RICHARD A. POSNER

THE FEDERAL COURTS

CHALLENGE AND REFORM

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Harvard University Press
Cambridge, Massachusetts
London, England

Printed in the United States of America

Second printing, 1999

First Harvard University Press paperback edition, 1999

Library of Congress Cataloging-in-Publication Data

Posner, Richard A.
The Federal courts : challenge and reform / Richard A. Posner.
p. cm.
Includes bibliographical references and index.
ISBN 0-674-29626-5 (cloth)
ISBN 0-674-29627-3 (pbk.)
1. Courts—United States. 2. Judicial process—United States.
3. Judges—United States. 4. Court congestion and delay—United States.
KF8700.P67 1996
347.73'2—dc20
[347.3072] 96-19516

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Preface

Article III of the Constitution of the United States ordains the creation of a Supreme Court, authorizes Congress to create other, inferior federal courts as well, and empowers the federal courts to exercise jurisdiction over specified classes of case thought to be of national concern—mainly cases between citizens of different states, admiralty cases, and cases arising under federal law. Out of these provisions, which date back to 1789, has grown the large, complex, powerful, controversial, and somewhat overworked judicial system that is the subject of this book. My intent, in this edition as in the earlier *The Federal Courts: Crisis and Reform,* published in 1985, is to describe, and as best I can explain, the system; to evaluate the proposals for improving it; and to make my own proposals for improvement.

Much has changed since the earlier edition. The changes not only warrant a new edition but require that it be a substantial, indeed a radical, revision of the first; and that is what I have tried to do. The changes in and concerning the federal court system that are reflected in this edition are both objective and subjective. The objective include changes, some quite unexpected, in the workload of the different tiers of the federal judicial system (district courts, courts of appeals, and Supreme Court); a continued expansion in the number of federal judges; the promulgation of federal sentencing guidelines, which have significantly affected the trial and appeal of federal criminal cases; an expansion of federal criminal jurisdiction in response to rising public concern with crimes of violence; a continued rapid increase in prisoner civil rights suits, despite the ever higher procedural and substantive hurdles that they must clear; a substantial overhaul of the system for compensating federal judges; some significant changes in federal jurisdiction (notably the elimination of all but the tiniest vestiges of the Supreme Court's mandatory jurisdiction);

strong pressures to allow the televising of federal court proceedings and to persuade federal courts to study racial and sexual discrimination in those courts and even in the legal profession as a whole; and an accelerating movement to reduce federal judicial workloads by aggressively encouraging and in some instances even requiring "alternative dispute resolution," usually some form of pretrial arbitration. This has been an eventful decade for the federal courts. I discuss the major events in this new edition and have updated all tables and figures.

The subjective changes I refer to involve my own thinking about the problems of the federal courts, which has changed since the first edition for a variety of reasons. One is the altered perspective created by longer, and slightly different, judicial experience. At the time of the first edition I had been a judge for only three years. Not only have I much more judicial experience under my belt (including experience with a court of eleven judges, compared to nine at the time of the first edition, and experience conducting civil jury trials as a "volunteer" in the district courts of the circuit). In addition, since 1993 I have been the chief judge of my court and, in consequence, the chairman of the judicial council of my circuit (the Seventh, covering Illinois, Indiana, and Wisconsin) and a member of the Judicial Conference of the United States, the governing body of the federal courts other than the Supreme Court. I have also during this past decade conducted academic research on a variety of topics directly related to the subject of this book, including judicial behavior, evaluation, and compensation, and alternative dispute resolution. And I was a member of the Federal Courts Study Committee (appointed by Chief Justice Rehnquist at the direction of Congress), which conducted a fifteen-month study of the federal court system and issued a comprehensive report in 1990.[1] Although I no longer agree with everything in the report—if only because it has in some respects been overtaken by events—my service on the committee gave me many new insights into the problems of the federal judiciary. The committee, moreover, both commissioned and stimulated important research on the federal courts; and quite independently of the committee, the last decade has seen an outpouring of scholarly research

1. *Report of the Federal Courts Study Committee* (April 2, 1990).

on the federal courts and courts more generally, including research that, like the first edition, takes an economic approach to issues of judicial administration. This research has altered my views on some points and confirmed them on others. Critics of the first edition pointed to the high ratio of impressions to data; I hope I have succeeded in reducing that ratio.

