



1983

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Recommended Citation

Patricia M. Wald, *Bureaucracy and the Courts*, 92 *YALE L.J.* (1983).
Available at: <https://digitalcommons.law.yale.edu/ylj/vol92/iss8/7>

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Bureaucracy and the Courts

Patricia M. Wald†

There has been much agonizing in the past few years about a creeping bureaucratization of the judiciary. Perhaps it is not coincidental that this concern came into vogue about the same time as supply-side economics. The refrain is familiar: Act now to cut judges' staffs and caseloads, so that they will invest more of their own energies and intellect; this investment will in turn increase judicial productivity, reduce word inflation, and enhance quality control. With a bit of luck, the reduction in court staff will lower case deficits, improve the balance of trade in slip opinions among the circuits, and expand consumer demand. The only anomaly in this scenario is that it holds no likelihood of increasing employment, for I gather the ultimate objective is to dismiss the clerks and return to the halcyon days when judges crafted their own opinions by the flickering light of kerosene lamps.

I do not intend to treat the bureaucratization debate disrespectfully, but I admit to being taken aback by commentators who have suddenly discovered that courts are complex organizations and that their work product inevitably reflects that complexity.¹ "Can't we somehow revert," they say,

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1. Although it represents a slight digression, I cannot forego the opportunity to comment that, at least in the court on which I serve, our greatest exposure to bureaucratic decisionmaking comes from the substantive nature of our caseload, predominantly appeals from administrative agency orders and rules. Our limited role in reviewing such agency decisions—largely the product of bureaucratic processes in the classic sense—is to determine whether agency procedures are in accord with the Administrative Procedure Act, whether there is "substantial evidence" for agency findings, and whether the decision is not arbitrary and capricious. We have very limited authority to interpret or apply the law according to our own reading or research. Unless they are palpably irrational, we must approve the decisions initially made by administrative law judges or lower echelon agency employees and approved by politically appointed boards, commissions, or administrators. Such decisions often incorporate all the disturbing aspects of bureaucratic decisionmaking alluded to by Professor Fiss: decisionmaking based on collective knowledge, executive summaries, and briefings; decisionmaking at levels removed from exposure to the people affected; and decisionmaking based on hidden agendas and political considerations. Yet the pristine federal judge, who would eschew all such practices in his or her own realm, is required to review and, in the overwhelming majority of cases to approve, thousands of such decisions each year.

Insofar as Professor Fiss also worries about any tendency of courts to adopt rigid, rule-oriented decisional processes rather than adhering to a tradition of empirical, individually-oriented judgments, the role of courts like ours in passing on the multitude of agency rules that focus on uniform standards regardless of individual equities must also give pause. Rulemaking has virtually taken over the administrative law field from case-by-case adjudication; I venture to say we judges affect many more lives, livelihoods, business survivals, and pocketbooks as a result of passing on such rules than we do as a result of deciding individual cases, where we can still adjust and enlarge precedent to take account of specific factual patterns. Our own court rules, mainly pertaining to procedure and evidence, are, Fiss points out, buffered with room for discretion to account for individual differences; the agency rules we

“to the judge as the kindly, self-reliant, innately just, circuit-riding chancellor?” No way. The cases proliferate and become ever more complex and time consuming. While dutifully admiring of those few judges who say they are still going it alone, I fear they are a wasting asset.

I also worry about where this debate is taking us. The frequently noted solution of reducing our caseload could reverse a series of salutary developments. The heavier caseload in large part reflects better access to the courts and more legal protections and benefits for less-favored members of society. I resist any wholesale surrender of these hard-fought victories to “reformers” rallying under the banner of judicial efficiency.

Given these reservations, I agree with Professor Fiss’ grand design for approaching the problem. As Fiss concedes, the courts hardly operate as a bureaucratic hierarchy. Vertically—district to circuit, circuit to Supreme Court—the federal judiciary does not function in the hierarchical fashion of a typical bureaucracy. Within multimember appellate courts, as well, there is certainly no hierarchical order of command. The absence of other key elements of the classical bureaucracy also makes the label inappropriate for the courts.

