The Fourth Estate and the Third Branch

(Address of United States Senior Circuit Judge Frank M. Coffin, Knight Center for Specialized Journalism Seminar: Covering Appellate Courts, University of Maryland, May 1, 1994.)

I. Introduction

The subject of media-court relations is relatively new. Statutory recognition of the need to provide the press and the public with information dates only from the 1970's. Recently, however, it has been a "hot" subject for various judicial conferences, state and federal. But often such discussions begin and end in amicable generalities.

I begin by accepting the concept of the press, the fourth estate, as Macaulay labeled it, as having a citizenship function that transcends entertainment and diversion.

Thirty-five years ago, in a book entitled The Fourth Branch of Government, Douglass Cater, then editor of The Reporter, wrote:

> Just as individual man cannot communicate thoughts that lie beyond the limits of his vocabulary to express, so it might be said that the vocabulary of the press delimits the thinking of men in organized society, particularly on matters as remote to their daily experience as their national government.

Or, to put it more bluntly, as Paletz and Entman do in their more recent Media Power Politics,

> By dent of the subjects they cover (and do not cover) and the ways they structure them, the mass media tell Americans what to think about, how to think about it, sometimes even what to think.

This is especially pertinent to that most remote part of government, about which the American public is least informed the judiciary.

I also acknowledge my awareness of the difficulties faced by the press in meeting its Fourth Estate responsibilities: the remorseless pressures of deadlines; the inherent problem of simplifying complexity into a short account that can be both understood by and interesting to the general public; and the institutional hazard of having the best of stories distorted by a catchy headline tag. And I know that these difficulties are compounded for television reporters, who are compelled to think in terms of entertainment. I do not pretend to solve these problems. My hope is that what I say may be of help to you in wrestling with both your responsibilities and your constraints.

It is my purpose tonight to try to advance the dialogue. I shall try to do the following things: identify our objectives in supporting this seminar; sketch the underlying ground rules and stages of the appellate process; highlight some myths you should immunize yourself against; expose the threats to appellate judging that now loom ahead; and propose a short list of suggestions for both the media and the judiciary.

II. Media Objectives

I therefore suggest the following objectives in an ascending order of aspiration. First, to acquire a basic understanding of the appellate system, its courts, judges, and processes, simply in order to avoid fostering misapprehensions. Second, and more positively, to achieve precision in your reporting, e.g., to identify what the issue is and what it is not. Third, and more broadly, to

enlarge the understanding of your audience about what is going on. Fourth, to develop a discriminating citizen assessment and demand for quality in judges and court proceedings. Finally, to contribute to a realistic appreciation of the proper needs of the court system.

III. Basics of the Appellate System

A. The Ground Rules. Your reporting and commentary will be more credible if you are aware of the particular strengths and limitations of appellate decision-making. It is unlike decision-making by a single trial judge, by a Congressional committee, by a government bureaucrat or agency, or by the CEO of a company. Appellate judges are far from free to decide exactly as they would prefer; but when they do decide, it is only after a process as nearly error proof as human ingenuity can devise. These are the basics:

1. The court has to take the record given to it by an agency or lower court. It cannot dig up new evidence.

2. Once a lower court or agency has, after a fair adversary hearing, reached a decision, that decision is entitled to a respectful deference. This deference has teeth. The decision stands unless the appellate court finds a really bad factual error or a mistake of law.

3. Decision is not off-the-cuff or hurried. It is a drawn out, attenuated affair, with continually changing views. Its strength lies in the tentativeness, openness, and gradualness of taking final positions.

4. Decision is not the act of one person. It must be shared by from two to six or more colleagues. It is a collegial act. A majority vote is required but in most cases unanimity is sought and achieved. This mutes extravagant statements and the brightest colors but serves stability and continuity. It is a guaranty against whim, prejudice, and insensitivity.

5. Decisions are never made on the say-so of one party. The court always has the benefit of the best efforts of opposing counsel -- a powerful if not perfect mechanism for the discovery of truth.

