

2016

## The Court of Appeals as the Middle Child

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### Recommended Citation

Raymond Lohier, *The Court of Appeals as the Middle Child*, 85 Fordham L. Rev. 945 (2016).

Available at: <http://ir.lawnet.fordham.edu/flr/vol85/iss3/1>

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# THE ROBERT L. LEVINE DISTINGUISHED LECTURE

## THE COURT OF APPEALS AS THE MIDDLE CHILD

*Raymond Lohier\**

### INTRODUCTION

It's said that middle children are most likely to be forgotten in the chaos of family life. The same could be said of the U.S. Courts of Appeals, which in 2016, mark their 125th anniversary, and which are the middle child of the federal judicial family.<sup>1</sup> As too few people, even academics, know, the courts of appeals were created in 1891 by the Evarts Act,<sup>2</sup> more than a century after the Constitution and the First Judiciary Act. The history of the courts of appeals has accordingly hovered somewhat uneasily next to that of the U.S. Supreme Court and the district courts. Setting aside the rare times when an appellate court strikes down or stays an important national statute or program, our work remains largely below the radar of American public debate. In contrast to our sibling Article III courts, district and Supreme, our intermediate appellate character is stunted in three different ways.

First, my colleagues and I operate largely as members of three-judge panels and are each not much more than one-third of a judge. Every member of a panel must always be open to compromise, persuasion, and moderation in order to secure a majority or, preferably, unanimity to decide a case. Second, we have less room to maneuver—less discretion, for lack of a better word—than our sibling courts in deciding cases. We are at once

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\* I want to thank Dean Matthew Diller and Professor Benjamin Zipursky for inviting me to give the 2015–2016 Levine Lecture. I also had the fortune of working on the Fordham Self-Study Committee with Professor Howard Erichson and several other members of the Fordham University School of Law faculty and staff in preparation for an American Bar Association accreditation visit.

1. This comports with our tendency to visualize the federal judicial system along a vertical axis. In *Making Our Democracy Work: A Judge's View*, for example, Justice Stephen Breyer lists “the different judicial tasks that ordinary federal courts perform at different levels of the judicial system” as follows: “trial courts are at the bottom, appeals courts in the middle, and the Supreme Court on top.” STEPHEN G. BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW* 137 (2010). After explaining that “[t]his hierarchical organization reflects the fact that the ‘higher courts’ have the last word in respect to the meaning of a text,” Justice Breyer helpfully clarifies that the U.S. Supreme Court, not the courts of appeals, has the final authoritative word. *Id.*

2. Ch. 517, 26 Stat. 826 (1891).

more tightly bound by Supreme Court precedent than the Supreme Court itself appears to be these days, and we are also arguably more bound by principles of deference to a trial court's factual findings and discretionary judgment calls. Finally, the pressure of our ballooning appellate docket and the nature of our intermediate role have pressed us to focus more than ever before on our primary functions of error correction and solving the actual and discrete problems before us, so that we can decide cases quickly.

### I. A BRIEF HISTORY

Understanding the modern role and predicament of the regional federal courts of appeals requires some understanding of how, and why, they were formed.

The idea of a right to appeal has, of course, been a bedrock of our federal system. The First Judiciary Act of 1789 not only created the district courts but also fashioned what might loosely be regarded as intermediate courts that served both trial and appellate functions.<sup>3</sup> By at least the mid-1850s, these so-called "circuit courts" consisted of one Supreme Court Justice who "rode circuit," usually once a year, one circuit judge, and one district judge. Rather than tasking a separate cadre of intermediate appellate judges with the function of reviewing the work of a district judge, the circuit courts were vested with original jurisdiction to consider cases that substantially overlapped with the original jurisdiction of the district courts.<sup>4</sup> This would be the equivalent today of Justice Ruth Bader Ginsburg (the Second Circuit's current circuit Justice), Chief District Judge Colleen McMahon, and I convening together to preside over a once-a-year sampling of federal cases in Manhattan, determine questions of both fact and law, and otherwise share responsibility for trial and appellate functions. Looking back, the process was essentially preposterous.

By the late 1800s, the Supreme Court was overtaken by an explosion in the number of cases on its docket, arising from advances in technology, a sharp increase in patents, a growing population, and the significant expansion of federal jurisdiction through federal laws following the Civil War and Reconstruction.<sup>5</sup> It became virtually "impossible for the circuit justices or the circuit judges to attend all the sittings of these courts,"<sup>6</sup> and the remaining district judge on the circuit panel was sometimes left to review his (it was always "his" back then) own decisions on appeal. In 1819, the Supreme Court had disposed of 53 out of 131 cases on its docket.<sup>7</sup> By 1886, the Court's docket had ballooned to nearly 1,400 cases, of which only 451 were disposed during the Term.<sup>8</sup> And by 1890, the Court faced a three-year backlog in work.<sup>9</sup>

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3. *See* Judiciary Act of 1789, ch. 20, 1 Stat. 73, 74–75.

4. *See id.* at 78–79.

5. *See* 21 CONG. REC. 3403 (1890).

6. *Id.* at 3404.

7. *See id.* at 3409.

8. *See id.*

9. *See id.*

Prompted by certain members of the Supreme Court, the House of Representatives conceived of a standalone intermediate circuit court of appeals devoted exclusively to appellate, rather than fact-finding functions, leaving original jurisdiction over most federal cases to district courts acting as the finders of fact.<sup>10</sup> It is interesting to me that from the start, then, Congress viewed the primary function of these intermediate courts to be to reduce or “unload the docket of the Supreme Court.”<sup>11</sup>

As is now well known only among judicial aficionados, the modern regional circuit courts of appeals were finally established by the Judiciary Act of 1891, also known as the Evarts Act after its chief sponsor, Senator William Evarts of New York.<sup>12</sup> The Evarts Act eliminated the old circuit courts and relieved the Supreme Court of overseeing most judgments of the district courts.<sup>13</sup> From that point on, the Justices were largely out of the pedestrian business of settling individual disputes, reviewing findings of fact, or “correcting substantial errors in the conduct of trials and the application of law.”<sup>14</sup> They would be able to focus their attention on articulating national law.<sup>15</sup> The newly created courts of appeals, meanwhile, immediately received the Supreme Court’s unfinished and unglamorous work—its judicial hand-me-downs. Almost all of the Court’s appellate cases involving direct review of district court final judgments were transferred to the courts of appeals, as were the posttrial or posthearing determinations of the now defunct circuit courts.<sup>16</sup>

The Evarts Act, however, did grant the courts of appeals one significant power in relation to the Supreme Court that we might consider regaining. Although the power turned out to be short lived, circuit courts were authorized to certify difficult and important questions of law to the Supreme Court, while the Supreme Court itself simultaneously received the power to issue writs of certiorari to choose cases to review and decide in its discretion.<sup>17</sup> The circuit certification power signified that the Supreme

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10. See H.R. REP. NO. 50-942, at 3 (1888).

