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### Building an Appellate System Worthy of a Great Nation

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# THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

## CLOSING ADDRESS

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### BUILDING AN APPELLATE SYSTEM WORTHY OF A GREAT NATION

Randall T. Shepard\*

Speeches by Alan Morrison<sup>1</sup> and Paul Carrington<sup>2</sup> during this gathering suggest that, as compared to thirty years ago, the appellate courts of the nation face far fewer problems. Each of us will have to ponder over time whether that is really so or whether we have simply convinced ourselves that we are better off.

My assignment in closing this National Conference on Appellate Justice is to ask the question, “Where do we go now?” It has never been imagined by the organizing committee that this meeting would undertake to forge a plan of collective action for the future of America’s appellate courts. Still, it is fair to say that these days together have helped shape our views about problems and opportunities, and that the people and the organizations who have put this meeting together, the Federal

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1. Alan B. Morrison, Senior Lecturer in L., Stanford L. Sch., Speech (Session III—Optimizing the Law-Declaring Function, Natl. Conf. on App. Just. Nov. 6, 2005).

2. Paul D. Carrington, Prof. of L., Duke U. Sch. of L., Speech (Session III—Optimizing the Law-Declaring Function, Natl. Conf. on App. Just. Nov. 6, 2005).

Judicial Center, the National Center for State Courts, the Institute for Judicial Administration, and the American Academy of Appellate Lawyers, have greater capacity to improve appellate justice than ever before.

### TWO IMAGES OF APPELLATE COURTS

Our conversations here have demonstrated to me that participants hold very different ideas of how appellate courts can or should perform their assignment in the American legal system.

There are two competing images in the minds of lawyers and judges about how appellate courts function. One of those is the classic paradigm of an appellate court, mentioned yesterday by Judge Susan Graber.<sup>3</sup> It is a paradigm replete with the rituals of American justice—rituals as familiar as the filing of briefs or standing up at the beginning of court. The classic paradigm imagines that lawyers file a record of proceedings, and that judges read the briefs, hear arguments, discuss the case among themselves, and return to their chambers to prepare opinions.

The other image of appellate courts focuses on organic institutions that are constantly remaking themselves. In the course of that redesign, the people responsible for the institutions do not always share a consensus about what is routine and what is weighty, or what is a good shortcut and what is a harmful one. For example, some participants in this meeting have characterized direct criminal appeals as rather ordinary legal excursions appropriate for summary examination by staff and summary disposition by judges. Other participants have argued that the direct criminal appeal calls upon judges to exercise a high level of scrutiny because such cases involve the deprivation of liberty. The trial judge's view of this difference was nicely put by Judge Neil Wake, who referred to himself as a judge from an "error-creating court."<sup>4</sup>

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3. Susan P. Graber, J., U.S. Ct. of App. for the 9th Cir., Presentation Comment (Session II—The Challenge of Volume and the Promise of Technology, Natl. Conf. on App. Just., Nov. 5, 2005).

4. Neil V. Wake, J., U.S. Dist. Ct., D. Ariz., Breakout Group Discussion Comment (Natl. Conf. on App. Just., Nov. 5, 2005).

THE CHALLENGE OF CANDID DISCUSSION  
BETWEEN LAWYERS AND JUDGES

Just before this meeting opened there was an orientation for all those who would be responsible for conducting and reporting breakout sessions during the conference. In the course of this orientation, one of the facilitators asked, "How will we get the judges to talk candidly about these matters?" It has seemed to me over the last few days that a more prescient question would have been how to induce lawyers, even first-rate lawyers at a meeting held hundreds of miles away from the courts where they regularly appear, to talk candidly to judges about various issues.

