

Summer 1995

Future of the Federal Courts, The

Richard S. Arnold

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Richard S. Arnold, *Future of the Federal Courts, The*, 60 Mo. L. REV. (1995)

Available at: <https://scholarship.law.missouri.edu/mlr/vol60/iss3/1>

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

MISSOURI LAW REVIEW

VOLUME 60

SUMMER 1995

NUMBER 3

The Future of the Federal Courts*

*Richard S. Arnold***

I'm most grateful to my Brother, Judge John R. Gibson, for such a generous introduction. He did leave some things out, mercifully. He left out the fact that I ran for Congress twice and got beat, although I did run against eight people and managed to surpass six of them, which isn't too bad. I'm most grateful for his presence and for the presence of my Brother, Judge Pasco Bowman of Kansas City.

I want to recognize also the presence of Mr. Thomas E. Deacy of Kansas City, a leading member of the bar. It's Mr. Deacy's fault that I'm here. He investigated me for the American Bar Association, and somehow he let me through the net. Also, I want to mention the presence of Mr. Tim Gammon, who for years was a distinguished and effective contributor to the work of my Court as Senior Staff Attorney.

I know this is a great law school because you have invited me to speak. It's a great privilege for me to be asked to come here, and I don't know, Dean, what the protocol is, but after I've finished my remarks, if anybody wants to ask a question, that will be fine. With the law teachers here and the law students, there are bound to be some things I say that you all disagree with, and I don't mind being told that. In fact, I can be educated by that experience. So I want to thank the Dean for asking me, and I want to thank the Editor-in-Chief of the Law Review, Mr. Ray Williams, for being kind enough to meet me and bring me into the Law School. I want to thank all of you who are willing to subject yourselves to this lecture.

I'm conscious of the great tradition of this lecture series, and I feel honored to be included in the list. In fact, as I look at the list, I wonder how I got here. I notice that the lecture series began 40 years ago with an address by the Honorable Rush Hudson Limbaugh, progenitor of the judges and others. In fact, I was watching Rush Limbaugh yesterday, not the man who spoke in your lecture series, but his namesake. He was on TV, and he

* Earl F. Nelson Lecture. University of Missouri-Columbia School of Law, Friday, March 24, 1995.

** Chief Judge, United States Court of Appeals for the Eighth Circuit.

promised to tell the audience what was in Thomas Jefferson's crime bill. Unfortunately, I had to leave before he got to that point, but I'm most anxious to find out what was in President Jefferson's crime bill. I'm sure that I would be for it.

I'm also happy to be here in Missouri, which is the best customer our Court has. I don't know what we would do without Missouri. We'd run out of work. I can't say that Missouri is the greatest state in the Eighth Circuit because somebody might repeat that remark in another state, and I would be in trouble; but I can say that St. Louis is the main seat of our Court. It is the capital of our Circuit, so to speak, the chief city among seven states, and as far as I'm concerned, it always will be.

The title of this talk is *The Future of the Federal Courts*. I guess the mere title implies that I think that we have a future. And we do. The volume of business that we attract is not likely to go away, and so the judges are going to continue to be fully employed, which is a relief to our minds. But the very volume that we're attracting is our biggest problem. I want to take this opportunity to talk with you about what the indices of that volume are; what we are doing to try to cope with it; what success, if any, we're having; and what we can do about it in the future. There are a lot of ideas about this subject, and a lot of them are in disagreement. I don't know that I've come to a final judgment about what the outcome or solution should be, but I'm going to try out some ideas on you, and give you a sort of menu of different solutions, and see if we can reason together to some kind of conclusion.

