

University of Chicago Law School

Chicago Unbound

Journal Articles

Faculty Scholarship

1987

Commentary, The Federal Courts in the Next 100 Years

Paul M. Bator

Follow this and additional works at: https://chicagounbound.uchicago.edu/journal_articles



Part of the [Law Commons](#)

Recommended Citation

Paul M. Bator, Comment, "Commentary, The Federal Courts in the Next 100 Years," 38 South Carolina Law Review 449 (1987).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

REMARKS OF PROFESSOR PAUL M. BATOR*

I agree enthusiastically with Dean Griswold's paper and with the diagnostic, although not the prescriptive, parts of Dean Carrington's paper.²²

We have had two big problems discussed today. First is the problem of litigiousness. I will not pause on this, although I think it is ironic that nobody has talked about the contributions of the legal profession to this atmosphere of litigiousness. The second problem, on which there is really a remarkable congruence between Dean Griswold and Dean Carrington, can perhaps be summarized in this way: There has been, as a consequence of the litigation explosion, a diminishing capacity—and perhaps also a diminishing sense of responsibility—in the federal appellate system to perform the modest, but important, professional work of appellate courts. This work includes the correction of injustice and error, the cleaning up of mistakes and malfunctions and muddles, and the provision of intelligent and intelligible guidelines to citizens and lawyers and lower court judges on what is the law and what are the rules of the game.

The worst offender, by far, in this diminution in the professional quality of appellate lawmaking is the Supreme Court of the United States. You may be rather shocked by what I am about to say next, but I think in terms of professional criteria—care in the choice and use of legal materials and in the craftsmanship of opinions—the worst federal court in the country is the United States Supreme Court. It is followed very closely in that race by the United States Court of Appeals for the District of Columbia Circuit, which is most like the Supreme Court among the courts of appeals. On the whole, the regular courts of appeals are more professional and much less political than the Supreme Court. That is, in part, because their cases require or evoke professional rather than political responses in more situations.

In the case of the Supreme Court, as Dean Griswold says,

* John P. Wilson Professor of Law, University of Chicago. A.B., 1951, Princeton University; M.A., 1953; LL.B., 1956, Harvard University.

22. Just to drop a footnote here, I do not understand Dean Griswold's critique of the present federal appellate system to suggest a return, as Professor Wechsler seemed to think, to a formalistic or narrow methodology of deciding appellate cases.

the Justices seem simply to have lost the capacity to function as a court. We do not have *one* Supreme Court. We have nine so-called "offices," which churn out elephantine and unintelligible opinions concocted largely by law clerks. These opinions do not provide the country with sufficient intelligent and intelligible guidance.

I would like to add two points to Dean Griswold's account which illustrate the fact that the Court is no longer able to provide the country with sufficient appellate court guidance. The Court has almost abandoned any attempt to supervise the application of commercial and business law in the private sector. It is simply not interested in private business cases. For instance, it virtually never even reviews a tax case unless the Government is the petitioner or agrees that certiorari should be granted. One can come to the Court with a case in which some dog has sniffed out an ounce of marijuana, and the Justices cannot wait to get their hands on it. But they are not interested in the economic and business life of the nation, which is regrettable because that prejudices our ability to improve the law in that field. There is no national appellate capacity in that field.

That leads to my second point, which is that the statistics actually overstate the extent to which there is access to Supreme Court review. Dean Griswold stated that about 150 cases are reviewed on the merits with opinion;²³ however, 150 cases grossly overstates reality, because about one-half of the 150 are cases in which certiorari is granted at the petition of the Federal Government or in which the Government accedes to certiorari. The Government has a terrific chance at Supreme Court review. Approximately eighty percent of their petitions for certiorari are granted. If you take about seventy-five or eighty cases out of that statistic, the statistics become infinitely more dramatic. Furthermore, even in the seventy-five or eighty cases that remain, the so-called private cases, the Government has a very large influence because the Court very often asks the Government its views on whether it should take a private case. In addition, the recommendations of the Solicitor General are very influential. Thus, access to the Supreme Court is now very much

23. See Griswold, *supra* p. 403. These emanate from the 30,000 plus cases in the courts of appeals and from the numerous cases—perhaps another 20,000—in the state courts in which a federal question is dispositive.

in the hands of the executive branch of the federal government. I think the Court has, in fact, gone too far in this respect and the explanation lies with the case explosion. The Solicitor General's office is a remarkable and superb organization. It gives very high quality advice. As a result, I think its advice is now followed too much, and the Court relies too much on the Solicitor General's office in deciding what cases to hear. In private litigation no chance of Supreme Court review exists unless there is a direct conflict among circuits or unless one has a case of absolutely stupendous importance or dimension.

