Washington University Law Review

Volume 1961 | Issue 2

January 1961

Some Reflections on the Judicial Function at the Appellate Level

Harold R. Medina

SOME REFLECTIONS ON THE JUDICIAL FUNCTION AT THE APPELLATE LEVEL

HAROLD R. MEDINA†

The Tyrrell Williams Memorial Lectureship was established in the School of Law of Washington University by alumni of the school in 1949, to honor the memory of a well-loved alumnus and faculty member whose connection with and service to the school extended over the period 1898-1947. This thirteenth annual lecture was delivered on March 22, 1961.

Ten years ago, and shortly before I took my seat beside my brothers of the United States Court of Appeals for the Second Circuit, I made a little speech at the annual dinner of the American Bar Association Section of Judicial Administration in honor of the Judiciary of the United States. The title of the address was "Some Reflections on the Judicial Function." When my old friend Jim Douglas asked me to come here today to address this distinguished gathering, he suggested that I pursue the same subject, and so I shall. But, since I thought it best to have a change of scene, we shall discuss the judicial function at the appellate level.

When I was at the Bar, and especially after a few years of experience as a United States District Judge, I thought I had a pretty good idea of how cases were decided at the appellate level. But, here again, I found I had a lot to learn; and something new pops up almost every day. That is one of the things that makes life interesting.

As on the former occasion above referred to, I shall use my surprises as the framework of some comments. As always, the theme is pleasure and profit, as taught by our old friend Horace almost two thousand years ago.

My first surprise came on the day I first sat in the Court of Appeals or very shortly thereafter. I was appointed to the court by President Truman in June, 1951, and it was not until November, 1953 that I could join my brothers of the Second Circuit, because I was tied up in a long antitrust case, and the opinion in that Investment Bankers' case was finally filed in late October. I could hardly wait to be up there on the bench listening to the arguments. So I read all the briefs and what we call appendices in the cases coming up for argument, and on the big day I marched up to the bench from the robing room

† Senior Circuit Judge, United States Court of Appeals, Second Circuit.

at the end of the procession, with a pile of briefs and appendices under my arm. To make matters worse, I asked a number of questions during the arguments. At the end of the session we returned to the robing room and one of the older judges said: "Trying to impress the populace, I see." That was shock number one. Surely a judge has the right to read the briefs and records in advance of the arguments, if he chooses to do so, and he has the right to ask questions, too!

But now I was part of a cooperative effort, something quite different from sitting alone as a trial judge. Little by little I came to realize what I should have known from the beginning, that the judges of an appellate court are just like everyone else, they differ one from another as do the leaves on the trees. And as they learn to live and work together, rub shoulders and have their spats and their happy times, each striving to find his own little place in the sun, adjustments are made, friendly intimacies and courtesies multiply and the law thrives mightily.

My whole professional life had been spent in courtrooms; controversy is the breath of life to me; the give and take of spirited colloquy between the lawyers and the judges stimulate my thinking processes. But some courts, as many here today can testify, go through whole sessions with no more than a question or two from the judges. Sometimes one of the judges seems to be talking all the time. I remember when I was at the bar I observed some of the judges on appellate courts reading the briefs or records during the oral arguments. And I have even heard judges say they can read a brief and listen to an oral argument at the same time, and understand what they are reading and what they are listening to.

The plain fact is that some men think faster than others, some read with incredible speed, some like to listen to oral arguments, some would prefer to have most cases submitted on briefs; and, *mirabile dictu,* some do not hear too well. Some are eager beavers and others would like to have a moment or two to themselves once in a while, to catch up with their reading, or play golf. I have a footnote here. It is a cardinal principle in every court, trial or appellate, to soak the eager beaver. It is a rule of general application and I approve of it. Indeed, how can it be otherwise? He gets what he is asking for.

