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Irving R. Kaufman

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NEW REMEDIES FOR THE NEXT CENTURY OF JUDICIAL REFORM: TIME AS THE GREATEST INNOVATOR

IRVING R. KAUFMAN*

INTRODUCTION

As the federal judiciary prepares to enter its third century, the Court of Appeals is caught between the Scylla and Charybdis of an overcrowded docket and the mounting costs of assuring litigants their rightful day in court. As with Odysseus, flexibility must be our lodestar in meeting the challenge. A new willingness to accept judicial reform must override our natural prudence in the face of change, lest administration of the law fall behind the progress of the society we serve. Sir Francis Bacon admonished:

[He that will not apply new remedies must expect new evils; for time is the greatest innovator; and if time of course alter things to the worse, and wisdom and counsel shall not alter them to the better, what shall be the end?]

After forty years on the federal bench, I offer the following “wisdom and counsel” in hopes that future efforts toward judicial reform will receive a prudent, not a prejudiced evaluation. Meaningful judicial reform in the next century requires an eagerness to pursue new avenues instead of a willingness to retrace timeworn paths that have yet to lead us to our destination.

I. AN HISTORICAL OVERVIEW

A. Origins of the Circuit Courts of Appeals

The United States courts of appeals have so rapidly become a fixture of our government that it is difficult to believe that they were only formally instituted in 1891. Alexander Hamilton first propounded the idea of federal circuit courts in The Federalist. The Judiciary Act of 1789 had provided for precursors to the current courts of appeals. These ancient circuit courts were composed of two Supreme Court justices and one federal district court judge. The Supreme Court justices were intended to assure national authority and uniformity of decision. The district judge

* Former Chief Judge, now a Senior Judge of the United States Court of Appeals for the Second Circuit. B.A. 1928, Fordham University; LL.B. 1931, Fordham University School of Law. Judge Kaufman is a recipient of the Presidential Medal of Freedom. This Article is based on a paper circulated at the Bicentennial Conference of Judges of the United States Court of Appeals, October 24-26, 1988, in Washington, D.C.

3. The Federalist No. 81 (A. Hamilton).
4. ch. 20, 1 Stat. 73.
was to provide a knowledge of local law and customs. John Jay, our first chief justice, complained to Congress of the debilitating effect of circuit riding. In fact, the justices offered to forego $500 of their $3500 annual salary to provide for relief from their equestrian chores through the appointment of independent, permanent circuit judges in the various regions.

It was not until 1891 that the current system of circuit courts of appeal for each circuit was adopted. Like their predecessors, the courts of appeals are branches of the national government, and yet each retains a regional character. This distinctive blend has marked the history of the court with which I am most familiar, the Second Circuit. When New York emerged as the preeminent seaport and mercantile center for the nation, the Second Circuit, along with the District Court for the Southern District of New York, became the foremost American admiralty court. At the same time, the unique judicial talent of such luminaries as Learned Hand, Augustus Hand, Thomas Swan, Charles Clark and Jerome Frank contributed immeasurably to the national development of all areas of the law.

Along with its substantive reforms, the Second Circuit has also significantly expanded the sphere of judicial reform. I like to think that my stewardship of the court contributed to this tradition by the addition of such institutions as the Civil Appeals Management Plan (CAMP). Additionally, the circuit has instituted bold and innovative administrative programs to preserve oral argument and to expedite the determination of appeals in a day when other courts have become mired in backlogs. Despite the fact that it is the only federal court of appeals in the country still permitting oral argument in all cases, the Second Circuit has managed to clear its calendar completely for the last six consecutive years. This record is all the more remarkable in light of the continued growth in the circuit’s docket, which has nearly doubled in the last ten years.

Of course, caseloads remain at an historic high in other circuits as well. The familiar aphorism, “justice delayed is justice denied,” has taken on a hollow ring as society has become increasingly numbed to the harms inflicted by interminable delay. The courts, with alarming frequency, are used as the first, rather than last resort of dispute resolution. Even in the court of appeals, where I have sat for twenty-seven years, an enormous number of the litigants exhibit a “sue and be damned” attitude, offering only factually complex tales of obstinacy to reasoned negotiation rather than presenting the pressing legal issues we are meant to


7. See id.
resolve. Recent statistics reveal that the number of cases commenced in the United States courts of appeals since 1980 has increased steadily from 23,200 to 35,176 in 1987.\(^8\) Clearly, the flood tide of litigation is still rising.

