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## Book Review of Courts of Appeal in the Federal Judicial System: A Study of the Second, Fifth, and District of Columbia Circuits

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## BOOK REVIEW

COURTS OF APPEAL IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS. By J. WOODFORD HOWARD, JR. Princeton: Princeton University Press, 1981. Pp. 415, Tables, Appendices, Index. \$32.50 (cloth), \$12.50 (paper).

PETER G. FISH\*

Years of dogged and dedicated research combined with disciplined scholarly reflection has resulted in a major creative contribution to a growing, but often redundant, body of literature on the federal intermediate appellate courts. Law students, scholars, legal practitioners, and exponents of reform will find this work a monumental analysis of the case flow that courses into and out of the "courts in-between" as well as a massive synthesis of social science literature. This work epitomizes the scholarly craft at its best and demonstrates the utility of that craft in grappling with an important problem confronting modern American society.

Author J. Woodford Howard, Jr. is Thomas P. Stran Professor of Political Science at The Johns Hopkins University and is biographer of Supreme Court Justice Frank Murphy. He is the distinguished immediate successor to an equally distinguished scholar and biographer, Carl Brent Swisher. In *Courts of Appeal in the Federal Judicial System*, Professor Howard examines appellate tribunals in three circuits: the Second, with its commercial litigation; the compact District of Columbia, with its caseload of government and criminal business; and the sprawling "old" Fifth, stretching across the Deep South with its reputed load of civil rights cases and real overload of cases in general.

Howard constructed his data base for consideration of case flow in the three courts from the period beginning July 1, 1964 and ending June 30, 1967. During those three base years, 4,941 cases

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passed through the trio of circuits. Opinions in most cases were published in the *Federal Reporter*, but Howard and his assistants also turned up 806 unpublished decisions. The saga of their discovery and the difficulties of tracking all of the nearly 5,000 cases through the three tiers of the federal judicial system is graphically described in Appendix I. Providing a third dimension to his study are the author's in depth interviews of thirty-five judges and chief clerks in the relevant circuits. He ranges widely in viewing courts of appeals as institutions that "look down to district courts and agencies, up to the Supreme Court and the central government, in to themselves, their colleagues and staffs, across to rival appellate courts, and all around to various groups and individuals who compose their attentive publics." But he views the courts through the eyes of a political scientist thoroughly familiar with the variety of methodologies common to that discipline.

For these courts in the middle, he argues, "politics pervades their goals, composition, and working milieu. They orbit in the political universe." This perspective may evoke challenges from legal traditionalists enamored with formal institutional procedures and convinced that both law and administration are separate and distinct from politics. Legal realists also will find disappointing Howard's failure to discover that the judicial process at the intermediate appellate level is little more than pure discretion, behavior, and politics. Instead, the Hopkins scholar plots out a middle way founded on case flow data and insightful analyses of interview material. What he finds has far-reaching implications for an understanding of the role of appellate courts and of their judges. In addition, his study throws both light and doubt upon assorted proposals for reform.

In Part I, Howard analyzed case flow evidence and found that the three courts were more than three identical elements situated in the middle tier of an organizational pyramid. Rather, they were substantially diverse regional entities that wove local and national interests into a fabric of federal law in which task their judges enjoyed substantial discretion within the confines of *stare decisis*. Sixty-three percent of their business involved statutory interpretation and only 9% prompted them to construe language in the Constitution. What they received as grist for their judicial mills depended upon what litigants brought to them in appealing 32% of

appealable district court decisions. Rationalism, however, was not the hallmark of this process. Diversity cases, in which the federal interest was weakest, generated a relatively high rate of appeals, but rural districts, where trial judges proved especially resistant to appellate court oversight, produced a low rate.

As for rates of appeals and reversals of lower court decisions, Howard found little relationship, a revelation that raises questions about litigant-lawyer motivation and suggests an area for further study. Nor did his data support the often cited thesis of Richardson and Vines that courts of appeals play an important role in reformulating issues developed in the trial courts. Such activity characterized only 7% of appealed cases in the three-year sample. In fact, the courts of first instance proved to be courts of final resort in two-thirds of all cases and their decisions prevailed in 96%. Their business, however, was not uniform. Its volume and substance undulated from circuit to circuit because the courts served different clientele and different policy values. The result, said Howard, is regional specialization, the development of twelve geographically dispersed judicial power centers, and regionalized national law which may or may not meet varied criteria for harmony and uniformity.

