1987

Commentaries (Symposium: the Federal Courts; the Next 100 Years)

Paul M. Bator

COMMENTARIES I

REMARKS OF THE HONORABLE J. HARVIE WILKINSON III*

It is clear to me, after these proceedings, that I am part of a problem-ridden profession. I feel disinclined to undertake a full-scale counterattack on what Dean Griswold and Dean Carrington have said, mainly because some of the problems they pointed out are quite real. My own feelings are somewhat impressionistic as far as the explosion of litigation is concerned, and an explosion is clearly what we are talking about because all the other problems that have been discussed trace to this one fact.

My primary goal as a judge is to cast an informed vote, because that vote is what affects the parties. One of the dangers is that the crunch of cases is going to lead judges to rely too exclusively on substitutes for briefs and records, particularly, law clerk bench memos. On some cases I have my law clerks prepare bench memos, but I try very hard not to let those bench memoranda become a crutch. I try to read the briefs. What disturbs me is that I have all too little time to get into the record. I have to deal with the record of the case very selectively. There is a requirement that briefs make specific references to the record, and I look into the record to see what interests me when a brief refers me to it. Nevertheless, the day of having the opportunity to read a record straight through is long gone.

I think this relates to what Dean Carrington properly regards as an important function of the courts of appeals, which is the correction of error.[1] Regardless of the precedential value a decision may or may not have, it will have a very significant impact upon the lives of the people involved. That is the bottom line. I do not think we can forget that, at the end of the road, there is going to be an order and a mandate and somebody's life is going to be affected in a very tangible way.

I would like to spend just a moment on what Dean Griswold

---

* Judge, United States Court of Appeals for the Fourth Circuit. B.A., 1967, Yale University; J.D., 1972, University of Virginia.

1. *See* Carrington, *supra* pp. 424-25.

identified as the consequences of the litigation explosion.[2] He spoke of a loss of collegiality within the judiciary. We are so busy catching up with our casework, he thinks, that we have too little time to talk among each other and to negotiate our differences of opinion in cases. I think that is much more of a problem at the Supreme Court than it is at the court of appeals level. We are blessed because seventy-five to eighty percent of our cases are cases on which good judges using good lawyerly skills can come to an agreement. That is not true of the Supreme Court's docket. It is a great luxury for a court of appeals to have some tax cases, admiralty cases, bankruptcy cases, and commercial cases on which a consensus can be reached. I also think the fact that we sit in different panels and with different judges each day helps our deliberations. It is good to sit with different judges in different combinations so one does not square off on the same issues with the same judges time after time. It helps those of us at the circuit court level maintain a degree of collegiality that is more difficult when the same people confront the same highly charged docket every day.

I am concerned, as is Dean Griswold, about the plurality opinions and the separate opinions of the Supreme Court. I do not know that that is causally connected to the problem of the litigation explosion. It would seem that the more cases one has, the more pressure there would be to write less and not more. I am mystified why the growing number of cases means more writing rather than less. I think it must have something to do with the personal dynamics within the institution. Certainly, a major responsibility for cutting down on separate opinions lies with the Chief Justice, whose power it is to assign opinions in the first place. Also, one of the major tasks of jurisprudential leadership that faces the new Chief Justice is to try to cut down on the plurality opinions and address the problem identified by Dean Griswold. I remember one afternoon at the Justice Department during which we were faced with a barrage of press inquiries in the wake of a particular Supreme Court case. The press wanted to know what the decision meant. We could not immediately tell them because it took some pretty good lawyers several hours to try to figure it out. We simply could not determine how many

2. *See* Griswold, *supra* p. 400.

Justices would line up behind how many propositions. We could not comment on the decision until we knew with certainty the holding, and determining that was not easy.

Dean Carrington and Dean Griswold both take the courts of appeals to task for what they called discretionary justice.[3] Dean Carrington says that we have forsaken the function of error correction for discretionary justice—that there is so much law and so much doctrine out there that we can just pluck from here and there to reach the results that we want. If that is the trend, I think it is a very unhealthy one.

Let me just mention from a circuit judge's point of view one of the problems that we face. If I knew how the Supreme Court were going to decide a case, I would regard it as my obligation to decide it the same way. That prediction, however, is often very difficult to make. A great deal of the criticism directed at the circuit courts of appeals for discretionary justice is frankly a reflection of the fact that the Supreme Court has set, in many areas of law, a deeply divided course, and a course in which no clear direction is evident. We do the best we can. It would be an easier job if the task of understanding the Supreme Court's course on a given set of issues were easier.

