

AN ARGUMENT ON THE RECORD FOR MORE FEDERAL JUDGESHIPS*

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The federal circuit courts have changed radically in the last twenty-five years in response to an overwhelming increase in caseload. For most of their one-hundred-year history, the judges heard oral arguments and, sometimes with the help of a single clerk, wrote fully reasoned, published opinions in nearly all cases.

I. SHORTCUTS TO DECISION MAKING

Today, those time-honored procedures are sadly truncated. Now, fewer than half the circuit courts hear oral argument in at least half of the cases they decide. Traditionally the norm, a fully reasoned precedential opinion today accounts for less than a third of all case terminations. Further, the judge now operates not as an isolated artisan, but rather as the manager of a team of clerks and staff attorneys. Their role is to conserve judicial effort by screening cases and participating significantly in the opinion-writing and decision-making processes. Law clerks have trebled in the last thirty years; and central staff, unknown thirty years ago, now outnumber judges in most circuits.

Not only is “judge time” rationed, the key decisions allocating the judges’ efforts are not even made by the judges. Clerks and central staff screen the appeals to determine how

* Testimony given on April 3, 1998, before the Commission on Structural Alternatives for the Federal Courts. Professor Richman’s views appear more fully at William M. Richman, *The Appeals Process*, 24 PEPP. L. REV. 911 (1997); William L. Reynolds & William M. Richman, *Studying Deck Chairs on the Titanic*, 81 CORNELL L. REV. 1290 (1996); and William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273 (1996).

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much judge time to allocate to each case and to recommend whether oral argument should be granted and whether a full opinion (or, indeed, any opinion) should be written. Thus, an effective right to appeal error to the circuit courts no longer exists; instead, litigants must petition the staff to obtain access to the judges. In short, despite their statutory and historical role as courts of appeals, the circuit courts have become certiorari courts.

II. THE CUMULATIVE IMPACT OF THE SHORTCUTS

These developments have had other unfortunate consequences. First, the overall quality of the work of the circuit courts has declined markedly. The reduction is most obvious in the opinions: more than half are unpublished, and a substantial portion fails the most minimal standards. Second, reductions in oral argument deprive litigants of the assurance that the judges have paid some personal attention to their cases. The proliferation of para-judicial personnel only exacerbates the problem, leading litigants to suspect that the staff, not the judges, have made the decision.

Third, and perhaps most important, the transformation has created different tracks of justice for different cases and different litigants. An “important” case, such as a major securities matter, receives the traditional model of appellate justice. In a “routine” case (an appeal of a denial of social security benefits, for example), central staff may read the briefs, recommend against oral argument, and prepare a draft opinion. In these cases, actual judge time probably consists of limited review of the staff recommendations. The draft opinion is not published, and sometimes no opinion (other than a brief affirmation) is issued at all.

The problem of two-track justice is exacerbated because the burdens of the change fall disproportionately on the poorest and least powerful federal litigants involved in the routine, or “trivial,” cases: social security litigation, civil rights cases, pro se appeals, and prisoner petitions. The standard explanation that some cases are more “important” than others because of high economic stakes or more complex legal problems misses the point. The basic guarantee of justice to all in equal measure

suffers under any regime that allocates justice differently according to the wealth and sophistication of the litigants.

These developments are a direct consequence of an increase in caseload that has far out-stripped the increase in the number of judges. Yet the transformation was not inevitable. Relying on a series of logically flawed and empirically baseless arguments, the Judicial Establishment has steadfastly resisted the one obvious solution: to ask Congress for a radical increase in the number of judges. The real motive for resistance to the needed expansion has been the desire to maintain a small, elite federal judiciary. The size of the tool has dictated the size of the job, rather than the other way around.

