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Essay

# THE SUPREME COURT AND THE FUTURE OF THE FEDERAL JUDICIARY

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At the beginning of this year, the Supreme Court of the United States held a special ceremony marking the two hundredth anniversary of the first sitting of the Court. At the same time, the Federal Courts Study Committee entered its final phase of work, conducting hearings across the country on its draft report concerning the structure and workload of the federal courts, including the Supreme Court. In addition, Senator Joseph Biden of Delaware,Chairman of the Senate Committee on the Judiciary, recently announced the completion of an important study of the civil justice system in the United States, with a number of proposed recommendations and reforms aimed at improving the administration of justice. With the confluence both of commemorations of our Nation's heritage and history and of important, thoughtful studies about the future of justice in America, it is a propitious time for reflecting on the Supreme Court of the United States and the future of the federal judiciary.

## I

It is wisely said that past is prologue. And thus it is appropriate to examine where we are in light of where we have been. The judicial system presently includes "one supreme Court," in the words of Article III of the Constitution, and an increasingly complex array of both Article III courts and Article I tribunals established by Congress. But before recalling briefly the origins of our federal judicial system, we should note that Congress has not

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only significantly expanded the size of the Article III branch, most recently with the Omnibus Judgeship Bills of 1978 and 1984,[1] but it has also created new and specialized Article I courts. Indeed, the establishment of specialized tribunals would seem to be the wave of the future, evidenced most recently by the creation of the new Veterans Appeals Court.[2] In 1982, Congress created the United States Claims Court,[3] joining the growing family of Article I tribunals, including the United States Tax Court, the United States Court of Military Appeals, the courts of the District of Columbia and certain territorial tribunals. Perhaps most visibly to many Americans, bankruptcy courts stand as a reminder that not all tribunals exercising federal jurisdiction are Article III courts enjoying the characteristics of life tenure and complete independence from the political branches.

Specialized tribunals are clearly rising on the popularity charts. Justice Scalia's landmark address before the American Bar Association several years ago welcomed the advent of such courts and at the same time sounded an alarm about the future of the federal judiciary by virtue of rising workload demands.[4] That burgeoning workload has been occasioned not only by increased case filings but also by Congress' continuing passage of statutes granting new jurisdiction to heavily burdened federal courts. The scourge of narcotics — and of drugs as big business — has likewise contributed to the substantial workload of the federal courts. With increased popularity in Congress of mandatory minimum sentences and the advent of sentencing under an elaborate regime of sentencing guidelines, criminal sentencing reform also has added new challenges for the federal judiciary.

The mosaic of the modern federal judiciary is increasingly complex. Even within the confines of Article III courts we have witnessed in recent years the increased use of United States Magistrates[5] and the increased use of special masters in complex cases.

Those students who have labored through such Civil Procedure arcana as the final judgment rule, the appealability of interlocutory orders, and the *Cohen v. Beneficial Finance*[6] collateral order doctrine, are only at the very beginning of a challenging, daunting process. Life in the law is complicated, and it will likely become even more so during the careers of those presently in the student body of this great institution. Even determining which judicial route to take is likely to require considerable skill in procedural map reading.

## II

The judicial system was not always so complicated (although code pleading certainly had its own set of mysteries). As reflected in Chief Justice

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1. 28 U.S.C. § 44 (1948). 1978 Amendment Pub. L. No. 95-486. 1984 Amendment Pub. L. No. 98-353.
2. 38 U.S.C. § 4051 (1988).
3. 28 U.S.C. § 171 (1982).
4. Scalia, *Addressing the American Bar Association on Specialized Courts*, 73 A.B.A. J., April 1, 1987, at 20.
5. This practice, however, has been confined in some respects, as in cases such as Gomez v. United States, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989), limiting the use of U.S. Magistrates in conducting voir dire in criminal cases.
6. 337 U.S. 541 (1949).

Burger's recent remarks,[7] the Supreme Court that first assembled in early 1790 had few cases with which to grapple. The Court faced far greater challenges than the docket itself reflected, however. In fact, when the Court opened its doors for business in New York in early 1790, there were no cases on the docket. The humble items of business before the Court on its historic opening day were the admission of lawyers to practice and the appointment of a marshal of the Court — a fairly easy day's work.

