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## 2020 Year-End Report on the Judiciary by the Chief Justice of the United States

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## An Introduction

*"[N]o one will understand me to be speaking with disrespect[,] . . . [for] one may criticise even what one reveres."*

—Oliver Wendell Holmes, Jr.\*

*The curious document that begins on the next page requires some explanatory introduction. My invitation to participate in a panel on the federal appeals process at the Symposium on Civil Litigation Reform in the Twenty-first Century gave me serious pause. I was pleased and honored to be included on a panel with Judge Thomas M. Reavley and Professor William M. Richman, of course, but I despaired of saying anything that has not already been said before many times and in many ways, either by me or by my distinguished fellow panelists. Therefore, I sought redemption in technology. I began "surfing the Internet," looking for interesting and current data on the United States Courts of Appeals. Inexplicably, my PC screen went blank, and the logo "Netscape-2020" suddenly appeared. Somehow, somehow, I was browsing the future. Among other documents, I downloaded a copy of the Chief Justice's Year-End Report on the Federal Judiciary for the year 2020. Just about then the screen went blank again. Never before or since has anything like this ever happened, and our computer guru could offer no explanation for this mysterious time-surge. The Pepperdine Law Review agreed that this document should be published as part of the 1997 Symposium without any changes or annotations. Thus, the future will speak for itself. Tempus Fugit.*

—Thomas E. Baker\*\*

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\* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 473 (1897).

\*\* Alvin R. Allison Professor, Texas Tech University School of Law; Lubbock, Texas; tbaker@ttu.edu. B.S. 1974, Florida State University; J.D. 1977, University of Florida. Professor Baker's latest book is *THE MOST WONDERFUL WORK—OUR CONSTITUTION INTERPRETED* (1996).

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**2020 YEAR-END REPORT ON THE JUDICIARY  
BY  
THE CHIEF JUSTICE OF THE UNITED STATES**

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## I. A FOND FAREWELL

This is my twentieth and final Year-End Report on the Judiciary. I have notified the President this day that I will retire as Chief Justice of the United States at the end of this October Term 2020, effective July 1, 2021, or when my successor is confirmed.

Upon his own retirement, Chief Justice Earl Warren spoke of the awesome responsibility undertaken by those who are called on to speak the last word under the Constitution:

It is a responsibility that is made more difficult in this Court because we have no constituency. We serve no majority. We serve no minority. We serve only the public interest as we see it, guided only by the Constitution and our own consciences. And conscience sometimes is a very severe taskmaster.<sup>1</sup>

During my tenure, I have tried in good conscience to judge by this creed, and that is how I hope to be judged.

On this occasion, it is altogether fitting and proper to begin with a solicitous note of gratitude to my good colleagues on the Supreme Court, for whom I have the highest personal regard and the deepest respect and admiration. While we have not always agreed in all of our decisions, all of us have strived to disagree agreeably, at least most of us, most of the time, though admittedly not all of us, and not all of the time. That reminds me to offer our heartfelt best wishes to Justice Antonin Scalia on his eighty-sixth birthday and his thirty-sixth anniversary of being appointed to the Supreme Court. Next year he will become the Justice with the longest service in our history. And I say without fear of contradiction that the “Energizer Dissenter,” as he is affectionately known, will go on and on, beating his drum for many Terms to come.<sup>2</sup>

**Writ of Reinhardt:** While on the subject of the Supreme Court, I should take the time to express our appreciation to Congress for adding to the All Writs Statute<sup>3</sup> the new explicit authorization to issue a Writ of Reinhardt. This new writ takes the form of an Order by the Court which designates a list of circuit judges by name so that every decision or opin-

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1. Retirement of Mr. Chief Justice Warren, 89 S. Ct. 17 (1969) (Order).

2. “Acknowledging his frustration in a humorous vein, Justice Scalia periodically asks his own clerks: ‘What’s a smart guy like me doing in a place like this?’” Paul M. Barrett, *The Loner: Despite Expectations, Scalia Fails to Unify Conservatives on Court*, WALL ST. J., Apr. 28, 1992, at A1; see also *Cult of Scalia* (visited Apr. 7, 1997) <<http://pilot.msu.edu/user/schwenkl/scalia.htm>>; *The Scalia Shrine* (visited May 8, 1997) <<http://johnh.wheaton.edu/~jonmitch/scalia.html>>.

3. 28 U.S.C. § 1651 (1994).

ion written by a listed judge is automatically vacated and remanded for further consideration.<sup>4</sup> This writ is the most significant increase in our discretionary power over our Court's docket in more than thirty years.<sup>5</sup> We deem it appropriate to require the agreement of five Justices (one more than the four votes needed to grant review of a case)<sup>6</sup> so that only a majority may add or remove a circuit judge's name from the Order list.<sup>7</sup>

## II. THE FIRST TWO DECADES OF THE TWENTY-FIRST CENTURY

In the fullness of time, we should stop and reflect upon where we have been and where we are<sup>8</sup> and where we are going, upon the politics of meaning or, perhaps, the politics of politics and the meaning of meaning.<sup>9</sup> Let us pause to contemplate all that has happened in the United States of America, during my time in the center chair, looking back on the decades of the 00s and the 10s.<sup>10</sup>

**Demographics:** The population has increased by thirty million and, because the basic workload of the courts is greatly a function of the population, the judicial workload has grown apace. Furthermore, the dockets of the courts continue to reflect changes in the population. As the baby-boomer generation grew older and reached retirement, more and more cases raising issues related to the elderly were pressed on the courts. More cases presented issues related to pensions and health care,

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4. See David M. O'Brien, *Reinhardt and the Supreme Court: This Time, It's Personal*, L.A. TIMES, Dec. 12, 1996, at M2.

5. See Robert L. Stern et al., *Epitaph for Mandatory Jurisdiction*, A.B.A. J., Dec. 1, 1988, at 66.

6. See John Paul Stevens, *The Life-Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1 (1983).

7. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 82 n.8 (1973) (Brennan, J., dissenting) (citing to more than thirty cases that were "Redrup-ed" and reversed by one-citation per curiam opinions).

8. Reader: YOU ARE HERE\*.

9. MICHAEL LERNER, *THE POLITICS OF MEANING: RESTORING HOPE AND POSSIBILITY IN AN AGE OF CYNICISM* (1996).

10. This portion of the Year-End Report is adapted from Thomas E. Baker, *A View to the Future of Judicial Federalism: "Neither Out Far Nor in Deep,"* 45 CASE W. RES. L. REV. 705, 709-15 (1995). The discussion draws on the predictions of two studies of the future of the judicial system. HUDSON INSTITUTE, *TRENDS AFFECTING THE FEDERAL COURTS* (Oct. 1989) (commissioned by the Federal Courts Study Committee); Franklin M. Zweig et al., *Securing the Future for America's State Courts*, 73 JUDICATURE 296 (1990) (Georgetown University's "Delphi Study"); see also Lars Fuller & Craig Boersema, *Judging the Future: How Social Trends Will Affect the Courts*, 69 DENV. U. L. REV. 201 (1992); Panel Discussion, *The Changing Face of America—How Will Demographic Trends Affect the Courts?*, 72 JUDICATURE 125 (1988). Those futurists were remarkably prescient.

for example. In the aftermath of the Social Security Crisis of 2011, unprecedented class action lawsuits of biblical proportions were filed in every district court in the country. Once so-called "death and dying issues" became to be understood as federal and constitutional issues, an entirely new category of federal litigation presented itself to federal courts.<sup>11</sup>

**Civil Docket Growth:** Differences in birthrates and immigration patterns among racial groups have resulted in proportional increases in the percentages of nonwhite ethnic and racial groups. Consonant with our previous national experience, these new groups of "hyphenated-Americans" repaired to the courts to work out their differences with the larger society, in civil rights suits and workplace litigation over discrimination in business practices and employment patterns. The transition from a smokestack economy to a silicon chip society had huge unsettling effects on businesses and workers, with a consequent increase in litigation. Likewise, the social transformation of the institution of the family and the related reforms of federal and state public assistance programs meant more cases for courts. The back-and-forth pendulum swings in the federal policies on government entitlements during the last twenty years also generated more disputes over programmatic phase-outs and individual benefits terminations.