6. The judges, whatever may be their personal biases or philosophies, are, most of the time, in most cases, on most issues, severely constrained by legal conventions, principles, and rules.

7. The decision must be justified by written reasons. This is a simple but marvelous safeguard against bias, sentiment, and result-oriented thinking. Not infrequently a decision must be rethought because it just won't write.

Add these building blocks together and you have a system well worth your most serious attention.

B. Process. If a journalist, on first hearing about a case on appeal, should assume that the court or Judge X would obviously decide it in a certain way, he would do well to keep in mind the following eight steps the court and the judge must take. At least these are the steps that we take in the First Circuit. Other courts may vary in some details.

First comes the solitary, somewhat tedious job of reading the briefs, some twenty to thirty sets for a week of argument, encompassing two thousand pages and more. Then follows a discussion between judge and law clerks, before oral argument takes place, in which they identify weak spots and questions to ask counsel. Next comes oral argument in which a judge hears not only the arguments of counsel but, as he listens to his colleagues' questions, learns what most concerns them. The judges then convene for a decision conference in which each has his say and a tentative vote.

Each judge returns to his chambers where another discussion, a post mortem, takes place

between the judge and his law clerks. Then, the writing judge begins the processes of research and writing. Following these come the tasks of editing and revising. And, finally, the draft is circulated to the other panelists, whose reactions then must be considered by the writing judge. Only after a majority of the panel sign on to the opinion does it become an opinion of the court.

C. Procedure. I now call your attention to something you might not think of -- and even resist: procedure. You obviously are deeply interested in the substance of cases -- a drug conspiracy, abortion, school prayer, freedom of the press. But to discuss cases intelligently, you have to be able to distinguish what the court actually decided and what was mere chaff or "dicta." To do this, you must have a rudimentary knowledge of some key procedures.

For example, if an appeal is -- as it so often is -- from the granting of a motion for summary judgment, you must know that it can be properly granted only if all the undisputed facts and inferences point to judgment for the moving party. If not, the case must be held for further fact finding. So a reversal doesn't say anything about the merits. It means only that the case must be sent to the jury. Similarly, if a party has not made a timely objection to evidence or request for certain instructions at trial, he hasn't preserved the issue for the appellate court. Time after time the briefs wax eloquently about a trial error only to have the court affirm on the basis of waiver. Again the merits ought not be part of the story you write. Another trap for the unwary reporter is to say that the Supreme Court has "affirmed" or "upheld" a lower court ruling when all that has happened is that the Court denied certiorari.

IV. Some Myths

A considerable amount of written and oral comment about judges, and courts, and opinions has to do with popular conceptions that have long ago been crystallized into myths. They are part of the baggage of each generation. To the extent that you can identify them you will be somewhat liberated from them. . . and so will your readers.

Let us consider these common statements, usually delivered with great conviction: (1) What's Judge A's judicial philosophy? Oh, he's a conservative. (2) What court issued that decision? Oh, not a federal court. Just a state court. (3) Why do you favor the popular election of judges? That's the democratic way to keep them accountable. (4) Why did they reverse that drug runner's conviction? Oh, the court let him go on a technicality. I equate each of these statements with a popular myth. In the order I mentioned them, they are the Myth of Philosophy, the Myth of Elitism, the Myth of Undemocratic Unaccountability, and the Myth of Technicalities.

A. The Myth of Philosophy. By this I don't suggest that philosophy is absent from the makeup of a judge. What I do suggest is that he or she is likely to be a creature of a number of philosophies. Or of opposite philosophies on different issues. A judge is an activist whether he enjoins a government from interfering with a person's rights or sits on his hands and lets the state push the individual around. One can be a conservative on prisoner's rights and a liberal in a sex, race, or age discrimination case. One can be conservative, i.e., pro business, in a labor-management case and liberal when business is being sued for discharging toxic wastes.

There are other kinds of philosophies contesting with each other. One judge may be a literalist in interpreting statutes; the other may give weight to legislative history. One judge may apply sentencing guidelines with rigidity; another may strive for flexibility. One judge may feel justice is enhanced by applying procedural rules strictly; another may want to recognize more "give" or escape valves.

