All The King's Horses And All The King's Men...

From the Front Line
2002

IN MY ARTICLE, "Politics and Prisoners," I touched upon the subject of the case load of federal judges being so burdensome as to indicate that criminal defendants are not receiving a full *de novo* review of petitions for a writ of *habeas corpus*. That article was written for another entire purpose and my discussion of this issue was cursory. In fact, while the preliminary numbers I had compiled up to the date of that article had started showing a statistical impossibility due to the limitations of the human mind, I had not completed extrapolating those numbers at the time I wrote that article. I have now completed my research and finished crunching the numbers involved. I can find no error in my calculations, nor in the rather startling conclusions those numbers lead me to assert below. It all comes down to this. The judicial system in the United States is not only bankrupt of human resources, but is deceiving the American people, and I can prove it statistically.

I challenge any reader to check the numbers below and prove I am wrong. I admit to not wanting to believe what I am exposing here, and that what I have found confirms suspicions I have had for some time now, but did not have the means to prove.

Unless otherwise noted, the tables and statistics below appear in the "The Sourcebook of Criminal Justice Statistics, 2000," published by the Department of Justice, *Bureau of Justice Statistics*, report number NCJ-190251.

In the year 2000 a total of 31,560 prisoner petitions challenging their convictions were filed in the 94 United States District Courts. The breakdown of those petitions is as follows:

6,341 — Federal Prisoner 28 U.S.C. §2255 motions to vacate.
3,870 — Federal Prisoner 28 U.S.C. §2241 *habeas corpus* petitions.
21,349 — State Prisoner 28 U.S.C. §2254 *habeas corpus* petitions.
31,560 — Total. (See Table 5.61, p. 467).

In the year 2000, 11,303 prisoners, both state and federal, filed appeals to a United States Court of Appeals from district court decisions denying their motions to vacate or *habeas* petitions. The majority of those appeals were taken by the prisoner after losing the petition, some were taken by the government after it lost. (See Table 5.63, p. 469.) This is a total of 24.3% of all appeals filed in the U.S. courts of appeals in 2000. (Table 5.63, p. 469, showing a total of 46,487 cases filed in 2000.)

For purposes of this article, I have decreased the percentage of *habeas corpus* appeals to 20%. This is because the number of *habeas corpus* petitions filed has been steadily increasing since the passing of the 1996 Anti-Terrorism and Effective Death Penalty Act (AEDPA). The cases terminated in 2000 by the U.S. courts of appeals would have included a slightly lower number of *habeas* petitions because the average litigation time-frame is around two years for a decision to be entered in the U.S. district court that can be appealed, and around one year while the court of appeals decides the case. Remarkably, reducing the percentage of *habeas* cases terminated in 2000 to 20%, from the 24.3% filed in 2000, made no difference in the overall numbers, because more cases were terminated than were filed in 2000 in U.S. courts of appeals.

Table 5.62, p. 468 states that 56,512 cases were terminated in the U.S. courts of appeals in the year 2000. The average percentage of *habeas* petitions filed from 1996 to 1999 is 20.37%. (Table 5.63, p. 469.) Using the 20% reduced number that adjusts for the lower number of *habeas* cases filed in 1996-99 still leaves 11,302 of

those 56,512 terminated appeal cases as *habeas* petitions or motions to vacate, only one number less than the total number of new *habeas* appeals filed in the year 2000, which were:

2,671 — Federal prisoner 28 U.S.C. §2255 motions to vacate.
1,398 — Federal prisoner 28 U.S.C. §2241 *habeas corpus* petitions.
7,234 — State prisoner 28 U.S.C. §2254 *habeas corpus* petitions.
11,303 — Total. (See Table 5.63, p 469.)

As shown by Table 5.61, p. 467, only 35.8% of all prisoners filed an appeal from the denial of their Petition for a Writ of *Habeas Corpus*, Motions to Vacate, or were granted a Certificate of Appealability, as newly required by the 1996 AEDPA.

