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The Politics of Federal Judicial Administration

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BOOK REVIEWS

THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION. By *Peter Graham Fish*. Princeton, N.J.: Princeton University Press. 1973. Pp. xiv, 528. \$20.

This book is addressed to the small audience who interest themselves in such uncelebrated political institutions as the Administrative Office of the United States Courts, the Judicial Conference of the United States, the Judicial Councils of the Circuits, and the Federal Judicial Center. These institutions, largely invisible to the public they are intended to serve, are not political in the partisan sense. And it would be a bold author who would attempt to interest any significant portion of the national electorate in the selection of their members or officials or in any of the issues they have recently confronted.

But it was not always so and may not always be. In the past century, the populist movement was actively concerned with the ways and means through which the federal judicial power was exercised. Its leaders realized that the judicial organizational scheme had something to do with the general effectiveness of the judicial system, which they regarded with great disfavor. Thus, many populists long fought the creation of the Circuit Courts of Appeals, because they feared that any improvement in the functioning of courts would blunt the force of their efforts to reduce the impact of the federal judicial system on society.¹ They were opposed by the political advocates of the eastern industrial establishment, who regarded the federal courts as an important instrument in achieving a national economic and political system. Ultimately, of course, the latter group prevailed.

It is possible that new lines of partisanship are forming around similar issues presented by current efforts to reform the federal appellate courts. These efforts first began to take shape with a study commissioned by the American Bar Foundation. That study, which was directed by the reviewer, was completed in 1968.² While it produced no direct results, it did provide the background for a successful effort in 1972 to persuade the United States Senate³ to broaden the mandate given to the congressional Commission created in that year

1. The story is most fully told in F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 56-102 (1928).

2. AMERICAN BAR FOUNDATION, *ACCOMMODATING THE WORKLOAD OF THE UNITED STATES COURTS OF APPEALS* (P. Carrington ed. 1968). See also Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969); Carrington, *The Power of the District Judge and the Responsibility of Courts of Appeals*, 3 GA. L. REV. 507 (1969).

3. *Hearings on S.J. Res. 122 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. (1972).

to examine circuit boundaries. The Commission, formally entitled the Commission on the Revision of the Federal Court Appellate System, was directed to expand its scope to include questions of federal appellate organization.⁴ It is now embarked on the broader phases of its examination and may well recommend revisions that will powerfully activate any latent interests in judicial administration. While the ill reception⁵ accorded the proposals of the Supreme Court Caseload Study Group led by Professor Paul Freund⁶ may deter the Commission from making far-reaching proposals, it has been explicitly urged to do so by the Advisory Council on Appellate Justice,⁷ which has made general recommendations to the Commission to revise the federal appellate structure. The views of the latter group, with some modification, have now been adopted by the American Bar Association.⁸

The nascent political interests that may be forming around federal appellate court reform offer a surprising contrast to the align-

4. The Commission on the Revision of the Federal Court Appellate System was charged as follows:

[T]here is hereby established a Commission on Revision of the Federal Court Appellate System (hereinafter referred to as "Commission") whose function shall be—

(a) to study the present division of the United States into the several judicial circuits and to report to the President, the Congress, and the Chief Justice its recommendations for changes in the geographical boundaries of the circuits as may be most appropriate for the expeditious and effective disposition of judicial business.

(b) to study the structure and internal procedures of the Federal courts of appeal system, and to report to the President, the Congress, and the Chief Justice its recommendations for such additional changes in structure or internal procedure as may be appropriate for the expeditious and effective disposition of the caseload of the Federal courts of appeal, consistent with fundamental concepts of fairness and due process.

Act of Oct. 13, 1972, Pub. L. No. 92-489, 86 Stat. 807.

5. See, e.g., Brennan, *Justice Brennan Calls National Court of Appeals Proposal "Fundamentally Unnecessary and Ill-Advised,"* 59 A.B.A.J. 835 (1973); Goldberg, *One Supreme Court*, NEW REPUBLIC, Feb. 10, 1973, at 14; Gressman, *The National Court of Appeals: A Dissent*, 59 A.B.A.J. 253 (1973); Lewin, *Helping the Court With Its Work*, NEW REPUBLIC, March 3, 1973, at 15; Warren, *Retired Chief Justice Warren Attacks . . . Study Group's Composition and Proposal*, 59 A.B.A.J. 724 (1973).

6. FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (1972) [hereinafter FREUND STUDY GROUP REPORT].

7. The Advisory Council, a group cosponsored by the Federal Judicial Center and the National Center for State Courts, has only recently released its "explicit urging" to the Commission, in the form of a resolution adopted February 11, 1974. The resolution follows an earlier working memorandum that was released to the Commission in August 1973. See P. Carrington & M. Rosenberg, *A Preliminary Report on the Revision of the Federal Court Appellate System* (Aug. 1973).

8. The memorandum cited in note 7 *supra* also served as a component in the work of the American Bar Association Special Committee on Coordination of Judicial Improvements, whose recommendations were accepted by the American Bar Association in Houston in February 1974. Although there is some difference between the proposals of the A.B.A. Committee and the Advisory Council, the two groups are proceeding cooperatively as a result of the effective liaison work of Circuit Judge Shirley M. Hufstедler. For her views, see *Courtship and Other Legal Arts*, Address to The Fellows of the American Bar Foundation and the National Conference of Bar Presidents, Feb. 3, 1974.

ment of the nineteenth-century populists against the eastern establishment. If there is a new "left" forming, it seems to be centered among the most deeply committed admirers of the Warren Court; they manifest suspicion of any plan that might reduce the power of the Supreme Court vis-à-vis the lower courts. In such disparate areas as collateral attack on state-court convictions or class litigation to enforce environmental protection laws, these individuals tend to take an expansive view of the role of the federal courts in general, as well as of the Supreme Court in particular.⁹ To the extent that there is an articulated "right," it seems to be centered among the membership of the federal judiciary, who fear that continued enlargement of the role of the federal courts in general, and of the appellate courts in particular, will dilute the quality and status of those institutions.¹⁰ The current movement to restrict federal jurisdiction seems to have a distinctly elitist flavor, which is a pole apart from the motives of the populists who espoused the same cause a century ago.

Perhaps this paradoxical reversal suggests to the cynical that the debate about judicial institutions is, at root, unprincipled. It does, indeed, appear that the reactions of many observers to the issues of judicial politics are controlled by their perception as to whose ox is being gored by those presently exercising the judicial power. However, this is predictable and inevitable, for judicial institutions exist to serve purposes external to themselves and it is correct to view internal organizational issues in the light of their relationship to those external considerations. In a true sense, however, all sides of the many issues can be viewed as conservative. The real difference simply is over which features of judicial institutions are most in need of conservation when circumstances outside the judicial system require changes in its structure.

The circumstance that evokes the present sense of a need for reform in our judicial institutions is the very substantial demands placed on the courts by recent developments, particularly with regard to the right to counsel, in constitutional criminal procedure. Especially in the federal courts, the tremendous increase in criminal litigation has been the most important cause of some fairly fundamental changes in the appellate process. No longer are all appellate litigants assured of an opportunity to confront the appellate judges in oral argument¹¹ or to have a written statement of the reasons for appellate decision-making.¹² Moreover, every appellate judge in the federal system is now supported by a growing personal staff. In addition, there

9. See note 5 *supra*.

10. See H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* (1973).

11. See generally Federal Judicial Center, *Comparative Report on Internal Operating Procedures of United States Courts of Appeals* (July 1973).

12. See generally Advisory Council on Appellate Justice, *Standards for Publication of Judicial Opinions* (Federal Judicial Center Research Series No. 73-2, Aug. 1973).

is an increasing trend, highly developed in some state courts, toward the establishment of substantial staff support, at the institutional level, for whole courts.¹³ These staff developments, however necessary, have diluted the personal responsibility of the judges and have tended to insulate them from one another in such a way as to reduce collegiality in decision-making. As a result, courts have begun to resemble administrative agencies.¹⁴

This loss of collegiality is further compounded by the fact that the number of federal appellate judgeships has been increased because of the great increase in caseloads. And, in turn, it has evoked concern for the uniformity and predictability of appellate decisions.¹⁵ Some evidence suggests that the growth of the federal judiciary has made it less amenable to effective leadership by the Supreme Court.¹⁶ Traditionally, the supervision of the Supreme Court has been limited to the review of individual cases,¹⁷ and, inasmuch as its capacity to give plenary attention to cases has not been increased, its impact is felt in an ever-diminishing percentage of federal appeals.¹⁸