One discussion about the duration and frequency of oral argument illustrated this problem for me. At least a few judges in the room affirmed their commitment to the oral argument and then explained that their courts typically set the standard amount of time given to each side at five minutes. Contemplating the intellectual weight of such encounters, I recalled a statement by my friend Judge Mary Beck Briscoe, who once said, "I sometimes feel as if I've been involved in a judicial drive-by shooting."<sup>5</sup>

Wondering about the value of ten-minute arguments led me to think about the effects of arguments in my own court of last resort, where the usual time is forty minutes. It is more common than not that after oral argument some member of our court declares a change of heart about the outcome as a result of the argument. It is even more common that the decision is shaped in important ways by what the members of the panel heard in the courtroom. Put another way, the decision to affirm or reverse may not be altered by the argument, but the jurisprudential ground, and therefore the precedential value of the dispositional opinion, frequently changes in important ways as a result of the discussion in open court.

It was difficult for me to imagine that any lawyer in the discussion I have just described really believed that five minutes was an appropriate time for this intellectual exchange to occur,

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5. Mary Beck Briscoe, J., U.S. Ct. of App. for the 10th Cir., Conversation with Author (1996).

but none elected to challenge the judges who thought it adequate. Only other judges did that.

Likewise, the judges in the groups in which I participated believed that the internal practices under which their courts made decisions were well and widely known.<sup>6</sup> The subsequent discussion in these same meetings, a discussion with some of the best informed lawyers in the American appellate world, revealed that there were actually a good many things lawyers did not know about important internal practices of various appellate courts.

These conversations and others demonstrated that the profession needs to devise ways to make these encounters occur on a more regular and open basis. As Alan Morrison observed, the only real way to do this is for judges and lawyers to spend more time talking with each other about how appellate courts do and should operate.<sup>7</sup> And as Kathleen Lewis related, there are regular appellate bench and bar meetings in her state of Michigan,<sup>8</sup> which seems like about as good a device as one might be able to imagine. Really, it is the judges who have to take the lead to make this happen.

#### THE VALUE OF PUBLIC UNDERSTANDING

As is so often the case with meetings of people involved in public-sector activities, there has been some tendency for participants to lament that the level of public confidence and satisfaction would be higher “if people only understood better what we do.” Professor Thomas Baker observed that the only

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6. For example, Justice Stephen Breyer spoke about the internal process of the Supreme Court by saying, “[T]he inside story is that there isn’t much of one.” Stephen G. Breyer, Speech, *The Future of Appellate Courts* (Natl. Conf. on App. Just., D.C., Nov. 5, 2005); see also Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View from the Supreme Court*, 8 J. App. Prac. & Process 91, 95 (2006).

7. Alan B. Morrison, Senior Lecturer in L., Stanford L. Sch., Presentation Comment (Session III—Optimizing the Law-Declaring Function, Natl. Conf. on App. Just., Nov. 6, 2005).

8. Kathleen McCree Lewis, Member, Dykma Gossett PLLC, Presentation Comment (Session I—The Position of Appellate Courts Today, “No Court is an Island” Panel, Natl. Conf. on App. Just., Nov. 5, 2005).

solution for improving public understanding was to turn “bright lights” on the appellate system.<sup>9</sup>

To be sure, the general level of public confidence in what we do is not particularly high. A recent poll indicated that that proportion of the public having “a great deal of confidence” in the United States Supreme Court was only thirty percent and that for the rest of us it was more like twenty-five percent.<sup>10</sup> It is likewise true that the public is a little vague about facts we regard as very basic. When asked in the course of the same poll whether it was true or false that the three branches of American government were the executive, the legislative, and the judicial, just fifty-one percent of the American public were prepared to venture that this was true.<sup>11</sup> Asked whether it was true or false that federal judges serve life tenure, forty-one percent of the respondents agreed that it was true.<sup>12</sup>

We have little alternative but to believe that brighter lights will help build greater confidence in the appellate system, not to mention the rest of the courts. Among many other things, we have to help the press do a better job at explaining what we do. On this score, the appellate courts certainly have a long way to go. If one contemplates how the United States Supreme Court handled public information during *Bush vs. Gore*,<sup>13</sup> it should not be any surprise that its final decision was not as well received as other decisions of the Court, even taking into account the highly political nature of the matters at stake and the fact that the whole country had chosen up sides.

