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## Historical Antecedents of Challenges Facing the Georgia Appellate Courts

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## HISTORICAL ANTECEDENTS OF CHALLENGES FACING THE GEORGIA APPELLATE COURTS

Michael B. Terry\*

### INTRODUCTION

The Georgia appellate courts face challenges common to many courts in these days of reduced governmental resources.<sup>1</sup> At the same time, the Georgia appellate courts face unusual challenges that can be traced to their historical antecedents and one unique constitutional provision: the “Two-Term Rule.”<sup>2</sup>

Just as “[t]he law embodies the story of a nation’s development through many centuries,”<sup>3</sup> the current rules and practices of both the Supreme Court of Georgia and the Court of Appeals of Georgia embody the story of the development of those courts since their founding. Several aspects of the history of the courts directly impact the challenges facing those courts today.<sup>4</sup>

Three important aspects of the history of Georgia’s appellate courts are (i) legislative resistance to the creation and expansion of the appellate courts; (ii) the constitutional “Two-Term Rule”;<sup>5</sup> and (iii) attempts by the executive and legislative branches to deprive the courts of necessary funding. To this day, the Georgia appellate courts have too few judges, are understaffed and under-funded for the number of

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1. *Budget Resource Center*, NAT’L CTR. FOR STATE COURTS, <http://www.ncsc.org/information-and-resources/budget-resource-center.aspx> (last visited Apr. 12, 2014).

2. GA. CONST. art. VI, § 9, para. 2 (“The Supreme Court and the Court of Appeals shall dispose of every case at the term for which it is entered on the court’s docket for hearing or at the next term.”). Each appellate court has three terms per year. O.C.G.A. § 15-2-4 (2012) (setting Supreme Court terms); O.C.G.A. § 15-3-2 (2012) (setting Court of Appeals terms).

3. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

4. The history of Georgia’s appellate courts has given rise to numerous books and articles. *See, e.g.*, A HISTORY OF THE SUPREME COURT OF GEORGIA: A CENTENNIAL VOLUME (John B. Harris ed., 1948); BRASWELL D. DEEN, JR. & WILLIAM SCOTT HENWOOD, *GEORGIA’S APPELLATE JUDICIARY: PROFILES AND HISTORY* (1987); ERWIN C. SURRENCY, *THE CREATION OF A JUDICIAL SYSTEM: THE HISTORY OF GEORGIA COURTS, 1733 TO PRESENT* (2001); MICHAEL B. TERRY, *GEORGIA APPEALS: PRACTICE AND PROCEDURE WITH FORMS 1–15* (2014); Charles J. Bloch, *The Supreme Court of Georgia and the Court of Appeals of Georgia*, 23 GA. B.J. 523 (1961).

5. GA. CONST. art. VI, § 9, para. 2; O.C.G.A. § 15-2-4; O.C.G.A. § 15-3-2.

cases they must handle, and are subject to a unique constitutional mandate that cases be decided on a strict time schedule.<sup>6</sup> This confluence of issues has led to the adoption of rules, procedures, and customs designed to move cases quickly and efficiently through the system with minimal resources. Such measures have alleviated but not eliminated the problem.

### I. HISTORICAL OVERVIEW OF GEORGIA'S APPELLATE COURTS

By 1845, Georgia was the only state with no appellate court.<sup>7</sup> The original Georgia Constitution of 1777 provided for superior courts, which in Georgia are trial courts.<sup>8</sup> There was no right of appeal.<sup>9</sup> The only redress for improper outcomes were a demand for new trial (as of right)<sup>10</sup> before a different jury in civil cases, a reprieve from the Governor and/or pardon by the Assembly in criminal cases,<sup>11</sup> and an appeal to the Continental Congress in cases involving “captures” or prizes of war.<sup>12</sup> In 1789, a new trial became no longer available upon

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6. See JUDICIAL COUNCIL OF GA., ADMIN. OFFICE OF THE COURTS, GEORGIA SUPREME COURT CASELOAD: DOCKET YEAR SEPTEMBER 1, 2012–AUGUST 31, 2013 (2012); JUDICIAL COUNCIL OF GA., ADMIN. OFFICE OF THE COURTS, GEORGIA COURT OF APPEALS CASELOAD: DOCKET YEAR SEPTEMBER 1, 2012–AUGUST 31, 2013 (2012); 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, 11–12 (2001); THOMAS S. CHAMBLESS ET AL., REPORT OF THE COMMISSION ON THE APPELLATE COURTS OF GEORGIA 6 (Dec. 1996) (on file with the Georgia Administrative Office of the Courts).

7. *History of the Court of Appeals*, GA. COURT OF APPEALS, <http://www.gaappeals.us/history/index.php> (last visited Apr. 12, 2014).

8. GA. CONST. of 1777, art. XXXVI.

9. *Id.* at art. XL (“[I]f any plaintiff or defendant in civil causes shall be dissatisfied with the determination of the Jury, then, and in that case, they shall be at liberty within three days, to enter an appeal from that verdict; and demand a new trial by a special Jury, to be nominated as follows, viz. each party plaintiff and defendant shall chuse [sic] six, six more names shall be taken indifferently out of a box provided for that purpose, the whole eighteen to be summoned, and their names to be put together into the box, and the first twelve that are drawn out, being present, shall be the special Jury to try the cause, and from which there shall be no appeal.”).

10. *Id.*

11. *Id.* at art. XIX.

12. *Id.* at art. XLIV.

demand but was vested in the discretion of superior court judges.<sup>13</sup> This was still the only avenue of “appeal” from a civil judgment.<sup>14</sup>

In the 1798 Constitution, the superior courts were authorized to hear appeals from the inferior courts on writs of certiorari.<sup>15</sup> However, the Constitution forbade any appeal being brought to a court outside the county where it was tried.<sup>16</sup> Thus, probate court cases could be reviewed on certiorari by a trial court of general jurisdiction in the same county.<sup>17</sup> There were still no true appellate courts in the state.

