



2007

A Critical Assessment of the Cultural and Institutional Roles of Appellate Courts: The Second Edition of Appellate Courts: Structures, Functions, Processes and Personnel

Paul D. Carrington

Follow this and additional works at: <https://lawrepository.ualr.edu/appellatepracticeprocess>



Part of the Courts Commons, and the Legal Education Commons

Recommended Citation

Paul D. Carrington, *A Critical Assessment of the Cultural and Institutional Roles of Appellate Courts: The Second Edition of Appellate Courts: Structures, Functions, Processes and Personnel*, 9 J. APP. PRAC. & PROCESS 231 (2007).

Available at: <https://lawrepository.ualr.edu/appellatepracticeprocess/vol9/iss1/11>

This document is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in The Journal of Appellate Practice and Process by an authorized administrator of Bowen Law Repository: Scholarship & Archives. For more information, please contact mmserfass@ualr.edu.

THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

BOOK REVIEW

A CRITICAL ASSESSMENT OF THE CULTURAL AND INSTITUTIONAL ROLES OF APPELLATE COURTS*

Paul D. Carrington**

The new edition of *Appellate Courts: Structures, Functions, Processes and Personnel* was produced to serve law students in a course on Appeals. It is well done. The course should be in the curriculum of every law school that hopes not only to supply law clerks, staff attorneys for appellate courts, or (most especially) appellate judges, but also leaders of the organized bar and top government lawyers who share responsibility for the laws governing appellate courts and their proceedings. Better knowledge of its subject might even help a lawyer win a case every now and then.

*See *Appellate Courts: Structures, Functions, Processes, and Personnel* (Daniel J. Meador, Thomas E. Baker, & Joan E. Steinman eds., 2d ed., Lexis-Nexis 2006) [hereinafter the Second Edition].

** Professor of Law, Duke University. As noted in the text of this review, I was a nominal co-editor of the first edition of this book. Professor Meador and I have been friends for forty years, sometimes co-authors, and sometimes allies in endeavors at judicial law reform. I am also sometimes amiably quoted in the book. I have, however, had no role whatever in the development of this edition. In the spring of 2006, I for the first time taught a course on Appeals as the second to Professor Michael Tigar, who is, among other distinctions, the co-author of the definitive text on the subject. Michael E. Tigar & Jane B. Tigar, *Federal Appeals: Jurisdiction and Practice* (3d ed., West Group 1999). Jena Levin provided valuable assistance to preparing this review.

Many of the issues presented in this book are seldom noticed by many law teachers or their students.¹ Some of these are narrowly technical in nature. For example, who teaches that the time for appeal is “jurisdictional” in the sense that no court may, even for good cause, grant an extension? Many have protested this excessive rigidity;² yet the Supreme Court applied it again in 2007 to bar an appeal from a habeas denial that was filed two days late but before the date specified by the district judge.³ The judge simply misread the calendar by three days, and no one representing the state objected, perhaps because its lawyers shared the appellant’s counsel’s failure to notice the error. Even a well-educated and reasonably careful lawyer could have forfeited his clients’ rights in such circumstances. And it is hard to see what harm was done to the state by giving the prisoner a couple of extra days to appeal.

The brutal result in *Bowles v. Russell* was based on the conclusory declaration that the time for appeal has long been held to be “jurisdictional,” and therefore cannot be extended for any reason.⁴ Five Justices disowned their power to “create equitable exceptions,”⁵ i.e., to do justice even when the mistake was made by a federal district judge and counsel for the state made no objection to the extra days. As the dissenters observed, the appellant’s appointed counsel

probably just trusted that the date given was correct, and there was nothing unreasonable in so trusting. The other

1. An exception was the Duke Law students who in 1983 joined in writing a thorough, careful restatement of the law of federal appellate jurisdiction as a contribution to a double issue of *Law and Contemporary Problems*. They sought to clarify an arcane subject and won the approval of a conference of eminent federal appellate judges, some of whom contributed essays to the issue. See Student Authors, *Federal Civil Appellate Jurisdiction: An Interlocutory Restatement*, 47-2 L. & Contemp. Probs. 13 (1984). I take this occasion to salute their memorable efforts. Alas, the complexity of the problems they addressed assured that no simple solutions could be provided.

