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Current Challenges to the Federal Judiciary

*Carolyn Dineen King**

—Remarks at the Judge Alvin B. and Janice Rubin 2005 Lectures, October 25, 2005, Paul M. Hebert Law Center, Louisiana State University.

INTRODUCTION

In the United States, an independent judicial system enjoying the confidence of the citizenry is central to preserving the rule of law. The rule of law, in turn, is the bedrock of both our federal and state judicial systems. I will mention several challenges to the independence of the Judiciary that are operative today and seem, to me at least, to be particularly troubling. I will also talk about some fundamental changes that are occurring in the federal district and appellate courts.

During the nearly seven years that I have been Chief Judge of the Fifth Circuit and a member of the Judicial Conference of the United States, I have been privileged to have a ring side seat on the relations among the three branches of government and particularly on the effects of the political branches on the federal judiciary. I would like to talk about that, beginning with money and moving on to even more important aspects of judicial independence.

I. POLITICAL CHALLENGES

A. *Governance and Financing of the Judiciary*

First, for background information, let me tell you how the federal judiciary is governed and financed. The federal judiciary is governed by the Judicial Conference of the United States, which is chaired by the Chief Justice of the United States and composed of

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Circuit Judge, United States Court of Appeals for the Fifth Circuit. Judge King was Chief Judge of the Fifth Circuit and a member of the Judicial Conference of the United States from 1999 to 2006. She was appointed by Chief Justice William H. Rehnquist to be a member of the Executive Committee of the Judicial Conference from 2000 to 2005 and to chair the Committee from 2002 to 2005. Judge King was appointed to the Fifth Circuit by President Carter in 1979.

the chief judge from every judicial circuit, a district judge representative from every circuit, and the chief judges of the Federal Circuit and the Court of International Trade—twenty-seven members in all. It meets twice a year, in September and March. Its function is to set the policies by which the Judiciary is governed. Those policies are developed in the first instance by committees of the Judicial Conference composed of circuit, district, magistrate, and bankruptcy judges. Each committee has a specific area of responsibility, for example, the budget, criminal law, information technology, judicial resources, security, space and facilities, and the rules of practice and procedure. The committees meet twice a year and forward to the Judicial Conference recommendations on policies to be adopted by the Conference. The Executive Committee, which I chaired, helps develop the agenda for the Judicial Conference sessions, acts on behalf of the Conference on emergency matters, and adopts the spending plan for the Judiciary shortly before the beginning of each fiscal year.

The Constitution mandates that the powers of the federal government be separated among three independent branches: executive, legislative and judicial.¹ But the Judiciary is financed, like all other parts of the federal government, through appropriations bills passed by Congress and signed by the President. You have heard that the Judiciary does not have the power of the purse. Indeed, it does not; it is dependent for its financial livelihood on Congress and the President. So our independence must always be understood as qualified by our dependence on the other branches for our money. Each year we receive four separate appropriations, which in fiscal 2005 totaled approximately \$5.42 billion.² Our principal appropriation is for our Salaries and Expenses account, from which most of our bills are paid.

For many years, our appropriations were adequate to cover not only our existing levels of operations but also the additional manpower, space, and equipment that the ever increasing caseloads required. But beginning about the time of the disappearance of the

1. See U.S. Const. arts. I, II, & III.

2. U.S. Courts, Judiciary Budget Facts and Impact, <http://www.uscourts.gov/judiciary2005.html> (last visited Mar. 5, 2006).

federal budget surplus and the advent of soaring federal budget deficits, the size of the increase in our appropriations over the amounts we received in the prior year began to diminish sharply. Specifically, in the year 2000, when times were good, we received a 9.9% increase in our Salaries and Expenses appropriation over the corresponding 1999 appropriation.³ That percentage increase over the prior year diminished to 7.6% in 2001, 7.2% in 2002, 4.8% in 2003, 4.7% in 2004, and 4.3% in 2005, not a good trend, to say the least.⁴ For fiscal 2004, in which we received the 4.7% increase over the preceding year, we actually needed an increase of over 6% simply to maintain current staff and services, and an increase of 11% to fully fund our increased workload.⁵ The result of the shortfall was that we lost 1,350 staff positions, or 6% of our court staff.⁶