B. The Current Malaise

The twin demons of cost and delay continue to afflict the judicial process. Learned Hand's stinging indictment of our courts is, if anything, more true today than it was in 1921: "[A]s a litigant I should dread a lawsuit beyond almost anything else short of sickness and death."\(^9\) Delay in the resolution of disputes is the most visible, although perhaps not the most serious, symptom of this judicial malady. Although protracted litigation is hardly a new phenomenon, our backlogs are nevertheless grave enough to warrant serious attention. Magellan's crew sailed around the world in an old wooden ship in three years; yet today the resolution, or even the commencement of the trial of many serious cases takes a far longer period.

Delay is, however, but one reason why so many cases which really should be resolved by a trial are settled long before—or never filed at all. The sheer monetary cost of seeking judicial relief may well be the greatest barrier to court access. Much of the expense may be attributed to liberalized discovery under the Federal Rules of Civil Procedure. Lawyers have used these procedures as a ready tool for harassment in a process that has become little more than an ordeal for parties subjected, in effect, to two trials instead of one. It is a customary and often successful tactic to disable the other party both by burdensome requests for discovery and by release of only the most limited information. During my tenure on the Second Circuit, I recall one recent case that generated over 1,200 depositions comprising nearly 150,000 pages of transcript. My point is not that we should expect litigants to act out an Alice in Wonderland script and come forward graciously saying "here is damaging information you may use against me." But let us not overlook that the process of extraction of the facts has become a very expensive exercise, requiring the services of an attorney or even a corps of counsel, whose fees may be prohibitively expensive.

The primary impact of the expense and delay in private civil litigation is felt by the blameless defendant or plaintiff. Before deciding to submit all the facts at trial to an admittedly fair and detached decision-maker, each party must consider an externality—the cost of justice itself. With distressing frequency the expense of a coerced settlement, even after paying court and counsel fees, may be far less than the price of justice. We

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long ago eliminated trial by ordeal, but some charge it has been replaced with ordeal by trial. Delay, moreover, has a deleterious effect on the outcome of those cases that do come to trial. For example, few witnesses can recall with precision an accident that occurred four or five years before. And compensation is deferred far past the time when the injured plaintiff was plagued by medical and other expenses and most urgently needed the money.

Perhaps even more serious than delay are the secondary effects on the future behavior of the offending party. The disabling effect which resort to the judicial process may have on a putative defendant or plaintiff is the modern American Ring of Gyges for the unscrupulous litigant. The strike suit by a shareholder against his corporation is a frequently cited example. But one can with equal justification point to the slumlord who turns off his tenants’ heat several days each month to save fuel costs, secure in the knowledge that his tenants will be deterred from asserting their rights by the expense they would incur.

Additionally, a new breed of civil case seems to crowd our dockets. These monkey puzzles feature fact patterns of byzantine proportions. Yet, the legal issues presented are often either insignificant or long settled questions. Such cases represent a tremendously wasteful expenditure of the time and resources of the federal courts. Page upon page of exhibits and supporting affidavits must be read and absorbed before the often simple legal question at the heart of the matter is even considered.

Some of these cases are the product of the plethora of new bases for litigation created by Congress in recent years. Our society is now paying the price for its failure to provide sufficient judicial resources to cope with Congress’ past lawmaking binges. As ever-increasing resort is made to the judiciary as the arbiters of all possible problems that befall society, the lack of wherewithal to deal with those demands has caused the courts to suffer the inevitable hangover.

New causes of action in areas of securities law, consumer protection, workplace health and safety, credit practices and civil rights now consume a significant portion of the time of the courts. In addition, the common law has been expanded. The area of products liability, for example, has seen unprecedented growth, as have many aspects of the criminal law.

II. GROWTH: THE OLD REMEDY

The traditional remedy for coping with the manifold expanding demands on the courts of appeals has been growth. In fact, adding more judges historically has been the only real structural change in the federal appellate system that the federal government has consistently embraced since the Federal Judiciary Act of 1789.10 Indeed, overcrowding was the

10. The Supreme Court has responded to its burgeoning caseload differently. Since, unlike the court of appeals, the Supreme Court is not a court of error, it has the luxury of
stimulus for the restructuring of the federal judiciary under the Evarts Act\(^1\) in 1891, which created the modern circuit courts of appeals.

In recent years, the number of judgeships has been increased with a vengeance. While the courts of appeals grew at a fairly steady rate of about ten new judges every twenty years until the late 1970s, the 1978 Omnibus Judgeship Act\(^2\) augmented the federal judiciary by 36 percent. This meant a boost in the number of circuit judges from 94 in 1979 to 124 in 1980. Currently, there are 168 authorized positions in the courts of appeals.\(^3\) The procedure by which the new positions were added, as well as the consequences of the additions, have been much criticized.

