J. Woodford Howard, Jr.

Courts of Appeals in the Federal Judicial System

A Study of the Second, Fifth, and District of Columbia Circuits

Courts of Appeals
in the Federal Judicial System

A Study of the Second, Fifth, and
District of Columbia Circuits

J. Woodford Howard, Jr.

Princeton University Press
Princeton, New Jersey

Published by Princeton University Press, Princeton, New Jersey
In the United Kingdom: Princeton University Press, Guildford, Surrey

Library of Congress Cataloging in Publication Data will be
found on the last printed page of this book

This book has been composed in VIP Melior

Clothbound editions of Princeton University Press books
are printed on acid-free paper, and binding materials are
chosen for strength and durability

Printed in the United States of America by Princeton
University Press, Princeton, New Jersey

Courts of Appeals
in the Federal Judicial System

To **Valerie Hope Barclay Howard**

Preface

There are twelve Courts of Appeals in the American national judiciary. They serve, according to statute, as intermediate appellate courts between ninety-five federal district courts and the Supreme Court of the United States. Even passing familiarity with federal circuit courts, as they are commonly called, suggests that they are important power centers in the American polity. As courts of last resort in the vast majority of federal cases, and as primary organs of judicial review of federal administrative agencies, they shoulder heavy responsibilities in enforcing national law, declaring federal rights, and holding bureaucrats to account. Controversies over the Pentagon papers, the Nixon tapes, and the Alaska pipeline illustrate how Courts of Appeals filter and shape great issues of public policy on their way to Congress and the Supreme Court.[1] Appointed for life by the President and confirmed by the Senate, the 132 federal circuit judges are major actors in American government.

Beyond general impressions, however, knowledge of the functions and operations of circuit courts is largely intuitive and fragmentary. Until the last two decades, few analysts followed the lead of Frankfurter and Landis by treating Courts of Appeals as integral parts of the federal legal system.[2] Only a handful of monographs, articles, and dissertations differentiated their operations from appellate decision making generally or focused on circuit judges as human instruments of federal power.[3] Not until court congestion reached a "near crisis" in the mid-1970s was a U.S. Commission on Revision of the Federal Court Appellate System formed to study their unique problems of adjudication and administration.[4] Collectively these studies provide a solid base on which this and future works will build. Still, Courts of Appeals remain among the least comprehended of major federal institutions. Revered though their leaders may be in the legal profession, to many citizens they are courts "nobody knows."[5]

The object of this study is to help improve understanding of intermediate federal courts by analyzing the business and functions of three major tribunals in the flow of federal litigation and the attitudes of the judges toward their job and its chief problems. The unifying threads of the inquiry are two classic questions in American federalism and jurisprudence, both bearing on problems of in-

stitutional cohesion. First, what provides the glue binding federal courts into a judicial system? Second, what controls the personal discretion of circuit judges to make law and policy in the course of adjudication? To explore these questions we shall view the three tribunals from twin perspectives. The focus of Part I, formal and telescopic, is on intercourt relations. After setting the stage in Chapter One for readers unfamiliar with the organization of federal courts and their political setting, we shall analyze the business of the three circuits and their decisions in the stream of federal litigation (Chapters Two and Three). Of particular concern are their functions in the federal judicial system and their relations with other courts. How uniform or unique is the work of the circuit courts? How strong are formal controls—appellate review and reversal—in supervising lower courts at both appellate levels?

Having explored the functions and relations of circuit courts as institutions, we then shift perspective in Part II to a more informal and microscopic analysis of the roles of circuit judges in the appellate process. Using judges, attitudes, and votes as units of analysis, we shall address a basic question of whether, in light of limited appellate supervision, shared political and professional values among the judges support the system of formal review. This inquiry dissolves into several subsidiary questions. Who are the judges, how were they chosen, and how did they learn what is expected of them as jurists? (Chapter Four) How did they perceive their judicial roles and evaluate various elements of decision? (Chapter Five) What relationships existed if any, among their political and professional orientations and their voting behavior on the bench? (Chapter Six) Is personal discretion restrained by judging in groups? How do circuit judges reach consensus and resolve conflicts? (Chapter Seven) Did administrative powers affect opportunities for leadership in adjudication? How was judicial work and therefore power distributed among the members? (Chapter Eight) Finally, the two perspectives come together in Chapter Nine, which considers the chief problems faced by the circuit courts in the current law explosion together with alternative solutions to these problems. Thus, without pretending to answer all the questions raised, or even most of them, we shall explore the integration of the federal judicial system, as seen from without and within three major Courts of Appeals.

