STRIKING A DEVIL'S BARGAIN: THE FEDERAL COURTS AND EXPANDING CASELOADS IN THE TWENTY-FIRST CENTURY[*]

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Over the past four decades, caseloads in the federal courts have grown by leaps and bounds. During the twelve months ending in September 2008, more than sixty-one thousand cases reached the twelve regional United States courts of appeals, which have only 167 active judgeships. Such impossibly inflated dockets have forced the federal appellate courts to create an administrative system that sacrifices justice for efficiency. Today, motions and staff attorneys play a critical role in sifting through thousands of appeals. To cope with the caseload volume crisis, this Article suggests a different path: a limited system of discretionary review, reserved for cases that have already been reviewed multiple times, administered by courts of appeals judges.

I. INTRODUCTION

Twenty years ago, the federal courts were in crisis. Between 1960 and 1988, the number of cases filed in federal court skyrocketed, threatening to bury a judiciary that lacked the necessary manpower.[1] Observers predicted dire consequences: a massive increase in the number of authorized judgeships that would dilute the quality of the federal judiciary, or a substantial decrease in the time a judge could devote to a

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[1] 89,112 cases were commenced in the United States district courts in 1960; by 1988, that number had swelled to 284,219, an increase of nearly 220 percent. During the same period, the number of active district court judges increased from 233 to 547, an increase of only 135 percent. *See* Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 U. CHI. L. REV. 761, 761–62 nn. 1 & 3 (1989). The courts of appeals saw an even more dramatic expansion in their caseloads. The number of appeals filed between 1960 and 1988 rose 862 percent (from 3,899 to 37,524). The number of appellate judges, however, increased by only 139 percent (from 66 to 158). *See id.* at nn. 2–3.

case.[2] Now, the sense of urgency seems to have disappeared. Many believe that the crisis has passed, if it ever existed at all. The 2005 National Conference on Appellate Justice Report reflects the sense of the participants that while federal dockets had been overloaded in the 1970s and the 1980s, the full-scale breakdown of justice many had predicted did not occur.[3]

I respectfully dissent. As a judge on the United States Court of Appeals for the Ninth Circuit for over twenty years, I can attest that the crisis has not passed. To outsiders, the federal courts may seem to be dispensing justice about as competently as before. But I submit to you that this is an illusion; I confess that we have made a devil's bargain to achieve some semblance of order. Specifically, we have made painful compromises to cope with the tens of thousands of appeals that clog our dockets each year. These uneasy truces were once troubling exceptions to an idealized version of appellate justice but are now settled assumptions undergirding our system of appellate review. In this Article, I describe these compromises, identify the source of expanding caseloads, and suggest a path for the future.

II. THE CASELOAD VOLUME CRISIS

I begin with the numbers. Driven by immigration appeals, social security disability cases, and habeas petitions, our caseload has reached astounding proportions. During the twelve months ending in September 2008, more than sixty-one thousand cases reached the twelve regional United States courts of appeals.[4] That number is actually down by almost three percent from 2004, when nearly sixty-three thousand appeals were filed.[5] However, the 2008 numbers reflect an increase of more than six

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[2] *See, e.g.*, Editorial, *Opening Up Federal Judicial Discipline*, 78 JUDICATURE 4 (1994); Newman, *supra* note 1, at 762–63 ("[W]e have now reached, and may have passed, the point where the increase in federal court cases poses a serious and substantial risk to the nature and quality of the federal judicial system."); William H. Rehnquist, *1993 Year-End Report on the Federal Judiciary*, 17 AM. J. TRIAL ADVOC. 571, 571 (1994) ("An era of austerity will require changes in the way the judiciary does its internal business. It will also require changes in the habits and expectations of professional users of the system—lawyers and judges whose habits and expectations were developed when the system was under far less pressure."); Thomas E. Baker, *Applied Freakonomics: Explaining the "Crisis of Volume,"* 8 J. APP. PRAC. & PROCESS 101, 102 (2006) ("A series of commissions, committees, study groups, conferences, and symposia predicted that the rapidly increasing number of cases was about to overwhelm the federal appellate court system and that only radical structural reforms could save it.").

