

ARIZONA LAW REVIEW

VOLUME 2

WINTER 1960

NUMBER 2

ARIZONA'S NEW JUDICIAL ARTICLE [†]

THE HONORABLE WILLIAM O. DOUGLAS*

I take this occasion to pay the Arizona Bench and the Bar a belated compliment for an action that went largely unnoticed at the time. A year or more before *Brown v. Board of Education*¹ was decided two Arizona courts had held that segregation of students in public schools by racial standards was unconstitutional. These two opinions were written in the superior court, one by the present Chief Justice Fred C. Struckmeyer, Jr. of the Arizona Supreme Court, and the other by Justice Charles C. Bernstein of the Arizona Supreme Court. On May 7, 1954, ten days before the *Brown* decision, the attorney for Maricopa County advised the school boards in Arizona that segregation of students in public schools by reason of color was not authorized "by our constitution or by our statutes." Before the next September the remaining pockets of segregation remaining in Arizona's school system were eliminated.

Arizona, as a state, has often been an innovator. She has trod a rather lonely way. When the joint resolution admitting her to statehood was sent to the White House, President Taft vetoed it because Arizona's first constitution contained a provision for the recall of judges by popular vote. This provision collided with Taft's notion of an independent judiciary. Arizona changed her constitution to meet Taft's objections. But once admitted she restored the provision; and it exists to this day in Article VIII, Section 1, of the Arizona Constitution. That procedure never proved very popular among the various states as evidenced by the fact that only eight of the fifty have adopted it.

The newly proposed article on the judiciary which is on the ballot as an initiative measure is not nearly as radical. It follows to a large extent the model Judiciary Article which the Section of Judicial Administration of the American Bar Association recommended in July of this year. It proposes among other things the creation of an intermediate appellate court. Thirteen other states now have such a court; and as our population increases it is almost certain that more and more states will follow.

A few years ago I was asked by the government of Puerto Rico to visit San Juan and give advice as to the problems of its supreme court. I

[†] Address delivered to Pima County Bar Association October 25, 1960.

* See Contributors' Section, p. 269, for biographical data.

¹ 347 U.S. 483 (1954).

learned that almost every case went as a matter of right from the trial court to the supreme court and that they were presented on typewritten records. That court, though composed of able and hard-working judges, was five years in arrears. And it seemed impossible for it to catch up.

One of my recommendations was the adoption of the New Jersey system with a flexible intermediate appellate procedure. That precise remedy was not chosen. Appeals from administrative agencies were, however, routed to the superior courts by the Act of June 26, 1958, Section 1—an alternative way of handling a part of the problem. Moreover, a large group of cases was made reviewable in the supreme court by way of certiorari issued at the discretion of the court.²

Article 6, Section 3, Paragraph 3, of the New Jersey Constitution goes further. While the New Jersey Constitution does not create a separate intermediate appellate court, it provides that an intermediate appellate court shall be a division of the superior court and "shall have such parts, consist of such number of judges, and hear such causes, as may be provided by Rules of the Supreme Court." Under the rules of the court, the supreme court designates the number of parts, while the chief justice assigns, for definite or indefinite periods, the judges who are to sit in each part. Each part must have three judges in order to have a quorum, but the chief justice may appoint as many more as seems needed.³ Usually there are at least two parts sitting; but there have been as many as four and as few as one. The fewer the parts the more judges available for trial work. In other words there is great flexibility in the New Jersey system, the judges moving back and forth between trial and appellate work as the volume of cases dictates.

The Arizona proposal goes part of the way, leaving more power to the legislature than to the supreme court in deciding the composition and activities of the intermediate appellate court than does New Jersey.

Our judicial system faces new and perplexing problems in this age of swift communication, great commercial enterprises, and population explosions. Our legal structure must move to meet the demands of this vast, crowded, industrialized and urbanized society while preserving the fundamental concepts of due process that we deem essential to freedom. The members of our profession know better than anyone else why an efficient, smooth working system of courts beholden to no political boss, no special interest, no newspaper cabal, provides the best possible climate for protection of the rights of the people.

Delay in the administration of justice has been a cause of concern for centuries. It was one of the grievances that led to the Magna Carta. And observers of the legal scene such as Dickens have seldom failed to

² Act of June 26, 1958, §2 (Puerto Rico).