I now see, moreover, that in writing the first edition I was too tightly in the grip of the conventional legal professional's conception of judging, a conception that emphasizes "craft" values deeply threatened by any increase in judicial caseloads. My recent work on the sociology of the profession (see in particular Chapter 3 of my book *Overcoming Law* [1995]) has helped me to realize that these values are themselves contestable and to appreciate the success of the federal judiciary in adapting to the problems created by the enormous growth in caseload of recent decades. An even sharper reality jolt has been provided by the leveling off of the caseload in both the district courts and the Supreme Court. The success of the federal courts in coping with a caseload that ten years ago I would have thought wholly crippling, and the recession of caseload in all but the courts of appeals, have led me to change the subtitle of the book ("Crisis and Reform," in the first edition), substituting "Challenge" for "Crisis." It is inaccurate to describe the situation of the federal courts as critical, although it may become so in the future, perhaps the near future; elastic will stretch only so far. My change in outlook between the first and second editions is seen most clearly in Chapter 6 of this edition.

The crisis that impended in the 1980s was averted, or at least postponed, by measures that may portend the gradual transformation of the federal judiciary from the Anglo-American (really American, I shall argue) model to the Continental European model. I am not sure that this would be a bad thing. But many will think it bad, and good or bad it would be a momentous change and deserves more attention than it is getting. The European model is characterized by a career judiciary, a high ratio of judges to lawyers, specialized courts, abbreviated proceedings, and an emphasis on applying rather than on also making rules of law. It lends itself better than the American model to accommodating an indefinite growth in judicial business. It may be our future, although there is as yet no sign that the ratio

of judges to lawyers is increasing. A comparative dimension, incidentally, is a new feature in this edition.

I have retained the basic structure of the first edition, though with several alterations. I have dropped old Chapter 1 ("The Judicial Process"), which now strikes me as excessively simple-minded for the likely readership of this book. I have also dropped Chapters 9 and 10 ("Interpreting Statutes and the Constitution" and "Common Law Adjudication in the Courts of Appeals") and the discussion of "substantive due process" in Chapter 6 ("The Role of the Federal Courts in a Federal System"). These discussions stray too far from the institutional concerns that should be the focus of a book on judicial administration. (I have written at length on interpretation elsewhere. See, in particular, Part III of my book *The Problems of Jurisprudence* [1990].) I have also eliminated the Conclusion to the first edition. The Conclusion was mainly a criticism of the neglect of social science by the legal professoriat, which I have elaborated elsewhere (see, for example, Chapter 2 of *Overcoming Law*) and to which I allude briefly below. Three other chapters (Chapters 3 through 5 of the first edition) grew so large in this edition that they have undergone mitosis.

I hope this book makes a practical contribution to the improvement of the federal courts. But I also hope it advances the cause of scientific judicial administration. It has been observed that "the purpose of judicial administration is to enable courts to dispose—justly, expeditiously, and economically—of the disputes brought to them for resolution."[2] It is a noble purpose. Its fulfillment depends on a melding of different approaches. One is the increasingly rigorous economic theory of litigation and courts. Another, which overlaps, is a legal-academic literature on judicial administration that is making increasing use of economic theory and statistical inference. Another, parallel literature, which is more heavily statistical but also less theoretical and more policy-oriented, is authored by employees and consultants of the Federal Judicial Center and other specialized judicial research agencies, public and private. Judges themselves have written extensively on judicial administration,[3] though the candor and ac-

2. Russell Wheeler, "Judicial Administration: Its Relation to Judicial Independence," 23 (National Center for State Courts, Publication No. R-106, 1988).

3. For good examples, see Henry J. Friendly, *Federal Jurisdiction: A General View* (1973); Stephen Breyer, "The Donahue Lecture Series: 'Administering Justice in the First Circuit,' " 24 *Suffolk University Law Review* 29 (1990).

curacy of this literature leave something to be desired, I have to admit.[4] The "law and society" movement, broadly sociological though dominated by law professors, has made important and rather neglected contributions to the empirical study of judicial administration—neglected by me at any rate, and I have tried to make amends in this edition.