2. The Second Edition’s editors at page 161 cite four critics of the absolute rule invoked by the Court: this reviewer, and Professors Edward Cooper, Maurice Rosenberg, and Mark Hall. I know of no published defense of it.

3. *Bowles v. Russell*, ___ U.S. ___, 127 S. Ct. 2360 (2007).

4. *Id.* at 2362, 2366 (noting that the Court has “long and repeatedly held that the time limits for filing a notice of appeal are jurisdictional in nature,” and announcing that “[t]oday we make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement”). This doctrine is considered critically on pages 158-161 of the Second Edition.

5. *Bowles*, 127 S. Ct. at 2366.

side let the order pass without objection, either not caring enough to make a fuss or not even noticing the discrepancy; the mistake of a few days was probably not enough to ring the alarm bell to send either lawyer to his copy of the federal rules and then off to the courthouse to check the docket.⁶

One cannot say with certainty that if they had taken a law school course designed around this book, the majority of the Court would have reached a more sensible result, but surely it is an aim of professional education to demean such disgraceful nonsense as that expressed in the majority opinion.

The course and the book are, however, about much more than such legal technicalities. The book is a critical assessment of the cultural and institutional roles of appellate courts. Few lawyers, even those appointed or elected to an appellate bench, or who serve in high government offices, have ever thought critically about many of the issues posed. The chief thing American lawyers learn in law school about appellate courts is that they make law. And perhaps the primary motive of those lawyers seeking appellate judgeships is an ambition to exercise that lawmaking power. But this volume goes beyond the basics to raise the fundamental questions that even moot court practice seldom raises: Who are these persons I address when making an argument as counsel? What is their role in the legal system? What claims have a litigant or his counsel to their attention? What claim has the trial judge under review to a measure of deference? The editors aptly quote Judge Dickson Phillips's observation that the answers to these questions are "surprisingly unsystematic and relatively obscure."⁷

Given this obscurity and the fixation of law schools on the lawmaking function of appellate courts, it is unsurprising that appellate judges tend to delegate to law clerks and staff attorneys the onerous and less celebrated or less rewarding work that comes with the bulk of the appeals, and to save for themselves opportunities to express views on the public policies

6. *Id.* at 2372 (footnote omitted) (Souter, Stevens, Ginsburg, & Breyer, JJ., dissenting).

7. Second Edition at 222 (quoting J. Dickson Phillips, Jr., *The Appellate Review Function: Scope of Review*, 47-2 L. & Contemp. Prob. 1 (1984)). And see Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 Vand. L. Rev. 437 (2004).

of the day in ever longer but fewer published opinions. In the federal system, most lawyers are not heard to speak at oral argument, so the judges responsible for deciding their cases need neither be seen nor demonstrate their familiarity with the issues presented. Indeed, many, many appeals are decided by memoranda written by staff attorneys subject to nominal oversight by those appointed by the President and confirmed by the Senate to assure the correctness of the actions of United States courts.

The tendency of judges to delegate is magnified in the federal courts by the reality that the appetite for lawmaking pervades the federal judiciary. Even the trial judges subject to the appellate courts' review have also acquired large staffs to which they delegate the tasks that seem humdrum and unworthy of their full attention. That tendency is so visible that Judge Patrick Higginbotham has questioned why we still call them "trial judges" if they no longer conduct trials.⁸ District Judge Brock Hornby explains that having less to do in the courtroom, he is using his law clerks to write long legal opinions⁹ because the appellate courts are increasingly applying their work model to the trial judges.¹⁰ And at the other end of the hierarchy the Supreme Court has done much the same, delegating its less exciting duties to staff and to lower courts so that the Justices can enjoy writing fewer but longer opinions. Among the judicial duties often delegated by the Supreme Court to lower courts is responsibility for the legal correctness of the dispositions in cases it considers when performing its more exhilarating