"E Pluribus Pluribus" thus seems to be the motto of the United States courts.<sup>12</sup> With the benefit of hindsight, we can appreciate how political, social, and economic factors have grown the civil caseload in four primary ways.<sup>13</sup> First, judicial<sup>14</sup> and political<sup>15</sup> decisions extended the civil rights and antidiscrimination policies of the federal government to cover

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11. See *Quill v. Vacco*, 80 F.3d 716 (2d Cir.), *cert. granted*, 117 S. Ct. 36 (1996); *Compassion in Dying v. Washington*, 85 F.3d 1440 (9th Cir.), *cert. granted sub nom.*, *Washington v. Glucksberg*, 117 S. Ct. 37 (1996). "When a liberal says something is like abortion, we know that something, whatever it is, is protected by the Constitution." ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH* 111 (1996).

12. Al Kamen, *For Gore, It's All in the Translation*, WASH. POST, Jan. 10, 1994, at A13 (quoting Vice President Gore to observe that America's "ethnic melting pot" demonstrates the national motto, "e pluribus unum—out of one, many.")

13. See Baker, *supra* note 10, at 713-14.

14. See *Romer v. Evans*, 116 S. Ct. 1620 (1996); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *Plyler v. Doe*, 457 U.S. 202 (1982).

15. Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12213 (1994)); Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 82 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634 (1994)).

newly defined groups with more and more individual members. Second, the expansion of mass tort litigation involving health and environmental matters presented complex and difficult issues of causation and risk allocation in a larger context of more and more elaborate federal administrative regulations.<sup>16</sup> Third, these mass tort cases and related developments imposed a disproportionate burden on the federal courts, taxing their capacity for evolving the law to keep up with scientific and technological advances.<sup>17</sup> Fourth, late twentieth century deconstructive tendencies to de-mythologize the professions of medicine and law spread to countenance the extension of malpractice theory to allow actions in the areas of education, religion, and government, including the paradox of bringing lawsuits to claim judicial malpractice. Finally, litigiousness increased generally between the years 2000 and 2020, as it seemed that the old-fashioned cliché “Don’t make a federal case out of it!” was turned around to make a federal case out of everything.<sup>18</sup>

**Criminal Docket Growth:** The criminal caseload increased during the first two decades of this century simply as a factor of population increase over the same period. However, the legislative tendency towards criminalization of more and more behaviors and the proclivity of prosecutors in the executive branch to prosecute more offenders have exacerbated the strains on the district courts. New categories of crimes, unknown in the 1990s, have been added to the federal criminal code to regulate the cyberspace economy. Indeed, congressional lawmakers have been ingenious in extending the scope of federal crimes to police the globalized economy under the Commerce Clause. But the forty-year “War on Drugs” has contributed the most to the crowded dockets of the district courts, with no end in sight. Indeed, my worry, quite frankly, is that the court system has been the unintended casualty of this war. Relatedly, prisoners’ rights litigation has increased exponentially with the levels of magnitude increases in the numbers of prisoners in state and federal prisons. Lawsuits against prison officials brought under the Religious Freedom Restoration Act have increased dramatically every year since it was enacted in 1993.<sup>19</sup> And the more prisoners we have in custody, the

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16. AMERICAN LAW INSTITUTE, *COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS* (1994); Donald T. Trautman, *Some Thoughts on Choice of Law, Judicial Discretion, and the ALI’s Complex Litigation Project*, 54 LA. L. REV. 835 (1994).

17. CARNEGIE COMMISSION ON SCIENCE, TECHNOLOGY, AND GOVERNMENT, *SCIENCE AND TECHNOLOGY IN JUDICIAL DECISION MAKING: CREATING OPPORTUNITIES AND MEETING CHALLENGES* (1993).

18. *But cf.* Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633 (1994); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093 (1996).

19. 42 U.S.C. § 2000bb (1994); *see Flores v. City of Boerne*, 73 F.3d 1352 (5th Cir.), *cert. granted*, 117 S. Ct. 293 (1996).

more petitions for habeas corpus will be filed, no matter how Congress tries to restrain them.<sup>20</sup>

**Federalization:** The most important development for the federal court workload since the turn of the century has been the accelerating and expanding “federalization” of the law in the United States.<sup>21</sup> Congress has greatly extended the subject matter jurisdiction of the federal courts, in effect, by authorizing civil claims and criminal prosecutions in area after area that would have been considered the domain of the states three decades ago. Back in the 1990s, no one could have foreseen the nationalizing effect of the North American Free Trade Agreement and the General Agreement on Tariffs and Trade.<sup>22</sup> The judicial mind reels looking back at the proliferation of such treaties and agreements since then. Mention already has been made of the federalization of the criminal law, which began to accelerate after the passage of the Violent Crime Control and Law Enforcement Act of 1994.<sup>23</sup> This trend has accelerated ever since, with only the occasional and brief pause.<sup>24</sup>

Looking back, we can identify two paradigm-shifting statutes in the long-run, run-away federalization: congressional enactment of a comprehensive national health care program in 2009<sup>25</sup> and the Federal Products Liability Act of 2011.<sup>26</sup> Today, there are forty billion administrative claims filed each year under the health care program; approximately ten percent, or four million, are denied and contested, and an estimated one out of forty of these disputes survives the administrative process and ends up in the court system.<sup>27</sup> This total number of additional federal cases is nearly matched by the products liability suits brought under the 2011 statute.<sup>28</sup> These two federal statutes by themselves have added more than 80,000 cases each year to the dockets of the federal courts. These two examples have been compounded by a myriad of other laws that have federalized area after area of public policy once deemed within the domain of the states and state courts.

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20. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

21. WILLIAM W. SCHWARZER & RUSSELL R. WHEELER, ON THE FEDERALIZATION OF THE ADMINISTRATION OF CIVIL AND CRIMINAL JUSTICE (Fed. Jud. Ctr. 1994).

22. Baker, *supra* note 10, at 745-48.

23. *Id.* at 748-54.

24. See *United States v. Lopez*, 115 S. Ct. 1624 (1995).

25. Baker, *supra* note 10, at 755-59.

26. *Id.* at 759-60.

27. These are “conservative estimate[s].” *Id.* at 757.

28. *Id.* at 760.



The Third Branch always has and always will depend on “the kindness of strangers,”<sup>29</sup> strangers in the legislative branch, because the Constitution gives to Congress the plenary power to “ordain and establish” the “inferior courts” of the United States and then to order their jurisdiction.<sup>30</sup> But Congress must not practice deficit jurisdiction. The number of judges and the resources of the judicial branch must remain equal to the demands on the court system. For it is through our courts that our nation pursues its preambulatory purpose to “establish justice.”<sup>31</sup>

**Judicial Independence:** I cannot emphasize enough how “[t]he institutional independence of the federal judiciary is critical to our nation’s political system.”<sup>32</sup> The Constitution’s impeachment and removal provisions provide an eighteenth century cannon which may be deployed at the will of the legislative branch.<sup>33</sup> But the Framers contemplated that Congress would proceed in wisdom and with restraint. As the titular leader of the Third Branch, I must register my grave reservations about the impeachment proceedings currently being conducted against Circuit Judge Dennis Rodman of the Court of Appeals for Chicago.<sup>34</sup> Congress must honor the separation of powers to distinguish between on-court and off-court judicial behavior. Discipline procedures short of impeachment and removal have been an effective part of our federal judicial system for some forty years.<sup>35</sup> Those procedures should be permitted to run their course within the judicial branch before Congress resorts to its constitutional powers.

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29. “Whoever you are—I have always depended on the kindness of strangers.” TENNESSEE WILLIAMS, *A STREETCAR NAMED DESIRE* act 3, sc. 11 (1947) (quoting character of Blanche DuBois).

30. U.S. CONST. art. III, § 1.

31. U.S. CONST. preamble; see Abram Chayes, *How Does the Constitution Establish Justice?*, 101 HARV. L. REV. 1026 (1988).

32. THOMAS E. BAKER, *THE GOOD JUDGE: REPORT OF THE TWENTIETH CENTURY TASK FORCE ON FEDERAL JUDICIAL RESPONSIBILITY* 3 (1989). See generally *Federal Judicial Independence Symposium*, 46 MERCER L. REV. 637 (1995).

33. See *Nixon v. United States*, 506 U.S. 224 (1993). See generally ELEANORE BUSHNELL, *CRIMES, FOLLIES, AND MISFORTUNES: THE FEDERAL IMPEACHMENT TRIALS* (1992); MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS—A CONSTITUTIONAL AND HISTORICAL ANALYSIS* (1996); WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* (1992); MARY L. VOLCANSEK, *JUDICIAL IMPEACHMENT: NONE CALLED FOR JUSTICE* (1993).

