Education and Training Series

Consumers of Justice: How the Public Views the Federal Judicial Process

CONSUMERS OF JUSTICE: HOW THE PUBLIC VIEWS THE FEDERAL JUDICIAL PROCESS

By Daniel J. Meador
Professor of Law, University of Virginia

Presented at a Seminar for Federal Appellate Judges
Sponsored by the Federal Judicial Center
March 11-14, 1975

FJC-ETS-77-6

There is a preliminary difficulty about this subject: who is a consumer of federal appellate justice? We could agree that the lawyers, the litigants, and the federal district judges are all important consumers. Judge Griffin Bell suggested a moment ago that there might be a challenge to my standing as a consumer, and he may have a point, although I think the academics are clearly among the consumers: they live with your products; they digest them in great quantity. In fact, they are not only your consumers, they are also your interpreters and your critics. Then, too, we have the general public and the newspapers. Indeed, I concluded that a consumer of federal appellate justice is anybody who reads, uses, or is affected by what you do, which is to say, in short, almost everybody, including those yet unborn, because the generations to come will have to reckon with what you do now, for better or worse. I suppose I can represent that class, as well as the others.

The fact is, however, that I cannot really represent any of these; they do not agree with each other. Lincoln said that the sheep and the wolf do not have

the same definition of liberty. So, I assume that plaintiffs and defendants, prisoners and prosecutors, American Civil Liberties Unions, Chambers of Commerce, and so on, do not all agree about what you do or should do. Thus I can do no more than present one interested observer's view of your work, comments tinctured heavily by what I perceive others to be thinking about what you have been doing in recent years.

A temptation here is simply to toss well-deserved bouquets; the United States Courts of Appeals has many fine qualities. In many respects, they are better and stronger than ever. But I assume that you are interested in hearing more about the troubled concerns of outsiders. In discussing these, I will try to exercise a candor at least equal to my respect for the federal judiciary. In talking about what outsiders think about the federal courts, I hope I do not step on many toes. A friend of mine once said, when he came back from a meeting, that "those people in there certainly have large toes and thin shoes." I hope that is not the case here. In any event, any stepping on toes that occurs is inadvertent; my interest is only in trying to say something that may be helpful.

The American public, at the moment, seems to be ambivalent about the federal courts. In the afterglow of Watergate, many applaud the courts as the defenders of the Constitution. At the same time, however, there is a distrust of all officialdom that has risen to new heights, and this spills over onto the judiciary. So, despite the high marks that the courts get in Watergate, there are, I think, apprehensions abroad in the land.

Consider, for example, the surprising number of recently-published books, designed for the popular market, which are sharply critical of the federal judiciary. I was rather surprised to find that in 1974, there were four of these books that appeared on newsstands across the country: Judges, by Donald Dale Jackson; The Bench Warmers, by Joseph C. Goulden; The Appearance of Justice, by John McKenzie; and Judging the Judges, by David Stein. In the year before, we had Why Justice Fails, by Whitney North Seymour, Jr. A few years earlier, we had The Corrupt Judge, by Joseph Borkin. I believe strongly that judges should know what people are saying about them. So, however distasteful it may be to you to read these books, or however

little or much merit they may have, I suggest they are worth some attention. Some of them contain strident, almost emotional, passages (we are apt to disagree with a number of conclusions and proposed remedies), yet these books do contain facts that are documented and some facts that I find fairly damning.

We can, of course, dismiss a lot of this by saying that the judges who misbehave or act with impropriety are a tiny percentage; the majority of judges are persons of ability and integrity. That is true. Yet I think to rest on that proposition would be to miss the significance of these books. These books are significant because they both reflect and contribute to a public hostility, a public attitude. They reenforce a latent, and sometimes overt, public hostility to the judiciary. This unfavorable attitude, I think was in part responsible for the unfortunate refusal over the past several years of Congress to enact the judicial pay raises. A continued drumbeat of strongly critical publications like these could contribute significantly to an erosion of public respect for the judiciary. My point about these books is simply that we need to read them, to pay attention to what they are saying,

and if there is any merit to their criticism, let us be sure that the problems are addressed.