The Judiciary's financial problems are based not only on the declining level of our appropriations but also on the fact that 84% of our expenses consist of two items over which we have little control in the near term. The first of these is the rent which, under federal law, we must pay to the General Services Administration (GSA) for our courthouses and other buildings. In fiscal 2005 that rent, which is a first charge against our appropriation, totaled 22% of our Salaries and Expenses appropriation.⁷ Our personnel costs, which are the other item over which we have little control in the near term, totaled 62% of our Salaries and Expenses appropriation in fiscal 2005.⁸ Our rent has been increasing at the rate of 7% to 7.5% per year, partly as a result of escalation clauses in our leases with the GSA and partly as a result of the addition of new space. Our personnel costs have been increasing at a rate slightly in excess of 6% per year as a result of generous cost-of-living adjustments and pay policies that are government-wide. So, to

3. Report of the Executive Committee of the Judicial Conference of the United States, *Cost-Containment Strategy for the Federal Judiciary: 2005 and Beyond* (August 12, 2004) [hereinafter Report]. Report was approved by the Judicial Conference of the United States on September 21, 2004.

4. *Id.*

5. *Id.* at 3-4.

6. 2004 End-Year Report on the Federal Judiciary (2004), available at <http://www.supremecourtus.gov/publicinfo/year-end/2004year-endreport.pdf>.

7. Report, *supra* note 3, at 1.

8. *Id.*

sum up the problem, when your appropriation is increasing at the rate of approximately 4.5% per year but 84% of your expenses are increasing at rates between 6% and 7.5% per year, you have a terrible financial problem.

In September 2004, recognizing that the federal judiciary faces unprecedented funding challenges in the coming years because of the fiscal constraints that Congress faces, the Judicial Conference adopted a major cost containment strategy. We looked at every major component of our expenses, and devised a plan that over the next few years will, if implemented faithfully, substantially reduce the gap between our appropriations and our expenses. But a couple of major components of that plan, including a new compensation policy, remain to be fully developed, and it will take sustained discipline to fully implement the plan over the next few years. Even if we are faithful to the plan, however, there will still be shortfalls, smaller ones to be sure, unless our appropriations improve. Those shortfalls have to come principally out of staffing levels because that is the only major component of our expenses that is flexible. Any threat to our staffing levels is serious; we cannot absorb further staff cuts of any size without real damage to our operations.

It is not only the Third Branch that faces the possibility of substantial budget cuts in the years ahead; all government agencies face the same possibility. But the Judiciary is in a somewhat different position than the ordinary government agency. Most government agencies manage a large number of programs. In such a case, if the budget is cut, the agency can trim back or sometimes even eliminate some of its programs. The Judiciary does not have programs. It has only two lines of work, both reactive. We take in cases filed by others under jurisdictional grants established by Congress, work on those cases, finish them up, and send them out the door. If the cases we take in happen to be criminal cases and the defendants are indigent, we appoint and pay counsel as the Constitution requires. And at the other end of the system, we supervise felons released from the federal prison system. We do not have the option of trimming back our work.

Our appropriations committees in both the Senate and the House understand our unique plight and have been uncommonly sympathetic. Do not forget that we did receive increases in our

appropriations, albeit not as large as we needed, when some other government agencies received cuts. But, in the end, understanding and sympathy will not be enough to carry the day; it comes down to how many dollars our appropriators have to appropriate. The size of the federal deficit is the core problem. As long as it continues, our situation will be at the least very difficult, and if we are forced to make more layoffs, it could be disastrous.

B. Attacks on the Judiciary

Thus far, I have addressed the challenge to judicial independence that comes from how we are financed. This particular challenge is, at least, one provided for in the Constitution. I will move now to other challenges to our independence that run counter to what the Constitution contemplates. Justice Stephen Breyer has framed the issue. He said: the “question of judicial independence revolves around the theme of how to assure that judges decide according to law, rather than according to their own whims or to the will of the political branches of government.”⁹ As Professor Dennis Hutchinson of the University of Chicago has pointed out, Breyer’s succinct formula contains at least two premises. “First, the judicial independence is not an end in itself but is an instrument in service of the rule of law. Second . . . ‘judges free from executive and legislature control will be in a position to determine whether the assertion of power against the citizen is consistent with law.’”¹⁰ Keeping those premises for judicial independence in mind, let us look at how well the Judiciary has fared with members of the House and Senate other than our appropriators.