In the absence of an appellate court to resolve divergent lines of cases, the superior court judges sought to achieve uniformity through coordinated approaches to cases and controversies.<sup>18</sup> The judges were repeatedly halted in their efforts by a legislature determined to curtail judicial power and, in particular, to avoid the power of judicial review. For example, from 1799 until 1801, the superior court judges met annually to set rules and discuss points of law that had been reserved until the annual meeting for argument.<sup>19</sup> The purpose was to provide for consistent opinions. The legislature in 1801 forbade this procedure, and required “[t]hat all points reserved for argument, and now waiting a decision . . . be and the same are hereby directed to be sent back to the respective counties from whence they have been sent, and there decided by the presiding Judge.”<sup>20</sup> Legislative hostility to a powerful or coordinated judiciary was hallmark of early Georgia, with repeated interventions by the legislature into efforts of the judiciary to organize and coordinate.<sup>21</sup>

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13. GA. CONST. of 1789, art. III, § 2 (“The General Assembly shall point out the mode of correcting errors and appeals; which shall extend as far as to empower the Judges to direct a new trial by jury within the county where the action originated, which shall be final.”).

14. *Id.*

15. GA. CONST. of 1798, art. III, § 1.

16. *Id.*

17. *Id.*

18. *The Supreme Court of Georgia: A History*, SUPREME COURT OF GA., <http://www.gasupreme.us/history/> (last visited Apr. 12, 2014).

19. *Id.*

20. AUGUSTIN SMITH CLAYTON, A COMPILATION OF THE LAWS OF THE STATE OF GEORGIA 38 (1813), available at [http://digitalcommons.law.uga.edu/ga\\_code/8](http://digitalcommons.law.uga.edu/ga_code/8).

21. Bond Almand, *The Supreme Court of Georgia: An Account of its Delayed Birth*, 6 GA. B.J. 95, 95 (1943).

### A. *The Creation of the Supreme Court of Georgia*

Georgia's Constitution was finally amended in 1835 to authorize a Supreme Court "for the Correction of Errors."<sup>22</sup> The Supreme Court consisted of three judges, elected by the legislature.<sup>23</sup> There was no Chief Judge or Justice.<sup>24</sup> The Supreme Court had no original jurisdiction, but was solely "a court alone for the trial and correction of errors in law and equity from the Superior Courts of the several circuits."<sup>25</sup> The initial constitutional amendment creating the Supreme Court also contained the first version of the "Two-Term Rule."<sup>26</sup> The Two-Term Rule has had a major and lasting impact upon the rules and decision-making processes of the Georgia courts, as discussed in greater detail below.

Despite constitutional authorization in 1835, the General Assembly did not implement and fund the creation of the Supreme Court until 1845 (effective in 1846).<sup>27</sup> In 1863, the position of Chief Justice was created. The first Chief Justice was Joseph Henry Lumpkin.<sup>28</sup>

The Supreme Court's workload in the early years was staggering. The long hours worked by the Justices drew the attention and support of the organized Bar.<sup>29</sup> Only after years of lobbying by the Court and organized Bar, the Constitution was amended in 1896 (effective 1897) to provide for the addition of three Justices to the Court, for a total of

22. 1835 Ga. Laws 50.

23. *Id.*

24. *See id.*

25. *Id.*

26. The first version of the "Two-Term Rule" states:

[S]aid court shall, at each session in each district dispose of and finally determine each and every case on the docket of such court at the first term after such writ of error brought; and in case the plaintiff in error in any such case shall not be prepared, at such first term of such court, after error brought to prosecute the same, unless precluded by some providential cause from such prosecution, it shall be stricken from the docket, and the judgment below shall stand affirmed.

*Id.*

27. 1845 Ga. Laws 18.

28. David Connolly, *Joseph Henry Lumpkin (1799–1867)*, NEW GA. ENCYCLOPEDIA (May 14, 2013), <http://www.georgiaencyclopedia.org/articles/history-archaeology/joseph-henry-lumpkin-1799-1867>; *The Supreme Court of Georgia: A History*, *supra* note 18.

29. At that time, the organized Bar in Georgia was a voluntary bar association called the Georgia Bar Association, founded in 1884. *History of the Bar*, STATE BAR OF GA., <http://www.gabar.org/aboutthebar/historyofthebar.cfm>. References to the Bar after 1964 refer to the State Bar of Georgia. *Id.*

six.<sup>30</sup> This amendment also provided that Justices and the Chief Justice would be elected by the people.<sup>31</sup>

Forty-nine years later, the Constitution of 1945 provided for the addition of a seventh Justice.<sup>32</sup> Since that time, the number of Justices on the Supreme Court has remained at seven.<sup>33</sup> Although the Constitution of 1983 authorized the General Assembly to increase the size of the Supreme Court to nine Justices,<sup>34</sup> the General Assembly has not acted upon this authorization. As the population and commerce of the State of Georgia have continued to grow, the number of appellate judges has consistently fallen behind.<sup>35</sup> Each increase in the number of Justices has taken years to accomplish after the need became obvious, with the result that the Court has functioned for essentially its entire history with fewer Justices than its caseload justified.