The point is not to overplay the role of philosophy in judging judges or courts. Not only is there within each individual judge a rich pluralism of philosophies, but the conventions,

disciplines, and rules governing judges give play for "philosophy" in not more than ten or fifteen percent of the cases. And even then the necessity of persuading a majority acts as a brake on philosophic extremism. In saying this, I must except the Supreme Court of the United States where policy making guided by philosophy plays a prominent role.

B. The Myth of Elitism. I suspect that the half of you who are based in large metropolitan areas may be better acquainted with this myth than your colleagues from the smaller communities. The myth flourishes most among large non-resident corporations who automatically strive to keep their litigation in a federal court. And, accordingly, the leading litigators who represent them share the prejudice. And law schools and their professors aid and abet the myth that the jewel in the crown of the nation's judiciary is the federal court system.

This is nonsense for several reasons. In the first place the state's 100 appellate courts and 1200 appellate judges handle from 85 to 90 percent of the nation's appeals. In the second place, the state courts, particularly through their relatively new Intermediate Appellate Courts, can increasingly give better service than the feds. In the third place, the resurgence of state constitutional law affords many litigants more protection than does the federal constitution. And finally, although woefully underfunded, the state courts, whether we like it or not, will determine whether our nation's justice system is what we have a right to expect it to be. And the sooner the media and everyone else give proper attention and concern to state courts, the better.

C. The Myth of Undemocratic Unaccountability. Every era sees a renewal of debate over the apparent anomaly of judges declaring legislative acts unconstitutional. How is this possible in a democracy? What you as responsible journalists should keep in mind are several moderating thoughts on this always heated debate. The first is that ours is not an unalloyed democracy like a New England town meeting. It is a mixed government. Small states are entitled to as many senators as the largest states; one can win the Presidency in the popular vote but lose it in the Electoral College; the President can defeat a veto override by controlling one third of both houses plus one.

The second thing to remember is that the notion of judges being given the power to void legislative acts for unconstitutionality is a peculiarly American one, taking root in colonial times, explicitly stated in early state constitutions, implicit in the Supremacy Clause of our Constitution, and expressly articulated in the debates on ratification. Thirdly, when one really digs into how much accountability exists with regard to Congressmen and Senators, and top officials in the executive branch, one realizes that the judiciary, in a different way, under different governance and procedures, is not so lacking in accountability. Finally -- and most importantly — the core function of a judge in preserving individual rights against encroachment by the majority is inconsistent with his being accountable to the electorate in the same ways as a legislator.

D. The Myth of Technicalities. I think you will agree that at the present a typical story might lead off with, "Serial rapist Z won a new trial through a technicality." How much better it would be if the lead sentence read, "Criminal defendant Z won a new trial because the prosecution, though having had time to obtain a search warrant, nevertheless broke into his house without one." I know. This sentence doesn't "sing." But I'm not a journalist. It's up to you to give appropriate framing to the thought.

The fact is that most errors meriting reversal are not mere minor slips but clear refusals to obey well known legal rules, many of which have been at the heart of our bill of rights tradition for over two centuries. And, of course, most such reversals result in either new trials or guilty pleas after plea bargaining. The all important point is that a constitutional protection is available

to all or none. Diminishing the concept of cherished protection to "mere technicality" weakens the very fabric of our constitution-restrained society.

V. Millennium Eve Threats

Apart from knowing about the basic disciplines governing appellate courts and being alert to recurrent mythology, you should also be aware of the areas of vulnerability appellate courts face as we prepare to enter the third millennium. Awareness is a prerequisite of vigilance and vigilance is the prerequisite of preservation.

Simply put, what is at stake is an 18th century, highly individualistic, humanistic profession trying to cope with all the external pressures of the late 20th century. What is in danger from these pressures is the wisdom of a judge of independent and serene mind focusing in an unhurried manner upon the facts and law of a given case, working in close collaboration with colleagues, with time to reflect on all the implications of any decision and to write a clearly reasoned opinion.

