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A JUDGE'S VIEW ON *JUSTICE*, *BUREAUCRACY*, AND *LEGAL METHOD*

Harry T. Edwards*

At the recent Inaugural Lecture of the University of Windsor's Distinguished Scholars Program on Access to Justice, my former law teaching colleague, Professor Joseph Vining, delivered a speech entitled *Justice, Bureaucracy, and Legal Method*.¹ Because, in my view, Professor Vining's address raised some disturbing questions, and some seriously misguided suggestions, about the growth of bureaucracy in the courts and the delivery of justice, I believe that a response is appropriate.

In the hope that I will not confuse matters, let me state my perception of Professor Vining's thesis. He initially asserts that "there is a sense among serious analysts that the Supreme Court is failing them and that [the judicial opinions of the Court] are wanting." He suggests, for example, that many scholars have complained that recent opinions are "inconsistent" and "poorly articulated." He then adds that the complaints of today — which, he says, are "underscored by . . . criticism which is unhappy and disrespectful" — point "to a change of a sort not experienced before." This alleged change, according to Professor Vining, is reflected by Supreme Court opinions that "now more often seem things written by no one at all." It is this latter view that is the focal point of Professor Vining's thesis. His central theme appears to be that, because of recent events, there is a "real possibility of the bureaucratization of the Supreme Court," and that once lawyers become aware of this, they will lose faith in the authoritative quality of judicial pronouncements.

In support of his thesis, Professor Vining relies on certain critical assumptions. First, he suggests that traditional collegial relations among Justices either no longer exist or are rapidly waning because the Supreme Court (and lower courts as well) have become burdened with larger staffs of secretaries and law clerks.

Second, Professor Vining postulates that the growing judicial staffs are responsible for decisions that are "too long," that are

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1. Professor Vining's paper appears at 80 MICH. L. REV. 248 (1981).

"patchwork" in design, and that reflect "bureaucratic writing." Worse yet, Professor Vining believes that the larger judicial staffs must of necessity "communicate directly with one another . . . and reach agreements among themselves," presumably without regard to the preferred opinions of the Justices or judges who are designated to decide a given case.

Third, Professor Vining observes that former "clerks routinely now say in private that they were ghost writers of one or another important opinion," as if to suggest that judges and Justices are merely pawns in the hands of their law clerks insofar as decision-writing is concerned. He goes so far as to assert that "we know that a large professional staff must have something to do . . . [and so they must be] working to produce . . . the texts [of the Supreme Court opinions] to which American lawyers turn when they undertake legal analysis."

Finally, the conclusion offered by Professor Vining is that — to the extent that the opinions of the Supreme Court are no longer viewed as "the thinking, feeling, and reasoning of the author and those persuaded with him," — "what we lose is law, not just an old way of doing things"

With all due respect to the opinions of my good friend, I must say at the outset that I find many of the concerns expressed by Professor Vining to be much ado about nothing. I reject his thesis for three central reasons. First, many of Professor Vining's factual assumptions about the process at work are wrong. I fear that Professor Vining has relied too heavily on information gained from former law clerks, not from judges. Second, I strongly dispute Professor Vining's conclusion that judicial decisions today are no longer the products of judges' thinking. Whatever effect the burgeoning judicial bureaucracy has had, I surely do not believe that it has made federal judges mere extensions of their staffs. Third, I do not believe that the Supreme Court's opinions have lost their authority. Whether or not the decisions are the subject of criticism, it remains clear that the Supreme Court's written opinions are the authoritative law of the land.

I. THE COLLEGIAL SETTING

Taking Professor Vining's stated assumptions in the order in which I have related them, I have the most difficulty understanding or responding to his first concern regarding collegial relations on the Court. Professor Vining refers, almost longingly, to "Supreme Court opinions [of] a single mind." I understand him to suggest that, at least until recently, the Court truly existed as "nine judges in dialogue with one another, trying to come to common ground" Initially, I would offer that this suggestion is somewhat fanciful

when one considers, for example, the diverse personalities of the Vinson Court of 1951, consisting of Justices Vinson, Black, Reed, Frankfurter, Douglas, Jackson, Burton, Clark, and Minton; or when one recalls, from even earlier days, the lone, but strong, voices of Justice Brandeis, or Justice Holmes, or Justice Murphy. These were hardly Courts or justices committed to a "common ground" in the name of collegiality.