First of all, let me give you some numbers. I promise this part of it won't be long. In fact, the whole thing won't be long, much to your relief I'm sure. The interesting thing is that appeals seem to be the fastest growing part of the federal courts' business. I don't know whether that is a compliment to the Court of Appeals, or we're just the only place you can go after you lose in the District Court, but it's true. The appeals have gone up steadily. Even in just the last six years, since 1989, the appeals volume nationwide in the federal courts of appeals has gone up by 25 per cent. In fact, when I came on the Eighth Circuit, which was 15 years ago, there were nine active judges and we had about 1,200 appeals per year. Now there are eleven active judges, and we have about 3,000 appeals per year. As you can see, we're doing a great business. We have a lot of customers. Whether they're happy or not, I don't know, but they keep coming back. Indeed, some of them are repeat customers. We have a number of incarcerated gentlemen who like us so well that they file maybe 30 or 40 lawsuits a year. And we get to know them.

One of the reasons why we're able to keep up—this is a footnote, but it's an important one—is that in addition to the eleven active judges who serve on our Court, we have seven senior judges, all of whom work. Judge John Gibson is one of them. And I want you to know that Judge Gibson doesn't get paid any more for working all day than he would if he stayed home. It's

a fact that is well known to this audience, but most of the public doesn't realize that after a judge, by the grace of Congress, is permitted to take senior status, the judge can either continue to work or not, as he or she chooses. And all of them who are physically able, with very few exceptions, continue to work. We could not handle our caseload otherwise. The courts of appeals and the district courts in this country could not handle their caseload without the active contributions of the senior judges. As a matter of fact, about 14 per cent of the trials in district courts in this country are presided over by judges in senior status. That's an invaluable help for us.

Back to the point. The trend that we've seen in the last six years in the increase in appeals is not a new trend. In 1950, there were 2,830 appeals filed. By 1970, the volume was up four times. It was up to 11,662. By 1990, there were 41,000 appeals filed. In 1994, the number was about 49,000. In that period of time, the number of circuit judgeships has only gone up about two and one-half times. And the end is not in sight. I don't think that we have yet seen the end of the litigation explosion or the appeals explosion. I suppose, in a way, it is a compliment that people would rather come to court with their disputes than fight in the streets, or do whatever else they might do in the nature of dispute resolution.

Let me give you some good news first. I think that our Court, the United States Court of Appeals for the Eighth Circuit, is coping reasonably well with the volume. Incidentally, I'm not taking credit for this. Chief Judge is largely an honorific designation. I didn't get elected Chief Judge. I didn't get appointed Chief Judge. The way you get to be Chief Judge is to live that long. I managed to do that. I like to repeat what my colleague Judge Stephanie Seymour, who is with the Tenth Circuit, said when she took the reigns of power: she found they were not attached to anything. Another of my colleagues—not either of the two gentlemen who are here, one of my brethren on the Court of Appeals—says being Chief Judge of a court of appeals is like trying to herd cats. I'm not taking credit, I'm giving it to all the judges of the Court. Our pending caseload is now about 200 cases fewer than it was two years ago. We still have 1,600 pending cases, which is quite a large number. Two hundred sixty-nine of them have been argued or submitted, or are ready for submission.

I do want to brag a little bit about what we did last month. I'm not sure why this is true; I wish I could find the reason. The volume of our appeals in February of this year was only 191 cases, which is quite low. We decided 298 cases in February. We may run out of work here if that keeps up. The interesting thing is that of the 191 cases filed in February, 92 of them were by pro se litigants. Forty-eight percent of the appeals were by people without lawyers. Most of them are inmates in prison, but not all of them. Some of these cases are tedious. Sometimes, frankly, some of these litigants are crazy. It's pretty easy to tell. You don't have to read an entire 50-page brief to know. One of my colleagues, Judge Van Osterhout, from past days, said that

"briefs are like rotten eggs, you don't have to eat the whole egg to know it's rotten." That's true of some of the pro se appeals. On the other hand, it's important that a citizen without any formal education, perhaps, without any money, has a place where he or she can go and be heard. And they have enough confidence in us to come to that place. I take some comfort in that.

