Marquette Law Review

Volume 48
Issue 4 *Spring 1965*

Article 1

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Supreme Court of the United States

MARQUETTE LAW REVIEW

Vol. 48 SPRING, 1965 No. 4

THE UNITED STATES SUPREME COURT: REFLECTIONS PAST AND PRESENT*

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It is a pleasure indeed to participate in this your annual reunion. It's the greater pleasure because of the opportunity it affords me to see again some old friends of your distinguished state and federal judiciaries. Chief Justice Currie and Justices Fairchild, Hallows, Gordon, and I have been students together at the appellate judges seminars at New York University. I, too, of course have had the honor of service in state courts including my own state's supreme court. And I am now well through my ninth term in Washington. My own personal reaction upon moving from Trenton to Washington was one of considerable astonishment at learning how different the work of the two courts really is. The work of each has a character, a difficulty, and a complexity of its own, and none of these has its exact counterpart in the other. But I was not alone in discovering that my state court experience hardly prepared me for what was to come. When Justice Holmes came to the Court from the Supreme Judicial Court of Massachusetts he wrote Pollock that he found it to be "an adventure into the unknown," and when Justice Cardozo came from the New York Court of Appeals, he said: "Whether the new field of usefulness is greater, I don't know. Perhaps the larger opportunity was where I have been." But I don't think this gracious annual event is the occasion for too solemn a discourse. So tonight I'll not attempt anything very serious but only look through the binoculars of history at some sidelights of the Court.

For example, not every appointee to the Court has prized the honor above all else. John Quincy Adams was nominated to the Court and confirmed while on a delicate diplomatic mission to Russia. He rejected the appointment out of hand—apparently thinking it either an insult or a devious way of bringing him home—and returned to haggling with the Czar. So you see there is nothing new—from our beginnings getting tough with Russian dictators has been a good way to get to the

*A speech delivered at the Marquette University Law Banquet, February 25, 1965.

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White House. All in all, there have been twenty-four nominees to the Court who for one reason or another did not sit. Roscoe Conkling, for one, found New York politics more attractive and declined the office after his nomination was confirmed in 1882. Stanton, Lincoln's Secretary of War, was nominated and confirmed in 1869 but died four days later. Perhaps the most curious case was that of the last chancellor of New York during the 1840's. It's often said the presence of a particular person or personality at a certain time in history has brought about important judicial reforms. The story of the chancellor who would be a Justice is a case in point. He was twice nominated by President Tyler but both times rejected by the Senate. His rejection was puzzling at first because every prominent leader of the New York bar had strongly endorsed the nomination. But the reason at length came to light. One of the prominent New York lawyers wrote his senator urging the confirmation. He told the senator that all of the New York bar "are anxious to get rid of a querulous, disagreeable, unpopular Chancellor." Though the man was mild enough in private, on the bench he was highly unconventional and frequently harassed counsel with pointed interrogation and biting sarcasm. Having failed to elevate him out of the state, the New York bar resorted in desperation to a more drastic remedy. They induced the New York legislature to abolish the position of chancellor, thus, you see, achieving a notable judicial reform for quite unjudicial purposes.

Of course, you know, I'm sure, that there have been Justices who found other pastures greener after taking their seats. The first Chief Justice, John Jay, was absent in Great Britain as Washington's special envoy when he was elected Governor of New York. This opportunity so pleased him that upon his return he promptly resigned as Chief Justice. His colleague, Associate Justice Rutledge, had quit earlier for what seemed to him the more desirable post of chief justice of South Carolina. Rutledge was given a recess appointment as Jay's successor as Chief Justice of the United States but, when the Senate convened, it rejected his nomination within minutes after its submission. From that episode aroses a conundrum: Is Earl Warren the thirteenth or the fourteenth Chief Justice? I have heard it said that Chief Justice Vinson believed that Rutledge was not in the line of Chief Justices and that he, Vinson, was therefore the twelfth Chief Justice. The present Chief Justice believes that Rutledge was in the line of Chief Justices and that he, Warren, is the fourteenth Chief Justice. At the John Marshall celebration at William and Mary a few years ago, held after the decision in *Brown v. Board of Education*,[1] Chief Justice Warren was the speaker and Virginia's state officials stayed away almost to a man. The program for that event lists thirteen, not fourteen, Chief Justices.