34. DENNIS RODMAN, *BAD AS I WANNA BE* (1996).

35. The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (codified as amended at 28 U.S.C. §§ 332, 372 (1994)).

## III. THE UNITED STATES COURTS OF APPEALS

In keeping with past Year-End Reports on the Judiciary, I want to highlight one part of the Third Branch, even though we all understand that all our courts, state and federal, articulate as "ONE WHOLE" system.<sup>36</sup> This year, my focus is on the United States Courts of Appeals and their problems.<sup>37</sup>

**Study After Study:** Nearly thirty years ago, Chief Justice Rehnquist urged, "One of the chief needs of our generation is to deal with the current appellate capacity crisis in the federal courts of appeals."<sup>38</sup> His alarm was sounded amidst a Greek chorus of tragedian studies, which started more than fifty years ago and which have continued to the present day.<sup>39</sup>

1968: An American Bar Foundation report recommended a sequential strategy for dealing with federal appellate growth in the long run.<sup>40</sup>

1972: A Federal Judicial Center committee, known as the Freund Committee, made recommendations to the Supreme Court and Congress to create a new level of appellate court.<sup>41</sup>

1972 & 1975: The congressionally created Hruska Commission issued two reports, three years apart: the first report recommended dividing of the Fifth and the Ninth Circuits; the second report recommended creating a new level of appellate court.<sup>42</sup>

36. THE FEDERALIST NO. 82, at 494 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

37. The futuristic statistics and predictions offered here are not as terribly outlandish as they might first appear. They merely take the next logical steps toward greater federal appellate court efficiencies. Consider what one circuit judge foresaw when he gazed into the crystal ball thirty years ago: "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." John J. Gibbons, *Maintaining Effective Procedures in the Federal Appellate Court*, reprinted in THE FEDERAL APPELLATE JUDICIARY IN THE 21ST CENTURY 22, 27 (Cynthia Harrison & Russell R. Wheeler eds., Fed. Jud. Ctr. 1989).

38. William H. Rehnquist, *Chief Justice Addresses Federal Court Workload, Future Needs*, THE THIRD BRANCH, June 1992, at 4 (Admin. Office of U.S. Courts).

39. "[T]he fundamental transformation of the federal appellate process is an issue that has been studied to death." William L. Reynolds & William M. Richman, *Studying Deck Chairs on the Titanic*, 81 CORNELL L. REV. 1290, 1303-04 (1996).

40. AMERICAN BAR FOUNDATION, ACCOMMODATING THE WORKLOAD OF THE UNITED STATES COURTS OF APPEALS (1968).

41. FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT, reprinted in 57 F.R.D. 573 (1972).

42. Commission on Revision of the Federal Court Appellate System, *Structure and*

1975: The Advisory Council on Appellate Justice, in liaison with the Federal Judicial Center and the National Center for State Courts, proposed guidelines for a complete restructuring of the federal appellate system.<sup>43</sup>

1977: The Department of Justice Committee on Revision of the Federal Judicial Center made many recommendations for improving the federal courts.<sup>44</sup>

1978: The American Bar Association Action Commission to Reduce Court Costs and Delay recommended intramural reforms in federal appellate procedures.<sup>45</sup>

1986: The NYU Project focused on the Supreme Court and proposed a "managerial model" for improving the functioning of the federal appellate system.<sup>46</sup>

1989: The American Bar Association's Standing Committee on Federal Judicial Improvements reviewed and repeated the concerns of previous studies and concluded that "reform of the courts of appeals will not be a question of whether, but a question of when."<sup>47</sup>

1990: The congressionally created Federal Courts Study Committee concluded that the Courts of Appeals faced a "crisis of volume" that was predicted to continue to worsen and eventually require some "fundamental change."<sup>48</sup>

1993: The Federal Judicial Center reported to Congress that intramural reforms eventually would prove inadequate and, if the national policy choice is to maintain the existing federal appellate structure, in order to restore traditional appellate procedures in all appeals or in all ap-

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*Internal Procedures: Recommendations for Change*, 67 F.R.D. 195 (1975); Commission on Revision of the Federal Court Appellate System, *The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change*, 62 F.R.D. 223 (1973) [hereinafter *Geographical Boundaries*].

43. See Daniel J. Meador, *The Federal Judiciary—Inflation, Malfunction, and a Proposed Course of Action*, 1981 BYU L. REV. 617, 628-29.

44. DEPARTMENT OF JUSTICE COMMITTEE ON REVISION OF THE FEDERAL JUDICIAL SYSTEM, *THE NEEDS OF THE FEDERAL COURTS* (1977).

45. Seth Hufstедler & Paul Nejelski, *A.B.A. Action Commission Challenges Litigation Cost and Delay*, 66 A.B.A. J. 965 (1980).

46. SAMUEL ESTREICHER & JOHN SEXTON, *REDEFINING THE SUPREME COURT'S ROLE: A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS* (1986); see also Thomas E. Baker, *Siskel and Ebert at the Supreme Court*, 87 MICH. L. REV. 1472 (1989) (critical book review).

47. REPORT OF THE A.B.A. STANDING COMMITTEE ON FEDERAL JUDICIAL IMPROVEMENTS, *THE UNITED STATES COURTS OF APPEALS: REEXAMINING STRUCTURE AND PROCESS AFTER A CENTURY OF GROWTH* 40 (1989).

48. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 109 (Apr. 2, 1990).

peals decided on the merits, there must be substantially fewer appeals or some massive increase in the number of judges and support personnel.<sup>49</sup>

1993: The Federal Judicial Center published a Report on the debate whether to increase the number of federal judges dramatically to meet caseload demands or whether to declare a moratorium on new judge-ships.<sup>50</sup>

1994: The Federal Judicial Center issued its study of the worrisome implications for the federal courts resulting from the federalization of the law in the United States.<sup>51</sup>

1994: Professor Thomas E. Baker published his now classic work on the courts of appeals in order to draw attention to their problems.<sup>52</sup>

1995: The Judicial Conference of the United States approved a Long Range Plan for the Federal Courts which recommended "circuit restructuring . . . if compelling empirical evidence demonstrates adjudicative or administrative dysfunction."<sup>53</sup>

1999: The American Law Institute completed its comprehensive review of the jurisdictional and procedural provisions in the United States Code.<sup>54</sup>

49. FEDERAL JUDICIAL CENTER, STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS: REPORT TO THE UNITED STATES CONGRESS AND THE JUDICIAL CONFERENCE OF THE UNITED STATES 156 (1993).

50. GORDON BERMANT ET AL., IMPOSING A MORATORIUM ON THE NUMBER OF FEDERAL JUDGES: ANALYSIS OF ARGUMENT AND IMPLICATIONS (Fed. Jud. Ctr. 1993).

51. SCHWARZER & WHEELER, *supra* note 21.

52. THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS (1994). See generally Edith H. Jones, *Back to the Future for Federal Appeals Courts: Rationing Federal Justice by Recovering Limited Jurisdiction*, 73 TEX. L. REV. 1485 (1995); Stephen Reinhardt, *Surveys Without Solutions: Another Study of the United States Courts of Appeals*, 73 TEX. L. REV. 1505 (1995); Joseph F. Weis, Jr., *The Case for Appellate Court Revision*, 93 MICH. L. REV. 1266 (1995). "If we are facing failure in our assignment, corrections by Congress and the judges are at hand that should silence the alarm bells." Thomas M. Reavley, *A Review of Rationing Justice On Appeal: The Problems of the U.S. Courts of Appeals*, 26 TEX. TECH L. REV. 271, 271 (1995) (book review).

53. JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS, Recommendation No. 17, at 44 (Dec. 1995). See generally Robb M. Jones, *The Future of the Federal Courts*, JUDGES J., Fall 1995, at 17.

54. Baker, *supra* note 10, at 813-14. See generally American Law Institute, Federal Judicial Code Revision Project, Preliminary Draft No. 1 (Sept. 9, 1996); American Law Institute, Federal Judicial Code Revision Project, Council Draft No. 1 (Dec. 1, 1996).

**2020 Commission on Federal Court Structure:** Three years ago, the Commission on Federal Court Structure, popularly named the Baker Commission after its distinguished Chairman, began its comprehensive study of the structure and organization of the federal courts.<sup>55</sup> The Baker Commission took a decidedly long-range perspective. The Commission was composed of prominent members of all three branches as well as distinguished lawyers and professors. This interbranch group relied on the cumulative expertise of the Administrative Office of the United States, the American Bar Association, the American Law Institute, the Department of Justice, the Federal Judicial Center, the Judicial Conference of the United States, the Judiciary Committees of both the Senate and the House of Representatives, the State Justice Institute, and the National Center for State Courts.

