

12-15-1983

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Recommended Citation

Stanley Mosk *Opinion: A Two-Part State Supreme Court*, 11 Pepp. L. Rev. Iss. 1 (1984)
Available at: <https://digitalcommons.pepperdine.edu/plr/vol11/iss1/1>

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OPINION: DISSENT

Opinion-Dissent is a new feature of the Pepperdine Law Review. Its purpose is to facilitate discussion of current legal issues through a presentation of contrasting viewpoints.

Opinion: A Two-Part State Supreme Court

Justice Stanley Mosk*

The highest courts of our nation and state are being inundated by an ever-increasing caseload of appeals. From 1961 to 1981 the U.S. Supreme Court docket rose from 2,570 cases annually to 3,814, and this year's number will be higher. Chief Justice Warren E. Burger has called for a major reform in the creation of a new intercircuit appellate tribunal to relieve what he has described as an intolerable burden on the high court. A bill offered by Senator Robert Dole (R-Kan.) would create such a tribunal.

According to Judicial Council statistics, the increase in the

* Associate Justice, Supreme Court of California. Reprinted with permission of the Los Angeles Times, from an article appearing on June 29, 1983.

work of the California Supreme Court has been even more dramatic. Total business transacted by the seven justices rose from 4,673 matters in 1971 to 7,208 in 1981. Petitions for hearing increased from 2,417 in 1971 to 3,179 in 1981; approximately 8% of such petitions are granted.

As the figures appear to verify, if the workload of the United States Supreme Court requires a major overhaul of the federal judicial process, it follows that an improvement in California procedures is indicated. The comparatively recent addition of voluminous death-penalty records to the already heavy burden on the California Supreme Court have focused additional attention on the problem.

Under the state Constitution, only the supreme court hears appeals in a capital case. There are now 126 death-penalty appeals before the California court in various stages of completion. Most of them have not yet been fully briefed by defense counsel and the attorney general; many are still awaiting completion of the trial court record. Still others require U.S. Supreme Court decisions on related issues. But some day in the foreseeable future those appeals and others to follow will be completed and then must be heard and decided by the California court.

There are some impatient legislators who insist that death-penalty cases must receive absolute priority, that they must be heard and determined by the Supreme Court in preference to all other pending matters. This, I suggest, is an unrealistic tampering with the judicial process. Can it be said that a death-penalty case deserves to be heard before an appeal involving the care, custody and welfare of a minor child; or ahead of a matter involving an imminent election; or a personal-injury suit by one who became a paraplegic as the result of a drunken motorist's negligence; or an injunction sought by a business to prevent its destruction by unfair competition; or a judgment for millions of dollars against an industrial or commercial company that is accumulating thousands of dollars in interest while awaiting final decision; or ahead of a petition involving the license of a professional person whose conduct requires discipline to protect the public? Examples abound of other litigation that arguably may be more urgent than the ultimate fate of a murderer who has been convicted and is isolated on Death Row, thus presenting no imminent danger to society.

The judicial process will never achieve an equitable apportionment of resources between criminal and civil litigation as long as the tendency persists for legislators and politicians to inject their ad hoc views on priorities. Since that appears to be an emerging

pattern, I sense a pressing need for a major overhaul of our ultimate appellate process.

To that end I point to the method employed in two states, Oklahoma and Texas, to avoid the competition for attention between civil and criminal appeals. In Oklahoma the supreme court hears only civil appeals, whereas a separate court of criminal appeals has exclusive appellate jurisdiction in all criminal matters. In Texas a similar procedure prevails.

I propose for California a constitutional amendment to create two separate divisions of our supreme court—one devoted exclusively to criminal matters, the other to hear only civil cases. Indeed, up until 1966 the state Constitution provided for the court, when not sitting all together, to consist of two separate departments. That provision was never operative and was subsequently deleted, but its principle can be readily restored through a vote of the people.

To handle the current and future caseload, the number of justices must be increased. In my plan there would be an increase from seven to eleven justices. Five would sit as the Supreme Court/Criminal Division, and five would constitute the Supreme Court/Civil Division. One of each five would be designated presiding justice of the division. The chief justice would not be confined as a formal member of either panel, but would have administrative responsibility for supervising the total workload, and would be empowered to sit in either division to replace a justice who is disqualified, ill or on vacation, or to assign *pro tem* justices as required. The chief justice would continue to be chairperson of the Judicial Council and to sit on the Commission on Judicial Appointments.

Under this plan, three of the five justices in either division would be able to grant petitions for hearing, and the vote of three justices would constitute a majority for decision. The opinions of the two divisions would be published in separate volumes of California reports.

Initially all existing members of the supreme court would retain their positions in the revised scheme, and would be permitted to select the division in which to serve. There might be a federal constitutional impairment-of-contract problem if that were not permitted. The governor would fill the remaining four vacancies, and would have the authority to designate the presiding justices for the two divisions.

No reform plan can be entirely free of problems, and this proposal undoubtedly has its share. I anticipate dilemmas arising in determining the nature of some litigation in such areas as contempt proceedings, executive-clemency petitions, traffic violations, State Bar disciplinary actions and other matters involving administrative penalties. Whenever a doubt arises, the chief justice should be permitted to designate the division to hear the appeal.

Undoubtedly refinements and revisions may be offered to improve on my basic suggestion. And there should be debate on the underlying merits. But the time has arrived for consideration of major appellate reform—not merely on the federal level as proposed by Chief Justice Burger, but right here in California as well.