8. Patrick E. Higginbotham, *So Why Do We Call Them Trial Courts?* 55 S.M.U. L. Rev. 1405 (2002).

9. D. Brock Hornby, *Stepping Down*, 8 J. App. Prac. & Process 265, 269-70 (2006) ("I now tell law clerks when I hire them that their experience will be far more like that of appellate clerks than it would have been in 1990, and that they will spend much more time studying written briefs, listening to oral arguments, and writing opinions than struggling with jury instructions and evidentiary rulings in the courtroom. Of course, when I tell them this, I am talking about my own professional worklife."). He rightly attributes the transformation of roles to Supreme Court opinions re-writing Rule 56 to enlarge the use of summary judgments. *Id.* at 268 n. 2; see Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?* 78 N.Y.U. L. Rev. 962 (2003)). And the Supreme Court in 2007 further extended summary judgment practice to magnify this effect. *Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, 127 S. Ct. 1955 (2007).

10. Hornby, *supra* n. 9, at 269.

legislative function. Consider then the question: “Why do we still call them appellate judges—or Justices—if their primary task is to proclaim law as legislators?”¹¹

Yes, of course, appellate courts make law. But we do have other institutions to provide that service. The indispensable task of the appellate court is to correct error, or perhaps more precisely, to convince the parties and their counsel that the possibility of incorrect application of the law has been seriously considered by judges of rank and security, and to remind trial judges that they are indeed confined by the law in the choices that they may make in response to overtures from parties. Congressman David Culberson, who in 1891 led the initiative to establish the United States Courts of Appeals, proclaimed his purpose as the constraint of the “kingly power” of federal trial judges who were then too numerous and too self-indulgent to be corrected by one Supreme Court.¹² If the newly commissioned intermediate appellate judges were to make law, that effort was to be merely incidental to their primary task of making the trial judges visibly accountable for their fidelity to controlling law.

Indeed, that same expectation was framed by the common law tradition of judicial lawmaking, which was a secondary and often unnoticed effect of decisions reviewing rulings by first instance judges for correctness as enforcements of law. The laws made by early appellate judges were traditionally expressed only in brief oral explanations of their decisions that might be synthesized by a reporter whose published report might or might not be attended by lawyers and judges in later cases. As Tennyson explained, law made by common law judges was a “wilderness of single instances.”¹³

Congressman Culberson surely had it right that federal district courts need to be held to account for their use of the great powers vested in them. This is, I suggest, with respect to

11. Judge Posner has identified the Supreme Court of the United States as not a court, but a superlegislature. Richard D. Posner, *Foreword: A Political Court*, 119 Harv. L. Rev. 31, 35 (2005) (pointing out that “it is no longer feasible for the Court to control the lower courts by means of narrow, case-by-case determinations—the patient, incremental method of the common law,” and that it “must perforce act legislatively”).

12. 21 Cong. Rec. 3403 (1890).

13. Alfred, Lord Tennyson, *Aylmer's Field*, lines 435-439, in *The Poetical Works of Tennyson* 241, 246 (Houghton Mifflin Co. 1974) (reprint of 1898 edition) (also available at <http://classiclit.about.com/library/bl-etexts/atennyson/bl-aten-aylmer.htm>).

civil matters, even more true in our day than in his.¹⁴ Our trial courts increasingly resemble bureaucracies, as their staffs have been enlarged with a growing number of magistrate judges, bankruptcy judges, court-annexed arbitrators, special masters, law clerks, and mediators.¹⁵ Recent reforms of civil procedure in courts of first instance have been in the direction of enlarging the power and discretion of the trial judge¹⁶ in managing a cadre of assistants, causing him or her increasingly to resemble the awesome Chancellors of old, who did in reality exercise royal power.¹⁷

If American law is to play the traditional and expected role of holding together a vast, diverse, and conflicted population by assuring adequately shared trust in law and its institutions, litigants must perceive that they are getting the personal attention of judges that is the heart of the Due Process guaranteed by state and federal constitutions. Judges sitting on appellate benches, and their subordinates, must therefore give serious attention to appellate procedures and structures established to ensure the measures of accountability and transparency required to assure litigants, and the public, that the job is being done, and being done by those whose job it is to do it.

