

# Michigan Law Review

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Volume 93 | Issue 6

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1995

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Joseph F. Weis Jr.

*United States Court of Appeals for the Third Circuit*

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### Recommended Citation

Joseph F. Weis Jr., *The Case for Appellate Court Revision*, 93 MICH. L. REV. 1266 (1995).

Available at: <https://repository.law.umich.edu/mlr/vol93/iss6/7>

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# THE CASE FOR APPELLATE COURT REVISION

*Joseph F. Weis, Jr.\**

RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS. By *Thomas E. Baker*. St. Paul, Minnesota: West Publishing Co. 1994. Pp. xxi, 445. \$30.

That the U.S. courts of appeals are in trouble is obvious to many close observers. Skeptics who question the existence of a crisis point to the fact that the appellate courts are relatively current in their caseload, despite the soaring number of appeals within the past thirty-five years. Comforted by the disposition statistics, the doubters see little need to worry about such matters as the radical changes in appellate procedures that have occurred and are content to sit back, complacently awaiting the arrival of a "real" crisis before taking any steps to modify the century-old system of appellate courts.

Professor Thomas E. Baker<sup>1</sup> takes quite a different view. He writes wistfully, "Gone forever are the days when every federal appeal was fully briefed and orally argued and then decided with a written opinion collegially produced by a three-judge panel with the full focused attention and active participation of each individual circuit judge" (p. 287). The deletion or curtailment of various stages of the ideal appellate procedure smacks to him of "rationing justice on appeal," the title he has chosen for his comprehensive study of the problems of the U.S. courts of appeals.

In 1988, Congress created the Federal Courts Study Committee and assigned to it — in addition to a broad mandate to examine the problems of the federal courts — the task of studying the structure of the appellate courts.<sup>2</sup> Baker served ably as Associate Reporter of this Committee, working directly with the subcommittee on administration, management, and structure. In addition, he has written extensively on various aspects of the federal court system<sup>3</sup> and

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\* United States Circuit Judge, United States Court of Appeals for the Third Circuit; B.A., Duquesne University; J.D., University of Pittsburgh. — Ed.

1. Alvin R. Allison Professor, Texas Tech University School of Law.

2. Federal Courts Study Act, Pub. L. No. 100-702, 102 Stat. 4644.

3. See, e.g., Thomas E. Baker, *An Assessment of Past Extramural Reforms of the U.S. Courts of Appeals*, 28 GA. L. REV. 863 (1994); Thomas E. Baker, *Imagining the Alternative Futures of the U.S. Courts of Appeals*, 28 GA. L. REV. 913 (1994); Thomas E. Baker, *A Proposal that Congress Create A Commission on Federal Court Structure*, 14 MISS. C. L. REV. 271 (1994); Thomas E. Baker, *Proposed Intramural Reforms: What the U.S. Courts of Appeals*

is therefore particularly well qualified to examine some of the suggestions for its reorganization.

The dramatic increase in the workload of the courts of appeals is beyond dispute. In 1960, approximately 4000 appeals were filed. By 1990, that number had risen to 40,000, a ten-fold increase in a mere thirty years. Not only has the number of appeals in absolute terms soared, but the rate of appeal has increased as well — from one in forty district court dispositions in 1960 to the current one in eight, a five-fold increase.<sup>4</sup>

In 1960, there were 68 circuit judges. In 1990, there were 168, only approximately two-and-one-half times more. Comparing the number of appeals per panel demonstrates the increased workload of the individual judge: there were 172 such appeals in 1960, and 787 in 1990.<sup>5</sup> Even if the ratio of circuit judges to the number of appeals was low in 1960, the dramatic increase reflected in the 1990 ratio represents a significant augmentation in the responsibility of each circuit judge.

Baker discusses the various changes in procedure that have been adopted to keep the courts current. He describes in detail such controversial measures as reduced opportunity for oral argument, screening of cases by staff attorneys, filing of decisions without opinions, nonpublication of opinions, and increased use of law clerks to draft opinions. The author concedes that without these "intramural reforms," the courts of appeals as we know them would not have survived, but he asserts that as a result, the courts have become quite different institutions from the ones of only a few years ago.