At that time, the Court had only six members, in contrast to its current number. The round number of 6 was fixed by Congress in the Judiciary Act of 1789,[8] and President Washington, in exemplary fashion, promptly appointed a very distinguished inaugural bench. The Nation's first Chief Justice, John Jay, was a gifted lawyer, richly experienced in foreign affairs. Jay, of course, authored *The Federalist Papers*,[9] along with Madison and Hamilton. The Court's early members also included James Wilson, a towering legal figure in the late eighteenth century. Like his colleagues Justice John Rutledge of South Carolina and Justice John Blair of Virginia, Wilson had served as a delegate to the Constitutional Convention in Philadelphia only two and one-half years previously.

The pace of professional life was assuredly different in those days. Although the rigors of circuit riding made the life of the early Justices extremely arduous, the docket itself left ample time for thorough argument in the British style and for reflection. In those days, difficult issues could be argued for several days, as contrasted with the Court's current procedure of allowing a modest 30 minutes for each side. In *McCulloch v. Maryland*,[10] no fewer than six counsel, including Daniel Webster, were permitted to argue and the entire argument lasted nine days. Indeed, as amicus in a recent case, involving the very difficult issue known as the "right to die,"[11] I stood at the Supreme Court podium for a grand total of 10 minutes. As my distinguished predecessor, Rex Lee,[12] stated in a presentation during the Court's two hundredth anniversary ceremony: "[At the time of the argument in *McCulloch*], Thomas Edison's birth was still twenty-eight years away, and there were no red nor white lights [at the podium]."

In fact, the Supreme Court was the place to go for a good show. In his work on the history of the Supreme Court,[13] Charles Warren related that the social season of Washington began with the opening of the Supreme Court term. Today, needless to say, Washington society no longer revolves around the Court's term. People do not flock to see advocates argue, although they may flock to see a particular case presented and hear what the Justices themselves have to say in questioning counsel.

But in that early, formative period, with the leisure of time for hearing the cases, thoroughly considering the arguments, and then carefully coming to

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7. Chief Justice Burger, Proceedings of the Supreme Court in the commemoration of the 200th anniversary of the Court's first sitting (January 1990).
8. An Act to Establish the Judicial Courts of the United States, ch. 20 (1789).
9. A. HAMILTON, J. MADISON, J. JAY, THE FEDERALIST (H. Cabot 1888).
10. 17 U.S. 316 (4 Wheat.) 316 (1819).
11. Cruzan v. Director, Missouri Dept. of Health, 760 S.W.2d 408 (Mo. 1988), *cert. granted*, 109 S.Ct. 3240 (1989).
12. Now president of Brigham Young University.
13. C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1922).

judgment, the Court rendered remarkable and sound opinions. The advent of judicial review is well known, presaged initially by *Hayburn's* Case in 1792 on circuit,[14] and then even more clearly in 1796 in *Hylton v. United States.*[15] Both cases powerfully foreshadowed *Marbury v. Madison.*[16] In our system of separated powers, it became the responsibility of the early Court to serve as an instrument for achieving the Madisonian and Hamiltonian vision of a vast commercial republic, overcoming the parochial and at times protectionist interests of the several States. As Chief Justice Burger has aptly stated, the Constitution as interpreted by the Supreme Court was instrumental in creating a common market for the United States, a free trade zone along the Atlantic and extending into remote frontiers that were destined in the fullness of time to reach to Arizona and far beyond.[17]

Even in this century, the Court was able to devote careful attention and considerable time to its opinions in cases of great moment. Holmes' short, pithy opinions are of course legendary, but their length was a matter of his style and choice, not necessity. Examine, by way of comparison, Chief Justice Taft's opinion for the Court in the landmark separation of powers case, *Myers v. United States.*[18] The case was argued in 1923, reargued for two days in 1925, and then was the subject of a lengthy, scholarly opinion that consumes almost 100 pages of the United States Reports. Chief Justice Taft's law clerk that term — and note that there was only one — is still very much alive and well. That former clerk, Richard Williams, recalls coming down from New Haven, freshly graduated from the Yale Law School, and assisting the Chief Justice in the course of Taft's drafting the opinion. Mr. Williams relates that it was Chief Justice Taft who drafted the opinion, not the law clerk.