I also call attention to the fact that the court of appeals is a derivative court. It should be inculcated in circuit judges that a presumption of correctness often belongs to someone else. It belongs to state courts in diversity cases. It belongs to the federal district judge on the admission of evidence and findings of fact. If it is a constitutional matter, we should defer to the Supreme Court. If it is a statutory matter, we defer to Congress. If it is a regulatory matter, we defer to the agencies. In section 1983 suits there is a presumption of good faith on the part of the school board or the warden, or at least there is a good faith immunity. There is always a presumption somewhere, and a good judge does not overturn those presumptions without a very solid reason for doing so. I think a reminder about the cautious nature of the reviewing function will help reduce some of the complaints about discretionary justice.

Dean Griswold points to two Ninth Circuit opinions within the space of a year that directly contradicted one another.[4]

---

3. *See* Carrington, *supra* pp. 420-23; Griswold, *supra* p. 409.
4. *See* Griswold, *supra* p. 404.

Sometimes on the circuit court of appeals, I think we are always being judged by the Ninth Circuit. People look at the Ninth Circuit and say, "Look what problems they are having." They judge the entire system by the experiences of a single circuit. Intracircuit conflicts are a problem. They occur more often on larger circuits. There is, however, a world of difference between a small circuit such as the First Circuit, a medium-sized circuit such as the Fourth Circuit, and a large circuit such as the Ninth Circuit. We have a practice on the Fourth Circuit which, I think, is different from many circuits and which helps to reduce intracircuit conflicts. We do not merely circulate opinions to the panel members who heard the case. We circulate our opinions to the entire court: eleven active judges and two on senior status. Many times, the judge who complains loudest about a particular opinion will not have been a judge who actually sat on the panel. This is a good thing because if you are dissatisfied with a previous opinion, you still ought to follow it as a matter of precedent. Human nature being what it is, you are a lot more likely to follow a previous opinion if you know you are going to have to run your opinion through the eyes of the person who wrote the previous one. He is going to be able to object and tell you that you are not following his precedent before your case comes down. This is a salutary rule and it helps us to maintain, as best we can, a coherent body of circuit law.

Let us pass from the problem to some of the solutions. So much has been said about so many solutions. I would not begin to try to canvass all those ideas. I do think that a lot of this litigation explosion is a self-inflicted wound. I think that much of it is caused by a great suspicion toward the exercise of authority that developed primarily as a result of three events. First, the unjustifiable abuses of state governments, many of them in the South, in the late 1950s and early 1960s. Much of the growth of habeas corpus and section 1983 jurisprudence traces to the abuses of power that occurred in the South immediately after *Brown v. Board of Education*.[5] Then came Vietnam and, after that, Watergate. Authority was so thoroughly discredited that attacks on authority became legitimate. The federal courts, aware of these experiences, helped to legitimize attacks upon au-

5. 347 U.S. 483 (1954).

thority. In many cases, federal judges themselves came to distrust the exercise of authority, whether in state courts, in the prisons, or in the schools. Many federal judges became suspicious of the capacity of those in authority to treat individuals in good faith. As a result, it seems to me that the federal courts took on a lot more than they could handle. We may be moving out of a phase in our history in which this automatic distrust of authority is justified. We have got to move back, it seems to me, to a position in which the federal courts can trust people to do the things for which they are primarily responsible. Many of the solutions to this problem do not require a statute or major structural reform within the federal system. They require a sense of limitation and a sense of priority on the part of federal judges.

Two Supreme Court decisions greatly reduced the workload in the federal courts: *Allen v. McCurry*[6] and *Stone v. Powell*.[7] They are very low visibility decisions as far as the general public is concerned; however, in those cases much was done to have search and seizure issues resolved first and finally within state courts. That has done a tremendous amount to relieve the burden on federal courts. On the other hand, there are cases like *Patsy v. Board of Regents*,[8] which held that one does not need to exhaust administrative remedies in section 1983 cases. Cases like *Patsy* add an enormous amount of litigation to the federal courts. Therefore, the Supreme Court itself has great control over our dockets and the problem of litigiousness.

The other part of the responsibility lies, I think, with Congress, which has the ability to preempt, pursuant to the Commerce Clause, almost any area of state law it desires to supplant. I am surprised by the number of detailed statutes that deal with everything under the sun. There is just an extraordinary amount of federal legislation. It often takes the federal courts years to resolve crucial issues regarding this legislation. For example, it was not until the *Burdine* case[9] in 1981 that the proof scheme under title VII of the Civil Rights Act of 1964[10] was really resolved in any meaningful way. It took the courts seventeen years

6. 449 U.S. 90 (1980).
7. 428 U.S. 465 (1976).
8. 457 U.S. 496 (1982).
9. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).
10. 42 U.S.C. §§ 2000e to 2000e-17 (1982).

to develop a settled method of procedure under a landmark enactment. I hope Congress understands just how long it takes the judiciary to digest complex legislation. Meanwhile, it is a litigator's field day.