Now, I have a suggestion. These differences in the personalities of appellate judges are like differences in points of view on life and things in general. An intellectual would say the judges have different philosophical outlooks. Naturally, some are more conservative than others, some like administrative duties, some are more interested than others in helping to make the law grow and adjust itself to chang-

ing times and mores. I rejoice in all this. Let us not be afraid to bring such differences out into the open, and discuss them. For these are the very qualities that make for the wise and just disposition of each particular case, and for the gradual and not too rapid expansion of the law. If only we have sincere, earnest judges, each dedicated to the task of having the cases decided the way he thinks they ought to be decided, all will be well. Let us not get too excited about the differences of opinion or the dissents. They are a sign of health and vigor.

Incidentally, here is another footnote: you may be interested to know that today in our court the cases are all set down for a day certain for argument, and most but not all of the judges read some part or all of the briefs and appendices before the arguments.

The second surprise I had was our memorandum system. I had supposed that we would follow what I had heard was the practice of other appellate courts, of having a conference of the judges after a week of hearing oral arguments, or perhaps even after each day of hearing arguments, followed by a vote on how each case was to be decided, and the assignment of the writing of the opinions to the various judges. On my first day, however, I was informed that before any conference, each judge is required to write a memorandum on each case, discussing the law points and giving his views, together with an indication of how he is going to vote on the case, for affirmance, reversal, modification or dismissal of the appeal. We sit in panels of three judges for a week at a time, Monday through Friday. Back in 1953 the conference was usually held on the Wednesday or Thursday following the Friday of the week of hearing arguments. Well, I could hardly believe we were required to prepare these memoranda. Why, I said to myself, all this extra work? Moreover, one was not supposed to look at the memoranda of the other judges as they came in, so that each works independently. Of course, we peek once in a while, but not often.

This memorandum system is a wonderful thing. It is the only possible way to make each judge work on every case, the only way to get the considered judgment of each of the three judges in every case. While there is not sufficient time to do a thorough job, especially on the long, complicated cases, the results on the whole are very good.

At the conference the cases are decided, or tentatively decided, and whoever is the presiding judge, according to seniority, assigns the writing of the opinions in the various cases. Whenever the Chief Judge sits, he presides, so he always assigns the opinions when he is sitting.

Here let me suggest a number of possibilities that may not have occurred to any of the lawyers here today. And I am now shifting

away from my court and speaking of appellate courts generally, whether or not they use the memorandum method or something equivalent to it. Indeed, I have been speaking generally all the while, except where I have made some specific reference to the Second Circuit.

One thing that I should never have imagined possible was that one of the judges was just waiting for a case to come up involving a certain proposition of law, and he had the opinion all written, even before the case was argued. I am informed that this was done occasionally by a certain famous Supreme Court Justice who has long since gone to his reward. Last year when I went to address the Annual Conference of Michigan Judges I was told of a case where one member of the supreme court of that state actually filed an opinion in a case that had not yet been argued.

Everyone recalls how Chief Justice Marshall in the early days wrote all those long opinions construing the Constitution. I wonder what the other Justices thought when he assigned the writing of those opinions to himself.

Only a few years ago Professor Alpheus T. Mason wrote his great biography, "Harlan Fiske Stone, Pillar of the Law." There was a great fuss over the fact that Professor Mason had drawn back the veil and disclosed how some of the learned justices reacted to the assignment of some of the opinions by the Chief Justice. What is this all about? I shall tell you. It is very interesting.

Some cases are as dull as dishwater. The facts are complicated, the opinions below either non-existent or not helpful, the briefs a mass of confusion. To make matters worse, these cases do not involve any legal principles of general interest; they do involve a monumental amount of labor, and they do not mean a thing, except to the parties and to the cause of justice in general.

By way of contrast, other cases involve issues of immediate, sometimes critical importance to the public at large. It is not strange that a particular judge should like to get one of these every now and then, especially if he has been writing dissents on the very subject and now the court is at last coming around to his point of view. Footnote: is the head of the court supposed to write the opinions in all the landmark cases?

