The State of the District of Columbia Court of Appeals

Theodore R. Newman Jr.

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In 1977 the District of Columbia Court of Appeals celebrated its thirty-fifth birthday, having been created as the Municipal Court of Appeals for the District of Columbia by Act of Congress of April 1, 1942.\footnote{Act of April 1, 1942, ch. 207, § 6, 56 Stat. 194 [hereinafter cited as Act of 1942].} Last year also marked the sixth year that the court has served as the court of last resort in the District of Columbia court system, pursuant to the District of Columbia Court Reform and Criminal Procedure Act of 1970.\footnote{D.C. Code §§ 11-101 to 11-2504, 23-101 to 23-1705 (1973).} Thus, while one could consider the court to be in the prime of its institutional adulthood, it is simultaneously in its childhood/in terms of the functions it is now called upon to perform. In order to properly understand the scope of the problems facing the court and to evaluate the steps being taken to deal with them, it is crucial that we examine the court since its inception. The focus of analysis must not merely be on the increase in the number of cases filed. Rather, it must also account for the changes in the substantive nature of the issues which the court has been called upon to address, changes which have been brought about primarily by virtue of wide-ranging alterations in the jurisdictional structure of the District of Columbia's court system.

I. THE HISTORY OF THE COURT

Before the Municipal Court of Appeals was created in 1942, the judicial power in the District was vested in "First. Inferior courts, namely, justices of the peace and the police court; and Second. Superior courts, namely, the supreme court of the District of Columbia, the court of appeals of the District of Columbia, and the Supreme Court of the..."
United States. The Municipal Court of Appeals was established as "an intermediate appellate court . . . for the hearing of appeals from judgments and orders of The Municipal Court for the District of Columbia . . . ." Because of the severely limited jurisdiction of the trial courts over whose judgments and orders the court was to exercise review, the volume of cases was relatively low and the scope of issues presented proportionately narrow.

The Act creating both the Municipal Court for the District of Columbia and the Municipal Court of Appeals did not alter the status of the United States Court of Appeals as a court of the District of Columbia for purposes of appellate review. Review by the circuit court was limited to judgments of the municipal court of appeals and was discretionary in nature. Also, because it also was a court statutorily vested with the "judicial power in the District," the Supreme Court of the United States


5. The Act creating the new Municipal Court expanded the jurisdiction previously exercised by the article I trial courts only on the civil side. This expansion was effectuated by raising the jurisdictional limit on the amount in controversy in suits for damages from $1,000 to $3,000. On the criminal side, jurisdiction in the new court was identical to that previously exercised by the Police Court: essentially concurrent jurisdiction with the United States district court over misdemeanors and offenses against municipal ordinances and regulations. Act of 1942, ch. 207, § 4, 56 Stat. 192.

6. Appeal from the Municipal Court or from the separate Juvenile Court was of right, with the exception of judgments of the small claims and conciliation branch and judgments of the criminal branch when the penalty imposed was less than $50, in which cases review was by "application for the allowance of an appeal." Act of 1942, ch. 207, § 7(a), 56 Stat. 195.

7. In the fiscal year ending June 30, 1943, 139 cases were commenced and 115 were terminated. Of the 60 appeals taken from the civil branch of the Municipal Court, nearly two-thirds involved claims of less than $500 (not including appeals by application from the small claims branch). MUNICIPAL COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, STATISTICAL REPORT FOR FISCAL YEAR ENDING June 30, 1943 at 1. A significant number of appeals involved issues such as the admissibility of evidence, whether judgments of the trial court were adequately supported by the evidence, and whether jury instructions accurately reflected the law. See, e.g., American Heating Eng'r Co. v. Kennedy-Chamberlin Dev. Co., 31 A.2d 654 (D.C. 1943); Fliss v. Reliable Constr. & Realty Co., 31 A.2d 655 (D.C. 1943); Brooks v. District of Columbia, 31 A.2d 657 (D.C. 1943); Waterman v. Railway Express Agency, 31 A.2d 657 (D.C. 1943); Raaen v. Southern Hotel Supply Co., 31 A.2d 659 (D.C. 1942); Smith & Gottlieb, Inc. v. Cheatham, 31 A.2d 676 (D.C. 1942); Washington Nat'l Ins. Co. v. Stanton, 31 A.2d 680 (D.C. 1942). Additionally, on the civil side, the substantive issues before the court generally involved well-settled issues of contract, tort, and negotiable instruments law. On the criminal docket, jurisdiction was limited to review of misdemeanor convictions.