[3] *See, e.g.*, Baker, *supra* note 2, at 102 ("[T]oday the courts of appeals are not hopelessly backlogged. There is no panicky sense of being overwhelmed. Everything seems to be 'business as usual,' at least on the surface.").

[4] James C. Duff, Admin. Office of the U.S. Cts., *2008 Annual Report of the Director: Judicial Business of the United States Courts*, 96 tbl.B-3 (2009), *available at* http://www.uscourts.gov/judbus2008/contents.cfm.

[5] *Id.* The peak caseload year was 2005, when more than 68,000 appeals were filed in the federal courts.

percent from September 2002, showing that overall our caseload is trending upward.[6] Indeed, my own court has seen a *thirty-one percent* rise in the number of appeals since 2001.[7] These numbers are extraordinary, especially when one considers that the nation has only 167 active judgeships on the federal courts of appeals.[8]

But even those numbers understate the problem's magnitude. Because three judges are assigned to each case, many appeals produce dissents, creating ever more writing responsibility. Significant time is allotted for oral argument. On the larger courts like mine, judges must regularly travel to courthouses within the circuit, in my case to San Francisco, Pasadena, Seattle, Phoenix, and sometimes to Honolulu and Anchorage, in addition to hearing arguments at my own courthouse in Portland. Thus, the actual burden is even greater than the raw numbers suggest.

The federal district courts face similarly crushing caseloads. As in the courts of appeals, the number of cases filed annually has dipped slightly since the 2005 conference. Between March 31, 2004 and March 31, 2008, the number of annual filings in the district courts dropped by more than six percent to about 315,000.[9] Despite the drop, that number remains more staggering even than the number of federal appeals. Each one of the 678 active district court judgeships is responsible, on average, for over five hundred cases per year, though there is some variance between circuits. The crisis is more acute at the district court level because the district judges must preside over trials, oversee settlement negotiations, and rule on millions of motions. In the district courts, clogged dockets are a central reason for the disappearance of the civil and the criminal trial.[10]

Rising caseloads are not the only source of pressure on federal courts of appeals judges; today's judges are also responsible for a milieu of administrative duties. As Judge Jon Newman has pointed out: "Unlike their counterparts of earlier decades, today's federal judges participate in an elaborate administrative structure within their individual courts, their judicial councils, and the committees of the United States Judicial Conference."[11] We rule daily on motions for leave to file *amicus curiae* briefs, motions for extensions of time, and a variety of other matters. In

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[6] *Id.*; Leonidas R. Mecham, Admin. Office of the U.S. Cts., *2002 Annual Report of the Director: Judicial Business of the United States Courts*, 73 tbl.B (2003), *available at* http://www.uscourts.gov/judbus2002/contents.html.

[7] Duff, *supra* note 4, at 100 tbl.B-3; Mecham, *supra* note 6, at 73 tbl.B.

[8] 28 U.S.C. § 44(a) (2006). This number does not include the twelve authorized judgeships on the United States Court of Appeals for the Federal Circuit.

[9] *See* Admin. Office of the U.S. Cts., *Federal Judicial Caseload Indicators: March 31, 2008*, *available at* http://www.uscourts.gov/caseload2008/front/IndicatorsMar08.pdf.

[10] *See* Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 119 n.113 (2005).

[11] Newman, *supra* note 1, at 766.

my court, we also spend much time deciding whether to rehear cases *en banc*.