### B. *The Creation of the Court of Appeals of Georgia*

In 1895, after a constitutional amendment to increase the Justices of the Supreme Court from three to five failed to pass, the organized Bar proposed the creation of an intermediate appellate court as an alternative to the unpopular expansion of the Supreme Court.<sup>36</sup> Although the proposal was to create a single intermediate appellate court, there was an alternative proposal included to create five geographical districts with each district having its own intermediate appellate court.<sup>37</sup>

The Bar's proposal was not acted upon by the legislature, but in 1897, the Supreme Court was finally increased to six Justices.<sup>38</sup> However, as the population and commerce of the state continued to grow, the appellate caseload remained unmanageable for a single

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30. 1896 Ga. Laws 42–43; *The Supreme Court of Georgia: A History*, *supra* note 18.

31. *The Supreme Court of Georgia: A History*, *supra* note 18.

32. GA. CONST. of 1945, art. VI, § 2, para. 1.

33. *The Supreme Court of Georgia: A History*, *supra* note 18.

34. GA. CONST. of 1983, art. VI, § 6, para. 1 (“The Supreme Court shall consist of not more than nine Justices . . .”).

35. *See* Creswell, *supra* note 6, at 12.

36. *General Minutes*, in REPORT OF THE TWELFTH ANNUAL MEETING OF THE GEORGIA BAR ASSOCIATION 5, 22–23 (John W. Akin ed., 1895).

37. *Id.* at 23–24.

38. 1896 Ga. Laws 42–43.

appellate court consisting of a single panel.<sup>39</sup> In effect, every appellate judge in the state had to act on every single appeal in the state.

In 1902, the Bar again called for the creation of an intermediate appellate court.<sup>40</sup> A bill to amend the Constitution was submitted in 1902, but was not acted upon by the legislature.<sup>41</sup> Once again, in 1903 the Bar called for the creation of a Court of Appeals.<sup>42</sup> The proposed Court of Appeals would have a Presiding Judge and four Associate Judges.<sup>43</sup> But until 1906, the legislature refused to act.<sup>44</sup>

After twelve years of lobbying by the Bar, in 1906, a bill to submit to the electorate an amendment to the Constitution “to provide for the establishment of a Court of Appeals and to define its powers and jurisdiction” was approved by the legislature.<sup>45</sup> The amendment was ratified that year, creating the Court of Appeals.<sup>46</sup> The first three judges of the Court of Appeals were elected in November 1906.<sup>47</sup> The court convened in early January 1907, and heard arguments and issued its first opinions by January 11, 1907.<sup>48</sup>

During the first ten years of its existence, there was no review of the Court of Appeals’ decisions by the Supreme Court of Georgia.<sup>49</sup> The unavailability of such review allowed direct petitions for certiorari to the United States Supreme Court from decisions of the Georgia Court of Appeals.<sup>50</sup>

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39. *Report of the Committee on Relief of the Supreme Court*, in 20 REPORT OF THE TWENTIETH ANNUAL SESSION OF THE GEORGIA BAR ASSOCIATION 133, 140 (Orville A. Park ed., 1903).

40. *See id.* at 134, 138; Andrew J. Cobb, *The Judicial System of Georgia: Its Defects; What Changes Are Necessary to Bring About a More Harmonious and Orderly System and to Relieve the Supreme Court*, in 19 REPORT OF THE NINETEENTH ANNUAL SESSION OF THE GEORGIA BAR ASSOCIATION 183, 183 (Orville A. Park ed., 1902).

41. *Report of the Committee on Relief of the Supreme Court*, *supra* note 39, at 144–45.

42. *Id.* at 136–44.

43. *Id.* at 138.

44. 1906 Ga. Laws 24.

45. *Id.*

46. *Baggett Transp. Co. v. Barnes*, 132 S.E.2d 229, 231 (Ga. Ct. App. 1963); LEAH F. CHANIN & SUZANNE L. CASSIDY, *GUIDE TO GEORGIA LEGAL RESEARCH AND LEGAL HISTORY* § 4-10, at 71 (1990).

47. CHANIN, *supra* note 46, § 4-10, at 71.

48. *See Hunter v. Lissner*, 58 S.E. 54 (Ga. Ct. App. 1907).

49. *See Cent. of Ga. Ry. Co. v. Yesbik*, 91 S.E. 873, 873 (Ga. 1917).

50. *See Cincinnati, New Orleans, & Tex. Pac. Ry. Co. v. Slade*, 216 U.S. 78, 80 (1910) (“This writ of error to the court of appeals was allowed by the chief judge upon the ground that the court of appeals was the highest court of the state in which a decision in the suit could be had . . .”).

## II. GROWTH OF GEORGIA'S APPELLATE COURTS

The existence of two courts of last resort in the state created conflicts. In 1916, a constitutional amendment limited Supreme Court jurisdiction and enlarged the Court of Appeals' jurisdiction.<sup>51</sup> The General Assembly the same year added three judges to the Court of Appeals and provided for them to sit in two divisions of three.<sup>52</sup> All criminal cases were to be assigned to one division, which would also handle some civil cases.<sup>53</sup> The other division handled only civil appeals.<sup>54</sup> To balance the workload, the court decided that two criminal cases would equal one civil case.<sup>55</sup>

In 1960, the Court of Appeals was enlarged to seven judges<sup>56</sup> and in 1961 to nine.<sup>57</sup> The Court of Appeals then sat in three divisions of three judges each.<sup>58</sup> In 1996, the legislature added a tenth judge, rejecting efforts by the Bar and Governor to increase the number to 12.<sup>59</sup> However, the eleventh and twelfth judges were added to the Court of Appeals in 1999, and the court then comprised four divisions of three judges each.<sup>60</sup>

The growth of the court has not kept up with the population growth of the state, the economic growth of the state, nor the appellate caseload. The Court of Appeals of Georgia has been, for many years, one of the busiest intermediate appellate courts in the country.<sup>61</sup> It has more cases per judge than most other courts.<sup>62</sup>

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51. 1916 Ga. Laws 19–20.