III. ANSWERING THE ARGUMENTS AGAINST INCREASING JUDGESHIPS

A. *Quality Candidates*

The argument that increasing the number of judgeships would vastly reduce the quality of the bench is hard to take seriously. Increasing circuit judgeships by 100 would result in a 3,000-to-one ratio of lawyers to circuit judgeships. Surely one out of every 3,000 lawyers in this country is qualified, willing, and able to fill a circuit judgeship. There are over 600 district judges, about 800 state appellate judges, over 5,000 law professors, and countless senior partners, prosecutors, public defenders, and state and federal administrative lawyers. Surely that group could produce 100 distinguished candidates for the circuit courts.

A variation of the argument asserts that increases in judgeships will reduce the prestige of the position and thus diminish the pool of distinguished candidates. No empirical evidence supports the bald assertion, and the limited evidence available suggests the opposite. Circuit judgeships have not become less sought after as their number has tripled since 1950, nor is there a dearth of fine applicants for the 649 district court judgeships.

Another variation asserts that an increase in judgeships will reduce the scrutiny of each appointment, permitting the political

process to forward and confirm mediocre candidates. With respect to congressional scrutiny, the argument comes too late. Judges are confirmed in groups, and hearings are pro forma. There is no empirical support for the argument that increases in judgeships will reduce other forms of scrutiny; and the limited evidence suggests otherwise. There has been no noticeable reduction in scrutiny or quality as the circuit bench has tripled in the last fifty years, nor do we know of variations in scrutiny and quality between the First Circuit, with six judges, and the Ninth, with twenty-eight. Further, if increases would dilute quality and scrutiny, there is no indication of the relevant numbers or proportions. For all we know, a 1000% increase in judgeships might have a substantial impact on scrutiny and quality, while an increase of 100% (the largest suggested so far) might have none.

The quality-of-the-bench argument suffers from an even more serious flaw. It focuses on the quality of the active circuit judges—not on the quality of the appellate justice dispensed. A substantial increase in the number of judgeships would reduce improper delegation to staff and thus increase the odds that every case on the docket would receive the personal attention of the judges. Thus even if expansion reduced the quality of the average circuit judge, it would still increase the overall quality of appellate justice.

B. Expansion is Too Expensive

The 100 new judgeships now needed would require an annual expenditure of about \$80 million, not a trivial sum. But large numbers can be understood only through comparisons. The federal government spends only two-tenths of one percent of the federal budget on the entire federal judiciary—\$2.6 billion out of the total of \$1.4 trillion. The \$80 million required for 100 new judgeships in turn amounts to less than 3% of the \$2.6 billion dollar judiciary budget, and thus about one two-hundredth of one percent of the federal budget.

By comparison the franking privilege for members of Congress costs about \$60 million per year; the National Gallery of Art, about \$50 million; price support payments to wool and mohair producers, about \$180 million; and more than forty

universities receive over \$70 million each in Federal Research and Development Funds.

The argument suffers from a more crucial flaw. Even if the extra capacity were too expensive on some platonic scale, that is a reason for *Congress* to refuse to create the judgeships. It is not a reason for the judiciary to refuse to ask for them.

C. Too Much Precedent?

Opponents of increased appellate capacity have argued that expansion will lead to instability in the law. According to this argument, if Congress adds judgeships to existing circuits, the circuit courts will decide more cases, and the law of the circuit will become muddled, which in turn, will promote higher rates of appeal as losing litigants find it increasingly worthwhile to “take their chances.” Alternatively, Congress could add more circuits, but anti-expansionists contend that doing so would increase inter-circuit conflicts, which already are too numerous for the Supreme Court to resolve.

1. No Empirical Evidence

The first of many problems with the instability-of-the-law argument is that its crucial premises lack any empirical support. There simply is no evidence that increasing the number of judgeships within a circuit reduces the stability of circuit law or increases the rate of appeal. Nor is there any evidence that increasing the number of circuits will create a serious problem of unresolved inter-circuit conflicts.