For purposes of calculating the numbers of pages of documents involved in these cases below, I am going to use the 11,303 number of new appeals filed in the year 2000. The one case which is the difference in the numbers between those cases filed in 2000, and those appeals terminated in 2000, is statistically insignificant. Further, the numbers below do not include the numbers of pages of the briefs filed in objections to the magistrate's R&R, or in the U.S. courts of appeals briefs. Those briefs alone exceed 1,300,000 pages of documents in 11,303 cases. I have left out those pages to create a built-in margin of error, and so as not to be accused of overstating the problem. But even with my omitting over 1,300,000 pages from the following calculations, to account for cases such as guilty pleas which have fewer transcript pages (and which are a small percentage of *habeas corpus* filings), the 11,303 *habeas* appeals still testify that there exists a serious problem of which the public is unaware. Also, before proceeding to the calculations, it is important that I make certain you understand the standard of review required in these prisoner *habeas* cases. Even those cases held procedurally defaulted at some level of the state court system, and the federal prisoner's petitions, require a review by the court for a manifest miscarriage of justice sufficient to overcome the procedural default. This review must be a review *de novo* of all the records of the case.

Table 5.62, p. 468, shows there are a total of 167 judgeships that are authorized by Congress in the eleven U.S. courts of appeals (excluding the federal circuit court not relevant to the issue addressed), and that those courts operate exclusively as three-judge panels, for a total of 55 panels available on any one day to hear cases. All three judges on the panel must review any *habeas corpus* petition *de novo*. The phrase *de novo* means anew; afresh; a second time:

> "Hearing *de novo*. Generally, a new hearing or a hearing for the second time, contemplating an entire trial in the same manner in which matter was originally heard and a review of previous hearing. Trying matter anew the same as if it had not been heard before and as if no decision had been previously rendered. On hearing *de novo* court hears matter as court of original and not appellate jurisdiction." *Black's Law Dictionary*, 1991, at pages 300 and 498.

The judges reviewing a state prisoner's *habeas corpus*, or a federal prisoner's motion to vacate, are required to read every part of the record of the conviction. This includes the pretrial briefs, the pretrial hearing transcripts, the trial transcripts, the appeal briefs, the appeals court decision, the state supreme court briefs and decision, the *habeas corpus* petition, the magistrate's Report and Recommendation, the objections to the magistrate's Report and Recommendation, the U.S. district court judge's opinion, and briefs and rulings on the certificate of appealability. Each judge on the panel of the court of appeals must review every page of the entire proceedings below their court, and render a decision, *de novo*, as if no other court has ever heard the issues raised and ruled upon them before.

Further, the judge cannot delegate this to a law clerk. Every U.S. citizen is entitled to a *de novo* review of his or her case on petition for a writ of *habeas corpus* by an Article III judge – i.e., a judge appointed by the President of the United States, by and with the advice and consent of the Senate, to sit during good behavior upon a U.S. federal court.

There were 28,560 appeals filed in the U.S. courts of appeals in 1985. There were 46,487 appeals filed in 2000. (Table 5.63, p. 469.) This is an increase of 62.7% in the number of cases. Yet in the same time, the number of judges has only increased from 156 to the present day 167, or an Increase of 7% in the number of judges sitting on the U.S. courts of appeal. (Table 5.62, p. 468.)

If, as stated at Table 5.62, p. 468, there were 167 judges, sitting as 55 three-judge panels, on any given day during the year 2000, and they decided on and terminated a total of 56,512 appeals, then each panel averaged a total of 1027 cases per year, or 4 (3.95) cases per day in a 260-day working year. Further, 20%, or 11,303, of those cases, were prisoner's (either state or federal), *habeas corpus* petitions. As stated above, these petitions require a full review *de novo* of all the lower court transcripts and documents.

The number of documents each case involves can be calculated, based on the length of the trial. But how many of the 11,303 cases involved what length of trial? Statistics again give us the answer.

Whether in state or federal court, criminal trials take about the same length of time for the prosecution to call witnesses and present and argue the case. All other aspects of the trial are also very similar, because most states have based their criminal rules of procedure, rules of evidence and jury instructions on their counterparts in the federal system. Of a total of 6,746 criminal trials in federal courts in 2000, the following cases lasted for the described periods of time. I have calculated and added the percentage each category comprises of the total number of trials. (See Table 5.38, p. 452.)

Further, based on my 13 years of experience as a criminal appellate paralegal, I have assigned the approximate number of transcript pages each trial of varying length will generate, and placed those numbers to the right of the chart. These transcript page totals include the average number of pre-trial hearing transcripts held on discovery motions and motions to suppress, which appear to some extent in every case, but not the briefing.