Seldom is attention given in the curricula of most American law schools to the subject of the law governing the appellate process. Law professors are, like the future judges they instruct, universally fascinated with the substantive politics of the law

14. There was no right to appeal a criminal conviction in a federal court until 1888. It was at first limited to capital cases, but was extended to all convictions by the 1891 Act. And it would be many decades before the right to counsel was respected. See generally Lester Bernhardt Orfield, *Criminal Appeals in America* (Little, Brown 1959).

15. This growth was first approved by Congress in the Federal Magistrates Act of 1968, 82 Stat. 1108, 28 U.S.C. §§ 631-39. Cf. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). Justices White, Powell, and Burger found the majority decision upholding the statute to have read Article III out of the Constitution. *Id.* at 113 (White, J., Burger, C.J., & Powell, J., dissenting).

16. Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 Wis. L. Rev. 631; Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. Rev. 1 (1996).

17. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pa. L. Rev. 909 (1987); Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 Cornell L. Rev. 1181 (2005); Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 Yale L.J. 27 (2003).

that appellate judges make, but very few are seriously attentive to the complexities of the institutional duties and responsibilities that may be neglected or misused by the empowered judiciary. Those who teach civil or criminal procedure seldom give more than glancing attention to issues of appellate jurisdiction, or the appropriate standards of review, or the institutional need for transparency, or even to what might be loosely described as appellate due process.

Daniel Meador, the senior editor of this book, invented the course for which it is designed. He aimed to correct that curricular failing and cause more lawyers, judges, and lawmakers to be informed of the public interest in the structure and conduct of appellate courts. The value of the course and the importance of the book may be more apparent in light of the events leading to its development.

Professor Meador's first edition reflected his major role in the work of the Advisory Council on Appellate Justice. That group was summoned in the 1970s by the Federal Judicial Center and its leader, Judge Alfred P. Murrah, to consider proposed reforms in appellate procedure and in the structure of federal appellate courts, and, incidentally, in state appellate courts as well. The climax of the Council's work was a large national conference called to San Diego in 1975 to consider the thoughts of the Council; the National Center for State Courts joined in its sponsorship. Conferees were presented with three studies on which they were invited to reflect. One study had been conducted by the American Bar Foundation under the direction of this reviewer,¹⁸ another by a commission appointed by the Supreme Court and led by Professor Paul Freund,¹⁹ and a third by a commission created by the Senate Judiciary

18. American Bar Foundation, *Accommodating the Workload of the United States Courts of Appeals* (Am. Bar Found. 1968); this report was later elaborated upon by the study's director. See Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 Harv. L. Rev. 542 (1969).

19. Study Group on the Caseload of the Supreme Court, *Report*, 57 F.R.D. 573 (1972); this study favored a court with jurisdiction to shield the Court from the task of deciding certiorari petitions. Members of the Court were offended by the suggested restraint on the power of the Justices to decide what cases they choose to decide. For reflections, see Philip B. Kurland, *The Supreme Court and the Judicial Function* (U. Chicago Press 1975); Doris Marie Provine, *Case Selection in the United States Supreme Court* (U. Chicago Press 1980).

Committee and chaired by Senator Roman Hruska.²⁰ These three studies were united in the view that reforms in the federal appellate structure and practice were overdue.

That conference and its antecedents were responsive to growing caseloads requiring increasing numbers of judges in state as well as federal courts. In substantial measure, the growing caseloads were the result of reforms in criminal procedure and in the rights of prisoners to appellate and collateral review of convictions, and to decent conditions of imprisonment. Much of the new caseload was cases uninspiring to those assigned to hear and decide them. Many appeals were pro forma,²¹ and more than a few were advanced pro se. Memorable to the reviewer was an account of one appellate judge who described an appeal then recently heard that was primarily based on the noticed fact that the national flag was not on display in the courtroom in which the defendant was convicted, "and then counsel went on to his weaker arguments." The lawyer making that argument may have been doing the best possible job to vindicate his client's constitutional right to appellate review. Increasingly, oral arguments were denied; most appellate opinions were brief and often unpublished, but the others became longer, perhaps to give more orders to lower courts in the hope of reducing the need to correct their errors. And as the number of appellate judges increased, their statements of the law were declining in the weight of their authority. While they differed in details, all three noted studies and the Advisory Council agreed that structural change was needed in the federal courts to assure that the appellate function could be more adequately performed.