A Federal Judicial Center study reported that 80% of responding circuit judges and 68% of responding district judges believed that lack of clear circuit precedent was a small or non-existent problem.¹ Further, in each group the percentage of judges expressing concern did not correlate with circuit size.² Another useful study, commissioned by the Ninth Circuit and conducted by Professor Arthur D. Hellman, targeted inconsistency of circuit precedent and unpredictability of

1. JUDITH A. MCKENNA, STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS 93 (1993).

2. *Id.*

decisions.³ Hellman examined a sample of the published opinions of the Ninth Circuit and found little evidence of intra-circuit conflict.⁴ Further, Professor Hellman concluded that the issues that did cause unpredictability would do so regardless of the number of applicable precedents and, therefore, regardless of circuit size.⁵

Hellman also examined separate dissenting and concurring opinions on 172 issues in the sample. His analysis led him to conclude that the primary cause of unpredictable outcomes in the Ninth Circuit was not “a plethora of circuit precedents that point in different directions,” but rather the “absence of a circuit precedent that is closely on point, or less commonly, a fact-specific rule . . . that by its nature requires case-by-case evaluation.”⁶ These conditions, he concluded, would “occur less often in the large circuit because the larger number of decisions increases the odds that there will be a precedent on point.”⁷

A variation on the unstable law argument asserts that increasing the number of circuit judges would create instability in the law of the circuit and that this instability in turn would increase the rate of appeal. Proponents of this argument cite the five-fold increase in national appeal rates that has accompanied the steady growth in appellate judgeships. This argument is a classic example of a logical fallacy, *post hoc ergo propter hoc*. Absent some clear causal mechanism, it makes no sense to attribute accelerated appeal rates to additional judgeships, rather than to a host of other changes in the social and legal landscape. Not every correlation is a cause.

More enlightening is a comparison of current appeal rates in circuits of various sizes. If the more-judges-creates-more-appeals argument is valid, we should expect to see a relationship between circuit size and appeal rates. In fact, however, rates of appeal seem to be unrelated to circuit size, suggesting that increasing the size of the circuit bench is unlikely to affect those rates.

3. Arthur D. Hellman, *Breaking the Banc: The Common-Law Process in the Large Appellate Court*, 23 ARIZ. ST. L.J. 915 (1991).

4. *Id.* at 920.

5. *Id.* at 983-84.

6. *Id.*

7. *Id.* at 984.

In lieu of enlarging the existing circuits, Congress could create more appellate capacity by creating new circuits. Opponents of this solution see it merely as a trade of one kind of inconsistency for another, contending that inter-circuit conflicts will multiply far beyond the Supreme Court's already inadequate capacity to resolve them. Once again, the empirical evidence suggests otherwise. In a study commissioned by the Federal Judicial Center pursuant to congressional request, Professor Hellman investigated 142 inter-circuit conflicts that the Supreme Court refused to hear in the 1984 and 1985 Terms.⁸ Of these he found only forty that (a) had not been put to rest by subsequent decisions or legislation, (b) continued to generate litigation, and (c) controlled outcomes in reported cases.⁹ Further, he noted that the Court had ample room on its docket to resolve these conflicts.¹⁰

2. *Consistency v. Capacity*

Even if we assume that new judgeships will produce significant inconsistency, it still does not follow that Congress should refuse to create them. The logical leap from new-judgeships-increase-inconsistency to create-no-new-judgeships is vulnerable to a powerful *reductio ad absurdum* attack. If consistency is the paramount goal of the judicial process, and fewer judgeships mean more consistency, Congress should *reduce* the number of authorized judgeships, yet the consequences of such a maneuver would be disastrous. Today the circuit courts can keep current by giving full appellate process to only half their caseload and handling the other 50% bureaucratically. If Congress reduced the number of judgeships, even fewer cases would receive the traditional appellate process, and correspondingly more would be handled bureaucratically. To push the absurdity even farther, if fewer judgeships mean greater consistency, why not have a single three-judge panel for the nation?

8. ARTHUR D. HELLMAN, UNRESOLVED INTERCIRCUIT CONFLICTS: THE NATURE AND SCOPE OF THE PROBLEM iii (1994).

9. *Id.* at 120.

10. *Id.* at 121.