There have been many interesting ideas that Dean Carrington and Dean Griswold have put forth about structural reforms. I am most interested to hear what the other commentators have to say, so I do not propose to dwell on all of them. I would say something, however, in response to Dean Griswold's discussion of specialized courts.[11]

I think this must be dealt with cautiously and very much on a subject-by-subject basis. There is a danger in leaving whole areas of law to the specialists and to the particular political interest groups in an area. If, for example, we were to have a specialized court in labor law, would we be leaving appointments to that court to the same pull and tug of business and labor interests that now characterize appointments to the Labor Department and to the National Labor Relations Board? Is it not better to have some judges dealing with labor law problems who were not proposed by the special interest groups on either side of the field? Antitrust law presents a slightly different kind of problem because there seems to be a clash of economic and academic theories propounded by those who acquire a very keen and partisan intellectual interest in them. I am not sure I want to leave appointments to the antitrust court to the tug and pull of those competing schools of thought.

I also think it is hard to pigeonhole cases. Within a single case, we often have overlapping claims and knotty procedural problems. For example, sometimes an antitrust claim will be only one of three or four significant questions in a case. Therefore, I think we might have some jurisdictional problems in routing cases to the right court.

A final plea regarding specialized courts: I do not think that the increasing complexity and specialization of the world ought to make us panic. I do not think that we should sell short the range and versatility of general analytical powers. There is a high order of analytical ability in the upper reaches of the legal profession, which continues to cut across a range of substantive

11. *See* Griswold, *supra* p. 408.

problems. Judge Posner points out that we may not be specialists in this or that, but we are specialists at judging. General acumen can compensate for some deficiencies of expertise.

I do think specialized courts could serve a useful purpose in the area of taxation. Here I must confess to you that I go out of my way to avoid an intercircuit conflict. If I think an earlier tax decision of another circuit court is wrong, I would not hesitate to disagree with it. But I am so sensitive to the concerns that Dean Griswold has that I accord a presumption of correctness to a decision that an earlier circuit court panel has made on a question of taxation. Unless I have a very good reason for voting to depart from that decision, the values of uniformity and stability and the avoidance of conflict are paramount. It may be that in the field of taxation we have not served the legal profession as well as we should have. I am cognizant of the need for answers to many questions that the Supreme Court lacks the capacity to undertake.

I have only one final comment. Regarding a National Court of Appeals, commentators have suggested the need for a Supreme Court that would confine itself to high-profile constitutional questions, leaving the National Court of Appeals to the resolution of statutory conflicts. Dean Carrington said that one of the difficulties of the 1925 Act is that the Supreme Court and the circuit courts have lost their function as error correction tribunals and that we have become policy-making bodies.[12] If we had a National Court of Appeals, I wonder whether it would not transform the Supreme Court into even more of a court of constitutional philosophy than it is at present. It might move us further away from the perception of the Court as a court of law. I agree with Dean Carrington that the public perception of courts as courts of law is terribly important to the authority of law, and, as august as the Justices of the Supreme Court are, I think it benefits every judge to engage in very close quarters statutory interpretation. It is a fine technical exercise and yet it helps to remind us of who we are, and that is, first and foremost, lawyers.

I want to thank Dean Griswold and Dean Carrington for what I thought were most illuminating and interesting papers.

---

12. *See* Carrington, *supra* pp. 424-28.

REMARKS OF PROFESSOR HERBERT WECHSLER*

I want to comment primarily on Dean Griswold's paper, but I shall have a few things to say about Dean Carrington's paper as well. Let me begin by saying that I served on the Hruska Commission,[13] to which reference was made, through all the years that it sat. I supported, indeed I helped to develop, the proposal for the National Court of Appeals that would adjudicate cases filed in the Supreme Court, which were within its appellate jurisdiction, and which the Court chose to refer to the National Court of Appeals rather than either to decide itself or to deny further review. Also, we made proposals that would have given the National Court of Appeals a transfer jurisdiction; that is, a regional court of appeals would have been authorized to transfer a case to the National Court of Appeals when it concluded that a nationally binding decision was needed. That aspect of our recommendation encountered so much resistance initially that Senator Hruska decided to drop it from the bill he introduced to enact the proposals of the Commission.