Impossibly large dockets and administrative responsibilities have forced us to create a system that might be called, with only slight exaggeration, "assembly-line justice." In the Ninth Circuit, we dispose of our twelve thousand-odd annual appeals in several streamlined ways. Motions attorneys sift through our filings, identifying those that can be addressed immediately on procedural grounds.[12] About half of our appeals are disposed of in this way.[13]

The remaining six thousand appeals are then funneled to a group of staff attorneys, who assign each case a "weight" from one to ten based on the staff attorney's judgment about the difficulty level of the case.[14] About two thousand of these six thousand appeals receive a weight of "one," which means that the staff attorney thinks that the law involved is plain and the proper resolution of the case is clear.[15] These cases are then presented to a three judge screening panel, which either agrees with the staff attorney's recommendation, modifies the proposed disposition, or kicks the case over to the regular argument calendar.[16] In the first five months of this year, the Ninth Circuit panel has agreed with the staff attorney's recommendation ninety-five percent of the time. Based upon my personal experience, each of these "screened out" cases receives about four to nine minutes of consideration by a Ninth Circuit panel before filing. I am not entirely confident that such cursory judicial review is error-free.

Over half of the remaining five thousand appeals that are assigned to regular merits panels are denied oral argument by being ordered submitted on the briefs.[17] In the end, approximately two thousand cases out of more than twelve thousand see oral argument.[18] Put differently, a litigant who files an appeal in the Ninth Circuit has about a sixteen percent chance of ever discussing his case in front of a three judge oral argument panel. I speak, of course, from my experience as a judge on the Ninth Circuit, but I know that other circuits have had to make similar compromises.

We also cope with our backlog by making litigants wait for calendaring and a decision. In the Ninth Circuit, on average, nineteen months pass from the moment a notice of appeal is filed to the moment a panel of judges files the disposition.[19] And our experience is not

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[12] *See* Ninth Circuit General Order 6.2(a) (2008), http://www.ca9.uscourts.gov/rules/General Orders/General Orders.pdf.

[13] Duff, *supra* note 4, at 117 tbl.B-5A.

[14] *See* Ninth Circuit General Order, *supra* note 12, at 6.5.

[15] *See id.* at 6.5(a).

[16] *Id.*

[17] Duff, *supra* note 4, at 42 tbl.S-1 & 117 tbl.B-5A.

[18] *Id.*

[19] *See id.* at 105 tbl. B-4.

entirely atypical. The most expeditious circuits take between eight to ten months while the next slowest take fourteen to seventeen months.[20] Even worse, a party who files suit in a district court within the Ninth Circuit can expect to wait nearly forty months before his case is finally resolved on appeal.[21] The striking length of time we take to dispose of cases is alarming. No litigant should be required to wait that long to receive due justice. As the 2005 National Conference on Appellate Justice Report aptly remarked about the state of appellate justice: "[W]e've lost something valuable that we used to have, but we don't miss it (or most of us don't) because we don't realize that we've lost it."[22]

III. THE SOURCE OF THE CRISIS

Our caseload is overwhelmingly composed of criminal cases and administrative agency appeals. During the twelve month period ending September 30, 2008, nearly 1,700 direct criminal appeals, involving mostly drug and immigration offenses,[23] were filed in the Ninth Circuit, filling more than twelve percent of our total docket.[24] In addition, 3,281 prisoner petitions, including habeas petitions, motions to vacate sentence, and prison condition cases, reached my court.[25] Criminal cases of one sort or another therefore consume fully thirty-nine percent of the Ninth Circuit's docket. That number reflects the federalization of criminal law over the past four decades.[26]

Litigation involving administrative agencies also floods our courtrooms. During the twelve-month period ending September 30, 2008, 4,861 administrative appeals were filed in the Ninth Circuit, which is nearly thirty-six percent of our total docket.[27] These are overwhelmingly—nearly ninety-five percent—immigration appeals.[28]

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[20] *Id.*

[21] *Id.*

[22] Arthur D. Hellman, *The View from the Trenches: A Report on the Breakout Sessions at the 2005 National Conference on Appellate Justice*, 8 J. APP. PRAC. & PROCESS 141, 179 (2006).

[23] Duff, *supra* note 4, at 123–27 tbl.B-7.

[24] *See id.* at 86 tbl.B-4.

[25] *Id.* at 123–27 tbl.B-7.