The various procedures that courts have adopted to keep from being inundated have received substantial criticism. After observing these modifications for some years, however, it seems more appropriate to ponder, "What else could the courts have done?" With a sense of discouragement one is also tempted at times to ask, "Does anyone really care?"

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*Might Do to Help Themselves*, 25 ST. MARY'S L.J. 1321 (1994); Thomas E. Baker, *Some Preliminary Thoughts on Long-Range Planning for the Federal Judiciary*, 23 TEX. TECH L. REV. 1 (1992); 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 (1994); Thomas E. Baker & Douglas D. McFarland, *The Need for a New National Court*, 100 HARV. L. REV. 1400 (1987).

4. FEDERAL COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 110 (Comm. Print 1990).

5. 1960 DIRECTOR ADMIN. OFF. U.S. CTS. ANN. REP. 68; 1990 DIRECTOR ADMIN. OFF. U.S. CTS. ANN. REP. 3 (indicating that the authorized number of federal appellate judgeships is 156; the figure provided in the text was calculated by adding the number of federal circuit judges (12) to 156).

Although a few commentators have decried the increasing bureaucratization of the federal judiciary,<sup>6</sup> this process continues unabated. Indeed, some courts have devised systems for quickly screening in wholesale batches cases staff attorneys deem to be of little merit. Staff attorneys assigned to the cases meet with a panel of three judges and orally present the cases to the panel, along with a proposed dispositive memorandum order or judgment. Although disposition of the cases by the judges must be unanimous, it appears that many of the judges who participate in the process do not have time even to read the briefs.

It is undeniable that many cases have no reason for being on appeal other than the fact that the appellant did not like the result in the trial court. The time spent in processing cases of this nature necessarily decreases that available for the careful consideration of appeals that are complex or that raise serious issues. Nevertheless, one may argue that if the law permits an appeal of right, the judges should personally read the briefs, particularly if they do not find the case requires oral argument.

Baker recognizes that we cannot return to the good old days, but he worries that the current intramural reforms may result in a "bureaucracy . . . deciding what the bureaucracy can decide and what needs to be passed on to the judges" (p. 164). He maintains that reforms should be "evaluated in terms of the quality of appellate adjudication, not in terms of history or efficiency" (p. 164).

We seem to be in an era when federal circuit judges are becoming mere case processors, presiding over a system that is resigned to dispose of more and more appeals every year while less and less time is available for thoughtful deliberation. It has often been said that courts are not created for judges. That is true, but it does not follow that the benefits of collegiality and careful reasoning are of little or no concern to the public. Collegiality — in the sense of a group action to decide an issue — is the very essence of an appeal in the common law system.

Congress has shown no interest in limiting the caseload of the federal courts and, to the contrary, has continued to expand their jurisdiction. The ever-increasing federalization of the criminal law is but one indication of this trend. Any realistic appraisal of the future must recognize that despite the judiciary's efforts to restrain the growth of jurisdiction, Congress will continue to augment, not shrink, the work of the federal courts.

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6. See, e.g., Harry T. Edwards, *The Rising Work Load and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871 (1983); Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442 (1983); Patrick E. Higginbotham, *Bureaucracy — The Carcinoma of the Federal Judiciary*, 31 ALA. L. REV. 261 (1980); Alvin B. Rubin, *Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency*, 55 NOTRE DAME L. REV. 648 (1980).

Because the efficiency of the intramural modifications of procedure have pretty much run their course, Congress will continue to resort to the problem-loaded practice of adding more judges to the federal bench. This solution carries with it — in the appellate courts particularly — the erosion of coherence and consistency. The continued increase in the number of appellate judges will inevitably impose ever more severe strains upon the century-old U.S. courts of appeals.

The Evarts Act of 1891,<sup>7</sup> which created the federal intermediate appellate courts, was — like most legislation — a compromise among differing views. Although the organization that emerged was adequate to cope with the conditions that existed at the time, serious defects have developed and have become glaringly apparent, particularly in the past fifty years.