LENGTHS OF CRIMINAL TRIALS COMPLETED IN U.S. COURTS IN 2000

Length	No. Trials	Per Cent	Average Transcript Pages
1 day	3,260	48.32	300 pages
2 days	1,135	16.82	550 pages
3 days	832	12.33	800 pages
4–9 days	1,227	18.18	1,550 avg. pages
10–19 days	222	3.29	2,800 avg. pages
20+ days	70	1.03	4,000 avg. pages
Totals:	6,746	100% (rounded) (Table 5.38, p. 452.)	

Applying these percentages to the 11,303 *habeas* cases, the total average number of only trial transcript pages in the cases requiring a *de novo* review and dismissed in 2000 by the U.S. courts of appeal are as follows:

TOTAL TRANSCRIPT PAGES IN 11,297 *HABEAS* CASES (99.97%)

Length	Per Cent	No. Trials x Pages Each	= Total, Subset
1 day	48.32	5461 300	1,638,300
2 days	16.82	1901 550	1,045,550
3 days	12.33	1393 800	1,114,400
4–9 days	18.18	2054 1,550	3,183,700
10-19 days	3.29	372 2,800	1,041,600
20+ days	1.03	116 4,000	464,000
Totals:			
	Trials:	11,297 Transcripts,	8,487,550 pages.

Unfortunately, the 8.4+ million pages of transcripts generated by the 11,303 *habeas* cases terminated in the year 2000 by the U.S. courts of appeals are not the end of it. When dealing with over 11,000 cases, even a few pages for each can add up quickly. In addition to the transcripts, the judges are also required to review:

	Pages
Pre-Trial Briefs:	
average 40 pages x 11,303=	452,120
Direct Appeal Briefs:	
defendant's brief, 35 pages	
government's brief, 35 pages	
defendant's reply brief, 15 pages	
government's reply brief, 15 pages	
total 100 p. x 11,303 =	1,130,300
Appeals Court Opinion (avg.)	
10 pages x 11,303 =	113,030
Supreme Court Briefs (state or federal)	
defendant's brief, 20 pages	
government's brief, 20 pages	
Total[1] 40 p. x 11,303 =	452,120
Supreme Court Opinion (state or federal)(avg.)	
Opinion[2] 2 p. x 11,303 =	22,606
Average Post-Conviction filings for State Prisoners	
post-conviction and appeals[3] 50 p. x 7,234 =	361,700
Habeas Corpus Required Forms & Traverse	
forms and motions, 16 pages	
traverse to response 20 pages	
total, 36 p. x 11,303 =	406,908
U.S. District Court Proceedings	
magistrate's report and recommendation	
20 p. x 11,303 =	226,060
U.S. district judges' opinions	
10 p. x 11,303 =	113,030
Certificate of Appealability Proceedings	
appellant's brief, 30 pages	
government's brief, 20 pages	
district court order, 5 pages	
Total, 55 pages x 11,303 =	621,665

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[1] Jurisdictional Memoranda to State and Federal Courts vary in allowed page length from 15 pages to 50 pages. I set this number on the low side.

[2] Most cases are declined jurisdiction by both the State and Federal Supreme Courts. Death penalty cases, and cases where jurisdiction is accepted and the case heard on the merits, can sometimes receive Opinions that are from 50 to 100 pages in length. Others receive a one-page denial. I adjusted the page number to "2" to reflect correctly those cases that do receive a lengthy opinion, because they are few in number.

[3] This applies only to State prisoner *habeas* actions. The number of State *habeas corpus* appeals is lower than the total of federal and State prisoner *habeas* appeals, as is reflected in the 7,234 number. (See Table 5.63, at page 469.)

The total number of pages generated by 11,303 state or federal *habeas* actions comes to:

transcripts (11,297 cases)	8,487,550
pre-trial briefs	452,120
appeals court briefs	1,130,300
appeals court opinions	113,030
supreme court briefs	452,120
supreme court opinions	22,606
state post-convictions & appeals (7,234)	361,700
habeas corpus forms & traverse	406,908
U.S. district court – magistrate's R&R	226,060
U.S. district court judge opinion (min.)	113,030
certificate of appealability proceedings	621,665
total pages requiring *de novo* review:	12,387,089

In the year 2000, according to the statistics above, in order to render a complete *de novo* review of the 11,303 prisoner *habeas corpus* cases that were a part of the 56,512 cases terminated by the U.S. courts of appeals, bearing in mind this is only 20% of the total case load disposed of by the courts in 2000, the 167 judges, operating as 55 three-judge panels, would have had to read 615 pages each day, for the total 366 days of the year 2000. (Courts are technically open seven days a week: 2000 was a leap year, so they had one extra day to read. I would have to assume they needed it.)