possessed jurisdiction to review judgments of the United States Court of Appeals not otherwise reviewable in its appellate jurisdiction, although as a matter of practice, it would abstain from exercising its jurisdictional prerogatives in matters involving purely local law. However, the circuit court fully exercised its authority as the highest court of the jurisdiction. In short, the circuit court, sitting as the court of last resort in the District of Columbia, utilized its appellate authority in a manner that students of appellate court function have referred to as "institutional review." Thus, the Municipal Court of Appeals exercised its appellate jurisdiction towards the fulfillment of the second function of appellate courts: "error review." To fulfill this limited function, the Municipal Court of Appeals as originally constituted consisted of a Chief Judge and two Associate Judges, each serving fixed terms.

From all appearances, this complement of judges was sufficient to handle the work of the court. This is demonstrated by the fact that between June 30, 1942 and June 30, 1945, of the 408 cases commenced, 387 cases were terminated, only ten of which were disposed of by the parties. A decade later the caseload of the three-member court was approximately the same and the rate of dispositions did not drop noticeably. However, by 1967 the caseload had increased to 312 filings annually. Moreover, the criminal docket comprised over 50% of the calendar, thus increasing the need for celerity in dispositions and mak-

11. See note 10 supra. For an interesting and elucidative examination of the role of intermediate appellate courts see Hopkins, The Role of an Intermediate Appellate Court, 41 Brooklyn L. Rev. 459 (1975). See also cases cited note 7 supra.
12. See Municipal Court of Appeals for the District of Columbia, Statistical Reports for Fiscal Years Ending June 30, 1943, 1944 & 1945. Moreover, nearly 70% of the cases disposed of by the court were the subject of published opinions.
13. See Municipal Court of Appeals for the District of Columbia, Statistical Reports for Fiscal Years Ending June 30, 1955 & 1956. It is significant that in none of the five years discussed in this and the preceding note did criminal appeals comprise more than 15% of the court's docket. This stands in stark contrast to the fiscal year ending September 30, 1977, in which criminal appeals comprised over 50% of the filings. District of Columbia Court of Appeals, Statistical Report for Fiscal Year Ending September 30, 1977.
15. Id.
ing the court's steadily increasing backlog more ominous. In response, Congress enlarged the size of the court to six judges.

Fiscal year 1971 marked the last full year that the District of Columbia Court of Appeals shared appellate jurisdiction over "local" matters with the United States Court of Appeals. In that year, case filings numbered 548, and while over 90% of the cases presented to the court were disposed of, the court was left with a 20% increase in its pending unresolved caseload at the end of the year.

It would be supererogatory to engage in a detailed analysis of the effect of the Court Reorganization Act on the jurisdiction of the various District of Columbia courts. It is, however, necessary to highlight several aspects in which the reorganization had impact on the operation of the court. By creating a trial court of general jurisdiction over all criminal and civil matters arising in the District, the reorganization significantly broadened the scope of the issues which could be raised at trial and, consequently, on appeal. No longer would "big" local cases be tried in the district court and reviewed by the United States Court of Appeals, and no longer would those courts be "the big courts" of the District of Columbia. The District of Columbia Court of Appeals became the court of last resort in the District of Columbia. Notwithstanding this most significant change in the status of the court, appeal of right remained in virtually all cases. Thus, the court was called upon to exercise both of the previously identified functions of appellate courts, i.e.,


17. Act of Dec. 8, 1967, Pub. L. No. 90-178, § 1(1), 81 Stat. 544. In part, the increase in filings was brought about by a change in the trial court jurisdiction. By Act of Oct. 23, 1962, Pub. L. No. 87-873, § 2, 76 Stat. 1171, Congress changed the name of the Municipal Court to the "District of Columbia Court of General Sessions," and expanded its civil jurisdiction to include cases in which the amount in controversy did not exceed $10,000. Additionally, Congress had, by Act of Apr. 11, 1956, ch. 204, § 101, 70 Stat. 111, transferred jurisdiction over domestic relations cases from the United States district court to a newly-created Domestic Relations Branch of the Municipal Court. See id. § 105, 70 Stat. 112.