The most striking development has been the undermining of the fundamental concept of federal law uniformity. At the time of the creation of the circuit courts of appeals in 1892, the Supreme Court was able to supervise the development of national decisional law. As time went on, however, the courts of appeals developed an “ersatz autonomy” through which they recognized *stare decisis* within their own circuits but accorded only “persuasive” authority to the decisions of other courts of appeals. An unfortunate opinion of the Supreme Court in 1900, *Mast, Foos & Co. v. Stover Manufacturing Co.*,<sup>8</sup> encouraged this balkanization, holding that one circuit court of appeals was not required to accept the decision of another circuit court of appeals. Most probably, the Supreme Court did not anticipate the growth of the courts of appeals and the trouble its opinion would create for itself and the nation in the future.

In any event, the reviewing capacity of the Supreme Court has failed to keep pace with the flood of opinions issued by the courts of appeals. In 1924, the Supreme Court reviewed about ten percent of these decisions, an adequate level of supervision to ensure uniformity.<sup>9</sup> In recent years, however, that figure has dropped to less than one percent, while the percentage of appellate cases raising serious questions of federal law has increased.

Questions of constitutional and federal statutory law in the courts of appeals are too often decided as if the country were a federation of circuits rather than one nation. But as Baker points out, “The theoretical underpinning of the Constitution, revealed in the Supremacy Clause and in the provision for one Supreme Court, is a commitment to a single uniform national law” (p. 262).

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7. Act of Mar. 3, 1891, ch. 517, 26 Stat. 826.

8. 177 U.S. 485 (1900).

9. Baker & McFarland, *supra* note 3, at 1405.

This premise of national uniformity has given way to an emphasis on the "law of the circuit" to ensure consistency at least within a court of appeals. The freedom of courts of appeals to follow their own bent has been dubbed "percolation," a process that proponents contend eventually leads to the "right" result. It may be that the advocates of percolation are simply trying to put the best face possible on a situation that has grown to the point where regional variation of what should be nationally consistent law has attained some degree of legitimacy. The fact that balkanization exists, however, does not mean that it is appropriate or should be tolerated.

Another weakness of the federal appellate system that has become more apparent is its dependence upon geographical designations called "circuits" that have their roots in the Judiciary Act of 1789.<sup>10</sup> The organization of the appellate courts today reflects the travel and communications considerations that were so important two hundred years ago.

Because of periodic tinkering with the boundaries of the circuits without real consideration of the validity of the basic premise, the territorial organization of the federal appellate system is a hodgepodge of historical accident. The First Circuit consists of four small states in the northeastern part of the country as well as the Commonwealth of Puerto Rico and has an appellate bench of six judges. The Ninth Circuit, on the other hand, includes nine states in the western part of the United States, as well as Guam and the Pacific possessions. The Ninth Circuit has twenty-eight circuit judges and is asking for ten more. The Court of Appeals for the District of Columbia serves the smallest geographical area, limited as it is to the District of Columbia.

Baker recognizes that restructuring the courts of appeals is an issue separate and distinct from that of controlling the size of their caseload. He makes this clear by pointing out that a reorganization of the courts will not remove one appeal from the appellate courts' collective docket (p. 186). Nevertheless, the increasing volume of cases and the concomitant necessity of accommodating additional judges within the appellate courts mandate a thorough study of the system. Court restructuring will not reduce the number of appeals, but the number of appeals mandates a systemic restructuring to cope with the onslaught.

Baker points out that to do nothing is to make a choice to maintain a structure with serious weaknesses that future demands will only exacerbate. In *Rationing Justice on Appeal*, he analyzes a number of nonexclusive restructuring proposals by the Federal Courts Study Committee (pp. 238-79). These suggestions include:

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10. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

1. dissolving the present circuit boundaries and creating a unified court consisting of regional divisions of nine members that would follow national instead of circuit stare decisis;
2. creating regional courts of nine judges with four or five upper-tier appellate courts to maintain consistency;
3. creating subject-matter courts on a national basis or as panels within existing courts of appeals;
4. creating a single, centrally organized appellate court;
5. consolidating existing circuits into perhaps five "jumbo" regions.

