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## Message from the Chair

### The Court of Appeals Should Be Further Expanded

It is settled law that there is no constitutional right to an appeal. Appeals are allowed by the grace of the legislature. Georgia did not even have appellate courts until 1845, when the General Assembly created the Supreme Court.

Nevertheless, if law is the application of neutral principle rather than the exercise of raw power, appeals are the sine qua non of law. Without an appellate process, "Each judge is supreme in his own [court], construing as he pleases, allowing no controlling influences to any opinion but his own, and often overruling them. Such a system is fraught with evils intolerable, that it is a matter of wonder that an enlightened people should submit to it for a single day." So argued Governor Charles McDonald in 1843, advocating the creation of our Supreme Court.

Appellate courts do not merely set legal policy and correct error. They check power. If setting legal policy was the sole reason for appeals, only the handful involving matters of concern, gravity and importance to the public would need to be decided. If correcting error was the sole reason, low reversal rates, high costs, and long delays would argue persuasively for eliminating appeals entirely.

For a several years I have served on a committee of domestic lawyers that advocates restoration of direct appeals in domestic cases. Initially I was more than skeptical. Rulings in domestic cases usually turn on issues of fact and matters of discretion. Prolonging such cases is often a real disservice to the parties and their

children. Domestic cases are often appealed for emotional reasons – or just plain bad reasons. But lawyers who remember when domestic appeals became discretionary persuaded me. They recounted that when domestic appeals became discretionary and the appellate check on trial judges' power became more remote, the quality of trial-court judging deteriorated.

A vigorous appellate system is a necessity primarily because Acton's famous observation that power corrupts and absolute power corrupts absolutely is as true of judges as of any other mortals. The United States Attorney and the Judicial Qualifications Commission are equipped to handle the rare instances of gross or criminal corruption. But appeals are the only viable remedy for venial corruption – the sort to which all of us are subject and of which the best of us are the most conscious in ourselves. Appeals provide a remedy for the subtle corruption that tempts judges to give their predispositions too much sway, to confuse their own opinions with the law, to overestimate their own wisdom, or to rely on gut instinct instead of thinking through a difficult issue. (Of course, lawyers often share in the culpability for that last sin.)

As to such temptations, appellate review instills discipline. Appellate judges are similarly disciplined by the need to persuade their colleagues. That discipline is effective only to the extent that appellate review is rigorous and that appellate judges' need to persuade their colleagues is real.

In Georgia, most appeals are handled by the Court of Appeals. The rising caseload in that court cannot but make appellate review more remote and therefore less rigorous. The Court of Appeals had nine judges from 1961 until 1996. A tenth judgeship was created in 1996,

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and the number was increased to twelve in 1999. In 1961 there were 55 superior court judges. In 1996 there were 169. Today there are 187. In a 1990 report by the National Center for State Courts, Georgia ranked among the busiest appellate courts in the nation. In a 1999-2000 National Center report, Georgia ranks second among 21 reporting states in the number of mandatory appeals cleared per judge. The ground gained by adding three judges in the late 1990s is rapidly being lost.

Caseload pressures have consequences. The judges of Georgia's Court of Appeals are apparently unique among American appellate judges in not routinely discussing their cases face-to-face except at oral argument. In recent years, the Court of Appeals reduced the maximum length of oral argument and made the grant of oral argument discretionary. Caseload pressures push members of the court to increase their reliance on the judge to whom the case is assigned, undermining the discipline imposed by the panel system. Regardless of the judges' diligence and the diligence of their staffs, it is unrealistic to expect that caseload pressures will not affect the quality of decisions and the rigor with which appellate judges review the work of trial judges and of one another.

As the rigor of that review erodes, the discipline imposed upon trial courts and upon the members of the appellate court erodes as well. Unless the membership of the Court of Appeals is allowed to keep pace with its caseload, that rigor and therefore that discipline cannot but erode.

It is often assumed that adding members to the Court of Appeals must mean dividing it along lines of geography or subject-matter. Such divisions would come with a price. Different appellate districts will necessarily mean different law in different parts of the state. Specialty appellate courts are subject to more focused political pressure than generalist appellate courts. This is especially true of courts of criminal appeals, which are the specialty appellate courts created in other states.

But technology has made it possible to expand the Court of Appeals without creating such divisions. Records can now be copied in electronic format and accessed over the internet. Federal appellate judges have long had the option to establish their chambers anywhere in their circuits. Judges of the Georgia Court of Appeals should have a similar option. Such an option would make service on the Court of Appeals more attractive to Georgians who live outside metropolitan Atlanta. The loss of face-to-face contact among the judges would be a disadvantage, but the court operates primarily by memo now.

Regardless how it is done, the Court of Appeals should expand along with its caseload. Under the best of circumstances, there are enough vagaries in the appellate process to make reversal of even the most blatant error uncertain. The greater that uncertainty, the closer our system degenerates toward Governor McDonald's "evils intolerable."

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