The answer, of course, is that consistency is not the only goal. At least as important is adequate capacity. Thus, even if we assume (counter-factually) that expansion generates inconsistency, we have proved only that adequate capacity on the one hand and legal consistency on the other are competing values that must be balanced against each other, not that judgeships should be frozen at current levels.

In order to strike the proper balance, we would need to know much more than we do about the relationship between additional judgeships and legal inconsistency. In the absence of data on the purported correlation, the issue turns on the burden of proof. That burden belongs on the opponents of expansion because of the difference between known versus unknown costs and benefits. The known benefit is the traditional appellate process which made the federal appellate courts great, and which could still survive if judgeships were increased by adequate levels. It makes no sense to sacrifice that known benefit in return for a completely speculative dividend of increased consistency.

3. *Mechanisms that Enhance Consistency*

Even if we assume counter-factually that increased capacity leads inevitably to inconsistency and that consistency is the system's paramount goal, it still does not follow that Congress should refuse to supply additional judgeships. There are numerous devices to safeguard consistency without permanently limiting the nation's appellate capacity. Among them are:

(a) *Better legislation*: Congress should give attention, both before and after passage, to statutory issues that recurrently generate litigation (e.g., preemption, retroactivity, limitations).

(b) *Subject-matter-specialized appellate courts or panels*: These can reduce inconsistency by decreasing the number of decision-makers in a particular area of law.

(c) *A fourth tier of courts*: Another tier of courts, between the circuit courts and the Supreme Court, could resolve inter-circuit inconsistencies, thus permitting more circuits and allowing each one to remain small enough to minimize intra-circuit inconsistency.

In order to use specialization or a four-tier pyramid, the courts would need to abandon several cherished traditions such

as the small size and elite status of the federal judiciary, the historical role of federal judges as generalists, the practice of allowing conflicts to “percolate” before they reach the Supreme Court, and the traditional conventions of circuit alignment.

As comforting and familiar as these traditions are, however, they are also peripheral. The defining characteristics of the federal appellate courts have been that the judges did their own high quality work and the courts did not ration justice according to the status of the litigants. Those defining characteristics, of course, are in serious jeopardy. If the cost of saving them is the abandonment of some peripheral traditions, the price may be high, but it is certainly a worthwhile exchange.

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

D. Loss of Collegiality

Adding judges, it is sometimes argued, would reduce collegiality between judges, thereby impairing judicial quality. Little detail accompanies this objection, and for good reason. First, it is by no means clear that collegiality is a function of small size, as famous feuds on the Supreme Court attest. Second, collegiality on the modern circuit court is probably a myth anyway. For example, one study of the Eighth Circuit, a relatively small court, found that even among judges on a particular panel, “the memorandum was the most frequently used means of communication.”¹¹ Communication with off-panel judges was “not extensive,” and communication involving track-two cases was nearly non-existent.¹²

Even if collegiality were not a myth, it is difficult to see why it should be valued so highly. No data exist to suggest that

11. Stephen L. Wasby, *Internal Communication in the Eighth Circuit Court of Appeals*, 58 WASH. U. L.Q. 583, 589 (1980).

12. *Id.*

collegiality produces meaningful gains in efficiency, for instance. Of course collegiality does provide one clear benefit: Professional life on a collegial court is more pleasant for the judges. The courts, however, exist for the good of the nation, not the professional satisfaction of the judges.

E. Jurisdictional Retrenchment

Advocates of a small, elite federal judiciary have their own solution to the problem of appellate overload: jurisdictional contraction. Congress should just return federal jurisdiction to the proper, limited scope prescribed by the Constitution, history, and federalism, and then the caseload of the federal courts would decrease enormously, eliminating the need for expansion of the judiciary.

The jurisdictional retrenchment argument, however, like the rest of the court-capping rhetoric, is seriously flawed. The argument relies mainly on tradition, but the historical record is anything but clear. The reach of federal jurisdiction has changed repeatedly in response to evolving congressional appraisals of the need for federal solutions to social, political, and economic problems. In the end, the scope of federal jurisdiction has hinged less on theory and tradition and more on politics and expedience.