Congress is expected to create more than sixty new judgeships during the next legislative session.\(^4\) Whether or not this increase will truly alleviate the malaise currently suffered by the judicial system or whether it will, like all of the past increases, be just another "quick fix" is debatable. Even if the most recent addition of federal judgeships at the appellate level produces a more lasting effect, I am convinced that it is not the long term answer to our current pressing need for judicial reform. Additional judgeships are both an inefficient use of scant judicial resources and a disruptive influence on the development of the law.

The process by which Congress creates federal judgeships has been called haphazard and erratic.\(^5\) Even those in favor of additional judgeships concede that while the need for federal judgeships has tended to grow at a gradual and continuous rate, judges have been added in fits and starts.\(^6\) Part of the difficulty is that all three branches of government are involved in the process, and each might have a different notion of how many, if any, judges should be added. Additionally, both the selection and confirmation of judges are politicized activities. Nominations are often awarded to the party faithful by the administration in power at the time. If a majority of the Senate belongs to the opposing party, the confirmation process may become an opportunity for partisanship rather than a search for excellent legal minds. Moreover, a Congress dominated by one party is hesitant to create new positions for a president of the


\(^{13}\) See 1987 Mecham Report, supra note 8, at 51, table 20. At present, 8 of these positions are vacant and there are 58 Senior Circuit Judges.

\(^{14}\) See Roberts, Reagan's Legions of Nominees Put His Own Stamp on the Judiciary, N.Y. Times, Oct. 9, 1988, § 4, at E5, col. 1. Last September, the Judicial Conference voted to ask Congress to create 14 new court of appeals judgeships and 37 permanent and 22 temporary district court judgeships.


\(^{16}\) See Mikva, More Judgeships—But Not All At Once, 39 Wash. & Lee L. Rev. 23, 26-27 (1982).
other party to fill. And, of course, there are intraparty vagaries associated with the selection of individual candidates.

Justice Felix Frankfurter warned early on of the consequences of expanding the federal judiciary:

The business of courts, particularly of the federal courts, is drastically unlike the business of factories. The function and role of the federal courts and the nature of their judicial process involve impalpable factors, subtle but far-reaching, which cannot be satisfied by enlarging the judicial plant. . . . In the farthest reaches of the problem a steady increase in judges does not alleviate; in my judgment, it is bound to depreciate the quality of the federal judiciary and thereby adversely to affect the whole system.17

Frankfurter's intuition that adding judges might impede, rather than facilitate, the functioning of the federal courts bears closer scrutiny. The judicial process, like the artistic process, may be hindered, not enhanced, by simple multiplication.

A. An Inefficient Response

Adding new judges may not be efficient in simple economic terms. According to the Administrative Office, the estimated cost of establishing a single new court of appeals judge is about $630,000.18 Maintaining the new judge and his staff amounts to an estimated annual cost of about $478,000.19 Obviously, these costs rapidly spiral into the tens of millions when the addition of a dozen or more new judges is contemplated.

There are other important costs to be considered as well. One of great concern to me is the possible loss of collegiality. Learned Hand's Second Circuit was composed of only six judges. I believe that the thirteen active judges (presently, one position has been vacant for more than a year) and four senior judges of the current Second Circuit can lay claim to a level of collegiality similar to that great court. However, I can only speculate as to the difficulties my colleagues and I would face in maintaining a collegial atmosphere if we are to face further increments of judges. For a process rooted in opinion and consensus, the problem is not ephemeral. Judge Harry Edwards of the D.C. Circuit explained: "[F]ew judges who have sat on an appellate court would deny that—to some unquantifiable degree—the impediments to collegiality that stem from the sheer number of members of the court reduce the overall quality of the court's work product."20

19. Id.
B. *A Disruptive Influence*

Even more worrisome is the possibility that additional judges may disrupt the development of the common law. The coherence and uniformity of the law are bound to decline with the addition of new judges. Such instability can have a snowball effect. The judicial workload is increased because more panel rehearsings and en banc votes are required. And the uncertainty of outcomes resulting from a cacophony of differing opinions can act as a catalyst for new appeals as more litigants find a roll of the appellate dice worth the chance.