What we see is that the independence of the Judiciary is being challenged by the unprecedented attacks being leveled at both the state and federal judiciaries. These attacks emanate from members of both houses, especially House members from Texas, and they emanate also from various other interest groups, particularly some

9. Stephen G. Breyer, *Judicial Independence in the United States*, 40 St. Louis U. L.J. 989, 989 (1996).

10. Dennis J. Hutchinson, *History of Attacks on Judicial Independence*, presented at Workshop for Judges of the United States Court of Appeals for the Fifth Circuit (October 6, 2005) (on file with author).

fundamentalist religious groups. They are triggered most often by judicial decisions, such as the Schiavo case, the Ten Commandments cases, and the recent eminent domain cases. After the courts decided not to intervene in the Schiavo case, House majority leader Tom DeLay warned that the judges would have to “answer for their behavior” in a court system “run amok.”¹¹ Shortly after Judge Lefkow’s husband and mother were murdered and the violence that occurred in a state courthouse in Georgia, Senator Cornyn took to the Senate floor to suggest some vague connection between the deranged murderers responsible for “recent episodes of courthouse violence” and “judicial activism.”¹² To his credit, he subsequently backed off of that. Although a few called for impeachment of judges responsible for the controversial decisions, Representative James Sensenbrenner, Chair of the House Judiciary Committee, rejected the notion that Congress should respond to cases such as the Schiavo matter by attempting to neuter the courts through the impeachment of judges. But even in rejecting impeachment, he warned ominously, “This does not mean that judges should not be punished in some capacity for behavior that does not rise to the level of impeachable conduct.”¹³ He reserved the right to tinker with the courts’ jurisdiction. And he proposed the creation of an inspector general within the Judiciary. Other Congressmen have suggested that the way to rein in the courts is to starve them, raising the specter that further constraints on our budget would be the pay-back for controversial decisions.

C. *The Appointment Process*

The independence of the Judiciary is also being undermined by the process by which federal appellate judges are appointed, a process that involves both the executive and legislative branches. I understand that the judicial appointment process has always been political, but to varying degrees and with varying results on the

11. Editorial, *Republicans Need to Cool Court Tactics*, N.Y. Daily News, May 1, 2005 (on file with author).

12. *Angry at Rulings, Some Judge the Judges*, ABC News, May 1, 2005, <http://abcnews.go.com/Nightline/LegalCenter/story?id=1028391&page=1> (last visited Mar. 5, 2006) (on file with author).

13. *Clarity for the Judiciary*, Wash. Post, May 11, 2005, at A16.

process itself and on the choice of appointees. I am a fourth-generation Republican, appointed by a Democratic President who specifically said that he did not care what my politics were. But, admittedly, that was unusual. Recognizing that the Republican administrations in the last twenty-five years may well not have been unique, it seems to me that they have featured an ever increasing demand by the President and his supporters for candidates for the intermediate appellate courts with strong conservative political views who can be relied upon to be rigorously faithful to those views. That is not to say that every federal appellate judge appointed by those administrations fits that description because many do not. But it is to say that increasingly, the common perception of what it takes to receive a judicial appointment is fidelity to strongly held political views. In a recent issue of the ABA Journal, the Chief Justice of the Utah Supreme Court, Christine Durham, captured the problem well. She said: "One of our concerns has to be about efforts, which are widespread, to ensure and extract, either from sitting judges or from candidates for judicial office, commitments that they will decide cases in accord with a certain economic and political agenda."¹⁴

What this selection process conveys to the public is the notion that the Judiciary is yet another political branch of government, a kind of stepchild of the other two branches. Judicial independence is central to the separation of powers, and when the Judiciary is perceived as a stepchild of the political branches of government, the separation of the three branches of government is impaired. This alters the public's perception of the role of the judge in a way that is damaging to the judge's ability to say what the law is and his authority or credibility in so doing. But, worse than that, it bleeds back into the courts. Some judges begin to think, even judges who have not been a part of the recent appointment process, that fidelity to political views (whether conservative or liberal) is an important part of their role, even if it simply takes the route of countering some other judge's agenda. Instead of, or layered over,

14. *Judges in the Culture Wars Crossfire: The 'Least Dangerous Branch' Is Becoming the Most Vilified Branch; A High-Profile Panel Debates Whether the Criticism Threatens Judicial Independence*, 91 A.B.A. J. 44 (2005).

a searching examination of what the law and the record teach about a particular case is a commitment to push the law in one direction or another.