[26] For a critical analysis of Congress's tendency to criminalize conduct that the states already prohibit, see AMERICAN BAR ASSOCIATION, REPORT OF THE ABA TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW (1998), *available at* http://www.nacdl.org/public.nsf/legislation/overcriminalization/$file/fedcrimlaw2.pdf; *see also* Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 42 (1996) ("The modern phase of federal criminal jurisdiction began in the 1960s and 1970s, when Congress relied upon the commerce power to enact criminal provisions targeting organized crime, illegal drugs, and violence, while continuing to employ criminal sanctions for a wide variety of other social ills.").

[27] *See* Duff, *supra* note 4, at 100 tbl.B-3.

[28] *Id.*

Appeals from agency determinations are not the only administrative cases clogging our docket. Because federal law gives almost anyone the right to seek judicial review of an adverse agency determination,[29] other suits seeking review of agency action fill an additional 1.5 percent of our docket.[30] Many of these are suits challenging environmental regulations, an environmental agency's failure to regulate, or another agency's failure adequately to consider the effects of its action on the environment. Others are social security disability cases, in which claimants seek review of district court decisions affirming the Social Security Commissioner's denial of benefits. Such litigation is the natural, unavoidable result of an increasingly vigorous federal administrative state that regulates everything from the environment to the food on supermarket shelves. Criminal cases, prisoner petitions, and suits seeking review of agency action constitute an astonishing seventy-two percent of the Ninth Circuit's caseload.[31]

IV. A CERTIORARI SYSTEM

The sheer scope of litigation involving administrative agencies, however, illuminates a stop-gap solution that could help stem the tide of cases: a limited system of discretionary review administered by court of appeals judges. Many of these cases have already been reviewed multiple times. Under new 2006 administrative procedures that are gradually being implemented nationwide, for example, social security disability cases undergo extensive administrative review before reaching the courts of appeals.[32] First, a claimant obtains an initial medical determination from a state disability agency.[33] If the determination is adverse, the claimant may petition for review from a federal reviewing official.[34] If the reviewing official denies the claim, the claimant may obtain a hearing in front of an administrative law judge appointed by the Social Security Commissioner.[35] After the hearing, the ALJ decides whether the claimant is entitled to benefits by applying a five-part test.[36] A Decision Review Board composed of administrative law judges selected by the Social

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[29] *See* 5 U.S.C. § 704 (2006) ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.").

[30] *See* Duff, *supra* note 4, at 100 tbl.B-3.

[31] *Id.* at 121 tbl.B-6. Notably, diversity of citizenship cases constitute less than three percent of our total caseload. *Id.* at 125 tbl.B-7.

[32] Administrative Review Process for Adjudicating Initial Disability Claims, 71 Fed. Reg. 16,424 (Mar. 31, 2006).

[33] *See* Disability Determinations, 20 C.F.R. § 405.101 (2008) ("The State agency will adjudicate your claim . . . . The disability examiner will make a determination based on all the evidence. . . . It will also inform you of your right to review by a Federal reviewing official and your right to representation.").

[34] *See id.* §§ 405.201, 405.215(a).

[35] *See id.* § 405.301.

[36] *See id.* §§ 416.920, 405.301.

Security Commissioner may then review the ALJ's decision.[37] If the end result is an adverse decision from the ALJ or the Decision Review Board, the claimant may file a civil action in United States District Court.[38] Only after the claimant loses in federal district court, which itself frequently involves two levels of review—one by a magistrate judge followed by the district judge—will his claim reach the courts of appeals. By the time we see social security disability cases, therefore, four to six levels of review, including one or two in an Article III court, have already taken place.

Many immigration cases, including asylum petitions and withholding of removal proceedings, also receive a full complement of administrative review. An alien first presents his case in front of an asylum officer or an immigration judge, who makes an initial determination regarding whether the alien is eligible for asylum or is deportable.[39] If the asylum officer's or the immigration judge's decision is adverse to the alien, he may then appeal to the Board of Immigration Appeals (BIA).[40] If BIA denies the alien's claim, the alien may petition the Attorney General for cancellation of removal.[41] Only after exhausting these avenues of administrative relief does an alien seek review in the courts of appeals. To be sure, unlike social security cases, immigration appeals are not reviewable in federal district court.