If the judges worked a standard 260-day work year, each one would have had to read 866 pages of documents per day in order to give the prisoners' *habeas corpus* actions a complete review *de novo*.

After the judges completed reading these 866 pages of documents, they then had to complete the other 80% of their work for that day.

Do the math. 55 panels x 260 work days = 14,300 work days. 12,387,089 total pages of documents divided by 14,300 = 866 pages a day. 55 panels times 366 working days = 20,130 working days. 12,387,089 total pages of documents divided by 20,130 working days = 615 pages a day. And that is for only 20% of the total cases the U.S. courts of appeals decided, terminated, disposed of in some manner, in the year 2000. [1]

Even if you had 1320 judges, instead of 167 judges, operating in 440 three-judge panels, they would still have to read 108 pages a day each just to decide the *habeas corpus* cases terminated in the year 2000, and again, that would only be 20% of the workload they had that day!

Based on the above numbers, the average *habeas corpus* appeal consists of a total of 1,096 pages. That's not a ridiculous number of pages for a trial and several years of litigation. The appendix in my own appeal from the denial of my petition for a writ of *habeas corpus* was 2,690 pages in length, not counting over 100 pages of briefing by the Ohio State Attorney General and myself in the U.S. court of appeals, which, as stated above, I have omitted from my calculations in all the above terminated cases. As staffed and structured, our court system is inadequate to deal with the numbers of cases now being appealed.

I don't believe anyone reading this article can believe judges are reading 866 pages a day, every day, and still doing another 80% of their work. The truth is simple and self-evident from the numbers above. The judges are not reading these documents. Instead, some first-year law school student hired out of Harvard or Yale is skimming through this massive amount of documents and placing a short summary on the judge's desk. The twenty or thirty-page opinions issued in these cases are being written by these same law clerks, and merely edited by the judge, without the judge ever viewing the facts or evidence underlying the claimed constitutional errors presented.

I know of no human being who can read and understand 866 pages of documents a day, each and every work day, as 20% of his total work load, and dispense fair, correct and honorable justice. We are being deceived by our courts and government.

We, as citizens of the United States, are being denied our birthright – the review of our convictions by the government for constitutional error, by an Article III judge, who is appointed for a life tenure to guarantee impartiality by raising him above politics and public censure that could influence his decisions on heinous crimes or high-profile cases.

Prisoners have been complaining that their cases are not being decided fairly by the federal courts of appeal for several years now. No one listens to them. The present 11 circuit courts of appeals were set up over 100 years ago, when hundreds, not tens of thousands, of cases were being heard. The Ninth Circuit Court of Appeals in San Francisco, for example, hears and decides cases from eleven States, including California. It is time for a complete overhaul of the judicial system in the United States, the creation of more U.S. courts of appeals, and the tripling or quadrupling of the number of judgeships on those courts of appeal.

In Plato's *Republic*, Socrates asked Thrasymachus, what happens when a ruler errs? Thrasymachus replied that a ruler is not a ruler when he errs. In *The Prince*, by Niccolo Machiavelli (1532), it is stated that, although a prince can sometimes afford to be virtuous, flattery, deceit, and even murder are often necessary if the prince is to maintain himself in power.[2]

In the year 1690, John Locke published "Of Civil Government: The Second Treatise." He stated that in order to remedy the inconveniences resulting from a state of nature, in which every man is judge of his own acts, men enter into a contract, thereby creating a civil society empowered to judge men and to defend the natural rights of men. He further stated that if a government violates the social contract by endangering the security and rights of the citizens, it rebels against the people, and the people have the right to dissolve the government. While "pork" projects flow freely through our legislative body, real problems, such as the one described above, cannot generate even a letter in response to a prisoner or concerned citizen from those same legislators. It is time we demand responsible representatives who are not afraid to deal with the real flaws of our society and make changes to our system that are fundamental as opposed to cosmetic makeovers.

To paraphrase Frank N. Magill in his book, *Masterpieces of World Philosophy*, while discussing the "Essay on Liberty," by John Stuart Mill (1859), p. 394, "Our government's task concerns how men are to meet the necessary demands of organized life without destroying the rights of the individual."

Understand that I am a rebel, not a revolutionary, in the ideas I advance in my articles. "In rebellion, the slave rises against his master; in revolution he aspires to take his master's place." *The Rebel*, by Albert Camus (1951).