We have been reminded several times today that the federal judiciary is an anomaly in a democratic society--a non-elected group, not holding office for terms of years--and that its survival and effectiveness depend ultimately on the approval of the American public. This I believe to be so. I further think that there is a vast reservoir of support throughout the country for the judiciary, but it is not unlimited. It is not inexhaustible. Sir Kenneth Clark, in his work on civilization, says that disillusion and cynicism can destroy our institutions as effectively as bombs.

While brooding about all this, I came across a statement in an opinion by Judge Aldisert that gave me an inspiration for a theme covering a number of matters. This was a happy coincidence, since he had gotten me into this business. The statement says this:

> Judges in a free society regard even the appearance of a biased decision as more harmful than a result they personally disapprove. Lord Herschell's remark to Sir George Jessell comes to mind:

> 'Important as it was that people should get justice, it was even more important that they should be made to feel and see that they are getting it.'[1]

That quotation expresses the notion, deeply embedded in English law, and inherited by us, that it is not enough that justice in fact be done; it must also be seen to be done. As Justice Frankfurter put it, "Justice must satisfy the appearance of justice."[2] It is difficult for any of us, as a human matter, to see ourselves as others see us. This is a shortcoming among law faculties, I might add, where, apart from the federal judiciary, we have probably the highest independence and security of any group in our country. The ramifications of this notion about the appearance of justice have not been sufficiently appreciated.

Appearance, however, is only one element in the administration of justice in the courts. Another is the actuality or the reality of justice. And still another is the ideal of justice. The ideal is not hard to state. The American public would like a court system that hears and decides cases fairly and efficiently and is manned by judges who are intelligent,

---

[1]Helfant v. Kugler, 500 F.2d 1188, 1197 (3d Cir. 1974).

[2]Offutt v. U.S., 348 U.S. 11, 14 (1954).

fair, knowledgeable in the law, incorruptible, and so on. A large source of unease about the courts, in my judgment, comes from nothing more than the simple fact that our judges are human beings and hence fallible. Thus, in one degree or another, they fall short of the ideal, and thus the justice that they administer falls short of the ideal. We recognize that. But nevertheless, we need to keep before us the ideal as the model to which we always seek to conform the reality and the appearance. Reconciling reality and appearance is a theme I would like to elaborate on a bit in relation to some aspects of your day-to-day work.

One aspect concerns some of the internal processes being employed now--the ways and means by which appellate judges reach decisions. The appearance of justice is suffering in some appellate courts because of novel internal practices adopted in recent years to meet the large increase in caseloads. Screening has come on the scene, and this brings with it a differentiation of decisional processes. Some appeals are being decided without oral argument, without conference, and without a signed opinion. Staff attorneys are being employed to assist in screening and opinion writing.

These internal innovations are largely shielded from the view of the outer world. Apprehensions have arisen. Doubts exist about the treatment that appeals are getting. Although some efforts have been made to explain these new practices, there is still a good deal of mystery about how some appellate courts are operating. Lawyers often have the erroneous impression that cases are being decided by staff lawyers, and that judges are giving insufficient attention to their business. In other words, the appearance is that justice is being shortchanged.

The reality, though, is that these innovations are mostly sound and sensible. They are constructive responses by the judges to new circumstances. Much has been written and said about this in recent times, and I am not going into details, except to say that it is unlikely, in most situations, that the quality of justice in fact suffers. Nevertheless, if this is not so perceived, justice is impaired. As John McKenzie put it in the closing lines of his book, "The appearance of justice is an indispensible element of justice itself."[1]

---

[1]McKenzie, The Appearance of Justice 241 (1974).

Another writer said it this way: "Unless justice is seen, it is not justice. The medium is the message."[1] Thus, we need to take steps to bring the appearance in line with the reality--the reality, I hope, being that these new procedures do in fact accord a sound measure of justice to all appellate litigants.