Second, let me say that the Commission supported the proposal for the National Court of Appeals, not as a means to relieve the Supreme Court from an excessive burden, which had been the motivation of the Freund Committee[14] a few years earlier, but precisely for the reason that Dean Griswold stated in his paper—to enhance the appellate capacity of the courts of the United States to render nationally binding decisions. Although these decisions, which would be binding on all circuit courts, on the district courts, and on the state courts, would be subject to a theoretical possibility of ultimate review in the Supreme Court, we felt, as Dean Griswold said he feels, that one could be quite confident that further review by the Supreme Court would be granted very rarely once the Supreme Court itself had made the

---

* Harlan Fiske Stone Professor of Constitutional Law Emeritus, Columbia University. A.B., 1928, City College of New York; LL.B., 1931, Columbia University; LL.D., 1962, University of Chicago; LL.D., 1967, Harvard University; LL.D., 1978, Columbia University; LL.D., 1984, Georgetown University.

13. COMM'N ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE, 67 F.R.D. 195 (1975).

14. REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT, 57 F.R.D. 573 (1972).

decision to refer the case to the National Court of Appeals.[15]

We favored establishing a permanent court with appointments by the President and confirmation by the Senate. The present proposal of Chief Justice Burger,[16] which, as Dean Griswold said, relies upon a pragmatic compromise, is to establish a temporary court for five years for experimental purposes, with personnel drawn from the present circuit judges. I would favor that proposal as better than nothing.

I must say, however, that I respect the extensiveness of the hostility to this idea, which has slowly developed through the years. Indeed, my judgment at the moment would be that this will not be enacted, certainly not in the proximate future, however great the need for it may be. Hence, while I no more wish to be a prophet than any of the other persons on this program, it is my belief that for a very substantial period of time to come, the Supreme Court will have to function as it does without enjoying the additional option (which is the way I view it) of achieving a nationally binding adjudication by reference to another court.

Therefore, we will continue to have 180 or so nationally binding adjudications from the Supreme Court annually, since that number cannot be increased. All one has to do is count the days in the week and the weeks in the year to satisfy oneself that there are logistical limits to what the Supreme Court can decide. That method is not a very satisfactory solution, but many people, I think, will feel that it is preferable to any alternative.

I did not understand Dean Griswold to have said that he believes that the Supreme Court situation contributes to the idea that we have a system of discretionary justice. Discretionary appellate review is not the same as discretion to decide the merits of a case without regard to binding legal norms. As was pointed out earlier, we lived for many years without appellate review in many categories of cases within the federal system.[17] Discretionary review in the highest court, as in England in the House of Lords, is really almost universal in our system. What

---

15. *See* Griswold, *supra* pp. 407-08.

16. *See* Address by Chief Justice Warren E. Burger, Am. Bar Ass'n Midyear Meeting (Feb. 17, 1985), *reprinted in The State of the Judiciary Address: The Time Is Now for the Intercircuit Panel*, 71 A.B.A. J. 86 (1985).

17. *See* Wright, *supra* p. 386.

we can ask, however, is that the Court be prudent and sensitive in the exercise of its choice of the cases to review. I do agree with Dean Carrington that a certain price is paid for the discretionary system.[18] I put it to you only that it is an inevitable price; therefore, we ought to ask ourselves what can be done to improve the situation within the framework that we have. So much for the National Court of Appeals point.

I really believe that the larger problem is in the circuit courts. I think the catalog of circuit proposals, one of which Dean Griswold mentioned, may be a significant alleviation, but only an alleviation. To a larger extent than our ideals have heretofore admitted, we are going to have to live with the notion that legal administration will take on more and more of the qualities of ad hoc arbitrament or arbitration and less of the egalitarian quality of governmental intervention under law that our ideals have pictured in the past. I see no escape from that result if the phenomenon of steadily increasing volume persists in future years.

The other aspect of Dean Griswold's paper that I want to say more about does not involve the judicial structure, but his lamentation about the effects of the volume explosion on the judicial process and its consequences.[19] I hope that in his distinguished old age he does not permit himself to renounce the great achievements that have happened in my litetime in the nature of the judicial function as conceived in the United States. Specifically, I grew up in those exuberant 1920s at Columbia University to which Dean Carrington referred—the Oliphant days, during which the nature of law was being turned upside down. The great thing that emerged in my student days under the leadership, I would say, of many of the people at the Harvard Law School, including Dean Griswold, was that the closed case system in which my father's generation believed became a thing of the past. The message that Cardozo so eloquently articulated was that the application of law under a system of precedent involves a constant and inevitable reexamination and reevaluation of what had been held in earlier cases. That seems to me to state in a nutshell the present view of precedent. This view is particularly exemplified, I think, in the federal courts, although now

18. *See* Carrington, *supra* pp. 420-23.
19. *See* Griswold, *supra* pp. 403-06.

many state courts share that view as well. I hope and pray that neither the pressures of volume nor anything else is going to modify that view, and if this means that it is harder to advise clients or that there is bound to be a certain element of inequality in the application of law, I accept that as the lesser evil. We must have a living law. Dean Griswold recognized that there would be people holding the view that I express. I simply want to get on the record about how firmly I hold that view.

