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Opening Remarks

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Chief Justice Eric J. Magnuson[†]

It is, indeed, a privilege to speak on this auspicious occasion commemorating the twenty-fifth anniversary of the Minnesota Court of Appeals. I am one of a relatively small handful of people, a practitioner, whose appellate experience predates by some distance the creation of the court of appeals and continues through today. I speak to you as chief justice, but I also speak to you as someone who was there when the court was conceived, when it was born, when it struggled as a newborn, while it matured, and as it grew to its current high stature.

When I joined the legal profession in 1976, the appellate world was far different than it is today. Immediately after I graduated from law school, I clerked for Chief Justice Robert Sheran. I worked with nine other law clerks serving a supreme court of nine justices. The Minnesota Supreme Court was really the only appellate court. Parties could appeal some county court decisions to three-judge district court panels, but if you had a case in district court and you wanted an appeal, you went to the Minnesota Supreme Court. However, that journey left a lot to be desired.

First, there was the delay. It took no less than fifteen and often as much as twenty-three months to get through the Minnesota Supreme Court. More than that, however, as a practitioner you would not only tell your client, "Well, this is going to take a long time." You'd also have to say, "And in the end, it may not be very satisfying to you." They'd ask why. I'd say, "because what you're

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going to end up with in most cases is a one-line order, a summary disposition, one line that was the total reward for all the hard work that we had done in preparing the briefs, analyzing the issues, distilling the case down to principles that we thought were controlling." It was bad enough to be an appellant and receive an order that said the decision of the district court was summarily affirmed after you'd spent hundreds of hours and thousands of dollars of your client's time, but at least you'd won. It was far worse when you got one that said the decision of the district court was summarily reversed. You couldn't tell your client why. You couldn't do anything but speculate. That was a daunting issue to deal with.

The reasons for the delay and for the summary manner in deciding cases were really very well recognized even when I was a law clerk. First of all, the number of appeals pending before the supreme court increased by 500% from 1957 to 1977. That sounds like a long time, but it was only over twenty years—a 100% increase every four years. The number of appeals doubled from 1973 to 1978, yet the number of published opinions written by the court was roughly the same. In 1957, 213 cases were filed and 178 opinions were written. In 1978 over 1,500 cases were filed and only 150 received oral argument. And while there were some written opinions in cases without oral argument, I think you get some of the sense of how it felt. Your case was going into a black hole. You knew you would present your case and it would get decided, but you never quite knew how or when.

The supreme court tried a number of solutions to deal with these challenges. In 1973, the constitution was amended and the number of justices was increased from seven to nine. The court then divided itself into three-justice panels. There were a lot of those when I was clerking. You would find out who would hear your argument when the calendar came out. And while the decisions of a three-justice panel were the decisions of the court, it still had the appearance and the feel of less-than-full consideration by the supreme court.

The court continued to reduce the number of full written opinions, decided more and more cases without oral argument, relied increasingly on staff, and increased the number of cases it considered in a single day. One of the things that I still find remarkable about our court of appeals, especially now that I am on the supreme court, is the number of cases they consider every day.

I hear two arguments a day, three or four days a week for the first part of the month. It's a lot of work to get ready. The court of appeals has four, five, six, or seven arguments a day. It's a tremendous amount of work. And, in the 1970s, the supreme court said we're not going to have oral argument, but they found themselves, nonetheless, increasing the number of cases they had to consider in a day. They added additional days of conferencing. In short, they started working a lot harder, not that they hadn't worked hard before.

As Chief Justice Doug Amdahl (the godfather of the court of appeals) said, "None of these methods of trying to solve the caseload problem has been successful. The results have not been satisfying to the court, nor to the citizens whose cases are before us."[1]

And what I find remarkable in retrospect (not too remarkable because whenever you have a legal proposition and lawyers involved, you'll have arguments on both sides) was that there were numerous opponents to the creation of the court of appeals, many of them well-respected judges and lawyers. They expressed a number of concerns in a very vocal manner, including their fear that the court of appeals would simply become another layer of judicial proceedings and the supreme court would still make the final decision in every case, so it would just be more work to go through without any benefit.

In response, the proponents of the court pointed out that thirty-three other states had intermediate courts of appeal and the percentage of cases that went on to further review by the supreme court in those states ranged between 4% and 12%. So, they said, if the parties can get a final decision in around 90% of the cases, that's worth creating the court.