The other thing I want to tell you about our Court is—I'm still bragging about my colleagues—that we're able to dispose of our cases fairly quickly. We have a median time of decision of pending appeals of 8.1 months. Notwithstanding what you might feel about the pace of the legal system, if you watch television these days, we are, I think, reasonably prompt and act with reasonable dispatch in our Circuit. We have either the first or the second best record in the country on speed of deciding appeals. We have the best record in the country in time elapsed from filing of the complaint in the District Court to decision on appeal. The median time there is 20.6 months. In criminal appeals, our record is the best in the country. We have 7.9 months as the median time for disposition. If you want to have a case delayed, don't file it in our Court, because in all likelihood—there are exceptions, of course, but, on the average—it will not be delayed. That's the good news.

The bad news is that the trend of upward volume is continuing, and we don't have many new judgeships on the horizon. Our Court has voted not to request any new judgeships, because we think we're able to handle the business without them. And Congress is not about to create any new judgeships any time soon. I'm going to come back to that subject.

I'm afraid that the volume is just about on the brink of swamping us. What I have told you up to now, the good news, is in terms of quantity—numbers. Now the first duty of a court is to decide a case. You've got to get it done. The second duty of the court is to get it right. You have to get the case out the door, because there are other cases waiting on it. Then you have to try to get it right. The third duty of the court is to write an opinion which is intelligible, which explains the result, and which we hope, is acceptable to the losing side. I think about losing litigants a lot. Those are the people who need to understand that they have been heard—that a reasoning creature of some kind has evaluated their argument and come to some sort of defensible conclusion about it. They won't like it; they won't enjoy losing, but I hope that they will have a sense that they have been heard. And so it's important how opinions are written. I said some of this to an appellate advocacy class yesterday. Opinions should be written in English, so that people who are not lawyers can understand what is happening to them. And that takes time. I worry that sometimes our opinions are not living up to that standard.

We are having fewer oral arguments. Incidentally, I love the arguments. That's the time when we get face to face with the lawyers, we can tell them what we think is wrong with their case, they can tell us what's wrong with our thinking, and they have a last clear chance to persuade the judges before the

decision is made because we have our conference and vote on the case that same day, right after arguments, and before lunch. It sometimes means the conferences are short, but some of them don't need to be long. It worries me that over the years, not so much in the Eighth Circuit, but throughout the country, fewer cases are being argued. I think oral argument is an important part of the process.

You also notice—if you are unfortunate enough to subscribe to our slip opinions—that there are more short-form per curiam dispositions. Sometimes you get an opinion from our Court, if you can call it an opinion, which essentially says, you lose. That's all it tells you. Per curiam. The judgment is affirmed. See Rule 47B. Let me say that there are some cases that don't deserve any more than that. My favorite example is the inmate in the St. Louis County jail who complained that he wasn't given country and western music. Well, I thought he should have the country and western music, but I didn't think the Eighth Amendment required it, which is what his lawsuit was about. I wrote an opinion in that case. It took 15 minutes, but it was a little opinion.

We are also seeing more unpublished opinions. This is a strange phenomenon. I hope that law students and law teachers will feel that it's strange. We have a rule that says that if an opinion of our Court is not "intended for publication," you cannot cite that opinion to us. It is not precedent, it is not binding on us, and we don't even want to hear about it. I don't think this actually happens, but in theory we can decide a case on one legal basis on Monday and just because we don't mail that opinion to West and the other legal publishers, we could decide that same legal issue the opposite way on Tuesday. And you couldn't even tell us we'd done it.¹

1. The rule has since changed. It now reads as follows:

Unpublished opinions are not precedent and parties generally should not cite them. When relevant to establishing the doctrines of res judicata, collateral estoppel, or the law of the case, however, parties may cite any unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well. A party who cites an unpublished opinion in a document must attach a copy of the unpublished opinion to the document. A party who cites an unpublished opinion for the first time at oral argument must attach a copy of the unpublished opinion to the supplemental authority letters required by FRAP 28(j). When citing an unpublished opinion, a party must indicate the opinion's unpublished status.