The Research Design

Because the analysis draws upon social science 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.)

Ideally, all twelve Courts of Appeals should be studied in a common framework. Because of time and financial constraints, this study was narrowed to three tribunals—the 2d, the 5th, and the District of Columbia circuits—during the period 1960-1979. The three intermediates were chosen on a priori grounds of significance, subsidiary grounds of convenience, and because they were different. The 2d circuit, a court of eleven judges covering the states of New York, Connecticut, and Vermont, has long been regarded as the nation's leading commercial court. The far-flung 5th circuit was the largest intermediate tribunal in number of judges and volume of business. Covering the six Gulf states of Florida, Georgia, Alabama, Mississippi, Louisiana, and Texas, plus the Canal Zone, this tribunal bore the brunt of implementing the Supreme Court's broad decrees in racial desegregation. Before being split into two circuits in 1981, it also became a paradigm of a circuit overloaded by burgeoning demand.[a] The D.C. circuit, a court of eleven judges with limited geographical scope, has special responsibilities over administrative appeals and, until 1973, had a unique local jurisdiction that made it the counterpart of a state supreme court in the nation's capital.

Together, the three tribunals traverse the range of activities circuit judges over the country are expected to perform. To determine the functions of these courts and the votes of their judges, all of their nonconsolidated decisions reported during fiscal years 1965-1967 —a total of 4,941 cases—were analyzed, coded on computers, and traced as they flowed through the circuits and the Supreme Court. The cases from the mid-1960s, which we shall call the base period, comprised roughly 40 percent of total decisions made by all circuit courts after hearing or submission on briefs during these years. The period is a useful basepoint because it was the last span of relative stability before an avalanche of appeals descended upon larger circuits, forcing expansion of judicial manpower by one-third after 1978. At the same time, most of the key legal issues of the 1970s were germinating in the litigation. To capture longer-term trends, we shall also draw from the reports of the Administrative Office of the United States Courts from fiscal 1960 to 1979.

The data concerning political values and role perceptions derive from not-for-attribution interviews conducted by the author with thirty-five active and senior judges from these circuits during 1969-1971. One retired Justice of the Supreme Court and three circuit

[a] The 11th circuit was carved from the 5th circuit while this book was in press. Thus, references to the 5th circuit are to the predivided circuit, except as noted.

court clerks were also interviewed. The interviews, combining mostly open-ended with a few structured questions, lasted from thirty minutes to six hours, for an average of about one hundred minutes. Turnover caused some differences between the judges in the cases and the interviews; but thirty judges, slightly less than a third of all federal circuit judges at that time, participated in both the interviews and the decisions. Spread geographically from Hartford to Houston, the judges interviewed, and listed below, included some of the country's most eminent jurists, such as Friendly and Lumbard in New York, Tuttle and Wisdom in the South, and Bazelon and Wright in Washington. Most of them still serve on Courts of Appeals. To protect their anonymity, only one remark quoted in the text will be attributed to its source. Also respected are judges' wishes to keep a few comments off the record. In addition to Mr. Justice Tom C. Clark, interviews were conducted with the following:

Second circuit

Robert P. Anderson
Wilfred Feinberg
Henry J. Friendly
Paul R. Hays
Irving R. Kaufman
J. Edward Lumbard
Harold R. Medina
Leonard P. Moore
J. Joseph Smith
Sterry R. Waterman
A. Daniel Fusaro, clerk

District of Columbia circuit

David L. Bazelon
Charles Fahy
Harold Leventhal
Carl McGowan
Roger Robb
Spottswood W. Robinson III
Edward A. Tamm
J. Skelly Wright
Nathan J. Paulson, clerk