Congress charged the Baker Commission to: (1) determine the nature and extent of the problems with the structure of the courts of appeals; (2) identify and review proposed extramural or structural reforms; (3) evaluate the purpose of each proposed reform against the appellate ideal; (4) assess the projected costs and benefits of each proposed reform in terms of the federal appellate tradition; (5) measure the expected effect of each proposed reform of the intermediate court on the district courts and the Supreme Court; (6) draft alternative legislative plans for reforming the structure of the federal court system; and (7) articulate general criteria to assess the alternative proposed reforms.<sup>56</sup>

This past year, the Baker Commission delivered a 200-page final report, entitled *COURTS TO CONGRESS: JUST DO IT!*<sup>57</sup> Without a doubt, this document provides "the bold and imaginative vision that is necessary to bring about change in an institution as conservative as the federal judiciary."<sup>58</sup> I commend this remarkable document to Congress' careful consideration. Having thus commended this study, my plaintive plea to Congress is this:

The time has come. The time is now.  
I say unto Congress. Enact legislation!  
I do not care how.<sup>59</sup>

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55. See Thomas E. Baker, *A Proposal That Congress Create a Commission on Federal Court Structure*, 14 *MISS. L. REV.* 271 (1994); see also Carl Tobias, *The New Certiorari and a National Study of the Appeals Courts*, 81 *CORNELL L. REV.* 1264 (1996).

56. Baker, *supra* note 55, at 277.

57. COMMISSION ON FEDERAL COURT STRUCTURE, *COURTS TO CONGRESS: JUST DO IT!* (Nike Jud. Ctr. 2020).

58. Reinhardt, *supra* note 52, at 1505.

59. DR. SEUSS, *MARVIN K. MOONEY WILL YOU PLEASE GO NOW!* 4 (1972).

The Baker Commission Report describes the spiraling mega-crisis of the courts of appeals.<sup>60</sup> Indeed, the Commission coined the term “mega-crisis” specifically to describe the orders of magnitude increases and the prevalent diseconomies of scale which characterize the intermediate federal appellate courts in 2020.<sup>61</sup> Twenty-five years ago, it could be observed that those courts, like little Alice in *Through the Looking Glass*, were running as fast as they could to stay in the same place.<sup>62</sup> Today, they more resemble George Jetson on his treadmill, caught up in their own machinery, going round-and-round in an out-of-control panic.

Consider the simple linear progression of circuit judgeships and appellate filings at ten-year intervals over the last half-century.<sup>63</sup>

60. “However people may view other aspects of the federal judiciary, few deny that its appellate courts are in a ‘crisis of volume’ that has transformed them from the institutions they were even a generation ago.” REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 48, at 109.

61. We do note, however, that there are “crises” and then there are “crises”:

“Crisis” is a much overused word. Burgeoning caseloads are nothing new, nor is the sense that the system is on the verge of breakdown. What is new is the perception that the traditional remedies—enlarging the number of judgeships and auxiliary staff, creating new courts, or subdividing existing courts into smaller units—are no longer adequate.

Arthur D. Hellman, *Crisis in the Circuits and the Browning Years, in RESTRUCTURING JUSTICE—THE INNOVATIONS OF THE NINTH CIRCUIT AND THE FUTURE OF THE FEDERAL COURTS 3, 4* (Arthur D. Hellman ed., 1990) (footnotes omitted).

62. See Thomas E. Baker & Denis J. Hauptly, *Taking Another Measure of the “Crisis of Volume” in the U.S. Courts of Appeals*, 51 WASH. & LEE L. REV. 97, 107 (1994).

63. For the years 1950-1990, these figures are taken from *Admin. of the Fed. Judiciary: Hearings Before the Subcomm. on Intellectual Property and Judicial Admin. of the House Comm. on the Judiciary*, 102d Cong., 1st Sess. (1991) (statement of Charles Clark). See Baker & Hauptly, *supra* note 62, at 108 n.47. For the years 2000 & 2010, these figures are the highest estimates taken from Memorandum by Steven C. Suddaby, Statistician, Administrative Office of the United States Courts, to Denis J. Hauptly, Reporter, Subcommittee on Administration, Management, and Structure of the Federal Courts Study Committee (July 20, 1989), *reprinted in 2 FEDERAL COURTS STUDY COMMITTEE WORKING PAPERS AND SUBCOMMITTEE REPORTS* (July 1, 1990). For the year 2020, the figures simply were made up to look really bad, thus illustrating that “[t]here are three kinds of lies: lies, damned lies, and statistics.” MARK TWAIN, MARK TWAIN’S AUTOBIOGRAPHY 246 (1928) (attributing the remark to Benjamin Disraeli). Constructing the alternative futures of the federal courts permits a certain poetic license:

The year is 2020. Congress has continued the federalization trends of the eighties and nineties, and federal court caseloads have grown at a rapid rate. In the United States Court of Appeals for the 21st Circuit, Lower Tier, a recently appointed federal judge arrives at her chambers, planning to consult the latest electronic advance sheets in Fed 7th in order to determine the

<u>1970</u>	<u>1980</u>	<u>1990</u>	<u>2000</u>	<u>2010</u>	<u>2020</u>
97	132	156	577	1384	2000
11,662	23,200	40,898	93,477	221,644	400,000

Currently, the courts of appeals annually produce published opinions amounting to two terabytes of the FEDERAL REPORTER CD-ROM SERIES, the equivalent of 1000 volumes in the old FEDERAL REPORTER 4TH SERIES.<sup>64</sup> These courts and their judges have innovated to the nth degree implementing intramural reforms, i.e., adaptations of appellate procedures and case processing techniques. Judge Learned Hand was not describing this generation of circuit judges when he remarked that federal judges were "curiously timid about innovations."<sup>65</sup> They have followed in the steps of their predecessors, the great judicial innovators of the 1960s and 1970s who saved the courts of appeals from the last great terror of caseload growth.

The fact is that we can count the total number of appeals once they are filed, but we cannot adequately explain their multiplier increases.<sup>66</sup> Even a slight change in the rate of appeal, i.e., the ratio of appealable district court terminations which are actually appealed to the courts of appeals, results in huge increases in the appellate dockets. And changes in the rate of appeals have not been slight. Indeed, by one measure there was a five-fold increase in the rate of appeals in the last half of the past century; the ratio went from 1:40 to 1:8.<sup>67</sup> If this trend were to extrapolate, by the middle of this century the ratio could exceed 1:2. In other

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applicable law of her circuit and the upper tier court of appeals for her region. With nearly a thousand court of appeals judges writing opinions, federal law in 2020 has become vaster and more incoherent than ever.

This is only the judge's fourth month on the job, even though she was nominated by the President three years earlier; the appointment and confirmation process has bogged down even more than in 1995 because of the numbers of judicial candidates that the Senate Judiciary Committee must consider every year. Her predecessor was only on the bench for a year and a half before resigning in protest because he felt that he was only a small cog in what had become a vast wheel of justice.

JUDICIAL CONFERENCE OF THE UNITED STATES, *supra* note 53, at 17; *see also* THE FEDERAL APPELLATE JUDICIARY IN THE 21ST CENTURY (Cynthia Harrison & Russell Wheeler eds. Fed. Jud. Ctr. 1989).

64. See Thomas E. Baker, *Federal Reporter, Third Series: A Call for Opinions "Sufficient Unto the Case,"* 5 SCRIBES J. LEGAL WRITING 142, 144 (1994-95).

65. LEARNED HAND, THE CONTRIBUTION OF AN INDEPENDENT JUDICIARY TO CIVILIZATION, IN THE SPIRIT OF LIBERTY 155, 158 (Irving Dillard ed., 1960).

66. RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 113-21 (1996).

67. BAKER, *supra* note 52, at 211.

words, more than half of district court decisions will be appealed, resulting in an increase in filings in the courts of appeals of several orders of magnitude by the year 2050. We must do what we can to react to these increases: we must innovate with a vengeance.

**Summary Calendar:** In 1979, the Federal Rules of Appellate Procedure were amended to allow appeals to be decided without oral argument, if a three-judge panel could agree unanimously.<sup>68</sup> By the 1990s, the courts of appeals were deciding about half of their cases without oral arguments.<sup>69</sup> That trend has continued until the present. While today more oral arguments are being held than ever before, as an absolute number, the proportion of appeals afforded an oral argument is down to about one in ten.