22. See D.C. Code §§ 11-721(b)-(c) (1973). The exceptions to this procedure are limited to judgments of the Small Claims and Conciliation Branch and those judgments of the Criminal Division in which the penalty imposed was less than $50. Id.
error review and institutional review, while simultaneously moving from its position as a low-volume intermediate appellate court to a non-discretionary, high-volume court of last resort. Finally, the court was given jurisdiction to review orders and decisions of the mayor and city council as well as "any agency of the District of Columbia." The combined effect of these expanded jurisdictional provisions was more than a doubling in the number of appellate filings in calendar 1976 as compared to calendar 1971. Moreover, by the end of calendar 1976 the court was faced with a pending docket nearly equal in size to the number of cases disposed of during that year.

The effect on the court's caseload, both in numbers and complexity, represents the most far-reaching consequence of the revised jurisdictional structure. However, court reorganization has also created issues regarding the relationship of this court to the federal courts within the District, as well as to the United States Supreme Court. Moreover, because it is a court of last resort, the court must face questions relating to its supervisory authority over the Superior Court. Given the comparative significance of the caseload expansion, however, it is appropriate to examine first in some detail the techniques and procedures which the court has considered and begun to implement to meet the demands upon it.

II. NEW TECHNIQUES TO INCREASE ADMINISTRATIVE EFFICIENCY

Though the enormous increases in appellate dockets take on different dimensions in this jurisdiction because of the unique historical development of the "local" court system, such increases are, of course, a nationwide phenomenon. As a result, students of the judicial process have begun to devote increased attention to the function of appellate tribunals, focusing primarily on the manner by which increased efficiency can be obtained without sacrificing "the imperatives of appellate

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23. See notes 10 & 11 supra.
25. A detailed analysis of this increase is presented in REPORT ON THE WORKLOAD OF THE DISTRICT OF COLUMBIA COURT OF APPEALS: CALENDAR YEAR 1976 AS COMPARED TO FIVE PRECEDING YEARS (1977) [hereinafter REPORT ON WORKLOAD].
26. Id. at 5. As a gauge of the workload that the court faces, it should be noted that the court has by far the largest caseload when compared to appellate courts of the same size (nine members) and when compared to appellate courts which serve in jurisdictions of comparable population (800,000). Id. at 7. See also W. KRAMER, OUTLINE OF BASIC APPELLATE COURT STRUCTURE IN THE UNITED STATES (1975).
27. These issues are briefly explored in Part III, infra.
The problem would be difficult enough were it only to involve devising techniques whereby a court could handle an increased number of cases of uniform difficulty and indistinguishable significance. Such a picture does not, however, accurately represent the present circumstance. Appellate court caseloads generally, and this court's in particular, have become more diverse in composition as well as larger. This adds to the complexity of the management problem. An American Bar Association study has formulated this administrative problem in the following manner:

This variety in caseloads means that appellate courts must employ procedures and methods of administration that permit them to give sufficient attention to complex cases and at the same time to eliminate undue expenditure of effort on less difficult matters, while avoiding peremptoriness or its appearance and thus subverting the very purpose of appellate review. These complex requirements mean that appellate courts must exercise positive control and supervision of their caseflow to an extent far beyond that to which they have been traditionally accustomed.

In an attempt to meet these requirements, this court has implemented processes which seek both to increase present administrative efficiency (i.e., doing better that which we are already doing), as well as to develop long-term plans for meeting the inevitable future increases in caseload volume and diversity. In this regard, five strategies have been developed: (a) increased utilization and expansion of the court's central staff of "court law clerks" aiming at two areas: reduction of both the motions backlog and the number of cases which are placed on the court's "regular" as opposed to its "summary" calendar; (b) increased utilization of memorandum judgment orders and a consequent decrease in published opinions; (c) use of pre-argument conferences between the court and the parties, referred to as "settlement" conferences for shorthand purposes; (d) use of pre-argument conferences among the members of the court who will hear the argument; and (e) establishment of internal operating rules. These shall be discussed in turn.

A. Increased Use of Court Law Clerks: Motions and Summary Calendar

The call for greater reliance upon a centralized legal staff is wide-
spread today. In large part, this is based upon the perception, supported by the relatively limited data available, that there exists a utilitarian limit to the size of a judge's personal research staff, particularly with regard to a judge's ability to adequately supervise and administer his law clerks. Such a central staff utilization is particularly critical in a court such as ours which undertakes to perform both the error review function and the law development function. As Professors Carrington, Meador, and Rosenberg have phrased it:

The crucial step in the effective utilization of central staff is to alter the traditional appellate procedure which operates in all cases the same, in favor of a differentiated procedure which measures the court's efforts to fit the needs of the particular case. It is in the operation of a differentiated procedure that the central staff can be used to substantial advantage.

