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JUSTICE ON APPEAL—ONE WAY OR MANY?

Michael E. Smith*

After two centuries of our nation's existence, discussions of federalism are certain to sound familiar. The ground of argument has been worked so thoroughly, there is hardly a patch left unturned. Conventional watchwords suggest the competing interests: adaptability to local circumstances contrasted with efficiencies of scale, circumscribed experimentation contrasted with prevention of forum-shopping, local self-government contrasted with the cosmopolitan perspective.¹ The most that can be done now, absent exceptional insight, is to display these choices in a fresh context.

What follows is yet another variation on the theme. It concerns the propriety, perhaps the desirability, of diversity among the federal courts of appeals in the procedural means by which they dispose of their caseloads.² These internal procedures include, for example, the number of cases calendared for each judge, the extent to which oral argument is granted, nonpublication of opinions, and use of court staff. The problem dealt with here is the extent to which these procedures should be uniform throughout the circuit courts.

This problem is not usually thought of as a matter of federalism, which ordinarily refers to relations between the federal government and the states or among the states, rather than to relations among regional units within the federal government. Yet the value choices, if not the constitutional scruples, are similar. Moreover, as centralization increases, regionalism within the federal government may replace in importance the more familiar problem of federal-state relations.

Strong forces are pressing toward homogenization of the internal procedures of the federal courts of appeals. Although part of this thrust may be aimed at uniformity in itself, it seems mostly to be a response to the common assumption that for every problem there is a universal solution.

While working for the District of Columbia Circuit Court, I observed some of these pressures toward uniformity at close quarters. A sample follows.

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¹ For a useful elaboration of the customary contentions, see G. BENSON, *THE NEW CENTRALIZATION* 9-21 (1941). The vintage of this work supports my point.

² Much of what I have to say applies also to state appellate courts, but they are not my principal concern.

(1) Congress may be edging toward informal national standards for the circuit courts. In early 1977, the chief counsel of the Senate subcommittee concerned with additional federal judgeships closely questioned Chief Judge David L. Bazelon of the District of Columbia Circuit concerning his court's failure to achieve par in such statistics as the number of opinions produced by each judge and the proportion of cases decided without oral argument.³

(2) The Commission on Revision of the Federal Court Appellate System, popularly known as the Hruska Commission, sought to reform the internal procedures of the circuit courts, in addition to its well publicized proposal for a National Court of Appeals. Its recommendations concerned, in particular, denial of oral argument, nonpublication of opinions, and the functions of court staff.⁴

(3) The legal profession has joined the campaign. The American Bar Association last year endorsed standards covering a wide range of internal procedures of appellate courts.⁵

(4) Increasingly, academic writers are also offering procedural advice to the federal courts of appeals. In my view, the finest product of this development thus far is the focus of this symposium, *Justice on Appeal* by Professors Carrington, Meador, and Rosenberg. The authors provide practical and humane proposals on such subjects as the granting of oral argument, preparation and publication of opinions, central staff, expediting of criminal appeals, appointment of counsel, appropriate caseloads per judge, and specialized case assignments.⁶

(5) There are pressures for uniformity even within the judicial branch. The Administrative Office of the United States Courts, for example, recently submitted a report to the Judicial Conference of the United States that conceives of staff counsel primarily as *pro se* clerks and makes recommendations tending to fix them in that mold.⁷

I do not mean to suggest that these pressures on the federal courts of appeals are necessarily misguided. On the contrary, some of the proposals, in my view, are highly desirable as general propositions. The question, however, is whether they ought to be impressed on all of the circuit courts.

The strength of political pressures toward uniformity should not be exaggerated. As in all groups, there are also strong forces operating among the judges that encourage them to continue doing business in their

³ *Hearings on S. 11 & S. 460 Before the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 648-50 (1977) [hereinafter cited as *1977 Hearings*].

⁴ UNITED STATES COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 46-54 (1975) [hereinafter cited as COMMISSION RECOMMENDATIONS].

⁵ ABA COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO APPELLATE COURTS: APPROVED DRAFT (1977) [hereinafter cited as ABA STANDARDS]. See notes 20-23, 30 and accompanying text *infra*.

