feel inadequate in trying to deal with the problems of the district courts of the Second or Third Circuits.

Second, the case for using panels of specialists in various areas of federal law is equally unpersuasive to me. We gain a great deal by having John Gibbons not confine his talents to

civil rights, his predominant field of recognized ability, but write on the discretionary-function exception of the Federal Tort Claims Act and on the validity and invalidity of the Social Security Administration's decisions. In our court we feel we gain a great deal by having Judges James Logan and Steven Anderson, who are experts in tax law, writing also on criminal law and civil rights cases. We are enriched by their participation, which we would lose if we tried to create panels of specialists.

Similarly, I am unimpressed by the so-called "problem" of a lack of predictability in circuit court opinions. This "problem" warrants no legitimate protest. Why are the decisions unpredictable? Because after we've winnowed out the insubstantial cases, and we turn to those that require full briefing and full argument, we are dealing with tough cases.

During the Ames Competition finals in 1950 at Harvard, Justice Black commented that he didn't understand all the concern about divided opinions on the Supreme Court; those cases are tough, he explained, just like the one in the Ames Competition. Even on a moot court case, he extolled the vision of divided opinions. The lack of predictability is not a serious problem; it's the toughness of cases, not the unpredictability of the judges, that creates the divergences.

Turning to the subject of closer and more immediate supervision of the district courts: while more intervention from the courts of appeals may be desirable, I don't feel the district judges view us as unduly distracted or uncertain. I don't know that they desire a much closer relationship with the appellate courts. Judge Lee West tells us that they view the appeals judge as the general coming up from the rear echelon, arriving as the smoke of battle is clearing, and going about shooting the wounded.

Having been negative, let me turn to more positive or constructive observations.

The first one concerns the broader use of the procedure of certifying questions of state law to the highest courts of our

states. The first state statute authorizing such a procedure was passed in 1945 in Florida, but it lay dormant until 1960, when the Supreme Court, in *Clay v. Sun Insurance Company*, commended the Florida legislature on its rare insight in passing the law permitting its state supreme court to answer certified questions. In the *Clay* case, the Supreme Court vacated a Fifth Circuit judgment that had passed over a difficult state law question and had been grounded on a constitutional ruling. The case was vacated and sent back with a strong suggestion that the case in issue be certified to the Florida Supreme Court. By 1987, there were 24 states and the Commonwealth of Puerto Rico that had adopted the certification process.

I recommend certifying questions of state law both for the district courts, which can use it earliest and most effectively, and for the circuit courts. We have state supreme court rules and statutes in every one of the states in the Tenth Circuit that permit the procedure to be used, and we have an intelligence system on certification. Every time a district judge in Oklahoma certifies one of these difficult questions to the Oklahoma Supreme Court, we alert all of our appellate panels and all the district judges in Oklahoma so that they can hold cases pending a decision from the Oklahoma court. I believe the process is capable of broad application, beyond diversity cases, including cases involving the Federal Tort Claims Act, which specifically incorporates state law, and federal estate tax cases. The Tenth Circuit recently certified an important question of probate law that was controlling to the Supreme Court of Kansas. This procedure is one I suggest we use vigorously in coordination with our district courts.

Finally, the other device I propose is to permit the federal courts of appeals to have the authority in diversity cases to grant or deny appeal by certiorari. I realize this procedure violates the principle of the right to one appeal, but the statute could mitigate that concern with the provision that the petition for appeal be presented to a three-judge panel, with the vote of only one judge needed to require a panel to enter an

order granting appeal. The time gained by eliminating some cases through certiorari would then permit us to concentrate more on those important areas that have been so persuasively outlined by Judge Higginbotham.

Restoring the Authority of the District Court

Joseph F. Weis, Jr.

I have not consulted a national pollster, nor have I conducted any widespread survey among the district judges, but I have not yet detected that yearning for review that Paul Carrington has suggested in his discussion. I find myself rather more in agreement with the view expressed by Charles Allen Wright in an article he published some years ago, "The Doubtful Omniscience of Appellate Courts."[1] Professor Wright argued that the appellate courts had assumed too many of the functions previously performed by the trial courts, that appellate judges have been guilty in a sense of shooting themselves in the foot. Having taken on these tasks, now we find ourselves overloaded. Perhaps the time has come to send some of this work back to the trial courts.

For example, circuit judges spend a substantial amount of time reviewing in the first instance appeals from the administrative agencies, a situation which arose perhaps from the view that decisions of administrative agencies should be reviewed only by multi-judge bodies. I think time has proved that rationale is not sufficient reason to overburden the courts of appeals. Many, if not most, of the administrative appeals should be assigned to, and stop at, the district court, with review by the court of appeals only by leave.

Sentence appeals, too, could be handled by the district courts. The model of the bankruptcy court may prove useful here, with panels of three district judges, or of two district judges and one circuit judge, hearing sentence appeals after the courts of appeals have laid out guidelines on some of the legal issues that will be raised. These cases by and large will

turn on purely factual issues and needn't come to the courts of appeals.

Professor Carrington also refers to technology as a method to ameliorate the workload of the appellate courts. Not only are we already videotaping trials, we're preparing audiotapes and instantaneous transcripts, all of which will go a long way toward solving the problem that Judge Lay mentions, the delay between the trial and disposition on appeal. We should be able to solve the transcript-delay problem within a few years, but more is on the technological horizon. Not only will we have the videotape available for checking, it won't be very long before we have all the exhibits, all the transcripts, and all the evidence in the case entered into a data base. This data base will be kept in a district court, and during trial the introduction of exhibits will be effected by the transfer of an electronic image from the lawyer's data base to the district court's data base. The evidence will remain there until such time as the appellate judges, sitting in their chambers or sitting at home with a personal portable computer, call it up on the screen. Not only will the judges see the pleadings and the documents introduced into evidence on the screen, they will be able to see and hear portions of the trial and arguments before the trial courts. That is not too far down the road.

The great temptation at that time will be for the appellate court to succumb to fact-finding and second-guess the trial court. This temptation must be resisted; we must be mindful of the concept of finality. Most of the cases are decided properly in the district courts; the affirmance rate reflects that. If we insist on trying the cases twice, we will never reduce the workload of the appellate courts.

As another proposal for transferring work back to the district court, let me refer once again to the error-correction function. There are many cases where errors are brought to the attention of the appeals court which could have, and would have, been solved by the district court had they been

raised there. We should give some thought to limiting the ability of the litigant to take an appeal on a point without giving the district court a chance to correct its oversight or its clear mistake on post-trial motion.

I turn now to the suggestion made by Judge Campbell, proposing a two-tier appellate system of review within the court of appeals. Judge Breyer posed the problem of resolving difficult areas of substantive law, but errors can occur in any field regardless of the type of dispute. What we should keep in mind is that there are two separate functions of the appellate court, the error-correcting assignment and the law-giving function. They do not always deserve the same treatment.

Some of our problems are created by the fact that we now treat all appeals in the same way. Perhaps we need to be more discriminating in our procedures. We might, for example, work out a two-tier system, where error-correcting cases are handled with less extensive treatment, such as published opinions. We could then ensure that law-giving cases are decided with benefit of full briefing and argument and are concluded with published opinions. Initial screening of cases to determine their "track" could be done by panels of judges, not staff. Such a procedure, it seems to me, might ease some of the present burden of the appellate courts. Judge Campbell's idea is worthy of further exploration.

Notes

1. Wright, *The Doubtful Omniscience of Appellate Courts,* 41 Minn. L. Rev. 751 (1957).

Defining Standards of Review

William W Schwarzer

Professor Carrington has pointed out that the appellate process today is characterized by indeterminacy. While one cannot prove it empirically, it is the perception that makes it a reality.

Professor Carrington points to various causes inherent in the structure of the appellate courts, not the least of which is the growing number of appellate judges. I would add the instability, if not volatility, of the law, the decline in the force of stare decisis, and the increasing involvement of the courts in the multifarious problems of our conflict-ridden society.

But I would also look closer to home, in particular at standards of appellate review. These seem to me to be growing nebulous in their terms, expansive in their interpretation, and elastic in their application. As a consequence, litigants are encouraged to take appeals they would not otherwise take. The statistics confirm this conclusion: While in 1966, 1 out of 13 cases terminated in the district courts was appealed, in 1988, 1 out of only 9 terminated cases was appealed. It has been said that in the Ninth Circuit, a reasonable lawyer can convince himself or herself that with a lucky draw of the panel, he or she has a chance to win almost any case.

Indeterminacy has an impact on both functions of appellate courts: the law-declaring function and the error-correcting function. My remarks are limited to the error-correcting function.

If indeterminacy is to be brought under control, standards of review must become more clearly defined and certain in their application. But before that can be accomplished, one must come to grips with the underlying problem: the absence

of a generally understood and commonly shared working doctrine of error. What do we mean by error? Would appellate judges agree, for example, on the extent to which error includes (a) misapplication of a rule of law to facts, (b) misinterpretation of undisputed evidence, (c) failure to find the true facts, or (d) a decision that reaches an unjust result? A standard of review without a settled concept of error is an empty vessel, a signpost that points nowhere. Thus, high on the agenda for the next 100 years should be an effort to achieve a better understanding of what the error-correcting function is about.

With these observations in mind, let me address standards of review in three situations that commonly present themselves on appeal. First, review of findings of fact and the resulting conclusions: Rule 52(a) makes findings of fact final unless "clearly erroneous," a standard the Supreme Court defined as requiring "a definite and firm conviction that a mistake has been made." But how much does it take to convince a two-judge majority of a panel that a mistake has been made when they disagree with the outcome below?

Some commentators are not concerned about this. Professor Carrington in fact has said that the courts of appeals do not pursue their error-correcting function with sufficient vigor. He and others rank the correction of trial court error high on their list of priorities.

It is well to have in mind, however, that changing the outcome of a case in the court of appeals does not necessarily result in the correction of an error. As Justice Jackson said of the Supreme Court: "We are not final because we are infallible; but we are infallible only because we are final."[1]

It is useful here to examine the relative capacities and qualifications of the court of appeals and the district court. It is not likely to be claimed that appellate judges as a group are more carefully selected for wisdom, legal knowledge, or experience than are district judges. The appellate court's claim to superior judgment, as Judge Coffin has written, lies in num-

bers, three heads usually being better than one. But that advantage is diminished in proportion to the intrusiveness of review of the trial court. To the extent the appellate court fine-tunes the proceedings below, it reduces its resources for reflection and collegial consideration.

If we compare the courts' respective depth of understanding of the case, it is plain that the district court has the advantage. The district judge lives with the case from the time it is filed, through discovery disputes, pretrial, and often trial. The judge has had to identify and analyze the issues, structure the facts, and listen to the lawyers and witnesses, often at length. He or she has gained an understanding of the record and an appreciation for the strengths and weaknesses of the parties' contentions, going far beyond questions of witness credibility.

In contrast, the court of appeals judge learns about the case primarily from briefs constructed from bits and pieces of the record skillfully selected and arranged by appellate counsel to demonstrate the presence of error. As Justice Frankfurter said, the case on appeal often takes on a meretricious appearance, bearing little resemblance to the case in the trial court. Thus a case tried as a contract dispute may become an agency case on appeal, turning on what might have been a throwaway issue below.

Having read the briefs, the appellate judge may hear up to 30 minutes of argument, though fewer and fewer cases enjoy this treatment. Then the case is decided in conference and the opinion assigned. The writing judge or the law clerk may read some or all of the record. Time demands being what they are, rarely will the other judges read much of the record. But even a reading of the cold record on appeal gives the reader little confidence that he or she has a fair understanding of the import of the evidence and the proceedings.

In the light of this comparison—and giving the judges of the court of appeals their due for diligence and acumen—one cannot say that they enjoy an overwhelming advantage in ascertaining and correcting error. As Judge Harrie Chase of

the Second Circuit said, though trial judges may at times be mistaken about facts, appellate judges are not always omniscient.

Second, review of summary judgments: The scope of review is defined as "de novo," but that seems a misnomer, for the appellate court does not start fresh. It decides on the basis of the record that is brought up, but that record is the end product of the process below in which it was developed. In that process, the trial judge—dealing with discovery and other pretrial matters and exchanging ideas with counsel in conferences and hearings—had an opportunity to gain an understanding of the case that the appellate court lacks. That will not be relevant where the issue is one of pure law, but many summary-judgment actions present mixed questions of law and fact, involving issues of materiality and application of law to fact. Here the respective roles of the courts matter. The court of appeals is like a pathologist, examining only a fragment of the body for the cause of death, while the district court acts more like a surgeon, who considers the whole body.

Thus it would be more accurate to describe the present standard of review of summary judgment as being "without deference." But in light of the respective roles and capacities of the courts, does the use of that standard—except in cases of pure law—make sense?

Third, trial court rulings concerning the management of the litigation or the conduct of the parties are reviewed under the "abuse of discretion" standard. But more often than not, the appellate court pays only lip service to this standard while substituting its own judgment. Yet, the trial court clearly is in the best position to understand the needs of the case, and that court must live with the case and continue to manage it when it comes back from the court of appeals.

To sum it up, the appellate process—not invariably but too often—is characterized by (a) loose standards of review, (b) an opportunity for the litigant, if not to retry the case, at least to present a new and different case on appeal, and (c) a

willingness of appellate courts to second-guess the trial court. This state of affairs has encouraged the taking of appeals and disproportionately increased the workload of the courts of appeals.

There is a need, therefore, to develop a working doctrine of error and congruent standards of review that will effectively serve the interests of finality, economy, and justice. The lodestar of this effort should be the preservation of the courts of appeals as institutions for reflective, deliberative, and collegial determinations of questions of law—not for giving losing litigants a second crack at winning, leaving the dispute-resolution function primarily in the trial courts and reserving the scarce resources of the appellate courts to serve the appellate function.

Having set the agenda, I am not prepared to present the solutions. But as a start, we might consider the adoption of an explicit presumption of validity of the acts and decisions of trial courts, requiring that all review be deferential except on pure questions of law. This presumption would send a message to prospective appellants that an appeal would not be profitable in the absence of a demonstrably significant error while at the same time relieving the appellate courts from having to make a searching reexamination of the proceedings below.

Notes

1. Brown v. Allen, 344 U.S. 443, 540 (1953).

Chapter IV

The Relationship Between the Federal and State Courts

Laurence H. Tribe

Paul Carrington has posed the question of whether federal appellate judges ought to see themselves as Napoleon at Borodino: as strangers to their own foot soldiers, the federal district judges, rather than as family, and if this is so, what should be done about it. To extend the military metaphor a bit, if the district courts are somehow to be seen as the army, then some might wonder just who the state courts are. At times it sounds as if they ought to be viewed as the enemy of federal judges, to whom they should cede no hostages and on whom they should dump as much flak as possible. Whether that is a good way to approach the interface between the federal and state judiciaries, or whether more *glasnost* is needed and less *perestroika*, is my broad topic.

In contemplating the future of federal jurisdiction, I am reminded of one of my favorite cartoons. It shows a couple of characters who seem to be pilgrims on what might be the Mayflower, scanning the remote horizon. As one leans over the edge and sees the beginnings of land, he says to the other: "You know, religious freedom is my immediate objective, but my long-term goal is to go into real estate." That suggests a great deal at a great many levels. At one level, it suggests that constitutional ends are often lofty, whereas the means that we need to use to pursue them are rather more mundane and mechanical, involving conceptions of structure, geography, and the relationship among various levels of jurisdiction. At another level, the cartoon reminds us that the Constitution's lofty ends may themselves include a fairly complex mix of values and principles. Judge Higginbotham writes persuasively of the human rights cases that he hopes will never be relegated entirely to the state courts. Judge Newman talks forcibly about a discretionary line that he hopes can be drawn by judges between important cases and trivial ones. He refers to the case of the prisoner's lost hobby kit—the famous case of *Parratt v. Taylor*[1]—as a paradigm of triviality and in effect asks why we must make a federal case out of it. And he seems to marvel a bit that it was the Texas state courts to which our

system relegated the $10 billion Texaco–Pennzoil dispute, which for him seems a paradigm of a significant controversy.

But one man's triviality may be another's cause célèbre; one man's "discretion" to dump unimportant cases on an already overloaded state judiciary may, with all respect, appear to another man to be license to ignore the integrity and dignity of one's sister tribunals. There is a serious question to be posed about the interface between the federal judiciary and the judiciaries of the states. The choice of which cases to leave primarily in which set of tribunals irreducibly involves basic matters of value, not a simply and neutrally articulated notion that one judicial system is less corrupt and less contemptuous of the Constitution and should therefore be the system of choice for all right-thinking people who believe in important constitutional values. The matter is more complex than that.

I agree strongly with two broad points that Paul Bator made in a 1981 article entitled "The State Courts and Federal Constitutional Litigation,"[2] which I regard as the starting point in understanding how the interface between the federal and state judiciaries ought to be structured. The first of his fundamental observations is that state courts are bound to play a continuing and central role in elaborating and enforcing federal constitutional principles. As the Chief Justice puts it, they will remain the workhorses of the American judicial system, especially given the optional character of the entire federal judiciary. It is folly to regard the state courts as the inherent enemies of federal constitutional claims. At a certain level, given the limits of what the U.S. Supreme Court can do, the state courts are the courts of ultimate and last resort for the preservation of constitutional liberties—at least if Congress should be so minded as to reduce the power of the intermediate federal judiciary.

The second basic proposition on which I agree strongly with Professor Bator is that the view of federal judges as more receptive to federal constitutional values depends on which federal constitutional values the particular speaker cares most

about. Consider, for example, which set of courts is more likely to be receptive to claims about unwarranted federal invasion of the integrity, sovereignty, and autonomy of state governments. Is it necessarily the federal courts operating under the aegis of the recent *Garcia*[3] decision that are most sensitive to constitutional claims of state sovereignty? Elsewhere[4] I argue that *Garcia* was misguided: My prediction is that it won't last forever and that the Republican form of government clause may eventually form a textual home for a new version of state sovereignty. But whether that is right or wrong, it is simply not evident that all federal constitutional values are most safely entrusted to federal judges.

We might also ask ourselves which set of courts is more likely to be receptive to claims about the illegality of imprisonment authorized by federal executive officials: courts that are themselves appointed by the federal executive or state courts? It is paradoxical that in 1872 the Supreme Court held in *Tarble's Case*[5] that it was beyond the jurisdiction of state courts to inquire into the legality of the detention of someone held under the order of an executive official. But whether or not *Tarble's Case* will forever remain good law, it is not self-evident that the state courts would have been less receptive to the relevant claims of constitutional right and liberty.

We also have to ask whether federal courts really were protecting human rights in *Lochner v. New York,*[6] in *Hammer v. Dagenhart,*[7] in *Adkins v. Children's Hospital,*[8] and in the rebirth of claims of property in cases like *First English*[9] and *Nollan.*[10] Justice Stewart observed in *Lynch v. Household Finance Corp.*[11] that, in his view, the distinction between "human rights" and "property rights" was misleading, since under our Constitution, "[p]roperty does not have rights," only *people* do, and those rights may be economic as well as noneconomic in character.

We should remember that the federal courts were not particularly sensitive to claims of human rights when they treated human beings as property in the *Dred Scott*[12] case.

How sensitive were the federal courts to human rights in *Plessy v. Ferguson*,[13] or in *Korematsu v. United States*;[14] or in *Bradwell*,[15] the Supreme Court's opinion upholding the exclusion of women from the legal profession; or in *Geduldig*,[16] telling us that discrimination against pregnancy is ultimately not gender-based, however it may appear; or, for that matter, in *Bowers v. Hardwick*,[17] dealing with issues of sexual privacy?

These are complex questions. Generalizations about which body of courts will be most sympathetic to human rights must be offered in a tentative way. Justice Sandra Day O'Connor wrote an article seven years ago in which she described a survey of a few hundred lawyers in 10 jurisdictions.[18] She reported that the great majority of those who replied saw no great difference between the state and federal courts in the quality of judges or of justice. Now, to be sure, that was a somewhat skewed sample. The lawyers were asked to fill out a questionnaire as they filed civil actions in the state courts, so perhaps they were not the right group to ask. But these results are still sobering. Perhaps even more sobering is the thought that, with every passing year, still more lawyers may prefer the state tribunals to the federal ones. There is room for argument about whether this development reflects good reasons or bad ones. In any event, the development may say something about the composition of the state and federal judiciaries, and about the difficulty of offering value-neutral generalizations as to which courts can be relied on to show sensitivity to claims of constitutional right.

I think all of this demonstrates that there are basic *political* judgments that must be made in designing an appropriate jurisdictional allocation, and that such a design cannot be based on any supposedly neutral, expert evaluation of available data. Indeed, most of us readily concede that the basic design of the system for allocating jurisdiction between federal and state courts is and must remain with Congress, although I expect that Congress will listen carefully to what judges have to

say as it considers jurisdictional changes in the years ahead. In commenting upon that allocation, it is crucial to grapple with Professor Redish's rather provocative claim that judge-made abstention in the civil rights area, especially in suits filed under § 1983, in the name of the doctrine of *Younger v. Harris*[19] and its progeny, is "a blatant, indefensible judicial usurpation of Congressional authority." He argues, and I think rightly, that Congress's statutory grants of jurisdiction are not purely discretionary. They are not. But neither are they automatic mandates. It seems to me that Congress has thus far designed the system to respect pending state judicial proceedings, whether criminal or civil.

Cases like *Rizzo v. Goode,*[20] which extrapolate from abstention in deference to state *judicial* proceedings into the rather different area of abstention to permit the state *executive* and the state *legislature* to do their work, I do see as dubious in their legitimacy and as perhaps inconsistent with the mandate of § 1983. But I believe that Professor Redish, both in his essay in this volume and in his two landmark articles on this subject,[21] is not correct when he dismisses the *Younger* line of cases as illegitimate and as violative of the separation of powers. He gives too little weight to the basic thrust of the Anti-Injunction Act,[22] which dates back to 1793. It is the statute which, for nearly two centuries, has structured the relations between the two parallel judicial systems for vindicating federal rights in this country. That act forbids federal injunctions of state court proceedings except as expressly authorized by act of Congress or where necessary in aid of a federal court's jurisdiction or to protect or effectuate federal court judgments.

Mitchum v. Foster[23] in 1972 read § 1983 of the Civil Rights Act as an express authorization, thereby placing every § 1983 case outside the reach of 28 U.S.C. § 2283, the Anti-Injunction Act. But *Mitchum,* I submit, did not attribute to Congress—and could not plausibly have attributed to Congress—an intent to make federal displacement of state

judicial proceedings absolutely automatic in all § 1983 cases, regardless of the adequacy of the state system for vindicating the federal rights that are at stake. Of course Congress could create, through § 1983 or otherwise, an absolutely automatic displacement of pending state proceedings—criminal or civil—without violating state sovereignty even if *Garcia* were eventually overruled. But especially after *Garcia,* the burden of clear statement should rest with those in Congress who wish to mandate such automatic federal displacement of state judicial processes.

It is troubling when federal courts perform their own micro cost–benefit analyses, weighing on one side of the scale the precise magnitude, quality, and texture of the state's interest, whether in a custody dispute or in a quasi-criminal nuisance action, and weighing on the other side of the cost–benefit calculus the relevant federal interest in vindicating rights under § 1983. The logic of *Younger* pushes inexorably toward the direction that the Supreme Court has pursued—extending it to essentially all pending proceedings regardless of their character.

Thus, Justice Scalia's majority opinion in *Boyle v. United Technologies,*[24] creating a federal immunity for government contractors that displaced state tort law without any clear statement—indeed any statement—by Congress of that intent to displace state law, stands on shaky ground. In the post-*Garcia* world, but in a world that at least tries to take seriously the claims of states as autonomous bodies and not simply as departments of a central national government, it is not too much to ask Congress to be clear when it wishes to preempt state law, displace state law, or in effect authorize a flanking maneuver around pending state proceedings in the absence of any showing of their inadequacy in vindicating the federal rights that are at stake.

Justice Brennan, dissenting in *Boyle,* accused Justice Scalia and those who joined him of "judicial activism" in creating this special shield of immunity. (Perhaps this characterization

was a bit tongue-in-cheek: The dreaded "A" word, "activism," seems to be the term that any judge or advocate may use to describe an approach that comes out the "wrong" way.) But much can be said for the proposition that, if we are to readjust the fundamental architectural principle put in place nearly 200 years ago in the Anti-Injunction Act, the proper locus of change is in Congress, not in the federal courts (not even in the Supreme Court), in deciding where precisely to draw the line around *Younger*. Thus, even if the Supreme Court were to conclude that the *Younger* tree was wrongly planted and that perhaps some of its branches should be pruned or that it should be uprooted altogether, I think that, for important institutional reasons, it would be a mistake for the Court to do the pruning or the uprooting itself.

Some have spoken of the decline of stare decisis as an important reason for indeterminacy in the law, an important reason why so much turns on the personalities of whoever happens to occupy the bench. It does seem to me that in constitutional matters, stare decisis properly has a limited role. It is hard enough to amend the Constitution; so anyone who suggests that there is a one-way ratchet in these matters—in which the moving finger writes and, having writ, moves on, and cannot be lured back to cancel half a line of constitutional exegesis—has quite a burden to sustain. But I think that in matters of statutory interpretation—and that, after all, is what we're dealing with in designing and elaborating the interface between the federal and state judiciary under lines of authority such as *Younger*—once the Court has moved in a certain direction over a period of time, and in the absence of an extraordinary showing of truly radical error, the ball really should be in Congress's court, regardless of whether we're dealing with a supposedly anti-civil rights decision, like *Younger*, or a supposedly pro-civil rights decision, such as *Runyon v. McCrary*,[25] interpreting 28 U.S.C. § 1981, or *Jones v. Mayer*,[26] interpreting 28 U.S.C. § 1982. That is why I think so much turns, in terms of institutional continuity and pre-

dictability, on the Supreme Court's handling of cases like *Patterson*.[27] Whatever the Court thought about whether *Runyon* and *Jones* were rightly decided as to the reach of those civil rights provisions, it was terribly important that the Court respected the reliance interest of the legislative branch. Congress *must* be free to build upon its own earlier statutes as though they included within them the gloss placed by authoritative judicial interpretation, as Congress did in the attorneys' fee area dealing with private causes of action against private wrongs under §§ 1981 and 1982. If Congress cannot take for granted that its legislative product has been effectively reflected and elaborated in the process of judicial construction, and must instead assume that such construction is purely provisional, then despite an otherwise busy schedule, it has to revisit all cases of statutory interpretation and enact by law a list saying "We approve of these interpretations and disapprove of those." That would not be an institutionally sound use of Congress's capacities. It seems to me that in this area, in the *Younger* area, and in other controversial areas, regardless of whose ox is gored, statutory stare decisis ought to be the rule, in the absence of an extraordinary and profound showing to the contrary.

