Report of the Appellate Jurisdiction Review Commission

January 2016

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I. EXECUTIVE SUMMARY

During the 2015 Regular Session of the Georgia General Assembly, the legislature passed and Governor Nathan Deal signed House Bill 279, which created three new judgeships on the Georgia Court of Appeals. While this expansion represents the first major appellate court change since 1999, it also provides an opportunity to reexamine the existing jurisdiction of the Supreme Court of Georgia and the Georgia Court of Appeals as well as the allocation of caseload between these appellate courts.

On October 1, 2015, Governor Deal signed an executive order creating the Georgia Appellate Jurisdiction Review Commission ("Commission"). The Governor tasked the Commission with "review[ing] the current jurisdictional boundaries of our appellate courts and mak[ing] assessments about modernizing those courts for efficiencies and to achieve best practices in the administration of justice."[1]

The Commission respectfully submits this final report to the Governor, Lieutenant Governor, Speaker of the House of Representatives, Chief Justice of the Supreme Court, and Chief Judge of the Georgia Court of Appeals for full consideration during the 2016 legislative session.

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[1] Exec. Order No. 10.01.15.03 (Oct. 1, 2010), http://gov.georgia.gov/sites/gov.georgia.gov/files/related_files/document/10.01.15.03.pdf.

II. BACKGROUND

In 1845, after extensive legislative debate and analysis about the unchecked power of superior court judges in Georgia, the Supreme Court of Georgia was created and staffed with only three Justices. Upon this action, Georgia became the last state then in existence to create an appellate court system.[2] As the only appellate court in the state, the Supreme Court primarily corrected "errors in judgments rendered in the superior courts of this state."[3] Due to the fact the Supreme Court had jurisdiction over all appeals, the court's workload increased dramatically.[4] By 1894, "the workload of the court became so heavy that Chief Justice Logan Bleckley resigned . . . because he was physically exhausted."[5]

After expanding the Supreme Court from three Justices to six in 1895, the legislature created a three-member Court of Appeals in 1906 "[t]o relieve the increasing workload of the Supreme Court."[6] Due to the fact that the Court of Appeals was originally conceived as a court of final jurisdiction, the Supreme Court could not review any decisions of the Court of Appeals and could only decide cases that fell within the Court of Appeals' direct jurisdiction if the Court of Appeals asked for guidance by certifying a question to the Supreme Court.[7] The Supreme Court's certiorari jurisdiction was later created by an amendment to the Georgia Constitution in 1916.[8]

Since the creation of the Court of Appeals in 1906, Georgia's division of appellate jurisdiction has been premised on a historical quirk resulting from the development of the appellate courts rather than a carefully considered plan.[9] At that time, direct appeals were divided by appealing issues originally filed in superior court to the Supreme Court and appealing issues originally filed in an inferior trial court to the new Court of Appeals.[10] While this may have made sense at one point, the division of cases between superior and inferior trial courts was established in the 1777 Georgia Constitution based on which cases were deemed most important at that time. This division, originally conceived almost 240 years ago and almost seventy years before the state had an appellate court, still controls appellate jurisdiction instead of which appeals are deemed most important by today's standards.[11]

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[2] *See History of the Court of Appeals*, GA. COURT OF APPEALS, http://www.gaappeals.us/history/ (last visited Jan. 12, 2016).
[3] *Cent. of Ga. Ry. Co. v. Yesbik*, 91 S.E. 873, 873 (Ga. 1917).
[4] THOMAS S. CHAMBLESS ET AL., REPORT OF THE COMMISSION ON THE APPELLATE COURTS OF GEORGIA 2 (Dec. 1996) (on file with the Georgia Administrative Office of the Courts).
[5] *Id.*
[6] *Id.*
[7] *History of the Court of Appeals*, *supra* note 2.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *See Constitution of Georgia: February 5, 1777*, THE AVALON PROJECT, http://avalon.law.yale.edu/18th_century/ga02.asp (last visited Jan. 13, 2016).

As Georgia continued to grow, the Georgia General Assembly increased the number of Court of Appeals judges to respond to strain on the Court. The Court of Appeals grew from three judges to six in 1916. A seventh judge was added in 1960 and two more judges were added in 1961 to bring the total number to nine.[12] In the 1990s, the legislature expanded the Court of Appeals again, growing to ten judges in 1996 and then to twelve in 1999.[13] The final expansion of the Court of Appeals occurred January 1, 2016, when the court reached its current number of fifteen judges.[14]

The addition of three new Court of Appeals judges earlier this month increased the Court of Appeals' judging capacity by 25%, and will help to alleviate the overworked court.[15] The jurisdictional division between the Supreme Court and the Court of Appeals, however, continues to create tension and confusion.[16] Because the jurisdiction division between the two courts has remained essentially unchanged since 1916, the Supreme Court and Court of Appeals can be viewed as dual courts of last resort.[17] Today, the "large majority" of the forty states with an intermediate appellate court "have a supreme court with exclusively or primarily certiorari or other discretionary jurisdiction, and an intermediate appellate court for original appellate jurisdiction in most cases."[18]