One of the functions presently carried out by the court law clerks, who, working under the supervision of the Clerk of the Court, constitute the court's "central legal staff," is the preliminary screening of cases which are fully briefed. The purpose is to submit recommendations to the Clerk of the Court (who is an attorney) and the Chief Judge for calendaring. Of 615 cases set for merits determination during calendar 1976, 239, or approximately 40%, were set on the summary calendar. These are generally one or two issue cases which are susceptible of disposition without oral argument and without published opinion. Final disposition is by a three-judge panel, as is the situation with cases placed upon the "regular" calendar, and each judge's review of the merits is undertaken with the research assistance of the judge's law clerks. Data from other jurisdictions demonstrates that this procedure results in a


33. See Cameron, supra note 32, and sources cited therein at 467-68 n.8; P. Carrington, D. Meador, M. Rosenberg, supra note 10, at 44-46.

34. See P. Carrington, D. Meador, M. Rosenberg, supra note 10, at 47. Within the next six months, the court anticipates the installation of a mini-computer. It is anticipated that use of this technology will assist in a more efficient caseflow management program.

35. Since November, 1974, the court has divided its calendar into a "regular" calendar and a "summary" calendar. Carrington, Meador, and Rosenberg have suggested that this "calendaring" function, to which they apply the term "routing preview," can be performed by the "staff director," a person who is functionally equivalent to the Clerk of the Court. P. Carrington, D. Meador, M. Rosenberg, supra note 10, at 49.
significant time-savings. Our experience tends to confirm this data. However, budgetary limitations may well cause the court to limit its employment of court law clerks in the future, with the attendant loss of productive capacity. If the court is to continue its efforts at differentiating between those cases which necessitate consideration under the more traditional appellate procedure and those which are susceptible to a foreshortened mode of review without a diminution in "appellate justice," increased resources must be devoted to enlarge the central legal staff.

The second function of the court law clerk is the screening of motions and preparing written analyses thereof. On November 1, 1976, an unresolved motions backlog totalling approximately eighty existed. By assigning one of the court law clerks full time to motions, the backlog was reduced to approximately twenty-five by February 1, 1977. While it would be desirable to continue in this fashion, the budgetary constraints

37. It is appropriate, at this point, to address briefly the concerns of those persons who fear that summary process means summary justice. The literature belies any such contention. See, e.g., Cameron, supra note 32, at 475; Christian, Using Prehearing Procedures to Increase Productivity, 52 F.R.D. 55, 60 (1971); Flanders & Goldman, Screening Practices and the Use of Para-Judicial Personnel in a U.S. Court of Appeals: A Study in the Fourth Circuit, 1 JUS. SYST. J. 1-16 (1975). As Professor Meador has noted, the use of such screening procedures demonstrates the "functional blurring" between "appeals of right" (the system under which our court operates) and "discretionary review," thus serving "to legitimate abbreviated appellate processes, [and] thereby loosening the decisional strait-jacket in which many appellate courts think themselves bound because their jurisdiction is cast in terms of "appeals of right." That is, because of the introduction of screening and differentiated process, it can now be recognized that an "appeal of right" does not include a right to any fixed procedure . . . What a litigant should get at the first level of review—whether his avenue of review be labeled as one of right or one in the court's discretion—is a procedure which preserves the essential elements of an appeal . . . The procedure should preserve the essence, but it need not preserve all the familiar trappings . . . How the contentions are communicated is not of the essence; whether in writing or orally is a detail of means on which there is surely room for choice by the court. How the court goes about considering and deciding the case is likewise a matter which does not go to the essence, so long as the judges give a meaningful consideration to the merits of the appellant's contentions.

D. MEADOR, supra note 32, at 170. But cf. P. CARRINGTON, D. MEADOR, M. ROSENBERG, supra note 10, at 16-24 (oral argument ought be permitted whenever sought by a party, but parties ought to be invited to waive argument when the court deems it appropriate). Compare APPELLATE COURTS, supra note 10, at § 3.35 & note at 56-7 (eliminating oral argument viewed as an "extreme measure" but remaining under court control; parties allowed to submit written statements in support of oral argument when advised that court intends none).

previously adverted to cast some doubt upon our ability to do so. Such a loss would be highly regrettable.