Judge Tjoflat of the Eleventh Circuit described the problem in the context of the old Fifth Circuit before it was split into the current Fifth and Eleventh Circuits:

> If you have three judges on a court of appeals, the law is stable. . . . When you add the fourth judge to that court, you add some instability to the rule of law in that circuit because another point of view is added to the decision making. When you add the fifth judge, the sixth judge, when you get as large as the old Fifth Circuit was, with twenty-six judges, the law becomes extremely unstable. One of several thousand different panel combinations will decide the case, will interpret the law. Even if the court has a rule, as we did in the old Fifth, that one panel cannot overrule another, a court of twenty-six will still produce irreconcilable statements of the law.\(^1\)

At present the Ninth Circuit has twenty-five active circuit judges and eleven senior circuit judges.\(^2\) Its large size has led that circuit to provide for "limited en banc" procedures in which only eleven judges vote. Of course each of the twenty-five active judges still faces the time-consuming task of carefully reviewing for petitions en banc.

The en banc proceeding illustrates precisely the types of problems that are likely to follow continued increases in the number of circuit judges. Advocates of a liberal use of en bancs trumpet the definitive resolution of intracircuit conflicts as their major advantage. Critics urge that protracted proceedings that fail the test of finality and merely serve to exacerbate conflicts will consume precious judicial resources and undermine the panel system.

En banc opinions must be written and circulated among the members of the en banc court; invariably they spark a blizzard of memoranda in an effort to forge a consensus. It is axiomatic that three judges, in an intimate conference, will find the heart of a case more quickly than will eleven. The ultimate delay occasioned by the en banc proceeding is startling. The interval between oral argument and en banc disposition is, on

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average, five times as great as that for a panel disposition. This delay burdens the bench, the bar and most importantly, the litigants.

Yet, there are those who argue that these substantial delays and inefficiencies are a small price to pay for uniformity of decision. An unfortunate irony of the en banc proceeding in many circuits is the frequency with which it produces either a majority opinion that was crafted in a purposefully vague manner to forge a consensus within the court, or a litany of diverging opinions, injecting a degree of uncertainty into the law that we can well do without.

*Community for Creative Non-Violence v. Watt* provides a singular example of the obfuscatory potential of allowing “too many cooks” to contribute to the jurisprudential soup. That case, involving the right of demonstrators to sleep in a park as a means of protesting federal policies affecting the poor and homeless, required the court to balance the vying interests of expression protected by the first amendment on the one hand and governmental regulations on the other. The en banc opinions resulted in a smorgasbord of six judicial pronouncements—from the eleven judges on the court—on the parameters of first amendment protection, informed as much by ideological splits as by constitutional principles. Indeed, the extreme confusion is captured by the West headnote for the case:

- Mikva, Circuit Judge, filed opinion in support of reversal in which
  - Wald, Circuit Judge, concurred.
- Spottswood W. Robinson, III, Chief Judge, and J. Skelly Wright, Circuit Judge, filed concurring statement.
- Harry T. Edwards, Circuit Judge, concurred and filed opinion.
- Ginsburg, Circuit Judge, concurred in the judgment and filed opinion.
- Wilkey, Circuit Judge, dissented and filed opinion in which Tamm, MacKinnon, Bork, and Scalia, Circuit Judges, joined.
- Scalia, Circuit Judge, dissented and filed opinion in which MacKinnon and Bork, Circuit Judges, concurred.

I recall Judge Charles Clark, former Chief Judge of the Second Circuit, saying on several occasions that the en banc proceeding raised more questions than it settled. Additional judgeships would have a similar result. The fate of *Community for Creative Non-Violence* could befall the entire case law of the circuit courts of appeals, if the din of more and more voices is allowed to garble the message of the federal appellate judiciary.

C. A Decline in Prestige

As Justice Frankfurter noted early on, the government’s ability to attract and retain capable judges is, at least partially, inversely propor-
tional to the size of the federal judiciary.\textsuperscript{25} Until 1980, the total authorized number of lifetime appointments to the courts of appeals was fewer than the number of United States senators.\textsuperscript{26} The attraction of exclusivity is only human. An influx of new judges is bound eventually to devalue the judicial currency. Several years ago, then Justice Rehnquist commented:

To the extent that the element of prestige is gradually phased out of any judgeship, whether federal or state, we run the risk of depleting even further the reservoir of available talent to fill the judgeship.\textsuperscript{27}

Of course, salary and other conditions of employment are also factors in the equation. Higher private sector salaries are already a substantial deterrent to talented lawyers seeking judgeships. As Judge Oakes of the Second Circuit noted in a recent address, "[t]hat the judicial salaries are roughly in the category of third-year associates in the larger city firms is somewhat degrading."\textsuperscript{28} The loss of prestige occasioned by constant increases in the number of federal judges would only further deplete the package of benefits that, in the past, attracted some of the leading lights of the bar to the judiciary.