The remedy for this, I suggest, is to make known publicly all of these internal procedures, and to maintain them in a more open and visible manner. There should be no mystery as to how you are operating. The Third Circuit has made an excellent move in that direction, with the publication of a little booklet entitled Internal Operating Procedures. Every appellate court would do well to disseminate its internal practices in a publication of this sort. The Commission on the Revision of the Federal Appellate Court System--the so-called Hruska Commission--is recommending that all circuits do this.

Another discrepancy between reality and appearance has developed through the practice of some courts of giving only a cryptic statement of results rather than an explanation. Here is a recent example. "Upon consideration of the record, the briefs, and oral

---

[1]Berman, The Interaction of Law and Religion 32 (1974).

argument, we find no merit in this appeal. Affirmed." It seems to me that lawyers and litigants--your most immediate consumers--are entitled to a bit more than that. At a minimum, they should be assured that the court knew what the issues were, and they should have some indication of why the court ruled against them. The reality here may be that the judges perfectly well understood the issues and soundly analyzed them under the law. Yet without a statement of reasons, there will be suspicions otherwise. In other words, the appearance of justice will suffer. A few sentences in many of the routine and simple cases would be quite adequate for this purpose.

At the other end of this spectrum is the often-heard complaint that judges are writing too much, opinions are too long, footnotes are too numerous, and publication is overdone. While that does not adversely affect the appearance of justice, it is a concern among your consumers. While I tend to share the complaint, I am favorably impressed with the substantial number of opinions in recent volumes of the Federal Reporter that are relatively short. But 507 volumes of F.2d are awesome testimony to the outpouring of written words.

Too much is being published. The short per curiams that are being used now with increasing frequency--and soundly so--do not need to be published in most cases. In short, while I urge against underwriting, I also urge against overwriting and overpublishing.

Another suggestion to reconcile appearance and reality is that each appellate court should create an advisory committee on its internal decisional processes. The committee should be composed of lawyers, trial judges, law professors, and appellate judges. The model for this is the typical rules advisory committee. This committee could be a source of good ideas for improved procedures. But, more important, perhaps it would serve to inform the consumers about how the court is actually functioning. It would help you answer the question, how do we appear? The Hruska Commission, I am happy to say, is also recommending this idea.

I turn now to an entirely different aspect of appearance and reality--one that might not be thought of in that light at all. And yet it affects the appearance of justice in a fundamental way. This is the present state of affairs concerning retirement and removal of federal judges. The wisdom of the Constitution framers is nowhere better demonstrated than in that

provision that guarantees tenure against political interruption. And yet that arrangement makes it especially important that we give attention to a rational system for retirement and removal. The public cannot understand why there cannot be an effective means of getting off the bench those who are disabled or who act improperly. Nor can the public understand why a judge cannot be retired for age like almost everybody else in our society except elected officials. I have heard comments to that effect from a great variety of sources; and often with vehemence--from businessmen, teachers, workers, taxi drivers, what have you. Their questions are hard to answer.

The existing system saddles the federal courts with a burden that they should not have to bear, and one that can be alleviated. It damages the image of the judiciary and of justice. The present lack of means for dealing with this problem is not necessary to the independence of the judiciary. I was delighted to read in the newspaper over the weekend that the Judicial Conference of the United States has taken a step in this direction and that it supports in principle a mechanism other than impeachment for removal of judges. My suggestion is that the public image of

the judiciary would be significantly increased if all federal judges would affirmatively and publicly support measures to this end. This would do much to reassure the public that we do not have simply a self-interested trade union. There is a public thirst for increasing accountability in all government offices. A move by the federal judges themselves would fit in with that public desire.

Turning now in a different direction, I offer a few thoughts that relate to some of the discussion earlier today on the appropriate role of the federal courts. In the formal structure of the federal judiciary, you sit on intermediate courts. Yet the reality is that increasingly, the United States Courts of Appeals are, in effect, courts of last resort--each for the circuit in which it sits. This comes about because the volume of cases is such that the Supreme Court reviews drastically fewer of your decisions than it did; this is down to something like one percent now. In other words, the volume of business at the top has outstripped the capacity of a single nine-judge court. Some years ago, we had eleven horses, all harnessed together under the tight control of a single driver with reins firmly in hand. What has happened, as I see it,

is that the harnesses have been loosened, the reins are limp, and the eleven horses are no longer under tight control. This may have a subtle, unsuspected effect on the attitudes of the intermediate appellate judges. The absence of tight restraint from above may have created a situation more conducive to the so-called "free wheeling" about which we have heard today. This situation might be remedied if Congress acts on the Hruska Commission idea of a new national court. But it is likely to be some years before that comes about. In the meantime, you are going to sit, in a very high percentage of cases, as the court of last resort. Looked at in that light, your job becomes even more awesome than it was before.