B. Increased Use of Memorandum Opinions

The proposition that the writing and review of opinions occupies the largest portion of an appellate judge’s time hardly needs substantiation.\textsuperscript{39} When a court’s caseload is manageable and totally current, it is not surprising that the bulk of its merits dispositions would be by published opinions. In this regard, one may again note that in the years immediately following the creation of the Municipal Court of Appeals, over 70% of its decided cases were by published opinion.

By contrast, in fiscal 1977, of 746 cases terminated by merits adjudication by the court, published opinions were issued in 275 cases, or 37%. In the remainder, termination was by “Memorandum Opinion and Judgment Order.” It is crucial to understand what is contained in such a Memorandum Opinion and Judgment Order. Generally, these are merely substantially condensed versions of what would be contained in a published opinion: (a) statement of proceedings below and issues raised on appeal; (b) recitation of relevant facts; (c) analysis of relevant law; and (d) application of law to facts leading to result.\textsuperscript{40} The use of unpublished opinions as a dispositional technique has wide support among the commentators on the appellate decisional process. The National Advisory Commission on Criminal Justice Standards and Goals has suggested that only 20% of all criminal appeals should be terminated by published opinion.\textsuperscript{41} Other commentators and groups have recognized the validity of this technique in the area of civil, agency, and other types of appeals.\textsuperscript{42} When caution is taken to insure that unpublished opinions do not become a vehicle by which a court may fail to consider adequately the merits of each case presented, their value is, to my mind, unquestionable. The court, in its attempt to insure proper use of unpublished opinions, has incorporated into its internal operating procedures both written standards for the use of unpublished opinions and procedures by

\textsuperscript{39} But see R. Aldisert, Third Circuit Time Study (1973).

\textsuperscript{40} An examination of the published opinions by the court during its early history and comparison of them with present-day Memorandum Opinions and Judgment Orders will disclose a great similarity between the two. Given the limit of the court’s function to “error review” prior to court reorganization, this is understandable.

\textsuperscript{41} See NAC, supra note 16, at § 6.9. Note that in 1976, 51% of criminal appeals disposed of on the merits were by published opinion. See T. Newman, supra note 38, at app.

which the bar may seek to have the court publish an unpublished opinion. Further, to evaluate the experience of the court in complying with these standards, I will recommend to the court that upon the conclusion of one year of operation under the new standards (which became effective January 1, 1978), an evaluation be made by some entity such as the Young Lawyers Section of the Bar Association of the District of Columbia, and that this evaluation be made public.\textsuperscript{43}

It is clear that if the court is to prevent a further increase in the one-year backlog presently existing, a greater use of unpublished opinions must be made in the performance of the court’s “error review” function.

\section*{C. Pre-argument Conferences Between the Court and Parties}

In recent years, various appellate courts have begun to experiment with pre-argument “settlement” conferences. As is reflected in a recent article in the American Bar Association Journal,\textsuperscript{44} such conferences have been utilized with varying degrees of success in the United States Court of Appeals for the Second Circuit, several Appellate Divisions of the Supreme Court of New York, and the Third District Court of Appeals in California.

Chief Judge Kaufman has had occasion to write regarding the Second Circuit’s program,\textsuperscript{45} known as the “Civil Action Management Program,” or CAMP, which constituted the first implementation of Federal Rule of Appellate Procedure 33.\textsuperscript{46} As such, it has as its objectives “to encourage parties in civil cases to reach voluntary settlement early in the appellate process and to simplify the issues and otherwise streamline unsettled cases for adjudication.”\textsuperscript{47} Although the results of the Second Circuit plan appear to be marginal,\textsuperscript{48} reports on the use by other courts of this