³ See N.J. Rev. R. 2:1.

point a critical finger at the failure to render prompt justice. In *Bleak House*, Dickens let the famous case of *Jarndyce v. Jarndyce* continue until the whole estate was consumed by fees, Richard Carstone, a ward, obtaining his only relief in Heaven.

At one time five years were allowed to prosecute appeals to and writs of error out of the United States Supreme Court.⁴ Appeals in state courts were similarly protracted, seven years being allowed in one state.⁵ Those leisurely days are gone. The volume of cases has required litigants to act with dispatch. From thirty to ninety days is the time now allowed to bring a case to the United States Supreme Court; and extensions of time are restricted.⁶

The demands now made on our courts, particularly the trial courts, are becoming increasingly heavy. All the available statistics indicate a steady growth in number of cases filed each year. The reasons are many—greater population, greater ability to finance litigation, more laws affecting our daily lives. This larger case load and the increasing complexity of much of our litigation makes it imperative that our courts be so constructed as to enable them properly to manage their work. We must be more careful to insure that the *quality* of justice is not allowed to suffer at the hands of quantity.

Many states which have accomplished judicial reforms as you now propose waited until the evils attending delay and congestion almost overwhelmed them. Illinois has had complex problems that will be worked out, it is hoped, by a new proposed judicial article.⁷ In some metropolitan courts in the East the time lag from filing to trial exceeds forty months. It is in such areas as these that we begin to hear proposals to short circuit jury trials and to refer certain types of cases to boards or commissions.

There are essential elements of our techniques of trial that cannot be sacrificed to speed and efficiency. We should never give up the notion that trials should take place in a calm, unhurried atmosphere. We should not repudiate Canon 35 of the American Bar Association's Canons of Judicial Ethics and let cameras, radio, and television take over the courtrooms. We should not dilute our adherence to the adversary system, the right of confrontation of witnesses, and the right of cross-examination. We should be alert to protect the right of cross-examination. We should be alert to protect the right of trial by jury from inroads urged

⁴ See *Erwin v. Lowry*, 7 How. 172, 184 (1849); 1 Stat. 73, 85 (1789).

⁵ See POUND, *APPELLATE PROCEDURE IN CIVIL CASES* 145-46 (1941).

⁶ SUP. CT. R. 11, 22.

⁷ See Illinois State Bar Association and Chicago Bar Association, *The Proposed Judicial Article*, 49 ILL. B.J. 24 (1960).

in the name of efficiency. As calendar congestion increases, there are always those who would streamline procedure at the expense of basic rights. The record of the trial of Sir Walter Raleigh⁸ is an ancient example of how easily the demands of efficiency are used to mask injustice. Raleigh was denied the right to face his accusers because it would be impossible to get people to *be* accusers if they had to face cross-examination.

Yet a man's rights may be greatly depreciated if he must wait two or more years to get inside a courtroom to establish them. It is a hopeful sign that the issue of delay in Arizona's courts is being met with a boldness and determination that is characteristic of the West.

Arizona has a record of willingness to take new steps in the direction of improving its judicial administration. This state was one of the first to adopt Rules of Civil Procedure modeled on the Federal Rules. The latter were the product of much effort on the part of some of our ablest lawyers, judges and teachers and constituted sweeping innovations in legal procedure. The willingness to adopt new ideas is evident in your present efforts to modernize your judicial structure.

In Arizona, I understand, the problem of court delay is acute in Phoenix and is foreshadowed in Tucson and other urban areas of the state. I am told that an unreasonable time lag is beginning to be felt in the appellate reaches of the court system. It is good that you want now to anticipate the difficulties that in time will become more urgent.

I shall not comment in detail on the proposal to be submitted to your voters next month. There are at least three essentials of a judicial system that this proposal promotes and encourages:

(1) An intermediate appellate court is normally accompanied by a reduction in the obligatory jurisdiction of the supreme court. That was done in Puerto Rico, as I have indicated, and in New Jersey.⁹ The increase in discretionary jurisdiction is designed to give judges the time necessary for meditation and deliberation and to try to prevent them from being overwhelmed by the minutiae of small and unimportant cases. The reduction in the obligatory jurisdiction of the United States Supreme Court, as a result of a 1925 Act of Congress,¹⁰ made it possible for the Court to hear on the regular calendar—for the first time in 100 years—cases docketed during the term. The presence of discretion in the Court to refuse to review an intermediate appellate court in the federal system or a state court, as the case may be, is today the only way we keep our docket in manageable condition. Today petitions for certiorari

⁸ 2 How. St. Tr. 1 (1603).

