William W Schwarzer: A Judge for All Seasons

*John B. Oakley**

I.

Judge Schwarzer has seen it all, but we are far from seeing all of Judge Schwarzer. This Tribute marks a turn of season for him, but his retirement as Director of the Federal Judicial Center is hardly more than an early autumn; the leaves of his career are still very much on the tree.

The seasons of Judge Schwarzer's life as a judge remind me of another verbal quatrefoil, depicting not the passage of time but the totems of commitment: "something old, something new, something borrowed, something blue." When he took the vows of judicial office, Judge Schwarzer began his new life in an old-fashioned way, as a hard-working trial lawyer elevated to the federal district court. His tenure at the Federal Judicial Center presented him with a new set of challenges, to which he responded not only ably, but with distinction. He is about to embark on a round of assignments to sit on federal courts of appeals across the country, riding a nationwide circuit of courts lucky to borrow his talents. But one season remains in which Judge Schwarzer will, I hope, put to work his seasoned skills of discourse with Congress to help redress something blue: the changing character and circumstances of the job of a federal judge. This is the hue about which I cry in the balance of these remarks. True to both metaphors, I write in four parts.

I do not tell this tale of woe as a proxy for Judge Schwarzer. He is not one to whine, and the only times I have heard him touch upon these concerns over the declining quality of the professional life of modern federal judges have been in the

* Professor of Law, University of California, Davis; B.A. 1969, University of California, Berkeley; J.D. 1972, Yale University. J. Christopher Dawson and John A. Thawley assisted my research on the working conditions of modern federal judges.

course of addresses dealing with larger issues of sound judicial administration.[1] My message is a moral one. It is not healthy for the Republic to turn the federal courts into an overworked bureaucracy where the quantitative need to decide cases on a mass-production basis compromises the qualitative standards of decision-making that for two centuries have made the federal courts trusted models of judicial excellence.

II.

Over the last thirty years, the nature of the job of the federal judge has changed dramatically. For the most part, the changes have not been for the better. Today, federal judges at both the trial and appellate level are hearing more cases with fewer available judicial resources. As a result, most federal judges find themselves working nights and weekends, devoting less time to exploring the issues of each case, relying increasingly on the help of law clerks, and enjoying their jobs and lifestyle much less.

As the quality of life of the federal judge declines, one could expect a proportional decline in the quality and quantity of the judicial output. However, the federal judiciary has accepted the challenge of the litigation explosion with stoic resolve, and has processed a maximal workload increase with a minimal decrease in the quality of results. Yet the signs are clear. Without major reform of our system of justice, caseloads will continue to expand, and the judiciary will be unable to meet the increased demand for its time and energy.

Article III is not a footnote to the Constitution. The judicial branch of government occupies a place in the constitutional scheme of equal responsibility and importance to either of the political branches. But federal judges, including even Supreme Court Justices once confirmed to the Court, properly occupy a position of far less prominence in the public mind than do their counterparts who exercise Article I power from within the Congress, or Article II power from within the White House.

---

[1] William W Schwarzer, Address at the American Law Institute Annual Meeting (May 17, 1990), *in* 1990 PROCEEDINGS OF THE AMERICAN LAW INSTITUTE 258 (1991); William W Schwarzer, Twenty-Five Years of the Eastern District of California, Address Before the Sacramento Chapter, Federal Bar Association (Nov. 21, 1991) (on file with author).

A number of factors account for the obscurity in which federal judges generally do their work. First, Article III's grant of life tenure pointedly removes federal judges from the electoral process. Few things are more clear, as a matter of "original intent," than that the Framers wanted federal judges to stay clear of the campaign trail. Their decisions must be validated by reason and experience, not the next election. Second, Article III predicates any exercise of federal judicial power on the initiative of the parties in presenting to a federal judge a "case or controversy." While the parties may have some control over the federal district in which a case is litigated, they generally have scant control over the particular judge to whom, by lot, the case is assigned. The party-driven nature of federal litigation makes the exercise of federal judicial power essentially passive, even for the rare judge who would accept being labeled as a "judicial activist."

In addition to these constitutional constraints, there are two other reasons why most of the work of the federal judiciary, most of the time, attracts scant public attention. As a matter of sound public policy, the federal judiciary is the most decentralized branch of government. True, the Supreme Court has the power to bring to the center for review and correction virtually any decision by a subordinate federal judge. But that power is rarely exercised. The great bulk of the work done by federal judges occurs far from Washington, in thousands of cases dealt with daily in hundreds of courtrooms. Finally, as a matter of sound judicial policy, federal judges have self-consciously cultivated the obscurity in which they labor. This insulation from the tumult of daily public attention breeds the detachment so vital to the federal judiciary's primary mission: impartial interpretation and resolute enforcement of the Constitution and laws of the United States.