Like Sisyphus, condemned to roll his rock up the hill endlessly, I sit in this prison cell writing day after day, sounding an alarm to a threat to our freedom which only citizens like me, who are its victims, can clearly see. The lives of the wrongfully convicted are shattered. We depend on the U.S. Court of Appeals as the final safety valve in our system of justice, knowing the Supreme Court can hear only 1% of the 10,000 cases presented to it each year. But we find, as proved statistically above, that the king's men are so swamped with calls for help from the more than 2,000,000 prisoners incarcerated at any given time in local jails, and state and federal prisons, that they simply do not have the human resources to answer the calls, or the time to weed out the cases with merit – much less to discern which of those prisoners are actually or factually innocent. They have time only to give the appearance of justice in the few cases that catch someone's eye. After all, as long as the majority of the public believes the courts are doing their job, little else matters in the larger scheme of things – or at least it didn't until DNA evidence came along and started exposing all the mistakes the courts had failed to correct.

As a child, I was taught to believe in the police and courts of my country. As a man, I have learned that justice actually is blind, haphazard and administered by deceitful people, unwilling to admit that the system is simply broken.

Until next time, this is Jim Love reporting From the Front Line.

METHODOLOGY

All facts and statistics I needed for this essay are not available to me at this time, and future refinements will be forthcoming. However, I am confident in the overall numbers of pages per day as either being accurate or low, because I have built in a significant margin of error by several omissions.

First, I did not eliminate any federal holidays from the number of work days. I only eliminated Saturdays and Sundays from the work year and rounded that down from 261 to 260. There are ten (10) federally recognized holidays.

Second, I did not eliminate any vacation time the judges would take each year, time for continuing legal education requirements, seminars, sick days allowed or time spent assigned to various Federal studies, such as frequently occur. I did not eliminate vacant judgeships from the 55 panels possible.

So the total of "work days" I have quoted for the appeals court judges is high.

In regards to the total number of pages of each case, I have calculated that number on the low end of the spectrum. The only briefings which may be high are the numbers given for briefing Certificates of Appealability, overall. Yet my personal brief on this issue far exceeded the number given. I briefed and cited 134 errors of fact in the 38-page opinion issued in my case by the District Court. The substantive issues raised in the Writ must be fully briefed both in the Application for COA and the brief filed in the Court of Appeals, or they are waived. *Modrowski* v. *Mote*, 322 F.3d 965, 969 (7th Cir. 2003).

I have not included the numbers of pages that are involved in the briefing in the Courts of Appeals. A "14,000" word brief is allowed. Mine was 54 pages in length. Nor have I included the government's Response brief, the Appellant's Reply brief, or the government's Reply brief. I have not included the objections filed in the U.S. District Court to the Magistrate's R&R. I have not included any Discovery documents filed pre-trial in the case. In one case I know of, Discovery encompassed over 700 pages of documents.

Further, the numbers of' one-day and two-day trials are inflated, while three-days and four-to-nine day trials are deflated, further reducing the total numbers of pages. This occurs because one-day trials are usually held on less serious charges carrying substantially shorter sentences. By the time the defendant exhausts State remedies, in the majority of these cases, the sentence being served is nearly completed. Because it takes two years for a U.S. District Court to rule upon a *habeas* petition, and because the defendant's sentence from a one or two day trial expires within that time frame, they simply do not file *habeas* petitions as often as those men and women who had more serious cases, involving longer trials and longer sentences.

I overstated the numbers of work days for judges, and understated the numbers of total pages of documents needed reviewed, to compensate for a couple of factors for which statistics are unavailable.

First, I did not include the numbers of work days that retired senior judges work, or U.S. District Court judges who sometimes sit by "designation" on appellate panels. In a follow-up essay I am working on, computing the numbers of pages U.S. District Court judges have to read, I did include Senior Judges. The difference is that U.S. Court of Appeals judges are more elderly when appointed than U.S. District Court judges, and complete their mandatory 15 years at a higher age. Correspondingly, retired U.S. Court of Appeals judges work fewer days and take a lighter case load than retired U.S. District Court judges.

Further, while present case law requires that almost all *habeas* cases receive a full *de novo* review, there are some cases, for instance where a procedural default is clear on the record and a defense of a manifest miscarriage of justice is not raised; a treaty violation; an excessive bail petition; or an uncontested instance of failure to exhaust, where a *de novo* review is not required. I have adjusted my numbers to compensate for these types of cases.