⁹ N.J. Const. Art. 6, § 5.

¹⁰ 43 Stat. 936 (1925).

that are granted or appeals that are noted during the first three months of a term are generally heard during that term. The discretion to grant or deny petitions for certiorari under the standards prescribed by Congress is exercised in the favor of a grant in about ten percent of the cases.¹¹ This history and those statistics, as well as New Jersey's and Puerto Rico's systems, are relevant to the problem of relieving any state supreme court from the duty to hear every case, no matter its merits or importance.

Arizona has approached the problem differently. The obligatory jurisdiction in appellate cases is not reduced. The supreme court is, however, empowered to sit in divisions—a feature absent from the New Jersey system and from the Model Judiciary Article of the American Bar Association. The United States Supreme Court is not empowered to sit in divisions. Article III, Section 1 of the federal Constitution vests the judicial power of the United States “in one supreme court”; and in conformity therewith Congress has fixed a quorum at six.¹² At one time a writ of error to state courts, which was submitted not of right but subject to the discretion of the court, was routed to one Justice to determine whether it should be allowed.¹³ There is today, and for a long time there has been, no such division of labor even on *administrative* functions. Every Justice votes on every petition for certiorari and on every jurisdictional statement.

Sitting in divisions raises problems of administration comparable to those in the courts of appeal in the federal system. A federal court of appeals, though composed of more than three judges, may sit in panels of three.¹⁴ There is jurisdiction for *en banc* hearings under such procedures as a court of appeals designs.¹⁵ I mention these cases not to suggest that the federal appellate procedure is the appropriate one for Arizona. Sitting in divisions is not without precedent. Puerto Rico is, indeed, proposing a constitutional amendment to allow it. While the Supreme Court of California may sit in divisions,¹⁶ and at one time did, the practice is no longer followed. Though it is not the trend in judicial reform to allow state supreme courts to sit in divisions—the preferred remedy being the creation of an intermediate appellate court and the reduction of the supreme court's obligatory jurisdiction—Arizona's proposal is a step

¹¹ See Douglas, *The Supreme Court and Its Case Load*, 45 CORNELL L.Q. 401, 410 (1960).

¹² 28 U.S.C. § 1 (1948).

¹³ See *Heike v. United States*, 217 U.S. 423, 427 (1910); *Twitchell v. Commonwealth*, 7 Wall. 321, 324 (1869).

¹⁴ *Textile Mills Corp. v. Comm'n*, 314 U.S. 326 (1941).

¹⁵ See *United States v. American-Foreign SS Corp.* 363 U.S. 685, 688 (1960); *Western Pacific R.R. v. Case*, 345 U.S. 247 (1953).

¹⁶ CAL. CONST. art. VI, § 2.

toward giving the judges of her highest court the time needed for reflection and mature deliberation.

(2) The creation of an integrated statewide judiciary presided over by a chief justice who possesses broad powers to assign judges from one area to another and from one court to another is an extremely important proposal. This is a feature of the newly adopted Constitutions in Alaska,¹⁷ and in Hawaii.¹⁸ This feature of your proposal seems to me necessary in a system of courts that is flexible enough to meet varying case loads in different parts of a state that is growing as rapidly as Arizona.

(3) Provision for an administrative director to assist the chief justice is extremely important. The newly adopted Constitutions of Hawaii¹⁹ and Alaska²⁰ give the supreme court power to appoint an administrative director to supervise the administrative operations of the judicial system. We have such an office in the federal system.²¹ Obviously one cannot administer something without knowing what his problems are. The primary function of an administrative director of this character is to gather and interpret statistics concerning the stuff of court business, which, of course, is litigation. How many cases are there? What kinds? Where are they pending? How long have they been pending? Is the number of new cases on the up or down grade? The necessity for such information is apparent. This is not all that an administrative director does. He will have important housekeeping tasks, budget responsibilities and the duty continuously to study operations and develop procedures the better and more efficiently to process court business. But his statistical function will greatly affect judicial administration. They will be in part the basis of the decisions by the chief justice as to where he will assign judges: for example, in what counties are temporary measures necessary to keep the flow of cases moving in such numbers as will keep up with intake. For these vital decisions the director's statistics must be current data. He will, of course, compile historical data, such as comparative annual records of the business done in each court which are serviceable to show trends in litigation. These will help test the quality and effectiveness of judicial administration from year to year in keeping dispositions ahead of or at least abreast of new litigation. The reports of the administrative director in New Jersey and of the administrative office in the federal system show how important this work is.