If, therefore, the ball is in Congress's court in terms of basic institutional redesign of the interface between the federal and state judiciaries, the operative question then becomes how federal judges might urge Congress actually to play the game and to deploy the resources at its disposal. I would like to share several thoughts along these lines, in addition to advancing a quite tentative proposal as a thought-experiment.

The first observation goes to an issue raised by Professor Redish: whether there is a crisis. It seems to me that Congress ought not approach this subject as though there were need for the radical, drastic, immediate action which a crisis mentality would suggest. Speaking of all this as a crisis tends to suggest that docket-clearing is the highest priority of all; that suggestion seems overstated. But there needn't be a "crisis" before

there is a serious need for Congress to begin *now* to attend to what is ultimately a serious and complex set of problems requiring sustained and concerted action.

I tend to believe that there is a problem even if not a crisis; that things are likely to get worse before they get better, if they get better; the fact that one can read lovely opinions written partly by judges and partly by law clerks is not much source of solace; and that the tip of the iceberg conceals a lot of the problem. The opinions may look fine, but what we don't know (and can't measure by reading them) is what the impact is of the burgeoning volume of federal cases on litigants, on lower courts and on state courts.

My second observation is that we should take advantage of the fact that we have a problem, and not a crisis, by urging Congress to look systemically and broadly at the issues that confront it rather than urging it to leap towards some Band-Aid solution. The approach to this problem should not be piecemeal. We have to recognize that we confront a seamless web, that all of the various doctrines defining the interface between the state and federal judiciaries importantly interlock—for example, that doctrines of *Younger* abstention and doctrines of *Rooker/Feldman*[28] finality and doctrines of the adequacy of alternatives available to habeas petitioners are so importantly interlocked that dealing with any one of them without simultaneously thinking about the others is very likely to amount to a kind of pillow-punching, in which you solve a problem in one place only to have it pop out somewhere else.

Attempting to solve the problem by simply lifting many cases—the supposedly least significant ones—out of the federal judiciary and transporting them to the state judiciary also amounts to pillow-punching. The idea is intriguing, and I commend Judge Newman for candidly setting out his views on this matter. His idea is that the states can take on a little water and they will hardly notice it, whereas we're going to sink if we don't do some bailing. But can we expect state courts to perform their vital functions with a sense of dignity

and self-respect if we maintain that they are to be relegated the least important and the least interesting cases? That notion generates a kind of self-fulfilling prophecy that no amount of institutional tinkering and no amount of increase in state judicial salaries can solve. It is already too widely thought that the really important cases are the federal cases brought in federal courts and that state judges are by design left over with the dregs.

If the problem is that the number of lawsuits is growing out of proportion to our capacity to deal with them without having our institutions for adjudication swell beyond the point of coherence and collegiality, then lifting the cases out of one set of courts and plunking them into another really may not solve the problem at all—it may simply move the pea from under one shell to another. It becomes necessary instead to focus on alternative mechanisms of dispute resolution and alternative ways of managing and protecting constitutional rights beyond the typical bipolar vision of the lawsuit.

My next observation picks up on the theme raised both by Judge Campbell and by Judge Holloway about the virtues of the generalist's role and the dangers of specialization. I am troubled, as is Judge Campbell, by the West German model of specialized judges and troubled by Justice Scalia's eagerness to embrace it.[29] Could we have, either at the district court level or in the court of appeals, a meaningful solution by increasing the cadres of specialized adjudicators? Although the work might be more interesting for the generalists who are left, there are values to be served considerably higher than the psychic income of federal district and circuit court judges. I believe it is a mistake to relegate what appear to be ordinary, garden-variety claims to other tribunals, especially given the inevitable tendency most of us will have to identify the concerns of ordinary people—landlord–tenant disputes, Social Security disputes—as "garden variety." Highly specialized tribunals offer second-class justice, without the breadth of vision that a generalist can provide. A specialized tribunal ought not

to be the fate of people simply because the federal questions they pose involve relatively small dollar stakes.

My fourth thought is that Congress ought not to be encouraged to rely very heavily on judicial discretion. I am not sure to what degree I agree with Professor Carrington's view that appellate court orders are not taken seriously. But I agree more with that view than with Judge Schwarzer's suggestion that district courts are too tightly controlled by appeals courts. Creating very broad discretion at the district court level or at the court of appeals level in deciding which cases to hear leads to, if I may use the word, a kind of crisis: a crisis of confidence in the legitimacy of the system as so much is made to turn on the luck of the draw. And the more heterogeneous the judiciary becomes, the less determinate the outcomes, and the more uneasy I become in saying that a great deal should turn on the frankly unguided discretion of particular decision makers.

I want finally to offer a very tentative proposal, the details of which I do not pretend to have worked out, but which might be a useful thought-piece in discussing what approach Congress should take in this area. To address the question of state court competence, Congress might pass legislation designed to nudge state courts themselves toward a greater degree of institutional independence and political integrity. Congress could no doubt find authority to act either under § 5 of the Fourteenth Amendment or under a combination of Congress's quite ample Article I and Article III powers. Much of the concern expressed about state courts in the last decade or so relates to all the political pressures on state judges—in particular, the distressing fact that so many state judges have to raise enormous amounts of campaign money in order to run for reelection—and to all the other things that make one fear that they are not capable of doing impartial justice.

To address this problem, Congress might establish an avenue of appeal from state courts to a special panel of federal circuit court judges to ventilate claims that the state forum,

for various institutional reasons, created an undue risk to impartial adjudication and that its rulings on federal questions should therefore receive less deference than they otherwise would. Such a law would draw on the model of the Voting Rights Act—not displacing state tribunals, but diminishing the deference they receive in certain cases. Such oversight might put some pressure on state courts to better protect litigants' rights. Similarly, it might encourage state legislatures to redesign their judiciaries as more independent bodies. As problematic as such a solution is, it makes more sense than some alternatives. One alternative is that of episodic Supreme Court intervention on certiorari in individual cases involving allegations that this or that judge was biased. There are perhaps eight or nine cases of that kind in the last half century; they represent an almost useless form of intervention.

A second major alternative is a more generic form of Supreme Court intervention on the procedural front, analogous to what the Supreme Court has done to substantive state-court-made law in areas like racially restrictive covenants[30] and the law of defamation.[31] In those areas, the Court has found itself moving not episodically, but in a more or less wholesale way to say that certain bodies of law made by state courts are insufficiently respectful of certain substantive federal constitutional concerns. That is harder to do in a procedural way. Cases like *Henry v. Mississippi*[32]—involving early efforts to say that there are certain forms of procedural default that we don't think states should penalize litigants for—may have represented a harbinger of that kind of development, though it didn't go very far. A legislative approach taken by Congress may prove more salutary.

Lastly, there is the alternative of more or less wholesale federal displacement of state courts on the ground that they are fundamentally unreliable—opening up avenues under § 1983 without exhaustion and without abstention, and basically getting rid of the full range of current doctrines that show some degree of deference to the state judiciary. That

kind of solution is likely to create more problems than it solves.

As this single proposal should illustrate, all of us have very different views of what the nature of the problem is and what the ultimate goal ought to be. But I don't think that those differences eliminate the possibility that we may very much agree ultimately on where the system ought to be nudged. Our underlying disagreements of vision and of value shouldn't prevent us from finding at least some shared paths to pursue—despite our very different ultimate destinations.

Notes

1. 451 U.S. 527 (1981).
2. 22 Wm. & Mary L. Rev. 605 (1981).
3. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).
4. L. Tribe, American Constitutional Law §§ 5–23 (2d ed. 1988).
5. 80 U.S. (13 Wall.) 397 (1872).
6. 198 U.S. 45 (1905).
7. 247 U.S. 251 (1918).
8. 261 U.S. 525 (1923).
9. First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378 (1987).
10. Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987).
11. 405 U.S. 538 (1972).
12. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).
13. 163 U.S. 537 (1896).
14. 323 U.S. 214 (1944).
15. Bradwell v. State, 83 U.S. (16 Wall.) 130 (1873).
16. Geduldig v. Aiello, 417 U.S. 484 (1974).
17. 478 U.S. 186 (1986).
18. O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge,* 22 Wm. & Mary L. Rev. 801–19 (1981).
19. Younger v. Harris, 401 U.S. 37 (1971).
20. 423 U.S. 362 (1976).
21. *The Doctrine of* Younger v. Harris*: Deference in Search of a Rationale,* 63 Cornell L. Rev. 463 (1978); *Abstention, Separation of Powers, and the Limits of Judicial Function,* 94 Yale L.J. 71 (1984).
22. 28 U.S.C. § 2283.

23. 407 U.S. 225 (1972).

24. 108 S. Ct. 2510 (1988).

25. 427 U.S. 160 (1976).

26. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

27. Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989) (reaffirming *Runyon,* but giving the statute a limited construction).

28. Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); District of Columbia Ct. App. v. Feldman, 460 U.S. 462 (1983).

29. Justice Antonin Scalia, Remarks before the Fellows of the American Bar Foundation and the National Conference of Bar Presidents, New Orleans, La. (February 15, 1987).

30. Shelley v. Kraemer, 334 U.S. 1 (1948).

31. New York Times v. Sullivan, 376 U.S. 254 (1964).

32. 379 U.S. 443 (1965).

Commentary on

The Relationship Between the Federal and State Courts

Reallocation: A Two-Way Street

Alvin B. Rubin

The common theme that runs through this discussion is that, whatever peripheral problems may face the federal courts of appeals, the basic problem that must now be addressed is their caseload. We've tried all the easy solutions: dividing circuits, adding more judges and more staff, and utilizing mechanical aids like computers. We have tackled another solution: national realignment of circuits—unsuccessfully. A national commission on recircuiting resulted in the division of one circuit. The political possibility that we will reorganize into 15 or 20 federal circuit courts of approximately equal size is remote. So we are left with finding some other method to solve the problem of expanding caseload—and with finding a solution to the other problems that are incidental to the caseload problem.

If the problem is caseload, there are only two basic ways to deal with it. One is to decrease the total number of cases that are filed in the district courts, thus decreasing the total universe of federal cases and hence the number of judgments from which appeals can be taken. The other is simply not to permit appeals from all of the final judgments and other decisions of district courts and administrative agencies that are now appealable. This might be accomplished by requiring those who wish to appeal to the circuit courts to seek some sort of writ of review. This might be applicable in all cases or only in some, such as diversity cases.

When we discuss the relationship between state and federal courts, we usually talk about shifting some cases from the federal system to the state system, thereby directly reducing the volume of cases at the district court level and less directly

at the appellate level. In considering the relationship between the two systems, however, we need to recognize also that reallocation of jurisdiction ought not to be a one-way street: Some cases that are now going through the state system ought to come through the federal system. The study of the allocation of jurisdiction between state and federal courts should be systemwide, and it should take into account both the varying roles of the state and federal courts and their differing abilities. The study ought not address either exclusively or primarily the needs of the federal courts. In the past, efforts by the Judicial Conference to address the allocation of jurisdiction between the state and federal systems have been unilateral; we need a coalition between federal and state judges before we can arrive at a mutually acceptable proposal, for no proposal that is satisfactory only to the federal courts is apt to be adopted.

One of the guiding principles of such a study must be, as Professor Tribe states, that all cases are not equal. We cannot evaluate caseload simply by counting cases. Let me offer an example: State courts handle most of the Federal Employers' Liability Act (FELA) cases, and they handle them by plaintiff's choice because the lawyers for most plaintiffs in FELA cases choose to go to state courts. So far as I know, the state courts handle these cases well. Most Jones Act cases, however, which are in effect only a subspecies of FELA cases, are filed in federal courts. State courts could easily assume jurisdiction over all FELA and Jones Act cases. If the state courts can handle 90% of the FELA cases, as they apparently do, they can take the Jones Act cases and the other 10% of the FELA cases without being overburdened.

I think that we could likewise reach a consensus that jurisdiction over some (or most) federal-question cases might continue to be vested in federal courts but that jurisdiction over others might be imparted exclusively to state courts, depending on the nature of the case. As Professor Tribe has pointed out, the federal courts are not the only repositories of

the spirit of constitutional vigilance. Historically, federal courts did not have federal-question jurisdiction, although if a state court misinterpreted a federal statute or misapplied a federal constitutional right, Supreme Court review provided a potential remedy. We know that today this supreme remedy no longer is practically available; the Supreme Court takes two or three cases of this kind in a year.

Congress has repeatedly rejected any basic change in diversity jurisdiction, recent minor alterations notwithstanding, but it seems to me that, if the federal and state courts can arrive at a mutually acceptable plan of reform, Congress might acquiesce. Eliminating diversity jurisdiction when the resident plaintiff elects a federal forum seems an obvious choice. Jurisdiction in diversity cases is a matter in which the state courts have an equal interest. It may be susceptible to solution if federal and state judges can arrive at a joint recommendation.

Conversely, the federal courts ought to be the primary forum for some cases that are now being decided in the state courts. In many instances federal courts are abstaining from deciding cases on the basis that a state court should decide both the federal and state law issues, with final review available on federal law issues by resort to the Supreme Court. The Supreme Court simply cannot undertake to review any significant number of these decisions. Yet, for example, in a case in which the members of a Fifth Circuit Court of Appeals panel all thought that the basic question was one of federal preemption, the panel felt obliged to abstain. The case was *NOPSI v. City of New Orleans*,[1] in which certiorari was granted.

The review of some part of abstention doctrine could be effectively accomplished judicially, since abstention is basically a creation of the courts. But the rules are a judicial development built on statutes and, as Professor Tribe points out, the established judicial interpretation of statutes ought to be altered legislatively in most cases rather than by judicial changes of mind. I do not agree with Professor Tribe's suggestion that

Congress or the federal courts are likely to intervene to mandate structural reform of the state court system. Current political philosophy will lead the federal courts to leave to the state legislative and judicial systems the solving of these problems. Fundamental solutions to state court problems are not likely to be attempted by either Congress or the federal courts.

Finally, I would like to advocate more effective communication between state and federal judges. One development is promising: Many state courts of last resort will now accept questions certified by the federal courts. More attempts to consider fraternal adjustments of our relationships are important. When I came on the district court bench 23 years ago, I found a degree of personal antagonism between state and federal judges that was more acute than it is currently. My impression is that the state judges with whom I come in contact are now less resentful, perhaps because federal courts are less intrusive.

Personal relationships between state and federal judges now seem to be better, but I think we can improve them even more. Perhaps part of the momentum can come from the Federal Judicial Center by sponsoring joint workshops. Federal–state workshops, where federal and state judges together study substantive and procedural judicial problems, might be a helpful step. The federal–state judicial councils can also do more in this area. Cooperation is in the interest of both the federal and state judiciaries because they share the same long-range goals. We are chosen in different ways, we have different jurisdictions; but I think federal judges and state judges share the same hopes, the same goals, and the same desires for justice under law.

Notes

1. 850 F.2d 1069 (5th Cir.), *cert. granted*, 109 S. Ct. 780 (1989).

Perceiving Competence in the State Courts

Robert C. Murphy

Years ago, a regular participant in the meetings of the Conference of Chief Justices was one very strange Chief Justice, from a state I will not name, who unfailingly at each meeting proposed a resolution to impeach Earl Warren for high crimes and misdemeanors. I didn't say anything for the first couple of years, but I finally felt constrained to get up and say to this Chief Justice, "Earl Warren is dead, you know." This fellow was not to be cheated out of his resolution by so trivial a detail; he just thundered that he wanted to impeach him posthumously. So it's fair to say that the relationship between the state and federal judiciaries, at least in those days, was not entirely untroubled.

In the preceding discussion, we have encountered two key observations. The first is that to avoid a crisis in the federal judicial system, some portion of the federal caseload will have to be transferred to the state system. The second observation is that federal judges have some reluctance to make this recommendation because of a sense that state judges and state courts are not now and indeed have never been quite the equal of the federal courts.

Perhaps, as Professor Tribe indicates, the reputation of the state courts suffers because they are less independent from their legislatures than are the federal courts; perhaps in the past the quality of adjudication in the state courts was inferior to that of the federal courts. If that was ever true, it is true no longer, but I think the perception remains.

The view endures in part because state legislatures all too frequently require that state judges engage in the political election process for their offices. Although the elections are

now often retention elections rather than contested elections, the process still tarnishes and therefore diminishes the overall effectiveness of the state court system. As long as state judges have to go out, like any political candidate, and raise funds to retain their office, they will be thought vulnerable to political pressure of various kinds. In Maryland, judges of the trial courts of general jurisdiction must still run in contested elections. Every year for the last 15 we have fought with our legislature to eliminate this practice and to have judges run against their record if they have to run at all. Our side has not been successful. For reasons that elude me, our politicians seem to relish having judges run with them on their tickets and attend the endless round of bull roasts. Professor Tribe suggests that Congress might, through section 5 of the Fourteenth Amendment, abolish all elections for state court judges. It would be an interesting effort to watch.

Regardless, though, of the public's perception of us, 98% of all the litigation in the country flows through the state courts. The adjudication and the vindication of constitutional and other federal rights are a vital part of the daily staple of state judges. In conscientious recognition of our responsibilities, state courts have made vigorous efforts to improve our effectiveness.

In 1984, at the request of the Conference of Chief Justices, Congress enacted the State Justice Institute Act, which was some eight years in the making. The Conference sought the legislation so that federal funds could support the improvement of the quality of our state courts. This step seemed a necessary antecedent to the state courts' alleviating the terrible burden that the federal courts are now facing. The institute is designed to support research and development, and to assist the National Center for State Courts in improving the state court system, as well as enhancing public confidence in it. Presently we have, with the financial support of the Bureau of Justice Assistance of the Justice Department, an ongoing program to develop trial court performance standards at the

state level in our circuit court systems—courts of general jurisdiction—again to upgrade the quality of state court adjudication.

The state courts can be helpful, and we do stand ready. The Conference of Chief Justices has considered and adopted positions on a number of areas bearing on federal–state court relationships. In 1977, we stated our willingness to pick up diversity cases, if diversity jurisdiction was to be abolished, fully recognizing that state courts are not less overwhelmed than are the federal courts.

We view with great approval inclusion of state court judges on the Federal Courts Study Committee. Their participation will help the committee assess the present interaction between the federal and state courts and make appropriate judgments about that future relationship. The Federal Courts Study Committee represents a fine vehicle through which the Judicial Conference can put before the Congress a well-documented agenda as we enter the 21st century, one that avails itself of the strength of the state court system as well as supports the effectiveness of the federal judiciary.

Chapter V

Uniformity of Federal Law

A. Leo Levin

The subject of uniformity of federal law prompts us to consider first the values to be served by uniformity or consistency, including some discussion of the limits of uniformity and the advantages of a little disuniformity from time to time. Thereafter, we will turn to maintaining intracircuit consistency and uniformity, and, finally, to the problem of uniformity on the national scene, intercircuit uniformity.

There are powerful forces tending toward disuniformity. Consider simply the number of different three-judge panels that a court of appeals can produce. For example, 12 active judges on a circuit can form 220 different three-judge panels. Adding 3 active judges, for a total of 15, increases the number of possible three-judge panels to 455, each different from the rest. A 28-judge court, a number not unfamiliar on the West Coast, allows 3,276 different three-judge panels, and this calculation does not take into account seniors, visiting judges, and judges from the district court sitting by designation. Uniformity and coherence in the law, in other words, is hardly automatic. Achieving it demands attention to ameliorative devices because the probability of the caseload shrinking is not high.

Against this backdrop, what are the values to be served? In 1987, Judge Ruth Bader Ginsburg and Attorney Peter Huber repeated with approval an observation that had appeared in a *Yale Law Journal* Note: "Uniformity promotes the twin goals of equity and judicial integrity—similar treatment of similar litigants secures equity, while it also inspires confidence in the legal system, a confidence crucial to the effective exercise of judicial power."[1] This theme has been invoked for a century. Judge Henry Friendly, after quoting Lord Mansfield, who had said, "We must act alike in all cases of like nature," termed that statement "the most basic principle of jurisprudence."[2]

It hardly denies the importance of uniformity to recognize that the absence of consistency is sometimes desirable. One such instance results from the process we know as "percola-

tion," the examination of an issue in a number of circuits. We invite the independent views of numerous panels in order to give the Supreme Court the benefit of a variety of opinions in differing factual contexts. Surely we want the great issues of constitutional law decided with benefit of percolation. A new and important doctrine of constitutional law does not emerge full-blown in the very first case in which it is recognized. Limits must be defined, and rationale refined, typically on a case-by-case basis.

So the question for us is not "whether percolation," but how much of it is desirable. It may be helpful to consider a question that Francis Kirkham, a San Francisco practitioner of many years' standing who had clerked for Chief Justice Charles Evans Hughes, put to a witness who testified before the Commission on Revision of the Federal Court Appellate System. Kirkham turned to the witness, who had been extolling the virtues of percolation, and asked: "If the Congress of the United States were in doubt about what would be the best applicable balance in one of these cases that you say should percolate, and it would decide [to] enact a law which will be applicable west of the Mississippi, and enact another law which would be applicable east of the Mississippi, try it out for a few years, and then, [after it saw] which is best, adopt that one—now, that would be vulnerable immediately under the Equal Protection Clause, wouldn't it?"[3] Kirkham's witness did not back down, but consideration of this question may help us to explore the limits of percolation.

One area in which limits are appropriate we might call "percolating with an empty pot"—repetitive litigation for the purpose of creating conflict. Maybe the best example in recent years is the effort that culminated in the Supreme Court's deciding the mundane question of whether the U.S. Postal Service is immune from state court garnishment proceedings. Before the Supreme Court heard this case, the government had relitigated the issue some 20 times in district court and 8 times in different courts of appeals.[4] That is too much perco-

lation in the absence of real coffee. There are some limits to the virtue of different courts' looking at things independently again and again, or of litigants' being encouraged to think that they can get a definitive resolution of the problem only by creating a conflict.

A second legitimate limitation on the desirability of complete uniformity is to be found in what Judge Henry Friendly called the "law of the circuit." Today there can be no doubt about the indispensable role of the courts of appeals and of the judges of those courts. But Henry Friendly wrote of the "nagging doubts concerning the role of the court of appeal judge,"[5] and he found comfort in the fact that on some questions (the examples he gave involved evidence and procedure) there is a "Second Circuit view" which is citable as such.

Others have suggested that, even if we need not promote inconsistency, we are bound to tolerate it. Chief Justice Burger adopted the practice (as he announced publicly) of using the symbol "TC," for "tolerable conflict," to identify petitions for certiorari which should be denied even though they asserted the need to resolve a conflict. But his notion of a tolerable conflict was, if not a concession to the shortness of life, at least a concession to the shortage of resources. We ought not seek inconsistency, but we ought to live with it because we can do no better at the moment.

Judge Posner, however, in his exceedingly valuable book on the federal courts, pushes this idea a little too far. He writes: "Conflicts that do not involve subjecting the same person [he excludes the U.S. government] to inconsistent legal obligations are not intolerable."[6] In terms of how much a system can tolerate, his definition may be right. We can run a system with a lot of inconsistency; if it doesn't reach the Posner line, we may be able to tolerate it. But how much inconsistency, measured against the values of uniformity, ought we to tolerate? That is another question.

We turn to the question of what we can do about inconsistency—considering first intracircuit inconsistency and,

thereafter, intercircuit inconsistency. Intracircuit inconsistency is controlled by the prevailing rule that one panel may not overrule another's published opinion without going en banc. The rule is phrased differently from circuit to circuit. The Third Circuit's Internal Operating Procedures open in a rather gentle way: "It is the tradition of this court that reported panel opinions are binding on subsequent panels." I like that kind of Quaker consensus, but if you read to the end of the operating procedure, it says, "Court in banc consideration is required to overrule a published opinion of this court."[7]

A familiar technique in quite a few circuits is the circulation of a draft opinion to all the active judges, in order to avoid the formal en banc. The Seventh Circuit's Rule 40(f) provides for this procedure and is applied in a number of different ways. That rule provides that a panel may overrule even a published prior panel decision, provided it has circulated the opinion to all the active judges on the circuit court and a majority do not vote to hear the case en banc. In some cases, the opinions just use the formula as the rule itself provides, such as "A majority of the judges on active service not having requested en banc, etc."[8] In some cases, buried in a footnote in an opinion, appears the formulation: "These three judges dissent from the decision not to rehear the case en banc and they do so for the following reasons." Although expedient, one may wonder whether a court that is divided about overruling precedent ought to handle its division simply by noting in a footnote the views of those judges who are in the minority. But, of course, there is no single, unequivocal method of accommodating the crunch between the realities of the caseload and the desire to afford the judges at least the opportunity to have their dissent noted (whether in large type or in small type).

An alternative to circulation is the en banc itself. The Ninth Circuit has pioneered in the limited en banc, which allows less than half of the judges in active service to bind the

circuit. There is a general consensus that this mechanism, statutorily authorized,[9] is a successful one in the Ninth.

There are some things, however, to watch. First, we still see a reluctance to convene an en banc, a phenomenon then-Judge, now Justice, Anthony Kennedy disparaged: "Our court, once again, gives a simple shrug when requested to invoke the short en banc procedure permitted us by Congress."[10] Reluctance extends to cases in which the problem is consistency as well as to cases in which the Court was elaborating a principle that leapt far beyond precedent. How does the reluctance to meet en banc affect consistency? This question, particularly as to the Ninth Circuit, which has the largest number of judgeships and is the only one with a limited en banc procedure, remains to be studied.