Although he discusses each of these options and some variations without endorsing any one, Baker leaves no doubt as to his feeling about the need for reform. He explicitly takes issue with the idea that it is somehow possible to maintain the status quo.

The choice, of course, must be made by Congress. If it chooses to retain the present system, "it should do so after careful study and deliberation, with a full understanding of the implications for the federal appellate system and not because of a political paralysis or out of an attitude of benign neglect" (p. 233). In Baker's view, doing nothing would be "irresponsible" and as "radical" as both some of the suggested forms of structural change and substituting discretionary review for appeal as of right (p. 234). Given the choice, the public would likely prefer to preserve the appeal of right and would approve additional judgeships in a new structure that could efficiently handle its work.

Mindful of the twenty-five-year debate that preceded the Evarts Act, the Federal Courts Study Committee recommended that serious research and debate be carried out within the five-year period following the Report.<sup>11</sup> As so often happens with court reform, however, the years have sped by, and unfortunately, not enough has been accomplished. Reports that the courts are managing their caseloads and that therefore there is no need for structural modernization at this time miss the point. The courts' caseload continually burgeons, and any forecast that the growth will not continue flies in the face of every reliable factor that indicates to the contrary, despite occasional downward blips.

Since the Study Committee made its report in 1990, the number of appeals on the docket grew from 40,000 to over 50,000 in 1993. A forecast of a docket of over 110,000 appeals in the year 2015 appears, if anything, to be conservative.

It is ill-advised to wait as the system deteriorates at an increasingly rapid rate until the crisis that the Study Committee described becomes apparent to even the standpatters of today. The disruption and readjustment that the defenders of the status quo invoke as a reason to delay will only be magnified in the future.

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11. FEDERAL COURTS STUDY COMM., *supra* note 4, at 109 (Comm. Print 1990).

Baker believes in action now. He proposes the creation of a commission on federal court structure that would have a two-year life span (pp. 295-300). Unlike the Study Committee, which received an extremely broad assignment, the Structure Commission would have a narrow and specific focus. It would develop alternative plans for modernizing the federal appellate system, and at the conclusion of its work, it would draft and submit alternative legislation to Congress. The Commission would include members of the House and Senate, as well as judges and members of the executive branch, the bar, academia, and the public. It would be adequately funded so that it could hire full-time experts to collect and analyze the necessary data.

The Commission's work need not begin at ground zero. In addition to the work of the Federal Courts Study Committee, the Commission could build on the Reports of the Hruska Commission<sup>12</sup> and other groups that have addressed the problem in the past. Many scholars have commented on federal court reform; Baker includes, as a most valuable addition to his book, a comprehensive bibliography of the many thoughtful works on improving the federal court appellate system. As one devoted to the topic soon learns, little in this field remains unexplored. It is not ideas that are lacking, but implementation.

Perhaps most important, successful federal appellate court modernization requires a change in mindset by all concerned. A wooden adherence to the outdated circuit structure stifles creative thinking and blinds its adherents to the possibilities offered by today's travel and technological advances. A receptivity to constructive change, coupled with a return to the fundamental premise of uniform federal law, can put the courts of appeals in a position to cope effectively with tomorrow's challenges.

*Rationing Justice on Appeal* is an important work. It succinctly exposes serious difficulties that are unknown to the general public and to a large segment of the bar as well. The author explores a number of interesting proposals that have been advanced as solutions to the festering problems and, most significantly, argues that the time for action has come. If Congress creates the Commission that Baker envisions, the first task that its members should undertake would be to read this book. In the meantime, all of us who have, or should have, an interest in its subject matter will find the study to be invaluable.

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12. The Hruska Commission was created by Congress in 1972 to study possible revisions of the structure of the courts of appeals. One of the Hruska Commission's suggestions was capacity reform through the creation of a national court of appeals. P. 36.