In those days, the legal secretary's role was to gather research materials and to be a sounding board for ideas. Although Mr. Williams gathered research materials on such vital aspects of our Nation's constitutional history as the impeachment of President Andrew Johnson (in the wake of Congress's passage of the Tenure of Office Act), the words that went into the lengthy, scholarly opinion in *Myers* came from the hand of the Chief Justice.

Now it may be that there is something in the water at Yale that cultivates such good writers. Another immensely talented judicial writer who spent his legal training years under the elms at New Haven was the late Justice Potter Stewart. Justice Stewart, I am told, once aspired to be a journalist, and served as an editor of the *Yale Daily News* while an undergraduate. An excellent writer, Justice Stewart enjoyed crafting his own opinions during his distinguished career on the Supreme Court. But times changed during the course of Justice Stewart's service on the High Court. Justice Stewart, it is said, increasingly relied upon clerks to produce the initial drafts of opinions in virtually all the cases. Things had just become too busy to do it the old fashioned way.

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14. 2 U.S. 409 (2 Dall.) 409 (1792).
15. 3 U.S. 171 (3 Dall.) 171 (1796) (upholding the constitutionality of the federal Carriage Tax).
16. 5 U.S. 137 (1 Cranch) 137 (1801).
17. *See supra* note 7.
18. 272 U.S. 629 (1926).

The burdens of office thus began presenting real challenges for the federal judiciary. In a time of increased public visibility, especially with the constitutional law revolution wrought in this century and particularly during the tenure of Chief Justice Warren, the Court was increasingly hampered by the sheer burden of its work. The volume of filings, the number of opinions, and not surprisingly, the size of the staff increased significantly. Now, of course, each Justice is entitled to four law clerks, which is good news for aspiring law school graduates seeking clerkships. But it is not altogether clear that the advent of expanded legal staffs to cope with the increased caseload augurs well for the judicial process. It was, after all, in this century that Brandeis — when asked how the judiciary was different from the other two branches of government — is said to have replied: "We do our own work." When one reads the opinions of Justice Brandeis, no one could doubt that the Justice himself labored over every word. That sort of care in the traditions of our profession — of great craftsmanship, of thorough scholarship, and careful reasoning after a painstaking evaluation of the record and respectful study of the pertinent authorities — is increasingly difficult for judges throughout our system to achieve.

These developments have led to some baleful results. Elsewhere, I have had occasion to urge a rediscovery of ancient appellate values of collegiality and deliberativeness in the tradition of Learned Hand's Second Circuit. I called my observations, "Returning to Learned Hand's Farm,"[19] for it was to Judge Hand's farm that the judges of that great court reportedly would repair to ruminate about a particularly nettlesome case. But those less-crowded days are gone, perhaps forever, replaced now by quite large appellate courts, with as many as twenty-seven active judges on a single court. What is more, the likelihood is great that in the next century we will see increased pressures to expand significantly the size of all existing tribunals. The small, collegial court of Learned Hand has been replaced by the more modern, much larger, geographically diffuse circuit symbolized by the circuit in which we are so pleasantly situated today. As Chief Judge Howard Markey of the Federal Circuit has put it so succinctly: "These days, Learned Hand couldn't be Learned Hand."[20]

## III

We stand today at a crossroads for the federal judiciary. Perhaps not since the late nineteenth century has such concerted attention been given to our federal justice system. Indeed, the last great restructuring of the federal judiciary occurred almost exactly 100 years ago, with the passage of the Evarts Act of 1891.[21] That statute brought into being the circuit courts of appeals as we know them, established along geographical lines, with the exception of my former and beloved court, the D.C. Circuit, and the much newer United States Court of Appeals for the Federal Circuit, created in 1982.

Recent studies propose significant structural changes in our federal appellate system. In addition to periodic proposals for a national court of tax

19. Address by Hon. Kenneth W. Starr, Institute of Judicial Administration, A.B.A. Annual Meeting (August 1990).
20. 33 S.D.L. REV. 371, 371-86 (1988).
21. ch. 517, 26 Stat. 826 (1891).