8th Cir. R. 28A(k).

For a good discussion of the problem by an able member of the faculty of this law school, see Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose*

There's something wrong with that. The reason we do that is because of the high volume, and because we don't have time to write, or we think we don't have time to write, full opinions explaining the results carefully in each case. I think it's an unfortunate result of the volume problem that we feel that way. I hasten to say again there are cases that don't need a whole lot of consideration. I'm fond of referring to a statement of Lord Bacon, which was about books in general, not legal opinions, but I think it fits. He said, "[S]ome [books] are to be tasted, others to be swallowed, and some few to be 'chewed and thoroughly digested.'"² My fear is that because of the volume problem, there are cases we are not chewing and not thoroughly digesting. There's a great prayer in the *Book of Common Prayer* that I like to quote. It's about the scriptures, not about legal opinions, but it talks about "read, mark, learn, and inwardly digest."³ There are cases that need that. They need to be read, and then marked. I suppose you law students still underline in books. I always did. And then learn the case, and then inwardly digest it. Some of these things need to be thought about. The volume problem is causing us to have too little time to think about some of the hard cases as much as we need to.

What are we doing about this? That's the question—what do we do about it? Well, there are several possible solutions. First solution, just say no. Slow down. There's a great article by Judge Carolyn King of the Fifth Circuit called *A Matter of Conscience* which discusses that solution.⁴ She says there are things that you just can't do very fast. And if we have to spend a week reading the record to decide a death-penalty case, or a school-desegregation case, or a bankruptcy case, or whatever it is, we just do it. If this means that 50 cases are postponed and don't get decided for a few months, then that's what it means, and that's all there is to it. There's something to that view. There are times when you have to say to yourself, I must lay everything else aside and pay attention to this difficult case. But it's not very satisfactory, is it, because it means that the people who have the other cases have to wait. The old cliché, "justice delayed is justice denied," is true.

Well, what about a second solution—that is, try to get our jurisdiction reduced? There are proposals about reducing the jurisdiction of federal courts. For example, there is a proposal that the diversity jurisdiction should be

a Greater Threat?, 44 AM. U. L. REV. 757 (1995).

2. See David A. Nelson, *Rationing Justice on Appeal: The Problems of the U.S. Courts of Appeals*, 47 ADMIN. L. REV. 111, 114 n.3 (1995) (book review) (quoting Lord Bacon).

3. BOOK OF COMMON PRAYER 92 (1928 ed.) (Collect for the Second Sunday in Advent).

4. Carolyn Dineen King, *A Matter of Conscience*, 28 HOUS. L. REV. 955 (1991).

abolished, and the Judicial Conference of the United States, a body on which I sit by virtue of being Chief Judge, has officially endorsed that view. I was not there when the Conference took that vote, and I hope it's not improper of me to say I don't agree with it. Diversity cases were the staple of the federal courts in 1789.⁵ That's really what we did. Aside from diversity cases and a few federal crimes, that was it. The rest of the stuff went into the state courts, and there wasn't any general statute giving federal-question jurisdiction to the federal district courts until 1875.⁶ That doesn't mean it has to stay that way, of course. But I think we need to remember that disputes between citizens of different states were a major reason why the Congress chose to create what the Constitution is pleased to call, in a somewhat snide way, the inferior courts. We don't have to have district courts and courts of appeals in the federal system. Maybe some people think we shouldn't have them. The only court that the Constitution requires is the Supreme Court. But Congress created the lower court primarily to hear diversity cases.

It is said that we don't need them any longer because there is no longer any prejudice in one state against the citizens of another state. I'm sure that's true in Missouri. But if you're an Arkansan, and you've got a lawsuit in Texas, I guarantee you don't want to be in the state court. (You don't want to be in a basketball court, either.) And I'm not saying that federal judges don't have prejudices, too. They do. All human beings have prejudices. But I think it is important for there to be a forum which is less locally identified. And I don't think, incidentally, that there is much chance that Congress will abolish diversity jurisdiction simply because most lawyers don't want it abolished, and I understand why they feel that way.

