

## Foreword: Judicial Administration: Stepchild of the Law

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### FOREWORD: JUDICIAL ADMINISTRATION: STEPCHILD OF THE LAW

WILFRED FEINBERG\*

The function of a foreword, I suppose, is to say pleasant things about whatever it is that is being introduced and to assess favorably its significance, albeit briefly. I do not believe in biting the hand that invites me, but I will demur mildly from following either course. I do so not because I deprecate the scholarship of what follows. The student works seem thorough; the pages of the issue are festooned with footnotes and reflect the intensive research and painstaking care that typify law review comment.

My cavil is of a different kind and, except in the most general sense, is not addressed to the articles in this seventh annual survey of the Second Circuit at all. I have no particular fault to find with the editors of the survey. Instead, I applaud them—not once but twice. The first hurrah is for their continuing to examine the operation of one of the United States Courts of Appeals in a regular and comprehensive way. This tradition of examining the range of the court's work, rather than the speck of an opinion or two, is valuable and should be encouraged.<sup>1</sup>

My other cheer is for their suggestion that I write the Foreword this year about the denial of an en banc hearing in *Gilliard v. Oswald*.<sup>2</sup> After the panel opinion in that case, appellees filed a peti-

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\* Circuit Judge, United States Court of Appeals for the Second Circuit. The assistance of Ralph C. Cavanagh in the preparation of this Foreword is gratefully acknowledged.

<sup>1</sup> For examples of scrutiny of courts in addition to our own, on both the state and federal levels, see *The Supreme Court of California 1975-1976*, 65 CALIF. L. REV. 220 (1977); *The United States Court of Appeals for the First Circuit 1975-1976 Term*, 11 SUFFOLK L. REV. 185 (1977); cf. *The United States Courts of Appeals: 1975-1976 Term Criminal Law and Procedure*, 65 GEO. L.J. 203 (1976).

<sup>2</sup> 552 F.2d 456 (2d Cir. 1977).

tion for rehearing containing what we still quaintly call a "suggestion" that the case be reheard en banc. When the petition was denied and the suggestion rebuffed, three active judges filed opinions: Chief Judge Kaufman concurred in the denial of rehearing,<sup>3</sup> Judge Oakes dissented,<sup>4</sup> and Judge Timbers, in effect, dissented from the reasoning of Chief Judge Kaufman's concurring opinion.<sup>5</sup> This proliferation of judicial opinions in connection with the rejection of a request for an en banc hearing was extraordinary. Most such petitions sink without a ripple, except for an occasional notation of a dissenting vote or two in the order denying en banc reconsideration. The student editors of this issue were acute, therefore, in suggesting to the writer that these opinions in *Gilliard* presented a proper occasion for reflections on whether the en banc procedure is workable.

I have resisted that temptation, but not because the topic is a poor one. My reason is rather the reverse. The subject of en bancs is such a rich one that it cannot be covered adequately in a foreword, even if that format were stretched beyond its ordinary limits. But the suggestion has led me instead to the point of this piece, which is, I think, appropriate for a foreword. Briefly, that point is that those who study and write about the law too often ignore a substantial aspect of it, of which the en banc procedure is but a tiny part. I refer to what, for want of a better term, is called "judicial administration." The phrase does the subject a disservice. It conjures up pictures of faceless bureaucrats giving docket numbers to cases and placing papers into files. Such a subject seems lifeless, tedious and unworthy of the attention of the finest minds. It is, therefore, in large part ignored or, at best, tolerated by law schools, law reviews and scholars.<sup>6</sup> In short, judicial administration is the stepchild of the law.

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<sup>3</sup> *Gilliard v. Oswald*, 557 F.2d 359 (2d Cir. 1977). Judges Mansfield and Gurfein joined in this opinion, although Judge Mansfield would have voted to grant en banc rehearing.

<sup>4</sup> *Id.* at 360.