It is time, I submit, to abolish oral argument altogether in that remaining ten percent of appeals. This will reclaim the time and effort circuit judges are currently devoting to preparing and participating in oral arguments, which represent a substantial systemic savings of judicial resources. Additionally, the even greater amounts of judge time currently being devoted to "screening" cases to identify the one-in-ten appeal would be reclaimed. This reform can and should be accomplished by amending the Federal Rules of Appellate Procedure.<sup>70</sup>

Relatedly, some courts of appeals have conducted parallel experiments to abolish written briefs, in a further effort to save judge time. Calls for less reliance on written presentations go back many years.<sup>71</sup> The current pilot programs show much promise. The idea is that lawyers for each side are permitted to file only a letter not to exceed 1400 words or 9000 characters in lieu of a brief. This mode of limitation can be traced back to the late 1990s, when the appellate rules were amended to impose type-volume limitations in terms of words, characters per page, and number of lines.<sup>72</sup>

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68. FED. R. APP. P. 34(a).

69. BAKER, *supra* note 52, at 110. See also William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 279-81 (1996).

70. Thomas E. Baker, *An Introduction to Federal Court Rulemaking Procedure*, 22 TEX. TECH L. REV. 323 (1991); *A Self-Study of Federal Judicial Rulemaking, A Report from the Subcommittee on Long Range Planning to the Committee on Rules of Practice, Procedure and Evidence of the Judicial Conference of the United States*, 168 F.R.D. 679 (Dec. 1996) (Thomas E. Baker & Frank H. Easterbrook, Subcommittee Members).

71. See BAKER, *supra* note 52, at 117-19, 165-66.

72. See Committee Note to FED. R. APP. P. 32(a)(7) (Preliminary Draft and Proposed



**Decisions Without Opinion:** One of the innovations of the old Fifth Circuit, begun in 1970, was to affirm selective appeals without any written opinion.<sup>73</sup> The practice soon was generalized to allow reversals without opinion, as well. The technique spread to other circuits and, over time, became less and less selective and more and more practiced. Under current practice, an opinion is written in no more than one-quarter of the appeals brought nationwide.

Several courts of appeals have taken the next logical step to abolish written opinions in all appeals pursuant to their local rulemaking power.<sup>74</sup> A beneficial by-product of the abolition of written opinions in those courts has been to resolve, once and for all, the debate over the propriety of non-publication/non-citation protocols in the local circuit rules, which permit panels to publish some opinions only to the litigants and which forbade the citation of the unpublished opinion.<sup>75</sup> Of even more significance for the federal court system qua system is that eliminating opinions will result de facto in the certain elimination of the problem of conflicts among the circuits.

Today, the decision-without-opinion has become the federal appellate norm. The written opinion is an outdated judicial ritual that became obsolete back in the 20th century. It is time to free ourselves from this formalistic ritual that dates back to before there were computers. It is time, I submit, to eliminate written appellate opinions altogether and I urge all the courts of appeals to implement this reform immediately.

**Staff Attorneys and Law Clerks:** To their great and lasting credit, the circuit judges have held the line against increasing their decisional staff.<sup>76</sup> They recognize that a 5:1 ratio of law clerks to judges, which is the national average, is the maximum of delegation and supervision.<sup>77</sup> They understand that judges must do their own supervising of staff if they are to deserve the public's respect.<sup>78</sup>

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Amendments, Apr. 1996).

73. See *NLRB v. Amalgamated Clothing Workers Local 990*, 430 F.2d 966 (5th Cir. 1970); Philip Schuchman & Alkan Gelfand, *The Use of Local Rule 21 in the Fifth Circuit: Can Judges Select Cases of "No Precedential Value"?*, 29 EMORY L.J. 195 (1980).

74. FED. R. APP. P. 47.

75. BAKER, *supra* note 52, at 125-35; Richman & Reynolds, *supra* note 69, at 281-86; William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573 (1981); Elizabeth M. Horton, Note, *Selective Publication and the Authority of Precedent in the United States Courts of Appeals*, 42 UCLA L. REV. 1691 (1995).

76. BAKER, *supra* note 52, at 139-47.

77. Thomas E. Baker, *The Institution of Law Clerks in the U.S. Courts of Appeals*, 3 LONG TERM VIEW 71, 72 (1995).

78. CHARLES E. WYZANSKI, JR., WHEREAS—A JUDGE'S PREMISES 61 (1965) (ascribing to Justice Brandeis the remark, "The reason the public thinks so much of the Justices of the Supreme Court is that they are almost the only people in Washington who do their

Staff attorneys work for the court as a whole rather than for an individual judge, in a sense, each one doing the work of three law clerks in three chambers.<sup>79</sup> They have become a fixed feature of the modern court of appeals.<sup>80</sup> The Judicial Conference of the United States has recognized that there are limits to the number of staff attorneys that can be deployed on a central staff.<sup>81</sup>

Law clerks or "elbow clerks" perform valuable work in chambers. Today, the typical chambers includes four law clerks, and this number has not increased since the 1990s.<sup>82</sup> The modern paradigm in chambers is that circuit judges resemble "senior partners, high government officials, and professors" who "scrupulously review and edit" the preliminary work of their junior associates.<sup>83</sup> Nostalgia for the day when a judge researched and wrote each opinion is just nostalgia. By one circuit judge's estimate, a judge without law clerks could research and write about a dozen or so opinions a year.<sup>84</sup>

Some courts of appeals have experimented with the position of a law clerk's law clerk—a para-judicial assistant to the judge's law clerk.<sup>85</sup> To keep these positions distinct, those courts have renamed law clerks "sub-judges" and named these assistants "para-judicials." This pyramid ar-

own work."). See generally POSNER, *supra* note 66, at 140-57.

79. The staff attorney

acquires a case at the moment the notice of appeal is filed, shepherds it through each procedural step until the closing brief is in, prepares legal memoranda, drafts a proposed opinion or other disposition, recommends grant or denial of oral argument, and presents the complete package to the judges to be graded pass/fail.

Shirley M. Hufstедler, *The Appellate Process Inside Out*, 50 CAL. ST. B.J. 20, 22 (1975).

80. Richman & Reynolds, *supra* note 69, at 287-92; William M. Richman & William L. Reynolds, *Appellate Justice Bureaucracy and Scholarship*, 21 U. MICH. J.L. REFORM 623, 637 (1988); Donald P. Ubell, *Evolution and Role of Appellate Court Central Staff Attorneys*, 2 COOLEY L. REV. 157, 166 (1984).

81. Baker, *supra* note 77, at 75.

82. *Id.* at 72.

83. Patricia M. Wald, *The Problems with the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?*, 42 MD. L. REV. 766, 778 (1983). See generally WILLIAM KOMNARSKI, *THE OPINION OF THE COURT* 30-31, 44-54 (1996).

84. Wald, *supra* note 83, at 777.

85. JOHN BILYEAU OAKLEY & ROBERT S. THOMPSON, *LAW CLERKS AND THE JUDICIAL PROCESS: PERCEPTIONS OF THE QUALITIES AND FUNCTIONS OF LAW CLERKS IN AMERICAN COURTS* 27-29 (1980); Kenneth W. Starr, *The Courts of Appeals and the Future of the Federal Judiciary*, 1991 WIS. L. REV. 1, 7.

rangement seems to promise a marked increase of in-chambers productivity.

**Technology:** Perhaps the greatest advances in the courts of appeals over the last two decades have been in the area of technology. A few highlights are illustrative: records, briefs, and other documents are routinely filed electronically;<sup>86</sup> fully-automated appellate case-management plans rely on advanced software programs;<sup>87</sup> electronic networks link judges' chambers, the clerk's office, and staff attorneys. Perhaps the most pronounced change in appellate technology has been the growing presence of the courts of appeals on the World Wide Web of the Internet. Internet home pages have revolutionized how judges and lawyers interact on appeal, including virtual oral arguments, e-mail linkages for briefing, instantaneous publishing and downloading of decisions, and the like.<sup>88</sup>

Under the joint auspices of the Federal Judicial Center and the Administrative Office of United States Courts, a prototype software program, nicknamed "Judge Dread," has been developed to provide computer assistance to human judges deciding cases.<sup>89</sup> These protocols will allow each side to access a hyper-text-mark-up-language form at a court's home page and to keyboard answers to sets of questions arranged in series, each set of questions being generated by the answers to the previous set of questions, until the program reaches a recommended outcome (to affirm or reverse the District Court) based on a computer-generated rationale which will be communicated directly to the parties and to the three judges assigned the appeal. Then the parties may electronically file their responses to the computer recommendation with the human judges. Of course, the actual judging in these appeals will still be performed, ultimately, by the human judges. A pilot program will be conducted by the Rand Corporation, beginning at the end of this year, in which randomly selected appeals will be decided by both existing appellate proce-

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86. See FED. R. APP. P. 25(a)(2)(D). We have come a long way since the first primitive, interactive cyberbrief was filed in the Supreme Court back in 1997. That amicus curiae CD-ROM, ironically enough, was filed in a case dealing with government censorship on the Internet. *Reno v. ACLU*, \_\_\_ S. Ct. \_\_\_ (1997) (No. 96-511). See generally Shannon P. Duffy, "Cyberbrief" Shows Web's Workings, LEGAL INTELLIGENCER, Feb. 21, 1997, at 1.