There is a further complication to this scene that results when a judge has ambition to move ahead, a normal human ambition perhaps, but one that may present a moral hazard to a judge, particularly in view of the of the current appointment process. Every court of any size, district or appellate, has a judge who wants to move ahead. Some courts have several. A few years ago, I attended a symposium on judicial independence at Yale Law School on alumni weekend that featured five federal judges who had graduated from the same class at Yale. After the speakers had made their presentations, comments from the floor were requested and Judge Guido Calabresi of the Second Circuit, formerly the Dean at Yale, popped up from the back row. He said that he had only been on the Second Circuit for a few years, but that it was long enough for him to conclude that the greatest threats to judicial independence were judges with ambition. He said that many such judges were real candidates for advancement only in their own minds. Nevertheless, a judge with ambition constantly has his eye on what the Administration or the Senate Judiciary Committee would think about a decision under consideration and how the decision would affect his chances for advancement. Such a judge is sometimes inclined to give the law a push, to do the judicial equivalent of putting his thumb on the scale. Some such judges go around the country making speeches to various groups, including well-known groups that seem to me to be to be judicial analogues to political parties, about their views of the law. I recognize that judges have First Amendment rights, but some of what I have read comes dangerously close to the expression of views about cases that may well come before them. Indeed, I fear it is intended to do exactly that. And that is how the public would understand it, further damaging public acceptance of, or commitment to, judicial independence.

I must say that I was greatly heartened by the fact that the two most recent nominees to the Supreme Court—Court of Appeals Judge John Roberts, Jr. and White House Counsel Harriet Miers—have not been on the speakers trail, and indeed, that may have been a key factor in their nominations. But the howl that went up from

some in the conservative camp upon the nomination of Harriet Miers was telling. Tony Blankley, a conservative writer for *The Washington Times*, said:

Of course, we conservatives were hoping for—and had justifiable reasons to expect—that President Bush would nominate any one of the many brilliant conservative legal intellectuals who our movement has been carefully nurturing and advancing these past 30 years. We raised them from precocious pups. We gave them succor when they presented themselves in the political jungle. We advanced them carefully through the training grounds of high office. And the deepness of their thoughts and the deftness of their words made them beloved of the tribe. And now this president, who we with our own millions of arms raised on high, has spurned our best and chosen one of his lackluster own

I would have vastly and justifiably preferred President Bush to have chosen a certain, proven, intellectually formidable legal warrior (of whom he had an abundant choice). But I have to admit on reflection that even with the dull, dutiful Dallas evangel, it is much more likely than not, that 10 years from now she will be voting quite reliably with [Justices] Roberts, Scalia, Thomas and the one or two more generally conservative justices who George Bush will probably have the chance to place on the court in the remaining three-and-a-third years of his presidency.

It could have been so much more. But it is probably enough. And in politics, when we probably get enough—we should be thankful.¹⁵

By the way, you should not underestimate the level of outrage in conservative groups that their long-term plan¹⁶ for cultivating, promoting, and providing forums for “certain, proven” candidates for the Supreme Court has been thwarted by a President who had

15. Tony Blankley, *High Court Politics*, Townhall.com, Oct. 5, 2005, <http://www.townhall.com/opinion/columns/tonyblankley/2005/10/05/159417.html>.

16. See David D. Kirkpatrick, *In Alito, G.O.P. Reaps Harvest Planted in '82*, N. Y. Times, Jan. 30, 2006, at A1.

the chutzpah not to buy into their grooming premises and not to chose one of their protégés. Nor should you underestimate their political power or the strong possibility that they will eventually prevail. Time will tell.¹⁷

Mr. Blankley characterizes the nomination of Harriet Miers to the Supreme Court as “politics,” and politics it is. But my point is that the politics are not simply at the nomination level but regrettably interspersed throughout the judicial system. Therein lies the serious challenge to judicial independence that has characterized much of the last twenty-five years.

II. STRUCTURAL CHANGES

Thus far I have described political challenges to the Judiciary. What I would like to do now is to talk about structural changes in the judiciary that have been going on during the twenty-six years that I have been a federal judge and that represent continuing challenges to the Judiciary. The first relates to changes in the role of the trial judge, and the second to changes in the role of the appellate judge.