Under the Georgia Constitution of 1983, the jurisdiction of the Supreme Court is split among three different types of cases. The first type includes writs of certiorari, cases in which the Court of Appeals is equally divided and certified questions from federal courts. The second type includes cases constitutionally mandated as being within the exclusive jurisdiction of the Supreme Court—all cases involving a treaty or the construction of the Constitution of the United States and the Constitution of Georgia and all cases involving an election contest.[19] Finally, unless the General Assembly provides otherwise (and, to date, it has not), the Supreme Court has direct (or "general") appellate jurisdiction over:

> (1) Cases involving title to land; (2) All equity cases; (3) All cases involving wills; (4) All habeas corpus cases; (5) All cases involving extraordinary remedies; (6) All divorce and alimony

[12] *See* CHAMBLESS ET AL., *supra* note 4, at 2.
[13] Richard W. Creswell, *Georgia Courts in the 21st Century: The Report of the Supreme Court of Georgia Blue Ribbon Commission on the Judiciary*, 53 MERCER L. REV. 1, 11 (2001).
[14] 2015 Ga. Laws 919.
[15] *See* Creswell, *supra* note 12. *See also* CHAMBLESS ET AL., *supra* note 4.
[16] Kyle G.A. Wallace, Andrew J. Tuck & Max Marks, *Division of Labor: The Modernization of the Supreme Court of Georgia and Concomitant Workload Reduction Measures in the Court of Appeals*, 30 GA. ST. U. L. REV. 925, 942 (2014).
[17] *Id.*
[18] CHRISTOPHER J. MCFADDEN ET AL., GEORGIA APPELLATE PRACTICE WITH FORMS §1:6, at 20-21 (2012-2013 ed. 2013).
[19] GA. CONST. art. VI, § 6, para. 2.

> cases; (7) All cases certified to it by the Court of Appeals; and (8) All cases in which a sentence of death was imposed or could be imposed [which has been interpreted to mean not only death penalty cases but all murder cases].[20]

As the State's highest court, the Supreme Court is also responsible for a plethora of regulatory and administrative responsibilities including, but not limited to, regulation of the practice of law, regulation of bar admissions, chairing the Judicial Council and establishing uniform rules for all classes of courts.[21]

This Commission's analysis found that, in the past three calendar years, the Supreme Court issues an average of 432 majority opinions per year. Only eighteen percent (or approximately 78 opinions) of these cases fall under the category of constitutionally-mandated exclusive jurisdiction of the Supreme Court. Twenty percent (or approximately 87 opinions) are part of the Supreme Court's regulatory function (i.e., attorney and judicial discipline cases, State Bar fitness matters and formal advisory opinions). The remaining 62% of the Supreme Court opinions dispose of cases in the general jurisdiction category with 39% (approximately 167 opinions) involving murder, death penalty and habeas corpus cases and 23% (approximately 100 opinions) involving routine civil matters. Of these routine civil opinions issued by the Supreme Court last year, eleven cases involved title to land, eleven cases involved equity, eight cases involved wills, fourteen cases involved extraordinary remedies, 31 cases involved divorce and alimony and 24 case involved miscellaneous civil and non-murder criminal matters.

The appellate courts' and appellate litigants' time and resources are also consumed by the transfer of cases between the Supreme Court and Court of Appeals when jurisdictional issues are not clear. For example, during 2014 alone, the Supreme Court transferred 115 cases to the Court of Appeals and the Court of Appeals transferred 75 cases to the Supreme Court. The determination of proper jurisdiction and resulting transfer can often take months. None of this work or delay is related to the merits of the cases.

Inefficiencies are exacerbated by the decisional processes of the courts. The Constitution requires the Supreme Court to sit en banc, meaning that all seven Justices must decide every case, while the Court of Appeals normally decides cases by three-judge panels. This Commission found that it is highly unusual and ineffective for seven, rather than only three appellate judges to decide routine appeals. Because of the number of judges and the five-panel structure of the Court of Appeals, that Court can decide five routine cases with approximately the same effort and time the Supreme Court takes to decide one.

While multiple commissions, committees, studies and scholarly articles since the 1970s have recommended the transfer of jurisdiction over some or all routine civil and criminal appeals from the Supreme Court to the Court of Appeals, legislation to do such has never materialized. The major stumbling block to these recommendations has always been that a transfer of cases to the Court of Appeals would be unfair and unworkable without adding judges and support staff to

[20] GA. CONST. art. VI, § 6, para. 3.
[21] *See Wallace v. Wallace*, 255 Ga. 102, 109-112 (1969). *See also* O.C.G.A. § 15-5-20.

the Court of Appeals. Before the addition of three new judges on the Court of Appeals earlier this month, each judge handled an average of 150 opinions per year. The addition of the three new judges reduces that caseload by about thirty per judge. Enacting the recommendations that follow will add approximately seven additional cases per judge, for a net reduction of 23 cases per judge.[22]

In sum, the following recommendations would result in much greater efficiency in disposing of routine civil appeals, with Supreme Court review of cases involving issues of importance remaining available by petition for certiorari. It would also enable the Supreme Court to focus more on the most important cases and the administration of the justice system. Finally, and perhaps most importantly, it would create an appellate system that is more logically and intentionally organized rather than the current system, which is largely an accident of historical development.