The work of the Council was later recorded in a book authored by Meador, this reviewer, and Maurice Rosenberg²² to record and explain the view prevailing among its members, who

20. *Report of the Commission on the Revision of the Federal Court Appellate System*, 61 ABA J. 819 (1975); see also Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195 (1975).

21. In *Anders v. Cal.*, 386 U.S. 738 (1967), the Court held that appointed counsel abandoning an appeal must file a brief explaining the absence of a viable appellate argument.

22. Professor Rosenberg, now deceased, was then a professor at the Columbia Law School.

were united in the view that a time for reforming the federal appellate courts had arrived. That book was published in 1976.²³

Professor Meador became an Assistant Attorney General in 1977. Attorney General Griffin Bell, another member of the Advisory Council on Appellate Justice, commissioned him to initiate reforms in the structure of the federal judiciary. There were no direct results of his efforts, but they did lead to the creation of the Federal Circuit in 1982.²⁴ Alas, that reform was not among those proposed by the American Bar Foundation group, the Supreme Court's Freund committee, or the Senate's Hruska commission. That new court was given exclusive jurisdiction over appeals in certain intellectual property cases notwithstanding cautions against specialized appellate judgeships²⁵ and the country's unfavorable experience with the Commerce Court.²⁶ Perhaps the Federal Circuit has not fallen into the same trap or maybe it has; experts on intellectual property law might perceive that the court strongly favors property rights at the expense of the public domain. If there are interest groups seeking to influence the selection of judges to be appointed to that court, it is surely those enriched by the expansion of intellectual property rights, and not those who merely wish for less costly access to ideas and art.

In 1979, Professor Meador returned from the Department of Justice to the University of Virginia Law School. He then created the law school course on Appeals and developed the first

23. See Paul D. Carrington, Daniel J. Meador & Maurice Rosenberg, *Justice on Appeal* (West Pub. Co. 1976) [hereinafter *Justice on Appeal*]. The recommendations of the Advisory Council appear on pages 254-255. The authors' more elaborate recommendations appear on pages 225-231.

24. See Federal Courts Improvement Act of 1982, P.L. 97-164. The portions of the Act relevant to this discussion are now codified as 28 U.S.C. § 1295 (available at <http://uscode.house.gov>).

25. Indeed, Meador and his co-authors considered the problem and proposed that a court such as the Federal Circuit, if established, should be served by judges rotating to that court from the regional circuits. *Justice on Appeal*, *supra* n. 23, at 220. The purpose of such rotation would be to diminish the lawmaking role of the court and insulate the process of judicial selection from the influence of those having the greatest stake in intellectual property law. *Id.*

26. The Commerce Court was created by the Mann-Elkins Act, 36 Stat. 539 (1910), to review decisions of the Interstate Commerce Commission, and abolished three years later, 38 Stat. 208 (1913), because its judgeships so quickly became a major target of those with a stake in railroad politics.

edition of the book under review.²⁷ At the same time, he instituted a graduate program for newly elected or appointed appellate judges whom he hoped, among other things, to acquaint with the issues giving rise to the percolating reformist agenda.²⁸ While the first edition of the book reflected work that Meador had done with Maurice Rosenberg and myself, and incorporated some suggestions made by us, neither Rosenberg nor I was entirely comfortable with being identified as a co-editor. Neither of us found occasion to teach the course from the first edition, and neither of us received royalties from its sale. It is thus Meador's vision and Meador's book that has been elegantly updated by the junior editors, Baker and Steinman.