Specialized rotating panels on the circuit-court level may work toward consistency. Professor Daniel Meador has been a strong proponent of this idea. The idea—applicable only to some circuits and then with some serious administrative difficulties—is that a panel of generalist judges, keeping to some extent a general caseload, would nonetheless be the group to which all cases of a particular type would be sent, unless the cases were considered en banc. This structure would contribute to uniformity within the circuit as well as enhance efficiency. Such rotating panels would not be permanent: Each judge might serve for five years, with terms staggered. The continuing change would serve to prevent the evils of specialization. It seems unlikely that many of the categories of cases sent to specialized panels would have problems of inconsistency or incoherence. Some experimentation may be worthwhile.

Before leaving the problem of intracircuit uniformity, the issue of the ideological judge or panels of judges deserves mention. (I don't say the "problem" of ideological judges, because that characterization itself is subject to question.) Fifteen years ago, former Solicitor General Erwin Griswold complained that in too many cases a lawyer could tell the re-

sult of an appeal as soon as he learned which three judges would hear the case.[11] Professor Michael E. Tigar, in his work on federal appeals, discusses the same problem in the context of a court's agreeing to hear a case en banc: "There are, of course, ideological differences among judges, and one judge's artful distinction may be another's temerarious non-uniformity. So a panel's uncharitable reading of prior precedent [a lovely way to put it] does not guarantee en banc treatment."[12] The basic problem Professor Tigar is pointing to is whether the values to be served by uniformity are in fact served when the result in various areas of the law appears to be determined by the composition of the particular panel. However severe this problem, it is compensated for, to some extent, by the court acting as a whole.

One of the most promising provisions designed to promote intercircuit consistency is exclusive venue on appeal. The U.S. Court of Appeals for the D.C. Circuit is a prime example. This court has exclusive venue on appeals in FCC cases (for example, in cases dealing with the location of stations) and in cases growing out of a whole roster of other statutes. This does not, of course, make the D.C. Court of Appeals a specialized court; it hears a wide variety of other cases as well. Another example is the U.S. Court of Appeals for the Federal Circuit, which has a large number of different kinds of cases but exclusive venue for appeals from all over the country in patent cases. Plainly, when only one appellate court hears these cases, the problem of intercircuit conflict disappears. Can we extend the concept beyond the District of Columbia? One proposal would give all tax appeals to the Eighth Circuit or to the Tenth Circuit. Today, it seems unlikely that members of Congress will risk their careers by telling their constituents that all their tax appeals are going to be heard in St. Paul. But as problems become more serious and turn into crises, proposals once unthinkable may become thinkable.

It has been suggested that our appellate courts can contribute to uniformity by deferring to the law of other circuits.

This proposal, too, comes in many forms. Rule 40(f) of the Seventh Circuit requires that any draft opinion that would "create a conflict between or among circuits," be circulated among the active judges.[13] It says that such an opinion "shall not be published unless it is first circulated . . . and a majority . . . do not vote to rehear in banc." This procedure follows a suggestion by Justice Walter Schaefer of the Illinois Supreme Court: Let every circuit follow the first panel decision anywhere in the country, unless an en banc decides to the contrary, in which event that en banc will control until the Supreme Court holds otherwise. Judge Godbold some time ago pointed out the flaws in this proposal, the most serious of which is that it imposes the obligation to follow a circuit which is first but not particularly expert in an area, be it oil and gas or civil rights.

There are many problems with any particular proposal, including this one, even bearing in mind Judge Lay's observation that there is an obligation on a court of appeals to try to minimize intercircuit conflict. Nevertheless, Justice Schaefer's proposal, would, I fear, put an intolerable burden on the U.S. Supreme Court, because you run the risk of achieving uniformity at the price of a less than optimal result, unless and until the Supreme Court decides to intervene.

Could changes in legislative structure promote uniformity? Much inconsistency comes from the interpretation of statutes. A recent issue of *Law Week* reported what appears to be a new conflict related to interim Social Security disability benefits.[14] One circuit decided one way, a second circuit, another. Judge Ginsburg among others has addressed this problem and proposed that Congress resolve the issue, through either a ministry of justice or a special committee within the Congress—surely a rational proposal. But "rational" doesn't translate immediately into "practicable." When the proposal was described at a seminar in the presence of members of Congress, they exhibited polite skepticism,

citing the prerogatives of the substantive committees, which they predicted would not be readily surrendered.

Finally, many have proposed a national court of appeals, or intercircuit tribunal. I have been a partisan on that issue for many years, and the brevity of my remarks reflects no lessening of my support for it. It has been the most widely discussed of any of these proposals. All I will say is this: Our job is to preserve the federal judiciary and the basic values it now embodies, despite an increasing workload. Uniformity in the national law is one such important value. The proposed tribunal, rather than acting as a "fourth tier," would exercise reference jurisdiction from the Supreme Court in situations where that Court has determined that the issue ought to be decided on a national basis, but that the Justices themselves have no interest in deciding it. The probability that the issue would promptly reappear on the Supreme Court's agenda is therefore exceedingly low. One knowledgeable individual said that the Hruska Commission proposal might not then be timely, but that it was good to have something like it "in the icebox." That observation may, with time, prove to have been prophetic.

I conclude as I began: Our concern is with the ideals that we all share, uniformity in the interest of equity and judicial integrity.

Notes

1. Ginsburg & Huber, *The Intercircuit Committee*, 100 Harv. L. Rev. 1424–25 (1987) (citing Note, *Intercircuit Conflicts and the Enforcement of Extracircuit Judgments*, 95 Yale L.J. 1505 (1986)).

2. Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 758 (1982).

3. 2 Commission on Revision of the Federal Court Appellate System, Hearings, Second Phase, pursuant to Pub. L. No. 92-489 as amended Pub. L. No. 93-420 at 798, Washington, D.C. (April 16, 1975) (Statement of Martha A. Field, Professor, University of Pennsylvania Law School).

4. Franchise Tax Bd. of Cal. v. U.S. Postal Serv., 467 U.S. 512 (1984). The "nearly universal conclusion of the lower federal courts," *id.* at 519,

n.12, prompted sharp judicial criticism of the government's relitigation policy. See Levin & Leeson, *Issue Preclusion Against the United States Government,* 70 Iowa L. Rev. 113, 128–29 (1984).

5. Friendly, *"The Law of the Circuit" and All That,* 46 St. John's L. Rev. 408 (1972).

6. R. Posner, The Federal Courts: Crisis and Reform 163 (1985).

7. U.S. Court of Appeals for the Third Circuit, Internal Operating Procedures, ch. 8: Hearing or Rehearing In Banc Criteria, § C, p. 12 (April 1988).

8. 7th Cir. R. 40(f):"A proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court or create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear in banc the issue of whether the position should be adopted. . . . When the position is adopted by the panel after compliance with this procedure, the opinion, when published, shall contain a footnote worded, depending on the circumstances, in substance as follows:

'This opinion has been circulated among all judges of this court in regular active service. (No judge favored, or A majority did not favor) a rehearing in banc on the question of (*e.g.*, overruling *Doe v. Roe*).' "

9. 28 U.S.C. § 46(c),(d), 92 Stat. 1633 (1978).

10. Jerry T. O'Brien, Inc. v. SEC, 719 F.2d 300 (9th Cir. 1983) (dissenting opinion).

11. Commission on Revision of the Federal Court Appellate System, Hearings, First Phase at 29 (Aug. 2, 1973).

12. M. Tigar, Federal Appeals: Jurisdiction and Practice 299 (1987).

13. 7th Cir. R. 40(f).

14. 57 L.W. 2159–60 (1988). The First Circuit went one way, although the Second Circuit had held to the contrary. On the same day, and reported in the same issue of Law Week, the Eighth Circuit decided the same issue contrary to the First Circuit's decision.

Commentary on
Uniformity of Federal Law

Enlarging the Capacity of the Supreme Court

Byron R. White

It has been said for a long time that there is not just one Supreme Court in this country, there are 12 regional Supreme Courts and one specialized Supreme Court, so that we really have 13 Supreme Courts. The basis for this statement is the decline over the last century in the percentage of cases that the Supreme Court can review. So for all practical purposes, the development of the federal law is very much in the hands of the 13 circuit courts of appeals.

Since the middle 1970s, I have been convinced that the Supreme Court of the United States does not have the capacity to decide all the cases that should be decided at that level, cases that would have been decided in years gone by. From 1925, when Congress passed the Judges Act, which greatly increased the Court's discretionary jurisdiction, until the 1970s, the Supreme Court did take all the cases that deserved its attention. With the growth in litigation generally and in our docket in particular, I have become convinced, reviewing the order list week by week, that there are numerous cases that we should be reviewing and are not.

In keeping with Supreme Court tradition, we don't grant any more cases in a single term than can be decided in a single term. Between 1950 and 1970, the Court published about 100 signed opinions a year. With the growth of the docket, we experienced a great deal of pressure to decide a larger number of cases. When Chief Justice Burger joined the Court, in an effort to meet the need, we cut the argument time in half. Each side was given half an hour to argue, instead of an entire hour. In three days a week, we could then hear 12 cases, whereas before, in four days, we could hear only 8. In a

very few years, we went from 100 signed opinions to 150 signed opinions, which, the Court agrees, is just about the ceiling.

With an increased docket, with more petitions for review, if we are going to stay within that limit, we are going to decline to hear cases that we might otherwise have heard. We prefer at the Court to stay current in our work and to give speedy justice to the petitions we grant, rather than to grant more cases than we can decide in a single term and to fall steadily behind. I have dissented about 200 times from the denial of certiorari over the last four years, in cases in which I think there is a conflict, tolerable or intolerable. Still, every term, the largest proportion of our decided cases are purely statutory cases, with no constitutional question involved, in which there is a conflict among the circuits. Moreover, the Court makes virtually no grants in purely statutory cases unless there are conflicts, a clear difference from former practice, when we often took statutory cases where the issue was important.

There is a substantial problem with respect to conflicts. I have supported the notion of a national court of appeals, and I have supported the intercircuit panel concept, although in both plans, all cases would come to the Supreme Court first. We would take all the cases that we could handle, but if there were other cases, primarily statutory cases, that we thought should be decided, we would refer them to this subordinate body. Opponents to this plan argue that such a practice would simply generate more petitions for certiorari from yet another court; even so, they would add only slightly to the existing flow of petitions. Intercircuit conflict remains a serious problem; I see little merit in the federal law being applied one way in one circuit and a different way in another. Why should people in one region, for example, have different federal tax obligations from those in another region?

My final observation is this: Some people claim that the Supreme Court now decides too many cases. One of the val-

ues of establishing a subordinate court to which we might send statutory cases would be that we could reduce our caseload, our argument docket. And, indeed, many of the statutory cases we do decide can hardly be characterized as "important."

But if we deny cases that we do not have the capacity to decide, and the customers are not complaining, the courts of appeals are quiescent, the lawyers are quiescent, and Congress is quiescent, perhaps the Supreme Court should not worry either.

Efficiency and Deference

Donald P. Lay

When we talk about the problem of uniformity of national law, in some respects we are playing a numbers game. Some data compiled by Judge J. Clifford Wallace illustrate the magnitude of the difficulty. On a straight-line projection based upon the years from 1975 to 1980, by the year 2000 we will see an increase of 223% in appellate court filings, to a level of some 75,000 cases. Using similar projections, Wallace predicts 1,037 district judgeships for the year 2000, an increase of about 101%, and 289 appellate court judges, an increase of about 119%.[1]

Such figures suggest that we need to do some planning to accommodate this growth. But I would like to raise the question of the cost of the structural changes that we are advocating to this end. My concern is, frankly, with efficiency as much as with uniformity. I applaud the practice of the Supreme Court, as described by Justice White, of taking only the number of cases that the Court can dispatch in a year. I wish we could do so on the courts of appeals. Neither the district courts of this country, the state courts of this country, nor the courts of appeals are doing an expeditious job of dispensing justice, and I am concerned that proposed structural changes will make matters worse.

Any intercircuit tribunal or a national court builds further delay into the process, regardless of whether you call it a fourth tier or a second tier or a review tier. Expeditious justice becomes less a reality, not more.

Does the present problem warrant such a change? Large circuit courts do increase the potential of intracircuit conflict, but still, the Ninth Circuit has done a fine job in preventing

panels from creating conflict. The Eighth Circuit has no such problem; only three judges need indicate a request for an en banc where circuit precedence may be contradicted. As a result, we can keep the law of the circuit reasonably clear.

It is my view that, in order to maintain intercircuit uniformity, we should show the greatest deference to the decisions of other circuit courts, of judges who are just as experienced as we, who have studied full case records, who have analyzed the issues, who have the same ability, and perhaps greater ability, than we have. Before we differ with another circuit's holding, we should ask, just as we do when overruling precedent of our own, Is this a decision that we cannot permit to stand? Is it so much a deviation from the norm or so irrational an approach or analysis that we can't accept it? If the answers to these questions are "no," we should hesitate long before ruling in opposition to the circuit that has analyzed the issue before us.

This is not Justice Schaefer's concept that we should all be bound by the first circuit court to decide an issue. There is a great deal to be said in favor of consideration of an issue by several courts of appeals. Recall Justice Holmes's observations: "The life of the law has not been logic, it has been experience."[2] The truth is that the law is always approaching and never reaching consistency. It is forever adopting new principles from life. It will become entirely consistent only when it ceases to grow.

The Supreme Court does benefit from the wisdom of the appellate judges, through the vehicle of percolation. The Supreme Court waited almost 15 years before it decided the patent cases based upon the patent statutes passed in the early 1950s. Justice Clark told me that the Court waited that long because they wanted to see how other judges interpreted and analyzed these cases. It remains to be seen whether the gain in uniformity resulting from the exclusive jurisdiction in patent cases of the Federal Circuit will be worth the loss of competing viewpoints.

Courts of exclusive jurisdiction may prove useful in establishing uniformity in an efficient manner, but such cannot be said of the en banc. The en banc procedure in the courts of appeals is the greatest waste of judicial energy that you can conceive. En bancs may be essential in cases of intercircuit conflict. An extraordinarily important case, deciding legal issues of great significance never before considered, might warrant an en banc. But en bancs should be very few, and we should not have en banc hearings where the only disputes are factual or where the call was a close one on the legal issues. The judicial energies of a full court en banc take away from the work of hearing cases, and the increasing caseload affords us no such luxury.

On the question of national uniformity, I would respectfully suggest, in light of Justice White's statements, that justices can disagree as to whether there is a circuit conflict, and whether it's something that should be resolved on a national level. Justice Stevens has stated many times that he knows of no occasion where the Court has ever denied certiorari because of the lack of capacity of the Court to hear the case. Still, the Supreme Court now receives more than 5,000 petitions for certiorari, and, if we accept Judge Wallace's figures, by the year 2000 there will be 6,800. Justice Frankfurter wrote in 1937 that the Court had 837 petitions for certiorari that year, and he said the Court couldn't handle a single additional petition.

But will a national court of appeals solve that problem? It seems to me that as long as there is another court, the losing litigant is going to try to seek review in that court. It's Justice Jackson's principle: "We are not final because we are infallible, but we are infallible only because we are final."[3] Another court is going to result in more and more petitions for certiorari. It's going to delay the process further.

Justice White makes the point there is a need for national law. He told me one time, perhaps a bit tongue-in-cheek, that the reason we need a greater capacity for national law is that

those of us on the courts of appeals are wrong too often. Perhaps; but the question remains regarding the appropriate role of the Supreme Court. Is it a court to review errors of the courts of appeals or is it a court of national policy to declare what national law should be on important national issues? If the latter, then there are not many cases that are denied by the Supreme Court that ought to be answered by the Supreme Court.

But if the Supreme Court today does adequately handle its caseload, will that be true for long, given the rapid increase in the numbers of petitions for certiorari? Judge Feinberg has advocated that we adopt a National Law Review Commission, where members of Congress would study questions of statutory interpretation and recommend that Congress enact defining legislation. Maybe such a commission is the answer. The other answer is uniformity through the specialized court.

If we do decide we need a national intermediate court, we must set it up in such a way that it does in fact lessen the number of petitions for certiorari and offer to the Supreme Court thereby a larger capacity for creating consistent, uniform national law. How can this be done, constitutionally, since we cannot limit the jurisdiction of the Supreme Court by statute? We could appoint a national court that would review cases solely by the consent of the parties, much as we do with cases before magistrates that ordinarily go to Article III judges. This consent could be recorded at the beginning stages of the trial, before we know who wins and loses. No constitutional issue or federal statutory issue could be precluded by this consent because certiorari must go only to the Supreme Court of the United States on those issues. But on other issues, the national court would be the final review if the parties have consented. Since the parties would have a better chance of review from the court of appeals decision by this national court than from the Supreme Court of the United States, there is some incentive to enter into that consent. Such a plan retains the jurisdiction of the Supreme Court but does

not create an additional tier of justice. Perhaps this idea would work as well as any other.

Notes

1. Wallace, *Working Paper—Future of the Judiciary,* 94 F.R.D. 225, 228 (1981).

2. Holmes, Common Law 1 (1881).

3. Brown v. Allen, 344 U.S. 443, 540 (1953).

A Long-Range View

Pierce Lively

If the growing caseload were a matter only of judicial overwork, we would probably look seriously at proposed solutions, such as enlarging the size of our courts indefinitely. But the increase in judicial business is significant also because of its implications for consistency in interpreting statutes of national reach and importance. We all understand that absolute uniformity is impossible. We understand that it is not even desirable in all areas of the law. However, there is a vast difference between tolerating inconsistent decisions in cases applying the common law or constitutional law and tolerating inconsistency in cases involving statutory construction and application.

As lower court judges, we owe a debt of gratitude to Alexander Hamilton, who insisted on a national court system consisting of federal courts in each state, rather than the establishment of only a single federal Supreme Court to hear appeals from the state supreme courts. In Number 81 of *The Federalist*, Hamilton touched on a number of relevant issues, but his key statement for my present purpose was this: "State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws." What did he mean by "inflexible"? Is there implied in "inflexible" a need for uniformity? I believe it is likely that Hamilton was concerned about uniformity as much as about the local pressures that might be brought to bear on state court judges.

Is uniformity a desirable goal? If it is, how do we achieve it? In 1976, when Paul Carrington, Daniel Meador, and Maurice Rosenberg wrote their book, *Justice on Appeal*,[1] there

were 11 courts of appeals[2] and 97 judges. Now there are 13 courts of appeals and 159 judges. They wrote then about the difficulty of foreseeing the problems of the future. Similarly, as we try to look ahead to the next 40 or 50 years, we cannot predict the shape of the future with any certainty. My own experience illustrates this point: When I clerked for the Sixth Circuit in the 1940s, we had 12 or 15 habeas corpus cases that year, and not a single § 1983 case. In the Sixth Circuit in 1988, we handled more than 1,000 appeals from state prisoners, about one-quarter of our total caseload. That change could not have been predicted. In their work, Carrington, Meador, and Rosenberg proposed a system of panels to deal with classifications of cases that assumed that a projected annual workload of 1,200 cases for a court of appeals would include 65 state prisoner petitions—about 5.5% rather than 25%. So, as we try to anticipate future problems, we must recognize that the problems will change as the mix of cases changes, often for reasons that we cannot now predict.

In 1976, Dean Carrington and his colleagues assumed that a court that became much larger than the magic number of nine could not maintain uniform law of the circuit. A court larger than nine, they predicted, would require many en bancs that would generate more questions than they would answer. In this case, judged at least by the experience of the Sixth Circuit, the authors were prescient. Since we grew to 15 judges, our en banc hearings now typically produce five or six opinions; they clarify virtually nothing. After our last en banc, almost a year elapsed before all of the opinions were entered. I see no hope of avoiding these inconsistencies by the use of full en bancs, although the mini en banc of the Ninth Circuit might be effective if we could obtain authorization for a similar process in each large circuit. I am impressed by the device Chief Judge Campbell has proposed: the two-tiered system in which a panel within the court provides uniformity, particularly in statutory construction. It seems to me that we should give this proposal further consideration.

We do have one practice in the Sixth Circuit that helps with intracircuit conflict. Not only do we circulate all draft opinions, we circulate what is called a panel report. At the end of each hearing day, one judge on the panel writes a report covering each case assigned for full study, opinion, and publication—the cases that will clearly carry precedential value. The report is circulated among all of the judges of the court, active and senior, usually within 24 hours. This report alerts all members of the court to the pending issues. When judges on other panels see cases that appear to be similar to cases they are considering, discussions take place among the judges in order to avoid intracircuit conflict. The avoidance of intracircuit conflict by this technique and others may prove more useful as a practical matter to district judges and practicing attorneys than the resolution of intercircuit conflict. Most lawyers practice primarily within one circuit, and intracircuit conflicts generate serious problems in advising clients. Also, district judges rightly feel frustrated by mixed signals.

Intercircuit conflict is more likely the concern of academic lawyers and litigators with national practices. Certain federal agencies contribute to the problem by relitigating issues in circuit after circuit, hoping they can turn local defeat into national victory by getting the Supreme Court finally to resolve conflicts in their favor. Perhaps we could persuade the executive branch to discontinue this practice, instead submitting these questions to Congress for clarification. In theory, the Supreme Court will eventually resolve such conflicts, but we know that in practice the Supreme Court will not have the opportunity to do so.

Many suggestions considered in this volume were proposed, in 1977, in the Bork Report.[3] One suggestion emerging from that report—the creation of more Article I courts with a limited review in regional courts of appeals—has been adopted by Congress in creation of the special court for veterans' claims. There have been many inconsistencies in treatment of Social Security claims by the various circuits. The

Bork Report recommended an Article I court for Social Security claims, and I believe such a court would tend to bring greater uniformity in dealing with entitlement claims.

The debate continues about the utility of the intercircuit tribunal. One criticism of it, tendered by Judge Lay, I think is not valid: that it would cause delay. Although consideration by such a body might result in a temporary delay of a specific case, in the long run clear resolution of conflicting decisions interpreting statutes would speed up the work of the courts. An authoritative statement of the law would remove the incentive to file cases solely on the chance that a new interpretation may be forthcoming or that a litigant may benefit from inconsistencies. The most recent proposal for establishment of an intercircuit tribunal with a "sunset" provision seems eminently reasonable to me.

I have great hopes for the new Federal Courts Study Committee. The Judicial Conference of the United States presented our needs to Congress without hyperbole, as a serious and worsening national problem. My impression is that the approach won a thoughtful and respectful hearing from Congress. It is to be hoped that personal and parochial interests, both in Congress and among the judges, will not be permitted to thwart what appears to be the best opportunity at the present time for achieving significant progress toward solutions to our most serious problems, including lack of uniformity.

Notes

1. P. Carrington, D. Meador & M. Rosenberg, Justice on Appeal (1976).

2. This figure does not include the Court of Customs and Patent Appeals or the Court of Claims, which were merged into the U.S. Court of Appeals for the Federal Circuit in 1982.

3. Department of Justice Committee on Revision of the Federal Judicial System, The Needs of the Federal Courts (January 1977).

Clear Laws; Clear Opinions

Mary M. Schroeder

How we deal with uniformity in the federal law will in large measure determine how our federal courts will look in 20 to 50 years. Inconsistency is not only unfair to the litigants; it is also time-consuming. Consider the fact that some of our very best lawyers, familiar with our state and federal court systems, are now leaving those systems for private systems of dispute resolution. What is the market telling us? Perhaps we should see it as a signal that our customers don't want an expensive, time-consuming process that has as its chief accomplishment the creation of several shelf feet per year in the West reporter system.

Lawyers and litigants want to be assured of a fair hearing in the trial court and an appeal that offers them an even-handed application of legal principles they can understand. That goal is one we should strive to meet; clearly some degree of consistency in our law is essential to such a system. But as our population expands and as the concerns of our modern society are more frequently reflected in federal law, the problem of maintaining consistency will grow more acute.

I see two ways to approach the problem of consistency for the future. One is to see the problem as one of conflict resolution, of developing more and more sophisticated mechanisms, including the creation of new institutions, to resolve conflicts which occur within the circuits and among the circuits. But all these proposals—the en bancs, limited en bancs, intracircuit tribunals—are expensive, labor-intensive, and stressful. Because they are addressed to conflicts after they emerge, we might call them postnatal intensive care.

The second approach is to develop ways to improve our existing system in order to avoid conflicts in the first instance. This, which we might call prenatal care of opinions, is in my view a more desirable option. What we need for the future is not more ways to resolve conflicts, but fewer conflicts to resolve.

Now let me say a word, as a judge of the Ninth Circuit, about en bancs and limited en bancs. Whether you have a full en banc or a limited en banc—as we're authorized in the Ninth Circuit—en bancs will remain stressful, time-consuming, and expensive. If the stress and expense associated with the prospect of an en banc serves as a deterrent to conflicts, the en banc system can function not only to resolve conflicts but also to prevent them. Viewed another way, the drawbacks of en bancs can provide an incentive for judges to harmonize their opinions with the existing opinions in the circuit.

Our Ninth Circuit experience has shown that the limited en banc system can work if certain conditions are met. First, limited en bancs have to be administered with a very firm but gentle hand. Second, judges must refrain from the messianic impulse to call for an en banc each time they feel compelled to dissent from a panel opinion.

An important tool that may be underutilized for the prevention of conflicts is the computer data bank. Our concern about uncontrollable numbers of cases feeds in part on our fear that we cannot keep up with the large number of decisions. But with computers, we can in fact keep up. Computers permit us to find instantly the cases in our circuit and in other circuits that relate to the problems at hand. Our makeshift indexing systems are gone with the wind, and the lawyers, too, are doing a far better job of calling to our attention the relevant authorities. They often supplement their briefs with citations to our new cases almost as fast as we receive the slip opinions ourselves. So the risk of "inadvertent conflict" has been materially reduced.

There is a darker side to the computer, however. One problem is the inability to differentiate between more important and less important decisions, between key passages and insignificant ones. In the computer, all words are created equal, and once they get into the computer, they stay in the computer.