It has been said that the American doctrine of judicial review is workable only because we have in this country, or at least have had, a generally shared common core of assumptions and beliefs about such fundamental matters as the nature of man and his relation to government. The one great rupture was the Civil War. Otherwise, we have not been driven by radically conflicting ideologies that have afflicted some other countries. The Declaration of Independence, for example, embodies these concepts. Much of the common core of our values was

derived through the centuries, from Judaism and Christianity. The roots of our civilization run back over the centuries into those two great religions.

In a national community of that sort, courts can function acceptably in the common law tradition, even on ultimate constitutional issues. In filling the interstices in the common law sytle--"legislating in the gaps"--however large or small those gaps may be, the judges give voice to the shared values of the community. The system assumes that there are, in fact, common values which judges know or can ascertain. If that is the situation, and the judges perform well and conscientiously, the decisions are acceptable to the public because they accord with the public sense of what is right and proper.

The problem now is that these historic conditions seem to be changing and may change even more. This puts the courts in a more difficult position. And it puts in a somewhat different light this ongoing debate about their appropriate role. Evidence is fairly plentiful that there is an erosion in the sense of community and in this common core of values that have sustained our national life. Everyone can get up his own list.

The signs can be seen in the disintegration of the ciites; crime; rising divorce rate; apprehensions over security of person and property; drug problems; aimlessness among youth; corruption in high places; and conflicts along economic, racial, and sexual lines. If the center won't hold, to use Yeats's expression, and if the common values break down, how can the courts hope to articulate widely shared values in the common law fashion and to resolve disputes in a way that will be broadly accepted? This seems to me to be a central difficulty in the years ahead, especially since you are acting in effect as a supreme court. However, I hope that this diagnosis of the condition of society is overly pessimistic.

Professor Harold Berman of the Harvard Law School has recently written a thought-provoking little book called The Interaction of Law and Religion. This book is well worth reading, although I have difficulty with his definition of religion. He perceives a disillusionment with formal law and formal religion. He thinks that this is:

> symptomatic of a deeper loss of confidence in fundamental religious and legal values, a decline of belief in and commitment to any kind of transcendent reality that gives

> life meaning, and a decline of belief in and commitment to any structures and processes that provide social order and social justice.[1]

Berman goes on to contend:

> that the crisis of confidence in law which we are now experiencing in America and elsewhere can only be met and resolved if we recognize that law is not only a matter of social utility but also and fundamentally a part of the ultimate meaning and purpose of life, a matter involving man's whole being including not only his reason and will but also his emotions and his faith.[2]

Somewhere I saw a statement that struck a similar note, that today we are a "cut-flower civilization." I thought that was a splendid metaphor. What was meant was that though we still show the full bloom of Western civilization, this will wither and die because contemporary society has been cut off from its Judeo-Christian roots.

Now what does all of this have to do with your work as federal appellate judges? Here I can only offer some tentative thoughts. First, despite whatever fragmenting and breaking down of values we have, the federal judiciary is still in the best position of any other entity or group to continue to articulate in a meaningful way, through decisions of cases, those fundamental

---

[1] Ibid., 23.

[2] Ibid., 77.

values that do lie around the heart and soul of the American experience. Through doing this, perhaps the courts may be able, to some degree, to contribute to preventing a further erosion of these values. I hasten to add, however, that it will not be easy to perceive these values and to gauge their applicability in the kinds of controversies likely to be coming before the courts.

Of course, the courts alone cannot save society. Learned Hand and others have said that long ago. Courts alone cannot alter conduct and beliefs among 200,000,000 people. But they can play a part.