Professor Fiss therefore wants to reshape the debate into an analysis of the courts’ institutional form: to identify the “bureaucratic” features of the court system, define the threats they pose to important judicial values, and formulate institutional arrangements that preserve those values while enabling courts to cope with an increased workload. This takes the problem now posed under the caption “judicial bureaucracy” and changes it into an inquiry about how the courts can do their work better in the face of increasing demands on their time and less than adequate resources.

I. Professor Fiss’s Proposals

Professor Fiss focuses on the stresses in our court system created by the growth of staff, not judges, and identifies the isolation from critical educational experiences and the diffusion of judicial responsibility as the greatest problems created by that change. He has a two-tiered strategy for meeting the problem: separating legal from managerial tasks,² and struc-

uphold, however, are predominantly utilitarian, providing little or no succor for the individuals chosen as sacrifices to the commonweal.

While the focus of the bureaucratization debate has been on how we do our work, our greatest contribution to bureaucracy may be in what real-life circumstances force us to do, that is, in our limited review and almost unanimous affirmance of the vast number of bureaucratically-arrived-at decisions. There is no doubt, in that regard, that we function as an indispensable adjunct to the federal bureaucracy whose decisionmaking practices we are urged to avoid.

2. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1461 (1983).

turing the newly focused legal tasks to concentrate responsibility in the judge.³ He offers a number of proposals to implement his strategy.

First, he would curb the use of special masters, increasingly employed to monitor and enforce judicial decisions in institutional litigation, and replace them by expert witnesses and amici.⁴ I am extremely skeptical.

My experience as a litigator in these frustratingly complex suits was that the entry of the decree or the signing of a settlement was only the first step in obtaining real relief for the plaintiff. Like the generals who declare victory and hasten aboard ship while the guerilla forces stalk the defenseless port, expert witnesses and amici often leave the trial judge to fend for himself once the legal victory is declared. Soon the outraged plaintiff's counsel reappears with a motion for enforcement or contempt. Conditions and events change—the relief ordered produces unanticipated consequences—and the judge finds himself in the middle of a second war.

Traditionally, expert witnesses and amici have been individuals or organizations with expertise and well-developed positions on particular issues; they are rarely equipped or willing to become the eyes and ears of the judge in the day-to-day monitoring of a decree, or to perform detailed investigations that may help the judge resolve disputes incidental to the decree. Indeed, it is problematic whether such a role would be appropriate for them, since in most cases they will have taken a decisive position on one side or the other during the trial leading to the decree.

The special master, on the other hand, is generally perceived as a neutral figure, accessible to both sides and operating under the direct supervision and authority of the court itself. Given the strong public feeling aroused by these cases, I do not worry greatly that judges will permit masters to make vital decisions without appropriate consultation. I have not seen it happen. In such a volatile setting, the master's role is crucial. He reports on compliance, decides or negotiates the problems that arise daily under the court's decree, and recommends further (or lesser) relief depending on changed circumstances. As a representative of the court, the master moderates the excesses of the protagonists. Professor Fiss may consider masters as watered-down judges or even usurpers, but in my view they are an indispensable extension of the trial judge so long as the court retains jurisdiction over these non-static cases.

I feel the same way about reliance upon magistrates, whose use Fiss would also like to curb. He worries that enlargement of magistrates' jurisdiction diffuses trial judges' decisional responsibility, burdens judges with supervisory tasks, and removes judges from exposure to real evidence and

3. *Id.* at 1462-67.

4. *Id.* at 1462-63.

participants.⁵ I agree that the real scourge of “bureaucracy” comes when the formal decisionmaker has no contact with the original sources of information or with the full array of options that may exist. Yet, for all his alarms, I do not find Professor Fiss’ fears about the judiciary particularly gripping in this context.