III. SOME NEW REMEDIES

A. The Civil Appeals Management Plan

For years I observed and participated in the operation of pre-trial conferences in our district courts, and my experiences convinced me that introduction of a similar program on the appellate level would produce equally fruitful results. Fourteen years ago, during my first year as Chief Judge of the Second Circuit, I proposed a program for appellate proceedings which injected court-sponsored mediation in settlement proceedings into appellate litigation. Instituted in 1974, the Civil Appeals Management Plan (CAMP)\textsuperscript{29} had several major aims: first, to encourage the res-

\textsuperscript{25} Cf. Lumbermen's Mut. Casualty Co. v. Elbert, 348 U.S. 48, 59 (1954) (Frankfurter, J., concurring) (increases in the number of federal judgeships will depreciate the quality of the judiciary).


\textsuperscript{27} Address by Justice Rehnquist, Mac Swinford Lecture, University of Kentucky 17 (Sept. 23, 1982) (available upon request from the Public Information Office, United States Supreme Court). Some argue that there has been a general decline in the prestige of judges for a variety of reasons. See, e.g., Judge Owen McGivern, The Decline of the Judiciary, N.Y.L.J., Oct. 7, 1988, at 1, col. 1.

\textsuperscript{28} Judge James L. Oakes, Changing Perspectives of Judging, 1947-1987, 22 Nebraska Transcript, Summer 1988, at 24, 27.


CAMP has its roots in Federal Rule of Appellate Procedure 33, which provides:

The court may direct the attorneys for the parties to appear before the court or a judge thereof for a prehearing conference to consider the simplification of
olution of appeals without participation by judges, thereby preserving time, their scarcest and most precious asset; second, to expedite the consideration of appeals that will be briefed and argued; third, to have staff counsel help the parties clarify the issues on appeal; and fourth, to dispose of minor procedural motions without expenditure of judicial resources. CAMP was unique among appellate case management programs because it undertook to wrestle with overcrowded dockets in a manner that was not purely administrative.\textsuperscript{30}

The centerpiece of CAMP is the staff counsel, who conducts the pre-argument conference and is responsible for administration of the program.\textsuperscript{31} With few exceptions, all civil cases docketed in the Second Circuit are referred to CAMP.\textsuperscript{32} The appellant must submit a "pre-argument statement" within ten days of docketing an appeal.\textsuperscript{33} Shortly thereafter, staff counsel issues a scheduling order, designating the week of argument, the proposed date for a CAMP conference, and deadlines for the filing of the record and briefs.\textsuperscript{34} Staff counsel is also authorized to dispose of motions dealing with the filing of oversize briefs.

Staff counsel, attorneys for the parties, and on occasion the parties themselves, participate in the conferences, which may last from one hour to several hours. When necessary, more than one conference is held. If the parties fail to resolve the dispute at conference, however, they retain the right to proceed to briefing and oral argument.

For staff counsel, the most gratifying aspect of CAMP is the role he

\textsuperscript{30}. CAMP has enjoyed an impressive record to date. CAMP accounted for 541 of the 2,944 cases disposed of by the Second Circuit during the year ending June 30, 1988. Another 1,109 cases were dismissed without a hearing on the merits, mostly through default, failure to meet filing deadlines, and non-CAMP settlement. CAMP's 18 percent decrease in cases requiring the time and resources of the circuit judges doubtless contributed to the court's ability to clear its calendar.

\textsuperscript{31}. The Second Circuit now has two full-time staff counsel.

\textsuperscript{32}. See Kaufman, \textit{The Second Circuit Review—Safeguarding Judicial Resources: The Joint Duty of Bench and Bar}, 52 Brooklyn L. Rev. 579, 586 n.24 (1986). An interesting by-product of CAMP was its use by the parties in ways never contemplated by its founders. In some large multi-defendant criminal cases, the parties asked for conferences to set dates for briefing and argument. They also capitalized upon this opportunity to avoid repetition in briefs and in the appendices, and to select a mutually acceptable lead counsel. This procedure is now conducted by a non-CAMP Staff Attorney in those multi-defendant actions that present intricate scheduling problems.

\textsuperscript{33}. See CAMP Rules, \textit{supra} note 29, at 113 (Rule 3(a)).