But almost all *habeas* cases require a complete *de novo* review. See, e.g., *Sistrunk* v. *Armenakis*, 292 F.3d 669 (9th Cir. 2002) (newly discovered evidence requires review of trial record to see if jury would be "more likely than not" to have still convicted in light of the evidence presented at trial); *O'Neal* v. *Lampert*, 199 F.Supp.2d 1064 (D. Or. 2002) (Actual innocence claim can overcome one-year statute of limitations – requires review of entire trial record*); United States ex rel. Gomez v. Schomig*, 203 F. Supp.2d 925 (N.D.Ill. 2002) (court required complete state record to determine whether petitioner's claim of actual innocence was sufficiently credible to overcome procedural bar to consideration of ineffective assistance [of counsel] claim); *Finley* v. *Johnson*, 243 F.3d 215 (5th Cir. 2001) (*Brady* claim of withholding of exculpatory evidence requires review of state trial record under *Schlup* standard); *Flanders* v. *Graves*, 299 F.3d 974, 978 (8th Cir. 2002) (*en banc*) (in some circumstances claim of actual innocence may toll one-year statute of limitations); *Hamilton* v. *Vasquez*, 882 F.2d 1469, 1471 (9th Cir. 1989) (court has duty to obtain and review state court record where questions presented are mixed questions of fact and law prior to issuing Summary Dismissal of Writ under *Habeas* Rule 4); *Yates* v. *Evatt*, 500 U.S. 391, 405-406 & n. 10, 409-410 (1991) (harmless error, ineffective assistance of trial and appellate counsel, prosecutorial misconduct and insufficiency of the evidence claims cannot be ruled upon without review of entire state court trial record).

For a more complete list of *habeas* claims, both legal and factual in nature, which require a complete *de novo* review, see generally *Federal Habeas Corpus Practice and Procedure*, by Liebman and Hertz, 4th Ed. 2001, §§2.4b, 2.4d, 18.2b, 20.3d, 25.5, 30.1, 31.4f, 32.1, 32.3 and 37.3a.

For the above reasons, I am confident that the methodology I have used to compensate for those miscellaneous statistics unavailable to me due to my incarceration, presents a realistic and overall correct approximation of the numbers of pages of documents required to be read by the judges of the U.S. Courts of Appeals in the year 2000 in order for them to have dismissed a total of 11,303 *habeas corpus* cases on appeal. I stand by my challenge for anyone to find substantial error in my calculations.

Endnotes:

[1] Provided you obtain statistics from individual state supreme court administrators, this formula will work for any court system.

[2] Paraphrased from *Masterpieces of World Philosophy*, edited by Frank N. Magill, selected and introduced by John K. Roth [New York: Harper-Collins, 1990.]

System Failure

From the Front Line
August 8, 2006

I RECEIVED THE 31st Edition of the Sourcebook of Criminal Justice Statistics (NCJ-208756), from the National Criminal Justice Reference Center in Rockville, Maryland last week. I checked all the updated statistics against the 2000 Edition from which I quoted the majority of the statistics in this book. Over the three years the numbers have simply become worse.

My second trial was held in June, 1996. My prison number is #329-475. As of June 2006, Ohio's prison system was processing 540-000 numbers at their reception centers. That is 200,000 men and women processed in ten years, or 20,000 per year on average.

Ohio has 12 District Courts of Appeals. Those appeal courts have a total of 66 elected judges on them, who, like those in the federal appeals courts, sit exclusively as a three-judge panel on each case before them and comprise a total of 22 panels. That is 1,000 cases per year per panel, or, four a day during a 260-day work year.

The problems in the United States Courts of Appeals and the United States District Courts are detailed in "All the King's Horses and All the King's Men...," and in "What John Ashcroft Has Done, or, the Good, the Bad and the Ugly." These same problems extend to all levels of our court system, both State and federal.

In 1979 the United States Supreme Court denied a Petition for *Certiorari* in a case named *Brown Transport Corp.* v. *Atcon, Inc.*, 99 S.Ct. 626 (1979). Justice White and Justice Blackmun filed a dissenting opinion. Chief Justice Burger also filed a comment at p. 633. In their dissents they quoted reports from the Federal Judicial Center, Report of the Study Group on the Caseload of the Supreme Court, 5 (1972), and from the Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change, 29 (1975).