87. See BAKER, *supra* note 52, at 153.

88. See generally *Federal Courts' Home Page* (visited Feb. 21, 1997) <<http://www.uscourts.gov>>; *The Federal Judicial Center Home Page* (visited Feb. 21, 1997) <<http://www.fjc.gov>>; *U.S. Federal Courts Finder* (visited Feb. 21, 1997) <<http://www.law.emory.edu/FEDCTS>>.

89. See Isaac Assimov, *The Next 70 Years for Law and Lawyers*, 71 A.B.A. J. 57, 58 (1985); BAKER, *supra* note 52, at 153.

dures and by using the Judge Dread courtware to allow for a comparison for consistency in outcomes.

**State-of-the-Appellate-Art Innovations:** The visionary judges of the United States Courts of Appeals have reimagined their courts in the twenty-first century. Federal appellate procedures have evolved and progressed far beyond their nineteenth century origin in the Evarts Act.<sup>90</sup> New traditions have replaced old traditions.<sup>91</sup> Our appellate ideals better reflect the modern appellate reality.<sup>92</sup> We have rid ourselves of illusions like the oral argument and the written opinion.<sup>93</sup> We look into the future with our eyes wide open, prepared for the worst but prepared to do our best.

Those of us charged with the responsibility to administer the federal courts must anticipate future problems and prepare to solve them now.<sup>94</sup> We have experienced exponential increases in federal appellate caseloads since 2000, and predictions for the coming decades of the 30s and 40s create a sense of urgency that our federal appellate procedures should be radically refashioned to allow the courts of appeals to decide more appeals more expeditiously. The statutory right<sup>95</sup> of an appeal must be preserved at all cost.<sup>96</sup>

It is a truism that the courts of appeals differ in their regional experiences, that they are separate and individual judicial institutions.<sup>97</sup> But I want to highlight two spectacular innovations which have been success-

90. Act of Mar. 3, 1891, ch. 517, 26 Stat. 826. *See generally* BAKER, *supra* note 52, at 9-11.

91. BAKER, *supra* note 52, at 21-26, 181-85.

92. *Id.* at 27-30.

93. "In far too many appeals being decided by the Courts of Appeals today, what remains of the federal appellate tradition and ideal resembles Alice's Cheshire Cat, only the smile is left and it is growing fainter and fainter." *Id.* at 184.

94. "The history of procedure is a series of attempts to solve the problems created by the preceding generation's procedural reforms." Judith Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603, 624 (1985).

95. 28 U.S.C. §§ 1291-1292 (1994).

96. *See* BAKER, *supra* note 52, at 149-50.

The cumulative impact of decision making shortcuts has imposed costs above and beyond the disadvantages of each individual procedure. As a result of the reforms, the circuit courts have lost their role as appellate courts and have become certiorari courts. Further, the changes in the decision making process have diminished the quality of the courts' work, a degradation which has had the greatest effect upon the poorest and least powerful litigants.

Richman & Reynolds, *supra* note 69, at 293.

97. BAKER, *supra* note 52, at 106-07.

fully implemented by two different courts of appeals. My purpose is not to endorse these particulars, though I find them creative and original. Instead, my avowed purpose is to endorse the general attitude of experimentation and invention displayed by these two courts of appeals.

The United States Court of Appeals for Las Vegas has taken the nonargument calendar and the decision-without-opinion reforms to the next level. The judges have established the Coin-Toss Calendar. Appeals are screened onto this calendar if they satisfy several related criteria. If an appeal presents issues that are unimportant and uninteresting to the judges and it appears that determining the correct outcome will take too much time, considering what is at stake for the party-litigants, the case is scheduled for an appellate appearance before an appellate magistrate.<sup>98</sup> At the appellate appearance, the lawyers are permitted to examine a coin specially cast with the Seal of the Court on each side, clearly labelled "Affirmed" on one side and "Reversed" on the other. The immediate result is announced to the parties and officially recorded and eventually published in a table in the case reporter.<sup>99</sup>

The delegation to the appellate magistrate obviously saves valuable circuit judge time. There can be no complaint about delegation to law clerks. Time otherwise wasted reading the briefs, studying the record, and researching law in the coin-toss appeals can be put to better uses. Finally, the Coin-Toss Calendar formalizes and legitimizes a practice that court observers time-out-of-mind have attributed to judges.

The United States Court of Appeals for Atlantic City has developed an ingenious procedure to deal with wholesale categories of appeals which it calls "Scratch-an-Appeal." The procedure is based on an historical regression analysis of past decisions in appeals dealing with social security, prisoner civil rights, and habeas corpus. That statistical analysis revealed a relatively low percentage of reversals in those categories that did not correlate sufficiently with any fact pattern or principle of law. In short, the distribution of outcomes more resembled random Jungian black-box decisions.

The circuit judges rightly deemed it far too inefficient and wasteful to go on searching for needles in those haystacks of appeals on a case-by-case basis. Consequently, the clerk of the court entered into an agreement with the same company that provides "scratch-off" game cards for the New Jersey state lottery to have "Scratch-an-Appeal" cards printed up for the court's use, under a security arrangement similar to the state's lottery. The cards bear the legend "United States Court of Appeals for

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98. *See id.* at 175-76.

99. *Cf. id.* at 121-23 (describing the "anathema" practice of deciding appeals without opinions).

Atlantic City Scratch-an-Appeal." The cards are very tastefully designed with a high-quality, full color graphic of the blindfolded figure of Justice holding a set of scales. Full color printing and scanning techniques eliminate any risk of tampering or counterfeiting.

When an appeal is presented in one of the designated categories, the court clerk takes the next card from a secure dispenser and stamps it with a docket number and then mails it to the appellant. On the reverse side of the card appear instructions on how to use a key or a coin to scratch away the scales of justice to reveal the outcome of the numbered appeal, "Affirmed" or "Reversed." If "Affirmed" appears on the card, nothing else is required of the litigants. If "Reversed" appears, the appellant is requested to redeem the card for an official form mandate to be entered on the appellate record. The court already is contemplating expanding the "Scratch-an-Appeal" program to develop a separate card for all cases with pro se appellants, whose litigation proclivities somewhat mirror a compulsive gambler.<sup>100</sup>

Appellate procedures thus have been brought into line with the realities of the appellate predicament, and this novel judicial process reflects the larger culture. The key to the success of this program is that the court established the reversal rate at ten percent, which is higher than the old-fashioned decisions by judges and better odds than one gets in comparable state lottery scratch-off games.<sup>101</sup> The "Scratch-an-Appeal" is very popular with many litigants, who understand their chances for success otherwise are rare to nonexistent and who prefer random outcomes to expensive appeals and long delays.

These are just two examples of procedural innovations that deserve to be implemented widely in the courts of appeals. We must remind ourselves that there is no constitutional right to an appeal.<sup>102</sup> Rather, bring-

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100. Cf. Adam Geller, *That's the Ticket—Instant Game Card Printer Making a Mint*, 45 REC. N. N.J., Aug. 13, 1995, at B1; James Walsh, *Why Do People Play the Lottery?*, CONSUMER RES. MAG., Mar. 1, 1996, at 22.

101. See Thomas E. Baker, *A Catalogue of Judicial Federalism in the United States*, 46 S.C. L. REV. 835, 872 (1995).

It is worth noting that the federal [habeas corpus] jurisdiction has a certain 'needle in the haystack' quality: "[C]omprehensive statistics are lacking, but those that are available indicate that the writ is granted in at most 4 percent of the cases in which it is sought, and in many of these cases it is possible for the state to retry the prisoner."

*Id.* (quoting CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* 366-67 (5th ed. 1994)).