\begin{footnotes}
\item[43] Similar studies have disclosed little abuse of this method of case disposition. See, \textit{e.g.}, \textsc{National Center for State Courts}, \textsc{Report on Unpublished Opinions of the California Court of Appeals} 15-16 (1976), \textit{reported in} Mueller, \textsc{Unpublished Opinion Study}, 1 \textsc{St. Court J.} 23 (Summer 1977); Frank, \textit{Remarks before the Ninth Circuit Judicial Conference}, 16 \textsc{Judges’ J.} 10 (Winter 1977).
\item[44] See \textsc{Benjamin & Morris}, \textsc{The Appellate Settlement Conference: A Procedure Whose Time Has Come}, 62 \textsc{A.B.A.J.} 1433 (1976).
\item[46] That rule provides for a pre-hearing conference, analogous to the usual pre-trial conference authorized by Superior Court Rule of Civil Procedure 16. It is aimed at the simplification of issues to be addressed at oral argument.
\item[47] See Kaufman, \textit{ supra} note 45, at 1094.
\item[48] In his article reviewing the early results of CAMP, Chief Judge Kaufman claimed a remarkably high degree of success in achieving termination of cases without argument as
\end{footnotes}
technique are encouraging.

While recognizing that pre-argument conferences are not the panacea for the problem of scarce appellate resources, it appeared that such a program might prove sufficiently useful in the District of Columbia Court of Appeals to warrant exploration. Consequently, the court requested and obtained funding from the Law Enforcement Assistance Administration to conduct a seminar at which the judges of this court, selected judges from the Superior Court, and members of the Bar could consider the adoption of such procedures. Last April the seminar was conducted, and the procedures have been utilized in two cases. In one, Washington Hospital Center v. Moore, a highly complex medical malpractice case wherein a $2.5 million verdict had been returned, a settlement was reached after briefing for $1.5 million. In a second, Adams v. District of Columbia, a personal injury case arising from a stabbing at the District of Columbia Jail, a $598,000 verdict was compromised prior to briefing for $225,000. Moreover, because the conference in the former case was conducted by a judge of the trial court, and in the latter by a retired judge of the District of Columbia Court of Appeals, there was virtually no expenditure of the scarce resource of actively sitting appeals judges' time. My predecessor, Chief Judge Gerard Reilly, although retired, has graciously agreed to continue to serve the bench and bar of

compared to "un-CAMPed" cases. Id. at 1098 & n.16. However, a more recent independent evaluation taken under the auspices of the Federal Judicial Center indicates that the program has not been as successful as its advocates claim, effecting only a marginal acceleration in the disposition of civil appeals. Goldman, An Evaluation of the Civil Appeals Management Plan: An Experiment in Judicial Administration (1977).


51. Holding the conference after substantial briefing is not the preferable mode of procedure. As Mack has cogently argued:

One of the two major monetary incentives to settlement in the model is the avoidance of the higher transaction costs of appeal. The appellate brief is probably the single major expense of both lawyers' time and clients' money in an appeal. The table above [showing percentage of Third Circuit settlements in FY 1972] shows that fully 85% of litigants who seek to settle do so before the significant costs of brief writing are incurred.

Mack, supra note 49, at 31. The results in Washington Hospital Center demonstrate, however, that settlement can be reached even when timing is less than optimal, and therefore that the timing factor ought not control whether a pre-argument conference is pursued.


53. In the Second Circuit, pre-argument conferences are conducted by staff counsel. In virtually all other jurisdictions, however, active or retired judges are utilized. This appears to be the preferred approach.
the District of Columbia by undertaking the role of pre-argument settlement judge on a continuing basis.

In concluding, I should strongly emphasize that the effectuation of a settlement does not constitute the sole measuring rod as to the effectiveness of the pre-argument conference procedure. As Chief Judge Kaufman points out:

Even where pre-argument conferences did not lead to settlement or withdrawal of the appeal, significant benefits accrued. In 18 cases the conference resulted in substantial simplification of the appeal. Numerous substantive motions were eliminated by stipulation, issues were clarified or dropped, and projected appendices were reduced in size. Agreements reached at the conferences concerning such matters were memorialized in pre-argument orders, which control the future course of the appeals. The aggregate saving of judicial resources occasioned by fewer motions and sharply defined appeals, although not easily quantified, is substantial (citations omitted).

D. Pre-argument Panel Conferences

A related, but procedurally and functionally distinguishable innovation of the court is the use of conferences, prior to argument, among the members of the panel designated to hear the scheduled cases. The aim is to identify those issues which appear most decisive or troublesome to the panel members, so that counsel can be informed as to which questions to address in oral argument. Moreover, the conferences help prepare the panel members more thoroughly for the argument. It is unnecessary to dwell on the benefits expected to accrue from this procedure. If oral argument is to be meaningful to the ultimate disposition of a case, it follows inexorably that steps which serve to prepare all the participants better and to focus the substantive discussion more adequately ought to be fostered at every turn.