⁶ The proposals are summarized in P. CARRINGTON, D. MEADOR, & M. ROSENBERG, JUSTICE ON APPEAL 225-31 (1976).

⁷ DIVISION OF PERSONNEL OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, SURVEY OF COURT LAW CLERK AND "CAREER" LAW CLERK POSITIONS (1977).

own ways. The influences I have observed included the following: a salutary preoccupation with deciding cases, at the expense of concern for procedural reform; reasoned commitment to present procedures or objections to the alternatives offered; wariness of what may be regarded as improper outside dictation; insulation from face-to-face criticism by the bar and public;⁸ and of course reluctance to endure the toil and dislocations of change. The judges are encouraged in these tendencies, on specific issues, by public officials, practitioners, or professors who may be satisfied with things as they are or unable to agree on a change.⁹

I also readily acknowledge that the pressure on the federal courts of appeals to adopt specified internal procedures is to some extent justified. In fiscal year 1976, the median time in the circuit courts from filing of the complete record to disposition of a case argued or submitted on briefs was over seven months, and in the slowest court it was nearly a year.¹⁰ Moreover, the prognosis is not propitious. In 1968, with ninety-seven authorized circuit judges, there were 9,116 cases filed in the federal courts of appeals; in 1976, with exactly the same number of authorized judgeships, 18,408 cases were filed.¹¹ Even if all thirty-seven of the requested new circuit court positions¹² are provided by Congress, the ratio will still be markedly less favorable than a decade ago for the prompt handling of business. Further, informed observers sense that the average appeal is becoming increasingly onerous. Congress has fostered a growing number of lawsuits involving intricate technical issues, usually accompanied by ponderous administrative records, to be decided without meaningful statutory guidelines.¹³ The judges have also brought burdens on themselves by proving to be hospitable to claims raising inscrutable social issues.¹⁴

Revision of internal procedures is not the only way, or even the most important way, of responding to this predicament. The alternatives in-

⁸ In the words of a remarkable jurist, "It's hard not to get the feeling that your ass is the divinity if it's been gettin' kissed for twenty years." *Quoted in* D. JACKSON, *JUDGES* 108 (1974).

⁹ *E.g.*, on denial of oral argument, *compare* 1977 *Hearings*, *supra* note 3, at 649-50, with P. CARRINGTON, D. MEADOR, & M. ROSENBERG, *supra* note 6, at 16-24; on nonpublication of opinions, *compare* COMMISSION RECOMMENDATIONS, *supra* note 4, at 49-53, with P. CARRINGTON, D. MEADOR, & M. ROSENBERG, *supra* note 6, at 35-41.

¹⁰ DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, MANAGEMENT STATISTICS FOR UNITED STATES COURTS 1976, at 12-13 (1976).

¹¹ *Id.* at 13; ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1976 SEMI-ANNUAL REPORT OF THE DIRECTOR 1 (1976) [hereinafter cited as 1976 REPORT].

¹² Including those requested if the Fifth Circuit were split; *see* 1977 *Hearings*, *supra* note 3, at 572, 612.

¹³ Leventhal, *Appellate Procedures: Design, Patchwork, and Managed Flexibility*, 23 U.C.L.A. L. REV. 432, 436 (1976); McGowan, *Congress and the Courts*, 62 A.B.A.J. 1588 (1976); *Hearings Before the Commission on Revision of the Federal Court Appellate System: First Phase* 83-85 (1973) (Statement of Judge J. S. Wright). The ultimate (it is to be hoped) was reached in *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir.) (*en banc*), *cert. denied*, 426 U.S. 941 (1976).

¹⁴ *E.g.*, *National Citizens Comm. for Broadcasting v. FCC*, 555 F.2d 938, 956-66 (D.C. Cir. 1977) (divestiture of local newspaper-broadcast combinations required unless cross-ownership clearly shown to be in public interest), *cert. granted*, 98 S. Ct. 52 (1977); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 51-59 (D.C. Cir.), *cert. denied*, 98 S. Ct. 111 (1977) (prohibition against *ex parte* contacts with administrative agencies extended to informal rulemaking proceedings).

clude: appointing numerous additional judges, coupled with the creation of new appellate tribunals;¹⁵ restricting the jurisdiction of the federal courts, either by shifting cases to other forums or by eliminating causes of action altogether;¹⁶ and perhaps even doing nothing, to the point where litigants tire of waiting and go elsewhere to resolve their disputes.¹⁷

Yet in actuality, and for good reasons, a sweeping response to the problem is unlikely. Rather, the probable result will be amelioration through a variety of devices, including the adjustment of internal court procedures. In these circumstances, pressure may be appropriate to induce the judges and others to consider and agree on procedural change.