102. BAKER, *supra* note 52, at 236 (referring to "venerable Supreme Court dictum" to this effect).

ing an appeal is a matter of governmental grace, first legislative and then judicial. Furthermore, if the Constitution is not offended by tossing a coin to impeach and remove a judge with Article III tenure, then surely a federal judge can toss a coin to decide an appeal.<sup>103</sup>

These two state-of-the-appellate-art innovations promise enormous savings of ever-becoming-more-scarce judicial resources. Unfortunately, documented projections of federal appellate docket growth for the next two decades will resemble "The Blob" and will consume these savings and more.

**Adding Judges:** It only stands to reason, unless demand somehow is decreased, that the most logical alternative for dealing with growing federal appellate dockets is to increase the supply of judgepower. Traditionally, creating new circuit judgeships was the domain of the political branches.

In 1990, there were 156 circuit judgeships, even though the caseload would have justified 206 under the Judicial Conference standards.<sup>104</sup> For most of the history of the courts of appeals, circuit judgeships have been delivered in larger and larger litters.<sup>105</sup> Omnibus bills traditionally were the captives of divided government, however. When the White House and the Congress were in the hands of different parties, no judgeships were forthcoming.<sup>106</sup>

It was a judicial miracle, then, that occurred in 2000, after a sea-change election by which the White House and the Congress came under control of the same party, when Congress passed and the President signed the Circuit Judgeship Parity Act.<sup>107</sup> Veteran court reformers still marvel at this far-reaching legislation. Authority to create circuit judgeships was delegated to the Judicial Conference under a docket-based formula, subject to being modified only by legislation if enacted before the new position is filled.<sup>108</sup> We in the judicial branch ceased our resistance to the most obvious and indeed necessary solution to appellate case-

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103. *Cf. Nixon v. United States*, 506 U.S. 224, 253-54 (1993) (Souter, J., concurring).

104. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 48, at 114. By 1992, the total was 179 judgeships, though some positions were unfilled, and the Administrative Office formula would have justified 277. Richman & Reynolds, *supra* note 69, at 297-98 & n.126.

105. BAKER, *supra* note 52, at 201, 212.

106. DEBORAH J. BARROW ET AL., THE FEDERAL JUDICIARY AND INSTITUTIONAL CHANGE 75-76 (1996); John M. De Figueiredo & Emerson H. Tiller, *Congressional Control of the Courts: A Theoretical and Empirical Analysis of the Expansion of the Federal Judiciary*, 39 J.L. & ECON. 435, 459-60 (1996).

107. Pub. L. No. 106-123, 104 Stat. 456 (2000).

108. The bill was based on CARL BARR, JUDGESHIP CREATION IN THE FEDERAL COURTS: OPTIONS FOR REFORM (Fed. Jud. Ctr. 1981); *see also* BAKER, *supra* note 52, at 207-09.

load.<sup>109</sup> The impact from this legislation on the courts of appeals has been profound. Maintaining a parity between caseload and judgeships, the number of authorized positions immediately increased to 577 judgeships in the year of passage, and the total has roughly doubled every ten years to the present full complement of 2000 circuit judges.<sup>110</sup> Despite this decennial doubling, caseload demand continues to outstrip judgeship supply, though the courts of appeals are staying current. And we have exorcised the specter of judicial gridlock while maintaining our grand tradition of generalized courts.<sup>111</sup>

Adding these large cohorts of judges to the courts of appeals has not been without untoward effects. The old en banc rehearings became impossible and had to be abolished.<sup>112</sup> The judicial branch budget has grown exponentially to cover the costs of additional judgeships, chambers expenses, and support staff.<sup>113</sup> The days of the once-elite federal bench are gone forever, with federal judges outnumbering administrative law judges in the Social Security Administration.<sup>114</sup> Quality of judging has not suffered, at least in part because there are so many able lawyers in the United States.<sup>115</sup> Increased instability in the law of the circuit has resulted in increased rates of appeals, thus fueling larger increases in the

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109. Richman & Reynolds, *supra* note 69, at 297-339.

110. "In 1975, one federal jurisdiction seer predicted that in the twenty-first century 5,000 circuit judges would be filling 1,000 volumes of Federal Reporter, umpteenth series, disposing of approximately a million appeals—each and every year." BAKER, *supra* note 52, at 212 (citing John H. Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567, 567 (1975)).

111. "Since concern with caseload is most acute in the courts of appeals, the idea of specialized federal courts of appeals deserves careful consideration." POSNER, *supra* note 66, at 244; see Victor Williams, *A Constitutional Charge and a Comparative Vision to Substantially Expand and Subject Matter Specialize the Federal Judiciary: A Preliminary Blueprint for Remodeling Our National Houses of Justice and Establishing a Separate System of Federal Criminal Courts*, 37 WM. & MARY L. REV. 535 (1996).

112. BAKER, *supra* note 52, at 155-58, 202.

113. *Id.* at 203.

114. THE ALJ HANDBOOK, AN INSIDER'S GUIDE TO BECOMING A FEDERAL ADMINISTRATIVE LAW JUDGE 62 (2d ed. 1994). The SSA was once labeled "the Mount Everest of bureaucratic structures . . . with . . . the largest system of administrative adjudication in the western world." Jon C. Dubin, *Social Security Law*, 26 TEX. TECH L. REV. 763, 764 (1995).

115. Comparing the linear rates of average growth in the American population with the recent trends in the number of lawyers, "by the year 2074 every man, woman, and child in the United States will be a lawyer." JOHN SILBER, STRAIGHT SHOOTING: WHAT'S WRONG WITH AMERICA AND HOW TO FIX IT 213 (1989).



docket in a closed system of mega-crisis.<sup>116</sup> More intangible speculations have been expressed, along the way, that so large a number of circuit judgeships lessens the authoritativeness of the courts of appeals, renders virtually impossible synthesis and critique of the law, and disadvantages litigants who lack the resources to keep up with the law.<sup>117</sup> But, thankfully, pragmatism has won out.<sup>118</sup>

**Splitting Circuits:** The chief consequence of adding so many circuit judges for the structure of the intermediate federal courts has been the splitting—more descriptively, the fracturing—of the structure of the regional courts of appeals. The nineteenth century geographical organization has been obliterated.

The 1981 division of the old Fifth Circuit to create the Eleventh Circuit, some twenty years in the making, was a harbinger of things to come.<sup>119</sup> The old court suffered from such diseconomies of scale in terms of geography, population, docket, and number of judges that Congress was moved to divide it in two.<sup>120</sup>

When Congress enacted the above-mentioned Circuit Judgeship Parity Act of 2000, circuit splitting achieved a critical mass. The immediate doubling increase to 577 judgeships that year provided Congress with a compelling reason to redraw the circuit boundaries.<sup>121</sup> The old Ninth Circuit was divided immediately to create the Twelfth Circuit.<sup>122</sup> When no court wanted to be named the Thirteenth Circuit out of judicial triskaidekaphobia, Congress established a legislative precedent of renaming the circuits after their headquarters city.<sup>123</sup> Thus, the “United States

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116. BAKER, *supra* note 52, at 206-07.

117. See Stephen Breyer, *Administering Justice in the First Circuit*, 24 SUFFOLK U. L. REV. 29, 38-40 (1990).

118. Richman & Reynolds, *supra* note 69, at 339-40.

119. BAKER, *supra* note 52, at 52-73.

120. *Id.* at 65-66.

121. We have not recommended a general realignment of all the circuits. To be sure, the present boundaries are largely the result of historical accident and do not satisfy such criteria as parity of caseloads and geographical compactness. But these boundaries have stood since the nineteenth century . . . and whatever the actual extent of variation in the law from circuit to circuit, relocation would take from the bench and bar at least some of the law now familiar to them. Moreover, the Commission has heard eloquent testimony evidencing the sense of community shared by lawyers and judges within the present circuits. Except for the most compelling reasons, we are reluctant to disturb institutions which have acquired not only the respect but also the loyalty of their constituents.

*Geographical Boundaries*, *supra* note 42, at 228.

122. BAKER, *supra* note 52, at 74-105 (arguing for a postponement of proposals to divide the Ninth Circuit). See generally Symposium, *The Proposal to Split the Ninth Circuit Court of Appeals*, 57 MONT. L. REV. 241 (1996).