We ourselves must assume at least some of the burden for building better public understanding. Happily, some of the ways that we may solve these public information problems involve relatively simple techniques.

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9. Thomas E. Baker, Prof., Fla. Intl. U. College of L., Presentation (Session I—The Position of Appellate Courts Today, “Overview: ‘Demand’ and ‘Supply’” Panel, Natl. Conf. on App. Just., Nov. 5, 2005); see also Thomas E. Baker, *Applied Freakonomics: “Explaining the Crisis of Volume”* 8 J. App. Prac. & Process 101 (2006) (providing a preliminary outline for Professor Baker’s presentation at National Conference).

10. *Access to Justice and Constitutional Rights versus Political Pressure: Defining the Battle for the Courts* 23 (Justice at Stake Sept. 2005) (unpublished manuscript on file with Justice at Stake) [hereinafter *Defining the Battle*].

11. *Speak to American Values: A Handbook for Winning the Debate for Fair and Impartial Courts* 17 (Justice at Stake 2006).

12. *Defining the Battle*, supra n. 10, at 17.

13. 531 U.S. 98 (2000).

Judge Mary Schroeder tells me that in the California recall case involving Governor Gray Davis, the Ninth Circuit found itself close to issuing a decision late on a given evening. The court decided to tell the press that there would be no decision that night, but rather first thing in the morning.<sup>14</sup> The judges worked through the evening to edit and polish opinions, releasing the decision early the next day. This early morning release gave the working press an entire day in which to absorb what the court had written and do a better job of explaining it for the people of California. My own court follows a similar practice with all of our hand-downs, releasing opinions only in the morning, before 11:00 a.m., on Tuesdays, Wednesdays, and Thursdays, on the theory that this gives the press a chance to write stories without the pressure of approaching deadlines. In high profile cases, we usually provide the lawyers a modest head start, so that they have a chance to review the court's opinion before the press telephones them for comment. The Minnesota Supreme Court accomplishes some of these same objectives by releasing all opinions at 1:00 p.m. on Thursdays.

Aside from helping the press improve its work, the electronic age has provided courts with new ways to speak directly with the public. Some thirteen state appellate courts now provide webcasting of oral arguments. My court views these broadcasts as having three audiences: the legal community, schools and colleges, and reporters. We recently have taken an interest in making them available through community access channels and through a possible state network modeled on C-Span, something that already exists in a handful of states. There is no real likelihood that substantial portions of arguments will be broadcast to the public on the evening news. If we are to make that part of our activity available to our fellow citizens, we will have to do it ourselves. It will always be a small audience, but it will be a high caliber audience of decisionmakers, public sector activists, opinion leaders, and better-informed future citizens.

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14. Mary M. Schroeder, C.J., U.S. Ct. of App. for the 9th Cir., Conversation with Author (2005) (discussing *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914 (9th Cir. 2003) (en banc) (per curiam)).

## ATTACKS ON OUR WORK

I recently had reason to re-read what is perhaps the most famous speech ever given about courts, the 1906 address to the annual meeting of the American Bar Association by Dean Roscoe Pound of the Harvard Law School.<sup>15</sup> Perhaps the most interesting revelation in this re-reading was Pound's long recitation of the many occasions over hundreds if not thousands of years in which the work of judges has been the topic of severe public criticism. Pound meant to give comfort, as some do today, by reminding the profession that there's always been criticism.

In today's criticism of the courts, however, I observe two important differences from the era in which Pound was speaking.

One significant difference is the efficiency with which assaults may be launched in the electronic age. We all know intuitively that talk radio, cable television commentaries, and Internet blogs have accelerated and broadened the ability of individuals or groups to spread their views. As a result, it is much more likely than ever before that a single judicial flashpoint will reflect on all of us and affect public opinion about all of us. If a court in Vermont decides on a given morning to invalidate the state's marriage statute and require a regime for gay civil unions, people in California and Colorado are chattering about it on the Internet before the sun sets.