A second problem is the prolixity of opinions. We sow the seeds for conflicts in the future when we use careless language in our own opinions or permit too much to appear as the result of law clerk research.

In addition to forming careful interpretations of the law in order to eliminate conflict, we have to take a more active role in formulating that law: specifically in the rules that we must follow and the statutes that define the scope of our work. The more we weed out uncertainties and ambiguities before the rules or statutes are promulgated, the less likely conflict becomes. Why should we have at least three different standards of review or combinations of standards of review in the circuits for reviewing Rule 11 sanction determinations? Is it that we're doing a bad job in applying the law, or are there problems with the rule itself that could have been taken care of before it was promulgated? In Congress, every statute that creates new remedies has provisions on judicial review; we should have some input, so that those provisions are clear. Attorneys' fees statutes would benefit from judicial comment before they are passed. The Judicial Conference's mechanism of developing policy suggestions and communicating them to the Congress is awkward and does not permit this kind of participation. Perhaps we can devise an alternative system. Perhaps we should consider some kind of law review commission to identify where rules and statutes are not working as planned.

The problems for the future in uniformity of federal law emerge not so much as caseload but as issue load. Many cases manage to involve complex issues about the merits of the case, the behavior of the lawyers when they tried the case, and

then the amount the lawyers should be paid afterwards. We need to streamline the whole system so that neither opinions, rules, nor statutes create unnecessary decision making and resultant conflicts.

In that way we can help limit conflict to the areas in which there are important policy decisions to be made. As appeals court judges, we may be in the best position to take the lead because we are the ones who see the cases whole, and we are the ones who take at least a regional perspective if not a national one. Leadership in the future to solve the problem of uniformity comes most appropriately from the federal appellate judiciary.

Chapter VI

Perspectives from the Circuits: Maintaining the Character and Collegiality of the Courts of Appeals

A Healthy and Diverse Judiciary

Charles Clark

The title "Maintaining the Character and Collegiality of the Courts of Appeals" assumes that we now have those qualities, and I'm satisfied that we do. The real question is, how do we keep them? That will be the theme of my remarks.

The key to continuing our character and collegiality is whether one thinks that being a circuit judge is satisfying. Is this how you really want to spend the days of your life? The answer is to be found in the work you do and the community in which that work is done.

The significance of the work is not measured by the number of cases that you must decide. The substance of those cases is even more important. But everything can't be written for posterity. Even paradise has got to have garbage collectors. But how much garbage should we have to haul? My analysis is that about 35% of what I do is shoveling trash, preparing opinions in cases that could be disposed of promptly and correctly by a second-year law student. The attention these cases demand from appellate judges is wasted effort. We need to find some just way to eliminate such cases from the universe of cases to be decided and written by Article III judges.

The number and quality of the people judges work with is also important. My colleagues and staff on the old Fifth Circuit and the people I work with on the new Fifth were and are challenging people, enjoyable people. I like to visit with the circuit judge who works downstairs in my building. These conferences get me back on the track again. Sometimes I even tell him a thing or two. The telephone frequently connects me with my other colleagues in the same way. It's a lot of fun; it's challenging. Contact is important to collegiality. Staff also

plays an important role in making life on the circuit court satisfying, as long as it does not grow out of bounds. New law clerks can bring a fresh and invigorating perspective to the work. I change every year, and each time it is an enjoyable experience. A good clerk of court is a vital cog in creating good relations with litigants and the bar. The character of a court is formed in the eye of the beholder.

A substantial increase in pay is needed to attract high-quality new practitioners to the bench for the next generation of appellate judging and to hold the really good young judges now on board. Although political considerations make increases in pay difficult to obtain, we must persuade Congress to keep judicial pay in line with inflation and competitive with lawyers' income.

There are minor irritants that should be eliminated. Principal among them is the annual financial disclosure statement. One judge commented aptly that filing this form is like making an old man undress in front of an open window; nobody is going to see anything they're interested in—it's just embarrassing to the old man. The idea that a judge can or ought to be required to prove that he is honest is a faulty one. If these statements can't be eliminated, the cycle should be increased to every fifth year, or judges ought to be able to file their income tax statements in lieu of the present tedious, ever-changing form. The judicial complaint procedure under 28 U.S.C. § 372(c) is another idea whose time has gone. It is 99 and 44/100% worthless. All I see come from disappointed litigants complaining about adverse rulings or making reckless general accusations that a judge is destroying the Republic. The remaining 56/100% could and would be handled by existing judicial council procedures.

The proposals seeking to create uniform circuits or a single nationwide court of appeals seem to me worth opposing. It's just fine for the circuits to be diverse. Such diversity provides an opportunity for experimentation without wholesale loss and for cross-fertilization of the law through differing

ideas. The burden on the Supreme Court is slight when compared to the loss of these benefits. These good qualities could be further enhanced by intercircuit assignments of active judges. Increases in travel costs for such a program would be relatively small, since most judges travel to sit on their own courts. There is no better learning tool than to have active judges visit other circuits—actually work a week a year with a different court. Such an assignment ought to include a requirement to sit down with the clerk, the circuit executive, and some of the administrative judges in the circuit visited and learn how things are done there, then to report the results to one's home court. This would afford a real opportunity to enhance the judicial character of our courts. Collegiality would also flourish. Let me add here a related proposal: judge assignments based on need. Congress requires the judicial branch to keep and report statistical data to the Judicial Conference of the United States. The statute creating the Conference provides that these data are to be used for the purpose of assigning judges. But the Conference has never dared to tell any underutilized judge to go where the workload has outstripped resources. We should start doing what the statute contemplates and assign judges from circuits and districts that are not busy to circuits or districts where their work is needed. It is unfortunate that no such plan has ever been put in operation, because doing worthwhile work is the essence of building character.

Next, let me paraphrase Paul Revere's cry: The future is coming! All of the data that we have available offer clear danger signals. They portend a great expansion of cases, of support staff, and of judges. One has only to look at the present request of the Judicial Conference to the Congress. We are asking for 14 new circuit judges and over 50 new district judges, all of whom will require additional staff—clerks, magistrates, probation officers, public defenders, court reporters. Just those additions would increase the personnel of the judicial branch from 21,000 people now to 25,000 as soon as

1990. At this rate, by the year 2000 the federal bureaucracy will be 42,500. There will be almost twice the number of appeals, 50% more district court filings, and three times the number of bankruptcy cases. 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. Congress must curtail jurisdiction so that federal courts are limited to deciding issues that have federal significance. Courts must eliminate frivolous litigation. If we don't act to reverse our expanding universe—if we just sit by—our valuable institution will be overwhelmed.

In sum, we now have the finest jobs in the field of law. It is not a job that will remain thus desirable without effort. We cannot simply go about our work and enjoy associating with our colleagues. Camus said "Rebel," and rebel we must! If we don't resist, those with marketplace standards of moral conduct will force us to publicly account for every thought and action. If we don't stand up for curtailing jurisdiction, litigation will become legion and we will sink into a morass of numberless adjudicators. If we don't protest for delinking our pay from that of Congress, we will not achieve the decent salaries necessary for a healthy, diverse judiciary.

The future is coming! Its outlines are discernible. The only question is whether we can remain judges of character and quality.

Goodwill and Dedication

Harrison L. Winter

It is generally accepted that the appellate judiciary must grow in size and change in character by the year 2000. How we preserve the essential character of the courts as we know them now and how we preserve the collegiality that we now enjoy are matters of considerable conjecture.

I was first a law clerk on the Fourth Circuit in the early '40s, when the court consisted of three members. I went on the district court at the time the court of appeals was expanded to five, and I stayed on the district court for four and a half years. I then went on the court of appeals when its membership was increased to seven. Since then we have grown to 9, to 10, to 11, and we hope, if Congress appreciates our needs, eventually to go to 15.

During this period of time, of course, the nature of collegiality has had to change. It's easy to sit down with three judges and feel a closeness of association; when you become five, that closeness is somewhat diluted, more so when you become seven, still more when you are nine. But though we must adapt the form of collegiality for larger groups of judges, we must preserve it, for it is a crucial part of the functioning of the court.

Collegiality depends in large part on goodwill among the judges. As one who was a member of a court which cut into the southern states during the school desegregation days, I'm the first to say that I recognize that goodwill cannot be legislated and it can't be decreed, particularly by a chief judge who, after all, has no statutory powers. The most he can do is attempt to exercise moral leadership and persuasion, verbally and by example.

How does the chief judge exercise moral and persuasive leadership to institute collegiality? The first thing that he must do, despite ideological differences on his court, despite differences in personalities and in approach, and perhaps even differences in his personal affinity with members of the court, is exhibit scrupulous fairness in dealing with all of these judges. The chief judge must give the holder of even those views he considers outrageous a fair hearing and a fair opportunity to express them.

Some practices in the Fourth Circuit have enhanced the collegiality of our court. When the court was smaller, we always had all of our sittings together and all the sittings were in one place (Richmond). We'd have all of the judges there at one time, and our panels would change every day. Now that we have a need for more panels and the facilities in Richmond are somewhat limited, we have panels sitting in Richmond and in Baltimore at the same time. Whether in Richmond or in Baltimore, each panel, with rare exception, has lunch together. We also have the practice of all of the visiting judges having dinner together at least once during a week of court. We find that when we regularly break bread with our fellow judges, it's not hard then to think of them as brothers or sisters, however our views might have differed in a case or however vigorous the discussion might have been.

It is also important to encourage collegiality between the circuit and district judges. In the Fourth Circuit, we invite each new district judge to sit with the court of appeals. We get the opportunity to meet him or her, and the new district judge sees firsthand the appellate practice in the Fourth Circuit.

When I was a new district judge, I was invited to sit with the appeals court very promptly after my appointment. The court was then sitting in Alexandria because the courthouse in Richmond was undergoing renovations. Chief Judge Sobeloff had a habit of taking a walk after dinner, and one night I went walking with him. He took the occasion to tell me of his great

frustration as a circuit judge, created by the limitations on the scope of review. "Between the standard of 'not clearly erroneous,' and the need for substantial evidence, and sometimes a finding in the record that there has to be a basis in fact," he said, "it's many times impossible to do justice!" That private chat was one of the experiences that made me feel more like a part of the team in the Fourth Circuit.

The duty to further and preserve collegiality rests with every member of the court. One of the most destructive things to collegiality on the court is what I call the excessive dissenting opinion. I'm not suggesting for one moment that unanimity is an absolute goal to which we should subordinate honest differences. There will be divisions and opposing points of view, and it's proper that voice be given to them. But voice must be given to them with some degree of restraint, in words that eschew emotional appeal.

Intemperate dissent has two sequelae which are extremely undesirable. When the dissenting language becomes excessive, it can easily be construed as a personal attack on a fellow judge, the judge whose vote you hope to capture tomorrow. Personal animosity makes future agreement more difficult.

An even more important consideration, however—and this I think is the overriding one—is that a court is a very fragile institution. We couldn't possibly go out and enforce all of our decrees and all of our judgments. We don't have the staff; the marshals could not do it. Our effectiveness depends upon people accepting our judgments and abiding by our decisions willingly. We rely on public confidence and public acceptance. When the public sees that we're hurling words that verge on insult, especially on a point about which there can legitimately be an intellectual difference, we destroy the very basis on which we must ultimately depend.

I am persuaded that with goodwill, with a sense of dedication, and with the recognition that we're not just individuals, we're not just members of particular courts, but members of a great judicial institution, we will be able to adapt to the

innovations of this third century and still preserve the essence of the court today.

Calendars, Collegiality, and Other Intangibles on the Courts of Appeals

Patricia M. Wald

The Distinctive Character of Courts of Appeals

The character of a circuit is a delicate composite of history, judges' personalities, distinct kinds of regional issues and problems, and even different types of counsel who appear in court. Most of us are proud to be not just Article III judges, but members of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, D.C., or Federal Circuit. Our emotional loyalties can stretch just so far, and the circuits are it. Our role models tend to come from our own circuits—we get our thrills from sharing the same robing closet, or chambers, that Dave Bazelon, or Skelly Wright, or Carl McGowan, or Harold Leventhal (in my case) used. We may have to even out gross disparities in caseloads and geographical contours, but I hope we never have national judge pools. My own feeling is that our best federal judges decide cases against a historical and geographical backdrop that takes account of traditional tensions as well as past problems and resolutions in particular regions; localism and regionalism should and do inform federal courts and subtly affect their judgments and rationales.

This distinctiveness among circuits translates, in my opinion, to a greater need for decentralization of control over our own adaptations to future events. The Judicial Conference and the Administrative Office have commendably begun experimenting with letting some of us try budgeting and administering for ourselves—what the First Circuit needs may be more clerk's office personnel, not computers, and vice versa

for the Fourth Circuit. As I consider the panoply of suggestions for dealing with our explosive caseloads, it seems to me the same differential technique is in order.

The D.C. Circuit, for instance, is an animal of a different color from all others. We have no volume problems with Social Security or prisoner cases, and only a small number of diversity cases. Sixty percent of our appeals come not from the district court, but straight from the agencies. We are the first, and usually the only, Article III court that will pass on the citizen's protest against what he or she perceives to be an arbitrary bureaucracy. Discretionary appeals for us would be problematic. And we write not just for the immediate litigants, but for agency heads throughout the federal government, who must apply our statutory interpretation or our restrictions on their enforcement of national programs. Even when we affirm agencies, and even when the case may not arise again, our opinions often need to be published for the benefit of and dissemination to the agency personnel and program beneficiaries. Any presumption against publication would seriously threaten our agency watchdog function.

On the other hand, it *would* be of great help to our circuit to get the point across to Congress that when it drafts new statutes, it ought to think about what kinds of decisions it wants to be appealed to the courts and to which courts. The first branch is beginning to think along these lines in proposals for judicial impact statements contained in pending reform legislation. We have also begun an interesting project with the Brookings Institution through which we send to Congress for its edification and possibly action judicial decisions where we had to cull legislative history and text to decide what Congress meant and then were not sure we were right. Enormous inroads could be made in our workload if Congress made its intent clearer in its legislative actions and if it focused on what it expects by way of federal review.

We in the D.C. Circuit could do much better, too, if we could legitimate closer contact with the agencies whose deci-

sions we supervise. Often we don't understand what they are getting at, what problems they face; we are supposed to rule if they are acting arbitrarily or capriciously, but their lawyers tell us only legal doctrine which we already know and not enough about the critical factors in the underlying dispute. We need to have more dialogue with general counsel's offices, to let them know why we send back up to 20% of cases a year—most often because we don't think their rationales make sense. Is it our fault or theirs? In a circuit with a relatively small caseload compared to others, clearer legislative direction and better agency rationales would save us enormous amounts of time. As we are fast becoming a country of statutory law, perhaps the D.C. Circuit is a flagship for federal courts across the nation in this respect.

Our cases, while on an upward trend like all other circuits', roller-coaster back and forth, from year to year, depending on the philosophy and activity of the federal agencies—up 50% in one year, down 20% in the next, and so on. But one thing is quite clear: Our statutory and administrative cases are becoming ever more complex—more parties, more intervenors, more issues; we already have a special complex track for dozens of the "big cases" every year, some requiring hours and even days of argument. Managing these big cases has become a major undertaking in our circuit, and we will need to get even more adroit at it to survive. No lopping off of federal jurisdiction for certain types of cases or transferring of private actions to state courts will save our hides. Our best hope lies in reform from without—better legislative drafting and maybe "reg–neg" developments, where parties negotiate out regulations before they go to court. These are vital cases—clean air and water, surface mining, OSHA, hazardous waste disposal. I am convinced after nine years that they must have at least one layer of judicial review if the agencies are to be kept honest (many agency officials agree). But to do our unique job, we need innovative case-tracking and case-scheduling systems to separate out the more obvious cases for

summary treatment, lots of automation, and, yes, law clerks to do the interminable record searches.

Our most promising adaptation to the challenge has been a new case-scheduling plan we adopted two years ago that separates out early in the process the cases that don't need oral argument, puts them before a panel of judges, and gets the opinions (unpublished) out fast. We also insist all litigants file any dispositive motions, such as a motion to dismiss for lack of standing or lack of finality, or motions for summary affirmance or reversal, within 45 days of filing the appeal. That way, a case that fails a threshold jurisdictional requirement doesn't go through to full briefing and take up a slot on the merits calendar. In two years, we have upped the judicial disposition rate 43% but, ironically, the cases we now dispose of with short, unpublished opinions up front turn out to be the cases that used to fall out by themselves without judicial action later in the process. So the net gain is not as high as we would like, but at least we are staying current.

My point is that the future of the circuits will largely depend on their own analyses of their own problems and their own internal experimentation with their own solutions. In our case, for instance, the more complex the case, the more you need oral argument. I think we are close to our natural ceiling right now in not granting it in 10% of our cases. Without oral argument, the lawyers have you in their control—they say what they want in the briefs, secure in the knowledge that they will not be subjected to a confrontation with the judge. Hard cases raise hard questions, and judges need face-to-face answers. Oral argument doesn't take that much time. Again, we have an intangible—the one-on-one encounter, however brief, between judges and counsel, when the lawyer knows the judge himself or herself, not his or her clerk, is listening. Oral argument, in my experience, does turn cases—hard ones—around more often than one might think. It also tilts balanced ones, and it changes the rationale on which even preordained results are based. Perhaps most important, *it makes the process*

human. A process without sustained human interaction or involvement is called a bureaucracy, and that shouldn't be us. I think the courts ought to hang on to their visible human processes as long as they can, and as long as the judges think it helps them to get things right. That is in about 85% to 90% of cases in our circuit.

As the subject matter of our agency cases gets ever more arcane, often we have no place to turn for post-argument clarification. I think within the next decade we have to solve the age-old problem of where to look for better understanding of problems involving statistics, technology, epidemiology, biophysics, risk management. The lawyers simply don't provide it to us now in their briefs. We have the capacity to mess things up royally for the agencies, and we sometimes do. How can the adversary system be made to educate us in what we need to know to make these decisions? The problem of the neutral expert, discussed for decades, needs to be revisited in the years ahead. Do we need different kinds of law clerks for longer periods, more specialized educator–advocates, supplementary processes for asking after-argument questions?

I do think judging is getting harder, and I think it is a full-time job. We ought to be paid better, so that we would be willing to spend full-time on it. A lot of judges feel they have to moonlight, and that is too bad. Others genuinely enjoy the speechmaking, the law review writing, the seminars. But I am afraid that close to a full-time judging commitment may be required in the near future. The hours on the bench may have to expand in order to permit oral argument and to sustain or even improve the quality of opinions. We have, as Judge Lay said, a responsibility of visibility and accountability to people who are affected by our decisions.

Judges have to be tougher on themselves if the system is to work under stress. They have to produce opinions within reasonable time limits; they have to exercise reasonable restraint in not laying out the whole field of law in textbook style; they have to forgo the "White Paper" approach: "This is

my comprehensive view on this subject or that"; they have to take cases in turn, not dive into their favorites for months at a time and let the losers languish.

I do not think specialization is the appropriate solution for the problem of rising caseloads. Despite being on what some call a de facto administrative law court, I worry about specialization. We're about as close to it on our circuit as you can come and not get burned out. Specialized panels would be anathema—assign our judges to FERC cases for six months and all hell would break loose. Specialists quickly develop points of view and a certain degree of imperviousness to non-specialist approaches; the worst thing in the world I can think of is to assign a judge only cases in a field in which he or she has prior experience. That is a shortcut to static justice. The best challengers are often the neophytes who don't know enough *not* to ask the hard questions.

More intangibles still: Our system of justice has always been unique in its emphasis on free expression of judges' views. Although it sometimes makes for short-term inconsistency, the give and take of good minds on both sides of an issue over time tends to produce the best resolution in circuit law. There have been proposals for majority control of all decisions in the circuit. This would act as a suppressant of dissenting views. Circuit court majorities come and go with the administration in power. Some of our greatest jurisprudence has been introduced into the law in the form of dissents and expressions of minority views. If temporary majorities are able to prevent discordant views from being published as "unworthy," I would think it a greater hindrance to attracting truly good people to the judiciary than almost anything else that has been mentioned, even the chronically low pay.

En bancing is a tense, even nasty, process now, but at least it must be seen through to a full hearing and resolution with an opportunity for published dissents. If it were capsulized into a simple decision not to publish, the opportunity for suppression of minority views would be far greater than it is now.

That result, I think, is not worth the price. In short, we must be careful not to court consistency too ardently. Different circuits take note of differences and dissents in each other's jurisprudence; they distill and synthesize those differences to make even better opinions. The national jurisprudence can tolerate it. Ironically, social psychologists in group dynamics tell us that a group often reaches its highest level of self-esteem when it unanimously reaches a decision that later turns out to be disastrous.

I do, however, think we can do a better job of getting rid of the frivolous or "no real issue" cases faster, and we should not be embarrassed about doing so. Staff counsel can spot them for us, judges can eyeball them to make sure no dormant *Gideon v. Wainwright* is among them, and a short, unpublished opinion drafted by staff is all that is necessary to terminate the case. Justice may be equal, but equality in turn is proportional. Many circuits have had their processes jammed up by perennial litigants, and we should not stand for it. We can and should, over time, change the expectation of marginal litigants as to what kind of review they will get.

A final point: I do not discount the importance of resolving numbers problems so judges do not feel under continual siege. Volume crises eventually spill over into substance. A crisis-oriented court will inevitably be tougher on entrants into the federal arena; already the doctrines of nonjusticiability, standing, political question, and separation of powers are invoked aggressively to cut down the number of cases we decide on the merits. We have to solve our numbers problems, or it will be reflected in the quality of our jurisprudence. New kinds of cases are going to turn up over the years, new types of injuries will be advanced; government activities and their consequences will become more complex, so will tracing their effects for standing purposes. As the size and diversity of our population grows, so will federal court litigation, and as deep-seated divisions in the country surface, so will the calls for federal courts to umpire them and to protect the weak and un-

derrepresented. Unless we come to terms with our numbers problems, we risk the danger of retreating from our constitutional duties to contribute to the solution of these new problems under cover of ever more difficult entry barriers.

Collegiality

Federal judges do not get to choose their colleagues. We are thrown together with one another, not by choice but by manifest destiny. Since Presidents overwhelmingly choose judges with sympathetic philosophies, an appellate court over time reflects the political and social diversity of the country at large. One survey showed half of all federal judges had been "politically active" before coming on the bench. Other studies show that a judge's party affiliation is a better predictor of his or her decision making than religion, socioeconomic origins, education, or age. Within a few years a court with a definite liberal tilt can become a bastion of conservatism, and vice versa. When I came on board the D.C. Circuit in 1979, there had been no changes in the court's membership for 10 years; since then there have been 11 new appointments.

Judges cannot work around each other as one learns to do in a law firm, a government office, or even a faculty. A computer makes up panels of judges and assigns cases nowadays, and there is no begging off for incompatibility. Only the grim reaper or retirement can free us from each other. Personal relationships between the judges can play a crucial role in appellate court operations. One survey of appellate judges found that when precedents are absent or ambiguous, personalities, predilections, and group relations rush in to help fill the void.

Given all this, collegiality becomes all important. One of the most important things in running an appellate court is maintaining an atmosphere in which judges can agree or disagree on substance free of personality clashes or risk of personal reprisal. Colleagues who are perennially annoyed and irritated with one another have difficulty listening respectfully and open-mindedly to each other; they have little incentive to

seek a middle ground. In the memorable words of Oliver Wendell Holmes: "We ought not to behave as though we were two cocks fighting on a dunghill."

But collegiality is not so easy to attain. Personal antagonisms do fester and breed on courts, as elsewhere, and the press is only too willing to publicize them. This is too bad, for there is distinct danger to the body politic from a court which is perceived as riddled with personal feuds. When personal antipathies are thought to influence the way a court acts, everyone in the judicial system suffers: Advocates thrust and parry, not just legal arguments but judicial relationships as well; they alter their arguments and authorities to fit the personalities as well as the merits, and in the process the final outcome or the rationale of the case may be subtly changed from what it might have been. The most damaging result may be the unconscious skewing effect on the judgment of the warring judges themselves or public distrust or disenchantment with the process altogether.

Of course, there have always been personal conflicts on courts, perhaps especially on the Supreme Court. Tempers flared so badly at the time of the *Dred Scott* decision that Chief Justice Taney tried to bar his lifelong opponent, Justice Curtis, from even seeing the other justices' opinions before Curtis wrote his dissent. And in the 1870s, Justice Miller publicly called his Chief "mediocre" ("I can't make a great Chief Justice out of a small man," he told a friend); two other members he called "too old" ("[I can't] keep the Chief Justice from giving them cases to write opinions in which their garrulity is often mixed with mischief"); and still another he described as a captive of presidential ambitions. In 1910, then President—later to be Chief Justice—Taft reported, on the basis of in-court sources, that

> [t]he condition of the Supreme Court is pitiable, and yet those old fools hold on with a tenacity that is most discouraging. Really the Chief Justice Fuller is almost senile; Harlan does no work; Brewer is so deaf that he cannot hear and has

> got beyond the point of the commonest accuracy in writing his opinions. . . . I don't know what can be done. It is most discouraging to the active men on the bench.

The informal traditions that grow up in a court can help or hinder judge relationships, and they become ever more important as numbers grow. Lists of unwritten do's and don'ts are part of the "socialization" process of every court. Some of my favorites are

1. Think hard before you vote to en banc; your time will come, and judges have long memories. If you are truly worried by a colleague's opinion, go see him or her and try to convince him or her to change the offensive parts on his or her own.
2. Keep a written record of everything except nasty remarks. The photocopy machine is your worst enemy.
3. Never mention it when a colleague's opinion has been reversed by the Supreme Court; pretend it never happened.
4. Don't hesitate to make substantive comments on other judges' opinions, but not stylistic ones. Dealing with one's colleagues is not like correcting term papers. Justice Bradley once wrote to Justice White: "While I concur in the doctrine I am willing to trust the Chief Justice in the mode of expressing it."
5. Give prompt attention to other judges' draft opinions; a colleague who has labored long on a draft can do a slow burn if it sits too long on your desk. Several courts have formalized this rule of civility by putting limits on the time any judge can take to react to another's opinion.
6. Don't hog oral argument, cut off a colleague's questioning, or "rephrase" a colleague's question for the lawyer's sake. "What Judge X meant was . . ." is a prelude to a tense post-argument conference.