Litigants who wish to challenge decisions by agencies such as the Federal Communications Commission or the Environmental Protection Agency must similarly navigate the system of administrative review that Congress has crafted. Substantive agency rulemaking takes place only after the conclusion of an extended notice and comment period in which anyone may participate.[42] In addition, agencies often hold public hearings before issuing regulations or adjudicating particular controversies.[43] By the time these issues reach the courts of appeals, many minds have spent much time pondering them.

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[37] *Id.* §§ 405.401–.405. The Decision Review Board's review decision is discretionary and *sua sponte*; claimants may not appeal to the Decision Review Board.

[38] 42 U.S.C. § 405(g) (2006). ("Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days . . . .").

[39] *See* 8 U.S.C § 1229a(a) (2006); 8 C.F.R. § 208.2(b), 208.14(b) (2008). Aliens are also permitted to obtain counsel before removal proceedings begin. 8 U.S.C. § 1229(b) (2006).

[40] 8 C.F.R. § 1003.1(b), 1003.38(a)(2008).

[41] *See* 8 U.S.C. § 1229b(a)(2006)("The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien (1) has been an alien lawfully admitted for permanent residence for not less than 5 years, (2) has resided in the United States continuously for 7 years after having been admitted in any status, and (3) has not been convicted of any aggravated felony."); *see also* 8 C.F.R § 240.66 (2008).

[42] 5 U.S.C. § 553(b)–(c) (2006) ("[T]he agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.").

[43] *Id.* §§ 556–557.

The need for judicial review is less compelling (though not entirely absent) when a case has already been evaluated in the administrative process. Recognizing this, I suggest we should adopt a discretionary certiorari-like system to dispose of social security disability claims, those immigration cases that have already had two levels of administrative review, and possibly the simplest lawsuits challenging agency action. After losing a social security disability claim in federal district court or an immigration case in the Board of Immigration Appeals, litigants would petition the courts of appeals for review. Such a petition would not be funneled through staff attorneys; rather, it would go directly to the judges, who would decide whether the case warrants an additional level of review. Like a similar system that Judge Jon Newman proposed in 1989, "[t]he implementation of the discretionary access system must not become an occasion for extensive litigation on the issue of access itself."[44] Instead, "[t]he decision to permit access should be made without factfinding and should be non-reviewable."[45]

Discretionary access to the courts of appeals would permit federal judges to concentrate on the cases that have been reviewed only once before while also keeping the courthouse door ajar to cases that present novel legal issues or are exceptionally important. The proper criteria for granting certiorari would be a subject of legitimate debate; I note, however, that cases presenting only the question whether substantial evidence supported the agency's determination might be particularly attractive candidates for swift resolution. Like Judge Newman's proposal, discretionary review of social security and immigration cases "would also provide the federal court system with flexibility to adjust its caseload in response to fluctuations in the volume of filings in categories of obligatory jurisdiction."[46] The currently high affirmance rate of these administrative decisions provides some assurance that discretionary judicial review would not result in denying relief to meritorious claims. Such a system might also be applied to diversity cases, where the litigants would be merely relegated to state court rather than denied judicial review altogether.

V. CONCLUSION

Judge Learned Hand said in 1951 that "[I]f we are to keep our democracy there must be one commandment: Thou shalt not ration justice."[47] The number of cases we must address, however, makes it impossible to obey Judge Hand's commandment. No solution to the caseload crisis will be painless or will satisfy every litigant. All will involve

[44] Newman, *supra* note 1, at 772.