Then there are cases in which for one reason or another a particular judge does not want to write. If Judge A has the reputation of being an outstanding liberal, it is unlikely he will relish writing an opinion affirming the conviction of a wayward member of a union or sustaining the ban of the censor on an allegedly obscene book or motion picture, even if he thinks the judgment below should be affirmed. The combinations and permutations of this theme are

legion. Moreover, the ultimate and definitive decision in a particular case may depend in no small measure on the judge to whom the writing of the opinion is assigned. Until the moment of filing, all votes are, and must be, tentative and subject to change.

Sometimes a case will be decided on a point not argued or even mentioned by counsel on either side of the case. And, in the course of practicing law and being a judge for almost fifty years, I have known one or two judges who were always on the alert for an opportunity to make the case turn on some law point that had been overlooked. More often than not this type of case involves legal principles of considerable importance but there is no money in it. As there is no money in it the opportunity to earn a good fee is conspicuous by its absence, and the result is that the lawyers do not really get their teeth into the case. What should the court do? Setting the case down for reargument has proved not to be a solution, at least such has been my experience. Perhaps this might work if the suggestion was made that the American Civil Liberties Union, the SEC, the American Arbitration Association or some similar group file a brief amicus curiae at the time of the reargument. But this does not appeal to me. It is almost sure to muddy the case up in one way or another. In one case of this type the appellant was a colored porter acting pro se, and it was clear that he did not have the remotest idea what the controlling questions of law were, and his adversaries, a railroad and a union, did not seem disposed to bring these questions into focus. What we did was to set the case down for reargument and assign counsel for the porter; even though it was not a criminal case. Should the Supreme Court in *Erie Railroad v. Tompkins* have warned counsel of what was coming? When all is said and done, and with due consideration for the pros and cons, the best course to pursue seems to be to go ahead and decide the case the way the court thinks it should be decided, and then wait to see what the lawyers turn up on a petition for rehearing. Incidentally, these petitions for rehearing are a nuisance; but the only thing to do is to study them with care in every instance and grant the rehearing or correct the original opinion, if something has been overlooked or some mistake has been made.

Another one of my surprises will further illustrate the operation of the judicial function at the appellate level. A bank robber named Puff had killed an FBI man. The circumstances were these: after a year or so of effort several FBI men closed in on Puff in a small New York hotel. Crouched in a corner by an open door, with his revolver in his hand, was an FBI agent looking toward the elevator on the lobby floor, as it was anticipated that Puff would come down in the elevator on his way out of the hotel. Instead, with a loaded revolver in each hand, the bank robber came down the stairway, quietly

slipped out behind the crouched FBI man and pumped eight slugs into him and killed him. The so-called defense was that the killing was in self-defense and that there was no premeditation. One of the points for reversal had to do with the admission over objection of a copy of the indictment of Puff in Kansas for the bank robbery. It was also argued that it was improper to prove that Puff had committed the separate crime of bank robbery. The three judges, of whom I was one, were arguing in conference. One was for reversal, the second for affirmance and the third just could not as yet make up his mind. So, to my amazement, the presiding judge assigned the writing of the opinion to the judge who could not yet make up his mind which way to vote. But this makes sense, doesn't it? That is the traditional way of handling such situations in the Second Circuit.

Then there are various ways of writing opinions. Learned Hand writes all his out in longhand. He will not even permit his law clerk to draft a paragraph here or there for his consideration. The work is all his own and it bears the unmistakable stamp of his style and his personality. After you have lived with a number of judges for a few years, you get to know their mannerisms, the way they express themselves, or the way they do not express themselves. For there must be judges who rely upon their law clerks at least to draft opinions in the first place; and then, after revision, perhaps by several hands, it may not be possible to identify the author. Indeed, as copies of speeches by judges are received in the mail from time to time, or appear in law reviews and bar journals, it is a fascinating game to study a series of them by the same individual and guess how many cooks had a hand in the baking of the pie. Of course it is hopeless to try to do this with the speeches of politicians, as everyone knows they make so many speeches it is humanly impossible that they should all be written by the same person.