In these circumstances, more than ever, federal judges need to be men and women who have a deep understanding of history and of contemporary American life. This brings up something I have not mentioned, and that is the selection process. That is obviously crucial. I pass it by, however, because I assume that in this group, everyone thinks the selection process has worked exceedingly well--at least in one instance. So passing that by, what we need to think about is what we can do, for those who do come on the bench--however they get there--and for those already on the bench, to give them a better understanding of these matters.

This seminar is a splendid move. I have long thought that seminars, focused like this on the substance of the judicial process, are the sorts of discussions judges ought to have. Now, to go one step further, in light of the difficulties I have mentioned, I would like to suggest that the Federal Judicial Center consider sponsoring seminars for federal appellate judges focused on such things as the origin and development of fundamental values of Western civilization, expecially as they have been understood in the United States. The faculty for that kind of seminar could be composed of historians, theologians, philosophers, and others from the humanities--probably no lawyers. It is no disrespect to say that because most federal appellate judges--and all other judges--are in a busy professional life, they have had little time to read and reflect deeply on these matters.

Another kind of seminar along a similar line might deal with the relationship of these fundamental values to current and future social problems. Here a faculty might be drawn from the social sciences as well as from the humanities. After all, if the federal judges are to serve, at least in part, as the preservers

and interpreters of these values in contemporary life, it is vitally important, it seems to me, that they know and understand what these values are and where they came from.

The social changes that seem to threaten the traditional values put into a new light the question that has cropped up throughout the day about the proper scope of the concept of "cases and controversies," justiciability, and related doctrines. Will it become, for example, evermore important in a fractured society for courts to avoid getting embroiled in volatile disputes? We have been counselled many times about this; we have been told that the courts can maintain their effectiveness only by staying out of highly-politicized controversies. If, in a particular case, there is no commonly accepted value that can be applied, a decision by a court on any basis is likely to generate divisiveness and to suck the courts into damaging political fights. It may be that leaving certain disputes to be fought out in other arenas may be even wiser than in the past.

On the other hand, as was made clear this morning, there are strong tendencies in a different direction, tendencies of courts to act increasingly in a legislative

fashion, laying down broad prescriptions beyond the necessities of the case, making law wholesale and not retail. My favorite examples of this, by the way, are the 1973 abortion decisions.[1]

The proper scope of the judicial function must be evaluated anew in light of the times we live in. An article by a faculty colleague of mine might provide you with some additional food for thought. It is by Professor Ted White and is on the subject of "The Evolution of Reasoned Elaboration."[2] He traces the rise and fall of legal realism and the advent of the so-called reasoned elaboration; then he argues that neither of those jurisprudential approaches is wholly adequate for the 1970s and that we have an evolving and more useful set of jurisprudential techniques that draws on both of those.

A withdrawal from judicial legislation could come about, and would come about more easily, if, as some people predict, we are going to have a resurgence of activity by the legislative branch. The more comprehensive and up-to-date our legislation is, the less the

---

[1]Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973).

[2]59 Va. L. Rev. 279 (1973).

pressure on the courts to legislate. If we take a more optimistic view of society than some of my earlier comments indicate, we may have not a death or destruction of all the traditional values, but rather a regeneration and reformulation. There are evidences, I think, of that going on. If that occurs, we may have a newly-emerging consensus that may be reflected in a lot of new legislation. In that event, the courts might find themselves under pressure not to legislate but to invalidate legislation. By that time we would have come full circle to the 1930s. One message I got from Dean Griswold this morning, with which I hope we all might agree, and which is appropriate to bear in mind whatever the future brings, is that the judges themselves, like everyone else, are under the law and not above it or outside of it. All of this, to get back to one of my earlier points, takes on added significance for you, given our present lack of adequate control at the top of the federal judicial pyramid.

Let me say in closing, and by way of pulling together these thoughts, that on behalf of all of your consumers, living and yet unborn, I would like to express the hope--and I might say the confidence--that you will

work and strive mightily toward adjusting reality and appearance in appellate justice. I view that as vitally important. And I also wish to express the hope and confidence that you will not get cut off from our roots.

END