Except for the creation of the Federal Circuit, none of the reforms advanced by the three studies or by the Advisory Council has been seriously considered by Congress. Meanwhile, two more studies were conducted, one under the auspices of the Judicial Conference of the United States,²⁹ and another commissioned by Congress and led by retired Justice Byron White, then assisted by Professor Meador.³⁰ Their recommendations resemble those advanced in the three previous studies. There was also the 1994 work of Professor Baker,³¹ who had begun in 1987 publishing thoughtful reflections on the need for reform.³² Professors William Reynolds and William Richman joined the chorus about the same time.³³ And then

27. Daniel J. Meador, Maurice Rosenberg & Paul D. Carrington, *Appellate Courts: Structures, Functions, Processes and Personnel* (Michie Co. 1994).

28. See Virginia Law, *Master of Laws in the Judicial Process*, <http://www.law.virginia.edu/html/prospectives/judges/judges.htm> (noting that the graduate program for judges was established in 1980, but has since been discontinued) (accessed Oct. 10, 2007; copy on file with Journal of Appellate Practice and Process).

29. Judith A. McKenna, *Structural and Other Alternatives for the Federal Courts of Appeals* (Fed. Jud. Ctr. 1993).

30. Commission on Structural Alternatives for the Federal Courts of Appeals, *Final Report* (Fed. Jud. Ctr. 1999), http://www.fjc.gov/library/fjc_catalog.nsf/autoframepage!openform&url=/library/fjc_catalog.nsf/DPublication!openform&parentid=0B9620FF463BF37285256CA300675A01 (accessed Nov. 9, 2007).

31. Thomas E. Baker, *Rationing Justice on Appeal—The Problems of the U.S. Courts of Appeals* (West Pub. Co. 1994).

32. E.g. Thomas E. Baker & Douglas D. McFarland, *The Need for A New National Court*, 100 Harv. L. Rev. 1400 (1987).

33. E.g. William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 Cornell L. Rev. 273 (1996);

came Professor Steinman to join the cause.³⁴ But notwithstanding an almost universally shared opinion that the system was failing in both federal and state courts to serve the public need, no substantial proposal regarding the appellate structure has been seriously considered by Congress. To be sure, there were skeptics inclined to prefer the evolving system of federal appeals to the proposals for reform; Professor Arthur Hellman stands out as the leading academic voice resisting the clamor for reform.³⁵

In 2005, at the urging of Professor Meador, the American Academy of Appellate Lawyers staged a conference redolent of the 1975 event organized by the Advisory Council on Appellate Justice.³⁶ The Academy, unlike the Advisory Council, had no agenda of reform, and I am aware of no reform initiatives that resulted from the event. As a participant, I spoke with many able appellate judges. I frequently heard the observation that all is well, that the infrequency of oral argument is insignificant because so many of the lawyers wishing to present arguments are simply not worth listening to. And I heard the explanation that judges and their staffs need to concentrate on polishing their published opinions because it is by the quality of those utterances that their professional careers will be judged by their peers and by posterity. It was also said that the creation of more judgeships would merely increase the difficulty of maintaining coherence. I have no doubt that there is some merit in each of these observations.

But I hope even so that this book and the law school course it serves to organize will advance the cause of appellate court law reform. Judge Clement Haynsworth was entirely correct in his observation that “reform in the administration of justice is a fragile thing, easily wrecked by stout opposition from even a

see William M. Richman, *An Argument on the Record for More Appellate Judgeships*, 1 J. App. Prac. & Process 37 (1999).

34. E.g. Joan E. Steinman, *The Scope of Appellate Jurisdiction: Pendent Appellate Jurisdiction Before and After Swint*, 49 Hastings L.J. 1337 (1998).

35. E.g. Arthur D. Hellman, *The Proposed Intercircuit Tribunal: Do We Need It? Will It Work?* 11 Hastings Const. L.Q. 375 (1984); Arthur D. Hellman, *The Unkindest Cut: The White Commission Proposal to Restructure the Ninth Circuit*, 73 S. Cal. L. Rev. 377 (2000).