Therefore, if we are to envision improvements in the system, they must come within the approach to case law that is now conventional and taught in the schools and no longer regarded as novel. I can assure you that my father would have repudiated it even more vigorously than Dean Griswold did, but he was admitted to the bar in 1896. He reflected the views of his generation, and they did not do very well with the legal system. Indeed, the legal system as it existed in 1931, when I took my law degree at Columbia, was a shambles; and I say that in measured terms and with a firm conviction. It has its weaknesses today, but it has had enormous achievements and much that represents the best in our legal environment and in our culture would not have been possible under the older view. All of this means, I think, that we are not likely to emerge, even from careful evaluation, with great change in the appellate system as it stands.

There is, however, another perspective, and it is one that I will take my last minutes to put before you. I think that what has been said thus far completely overlooks the fact that the problems of the federal courts in the next hundred years should not be stated as the problems of the federal appellate courts. The district courts are the main bulwark of action in the system; and the problem is whether the extremely valuable resources that they represent are, under present law and present statutes concerning jurisdiction, remedies, and substance, used with prudence and wisdom. To face that question calls for focus on all the statutory delineations of the jurisdiction of the district courts, on the sources of federal law whether they be statutory or decisional, and on the kinds of lawsuits that are subject to federal adjudication, asking if they involve a waste of finite federal resources or call upon the courts to make determinations that should be made explicitly by Congress.

What is required as I see it goes beyond the ALI study, completed in 1968, of the division of jurisdiction between state

and federal courts[20] or Judge Henry Friendly's Columbia lectures of 1972, which he called *Federal Jurisdiction: A General View*,[21] although both those works would render great assistance. Unless and until a project of the dimension I propose is instituted under proper auspices (ideally, authorized by act of Congress), the logistical problems that plague the courts today will persist and may get worse, and the indeterminacy of our law upon so many central issues will inevitably be exacerbated.

I put it to you that those of us who care about the federal judicial institution ought to put our shoulders to the wheel, and the prospects are not good. The smallest proposal for change evokes special interest hostility whenever it impinges on any special interest, and Congress has simply not equipped itself to deal with problems of this order, even when great skill has been conscripted in the effort. Consider, for example, the proposed federal criminal code started under the very influential auspices of Senator McClellan of Arkansas. In the end, the fragmenting criticisms attached to various particular aspects of the matter put an end to the effort. And so, perhaps, I think that here, as in so many other areas of our lives, we still confront the problem. Consequently, a problem for our democracy is figuring out how to elect a Congress that will feel an obligation to the public who chose them to give continuous, vigorous, and knowledgeable attention to the maintenance and improvement of the legal system.

---

20. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969).

21. Lectures delivered by Judge Henry J. Friendly, Columbia Carpentier Lectures, Columbia University School of Law , *reprinted in* H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW (1973).

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 irrebutable. 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.

REMARKS OF PROFESSOR DANIEL J. MEADOR*

Let me comment on the papers of Deans Griswold and Carrington. I share their perception of the judicial scene. It seems to me they have diagnosed it about right and I share their views.

Allow me to add a little bit of factual information about an aspect of the scene that has been discussed only briefly by one or two speakers: the state courts as sources of federal judicial business. This is an obvious point; yet, I think it is one not fully appreciated. In talking about federal courts, we often consider the courts of appeals as the only feeders of the Supreme Court's business and problems, but the state courts are very substantial sources of business as well.