There is a quite different consideration that points to the same conclusion. Despite their general resistance to change, on certain matters the circuit judges may be too ready to adopt dubious innovations.¹⁸ In my experience, these tend, naturally enough, to be ones that offer the judges relief from unpleasant burdens without obvious diminution of their power. The best response to this propensity may not be to resist uniformly altogether, but to urge sound proposals in place of doubtful ones.¹⁹

Having conceded that stout forces will inevitably resist undue judicial regimentation, and that there are good reasons for urging that the single best solution to a problem be adopted by all of the circuit courts, I nevertheless believe that observers wrongly lose sight of the extent to which diversity of internal procedures among the circuit courts is proper, indeed perhaps desirable. I leave to others the invocation of relatively speculative justifications, such as the values of circumscribed experimentation or local self-government. My reasons are based on concrete differences in situation among the federal courts of appeals.

The most obvious differences are in external circumstances: the size and character of caseloads; the extent to which circuit judges, lawyers, and district courts are geographically dispersed; the quality of the bar within the circuits; and similar factors. Examples will indicate the possible effect of these differences on a court's internal procedures.

(1) The American Bar Association has recommended that at the outset of an appeal the parties file statements providing basic information about the case;²⁰ an earlier proposal would have required inclusion of a summary of facts, questions presented, and principal authorities.²¹ Since such preliminary statements may entail considerably more paperwork for lawyers, and especially for court staffs, there should be a substantial justification for the requirement. In the Tenth Circuit Court, which has

¹⁵ See, e.g., COMMISSION RECOMMENDATIONS, *supra* note 4, at 5-39, 55-60.

¹⁶ See, e.g., H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* (1973).

¹⁷ Casper & Posner, *A Study of the Supreme Court's Caseload*, 3 J. LEGAL STUD. 339, 348 (1974).

¹⁸ E.g., proposals that opinions not be published. For a staunch defense of nonpublication, see Frank, *Remarks Before the Ninth Circuit Judicial Conference*, 16 JUDGES' J. 10 (1977).

¹⁹ Represented, in my view, by P. CARRINGTON, D. MEADOR, & M. ROSENBERG, *supra* note 6, at 35-41, in preference to Frank, *supra* note 18.

²⁰ ABA STANDARDS, *supra* note 5, at 31, 35-36.

²¹ ABA COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION, *STANDARDS RELATING TO APPELLATE COURTS: TENTATIVE DRAFT*, 35-36 (1976).

required them for years with apparent satisfaction, I am told that their main function is to expose jurisdictional flaws promptly, such as failure of the district court to enter a "separate" judgment.²² This may be a sufficient justification in a circuit with inattentive lawyers or with district courts too numerous and dispersed to be readily supervised. In a compact circuit with a punctilious bar and judiciary, however, preliminary statements must be justified, if at all, on different grounds.

(2) As mentioned above, the chief counsel of the Senate Subcommittee on Improvements in Judicial Machinery has begun to encourage the federal courts of appeals to emulate the practices of the most productive circuits.²³ Likewise, the authors of *Justice on Appeal* advise that each circuit judge should participate in deciding 225 contested cases per year.²⁴ Neither of these propositions makes sense unless the weight of individual cases is alike from court to court. While there is yet no systematic and reliable evidence on this point, the Federal Judicial Center has uncovered some useful clues. In a survey of three circuit courts several years ago, criminal and prisoner appeals and original proceedings were rated as the least time-consuming, while antitrust appeals and petitions from administrative agencies other than the NLRB were considered the most burdensome.²⁵ Not surprisingly, the caseload of the "most productive" circuit court in fiscal year 1976 consisted of forty-six percent criminal, prisoner, and original cases, but only nine percent antitrust and non-NLRB administrative cases. By contrast, the caseload of the "least productive" court was composed of only seventeen percent of the lightest kinds of cases and forty-five percent of the heaviest kinds.²⁶ Differences between the two courts in the number of cases decided without oral argument may also be partially explained in the same way.²⁷