A number of factors limit the diffusion of responsibility from judge to magistrate. Magistrate selection is firmly lodged in judges. The close working relationship between magistrates and judges ensures that judges’ standards are quickly transmitted to magistrates and reinforced on a continuous basis. Finally, trial judges realize that they are fully responsible for decisions based on the findings or recommendations of their “subjudges”; appellate judges do not hesitate to reverse unsubstantiated decisions or findings.

When we debate the utility of magistrates we must ask, “compared to what?” The use of magistrates is far preferable to denying large groups of litigants access to judicial review. For example, rejected social security disability applicants whose appeals are heard initially by a magistrate are on the whole better off than their counterpart veteran applicants, who have no judicial review at all. Professor Fiss’ answer is more district judges.⁶ Though I could hardly dissent, I imagine he would concede that there is often a long wait between a recognized need and congressional authorization of additional judges.

Professor Fiss’ third proposal is the creation of more specialized courts, although he recognizes their dangers and specifies few new areas that warrant their use.⁷ I share the concerns about specialty courts expressed elsewhere by Judge Clifford Wallace.⁸ Specialty courts invite domination by the specialized bar—no one else understands or cares. Worse, the narrow focus of the judges and their isolation from the mainstream of the law can lead to arcane legal developments in one area of the law at odds with fundamental legal principles and values in others. Moreover, as Judge Wallace points out, “it is not clear that precise jurisdictional definitions can ensure that the specialist judge will hear only the specialized subject matter.”⁹ As the recent plight of bankruptcy judges instructs, the ability to package coherent bodies of law in casebooks or even in statutes does not ensure that the legal issues will remain neatly categorized in lawsuits.¹⁰

5. *Id.* at 1456.

6. *Id.* at 1463.

7. *Id.* at 1464–66.

8. Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 CALIF. L. REV. 913 (1983).

9. *Id.* at 933.

10. It is incongruous for Professor Fiss to warn of insensitivity and unresponsiveness in delegated decisionmaking by magistrates or masters, and at the same time to endorse specialized courts that in

Professor Fiss' concern with limiting "bureaucratic pathologies" by structuring court staffs to ensure that judges are fully responsible for the staff's work¹¹ is a legitimate worry. With respect to law clerks, a judge must be sure to take responsibility for any and all of their work that finds its way into the final product. The hard part is learning how to manage law clerks effectively to increase the quality and quantity of the judge's own input and output.

I am not, however, overly concerned that a judge's final decision reflects discussions with law clerks. Most decisions benefit from a continuing dialogue between judge and law clerk, before as well as after the result is determined.

As for research and writing, so long as the judge reads all the briefs and relevant portions of the record, engages counsel at oral argument, participates in the pre-decision discussion with his or her colleagues, and controls the formulation and expression of the ideas and analysis that go into his or her opinion, the job is responsibly done. Whether the judge writes the first draft for the clerk to criticize and flesh out, or the clerk writes the first draft for the judge to review, revise, challenge or accept, does not conclusively indicate whether the judge is still in charge.

Finally, Professor Fiss wants to strengthen the traditions of individual responsibility by separating more sharply the managerial and adjudicatory functions of the judge.¹² For law to be a dynamic force, it must guide participants in processes structured by the law and take account of their capacities, problems, incentives, and resources. If I have any major fault to find with appellate decisions, it is that they are increasingly academic and isolated from real life. They are frequently insensitive—occasionally oblivious—to the ways in which they will affect practitioners and fellow trial judges, let alone ordinary people carrying on ordinary lives.