[1] 349 U.S. 294 (1955).

Chief Justice Warren has wondered whether this was because William and Mary doesn't recognize Rutledge's claim or because they don't recognize his. Or perhaps, like the hotel that has no thirteenth floor, there has just never been a thirteenth Chief Justice.

But to get back—did you know that President Monroe, after Justice William Johnson had sat several years on the Court, offered Johnson, by way of reward for conspicuous service, the lucrative position of customs collector in any major port of Johnson's choice? Did you know, too, that one Justice saw nothing improper in remaining on the Court while he waged a vigorous, although unsuccessful, campaign for the governorship of New York against Martin Van Buren? At least those Justices who ran for the Presidency—Justice Davis in 1877 and Justice Hughes in 1916—resigned before campaigning.

The popular interest these days in everything the Court does is a far cry from the almost complete disinterest shown in its beginnings. Believe me there's a difference in the climate between Trenton and Washington. The winds of criticism and controversy that swirl around the Court in Washington are generally of a higher velocity than those blowing in state capitals—and the temperature is hotter. But the Court's beginnings hardly forecast what was to come. The Court truly had a hard time getting under way. Its history began in New York in the old Produce Mart, called the Exchange, at the corner of Broad and Wall Streets. There the first Court shared quarters with the New York legislature in a building also used at odd hours as an off-Broadway theatre, an exhibition hall, a coffee house, and a market for cut-rate imported goods. Indeed, I am not sure that the recently discarded tradition of starting Court sessions at noon didn't have its origin then, for the New York Assembly met in the morning and the Justices had to bide their time until the distinguished legislators recessed for lunch. Actually, though, it didn't make too much difference. First of all there was trouble getting the whole Court to New York for that session. One of the Justices never did show up. He doubled in brass as the Chief Justice of the Maryland Court of Appeals and those duties detained him until after the end of the Supreme Court's first term. It is said though that he duly submitted a voucher for his salary.

But then it was, of course, a Court without any business to do. There might have been a few cases had anyone remembered earlier to appoint a Clerk. Without a Clerk there was no one to issue a writ of error or a subpoena, so no lawyer quite knew how to get a case before the Court. The legal business of most of that term was principally the admission of attorneys to practice. And I must say that there are mornings in our Court today when happily the number of admissions reminds us that the emphasis of the Court's work has not completely changed.

Our housing, though, has changed indeed. The Marble Palace, if I may borrow John Frank's somewhat irreverent phrase, is a long step from the Produce Mart. And indeed a long step from the Court's housing for most of its first half century. Eventually the Government moved from New York to Philadelphia, a "thoroughly dissipated metropolis," in the view of one Boston lawyer. When the Court left New York, its claim to the use of the hall of the Exchange passed into the hands of a budding young political group, the Society of Saint Tammany. While in Philadelphia, the Justices fared a bit better, thanks to the generosity of the Pennsylvania Supreme Court, which made its courtroom available for this purpose for several years. The Pennsylvania chief justice had a curious habit. He always wore his hat while on the bench. But those were the uncomplicated days before *Erie R.R. v. Tompkins*[2] and John Jay apparently felt no obligation to follow the local practice.

When the Government moved to the swamps of the Potomac its energies were given entirely to finding a suitable home for the President and spacious halls for the Congress. Nobody, but absolutely nobody, thought about housing for the Court. Eventually, by diligent pressures the Justices managed a Senate committee lounge in the magnificent new Capitol. It was a room all of 24 by 30 feet, destined in time to become the Clerk's file room. But in short the Senate dislodged the Court even from that modest room. It was given an old library in the House Wing, but the library was not heated and the bone-weary Justices doubtless with relief transferred their sessions to a tavern, Long's Tavern in Carroll Row. They moved back to the Capitol when more suitable quarters became available and occupied space which in time became the Law Library. However, they were forced again to go to a tavern, this time Bell's Tavern, when the British burned the Capitol. With a genius for understatement the senator from New Hampshire wrote the senator from New York that this second tavern was "uncomfortable and unfit for the purpose for which it was used. It was the house of Bailey, a reformed gambler from Virginia, who has taken and fitted it up for a tavern." Eventually the old Senate Chamber was converted into the fine courtroom occupied by the Court for so many years until the completion of our magnificent building in 1935.