36. The Conference proceedings were published in Volume 8, Issue 1, of this Journal.

small handful or two of respected or influential persons,”³⁷ for what is everyone’s business is no one’s special concern. And the Judicial Conference of the United States, like any fraternal organization, is almost incapable of seriously considering any scheme that diminishes the discretion or impairs the status of its members. Professor Hellman’s skepticism toward reform tends, then, to find a congenial audience among members of the judicial fraternity. And Professor Tigar has aptly quoted Chesterton’s dictum that judges “are not cruel. They just get used to things.”³⁸

On that account, it took a half century of agitation after observers first noticed the need for the Courts of Appeals before Congressman Culberson and Senator William Evarts at last secured enactment of the Judiciary Act of 1891. And that was before the Judiciary Act of 1922³⁹ established the Judicial Conference of the United States, an event leading to a major enlargement of the political power of the judicial fraternity.

It is not merely the intermediate courts that are in need of serious reform. In 2005, Professor Meador and I joined an eminent group—something of a philosophic successor to the Advisory Council on Appellate Justice—that recommended term limits for Justices⁴⁰ as a first step in providing Congressional checks and balances on an institution that, in our view, has become too big for its britches. As Judge Posner has observed, the Court has come to think of itself as a superlegislature⁴¹ largely unconcerned with whether specific cases have been

37. Ltr. from Clement F. Haynsworth, J., U.S. Ct. of App. for the 4th Cir., to Prof. A. Leo Levin, Exec. Dir., Commn. on Rev. of the Fed. Ct. App. Sys. (Apr. 30, 1975), in *Hearings before the Commission on Revision of the Federal Court Appellate System* vol. II, 1327 (1975).

38. Michael E. Tigar, *A Review of Appellate Courts* (2d ed. 2006), 2007 Fed. Cts. L. Rev. 2 (July 2007), <http://www.fclr.org/2007fedctslrev2.htm> (accessed Nov. 9, 2007).

39. See An Act for the Appointment of an Additional Circuit Judge for the Fourth Judicial Circuit, for the Appointment of Additional District Judges for Certain Districts, Providing for an Annual Conference of Certain Judges, and for Other Purposes, 42 Stat. 837 (1922).

40. The proposal is that the terms of Supreme Court Justices should be limited so that a new Justice would be appointed within each two-year term of Congress, which would yield a normal term extending to eighteen years. See *Reforming the Court: Term Limits for Justices* (Roger C. Cramton & Paul D. Carrington eds., Carolina Academic Press 2006) (including in addition to the text of the proposed Act numerous ideas for reform advanced by those commenting on the proposal).

41. Posner, *supra* n. 11, at 35-39.

decided with correct regard for the rights of parties. Its staff of law clerks, sitting as its certiorari panel, plays a large role in the selection of the few cases it agrees to decide, so that the Justices provide a model for lower court judges opting to delegate their scutwork to staff, and to limit their own chores to those that are more fun.

While the editors of this second edition of *Appellate Courts* have devoted a brief chapter to the management of the Supreme Court, there is no reference to the scheme advanced by Meador, myself, and others in 2005, surely in part because the volume advancing that idea and numerous other proposals for reform had not been published when *Appellate Courts* went to press. But those teaching the course served by this book might do us the honor of considering the diverse proposals advanced in that volume. Also worthy of attention are two other recent books calling attention to the extraordinary and questionable role of the law clerks serving the Supreme Court Justices.⁴²

The editors of this new edition are of course fully aware of the impediments to reform. In their concluding remark, they do not neglect to quote Arthur Vanderbilt's chestnut that "judicial law reform is no sport for the short-winded." Given the present state of American politics, it will require acts of truly exceptional political courage to achieve even modest reforms to address the issues posed in this book. Might there be legislators willing and able to forsake the tasks of fund raising and securing earmarks long enough to address serious institutional problems of constitutional importance? Perhaps the best hope for reformers is a Supreme Court that continues to write lawmaking opinions evoking the sort of public rage that benign reforms might be expected to ease. Only time will tell.

42. Todd C. Peppers, *Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk* (Stanford L. & Pol. 2006); Artemus Ward & David L. Weiden, *Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court* (N.Y.U. Press 2006).