Furthermore, I am not entirely sure how Professor Vining can comfortably assess what he calls the "representative quality of . . . thinking" of the Burger Court, as compared with predecessor Courts, when (at least in my view) the number and complexity of constitutional and statutory issues faced by the Supreme Court during the past two decades have never been matched at any other time in our history. One need only skim Judge Friendly's chapter on "The Explosion of Federal Court Litigation," in *Federal Jurisdiction: A General View*, to get a sense of the problem. In the light of these realities it is no wonder that the Warren and Burger Courts have been burdened with numerous concurring and dissenting opinions in the many complex cases that have come before them.

It may be that Professor Vining is not really objecting to a lack of collegiality among Justices, or a lack of opinions of a "single mind," but, rather, to what he perceives to be an alienation of certain Justices from the actual processes of considering and deciding cases. I find this suggestion equally baffling, however, when I think of a number of strongly worded opinions, written by various members of the Burger Court, in terms and styles that are plainly unique to the authors. These opinions, which have recurred over time, hardly suggest that the Justices are removed from the Court's decision-making processes.

II. THE ALLEGED "BUREAUCRACY"

This leads me to the second point made by Professor Vining, having to do with his claims about the "bureaucratization of the Supreme Court." Professor Vining sees the federal courts — and the Supreme Court in particular — becoming more complicated institutions. Court organization is more complex, Justices' staffs have grown, and there are even staff hierarchies within certain Justices' chambers. The effect of all of this, according to Professor Vining, is that the Supreme Court's written opinions are no longer the products of the thoughts of the Justices. Instead, Professor Vining would have us believe that Supreme Court opinions are now mostly the institutional product of a complex organization, much like the final rules and orders promulgated by an administrative agency.

According to Professor Vining, much of the alleged bureaucratic growth has resulted from the increase in the number of law clerks

working at the Court. At one point in his paper, Professor Vining states that "[w]ithin a single generation the Justices have quadrupled the number of their law clerks." This may be so, but he fails to ask why this has happened. The answer is simple: In 1950, at the time of the Vinson Court (when Justices had two law clerks), there were less than 1,200 cases on the docket of the Supreme Court; in 1980 (when a majority of the Justices had four clerks), there were more than 5,000 cases on the docket. In other words, the number of cases filed with the Supreme Court over the past thirty years has more than quadrupled.²

The same phenomenon has been witnessed in the federal courts of appeals. For example, in 1950, there were less than 3,000 appeals commenced in all U.S. Courts of Appeals; by 1979, this number had jumped to over 20,000.³

In the District of Columbia Circuit, the number of appeals filed rose from just over 500 in the year 1959-1960 to over 1,600 last year. The workload has measurably increased even during the past few years. In 1979-1980, the year before our staffs were increased from one to two secretaries and from two to three law clerks, we terminated 1,310 cases, including 461 by opinion or order, and wrote an average of twenty-two full opinions per active judge. Last year, with enlarged staffs and two additional judges, we terminated 1,595 cases, including 599 by opinion or order, and wrote an average of 27.5 full opinions per active judge. In addition, the court processed over 2,500 three-judge motions and over 9,000 motions before the Chief Judge.⁴

These figures make it plain that judicial staffs have been enlarged in order to deal with the explosion in federal litigation over the past two decades.