11. *Id.*

12. Circuit Court of Appeals (Evarts) Act of 1891, ch. 517, 26 Stat. 826. The Evarts Act represented a compromise between a majority of legislators who sought to relieve the Supreme Court of its congested caseload while retaining its status as a unitary court and a minority who were concerned that ordinary citizens would no longer have access to the Supreme Court. See Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1653 (2000).

13. See generally 26 Stat. 826.

14. See JEFFREY B. MORRIS, FEDERAL JUSTICE IN THE SECOND CIRCUIT: A HISTORY OF THE UNITED STATES COURTS IN NEW YORK, CONNECTICUT & VERMONT 1787 TO 1987, at 94 (1987).

15. *Id.* at 93–94.

16. The Evarts Act also provided that the Supreme Court would avoid certain categories of cases altogether. See 26 Stat. at 828. Court of appeals decisions would be final and not subject to further automatic review by the Supreme Court, for example, in diversity jurisdiction cases and “in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases.” *Id.*

17. See *id.*; see also Hartnett, *supra* note 12, at 1649–57.

Court would never be “alone in deciding” what questions of law were important for it to review.<sup>18</sup>

Since 1891, the fundamental role of the courts of appeals has remained fairly the same, with one important exception. We still primarily review claims of factual or legal error by the district courts; and because of the Supreme Court’s limited use of its review power, we remain effectively the forum of last resort in 99.9 percent of all federal cases.<sup>19</sup> Unfortunately, our authority to certify important legal questions to the Supreme Court was eliminated in 1925.<sup>20</sup> As a result, as we all know, today’s Justices decide which cases to hear with the unbridled exercise of their certiorari power, while the courts of appeals are left to plead, cajole, and exhort them to take up important questions of law through opinions, articles, speeches, and the like. It has occurred to me that perhaps we should resurrect certification to permit each circuit acting in banc to certify at least one question to the Court each year.

Having lost the power of federal certification, the appellate courts still managed to retain other important functions beyond error correction. For example, we remain responsible for maintaining uniformity of legal doctrine within our geographical circuits and, to a lesser extent, nationwide. Let me pause for a moment on the issue of national uniformity as an objective of middle courts. The ease of electronic research and the accessibility of databases and journals to determine the law of sister circuits have made circuit splits more well conceived and intentional, and the goal of national uniformity on an increasing array of issues a real possibility. And to the extent circuit splits (intended or not) exist and linger, circuit courts today act as miniature laboratories, supplying lines of legal analysis for the benefit of the Supreme Court on controversial and important national legal issues, so that prodding—rather than merely anticipating—Supreme Court pronouncements in difficult cases has become a small but fixed part of our federal appellate culture.

#### A. *The Middle Status of Modern Courts of Appeals*

Despite our 125 years of service, the public and, I am afraid to say, even the bar know relatively little about what we are or do. Most will not know the number of authorized circuit judgeships,<sup>21</sup> and many lawyers and law

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18. See Hartnett, *supra* note 12, at 1651.

19. See *The Justices’ Caseload*, SUP. CT. U.S., <https://www.supremecourt.gov/about/justicecaseload.aspx> (last visited Nov. 19, 2016) [<https://perma.cc/8DYM-LXY7>].

20. See Hartnett, *supra* note 12, at 1661. In 1925, we were unceremoniously stripped of the certification power, and the Supreme Court grabbed “the absolute and arbitrary discretion” to decide its own docket. *Id.*

21. The number is 179 compared to 9 Justices and 673 authorized district court judgeships. See *Authorized Judgeships*, U.S. CTS., <http://www.uscourts.gov/judges-judgeships/authorized-judgeships> (last visited Nov. 19, 2016) [<https://perma.cc/3MM4-PQMK>]. For the regional courts of appeals, 167 judgeships are currently authorized by law, plus an additional 12 on the Federal Circuit, for a total of 179 circuit court judgeships—a

students, let alone lay persons, will not even know how many circuit courts exist without Googling it to see that there are thirteen in all, including the specialized Federal Circuit. On the Second Circuit there's even the joke that family members or friends of Second Circuit judges will ask when we can expect to graduate to the First Circuit. (In response to this widespread lack of civic knowledge, under the stewardship of Chief Judge Robert Katzmann, Circuit Executive Karen Milton, Clerk of Court Catherine Wolfe, Librarian Luis Lopez, and many others, the Second Circuit has embarked on a program to educate young students in and around New York City about the role of the federal courts, and especially the federal appellate courts, in government. I believe this worthwhile program will soon be expanded to all three states within the circuit. With the backing of the Judicial Conference, the main policymaking arm of the federal judiciary, this program should soon also expand nationwide. Educating the public, young and old, about the judiciary can only serve to spur public confidence in the federal courts.)

Those most familiar with our work will recognize our difficulty in grappling with the waves of cases that come before us. On one side is the automatic right to appeal based on genuine error or, more often, little more than unmerited dissatisfaction with a district judge's final judgment or an executive agency's final order; taking our judicial obligations seriously means that deciding even obviously meritless appeals requires care and time. On the other side is the Supreme Court's recent reluctance to engage in plenary review of more than about 65 federal cases nationwide each Term, out of the roughly 55,000 cases resolved by the courts of appeals in each of the last six years.<sup>22</sup> In addition, as I will explain shortly, Congress's relative inactivity of late often means that our interpretation of statutes, right or wrong, will be the final word. Ordinary litigants, with no realistic shot of having their cases heard by the Justices, thus look to us exclusively for practical final relief in all manner of cases, even though in any given case we circuit judges know that our older, stronger sibling is looking over our judicial shoulder.

With this background in mind, let me briefly describe the current interactions of the courts of appeals with Congress, the Supreme Court, and the district courts.