<sup>5</sup> *Id.*

<sup>6</sup> Notable valuable exceptions are found in the writings of Professors Carrington, Meador and Rosenberg. See, e.g., P. CARRINGTON, D. MEADOR & M. ROSENBERG, *JUSTICE ON APPEAL* (1976) [hereinafter cited as *JUSTICE ON APPEAL*]; D. MEADOR, *APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME* (1974); Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969); Meador, *Appellate Case Management and Decisional Processes*, 61 VA. L. REV. 255 (1975); Rosenberg, *Let's Everybody Litigate?*, 50 TEX. L. REV. 1349 (1972). Various studies of the Federal Judicial Center are also useful, as is the report of the so-called Hruska Commission. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, *STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE* (1975) [hereinafter cited as *Hruska Commission Recommendations*].

It may be that this picture is somewhat overdrawn, but if so, not by much. I have not recently examined in detail the contents of a cross section of law reviews or law school curricula to document my assertion.<sup>7</sup> But I am confident that the predominant emphasis is still on loving examination of the individual case, opinion or doctrine. Nor do I claim that this treatment is unwise or unwarranted. I remember well the case method of instruction and—between moments of terror—I loved it. The gradual expansion or contraction of precedent, the reconciliation of particular cases, the resolution of individual conflicts in a fair and principled way are all great intellectual fun. I know. I do it—or at least try to—all the time. I do not suggest that we stop studying this process. But I do urge that we pay more attention to what actually goes on in the courts in the great mass of cases, that we examine the system as well as the case, and that we look to the whole as well as to a few of its parts. Let me give some examples, with particular emphasis on the federal courts.

### *The Decisional Process*

In the last decade, there have been astounding developments in the way the eleven circuit courts of appeals decide cases. In most circuits, oral argument has become the exception rather than the rule. In all circuits, summary dispositions have greatly increased. The decisional devices range from the per curiam published opinion to the delphic one-sentence order, with such in-between formats as the detailed but unpublished memorandum order and the reasoned, oral disposition in open court, transcribed for possible use by the parties should they desire it. In short, the decisional process in the federal courts of appeals has been absolutely transformed.

Fruitful areas of study abound. The initial inquiry might focus on the decisional process in each circuit. What proportion of their caseloads are decided by full signed opinion, by published per curiam opinion, by detailed order, by uninformative order, by reasoned oral dispositions? Are there significant differences among and within the circuits?

The different decisional devices presently being utilized also

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<sup>7</sup> I did have a check made, though, of the number of book reviews of *APPELLATE JUSTICE: 1975*, the five volume study prepared in connection with the National Conference of Appellate Justice planned by the Advisory Council for Appellate Justice and sponsored by the National Center for State Courts and the Federal Judicial Center. None was found. Moreover, apparently only one student-edited law review has reviewed *JUSTICE ON APPEAL*, *supra* note 6. See Hopkins, Book Review, 77 COLUM. L. REV. 332 (1977).

warrant examination. Are there too many summary dispositions? Do the new procedures tend to be confined to one or more types of cases? Are the overall effects adverse or salutary?<sup>8</sup> Is one decisional device superior to another? Finally, what happens to these summary dispositions when they reach the Supreme Court?<sup>9</sup>

### *The Judiciary*

Due to the growing appellate caseload and the failure of Congress since 1968 to increase the number of circuit court judges, the busiest courts of appeals have been forced to rely heavily on continual infusions of judicial manpower from the ranks of senior circuit judges, visiting circuit judges, and district judges from the home and other circuits. For example, in fiscal 1975, 77 judges sat on the Ninth Circuit Court of Appeals, 41 sat on the Second Circuit, 35 on the District of Columbia Circuit and 34 on the Fifth Circuit.<sup>10</sup> The implications are varied: (a) Does a substantial percentage of three-judge panels now contain fewer than two active circuit judges from the host circuit? (b) In each circuit, can it actually be said that there is a law of the circuit? (c) What are the advantages and disadvantages (and there are both) of the shuttling of personnel from circuit to circuit and from district to appellate court (and back)?

### *En Banc Procedure*

With the increase in appellate caseload, more attention must be paid to en banc procedure, the subject first suggested by the student editors. A careful study of the disposition of requests for en banc hearings in the last decade in particular circuits might shed

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<sup>8</sup> See Haworth, *Screening and Summary Procedures in the United States Courts of Appeals*, 1973 WASH. U.L.Q. 257, for an excellent start on the continuing work that should be done. Among Haworth's more intriguing findings was the Fifth Circuit's tendency to utilize summary dispositions far more frequently in diversity and admiralty actions than in criminal appeals. *Id.* at 280-81. He also determined that the decline in oral argument (heard in barely 40% of the Fifth Circuit's cases for fiscal year 1972) was associated with a statistically significant increase in the percentage of actions affirmed. *Id.* at 313-14. This provocative study has apparently not been replicated in other circuits.