In October of 1982, the *St. Paul Pioneer Press* carried two articles discussing the pros and cons of the proposed intermediate court and possible alternative solutions.[2] Those included increasing the supreme court to fifteen justices, plus a chief justice, and having the court sit in rotating panels of five justices each, with

1. Douglas K. Amdahl, The Case for a Minnesota Court of Appeals, *in* 2 THE JUDICIAL CAREER OF DOUGLAS K. AMDAHL 406, 406 (1992).

2. Douglas Amdahl, Op-Ed., *PRO: Case Load of High Court is Denial of Justice*, ST. PAUL PIONEER PRESS (Minn.), Oct. 10, 1982; Minority Report of the Ad Hoc Intermediate Appellate Court Committee, Op-Ed., *CON: Expanded Supreme Court Can Do The Job*, ST. PAUL PIONEER PRESS (Minn.), Oct. 10, 1982.

each panel having authority to decide the case without consulting the other eleven, except in "major cases."[3] I'm not quite sure how the court was going to figure out what was a major case. But in major cases, there would be eight more judges added on to hear the case en banc. How adding half a dozen more judges and making them work in groups was really going to solve the problem in any way different than creating a court of appeals apparently wasn't an obstacle to the people who proposed that solution.

Other alternatives were also proposed, including further reducing the number of oral arguments and written opinions. That would make the cure worse than the disease. Still other alternatives, such as establishing more specialized courts like the tax court, the Workers' Compensation Court of Appeals, raised many of the same objections that were raised to the court of appeals.

One of the vocal critics of the court of appeals was Ramsey County District Court Judge Joe Summers. Joe was one of the most colorful and engaging judges that I ever had the opportunity to appear before. He was articulate, he was bright, and he wasn't terribly reverent all the time. He wrote a letter that was published in 1982 in which he said this about the court of appeals, "I think that such a court would be a waste of money, produce an avalanche of new appeals, make litigation more costly and slow, and probably make winters colder."[4] Joe Summers and William Cooper, who was a member of the state judicial planning committee and the board of directors of the American Judicature Society, continued their debate through a series of articles in local magazines.

Joe wasn't alone. Henry Halladay, one of the leading lawyers in Minnesota, wrote a long article in the *William Mitchell Law Review* entitled, "Minnesota Does Not Need an Intermediate Court of Appeals."[5] He asserted that the side effects of such a court were prohibitive.[6] And in my new role, I find these effects to be really interesting. One possible consequence Halladay discussed was that, in his view, the supreme court would be left to only decide important cases, as opposed to what it was doing before, and that

3. *Id.*

4. Letter from Joseph P. Summers to Bruce C. Stone (Jan. 13, 1982), *in* 2 THE JUDICIAL CAREER OF DOUGLAS K. AMDAHL 381, 381 (1992).

5. Henry Halladay, *Minnesota Does Not Need an Intermediate Appellate Court*, 7 WM. MITCHELL L. REV. 131 (1981).

6. *Id.* at 132–38.

would result in an increase in prestige flowing to the supreme court which would go to the heads of the justices.[7] Halladay concluded that "increasing prestige is hardly a good reason to add a tier of bureaucracy."[8] He was also concerned that the supreme court would be converted into what he described as a "more policy-oriented judiciary."[9] This is another quote from his law review article: "These courts also more often reverse lower court decisions and they tend, in general, toward a philosophy of judicial activism."[10]

You'll hear later in this program a very thoughtful presentation from former Minnesota Court of Appeals Judge and Supreme Court Justice Sam Hanson on the difference between arguing to a policy-making court and a lawmaking court.[11] In some ways Henry Halladay was right, the supreme court does bask in the glory of its prestige, but we also think carefully about the policy issues that confront us. We can change the law. We shouldn't do it very often, but that is always an argument that we can entertain. Halladay concluded his critique by saying that "[t]hese changes wrought by discretionary review are only part of the pragmatic pig in the judicial poke that we would be buying in the creation of an intermediate appellate court."[12]

Fortunately, the proponents of the court were more numerous and at least as vocal. In that same edition of the *William Mitchell Law Review*—and the court, I think, clearly owes a debt of gratitude to William Mitchell for its active role in not advocating one side or the other but airing the conflicting opinions, providing a forum for a discussion that had to take place before you could get support for the court—Laurence Harmon, the state court administrator at the time, authored an article titled "A Needs Analysis of an Intermediate Appellate Court,"[13] a very thoughtful analysis of the facts supporting the creation of an intermediate court of appeals. And Geoffrey Peters, then dean of Mitchell, introduced the