### *B. Congress*

A main staple of the appellate court diet remains the interpretation of federal statutes supplied by Congress; but over the last three decades, Congress's enactment of laws has contracted sharply rather than expanded. There has not been a ramp up of federal legislation of the magnitude that followed the Civil War and Reconstruction and caused the explosion in

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number which translates to roughly nine times the number of Justices but only a quarter of the number of district judges. *See id.*

22. *See Federal Judicial Caseload Statistics 2015*, U.S. CTS., <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2015> (last visited Nov. 19, 2016) [<https://perma.cc/9388-JFH6>]; *The Justices' Caseload*, *supra* note 19.

judicial caseloads. In fact, comparing the ten-year period of congressional activity from 1985 through 1994 to that from 2005 to the present, the enactment of new federal laws has dropped by over a third.<sup>23</sup> Thirty years ago, the 100th Congress enacted 761 laws, while two years ago, the 113th Congress passed 296 laws, nearly 500 fewer.<sup>24</sup> In my view, the slowing rate of lawmaking has had the effect of giving our courts time to settle our precedent in several important and previously uncharted areas of the law through precedential opinions. In recent years, this has been especially true of immigration appeals, in which the percentage of precedential opinions issued by the Second Circuit has plummeted to virtually zero. Conversely, I anticipate that issues relating to relatively new and substantial statutes—for the Second Circuit, the Dodd Frank Act is but one example—will percolate through the judicial system and eventually compel us to issue more opinions.

In the meantime, almost all of the work of our circuit courts is off the congressional radar. Circuit opinions, with or without the intercession of the Supreme Court, so rarely prompt a ripple in Congress that it becomes memorable when they do. The few ripples more often arise in cases involving issues of national security. A recent example was our decision in *ACLU v. Clapper*,<sup>25</sup> which stirred a vigorous debate in Congress in 2015 when we held that the text of section 215 of the USA PATRIOT Act did not plainly authorize the systematic bulk collection of domestic phone records by the National Security Agency.<sup>26</sup> Even more recently, Senator Orrin Hatch of Utah cited our court's decision in *Microsoft Corp. v. United States*,<sup>27</sup> in which we held that the Electronic Communications Privacy Act (ECPA) did not authorize the government to obtain electronic communications stored outside the United States.<sup>28</sup> Senator Hatch and other members of Congress pointed to both the majority opinion and a concurring opinion in that case to ask the Department of Justice to work with Congress on fixing the ECPA.<sup>29</sup> On extremely rare occasions, specific congressional involvement arises in the context of a discrete case, as when individual Senators or Representatives seek to influence how we decide

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23. See AEI & BROOKINGS INST., VITAL STATISTICS ON CONGRESS tbl.6-4 (2014), [https://www.brookings.edu/wp-content/uploads/2016/06/Vital-Statistics-Chapter-6-Legislative-Productivity-in-Congress-and-Workload\\_UPDATE.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/Vital-Statistics-Chapter-6-Legislative-Productivity-in-Congress-and-Workload_UPDATE.pdf) [<https://perma.cc/WZ7R-K2RS>].

24. See *id.*; *Public Laws*, CONGRESS.GOV, <https://www.congress.gov/public-laws/113th-congress> (last visited Nov. 19, 2016) [<https://perma.cc/T888-WCXF>].

25. 785 F.3d 787 (2d Cir. 2015).

26. See *id.* at 826. Also consider the remarkable series of decisions from several circuit courts regarding the constitutionality of federal and state prohibitions against the marriage of same-sex couples. See, e.g., *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012); *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010); *McConnell v. United States*, 188 F. App'x 540 (8th Cir. 2006). Those decisions received significant attention from the general public as well as Congress and other federal and state officials.

27. 829 F.3d 197 (2d Cir. 2016).

28. See *id.* at 222.

29. See Letter from Christopher A. Coons et al., Sponsors of the Int'l Commc'ns Privacy Act, to Loretta Lynch, Att'y Gen. (Oct. 13, 2016), [http://www.hatch.senate.gov/public/\\_cache/files/3e496a4b-fe64-423d-a48f-746e9f9b8ea5/Letter%20to%20AG%20Lynch,%20October%2013,%202016.pdf](http://www.hatch.senate.gov/public/_cache/files/3e496a4b-fe64-423d-a48f-746e9f9b8ea5/Letter%20to%20AG%20Lynch,%20October%2013,%202016.pdf) [<https://perma.cc/C5SF-PFJF>].

important legal issues, such as the indefinite detention provisions of the National Defense Authorization Act for Fiscal Year 2012, by submitting amicus briefs pressing their points of view.<sup>30</sup>

There also are continuing efforts to get Congress's attention on broader issues of statutory language. Fairly recently, for example, the Judicial Conference of the United States sought to revitalize and readvertise an excellent project to promote communications between federal courts of appeals and Congress.<sup>31</sup> Under the project, "courts of appeals identify opinions that point out possible technical problems in statutes [such as ambiguities and gaps] and send those opinions to Congress for its information and whatever action it wishes to take."<sup>32</sup> Yet, for whatever reason, only three opinions were submitted to Congress under this project in 2015 and only fifty-two altogether have been submitted since 2007.<sup>33</sup> Of course, other ways to solicit legislative attention exist short of using this formal mechanism. An opinion that cries for congressional action or decries congressional inaction is one example. But, as I explain later, that opinion is apt to be ignored by Congress if it comes from a circuit court, rather than even a lone dissenter on the Supreme Court.

### C. The Supreme Court

The Supreme Court now tends exclusively to the most controversial and important questions of national law. Having shed its error-correction function 125 years ago, each Term the Court devotes a significantly greater proportion of its decisional diet than do the courts of appeals to questions of constitutional rather than statutory interpretation.<sup>34</sup>

But even in cases that pivot on the interpretation of statutes, the media, public officials, and the public at large understandably pay vastly more attention to the Supreme Court than to the circuit courts.<sup>35</sup> Take, for example, Lilly Ledbetter's well-known gender discrimination lawsuit a decade ago against Goodyear Tire under the Equal Pay Act.<sup>36</sup> No one

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30. In general, congressional involvement in specific cases is extremely rare. Nevertheless, in 2013, for instance, Senators John McCain and Lindsay Graham successfully implored a panel of the Second Circuit, on which I sat, by submitting an amicus brief providing a rationale for the enforcement of the indefinite detention provisions of the National Defense Authorization Act of 2012 that differed slightly but in important ways from the rationale offered by the executive branch.

31. See JUDICIAL CONFERENCE OF THE U.S., STRATEGIC PLAN FOR THE FEDERAL JUDICIARY 15–16 (2015); see also ROBERT A. KATZMANN, COURTS AND CONGRESS 76–78 (1997).

32. Robert A. Katzmann & Russell R. Wheeler, *A Mechanism for "Statutory Housekeeping": Appellate Courts Working with Congress*, 9 J. APP. PRAC. & PROCESS 131, 133 (2007).

33. See *Project on Statutory Construction Promotes Inter-Branch Communications*, U.S. CTS. (Sept. 10, 2015), <http://www.uscourts.gov/news/2015/09/10/project-statutory-construction-promotes-inter-branch-communications> [https://perma.cc/B4D7-S5L3].