<sup>9</sup> For examples of Second Circuit summary dispositions which culminated in plenary Supreme Court review, see *Henderson v. Morgan*, 426 U.S. 637 (1976), *aff'g* 516 F.2d 897 (2d Cir. 1975); *Giglio v. United States*, 405 U.S. 150 (1972), *rev'g and remanding* No. 34973 (2d Cir. Sept. 23, 1970).

<sup>10</sup> These figures were supplied by the Administrative Office of the United States Courts. Figures for later years indicate that, except in the District of Columbia Circuit, the number of judges hearing cases in the larger circuits is increasing. *Cf.* Green & Atkins, *Designated Judges: How Well Do They Perform?*, 61 JUD. 358 (1978) (an exhaustive review of the performance of imported judicial manpower in the circuit courts from 1965-1969).

light on the following: (a) To what extent do the circuits differ in their receptivity to convening an en banc court? (b) What should be the criteria? Are these criteria actually used?<sup>11</sup> (c) Do en bancs accomplish anything in settling doctrine? It was common knowledge on the Second Circuit that Learned Hand thought they were a waste of time.<sup>12</sup> Do subsequent panels bow to the new doctrine or tend to find ways to avoid it in instances where the panel majority disagrees with the conclusions of the en banc court? (d) How often are en banc decisions relegated to relatively inconsequential status by prompt Supreme Court intervention? (e) Does the growing size of circuit courts<sup>13</sup> make the en banc procedure unworkable without substantial change?<sup>14</sup> A detailed analysis of what has occurred in the Fifth and Ninth Circuits, which now have 15 and 13 authorized judges, respectively, might be helpful.

### *Appellate Court Structure*

Should the appellate structure of the federal courts be changed entirely? On this, the contributions of the Freund Commission<sup>15</sup> and the Hruska Commission<sup>16</sup> have been of tremendous value in focusing attention on the problem and stimulating discussion. Although the suggestions of these Commissions with respect to creation of a national court of appeals have generated a lively scholarly debate,<sup>17</sup>

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<sup>11</sup> It has been suggested that a variation of Peter's Principles applies: Enthusiasm for an en banc increases in direct proportion to proximity to the author of the dissenting panel opinion.

<sup>12</sup> The contrasting perspectives of Judge Learned Hand and Charles E. Clark on the utility of en banc hearings are discussed in M. SCHICK, *LEARNED HAND'S COURT* 105 (1970).

<sup>13</sup> Under pending bills, seven courts of appeals would have more than nine authorized judges.

<sup>14</sup> The Hruska Commission proposed that participation in en banc hearings and determinations be limited to the nine judges longest in service who were not eligible for senior status. See HRUSKA COMMISSION RECOMMENDATIONS, *supra* note 6, at 60-62; *cf.* the alternatives suggested in JUSTICE ON APPEAL, *supra* note 6, at 200-08.

<sup>15</sup> This group, under the chairmanship of Professor Paul A. Freund of the Harvard Law School, was appointed in 1971 by Chief Justice Burger "to study the case load of the Supreme Court and to make such recommendations as its findings warranted." REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT ix (1972). Among its recommendations was the establishment of a National Court of Appeals to "screen all petitions for review now filed in the Supreme Court, and hear and decide on the merits many cases of conflicts between circuits." *Id.* at 18.

<sup>16</sup> The Hruska Commission, chaired by Senator Roman Hruska, was established by Congress in 1972 to consider changes in circuit court structure, internal procedures, and geographical alignment. The report of the Commission is cited in note 6 *supra*.