Justice White complained that under the pressures of the case load, many cases that deserved to be reviewed and decided upon were being dismissed. He cites several examples of important national issues that were simply passed over by the Court, and cites conflicting authority in other parts of the nation. *Id.*, at 628-632. He then compares the Supreme Court's case load to that of 1937, and quotes from a letter from Chief Justice Charles Evans Hughes, written in 1937, complaining that at least 20% of the Petitions for *Certiorari* filed in 1937 were deserving of review by the Court, but that it was simply impossible for the Court to hear and carefully decide on that many cases. *Id.*, at 632. Justice White then observed that less than 1,000 cases had been filed in the U.S. Supreme Court in 1937, and compared that with the 4,000 cases that had been filed in 1979 –42 years later.

Justice White then stated:

> "...In 1937, there were fewer than 1,000 new filings on the Supreme Court docket. In 1962, there were about 2,800 and today about 4,000. No longer is it possible to review 20% or even 10% of the cases in which petitions are filed. ...For the 24 years ending with the 1970 term, in cases granted plenary consideration, the Court issued an average of 101 full opinions plus 10 to 15 *per curiam* opinions. Since 1970, we have averaged 132 full opinions plus 15 *per curiam* opinions – these opinions deciding an average of 170 cases – and we cannot hope substantially to exceed this average or to increase the percentage of all cases docketed to which we give plenary review. Indeed, if the certiorari docket resumes the remarkable growth that it exhibited prior to 1972, which it may well do when the output of the courts of appeals begins to reflect the many new judgeships created by the Omnibus Judgeship Act

just passed by Congress, the percentage of petitions filed that can be reviewed here will inevitably decline even further. ...There is no doubt that those concerned with the coherence of the federal law must carefully consider the various alternatives available to assure that the appellate system has the capacity to function in the manner contemplated by the Constitution. As others have already noted, there is grave doubt that this function is adequately being performed." *Brown*, at 632.

It should be noted also that the 2003 Sourcebook evidences that in 1979 there were 132 total judges on the U.S. Courts of Appeals. That number has increased today to 167 judges. (Table 5.66, p. 462). But at the same time the cases filed before the courts increased from 19,259 in 1980 to 46,358 in 2003. (Table 5.67, p. 463).

Further, the backlog of cases increased from 21,510 in 1982, to 44,600 in 2003. (Table 5.66, p. 462).

The United States Supreme Court docket of filed cases increased from 4,781 in 1979 (when the above discussion took place), to 9,406 docketed cases in 2002. (Table 5.69, p. 465).

Justice White, in *Brown Transport Corp*., *supra*, further stated:

"...In 1972 a study group chaired by Paul Freund of the Harvard Law School examined the problem. Its stark conclusion was: 'The statistics of the Court's current workload, both in absolute terms and in the mounting trend, are impressive evidence that the conditions essential for the performance of the Court's mission do not exist. For an ordinary appellate court the burgeoning volume of cases would be a staggering burden; for the Supreme Court the pressures of the docket are incompatible with the appropriate fulfillment of its historic and essential functions.' Federal Judicial Center, Report of the Study Group on the Caseload of the Supreme Court 5 (1972), reprinted in 57 F.R.D. [Federal Rules Decisions] 573, 581 (1973)." *Brown*, at 632-633.

The problems I am addressing in this book have been known to Congress, our judges, and the legal community for over 34 years – yet nothing has been done to correct the problems, and it is not even a topic of national debate!

Justice White further states:

"...Likewise, the Commission on Revision of the Federal Court Appellate System, which was established by Congress, concluded in 1975 that the present appellate arrangements leave unsettled too many conflicting decisions and important questions of federal law. The point has been reached at which 'the percentage of cases accorded review [has] dipped below the minimum necessary for effective monitoring of the nation's courts on issues of federal statutory and constitutional law.' Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change 29 (1975), reprinted in 67 *F.R.D.* 195, 217 (1976)." *Brown*, at 633.

Agreeing with Justice White, Chief Justice Burger commented separately, stating:

"...Reasonable men can, and do, have differing views on the specific cases recited by Mr. Justice White, but his analysis of the broad workload problem confronting this Court is sound and constitutes an important service. It is not a healthy situation when cases deserving authoritative resolution must remain unresolved because we are currently accepting more cases for plenary review that we can cope with in the manner they deserve. ...It is now six years since a committee of distinguished practitioners and scholars, all of them intimately familiar with the work of the Court, concluded that the growth in the volume and changing complexion of that work called for a remedy. Federal Judicial Center, "Report of the Study Group on the Caseload of the Supreme Court" (1972), 57 *F.R.D.* 573 (1973)." (Footnote omitted). *Brown*, at 633.