52. *Id.* at 56–57.

53. *Id.* at 57.

54. *Id.*

55. *History of the Court of Appeals, supra note 7.*

56. 1960 Ga. Laws 158.

57. 1961 Ga. Laws 140.

58. One division was assigned all criminal cases. *Id.* at 141. The other two divisions handled only civil cases. *Id.* In 1967, all three panels began taking civil and criminal appeals. 1967 Ga. Laws 538.

59. 1996 Ga. Laws 405; *History of the Court of Appeals, supra note 7.*

60. 1999 Ga. Laws 11.

61. *History of the Court of Appeals, supra note 7.*

62. *Id.*; see also RICHARD Y. SCHAUFFLER ET AL., NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2010 STATE COURT CASELOADS 40 (2012); COURT STATISTICS PROJECT, NAT'L CTR. FOR STATE COURTS, NUMBER OF AUTHORIZED JUSTICES/JUDGES IN STATE COURTS, 2010 (2012).

The Court of Appeals has statewide appellate jurisdiction of all cases except those involving constitutional questions, land title disputes, the construction of wills, murder, election contests, habeas corpus, extraordinary remedies, divorce and alimony, and cases where original appellate jurisdiction lies with the superior courts.<sup>63</sup> The Court of Appeals may certify legal questions to the Supreme Court.<sup>64</sup>

Cases filed in the incorrect appellate court are transferred, not dismissed.<sup>65</sup> The dispute over the scope of jurisdictional provisions has led to many back-and-forth decisions, transfers, and occasional sniping between the Supreme Court and the Court of Appeals. Exacerbated no doubt by the pressures of a particularly heavy docket and the time constraints imposed by the Two-Term Rule, each court will occasionally conclude that the other is taking overly liberal advantage of the transfer rules.<sup>66</sup>

### III. FINANCIAL ADMINISTRATIVE CHALLENGES FACING GEORGIA'S APPELLATE COURTS

Legislative and executive opposition to appellate courts in Georgia was not limited to opposing their creation and growth. In 2009, faced with dwindling state tax revenues, an administration distrustful of the courts began a series of annual budget cuts, which starved Georgia's appellate courts of the funds needed to operate effectively.<sup>67</sup> The Georgia courts were forced to take a 25% funding cut in June 2009.<sup>68</sup> The judicial branch received less than 0.8% of total state

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63. GA. CONST. art. VI, § 5, para. 3; GA. CONST. art. VI, § 6, para. 3.

64. GA. CONST. art. VI, § 5, para. 4 (“The Court of Appeals may certify a question to the Supreme Court for instruction, to which it shall then be bound.”).

65. O.C.G.A. § 5-6-37 (2012).

66. *See, e.g.,* Spurlock v. Dep’t of Human Res., 690 S.E.2d 378, 384–87 (Ga. 2010) (Nahmias, J., concurring).

67. *See* John Schwartz, *Critics Say Budget Cuts for Courts Risk Rights*, N.Y. TIMES, Nov. 26, 2011, <http://www.nytimes.com/2011/11/27/us/budget-cuts-for-state-courts-risk-rights-critics-say.html>; SONNY PERDUE & TREY CHILDRESS, BUDGET IN BRIEF: AMENDED FISCAL YEAR 2008 AND FISCAL YEAR 2009 44–56 (2009).

68. Paulo Prada & Corey Dade, *Cases Pile Up in Georgia Courts: Budget Squeeze Forces Cuts in Spending for Judiciary, Creating Months-Long Delays*, WALL ST. J., Sept. 8, 2009, <http://online.wsj.com/news/articles/SB125236538620490881>.

appropriations in 2009.<sup>69</sup> While many state judiciaries received budget cuts at this time, cutbacks to the Georgia courts were the most severe.<sup>70</sup> Another series of budget cuts occurred in 2010, and again in 2011.<sup>71</sup> A 2009 report of the Judicial Council of Georgia noted that “Georgia’s courts have experienced more severe budget cuts than of any of the fifty states.”<sup>72</sup>

The impact on Georgia’s appellate courts was immediate and detrimental. The appellate judges’ salaries were frozen.<sup>73</sup> Both Georgia’s appellate courts were forced into layoffs of court employees, losing experienced career clerks and other staffers.<sup>74</sup> Remaining employees, including judges and Justices, took up to twelve unpaid furlough days a year.<sup>75</sup> Furloughed workers, including judges and clerks, could not work, even from home, on those furlough days.<sup>76</sup> Cases stacked up, but the Two-Term Rule remained the unavoidable constitutional imperative.<sup>77</sup> All final decisions covered by the Two-Term Rule had to be issued on time, and they all were.<sup>78</sup>

Computer updates and implementation of electronic filing systems were put on hold.<sup>79</sup> The Supreme Court law library was closed.<sup>80</sup>

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69. Crystal Johnson, *State of the Judiciary Notes*, AOC ON BALANCE, Apr. 2010, at 1.

70. Prada & Dade, *supra* note 68.

71. See SONNY PERDUE & TREY CHILDRESS, BUDGET IN BRIEF: AMENDED FISCAL YEAR 2009 AND FISCAL YEAR 2010 36–50 (2010); SONNY PERDUE & DEBBIE DLUGOLENSKI, BUDGET IN BRIEF: AMENDED FISCAL YEAR 2010 AND FISCAL YEAR 2011 43–58 (2011).

72. Minutes of the Meeting of the Judicial Council of Georgia, ADMIN. OFFICE OF THE COURTS 3 (June 11, 2010), [http://www.georgiacourts.org/councils/Handouts\\_Judicial%20Council%20Meeting%206-11-2010.pdf](http://www.georgiacourts.org/councils/Handouts_Judicial%20Council%20Meeting%206-11-2010.pdf).