The obscurity in which the judicial branch carries out its share of federal governance also masks the daunting challenges and problems confronting the modern federal judge. These concerns, virtually invisible to the public, also seem to have escaped the sustained attention of the coequal branches of the federal government. Relatively recently, however, federal judges have joined other commentators in speaking out about the continued deterioration of the conditions under which they must work.

They seek to inform and thereby to improve the understanding of the nature of their work on the part of the public, the bar, and their fellow constitutional officers in the political branches of government.[2]

Judge Jon O. Newman of the Second Circuit Court of Appeals has observed that with the great increase in the number of cases to be heard by each federal judge, the risk that the judge will not devote adequate attention to some cases grows inevitably. In the district courts, the rise in volume primarily has resulted in an increased backlog of cases awaiting trial and an increased pressure upon the judge to quickly decide important nontrial matters such as motions for dismissal, summary judgment, and preliminary injunction. In the circuit courts, the rise in volume has resulted in a tremendous increase in the number of cases heard by each three-judge panel, and a proportional risk that the judges will fail to give sufficient attention to significant issues. "[T]oday's increasing volume has altered the standards many judges apply in determining how much time is appropriate for thinking about the decision in a case and for crafting a careful opinion."[3] Judge Newman warns that the risk is very

---

[2] Any history of modern judicial comment on the state of the federal courts must begin with HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW (1973) and RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM (1985). For recent expressions of concern by federal judges in the periodical literature, see Irving R. Kaufman, *New Remedies for the Next Century of Judicial Reform: Time as the Greatest Innovator*, 57 FORDHAM L. REV. 253 (1988) [hereafter Kaufman, *New Remedies*]; Irving R. Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 59 FORDHAM L. REV. 1 (1990); Thomas J. Meskill, *Caseload Growth: Struggling to Keep Pace*, 57 BROOK. L. REV. 299 (1991); Roger J. Miner, *Federal Courts, Federal Crimes, and Federalism*, 10 HARV. J.L. & PUB. POL'Y 117 (1987); Roger J. Miner, *Planning for the Second Century of the Second Circuit Court of Appeals: The Report of the Federal Courts Study Committee*, 65 ST. JOHN'S L. REV. 673 (1991); Thomas G. Nelson, *The Future of the Federal Courts: The Case for a Mission Statement*, 37 IDAHO ST. BAR ADVOC., Aug. 1994, at 12; Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 U. CHI. L. REV. 761 (1989); Robert M. Parker & Leslie J. Hagin, *Federal Courts at the Crosswords: Adapt or Lose!*, 14 MISS. C. L. REV. 211 (1994); J. Clifford Wallace, *The Future of the Judiciary: A Proposal*, 27 CAL. W. L. REV. 361 (1991); J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147 (1994). For institutional expressions of federal judicial concern over caseload growth, see REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990); UNITED STATES JUDICIAL CONFERENCE COMMITTEE ON LONG RANGE PLANNING, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS (Mar. 1995 Draft) [hereafter LONG RANGE PLAN].

[3] Newman, *supra* note 2, at 765-66.

clear that without caseload reform federal judges will no longer be able to function at the high level of competence expected of them.

The statements of these newly protestant judges demonstrate a gnawing self-doubt that current conditions are compatible with satisfactory discharge of judicial responsibilities. They know that adequate time and a reflective environment are indispensable to resolving controversies about federal law judicially. Judges cannot get by with the sort of intuitive guesswork and pluralistic accommodation of competing interests that is part and parcel of the political process. Judges worthy of their robes must strive for reasoned decision-making, with factual premises carefully tested against the record, and legal premises carefully rooted in statute or precedent. Judges must fashion decisions that are not only sound for the future but true to the past. Good judging cannot be done on the fly, and respect for the law cannot long endure if disputes about the law are resolved in off-the-cuff fashion by overworked judges.

III.