There was a time when people used to refer to "the color line of the court"—though I hasten to say the reference had nothing to do with segregation. The mention was of the time when Justices Gray, Brown, and White sat in a row. These three Justices were long retired when that expression gave rise to an atrocious pun. At a dinner party attended by Chief Justice Hughes mention was made of the

[2] 304 U.S. 64 (1938).

color line and that those who had made it up no longer sat on the Court. This provoked from some wag, the awful pun: "Of course not, the Court is all Hughes now."

A few weeks ago I had a visit from a candidate for a master's degree who was writing a paper on the reaction of the Supreme Court to public disapproval of certain decisions. He said that he was not having much success in finding helpful, or any, materials on that subject and thought he'd like to inquire directly of Justices whose opinions for the Court were sometimes greeted with more disdain than acclaim. I don't know why I should have been the one he chose to speak to first, but there it is. I couldn't help him very much.

Almost every decision is disapproved by somebody. The American habit of framing controversial political, social, and economic problems as law suits for ultimate decision by the Court must inevitably mean that our resolution of the controversy must always disappoint proponents of the losing side. Indeed, I think that in the nature of things we should be uneasy only when there is no criticism. Certainly the profession would not be discharging its responsibility if it failed vigorously, though I hope objectively, to voice felt criticism of the Court's work. All of us are regular readers of law reviews because of the help we get from the painstaking, thoughtful, critical writing they often provide. Even the best of criticism—which is often the best precisely because it is the most telling and the most pungent—sometimes disturbs me. But if I need solace when that happens, I can always go back and read that delightfully extravagant sentence in the letter to the editor of Look Magazine: "Justice Brennan appears to be the only American in high government with whom I cannot find one iota of fault."

But, I repeat, our American tradition of framing as law suits social, political, and economic problems which disturb and divide our society must inevitably produce decisions upon which all will not agree. The disappointed will, and should, express their dissatisfaction as they see it. But, happily, not all go about it in the way one disappointed citizen told Justice Field what he thought of an opinion he had written for the Court. One day a harmless looking box addressed to the Justice arrived at the Court. Somehow the Justice's suspicions were aroused and he had his law clerk take the box outside the building with instructions to open it after dousing it in water. Evidently law clerks did more than legal research in those days. Sure enough, when the box was opened it was found to contain a potent homemade explosive. And affixed inside the lid where it would surely have been seen just before the explosive went off was a copy of Justice Field's opinion.

Many people ask whether the Court's workload is growing unmanageable. Well, I am in my ninth term of the Court. In my first term the docket was some 2,050 cases. Last term the docket was 2,770 cases,

an increase of some 36 per cent. So it has been said it's only reasonable to conclude that the Court is overworked and can't give adequate consideration to the decision even of the 150-odd cases we decide by written opinion after argument. For while the docket is more crowded, the percentage of cases taken has remained fairly constant, in the neighborhood of 7 per cent. While the conclusion that we are over-burdened may seem to follow as a matter of mathematics, I say with all respect that those who draw that conclusion are not fully informed about the Court and the way it must function. Justice Douglas has answered this argument at length and I could add little to what he has already said on the question.

What I would like to consider for a moment though is a question which has not had much attention from those who think we are overburdened. That is the question of what might be done even if it were perfectly clear that the size of our docket is a problem. What are the remedies? I have grave doubt whether increasing the size of the Court would be an answer. At the very least an increase in the membership would substitute new problems for old ones and perhaps aggravate rather than relieve the problem. For a Court which may not sit in panels, nine seems to me to be about the maximum number. I have also sat on three- and seven-judge appellate courts and have learned that size can affect administration. I think that nine is probably just about right. Perhaps, it has been suggested, we should take fewer cases for plenary consideration each term. But, as it is, we take no more cases now than did our predecessors in the twenties; indeed, in most years, the number in which certiorari is granted or jurisdiction noted tends to be smaller than thirty or forty years ago—and in consequence the length of each full opinion tends to be somewhat greater. In addition, there are certain areas in which the protection of vital federal interests demands that we take a certain number of cases each year, even though our docket may sometimes seem to be overbalanced in particular areas. For us to avoid these areas just because we cannot always fashion new principles of law or resolve important new federal questions would, it seems to me, be hiding our heads in the sands of irresponsibility. So that is not the answer.