<sup>17</sup> See authorities collected in P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 2-4 (Supp. 1977); Haworth, *Circuit Splitting and the "New" National Court of Appeals: Can the Mouse Roar?*, 30 Sw. L.J. 839, 840 n.14 (1976).

related questions deserve continuing attention. For example: Has the Supreme Court in recent years been granting certiorari more or less frequently in cases of conflict between the circuits? Are there significant issues of conflict on which certiorari has recently been denied? The latest studies I have seen were done by Professor Feehey for the Hruska Commission, examining certiorari petitions for the 1971 and 1972 terms of the Supreme Court,<sup>18</sup> and by Professors Casper and Posner, whose investigation encompassed the 1971-1973 terms.<sup>19</sup> Worthwhile as regards this and other aspects of the Supreme Court's ongoing dialogue with the circuit courts would be an annual survey of cases *not* accepted for review.<sup>20</sup> A promising beginning was made along these lines some three decades ago in the *Pennsylvania Law Review*, but the seedling did not take root.<sup>21</sup>

### *Jurisdiction*

Should the jurisdiction of the federal courts be materially altered? There has been a good deal of attention devoted to this subject, *e.g.*, Judge Friendly's comprehensive book,<sup>22</sup> the ALI proposals on diversity jurisdiction<sup>23</sup> and others too numerous to list.<sup>24</sup> But much remains to be done. For example, what would be the actual impact on the state courts of the complete elimination of diversity jurisdiction? What has been the effect on the federal courts of statutes passed only in the last ten years? Contrast the attention paid by the law reviews to the device of environmental impact statements with that accorded Chief Justice Burger's proposal for judicial impact statements to accompany new statutes.<sup>25</sup>

<sup>18</sup> See HRUSKA COMMISSION RECOMMENDATIONS, *supra* note 6, at 93-111.

<sup>19</sup> See G. CASPER & R. POSNER, *THE WORKLOAD OF THE SUPREME COURT* 85-92 (1976).

<sup>20</sup> Consider, for example, the value of a mechanism for identifying on a continuing basis the relatively noncontroversial inter-circuit conflicts which initially escape Supreme Court review and yet, if spotlighted, may come to be seen as fit candidates for certiorari or Congressional intervention. See Feinberg, *A National Court of Appeals?*, 42 *BROOKLYN L. REV.* 611, 627 & nn.85-86 (1976). This service could be rendered by a law review which took up the suggestion of an annual survey.

<sup>21</sup> See Harper & Etherington, *What the Supreme Court Did Not Do During the 1950 Term*, 100 *U. PA. L. REV.* 354 (1951); Harper & Pratt, *What the Supreme Court Did Not Do During the 1951 Term*, 101 *U. PA. L. REV.* 439 (1953); Harper & Rosenthal, *What the Supreme Court Did Not Do in the 1949 Term—An Appraisal of Certiorari*, 99 *U. PA. L. REV.* 293 (1950).

<sup>22</sup> H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* (1973).

<sup>23</sup> See ALI *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* (1969).

<sup>24</sup> See, *e.g.*, Frank, *For Maintaining Diversity Jurisdiction*, 73 *YALE L.J.* 7 (1963); Friendly, *Averting the Flood by Lessening the Flow*, 59 *CORNELL L. REV.* 634 (1974); Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 *HARV. L. REV.* 317 (1977).

<sup>25</sup> The Chief Justice's proposal is summarized in Burger, *The State of the Federal Judiciary—1972*, 58 *A.B.A.J.* 1049, 1050 (1972).

### *ABA Standards*

What is happening with the Standards Relating to the Administration of Criminal Justice, approved over the last decade by the American Bar Association? These Standards would have a profound effect if adopted in all jurisdictions. Have they been adopted? If not, what are the problems? The Standards are now being updated. Any significant changes will merit careful scrutiny and evaluation.

### *Criminal Justice*

Criminal justice on the appellate levels offers a wide range of virtually untapped empirical questions: (a) What are the rates of appeal from contested criminal cases in the state courts? Do they differ from state to state, and if so, why? Do the factors tending to influence volume suggest workable and defensible strategies for reducing frivolous appeals? (b) How many contested felony trials are there each year? In what percentage are full transcripts provided? What would be the cost of routinely and swiftly preparing a transcript in all such cases, thereby eliminating one troublesome source of delay in the criminal process?<sup>26</sup> (c) What would be the result of passage of legislation now pending in Congress which provides for sentencing review in the federal system under certain circumstances? Here the record in those states which currently afford sentencing review should prove illuminating.<sup>27</sup> What has been the experience of the states that allow a reviewing court to increase the sentence? Has this significantly deterred appeals by defendants?<sup>28</sup>

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<sup>26</sup> My own estimates of transcript costs for felony trials in the federal system, circa 1972, are set out in Feinberg, *Expediting Review of Felony Convictions*, 59 A.B.A.J. 1025, 1026-27 (1973). Cf. *United States v. MacCollom*, 426 U.S. 317, 334-40 (Stevens, J., dissenting) (pointing out that routine provision of transcripts preserves rights of indigent defendants in subsequent collateral reviews of convictions).