But haven't I, the skeptical reader may ask, left out the most important thread in the tapestry—the countless articles, and occasional treatises and books, by students of federal jurisdiction, of "federal courts" as the subject is known in law schools? In a critical commentary on the *Report of the Federal Courts Study Committee,* George Brown noted with surprise and discomfort that the committee had avoided "the ideological dimensions of the subject and . . . the Supreme Court's decisions and doctrines that reflect them."[5] "The Committee may have felt," he speculated, "that the issues that dominate the federal courts classroom are largely irrelevant to a study of problems in the federal courtroom."[6] He regarded the first edition of my book as having "had a clear impact on the work of the entire Committee" and remarked, "Posner's book cast substantial doubt on the utility of doctrinal analysis to the task of evaluating current problems in the federal courts."[7] The years have not stilled these doubts. The doctrinal issues that make the course on federal courts one of the most demanding in the law school curriculum have little to do with the actual problems of the federal courts. Those problems were exacerbated by the political preferences of a previous generation of judges, but political preferences should not be confused with the analysis of legal doctrine, and the problems of the federal courts have far more to do with social, institutional, and systemic matters than with anything that a lifetime of study of legal doctrine might help one to

4. As forcefully pointed out in Marc Galanter, "The Life and Times of the Big Six, or, The Federal Courts since the Good Old Days," 1988 *Wisconsin Law Review* 921.

5. George D. Brown, "Nonideological Judicial Reform and Its Limits—The Report of the Federal Courts Study Committee," 47 *Washington and Lee Law Review* 973, 984 (1990).

6. Id. at 985. This thought is echoed by Michael Wells, who describes federal courts as a scholarly backwater. Wells, "Busting the Hart and Wechsler Paradigm," 11 *Constitutional Commentary* 557 (1995). For a more optimistic view, see Richard H. Fallon, Jr., "Reflections on the Hart and Wechsler Paradigm," 47 *Vanderbilt Law Review* 953 (1994).

7. Brown, note 5 above, at 986.

understand. It is more than curious that the enormous changes in the institutions of American law over the last thirty-five years, of which the changes chronicled in this book are only a part, are barely an object of study in American law schools.[8] The old saw must be true: the study of law sharpens the mind by narrowing it.

I thank Ward Farnsworth, Collins Fitzpatrick, Marc Galanter, Joshua Karsh, Daniel Klerman, Kevin Kordana, Carolyn Shapiro, Clifford Wallace, and Russell Wheeler for very helpful comments on a previous draft; Russell Wheeler, Judith McKenna, and other staff of the Federal Judicial Center, and Gwendolyn Coleman, Marilyn Ducharme, and Elaine Young of the Administrative Office of the United States Courts, for prompt and generous assistance with data; Asheesh Agarwal, Kevin Cremin, Anup Malani, Betsy Mukamal, Robert Pfeffer, Keith Sharfman, Imran Siddiqui, Andrew Trask, Clinton Uhlir, and Douglas Y'Barbo for invaluable research assistance; and my editor at Harvard University Press, Michael Aronson, for encouraging me to undertake this second edition.

8. The most recent edition of the Hart and Wechsler federal courts text, however, contains some highly useful descriptive material. See the first footnote in the next chapter.

I regret to say that two important statutes bearing on the subject matter of this book, the Antiterrorism and Effective Death Penalty Act, and the Prison Litigation Reform Act, both passed by Congress and signed into law by President Clinton in April 1996 with very little advance warning, came too late to be discussed in this edition. The first of these acts substantially curtails federal habeas corpus for state and federal prisoners and judicial relief for persons ordered deported. The second act substantially curtails prisoner civil rights litigation. If the acts survive the inevitable constitutional challenges, they will soon lead to a substantial reduction in both federal habeas corpus cases and prisoner civil rights cases, both substantial contributors to the federal courts' caseload.

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Part I

The Institution