There is a proposal that might be beneficial, and that is that if a person—an in-state plaintiff—files a suit against an out-of-state defendant, the in-state plaintiff doesn't need to have a choice of a federal versus a state forum. So the in-state plaintiff would then have to file in the state court; but the out-of-state defendant then could remove to the federal court, so a number of those cases would come back into the federal court anyway.

I don't think there's much relief in sight in terms of reducing our jurisdiction. On the contrary, the trend is quite the opposite. What we're seeing in Congress, and this has been accelerating for the last ten years at least, maybe twenty, and we see it in this session. We're seeing an increase in federal jurisdiction. An outstanding example, and my favorite example—this is a crime-bill thing—is an amendment proposed by Senator D'Amato of New York which would make it a federal crime to commit

5. Judiciary Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78 (codified as amended at 28 U.S.C. § 1332(a) (1948)).

6. Judiciary Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470, 470 (codified as amended at 28 U.S.C. § 1331 (1948)).

virtually any illegal act with a gun, if the gun has travelled in interstate commerce, which by and large they do. Most states don't have gun factories, so you know the gun came from out of state. There are about 750,000 crimes committed in this country with guns every year, only about one-third of which result in arrests. You can see if 250,000 new criminal prosecutions were filed in the federal courts, we would be absolutely swamped. I'm not saying that those cases would all come into the federal courts, but I am raising the question whether there is a sufficient federal interest to justify making every gun crime a federal crime.

When Senator D'Amato proposed his amendment, some of us in the Judicial Conference expressed reservations about it. The Chief Justice wrote a letter expressing reservations about it. We were saying this is going to create a big burden on the federal courts; we don't have the judges; we don't have the staff; we don't have the money, to be crass about it, to handle this much new business. And here's what Senator D'Amato said about it: "I could care a hoot about the fact that it may create a burden for the [federal] courts."⁷ Can't you just hear his voice saying that? "Better a burden for the courts than continued killing and violence on our streets. When a woman gets shot and killed and loses three babies, you're telling me I should be worried about whether the courts should take on additional cases?"⁸ I can sympathize with that. There is a point to that, really. Certainly it is not particularly important that a judge will have to do more work. That's what we're for. We're here to do the work that Congress gives us to do. The truth is that the definition of sufficient federal interest to justify federal jurisdiction is whatever Congress thinks it is as long as it's within the Constitution. I'm a little uneasy sometimes about criticizing these congressional efforts at expansion. But we are not saying that the judges resent having more work to do, but that we can't handle the work quickly enough if so much additional work is given to us without additional resources.

The point I want to make for present purposes is simply this: the urge in Congress to create new federal causes of action, civil and criminal, is not abating. And again, it's a compliment to us in a sense that they want to use the federal forum. Let me give you one other example. This is another illustration of the perils that judges get into when they get into some sort of quasi-political discourse. There is a Violence Against Women Act, which was passed as part of the 1994 crime bill.⁹ This creates not only new federal

7. J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147, 1153 (1994) (quoting Michael Isikoff, *Crime Bill's Costs Worry U.S. Judges; Senate Plan Seen Adding Inmates*, WASH. POST, July 22, 1991, at A1).