Confidence in the Supreme Court's ability to bring unity to disparate treatment of national law is misplaced. The author joins a chorus of judicial Jeremiahs in reporting that although the High Court "disturbed" two-thirds of the decisions rendered by appellate courts, it only heard 1.9% of the cases handled by them during the 1964-1967 base period. This proportion fell even further by 1975. Consequently, the three circuit benches became courts of last resort in 98.1% of their cases and actually prevailed in 98.6%. In the base period the Court "disturbed" only 1.3%. Cases in this class were in highly selective areas of law: constitutional issues, 32% as compared to 9% for courts of appeals; criminal law and procedures, 30% as compared to 24% for courts of appeals; and administrative appeals, 22% as compared to 13% for courts of appeals. On the other hand, some areas of high intermediate court activity such as patents, insurance, and real property went virtually unreviewed, leaving the appeals courts as final arbiters. Howard concludes that when the "August Nine" intervene, they do so less to correct errors, or even to resolve intercourt conflict, than to

exercise lawmaking power in settling major policy disputes. "The Supreme Court," he flatly declares, "is a policy court; Courts of Appeals are courts of appeals." The latter correct errors, enforce national law, and filter cases for the Supreme Court. Their insulation from meaningful High Court error correction renders them autonomous institutions in adjudication and administration, independent of the Court above and of those with coordinate jurisdiction on either side.

Lack of unity and uniformity conjures up visions of appellate tribunals whose orbits have gone haywire and whose whole universe verges on disintegration. But the author reports no evidence of an intergalactic disaster. To be sure, problems arise out of this condition. Balkanization exists due to the paucity of error-correcting review, but is confined mostly to patents and taxation. Given the institutional performance considered in Part I, observers would expect these heavily loaded courts to be wallowing in far more deplorable conditions of existence. Hierarchy, structure, and formal rules, however, are not the complete story. Unity, coherence, and accountability of courts of appeals may not depend solely on bricks and mortar. Politics, in the sense of a variety of informal constraints and internalized norms, may explain better the survival of a judge-dependent system infringed upon by only weak and diffuse external controls. Part II, therefore, examines the critical roles played by circuit judges.

Judges who sit on the federal intermediate appellate courts are a very special breed as demonstrated by their recruitment process, socialization, and professionalization. Cosmopolitan in origins, urban in upbringing and legal practice, and mobile in their occupations, they possess traits leading them away from career paths in state government and Congress. In addition, these same traits may have made them more attractive to panel members of President Carter's Circuit Judge Nominating Commission who were characterized by similar traits. Circuit judges consequently ascend to the bench in possession of a national rather than local outlook. They are prepared to embrace the paramount mission of the circuit courts by adjudicating appeals as agents of the national government.

As role types, Howard found that most judges were neither lawmaking "innovators" nor self-effacing "interpreters." The majority

fits the mold of "realists" or pragmatic problem solvers filling judicial power vacuums. For them, non-political professional norms hardly shielded judicial decisions from policy predilections and personal preferences. Instead, the author discovered the political and professional values interacted to the extent that "the distinction between politics and law, so prominent in professional ideologies, tends to blur among those who staff the Courts of Appeals." In fact, "political and judicial philosophies are entwined in resolving and rationalizing the normative ambiguities of their work." So entwined were these disparate elements that Howard was hard put to find evidence that past political attitudes significantly affected judicial votes, "except feebly in civil rights." Instead, judges' votes reflected individual role perceptions, a finding which Howard terms his "biggest surprise." So much for the predictive impulses of social science and the normative impulses of legal theory that fueled the successful attacks of organized labor and black Americans on such memorable Supreme Court nominations as John J. Parker in 1930 and Clement L. Haynsworth, Jr. in 1969.

Pre-judicial socialization and professionalization fit circuit judges into a common mold. Their political values are shared "in concert rather than in collision with professional norms." This bond, Howard contends, is the real glue that holds together a decentralized court system, narrows the range of circuit conflict, and obviates the need for error-correcting intervention by the Supreme Court. This relationship is partially responsible for the 4% dissent rate in the three circuits examined. Also accounting for such remarkable consensus is the heavy workload, rules of civility, attempts to avoid complicated en banc proceedings, and, above all, the customary three-judge rotating panels. These transitory panels allow intra-circuit dispersion of personal and ideological conflict without dissent but generate discordant intra-circuit decisional law. Structurally, the system guarantees disharmony if not judicial disaster. "Fragmented, informal, and permissive," Howard comments, "these small groups of equals are organized according to rival principles of independence and collegiality. Panel rotation tends to pluralize them, en bancs to polarize them. Rotation is to the parts what regionalism is to the whole—a decentralizing and destabilizing force."