<sup>27</sup> The one such recent study I have found, an examination of the frequency and impact of sentence review in Connecticut and Massachusetts, is a model for future researchers. See Zeisel & Diamond, *Search for Sentencing Equity: Sentence Review in Massachusetts and Connecticut*, 1977 A.B.F. RES. J. 883 [hereinafter cited as Zeisel & Diamond]. The authors note that "[t]he only prior study of appellate review of sentences in Connecticut was published 18 years ago." *Id.* at 895 n.42. It is to be hoped that such enterprises will now be undertaken more frequently, with a substantial number of states permitting some review of the merits of sentences.

<sup>28</sup> Cf. Zeisel & Diamond, *supra* note 27, at 923-28 (concluding that potential for increased sentence following review in Massachusetts and Connecticut serves to discourage applications, and analyzing cases where increases occurred).

## CONCLUSION

It is possible to go on and on, identifying such issues as the competence of lawyers,<sup>29</sup> the discipline and disbarment of lawyers, the selection of judges,<sup>30</sup> the effect of delay in that selection process, the disciplining of judges, the possibility of televising appellate arguments,<sup>31</sup> the use of magistrates, the cost of litigation, the utility of alternative modes of settling disputes and the increased use of court executives and supporting staff. Some of these questions are now the subject of intensive controversy; some are being considered by the Justice Department's new Office for Improvements in the Administration of Justice under the imaginative direction of Assistant Attorney General Daniel J. Meador. All are worthy of attention and focus.

My principle point is a simple one. I would not eliminate the emphasis now given by law schools, law reviews, and commentators generally to the individual case and the analytically elegant legal principle. Yet those who concentrate on the scholarly exposition of particular new doctrines are ignoring the main business of the appellate courts: reviewing for error an expanding universe of trial court determinations, few of which will ultimately provoke a published opinion in the *Federal Reporter, Second Series*. The actual and optimal mix of the flood of issues subject to appellate reconsideration, the impact on such reconsideration of strategies now being implemented to cope with increased caseload, and the capabilities, present and potential, of those participating in the process are all as worthy of attention as the more glamorous areas of the law. But the scrutiny they merit will be scatter-shot and uninformed if it does not proceed in company with an increased appreciation for and understanding of the tools of the social scientist. Law reviews can play a role by increasing their until now fitful commitment to empirical projects,<sup>32</sup> and by concentrating resources in some

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<sup>29</sup> Federal judges have recently been asked to rate the quality of attorneys appearing before them in questionnaires to be tabulated and assessed by the Committee of the Judicial Conference of the United States to Consider Standards for Admission to Practice in the Federal Courts, chaired by Chief Judge Edward J. Devitt.

<sup>30</sup> President Carter has instituted the practice of soliciting recommendations for circuit court appointments from panels of a Nominating Commission. See Exec. Order No. 11972, 42 Fed. Reg. 9659 (1977). A study of the operation of these panels would be highly instructive, the more so given the anticipated surge of appointments brought on by congressional enlargement of the circuit courts.

<sup>31</sup> For a qualified endorsement of this innovation, see Editorial, *Watch It on TV*, 64 A.B.A.J. 7 (1978).

<sup>32</sup> I do not mean to suggest that there have been no significant contributions. For an

of the areas sketched above. They will find an eager audience in a growing number of judges, federal and state, and in an expanding core of professionals in judicial administration.<sup>33</sup> More important, they will point the way toward enlightened reform in neglected areas of the law of great concern to those for whom the administration of civil and criminal justice is of more than academic interest.

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excellent case in point, now of more than ten years' vintage, see Project, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519 (1967).

<sup>33</sup> Included among this group are the personnel of the Federal Judicial Center, the National Center for State Courts and the new Office for Improvements in the Administration of Justice.