Fifth circuit

Robert A. Ainsworth, Jr.
Griffin B. Bell
John R. Brown
G. Harrold Carswell
Charles Clark
James P. Coleman
David W. Dyer
Walter P. Gewin
John C. Godbold
Irving L. Goldberg
Warren L. Jones
Lewis R. Morgan
Richard T. Rives
Bryan Simpson
Homer Thornberry
Elbert P. Tuttle
John Minor Wisdom
Edward W. Wadsworth, clerk

Two influential concepts from the social sciences provide the organization and analytical framework for this book. First is the prem-

ise of *system*.[6] Though avoiding the jargon of systems analysis, this study is set in a systems framework in order to make explicit my assumptions that the federal appellate process fits neither the classic model of mechanical jurisprudence, in which judges ratiocinate in splendid isolation from the environment, nor the legal realist model in which judges' predilections are all that matter when courts attempt to settle other people's disputes. Rather, I assume that Courts of Appeals function on a complex stage of loosely related parts, including judges and a large company, in continuing processes of conflict resolution and policy making. By virtue of their intermediate positions, Courts of Appeals fit naturally within a systems framework. They are the hub of an interlocking network of relations linking circuit judges to district courts, federal agencies, and the Supreme Court, and thence to other appellate courts, branches of government, and a wide array of individuals and interest groups who compose their chief constituencies. Simultaneously as litigants make demands on circuit courts, the judges convert the stimuli of cases, collegial relations, and their own values into decisions (output). The responses of their clienteles in the form of new litigation and other reactions then return "to haunt the system" (feedback).[7] What happens in one part of the system, moreover, usually affects the rest.

The study is not a full-fledged systems analysis of the three circuit courts. The emphasis is on court relations and judicial roles as preliminary steps. Yet, the idea of system underlies Part I, because it offers several advantages. For one thing, the system premise prevents us from falling into the trap of projecting the Supreme Court onto the whole judicial process and assuming that what occurs in our least typical tribunal characterizes all of them. Focusing on Courts of Appeals as one among several power centers enables us to differentiate their unique functions and relationships with other tribunals without losing sight of their uniformities.

Another advantage is that the system premise places circuit courts in their working environment. Strong though judicial independence may be, the American judicial tradition has always linked federal courts to the political process.[8] As described in Chapter One, politics determines the missions, organization, and jurisdiction of federal judges as well as who sits. Politics also restricts the options available for court reform.

The idea of a judicial system, though to some more a statement of aspiration than of reality, also locates common ground among those who study federal courts. A common core of systemic assumptions

unifies several law-related disciplines. When lawyers Shepardize cases, forum shop, or take a "functional approach," they assume, as did Frankfurter and Landis, that the federal judiciary "articulates as a system."[9] When social scientists convert common observations into the special language of systems analysis, they do so to compare decision making across a broad and less obvious range of institutions and social contexts. Such comparisons are not only essential steps in constructing viable theories of judicial decision but also have practical implications for rational allocation of business among government institutions. As federal judges participate more and more in ruling the country, what problems are they equipped to handle and what should be left to other tribunals and institutions?[10]

The organizing concept for Part II of the book is *judicial role*. These chapters draw explicitly from a substantial social-science literature which applies so-called role theory to the study of decision makers' values. In particular, this analysis owes a heavy debt to Wahlke, Eulau, Buchanan, and Ferguson, *The Legislative System*, a pioneering study of American state legislators, since replicated for several legislatures and courts over the globe.[11] Because role theory rests on a theatrical metaphor—and judging is anything but play acting—it suffers from an unfortunate ambiguity in terms. The term "social role" is commonly used to describe both what persons or groups do in a social system and the norms guiding their action. In this study the terms "function" will be used for the former, and "role" will be restricted to the latter or normative sense.[12] The basic notion is that human behavior is guided by mutual expectations held by actors in a given position and those with whom they deal. A social role by definition is neither behavior nor idiosyncratic conduct; it is a reciprocal web of shared expectations about how a given task should be performed.[13] Just as actors in most plays are expected to act a part rather than themselves, so roles in different circumstances turn a person into a father, a daughter, a lover, a lawyer, a judge, or even a thief. Shared role expectations are what convert a collection of individuals into a legislature or a court. The norms of work also differentiate legislatures from courts.