73. *Georgia Salaries Over a Decade, 2004–2013*, JUDICIAL SALARY TRACKER, <http://www.ncsc.org/FlashMicrosites/JudicialSalaryReview/2014/home.html> (follow link for State of Georgia) (last visited June 14, 2014).

74. Carol Hunstein, Chief Justice, Supreme Court of Georgia, 2011 State of the Judiciary Address 6 (Feb. 16, 2011).

75. *Id.*; Press Release, Supreme Court of Georgia, *Supreme Court Justices to be Furloughed*, (Sept. 2, 2009), [http://www.gasupreme.us/press\\_releases/furloughs.pdf](http://www.gasupreme.us/press_releases/furloughs.pdf) (noting that “[a]lthough the [Georgia] Constitution prohibits the lowering of judges’ salaries, it does not prohibit them from voluntarily returning a portion of their own pay” through the use of furloughs).

76. 31 U.S.C. § 1342 (2012).

77. GA. CONST. art. VI, § 9, para. 2.

78. CHRISTOPHER J. MCFADDEN ET AL., GEORGIA APPELLATE PRACTICE WITH FORMS § 2:4 (2013).

79. Minutes of the Meeting of the Judicial Council of Georgia, *supra* note 72 (noting that the Georgia Courts Automation Commission budget reduced from \$585,652.33 in FY 2010 to \$0 in FY 2011).

80. Hunstein, *supra* note 74, at 6.

Reimbursed business travel was banned.<sup>81</sup> The courts began to comparison shop for office supplies if they could be located cheaper than they were provided through the state's purchasing arm.<sup>82</sup>

The judges and Justices had to make do with less: less pay, less technology, less staff assistance. The only thing not reduced was their caseload.<sup>83</sup> Between 2009 and 2012, seven of twelve Court of Appeals judges retired, as did the long-serving Clerk of the Court.<sup>84</sup> None had reached the encouraged retirement age.<sup>85</sup> A causal link between the budget cuts and at least some of the retirements would not be entirely speculative.

Frequent appellate practitioners began to perceive<sup>86</sup> a greater delay in categories of decisions not covered by the Two-Term Rule, such as rulings on petitions for certiorari.<sup>87</sup> Expected two-month delays became four months and then more.<sup>88</sup> The situation has now eased somewhat. Budget cuts have stopped and small increases have occurred.<sup>89</sup> Decision time on petitions for certiorari has begun to creep back down. But the courts have not been returned to the level of

81. *Id.*

82. *Id.*

83. *Id.* at 7.

84. *Clerks*, GA. COURT OF APPEALS, <http://www.gaappeals.us/history/clerks.php> (last visited Apr. 14, 2014); *Roster of Judges*, GA. COURT OF APPEALS, <http://www.gaappeals.us/history/roster.php> (last visited Apr. 14, 2014).

85. GEORGIA APPELLATE PRACTICE HANDBOOK § 9.2.2, at 141 (Daniel F. Diffley et al. eds., 7th ed. 2012); see, e.g., Charles William Ginn, *Leah Ward Sears (b. 1955)*, NEW GA. ENCYCLOPEDIA (Aug. 27, 2013), <http://www.georgiaencyclopedia.org/articles/government-politics/leah-ward-sears-b-1955>.

86. See, e.g., *Parker v. State*, No. S14C1005 (Ga. June 16, 2014), available at [http://www.gasupreme.us/granted\\_apps/granted\\_certs/s14c1005.pdf](http://www.gasupreme.us/granted_apps/granted_certs/s14c1005.pdf) (certiorari granted three months after Court of Appeals opinion in 2014).

87. See *Extending a Term of Court for the Charter Schools Commission Case*, SCOG BLOG (Mar. 30, 2011), <http://scogblog.com/2011/03/30/extending-a-term-of-court-for-the-charter-schools-commission-case/> (explaining that, in a highly unusual move, the Supreme Court of Georgia extended the January term of court to take additional time to rule on a case).

88. Compare *State v. Velazquez*, 2007 Ga. LEXIS 426 (Ga. June 4, 2007) (certiorari granted less than three months after Court of Appeals opinion in 2007), with *Tampa Inv. Grp., Inc. v. Branch Banking and Trust Co., Inc.*, No. S11C1728 (Ga. Nov. 7, 2011), available at [http://www.gasupreme.us/granted\\_apps/granted\\_certs/s11g1728.pdf](http://www.gasupreme.us/granted_apps/granted_certs/s11g1728.pdf) (certiorari granted more than four months after Court of Appeals opinion in 2011), and *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.*, No. S12C1924 (Ga. Nov. 27, 2012), available at [http://www.gasupreme.us/granted\\_apps/granted\\_certs/s12g1924.pdf](http://www.gasupreme.us/granted_apps/granted_certs/s12g1924.pdf) (certiorari granted more than four and a half months after Court of Appeals opinion in 2012).

89. NATHAN DEAL & TERESA A. MACCARTNEY, BUDGET IN BRIEF: AMENDED FISCAL YEAR 2013 AND FISCAL YEAR 2014 51 (2014).

funding or staffing that existed in 2008, which was already far below the national average.<sup>90</sup> They are still required to do more with less.

The result of years of opposition to creating, expanding, and funding the appellate courts of Georgia has impacted how they function. For example, appellate records, transmitted from the trial court, are paper records.<sup>91</sup> They are copied, numbered, packed, and shipped. This results in delays. The records cannot be duplicated electronically or viewed remotely.<sup>92</sup> This requires attorneys to travel to the court to review the record, or pay to have it duplicated by the court.