Appellate courts' responsibility to bring trial courts within a circuit into reasonable uniformity often entails prescribing procedures or criteria for the trial courts to use in making decisions. This is one way we ensure judicial accountability. We thus face unavoidable "managerial" issues in matters ranging from the kind of proof that suffices to show "prevailing rates" in an attorneys' fees case to the "clear bright line" for policemen in Fourth Amendment law. Is it an exercise of judicial responsibility or "bureaucratic management" to require trial judges who dismiss *in forma*

effect shut out the nonspecialized world. The lawyer's task of making technical matter intelligible for generalist judges, and the judge's job of making technical decisions understandable to the public, are both elements of any effort to ensure judicial accountability.

11. Fiss, *supra* note 2, at 1466-67.

12. *Id.* at 1461.

pauperis petitions to give reasons? Perhaps Professor Fiss can make this distinction; I cannot.¹³

In sum, I agree with Professor Fiss that we must end the obsession with caseload and focus on organizational form.¹⁴ However, much of his prescription inclines too much toward the quaintly anachronistic notion that judicial responsibility requires freeing judges from worrying about how others act so that they can worry about doing everything themselves. That style, I fear, is from a simpler, long-gone era. If we are to preserve the true judicial functions, we can and must delegate duties once performed entirely by judges, but we must insure that the judges stay in control of the process. We must define the precious non-delegable duties that insure judicial accountability and guard them zealously. In that search, the federal bench welcomes Professor Fiss' help.

II. Managing the Judicial Decision Process

Although I have presented my own suggestions for improvement in greater detail elsewhere,¹⁵ I would like briefly to sketch several of my main proposals here. In my view, judges ought to give more attention to managing the judicial process. Any institution, such as the District of Columbia Circuit, that processes over 1,000 cases a year and decides them with tens of thousands of pages of explanation by eleven judges of equal stature has to be managed. But managed for what end?

I suggest that we should aim to decide cases accurately, explain our reasoning clearly, and strive for uniformity among our rulings—all in a timely fashion. Finally, we need to enhance public confidence in the court as an institution by maintaining its historic strength: having a personalized judiciary make decisions through the application of impersonalized rules. I believe the fear that the last objective is being sacrificed to attain the other four is at the heart of much angst about judicial “bureaucracy.”

The prime resource we have to accomplish these goals is judges' time. Our task is to manage the courts to preserve the personalized judicial role. The external accountability of courts depends vitally on judges' personal involvement, including providing reasoned decisions, identifying the au-

13. Should appellate courts quit using their “supervisory jurisdiction” to lay down uniform rules for conducting preliminary hearings within hours of arrest, as the Supreme Court did in *McNabb v. United States*, 318 U.S. 332 (1943)? Surely Professor Fiss does not want us to delegate these “managerial judgments” to others such as the circuit executive? But where do we draw the line? He suggests judicial rulemaking instead of adjudication for some of these decisions. In my experience that is far too time-consuming and cumbersome a process to offer any practical relief.

14. Fiss, *supra* note 2, at 1460.

15. For more detailed analysis of the problems confronting the federal courts, and some suggestions for change, see Wald, *The Problem With the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge*, 42 MD. L. REV. 766 (1983).

thors of our opinions by name, and listening to oral argument. Personal involvement also reduces the dangers of an isolated judiciary that so concern Professor Fiss.

The opinions in which we explain our decisions provide one method by which we are held personally accountable. Thus, we should regard with some concern the growing reliance of my own and most other courts on summary orders and unpublished *per curiam* memoranda, unattributable to any one author. These modes of decision accounted for forty-nine percent of our merits cases and virtually all of our motions determinations last year. Unless the use of unexplained orders and unpublished and uncitable opinions is monitored carefully, it permits judges to decide which of their decisions will become precedent and which will not, increases the likelihood of nonuniform dispositions, and diminishes individual judicial visibility and accountability. The exercise of writing for personal attribution even a few sentences of rationale insures a level of thought that a mere signal of affirmance, dismissal, or reversal does not.

The process by which we arrive at decisions must also inspire confidence. In the environment of judicial decisionmaking, oral argument is a vital but endangered species. While some circuits have faced the time crunch of overloaded dockets by limiting oral argument to fewer than fifty percent of their cases, it should be recognized that oral argument serves a number of important functions.