So, the case for the proposition that there is insufficient national appellate capacity seems overwhelming. Therefore, the case that some structural institutional change is necessary and eventually will prove to be inevitable also seems irrefutable. However, like Professor Wechsler and others, I am rather pessimistic for the near term. I think the situation is going to have to get much worse before there can be improvement. There are many interest groups that are naysayers to any suggestion for change, and there exists deep resistance on the part of the federal courts of appeals judges to any proposal for institutional or structural change. A deep conservatism is present. Consequently, there is always a litany of objections to any proposal that is made. I was rather struck by Judge Wilkinson's submission here this afternoon because it shows that he, too, even after two brief years, has joined the clan.

Let me say a quick word about Dean Carrington's suggestion.²⁴ I appreciate that one should not jump too hard because his proposal was really, I think, just a trial balloon. Nevertheless, an interesting discrepancy exists between his diagnosis of the ills of the system and his suggestion that there should be an error-correcting junior court of appeals system just above the district courts. This proposal would leave the existing courts of appeals to be discretionary courts without responsibility for the error correction function. It seems to me that this proposal would widen the scope of discretionary jurisdiction and would, therefore, be a step in the wrong direction. It would make the courts of appeals more like the Supreme Court, and the thing that we do not need today is more supreme courts.

24. See Carrington, *supra* p. 433.

Another proposal, which is not quite the same as his and which he has criticized,²⁵ but which is closely related, is the idea that the courts of appeals should have a discretionary jurisdiction and that we should simply end the institution of the appeal as a right. This, too, strikes me as a terrible idea. I think that if this idea seriously comes on the scene, lawyers will finally really just stand up and say, "No." I cannot imagine that lawyers want to go back to the days when they are simply at the mercy of the district judge, which today often means at the mercy of the federal magistrate.

I think a National Court of Appeals, or something like it, is absolutely inevitable and will come to pass simply because we need an increase in our capacity to render authoritative, nationwide decisions. Another change that I think is inevitable and desirable, and against which Jay Wilkinson raised his voice and which is much resisted by federal judges, is the idea of specialization at the appellate level. Obviously, there are misgivings and fears and criticisms one can make of this idea. There are disadvantages to dividing the appellate task by subject matter or by making distinctions between civil law and criminal law; but some of the dangers can be avoided by creative architecture in the proposal, making sure that the specializations are not too narrow. This would eliminate the fear that you get a very political labor court, which does nothing but labor, and all the political pressures then focus on that. More generally, I think that the risks and disadvantages of specialization have been greatly exaggerated.

We might pause here and learn a little from other legal systems. The fact is that there is specialization in every mature legal system other than ours. We are really the exception. In every other legal system, even the British system, which is most like ours in its nonspecialization, the appellate task is not simply jumbled into one general court. There are functional and subject matter allocations in France, Germany, Switzerland, Japan, and, to some extent, England. And it happens without terrific and dire consequences.

If we have a national court for administrative appeals or tax appeals or whatever, it would have many advantages. It would

25. *Id.* at pp. 429-31.

obviously add to the national capacity to render authoritative nationwide rules. It would also help alleviate the diminishing sense of *professional* responsibility in our appellate courts. That is, I think it would have a substantive impact on some of the problems that Dean Carrington and Dean Griswold recognized. I think specialization would give courts an added substantive sense of professional responsibility over the intelligibility and the soundness of the development of the law in that field. One of the problems in our federal judiciary today is that no judge has any sense of inner responsibility for the development of law in an area. In other words, what we would have is a somewhat less political and a somewhat more professional atmosphere in the federal judiciary.

Many federal judges do not like this idea because it is rather nice to be an all-purpose philosophical king or queen, and their positions would become somewhat less glamorous and awesome. I think that what we gain is not so much expertise, which is what I think Judge Wilkinson was talking about, but the sense of responsibility that one is somehow a participant in the creation of an intelligent and intelligible body of law. It somewhat decreases the disadvantage of the common-law system, which is that litigation is ad hoc and, therefore, no judge sees more than a little corner of the problem.

It seems to me that our judges perform a vital task. They are guardians of our liberties. Nevertheless, it also seems to me that it would be better for all of us if we focused less on the awesome things that they do. It would be better if the judges thought of themselves more as lawyers and less as Platonic guardians or as engineers of social and economic change. It would be better if they remembered that what they are ultimately paid for is to be a *court*, and that a court is an *institution* which must evoke a sense of institutional responsibility if it is to function well as a court. You must ask yourself, then, what is a *court* meant to do? Their opinions should not be deemed an occasion for display, for erudition, or for philosophical and political debate. They are supposed to add useful and intelligible and intelligent improvements to the body of the law—a commitment that I think desperately needs regeneration today.

PROFESSOR WRIGHT: I am dying of curiosity, but I guess I will have to wait until the open discussion to find out where you rank the Court of Appeals for the Ninth Circuit

among the judicial bodies.

PROFESSOR BATOR: A close third.