The Court of Appeals formerly employed a law clerk tasked solely with “jurisdictional review,” that is, reviewing each new appeal to make sure the order from which an appeal was taken was an appealable order, that the appeal was proper and timely, and that the appeal was to the proper court.<sup>93</sup> Although other clerks have picked up that task, the absence of a dedicated jurisdictional clerk with particularized knowledge of the jurisdictional issues reviewing each case reduces consistency and makes it more important for attorneys to critically review their opponent’s appeal for jurisdictional defects and file motions to dismiss or transfer if needed.

There are fewer clerks to review trial court records, research the law, and draft orders or opinions.<sup>94</sup> Thus, more of these tasks fall upon the judges and Justices. By necessity, this leaves less time for analysis, discussion, and careful crafting of opinions. It means less time for the judges or Justices to prepare for oral argument. It also means fewer oral arguments are granted in the Court of Appeals.<sup>95</sup> It means less familiarity with the record.

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90. See JUDICIAL COUNCIL OF GA., ADMIN. OFFICE OF THE COURTS, ANNUAL REPORTS GEORGIA COURTS: FY 2013 17 (2013), available at [http://www.georgiacourts.gov/files/Annual%20Reports/Annual\\_Report13.pdf](http://www.georgiacourts.gov/files/Annual%20Reports/Annual_Report13.pdf). This proposition is incorrect with respect to funding according to the Georgia Court of Appeals state budgets since 2008.

91. Jeffrey J. Swart, *Setting the Record Straight: A Proposal to Save Time and Trees*, 14 GA. B.J. 15, 15 (Oct. 2008).

92. *Id.* at 15–16.

93. Meredith Hobbs, *Appeals Court Layoffs Launch Solo Career*, DAILY REPORT (Oct. 1, 2008), <http://www.dailyreportonline.com/id=1202551697714?slreturn=20140314170722>.

94. See Carol Hunstein, Chief Justice, Supreme Court of Georgia, 2012 State of the Judiciary Address 6 (Jan. 25, 2012).

95. See TERRY, *supra* note 4, at 13–14, 33.

All of these issues can be addressed by greater preparation, planning, and more detailed presentation by advocates practicing before these courts. A practitioner cannot assume complete familiarity with the record. References to the record in briefs must be copious and precise. The lawyer must be prepared to point out at oral argument where in the record something may be found. The lawyer should not be surprised if only one judge at oral argument seems closely familiar with the briefs and issues. Division rather than duplication of labor is one method of coping with the increased workload. Understanding what has been thrust upon these judges and their staff by a particularly heavy caseload per judge and reduced funding and staffing can help the practitioner to understand and predict the course of a case through the appellate courts of Georgia, and to explain this to clients.

#### IV. GEORGIA'S "TWO-TERM RULE"

As mentioned above, a unique feature of the Georgia appellate courts is the "Two-Term Rule."<sup>96</sup> This constitutional rule imposes strict deadlines on the merits decisions of the Georgia Supreme Court and Court of Appeals: "The Supreme Court and the Court of Appeals shall dispose of every case at the term for which it is entered on the court's docket for hearing or at the next term."<sup>97</sup> "[T]he 'remedy' for an appellate court's failure to timely dispose of a case to which the two-term rule is applicable is the affirmance of the lower court's judgment by operation of law."<sup>98</sup> This is simply not allowed to happen. That the Georgia appellate courts continue to function given the caseload and diminished resources is amazing. That they always meet the constitutional imperative of the Two-Term Rule is even more so.<sup>99</sup>

The appellate courts have three terms of court, known as the January Term, April Term and September Term.<sup>100</sup> The Two-Term Rule thus

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96. See *supra* note 2 and accompanying text.

97. GA. CONST. art. VI, § 9, para. 2.

98. *In re Singh*, 576 S.E.2d 899, 901 n.3 (Ga. 2003).

99. See MCFADDEN ET AL., *supra* note 78, § 2:4.

100. O.C.G.A. § 15-2-4(c) (2012) ("[T]he September term shall end on December 16, the January term shall end on April 14, and the April term shall end on July 31."); O.C.G.A. § 15-3-2 (2012).

gives rise to three deadlines each year, by which a third of the court's annual caseload must be finally resolved.<sup>101</sup>

Meeting the three constitutional deadlines imposed by the Two-Term Rule each year has given rise to the concept of “distress.”<sup>102</sup> Distress refers to the last month for decisions on cases docketed for hearing in the previous term.<sup>103</sup> This period is known as “distress month,” and the last week before cases docketed to the previous term must be decided is known as “distress week.”<sup>104</sup> The cases which must be decided that month and week are known as “distress cases.”<sup>105</sup> The term “distress” is a fitting description of the pressures that result from the need to comply with this constitutionally-mandated hard deadline to finally decide hundreds of cases per year.

The Two-Term Rule does not require that all cases be decided by the term after they are docketed, but rather “at the term for which it is entered on the court’s docket *for hearing* or at the next term.”<sup>106</sup> As the Court of Appeals explained:

The relevant date is not the date the appeal was filed with the court but the date the case was docketed for hearing. Although this appeal was filed in the September 1986 term of court, it was docketed for hearing during the January 1987 term. Therefore, the disposition of the appeal during the April term complies with the “two-term rule” of the Georgia Constitution.<sup>107</sup>

It does not matter if oral argument is not requested or granted. The case is “docketed for hearing” in a future term even if that “hearing” is never held.<sup>108</sup>

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101. GEORGIA APPELLATE PRACTICE HANDBOOK, *supra* note 85, § 9.5.3, at 148.

102. *Id.*

103. *See id.*

104. *See id.*

105. *Id.*

106. GA. CONST. art. VI, § 9, para. 2 (emphasis added).

107. *Superb Carpet Mills, Inc. v. Thomason*, 359 S.E.2d 370, 372 (Ga. Ct. App. 1987).