Leadership plays an important role in ameliorating apparent

structural problems that would pose dangers to a viable court system. "In Courts of Appeals, as in other organizations of equals," the author declares, "certain individuals performed uncommon labor and reaped uncommon influence on the basis of their expertise and length of service." The chief judges of the circuits and the presiding judges on the rotating panels inevitably occupied positions that fused managerial skills with legal policy-making expertise and power. For, as Howard says, the power to sit and the power to assign is the power to decide. Judicial leaders possess the ability to manipulate both random panel rotation and opinion assignments in order to promote important policy goals. In this manner, panels were "rigged" in the Fifth Circuit in the early 1960's in order to generate maximum judicial authority on a vital national issue. So much for the official theory of *primus inter pares*.

In Part III, the author applies his findings to assorted reformist siren songs, many of which emphasize the separation of politics from both law and administration. He rejected the possible remedy of additional judges. This remedy constitutes merely "a quick fix" necessitating a second appellate tier such as the proposed National Court of Appeals. Geographic realignment of the circuits affords no better remedy because its path is blocked by jungle-like political thickets as exemplified by the decades-long struggle to split the Fifth Circuit. Diversion of certain categories of cases, especially those based on diversity jurisdiction, would be helpful, but it too faces political obstacles. Creation of new institutions, such as specialized panels or tribunals, to adjudicate cases infused with technical subject matter poses the possibility of institutions marked by "tunnel vision, ideological polarization, and a fate augured by that of the old Commerce Court." Expanded discretionary docket control would reduce access for appellants without counsel, in favor of the affluent few who enjoy the services of attorneys.

Improved management techniques, long dear to the hearts of judicial reformers, offer means of streamlining adjudication. But at what price, queries Howard? The use of screening systems supervised by non-judges and the disappearance of signed written opinions pose dangers to a judicial system historically distinguished by independence, decentralization, and individual craftsmanship. Modern management converts judges from decisionmakers into supervisors, threatens them with administrators on top rather than

on tap, and moves courts closer to a condition characterized by centralization, bureaucratization, and professionalization. Howard worries that such developments will eventually subvert "the very values of collegiality, informality, and judicial independence." One well may worry with him about the continued legitimacy of courts that wield society-shaping powers when those courts take on the qualities of innumerable run-of-the-mill governmental agencies. At that point, one might anticipate a massive infusion of the popular will into a judicial sanctuary rendered defenseless by its managerial adaptations to case load stresses. On that day, long forgotten opponents of the federal courts like Senators Robert M. LaFollette of Wisconsin and George W. Norris of Nebraska would doubtless rise from their graves to witness the breathtaking events.

Although the National Court of Appeals ever hovers in the background as "a solution in search of a problem," Armageddon may not be imminent. Uniformity may be neither achievable nor even desirable in a pluralistic federal judiciary. No one can be confident of answers. Howard warns against an uncritical "rush to modernization and new institutions." He says "a go-slow policy is . . . in order given the inadequate knowledge, the unanticipated consequences of reorganization, and the faulty premise that administration is separable from policy-making. Both jumboism and proliferation, in other words, should come last, not first. . . . Organizationitis is a dubious cure for appealitis." What is needed is little more than institutional tinkering, some diversion, perhaps limited specialization, limited certiorari powers, and inquiry into litigation motives. Beyond such cautious steps, costs incurred for a national court may be too high in light of the uncertain benefits to be gained.

Here then is a meticulous work of exceptional scholarship which is in a class by itself. Whether it stands as a seminal study with *The Business of the Supreme Court* by Felix Frankfurter and James M. Landis, published over half a century ago, may be debated. However it is characterized, Howard's book must be considered one which is full of important data and wise insights into the federal appellate courts. Readers will find the index comprehensive and the text nearly flawless. They will doubtless regret being held hostage by the economic exigencies of university press publishing as evidenced by the voluminous and useful footnotes inconve-

niently located at the back of the book rather than at the bottom of pages. Readers compelled to seek out sources in the notes also will regret the absence of a bibliography. Such minor shortcomings must fade swiftly when considered against the rich contents of this landmark study of the United States Courts of Appeals.