34. See BREYER, *supra* note 1, at 139.

35. I should make clear that I do not believe that opinions should be written to draw attention to themselves by overly broad pronouncements or ornate language.

36. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

remembers the Eleventh Circuit's initial decision rejecting Ledbetter's claim,<sup>37</sup> but everyone recalls Justice Ginsburg's dissent in that case,<sup>38</sup> which prompted Congress and President Obama to pass the Lilly Ledbetter Fair Pay Act.<sup>39</sup> Nor, I think, would a dissenting opinion from the Eleventh Circuit, even of the force of Justice Ginsburg's dissent in that case, have prompted Congress or the President to pass that Act. In fact, had Lilly Ledbetter's case not been heard by the Supreme Court, I doubt we would remember her today.

There are exceptions to our middle-child status. Circuit court decisions sometimes not only get their day in the sun but also significantly impact national events and the public discourse. The *Clapper* case,<sup>40</sup> the same-sex marriage equality cases,<sup>41</sup> cases relating to racial equality or the First Amendment, and so on, confirm that the federal courts of appeals can and do confront and decide real, concrete disputes involving critical problems of national importance. The Fifth Circuit of the mid-1950s and 1960s, for example, had the famous phalanx of "unlikely heroes"<sup>42</sup>—Judges Elbert Tuttle, John Minor Wisdom, John Robert Brown, and Richard Rives—without whom the promise of *Brown v. Board of Education*<sup>43</sup> in the southern states would almost surely have failed. Crises, chronic injustice, and profound national constitutional problems can, consistent with Supreme Court precedent, justify and prompt a powerful and memorable response from the courts of appeals and, in turn, prod the Supreme Court in the same direction. We have to keep in mind, though, that these cases are the exceptions, not the rule.

#### D. The District Courts

The circuit court's sibling on the other side, the district court, today represents the foundation of the federal judicial system. Its basic function is as well known in the popular imagination as that of the Supreme Court. Since the first session of a district court in lower Manhattan in November 1789, the greatest power of the district courts has been their power to find facts.<sup>44</sup> Because of the significant deference circuit courts accord to factual

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37. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 421 F.3d 1169 (11th Cir. 2005), *aff'd*, 550 U.S. 618.

38. See *Ledbetter*, 550 U.S. at 643 (Ginsburg, J., dissenting).

39. Pub. L. No. 111-2, 123 Stat. 5 (2009).

40. *ACLU v. Clapper*, 785 F.3d 787 (2d Cir. 2015).

41. See, e.g., *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012); *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010); *McConnell v. United States*, 188 F. App'x 540 (8th Cir. 2006); *Smelt v. County of Orange*, 447 F.3d 673 (9th Cir. 2006).

42. See generally JACK BASS, UNLIKELY HEROES (1981).

43. 349 U.S. 294 (1955).

44. The public seems to understand the idea of trials, hearings, and witnesses in court. Though the distinction between state and federal court may be lost, the media, movies, television shows, and other entertainment routinely depict the lone trial judge presiding. With the exception of moot courts, furthermore, much of the practical or clinical legal education in the United States, to the extent it focuses on federal courts, attends to trial rather than appellate court proceedings, including examinations of witnesses and the presentation of procedural and evidentiary issues before trial judges.

findings, it is, I think, the most important power in the judicial process.<sup>45</sup> Whether appellate deference to factual findings makes sense is no longer debated or even genuinely debatable.<sup>46</sup> The district court judge's initial determination of material adjudicative facts often determines the outcome of an appeal. Even the Supreme Court will refuse to second guess a district court's factual conclusion that has been left undisturbed by a circuit court.<sup>47</sup>

Indeed, for all the appeal of the right to appeal, the rate of reversal of district court judgments is astonishingly low. In 2015, for example, the Second Circuit reversed in fewer than 8 percent of the merit dispositions involving district court judgments.<sup>48</sup> Accounting for some errors and remands short of reversal, I estimate that our reversal and vacatur rate is probably about 10 percent. The rate of reversal of district court judgments in the Fourth Circuit in 2015 was even lower, at less than 5 percent.<sup>49</sup>

I am confident that a compelling reason for these low reversal rates is the exceptional level of professional competence among district judges. Our recognition of their institutional competence is reinforced, though, by a background concern that the assembly line from district to appellate court would grind to a virtual halt if a substantial percentage of cases were returned as defective. In other words, if losing litigants believed they had, say, a 30 percent or higher chance of prevailing on appeal, the automatic *right to appeal* would, for the courts, be tantamount to an *actual appeal* in virtually every case. It is for this practical reason that our precedents and procedures so strongly to favor affirmance. Among other imbalances favoring appellees (and district court decisions), appellate courts may affirm, but not reverse, for any reason that can be found in the record, even a reason not relied upon by the parties. Appellants, not appellees, have a steep hill to climb on appeal in order to prevail.

Another primary reason for the low reversal rates is that we accord significant appellate deference to the decisions of district court judges who are "on the ground," so to speak, in criminal and civil cases. Since 2008, for example, the Second Circuit has held that substantive appellate scrutiny of criminal sentences is "particularly deferential"<sup>50</sup> and that district judges

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45. Second Circuit Judge Jerome Frank aptly described that power years ago: "Usually," he said,

the trial judge's fact-finding is accepted by the upper court on an appeal, if there is an appeal. Because of the incontestable mistakes in the trial judge's findings (or guesses), innocent men go to jail, and other men suffer defeat in civil law suits they ought to win, thus losing their property, their fortunes, their jobs or their reputations.

Jerome N. Frank, *Some Reflections on Judge Learned Hand*, 24 U. CHI. L. REV. 666, 676 (1957).

46. *The Federalist No. 81* recognizes that facts determined by district courts will, in the ordinary course, not be reexamined by appellate courts. See THE FEDERALIST NO. 81 (Alexander Hamilton).

47. See BREYER, *supra* note 1.

48. See E-mail from Catherine Wolfe, Clerk of Court, Second Circuit, to Raymond Lohier, Judge, Second Circuit (Mar. 9, 2016, 15:32 EST) (on file with the *Fordham Law Review*).