The National Center for State Courts did a study a few years ago concerning the involvement of federal law in state supreme court litigation. That study found a three-fold increase in the volume of federal law in state supreme court opinions in the twenty-year period between 1959 and 1979.[26] Also, I did a survey a year or two ago on a sampling basis of state supreme court opinions in the year 1983. I found that twenty-eight percent of the opinions involved a square decision of a federal question, which made those decisions eligible for United States Supreme Court review. Nobody knows how many state supreme court decisions we have in the United States each year. State judicial statistics are still incomplete and sketchy, but it is clear they run well into the thousands if you consider all the fifty states. The survey I did indicated that more than one-fourth of those many thousands of decisions concerned federal questions and, therefore, form part of the pool of potential Supreme Court business.[27] I think it is very important to keep that in mind as we look at the totality of the picture. Including the District of Columbia and Puerto Rico, we have fifty-two nonfederal jurisdictions over which the Supreme Court has appellate jurisdiction. We often overlook the fact that in relation to the United States Supreme Court, state supreme courts on federal question cases

---

* James Monroe Professor of Law, University of Virginia. B.S., 1949, Auburn University; J.D., 1951, University of Alabama; LL.M., 1954, Harvard University.

26. Complete data from the National Center Study is presented in Meador, *Federal Law in State Supreme Courts*, 3 CONST. COMMENTARY 347 (1986).

27. *See id.*

are in the position of intermediate appellate courts. If we take those fifty-two nonfederal courts and add in the thirteen United States Courts of Appeals, we realize that there are sixty-five intermediate appellate tribunals over which the single United States Supreme Court with nine Justices must preside.

There is no other court of last resort in the Anglo-American world, or anywhere else in the world to my knowledge, which has such an extensive span of supervision over inferior appellate tribunals. Therefore, I have no difficulty at all subscribing to the view that there is a lack of national appellate capacity, a lack of appellate capacity at the top of the system.

One approach to curing this problem is that which has been discussed here several times. I will not elaborate on the proposal, but I do endorse the creation of something equivalent to the proposed intercircuit panel. I think of the panel as an overflow chamber, providing an alternative chamber to which the Supreme Court can refer cases. I am pessimistic, however, about its adoption. Although I think the problem consists of a whole set of interrelated, sophisticated problems that perhaps require not one solution or one line of approach, but rather several simultaneous approaches that are not either/or, I endorse the intercircuit panel as one approach. I think it would do some good, but I would not stop there.

Indeed, it may work out that what we get is what we can accomplish politically. It may not be what is best or ideal, but what can be achieved politically. If we are blocked along one line, then we must press along another.

The other line I would like to see pursued is to approach the problem not at the top by creating this overflow chamber for the Supreme Court, but at the intermediate level by heading the problem off before it gets to the Supreme Court. In other words, we could reduce the hydraulic pressure coming up from the bottom to the Supreme Court. This approach to this problem has also been discussed here several times already, and that is a redesigning of the intermediate tier, at least to some extent, along subject matter lines.

Let me say something about this idea because I think it is important. The situation described by Dean Griswold as a kind of disintegration of the system in the normal meaning of a sys-

tem[28] and by Paul Carrington as a lack of effective command and effective control[29] seems to undermine one of the fundamental notions of our federal constitutional system. The system is structured, and has been so structured since the Constitution was ratified in 1787, to grant to the American people a choice about government. If the people want a matter to be governed in a diverse and perhaps regionally different way, the choice is very simple. We simply leave the matter to the states where it already is. We do nothing at the federal level. On the other hand, if we want something to be dealt with in a nationally uniform manner, we get Congress to enact a statute, and the enactment of the statute in itself says that this is a subject to be dealt with in the same way throughout the nation. We have a few relatively rare exceptions to this rule in which Congress will enact a statute, but, nevertheless, leave the content of the law to the states. A good example is the Federal Tort Claims Act under which a determination of government liability depends on state law.[30] But this situation is relatively rare. We normally think that when Congress enacts a statute it is because we want and need the law administered the same way throughout the nation. In other words, a transaction in South Carolina that is taxable under the Internal Revenue Code ought to be taxable in Missouri; what is a federal crime in New York ought to be a federal crime in California; what amounts to unfair labor practice in Minnesota ought to be unfair labor practice in Florida. The existing system in the federal judiciary, however, thwarts this fundamental political choice that the American people theoretically have. Today, when Congress enacts a statute, laying down a nationally uniform rule, the situation within the federal judiciary frustrates the full implementation of that choice because the structure is such and the conditions are such that we do not have a guarantee of a nationwide, even-handed, uniform application of the federal law. This situation, to me, is fundamentally disturbing, and we ought to take steps to try to remedy it.

It seems to me that we can solve the problem in a way that preserves all the other values that we cherish in the system, whatever they are. This can be done through careful, creative,

---

28. *See* Griswold, *supra* pp. 405-06.
29. *See* Carrington, *supra* pp. 423-25.
30. *See* 28 U.S.C. § 2674 (1982).

and imaginative institutional architecture. A promising way to cure these problems is a redesigning along subject matter lines. There has been a lot of reluctance here to make predictions (called indiscretions), but I will be indiscreet enough to make a few little predictions. I will not be embarrassed if in ten, twenty, or thirty years, when I am no longer around to know about it, they turn out to be wrong.