A. *Changes in the District Courts*

The Civil Justice Reform Act of 1990 had as its purpose to promote for all citizens—rich or poor, individual or corporation, plaintiff or defendant—the just, speedy, and inexpensive resolution of civil disputes in the federal courts. The Act comments that “[h]igh costs, long delays and insufficient judicial resources all too often leave this time-honored promise unfulfilled.”¹⁸ The Act predicts that “[b]y improving the quality of the process of civil litigation, this legislation will contribute to improvement of the quality of justice that the civil justice system delivers.”¹⁹ Among other things, the Civil Justice Reform Act mandated that a civil litigation manual for district courts be prepared, providing a

17. In the face of political pressure, Harriet Miers withdrew her nomination for Supreme Court Justice on October 27, 2005. See Miers Withdraws Supreme Court Nomination, CNN.com, Oct. 27, 2005, <http://www.cnn.com/2005/POLITICS/10/27/miers.nominations/> (last visited Mar. 5, 2006).

18. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089.

19. *Id.*

“description and analysis of the litigation management, cost and delay reduction principles and techniques, and alternative dispute resolution programs considered most effective by the Judicial Conference [of the United States]”²⁰ The manual was prepared by a small panel of very experienced and able trial judges, under the direction of the Judicial Conference. In March 2001, eleven years after the Act was passed, the result of their efforts was presented to and approved by the Judicial Conference. The manual is a 157-page, highly detailed manual, together with sample forms, that was distributed to all district and magistrate judges and made available to the public. Those of you in the audience who plan to make your living as trial lawyers will need to become thoroughly familiar with the manual. The case management techniques detailed in the manual are, of course, rooted in and driven by the Federal Rules of Civil Procedure and the Federal Rules of Evidence and have evolved over many years. The manual lays heavy emphasis on the role of the judge in controlling the development of a case, and every page exhorts the judge to be actively involved in every stage of development.

In terms of what it seeks to do, the manual seems to me to be extremely well-done and very useful. But two things, not in the least novel, come through loud and clear. The first is that the case management techniques that this manual details—and these are tried and true techniques, developed over decades—are undoubtedly designed to reduce cost and delay, but they seem highly likely to make it very time-consuming (in terms of lawyers’ time) and very expensive (in combination with extraordinarily high rates that lawyers now charge for their time) for the client to file and pursue a case in federal court. For years, I have heard comments from judges and lawyers that we are losing market share to the state courts. One can debate whether this is good or bad, but just looking at the manual (which captures in one place, and with an official imprimatur, all the hoops through which a federal civil case must go), it is not hard to identify one of the possible reasons for this loss of market share. The second thing that is clear from the manual is that at every stage of the development of the case,

20. 28 U.S.C. § 479(c)(3) (2000).

heavy emphasis is laid on positioning the case so that settlement is facilitated and trial is avoided.

Which brings me to related major structural changes that have been underway for the last thirty years in the federal district courts (and, as I understand it, in some state courts as well)—the declining trial rate and the change in the role of the district judge. In the thirty-year period from 1970 through 1999, the total number of civil cases filed in the federal district courts rose 152%.²¹ In the same time period and in spite of that increase, the number of cases that were tried dropped by 20%.²² It is of course true that, historically, only a relatively small number of the civil and criminal cases filed have proceeded to trial. But during the past thirty years, we have gone from a trial rate of 12% of civil cases filed to the current trial rate of 3%, and the decline exists in all categories of cases.²³ On the criminal side, the trial rate has dropped by 10%, with the greatest reduction occurring since 1989.²⁴ The latter decline parallels an increase in convictions obtained from guilty pleas, from 85% in 1976 to 95% in 1999.²⁵ The common wisdom is that the increase in guilty pleas during the last ten years or so is linked to the adoption of the Sentencing Reform Act of 1984 and the adoption of the Guidelines and minimum sentencing in 1986 and 1988. Interestingly, as the trial rate in both civil and criminal cases has declined, the percentage of cases tried that is accounted for by jury trials, as distinguished from bench trials, has increased substantially.

The declining trial rate in civil cases has been accompanied by an extraordinary increase in the use of private dispute resolution forums, such as arbitration and mediation, which divert cases from the federal courts or, once a case is filed in federal court, are resorted to either by agreement or by direction from the district court. Twenty-five years ago, people who made their living as arbitrators or mediators were few and far between. Today, we have an army of them handling what used to be our business.

21. Compiled statistical information from the Administrative Office of United States Courts (on file with author).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

One unfortunate side effect of the resort to private dispute resolution is that the development of judicial precedent that informs behavior *ex ante* and helps resolve cases *ex post* has been impaired. Even arbitrators complain that they see legal issues recurring in arbitrations, issues which they have addressed before but which are not the subject of any judicial decisions and which therefore must be addressed again and again. Thus, a process invoked in the name of efficiency paradoxically has its own inefficiency.