appeals, a proposal that has been a source of considerable concern to my Department, there have been several important studies of note. Almost twenty years ago, the Freund Committee, appointed by Chief Justice Burger and chaired by Professor Paul Freund of the Harvard Law School, examined the workload of the Supreme Court of the United States and called for creation of a new National Court of Appeals.[22] This new national court would, under the proposal, screen cases emerging from the various (now thirteen) circuits courts of appeals and refer those deemed worthy of decision on to the Supreme Court. Shortly thereafter, the Hruska Commission,[23] appointed pursuant to Congress's mandate, arrived at a similar conclusion, but with important differences. Agreeing with the Freund Commission's basic conclusion that the Nation lacked adequate national appellate capacity, the Hruska Commission likewise called for a new appellate court, but one that would enjoy only reference jurisdiction from the Supreme Court. That is, the "Hruska court" would have had no screening function at all. It would simply wait and consider those cases referred by a very busy Supreme Court, after the Supreme Court determined that the issue merited a nationally binding decision but which the Supreme Court itself was too busy to resolve. The classic example was that of a conflict in the circuits on a point of federal law, but one that did not seem to be of great import to the country as a whole.

Finally, the Justice Department produced a very thoughtful report in 1977 during the stewardship of Attorney General Edward Levi and under the chairmanship of Solicitor General Robert Bork.[24] Foreshadowing Justice Scalia's ABA speech,[25] the Bork Report embraced the approach of Judge Henry Friendly of the Second Circuit, whose idea was to reduce the flood of cases in the federal system by reducing the flow into the system. Accordingly, under the approach embraced by the Bork Report, more cases would be routed into the state courts (which is, I hasten to add, part of the thrust of the tentative recommendations of the Federal Courts Study Committee). In addition, new Article I tribunals, such as specialized tribunals to hear Social Security Act disability cases, would be established. In this way, the reasoning went, fewer cases would enter the federal system, and the Nation would thus faithfully preserve the present structure (with the addition of specialized Article I courts) and the generalist nature of the Article III federal judiciary.

## IV

In this lively period of reflection, it would be woefully premature and inappropriate to opine definitively on these difficult and important questions about the future of the federal judiciary. It would be premature because, as of this writing,[26] the Federal Courts Study Committee has not yet released its final report to Congress and the President. It would also be inappropriate for me to opine definitively on the subject since these matters are presently under review

22. Federal Judicial Center, Report of the Study Group on the Caseload of the Supreme Court (1972), *reprinted in* 57 F.R.D. 573 (1972).

23. Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendation for Change (1975), *reprinted in* 67 F.R.D. 195 (1975).

24. The Needs of the Federal Courts, Report of Department of Justice Committee on Revision of the Federal Judicial System (Jan. 1977).

25. *Supra* note 4.

26. The report has since been completed and submitted to Congress and the President.

in the Department of Justice under the leadership of Attorney General Thornburgh.

But it seems neither inappropriate nor premature to identify several very important values in our system that, in my judgment, deserve not only to be preserved but if at all possible to be fostered:

*First*

The first value is the traditional nature of federal courts as generalist courts, open to resolve the full, bewildering variety of cases arising under federal law. There is an intangible, but important quality for judges who sit in judgment over the liberties and property of the people (and at times even their lives) to be individuals of broad range and vision. They should have technical skills, to be sure, but not be technicians. The law, after all, is a very human endeavor. It is not akin to theoretical physics, computer science, or engineering, which place a premium on dazzling insights and technical expertise. Law reflects the experience and wisdom and values of the people, codified in statutes and articulated in judicial decisions. The broader and richer the legal experiences and responsibilities of the judge, the better the body of law will tend to be. We should therefore seek to preserve common-law values, as it were, in our heritage of Article III judges called upon to exercise judgment in a rich and varied range of matters.

*Second*

The second value is one in which judges are permitted — indeed, called upon — to judge, rather than required to manage. When I was a brand new judge, one of our able district judges in Washington told me that in his view, the single most important characteristic of a federal district judge these days is that he or she be an effective manager. So too, the recent report on civil justice reform initiated by Senator Biden calls on federal judges throughout the system to more effectively manage their growing dockets.

That is as it should be. It is clear that the Nation, with its remarkable diversity, desperately needs efficient decision-making capacity. Until methods of alternative dispute resolution grow in importance, the courts — state and federal — assume the role of what in a quieter, more rural society would have been that of the village sage or elder, the role of dispensing justice. That means that judges must indeed be managers.