Dwarfing all other concerns of the federal judiciary is the tremendous growth of the federal caseload. This growth — the caseload "explosion" — constitutes an increasing threat to the federal judiciary's future capacity to provide timely, just, and well-reasoned resolutions to conflicts. While the effects of the caseload explosion and the means thought necessary to ameliorate the growing crisis are a matter of active debate,[4] the sheer numbers cannot be denied. In the three decades subsequent to 1960, filings in the district courts tripled.[5] During that period,

---

[4] *See, e.g.*, TERENCE DUNGWORTH & NICHOLAS M. PACE, STATISTICAL OVERVIEW OF CIVIL LITIGATION IN THE FEDERAL COURTS (1990); POSNER, *supra* note 2; Meskill, *supra* note 2; Wallace, *supra* note 2; Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 B.Y.U. L. REV. 3; Newman, *supra* note 2; Kaufman, *New Remedies*, *supra* note 2. *See generally* LONG RANGE PLAN, *supra* note 2 (discussing crisis conditions in federal courts and proposing various means of mitigation).

[5] In the twelve month period ending June 30, 1960, 89,112 cases (59,284 civil; 29,828 criminal) were filed in the federal district courts. 1960 DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ANN. REP. 224 (table C1), 288 (table D1) [hereafter ANNUAL REPORT]. In the twelve month period ending June 30, 1990, 266,783 cases (217,879 civil; 48,904 criminal) were filed. 1990 ANNUAL REPORT, at 2. Note, however, that

appeals to the circuit courts increased nearly ten times.[6] A recent RAND Corporation study[7] made a careful empirical analysis of the federal courts' disposition of civil cases in recent decades. The study indicates that, despite the mushrooming size of their dockets, a combination of more work and more judges have allowed the courts to keep pace with the number of filings per year.[8] Yet the implications are clear. As more and more cases enter the queue,[9] federal judges must work that much harder and longer every day in order to keep up. Since there are practical limits on the numbers of federal judges that the present appellate system can accommodate,[10] even if Congress were willing to create new judgeships indefinitely, the incessant increase in cases filed in the federal courts has fueled incessant increases in per-judge caseload, such that federal judges face an increasingly sisyphean task of case management and docket control.[11]

---

the 1990 totals were actually down 15 percent from an all-time high of 313,170 cases filed in the twelve month period ending June 30, 1985. 1985 ANNUAL REPORT, at 276 (table C1), 336 (table D1).

[6] In 1960, 3899 appeals were filed in the circuit courts of appeals. 1960 ANNUAL REPORT, at 210 (table B1). In 1990, the number of appeals increased to 38,520. 1990 ANNUAL REPORT, at 3 (table 1).

[7] DUNGWORTH & PACE, *supra* note 4.

[8] "[T]he general conclusion we draw from these statistics is that when the federal district courts were considered as a whole, the average time to disposition for private civil cases was about the same in 1986 as it was in 1971." DUNGWORTH & PACE, *supra* note 4, at vii.

[9] For a detailed presentation of the relevant trend lines, based on 1940-1992 data extrapolated out to 2020, see LONG RANGE PLAN, *supra* note 2, at 137-50 ("Appendix A: Current Trends and Projections").

[10] Judge Newman has proposed capping the size of the Article III judiciary at 1000 judges, a figure I think is too low. *See* Jon O. Newman, *1,000 Judges — The Limit for an Effective Judiciary*, 76 JUDICATURE 187 (1993). But certainly the manageable size of the Article III judiciary is well below the 4000 judges that the present formula for acceptable caseload per judge would require if current filing trends continue unabated until 2020. *See* LONG RANGE PLAN, *supra* note 2, at 18.

[11] This is not to suggest that state court judges are living a country-club life while federal judges alone labor in the mines. Per-judge caseloads in state courts are three to five times greater than in federal court. *See* John B. Oakley, *The Future Relationship of California's State and Federal Courts: An Essay on Jurisdictional Reform, the Transformation of Property, and the New Age of Information*, 66 S. CAL. L. REV. 2233, 2234-35 & nn.3-4 (1993). These figures must be interpreted with caution because of the many variables and discrepancies that affect the collection of caseload statistics across court systems, *id.* at 2234 n.3, but the stark fact remains that the life of most state judges — especially in the urban trial courts — is a circle of hell that makes the purgatorial conditions in which federal judges work seem benign by comparison. I do not take up here the burning question whether courts that operate in

No statistical study captures the deteriorating caseload situation as well as the words of the judges themselves. Professor Lauren Robel has described the results of the survey of federal judges undertaken by the Federal Courts Study Committee that asked how increased caseloads have affected their working and personal lives.[12] Many district court and appeals court judges bluntly expressed exasperation, vividly describing the pressure to work constantly and to rely heavily on their law clerks in order to keep up with the ever-increasing caseload:

> The work load is up and so is my blood pressure! . . . I fear the consequences affect my family as well as myself. Life is still under control, but we walk closer and closer to the edge!
>
> * * *
>
> I find myself working virtually "around the clock."
>
> * * *
>
> There is no weekend that is free of office work.
>
> * * *
>
> I often wonder if I am reading a judge's opinion or his law clerk's. . . .
>
> * * *
>
> I am too dependent upon law clerk work and input for resolution of pretrial motions.[13]

Several of these judges felt that the increased workload has caused an erosion of the quality of their work.