Those words were written 27 years ago. Chief Justice Burger went on to say:

> "...That commission found four significant consequences resulting from the inability of the federal judicial system to provide adequate capacity for the declaration of national law: (a) unresolved intercircuit conflict; (b) delay; (c) a burden on the Supreme Court to hear cases arising from intercircuit conflict otherwise less worthy than many cases denied review; and (d) resulting uncertainty in the law. *Id.*, at 217-219." *Brown*, at 634.

The Judiciary Act of 1789 created only 13 federal district judgeships. It did not provide for the Circuit Courts of Appeals. The Judiciary Act of 1801, urged by then Chief Justice John Jay and his associate justices, authorized the Circuit Courts of Appeals, but was repealed after Thomas Jefferson was elected President. It was not until 1891 that the Courts of Appeals were created. In 1978 the Omnibus Judgeship Act raised the total number of judges authorized for the U.S. Courts of Appeals from 97 to 132. Since then that number has been raised to 167. Regardless, this is still only 55 three-judge panels on any given day, forced to hear 1093 cases a year each.

It is simply inadequate.

Chief Justice Burger, in concluding his remarks, foretells the point in time that we have reached now, and which has imposed upon me a duty to sound the alarm and write this book. Chief Justice Burger stated:

> "...The additional judgeships may solve short-term problems, but the long-term problems of the Supreme Court [and the Courts of Appeals] analyzed by the Freund Committee and the Commission on Revision of the Federal Court Appellate System remain as they were a decade ago. If the improvement in the expeditious dispensation of justice intended by the Congress and the President when they authorized 152 new [district court] federal judges is to be realized, these problems should be faced without waiting for a crisis." *Brown*, at 636.

Twenty-seven years ago Chief Justice Burger and Justice White foresaw the crisis we have reached in this nation, which is described in this book.

It is fundamental that in order for the rights of the individuals of this nation to be protected and preserved, fairness and careful resolution of the cases before the courts is an indispensable necessity. Judges must have the time available to not only read the documents that comprise the cases before them, but to reflect and ponder upon the impact of the decision made on that individual and on society as a whole.

We simply do not have an adequate number of judges, courthouses or staff for that to occur in the year 2006, and have not had that for over 30 years. As a result, the evolution of our laws has stagnated as stopgap measures have been enacted which have only one purpose in mind – to reduce the number of citizens who are able to have their cases heard on the merits of their claims, and allow thousands of cases to be dismissed after a cursory review of the procedural errors made by uneducated citizens seeking only an "authoritative resolution" of their claimed constitutional violations.

The courts of this nation are in s*ystem failure*. This is why so many innocent citizens languish in prison, their lives ruined, as DNA exonerations across this nation have proven over the past 15 years.

How many wrongful convictions have yet to be discovered – or will never be discovered?

Email your senators and representatives. Email your State representatives. Have them apply the formula in "All the King's Horses and All the King's Men..." to your state appellate court system, and see what the numbers reveal. If they won't do it, write to the court administrator at your state supreme court, or go online, and find the statistics yourself and apply the formula.

Most people never need a court to intervene in their life. When they do, they need that court desperately. But even if you are never directly before a court, every decision they make, every law they interpret, in some way, makes its way back into your life.

You need those decisions to be fair.

On a grander and less personal scale, consider the impact of what has been revealed to you in this book on the future of this Nation. It was founded upon the Rule of Law and the American People take great pride in our system of justice, as they believe it to be. Can you, as an American, in good conscience allow it to be less? I cannot.

On August 4, 2006, *USA Today* reported on page 3 that North Carolina passed a law creating an appeals panel for prisoners who claim their innocence. The Innocence Inquiry Commission consists of eight members: if five members agree that the new evidence submitted by the prisoner proves innocence, then the Commission has the power to send the case to a three-judge panel of the Superior Court. If all three judges vote in the prisoner's favor, the conviction is overturned.

This is the first Innocence Inquiry Commission of its kind in the nation, and at least a start on the type of Commission I have been advocating these many years. I ask you to bring this to the attention of the legislature in your State.

As Justice Brennan stated, "The prisoner's petitions in this nation are the first line of defense for the Constitution of the United States." I have been on that Front Line for 16 years, and I can tell you, from personal experience and observation, that first line of defense has been breached.

I have sounded the alarm and called for reinforcements. Only you can answer that call.

Until next time, this is Jim Love reporting From the Front Line.