Moreover, in addition to these subtle changes in the quality of federal appellate justice, other problems have emerged from the increase in criminal appellate litigation. One is a general delay in the process of criminal law enforcement resulting from time lost during appeal.¹⁹ It is not uncommon for from six months to a year to elapse between the filing of the record and appellate disposition.²⁰ In a time

13. See, e.g., Lesinski, *Judicial Research Assistants: The Michigan Experience*, 10 JUDGES' JOURNAL 54 (1971).

14. This seemed to be the core of concern motivating the FREUND STUDY GROUP REPORT, *supra* note 6.

15. See, e.g., FREUND STUDY GROUP REPORT, *supra* note 6; Griswold, *The Supreme Court's Case Load: Civil Rights and Other Problems*, David C. Baum Memorial Lecture, Univ. of Illinois, Nov. 8, 1973; Carrington, 82 HARV. L. REV. 542, *supra* note 2, at 580-617.

16. An effort to quantify the problem is Carrington, *United States Appeals in Civil Cases: A Field and Statistical Study*,—HOUSTON L. REV.—(1974). Cf. Goldman, *Conflict and Consensus in the United States Courts of Appeals*, 1968 WIS. L. REV. 461.

17. Professor Fish recounts earlier efforts to enhance the supervisory power of the Supreme Court (pp. 117-28, 136-37).

18. The diminishing capacity of the Supreme Court to maintain an alignment of the lower federal courts is told in the following numbers. In 1963, the courts of appeals made 3,172 dispositions after submission; the Supreme Court granted 98 petitions for certiorari to those courts, thus reviewing 3.1 per cent of the dispositions. 1963 ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ANN. REP. 182 (table B 1), 186 (table B 2). In 1973, the courts of appeals made 9,779 dispositions after submission, and the Supreme Court granted 135 petitions, thus reviewing 1.4 per cent of the dispositions. 1973 ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ANN. REP. A-1 (table B 1), A-3 (table B 2) (preliminary edition).

19. See generally Advisory Council on Appellate Justice, *Expediting Review of Felony Convictions After Trial* (Federal Judicial Center Research Series No. 73-1, Aug. 1973); Bell, *Toward a More Efficient Federal Appeals System*, 54 JUDICATURE 237 (1971); Bryan, *For a Swifter Criminal Appeal—To Protect the Public as Well as the Accused*, 25 WASH. & LEE L. REV. 360 (1968).

20. 1973 ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ANN. REP. A-7 (table B 4) (preliminary edition).

when only a minor fraction of contested convictions resulted in an appeal, this delay was not a serious matter. Now that most contested convictions produce appeals,²¹ it has become a significant impairment of the effectiveness of the process and is itself an inducement to more criminal appellate litigation, at least in those cases in which punishment is postponed pending appeal. Whatever the eventual outcome, delay in the disposition of criminal litigation is bad. If the accused is ultimately absolved, it is unacceptable to keep him under punishment or threat of punishment for long. If he is to be punished (or corrected), it is unacceptable to postpone that action for long. Thus, there are powerful incentives for developing a criminal appellate process that is much more expeditious, even though this may well require changes that significantly modify the structure of current institutions and the roles played by their members.²²

The proliferation of post-conviction criminal litigation has also been a substantial source of uncertainty.²³ In part, this development may be the result of the excessively narrow scope of present processes for criminal adjudication, which often leave a variety of constitutional objections open for determination in post-conviction proceedings.²⁴ Also, the inability of the Supreme Court to cope with the massive job of reviewing state convictions for errors in enforcing federal law has induced the Court to opt for review of state convictions by lower federal courts through post-conviction litigation.²⁵ It is possible that either or both of these sources of the problem could be alleviated, but only by means of significant changes, which would, again, disturb institutions and careers.

Without attempting to suggest a coherent solution to all of these difficulties, one can safely assert that basic issues of constitutional import are presented by the plight of the federal courts. And one of the most basic of these is how we shall resolve them. It is this question alone to which Professor Fish has addressed himself. He has done so

21. In fiscal 1973, there were 5,974 defendants convicted after trial in the district courts. 1973 ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ANN. REP. A-48 (table D 4) (preliminary edition). And there were 4,453 criminal appeals perfected in the courts of appeals. *Id.* at A-9 (table B 7).