I say nothing of what may be called the patchwork opinions, with nothing but a colorless statement of the facts, followed by a few paragraphs of legal platitudes and numerous lengthy quotations from the opinions of other judges. Learned Hand once told me a story of one of the judges who, in the good old days, got out as many as nine opinions in one day, and this judge boasted of the fact that he cut out excerpts from the briefs of counsel and pasted them together, with a word or two by way of connection, and "affirmed" or "reversed" tacked on at the end.

Now the funny part of all this is that these things do not worry me a bit, and I do not think they should worry anyone else. What does bother me a little is that lawyers and judges often seem to avoid such subjects as though they were taboo, as if the disclosure of these differences in the working habits of judges somehow constituted an

attack on the integrity of the courts. So I shall add another footnote. There is no reason under the sun why a judge should not have his law clerk draft an opinion for his revision and approval, nor is the law apt to suffer in any substantial measure if the judges are not constantly striving to emulate the style of a Holmes, or a Learned Hand or a Cardozo. Indeed, we should have a fine mess of rhetoric if they did. It is the same old story. No two appellate judges are alike. More than a few leave their mark upon the fabric of the law by their assiduous efforts to help other judges by consultation and advice, by suggestions for the revision of opinions, the expansion of ideas not yet fully developed, and by a hundred and one other friendly offices. Even the man who seems always to be behind with his work exerts a steadying influence and often steers his brothers away from pitfalls they did not see in their haste to keep current the work of the court.

How about the lawyers and the law clerks? Do they influence the course of justice in an appellate court? They do. There is no doubt about it. They do and they should. That is what they are supposed to do.

Not so long ago someone brought up the subject of the law clerks, and in an insinuating way gave the impression that perhaps some of the decisions of the courts were to be blamed on the bright boys from Harvard, Columbia, Yale and Chicago. The reply, as I recall it, was a thunderous denial. Why is this? Are we all living in a world of sham? Is there some point in pretense or illusion, all in the cause of the dignity of the courts?

During the fourteen years I have been a judge I have tried each year to get the best man or woman I could from the Columbia Law School to be my law clerk for one year. The reason I pick Columbia is not only because I think it is the best law school in the United States, but because I taught there for twenty-five years. Why do I take a man just out of law school, instead of a lawyer with more experience? Why do I keep him for one year only? There are various reasons, all of which are relevant to our discussion. In the first place, I want the very best man I can get; I want a man with brains, who has had a fine scholastic record and who has ideas. I want him to be able to look up law, and I want him to be able to think. I do not want a man with experience; if he has the experience and is the sort of man I can use he won't want the job, as he will be on his way to a partnership in some good law firm. If he has the experience and wants the job, he is not the kind of man I am looking for. Moreover, I do not want a man to decide my cases. I want a man to help me to decide them. Above all I want a man of integrity, not just honest and honorable, but with a mind of integrity. What I mean by this is a mind that is not

satisfied until it envisions a problem as an integral whole, the sum of all its parts. I do not say I always get this sort of a paragon, but he is the man I am after.

When we get burrowing into a case, the fur flies. After every day's session of court, I report the arguments to my law clerk and get him on the scent. Is everything calm and peaceful? Decidedly not. We argue over the points, we argue over the way certain opinions are to be interpreted, we argue over the facts of the cases and we argue over everything under the sun. This may not be the course of procedure with every appellate judge who is lucky enough to have a law clerk, but it is the course of procedure with most of those with whom I have some close contact.

And so, I ask the question: thus working together is it possible that my law clerk has no influence on my views of the law? I think it is not possible; of course he has some influence on the decisional process in which I participate; and that is the very reason I have him as my law clerk. Why deny it? However, we should not be suprised to find that the law clerks occasionally have an exaggerated notion of the extent of their contribution to the cause of justice.