7. Don't agonize for months or years over every word while the other judges and litigants wait anxiously for a ruling.
8. Don't be a profligate concurrer intent on getting special points across in every case. It's an interesting fact that concurrences are not cited or used very often by future courts. John Frank wrote that "Justice Frankfurter . . . consumed a large portion of his energy and talent in essays which, for all practical purposes, might as well have been written on paper airplanes and thrown out a Supreme Court window."

Purposeful efforts by judges to spend more time together in nonconfrontational situations may also be worthwhile. With circuits so far-flung and schedules so crowded, it is amazing how little one sees of one's own colleagues. Even in the same building, months can go by if one doesn't make a conscious effort to keep in touch socially.

When a full court is asked to en banc a panel opinion, collegiality is at its greatest risk. Although Federal Rule of Civil Procedure 35(a) provides for en bancs either in cases of "exceptional importance" or "to maintain uniformity" in circuit law, most en bancs in my experience reflect the current court majority's view that the law is headed in the wrong direction. These judgments are likely to be made with some frequency when courts are split ideologically. Some courts, like the Second Circuit, nonetheless have a strong tradition against en bancing; they live with their differences at least until the Supreme Court steps in. In other circuits, like our own, en bancs run from a half-dozen to a dozen a year. En bancs generate the highest personal tensions on a court; the panel majority's work is wiped off the legal map, sometimes with less regard to legal error than to its deviation from the will of the majority. For the panel majority, losing an en banc is a bitter pill, since the entire court is now on record the other way. Thus, lobbying for a decisive vote is far more frequent in en bancs than in panels. They are not to be under-

taken lightly—consistency and collegiality often tug at each other. A newly emergent majority on a court should wield its power cautiously and graciously as far as en bancs are concerned.

Finally, even when judges disagree, we should do so civilly. Although the press thinks "passionate dissent" is one word (whoever heard of a dispassionate dissent?), too often there are untoward degrees of personal involvement and even personal hostility discernible in opinions. A dissent is by nature cathartic; unlike the author of a majority opinion, the dissenter need not hedge, conciliate, accommodate. The parade of horribles, the slippery slope, the barbed jab, the ad hominem jab, the bitter accusation, the catastrophic prediction—all are fuel for the dissenter's fire. Maybe we should think more institutionally about the human effects of the pejorative adjectives we so generously sprinkle throughout our writings. It might even be useful to experiment with having one of our most respected members act as designated omitter, routinely going through our opinions and identifying unnecessary ad hominem rhetoric.

I do think we judges need to think and care more about our collegial relationships. They affect the law we produce in significant and often unpredictable ways. All institutions are composed of human beings; in none does humanity, tolerance, patience, and respect have a more direct impact on the quality of work than in our appellate courts.

Chapter VII

Perspectives from the Judicial Conference: Accommodating the Tension Between National and Decentralized Administration

Awakening the Judiciary: Recent Developments in National Judicial Administration

Wilfred Feinberg

Mentioning judicial administration to judges usually has the effect of a sleeping pill. It is not hard to understand why. The business of the federal courts is to process cases and decide them in a reasoned, consistent, and fair way. That work is interesting, sometimes even fascinating, which is the main reason why most judges, perhaps all, take the job in the first place. But how a court is managed affects the efficiency and fairness of procedures and the consistency of decisions. Thus, more and more judges have come to recognize, however slowly or reluctantly, that it is also necessary to focus on judicial administration.

National judicial administration is a fairly recent development. Four decades ago, the term *chief judge* snuck into the U.S. Code without any fanfare at all.[1] In 1948, there were not many federal judges or cases. At that time, excluding the Supreme Court, there were only about 260 federal judges.[2] Now we have some 970.[3] We then had some 2,700 appeals in all the circuit courts.[4] Now seven circuits each have more appeals than that, and a few others are getting close to that number.[5] With the increase in judges and cases came a concomitant increase in staff to process the cases (law clerks, secretaries, clerk's staff) and a need for expanded administration. There was no way to avoid it. There were simply too many people around whose help we needed to process and decide those appeals. And so a system evolved, with some fits and starts, with policy emanating on a national level and adminis-

tration shared to some extent through national, regional, and local mechanisms.

On the national level, there is the Judicial Conference of the United States. It is surprising how few federal judges are fully aware of how that body operates, perhaps because most judges are so busy they do not have the time to inform themselves. Or perhaps some judges are simply not interested, although they should be, because, as already indicated, how courts are administered affects the efficiency, fairness, and consistency with which cases are handled and decided. Briefly, the Judicial Conference consists of 26 federal judges presided over by the Chief Justice of the United States.[6] The 12 chief judges of the regional courts of appeals and one district judge from each circuit are members of the Conference, along with the chief judges of the Court of Appeals for the Federal Circuit and the Court of International Trade.[7] The chief judges are there by seniority, since that is how a circuit chief judge is chosen,[8] and they remain members of the Conference as long as they hold that position.[9] The district court representatives are selected by the judges in their respective circuits and serve three-year terms, which may be repeated.[10]

The Conference meets twice a year in Washington, for a day or two. Each time it meets, the Chief Justice continues the valuable practice, apparently initiated by Chief Justice Burger, of having breakfast with the district judge representatives on one morning and with the circuit chiefs on another. At that time, the judges can discuss informally with the Chief Justice anything at all—and they do. The formal work of the Conference is done primarily through committees.

Soon after Chief Justice Rehnquist assumed office in September 1986, he created an ad hoc committee, which he chaired, to study and evaluate the way the Judicial Conference worked.[11] The other members of that committee were Chief Judges James R. Browning, Levin H. Campbell, Charles Clark, Barbara B. Crabb, John F. Nangle, and Aubrey E. Robinson, Jr., as well as the author of this article and Circuit

Executive James A. Higgins. The ad hoc committee solicited the views of every federal judge in the nation and developed recommendations to revise the structure of the Conference. These recommendations included revitalization of the executive committee, creation of new committees and consolidation of some others, and formation of a legislative liaison group to help deal with fast moving legislative developments. The committee also recommended a greater degree of turnover in committee membership and increased communication between the Conference, its committees, and the rest of the judiciary.[12] Chief Justice Rehnquist supported these recommendations right down the line, and not surprisingly, the Conference adopted them in September 1987.[13]

The Chief Justice also streamlined Conference meetings. Previously, the members of the Conference usually had to consider the oral presentation of many lengthy reports from the various committees. Chief Justice Rehnquist has instituted the practice of having consent-and-discuss calendars so that discussion is reserved for those reports on which there is actual or potential disagreement.

After the revamped committee structure went into effect and at the time of the September 1988 Judicial Conference, there were 21 regular committees and one special committee and four advisory committees on rules.[14] On these committees were four Supreme Court Justices, 77 circuit judges, 129 district judges, and 65 other judicial officers, academics, and lawyers.[15] Since then, other committees have been created.[16] Staff for the committees is provided by the Administrative Office.

A list of the membership of the Conference, the committees, and their members as of the September 1988 meeting is presented in Appendix B-1. The same information for the committees created since then appears in Appendix B-2. Just the names of the committees alone show the immense scope and variety of the matters with which the Judicial Conference is concerned. Some of the new committees are offshoots of

what used to be the Committee on Judicial Administration, whose responsibilities had become too large for mere mortals to handle. Thus, we now have a committee dealing with judicial improvements, such as automation in the courts. Another new committee is concerned only with space and facilities. Another new committee oversees operations of the Administrative Office of the U.S. Courts. Each of these subjects is a matter of great practical importance to federal judges.

All federal judges in the country are encouraged to contact the two Conference representatives and the members of the committees from their circuit for information with regard to matters within their jurisdiction. What the committees do is not secret, and the members are not encouraged to be secretive.

One of the first things that the executive committee did was to adopt an interim policy that when the Administrative Office recommends to a Judicial Conference committee that a request submitted by a judge or a court be rejected, the Director of the Administrative Office should notify the judge or court promptly.[17] Similarly, if a committee of the Conference votes to reject a request of a judge or a court, the chairman of the committee should notify the requester promptly unless there are compelling reasons for not doing so.[18] At its March 1988 meeting, the Judicial Conference made this interim policy permanent.[19]

All of that is history and brings us to the present. What will the future bring? Certainly, greater involvement of all federal judges in national administration should be encouraged through increased communication and by turnover on the committees. Still, as the number of judges and judicial employees grows (and this seems inevitable with the increase in population), national administration may become more unwieldy. We have already taken some steps towards some decentralization and more regional administration between the top level in Washington and the district courts.

The circuit councils, which for a long time were barely more than paper entities, have become more important in recent years. At the start of this decade, Congress confirmed and strengthened the power of the councils and mandated representation of the district courts on them.[20] At the present time, the councils have been assigned a great many important functions both by Congress and by the judicial branch itself. Examples of the former are supervision of speedy trial plans[21] and jury selection plans.[22] Examples of the latter are allocation of construction money for new facilities, determination of appropriate emergency personnel for judges, and recommending the proper number of judgeships in each district. The councils are also the administrative level of last resort with respect to disposition of most judicial misconduct complaints. When a circuit chief judge dismisses such a complaint, as happens in most cases, the statute provides for a petition for review to the circuit council, but not beyond that.[23]

Budget decentralization, technology, geographic regrouping, state–federal local councils—all of these may help cope with the growing and diverse system of federal judicial administration. It seems likely that most judges will be tempted to turn over more and more judicial administration to experts and to staff. Judge Newman asked a penetrating question at the Federal Appellate Judges' Conference—whether judges can find the time for administration. It is a problem for all of us. Yet, because of the experience and knowledge of the court system they have, judges should stay involved in the way the judicial system is administered.

The single area affecting administration of the courts that needs most attention is the relationship with Congress. It is an anomaly that Congress treats the judiciary, at least in the national budgetary process, not as the third independent branch of government but as simply another agency. The judiciary's budgetary requests are considered by the relevant congressional committees along with those submitted by the Commerce Department, the State Department, and the Depart-

ment of Justice. The so-called "Budget Summit" agreement reached in the fall of 1987, which limited budget increases to 2%, was negotiated by representatives only of the executive and legislative branches. It was apparently not thought necessary to obtain the views of the judiciary, the third branch, although the courts are, of course, vitally affected by the budgetary process. The aim of reducing expenses is commendable, but applying an inflexible meat-axe approach to the judiciary budget may do more than simply cut services. It may infringe upon such constitutional rights as trial by jury.

Symbolism in this context is important. It may be helpful to convene periodically—perhaps every five years—a national conference of all federal judges in Washington, and for the Chief Justice to deliver a State of the Judiciary report annually to the Congress and to the nation. Moreover, cooperation between all of the branches of government can be encouraged by new institutions. One example might be a National Law Revision Commission to highlight each year for the relevant congressional committees those conflicts in the federal courts that do not raise issues of social policy and lend themselves to simple legislative solution.[24] Both Congress and the executive branch must recognize that the federal judiciary (whose budget is far less than 1% of the total national budget) is an independent branch of government with a core function that must be preserved.

We can all be sure that in the next few decades the way in which the federal judicial system is administered will change. Federal appellate judges can and should help shape the nature and direction of that change. This is a large task worthy of the judiciary's talents, since it will have a profound effect on how well the federal courts do their job.

Notes

1. *See* Act of June 25, 1948, ch. 646, § 45(a), 62 Stat. 869, 871 ("The circuit judge senior in commission shall be the chief judge of the circuit.") (codified as amended at 28 U.S.C. § 45).

2. Estimate supplied by Administrative Office of the U.S. Courts.

3. Annual Report of the Director of the Administrative Office of the U.S. Courts, 1987, at 20.

4. Annual Report of the Director of the Administrative Office of the U.S. Courts, 1948, at 118, Table B-1.

5. Administrative Office of the U.S. Courts, Federal Court Management Statistics 6, 8, 10, 12, 14, 20, 24 (1988).

6. *See* 28 U.S.C. § 331.

7. *Id.*

8. 28 U.S.C. § 45(a) (1).

9. 28 U.S.C. § 331.

10. *Id.*

11. *See* Report of the Proceedings of the Judicial Conference, September 21, 1987, at 57.

12. *Id.* at 57–60.

13. *Id.* at 57.

14. Membership List of the Judicial Conference, at 1–10, contained in binder of materials presented to the Judicial Conference of the United States, September 14–15, 1988.

15. *Id.*

16. Since September 1988, the Judicial Conference has added one committee: the Ad Hoc Committee on Cameras in the Court Room. Another committee also has been added by statute: the Federal Courts Study Committee. On these committees, there are 20 more jurists, legislators, academics, and lawyers.

17. Report of the Proceedings of the Judicial Conference of the United States, March 15, 1988, at 6.

18. *Id.*

19. *Id.*

20. Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (codified as amended in scattered sections of 28 U.S.C.).

21. The Speedy Trial Act of 1979, 18 U.S.C. § 3006A (1982); *see also* Government of Virgin Islands v. Bryan, 818 F.2d 1069, 1074 (3d Cir. 1987) (citing 28 U.S.C. § 332(d)(1)). *See generally* Feinberg, *The Office of*

Chief Judge of a Federal Court of Appeals, 53 Fordham L. Rev. 369, 379 (1984).

22. Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861–1877 (1982).

23. 28 U.S.C. § 372(c) (10).

24. S. Estreicher & J. Sexton, Redefining the Supreme Court's Role 126 (1986).

The Role of Technology in the Future of the Courts

Howard T. Markey

My assigned topic is technology and how it might, in the future, help to accommodate the tension between national and decentralized administration. Presumably, *accommodate* is a synonym for *reduce*. After more than 16 years on the Judicial Conference, I would not dispute the existence of tension, particularly between those who complain that national administrators are insensitive to and ignorant of local court problems (a judge should not have to run to the Administrative Office to buy a pencil) and those who see the complainers as parochial folks ignorant of the big picture. Increased communication through technology can do much to reduce the perceived ignorance of both groups.

It is too easy to say that the nature of some policies and administrative practices requires national dictation, while the nature of others better suits them for local choice. Identifying which is which is a problem not limited to the federal judiciary. It exists in most national organizations and has permeated what we call our federalism since 1787. It showed up in the Judiciary Act of 1789 in disputes on whether federal courts were needed in addition to the state courts. It appeared again when circuit boundaries were set on state lines. It has often involved a scramble for dollars. The solution has always been compromise and accommodation. Technologically increased communication can help all concerned to identify and compromise on which policies and practices must be set nationally and which may be set locally.

A special dichotomy faces us as federal judges. In our judging, our deciding, we must jealously guard our indepen-

dence of other branches, of public pressures, and of each other. In administering our personal staffs and in participating in the administration of our court, we must often subordinate our views to the cooperative good of the court or the judiciary as a body. If we don't adhere to that distinction, it could be said of the judiciary that it is like "a log floating down the river with a thousand ants on it—and each one thinks he's steering it."

Though a judge's job is often described as to "process and decide" cases, I would suppose that in a utopian world the judge would *only* decide cases and write opinions and would have absolutely nothing to do with processing or administration, because the latter would be done, and done perfectly, by others.

In another dimension, the nonhierarchical nature of the third branch makes it difficult if not impossible to fix responsibility, and as every experienced administrator knows, the guaranteed way to ensure less than perfect administration is to split authority from responsibility, or to put it another way, to fail to distinguish the permissible delegation of duties from the impermissible delegation of responsibilities.

Administration has been defined as the use of people and equipment, the only resources we have, to achieve the mission of the unit. That the judiciary's mission is unique does not destroy or diminish in any way the proven principles of good administration. Some of its elements are internal, such as the hiring, training, paying, promoting, and inspiring of the unit's people and the procurement, maintenance, and upgrading of equipment. Other elements are influenced by the requirement for cooperation with other units—and this implicates input from the larger or national body of which the unit is a part; the agreement with the Marshal's Service is a recent example.

Technology is but a synonym for *tools*. It is what we do with what the search we call *science* has learned. The technological juggernaut has concerned many people. It has been pointed out that 99% of all the scientists and technologists

who ever lived are living now. Thoreau warned of the danger that "men would become tools of their tools." The march of technology, however, is inexorable. I will never understand the man who crosses the country in five hours, at 35,000 feet, in perfect pressurized comfort, at 560 miles per hour to reach a college where he gives a lecture on the evils of all technology. We have much technology now, but we will have more and more in the future. Indeed, Alvin Toffler's "electronic cottages"[1] are available right now. Technology will not itself solve our problems, but it can supply us with options in our problem-solving efforts.

The movement of judicial administration in the future will, I believe, accelerate in the direction of decentralization. I say that for three reasons:

1. Centralized administration will be more and more difficult because of the growing size of the judiciary, with individual courts already deciding more cases per year than the entire judiciary did only a few years ago.
2. The recent and ongoing growth of interest, studies, and training in judicial administration and court management has resulted in a spread of management skills among court clerks, circuit and district executives, and others.
3. Our expanding technology, if properly used, can make decentralization work to the satisfaction of all but the most dedicated centralist.

For decentralized administration to work, it must be seen as a two-way street. Data and reports on local administrative policies and practices must be communicated both vertically and horizontally. Otherwise, the judiciary would become a mob, with everybody in business for himself, and the resulting chaos and embarrassments would lead to irresistible calls for recentralization. It is technology that can supply the needed vertical and horizontal communication and supply of data.

Technology, in our field, concerns production and communication. Taking production first, Judge Weis mentioned

the use of technology in our decision making. Every judge will soon have a personal computer (PC) for computer-assisted legal research in chambers. The technology exists to "network" PCs among chambers, courts, and the Administrative Office, and to transmit over that network opinions, orders, vote sheets, reports, or anything else that can be written. We will soon be preparing opinions in machine-readable form for direct placement in the computerized opinion services. The recent request of the American Society of Newspaper Editors for early access to our opinions could be satisfied by providing the software that would enable the editors, without leaving their offices, to access a clerk's office computer, in the memory of which would reside all the opinions issued that day or that week. Supplying counsel with proof that the court has decided his precise issue the same way 700 times might discourage frivolous appeals, or at least persuade a judge that Chief Judge Gibbons is right when he says it is really not necessary to write a published opinion saying the same thing for the 701st time. That might help us to recognize that the answer to a wasteful and thus frivolous appeal is not to issue a wasteful and thus frivolous opinion. Currently, appeals are prepared by adversary lawyers, and we are "presented" with an appeal as a fait accompli. Technology can enable us to get "in the act" sooner. The videotaped trial records now approved for experimentation will enable the appeal well within the 30 days envisioned by Chief Judge Lay. Videotaped records may also encourage the well-deserved presumption of correctness of the district court decision suggested by Judge Schwarzer. A computer printout of facts and issues in appeals can be circulated when an appeal is filed and may supply the case-category knowledge Judge Breyer said was needed to effectuate Chief Judge Campbell's suggestion of a "super panel" in each circuit.

But technology's potential for increasing communication will be its greatest contribution to the accommodation of the tension between national and decentralized administration. I

don't know what the cost of a closed-circuit two-way television network tying every judge to every other judge would be, but it may be less than what is now spent on travel and lodging for the 300 judges involved in two meetings every year of the Judicial Conference and its 23 committees. When Chief Justice Taft called the first meeting of senior circuit judges in 1922, it was the only way they could see and talk to each other. That is no longer true. Representation on the Judicial Conference will be facilitated, for the availability of a PC network in all chambers of a circuit will remove any excuse for a representative of the Conference not knowing what the judges in the circuit want. Even a Burke-influenced representative can know what guidance he is not following. Similarly, present technology of communication can assure the Conference that it knows what is going on in the system. Technology can tell the Chief Justice, for example, when he is assigning visiting judges, where the need really is, which might help in meeting Chief Judge Clark's concern.

There will really be no reason for a judge to be tense about insensitive national policy and administrative decisions when the judge can "tune in" and actually watch his or her suggestion or complaint or plea being considered by a committee, and again when it is being considered by the Judicial Conference. The complainers will realize that those establishing national policies and administrative practices really don't have two heads, and those who must do that establishing will realize that the complainers are not as parochial as they thought. I don't mean that we would or should conduct a continuous town meeting in the third branch, but only that technology can, where it is appropriate, enable such exercise of true democracy in a controlled, periodic manner and can serve to "accommodate" the tension between national and decentralized administration.

Enough brainstorming; we need to keep things in perspective. There will always be some room for Chief Judge Bauer's yellow pad. Technology is not a panacea. In fact, it

just sits there. It must be understood and used and used wisely to make the performance of a needed task faster or more complete. So long as it is restrained to its role as servant, technology can pay for itself, however large the caseload or whatever our jurisdiction.

Lastly, no technology, not even biochemistry's deoxyribonucleic acid, will enable any of us to be genetically engineered into another Learned Hand. Learned Hand could not be Learned Hand today. There just isn't time. Certainly it is impossible for a panel to meet at his farm and discuss a single case all day, and none of us has time to revise our opinions 12 times. But if we succeed in using every resource, including the technological, to continue the delivery of justice and the preservation of liberty in a free society, Hand may one day say to us, "Well done."

Notes

1. A. Toffler, The Third Wave (1981).

Chapter VIII

Working with the Congress of the Future

Frank M. Coffin

It is safe to say that the happiness, effectiveness, stability, and independence of the federal judiciary depend to a very large extent on Congress. If it is sensitive and responsive to our needs, we shall remain one of the most durable legacies of the founders of this nation. If it is not, long continued suspicion, underfunding, petty harassment, minute oversight, and capricious additions to workload can be the equivalent of a constitutional amendment repealing Article III. Our budget; our conditions of work, including workload, salary, fringe benefits, restrictions, and discipline; our structural organization, jurisdiction, and procedures—all are at the disposal of our 535 elected compatriots.

All that is safe to say. What is not safe to say is precisely how we should try to live and work with this sister branch that means so much to us. Our Committee on the Judicial Branch of the Judicial Conference of the United States recently sponsored, with the Brookings Institution, a colloquium on judiciary–congressional relations. The papers and proceedings of that event have been, with assistance from the Governance Institute, collected and presented in a book, edited by Robert Katzmann, *Judges and Legislators: Toward Institutional Comity.* That book underscores the obstacles to communication and understanding that have made the present state of health between our two branches, to quote my own words, "if not an acute crisis, . . . a chronic, debilitating fever."[1] That book is a beginning. It charts the areas of our inquiry. It asks the broad questions.

What I want to do now is carry the inquiry a step farther and deeper by hazarding a look into the future. Addressing the focus of this volume, we ask: What kind of Congress will we be living with in the next decade or so, and what does our preview suggest as guides for our dealings with it? At the outset let me disavow any special credentials. My own congressional experience is already three decades in the past, when life was simple: a staff of five or six; incoming mail of 100 or so letters a week; service on one committee, one subcommittee,

and one joint committee; a monthly constituent newsletter and some occasional tapes for home radio stations; a campaign budget of $25,000; and, generally, a not unhappy willingness to follow the benign but firm leadership of Speaker Rayburn and his "Board of Education," which made room for bipartisan support of President Eisenhower's foreign policy.

Since those halcyon days there have been a major revolution and a minor counterrevolution. There was first the era of decentralization, reforms, onslaughts against seniority and party discipline, and the openness of the 1970s. This was followed, in the 1980s, by a trend back toward centralization, leadership, and discipline. The former revolution was centrifugal; the latter counterrevolution was, and is, centripetal. What complicates matters is that both movements coexist today, something like the various shiftings of the tectonic plates underlying the continents.

The Centrifugal Congress

Here is the profile of the centrifugal Congress, measured by workload, dispersion of authority, reliance on staff, loss of institutional memory, and vague legislation.

Workload. A casual appraiser of statistics might conclude that Congress is working less than it did in the days of LBJ's flood of Great Society legislation. Fewer bills are introduced today than were introduced in the late 1960s or even in the 1950s;[2] only 40% as many bills pass into law as did in the 1950s;[3] the number of committees in both houses was drastically reduced by the 1946 Legislative Reorganization Act, and while subcommittees in the House have leaped up, particularly in the 1970s, the Senate has managed to cut back its total committee numbers to a figure comparable to that in the 1950s;[4] and the length of a congressional session has stabilized at about 300 days.[5]

These facts conceal the hard truth that the workload of Congress has inexorably increased in both quantity and complexity. First, much of the supposed decrease in bills intro-

duced is, especially in the House, attributable to a change of rules allowing an unlimited number of cosponsors for any bill. The year after this rule change, the number of bills introduced in the House fell from 16,000 to 9,000.[6] Second, the nature of the legislation has changed from freestanding, single subject measures to complex, omnibus, multiple-subject, vast-scale authorizations; continuing appropriation resolutions; and budget reconciliation bills. New ideas of members are likely to appear (or be hidden) in such vehicles. Today's average statute occupies over nine pages of closely printed text, compared to fewer than two pages in the mid-fifties.[7] Third, though total numbers of hearings have eased off since the 1970s, the quantity of transcript pages of testimony and submissions has been rising.[8] Moreover, with the budgetary crunch foreclosing much programmatic legislation, committees are spending increasing time on oversight and investigation—activity not revealed by numbers of bills passed.[9] Fourth, more indicative of workload than numbers of committees and subcommittees is the average number of assignments per member. In the mid-fifties in the House, the total average number of assignments per member was three; this exactly reflected my own involvement. I was a member of the Foreign Affairs Committee, its Europe Subcommittee, and the Joint Economic Committee. Today the average is 6.4 assignments per member,[10] while that in the Senate—even after the 1984 retrenchment effort—is 11.[11] Fifth, hours of floor activity in both houses have shot up. In the House, the average day has increased from 4.1 hours in 1955–1956 to 6.4 hours in 1985–1986, an increase of 56%.[12] Over the same period, the Senate's day has increased by 30% from 6.1 hours to 8.1 hours.[13] Finally, the number of recorded votes has dramatically increased. In the House, there has been more than a sixfold expansion, from 147 in 1955–1956 to 890 in 1985–1986.[14] In the Senate, in the same span of time, there has been a threefold increase, from 224 to 740.[15]

Workload has other dimensions than legislation. One is constituent service and relations. Take mail, for example. When I was a congressman, in the mid-fifties, annual congressional mailings were about 60 million pieces; in 1986, such mailings had reached 758 million, a twelvefold increase.[16] I used to go to my home district every other month or so; now it is a rare senator or representative who does not return home at least every other week, if not every week. Still another formidable component of workload must be considered—fund-raising. From 1974 to 1986, the consumer price index rose 220%; in the same period, spending for congressional campaigns quintupled. In 1974, only 10 House candidates spent $200,000 or more on their campaigns; by 1986, the number rose to 370, with 105 of them exceeding half a million dollars.[17] Constituent demands and fund-raising exacerbate an already awesome workload.