E. Internal Operating Rules

The need for internal operating procedural rules for an appellate court has been frequently recognized. As pointed out, "the essential func-

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54. Kaufman, supra note 45, at 1101; see APPELLATE COURTS, supra note 10, at § 3.53 & note at 89-90. In Christian v. United States, appeal docketed, Civ. No. 8809 (D.C. 1974), a pre-briefing conference between the court and counsel was used effectively by this court to accomplish these types of goals.

55. See APPELLATE COURTS, supra note 10, at § 3.34(b).

56. See, e.g., APPELLATE COURTS, supra note 10, at § 3.40 & Commentary at 69. See also id. § 3.30, Commentary at 46-47.
tions of an appellate court are . . . beyond the reach of effective outside scrutiny." Because of the need for confidentiality in the court's decisional processes, as well as for official autonomy, effective supervision of the court's duties must come from within. In recognition of such responsibility, internal rules were formulated and published by the court. They became effective on January 1, 1978. The rules are an attempt to deal forthrightly with the entire range of issues that face the court, including the establishment of guidelines for calendaring of cases, guidelines for the use of memorandum judgment orders and opinions, rules regarding petitions for hearings and rehearings en banc, and a schedule for the post-argument disposition of cases. It is hoped that these procedures and their publication will both facilitate the orderly conduct of court business and help to upgrade the level of the court's public accountability.

Having emphasized the steps taken thus far to make the District of Columbia Court of Appeals a more efficiently operated system, I should strongly emphasize that while efficiency in operation and some degree of celerity in dispositions is essential if justice is not to be deferred by protracted litigation, efficiency is not the benchmark against which the functioning of this court ought to be measured. Indeed, as Mr. Justice Stewart has so cogently remarked:

In our contemporary infatuation with statistics and with record-keeping, I am convinced that there is too often a temptation to measure the efficiency and character of a court entirely in terms of how many cases that court disposes of each year. Statistics are all very well, and it is all very well to import into the practice and procedure of the courts whatever techniques of modern business administration may be adaptable. But judicial decisions are not articles of commerce, and courts are not Detroit assembly lines. The quality and character of justice are much too elusive and much too important to be measured entirely in terms of how many. Long ago Chief Justice Hughes warned of indulging the passion for expedition at the risk of thorough and deliberate consideration of cases.

III. THE RELATIONSHIP WITH THE SUPERIOR COURT

Having focused thus far exclusively on issues internal to the court, I shall now shift that focus to another major area of concern with which the court must deal: its relationship to the Superior Court. My goal is not

57. Id. at 47.
58. Id.
59. R. LEFLAR, supra note 42, at 252.
to engage in a detailed exposition on the nature of the interaction between a court of last resort and the trial bench over which it exercises review, but rather to adumbrate two particular problems which the court must address: review of the exercise of trial court discretion and the exercise of supervisory jurisdiction, especially in the area of law enforcement.

A. Trial Court Discretion

One need not have long studied the trial court process to realize that the vast majority of decisions made at that level involve the exercise of trial court discretion. This is particularly true of rules governing pre-trial procedure and admissibility of evidence during the course of the trial itself. There is generally no replacement for trial judge discretion. Were an appellate body to attempt a detailed review of the various considerations of which the trial judge must be cognizant in administering the conduct of litigation, finality in judgments—surely a goal to be fostered—would be seriously jeopardized. Moreover, it is doubtful that an appellate tribunal could properly take into account all the multi-various factors, even were this a desirable goal. Thus, the primary protection against abuse of the trial process by the judiciary resides in a high quality and conscientious trial bench.

Nonetheless, appellate courts have a responsibility to monitor the exercise of discretion by the trial judge. It is one thing to affirm a judgment on the ground that the challenged ruling resides in "the sound discretion of the trial court" to which the reviewing court ought to defer; it is quite another to totally abdicate the responsibility to review discretionary decisions. Appellate review of trial court discretionary determinations ought to be undertaken with a view toward developing standards and procedures aimed at securing greater uniformity of result. An appellate court must be careful to guard against the twin faults of considering only whether it would have exercised discretion in the same way that the trial court chose, or merely announcing "in conclusory terms whether or not there was an abuse of discretion in particular circumstances." Because of its ultimate authority to establish the governing law within its

60. One of the issues thus not addressed is the severe limitation placed upon the court performing the traditional and proper role of a jurisdiction’s highest court in supervising the administration of a court system. See ABA Comm. on Standards ofJudicial Administration, Standards Relating to Court Organization [hereinafter cited as Court Organization] §§ 1.11, 1.12(d), 1.30, 1.33 (giving the structure and composition of the Joint Committee on Judicial Administration, the body charged with supervising the administration of the District of Columbia court system); D.C. Code § 11-1701 (1973).