But we should remember that the great tradition of judging in the English and American courts was not just deciding the case, or presiding over the trial, or listening to the appeal and then coming to a decision. It was, rather, the tradition of rendering judgment, that mysterious process of the trained legal mind, informed by the experience and values of the people, and bound by oath to do equal justice to the poor and the rich consistently with the rule of law, resolving with evenhandedness and — hopefully — wisdom the case at hand. But it was not just to dispense justice in the case at bar. Judging was (and is) to be informed and guided by a profound sense of being an instrument of the law, constrained by law, faithful to law, obedient to law.

The reasons for this are not hard to understand. Those reasons sound in equal protection and due process values, of treating similarly situated litigants alike, of applying a known rule in each case fairly governed by it, and not

dispensing an individualistic brand of justice. A judge must consider the effect of judicial decisions on the rights of others not before the court who, like society itself, are entitled to order their affairs in reliance on the durability and consistency of the law. In short, in discharging their responsibilities, judges should indeed manage their dockets and they should decide the cases as expeditiously as possible, but they must still be allowed to bring *judgment* to bear. Judges should be permitted to judge and render opinions, not just reach decisions.

***Third***

Third, and finally, our focus on reforms and improvements in the administration of justice should be informed by the normative justification in a federal republic for a body of national law. At the founding of the American Republic 200 years ago, the basic sovereign decision was made by the people that our republic would be federal in nature. The States would be preserved and would indeed have vital responsibilities for the protection and welfare of the people. For its part, the national government would assume important responsibilities as well. When appropriate, laws and actions of the national government would be supreme, displacing (or as we say in the jargon of the law, preempting) state law.

The very idea of national law carries with it the characteristic or quality of uniformity. If there is to be national law (or, as we say, federal law) on a subject, then that law must be the same in Arizona as it is in New York or Florida. Think for just a moment the unthinkable — that under conflicting judicial interpretations, conduct that would not be a crime under federal law in Arizona in the Ninth Circuit would constitute a federal crime in Manhattan. This would obviously be intolerable for a federal system, and that of course is one of the vital, historic functions of the Supreme Court — to maintain the uniformity of federal law.

But with the growth of the country and, concomitantly, of the federal court system, we have long since passed the day in which the Court even attempts to resolve all conflicts in federal law. Certain critical areas, especially in the criminal law, the law of taxation, and social benefits law do invariably (and appropriately) catch the Court's attention and are resolved through the exercise of the Court's discretion over its docket. But in other areas, nonuniformity is a recurring problem. The Federal Courts Study Committee estimates that from 60 to 80 circuit court conflicts were presented to the Supreme Court in a single recent Term which the Court chose not to resolve.

Now this certainly is not meant to be a criticism of the Court. Most thoughtful observers would not want the Court to work around the clock, all year round, seeking assiduously to iron out every single conflict that pops up in the vast and ever-growing body of federal law. There would simply be too many cases for the Court to decide in a way that comports with the values I sought to articulate in Points one and two — values of care, of scholarship, of collegiality, of real judging, not mere decisionmaking.

It is this question that merits, in my judgment, the most careful analysis and attention on our part in the wake of the draft report by the Federal Courts Study Committee. That report, like reports that have preceded it, suggests one possibility — that of the Supreme Court referring specific questions involving

conflicts of law between or among circuits to the existing courts of appeals for resolution by the full en banc court. This is yet another variation on the Freund Committee and Hruska Commission theme that some structural innovation or change will be necessary in order to provide greater national appellate capacity than presently exists. The change is necessary because of the inherent limitations of a Supreme Court, which sits (appropriately) only en banc, and not in panels of three as do the circuit courts of appeals.

## V

The winds of change are blowing. This is an important time for the globe, as dramatically evidenced by remarkable developments in Eastern Europe and in the Soviet Union itself. And for those of us called to the law, it is a time to remember the importance of the founding principles that guided the formation of the American Republic, It is a time to remember the purification and preservation of the republic in the 1860s by the eradication of a moral blight that utterly violated the basic principles of the Declaration of Independence — that all persons are created equal in the sight of God and under the law. Values of legal equality — values that have informed so much of the Supreme Court's constitutional jurisprudence in this century — are the values implicated by the problem of nonuniformity in federal law. We should, therefore, in the months ahead be very attentive, and respectfully consider, the appropriateness of changes that may instinctively seem unattractive but which deserve our very careful and sober attention. We should consider these changes both now and in the years ahead when the students of this institution, under the able leadership of our friend, Dean Sullivan, depart to begin their own service to the cause of equal justice under the rule of law.