Decentralization. The reform wave sweeping Congress and reaching its climax in 1975 succeeded in diminishing the importance of seniority, ousting three committee chairmen, increasing openness of the legislative process, and widening participation. But it also resulted in increasing the powers of subcommittee chairs and ranking members to hire their own staffs. Committee staffs doubled in the 1970s. And personal staffs of members, totaling 3,556 in the late 1960s, stood at nearly 12,000 in 1986.[18] This growth has meant that daily dealings between members have been replaced by extensive rules and procedures, complex organizational arrangements, and layers of staff aides. Negotiations are between staffs, who alone have hopes of mastering the details of huge committee reports and compendious bills. Special interest groups and their PAC (Political Action Committee) contributions are a force of their own, often cutting across party lines. PACs have increased sevenfold, from 608 in 1974 to 4,157 in 1986;[19] their contributions increased from $8,500,000 in 1972 to $132,000,000 in 1986.[20]

The result of all this is that, as one leading observer concluded, "Lawmakers were seen not as role players in a complex system of interactions in equilibrium, but as individual entrepreneurs in a vast open marketplace . . . ."[21] Or, as Hedrick Smith put it in his book, *The Power Game,* quoting Brooklyn Congressman Charles E. Schumer, "in the [H]ouse we are 435 little atoms bouncing off each other, colliding and influencing each other but not in a very coherent way. There used to be much more structure. But now there is no bonding that holds the atoms together."[22]

Discontinuity. One veteran Senate staffer I have talked with said that the biggest problem is the erosion of institutional memory in the legislative branch. Although this is counterintuitive, senators are proving more vulnerable and insecure than House members. For example, in 1986, 7 of 28 senators seeking reelection, or 25%, were defeated, while only 6 of 391 representatives, or 1.5%, were defeated.[23] Today any Senate seat is of national significance; the possibility of a serious challenge will have little difficulty attracting a substantial war chest. The House, however, loses far more members from retirement. In the 1960s, retirements averaged 25 a year; in the 1970s and 1980s, the average was 38, a 50% increase.[24] The greatest turnover is in staff, particularly in the personal staff of members, but also in committee staffs. One is impressed, in walking the halls of the six congressional office buildings, in seeing, with few exceptions, a parade of young men and women staffers—people enjoying their exciting way station with long hours and low pay before launching their own professional careers at home or in downtown Washington. Although the staffs of the Library of Congress, the General Accounting Office, the Congressional Budget Office, and the Office of Technology Assessment are more stable, increasingly inadequate pay levels threaten that stability.

So, when we see a child vaccine amendment or a veteran's appeals proposal that threatens a flood of new appeals a year (without being referred to a judiciary committee); a bill to

create a special court to consider the deportation of alien terrorists; an internally inconsistent statute; legislative history that is inadequate, opaque, or suspect; or a staggering budget slash of over $100 million to be somehow absorbed without jeopardizing justice, we must remember we are dealing with a combination of members who have little time to reflect on our problems, a high turnover in staff, and decentralized, almost autonomous, power centers where reinventing the wheel and fixing things that aren't broken are not unfamiliar phenomena.

The Centripetal Congress

If we were to stop here, we would have only two thirds of the picture. For there is beginning to emerge another view—that of a centripetal Congress. If what I have described so far is a Congress produced by the revolution of the 1970s, what we are about to see is the workings of a counterrevolution of the 1980s. It is a movement that tends to stress a centralizing establishment leadership, party discipline, a limitation on substantive legislation, and the diminished power of authorizing committees in favor of the appropriating and fiscal committees.

This other side of Congress is the product of a time of deficits and intense budgetary pressure, a time when the focus is on defining or reducing existing programs, not on creating new ones. Joe White writes in *The Brookings Review*, "[B]udgeting discord and fiscal stress push the system toward some process that reduces the number of players to a few who arrange a comprehensive bargain that the remaining players then sanction."[25]

The process started with the 1974 Budget Act, a sort of "treaty among suspicious and competing committees and factions."[26] It became even more sophisticated, if not Byzantine, with the 1985 Gramm-Rudman-Hollings agreement on a revenue freeze, a spending cease-fire, and a further "set of rules, deadlines, and procedural restraints."[27] For example,

rules were changed in both the Senate and the House to permit points of order against amendments to reconciliation bills that would violate Gramm-Rudman-Hollings. The budget committees have come front and center.

Another device, this one strengthening the appropriations committees, is the omnibus continuing resolution. From 1980 on, the continuing resolution metamorphosed from a stopgap measure to keep a program or agency afloat after lapse of the last annual appropriation into a systematic packaging of many appropriations bills in massive omnibus, multi-title bills, usually passed late in a session. This process was exemplified by the "summit" agreement between the President and congressional leaders after the October 1987 stock market crash. White describes the implication: "All appropriations, all tax hikes, and all entitlement reductions had to be produced together—taxes and entitlement in a reconciliation bill and appropriations in a CR [continuing resolution]—so that all parties could see the deal had been kept."[28] It remains to be seen whether the feat of Congress in September 1988 in meeting its deadline for the new fiscal year without resort to a continuing resolution is a rare event or an augury for the future. I suspect the former is more likely.

There are several by-products of this stringency-era omnibus approach to legislation. One is that power has reverted to leaders of the two houses. A corollary is that partisanship invariably colors the steps leading to final legislation. Another is that power also has shifted from the authorizing committees to the budget, tax, and appropriations committees. The power of the financial committees is indicated by the fact that the rules forbidding authorizations on appropriations bills are not applicable to continuing resolutions. While the views of substantive committees are sought and are not unimportant, they have diminished in influence. Still another by-product is that the omnibus measure is a haven of blame avoidance for members[29]—not only avoidance of blame for cutting one program when all are cut but also blunting criticism of particular

substantive legislation which is a minute part of a global package.

In addition to the centralization fostered by omnibus budget-induced packaging, there are a number of other centripetal forces working, particularly in the House of Representatives. Paradoxically, as Roger Davidson notes, the reforms of the 1970s that clipped the wings of the committee barons enlarged the power of the Speaker and the majority party caucus.[30] The Speaker nominates and the caucus approves all majority members of the Committee on Rules. In turn, the committee fashions restrictive rules governing the floor consideration of legislation; these rules now constitute almost half of all rules.[31] Moreover, the device of multiple referrals to House committees, authorized since 1975, gives the Speaker the crucial power of scheduling—of assigning a bill to two or more committees jointly, sequentially, or part of the bill to each. Davidson characterizes this multiple-referral authority as a closer tie to committee decision making than any seen since the 1910 revolt against Speaker Cannon.[32] The power can be used to arbitrate jurisdictional fights, to impose deadlines on committees, to coordinate committees and integrate public policy, and to speed or delay action.

Such powers do not yet exist in the Senate, where leaders have far less scheduling power and are subject to each senator's power to put a "hold" on legislation, to introduce a nongermane amendment, and to launch a filibuster. But Davidson tells us that "senators seem receptive to stronger leadership and tighter management."[33] And all three candidates for the majority leadership post in the Senate have voiced their support for streamlining procedures.[34]

Implications for the Judiciary

This, then, is the binary Congress that exists today and is likely to continue for our foreseeable future—with openness, dispersion of much power, prerogatives for individual members, reliance on staff, considerable turnover coexisting with

centralized authority in the leadership on all important fiscal and budgetary issues, power flowing to the money committees, and gigantic end-of-session packaging legislation considered under restrictive rules. What does this teach us as we try to achieve a legislative environment favoring the most effective functioning of the judiciary? This question served as the focus of a May 1989 workshop of the Governance Institute, from which protocols for communication between the branches are being developed. In the meantime, here are some tentative thoughts.

The picture of Congress teaches us, I think, that we should explore new ways of communicating and associating with both the decentralized and the centralized Congress. The former requires relationships across a wide spectrum. One Senate staffer gave us this advice: (1) don't confine contacts to the chairman of a subcommittee, for every member can initiate legislation; and (2) have ongoing relations with members, not just when we have our own parochial interests, for every member appreciates people with ideas. This raises the questions: when should the judiciary speak with one voice, and when should judges be able to speak their individual minds?

My instinct is that we gain more by encouraging broader communication even if this means that occasionally we reveal differing views. I doubt that the mere fact that some judges may have expressed contrary views would weigh heavily against a deliberate Judicial Conference position conveyed to a particular committee of Congress. One institutional innovation seems promising. It is the familiar suggestion that the Chief Justice deliver an annual State of the Judiciary Address to Congress. As the President draws upon the judgment of the Cabinet officers for the State of the Union address, so analogously would the Chief Justice draw on the Judicial Conference and its committees in order to present an institutional perspective.

Another objective, underlying much of what I have said, would be to refine and clarify the law and the general under-

standing relating to lobbying so that judges, legislators, and staffs will know what kind of communications are encouraged and what are not. Finally, recognizing that legislators at bottom are accountable to their constituents, not judges, we may need our own lay support group. While the organized bar is an obvious candidate, I would like to see leaders from other walks of life join in an enduring effort to preserve the independence, the quality, and the stability of the federal judiciary.

The centrifugal Congress also invites systematic and repeated communication with staff. Despite turnover, as one staffer has reminded us, key personal aides to members are likely to endure. In any event, records of communications are kept. Since members cannot always be available, judges should cultivate staff relationships at all levels. Another staffer emphasized that our task was that of constant reeducation. Here, it seems to me, is an opportunity for institutionalizing education and reeducation of legislative staff in the work and life of the judiciary through annual or biennial lectures, seminars, workshops, videotapes, visits to courts and chambers, and periodical papers on particular problems. Since this should not be a one-way street, we should also recognize the need for judges and appropriate court personnel to develop a deeper understanding of the work of congressmen, their committees, and staffs. Over time we might expect to develop a continuing community of interest in such matters as legislative drafting, legislative history, and the varying impact of legislation on the judiciary.

Coming to the centralized, establishment, centripetal Congress, it seems to me there exists a corollary to the State of the Judiciary Address. With the reorganization of the Judicial Conference, its Executive Committee is developing into a body with far more intimate and comprehensive knowledge of what is going on within the judiciary than ever before. If this group could occasionally meet informally with key leaders of the House and Senate, I believe better relations would result. One result might well be staking out judiciary–Congress rela-

tions as one of the few remaining areas of bipartisanship in an increasingly partisan atmosphere. I believe that leaders on both sides of the aisle would welcome such an enclave of bipartisan effort. Another result might be the creation of a climate for a rules change that would require new legislation to be subjected to a judicial impact analysis, something presently discounted as merely a Judiciary Committee grab for power.

With budgetary problems now dominating the agenda of Congress, we find ourselves wrestling with new ways to deal with budgetary restraints. Our own Committee on the Budget of the Judicial Conference has always been in the forefront in cultivating a close relationship with Congress. Now that relationship must be even closer. And ultimately we must address the structural problem of assuring that the independence and quality of the judiciary are not victims of squeezing macro budgetary decisions. One staffer has pointed out our unhappy position in the congressional appropriation subcommittee structure. Our budget is determined by the subcommittee that also deals with the giant Departments of Justice, Commerce, and State. We are in the position of a mouse trying to sleep with three elephants; the slightest change of position of his bedfellows may work catastrophe. Though our budget is only a tiny fraction of the total, the health of an entire branch of our government is at stake. Perhaps seeing a better structure for this critical decision making would be at the top of the agenda of any meeting with congressional leadership.

* * *

The Founding Fathers wrought soundly and, despite some foreshadowing by Montesquieu, contributed an original concept to government, separation of powers. But in our complex age, for each power to fulfill what was originally expected of it, there must be communication, the sense of a community of interest, and sensitivity toward the needs and problems of each other. This offers to us, as we enter our third century, a challenge to ingenuity, patience, and understanding.

Notes

1. Coffin, *The Federalist Number 86*, in Judges and Legislators: Toward Institutional Comity 21–22 (R. A. Katzmann ed. 1988).

2. N. J. Ornstein, T. E. Mann, & M. J. Malbin, Vital Statistics on Congress 1987–1988, at 165, 167 (1987) [hereinafter Vital Statistics].

3. *Id.*

4. R. H. Davidson & T. Kephart, Indicators of Senate Activity and Workload 9 (Congressional Research Service Report No. 85-133S, June 1985) [hereinafter Report 85-133S].

5. Vital Statistics, *supra* note 2, at 165, 167.

6. R. H. Davidson & T. Kephart, Indicators of House of Representative Workload and Activity 5 (Congressional Research Service Report No. 85-136S, June 1985) [hereinafter Report 85-136S]; Vital Statistics, *supra* note 2, at 165.

7. Report 85-136S, *supra* note 6, at 21–22.

8. *Id.* at 13.

9. *Id.* at 24.

10. *Id.* at 25.

11. Report 85-133S, *supra* note 4, at 10.

12. Vital Statistics, *supra* note 2, at Table 6-1, p. 165.

13. *Id.* at Table 6-2, p. 167.

14. *Id.* at Table 6-1, p. 165.

15. *Id.* at Table 6-2, p. 167.

16. *Id.* at Table 6-8, p. 174.

17. Vital Statistics, *supra* note 2, at 67–68.

18. *Id.* at 136.

19. *Id.* at Table 3-15, p. 103.

20. *Id.* at Table 3-16, p. 104.

21. Davidson, *The New Centralization on Capitol Hill*, in University of Notre Dame Review of Politics, Summer 1988, at 345, 351 [hereinafter *The New Centralization*].

22. H. Smith, The Power Game: How Washington Works (1988) (quoted in Davidson, *The New Centralization*, *supra* note 21, at 346).

23. Vital Statistics, *supra* note 2, at 43.

24. *Id.* at Table 2-9, p. 58.

25. White, *The Continuing Resolution: A Crazy Way to Govern?* The Brookings Review, Summer 1988, at 28, 35 [hereinafter *The Continuing Resolution*].

26. *The New Centralization*, *supra* note 21, at 355.

27. *Id.*

28. *The Continuing Resolution*, *supra* note 25, at 31.
29. *The New Centralization*, *supra* note 21, at 354.
30. *Id.* at 357.
31. *Id.* at 358.
32. *Id.* at 359.
33. *Id.* at 360.
34. *On Capitol Hill Creative Tension Turns to Gridlock*, Christian Science Monitor, April 15, 1988, at 7.

Chapter IX

The Governance of Space Societies

William J. Brennan, Jr.

The theme of this volume is the future of the judiciary. My topic, however, is not the immediate future or the next decade, but the next century, and my specific focus—perhaps a surprising one—is the law and outer space—and specifically what prospect there is for involvement of the law and courts and lawyers in the still mysterious but surely burgeoning evolution of humankind's effort to conquer the far reaches of the universe. Can it be that human beings shall indeed colonize the moon and Mars and even farther reaches of the heavens? Does the nation's reentry into the fray, signaled by the successful flight of Discovery, answer with an emphatic yes? In 1988, Congress authorized an appropriation for the National Aeronautics and Space Administration of $900 million to begin work on a space station,[1] a project estimated to cost upwards of $30 billion by the time it is finally assembled in orbit in the late 1990s. Apparently about 20 shuttle flights would be required over a three-year period to haul the station components into orbit for assembly there. Several shuttle flights would then be needed to ferry people and research equipment to and from the station. A "visions" committee of NASA is pondering a permanent base on the moon and human exploration of Mars.

In September 1988, President Reagan, with the five astronauts of the shuttle Discovery beside him at Houston, proclaimed that "America must lead the effort to colonize space, because in the next century leadership on Earth will come to the nation that shows the greatest leadership in space."[2] He talked of establishing a permanent moon base and of a manned flight to Mars. "Let every child dream that he or she may one day plant the Stars and Stripes on a distant planet," he said. "Mankind's journey into space," he went on, "like every great voyage of discovery, will become part of our unending journey of liberation. In the limitless reaches of space, we will find liberation from tyranny, from scarcity, from ignorance and from war. We will find the means to protect this Earth and to nurture every human life, and to explore the

universe." "This," he concluded, "is our mission, this is our destiny."

And during 1986–1987, in the pursuit of that mission, the National Air and Space Museum of the Smithsonian joined with the Center for Democracy to stage conferences of a large number of leading legislators, jurists, lawyers, educators, businessmen, and other distinguished citizens to discuss and propose a Declaration of First Principles for the Governance of Space Communities.[3] Drafts of such a declaration were completed and circulated for comment. As might be expected, some found flaws in it, of which more in a moment.

Now, why the sudden interest in the law of space communities? No such community exists, yet there is a feeling abroad that more quickly than we realize, there will be space communities—on the moon or on Mars or simply anchored somewhere in space. Princeton physicist G. K. O'Neill anticipates orbital colonies of 10,000 or more people in many places.[4] Another who has broad experience with space problems goes so far as to insist that we have technology today that can deliver millions of people to space; "hundreds of millions of people," he assures us, "will eventually live and work there from every part of the Earth."[5] Moreover, a presidential commission, the National Commission on Space, has filed a report stating that shortly there will be a "growing number of people working at Earth orbital, lunar, and eventually Martian bases, initiating the settlement of vast reaches of the lunar solar system." The commission even hazards a timetable: by 2001 (13 years from now), economical new vehicles, operating to a spaceport in orbit, to travel a highway to space and more people and cargo from Earth into space; by 2006 (18 years from now), initial operations by robots on the moon, followed by a permanent lunar outpost to support astronaut operations; by 2016 (28 years from now), detailed exploration of Mars with robots, followed by a Mars outpost for human activity.

In the face of the unbelievable accomplishments of space programs of the United States and Russia, I don't see how we can possibly reject all this as pure fantasy. But I do think that with so much to be done to create them, it may certainly be a long time before large, independent societies will be in existence.

Yet, if we accept, as I am persuaded we must, that space colonization is inevitable, and that we should therefore prepare for it, what are just some of the legal problems we should be thinking about? The conferees at last year's Smithsonian meetings identified a large number. Here are some: Since Earth is part of space and in space and is part of the Cosmos, space societies can't sever their ties with Earth. Is Earth then to determine the shape or nature of governance in space? If so, isn't space then just a new continent, as was our own when the Mayflower landed, to be explored as was our own by several nations—the Spanish, the French, the Portuguese, the English? Should any law then be made for a space society in advance of actual settlement? Does not that law have to await knowledge of what people will make up a colony in space? What is the best historical model: the Mayflower Compact, the Article of Incorporation of the British East India Company? Or should it be a wholly original creation? Will the norms of Western society determine the lives and dreams of humanity in space? If the United States creates a society populated by U.S. citizens, what federal law should govern that society? Admiralty law, perhaps? Does the Constitution follow the flag so that its protections are available to every resident of the space settlement? Who regulates the U.S. settlements—the space dwellers themselves or the Congress? Can we really say, or is that a question that should be left to the space settlers? In any event, is it not folly to think of a homogeneous society in space—won't we have separate, different groups? How do we acquire a portion of the moon or of Mars or of space itself for a settlement? From whom? What right is there to own real property in space? What mechanism should be

created for determining what domestic laws are appropriate to the space environment? Should it be something akin to a space equity jurisdiction? What of international approaches looking to a body of international law to regulate governance of all settlements?

These are by no means all of the questions posed by the relationships of Earth and the United States to space communities. The list does, however, signal something of the monumental tasks that must inevitably entangle lawyers in their solution. It is not that we do not already have some laws in the field. The United States became a signatory in 1967 to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies.[6] Under that treaty the signatories agree that each "shall bear international responsibility for national activities in outer space, including the moon and other celestial bodies, whether such activities are carried on by governmental agencies or by nongovernmental entities." There is also the Moon Treaty and perhaps up to 100 additional treaties or agreements relevant to outer space. Indeed, the American Law Institute itself cosponsored in November 1981 the international conference that debated issues on "Doing Business in Space: Legal Issues and Practical Problems." Moreover, Congress has extended federal criminal law to punish criminal conduct on the moon or other celestial bodies, and in spacecraft outside the Earth's atmosphere. Indeed, a few district court and state court decisions have extended American domestic law to the solution of outer space problems. We all know of lawyers who have already had occasion to counsel clients on space law. But I suggest that the actual establishment of space settlements will confront the profession with enormous new responsibilities that we ought to prepare for as thoroughly as we can. For it is accepted by all of us, I am sure, that the United States must be, and must become, unequivocally committed to space exploration and exploitation and the settlement of space by Americans. Our very sur-

vival requires no less. We have to keep in mind that Russians, Japanese, Europeans, and South Americans also have asserted interests in outer space.

Let me return now to the Declaration of First Principles that the Smithsonian Conference produced in 1987.[7] That declaration was not the only effort in its field. Another, entitled a proposed "Treaty Governing Social Order of Long-Duration or Permanent Inhabitants of Near and Deep Space"[8] (which I shall refer to as the convention to distinguish it from the declaration), was advanced in the book *Envoys of Mankind*,[9] by George S. Robinson and Harold M. White, Jr. Both the convention and the declaration have come under sharp criticism in a review of *Envoys of Mankind* by John A. Ragosta and Glenn H. Reynolds, lawyers practicing in Washington, D.C.[10] The criticism of the declaration may be more serious. While concluding that the declaration has much to recommend it because it focuses directly on affirmative statements of fundamental and political rights, the review comments:

> The Declaration appropriately guarantees civil and political freedoms that should govern all actions in space of earth and space inhabitants. Such principles can guide analysis of legal issues that arise in whatever context and provide guidance for a discussion of rules for governance of space societies. Unfortunately, the Declaration has a fatal flaw. The Declaration is written solely from the perspective of the United States, failing . . . to understand the critical role that the political relations of all Earth nations will have on space inhabitants. . . . We do not believe that the Soviet Union, France, China, or any other space-faring nation will look with favor on principles formulated in such a manner. It is simply not productive to seek to establish principles for laws and government in space that will certainly be perceived by the world's leader in space habitation (the Soviet Union, alas, not the United States) as either irrelevant or insulting.[11]

Having decided that both the convention and the declaration were flawed, Ragosta and Reynolds offered their own

version of a "Declaration of Rights and Principles for the Governance of Space Societies."[12] Their guidelines emphasized focus on the space inhabitants, not an attempt to defuse or resolve all the possible conflicts of Earth nations in space. Accordingly, their focus was on man's exploration and ultimate inhabitation of space, not simply one nation's space activities, and in that respect avoided unnecessary historic, political, and cultural ties to one nation. They believe that the declaration could not itself be a system of laws and governance, but should stop with fostering such a system. Finally, they too would have the declaration recognize that there are fundamental principles that should apply to governance of any human society.

It's very obvious that neither the convention nor the two declarations come even close to being the last word on the subject. As the reviewers observed, "All of the work done to date constitutes little more than a preface to the task of working out a scheme of governance for space societies."[13] But whether permanent human presence in outer space is likely in the near term or likely only in the distant future, apparently it is going to be a reality with which we must deal.

According to Ragosta and Reynolds, the study of space societies may have a big dividend for Earth:

> As Walter McDougall [the Pulitzer-prize winning historian] has noted, the great age of earth exploration stimulated a burst of inquiry into the laws governing nations and led to our modern system of international law. In the same way, inquiry into the rules that should govern societies in space is likely to provide fresh insights into the governance of societies here on Earth, a field in which, to judge by current events, there is certainly room for progress. This is particularly true because many of the most salient characteristics of space societies, such as strong dependence on sophisticated technology, problems with maintaining environmental quality, the need for people to work together smoothly under stress in close quarters, and the dependence of inhabitants on their society for basic necessities such as food, water, air,

> and communications, are in many ways simply exaggerations of characteristics already present (and growing) in Earth societies. By studying the problems of space societies we gain a window into not just their future, but our own.[14]

Most of us won't see the day when a code of laws for space communities will become an urgent necessity. But we can be glad that responsible quarters are beginning to give thought to the law and space communities. For, to repeat President Reagan's admonition, "America must lead the effort to colonize space, because in the next century leadership on Earth will come to the nation that shows the greatest leadership in Space."

Notes

1. Pub. L. No. 100-685, § 201(a)(1)(A), 102 Stat. 4083, 4086 (1988).

2. September 22, 1988, as reported in The Washington Post, September 23, 1988, at A3.

3. National Air and Space Museum, Smithsonian Institution, The Conference on the First Principles for the Governance of Space Societies, December 4–6, 1986 (first meeting).

4. G. K. O'Neill, The High Frontier (rev. ed. 1982).

5. National Air and Space Museum, Smithsonian Institution, The Conference on the First Principles for the Governance of Space Societies, December 4–6, 1986 (transcript of meeting).

6. October 10, 1967; 18 U.S.T. 2410; T.I.A.S. 6347; 610 U.N.T.S. 205.

7. Text at Jurimetrics J., Summer 1988, at 484–85.

8. Text at Jurimetrics J., Summer 1988, at 477–80.

9. G. S. Robinson & H. M. White, Jr., Envoys of Mankind (1986).

10. Ragosta & Reynolds, Book Review, Jurimetrics J., Summer 1988, at 473–90.

11. *Id.* at 485.

12. *Id.* at 487–89.

13. *Id.* at 489.

14. *Id.* at 490.