As for Professor Vining's claims that recent decisions of the Court suffer from length, "patchwork" designs and "bureaucratic writing," I can only respond with the observation that saying it does not make it so. Opinions may indeed be longer, but this is attributable in no small measure to the difficulty of the issues addressed. If one compares again the Vinson Court with the Burger Court, it is strikingly clear that the former group never had to deal with a composite of cases as demanding as those before the Court today. A host of equal protection issues, privacy questions, and cases relating to freedom of information, environmental concerns, affirmative action,

2. These statistics were obtained from the Statistical Analysis and Reports Division of the Administrative Office of the U.S. Courts, and are on file with the *Michigan Law Review*.

3. Statistics on appeals commenced in the U.S. Courts of Appeal during the twelve month periods ending June 30, 1940, 1950, 1960, and 1961-1979 are on file with the *Michigan Law Review*.

4. Caseload and motions statistics for the U.S. Court of Appeals for the District of Columbia Circuit are on file with the *Michigan Law Review*.

equal employment, governmental immunity, search and seizure, standing, protection for the handicapped, the death penalty, and procedural due process, to name but a few, were matters unheard of thirty years ago. The difficulty of the questions posed by many of these cases may not justify unduly lengthy opinions, but it offers at least a partial explanation.

Professor Vining's claim of "patchwork" opinions, reflective of "bureaucratic writing," is hardly susceptible to a reasonable response. If he objects to the results reached in certain cases, or to the styles of certain Justices' writings, then I can understand some of his concerns. However, if he is merely speculating that because the quality of the writing is suspect it must of necessity be the work of law clerks, then I find the criticism baseless. Indeed, what he fails to recognize is that law clerks often may clarify "patchwork" draft opinions of overworked Justices.

Insofar as the so-called "bureaucratic" quality of the writing is concerned, I am not sure that I even understand the criticism. To the extent that I do, I am frank to admit that — on the whole — I can find no measurable differences between the opinions of, say, the Vinson Court of 1951 and Burger Court of 1981.

III. THE CLERKS' "NETWORK"

One of the things that most distresses me about Professor Vining's paper is his assertion that law clerks "communicate directly with one another . . . and reach agreements among themselves," presumably without particular regard for the preferred opinions of the Justices for whom they work. The implicit suggestion underlying this assertion is that it is the law clerks, and not the judges and Justices, who actually decide cases.

I cannot fault Professor Vining for assuming that clerks — and not judges — dominate the decision-making process. Since he concedes that he has relied heavily on the "gossip" of law clerks as a primary source of information for his paper, and since more than a few former law clerks have been known to be afflicted with the disease of self-aggrandizement, Professor Vining's position is understandable. Nevertheless, I would be remiss if I did not state my view that Professor Vining's position will find little support among a vast majority of federal judges and Supreme Court Justices.

I am reminded of an occasion early this term when, following a lively oral argument in court, one of my law clerks said to me: "Judge, how did you know to ask counsel about that particular case? I have never mentioned that case to you!" I laughed and told my clerk that, although it might come as a surprise to him, there were a great many things that I knew that he did not tell me.

I make this point not to belittle the role of the clerk, but to reas-

sure those who would believe otherwise that more than a bare majority of Justices and judges know full well *what* they are doing when they decide a case and, more importantly, *why* they have elected to decide a case on the terms indicated. No one would take issue with Professor Vining's claim that there is a "network" of law clerks; this "network" is well-known to Justices and judges, alike. It is not, however, an alternative tier of decision-making, at odds with the work of the judges or Justices. Rather, more often than not, the network facilitates the efforts of many judges in the decision-making process.

IV. OPINION-WRITING

Professor Vining's complaints about the texts of Supreme Court opinions are somewhat difficult to fathom. On the one hand, he claims that the opinions are "too long," "dull," and "things of patchwork." This so-called "bureaucratic writing" has produced, what Professor Vining calls, "opinions . . . [that] seem things written by no one at all." On the other hand, Professor Vining appears to accept the suggestion from former clerks that they — the clerks — "were the ghostwriters" of important opinions for the Supreme Court. Given the fact that many former law clerks are now recognized to be brilliant legal scholars at some of the best law schools in our land, I am somewhat surprised that Professor Vining has appraised their ghost-written work in such harsh terms. If the quality of the Supreme Court opinions is as poor as has been suggested, and if it is the law clerks who are responsible for these disastrous writings, then maybe we should be more concerned about hiring practices at the major law schools.