In summary, what we are seeing is flight from the system. The reasons for this flight are many, and as we confront the problem, they will doubtless be better understood. Clearly, the considerable pre-trial expense resulting from our case management techniques is one reason. To the extent that the flight is to the state courts, the demand for lawyers who can actually try cases continues. But to the extent that settlement or alternative dispute resolution has become the way by which most cases get resolved, the demand for lawyers who can actually try cases diminishes, or put another way, the opportunity for lawyers to develop the skills and judgment required to try a case diminishes.

As for district judges, the system now demands a judge with highly developed management skills far more than it demands a skilled trial judge, although the management skills obviously draw heavily on trial experience. To the extent that a district judge fails to be sensitive to the need in an individual case to dispense with, fine tune, or curtail some, or perhaps many, of the case management techniques laid out so well in the manual and, instead, lets a case proceed on autopilot and turn into wave after expensive wave of forms, the goals of our system—the speedy and just resolution of disputes—will be defeated. And our customers will vote, as they have voted, with their feet; the business will continue to go elsewhere. Much of what will remain with us will not require the judicial talent we have historically attracted.

But the implications for our system of justice are more important. Article III and the Seventh Amendment give expression to a fundamental tenet of our system—that even in the resolution of civil disputes, the community, in the person of judges and juries, has always played a central role—and the ways in which those

disputes have been resolved have been visible to the public. All of that is altered when citizens with disputes resort in ever increasing numbers to private dispute resolution, partly because lawyers and judges have left many of them with no feasible alternative. Whether or under what circumstances that could be deemed a good, bad, or simply neutral development is more than I can get to today. But it clearly represents a substantial change in the way in which our country has functioned. The litigant who has no feasible alternative except to settle will sometimes reach a different result than he would have reached after trial by a judge or a jury, and he may be less willing to accept as just an adverse settlement result than he would have been to accept the same result when it is the product of a trial and the judgment of a judge or a jury of his peers. For such a litigant, we have kept the word of promise of Article III and the Seventh Amendment to his ear and broken it to his hope.

B. Changes in the Appellate Courts

I turn finally to changes in the role of an appellate judge that have occurred during the last twenty-five years or so. I was appointed to the Fifth Circuit by President Carter in 1979. My judgeship position was part of a package of eleven positions newly created by Congress in 1978 to deal with the burgeoning caseload in the Fifth Circuit which then extended from Key West to El Paso—six states in all. Congress made a judgment that the caseload in 1978 was too heavy, far too heavy, for the fifteen judges of that court to handle. What was that caseload? Appeals filed in the Fifth Circuit in 1978 totaled 3,500 cases.²⁶ The workload of an active judge during 1978 involved participating in 672 appeals terminated and preparing a total of 112 written decisions.

The Fifth Circuit (with a total after 1978 of twenty-six judges) was split by Congress in 1981 into two circuits, the Fifth (containing the states of Texas, Louisiana, and Mississippi) and the Eleventh (containing the states of Alabama, Georgia, and Florida), largely because of a perception that a court of twenty-six judges

26. See Administrative Office of the United States Courts, United States Courts of Appeals: Workload Statistics for the Decade of the 1970's (1980) [hereinafter *Workload Statistics*].

was too unwieldy. What has happened since 1981 is that the caseload of both the Fifth and Eleventh Circuits has grown tremendously, but only three judges have been added, all three to the Fifth Circuit. In 2000, a total of 15,100 appeals were filed in both circuits, to be disposed of by twenty-nine active judges.²⁷ That compares with 3,500 appeals filed in the old, six-state Fifth Circuit in 1978,²⁸ when Congress increased the number of judges from fifteen to twenty-six. So we have three more judges to deal with 11,600 more appeals. How does the per-judge workload in the Fifth Circuit in 1978 compare with the current Fifth Circuit? In 2000, the workload of an active judge involved participating in 1,516 appeals terminated (as compared to 672 in 1978) and preparing a total of 201 written decisions (as compared to 112 in 1978). Focusing on appeals terminated, our per-judge workload in the twenty-two years ended in 2000 increased 126%. Remember that Congress decided that the load in 1978 was far too heavy. Surely a candid assessment of our situation today would be the same. Yet, there is no move afoot or in prospect to increase the number of judges. So where we are in terms of workload is where we are likely to remain.