7. *Id.* at 134.
8. *Id.*
9. *Id.* (citation omitted).
10. *Id.* at 135 (citations omitted).
11. *See* Sam Hanson, Jonathan Schmidt & Tara Reese Duginske, *The Minnesota Court of Appeals: Arguing To, And Limitations Of, An Error-Correcting Court*, 35 WM. MITCHELL L. REV. 1261 (2009).
12. *Id.*
13. Laurence C. Harmon & Gregory A. Lang, *A Needs Analysis of an Intermediate Appellate Court*, 8 WM. MITCHELL L. REV. 51 (1981).

symposium volume with an article entitled "The Problems of Caseload and Delay in the Minnesota Court of Appeals."[14] There was a full airing of the issues.

But in the end it really wasn't the lawyers, the law professors or the judges that gave us the Minnesota Court of Appeals. It was the citizens themselves. It was the media. It was the concerned members of our state leadership outside of the judiciary who saw the problem and saw the solution. As an editorial from the February 10, 1982, *Minneapolis Tribune* said:

> The new court would speed up the appeals process: it would also make the process more accessible, since its judges would hear cases throughout the state. It would cost money, to be sure. But the public is paying a high price now—in delayed decisions, and in hastily prepared opinions that sometimes raise as many questions as they settle. Minnesota is the largest state still functioning without an appeals court midway between the trial courts and the Supreme Court. That expensive, burdensome distinction should be ended.[15]

At the same time, the *Pioneer Press* published an editorial that said:

> The Minnesota Supreme Court needs help. A steadily increasing number of appeals has buried the justices under a heap of briefs, depositions and transcripts . . . . The proposed system is the best available answer to an urgent need. The Legislature should approve the bill in time to get the constitutional amendment on next November's ballot.[16]

The proponents of the court of appeals had a grassroots advocacy program. Doug Amdahl said at one time he wanted a thousand lawyers speaking in a thousand locations to a thousand different audiences at the same time about the court of appeals.[17] And he almost got it. He flew all over the state. He spoke to so many Rotaries and VFWs and League of Women Voters' meetings

14. Geoffrey W. Peters, *The Problems of Caseload and Delay in the Minnesota Supreme Court—An Introduction to a Symposium*, 8 WM. MITCHELL L. REV. 41 (1981).

15. Editorial, *Minnesota Needs a New Appeals Court*, STAR TRIB. (Minneapolis), Feb. 10, 1982, at 8A.

16. Editorial, *A State Appellate Court*, ST. PAUL PIONEER PRESS (Minn.), Feb. 14, 1982, Focus, at 2.

17. 2 THE JUDICIAL CAREER OF DOUGLAS K. AMDAHL 299 (1992) (quoting Douglas K. Amdahl, Address at the Investiture of the First Six Minnesota Court of Appeals Judges (Nov. 2, 1983)).

that his day-by-day journal looks like a travelogue for greater Minnesota.[18]

The arguments in favor of the court prevailed. Oral argument would be permitted in nearly all cases, which has tremendous value for the court itself. Courts derive their power in large part from the respect which they garner from the citizens. If a court is a hidden court, if the court is invisible in its decision-making process, it doesn't earn the respect that it would have if it stands in front of the public, shows how it does its business, and does its business. Oral argument was terribly important in this part of the appellate process.

There would be written decisions in all cases, whether formal opinions, unpublished opinions or order opinions. Litigants would have greater access to the appellate process because the court would travel across the state. The quality of justice would be improved because appellate judges, not staff or lawyers, would decide the case. And, finally, concerns about costs would be offset by the fact that there would be no need to expand the supreme court even further. In an editorial in the *Fridley Sun* in late 1982, former Governor Elmer L. Andersen said:

> Much more could be written of historical detail and operational arrangements, but the basic essential is that the rapid growth of litigation has created an impossible situation for our state Supreme Court. Relief of some kind is essential to the benefit of individuals, businesses, institutions and all others using the courts so consideration can be expedited and judgments based on careful consideration of the facts and applicable law. Competent people have studied the problem and achieved major agreement among judges, lawyers and other interested people and organizations. It is important that this amendment be passed.[19]

And pass it did. On November 18, 1982, Chief Justice Amdahl received a letter from Sandra Day O'Connor. It is succinct. "Justice Amdahl, Hooray. I am delighted to hear that you succeeded in forming the Minnesota Court of Appeals. Sincerely, Sandra Day O'Connor."[20]

18. *See, e.g., id.* at 287–92.