108. *Smith v. Branch*, 487 S.E.2d 35, 39–40 (Ga. Ct. App. 1997) (Ruffin and Eldridge, JJ., concurring): Branch argues that because we denied oral argument, the case was not “heard” in January and we should consider it “heard” when it is docketed. However, the case was placed on the docket “for hearing” in the January term, and the fact that it was not “heard” orally does

Georgia appellate courts usually docket cases for hearing in the term following that in which the notice of appeal, transcript, and record are received by the court.<sup>109</sup> However, some cases are docketed for hearing two terms after these documents are received by the appellate court. “The docket for the January, April, and September terms shall close at noon on the 15th day of December, April and August, respectively.”<sup>110</sup> Thus, for example, a case received by the Court of Appeals on December 10 will be docketed for hearing in the January term, requiring a decision by the end of the April term. But a case received December 20 will be docketed to the April term, requiring a decision by the end of the September term.

The Two-Term Rule does not simply govern the deadline for the initial merits decision by the appellate court. All motions for reconsideration must also be resolved within the two terms.<sup>111</sup> This means the initial decision must be rendered sufficiently in advance of the end of the final term to allow time for motions for reconsideration to be filed, briefed, and ruled upon. Thus, initial merits rulings are released at least fifteen days before the end of the term.<sup>112</sup> “No judgment in a second-term case, other than a judgment on a motion for reconsideration in such case, shall be rendered during the last 15 days of any term.”<sup>113</sup> A schedule is publicly available.<sup>114</sup>

The Supreme Court has made it clear that the phrase “every case” in the Constitution does not mean every matter that comes before the appellate courts.<sup>115</sup> Instead it means every appeal from a trial court and, in the case of the Supreme Court, cases in which the Supreme Court grants certiorari to the Court of Appeals:

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not mean it was not “heard.”

*Id.*

109. GA. CT. APP. R. 11; GEORGIA APPELLATE PRACTICE HANDBOOK, *supra* note 85, § 9.5.3, at 148.

110. GA. CT. APP. R. 12.

111. GEORGIA APPELLATE PRACTICE HANDBOOK, *supra* note 85, § 9.5.3, at 148.

112. *Id.*

113. O.C.G.A. § 15-2-4(c) (2012). However, the Supreme Court (at least) may suspend the rule against making decisions other than reconsideration in the last fifteen days of a term. *Shore v. Shore*, 318 S.E.2d 57, 59 (Ga. 1984). The Supreme Court may also extend the term by order for a particular case. *Katz v. Katz*, 445 S.E.2d 531, 531 n.1 (Ga. 1994).

114. *2014 Terms*, GA. COURT OF APPEALS, [http://www.gaappeals.us/calendar/terms\\_2014.php](http://www.gaappeals.us/calendar/terms_2014.php) (last visited Apr. 14, 2014).

115. *In re Singh*, 576 S.E.2d 899, 901 (Ga. 2003).

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The cases to which the “two-term rule” applies are those that fall within our general and exclusive appellate jurisdiction as mandated by the state constitution. It is not applicable to those cases filed in this Court in furtherance of this Court’s exercise of its inherent authority to supervise and regulate the practice of law in Georgia.<sup>116</sup>

The Two-Term Rule also applies to transferred cases, but the date of docketing is the date received by the transferee court, and not the date the case was originally docketed by the transferor court:

For the purpose of compliance by our appellate courts with the Constitution of Georgia of 1976, Art. 6, Sec. 2, Par. 5 (the two term rule), cases transferred to the Court of Appeals will be considered as entered on the court’s docket for hearing on the day the remittitur from this Court is received in the Court of Appeals.<sup>117</sup>

The Georgia appellate courts have adopted rules and practices to assist them in dealing with the Two-Term Rule.<sup>118</sup> If a record received from the trial court is materially incomplete, the appellate court will not keep the case and await a corrected record. Rather, “[a]ny case docketed prior to the entire record coming to the Court, as requested by the parties, may be remanded to the trial court until such time as the record is so prepared and delivered to the Court.”<sup>119</sup>

Another example of the courts “working around” the Two-Term Rule involves settlements reached during the appeal of cases which require trial court approval of any settlement. This would include, for example, cases where one party is a minor,<sup>120</sup> cases involving

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116. *Id.* (citation omitted).

117. *Atl. States Constr., Inc. v. Beavers*, 301 S.E.2d 635, 636 (Ga. 1983); *CC Fin., Inc. v. Ross*, 301 S.E.2d 262, 264 (Ga. 1983).

118. *See, e.g.*, GA. CT. APP. R. 11(d).

119. *Id.*

120. *See, e.g., In re Payne*, 591 S.E.2d 832, 832 (Ga. 2004) (requiring probate court approval for settlement of case involving a minor).

estates,<sup>121</sup> and class actions.<sup>122</sup> If a settlement requiring trial court approval is reached while the case is pending in the appellate court, the court generally will not stay the appeal to await trial court approval.<sup>123</sup> To do so would risk violating the Two-Term Rule. The appellate court may, however, dismiss the appeal while leaving parties free to re-appeal in the event the trial court does not approve the settlement.