And so it is with the lawyers who write the briefs and argue the cases before us. They do influence us; that is what they are supposed to do. That is our system. I do not see how our system of American justice could work in appellate courts, or in any courts, without the research and the analysis and reasoning of the lawyers.

There is a conclusion. I have been working up to something. For years I have been troubled by the lack of understanding by the general public of the function and purpose of appellate courts. People simply do not understand what appellate courts are supposed to do. If they did, many of the appeals that come before us would never have been taken. How often do friends who seem to be sensible, generally well-informed, ask me, "What kind of a case are you trying today?", thus indicating a woeful ignorance of the fact that an appellate court usually hears arguments in several different cases in a single day. There is also the supposition that all judges know all the law, and that appellate judges certainly must know all the law. The general idea is that all these appellate judges have to do is listen to the arguments and then immediately hand down the decision. You drop your nickel in the slot, and out comes the chocolate bar.

In an indirect sort of way I am trying to get across the notion that, despite the fact that statutes and decisions of the courts are all printed in books, the law questions appellate judges are called upon each day to decide are new questions; the answers to these questions are not generally come upon except by hours upon hours of patient research and study, supplemented by such procedures as may be

adopted by particular appellate courts to implement the decisional process. The reason the judges react as they do to the various phases of this decisional process that I have been describing is that each appellate judge comes to have a certain point of view with respect to the way each particular case should be decided, and he struggles with might and main to make his view prevail. He would not do this if the answers were always clear. Because the answers are often so difficult to come by and of such critical importance in the American scheme of things, I say: let us rejoice that the judges on our appellate courts have different philosophies of life, different personalities and different working habits. Let us further rejoice to see how they differ over the administration of their courts, the assignment of the opinions, the reading or not reading of the briefs before hearing arguments and all the rest. If there be dissents, why not? At all events, let us rule out the humbug and the honey and look the facts full in the face.

WASHINGTON UNIVERSITY
LAW QUARTERLY

Member, National Conference of Law Reviews

Volume 1961 April, 1961 Number 2

Edited by the Undergraduates of Washington University School of Law, St. Louis.
Published in February, April, June, and December at
Washington University, St. Louis, Mo.

Subscription Price $4.00; Per Single Copy $1.25. A subscriber desiring to discontinue his subscription should send notice to that effect. In the absence of such notice, the subscription will be continued.

CONTRIBUTORS TO THIS ISSUE

EARL FINBAR MURPHY—Associate Professor of Law, Temple University School of Law. A.B. 1949, M.A. 1954, Butler University. J.D. 1952, Indiana University, LL.M. 1955, J.S.D. 1959, Yale University. Practiced Law in Indiana, 1952-54. Assistant Professor of Law, Harpur College, State University of New York, 1955-57. Rockefeller Fellow, University of Wisconsin School of Law, 1957-58. Assistant Professor of Law, Temple University, 1958-60. Member, Indiana, American and Inter-American Bar Associations.

RALPH R. NEUHOFF—Lecturer in Taxation, Washington University School of Law; Senior Partner, Neuhoff & Schaefer, St. Louis, Missouri. LL.B. 1916, Washington University. Member since inception, American Law Institute Tax Project. Member of the St. Louis, Missouri and American Bar Associations.

HAROLD R. MEDINA—Senior Judge, United States Court of Appeals, Second Circuit. A.B. 1909, Princeton University, LL.B. 1912, Columbia University. Associate Profesor of Law, Columbia University, 1915-40. Author: Judge Medina Speaks (1954); Summary of New York Pleading, Practice and Evidence (1941); Medina's New York Civil Practice Manual (1932). Judge, United States District Court, Southern District of New York, 1947-51. Judge, United States Court of Appeals, Second Circuit, 1951-58. "Man of the Year," 1949, Associated Press Newsmen; Fellow, American Academy of Arts and Sciences.