First, the fact that we actually listen to, question, and may be directly moved by litigants is imperative to the respect the public grants us and the authority that flows from that respect. Oral argument places the decisionmaker face-to-face with the contestants and gives what is often a remote and abstract legal system an important human character.

Oral argument also performs the valuable screening function of helping us decide how to allocate our efforts among cases. Seemingly inauspicious cases can blossom into consequential ones through probing interrogation that delves into subjects either avoided or inartfully presented in briefs. Pointed inquiry can identify areas where the law is clear or muddled, where the case may be disposed of summarily or may require more lengthy treatment. Oral argument keeps the lawyers honest—under cross-examination from the court, counsel will often concede points they have smugly assumed on paper.

Finally, and not insignificantly, a judge prepares a case differently when there is oral argument. In anticipation of an exchange, a judge delves for gaps or inconsistencies in the parties' positions that might be missed under summary consideration.

We also have to make our collegial court system work better. Collegial systems seem inherently inefficient; this is the price we pay for containing

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the arbitrariness of any one judge. Writing to accommodate, conciliate, appease, and persuade other panel members requires more care and more compromise than simply expressing one's own thoughts on a subject. Nevertheless, there are ways to speed up collegial decisionmaking on our circuit courts.

I endorse a "bubble theory" under which judges are free to decide how best to use and manage their personal staffs and how to develop their written product. However, to make the bubble theory work, and to keep judges operating in a reasonably synchronous fashion, we need to set time limits on the process of rendering decisions. We impose deadlines on lawyers, at least in theory; we should be willing to impose them on ourselves. Group norms do matter to judges even if we are unwilling to convert them into enforceable sanctions. Our court has in fact adopted some rules to encourage timely decisionmaking.¹⁶

Smooth case flow management can help allocate judges' time more effectively and efficiently. The court's staff counsel already aids us by assigning similar cases to the same panel or, where appropriate, by consolidating such cases. Especially in multiparty cases, pre-argument conferences with counsel can identify and clarify issues for briefing, avoid duplicative presentations, and focus the allocation of time for oral argument.

Finally, I have a "radical" proposal: I think the circuit's judges should occasionally engage in formalized judicial bull sessions, where they can clarify or reconcile their different perceptions of common problems. We all realize there are murky areas of a court's jurisprudence. The purpose of sharing views on such topics would not be to rigidify thought and definitely not to decide abstract issues. Rather, these sessions could make us more sensitive to our colleagues' viewpoints and perhaps establish a general aura of agreement on our responsibility, as a court, to maximize accord.

Conclusion

In the final analysis, our search for bureaucratic nits on the judicial body reflects a fear that overworked judges will delegate too much responsibility to aides, not do their own research, not write their own opinions, and not devote enough time to each case to do justice. Such a judiciary would forfeit the institutional integrity and respect accorded to an

16. For example, at present our court has an internal working rule that a judge cannot hear cases in a new term if he or she has not circulated draft opinions on more than three cases from the preceding terms. We also have adopted a rule, similar to ones in several other circuits, requiring a judge to respond to a circulated draft opinion within seven days. Another rule provides that the judge who wrote the panel opinion may release it if he or she does not receive a dissent within thirty days.

unelected judiciary in a democratic society. This unhappy state could occur, however, with large or small caseloads, and with many or few judges. Good judges and good bureaucrats need not forego structural and management adaptations. Both will use clerks, staff counsel, magistrates, masters, and other resources to do their judging work better than they could do it alone. Effective management of the courts' decisionmaking process can help maintain a personalized, accountable judiciary. But management can only help preserve and bring to the fore what is already there. In the final analysis, it is not bureaucracy we need fear so much as laziness, incompetence, lack of care, loss of caring, or weariness. The fault and the fix may lie in ourselves.