\textsuperscript{34}. See id. at 114 (Rule 4). The underlying concept of CAMP is that parties are more likely to resolve their differences before argument if they have not already invested large amounts of time and money in the preparation of the appeal. The first conference is, therefore, scheduled well in advance of the deadline for the filing of briefs.
plays in encouraging settlement. As one staff counsel explained, CAMP can, at its best, serve a “healing function” for parties who have been further driven apart by the litigation process. At the pre-argument conference, staff counsel invites the parties to state their views on the facts and legal issues of the case and to discuss the lower court opinion. While strictly abiding by the policy against coercing settlement, staff counsel does not hesitate to point out weaknesses in an attorney’s argument, or to recommend withdrawal of frivolous or hopeless appeals.

The Second Circuit vests considerable authority in staff counsel, so counsel for the parties are expected to approach these conferences seriously and to make a good-faith effort to resolve disputes before argument when possible. The pre-argument conference guidelines advise counsel to be “thoroughly prepared to discuss in depth the alleged errors and the reasons for their positions,” and to “obtain advance authority from their clients to make such commitments as may reasonably be anticipated.”

Participation in the CAMP conference is required of counsel, but the ultimate decision to settle, withdraw, or proceed to briefing and argument remains, of course, with the parties. Participation by judges in pre-argument conferences is a debatable issue, primarily because the psychological effect of having a judge conduct a conference is difficult to evaluate. The Second Circuit has insisted on excluding judges from participating in CAMP procedures. By keeping judges out of the conferences, CAMP reduces the demand on judicial resources and prevents the need for a judge to disqualify himself from an appeal because he had been present at the conference. The absence of judges also promotes a greater degree of candor.

By far the most important reason for withholding judicial participation in CAMP, however, is to avoid any perception that the court is attempting to pressure the parties to settle or withdraw the appeal. Staff counsel may provide the parties with a candid and objective assessment of their arguments. On occasion, he will go so far as to predict the outcome of the appeal. Because ordinary words assume unintended significance when clothed in judicial garb—staff counsel do not wear robes or preside in a courtroom, and the proceedings have an air of informality—similar comments, if uttered by a judge, would likely be viewed more as threats than as advice. To further promote candor in conferences, CAMP guidelines prohibit counsel for the parties, or anyone else, from informing

35. Interview with Frank Scardilli, Staff Counsel for CAMP, in New York City (Oct. 18, 1985).
36. CAMP Rules, supra note 29, at 121 (Guidelines for Conduct of Pre-Argument Conference).
37. The Seventh Circuit experimented with the effect of participation of judges in pre-argument conferences by holding staff counsel conferences with and without judges present. See J. Goldman, The Seventh Circuit Preappeal Program: An Evaluation (1982). The results of the experiment, however, showed that the presence of a judge in a pre-argument conference does not significantly affect the outcome of the conference. See id. at 43.
members of the court about discussions or actions at a conference. A party that breaches this confidence may be censured by the court.

I have long suspected the best justice is done when the parties voluntarily abandon litigation in favor of a solution that does not leave one party badly scarred and the other exalted. This is not merely a casual observation. Rather, it is a humble acknowledgement that the world is amorphous and is colored by emotions and experiences that are the very soul of the law. In another context, Edmund Burke observed: "All government, indeed every human benefit and enjoyment, every virtue, and every prudent act, is founded on compromise and barter." In CAMP I foresaw the possibility, and now have observed the reality, of recovering some of the humanity the judicial system has lost in trying to keep pace with the nation's explosion of litigation.

Regrettably, the tradition and propriety of the judicial office has prompted some to view the pursuit of compromise as incongruous with the judge's role. CAMP's most readily apparent contribution may be the expedition of case processing, but its success for over a decade also has a more profound meaning—that settlement and compromise are neither beyond the reach, nor beneath the dignity, of our intermediate appellate courts.

B. Private Judging

Another potential avenue of judicial reform is private judging. Faced with the avalanche of litigation, an increasing number of litigants are turning away from the state and federal courts to a growing network of private courts. The attractions are obvious. Private judging offers a prompt, comparatively inexpensive trial scheduled at the parties' convenience. It provides the opportunity to select the judge by agreement of the parties, and to ensure that he or she is knowledgeable in the particular subject under scrutiny. Use of private judges offers a way to avoid the inevitable publicity that accompanies a public trial. It also prevents confidential information from reaching the public domain. Most importantly in the minds of some observers, it indirectly speeds the wheels of justice in the public courts by removing a number of cases from the system.