Indeed, it does seem to me that whatever answer there can be to whatever problem exists—and I do not think this is a source of very great concern—lies in the controlled and thoughtful use of our discretionary review by way of certiorari. The answer is not in having more Justices, or granting more petitions, or writing shorter opinions, but in picking among the thousands of cases which are brought to us each year in order to distill from the mass the purest essence of judicial problems which cry out for decision. That is precisely what we are trying to do. And if there is a problem, it seems to me chiefly to be

that our judgment as to the worth of each case, as it is presented on petition for certiorari or appeal in often sketchy and inadequate form, is not always perfect. Even the judgment of hindsight is not perfect, and we are always handicapped by the exigencies of foresight.

As things stand, the expanded use of the summary calendar, that is, the calendar allowing only one-half hour to each side for oral argument, has proved very helpful. Indeed, over 60 per cent of the argued cases for this term are on the summary calendar. Written opinions in about one-third of the cases are handed down in about five weeks and another third within ten weeks and the rest in from ten to thirty weeks. But I also think that there are other remedies for shrinking the calendar that we might consider. Surely one candidate for revision is the statute governing direct appeal from the district courts. Our American tradition has always been that a losing litigant should have at least one appeal of right to some court. But antitrust cases, particularly those tried before a single judge, appealable under the Expediting Act[3] directly to us often require consideration of very extensive records. Trials of six months, nine months, or even a year in such cases are becoming increasingly the rule rather than the exception. It was not contemplated that our Court would ordinarily review fact findings. But cases of this kind often require that kind of review at least as a preliminary to the legal issues. This function could more properly and perhaps be better done by the court of appeals. Even if the number of such cases is small, the time required for their consideration is disproportionately large. The routing of such cases through the court of appeals seems not only appropriate but indeed necessary.

Measurable relief in another area may be more difficult. There has been an enormous increase in seven years in applications of both state and federal prisoners claiming that their convictions were obtained in violation of federally secured rights. It is not only that the applications themselves are often difficult to follow or decipher—most of them, of course, are prepared without assistance of counsel. The more serious difficulty arises from the fact that the courts below, particularly state courts, have disposed of the matters without opinions or any indication of the basis for the disposition. If it's a state case, we are thus unable to know whether the decision rests squarely on a determination of the federal claim, or wholly or partly on an adequate state ground. In consequence, we often have no alternative but to take what may prove on argument to be a wholly unfounded application or send it to federal habeas corpus. I think not only that our burden would be eased but the values of federalism be much better served if state courts would be less preoccupied with insubstantial procedural defaults, and come to grips with these federal constitutional claims, hold

[3] 32 Stat. 823 (1903), 15 U.S.C. §29 (1958).

hearings, and dispose of them on the merits. If that happened, many of these cases would never come to us and such as did we'd be able more promptly to decide. Perhaps our recent decisions in *Fay v. Noia*[4] and *Townsend v. Sain*[5] will give some impetus to the states to inaugurate such reforms.

Sometimes—especially around this time of year when our workload is heaviest—I think a bit enviously about those four Justices who sat through the spring of 1790 waiting for the cases that never came. Theirs was a vital, if easy, task, serving appropriately the needs of a new nation. We could not, even if we wanted to, be the Court of the 1790's or even of the 1920's. The pace at which the courts of the United States move today, and the amount of business they handle every year, are simply responsive to the radically different social, political, and economic demands of the 1960's. And the Court has changed no less than the other branches of Government. Yet, for all that the institution, its prestige, and its work have changed, something of the spirit of Marshall and Story and Taney, of Holmes and Brandeis and Hughes, is very much with us and will remain with our successors. Men come and go, principles of law alter and develop, but the essence of an institution survives intact.

[4] 372 U.S. 391 (1963).
[5] 372 U.S. 293 (1963).