8. *Id.*

9. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40001, 108 Stat. 1796.

crimes, but new federal civil causes of action, à la civil rights cases.¹⁰ The important distinction is that when you create a new federal crime, if you don't also appropriate the money to hire more Assistant United States Attorneys, FBI agents, DEA agents, or Immigration officers, it doesn't have much impact. It's in the book, but the cases aren't brought, and so the judges don't feel it so much. But if you create a civil cause of action, that will have an immeasurable impact because every private person who is injured by a violation of that law can sue. Private persons are not encumbered by the lack of federal appropriations. When the Violence Against Women Act—which essentially says that it is a tort to commit violence against someone on account of gender—was proposed, the Judicial Conference of the United States took a position against it. We said there's not a sufficient federal interest here. Big mistake. By the time that debate was over, we were made to look as if we were in favor of violence against women, which let me assure you, is not the case. We get into trouble sometimes when we attempt to have a political discourse. Eventually the Conference came back and revised that position and said, well, okay, we take no position on it. Do whatever you want to do, which of course is what they were going to do anyhow. My point is that the increases in our jurisdiction are going up and our efforts to temper that impulse are less than completely successful. So I don't see much in the way of relief from that quarter.

Well, what else can you do? You can create specialized courts. I have with me here a big thing which I'm not going to read. This is the report of the Long Range Planning Committee of the Judicial Conference. It has about 180 separate recommendations in it about the future of the federal courts, one of which is that there be additional specialized courts. For example, should we have a specialized court to decide social security claims? We do a lot of business with people who have their social security benefits denied. They go to a state adjudicator working under contract with the federal government. They lose. They go for reconsideration. They lose. They go to an administrative law judge. They lose. This is a lot of process. They go to an Appeals Council within the Department of Health and Human Services, and they lose. They then go to a federal district court, and they lose. And they think that they will then go to the Eighth Circuit and win. We see a lot of those, and some of them do win. The proposal is that there be a specialized administrative court created to handle those matters. The proposal has quite a lot of support among judges. I don't have much enthusiasm for it myself, because I think that ordinary folks, when the most important decision in their life is whether they can get these benefits, a question that turns on federal law, should have a federal court to go to. I think maybe the process should be

10. *See id.* at § 40302, 108 Stat. 1941 (codified at 42 U.S.C.A. § 13981 (West Supp. 1995)).

shortened so that you could go perhaps from the Secretary of Health and Human Services directly to a court of appeals, instead of going through the district court. Or maybe go to the district court and just have court of appeals discretionary review, like a writ of certiorari in the Supreme Court. That would be okay. But I have some hesitancy about specialized courts. This is done now, as you may know, with respect to patent cases. Since 1982, we don't have patent cases. The district courts have them, but the appeals go to the Court of Appeals for the Federal Circuit in Washington.¹¹ I have reservations about those ideas. I think the generalized judges, who try to see the law as a whole, usually do better than a judge who sees only the Tax Code, or the Bankruptcy Act, or the social security statute, and who thinks—this may be a caricature, but sometimes they appear to think—that's all there is to the law, when that isn't really so.

Well, if you're not going to have less business, and in fact you're going to have more, and you want to decide the cases promptly, there are only two or three things that can happen to bring that about. The first thing—and this is happening, and this is disturbing—you spend less time on each case. That generally is a bad idea. There probably are cases that we spend too much time on, but not many. When we err, we usually err on the side of spending too little time. I hope we don't pursue that trend any further.

The only other solution is more people. There are already about 27,000 people employed by the federal judiciary in this country, most of whom are not judges. Most of the solutions that you hear for this problem are that we need more staff; more staff attorneys, more law clerks, more settlement directors. There's even something in the Ninth Circuit called an appellate magistrate. Incidentally, that phrase makes my blood run cold. If I've got an appeal, I want a judge to decide it. I don't know about appellate magistrates. This is not a term that is in any statute. It's something the Ninth Circuit invented, and they are getting away with it so far. Let me tell you, though, in fairness to them, that the only thing their appellate magistrate does is to evaluate fee applications. I have reservations about more decisions being made by non-judicial personnel. I don't want to be misunderstood here. It's not that they are not smart. It's not that they are not well intentioned. They are. They are very competent people. Our staff attorneys and our law clerks and our settlement director do a wonderful job. In fact, I used to be a law clerk, and I think it's maybe the best job I ever had. Of course the law clerks tend, at least I did when I was one, perhaps to overestimate their own importance. We thought we knew everything. The judge that I worked for was smart enough to know that I didn't know everything.