> Sometimes I sign and send out orders that are not as well written as I would like. . . .
>
> * * *
>
> I find I am forced to choose between a full study of the issues presented and a prompt disposition of those issues.
>
> * * *
>
> I have to proceed on a form of "judicial triage". . . .
>
> * * *
>
> It is necessary to work longer hours than one should realistically expect to work in order to maintain quality.
>
> * * *

---

circle-of-hell conditions can escape dysfunction. It is clear to me that the circle of purgatory that most federal judges currently inhabit is not conducive to continued exercise of federal judicial power at the level of excellence traditionally expected of federal judges.

[12] Robel, *supra* note 4, at 6-11, 38-40.

[13] *Id.* at 8-9, 38-39.

> I feel I am becoming narrowly focused and less of a generally knowledgeable individual, and consequently in many ways less competent as a judge.[14]

In the courts of appeals, many judges have expressed dismay that the time they may devote to hearing oral argument in each case has diminished tremendously.[15]

Taken together, the judges' comments indicate that they believe that they are still able to perform their role adequately, but the pressures of the increased caseload have resulted in undue reliance on law clerks and have had an adverse effect upon their work.[16] And yet, implicit in their exasperated comments lies the implication that federal judges have done — and will continue to do — all that is humanly possible to fulfill their personal and institutional duty to hear and decide the cases brought in their courts. This commitment in the face of a depressingly overbearing future is ground for hope that the crisis can be averted if the federal judiciary receives the relief it needs.

IV.

The sheer volume of cases in the federal courts, and the resulting, exasperatingly high pressures will not abate themselves. Federal judges need help, and they need it now. As I noted above, the federal judiciary has traditionally, and for good reason, been politically and publicly silent. However, it is now imperative that the federal judiciary abandon its reticence, at least in this particular instance, and make its plight apparent to the political branches of the national government and to the American public. If the Congress and the President cannot understand the crisis impending in the federal courts, they will not be able to provide the extensive, systemic, and immediate relief that it will be necessary to resolve the looming crisis.

Federal judges have always faced challenges, but today's are different in kind. The conflict brewing between the courts and

---

[14] *Id.* at 9-11, 39-40.

[15] *Id.* at 49 n.186; *see also* J. CECIL & D. SIENSTRA, DECIDING CASES WITHOUT ARGUMENT: A DESCRIPTION OF PROCEDURES IN THE COURTS OF APPEALS (1985).

[16] Robel, *supra* note 4, at 7.

the political branches has a new edge, driven by the imperative for deficit reduction that cabins the resourcefulness of those who would be derelict — institutionally no less than personally — were they not sensitive to voters' most immediate practical concerns. At best the members of the legislative and executive branches can be expected to view principle through the lens of politics, never losing sight of the newspapers, constituent mail, and polling data. The gap in perception between the fora of politics and the forum of principle is widening, however, and current themes of electioneering have impoverished the discourse between the branches. This makes for delicate problems of interbranch relationships.

Judge Schwarzer is ideally suited for leadership in the continuing and ever more vital process of educating the political branches about what federal judges can and cannot accomplish without compromising their ability to meet their essential constitutional responsibilities in a traditionally excellent way. He is the embodiment of the ambassadorial judge in an age that calls for skillful diplomacy.

For some the defining characteristic of a diplomat is someone who never has anything sharp to say. That is not the conception of diplomacy at which Judge Schwarzer excels. But that is not the kind of diplomacy that is needed to surmount the present crisis in the relations between the courts and the elected branches. Judge Schwarzer has proved himself at ease in court,[17] in the library and the law reviews,[18] within the Judicial

---

[17] Judge Schwarzer graduated from the Harvard Law School in 1951, and remained at Harvard as a teaching fellow until 1952. He then practiced law in San Francisco as an associate (1952-60) and partner (1960-76) of the law firm of McCutchen, Doyle, Brown & Enersen. When he took the bench in 1976, he was one of the nation's leading litigators of complex federal civil cases. *See generally* JUDICIAL CONFERENCE OF THE UNITED STATES, JUDGES OF THE UNITED STATES 438-39 (2d ed. 1983); ALMANAC OF THE FEDERAL JUDICIARY 36-37 (1995).