There have been two major developments in the Fifth Circuit (and in other federal appellate courts as well) that have enhanced our ability to handle our caseload. First, we have experienced a substantial increase in staff. Today, our court (sixteen active judges and two senior judges) employs fifty staff attorneys and sixty-three elbow clerks, resulting in a total of 113 lawyers working for the court. In 1989, the Staff Attorneys Office had only sixteen lawyers; each judge had only three law clerks, whereas most now have four.

Second, beginning in the 1960s, the Fifth Circuit has developed a series of mechanisms that are designed to enable the court to handle a steadily increasing caseload without a concomitant increase in the number of judges. The traditional way of deciding a case is after an oral argument in which the lawyers have an opportunity to address the difficult issues in a case and respond to

27. See Administrative Office of the United States Courts, Statistical Tables for the Federal Judiciary (June 30, 2000).

28. See Workload Statistics, *supra* note 25.

questions from the bench. Since the 1960s, the number of cases sent to oral argument has steadily declined to the point that in the year 2004, only twenty-one percent of the fully briefed cases were sent to the oral argument calendar.²⁹ The balance of the cases was disposed of by summary calendar panels (sixty-seven percent) or conference calendar panels (twelve percent).³⁰ If a case has a novel issue in it, or is complicated, or has a lengthy record, or will likely be reversed, it is a candidate for the oral argument calendar. Otherwise it is a candidate for the summary calendar or the conference calendar. A case decided on the summary calendar is decided on the record and briefs by a panel of three judges. One judge prepares an opinion and sends the proposed opinion, along with the record and briefs, to the second and third judges by mail. Often the record and briefs arrive in the chambers of the first judge accompanied by a memorandum and a draft opinion prepared by the Staff Attorneys Office. The conference calendar is for our easiest cases, and the principal criteria for a conference calendar case are a limited record and a limited issue that has been frequently decided and is well-settled. The Staff Attorneys Office prepares a memorandum and a draft opinion on each conference calendar case. A conference calendar panel meets every other month for three days and disposes of a large number of cases per day. Both the summary calendar and the conference calendar are staff-intensive.

One other change that I would mention but cannot fully explore today is that the case mix has changed substantially in the Fifth and Eleventh Circuits (but not necessarily in the other circuits). In 1978, thirty-nine percent of all appeals filed in the old Fifth Circuit were direct criminal appeals and state and federal prisoner petitions, and the remaining sixty-one percent were civil and administrative appeals. In 2005, sixty-seven percent and fifty-eight percent of all appeals filed in the Fifth and Eleventh Circuits, respectively, were direct criminal appeals and state and federal prisoner petitions, and the remaining thirty-three percent and forty-five percent of the appeals filed in the Fifth and Eleventh Circuits,

29. Internal Fifth Circuit statistics (on file with author).

30. *Id.*

respectively were civil and administrative appeals. The decline in civil appeals (as a percentage of total appeals) might be expected from what I have said about the changes occurring in the district courts. The increase in criminal appeals and prisoner petitions is primarily a result of increased prosecution at the federal level of drug, immigration, and gun cases, as well as the adoption of the Anti-Terrorism and Effective Death Penalty Act, which was designed to decrease prisoner petitions but which has had the perverse effect of increasing them by putting a one-year statute of limitations into place.

The shifting case mix plays an important role in the need, or lack thereof, for additional judge power. To generalize (and admitting the many frailties likely in such a generalization), many civil appeals tend to be more judge-time intensive (and less susceptible to help from staff attorneys) than most, though certainly not all, criminal appeals and prisoner petitions. Those criminal appeals and prisoner petitions that present repetitive issues (of which the Fifth and Eleventh Circuit have droves) are particularly well suited to the presentation to judges of memoranda and drafts opinions by staff attorneys. In considering the request from circuits other than the Fifth and Eleventh for additional judgeships, Congress frequently asks why the other circuits cannot be as efficient (i.e., handle as many appeals per judge) as the Fifth and Eleventh Circuits. Without getting into whether our "efficiency" is wholly desirable from the standpoint of the administration of justice, one answer to that question, I suggest, lies in case mix, which differs considerably from circuit to another.

What has happened in the last twenty-five years or so is that there has been a change in the function of an appellate judge. If I had just described to you the way in which a large law firm or a federal agency works, there would be nothing unusual about the picture. A law firm or an agency handling a case depends on junior lawyers to review the record and do the requisite legal research; middle level lawyers to supervise the record review and legal research, to review the results of both and to make a recommendation to a senior partner on the decision to be made; a senior partner to make a final review and to make the requisite decision; junior and middle level lawyers to write up the decision;

and the senior partner to fine tune it. But, to say the least, that is not the way Learned Hand functioned.

