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Courts of Appeals in the Federal Judicial System

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COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM. By *J. Woodford Howard, Jr.* Princeton, N.J.: Princeton University Press. 1981. Pp. xxvi, 415. Cloth, $32.50; paper, $12.50.

Circuit courts of appeals occupy a relatively obscure position in the federal judicial hierarchy. Lacking the immediacy of the ninety-five district courts and the visible omnipotence of the Supreme Court, circuit courts, until recently, have received only cursory attention in the legal literature. Over the past decade, however, analysts have begun to acknowledge the significance of these intermediate appellate tribunals; moreover, some of the more enlightened commentaries have presented the circuits as integral components of the federal legal system.[1]

J. Woodford Howard, Jr.'s timely study, *Courts of Appeals in the*

9. In the chapter on judicial restraints, Neely only mentions that courts are asked to solve problems today that would not have been brought to courts twenty years ago. P. 202. This indirect reference is used to illustrate the increase in the judicial workload; Neely does not consider how this increase in workload undercuts his proposed restraints.

10. In his analysis of the judicial balancing function, Neely implicitly assumes that courts can decide when to intervene. Horowitz, in an empirical study, concluded that courts are particularly unfit to make this threshold intervention decision. Horowitz found courts poorly suited to judge the consequences of policy-making, hence poorly suited to decide when to intervene. D. HOROWITZ, THE COURTS AND SOCIAL POLICY 257-97 (1977).

Neely also overlooks the views of others in his analysis of restraints on the judiciary. Professor Choper notes that the basic restraints on the Supreme Court are impeachment and constitutional amendment. Neither of these restraints looms large as a practical matter. Because of this lack of external restraints, the Supreme Court at times has held to positions that are highly unpopular. J. CHOPER, *supra* note 1, at 47-55.

Others have disagreed with Choper and Horowitz. *See* Chayes, *supra* note 1, at 1307-09; McGowan, Book Review, 79 MICH. L. REV. 616 (1981). Neely, however, does not attempt to refute their arguments.

1. *See, e.g.*, S. GOLDMAN & T. JAHNIGE, THE FEDERAL COURTS AS A POLITICAL SYSTEM (2d ed. 1976); R. RICHARDSON & K. VINES, THE POLITICS OF FEDERAL COURTS (1970); G. SCHUBERT, JUDICIAL POLICY MAKING (rev. ed. 1974).

Federal Judicial System, supplements the existing literature with an exhaustive investigation of the effects of the recent litigation explosion[2] on three leading circuits.[3] Interestingly, Howard is concerned not only with "the business and functions of the three major tribunals in the flow of federal litigation," but also with "the attitudes of the judges toward their job and its chief problems" (p. xvii). These concerns led him to augment the detailed information that he and his assistants compiled on thousands of cases over a three-year period with insights gleaned from interviews with a number of circuit judges. Although these interviews lend a personal touch, and at times even produce a chuckle, Howard, like his predecessors, resorts to rigorous systems analysis. Consequently, readers who feel at ease with the technical jargon commonly used by political scientists will find *Courts of Appeals* relevant and enlightening. Readers who lack a strong background in the social sciences, however, must master the book's appendices before undertaking the yeoman task of deciphering Howard's incessant stream of data.[4]

In an attempt to impose a sense of order on his voluminous research, Howard initially poses two questions: (1) What binds federal courts into a judicial system? and (2) What controls the personal discretion of circuit judges as they make law and policy in the course of adjudication? Howard uses the answers to these inquiries to test various proposals for alleviating the pressures imposed by an expanding caseload.

Courts of Appeals consists of three parts. In Part I, Howard assesses the formal constraints[5] on judicial decision-making. In theory, the possibility of reversal by the Supreme Court should significantly restrict the exercise of discretion by circuit judges. But the Court's capacity to review lower court decisions is quite limited.[6] Since the Justices can review only a few cases, Howard finds, circuit courts usually dictate the final outcome. This freedom of the circuit judges to make policy, in Howard's view, promotes autonomy and

2. Between 1961 and 1978, the number of cases brought in the circuit courts roughly quadrupled. P. 10.

3. Because of time and financial constraints, Professor Howard limited his study to the Second, Fifth, and District of Columbia Circuits. He chose these tribunals on the basis of significance, convenience, and variety. P. xix.

4. Howard prefaces the book with a warning: "Because the analysis draws upon social concepts that may be unfamiliar to some readers, the basic conceptions and limitations of the research design should be understood from the start. (Further details regarding methodology appear in Appendix 1.)" Pp. xviii-xiv.