[45] *Id.*

[46] *Id.*

[47] Learned Hand, 75th Anniversary Address to the Legal Aid Society of New York (Feb. 16, 1951).

tradeoffs between justice and efficiency. We should prioritize cases that have been reviewed only once at the district court, while also leaving the door ajar to administrative appeals that present particularly important issues. Such a system necessarily involves rethinking our fundamental assumption that the federal courts of appeals are not certiorari courts, and that so long as a federal question is fairly presented or diversity jurisdiction is satisfied, litigants may seek appellate review as of right. Judge Hand may have been correct, but so long as Congress continues to pass criminal laws and so long as agencies continue to regulate, I see no superior alternatives.

Table 1. Filings in the Courts of Appeals by Circuit for Periods Ending September 30, 2002 and September 30, 2008[48]

Circuit	*2002*	*2008*	*Percent Change*
Total	57,555	61,104	6.1
District of Columbia	1,126	1,307	16.0
First	1,667	1,631	-2.2
Second	4,870	6,904	41.8
Third	3,643	4,054	11.3
Fourth	4,658	5,185	11.3
Fifth	8,784	7,667	-12.7
Sixth	4,619	4,853	5.1
Seventh	3,418	3,307	-3.2
Eighth	3,216	3,022	-6.0
Ninth	11,421	13,577	18.9
Tenth	2,661	2,226	-16.3
Eleventh	7,452	7,371	-1.1

[48] Mecham, *supra* note 6, at 73 tbl.B; Duff, *supra* note 4, at 83 tbl. B.

Table 2. Appeals Terminated on Merits October 1, 2007–September 30, 2008, by Circuit[49]

Circuit	*Total Appeals Terminated*	*Total Appeals Terminated on Merits*	*Percent*
All Circuits	59,096	29,608	50.1
District of Columbia	1,285	557	43.3
First	1,776	1020	57.4
Second	6,434	2,859	44.4
Third	3,990	2,300	57.6
Fourth	4,671	2,581	55.3
Fifth	8,086	4,121	51.0
Sixth	4,781	2,569	53.7
Seventh	3,281	1,338	40.8
Eighth	3,103	1,922	61.9
Ninth	12,373	5,800	46.9
Tenth	2,385	1,473	61.8
Eleventh	6,931	3,068	44.3

Table 3. Nature of Proceeding—Cases Filed October 1, 2007–September 30, 2008, Ninth Circuit[50]

Nature of Proceeding	*Number of Cases Commenced*
Total	13,577
Criminal	1,657
U.S. Prisoner Petitions	513
Other U.S. Civil	646
Priv. Prisoner Petitions	2,768
Other Private Civil	2,019
Bankruptcy	174
Administrative Appeals	4,861
Original Proceedings	939

[49] Duff, *supra* note 4, at 111–14, tbl.B-5.
[50] *Id.* at 87 tbl.B-1.

Table 4. Median Time Interval in Cases Terminated After Hearing or Submission From Filing of Notice of Appeal to Final Disposition, October 1, 2007–September 30, 2008, by Circuit[51]

Circuit	*Time Interval (in months)*
National Average	12.7
District of Columbia	12.2
First	13.3
Second	17.5
Third	14.7
Fourth	8.4
Fifth	11.3
Sixth	14.2
Seventh	12.0
Eighth	11.4
Ninth	19.4
Tenth	10.9
Eleventh	9.3

Table 5. Appeals Terminated After Oral Hearing–October 1, 2007–September 30, 2008, by Circuit[52]

Circuit	*Total Appeals Terminated*	*Appeals Terminated After Oral Hearing*	*Percent*
Total	59,096	8,983	15.2
District of Columbia	1,285	270	21.0
First	1,776	337	19.0
Second	6,434	1,111	17.3
Third	3,990	389	9.7
Fourth	4,671	395	8.5
Fifth	8,086	1,066	13.2
Sixth	4,781	909	19.0
Seventh	3,281	787	24.0
Eighth	3,103	576	18.6
Ninth	12,373	2,036	16.5
Tenth	2,385	468	19.6
Eleventh	6,931	639	9.2

[51] *Id.* at 105 tbl.B-4.

[52] Duff, *supra* note 4, at 84–87, tbl.B-1.