One prediction is that the situation is not going to improve itself. There are people who act as though it is. It seems irresponsible to act on the hope or assumption that the situation will somehow get better—that the litigiousness of our society will diminish, that litigation will somehow slacken. Barring a truly national calamity, something on the order of a depression in the depths of the early 1930s or a major war, I do not see any retrenchment in the volume of litigation. This means that we are likely to need more and more judges to meet that volume, and this, in turn, will worsen the problem. I predict that is likely to happen.

I would also predict, and this may be more of a hope than a prediction, that the solution will ultimately be seen to lie along the subject matter lines of appellate organization. That solution is appropriate because it gets us off of the horns of the dilemma we face. On one hand, if we keep adding judges at the intermediate appellate level to cope with volume, we move ever further along the road toward the Tower of Babel, the chaos, and the nonsystem that has been portrayed here.[31] On the other hand, if we do not increase judges at the intermediate level to meet the volume, then we move ever farther along the road toward the bureaucracy, ever more staff attorneys, ever more law clerks, and ever more delegation of authority by judges to parajudicial personnel. Neither of those roads is very attractive. I believe the way out is the subject matter proposal. This can be done at two levels.

First, forums can be created with nationwide jurisdiction over certain categories of cases. The Court of Appeals for the Federal Circuit represents a good model for that with nationwide jurisdiction over patents and certain other categories of cases; yet, it is not a specialized court. It has a diverse and

31. *See* Carrington, *supra* p. 429; Griswold, *supra* pp. 405-06.

mixed docket. Its judges operate over a considerable span of legal questions. Another good model, though structured differently, is the Temporary Emergency Court of Appeals, which has nationwide jurisdiction over certain energy law appeals. Judge Wilkinson voiced an often-heard concern, which is understandable, that courts specialized along subject matter lines would be vulnerable to pressures from special interest groups. However, I think that danger can be avoided by not having too narrow a range of jurisdiction, by giving the judges a mixed array of matters, and by not confining any judge to a single, narrow category of case. We can have subject matter organization without "specialization."[32]

We need not do this for the entire range of federal judicial business. I do not think we need to go to an extreme and create a single nationwide appellate forum for every type of case. Some can be left to regional treatment. For example, I would think diversity cases, if we retain them (and I do not favor that), could be left with the regional courts of appeals. Federal Employers' Liability Act[33] cases are another example. There are others that might safely be left in regional appellate hands, but there are categories in which there is a special need for nationwide uniformity for which there should be a single national appellate forum. Tax cases are a favorite example. We have here on this platform Dean Griswold. His first advocacy of this idea appeared over forty years ago. We included such a proposal in the Justice Department's original draft legislation that led to the creation of the Court of Appeals for the Federal Circuit. Criticisms from various quarters, however, caused the proposal to be dropped in the interest of moving forward with the bill. I still believe that tax cases are a fruitful area for this approach. There are others that could be worked out through careful study.

Subject matter organization at the intermediate appellate level would reduce the Supreme Court's concerns in those areas, as has happened in patent cases now. Because there is a single

---

32. A specific plan for a federal court of appeals is developed in greater detail in Meador, *An Appellate Court Dilemma and a Solution Through Subject Matter Organization*, 16 U. MICH. J.L. REF. 471 (1983). For a kindred, yet different (although not mutually exclusive) proposal, see Cameron, *Federal Review, Finality of State Court Decisions, and a Proposal for a National Court of Appeals—A State Judge's Solution to a Continuing Problem*, 1981 B.Y.U. L. REV. 545.

33. 45 U.S.C. §§ 51-60 (1982).

forum deciding all the patent appeals from the district courts nationwide, there are no conflicts; the Supreme Court is not greatly concerned with patent law anymore. Therefore, to ameliorate the Supreme Court's problems, we should approach the lack of appellate capacity at the top by attacking it from underneath—by creating selected nationwide intermediate appellate forums for certain subject matters.

Second, with or without the Federal Circuit kind of nationwide courts, I believe there is much to be gained by organizing each of the regional courts of appeals on a subject matter basis—creating panels within the courts of appeals to which designated cases will go. The pitfalls of specialization can be avoided by gradual rotation of judges so that no one judge spends an entire career on one panel and by giving each panel a diverse mixture of cases. At the trial level, the lawyers and the district judges would know the judges to whom an appeal would be going. I believe that this would do a great deal to stabilize the law—to bring coherence and predictability to the law. I think the knowability of the appellate judges in our system affects the predictability of the law. Our judges are not wholly fungible. On the court of appeal in England, one might make a plausible argument that the judges are interchangeable. That, however, is not the case in this country, and I do not expect it to be. Therefore, the known identity of judges who will decide the appeal would itself bring a higher degree of stability and predictability to the law. We can achieve that by internal subject matter organization on the courts of appeals. I think we ought to move along that line as well as along the line of creating some additional courts like the Federal Circuit.