19. Elmer L. Anderson, Editorial, *Establishing Court of Appeal*, FRIDLEY SUN, Oct. 27, 1982, at 2A.

20. Letter from Sandra Day O'Connor, Associate Justice, Ret., United States Supreme Court, to Douglas Amdahl, Chief Justice, Ret., Minnesota Supreme Court

As the video—that I hope you all see—that the anniversary committee has put together shows so dramatically, the debate about whether the court should be created was engaged in passionately by both opponents and proponents. In retrospect, however, the decision to have the court was an overwhelming success.

So what has twenty-five years brought us? Well, I've seen all twenty-five of them, and let me give you my perspective.

First, there's significantly greater access to appellate review. Not only is there meaningful right to appellate review, with a written decision in every case, but there is a public face on the vast body of our appellate law. I know what a significant event it is when the supreme court goes on a road trip. We regularly hold court sessions in high schools and the four Minnesota law schools. These events energize the community. They are interested in what the courts do. When the court of appeals travels across the state, it generates that same kind of energy.

The court of appeals has adopted largely transparent processes for handling its cases. Its internal rules and its procedural dispositions are well documented. Few other courts maintain resources like the Court of Appeals Special Term Opinion Index. If you want to know how the court of appeals views a particular rule, they've put their decisions out there. They maintain the index for you. They are helpful because it is a court that wants to get to the merits, not trick people with procedures.

Finally, appellate justice in Minnesota is speedy. The average time from a notice of appeal to a decision in a case without a transcript is six months. Even adding the delay for preparation of the trial record where a transcript is necessary only extends the time to about ten months. That may seem like a long time to some of you, but compare it to the fifteen to twenty-three months that people were experiencing before the court of appeals was created and compare it to similar courts across the country. We have a tremendously efficient and effective intermediate court of appeals in this state. I've argued in lots of other states. This is a gem.

Now, not every shadow cast by the court of appeals is positive. As many of the opponents feared, there's been a veritable explosion of case law as a result of the court of appeals' creation. The requirement of a written decision in every case, coupled with

(Nov. 18, 1982) (on file with author).

the nearly instant access we have through online services, means that an attorney can probably find a case to support any argument that he or she wants to make in any kind of litigation, and maybe one on each side. But that's not a bad thing, it's a good thing. No matter how many cases there are to look at, in the process of looking there will be some benefit—not in the precedent, because many of those cases aren't precedential—but in the fact that someone else has thought about an issue and has explained his reasoning. It should help all of us refine our thinking.

The court of appeals has done an excellent job of ensuring, to the greatest extent it can, that its decisions are consistent from case to case.[21] With the tremendous volume of cases it decides, the court can't be one hundred percent consistent, and, as former Chief Judge and Chief Justice Peter Popovich once recognized in an opinion, sometimes one court of appeals panel will find an indirect way of overruling another panel without saying so.[22] But by and large, the court of appeals has produced a clear and consistent body of case law.

Many who opposed the court of appeals thought the expense would outweigh any benefits the new court would bring. With due respect to their earnestly held beliefs, they were simply wrong. As someone who practiced appellate law before the court of appeals when it was created and in the twenty-five years since, I can tell you without hesitation that the court of appeals has improved the quality of justice in this state for all of us. We appropriately celebrate this twenty-fifth anniversary, and we should pay our respects to those who labored so hard to make the court the wonderful institution it is today. Thank you.

21. *See* Morgan v. Ill. Farmers Ins. Co., 392 N.W.2d 37, 40 (Minn. Ct. App. 1986) (declaring that the panel was "bound" by a different panel's decision); *but see* In re Rodriguez, 506 N.W.2d 660, 663 (Minn. Ct. App. 1993) (disagreeing with a prior panel's decision and "preferring to follow instead the views expressed" by the dissenting judge on that panel). *Compare* Gray v. Comm'r of Pub. Safety, 505 N.W.2d 357 (Minn. Ct. App. 1993), *with* Ascher v. Comm'r of Pub. Safety, 505 N.W.2d 362 (Minn. Ct. App 1993) (reaching opposite holdings on the same day).

22. Lee v. Industrial Elec. Co., 375 N.W.2d 572, 575 (Minn. Ct. App. 1985) (Popovich, C.J., dissenting).