I say this with tongue-in-cheek, of course. The simple truth is that law clerks routinely participate in the research and drafting work that goes into opinion-writing. This is no secret, nor should it surprise anyone to learn of this fact. Judge Mikva, a colleague of mine on the D.C. Circuit, says that so far as he can determine (excluding the volume of work on petitions for certiorari), the clerks' responsibilities at the Supreme Court are no different now than when he clerked on the Vinson Court in 1951. According to Judge Mikva, there were certain Justices on that 1951 Court who did virtually all of their own research and writing; there were several Justices who worked closely with their law clerks to produce opinions that were satisfactory to the Justice; and there were some Justices who left most of the research and writing to their law clerks. From all that Judge Mikva and I know of the workings of the Court today, and based on our own experiences on the court of appeals, practices have not changed much with respect to Justice/clerk relationships on the Supreme Court. Indeed, Judge Mikva suspects that, if anything, the only significant change since 1951 has been that there is less for-

mality now between Justices and clerks and, as a consequence, clerks probably have a better sense of the thinking of the Justices for whom they work.

There is surely no reason to believe that the members of the Burger Court are any less attentive to their opinion-writing responsibilities than were justices of earlier Courts. Although it is true that the current Court had a docket of over 5,000 cases in 1980, versus approximately 1,100 in 1950, the number of written opinions by the Supreme Court has not varied greatly over the past thirty years. In 1950, the Court handed down 114 full opinions; in 1960 the Court issued 125 opinions; in 1969 the number dropped to 105; and in 1980 the Court issued 144 opinions. The great increase in the volume of the Court's work has been in the area of petitions for certiorari. It is unlikely, however, that the work on petitions for certiorari has materially affected the Justices' work on case opinions. As Judge Friendly aptly noted in response to a proposal to create a National Court of Appeals to deal with the many petitions for certiorari:

Although the present system may waste some of the Justices' time, it is scarcely possible to engage in deep constitutional contemplation all day long, and there is no specific showing that the country has suffered from this diversion of energy. While [it is contended] that "issues that would have been decided on the merits a generation ago are passed over by the Court today," [proponents of the National Court do] not cite any instances where temporary passing over has really mattered; the impression I gain from thumbing the volumes of "a generation ago" is that the Court was deciding a good many cases not meriting its attention — as several Justices thought.⁵

Insofar as the details of opinion-writing are concerned, it is virtually impossible to generalize about the working habits of Justices and judges.⁶ There are undoubtedly some instances where judges are lax in their responsibilities and, as a consequence, the law clerks of these judges end up assuming most or all of the major responsibilities associated with decision-making and opinion-writing. This is certainly no new phenomenon, however, for there always have been some lazy — even incompetent — judges participating in the federal judicial system. The main point is that most judges and Justices remain fully responsible for all opinions coming out of their chambers.

Not surprisingly, some law clerks have been known to exaggerate the significance of their work on opinions. Marvin Schick has noted that

Law clerks and their judges disagree as to the role the former play. As Judge Medina stated: "They say, 'see that opinion of mine that

5. H. FRIENDLY, *FEDERAL JURISDICTION* 51 (1973) (footnote omitted).

6. See generally J. HOWARD, *COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM* (1981); J. OAKLEY & R. THOMPSON, *LAW CLERKS AND THE JUDICIAL PROCESS* (1980) (including extensive bibliography at 158-71).

came down yesterday.' Why to listen [to some law clerks] you wouldn't think the judges had anything to do with an opinion except maybe to take a quick glance and say, 'Okay boy. Good work. Good work.'"