A. The first threat is that of remorselessly increasing caseloads. Not only must all the devices of alternative dispute resolution be explored, but somehow the legislatures of the states and the Congress must be made to stop and think before they simply try to banish crime by outlawing it, by prescribing lengthy mandatory incarceration for whole classes of offenders, or by federalizing offenses traditionally dealt with by states. The press can make a contribution to level-headed analysis.

B. The second threat is that of serious and sustained underfunding of state court systems. Unfilled judicial vacancies; moratoria on new facilities and maintenance of old ones; delays in trials; curtailment of probation services, public defender programs, mediation, and youth shelters; slashed clerical staffs and payless vacations . . . all these and more constraints contribute to bringing many state systems, in the words of the American Bar Association, to "the verge of collapse." The press can do much to bring this threat to the forefront of public concern.

C. Finally, because of the caseloads, increasing administrative complexity, the threats to collegiality and to consistency of law within a circuit and, indeed, throughout the nation, the new millennium will see serious proposals for basic restructuring of our court system. These will concern the proper roles of state and federal courts, the size and number of federal circuits, and the possible creation of a new level of appellate court above the existing federal courts of appeal and state supreme courts. These all are public issues where the press will have a deep responsibility to observe, analyze, report, and comment.

VI. Bridge-Building Opportunities

I have a feeling that the field of effective press coverage of appellate courts and effective communication by judges with the press and the public is still quite unploughed. There are all too few accounts of concrete efforts which have achieved satisfying results. So I come to you not with prescriptions but with suggestions, seeking your reactions.

A. For Judges. In 1990 the prestigious Federal Courts Study Committee, concerned about meeting the information needs of the federal court system, recommended that in each circuit there be a trained media contact person, that courts should hold "press days" to enhance communication between the courts and the media, and that publications programs explaining court operations to the public be expanded.

Chief Justice Ellen Peters of Connecticut urges that judges, if they are to communicate effectively about the needs of their courts, enlist allies among consumer groups, including the

corporate world, and "enter into a dialogue with the press that can write the stories that help us or the stories that hurt us, in our pursuit of the resources that we urgently need."

B. For the Press. Some ideas which involve the press are the encouragement of workshops and conferences involving judges, court administrators and the media, and, importantly, the participation of press representatives in any broad-based citizen coalition concerned with courts. I also wonder if it would be useful to construct a simple glossary of legal terms most frequently encountered in covering appellate operations, written in language the average reader can understand. Then when a reporter has occasion to mention summary judgment, burden of proof, standing, waiver, or stare decisis, he can simply turn to the glossary, just as a judge instructing a jury turns to his collection of model instructions.

But perhaps the major suggestion I have tonight is a product of my uncertainty about what exactly is needed to improve reporting of appellate decision-making. Referring to reporting on Supreme Court decisions, Professor Elliot Slotnick of Ohio State, writing in Judicature (Oct.-Nov., 1991), quotes from a study on the New York Times reporting of discrimination cases by Larson:

> Little empirical research has been done to challenge the prevalent belief that articles about Court decisions are vague, incomplete, and often misleading.

Such a comment would be made even more strongly about the need for empirical study of reporting of lower court decisions.

Doris Graber, a political science professor at the University of Illinois in her book, Mass Media and American Politics cites two examples of "sketchy and imprecise" reporting. Both concerned Supreme Court cases; one involved school prayer and the other electoral redistricting. She found serious errors in several stories and concluded that "reporting of court activities seems to be more superficial and flawed than its presidential and congressional counterparts."

It seems to me that more of this kind of analysis should take place, and in a systematic way. At the moment I cannot say what is wrong, what misunderstandings on the part of the reading and viewing public exist, how serious and harmful they are, and how difficult it would be to get the stories right. If groups of judges, reporters, editors, and consumers could conduct post mortems of cases and their reportage with a view to finding answers to these questions, we would then be able to talk intelligently about providing better coverage.

But until that happens, this kind of seminar is the best available substitute. I look forward to hearing how you view this vital task of yours, to make intelligible the work of the courts to the citizenry.