Appendices

Appendix A

Thoughts for a Third Century: A Roscoe Pound Vision

Paul D. Carrington

The following is a summary description of a vision of federal civil procedure based on the writings of Roscoe Pound, but applied to contemporary circumstance. By far the most important circumstance for the third century, in my perception, is the availability of inexpensive video recording. Pound would have been quick to recognize that this invention transforms the possibilities for law to the same degree that it transformed public entertainment. Videotape can now replace other forms of court reporting. All testimony can now be taken at depositions, at a time and place convenient to the witness and lawyers without participation by court or jurors. If we were to require that testimony be presented in this form, the trial record could be produced in a form that is clean of error or redundancy, with substantial abbreviation of the time required for presentation to the trier of fact. This would be more than a convenience to parties, lawyers, witnesses, and triers of fact; it could also eliminate the possibility of mistrial. The latter result could be achieved by concluding all legal and procedural questions before any factual issue is presented to a trier of fact, as is feasible when the available evidence is already "in the can." This would reverse the familiar order of trial and appeal. Perhaps most important, it would undermine a premise of the "clear error" standard of Rule 52: Appellate judges would have the same access to the trial record as the trial judge does. Pound would find in this a solid additional

justification for his proposal to merge appeal with the usual post-trial motions.

The Judicial Code. Pound's Judicial Code would be as spare as possible; provisions might include the following:

1. There will be one court of the United States in which all Article III proceedings shall be brought.
2. The court will have regular divisions corresponding to the present districts.
3. There will be circuit judgeships and district judgeships.
4. There will be at least one district judge and one circuit judge appointed to serve in each regular division, but all judges shall be subject to assignment outside their divisions.
5. Final decisions will require the participation of three judges, at least one of whom shall be a circuit judge.
6. There will be such special divisions consisting of five or seven circuit judges as may from time to time be established by rule of court.
7. Special divisions will sit in panels of three except in cases designated by the court as suitable for disposition en banc.
8. Decisions of the court, whether made by a regular or a special division, will be reviewable only on certiorari to the Supreme Court of the United States.
9. Administrative decisions of the court, including the assignment of judges to regular or special divisions or the assignment of matters to special divisions, will be made at the direction of the council of the court.
10. The council will consist of the Chief Justice of the United States and 15 circuit judges selected generally in the manner by which chief judges are presently selected, and the council will be supported by a chief executive officer and other executives.

Rules of Court. Pound's rules might then provide roughly as follows:

1. Actions will proceed in the regular division selected by the plaintiff subject to a venue requirement.
2. When filed, an action will be assigned to the docket of a district judge having managerial responsibility, and also to the docket of a review panel of three judges sharing responsibility for the final decision.
3. Judges sitting in regular divisions will work in teams generally consisting of 3 or 4 circuit judges and 15 to 20 district judges.
4. The managing judge will rule on all preliminary matters, such as venue, provisional relief, and discovery, except those assigned by the judge to a magistrate for disposition.
5. All testimony will be taken at deposition and recorded on videotape by the court reporter.
6. After a management conference, the managing judge will establish the legal principles applicable to the action.
7. Objection to the legal conclusions of the managing judge may be made on a motion for review.
8. The motion for review will be heard and decided by the review panel unless the motion is referred for decision by the court to a special division.
9. If the matter is decided by a review panel of the regular division, a motion for rehearing may be entertained by the special division on conflicts, but only to correct a substantial and direct conflict with a decision of another division of the court.
10. After the law of the case is determined, the trial record (consisting of a videotape of any testimonial evidence, argument of counsel, and instructions to the jury; documentary evidence similarly edited by counsel; and real evidence) will be compiled and tailored to the le-

gally material issues, with all inadmissible material deleted by counsel, or the managing judge if called upon.

11. Objection to any rulings made by the managing judge will be made to the review panel, and modifications may be made in the trial record at the direction of that panel.
12. After disposition of such objections, the trial record will be submitted to the jury, if the case has been determined to present genuine issues to be tried by jury, or to the review panel to make any findings of fact needed to give application to the law.
13. In either case, the final judgment will be entered at the order of the review panel on the basis of the verdict or its own findings.
14. There will be one special division to hear motions for rehearing based on substantial and direct conflict with a conclusion of law made in another decision of the court.
15. Other special divisions will be established by the council to centralize the decision of difficult questions of statutory interpretation.
16. Special divisions will hear arguments in at least four cities spread across the continent.
17. No special divisions will be assigned more cases than can be decided by its judges on a half-time basis, and every circuit judge will be available for duty in a regular division at least half-time.
18. Assignments of judges to special divisions will be made on a seniority basis, with the consent of each judge, who must agree to continue with the assignment for at least five years, and with a limit on service in any special division of 10 years.

Appendix B-1

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September 1988

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Appendix B-2

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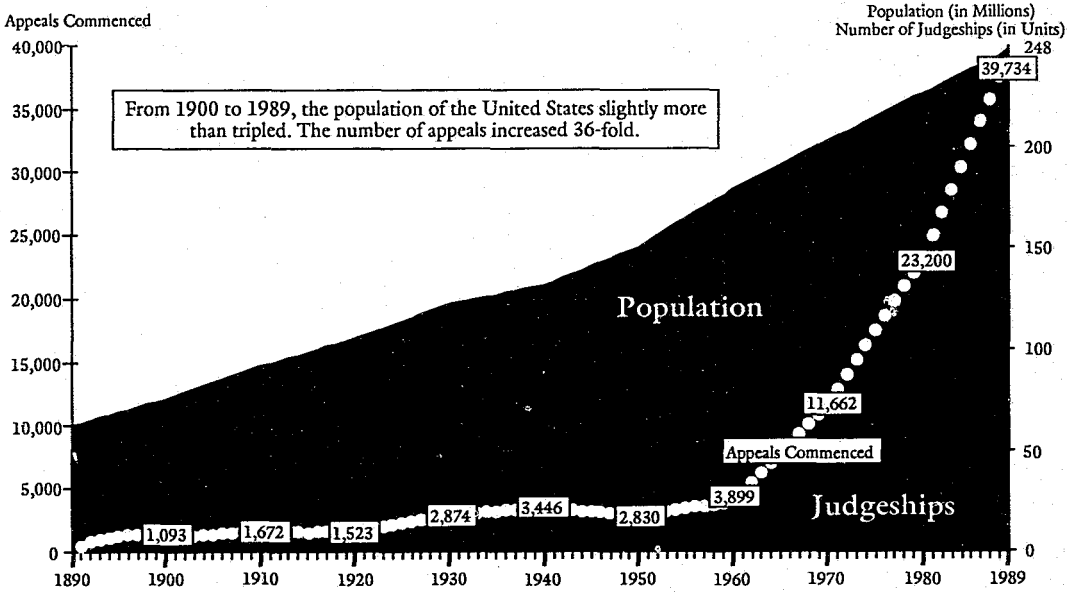
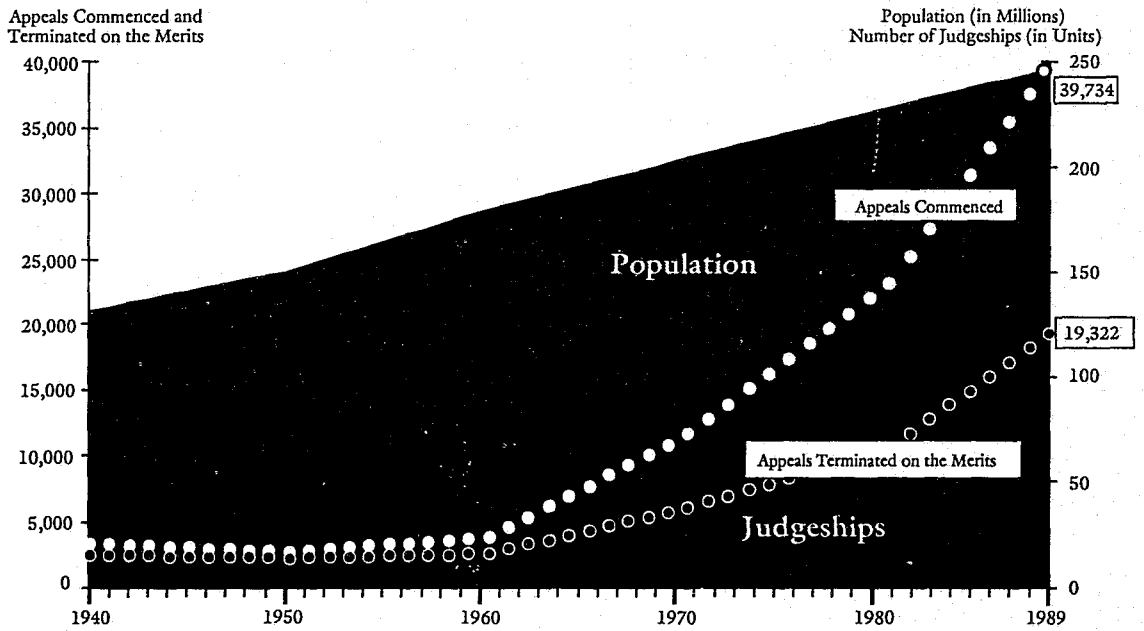
Figures

Figure 1. Population, Appellate Judgeships, and Appeals Commenced, 1890–1989



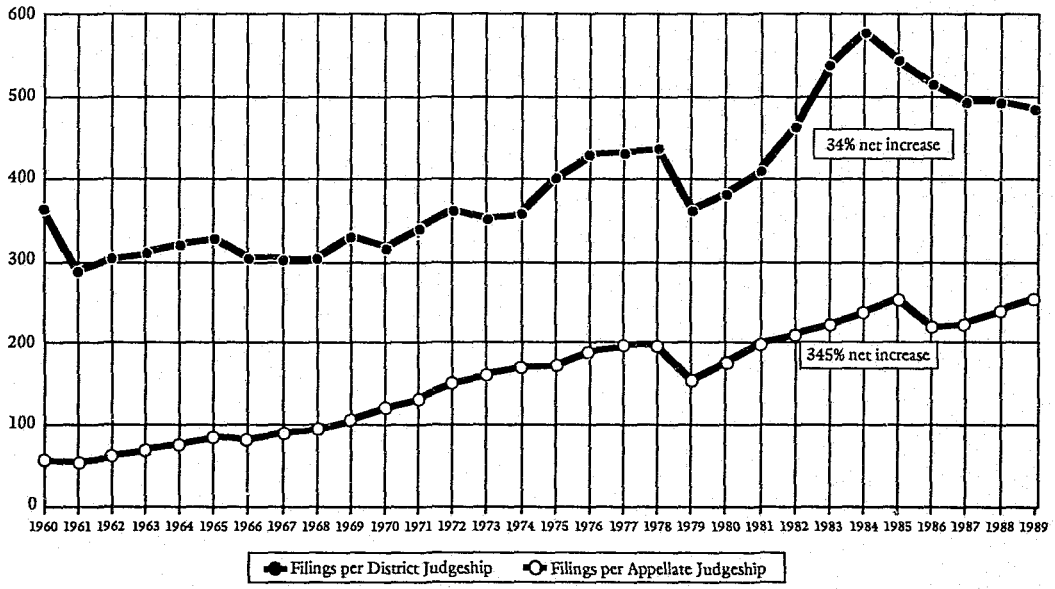
Sources: Appeals commenced and population data are interpolated from decennial figures. Statistical Abstracts, 1989 (Tables 1, 2, 14); Annual Report of the Director of the Administrative Office of the U.S. Courts, 1980, 1989 (Table 1); R. Posner, The Federal Courts: Crisis and Reform (1985), Table B-2. The number of appellate judgeships was drawn from appropriations legislation of the U.S. Congress, 1891, 1892, 1900, 1910, 1920, and 1930, and from AO tables cited above. Twelve-month periods end June 30. Figures do not include the Court of Appeals for the Federal Circuit.

Figure 2. Population, Appellate Judgeships, Appeals Commenced, and Appeals Terminated on the Merits, 1940–1989



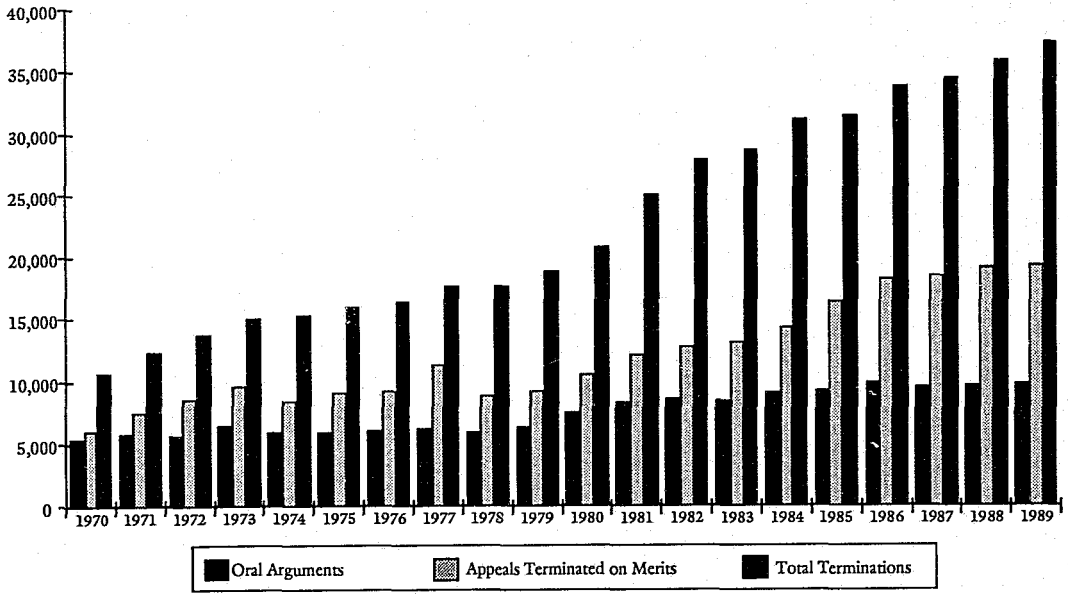
Sources: See sources named in Figure 1 and Annual Report of the Director of the Administrative Office of the U.S. Courts, 1940 (Table 1), 1950, 1960, 1970, 1980, 1989 (Table B-1). Annual termination data are interpolated from decennial figures. Twelve-month periods end June 30. Figures do not include the Court of Appeals for the Federal Circuit.

Figure 3. Filings per Judgeship: District Courts and Courts of Appeals, 1960–1989



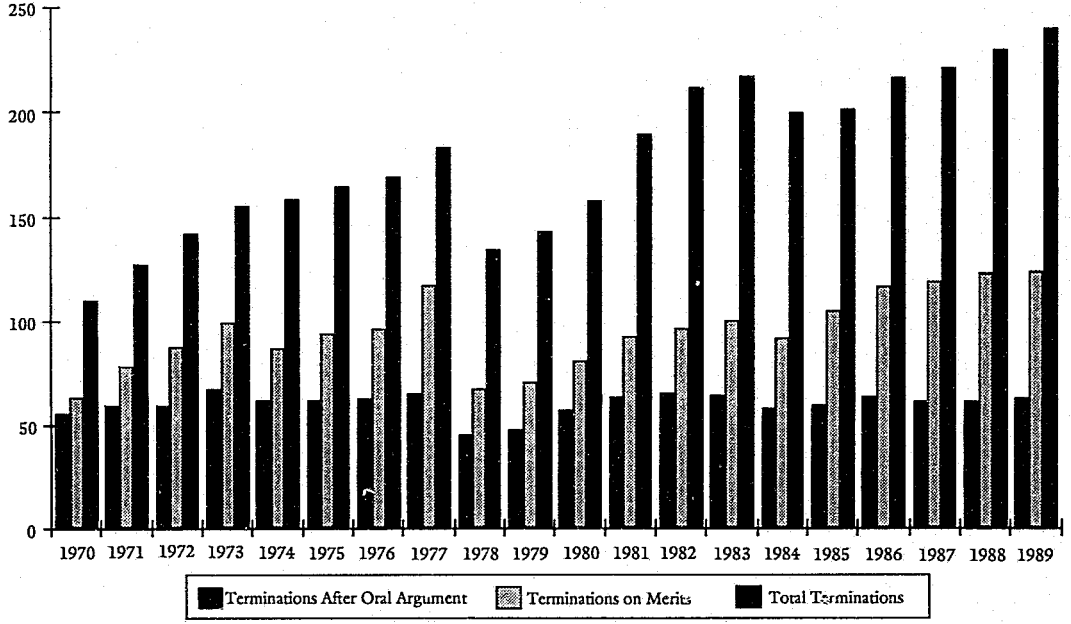
Note: Data do not reflect judicial work performed by senior or visiting judges nor the effect of vacancies. They also do not include the Court of Appeals for the Federal Circuit. Twelve-month periods end June 30.
Sources: Annual Report of the Director of the Administrative Office of the U.S. Courts, 1960–1988 (Tables B-3, C-1, D-1), 1970 (Table 12), 1979 (Table 4), 1981 (Table 42), 1988 (Tables 1, 3, 5, S-8), 1989 (Tables B, C, D-1).

Figure 4. Total Appeals Terminated, Appeals Terminated on the Merits, and Oral Arguments, 1970–1989



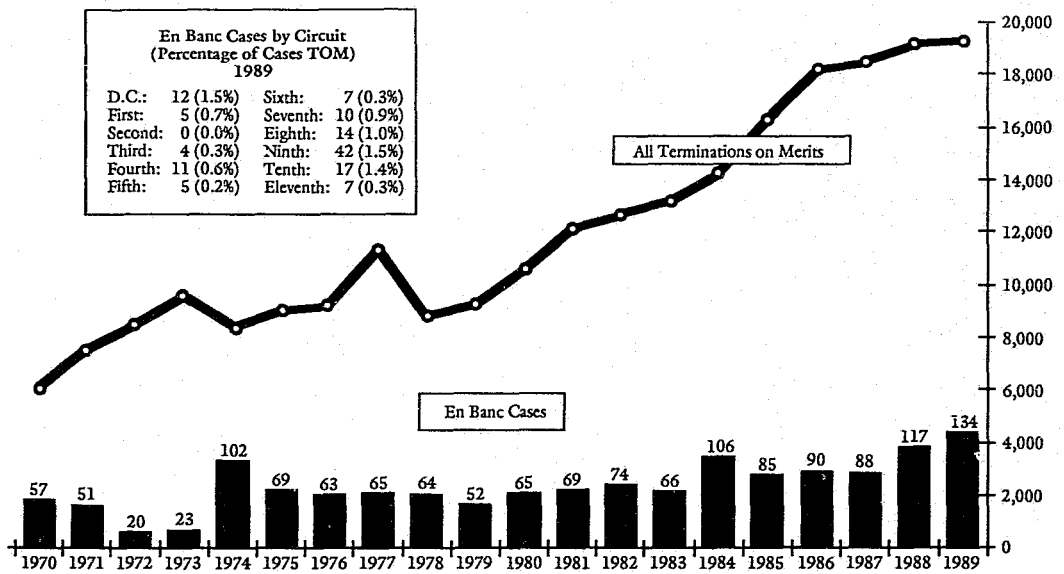
Sources: Annual Report of the Director of the Administrative Office of the U.S. Courts, 1970 (Table 8), 1970–1984 (Table B-1), 1975–1985 (Table 6), 1985–1989 (Table B-5), 1988 (Table S-2), 1988–1989 (Table S-3). Twelve-month periods end June 30. Figures do not include the Court of Appeals for the Federal Circuit.

Figure 5. Appeals Terminated per Judgeship, 1970–1989



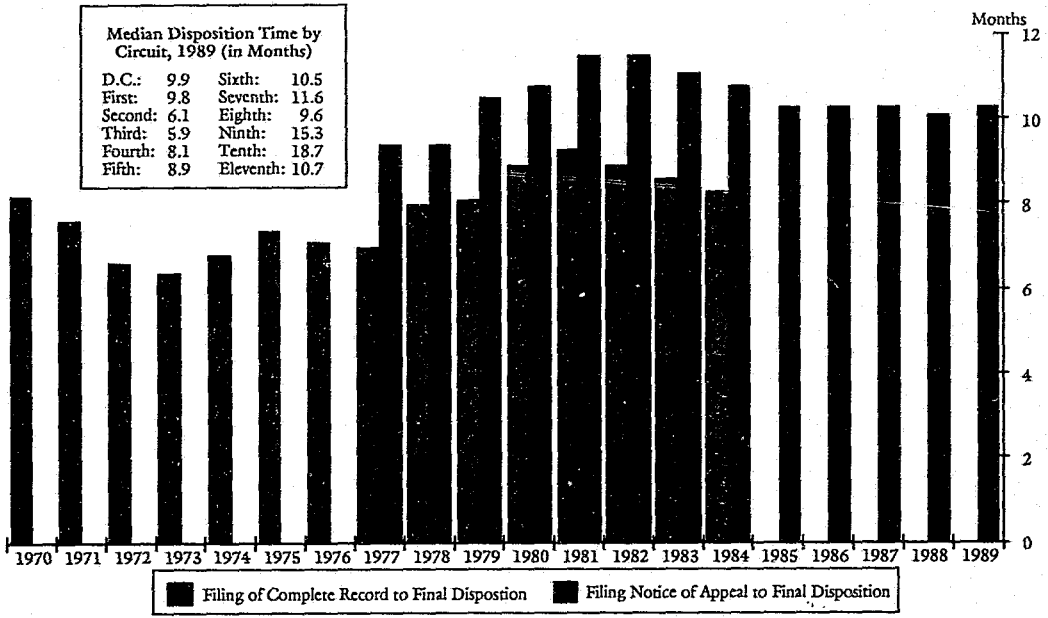
Sources: Annual Report of the Director of the Administrative Office of the U.S. Courts, 1970 (Table 8), 1975–1985 (Table 6), 1985–1989 (Table B-5), 1988 (Table S-2), 1988–1989 (Table S-3). Twelve-month periods end June 30. Figures do not include the Court of Appeals for the Federal Circuit.

Figure 6. Cases Considered by En Banc Courts, 1970–1989



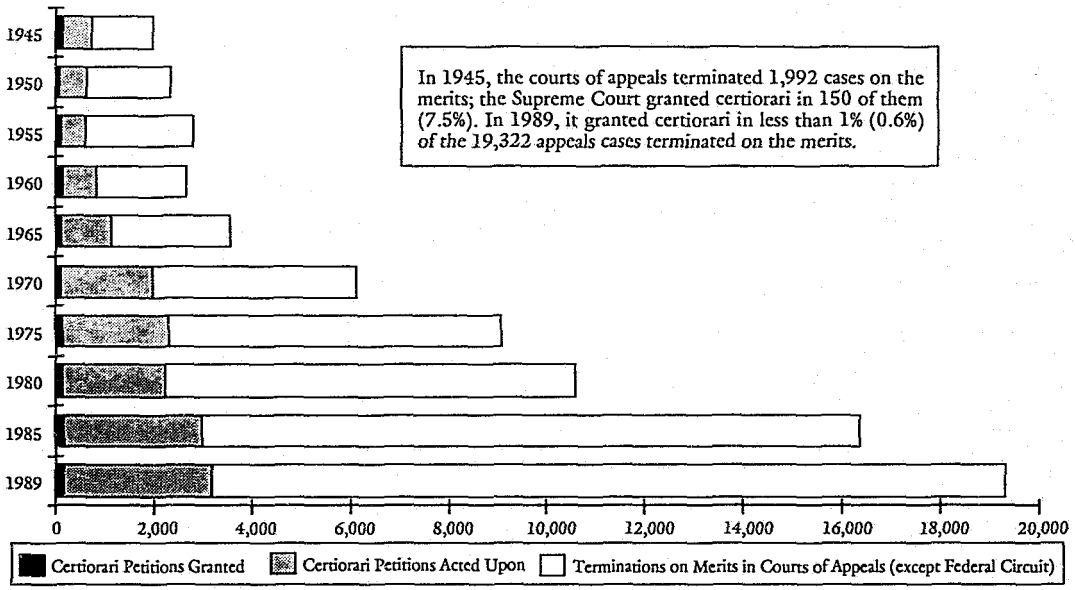
Source: Annual Report of the Director of the Administrative Office of the U.S. Courts, 1970–1989 (Table B-1), 1970, 1973, 1975–1976, 1980–1981, 1984–1985 (Table 7), 1971, 1977 (Table 6), 1974 (Table 31), 1972, 1978, 1982 (Table 8), 1979, 1983 (Table 9), 1986–1989 (Table S-3). Twelve-month periods end June 30. Figures do not include the Court of Appeals for the Federal Circuit.

Figure 7. Median Time to Disposition, 1970–1989



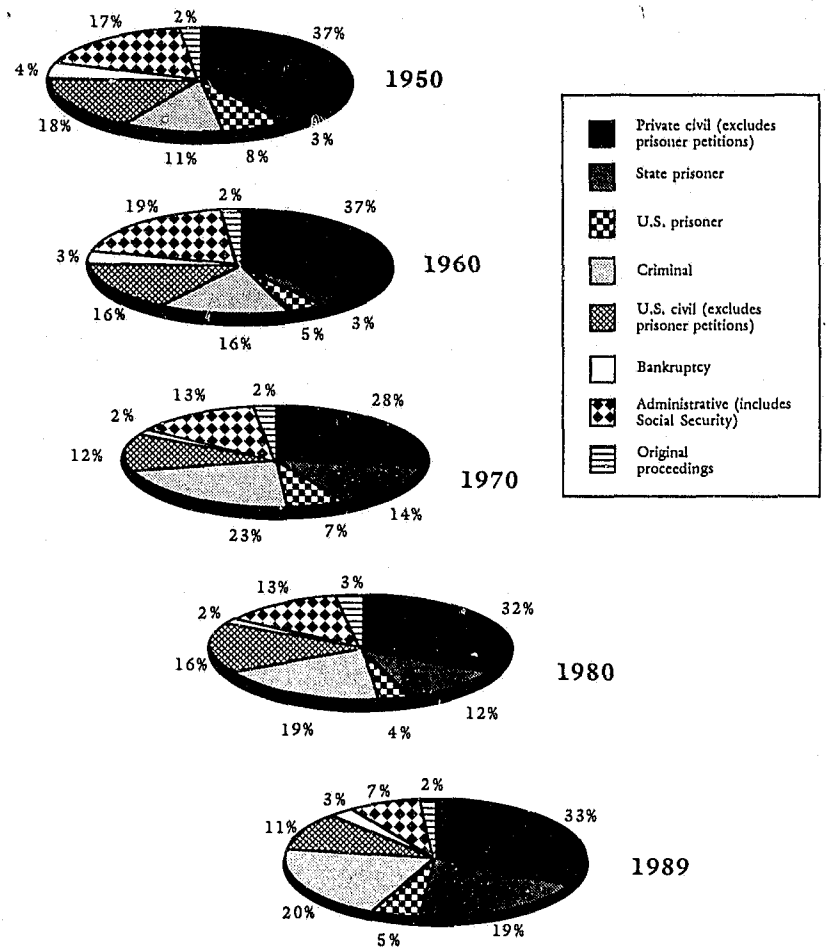
Source: Annual Report of the Director of the Administrative Office of the U.S. Courts, 1970–1989 (Table B-4). Twelve-month periods end June 30. Figures do not include the Court of Appeals for the Federal Circuit.