Anyhow, the proposition that we solve the problem by putting on more staff, it seems to me, ignores the fact that we may be just about at the limit

11. See 28 U.S.C. § 2343 (1988).

of that solution. I have four law clerks. The other circuit judges have three. I have four law clerks because I'm Chief Judge, which is the opposite of what it ought to be. When I became Chief Judge, I had to cut down on my real work, and most of what I do now is talk on the telephone and write memos about administrative matters. So it doesn't make much sense to give me another law clerk, but forget that part of it. With three law clerks, you're about at your limit as to what a single judge can absorb. Judges are like funnels: there's a big opening at the top and all the law clerks and the staff attorneys pour stuff in there. There's just a little funnel at the bottom. It all has to go through that one person. And unless the judge widens out that bottom so that it all just drops through rubber-stamped, you're not really getting any more done. For that reason I haven't thought that it made any sense for our Court to hire more staff attorneys, because there are still the same number of judges reviewing their work.

I've told you the problem. I've told you a lot of solutions. I have expressed reservations or disapproval about all of them. So why am I here? What's all of this about? My feeling is that what we need is more judges. This is very controversial in the federal judiciary and I think I'm in a minority on this subject. The Judicial Conference has voted not to put a cap on judgeships because it's Congress that should do that, not us, but the Conference voted to express a sort of opinion that there probably shouldn't be any more than 1,000 Article III judges. There are about 800 now. That leaves some room for expansion. But if the caseload is going to go up geometrically in the next 20 years as it has in the past 20 years, obviously 200 more judges are not going to be able to handle the load. It seems obvious to me that increasing the number of judges is one solution that at least deserves serious consideration. We hear objections to that. I have with me an article by Judge J. Harvie Wilkinson of the Fourth Circuit, a very able man. This article is called *The Drawbacks of Growth in the Federal Judiciary*.¹² It's a fine job. Judge Jon Newman, who is Chief Judge of the Second Circuit, has written on the subject expressing strong reservations about increasing the number of lower-court federal judges.¹³

This is a two-sided debate, and I may be on the wrong side of it, but let me talk with you just briefly about some of the reasons the opponents of more judgeships give. They say—you don't hear this said out loud, but in the back rooms if you listen between the lines you hear some judges say—we won't be as important. The more people there are who have a certain office, the less prestige there is for each person. That's the worst possible reason for

12. J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147 (1994).

13. See Jon O. Newman, *Are 1,000 Federal Judges Enough? Yes, More Would Dilute the Quality*, N.Y. TIMES, May 17, 1993, at A17.

opposing something if what you are proposing is in the public interest. Let me make clear that Judge Wilkinson and Judge Newman don't make this argument.

Some judges say that the people won't be as good. If you have 2,000 judges, the quality on average will be lower than if you have 1,000. I suppose there is a theoretical point there, but this is such a big country, and there are so many able lawyers in the bar. I can't believe that we can't find 2,000 or 5,000, if it came to that. And remember that all of this is against the background of the state courts. The state courts do most of the judicial business in this country. And we should remember that when we don't expand the capacity of the federal judiciary, that puts a burden on the states. It isn't that people don't file their lawsuits. They file them, but they file them in the state courts, which by and large do a wonderful job of handling a much greater volume than we have.

So I'm not really persuaded by those arguments. The conclusion seems inescapable to me that if our workload is going to go up, and if we don't want to spend even less time per case, and if we don't want more decisions made by nonjudicial personnel, the only solution is to create more judgeships. Congress, of course, will have the last say on this issue, and it will make its judgment on a political basis. I don't mean that critically. We have a political system. Politics governs the appointment of judges, in the sense that, under the Constitution, the judges are chosen by the two elected branches of government. Politics, in the sense of good public policy, governs what laws Congress passes. And politics will determine how many judgeships Congress wants to create. It's quite natural, for example, that if more judgeships are created by statute this year or next, you will probably see a provision that the judgeships will not be effective until after the next Presidential election. Or, at any rate, the law will be passed so late in 1996 that it won't matter in practice. No appointments will be possible until after the election. That's part of our system, and I'm not unhappy with it.