49. See *id.*

50. *United States v. Messina*, 806 F.3d 55, 61 (2d Cir. 2015).

have “considerable sentencing discretion”<sup>51</sup> and “very wide latitude to decide the proper degree of punishment for an individual offender and a particular crime.”<sup>52</sup> Some point to this language to suggest that challenges to criminal sentences since *United States v. Booker*<sup>53</sup> from both the government and the defense present a category of appeals that today are doomed to fail. To the defendant appealing his sentence, in other words, our standard of deference understandably may seem fatal in fact. In truth, since the reasonableness standard of review was first articulated, my court has only once set aside a sentence on the articulated ground that it was substantively unreasonable.<sup>54</sup> For the most part, we have yet to develop a reasoned way to assess when a district judge’s statutorily authorized sentence is too high or too low. Instead, panels too often (at least appear to) strain to resolve substantive challenges to a sentence by summary order or to employ procedural error to undo a sentence that gives the panel pause.<sup>55</sup>

So where does this put us? An excellent, recent book on the federal courts sponsored by the Supreme Court Historical Society and the Federal Judicial Center frames where the circuit courts find themselves today.<sup>56</sup> It says that in the last thirty years, “[c]aseload pressures [have] had a major impact on the courts of appeals, where cases per judgeship greatly outpaced district court cases. From 1987 to 2014, filings per district judgeship increased on average by 7 percent, compared with a 46 percent increase for judgeships in the regional courts of appeal.”<sup>57</sup> The 46 percent increase translated into a rise in “[a]ppellate filings . . . from over 35,000 in 1987 to almost 55,000 in 2014.”<sup>58</sup> But, faced with a near doubling in the number of appellate filings, “Congress added appellate judgeships only once,” in 1990, “lift[ing] the total judgeships in the regional courts of appeals [by a mere eleven], from 156 to 167.”<sup>59</sup>

Even if we account for the tremendous contributions of senior circuit judges, without whom few if any courts of appeals could function, these

51. *Id.* at 66.

52. *United States v. Cavera*, 550 F.3d 180, 188 (2d Cir. 2008).

53. 543 U.S. 220 (2005).

54. *See United States v. Aldeen*, 792 F.3d 247 (2d Cir. 2015).

55. Appeals from dismissals of civil complaints under Rule 12 of the Federal Rules of Civil Procedure and from grants of summary judgment under Rule 56 are likewise unlikely to succeed, but it is unclear why this is so. It would be interesting to see more scholarship and statistical analysis about this phenomenon because these appeals arguably involve only legal questions. As to the former Rule 12 dismissals, one reason may be the plausibility requirement under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), which, if wrongly deployed, threatens to deprive worthy litigants of trial by investing district judges with discretion to determine which inferences from the allegations in a complaint are plausible and which are not.

56. *See* PETER CHARLES HOFFER ET AL., *THE FEDERAL COURTS: AN ESSENTIAL HISTORY* 437 (2016).

57. *Id.*

58. *Id.*

59. *Id.* Even when we account for senior judges, the proportion of all circuit court judges to all district court judges has been roughly the same since 1950. In 1951, the end of the Learned Hand Court, there were roughly sixty cases per active judge. Last year, the number of terminated cases per active judge stood at over 550. *See* E-mail from Catherine Wolfe, *supra* note 48.

numbers reflect a situation that is nearly as unsustainable as the Supreme Court faced in 1891. In fact, the reality may be more dire today: there is no congressional relief in sight this time; a restoration of the certification power is off the table; and a meaningful increase in appellate judges is neither a realistic political option nor clearly desirable, because it might threaten to degrade collegiality and the maintenance of uniformity. So the regional courts of appeals, especially the busiest courts—the Second, Fourth, Fifth, Ninth, and Eleventh Circuits—have each been left to devise their own modes of relief consistent with preserving regional and national uniformity in procedure and legal doctrine.

## II. ADMINISTRATIVE SOLUTIONS

With this context for understanding some of the real problems the courts of appeals face today, I turn to some administrative solutions that might help control appellate caseloads, as well as the pace of work, and ensure that we have adequate time to deal with harder cases culminating in opinions. These procedures would dispose of straightforward cases more efficiently and even relieve us from having to decide certain cases altogether. The remainder of this Article focuses on three solutions in particular: summary orders, certification of questions to other courts, and the voluntary dismissal program that the Second Circuit recently implemented for immigration appeals.

Although all cases are in some sense equally important, in describing these procedures, it is important to keep a few realities in mind. First, a modern difficulty busy courts of appeals face is allocating resources efficiently and deciding cases quickly while at the same time taking seriously the individual and corporate rights at stake in each case. Moreover, in my experience, broad judicial philosophies are rarely relevant in the day-to-day work lives of most modern circuit court judges, even when deciding difficult cases. I have no doubt there are textualists, purposivists, formalists, and realists among us (although I have to say that I have yet to meet a colleague who does not fancy himself or herself a realist). But these views, or stances, are in much sharper relief on the Supreme Court than on the courts of appeals—or at least the Second Circuit. In the vast majority of intermediate appellate cases, none of these labels stick, and I have yet to encounter liberal or conservative bulls in the appellate china shop, nakedly kicking their way backward from policy preference to legal analysis in any case. In part this is because the overwhelming majority of cases are instead matters largely of administration, collegiality, and incremental judicial steps.

It is no wonder, then, that less than 3 percent of Second Circuit cases, for example, have resulted in dissents in the last few years and that about 87 percent of the regional appellate cases nationwide last year appear to have been resolved by some form of summary disposition.<sup>60</sup> There is a good explanation for this trend: dissents and opinions take time, and time is a

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60. See E-mail from Catherine Wolfe, *supra* note 48.

judicial commodity at odds with the pressure to dispose quickly of so many cases—a pressure formed by both our rising appellate caseload *and* the increasing difficulty of our difficult cases. As for case difficulty, Congress’s unwillingness to legislate either of its own accord or in response to judicial error, the Supreme Court’s reluctance to review and resolve more of these cases, and the willingness of some district judges to fill the vacuum left by both have all combined to force the courts of appeals to spend more time on ever-longer precedential opinions in harder cases.

#### A. Summary Orders

Summary orders are the first procedure to alleviate these problems that I want to discuss. These orders remain a somewhat controversial administrative or managerial feature of federal appellate work, even though they have been employed since at least the 1960s. When I use the terms “administrative” or “managerial,” I do not mean to obscure the challenging nature of many of those cases that are ultimately decided by summary disposition. Nor do I mean to suggest that the decision to proceed by summary order rather than opinion is not itself often a delicate matter of a panel’s collective judgment and discretion. But last year, and for several years now, roughly 90 percent of our appeals in the Second Circuit were disposed of summarily.<sup>61</sup> Immigration appeals, which I discuss below, accounted for roughly 15 percent of these summary dispositions.<sup>62</sup> To put things in broader historical perspective, a summary disposition rate of 90 percent compares to the 58 percent of cases decided by summary order in the 1983–1984 term, and 25 percent in 1969.<sup>63</sup> Summary orders are now the Second Circuit equivalent of dark matter in the universe, occupying a vast procedural and decisional space. But, at least since a rule change in 2007 allowed parties to cite them, these orders have received surprisingly little attention, even though the degree to which we deploy them today signals an important shift in the nature of the federal appellate job in the busier circuits.