[18] At last count Judge Schwarzer has had a leading role in the writing or editing of 11 books or manuals on litigation and judicial administration and over 50 articles in legal periodicals. His first book was *Managing Antitrust and Other Complex Litigation*, published in 1982. His most recent book-length publication is the forthcoming *Manual for Complex Litigation, Third*, which he edited in his capacity as Director of the Federal Judicial Center. He has authored many prominent law review articles. *See, e.g.*, William W Schwarzer & Alan Hirsch, *Summary Judgment After* Eastman Kodak, 45 HASTINGS L.J. 1 (1993); William W Schwarzer, *In Defense of "Automatic Disclosure in Discovery,"* 27 GA. L. REV. 655 (1993); William W Schwarzer, *Sentencing Guidelines and Mandatory Minimums: Mixing Apples and Oranges,*

Conference and at the Center,[19] and in the witness chair before Congress.[20] When he expresses an opinion, it is invariably well researched. He is a judge of the old school, and while he may be an "activist" judge when it comes to judicial administration, he has never been accused of the sort of "activist" judicial philosophy that might lead a judge to legislate from the bench. Judge Schwarzer has always respected the legislative process, and worked within it to secure needed reform. One who respects judicial restraint is *a fortiori* the better advocate for legislative restraint.

Judge Schwarzer has a commanding intellect, a steely will, a definitive knowledge of the work and capacities of the federal courts, and an informed sense of the legislative process. I expect that in his final season he will not be silent on issues pertaining to the welfare of the federal courts. He is not bucking for a seat on the Supreme Court or seeking to advance some personal agenda for the content of the Constitution or the role of law in American life. His record at the Federal Judicial Center is powerful testimony that he wants only for the federal courts to work well.

---

66 S. CAL. L. REV. 405 (1992); William W Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689 (1992); William W Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703 (1989); William W Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013 (1988); William W Schwarzer, *On Communicating with Juries: Problems and Remedies*, 69 CAL. L. REV. 731 (1981); William W Schwarzer, *Dealing with Incompetent Counsel: The Trial Judge's Role*, 93 HARV. L. REV. 633 (1980).

[19] Prior to assuming the Directorship of the Federal Judicial Center, Judge Schwarzer served as Chairman of the Committee on Federal-State Jurisdiction of the United States Judicial Conference. REPORTS OF THE PROCEEDINGS OF THE UNITED STATES JUDICIAL CONFERENCE 55 (1990).

[20] A partial list supplied to me by the Federal Judicial Center records 12 appearances by Judge Schwarzer before congressional committees during the three years from February 19, 1991 through March 2, 1994. For published footprints of Judge Schwarzer's many trips through the halls of congress, see, for example, *Multiparty, Multiforum Jurisdiction Act 1989: Hearings on H.R. 3406 Before the Subcomm. on Courts, Intellectual Property, and the Admin. of Justice of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 17 (1989); Attorney Accountability Act of 1995 (H.R. 988), H.R. REP. NO. 104-62, 1995 WL 86241, at 29 (noting testimony on Feb. 10, 1995, of Judge Schwarzer before House Judiciary Committee's Subcommittee on Courts, Intellectual Property, and the Administration of Justice).

Judge Schwarzer is thus ideally suited to be the hard-nosed advocate that the federal courts need for reasoned treatment by the political branches. He has a very hard nose.[21] It is too soon for the rest of his visage to be graven in stone; he has important work yet to do. But when all his seasons have run their course, I believe he will be remembered as worthy of inclusion on any Mount Rushmore of federal judges, as one whose impact on the federal courts endured beyond his time.

---

[21] He is not infallible. I have objected to the pace of recent Judicial Conference rulemaking and the contents of some of the new rules, including the pre-discovery disclosure provisions of new Rule 26 of the Federal Rules of Civil Procedure, which Judge Schwarzer championed. *See* John B. Oakley, *An Open Letter on Reforming the Process of Revising the Federal Rules*, 55 MONT. L. REV. 435, 437-38 (1994). But my point is that Judge Schwarzer is a determined and persuasive advocate for the causes he pursues, and this combination of talent and perseverance is just what is needed in the cause of protecting the ability of the federal courts to perform their essential functions.