Let me just finish by saying that whatever we do about this, and whether we're talking about the state courts or federal courts, there are two very important qualities that must be preserved. The first is that the essence of a court as an organ of government is reason. The President can sign a bill or veto a bill, and he doesn't have to give a reason, and nobody says, well, he didn't write a very good opinion explaining what he did. Congress can pass a law or an amendment, or defeat a law or an amendment, and members will make speeches on the floor; but very few people will go back and read the speeches and say, well, they didn't write a very good opinion in support of their vote. Those branches of government do things simply because they believe they are best in the public interest. That is their nature. Courts, on the other hand, are not, or should not be, simple expressions of human will. We're supposed to make our decisions by reference to something other than our own personal opinions, by reference to the law, reason, the facts, concepts

like that. This is so basic that I'm almost embarrassed to say it, but many members of the public seem to feel that judges are just politicians in another guise. Sometimes some of us are, but we should not be. We should decide cases on the basis of the law and the facts in the record, and on no other basis. And when we do decide our case, it's our duty to explain the decision in an opinion. We depend on the consent of the governed, just as the other branches do. If we make decisions affecting people's lives and don't explain them adequately, we are in trouble. That takes time. It takes reflection. It takes chewing and thoroughly digesting, as Lord Bacon says. We must try to preserve a court system in which the judges have enough time to reflect upon and explain their decisions adequately. That's the first point.

The second point is that we must be open. People, even if they are demented, even if they are inmates, need to have a place to go to complain and be heard. Sometimes I think the courts perform a psychiatric function just by listening to the litigants, even when they lose. I've had this experience in open court a lot of times. Just listening to someone is useful, even if you don't agree with what he or she is saying. And even when you decide a case against the particular litigant, you are performing a useful function. So I think of the courts as a place that should be open to everyone.

I like movies a lot. There is a movie called "The Wind and the Lion." Some of you may have seen it. It's fairly old now. It's about Theodore Roosevelt. The stars are Sean Connery and Candice Bergen (I almost said Murphy Brown.) The movie is about a woman named Perdicaris, who is an American citizen (that's Candice Bergen), and a Moroccan chief called Raisuli (that's Sean Connery). The Chief kidnaps the woman. This is a famous incident in diplomatic history. President Roosevelt had some very "Theodorean" things to say about it. He said, "Perdicaris alive or Raisuli dead." Incidentally, Raisuli capitulated, and Mrs. Perdicaris was released.¹⁴ Then the President said: "The great lesson is that you can go anywhere in the world and be treated with respect merely by saying, 'civis Americanus sum. I am an American citizen.'" He probably should have put the gender in the feminine in that statement, but he didn't. In any case, I think of courts, state or federal, as places where anybody can come in and say, "I am an American citizen," and he or she will be heard. In fact, you don't even have to say that much. All you have to say is: "I am a human being. I am here. I have facts. I have law. (I think I do, anyway.) So judge my case according to the

14. The movie may have rewritten history. It appears, in fact, that Mrs. Perdicaris had already been released when the President made his statement, and that John Hay, Roosevelt's Secretary of State, knew this when he sent the famous telegram containing the President's words. See Earnest Paolina, *Teddy Roosevelt's Hostage Hoax Just Keeps Bobbing Up Again*, N.Y. TIMES, June 4, 1995, § 4, at 14. However that may be, it's still a good story and it illustrates my point.

law and the facts and your own conscience." Such a task takes time, and that's why we need to be sensitive to this problem of volume and seek solutions to it.

These are the things—openness, reflection, and reason—that courts are really about. And these are the qualities that we must strive to preserve.