

A big red button is a good idea

David A. Carrillo and Stephen M. Duvernay | June 22, 2022

The problem with the docket delays in the California Court of Appeal, Third District, is already [well-documented](#), and it is a serious one: due process requires cases to be resolved without causing prejudicial effects from unjustified delay. But this is only the latest or just one example of a larger problem California's judiciary has struggled with from the state's inception: inadequate resources. And the blame game over accountability for the Third District's shortcomings risks shifting the focus away from this critical resource issue, and makes it less likely that much-needed resources will be forthcoming.

The solution to the docket delay problem is, as the [Chief Justice said recently](#) at the SCOCA Conference 2022, to look at what the appellate courts are doing, figure out if there's a problem, and address it going forward. That's a process solution for a process problem, and it's the right approach given the Court of Appeal's case-deciding procedure.

The Court of Appeal process for deciding cases has several actors who will notice that their inboxes are overflowing and should know when to speak up. Staff attorneys assigned to write drafts will know when they have too many cases, or it's taking too long to move things off their desks. Supervising staff attorneys and chambers chiefs of staff will have a broader perspective of their unit's performance and workload, and will know who is falling behind. The administrative presiding justices may lack power to punish slow chambers, but they will at least know when another justice is dawdling and can sound the alarm. Someone gathers the court statistics that get aggregated into the Judicial Council's annual report; evaluating those numbers against performance standards before aggregating them will reveal problems with individual justices or in specific courts.

Given that process, several actors could (and should) have spoken up, raised a red flag, or acted on the Third District's problems. Empowering those people to hit the big red "ALERT" button — and making that button effective — is a good plan.

But [allegations of malfeasance](#) in the Third District fiasco distract from the broader factors that enabled that situation to begin with. Such accusations only make it easier for the legislature to blame the courts for mismanaging existing resources as an excuse to deny more funding. (Two maxims come to mind here: Hanlon's razor "never attribute to malice that which is adequately explained by stupidity," and "bad facts make bad law.") Through its budgetary power, the legislature controls judicial resources, and some governors have further restricted judicial branch funding. Governor Jerry Brown, for example, [proposed some permanent](#) and made other major one-time cuts to court budgets ([\\$350 million in the 2011 budget](#)). Over several years in the 2010s state general fund support for the judicial branch was [cut by \\$1 billion](#).

That's consistent with the long history of California's judicial branch being stifled by inadequate resources to manage an ever-expanding docket, strangled by budget cuts, and choked by the inability to expand the bench without legislative authorization. That a court is behind in its work should surprise no one, least of all the courts.

The California Supreme Court’s own history shows this. The court struggled through 1879 to 1914 vainly attempting to shoulder its caseload. It divided into departments and employed commissioners in a losing battle against its bursting docket. The department system only made matters worse because it permitted en banc consideration — of course, nearly all litigants demanded en banc review and forced the court to hear many cases twice. So from 1885 to 1904, the legislature directed the court to employ commissioners to help with the workload. The legislature finally relented in 1904 and created the Court of Appeal. And now 118 years later the Court of Appeal is similarly overstuffed with cases and starved of resources.

Lack of funding is a significant driver of the fracas over the Third District’s case delays. And addressing that systemic problem requires getting more funding, which is linked to judicial independence and public respect. The way key players handled the Third District issue detracted from both those things.

Judicial independence requires leaving the judicial branch to largely self-regulate. Making it seem as if self-policing is inadequate invites legislative oversight, which ultimately will destroy the judiciary’s independence. That’s why first giving the Judicial Council a chance to resolve this informally would have been preferable. Starting with a public demand for an official proceeding risks making the judicial discipline system seem inadequate if it fails to reach the “right” result. That creates a no win-situation: handing out harsh discipline validates the perception of rot, or invites cries of cronyism if the investigation is slow-walked or only slaps a few hands.

Judicial authority depends on public respect, and personal attacks against the Chief Justice only make matters worse here. Filing CJP complaints and writ petitions starts the wheels of justice turning, with all the usual investigative and procedural delays. And publicly calling out the Chief Justice forces her to stand back, lest she be accused of interfering in legal processes — when she otherwise could have expedited matters. The result: forcing this issue into public proceedings slowed the solution, and arguably allowed for the perception that Third District justices were permitted to run out the clock until they qualified for full retirement benefits. And alleging malfeasance by the Chief Justice is even less productive: it creates a disincentive to take remedial action lest it be spun as an admission, weakens her persuasive powers by casting doubt on the office, and unfairly punishes her for acknowledging there’s a problem.

There’s blame all around for those who either created or mishandled the Third District situation. Our point is that making this into a public spectacle makes matters worse in two ways: by delaying a fix for the acute docket delay problem, and inhibiting the judiciary’s ability to seek longer-term remedies for the chronic funding problem. Delays in case processing call for an administrative solution, not throwing gasoline on a fire.

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David A. Carrillo is the executive director of the [California Constitution Center](#) at Berkeley Law. Stephen M. Duvernay is an attorney in private practice and the chief senior research fellow at the California Constitution Center.

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