III. RECOMMENDATIONS

A. Reduce the inefficiency and confusion created by the current system relating to the review and disposal of routine appeals by shifting certain civil-case jurisdiction to the Court of Appeals.

During the 2016 Regular Session of the Georgia General Assembly, it is the recommendation of this Commission that the legislature provide by law, pursuant to Article VI, Section VI, Paragraph III of the 1983 Georgia Constitution, that the following types of cases are within the appellate jurisdiction of the Court of Appeals, rather than the Supreme Court:

1. Cases involving title to land;
2. All equity cases, except those cases concerning proceedings in which a sentence of death was imposed or could be imposed and those cases concerning the execution of a sentence of death;
3. All cases involving wills;
4. All cases involving extraordinary remedies, except those cases concerning proceedings in which a sentence of death was imposed or could be imposed and those cases concerning the execution of a sentence of death;
5. All divorce and alimony cases.

The exceptions regarding equity and extraordinary remedies cases are needed to avoid any uncertainty regarding the Supreme Court's jurisdiction over all matters involving murder and death penalty cases.

To allow time for the courts and litigants to prepare for and adjust to these changes, it would be best for the General Assembly to make these jurisdictional changes effective January 1, 2017

[22] The nationally recommended average for intermediate appellate courts is 100 cases per judge. Thus, even with the reduction in caseload, Court of Appeals judges will still be required to handle more cases than what is considered national best practice. Similarly, the Supreme Court will still be required to decide about 330 cases by opinion each year. By comparison, the United States Supreme Court has decided only about 75 cases per year in recent years.

and these changes should apply to cases in which the notice of appeal or application to appeal is filed on or after that date.

B. Give the Court of Appeals greater procedural flexibility in its decisional process.

This Commission recommends that the General Assembly amend O.C.G.A. § 15-3-1 to allow the Court of Appeals to enact, by published rule, procedures relating to when the Court should decide cases with a panel consisting of more judges than its standard three-judge panel and when and how Court precedent is established and overruled. This statutory amendment would provide flexibility for the Court to adjust its rules in light of its expanded jurisdiction and future changes in caseloads and technology.

Ideally, the General Assembly would make this amendment effective on July 1, 2016.

C. Improve efficiency by bolstering court resources, staff and technology.

The Commission has been advised by the Court of Appeals that the Court is currently in the process of restructuring its Central Staff Attorney Office to more closely resemble that of other busy state and federal courts (i.e., one that shifts some cases to a central staff to assist in the drafting of opinions). The Court of Appeals is of the opinion, and the Commission agrees, that this familiar and time-tested model will allow the Court to operate more efficiently by identifying certain categories of cases that can be handled more expeditiously by the Court's Central Staff Attorneys. The restoration of two attorney positions that were cut during the Great Recession and the addition of more attorney positions in Central Staff will, then, allow the Court of Appeals to begin the process of building up a staff that can offer far greater assistance to the Court's judges in their opinion writing. It will also provide the Court with the personnel it will need to handle the significant influx of applications and motions that it will receive as a result of the jurisdictional shift in cases outlined in this report.

In addition, in order to recruit the best talent to serve as central staff attorneys and law clerks for terms of only one to three years, this Commission recommends that the General Assembly amend O.C.G.A. § 15-2-19 and O.C.G.A. § 15-3-9, which require that appellate staff attorneys and law clerks be members of the State Bar of Georgia prior to the beginning of their term of service. These requirements effectively preclude the hiring of recent law school graduates and many attorneys licensed in other states for these positions. Law clerks and staff attorneys should be given a year to become members of the State Bar of Georgia.

Ideally, the General Assembly would make these changes effective July 1, 2016.

This Commission also recommends that appropriations be made to maximize the use of the best technology available by our appellate courts including, but not limited to: e-filing systems, case management systems and technological tools that ease the review of trial court records.

D. Recognize the crucial roles the Supreme Court plays as the State's highest court.

The Supreme Court should have resources that are commensurate with the number and import of its special and essential constitutional duties. The Supreme Court plays a sacrosanct role in establishing and maintaining a coherent and consistent body of authoritative decisional law for the benefit of the bench, the bar, the business community and the general public.

In addition, the Supreme Court bears unique administrative and regulatory responsibilities that are essential to the proper functioning of the Judicial Branch and the justice system as a whole. Some of these responsibilities include: the establishment of uniform rules of practice and procedure for all classes of courts, regulation of admissions to the bar and regulation of the practice of law.

This Commission recommends that every effort be made to ensure that the decisional and administrative workload of the Justices is not so great as to preclude them from devoting adequate time to the review and determination of cases of gravity and public importance, the crafting of clear and consistent opinions to bind and provide guidance to the lower courts as precedents, and the discharge of its many crucial administrative and regulatory responsibilities. Any additional measures consistent with the Constitution that would enhance the ability of the Supreme Court to fulfill its special constitutional role should be given due consideration.

IV. ACKNOWLEDGEMENTS

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