123. “[A]re we to continue the splitting process until it becomes mincing, with a Unit-

Court of Appeals for the Fifth Circuit" was renamed the "United States Court of Appeals for New Orleans."<sup>124</sup> This new naming scheme later proved prescient when the division of California into multiple circuits established the legitimacy of subdividing one state into more than one circuit.<sup>125</sup> The process of congressional circuit splitting proceeded, as if following some law of physics, until we reached today's relatively stable configuration of 154 separate courts of appeals with 2000 Circuit Judges.<sup>126</sup>

The de facto criteria for splitting a circuit that have emerged over time were summarized by the Baker Commission: (1) a circuit should be composed of at least three zip codes; (2) no circuit should be created that will not require at least nine judges; (3) a circuit should contain neighborhoods with a diversity of population, legal business, and socioeconomic interests; (4) realignment should not depend on preexisting alignments; and (5) a circuit should be as contiguous as is possible.<sup>127</sup> Chief Judge Baker of the Court of Appeals for Lubbock, the Chairman of the Commission, wryly observed, "After all, these are not congressional districts."<sup>128</sup>

The benefits of circuit splitting have not been purchased without a price. Uniformity in the national law has been lessened by the prevalence and persistence of conflicts among the circuits, now multiplied many

ed States Court of Appeals for the Houston Metropolitan Area?" Thomas Gibbs Gee, *The Imminent Destruction of the Fifth Circuit: Or, How Not to Deal with a Blossoming Docket*, 9 TEX. TECH L. REV. 799, 806 (1978).

124. See Act of June 25, 1948, ch. 646, § 2680, 62 Stat. 869-870, 984-985 (Judicial Code provision officially renaming circuit courts of appeals as the "United States Court of Appeals for the [number] Circuit").

125. Cf. Arthur D. Hellman, *Legal Problems of Dividing a State Between Federal Judicial Circuits*, 122 U. PA. L. REV. 1188 (1974).

126. In 1990, 156 judges sat on 12 regional courts. See *supra* note 104 and accompanying text. In 2020, 2000 judges sat on x regional courts ( $156/12 = 2000/x$  and  $x = 154$ ).

127. In 1973, the Hruska Commission settled on criteria suitable to a different era:

- (1) circuits should be composed of at least three states;
- (2) no circuit should be created that would immediately require more than nine judges;
- (3) a circuit should contain states with a diversity of population, legal business, and socioeconomic interests;
- (4) realignment should avoid excessive interference in established circuit alignment; and
- (5) no circuit should contain noncontiguous states.

BAKER, *supra* note 52, at 56.

128. See *Bush v. Vera*, 116 S. Ct. 1941, 1965-67 (1996) (O'Connor, J., plurality opinion appendices A-C).

times.<sup>129</sup> Now, the Supreme Court applies the rule that a conflict is not ripe for review until at least 75 circuits, or roughly half the 154, have ruled on the issue. Thus conflicts percolate over great time and small distances.<sup>130</sup> The "federalizing function" of the courts of appeals has been lost.<sup>131</sup> And, of course, splitting a circuit does not do anything to alleviate workload. This is because a circuit's caseload manifests the distributive property from mathematics: simply dividing a court of appeals does not result in fewer appeals or in fewer appeals per judge.<sup>132</sup> But for anyone to object to this reform at this date in our judicial history would be splitting into the wind.

**Evolved Courts of Appeals:** The courts of appeals have come a long way since their creation nearly a century and a half ago. But their essential function as the intermediate appellate court between the district courts and the Supreme Court has been preserved.<sup>133</sup> Ignore the institutional changes in the numbers of circuits and the number of judges. What does it matter if it takes 2000 judges today to decide 400,000 appeals? What is important, what is essential, is that the appeals are being terminated and that the courts of appeals remain current in their docket.

We have arrived at the modern appellate wisdom that it is more important that an appeal be decided than that it be decided rightly.<sup>134</sup>

Therefore, how the courts of appeals go about deciding appeals simply does not matter. Appellate procedures are merely means towards a greater end. Ineffective procedures, procedures that place demands on scarce judicial resources, procedures like oral arguments and written opinions, must be discarded. Innovations like the Coin-Toss Calendar and the Scratch-an-Appeal demonstrate judicial ingenuity and a commitment to the greater end of the termination of appeals. The ultimate measure of appellate procedures is how much they contribute to the mission of the courts of appeals.<sup>135</sup> That mission is to decide appeals, not to create works of art.<sup>136</sup>

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129. BAKER, *supra* note 52, at 17-21.

130. "The framers of the Constitution and the drafters of federal statutes did not intend that our national law have 'more variations than we have time zones.'" Thomas E. Baker & Douglas D. McFarland, *The Need for a New National Court*, 100 HARV. L. REV. 1400, 1408 (1987) (quoting Warren E. Burger, 1985 Year-End Report on the Judiciary 13).

131. John Minor Wisdom, *Requiem for a Great Court*, 26 LOY. L. REV. 787 (1980).

132. BAKER, *supra* note 52, at 72-73.

133. *Id.* at 231.

134. "Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

135. BAKER, *supra* note 52, at 27-29.

136. See Thomas E. Baker, *Some Preliminary Thoughts on Long-Range Planning for the Federal Judiciary*, 23 TEX. TECH L. REV. 1, 2-5 (1992) (discussing the mission of

What is important, what is essential, is that the appeal-as-of-right has been preserved in the face of long-term docket growth that for more than half a century has threatened the function and survival of the courts of appeals. It is a testimony to the circuit judges that their industry and their innovation have allowed them to manage their dockets.<sup>137</sup> There is no more resilient an institution to be found in the federal government than the United States Courts of Appeals. Our circuit judges deserve our respect and admiration and our gratitude for their efforts to perfect appellate justice.<sup>138</sup>

#### IV. A PERSONAL POSTSCRIPT

President Carter will have the constitutional duty to nominate my successor, who will become the eighteenth Chief Justice.<sup>139</sup> This is most appropriate given the fact that her father was the only President to serve a full term without appointing a member of the Supreme Court. May she choose wisely for the good of our Republic.

the federal courts).

I know this is heresy. The idea that the nation will suffer if judges do not have as much time for each case as they once did is integral to the ideology of the American legal profession. Indeed, it is entwined with the central strand of that ideology—the conception of law, in all its aspects including judging, as a craft of patient artisans. Federal adjudication is further from this traditional ideal today than it was thirty-five years ago, when judges did more of their “own work.” But it is merely an article of faith, with no evidence or even good arguments to back it up, that the consequence of the “de-artisaning” has had a net deterioration in the average quality of justice meted out by the federal courts.

POSNER, *supra* note 66, at 185-86. Ultimately, procedures should be “administered to secure . . . just [the] speedy[] and inexpensive determination of every action.” FED. R. CIV. P. 1 (edited).

137. Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 BYU L. REV. 3, 37-57.

138. See, e.g., FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING 303-09 (1994). “What’s good for federal judges is good for the court system.” CHRISTOPHER E. SMITH, JUDICIAL SELF-INTEREST: FEDERAL JUDGES AND COURT ADMINISTRATION 126 (1995).

139. Peter G. Fish, *The Office of Chief Justice of the United States: Into the Federal Judiciary’s Bicentennial Decade*, in THE WHITE BURKETT MILLER CENTER OF PUBLIC AFFAIRS, THE OFFICE OF THE CHIEF JUSTICE 1-153 (1984); John R. Vile, *The Selection and Tenure of Chief Justices*, 78 JUDICATURE 96 (1994). Just to be contrary, my total includes one or the other Chief Justice who some others do not count: John Rutledge, who was nominated but not confirmed, or William Cushing, who was nominated, confirmed, and then declined. See *What’s in a Number?*, S. CT. HIST. SOC’Y, vol. xvi, no. 2, at 3 (1996).

In closing, I note that we are about to begin the third decade of this century. Now is not too soon to begin to build the foundation of a bridge to the twenty-second century. That was one of President Clinton's favorite metaphors back when he appointed me Chief Justice. I want to conclude by expressing my heartfelt thanks to him for providing me this opportunity for judicial service under the Constitution, made possible in no small part by his full and unconditional pardon.<sup>140</sup> He has been a wonderful helpmate and life's partner.

We both look forward to our new life together when I take up the challenge of being Dean at the Pepperdine University School of Law, retracing the footsteps of my colleague Justice Kenneth W. Starr, who some years ago left that post to join our Court.

Signed/

**Hillary Rodham Clinton**  
**Chief Justice of the United States**

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140. President Kennedy remarked upon the appointment of his brother Robert F. Kennedy to be Attorney General: "I see nothing wrong with giving Robert some legal experience as Attorney General before he goes out to practice law." BILL ADLER, *THE COMPLETE KENNEDY WIT* 179 (1967).