Law clerks probably exaggerate their influence because most of them do in fact draft some opinions; they fail to recognize that this is not the same as deciding the outcome of appeals.⁷

In my own chambers, my law clerks routinely are assigned to work on opinion drafts. However, to avoid any confusion over the matter, my *Manual For Law Clerks* instructs my clerks, as follows:

You must understand that your drafts will always be reworked by me. I am accountable for all written work that goes out in my name and so final drafts will reflect my personal imprint in both judgment and style. Therefore, unless I tell you otherwise, my revisions of your work (which usually will be substantial) should not be taken as criticism. It is simply a function of your job and mine to ensure that all final written work reflects the style and thinking of the judge. You may disagree with me at times; this is fine so long as you understand that the final judgment in any case is mine alone to make.

It is absolutely clear to me and to my clerks that no opinion leaves my chambers until I personally have completed work on a written product that satisfies my own standards. Every detail of my opinions must conform to my thinking and preferred methods of expression. Although my clerks labor tirelessly to assist me in this work, they and I know that the final product is mine.

From all that I have been able to discover about the workings of other judges' chambers on the D.C. Circuit, my practices in opinion-writing are not uncommon. Whether a particular judge works on first, intermediate and/or final drafts of an opinion, it is clear that most judges are significantly involved in both the decision-making and opinion-writing processes. Additionally, most opinions accurately reflect the style and thinking of the authoring judge. Although there are some circuit courts of appeals that use central staffs of lawyers to draft large numbers of *per curiam* opinions, no such practice is followed in the D.C. Circuit.

V. THE "AUTHORITATIVE" STATEMENT OF LAW

Professor Vining's concern that the decisions of a "bureaucratic" Supreme Court would lack legitimacy in the same way administrative decisions now lack legitimacy seems misplaced. First, he posits

7. M. SCHICK, LEARNED HAND'S COURT 107 (1970). In the October 5, 1981 issue of *U.S. News & World Report*, at 10, recently retired Supreme Court Justice Potter Stewart is reported to have observed that, though law clerks help, Justices write their opinions. Justice Stewart is quoted as saying: "I worked Saturdays, Sundays and most evenings . . . It's surprisingly difficult. I felt responsible for every word, comma, and semicolon." Justice Stewart added that camaraderie exists among Justices, clerks and lawyers. The Court's "accessibility, simplicity and humanity," he insisted, contrast with the "faceless bureaucrats" elsewhere in government.

that agency opinions have little authority because they are the product of a bureaucratic decision-making process and do not reflect the workings of a unified mind within the agency. Although this description of the process may be accurate, agencies *do* have authority over specific regulated communities, and their decisions are binding exercises of that authority. Attorneys who represent members of the regulated community must look to an agency's written opinion to determine the scope and the rationale of a particular decision, even if they scrutinize Supreme Court opinions somewhat differently.

Professor Vining's statement that there are methods of attacking an agency's decisions other than directly challenging the opinion itself does not mean that studying the opinion's text is unimportant or that the opinions themselves lack authority or legitimacy. Moreover, I doubt that the alternative methods he suggests — appealing to congressional committees, influencing the agency's budget, and involvement in electoral politics, for example — are particularly effective in challenging the day-to-day decisions of, say, an agency like the NLRB. The NLRB's decisions may be the product of a bureaucracy, and they may be challenged in a number of ways not used to challenge judicial decisions, but the decisions and the opinions that explain them are authoritative to those who must comply with them.

This is not to suggest that judicial and administrative decisions are alike, or that the judicial decision-making process could, without hazard or cause for concern, become like that of administrative agencies. The critical distinction between courts and agencies, however, is not that agency decisions and opinions lack authority, but that agencies are closer to the political process and are more likely to sway with the shifting political winds than are courts. Professor Vining's thesis, however, is that the Court is becoming more bureaucratic and less collegial, not that it is becoming more political.

Finally, Professor Vining seems to suggest that legislation is distinguishable from Supreme Court opinions and thus not susceptible to the same type of criticism. He states:

To be sure, there is legislation with its special claim to our respect.

But other pieces of writing — and perhaps legislation too — exert their authority over us and command our respect and serious attention because and to the extent that we hear a person through them. Their authority rests upon the sense of mind behind them.