Presumably, common understandings of how jobs should be performed affect how they are performed. Hence, determining the role perceptions and self-images of incumbent judges should provide information about the values of an important governmental elite and clues about why they decide as they do. These theories, too, have practical implications for the cohesion of federal courts. A central thesis is that shared values from the legal and political "cultures," carried into circuit courts by overlapping processes of socialization

and recruitment, and reinforced by formal supervision and peer pressure, serve as sinews of judicial solidarity.

Studying judicial values in this way has several analytical advantages. One is that role perceptions of incumbents mediate between how an office looks to insiders and to outsiders. The concept of social role, integral to social systems, also helps to relate individual and collective behavior in judiciaries.[14] Judicial roles may be conceived as a set of job prescriptions shared by the participants of the legal system, which links "judges & co." while distinguishing courts from other institutions. So viewed, judicial roles become intervening variables between institutional and personality factors in the judicial process. For roles by definition are both interpersonal and, through processes of learning and internalization by individuals, part of the common property Roscoe Pound called "the trained intuition of the judge," passed from one generation to the next.

Judicial roles—the dos and don'ts of judging—have long figured prominently in justifications of judicial power. Especially in the United States, where federal judges exercise uncommon lawmaking authority, what prevents their personal predilections and policy values from determining the rules by which we live? Theoretically, the main defenses against judicial lawmaking are internalized professional norms regarding the control of precedent and the limits of judicial choice. Given the significance of "moralities of decision" in the theory of separation of powers, we shall consider in Part II how the judges of the three circuits learned and perceived of their duties as jurists and the implications of this informal value structure for problems of institutional integration. Analytical difficulties apart, this section requires few mental leaps for lawyers and judges. Role metaphors imbue their work. The tasks of the various components of our legal system—police, prosecutors, advocates, jurors, trial judges, appellate judges, and so on—are so elaborately prescribed and delineated by custom, statute, and professional codes that judges are among the most role conscious of American public officials.[15] These judges, at any rate, soon undermined my efforts to avoid the fuzzy word "role" in the interviews by introducing it themselves. One judge, quick to discern the research design, remarked: "We all have an idea of what the job of a circuit judge is supposed to be from reading formal statutes, and we can infer some things from the cases. But aren't you saying that the job is really the way judges see it? I like that approach. I think it's true."

Perhaps it goes too far to say that perceptions are reality. Certainly the proposition poses vexing problems of proof. We can never be sure that what judges think coincides with what they say or do. Even

if thoughts and words are similar, observers cannot guarantee that they understood a judge in a hurried interview or structured questionnaire. More serious, what judges perceive as their duty does not necessarily constitute the judicial role. Because roles are relational, and perceptions may vary according to where one sits, we need to discover how the other participants in the judicial system see that job, too. Neither can we assume that judicial role perceptions actually affect judicial behavior. *This is the hypothesis to be proved.* That professional prescriptions affect judicial conduct is a plausible working hypothesis for the self-conscious judges of today; but too many variables, such as personality or the context of a case, intervene in judicial decision making to equate "ought" with "is."

We cannot even assume that judicial role conceptions are monolithic or static. Well-structured roles permit variations in individual behavior or style.[16] Just as Hamlet performed by Orson Welles or Laurence Olivier differs, though the words are the same, so our expectations of appropriate judicial conduct may vary by function, field, or forum. Certainly our impressions and conclusions are limited to these three tribunals in one place and time. Something must give, moreover, when the rules of judging are ambiguous or collide. These problems illustrate the difficulty of establishing the boundaries of role-influenced behavior. And they suggest why this study does not purport to solve all the riddles in the theory of judicial decision. In the final analysis, ample room is left for the play of individuals and the politics of one and the many.