22. As to feasibility, compare the English system described by D. MEADOR, CRIMINAL APPEALS: ENGLISH PRACTICES AND AMERICAN REFORMS (1973).

23. In fiscal 1973, as in each of the last few years, about 8,000 state prisoners petitioned to federal courts for writs of habeas corpus. 1973 ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ANN. REP. A-23 (table C 4) (preliminary edition). About 1,300 of these reach the courts of appeals, after a judicial determination that there is probable cause for appeal. *Id.* at A-8 (table B 7). About half of the latter number petition to the Supreme Court. FREUND STUDY GROUP REPORT, *supra* note 6, at A-9 (table V).

24. By the use of staff it would be possible to enlarge the scope of criminal appellate litigation to assure early adjudication of all possible issues. See National Advisory Commission on Criminal Justice Standards and Goals, standard 6.2 (1973).

25. See generally Haynsworth, *A New Court to Improve the Administration of Justice*, 59 A.B.A.J. 841 (1973).

in a manner that is helpful and very informative, but not very reassuring.

The political institutions that he describes are most notable for their low profiles. Few political observers, indeed, have been so attentive to the national political scene in the past half century as to be familiar with such names as D. Lawrence Groner (p. 129), Harold Stephens (p. 130), Henry P. Chandler (p. 169), Elmore Whitehurst (p. 169), and Warren Olney (pp. 217-18), all of whom have been among the powerful personalities that have shaped the institutions of federal judicial politics. As important as these individuals are the persons who hold federal judgeships, because the recurring theme of the book is that the judges, who control these institutions, are quite jealous of their prerogatives and, especially, of their autonomy and independence.²⁶ As a result, Professor Fish does not view the prospects for major reform as heartening. He concludes:

The record of the past half century does not in fact bode well for major reforms of the federal judiciary. Such changes, whether in administrative structures and powers, procedure, or court organization and jurisdiction tend to have a centralizing effect. . . . Each of the [suggested reforms] would exert decided centripetal impulses through the federal court system. Each would threaten or appear to threaten the hallowed ground of judicial independence. More realistically every one would be seen as subverting existing status relationships by changing the internal distribution of power within the judicial system. [P. 432]

As one who has participated in an effort at federal court reform since 1966, I do not presently share this assessment. At any time from 1966 until 1971, I would have agreed that the prospects for significant reform were extremely dim. Of course, that can be said at most times for most human institutions. I have also been a some-time participant in efforts to reform institutions of public education and professional legal education. I can attest to the hardness of resistance to change in those institutions; such resistance derives from psychological forces that take institutional political forms very much like those that Professor Fish describes.

But there are moments in the history of institutions when they are vulnerable to reforms that are reasonably responsive to current needs. There are at least two essential features of such moments. One is internal self-doubt; the other is an external banner to which the self-doubts can rally in pursuit of renewal and reassurance. Such a convergence did produce the Circuit Courts of Appeals in 1891,²⁷ a

26. Thus, after considerable effort, the Administrative Office at last published data on judicial output, despite such reactions as that of one irate judge who objected to the making of a "dean's list" and to exposing judges as "goats of the federal judiciary" (p. 198).

27. See F. FRANKFURTER & J. LANDIS, *supra* note 1.

considerable reform. Similar dynamics produced the Rules Enabling Act of 1934,²⁸ a development that receives surprisingly little attention from Professor Fish.

One can today perceive a growing lack of assurance on the part of federal judges that their work is as much in harmony with nature as was once thought. And one can see in the emergence of the Commission on Revision of the Federal Court Appellate System and in the action of the American Bar Association a modestly successful effort to erect a banner or device to rally these self-doubts. So, despite Professor Fish's prognosis, it is possible to hope that some of the present problems may be alleviated in the not too distant future by a substantial reform. Win or lose, the results of the present efforts will merit at least another chapter in the saga of which he records a part.²⁹

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28. Ch. 651, 48 Stat. 1064. See 1A MOORE'S FEDERAL PRACTICE ¶ 0.501 (1959).

29. Out of respect for the reviewers' craft, I am obliged to report that Professor Fish's book contains an erroneous map on page 240. The map, which identifies Illinois as Indiana and Indiana as Illinois, is attributed to John P. Winkle, III.