Private judging takes several different forms. The parties' consensual decision to seek private adjudication may be sanctioned and regulated by statute. At other times, the arrangement is purely private. In some

38. See CAMP Rules, supra note 29, at 122 (Guidelines for Conduct of Pre-Argument Conference); In re Lake Utopia Paper, 608 F.2d 928, 929-930 (2d Cir. 1979), cert. denied, 444 U.S. 1076 (1980).
39. Edmund Burke, Speech on Conciliation with America, in 1 The Works of Edmund Burke 450, 500 (George Bell & Sons 1886).
40. For more discussion of the Author's views on the ramifications of private judging, see Kaufman, Crowded Courtrooms: Jury's Still Out on Judges-for-Hire, Wall St. J., Nov. 9, 1988, at A22, col. 3.
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states, most notably California, where the process is known as “reference,” the private judge is empowered by state law to render a final decision binding on the parties. Federal practice contains a modified and little used version of this procedure. In “exceptional” circumstances, the Federal Rules of Civil Procedure provide for the appointment of a special master. The master’s findings of fact, however, are binding only with prior consent of the parties.

Under California’s procedure, the formality of the trial varies according to the parties’ preference. The testimony of witnesses need not be recorded in any fashion. By agreement, the prevailing California rules of evidence and procedure may be ignored. The structure of a private judicial decision can also be tailored by prior agreement. A simple conclusory statement, X owes Y $10,000, is sufficient. Judges’ fees, often $300 per hour for trial time and $150 per hour for deliberation, are generally split equally.

The popularity of private judging rests on the five basic characteristics that set it apart from the public judicial system. Briefly noted, these advantages are speed, reduced costs, convenience, flexibility and privacy. The success of private judging depends on its ability to deliver, in the words of one promotional flier, “streamlined, cost efficient” justice. These factors are especially attractive to corporate and wealthy litigants.

Yet, there are a substantial number of unresolved problems with private judging. In an almost invidious way, the new procedure may nurture litigiousness by so tailoring the judicial process to the disputants’ needs that bringing a law suit becomes an attractive option.

Another problem is that the message of a sanctioned, encouraged, or even condoned private court system may be contradictory. The existence of a private judiciary with different operative principles might impair the legitimacy of the public courts and their role in society. From a young age, we are taught to revere the judiciary for its fairness and wisdom. We invest the courts with an almost ecclesiastic authority to interpret constitutional and community values. Much of the respect for the judiciary as an institution stems from the perceived fairness of the adjudicatory process. The use of private judging on a large scale could erode the core support for the rule of law in our society.

In the same vein, other long-term effects on the judiciary caused by the growth of private courts may also prove problematic. A deep concern is the possibility that judges will be lured from the public bench by the prospect of significantly greater remuneration in the private courts. But,

42. See Fed. R. Civ. P. 53(b).
43. See Note, supra note 41, at 1598 n.25.
most worrisome, widespread use of private courts could stunt the growth of the common law. Attracted by the speed and cost of the new bargain justice, parties could take important cases in commercial and property law, to name a few of the areas best suited to private judging, from the public system.

This latter concern could marginalize the courts' role in our communities. Not only are dockets ever increasing but criminal trials and appeals have become a veritable growth industry in the federal and state courts. State prisoners, for example, brought 23 percent more appeals to the federal courts in 1987 than in 1986.45 With the trend toward taking business and family disputes out of the courts, the public courts could become specialized arbiters of law in criminal law or in other important areas. Even public law cases—employment discrimination, for example—could be tried by a private judge utilizing public precedent. If these trends continue, lawyers may be able to shop for the system they think most likely to render a favorable result. These possibilities would also contribute to the receding societal role for the judiciary.

Despite such grim prognostications, private judging persists. Like Circe, private judging's attractions are irresistible to those who hear them. The ability to have a case scheduled purely at the parties' convenience, the luxury of choosing your judge by consent, and a quick and relatively cheap resolution are mesmerizing charms indeed. The jury is still out on private judging. Despite many reservations, I eagerly await developments of the idea.

C. Other Avenues

My continued enthusiasm for CAMP and my cautious appraisal of private judging are mirrored in my feelings for several other proposals for judicial reform currently on the table. While the following options are not as novel as CAMP and private judging, they also appear to be promising pathways toward an improved federal judiciary.

1. Increased Use of Arbitration

While arbitration is not new, it has, in recent years, achieved a new level of respectability. Most recently, the Supreme Court in Shearson/ American Express, Inc. v. McMahon,46 determined that federal securities claims under the Securities Exchange Act of 1934 are arbitrable. In 1985, the Court decided that federal antitrust issues were arbitrable.47 Other recent cases suggest a trend toward expanding the scope and legitimacy of arbitration.48

45. See 1987 Mecham Report, supra note 8, at 11.
This new acceptance of arbitration as a tool of alternative dispute resolution is encouraging. Nonetheless, numerous issues remain to be resolved before the federal judiciary can count on arbitration as a substantial aid in stemming the flow of litigation. Particularly, the contours of arbitration's niche in the federal court system remain unclear.