So why do we rely on summary orders so much more today?

One part of the answer is that summary orders are a foreseeable response to the burden imposed by the automatic right to appeal. Another, slightly more intriguing part of the answer may be that several circuit judges *perceive* that they have relatively little substantive guidance left to give in several areas of the law. The well-settled law relating to guilty pleas, sentencing, and even substantive liability in criminal cases provides a good example of this phenomenon. When we identify recurring careless errors by district courts and issue an opinion rather than an order relating to already clearly established law, the opinion really acts as a forceful reminder masquerading as new guidance.

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61. *See id.*

62. *See id.*

63. *See id.*

Finally, as I have already suggested, recent congressional inaction may provide yet another answer to the puzzle of our increasing reliance on summary orders. Significant substantive laws ordinarily justify more opinions insofar as they require courts to interpret them. But opinions about the same statute run out over time as the law becomes settled.<sup>64</sup> By contrast, areas of the law in which the Supreme Court has provided little concrete guidance but that have undergone rapid changes because of private or executive government action may be ripe for substantially more opinions. Here, I think immediately of statutory issues relating to privacy, technology, and the extraterritorial application of our domestic laws.

The Second Circuit's rule governing summary orders instructs that an appellate panel may rule by summary order "[w]hen a decision in a case is unanimous and each panel judge believes that no jurisprudential purpose is served by an opinion," that is, a ruling having precedential effect.<sup>65</sup> The rule recognizes that summary orders, in addition to helping the court meet the demands of a rising caseload, are appropriate in cases where inadequate briefing, insufficient confidence in the record, or a determination that an issue is unlikely to recur, convinces a panel to avoid the much more time consuming process of generating an opinion and to proceed instead in tiny, judicious, nonprecedential steps.<sup>66</sup>

Of course, relying on summary dispositions as often as we do raises a number of potentially thorny problems. First, when some of our summary orders are not so "summary," they drain rather than protect judicial resources. Second, summary orders may confuse ordinary litigants into believing that they are designed to be as well conceived as opinions, rather than to quickly settle specific disputes, thereby spurring requests for rehearing instead of ending the appeal. Third, because the orders that are *truly* summary (that is, short) avoid any meaningful recitation of the facts or law to which future parties can latch, it is virtually impossible to ensure that a panel will summarily dispose of like cases with like facts and issues in the same way. This problem remains a vexing one to me and to others, but to my knowledge, no one has yet devised a way to avoid it. Fourth, a panel's decision to proceed by summary order and the order itself are sometimes completely wrong. Indeed, in the last five years, the Supreme Court has

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64. Justice Thomas recently also attributed the Supreme Court's "shrinking docket" to the decrease in congressional legislative activity. Congress, he said, "has not been enacting many major pieces of legislation that lead to litigation." Adam Liptak, *Justice Thomas, Reticent on the Bench, Is Effusive About His Time There*, N.Y. TIMES (Oct. 31, 2016), <http://www.nytimes.com/2016/11/01/us/politics/justice-clarence-thomas-25-years-on-supreme-court.html> [<https://perma.cc/V7U4-CUHN>].

65. 2D CIR. IOP 32.1.1(a). In other words, an appellate panel may rule by summary order when the order would not have precedential effect. *See id.*

66. Sometimes, for example, a panel member will persuade her colleagues to proceed by summary order in exchange for unanimity and to avoid a dissent. In those instances, the divisive issue is left for another day and another panel.

granted the petition for a writ of certiorari and issued full opinions reversing three cases that the Second Circuit resolved by summary order.<sup>67</sup>

Despite these and other drawbacks, I have come to believe that summary orders remain highly effective vehicles for us to conduct our primary task of error correction. They remind us that the principal judicial task of giving guidance on federal law remains with the Supreme Court, not the circuit courts; they permit panels to focus discretely on the particular case and the actual issues presented by the parties; they offer a quick and efficient way to deal with the mass of noncontroversial cases where established law and deference to district court determinations should be dispositive—and, yes, they sometimes help us duck difficult and contentious issues. In a word, summary orders offer the courts of appeals the closest equivalent to the power of asserting “certiorari denied.”

Some scholars and advocates may think we should largely be out of the business of drafting summary orders. The courts of appeals are better than that, they will assert. Of course, the assertion ignores the fact that issuing summary orders is not all we do. On the Second Circuit, for example, approximately 300 of our cases resulted in a published opinion last year.<sup>68</sup> Others will insist that our principal job *is*, in fact, to give robust guidance to the bench and bar, just as the Supreme Court does. That may now well be true on matters of statutory interpretation of new laws. Moreover, time and experience may change my view about our primary role if, by design or by default, the Supreme Court continues on its current course of providing less and less guidance on issues other than constitutional interpretation or allows circuit splits to persist. But for now, the days of Learned Hand, when the Second Circuit issued nothing but opinions, are past.

### *B. Certification of State Law*

While we might be criticized for using the summary order device too often, we do not often enough resort to the powerful administrative tool of certifying novel and important questions of state law to a state’s high court.<sup>69</sup> Despite the efficiencies and resource savings that certification was intended to supply, in the last two years, the Second Circuit has certified only fifteen questions of state law: nine to the New York State Court of Appeals, two to the Connecticut Supreme Court (here I don’t account for certification by federal district courts to the Connecticut Supreme Court, as permitted by Connecticut law), none to the Vermont Supreme Court, and a total of four to the Delaware and Nevada Supreme Courts. One would

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67. *See* *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979 (2016); *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012); *Cigna Corp. v. Amara*, 563 U.S. 421 (2011).

68. This figure comes from a search on Westlaw Next. According to the Clerk of the Court, this figure increases to 391 when one includes concurrences, dissents, and concurrences and dissents from denials of rehearing in banc.

69. The Supreme Court touted certification as “in the long run sav[ing] time, energy, and resources and help[ing] build a cooperative judicial federalism.” *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974). But the Court long ago got out of the certification business, having last used it in 1963. *See id.* at 389–90, 390 n.5.

think that over that period, we have grappled with more than fifteen unsettled questions of state law that our state judicial counterparts were better positioned to decide.