Arizona lawyers and judges may be interested in another aspect of

¹⁷ ALASKA CONST. art. IV, § 16.

¹⁸ HAWAII CONST. art. V, § 5.

¹⁹ *Ibid.*

²⁰ ALASKA CONST. art. IV, § 16.

²¹ 28 U.S.C. § 601 (1948).

New Jersey's system. Each of the judges of the trial courts files a weekly report of his activities with the administrative director.²² That report shows his hours on the bench each day, the names of the causes handled during the court day and the time given to each. The supreme court adopted administrative rules which prescribed fixed court hours and court days throughout the state and forbade the conduct of judicial business in chambers with some exceptions and provided for the filing of a weekly report by each judge. This weekly report operates to assure both that there will be no inequalities in the burden of judicial work among the judges and that what the judges do will be in the open for all to see. The weekly report is designed also to minimize another reason for complaint under the former system. There had often been long delays by judges in decisions upon matters to be decided by them and not by a jury. Delays as much as eight or ten years were not unknown in some New Jersey cases. (I might say parenthetically that the late James Alger Fee, when he was federal district judge in Oregon, exerted great effort to bring cases to trial promptly. Once he was assigned to the federal district court in the eastern part of the United States where, as I remember, 600 cases were on the docket, some of them having been pending for four or five years. He put the entire batch down for trial the next day, giving quite a few lawyers, I understand, ulcers of the stomach. As a result of his action there were, I think, over 500 cases either dismissed or settled at once, only about 80 going to actual trial.) Today each New Jersey judge lists on his weekly report every reserved decision and lists it again on every subsequent weekly report until the matter is decided. If the office of the administrative director notes that the decision is reserved an undue length of time, an inquiry of the judge for a reason usually has the consequence of a prompt disposition thereafter. The New Jersey bar and bench think this device has made a valuable contribution toward the goal of minimizing delays in judicial determinations.

The new Judicial Article which is proposed for Arizona has other important features; but the ones mentioned appear to be the most important. In the main they have soundness and excitement. That you have brought them forth now before problems of judicial administration have become unmanageable will give people cause for confidence in the leadership of your profession.

A word of caution is, however, necessary. No system, of itself, will master the difficulties which arise in the administration of justice. The Constitution of the Soviet Union contains many high-sounding references to the rights of man. But they mean very little in practice. The

²² N.J. REV. R. 1:30-5.

new court structure envisioned by this proposal will require the careful administration of a chief justice who is a wise judge and a diplomatic but vigorous administrator. It will require as well the wholehearted cooperation of trial and appellate judges who will be called upon to sacrifice some small part of what has heretofore been a considerable measure of freedom from restrictions on their time and activity.

Needless to say, this new court system will inevitably create some new demands on lawyers as a result of increasing pressures to keep calendars current.

The goal of prompt dispensation of justice of high quality is worth whatever small adjustments of habit may become necessary. That is one of the first requirements of effective judicial administration. There are of course other things as well. There is the problem of a trial, freed of the passions of the community. The requirement of a public trial is for the benefit of the accused. It was never designed to provide a stage for actors or a medium for public entertainment or enlightenment.²³ There is the problem of him who comes *in forma pauperis* and asks for a lawyer.²⁴ There is the problem of putting our best men on the bench, not leaving it, as is done in a few localities, for the mediocre who need political rewards. There is indeed hardly any problem of judicial administration—apart from the sheer volume of cases—which cannot be answered by high quality judges.

By your new proposal you will construct the framework of a workable system under which able and conscientious judges will thrive and dispense justice with even hands. This step you take is in the tradition of bold thinking about the problems of law in modern society.

²³ See Douglas, *The Public Trial and The Free Press*, 46 A.B.A.J. 840 (1960).

²⁴ See Douglas, *In Forma Pauperis Practice in the United States*, 2 N.H. BAR J. 5 (1959).