The federal courts play an important, if limited, role in supervising arbitration. They may become involved at the initiation of an arbitration proceeding if the parties disagree as to the scope or existence of an arbitration agreement, or if they believe there are important public policy implications to enforcing the provision. And, they must, of course, be called upon to enforce the final award.

But crucial questions of the relationship between the courts and arbitral tribunals remain. For example, when, if ever, are the decisions of arbitrators entitled to collateral estoppel? And, what effect is to be given arbitration awards in the arena of international law? Clearly, until such questions are answered, arbitration will lack the certainty and predictability necessary for it to reach its potential as a tool of justice. Fortunately, the Supreme Court's recent willingness to examine arbitration suggests that the requisite development is at hand.

2. Abolishing Diversity Jurisdiction

I am not as confident that the federal courts will soon see the end of another plague—diversity jurisdiction. The number of cases reaching the federal trial courts under diversity jurisdiction rose from 39,315 in 1980 to a high of 67,071 in 1987. Clearly, something must be done. Congress has considered abolishing diversity jurisdiction on several occasions, but has resisted such a fundamental change in the structure of the judiciary.

The typical legislative response to judicial overload has instead been to raise the amount in controversy requirement of diversity jurisdiction. In 1887, in response to the increased congestion occasioned by the broadening federal jurisdiction, Congress increased the jurisdictional amount to $2,000 to no avail. The year 1911 saw a further boost to $3,000. The present jurisdictional amount of $10,000 was instituted in 1958. In an-
other attempt to reduce the strain on the federal judiciary, a current House bill, if passed, will raise the amount in controversy requirement to $50,000.\textsuperscript{53} There is no reason to expect that this increase in the amount necessary for federal jurisdiction will have any more ameliorative effect than past increases. The only likely change will be in the amount of damages claimed in the pleadings.

3. Increased Use of Staff Specialists

Retaining the services of experts who have mastered certain legal specialties is another procedure that might prove beneficial for court units of appropriate size, such as an entire federal circuit or a large district court.\textsuperscript{54} This proposal goes far beyond such obvious and mundane tasks as assisting with pretrial hearings and motions. I foresee that, in the next century of the federal judiciary, the courts may request the disinterested expert opinions of legal scholars on complicated, specialized or unusually important issues. This is especially true in light of the growth of factually-complex civil case law noted above. Moreover, a substantial increase in law clerks might be avoided. The state could provide for the printing of the amicus briefs of experts, and perhaps also some modest compensation. Indeed, we might well develop a "tradition of regarding such public service as one of the most honorable responsibilities of the profession."\textsuperscript{55}

The use of staff specialists may further additional goals as well. Litigants could be saved most of the cost associated with use of the "language of the law," without any diminution in the quality of legal analysis presented to the courts, if these staff memoranda were prepared as a matter of course in every appropriate case. These briefs and memoranda would not only point out any important cases or issues overlooked by the parties in their briefs;\textsuperscript{56} in addition, by focusing the parties' and courts' attention on the legal issues truly in controversy and on the evidence necessary to resolve them, such adjunct views, much like pretrial conferences, would save time and money in preparing for trial and appeal.

CONCLUSION

Reflecting on my forty years on the federal bench, I am struck anew by the truth of Sir Francis Bacon's observation that time is the "greatest innovator" because it moves all things in the direction of entropy. It is

\textsuperscript{53} See The Federal Courts Study Act, H.R. 4807, 100th Cong., 2d Sess., 134 Cong. Rec. H10430, H10431 (1988). As of this writing, both houses of Congress have passed the bill, and it has been sent to the President. See id. at H10441.


\textsuperscript{55} Traynor, Badlands in an Appellate Judge's Realm of Reason, 7 Utah L. Rev. 157, 170 (1960).

\textsuperscript{56} The Second Circuit was the first to employ staff law clerks to perform similar functions with regard to \textit{pro se} cases. See Flannery & Robbins,\textit{ Pro Se Litigation}, 41 Brooklyn L. Rev. 769, 771 & n.6 (1975).
thus appropriate that I have here called for a type of "wisdom and counsel" necessary to counteract the impact on the courts which litigation in the next century is certain to produce.

But time is the greatest innovator in another sense. Time sometimes offers another chance. We, or those who come after us, are occasionally allowed to learn from our mistakes. As someone so memorably remarked, "Tomorrow is another day." As we contemplate tomorrow, let us examine our options with an innovative eye and an open mind.