However, countless judges who have struggled to divine the congressional intent behind a statute by examining its legislative history surely know that legislation is a product of a bureaucratic process that is uncontrolled by any single "person" or unified "mind." Indeed, the bureaucratization that Professor Vining fears has taken hold far more extensively in the legislative and executive branches, with their increasingly large and tenured staffs, than in the judicial branch. It is common knowledge that congressional committee re-

ports are frequently authored solely by staff members and ignored by many of the Members of Congress who pass the corresponding legislation.

For argument's sake, however, I am willing to accept Professor Vining's assertions that (1) courts and administrative agencies must be distinguished, and (2) a bureaucratization of the courts will ultimately undermine the authoritative quality of judicial opinions. What his arguments fail to recognize is that, despite the growth in the number of participants in the judicial system (to deal with the growth in the caseload), the judicial branch is still far from approaching the bureaucratic systems seen in the federal and state legislatures and federal administrative agencies.

The explanation for this is that there are certain inherent checks against bureaucratic control in the judicial system not present in the legislative and executive branches. For one thing, although it is true that one or two Supreme Court Justices may now hire one or two law clerks for a term of two years rather than one, it is still true that most law clerks leave the federal court system after very short tenure. For another thing, even when the system is infected by a lazy or ill-prepared judge, at least at the appellate level there are one or more other judges participating in the decision-making process with respect to a given case. Thus, it is most unlikely that any given case will be decided without a majority of the judges on a panel having given the matter serious review.

Finally, unlike the actions of many legislators and agency officials, the daily work of a judge is written, signed, and published for public scrutiny. Judicial opinions are read and cited by other courts; they are studied by law students; they are appealed by practitioners; and they are either praised or lambasted by law professors. Most judges do not decide cases in pursuit of public acclaim; nevertheless, knowing full well that judicial decisions are released for public ingestion, judges surely do seek to produce thoughtful, rational, and fully justified opinions. Indeed, I have found that the *pressure* to deliver "justice," expeditiously but thoughtfully and accurately, is as great as any that I have experienced in my professional career. One hardly assigns away such a responsibility to a law clerk.

VI. IN PRAISE OF LAW CLERKS AND JUDGES' SECRETARIES

Having said all of this, I would like to end with a special note of praise for law clerks and judges' secretaries. Since my tenure on the court is still relatively short, I can only reflect on my experiences with two secretaries, seven law clerks, and two interns. Nevertheless, my experiences already have been sufficiently rewarding so as to cause me to understand how fortunate I am to have a place on the bench.

A judge's work is highlighted by the daily give-and-take in collegial relations with other members of the court and by the sparks of excellent advocacy furnished by the star members of the bar. A judge especially thrives on intangible feelings of satisfaction derived from seeing that a case has been ably debated, carefully considered and thoughtfully disposed of in a quality opinion. When a judge does his or her job well, there are also intangible rewards of recognition from peers on the bench, members of the bar, and the public-at-large.

Nevertheless, the truth of the matter is that a judge's life is relatively isolated, and most hours are spent cloistered in chambers. But for one's staff, this life, without more, could be as boring as any imaginable for a person with an active mind. I was, therefore, truly struck by Professor Vining's lack of realization of the real value of a judge's staff. To suggest that the clerks and secretaries are merely a part of a "bureaucratic" horde is to mistake a Rembrandt masterpiece for a Trudeau cartoon.

Secretaries and law clerks are not the decision-makers in our judicial system, and most do not seek any such appellation. However, they do furnish an essential support system for the judge. They supply energy, extraordinary intelligence, loyalty, and a constant devotion to the public responsibility inherent in their jobs. They are interesting and fun people to have around. They not only work for endless hours, they give *life* to a chambers.

The work of some judges may be subject to criticism. But if criticism be due, then it should be directed at the judges, not their staffs. So far as I can tell, the quality of the judicial system is still determined by the judges and Justices assigned to decide the cases.