Let me make a final comment that is not directed toward the federal judicial problems themselves, but toward an equally difficult and troubling problem (maybe even more so), which concerns the means of bringing about any of these changes. This problem has been mentioned once or twice before. I simply want to stress it. We have a situation existing presently such that it is almost impossible to get Congress to pay attention to these problems and to act. You heard the history of the nineteenth century traced here today, from the close of the Civil War to the

Evarts Act[34] in 1891. For about a quarter of a century, there was ongoing debate about what to do. It took twenty-five years to bring about the creation of the courts of appeals. In other words, even then, in a much more uncrowded and leisurely world than now, it was enormously difficult to adopt reform. It is infinitely more difficult today to attract congressional attention to these problems. If one thinks about the pressing issues in Congress—national defense, taxation, health, welfare, and others across the spectrum of major, volatile political problems—one sees that the courts have an extraordinarily low priority.

There is no constituency pressing for reform. When I was in the Department of Justice, for example, we had a bill dealing with a jurisdictional matter. It was not going anywhere. I talked to an aide of a senator one day, a member of the Judiciary Committee. This aide told me that the senator was not going to support the bill because he had received calls from a half-dozen lawyers in his home state. I asked, "What did they say?" He said, "I do not know. They told him they were opposed to the bill. He does not know why they are opposed to it." That is all it takes—six lawyers or fewer to call in and say, "This is a bad bill. You ought not to go along with it." That is it. No counterforce or political constituency on the other side exists to support and press for reform.

What is the solution to this problem of lack of political power advocating reform? Let me say upfront that I think there is no perfect solution. I think one of the solutions lies in having the power of government itself brought to bear on these problems. Countries of continental Europe have a Ministry of Justice for this purpose. In England the Lord Chancellor's Office serves this role. These departments and these officials straddle all branches of government, and they have political clout and influence. They are charged with the caretaking of the judiciary. When something is wrong, they can get legislation enacted to take care of it. We have no mechanism like that, and I think we ought to think hard about trying to create something which approximates that proposal. We have had a suggestion for a congressionally created commission for some years. Judge Clifford Wallace of the Ninth Circuit conducted a survey and wrote a

34. Ch. 517, 26 Stat. 826 (1891).

paper on that proposal.[35] Chief Justice Burger has urged the creation of such a body.[36] There have been bills in Congress. Nevertheless, it is just as difficult to create some mechanism to deal with the problems as it is to deal with the problems themselves. These ideas get nowhere either.

I have long believed that the Department of Justice has a role to play here. It has been my hope that the sort of work that we attempted to do at the time I was in the Department in the Office for Improvements in the Administration of Justice would be carried forward. I must say, however, that I have been somewhat disappointed over the lack of attention to these problems in the current Department of Justice. I do believe that we can succeed if we have an aggressive United States Attorney General interested in the functioning of the courts. I think that it is fair to say that we would not have the Court of Appeals for the Federal Circuit today had it not been for the work of the Department of Justice. We would not have had the federal magistrate amendments[37] in the late 1970s had it not been for Justice Department work, and there are other measures of lesser import that were enacted as the result of the affirmative leadership of the Attorney General and the Department. That is important, I think, but especially so in the absence of any popular political constituency out there.[38] A commission would probably help.

I will leave this as my last point: The problem of bringing about changes in court structure and procedure and implementing them, whatever those changes are, is, to me, as difficult as it is to arrive at the solutions themselves.

---

35. Wallace, *Working Paper—Future of the Judiciary*, 94 F.R.D. 225 (1982).

36. Address by Chief Justice Warren E. Burger, Am. Bar Ass'n Midyear Meeting (Feb. 6, 1983), *reprinted in Annual Report on the State of the Judiciary*, 69 A.B.A. J. 442, 446 (1983).

37. *See* Federal Magistrate Act of 1979, 18 U.S.C. § 3401 (1982); 28 U.S.C. §§ 604, 631, 633-36, 1915 (1982).

38 . For an elaboration of these points, see Meador, *Role of the Justice Department in Maintaining an Effective Judiciary*, 462 ANNALS 136 (1982).