A more serious problem with the argument, however, is the bleak prospect of implementation. Even the most conservative reform proposals like those of the Federal Courts Study Committee have a knack for prompting spirited opposition, and as a result, few have even been introduced in Congress, let alone adopted.

The jurisdictional retrenchment argument is not only bad politics, it is bad policy as well. Its fundamental error is to misconceive the function of federal jurisdiction. That jurisdiction exists for the good of the country—not for the good of the federal courts. If Congress believes that “federalizing” some area of the law will benefit the country by controlling the drug problem or by protecting battered women, it is not merely Congress’s right, but its *duty* to pass such legislation, even though it might disappoint the federal judges or require

additional judgeships. Again, the size of the task should control the size of the tool, not vice versa.

F. *Elitism*

If judicial opposition to expansion cannot rest credibly upon the arguments usually advanced, are there other considerations that may help to explain it? One motive is familiarity. The current generation of judges has worked with the bureaucratic model of justice for their entire judicial careers, and there is a natural tendency to view as appropriate that which is familiar. Practice on the new certiorari courts also permits the judges to replicate their roles in practice, where they functioned more as team leaders than as isolated artisans. The role of the modern appellate judge, supervising elbow clerks, central staff, and legal externs, comfortably echoes the role of the senior practitioner, supervising the work of junior partners, associates, and paralegals.

Another motive is probably quality of life. Judge Gerald B. Tjoflat writes that “life as a judge on a jumbo court is comparable to life as a citizen in a big city—life on a smaller court to life in a small town.”¹³ Thus, “judges in small circuits are able to interact with their colleagues in a more expedient and efficient manner than judges on jumbo courts.”¹⁴ Although this image is attractive, reality is somewhat different, as the earlier discussion of collegiality shows. Further, it suggests that judges associate a “small town” existence with comfort, and that sitting on a larger court would be less homey. But the comfort of the judges is easily overvalued; again, the courts exist for the good of the nation, not for the satisfaction of the judges.

Yet another reason for judicial reluctance to expansion is concern about status. Justice Scalia does not want a larger judiciary: “It only dilutes the prestige of the office and aggravates the problem of image.”¹⁵ Once again, however, the courts exist to serve the national need for appellate capacity, not the judges’ need for “prestige” or “image.”

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

14. *Id.*

15. Stuart Taylor, *Scalia Proposes Major Overhaul of the U.S. Courts*, N.Y. TIMES, Feb. 16, 1987, at A1, A12.

IV. CONCLUSION

Congress established the United States Courts of Appeals to correct error at the district court level, and for the first eighty years of their existence, the circuit courts performed that function according to the traditional appellate model—visibly, collegially, personally, accountably, and equitably.

Beginning around 1970, the courts began to truncate the traditional model to keep pace with an overwhelming increase in the volume of cases. Today, the “routine” appeals of the system’s least wealthy and powerful litigants get no argument, no conference, no written, published precedential opinion, and little personal attention of Article III judges. Instead, they receive bureaucratic treatment at the hands of the central staff.

The obvious solution to the problem is to create enough judgeships to treat all cases in the traditional mode, but the Judicial Establishment has opposed that solution vigorously, relying on an array of exceedingly weak arguments. First, there is no empirical support for the fear that expansion will reduce the quality of the bench. Second, the cost of new judgeships is not overwhelming compared to other federal expenditures. Third, according to the only available empirical studies, expansion will not create legal instability; and even if it did, adequate capacity is at least as important as consistency. And fourth, the jurisdictional retrenchment argument is fantasy. Congress is not about to make radical cuts in federal jurisdiction to accommodate the judiciary’s desire to remain small.

The superficiality of these anti-expansion arguments suggests, and some judges candidly admit, that the desire to maintain collegiality and prestige is a major reason for judicial opposition to expansion. There is nothing intrinsically wrong with those goals, but short-changing the litigants for the benefit of the judges *is* wrong. The courts exist for the good of the nation, not the judges.