61. Appellate Courts, supra note 10, at § 3.11 & Commentary at 24.
jurisdiction, and the concomitant responsibility to ensure that the law is applied, insofar as humanly possible, with uniformity and evenhandedness, the appellate court must undertake to guide the trial court "by specifying the factors that it considers important and the range of choice within which the trial judge may properly act." Only when it has engaged in this exercise can an appellate court of last resort be said to have fulfilled its functions in this highly critical area.

B. The Exercise of Supervisory Power

The question of the scope of this court's "supervisory power" is one which presently faces us. Because of the unique historical development of the court, and its unique status with regard to its relationship to its federal counterparts, as well as to the Supreme Court, the problem takes on an added dimension. Given the fact that collateral attacks on criminal convictions in the Superior Court may not be presented to the federal courts in this jurisdiction, and because the Supreme Court has no appellate (non-discretionary) jurisdiction over judgments of this court, the authority of this court, and attendant responsibility, is at least as extensive as that of the highest court of a state judicial system.

The supervisory power of the Supreme Court over the lower federal courts has been expressly recognized. The Supreme Court has likewise acknowledged the role of highest state appellate courts in the exercise of supervisory jurisdiction. Mr. Justice Rehnquist, speaking of state courts, recently took occasion to note that an "appellate court will, of course, require the trial court to conform to constitutional mandates, but it may likewise require it to follow procedures deemed desirable from the viewpoint of sound judicial practice although in no wise commanded by statute or by the Constitution." In a number of cases, we have made

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63. The balance between the trial and appellate benches in the area of judicial discretion has commanded the attention of many commentators who have offered interesting and elucidative analyses. See, e.g., Rosenberg, Judicial Discretion of the Trial Court, Viewed from Above, 22 SYRACUSE L. REV. 635 (1971); Carrington, The Power of District Judges and the Responsibility of Courts of Appeals, 3 GA. L. REV. 507 (1969); Wright, The Doubtful Omniscience of Appellate Courts, 41 MINN. L. REV. 751 (1957).

64. See United States v. Washington, 328 A.2d 98 (D.C. 1974), rev'd, 431 U.S. 181 (1977), which is presently pending before the Court of Appeals on remand on the issue of invoking supervisory jurisdiction.


clear the existence of our supervisory power and our willingness to use it in appropriate circumstances.\textsuperscript{69}

While the limit of this power may be, as yet, uncertain,\textsuperscript{70} I, for one, am convinced that this court has those supervisory powers which the highest courts of the federal and state court systems possess, and that these powers enable the court to develop standards for the administration of justice in all the phases of the jurisdiction of the courts of the District of Columbia. It is my firm belief that this court cannot and will not shirk its responsibility to the public in this regard.

\textbf{IV. Conclusion}

What of the future? In the final analysis, combining in one appellate court both the "institutional review" function and the "error review" function is unsound.\textsuperscript{71} I submit that in the not too distant future, our city must face up to this fact and seriously consider the creation of a two-tier appellate court system composed of an intermediate appellate court to perform the "error review" function, and a higher appellate court to perform the "institutional review" function as well as those other functions indigenous to highest appellate tribunals.

In conclusion, may I thank the Editors of the Catholic University Law Review for instituting this review of the decisions of the highest court of the District of Columbia, the District of Columbia Court of Appeals. By doing so, they provide an invaluable service to the bench, the bar, and most importantly, to the public.


\textsuperscript{70} See United States v. Jacobs, 531 F.2d 87 (2d Cir.), vacated and remanded, 429 U.S. 909 (1976), further proceedings on remand, 547 F.2d 772 (2d Cir. 1976), cert. granted, 431 U.S. 937, 97 S. Ct. 2647 (1977).

\textsuperscript{71} See Court Organization, supra note 60.