One problem caused by the Two-Term Rule arises in cases where dispositive rulings on legal issues are pending before other courts. For example, if the Supreme Court of Georgia has before it a federal constitutional issue also pending for decision before the United States Supreme Court, whose ruling would bind the Georgia court, it would make sense to simply stay the Georgia appeal until the ruling of the United States Supreme Court. Similarly, if the Court of Appeals of Georgia has an issue before it that is currently pending for decision in the Supreme Court of Georgia, it would make sense to simply stay the Court of Appeals case and await the ruling of the Supreme Court of Georgia. That is how things are handled in other jurisdictions.<sup>124</sup> However, the Two-Term Rule makes such stays extremely problematic. The expected decision might not come down in time to allow resolution of the stayed appeal within the second term. Thus, the appellate courts of Georgia simply decide the cases before them without the guidance of the court whose ruling will be binding upon them.<sup>125</sup>

The Two-Term Rule and the deadline it imposes three times a year impacts the courts' internal procedures.<sup>126</sup> It reduces the opportunities to conference on cases. It reduces the willingness of the appellate courts to grant oral argument. It certainly impacts the time the courts can spend on each case. Importantly for attorneys practicing before the

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121. O.C.G.A. § 53-5-25(a) (2012).

122. O.C.G.A. § 9-11-23(e) (2012).

123. *See Hardwick v. Fortson*, 675 S.E.2d 559, 560 (Ga. Ct. App. 2009).

124. *See, e.g., United States v. Hill*, 539 F.3d 1213, 1213–14 (10th Cir. 2008) (providing for stay of appellate proceedings pending ruling of United States Supreme Court in a similar case); *State v. Hannah*, No. 24162, 2012 WL 173468, at \*1 (Ohio Ct. App. Jan. 20, 2012) (providing for stay of appeal in intermediate appellate court pending resolution of the same issue in Ohio Supreme Court).

125. *See, e.g., Larose v. Bank of America, N.A.*, 740 S.E.2d 882, 884–85 (Ga. Ct. App. 2013); *Roper v. Motors Ins. Corp.*, 229 S.E.2d 481, 481–82 (Ga. Ct. App. 1976).

126. *See TERRY*, *supra* note 4, at 33–34.

appellate courts of Georgia, it makes it less likely that a lengthy extension of time for a brief will be granted. Similarly, a continuance of an oral argument because of a conflict, vacation, or leave will seldom be granted for a period longer than one month, and then generally only if the panel has another argument date scheduled within the same term.

The impact of the Two-Term Rule is greater upon the Court of Appeals than the Supreme Court. This is largely due to the higher number of cases per judge in the Court of Appeals.<sup>127</sup> One recently retired Court of Appeals judge commented that “the Two-Term Rule is the bedrock of the culture of the Court of Appeals.”<sup>128</sup> It drives rules, traditions, and practices. A current Court of Appeals judge commented that the Two-Term Rule threatens to convert appellate judges into mere “case managers and editors” of opinions drafted by others.<sup>129</sup>

In *Nalley v. Langdale*,<sup>130</sup> decided on the last day of its second term, the concurrence dubitante issued by Judge Dillard addressed the stresses imposed by the Two-Term Rule:

I concur because I cannot say with confidence that my colleagues on the panel are incorrect in the manner they have chosen to resolve the issues before us. But I do so with serious doubts. And if I were deciding this case alone, my reasoning and conclusions might differ from the majority’s in several material respects. That said, I am satisfied that my colleagues have carefully and seriously studied this case. Chief Judge Ellington has penned a thoughtful opinion in which Presiding Judge Phipps has fully concurred. I commend them both for the amount of time and effort they have exerted in resolving this difficult and important case. Unfortunately, *our constitutional duty to resolve this appeal today (within two terms of docketing) precludes me from engaging in the type of extended study necessary to achieve a high degree of*

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127. See JUDICIAL COUNCIL OF GA., ADMIN. OFFICE OF THE COURTS, *supra* note 90, at 20–23.

128. See TERRY, *supra* note 4, at 34. The judge making this comment declined to be identified or quoted for attribution.

129. *Id.* The judge making this comment declined to be identified or quoted for attribution.

130. *Nalley v. Langdale*, 734 S.E.2d 908 (Ga. Ct. App. 2012), *cert. denied*, (Ga. 2013).

confidence that my experienced, able colleagues are right.<sup>131</sup>

On the positive side, the Two-Term Rule introduces an element of predictability into the timing of judicial decisions that is lacking in other jurisdictions. It keeps the courts from falling behind. It imposes discipline and efficiency. It keeps the litigation process moving.

I have questioned several current and retired Georgia appellate judges about their opinion of the Two-Term Rule. Nine of nine preferred keeping the Two-Term Rule in place. One judge stated that “while the Two-Term Rule presents challenges given our workload, it also keeps our cases moving, which is a huge benefit.”<sup>132</sup> Another appellate judge responded that “justice delayed is justice denied.”<sup>133</sup> Yet another judge referred to it as “a necessary evil,” and that “the ugly truth is that given the lack of resources available, without the Rule some cases would drag on forever.”<sup>134</sup> Another comment was “an important part of justice is finality. The Rule just takes some getting used to.”<sup>135</sup>

### CONCLUSION

The appellate courts of Georgia have developed rules, procedures, and a culture designed to address the challenges presented by the combination of legislative hostility and the unique constitutional mandate of the Two-Term Rule. They have met those dual challenges surprisingly well. Despite being starved of resources, the appellate courts of Georgia have maintained a high quality of decision-making while never violating the Two-Term Rule.

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131. *Id.* at 922 (emphasis added).

132. *See* TERRY, *supra* note 4, at 34–35. The judge making this comment declined to be identified or quoted for attribution.

133. *See* TERRY, *supra* note 4, at 35. The judge making this comment declined to be identified or quoted for attribution. *See also* RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS FROM THE LIBRARY OF CONGRESS 183 (Suzy Platt ed., 1992) (“Justice delayed is justice denied.”) (attributing quote to William E. Gladstone).

134. *See* TERRY, *supra* note 4, at 35. The judge making this comment declined to be identified or quoted for attribution.

135. *Id.* The judge making this comment declined to be identified or quoted for attribution.