Second, in the current political environment there is more careful and more purposeful deployment of attacks on courts as a tool to advance political goals in which the target actually lies elsewhere. It seems plain enough that a number of the constitutional referenda about gay marriage during the 2006 election cycle were not so much aimed at judges as they were at improving voter turnout among certain parts of the American electorate. Taken on these grounds, American judges were simply political road kill rather than targets.

Confronting these political efforts on their own terms leads to an important question: Among what parts of the public do

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15. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice* in *Handbook for Judges* 143, 161 (Kathleen M. Sampson ed., Am. Judicature Socy. 2004).



such criticisms resonate? One important weakness of the American bench is the lack of confidence in our work possessed by African Americans. Asked how much confidence they have in the United States Supreme Court, for example, twice as many whites as blacks say “a great deal.”<sup>16</sup> I am reminded of two friends and about how they each grew up thinking about the law. Dean Herma Hill Kay of Boalt Hall and Judge and Dean Henry Ramsey of California and Howard University told me once that “the law” meant something very different in the places where they each grew up. Where Herma Kay grew up, the law meant the body of statutes, common law, and the customary practice under which society organized itself. Where Henry Ramsey grew up, the law meant the fellows wearing uniforms who regularly came to the neighborhood and hauled people away to jail.<sup>17</sup> As I will say in a moment, any serious work to build public confidence and understanding must take differences such as these into account.

I suggest three things that the judiciary should do in response to these attacks.

First, appellate judges must keep in mind that the public sees us as closely connected to the rest of the government. We must give the public reasons to appreciate and value judicial institutions as special and crucial to building a better society. For instance, state supreme courts and others must appreciate the effects of inadequate public defender systems on public attitudes, especially those of African Americans. This is the reason my own court has placed such importance on improving the caliber of public defender offices and the caliber of public defenders in capital cases.<sup>18</sup> It is the reason why my colleague Justice Frank Sullivan has worked with others in the judicial

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16. *Defining the Battle*, *supra* n. 10, at 23. Queries about other courts also reflect substantial disparities between whites and blacks. The responses of Hispanics tend to parallel those given by whites. *Id.*

17. Herma Hill Kay, Barbara Nachtrieb Armstrong Prof. of Law, U. Cal.-Berkeley, and Henry J. Ramsey, Jr., Dean Emeritus, Howard U. Sch. of L., Conversation with Author (1997).

18. As an example of our efforts in this area, Indiana has adopted Criminal Rule 24, which requires that each defendant in a capital case be appointed two trial attorneys who meet certain minimum qualifications as to trial experience and training in the defense of capital cases. Ind. R. Crim. P. 24(B)(1), 24(B)(2) (LEXIS 2006). In addition, the rule sets acceptable workloads for public defenders so that they may “direct sufficient attention to the defense of a capital case.” Ind. R. Crim. P. 24(B)(3) (LEXIS 2006).

division of the American Bar Association on expanding the number of minority law clerks in appellate courts. It is the reason why the recommendations of the Pew Commission Report on Children in Foster Care are so important for trial and appellate courts, particularly in the state system.<sup>19</sup> It is the reason why projects to reform jury service deserve our support.<sup>20</sup> And finally, it is the reason why the National Center for State Courts consortium to help us assist people for whom English is a second language has such value.

Second, judges must not imagine that the bar alone can effectively tell our story. We must take a direct personal role in devising strategies to combat this new wave of assaults. We judges must organize our affairs so as to warrant the assistance and confidence of our natural allies: members of the profession and other civic and political leaders.

Third, we must pause to reflect about the effect that these attacks have on judges and on their families. It has, after all, been a difficult year to be a judge. Judge Joan Lefkow saw her family murdered in Chicago and Judge Rowland Barnes was himself murdered in a courtroom in Atlanta.<sup>21</sup> It has been a year when United States Senators from the right and left have assaulted judges during federal confirmation proceedings.<sup>22</sup>

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19. Pew Commn. on Children in Foster Care, *Fostering the Future: Safety, Permanence and Well-Being for Children in Foster Care* (Pew Charitable Trust 2004).