Our reluctance to certify state questions is rooted in history. For years, federal appellate courts produced significant opinions on important issues of state law. Until certification procedures were available, the federal courts of appeals had no choice but to try to provide doctrinal clarity and guidance to sometimes complex or unsettled bodies of state law directly, even if doing so implicated important state policies. Some judges continue to see that as a staple of our appellate jobs. Perhaps some are also lured by the interesting common law analysis that state law offers much more frequently than federal law.

It is true that we can safely answer many if not most state law questions by summary order without certification because the state law is clear and beyond reasonable debate. We confine certification to those cases where the question of state law is genuinely unsettled, important, and outcome determinative in the federal case. In other words, a panel should certify only when it is unable to reliably and confidently predict how a state's highest court would rule on an issue of importance to the state.<sup>70</sup> But when panels fail to certify and wrongly interpret state law in cases involving difficult issues, they subject the circuit court to deserved criticism from the state courts, as has happened over the years.<sup>71</sup>

Judging from the last five years, I believe there are two main reasons we tend to shy away from certifying, even in suitable cases. First, we may be unduly concerned about shifting our burden onto already busy state court colleagues. Second, we worry too much that our state court colleagues may decline the certified question—something that has rarely happened since 1985. These concerns have some merit, as do the graver structural concerns, in my view, that certification somehow allows the federal courts to skip to the front of the line without letting an issue percolate through the state judicial system and that it strips the state high court of the benefit of diverse state court views on the certified question.

Mindful of these pitfalls, we should nevertheless certify more often than we do. Certification reflects a restrained approach to federal appellate judging. Among other things, it avoids tying federal courts to uncertain resolutions of law. Moreover, the sense that the certification power is a matter of discretion to be used sparingly has prompted federal appellate

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70. Usually this happens when there are too few data points from the state's intermediate courts or their decisions conflict. It also can happen when a circuit panel perceives that the risk of an "erroneous federal precedent" on the issue, or of inconsistent results, is too high. Council on Judicial Admin. & Comm. on Fed. Courts, Ass'n of the Bar of N.Y.C., *Report and Recommendations on Second Circuit Certification of Determinative State Law Issues to the New York Court of Appeals*, N.Y.C. B. (July 1, 2002), <http://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/report-and-recommendations-on-second-circuit-certification-of-determinative-state-law-issues-to-the-new-york-court-of-appeals> [https://perma.cc/A526-267C].

71. In these difficult cases, therefore, respect for the competence and the right of our state counterparts to determine their own law counsels strongly in favor of certification.

panels instead to spend endless hours divining answers to state law questions in ultimately ambiguous decisions, statutes, and even treaties. Those hours could be better spent reviewing difficult issues of *federal* law in which we have more competence, leaving the hard state issues to state courts with the experience and expertise to adjudicate them.

It is also possible that we can lessen the risk of strain on federal-state collegiality that certification presents by more pointed use of joint federal state councils, like the New York State Federal Judicial Council, or having separate formalized meetings between circuit and state high court representatives to discuss recurring state law issues that arise in the federal courts.

### C. *The Role of Foreign Law on the Circuits*

An issue that is related to but distinct from the issue of state certification concerns the role of the court of appeals in resolving questions of foreign law. On these questions, the courts of appeals will virtually always have the last word.

As I noted in a concurring opinion a few years ago, the courts of appeals are faced with a growing number of international disputes, particularly in the commercial context.<sup>72</sup> Although these disputes have yet to play a very substantial role and international arbitration offers an important alternative forum, I predict that we will be tasked with increasing frequency to decide issues that require us to determine and apply foreign law.

Rule 44.1 of the Federal Rules of Civil Procedure makes it clear that “determining foreign law” falls within our province and that we have the *institutional* competence to do so.<sup>73</sup> As I have just described, when faced with difficult questions of state law, we have a well-developed, fairly successful system of certifying the question to state courts. This system promotes the development of state decisional law by those courts and strongly reflects principles of comity and federalism. At least in the context of cross-border commercial disputes, there is every reason to develop a similar formal certification process pursuant to which the courts of appeals, as the likely courts of last resort in these cases, may certify an unsettled and important question of foreign substantive or procedural law to designated courts of a foreign country.

Dispositive foreign law issues arise in both procedural and substantive law contexts. Consider, for example, that New York’s borrowing statute requires a nonresident plaintiff to file a claim within the shorter of the New York statute of limitations or the statute of limitations in the jurisdiction in which the claim accrued.<sup>74</sup> Therefore, when a claim accrues in a foreign country, our job is to determine the limitations period that courts in that country would apply, as well as when the limitations period begins to run.

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72. See *Terra Firma Invs. (GP) 2 Ltd. v. Citigroup Inc.*, 716 F.3d 296, 301 (2d Cir. 2013) (Lohier, J., concurring).

73. FED. R. CIV. P. 44.1.

74. See N.Y. C.P.L.R. § 202 (McKINNEY 2012).

Accordingly, in the last few years, appellate panels were asked to decide when a claim accrued for purposes of German law in one case and Korean law in another. In each case, the panel was fortunate to have basic agreement among the parties about which events triggered the limitation period. That left us with the simpler—but by no means simple—task of determining whether those events had occurred. For example, in the first case, “[t]he parties’ experts agree[d] that, under German law, a plaintiff has knowledge of the circumstances giving rise to the claim when she obtains knowledge of the facts necessary to commence an action in Germany with an ‘expectation of success’ or ‘some prospect of success’” in the litigation.<sup>75</sup> In a different case, the appellant (Woori Bank) agreed with the appellee (Merrill Lynch) that under South Korean law, the limitation period began when various public events and announcements relating to the appellee sufficed to make Woori Bank specifically and actually recognize that it had a claim for damages against Merrill Lynch.<sup>76</sup> Rather than rely on actual decisions of German or South Korean courts, we were able to point to the parties’ concessions and to the facts in the record on appeal.<sup>77</sup> Absent party agreement, however, I am not sure what we would have done.

In easier cases, therefore, the parties may agree or we can easily determine that the question of foreign law is either settled or unimportant to the development of a foreign nation’s law. But many cases involve the review of competing expert affidavits with dueling interpretations of English, Bermudan, Brazilian, German, or Korean law, and so on. As such, they fall far afield of our traditional error-correction function, and we lack a formal process even to test whether our rulings are ultimately right or wrong.

This is not a long-term, sustainable way to uniformly interpret private sector foreign law across the federal courts of appeals, each of which may be presented with materially different expert affidavits, for example, on similar issues. In lieu of the ad hoc system currently in place, we (through the Judicial Conference of the United States or otherwise) should start to work now with our foreign judicial counterparts from those nations whose laws are identified as most often the subject of federal litigation to devise a reciprocal certification system designed to promote both long-term efficiency and the consistent application of foreign laws. With that in mind, it would be useful to develop a large database or survey of private international law decisions as a way to facilitate research by domestic and foreign courts.