This suggests a final limitation in the work, which, to my mind, exacts the dearest price. Concentration on the abstractions of litigation flow and judicial roles leeches the flesh and blood from litigants and judges in action. That is a serious loss for these Courts of Appeals. All three tribunals are populated by jurists rich in intelligence, character, and experience. All three tribunals during this period confronted a wide variety of social conflicts, ranging from shipwrecks to flag burnings, from desegregation to railroad mergers, from the legality of the Vietnam War to dirty movies and hairstyles in the public schools. Not least at issue were the courts' own functions in the governmental scheme. Circuit judges became the objects of political struggle while this study was in progress. The D.C. circuit, long the target of controversy because of its innovations in criminal justice, underwent a little-noted ideological reconstruction during the Nixon administration. At the same time, Congress and the judges were redefining the court's functions of administrative oversight as well as its relations to a metropolitan capital struggling to achieve home rule. Presidents and senators also locked horns over

replacements in the 2d circuit that could effectively create a new court majority. Meanwhile, bombs were planted in the federal courthouse on Foley Square. Judicial politics was even more pronounced in the 5th circuit as both presidential parties vied for control of the federal judiciary. Two of its judges, Homer Thornberry and G. Harrold Carswell, were nominated to but failed to reach the Supreme Court. In the unfolding of President Nixon's "southern strategy," Attorney General John Mitchell publicly rejected a distinguished Republican prospect, John Minor Wisdom, for being "a damn left winger. He'd be as bad as Earl Warren."[17] Twice reporters interrupted my interviews to ask other circuit judges, such as future Attorney General Griffin B. Bell, about their chances of winning the prize. In the meantime, the court slipped into a crisis of exploding volume.

This is a book about the job of three United States Courts of Appeals and how their judges see it. Almost five thousand cases and thirty-five judges are abstracted into litigation flow and judicial roles for the same reason that busy judges spared me their time: to advance understanding of Courts of Appeals in the American government. I trust that readers will do their share by remembering that each statistic represents human beings bringing their conflicts, large and small, to other human beings cast in the role of judges for a just resolution through law.

Acknowledgments

Any work of this scope bears heavy debts to others who receive scant reward. In particular I am indebted to several gifted students—Alan Betten, John P. Crumrine, Jerry Goldman, James Hirschorn, Joel Ish, Durwood Littlefield, James S. Nathanson, Michael Nelson, John E. Schofield, J. Randall Smith, and Mark Thomas—who helped to construct the code, analyze the cases, and compile the data. Without their aid I never could have contemplated this study, much less completed it. The same holds for The Johns Hopkins University and the Ford Foundation. Johns Hopkins contributed research leave, computer facilities, and all those intangible supports that make it a scholar's haven. The study was launched under a faculty research fellowship granted by the Ford Foundation. However, the conclusions, opinions, and other statements are those of the author and not necessarily those of the Ford Foundation. I should also like to thank my daughter, Elaine Hope Howard, for proofreading; Mrs. Evelyn Scheulen, Mrs. Evelyn Stoller, and Mrs. Catherine Grover for skillful typing of the manuscript; William Ascher, Alan Betten, Matthew

Crenson, Jerry Goldman, Richard Katz, Thomas Marvell, Austin Sarat, Stephen V. Stephens, and John T. Wold for helpful criticism; Joseph F. Spaniol and James A. McCafferty of the Administrative Office of the United States Courts for aid in locating unreported cases and data for three-judge district courts; the Federal Judicial Center for sponsoring research reports at a critical time; and the *George Washington Law Review*, the *Law and Society Review*, and the *Journal of Politics* for permission to reprint portions of Chapters Two, Three, and Six. I am grateful to the *New Yorker* for permission to reprint two cartoons. Jerry Goldman graciously consented to reprinting in Chapter Two and Appendixes 2 and 3 parts of an article we wrote together for the *George Washington Law Review*. Special gratitude goes to the circuit judges, who generously gave their time and thoughts about federal appeals. For me the interviews were a rewarding personal experience from which I learned much about life as well as law. Most of all my thanks go to my wife who, in her many roles, more than merits the dedication of this book.

Contents

List of Appendixes