5. Throughout the book, Howard distinguishes between formal and informal constraints. Formal constraints include those procedural mechanisms built into the federal judicial system (*i.e.*, Supreme Court review, rehearings *en banc*, and panel rotation). Informal constraints embrace the relatively subtle notions of shared judicial norms, a common sense of purpose, and complementary political and professional values.

6. From 1965 to 1967, the Supreme Court heard only 1.9% of all circuit court cases; furthermore, the Justices reversed only two thirds of the decisions that they heard. Pp. 57-58.

heterogeneity. He concludes, therefore, that the specter of Supreme Court review does not, by itself, bind the intermediate federal courts into a judicial system (p. 84).

Although the statistics on Supreme Court review appear to support Howard's appraisal, he probably underestimates the overall effectiveness of formal constraints. Actual review by the Supreme Court is only one of the formal constraints on the discretion of circuit court judges. Howard asserts only that the Court cannot directly oversee the circuit courts; he fails to give due consideration to other, less hierarchical controls. The doctrine of *stare decisis*, for example, lends stability to the process of adjudication. Circuit judges do, of course, have some leeway to make policy, but they must work within the boundaries established by judicial precedent.

The answers to Howard's initial inquiries unfold in Part II as he shifts his attention to the circuit judges themselves and to the informal constraints that help form their consensus. Howard cites three processes that tend to filter judges of like character into appellate tribunals (pp. 89-120). First, the recruitment procedure weeds out incompetents and political extremists and draws upon accomplished jurists of middle-class means and moderate political convictions. Next, the socialization of circuit court judges — training that occurs primarily before their promotion to the bench — prompts a further convergence of ideological values. Finally, the process of professionalization gives rise to common judicial norms. Through long years of legal training — education, private practice, teaching, and adjudication — circuit judges acquire similar professional values. Ultimately, Howard finds, they share a sense of purpose.[7]

These three filtering processes, Howard maintains, promote consensus in judicial decision-making.[8] A shared conception of duty, spawned by complementary political and professional values, sustains both unity and uniformity. Informal, rather than formal constraints, therefore, provide the glue that binds the diverse elements of the federal court system. Succinctly summarized, Howard's final position is that " 'men count more than machinery' " (p. 124).

Howard makes his principal contribution to the legal literature in Part III. Perhaps the most pressing problem facing the courts of appeals today is their ever-increasing caseloads. In Part III, Howard discusses a number of proposals for mitigating the damage caused by this phenomenon (pp. 269-89). These include increasing the number of judges and circuits, realigning the existing judicial districts to balance limited resources, streamlining management to promote effi-

7. According to Howard, "judges were united by a common understanding that the central mission of circuit courts is to adjudicate appeals as agents of the national government." P. 156.

8. *But see* p. 204 (referring to the "bitter" and "acerbic" conflicts between various circuit court judges).

cient adjudication, and diverting certain types of cases to less congested and better-suited tribunals.

Howard criticizes each proposal in turn. Because of the system's sensitive nature, he warns, ill-considered solutions will cause widespread harm and may upset the consensual basis for decisions. Adding more judges, for example, could make *en banc* proceedings unmanageable; alternatively, increasing the number of circuits might aggravate regionalism and intercircuit conflicts. Geographic realignment raises similar provincial difficulties and, in any event, offers only limited potential for improvement. Better management would increase efficiency but it would exact a high price in terms of judicial flexibility and personalized attention. Finally, Howard faults diversion because it would restrict access to the federal courts.

Once again, Howard's criticisms are partly unwarranted. If, as he suggests, men count more than machinery, then the system's survival primarily depends on the informal norms that influence judicial decision-making. As long as the existing means of recruitment, socialization, and professionalization are preserved, the federal circuit courts can accommodate the structural alterations that these reforms would entail. The system, in fact, has already demonstrated its resilience by enduring the addition of new judgeships[9] and the partition of the Fifth Circuit. Despite Howard's premonitions, it should survive similar changes in the future.

On the whole, however, *Courts of Appeals* deserves more praise than criticism. Howard does not pretend to offer a panacea for the chronic afflictions of the federal circuit courts. He merely seeks to discuss the ramifications of potential changes before the litigation explosion compels hasty action. From this perspective, the best measure of the book's success may well be the fruitfulness of the further debate that it is almost certain to trigger.[10]

9. In 1978, Congress increased the number of circuit judgeships from 97 to 132. 28 U.S.C. § 44(a) (Supp. II 1978).

10. Howard's book has also been reviewed by Sbarboro, Book Review, 67 A.B.A. J. 1168 (1981); Whiteman, Book Review, 106 LIB. J. 466 (1981).