(3) The authors of *Justice on Appeal* urge courts to publish all opinions, a characteristically decent and workable proposal as they expound it.²⁸ Assuming, however, that certain courts will continue not to publish their least significant opinions, the Advisory Council for Appellate Justice supports the customary rule that these opinions not be cited as precedent.²⁹ The American Bar Association, on the other hand, would allow citation provided that adequate notice is given to the court and opposing parties.³⁰ In my view, neither alternative need prevail in all circuits. The

²² FED. R. CIV. P. 58.

²³ 1977 *Hearings*, *supra* note 3, at 648-49.

²⁴ P. CARRINGTON, D. MEADOR, & M. ROSENBERG, *supra* note 6, at 196-97, 142-46.

²⁵ FEDERAL JUDICIAL CENTER, APPELLATE COURTS CASEWEIGHT PROJECT 11-13 (1977). The survey also suggests that even within the same category of cases, some circuit courts hear more onerous appeals than others.

²⁶ 1976 REPORT, *supra* note 11, at 3, 64-66. The "most productive" and "least productive" courts were identified according to appeals terminated per judge, taking into account the contribution by senior and visiting judges. The case statistics are for the first half of 1976, the most recent detailed data available.

²⁷ 1977 *Hearings*, *supra* note 3, at 649-50.

²⁸ P. CARRINGTON, D. MEADOR, & M. ROSENBERG, *supra* note 6, at 35-41.

²⁹ 5 ADVISORY COUNCIL FOR APPELLATE JUSTICE, APPELLATE JUSTICE: 1975, at 129 (1975).

³⁰ ABA STANDARDS, *supra* note 5, at 63-65.

rationale behind the no-citation rule is that only local or large-scale litigants can keep up with unpublished opinions; insofar as these opinions are favorable, the ability to cite to them provides an unfair advantage.³¹ Like the justification for preliminary statements, this may make sufficient sense in a farflung circuit. It makes much less sense in a compact circuit where nearly all lawyers are local, of which the District of Columbia is the extreme instance.

(4) A federal statute provides that when petitions from the same administrative order are filed in several circuit courts, the court of first filing shall hear all of the cases, unless it considers another court to be more convenient.³² At times, this statute has prompted split second races to the courthouse. For example, after a recent FPC proceeding resulted in vastly increased natural gas rates, petitions to review the final order were filed virtually simultaneously by consumers in the District of Columbia Circuit Court and by producers in the Fifth Circuit Court.³³ Representative John E. Moss, a consumer advocate, later charged that lawyers for the producers, filing at the New Orleans courthouse, had been given an office and phone of their own and the undivided attention of a deputy clerk, while lawyers for the consumers in Washington had to wait in line at the counter of the clerk's office and use a public phone in another part of the building.³⁴ On its face this is a rousing tale of favoritism contrasted with regularity, but in fact the difference in treatment may simply reflect different physical circumstances between the two courts. A court with a relatively small caseload, and therefore a small clerk's office and staff, but within easy reach of most lawyers practicing before the court, is likely to be a bustling place where personal accommodations for the clientele are not feasible. In a court with a huge caseload, and facilities and staff to match, but with few lawyers in the vicinity, personal assistance to all customers can be offered as a matter of course.³⁵

Less obvious than external differences among the circuit courts, but at least as significant, are variations among the propensities and institutional traditions of the judges. Admittedly, many of these differences are of no value, and some ought to be suppressed. Others, however, manifest diverse gifts for expressing the same spirit of justice. Insofar as this is so, I believe that courts ought to safeguard their special talents, rather than squander them in attempts to conform to a common ideal. Such attempts may well fail, leaving the courts bereft of all excellence.

The following examples should not be regarded as an effort to argue the question: what constitutes good judging. They are merely meant to illustrate my general contention that some of the differences in the internal

³¹ P. CARRINGTON, D. MEADOR, & M. ROSENBERG, *supra* note 6, at 36.