Figure 8. Supreme Court Review of Court of Appeals Cases Terminated on the Merits, 1945–1989



Note: The final interval is four years rather than five years.
Sources: Annual Report of the Director of the Administrative Office of the U.S. Courts, 1945–1989 (Tables B-1, B-2). Twelve-month periods end June 30. Figures do not include IFP petitions, direct appeals, or appeals from the Court of Appeals for the Federal Circuit.

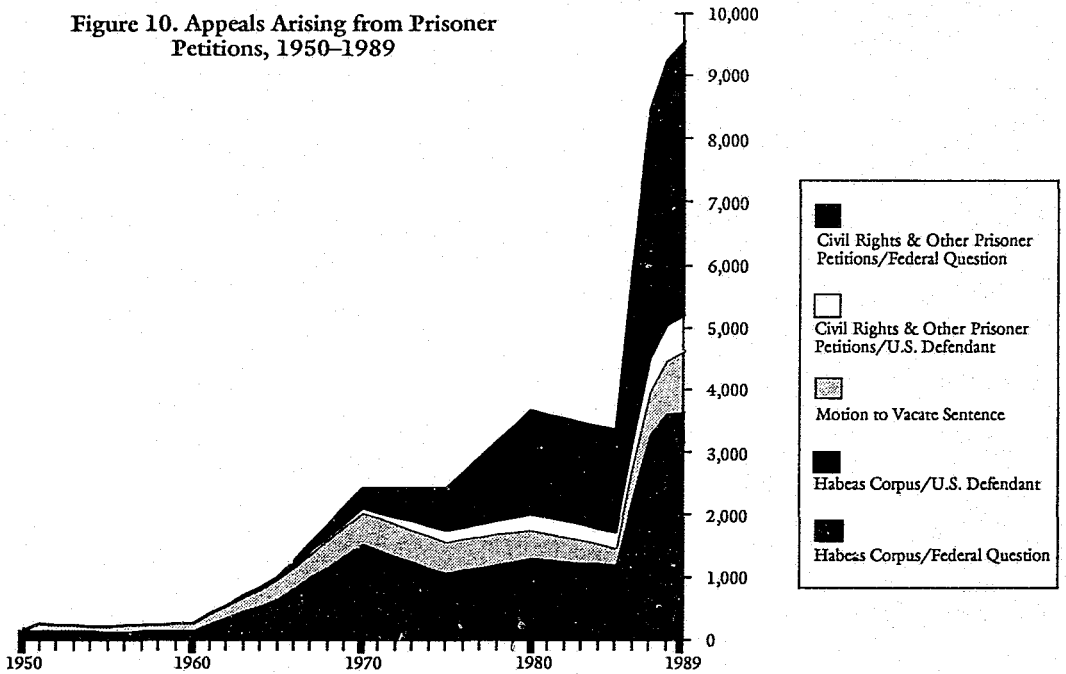
Figure 9. Appeals Filed by Type of Case, 1950–1989



Note: Social Security cases were not separated out of the Administrative category until 1970. In 1970, the Administrative cases comprised 133 Social Security and 1,389 other; in 1980, 627 Social Security and 2,323 other; and in 1989, 951 Social Security and 2,014 other.

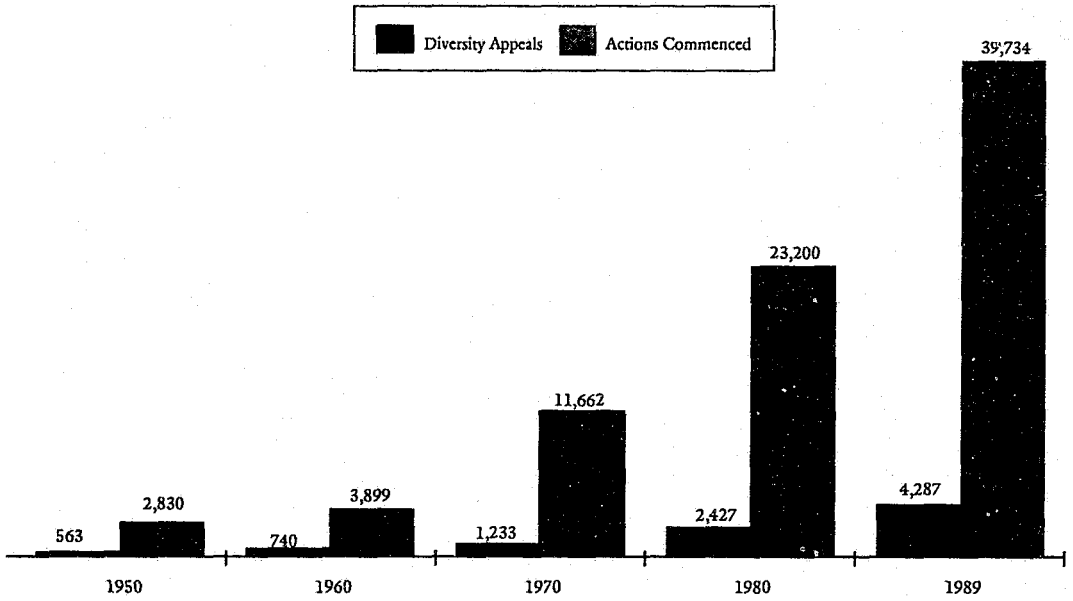
Source: Annual Report of the Director of the Administrative Office of the U.S. Courts, 1950, 1960, 1970, 1980, 1989 (Tables B-1, B-7). Percentages are rounded to the nearest integer. Twelve-month periods end June 30. Figures do not include the Court of Appeals for the Federal Circuit.

Figure 10. Appeals Arising from Prisoner Petitions, 1950–1989



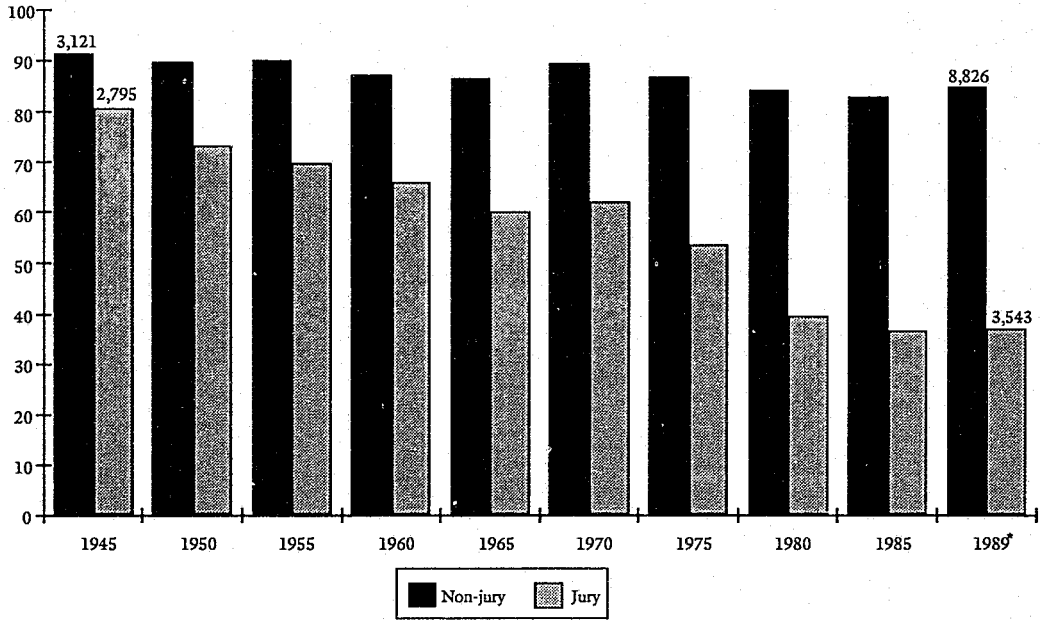
Sources: Annual Report of the Director of the Administrative Office of the U.S. Courts, 1950–1960 (Table B-5), 1965–1980, 1987–1989 (Table B-7), 1985 (Table B-1-A). Annual data interpolated from quinquennial figures. Twelve-month periods end June 30.

Figure 11. Diversity Appeals Compared With Commenced Appeals, 1950–1989



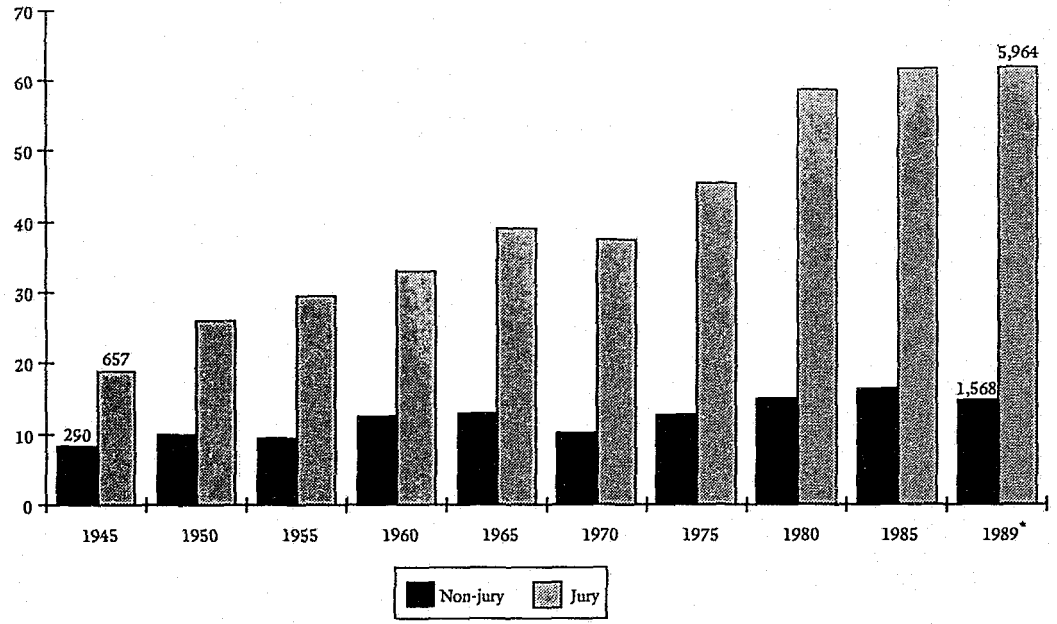
Sources: Annual Report of the Director of the Administrative Office of the U.S. Courts, 1950–1960 (Table B-5), 1970, 1980, 1989 (Table B-7). Twelve-month periods end June 30. Figures do not include the Court of Appeals for the Federal Circuit.

Figure 12. Percentage of Trials Two Days or Less, 1945–1989



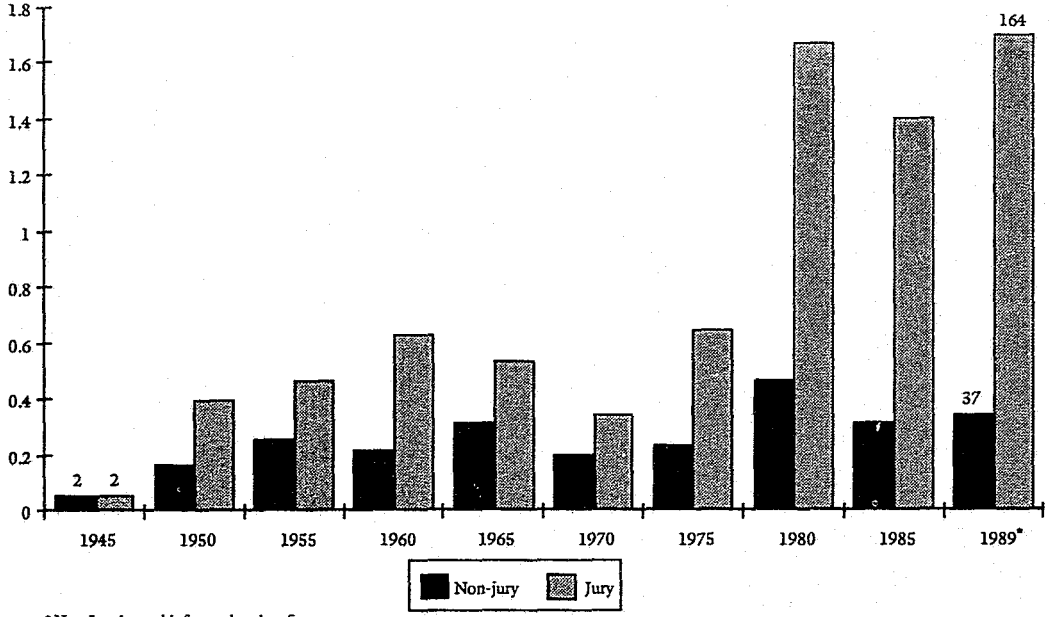
* *Note:* Last interval is four rather than five years.
Sources: Annual Report of the Director of the Administrative Office of the U.S. Courts, 1945–1989 (Table C-8). Twelve-month periods end June 30.

Figure 13. Percentage of Trials 3 to 19 Days, 1945–1989



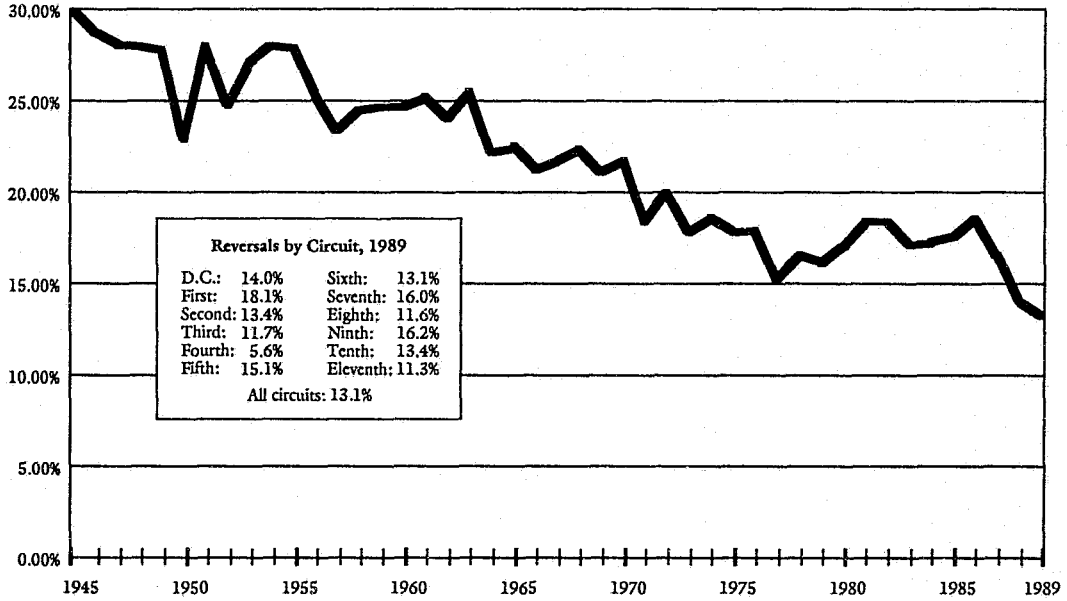
* *Note:* Last interval is four rather than five years.
Source: Annual Report of the Director of the Administrative Office of the U.S. Courts, 1945–1989 (Table C-8). Twelve-month periods end June 30.

Figure 14. Percentage of Trials 20 Days or Longer, 1945–1989



**Note:* Last interval is four rather than five years.
Sources: Annual Report of the Director of the Administrative Office of the U.S. Courts, 1945–1989 (Table C-8). Twelve-month periods end June 30.

Figure 15. Percentage of District Court Cases Reversed on Appeal, 1945–1989



Sources: Annual Report of the Director of the Administrative Office of the U.S. Courts, 1945–1985 (Table B-1), 1985–1989 (Table B-5). Twelve-month periods end June 30. Figures do not include the Court of Appeals for the Federal Circuit.

Contributors

William J. Bauer has been on the U.S. Court of Appeals for the Seventh Circuit since 1975 and became chief judge in 1986. He is a graduate of Elmhurst College and De Paul Law School. Before joining the appellate bench, he was U.S. district judge for the Northern District of Illinois.

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William J. Brennan, Jr., has served on the Supreme Court since 1956. He is a graduate of the University of Pennsylvania and Harvard Law School and came to the U.S. Supreme Court from the Supreme Court of the State of New Jersey, which he joined in 1952.

Levin H. Campbell was appointed to the U.S. Court of Appeals for the First Circuit in 1972 and became chief judge in 1983. He came to the circuit from the U.S. District Court for the District of Massachusetts; previously, he served as an associate justice of the Massachusetts Superior Court. He received both his undergraduate and law degrees from Harvard University. He has been a member of the Executive Committee of the Judicial Conference since 1984.

Paul D. Carrington is a professor of law at Duke University. He graduated from the University of Texas and from Harvard Law School. He is the author of, among other works, *Justice on Appeal* (with Meador and Rosenberg, 1976) and is the reporter for the Judicial Conference's Advisory Committee on Civil Rules.

Charles Clark is chief judge of the U.S. Court of Appeals for the Fifth Circuit, a position he assumed in 1981, having joined the court in 1969. He received his law degree from the University of Mississippi and served subsequently as special assistant to the attorney general of the state of Mississippi. He became a member of the Judicial Conference Executive Committee in 1984 and chairman in 1989, and from 1981 to 1987 he was chairman of the Budget Committee. He is also a member of the Judicial Conference Special Committee on Habeas Corpus Review of Capital Sentences.

Frank M. Coffin was appointed to the U.S. Court of Appeals for the First Circuit in 1965 and served as chief judge from 1972 to 1983. A graduate of Bates College, he also holds degrees from Harvard Business School and Harvard Law School. Before joining the federal bench, he was a member of Congress from the Second District of Maine, and later deputy administrator for the Agency for International Development. He now chairs the Judicial Conference Committee on the Judicial Branch. His book *The Ways of a Judge: Reflections from the Federal Bench* was published in 1980.

Wilfred Feinberg was appointed to the U.S. Court of Appeals for the Second Circuit in 1966 and was chief judge from 1980 to 1988. Previously U.S. district judge for the Southern District of New York (1961–1966), he graduated from Columbia College and from Columbia Law School. He served as chairman of the Executive Committee of the Judicial Conference from 1987 to 1988.

John J. Gibbons joined the U.S. Court of Appeals for the Third Circuit in January 1970. He became chief judge in 1987. He is a graduate of Holy Cross College and Harvard Law School.

John C. Godbold became director of the Federal Judicial Center in August 1987. He was appointed to the Fifth Circuit in 1966 and became chief judge of that circuit in February 1981. After the division of the Fifth Circuit, he became chief judge of the Eleventh Circuit, a post he held until 1986. He received his undergraduate degree from Auburn University and his law degree from Harvard.

A. Leon Higginbotham, Jr., was appointed to the U.S. Court of Appeals for the Third Circuit in 1977. He served in the Eastern District of Pennsylvania from 1964 to 1977. In 1968, he was vice-chairman of the National Commission on the Causes and Prevention of Violence. He graduated from Antioch College and from Yale Law School. His book *In the Matter of Color: Race and the American Legal Process* was published in 1978.

William J. Holloway, Jr., was appointed U.S. circuit judge for the Tenth Circuit in 1968 and became chief judge in 1984. He is a graduate of the University of Oklahoma and Harvard Law School.

Donald P. Lay was appointed U.S. circuit judge for the Eight Circuit in 1966 and became chief judge in 1979. He graduated from the University of Iowa and its law school.

A. Leo Levin is Leon Meltzer Professor of Law Emeritus at the University of Pennsylvania. He graduated from Yeshiva University and from the University of Pennsylvania Law School, where he joined the faculty several years later. He was executive director of the Commission on Revision of the Federal Court Appellate System from 1973 to 1975 and director of the Federal Judicial Center from 1977 to 1987. His writings include *Cases on Civil Procedure* (with Chadbourn and Shuchman, 2d ed., 1974)

and *The Pound Conference: Perspectives on Justice in the Future* (with Wheeler, 1979).

Pierce Lively joined the U.S. Court of Appeals for the Sixth Circuit in 1972 and served as chief judge from 1983 to 1988. He is a graduate of Centre College and the University of Virginia Law School. He is a member of the Judicial Conference Committee on Rules of Practice and Procedure.

Howard T. Markey was appointed chief judge of the U.S. Court of Customs and Patent Appeals in 1972 and was reassigned as chief judge of the U.S. Court of Appeals for the Federal Circuit upon its creation in 1982. He received his law degree from Loyola University and his master's degree from John Marshall Law School. He has served as a member of the Executive Committee of the Judicial Conference and chairman of its Committee on the Codes of Conduct and its Committee on the Bicentennial of the Constitution.

Robert C. Murphy became chief judge of Maryland's highest court, the Court of Appeals, in 1972. He had served on the Court of Special Appeals for five years and prior to that as Maryland attorney general. He is a graduate of the University of Maryland and its law school. He served as president of the Conference of Chief Justices in 1986 and is currently a member of the Judicial Conference Committee on the Bicentennial of the Constitution.

Jon O. Newman was appointed to the U.S. Court of Appeals for the Second Circuit in 1979. From 1972 to 1979, he served as U.S. district judge for the District of Connecticut. He graduated from Princeton University and Yale University Law School and was senior law clerk to Chief Justice Warren during the 1957 term. He is chairman of

the Judicial Conference Advisory Committee on Appellate Rules.

Martin H. Redish is professor of law at Northwestern University. He clerked for Judge J. Joseph Smith (U.S. Court of Appeals, Second Circuit), and in 1973 he joined the Northwestern faculty. He is the author of *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* (1980). He is a graduate of the University of Pennsylvania and Harvard Law School.

William H. Rehnquist became Chief Justice of the United States in 1986. From 1971 to 1986, he served as Associate Justice of the Supreme Court. He received his B.A. from Stanford University, graduate degrees from there and Harvard, and his law degree from Stanford. He clerked for Justice Robert H. Jackson during the Court's 1952 term. From 1969 to 1971, he was assistant attorney general in the Office of Legal Counsel, U.S. Department of Justice. His book *The Supreme Court: How It Was, How It Is* was published in 1987.

Alvin B. Rubin was appointed to the U.S. Court of Appeals for the Fifth Circuit in 1977. From 1966 to 1977, he served as U.S. district judge for the Eastern District of Louisiana. He received both his undergraduate and law degrees from Louisiana State University. He served as a member of the Board of the Federal Judicial Center from 1987 to 1989 and as a member of the Judicial Conference Committee on Court Administration from 1978 to 1984.

Mary M. Schroeder was appointed to the U.S. Court of Appeals for the Ninth Circuit in 1979. She is a graduate of Swarthmore College and the University of Chicago Law School. She served as a trial attorney with the Department

of Justice and from 1975 to 1979 was a judge on the Arizona Court of Appeals.

William W Schwarzer was appointed U.S. district judge for the Northern District of California in July 1976. He graduated from the University of Southern California and from Harvard Law School. He chairs the Judicial Conference Committee on Federal–State Jurisdiction, and he is the author of books and articles on federal practice and procedure, case management, and jury trials.

Laurence H. Tribe is Tyler Professor of Constitutional Law at Harvard. He graduated from Harvard College and from Harvard Law School. He clerked for California Supreme Court Justice Mathew Tobriner from 1966 to 1967 and for Justice Potter Stewart during the 1967 term, and then joined the Harvard Law School faculty. His many writings include *American Constitutional Law* (2d ed. 1988) and *Constitutional Choices* (1985).

Patricia M. Wald was appointed to the U.S. Court of Appeals for the District of Columbia Circuit in 1979 and became chief judge in 1986. A graduate of Connecticut College, she received her law degree from Yale. From 1951 to 1952, she clerked for Circuit Judge Jerome N. Frank. She served as assistant attorney general for legislative affairs, U.S. Department of Justice, from 1977 to 1979. She is a member of the Judicial Conference Committee on the Codes of Conduct.

Joseph F. Weis, Jr., was appointed to the U.S. Court of Appeals for the Third Circuit in 1973. He was U.S. district judge for the Western District of Pennsylvania from 1970 to 1973 and a judge of the Court of Common Pleas of Allegheny County from 1968 to 1970. A graduate of Duquesne University and the University of Pittsburgh

Law School, he chairs the Judicial Conference Committee on Rules of Practice and Procedure.

Byron R. White was appointed to the Supreme Court in 1962. A graduate of the University of Colorado and a Rhodes Scholar, he received his law degree from Yale University. He served as Deputy Attorney General of the United States from 1961 to 1962. He clerked for Chief Justice Fred Vinson for the 1946 term.

Harrison L. Winter was appointed to the U.S. Court of Appeals for the Fourth Circuit in 1966 and served as chief judge from 1981 to 1989. Prior to his appointment to the appellate bench, he served as U.S. district judge for the District of Maryland. He is a graduate of Johns Hopkins University and the University of Maryland Law School.