#### *D. Immigration Cases*

Finally, our handling of a sizeable immigration docket shows how we can develop novel approaches, short of issuing decisions, to deal with our

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75. *IKB Deutsche Industriebank AG v. McGraw Hill Fin., Inc.*, 634 F. App’x 19, 22 (2d Cir. 2015).

76. *See Woori Bank v. Merrill Lynch*, 542 F. App’x 81, 82 (2d Cir. 2013).

77. *See id.*

caseload while still protecting the rights of parties. Nearly fifteen years ago, without fully consulting the courts of appeals, Congress passed legislation that, together with prior legislation, transferred to the courts of appeals the responsibility for reviewing all final removal orders from the Board of Immigration Appeals (BIA). “The REAL ID Act established the circuit courts as the sole judicial arena of direct review of immigration matters.”<sup>78</sup>

The result was that between 2001 and 2008, the number of appeals filed from BIA decisions skyrocketed from 184 to 2,865.<sup>79</sup> By August 2005, the backlog of petitions for review of denied asylum applications in the Second Circuit was phenomenally high—“at just under 5,000 cases.”<sup>80</sup> The resulting caseload crisis naturally diverted the court’s attention away from other categories of important cases.

After a period of intensive opinion writing to resolve several open issues of immigration law, our court adopted the “non-argument calendar” (NAC) in 2009 to address the ongoing crisis and the erosion of judicial resources. The NAC helped dispose of a significant number of immigration appeals by, among other things, suspending the Second Circuit’s long tradition of having oral argument in virtually every case.<sup>81</sup> Still, by the time I joined the court in 2011, the backlog of NAC cases continued to consume a significant amount of our judicial time.<sup>82</sup> A major reason for the continuing backlog was that we were being asked to consider appeals in cases involving petitioners on a so-called “low priority removal list,” even though it was clear these petitioners would not be removed after our court denied review of a removal order. We concluded that this state of affairs undermined our court’s ability to allocate effectively its limited resources and to determine whether adjudication of a petition would be merely “an empty exercise tantamount to issuing an advisory opinion.”<sup>83</sup>

To rectify this problem, in 2011 and 2012, a few members of the Second Circuit engaged in a series of direct discussions first with representatives of the Civil Division of the Department of Justice and the Department of Homeland Security and ultimately also with members of the immigration

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78. Erick Rivero, Note, *Asylum and Oral Argument: The Judiciary in Immigration and the Second Circuit Non-Argument Calendar*, 34 HOFSTRA L. REV. 1497, 1523 (2006).

79. See Stacy Caplow, *After the Flood: The Legacy of the “Surge” of Federal Immigration Appeals*, 7 NW. J.L. & SOC. POL’Y 1, 12 (2012).

80. Rivero, *supra* note 78, at 1512 (quoting Press Release, John M. Walker, Jr., Chief Judge, Second Circuit (Aug. 4, 2005)).

81. It also required judges of the court to rely significantly on the circuit’s staff attorney’s office, which drafted bench memoranda and other materials related to each NAC case. Some took seriously the suggestion in Rule 34 of the Appellate Procedure Rules that panel members themselves must preliminarily “examine[] the briefs and record” in each case where oral argument is disallowed. See FED. R. APP. P. 34. With a backbreaking backlog of NAC cases, this proved almost impossible to achieve. I suspect that in most cases, many members of the court reviewed the memoranda and draft orders prepared by the staff attorney’s office rather than the parties’ briefs and the certified record.

82. See Caplow, *supra* note 79, at 11–12.

83. *In re Immigration Petitions for Review Pending in the U.S. Court of Appeals for the Second Circuit*, 702 F.3d 160, 161 (2d Cir. 2012).

bar in our circuit. All sides agreed that petitioners, with the government's consent, could move to voluntarily dismiss their appeals and remand to the BIA cases that the government agreed were low priority matters or where the likelihood of removal was low for other reasons, such as the difficulty in effecting removals to particular countries.<sup>84</sup> The BIA would then be expected to either administratively close the case or hold it in abeyance on its docket.<sup>85</sup>

The contours of this voluntary dismissal program, which was approved by our court proceeding in banc, are set out in a 2012 opinion by then-Chief Judge Dennis Jacobs on behalf of the court.<sup>86</sup> Needless to say, the results of our direct discussions with key stakeholders in the immigration area have proven enormously successful. In fact, they have helped us to accomplish what even summary orders and certifications cannot do, namely, avoid using judicial resources to decide cases altogether when doing so would not impact the petitioner's rights. Since October 2012, when the program was implemented, the circuit has dismissed between 1,500 and 1,600 immigration cases. In addition, our court's discussions and ongoing dialogue with the federal government has encouraged a further significant reduction in immigration filings, as the government has used its discretion to decide not to pursue removal in the first instance in more and more cases. The number of NAC cases we are required to review is currently a trickle compared to a few years ago. The reduction has permitted us, I hope, to review the record in each immigration case a little more carefully and to devote more time to our other cases.<sup>87</sup>

We have every reason to replicate this proactive engagement with stakeholders in other suitable areas that consume much of our time and resources.

#### CONCLUSION

This Article has sketched only some of the administrative procedures that the Second Circuit has employed as a middle court left with few choices and a rising caseload. The procedures are purely discretionary in the sense that no rules compel us to use them. Beyond merely helping us to control our docket, each procedure has, in my view, a special advantage. Each curbs our natural appetite as appellate judges to decide or to say more than we need to say in deciding individual cases. The restless circuit judge striving to be a big sibling is likely to belittle them as nothing more than the approaches of a bureaucrat. Incrementalists, like myself, who have largely come to grips with our status as the middle child, will applaud them

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84. *See id.*

85. The program permits the petitioner to reinstate her appeal at a later date without filing a separate notice of appeal if the government initiates removal proceedings.

86. *See In re Immigration Petitions*, 702 F.3d at 161–62.

87. It is no accident that a court of appeals, rather than Congress or the Supreme Court, developed this fix. If we had not pursued it, as other circuit courts have pursued their own solutions, no one would have done so on our behalf.

because they help us solve the actual and discrete problems before us, rather than problems manufactured in our own minds.

We should continue to look for other ways to reduce caseloads and to avoid unnecessary decision making consistent with the principles of restraint, the fair administration of justice, and an appreciation for the dignity and rights of every litigant.