Thirty years ago, then Justice Rehnquist made a speech to the American Bar Association entitled "The Cult of the Robe." In that speech he focused on the increasing number of direct criminal appeals, but the change in the function of an appellate judge that he identified as occurring in the way those appeals were handled is true today, at least in the Fifth Circuit, in the way in which a much broader group of appeals is handled:

[A]ppellate courts now process criminal appeals rather than decide them. The sheer numbers have been thought to require addition of staff clerks in almost all appellate courts. But there is a subtle change in the function of the appellate judge also; a change from the role of linesman at a tennis match to that of an inspector on an automotive assembly line. The tennis linesman does not start out with any presumption that the server's service will be in or out, he simply judges each serve on the merits. But the assembly line inspector assumes that a part is good unless he sees a defect in it.

The person who actually decides an appeal is an appellate judge—the person who supervises the processing of such appeals to decision, though he be called an appellate judge, is really more of an administrator. Instead of personally delving into and casting a vote on, say, ten cases, he takes part in supervising law clerks who delve into twenty or thirty cases, he approves what the law clerks have done in half or two-thirds of that number, and personally delves into and decides the remainder.

So long as the clerks and judges are capable, and they generally are, there is no denial of justice in this system. But the appellate judge who is one of its supervisors plays a different role than the appellate judge of a generation ago. The great hallmark of judges, to my mind, has always been the idea that whatever goes out over a judge's signature, while not necessarily composed in its entirety by him, has at least been fully considered and understood by him. Any

significant increase in this trend of converting judges into administrators would jeopardize that principle of judging.³¹

In my view, which is shared by some but not all of the judges on my court, we have gone a long way further down the road of converting judges into administrators in the last twenty-five years on this court. We still “personally delve into and decide” many cases each year, the number varying from one judge to another; but our efforts in a substantial number of the cases on our docket consists of directly supervising law clerks or indirectly supervising staff attorneys who delve into those cases and of approving what they have done. We have not become administrators because any of us is lazy; all the judges on my court work very hard, much harder, in my view, than almost all of our peers in law practice. We have not done so because we wanted to; most of us would be more comfortable, that is, less worried about the accuracy and quality of our decisions, if we did more of the spade work ourselves. The simple fact is that we have been compelled to become administrators of an ever-larger team of lawyers by reason of the sheer volume of our caseload and the decision of Congress, concurred in by a majority of the judges on our court, to limit the number of judges on our court.

I take some comfort from Justice Rehnquist’s statement that so long as the judges and clerks are capable, and they are, there is no denial of justice in the present system. But I am concerned that the core principle of judging that Justice Rehnquist identified—“that whatever goes out over a judge’s signature, while not necessarily composed in its entirety by him, has at least been fully considered and understood by him”³²—is in jeopardy today by reason of the sheer number of matters that go out over our signatures. One of our more experienced judges once commented to me, somewhat cryptically, that “we now have discretionary review.” I think that this problem may have been at the heart of what he was talking about.

31. Chief Justice William Rehnquist, Remarks at the Annual Dinner of the American Bar Association (August 9, 1976) (on file with author).

32. *Id.*

CONCLUSION

What I have described for you today is a series of major challenges to the federal judiciary, challenges to its very identity. The first is the financial challenge, not unique to the Judiciary, of trying to maintain our operations, including the quality of those operations, in an era of soaring budget deficits. The second stems from the increasingly divisive politics that surround us and permeate so many aspects of our lives. Those politics cause Congressmen to attack the courts in very intemperate language principally because of judicial decisions that they disagree with. And those politics have invaded the appointment process for the intermediate appellate courts to a remarkable degree, causing people to see the role of judges differently and some judges to see themselves and their role differently. I have described changes occurring in the federal district courts in which more and more litigants are using the alternate dispute resolution process to resolve their differences, trials are declining, and judges are becoming the managers of an ever more complex and expensive litigation process rather than trial judges. Finally, I have described the increasing reliance on staff that is occurring at the appellate level as a result of soaring caseloads and an understandable reluctance to deal with the soaring caseloads by increasing the number of judges. Along with this has come something of an evolution in the role of the appellate judge, in many although not all cases, to that of an administrator or manager. I hope this has given you something to think about, indeed something to worry about.