20. See e.g. B. Michael Dann, "Learning Lessons" and "Speaking Rights": *Creating Educated and Democratic Juries*, 68 Ind. L.J. 1229 (1993).

21. See e.g. David Heinzmann & Jeff Coen, *Federal Judge's Family Killed*, Chi. Tribune 1 (March 1, 2005); AJC Staff, *Courthouse Killings: Anatomy of a Shooting*, Atlanta J.-Const. 4A (March 12, 2005).

22. See e.g. Gail Russell Chaddock, *Senators Wary of Court Reach*, Christian Sci. Monitor 1 (Sept. 14, 2005) (reporting that Senators Mike DeWine, John Cornyn, and Sam Brownback, all Republicans, "blasted" the Supreme Court as "a sort of superlegislature" that is "making policy when it repeatedly strikes down laws passed by Congress and the state legislature," and criticized "the broad sweep of judicial activity today" during hearings on the nomination of then-Judge John G. Roberts, Jr. to the Supreme Court); Carolyn Lochhead, *Justice Brown Confirmed for Appeals Post*, S.F. Chron. A4 (June 9, 2005) (reporting that Senators Dianne Feinstein and Barbara Boxer, both Democrats, "denounced" then-California Supreme Court Justice Janice Rogers Brown during hearings on her nomination to the D.C. Circuit).

While 2005 may have been the high-water mark for such overheated rhetoric, it has surfaced often in recent years. See e.g. Jan Crawford Greenburg, *Embattled Judicial Nominee Withdraws*, Chi. Tribune 1 (Sept. 4, 2003) (reporting that Miguel Estrada withdrew his name from consideration for a post on the D.C. Circuit after an "acrimonious seven-month, Democrat-led filibuster" during which he was branded a "stealth nominee")

With these difficult experiences in mind, the Indiana court system decided to create an electronic newsletter called *Judicial Balance—Lessons for Law and Life*.<sup>23</sup> It features articles that help judges and their families contemplate their professional choices and adjust better to the burdens imposed by public assaults. We will provide this newsletter to any judge in the country who would like to receive it.

### CONCLUSION

We are, at the end of the day, in the rule of law business. People in places where the rule of law has been wanting, places like Bosnia and Rwanda, aspire to build more decent societies, and they understand that central to the creation of a prosperous society is a functioning, impartial, and independent court system. It is apparent that even the Chinese leadership has begun to appreciate this latter fact.<sup>24</sup>

The import of this for Americans was recently highlighted for me when we hosted a delegation of five judges, mostly appellate judges, from Ukraine. We spent seven days with them in Indianapolis, showing our Ukrainian friends about various aspects of our state's judicial administration and court reform. These days were altogether uplifting, as much for us as it seemed to be for them. My experience with them gave me greater hope for their future, and it renewed my own interest in what the future might be like for American judges and lawyers.

The task of those who lead America's courts is to warrant the admiration that people like those Ukrainians expressed for what we do. We must warrant that admiration not only for them but for our own fellow citizens. We must align ourselves with those of our fellow citizens who are intent on building a decent, safe, and prosperous society. It must be our job to build an appellate system, indeed a legal system, that is worthy of a great

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by Senate Democrats, and that Senate Majority Leader Bill Frist, a Republican, characterized the course of Estrada's nomination as "a tale of rank and unbridled Democrat partisanship").

23. Archived issues of the newsletter can be found at <http://www.in.gov/judiciary/balance>.

24. See e.g. Robert Marquand, *New for China's Courts: Trained Judges, Standard Rules*, *Christian Sci. Monitor* 1 (Aug. 16, 2001); Zou Keyuan, *Judicial Reform in China: Recent Developments and Future Prospects*, 36 *Intl. Law.* 1039 (2002).

nation. Spending several days with thoughtful, friendly, and committed people who desire that end has been a magnificent experience.