³² 28 U.S.C. § 2112(a) (1970).

³³ *American Pub. Gas Ass'n v. FPC*, 555 F.2d 852, 856 (D.C. Cir. 1976).

³⁴ Letter from John E. Moss to Harley O. Stagers (Nov. 10, 1976); Anderson & Whitten, *A Multibillion-Dollar Oil-Gas Capex*, Wash. Post, Dec. 16, 1976, D.C. 13, col. 4.

³⁵ By allotting personnel to clerks' offices almost wholly on the basis of the number of cases filed, the Administrative Office of the United States Courts commits the very error of which I am warning.

character of the circuit courts are appropriate, if not desirable. To this extent, the internal procedures of each court should take account of, and capitalize on, its particular qualities.

(1) Some admirable judges are highly reflective. They take a long time to decide a case, researching each issue thoroughly and thinking it through as deeply as possible. Their opinions are exhaustive; they pursue all points raised and justify each of their conclusions in detail. Moreover, they carefully scrutinize the opinions of their colleagues, giving ample advice and insisting on speaking for themselves when not fully satisfied with the majority's reasoning.³⁶ Other equally admirable judges are much more practical. They plunge into a case, arrive at a prompt conclusion, and go on to their next task. They are tolerant of the work of other judges, neither giving private advice nor expressing their disagreements publicly, except in unusual instances. Their opinions are terse; they focus on the major issues raised; and their primary aim is to articulate the holding clearly rather than to justify it.³⁷

Courts may be composed of judges of both kinds, but insofar as one or the other predominates these differences suggest procedural consequences. A court of the former type should not feel as obliged as the latter to dispose of as many cases for each judge, to dispense with oral argument or decide cases by brief memorandum opinions, or to grant rehearing only very grudgingly. It has a greater need for a host of law clerks.

(2) Good judges may properly hold strong views of what is socially right; this was true of two of our great Chief Justices, John Marshall and Earl Warren. In a circuit court composed predominantly of such judges, especially if appointed by different Presidents, the members are apt to disagree sharply with each other.³⁸ On the other hand, fine judges, such as Justice Holmes and Judge Learned Hand, may be relatively detached, except perhaps in their commitment to disinterested judging. The tendency of such a court, by contrast, will be to minimize controversy.³⁹

The former type of circuit court may need procedural mechanisms that are inappropriate for the latter, such as: assigning cases to panels almost wholly by lot, rather than steering related cases to the same panel; disposition of debatable procedural motions by full panels, rather than by a single judge or the court staff; and resort to en banc hearings in the relatively large number of cases over which the court is irrevocably divided.

I realize that some circuit courts may not be gifted at all. I also acknowledge that my plea for diversity of internal procedures can be abused; it can become an excuse for circuit judges who decline to restrain

³⁶ *E.g.*, Justice Frankfurter and several current judges of the District of Columbia Circuit Court.

³⁷ *E.g.*, three outstanding former judges of the Second Circuit Court—Charles M. Hough, Thomas W. Swan, and Augustus N. Hand.

³⁸ *E.g.*, the District of Columbia Circuit Court, intermittently during the past 25 years.

³⁹ *E.g.*, the Second Circuit Court during the 1930's.

themselves in the public interest. In such circumstances, they may have to be admonished or regulated according to uniform standards.

The propriety of diversity of internal procedures among the federal courts of appeals can thus be expressed in terms of recurring and conflicting cliches of federalism, primarily the tension between adaptability to local circumstances and avoidance of self-centered parochialism. Here, as elsewhere, wisdom may consist of knowing which cliché to invoke at the proper time.

As a rule of thumb, however, I encourage observers to err in favor of tolerating diversity. Uniform national standards should not be promoted unless clear matters of principle are involved or the conditions in each circuit are thoroughly appreciated. Even then, the possibility that certain local needs and values may have gone unnoticed suggests that the standards ought to allow considerable leeway. This approach may counteract the tendency to suppose that there is a universal solution to every problem. More importantly, it may assure scope for the disciplined exercise of individual judicial gifts, the most important ingredient of justice on appeal.